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Arbitrator

JAMS ARBITRATION

DUNN, JOSEPH, L.,

Claimant,

v.

STATE BAR OF CALIFORNIA, CRAIG HOLDEN, AND BETH JAY,

Respondents.

JAMS Ref: 1100083130

FINAL AWARD

I. Facts

A. Procedural Background

On November 18, 2014, Claimant Joseph Dunn ("Claimant") filed a lawsuit in the Superior Court for the State of California, Los Angeles County, Case No. BC563715, against the California State Bar ("State Bar"), State Bar President Craig Holden ("Holden"), and the State Bar Board of Trustees ("Board") for claims arising out of the termination of his employment with the State Bar. Claimant filed his First Amended Complaint on April 29, 2015, adding

Respondent Beth Jay ("Jay"). On June 12, 2015, the Superior Court granted the State Bar's Motion to Compel Arbitration.

On February 12, 2015, Claimant filed his Notice of Claims ("NOC") in this arbitration proceeding. The Arbitrator sustained a demurrer to all claims alleged against the Board, with leave to amend. On May 2, 2016, Claimant filed an Amended Notice of Claims ("ANOC"). In January of 2017, the Arbitrator granted summary judgment in favor of Respondents Craig Holden and Beth Jay on all claims asserted against them. Therefore, only two claims asserted against the State Bar remained: a claim for "Whistleblower" protection under Labor Code §1102.5 and a claim for Breach of the Implied Covenant of Good Faith and Fair Dealing. The Arbitrator conducted hearings on February 1 through February 7, 2017 to resolve the remaining claims.

B. Case Facts

1. Claimant Hired by the State Bar

The State Bar hired Claimant in November of 2010 to serve as its Executive Director. State Bar Trial Exhibit ("Rx") 543-6 ("Employment Agreement"). According to the Employment Agreement executed between Claimant and the State Bar, "essential duties" of the Executive Director included: ". . .to keep the Board and its President fully informed on matters of significance;" "to attend meetings of the Board and report to the Board at each Board Meeting on matters of significance;" "to appropriately safeguard and administer all funds, physical assets, and other State Bar property;" and "to establish and maintain positive relationships with. . . the Supreme Court. . .and other State Bar constituents." Id. §II.E. The Employment Agreement also stated that while employed as Executive Director, Claimant was "entitled to reimbursement for transportation, business and travel expenses incurred in the performance of his duties as

Executive Director and in accordance with the State Bar's travel expense and business expense policies . . .." Id. §VIII.

The State Bar had the right to terminate Claimant "with or without cause prior to the expiration" of his term, effective upon 30 days prior written notice. Id. §XIII.A(2). If the State Bar initiated termination, the State Bar was obligated to pay Claimant severance, unless, "in the sole discretion of the board, [Claimant] had committed an act involving moral turpitude, dishonesty, corruption or similar act of gross misconduct . . .." Id.

Between 2010 and 2014, Claimant received excellent performance evaluations. Hearing Transcript ("Tr") at 783; Claimant's Exhibits ("Cl's Ex.") 8/9. In 2011 and 2012, Claimant received merit bonuses, and in 2013, Claimant received a bonus that exceeded the amount specified for merit bonuses under his contract. Id. at 784. Claimant's original three-year contract was extended in January 2014 for another three years. SB Ex. Rx 546.

2. Claimant Criticizes Chief Trial Counsel Jayne Kim

In 2011, Dunn hired Jayne Kim to manage the daily operations of the State Bar's Office of Chief Trial Counsel ("OCTC"). Tr. at 909:24-910:13, 912:7-913:20. One of the tasks performed by Ms. Kim's department was the creation of monthly reports detailing the number of pending investigations into attorney misconduct (referred to as the "backlog" reports). Tr. 918, 920. Data to populate the reports was generated by the State Bar's Office of Budget and Performance. Id. at 920. The monthly reports were compiled into an annual report that detailed the State Bar's efforts to investigate complaints against California attorneys, entitled the Annual Discipline Report ("ADR"). Id. 919:11-920:25. Claimant reviewed the reports, signed them, and submitted the ADR reports to the California Legislature. Id. The reports assisted the legislature in evaluating the State Bar's performance. Id.; 425:10-21; SB Rx 655.

Claimant testified that in September of 2013, he expressed concern to Ms. Kim that the number of backlogged investigations pending in her department was too high. Tr. 807:6-16. One month later, Claimant noticed a decrease in the number of backlogged cases in Ms. Kim's monthly report. Tr. 806:21-24. Upon inspection, Claimant found that investigations initiated by the State Bar, referred to as "SBI" investigations, were not included in Ms. Kim's report. Id. Claimant believed that it was State Bar's policy and practice to include SBIs in all backlog reports, and concluded that Ms. Kim had intentionally deleted these cases from her report. Id. In late 2013, Claimant confronted Ms. Kim regarding the report. Id. at 921-922. Ms. Kim informed Claimant that she believed that it was State Bar policy to exclude SBIs from the backlog reports. Id. Claimant asked Ms. Kim to confirm State Bar policy on reporting SBI cases, and Ms. Kim contacted John Chiappetta, the Director of Budget Performance and Analysis. Id. at 922; SB Ex 652. Mr. Chiappetta informed both Ms. Kim and Claimant that while he *had* included SBIs in prior ADRs, he had also informed Ms. Kim that SBIs were *not* included in the monthly reports. Id.; SB Ex 652. Mr. Chiappetta acknowledged that the confusion regarding whether SBIs should be included in the monthly backlog reporting was due to his error. Id.; Tr. 923:4-924:12.

Claimant, however, continued to believe that Ms. Kim intentionally deleted SBIs from her monthly reports in order to boost the appearance of productivity in her department. Tr. 807. Claimant testified that he thought Ms. Kim's professed confusion as to State Bar policy on the matter was "patently false." Id. 808. According to Claimant, Mr. Chiappetta was a "numbers cruncher," not a lawyer or policymaker, and thus Ms. Kim should not have relied upon Mr. Chiappetta to determine whether SBIs should be included in the report. Id. 811-812.

Although Ms. Kim was a member of Claimant's Executive Management Team, Ms. Kim reported to the Regulations, Admissions and Discipline ("RAD") Committee, a State Bar

Committee composed of a subset of Trustees of the Board ("Trustees"). Tr. 911:13-22. Heather Rosing acted as the RAD Committee Chair and Michael Colantuono acted as Vice Chair. Id. 418:20-25. In early 2014, Claimant met with Mr. Colantuono and Ms. Rosing to inform them that Ms. Kim had failed to include SBIs in her backlog reports. Id. 816; 418:6-419:7. Claimant stated that he believed Ms. Kim intentionally eliminated SBIs from the backlog report to give the false impression that her department was efficiently reducing the number of backlogged investigations, and asserted that Ms. Kim's actions were a "fireable offense." Id. Mr. Colantuono and Ms. Rosing asked Claimant to refrain from further action and informed Claimant that they would conduct a "thorough" investigation of the incident. Id. 419:23-420:16.

