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8 Attorneys for Defendant
9 **MARK SCHUBERT**

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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ORANGE**

13 DIA C. RIANDA,) Case No. 30-2012-00598426
14)
15 Plaintiff,) Assigned for all purposes to:
16) Hon. Ronald L. Bauer, Dept. CX103
17 vs.)
18) NOTICE OF DEMURRER AND
19 GOLDEN WEST SWIM CLUB; GOLDEN) DEMURRER OF DEFENDANT MARK
20 WEST SWIM CLUB SUPPORT GROUP;) SCHUBERT TO PLAINTIFF'S
21 MARK SCHUBERT; and DOES 1 through) COMPLAINT
22 50, inclusive,)
23 Defendants.) Date: November 5, 2012
24) Time: 9:00 a.m.
25) Dept.: CX103
26)
27)
28)

29
30 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

31 PLEASE TAKE NOTICE that at 9:00 a.m. on November 5, 2012, or as soon thereafter
32 as the matter may be heard, in Department CX103 of the above-entitled Court located at 751
33 West Santa Ana Boulevard, Building 36, Santa Ana, California 92701, Defendant MARK

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SCHUBERT (“Schubert”) will and hereby does demur to the Complaint filed by Plaintiff DIA C. RIANDA (“Plaintiff”) on the following grounds:

1. Plaintiff’s First Cause of Action for Wrongful Termination in Violation of Public Policy fails to state facts sufficient to constitute a cause of action against Defendant Schubert (Code Civ. Proc. § 430.10(e));

2. Plaintiff’s Second Cause of Action for Breach of Employment Contract fails to state facts sufficient to constitute a cause of action against Defendant Schubert (Code Civ. Proc. § 430.10(e)); and,

3. Plaintiff’s Third Cause of Action for Retaliation fails to state facts sufficient to constitute a cause of action against Defendant Schubert (Code Civ. Proc. § 430.10(e)).

This Demurrer will be based on this Notice of Demurrer and Demurrer, the attached Memorandum of Points and Authorities, the pleadings, records and files in this action, and any other evidence or argument that the Court permits at or before the hearing on this matter.

Dated: October 9, 2012

LAW OFFICE OF RICHARD J. FOSTER

By: _____
Richard J. Foster
Attorneys for Defendant
MARK SCHUBERT

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DEMURRER

1. Plaintiff's First Cause of Action for Wrongful Termination in Violation of Public Policy fails to state facts sufficient to constitute a cause of action against Defendant Schubert (Code Civ. Proc. § 430.10(e));

2. Plaintiff's Second Cause of Action for Breach of Employment Contract fails to state facts sufficient to constitute a cause of action against Defendant Schubert (Code Civ. Proc. § 430.10(e)); and,

3. Plaintiff's Third Cause of Action for Retaliation fails to state facts sufficient to constitute a cause of action against Defendant Schubert (Code Civ. Proc. § 430.10(e)).

Dated: October 9, 2012

LAW OFFICE OF RICHARD J. FOSTER

By: _____
Richard J. Foster
Attorneys for Defendant
MARK SCHUBERT

1 Defendant Mark Schubert (“Schubert”) submits the following points and authorities in
2 support of his demurrer to Plaintiff Dia C. Randa’s (“Plaintiff”) Complaint for Damages.

3 **I.**

4 **INTRODUCTION**

5 When an attorney files a complaint with the Court, he or she certifies to the Court that
6 (i) the allegations in the complaint have evidentiary support, (ii) the claims are warranted by
7 existing law, and (iii) that the complaint was not presented for an improper purpose. Civil Code
8 § 128.7. In this case, plaintiff and her counsel have ignored all of these criteria. The complaint
9 is replete with distortions and out-and-out lies. Under clear California law, Plaintiff cannot
10 assert her claims against Schubert; she can only assert them against her employer, Golden West
11 Swim Club. Yet, although she has no conceivable claim against him personally, Plaintiff
12 named Schubert as a defendant and included lengthy and false allegations specifically designed
13 to unfairly damage his reputation and his professional standing, knowing that if her statements
14 were made in any other forum, she would be liable for defamation. The manner in which this
15 complaint was drafted evidences that Plaintiff and her attorney are on a mission to unfairly
16 destroy Schubert’s reputation regardless of the truth and in disregard of clear legal principles
17 and ethics.

