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State Bar of California and Craig Holden
8

9 IN THE MATTER OF ARBITRATION BETWEEN
10

11 SENATOR JOSEPH DUNN (Ret.)

12 Claimant,

13 vs.

14 THE STATE BAR OF CALIFORNIA;
CRAIG HOLDEN, an individual; BETH
15 JAY, an individual; and ROES 2-50,
inclusive,

16 Respondents.
17

JAMS Reference No. 1100083130

Assigned to the Hon. Edward A. Infante (Ret.)

**NOTICE OF RESPONDENTS THE STATE
BAR OF CALIFORNIA AND CRAIG
HOLDEN'S DEMURRER AND DEMURRER
TO CLAIMANT JOSEPH DUNN'S NOTICE
OF CLAIMS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Hearing Date: March 30, 2016

Time: 8:00 a.m.

1 **TO ALL PARTIES TO THIS ACTION AND TO THEIR RESPECTIVE**
2 **ATTORNEYS OF RECORD:**


3 **PLEASE TAKE NOTICE THAT:** On March 30, 2016 at 8:00 a.m., before the Honorable
4 Edward A. Infante (Ret.), the Arbitrator duly appointed pursuant to § XVI.B of the State Bar of
5 California Executive Director Employment Agreement for Claimant Joseph Dunn (“Claimant”),
6 Respondents the State Bar of California and Craig Holden (“Respondents”) will and hereby do
7 demur to the Notice of Claims (“NOC”) filed by Claimant.

8 This Demurrer will be made on the grounds that, despite its unsubstantiated and
9 inflammatory rhetoric, all of the NOC’s five causes of action, as described and detailed further
10 herein, fail to state facts sufficient to constitute any cause of action as a matter of law.

11 This Demurrer will be based upon Code of Civil Procedure § 430.10(a), (e), this Notice and
12 Demurrer, the attached Memorandum of Points and Authorities, any matters of which the
13 Arbitrator may take notice, all papers and records on file herein, and other evidence as may be
14 presented at or prior to the hearing on this Demurrer.

15
16 Dated: February 26, 2016

Respectfully submitted,
HUESTON HENNIGAN LLP

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21 By: 
22 John C. Hueston
23 Attorneys for Defendants the State Bar of
24 California and Craig Holden
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1 **DEMURRER TO NOTICE OF CLAIMS**

2 Defendants the State Bar of California (“State Bar”) and Craig Holden demur to the Notice
3 of Claims on the following grounds:

4 **1. First Cause of Action (“Whistleblower Liability and Retaliation”) — *against***
5 ***the State Bar of California***

6 a. The first cause of action against the State Bar for alleged whistleblower
7 retaliation fails to state facts sufficient to constitute a cause of action as a matter of law because
8 Claimant did not engage in protected activity under Labor Code § 1102.5. *See* Cal. Code of Civ.
9 Proc. § 430.10(a), (e); *Love v. Motion Indus., Inc.*, 309 F. Supp. 2d 1128, 1134 (N.D. Cal. 2004).

10 **2. Second Cause of Action (“Breach of Fiduciary Duty”) — *against Craig Holden***
11 ***and Board of Trustees Roes***

12 a. The second cause of action against Mr. Holden and Roe members of the
13 Board of Trustees fails to state facts sufficient to constitute a cause of action as a matter of law
14 because neither Mr. Holden nor members of the Board of Trustees owed Claimant a fiduciary duty
15 when he was Executive Director of the State Bar. *See* Cal. Civ. Proc. Code § 430.10(a), (e);
16 *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 13 (1972).

17 b. The second cause of action for alleged breach of fiduciary duty fails to state
18 facts sufficient to constitute a cause of action as a matter of law because Mr. Holden, along with
19 members of the Board of Trustees, are entitled to immunity under Government Code §§ 820.2 and
20 821 for their discretionary acts as public officials as alleged in the NOC. *See* Cal. Civ. Proc. Code §
21 430.10(a), (e); *Caldwell v. Montoya*, 10 Cal. 4th 972, 976 (1995).

22 c. The second cause of action for alleged breach of fiduciary duty fails to plead
23 that the alleged actions taken by Mr. Holden caused Claimant harm. *See* Cal. Civ. Proc. Code
24 §§ 436(1); 431.10(2); *Weiner v. Mitchell, Silberberg & Knupp*, 114 Cal. App. 3d 39, 48 (1980).

25 **3. Third Cause of Action (“Breach of Fiduciary Duty”) — *against the State Bar of***
26 ***California, Craig Holden, and Board of Trustees Roes***

27 a. The third cause of action against the State Bar, Mr. Holden, and Roe
28 members of the Board of Trustees for alleged breach of fiduciary duty fails to state facts sufficient

1 to constitute a cause of action as a matter of law because neither the State Bar, Mr. Holden, nor
2 members of the Board of Trustees owed Claimant a fiduciary duty. *See* Cal. Civ. Proc. Code
3 § 430.10(a), (e); *Zumbrun*, 25 Cal. App. 3d at 13.

4 b. The third cause of action for alleged breach of fiduciary duty fails to state
5 facts sufficient to constitute a cause of action as a matter of law because the FAC does not include
6 any well-pleaded facts that the State Bar, Mr. Holden, or members of the Board of Trustees
7 breached any alleged fiduciary duties they purportedly owed Claimant. *See* Cal. Civ. Proc. Code
8 § 430.10(a), (e).

9 **4. Fourth Cause of Action (“Intentional Interference with Contractual**
10 **Relations”) — *against Beth Jay and Craig Holden***

11 a. The fourth cause of action for alleged intentional interference with
12 contractual relations fails to state facts sufficient to constitute a cause of action as a matter of law
13 because Mr. Holden is entitled to immunity under Government Code § 820.2 for his discretionary
14 acts as a public official. *See* Cal. Civ. Proc. Code § 430.10(a), (e); *Caldwell*, 10 Cal. 4th at 976.

15 d. The fourth cause of action for alleged intentional interference with
16 contractual relations fails to state facts sufficient to constitute a cause of action as a matter of law
17 because Mr. Holden’s statements underlying Claimant’s cause of action as alleged in the NOC are
18 absolutely privileged under Cal. Civ. Code § 47. *See* Cal. Civ. Proc. Code § 430.10(a), (e); *Hansen*
19 *v. Cal. Dep’t of Corr. & Rehab.*, 171 Cal. App. 4th 1537, 1544, 1547 (2008).

20 **5. Fifth Cause of Action (“Breach of the Implied Covenant of Good Faith and**
21 **Fair Dealing) — *against the State Bar of California and Craig Holden***

22 a. The fifth cause of action for alleged breach of the implied covenant of good
23 faith and fair dealing fails to state facts sufficient to constitute a cause of action as a matter of law
24 because Mr. Holden, and Board members, are entitled to immunity under Government Code
25 § 820.2 for their discretionary acts as public officials as alleged in the NOC. *See* Cal. Civ. Proc.
26 Code § 430.10(a), (e); *Hardy v. Vial*, 48 Cal. 2d 577, 580 (1957).

27 b. The fifth cause of action for alleged breach of the implied covenant of good
28 faith and fair dealing fails to state facts sufficient to constitute a cause of action as a matter of law

1 because a cause of action for breach of the implied covenant of good faith and fair dealing cannot
2 be based on Respondents' termination of Claimant's at-will employment contract. *See* Cal. Civ.
3 Proc. Code § 430.10(a), (e); *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349 (2000).

4 c. The fifth cause of action for alleged breach of the implied covenant of good
5 faith and fair dealing fails to state facts sufficient to constitute a cause of action as a matter of law
6 as to Mr. Holden because he was not party to Claimant's employment contract and therefore was
7 not bound by any such covenant of good faith and fair dealing. *See* Cal. Civ. Proc. Code §
8 430.10(a), (e); *Austero v. Nat'l Cas. Co.*, 133 Cal. Rptr. 107, 110 (1976).

9 d. The fifth cause of action for alleged breach of the implied covenant of good
10 faith and fair dealing fails to state facts sufficient to constitute a cause of action as a matter of law
11 because Mr. Holden's statements underlying Claimant's cause of action as alleged in the NOC are
12 absolutely privileged under Cal. Civ. Code § 47. *See* Cal. Civ. Proc. Code § 430.10(a), (e); *Hansen*,
13 171 Cal. App. 4th at 1547.

