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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 AND WIOR'S MEMORANDUM IN SUPPORT OF DEMURRERS

Date:	August 27, 2013
Time:	3:45 p.m.
Dept:	24
Reservation No.:	
Judge:	The Hon. Frank Roesch
Complaint Filed:	May 16, 2013

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Plaintiff Hunter seeks retaliation for the NBPA Board of Player Representatives' unanimous decision to terminate him from his role as the NBPA's Executive Director following the publication of a 229-page independent report detailing egregious improprieties related to Hunter's management of the NBPA. Hunter's suit tries to recover the balance of his salary on his terminated, self-negotiated, never-ratified employment contract with the NBPA. But Hunter's suit does not stop there. He also sues NBA player Derek Fisher for breach of the alleged employment contract even though Fisher was not a party to the invalid contract and never employed Hunter. He also sues Fisher and Fisher's business manager, Jamie Wior, on a host of meritless tort claims.

Hunter's non-contract claims are all improper attempts to transform this futile contract dispute into a broader tort case. Each claim is deficient as a matter of law. Hunter first asserts that Fisher and Wior intentionally and negligently interfered with Hunter's contractual relationship with the NBPA. Based on settled California law, Fisher, an alleged agent of the NBPA, could not have interfered with the NBPA's contract. And Hunter fails to adequately plead that Fisher and Wior had the requisite intent for his interference claims or that Fisher and Wior engaged in independently wrongful conduct—each an independent ground to sustain the demurrers. Hunter likewise fails to plead sufficient facts explaining how Wior somehow prevented Hunter from performing under the alleged contract, or made performance more difficult, another fatal defect.

Hunter next asserts fraud claims based on allegations that Fisher misrepresented his authority to bind the NBPA to the alleged contract, which Hunter says is why he never sought ratification as required by the Union's Bylaws. But Hunter cannot establish that he (an experienced, well-educated lawyer) reasonably relied on an NBA player's statements about the contract ratification requirements. He likewise fails to plead with specificity that Fisher misrepresented or concealed his nonexistent negotiation with certain NBA owners, and alleges no duty that would have required Fisher to disclose any information to Hunter in any event.

Finally, Hunter has no valid defamation claims. Not only does Hunter's complaint fail to plead the specific words or substance of the allegedly defamatory statements, but he alleges no *facts* demonstrating that Fisher acted with actual malice. Nor are any of the alleged statements defamatory as a matter of law.

In short, Hunter has not stated any actionable claims against Fisher or Wior, and their motion for demurrers should be sustained without leave to amend.

RELEVANT FACTUAL BACKGROUND[1]

In July 1996, the NBPA hired Hunter to serve as its Executive Director. (Compl. ¶ 21; Compl. Ex. A at 1.) In 1999 and again in 2005, Hunter and the NBPA extended Hunter's employment for an additional term. (Compl. ¶¶ 24, 26.) Hunter acknowledges that these extension contracts were signed by the "then-Union Vice President" and "then-Union President" "*on behalf of* the NBPA." (*Id.* ¶¶ 25, 27 (emphasis added).) The prefatory language to the 2005 contract states that the parties were "G. William Hunter, sometimes referred to hereinafter as 'Employee' and/or Executive Director of the National Basketball Players Association ('NBPA') and Michael Curry *as President of the Executive Committee of the NBPA*, referred to hereinafter as 'Employer,' and/or Executive Committee." (Compl. Ex. C. at 1 (emphasis added).) The signature lines of both the 1999 and 2005 contracts then confirm they were signed by these officers on behalf of the NBPA; in both contracts, the "Employer" is listed as "National Basketball Players' Association," and the officers' titles are listed directly below the signature line. (Compl. Exs. B, C at 6.)

