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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

G. WILLIAM HUNTER, Plaintiff, v. DEREK FISHER, as President of the Executive Committee of the National Basketball Players Association and in his individual capacity, JAMIE WIOR, THE NATIONAL BASKETBALL PLAYERS ASSOCIATION, a Delaware corporation, and DOES 1 THROUGH 10, inclusive, Defendants.	Case No. LC100771 **PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRERS** Date: December 6, 2013 Time: 8:30 a.m. Dept.: D Judge: Hon. Huey P. Cotton Complaint Filed: May 16, 2013

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I. SUMMARY OF ARGUMENT

Plaintiff G. William "Billy" Hunter ("Hunter") submits this consolidated opposition to the separate demurrers filed by defendants National Basketball Players Association ("NBPA" or the "union") and defendants Derek Fisher ("Fisher") and Jamie Wior ("Wior").

This action seeks damages for NBPA's and Fisher's wrongful termination of Hunter's contract for employment as Executive Director of the NBPA, a position he held for 17 years before being summarily dismissed in February 2013. Hunter has pleaded 14 claims arising out of the events leading up to, and including, his termination.[1] The Complaint is extraordinarily comprehensive, consisting of some 36 pages and 216 charging paragraphs setting forth detailed factual allegations that amply satisfy California's pleading standard. *See* Cal. Civ. Proc. Code ("CCP") § 425.10(a)(1) (complaint shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language").

Defendants are apparently confused about the nature and scope of a demurrer under California law. Rather than focusing on what the Complaint actually alleges, the demurrers instead are founded, with minor exceptions, on one or more of the following untenable grounds: (i) fact-based arguments disputing the well-pleaded allegations of the Complaint; (ii) assertions that alternatively pleaded claims are inconsistent with one another; (iii) fundamental misunderstandings or misstatements of California law specifying the elements of the claims pleaded; and (iv) attempts to simply ignore key allegations in the Complaint and construct straw man arguments based on their supposed absence.

None of these arguments are appropriately raised at the demurrer stage. Subjecting plaintiff to the expense and effort of responding to defendants' ill-conceived arguments and the Court to the burden of analyzing and resolving them is frankly a waste of time and resources. Plaintiff

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[1] The Complaint filed on May 16, 2013 pleads four claims for breach of contract (Claims 1-4 [NBPA and Fisher]), four claims for intentional and negligent interference (Claims 5-8 [Fisher and Wior]), three claims for intentional misrepresentation and concealment (Claims 9-11 [Fisher]), one claim for negligent misrepresentation (Claim 12 [Fisher]), and two claims for defamation (Claims 13-14 [Fisher]).

respectfully submits that the demurrers should be overruled in their entirety.

II. FACTUAL BACKGROUND

A. The Employment Contract Between Hunter and the NBPA

In July 1996, Hunter and the NBPA entered into a written employment contract (the "Employment Contract") whereby Hunter became the NBPA's Executive Director for an initial three-year term with an additional optional renewal term. (Compl. ¶ 22 & Ex. A §§ 1, 3.) The NBPA and Hunter later extended Hunter's term of employment under the Employment Contract by agreements signed in 1999 ("1999 Extension"), 2005 ("2005 Extension"), and 2010 ("2010 Extension"). (Compl. ¶¶ 24-28 & Exs. A-D.) The 2010 Extension, which Fisher signed and in which he warranted he had authority to bind the NBPA to its terms, continued Hunter's term to June 30, 2015. It also gave Hunter the option, exercisable at his discretion, to extend that term for another year, until June 30, 2016. (Compl. Ex. D § 1.) Hunter has provided written notice of his intention to exercise this option. (Compl. ¶ 109.)

The Employment Contract, and each of the three extensions, contain two separate termination provisions. (Compl. Ex. A § 7, Ex. B § B.6, Ex. C § 6, Ex. D § 6.) The first provides that the NBPA may terminate Hunter for cause, defined in the 2010 Extension as "embezzlement, theft, larceny, material fraud or other acts of dishonesty," "failure to perform the duties of his position … within thirty (30) days of written notice from the [NBPA] to take specific corrective action," or "conviction of, or entrance of a plea of guilty or *nolo contendere* to, a felony or other crime." (Compl. Ex. D § 6.) If the NBPA terminates Hunter for cause, it must "pay [Hunter] his compensation for the time remaining on the contract from the date of termination to the end of the contract year." (*Id.*) The second termination provision permits the NBPA to terminate Hunter without cause provided that it "pay[s Hunter] his annual salary and benefits … for the remaining entirety of the contract Term . . . ." (Compl. Ex. D § 6(a).)[2]

[2] Under both provisions, the NBPA must also pay Hunter any accrued, but unused, vacation, and any outstanding reimbursements. (Compl. Ex. D §§ 6, 6(a).)

B. Fisher's Negotiation of Collective Bargaining Terms with Certain Team Owners in 2011, Which Undermined Hunter's Role as Executive Director

During his 17-year term as Executive Director of the NBPA, Hunter guided the union through three collective bargaining agreements ("CBAs") and created a legacy of financial prosperity for the NBPA and its members. (Compl. ¶ 1.) As Executive Director, Hunter worked for all players, including the rank-and-file players, as well as the superstars. (*See id*. ¶ 44.) Under the NBPA's constitution and by-laws, Hunter had exclusive authority to conduct collective bargaining negotiations with National Basketball Association ("NBA") team owners on behalf of the NBPA. (*Id.* ¶ 6.) In 2011, however, Fisher (the NBPA President), with the support and assistance of Wior (Fisher's publicist and business manager), interfered with Hunter's authority by engaging in secret negotiations with certain team owners with the aim of currying favor with those owners to benefit Fisher's personal interests. (*Id.* ¶¶ 53-74.) Fisher's secret negotiations undermined Hunter's bargaining position and ultimately resulted in a CBA that, although benefiting Fisher personally, was less favorable to rank-and-file NBA players. (*Id*. ¶¶ 75-78.) After discovering that Fisher was negotiating without authority for his personal benefit and against the interests of the majority of the NBPA, Hunter confronted Fisher. (*Id.* ¶ 63.) Fisher falsely denied the truth, both to Hunter and later in the media. (*Id*. ¶¶ 63, 68.)

