COURT OF APPEALS, STATE OF COLORADO Court Address: 101 W. Colfax Ave., Ste. 800 Denver, CO 80202 (303) 837-3785 Appeal from the District Court, City and County of Denver Case No: 11 CV 1584	▲COURT USE ONLY▲
Plaintiff/Appellant: MICHAEL SACKEL v. Defendants/Appellees: RONALD PHILLIPS; TIMOTHY NESTER; COMCAST CABLE COMMUNICATIONS, LLC; and COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.	Case No. 2012 CA 921
Attorneys for Defendants/Appellees Ronald Phillips, Timothy Nester, Comcast Cable Communications, LLC, and Comcast Cable Communications Holdings, Inc. Darin Mackender (#23296) Ruth N. Mackey (#39222) FISHER & PHILLIPS LLP 1999 Broadway, Suite 3300 Denver, CO 80202 Telephone: 303-218-3650 Facsimile: 303-218-3651 dmackender@laborlawyers.com rmackey@laborlawyers.com	
APPELLEES' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). Choose one: ☒ It contains 6,958 words. ☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k). It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/Darin Mackender
Darin Mackender

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

STATEMENT OF THE ISSUES

1. Whether Michael Sackel ("Sackel"), the plaintiff below and the appellant herein, waived and released his claims against Ronald Phillips, Timothy Nester, Comcast Cable Communications, LLC, and Comcast Cable Communications Holdings, Inc. (collectively, "Defendants"), the defendants below and appellees herein.
2. Whether Defendants are entitled to summary judgment on all claims in this case.

STATEMENT OF THE CASE

This case arises out of the termination of Michael Sackel's employment with Comcast in June 2009. Sackel contends that Comcast executives Timothy Nester ("Nester") and Ronald Phillips ("Phillips") intentionally interfered with his at-will employment agreement with Comcast by terminating his employment as part of an alleged scheme to make him a "scapegoat" in another lawsuit. He further contends that Comcast Cable Communications, LLC and Comcast Cable Communications Holdings, Inc. (collectively, "Comcast") should be held vicariously liable for Nester's and Phillips' actions. In response, Defendants assert that Sackel waived his claims against them in July 2009, when he executed a severance agreement and general release in exchange for more than $100,000 in severance pay and other consideration. They further assert that there are no genuine issues of material fact

with respect to Sackel's claims, and they are entitled to summary judgment as a matter of law.

Sackel filed his complaint in this matter on or about March 2, 2011. He asserted claims for intentional interference with contract and conspiracy against Nester, Phillips, and Fred Graffam ("Graffam"), a former Comcast executive; a defamation claim against Phillips; and a vicarious liability claim against Comcast. Nester, Phillips, and Comcast filed their answer on May 9, 2011, and Graffam filed his answer on August 12, 2011. On January 30, 2012, all of the defendants, including Graffam, filed a motion for summary judgment on all claims. In response to that motion, Sackel voluntarily dismissed all of his claims against Graffam and his defamation claim against Phillips. He argued that summary judgment was not appropriate on his intentional interference with contract and conspiracy claims against Nester and Phillips, as well as his vicarious liability claim against Comcast. On March 22, 2012, the district court granted Defendants' motion on the grounds that Sackel's intentional interference with contract and conspiracy claims had been waived, and his vicarious liability claim therefore also failed as a matter of law. The district court declined to address Defendants' other arguments.

On appeal, Sackel claims the district court improperly granted summary judgment on his intentional interference with contract and vicarious liability

claims. He does not assert that summary judgment was inappropriate on his conspiracy claim.

STATEMENT OF FACTS

Sackel began working for Comcast on or about April 23, 2007, as Director of Security for the company's West Division. *Document ID Number (hereinafter, "Doc.") 4597706, pp. 102-103 (Sackel dep., pp. 69:20-70:5); Doc. 45797767, pp. 123-124 (Sackel dep., Ex. 4*); *Doc. 45798121, p. 174 (Pla intiff's Responses to Defendants' Discovery Requests ("Plaintiff's Responses"), p. 7)*. In that position, he generally was responsible for overseeing the company's security functions throughout the Western United States. *Doc. 45798121, p. 174 (Plaintiff's Responses, p. 7)*. He reported to Nester, then Vice President/Controller for the West Division, from his hire date until December 2007, at which time Nester transferred to a regional office within the West Division. *Doc. 45798121, p. 169 (Nester aff., ¶ 2)*. Sackel then reported to Graffam, then Senior Vice President—Finance and Accounting for the West Division, from January 2008 until October 2008, at which time Graffam transferred to another region. *Doc. 45798121, p. 172 (Graffam aff., ¶ 2)*. In December 2008, Nester returned to the West Division office as Senior Vice President—Finance and Accounting, and again supervised Sackel until Sackel's termination in June 2009. *Doc. 45798121, p. 169 (Nester aff., ¶ 2)*.

