№ S258498

In the

Supreme Court

of the

State of California

JANE DOE, *et al.*,
Plaintiff, Cross-Defendant, Respondent, and Petitioner,

vs.

CURTIS OLSON,
Defendant, Cross-Complainant, and Appellant.

AFTER THE UNPUBLISHED OPINION AFFIRMING
AND REVERSING ANTI-SLAPP ORDERS BY THE
SECOND DISTRICT COURT OF APPEAL, DIVISION EIGHT
№ B286105
HON. MARIA E. STRATTON, ASSOCIATE JUSTICE;
HON. TRICIA A. BIGELOW, PRESIDING JUSTICE; AND
HON. ELIZABETH A. GRIMES, ASSOCIATE JUSTICE

LOS ANGELES COUNTY SUPERIOR COURT
№ SC126806
HON. CRAIG D. KARLAN, JUDGE

ANSWERING BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Defendant, Cross-Complainant, and Appellant CURTIS OLSON identifies himself and Plaintiff, Cross-Defendant, Respondent, and Petitioner JANE DOE as the interested parties to this review.

Respectfully submitted,

August 24, 2020 By: /s/ *Robert Collings Little*

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ISSUES

1. Does the litigation privilege of Civil Code section 47, subdivision (b), apply to contract claims, and if so, under what circumstances?

2. Does an agreement following mediation between the parties in an action for a temporary restraining order, in which they agree not to disparage each other, bar a later unlimited civil lawsuit arising from the same alleged sexual violence?

INTRODUCTION

From an atypical fact pattern in an unpublished opinion, the Court is considering whether to extend the litigation privilege to breach of contract claims. If it does, Curtis Olson cannot have any chance to hold Jane Doe accountable for breach of their non-disparagement agreement. If it does not, "victims like Doe," the argument goes, cannot have "unfettered access to the courts to fully address their claims." (OBM 68.) But Doe's "either-or"–approach to the issues is neither fair nor workable.

The tension here lies in preserving the purposes of the litigation privilege — speaking freely to the courts — while equally fostering the salutary policies underlying the fundamental freedom to contract — bargaining for finality and peace from litigation. For Olson, the disparagement is Doe's accusations. After mediating her accusations to a written settlement agreement, Olson wants the opportunity to prove he bargained for peace.

For Doe, that same disparagement is absolutely privileged. She wants to be free to make her accusations any time in any forum, as long as when she dittos them after her agreement with Olson, she does so on pleading paper. Can Olson at least try to enforce Doe's contractual promise not to disparage him — specifically not to accuse him of sexual misconduct after resolving the earlier civil harassment restraining order proceeding?

Doe answers no, suggesting Olson is forever barred from pressing his claim. Olson cannot have even a chance to plead and

prove by his breach of contract claim that he and Doe had a meeting of the minds at mediation, that he reasonably anticipated not seeing the same misconduct allegations appear yet again with zero deference to their non-disparagement agreement.

From caption to conclusion, Doe has cloaked herself with pseudonymity. Doe could have just easily designated Olson as John Doe and herself as Jane Roe to avoid disparaging him, and still pressed on with her allegations while facing the penalty of contractual damages. There is nothing technically burdensome with that.

But if Olson were "innocent until investigated," then he would be forever guilty of being accused. And if given the opportunity to prove Doe a liar now calumniating him with accusations of misconduct that never happened, then Doe's transgressions would still remain disconnected from her identity. Likewise, Olson would never have a right to seek damages for Doe's alleged breach of their agreement.

At bottom, Doe argues the issues here so the courthouse doors swing only one way: they are open to Olson as a defendant answering for torts, but closed to him as a cross-complainant asserting breach of contract. That is not fair, which is exactly why the Court of Appeal's opinion makes sense.

Not to say the Court of Appeal ruled Olson's way. It largely did not, affirming the trial court's order granting Doe's special motion to strike Olson's causes of action for breach of contract as to

her administrative complaints after they signed the non-disparagement agreement. And Doe admits in her brief she can repeat "the same disparaging allegations in her HUD/DFEH complaints." (OBM 23.) The Court of Appeal also affirmed the order granting her motion specially striking his action for specific performance of the non-disparagement agreement in every forum, administrative and civil. (Opn. 25.)

But where the Court of Appeal drew the line was on Doe specially striking Olson's breach of contract claim *at the pleading stage* for statements made in her unlimited civil complaint. (Opn. 25.) According to Doe's approach, Olson should be afforded no chance to prove her accusations violated their contractual agreement to non-disparagement. But as the trial court failed to analyze the probability Olson might succeed on the merits, the Court of Appeal made no merits ruling for Olson. It merely found the trial court's refusal to give Olson *any* opportunity to plead and prove a breach of contract claim was error. (Opn. 25.)

While the Court of Appeal's opinion is right, the contract at issue is a one-off, according to Doe's counsel, because a regular form agreement was unavailable. (OBM 17 [the mediator "had apparently run out of the standard form" agreement].) This case thus may not be a good vehicle for testing the litigation privilege against breach of contract claims generally.

Yet if this case were the right vehicle, Olson should be permitted to plead and advance his cross-claim for breach of contract in response to Doe's tort allegations. The Court of Appeal's decision

does not "bar a later unlimited civil lawsuit arising from the same alleged sexual violence" as the second issue as framed presumes. (Contra, Opn. 25 [fully affirming anti-SLAPP ruling as to specific performance].) Olson may not win, but he still should have the chance to plead and press his counterclaim rather than for it to be killed at inception.

The Court should afford no blanket litigation privilege to breach of contract claims. And as to this agreement involving non-disparagement concluding civil harassment proceedings, Olson should be afforded, at the very least, an opportunity to get beyond the pleadings stage to try to enforce the agreement and seek damages for what Olson's accusations have done to him. A party in his position is at least entitled to that.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Doe and Olson worked together to buy and preserve a historic apartment building in Los Angeles called Chateau Colline. (1AA 181 [¶3].) Olson bought the building, and converted it into eight condominiums. (*Ibid.*) He lived part-time in one of them, and served as president of its homeowners' association from 2013 to 2016. (1AA 182 [¶5], 187–189.) For her "sweat equity" in "saving" the building and getting it registered on the National Register of Historic Places, Doe lived in one condominium. (1AA 182 [¶5], 187–189; Opn. 3.)

In October 2015, Doe applied for a civil harassment restraining order against Olson, describing alleged sexual harassment and

assault, not just by Olson but by others she said were his friends or hired by him to harass her. (1AA 182 [¶6], 128–138.) He threatened to kill her, and she reported him to the police. (*Ibid.*) She sought and received a temporary restraining order with a no contact–provision pending an order to show cause on her request for a civil harassment restraining order. (1AA 182 [¶ 6], 128–138.)

Olson strenuously objected to Doe's "numerous outrageous and ridiculous allegations" about him. (1AA 182 [¶6], 195–200.) In a sworn declaration, he testified he was not in Los Angeles the day she said he sexually assaulted her, but in Orange County with his children. (*Ibid.*) He pointed out the homeowners' association's "history of problems with [Doe]." (1AA 181 [¶4].) Her "retaliatory" application for a civil harassment restraining order was a "calculated attempt" for leverage and retribution against him for a cease and desist–notice issued to Doe for her violations of the building's covenants, conditions, and restrictions. (1AA 182 [¶5], 187–189.)

At the hearing on the civil harassment restraining order, the trial court referred Doe and Olson to court-supervised mediation. (1AA 182 [¶8].) There they negotiated a settlement. Under their written settlement agreement, Olson denied "each and every allegation made by [Doe] in the dispute," and Doe dismissed her case against Olson without prejudice. (1AA 234 [¶¶5–6].)

