No. S258498

IN THE SUPREME COURT OF CALIFORNIA

JANE DOE,

Plaintiff, Cross-defendant, and Respondent,

v.

CURTIS OLSON,

Defendant, Cross-complainant, and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B286105

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The court of appeal erred in holding that, in light of a stay-away agreement containing a generic non-disparagement clause reached during civil harassment restraining order proceedings, Plaintiff, Cross-defendant, and Respondent Jane Doe's subsequent civil action against Defendant, Cross-Plaintiff, and Petitioner Curtis Olson seeking damages for sexual assault and harassment was not privileged under Civil Code section 47(b) and that Olson's cross-claim for breach of the agreement could proceed. As Doe explained in her opening brief, the court of appeal's holding was first incorrect because this Court's decisions all but ordain, and prevailing court of appeal and out-of-state precedent holds, that the litigation privilege will bar derivative breach of contract claims like Olson's unless the opponent clearly waived the privilege's applicability and enforcing such a waiver is consistent with public policy. (OB 25-46.)[1]

The court's decision was also wrong because, with or without the litigation privilege, the generic non-disparagement clause in the parties' stay-away agreement, as a matter of law, did not waive Doe's fundamental right to

[1] "OB" refers to Doe's Opening Brief on the Merits and "AB" to Olson's Answering Brief on the Merits—both filed with this Court. All other references are as defined in footnote 1 of the opening brief. All such references are followed by the applicable page reference.

file suit and was therefore no basis to permit Olson's breach of contract claim to proceed. (OB 46-61.) Finally, even if the stay-away agreement had somehow been a waiver, public policy still demands that the litigation privilege bar Olson's retaliatory contract claim. (OB 62-68.)

1. With respect to the first issue presented, Olson attempts to defend the court of appeal's holdings on the basis that "as a general rule, the litigation privilege . . . does not apply to contract claims." (AB 26.) But if it did, Olson says, any application should be limited first to "[o]nly breach of contract claims where the gist sounds in tort, not contract" (AB 43) or, "alternatively," where the contract "does not 'clearly prohibit' the challenged conduct, and . . . applying the privilege furthers the policies underlying the privilege." (AB 48.)

a. Olson's arguments about why the litigation privilege should not apply to contract claims "as a general rule" are unpersuasive. Applying the privilege to contract claims is no less consistent with the "vital public policy" of ensuring access to the courts and other official bodies than is applying it to tort claims. (*Ribas v. Clark* (1985) 38 Cal.3d 355, 364-365.) Unlike Olson's "general rule," which will chill such access, Doe's proposed rule appropriately balances the right of access with policies favoring freedom to contract by providing that the privilege will apply absent a clear waiver that is consistent with public policy.

b. Olson's first "alternative" that the privilege should at most apply only where the contract claim "sounds in tort, not contract" is incoherent because there is no species of contract claim that "sounds in tort." Moreover, the argument is contradicted by precedent because, as this Court has repeatedly held, the litigation privilege protects petitioning and related *conduct*—not against only *claims* labeled a certain way—and it does so whether the challenged conduct is truthful or dishonest, lawful or unlawful. Finally, the argument is unsupportable on this record because, as Olson has repeatedly asserted, his claim is based on, and seeks a "penalty of . . . damages" for, the reputational harm that Doe's allegedly false allegations have caused him. (AB 57.)

c. Olson's second "alternative" that the privilege should apply only absent a "clear[] prohibit[ion]" of the challenged conduct and when applying it furthers the privilege's underlying policies does not advance his case either. That rule is materially indistinguishable from the one that Doe advances and, under it, she prevails.

2. With respect to the second issue presented, Olson barely offers any relevant argument. Nowhere does he address the text of the parties' stay-away agreement, the civil harassment restraining order context in which it was reached, the statutory backdrop for such proceedings, or the contemporaneous understanding of the parties and how those interpretive tools compel the conclusion that, as a mat-

ter of law, there was no breach because Doe did not clearly and expressly waive her right to sue. For that reason alone, however this Court resolves the scope of the litigation privilege, the judgment of the court of appeal must be reversed and Olson's retaliatory breach claim be ordered dismissed.