In late December 2008, upon returning to the West Division, Nester began preparing Sackel's 2008 performance evaluation. *Doc. 45798121, p. 169 (Nester aff., ¶ 3)*. Among other things, he reviewed Sackel's 2007 performance evaluation, which he had prepared and delivered to Sackel in March 2008; Sackel's goals for 2008, and his performance against those goals; and Sackel's self-evaluation for 2008. *Doc. 45798121, p. 169 (Nester aff., ¶ 3)*. He spoke with Graffam, as well as Mark Farrell, who was the Chief Security Officer for Comcast, and a human resources leader in Comcast's Portland office with whom Sackel had significant dealings. *Doc. 45798121, p. 169 (Nester aff., ¶ 3)*. Based on his own observation and experience, and the input from others, including Sackel himself, Nester prepared a written 2008 Performance Recap. *Doc. 45798121, p. 169 (Nester aff., ¶ 4)*. He gave Sackel an overall rating of "Needs Improvement" and outlined a performance improvement plan for Sackel. *Doc. 45797767, p.125 (Sackel dep., Ex. 7); Doc. 45798121, p. 169 (Nester aff., ¶ 4)*. On or around March 10, 2009, Nester delivered the 2008 Performance Recap to Sackel. *Doc. 45798121, p. 169 (Nester aff., ¶ 4)*.

Around that same time, Nester also prepared a 90-day Performance Improvement Plan for Sackel. *Doc.45798121, p. 169 (Nester aff., ¶ 5)*. In it, Nester summarized Sackel's 2008 performance evaluation, explained Sackel's performance expectations, and warned Sackel that failure to address the issues

described could result in additional corrective action, up to and including termination. *Doc. 45797767, pp. 127-129 (Sackel dep., Ex. 8); Doc. 45798121, p. 169 (Nester aff., ¶ 5)*. Nester indicated that he would meet with Sackel on a regular basis to assess his understanding and progress. *Doc. 45797767, pp. 127-129 (Sackel dep., Ex. 8)* ; *Doc. 45798121, p. 169 (Nester aff., ¶ 5)*. On or about March 25, 2009, Nester delivered the Performance Improvement Plan to Sackel. *Doc. 45798121, p. 169 (Nester aff., ¶ 5)*. Thereafter, he and Sackel met on a regular basis to discuss Sackel's performance. *Doc. 45798121, p. 169 (Nester aff. ¶ 5)*.

In late May and early June 2009, Nester evaluated Sackel's progress under the Performance Improvement Plan. *Doc. 45798121, p. 169 (Nester aff., ¶ 6)*. He determined that Sackel had not shown significant improvement and decided to terminate Sackel's employment. *Doc. 45798121, p. 169 (Nester aff., ¶ 6)*. He informed Brad Dusto, then President of the West Division, and Phillips, then Vice President for Human Resources for the West Division, of his decision. *Doc. 45798121, p. 169 (Nester aff., ¶ 6)*; *Doc. 45798121, p. 178 (Phillips aff., ¶ 3)*. On or about June 15 or 16, 2009, Nester and Phillips met with Sackel and informed him that his employment was being terminated effective June 19, 2009. *Doc. 45798121, pp. 169-170 (Nester aff., ¶ 7)*; *Doc. 45798121, p. 178 (Phillips aff., ¶ 4)*. They provided him with a proposed Separation Agreement and

General Release, in which Comcast offered to pay him six months' severance in exchange for a general release, among other things. *Doc. 45798121, pp. 169-170 (Nester aff., ¶ 7)*; *Doc. 45798121, p. 178 (Phillips aff., ¶ 4)* . Sackel took the agreement and left the premises. *Doc. 45798121, pp. 169-1 70 (Nester aff., ¶ 7)*; *Doc. 45798121, p. 178 (Phillips aff., ¶ 4)*.

Subsequently, Sackel contacted John Douglas, a corporate human resources representative, and requested additional severance pay. *Doc. 4597706, pp. 121-122 (Sackel dep., pp. 262:15-263:12)* . Ultimately, the parties agreed on eleven months' severance, and Sackel executed a revised Separation Agreement and General Release ("Agreement") on July 2, 2009. *Doc. 4597706, pp. 121-122 (Sackel dep., pp. 262:15-263:12)* ; *Doc. 45798040, pp. 157-167 (Sackel dep., Ex. 20)*. The Agreement provided:

> You, on your own behalf and on behalf of your heirs, executors, administrators and assigns (collectively, "Employee Releasors"), hereby knowingly and voluntarily waive, release, and forever discharge Company, its parents, affiliates, subsidiaries, successors, assigns, employees, officers, agents, directors, benefit plans and benefit plan fiduciaries (collectively, "Comcast Releasees"), of and from any an all actions, causes of action, suits, claims, debts, demands and complaints whatsoever, in law or equity, that the Employee Releasors or any of them ever had, now have, or may have against the Comcast Releasees or any of them arising out of or relating to your employment with the Company, the termination of that employment or any other matter, including but not limited to any tort . . . and any claims for defamation, injury to reputation, [or] breach of contract . . . which you had, now have, or may have. The

> parties intend this release to be broadly construed in favor of Company. This Agreement does not, however, release any rights or claims which may arise after the date on which you sign this Agreement. . . .