As the Chair of the RAD Committee, Ms. Rosing outlined a plan of action to investigate Claimant's allegations against Ms. Kim. Id. 420:18-21. Mr. Colantuono and Ms. Rosing interviewed Ms. Kim, Mr. Chiappetta, and the State Bar's General Counsel. Id. 422:3-18; 424:9-10; 427:18-27; 429:20-24. Mr. Colantuono and Ms. Rosing concluded that there was a history of confusion at the State Bar regarding the definition of "backlogged" investigations, and that Mr. Chiapetta's and Ms. Kim's reporting errors were the result of this historic, internal confusion at the State Bar. Id. 428:429:17. Additionally, Mr. Colantuono and Ms. Rosing concluded that the number of SBI investigations was sufficiently small relative to the total number of outstanding investigations such that it was unlikely that Ms. Kim, or anyone else, would manipulate SBI numbers in an attempt to bolster the State Bar's perceived performance. Id. Mr. Colantuono and Ms. Rosing reported their conclusions to Claimant, and recommended that Claimant standardize the State Bar's policy regarding reporting backlogged investigations and lobby the legislature for clarification as to how the State Bar should define its metrics. Tr. 429:1-17. The RAD Committee's investigation concluded that the errors in reporting SBI investigations were due to "a big misunderstanding that just required clarification." Id.; Tr. 430:17-23. In February of

2014, the General Counsel's Office prepared an agenda item for a Board proposal to "clarify" and "expand" the guidelines on reporting backlogged investigations to RAD. Rx 655. The Board approved the resolution in March of 2014. Tr. 930:3-8.

3. Ms. Kim Files a Complaint Against Claimant

On July 31, 2014, Ms. Kim filed a formal complaint against Claimant with State Bar Human Resources Director, Robert Hawley. Rx 549. Ms. Kim reported several concerns regarding Claimant's performance as Executive Director, but two issues are of primary importance in this case. First, Ms. Kim expressed concerns regarding Claimant's use of funds to travel to Mongolia in January 2014. SB Rx 549-1. Ms. Kim noted that while Claimant had informed the Board that State Bar funds would not be used to pay for Claimant's trip, Claimant had, in fact, submitted an expense report to obtain reimbursement for his travel costs, and his airfare had been purchased through the State Bar travel agent. Id.549-2. Second, Ms. Kim reported an event that occurred in May of 2014 at a quarterly meeting between representatives of the Supreme Court and key executives of the State Bar. Tr. 933:25-934:19. Both Ms. Kim and Claimant were in attendance. Id. During the meeting, Supreme Court representatives instructed the State Bar representatives to "stand down" on Assembly Bill 852, a bill pending before the legislature in the spring of 2014. Tr. 933:25-934:7. Shortly thereafter, Ms. Kim attended a State Bar Board Meeting at which Claimant and Mr. Miller advocated that the State Bar should *support* AB 852. Id. 934:8-13. In fact, Claimant submitted a memorandum prior to the Board meeting stating that there was "no known opposition" to AB 852. Id. 935:2-4. Ms. Kim believed that Claimant's statements to the Board directly contradicted the instructions Claimant had received from the Supreme Court's representatives, and that Claimant had failed to inform the Board regarding the opinion of a significant State Bar stakeholder.

4. Board Hires Munger, Tolles, & Olson to Investigate

Mr. Hawley submitted Ms. Kim's report to State Bar Audit Committee. Tr at 337:1-18; 528:23-529:8. The Audit Committee notified then State Bar President Luis Rodriguez. Tr. at 531:11-532:11; 691:17-24. Mr. Rodriguez recused himself from participating in the investigation and asked then Vice President and President-elect, Craig Holden, to work with the Audit Committee to determine the State Bar's response. Id.

The Audit Committee and Mr. Holden considered Ms. Kim' report to be a "Whistleblower Complaint" and concluded that the Board was obligated to obtain outside counsel to investigate her allegations. Tr. 529:24-530:8; 533:20-534:10; 593:14-19. After interviewing several law firms, the Audit Committee elected to hire Munger, Tolles & Olson (MTO) because MTO's bid to conduct a Phase I investigation was the lowest bid received. Id. 534:13-19. On September 14, 2014, the Board held a closed session meeting, at which the Audit Committee informed the full Board of Ms. Kim's report and of the Committee's recommendation to retain MTO to investigate the allegations. Rx 561-1. The Board voted to ratify the contract with MTO and authorized MTO to provide a written report, including recommendations, to the Board upon completion of their investigation. Id.

5. The MTO Report

MTO interviewed five witnesses during Phase I of its investigation and presented its preliminary analysis to the Board at the September 14, 2014 Board meeting. Tr. 1067:2-22. Phase II of MTO's investigation involved interviewing 19 additional witnesses and reviewing relevant documents. Id. at 1067:23-1068:11. MTO investigators interviewed Claimant twice, once during Phase I of the investigation and again during Phase II. Id. 1070:13-19. During Phase III of the investigation, MTO created and presented a report of its findings to the Board. Id. 1068:10-11.

The MTO report concluded that Claimant had engaged in serious misconduct that justified termination by "repeatedly provid[ing] inadequate or inaccurate information to the [B]oard in a way that undermined its ability to exercise its decision-making authority." Rx. 552-29. Specifically, the MTO report concluded that although the Supreme Court instructed Claimant to stop all State Bar action on AB 852, Claimant ignored those instructions, failed to disclose the Supreme Court's position on AB 852 to the Board, and affirmatively advocated to the Board that it should sponsor AB 852. Rx 552-10-12. The MTO Report noted that on April 10, 2014, Supreme Court Staff Attorney Beth Jay wrote to Claimant that the State Bar's position on AB 852 should be, at most "neutral for now." Rx. 608-1. On April 17, 2014, Claimant was further instructed that the Supreme Court wanted AB 852 to be "delayed pending input." Rx. 610-1. On April 25, 2014, the Supreme Court informed Claimant that it wanted the bill "stopped until it has time to gather additional information." Rx. 614-1. Nonetheless, on May 6, 2014, Claimant wrote a memorandum to the Board in which he stated that the "Board should adopt the recommendation to sponsor AB 852," and that there was "no known opposition" to AB 852. Rx. 617-2. At the May 8, 2014 Board Operations Committee Meeting, Claimant placed AB 852 on the "consent calendar" for the next day's Board meeting. [1] Rx. 568-1. As a result, the Board voted to sponsor AB 852.

The MTO report also indicated that at the September 2014 Board Meeting, Claimant represented to the Board that the Chief Justice of the California Supreme Court affirmatively supported a proposal to move State Bar's headquarters from San Francisco to Sacramento. Rx. 552-12-13. MTO attorneys interviewed the Chief Justice, however, who stated that she had not

[1] Items placed on the "Consent Calendar" are "non-controversial" items that do not require discussion. Tr. 349:24-350:9. The Consent Agenda does not require a motion or a second and is routinely adopted in the absence of any objection. Id.

spoken with Claimant, had not taken a position regarding the move, and had, in fact, expressed concerns about the impact of the move to Mr. Rodriguez. Rx 520 at 164:1-16; Rx 450 at 62:22-63:21.