C. Fisher and Wior's Campaign to Oust Hunter

After his confrontation with Hunter, Fisher withdrew from participating in the NBPA's affairs and began efforts, aided by Wior, to remove Hunter as Executive Director. (*Id*. ¶¶ 79-80.) After Fisher received a vote of no confidence from the Executive Committee, he and Wior orchestrated a press campaign designed to undermine Hunter and muddy his reputation. (*Id*. ¶¶ 83-84.) Fisher and Wior also used the negative media attention generated by that campaign to instigate an internal investigation aimed at impugning Hunter. (*Id*.) During the course of this investigation, Fisher made false statements to the investigators attacking Hunter's character and integrity. As one example, Fisher falsely implied that Hunter had attempted to conceal that he had retained a law firm that employed Hunter's daughter, despite the fact that Hunter had fully disclosed that information to Fisher and the other members of the Executive Committee. (*Id*. ¶ 90.)

As another example, Fisher falsely told the investigators that Hunter had tried to bribe Fisher with the gift of a watch in order to secure Fisher's support during the 2011 collective bargaining negotiations. (*Id*. ¶ 91.) This accusation was inconsistent with the long-standing tradition of gift-giving to NBPA officers and Executive Committee members that predated Hunter, and with Fisher's ready acceptance of the gift without concern or complaint. (*Id*.)

D. The Wrongful Termination of Hunter's Employment

Fisher and Wior's campaign was ultimately successful. Fisher and other members of the Executive Committee wrote a letter to Hunter (the "Termination Letter") informing him that his employment with the NBPA was terminated, effective immediately. (Compl. ¶ 96 & Ex. E.) To avoid paying Hunter his salary and benefits for the remainder of the contract term as provided by Paragraph 6(a) of the 2010 Extension, the NBPA disavowed its contract with Hunter, asserting that it "is null, void, invalid, and unenforceable" because the 2010 Extension "was not properly negotiated, executed, or approved." (Compl. Ex. E.) Alternatively, the letter stated that, in the event the Employment Contract is enforceable, "this letter shall be construed as notice of a 'for cause' termination pursuant to paragraph 6." (*Id*.) However, the Termination Letter did not specify any grounds for the purported "for cause" termination. (*Id.*)

III. ARGUMENT

A complaint is sufficient so long as it apprises the defendant of the factual basis for the plaintiff's claim. *Elder v. Pacific Bell Tel. Co.*, 205 Cal. App. 4th 841, 858 (2012). Thus, the complaint need only set forth the ultimate facts constituting each cause of action; the plaintiff need not plead evidentiary facts supporting the ultimate facts alleged. *See Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1549 (2009). Pursuant to CCP § 452, which governs demurrers, the allegations of a complaint must be "liberally construed, with a view toward substantial justice." *Stevens v. Super. Ct.*, 75 Cal. App. 4th 594, 601 (1999). As such, "[i]f the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." *Quelimane Co., Inc. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 38 (1998).

In ruling on defendants' demurrers, this Court must "treat the demurrer as admitting all

material facts properly pleaded" and "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." *Quelimane*, 19 Cal. 4th at 38 (internal quotation marks omitted). A court must "deem to be true all material facts that were properly pled" and "must also accept as true those facts that may be implied or inferred from those expressly alleged." *Guzman v. County of Monterey*, 178 Cal. App. 4th 983, 990 (2009) (internal quotation marks omitted); *see also City of Pomona v. Super. Ct. of Los Angeles County*, 89 Cal. App. 4th 793, 800 (2001) (exhibits to the complaint are properly before the court on a demurrer).

A demurrer must be overruled where, assuming all material facts to be true, any portion of the complaint states facts sufficient to form a cause of action. *Zelig v. County of Los Angeles*, 27 Cal. 4th 1112, 1126 (2002). That is the case even if "the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown . . . ." *Elder*, 205 Cal. App. 4th at 855-56 (internal quotation marks omitted). Finally, it is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the plaintiff can amend the complaint to cure its defects. *Leach v. Drummond Med. Group, Inc.*, 144 Cal. App. 3d 362, 368 (1983).

A. The NBPA's and Fisher's Demurrers to Hunter's Breach of Contract Claims (1-4) Must Be Overruled.

1. The Breach of Contract Claims (1-4) Are Properly Pled as Alternative Counts.

The first four counts of the Complaint more than adequately plead claims for breach of contract against the NBPA and, alternatively, Fisher. Claim 1 alleges that the NBPA breached the Employment Contract by terminating Hunter without the compensation required by the express terms of that agreement. Because the NBPA contended when terminating Hunter that the 2010 Extension is "null, void, invalid, and unenforceable" (Compl. Ex. E), Hunter also alleges alternative contract claims against the NBPA including a claim for breach by repudiation, breach of an implied-in-fact contract, and breach of the duty of good faith and fair dealing. And, since the NBPA took the position that the 2010 Extension "was not properly negotiated, executed, or approved" (*id.*), Hunter alternatively asserts these same causes of action against Fisher, who signed the 2010 Extension and expressly represented and warranted therein that he had the authority to

sign on behalf of the NBPA and to bind the NBPA to the terms of the agreement. (Compl. ¶ 31 & Ex. D.)

