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DEREK FISHER and JAMIE WIOR

SUPERIOR COURT OF THE STATE OF CALIFORNIA

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. RG 13679736

Assigned For All Purposes To:
Judge Frank Roesch

DEFENDANTS FISHER & WIOR'S MEMORANDUM IN SUPPORT OF ANTI-SLAPP MOTION AND REQUEST FOR ATTORNEYS' FEES

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In the midst of the heated 2011 lockout and subsequent CBA negotiations, Hunter, in an interview with the *New York Times*, praised Fisher for the leadership *Hunter* encouraged: "I told him, 'I think I'm going to let you take the lead on a lot of this...Over a year ago, well before the lockout, I pushed him forward. I'd say, 'Rather than you stand around, you should be the one out in front.' And he's been doing a great job." *New York Times*, 10/17/11. Yet after being terminated without a valid contract and for a host of improprieties, Hunter conveniently changed his tune. The time has come for Hunter to accept responsibility for his own actions. The law requires nothing less.

Hunter premises his claims against Fisher and his business manager Wior almost entirely on conduct protected by the First Amendment. He sues Fisher for openly sharing concerns in response to questions by investigators during a Paul Weiss investigation Hunter directed, and for delivering a prepared statement as President of the NBPA. And he attacks Wior for allegedly drafting Fisher's "public statements" and encouraging him to "publicly [speak] on behalf of the Union and [disseminate] messages to the players"—the very duty of the NBPA President. By participating in a detailed review of Union business practices, Fisher acted in the best interests of *all* present, future and former players. His leadership in cooperating with a legal investigation that uncovered both the Union's need to revise its business practices *and* Hunter's misconduct should be commended—not something that subjects him or his business manager to liability.

California law authorizes a "special motion to strike" for "strategic lawsuits against public participation" or "SLAPPs." *See* Cal. Civ. Pro. § 425.16(b)(1) . Courts commonly apply the anti-SLAPP statute to bar claims just like those alleged here. Hunter's claims seek retribution for Fisher exercising his free speech rights in connection with an issue of public interest. Because Hunter cannot possibly show he can prevail on his claims against Fisher and Wior, the anti-SLAPP statute requires the Court to strike Hunter's claims and award fees to Defendants.

RELEVANT FACTUAL BACKGROUND

The NBA is a professional basketball league followed by millions of fans worldwide. The league, its players, and the dealings of its player union, the NBPA, are covered by numerous media outlets within the United States and internationally every day. Indeed, Hunter touts his own notoriety as the Executive Director of the NBPA, as well as the extensive media coverage he has

received. (*E.g.*, Compl. ¶¶ 1-2, 16-20, 32-41, 43, 50, 59, 68, 76-77, 84-92.)

Even before Fisher became NBPA President, NBA players began raising questions about the NBPA's business practices as a whole. (Fisher Decl. ¶ 5.) Players and others recognized the need to reform the Union. (*Id.*) Concern continued to be expressed during and after the lockout in 2011. (*Id.* ¶ 6.) Thus, on April 13, 2012, a quorum of NBA players on the NBPA Executive Committee discussed whether to conduct a business review of the organization as a whole. (*Id.*) Hunter's conduct was not even discussed. (*Id.*) The Executive Committee quorum voted and passed a resolution calling for a thorough review of the NBPA. (*Id.*) When Hunter learned of the resolution, he circled the wagons. He claimed a similar audit already existed, that Fisher was on a "fishing expedition," and requested Fisher's removal as NBPA President. (*Id.* ¶ 7.)

Two weeks later, on April 25, 2012, the U.S. Attorney's Office for the Southern District of New York subpoenaed Hunter as NBPA Executive Director seeking Union financial and business records. (*Id.* ¶ 8.) Numerous media outlets reported on potential improprieties, both accurately and inaccurately: for example, *The New York Times* and *Yahoo! Sports*, among others, reported about Hunter hiring close family members and investing Union funds in ventures with ties to his family. (Kassof Decl. ¶¶ 4-7, Exs. 3-6.) The government's subpoena led to further media coverage and public scrutiny of Hunter's management of the Union. (*Id.* ¶¶ 8-9, Exs. 7-8.)