The MTO Report further concluded that Claimant misrepresented to the Board that State Bar funds would not be used to fund Claimant's travel to Mongolia in January of 2014. Rx 552-5. Claimant had stated at a board meeting that no State Bar funds would be used to pay for his travel, and yet Claimant booked his airfare through the State Bar travel department, and Claimant submitted for State Bar reimbursement of other travel costs. Rx 552-5, 594, 595, 596, 597, 520; Tr. at 51:23-52:1; 166:1-10; 489:12-14; 760:6-16. The report noted that Claimant also failed to correct an April 23, 2014 newspaper article that reported that no State Bar funds had been used to fund Claimant's trip. Tr. At 1082:3-5; Rx. 552-6.

6. The Board's Response to the MTO Report

MTO attorneys presented the results of its report to the Board at an October 17, 2014 Special Board Meeting. RX 562-1. A motion was made to formally reprimand Claimant in response to the MTO Report's findings, but the Board tabled the motion for consideration at a later date. Id. 562-2. On October 30, 2014, the Board conducted a Closed Executive Session Meeting at which it voted to accept the findings of the MTO Report, but not the recommendations in the report regarding how the Board should respond. Rx. 563. The Board also appointed Trustees Joanna Mendoza and David Pasternak to draft and propose a formal letter of "reprimand/counseling" for the Board's review and consideration at a follow-up, closed board session scheduled for November 7, 2014. Id. 563-2.

Prior to the November 7, 2014 board meeting, the Board received two letters from the Geragos & Geragos Law Firm. On November 3, 2014, Mr. Geragos sent a letter to the Board stating that his firm had been "retained by a whistleblower" who was "a member of the State Bar

of California," but that "due to concerns about retaliation and reprisal," his client would not be identified. Rx. 554.1 Mr. Geragos asserted that the process under which MTO was retained violated State Bar protocol and he demanded that the State Bar place a "litigation hold" on all related documents. Id. Mr. Geragos further stated that Trustee Miriam Krinsky failed to disclose a longstanding relationship with one of the MTO attorneys who conducted the investigation, and thus the engagement of MTO by the State Bar was conflicted. Id. Rx 554-2.

On November 5, 2014, Mr. Geragos sent a second letter to the Board. Rx. 556. In his second letter, Mr. Geragos objected that personnel in the office of the Executive Director had shredded documents related to the case, and he reiterated his demand that the State Bar place a "litigation hold" on all staff and personnel at the State Bar. Id. 556-1-2. Mr. Geragos further stated that he had been "retained by additional whistleblowers" who alleged that Ms. Kim had engaged in misconduct by submitting false and misleading reports designed to deceive the Board, the RAD Committee, members of the California State Bar, the State Legislature, the California Supreme Court, and the California Governor. Id. 556-2. Mr. Geragos noted that in the fall of 2013, Ms. Kim's job performance "came under scrutiny" due to the backlog of State Bar investigations, and that Ms. Kim removed SBI cases from the backlog inventory to give a false and misleading impression that the backlog at the State Bar had been reduced. Id. 556-3.

On November 7, 2014, the Board conducted a closed meeting to further deliberate on how to respond to the findings reported in the MTO Report. Rx. 564-1. At that meeting, a new attorney, Carol Stevens of Burke, Williams & Sorensen, attended and advised the Board on how to respond to the MTO Report. Rx. 564-1. The Board deliberated and, by an 11-4 vote, resolved to notify Claimant that it was exercising its right to terminate Claimant's employment under Section XIII(A)(2) of the Employment Agreement. Id. 564-2. The Board further resolved to offer Claimant the opportunity to resign in exchange for the severance payment provided for by

his contract. Id. The Board authorized Mr. Holden to consult with Ms. Stevens and negotiate with Claimant regarding his resignation or termination. Id. 564-3. Lastly, the Board authorized Mr. Holden to solicit proposals for insurance coverage counsel and litigation defense counsel to investigate and resolve the two letters "regarding unidentified 'whistleblowers' received from the Geragos & Geragos" law firm. Id.

On November 7, 2014, Mr. Holden notified Claimant of the Board's resolution to terminate his employment. Rx 577. During the following week, Mr. Holden and Claimant negotiated the terms of a resignation in lieu of termination, but ultimately, Mr. Holden terminated Claimant and the State Bar did not pay Claimant severance. Cl. Ex. 176. On November 18, 2014, the Geragos & Geragos Law Firm filed a lawsuit on behalf of Claimant in the Superior Court.

II. Analysis

Claimant has the burden to produce sufficient evidence to support a finding in his favor on each and every element of his claims by a preponderance of the evidence. *See, Beck Dev.* Co. *v. S. Pac. Transport Co.*, 44 Cal.App.4th 1160, 1205 (1996); Cal. Evid. Code §§115, 500.

A. Violation of Labor Code §1102.5

Claimant alleges that he made "Whistleblower" complaints to the State Bar during his employment and that the State Bar wrongfully terminated him in retaliation for these complaints. ANOC ¶¶ 69-78. California Labor Code Section 1102.5(b) states that an "employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

Claimant may prove his claim for wrongful retaliation by either direct or circumstantial evidence. "Where a plaintiff offers direct evidence of discrimination that is believed by the trier of fact, the defendant can avoid liability only by proving the plaintiff would have been subjected to the same employment decision without reference to the unlawful factor." *Moker v. Orange County*, 157 Cal.App.4th 121, 137 (2007). Claimant offered no direct evidence of retaliation. Instead, Claimant relied upon circumstantial evidence to support his claim that the State Bar fired him in violation of Labor Code §1102.5.

To prove a retaliation claim by circumstantial evidence, a plaintiff must "first establish a *prima facie* case of retaliation." Id. Plaintiff must show that he engaged in a protected activity, his employer subjected him to an adverse employment action, and that there is a causal link between the two. *Patton v. Grant Junior High School Dist.*, 134 Cal.App.4th 1378, 1384 (2005). "Once established, the defendant must counter with evidence of a legitimate, non-retaliatory explanation for its acts. If [the] defendant meets this requirement, the plaintiff must then show the explanation is merely a pretext for retaliation." *Moker*, 157 Cal.App.4th at 137.

An employee engages in a "protected activity" if he or she discloses information to an employer that the employee reasonably believes is a "violation of state or federal statute, or violation or noncompliance with a state or federal rule or regulation." Cal. Labor Code §1102.5 (b). The statute does not require that an employee prove that a violation actually occurred; the statute requires only that the employee had a "reasonable belief" that a violation occurred. *Id.* The employee must reasonably believe that the conduct reported may violate a *specific* statute, rule, or regulation, however. *Love v. Motion Indus., Inc.*, 309 F.Supp.2d 1128, 1135 (N.D. Cal. 2004). A reasonable belief that the "activity violated some unnamed statute, rule, or regulation" is insufficient. *Id.*

Claimant must also prove that the Board fired him because of his protected, "Whistleblower" activity. "Retaliatory motive is proved by showing the plaintiff engaged in protective activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter." *Morgan v. Regents of University of Cal.*, 88 Cal.App.4th 52, 69 (2000). "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in protected activity." *Id.* at 70 (*citing Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982)).

