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12
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SANTA CLARA**

15 STEPHEN A. O'BRIEN, an individual,
16
17 Plaintiff,

18 vs.

19 TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY; MARIE TUIE, an individual,
20 and DOES 1 through 25, inclusive,
21 Defendants.

Case No.

COMPLAINT

1. **Retaliation in Violation of California Whistleblower Protection Act (Gov. Code § 8547.12)**
2. **Retaliation in Violation of California Labor Code § 1102.5**
3. **Retaliation in violation of California Fair Employment and Housing Act (Gov. Code § 12940(h))**
4. **Wrongful Termination in Violation of Public Policy**

DEMAND FOR JURY TRIAL

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COMPLAINT

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1 **I. INTRODUCTION**

2 1. Prior to joining San Jose State University (“SJSU”) as its Deputy Director of
3 Athletics, Stephen O’Brien enjoyed over a decade-long career in intercollegiate athletics at top
4 universities, including the Naval Academy Athletic Association of the United States Naval
5 Academy. O’Brien has a passion for athletics and undertook his role at SJSU with great
6 enthusiasm. In his role, O’Brien reported directly to Athletics Director and Defendant Marie
7 Tuite.

8 2. O’Brien’s work for SJSU was excellent by every available measure: the
9 University wrote performance reviews naming him an “exceptional” employee, and lavished him
10 with bonuses, awards, and salary increases. To match his high degree of competence, SJSU
11 empowered O’Brien with increased responsibility and oversight. Tuite herself handwrote him
12 notes of appreciation and recognition.

13 3. But in the performance of his duties, O’Brien began to observe a series of deeply
14 troubling events and learned of a culture of fear and intimidation perpetuated by Tuite. While
15 undertaking efforts to maintain SJSU’s compliance with legal and regulatory mandates, several
16 employees were threatened, reprimanded, disciplined, or otherwise retaliated against by Marie
17 Tuite. Tuite also indirectly retaliated against employees, by ordering her direct reports to
18 administer discipline to those who opposed her. She aimed to stifle legitimate compliance
19 activities or cover up non-compliance within the Athletic Department.

20 4. For example, O’Brien observed Tuite undermine her staff’s legitimate compliance
21 activities, when they discovered and properly investigated athletes who had violated NCAA
22 bylaws, anti-gambling mandates, and prohibitions on student-athlete drug use. Seeking to avoid
23 blame and reputational harm, Tuite retaliated against compliance staff who uncovered clear
24 violations, and enlisted O’Brien to pretextually discipline them on her behalf.

25 5. Tuite’s directives were motivated by her own retaliatory motives, rather than any
26 legitimate justification. O’Brien reasonably believed that her directives violated the law,
27 compromised SJSU’s NCAA status, or otherwise constituted improper governmental activity. He
28 opposed her requests and began to perceive a pattern.

1 6. Before O'Brien began at SJSU, Director of Sports Medicine and Head Athletic
2 Trainer Scott Shaw was accused of sexually fondling more than a dozen female athletes. In 2009
3 the University conducted a small, quiet investigation, and cleared Shaw of all wrongdoing. But
4 approximately eight years later these athletes and others reported to Sage Hopkins, SJSU's
5 women's swimming and diving coach, that Shaw's abuse was ongoing, and that the University's
6 prior investigation was insufficient.

7 7. Hopkins quickly realized that SJSU's initial Title IX investigation was critically
8 flawed. He compiled evidence from female athletes and others into a 300-page dossier imploring
9 the University to renew its investigation. Hopkins explicitly called out Marie Tuite's role in
10 covering up Shaw's abuse and stifling the first investigation. SJSU agreed to re-initiate a new
11 Title IX investigation, partly due to Hopkins' reports, and at the recommendation of an outside
12 agency.

13 8. In the midst of the renewed investigation into Shaw and Tuite, and consistent with
14 her prior pattern, Tuite directed O'Brien, her #2 in the Athletics Department, to administer
15 discipline to Hopkins for conduct O'Brien had personally never witnessed. She knew she could
16 not administer such discipline herself as it would be clearly viewed as retaliatory, so she directed
17 O'Brien to do it for her.

18 9. O'Brien believed carrying out Tuite's directive would compromise the integrity of
19 the active Title IX investigation, of which she was a subject, or worse, constitute unlawful
20 retaliation. O'Brien lacked personal knowledge of the underlying conduct Tuite sought to
21 discipline (and the head of SJSU's Human Resources could not support it), and he pointed out
22 the apparent conflict in what she was asking him to do. O'Brien's opposition was rebuffed.

23 10. O'Brien was placed in an untenable position: obey Tuite's orders and become
24 complicit in her unlawful activities or refuse to comply and risk appearing insubordinate.

25 11. Aiming to avoid disobedience, O'Brien participated in a meeting with Hopkins to
26 deliver the discipline against him. Nonetheless, O'Brien expressed strong opposition to this
27 retaliatory activity and other improper directives administered by Tuite. O'Brien himself became
28 a whistleblower when he brought this to the attention of SJSU administrators via detailed

1 complaint. After the meeting with Hopkins, with a Tuite loyalist present to report back, Tuite
2 expressed displeasure after learning that O'Brien was allegedly on Hopkins' "side" rather than
3 hers.

4 12. On March 2, 2020, Defendants terminated O'Brien with striking temporal
5 proximity to his whistleblowing conduct, offering no reason other than his purported "failure to
6 fulfill Tuite's expectations of [her] Deputy Director."

7 13. Defendants terminated O'Brien for opposing and reporting conduct he reasonably
8 believed to be unlawful, improper, or in violation of strict regulatory guidelines. With a shining
9 record of well-documented positive performance leading up to his whistleblowing, there is no
10 plausible justification for SJSU's choice to terminate O'Brien other than for the unlawful reasons
11 as set forth herein.

12 **II. JURISDICTION AND VENUE**

13 14. This Court has jurisdiction over this matter pursuant to California Code of Civil
14 Procedure ("CCP") Sections 71 and 382 by virtue of the fact that the complained-of acts and
15 practices giving rise to this action took place, in whole or in part, in the State of California.

16 15. Venue is proper in the Superior Court for the County of Santa Clara pursuant to
17 CCP Section 395 because SJSU is located in, and conducts business within, the County of Santa
18 Clara, and at all times relevant to this action Plaintiff worked for SJSU within the County of
19 Santa Clara. Defendant Tuite also resides in Santa Clara County.

20 16. The amount in controversy exceeds the jurisdictional minimum of this court.

21 **III. THE PARTIES**

22 **A. Plaintiff**

23 17. Plaintiff Stephen O'Brien is a natural person who is a resident of California and at
24 all times mentioned in this complaint lived and worked in Santa Clara County.

25 18. Prior to joining SJSU's ranks, O'Brien enjoyed a successful career in legal and
26 collegiate service. He was the Senior Associate Athletics Director at the United States Naval
27 Academy located in Annapolis, Maryland, for six years. Before that, he was Associate Athletics
28

1 Director and Assistant Athletics Director at University of California at Santa Barbara, and Santa
2 Clara University, respectively.

3 19. O'Brien earned a juris doctorate from the University of Southern California,
4 Gould School of Law. He is an active member in good standing with the California State Bar.

5 20. O'Brien has a strong reputation within the higher education and intercollegiate
6 athletics industry as being values-driven and ethical in his approach to work.

7 **B. Defendants**

8 21. Defendant the Board of Trustees of the California State University ("CSU
9 Defendant")¹ is the State of California acting in its higher education capacity, through the
10 California State University ("CSU") system. CSU is incorporated as, and governed by, the Board
11 of Trustees of the California State University, which oversees all public universities in the CSU,
12 including San Jose State University. San Jose State University ("SJSU") is a California public
13 university located in the City of San Jose, Santa Clara County, California. At all times herein
14 alleged in this Complaint, Plaintiff Stephen O'Brien worked on SJSU's campus and was
15 employed by the CSU Defendant, the properly named Defendant in this action.