The following day, the NBPA's Executive Committee with Hunter's guidance formed a six-member Special Committee "charged with supervising an internal investigation" into the NBPA's affairs. (Compl. ¶ 84.) *The New York Times* reported that Hunter "pledged his full cooperation with the internal inquiry," but "recused himself from the process to ensure that it is an independent one." (Kassof Decl. ¶ 8, Ex. 7.) Fisher had no involvement in the decision to form the Special Committee. (Fisher Decl. ¶ 9.) Despite Hunter declaring his independence (and some in the media questioning how any investigation of the NBPA could be independent of Hunter, *see* Kassof Decl. ¶ 10, Ex. 9), one day later, the Special Committee retained Paul Weiss, at Hunter's request, to conduct an investigation and respond to the government subpoena. (Fisher Decl. ¶ 10.) Paul Weiss remained in direct communication with the U.S. Attorney's Office throughout its investigation. (*Id.* ¶ 11.)

Paul Weiss interviewed Fisher, Hunter and three dozen others, reviewed thousands of

documents, and retained Deloitte to assist with accounting issues. (Kassof Decl. ¶ 3, Ex. 2, at 39-45.) Those interviewed understood Paul Weiss would communicate with the U.S. Attorney's Office. (Fisher Decl. ¶ 11.) After completing its 9-month investigation, Paul Weiss published a 229-page Report. The Report found Hunter had acted inconsistent with his fiduciary obligations, used poor judgment, failed to disclose information, paid little attention to the appearance of impropriety, did not properly manage conflicts of interest, and had been working under a self-negotiated contract the Union never ratified. (Kassof Decl. ¶ 3, Ex. 2.) Based on those findings, and their personal dealings with Hunter separate from the report, the NBPA Board of Player Representatives voted unanimously to terminate Hunter's employment. (Fisher Decl. ¶ 12.)

LEGAL STANDARD

Under California's anti-SLAPP statute, a party may move to strike any claim arising from "protected activity," Cal. Civ. Pro. § 425.16(b)(1), in furtherance of the right of free speech. *See Peregrine Funding, Inc. v. Sheppard & Mullin Richter Hampton LLP*, 133 Cal. App. 4th 658, 670 (2005). Courts analyze an anti-SLAPP motion in two steps. The moving party must first make a *prima facie* showing that the challenged cause of action "arises from" protected activity within one of Section 425.16's four categories: a statement or writing made (1) before an official proceeding authorized by law, (2) in connection with an issue under consideration or review by an official proceeding authorized by law, or (3) in a place open to the public or public forum in connection with an issue of public interest; or (4) other conduct in furtherance of the exercise of the right of free speech in connection with a public issue or issue of public interest. Cal. Civ. Pro. § 425.16(e). The nonmoving party must then show a probability of prevailing by proving his claims are "both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.*

ARGUMENT

I. THE ANTI-SLAPP STATUTE BARS HUNTER'S DEFAMATION CLAIMS.

A. Hunter's Defamation Claims Arise From Protected Activity.

California courts routinely apply the anti-SLAPP statute to bar defamation claims. *E.g.*, *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 203 Cal. App. 4th 450, 464 (2012); *Young v. CBS*

Broadcasting, Inc., 212 Cal. App. 4th 551, 567 (2012); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 33 (2007); *Aber v. Comstock*, 212 Cal. App. 4th 931 (2012).[1] Hunter bases his two defamation counts against Fisher on four alleged statements about Hunter's job performance. Specifically, Hunter alleges Fisher defamed him by:

1. "Claiming to be aware of conduct by Hunter that might be subject to, and might subject others to, criminal liability." (Compl. ¶¶ 198(a), 209(a).)

2. "Claiming to have been unaware that Hunter's daughter was employed by the prominent Washington D.C.-based law firm that Hunter retained to represent the NBPA, thus implying that Hunter was trying to conceal the fact that he had retained a law firm that employed his daughter." (Compl. ¶¶ 198(b), 209(b).)

3. "Claiming that the gift given to him by Hunter on behalf of the NBPA at the close of Fisher's first term as NBPA President was intended to ensure his loyalty to Hunter during the upcoming collective bargaining negotiations." (Compl. ¶¶ 198(c), 209(c).)

4. "Stating at a press conference that Hunter had divided, misled, and misinformed the Union and players and propounded threats and lies against the Union." (Compl. ¶¶ 198(d), 209(d).)

None of these alleged statements is actionable—and all four are protected by the anti-SLAPP statute.

