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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TOMMY LaNIER,

Plaintiff,

v.

UNITED STATES OF AMERICA, et
al.,

Defendants.

Case No. 15-cv-00360-BAS-BLM

**ORDER GRANTING
DEFENDANT MCADAM'S
MOTION FOR SUMMARY
JUDGMENT**

20 Plaintiff Tommy LaNier brings a claim for defamation against Defendant Kean
21 McAdam, alleging McAdam defamed him by telling an executive board he falsely
22 justified a business trip to Puerto Rico. McAdam now moves for summary judgment,
23 arguing, among other things, that the allegedly defamatory statement is privileged
24 under the “common interest” privilege of California Civil Code § 47(c). The Court
25 heard oral argument on the motion on August 9, 2017. For the following reasons, the
26 Court grants the motion. (ECF No. 42.)

27 **BACKGROUND**

28 The events giving rise to this suit occurred while both Plaintiff LaNier and

1 Defendant McAdam worked as part of the San Diego-Imperial region of the High
2 Intensity Drug Trafficking Area (“HIDTA”) program. HIDTA is administered by the
3 Office of National Drug Control Policy (“ONDCP”), a component of the Executive
4 Office of the President. HIDTA is not an organization itself, but rather serves as a
5 “coordination umbrella” for federal, state, and local law enforcement agencies,
6 “enabling them to combine and leverage resources and capabilities to address drug
7 trafficking and drug-related crime.” (ECF No. 42-3, Exh. B, HIDTA Program–Policy
8 and Budget Guidance (“Guidance”) § 2.3.5.) The Director of ONDCP designates
9 specific areas in the United States as HIDTAs, and then allocates federal funds to
10 support coordinated counter-drug activities in those areas. (*Id.* § 2.1.3.) The San
11 Diego-Imperial HIDTA is one such designee, and is referred to as the SDI-HIDTA.

12 The SDI-HIDTA, like all HIDTA designees, is governed by an Executive Board
13 (“Board”) comprised of federal, state, and local law enforcement leaders from the
14 designated area. (*Id.* § 3.4.) The Board is responsible for assessing the drug trafficking
15 threat in the area, developing a strategy to address the threat, designing and overseeing
16 initiatives to implement the strategy, reviewing and approving reports from the
17 HIDTA to the Director of ONDCP, and managing funds. (*Id.* §§ 2.3.2, 3.4.2.)

18 Each Board selects a HIDTA Director, who is responsible for implementing the
19 Board’s strategy and policies. (*Id.* § 3.4.7.) Defendant McAdam is, and was at all times
20 relevant, Director of the SDI-HIDTA. As Director, McAdam’s principal
21 responsibilities include: providing day-to-day administrative, financial, and program
22 management for HIDTA operations, ensuring that SDI-HIDTA initiatives comply
23 with federal requirements, and advising the Board concerning the performance of
24 HIDTA initiatives. (*Id.* § 3.5.1.) The SDI-HIDTA Director also serves as the point of
25 contact between the Board and ONDCP on all HIDTA matters. (*Id.* § 3.5.2.)

26 From January of 2004 to October of 2013, Plaintiff LaNier served as the
27 Director of the National Marijuana Initiative (“NMI”), an initiative of the SDI-
28 HIDTA. (ECF No. 43-2, LaNier Decl. ¶ 2.) In this capacity, LaNier frequently traveled

1 to other regions of the United States to provide training related to marijuana
2 interdiction. Because the NMI is an initiative of the SDI-HIDTA, LaNier’s NMI-
3 related travel required approval by the SDI-HIDTA Director. (*Id.* ¶ 8.) In July of 2013,
4 LaNier submitted, and McAdam approved, a request to travel with a small team to the
5 Puerto Rico-United States Virgin Islands (“PR-USVI”) HIDTA to assess training
6 needs. (LaNier Decl. Exh. 2-2.) LaNier traveled to Puerto Rico from September 3
7 through September 6, 2013.

