

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - March 26, 2010**

EVENT DATE: 04/09/2010 EVENT TIME: 02:00:00 PM DEPT.: C-62

JUDICIAL OFFICER: Ronald L. Styn

CASE NO.: 37-2008-00090684-CU-BT-CTL

CASE TITLE: SAN DIEGO COUNTY SCHOOLS FRINGE BENEFITS CONSORTIUM VS. ALLRED

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Business Tort

EVENT TYPE: Summary Judgment / Summary Adjudication (Civil)

CAUSAL DOCUMENT/DATE FILED:

The court first addresses the evidentiary issues. Cross-Complainants Barry Allred, Christopher Dougherty, Christinha Furtado, Lori Lin, Mary Seki and Michael Zeiger's evidentiary objection 6 is sustained; objections 4, 5, 7, 8 and 9 are overruled; objections 1-3 are overruled because the objected to testimony is not specified. *Fibreboard Paper Products Corporation v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, et al.* (1964) 227 Cal.App.2d 675, 712.

The court then rules as follows. Cross-Defendant Daniel Puplava's motion for summary judgment is denied. Puplava's alternate motion for summary adjudication is granted in part and denied in part.

Claims Presentation Requirements of Government Code § 900 et seq.

Puplava contends all of the alleged conduct giving rise to the unfair competition causes of action occurred more than six months prior to October 20, 2008, when the Advisors filed their Government Claim; the Advisors' failed to identify a conversion claim in their Government Claim; and two of the three interference claims were not included in the Advisors' Government Claim. However, Puplava fails to include in his separate statement a reference to evidence supporting when the Advisors filed their government claim and the contents of the claim. Absent reference in the separate statement, there is no basis to grant summary judgment/adjudication based on failure to comply with the claims presentation requirements of Government Code §900 et seq. Nonetheless, because the Advisors do not raise this evidentiary defect issue in opposition, and because it appears there is no dispute as to the date and contents of the Advisors' Government Claim, the court addresses the issue of whether the Advisors' complied with the claims presentation requirements of Government Code § 900 et seq.

Under section 911.2, "[a] claim relating to a cause of action for death or for injury to person or to personal property ... shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action." Section 945.4 then provides

that "*no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.*" (Italics added.) Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity.

State of California v. Superior Court (2004) 32 Cal.4th 1234, 1239.

Puplava argues all of the conduct allegedly giving rise to the first and sixth causes of action for unfair competition occurred more than six months prior to October 20, 2008, when the Advisors filed their Government Claim. Puplava relies on the date of his agreement to the Amended Memorandum of Understanding (March 24, 2008) and evidence he has complied with such agreement [SSUMF 21, 22]. In opposition, the Advisors submit evidence Puplava continues to provide investment advice and has not completely divested himself of his book of business. [Advisors' response to SSUMF 21, 22] Drawing all reasonable inferences in the light most favorable to non-moving party [*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843] the court finds this evidence sufficient to create triable issues of material fact as to whether Puplava continued to engage in such alleged acts within six-months of the filing of the Advisors' Government Claim. The court is not persuaded by the Advisors' argument they do not sue Puplava in his official capacity as to the first cause of action, because, as pled, the cross-complaint alleges violations of Government Code §1090, which, by its terms applies to public employees acting in their official capacity. The Advisors' submit evidence it is Puplava's dual role that gives rise to this cause of action. [Advisors' response to SSUMF 12] The court finds triable issues of fact as to whether the Advisors' first cause of action is barred by the claims presentation requirements of Government Code §900 et. seq.

