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SUPREME COURT OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital
community,

Plaintiffs/Appellants

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and
GREGORY ASHLEY,

Defendants/Respondents,

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)

Case No. 10-2-02357-4

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

In an effort to avoid Supreme Court review, the respondents claim that the “at-will” aspect of Dr. Tamosaitis’ employment is not before the Court, but this is just not the case. In every pleading submitted by the respondents in state and federal court, BNI argued that, “Plaintiffs fail to state an actionable ‘tortious interference’ claim because under Washington law, at-will employees such as Dr. Tamosaitis have no business expectancy in continued employment, thereby negating the first element of his claim. *Woody v. Stapp*, 146 Wn. App. 16, 24, 189 P.3d 807 (2008).”¹ The trial court considered BNI’s argument, and so must this Court.

Russo, Ashley, BNI, and URS were determined to meet the June 30, 2010 deadline for closing the “M3” mixing issue in order to obtain the \$6 million fee from DOE. Dr. Tamosaitis was supportive of, and worked towards, achieving this goal, but not at any cost. He was primarily concerned with addressing the technical and safety issues that he felt should be resolved in order for the WTP to run efficiently and safely. The technical and safety concerns Dr. Tamosaitis raised have been researched and lauded by top experts in the field, including the Defense Nuclear Facilities Safety Board (“DNFSB”). Still, his efforts came at great

¹ CP 318, 325, 1019 (Russo/Ashley), 363, 368 (BNI) (federal court motions to dismiss and replies), CP 720, 722 (response to motion for remand), 1625, 2482 (state court motion for summary judgment and reply).

personal cost. BNI improperly and illegally instructed URS to remove Dr. Tamosaitis from his position at the WTP. Dr. Tamosaitis was humiliated when he was abruptly fired, escorted off the property with no explanation, and asked to immediately return his cell phone, badge, and Blackberry. He was not allowed to retrieve his personal belongings from his office. URS then placed Dr. Tamosaitis in a basement office in downtown Richland for 16 months and stripped him of all meaningful responsibilities that his education and forty years of chemical and nuclear industry experience had previously earned him. Over two years later, Dr. Tamosaitis remains employed by URS, but his career and reputation have been destroyed by BNI's tortious interference.²

The trial court ignored the standard at summary judgment when it dismissed Dr. Tamosaitis' tortious interference with a business expectancy claim. Dr. Tamosaitis raised numerous issues of material fact as to each element of his claim. BNI misled the court in its lengthy summary judgment reply brief by citing extensively to Georgia law for the

² On October 10, 2012, the United States District Court for the Eastern District of Washington, Hon. Lonny R. Suko presiding, granted URS Energy & Construction's Motion for Summary Judgment, dismissing Dr. Tamosaitis' last remaining claim in federal court under the ERA after finding, in part, that "the undisputed material facts reveal that [BNI] was solely responsible for [Dr. Tamosaitis'] removal from the WTP project and is the entity which 'took adverse action' against him." *Tamosaitis v. URS Energy & Construction*, No. CV-11-5157-LRS, Order Granting Summary Judgment (Appendix 1). A new article related to the dismissal was published on October 12, 2012 on the local NPR affiliate (Appendix 2). Dr. Tamosaitis asks the Court to take judicial notice of these documents. ER 201.

proposition that a contractor cannot be a “stranger” to the employment relationship between a subcontractor and the subcontractor’s employee, which is not the standard in Washington. Before this Court, however, BNI acknowledges that the standard at issue in *Lee v. Caterpillar*, 2011 U.S. Dist. LEXIS 144959 (N.D. Ga. Dec. 2, 2011), is not the law in Washington, relegating its reference to the case to a single footnote. CP 2485-87, Resp. Br. at 27, n.27. Instead, *Awana v. Port of Seattle*, 121 Wn. App. 429, 436, 89 P.3d 291 (2004), controls, which notes that liability for tortious interference with a business relationship can arise when one employer encourages another employer to terminate an at-will employee.

BNI does not seek dismissal on the “improper purpose” or “improper means” prong of a tortious interference claim. It does not maintain that Russo and Ashley acted in good faith, or deny that they acted in bad faith, when directing URS to remove Dr. Tamosaitis from WTP in retaliation for whistleblowing. Instead, BNI seeks to escape liability in any forum available to Dr. Tamosaitis by arguing it cannot be held liable under the Energy Reorganization Act’s (“ERA”) whistleblower provisions, 42 U.S.C. § 5851, because it is not Dr. Tamosaitis’ “employer,” and it cannot be held liable in this forum because it is not a “third party” to Dr. Tamosaitis’ business expectancy to remain at the WTP. This Court should prohibit such a contradictory argument. BNI

had no authority to remove Dr. Tamosaitis for an improper purpose and acted as an intermeddling third party when it directed URS to remove Dr. Tamosaitis.

Having raised a genuine issue of material fact as to each element of his tortious interference with a business relationship claim, Dr. Tamosaitis urges this Court to accept review, and clarify and strengthen the law of tortious interference in Washington by providing guidance to the lower courts and determining that the trial court erred when it granted summary judgment in favor of BNI.

II. ARGUMENT

A. BNI's Attempt to Throw Mud at the Wall in the Hopes that Some of It Will Stick is Both Easily Refuted and Unavailing Given the Standard at Summary Judgment

Now, as at summary judgment, BNI seeks to discredit Dr. Tamosaitis' past work performance, the safety and technical issues he raised, and his expectations to remain at the WTP through the remainder of his career. However, given the standard at summary judgment, these factual differences, which Dr. Tamosaitis is able to rebut with credible evidence, only create triable issues of fact that must be resolved by the jury. Dr. Tamosaitis is entitled to have all facts and inferences viewed in the light most favorable to him and summary judgment should be granted "only where there is but one conclusion that could be reached by a

reasonable person.” *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 216, 242 P.3d 1 (2010).

BNI claims that Dr. Tamosaitis’ leadership of M3 was “plagued by missteps and disorganization” and cites to certain emails related to a 2009 presentation to DOE. Resp. Br. at 7, n.4, citing CP 1779, 1782. However, a review of the emails shows clear leadership from Dr. Tamosaitis – an understanding of the issues, an explicit direction for moving forward, and a willingness to accept responsibility for any mistakes that were made, even those over which he had no control. CP 1779, 1782. As for Russo replacing Dr. Tamosaitis as head of M3 with BNI Manager Mike Robinson, both Dr. Tamosaitis and URS Assistant Project Manager Bill Gay testified that the reason Russo put Robinson in charge was to have a BNI manager run the project. CP 1653, 1802. This way, BNI interfaced directly with DOE and could drive M3 to closure by the deadline. CP 1653. Other than interfacing with DOE, Dr. Tamosaitis’ role did not change. CP 1802. Dr. Tamosaitis had successfully closed other, larger WTP projects and sought a robust approach to resolving the M3 mixing issue. CP 1707, 2078-98. Russo, Ashley, Robinson, and BNI sought to meet the deadline at all costs. CP 1653, 2107, 2120, 2123, 2126, 2127.

BNI claims Dr. Tamosaitis had no reasonable expectation to remain at the WTP after the M3 closure. Resp. Br. 8-17. First, it is

undisputed that Gay never spoke to Dr. Tamosaitis about a position at Sellafield and that Dr. Tamosaitis repeatedly told URS management that he did not want to relocate due to his grandchildren. CP 1670, 1794, 1797-97, 1857, 1861, Resp. Br. at 14, n.12. The draft announcement stating that Dr. Tamosaitis was taking a position in Sellafield stops mid-sentence because no plan was ever in place. CP 1838-39. This draft announcement was never sent out. The announcement that was approved by Ashley, and emailed to Russo, stated that Dr. Tamosaitis and his R&T team would remain at the WTP under the Operations group. CP 2171-72. This email was consistent with Dr. Tamosaitis' expectations on June 30, 2010. CP 2404, 2408, 1851-52. On July 2, 2010, the day Dr. Tamosaitis was abruptly fired from the WTP, he had come to work that day expecting to determine final seating assignments for his R&T group. CP 2408.

In the wake of Dr. Tamosaitis' termination from the WTP, a BNI Public Affairs manager questioned why DOE was involved in Dr. Tamosaitis' removal and whether it was typical for URS to move a senior management person while their job was ongoing. CP 1912, 2204, 2173. Other DOE officials questioned why BNI handled Dr. Tamosaitis' removal so poorly and wanted to know what was communicated by whom and what BNI was thinking. CP 2209. BNI repeatedly expressed its concern, not about running the WTP safely or protecting against

whistleblower retaliation, but about protecting their funding from Congress – “Need to be sure ‘Hill’ get covered and protect the \$50 million.” CP 2170, 2176-77, 2209. Russo repeatedly stated they could close M3 on time if they were willing to take some risk. CP 2118, 2123.

Dr. Tamosaitis knew that there was much work to be done at the WTP, even after the official “closure” of M3. CP 1659, 1669, 1673. The idea was to change the name of the Research and Technology group so that it appeared the work was complete, but to transfer the group to another department serving the WTP. CP 1659, 1669, 1673, 1787, 1789, 1794, 1797, 1851-53. His “Jobs for Walt” emails express this goal and the goal of keeping the group together. *Id.* On June 23, 2010, Dr. Tamosaitis writes that Gay informed him the R&T group would be under Operations. CP 1851-52. Dr. Tamosaitis’ emails related to going to work for Duane Schmoker were in addition to the work performed for the WTP. CP 1659, 1797.³

³ Dr. Tamosaitis testified, CP 1659:

8 Q. Mr. Schmoker's group, had you ever requested in any
9 time in 2010, to go to work for Mr. Schmoker's group?
10 Yes. There was -- the whole thought of the R&T
11 group going back even into '09, was to eliminate the R&T title
12 and, but yet provide support to WTP. One of the places where
13 you could put R&T and support the tankfarm and WTP, would have
14 been through Schmoker's group.
15 The other places where WSMS or SMS, I guess, as
16 it's called now. Another might have been Denver Engineering.
17 We explored a number of those possibilities. The intent was
18 to support WTP but do away with the R&T name.

In addition to continuing to run the newly-named R&T group, Dr. Tamosaitis had a reasonable expectation that, absent retaliation, he would have advanced in his career at the WTP. In March 2010, Gay sent an email to Ashley and others indicating he had found a willing replacement for Rich Edwards when Edwards left the project. CP 2186. Although the email does not identify Dr. Tamosaitis by name, Dr. Tamosaitis testified consistently with this email during his deposition, as well as regarding the other positions at the WTP that he reasonably expected to move into absent BNI's tortious interference. CP 1672-74.

Russo, Ashley, and BNI knew Dr. Tamosaitis planned to remain at the WTP for the rest of his career, and certainly after the closure of M3 on June 30, 2010. CP 2171-72, 2201, App. Br. at 22-25, 35-36.

BNI's claim that the recent Division III case finding that at-will employees do not have a business expectancy in continued employment, *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 258, 274 P.3d 375 (2012), which is in conflict with numerous Division I authorities, is a red herring argument for accepting review, is inaccurate. App. Br. 1-2, 5-6, 29-33, Resp. Br. at 37, *see supra* at 1, n.1.

B. BNI Did Not Have “Sweeping Management Control” Over Senior URS Managers at the WTP and Did Not Have Authority to Remove Dr. Tamosaitis from the WTP

In the responsive brief, BNI argues that it is not a third-party intermeddler because it had the right to control the staffing of senior management positions at the WTP. Resp. Br. at 25-28. BNI maintains it derives this authority from its contracts with DOE and URS. Resp. Br. at 4-5, 25-28. BNI does not have “sweeping management control over all aspects of the Project,” including senior URS managers. Resp. Br. at 4. As the BNI-URS contract states, URS is to supply the personnel necessary to perform its responsibilities under the contract and BNI will reimburse URS. CP 2558. BNI can control only “key,” specifically-designated URS positions. CP 2394, 2567-68. BNI must give its written consent in order to remove or replace an individual in a “key” position. CP 2567.⁴ In 2010, Dr. Tamosaitis was not in a “key” position and BNI had no authority to control his placement at the WTP. CP 2394, 2567-68. Since it could not remove Dr. Tamosaitis on its own, BNI could only threaten to withdraw funding from Dr. Tamosaitis’ position at the WTP so that URS

⁴Dr. Tamosaitis testified, CP 1659: Q. Mr. Schmoker's group, had you ever requested in any time in 2010, to go to work for Mr. Schmoker's group? A. Yes. There was -- the whole thought of the R&T group going back even into '09, was to eliminate the R&T title and, but yet provide support to WTP. One of the places where you could put R&T and support the tankfarm and WTP, would have been through Schmoker's group. The other places where WSMS or SMS, I guess, as it's called now. Another might have been Denver Engineering. We explored a number of those possibilities. The intent was to support WTP but do away with the R&T name.

would have to pay out of its own non-reimbursable funds, not project funds. CP 2173, 2275, 2288-89.

BNI cites § B-1 of the DOE-BNI WTP contract, which states, in relevant part, that “[t]he Contractor shall...provide the personnel, materials, supplies, and services...and otherwise do all things necessary and incident to designing, constructing, and commissioning the Hanford Waste Treatment and Immobilization Plant...,” to argue that it had control over URS senior management at the WTP. Resp. Br. at 5, 25, CP 1724. Yet, the BNI-URS subcontract contains this same boilerplate language. CP 1729, 2558. The BNI-Washington Group International (now URS) contract, § B-1, states: “The SUBCONTRACTOR [URS] shall...provide the personnel, materials, supplies, and services...and otherwise do all things necessary and incident to SUBCONTRACTOR’S participation as a member of the integrated team in designing, engineering, procuring, constructing, starting-up, and commissioning WTP....” CP 1729, 2558.

Section I.72(c) of the contract states: “All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer [BNI] may require, in writing, that the Contractor [URS] remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.” CP 1734,

2561.⁵ BNI uses this provision to argue it had the authority to remove any URS employee it deemed “objectionable.” Resp. Br. at 26. But the contract does not exempt BNI from all applicable laws, such as statutory discrimination laws and common laws like tortious interference. CP 2563. The contract also creates an affirmative duty not to retaliate against whistleblowers, so BNI could not remove an employee from the project for whistleblowing simply by arguing that the whistleblowing was “otherwise objectionable.” CP 1734, 1957-1958, 2561, 2564-65, App. Br. at 10-11. Doing so would be an “improper purpose” under the tortious interference analysis.⁶ The “otherwise objectionable” language of § I.72(c) does not give BNI free reign to remove URS employees from the WTP for any reason.⁷

Russo also interpreted the BNI-URS contract to limit his power; he understood that BNI could not remove Dr. Tamosaitis from his position at the WTP when he wrote: “He is URS. I directed URS to get [Dr. Tamosaitis] out of here 2 weeks ago after meeting with Mike Kluse.

⁵ Section I of the BNI-URS contract starts by designating that URS will thereafter be referred to as the “Contractor” and BNI will be referred to as the “Contracting Officer.” CP 1731, 2559.

⁶ “Interference can be ‘wrongful’ by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession.” *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989).

⁷ Additionally, § I.76(b) of the BNI-URS contract states that “[w]ork performance under this contract shall be under the full-time resident direction of...one or more senior officers” of URS. CP 1735, 2566. Thus again, URS, not BNI, was responsible for directing Dr. Tamosaitis.

Today I told Gay that [Dr. Tamosaitis] will no longer be paid by WTP.” CP 2173. URS Human Resources Manager Cami Krumm testified that at a July 8, 2010 meeting with Russo, Russo stated: “We will not pay for [Dr. Tamosaitis] on this project. If he works, it will be an unallowable cost.” CP 2275, 2288. Russo’s statement shows that, although BNI held the purse strings, it had no authority to remove Dr. Tamosaitis from the WTP. Dr. Tamosaitis could have remained at the WTP if URS were willing to pay out of pocket for his work. As Krumm noted, she and Gay discussed this option but decided that “the conditional return was obviously not going to work.” CP 2275, 2289.

BNI reads too much into Dr. Tamosaitis’ testimony during his deposition that BNI is the “design agent,” has “design authority for the project,” and that BNI “controls” the management level of the WTP. Resp. Br. at 26, CP 1652. First, Dr. Tamosaitis was not stating, and not qualified to state, a legal conclusion as to whether BNI is a third-party intermeddler under a tortious interference analysis. Second, read in the greater context of his statements, it is clear that Dr. Tamosaitis is discussing his understanding of BNI’s role as the prime contractor at the WTP and his personal understanding of the contract. Dr. Tamosaitis states that “[t]here are a number of jobs that URS people cannot have in the project.” CP 1652. He testified that when he went to the WTP in 2003, he

was in a “key” position and explains, “I originally was in a, I believe it’s referred to as a key position which required DOE and Bechtel to concur with that position.” CP 1652, 2390. When asked whether he agreed that BNI “as the prime contractor, had the authority to direct URS to remove people from the project payroll assuming it’s for a legitimate business purpose,” Dr. Tamosaitis responded: “I believe that Bechtel believes they have the authority to do that, yes.” *See* CP 1997, 2390.⁸

At summary judgment, as the non-moving party, Dr. Tamosaitis was entitled to have all reasonable inferences drawn in his favor. The trial court failed to apply this standard when it summarily dismissed Dr. Tamosaitis’ tortious interference claim. The contract provisions enumerated above, which were before the court at summary judgment, and more explicitly before the court in plaintiff’s motion for reconsideration, at minimum, create a genuine issue of material fact as to whether BNI had authority to direct URS to remove Dr. Tamosaitis from his position at the WTP. CP 1726, 2558.

C. BNI is a “Third Party Intermeddler” to Dr. Tamosaitis’ Employment with URS

In the administrative forum under the ERA, BNI denied that it was Dr. Tamosaitis’ “employer” for purposes of liability under the

⁸ The specific page referenced in Dr. Tamosaitis’ deposition, page 18, cited as S-332 at summary judgment, appears to have been inadvertently omitted from the record. *See* CP 1997, 2390. It is attached as Appendix 3.

whistleblower protection provisions of that statute. CP 2355 n.39, App. Br. at 6. BNI maintains that position here. Resp. Br. at 27-28. BNI admits it did not have the authority to evaluate Dr. Tamosaitis' performance or to discipline Dr. Tamosaitis for performance problems. CP 2355 n.39.

For the reasons stated above, BNI did not have contract authority to remove Dr. Tamosaitis from the WTP for an improper purpose. Additionally, even though BNI backs away from express reliance on *Lee v. Caterpillar*, 2011 U.S. Dist. LEXIS 144959 (N.D. Ga. Dec. 2, 2011) in the Brief of Respondents, at summary judgment, the trial court appears to have adopted its reasoning. BNI also continues to assert the same logic applies in arguing it is not a "stranger" to the business relationship.

In citing *Lee v. Caterpillar*, 2011 U.S. Dist. LEXIS 144959 (N.D. Ga. Dec. 2, 2011) at summary judgment, BNI argued that a contractor cannot be a "stranger" to the employment relationship between a subcontractor and the subcontractor's employee. Georgia law had recently developed to limit the number of entities that could be held liable for tortious interference by narrowly defining who is a "stranger" to the contract. In *Atlanta Market Ctr. Mgmt., Co. v. McLane*, 269 Ga. 604, 610, 503 S.E.2d 278 (Ga. 1998), the Georgia Supreme Court explicitly stated:

We endorse the Court of Appeals' line of cases which, in effect, reduce the number of entities against which a claim of tortious interference with contract may be maintained. We

reiterate that, in order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract... In other words, all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships.

Lee relied heavily on *Atlanta Market. Lee*, 2011 U.S. Dist. LEXIS 144959,

*17-21. This narrow “stranger doctrine” is not the law in Washington.

In Washington, although the law is not well-developed in reported cases, retaliation by a principal against a whistleblowing subcontractor through pressure on the prime contractor to terminate the subcontract constitutes a *prima facie* cause of action for tortious interference. Thus, pressure on a subcontractor by the prime contractor to remove a whistleblowing employee must also support a claim of tortious interference. In *Awana v. Port of Seattle*, 121 Wn. App. 429, 431, 89 P.3d 291 (2004), a group of employees working for Alpha Insulation, Inc. performing asbestos abatement work at Sea-Tac International Airport, in connection with a contract between the Port of Seattle and Alpha, were terminated by Alpha a few weeks after they refused to perform the work owing to safety concerns, and after one of the employees reported those concerns to Labor & Industries (L&I). *Id.* at 431-2. The Port was eventually fined by L&I after an investigation. *Id.* at 432, n.1.

The *Awana* plaintiffs asserted claims for wrongful discharge in violation of public policy against the Port, some Port managers, and Alpha. *Id.* The trial court dismissed the Port and its managers from the case. *Id.* at 432. The Court of Appeals affirmed the dismissal of the Port and its managers. On appeal, the employees argued that the Port should be viewed as an employer because it exerted control over the job site and had a responsibility for safety. *Id.* at 434. Moreover, the employees argued that the Port should be held liable for wrongful discharge because it pressured Alpha into retaliating against its employees. *Id.* at 436.

The Court of Appeals refused to extend the wrongful discharge tort to the Port of Seattle for a variety of reasons. Of significance here, the court noted, “[c]ontrol over the jobsite does not, however, confer control over the employment of a subcontractor’s workers.” *Id.* at 434.