Defendants NBPA and Fisher demur to these causes of action primarily on the ground that they are "superfluous" or "inconsistent" with one another. (NBPA Br. 5 (repudiation claim should be dismissed as superfluous); *id.* at 7 (implied-in-fact contract claim should be dismissed as inconsistent with Hunter's express contract claim); *id.* at 8 (covenant of good faith and fair dealing claim should be dismissed as superfluous); *see also* Fisher & Wior Br. 5 (same).) That is not a proper basis for demurrer. California law permits a plaintiff to plead claims in the alternative where, as here, he faces uncertainty as to the exact nature of his legal right. *See Tanforan v. Tanforan*, 173 Cal. 270, 273 (1916) ("[W]hen for any reason the pleader thinks it desirable so to [plead alternative counts], as where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety."). Moreover, even the case law that defendants themselves cite makes clear that, even if claims are superfluous or duplicative, "[t]his is not a ground on which a demurrer may be sustained." *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 890 (2008).

Defendants' remaining grounds for demurrer to Hunter's contract causes of action are similarly unmeritorious.

a. Breach of Express Contract (Claim 1)

Defendants insist that Hunter's breach of express contract claim should be dismissed because the 2010 Extension was never approved by the NBPA Board of Player Representatives as allegedly required by the NBPA's by-laws. (NBPA Br. 3-5; Fisher & Wior Br. 5.) Again, this argument is not a proper basis for demurrer. Hunter has alleged that the 1996 Employment Contract is the operative agreement. (Compl. ¶ 106.) Factual questions such as whether the Employment Contract or the 2010 Extension constitutes the relevant employment agreement, whether the 2010 Extension required a vote by the Board of Player Representatives, and whether the 2010 Extension was approved in accordance with the NBPA's by-laws cannot be resolved at

the pleading stage.[3] *See Harris v. Rudin, Richman & Appel*, 74 Cal. App. 4th 299, 307-08 (1999) (whether agreement at issue in breach of contract claim is binding "is a factual question not properly the subject of a demurrer"). Defendants cannot avoid this obstacle by asserting that Hunter's failure to allege that the 2010 Extension was approved by a supermajority of the NBPA's Board of Player Representatives renders this issue "undisputed." (NBPA Br. 4.) Hunter is not obligated to plead allegations tailored to meet defendants' version of the facts or to anticipate all of defendants' potential defenses and affirmatively address them in his Complaint. *See, e.g., Jaffe v. Stone*, 18 Cal. 2d 146, 158-59 (1941) ("[L]ike other defenses, this should be raised in the answer, not anticipated in the complaint. It would not involve a positive averment of fact, an element of plaintiff's cause of action; plaintiff would be simply negativing an exception to, or a qualification upon, these elements of his cause of action; he would have to single out that particular exception among others that might be raised as defenses. But the salutary rule of pleading frowns upon averments negativing or anticipating defenses, and requires that such matters be left to the answer."). The Complaint alleges facts sufficient to show that Hunter entered into a contract with the NBPA signed by its President. That is enough.

b. Breach of Express Contract by Repudiation (Claim 2)

In the Termination Letter, the NBPA repudiated the Employment Contract, and made clear that it would not pay Hunter's salary and benefits through the end of the contract term. (*See* Compl. ¶¶ 111-12, Ex. D § 6, Ex. E (2010 Extension is "null, void, invalid, and unenforceable").) To ensure that defendants are aware that Hunter seeks recovery of the full amount he is owed under the contract, including compensation for the additional one-year option term that Hunter elected to exercise (*id*. ¶ 109), Hunter separately pled a claim for breach by repudiation.

Defendants contend that Hunter cannot sue for anticipatory repudiation because he gave the

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[3] As set forth in Plaintiff's Objections to Defendant NBPA's Request for Judicial Notice in Support of Demurrers to Complaint and in Support of Anti-SLAPP Motion filed herewith, defendants' attempts to inject purported "facts" regarding approval of the 2010 Extension into a demurrer are inappropriate.

NBPA notice that he was exercising his option to extend the 2010 Extension for an additional year and therefore "elect[ed] to treat the 2010 alleged contract as if it remained valid." (NBPA Br. 6-7 (citing *Taylor v. Johnston*, 15 Cal. 3d 130, 136-37 (1975)); Fisher & Wior Br. 5.)[4] Defendants again mistake or misstate the law. An injured party does not lose his right to sue for anticipatory breach simply by treating the contract at issue as still in force. *Central Valley General Hospital v. Smith*, 162 Cal. App. 4th 501, 516-19 (2008) (interpreting *Taylor v. Johnston*, 15 Cal. 3d 130 (1975)). An injured party loses his right to sue for anticipatory breach only if the defendant retracts the repudiation prior to the time of performance. *Id.*; *see also Guerrieri v. Severini*, 51 Cal. 2d 12, 19-20 (1958); *accord In re Randall's Island Family Golf Ctrs, Inc*., 261 B.R. 96, 101-02 (Bankr. S.D.N.Y. 2001) (applying New York law). That is not the case here.

c. Breach of Implied-in-Fact Contract (Claim 3)

Defendant NBPA's attempt to dispose of Hunter's breach of implied-in-fact contract claim similarly fails. NBPA Br. 7. (Fisher does not make this argument. (*See* Fisher & Wior Br. 5.)) Contrary to the NBPA's mischaracterization of the Complaint, Hunter does not contend that an implied-in-fact contract should "supersede or otherwise alter" the terms of a valid and enforceable express contract. (*See* NBPA Br. 8.) Instead, Hunter asserts this claim in the alternative in response to the NBPA's claim that the express contract between the parties is "null, void, invalid, and unenforceable." (Compl. Ex. E.) Hunter worked for the NBPA for 17 years under the terms of the Employment Contract and three extensions, each of which was approved by identical means. If a court accepts the NBPA's position that the 2010 Extension is unenforceable, Hunter alleges and