14 In summary, the State Bar and Craig Holden demur against the following claims as set forth
15 in the chart on the next page:

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| NO. | CAUSE OF ACTION | RESPONDENT | BASIS FOR DEMURRER |
|-----|---|-------------------------|---|
| 1 | "Whistleblower Retaliation" | State Bar of California | Claimant did not engage in protected activity. |
| 3 | "Breach of Fiduciary Duty-- Leak" | State Bar of California | No fiduciary duty owed. No allegations that a Board member leaked the investigative report. |
| 5 | "Breach of Implied Covenant of Good Faith and Fair Dealing" | State Bar of California | No breach as a matter of law; termination of <i>at-will</i> employment cannot constitute breach of implied covenant. |
| | | | |
| 2 | "Breach of Fiduciary Duty" | Craig Holden | No fiduciary duty owed. Holden entitled to immunity per Gov't. Code §§ 820.2 and 821. Holden's alleged acts did not harm Plaintiff. |
| 3 | "Breach of Fiduciary Duty-- Leak" | Craig Holden | No fiduciary duty owed. No allegations that Holden leaked the investigative report. |
| 4 | "Intentional Interference with Contractual Relations" | Craig Holden | Holden entitled to immunity per Gov't. Code § 820.2. Holden's alleged statements are privileged under Cal. Civ. Code § 47. |
| 5 | "Breach of Implied Covenant of Good Faith and Fair Dealing" | Craig Holden | Holden is not a party to the contract. No breach as a matter of law; termination of <i>at-will</i> employment cannot constitute breach of implied covenant. Holden entitled to immunity per Gov't. Code § 820.2. Holden's alleged statements are privileged under Cal. Civ. Code § 47. |
| | | | |
| 2 | "Breach of Fiduciary Duty" | Roe Board Members | No fiduciary duty owed. Board members entitled to immunity per Gov't. Code §§ 820.2 and 821 |
| 3 | "Breach of Fiduciary Duty-- Leak" | Roe Board Members | No fiduciary duty owed. No allegations that a Board member leaked the investigative report. |

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Dated: February 26, 2016

Respectfully submitted,
HUESTON HENNIGAN LLP



By:
John C. Hueston
Attorneys for Defendants the State Bar of
California and Craig Holden

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This is a straightforward case. On November 7, 2014, as was clearly their right under
4 Claimant’s employment contract, the State Bar Board of Trustees (“Board”) voted to terminate
5 Claimant from his position as Executive Director of the State Bar of California (“State Bar”).
6 Claimant was terminated after an internal investigation into complaints that he engaged in serious
7 ethical breaches, acts of dishonesty, and breaches of fiduciary duty. Embarrassed by the
8 termination and the uncovering of his misconduct, Claimant filed suit in superior court against the
9 State Bar, Craig Holden (the State Bar’s former, volunteer President), and Board of Trustees Roes
10 (collectively, “Respondents”).

11 Claimant’s causes of action are predicated entirely on false and highly inflammatory
12 allegations, which have nothing to do with his termination. Claimant’s intent is clear—he has used
13 this lawsuit and the accompanying media coverage as a forum to spread misinformation about the
14 State Bar and Mr. Holden, in order to tarnish their reputations in retaliation for Claimant’s
15 termination, to divert attention from Claimant’s own wrongdoing, and with the hopes of extracting
16 a settlement from the State Bar. Regardless, even accepting Claimant’s allegations as true (which
17 they are not), his claims fail as a matter of law for the numerous and independent reasons discussed
18 below.

19 Claimant’s first cause of action (“Whistleblower Retaliation”) alleges that the State Bar
20 terminated Claimant in retaliation for filing two anonymous “whistleblower notices.” Putting aside
21 the fact that the letters did not influence the Board’s decision to terminate Claimant¹— the Notice
22 of Claims (“NOC”) does not plead facts sufficient to establish that Claimant even engaged in
23 protected activity under Labor Code § 1102.5. That section requires Claimant to plead and prove
24

25 ¹ As an initial matter, the State Bar was entitled to fire Claimant for any reason or no reason
26 pursuant to his *at-will* employment contract. NOC, Ex. A, § XIII(A). Second, and as explained
27 more fully in the concurrently filed Anti-SLAPP motion, Claimant’s purported “whistleblower
28 notices” were not sent until *after* the Board concluded its investigation and determined that
Claimant had engaged in serious misconduct, *after* the Board held two closed-session meetings to
discuss the investigation, and only *days before* the Board formally voted to terminate Claimant.
Moreover, the letters were *anonymous*, meaning that the Board members had no reason to suspect
they were written on behalf of the State Bar’s then Executive Director.

1 that he disclosed information he reasonably believed was an actual violation of law. While
2 Claimant alleges that he disclosed so-called “ethical breaches” and “prosecutorial lapses,” he does
3 not plead that the information he disclosed constitutes actual violations of law. *Love v. Motion*
4 *Indus., Inc.*, 309 F. Supp. 2d 1128, 1134 (N.D. Cal. 2004) (dismissing § 1102.5 claim where
5 plaintiff “failed to allege any specific federal or state violation stemming from” plaintiff’s
6 disclosures).

7 Claimant’s other causes of action fare no better. Both the second cause of action (“Breach
8 of Fiduciary Duty”) and the third cause of action (“Breach of Fiduciary Duty—Leak”) fail as a
9 matter of law because the NOC does not (and cannot) plead facts sufficient to show that
10 Mr. Holden², other Board members³, or the State Bar owed Claimant a fiduciary duty. Indeed, the
11 NOC relies on nothing more than a threadbare conclusion that he was the beneficiary of some
12 fiduciary relationship. *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 13 (1972) (cause of action
13 for breach of fiduciary duty must plead specific facts to prove that a fiduciary duty exists). While
14 the NOC appears to suggest that Respondents owed Claimant a fiduciary duty because he was a
15 State Bar employee, the law in California is clear that an employer-employee relationship does not
16 give rise to a fiduciary relationship. *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 129
17 (1966) (“[N]o presumption of a confidential relationship arises from the bare fact that parties to a
18 contract are employer and employee.”).

19 Separately, and additionally, the NOC’s second (“Breach of Fiduciary Duty”), fourth
20 (“Intentional Interference with Contractual Relations”), and fifth (“Breach of the Implied Covenant
21 of Good Faith and Fair Dealing”) causes of action fail because they are predicated on numerous
22

23 ² The claims asserted against Mr. Holden are the second and third causes of action for breach of
24 fiduciary duty, the fourth cause of action for intentional interference with contractual relations, and
25 the fifth cause of action for breach of the implied covenant of good faith and fair dealing. Because
26 these claims fail for multiple independent reasons discussed herein, Mr. Holden should be
27 completely dismissed from this arbitration.

28 ³ The NOC names Roe members of the State Bar Board of Trustees as fictitious respondents in the
second and third causes of action. Individual Board members have no obligation to respond to
Claimant’s NOC because none have been named or served. Nevertheless, the Demurrer should be
sustained as to the Roe members because the causes of action against them fail for the same
reasons why they fail against the State Bar and Mr. Holden. *See Pierce v. San Mateo Cty. Sheriff’s*
Dep’t, 232 Cal. App. 4th 995, 1020–21 (2014).

1 alleged actions by Mr. Holden, all of which constitute discretionary acts that he allegedly took in
2 his official capacities as President of the State Bar. Thus, Mr. Holden is entitled to absolute
3 immunity under California Government Code § 820.2 (public employee not liable for injury
4 resulting from “the exercise of the discretion vested in him, whether or not such discretion be
5 abused”) and § 821 (public employee not liable for injury “caused by his adoption of or failure to
6 adopt an enactment or by his failure to enforce an enactment”). *See also Caldwell v. Montoya*, 10
7 Cal. 4th 972, 976 (1995). Although the second cause of action also names Roe Board members as
8 Respondents, it pleads no facts about them or their actions. *See Pac. Coast Refrigeration, Inc. v.*
9 *Badger*, 52 Cal. App. 3d 233, 249 (1975) (no cause of action stated against fictitious defendant).
10 Even if it did, the Board members would be entitled to immunity like Mr. Holden. *See Pierce v.*
11 *San Mateo Cty. Sheriff’s Dep’t*, 232 Cal. App. 4th 995, 1020–21 (2014) (appropriate to dismiss
12 action against Doe defendants after successful demurrer by named defendant “where the basis for
13 the successful demurrer applies equally to the Doe defendants”).

14 In addition, the third cause of action (“Breach of Fiduciary Duty — Leak”), which is
15 predicated on the alleged leak of confidential information from an investigative report into
16 Claimant’s misconduct, fails because the NOC does not allege that Mr. Holden or any other Board
17 member leaked the investigative report. Instead, the NOC relies solely on conclusory and
18 ambiguous allegations that “certain” unnamed Board members were responsible for the leak. NOC
19 ¶ 50. There were, however, 16 members on the Board of Trustees at the time of the alleged leak.
20 Thus, even assuming Respondents owed Claimant a fiduciary duty—they did not—the NOC fails
21 to plead facts sufficient to claim that Defendants breached that duty. *Eunice v. United States*, 2013
22 WL 756168, at *3 (S.D. Cal. Feb. 26, 2013) (granting motion to dismiss where Plaintiff “lump[ed]
23 all ‘defendants’ together and facts regarding the incident”).

