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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

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. RG13679736 **ASSIGNED FOR ALL PURPOSES TO THE HON. FRANK ROESCH DEPARTMENT 24** **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR CHANGE OF VENUE** Date: August 15, 2013 Time: 3:45 p.m. Dept.: 24 Judge: Hon. Frank Roesch

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I. INTRODUCTION

This case belongs in Alameda County. Plaintiff G. William Hunter ("Plaintiff" or "Hunter") served as the National Basketball Players Association's ("NBPA" or "union") Executive Director for seventeen years under a 1996 employment agreement (the "Employment Contract"), which was signed in Alameda County – a fact defendants do not contest, or even address – before being wrongfully terminated in 2013. The fact that Hunter executed the contract in Alameda County is dispositive of the venue issue because defendants have conceded that, under California Code of Civil Procedure ("CCP") § 395(a), an action arising under contract may properly be brought in the county where the contract was signed, regardless of where the defendants reside. Def. Br. at 5. Given this concession, defendants cannot credibly challenge venue in this Court.

Instead, defendants construct their venue argument based on their own version of the facts. This is nowhere more evident than in defendants' assertion that "[t]he only tie [of this case] to Alameda County is plaintiff's vacation home. There is nothing else." *Id*. at 3. As it turns out, not only is that representation dead wrong, but in making it, defendants ignored contrary information that was in their exclusive possession when this case was filed. At the time he filed the Complaint, Hunter did not have access to a fully executed copy of the Employment Contract because virtually all of his employment records remained in defendant NBPA's possession when defendants locked Hunter out of his office. The only copy of the Employment Contract to which Hunter had access was an unsigned and redacted copy that the NBPA had made publicly available on the Internet, which Hunter attached as an exhibit to the Complaint. Hunter's address in Oakland, Alameda County, had been redacted from the publicly available copy of the Employment Contract. Despite the fact that defendants must have known this information when they filed their motion for change of venue, they not only failed to bring it to the Court's attention, but affirmatively contradicted it in their briefing.[1]

[1] Hunter has since obtained a fully executed and unredacted copy of the Employment Contract, which is attached to his accompanying declaration as Exhibit 2. His street address has been redacted to protect his privacy, since Hunter still maintains that residence. In addition, Hunter has redacted his and the NBPA's telephone and facsimile numbers.

Defendants also conspicuously ignore Hunter's allegations that the Employment Contract was entered into in 1996 and subsequently extended for three additional terms. Compl. ¶¶ 22-31. Instead, they focus on the last extension ("2010 Extension"), which defendants characterize as being *the* operative contract, and which they say was signed in Las Vegas. *See, e.g.*, Def. Br. at 1, 2, 5. That argument is unavailing for purposes of determining venue. While defendants may ultimately dispute at the merits stage whether the 1996 Employment Contract, the 2010 Extension, or both are the operative instruments for purposes of the breach of contract claims, the allegations of the Complaint must be taken as true on a motion for change of venue. *Rutherford v. New York Hanseatic Corp.*, 153 Cal. App. 2d 462, 464 (1957). Based on the contract claims as pleaded and defendants' concession that this action was properly filed where the contract was signed, venue is proper in Alameda County.

Defendants' tactics also include a gratuitous attack on the Presiding Judge of this Court, whom they accuse of having had improper ex parte contact with Hunter in the form of an email exchange that occurred more than a year before this lawsuit was filed. Defendants make the serious accusation that this contact renders the entire Alameda County Superior Court bench incapable of providing a fair and impartial adjudication of this matter, but they fail to back it up. Defendants do not explain how an email exchange that occurred more than a year ago can constitute an improper ex parte contact in the first place, let alone how it requires the disqualification of the entire Court. And defendants do not even try to explain why the email exchange entitles them specifically to a transfer to Los Angeles County. Defendants' assertion of bias is not legitimate but merely an attempt to attack Hunter's character and tarnish this Court in the process.

It is defendants' burden to prove that Plaintiff's chosen venue is improper. Instead of meeting that burden, defendants have mischaracterized Plaintiff's allegations and made baseless accusations of impropriety. Defendants' motion to transfer this case to Los Angeles County should be denied.