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[4] To the extent that plaintiff has addressed substantive issues raised in defendants' demurrers, he has done so under California law, as the moving parties have done. (*E.g.*, NBPA Br. 6 (citing *Taylor v. Johnston*, 15 Cal. 3d 130 (1975) with respect to repudiation).) Although defendants have cited the law of other states in certain instances, mere citations are insufficient to invoke a choice-of-law analysis. *See Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 581 (1974) ("In short, generally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it."). Plaintiff reserves the right to argue choice of law if and when appropriate later in these proceedings.

is entitled to prove that the parties operated under an implied-in-fact contract containing the same terms. This is an entirely appropriate pleading strategy: "One of the typical occasions for alternative pleading is uncertainty about the nature of a contractual obligation that the evidence may establish: Express, implied in fact, or quasi-contractual." 4 Witkin, Cal. Procedure (5th Ed. 2008) Pleading, § 407; *see also Penziner v. West Am. Finance Co.*, 133 Cal. App. 578, 582 (1933) ("Inconsistencies between alternative counts cannot be attacked by demurrer, since each count stands on its own allegations, unaffected by those contained in other counts."); *Wilson v. Smith*, 61 Cal. 209, 211 (1882) ("Under our Code, which provides that the complaint must contain 'a statement of the facts constituting the cause of action, in ordinary and concise language,' the plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only.").

d. Breach of the Implied Covenant of Good Faith and Fair Dealing (Claim 4)

Defendants' demurrer to Hunter's claim for breach of the implied covenant of good faith and fair dealing fails for the same reason as the previous argument. The NBPA asserts that the 2010 Extension is unenforceable because it was not properly approved by the NBPA's Board of Player Representatives. (NBPA Br. 3-5.) If a court accepts the NBPA's position, Hunter is entitled to plead in the alternative that the NBPA's failure to secure such approval of the 2010 Extension constitutes a breach of the implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing is read into every contract. *Avery v. Integrated Healthcare Holdings, Inc.*, 218 Cal. App. 4th 50, 61 (2013). It requires each party to do all things reasonably contemplated by the contract's terms to accomplish its goals, and to refrain from doing anything that would destroy or injure another party's right to receive the fruits of the contract. *See, e.g.*, *Schoolcraft v. Ross*, 81 Cal. App. 3d 75, 80 (1978) ("The implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose."). The 2010 Extension expressly stated that the NBPA would be bound by its terms, and the implied covenant imposed a duty on the NBPA to do all things reasonably necessary to ensure the contract's enforceability, including securing any necessary approvals. To the extent the NBPA

failed to do so, it breached the implied covenant of good faith and fair dealing.[5]

2. Defendants' Argument That the Arbitration Provision Bars the Contract Claims Is Notably Defective.

The NBPA's argument that Hunter's contract claims should be dismissed because he did not file a claim for arbitration within 90 days of his termination fails for three independent reasons. (Fisher does not make this argument. (*See* Fisher & Wior Br. 5.)) First, the NBPA's argument is based on a provision of the 2010 Extension stating that Hunter must "make a timely request for arbitration i.e., within ninety (90) days from the date [he] knew … of the event which gives rise to the dispute." (Compl. Ex. D § 10.) But the NBPA has taken the position that the 2010 Extension is "null, void, invalid, and unenforceable." (Compl. Ex. E; *see also* NBPA Br. 3.) The NBPA cannot have it both ways. *See Brodke v. Alphatec Spine Inc.*, 160 Cal. App. 4th 1569, 1571 (2008) (party seeking to rely on arbitration provision must clearly affirm validity of the contract).

Second, the 90-day contractual period has not yet expired. Hunter commenced this action within 90 days of his receipt of the Termination Letter. (*See* Compl. ¶¶ 96-99.) Under CCP § 1281.12, the filing of this lawsuit tolled the contractual limitations period. CCP § 1281.12 provides:

> If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the

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[5] Defendants assert that "Hunter may not invoke the implied covenant of good faith and fair dealing to transform an at-will employment relationship into one requiring good cause for discharge" (NBPA Br. 8 n.5), but again, that argument misstates the nature of Hunter's claim. As explained above in text, the claim for breach of the covenant of good faith and fair dealing is pleaded as an alternative in the event the 2010 Extension is found unenforceable. In that case, Hunter has a separate claim for the injury caused by defendants' failure to obtain any necessary additional approvals. To the extent defendants are arguing that the Court *must* consider Hunter to have been an at-will employee, that fact-based argument is patently improper at the demurrer stage.

> final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first.

Accordingly, the 90-day time limitation for "filing of a timely request for arbitration," if even required, has not yet passed.[6]

The NBPA's argument that CCP § 1281.12 applies only to the "procedural" and not the "substantive component" of a limitations period is made up out of whole cloth. (NBPA Br. 10.) A limitations period has no separate "components." The limitations period has either passed, in which case plaintiff's claim is barred, or it has not, in which case plaintiff's claim may proceed. The only case the NBPA cites in support of its novel argument, *Pearson Dental Supplies, Inc. v. Super. Ct.*, 48 Cal. 4th 665 (2010), only confirms that CCP § 1281.12 applies here. In *Pearson Dental*, the California Supreme Court held that CCP § 1281.12 applied to toll a limitations period that provided that, if a party failed to timely request arbitration, "the claim shall be void and considered waived to the fullest extent allowed by law." *Id*. at 671. This provision is substantively indistinguishable from the provision here, which states that "[a]bsent the filing of a timely request for arbitration, the action taken shall be deemed final and binding and not subject to any further review." (Compl. Ex. D § 10.)

Finally, this argument is no more than an attempt by the NBPA to invoke the arbitration provision to bar this action without satisfying the rigorous requirements for doing so – first and foremost, that a defendant seeking to compel arbitration must affirm the existence of the agreement to arbitrate. Defendant NBPA has rather conspicuously done just the opposite. (*See* Compl. Ex. E (the 2010 Extension is "null, void, invalid, and unenforceable"); *see also* NBPA Br. 3.) This very type of "evasive pleading" has been found ineffective and condemned by the Court of Appeal. *Brodke*, 160 Cal. App. 4th at 1572-73.