Of most import here is the conclusion reached by the Court of Appeals that “[b]ased upon their theory that the Port encouraged Alpha to terminate their employment, Appellants [the employees] presumably have an action against the Port for tortious interference with contractual relations.” *Id.* at 436. Thus, the only remedy available against the Port was for tortious interference.

In finding that liability for tortious interference with a business relationship can arise from encouraging an employer to terminate an at-

will employee, the *Awana* court stands squarely in contrast to *Lee* and *Atlanta Market*. BNI made their argument related to *Lee* for the first time in their reply brief; therefore, Dr. Tamosaitis had no further opportunity to respond.⁹ CP 2485-87. However, Dr. Tamosaitis addressed this argument in his motion for reconsideration, which the trial court considered and denied. CP 2521-35, 2576.

In Washington, a “third party” is an entity who is not a party to the contract. BNI was not a party to Dr. Tamosaitis’ employment relationship with URS and therefore, BNI is a “third party.”¹⁰

In an analogous case, *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011), a government employee for Seattle Municipal Court (“SMC”) allegedly instructed the plaintiff’s employer, Sound Mental Health, a contractor of SMC, to remove plaintiff from his position after plaintiff testified truthfully at a hearing. The court found that the plaintiff

⁹ *Lee* was decided on December 2, 2011, after the defendants had filed their motion for summary judgment.

¹⁰ In addition to *Lee v. Caterpillar*, 2011 U.S. Dist. LEXIS 144959 (N.D. Ga. Dec. 2, 2011), cited in footnote 27, BNI also cites Oregon district court case *Adidas Am., Inc. v. Herbalife, Inc.*, 2011 U.S. Dist. LEXIS 85677 (D. Or. July 29, 2011), to support its claim. *Adidas* looked to California law and found that where the defendant “has a legitimate interest in either the contract or a party to the contract, the defendant is not a stranger to the contract itself or to the business relationship.” *Adidas Am., Inc.*, 2011 U.S. Dist. LEXIS 85677 at *10-11 (citing *44B Am. Jur. 2d Interference § 7*). Even if that were the law in Washington, BNI did not have a *legitimate* interest in Dr. Tamosaitis’ expectancy to remain at the WTP because Dr. Tamosaitis was not “key” personnel and BNI acted for an improper purpose when it retaliated against Dr. Tamosaitis for reporting safety and technical concerns. *Armer v. OpenMarket, Inc.*, 2009 U.S. Dist. LEXIS *12-13 72434 (W.D. Wash. July 27, 2009), also cited by BNI, simply quotes from *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978) for the proposition that “a party to a contract cannot be held liable in tort for interference with that contract.”

could assert First Amendment claims against the government even though the plaintiff worked for a private employer. *Id.* at 1102. The court stated: “Where the government may not prohibit certain speech, it also may not threaten to exert economic pressure on a private employer in order to ‘produce a result which [it] could not command directly.’” *Id.* at 1100 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)). The same principle applies here. BNI improperly interfered when it directed URS to remove, and keep, Dr. Tamosaitis from his duties at the WTP. Like in *Awana* and *Clairmont*, BNI did not have contract authority to remove Dr. Tamosaitis.

BNI’s argument that it is not a third-party intermeddler is essentially an argument that it was justified, privileged, or that it had a “legal right” to remove Dr. Tamosaitis; even for a retaliatory reason. However, neither the DOE-BNI contract, nor the BNI-URS contract, gives BNI an absolute right to control which URS non-key senior managers work at the WTP. “Interference is justified *as a matter of law* only when the interferor engages in the exercise of an absolute right, equal or superior to the right which is invaded. An absolute right exists only where a person has a definite legal right to act, without any qualification.” *Topline Equip., Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 93-94, 639 P.2d 825 (1982) (citing *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617

P.2d 704 (1980); *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 P. 441 (1911); *Singer Credit Corp. v. Mercer Island Masonry, Inc.*, 13 Wn. App. 877, 538 P.2d 544 (1975); and 45 Am. Jur. 2d Interference § 28, at 305 (1969)). “Exercising one’s legal interests in good faith is not improper interference,” but BNI had no legal right and did not act in good faith. *Cornish Coll. of the Arts v. 1000 Va. Ltd. P’ship*, 158 Wn. App. 203, 225, 242 P.3d 1 (2010).

A privilege to interfere can be established if the interferor’s conduct is deemed justifiable, considering such factors as: 1) the nature of the interferor’s conduct; 2) the character of the expectancy with which the conduct interferes; 3) the relationship between the various parties; 4) the interest sought to be advanced by the interferor; and 5) the social desirability of protecting the expectancy or the interferor’s freedom of action. *Cherberg v. Peoples Nat’l Bank of Wash.*, 88 Wn.2d 595, 604-05, 564 P.2d 1137 (1977). Here, the nature of BNI’s conduct was improper. After writing, “Walt is killing us. Get him in your corporate office today,” among numerous other emails, Russo directed that Dr. Tamosaitis be removed from his position at the WTP in retaliation for raising safety and technical concerns. CP 2179. BNI does not even argue that Russo and Ashley acted in good faith. Second, the character of the expectancy is one that should be protected. Dr. Tamosaitis built his entire career in the

nuclear/chemical industry. He has a Ph.D. in systems engineering and forty years of experience. After BNI's improper interference, he has been assigned little to no meaningful work and his reputation and career have been destroyed. Third, it is uncontested that BNI has never been Dr. Tamosaitis' employer, and the contract language BNI relies on does not give BNI authority to remove Dr. Tamosaitis, and certainly not for an improper purpose. The interest sought to be advanced by BNI was an interest in suppressing opposing viewpoints in order to meet a deadline and garner a significant fee. Russo stated "I will send anyone on my team home if they demonstrate an unwillingness or inability to fulfill my direction." CP. 2107. Lastly, the social desirability of protecting Dr. Tamosaitis' expectancy is strong. The whistleblower protection provisions mandated in every DOE contract express the social desirability of protecting whistleblowers. CP 2564-65. Conversely, the social desirability of protecting BNI's freedom to act, when the actions are taken for improper purposes, in bad faith, and in violation of the whistleblower protection provisions, is low.

D. Dr. Tamosaitis' Improper Removal from the WTP to a Position With No Meaningful Work and No Supervisory Authority Constitutes a Breach or a Termination of His Business Expectancy

BNI attempts to downplay the negative repercussions Dr.

Tamosaitis experienced since being improperly removed from the WTP and placed in a position with no meaningful work for the past two years. Resp. Br. at 38-40. The breach that occurred was the end of Dr. Tamosaitis' ability to remain at the WTP throughout the project and the end of any future career prospects in his field. CP 1672.¹¹

BNI argues that Dr. Tamosaitis' lost business expectancy is simply current "job dissatisfaction" and cites to a case where an employee quit his job after being socially ostracized by his coworkers. Resp. Br. at 35. (citing *Eserhut v. Heister*, 62 Wn. App. 10, 14-16, 812 P.2d 902 (1991) (*Eserhut II*)). The federal court also distinguished BNI's reliance on this case, albeit for a different reason, i.e. that BNI had argued the case supported rejecting Dr. Tamosaitis' claim because he is an at-will employee. As noted by Judge Whaley, the *Eserhut II* court simply found that "the defendants did not act with the requisite intent" needed to prove

¹¹ Dr. Tamosaitis testified: "And by terminating me from the project and people knowing that, there's going to be very few if any companies that will take me on, for fear that, 'He might do the same thing to us, look what he did to Bechtel,' when what Bechtel did wasn't appropriate, in my opinion." CP 1672. Dr. Tamosaitis also testified that his expectancy was to remain at the WTP or in a position supporting the WTP project, and this expectancy was breached by BNI's improper interference. CP 1659, 1669. After the announcement of the M3 closure, "[t]he intent was to support WTP but do away with the R&T name." CP 1659.

the claim. CP 132. BNI is incorrect about the holding of *Eserhut II* again, claiming that it stands for the proposition that “[n]on-pecuniary concepts such as ‘job dissatisfaction’ are not compensable.” Resp. Br. at 35.

Eserhut II does not focus on the need for pecuniary loss and finds simply that the direct, intentional, substantial interference in the plaintiff’s work duties was lacking under the facts of that case. *Eserhut II* at 14-16.

BNI cites *White v. State*, 131 Wn.2d 1, 29 P.2d 39 (1997) to claim that Dr. Tamosaitis “is in essence” complaining about “wrongful transfer.” Resp. Br. at 35. The federal court judge, on remand, already ruled:

The Court... finds that Plaintiff’s claim here is distinct from the claims advanced in *White* and *Korslund*. Plaintiff does not claim that his employer is liable for wrongfully transferring him, but rather that third parties are liable for wrongfully interfering with Plaintiff’s contract with his employer. Moreover, the Court finds that Defendants read the case law too broadly. No language in *Korslund* suggests that Washington tort law as a whole is preempted by federal law relating to the nuclear industry. Rather, *Korslund*’s analysis centers around the “jeopardy” and public policy elements of a wrongful discharge claim, and declined to recognize a cause of action for wrongful retaliation on that basis alone. 156 Wash. 2d at 184. Those elements are simply not implicated by Plaintiff’s tortious interference claim.

CP 133 (citing *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005)).¹²

¹² BNI’s suggestion in closing, Resp. Br. 50, that Dr. Tamosaitis already “has an adequate remedy” under the ERA “if he truly believes himself to be a whistleblower” is an attempt to deflect this Court’s attention away from the fact that BNI claimed it was not

E. This Court Should Consider All Evidence in the Record on Review

BNI incorrectly states that the trial court “disregarded” the supplemental summary judgment materials submitted by Dr. Tamosaitis, which were also incorporated into his motion for reconsideration. Resp. Br. at 46. It also incorrectly states that the appellate court may only consider the facts in the record before the trial court when the summary judgment order is granted, citing RAP 9.12. Resp. Br. at 23. The language of RAP 9.12 is intentionally broader than simply “facts in the record;” it states that “the appellate court will consider only evidence and issues called to the attention of the trial court.” This includes evidence on reconsideration, which the trial court expressly noted that it “considered” in the instant case. CP 2576-77. “In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration.” *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997) (citing *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P.2d 87 (1994). “Furthermore, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration.” *Id.* (citing *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 8, 866 n.19, 851 P.2d

liable under the ERA because it was not Dr. Tamosaitis’ “employer” and also suggests that the wrongful discharge analysis of “an adequate alternative means of promoting the public policy” is somehow relevant to Dr. Tamosaitis’ claims, a position which the federal court already rejected.

716 (1993). “Motions for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court.” *Id.* A *de novo* standard of review is applied by the appellate court to all rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

BNI cites to *Wagner Dev. v. Fidelity & Deposit*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999) and *Brown v. Park Place Homes Realty*, 48 Wn. App. 554, 558-60, 739 P.2d 1188 (1987) in arguing that this Court should disregard any evidence submitted in the supplemental briefing at summary judgment or in the motion for reconsideration. Resp. Br. at 23, 46-47. Those cases, however, simply stand for the proposition that it is within the discretion of the trial court whether to accept or reject subsequent affidavits. Here, the trial court did not reject or disregard the materials; the order on reconsideration states that the trial court considered the materials. CP 2576-77. This Court should consider them as well.¹³

As noted in the opening brief, there is no minimal damage amount requirement in a tortious interference claim, and BNI does not cite to any authority suggesting that there is. App. Br. at 42-47, Resp. Br. at 47. Dr.

¹³ BNI misses the point in trying to distinguish *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 789-90, 585 P.2d 1174 (1978). Resp. Br. at 47, n.43; App. Br. at 43, n. 10. In that case, the trial court had rejected certain materials filed in the motion for reconsideration, but the appellate court considered the entire record, including the materials rejected by the trial court. The case is directly relevant, whereas *Wagner* and *Brown* are not because in those cases, the trial court rejected the subsequent materials, and here the court considered them.

Tamosaitis' property loss, which was a proximate cause of BNI's decision to remove him from the WTP, in addition to the pecuniary losses related to the damage to his reputation, and his emotional distress damages constitute recoverable resulting damages. The trier of fact will determine what damages were proximately caused by BNI's tortious interference. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-46, 771 P.2d 711 (1989).

III. CONCLUSION

Dr. Tamosaitis is able to raise a genuine issue of material fact with respect to each element of his tortious interference with a business expectancy claim and this Court should reverse the summary judgment dismissal of his claim and remand for trial.

Respectfully submitted this 15th day of October, 2012.

THE SHERIDAN LAW FIRM, P.S.

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DECLARATION OF SERVICE

Beth Touschner states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am an attorney employed by Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.
2. On October 15, 2012, I caused to be delivered via email addressed to:

Kevin C. Baumgardner
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LLP
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a copy of REPLY BRIEF OF APPELLANTS.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of October, 2012 at Seattle, King County, Washington.



Beth Touschner
Attorney

Appendix 1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WALTER L. TAMOSAITIS, PHD,
an individual, and SANDRA B.
TAMOSAITIS, representing the
marital community,

Plaintiffs,

vs.

URS CORPORATION a Delaware
Corporation; URS ENERGY &
CONSTRUCTION, INC., an Ohio
Corporation, and the DEPARTMENT
OF ENERGY,

Defendants.

No. CV-11-5157-LRS

**ORDER GRANTING
MOTION FOR SUMMARY
JUDGMENT**

BEFORE THE COURT is Defendant URS Energy & Construction's (URS E & C's) Motion For Summary Judgment (ECF No. 108).¹ This motion was heard with oral argument on September 27, 2012.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The first three administrative complaints filed by Plaintiff, Walter L. Tamosaitis, Ph.D., with the Department of Labor (DOL) on July 30, 2010 (First DOL Complaint), December 15, 2010 (First Amended DOL Complaint), and

¹Because of previous orders entered by the court, Walter L. Tamosaitis, Ph.D., is the sole remaining Plaintiff in the captioned matter and URS E & C is the sole remaining Defendant.

1 September 1, 2011 (Second Amended DOL Complaint), named "URS, Inc." as a
2 respondent. There is no such entity as "URS, Inc.."

3 It was not until September 7, 2011, in his "Corrected" Second Amended
4 Complaint, that Dr. Tamosaitis first named URS Corporation as a respondent in the
5 administrative proceedings. On that same date, Dr. Tamosaitis filed a "Notice Of
6 Federal Filing" with DOL. Pursuant to that filing, his administrative complaint
7 was dismissed by DOL on October 14, 2011. In its "Order Granting URS
8 Corporation's Motion For Summary Judgment" (ECF No. 100), this court found
9 that because Dr. Tamosaitis did not have an administrative claim pending
10 specifically against URS Corporation for one year before he "opted out" pursuant
11 to 42 U.S.C. Section 5851(b)(4) of the Energy Reorganization Act (ERA) and filed
12 the captioned suit in federal court on November 9, 2011, he did not exhaust
13 administrative remedies against URS Corporation as required. This court held it
14 was without subject matter jurisdiction to hear ERA claims against URS
15 Corporation. This reasoning mandates the same result as to URS E & C because
16 it was not specifically named a respondent in the DOL administrative proceedings
17 until the filing of the Second Amended DOL Complaint on September 1, 2011.²

18 Although the First DOL Complaint filed on July 30, 2010 named "URS,
19 Inc.," a non-existent entity, as the respondent, URS Corporation submitted a
20 responsive statement to the DOL investigator, dated September 21, 2010 (Ex. P to
21 ECF No. 112). That statement identified URS E & C, "a wholly-owned subsidiary
22 of URS Corporation," as the employer of Dr. Tamosaitis. (*Id.* at p. 106). It can be
23 argued that based on this statement, URS Corporation and DOL knew the specific
24

25 ²Nor were URS Corporation and URS E & C specifically named as
26 respondents within 180 days after the date of the alleged wrongful action, that
27 being the removal of Dr. Tamosaitis from the Waste Treatment Plant (WTP)
28 project on July 2, 2010. 42 U.S.C. Section 5851(b)(1).

1 entities whom Dr. Tamosaitis was complaining about and why. Even if that is so,
2 because Dr. Tamosaitis “opted out” on September 7, 2011, when he filed his
3 “Notice Of Federal Filing” with DOL, he did not wait the full year given to DOL
4 to issue a final decision as required by 42 U.S.C. Section 5851(b)(4). Dr.
5 Tamosaitis “opted out” then, not when the administrative proceedings were
6 formally dismissed by DOL on October 14, 2011.

7 Jurisdictional provisions in federal statutes are to be strictly construed.
8 *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986) U.S.C.
9 Section 5851(b)(4) is such a provision: “If the Secretary [of DOL] has not issued
10 a final decision within 1 year after the filing of a complaint under paragraph (1),
11 and there is no showing that such delay is due to the bad faith of the person seeking
12 relief under this paragraph, such person may bring an action at law or equity for de
13 novo review in the appropriate district court of the United States, which shall have
14 jurisdiction over such an action without regard to the amount in controversy.” The
15 exercise of jurisdiction by a district court is expressly conditioned upon DOL
16 having a full year to issue a final decision and not doing so. The only exception
17 is for the benefit of DOL in the event the claimant has been responsible for delay
18 in issuance of the final decision. That exception does not apply in this case.

19
20
21 **PARTY RESPONSIBLE FOR ADVERSE ACTION**

22 In the alternative, URS E & C contends it is entitled to summary judgment
23 because there is no genuine issue of material fact that it bears no responsibility for
24 the adverse action taken against Dr. Tamosaitis and therefore, is not subject to
25 liability under the ERA.

26 The purpose of summary judgment is to avoid unnecessary trials when there
27 is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129
28 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R. Civ. P.

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT- 3**

1 56, a party is entitled to summary judgment where the documentary evidence
2 produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby,*
3 *Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v. Weidner*, 780 F.2d 727,
4 732 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine
5 dispute over a fact that might affect the outcome of the suit under the governing
6 law. *Anderson*, 477 U.S. at 248.

7 The moving party has the initial burden to prove that no genuine issue of
8 material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475
9 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its
10 burden under Rule 56, "its opponent must do more than simply show that there is
11 some metaphysical doubt as to the material facts." *Id.* The party opposing
12 summary judgment must go beyond the pleadings to designate specific facts
13 establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325,
14 106 S.Ct. 2548 (1986).

15 In ruling on a motion for summary judgment, all inferences drawn from the
16 underlying facts must be viewed in the light most favorable to the nonmovant.
17 *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against
18 a party who fails to make a showing sufficient to establish an essential element of
19 a claim, even if there are genuine factual disputes regarding other elements of the
20 claim. *Celotex*, 477 U.S. at 322-23.

21 For an employee to prevail under the ERA, he must show: (1) he engaged in
22 protected conduct; (2) the employer was aware of this conduct; and (3) the
23 employer took adverse action because of this conduct. *Hasan v. U.S. Dept. Of*
24 *Labor*, 298 F.3d 914, 916 (10th Cir. 2002). In the instant case, the question is not
25 if there is a genuine issue of material fact whether Dr. Tamosaitis engaged in
26 protected activity and whether he was removed because of it. URS E & C
27 acknowledges that its motion assumes Dr. Tamosaitis engaged in protected conduct
28 and that he was retaliated against because of that conduct by being removed from

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT- 4**

1 the WTP project. The question is if there is a genuine issue of material fact
2 whether URS E & C retaliated against Dr. Tamosaitis and whether it took adverse
3 action against him because he engaged in protected conduct.

4 Dr. Tamosaitis has not presented evidence raising a genuine issue of material
5 fact that his employer, URS E & C, “took adverse action because of his conduct.”
6 On the contrary, the undisputed material facts reveal that Bechtel National, Inc.
7 (BNI), the prime contractor, was solely responsible for his removal from the WTP
8 project and is the entity which “took adverse action” against him.

9 BNI was contractually authorized to demand that URS E & C, the
10 subcontractor, remove him from the WTP project. The BNI-URS E & C
11 Subcontract contains the following clause under the heading “Material And
12 Workmanship:”

13 All work under this contract shall be performed in a
14 skillful and workmanlike manner. The Contracting Officer
15 may require, in writing, that the Contractor remove from
the work any employee the Contracting Officer deems
incompetent, careless or otherwise objectionable.

16 (ECF No. 112, Ex. J at BNI00036268). An identical clause is contained in the
17 prime contract between BNI and DOE, but the BNI-URS E & C Subcontract
18 specifies that:

19 Whenever necessary to make the context of these clauses
20 applicable to this Subcontract, the term “CONTRACTOR”
21 shall mean “SUBCONTRACTOR” and the term “Contract”
22 shall mean this Subcontract, and the term “Government”,
“Contracting Officer” shall mean Bechtel National, Inc.
(BNI) . . . or BNI’s representative

(*Id.* at BNI00036160)(Emphasis added).

23 BNI employee, Frank Russo, Project Director for the WTP project and BNI’s
24 senior most representative on the project, instructed URS E & C to remove Dr.
25 Tamosaitis from the project. Russo did so in writing, as evidenced by his July 1,
26 2010 e-mail to URS E & C manager William Gay, directing Gay to get Dr.
27 Tamosaitis “in your corporate office today” and off the WTP site. (Ex. L to ECF
28

1 No. 112). The fact Russo may not have held the specific title of “Contracting
2 Officer” is of no consequence as he clearly was the foremost agent of BNI with
3 regard to the WTP project, was authorized to act on behalf of BNI with regard to
4 the WTP project, and was otherwise “BNI’s representative” with regard to the
5 WTP project. Under the plain terms of the subcontract, Russo was authorized to
6 require the removal of Dr. Tamosaitis from the WTP project and he did so. Further
7 proof of that authority is another clause in the Subcontract stating that “the extent
8 of the work to be done by the Contractor shall be subject to the general supervision,
9 direction, control, and approval of the Contracting Officer.” (ECF No. 157, Ex. J-1
10 at BNI 00036270). “Contractor,” of course, means “Subcontractor” URS E & C,
11 and “Contracting Officer” means “Bechtel National, Inc. (BNI) . . . or BNI’s
12 representative.”