As to the sixth cause of action for unfair competition, as pled, the conduct giving rise to this cause of action consists of Puplava's alleged statements made about the Advisors as well as Puplava's alleged contact with CalSTRS and SagePoint. [XC ¶¶ 119-124] Puplava submits evidence he never defamed the Advisors by falsely representing the Advisors to be unethical, dishonest, greedy, reckless and/or unlawful [SSUMF 36]. The Advisors fail to set forth evidence Puplava made allegedly defamatory statements about the Advisors, or that Puplava made such statements within six months prior to the Advisors' filing of their Government Claim. [Advisors' response to SSUMF 36] Puplava submits evidence he did not contact Cal STRS and that Cleary, the attorney for the Consortium, said nothing derogatory to Derman about the Advisors. [SSUMF 37-38] The Advisors fail to submit evidence that Puplava made any improper contact with CalSTRS, or that such contact occurred within six months prior to the Advisors' filing of their Government Claim. Puplava submits evidence that, although he contacted SagePoint, he never falsely represented to SagePoint that SagePoint would be named in the Consortium's lawsuit or falsely represented to SagePoint the advisors intended to begin a relationship with CalSTRS. Puplava also submits evidence SagePoint did not suspend its approval of the Advisors' RIA application as a result of Puplava's phone calls [SSUMF 42-43]. The Advisors fail to submit evidence that Puplava made any improper contact with SagePoint, or that such contact occurred within six months prior to the Advisors' filing of their Government Claim. The court finds the evidence relied upon by the Advisors' insufficient to create triable issues of material fact as to whether Puplava engaged in wrongful acts of unfair competition with respect to the Advisors' clients, CalSTRS or SagePoint within six months of the Advisors' filing their Government Claim. The Advisors' fail to submit evidence establishing Puplava's alleged conduct was performed in his individual capacity. The court is not

persuaded by Advisors' reliance on their cross-complaint to establish their claim as one against Pupilava as an individual. The cross-complaint specifically alleges Pupilava acted both "within the course and scope of his employment with the County" and as an independent investment advisor outside the scope of his employment. The court finds the Advisors' sixth cause of action for unfair competition is barred for failure to comply with the claim presentation requirements of Government Code §900 et. seq.

First Cause of Action - Unfair Competition

Pupilava's motion for summary adjudication is **denied**.

B & P Code §17204 confers standing only upon a "person who has suffered injury in fact and has lost money or property as a result of such unfair competition." "[T]o have standing to assert any UCL claim, Plaintiff must show either prior possession or a vested legal interest in the money or property allegedly lost." *Walker v. GEICO General Insurance Company* (E.D. Cal. 2007) 2007 US Dist. LEXIS 10652, * 9.

In his separate statement, Pupilava states "[t]he financial advisors do not have standing to assert monetary damages against Dan Pupilava for allegations of unfair competition" [SSUMF 34]. However, Pupilava fails to set forth facts with respect to the Advisors' non-monetary damage claims (i.e. restitution and injunctive relief) and fails to set forth such facts specifically with respect to the first cause of action for unfair competition. Absent identification of facts supporting Pupilava's claim of the Advisor's lack of standing, there is no basis to summarily adjudicate this causes of action.

Even if the court were to reach beyond this procedural defect, the result would not change. The Advisors submit evidence Pupilava received commissions which otherwise would have gone to the Advisors and that Pupilava took 10% of the commissions the Advisors received [Advisors' response to SSUMF 30]. The court finds evidence Pupilava took 10% of the Advisors' commissions sufficient to create triable issues of material fact as to whether the Advisors had possession or a vested legal interest in the portion of the commissions lost. The court finds these facts distinguishable from those in the authorities relied upon by Pupilava. The auto body plaintiff in *Walker* did not receive less than the agreed upon hourly rate. In *Peterson v. Celco Partnership* (2008) 164 Cal.App.4th 1583, the court rejected plaintiff's standing based on a finding plaintiffs received the insurance policy paid for – irrespective of the unlawful commission that was illegally retained by defendant as a percentage of plaintiffs' insurance payments. The court in *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.app.4th 798, found plaintiff lacked standing because she purchased the defendant's skin care cream solely to establish standing. In none of these instances did the plaintiffs receive less than what was paid for or deprived of money (or property) which they had already expended or were entitled to. Conversely, the Advisors submit evidence of commissions received by the Advisors out of which Pupilava allegedly improperly kept 10%. These facts are more analogous to *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, wherein the court found standing by a plaintiff who paid excess costs for refueling a rental vehicle. In opposition the Advisors also submit evidence that they continue to suffer injury because Pupilava continues to provide investment advice and has not divested himself of his book of business [Advisors' response to SSUMF 32]. The court finds this evidence sufficient to create triable issues of fact as to whether there is a probability of future harm as a result of Pupilava's conduct.