"Voluntarily by mutual agreement," they agreed their contract to be admissible "in any subsequent proceeding" to prove its existence and to enforce it. (1AA 234 [¶¶5–6].) They agreed for a period of three years "not to contact or communicate with one another or guests accompanying them, except in writing and/or as required by law," and to go "their respective directions away from one another" if they "encountered each other in a public place or in common areas near their residences." At the heart of this review, they agreed "not to disparage one another." (*Ibid.*)

Less than a year later, in August 2016, Doe filed an administrative complaint against Olson with the federal Department of Housing and Urban Development (HUD), alleging sex and gender discrimination based on "unwanted sexual comments and touching," "stalk[ing]," and taking her picture. (1AA 183 [¶10], 163–168.) She alleged Olson abused his position as association president by having a maintenance person "install cameras" to photograph her in her bedroom and bathroom. (*Ibid.*)

HUD referred her administrative complaint to the state Department of Fair Employment and Housing (DFEH). (1AA 183 [¶11].) The DFEH acknowledged the HUD complaint and confirmed it would investigate Doe's allegations. (1AA 183 [¶11]; 170–173.) In September 2016, DFEH conveyed it would investigate her allegations and grievances. (*Ibid.*)

Less than three months later, however, Doe filed a long, unlimited civil complaint for damages, alleging more than a dozen

wide-ranging claims for sexual battery; assault; tortious interference with economic or prospective economic advantage; interference with quiet use and enjoyment of real property; intentional infliction of emotional distress, negligent infliction of emotional distress, or both; defamation, false light, or both; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; discrimination based on ethnicity; discrimination based on marital status; discrimination based on perceived religion; invasion of privacy, stalking, or both; distribution of obscene materials without consent; quiet title of prescriptive easement; and declaratory relief. (1AA 004, 183 [¶12].)

Among the defendants, she named Olson, the building's association, and its board members whom, she said, were Olson's friends and "agents" helping him punish her for rejecting his "romantic advances" beginning more than a decade earlier, "by stalking, defaming, discriminating, harassing, and a host of other outrageous actions." (1AA 004, 183 [¶12].) She alleged, "Olson and his [association] friends hatched an unending series of schemes to discriminate and harass" her. They called her "a prostitute," "a liar," and a "crazy psycho-bi*ch," she said. (1AA 004–059, 014 [¶ 31].)

Five months later, Olson cross-complained, asserting causes of action for breach of contract and specific performance against Doe. (1AA 043–053.) "Doe similarly accuse[d] Olson of unlawful conduct, including sexual battery, assault, infliction of emotional distress, misogyny, anti-Semitism, invasion of privacy, and stalking," he alleged. "Doe's claims against Olson" were "based on the

same allegations she made in connection with her application for a restraining order and in filing her HUD Complaint and her [DFEH] Complaint." (1AA 181–184 [¶¶ 4, 6, 15].)

By dittoing the allegations Doe had made, Olson had denied, and Doe dismissed in her civil harassment proceeding, Olson contended she had violated the agreement's non-disparagement clause. (1AA 043–053.) Her untrue accusations put Olson's entire business at risk, so he cross-claimed against her for damages. (1AA 184 [¶17])

According to Olson, in the administrative complaints and in her civil complaint, Doe "disparaged [him] by resurrecting and leveling the same false allegations that she previously made in connection with her application for a restraining order — i.e., the same application she dismissed as part of the Mediation Agreement." (1AA 184 [¶¶16–17].)

In response, Doe moved to specially strike Olson's cross-complaint as a strategic lawsuit against public participation under the anti-SLAPP statute. (1AA 062–072; Code Civ. Proc., § 425.16, subds. (b)(1), (e)(1), and (e)(4).) She argued his cross-complaint was "retaliatory litigation" meant to "chill" and "discourage Doe's rights of freedom of speech and right to petition the courts and the executive branch for redress of grievances." (*Ibid.*) Doe contended Olson could not present admissible evidence establishing a probability of prevailing on his claims for breach of contract and specific performance. (1AA 068–072.)

In opposition, Olson argued that because Doe signed a valid agreement "not to disparage the other to any other party," but then repeated the same disparaging accusations from before, she had breached their mediation agreement. (1AA 313.)

The trial court granted Doe's special motion to strike his cross-complaint in every respect. (1AA 316.) As to the first prong, the trial court ruled Doe met her burden to establish that her "three filings [i.e., the HUD/DFEH complaints and the civil complaint] are protected activity." (*Ibid.*) As to the second prong, the trial court found the litigation privilege in Civil Code section 47, subdivision (b) barred, as a matter of law, Olson's two causes of action, so the trial court needed not analyze whether Olson had showed a probability of prevailing. (*Ibid.*)

Olson appealed, and the Court of Appeal affirmed the trial court in all respects except one. (Opn. 15.) It reversed the trial court's determination that, as a matter of law, Olson could not plead his breach of contract counterclaim for repeating her allegations in the civil complaint. (Opn. 15.)

Doe petitioned for review, and she wants this Court to hold that the litigation privilege extends to breach of contract claims like Olson's involving their mediation agreement concluding her civil harassment restraining order proceeding.

ARGUMENT AND LEGAL ANALYSIS

1. As a general rule, the litigation privilege in Civil Code section 47, subdivision (b), does not apply to contract claims

This Court has not extended the litigation privilege of Civil Code section 47, subdivision (b), to breach of contract claims. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 773 (*Navellier II*).) Because of the fundamental difference between contract claims and tort claims, and considering the policies underlying both the litigation privilege and the freedom to contract, the Court should not now extend the privilege to contract claims as Doe suggests. (OBM 28.)

The Legislature originally conceived California's statutory litigation privilege to limit liability for defamation. (*Oren Royal Oaks Venture v. Greenberg, Bernhard et al.* (1986) 42 Cal.3d 1157, 1163 (*Oren*); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 213 (*Silberg*); see OBM 27.)

As Doe correctly observes, the Court has expanded the privilege to torts besides defamation because the privilege "should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b)." (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1203.)

Despite this expansion, the litigation privilege "is not without limit." (*Action Apartment Assn., Inc. v. City of Santa Monica*

(2007) 41 Cal.4th 1232, 1242.) The Court has long held, for example, that the privilege cannot bar a claim for malicious prosecution. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 382.) Consistent with the policy underlying the privilege and its scope, the Court should not apply the privilege to breach of contract claims.

First, contract claims do not implicate the policy of providing free access to the courts without fear of harassment from derivative tort liability. *Second*, the policy of encouraging freedom to contract — for parties to freely make and enforce "private law" — generally outweighs the policies underlying the litigation privilege.

1.1. Contract claims do not implicate the primary policy underlying the litigation privilege

Tort law and contract law arise from well-established but distinct purposes. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 (*Erlich*) ["the distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas"].)

Tort law advances the social policy of preventing various types of harm to society's members, imposing equal duties upon each member with no binding agreement but based on general behavioral expectations. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 (*Applied Equipment*) ["Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy"]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176; Civ. Code,

§ 1708 ["Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights"].)

Contract law, in turn, regulates only the parties to the contract, and enforces only their agreed-upon intentions. (*Erlich*, 21 Cal.4th at pp. 550–551; *Applied Equipment*, 7 Cal.4th at p. 514 ["Contract law exists to enforce legally binding agreements between parties"].)

"Because a contract is private law created by the parties, it does not involve the community concerns and obligations central to tort. The parties' agreement forms the fundamental law of the case, and it is the basis for determining liability for damages caused by breach. When two private parties make a contract, they create mutual risks which are based on that contract and not on more general expectations of behavior." (Hunter, Modern Law of Contracts (2020 ed.) § 14:9.)

In freely entering into a contractual relationship, a party may voluntarily relinquish even fundamental rights, including constitutional rights to free speech or to a jury trial. (*Sanchez v. City of San Bernardino* (2009) 176 Cal.App.4th 516, 528, citing *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 319 (*ITT Telecom*) [waiving First Amendment rights by contract]; *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852-854 [waiving the constitutional right to a jury trial by contract].[1])

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[1] *Crossroads Investors, L.P. v. Fed. Nat. Mortgage Assn.* (2017) 13 Cal.App.5th 757, 787 (*Crossroads*), citing *Navellier II*,

Consistent with this principle, the reviewing courts have upheld the validity of an appeal waiver in a plea bargain because it is also an enforceable contract between a prosecutor and defendant. (See, e.g., *United States v. DeSantiago-Martinez* (9th Cir. 1992) 980 F.2d 582, 583, as amended (1994) 38 F.3d 394, cert. den. (1995) 513 U.S. 1128; *United States v. Attar* (4th Cir. 1994) 38 F.3d 727, 731, cert den. (1995) 514 U.S. 1107.)