Claimant asserts that he engaged in two forms of protected "Whistleblower" activity. First, Claimant alleges that he was one of the unidentified, anonymous "Whistleblowers" referred to in the letters Mr. Geragos sent to the State Bar in November of 2014. Tr. 50:11-15. Second, Claimant alleges that his complaints to the RAD Committee regarding Ms. Kim's failure to include SBIs in the backlog reports constitute a protected "Whistleblower" activity. Tr. 50:9-11.

1. Mr. Geragos' November 2014 Letters to the Board

Mr. Geragos' first letter informed the State Bar that the retention of MTO violated State Bar protocol and that Ms. Krinsky failed to disclose a potential conflict. Rx 554. Mr. Geragos' second letter informed the Board that Ms. Kim had unlawfully manipulated data regarding the backlog of investigations and that Mr. Jim Fox might have had conflicted interests with regard to the MTO investigation. Rx, 556-2-4.

Although Mr. Geragos' letters stated that they related to a "Whistleblower Complaint," the letters did not specify any statute, rule or regulation that Mr. Geragos' clients believed may have been violated as a result of the reported actions. Furthermore, Claimant failed to testify at the hearing that he believed a particular statute, rule, regulation or law was violated by the behavior described in the letters. Even if Claimant was one of Mr. Geragos' unnamed clients,

and even if he had testified that he believed the actions described in the letters violated a specific law, Claimant's claim would still fail because Claimant produced no evidence that Mr. Geragos' letters *caused* the Board to terminate him.

Mr. Geragos' letters did not identify his clients and Claimant failed to produce evidence indicating that the Trustees knew that Claimant was one of the unnamed "Whistleblowers." Rx 554-1; Rx 556-2. Evidence submitted by the State Bar indicates that the Trustees did *not* know that Mr. Geragos represented Claimant or that Claimant was one of the unnamed "Whistleblowers:"

- Mr. Dean: "Q. Did Mr. Geragos identify his client or clients in those letters? A. No. Q. Did you believe the anonymous clients included Joe Dunn? A. No. . . .Q. Prior to your voting in favor of terminating Mr. Dunn, did you believe for any reason that he was a whistleblower? A. No. Q. Did any trustee say anything to you or in your presence that suggested they thought he was a whistleblower? A. No." Tr. at 1164:10–23.

- Mr. Fox: "Q. At the time of the board's vote on November 7th to terminate Mr. Dunn, what did you know about the identity of the whistleblowers that Mr. Geragos purported to represent? A. Nothing . . . Q. Did you at any time vote to terminate Mr. Dunn because you believed he was blowing the whistle? A. No." Tr. at 191:5–9, 192:4–6.

- Ms. Mendoza: "[W]e didn't even know who the letters were from. Just anonymous people . . . In fact, I even question whether or not those people even existed . . ." Rx. 688 (Mendoza Depo. Tr.) at 199:21–200:5.

- Ms. Moore: "At no time prior to Mr. Dunn's termination, did I know or suspect that the letters were written on Mr. Dunn's behalf. I did not know Mr. Geragos was Mr. Dunn's attorney. At no time during the Board's discussions during the September 14, October 17, October 30, or November 7 Board meetings, or at any other time, did any Trustee state or indicate in any way that they believed Mr. Dunn was a whistleblower (in sum or substance). At no time during our discussions did any Trustee state or indicate in any way that any adverse action should be taken against any purported whistleblower." Rx. 647-3, ¶¶ 6–9.

- Mr. Vera: "I did not know Mr. Dunn was represented by Mr. Geragos. I did not find out that Mr. Geragos was Mr. Dunn's attorney until Mr. Dunn filed a civil complaint on November 13, 2014 in Los Angeles County Superior Court against the State Bar." Rx. 646-3, ¶ 6.

- Ms. Meyers: "Q. Did you have a belief as to whether or not Mr. Dunn was the source behind those letters? A. I have no idea who the source was." Tr. at 727:19–728:16.

- Mr. Pasternak: "Q. Now, when you voted to terminate Mr. Dunn, did you do so because you believed he was a whistleblower? A. Absolutely not. . . . Q. In all of your discussions with the trustees, Mr. Pasternak, did any trustee express that they were voting to terminate Mr. Dunn because they believed he was a whistleblower? A. Absolutely not. Q. Did any trustee even express that they believed Mr. Dunn was a whistleblower? A. No. Nobody knew. That is, nobody knew who Mr. Geragos's unnamed whistleblower clients were." Tr. at 1195:10–1196:7.

- Ms. Rosing: "Q. . . . at the time the Board voted to terminate Mr. Dunn on November 7th, did you believe Mr. Dunn was himself a whistleblower? A. No. Q. At any time prior to his termination, did any Board member say anything to you suggesting that they believed Mr. Dunn was a whistleblower? A. No. . . .Q. Did you believe that those letters were sent on behalf of Mr. Dunn? A. No." Tr. at 591:12–592:6.

- Ms. Brewer: "Q. Before you voted to terminate Mr. Dunn, did you consider him to be a whistleblower? A. No . . . Q. Did you vote to terminate Mr. Dunn in retaliation for blowing the whistle? A. Since I didn't know he blew the whistle, I don't know how I could have acted in retaliation." Tr. at 1133:7–15.

- Ms. Krinsky: "Q. Now, at any time during your discussions about [] reprimanding or terminating Mr. Dunn, did you ever believe him to be a whistleblower? A. Joe? Q. Yeah. A. No. Q. . . . did you vote to terminate Mr. Dunn to retaliate against him for whistleblowing? A. No. Q. Did any trustee on the Board say to you, Mr. Dunn was a whistleblower? A. Absolutely not. . . . Q. Did those letters reveal to you that Mr. Dunn was the source of those letters? A. No. . . ." Tr. at 774:24–776:15.

- Mr. Colantuono: "Q. Did the [Board's] consensus [to terminate Claimant] have anything at all, in your observation or in your mind, to do with Mr. Dunn's alleged status as a whistleblower? A. No. . . . Q. Did you believe that Mr. Dunn was a whistleblower? A. No." Tr. at 330:8–19.

At least one board member assumed that Ms. Kim's own staff must have lodged the complaints:

- Mr. Mangers: "Q. You knew the whistleblowers in my letters was Joe; didn't you? A. I certainly did not." "Q. Did you vote to terminate Mr. Dunn because you believed he was a whistleblower? A. No. Q. Did you believe Mr. Dunn was the source of Mr. Geragos's letters? A. No. I, quite frankly, thought they were from Ms. Kim's subordinates." Tr. at 462:1–3, 500:12–24.