Instead of addressing the stay-away agreement, Olson seizes on the court of appeal's rejection of his specific performance claim and reimagines the agreement as somehow permitting him to sue Doe in parallel and impose a "penalty of contract damages" if she proves unsuccessful. Not only is that reimagination contrary to how the agreement must be analyzed, but it would amount to an impermissible end-run around the strictures for a malicious prosecution claim, which this Court has described as "essential to assure free access to the courts" and "protecting the right to judicial relief." (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194.)

3. Finally, with respect to public policy, Olson argues it would be "unfair" to allow Doe to pursue her claims against him without allowing him to pursue his counter-claim, or without her having shielded his identity. (AB 60, 64) There is, however, nothing unfair about ensuring that a victim of sexual assault and harassment—issues of indisputable public importance—who agreed to only a mutual stay-away and non-disparagement agreement has unencumbered access to the courts to seek redress for the damage done to her. Indeed, it would violate public policy if—as Olson suggests—a

court-appointed mediator were involved in convincing an unrepresented petitioner into waiving her litigation rights in exchange for the safety and security of a stay-away agreement. Moreover, even if this Court perceived some unfairness in not permitting Olson to proceed in parallel, precedent does not permit it. This Court favors "the original litigation itself" over derivative counter-claims and, accordingly, has applied the litigation privilege to numerous assertedly "unfair" scenarios. (*Rubin*, *supra*, 4 Cal.4th at p. 1203.)

Olson's argument—penned for the first time despite three years of litigation—about Doe naming him publicly does not change the calculus. The belated argument is waived, and no precedent recognizes that the applicability of the litigation privilege may turn on suing pseudonymously.

For the foregoing reasons and those stated in Doe's opening brief, the Court should reverse the court of appeal's judgment and order Olson's retaliatory breach claim dismissed.

ARGUMENT

I. California's Litigation Privilege Applies to Derivative Contract Claims, Absent a Clear and Express Waiver that Is Consistent with Public Policy.

As Doe explained in her opening brief, California's litigation privilege should apply to derivative contract claims, absent a clear and express waiver that is consistent with

public policy. (OB 28-37.) This rule flows naturally from this Court's repeated expressions that the privilege has an "expansive reach" to promote "the broadly applicable policy of assuring litigants the utmost freedom of access to the courts to secure and defend their rights." (*Rubin*, *supra*, 4 Cal.4th at p. 1194, quotation omitted; see generally OB 27-29.) This rule also reflects the prevailing view of the courts of appeal that have actually grappled with the issue. (OB 31-37 [analyzing *Wentland v. Wass* (2005) 126 Cal.App.4th 1484, *Feldman v. 1100 Park Lane Assocs.* (2008) 160 Cal.App.4th 1467, *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, and *McNair v. City & County of San Francisco* (2016) 5 Cal.App.5th 1154].) Olson's suggestion that Doe is somehow asking the Court to apply a "blanket litigation privilege to breach of contract claims" (AB 20, 43) is a red herring that mischaracterizes Doe's position.

Beyond misstating Doe's position, Olson argues that (1) the litigation privilege "as a general rule" should not apply to contract claims (AB 26-27) and (2) in the alternative, it "should apply only to breach of contract claims where the gist sounds in tort, not contract," and the claim is equivalent to one for defamation. (AB 43; see also AB 30-32.) As explained below, neither argument succeeds. Among other things, the rule articulated by Doe—that the litigation privilege applies absent a clear and express waiver that is consistent with public policy—better balances the fundamental

right of access to the courts with the policy favoring the freedom of contract. And the "gist" of Olson's non-disparagement claim *is* that Doe has defamed him and harmed his reputation by bringing her suit. Olson's third, fallback argument itself advocates for a rule meaningfully indistinguishable from Doe's—*i.e.*, that the privilege does not apply if the contract "clearly prohibits" the allegedly breaching conduct and "applying the privilege furthers [its] policies" (AB 47-48)—and would necessarily require reversal in this case.