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[6] Hunter does not concede that the claims alleged in this action are subject to arbitration in any event and reserves all rights to contest a motion to compel arbitration, if and when defendants choose to file such.

3. Hunter's Alternative Claims Against Fisher Are Proper in Light of the NBPA's Assertion That the 2010 Extension Was Not Properly Executed.

Fisher argues that Hunter's contract claims against him should be dismissed because, in signing the 2010 Extension, Fisher was acting on behalf of the NBPA as its authorized agent. (*See* Fisher & Wior Br. 4-5 (asserting that Fisher signed the 2010 Extension "on behalf of the NBPA" and that the "[t]he signature page, like the rest of the alleged contract, reaffirms Hunter's allegation that Fisher was acting as the NBPA's agent, not in his personal capacity").) The NBPA, however, has taken the position that Hunter's contract claims should be dismissed because Fisher *did not* have the authority to bind the NBPA. (*See* NBPA Br. 3-5.) Defendants cannot have it both ways. Either Fisher was the NBPA's agent and thus authorized to bind the NBPA to the 2010 Extension, in which case Hunter's claims against the NBPA are proper, or he was not, in which case Hunter's claims against Fisher in his individual capacity are proper. Hunter was not required to predict the outcome of the defendants' contradictory arguments when filing his Complaint. The option of pleading claims in the alternative – as Hunter has done – is designed to preserve a plaintiff's options and save him from having to make such an election under just such circumstances as exist here. *See, e.g., Lambert v. Southern Counties Gas Co. of Cal.*, 52 Cal. 2d 347, 353-34 (1959) (ordering trial court to overrule demurrer based on one defendant's argument that plaintiff had alternatively pleaded that a different defendant was liable for the injury at issue).

B. Fisher and Wior's Demurrers to Hunter's Interference Claims (5-8) Must Be Overruled.

1. Fisher's Position as President of the NBPA Does Not Immunize Him from Liability for Interfering with Hunter's Employment Contract and Prospective Economic Relations.

Fisher's argument that he cannot be held liable for inducing the breach of or interfering with the Employment Contract because he was President of the NBPA is, once again, flatly wrong on the law. (Fisher & Wior Br. 5-6.) For decades, California "courts have allowed contract interference claims to be stated against owners, officers, and directors of the company whose contract was the subject of the litigation. While those defendants may attempt to prove that their conduct was privileged or justified, that is a defense which must be pleaded and proved." *Woods v.*

Fox Broadcasting Sub., Inc., 129 Cal. App. 4th 344, 356 (2005); *see also Webber v. Inland Empire Invs*, 74 Cal. App. 4th 884, 900 (1999); *Collins v. Vickter Manor, Inc*., 47 Cal. 2d 875, 883 (1957). Whether Fisher may be held liable for interference with or inducing breach of the NBPA's contract with Hunter depends on whether Fisher was acting within his authority to act in the NBPA's interests or whether he was, as Hunter has alleged, acting to advance his own individual interest. That question of fact cannot be determined at the pleading stage.

2. Hunter Sufficiently Pled That Wior Interfered with His Contract and Prospective Economic Relations.

Wior's assertion that Hunter's interference claims against her cannot proceed because Hunter pled those claims "without alleging any facts to substantiate his bare allegation" is simply untrue. (Fisher & Wior Br. 6.) One need only read the Complaint to conclude that Hunter alleged sufficient factual detail regarding Wior's interference. Hunter has alleged that "Fisher *and Wior* waged a personal campaign to displace Hunter as the Union's Executive Director, including denying that Fisher had ever had the authority to sign Hunter's employment contract and instigating an investigation that was used as a pretext by Fisher and the NBPA to terminate Hunter without cause." (Compl. ¶ 7 (emphasis added).) Hunter further alleged, among other things, that Wior "orchestrated [a] press campaign designed to undermine Hunter and muddy his reputation," which provided the impetus for the internal investigation used as a pretext for terminating Hunter (*id.* ¶ 84), and that Wior participated in devising and implementing a strategy to allow Fisher to remain as President of the NBPA and drive the union's use of the internal investigation as a pretext for terminating Hunter (*id*. ¶ 85).

These allegations satisfy the pleading standards under California law. *Semole v. Sansoucie*, 28 Cal. App. 3d 714, 719 (1972) ("The Supreme Court has consistently stated the guideline that a plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action.") (internal quotation marks omitted). No greater level of specificity is required, especially where, as here, Wior may be assumed to have knowledge of the relevant facts superior to that possessed by Hunter. *See id*. ("It has also been stated that the particularity required in

pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff.") (internal quotation marks omitted).

3. None of Defendants' Additional Arguments Supply a Proper Basis for Their Demurrer to Hunter's Interference Claims.

Fisher and Wior's remaining arguments in support of their demurrers to Hunter's interference claims are easily disposed of.

First, Fisher and Wior's contention that Hunter "fail[s] to allege that Fisher and Wior engaged in any intentional conduct" simply ignores the words appearing on the face of the Complaint. (Fisher & Wior Br. 6.) The Complaint includes extensive allegations describing Fisher and Wior's intentional, coordinated effort to oust Hunter as the union's Executive Director. (*See* Compl. ¶¶ 79-101.) Moreover, it is nonsensical to argue, as defendants do, that Hunter's allegations regarding the self-interested motives of both Fisher and Wior somehow "disprove, rather than support" the allegation that their conduct was intentional. (Fisher & Wior Br. 7.) Fisher and Wior intentionally engaged in a campaign to interfere with Hunter's Employment Contract and economic relationship with the NBPA, displace Hunter as Executive Director, and further their own personal interests. Thus, the Complaint not only alleges that Fisher and Wior "'kn[e]w that the interference is certain or substantially certain to occur as a result of [their] action[s],'" but that they specifically *intended* the interference to occur. (Fisher & Wior Br. 6 (quoting *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 586 (2003)); *see also* Compl. ¶¶ 134, 141, 149.)