Each was a statement "of free speech in connection with a public issue or an issue of public interest" under the fourth anti-SLAPP category. Cal. Civ. Pro. § 425.16(e)(4). The anti-SLAPP statute covers any statement or conduct that "concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic." *Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th 709, 716 (2010); *Stewart v. Rolling Stone LLC,* 181 Cal. App. 4th 664, 677 (2010) ("[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities."). Here, each allegedly defamatory statement concerned the highly publicized issue of Hunter's conduct as Executive Director of the NBPA. (*See* Compl. ¶ 52.) Thus, Fisher's comments regarding a matter of public concern are "a classic form of free speech" and protected conduct. *See*

[1] As the court noted in *Hecimovich*: "Numerous cases have made the SLAPP analysis in defamation cases, as manifest by the five pages of cases discussed in Notes 29 through 35 of the annotations to section 425.16 in West's *Annotated Codes* . . . Indeed, as our colleagues in Division One confirmed in the course of a lengthy discussion of the history and purpose of the SLAPP procedure, defamation is the very first of the favored causes of action in SLAPP suits." 203 Cal. App. 4th at 464 (internal citation and quotation marks omitted).

Monterey Plaza Hotel v. Hotel Empl. & Rest. Empl., 69 Cal. App. 4th 1057 (1999).

Moreover, the last three alleged statements were reported to the public at large, which puts them squarely within the third category protected by the anti-SLAPP statute. Fisher's statements at a press conference were clearly "made in a place open to the public or public forum." Cal. Civ. Pro. § 425.16(e)(3). The other two were published in Paul Weiss's public investigative report. Each was made "in connection with an issue of public interest," and falls within the third category of conduct protected by the anti-SLAPP statute. *See McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 111 (2007); *Marantha Corrs., LLC v. Dep't of Corrs. & Rehab.*, 158 Cal. App. 4th 1075, 1086 (2008).

The Northern District of California's decision in another case involving well-known NBA personalities is instructive. In *Roe v. Doe*, former Dallas Mavericks head coach Don Nelson sued Mavericks owner Mark Cuban for defamation based on comments Cuban made during an on-air radio interview following Nelson's departure from the Mavericks. No. C 09-0682 PJH, 2009 WL 1883752, *3 (N.D. Cal. June 30, 2009). Cuban filed an anti-SLAPP motion, asserting that his comments were protected under Sections 425.16(e)(3) and (4). *Id.* at *7. The court agreed:

> To the extent that Nelson argues that the contract dispute was a private dispute, and therefore not converted into a matter of public interest, the court disagrees. As acknowledged by Nelson, 'he is well-known as a head coach and general manager of professional basketball teams,' and his contract dispute with defendants 'received great national and worldwide attention and publicity.' As such, Nelson's contract dispute with defendants was not a private matter; rather, it was a topic of widespread concern to a substantial number of people, and therefore it was a matter of public interest. Indeed, the challenged statements made by Cuban were prompted by the public's interest in the dispute.

Id. at *8. The court found Nelson unlikely to succeed on his defamation claims, and granted Cuban's anti-SLAPP motion. *Id.* at *15.

Like Nelson, Hunter alleges he has been consistently in the public eye, and the CBA negotiations and his termination received extensive media coverage. (*See supra* at 1-2.) Thus, Hunter has pled himself right into a *prima facie* showing that his defamation claims fall within multiple protected categories under Section 425.16(e).

B. Hunter Cannot Establish Probable Success On His Defamation Claims.

Hunter's defamation claims have no chance of success. Three global problems plague all four statements at the outset. *First*, Hunter's defamation claims are fatally flawed because his

complaint fails to plead the specific words or substance of the alleged statements. Demurrer at 13 (citing *Aber*, 212 Cal. App. 4th at 948 & *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1421 (2001)). *Second*, relatedly, Hunter cannot prove by admissible evidence that any of the alleged general statements were even made. The first three are Hunter's own characterization of a third party's characterization of a statement made by Fisher. And the last is Hunter's mischaracterization of statements at a press conference. In other words, each alleged "statement" is inadmissible hearsay or conjecture—not admissible evidence. *Aber*, 212 Cal. App. 4th at 952 (granting anti-SLAPP motion where plaintiff "[had] not submitted any admissible evidence that Aber made defamatory statements about him"). The *actual* statements each contained an adequate factual basis, and Fisher believed them all to be truthful when he made them. (Fisher Decl. ¶¶ 13-17.) *Third*, the complaint makes no attempt to allege "actual malice," an element of clear and convincing proof required for a claim brought by a public figure like Hunter. *See Roe*, 2009 WL 1883752, *13-15; *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1162 (2004); *see also* Demurrer at 13-14.

But those are only the *threshold* reasons for dismissal. Hunter's defamation claims are not actionable for several independent reasons as well.