A. Olson Fails to Offer Any Persuasive Basis for a Categorical Rule that the Litigation Privilege Does Not Apply to Contract Claims.

1. Applying the Litigation Privilege to Contract Claims Is Consistent with the Policy of Ensuring Access to the Courts.

This Court has held that the litigation privilege rests on the "vital public policy" (*Ribas, supra,* 38 Cal.3d at pp. 364-365) of "promot[ing] the effectiveness" of judicial and other official proceedings "by encouraging 'open channels of communication and the presentation of evidence'" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213, citation omitted). "Such open communication is 'a fundamental adjunct to the right of access to [such] proceedings,'" and "the 'external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice.'" (*Ibid.*, citations omitted.)

Olson suggests that "contract claims do not implicate the policy of providing free access to the courts" because a contractual dispute between private individuals does not involve "community concerns" (AB 27-28) and because contract damages are more limited than tort damages (AB 35). Neither argument withstands scrutiny.

First, the ability to bring a lawsuit for torts clearly can implicate community concerns. Olson acknowledges that "[t]ort law advances the social policy of preventing various types of harm to society's members" (AB 27), and here, Doe brought tort claims alleging sexual violence and a pattern of harassment. Whether victims of sexual assault and harassment have access to court and are not silenced is clearly a matter of significant public concern. (OB 64-65.) The fact that *Olson* is asserting a contract claim *against Doe* does not vitiate the public policy or "community concerns" supporting Doe's right of access to pursue her underlying claims against him.

In this respect, this case is squarely in line with *Vivian*, which involved statements during a Sheriff's Department investigation and in family court about harassment, stalking, and threats of violence. (214 Cal.App.4th at pp. 270, 273-275.) *Vivian* observed that, unlike a typical commercial dispute, the case obviously "involve[d] a significant public concern," and thus applying the litigation privilege to

the contract claim there served "[t]he public purpose" and "the policies underlying the privilege." (*Id.* at pp. 276-277.)

As the opening brief reflects, cases applying the litigation privilege to contract claims reflect various situations in which it clearly promotes public policy to ensure that people have access to the courts and other official bodies and can speak on matters of public concern without fear of a derivative suit in contract. (OB 33-42.)

Second, it is no answer for Olson to say that contract damages are traditionally more limited than tort damages and thus purportedly present "no chilling effect." (AB 34-35.) Here, Olson filed a contract claim that, in his own words, is intended to impose a "penalty of contractual damages" for Doe's alleged wrongful disparagement of him. (AB 57.) And the damages he alleges are substantial, as they are based on alleged harm to his reputation and its consequential financial effect on his business affairs. (AA 49 [alleging general and consequential damages]; AA 184 [declaring that Doe's complaint "negatively impact[s] my relationships with existing and prospective lenders, investors, and other third parties with whom my company and I transact business," "thereby putting my entire business and livelihood at risk"].) These are the same kinds of damages that are normally sought for tort claims alleging defamation and interference

with prospective economic advantage, and which can be significant, even without punitive damages.[2]

When an ordinary person is threatened with monetary damages—in whatever amount—that is clearly likely to have a chilling effect even on meritorious claims and truthful complaints. That is particularly true in a case like this, where Doe is proceeding *in forma pauperis* and alleging claims based on sexual assault and harassment. There are countless situations in which a party is telling the truth but fears she will not be believed and that her lawsuit will be unsuccessful. The threat that an unsuccessful lawsuit will result in potentially ruinous personal liability will obviously chill meritorious suits.