II. FACTUAL BACKGROUND

A. Hunter Was Wrongfully Terminated After 17 Years as the NBPA's Executive Director.

Plaintiff Hunter served the NBPA as its Executive Director for seventeen years, beginning in 1996 and ending when he was terminated without cause on February 17, 2013. Compl. ¶¶ 21, 96. The union prospered during Hunter's tenure, growing more financially secure, responsive to its members, and socially conscientious. *Id*. ¶¶ 1, 32-41. The terms of Hunter's employment were governed by the written Employment Contract, which became effective on July 15, 1996, together with three extensions of the contract term, the "1999 Extension" effective July 15, 1999, the "2005 Extension" effective July 1, 2005, and the 2010 Extension negotiated in June 2010 and effective July 1, 2011. *Id*. ¶¶ 22, 24, 26, 28.

Among his many duties and responsibilities as Executive Director, Hunter functioned as the union's exclusive conductor of the collective bargaining relationship between the union and the National Basketball Association (the "NBA"). *Id*. ¶¶ 70-71. However, in 2011, during intense collective bargaining negotiations with the NBA and in the midst of a work stoppage, Hunter learned that defendant Fisher had been secretly negotiating with NBA team owners to strike a self-serving deal, thereby undermining Hunter's authority and interfering with Hunter's Employment Contract and 2010 Extension. *Id*. ¶¶ 62, 67, 69-74. Thereafter, Fisher and Wior launched a campaign to destabilize Hunter's role as Executive Director and assume control of the NBPA. *Id*. ¶¶ 79-93. On February 17, 2013, the NBPA terminated Hunter's employment without cause. *Id*. ¶¶ 93-101.

B. Hunter Signed the Employment Contract in Alameda County.

In 1996, Hunter resided at the same Oakland, California residence that he maintains today. Hunter Decl. ¶¶ 5-6. He was represented in the 1996 NBPA contract negotiations by Keven J. Davis, Esq. of the Garvey, Schubert & Barer law offices in Seattle, Washington. *Id.* ¶ 4. Mr. Davis is deceased. *Id.* In August 1996, after Hunter and the NBPA had agreed on the final terms of the Employment Contract, Mr. Davis forwarded the Employment Contract to Hunter at his Oakland home for Hunter's signature. *Id.* ¶ 6 & Ex. 1. Hunter signed the Employment Contract in Oakland, and then returned the fully executed contract to his lawyer. *Id.* ¶ 8. A copy of the fully executed

Employment Contract is attached as Exhibit 2 to Hunter's Declaration.[2]

C. Hunter Filed This Breach of Contract Action in Alameda County.

Hunter filed the Complaint on May 16, 2013 in the Alameda County Superior Court alleging fourteen claims for relief related to breach of contract, interference with contractual relations, and defamation. The contract claims are specifically grounded in the 1996 Employment Contract. The breach of express contract claim alleges that "Fisher and the NBPA breached *the Employment Contract* by discharging Hunter before the end of his employment term *under the Employment Contract* and 2010 Extension, including the additional one-year option period provided for in the 2010 Extension." Compl. ¶ 106 (emphasis added). The other two breach of contract claims are also specifically based on the Employment Contract. *See id.* ¶ 112 (Breach of Express Contract by Repudiation) ("Fisher and the NBPA clearly and positively indicated to Hunter that they would not meet the requirements of the contract, thereby expressly *repudiating the Employment Contract* and the 2010 Extension.") (emphasis added); *id*. ¶ 121 (Breach of Implied-in-Fact Contract) ("Fisher and the NBPA *breached the Employment Contract* by discharging Hunter before the end of his employment term *under the Employment Contract* and the 2010 Extension, including the additional one-year option period provided for in the 2010 Extension") (emphasis added). Defendants are not at liberty to simply ignore these allegations and characterize the 2010 Extension as the operative agreement for venue purposes.

III. ARGUMENT

A long-standing tenet of California law is that a plaintiff is presumed to have filed his Complaint in the proper court. *Fontaine v. Super. Ct.*, 175 Cal. App. 4th 830, 836 (2009) ("The moving party must overcome the presumption that the plaintiff has selected the proper venue."). Given this presumption, defendants seeking to move the case bear the burden of demonstrating "that the plaintiff's venue selection is not proper under any of the statutory grounds." *Id*. (quoting

[2] Even the notice provision of the Employment Contract requires that notice to Hunter be provided in Oakland, California. Hunter Decl. Ex. 2. Yet the defendants claim that the Complaint is "factually inaccurate," and that notice under "Hunter's never-ratified employment contract" was to be provided in New York, not Alameda. Def. Br. at 1. Again the defendants ignore the well-pleaded allegations of the Complaint and try to create confusion between the Employment Contract and the 2010 Extension.