Doc. 45798040, pp. 164-165 (Sackel dep., Ex. 20 (pp. 8-9)). Sackel received severance pay from June 19, 2009, through May 14, 2010, totaling more than $100,000, along with other consideration, in exchange for his release of claims. *Doc. 4597706, pp. 121-122 (Sackel dep., pp. 262:15-263:12)*; *Doc. 45798040, pp. 157-167 (Sackel dep., Ex. 20)*.

Several months after his termination, in December 2009, Sackel was joined as a defendant in a lawsuit filed by Steven Guenter, a former Comcast employee in California (the "*Guenter*" case). *Doc. 45797706, p. 109 (Sackel dep., p. 178:12-16); Doc. 45797930, pp. 130- 144 (Sackel dep., Ex. 12)* . Several Comcast entities and two other Comcast employees were named as defendants. *Doc. 45797930, pp. 130-144 (Sackel dep., Ex. 12)* . Sackel's involvement in the *Guenter* case stemmed from an internal investigation conducted in 2008. He and another security employee had investigated Guenter and others for alleged accounting improprieties. *Doc. 45797706, pp. 104-107 (Sackel dep., pp. 160:25-162:6, 163:10-11)*. Upon the conclusion of their investigation, Guenter's employment was terminated. *Doc. 45797706, p. 108 (Sackel dep., p. 173:8-9); Doc. 45797930, pp. 130-144 (Sackel dep., Ex. 12)* . Guenter filed suit, alleging age discrimination and wrongful termination against the Comcast entities and defamation against

Sackel and the other Comcast employees. *Doc. 45797930, pp. 130-144 (Sackel dep., Ex. 12)*. Comcast indemnified Sackel in the litigation. *Doc. 45797706, pp. 109-111 (Sackel dep., pp. 178:25-180:23; Doc. 45797930, pp. 145-146 (Sackel dep., Ex. 14)*. Sackel ultimately was dismissed from the case without incurring any expense or liability. *Doc. 45797706, pp. 111-112 (Sackel dep., pp. 180:12-23, 183:10-19)*.

In early December 2009, Phillips gave a deposition in the *Guenter* case. *Doc. 45798040, p. 156 (Sackel dep., Ex. 19 (cover page))*. He testified that he did not know who made the decision to terminate Guenter's employment, but that Sackel "was the first person that told me that the–he had been told that we were to terminate the three folks." *Doc. 45798190, pp. 182-183 (Phillips dep., pp. 24:11-25:3)*. In response to follow-up questions, Phillips testified:

> Q. So your initial information that these men had to be terminated was from Mike Sackel?
>
> A. Correct.
>
> ***
>
> Q. When you had that conversation with Mr. Sackel and he told you that these three men had to be terminated, what did Sackel say?
>
> A. That the findings of the investigation were that they–he had presented the findings of the investigation to Security and Internal Audit, and that we were being asked to terminate their employment.

Doc. 45798190, p. 183 (Phillips dep., pp. 25:9-25:12, 27:22-28:7).

Later that month or early the next month, Sackel learned about Phillips' testimony from his attorney, Nancy Sheehan. *Doc. 45797930, pp. 147-149 (Sackel dep., Ex. 15)*. In an email to her on January 22, 2010, he said, "After hearing of the testimony by Ron Phillips, I am disgusted, but not surprised. I have witnessed and been harmed professionally by his slander and self-serving inaccurate comments . . . . For Phillips to testify that I recommended Guenter, or anyone in this case to be terminated is outrageous and absurd. . . . Phillips has in the past, and in this circumstance, lied to protect himself." *Doc. 45797930, pp. 147-149 (Sackel dep., Ex. 15)* . In another email to Sheehan on March 1, 2010, he again stated, "I have never seen anything as blatant as the actions taken to cover themselves in this matter. How Ron Phillips could testify under oath that I recommended Guenter be terminated based on the findings of my investigation is beyond comprehension. . . . I have been slandered and my professional reputation ruined. Ron Phillips should be investigated for his role in this matter and his act of perjury." *Doc. 45798040, pp. 154-155 (Sackel dep., Ex. 17)*. Subsequently, in an April 2010 letter to Brian Roberts, Comcast's Chief Executive Officer, Sackel complained about Phillips' testimony and then stated, "Although I felt I was wrongfully terminated, I negotiated and agreed to a severance package . . . ." *Doc. 45798040, pp. 150-153 (Sackel dep., Ex. 16)*. This case followed.

SUMMARY OF THE ARGUMENT

In June 2009, Sackel's employment with Comcast was terminated for poor performance. Approximately two weeks later, Sackel executed a Separation Agreement and General Release, in which he agreed to waive and release all claims that he had against Comcast and its officers, directors, and employees, in exchange for more than $100,000 in severance pay and other consideration. Under Pennsylvania law, which is the governing law pursuant to the Agreement, the effect of a release is determined by the ordinary meaning of its language. *Buttermore v. Aliquippa Hospital* , 561 A.2d 733, 735 (Pa. 1989). A general release is enforceable if its language is clear and unambiguous. *Ford Motor Co. v. Buseman*, 954 A.2d 580, 583 (Pa. Super. Ct. 2008). In this case, the subject release clearly and unambiguously waived and released *all* claims that Sackel had or may have had against the Comcast Releasees, as defined therein, including the claims asserted in this case and *all* of the Defendants in this case.