Second Cause of Action – Conversion

Pupilava's motion for summary adjudication is **granted**. The elements of a conversion are the plaintiff's

ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544; *Shopoff & Cavallo LLP* (2008) 167 Cal.App.4th 1489, 1507. Puplava submits evidence none of the Advisors, including Advisor Mary Seki, suffered damage as a result of Puplava's allegedly taking his financial records from Advisor Seki [SSUMF 28]. In opposition, the Advisors fail to submit evidence of any damages suffered by Advisors Allred, Dougherty, Furtado, Lin and Zeiger. As to Advisor Seki, the Advisors submit evidence admitting Seki has not suffered any monetary damages, but that Seki "is at risk of harm if she is audited and her files are found to be incomplete" [Advisors' response to SSUMF 28]. The court finds such evidence insufficient to create any triable issue of act as to whether Advisor Seki suffered damages as a result of Puplava's allegedly taking his financial records.

The court does not address whether this cause of action is barred for failure to comply with the claims presentation requirements of Government Code §900 et. seq. because, even if this cause of action is not barred, the court grants Puplava's motion on the merits.

Fifth Cause of Action - Intentional Interference with Prospective Economic Advantage

Puplava's motion for summary adjudication is **granted**.

The five elements for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. (See *Buckaloo v. Johnson*, supra, 14 Cal.3d at p. 827.)

Youst v. Longo (1987) 43 Cal.3d 64, 71 fn. 6. In addition to the traditional elements, the Advisors must also establish Puplava's conduct was "wrongful by some legal measure other than the fact of the interference itself." *Della Penna v. Toyota Motor Sales, USA* (1995) 11 Cal.4th 376, 393.

The complaint relies on 1) Puplava's alleged statements to the Advisors' clients that Advisor's were "unethical, dishonest, greedy, reckless, and unlawful"; 2) Puplava's alleged directive to the Consortium's outside counsel (Cleary) to place a telephone call to CalSTRS (Ed Derman); and 3) Puplava's alleged statements to SagePoint. Puplava submits evidence he never defamed the Advisors by falsely representing the Advisors to be unethical, dishonest, greedy, reckless and/or unlawful [SSUMF 36]. The Advisors submit no evidence in response. Puplava submits evidence Cleary said nothing derogatory to Derman about the Advisors; Derman/CalSTRS did not refuse to do business with the Advisors because of the phone call from Cleary; CalSTRS has never used financial advisors to see their program and does not pay commissions to anyone to sell the CalSTRS program [SSUMF 38-41]. In opposition the Advisors submit evidence there were no outstanding "business possibilities" between the Consortium and CalSTRS at the time of Cleary's phone call and argue that "[t]here was no business reason for Cleary to contact CalSTRS" and "[c]onsequently, the only purpose for Cleary's phone call must have been to intimidate CalSTRS and to discourage it from doing business with the Advisors" [Advisors' response to SSUMF 38-39]. Puplava submits evidence that, although he contacted SagePoint, he never falsely represented to SagePoint that SagePoint would be named in the Consortium's lawsuit or falsely represented to SagePoint the advisors intended to begin a relationship with CalSTRS. Puplava also

submits evidence SagePoint did not suspend its approval of the Advisors' RIA application as a result of Pupilava's phone calls [SSUMF 42-43]. In opposition, Advisors rely solely on evidence that Pupilava admits he placed several phone calls to SagePoint to ask about the status of the Advisors' RIA application [Advisors' SSUMF 42-43]. The court finds the evidence relied upon by the Advisors' insufficient to create triable issues of material fact as to whether Pupilava engaged in intentional wrongful acts designed to disrupt the Advisors' relationships with the Advisors' clients, CalSTRS or SagePoint.

The court does not address whether this cause of action is barred for failure to comply with the claims presentation requirements of Government Code §900 et. seq. because, even if this cause of action is not barred, the court grants Pupilava's motion on the merits.

Punitive Damages

Pupilava's motion for summary adjudication is granted. The Advisors seek punitive damages only on their cause of action for intentional interference with prospective economic advantage. For the reasons set for above, the court grants summary adjudication as to this cause of action. Absent a viable cause of action, there is no basis to impose punitive damages.