24 Further, the NOC’s fourth (“Intentional Interference with Contractual Relations”) and fifth
25 (“Breach of the Implied Covenant of Good Faith and Fair Dealing”) causes of action must be
26 dismissed because—in addition to the immunity arguments discussed above—they are expressly
27 based on alleged statements by Mr. Holden that are absolutely privileged under California Civil
28 Code § 47. That statute affords immunity to statements made “in any [] official proceeding

1 authorized by law,” Cal. Civ. Code, § 47(b), and internal investigations of misconduct by
2 government employees—like the State Bar’s investigation into Claimant’s misconduct—qualify as
3 such under Civil Code § 47. *See, e.g., Hansen v. Cal. Dep’t of Corr. & Rehab.*, 171 Cal. App. 4th
4 1537, 1544, 1547 (2008). Because Mr. Holden’s alleged statements were made in connection with
5 the State Bar’s investigation, they are absolutely privileged.

6 Finally, the fifth cause of action (“Breach of Implied Covenant of Good Faith and Fair
7 Dealing”) does not state a claim against the State Bar or Mr. Holden. As a matter of law, Claimant
8 cannot base an implied covenant claim on Respondent’s termination of his *at-will* employment
9 contract. *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349 (2000) (Because the implied covenant
10 “cannot be endowed with an existence independent of its contractual underpinnings,” it cannot
11 logically be based on a claim that [the] discharge [of an at-will employee] was made without good
12 cause.” (citations omitted)). Second, Mr. Holden was not a party to Claimant’s employment
13 agreement, therefore he was not bound by an such covenant of good faith and fair dealing. *Austero*
14 *v. Nat’l Cas. Co.*, 62 Cal. App. 3d 511, 515 (1976) (“[O]ne who is not a party to the underlying
15 contract may not be held liable for breach of an implied covenant of good faith and fair dealing for
16 as to him no such implied covenant exists.”).

17 For these reasons and those discussed below, the Arbitrator should grant Respondents’
18 demurrer to the NOC’s first, second, third, fourth, and fifth causes of action.

19 **II. PROCEDURAL HISTORY**

20 The State Bar of California is a constitutional entity, established by Article VI, § 9 of the
21 California Constitution. Cal. Const., art. VI, § 9; NOC ¶ 11. It is a public corporation that serves as
22 an administrative arm of the California Supreme Court. Bus. & Prof. Code § 6001; *In re Attorney*
23 *Discipline Sys.*, 19 Cal. 4th 582, 592, 598–600 (1998); NOC ¶ 11. The State Bar acts through the
24 Board of Trustees, which makes rules of procedure, regulates, and operates the State Bar. Bus. &
25 Prof. Code §§ 6010, 6025, 6030; NOC ¶ 11. Craig Holden served as the volunteer President of the
26 State Bar Board of Trustees from September 2014 through September 2015. NOC ¶ 12.

27 Claimant Joseph Dunn was employed by the State Bar as the organization’s Executive
28 Director from November 2010 to November 2014 pursuant to a written employment agreement that

1 was terminable at-will. NOC ¶¶ 10, 19; Ex. A, § XIII(A). On November 7, 2014, the State Bar
2 served Claimant with a notice of termination. NOC ¶ 19.

3 In response, Claimant filed a lawsuit in California Superior Court against the State Bar,
4 Craig Holden, and Roe Board members on November 13, 2014. The Complaint alleged two causes
5 of action: a claim against the State Bar for retaliating against Claimant’s purported whistle-blower
6 activities in violation of Labor Code § 1102.5, and a claim against Mr. Holden and Roe Board
7 members for breach of fiduciary duty.

8 On January 26, 2015, the State Bar and Mr. Holden filed a Demurrer and a Motion to
9 Compel Arbitration pursuant to the arbitration provision in Claimant’s employment agreement. On
10 April 29, 2015, Claimant filed a First Amended Complaint (“FAC”), thereby mooting Defendants’
11 demurrer.

12 The FAC added a new cause of action against the State Bar, Mr. Holden, and Roe Board
13 members for breach of fiduciary duty and a new cause of action against Respondent Beth Jay,
14 Defendant Roe 2, and Roe Board members for intentional interference with contractual relations.

15 On June 12, 2015, the court granted Respondents’ Motion to Compel Arbitration pursuant
16 to Claimant’s employment agreement and stayed all proceedings in this case pending arbitration,
17 except for a hearing on Claimant’s Motion for a Preliminary Injunction, which he ultimately
18 withdrew on December 15, 2015.

19 On November 9, 2015, the State Bar’s counsel filed a petition requesting the court to
20 appoint an arbitrator. On January 4, 2016, the court appointed the Hon. Edward A. Infante as the
21 arbitrator in this case.

22 On February 12, 2016, Claimant filed his NOC—his second amendment overall. The NOC
23 replaced Defendant Roe 2 for Mr. Holden as a Respondent in the fourth cause of action for
24 intentional interference with contractual relations and it added a new cause of action for breach of
25 the implied covenant of good faith and fair dealing against the State Bar and Mr. Holden.

26 **III. LEGAL STANDARD**

27 “A demurrer tests the legal sufficiency of the complaint.” *Hernandez v. City of Pomona*, 49
28 Cal. App. 4th 1492, 1497 (1996). A court treats the demurrer as conceding all material facts

1 properly pled in the complaint. *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 966–67 (1992).
2 However, if the complaint contains “conclusions of fact or law, opinions, speculation or allegations
3 which are contrary either to law or judicially noticed facts,” they will be disregarded. *McAllister v.*
4 *Cnty. of Monterey*, 147 Cal. App. 4th 253, 289 (2007). A complaint must allege the essential facts
5 with “reasonable precision and with particularity sufficient to acquaint a defendant with the nature,
6 source and extent of his cause of action.” *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 550 (2007).
7 A demurrer will be sustained when the complaint fails to state facts sufficient to constitute a cause
8 of action. Cal. Code of Civ. Proc. § 430.10(e).

9 **IV. ARGUMENT**

10 **A. Claimant is Not a “Whistleblower” — He Did Not Engage in Protected Activity**

11 In order to establish a *prima facie* case of retaliation pursuant to Labor Code § 1102.5, a
12 plaintiff must show that (1) he engaged in a protected activity, (2) his employer subjected him to an
13 adverse employment action, and (3) there is a causal link between the two. *Patten v. Grant Joint*
14 *Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384 (2005). Protected activity is the disclosure of
15 information an employee “has reasonable cause to believe [constitutes] a violation of state or
16 federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.”
17 Labor Code § 1102.5(b).

18 Courts require strict adherence to this statutory language. “[T]he employee must be able to
19 point to some legal foundation for his suspicion—some statute, rule or regulation which may have
20 been violated by the conduct he disclosed.” *Fitzgerald v. El Dorado Cty.*, 94 F. Supp. 3d 1155,
21 1172 (E.D. Cal. 2015); *Love*, 309 F. Supp. 2d at 1134 (dismissing § 1102.5 claim where plaintiff
22 “failed to allege any specific federal or state violation stemming from” plaintiff’s disclosures).

23 Here, Claimant’s first cause of action alleges he anonymously reported that (1) the State
24 Bar’s Office of Chief Trial Counsel (“OCTC”) inaccurately reported the number of attorney
25 discipline complaints in its backlog; (2) the Board and OCTC did not enforce Assembly Bill 1159
26 to prosecute those engaged in the unauthorized practice of law targeted at the immigrant
27 community; and (3) the Board hired Munger, Tolles & Olson LLP (“MTO”) to investigate
28 Claimant’s misconduct despite a conflict of interest and in violation of State Bar protocol. NOC

1 ¶¶ 1–3, 60. Claimant’s allegation that he reported these alleged improprieties is provably false, and
2 the accusations of wrongdoing are themselves groundless, but even taking his allegations as true at
3 this stage, Claimant’s disclosures do not amount to protected activity under § 1102.5.

4 Critically, Claimant *does not identify any actual law* that Respondents allegedly violated.
5 Rather, the FAC describes Defendants’ alleged misconduct as “egregious improprieties,” “ethical
6 breaches,” “fiscal improprieties,” and “compliance failures.” NOC ¶¶ 2, 20, 34, 39. This, by itself,
7 is sufficient to dismiss Claimant’s claim. *See Fitzgerald*, 94 F. Supp. 3d at 1172; *Love*, 309 F.
8 Supp. 2d at 1134.

