UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PIOTR NOWAK *Plaintiff,*	:	CIVIL ACTION
	:	NO.: 2:14-cv-03503
vs.	:	
MAJOR LEAGUE SOCCER, LLS and MAJOR LEAGUE SOCCER PLAYERS UNION, *Defendants.*	:	

AND NOW, this _____ day of _____, 2014 it is hereby **ORDERED** that Defendant Major League Soccer Players' Union's Motion to Dismiss the Claims asserted by Plaintiff, Piotr Nowak is **DENIED.**

_____
Mary A. McLaughlin, U.S.D.J

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PLAINTIFF PIOTR NOWAK'S MEMORANDUM OF LAW IN OPPOSITION TO MAJOR LEAGUE SOCCER PLAYERS UNION'S MOTION TO DISMISS

Plaintiff, Piotr Nowak submits the following memorandum of law in opposition to the Motion to Dismiss filed by Defendant, Major League Soccer Players Union ("Players Union"). For reasons set forth at length below, Plaintiff respectfully requests that this Honorable Court deny the Defendant's Motion to Dismiss.

I. INTRODUCTION

The Players Union seeks to dismiss Nowak's tortious interference with contractual relations claim against the Players Union under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). The Players Union asserts that Nowak's claim is preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. ("NLRA") and that Nowak's Complaint fails to state a viable claim. However, the NLRA is only peripheral to Nowak's tortious interference claim and the Eastern District of Pennsylvania has a greater interest in hearing this case than does the National Labor Relations Board ("NLRB"). Accordingly, the NLRA does not preempt Nowak's claims. Additionally, Nowak has asserted a proper claim for tortious interference against the Players Union. For these reasons, the Players Union's motion to dismiss must be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Piotr Nowak, of Chadds Ford, Pennsylvania, is an internationally renowned professional soccer coach, who was selected to coach the United States Olympic team in 2008. (*Nowak's Complaint*, ¶ 9). On or about June 1, 2009, the Philadelphia Union Soccer Club ("Team") and Mr. Nowak entered into a contract, which employed Mr. Nowak as the Team Manager through December 31, 2012. (*Id.*, ¶ 10). The employment contract provided that his termination must be done in "good faith" and only "for cause," and if the cause for termination is curable, Nowak was to be provided an opportunity to cure the defect. (*Id.,* ¶¶ 10-12).

On or about June 13, 2012, Mr. Nowak was notified by the Team that he was being terminated for various reasons, including "inappropriate hazing activities," "engaging in behavior that put the health and safety of Team players at risk," engaging in discussions regarding and otherwise seeking employment by other professional soccer teams in Europe;" "not allowing players to have water during such activities despite temperatures in excess of 80 degrees;" and "insubordination." *See* Exhibit "A," Nowak's Termination Letter." The purported justifications for the termination were pretextual and without any factual basis. *Complaint*, ¶ 21. Furthermore, the Team failed to meet its obligation of providing Nowak with notice of termination and did not provide an opportunity to cure the concerns before the termination was effective. *Id.*, ¶ 22.

Nowak brought an action in this court against the Team for its breach of contract. *See Piotr Nowak v. Pennsylvania Professional Sports, LLC and Keystone Sports & Entertainment LLC*, No. 2:12-cv-04165-MAM. That matter has been remanded to AAA arbitration. During the discovery phase of Nowak's case against the Team, Plaintiff learned that his termination was

precipitated by an investigation demanded by the Players Union, that the Players Union made uncorroborated and inaccurate representations about Nowak, which were accepted at face value by co-defendant Major League Soccer, LLS ("the League"). *Complaint,* ¶¶ 26-29. In addition, Nowak learned that the Players Union demanded that Nowak be fired. *Complaint,* ¶¶ 26-29.

As a result of the Players Union and League's involvement in Nowak's termination, Nowak filed suit against these parties on June 12, 2014 alleging tortious interference with contractual relations. *See Complaint*. On November 7, 2014, the Players Union filed the instant motion to dismiss.

Nowak's tortious interference claim is not preempted by the NLRA because the claim against the Players Union is only peripherally related to the NLRA. Furthermore, the Eastern District of Pennsylvania has a greater interest in hearing matters related to tort and contract law than does the NLRB. Finally, Nowak has asserted a valid claim for tortious interference against the Players Union. For these reasons, Nowak's Complaint should not be dismissed under Fed.R.Civ.P. 12(b)(1) or 12(b)(6).