In 2010, Hunter and the NBPA signed another employment extension contract, this time with Derek Fisher, the Union's President, signing on the NBPA's behalf. (Compl. ¶ 28.) The prefatory language to the alleged 2010 contract mirrors the language in the 2005 contract, stating that the parties are "G. William Hunter, sometimes referred to hereinafter as 'Employee' and/or Executive Director of the National Basketball Players Association ('NBPA') and Derek Fisher *as President of the Executive Committee of the NBPA*, referred to hereinafter as 'Employer,' and/or Executive Committee." (*Id.*; Ex. D to Compl. (emphasis added).) Like the 1999 and 2005 extension contracts, the alleged 2010 contract also lists the "Employer" as the "National Basketball Players Association" and includes Fisher's title, "President," under his signature line. (Compl. Ex. D at 5.) The "Terms and Duties" section of the alleged 2010 contract also states that "the Executive Committee hereby retains and extends the contract of employment of G. William Hunter as the Executive Director of

[1] Defendants assume the facts alleged in the complaint for purposes of the demurrers only.

the NBPA . . ." (*Id.* at 1.) Nothing in the alleged 2010 contract suggests Fisher intended to bind himself personally to the agreement.

The alleged 2010 contract expressly incorporates the NBPA's By-Laws (*id.*), which in turn requires the Executive Director's employment contract be "approved by two-thirds (2/3) of the combined total of all Board of Player Representatives and Executive Committee members." (Compl. Ex. A at 9; Compl. ¶ 22.)[2] Hunter's 2010 contract, however, was never ratified. (Compl. ¶ 97.)

LEGAL STANDARD

A demurrer "test[s] the sufficiency of a complaint by raising questions of law to determine whether the complaint states facts sufficient to constitute a cause of action." *Awards Metals, Inc. v. Super. Ct.*, 228 Cal. App. 3d 1128, 1131 (1991). The "material and issuable facts properly pleaded in the complaint" are admitted, but "contentions, deductions, or conclusions" are not. A demurrer should be sustained when "[t]he pleading does not state facts sufficient to constitute a cause of action," CAL. CIV. PROC. CODE §430.10(e); *Washington v. Cnty. of Contra Costa*, 38 Cal. App. 4th 890, 894 (1995), and without leave to amend, where there can be no liability on the claim as a matter of law. *See Award Metals*, 28 Cal. App. 3d at 1131-32.

ARGUMENT

I. Hunter's Contract Claims (Counts 1-4) Fail As A Matter Of Law.

Counts 1-4 of the complaint allege that Fisher should be held responsible for breaching Hunter's alleged 2010 employment contract and for breaching the covenant of good faith and fair dealing. Under black-letter law, however, only a party to a contract may be liable for its breach. *Filippo Indus., Inc. v. Sun Ins. Co. of New York*, 74 Cal. App. 4th 1429, 1443 (1999) (a defendant "cannot be held liable for breach of a duty which flows from a contract to which he is not party"). It is also well settled that "[t]he prerequisite for any action for breach of the implied covenant of good

[2] Because the NBPA Bylaws are referenced in the complaint and its exhibits, they are subject to judicial notice and may be considered on a demurrer. *See Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 800 n.1 (1985) (trial court properly took judicial notice of documents referenced in complaint in sustaining demurrer without leave to amend); *Swiss Park, Inc. v. City of Duarte*, 136 Cal. App. 3d 755, 758 (1982) (trial court properly took judicial notice of full document only partially quoted in complaint in sustaining demurrer without leave to amend); *Marina Tenants Ass'n v. Deauville Marine Dev. Co.*, 181 Cal. App. 3d 122, 130 (1986).

faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." *Smith v. City and Cnty. of San Francisco*, 225 Cal. App. 3d 38, 49 (1990). Here, Fisher cannot be held responsible for any alleged breach because he was not a party to Hunter's invalid contract, along with the reasons cited in the Demurrer filed by the NBPA.

A. Fisher Was Not A Party To The Alleged Contract.

Under California law, "it is settled that a personal judgment for damages for breach of contract may not be obtained against a known agent of a disclosed principal." *Sackett v. Wyatt*, 32 Cal. App. 3d 592, 597 (1973). That is, "[w]here the signature as agent and not as principal appears on the face of the contract, the principal is liable and not the agent." *Filippo Indus., Inc.*, 74 Cal. App. 4th at 1442; *see also Money Matters Mgmt. v. Niche Mktg., Inc.*, No. 07-0591, 2007 WL 3052996, at *3 (S.D. Cal. Oct. 19, 2007) ("[T]here is no basis in California law for proceeding against an agent signing *on behalf of* a corporation.").