18 **1. The Allegations in Plaintiff’s Complaint have no Evidentiary Support**

19 Plaintiff’s complaint is replete with distortions and lies. To delineate all of the
20 distortions and lies would take too much space, but a few examples of Plaintiff’s allegations are
21 illustrative. For example, Plaintiff alleges that Schubert discovered that a colleague of his, Sean
22 Hutchison, was engaged in an inappropriate sexual relationship with one of the swimmers
23 Hutchison was coaching, and that Schubert hired a private investigator, who secured
24 photographic evidence which depicted Hutchison acting intimately with that swimmer. Plaintiff
25 accuses Schubert of holding on to this evidence for his own personal gain instead of turning it
26 over to the authorities. None of this is true. Schubert never hired a private investigator and
27 never had any evidence that Hutchison had an inappropriate sexual relationship with one of his
28 swimmers. Plaintiff’s allegations are simply false. USA Swimming conducted a thorough

1 investigation of Hutchison and found no evidence of inappropriate behavior.

2 Plaintiff next alleges that Schubert concealed information that a coach named Rick Curl
3 had sexually abused one of his swimmers in the 1980's. Curl was not associated with Schubert,
4 but the swimmer in question swam for Schubert years later. By that time, the swimmer had
5 notified her parents of the abuse and retained an attorney, who negotiated a confidential
6 settlement with Mr. Curl. As stated in the complaint, Schubert notified USA Swimming of the
7 abuse, as did the swimmer, and USA Swimming subsequently banned Mr. Curl from coaching
8 for life. Plaintiff's claim that Schubert concealed this information is patently false.

9 Plaintiff then alleges that Schubert entered into a confidential agreement with USA
10 Swimming whereby USA Swimming "bought him off" from disclosing any further information
11 about sex abuse by swim coaches. Incredibly, she alleges that in exchange for money, Schubert
12 agreed not to divulge any further information about sexual abuse by any swim coaches. This is
13 absolutely false. While Schubert did enter into a settlement agreement with USA Swimming, it
14 had no clause preventing Schubert from reporting sex abuse. To the contrary, as publicly stated
15 by USA Swimming, Schubert agreed to follow all of USA Swimming's regulations, including
16 the duty to promptly report evidence that any coach was sexually abusing a swimmer.

17 Plaintiff's allegations concerning Bill Jewell are equally distorted. All conduct of which
18 Schubert was aware was in open view. While Jewell may have touched some swimmers, all
19 such touchings were also in open view, in the act of coaching and in line with USA
20 Swimming's guidelines.

21 There are many other lies and distortions in Plaintiff's complaint, but these examples
22 illustrate that Plaintiff's complaint was drafted in the dark, with no consideration of the truth.

23 Finally, Plaintiff was terminated for legitimate reasons. She created problems with the
24 Golden West Swim Club's Board of Directors by being uncooperative, rude and by making
25 negative comments behind their backs. Her conduct as a coach was substandard. She bullied
26 swimmers, was rude to potential new club members and sent condescending and rude emails to
27 club members. She was extremely unpopular and unaccepted by the club's senior swimmers.
28 Notably, she was rude to Golden West College's staff and water polo coaches, threatening the

1 club's future use of the pool.

2 **2. The Claims in Plaintiff's Complaint are not Warranted by Law**

3 Plaintiff and her counsel have alleged claims against Schubert that have no basis in the
4 law. As set forth below, all of her claims can only be brought against her employer, Golden
5 West Swim Club. They are not claims that can be brought against Schubert, who was and is an
6 employee of the club. With minimal research, an entry level attorney could have figured that
7 the law does not allow Plaintiff to sue Schubert individually on the claims set forth in her
8 complaint. Plaintiff's attorney was so intent on disparaging Schubert, and in the process put
9 himself in the limelight, that he either failed to do the minimum research required of him or he
10 intentionally named Schubert individually for the sole purpose of disparaging his reputation.