III. ARGUMENT

A. Legal Standard

Dismissal is only warranted under Rule 12(b)(1) if the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous." *Gould Elec. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1409 (3d Cir. 1991)). Challenges to subject matter jurisdiction under Rule 12(b)(1) may be facial or factual in form. *Id.* at 176; A facial challenge attacks the complaint on its face and, for such a challenge, the court must consider

only the complaint's allegations and must do so in the light most favorable to the plaintiff. *Id.; Moyer Packing Co. v. United States*, 567 F.Supp.2d 737 (E.D. Pa. 2008).

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff is required to plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility does not "impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the alleged wrongdoing. *Id.* at 556. Even after *Twombly*, however, the standard remains that courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F. 3d 224, 233 (3d Cir. 2008).

In *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009), the Court clarified the *Twombly* inquiry as a two-pronged test. First, the Court should consider the sufficiency of the complaint, identifying the factual allegations that are to be accepted as true and those allegations that are legal conclusions and are not entitled to the assumption of truth. *Id.* Second, the court must consider whether the factual allegations plausibly suggest the plaintiff is entitled to relief. *Id.* To determine plausibility, the court should be "context-specific" and "draw on its judicial experience and common sense." *Id.* A complaint may not be dismissed merely when it "strikes a savvy judge that actual proof of those facts is improbable." *Twombly*, 544 U.S. at 556.

B. Nowak's Tortious Interference Claim Against the Players' Union is Not Preempted by the National Labor Relations Act.

In its motion, the Players Union argues that Nowak's tortious interference claim is preempted by the NLRA because the Players Union's demands that Nowak be investigated and terminated are activities protected by Section 7 of the NLRA, and therefore, this matter belongs

before the NLRB. *See* Players Union's Motion, p. 9.[1] However, this dispute is only peripherally related to the NLRA, and this Court has a greater interest in protecting its citizens from tortious interference than does the NLRA. Accordingly, dismissal on the grounds of NLRA preemption is not appropriate.

In *San Diego Bldg. Trades Council v. Garmon*, the U.S. Supreme Court held that the NLRA presumptively preempts a state-law claim if the claim concerns conduct that NLRA § 7 actually or arguably protects, or that NLRA § 8 actually or arguably prohibits. *Garmon*, 359 U.S. 236, 243-45 (1959). For preemption purposes, a court need not decide whether the conduct alleged would be deemed to be prohibited by the NLRA, since it is enough that the conduct upon which the state causes of action are based is "arguably" prohibited. *Garmon*, 359 U.S. 236, 243-246. The US Supreme Court has created two exceptions to *Garmon,* for which state laws claims are not preempted by the NLRA, even if they relate to conduct arguably prohibited or protected by the NLRA. The NLRA does not preempt a claim if the conduct if: (1) the relevant allegations are of only "peripheral concern" to the NLRA; or (2) The relevant law touches interests deeply rooted in local feeling and responsibility. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983). In such cases, the court must balance the state's interest in regulating the conduct against the interference with the Board's ability to adjudicate controversies committed to it by the NLRA and the risk that the state will sanction conduct that the NLRA protects. *Id*. at 498-99. Nowak's claim against the Players Union only peripherally relates to the NLRA and this Court has a

[1] Section 7 of the NLRA protects employees' rights, among other things, to organize, choose their bargaining agents and engage in concerted activities. 29 U.S.C. § 157. Section 8(a) of the NLRA prohibits employers from, among other things, restraining or coercing employees in the exercise of their § 7 rights, encouraging or discouraging membership in a union by discriminating in the terms of employment, and refusing to bargain collectively with employees' chosen bargaining agents. 29 U.S.C. § 158(a).

greater interest in hearing Nowak's tort claim than the NLRB. Accordingly, Nowak's claim is not preempted by the NLRA.