13 Dr. Tamosaitis has not presented any evidence raising an issue of material
14 fact that URS E & C conspired with BNI to remove him from the WTP project
15 because of any protected conduct in which he engaged.³ There is no evidence that
16

17 ³ At oral argument, counsel for Dr. Tamosaitis represented that the Benton
18 County Superior Court found there was a genuine issue of material fact on
19 Plaintiff’s civil conspiracy claim (civil conspiracy between BNI and URS),
20 thereby precluding summary judgment . The court is not aware of this
21 decision having been made part of the record. Counsel for URS E & C asserts
22 the Benton County Superior Court merely denied a Rule 12 motion to dismiss,
23 finding that the allegations contained in Plaintiff’s complaint were sufficient to
24 state a claim for civil conspiracy. A review of the docket sheet from Benton
25 County (10-2-02357-4) appears to bear out that the only summary judgment
26 disposition concerned the tortious interference claim asserted against BNI
27 which was the only claim remaining after Plaintiff voluntarily dropped his civil
28 conspiracy claim and all of the URS defendants.

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT- 6**

1 URS E & C knew of BNI's intentions before Russo issued his directive. In prior
 2 proceedings in Benton County Superior Court, counsel for Dr. Tamosaitis
 3 acknowledged that "Russo is the person who clearly was behind the decision to
 4 remove [Dr. Tamosaitis]" and "ordered [him] off the site on July 1st and also had
 5 his badge taken and his Blackberry taken." (Ex. F to ECF No. 112 at p. 46). Dr.
 6 Tamosaitis echoes this in his declaration: "As a result of being fired by URS (**as**
 7 **dictated by Russo**), I have missed out on being considered for the following jobs
 8" (Tamosaitis Declaration, ECF No. 139 at Paragraph 67). (Emphasis added).
 9 It is undisputed that URS E & C sought to have Dr. Tamosaitis reinstated to the
 10 WTP project, but BNI rejected that proposal. The evidence shows URS E&C was,
 11 in general, pleased with the services Dr. Tamosaitis had rendered on the WTP
 12 project. According to Dr. Tamosaitis, prior to his removal from the WTP project,
 13 URS E & C Manager Gay "often complimented me . . . and was very critical of
 14 BNI engineering" (Tamosaitis Declaration, ECF No. 139 at Paragraph 40).
 15 The evidence also shows that right up until July 1, 2010, the date Russo issued his
 16 directive, URS E & C anticipated that Dr. Tamosaitis would have a continuing role
 17 on the WTP project after the June 30, 2010 deadline established for closing of the
 18 M3 mixing issue. (Tamosaitis Declaration, ECF No. 139 at Paragraph 39 and
 19 Exhibit 9).

20 URS E & C simply carried out a directive from BNI which it was
 21 contractually obligated to carry out, whatever reservations it may have had about
 22 its propriety. URS E & C did not have the option of telling Russo it would not

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1 follow his directive.⁴ In deposition testimony, Dr. Tamosaitis acknowledged BNI
2 had to consent to URS E & C assigning him to a management position on the WTP
3 project. (Ex. O to ECF No. 112, at pp. 15-17).⁵ Further evidence of Russo's
4 authority over Dr. Tamosaitis on the WTP project is Dr. Tamosaitis's
5 acknowledgment that "in January 2010, Russo replaced me as the manager leading
6 the M3 mixing issue resolution effort with retiring BNI manager Mike Robinson,
7 a BS civil engineer, because he wanted [a] BNI manager in that position."
8 (Tamosaitis Declaration, ECF No. 139 at Paragraph 22).

9 In Washington, a civil conspiracy lies when there is an agreement between
10 two or more persons to accomplish some purpose, not itself unlawful, by unlawful
11 means. *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 451, 918 P.2d
12 531 (1996). There is simply no evidence from which a reasonable inference can
13 be drawn that URS E & C agreed with BNI to engage in deliberately concerted
14 action to remove Dr. Tamosaitis from the WTP project in retaliation for him
15

16 ⁴There is some indication in the record that Russo stated that if Dr.
17 Tamosaitis continued to work on the WTP, it would not be an allowable cost.
18 (Krumm Dep. at 73, ECF No. 144, Ex. 12 to Declaration of John P. Sheridan,
19 ECF No. 140). Even assuming this was an option, it simply would not have
20 been reasonable for URS E & C to pay Dr. Tamosaitis on a project on which
21 he clearly was not wanted by BNI and for which URS E & C would not be
22 reimbursed. It makes sense, of course, that URS E & C would want Dr.
23 Tamosaitis rendering services on a project for which URS E & C would be
24 receiving reimbursement for the cost of his services.

25 ⁵In his declaration (ECF No. 139 at Paragraph 6), Dr. Tamosaitis states that
26 in 2010 he was not in a key position and BNI had no authority to control his
27 placement at the WTP. This appears to be contrary to his deposition
28 testimony, and is certainly contrary to the balance of the record.

1 engaging in protected conduct. Furthermore, in light of the clear authority of Frank
2 Russo, URS E & C's acquiescence to BNI's directive that Dr. Tamosaitis be
3 removed from the WTP project does not constitute conspiratorial activity, and
4 does not constitute unlawful activity engaged in for an unlawful purpose.

5 The court notes that a significant amount of discovery occurred as part of the
6 Benton County litigation and the evidence developed there constitutes a substantial
7 part of the record before this court on the summary judgment motion filed by URS
8 E & C. Based on the well-developed record before it, this court concludes a
9 reasonable inference cannot be drawn that URS E & C bears any responsibility for
10 the adverse action taken against Dr. Tamosaitis. The court finds as a matter of law
11 that URS E & C did not retaliate against Dr. Tamosaitis. BNI removed Dr.
12 Tamosaitis from the WTP project; not URS E & C.⁶

13 Dr. Tamosaitis has not been discharged from his employment with URS E
14 & C. Nothing in the record creates a genuine issue of material fact that URS E &
15 C has discriminated him against with respect to his compensation, terms,
16 conditions, or privileges of employment in violation of the ERA. His pay has not
17 been reduced. He continues to receive bonuses. (Declaration of Dave Hollan, ECF
18 No. 152). He has engaged in other meaningful work since his removal from the
19 WTP (i.e., work at the Skunk Works), and has been offered other meaningful work
20 which he has declined because of his unwillingness to relocate. (Ex. G to ECF No.
21 155 at pp. 68-70; Ex. H to ECF No. 155 at p. 59). He has been offered office space
22 ///

23 _____
24 ⁶Plaintiff and his counsel, in this suit and other litigation, have made oral
25 and written representations suggesting BNI was the party who caused Plaintiff
26 to be terminated from the WTP project. URS E & C argues that judicial
27 estoppel should preclude Plaintiff from now arguing URS E & C is also
28 responsible. It is not necessary to address that issue.

1 other than the basement office he currently has, but has declined those offers.
2 (Ex. I to ECF No. 155).

3
4 **CONCLUSION**

5 This court is without subject matter jurisdiction to entertain Dr. Tamosaitis's
6 ERA claim. Even if this court had jurisdiction, it would find as a matter of law that
7 URS E & C was not a party responsible for the adverse action against Dr.
8 Tamosaitis and therefore, is not subject to liability under the ERA.

9 Defendant URS E & C'S Motion For Summary Judgment (ECF No. 108) is
10 **GRANTED**. Judgment is awarded to URS E & C on Dr. Tamosaitis's ERA claim.
11 Granting this motion renders **MOOT** Plaintiffs' Motion For Entry Of Final
12 Judgment (ECF No. 101) and Motion For Certification Of Interlocutory Appeal
13 pursuant to 28 U.S.C. §1292(b) (ECF No. 104). Those motions are **DISMISSED**
14 because a final judgment will now be entered on all of the Plaintiffs' claims
15 asserted against all of the named Defendants in the captioned matter. The District
16 Executive is **DIRECTED** to enter judgment for Defendants against Plaintiffs
17 pursuant to ECF Nos. 97, 98, 99, 100, and this order.

18 **IT IS SO ORDERED**. The District Executive shall forward copies of the
19 Judgment and this Order to counsel of record.

20 **DATED** this 10th of October, 2012.

21
22 *s/Lonny R. Suko*

23 _____
24 LONNY R. SUKO
25 United States District Judge
26
27
28

Appendix 2



ON AIR NOW

Midday Jazz

Playlist

Schedule

Podcasts

Calendar

Humanosphere

SUPPORT THIS STATION

News for Seattle and the Northwest

WEATHER WITH CLIFF MASS

The rain is here, but nothing like Columbus Day 1962

IF IT'S LEGAL

Will legal marijuana make police less effective?

TROUBLES IN SPACE

Space is full of junk. Boeing files plan to fix that

ONGOING COVERAGE:

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[2012 Elections](#)

[I Wonder Why ... ?](#)

[School of Jazz](#)

HANFORD NUCLEAR RESERVATION

Judge dismisses Hanford whistleblower case

Originally published on Fri October 12, 2012 2:35 pm

By Jessica Robinson



http://media.kpiu.com/files/2012/10/10/20121010_0054.jpg

Enlarge image
Walt Tamosaitis, a Hanford whistleblower, stands in front of the waste treatment plant at the Hanford Nuclear Reservation in southeast Washington. Photo by Anna King



Listen

00:54

A federal judge this week dismissed a lawsuit by a high-level whistleblower against a contractor at the Hanford nuclear site. A former manager there had voiced safety concerns about the design of a plant meant to treat millions of gallons of radioactive waste.

Walt Tamosaitis worked -- and continues to work -- for Hanford contractor URS. He claims the managers on the waste treatment plant were cutting corners. The plant is part of a massive effort to cleanup

radioactive waste at Hanford.

Tamosaitis says he called the contractor out in 2010 and shortly after landed in a basement office with "no meaningful work."

But U.S. District Judge Lonny Suko says Tamosaitis did not follow the proper administrative steps for his claim -- and even if he had, the judge says URS is not responsible for his dismissal. The court says it was the lead contractor, Bechtel, that made that call.

In a letter to employees this week, Bechtel said the move had nothing to do with retaliation. It welcomed "vigilance" from employees in identifying safety issues.

An attorney for Tamosaitis says he will appeal. A separate suit against Bechtel is pending at the Washington State Supreme Court.

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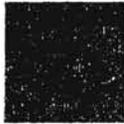
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HANFORD NUCLEAR RESERVATION
[Questions linger over piping Hanford's nuclear waste to treatment plant](#)

Appendix 3

1 legitimate business purpose?"

2 MR. SHERIDAN: Same objection.

3 THE WITNESS: I believe that Bechtel believes they
4 have the authority to do that, yes.

5 Q. (By Mr. Baumgardner) Well, you've been on a number
6 of projects where URS has been the prime contractor over your
7 40 plus years in the business, have you not?

8 A. No, I've not been on projects over my 40 years. I
9 was at Savannah River Lab which was an M&O. It was not a
10 project.

11 Q. It was an M&O, sir, would you define that term?

12 A. It was a manufacturing and operation contract. I
13 believe that's M&O, Maintenance and Operation. It means that
14 the, an M&O -- in DOE, there's two type of projects. There
15 are cost type projects and there are project projects.

16 Project projects are typically capital-funded like
17 WTP. And M&O is an operation that is cost-funded rather than
18 capital-funded, and that you work off cost funds.

19 At the Savannah River Lab where I was from,
20 gracious, from April of '89 to the March of '03, that was a
21 M&O, not a project.

22 Q. And is it proper terminology to say is that URS was
23 the prime contractor on that M&O?

24 A. URS was the prime -- no, I don't think that's
25 proper because I believe at the time of Savannah River, the

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Please find attached the Reply Brief of Appellants in Case No. 87269-4, Tamosaitis v. Bechtel National, Inc., et al, and the Appendix of Non-Washington Cases. This brief is filed by:

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SUPREME COURT OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital
community,

Plaintiffs/Appellants

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and
GREGORY ASHLEY,

Defendants/Respondents,

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)

Case No. 10-2-02357-4

APPELLANTS' APPENDIX OF NON-WASHINGTON CASES

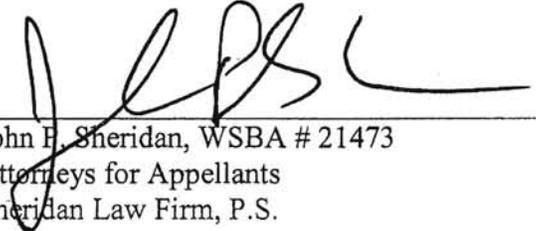
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Attorneys for Appellants

Appellants respectfully submit the following non-Washington cases cited in the Reply Brief of Appellants:

- 1) *Adidas Am., Inc. v. Herbalife, Inc.*, 2011 U.S. Dist. LEXIS 85677 (D. Or. July 29, 2011)
- 2) *Armer v. OpenMarket, Inc.*, 2009 U.S. Dist. LEXIS 72434 (W.D. Wash. July 27, 2009)
- 3) *Atlanta Market Ctr. Mgmt., Co. v. McLane*, 269 Ga. 604, 610, 503 S.E.2d 278 (Ga. 1998)
- 4) *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011)
- 5) *Lee v. Caterpillar*, 2011 U.S. Dist. LEXIS 144959 (N.D. Ga. Dec. 2, 2011)

Respectfully submitted this 15th day of October, 2012.

THE SHERIDAN LAW FIRM, P.S.

By: 

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DECLARATION OF SERVICE

Beth Touschner states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am an attorney employed by Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On October 15, 2012, I caused to be delivered via email addressed to:

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a copy of APPELLANTS' APPENDIX OF NON-WASHINGTON
CASES.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of October, 2012 at Seattle, King County, Washington.



Beth Touschner
Attorney



Analysis
As of: Oct 10, 2012

**ADIDAS AMERICA, INC. and ADIDAS AG, Plaintiffs, v. HERBALIFE
INTERNATIONAL, INC., Defendant.**

No. CV 09-661-MO

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
PORTLAND DIVISION**

2011 U.S. Dist. LEXIS 85677

July 29, 2011, Decided

August 1, 2011, Filed

SUBSEQUENT HISTORY: Injunction denied by *Adidas Am., Inc. v. Herbalife Int'l, Inc.*, 2012 U.S. Dist. LEXIS 69858 (D. Or., May 18, 2012)

PRIOR HISTORY: *Adidas Am., Inc. v. Herbalife Int'l, Inc.*, 2010 U.S. Dist. LEXIS 82991 (D. Or., Aug. 10, 2010)

COUNSEL: [*1] For Adidas America, Inc., Adidas AG, Plaintiffs: Daniel H. Marti, LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Stockton, LLP, Washington, DC; R. Charles Henn, Jr., LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Townsend & Stockton, LLP, Atlanta, GA; Stephen M. Feldman, LEAD ATTORNEY, Perkins Coie, LLP, Portland, OR; William H. Brewster, LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Stockton, LLP, Atlanta, GA.

For Herbalife International, Inc., Defendant: Kenneth R. Davis, II, LEAD ATTORNEY, Lane Powell P.C., Portland, OR; Leila Nourani, Merl John Carson, LEAD ATTORNEYS, PRO HAC VICE, Foley & Lardner LLP, Los Angeles, CA; Jon Martin Wilson, PRO HAC VICE,

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For Herbalife International, Inc., Counter Claimant: Kenneth R. Davis, II, LEAD ATTORNEY, Lane Powell P.C., Portland, OR; Leila Nourani, Merl John Carson, LEAD ATTORNEYS, Foley & Lardner LLP, Los Angeles, CA; James E. Griffith, PRO HAC VICE, Foley & Lardner LLP, Chicago, IL; Jon Martin Wilson, PRO HAC VICE, Foley & Lardner, Tampa, FL; Parna A. Mehrbani, Lane Powell, PC, Portland, OR.

For Adidas America, Inc., Adidas AG, Counter Defendants: Stephen M. Feldman, Perkins Coie, LLP, [*2] Portland, OR.

For Adidas America, Inc., Adidas AG, Counter Defendants: Daniel H. Marti, LEAD ATTORNEY, Kilpatrick Stockton, LLP, Washington, DC; R. Charles Henn, Jr., LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Townsend & Stockton, LLP, Atlanta, GA; William H. Brewster, LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Stockton, LLP, Atlanta, GA.

JUDGES: MICHAEL W. MOSMAN, United States District Judge.

OPINION BY: MICHAEL W. MOSMAN

OPINION

OPINION AND ORDER

MOSMAN, J.,

Adidas seeks summary judgment on Herbalife's two remaining counterclaims. The first is for intentional interference with contractual relations, business relations, or prospective economic advantage ("intentional interference"). The second is for violations of unfair competition law ("unfair competition") arising under *California Business and Professions Code § 17200* ("§ 17200").

I previously found that Herbalife breached the 1998 Settlement Agreement ("1998 Agreement" or "the agreement") by placing its name and Tri-Leaf design trademark ("Tri-Leaf Mark") on the Galaxy MLS ("Galaxy") team's jerseys. This finding prevents Herbalife from satisfying all the required elements of its intentional interference counterclaim. The unfair competition claim necessarily fails because [*3] it is derivative of the intentional interference counterclaim. I find that Adidas is entitled to judgment as a matter of law and grant its motion for summary judgment.

BACKGROUND

Adidas and Herbalife decided in the 1998 Agreement that Herbalife would not use its Tri-Leaf Mark on items Adidas considered its core goods, such as sports apparel and footwear. Tr. [224] 5-6. Since 2005, Adidas has been the sole provider of Major League Soccer, LLC ("MLS") team uniforms, footwear, and other items. Answer to Compl. [114] 13. MLS and its teams sell sponsorship rights for team uniforms, including sponsor logos on uniforms if the sponsor is not an Adidas competitor. *Id.*

In March 2007, Herbalife entered into one of these sponsorship agreements with the owner of the Galaxy, Anschutz Entertainment Group ("AEG"). *Id.* at 10. The agreement allows Herbalife to place the Tri-Leaf Mark and Herbalife name on the front of all Galaxy jerseys. *Id.*

Adidas knew of Herbalife's sponsorship agreement

with the Galaxy. *Id.* It printed Herbalife's logo and name on the Galaxy jerseys from 2007-2010. *Id.* at 12. Beginning in December 2009, Adidas challenged Herbalife's use of the Tri-leaf mark on the Galaxy jerseys, ultimately [*4] filing an action for trademark infringement and other claims. *Id.* at 10.

Herbalife responded with four counterclaims on April 5, 2010. Answer to Compl. [114]. The first and fourth counterclaims have already been dismissed. Op. and Order [159]; Op. and Order [223]. The intentional interference counterclaim asserts that Adidas's refusal to include Herbalife's name and logo on the Galaxy jerseys improperly obstructs Herbalife's economic relationship with the Galaxy. Answer to Compl. [114] 11. The unfair competition counterclaim argues Adidas unfairly and unlawfully disrupts Herbalife's branding and marketing efforts. *Id.*

DISCUSSION

The central issue in these motions is whether Herbalife's intentional interference and unfair competition counterclaims show a genuine dispute as to any material fact. I find Herbalife fails to satisfy all the elements of intentional interference and unfair competition counterclaims.

I. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. *Rule 56(c)(1)* says that a party arguing a fact that "cannot [*5] be or is genuinely disputed" must support the assertion by citing to particular parts of materials in the record or showing the cited materials do not establish the absence or presence of a genuine dispute. *Fed. R. Civ. P. 56(c)(1)*. The Court may grant summary judgment "if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it." *Fed. R. Civ. P. 56(e)(3)*. The U.S. Supreme Court has said *Rule 56* "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

II. Intentional Interference Counterclaim

A. Herbalife's Name and Logo on the Galaxy Jerseys Breach the 1998 Agreement

The main contention between Adidas and Herbalife is about what I said and meant on the question of breach at the September 14, 2010, and February 24, 2011, hearings. Herbalife argues "the Court never made any finding as to whether use of the Herbalife Tri-Leaf logo on the Galaxy jerseys [*6] with the word 'Herbalife' constituted a breach of the 1998 Settlement Agreement." Opp'n to Summ. J. [230] 1. Adidas argues I found the Herbalife logo on the Galaxy jersey breached the 1998 Agreement. Reply Mem. in Supp. of Summ. J. [232] 1. Adidas is correct. I found in the February 24, 2011, hearing that Herbalife's placement of its name and Tri-Leaf Mark on the Galaxy jerseys violates the terms of the parties' 1998 Agreement.

At the September 14, 2010, hearing, I said, "I believe that the better of the two arguments actually ends up being Adidas's argument, the only one that better gives effect to the entire contract and its obvious purpose." Tr. [168] 21. I also said to the parties: "I've essentially told you that I think Adidas is right, and that's how this is going to go unless Herbalife comes up with something in discovery." *Id.* at 27. Herbalife did not come up with something in discovery. After hearing argument on February 24, I granted Adidas's motion for partial summary judgment on the breach counterclaim. Tr. [224] 25.