In his Amended Opening Brief, Sackel argues that, at the time he executed the Agreement, he did not know of the alleged improper motivation behind his termination and, therefore, did not "knowingly" waive his claim for intentional interference with contract. Sackel did not raise that argument before the district court. Therefore, it should be disregarded. *Timm v. Reitz*, 39 P.3d 1252, 1255 (Colo. App. 2001); *Sterenbuch v. Goss*, 266 P.3d 428, 435 (Colo. App. 2011). In

any event, it is not clear whether Sackel is arguing that the release does not cover unknown claims, or that the release should be set aside on the basis of mutual mistake. Both arguments are specious. Under Pennsylvania law, a general release will be enforced absent fraud, accident, or mutual mistake. Sackel has not cited a single case supporting his new argument that the release should be limited to known claims. Moreover, Sackel has not come forward with evidence, or even asserted that there is evidence, of any fraud, accident, or mutual mistake.

Because Sackel agreed to an all-inclusive general release, he can only assert claims that arose after the date he executed the Agreement. Sackel's intentional interference with contract claim arose prior thereto. The Colorado Court of Appeals has held that an action for tortious interference with a contract accrues when the injury from the alleged interference occurred, *i.e.*, when the interference succeeded. *Sterenbuch*, 266 P.3d at 433. In this case, Sackel's intentional interference with contract claim accrued no later than June 19, 2009, when his employment was terminated by Nester. By his own account, at the time he was terminated, he believed that Nester had wanted to terminate him as early as March 2009, that the reasons for his termination were false and defamatory, and that he had been "wrongfully terminated."

Nester and Phillips also are entitled to summary judgment on the merits of Sackel's intentional interference with contract claim. To prove tortious

interference with a contract, a plaintiff must show that the defendant was aware of the existence of the contract, intended that one of the parties breach the contract, induced that party to breach the contract or made it impossible for that party to perform the contract, and acted improperly in causing the breach, and also that the plaintiff suffered damages as a result. *Hertz v. Luzenac Group* , 576 F.3d 1103, 1118 (10th Cir. 2009) (citing *Krystkowiak v. W.O. Brisben Cos* ., 90 P.3d 859, 871 (Colo. 2004)). An agent of a corporation generally cannot be held personally liable for inducing a corporation's breach of a contract if he was acting within the scope of his official duties or with the desire to serve the corporation's interests. *Trimble v. City of Denver*, 697 P.2d 716, 726 (Colo. 1985), *superseded by statute on other grounds*. In this case, Sackel cannot establish a triable issue of fact with respect to his claim. Nester and Phillips were acting within the scope of their official duties and with a desire to serve Comcast's interests. There is no evidence that either individual was motivated solely by desire to harm Sackel or used "wrongful means" to induce Comcast to breach the at-will employment agreement. Moreover, Sackel's belief that he was discharged as part of a scheme to make him a scapegoat in the *Guenter* case simply is not supported by the facts.

Finally, Sackel alleges that Comcast Cable Communications, LLC, and Comcast Cable Communications Holdings, Inc., are vicariously liable for Nester's and Phillips' alleged intentional interference with contract. An employer is

vicariously liable for the unauthorized torts of its employees if such torts are committed while the employee is acting within the scope of his employment. *Grease Monkey Int'l v. Montoya* , 904 P.2d 468, 473 (Colo. 1995). Here, the corporate defendants are not vicariously liable for the individual defendants' alleged tortious actions because, as explained above, Sackel cannot show that the individual defendants committed a tort against him.

ARGUMENT

I. Standard of review; preservation of issues on appeal.

Standard of Review. Defendants agree with Sackel's statement concerning the standard of review. This Court should review the district court's grant of summary judgment *de novo*. *Rocky Mountain Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067, 1074 (Colo. 2010). Summary judgment is appropriate when there is no genuine issue of material fact and the moving parties are entitled to judgment as a matter of law. *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 696 (Colo. 2009); C.R.C.P. 56(c). Where the moving parties do not have the burden of persuasion at trial, it is sufficient for them to show an absence of evidence in the record supporting the nonmoving party's claims. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). The burden then shifts to the nonmoving party to establish a triable issue of fact. *Id.* at 713. The nonmoving party cannot rest upon the allegations in the pleadings, but must provide specific facts

constituting a genuine issue for trial. *Burman v. Richmond Homes, Ltd*., 821 P.2d 913, 917 (Colo. App. 1991). The nonmoving party is entitled to have any reasonable inferences drawn from the facts, and to have any doubts resolved in his favor. *Copper Mountain*, 208 P.3d at 696. "If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact in his claim, a trial would be useless and the moving parties are entitled to summary judgment as a matter of law." *Continental Air Lines*, 731 P.2d at 713.