All four of Hunter's contract claims against Fisher suffer the same defect: Fisher signed the alleged employment contract at the direction and on behalf of the NBPA, not personally. The prefatory language in the alleged contract states it was entered into between Hunter and "Derek Fisher ***as President of the Executive Committee of the NBPA***" (Compl. ¶ 28; Compl. Ex. D at 1 (emphasis added)), not by Fisher as an individual. This was the same language used in the 2005 contract between Hunter and the NBPA, which Hunter concedes "was signed by the then-Union President ***on behalf of*** the NBPA." (Compl. ¶ 27; *see* Compl. Ex. C at 1.) And there is no language anywhere in the alleged contract suggesting Fisher intended to bind himself personally to any NBPA employment obligations to Hunter. *See, e.g., Falkowski v. Imation Corp.*, 132 Cal. App. 4th 499, 518 (2005) (breach of contract claim against CEO failed where the CEO signed the contract but "[t]here is no indication that [he] ever gave any of the plaintiffs reason to believe that he intended to be personally liable").

Hunter cannot claim Fisher is a contracting party because he signed his name on the last page. The 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. (*See* Compl. ¶ 174.) Fisher

signed his name above his title, "President," and under a signature line that listed the "Employer" as the "National Basketball Players Association." (Compl. Ex. D at 5.) This same format was used in the 1999 and 2005 contracts, which, again, Hunter concedes were entered "on behalf of" the Union. (Compl. ¶¶ 25, 27; Compl. Ex. B, C.) Under similar circumstances, courts have held that an officer is not personally liable for an alleged breach of contract because the officer was not a party to the contract. *See, e.g., Falkowski*, 132 Cal. App. 4th at 518 ("[The CEO] signed his name above his private corporate title in executing the relevant documents, thereby giving adequate indication of his status as corporate agent."); *California Linoleum & Shades Supplies v. Schultz*, 105 Cal. App. 471, 474 (1930) (affirming sustained demurrer where "[t]he defendant signed it in his capacity as president of the corporation and it did not bind him personally"). Because Fisher was not a contracting party, Counts 1-4 against Fisher should be dismissed.

B. The Contract Claims Against Fisher Fail For Several Independent Reasons.

Hunter's breach of contract claims also fail because (1) there was no valid contract between Hunter and the NBPA, as it was never approved pursuant to the NBPA Bylaws, (2) Hunter did not treat his termination as an anticipatory breach, and (3) Counts 2 and 4 are superfluous of Count 1. Fisher incorporates these arguments in the NBPA's Demurrer as additional, independent grounds to sustain his demurrers on Counts 1-4. (*See* NBPA Demurrer at Sections IV.A, IV.B, IV.D.)

II. Hunter's Interference Claims (Counts 5-8) Fail As A Matter Of Law.

Hunter alleges four interference claims against Fisher and Wior, all of which assert that Fisher and his business manager Wior interfered with the NBPA's contract between Hunter and the NBPA. None of these claims can survive a demurrer.

A. The Complaint Does Not Allege Fisher Interfered With A Third Party.

To plead a cause of action for inducing breach of contract or interfering with contractual or prospective economic relations, the plaintiff must show the defendant interrupted a relationship with a *third party*. *See Kasparian v. County of Los Angeles*, 38 Cal. App. 4th 242, 262 (1995) (intentional interference claims "can only be asserted against a stranger to the relationship"). Thus, "[i]t is also well established that corporate agents and employees acting for and on behalf of a corporation

cannot be held liable for inducing a breach of the corporation's contract." *Shoemaker v. Myers*, 801 P.2d 1054, 1068 (Cal. 1990).

Here, Fisher was the President of the NBPA. As the NBPA's alleged agent, Fisher cannot be held liable for inducing the breach of or interfering with the NBPA's alleged contract. *See PM Grp., Inc. v. Stewart*, 154 Cal. App. 4th 55, 64-65 (2007) (reversing judgment in favor of plaintiff because neither contracting party "nor his agents" could be liable for interference).

B. The Complaint Does Not Sufficiently Allege Wior Caused Any Direct Breach.

Hunter's interference claims against Wior likewise cannot survive dismissal because Hunter does not allege that any interference by Wior caused a direct breach or disruption of his relationship with the NBPA resulting in damages to Hunter—critical elements of his interference claim. *See Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1240 (2003). Nowhere does Hunter allege that Wior's conduct somehow prevented him from performing under his alleged contract or made his performance more difficult. Instead, he alleges—in conclusory fashion without facts—that Wior assisted Fisher in drafting his public statements and organizing public appearances which resulted in Hunter's termination. "Allowing such conclusory pleading would be contrary to the cautious policy of the courts about extending tort remedies to ordinary commercial contracts." *Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612, 618 (1993). Thus, without alleging any facts to substantiate his bare allegation, Hunter's interference claims against Wior cannot stand. *See, e.g., id.* (affirming sustained demurrer where the plaintiff "fail[ed] to state any factual basis for the assertion that [the defendant] interfered with [the plaintiff's] business relations").