The context of the two hearings shows I ruled specifically on the issue of whether the Galaxy jerseys with Herbalife's name and logo violated the 1998 Agreement. [*7] The original September 24, 2010, hearing also considered other Herbalife product lines like sports apparel and footwear for the public. Tr. [168] 5-6. Discovery on those items is being produced. *Id.* at 8. My language about determining the scope of breach refers to the broader question of whether other Herbalife apparel items violate the 1998 Agreement. Tr. [224] 25.

The specific question of whether the Galaxy jerseys breached the 1998 Agreement became settled when Herbalife failed to uncover additional information. *Id.* I found that Herbalife's name and logo on the Galaxy jerseys violates the 1998 Agreement with Adidas, in part because Herbalife agreed the jerseys constitute sports apparel. Tr. [168] 8-9.

B. Herbalife Fails to Establish All the Elements of Intentional Interference

I grant summary judgment on Herbalife's counterclaim for intentional interference with economic relations because it fails to satisfy all the elements required under Oregon law. Under Oregon law, a plaintiff must prove all the intentional interference counterclaim elements.¹ Herbalife fails to satisfy two elements: (1) "improper means or for an improper purpose"; and (2) "by a third party."

1 "(1) the existence [*8] of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages." *McGanty v. Staudenraus*, 321 Ore. 532, 901 P.2d 841, 844 (Or. 1995) (citing *Straube v. Larson*, 287 Ore. 357, 600 P.2d 371 (Or. 1979)).

1. Improper Means or for an Improper Purpose

Oregon courts use the *Restatement (Second) of Torts* (1979) to evaluate claims for intentional interference with economic relations. *Douglas Med. Ctr., LLC v. Mercy Med. Ctr.*, 203 Ore. App. 619, 125 P.3d 1281, 1287 (Or. Ct. App. 2006). The *Restatement* requires defendants to engage in some inherently wrongful action to find the intentional interference was accomplished through improper means or for an improper purpose.² The Oregon Supreme Court held that defendants might satisfy the *Restatement* by showing defendant's conduct was "wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession." *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Ore. 201, 582 P.2d 1365, 1371 (Or. 1978).³

2 "If [*9] the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not

improper." *Restatement (Second) of Torts* § 766 *cmi. j* (1979).

3 Further, "[c]ommonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." *Top Serv.*, 582 P.2d at 1371 n. 11.

Even if Adidas intentionally interfered with Herbalife's sponsorship agreement, Adidas has not done so through improper means or for an improper purpose. My prior finding that Herbalife, not Adidas, breached the 1998 Agreement is dispositive on this issue. Adidas is not acting by wrongful means because it seeks to enforce its rights under the 1998 Agreement. Rather, Adidas endeavors to advance its legitimate interest in manufacturing products in accordance with its own contractual [*10] and intellectual property interests. Advancing one's legitimate interest is not wrongful by statute, common law, or an established standard of Adidas's profession. Herbalife fails to satisfy all the elements of its claim, so Adidas is entitled to summary judgment.

2. By a Third Party

Even if Herbalife had established wrongful conduct by Adidas, Herbalife also fails to establish that Adidas was truly a "third party." Under Oregon law, "[t]he tort of intentional interference with economic relations 'serves as a means of protecting contracting parties against interference in their contracts from outside parties.' . . . The tort thereby protects the interests of a plaintiff from 'intermeddling strangers.'" *Wieber v. FedEx Ground Package Sys., Inc.*, 231 Ore. App. 469, 220 P.3d 68, 77 (Or. Ct. App. 2009) (quoting *McGanty*, 901 P.2d at 845). Parties not specifically named in the contract do not necessarily become "intermeddling strangers." The Ninth Circuit found that a defendant is not a stranger to a contract if the contract requires the defendant's cooperation. *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 834 (9th Cir. 2001).⁴ Where a defendant "has a legitimate interest in either the [*11] contract or a party to the contract, the defendant is not a stranger to the contract itself or to the business relationship." *44B Am. Jur. 2d Interference* § 7.

4 The court in *Marin* was analyzing California law, but I find the analysis persuasive here.

Herbalife disputes this interpretation of "stranger,"

arguing a stranger is synonymous with a non-contracting party. Opp'n to Mot. for Summ. J., [230] 17. Herbalife cites *Applied Equipment Corporation v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (Cal. 1994), for the proposition that the "tort duty not to interfere with the contract falls only on strangers--interlopers who have no legitimate [social or economic] interest in the scope or course of the contract's performance." *Id.* at 459. Herbalife argues that one must be a party to a contract to have a "legitimate interest" in a contract. I reject Herbalife's argument.

Adidas has a legitimate interest in Herbalife's contract with AEG. First, as the sole manufacturer of all MLS team jerseys including the Galaxy, Adidas's cooperation with the Galaxy and Herbalife is essential for Herbalife's sponsorship agreement. Answer to Compl. [114] 13. Adidas must manufacture the jerseys for performance of Herbalife's [*12] contract with AEG. Adidas demonstrated its clear involvement in and prior cooperation with the contract when it printed Herbalife's logo and name on the Galaxy jerseys from 2007-2010. *Id.* at 12.

Second, even if Adidas were not the sole manufacturer of MLS jerseys, its 1998 Agreement with Herbalife creates a legitimate interest in Herbalife's use of the Tri-Leaf Mark. Adidas and Herbalife agreed Herbalife would not use its Tri-Leaf Mark on sports apparel that competes with core Adidas goods. Tr. [224] 5-6. This prior agreement alone gives Adidas justification to be legitimately interested in Herbalife's use of its logo. Adidas possesses both an "economic" and "social" interest in the scope and performance of Herbalife's contract, eliminating the possibility that it is a third party to the economic relationship.

C. There Is No Material Difference between Oregon and California Intentional Interference Law

Adidas and Herbalife dispute whether Oregon or California intentional interference law should be used to evaluate the counterclaim. Herbalife argues that California intentional interference law should apply because Adidas "illicitly disrupted" the contractual relationship between Herbalife [*13] and AEG.⁵ Opp'n to Mot. for Partial Summ. J. [230] 19. Herbalife recommends California law because the contractual relationship is "overwhelmingly connected" to California via both parties' business contacts. *Id.*

5 Under California law, establishing a claim for intentional interference with contractual relations requires the plaintiff to prove: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517, 523 (Cal. Ct. App. 2006) (citing *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 (Cal. 1990)).

I need not evaluate this argument.⁶ Regardless of how significant the contacts are, Oregon conflict of law precedent directs courts to apply Oregon law if there is no material difference between the two (a "false conflict"). *Angelini v. Delaney*, 156 Ore. App. 293, 966 P.2d 223, 227 (Or. App. 1998) (citing *Erwin v. Thomas*, 264 Ore. 454, 506 P.2d 494 (Or. 1973)). A false conflict is present if the laws of both [*14] states on the same set of facts "would produce the same decision in the lawsuit . . ." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n. 20, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

6 To the extent this argument repeats Herbalife's earlier affirmative defenses of laches, waiver, and estoppel, I have already granted summary judgment on those defenses. Tr. [224] 25.

There is no material difference (relevant here at least) between the intentional interference law of Oregon and California, and I reach the same result regardless of which version I apply. Herbalife cites no authority for the proposition that, even under California law, a party who breaches a contract may sue the wronged party to that contract for exercising its legitimate interests under that contract. Herbalife's breach of the 1998 Agreement precludes that argument's validity. I implicitly found Adidas did not breach Herbalife's contract with AEG by ruling Herbalife breached the 1998 Agreement. If I found that Adidas's refusal to manufacture the Galaxy jerseys breached Herbalife's contract, it would effectively authorize Herbalife's intended Tri-Leaf Mark use in violation of the 1998 Agreement. I reject this position because it contradicts my earlier [*15] finding.

Herbalife fails to satisfy necessary intentional interference elements under California law, so I arrive at

the same result regardless of which state's law I apply. The false conflict between the laws eliminates any need to measure the respective contacts to California and Oregon. *Erwin*, 506 P.2d at 497-98.

III. Unfair Competition Counterclaim

A. The Counterclaim Is Derived from the Intentional Interference Counterclaim

Herbalife's unfair competition counterclaim relies on *California Business and Professions Code § 17200*.⁷ The success of Herbalife's unfair competition counterclaim depends on the validity of the intentional interference counterclaim.

7 The code defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200* (West 2008).

In defending the unfair competition counterclaim, Herbalife explicitly outlines its dependence on the intentional interference counterclaim: "Adidas's intentional interference with Herbalife's contract with the Galaxy constitutes an intentional interference with economic relations under California (and Oregon) law. Consequently, Adidas's [*16] conduct is unlawful and violates the 'unlawful business act' prong of California's UCL." Opp. To Mot. for Summ. J. [230] 21. The unfair competition law borrows violations of other laws and treats them as independently actionable. *Cel-Tech Comm'n, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). This is true for each of Herbalife's specific claims under the "unlawful" and "unfair" competition prongs of § 17200. *Ingels v. Westwood One Broad. Serv., Inc.*, 129 Cal. App. 4th 1050, 28 Cal. Rptr. 3d 933, 938 (Cal. Ct. App. 2005); *Cel-Tech*, 20 Cal. 4th at 187.

B. The Counterclaim Fails as a Matter of Law

The unfair competition counterclaim's validity hinges on the success of its intentional interference counterclaim both factually and legally. Factually, the unfair competition counterclaim requires that Adidas breached Herbalife's agreement with AEG. Legally, Herbalife would require a finding that Adidas violated intentional interference law because violation of another law is necessary to support § 17200 actions. *Ingels*, 28

Cal. Rptr. 3d at 938. My previous findings on the intentional interference counterclaim are dispositive. I found that Adidas did not breach Herbalife's AEG agreement because of Herbalife's [*17] 1998 Agreement breach. Further, I found that Herbalife failed to meet all the elements of the intentional interference counterclaim.

Herbalife's failure on the intentional interference counterclaim eliminates the unfair competition counterclaim. Herbalife fails to show a prior legal violation that would justify the § 17200 claim and the derivative nature of the claim prevents Herbalife from independently meeting its elements. Adidas is entitled to judgment as a matter of law.⁸

8 Even if Herbalife's intentional interference counterclaim succeeded, Herbalife would still fail on the unfair competition counterclaim. When evaluating §17200 violations, the Ninth Circuit requires claimants to allege the defendant engaged in business practices that are forbidden by statute, regulatory law, or court-made law. *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1044 (2010). For the purposes of § 17200, "court-made" law has been interpreted as "a

violation of a prior court order." *Nat'l Rural Telecomm. Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074 n.22 (C.D. Cal. 2003). Common law violations are insufficient to state a claim under § 17200. *Shroyer*, 622 F.3d at 1044. Therefore, [*18] Herbalife's common law intentional interference counterclaim would not be a valid basis for § 17200 liability, even if it had been successful.

CONCLUSION

Because I find Herbalife fails to show there is a genuine dispute as to any material fact, I GRANT Adidas's Motion for Partial Summary Judgment [9].

IT IS SO ORDERED.

DATED this 29th day of July, 2011.

/s/ Michael W. Mosman

MICHAEL W. MOSMAN

United States District Court



Analysis
As of: Oct 10, 2012

WILMA ARMER, et al., Plaintiffs, v. OPENMARKET, INC., et al., Defendants.

No. C08-1731RSL

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON**

2009 U.S. Dist. LEXIS 72434

July 27, 2009, Decided

July 27, 2009, Filed

SUBSEQUENT HISTORY: Claim dismissed by *Armer v. Openmarket, Inc.*, 2009 U.S. Dist. LEXIS 92265 (W.D. Wash., Oct. 5, 2009)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff customers brought an action against defendants, cellular telephone carriers and a premium content provider. The customers alleged claims of unjust enrichment, tortious interference with contract, and violations of the Washington Consumer Protection Act (CPA), *Wash. Rev. Code § 19.86.010 et seq.*, against the provider, and the provider filed a motion to dismiss all three claims under *Fed. R. Civ. P. 12(b)(6)*.

OVERVIEW: The court denied the motion. The customers' allegations were sufficient to provide fair notice of the nature of their claims and the grounds upon which the claims rested, as required under *Fed. R. Civ. P. 8*. Further, the provider failed to show that a written agreement to arbitrate existed under 9 U.S.C.S. § 2, much less that it encompassed the customers' claims against the

provider. The court also found that all claims stated causes of action. For the unjust enrichment claim, the provider was not a party to the contracts between the customers and carriers, and there was no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts. The fact that the customers had contracts with the carriers was irrelevant to claims against the provider. Thus, The unjust enrichment claim was thus, sufficient, and the customers had no obligation to plead facts to negate possible affirmative defenses in order to avoid dismissal, such as voluntary payment without protest. Finally, the CPA claim was sufficiently pleaded because a contractual relationship was not an element and the customers did not have to be residents to bring the claim.

OUTCOME: The court denied the provider's motion.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses,

*Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Motion
Practice > Content & Form
Civil Procedure > Dismissals > Involuntary Dismissals
> Failures to State Claims*

[HN1] In the context of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court's review is generally limited to the contents of the complaint. The court may, however, consider documents referenced extensively in the complaint, documents that form the basis of plaintiffs' claim, and matters of judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted. Where consideration of additional documents is appropriate, the allegations of the complaint and the contents of the documents are accepted as true and construed in the light most favorable to plaintiff. No claim should be dismissed unless the complaint, taken as a whole, fails to give rise to a plausible inference of actionable conduct.

*Civil Procedure > Pleading & Practice > Pleadings >
Complaints > Requirements*

[HN2] Pursuant to *Fed. R. Civ. P. 8(a)(2)*, a complaint must include a short and plain statement of the claim showing that the pleader is entitled to relief. Plaintiffs are not required to plead detailed factual allegations such as the date and amount of each alleged overcharge. Rather, a plaintiff must simply avoid labels, conclusions, and formulaic recitations of the elements of a cause of action in favor of factual allegations that are enough to raise a right to relief above the speculative level.

*Civil Procedure > Alternative Dispute Resolution >
Arbitrations > Federal Arbitration Act > Arbitration
Agreements*

*Civil Procedure > Alternative Dispute Resolution >
Arbitrations > Federal Arbitration Act > Orders to
Compel Arbitration*

*Civil Procedure > Alternative Dispute Resolution >
Validity of ADR Methods*

[HN3] Pursuant to the Federal Arbitration Act, a written agreement to arbitrate a dispute shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*.

*Contracts Law > Breach > Causes of Action > Elements
of Claims*

*Contracts Law > Types of Contracts > Implied-in-Fact
Contracts*

*Contracts Law > Types of Contracts > Implied-in-Law
Contracts*

[HN4] In Washington, a party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.

*Contracts Law > Remedies > Equitable Relief >
Quantum Meruit*

*Contracts Law > Types of Contracts > Implied-in-Fact
Contracts*

*Contracts Law > Types of Contracts > Implied-in-Law
Contracts*

[HN5] To bar a claim for unjust enrichment simply because a contract touching on the "subject matter" exists would be illogical. A claim for unjust enrichment is based on a theory of implied contract: in order to prevent a party from keeping benefits to which it is not entitled, courts are willing to infer a duty to return the benefits even in the absence of express consent or agreement.

*Contracts Law > Remedies > Equitable Relief >
Quantum Meruit*

*Contracts Law > Types of Contracts > Implied-in-Fact
Contracts*

*Contracts Law > Types of Contracts > Implied-in-Law
Contracts*

[HN6] The elements of an unjust enrichment claim under Washington law: (1) a benefit conferred, (2) knowledge of the benefit, and (3) circumstances that would make it unjust for a party to retain the benefit.

*Civil Procedure > Pleading & Practice > Defenses,
Demurrers & Objections > Affirmative Defenses >
General Overview*

*Civil Procedure > Pleading & Practice > Pleadings >
Complaints > Requirements*

*Civil Procedure > Dismissals > Involuntary Dismissals
> Failures to State Claims*

[HN7] The plaintiffs are under no obligation to plead facts sufficient to negate every possible affirmative defense in order to avoid dismissal.

Torts > Business Torts > Commercial Interference >

Contracts > Elements

[HN8] Recovery for tortious interference with a contractual relation requires that the interferor be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Banking Law > Consumer Protection > State Law > General Overview**

[HN9] A contractual relationship is not an element of a claim under the Consumer Protection Act (CPA), *Wash. Rev. Code § 19.86.010 et seq.*, and the Washington Supreme Court has confirmed that any person who is injured may sue under the CPA, regardless of whether there is privity of contract.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

Governments > Courts > Judicial Precedents

[HN10] Where there is a conflict in the case law, the United States District Court for the Western District of Washington will follow the pronouncements of the Washington Supreme Court.

COUNSEL: [*1] For Wilma Armer, individually and on behalf of all others similarly situated, Plaintiff: Clifford A Cantor, LEAD ATTORNEY, SAMMAMISH, WA; Michael J Aschenbrener, LEAD ATTORNEY, PRO HAC VICE, KAMBER EDELSON LLC (IL), CHICAGO, IL.

For Gregory McNeill, Plaintiff: Clifford A Cantor, SAMMAMISH, WA.

For OpenMarket Inc, a Michigan corporation, Defendant: Charles Platt, Sanket J Bulsara, LEAD ATTORNEYS, PRO HAC VICE, WILMER CUTLER PICKERING HALE & DORR (NY), NEW YORK, NY; Jeffrey M Thomas, Mark A Wilner, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA.

For Sprint Spectrum LP, a Delaware limited partnership, Nextel West Corporation, a Delaware corporation, Defendants, Cross Claimants, Cross Defendants: Amanda J Beane, Sarah J Crooks, LEAD ATTORNEYS, PERKINS COIE (SEA), SEATTLE, WA.

For OpenMarket Inc, a Michigan corporation, Cross

Defendant: Sanket J Bulsara, LEAD ATTORNEY, WILMER CUTLER PICKERING HALE & DORR (NY), NEW YORK, NY; Jeffrey M Thomas, Mark A Wilner, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA.

For OpenMarket Inc, a Michigan corporation, Cross Claimant: Charles Platt, Sanket J Bulsara, LEAD ATTORNEYS, WILMER CUTLER PICKERING HALE & DORR (NY), NEW YORK, NY; Jeffrey M Thomas, Mark A [*2] Wilner, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION

**ORDER DENYING DEFENDANT
OPENMARKET'S MOTION TO DISMISS**

This matter comes before the Court on a "Motion to Dismiss Complaint by Defendant OpenMarket, Inc." Dkt. # 30. ¹ Defendant argues that all of plaintiffs' claims should be dismissed because they (1) do not satisfy the notice pleading requirement of *Rule 8*, (2) are subject to arbitration, and (3) fail to state a claim upon which relief can be granted.

1 After this motion was filed, plaintiffs obtained leave to amend their complaint. A new operative pleading was filed on June 19, 2009. This Order evaluates the adequacy of the allegations contained in the Second Amended Complaint -- Class Action (Dkt. # 46).

Having reviewed the papers submitted by the parties, the Court finds that this matter can be decided without oral argument.

[HN1] In the context of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the Court's review is generally limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). The Court may, however, consider documents referenced extensively in the complaint, documents [*3] that form the basis of plaintiffs' claim, and matters of judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted.

United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003). Where consideration of additional documents is appropriate, the allegations of the complaint and the contents of the documents are accepted as true and construed in the light most favorable to plaintiff. *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 925-26 (9th Cir. 1996); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir. 2000). No claim should be dismissed unless the complaint, taken as a whole, fails to give rise to a plausible inference of actionable conduct. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Defendant has placed before the Court a document entitled "Terms & Conditions" that was apparently printed on March 23, 2009, from the following internet address: <http://www.sprintpcs.com/common/popups/popLegalTermsPrivacy.html>. This document is not mentioned in the Second Amended Complaint. The contract on which plaintiffs' claims are based is described in the complaint as an agreement to pay Sprint a set monthly fee for a period [*4] of approximately 12 months in exchange for cellular telephone service. OpenMarket has provided no evidence that the thirteen-page "Terms & Conditions" applies to the cellular telephone plans purchased by plaintiffs, that it was in effect when plaintiffs acquired service, or that plaintiffs agreed to or accepted the terms. Plaintiffs have not alleged, and the Court will not presume, that their agreement with Sprint was identical -- or even substantially similar -- to the "Terms & Conditions" that were published on the website as of March 23, 2009. In these circumstances, OpenMarket has not shown that the document it submitted for the Court's consideration forms the basis of plaintiffs' claims or are the proper subject of judicial notice. The Court has not, therefore, considered the March 23, 2009, "Terms & Conditions" when determining whether the complaint, taken as a whole, gives rise to a plausible inference of actionable conduct.

I. ADEQUACY OF PLEADING

Without addressing the allegations of the complaint as a whole, OpenMarket argues that the pleading must be dismissed because plaintiffs have failed to allege "the amount of the charges, the total number of charges, the phone number [*5] that was charged, the date of charges, and the attempts to achieve a refund" from defendants. Motion at 9. Defendant also challenges the adequacy of the allegations related to the elements of plaintiffs'

claims. See Motion at 13-14, 16-17, and 19. [HN2] Pursuant to *Fed. R. Civ. P. 8(a)(2)*, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs are not, as OpenMarket would have it, required to plead detailed factual allegations such as the date and amount of each alleged overcharge. *Twombly*, 550 U.S. at 555. Rather, a plaintiff must simply avoid labels, conclusions, and formulaic recitations of the elements of a cause of action in favor of factual allegations that are "enough to raise a right to relief above the speculative level." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 234-236 (3rd ed. 2004) ("The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.")).