Preservation of issues on appeal. As described below, Defendants do not agree with the entirety of Sackel's statement concerning preservation of the issues on appeal. Defendants agree that Sackel preserved the issue of whether his intentional interference with contract claim arose prior to his execution of the subject release. However, he did not preserve the issue of whether he "knowingly" waived the claim. The district court granted Defendants' motion for summary judgment on the grounds that Sackel's claim for intentional interference with contract had been waived and released, and his claim for vicariously liability therefore also failed as a matter of law. In particular, the district court found that the subject release was clear, unambiguous, and all-inclusive, that Defendants were covered by the release, that Sackel's intentional interference with contract claim was covered by the release, and that such claim had accrued at the time Sackel executed the release. *Doc. 47137299, pp. 328-330* . The waiver issue was

addressed by Defendants in their brief in support of their motion for summary judgment. *Doc. 45797643, pp. 81-84* . In his response to Defendants' waiver argument, Sackel asserted only that his intentional interference with contract claim had not accrued at the time he executed the release and, therefore, was not covered by the release. *Doc. 46409511, p. 211* . Now, among other things, Sackel argues that he did not waive or release his intentional interference with contract claim because he did not know about the claim at the time he executed the release. *Amended Opening Br., pp. 11-16* . That argument was not advanced to the district court and, therefore, should not be considered on appeal. *Timm*, 39 P.3d at 1255; *Sterenbuch*, 266 P.3d at 435.

II. Nester and Phillips are entitled to summary judgment on Sackel's intentional interference with contract claim.

A. Sackel's intentional interference with contract claim has been waived.

As described above, on July 2, 2009, approximately two weeks after his last day of employment, Sackel executed a Separation Agreement and General Release, which included a general waiver and release of claims. By its terms, that Agreement is governed by Pennsylvania law, *Doc. 45798040, p. 166 (Sackel dep., Ex. 20 (p. 10))*, which is where Comcast's headquarters are located. *Doc. 45798121, p. 170 (Nester aff., ¶ 8)*. The Court should apply the parties' choice of

law, as there is a reasonable basis to do so. *Hansen v. GAB Business Services, Inc.*, 876 P.2d 112, 113 (Colo. App. 1994).

Under Pennsylvania law, the effect of a release is determined by the ordinary meaning of its language. *Buttermore*, 561 A.2d at 735. A general release is enforceable if its language is clear and unambiguous. *Ford Motor Co.*, 954 A.2d at 583. "When construing the effect and scope of a release, the court, as it does with all other contracts, must try to give effect to the intentions of the parties. . . . The parties' intent at the time of signing as embodied in the ordinary meaning of the words of the document is [the court's] primary concern." *Id*. (quotations and citing references omitted).

In this case, the release in the Agreement is clear and unambiguous. Again, it provides:

> You, on your own behalf and on behalf of your heirs, executors, administrators and assigns (collectively, "Employee Releasors"), hereby knowingly and voluntarily waive, release, and forever discharge Company, its parents, affiliates, subsidiaries, successors, assigns, employees, officers, agents, directors, benefit plans and benefit plan fiduciaries (collectively, "Comcast Releasees"), of and from any an all actions, causes of action, suits, claims, debts, demands and complaints whatsoever, in law or equity, that the Employee Releasors or any of them ever had, now have, or may have against the Comcast Releasees or any of them arising out of or relating to your employment with the Company, the termination of that employment or any other matter, including but not limited to any tort . . . and any claims for defamation, injury to reputation, [or] breach of contract . . . which you had, now have, or may have. The

> parties intend this release to be broadly construed in favor of Company. This Agreement does not, however, release any rights or claims which may arise after the date on which you sign this Agreement. . . .

By its terms, the release covers *all* claims that Sackel had or may have had against the Comcast Releasees, including specifically claims relating to Sackel's employment and the termination thereof, and *all* of the Defendants in this case.[1] In interpreting a similar release, the Pennsylvania Supreme Court found that "it would be difficult to conceive of language more clear, pertinent, and all-inclusive." *Republican Ins. Co. v. Paul Davis Systems of Pittsburgh South*, 670 A.2d 614, 615 (Pa. 1995).

In his Amended Opening Brief, Sackel argues for the first time that, at the time he executed the Agreement, he did not know of the alleged improper motivation behind his termination and, therefore, did not "knowingly" waive his

[1] The Agreement was entered into by Comcast Cable Communications, LLC and Comcast Cable Communications Holdings, Inc., together with their parents, subsidiaries and affiliates, which were collectively referred to in the Agreement as the "Company." The Comcast Releasees include the Company and all of their employees, officers, agents, and directors, among others. Under Pennsylvania law, when the terms of a release discharge all claims and parties, the release is applicable to all tortfeasors despite the fact that they were not specifically named or did not contribute consideration towards the release. *Buttermore*, 561 A.2d at 735.

claim for intentional interference with contract.[2] It is not clear whether Sackel is arguing that the release does not cover unknown claims, or that the release should be set aside on the basis of mutual mistake. Both arguments are specious. Under Pennsylvania law, a general release will be enforced absent fraud, accident, or mutual mistake. *Buttermore*, 561 A.2d at 735. The release in this case is clear and unambiguous, and covers all claims that Sackel had or may have had against the Comcast Releasees at the time he executed the release. Sackel has not cited a single case supporting his new argument that the release should be limited to known claims. Moreover, Sackel has not come forward with evidence, or even asserted that there is evidence, of any fraud, accident, or mutual mistake. Rather, he simply claims that he did not know the alleged "improper" motive for his termination at the time he executed the release. The Pennsylvania Supreme Court has rejected similar efforts to cirvumvent a general release, stating:

> If such a release can be nullified or circumvented, then every written release and every written contract or agreement of any kind no matter how clear and pertinent and all-inclusive, can be set aside whenever one of the parties has a change of mind or whenever there subsequently occurs a change of circumstances which were unforeseen, or there were after-discovered injuries, or the magnitude of a releasor's injuries was unexpectedly increased, or plaintiff made an inadequate settlement. It

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[2] To support his argument, Mr. Sackel cites three Colorado cases. The parties' Agreement, of course, requires the Court to interpret the Agreement under Pennsylvania law.