Second, Fisher and Wior are wrong in saying that Hunter failed to allege facts sufficient to give rise to a duty of care in connection with Hunter's negligent interference claim (Claim 8). (Fisher & Wior Br. 7.) The California Supreme Court has held that "a duty [of care] may be premised upon the general character of the activity in which the defendant engaged, the relationship between the parties or even the interdependent nature of human society." *J'Aire Corp.*

v. Gregory, 24 Cal. 3d 799, 803 (1979). The court further explained that "[r]ather than traditional notions of duty, this court has focused on foreseeability as the key component necessary to establish liability." *Id*. at 806 ("[R]espondent is liable if his lack of ordinary care caused foreseeable injury to the economic interests of appellant."). Here, Hunter has alleged that Fisher and Wior knew of the economic relationship between Hunter and the NBPA and that they knew or should have known that their failure to act with reasonable care would disrupt that economic relationship. (*See, e.g.*, Compl. ¶¶ 157, 158.) Hunter's allegations regarding Fisher and Wior's power and influence in the NBPA, their access to media (*see, e.g., id*. ¶ 68), and their dissemination of false information about Hunter (*see, e.g., id*. ¶ 84), are also sufficient to infer that it was foreseeable that their actions would injure Hunter's economic interests and, therefore, that Fisher and Wior owed Hunter a duty of care.

Third, defendants' argument that Hunter's claims of interference with prospective economic relations (Claims 7 & 8) fail to allege that Fisher or Wior engaged in an independently wrongful act is another instance of defendants' willfully ignoring what appears in the Complaint. Hunter has alleged that Fisher interfered with Hunter's prospective economic relations with the NBPA by making several defamatory statements about Hunter. (*E.g.*, Compl. ¶¶ 197-216.) These defamatory statements are proscribed by common law and are therefore independently wrongful. Hunter has alleged that Wior interfered with Hunter's prospective economic relations by engaging in conduct that violated the NBPA's by-laws. (*Id*. ¶¶ 70-72.) This conduct is independently wrongful "by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995) (internal quotation marks omitted). As such, Hunter's allegations demonstrate that defendants' "actions [were] out of the realm of legitimate business transactions," and so fulfill the purpose of the independent wrongfulness requirement. *Id.* at 390 (internal quotation marks omitted).

Fourth, defendants' assertion that Hunter's claims for interference with prospective economic relations are duplicative of interference with contract claims is equally ineffectual. (Fisher & Wior Br. 8.) The California Supreme Court has expressly approved of pleading both interference with prospective economic relations claims and interference with contract claims

where the validity of the contract at issue has been challenged, as is the case here. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003) ("Thus, a plaintiff who believes that he or she has a contract but who recognizes that the trier of fact might conclude otherwise might bring claims for both torts [interference with contract and interference with prospective economic advantage] so that in the event of a finding of no contract, the plaintiff might prevail on a claim for interference with prospective economic advantage.").

Fifth, defendants' argument that "there was no valid employment contract between Hunter and the NBPA" affords no basis for dismissing Hunter's interference claims. (Fisher & Wior Br. 8.) As explained in Section III.A.1.a above, this defense must be rejected because it depends on the resolution of factual questions that cannot be answered on demurrer. Moreover, with respect to Hunter's claims for interference with prospective economic relations (Claims 7 & 8), the California Supreme Court has held that "the tort of interference with prospective economic advantage . . . is not dependent on the existence of a valid contract." *Korea Supply Co.*, 29 Cal. 4th at 1157 (internal quotation marks omitted).

C. Hunter's Misrepresentation and Concealment Claims (9-12) Are Sufficiently Pled.

1. Hunter Has Adequately Pled That He Reasonably Relied on Fisher's Representation That Fisher Had Authority to Bind the NBPA to the Terms of the 2010 Extension.

In the 2010 Extension, Fisher expressly represented and warranted that he had the authority to sign the 2010 Extension on behalf of the NBPA and to bind the NBPA to the terms of the agreement. (Compl. ¶ 31 & Ex. D § 11.) The Complaint alleges that Hunter reasonably relied on that representation in entering into the 2010 Extension and continuing to perform the duties and obligations required of him under the Employment Contract and the 2010 Extension. (*Id.* ¶¶ 178, 194.) Contrary to Fisher's contention, nothing more is required for Hunter to sustain his pleading burden.

"Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of

fact." *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995) (internal quotation marks omitted). This is not the "rare case" in which it is clear from the face of the complaint that Hunter could not have reasonably relied on Fisher's representation. Fisher's claim that, "as the Executive Director of the NBPA for 17 years, [Hunter] knew all about the Union's Constitution and Bylaws," is unsupported by anything in the Complaint and, even if true, presents only a further factual question about the reasonableness of Hunter's reliance on Fisher's representation. (Fisher & Wior Br. 9.)

Contrary to Fisher's assertion, this case is entirely different than *Guido v. Koopman*, 1 Cal. App. 4th 837 (1991). (Fisher & Wior Br. 9.) Critically, *Guido* was decided on summary judgment, not on demurrer. *Guido*, 1 Cal. App. 4th at 839. Moreover, at issue in *Guido* was defendant's purported oral representation, which was directly contradicted by a written release that the plaintiff herself had signed. *Id*. at 840. Even if the procedural posture of this case were similar to *Guido*, which it manifestly is not, no such facts exist here.[7]

2. Hunter Pled All Elements of His Fraud Claims.

Fisher also incorrectly contends that all of Hunter's misrepresentation and concealment claims (Claims 9-12) must be dismissed because Hunter has not pled that Fisher owed him any legal duty and that Claim 12 must be dismissed because Hunter has not pled any affirmative statement. (Fisher & Wior Br. 9-10.)