Having reviewed the allegations of the Second Amended Complaint, the Court finds that they are sufficient to provide 'fair notice' [*6] of the nature of plaintiffs' claims against OpenMarket and the 'grounds' on which the claims rest. See *Twombly*, 550 U.S. at 555 n.3. Plaintiffs have alleged facts regarding the aggregation business in which OpenMarket is engaged, the lack of safeguards to reduce the risk of unauthorized charges, and overcharges levied by OpenMarket and paid by plaintiffs. These allegations are not conclusory and satisfy *Rule 8*.²

2 OpenMarket cannot rely on *Lowden v. T-Mobile USA, Inc.*, 2009 U.S. Dist. LEXIS 21759, 2009 WL 537787 (W.D. Wash. Feb. 18, 2009), for the proposition that plaintiffs are required to allege the specific dates and amounts of improper charges in order to satisfy *Rule 8*. Despite broad allegations of improper charges, the plaintiffs in *Lowden* failed to allege that they had been overcharged for calls and services. The court therefore concluded that plaintiffs' right to relief was speculative and that the improper charges claim should be dismissed. In this case, the named plaintiffs have alleged not only that OpenMarket's practices and policies resulted in unauthorized charges for mobile content to Sprint customers, but also that their cell phone accounts were improperly charged as a result of OpenMarket's actions. [*7] See Second Amended Complaint at PP 29, 31, 35, and 37.

II. ARBITRATION

[HN3] Pursuant to the Federal Arbitration Act ("FAA"), a written agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. For the reasons discussed above, OpenMarket has not shown that a written agreement to arbitrate exists, much less that it encompasses plaintiffs' claims against OpenMarket.³

3 Even if the Court were to assume that the March 23, 2009, "Terms & Conditions" accurately sets forth plaintiffs' agreement with defendant Sprint, OpenMarket has not shown that it is entitled to enforce the arbitration clause contained therein. The "Terms & Conditions" purportedly represent an agreement between Sprint and its customers. OpenMarket has not shown that it was a party to the contract or that it was an express or implied beneficiary of the agreement. According to its terms, the agreement to arbitrate does not encompass claims against third parties: it expressly limits arbitrable disputes to "any claims or controversies *against each other* related in any way . . ." to Sprint's services or the contract [*8] between the parties." Terms & Conditions at 35 (emphasis added to counteract OpenMarket's creative (and misleading) use of ellipses in its reply memorandum). Nor has OpenMarket shown that it was an "agent" or "affiliate" of Sprint or that plaintiffs are equitably estopped from opposing OpenMarket's efforts to compel arbitration. Unlike the situation in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), where plaintiff's claim against a third party was intimately founded on and intertwined with the underlying contract obligations, plaintiffs' causes of action against OpenMarket could proceed even if their contractual claim against Sprint were to fail.

III. FAILURE TO STATE A CLAIM

Plaintiffs have asserted claims of unjust enrichment, tortious interference with contract, and violations of the Washington Consumer Protection Act, *RCW 19.86.010 et seq.*, against defendant OpenMarket. Defendant seeks dismissal of all three claims under *Fed. R. Civ. P. 12(b)(6)*.

A. Unjust Enrichment

Plaintiffs allege that OpenMarket has created a billing and collection system that is devoid of the checks and safeguards necessary to protect cell phone users from unauthorized [*9] charges for mobile content. Plaintiffs explain why erroneous or fraudulent billing can occur, how aggregators such as OpenMarket make money from every such billing, and how plaintiffs came to enrich OpenMarket through their payments to Sprint. Plaintiffs allege that, given its business model and practices, OpenMarket knew that some of the money it was collecting was unauthorized and that its retention of that money is unjust.

Defendant argues that the existence of a contract regarding the subject matter of plaintiffs' claims (namely charges for the provision of mobile content) bars a claim for unjust enrichment. Although a broad "subject matter" bar may exist in New York (see *Vitale v. Steinberg*, 307 A.D.2d 107, 111, 764 N.Y.S.2d 236 (N.Y.A.D. 2003)), Washington law is materially different on this point. [HN4] In Washington, "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943).⁴ OpenMarket is not a party to the contracts between plaintiffs and defendant Sprint, and there [*10] is no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts. [HN5] To bar a claim for unjust enrichment simply because a contract touching on the "subject matter" exists would be illogical. A claim for unjust enrichment is based on a theory of implied contract: in order to prevent a party from keeping benefits to which it is not entitled, courts are willing to infer a duty to return the benefits even in the absence of express consent or agreement. *MacDonald v. Hayner*, 43 Wn. App. 81, 85, 715 P.2d 519 (1986). The fact that plaintiffs have contracts with Sprint is irrelevant to their claim against OpenMarket. Plaintiffs have alleged facts supporting all of [HN6] the elements of an unjust enrichment claim under Washington law: (1) a benefit conferred, (2) knowledge of the benefit, and (3) circumstances that would make it unjust for OpenMarket to retain the benefit. The service agreements with Sprint give plaintiffs no contractual rights against OpenMarket. This is exactly the situation for which an unjust enrichment claim was designed. If the Court were unwilling to imply a contract simply because plaintiffs

have a contractual claim against Sprint, [*11] OpenMarket would be able to retain benefits to which it may have no right in law or equity.

4 *USA Gateway Travel, Inc. v. Gel Travel, Inc.*, 2006 U.S. Dist. LEXIS 92560, 2006 WL 3761259 at *6 (W.D. Wash. Dec. 20, 2006), is not to the contrary. OpenMarket's citation to and summary of that case are misleading. Plaintiff's claim of unjust enrichment was dismissed in *USA Gateway* because the court found that a contract implied in fact existed between the parties and governed plaintiff's right to recovery.

Defendant also argues that plaintiffs' unjust enrichment claim fails because they voluntarily paid their cell phone bills without protest. The voluntary payment doctrine is an affirmative defense: [HN7] plaintiffs are under no obligation to plead facts sufficient to negate every possible affirmative defense in order to avoid dismissal. To the extent the voluntary payment doctrine is applicable under Washington law,⁵ factual determinations regarding voluntariness, fraud, compulsion, and protest must await the development of the record.

5 See *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 87, 170 P.3d 10 (2007) (open question whether doctrine applies only in the contract context).

B. Tortious Interference with [*12] Contract

Plaintiffs allege that they had a contractual relationship with Sprint pursuant to which Sprint would provide and bill for communications and related services and plaintiffs would pay for the services received. Plaintiffs further allege that OpenMarket's erroneous or fraudulent billing for unauthorized services caused Sprint to breach its contracts with plaintiffs by placing charges on their cell phone bills for products and services that were never provided. OpenMarket argues that these facts cannot support a claim of tortious interference because it is "a non-stranger" to the contractual relationship. [HN8] "Recovery for tortious interference with a contractual relation requires that the interferor be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract." *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978). The complaint contains no allegations regarding a contract with OpenMarket and instead portrays OpenMarket as an

intermeddling third party that caused Sprint to breach its contracts with plaintiffs. Although the Court is not convinced that OpenMarket is the type of third-party against whom a tortious interference [*13] claim can be levied, its role is not adequately defined. OpenMarket is neither a party nor a total stranger to the contract: whether it was factually or legally incapable of interfering with plaintiffs' contracts with Sprint at the time of the relevant events must be determined later in the litigation.

C. Washington Consumer Protection Act ("CPA")

Plaintiffs allege that OpenMarket, as part of its business model, misleads the public and deceptively facilitates charges to consumer telephone bills for unauthorized mobile content. Plaintiffs further allege that they have been injured by OpenMarket's practices and that Washington has an interest in regulating the business activities of companies headquartered in the state.

Defendant argues that the CPA claim fails as a matter of law because (1) there is no contract between plaintiffs and OpenMarket (Motion at 20), and (2) out-of-state residents may not bring a claim under the CPA (Motion at 21).⁶ Neither argument has merit. [HN9] A contractual relationship is not an element of a CPA claim (see *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986), and the Washington Supreme Court has confirmed that "any person [*14] who is injured" may sue under the CPA, regardless of whether there is privity of contract (*Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993)).⁷ OpenMarket has not identified any authority limiting the remedies afforded by the CPA to Washington citizens. At least one court has determined that "[t]he CPA targets all unfair trade practices either originating from Washington businesses or harming Washington citizens." *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 553 (W.D. Wash. 2008), rev. denied, No. 08-80030, 2008 U.S. App. LEXIS 28006 (9th Cir. 2008). Because the CPA is to be liberally construed (*Indoor Billboard*, 162 Wn.2d at 86), the Court agrees.

6 Defendant has abandoned its argument that its conduct is exempt from scrutiny under the CPA.

7 A statement to the contrary in *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 758, 87 P.3d 774 (2004), is unsupported by any citation or analysis. [HN10]

Where there is a conflict in the case law, this Court will follow the pronouncements of the Washington Supreme Court.

OpenMarket has failed to support its more general assertion that its interactions with plaintiffs were so tenuous and indirect that they cannot be the basis of a [*15] CPA claim. Defendant offers no case law in support of this argument and has not explained which of the elements of a CPA claim depends on the directness of the relationship between the parties.

For all of the foregoing reasons, OpenMarket's motion to dismiss is DENIED.

DATED this 27th day of July, 2009.

/s/ Robert S Lasnik

Robert S. Lasnik

United States District Judge



ATLANTA MARKET CENTER MANAGEMENT COMPANY et al. v. McLANE et al.
al. EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC. et al. v.
McLANE et al.

S97G1229, S97G1239.

SUPREME COURT OF GEORGIA

269 Ga. 604; 503 S.E.2d 278; 1998 Ga. LEXIS 740; 98 Fulton County D. Rep. 2374

July 13, 1998, Decided

SUBSEQUENT HISTORY: [***1] Reconsideration Denied July 30, 1998. As Corrected August 17, 1998.

PRIOR HISTORY: Certiorari to the Court of Appeals of Georgia -- 225 Ga. App. 818.

DISPOSITION: Judgment reversed in part in Case No. S97G1229. Judgment reversed in Case No. S97G1239.

COUNSEL: Schnader, Harrison, Segal & Lewis, C. Wilson Dubose, Mary Anne Hall, Dionna K. Rutkowski, for Atlanta Market Center Management Company.

Alston & Bird, Douglas A. S. Chalmers, Jr., G. Conley Ingram, William H. Hughes, Jr., for Equitable Real Estate Investment Management, Inc.

James L. Ford, Sr., Terry D. Jackson, for McLane.

Schulten, Ward & Turner, Lou Litchfield, Littler Mendelson, J. Roy Weathersby, Huprich & Associates, Don C. Huprich, Philip S. Andrews, amici curiae.

JUDGES: Benham, Chief Justice. All the Justices concur.

OPINION BY: Benham

OPINION

[*604] [**279] **Benham**, Chief Justice.

We granted certiorari to the Court of Appeals to examine its opinion in a case involving a number of contractual relationships wherein the appellate court reversed a portion of the trial court's grant of summary judgment to Atlanta Market Center Management (AMC) and Equitable Real Estate Management and others (Equitable). [**280] *McLane v. Atlanta Market &c.*, 225 Ga. App. 818 [***2] (486 S.E.2d 30) (1997).

In 1987, AMC executed a written contract whereby AMC obtained the exclusive right to lease the Inforum, a downtown Atlanta building owned by a partnership, the managing partner of which was the owner of Equitable Real Estate. It was agreed that AMC was to be paid a bonus commission for every square foot of space which a new or existing tenant leased in the Inforum. In 1990, AMC made its at-will employee, appellee Laura McLane, a "leasing director" for the Inforum, assigned several tenant accounts to her, and orally agreed to pay her a bonus commission for each square foot of Inforum space leased to her Inforum tenants. A portion of the bonus was to be paid upon the execution of the lease, and the remainder of the bonus payable upon the tenant's occupation of the space. The AMC-McLane oral agreement had no provision concerning whether the bonus commission would be paid should McLane's at-will employment be terminated before the occurrence of the conditions precedent to payment.

In 1991, the Atlanta Committee for the Olympic Games (ACOG) occupied space in the Inforum through a lease which contained several expansion options. The ACOG account was assigned [***3] to McLane [*605] who serviced the account through ACOG's exercise of its expansion rights under the 1991 lease and received a bonus commission after each expansion. In July 1992, ACOG notified McLane and AMC that it wished to lease more Inforum space. When Equitable became aware of ACOG's interest in expanding its Inforum presence, Equitable entered into direct negotiations with ACOG concerning the proposed expansion and informed AMC that its Inforum management agreement would not be renewed after it expired on October 11, 1992. Equitable later extended the AMC management agreement through October 1992, and agreed to pay bonus commissions to AMC for those leases with certain specified tenants negotiated during the management agreement so long as the leases went into effect by December 31, 1992. ACOG was not one of the specified tenants and its lease for the expanded area was not executed until February 18, 1993, well after the October 31 expiration of the management agreement extension and the December 31 deadline. No commission was paid to AMC or McLane upon ACOG's execution of the lease expansion or upon its occupation of the newly-leased space.

With the loss of the Inforum management [***4] contract, AMC terminated McLane's employment on October 31, 1992. Knowing that McLane had refused a severance package offered by AMC because it had not included payment of a bonus commission for the 1993 ACOG expansion, AMC promised McLane it would pay her a portion of any commission it received from Equitable as a result of ACOG's 1993 expansion. Despite the loss of its Inforum management contract, AMC continued to manage a smaller portion of the Inforum and executed a new management contract with Equitable covering the more limited area on February 26, 1993. In that written agreement, AMC acknowledged that it had been paid all amounts owed it under the old agreement and that it was not entitled to any further payments thereunder. AMC also agreed to indemnify and hold Equitable harmless from any claim asserted against Equitable by any present or former employee of AMC arising out of the earlier management agreement.

Shortly thereafter, McLane filed suit against AMC and Equitable, contending she was entitled to a commission for the 1993 ACOG expansion and that

AMC had broken its promise to protect her commission rights and had breached its fiduciary responsibility to her by entering [***5] into a deal with Equitable which resolved the commission claim to McLane's detriment. She alleged that Equitable had tortiously interfered with her employment contract with AMC when it violated the Inforum management agreement by negotiating the 1993 ACOG lease expansion itself. McLane also sought punitive damages, attorney fees, and expenses of litigation. The trial court granted the defendants' joint motion for summary judgment. The [*606] Court of Appeals reversed that judgment, holding that McLane was entitled, as a matter of law, under her oral agreement with AMC to a commission of \$ 246,618 for the [**281] 1993 ACOG lease amendment, and that AMC had breached its fiduciary responsibility to fully compensate McLane and to protect her commission rights during AMC's negotiations with Equitable. The appellate court also found genuine issues of material fact concerning Equitable's liability for allegedly conspiring with AMC to deprive McLane of the commission (225 Ga. App. 818 at Division 4 (b)); and found sufficient evidence from which a jury could conclude that Equitable had tortiously interfered with McLane's efforts to procure the 1993 ACOG expansion lease pursuant to the terms of her employment [***6] contract with AMC, and that Equitable had interfered with McLane's right to receive compensation under her employment contract for the 1993 ACOG lease. The Court of Appeals rejected Equitable's assertion that it could not be liable for tortious interference with McLane's contract because it was not a stranger to the contract. 225 Ga. App. at 828. This Court granted the petitions for certiorari filed by AMC and Equitable, and expressed interest in the extent to which an employer owed a terminable-at-will employee a fiduciary duty under Georgia law, and the scope of the "stranger doctrine" in the law of tortious interference with contractual relations.

1. Fiduciary duties and obligations are owed by those in confidential relationships, i.e., relationships "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." *O.C.G.A. § 23-2-58*. The Court of Appeals ruled that AMC, "as a real estate professional and employer, had a fiduciary obligation to compensate McLane [***7] and to protect her during the parties' agency relationship" (

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225 Ga. App. at 825), implicitly finding that AMC and McLane enjoyed a principal-agent relationship or a confidential relationship arising out of their employer-employee relationship. We address each implicit finding seriatim.

(a) An agency relationship arises "wherever one person, expressly or by implication, authorizes another to act for him. . . ." *O.C.G.A. § 10-6-1*. In order for McLane to serve as AMC's agent, she had to be more than the employee delegated by AMC to look after certain accounts -- she had to be "vested with authority, real or ostensible, to create obligations on behalf of [AMC], bringing third parties into contractual relations with [AMC]." *Southeastern Fidelity Ins. Co. v. Heard*, 123 Ga. App. 635 (3) (b) (182 S.E.2d 153) (1971). There is no evidence that McLane was authorized to obligate AMC by entering into contracts on behalf of AMC; in fact, she admitted in a [*607] deposition that any leasing arrangement she might suggest had to meet with AMC's approval before AMC signed it. Therefore, we conclude that McLane failed to establish that she was AMC's agent.

There remains, however, the question whether [***8] AMC took on the role of acting as McLane's agent in its negotiations with Equitable concerning the 1993 ACOG expansion commission. AMC believed McLane's entitlement to a commission for the expansion was conditioned upon AMC's receipt of a commission from Equitable, and promised McLane it would pay her a commission upon the occurrence of that condition precedent. AMC then bargained away the condition precedent, effectively eviscerating McLane's receipt of a commission, in exchange for a written agreement whereby AMC continued to manage a smaller portion of the Inforum. However, there is no evidence that McLane authorized AMC to create obligations on her behalf during AMC's negotiations with Equitable. See *id.* Since it was not established that McLane acted as AMC's agent or that AMC acted as McLane's agent, there can be no breach of fiduciary relationship arising from a principal-agent relationship between the two.

(b) The Court of Appeals' opinion suggested that AMC might owe McLane a fiduciary obligation as her employer. The employee-employer relationship is not one from which the law will necessarily imply fiduciary obligations; however, the facts of a particular case may establish [***9] the existence of a confidential

relationship between an employer and an employee concerning a particular transaction, thereby placing upon the [**282] parties the fiduciary obligations associated with a principal-agent relationship. *Cochran v. Murrah*, 235 Ga. 304, 307 (219 S.E.2d 421) (1975); *Remediation Services v. Georgia-Pacific Corp.*, 209 Ga. App. 427, 431-432 (433 S.E.2d 631) (1993). The Court of Appeals appears to have based its holding that AMC had a fiduciary duty as employer to fully compensate McLane and protect her commission rights on AMC's purported usurpation of a business opportunity assigned to McLane, and AMC's assurances to McLane that AMC would pursue its claim for a commission from the 1993 ACOG expansion and would pay McLane her share of any commissions received from Equitable. If, as McLane contends, the ability to negotiate the 1993 ACOG expansion was a business opportunity wrongfully taken from her, it was not taken by AMC, but by Equitable when it elected to negotiate with ACOG directly. The assurances relied upon by McLane were made by AMC to McLane a month after the employer-employee relationship had ended; while the assurances likely would not have been [***10] made but for the prior employer-employee relationship enjoyed by the parties, because they were not made while the employer-employee relationship existed, we decline to hold that the post-employment assurances retroactively caused the [*608] employer-employee relationship to evolve into a fiduciary relationship between the parties. We conclude that the Court of Appeals erred when it ruled that the trial court should not have granted summary judgment to AMC and Equitable on McLane's claims of breach of fiduciary duties.

2. The Court of Appeals also reversed the trial court's grant of summary judgment to appellant Equitable on McLane's assertion that Equitable had tortiously interfered with McLane's contractual rights. Parties to a contract have a property right therein with which a third party cannot interfere without legal justification or privilege, and a party injured by another's wrongful interference may seek compensation in tort. *Luke v. Dupree*, 158 Ga. 590 (1) (124 S.E. 13) (1924); *O.C.G.A. § 51-12-30*. In order to prevail on a claim alleging tortious interference with contract, a plaintiff must establish the existence of a valid contract and that the defendant acted intentionally, [***11] without privilege or legal justification, to induce another not to enter into or continue a business relationship with the plaintiff, thereby causing the plaintiff financial injury. *Lake Tightsqueeze*

269 Ga. 604, *608; 503 S.E.2d 278, **282;
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v. Chrysler First Fin. Svcs. Corp., 210 Ga. App. 178 (5) (435 S.E.2d 486) (1993). See also *Voyles v. Sasser*, 221 Ga. App. 305 (472 S.E.2d 80) (1996); *McDaniel v. Green*, 156 Ga. App. 549 (275 S.E.2d 124) (1980); *Restatement, Second, Torts*, § 766.¹

1 Because our concern in granting the petition for certiorari, as expressed in the questions posed therein, was in the applicability of the "stranger doctrine" to the facts of this case, we assume for purposes of this opinion, that McLane has established the existence of contractual rights and relations with which Equitable allegedly interfered (*McDaniel v. Green, supra*, 156 Ga. App. at 550), and that Equitable had no right to negotiate directly with ACOG.