8 According to McAdam, he approved LaNier’s travel request based on LaNier’s
9 representation that Shannon Kelly and Mike Gottlieb of ONDCP requested and
10 directed LaNier to take the trip. (McAdam Decl. ¶ 16.) After LaNier left for Puerto
11 Rico, McAdam participated in a conference call with Kelly and Gottlieb during which
12 they denied directing or requesting that LaNier travel to Puerto Rico. (*Id.* ¶ 20.)

13 On October 16, 2013, approximately six weeks after LaNier returned from
14 Puerto Rico, the SDI-HIDTA Executive Board held its monthly meeting. The meeting
15 included a “closed session” to which McAdam was invited to discuss personnel issues
16 involving LaNier. LaNier alleges that during the closed session, McAdam defamed
17 him by telling the Board he falsely represented that Kelly and Gottlieb requested and
18 directed he travel to Puerto Rico. (Opp’n 13:20–25.) Following the closed session, the
19 Board voted to give LaNier the option to retire, resign, or be fired from his position.
20 LaNier retired.

21 LaNier originally filed suit in the Superior Court of California, County of San
22 Diego, asserting claims for defamation against McAdam and the City of Chula Vista,
23 and claims for retaliation against McAdam and other defendants. After the case was
24 removed to this Court, LaNier filed a First Amended Complaint (“FAC”) reasserting
25 his claim for defamation against McAdam. McAdam now moves for summary
26 judgment on the defamation claim pursuant to Federal Rule of Civil Procedure 56(a).

1 (ECF No. 42.) LaNier opposes.¹ (ECF No. 43.)

2 DISCUSSION

3 A. LaNier’s Request to Amend

4 The Court first addresses LaNier’s request to amend his FAC to more precisely
5 allege the content of McAdam’s defamatory statement to the Board. In the FAC,
6 LaNier alleges McAdam told the Board “LaNier . . . falsified his travel voucher and
7 falsified or lied about travel expenses incurred with regard to a business trip to Puerto
8 Rico.” (FAC ¶ 24.) However, in his opposition to McAdam’s motion for summary
9 judgment, LaNier alleges the specific defamation was McAdam’s assertion that
10 LaNier lied by stating that Kelly and Gottlieb of ONDCP requested and directed
11 LaNier to travel to Puerto Rico. (Opp’n 13:20–25.) LaNier requests this latter
12 statement be the statement the Court treat as the alleged defamation at issue.

13 The Court grants LaNier’s request to amend. Generally, when a party raises a
14 new claim or issue in opposition to a motion for summary judgment, district courts
15 should construe it as a request under Federal Rule of Civil Procedure 15(a) to amend
16 the pleadings “out of time,” and grant leave to amend “with extreme liberality.”
17 *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (citations
18 omitted). Here, the Court finds no reason to depart from Rule 15(a)’s liberal policy
19 favoring amendment.

20 McAdam argues leave to amend is improper because of undue delay and severe
21 prejudice. (Reply 1:14–4:21.) The Court finds this argument unpersuasive. LaNier
22 requested leave to amend in his first filing after reviewing McAdam’s grounds for
23 summary judgment, and part of the evidence that forms the basis of LaNier’s request
24 was obtained only six weeks prior to him seeking leave to amend. In addition, the risk
25 of prejudice to McAdam is minimal given that (a) McAdam knows the precise

26
27 ¹ In his opposition, LaNier requests the Court wait until it decides LaNier’s motion to enlarge time
28 and compel discovery before ruling on McAdam’s motion for summary judgment. Magistrate Judge
Barbara Major denied LaNier’s motion to enlarge time and compel discovery on March 10, 2017.
(ECF No. 62.) Accordingly, LaNier’s request is denied as moot.

1 statement he communicated to the Board during the October 16, 2013 closed session,
2 (b) the amended statement reflects what LaNier found during discovery, and (c) both
3 in his motion for summary judgment and reply McAdam proffers arguments that
4 assume the more specific defamatory statement alleged by LaNier. Under these
5 circumstances, the Court finds no undue delay or prejudice that would justify denying
6 LaNier’s request to amend. Accordingly, the Court will treat LaNier’s amended
7 allegation—i.e., that McAdam asserted LaNier lied by stating that Kelley and Gottlieb
8 requested and directed LaNier to travel to Puerto Rico—as the alleged defamation at
9 issue.