16 22. Plaintiff is informed and believes that Defendant Marie Tuite is a natural person
17 who resides in San Jose, Santa Clara County, California. At all times relevant in this Complaint,
18 this individual was serving as an agent, representative, and/or employee of San Jose State
19 University, in the capacity of Athletic Director of SJSU.

20 **IV. FACTUAL BACKGROUND**

21 **A. O'Brien's Tenure at SJSU Was Marked with Excellence**

22 23. SJSU hired O'Brien on August 7, 2017 as a Deputy Athletics Director. O'Brien
23 reported to Athletic Director and Defendant Marie Tuite.

24 24. O'Brien's performance at SJSU can only be described as exemplary, marked by
25 success, and regularly recognized by the University. In the Fall of 2019, SJSU's President
26 Papazian appointed him to serve on the Search Committee for a new Vice President for

27 ¹ The term "CSU Defendant" is used interchangeably herein with "SJSU" for ease of
28 comprehension.

1 University Advancement. In January 2020, he assumed oversight of the Athletic Development
2 Staff, an elevated responsibility that was rewarded with a corresponding increase in pay. In each
3 of O'Brien's performance reviews (2017-2018 and 2018-2019), Defendant Tuite gave him the
4 highest overall rating as an "Exceptional" employee. SJSU regularly applauded O'Brien's
5 performance, lavishing him with several bonuses and awards for his excellent work. For
6 example, in both August 2018 and 2019, O'Brien received a \$25,000 bonus for coordinating the
7 Mubadala Silicon Valley Classic, a large professional women's tennis tournament. In January
8 2020, just two months before terminating him, University Personnel and Marie Tuite approved a
9 10% merit increase to O'Brien's salary on account of additional duties he performed under her
10 direction, including assuming oversight over the Athletic Development Staff.

11 25. Tuite often specifically applauded O'Brien's exceptional work. In November
12 2019, she wrote him a personal note stating: "**Your ability to evaluate and solve crucial**
13 **challenges is so admirable. I appreciate your 'collegial' attitude with your colleagues in and**
14 **outside the dept.**" And in the letter awarding him his \$25,000 bonus, Tuite hand-wrote: "Steve,
15 **Thank you for your excellent work.**"

16 26. O'Brien's performance throughout his tenure was excellent by all available
17 measures. It was not until he opposed unjustified and unlawful retaliatory activities by SJSU
18 employees as described herein, that SJSU changed its view of him. The nexus between O'Brien's
19 whistleblowing and the dramatic changes to his job performance evaluations and ultimate
20 termination is blatant.

21 **B. O'Brien Opposed and Refused to Participate in Conduct He Reasonably**
22 **Believed Violated the Law, and Strict Rules and Regulations to Which SJSU**
23 **Was Bound**

24 27. Tuite regularly threatened employees – directly or indirectly – with termination or
25 discipline if they failed to adhere to her directives, lawful or otherwise. She often told those in
26 her department "**Those who make attempts on the life of the king aren't kept in the kingdom**
very long," and noted with disdain that non-MPP² employees were not at-will and therefore

27 ² Management Personnel Plan is a classification of senior level administrators within the
28 California State University System who are at-will, as distinct from other unionized employees
with far greater employment protections.

1 “harder to fire.” Tuite often expressed a strong preference towards at-will employees whom she
2 could more easily control, and followed these words with action: several SJSU employees during
3 O’Brien’s tenure who opposed protected activity were reprimanded, disciplined, involuntarily
4 resigned, or were terminated pursuant to Tuite’s directives. The culture of silence was
5 perpetually promoted by the retaliatory atmosphere she created.

6 28. As a member of the NCAA, a “member-led organization dedicated to the well-
7 being and lifelong success of college athletes,” SJSU is bound by strict regulations governing the
8 conduct of its student-athletes and athletic department employees, including regulations that
9 address violations of federal, state, and local laws that prohibit drug use, gambling,
10 discrimination on the basis of sex, and sexual assault.³

11 29. O’Brien reasonably believed that retaliatory acts against Athletic Department
12 employees for encouraging NCAA compliance could compromise SJSU’s membership with the
13 NCAA and lead to costly and wide-reaching consequences for the Athletic Department and
14 University.

15 30. For several years before and during O’Brien’s employment, SJSU’s Athletic
16 Department has been marred with NCAA compliance issues, resulting in heavy scrutiny by
17 regulators. For example, SJSU’s non-compliance caused the NCAA to place the women’s
18 basketball team on probation from 2016-2017. SJSU’s baseball program was placed on NCAA
19 probation from 2018 until after O’Brien’s departure from SJSU.

20 31. O’Brien was aware of these compliance issues, and received internal reports from
21 multiple sources that Tuite fostered a culture of retaliation and regularly threatened employees
22 who opposed her. This conduct created a chilling effect on compliance. In two specific instances
23 as set forth below, O’Brien himself witnessed unjustified adverse actions against employees
24 engaged in compliance that he reasonably believed amounted to unlawful retaliation. When he
25 voiced opposition to those actions, SJSU fired him.

26 ///

27 ³ SJSU separately has its own policies related to disciplining athletes found guilty of any of these
28 activities.

1 **1. O'Brien Opposed Tuite's Efforts to Stifle and Undermine Legitimate**
2 **Compliance with Strict Anti-Gambling Mandates**

3 32. Student-athletes are prohibited, by state and federal law,⁴ NCAA bylaws⁵ and
4 SJSU internal policies⁶ from gambling on intercollegiate athletics. Students who violate these
5 rules risk automatic loss of eligibility to compete. Violations can also detrimentally impact
6 SJSU's NCAA membership status.

7 33. SJSU's Compliance Department is tasked with investigating potential violations
8 of the NCAA's gambling prohibitions and is responsible for meting out potential violations and
9 taking appropriate disciplinary action against a student found, after sufficient investigation, to
10 have engaged in prohibited conduct. SJSU is also required to "self-disclose" any discovered
11 violations to the NCAA so it can determine appropriate action.

12 34. In October 2019, David Rasmussen, SJSU's Senior Associate Athletic Director
13 for Compliance, learned that a student-athlete had allegedly participated in over 170 unlawful
14 gambling wagers on a variety of collegiate and professional sports. SJSU's Compliance staff
15 began its customary process beginning with a "self-disclosure" to the NCAA. The NCAA
16 deemed the student ineligible to compete in SJSU athletics. The athlete admitted to all alleged
17 violations, but still appealed his ineligibility finding with the NCAA, which refused to reverse it.

18 35. Tuite originally approved of David Rasmussen's response to this student's
19 conduct. But on December 12, 2019, the student's parents sent a furious email to Tuite, accusing
20 SJSU of not sufficiently "supporting" their son, demanding that SJSU handle the matter "in-
21 house," and threatening to elevate their concerns up the SJSU chain of command.

22
23 _____
24 ⁴ California Constitution Article IV. For part of O'Brien's employment, until May 2018,
intercollegiate gambling was also illegal under federal law. *See Murphy v. National Collegiate*
Athletic Ass'n (2018) 138 S.Ct. 1461.

25 ⁵ NCAA Bylaw 10.3.

26 ⁶ See San Jose State University Student Athlete Handbook (October 20, 2020 version) p. 15
27 (available at
28 https://sjsuspartans.com/documents/2020/10/6//San_Jos_State_University_Student_Athlete_Hanbook_MKS_FINAL_COPY_Oct_2020.pdf?id=4873).