1. Statement #1 is Not Factual, True and Time-Barred.

Hunter first alleges that Fisher defamed him by "[c]laiming to be aware of conduct by Hunter that might be subject to, and might subject others to, criminal liability." (Compl. ¶¶ 198(a), 209(a).) As an initial matter, Hunter's allegation is not what Fisher actually said. Fisher's actual statement contained an adequate factual basis. (Fisher Decl. ¶ 13.) In any event, even taking the alleged characterization on its face, it cannot state a claim for many reasons.

First, it is non-actionable opinion. *See, e.g., Aisenson v. Am. Broad. Co. Inc.*, 220 Cal. App. 3d 146, 157 (1990) ("Merely making unflattering factual statements about someone, without more, does not give rise to a cause of action"; statement that appellant was a "bad guy" could not "reasonably be construed as an actionable false statement of fact"); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974) (statements that plaintiffs had "rotten principles" or "lack[ed] character" not actionable). Defamatory statements, in contrast, need a firm *factual* basis. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 18, 22 (1990) ("Unlike a subjective assertion the averred

defamatory language is an articulation of an objectively verifiable event."). A statement that information *"might be"* incriminating or *"might"* subject others to liability is an expression of a non-actionable subjective opinion. It is not an objective fact; for example, it does not say that Hunter's conduct *was* criminal or *would* result in criminal liability for others, much less how or why. *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 445 (1993); *Copp v. Paxton,* 45 Cal. App. 4th 829, 837 (1996) (an opinion is any broad, unfocused and wholly subjective comment); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1404-05 (1999) ("opinion" that plaintiff is a "loser wannabe lawyer," "creepazoid attorney," and the "meanest, greediest, low-blowing" expletive).

Second, the gist of even the characterization was true. The U.S. Attorney's Office is not only investigating Hunter, but also recently indicted two individuals from Prim Capital who entered into a financial arrangement with the Union under Hunter's watch. *See United States v. Joseph Lombardo and Carolyn Kaufman*, No. 13-cr-00411, Dkt. No. 16 (S.D.N.Y. May 30, 2013). Truth, of course, is an absolute defense. And a defendant "need not justify the literal truth of every word of the allegedly defamatory matter. It is sufficient if the substance of the charge is proven true, irrespective of slight inaccuracy in the details, so long as the imputation is substantially true so as to justify the gist or sting of the remark." *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1180-1181 (2000). Here, the recent Prim Capital indictments (on top of the extensive Paul Weiss findings) confirm the propriety and truth of Fisher's alleged statement that he was "aware of conduct by Hunter that might be subject to, and might subject others to, criminal liability."

Third, this alleged statement is barred by the statute of limitations because Hunter filed his Complaint on May 16, 2013, more than one year after the alleged statement on April 15, 2012. *See* Cal. Civ. Pro. § 340 (one year for defamation); *see also Aber*, 212 Cal. App. 4th at 953 (anti-SLAPP statute contemplates analysis of substantive merits of claims and available substantive defenses).

2. Statement #2 is Not Defamatory and Privileged.

The second allegedly defamatory statement—that Fisher told Paul Weiss he did not know Hunter's daughter worked for a law firm retained by the Union—is also a characterization of what Paul Weiss wrote, not any actual quote from Fisher. (Fisher Decl. ¶¶ 14-15.) But even the characterized statement is not defamatory for three reasons.

First, the statement is not "of and concerning" G. William Hunter. *See Vogel v. Felice*, 127 Cal. App. 4th 1006, 1023-24 (2005) (anti-SLAPP motion granted where statements not "of and concerning" the plaintiff); *Blatty v. New York Times, Co.*, 42 Cal. 3d 1033, 1042 (1986) (explaining the First Amendment requires defamatory statements "specifically refer to, or be 'of and concerning,' the plaintiff in some way."). Instead, the statement concerns the employment of Hunter's *daughter*. As such, it fails the most basic requirement of a defamation claim.

Second, the statement is not reasonably capable of defamatory meaning. There is certainly nothing defamatory on its face "without the need for explanatory matter." *See Palm Springs Tennis Club v. Rangel*, 73 Cal. App. 4th 1, 5 (1999). The statement is nothing more than Fisher's claimed awareness of an undisputed fact—where Hunter's daughter worked. Thus, Hunter "must *plead* and *prove* that as used, the words had a particular meaning, or 'innuendo,' which makes them defamatory." *Gilbert*, 147 Cal. App. 4th at 33. Hunter's asserted "innuendo"—that the statement implied that "Hunter was trying to conceal the fact that he retained a law firm that employed his daughter"—is a far cry from defamation. No reasonable person would think that a statement about whether Fisher knew where Hunter's daughter worked intended to suggest, in some defamatory way, that Hunter was trying to conceal information. *Id.* Further, Hunter has not pled special damages as required under California law to assert any claim based on innuendo. *See* Cal. Civ. Code § 45a.