10 **B. Legal Standard for Summary Judgment**

11 “A party may move for summary judgment, identifying each claim or defense—
12 or the part of each claim or defense—on which summary judgment is sought.” Fed.
13 R. Civ. P. 56(a). Summary judgment is proper when “the movant shows that there is
14 no genuine dispute as to any material fact and the movant is entitled to judgment as a
15 matter of law.” *Id.* A fact is “material” if it could affect the outcome of the case under
16 the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
17 (1986). A dispute of material fact is “genuine” only when the evidence is such that a
18 reasonable jury could resolve the issue in favor of the nonmoving party. *Id.*

19 The party moving for summary judgment has the initial burden of
20 demonstrating the absence of a genuine dispute of material fact. *Celotex Corp. v.*
21 *Catrett*, 477 U.S. 317, 323 (1986). To meet this burden, the moving party must either
22 (1) produce evidence negating an essential element of the nonmoving party’s claim or
23 defense or (2) show that the nonmoving party does not have enough evidence of an
24 essential element of his claim or defense to carry his ultimate burden of persuasion at
25 trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th
26 Cir. 2000) (citation omitted). If the moving party fails to carry his initial burden, the
27 nonmoving party has no obligation to produce any evidence, and summary judgment
28 will be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160–61 (1970); *Great Haw.*

1 *Fin. Corp. v. Aiu*, 863 F.2d 617, 619 (9th Cir. 1988) (per curiam). If, however, the
2 moving party carries his initial burden, the nonmoving party must then “go beyond
3 the pleadings” and, by affidavit or other appropriate evidence, demonstrate that there
4 is a genuine dispute for trial. *Celotex*, 477 U.S. at 324.

5 At the summary judgment stage, “the evidence of the nonmovant is to be
6 believed, and all justifiable inferences are to be drawn in his favor.” *Tolan v. Cotton*,
7 134 S. Ct. 1861, 1863 (2014) (per curiam) (alteration omitted) (quoting *Anderson*, 477
8 U.S. at 255). The quantum and quality of evidence needed to defeat a properly
9 supported motion for summary judgment is determined by the standard of proof that
10 would apply at a trial on the merits. *Anderson*, 477 U.S. at 252. “If the evidence is
11 merely colorable, or is not significantly probative, summary judgment may be
12 granted.” *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1185 (9th Cir. 2016)
13 (quoting *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016)).

14 **C. Common Interest Privilege**

15 McAdam moves for summary judgment on various grounds, one of which is
16 that the allegedly defamatory statement to the Board is protected by California’s
17 common interest privilege, Cal. Civ. Code § 47(c). The Court agrees summary
18 judgment is appropriate on this ground.²³

19 To prove defamation under California law, a plaintiff must show the intentional
20 publication of a statement of fact that is false, unprivileged, and has a natural tendency
21 to injure or cause special damage. *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan*

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23 ² Because the Court resolves McAdam’s motion for summary judgment on the basis of the common
24 interest privilege, it does not reach McAdam’s other grounds for summary judgment.

25 ³ Concurrent with his motion for summary judgment, McAdam filed a request for judicial notice of
26 the HIDTA Program–Policy and Budget Guidance dated September 9, 2012 (“Guidance”). (ECF
27 No. 42-2, Exh. A.) On summary judgment, documentary evidence such as the Guidance must be
28 properly authenticated before being considered by the district court. *Orr v. Bank of America, NT &
SA*, 285 F.3d 764, 773–74 (9th Cir. 2002). Here, the Guidance is self-authenticating under Federal
Rule of Evidence 902(5) as a “book, pamphlet, or other publication purporting to be issued by a
public authority.” Therefore, the Guidance is properly admitted and will be considered accordingly.
McAdam’s request for judicial notice is denied as moot.