If a party voluntarily contracts not to sue or otherwise speak to or in a court, a claim for breach of that agreement does not *improperly* limit the party's access to the courts. (*Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1494 ["one who validly contracts not to speak waives … the protection of the litigation privilege"]; *ITT Telecom*, 214 Cal.App.3d at p. 320 [defendant accepted duty not to disclose plaintiff's trade secrets by entering nondisclosure agreement, so litigation privilege did not bar breach of contract claim]; *DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 354 [statute designed to protect protected speech or petitioning rights should not be a shield from liability when defendant voluntarily relinquishes the rights as part of consideration in entering a prior contract].)

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106 Cal.App.4th at pp. 773–774 (recognizing a preexisting legal relationship like a contract may limit a party's right to petition); accord, *Charter Communications, Inc. v. City. of Santa Cruz* (9th Cir. 2002) 304 F.3d 927, 935 (waiver of First Amendment rights through voluntarily entered contract).

Even if the risk of a contract claim has a potential chilling effect, its source is not the plaintiff's contract claim, but the defendant's voluntary agreement. (See *Sun Life Assurance Co. of Canada v. Imperial Premium Finance, LLC* (11th Cir. 2018) 904 F.3d 1197, 1219 (*Sun Life*) ["But, the true source of any chilling effect will be the parties' duly-entered contract, which itself bars the filing of the lawsuit"].)

Any such potential chilling effect likewise evaporates in the climate of breach of contract since only parties who have voluntarily entered into a contractual relationship can bring a claim for breach — and only for a failure to abide by the contractual promises made by those in contractual privity. (*Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (*Oasis*) [one of the essential elements of a breach of contract claim is privity — that is, "the existence of the contract"]; Judicial Council of California Civil Jury Instructions (CACI) (2017 ed.) No. 303, Breach of Contract—Essential Factual Elements.)

Because contract law exists only to enforce the intentions of the contracting parties, the threat of a potential breach of contract claim cannot cause a litigant any fear of harassment by derivative tort liability. The duties arising from the contract, and the liability for its breach, are limited to its parties, rather than society at large.

And it is harm to society's discourse with the courts that is the principal evil the litigation privilege prevents. (*ITT Telecom*, 214 Cal.App.3d at pp. 320–323 [tort law imposes obligations on every

person based on social policy while contract law turns on the will or intention of the parties to a contract, so the litigation privilege applies to a misappropriation tort claim but not to claim for breach of a nondisclosure agreement]; *E. & J. Gallo Winery v. Andina Licores S.A.* (E.D.Cal., June 30, 2006, No. CVF05-0101) 2006 WL 1817097, at p. *7 (*E. & J. Gallo*) [California's litigation privilege is inapplicable to breach of contract claims because they do "not impinge on" a party's "right to resort to this or any other court, or in any other way contravene the [privilege's] policy reasons"].)

1.2. Breach of contract claims cannot be "artfully pleaded" defamation claims

This Court has expanded the litigation privilege to other torts so the artifice of "conveniently different labels" cannot circumvent the privilege with an equally chilling effect on judicial access. (*Rubin*, 4 Cal.4th at p. 1203.) But no such risk exists for breach of contract claims.

First, a plaintiff seeking a conveniently different label for pleading defamation cannot simply bring a breach of contract claim; only parties who have freely entered into a contractual relationship can do so. (*Oasis*, 51 Cal.4th at p. 821; CACI No. 303.)

Second, the "sine qua non" of recovery for defamation is "the existence of a 'falsehood,' " the engagement in false speech. (*Baker v. L.A. Herald Examiner* (1986) 42 Cal.3d 254, 259, quoting *Letter Carriers v. Austin* (1974) 418 U.S. 264, 283.)

A breach of contract claim, in contrast, hinges not on whether speech is true or false, but on a party's breach of an independent promise not to speak. (*Wentland*, 126 Cal.App.4th at p. 1492 [litigation privilege did not bar claim for breach of non-disparagement agreement because parties "had promised not to continue to make such comments," and "not because the negative comments were false"]; *T.T. ex rel. Susan T. v. County of Marin* (N.D.Cal., Jan. 25, 2013, No. C 12-02349) 2013 WL 308908, at p. *6 ["Where the communication at issue is a separate promise independent of the litigation, however, the litigation privilege may not apply"]; *Fisher v. Biozone Pharm., Inc.* (N.D.Cal., Mar. 23, 2017, No. 12-cv-03716-LB) 2017 WL 1097198, at p. *7 [a party may breach a non-disparagement agreement even if the disparaging information is true].[2])

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[2] Courts around the country recognize that the truth or falsity of a statement is irrelevant to determine whether it violates a non-disparagement agreement. (*JetPay Merchant Services, LLC v. Tepoorten* (N.D.Tex., Sept. 23, 2009, No. 3:08-cv-1380) 2009 WL 3047730, at p. *4 ["sole issue here is whether [defendant's] e-mail 'disparaged' [plaintiff], not whether the statements made were true"]; *FreeLife Internat., Inc. v. Am. Ed. Music Publications Inc.* (D.Ariz., Oct. 1, 2009, No. CV07-2210) 2009 WL 3241795, at p. *6 ["the ordinary meaning of" disparage "does not require that the disparaging statement be false"]; *Brenner v. Greenberg* (N.D.Ill., Mar. 10, 2011, No. 08-C-0826) 2011 WL 862224, at *4 [though "a disparaging remark can be and often is true," it still breaches non-disparagement agreement]; *Kappa Sigma Fraternity v. Richard G. Miller Memorial Foundation* (W.D.Va., Feb. 20, 2008, No. 3:07-cv-00026) 2008 WL 445005, at p. *2 [dismissing defamation claim not alleging statement false while upholding breach of contract claim based on same statement violating non-disparagement clause].)

There is thus no meaningful risk that a plaintiff will bring a claim for breach of contract as an artfully pleaded claim challenging defamatory speech someone utters to or in a court. Instead, the parties are already known to each other by their decision to be contractual privies; the contours and parameters of their private agreement to do or not do something are likewise by voluntary agreement.

1.3. California's anti-SLAPP statutory regime also prevents the risk of a party using contract claims to harass a contractual privy for suing or speaking to the courts

To the extent there is any perceived risk a litigant might attempt to bring meritless contract claims to harass another litigant, the anti-SLAPP statute mitigates that risk, if not eliminating it altogether. (Code Civ. Proc., § 425.16.) Petitioning activity within the scope of the litigation privilege falls within the anti-SLAPP statute. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

This means any contract claim arising from the act of suing or speaking to or in court requires proof the claim has sufficient merit to survive the second prong of anti-SLAPP testing — the same standard a litigant must meet when suing for malicious prosecution. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier I*) [where an action is a SLAPP, the plaintiff must show a probability of prevailing on the merits]; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735 (*Jarrow*) [malicious

prosecution action falls within purview of anti-SLAPP statute because it arises from protected activity]; *Pasternack v. McCullough* (2015) 235 Cal.App.4th 1347, 1355 [same].)

Here, however, the trial court would not even reach the probability that Olson could succeed on the merits. (Opn. 10 ["As to the second prong, the court found the litigation privilege precluded Olson's two causes of action; the court thus did not reach or analyze whether Olson demonstrated a probability of prevailing on his claims"].) And it was only that part of its ruling to which the Court of Appeal drew the line: "Though an argument may be made as to whether Doe was *permitted* by law to make said communication, we believe it undisputed that she was *authorized* by law to do so." (Opn. 18, original italics, citing *Silberg*, 50 Cal.3d at p. 212.)

In other words, Olson should not be prevented, at the pleading stage, from even trying to prove that Doe repeating the "numerous outrageous and ridiculous allegations" he "vehemently denied" (Opn. 4) could violate their private agreement not to disparage one another. (*Id.* at p. 6.)

1.4. **Available remedies likewise limit contract claims from being used to seek damages not contemplated by the parties**

Just as the laws of tort and contract turn on different objectives and policy principles, so too are their remedies distinct: "Contract damages are generally limited to those within the contemplation

of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment*, 7 Cal.4th at p. 515; Civ. Code, § 3300.) "In contrast, tort damages are awarded to compensate the victim for injury suffered." (*Id.* at p. 516.)