> would make a mockery of the English language and of the law to permit this release to be circumvented or held to be nugatory.

Id. at 735 (quoting *Emery v. Mackiewicz*, 240 A.2d 68 (Pa. 1968)). In any event, as described below, Sackel clearly knew or should have known that he had suffered any injury and the cause of that injury at the time he executed the release.

Because Sackel agreed to an all-inclusive general release, he can only assert claims that arose after the date he executed the Agreement. Sackel's intentional interference with contract claim arose prior thereto. The Colorado Court of Appeals has held that an action for tortious interference with a contract accrues when the injury from the alleged interference occurred, *i.e.*, when the interference succeeded.[3] *Sterenbuch*, 266 P.3d at 433; *see also Hroch v. Farmland Indus., Inc.*, 548 N.W.2d 367, 370 (Neb. Ct. App. 1996); *Scott v. City of New Orleans*, 888 So. 2d 318, 320 (La. Ct. App. 2004) (cause of action for tortious interference with contract accrued from the date that the contract was terminated); *Morrow v. Reminger & Reminger Co*., 915 N.E.2d 696, 712 (Ohio Ct. App. 2009)

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[3] Colorado law, not Pennsylvania law, should determine when Sackel's intentional interference with contract claim accrued. The parties agree that Pennsylvania law should govern the interpretation of the Agreement, and that Colorado law should apply to the merits of Sackel's tort claims. Claim accrual is a matter of substantive law, not contract interpretation. *See, e.g.*, *Waller v. Pittsburgh Corning Corp.*, 946 F.2d 1514, 1515 (10th Cir. 1991). Because Colorado substantive law applies to Sackel's tort claims, the Colorado rule for tort claim accrual applies.

(a claim of tortious interference with contract arises when one party to a contract is induced to breach the contract).

In this case, Sackel's intentional interference with contract claim accrued no later than June 19, 2009, when his employment was terminated by Nester.[4] At that point, he knew that he had suffered an injury (the termination of his employment) and the cause of the injury (Nester's decision and action to terminate his employment). By his own account, at the time he was terminated, he believed that Nester had wanted to terminate him as early as March 2009, that the reasons for his termination were false and defamatory, and that he had been "wrongfully terminated." *Doc. 45797706, p. 116 (Sackel dep., p. 208:20-208:25); Doc. 45798040, pp. 150-153 (Sackel dep., Ex. 16), Doc. 46784764, pp. 269-270 (Sackel dep., pp. 210:9-211 :11); Doc. 46409574, pp. 21 5-216 (Sackel aff., ¶ 2)* . Sackel's alleged claim existed at the time he signed the waiver and thus has been waived.

The same result occurs under Pennsylvania law. Contrary to Sackel's argument, Pennsylvania does not apply the "discovery rule," as Sackel describes it, to determine when a claim accrues. Under Pennsylvania law, a tort cause of action

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[4] Nester testified that he alone made the decision to terminate Sackel's employment, and that he did not need or seek Phillips' approval or ratification of the decision. *Doc. 46784730, p. 261 (Nester dep., p. 10:9-10:17)*. Those facts are undisputed.

generally accrues on the date the injury is sustained. *Pounds v. Lehman*, 558 A.2d 872, 873 (Pa. Super. Ct. 1989). "The so-called 'discovery rule' is considered an equitable exception to the general rule that the limitations period begins to run when the 'injury' occurred and 'applies' when there is an '*inability* of the injured, *despite the exercise of due diligence*, to know of the injury or its cause . . . .' " *Id*. (quoting *Larthey by Larthey v. Bland* , 532 A.2d 456, 458 (Pa. Super. Ct. 1987)). In that case, "the equitable discovery rule provides that the statute of limitations does not begin to run until the injured party is aware or reasonably should be aware of *his injury or its c ause*." *Sadtler v. Jackson-Cross Co.* , 587 A.2d 727, 731 (Pa. Super. Ct. 1991) (quoting references omitted) (emphasis added).[5] In other words, the rule in Pennsylvania is substantially the same as the rule in Colorado. Consequently, the result in this case would be the same under either rule.