1 *Mortg. Corp.*, 525 F.3d 822, 826 (9th Cir. 2008) (quoting *Smith v. Maldonado*, 85 Cal.
2 Rptr. 2d 397, 402 (1999)). Under the common interest privilege set forth in Cal. Civ.
3 Code § 47(c), “a defendant who makes a statement to others on a matter of common
4 interest is immunized from liability for defamation so long as the statement is made
5 without malice.” *Lundquist v. Reusser*, 875 P.2d 1279, 1279 (Cal. 1994). The
6 defendant has the initial burden of showing that the allegedly defamatory statement
7 was made on a privileged occasion. *Id.* at 1284. The burden then shifts to the plaintiff
8 to show the defendant made the statement with “actual malice.” *Id.*

9 A plaintiff may establish actual malice in two ways: (1) “by a showing that the
10 publication was motivated by hatred or ill will towards the plaintiff,” or (2) “by a
11 showing that the defendant lacked reasonable grounds for belief in the truth of the
12 publication and therefore acted in reckless disregard of the plaintiff’s rights.” *Sanborn*
13 *v. Chronicle Pub. Co.*, 556 P.2d 764, 768 (Cal. 1976) (quoting *Roemer v. Retail Credit*
14 *Co.*, 119 Cal. Rptr. 82, 88 (Ct. App. 1975)). To prove reckless disregard, a plaintiff
15 must show the defendant “made the false publication with a high degree of awareness
16 of . . . probable falsity, or must have entertained serious doubts as to the truth of his
17 publication.” *Young v. CBS Broad., Inc.*, 151 Cal. Rptr. 3d 237, 245 (Ct. App. 2012)
18 (citations omitted) (quoting *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657,
19 667 (1989)). “When a plaintiff fails to raise triable issues of fact regarding whether a
20 defendant acted with reckless disregard, a court may grant summary judgment in favor
21 of the defendant as a matter of law.” *Pashman v. Aetna Ins. Co.*, No. C–13–02835
22 DMR, 2014 WL 3571689, at *19 (N.D. Cal. July 18, 2014).

23 As an initial matter, the Court finds there is no genuine dispute of fact as to
24 whether McAdam’s statement was made on a privileged occasion. McAdam made the
25 statement to the SDI-HIDTA Executive Board, a body charged with “providing
26 direction and oversight in establishing and achieving the goals for the [SDI-] HIDTA.”
27 (Guidance § 3.4.2.) In light of its oversight responsibilities, the Board had a legitimate
28 interest in the conduct of LaNier, who was in charge of an important SDI-HIDTA

1 initiative, and whose business travel was paid for with HIDTA funds. (LaNier Decl.
2 Exh. 6-1.) McAdam shared this interest in LaNier’s conduct given that McAdam’s
3 responsibilities included “day-to-day administrative, financial, and program
4 management for the operations of the HIDTA” and advising the Board “concerning
5 the performance of HIDTA initiatives,” such as the NMI. (Guidance § 3.5.1.) Thus,
6 McAdam’s statement to the Board concerning LaNier’s allegedly false justification
7 for traveling to Puerto Rico was “a statement to others on a matter of common
8 interest,” and is privileged absent actual malice. *Lundquist*, 875 P.2d at 1279.

9 LaNier does not dispute that McAdam’s statement was made on a privileged
10 occasion; rather, he asserts summary judgment should be denied because there is a
11 genuine dispute as to whether McAdam made the statement with actual malice.
12 Specifically, LaNier contends McAdam did not have reasonable grounds to believe
13 the truth of his statement to the Board and therefore acted with reckless disregard.
14 McAdam argues there is no triable issue on this point because: (1) LaNier testified
15 during his deposition that he told McAdam Kelly and Gottlieb asked him to travel to
16 Puerto Rico, and (2) McAdam spoke with Kelly and Gottlieb before making the
17 allegedly defamatory statement to the Board, and both of them denied directing or
18 requesting LaNier to travel to Puerto Rico.