Indeed, Olson himself frames the inquiry as "whether Doe can *afford* to shoot and miss if her accusations prove false, given the specter of liability for [his] breach of contract damages." (AB 60, emphasis added.) That is *precisely* the chilling effect the litigation privilege is designed to avoid because it presents the same "external threat" to the "fundamental" "right of access" to judicial proceedings that would

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[2] (See, e.g., *King v. U.S. Bank Nat'l Ass'n* (2020) 53 Cal.App.5th 675, 720, *as modified on denial of reh'g* (Aug. 24, 2020), *review filed* (Sept. 4, 2020) [involving $4 million jury award for "reputation damages" from defamatory statement].)

be presented in a case for defamation or other torts.[3] (*Silberg*, *supra*, 50 Cal.3d at p. 213.)

2. Doe's Rule—Applying the Litigation Privilege Except Where Clearly Waived—Properly Balances the Fundamental Right of Access to the Courts with Policies Favoring the Freedom to Contract.

Olson's second argument against applying the privilege to contract claims is that "the policy of encouraging freedom to contract—for parties to freely make and enforce 'private law'—generally outweighs the policies underlying the litigation privilege." (AB 27.) In support, Olson contends that the litigation privilege does not apply to contract claims because "[i]n 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." (AB 28, emphasis added.) Olson then quotes *Wentland* for the proposition that "'one who validly contracts not to speak

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[3] Olson suggests that not applying the privilege to his contract claim is equivalent to not applying it to a malicious prosecution suit. (AB 38.) But there is a very significant difference. Malicious prosecution requires that the underlying action be (1) brought with malice, (2) brought without probable cause, and (3) resolved in the defendant's favor. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) Those requirements, this Court has said, are "essential to assure free access to the courts." (*Rubin*, *supra*, 4 Cal.4th at p. 1194.) Olson's breach claim lacks each of those essential elements and would result in damages based merely on Doe's inability to prove her claims—even if the lawsuit had a reasonable basis.

waives . . . the protection of the litigation privilege,'" and thus allowing a claim for breach of contract in such cases "does not *improperly* limit the party's access to the courts." (AB 29, quoting 126 Cal.App.4th at p. 1494.)

Even in his own framing, however, Olson characterizes contractual limits on the privilege as an issue of waiver of a fundamental right—not as a categorical rule against the litigation privilege applying to contract claims. After all, *Wentland* is a waiver case that recognizes the privilege may apply to contract claims in certain situations (OB 31-33),[4] and subsequent cases have cited *Wentland* as consistent with applying the privilege to contract claims, absent a clear waiver that is consistent with public policy (OB 33-39). Olson's analogy to a waiver of free speech and the right to jury trial further concedes that Doe's articulation of the rule is correct because the law is well-settled that any waiver of fundamental rights must be clear, express, and consistent with policy. (Compare AB 28-29 with OB 47-48.)

And critically, Olson nowhere explains how Doe somehow voluntarily contracted away her litigation rights. He simply assumes throughout his brief that by agreeing "not to

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[4] *Wentland* declined to apply the privilege "in *this* breach of contract case" because, as part of a commercial contract, sophisticated plaintiffs had waived the privilege's application in exchange for valuable consideration and expressly resolved "the truth" of the parties' respective assertions. (126 Cal.App.4th at p. 1494; see also OB 32-33.)

disparage" him for three years, she did so. As shown in Doe's opening brief and below, nothing in the text of the parties' stay-away agreement, the civil harassment restraining order context in which it was reached, the statutory backdrop for such proceedings, or the contemporaneous understanding of the parties suggests any "voluntary relinquish[ment]" in this case. (See OB 46-61; *infra*, at pp. 32-33.)