1 36. In response to pressure from these parents, Tuite changed course, deflected blame
2 to Rasmussen, accusing him of not being “supportive enough” to this student, and calling a
3 meeting with him and O’Brien purportedly to “review” the “process” Rasmussen used to arrive
4 at his conclusion that this student had violated NCAA rules. She also asked O’Brien to
5 independently investigate Rasmussen’s “process.” O’Brien complied, interviewing several
6 individuals including Rasmussen and other Compliance Department staff members. From
7 everything O’Brien could see, Rasmussen and the compliance staff adhered to all governing
8 policies. Rasmussen followed NCAA reporting processes, corroborated his findings with
9 significant documentation, and reached the right conclusion. 170 admitted instances of gambling
10 clearly violated brightline NCAA rules, not to mention state law. This was not a close call by any
11 measure.

12 37. On December 14, 2019, only two days after receiving the email from the student’s
13 parents, Tuite also separately asked O’Brien for any documents or emails regarding allegedly
14 “inappropriate” or “condescending” behavior on the part of Rasmussen, which she wanted
15 included in his next performance evaluation. O’Brien had never personally witnessed such
16 conduct, and Tuite could not corroborate it. However, Tuite persisted in this request for over two
17 months.

18 38. On February 4, 2020, O’Brien elevated his concerns to Senior Associate Vice
19 President for Personnel, Joanne Wright, writing:

20
21 “I am being directed by Marie [Tuite] to put something in the review that I
22 believe to be factually untrue...this evaluation directive relates to a larger issue
23 relating to the handling of an NCAA Compliance matter involving a student-
24 athlete who was declared ineligible on account of sports wagering.”

25 39. In another email from the same day, O’Brien wrote to Ms. Wright:

26 “[Tuite]’s urgency for me to provide her with [Rasmussen]’s review, where she is
27 directing me to put information in there which I believe to be untrue, is
28 particularly troubling as we are in the throes of an NCAA Drug Testing matter, a
separate issue...I see [Tuite] trying to ‘build a case’ against an employee under
false pretenses.”

1 40. Wright ignored the gravity of O’Brien’s concerns. In fact, her response appeared
2 to be an admission that opposing Tuite would be a dangerous choice for O’Brien to make: she
3 advised O’Brien on how to comply with Tuite’s directives while also shielding his own
4 opposition to them. On February 4, 2020, she wrote: “as your direct supervisor, Marie reviews
5 the evaluation...You may write ‘There have been concerns expressed that (.....)’ or ‘The
6 Athletic Director has expressed concerns about (.....).’ I hope this is helpful.” Wright did not
7 address O’Brien’s substantive concerns about being forced to write an untrue review: her
8 “advice” was aimed at wordsmithing to avoid Tuite’s wrath.

9 41. On February 5, 2020 Tuite wrote to O’Brien expressing displeasure with
10 Rasmussen, stating: “these parents were ready to go to the President’s Office.... We must always
11 support our student-athletes. *Especially when they don’t do the right thing.*”

12 42. Given the history of Tuite’s unfounded investigations into Rasmussen and the
13 close temporal proximity between her requested discipline and Rasmussen’s compliance work,
14 O’Brien reasonably believed that taking unjustified adverse action against Rasmussen at the
15 direction of Tuite, amounted to retaliation for Rasmussen’s compliance duties.

16 **2. O’Brien Opposed and Reported Tuite’s Retaliatory Actions Taken**
17 **Against Rasmussen and Hopkins, For Their Legitimate Compliance**
18 **Activities Related to Student-Athlete Drug Use**

19 43. Concurrent with the foregoing gambling incident, in January 2020, Rasmussen
20 and Sage Hopkins, SJSU’s Head Swimming and Diving Coach, were also instrumental in
21 uncovering other potential NCAA violations.

22 44. Both SJSU and the NCAA strictly prohibit student-athlete drug use.⁷ A violation
23 of these strict rules can result in a range of punishments for the transgressing athlete including
24 suspension, ineligibility, and removal from all athletic competition for the remainder of the
25 athlete’s career. SJSU’s Athletic Department is empowered to enforce these rules by requiring
26 any student-athlete reasonably suspected of engaging in drug use to submit to a drug test.

27 _____
28 ⁷ See footnotes 5 and 6, *supra*.

1 45. Hopkins received a complaint in January 2020 from one of his swimmers that an
2 SJSU star football player's home, shared with swimmers, smelled like marijuana and contained
3 drug paraphernalia. Hopkins relayed the complaint to Rasmussen in or around February 2020 for
4 investigation. Rasmussen investigated and found reasonable suspicion to subject the athletes
5 involved to a drug test, pursuant to SJSU's long-standing policies. This is a customary reaction
6 to such reports.

7 46. Consistent with her earlier pattern, Tuite initially agreed with Rasmussen.
8 However, when the student's football coach angrily confronted Tuite about the player's test and
9 emphasized the negative impact to the athlete should he test positive, she once again, quickly
10 shifted blame to Rasmussen to deflect it off herself. Tuite sharply admonished Rasmussen,
11 claiming, "I'm not concerned about the testing itself, I'm concerned about *the process*."

12 47. Tuite, without evidentiary basis, then outrageously accused both Rasmussen and
13 Hopkins of **racial profiling** as the basis for seeking the drug test. Ultimately, the football player
14 and swimmers submitted to drug tests. The test results for the swimmers became known, but
15 Tuite, eager to conceal the results of the football player for some unknown reason, told the
16 athletic trainer who administered the tests not to share the results of the football player's test, to
17 inappropriately protect him. She told O'Brien that SJSU had the results, but did not share them
18 with any compliance personnel.

19 48. On January 31, 2020, O'Brien spoke with Joanne Wright, Senior Associate Vice
20 President for University Personnel, to express his widespread concerns over a culture of
21 retaliation against compliance within the Athletics Department, citing these two among many
22 other issues. Prior to this exchange, Mr. O'Brien also met with Faculty Athletics Representative
23 Tamar Semerjian, in or around December 2019 or January 2020, wherein he raised the same
24 issues. Semerjian suggested O'Brien speak with Joanne Wright, which he did, on January 31,
25 2020.

26 49. Ms. Wright did not provide substantive guidance to O'Brien about his challenges
27 in the Department.
28

1 50. Meanwhile Tuite would not relent in her retaliatory campaign. During the week of
2 February 2, 2020, she demanded O’Brien issue a negative performance review of Rasmussen.
3 O’Brien again reasonably believed this discipline was unjustified: as far as he had seen,
4 Rasmussen was performing his job with a high degree of integrity and professionalism. He
5 reasonably believed Tuite’s requests amounted to unlawful retaliation.

6 51. O’Brien again sought Wright’s advice for how he should proceed. And again,
7 rather than substantively address his serious broader concerns about the chilling effect that
8 Tuite’s actions were having, Wright suggested “wordsmithing” Rasmussen’s performance
9 review to comply with Tuite’s directive and mentioned offhand that perhaps O’Brien and Tuite
10 had “communication difficulties” that could be addressed in a “mediation.”

11 52. On February 4, 2020, O’Brien explicitly wrote to Wright:

12 “I have wide-ranging concerns within our department. . .I need to submit a 12-
13 month MPP evaluation for a member of my staff [Rasmussen]. As I shared the
14 other day, I am being directed by Marie [Tuite] to put something in the review
15 that I believe to be factually untrue. . . this evaluation directive relates to a larger
16 issue relating to the handling of an NCAA Compliance matter involving a
17 student-athlete who was declared ineligible on account of sports wagering.”