Damages for torts, punitive or exemplary damages, along with those for mental suffering or emotional distress, are unavailable for breach of contract. (*Ibid.*; *Erlich*, 21 Cal.4th at p. 558; *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 392 ["punitive damages may not be awarded for breach of contract"].)

As a result, an action premised on the theory that the act of suing itself breaches independent, contractual promises creates no risk of tort damages. The worst a litigant need fear is being sued for contractual damages by a party with whom she or he formed a contract — damages placing the non-breaching party in the same position as before the breach.

Such a risk causes no chilling effect. But the opposite would be true if the litigation privilege were extended to all breach of contract claims, because of that application's inherent tension with equally robust policies favoring the freedom to contract.

1.5. **The fundamental public policies favoring freedom to contract weigh against applying the litigation privilege to contract claims**

Even if contract claims could have a potential chilling effect on suing, the effect is limited. This is because contract claims can be brought only by litigants with whom their adversaries freely signed an agreement, and only for damages contemplated by the agreement. The claims are also still subject to the anti-SLAPP statute.

Respect for well-established policies favoring making and enforcing contracts outweighs any limited chilling effect that might arise from permitting a litigant to pursue a contract claim against a party breaching an agreement not to sue or disparage a contractual privy. (*Stacy & Witbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 7–8 (*Stacy II*) [immunizing parties from breach of contract liability would frustrate and prevent enforcement of the contract].)

"The paper trail of contractual performance and course of dealing between parties under a contract cannot be immunized from use in later judicial proceedings just because that paper trail is also a publication that serves a litigation purpose. If that same paper trail amounts to wrongful performance or conduct under the contract, it escapes section 47(b)." (*Stacy II*, 47 Cal.App.4th at pp. 7–8.)

California law has long recognized strong public policy favoring the freedom of parties both to enter contracts and to enforce

them. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677 (*Foley*) [acknowledging the "fundamental principle of freedom of contract"]; *Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.* (1992) 2 Cal.4th 342, 363 (*Carma*) [discussing the "strong public policy favoring freedom of contract"]; *Jensen v. Traders & Gen. Ins. Co.* (1959) 52 Cal.2d 786, 794 [noting "public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations"].)

Without question, a party may freely covenant not to sue another or voluntarily agree not to disclose information or otherwise speak about another, in court or elsewhere. (*Jefferson v. Cal. Dept. of Youth Auth.* (2002) 28 Cal.4th 299, 310 [enforcing waiver encompassing claims not yet litigated]; *Belasco v. Wells* (2015) 234 Cal.App.4th 409, 422 [enforcing waiver of Civil Code § 1542].) Though our country's highest law safeguards free speech, it also recognizes that such protections can be voluntarily relinquished by agreement. (*Ibid.*)

So, if the litigation privilege were extended to bar a breach of contract claim against a party breaching her or his agreement not to sue or disclose certain information or otherwise speak about another in or out of court, it would impair policies favoring parties making and enforcing voluntary agreements. After all, "the litigation privilege was never meant to spin out from judicial action a party's performance and course of conduct under a contract, and, even were non-application of the litigation privilege to create a risk of diluting "the healthy policy of crushing derivative

tort actions," still "the rights, remedies and obligations of the other contracting party" must be preserved. (*Stacy II*, 47 Cal.App.4th at p. 8.)

The litigation privilege does not bar claims for breach of nondisclosure agreements because policies favoring enforcement of a "written promise of nondisclosure," and protecting a plaintiff's related interests, outweigh those underlying litigation privilege. (*ITT Telecom*, 214 Cal.App.3d at p. 319; accord, *Sun Life*, 904 F.3d at p. 1220 [defendant's "position that a party may never face a breach of contract suit for its litigation activity would create perverse incentives that would undermine the strong public policy favoring freedom of contract"].)

Application of the litigation privilege to bar a breach of contract claim would therefore render the agreement unenforceable and frustrate the purpose of the contract by immunizing defendants from enforcement of an agreement freely entered. (*Wentland*, 126 Cal.App.4th at p. 1494; *Navellier II*, 106 Cal.App.4th at p. 774.)

Just as this Court declined to apply the litigation privilege to malicious prosecution claims "lest that remedial tort be altogether eliminated," this Court should decline to apply the litigation privilege to contract claims against parties who freely agreed not to disclose certain information or not to speak disparagingly about another. (*Jarrow*, 31 Cal.4th at p. 738.[3])

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[3] Accord, *Sun Life*, 904 F.3d at p. 1220 (noting that much like applying the litigation privilege to malicious prosecution claims, "application of the privilege [to contract claims arising from agreements not to sue] would virtually extinguish a common

In sum, the policies in favor of enforcing parties' freely entered agreements and affording a remedy for breach to the other party far outweigh any limited risk a contracting party might try to sue for breach to chill the other party's participation in litigation. (*Stacy II*, 47 Cal.App.4th at p. 8 ["the rights, remedies and obligations of the other contracting party" must be preserved when balanced against "the healthy policy of crushing derivative tort actions"]; *ITT Telecom*, 214 Cal.App.3d at p. 319 [the policies in favor of enforcing "written promise of nondisclosure" and protecting plaintiff's related interests outweigh policies underlying the litigation privilege]; *Navellier II*, 106 Cal.App.4th at p. 774 [recognizing there should be no "privilege to breach" a contract]; accord, *Sun Life*, 904 F.3d at p. 1220.)

Moreover, the protections of the anti-SLAPP statute ameliorate, if not eliminate, any such risk. (*Navellier I*, 29 Cal.4th at pp. 87–88.)

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form of relief: the awarding of damages for breaches of agreements not to sue a contract counterparty"); *Avid Life Media, Inc. v. Infostream Group, Inc.* (C.D.Cal., Nov. 12, 2013, No. CV 12-09201, 2013 WL 6002167, at p. *6 (holding that application of California's litigation privilege to a claim for breach of a non-disparagement provision in a settlement agreement based on disparaging statements made in litigation against a third party "would render the Agreement largely meaningless"); *Enterprises v. Jewelry* (C.D.Cal., Feb. 3, 2014, No. CV122753) 2014 WL 12558293, at p. *3 (application of the litigation privilege under California law to a claim for breach of a settlement agreement provision "would render this bargained-for provision meaningless").

1.6. The prior decisions of the Court, the intermediate appellate courts, and sister courts permit breach of contract claims without blanketing them with the litigation privilege

As Doe acknowledges, this Court has applied the litigation privilege to tort claims — not to contract claims. (OBM 28.) Although Doe cites language in prior decisions referencing application of the privilege to "virtually all claims," such statements were made in the context of derivative tort actions, and "it is not apparent that [they] referred to anything other than tort claims." (*Navellier II*, 106 Cal.App.4th at p. 773, quoting *Pacific Gas and Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118; *ITT Telecom*, 214 Cal.App.3d at p. 317 ["*Ribas* [38 Cal.3d 355] applied the privilege to a statutory cause of action for invasion of privacy"]; OBM 28–29.)

Most intermediate appellate opinions cited by Doe do not address the specific question of whether the litigation privilege applies to contract claims, or merely cite earlier decisions without analysis. (OBM 29; *McClintock v. West* (2013) 219 Cal.App.4th 540, 554 [without specifically addressing whether the litigation privilege extends to contract claims, applying it to fraud and contract claims];[4] *Navellier II*, 106 Cal.App.4th at p. 774 [neither *La-*

[4] In *McClintock*, the Court of Appeal applied the litigation privilege "to prevent never-ending second bites at the apple about matters that took place during a prior proceeding." (219 Cal.App.4th at p. 554.) No such concerns apply to Olson's claims

borde v. Aronson (2001) 92 Cal.App.4th 459 nor *Pollock v. Superior Court (Silverstein)* (1991) 229 Cal.App.3d 26 "discuss whether all breach of contract actions involving privileged communication are necessarily precluded"]; *E. & J. Gallo*, 2006 WL 1817097, at p. *7 [neither *Laborde* nor *Pollock* considered "whether the litigation privilege operated to bar [a] breach of contract claim"].)

In contrast, multiple California courts, and sister courts in states like Florida, Texas, and Oregon, for example, have directly considered whether the litigation privilege should apply to contract claims and uniformly concluded it should not. (See Footnote 5, *post*.)