Mitchell v. Super. Ct., 186 Cal. App. 3d 1040, 1046 (1986)). As explained below, defendants' motion does not meet that burden.

A. Venue Is Proper in Alameda County Because the Employment Contract Was Signed Here.

Defendants concede that, in a breach of contract action, venue is proper in the county in which the contract was signed. Def. Br. at 4-5. According to defendants, "the case belongs in the county where the defendant resides (here, Los Angeles) *unless* (1) *it was signed where the plaintiff filed suit,* or (2) the contract specifically states that the defendant would perform an obligation in the county where the plaintiff filed suit." *Id*. at 5 (emphasis added). Venue is therefore proper in this Court under CCP § 395(a) because the Employment Contract – *the operative contract as alleged in the Complaint and attached as Exhibit A* – was indisputably signed in Alameda County.

The contract provision of CCP § 395(a) provides in part that an action founded on contract may properly be brought in the county "where the contract in fact was entered into."[3] As defendants acknowledge, the county "where the contract in fact was entered into" is the county in which the contract was signed. Def. Br. at 5. Venue is therefore proper in Alameda County because the Employment Contract was entered into (*i.e.*, signed) in Alameda County.

CCP § 395(a) further provides that contract venue is also proper in the county "where the obligation is to be performed" and that, absent a special term in writing regarding the place for performance, the county where the obligation is to be performed is the county where the obligation was incurred. For purposes of this latter provision, the obligation is deemed to have been "incurred" in the county in which the contract was signed. *Skidmore v. Solano Cnty.*, 128 Cal. App. 2d 391, 393-94 (1954); *see also* Def. Br. at 5. Venue is thus also proper in this Court because the Employment Contract contains no special writing about where the obligation at issue was to be performed, and so the obligation is deemed to be performed where the Employment Contract was

[3] CCP § 395(a) reads in relevant part: "[I]f a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary."

signed – again, in Alameda County. *See, e.g.*, *Mitchell v. Super. Ct.*, 186 Cal. App. 3d 1040, 1047 (1986) (interpreting "special contract in writing" narrowly as requiring an express specification that the defendant's performance be in a particular county and not permitting the county of performance to be "supplied by implication or extrinsic facts").

Thus, under either arm of the CCP § 395(a) provision for contract venue, the county in which the contract was signed is the appropriate venue. Accordingly, the motion to transfer should be denied and this case should remain in Alameda County.

B. Defendants Cannot Simply Ignore Hunter's Allegations Regarding the Employment Contract.

Defendants attempt to avoid this result by simply ignoring the Employment Contract that is Exhibit A to the Complaint. Although the Complaint plainly alleges that defendants Fisher and the NBPA breached the Employment Contract by discharging Hunter before the end of his employment term under the Employment Contract and 2010 Extension (Compl. ¶ 106), defendants are conspicuously silent about where the Employment Contract was signed. Rather, the only factual assertions that defendants make relate solely to the 2010 Extension. Def. Br. at 1-2, 5. Defendants misleadingly suggest that the 2010 Extension, which they claim was signed in Las Vegas, is the sole contract at issue in this case.[4] *Id*. By thus mischaracterizing the factual record, defendants are able to posit that "[t]he only tie to Alameda County is plaintiff's vacation home. There is nothing else." *Id*. at 3.

As amply demonstrated above and on the face of the Employment Contract itself, these assertions are factually wrong, and they are legally impermissible to boot. In essence, defendants are attempting to defeat venue by contesting that the Employment Contract is the instrument on which Hunter has filed suit. The Court may not make such a merits determination on a motion to transfer venue, and defendants' veiled invitation to do so should be rejected. *See Harbinson v. Affeldt*, 75 Cal. App. 2d 499, 501 (1946) ("[I]t has long been stated by our courts over a period of years that

[4] Defendants repeatedly refer to the 2010 Extension as "the alleged employment contract" (Def. Br. at 1-2) or "Hunter's alleged contract" (*id*. at 5), thereby contradicting the Complaint and characterizing the 2010 Extension as the only instrument on which Hunter is suing.

upon a motion for a change of venue the merits of an action will not be gone into except, perhaps, to determine whether or not a party to the action has been joined in good faith and not solely for the purpose of fixing the venue in a certain county.").