18 Neither Wright nor SJSU substantively addressed O’Brien’s disclosure.

19 53. With his concerns unaddressed and feeling that SJSU’s NCAA compliance was
20 seriously compromised by Tuite’s conduct, O’Brien elevated his concern to Lisa Millora, SJSU
21 President’s Chief of Staff. He sent Millora a text message on February 5, 2020 stating:

22 “I believe that our head of compliance is being bullied/intimidated by our
23 Athletics Director over a drug testing matter that I too am troubled by. . . I’m
24 sorry to text you, but I am seeing [Tuite]’s communications with [Rasmussen]; I
25 know much of the context of this situation and it is all deeply troubling.”

26 This complaint was again never substantively addressed by SJSU.

27 54. On February 9, 2020, O’Brien elevated his disclosure in a written complaint to
28 General Counsel for both SJSU and the CSU system, describing Tuite’s attempts to solicit
O’Brien to retaliate against Rasmussen, related to the foregoing NCAA compliance issues
explained above. O’Brien wrote: “I would like to file a formal complaint raising concerns that

1 relate to violations of state and/or federal law and efforts to discourage appropriate enforcement
2 of NCAA rules.”

3 55. SJSU did not substantively respond to O’Brien’s February 9 written complaint,
4 but in a February 25, 2020 staff meeting, Tuite took approximately forty minutes to discuss the
5 ways in which she felt Rasmussen had taken “process missteps” related to carrying out his
6 compliance functions.

7 **C. O’Brien Opposed, and Made Known His Opposition to, SJSU’s Interference**
8 **with an Active Title IX Investigation**

9 56. In 2009, SJSU’s Director of Sports Medicine and Head Athletic Trainer Scott
10 Shaw was accused of sexual misconduct toward more than a dozen female athletes. Shaw
11 allegedly touched over a dozen female athletes beneath their undergarments, massaging their
12 breasts and pelvic areas when they sought treatment for other parts of their bodies, without
13 explicit consent or the presence of a chaperone. SJSU initiated a Title IX investigation in 2009,
14 which quietly cleared Shaw of wrongdoing.

15 57. Various aspects of SJSU’s initial investigation have been widely criticized by
16 student-athletes and employees. For example, rather than investigate their accounts individually,
17 SJSU only investigated a formal complaint from one swimmer and treated the other swimmers’
18 claims as witness statements. Several swimmers complained that witness statements they earlier
19 submitted to SJSU’s Title IX office mysteriously disappeared from the casefile. The casefile was
20 purportedly only 2-pages long, despite encompassing accounts from approximately seventeen
21 women over a period of several years.

22 58. Despite finding “no wrongdoing” at the conclusion of the 2009 investigation,
23 SJSU adopted an unwritten policy prohibiting Shaw from treating female athletes.

24 59. Hopkins originated the 2009 investigation out of serious concern for the health
25 and safety of his athletes, and to protect his swimmers from what he understood to be Shaw’s
26 predatory and unlawful behavior.

1 60. Notwithstanding SJSU’s post-investigation order prohibiting Shaw from treating
2 female athletes, Hopkins learned in the intervening decade from his own athletes that Shaw
3 continued to treat *and* sexually abuse athletes.

4 61. In 2018, Hopkins notified SJSU leadership of reports he received from over a
5 dozen athletes about Shaw’s ongoing abuse. Hopkins found serious flaws in SJSU’s original
6 2009 investigation. He alleged that SJSU spoliated evidence in the spring of 2018 and that there
7 were other female student athletes who were victims of Shaw’s abuse, aside from the one
8 selected for SJSU’s investigation. Hopkins explicitly named Tuite and Eileen Daley as complicit
9 in the alleged cover-up under SJSU. His written complaint to SJSU detailed Tuite’s handling of
10 past and continuing allegations of discrimination and sexual abuse. Hopkins documented his
11 findings in a nearly 300-page dossier which he submitted to SJSU’s campus police, Tuite, and
12 multiple state and federal agencies, including the NCAA, imploring SJSU to re-open its
13 investigation.

14 62. Hopkins is not the only person to have raised similar concerns. Tuite and the
15 Athletic Department have been widely criticized for either failing to address serious student
16 complaints or preventing students from making them. For example, on May 21, 2019, over 35 of
17 SJSU’s Division I student-athletes delivered a signed letter to its President, detailing their
18 experiences of injustice, unfair treatment, alleged abuse, and mishandled Title IX complaints,
19 improper treatment by team doctors, and “threats” from Tuite.⁸ SJSU’s newspaper the Spartan
20 Daily publicly reported this issue, as did USA Today, which reported on February 26, 2021 that
21 an outside investigator found Shaw responsible for claims of sexual abuse spanning over a
22 decade.⁹

23 ⁸ See Vincente Vera, “Student athletes speak out against athletics culture and leadership at San
24 Jose State,” SJSUNews.com (May 29, 2019) (available at <https://sjsunews.com/article/student-athletes-speak-out-against-athletics-culture-and-leadership-at-san-jose-state>).

25 ⁹ See Former San Jose State top trainer found responsible for sexual misconduct in state probe,
26 available at <https://www.usatoday.com/story/news/investigations/2021/02/26/san-jose-state-athletic-trainer-shaw-responsible-sexual-misconduct/6836034002/>; see also Former SJSU sports
27 director found responsible for sexual misconduct, available at
28 <https://sjsunews.com/article/former-sjsu-sports-director-found-responsible-for-sexual-misconduct>

1 63. Also in May 2019, a former Athletic Department employee noted that three
2 student athletes complained in a meeting to Daley, who told each student why their complaints
3 were “wrong” and that “for the good of SJSU” they should give her the name of any additional
4 corroborating student athletes who have issues with [Tuite.]” The Athletic Department’s reaction
5 to such complaints¹⁰ has been widely criticized.¹¹

6 64. In response to Hopkins’ reports, the NCAA notified SJSU that it took his report
7 very seriously, lacked the resources to investigate itself, but strongly recommended that SJSU
8 renew its earlier investigation. In December 2019, SJSU heeded this recommendation. SJSU’s
9 President Mary Papazian issued a public statement in January 2020 announcing it was retaining
10 an outside investigator and the California State University System Title IX coordinator would
11 supervise the investigation with the explicit purpose of “avoid[ing] any potential conflicts of
12 interest.” Presumably, this reopened investigation partially sought to uncover whether any
13 wrongdoing occurred on behalf of SJSU personnel intimately involved in the original
14 investigation, such as Tuite.

15 65. O’Brien was generally aware of the Title IX investigation and subsequent
16 concerns regarding Shaw, however he became acutely aware of it in early December 2019. At
17 that time Rasmussen brought to O’Brien’s attention that the Title IX investigation was re-opened
18 in part because of Hopkins’ 300-page submission. Rasmussen provided O’Brien with a copy.
19 O’Brien reviewed the file and discussed it with Hopkins in late December 2019. Without passing
20 judgment on the merits of Hopkins’ accusations, O’Brien became aware that great care must be
21 taken to preserve the integrity of any resultant investigation, which involved serious, deeply
22 troubling conduct against SJSU’s female students.

23 66. O’Brien knew that part of preserving the integrity of Hopkins’ investigation
24 would be to ensure that to the extent any adverse action against Hopkins were necessary, that
25

26 ¹⁰ O’Brien had no knowledge of, nor role in, the Athletic Department’s handling of these
27 complaints.

28 ¹¹ See footnotes 8-9, *supra*.

1 such action be justified and well-documented in order to avoid any retaliation, or appearance of
2 retaliation, against Hopkins.

3 67. Notwithstanding this understanding, O'Brien still performed his duties relative to
4 Hopkins and others implicated in the Title IX investigation. For example, in December 2019,
5 Daley asked O'Brien to meet with members of the swimming/diving team, out of concerns about
6 Sports Medicine care, related to the experience level of a trainer assigned to the team. O'Brien
7 did so and Daley responded by expressing her gratitude for his involvement.