In his Amended Opening Brief, Sackel argues his claim did not accrue until he discovered Nester's and Phillips' alleged "improper motive" in early 2010 (after hearing about or reading Phillips' deposition from the *Guenter* case). Sackel has taken liberties with the elements of his claim to reach a particular result. To prove tortious interference with a contract, a plaintiff must show that the defendant

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[5] The cases cited by Mr. Sackel, *Youngren v. Presque Isle Orthopedic Group* , 876 F. Supp. 76 (W.D. Pa. 1995) and *Vaughn v. Didizian*, 648 A.2d 38 (Pa. Super. Ct. 1994), involve claims in which an injury occurred after the date of a release. Consequently, they are inapposite.

was aware of the existence of the contract, intended that one of the parties breach the contract, induced that party to breach the contract or made it impossible for that party to perform the contract, and acted improperly in causing the breach, and also that the plaintiff suffered damages as a result. *Hertz*, 576 F.3d at 1118 (citing *Krystkowiak*, 90 P.3d at 871). The plaintiff does not have to prove that the defendant possessed an "improper motive," only that his alleged interference was "improper." The Colorado Supreme Court has held that the defendant's motive may be a *factor* in determining whether that person's conduct was "improper," *Trimble*, 697 P.2d at 727, but it is not a necessary element. Consequently, discovery of an "improper motive" is not necessary for a claim to accrue.

In this case, Sackel clearly believed or had reason to believe that his termination by Nester was "improper" at the time he executed the release. As mentioned above, he testified that he believed Nester had wanted to terminate him as early as March 2009, and that the reasons for his termination were false and defamatory. Moreover, less than a year after his termination, Sackel told Comcast's CEO that, at the time he executed the release, he believed that he had been "wrongfully terminated." In other words, at the time he executed the release, Sackel believed or had reason to believe that Nester had made the decision to terminate his employment three or more months prior to actually taking action, that the reasons for his termination were false and defamatory, and that he was being

"wrongfully terminated." Those alleged facts were sufficient to put him on notice that a claim may exist.

The cases cited by Sackel do not compel a different result. *Financial Planning Associates Ltd. v. G.E. Johnson Construction Co, Inc.*, 723 P.2d 135 (Colo. 1986), and *City of Aurora v. Becht el Corp.*, 599 F.2d 382 (10th Cir. 1979), were construction defect cases, which have rules allowing for "delayed accrual." *Aurora*, 599 F.2d at 389. Likewise, *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984), was a medical malpractice case, which also has special rules and considerations relating to claim accrual. Sackel has offered no explanation as to how or why the decisions in those cases should apply in this case. Finally, *Winkler v. Rocky Mountain Conference of Unit ed Methodist Church*, 923 P.2d 152 (Colo. App. 1995), involved a claim for negligent supervision against a church. In that case, the plaintiff alleged that a pastor had sexually harassed her. She claimed that the church was aware of similar past conduct by the pastor and failed to take appropriate action. Among other things, the church argued that the plaintiff's claim was barred by the applicable statute of limitations. The court disagreed, holding that the plaintiff's claim did not accrue until she became aware of the church's alleged inaction. *Id.* at 158-59. That holding is inapposite to this case. Unlike the plaintiff in *Winkler*, Sackel clearly knew of Nester's and Phillips'

conduct at the time of his discharge, and by his own admission, believed their conduct was wrongful.

B. Nester and Phillips are entitled to summary judgment on additional grounds.

In deciding whether summary judgment in favor of Defendants was appropriate, the Court is not limited to reviewing the waiver issue discussed above. "[I]f the record supports other bases in which the district court properly could have granted summary judgment, [the Court] may still affirm that judgment." *Barnett v. Elite Properties of America, Inc.*, 252 P.3d 14, 23 (Colo. App. 2010). In this case, such other grounds exist.

As mentioned above, to prove tortious interference with a contract, a plaintiff must show that the defendant was aware of the existence of the contract, intended that one of the parties breach the contract, induced that party to breach the contract or made it impossible for that party to perform the contract, and acted improperly in causing the breach, and also that the plaintiff suffered damages as a result. *Hertz*, 576 F.3d at 1118 (citing *Krystkowiak*, 90 P.3d at 871).[6] An agent of a corporation generally cannot be held personally liable for inducing a corporation's breach of a contract if he was acting within the scope of his official

[6] The parties agree that Colorado law should apply to the merits of Sackel's tort claims. *See supra* page 19, n. 3.

duties or with the desire to serve corporation's interests. *Trimble*, 697 P.2d at 726. In this case, Sackel cannot establish a triable issue of fact with respect to his claim.

Sackel claims that Nester and Phillips tortiously interfered with his at-will employment contract with Comcast.[7] However, Nester and Phillips clearly were acting within the scope of their official duties and with a desire to serve Comcast's interests. In fact, Sackel's complaint alleges they were acting within the scope of their employment. *Doc. 37248073, p. 4 (Complaint ¶ 17)*. Nester was Sackel's direct supervisor from April 2007 to December 2007, and from January 2009 until Sackel's termination. As Sackel's supervisor, Nester was responsible for directing Sackel's work and evaluating his performance. *Doc. 45798121, p. 169 (Nester aff.*, *¶ 2)*. Phillips was the Vice President of Human Resources for the Western Division during the relevant time. In that position, he was responsible for providing human resources support to various business leaders, including Nester, which he did in connection with Nester's evaluation and termination of Sackel. *Doc. 45798121, p. 178 (Phillips aff.*, *¶¶ 2-3)*. In other words, the conduct about which Sackel complains was within the scope of the individual defendants' official duties on behalf of Comcast.