1. Nowak's claim is only peripherally related to the NLRA

Based on the precedent set forth by the US Supreme Court, Nowak's tortious interference claim against the Players Union should not be preempted by the NLRA, as this claim is only peripherally related to the NLRA, and the NLRB does not have an interest in hearing this case. In *Belknap,* the plaintiffs were replacement employees who alleged breach of contract and misrepresentation when the defendant-employer terminated the replacement employees upon return of the original union from a strike. *Belknap*, 463 U.S. 491 (1983). The U.S. Supreme Court found that the NLRA did not preempt the contract and tort claims because these claims were not identical to those that could be asserted under the NLRA, and because the Kentucky state court had a greater interest in protecting citizens from misrepresentation and breach of contract than did the NLRB:

> Belknap contends that the misrepresentation suit is preempted because it related to the offers and contracts for permanent employment, conduct that was part and a parcel of an arguable unfair labor practice. It is true that whether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the Board. The focus of these determinations, however, would be on whether the rights of strikers were being infringed. **Neither controversy would have anything in common with the question whether Belknap made misrepresentations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements.** As in *Linn v. Plant Guard Workers* "the Board [will] not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice. The strikers cannot secure reinstatement, or indeed any relief, by suing for misrepresentation in state court. The state courts in no way offer them an alternative forum for obtaining relief that the Board can provide. Hence, it appears to us that maintaining the misrepresentation action would not interfere with the Board's

> determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the Board and the federal law.

Belknap, 463 U.S. at 510-511 (emphasis added) (internal citations omitted).

As was the case in *Belknap*, Nowak was not a union employee, was not subject to any collective bargaining agreement is not alleging any labor law violation that is of concern to the NLRB. The fact that the Players Union engaged in conduct arguably covered by Section 7 of the NLRA is of peripheral concern to the facts of the case.

The 2001 Philadelphia Court of Common Pleas case, *Belknap, Richard G. Phillips Assocs., P.C. v. Selig*, 1550 Control Nos. 011140, 0111190, 011148 Pa. D. & C. (Pa. Com. Pl. 2001) also provides guidance to the instant dispute. *See* Exhibit "B," *Phillips* opinion. In *Phillips*, the plaintiff-law firm represented a Major League Baseball umpire's union. After the law firm led the umpire union in an unsuccessful and short-lived strike, a group of umpires and their counsel referred to the plaintiff-law firm as "incompetent" and "unethical." The law firm filed suit against a group of umpires and their counsel alleging claims including commercial disparagement and tortious interference with a contract. *Id.* While the court found that the relevant conduct did arguably implicate section 7 of the NLRA, the court denied the motion to dismiss on preemption grounds, finding the conduct was only "peripherally related" to the NLRA and the Pennsylvania courts had a greater interest in enforcing tort and contract law than did the NLRB:

> Here, the plaintiffs' claims allege conduct that is only a peripheral concern of the NLRA because the controversy presented to the court is not the same as any controversy that could be presented to the NLRB. **The plaintiffs are neither an employer nor a union. They are not parties to the collective bargaining agreement. They are not subject to the NLRA's protections. Since they cannot bring a claim before the NLRB, their claims in this action cannot be identical to any claim before the NLRB.**

Phillips, at 2-3 (emphasis added) (internal citations omitted).

Much like the plaintiff in *Phillips*, Nowak was not a party to any collective bargaining agreement, was not a member of any union and his claims do not relate to any labor laws. Accordingly, as was the case in *Belknap* and *Phillips*, Nowak's claims are only peripherally related to the NLRA.

While *Belknap* and *Phillips* are highly analogous to the circumstances of Nowak, the cases relied upon by the Players' Union are simply not applicable to the instant facts. The Players Union relies upon *Pennsylvania Nurses Assoc. v. Pennsylvania State Educ. Assoc.*, 90 F.3d 797 (3d Cir. 1996), *Local 926 Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983) and *Richardson v. Kruchko & Fries*, 966 F.2d 153 (4th Cir. 1992). All of these cases are distinct from this matter, as the cases cited by Players Union all relate to claims, which could have been asserted under the NLRA, and disputes that would typically be heard by the NLRB.

Pennsylvania Nurses Assoc. involved a dispute between two competing nurses unions, in which the plaintiff-union accused the defendant-union of defamation and tortious interference. 90 F.3d 797. The Third Circuit denied that preemption was appropriate as the case "involves the core activities with which the Act is concerned; union activities and the employees' election of an exclusive bargaining representative." *Pennsylvania Nurses Assoc.*, at 803.

The U.S. Supreme Court case *Local 926 Int'l Union of Operating Engineers v. Jones*, involved a NLRB complaint that was dismissed and ultimately filed in court, in which the

plaintiff-supervisor claimed the defendant-union urged the plaintiff's employer to terminate the plaintiff in retaliation for his previous employment with a non-union employer. 460 U.S. 669. In *Local 926*, the U.S. Supreme Court found that the retaliation claims were sufficiently related to conduct prohibited by section 8 of the NLRA, which prohibited discrimination based on union-membership, and that the NLRB had an interest superior to the state court. In *Richardson v. Kruchko & Fries*, 966 F.2d 153 (4th Cir. 1992), the plaintiff alleged unfair labor practices, and filed a claim with the NLRB and an additional suit in federal court. The Fourth Circuit noted that "Richardson's claims are in essence artfully pleaded unfair labor practice charges. They fall at the heart of the NLRB's exclusive jurisdiction--determinations as to whether an employer's conduct constitutes an unfair labor practice under NLRA." *Richardson*, 966 F.2d at 158.