9 For example, with respect to the State Bar’s retention of MTO, Claimant alleges that it was
10 a “waste” of money and violated “protocol.” NOC ¶ 34. It is well-established that violations of
11 internal policies and protocol are not violations of law within the scope of § 1102.5. *See, e.g.,*
12 *Patten*, 134 Cal. App. at 1384-85 (school principal’s report of “inappropriate conduct” by two
13 teachers and safety issues concerned “internal personnel matters . . . rather than the disclosure of a
14 legal violation” and was not protected); *Schulthies v. Nat’l Passenger R.R. Corp.*, 650 F. Supp. 2d
15 994, 1003 (N.D. Cal. 2009) (granting motion to dismiss retaliation claim where disclosure
16 concerned “efficiency, monetary waste and disruption of employees’ families and [not] a violation
17 of a statute or regulation”); *Mueller v. Cty. of Los Angeles*, 176 Cal. App. 4th 809, 822 (2009)
18 (employee did not engage in protected activity where he filed grievance alleging violations of Fire
19 Department policies).

20 Similarly, the NOC fails to explain how the Board and OCTC’s alleged lack of enforcement
21 of Assembly Bill 1159 constitutes anything more than a misuse of prosecutorial discretion. *See*
22 NOC ¶¶ 39–42. Indeed, under California Law “[a] public employee is not liable for any injury
23 caused by . . . his failure to enforce an enactment.” Govt. Code § 818.2. Moreover, ethical
24 breaches, even allegedly egregious ones, do not fall within the scope of protected activity. *See*
25 *Anderson v. MCI Commcn’s Servs., Inc.*, 2008 WL 4901083, at *6–8 (Cal. App. Nov. 17, 2008)
26 (unpublished).

27 The NOC’s allegations regarding Claimant’s alleged disclosure of the OCTC’s backlog
28 reporting is also deficient. While the NOC includes a conclusory and vague reference to the alleged

1 reporting as “unlawful,” NOC ¶¶ 21, 22, it fails to actually identify any law that the OCTC
2 purportedly violated, or that Claimant reasonably believed it violated. This is insufficient to state a
3 claim for § 1102.5 retaliation. *Love*, 309 F. Supp. 2d at 1135 (concluding that without citing to
4 “any statute, rule or regulation that may have been violated by the disclosed conduct,” plaintiff
5 lacked “any foundation for the reasonableness of his belief”).

6 The Demurrer should therefore be sustained to Claimant’s first cause of action. In the
7 alternative, Respondents request that the Arbitrator strike the allegations relating to Claimant’s
8 alleged disclosures that do not constitute protected activity under § 1102.5.

9 **B. The NOC’s Second and Third Causes of Action Fail to Plead that Any**
10 **Respondent Owed Claimant a Fiduciary Duty**

11 The NOC’s second and third causes of action fail because they do not allege any facts to
12 establish that Mr. Holden, the State Bar, or any Board member owed Claimant a fiduciary duty.
13 *O’Byrne v. Santa Monica-UCLA Med. Ctr.*, 94 Cal. App. 4th 797, 812 (2001) (“In the absence of a
14 fiduciary relationship, there can be no breach of fiduciary duty as a matter of law.”).

15 The elements of a cause of action for breach of fiduciary duty are “the (1) existence of a
16 fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.”
17 *People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 950 (2013). Fiduciary relationships are not
18 lightly created. Rather, they arise by operation of law from special, confidential relationships. *City*
19 *of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (2008). A defendant cannot be
20 charged with a fiduciary duty unless he or she *knowingly* undertook to act on behalf of and for the
21 benefit of another or entered into a relationship that imposed such an undertaking as a matter of
22 law. *Id.* Typical fiduciary relationships include lawyer/client, stockbroker/customer,
23 trustee/beneficiary, agent/principal, business partners, and joint venturers. *See Wolf v. Super. Ct.*,
24 107 Cal. App. 4th 25, 29–30 (2003).

25 A cause of action for breach of fiduciary duty cannot rely on mere conclusory allegations
26 that the defendant owed a fiduciary duty to the plaintiff. It must instead allege specific facts to
27 establish the existence of a fiduciary relationship. *See Zumbun*, 25 Cal. App. at 13 (sustaining
28 demurrer to the plaintiff’s claim for breach of fiduciary duty because the complaint contained a

1 conclusory allegation that a fiduciary relationship existed between the university-defendant and the
2 student-plaintiff). A “bare allegation that defendants assumed a fiduciary relationship . . . [is a]
3 conclusion[,]” not a well-pled fact. *Id.*; *see also Berryman v. Merit Prop. Mgt., Inc.*, 152 Cal. App.
4 4th 1544, 1558 (2007) (holding that a “mere allegation” in a complaint that the defendant assumed
5 a fiduciary duty “is a legal conclusion” and disregarding the conclusion).

6 There are no facts alleged in the NOC that suggest Mr. Holden, any Board member, or the
7 State Bar knowingly acted on behalf of Claimant or entered into a relationship with him that
8 imposes a fiduciary duty as a matter of law. Rather, Claimant’s NOC relies on nothing more than
9 the threadbare (and incorrect) conclusions that Respondents owed Claimant a fiduciary duty. NOC
10 ¶ 68 (“Mr. Holden owed a fiduciary duty to . . . Claimant as Executive Director of the State Bar.”);
11 ¶ 73 (“At all times, Respondents owed a fiduciary duty to Senator Dunn.”). These are unsupported
12 legal conclusions, as opposed to well-pled facts, and must be disregarded. *Zumbrun*, 25 Cal. App.
13 3d at 13; *Berryman*, 152 Cal. App. 4th at 1558. Without sufficient allegations of a fiduciary duty,
14 both the second and third claims for breach of fiduciary duty necessarily fail.

15 To the extent the NOC suggests (although it does not explicitly so state) that Mr. Holden
16 and the State Bar’s employer-employee relationship with Claimant gave rise to a fiduciary duty,
17 this theory fails. It is well settled in California that an employer does not owe fiduciary duties to his
18 employees. *Odorizzi*, 246 Cal. App. 2d at 129 (“[N]o presumption of a confidential relationship
19 arises from the bare fact that parties to a contract are employer and employee.”); *Amid v.*
20 *Hawthorne Cmty. Med. Grp., Inc.*, 212 Cal. App. 3d 1383, 1391 (1989) (“[A] bare employee-
21 employer relationship does not create a confidential relationship.”); *O’Byrne*, 94 Cal. App. 4th at
22 811 (holding that a hospital did not owe fiduciary duties to a physician on its staff because
23 “employment-type relationships are not fiduciary relationships”); *Miller v. Yokohama Tire Corp.*,
24 358 F.3d 616, 621–22 (9th Cir. 2004) (holding under California law that “[n]o presumption of a
25 confidential relationship arises from the bare fact that parties to a contract are employer and
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1 employee”).⁴ Moreover, Claimant does not even allege that Mr. Holden was his employer (he was
2 not).⁵

3 Accordingly, California courts have consistently granted demurrers to complaints that—like
4 Plaintiff’s FAC—only contained a conclusory allegation that an employer owed his employee a
5 fiduciary duty. In the leading California case on this issue, *Odorizzi v. Bloomfield School District*, a
6 school teacher alleged that the school district superintendent and principal fraudulently obtained his
7 resignation after he was arrested by taking advantage of his vulnerable mental state and
8 misrepresenting that they had his best interests at heart while advising him to resign. 246 Cal. App.
9 2d at 127. In granting the defendants’ demurrer on the teacher’s claim of constructive fraud for
10 failure to plead facts showing that the parties had a fiduciary relationship, the court held that “no
11 presumption of a confidential relationship arises from the bare fact that parties to a contract are
12 employer and employee.” *Id.* at 129; *see also Amid*, 212 Cal. App. 3d at 1391 (sustaining a
13 demurrer on the ground that an employer-employee relationship does not give rise to fiduciary
14 duties); *Miller*, 358 F.3d at 621 (applying California law and affirming dismissal of plaintiff’s fraud
15 claim on grounds that an employer-employee relationship does not give rise to a fiduciary duty).