8 68. In early 2020, Daley again approached O'Brien, relaying to him that she and
9 Hopkins were "not getting along." O'Brien willingly offered to facilitate a mediation of sorts, to
10 rehabilitate Hopkins' and Daley's relationship. At the last minute, Daley called the meeting off.

11 69. On February 2, 2020, Hopkins emailed up to ten individuals, including Mountain
12 West Conference Staff, Rasmussen, and members of the NCAA, detailing allegations to support
13 his belief that the re-opened Title IX investigation contained the same serious flaws as SJSU's
14 initial investigation. Hopkins' email explicitly criticized Tuite and Daley as being complicit in
15 covering up Shaw's abuse of female athletes. Hopkins' presented this information based on
16 firsthand accounts of the student-athletes he coached.

17 70. Upon learning of the email, Tuite summoned O'Brien into her office to cross-
18 examine him about why he failed to immediately "report" Hopkins' opposition to her. She was
19 angered at what she perceived to be an expression of disloyalty.

20 71. Tuite apparently did not see the danger in soliciting information from a
21 subordinate regarding a department whistleblower such as Hopkins and suggesting that the
22 subordinate be a conduit for "informing" on the whistleblower. Because Tuite was a key player
23 in Hopkins' whistleblowing disclosures, this dynamic was particularly troubling to O'Brien.

24 72. On February 6, 2020, seemingly out of nowhere, Tuite directed O'Brien to
25 discipline Hopkins for purported "aggression" against Daley. She told O'Brien a "No Contact
26 Order" would be issued against Hopkins on Daley's behalf due to her alleged feelings of
27 "unsafety," that SJSU sought to change Hopkins' supervisor, and issue Hopkins a formal Letter
28 of Concern.

1 73. Oddly, Tuite explained she was precluded from disciplining Hopkins herself,
2 presumably because of the active Title IX investigation of which she was a subject initiated by
3 Hopkins. She informed O’Brien that due to a conflict of interest, she would not be able to carry
4 out actions against Hopkins. Rather than risk being identified as actively interfering with the
5 investigation against her, she ordered O’Brien to retaliate against Hopkins on her behalf.

6 74. A few days later, Tuite launched attacks against Rasmussen for purportedly siding
7 with Hopkins. Tuite wrote to Wright and O’Brien on February 10, 2020, annoyed that
8 Rasmussen “did not share” the email from Hopkins with her, noting “Steve [O’Brien] did not
9 believe the information David [Rasmussen] provided rose to the level to alert me. . . It’s
10 imperative that a meeting take place . . . [to] better understand David’s participation in the
11 emails... *I must trust his actions and intentions.*” (emphasis added).

12 75. On February 12, 2020, O’Brien responded, stating that he did not share the
13 information with Tuite because he:

14 “felt it would be inappropriate to do so on account of there being an active
15 investigation in which you are identified as being a participant. I hope you
16 understand my reservations under those circumstances.”

17 76. Tuite’s demand that O’Brien discipline Hopkins, after Hopkins blew the whistle
18 against her, constitutes interference with the active investigation or retaliation against Hopkins as
19 a whistleblower, or both.

20 77. At a minimum, Tuite’s conduct violates SJSU’s own publicly stated policy related
21 to the investigation, which states:

22 **To avoid any potential conflicts of interest**, an independent investigator has
23 been hired and the California State University systemwide Title IX Coordinator is
24 supervising the investigation at SJSU’s request. To ensure fairness, President
25 Papazian has asked that **all parties named as part of the original investigation**
26 **refrain from any actions that could interfere in the review of the accounts**
27 **from 2009-10.**

28 (emphasis added).

 78. O’Brien reasonably believed Tuite’s conduct violated the law.

1 79. As was his customary practice, O'Brien sought to perform his job to the best of
2 his ability which included following his supervisor's directives. In order to carry out the
3 discipline in good faith, O'Brien sought to independently verify the grounds for discipline.

4 80. By phone on February 6 and in person on February 7, O'Brien approached Joanne
5 Wright to ask what SJSU's basis was for disciplining Hopkins. She responded that Hopkins had
6 acted "unprofessionally" which caused Daley's feelings of "unsafety." When asked for
7 examples, Wright could not provide any, aside from a few emails which she quickly flipped
8 through but refused to provide to O'Brien.

9 81. At that point, O'Brien made clear to Wright that he had serious reservations about
10 the request for him to discipline Hopkins without independently-confirmed evidence at the
11 upcoming meeting. Aside from the re-opened Title IX investigation, Hopkins had also recently
12 reported a student athlete's alleged drug use to SJSU's compliance department.

13 82. O'Brien harbored reasonable concerns that any unsupported action he took
14 against Hopkins, at the direction of Tuite and Daley, could be construed as unlawful retaliation
15 against a whistleblower. Wright's sole response was: "are you refusing to do your job as an
16 administrator?"

17 83. O'Brien immediately understood that SJSU was giving him a "no-win" choice to
18 either discipline Hopkins on Tuite's behalf and risk retaliating against a whistleblower, or refuse
19 to take Tuite's directive, and appear insubordinate.

20 **D. O'Brien Escalates His Opposition to Illegal Conduct and Improper**
21 **Governmental Activity Up SJSU's Chain of Command**

22 84. In a good faith effort to seek assistance with the foregoing predicament, on
23 February 9, 2020, O'Brien directed a written complaint (described in paragraph 54, above) to
24 CSU's Office of General Counsel, which laid out specific instances of retaliation, disregard for
25 legal compliance and student safety, interference with an active Title IX investigation, and
26 included Tuite's attempts to solicit the help of O'Brien in retaliating against Hopkins, in addition
27 to the incidents involving Rasmussen discussed above. O'Brien never received a substantive
28 response to this letter.

1 85. Notably, despite explicitly voicing opposition to Tuite’s and Wright’s directives
2 to discipline Hopkins, O’Brien made a good faith effort to comply with his marching orders. On
3 February 11, 2020, O’Brien, Wright, Hopkins, and Hopkins’ union representative met for the
4 anticipated purpose of having O’Brien discipline Hopkins. O’Brien met with Wright beforehand
5 to prepare, and she explained a “No Contact Order” had been issued against Hopkins the day
6 before, and that she had “changed her mind” and now preferred not to issue a formal Letter of
7 Concern to Hopkins.¹²

8 86. The meeting began relatively innocuously. O’Brien told Hopkins about the above-
9 mentioned “performance concerns,” the change to his supervisor, and that a formal Letter of
10 Concern would not be issued against him at this time. Hopkins was given the opportunity to ask
11 questions and expressed genuine confusion and concern about what of his actions made Daley
12 and/or Tuite feel unsafe, as that was certainly not his intent. In response, Wright identified an
13 email exchange between him and Daley as the exclusive basis for her feelings.

14 87. Hopkins asked whether either O’Brien or Wright were aware of the re-opened
15 Title IX investigation, or the NCAA drug-testing matter, each of which criticized Daley and
16 Tuite directly. He asked whether the discipline being administered against him was related at all
17 to that protected activity, or whether it could be perceived as retaliatory. O’Brien tried to respond
18 honestly, and said that such an interpretation was possible. Upon hearing this response, Wright
19 abruptly ended the meeting, telling Hopkins and O’Brien: “It seems like you guys have spoken to
20 one another.” Shortly thereafter, Wright, noticeably irritated, asked O’Brien directly if he had
21 spoken to Hopkins before the meeting. O’Brien told her definitively that he had not.

22 88. At 6:31am the next day, February 12, 2020, Tuite emailed O’Brien asking for his
23 meeting notes from the disciplinary meeting with Hopkins “by 2pm today.”

24 89. O’Brien responded, offering instead to “visit and talk it over when I get back to
25 the office tomorrow.” This response displeased Tuite. O’Brien reasonably believed that
26 providing her detailed notes from the meeting and complying with Tuite and Daley’s directive to

27 ¹² During his meeting, with Wright, she explained her office would draft the Letter of Concern,
28 and O’Brien would be “expected” to sign it.