11 **3. Plaintiff's Complaint Was Clearly Filed for Improper Purposes**

12 Plaintiff's complaint is a disgusting attack on a highly decorated and extremely
13 successful swim coach. Under the law, Plaintiff and her counsel can say anything they want in
14 the complaint, without worrying about Schubert suing them for defamation; the law provides a
15 privilege for such statements. But this doesn't make it right. A reading of the complaint
16 compels the reader to conclude that the motives of Plaintiff and her counsel were unbridled by
17 the truth or the law. Plaintiff and her counsel each had one motive; to unfairly destroy
18 Schubert's reputation.

19 **II.**

20 **PLAINTIFFS' FIRST CAUSE OF ACTION FAILS TO STATE A CLAIM AGAINST**
21 **SCHUBERT AS A MATTER OF LAW**

22 Plaintiff's First Cause of Action seeks damages for wrongful termination in violation of
23 public policy. Plaintiff bases this claim on her contention that Defendants violated Labor Code
24 section 6310, which precludes an employer from terminating an employee for reporting unsafe
25 working conditions or practices. As against Schubert, there are several reasons why this claim
26 cannot be maintained.

27 **A. Schubert, As Plaintiff's Supervisor, Cannot Be Liable for Wrongful**
28 **Termination.**

1 Plaintiff alleges that she was employed by Defendant Golden West Swim Club
2 (“GWSC”) and that Schubert was her supervisor. (*See, e.g.*, Complaint, ¶¶32, 35, 36.)¹ As
3 such, he cannot be liable for wrongful termination, and Plaintiff’s First Cause of Action is
4 barred as a matter of law.

5 The California courts have been clear and unequivocal in barring claims for wrongful
6 termination against supervisory personnel. *See, e.g.*, Khajavi v. Feather River Anesthesia Med.
7 Group (2000) 84 Cal.App.4th 32, 53; Miklosy v. Regents of University of California (2008) 44
8 Cal.4th 876, 901. Such claims are barred even when a supervisor is responsible for the
9 employer’s discharging the plaintiff. *Id.*

10 This is true regardless of the underlying basis for the wrongful termination claim. As
11 the Court noted in Lloyd v. County of Los Angeles (2009) 172 Cal.App.4th 320, “[a]n individual
12 who is not an employer cannot commit the tort of wrongful discharge in violation of public
13 policy; rather, he or she can only be the agent by which an employer commits that tort.” *Id.* at
14 330. In other words, it is the *employer’s* adverse employment action that constitutes the tort
15 and, “the supervisor’s action merges with that of the employer.” Miklosy, supra, 44 Cal.4th at
16 901-902, fn. 8.²

17 Because Plaintiff cannot maintain a wrongful discharge claim against Schubert
18 individually, his demurrer to her First Cause of Action should be sustained without leave to
19 amend.

21
22 ¹ While Plaintiff alleges, at paragraph 32 of her Complaint, that she entered into an oral
23 employment with Schubert, she admits she did so in his capacity as GWSC Head Coach (and
24 CEO)” and that Schubert had exclusive authority to hire GWSC’s assistant coaches and staff.
25 She also alleges throughout the Complaint that her employment was with GWSC – not with
26 Schubert individually. *See, e.g.*, Paragraph 32 (Plaintiff devoted her full-time effort to the
management of CWSC and performing coaching duties for GWSC); Paragraph 35 (Plaintiff’s
“job performance at GWSC” was excellent); Paragraph 36 (Plaintiff was not subject to a negative
performance evaluation at any time, “during her employment with GWSC”).

27 ² In an unpublished decision, the Second District Court of Appeal specifically
28 considered whether claims for discharge in violation of public policy under Labor Code section
6310 fell within an exception to this rule and held that they did not. Garcia v. Witt (2010) 2010
WL 2220885. While this case obviously is not controlling authority, the Garcia Court’s reasoning
is instructive.

1 **B. The Facts Alleged By Plaintiff Do Not Give Rise To A Claim Under Labor**
2 **Code Section 6310.**

3 Even if Plaintiff could state a claim against Schubert individually, the facts alleged in
4 the Complaint do not support a cause of action for violation of Labor Code section 6310.