In *Sanchez*, 176 Cal.App.4th at p. 528, fn. 3, for example, the Court of Appeal determined that the litigation privilege "does not protect voluntary statements that breach an express contract of confidentiality or nondisclosure." In *Navellier II*, 106 Cal.App.4th at p. 773, the Court of Appeal consistently declined "to hold that the litigation privilege bars the breach of contract cause of action as well as the fraud claim." In *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869, the Court of Appeal held the litigation priv-

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here. The reverse is true since Doe is trying to raise matters Olson contends were previously addressed in the parties' settlement agreement. Yet Does wants this Court to prevent Olson from even trying to advance this contention beyond the pleadings stage, with no judicial evaluation of the probability his contention has merit.

ilege does not bar a claim for breach of a confidentiality agreement based on declarations filed to oppose confirmation of an arbitration award.

Consonant is *ITT Telecom*, 214 Cal.App.3d at p. 319, where the Court of Appeal balanced the policies for applying the litigation privilege with those for enforcing contracts to find the litigation privilege did not bar a claim for breach of a nondisclosure agreement.

In *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 504 (*Bardin*), the Court of Appeal agreed that the "trial court erred in extending the Civil Code section 47 privilege to her contract causes of action" in a case against an employer based on its statements to police about the employee.

And in *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 (*Mattco*), the Court of Appeal decided: "The privilege applies only to tort causes of action."[5]

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[5] Accord, *Sun Life*, 904 F.3d at p. 1220 (under Florida law, "[defendant's] position that a party may never face a breach of contract suit for its litigation activity would create perverse incentives that would undermine the strong public policy favoring freedom of contract"); *deBarros v. Walmart Stores, Inc.* (D.Or. 2012) 857 F.Supp.2d 1109, 1112 (declining to apply litigation privilege to contract claim and observing that there is no precedent in Oregon or the Ninth Circuit supporting such an application); *Tulloch v. JPMorgan Chase & Co.* (S.D.Tex., Jan. 24, 2006, No. H-05-3583) 2006 WL 197009, at p. *7 (*Tulloch*) ("there is no reason to believe that the Texas Supreme Court would extend the absolute [litigation] privilege to bar the breach of contract counterclaim"), citing *Musser v. Smith Protective Services, Inc.* (Tex. 1987) 723 S.W.2d 653, 653–654.

Consistent with precedent, the Court should not make a blanket extension of the litigation privilege to breach of contract claims.

2. Alternatively, the litigation privilege should apply only to breach of contract claims where the gist sounds in tort, not contract

If this Court were inclined to extend the litigation privilege beyond tort to contract, the Court should be guided by why it extended the privilege beyond defamation claims in the first place. Doing so follows this Court's reasoning that the privilege "should not evaporate" because "a conveniently different label" is discovered for pleading "an identical grievance arising from identical conduct as that protected by section 47(b)." (*Rubin*, 4 Cal.4th at p. 1203; *Oren*, 42 Cal.3d at p. 1165, citing *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 99 (*Thornton*).)

"The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint. If it is desirable to create an absolute privilege in defamation, not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with libel or slander actions while acting for his client, we should not remove one concern and saddle him with another for doing precisely the same thing." (*Thornton*, 245 Cal.App.2d at p. 99.)

In this way, where the gist or essence of a plaintiff's claim is a defendant engaging in litigation speech that defamed or tortiously harmed a plaintiff, then the litigation privilege will bar the claim regardless of the specific tort label or theory of liability

set out by the plaintiff. (*Rubin*, 4 Cal.4th at p. 1203; see *Younger v. Solomon* (1974) 38 Cal.App.3d 289, 300 ["a privilege which attached in a defamation suit should also apply where the same facts constitute the basis for an action for abuse of process"].)

The essence of a contract claim may amount to the allegation that the defendant engaged in litigation speech that defamed or otherwise tortiously harmed the plaintiff, but only when the defendant's conduct "violates an independent duty arising from principles of tort law." (*Applied Equipment*, 7 Cal.4th at p. 515.) In such cases, the essence therefore sounds in tort, not in contract. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 40; *Voth v. Wasco Pub. Util. Dist.* (1976) 56 Cal.App.3d 353, 356 [regardless of whether parties are in a contractual relationship, "[i]f the action is based on a breach of a promise, it is contractual; if it is based on a breach of a noncontractual duty, it is in tort"].)

By contrast, where a contract action seeks relief for an injury from conduct breaching defendant's promises under the contract, but not violating an independent legal duty arising from principles of tort law, the claim sounds in contract. (*Applied Equipment*, 7 Cal.4th at p. 515; *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 488 [an action based solely on a breach of the written agreement sounds in contract]; *Peterson v. Sherman* (1945) 68 Cal.App.2d 706, 711 ["if the cause of action arises from a breach of a promise set forth

in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract it is ex delicto"].)

"Putting it in another way, if the acts complained of were actionable only because of the contract, and there is no negligence or breach of duty distinct from the breach of promise under the contract, the case is ex contractu." (*Nathan v. Locke* (1930) 108 Cal.App.158, 162; *Aas v. Superior Court (William Lyon Co.)* (2007) 24 Cal.4th 627, 643 ["A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations"], superseded on different grounds, *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079–1080.)

Consistent with *Rubin*'s reasoning, the Court should not extend the privilege to claims premised on an "identical grievance arising from identical conduct" as a defamation claim. This Court should, at most, extend the litigation privilege to contract claims only "[w]here the gravamen of the cause of action sounds in tort, not contract …." (*Wentland*, 126 Cal.App.4th at p. 1494.[6])

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[6] Consistent with the Court's direction in *Rubin* to look behind the labels to the substance, whether a claim sounds in contract or tort turns on the gist of the underlying factual allegations. (*Rubin*, 4 Cal.4th at p. 1203; *Williamson v. Pac. Greyhound Lines* (1944) 67 Cal.App.2d 250, 253 ["The authorities are uniform in holding that the nature of the action with respect to whether it is based on a breach of contract or sounds in tort must be determined by the gravamen, or essential facts or grievance as alleged, to be ascertained from a consideration of the pleading as a whole"]; *Little v. Speckert* (1959) 170 Cal.App.2d 725, 727 ["In seeking a determination whether an action is one in contract or in tort, the general rule is that the character of the action is to be

A contract claim that pleads "what is in substance an identical grievance arising from identical conduct" as defamation sounds in tort because the essence of a defamation claim is that the defendant engaged in false speech. (*Rubin*, 4 Cal.4th at p. 1203.) A pure contract claim, on the other hand, is not concerned with the truth or falsity of the speech and thus is not "a conveniently different label" for pleading conduct "protected by section 47(b)." (*Ibid.*)

Because the rationale for extending the privilege beyond defamation claims is not implicated by a breach of contract claim, the Court should hold the privilege inapplicable to contract claims that are not torts in disguise.

As the Court held in *Wentland*, 126 Cal.App.4th at p. 1495, the litigation privilege does not bar a contract claim alleging breach of a non-disparagement agreement when the action is not based on the theory that the disparaging statements are false, but on the defendant's promise not to make such statements. The contract claim therefore did not sound in tort, but in contract. (*Ibid.*; *Bardin*, 70 Cal.App.4th at p. 504 [litigation privilege does not apply to "causes of action for both breach of contract and breach of the implied covenant of good faith and fair dealing" which sound "only in contract, not in tort"].[7])

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determined by the nature of the grievance rather than by the form of pleading"].)

[7] Accord, *Tulloch*, 2006 WL 197009, at p. *7 (declining to apply litigation privilege because defendant's counterclaim was not essentially a defamation claim but a contract claim seeking contract damages for plaintiff's disclosures violating parties' agreement); cf. *Edwards v. Centex Real Estate Corp.* (1997) 53

Such a rule provides a bright-line test — and the benefits of objectivity and predictability for litigants and courts addressing whether the litigation privilege applies to a contract claim. (*In re Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 410 [bright-line rule is more beneficial than "fact-intensive, case-by-case standard" that may "lamentably" cause arbitrary results and inconsistent case law]; *People v. Kelly* (2010) 47 Cal.4th 1008, 1016.)

The rule proposed by Doe requires courts to address challenging questions — case-by-case — to determine whether application of the litigation privilege to the contract claim furthers the policies underlying the privilege and otherwise follows principles of public policy. (OBM 26.) No such abstruse standard applies to whether the litigation privilege should apply to tort claims, and this Court should not adopt such a rule in the context of contract claims.