Third, Fisher's statement is conditionally privileged under California Civil Code 47(c). Hunter admits Fisher made this statement to Paul Weiss during an interview pursuant to its investigation. (Compl. ¶ 10.) Given Fisher's position as President of the NBPA since 2007 and knowledge of the Union's affairs, he believed he had a duty to participate in the investigation and answer the questions Paul Weiss posed. (Fisher Decl. ¶ 11.) Thus, Fisher's statement is conditionally privileged as a response to questions from the investigators. Cal. Civ. Pro. § 47(c); *see also Aber*, 212 Cal. App. 4th at 953; *Noel v. River Hills Wilsons, Inc.*, 113 Cal. App. 4th 1363, 1369 (2003). Hunter can defeat this privilege only by showing "actual malice" by Fisher—a burden Hunter cannot meet. *See supra* at 6; Demurrer at 13-14.

3. Statement #3 is Not Factual, Not Defamatory and Privileged.

The third alleged defamatory statement likewise derives from Fisher's communications with

the Paul Weiss investigators. Specifically, Hunter alleges that "Fisher claimed he had been 'uncomfortable' with the gift [of a watch] and that 'he felt the watch may have been a gesture timed to ensure his loyalty to Hunter during the upcoming collective bargaining negotiations." (Compl. ¶¶ 91, 198(c), 209(c).) Hunter again characterizes what Fisher actually said. (Fisher Decl. ¶ 16.) The actual statement contained an adequate factual basis. But even Hunter's characterization fails for three independent reasons.

First, this statement is a non-actionable opinion rather than a statement of fact. *Aisenson*, 220 Cal. App. 3d at 157; *Copp,* 45 Cal. App. 4th at 837; *Savage*, 21 Cal. App. 4th at 445. The statement is about what Fisher *felt* and why he *felt* that way. That is not a false statement of fact—it is a statement of opinion, no different than the non-actionable statements in the Don Nelson-Mark Cuban case. *See Roe*, 2009 WL 1883752, at *11 ("The allegedly defamatory statements made by Cuban were phrased in terms of how he 'felt' and what he 'thought.' The statements thus expressed Cuban's belief, not a general truth."). *Second*, the statement is not defamatory on its face, so it is not defamation *per se*, nor is Fisher's statement that the gift made him feel uncomfortable reasonably capable of any defamatory meaning. *See Palm Springs Tennis Club*, 73 Cal. App. 4th at 5. In any event, Hunter has not pled any special damages. *See* Cal. Civ. Code § 45a. And *third*, the statement is conditionally privileged under California Civil Code § 47(c) because it too was made directly to Paul Weiss, per its request, as part of its investigation. (Fisher Decl. ¶ 16.) And because Hunter has not even pled actual malice—let alone facts to support it—he cannot prevail on this claim.

4. Statement #4 is Opinion, Privileged and Not Factual.

The final allegedly defamatory "statement" is that Fisher stated at "a press conference that Hunter 'divided, misled, and misinformed the Union and players and propounded threats and lies against the Union.'" (Compl. ¶¶ 100, 198(d), 209(d).) Hunter does not quote or cite the specific words Fisher said at the press conference. Apparently for a reason—what Fisher actually said never even mentioned Hunter, other than announcing his termination:

> Good afternoon, everyone. Today, for the NBPA, was a day of change. Today was a day of change for our association and our union. We held a meeting of the board of player representatives, with many different groups of players represented. Some of our international players, our all-stars, our younger players and a lot of our veteran players, as well. The player representatives and general body of our association have

> made their voices and their votes heard and today, a motion was raised, seconded and passed, unanimously, that we will terminate the employment of Billy Hunter. A new executive committee was formed. I remain as president, at this time, along with Matt Bonner serving as vice president, secretary treasurer will be James Jones, our first vice president elected will be Jerry Stackhouse. The following five players were chosen as vice presidents: Roger Mason, Jr., Chris Paul, Andre Iguodala, Stephen Curry and Willie Green. We want to make it clear that we are here to serve only the best interests of the players. No threats, no lies, no distractions will stop us from serving our membership. We do not doubt that this process will possibly continue in an ugly way, but we want to remind everyone that there are three ongoing government investigations pending, and so, we would like to continue to respect that process and will continue to handle ourselves accordingly in that regard, but going forward, will no longer be divided, misled, misinformed. This is our union and we are taking it back. There will be no further comment at this time, we appreciate you all being here this afternoon and at the appropriate time, as this process is carried, we will be in touch and willing to speak with the media at a later date, but thank [sic] you all for being here. *See* Kassof Decl. ¶ 11, Exhibit 10.