Therein lies the fundamental problem with Olson's argument that the litigation privilege *as a rule* does not apply to contract claims. If Olson is relying on a party's ability to freely relinquish her fundamental rights, then that policy is properly served by applying the litigation privilege to contract claims, except where there has been a clear and unambiguous waiver that is consistent with public policy. Olson's categorical rule, in contrast, would mean that the litigation privilege does not apply to *any* contract claim in any circumstance. Indeed, if Olson were correct, then the privilege would not apply to contract claims based on testimony to the Legislature, complaints to a public agency, or testimony as witness. But neither Olson nor the court of appeal goes that far.

In this respect, it is also unavailing for Olson to argue that the anti-SLAPP statute, by itself, provides sufficient protection because only potentially meritorious contract claims can survive the second stage of the analysis. (AB 33.) One could make the same argument that the anti-SLAPP

statute obviates the need for the litigation privilege for defamation or tort claims too, because only potentially meritorious defamation or tort claims will proceed. Yet nobody believes that the anti-SLAPP statute was intended as a substitute for the protections provided by the litigation privilege. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322 ["[T]he litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes."].) Moreover, the court of appeal's decision below illustrates the problem with relying on the anti-SLAPP statute by itself: the court agreed with Doe that she had "valid arguments" against Olson's broad reading of the non-disparagement clause, but having already found the litigation privilege inapplicable, it then allowed Olson's claim to proceed because, in the court's view, the contract was ambiguous and thus Olson's claim "shows the requisite 'minimal merit'" under the second step of the anti-SLAPP analysis. (Op. 22-24.)

The rule set forth in Doe's opening brief properly aligns the competing policies of the fundamental right of access to courts and the right to contract by applying the litigation privilege except where there is a clear waiver that is consistent with public policy. A party asserting a contract claim based on the filing of a lawsuit may proceed and can survive the second step of the anti-SLAPP analysis upon a proper showing but not where (as here) the basis for the claim is a generic non-disparagement clause without a clear waiver.

B. Olson's Alternative Rule—that the Litigation Privilege Applies to Only Contract Claims Where the "Gist" Sounds in Tort and Defamation—Cannot Save His Claim.

Falling back from any categorical rule, Olson argues that if the litigation privilege applies to contract claims, it should "apply only to breach of contract claims where the gist sounds in tort, not contract." (AB 43.) Elaborating on this theory, Olson argues that contract claims should be barred only "where the gist or essence of a plaintiff's claim is a defendant engaging in litigation speech that defamed or tortiously harmed a plaintiff" (AB 42-43), or even more narrowly stated, where the claim involves an "'identical grievance arising from identical conduct' as a defamation claim" (AB 45; see also AB 31-33 [arguing that there is "no meaningful risk that a plaintiff will bring a claim for breach of contract as an artfully pleaded claim challenging defamatory speech"]). And he contends that his contract claim does not sound in tort or implicate the purposes of the litigation privilege because his claim does not depend on the *falsity* of Doe's accusations—only the fact that she made them in her complaint, allegedly in violation of the stay-away agreement. (AB 44-45.) On several levels, these arguments make no sense.

First, it is incoherent to say a contract claim qualifies for the litigation privilege only if it "sounds in tort, not contract." If a party states a claim based on a contractual prom-

ise, it sounds in contract; if a party states a claim based on an independent common law duty, it sounds in tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.) There are situations when the same circumstances may give rise to claims sounding in both contract and in tort, but with somewhat different elements and burdens of proof. But Olson cites no case describing some species of contract claim that actually "sounds in tort, not contract." Nor does he purport to reconcile his rule with the case law applying the litigation privilege to contract claims—like *Vivian* (which also involved a generic non-disparagement clause), *Feldman*, or *McNair*—or explain why those cases somehow "sound in tort, not contract," whereas essentially identical claims here do not.