1 discipline Hopkins could amount to retaliation against a whistleblower. He simply wanted to
2 preserve the integrity of the Title IX investigation SJSU initiated.

3 90. On February 13, 2020, Hopkins wrote a letter to SJSU's President, explaining his
4 belief that the administrative action SJSU planned to take against him was retaliatory and
5 designed to undermine Hopkins' credibility to avoid re-opening the Title IX investigation. That
6 same day, Wright emailed O'Brien in a nearly two-page purported recitation of their meeting
7 two days earlier. Wright wrote:

8 "it was evident that you and Coach Hopkins had worked together on questions he
9 was going to ask you and answers you would give, particularly since you made it
10 a point to talk about the Letter of Concern at the beginning of the meeting even
11 though one was not issued and that Coach Hopkins's prepared questions
12 referenced a Letter of Concern . . ."

13 According to Wright, because O'Brien called one of the union representative's questions "a good
14 question," he was "essentially condoning Hopkins's [alleged] actions towards Daley as
15 appropriate." She further explained she "ended the meeting as it was clear that you and Hopkins
16 were working in tandem and that you had shared confidential personnel information with
17 Hopkins and his representative prior to the meeting and intended to continue discussing that
18 information at the meeting..."

19 91. Finally, Wright closed her email recommending that O'Brien "review" SJSU's
20 confidentiality policy "and proceed accordingly." Wright's admonishment was a thinly veiled
21 effort to reprimand O'Brien for her view that he was associating with Hopkins as a
22 whistleblower. O'Brien did not discuss this meeting with Hopkins prior to the meeting itself. But
23 even if he did, a discussion between Hopkins and O'Brien would not have breached SJSU's
24 confidentiality policy. Wright was simply castigating anyone she viewed as trying to expose
25 wrongdoing. She was also laying the groundwork for pretextual adverse action against O'Brien.

26 92. Aside from O'Brien's own whistleblowing disclosures, it was clear that SJSU
27 associated Hopkins and O'Brien with each other, such that Hopkins' continued whistleblowing
28 triggered a series of adverse employment actions against O'Brien. SJSU perceived a similar
association between Rasmussen and O'Brien. SJSU's decision to terminate O'Brien was
retaliation against him for his perceived affiliation to two employees who were engaging in

1 protected whistleblowing activity shortly before being unjustifiably disciplined. O'Brien's
2 actions to protect whistleblowers and the integrity of the Title IX investigatory and compliance
3 processes were treated by Tuite and SJSU as acts of disloyalty.

4 93. Indeed, Tuite's retaliation against Rasmussen for this same factual event appears
5 to be ongoing, even after O'Brien's termination. On information and belief, on April 20, 2020,
6 Tuite wrote to Rasmussen:

7 Because I have heard nothing to the contrary, I believe Sage [Hopkins] made the
8 false statements he did based upon information you provided to him. It was
9 unprofessional, and a lapse of judgment, on your part to even mention my name
10 (or Eileen [Daley]'s). Or discuss Eileen [Daley] at any time . . . Upon receipt of
11 several emails from [Hopkins], and in support of the truth, you should have
12 immediately put in writing that his statements regarding Eileen and I were
13 'creating a culture of non-compliance' were false. Your failure to admit your
14 phone conversation with Sage (until last week) is, again, a sign of a poor decision.

12 **E. SJSU Takes Adverse Action Against, and Terminates O'Brien in Response to
13 His Opposition**

14 94. On February 20, 2020, SJSU sent an internal memo placing a "Legal Hold" on
15 certain documents, out of a purported "reason to believe a legal proceeding could result in
16 connection with allegations made by Steve O'Brien, Deputy Director of Athletics." And on
17 February 28, 2020, Tuite removed Rasmussen from O'Brien's reporting line, stripped him of all
18 of his responsibilities outside of fundraising, and prohibited O'Brien from attending the
19 Mountain West Tournament that upcoming weekend. As the WBB Sport Administrator and
20 Primary Basketball Administrator for the MW Tournament, this is unquestionably a punitive
21 measure and not justified by any legitimate business purpose.

22 95. On March 2, 2020, SJSU terminated O'Brien,¹³ with striking temporal proximity
23 to his whistleblowing conduct. When asked why, Tuite did not respond, other than to say
24 O'Brien "**did not meet [her] expectations of her Deputy Director.**"¹⁴

25 _____
26 ¹³ In very close temporal proximity to O'Brien's termination, Tracy Tsugawa, SJSU's Title IX
27 coordinator abruptly resigned from the University "without explanation" after just over a year on
28 the job. A 20-year veteran of civil rights investigations, Tsugawa played a key role in the new
probe as the official who reconnected with and interviewed the 2009-10 swimmers. Tsugawa
gave no reasons for her departure, other than that "complications" arose with the investigation.

1 96. The reality is that O’Brien would not participate in Tuite’s cover-ups, and she
2 fired him as a result.

3 97. On March 19, 2020, O’Brien exercised his reconsideration rights under Section
4 427728, Title 5, CA Code of Regulations, asking SJSU to reconsider its decision to terminate
5 him. On March 24, 2020, Tuite declined, stating simply: “I do not find a basis for modifying the
6 decision to non-retain you.” O’Brien further appealed this decision to SJSU’s President on
7 March 29, 2020, which the President declined to overturn on April 3, 2020.

8 98. SJSU directly retaliated against O’Brien for whistleblowing, making a series of
9 protected disclosures, opposing, and refusing to participate in SJSU’s wrongful conduct that
10 reasonably appeared to be unlawful, including as retaliation against other whistleblowers or
11 individuals responsible for compliance. SJSU also indirectly retaliated against him by perceiving
12 his association with Hopkins and/or Rasmussen as whistleblowers in their own right.

13 99. SJSU terminated O’Brien for failing to participate in, and otherwise opposing its
14 unlawful or otherwise unethical conduct related to NCAA bylaws, and the active Title IX
15 investigation. O’Brien raised a number of protected complaints to Joanne Wright, Lisa Millora,
16 Stephen Silver, Faculty Athletics Representative Tamar Semerjian, Athletic Director Marie
17 Tuite, and SJSU President Mary A. Papazian between January 31 and February 10, 2020
18 regarding Athletic Director Marie Tuite’s unlawful, retaliatory conduct. In close temporal
19 proximity to his opposition, SJSU stripped O’Brien of material duties, divested him of customary
20 privileges associated with his employment, and on March 2, 2020, terminated him. But for
21 O’Brien’s protest regarding retaliation against a whistleblower and a compliance officer, nothing
22 in his personnel file or in Defendants’ behavior toward him justifies terminating him within a
23 month of his protected activity.

24
25
26 ¹⁴ Public reporting reflects a sentiment, at least from some, that is consistent with O’Brien’s
27 instincts of SJSU’s wrongdoing. (See e.g., Report: DOJ investigating San Jose State's handling
28 of Title IX complaints, available at <https://www.sfchronicle.com/collegesports/article/Report-DOJ-investigating-San-Jose-State-s-15837316.php> (referring to several other “allegations of dysfunction and a ‘toxic culture’ under athletic director Marie Tuite.”))

1 100. O'Brien has been deprived of wages, has and will suffer severe professional
2 reputational harm and has suffered emotionally as a direct and legal result of Defendants'
3 wrongful conduct as alleged herein.

4 101. O'Brien suffered substantial financial loss and continues to suffer substantial
5 financial loss far in excess of \$25,000.