First, with respect to Hunter's claim for intentional misrepresentation (Claim 9), there is no requirement that Hunter plead or prove any duty. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 482 (1998) ("It is the element of intent which makes fraud actionable, *irrespective of any contractual or fiduciary duty one party might owe to the other*.") (emphasis added).

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[7] The fact the *Guido* court found it relevant that, under the particular factual circumstances of that case, the plaintiff there was a practicing attorney who used releases in her practice in no way establishes that Hunter's prior legal experience forecloses Hunter from alleging reasonable reliance here.

Second, contrary to Fisher's suggestion, a duty to disclose for purposes of concealment (Claim 11) does not arise only where there is a fiduciary or similar relationship between the plaintiff and defendant. (Fisher & Wior Br. 10.) Rather, California courts have repeatedly recognized that a cause of action for non-disclosure of material facts may arise in situations where no fiduciary or confidential relationship between the parties exists. *See, e.g.*, *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 613 (1992) ("'In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances . . . .'") (quoting *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 294 (1970)); *Rogers v. Warden*, 20 Cal. 2d 286, 289 (1942) ("Defendants contend that the record does not show any confidential or fiduciary relation between the plaintiff and the defendants and that in the absence of such a relation the defendants were under no obligation to disclose facts known to them. But the rule has long been settled in this state that *although one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated*.") (emphasis added; internal quotation marks omitted). The concealment claim sufficiently alleges all of the necessary elements. (*See, e.g.*, Compl. ¶¶ 63, 68.)

Third, Fisher's claim that Hunter's misrepresentation claims based on Fisher's representation in the 2010 Extension that Fisher had the authority to bind the NBPA (Claims 10 & 12) "are actually for concealment," is false, as is his assertion that Claim 12 alleges no affirmative statement. (Fisher & Wior Br. 10.) Hunter alleged that "Fisher expressly represented and warranted to Hunter in writing that an important fact was true, to wit, that Fisher had the authority to sign the 2010 extension on behalf of the NBPA and to bind the NBPA to the terms of the agreement." (Compl. ¶¶ 174, 190.) Fisher's representation that he had the authority to sign the 2010 extension on behalf of the NBPA and his representation that he had the authority to bind the NBPA to the terms of the employment agreement are both affirmative statements made by Fisher to Hunter.

3. Hunter Pled His Fraud Claims With Sufficient Particularity.

Fisher's argument that the Complaint fails to meet the heightened pleading standards for fraud claims must be rejected. (Fisher & Wior Br. 11-12.) Although Fisher identifies three areas in which he claims Hunter's pleadings are insufficient, his arguments simply ignore much of what Hunter alleged in the Complaint. *First*, Fisher argues that Claims 9-11 do not include any specific facts to support Hunter's allegation that Fisher acted with the requisite fraudulent intent. (*Id*. at 11.) In making this assertion, defendant cites only to the allegations in the charging section of the Complaint in which Hunter alleged the specific causes of action. (*Id*.) Fisher completely ignores the extensive facts set forth in the factual allegations section and incorporated by reference into each of Hunter's fraud claims. (Compl. ¶¶ 164, 173, 181 (incorporating factual allegations).) When one considers the factual allegations in the Complaint, it is clear that Hunter has alleged the requisite fraudulent intent. Indeed, in light of the factual circumstances alleged regarding the secret negotiations – including that Fisher denied the secret negotiations in direct response to the confrontation with Hunter (*id.* ¶ 63) – it defies reason to claim that Fisher did not intend to deceive Hunter.

Second, Fisher is incorrect that Claim 9 "is entirely devoid of facts about Fisher's supposed representation." (Fisher & Wior Br. 11.) Hunter specifically alleged the factual circumstances in which Fisher falsely represented both directly to Hunter (Compl. ¶ 63) and through his public statements (*id*. ¶ 68) that he was not and had not been secretly negotiating with team owners. Defendant completely ignores these factual allegations and cites only to a single summary paragraph in the charging section of the Complaint. (Fisher & Wior Br. 11.) Once again, defendant cannot demonstrate that Hunter's pleading is deficient simply by ignoring what Hunter has pled.

Third, and finally, Hunter's allegations of reliance are sufficient. (Fisher & Wior Br. 12.) With respect to Claims 8 and 10, the only case cited by Fisher in support of his assertion that Hunter must provide greater detail regarding his reliance on Fisher's express representation that he had authority to bind the NBPA to the 2010 Extension is *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004). *Cadlo* is plainly distinguishable. There, the plaintiff had not pled that

he was even aware of the advertisements containing the misrepresentations at issue. *Cadlo*, 125 Cal. App. 4th at 520. That is certainly not the case here, where Fisher made the statement at issue in the 2010 Extension that Hunter himself signed. With respect to Claims 9 and 11, Hunter was not required to allege more detail about his reliance on Fisher's misrepresentations regarding the secret negotiations. (Fisher & Wior Br. 12.) Once again, Fisher cites only a single paragraph in the cause of action section of the Complaint (*id.*) and ignores the significant factual allegations set forth earlier in the Complaint that describe the circumstances under which Fisher made the misrepresentations regarding the secret negotiations or the effect that Fisher's unexposed negotiations had on Hunter's ability to negotiate a deal. (Compl. ¶¶ 60-68, 75-78.) Moreover, even if Fisher's assertions regarding reliance are correct (which they are not), that still would not warrant sustaining the demurrer. The case law Fisher himself cites establishes that a general demurrer will not be sustained where plaintiff intends to allege reliance, even if he does so defectively. *Younan v. Equifax, Inc.*, 111 Cal. App. 3d 498, 513-14 (1980) (overruling general demurrer "[n]otwithstanding that there is no *direct* averment in the complaint that the fraudulent representation induced plaintiff to submit to the examination" where "it appears from the complaint by a fair inference that plaintiff intended to allege, and did allege though defectively, that he relied upon the misrepresentation . . . ."). Defendant's demand for more specific pleading is baseless.[8]