C. Hunter's Interference Claims Fail For A Number Of Independent Reasons.

Counts 5-8 fail on a number of additional, independent grounds. *First*, Hunter's intentional misrepresentation/inducement claims (Counts 5-7) fail to allege that Fisher and Wior engaged in any intentional conduct. Under California law, a necessary element of each of these claims is an *intentional* act—*i.e.*, that the defendant "knows that the interference is certain or substantially certain to occur as a result of his action." *See 1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 586

(2003). A plaintiff cannot rely on conclusory pleadings to support his intentional interference claims. *Khoury*, 14 Cal. App. 4th at 617.

Here, the factual allegations underlying Hunter's pleading disprove, rather than support, the claims about Fisher's and Wior's intent. Hunter repeatedly alleges Fisher was motivated by a desire to obtain employment after his playing career rather than any intent to harm Hunter, and he ties Fisher's knowledge to these allegations. (Compl. ¶ 3 ("Fisher knew that the key to finding a well-paying position with the NBA or a team's front office was maintaining good relationships with the NBA and team owners"), *see also id.* ¶ 54.) Hunter similarly alleges that "aspirations to assume a position of responsibility within the NBPA" motivated Wior "to craft a new public persona for Fisher." (*Id.* ¶ 4.) None of this alleges the requisite knowledge or intent by Fisher or Wior to interfere with Hunter's relationship. As such, Hunter cannot meet the pleading standards for Counts 5-7.

Second, Hunter's negligent interference claim (Count 8) fails because Hunter does not allege that Fisher or Wior owed him a duty. "The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 348 (1997). Here, Fisher's only duties were to the NBPA, not to Hunter. And Fisher's business manager Wior certainly owed no duty to Hunter. Without a legal duty, Hunter's negligent interference claim fails as a matter of law. *See, e.g., Stolz v. Wong Commc'ns Ltd. Partnership*, 25 Cal. App 4th 1811, 1825 (1994).

Third, Counts 7 and 8 fail because Hunter does not allege that either Fisher or Wior engaged in an independently wrongful act in addition to allegedly inducing any contract breach. To prevail on claims for interference with prospective economic relations,[3] the plaintiff must prove that the defendant's alleged interference was *wrongful*, independent of its interfering character. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008). "[A]n act is independently wrongful if it is

[3] "The five elements for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008).

unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* This pleading requirement applies to both intentional and negligent interference claims. *Della Penna v. Toyota Motor Sales, USA, Inc.*, 902 P.2d 740, 743 (Cal. 1995). Hunter's complaint is entirely devoid of any facts demonstrating that Fisher or Wior engaged in independently unlawful conduct. As such, the Court should sustain the demurrers for this reason as well.

Fourth, Hunter's claims for intentional and negligent interference with prospective economic relations are entirely duplicative of his flawed inducement and interference claims. Counts 7 and 8 identify only a single "prospective economic relation"—the alleged contractual relationship between Hunter and the NBPA. This is based on the same relationship and alleged interference underlying Counts 5 and 6, and thus cannot state independent causes of action. *See Shoemaker*, 801 P.2d at 1068 (affirming sustained demurrer where plaintiff's interference with prospective economic advantage claim was "in reality identical in substance to plaintiff's claim for inducement of breach of contract").

Finally, Counts 5-8 fail because there was no valid contract between Hunter and the NBPA. The existence of a contract is an essential element of a viable claim for interference with a contractual agreement. *Beck v. American Health Grp. Int'l, Inc.*, 211 Cal. App. 3d 1555, 1567 (1989). For the reasons explained in the NBPA's demurrer, there was no valid employment contract between Hunter and the NBPA, and Hunter's interference claims fail for this additional reason as well.