6 **V. CONDITIONS PRECEDENT TO FILING ACTION**

7 102. O'Brien has complied with all required conditions precedent prior to filing this
8 action. O'Brien has complied with any and all pre-lawsuit filing requirements, including, but not
9 limited to, the following administrative exhaustion events:

10 a. O'Brien received a Right-to-Sue letter from the California Department of Fair
11 Housing and Employment ("DFEH") on December 22, 2020.

12 b. O'Brien timely served a claim on the CSU Defendant pursuant to the California
13 Tort Claim Act (Gov. Code §§ 910 *et seq.*). O'Brien's claim was post-marked on
14 August 27, 2020 and delivered on August 28, 2020. The CSU Defendant did not
15 respond to O'Brien's tort claim.

16 c. O'Brien served a Whistleblower Claim on the CSU Defendant (via Marie Tuite
17 and Julie Paisant) on December 23, 2020, pursuant to Gov. Code § 8547.12 *et*
18 *seq.*, and CSU Defendant's Executive Order Number 1116, as found on San Jose
19 State University's website.

20 **VI. CAUSES OF ACTION**

21 **FIRST CAUSE OF ACTION**

22 **(Retaliation in Violation of California Whistleblower Protection Act (Gov. Code § 8547.12))**
23 **(Against CSU Defendant and Marie Tuite)**

24 103. Plaintiff incorporates herein by reference each and every allegation in this
25 complaint as though fully set forth herein.

26 104. The California Whistleblower Protection Act ("the Act") protects California State
27 University employees against "acts of reprisal, retaliation, threats, coercion, or similar acts"
28 when said employees make "protected disclosures." Gov. Code § 8547.12.

1 105. A “protected disclosure” is any good faith communication that discloses or
2 demonstrates an intention to disclose information that may evidence an “improper governmental
3 activity” i.e., an activity in violation of any law or regulation, or that is economically wasteful, or
4 involves gross misconduct, incompetency, or inefficiency. Gov. Code § 8547.2(b),(d).

5 106. O’Brien made several protected disclosures during his tenure at SJSU as alleged
6 above, including but not limited to:

- 7 a. Rasmussen’s investigations, internal reporting, and opposition to unlawful
8 conduct and NCAA rules related to violations of student gambling
9 prohibitions;
- 10 b. Rasmussen and Hopkins’s investigations and internal reporting of NCAA
11 rules violations when a student was alleged to have smoked marijuana;
- 12 c. Hopkins’ reporting about SJSU’s failure to follow proper investigatory
13 processes in its Title IX investigation of Shaw’s alleged sexual abuse;
- 14 d. O’Brien’s reporting to Tamar Semerjian, Faculty Athletics Representative,
15 about the culture of retaliation at SJSU;
- 16 e. O’Brien’s reporting to Joanne Wright, Vice President of Personnel, about
17 Tuite’s directive to make misrepresentations in Rasmussen’s performance
18 review, which he believed (and reported) were specifically tied to
19 Rasmussen’s earlier reporting of NCAA rules violations and opposition of
20 Tuite’s improper conduct;
- 21 f. O’Brien’s reporting to Tuite that he was concerned about disciplinary
22 action taken against Rasmussen or Hopkins to be perceived as retaliatory;
- 23 g. O’Brien’s opposition to Tuite’s directives that he take adverse
24 employment action against Rasmussen and/or Hopkins, which he
25 reasonably perceived to be retaliatory against them and unlawful;
- 26 h. O’Brien’s elevation of his concerns about the culture of retaliation created
27 by Tuite to Lisa Millora, President’s Chief of Staff;
- 28

- 1 i. O'Brien's elevation of these same concerns to the Office of the General
2 Counsel of California State University;
- 3 j. Hopkins' own reports, which he elevated to SJSU's President, that SJSU's
4 administrative action against him was retaliatory and motivated by his
5 whistleblowing regarding Shaw, and/or the attendant Title IX
6 investigation;
- 7 k. O'Brien's reporting to each of the General Counsel and President of his
8 concerns that retaliatory actions were being taken against him for his
9 support of Rasmussen and Hopkins.

10 107. O'Brien's communications constituted protected disclosures under Gov. Code §
11 8547.12.

12 108. Retaliation can be direct or indirect. Direct retaliation occurs when someone
13 engages in protected activity and suffers an adverse employment decision because of his or her
14 protected activity. Indirect retaliation occurs when someone engages in protected activity and
15 *another person* suffers an adverse employment decision because of his or her close relationship
16 to the person that engaged in protected activity.

17 109. SJSU directly retaliated against O'Brien for whistleblowing, making a series of
18 protected disclosures, opposing, and refusing to participate in SJSU's wrongful conduct that
19 reasonably appeared to be retaliation against other whistleblowers or individuals responsible for
20 compliance. SJSU also *indirectly* retaliated against him by perceiving his association with
21 Hopkins and/or Rasmussen as whistleblowers in their own right.

22 110. O'Brien made the foregoing alleged disclosures in good faith for the purpose of
23 remediating the improper governmental activity(s).

24 111. Defendants SJSU and Ms. Tuite took retaliatory action against O'Brien, up to and
25 including his termination.

26 112. O'Brien's communication was a contributing factor in Defendants SJSU and
27 Tuite's decisions to take adverse employment action against, and ultimately terminate O'Brien.

28 113. O'Brien was harmed by Defendants' retaliatory actions.

1 114. Defendants' conduct was a substantial factor in causing Mr. O'Brien's harm.

2 115. Defendants' conduct was malicious. Defendants acted with intent to cause injury,
3 was despicable, and/or was done with a willful and knowing disregard of O'Brien's rights and
4 the safety of other students, athletes, employees, and the public at large.

5 116. A defendant acts with knowing disregard when the defendant is aware of the
6 probable dangerous consequences of the defendant's conduct and deliberately fails to avoid those
7 consequences.

8 117. As alleged herein, Defendants acted repeatedly to ignore O'Brien's protected
9 disclosures related to student athlete drug use and wagering, which Defendants failed to
10 substantively address. Defendants' conduct reflected a pattern of threatening or retaliating
11 against employees who raised significant compliance concerns within the Athletic Department,
12 like O'Brien. Defendants' conduct was intentional and deceptive: for example, Defendant Marie
13 Tuite sought to direct her reporting employees to unlawfully retaliate against other employees,
14 rather than face any consequences attendant to her disciplining those employees herself.

15 118. Defendants' conduct compromised O'Brien's rights, and the rights and safety of
16 the public. O'Brien made several reports about the retaliatory conduct he witnessed in the
17 Athletic Department, and rather than substantively address them, Defendants terminated him
18 instead.

19 119. The compliance systems in the Athletic Department related to SJSU's NCAA
20 membership, student athlete drug use, and sports wagering are designed for the safety of
21 students, student athletes, and employees.

22 120. As alleged herein, Defendants' conduct also risked the integrity of an active Title
23 IX investigation into sexual assault allegations from several female students. When O'Brien
24 raised concerns that Defendants' conduct could compromise the efficacy of the Title IX
25 investigation, Defendants terminated him and took other adverse action against him. Defendants'
26 conduct therefore evince an indifference to or a reckless disregard of the health or safety of
27 others; including those female student victims who reported Shaw's conduct, and potential future
28 victims of Shaw's alleged abuse.

1 121. Defendants attempted to hide the illegal reason for their decisions (including
2 O'Brien's termination) with a false explanation. Defendants therefore acted willfully and in
3 conscious disregard of O'Brien's rights.

4 122. Defendants' malicious conduct entitles O'Brien to punitive damages for this cause
5 of action.

6 **SECOND CAUSE OF ACTION**

7 **(Retaliation in Violation of California Labor Code § 1102.5)**

8 **(Against CSU Defendant)**

9 123. Plaintiff incorporates herein by reference each and every allegation in this
10 complaint as though fully set forth herein.