16 As in *Odorizzi*, the employer-employee relationship between the State Bar and the Claimant
17 did not give rise to a fiduciary relationship. *Odorizzi*, 246 Cal. App. 2d at 129; *O’Byrne*, 94 Cal.
18 App. 4th at 811. Rather, their relationship was governed only by Claimant’s at-will employment
19 contract, which provided that State Bar could terminate Claimant at any time for whatever or no
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21 _____
22 ⁴ Numerous other jurisdictions follow the same rule. *See, e.g., Brown v. Dorsey & Whitney, L.L.P.*,
23 267 F. Supp. 2d 61, 80 (D.D.C. 2003) (holding that “[a]n employer/employee relationship is not a
24 fiduciary relationship”); *ServiceMaster Co. v. Martin*, 252 Ga. App. 751, 757 (Ga. Ct. App. 2001)
25 (holding that a breach of fiduciary duty claim was properly dismissed where the plaintiff was
26 merely an employee and there were no well-pled facts indicating that a confidential relationship
27 existed); *Onanuga v. Pfizer, Inc.*, 2003 WL 22670842, at *3 (S.D.N.Y. Nov. 7, 2003) (granting
28 motion to dismiss holding that an “employer-employee relationship is not fiduciary in nature”);
Kraemer v. Crook, 94 B.R. 207, 209 (N.D. Ga. 1988) (same); *Bowman v. City of Indianapolis*, 133
F.3d 513, 519 (7th Cir. 1998) (holding that a relationship between a city and its employees does not
constitute a “confidential relationship”).

⁵ An employer is one who “controls and directs a worker under an express or implied contract of
hire and who pays the worker’s salary or wages.” Employer, *Black’s Law Dictionary* (Westlaw
10th ed. 2014). Claimant had an employment contract with and was paid by the State Bar—not
Mr. Holden. NOC Exhs. A-D.

1 reason, and did not impose a fiduciary duty on any of the Respondents. *Cf. Wolf*, 107 Cal. App. 4th
2 at 30–31 (“[T]he contractual right to contingent compensation in the control of another has never,
3 by itself, been sufficient to create a fiduciary relationship.”).

4 Nor *could* Mr. Holden or other Board members have owed Claimant any fiduciary duties.
5 As Board members, they owed a duty of loyalty to the organization and the public (as did the State
6 Bar) that would have been in conflict with and superseded any purported duty that they owed
7 Claimant. Bus. & Prof. Code § 6001.1; *Bennett v. Allstate Ins. Co.*, 753 F. Supp. 299, 303 (N.D.
8 Cal. 1990) (holding under California law that “an agent may not compete with the principal, nor
9 may he or she act as an agent for another whose interests conflict with those of the principal”).

10 For these reasons, the NOC cannot state either cause of action for breach of fiduciary duty.

11 **C. The Second Cause of Action’s Alleged Acts Did Not Harm Claimant**

12 Claimant’s second cause of action must be dismissed because it fails to plead any facts to
13 show a causal link between nearly all of Mr. Holden’s alleged actions and any injury to Claimant.
14 Proximate harm is an essential element of a breach of fiduciary duty claim. *See Weiner v. Mitchell,*
15 *Silberberg & Knupp*, 114 Cal. App. 3d 39, 48 (1980) (“[W]ithout proximate causation between the
16 torts alleged and the damages allegedly suffered, there can be no cause of action in tort.”); *Diodes,*
17 *Inc. v. Franzen*, 260 Cal. App. 2d 244, 254 (1968) (sustaining demurrer to breach fiduciary duty
18 claim where there were no facts alleged that the alleged actions of two corporate directors were
19 harmful to the plaintiff-corporation). Here, Claimant’s claim is based on the following alleged acts
20 by Mr. Holden, which caused no harm to Claimant—(1) the alleged retention of MTO; (2)
21 purported failure to implement A.B. 1159; and (3) alleged attempts to block the sale of State Bar
22 headquarters. Accordingly, even if these allegations were true, they cannot support a cause of
23 action for breach of fiduciary duty and the Demurrer should be sustained.⁶

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26 ⁶ Relatedly, the second cause of action alleges that Mr. Holden owed a fiduciary duty to the “*State*
27 *Bar*,” NOC ¶ 68. Claimant, of course, lacks standing to pursue such a claim on behalf of the State
28 *Bar*. *See Nelson v. Anderson*, 72 Cal. App. 4th 111, 124 (1999); *Schuster v. Gardner*, 127 Cal. App.
4th 305, 312–13 (2005).

1 **D. The Second, Fourth, and Fifth Causes of Action Fail Because Mr. Holden is**
2 **Entitled to Discretionary Act Immunity**

3 The Demurrer should be sustained to Claimant’s second, fourth, and fifth causes of action
4 for the same reason—all of Mr. Holden’s alleged acts (and any alleged acts of the Roe Board
5 members⁷) are entitled to “discretionary act” immunity under California law. *Caldwell v. Montoya*,
6 10 Cal. 4th 972, 976 (1995). Claimant has the burden of pleading facts “sufficient to show his
7 cause of action lies outside the breadth of any applicable statutory immunity.” *Keyes v. Santa Clara*
8 *Valley Water Dist.*, 128 Cal. App. 3d 882, 886 (1982). He failed to do so.

9 California’s common law has long provided personal immunity from lawsuits challenging a
10 public official’s discretionary acts. *Caldwell*, 10 Cal. 4th at 979. This immunity is now codified in
11 Government Code § 820.2, which states that “a public employee is not liable for an injury resulting
12 from his act or omission where the act or omission was the result of the exercise of the discretion
13 vested in him, whether or not such discretion be abused.”

14 The immunity provided by § 820.2 applies to “considered policy decisions” that involve the
15 exercise of judgment or choice, as opposed to “ministerial acts” that merely implement a policy
16 choice already made. *Caldwell*, 10 Cal. 4th at 981. California courts have broadly construed
17 § 820.2 to confer immunity on public employees for any discretionary act, even if the act
18 constitutes an abuse of discretion or the public official was “motivated by fraud, malice or
19 corruption.” *Freeny v. City of San Buenaventura*, 216 Cal. App. 4th 1333, 1344 (2013). The
20 immunity applies to all discretionary acts within the scope of the actor’s authority, including all
21 “incidental and collateral acts” in carrying out the policy decision. *Lipman v. Brisbane Elementary*
22 *Sch. Dist.*, 55 Cal. 2d 224, 233 (1961), *abrogated on other grounds by Philadelphia Newspapers,*
23 *Inc. v. Hepps*, 475 U.S. 767 (1985). This “absolute immunity” accomplishes the dual goals of
24 freeing public employees to exercise their judgment and circumscribing judicial second-guessing of
25 the decisions of public officials. *Freeny*, 216 Cal. App. 4th at 1343–44; *Johnson v. State*, 69 Cal. 2d

26 _____
27 ⁷ While the second cause of action only mentions Mr. Holden in its allegations, NOC ¶ 69, it also
28 names Roe Board members as Defendants. Insofar as the NOC is attempting to silently implicate
other Board members, the statutory immunities discussed in this section equally apply to any Board
members’ purported actions.

1 782, 793 (1968) (“Much of what is done by officers and employees of the government must remain
2 beyond the range of judicial inquiry.” (citation omitted)).

3 Mr. Holden is entitled to immunity. As President of the State Bar, Mr. Holden had broad
4 authority over State Bar matters. *See* Rules of the State Bar of California, Title 6, div. 1, ch. 2, Rule
5 6.20, ch. 4, Rule 6.40(A); Bus. & Prof. Code §§ 6010, 6025, 6030. All of the alleged acts
6 underlying Claimant’s second, fourth, and fifth causes of actions constitute discretionary actions
7 Mr. Holden supposedly took in his capacity as President of the State Bar.

8 1. Second Cause of Action

9 Claimant’s second cause of action (“Breach of Fiduciary Duty”) alleges that Mr. Holden
10 engaged in the following acts: (1) terminated Claimant; (2) authorized the retention of MTO; (3)
11 condoned and attempted to cover up the removal of backlogged attorney misconduct complaints;
12 and (4) failed to implement legislation. NOC ¶ 69. The second cause of action also incorporates by
13 reference allegations that Mr. Holden blocked the sale of the State Bar headquarters. NOC ¶¶ 56–
14 57. All of these alleged acts involve the exercise of discretion entrusted to Mr. Holden as President
15 of the State Bar and are therefore entitled to immunity. Each allegation is addressed below:

16 *First*, to the extent Mr. Holden participated in the decision to terminate Claimant’s at-will
17 employment, that decision constitutes “a quintessential discretionary act of government.” *Caldwell*,
18 10 Cal. 4th at 988. The California Supreme Court has held that the decision of individual members
19 of an elected board to terminate an employee is entitled to immunity. *Id.* In *Caldwell*, a school
20 board voted to terminate the school superintendent, who then sued the individual board members
21 alleging that they voted to terminate him for impermissible reasons, including his race, age, and in
22 retaliation for actions taken by his wife. *Id.* at 976. The Supreme Court sustained the defendants’
23 demurrer, holding that there is “little doubt” that the board’s decision “must be considered a basic
24 policy decision, immune from civil damage actions.” *Id.* at 982–83. The Court explained that the
25 board’s decision about who should occupy an important position like superintendent raises
26 “fundamental policy implications” and constitutes a “quintessential discretionary act of
27 government.” *Id.* at 983, 988. Finally, the Court held that the board members were entitled to
28

1 immunity, even if they had decided to terminate the superintendent for reasons that violated the
2 federal Fair Employment and Housing Act. *Id.* at 988–89.