3. Two conjunctive requirements should be satisfied before the litigation privilege bars a breach of contract claim

Alternatively, the line of Court of Appeal decisions mentioned by Doe considering application of the litigation privilege to contract claims have identified two conjunctive requirements that

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Cal.App.4th 15, 40 (rejecting argument that claim "sounds in contract and is therefore not the kind of derivative tort cause of action which the privilege is intended to prevent," and applying litigation privilege because "gravamen" of claim sounded in fraud, not contract); *Banga v. Equifax Info. Servs. LLC* (N.D.Cal., June 18, 2015, No. 14-CV-03038) 2015 WL 3799546, at p. *6.

must be satisfied before applying the privilege to bar a breach of contract action.

As explained in the most recent decision in that line of cases, "the privilege will apply to contract claims only [1] if the agreement does not 'clearly prohibit' the challenged conduct, *and* [2] if applying the privilege furthers the policies underlying the privilege." (*Crossroads*, 13 Cal.App.5th at p. 787 [bracketed numbering and italics added], citing *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 276–277; *Sanchez*, 176 Cal.App.4th at p. 528, fn. 3, italics added [the litigation privilege "does not protect voluntary statements that breach an *express* contract of confidentiality or nondisclosure"].[8])

If this Court decides the litigation privilege generally applies to breach of contract claims, the Court should reject the standard offered by Doe, and adopt a bright-line rule requiring that these two conjunctive elements be present before applying the privilege.

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[8] Cf. *McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1170 (finding contract did not "clearly prohibit" the defendant's conduct); *Vivian*, 214 Cal.App.4th at p. 276 ["the agreement on which plaintiff relies does not clearly prohibit the conduct that plaintiff challenges"]; *Feldman v. 1100 Park Lane Assocs.* (2008) 160 Cal.App.4th 1467, 1497 (*Feldman*) ("there was no breach of a confidentiality agreement or other agreement not to sue or to refrain from comment").

3.1 If the contract "clearly prohibits" the breaching conduct, the privilege should not apply

The first requirement — that the contract must prohibit the breaching conduct — arises from recognition that "one who validly contracts not to speak waives … the protection of the litigation privilege." (*Wentland*, 126 Cal.App.4th at p. 1494.) A necessary corollary to the voluntary agreement to give up the right to speak, on certain topics at least, is a waiver of the right to assert the litigation privilege as a defense to an action brought for breaching that agreement.

The recognition that a party may freely agree to waive the litigation privilege originates from this Court recognizing the principle of waiver in the anti-SLAPP context.

In ruling whether a breach of contract claim may survive the second prong of the anti-SLAPP statute, this Court explained that such a claim may survive as long as it has minimal merit because "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." (*Navellier I*, 29 Cal.4th at pp. 87–88; see *DaimlerChrysler Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 354 [holding anti-SLAPP statute will not bar a breach of contract claim premised on protected litigation speech when the defendant contractually waived the right to make such speech]; accord, *Pennsbury Village Assocs., LLC v. Aaron McIn-*

tyre (2011) 608 Pa. 309, 324 [11 A.3d 906] ["where pre-existing legal relationships preclude a party from engaging in the activity protected by anti-SLAPP legislation, that party cannot claim immunity for actions taken in violation of its pre-existing legal obligation"].)

Because this Court's "discussion suggests that breach of contract claims" based on litigation speech "have potential merit," the reviewing courts recognize that a party who voluntarily agrees not to speak similarly waives the right to assert the litigation privilege as a defense against an action for breaching that agreement. (*Navellier II*, 106 Cal.App.4th at p. 774; *Wentland*, 126 Cal.App.4th at p. 1494.)

As a result, when a party enters an agreement that prohibits making disparaging statements about another — without limiting the time, place, or manner of the agreed upon restriction on the party's speech — the party has waived the right to assert the litigation privilege when sued for breach of that agreement, based on the party's disparaging statements made inside or outside a civil complaint. (See *Enterprises v. Jewelry* (C.D.Cal., Feb. 3, 2014, No. CV-12-2753D) 2014 WL 12558293, at p. *3, fn. 6 [applying California law and ruling that litigation privilege did not bar breach of contract claim where the settlement agreement "expressly prohibited" the breaching conduct].)

3.1 Applying the privilege to breach of a non-disclosure or non-disparagement agreement does not further its underlying policies

Even where a contract does not "clearly prohibit" the breaching conduct, the litigation privilege does not bar a contract claim based on statements authorized by law unless "applying the privilege furthers the policies underlying the privilege." (*Crossroads*, 13 Cal.App.5th at p. 787, citing *Vivian*, 214 Cal.App.4th at pp. 276–277; *Wentland*, 126 Cal.App.4th at p. 1492 ["whether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege"].)

This second requirement recognizes that it makes no sense to apply the litigation privilege where doing so advances none of its policies. As *Wentland* found, applying the litigation privilege to breach of a non-disparagement or nondisclosure clause in a settlement agreement does not advance the privilege's underlying policies. (*Wentland*, 126 Cal.App.4th at p. 1494.)

"Unlike in the usual derivative tort action," application of the privilege in *Wentland* "did not serve to promote access to the courts, truthful testimony or zealous advocacy." Such a breach "is not based on allegedly wrongful conduct during litigation" but rather "on breach of a separate promise independent of the litigation[.]"[9] (126 Cal.App.4th at p. 1494; cf. *Oren*, 42 Cal.3d at

[9] The Court of Appeal in *Feldman, supra*, 160 Cal.App.4th at p. 1497, relied on by Doe, explicitly distinguished "*Wentland* and several of the cases relied on by it" because in *Feldman*, "there

p. 1167, fn. 6 [litigation privilege would not bar tort claim against defendant suing for improper purpose independent of litigation objective of underlying lawsuit].)

Application of the privilege to a claim for breach of a settlement agreement would frustrate the purpose of the agreement.[10] (*Wentland*, 126 Cal.App.4th at p. 1494; *Crossroads*, 13 Cal.App.5th at p. 787 ["If one expressly contracts not to engage in certain speech or petition activity and then does so, applying the privilege would frustrate the very purpose of the contract if there was a privilege to breach it"].)

As the federal district court observed when applying California law in *Avid Life Media, Inc. v. Infostream Group, Inc.* (C.D.Cal., Nov. 12, 2013, No. CV 12-09201) 2013 WL 6002167, at p. *6, applying the litigation privilege to a claim for breach of a non-disparagement provision in a settlement agreement "would hardly promote the finality of the judgment resulting" from the settlement. (Accord, *Enterprises*, 2014 WL 12558293, at p. *3 [applying California's litigation privilege to a claim for breach of settlement "would not encourage finality of judgments and bring an end to litigation"].)

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was no breach of a confidentiality agreement or other agreement not to sue or to refrain from comment."

[10] Where the settlement agreement does not cause a final dismissal with prejudice of a prior action, or where it was entered before litigation formally began, application of the litigation privilege reduces access to courts because the nonbreaching party is never allowed the chance to ask the court to enforce the contract. (*Crossroads*, 13 Cal.App.5th at p. 788.)

Indeed, application of the litigation privilege to frustrate the purposes of a settlement agreement undermines, rather than advances, the purposes underlying the litigation privilege. "Courts rely on the privilege to prevent the proliferation of lawsuits after the first one is resolved." (*Mattco*, 5 Cal.App.4th at p. 402; see also *Wentland*, 126 Cal.App.4th at p. 1492 ["the purpose of the litigation privilege is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation"], citing *Silberg*, 50 Cal.3d at p. 214; *Feldman*, 160 Cal.App.4th at p. 1496 [purpose of privilege is to "avoid unending litigation"].)

Yet application of the privilege to a contract claim for breach of a non-disparagement or nondisclosure clause in a settlement agreement discourages finality and engenders lawsuits after the first one is resolved. (*Wentland*, 126 Cal.App.4th at p. 1494 ["Application of the litigation privilege in this case does not encourage finality and avoid litigation"]; *Enterprises*, 2014 WL 12558293, at p. *3; *Bakst v. Community Memorial Health System, Inc.* (C.D.Cal., Jan. 31, 2011, No. CV0908241) 2011 WL 13214303, at pp. *10–11 [declining to apply California litigation privilege because the parties "waived the right to rely on the litigation privilege in the future" and "accepted the risk that … circumstances would arise in the course of making claims or seeking redress against other parties in which it would be beneficial to speak" about the other party].)