Given that Mr. Geragos did not name the identities of the "Whistleblowers" he represented, it is not surprising that the Board did not know that Claimant was one of them.

Furthermore, Mr. Geragos' November 5, 2014 letter objected that the Office of the *Executive Director* had shredded potentially relevant documents, and thus suggested that the letter was written, in part, to report unlawful activity committed by *Claimant*. Rx 556-2. In response to this allegation, Claimant wrote an email to Mr. Holden in which he disavowed that his office had shredded documents and implied that he was not involved with the Geragos letters. Rx. 682-1 ("if ***someone*** has made an allegation that a "secret" shredding program was launched in the Exec Office over the last few months, presumably in response to the overall situation we are dealing with, nothing could be further from the truth") (*emphasis added.*)

Several Trustees testified that they never considered Claimant to be one of the "Whistleblowers" referenced in the Geragos letters because it was highly unlikely that Claimant would "blow the whistle" on himself:

- Ms. Rosing: "[C]learly the executive director isn't going to accuse himself of shredding documents." Tr. at 592:7–16.
- Mr. Pasternak: "[T]he second letter talked about shredding going on in the executive office, Joe's office, which led me to believe he was writing on behalf of somebody else, because I couldn't understand why Joe would be complaining about shredding going on in his office." Tr. at 1195:13–23.
- Ms. Krinsky: "A second letter complained about improprieties, including in the executive director's office that files were being shredded and other improper things were being done. So, you know, that caused me to believe that somebody in the staff was worried about what our executive director was doing, as we were moving forward." Tr. at 775:25–776:15.
- Mr. Colantuono: "So if he's a whistleblower, why is he throwing stones at himself?"). Tr. at 331:7–15, 335:25–336:16.
- Mr. Fox: "Normally people don't blow the whistle on themselves." Tr. at 191:14–17.

Claimant argued that the Board must have terminated Claimant in reaction to the Geragos letters because "nothing else happened" between the October 30, 2014 Board Meeting at which a motion to terminate Claimant failed and the November 7, 2014 Board Meeting at which a motion

to terminate Claimant prevailed. Tr. 27:7-10. The State Bar produced evidence that significant events did occur, however, between those two board meetings, and that those events caused the Board to resolve to terminate Claimant.

The State Bar noted that even before the Board received the Geragos letters, the Board had voted to accept the factual findings of the MTO Report, and four Trustees had resolved to terminate Claimant. Rx. 563-1; 982:3-24, 767:21-768:7, 1188:13-20. The remaining Trustees were still deliberating on how to respond to the MTO Report. Tr. at 185:12-21. Trustee Janet Brewer testified that she felt she needed more time to deliberate because "it was a serious matter to consider terminating the executive director," and because she was a new Trustee, she was not "prepared to take that drastic action as of that date." Tr. at 1130:13-1131:1. Trustee Dennis Mangers testified that the Board was still in the process of "trying to work out something that would develop a consensus," and Trustee David Pasternak testified that "[t]he Board was still wrestling with determining what action to take." Tr. at 496:16-497:1, 1190:4-12. Nonetheless, it was clear that the Board intended to take action against Claimant. The evidence indicates that in an attempt to reach consensus, the Board agreed that two Trustees would draft a letter of reprimand that would be reviewed by legal counsel, "to see if the Board could coalesce behind a reprimand." Id. at 1190:4-12.

The Board also authorized the retention of a new lawyer who was unaffiliated with MTO to provide a second opinion. Rx. 563-2; 564-1. As Claimant points out, some of the Trustees believed that the MTO law firm was predisposed to concluding that Claimant should be terminated. Cl. Ex. 162-002 ("the attorneys have an obvious agenda"); 162-048 ("this is a witch hunt.") The decision to retain legal counsel for a second opinion appears to be an attempt by the Board to resolve the concerns of certain Trustees who were willing to accept the findings of the MTO Report, but not necessarily the recommendations.

At the November 7, 2014 meeting, Carol Stevens gave a presentation and provided legal advice to the Board. Rx. 564-1. The details of Ms. Stevens' presentation were not admitted into evidence because the State Bar asserted its right to withhold the information under the attorney-client privilege. Testimony from Trustees who had rejected the vote to terminate at the October 30, 2014 Board Meeting indicate, however, that these Trustees changed their minds regarding terminating Claimant after they engaged in further deliberation. Mr. Mangers testified that he "went back and reread the [MTO] report . . . thought carefully . . . and . . . finally came to the conclusion that Mr. Dunn simply could not continue to lead the organization." Tr. 498:2-499:25. Ms. Brewer testified that by November 7, she "had had an opportunity to mull . . . over [the MTO Report]" and "decided that . . . if any other member of the State Bar had engaged in dishonest acts . . . such as Mr. Dunn had engaged in, they would have been disciplined." Tr. 1130:2-24. After Ms. Stevens gave her presentation to the Board, the Board voted 11-4 to exercise its right under the Employment Agreement to terminate Claimant. Rx. 564-2.

Claimant's attempt to infer a circumstantial case of retaliatory termination based upon the Geragos letters is not supported by the evidence. The letters did not assert that Claimant reasonably believed that a specific statute, regulation, rule or law had been violated, and Claimant failed to testify to such a belief at the hearing. Thus, the letters do not support a finding that Claimant engaged in a "protected activity." Claimant's attempt to infer causation on the basis that his termination occurred within a relatively short time after Mr. Geragos sent the letters fails because none of the Trustees knew that Claimant was represented by the Geragos law firm and none of the Trustees knew that Claimant was one of the "Whistleblowers" described in the letters. Furthermore, the Board was considering termination before Mr. Geragos sent the letters, and the deliberations at the November 7, 2014 Board Meeting indicate that a second

opinion provided by a new lawyer as well as further deliberations caused a majority of the Trustees to agree that termination was the appropriate response.

2. Claimant's Complaints to the RAD Committee Regarding Ms. Kim

Claimant also asserts that he engaged in protected "Whistleblower" activity in early 2014 when he reported to the RAD Committee that Ms. Kim failed to report SBI cases in her backlog reports. Tr. 1208:21-1210:9.

In the ANOC, Claimant alleged that he reasonably believed that Ms. Kim's actions violated California Business & Professions Code §§6106, 6068(a), and 6128 (a), California Penal Code §424, and California Government Code §§8314, 815.6, and 1090. ANOC, ¶73. Claimant introduced no evidence, however, to support these allegations. Claimant failed to testify that he reasonably believed, at the time that he discovered the reporting discrepancy, that Ms. Kim's actions violated a specific state or federal statute, or a state or federal rule or regulation. Nor is there any evidence that Claimant reported Ms. Kim's actions to the RAD Committee based on a reasonable belief that Ms. Kim had violated a particular law or statute. Claimant's comment to the RAD Committee that the deletion of SBI data from the backlog report was a "firable offense" might indicate that Claimant was concerned about the trustworthiness of a member of the executive staff, but it does not demonstrate that Claimant believed Ms. Kim had violated any law. As the State Bar pointed out in closing arguments, it was Claimant, not Ms. Kim, who signed and issued the State Bar's report on pending investigations, and therefore, Claimant could not reasonably believe that Ms. Kim was guilty of issuing false reports to the California Legislature. Tr. 1238:17-24.