C. As Defendants Concede, CCP § 395(a)'s Contract Provision Establishes Venue over the Entire Case.

Defendants agree that, under the contract provision of CCP § 395(a), venue based on the place of contract execution controls on a case-wide basis: "In other words, *the case* belongs in the county where the defendant resides (here, Los Angeles) *unless* (1) it was signed where the plaintiff filed suit, or (2) the contract specifically states that the defendant would perform an obligation in the county where the plaintiff filed suit." Def. Br. at 5 (emphasis added).

Even aside from defendants' concession, applying the contract venue provision to the entire case, including claims to which the provision would not apply if those claims had been brought alone, is consistent with the California Supreme Court's decision in *Brown v. Superior Court*, 37 Cal. 3d 477, 486-87 (1984). In *Brown*, a case that defendants themselves cite (Def. Br. at 3), the court found that "[a] responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client." *Id*. at 486. Thus, the court determined that if the venue provision at issue were construed as applying only to a single claim as opposed to the whole case, plaintiffs who wished to avail themselves of that provision "would be faced with a Hobson's choice" of either abandoning those claims not covered by the venue provision or trying those claims in a different county, a result that "would fly in the face of judicial economy." *Id*. at 487.

The rationale of *Brown* applies squarely to this case. Defendants Fisher and the NBPA breached the Employment Contract following a sustained campaign waged by defendants Fisher and Wior to displace Hunter as the NBPA's Executive Director. Compl. ¶¶ 7, 79-101. Because the campaign was broad in both scope and consequence, Hunter must plead a variety of tort and contract causes of action in order to fully protect his interests. Forcing Hunter to file his tort claims elsewhere in order to take advantage of the contract venue provision of § 395(a) "would fly in the face of judicial economy." *Brown*, 37 Cal. 3d. at 487. For this sound policy reason, the contract

provision of § 395(a) should be applied to Hunter's case as a whole.

D. Defendants' Residence Does Not Control Venue in This Case.

A defendant's residence controls venue under CCP § 395(a) *only if some other venue provision does not apply*. *Stanning v. White*, 156 Cal. App. 2d 547, 549 (1958) ("[W]hen a plaintiff in an action on a contract has brought himself within one of the alternatives provided in Section 395 of the Code of Civil Procedure, the defendant may not, on the ground of residence alone, have the case transferred to the county in which he resided at the commencement of the action."). As explained above, the contract venue provision makes venue proper in Alameda County. Thus, the "general venue rule" that defendants' residence controls venue does not apply here.

Defendants throw up a smokescreen of accusations designed to deflect attention from the correct result, charging that Plaintiff engaged in "creative pleading" regarding defendants' residences and knowingly misrepresented defendants' "locations" in order to "justify the Alameda County filing." Def. Br. at 1. These accusations are illogical, since Plaintiff has not attempted to base venue on the defendants' residences. Compl. ¶ 15. [5]

Defendants further confuse the issue by asserting that the individual defendants' residence controls "even though the action was initially brought in a county where the corporate defendants may be sued under [CCP §] 395.5." Def. Br. at 3 (quoting *Brown v. Super. Ct.*, 37 Cal. 3d 477, 482, n.6 (1984)). This argument is similarly illogical and irrelevant, as Hunter has never alleged that venue is based on CCP § 395.5, and no reference to that statute appears anywhere in the Complaint.

Finally, it is not enough for defendants simply to establish that they reside in Los Angeles

[5] Defendants' accusations that Plaintiff engaged in "creative pleading" regarding defendants' residences are not only illogical, they are unfounded. Defendant Fisher denies "owning" a residence in Oklahoma, but does not deny that he played for the Oklahoma City Thunder and resided in Oklahoma at that time. Fisher Decl. ¶ 3. Home ownership, of course, is not dispositive of the residence issue. *Younger v. Spreckels*, 12 Cal. App. 175, 177 (1909) (finding that trial court erred in determining defendant's residence for venue purposes based on defendant's ownership and occupation of a home where other factors demonstrated that defendant's residence was elsewhere). Defendants assert that Hunter must have known where defendant Wior currently resides based on where service of discovery was attempted after the Complaint was filed (Def. Br. at 1), but Wior's own declaration states that Hunter attempted service at Wior's *former* place of residence. Wior Decl. ¶ 3. Finally, defendants claim that the Complaint does not mention the NBPA's New York City location (Def. Br. at 1), but the Complaint plainly alleges that the NBPA's principal place of business is in New York. Compl. ¶ 12.