3 Under *Caldwell*, the Board’s decision to terminate Claimant’s at-will employment
4 constitutes a discretionary act. The Executive Director of the State Bar is responsible for managing
5 the largest state bar in the country, consisting of more than 250,000 members.⁸ As acknowledged in
6 the NOC, the “Executive Director functions as the chief executive officer for the State Bar and
7 oversees all employees.” NOC ¶ 16. It is an important position, and the Board’s process of deciding
8 who should occupy it has “fundamental policy implications.” *Caldwell*, 10 Cal. 4th at 983. The
9 NOC fails to plead any facts sufficient to show that Mr. Holden or other Board members’
10 participation in making that determination lies outside the scope of § 820.2 immunity. *See Keyes*,
11 128 Cal. App. 3d at 886. Indeed, even if Mr. Holden and the Board terminated Claimant for
12 improper reasons (which they did not), they would be entitled to immunity. *Caldwell*, 10 Cal. 4th at
13 989; *see also Freeny*, 216 Cal. App. 4th at 1344.

14 *Second*, the Board’s authorization to hire MTO to investigate Claimant’s misconduct also
15 constitutes a discretionary act that is entitled to immunity. The law in California is clear that “the
16 award of a public contract involves the exercise of discretion, [thus] the government employees and
17 entities involved are immune from liability.” *Curcini v. Cnty. of Alameda*, 164 Cal. App. 4th 629,
18 648 (2008) (citation omitted). This rule applies even if the process for awarding the public contract
19 was not conducted in accordance with protocol. *Id.* (sustaining a demurrer and holding that
20 Sherriff’s Office employees were immune from suit for awarding a public contract to jail chaplains,
21 despite plaintiffs’ allegations that they misrepresented and rigged the bidding process).

22 Moreover, any “incidental and collateral acts” that Mr. Holden and the other Board
23 members took in connection with their duties as trustees—including investigating Claimant’s
24 misconduct and hiring MTO—are entitled to immunity. *Lipman*, 55 Cal. 2d at 233–34 (holding that
25 three school district trustees were entitled to immunity for conducting an investigation into the
26 plaintiff-school superintendent’s fitness for office). Mr. Holden’s duties include “supervis[ing],

27 _____
28 ⁸ *Member Demographics*, the State Bar of California (July 6, 2015), *available at*
<http://goo.gl/xb21G3>.

1 direct[ing], and control[ing] the officers of the State Bar” and “manag[ing] the performance of the
2 Executive Director in accordance with board goals and objectives.” *See* Rules of the State Bar of
3 California, Title 6, div. 1, ch. 4, Rule 6.40(A)(1), (4). Likewise, the Board “reserves authority over
4 all matters pertaining to the State Bar.” Rules of the State Bar of California, Title 6, div. 1, ch. 2,
5 Rule 6.20. All of the conduct at issue with respect to MTO falls within the authority granted to
6 Mr. Holden and the other Board members.

7 *Third*, Mr. Holden and the other Board members’ response to the alleged removal of
8 backlogged bar complaints constitutes a discretionary act within the scope of their authority to
9 supervise State Bar employees. *Id.* Accepting Claimant’s allegations regarding the backlog as true,
10 Mr. Holden and the Board had to balance alternative approaches in deciding how to respond to the
11 alleged removal. Claimant’s NOC impermissibly seeks to subject that decision-making process to
12 judicial second-guessing. *See Johnson*, 69 Cal. 2d at 793.

13 *Fourth*, Mr. Holden’s alleged attempt to block the sale of the State Bar headquarters is
14 entitled to immunity. Any action that Mr. Holden took with respect to moving or improving the
15 State Bar’s headquarters was incidental to his duties as State Bar President and involved a balance
16 of considerations (like rent and utility costs) with the State Bar’s space and infrastructure
17 requirements. Thus, this alleged act involved the exercise of judgment or choice within the scope of
18 the immunity provided by § 820.2. *See Caldwell*, 10 Cal. 4th at 981.

19 *Finally*, the NOC alleges that Mr. Holden and the other Board members failed to implement
20 legislation, specifically Assembly Bill 1159. Pursuant to Government Code § 821, “[a] public
21 employee is not liable for an injury caused by his . . . failure to enforce an enactment.” *See also*
22 *Roseville Comm. Hosp. v. California*, 74 Cal. App. 3d 583, 590 (1977) (sustaining a demurrer and
23 holding that the Attorney General’s failure to enforce a statute on a hospital was entitled to
24 immunity under §§ 821 and 820.2); *Nunn v. California*, 35 Cal. 3d 616, 622–26 (1984) (holding
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1 that a state agency's decision to delay the promulgation of a regulation is entitled to immunity).
2 Accordingly, any alleged failure to implement the bill is entitled to immunity.⁹

3 The Demurrer should therefore be sustained to Claimant's second cause of action.

4 2. Fourth and Fifth Causes of Action

5 For these same reasons, Claimant's fourth cause of action ("Intentional Interference with
6 Contractual Relations") and fifth cause of action ("Breach of the Implied Covenant of Good Faith
7 and Fair Dealing") also fail. Both claims are based on the same set of alleged discretionary acts by
8 Mr. Holden: (i) initiating and participating in the retention of MTO to investigate Claimant; and (ii)
9 engaging in communications with Board members regarding Claimant's mismanagement of State
10 Bar affairs and the Chief Justice of the California Supreme Court's position on Claimant's
11 employment. NOC ¶¶ 47, 82, 83, 91, 92. These acts are entitled to immunity.

12 The California Supreme Court has held that public employees are immune from suit for
13 participating in investigations of employee misconduct, even if the defendant's accusations against
14 the employee were false (here they were not), and even if the defendant instigated the investigation
15 for unlawful reasons (here it was not). In *Hardy v. Vial*, 48 Cal. 2d 577, 580 (1957), the Court held
16 that state officials were immune from suit for allegedly conspiring with three private parties to
17 cause the termination of a college professor by launching an investigation and filing false
18 affidavits. The Court rejected the plaintiff's arguments that the defendants' actual motives
19 mattered, or that the defendants acted outside of their authority when they conspired with the three
20 private parties to file the false affidavits, holding that the "alleged purpose of the conspiracy . . .
21 was to accomplish the dismissal of plaintiff from his employment [and that] purpose, of course,
22 was clearly within the scope of the[ir] official duties." *Id.* at 583 (emphasis added).

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25 ⁹ Mr. Holden and other Board members' alleged failure to implement A.B. 1159 also qualifies for
26 immunity under § 820.2. A public official's decision on how to implement legislation or his failure
27 to do so is a quintessential example of a discretionary act involving competing policy
28 considerations. *See Roseville Cmty. Hosp.*, 74 Cal. App. 3d at 590 ("Law enforcement and
regulatory activity entail continual choices among priorities. A decision to devote available
facilities and personnel to selected areas and to abstain from active pursuit of others is a policy or
planning decision at a relatively high internal level."); *Nunn*, 35 Cal. 3d at 623 (implementing
legislation requires "exercis[ing] discretion in accommodating . . . contending interests").

1 Likewise, the Supreme Court held in *Lipman* that school district trustees were immune from
2 allegations that they forced the plaintiff-school superintendent's termination by maliciously and
3 without cause investigating her fitness for office and engaging in related communications with
4 others who had "similar investigatory powers," including the school superintendent and district
5 attorney. 55 Cal. 2d at 233-34; *see also Kemmerer v. Cty. of Fresno*, 200 Cal. App. 3d 1426, 1438
6 (1988) (county employees were entitled to immunity for initiating investigation and disciplinary
7 proceedings into plaintiff's misconduct).

8 The Supreme Court's holdings in *Hardy* and *Lipman* apply with full force here. As
9 explained above, Mr. Holden's duties as President of the State Bar included overseeing Claimant
10 and his performance as Executive Director. *See* Rules of the State Bar of California, Title 6, div. 1,
11 ch. 4, Rule 6.40(A)(1), (4). Accordingly, Mr. Holden's alleged initiation of an investigation into
12 Claimant's misconduct and the related hiring of MTO fall squarely within the scope of his
13 discretionary authority. *Hardy*, 48 Cal. 2d 580; *Lipman*, 55 Cal. 2d. 233-34.