Additionally, Claimant offered no evidence to support a conclusion that his comments to the RAD Committee regarding Ms. Kim in the Spring of 2014 caused the Board to terminate him in November of 2014. After Claimant expressed his concerns to the RAD Committee, the

Committee investigated and found that there was "internal confusion" at the State Bar regarding reporting metrics. Tr. 423:9-425:1, 475:16-24, 428:15-24. Thus, the RAD Committee concluded that Claimant's assertion that Ms. Kim intentionally falsified reports was not supported by their investigation and was unlikely given the small number of SBIs that had been deleted from the report. Tr. 429:1-430:15, 480:3-21, 928:21-930:5, Rx. 655. By March of 2014, the issue had been investigated and resolved, and Claimant never again raised a concern regarding Ms. Kim's reports to the RAD Committee. Tr. 481:19-25.

Claimant also suggests that *Ms. Kim* retaliated against him for reporting her to the RAD Committee by filing her "Whistleblower" complaint. Ms. Kim had no authority to terminate Claimant, however. The Board of Trustees terminated Claimant and Claimant provided no evidence of any connection between the Board's decision to terminate and Claimant's communications with the RAD Committee. The two events are not temporally connected because the issue regarding Ms. Kim's backlog reporting was resolved and put to rest eight months before the Board terminated Claimant. Additionally, the evidence indicates that the Board terminated Claimant based on the findings of the MTO Report and the Board's determination that Claimant had failed to perform his duties adequately. In other words, the Board terminated Claimant for legitimate and non-retaliatory reasons.

Eight of the eleven Trustees who voted to terminate Claimant at the November 7, 2014 Board Meeting testified at the hearing that they voted to terminate because the MTO Report revealed that Claimant failed to keep the Board adequately informed of significant issues, and, in some instances had actively deceived the Board:

- Mr. Mangers: "I finally came to the conclusion that Mr. Dunn could not continue to lead this organization. . . there was just no escaping the fact that he had been dishonest with the Board and not forthcoming on some major issues." Tr. at 498:2–499:25.

- Mr. Pasternak: "I believed that the findings in the Munger report that we had adopted, established dishonesty, misconduct, lack of candor by Joe. That left us no alternative, as a State Bar, who's responsible for the ethics of our profession, to do anything other than to terminate our executive director." Tr. at 1188:13–20.

- Ms. Meyers: "the reason I felt Mr. Dunn should be terminated, and to this day, I still maintain that, is because of the breach of his fiduciary duty to the Board, as well as the breach of his contractual obligations to the Board. He had an obligation, both under his contract and his fiduciary duty, to disclose all information pertinent to anything the Board decides." Tr. at 722:18–723:24.

- Ms. Krinsky: "I felt that his failure to have been honest with us, that act of dishonesty, and his failure of candor with the Board, provided a basis for his termination." Tr. at 770:23–771:11.

- Mr. Flanigan: "I felt that Mr. Dunn had violated his fiduciary relationship with the Board . . . to keep the Board and its president fully informed on matters of significance. I believed that Mr. Dunn had not done that on several occasions." Tr. at 982:3–24, 983:25–984:11.

- Mr. Fox: "Q. Why did you vote to terminate Mr. Dunn on November 7th? A. I believed that he had engaged in improper, unethical, dishonest behavior that involved moral turpitude." Tr. at 188:14–18.

- Mr. Dean: "Q. [] what, if any, effect on your decision to vote to terminate, did that belief that Mr. Dunn had engaged in dishonesty and moral turpitude have on your vote? A. Well, . . . that was everything. That's why I voted to terminate him. . . ." Tr. at 1166:18–1167:15.

- Ms. Brewer: "I decided that basically if any other member of the State Bar had engaged in dishonest acts and acts of moral turpitude, such as Mr. Dunn had engaged in, they would have been disciplined. They would have probably been disbarred. And that it was appropriate to - - basically the level of his dishonest acts that he should be terminated." Tr. at 1130:13–1131:1, 1130:2-24.

The State Bar admitted into evidence the declarations of the remaining three Trustees who voted to terminate Claimant. These declarations also confirm that Claimant was terminated because he made misrepresentations to the Board and misused State Bar funds:

- Mr. Torres: "I supported Mr. Dunn's termination because (i) MTO is a reputable law firm that conducted an independent investigation and ultimately concluded that Mr. Dunn misused State Bar funds and made misrepresentations to the Board." Rx. 644 ¶ 3.

- Mr. Vera: "I thought MTO did a thorough, impartial, and high-quality job, and I did not have any reason to doubt the investigation's findings that Mr. Dunn had misused State Bar funds and misled the Board. . . it was my strong belief that it was in the best interests of the State Bar and consistent with my fiduciary duties as a Trustee to support Mr. Dunn's termination. Rx. 646 ¶ 3.

- Ms. Moore: "After discussions with other Board members, it was my view that . . .he had intentionally manipulated the Board on numerous occasions." Rx. 647 ¶3.

In fact, three of the four Trustees who voted *against* termination testified that they nonetheless supported the Board's decision to terminate: "even though I voted against that motion, I spoke in favor of Joe's termination. There was nobody left defending Joe at that point." Tr. 387:2-8; *see also*, Tr. 589:19-591 and Rx 687 at 58:9-15.

Although Claimant introduced evidence that some Trustees disagreed with aspects of the MTO Report, or believed that the MTO attorneys were predisposed to concluding that Claimant should be terminated, the Board nonetheless adopted the findings of the MTO Report. Rx. 563-1. Even if MTO was biased in favor of termination, as Claimant suggests, the Trustees had personal knowledge of Claimant's representations to the Board. Therefore, once the Board learned that the Supreme Court did not support AB 852 or the proposal to move the headquarters to Sacramento, and once the Board discovered that Claimant used State Bar funds to pay for the Mongolia trip, the Board did not need to rely upon the MTO Report to conclude that Claimant had mislead them.

Claimant failed to demonstrate that he engaged in protected "Whistleblower" activity when he reported Ms. Kim to the RAD Committee. Claimant also failed to demonstrate that his comments to the RAD Committee had any causal connection to the Board's decision to terminate his employment. Furthermore, the State Bar's evidence demonstrates that the Board had a legitimate, non-retaliatory explanation for its decision to terminate Claimant's employment. Claimant provided no evidence demonstrating that the Board's justifications for terminating

Claimant were merely "pretextual," and thus, Claimant failed to prove a violation of Labor Code §1102.5.