After proving the existence of a contract, it is essential to a claim of tortious interference with [***12] contractual relations that the plaintiff establish that the defendant is a "third party," i.e., a "stranger" to the contract with which the defendant allegedly interfered. One is not a stranger to the contract just because one is not a party to the contract, as it has been held that the alleged interferer is not a stranger to the contract and thus not liable for tortious interference where the alleged interferer was the agent for one of the parties to the contract of insurance (i.e., the underwriter), and all the purported acts of interference were done within the scope of the interferer's duties as agent. *Jet Air v. Nat. Union Fire Ins. Co.*, 189 Ga. App. 399 (375 S.E.2d 873) (1988). See also *Hyre v. Denise*, 214 Ga. App. 552 (449 S.E.2d 120) (1994) (where the court ruled that an attorney who on behalf of a client asserts or prosecutes a claim arising from contractual rights or duties is not a stranger to the contract so that neither the attorney nor the attorney's partners may be held liable for tortious interference); [*609] *Nexus Svcs. v. Manning Tronics*, 201 Ga. App. 255 (1) (410 S.E.2d 810) (1991) (where the alleged interferer was the corporate president of one of the contracting [***13] parties and all his [**283] purported acts of interference were within the scope of his corporate duties, he was not a stranger to the corporation's contract and thus was not liable for tortious interference). Similarly, a defendant averred to have been acting in an official capacity is not a stranger to an employment contract (*Johnson v. Rogers*, 214 Ga. App. 557 (3) (448 S.E.2d 710) (1994)), and neither is an employee's supervisor. *Hylton v. American Assn. for Vocational Instructional Materials*, 214 Ga. App. 635

(448 S.E.2d 741) (1994). The intended third-party beneficiary of a contract, legally authorized to enforce the contract, cannot be held liable for tortious interference since he is not a stranger to the contract. *Cohen v. William Goldberg & Co.*, 202 Ga. App. 172 (413 S.E.2d 759) (1991). The exclusion of third-party beneficiaries from the "stranger doctrine" has been expanded to cover those who benefit from the contract of others, without regard to whether the beneficiary was intended by the contracting parties to be a third-party beneficiary. See *Lake Tightsqueeze v. Chrysler First Fin. Svcs. Corp.*, *supra*, 210 Ga. App. 178 (5) (one who would benefit from the contract [***14] with which one is alleged to have interfered is not a stranger to the contract and cannot have tortiously interfered), and *Disaster Svcs. v. ERC Partnership*, 228 Ga. App. 739 (492 S.E.2d 526) (1997) (one with a direct economic interest in the contract, even though not a third-party beneficiary, is not a stranger to the contract).

In *Jefferson-Pilot Communications Co. v. Phoenix City Broadcasting*, 205 Ga. App. 57, 60 (421 S.E.2d 295) (1992), the shadow of liability for tortious interference was further diminished when the Court of Appeals reasoned that "all parties to a comprehensive interwoven set of contracts which provided for the financing, construction, and transfer of ownership" were not strangers, i.e., the purchaser of a radio station was not a stranger to the contractual relations between the radio station's seller and the seller's lenders. Thus, in order for a defendant to be liable for tortious interference with contractual relations, the defendant must be a stranger to both the contract *and* the business relationship giving rise to and underpinning the contract. *Renden, Inc. v. Liberty Real Estate*, 213 Ga. App. 333 (444 S.E.2d 814) (1994) (where the lessor [***15] was "an essential entity" to the subletting of space by its tenant since the tenant's right to sublease was set forth in the lessor's lease).² But see *Strahley v. Pruitt Corp.*, 231 Ga. App. 502 (1) (498 S.E.2d 78) (1998), where the Court of Appeals held that [*610] the corporate owner and operator of nursing homes, while "inextricably bound together" with the residents and an independent health care provider serving the residents, could be liable, in light of the statutory Bill of Rights for Residents of Long-Term Care Facilities (*O.C.G.A. § 31-8-101 et seq.*), for tortious interference with contractual relationships between the residents and the health care provider; *Cumberland Center Assoc. v. Southeast Management &c. Corp.*, 228 Ga. App. 571 (3) (b) (492 S.E.2d 546) (1997), where the Court of Appeals,

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without mentioning the "stranger doctrine," held that the tenant who had been procured by a leasing agent to rent office space could be held liable for tortious interference with a commission agreement between the leasing agent and the landlord; and *Sunamerica Financial v. 260 Peachtree St.*, 202 Ga. App. 790 (3) (b) (415 S.E.2d 677) (1992), where the Court of Appeals declined to [***16] hold as a matter of law that a parent corporation is not a stranger to the contracts of the corporation's wholly-owned subsidiary or of the latter's wholly-owned subsidiaries.

2 While the tort alleged in *Renden, Inc. v. Liberty Real Estate* was tortious interference with a *business* relationship, the applicability of the "stranger doctrine" is the same for that tort as for tortious interference with a contractual relationship.

We endorse the Court of Appeals' line of cases which, in effect, reduce the number of entities against which a claim of tortious interference with contract may be maintained. We reiterate that, in order to be liable for tortious interference, one must be a stranger to both the

contract at issue and the business relationship giving rise to and underpinning the contract. *Renden, Inc. v. Liberty Real Estate, supra*, 213 Ga. App. 333. In other words, all parties to an interwoven contractual arrangement are not liable for tortious interference with any [**284] of the contracts or business [***17] relationships. *Jefferson-Pilot Communications v. Phoenix Broadcasting, supra*, 205 Ga. App. at 60. Any statements or holdings to the contrary in *Strahley v. Pruitt Corp., supra*, 231 Ga. App. 502; *Cumberland Center Assoc. v. Southeast Management, supra*, 228 Ga. App. 571; and *Sunamerica Financial v. 260 Peachtree St., supra*, 202 Ga. App. 790, are hereby disapproved. Accordingly, we reverse the Court of Appeals' rejection of Equitable's assertion that it was not a stranger to McLane's employment contract with AMC and hold that the trial court was correct in granting Equitable summary judgment on McLane's claim of tortious interference with contract.

*Judgment reversed in part in Case No. S97G1229.
Judgment reversed in Case No. S97G1239. All the
Justices concur.*



1 of 1 DOCUMENT

RICHARD CLAIRMONT, Plaintiff-Appellant, v. SOUND MENTAL HEALTH,
 Defendant, and JONI WILSON, in her individual capacity, Defendant-Appellee.

No. 09-35856

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

632 F.3d 1091; 2011 U.S. App. LEXIS 962; 31 I.E.R. Cas. (BNA) 1301

July 16, 2010, Argued and Submitted, Seattle, Washington

January 19, 2011, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:08-cv-00507-TSZ. Thomas S. Zilly, Senior District Judge, Presiding.

Clairmont v. Wilson, 2009 U.S. Dist. LEXIS 76532 (W.D. Wash., Aug. 27, 2009)

COUNSEL: Jesse A. Wing, MacDonald Hoague & Bayless, Seattle, Washington, for the plaintiff-appellant.

Erin L. Overbey, Assistant City Attorney, Seattle, Washington, for the defendant-appellee.

JUDGES: Before: Susan P. Graber and Richard A. Paez, Circuit Judges, and Larry A. Burns, * District Judge. Opinion by Judge Paez.

* The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.

OPINION BY: Richard A. Paez

OPINION

[*1097] PAEZ, Circuit Judge:

In this *First Amendment* retaliation case, Richard

Clairmont appeals the district court's grant of summary judgment to Defendant Joni Wilson, the Manager of Probation Services at the Seattle Municipal Court. Before filing suit, Clairmont was employed as a domestic violence counselor for Sound Mental Health, a private [*1098] company that provides domestic violence prevention treatment programs to criminal defendants in Seattle. He alleges that he was fired in retaliation for giving truthful subpoenaed testimony in a criminal proceeding. Although Clairmont was not employed directly [**2] by the Seattle Municipal Court, the district court determined that, because his employer was an independent contractor for the court, his *First Amendment* claim should be evaluated as if he were a public employee. Applying the *Pickering*¹ public employee balancing test, the district court determined that the Seattle Municipal Court's interests outweighed Clairmont's *First Amendment* interests, and granted Wilson's motion for summary judgment on the basis of qualified immunity.

1 *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

As we explain below, we agree with the district court that, for the purposes of this suit, Clairmont's retaliation claim should be evaluated as if he were a public employee. We conclude, however, that Clairmont's *First Amendment* interests outweigh the administrative interests of the Seattle Municipal Court and that his rights

were clearly established at the time of the alleged violation. We therefore reverse and remand.

I. Background

Sound Mental Health ("SMH") is a private company that is regulated and certified by the Washington Department of Social and Health Services to provide domestic violence perpetrator treatment ("Treatment") to defendants charged with or convicted [**3] of domestic violence offenses. *Id.* Clairmont was employed by SMH from December 2005 to late November 2007 as a "Program Manager." In this position, Clairmont was responsible for coordinating and supervising SMH's Treatment program.

Certified Treatment providers are placed on a list that the Domestic Violence Probation Unit ("Probation Unit") of the Seattle Municipal Court ("Municipal Court") distributes to pretrial and convicted defendants who must complete a Treatment program.² The staff in the Probation Unit do not make referrals to specific providers, but they do inform potential participants whether a provider has special services that might be of interest to a defendant. Defendants choose which Treatment program they want to attend and pay the provider directly; the Municipal Court is not involved in the monetary transaction between a defendant and a Treatment provider.

² The court may defer prosecution of defendants accused of a domestic violence offense under a stipulated order of continuance, provided that the defendant voluntarily completes a Treatment program and complies with other court-ordered conditions. *Wash. Rev. Code § 26.50.150; Wash. Admin. Code § 388-60-0015.*

Unlike other [**4] Treatment providers on the list, SMH had a contract with the Municipal Court during the time in question. Under the terms of the contract, SMH provided specified services to the general public and to Treatment participants. In return for its services, the Municipal Court provided SMH with equipment and office space at the courthouse; there were no direct payments between the parties. In addition, SMH agreed to submit monthly reports and to attend meetings with the Municipal Court probation staff as needed. The contract specifically characterized SMH as an "independent contractor."

On November 8, 2007, Clairmont was subpoenaed to testify as an expert witness [*1099] in a hearing on behalf of a criminal defendant who was enrolled in a Treatment program with a different organization. The Treatment organization had terminated the pre-trial criminal defendant from the program prematurely, and the Probation Unit accordingly sought to revoke the continuance of his prosecution and to impose jail time and other sanctions. The defendant's counsel believed that her client had been treated differently because of his status as a Spanish-speaking defendant and informally consulted with Clairmont before the [**5] hearing about the reasons that the Treatment provider had given for the termination. The defendant's counsel later subpoenaed Clairmont to testify at the revocation hearing. At the hearing, Clairmont qualified as an expert witness and the parties posed hypothetical questions to him concerning when it might be appropriate to terminate a participant from a Treatment program.

A Probation Unit staff member heard Clairmont's testimony and brought it to the attention of her supervisor, Joni Wilson, Manager of Probation Services for the Municipal Court. On November 14, 2007, Wilson contacted Clairmont's supervisor at SMH regarding Clairmont's testimony and, on November 29, 2007, Clairmont was fired. The letter informing Clairmont of his termination stated, in pertinent part:

Sound Mental Health has very recently received further critical feedback from the City of Seattle Domestic Violence Probation Officers Unit about your performance and program management. Your advocacy for clients remains strong. However, prior attempts to improve accountability, care coordination and [to] restore confidence in your management of the program with the probation unit have been unsuccessful. The unit reports [**6] that they have lost trust in the integrity of the program and consider that the situation is not salvageable. The program is in jeopardy. They have proposed a stop-referral beginning immediately. This leaves SMH with no option but to terminate your employment effective today

....

In April 2008, Clairmont filed suit against SMH and Wilson under 42 U.S.C. § 1983, alleging that he was terminated by SMH in violation of his *First Amendment* right to free speech and asserting various state-law claims against SMH.³ Wilson filed a motion for summary judgment asserting that she was entitled to qualified immunity. She argued that, in light of the factual record, Clairmont had failed to establish a violation of his *First Amendment* free speech rights and, even if he had, the law was not clearly established when Clairmont was fired. Wilson also argued that Clairmont was fired, not because of his testimony, but because of his poor performance as a program manager.

³ Clairmont settled his claims against SMH, which resulted in dismissal of his suit against SMH.

The district court, analyzing the facts as if Clairmont were a public employee, concluded that Clairmont's testimony was not protected speech, [**7] both because it was not on a matter of public concern and because Clairmont's speech was of such "minimal value" that it was outweighed by the Probation Unit's interests in addressing victim safety and civil liability. The district court held, in the alternative, that "Clairmont's *First Amendment* right was not so 'clearly established' as to preclude qualified immunity for Ms. Wilson." Clairmont timely appealed.⁴

⁴ We review de novo a grant of summary judgment on the basis of qualified immunity. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994). In determining whether summary judgment was appropriate, we must view the evidence in the light most favorable to the non-moving party. *Huppert v. City of Pittsburg*, 574 F.3d 696, 701 (9th Cir. 2009).

Clairmont also challenges (1) the denial of his motion to strike certain deposition testimony, and (2) the grant of Wilson's motion to amend her answer. First, in light of our conclusion that Wilson is not entitled to qualified immunity, we hold that the denial of Clairmont's motion to strike is moot. We therefore dismiss Clairmont's appeal of this issue. Second, because Clairmont cannot establish that he was prejudiced, we reject Clairmont's challenge [**8] to the order granting

leave to amend. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Accordingly, we affirm the district court's ruling granting Wilson's motion to amend.

[*1100] II. Discussion

As a preliminary matter, Wilson argues that she could not have violated Clairmont's *First Amendment* rights because she did not have any governmental authority over him. More specifically, Wilson argues that she lacked the authority to fire Clairmont or to order the Probation Unit to stop referring clients to SMH. Regardless of Wilson's actual authority, the factual record could reasonably support a finding that Wilson threatened SMH with the possibility that the Probation Unit would stop referring defendants to SMH unless SMH terminated Clairmont. In addition, *First Amendment* protection does not depend on whether the governmental action is direct or indirect. Where the government may not prohibit certain speech, it also may not threaten to exert economic pressure on a private employer in order to " 'produce a result which [it] could not command directly.' " *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)).

In [**9] reviewing the district court's legal conclusion that Wilson is entitled to qualified immunity, we apply the familiar analytical framework laid out in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), modified by *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Under *Saucier*, whether a government official is entitled to qualified immunity is a two-part inquiry: (1) whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right; and (2) whether that right was clearly established "in light of the specific context of the case." *Id.* at 201. We address these questions in turn. See *Pearson*, 129 S. Ct. at 818 (holding that courts may consider the two prongs in either order).

A. The public employee balancing test applies

Before addressing whether Clairmont has demonstrated that Wilson violated his constitutional rights, we must first determine whether Clairmont should be considered a public employee or a private citizen. "[T]he State has interests as an employer in regulating the

speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry [**10] in general." *Pickering*, 391 U.S. at 568. This is because the government, as an employer, has an interest "in promoting the efficiency of the public services it performs through its employees." *Id.* As a result, "a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public." *City of San Diego v. Roe*, [*1101] 543 U.S. 77, 80, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam).

When a plaintiff is a public employee, we apply a test that balances the government's legitimate administrative interests as an employer against the employee's interests in free speech, to determine whether the government has violated the employee's *First Amendment* right to speak freely. *See id.* Accordingly, in evaluating whether a plaintiff should be considered a public employee, we consider whether the relationship between the parties is analogous to that between an employer and employee and whether the rationale for balancing the government's interests in efficient performance of public services against public employees' speech rights applies. *CarePartners, LLC v. Lashway*, 545 F.3d 867, 881 (9th Cir. 2008) (citing *Blackburn v. City of Marshall*, 42 F.3d 925, 932-34 (5th Cir. 1995)), [**111] cert. denied, 129 S. Ct. 2382, 173 L. Ed. 2d 1294 (2009).

An independent contractor who provides services to the government is generally treated like a public employee for purposes of determining whether the contractor has alleged a violation of his *First Amendment* rights. *Bd. of Cnty. Comm'rs. v. Umbehr*, 518 U.S. 668, 673-74, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996). In *Umbehr*, the Court noted the similarities between an independent contractor and a public employee, recognizing both an independent contractor's interests in financially valuable government contract work and the government's need to be free to terminate an independent contractor (1) to respond to poor performance; (2) to improve efficiency, efficacy, and responsiveness; and (3) to prevent the appearance of corruption. *Id.* at 674. Recognizing that independent contractors are protected by the *First Amendment* from retaliatory government action, the Court held that "the *Pickering* test, determines the extent of their protection." *Id.* at 673. Thus, "[w]hen a business vendor operates under a contract with a public

agency, we analyze its *First Amendment* retaliation claim under § 1983 using the same basic approach that we would use if the claim had been raised by an employee of the [**12] agency." *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004).

Clairmont was not employed by the Municipal Court; he worked for SMH, a private company. Therefore, it is not immediately obvious whether he should be treated as a public employee, an independent contractor, or as a private citizen. Clairmont argues that, because he was not employed by the Municipal Court, he should be treated as a private citizen. As Clairmont notes, although the Probation Unit relies on the information it receives from Treatment providers, it provides no direct funding to these organizations, nor does it have control over the certification, programming, hiring, or firing by the various Treatment providers. There is also no evidence in the record that there was any obligation or even authorization for Wilson to threaten SMH that the Probation Unit would stop making referrals if management did not make the changes that she wanted, such as removing Clairmont from his position.⁵ As Clairmont points out, [*1102] under the applicable regulation, the authority to investigate complaints against Treatment providers and to impose sanctions rests with the Department of Social and Health Services, not the [**13] Probation Unit. *Wash. Admin. Code* § 388-60-0615. Thus, under this regulation, if Wilson had concerns about SMH's Treatment program, she could have contacted the Department of Social and Health Services officials and asked them to conduct an investigation.

⁵ Wilson argues that she had an obligation to contact SMH when she became concerned about Clairmont's testimony. She relies on the Washington Supreme Court's opinion in *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (Wash. 1999) (en banc), which held that probation counselors have a duty to protect the public from reasonably foreseeable danger resulting from the dangerous propensities of probationers under their supervision. Wilson's reliance on *Hertog* is misplaced; the fact that Wilson might be obligated to monitor carefully the defendants under the Probation Unit's supervision does not turn the Probation Unit's relationship with all of the defendants' service-providers into an employer-employee relationship for purposes of

First Amendment analysis.

Clairmont argues that SMH, like other Treatment providers, is simply a licensee that is regulated by the state. This argument might have some force were it not for the unique relationship between [**14] the Municipal Court and SMH. Although SMH was licensed by the state as a Treatment provider, and listed as a provider of such services, it offered its services at the courthouse and maintained a close relationship with representatives from the Probation Unit. Under the terms of its contract with the Municipal Court, SMH "provide[d] screening and referral case management and consultation to the Probation Unit." SMH was also required to provide "staff coverage in the court Resource Center 40 hours per week." Further, "[a]ll SMH staff [had to] submit a monthly report . . . to document the number of participant's [sic] served, direct services rendered, number of service hours, and linkages to other court and community based services." The contract further provided that SMH's work "shall, at all times, be subject to the City's [through the Municipal Court] general review and approval." Finally, as noted above, the contract characterized the relationship between SMH and the Municipal Court as "that of an independent contractor."

Clairmont was not a signatory to the contract, but SMH could not provide Treatment services without certified individual providers like Clairmont. Although Clairmont [**15] was not a Municipal Court employee, given the nature of the relationship between the court and SMH, the nature of the services provided by SMH, and Clairmont's role in the provision of such services, we conclude that his relationship to the Municipal Court was analogous to that of an employer and employee. Further, given the Probation Unit's need to ensure that SMH's services were properly provided to court-ordered Treatment participants, the balance tips in favor of treating Clairmont as a public employee for purposes of determining whether he has alleged a viable *First Amendment* retaliation claim. We therefore review Clairmont's *First Amendment* retaliation claim using the *Pickering* balancing test set forth below.

B. Under the public employee balancing test, Clairmont has alleged a *First Amendment* retaliation claim

"It is well settled that the state may not abuse its position as employer to stifle the *First Amendment* rights

[its employees] would otherwise enjoy as citizens to comment on matters of public interest." *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (quoting *Pickering*, 391 U.S. at 568), cert. denied, 130 S. Ct. 1047, 175 L. Ed. 2d 881 (2010). In applying *Pickering's* balancing test, [**16] we employ a sequential five-step inquiry to determine whether a public employee has alleged a violation of [*1103] his *First Amendment* rights as a result of government retaliation for his speech:

- (1) whether the plaintiff spoke on a matter of public concern;
- (2) whether the plaintiff spoke as a private citizen or public employee;
- (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
- (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and
- (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. The plaintiff bears the burden of proof on the first three areas of inquiry, but the burden shifts to the government to prove the last two. *Id.* at 1071. If the plaintiff fails to carry his burden at any step, qualified immunity should be granted to the defendant. *Id.* at 1070-72. Here, because Clairmont ultimately prevails at all five steps, we conclude that he has alleged sufficient facts to establish that he was terminated in violation of his *First Amendment* rights.

1. Clairmont's speech was on a matter of public [17] concern**

"We have defined the scope of the public concern element broadly and adopted a liberal construction of what an issue of public concern is under the *First Amendment*." *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709-10 (9th Cir. 2009) (internal quotation marks and citations omitted). We have specifically rejected "rigid multi-part tests" and refused to "articulate[] a precise definition of public concern." *Id.* at 709 (internal quotation marks omitted). Rather, we rely on the framework set forth in *Connick v. Myers*, which reviews "the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (emphasis added);

Eng, 552 F.3d at 1070. On the basis of this "generalized analysis of the nature of the speech," we can place the speech on a continuum ranging from matters of public concern to matters of purely personal concern. See *Desrochers*, 572 F.3d at 709. On one end, there is speech that relates to matters of concern to the community, including political or social matters. *Eng*, 552 F.3d at 1070. On the other end, there are individual grievances and personnel disputes that are irrelevant to the public's evaluation of governmental [*18] agencies. *Id.*

Clairmont argues that, regardless of the subject matter, truthful testimony given pursuant to a subpoena should be considered per se a matter of public concern. As we detailed in *Alpha Energy Savers*, our sister circuits are split on "whether the context of a courtroom appearance raises a public employee witness's testimony to the level of public concern, regardless of its content." 381 F.3d at 926 n.6. There, we declined to decide whether a public employee's testimony was inherently a matter of public concern. *Id.*

So too here, we need not decide whether truthful testimony given pursuant to a subpoena is per se a matter of public concern because in this case, the content, form, and context of Clairmont's testimony establish that his speech related to a matter of public concern.