Second, Olson misunderstands the history and policies underlying the litigation privilege in suggesting that it has been extended to *only* torts involving an "'identical grievance' … as a defamation claim," where falsity is an element of the claim. (AB 45.) For example, the privilege has been extended to claims for invasion of privacy, intentional interference with contract, and intentional infliction of emotional distress, where falsity is not an element and the "gist" of the claim was not that speaker told a lie, but *told the truth*. (See *Silberg*, *supra*, 50 Cal.3d at p. 215 [summarizing types of claims to which the privilege applies]; *Ribas*, *supra*, 38

Cal.3d at p. 358 [holding that litigation privilege protected claims against witness who "testified to her recollection of the conversation on which she had eavesdropped"].) As *Ribas* explained, "although the statutory privilege accorded to statements made in judicial proceedings appears in the code in the chapter on defamation, it applies to virtually all other causes of action, with the exception of an action for malicious prosecution." (*Id.* at p. 364.)

That is not because the privilege exists to protect *false* speech, but to promote "the vital public policy of affording free access to the courts." (*Id.* at pp. 364-365.) Olson's own brief quotes case law for the point that the litigation privilege exists "not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned" with a retaliatory lawsuit. (AB 43, quoting *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 99.) The policy of protecting an "honest" person's access to court applies regardless of whether the threatened derivative claim is based in contract or tort. In this respect, Olson's argument gets it backwards: He contends that the privilege protects against only false statements made in court, but if a party alleges a breach of contract based on *truthful* statements to a court (or agency), then the claim does not sound in tort and the privilege somehow evaporates.

This Court's decision in *Rubin* is illustrative. There, the plaintiff sought to enjoin a law firm and its agent under the Unfair Business Practices Act from "soliciting" residents of a mobile home park to file suit against the park's owners. (*Rubin*, *supra*, 4 Cal.4th at p. 1196.) As *Rubin* explained, "the gravamen of plaintiff's complaint is not that the claims of the [residents] are themselves groundless," but that the defendants used wrongful means in soliciting "potentially *meritorious* claims." (*Id.* at pp. 1196-1197.) And because both the challenged conduct involved communications in furtherance of a judicial proceeding and the plaintiff had merely used "a conveniently different label" (the Unfair Business Practices Act) "for pleading what is in substance an identical grievance arising from identical conduct" (the tort of "solicitation") "as that protected by section 47(b)," this Court found the defendants' conduct privileged. (*Id.* at pp. 1196, 1202-1203.) Contrary to what Olson asserts, the point in *Rubin* was not that the claim involved "an 'identical grievance arising from identical conduct' *as a defamation claim*" (AB 45, emphasis added), but that a party's freedom to pursue litigation does not disappear simply because the plaintiff imagines an alternative label outside of tort law for challenging the person's *litigation conduct*.

Third, the "gist" of Olson's non-disparagement claim clearly is the functional equivalent to a claim for defamation

and other torts covered by the privilege. Although Olson argues that falsity is not an element of his claim for non-disparagement (AB 31-32), Olson himself repeatedly characterizes his claim and asserted damages as based on the alleged falsity of Doe's accusations. (E.g., AB 24 ["Her untrue accusations put Olson's entire business at risk, so he cross-claimed against her for damages."].)

Moreover, the damages Olson alleges are the equivalent to those normally sought in tort. Olson is not seeking the benefit-of-the-bargain differential between the contract price and actual value of widgets that Doe delivered. He is seeking damages based on a claim that allegedly false accusations have caused him "significant harm, personally and professionally" (AA 184)—precisely the type of reputational harm that is the gravamen of a defamation claim. Olson is also seeking damages based on the notion that Doe's accusations "affect[] 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." (AA 184.) That is equivalent to a claim for tortious interference with prospective economic advantage, which is also subject to the privilege. (*Silberg*, *supra*, 50 Cal.3d at p. 215.)

At bottom, Olson's claim is one for wrongful "disparagement," asserting that allegedly false accusations levied in a court proceeding have caused reputational harm and interference with his prospective business relationships. It is

hard to imagine any case in which a "contract" claim were more equivalent to a claim for defamation or sounded more "in tort." As this Court explained in *Rubin*, *supra*, 4 Cal.4th at p. 1203, "[i]f the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity 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)."