III. Hunter's Fraud-Based Claims (Counts 9-12) Fail As A Matter Of Law.

Hunter bases his fraud claims on two theories: (1) Fisher misrepresented his authority to bind the NBPA as a party to the alleged 2010 contract, which Hunter inferred meant he could forgo the NBPA's contract ratification process; and (2) Fisher misrepresented/concealed that he had been "secretly" negotiating with certain NBA owners. Neither theory can state a claim.

A. Hunter Cannot Show Reasonable Reliance.

Hunter cannot establish reasonable reliance on Fisher's representations about the contract as a matter of law. *See Alliance Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995) (intentional or

negligent misrepresentation and concealment claims require reasonable reliance). "[W]hether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts." *Id.* In "determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered." *Guido v. Koopman*, 1 Cal. App. 4th 837, 843-44 (1991).

Here, Hunter touts his legal education and experience. (Compl. ¶ 18.) And as the Executive Director of the NBPA for 17 years, he knew all about the Union's Constitution and Bylaws. In fact, Hunter relies on what the Bylaws "authorized" to support his contract claims. (*E.g., id.* ¶¶ 70-71.) Hunter cannot plausibly claim reasonable reliance on a representation by an NBA player about whether Hunter needed the contract ratified under the Bylaws, especially when Hunter himself embraces those very Bylaws elsewhere in his complaint and alleges nothing the player said about the Bylaws.

The First District Court of Appeal's decision in *Guido v. Koopman* is instructive. There, the plaintiff, an attorney, claimed damages and reasonable reliance on her horseback riding instructor's statements that a release of liability was meaningless. 1 Cal. App. 4th at 843. The court rejected this argument as a matter of law, holding that the plaintiff's reliance was not reasonable because "a practicing attorney can[not] rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading." *Id.* at 843-44. This case is no different. Hunter cannot allege reasonable reliance on non-lawyer Fisher's alleged assertions that contradicted the requirements of the Union's Bylaws. Accordingly, his misrepresentations based on the employment contract (Counts 10 and 12) fail as a matter of law. *See also Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1331 (1986) (affirming sustained demurrer where "it would not be 'reasonable' for [plaintiff] to accept [defendant's] representations as an *adversary* without an independent inquiry").

B. Hunter Has Not And Cannot Plead Fisher Owed Him A Duty.

In addition, Hunter has not sufficiently pled Counts 9-12. Concealment requires a duty to disclose information to the plaintiff. *Goodman v. Kennedy*, 18 Cal. 3d 335, 346 (1976). Hunter

nowhere alleges that Fisher owed him any legal duty. As President of the NBPA, Fisher had no fiduciary or other duty to Hunter *personally* to disclose anything. The absence of a duty (and failure to allege one) is fatal to Count 11. *See id.* (upholding dismissal where plaintiffs did not allege facts to show duty: "Being grounded solely on omissions, the validity of the present fraud counts depends on allegations that would establish some duty of disclosure on the part of defendant."); *Chase Chem. Co. v. Hartford Accident & Indem. Co.*, 159 Cal. App. 3d 229, 242 (1984) (plaintiff failed to plead fraudulent concealment claim where complaint "fail[ed] to allege *facts* upon which a duty on the art of [the defendant] may be predicated").

Counts 9, 10 and 12 fail for similar reasons. Although Hunter contends Fisher "misrepresented" his authority to bind the NBPA to the terms of the employment contract, his misrepresentation claims (Counts 10 and 12) are actually for concealment—*i.e.,* that Fisher did not inform Hunter that he needed to follow the ratification process in the NBPA Bylaws. But, again, Hunter fails to allege that Fisher owed him a duty to disclose the requirements of the Bylaws. And Hunter's other misrepresentation claim, Count 9, similarly fails to allege any duty. Without such allegations, Hunter's fraud claims fail as a matter of law.