Rather, allowing a party who has settled a dispute and voluntarily agreed to a non-disparagement clause to repeat in later filings the disparaging comments supporting the prior proceedings — while shielded by the litigation privilege, and without seeking to have those filings sealed or otherwise protect the accused's identity — invites further litigation after the settlement. (*Wentland*, 126 Cal.App.4th at p. 1494.) Such a result frustrates rather than furthers the policies underlying the litigation privilege aimed at "enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." (*Silberg*, 50 Cal.3d at p. 214; see also *Mattco*, 5 Cal.App.4th at p. 402.[11])

For these reasons, the litigation privilege should not apply to a contract claim for breach of a non-disparagement clause or non-disclosure clause within a settlement agreement because "[t]he policies behind the litigation privilege are not furthered" by doing so. (*Wentland*, 126 Cal.App.4th at p. 1494; *Mattco*, 5 Cal.App.4th at p. 404 [refusing to apply the litigation privilege to a contract

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[11] Allowing a party to pursue new litigation based on matters already disposed of by settlement — especially where the prior settlement was entered before litigation commenced or without a final judgment on the merits — would scarcely encourage parties to settle their cases. (*Enterprises*, 2014 WL 12558293, at p. *3 [applying California's litigation "privilege here would not encourage finality of judgments and bring an end to litigation, but would rather discourage settlement"]; cf. *Oren*, 42 Cal.3d at p. 1166 ["Settlements of disputes have long been favored by the courts"]; *Mattco,* 5 Cal.App.4th at p. 404 ["Applying the privilege in this circumstance does not encourage witnesses to testify truthfully; indeed, by shielding a negligent expert witness from liability, it has the opposite effect"].)

claim where it has the opposite effect of the objective of the policies underlying the privilege]; *Sanchez*, 176 Cal.App.4th at p. 528 [litigation privilege "does not protect voluntary statements that breach an express contract of confidentiality or nondisclosure"].)

Multiple federal courts applying California law have similarly concluded that "the litigation privilege does not preclude breach of contract actions where the statements at issue were uttered in violation of a confidentiality agreement or nondisclosure agreement." (*Yardley v. ADP TotalSource, Inc.* (C.D.Cal., Apr. 4, 2014, No. CV-13-04639) 2014 WL 1496333, at p. *2.[12])

[12] See also *Avid Life Media, Inc.*, 2013 WL 6002167, at p. *6; *Enterprises*, 2014 WL 12558293, at p. *3 ("application of the privilege would render bargained-for [settlement agreement] meaningless"); *T.T. ex rel. Susan T.*, 2013 WL 308908, at p. *6 (the litigation privilege should not apply to a breach of settlement agreement claim because any effort to enforce valid litigation release would be "hamstrung by invocation of the litigation privilege"); *Bakst*, 2011 WL 13214303, at pp. *10–11; *Misle v. Schnitzer Steel Indus., Inc.* (N.D.Cal., Feb. 19, 2017, No. 15-CV-06031) 2017 WL 731459, at p. *5 (litigation privilege did not bar breach of contract claim premised on defendant suing to recover funds because "these alleged breaches are 'not simply a communication, but also wrongful conduct or performance' "); *USA Wheel & Tire Outlet # 2, Inc. v. United Parcel Service Inc.* (C.D.Cal., Jan.14, 2014, No. SACV 13-0403) 2014 WL 197733, at pp. *3–4 (litigation privilege does not bar counterclaim for filing unredacted court documents in violation of confidentiality agreement).

4. The answer to the second issue here is simple because the Court of Appeal's holding does not bar Doe's claims but allows Olson to plead and prove his

A civil harassment restraining order proceeding is not a matter to be taken lightly. Several individual rights are immediately put in jeopardy by mere accusations sworn out on judicial council forms, including constitutional guarantees and limitations on physical liberty. The standard for issuing a temporary restraining order in a civil harassment proceeding is low, a minimal "reasonable proof"–standard, conjoined with "great or irreparable harm." (Code Civ. Proc., § 527.6, subd. (d); see 20 Cal. Judges Benchguide: Injunctions Prohibiting Civil Harassment and Workplace/Postsecondary School Violence (CJER 2016 rev.) § 20.3(4).)

The Court's second question as framed here is easy to answer, although it is not strictly drawn from the facts since Doe's action was not merely one "for a temporary restraining order." A temporary restraining order had been partly granted and partly denied. (1AA 182 [¶ 6], 128–138; Opn. 4 ["The court issued a temporary restraining order granting Doe's requested personal conduct orders as to Olson, but denying her request for a stay-away order"].)

Doe's next step at the civil harassment restraining order proceeding was effectively to enjoin Olson from living at the building he owned based on her accusations of sexual misconduct against him. That would have been the effect of the stay-away order she

sought, which would have essentially operated to evict Olson from his own building. (But see *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811 [Code Civ. Proc., § 527.6 is not intended to summarily determine complex issues like easement dispute]; *Marquez-Luque v Marquez* (1987) 192 Cal.App.3d 1513, 1517–1519 [§ 527.6 protects people, not property, so court cannot evict respondent threatening property damage not harm to petitioner].)

Olson "vehemently denied" Doe's accusations, and he had evidence to prove they were false had the burden shifted to him to do so. (Opn. 4–5; 1AA 181–184 [¶¶ 4, 6, 15].) Doe and Olson went to mediation instead, which, temporarily at least, resolved her action.

Under the law of this case, the non-disparagement clause in the mediated agreement does not operate to "bar" Doe's "unlimited civil lawsuit arising from the same alleged sexual violence." The Court of Appeal's limited exception for Olson's breach of contract claim permits Doe to try to prove her tort causes of action against Olson, which involve much more than sexual violence — "hatch[ing] an unending series of schemes to discriminate and harass" her. (1AA 004–033.). But Doe cannot shoot and miss without facing the penalty of contract damages.

Let us look at another context where the Legislature has recognized the incentive to make false accusations can be so great as to overwhelm the motivation for veracity. A short trip to one-hundred-percent temporary legal and physical custody in contentious

family law proceedings is when one parent accuses the other of sexually abusing their children. The accusation, true or false, is so explosive that it immediately triggers what can be dire consequences in custody arrangements. (Fam. Code, § 3027, Welf. & Inst. Code, §§ 328, 16504, 16506.) For school-aged children, these "temporary" custody arrangements can continue over multiple grades. For the health, safety, and welfare of children, these consequences are gravely necessary if the accusation is true.

But what happens if the accusation is false? The parent who lied then enjoys full custody, while imposing — under the imprimatur of the legal consequences of an accusation alone — mental anguish, emotional agony, and financial expense against the innocent but nonetheless accused co-parent, sometimes with irreversible damage to the child and their relationship with both parents.

Having recognized these sad but inevitable consequences, the Legislature has attempted, at least over the past three decades, to discourage false reports of sexual abuse by mandatory custody reconsideration, sanctions, attorney's fees, and by imposing conditions on the false accuser's visitation. (Fam. Code, §§ 3022.5, 3027.1, 3027.5.)

In this case, the Court of Appeal's unpublished decision denies specific performance to Olson, so the courthouse door is now wide open for Doe to pursue her complaint of wide-ranging harassment and sexually charged wrongdoing against Olson. But there are

potential teeth. Olson may pursue his breach of contract counter-claim past the pleadings stage if he can show he is likely to prevail on the merits that Doe breached their agreement.

Doe agreed not to disparage Olson. According to Doe, her agreement is so broad that it is meaningless. (OBM 50.) It is "generic" (OBM 21, 35, 50, 54 & 59) and "unadorned" (OBM 13 & 54), she says now, so it amounts to nothing signed on paper. Had Olson known she would take this position after signing their agreement, he may not have settled at mediation but instead pressed her to prove her case, and then brought a malicious prosecution claim against her.

And, of course, Doe can and will tenaciously pursue the defense of a "meaningless" non-disparagement clause on remand, while simultaneously seeking justice for extraordinarily elaborate wrongdoing as alleged — if she can prove it.