4. Hunter Is Permitted to Assert Tort Claims Against Fisher for Misrepresenting His Authority to Bind the NBPA.

Fisher's final argument that Hunter's misrepresentation claims must be dismissed because they "merely restate contractual obligations" misrepresents the nature of Hunter's claims. (Fisher & Wior Br. 12 (internal quotation marks omitted).) Hunter is not restating his claim that the NBPA failed to comply with the terms of its contract. Rather, Hunter is raising a claim *against Fisher*

[8] Defendant also repeats his argument that the factual issue of reliance can be determined on the face of the Complaint. (Fisher & Wior Br. 12 ("Again, this is unsurprising given Hunter's legal background and experience, knowledge about the contract ratification process, and affirmative reliance on the Bylaw provisions in his complaint.").) For the reasons already discussed, this argument is incorrect. *See supra* Section III.C.1.

should Fisher's statement that he had the authority to bind the NBPA be held to be false. (Compl. ¶¶ 174-75, 190-91.) The cases that Fisher cites in support of this argument raise entirely different claims than the ones at issue here. *See BFGC Architects Planners, Inc. v. Forcum/Mackey Constr., Inc.*, 119 Cal. App. 4th 848, 852-53 (2004) ("[The complaint] alleges defendants breached their duties to district by failing to comply with the terms of their contracts."); *Erlich v. Menezes*, 21 Cal. 4th 543 (1999) (reversing award of emotional distress damages against defendant based defendant's simple breach of contract to build plaintiffs' home).

D. Hunter's Defamation Claims (13 & 14) Are Properly Pled.

1. Hunter Pled the Substance of the Defamatory Statements with Sufficient Particularity.

Fisher asserts that Hunter's defamation claims suffer from a "fatal defect" because Hunter "never alleges the specific words he claims Fisher said" and "only very generally describes the purported defamatory statements." (Fisher & Wior Br. 13.) This, too, is incorrect. No requirement exists that Hunter must plead the exact words of the defamatory statement. *Okun v. Super. Ct.*, 29 Cal. 3d 442, 458 (1981) ("Nor is the allegation defective for failure to state the exact words of the alleged slander. . . ."). Rather, "slander can be charged by alleging the substance of the defamatory statement."[9] *Id*. Hunter alleged the substance of each of the defamatory statements at issue, thereby meeting this pleading requirement. (Compl. ¶¶ 81, 90, 91, 100; *see also id*. ¶¶ 198, 209.)[10]

[9] "Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense." *Okun v. Super. Ct.*, 29 Cal. 3d at 458. Here, defendant Fisher has superior knowledge of the facts surrounding the defamatory statements, as he made those statements outside of Hunter's presence. (*See* Compl. ¶¶ 81, 90, 91, 100.) This further undermines defendant's claim that Hunter's pleading is insufficient.

[10] Tellingly, in asserting that "Hunter only very generally describes the purported defamatory statements," defendant completely ignores all of Hunter's allegations regarding the defamatory statements set forth in the factual allegations section of the Complaint (Compl. ¶¶ 81, 90, 91, 100) and cites only to the summaries of those statements in the cause of action section (Fisher & Wior Br. 13 (citing Compl. ¶¶ 198, 209)). Defendant cannot demonstrate that Hunter has failed to sufficiently plead the defamatory statements by simply ignoring Hunter's allegations regarding those statements.

2. Hunter Alleged the Requisite Facts About Fisher's Mental State.

Fisher next argues that Hunter's defamation claims must be dismissed because "[t]he complaint alleges nothing about Fisher's mental state." (Fisher & Wior Br. 13-14.) This argument fails for two independent reasons. First, Fisher cites nothing to support his assertion that "Hunter is a public official or at the very least a limited purpose public official for purposes of this controversy." (*Id*. at 13.) Fisher is not entitled to the qualified privilege that attaches to statements made about public officials or public figures simply because he says so. *See Peoples v. Tautfest*, 274 Cal. App. 2d 630, 635 (1969) ("The rule of *New York Times Co. v. Sullivan* [requiring proof of actual malice where plaintiff is a public figure] is denominated by the United States Supreme Court as one of privilege. The defense of privilege to a charge of defamation is an affirmative one which must be specifically pleaded unless it appears on the face of the complaint.").

Second, even if Hunter were required to plead actual malice, he has done so. Indeed, Hunter expressly alleged that "Fisher knew the statements [at issue] were false or had serious doubts about the truth of the statements." (Compl. ¶¶ 205, 214.) This is the precise mental state required to establish actual malice. *See, e.g., Khawar v. Globe Intern., Inc*., 19 Cal. 4th 254, 262-63 (1998) (a statement is made with "actual malice" if the defendant had "knowledge that [the statement] was false" or "entertained serious doubts as to the truth of his [statement]") (internal quotation marks omitted); Judicial Council of California Civil Jury Instruction 1700.

3. The Purported "Pleading Deficiencies" Identified in Defendants' Anti-SLAPP Motion Do Not Provide a Legitimate Basis for Sustaining Fisher's Demurrers.

Fisher concludes by asserting that his demurrer should be sustained because of various "pleading deficiencies" outlined in Fisher and Wior's Anti-SLAPP Motion. (Fisher & Wior Br. 14.) As explained in Hunter's Memorandum of Points and Authorities in Opposition to Defendants' Anti-SLAPP Motions, those arguments are without merit and do not require dismissal of Hunter's defamation claims.

IV. CONCLUSION

As explained above, Hunter has demonstrated that the allegations in his Complaint are sufficient. For those reasons, the demurrers should be overruled in their entirety. If the Court disagrees, however, Hunter should be granted leave to amend. *See, e.g.*, *Quelimane Co.*, 19 Cal. 4th at 39 ("If a complaint does not state a cause of action, but there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted.").

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Respectfully submitted,

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