19 LaNier’s evidence that McAdam lacked reasonable grounds for believing the
20 truth of his statement consists of the following: (1) a July 11, 2013 email from
21 Shannon Kelly asking LaNier to “reach out” to Mike Roy, Director of the PR-USVI
22 HIDTA, regarding possible “guidance” on marijuana operations (LaNier Decl. Exh.
23 3); (2) an email from McAdam to Roy, sent prior to LaNier making the trip to Puerto
24 Rico, in which McAdam touted LaNier’s expertise (LaNier Decl. Exh. 4-1); (3) the
25 fact that there is no policy requiring ONDCP to request or direct any business trip of
26 LaNier within the United States or its territories (LaNier Decl. ¶ 8; Exh. 6-2); (4) the
27 fact that McAdam has nothing in writing from Mike Gottlieb indicating Gottlieb
28 disapproved of the Puerto Rico trip (ECF No. 43-1, Lynn Decl. Exh. B-7); (5)

1 McAdam’s admission that he was “irritated” by the situation involving alleged
2 incidents of sexual harassment in the SDI-HIDTA office and that he knew LaNier was
3 complaining about the situation on behalf of the victim of the alleged harassment (ECF
4 No. 44, Corrected Lynn Decl., Exh. A-1, A-2); (6) the fact that the Board did not
5 undertake an independent investigation to verify McAdam’s statement regarding
6 LaNier’s alleged untruthfulness (Lynn Decl. Exh. A-3); and (7) the fact that during
7 LaNier’s exit interview, McAdam told LaNier his termination was not related to his
8 job performance (LaNier Decl. ¶ 9).

9 The Court finds LaNier’s evidence, taken as true, does not raise a genuine
10 dispute as to whether McAdam lacked reasonable grounds to believe the truth of his
11 statement to the Board.

12 First, the July 11, 2013 email from Kelly asking LaNier to “reach out” to Mike
13 Roy is irrelevant to McAdam’s grounds for belief because there is no evidence
14 McAdam was copied on, or was otherwise aware of, the email. And even if LaNier
15 had read the email, Kelly’s request for LaNier to “reach out” to Roy does not support
16 the inference that McAdam should have interpreted the email as Kelly asking or
17 directing LaNier to travel to Puerto Rico. *See Villiarimo v. Aloha Island Air, Inc.*, 281
18 F.3d 1054, 1065 n.10 (9th Cir. 2002) (citation omitted) (explaining that on summary
19 judgment the court need not draw *all* possible inferences in non-movant’s favor, but
20 only all *reasonable* ones). Indeed, LaNier testified at his deposition that he did not
21 think anything in Kelly’s July 11, 2013 email suggested that he travel to Puerto Rico.⁴

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23 ⁴ At his January 7, 2015 deposition, LaNier testified as follows:

24 “Q. Exhibit 22 is an email from Shannon Kelly to you dated July 11, 2013.
25 You’ve seen this before, haven’t you?

26 A. [LaNier] Yes, I have.

27 Q. You spoke to her on July 11, right?

28 A. [LaNier] After I received this email.

1 Second, McAdam’s email to Roy touting LaNier’s expertise in no way
2 undermines McAdam’s basis for belief in the truth of his statement. There is no
3 contradiction in McAdam respecting LaNier’s subject matter expertise and later
4 forming a reasonable belief that LaNier lied about ONDCP directing or requesting the
5 trip. Furthermore, McAdam’s statement in the email that “[m]y understanding is that
6 ONDCP suggested [the trip]” is not significantly dispositive where there is no basis
7 to find that McAdam’s “understanding” came from ONDCP rather than from LaNier
8 himself. Here, the undisputed evidence indicates that LaNier told McAdam that
9 ONDCP requested and directed he travel to Puerto Rico, and that McAdam learned
10 from ONDCP that that was not the case (ECF No. 46-1, Stayton Decl., Exh. D, LaNier
11 Dep. 271:9–272:2; McAdam Decl. ¶¶ 19, 20).⁵ On this record, McAdam’s email to
12 Roy does not raise a genuine dispute of fact as to McAdam’s grounds for believing
13 LaNier had been untruthful.