In this matter, Nowak is not a member of a union, as was the case in *Pennsylvania Nurses Assoc.*, and is not alleging any labor law violation as did the plaintiffs in *Local* 926 and *Richardson*. Nowak was a non-union employee, alleging tortious interference with his contractual relations with an employer. Because Nowak's claim against the Players Union is only peripherally related to the NLRA, the Court should follow the precedent set forth in *Belknap* and *Phillips* and decline to dismiss Nowak's claim on the grounds of preemption.

2. The Eastern District of Pennsylvania has a greater interest in presiding over this matter than does the NLRB

While the NLRB plays the vital role of adjudicating labor disputes, state and federal courts have a greater interest than that of the NLRB when it comes to hearing the tort claims brought by the forum's citizen(s). If the Court determines that it has an interest in protecting its citizens from the alleged conduct, the Court next inquires whether "the exercise of state jurisdiction over the tort claim entail[s] little risk of interference with the regulatory jurisdiction of the Labor Board." *Sears, Roebuck & Co. v. San Diego County,* 436 U.S. 180, 195-196 (1978).

If it poses little risk of interfering with the role of the NLRB, the state law claim may proceed even if "the challenged conduct occurred in the course of a labor dispute and an unfair labor practice charge could have been filed." *Id.* The critical inquiry is whether the controversy presented to the state court is identical to ... or different from ... that which could have been, but was not, presented to the Labor Board. *Id.* This principal was clearly articulated in *Belknap*:

> Hence, it appears to us that maintaining the misrepresentation action would not interfere with the Board's determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the Board and the federal law. At the same time, Kentucky surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm.

Belknap, 463 U.S. at 511.

Similarly, in *Phillips*, the court applied the reasoning of *Belknap* to the plaintiffs' claims, finding that Pennsylvania courts had a more substantial interest in tort and contract matters than the NLRB:

> Moreover, the state's interest in providing redress for tortious conduct and breaches of contracts is one that 'touches interests deeply rooted in local feeling and responsibility.' The plaintiffs are not parties to the collective bargaining agreement, are outside of the scope of the NLRA's protection and have no redress for this conduct outside of state law. In such a case, the state's interest in providing relief outweighs any risk that the state will sanction conduct that the NLRA protects. The NLRA does not preempt the claims. The court overrules these objections.

Phillips, at 2-3 (citing *Belknap,* 463 U.S. 491) (emphasis added) (internal citations omitted).

Unlike the cases relied upon by the Players Union, Nowak is not asserting a claim centrally related to labor law or that would typically be heard by the NLRB. Nowak's claim is rooted in Pennsylvania tort and contract law, and does not substantially relate to the NLRA or

other federal labor law. Applying the holdings in *Belknap* and *Phillips*, it is clear that the Eastern District of Pennsylvania has a greater interest in hearing Nowak's tortious interference claim than does the NLRB. Accordingly, preemption of Nowak's claim against the Players Union is unwarranted.

C. Nowak Has Stated a Valid Claim for Tortious Interference against the Players' Union

In its Motion to Dismiss, the Players Union also alleges that Nowak has failed to allege sufficient facts to establish claim for tortious interference to meet the standard of Fed.R.Civ.P. 12(b)(6). *See* Players Union's Motion, pp. 9-12. Because Nowak has met properly pleaded the requisite elements for a tortious interference claim, and because the Players Union's false and pretextual representations to the League were not privileged, the Players Union's motion to dismiss must be denied.

Under Pennsylvania law, to prevail on a claim for tortious interference with existing or prospective contractual relationships, a party must prove: (1) the existence of a contractual or prospective contractual or economic relationship between the plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm an existing relationship or intended to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) legal damage to the plaintiff as a result of the defendant's conduct. *Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199, 212 (3d Cir. 2009); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir.1998).