"First and foremost, we consider the content of the speech the greatest single factor in the *Connick* inquiry." *Desrochers*, 572 F.3d at 710 (internal quotation marks and citation omitted). Speech that deals with the functioning of government is a " 'matter[] of inherent public concern.' " *Eng*, 552 F.3d at 1072 (quoting *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995)). In addition, speech [*19] that helps the public evaluate [*1104] the performance of public agencies addresses a matter of public concern. *Id.* at 1073 (citing *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006)). Thus, for example, speech alleging that the government engaged in discrimination or other civil rights violations is on a matter of public concern. See, e.g., *Alpha Energy Savers*, 381 F.3d at 925. Finally, speech discussing "threats to public safety" is "of vital interest to citizens," and speech exposing policies that put people in jeopardy is " 'inherently of interest to the public.' " *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (quoting *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1406 (9th Cir. 1988)).

Here, Clairmont's testimony dealt with the

performance of an independent Treatment provider who had been treating a criminal defendant as part of a court-ordered program. Clairmont gave expert testimony regarding how he would have dealt with a hypothetical Treatment client who had engaged in the type of conduct the defendant allegedly committed. Clairmont's testimony thus dealt with the ways in which Treatment programs treat charged and convicted domestic violence offenders, which ultimately implicates [*20] the Municipal Court's attempts through the Probation Unit to protect victims of domestic violence--unquestionably a matter of public concern. See *Hyland*, 972 F.2d at 1137; cf. *Jones v. Union County*, 296 F.3d 417, 426 (6th Cir. 2002) (stating that "[T]here is no question that combating domestic violence is a matter of public concern"); *Rendish v. City of Tacoma*, 123 F.3d 1216, 1224 (9th Cir. 1997) ("A municipal court judge's allegedly inappropriate remarks made in domestic violence cases implicate the public's interest in the impartial administration of the courts.").

Moreover, it is irrelevant to our analysis whether Clairmont's testimony influenced the judge's ultimate determination regarding revocation. *Robinson v. York*, 566 F.3d 817, 823 (9th Cir. 2009), cert. denied, 130 S. Ct. 1047, 175 L. Ed. 2d 881 (2010). Testimony that addresses a matter of public concern need not have an effect on the result of the litigation, it need only contribute in some way to the resolution of a proceeding in which a matter of public concern is at issue. *Id.*

The form that the speech in question takes is another factor relevant to whether speech addressed a matter of public concern. *Desrochers*, 572 F.3d at 714-15, 715 n.17. [*21] Although not dispositive, a small or limited audience " 'weigh[s] against [a] claim of protected speech.' " *Desrochers*, 572 F.3d at 714 (alteration in original) (quoting *Roe v. City of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997)); see also *Garcetti v. Ceballos*, 547 U.S. 410, 420, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). For example, when speech takes the form of an internal employee grievance, and is not presented to the public, the form "cuts against a finding of public concern." *Desrochers*, 572 F.3d at 715. Here, the form of Clairmont's speech was subpoenaed testimony, which was presented in a public courtroom. Thus, the form of Clairmont's speech supports a determination that the speech was on a matter of public concern.

Finally, we consider the context of Clairmont's testimony and examine the point of his speech. *Id.* When

a public employee's contested speech occurs in the context of an internal power struggle or personal employment grievance, this will militate against a finding of public concern. *Id.* Sworn courtroom testimony, however, will constitute speech on a matter of public concern when it "bring[s] to light potential or actual discrimination, corruption, or other wrongful conduct by government agencies [**22] or officials." *Alpha Energy Savers*, [*1105] 381 F.3d at 925 (citing *Lytle v. Wondrash*, 182 F.3d 1083, 1087-88 (9th Cir. 1999); *Rendish*, 123 F.3d at 1223-24). Indeed, in *Alpha Energy Savers*, we held that a public employee's testimony on behalf of a co-worker's private grievance against his union was on a matter of public concern when he alleged that the union breached its duty of fair representation by failing to investigate and pursue a grievance against the county for employment discrimination on the basis of race and age. *Id.* We concluded that, irrespective of the motivation behind the speech in question, "[s]o long as either the public employee's testimony or the underlying lawsuit meets the public concern test, the employee may, in accord with *Connick*, be afforded constitutional protection against any retaliation that results." *Alpha Energy Savers*, 381 F.3d at 927.

Here, the speech at issue was Clairmont's expert testimony at a criminal defendant's revocation hearing. His testimony was offered to help the judge decide whether to allow the defendant to continue his Treatment. Moreover, Clairmont spoke not because he volunteered to do so, but because he was subpoenaed. There is no record [**23] evidence that Clairmont was motivated by anything other than a desire to comply with the subpoena and to testify truthfully as required by law.

In sum, we conclude that the content, form, and context of Clairmont's testimony demonstrate that his speech was on a matter of public concern. We thus proceed to step two.

2. Clairmont's testimony was not part of his official duties

A public employee's speech is not protected by the *First Amendment* when it is part of the employee's official job duties. *Garcetti*, 547 U.S. at 426. Whether an employee's disputed speech is part of his official duties presents a mixed question of fact and law. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). For purposes of considering Wilson's claim to qualified immunity at the summary judgment stage, we

resolve any material factual disputes in Clairmont's favor. *Huppert v. City of Pittsburg*, 574 F.3d 696, 701 (9th Cir. 2009).

Here, SMH did not ask Clairmont to testify; he testified because he was subpoenaed by a third party. Moreover, the only evidence in the record regarding Clairmont's official job duties is Clairmont's "Job Description" attached to Wilson's motion for summary [**24] judgment.⁶ Clairmont's job description did not include testifying as an expert witness in court proceedings. Indeed, there is nothing in the job description about testifying at all, even on behalf of his own clients.

6 At his deposition, Clairmont reviewed the job description and verified that it "generally describe[d]" his job duties at SMH.

Wilson argues that it is not unusual for a domestic violence counselor to testify at a court hearing and supports her argument by referring to another domestic violence counselor who testified at the same hearing as Clairmont. As Clairmont points out, the fact that *other* domestic violence counselors from different organizations might testify at court hearings is irrelevant to whether *his* official job duties required him to testify at such hearings. In addition, the other counselor stated that he testified only because he was ordered to do so by the judge. Finally, Wilson admits in her summary judgment declaration that "[the probation unit counselor] found it unusual that Clairmont was testifying in [*1106] [a] hearing that did not involve a person he was treating."

Wilson also argues that Clairmont nonetheless testified as part of his official duties because [**25] the content of Clairmont's testimony regarding his treatment philosophy described the nature of his duties as a contract counselor for SMH. In *Garcetti*, however, the Supreme Court held that even if the content of an employee's speech concerned the subject matter of his employment, this fact was not dispositive of the employee's *First Amendment* retaliation claim. 547 U.S. at 421. "As the Court noted in *Pickering*: 'Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.' " *Id.* (quoting *Pickering*, 391 U.S. at 572); see also *Eng*, 552 F.3d at 1073 (holding that Eng's version of the facts

plausibly showed that he spoke as a private citizen because, although he learned about the subject matter of his speech in the course of his work, he had no official duty to complain about it to the relevant agency); cf. *Huppert*, 574 F.3d at 707-08 (granting qualified immunity because testifying in court is part of a California police officer's official duties).

Although [**26] Clairmont testified about treating a hypothetical Treatment client, there is no evidence that testifying in court, whether or not as an expert, was a part of his official duties at SMH. When viewed in the light most favorable to Clairmont, *Huppert*, 574 F.3d at 701, the record evidence supports a finding that Clairmont was not testifying as part of his official duties. We therefore continue to step three of the analysis.

3. Clairmont's testimony was a substantial or motivating factor in his termination

The third inquiry--whether Clairmont's testimony was a substantial or motivating factor in his termination--"is purely a question of fact. . . . [W]e must assume the truth of the plaintiff's allegations." *Eng*, 552 F.3d at 1071. The parties dispute whether Clairmont was fired as a result of Wilson's comments to Clairmont's SMH supervisors about his testimony, or whether his termination resulted from complaints about Clairmont's performance made by Wilson long before Clairmont testified. Several emails in the record that, viewed in the light most favorable to Clairmont, *Huppert*, 574 F.3d at 701, reasonably could support a finding that Clairmont was fired because of Wilson's comments to his [**27] supervisor about Clairmont's subpoenaed testimony. We therefore proceed to step four.

4. Wilson failed to give an adequate justification for treating Clairmont differently than other members of the general public

The government bears the burden of showing that under the *Pickering* balancing test, "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. "Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes." *Eng*, 552 F.3d at 1071. As we have emphasized, we must view all disputed facts in the light most favorable to Clairmont. *Huppert*, 574 F.3d at 701.

Eng holds specifically that the government must establish that its "legitimate *administrative* interests outweigh [*1107] the employee's *First Amendment* rights." *Id.* (emphasis added). These interests include promoting efficiency and integrity in the discharge of official duties and maintaining proper discipline in the public service. *Connick*, 461 U.S. at 150-51. Because Clairmont's speech is examined in the context of independent [**28] contractors, this test is "adjusted to weigh the government's interests as contractor rather than as employer." *Umbehr*, 518 U.S. at 673. Cases that analyze whether the government's administrative interests outweighed the plaintiff's right to engage in protected speech examine disruption resulting both from the act of speaking and from the content of the speech. Here, we conclude that Wilson has not established disruption of either kind sufficient to outweigh Clairmont's *First Amendment* rights.

In examining whether a public employee's act of speaking disrupted the workplace, we review "the manner, time, and place in which" the employee's speech took place. *Connick*, 461 U.S. at 152. In *Connick*, the fact that the employee's speech took place at the office supported the Court's determination that the speech disrupted the efficiency of the workplace. *Id.* at 153. The Court contrasted the situation with that in *Pickering*, where the employee's speech occurred during the employee's free time away from the office. *Id.* [**29] Here, Clairmont did not speak at the workplace during a Treatment session or at an office meeting; rather, he testified in a criminal hearing concerning a person he was not treating.

Relatedly, we consider whether Clairmont's testimony impeded his ability to perform his job duties. *See id.* at 151. Perhaps because Wilson earlier argued that testifying was one of Clairmont's official job responsibilities, Wilson makes no argument and puts forth no evidence that Clairmont's act of testifying at the revocation hearing prevented him from fulfilling his other work responsibilities.

Wilson does argue, however, that the *content* of Clairmont's testimony interfered with the working relationship between SMH and the Probation Unit. In *Connick*, the Court held that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52.

There, the Court characterized the public employee's speech as "causing a mini-insurrection" and as "an act of insubordination which interfered with working relationships." *Id.* at 151. To prove that an employee's speech interfered with working relationships, the government [**30] must demonstrate "actual, material and substantial disruption, or reasonable predictions of disruption in the workplace." *Robinson, 566 F.3d at 824* (internal quotation marks omitted). And if there are material factual disputes, we resolve all factual disputes in favor of the non-moving party, provided that there is evidence that reasonably would support such a finding. *See CarePartners, 545 F.3d at 875 n.3* (citing *Scott v. Harris, 550 U.S. 372, 379-80, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*).

Here, although Wilson alleges that Clairmont's testimony disrupted the Probation Unit's workplace, she cites no record evidence to support the allegation. We note, however, that in support of her motion for summary judgment, Wilson filed a declaration in which she stated that the Probation Unit's staff aired some concerns about the content of Clairmont's testimony at the monthly staff meeting held the day after Clairmont testified. In speaking to Clairmont's supervisor, Wilson [*1108] characterized her staff as distrustful of Clairmont because "[his] testimony indicated that [he] was still having the same problems I had discussed with [him earlier]." In other words, Wilson appears to argue that Clairmont's testimony was disruptive, because [**31] it confirmed his Treatment philosophy, which was the basis for his alleged performance issues.

We must construe all evidence in the light most favorable to Clairmont. *Huppert, 574 F.3d at 701*. As noted above, Clairmont produced evidence that disputes Wilson's allegations of prior poor performance. In addition, Clairmont argues that the Probation Unit's expressed distrust is a result not of what he said (or any alleged prior poor performance), but rather is a result of the fact that he testified on behalf of a criminal defendant and thus on the opposite side of the Probation Unit. We agree with the Fifth Circuit's statement that "[a] concept of loyalty that sweeps so broadly is not one that may legitimately trump compelling interests in speaking on matters of public concern." *Kinney v. Weaver, 367 F.3d 337, 366 (5th Cir. 2004)* (en banc). More importantly, there is no evidence in the summary judgment record substantiating Wilson's allegations of disruption in the workplace.

In balancing Clairmont's *First Amendment* right to testify truthfully pursuant to a subpoena against the justifications set forth above, we hold that the weak and largely unsupported administrative interests advanced [**32] by Wilson do not outweigh Clairmont's *First Amendment* free speech rights. Having concluded that Wilson is not entitled to summary judgment at step 4, we proceed to step 5.

5. Wilson failed to show that Clairmont would have been terminated even absent his testimony

"[I]f the government fails the Pickering balancing test, it alternatively bears the burden of demonstrating that it 'would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct.'" *Eng, 552 F.3d at 1072* (alteration in original) (quoting *Thomas, 379 F.3d at 808*).

This question relates to, but is distinct from, the plaintiff's burden to show the protected conduct was a substantial or motivating factor. It asks whether the "adverse employment action was based on protected *and* unprotected activities," and if the state "would have taken the adverse action if the proper reason alone had existed."

Id. (quoting *Knickerbocker v. City of Stockton, 81 F.3d 907, 911 (9th Cir. 1996)*). This inquiry is "purely a question of fact" and "we must therefore once again assume the truth of the plaintiff's allegations." *Id.*

Here, Clairmont submitted deposition testimony, emails among staff at [**33] SMH, and his termination letter, which suggest it was only after Clairmont's testimony and Wilson's subsequent threats of reprisal that SMH decided to terminate Clairmont. Because "[i]mmunity should be granted on this ground only if the state successfully alleges, without dispute by the plaintiff," that it would have taken the adverse action "even absent the questioned speech," we conclude that, in light of all the record evidence, Wilson has not met her burden on this issue and has, therefore, not demonstrated that she is entitled to summary judgment on this alternative ground. *See id.*

In sum, on the basis of the summary judgment record, we hold that Clairmont has presented sufficient

evidence to establish that his speech was constitutionally protected and that Wilson violated his *First Amendment* rights. Therefore, we must also examine whether it was clearly [*1109] established that Clairmont's speech was constitutionally protected and that a reasonable official in Wilson's position would have understood that her actions would violate Clairmont's *First Amendment* rights at the time the alleged retaliation took place.

C. It was clearly established that Clairmont's speech was protected

As noted [**34] earlier, even where a plaintiff has presented sufficient evidence to show that his constitutional rights were violated, a government official may still be entitled to qualified immunity. *Saucier*, 533 U.S. at 201. "If the right was not clearly established at the time of the violation, the official is entitled to qualified immunity." *CarePartners*, 545 F.3d at 876 (citing *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007)). Whether the law was clearly established is an objective standard; the defendant's "subjective understanding of the constitutionality of his or her conduct is irrelevant." *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008). Thus, we must determine only whether, in light of the existing law in 2007, a reasonable Manager of the Probation Services would have understood that her actions violated Clairmont's *First Amendment* right to free speech. *See id.*

The plaintiff bears the burden to show that the contours of the right were clearly established. However, "closely analogous preexisting case law is *not* required to show that a right was clearly established." *Robinson*, 566 F.3d at 826 (emphasis added) (quoting *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001)). [**35] While "there must be some parallel or comparable factual pattern[,] . . . the facts of already decided cases do not have to match precisely the facts with which [the government employer] is confronted." *Fogel*, 531 F.3d at 833; *see also Rivero v. City of San Francisco*, 316 F.3d 857, 865 (9th Cir. 2002) (stating that to defeat qualified immunity, a plaintiff must show that two legal propositions were clearly established: (1) that the speech was on a matter of public concern, and (2) that the employee's speech interests outweighed the government's legitimate administrative interests); *cf. Moran v. Washington*, 147 F.3d 839, 843 (9th Cir. 1998) (rejecting as overly abstract a district court's determination that a constitutional right was clearly established because

"[d]ismissal based upon protected speech is impermissible"). Because there were cases that would have alerted a reasonable person in Wilson's position that it would be unlawful to retaliate against an employee for having testified in a criminal proceeding pursuant to a subpoena, we conclude that Clairmont's *First Amendment* rights were clearly established at the time of his alleged retaliatory firing.

In *Robinson*, we held that, [**36] by 2005, it was clearly established that a public-employee witness had a *First Amendment* right to testify in a class-action lawsuit in which discrimination was at issue. 566 F.3d at 826. We so concluded because (1) the Supreme Court had already decided *Pickering*, "establishing that the *First Amendment* protects employee speech on matters of legitimate public concern," and (2) it was already clearly established that "only a real, not imagined, disruption might outweigh the expressive interests of the employee." *Id.* (internal quotation marks omitted). In addition, we noted that the type of testimony given by Robinson had been held to be a matter of public concern and that the justification given by the employer for the alleged retaliation had been held to be insufficient to justify retaliation for protected speech. *Id.*

As noted in Part II.B.1, above, we have held previously that threats to public safety [*1110] and the impartial judicial administration of domestic violence cases are issues of public concern. *Rendish*, 123 F.3d at 1224; *Hyland*, 972 F.2d at 1137. And in *Robinson*, we held that, as early as 2005, it was clearly established that a public employee's voluntary testimony relating to discrimination [**37] was a matter of public concern. 566 F.3d at 826. In light of our then existing case law, we conclude that, in 2007, it was clearly established that Clairmont's subpoenaed testimony related to an issue of public concern.

In addition, as stated in *Robinson*, it was clearly established by 2005 that for a government employer's legitimate administrative interests to outweigh an employee's right to engage in protected speech, the disruption had to be "real, not imagined." Wilson has not established that there was any disruption other than some concerns aired at a staff meeting. Indeed, Wilson's own declaration suggests that it was Clairmont's alleged poor performance that disrupted his working relationship with the Probation Unit and that Clairmont's testimony merely confirmed pre-existing concerns.

Wilson's claim to qualified immunity can succeed only if we take the evidence in the light most favorable to her and draw all competing inferences in her favor; this is fatal to her argument. When we resolve all factual disputes and draw all reasonable inferences in Clairmont's favor, as we must, there is no support for Wilson's argument that Clairmont's testimony caused workplace disruption the [**38] quelling of which outweighed Clairmont's interest in engaging in protected speech. It was clearly established at the relevant time that Wilson's proffered evidence of disruption in the workplace was woefully insufficient. *Robinson*, 566 F.3d at 826 (holding that factual disputes about the extent of the workplace disruption and about whether the justifications asserted by the defendant were pretextual precluded a finding of disturbance sufficient to outweigh a public employee's right to engage in protected speech). We therefore agree with Clairmont that the law was clearly established at the time of his alleged retaliatory firing.

III. Conclusion

For all of the above reasons, we conclude that Clairmont has presented sufficient evidence from which a reasonable fact-finder could conclude that Wilson violated Clairmont's *First Amendment* rights when she played a substantial role in Clairmont's retaliatory firing. Clairmont has also established that his right to testify truthfully in response to a subpoena on issues related to public safety and discrimination was clearly established at the time of his testimony and termination. Under these circumstances, the district court erred in concluding [**39] that Wilson was entitled to qualified immunity. Accordingly, we reverse the district court's grant of summary judgment to Wilson and remand for trial.

DISMISSED in part; AFFIRMED in part;
REVERSED in part and REMANDED.
Plaintiff-Appellant shall recover his costs on appeal.



JUSTIN LEE, Plaintiff, v. CATERPILLAR INC., Defendant.

1:11-cv-2130-WSD

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
GEORGIA, ATLANTA DIVISION

2011 U.S. Dist. LEXIS 144959

December 2, 2011, Decided

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COUNSEL: [*1] For Justin Lee, Plaintiff: Charlena L. Thorpe, The Law Office of Charlena Thorpe, Inc., Duluth, GA; Demetrius Tennell Lockett, Townsend Lockett & Milfort, LLC, Atlanta, GA.

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JUDGES: WILLIAM S. DUFFEY, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM S. DUFFEY, JR.

OPINION

OPINION AND ORDER

This matter is before the Court on Defendant Caterpillar Inc.'s ("Caterpillar") Motion for Judgment on the Pleadings [4].

I. BACKGROUND

This action arises out of the termination of Plaintiff Justin Lee's employment by one of Caterpillar's contractors, Supply Chain Services International, Inc. ("SCSI"). Lee alleges that Caterpillar caused SCSI to terminate Lee's employment by falsely reporting to SCSI that Lee had been involved in an altercation at

Caterpillar's assembly plant in Griffin, Georgia (the "Griffin Facility").