14 Mr. Holden's purported and related communications with other Board members about the
15 investigation, Claimant's mismanagement of State Bar affairs, and the judiciary's views on
16 Claimant's employment are also entitled to immunity. Indeed, the Board was directly involved in
17 and authorized the investigation into Claimant's misconduct. Mr. Holden's alleged
18 communications with them took place in the course of the investigations and are therefore
19 protected. *See Lipman*, 55 Cal. 2d 233 (school-district trustees' communications about plaintiff
20 with others who had "similar investigatory powers" were entitled to immunity). This result is not
21 changed by Claimant's (untrue) allegations that Mr. Holden made false statements to the Board.
22 *See Hardy*, 48 Cal. 2d at 583 (even false statements made in the course of an investigation are
23 entitled to immunity).

24 Finally, with respect to allegations that Mr. Holden initiated the investigation and retained
25 MTO, the law is clear that the retention of a public contractor involves the exercise of discretion
26 and is therefore immune from suit, even if the retention process was not conducted in conformance
27 with official protocol. *Curcini*, 164 Cal. App. 4th at 648.

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1 As President of the State Bar, Mr. Holden had broad authority and considerable discretion
2 over State Bar matters. Claimant’s NOC impermissibly asks the Arbitrator to intrude upon and
3 interfere with fundamental policy decisions entrusted to Mr. Holden and others, including who
4 should be Executive Director of the State Bar, how allegations against the Executive Director
5 should be addressed, how legislation should be implemented, and whether the State Bar should
6 move its headquarters. Because public officials like Mr. Holden cannot be held liable for
7 discretionary acts or failure to implement legislation, the Demurrer must be sustained to Claimant’s
8 second, fourth, and fifth causes of action.

9 **E. The Third Cause of Action Does Not Plead Facts Showing That Respondents**
10 **Breached Any Alleged Fiduciary Duty Owed to the Claimant**

11 In addition to the absence of a fiduciary duty, the third cause of action for breach of
12 fiduciary duty must be dismissed as a matter of law for failure to plead facts sufficient to support
13 that cause of action. The third cause of action is predicated upon the alleged leak of confidential
14 information—by unnamed Board of Trustees members—from the MTO investigative report.
15 Conspicuously absent from the NOC, however, is any allegation that Mr. Holden (or any Board
16 member for that matter) leaked the information or was otherwise involved in the leak. Instead, the
17 NOC lumps all Respondents together and alleges in conclusory fashion that “*Respondents . . .*
18 *leak[ed] slanderous and false allegations from the confidential report to the press,*” and that
19 “*Respondents have flatly refused*” to cooperate with State Bar investigators to determine the source
20 of the leak. NOC ¶¶ 74–75 (emphases added). The closest the NOC comes to alleging that
21 Mr. Holden (or any particular Board member) was involved in the leak are generalized and
22 conclusory allegations that “certain BOT members” leaked the information. NOC ¶¶ 50, 52. There
23 were, however, 16 Board members at the time of the supposed leak. *See* Cal. Bus. & Prof. Code
24 § 6009.7; *Board of Trustees, State Bar of California, available at* <http://goo.gl/ZeVAgP>.

25 The “purpose of a complaint is to furnish the defendants with certain definite charges which
26 can be intelligently met. . . . The point is that the accuser must place his finger squarely and directly
27 upon whatever dereliction is relied upon (by plaintiff).” *Zumbrun*, 25 Cal. App. 3d at 8.
28 Accordingly, a complaint must allege the essential facts with “reasonable precision and with

1 particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of
2 action.” *City of Los Angeles*, 42 Cal. 4th at 550; *see also Ankeny v. Lockheed Missiles & Space Co.*,
3 88 Cal. App. 3d 531, 537 (1979) (complaint allegations “should be stated with clearness and
4 precision so that nothing is left to surmise”).

5 The third cause of action fails this test by impermissibly lumping all of the Respondents,
6 including the Board members, together and providing no factual basis to distinguish their conduct.
7 Because Mr. Holden is not specifically alleged to have participated in, authorized, or even
8 condoned the leak, the demurrer should be sustained. *See Buccella v. Mayo*, 102 Cal. App. 3d 315,
9 325–26 (1980) (reversing default judgment against defendant where “the nature of defendant’s
10 connection with” the alleged wrong “was completely unknown” because plaintiff’s complaint
11 merely “lumped” defendant together with numerous other defendants); *Eunice*, 2013 WL 756168,
12 at *3 (“Lumping all ‘defendants’ together and facts regarding the incident does not put a particular
13 defendant on notice as to grounds for the allegations.”); *Lane v. Vitek Real Estate Indus. Grp.*, 713
14 F. Supp. 2d 1092, 1103–04 (E.D. Cal. 2010) (same). Likewise, the NOC fails to furnish defendants
15 with definite charges because it fails to identify any specific information that was leaked to the
16 press.¹⁰

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18 _____
19 ¹⁰ The third cause of action also fails to meet the heightened pleading standard imposed by
20 Government Code § 951, which provides that “any complaint for damages in any civil action
21 brought against a publicly elected or appointed state or local officer, in his or her individual
22 capacity, where the alleged injury is proximately caused by the officer acting under color of law,
23 shall allege *with particularity* sufficient material facts to establish the individual liability of the
24 publicly elected or appointed state or local officer and the plaintiff’s right to recover therefrom.”
25 (emphasis added). While there is no California authority defining the phrase “publicly elected . . .
26 state . . . officer” in § 951, Mr. Holden qualifies as such under the plain terms of the statute. He is a
27 publicly elected officer of the State Bar, which is a State government entity in the judicial branch of
28 State government. Bus. & Prof. Code § 6001; *In re Rose*, 22 Cal. 4th 430, 438 (2000); *In re
Attorney Discipline Sys.*, 19 Cal. 4th at 592, 598–600. In 2011, Mr. Holden was elected to the
Board by the vote of active members of the State Bar pursuant to Bus. and Prof. Code §§ 6013.2,
6018, 6019. In July 2014, the Board of Trustees elected Mr. Holden to serve as President of the
State Bar pursuant to Bus. and Prof. Code § 6021. NOC ¶ 5. Further, the election took place during
a “public meeting” of the Board of Trustees pursuant to Bus. and Prof. Code § 6026.5.
Accordingly, Mr. Holden qualifies as a “publicly elected . . . state . . . officer,” and the heightened
pleading standard of § 951 applies.

1 **F. The Fourth and Fifth Causes of Action are Based on Privileged Statements by**
2 **Mr. Holden**

3 The fourth and fifth causes of action are based on alleged statements Mr. Holden made to
4 Board members in connection with the State Bar’s internal investigation into Claimant’s
5 misconduct. *See* NOC ¶ 82 (alleging that Mr. Holden “participated in the retention of MTO,” and
6 thereafter “engaged in, and actively participated in communications” with Board members); ¶ 83
7 (alleging that Mr. Holden “provid[ed] false information concerning [Claimant’s] employment
8 status” to Board members); ¶ 91 (alleging that Mr. Holden “launched the . . . MTO investigation”);
9 ¶ 92 (alleging that Mr. Holden “made false statements about [Claimant]” to the Board).

10 These statements are absolutely privileged under Cal. Civ. Code § 47. In pertinent part, § 47
11 provides that statements are privileged if they are made “in any [] official proceeding authorized by
12 law.” Cal. Civ. Code § 47(b). The privilege is not limited to statements made during an official
13 proceeding; it also extends to statements made to initiate official action. *Kashian v. Harriman*, 98
14 Cal. App. 4th 892, 913 (2002).

15 California courts have consistently held that internal government investigations into
16 employee misconduct—like the State Bar’s investigation of Claimant—constitute “official
17 proceedings authorized by law” under Civil Code § 47. *Braun v. Bureau of State Audits*, 67 Cal.
18 App. 4th 1382, 1389 (1998) (collecting cases, and holding that State Auditor investigation
19 constituted “official proceeding authorized by law” therefore statements made during the
20 investigation were privileged); *Hansen*, 171 Cal. App. 4th at 1544, 1547 (statements made during
21 California Department of Corrections and Rehabilitation internal investigation into employee
22 misconduct were absolutely privileged); *Howard v. Oakland Tribune*, 199 Cal. App. 3d 1124, 1128
23 (1988) (Department of Education investigation into an alleged misuse of public funds was an
24 “official proceeding” within the meaning of Civil Code § 47).