Absence of privilege or justification means that the defendant's conduct was "improper." *Cloverleaf Dev. Inc. v. Horizon Fin., F.A.,* 500 A.2d 163, 167 (Pa. Super. 1985). The factors to be considered in determining whether conduct is "improper" are: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct

interferes; (4) the interests sought to be advanced by the actor; (5) the proximity or remoteness of the actor's conduct to the interference; and (6) the relations between the parties. *Cloverleaf Dev. Inc.* 500 A.2d 163, 167 (citing Restatement (Second) of Torts § 767).

Nowak has properly pleaded the necessary elements for a tortious interference claim against the Players Union. In his Complaint, Nowak pleads that he had a valid contract with the Team. (*Complaint, at* ¶¶ 10-14). Nowak pleads that the Players Union intended to harm Nowak and was not privileged to interfere with his contract. (*Complaint, at* ¶¶ 33-35). Nowak the reasons for his termination were false and "pretextual" and that the Players Union was not privileged to interfere with Nowak's contract. (*Complaint*, at ¶¶ 18, 34). Finally, Nowak pleads that he has suffered harm as a result of the Players Union's tortious interference. (*Complaint*, at ¶¶ 35-36). Clearly, Nowak's Complaint meets the requirements set forth in *Acumed* and *Brokerage Concepts, Inc.* for a tortious interference claim against the Players Union.

The Players Union argues that its representations to the League and the Team about Nowak's purportedly inappropriate coaching conduct were "privileged" and protected by federal labor law. *See* Players Union's Motion, at 11-12. However, an employee or union is not engaging in "privileged" activity if this party makes knowingly false statements or engages in conduct that is otherwise improper. *See Phillips,* 1550; *See also Birl v. Philadelphia Elec. Co*., 167 A.2d 472 (Pa. 1960); *See Cloverleaf Dev. Inc.*, 500 A.2d 163.

In *Philips*, the court denied the defendant's preliminary objections to Phillips' tortious interference claims, on the basis that the plaintiffs alleged that there was an existing contract, the defendants purposefully acted to harm the contractual relationship and that the defendants made knowingly harmful statements about the plaintiffs that interfered with their contractual relation. *See Phillips,* at *2. In *Birl*, the plaintiff alleged that the defendant-electric company, for whom

the plaintiff used to be employed, falsely informed the plaintiff's current employer that he quit his previous job without notice. *See Birl,* 167 A.2d 472. The Pennsylvania Supreme Court reversed the Court of Common Pleas' granting of the defendant's preliminary objections on the ground that the plaintiff pled a plausible claim for tortious interference, finding that the potentially harmful nature of the representations to the plaintiff's contractual relations was "too obvious for words." *Birl*, at 475. As was the case in *Phillips* and *Birl*, Nowak has alleged the existence of a contract, purposeful conduct by the Players Union, the absence of privilege, and that he suffered harm as a result of the Players Union's non-privileged interference with his contractual relations.

In support of its motion to dismiss for failure to state a claim, the Players' Union errantly relies on the case *Small v. Juniata College*, 682 A.2d 350 (Pa. Super. 1996). *See* Players Union's Motion, at 11-12. *Small* is clearly inapplicable to this matter because *Small* was dismissed on summary judgment. Therefore, the *Small* court had the opportunity to review the evidence and evaluate whether the players had in fact acted maliciously (i.e. with privilege) when complaining about the plaintiff. Because the instant matter has not yet reached the discovery phase, the Court must take Nowak's allegations as true. In his Complaint, Nowak has alleged that the Players Union's demands to the League were pretextual and done in bad faith without privilege. Because this matter is still in the pleading stage, *Small* is inapplicable and Nowak has stated a valid clam for tortious interference against the Players Union.

For these reasons, the Players Union's motion to dismiss must be denied.

IV. CONCLUSION

For the reasons stated in this memorandum, Nowak's claims are not preempted by the NLRA and Nowak has stated a viable claim against the Players Union. Accordingly, the Players Union's Motion to Dismiss Nowak's Claims must be denied.

Respectfully submitted,

HAINES & ASSOCIATES

/s/ *Clifford E. Haines*

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Date: November 26, 2014

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CERTIFICATE OF SERVICE

I, Clifford E. Haines, Esquire, hereby certify that on this 26th day of November, 2014, I caused a true and correct copy of the foregoing Plaintiff Piotr Nowak's Response to Opposition to Defendant Major League Soccer Players Union's Motion to Dismiss, to all parties via ECF.

/s/ Clifford E. Haines
CLIFFORD E. HAINES