Lee was an SCSI employee from April 21, 2008, to November 21 or 24, 2008. (Compl. [1-2] ¶ 5).¹ SCSI is a Caterpillar contractor that provides inspection services for incoming parts and outgoing engine assemblies at Caterpillar's Griffin Facility. (Id.). Lee worked for SCSI at the Griffin Facility inspecting Caterpillar engine assemblies [*2] prior to delivery to customers. (Id. ¶ 10).

¹ Lee initially alleges he was an employee until November 21. Later, however, he alleges that SCSI terminated him as a result of information it received from Caterpillar on November 24, 2008. (E.g., id. ¶ 22).

On Friday, November 21, 2008, three Caterpillar employees reported an altercation at the Griffin Facility between Lee and Fredericka Hughes, a female employee of another Caterpillar contractor. (Id. ¶ 11, Ex. A). One employee reported hearing yelling and then seeing Lee yelling at Ms. Hughes and putting his hands in her face. (Id.). The second employee reported that she heard Lee yelling at someone and that a couple minutes later Ms. Hughes emerged from the area of the yelling. (Id.). This employee stated that Ms. Hughes had blamed herself for causing Lee to yell at her. (Id.). The third employee reported that Lee was "screaming and cussing" at Ms. Hughes. (Id.). After the purported altercation, Caterpillar

escorted Plaintiff from the premises of the Griffin Facility.

Lee disputes the version of events reported by the Caterpillar employees. He alleges he was not involved in an altercation with Ms. Hughes and did not threaten her. (Id.). [*3] He also alleges that on the day of the purported incident, Ms. Hughes stated orally and in writing that she was not involved in an altercation with Lee and that Lee did not threaten her. (Id. ¶¶ 13-15). Caterpillar did not interview Lee regarding the incident. (Id. ¶ 16; Answer [3] ¶ 16). Lee contends that Caterpillar personnel were retaliating against him for citing numerous problems with Caterpillar engine assemblies that Lee discovered during his inspections. (Compl. ¶¶ 17, 24).

According to Lee, on Monday, November 24, 2008, Caterpillar reported to SCSi that Lee had been in an altercation at the Griffin Facility and had threatened Ms. Hughes. (Id. ¶ 18). Caterpillar also forwarded to SCSi the statements by the three Caterpillar employees who witnessed the altercation. (Id. ¶ 19; Answer ¶ 19). Lee alleges that Caterpillar failed to inform SCSi that Ms. Hughes denied orally and in writing having the altercation with Lee. (Compl. ¶¶ 20-21). Lee contends these communications by Caterpillar were knowingly false. (Id. ¶ 23). He further alleges that SCSi, relying on Caterpillar's false or misleading communications, terminated Lee's employment. (Id. ¶ 22).

Lee filed his Complaint on May [*4] 27, 2011. The Complaint has a section called "Relevant Factual Background," followed by 25 paragraphs and his prayer for relief. The Complaint does not have separate counts or claims and does not state the cause of action under which Lee seeks relief. The Complaint simply claims that on November 24, 2008, Caterpillar made a knowingly false, non-privileged statement to SCSi that harmed Lee. Caterpillar construed the Complaint, which alleges all the elements of defamation, as stating a claim for defamation. It filed a motion for judgment on the pleadings, on the ground that defamation has a statute of limitations of one year and Lee filed his Complaint two and one-half years after the allegedly defamatory communication. Lee responded that fraudulent conduct by Caterpillar tolled the limitations period for his defamation claim. Lee also contends that his Complaint contains claims for negligence, fraud, negligent misrepresentation, and tortious interference with employment. Caterpillar replies

that grouping these claims together and failing to distinguish between them violates *Federal Rule of Civil Procedure 10(b)* and that, in any event, the Complaint fails to state a claim upon which [*5] relief can be granted under any of these theories.

II. DISCUSSION

A. Legal Standard

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." *Fed. R. Civ. P. 12(c)*. "A motion for judgment on the pleadings is subject to the same standard as is a *Rule 12(b)(6)* motion to dismiss." *Provident Mut. Life Ins. Co. of Phila. v. City of Atlanta*, 864 F. Supp. 1274, 1278 (N.D. Ga. 1994). In considering a motion for judgment on the pleadings, the allegations contained in the complaint must be accepted as true and the facts and all inferences must be construed in the light most favorable to the nonmoving party. See *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). "[U]nwarranted deductions of fact," "conclusory allegations," and "legal conclusions," however, "are not admitted as true." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (internal quotation marks omitted).

Ultimately, the complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Mere "labels and conclusions" are insufficient. *Twombly*, 550 U.S. at 555. [*6] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). This requires more than the "mere possibility the defendant acted unlawfully." *Sinaltrainal*, 578 F.3d at 1261. "The well-pled allegations must nudge the claim 'across the line from conceivable to plausible.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

B. Limitations Period For Defamation Claims

"Georgia law is . . . clear that the statute of limitations for 'injuries to the reputation' must be filed within one year after the right of action accrues or it is time-barred." *Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146, 1153 (11th Cir. 2011) (citing *Ga. Code Ann. §*

9-3-33). A claim for libel or slander is one for injury to reputation. See *Infinite Energy, Inc. v. Pardue*, 310 Ga. App. 355, 713 S.E.2d 456, 463 (Ga. Ct. App. 2011); Ga. Code Ann. § 51-5-1 (defining libel). A defamation claim accrues on the date the allegedly defamatory communication is published. See *McCleskey v. Vericon Res., Inc.*, 264 Ga. App. 31, 589 S.E.2d 854, 856 (Ga. Ct. App. 2003).

Lee alleges Caterpillar [*7] defamed him on November 24, 2008, when it told Lee's employer that Lee had been in an altercation with and threatened a female employee at the Griffin Facility. (Compl. ¶ 18). Lee's defamation claim therefore accrued on November 24, 2008, and he was required to file his claim by November 24, 2009. See *Infinite Energy*, 713 S.E.2d at 463-64 (defamation claim may be filed on one-year anniversary of accrual date). Lee did not file his Complaint until May 27, 2011, a year and a half after the limitations period on his claim expired.

Plaintiff alleges he did not become aware of the allegedly defamatory comments until May 28, 2010. (Compl. ¶ 28). This is irrelevant under Georgia law. "Actions for injuries to the reputation . . . must be brought within one year from the date of the alleged defamatory acts regardless of whether or not plaintiff had knowledge of the act or acts at the time of their occurrence." *Brewer v. Schacht*, 235 Ga. App. 313, 509 S.E.2d 378, 383 (Ga. Ct. App. 1998) (quoting *Cunningham v. John J. Harte Assocs., Inc.*, 158 Ga. App. 774, 282 S.E.2d 219, 220 (Ga. Ct. App. 1981)); *Metlife v. Wright*, 220 Ga. App. 827, 470 S.E.2d 717, 718 (Ga. Ct. App. 1996) ("ignorance of the facts constituting a [defamation] cause of action does [*8] not prevent the running of the statute of limitation").

Lee argues that fraudulent conduct tolled the limitations period for his defamation claim. Fraudulent conduct tolls the statute of limitations in two circumstances.² "The first circumstance is where the actual fraud is the gravamen of the action. In such cases the statute of limitations is tolled until the fraud is discovered or by reasonable diligence should have been discovered." *Shipman v. Horizon Corp.*, 245 Ga. 808, 267 S.E.2d 244, 246 (Ga. 1980). This circumstance does not apply to this case. The Complaint does not allege that a fraud occurred. Although Lee argues that a cause of action for fraud may be inferred from the Complaint, the Complaint itself is focused on alleging the elements of

defamation. No reasonable reading of the Complaint could allow a person to conclude that Plaintiff has alleged that fraud occurred, and the Complaint did not put Caterpillar on notice that Lee is claiming fraud. Moreover, as discussed below, see *infra* § II.C.2, the Complaint does not state a valid cause of action for fraud. Actual fraud is not the gravamen of Lee's cause of action and the statute of limitations was not tolled for that reason.

2 Only [*9] actual, as opposed to constructive, fraud tolls the statute of limitations. *Shipman v. Horizon Corp.*, 245 Ga. 808, 267 S.E.2d 244, 246 (Ga. 1980).

"The second circumstance [that tolls the limitations period] is where the gravamen of the action is other than actual fraud . . ." *Id.* "In such cases there must be a separate independent actual fraud involving moral turpitude which debars and deters the plaintiff from bringing his action. However, in these circumstances, silence concerning the underlying action cannot be a continuation of an original actual fraud because there is none." *Id.* In this case, Lee has not alleged or argued that Caterpillar committed a separate fraud that prevented him from filing this lawsuit within the one-year limitations period. He only argues that the defamatory communication was also a fraudulent statement. This is not sufficient to toll the limitations period.

There is nothing in this case to toll the limitations period for Lee's defamation claim against Caterpillar for the statements of November 24, 2008. Lee was therefore required to file his defamation claim by November 24, 2009. Because he filed his Complaint after that date, on May 27, 2011, judgment on the pleadings [*10] in Caterpillar's favor is required to be granted on Lee's defamation claim.

C. Lee's Alternative Theories Of Recovery

Lee contends in his response to Caterpillar's Motion for Judgment on the Pleadings that the Complaint also asserts claims for negligence, fraud, negligent misrepresentation, and tortious interference with employment.³ This seems to violate the principle that separate claims for relief should be separately identified or placed in separate counts of the Complaint and for this reason these claims are required to be dismissed. See *Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) (citing *Fed. R.*

Civ. P. 10(b)); *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 905 (11th Cir. 1996) (noting that it was improper for the plaintiff to assert nine discrete theories of recovery within single count of complaint).

3 The parties do not dispute that these theories of recovery, unlike Lee's defamation claim, are subject to a four-year limitations period and thus are not time-barred.

The parties, however, have briefed the adequacy of Lee's alternative theories of relief. The Court therefore will address the adequacy of Lee's new theories and consider [*11] whether they state claims upon which relief can be granted.

1. Negligence

Lee argues that Caterpillar acted negligently when it gave Lee's employer an allegedly false account of the incident between Lee and Ms. Hughes. To state a claim for negligence, a plaintiff must allege "the existence of a duty on the part of the defendant, a breach of that duty, causation of the alleged injury, and damages resulting from the alleged breach of the duty." *Rasnick v. Krishna Hospitality, Inc.*, 289 Ga. 565, 713 S.E.2d 835, 837 (Ga. 2011). Lee has not alleged the duty on which his purported negligence claim is based and he has not alleged how Caterpillar breached that duty. There also does not appear to be any basis for Lee to allege the existence of such a duty or a breach thereof. See, e.g., *McBride v. WSPA/Media Gen., Inc.*, No. 6:07-467-HMH-WMC, 2007 U.S. Dist. LEXIS 45301, 2007 WL 1795835, at *4 (D.S.C. June 21, 2007) (where only duty implicated in case is duty not to defame, plaintiff's "only colorable 'negligence' claim is for defamation"). Lee has not stated a claim for negligence upon which relief can be granted.

2. Fraud And Negligent Misrepresentation

Lee also argues that his Complaint asserts a claim that Caterpillar committed fraud [*12] by falsely stating to SCSJ that Lee had an altercation with and threatened a female contractor at the Griffin Facility. Fraud has five elements: (1) "a false representation by a defendant"; (2) "scienter"; (3) "intention to induce the plaintiff to act or refrain from acting"; (4) "justifiable reliance by plaintiff"; and (5) "damage to plaintiff." *Thompson v. Floyd*, 310 Ga. App. 674, 713 S.E.2d 883, 891 (Ga. Ct. App. 2011) (quoting *Crawford v. Williams*, 258 Ga. 806, 375 S.E.2d

223 (Ga. 1989)). Caterpillar argues Lee cannot state a claim for fraud because he has not alleged that Caterpillar made any representation--let alone a false representation--to Lee or that Lee relied on any representation by Caterpillar.

Georgia follows "the familiar precept that actionable fraud must be based upon a misrepresentation made to the defrauded party, and relied upon by the defrauded party." *Fla. Rock & Tank Lines, Inc. v. Moore*, 258 Ga. 106, 365 S.E.2d 836, 837 (Ga. 1988). This precept is extended to circumstances of indirect fraud, where the misrepresentation is made to a third-party, knowing the third-party will repeat the falsehood to the plaintiff and the plaintiff will rely on the third-party. *Id.* As the Georgia Supreme Court has explained, [*13] fraud exists "where . . . A, having as his objective to defraud C, and knowing that C will rely upon B, fraudulently induces B to act in some manner on which C relies, and whereby A's purpose of defrauding C is accomplished." *Id.*

The Georgia Supreme Court has cited approvingly the formulation of this rule contained within the Second Restatement of Torts:

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Fla. Rock & Tank Lines, 365 S.E.2d at 837 n.1 (quoting *Restatement (Second) of Torts* § 533 (1977)). In *Florida Rock and Tank Lines*, for example, the defendant misrepresented to Exxon that he intended to pay for gasoline, knowing that Exxon would repeat the misrepresentation to the plaintiff and that the plaintiff, relying on Exxon, would deliver the gasoline to defendant. *Id.* at 837.

Plaintiff does [*14] not allege in his Complaint that Caterpillar made any false statements to him or that he relied on any statements. He did not even learn of the

allegedly defamatory statements until years later. Instead, the disputed statements were made to SCSI, and SCSI alone relied on the statements. This is not a case of indirect fraud because there are no allegations that SCSI repeated the statements to Lee or that it would have been possible for Lee to take any action in reliance on the statements. Lee's claim for fraud therefore fails.

Lee's claim for negligent misrepresentation fares no better. The elements of negligent misrepresentation are "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." *Futch v. Lowndes Cnty.*, 297 Ga. App. 308, 676 S.E.2d 892, 896 (Ga. Ct. App. 2009) (quoting *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 267 Ga. 424, 479 S.E.2d 727, 729 (Ga. 1997)). This cause of action comes from the *Restatement (Second) of Torts Section 522*, which the Georgia Supreme Court adopted in *Robert & Co. Assocs. v. Rhodes-Haverty P'ship*, 250 Ga. 680, 300 S.E.2d 503, 504 (Ga. 1983) [*15] (quoting, adopting, and discussing *Section 522*).

A party who makes a negligent misrepresentation is only liable to those who reasonably relied on the false statement. The elements as described in *Hardaway Co.* indicate that a plaintiff must show that the plaintiff relied on the statement and that the plaintiff suffered economic injury as a result of that reliance. The notion that liability for negligent misrepresentation may extend to harms suffered by a party who did not rely on the misrepresentation is unprecedented. The Restatement rule also demonstrates that the plaintiff must rely on the false statement. It states, in relevant part: "One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information." *Restatement (Second) of Torts § 552(1)*. Liability for negligent misrepresentation thus only extends to the pecuniary losses of those who justifiably rely on the misrepresentation.

The only disputed representation in this case was by Caterpillar to SCSI, and the only reliance in this case was by SCSI. Caterpillar made no representations to Lee, [*16] and Lee did not rely on any representations by Caterpillar. Lee therefore has not stated a claim for negligent misrepresentation against Caterpillar. ⁴

⁴ There may be an additional problem with Lee's

claim. A negligent misrepresentation claim requires that the defendant "supplie[d] information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest." *Robert & Co. Assocs.*, 300 S.E.2d at 504. Negligent misrepresentation therefore "generally applies to professional or expert defendants," *Asuamah v. Haley*, 293 Ga. App. 112, 666 S.E.2d 426, 436 (Ga. Ct. App. 2008), rev'd in part on other grounds sub nom. *Cendant Mobility Fin. Corp. v. Asuamah*, 285 Ga. 818, 684 S.E.2d 617 (Ga. 2009), or to information that is given in exchange for consideration, *Restatement (Second) Torts § 552 cmt. d*. In this case, Caterpillar was not providing expert or professional advice to SCSI and there are no allegations that it had a pecuniary interest in, or received consideration for, providing the information to SCSI.

3. Tortious Interference With Employment

Lee next contends that by causing SCSI to terminate Lee's employment, Caterpillar tortiously interfered with Lee's employment relationship [*17] with SCSI. A claim of tortious interference requires that "the plaintiff establish that the defendant is a 'third party,' i.e., a 'stranger' to the contract with which the defendant allegedly interfered." *Atlanta Market Ctr. Mgmt., Co. v. McLane*, 269 Ga. 604, 503 S.E.2d 278, 283 (Ga. 1998). This exclusion "cover[s] those who benefit from the contract of others, without regard to whether the beneficiary was intended by the contracting parties to be a third-party beneficiary." *Id.* If a defendant has "a legitimate interest in either the contract or a party to the contract, the defendant is not a stranger to the contract." *Disaster Servs., Inc. v. ERC P'ship*, 228 Ga. App. 739, 492 S.E.2d 526, 529 (Ga. Ct. App. 1997). The stranger doctrine also applies to "all parties to a comprehensive interwoven set of contracts." *Id.* (quoting *Jefferson-Pilot Commc'ns. Co. v. Phoenix City Broad., Ltd of Atlanta*, 205 Ga. App. 57, 421 S.E.2d 295, 299 (1992) (purchaser of radio station was not a stranger to contract between radio station's sellers and seller's lenders)). Thus, "in order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract." [*18] *Id.* "The Atlanta Market Center Mgmt. Co. ruling, 'in effect, reduces the number of entities against which a claim of tortious interference with contract may be

maintained." *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1284 (11th Cir. 2003) (quoting *Atlanta Mkt. Ctr. Mgmt. Co.*, 503 S.E.2d at 283).⁵

5 The Georgia Supreme Court also clarified that the "stranger doctrine" is the same for tortious interferences of both contractual and business relationships. *Atlanta Mkt. Ctr. Mgmt. Co.*, 503 S.E.2d at 283 n.2.

Georgia courts have consistently held in circumstances analogous to this case that a business is not a stranger to the employment relationship between its contractor and the contractor employees who provide the contracted services to the business. See *Kollman v. Int'l Bhd. of Elec. Workers*, No. 1:01-cv-2955-TWT, 2003 U.S. Dist. LEXIS 15893, 2003 WL 22047882, at *7-8 (N.D. Ga. July 18, 2003) (construction company not a stranger to employment relationship between its subcontractor and subcontractor's employee); *Atlanta Mkt. Ctr. Mgmt. Co.*, 503 S.E.2d at 280-283 (building owner was not a stranger to employment relationship between broker contracted to lease building space and broker's at-will employee [*19] delegated with responsibility of finding tenants for building); *Nicholson v. Windham*, 257 Ga. App. 429, 571 S.E.2d 466, 469 (Ga. Ct. App. 2002) (law firm where temporary worker was placed was not a stranger to contract between temporary worker and her temporary work agency); see also *Iraola & CIA, S.A.*, 325 F.3d at 1277, 1283-84 (under Georgia law, manufacturer was not a stranger to employment relationship between foreign distributor of its products and distributor's employees); cf. *Perry Golf Course Dev., LLC v. Hous. Auth. of City of Atlanta*, 294 Ga. App. 387, 670 S.E.2d 171, 175-76 (Ga. Ct. App. 2008) (public housing authority was not a stranger to contractual relationship between members of an LLC formed to redevelop public housing); *Pruitt Corp. v. Strahley*, 270 Ga. 430, 510 S.E.2d 821, 822 (Ga. 1999) (nursing home facility was not a stranger to independent care provider's contracts with nursing home's residents).

Here, SCSi had a contract with Caterpillar to perform inspection services at Caterpillar's Griffin Facility. (Compl. ¶ 6). To fulfill its contract with Caterpillar, SCSi employed Lee, who was responsible for inspecting engine assemblies at the Griffin Facility.

(Compl. ¶ 10). He worked at Caterpillar's facility providing [*20] services to Caterpillar. The purpose of Lee's employment relationship with SCSi was the fulfillment of SCSi's contractual obligations to Caterpillar, and the two sets of contracts and relationships were therefore interwoven. Lee's employment relationship with SCSi was also for the benefit of Caterpillar, so that Caterpillar would receive the services it required under the SCSi contract. Additionally, Caterpillar's allegedly defamatory statements were about Lee's conduct while he was at Caterpillar's facility performing services pursuant to Caterpillar and SCSi's contractual relationship. The alleged altercation between Lee and Ms. Hughes was relevant to the quality and efficiency of the performance of SCSi's contract, and it also concerned Lee's impacts on another vendor with which Caterpillar had a contract.

Taking the allegations in Lee's Complaint as true, there was an interwoven contractual and business relationship between Caterpillar, SCSi, and Lee. Caterpillar also was a beneficiary of and had a legitimate interest in Lee's employment relationship with SCSi. As a matter of law, therefore, Caterpillar was not a stranger to Lee's employment relationship with SCSi. As this is an [*21] "essential" element of a claim for tortious interference with contractual relations, *Atlanta Mkt. Ctr. Mgmt.*, 503 S.E.2d at 282, Lee has failed to state a claim for tortious interference with contractual relations upon which relief can be granted.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Caterpillar Inc.'s Motion for Judgment on the Pleadings [4] is **GRANTED**. This action is **DISMISSED**.

SO ORDERED this 2nd day of December, 2011.

/s/ William S. Duffey, Jr.

WILLIAM S. DUFFEY, JR.

UNITED STATES DISTRICT JUDGE

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Please find attached the Reply Brief of Appellants in Case No. 87269-4, Tamosaitis v. Bechtel National, Inc., et al, and the Appendix of Non-Washington Cases. This brief is filed by:

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