First, as the transcript confirms, the statement is not "of and concerning" Hunter. Hunter is not mentioned in the allegedly defamatory words, nor is any conduct attributed to him. *See Vogel*, 127 Cal. App. 4th at 1023-24; *Blatty*, 42 Cal. 3d at 1042. And *second*, the statement is again non-actionable opinion based on disclosed facts, not a representation of an objective fact that can be proved or disproved. *Aisenson*, 220 Cal. App. 3d at 157; *Copp,* 45 Cal. App. 4th at 837; *Savage*, 21 Cal. App. 4th at 445. In fact, the press conference statement is classic non-actionable rhetorical hyberbole. *See Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (2012); *Balzaga v. Fox News Network, LLC*, 173 Cal. App. 4th 1325, 1342 (2009).

II. THE ANTI-SLAPP STATUTE BARS HUNTER'S TORT CLAIMS.

A. Hunter's Claims Arise Out Of Protected Activity.

Hunter centers his tortious interference and concealment counts on Fisher and Wior's use of the media. (Compl. ¶¶ 4, 56, 68, 84.) This puts those claims squarely under the anti-SLAPP statute. *See, e.g., Park 100 Inv. Gp. II v. Ryan*, 180 Cal. App. 4th 795, 813 (2009); *Salma v. Capon*, 161 Cal. App. 4th 1275, 1289 (2008); *Taheri Law Gp. v. Evans*, 160 Cal. App. 4th 482, 489 (2008); *Gilbert*, 147 Cal. App. 4th at 33.

More specifically, Hunter bases each tortious interference count against Wior, Fisher's business manager, on allegations that fall into a protected category:

- Wior took "control of [Fisher's] media appearances and public statements" and "micromanaged Fisher's public statements and appearances." (Compl. ¶¶ 4, 56.)

- "With Wior's assistance and prompting, Fisher began to overreach his authority by, for example, making public statements on behalf of the NBPA . . . ." (Compl. ¶ 56.) "Wior was closely involved in the drafting of all of Fisher's public statements. On or about October 31, 2011, Fisher and, on information and belief, Wior, wrote a letter to the NBA players falsely stating that Fisher's 'ONLY goal is to present you [the players] with the most fair deal possible." (Compl. ¶ 68.)
- "Wior orchestrated [a] press campaign designed to undermine Hunter and muddy his reputation." (Compl. ¶ 84.)

Each of these allegations, expressly incorporated into Hunter's fifth, sixth, seventh and eighth counts against Wior, refers to statements "made in a . . . public forum in connection with an issue of public interest," the third anti-SLAPP category—namely, "public statements" and a "press campaign" regarding the NBPA's investigation into Hunter's conduct as Executive Director and his termination. *See* Cal. Civ. Pro. § 425.16(e)(3); *Marantha Corrs., LLC*, 158 Cal. App. 4th at 1086; *McGarry*, 154 Cal. App. 4th at 110. Further, Wior's alleged conduct—drafting Fisher's public statements and engaging in a press campaign—falls clearly within her "constitutional right of free speech in connection with a public issue or issue of public interest," anti-SLAPP category number four. *See id.* § 425.16(e)(4); *Rivera*, 187 Cal. App. 4th at 716.

Similarly, Hunter's allegations of tortious interference and two of his fraud-based counts against Fisher (Counts 9 and 11) arise from protected conduct. Specifically, Hunter's tortious interference claims against Fisher focus on his media statements denying involvement in any secret negotiations during the 2011 lockout, *see* Compl. ¶ 68 (quoting a letter from Fisher published on ESPN.com), as well as Fisher's statements to Paul Weiss investigators and the media—all of which constitute protected conduct for the reasons described in Part I above. (Compl. ¶¶ 80-81, 84, 90.) One of Hunter's misrepresentation counts likewise alleges that "Fisher represented to Hunter both directly ***and through his public statements*** that an important fact was true, to wit, that Fisher was not and had not been secretly negotiating the 2011 CBA terms with the Certain Owners." (*Id.* ¶ 165 (emphasis added).) And Hunter's parallel concealment count (Count 11) is the inverse of this same allegation—*i.e.*, that Fisher "concealed" to Hunter the alleged falsity of his public statement. (*Id.* ¶¶ 181-87.) Each claim, therefore, falls into two categories of protected conduct—statements "made in a . . . public forum in connection with an issue of public interest," and the exercise of Fisher's "constitutional right of free speech in connection with a public issue or issue of public interest." *See*

Cal. Civ. Pro. § 425.16(e)(3) & (4); *Marantha Corrs., LLC*, 158 Cal. App. 4th at 1086; *Fabbrini v. City of Dunsmuir*, 544 F. Supp. 2d 1044, 1050-51 (E.D. Cal. 2008).