14 Third, the fact there is no official policy requiring ONDCP to request or direct
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17 Q. You don’t read anything in this email, Exhibit 22, do you, that suggests you
travel to Puerto Rico?

18 A. [LaNier] No.

19 Q. And in the conversation you had with Ms. [] Kelly on July 11 after you got
20 this email, was there anything she said that suggested to you that she or
21 anybody in ONDCP wanted you to travel to Puerto Rico?

22 A. [LaNier] No.”

23 (ECF No. 46-1, Stayton Decl., Exh. E, LaNier Dep. 524:20–525:11.)

24 ⁵ LaNier attempts to dispute this evidence by citing the LaNier Declaration ¶¶ 4–8. But nothing in
25 the paragraphs cited controverts McAdam’s evidence that LaNier told him ONDCP requested and
26 directed he travel to Puerto Rico, and that he learned from ONDCP that that was not the case. Taken
27 as true, the portions of the LaNier Declaration cited by LaNier establish that (1) McAdam authorized
28 the Puerto Rico trip, (2) McAdam was under the impression ONDCP suggested the trip, (3)
McAdam’s authorization was the only authorization required for LaNier to travel, and (4) Kelly and
Gottlieb were aware LaNier would be traveling to Puerto Rico. At no point in the LaNier Declaration
does LaNier deny having told McAdam that ONDCP requested and directed the trip, or challenge
McAdam’s account of his conversation with ONDCP on the issue.

1 LaNier’s business-related travel is irrelevant to McAdam’s belief in the truth of what
2 he told the Board. McAdam did not tell the Board LaNier traveled to Puerto Rico
3 without required ONDCP authorization. Rather, McAdam told the Board LaNier
4 falsely represented ONDCP had requested and directed the trip be taken. These are
5 separate and distinct issues. The fact that LaNier did not *need* an ONDCP request to
6 travel does not call into question evidence showing LaNier told McAdam he *received*
7 such a request. Therefore, the lack of an official policy requiring ONDCP to request
8 or direct LaNier’s travel does not create a genuine dispute as to whether McAdam
9 reasonably believed LaNier lied about traveling at ONDCP’s behest.

10 Fourth, the fact that McAdam has nothing in writing indicating Gottlieb
11 disapproved of the Puerto Rico trip does not create a genuine dispute of fact regarding
12 reckless disregard. For one thing, the issue is not whether ONDCP “approved” or
13 “disapproved” of the trip; the issue is whether ONDCP specifically requested or
14 directed LaNier to take the trip. In addition, LaNier does not explain how the lack of
15 something in writing from Gottlieb creates a triable issue where the evidence shows
16 McAdam spoke with Gottlieb before making the allegedly defamatory statement to
17 the Board. (McAdam Decl. ¶¶ 18–20.)

18 Fifth, McAdam’s admission that he was “irritated” by alleged incidents of
19 sexual harassment in the SDI-HIDTA office, and aware of LaNier’s role in advocating
20 on behalf of the alleged victim of the harassment, does not raise a genuine dispute as
21 to whether McAdam had reasonable grounds for his statement. Although the evidence
22 supports the reasonable inference that McAdam was frustrated with LaNier, such
23 frustration could only support a finding of malice to the extent it impacted McAdam’s
24 “actual belief” concerning the truthfulness of the statement he made before the Board.
25 *See Harkonen v. Fleming*, 880 F. Supp. 2d 1071, 1081 (N.D. Cal. 2012) (explaining
26 that the focus of the actual malice inquiry is on “the defendant’s attitude toward the
27 truth or falsity of the material published,” not “the defendant’s attitude toward the
28 plaintiff”) (quoting *Christian Research Inst. v. Alnor*, 55 Cal. Rptr. 3d 600, 618 (Ct.