B. Breach of the Covenant of Good Faith and Fair Dealing

Claimant argued that the State Bar breached the covenant of good faith and fair dealing by terminating Claimant in bad faith in order to deprive him of severance pay under the terms of the Employment Contract. *See*, Cl's Ex. 4, §XIII(A)(2). Section XIII(A)(2) of the Employment Contract states that Claimant was entitled to severance pay upon termination unless, "in the sole discretion of the Board," Claimant had committed an "act involving moral turpitude, dishonesty, corruption or similar act of gross misconduct . . .." Cl's Ex. 4, p. 6.

"Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract." *Digerati Holdings, LLC v. Young Money Entertainment, LLC*, 194 Cal.App.4th 873, 885 (2011). "The implied covenant protects the reasonable expectations of the contracting parties based on their mutual promises. . . .." *Id.* The covenant does not expand upon the terms of the contract, however. "The scope of conduct prohibited by the implied covenant depends on the purposes and express terms of the contract." *Id.*

The State Bar argued that the express terms of the Employment Contract allowed the Board to terminate Claimant without paying severance, and thus Claimant is attempting to impose a duty upon the State Bar via the implied covenant that is greater than the duty imposed under the contract. The State Bar points to both the findings of the MTO Report, which indicate that Claimant engaged in acts of dishonesty, and to the individual testimony of several Trustees, who stated that they personally believed that Claimant had behaved dishonestly. Rx. 552, 563-1; Tr. 1132:23-113:6, 985:18-982:2, 1194:12-17. According to the State Bar, this evidence indicates that the Board terminated Claimant because, in the "sole discretion of the Board,"

Claimant had committed an "act involving moral turpitude, dishonesty, corruption or similar act of gross misconduct . . .." Thus, the State Bar argues Claimant has no right to severance under the contract and cannot utilize the implied covenant to otherwise obtain the benefit.

Claimant asserted that the Board did not exercise its right to terminate him "for cause," and that the Board did not find that Claimant acted with "moral turpitude, dishonesty, corruption or similar act of gross misconduct." The final version of the November 7, 2014 Meeting Minutes supports Claimant's assertion: the Board resolved to "unilaterally terminate" Claimant, but did not indicate whether the termination was "for cause" or "without cause." The Board also made no finding that Claimant had acted with "moral turpitude, dishonesty, corruption or [a]similar act of gross misconduct." Claimant introduced evidence of early drafts of the minutes from the November 7, 2014 Board Meeting that support this conclusion. The draft minutes indicate that the Board authorized Mr. Holden to: (1) offer Claimant the opportunity to resign in exchange for the payment of severance provided by his contract; and (2) terminate Claimant pursuant to the "termination *without cause* provision of his contract" if Claimant did not agree to resign. Cl.'s Ex. 45 (*emphasis added.*) Furthermore, the termination letter sent to Claimant by Mr. Holden states that the Board voted to "unilaterally terminate" his employment; the letter does not state that Claimant was terminated "with cause." Cl.'s Ex. 66.

The MTO Report and the individual testimony of Trustees are not acts of the Board. The Arbitrator cannot presume that the Board would have resolved that Claimant had acted with "moral turpitude, dishonesty, corruption or similar act of gross misconduct" had the Board chosen to deliberate on the matter. The facts indicate that the Board either terminated Claimant "without cause" or the Board simply failed to make a determination on the matter. Thus, the Board did not exercise its right under the Employment Contract to terminate Claimant without

paying severance, and Claimant may assert his claim for breach of the covenant of good faith and fair dealing.

The elements of a claim for breach of implied covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) plaintiff "did all, or substantially all of the significant things that the contract required," or was excused from having to perform; (3) all conditions required for defendant's performance occurred or were excused; (4) defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; and (5) plaintiff was harmed by defendant's conduct. Judicial Counsel of California Civil Jury Instruction 325.

The State Bar argued that Claimant's breach of the implied covenant claim must fail because plaintiff cannot prove an essential element of the claim: that he either performed or "substantially performed" under the Employment Contract. "The covenant . . . requires each party to do everything the contract presupposes the party will do to accomplish the agreement's purposes." *Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218 Cal.App.4th 1230, 1245 (2013); *see also*, *Durell v. Sharp Healthcare*, 183 Cal.App.4th 1350, 1367 (2010) (a plaintiff "cannot state a cause of action for breach of the implied covenant without adequately pleading an excuse for his nonperformance.") Thus, the evidence must show that Claimant either performed or "substantially performed," under the contract. "What constitutes substantial performance is a question of fact, but it is essential that there be no willful departure from the terms of the contract," and any defect in performance must "be easily remedied or compensated," so that each party "may get practically what the contract calls for." *Posner v. Grunwald-Marx, Inc.*, 56 Cal.2d 169, 186 (1961); *see also, Connell v. Higgins,* 170 Cal. 541, 556-57 (1915) ("[w]hether . . . defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.")

The Employment Contract obligated Claimant to "keep the Board . . . fully informed on matters of significance" and to "appropriately safeguard and administer all funds . . . and other State Bar assets," among other duties. Claimant's performance reviews also indicate that Claimant was expected to maintain a good relationship with the Supreme Court, and early reviews indicate that the Board believed Claimant had fulfilled his obligations. Cl.'s Ex. 8/9, "2010-2011 Performance Evaluation," SB00000227 ("Joe has . . . done an excellent job of managing and improving relations with the Supreme Court, which is a very important constituent"); SB00000229 (Joe has maintained and enhanced "constituent relations" by attending "monthly lunches with Beth Jay, principal attorney to the Chief Justice" and "attendance at meetings . . with the Chief Justice"); SB00000232 (". . he has been able to assist the Bar with improving its relationship with . . . the Supreme Court.") Id. at SB00000111 (Joe "informs the Board about significant matters affecting the State Bar" and "communicates his knowledge to the Board"); ("I have little insight into relationships with the Supreme Court . . . but I have no reason to think there are problems.") Thus, it is clear that the Trustees were satisfied with Claimant's performance from 2010 through 2013, and as a result, the Board renewed Claimant's contract in January of 2014.

However, it is also clear that the Trustees were not satisfied with Claimant's performance in 2014. The evidence indicates that Claimant breached his duties to keep the Board "fully informed" and to maintain good relations with the Supreme Court when he failed to inform the Board about the Supreme Court's opposition to AB 852 and when he encouraged the Board to affirmatively support a bill that the Supreme Court opposed. Claimant also breached these duties when he misinformed the Trustees that the proposal to move State Bar Headquarters to Sacramento had been "socialized with the Court" and implied that the Court supported the proposal. In truth, it was not clear that the Supreme Court supported the move, and the Chief

Justice stated that she had never spoken with Claimant about the proposal and expressed concerns about the proposal to Luis Rodriguez. Rx. 552-12-13. Additionally, Claimant breached his duty to keep the Board "fully informed" and to "safeguard and administer all [State Bar] funds" when he informed the Board that State Bar funds would not pay for the Mongolia trip and then charged some of the costs of his trip to the State Bar.