B. Hunter Cannot Establish Probable Success On His Interference Claims.

Like his defamation claims, Hunter's tortious interference claims cannot survive this motion (or defendants' demurrers) for five different reasons. *First*, Hunter bases his tortious interference claims on the same non-actionable conduct underlying his flawed defamation claims. *See Gilbert*, 147 Cal. App. 4th at 34 ("The constitutional privilege applies not merely to defamation but to 'all claims whose gravamen is the alleged injurious falsehood of a statement.' Thus, the collapse of Sykes's defamation claim spells the demise of all other causes of action . . . such as . . . interference with economic advantage . . . ."); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1014 (2001) (reversing order denying anti-SLAPP motion on tortious interference count because "[a] person cannot cannot incur liability for interfering with contractual or economic relations by giving truthful information to a third party").

Second, Hunter cannot establish any interference by Fisher or Wior that caused a direct breach or disruption of his alleged employment contract with the NBPA. *See Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1240 (2003). The NBPA terminated Hunter shortly after the release of Paul Weiss's investigative report detailing self-dealing, mismanagement, nepotism and other conduct. (Compl. ¶¶ 93-101.) The termination letter, which Hunter attached to his complaint, terminated him "for cause" and also because his 2010 contract extension was never ratified by the Union. (*Id.* ¶¶ 98-100.) Given these facts, Hunter cannot show by admissible evidence that any press campaign, media statements or other direct conduct by Fisher or Wior (as opposed to Hunter's own conduct and the lack of any contract ratification) caused his employment to be terminated.

In fact, Hunter's claims against Wior are even more attenuated. Hunter alleges only that Wior's assistance to Fisher in drafting his public statements and organizing his public appearances caused Hunter's termination. It is quite the leap to connect Wior's work as Fisher's representative with the termination of the Executive Director of the NBPA. Wior played no role in executing or negotiating Hunter's never-ratified contract. The claims against Wior are makeweight.

Third, all four of Hunter's tortious interference counts fail because Hunter cannot establish the requisite intent. Specifically, Hunter's claims for inducing breach of contract (Count 5) and intentional interference with contractual relations (Count 6) require that Hunter establish that Fisher or Wior "intended" to induce a breach or disruption of his relationship with the Union. *See Winchester Mystery House, LLC v. Global Asylum, Inc.*, 210 Cal. App. 4th 579, 596 (2012). Hunter must show that Fisher and Wior "[knew] that the interference [was] certain or substantially certain to occur." *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 586 (2003). With respect to Hunter's claims for interference with prospective economic relations (Counts 7 and 8), "the intentional act at issue must be 'independently wrongful." *City of Costa Mesa v. D'Alessio Invest., LLC*, 214 Cal. App. 4th 358, 376 (2013); *Contemp. Servs. Corp. v. Staff Pro Inc.*, 152 Cal. App. 4th 1043, 1060 (2007).

Here, Hunter cannot show either knowledge on the part of Fisher and Wior that the NBPA would allegedly breach the never-ratified contract or any "independently wrongful" act. Hunter's complaint contains only conclusory allegations on these issues. In fact, the underlying factual allegations disprove Fisher's and Wior's intent. Hunter repeatedly alleges that Fisher's actions were motivated by his desire to obtain employment after his playing career rather than any intent to harm Hunter. (Compl. ¶¶ 3, 54.) Hunter similarly alleges that "aspirations to assume a position of responsibility in the NBPA" motivated Wior "to craft a new public persona for Fisher." (*Id.* ¶ 4.) Apart from being totally false, (*see* Fisher Decl. ¶¶ 18-21; Wior Decl. ¶¶ 4-5), none of these allegations suggests an intent to interfere with Hunter's employment contract or any "independently wrongful act" or other course of conduct intentionally designed to induce Hunter's termination.