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[7] Again, Nester alone made the decision to terminate Sackel's employment. There is no evidence that Phillips jointly made or otherwise recommended the decision. On that basis alone, the tortious interference claim against Phillips should be dismissed.

Because Phillips and Nester were acting within the scope of their employment, Sackel must show that they were "motivated solely by a desire to harm one of the contracting parties or to interfere in the contractual relations between those parties . . . ." *Trimble*, 697 P.2d at 726. Moreover, since Sackel was an at-will employee, he also must show that Nester and Phillips used "wrongful means, such as physical violence, fraud, civil suit, or criminal prosecution" to induce Comcast to breach the contract. *Electrolux Corp. v. Lawson*, 654 P.2d 340, 341-42 (Colo. App. 1982) (*citing* RESTATEMENT (SECOND) OF TORTS § 768 (1965)); *see also Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 496 (Colo. 1989) (noting that contracts terminable at-will are generally entitled to less protection than contracts not terminable at-will because interference with an at-will contract is interference with a future expectancy, not a legal right). There is no evidence that either individual was motivated solely by a desire to harm Sackel or used "wrongful means" to induce Comcast to breach the at-will employment contract. The conduct on which Sackel bases his claim is insufficient to establish a claim.

The decision *Donohue v. Unipac Service Corp.* , 847 F. Supp. 1530 (D. Colo. 1994), supports that conclusion. There, the court found no tortious interference as a matter of law where the plaintiff alleged that several officers and managers improperly lowered his performance evaluation, retaliated against him

for reporting that certain departments had not followed company procedures, and questioned another employee about whether the plaintiff had taken kickbacks or bribes from vendors. *Id.* at 1534-35. One of the managers stated openly that she disliked the plaintiff because he was difficult to work with and did not respond to requests for services in an efficient or cost-effective manner. *Id.* at 1534-35. Because the actions on the part of plaintiff's managers fell within the scope of their employment and were not motivated solely by personal reasons, the court granted summary judgment for the defendant. *Id.* Likewise, in this case, the individual defendants' actions do not constitute tortious interference as a matter of law.

Sackel speculates that Nester and Phillips terminated his employment as part of a scheme to make him a scapegoat to reduce Comcast's liability in the *Guenter* litigation. *Amended Opening Br., pp. 5-6* . To support this theory, he points to statements made or allegedly made by Phillips. First, he contends that Phillips' deposition testimony in the *Guenter* case, *see supra* page 8, reflects this alleged scheme. Second, he claims that, at the time of his termination, Phillips stated that one of Comcast's attorneys in the *Guenter* litigation had said that Sackel's investigation of Guenter was "the worst he's ever seen." No reasonable jury could conclude, based on those statements, that Sackel was terminated as part of a scheme to make him a "scapegoat" in the *Guenter* litigation. Notably, none of the statements was made by Nester, or reflects on Nester's reasoning for the

decision he made. Moreover, none of the statements states or implies that Sackel was discharged to be made a scapegoat in the *Guenter* case. In fact, Sackel's theory is just plain wrong.

The *Guenter* case was resolved before any substantive motions were filed or any evidentiary hearings were held. *Doc. 46784730, p. 262 (Guenter docket sheet)*. The parties conducted some discovery and then participated in mediation. *Doc. 46784730, p. 262 (Guenter docket sheet)*. There is not a single filing that even suggests that Comcast was trying to place blame on Sackel. Nor would it have made any sense for the company to have done so since it was indemnifying him. In its only substantive submission in the case–a confidential mediation brief–Comcast did not attempt to make Sackel a scapegoat. To the contrary, it supported him and his investigation. *Doc. 46784801, pp. 273-290 (Spring aff., Ex. 1)*. Sackel's belief that he was discharged as part of a scheme to make him a scapegoat in the *Guenter* case simply is not supported by the facts.

III. Comcast is entitled to summary judgment on Sackel's vicarious liability claim.

Sackel alleges that Comcast Cable Communications, LLC, and Comcast Cable Communications Holdings, Inc., are vicariously liable for Nester's and Phillips' alleged intentional interference with contract. An employer is vicariously liable for the unauthorized torts of its employees if such torts are committed while the employee is acting within the scope of his employment. *Grease Monkey Int'l*,

904 P.2d at 473. Here, the corporate defendants are not vicariously liable for the individual defendants' alleged tortious actions because, as explained above, Sackel cannot show that the individual defendants committed a tort against him. The corporate defendants are entitled to summary judgment on Sackel's vicarious liability claim.

CONCLUSION

For the reasons stated above, Defendants/Appellees Ronald Phillips, Timothy Nester, Comcast Cable Communications, LLC, and Comcast Cable Communications Holdings, Inc. request the Court affirm the district court's judgment in their favor on all claims.

DATED: September 25, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of September, 2012, a true and correct copy of the foregoing **APPELLEES' ANSWER BRIEF** was electronically filed and served via Lexis/Nexis File and Serve to:

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