5 That section prohibits an employer from discharging an employee when the employee
6 has “made an oral or written complaint to the division [Division of Occupational Safety &
7 Health], other governmental agencies having statutory responsibility for or assisting the division
8 with reference to employee safety or health, his or her employer, or his or her representative.”
9 Lab. Code §6310(a)(1).

10 Labor Code Division 5, Part 1, of which Section 6310 is a part, was “enacted for the
11 purpose of assuring safe and healthful working conditions . . . by authorizing the enforcement of
12 effective standards, assisting and encouraging employers to maintain safe and healthful working
13 conditions, and by providing for research, education, training and enforcement in the field of
14 occupational safety and health.” Labor Code §6300.

15 Thus, Labor Code section 6310 does not protect an employee from termination in every
16 case where she complains to her employer. In order to state a claim for wrongful discharge in
17 violation of Labor Code section 6310, Plaintiff must allege that her complaints to GWSC
18 concerned *unsafe working conditions or practices*. See, e.g., Daly v. Exxon Corp. (1997) 55
19 Cal.App.4th 39, 43-44; Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 299; Chin, et al., Cal.
20 Practice Guide: Employment Litigation (TRG 2012) §5:161 (Lab. Code 6310(b) prohibits
21 discrimination or discharge for complaining about unsafe work conditions or practices).

22 Plaintiff cannot make any such allegations here. In fact, she has failed to allege *any* risk
23 or threat to *any* employee of GWSC. To the contrary, her complaint is based on complaints she
24 made regarding a coach’s treatment of swimmers who joined the club – *not* his treatment of
25 employees. See Complaint, ¶17 (Schubert refused, “to properly address plaintiff’s legitimate
26 complaints of improper coach/athlete interactions”); ¶43, 44, 50 (Plaintiff claims the conduct
27 she reported to Schubert was in violation of USA Swimming’s Code of Conduct and GWSC
28 rules). Clearly, the conduct complained of by Plaintiff does not fall within the scope of Labor

1 Code section 6310.

2 Absent a violation of section 6310, Plaintiff cannot state a claim for wrongful
3 termination in violation of public policy, because such cases are only permitted where a specific
4 statutory or constitutional violation is alleged. Esberg v. Union Oil Co. (2002) 28 Cal.4th 262,
5 271 (claim for wrongful termination in violation of public policy must be tethered to specific
6 constitutional or statutory provisions); Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238,
7 1257 (claim for wrongful termination in violation of public policy must be accompanied by
8 citations to specific statutes or constitutional provisions allegedly violated); Green v. Ralee Eng.
9 Co. (1998) 19 Cal.4th 66, 84 (plaintiff has the burden of providing the specific statutes or
10 regulations on which her claim is based).

11 Here, the only statutory violation alleged by Plaintiff is under Labor Code section 6310,
12 which simply does not apply to the conduct in question.

13 In fact, Plaintiff's complaints to Schubert appear to consist of nothing more than
14 concerns over a coach's violation of internal GWSC policies, which are insufficient in any
15 event to sustain any claim for wrongful termination in violation of public policy.

16 The Court in Patten v. Grant Joint Union High School District (2005) 134 Cal.App.4th
17 1378, squarely addressed this issue. In Patten, a teacher claimed she was wrongfully terminated
18 for reporting inappropriate conduct by a male teacher with female students. The Court held that
19 the employer was not liable for terminating plaintiff as a result of her complaints, because they
20 were made, "in the context of an internal personnel matter based on a student complaint, rather
21 than in the course of a legal violation." Id. at 1385.

22 The same result was reached by the Court in Carter v. Escondido Union High School
23 District (2007) 148 Cal.App.4th 922, where the plaintiff alleged she was terminated after
24 complaining that a high school football coach had improperly recommended nutritional
25 supplements to a student. The Court noted that, while an employee may have a laudable goal of
26 preventing crime, "this is not enough to fit within the narrow confines of wrongful termination
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1 in violation of public policy.” Id. at 217.³

2 Based on this authority, it is clear that Plaintiff has not, and cannot, state any claim
3 against Schubert for wrongful termination in violation of public policy. Schubert’s demurrer to
4 the First Cause of Action should be sustained without leave to amend.