The State Bar's evidence indicates that as a result of these breaches of duty, the Board did not "get practically what the [employment] contract call[ed] for:"

- Ms. Brewer: "Q. [D]id Mr. Dunn perform his contractual obligations as executive director of the State Bar? A. No, he did not. Q. Why not? A. . . . He did not truthfully inform the members of the Board or the president about the Supreme Court's position on two significant matters, and misused the State Bar funds in addition to that." Tr. at 1132:10–22.

- Mr. Fox: "Q. . . . In your opinion, Mr. Fox, did Mr. Dunn perform his obligations under the contract? A. No. Q. Why not? A. . . . Not only did he not keep [t]he Board fully informed, he misinformed [t]he Board." Tr. at 193:9–14.

- Mr. Flanigan: "Q. [D]o you believe that Mr. Dunn performed his contractual obligations as executive director of the State Bar? A. I do not believe that he did. Q. And why not? A. . . . Just starting out with number one here, to keep the Board and its president fully informed on matters of significance. I believe that Mr. Dunn had not done that on several occasions." Tr. at 983:25–984:8.

- Ms. Meyers: "And the reason I felt Mr. Dunn should be terminated, and to this day, I still maintain that, is because of the breach of his fiduciary duty to the Board, as well as the breach of his contractual obligations to the Board. He had an obligation, both under his contract and his fiduciary duty, to disclose all information pertinent to anything the Board decides, to the Board." Tr. at 723:4–11.

- Mr. Pasternak: "Q. [D]id you believe that Mr. Dunn complied with his obligations under his employment contract? A. He did not. Q. Why not? A. Well, among other things, the contract required that Joe fully inform the Board about material matters or subjects that it should consider. The Munger report demonstrated that he did not comply with that." Tr. at 1192:21–1193:9.

Claimant's actions caused the Board to question Claimant's motivations and damaged Claimant's relationships with both internal staff and key stakeholders. The State Bar introduced

evidence indicating that Trustees considered each of Claimant's breaches to be significant and substantial:

Regarding Claimant's failure to inform the Board that the Supreme Court opposed AB 852:

- Mr. Colantuono: "Q. If he had told you that, would it have affected your view on whether or not the Bar should be sponsoring that bill? A. Yes." Tr. at 348:4–349:3.

- Mr. Dean: "If the Supreme Court had an objection, we would take it seriously times ten. So it would stand out and . . . if we had been told that the Supreme Court had an issue with something, there would have been big discussion about that." Tr. 1148:3–16

- Ms. Krinsky: "If the Court had had concerns, . . . that would have mattered greatly to me." Tr. 759:1–13.

- Ms. Rosing: "[T]hat was troubling to me, because I voted on that. And I voted in a way where I would have liked to have had what Munger, Tolles & Olson say was available information. I didn't have that information at the time I voted." Tr. 606:19–607:3.

Regarding Claimant's failure to adequately and accurately inform the Board regarding the proposal to move State Bar Headquarters:

- Ms. Krinsky: "The question of whether our staff should be uprooted and relocated from San Francisco to Sacramento was another example of where there appeared to be a set of objectives by our executive director and different views by others, including leadership of the Court. And the Board simply wasn't getting the complete picture. We weren't being told by our executive director what we needed to know to make critical decisions." Tr. 761:18-762:12.

- Mr. Pasternak: "[I was] concerned that Joe had his own agenda, and his . . . agenda was to move the State Bar headquarters to Sacramento, when others, such as apparently the chief justice, had significant concerns about that. And things like that were not being disclosed to the Board." Tr. 1188:21-1189:8.

- Mr. Colantuono: "Q. . . . 'And made misstatements to a board committee regarding the Supreme Court's views on the Bar's possible move to Sacramento.' Do you believe that last statement describes an act of dishonesty? A. Yes."; Tr. at 356:13–21

- Mr. Mangers: "Q. Did you come to later learn whether or not Mr. Dunn's statement to you, that the move to Sacramento had already been socialized with the Court, was

true? . . . A. I did. Q. Was that another example of dishonesty by Mr. Dunn? A. It seemed to me that it was." Tr. 494:12–20.

Regarding Claimant's misrepresentations regarding the source of the funding for his trip to Mongolia:

- Ms. Krinsky: "Whether it was $5, $5,000 or $5 million, the issue in my mind was veracity and honesty with the Board. . . . And our ability to do that is hamstrung if we can't trust our leadership to give us critical information." Tr. 760:17–761:17.

- Mr. Mangers: "The amounts of money were not that significant, but he had stipulated that no Bar funds would be used, and then submitted expense reports asking for reimbursement. That seemed incongruous with what he indicated." Tr. 489:19–490:2.

- Mr. Meyers: "Q. . . .What were you troubled about with Mongolia, the expenditures with respect to Mongolia? A. [O]bviously the Board knew that the State Bar was not paying for that trip for either Mr. Dunn, Mr. Layton or . . .[Howard] Miller, to go on the trip. And, . . . they did pay for it. And the fact that it was later repaid, clearly substantiated the fact in my mind that it should not have been paid for with State Bar dues." Tr. 719:4–16.

Claimant's evidence is insufficient to rebut the State Bar's showing that Claimant failed to keep the board fully informed on matters of significance.[2] Claimant failed to "substantially perform" under the contract, and thus Claimant failed to prove an essential element of his claim for breach of the implied covenant of good faith and fair dealing.

III. CONCLUSION

Claimant failed to demonstrate by a preponderance of the evidence that the State Bar

[2] When asked to explain why he failed to inform the Board that the Supreme Court opposed AB 852, Claimant testified that he did not want to communicate the Supreme Court's opposition to the bill in a public forum, and claimed that at the May 8, 2014 board meeting, he suggested that a "stakeholder" had "concerns" regarding AB 852. Tr. 794:20-795:6. There is no evidence of these comments in the meeting minutes, and Claimant's assertion that he made these comments conflicts with evidence that Claimant informed the Board that there was "no known opposition" to AB 852 and that he placed sponsorship of AB 852 on the Board's Consent Agenda. Claimant also pointed to the testimony of Trustee Joanna Mendoza, who stated that she "seemed to recall" that the Supreme Court may have had conflicting opinions regarding AB 852. Tr. 853:1-18; Rx 688 at 207:4-14. Even if Ms. Mendoza's recollections are accurate, none of the other Trustees testified that they knew of the Supreme Court's position. Thus, the weight of the evidence indicates that Claimant failed to perform his duty to keep the Board fully informed.

violated Labor Code § 1102.5. Claimant also failed to prove each element of his claim for Breach of the Implied Covenant of Good Faith and Fair Dealing. Therefore, the Arbitrator finds in favor of the State Bar on all claims.

On January 18 and 19, 2017, the Arbitrator issued orders granting Summary Judgment in favor of Respondents Beth Jay and Craig Holden disposing of all claims against them. Wherefore, judgment is made in favor of all Respondents and Claimant's request for an Arbitration Award is denied.

Dated: March 20, 2017

Edward A. Infante, Arbitrator