County. Defendants must negate venue as laid under the provisions on which Plaintiff relies. *See Smith v. Stanford Research Inst.*, 212 Cal. App. 2d 750, 754 (1963) ("It is incumbent upon the moving party to show not only the place of its residence or principal place of business, but also that the contract was not made, that it was not to be performed, that the obligation or liability did not arise and that the breach did not occur in the county wherein the venue is originally placed by the filing of plaintiff's complaint.") (internal quotation marks omitted). As defendants have failed to do so, this case must remain in Alameda County.

E. Defendants Are Not Entitled to Disqualify the Entire Alameda County Superior Court.

Defendants close their brief by accusing The Honorable C. Don Clay of having had improper ex parte contact with Hunter, an accusation that they claim warrants recusal of the *entire* Alameda County Superior Court bench. Def. Br. at 5-6. This argument is breathtaking both in its audacity and its vacuity. The Court should treat this argument as waived because the defendants do not cite any legal authority in support of it. *See In re Marriage of Falcone & Fyke*, 164 Cal. App. 4th 814, 830 (2008) ("The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived."); *see also* Cal. R. Ct. 8.204(a)(1)(B).

On the merits, the Court should reject this argument because unless the Court is disqualified under CCP § 170 et seq., the Court has an obligation to retain the case, not transfer it. *See* CCP § 170 ("A judge has a duty to decide any proceeding in which he or she is not disqualified."); s*ee also Briggs v. Super. Ct.*, 87 Cal. App. 4th 312, 319 (2001) ("The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.") (internal quotation marks omitted); *People v. Brown*, 6 Cal. 4th 322, 336 (1993) (even due process challenges based on judicial bias must meet the standards of CCP § 170.1).

To meet the standard for judicial disqualification, defendants must show that the assigned judge has personal knowledge of disputed evidentiary facts, CCP § 170.1(a)(1), a financial interest in the subject matter of the proceeding, *id*. § 170.1(a)(3), a spouse or family member "within the third degree of relationship" who is a party to the proceeding, *id*. § 170.1(a)(4), or another of the statutory bases for disqualification, *see generally id*. § 170.1(a)(1)-(9). The standard for

disqualification is objective; it does not provide the parties with disqualification rights. *United Farm Workers of Am. v. Super. Ct.*, 170 Cal. App. 3d 97, 104 (1985) ("While this objective standard clearly indicates that the decision on disqualification not be based on the judge's personal view of his own impartiality, it also suggests that *the litigants' necessarily partisan views not provide the applicable frame of reference*.") (emphasis added and footnote omitted). Further, defendants must substantiate their disqualification motion with facts introduced by verified statement or a declaration that meets the standards of CCP § 170.3(c)(1).

The defendants' motion contains just two purportedly supporting facts – Hunter is a former prosecutor in the Alameda County District Attorney's office, and a year before this case was filed, Hunter exchanged emails with *Judge Clay*. Defendants do not even assert—let alone substantiate—that either of these purported facts relate to *Judge Roesch*, let alone requires his disqualification under CCP § 170.1. Defendants have no conceivable basis to disqualify the assigned judge. Accordingly, this Court has an obligation to retain this case under CCP § 170, despite defendants' baseless insinuations of impropriety against the plaintiff and this Court.

Finally, the Court should expressly reject the defendants' claim that an email exchange with Judge Clay, which occurred over a year before this case was even filed, was an improper ex parte contact. There is nothing improper about a judge having social contacts with members of his community. *See, e.g.*, *United Farm Workers of Am.*, 170 Cal. App. 3d at 100 ("[T]he proper performance of judicial duties does not require a judge to withdraw from society and live an ascetic, antiseptic and socially sterile life.").

IV. CONCLUSION

Plaintiff respectfully submits this action was properly filed in Alameda County, where the operative contract was executed. Because defendants have not met their burden of showing that Plaintiff's choice of venue is incorrect, their motion for change of venue should be denied.

DATED: August 2, 2013

Respectfully submitted,

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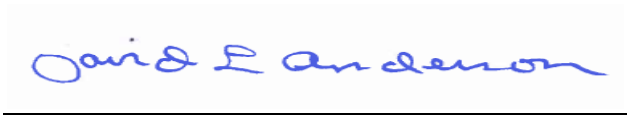

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