5 **III.**

6 **PLAINTIFF’S SECOND CAUSE OF ACTION IS BARRED BECAUSE**

7 **PLAINTIFF’S EMPLOYMENT CONTRACT WAS WITH GWSC**

8 **AND NOT WITH SCHUBERT**

9 Plaintiff’s Second Cause of Action seeks damages for breach of an oral employment
10 agreement she entered into in July 2011 with Defendant GWSC. Plaintiff has again named
11 Schubert to this cause of action, despite the fact that she had no contractual relationship with
12 him and he was never her employer.

13 It is black letter law that a party cannot be sued for breach of a contract to which they
14 are not a party. *See, e.g., Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 830
15 (essential element of claim for breach of contract is the existence of a contract between the
16 parties); 4 Witkin, Cal. Procedure, Pleading (4th ed. 2008) §515 (same).

17 Here, Plaintiff alleges that she was employed by GWSC – *not* Schubert (*see, e.g.,*
18 Paragraph 32 (Plaintiff devoted her full-time effort to the management of CWSC and
19 performing coaching duties *for GWSC*); Paragraph 35 (Plaintiff’s “job performance *at GWSC*”
20 was excellent): Paragraph 36 (Plaintiff was not subject to a negative performance evaluation at
21 any time, “*during her employment with GWSC*”).

22 Plaintiff alleges only that Schubert was the head coach and CEO of GWSC, as well as
23 Plaintiff’s immediate supervisor. (Complaint, ¶4.)

24
25 ³ The fact that Plaintiff’s complaints consisted of internal personnel matters, as opposed
26 to illegal conduct, is evident from the fact that, despite her claim that Defendants failed to take
27 action to protect “innocent children” (Complaint, ¶8), Plaintiff did not report any alleged
28 misconduct to any law enforcement agency. This is true, despite the fact that Plaintiff expressly
alleges that *all* coaches and managers employed by GWSC (including her) were required under
the USA Swimming Code of Conduct and its Athlete Protection Policies to report any sexual
harassment, abuse and/or molestation under USA Swimming’s mandatory reporting procedures.
(*See* Complaint, ¶12.)

1 Because Plaintiff had no contractual relationship with Schubert, she cannot possibly
2 allege a claim for breach of contract against him based on termination of her employment. Nor
3 is this a defect that Plaintiff can cure. Accordingly, Schubert’s demurrer to the Second Cause of
4 Action should be sustained without leave to amend.

5 IV.

6 **PLAINTIFF’S THIRD CAUSE OF ACTION CANNOT BE ALLEGED AGAINST**
7 **SCHUBERT INDIVIDUALLY**

8 Plaintiff’s Third Cause of Action for “Retaliation” is virtually identical to her First
9 Cause of Action. Again, Plaintiff alleges that she was wrongfully terminated in violation of
10 Labor Code section 6310:

11 70. Plaintiff consistently opposed Jewell’s above-described unlawful,
12 wrongful and offensive conduct, by repeatedly complaining to her immediate
13 supervisor, Schubert, concerning such conduct.

14
15 71. Defendants terminated plaintiff’s employment in retaliation for
16 her complaints regarding such behavior.

17
18 Complaint, ¶¶70-71.)

19 For the same reasons discussed above, this claim cannot be sustained against Schubert.

20 First, as Plaintiff’s supervisor, Schubert cannot possibly be liable for wrongful
21 termination. Such a claim can only be maintained against Plaintiff’s employer – GWSC.

22 Second, a claim under Section 6310 requires that the termination be the result of
23 complaints about “unsafe work conditions or work practices” – not violations of internal
24 policies and procedures, which are not even alleged to have endangered any employees of
25 GWSC.

26 Because Plaintiff has not alleged a claim against Schubert for wrongful termination or
27 violation of Section 6310, and cannot amend her Complaint to do so, Schubert’s demurrer to the
28 Third Cause of Action should be sustained without leave to amend.

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V.

CONCLUSION

Plaintiff has failed to allege any valid claim against Schubert, nor can she do so under well-established California law. The Court should therefore sustain Schubert's demurrer to the Complaint in its entirety without leave to amend.

Dated: October 9, 2012

LAW OFFICE OF RICHARD J. FOSTER

By: _____

Richard J. Foster
Attorneys for Defendant
MARK SCHUBERT