C. Count 12 Alleges No Affirmative Statement By Fisher.

Count 12 alleges that Fisher negligently misrepresented that he had the authority to sign the alleged employment contract and bind the NBPA and that this somehow "prevented Hunter from insisting that the 2010 Extension should be submitted to the NBPA Board of Player Representatives for approval." (Compl. ¶¶ 190, 194.) Of course, Hunter identifies no statement by Fisher suggesting he could waive the ratification process. Silence on the issue establishes nothing. To plead a negligent misrepresentation claim, the plaintiff must allege a "positive assertion"; "an implied assertion or representation is not enough." *Wilson v. Century 21 Great W. Realty*, 15 Cal. App. 4th 298, 306 (1993). Without alleging any affirmative statement by Fisher that he had authority to waive the required ratification, Hunter has no negligent misrepresentation claim as a matter of law. *See id.*

D. Hunter Has Not Pled His Fraud Claims With Particularity.

Hunter's fraud-based counts also suffer from an additional defect: they do not meet the heightened pleading standards required for fraud claims. Fraud claims must allege specific facts showing the who, what, and when of the fraud and the actions taken in reliance. *People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 947 (2013); *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 878 (2008) ("concealment is a species of fraud [and] must be pleaded with specificity"). "Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically)." *Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 216 (1983) (superseded by statute on other grounds); *see also id.* ("The idea seems to be that because allegations of fraud involve a serious attack on character, fairness to the defendant demands that he receive the fullest possible details of the charge to prepare a defense."). None of Hunter's fraud claims meets this requirement.

First, the intentional misrepresentation and concealment counts (Counts 9-11) fail to allege that Fisher possessed the necessary fraudulent intent. All four counts simply assert that "Fisher intended that Hunter rely on the representation" or that "Fisher intended to deceive Hunter by concealing the fact." (Compl. ¶¶ 168, 177, 184, 193.) They do not, however, include any specific *facts* to support that alleged intent, a fundamental requirement for Counts 9-12. *See, e.g., Wilhelm*, 186 Cal. App. 3d at 1331.

Second, Count 9 (the intentional misrepresentation of the supposed secret negotiation with certain NBA owners) is entirely devoid of facts about Fisher's supposed representation. Hunter asserts only that "Fisher represented to Hunter both directly and through his public statements that . . . Fisher was not and had not been secretly negotiating the 2011 CBA terms." (Compl. ¶ 165.) It does not include *any* facts about (1) when Fisher made these alleged misstatements, (2) where he made them, or (3) what specifically he said. This too is fatal. *See Wilhelm*, 186 Cal. App. 3d at 1331; *see also Pembrook v. Houston*, 41 Cal. App. 54, 57-58 (1919).

Third, all four fraud-based claims (Counts 9-12) fail to allege facts showing reasonable reliance. Under California law, "the mere assertion of 'reliance' is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual

reliance." *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004). The plaintiff must also "plead that he believed the representations to be true." *Younan v. Equifax, Inc.*, 111 Cal. App. 3d 498, 513 (1980). None of Hunter's fraud-based counts satisfy this requirement.

Counts 8 and 10, which assert that Fisher misrepresented his authority to bind the NBPA, simply allege, in a conclusory way, that Hunter "reasonably relied" on the alleged representation when he signed his employment contract and continued working as Executive Director. (Compl. ¶¶ 178, 194.) The complaint says nothing about whether, why, and how Hunter actually believed the alleged representation. *Cadlo*, 125 Cal. App. 4th at 519 (affirming sustained demurrer where plaintiff failed to allege justifiable reliance). 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.

Similarly, Counts 9 and 11, which allege Fisher misrepresented and concealed his supposed secret negotiation with "Certain Owners," simply assert that Hunter "reasonably relied" on Fisher's alleged misrepresentation/concealment "in proceeding with and determining his position in the negotiation of the 2011 CBA with the NBA and team owners." (Compl. ¶ 185.) This is far from sufficiently specific, especially where Hunter never alleges temporally when the alleged representation from Fisher occurred or how it affected Hunter's negotiating strategy.

E. Hunter Cannot Transform His Contract Case Into Tort Claims.

Finally, Counts 10 and 12 also fail because they impermissibly seek to transform Hunter's breach of contract claims against the NBPA into a tort cause of action against Fisher. "A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations," unless he can prove that the defendant's conduct "violate[s] a social policy." *BFGC Architects Planners, Inc. v. Forcum/Mackey Constr., Inc.*, 119 Cal. App. 4th 848, 853 (2004). "Providing tort remedies in connection with a breach of contract is particularly inappropriate when the sole injury to the plaintiff is economic." *Erlich v. Menezes*, 21 Cal. 4th 543, 554-55 (1999). Here, Hunter seeks only economic damages (the same damages that he alleges in his breach of contract counts) and has pled no facts to support that Fisher violated any "social policy." Thus, his

fraud claims based on the 2010 employment contract (Counts 10 and 12) fail as a matter of law for this additional reason.