Fourth, all of Hunter's interference claims against Fisher fail because he has not alleged and cannot prove that Fisher interfered with an economic relationship between Hunter and a third party. *See Applied Equip. Corp. v. Litton*, 7 Cal. 4th 503, 514 (1994). "The tort duty not to interfere with the contract falls only on strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance . . . a party to the contract owes no tort duty to refrain from interference with its performance." *Id.*; *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 832 (9th Cir. 2001) ("California law has long recognized that the core of intentional

interference business torts is interference with an economic relationship by a third party stranger to the relationship").

Fisher, as the President of the NBPA, is alleged to be an agent of the Union (Compl. ¶ 10), and an Executive Committee member to whom Hunter was to report (Fisher Decl. ¶ 4). He was acting for and on behalf of the NBPA when terminating Hunter and could not interfere with the Union's own business relationships. *See Mintz v. Blue Cross of Cal.*, 172 Cal. App. 4th 1594, 1600 (2009) (tortious interference claim could not be stated against corporate agent acting for or on behalf of a party to a contract); *Shoemaker v. Myers*, 52 Cal. 3d 1, 24-25 (1990) (holding there was no viable tortious interference claim separate from a breach of contract claim where supervisor acted on behalf of company when terminating employee).

Fifth, the fifth and sixth causes of action fail for the additional reasons that, as outlined in Fisher and Wior's Demurrers, there was no valid contract, no breach of a valid contract, no breach caused by Fisher or Wior's allegedly wrongful and unjustified conduct, and other reasons.

C. Hunter Cannot Establish Probable Success On His Fraud-Based Claims.

Hunter's intentional misrepresentation and concealment claims against Fisher also fail for several reasons. As an initial matter, all of Hunter's fraud-based counts should be dismissed for failure to meet the heightened pleading standards required for fraud claims. *See* Demurrer at 11-12; *Philipson & Simon v. Gulsvig*, 154 Cal. App 4th 347, 362 (2007) (reversing denial of anti-SLAPP motion on fraud and misrepresentation counts); *Adobe Sys., Inc. v. Coffee Cup P'nrs. Inc.*, No. C 11-2243 CW, 2012 WL 3877783, at *14 (N.D. Cal. Sept. 6, 2012). With respect to the claims based on the lockout, Hunter fails to plead any facts showing (1) when and where Fisher made the alleged misstatements regarding the 2011 CBA negotiations or (2) what he specifically said. Nor does the complaint allege facts showing fraudulent intent by Fisher or reasonable reliance by Hunter.

And even if Hunter's fraud-based claims could survive this threshold pleading defect, Hunter cannot provide sufficient evidence to establish any of the five required elements for fraud. *See Gulsvig*, 154 Cal. App 4th at 363 (fraud requires proof of "(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."). As to the first

and second elements, Fisher never negotiated any side-deal, so a statement to that effect cannot be a misrepresentation or evidence of scienter. (Fisher Decl. ¶¶ 18-20.) Nor can Hunter establish that Fisher intended to induce Hunter's reliance to do anything by publicly denying any side-deal, any justifiable reliance by Hunter or any resulting damage. *See* Demurrer at 8.9. Hunter never even alleges when the alleged representation occurred or how it affected his negotiating strategy. And the damages he seeks in this case stem from his termination—not anything resulting from Fisher allegedly misrepresenting his role during the lockout. Further, Hunter's concealment claim requires proof that Fisher had a duty to disclose the purportedly concealed information—an issue that is not even adequately pled. *See* Demurrer at 9-10. As President of the NBPA, Fisher had no fiduciary or other duty to Hunter *personally* to disclose anything. Thus, this count fails for an additional reason.

III. REQUEST FOR ATTORNEYS' FEES

An award of reasonable attorneys' fees and costs to a defendant who prevails on a Section 425.16 motion to strike is "mandatory." Cal. Civ. Pro. § 425.16(c); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001). Hunter's lawsuit is designed to chill Defendants' rights to free speech, and he cannot prevail on any of his fourteen causes of action. Defendants ask the Court to find that they are entitled to reasonable fees and costs as required by statute for any successful anti-SLAPP motion.

CONCLUSION

Plaintiff Hunter's claims against Derek Fisher and Jamie Wior are paradigmatic of the types of claims California courts routinely strike under the anti-SLAPP law. They arise out of the legitimate exercise of free speech to keep the public informed about the state of the NBPA and the now apparent wrongdoing by Hunter. The Court should apply the anti-SLAPP statute, strike the claims against Fisher and Wior, and award them attorneys' fees.

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Respectfully submitted,

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