25 Courts have reached the same conclusion in the Anti-SLAPP context. That statute serves
26 similar policy interests and includes nearly identical language to § 47. Cal. Civ. Proc. Code
27 § 425.16(e)(2) (defining protected activity to include statements “made in connection with . . . any
28 other official proceeding authorized by law.”). Accordingly, California courts look to both statutes

1 as an aid in construing the other, and a statement protected under the Anti-SLAPP statute as one
2 made in connection with an “official proceeding” is typically privileged under § 47 as well. *Neville*
3 *v. Chudacoff*, 160 Cal. App. 4th 1255, 1263 (2008); *ComputerXpress, Inc.*, 93 Cal. App. 4th at
4 1009 (interpreting meaning of “official proceeding” under Anti-SLAPP statute by looking to
5 “analogous context of the privilege under Civil Code section 47”); *Hansen*, 171 Cal. App. 4th at
6 1547 (statements communicated during internal investigation were done so as part of an “official
7 proceeding” within both statutes).

8 As explained more fully in Respondents’ concurrently filed Anti-SLAPP motion, internal
9 investigations into government employee misconduct constitute “official proceedings” under the
10 Anti-SLAPP statute. *Hansen*, 171 Cal. App. 4th at 1544; *Miller v. City of Los Angeles*, 169 Cal.
11 App. 4th 1373, 1383 (2008) (City of Los Angeles’ internal “investigation into [an employee’s]
12 conduct in connection with his public employment and its determination and report that he had
13 engaged in misconduct on the job” constituted an “official proceeding authorized by law.”).

14 Here, the Board of Trustees, acting pursuant to its legal authority, formally initiated an
15 internal investigation into Claimant after receiving a whistleblower report regarding his alleged
16 misconduct. NOC ¶ 34. It then held four closed-session meetings to discuss the results of the
17 investigation, and a final closed-session meeting during which it voted to terminate Claimant’s
18 employment. The investigation and Board meetings plainly constitute “official proceedings
19 authorized by law” under both Civil Code § 47 and the Anti-SLAPP statute. *See Hansen*, 171 Cal.
20 App. 4th at 1544, 1547.¹¹ Because Mr. Holden’s statements underlying the fourth and fifth causes
21 of action were made to initiate and during the course of the investigation, the statements are
22 absolutely privileged and the Demurrer should be sustained. Cal. Civ. Code § 47.¹²

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25 ¹¹ For sake of brevity, Respondent’s incorporate the arguments in the accompanying Anti-SLAPP
26 motion as to these points.

27 ¹² Claimant’s fourth cause of action fails for an additional and independent reason. An agent or
28 representative of a contracting party cannot be held liable for the tort of interfering with the
contract. *Mintz v. Blue Cross of Cal.*, 172 Cal. App. 4th 1594, 1606 (2009). Because Mr. Holden
represented the State Bar as its President, he cannot be held liable for allegedly inducing the State
Bar to breach its contract with Claimant.

1 **G. The Fifth Cause of Action Fails As a Matter of Law Against the State Bar and**
2 **Mr. Holden**

3 Claimant’s fifth cause of action alleges that the State Bar and Mr. Holden breached the
4 covenant of good faith and fair dealing implied in Claimant’s employment contract by launching
5 the MTO investigation and allegedly making false statements to Board members in order to
6 convince them to terminate Claimant. NOC ¶¶ 91, 92. Noticeably absent from Claimant’s
7 allegations, however, is any mention of the fact that Claimant’s employment with the State Bar was
8 *at-will*. Section XIII(A) of Claimant’s employment contract expressly states that “[t]he State Bar or
9 Dunn may terminate this Agreement, *with or without cause . . .*” NOC, Ex. A § XIII(A) (emphasis
10 added).

11 This fact is fatal to Claimant’s claim. It is axiomatic that the implied covenant of good faith
12 and fair dealing only protects a party’s right to receive the actual benefits of an agreement. *Guz*, 24
13 Cal. 4th at 349 (The covenant cannot “be endowed with an existence independent of its contractual
14 underpinnings.” (citation omitted)). Thus, the California Supreme Court has held that a cause of
15 action for breach of the implied covenant cannot be based on a claim that an at-will employee was
16 terminated without cause. *Id.* (“Precisely because employment at will allows the employer freedom
17 to terminate the relationship as it chooses, the employer does not frustrate the employee’s
18 contractual rights merely by doing so.” (citation omitted)); *see also Foley v. Interactive Data*
19 *Corp.*, 47 Cal. 3d 654, 698 (1988).

20 Accordingly, Claimant cannot state a cause of action for breach of the implied covenant
21 based on Respondents’ alleged acts in causing the termination of his at-will employment contract.
22 Nor has Claimant identified any other purported contract benefits that Respondents deprived him
23 of. The Demurrer should be sustained as to Claimant’s fifth cause of action for this reason alone.

24 Separately, and additionally, Claimant cannot state a cause of action for breach of the
25 implied covenant against Mr. Holden. The law is exceedingly clear that non-parties to a contract
26 are not bound by any implied covenant of good faith and fair dealing. *Austero v. Nat’l Cas. Co.*,
27 133 Cal. Rptr. 107, 110 (1976) (“[O]ne who is not a party to the underlying contract may not be
28 held liable for breach of an implied covenant of good faith and fair dealing for as to him no such

1 implied covenant exists.”); *Curley v. Wells Fargo & Co.*, 2014 WL 988618, at *8 (N.D. Cal. Mar.
2 10, 2014) (same); *Bell-Sparrow v. Wiltz*, 2014 WL 491007, at *3 (N.D. Cal. Feb. 4, 2014).
3 Claimant’s employment contract was with the State Bar—not Mr. Holden. In fact, Claimant’s
4 contract and all of the amendments thereto were executed *before* Mr. Holden even became
5 President of the State Bar in September 2014. NOC ¶ 5; Exhs. A, B, C, D. The Demurrer should be
6 sustained as to Claimant’s fifth cause of action.

7 **H. The Demurrer Should Be Granted Without Leave To Amend**

8 A demurrer should be sustained without leave to amend unless the plaintiff meets their
9 burden of demonstrating a “reasonable possibility” that they can cure the defects in their complaint
10 by identifying “some legal theory or state of facts . . . that would change the legal effect of their
11 pleading.” *Hernandez*, 46 Cal. 4th at 520 n.16. Claimant cannot meet his burden here. Among other
12 reasons, Claimant cannot plead facts sufficient to establish that Mr. Holden or the State Bar owed
13 Plaintiff a fiduciary duty. Notably, Claimant was unable to plead any additional facts that could
14 give rise to a fiduciary relationship, even though he already amended his complaint *twice*—(1)
15 once after he was served with Respondent’s original Demurrer in superior court that raised this
16 issue; and (2) again when he filed his Notice of Claims in arbitration. Nor can Claimant plead facts
17 to show that Mr. Holden was bound by the implied covenant of good faith and fair dealing, or that
18 the State Bar breached any such covenant. Claimant likewise cannot allege additional facts that
19 Mr. Holden or any other Board member was involved in the alleged leak. Nor can he allege facts
20 sufficient to establish that Mr. Holden’s alleged acts do not fall within the scope of immunity
21 provided by Government Code §§ 820.2, 821, or that his statements alleged in the fourth and fifth
22 causes of action are not privileged under Civil Code § 47.

23 **V. CONCLUSION**

24 For the foregoing reasons, the State Bar and Mr. Holden respectfully request that the
25 Arbitrator grant their Demurrer to the NOC’s first, second, third, fourth, and fifth causes of action.
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1 Dated: February 26, 2016

Respectfully submitted,

2 HUESTON HENNIGAN LLP

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By:

John C. Hueston
Attorneys for Respondents
State Bar and Craig Holden

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On February 26, 2016, I served the foregoing document(s) described as:

NOTICE OF RESPONDENTS THE STATE BAR OF CALIFORNIA AND CRAIG HOLDEN'S DEMURRER AND DEMURRER TO CLAIMANT JOSEPH DUNN'S NOTICE OF CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

on the interested parties in this action as stated on the attached mailing list.

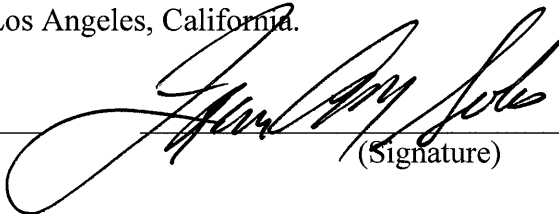
(BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth on the attached mailing list, with fees for overnight delivery paid or provided for.

(BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

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

Executed on February 26, 2016, at Los Angeles, California.

Francine Solis
(Type or print name)



(Signature)

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