IV. Hunter's Defamation Claims (Counts 13-14) Fail As A Matter Of Law.

In his last two counts, Hunter alleges that Fisher made four defamatory statements against him, as outlined in more detail in Fisher and Wior's Anti-SLAPP Motion. Two global problems undermine all four alleged statements. *First*, Hunter's complaint fails to plead the specific words or substance of the allegedly defamatory statements. *See Aber v. Comstock*, 212 Cal. App. 4th 931, 948 (2012). "It is sometimes said to be a requirement, and it certainly is the common practice, to plead the exact words or the picture or other defamatory matter. The chief reason appears to be that the court must determine, as a question of law, whether the defamatory matter is on its face or capable of the defamatory meaning attributed to it by the innuendo. Hence, the complaint should set the matter out verbatim, either in the body or as an attached exhibit." 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 739, p. 159; *see also Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1421 (2001) (landlord's conclusory allegations that unspecified "words and actions" and unspecified "false allegations" of tenants' attorney had "lowered" his reputation insufficient to plead defamation). Hunter only very generally describes the purported defamatory statements (Compl. ¶¶ 198, 209), and never alleges the specific words he claims Fisher said. That is a fatal defect.

Second, because Hunter is a public figure he must also prove, by clear and convincing evidence, that Fisher published the allegedly defamatory statement with actual malice. *See Rudnick v. McMillan,* 25 Cal. App. 4th 1183, 1190 (1994); *Mosesian v. McClatchy Newspapers,* 233 Cal. App. 3d 1685, 1689 (1991). "[T]he touchstone for public official status is the extent to which the plaintiff's position is likely to attract or warrant scrutiny by members of the public. Such scrutiny may follow either because of the prominence of the position in the official hierarchy, or because the duties of the position tend naturally to have a relatively large or dramatic impact on members of the public." *Young v. CBS Broad., Inc.*, 212 Cal. App. 4th 551, 560 (2012). Here, Hunter is a public official or at the very least a limited purpose public official for purposes of this controversy. *See Roe v. Doe*, No. C 09-0682 PJH, 2009 WL 1883752, *11 (N.D. Cal. June 30, 2009) (former Dallas Mavericks head coach Don Nelson was limited public figure for purposes of statements made

regarding his employment by the Mavericks). In either case, Hunter must prove Fisher either *knew* the statement was false or *recklessly disregarded* it. *See Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1162 (2004) (reversing trial court where plaintiff could not show actual malice); *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 273 (2001); *Conroy v. Spitzer*, 70 Cal. App. 4th 1446, 1451-54 (1999); *Vogel v. Felice*, 127 Cal. App. 4th 1006 (2005). This requires that Hunter demonstrate Fisher "in fact entertained serious doubts as to the truth of his publication," or acted with a "high degree of awareness of . . . probable falsity." *See Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964). The complaint alleges nothing about Fisher's mental state, and thus provides a second basis for dismissal.

In addition, all of Hunter's defamation claims suffer from a number of pleading deficiencies, each of which is outlined in Fisher and Wior's Anti-SLAPP Motion and provides an independent ground on which to sustain the demurrer. *First*, the four alleged statements are non-actionable opinions based on disclosed facts. For example, alleged Statement #3 is about what Fisher *felt* and why he *felt* that way based on what he learned—a statement of his opinion, not a fact. *See Roe*, 2009 WL 1883752, at *11; Anti-SLAPP Br. at 9. *Second*, the four allegedly defamatory statements are not reasonably capable of a defamatory meaning. Alleged Statement #2, for example, is nothing more than Fisher's claimed awareness of an undisputed fact—where Hunter's daughter worked. *See Ringler Ass'ns. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1180-1181 (2000); Anti-SLAPP Br. at 8. *Finally*, Statement #1 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. PROC. CODE § 340 (one year for defamation); Anti-SLAPP Br. at 7. Fisher incorporates those arguments as additional grounds on which to sustain his demurrers.

CONCLUSION

All of Hunter's claims against Fisher and Wior are barred by clear California law and pleading standards. Accordingly, for the reasons stated above, this Court should sustain Fisher and Wior's demurrers without leave to amend.

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Respectfully submitted,

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