11 124. Labor Code § 1102.5 prohibits an employer from retaliating against an employee
12 for his or her disclosure of information related to, or refusal to participate in, unlawful acts or
13 acts the employee reasonably considered to be unlawful.

14 125. The CSU Defendant, via his employment at SJSU, was O'Brien's employer.

15 126. O'Brien made many disclosures as described fully in this Complaint, including
16 but not limited to disclosures to Ms. Tuite, a person with authority over O'Brien and an
17 employee with authority to investigate, discover, or correct legal noncompliance, that certain
18 actions taken against his colleagues might be unlawful.

19 127. O'Brien had reasonable cause to believe that the information disclosed a violation
20 of state and federal statutes against retaliation, and that O'Brien's participation in disciplinary
21 activities against his colleagues would result in violation of state and federal statutes against
22 retaliation.

23 128. Defendants discharged O'Brien.

24 129. O'Brien's disclosure of information and refusal to participate in disciplinary
25 actions against his colleagues was a contributing factor in SJSU's decision to discharge O'Brien.

26 130. O'Brien was harmed by his termination.

27 131. SJSU's conduct was a substantial factor in causing O'Brien's harm.
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THIRD CAUSE OF ACTION
(Retaliation in Violation of California Fair Employment and Housing Act)
(Gov. Code § 12940(h))
(Against the CSU Defendant)

132. Plaintiff incorporates herein by reference each and every allegation in this complaint as though fully set forth herein.

133. Gov. Code § 12940(h) makes it illegal for an employer to discharge, expel, or otherwise retaliate against an employee for engaging in activity protected under the Fair Employment and Housing Act (“FEHA”).

134. FEHA prohibits discrimination on the basis of gender, and Title IX (20 U.S.C. §1681 et seq.) is a federal counterpart of FEHA, and prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.”

135. O’Brien opposed, reported, and refused to participate in activity forbidden under FEHA, including activit(ies) that aimed at protecting the integrity of an active Title IX investigation of Scott Shaw’s alleged physical and sexual assault of female student athletes, as alleged herein. O’Brien believed Defendants were taking retaliatory, discriminatory efforts to undermine the integrity of the Title IX investigation against Shaw.

136. The CSU Defendant discharged O’Brien and/or subjected O’Brien to adverse employment actions and ultimately terminated him.

137. O’Brien’s engagement in the foregoing activities, forbidden under FEHA was a substantial motivating reason for SJSU’s decision to discharge O’Brien.

138. O’Brien was harmed.

139. The CSU Defendants’ decision to discharge O’Brien was a substantial factor in causing him harm.

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1 **FOURTH CAUSE OF ACTION**

2 **Wrongful Termination in Violation of Public Policy**

3 **(Against the CSU Defendant)**

4 140. Plaintiff incorporates herein by reference each and every allegation in this
5 complaint as though fully set forth herein.

6 141. O'Brien was terminated for reasons that violate fundamental principles of public
7 policy.

8 142. O'Brien was employed by SJSU.

9 143. The CSU Defendant discharged O'Brien.

10 O'Brien was terminated for reporting his 'reasonably based suspicions' of illegal activity.

11 144. O'Brien refused to engage, opposed, and reported, what he reasonably believed to
12 be Defendants' unlawful conduct, including related to:

- 13 a. Rasmussen's investigations, internal reporting, and opposition to unlawful
14 conduct and NCAA rules related to violations of student gambling
15 prohibitions;
- 16 b. Rasmussen and Hopkins's investigations and internal reporting of NCAA
17 rules violations when a student was alleged to have smoked marijuana;
- 18 c. Hopkins' reporting about SJSU's failure to follow proper investigatory
19 processes in its Title IX investigation of Shaw's alleged sexual abuse;
- 20 d. O'Brien's reporting to Tamar Semerjian, Faculty Athletics Representative,
21 about the culture of retaliation at SJSU;
- 22 e. O'Brien's reporting to Joanne Wright, Vice President of Personnel, about
23 Tuite's directive to make misrepresentations in Rasmussen's performance
24 review, which he believed (and reported) were specifically tied to
25 Rasmussen's earlier reporting of NCAA rules violations and opposition of
26 Tuite's improper conduct;
- 27 f. O'Brien's reporting to Tuite that he was concerned about disciplinary
28 action taken against Rasmussen or Hopkins to be perceived as retaliatory;

- 1 g. O'Brien's opposition to Tuite's directives that he take adverse
2 employment action against Rasmussen and/or Hopkins, which he
3 reasonably perceived to be retaliatory against them and unlawful;
- 4 h. O'Brien's elevation of his concerns about the culture of retaliation created
5 by Tuite to Lisa Millora, President's Chief of Staff;
- 6 i. O'Brien's elevation of these same concerns to the Office of the General
7 Counsel of California State University;
- 8 j. Hopkins' own reports, which he elevated to SJSU's President, that SJSU's
9 administrative action against him was retaliatory and motivated by his
10 whistleblowing regarding Shaw, and/or the attendant Title IX
11 investigation;
- 12 k. O'Brien's reporting to each of the General Counsel and President of his
13 concerns that retaliatory actions were being taken against him for his
14 support of Rasmussen and Hopkins.

15 145. Moreover, Defendants' termination of O'Brien for refusing to comply with their
16 directives rose to the level of public importance. The public, including but not limited to the
17 female student athletes who were victimized by Shaw or who risked being victimized by him in
18 the future, were put at risk by Defendants' conduct. Each of the foregoing underlying laws affect
19 the public, including SJSU's students, employees, or the public at large. Defendants'
20 terminating O'Brien for failing to accede to their unlawful demands violates public policy.

21 146. O'Brien's engagement in the foregoing activities was a substantial motivating
22 reason for O'Brien's discharge.

23 147. O'Brien was harmed.

24 148. The discharge was a substantial factor in causing O'Brien's harm.

25 **VII. PRAYER FOR RELIEF**

26 WHEREFORE, Mr. O'Brien prays for judgment against Defendants as follows:

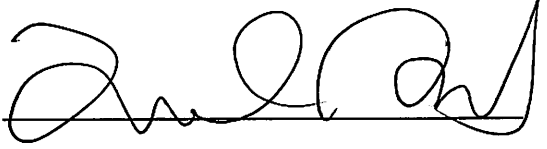
- 27 1. For economic and non-economic damages according to proof;
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- 2. For pre-judgment and post-judgment interest at the maximum amount;
- 3. Reasonable attorneys' fees and costs;
- 4. Appropriate injunctive and declaratory relief;
- 5. Costs of suit herein;
- 6. Punitive damages on the first cause of action as provided for in Gov. Code § 8547.12(c); and
- 7. For such further relief as the Court or finder of fact may deem just and proper.

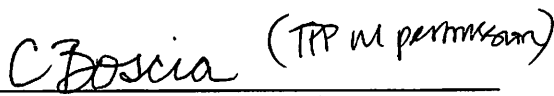
Dated: March 2, 2021

COTCHETT, PITRE & McCARTHY, LLP

By: 

NIALL P. MCCARTHY
TAMARAH P. PREVOST
BETHANY M. HILL

COTCHETT, PITRE & MCCARTHY LLP

By:  (TPP w/ permission)

CHRISTOPHER BOSCIA
BOSCIA LEGAL

Attorneys for Plaintiff Stephen A. O'Brien

1 **VIII. DEMAND FOR JURY TRIAL**

2 Plaintiff requests a trial by jury as to all causes of action.

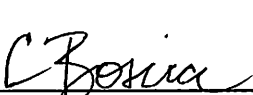
3 Dated: March 2, 2021

COTCHETT, PITRE & McCARTHY, LLP

4
5 By: 

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11 CHRISTOPHER BOSCIA

12 BOSCIA LEGAL

13 *Attorneys for Plaintiff Stephen A. O'Brien*

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