1 App. 2007)); *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 619 (Cal. 1984)
2 (explaining that “mere proof of ill will” is insufficient to prove actual malice). Here,
3 McAdam spoke to Kelly and Gottlieb before communicating to the Board his belief
4 that LaNier had been untruthful. Thus, even if McAdam was frustrated with LaNier,
5 LaNier has not raised a genuine dispute of fact that this frustration impacted
6 McAdam's belief in the truth of his statement.

7 Sixth, the fact that the Board did not independently investigate the truth of
8 McAdam's statement is irrelevant. McAdam is the person who made the allegedly
9 defamatory statement and so it his basis for belief in the truth of the statement that
10 matters, not the Board's.

11 Seventh, the fact that McAdam told LaNier during LaNier's exit interview that
12 his termination was not related to job performance does not raise a triable issue as to
13 reckless disregard. To prove reckless disregard, a plaintiff must provide evidence that
14 the defendant had a high degree of awareness that the statement in question was
15 probably false, or that the defendant entertained serious doubts about the truth of the
16 statement. *Young*, 151 Cal. Rptr. 3d at 245. McAdam's basis for believing the truth of
17 his statement was his conversation with Kelly and Gottlieb before speaking to the
18 Board. Thus, the fact that McAdam told LaNier his termination was not related to
19 performance does not raise a genuine dispute as to whether McAdam lacked
20 reasonable grounds for believing the truth of what he told the Board.

21 At oral argument, LaNier's counsel called attention to a conference call that
22 McAdam held with Gottlieb, Kelly, and LaNier before LaNier traveled to Puerto Rico.
23 (Lynn Decl. Exh. B-5, McAdam Dep. 57:21–59:1.) Toward the end of the call,
24 McAdam mentioned that LaNier would soon be traveling to Puerto Rico at ONDCP's
25 suggestion or request. Neither Kelly nor Gottlieb responded when McAdam raised the
26 subject. LaNier's counsel argues this call proves Kelly and Gottlieb were aware of the
27 trip, and therefore McAdam had no reasonable grounds for telling the Board that
28 ONDCP did not request or direct it.

1 This evidence does not create the conflict LaNier's counsel suggests it creates.
2 Had McAdam made his statement to the Board on the basis of Kelly and Gottlieb's
3 non-response at the end of the above-described call, there might be a triable issue as
4 to whether McAdam had a reasonable basis for believing the truth of his statement.
5 But that is not what happened. Instead, before McAdam spoke to the Board concerning
6 LaNier, he held a conference call with Kelly and Gottlieb specifically to discuss the
7 Puerto Rico trip, during which Kelly and Gottlieb denied requesting or directing
8 LaNier to take the trip. (McAdam Decl. ¶¶ 18–20.) In light of this second call, the fact
9 that Kelly and Gottlieb were non-responsive when McAdam mentioned the Puerto
10 Rico trip during the previous call does not create a genuine dispute as to whether
11 McAdam had a reasonable basis for believing LaNier had been untruthful.

12 In sum, McAdam has shown that his statement to the Board regarding LaNier's
13 alleged untruthfulness involved a matter of common interest, and LaNier's evidence,
14 and reasonable inferences drawn therefrom, fail to raise a genuine dispute of fact
15 regarding actual malice. Thus, the common interest privilege of Cal. Civ. Code § 47(c)
16 applies, and McAdam is protected from liability for his statement to the Board.

17 **CONCLUSION**

18 At the summary judgment stage, district courts do not make credibility
19 determinations or weigh conflicting evidence. The evidence of the nonmoving party
20 is accepted as true, and all reasonable inferences are drawn in his favor. But the
21 nonmoving party cannot defeat a properly supported motion for summary judgment
22 when the evidence cited is insufficient to create a genuine dispute for trial. Here, the
23 quantum and quality of evidence provided by LaNier is insufficient to create a genuine
24 dispute on the issue of actual malice. Therefore, California's common interest
25 privilege applies as a matter of law, and McAdam is entitled to summary judgment.
26 McAdam's motion for summary judgment is GRANTED.

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2 **IT IS SO ORDERED.**

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4 **DATED: August 14, 2017**

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Hon. Cynthia Bashant
United States District Judge

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