At the same time, if Olson can prove Doe breached the mediation contract with him, he well may be entitled to the damages he has suffered because of accusations which he vehemently contends are false. (1AA 181–184 [¶¶ 4, 6, 15]; AOB 10, citing 1AA 184 [¶ 17] ["Doe's wrongful conduct affects Olson's and his company's ability to obtain financing and, consequently, their ability to transact business, thereby putting Olson's entire business at risk."].)

The Court of Appeal's judgment, therefore, does not bar Olson's unlimited civil action from proceeding. But like the parent counseled on the consequences of a false report of sexual abuse

against another parent in highly contentious family law proceedings, Doe may need to reassess the consequences if her accusations are less than veracious. If they turn out to be less than truthful — remembering that Olson may prove he was in Orange County with his children when Doe's September 2015 attack supposedly took place in Los Angeles (1AA 182 [¶6], 195–200, Opn. 4) — then Olson's damages may outweigh Doe's effort at "retaliating" against him. But if Doe proves her claims are true, then her tort damages may dwarf into nonexistence any breach of damages suffered by Olson.

The point is no longer whether Doe is barred from making her claims. After affirming the trial court's order specially striking Olson's specific performance claims (Opn. 15), nonetheless he still faces her tort claims on remand. The Court of Appeal's decision here merely permits Olson to advance his breach of contract claim at the same time Doe presses her claims.

Now the point is whether Doe can afford to shoot and miss if her accusations prove false, given the specter of liability for Olson's breach of contract damages. Should she face any consequences if they are false? The answer here may well be: yes. But should she be immunized by the litigation privilege as she wishes to be, she would face none. This is unfair, given both the circumstances and the negotiated agreement.

5. The litigation privilege should not apply to Olson's cross-claim for breach of a non-disparagement agreement when Doe intentionally sued in a manner calculated to shield her identity but not her accused

At the very least, this Court should hold that the litigation privilege does not apply to a contract claim for breach of a non-disparagement or nondisclosure clause when the plaintiff fails to sue in a manner calculated to protect, even at first, the identity of the accused in contractual privity with the accuser.

As noted above, Doe could have just as easily designated Olson by a pseudonym in her unlimited civil complaint. It would not have been the first time an accusing "victim" and a denying "wrongdoer" were shielded from the stain of highly charged accusations of sexual misconduct. (See, e.g., *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1057, fn. 1 ["The parties refer to the individuals involved by the pseudonyms 'John Doe' and 'Jane Roe,' and we shall do the same"]; *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 46 [same].)

Had Doe done so, she would have promoted the purpose of the litigation privilege — freedom of access to the courts — without triggering equally compelling contractual liability for causing further damage to Olson. (AOB 10, citing 1AA 184 [¶ 17]; *Action Apartment Assn.*, 41 Cal.4th at p. 1241; see *USA Wheel & Tire Outlet # 2, Inc.*, *supra*, 2014 WL 197733, at pp. *3–4 [California's

litigation privilege does not bar counterclaim alleging plaintiff violated confidentiality agreement by filing unredacted court documents]; cf. *Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058, 1070 (*Advanced Textile*) ["The district court … erred in concluding that anonymity can never be used to shield plaintiffs from economic injury"].)

A litigant who has entered into a non-disparagement or nondisclosure clause in a settlement agreement has a clear path to filing a lawsuit that would otherwise violate the clause without fear of being subject to a breach of contract claim: by first suing her accuser by pseudonym or under seal. (See Cal. Rules of Ct., rules 2.550–2.551.[13])

"The judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web. [Citations.] Doe designations may be appropriate even where sealing orders are not. (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879 ….) (*Starbucks Corp. v. Superior Court (Lords)* (2008) 168 Cal.App.4th

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[13] Lest Doe's counsel be tempted to dismiss this argument out of hand, it hardly bears mentioning it involves a pure question of law on undisputed facts — she sued Olson by name while using a pseudonym — raised by the issues she framed for this Court's review. (*Walker v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 8:272, pp. 8-195–8-196; accord, *Dream Palace v. County of Maricopa* (9th Cir. 2004) 384 F.3d 990, 1005.) Olson would be permitted to litigate its merits only if he can advance his breach of contract claim past the pleadings stage, something Doe tries to kill at inception now by this Court's review. (See *Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1228.)

1436, 1452, fn. 7, citing *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 536, fn. 1, and *Johnson v. Superior Court (Cal. Cryobank, Inc.)* (2000) 80 Cal.App.4th 1050, 1072, disapproved on a different ground in *Williams v. Superior Court (Marshalls of CA, LLC)* (2017) 3 Cal.5th 531, 557, fn. 8; see also *Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 767.)

In *Advanced Textile*, *supra*, 214 F.3d 1058, for example, the federal Court of Appeals observed: "In this circuit, we allow parties to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity 'is necessary … to protect a person from harassment, injury, ridicule or personal embarrassment.' " (*Advanced Textile*, 214 F.3d at pp. 1067–1068, citing and quoting *United States v. Doe* (9th 1981) 655 F.2d 920, 922, fn. 1 and *Doe v. Madison School Dist. No. 321* (9th Cir. 147 F.3d 832, 833, fn 1 (9th Cir. 1998), vacated on other grounds (9th Cir. 1999) 177 F.3d 789 (en banc).[14]

This reflects respect for the fundamental policies of freedom of contract by enforcing contracting parties' voluntarily agreed to non-disparagement and nondisclosure clauses within settlement agreements. Initially captioning Olson with a pseudonym, mov-

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[14] Trial courts should determine the need for pseudonyms to shield anonymous party from retaliation by evaluating (1) the severity of threatened harm, (2) the reasonableness of anonymous party's fears, and (3) the anonymous party's vulnerability to retaliation, and by also determining whether proceedings can be structured to mitigate prejudice to opposing party, and whether public's interest is best served by requiring litigants to reveal their identities. (*Advanced Textile*, 214 F.3d at pp. 1067–1068.)

ing to seal, or not disclosing the identity of her accused under circumstances like these minimizes any breach of the parties' non-disparagement or nondisclosure clause.

Allowing a party who has settled a dispute and voluntarily agreed to a non-disparagement clause to repeat the disparaging comments that were the precise basis of the prior proceeding in publicly available litigation filings — while shielding their own identity without according the same pseudonym to the rightly or wrongfully accused — needlessly crushes the policies underlying enforcement of parties' freely given promise not to disparage or disclose information about the other party.

As a party to such a contract, Doe could have easily complied with her promise by filing her unlimited civil complaint containing her same disparaging accusations under pseudonym or seal. If she proves them, the trial court would then have broad discretion to unseal or reveal the identity of accused.

But the fact Doe filed her complaint shielding herself with a pseudonym proves her allegations warrant sealing, or at a minimum, merit due consideration for whether her choice to use Olson's identity and not her own compromises privacy in a sensitive, personal matter, while concurrently breaching their contract.

Here, immunizing her identity under these circumstances with no deference to her contractual privy, the accused, is unfair, par-

ticularly if Doe proves herself to be a liar, leveling false allegations with the intent to destroy Olson and his business in potential violation of their non-disparagement agreement.

CONCLUSION

Just as Doe is free to pursue her accusations against Olson in further litigation, so too should Olson have a chance to freely plead and prove damages for breach of their non-disparagement agreement. An equal opportunity for both litigants is all the Court of Appeal's decision permits.

For these reasons, the judgment of the Court of Appeal affirming and reversing the trial court's orders specially striking Olson's cross-complaint should be affirmed.

Respectfully submitted,

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August 24, 2020

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(CAL. RULES OF COURT, rule 8.520(c))

I, the undersigned appellate counsel, certify this answering brief on the merits consist of 11,946 words, exclusive of the portions specified in California Rules of Court, rule 8.520(c)(1), relying on the word count of the Microsoft Word program used to prepare it.

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(CODE CIV. PROC., §§ 1013, subds. (c), (d) & (g), 1013a, subd. (2); CAL. RULES OF COURT, rules 8.25(a), 8.29, 8.70–8.79, & 8.212(c)(1)(3); CAL. SUPREME COURT, RULES REGARDING ELECTRONIC FILING, rule 2 [as amended Mar. 18, 2020])

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