C. Doe's Approach Is the Same as Olson's "Clearly Prohibits" Standard and Is Consistent with Prevailing Case Law.

Finally, Olson falls back to advocating, "[a]lternatively," for a standard under which 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.'" (AB 48, quoting *Crossroads Investors, L.P. v. Federal National Mortgage Ass'n* (2017) 13 Cal.App.5th 757, 787.) Initially, Olson acknowledges that these "two conjunctive requirements" were "identified" in the very court of appeal decisions embodying the rule proposed by Doe. (AB 47.) Yet he fails to provide any meaningful explanation why those cases would not require applying the privilege here.[5] Olson is also

[5] Olson's only response to three of those four decisions—*Vivian*, and *Feldman, McNair*—is to acknowledge (buried in

wrong to suggest that *Crossroads Investors*, a handful of California cases that he newly cites, and out-of-state authority support a rule different from Doe's. (AB 48.)

For starters, *Crossroads Investors* is consistent with Doe's position: the Third District held that the litigation privilege applies to derivative contract claims, unless "one *expressly contracts* not to engage in certain speech or petition activity." (13 Cal.App.5th at p. 787, emphasis added.) Additionally, *Crossroads Investors*—as Olson acknowledges—simply paraphrased *Vivian*, the case most similar to this one. (AB 48.)

To be sure, *Crossroads Investors* declined to apply the privilege to certain of the contract claims at issue. But that case involved a commercial transaction between sophisticated parties and allegations that the defendant breached a deed of trust based on the manner in which "it conducted a non-judicial foreclosure." (*Id.* at p. 788.) The court found that claims relating to the conduct of the foreclosure were not barred by the litigation privilege, whereas allegations based on litigation conduct itself (responses to interrogatories) were. (*Ibid.*) Neither the holding, the rationale, nor the facts of *Crossroads Investors* is inconsistent with Doe's position or supports finding a waiver of the litigation privilege as to Doe's litigation conduct.

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a footnote) that they found no clear waiver of the defendant's petitioning rights. (AB 48, fn. 8.)

Olson is also wrong to assert that "[*m*]*ost* intermediate appellate opinions cited by Doe do not address the specific question of whether the litigation privilege applies to contract claims." (AB 40, citing OB 29, emphasis added.) As Doe's detailed discussion of *Wentland*, *Feldman*, *Vivian*, and *McNair* showed, those decisions did address whether the litigation privilege applies to contract claims, holding that it applies absent a waiver that is consistent with public policy. (OB 31-37.) And the facts here are consistent with the holdings in *Feldman*, *Vivian*, and *McNair* that there was no sufficiently clear waiver (in contrast to the commercial transaction in *Wentland*, where there was such a clear waiver).

None of the California cases that Olson newly invokes (AB 41-42) is inconsistent with the legal standard presented by Doe. The first three are consistent on their face. (*ITT Telecom Prods. Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 312, 318-320 [express trade secret protection provision in employment contract, the enforcement of which was consistent with Evidence Code § 1060 (protecting trade secrets)]; *Bardin v. Lockheed Aeronautical Sys. Co.* (1999) 70 Cal.App.4th 494, 501, 504-505 [express release of "any and all liability" in employment application, the enforcement of which was consistent with Government Code § 1031.1 (qualifications for peace officers)]; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869 [express "confidentiality agreement" from prior unsuc-

cessful mediation, the enforcement of which was consistent with "the statutory limits on the content of mediators' reports"].) And the remaining two are wholly irrelevant to the issues here. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 395, 406 [litigation consultancy agreement sought to be enforced by client against its retained expert based on expert's professional malpractice]; *Sanchez v. County of San Bernardino,* (2009) 176 Cal.App.4th 516, 528, fn. 3 [concerning the "discharge of an official duty" privilege under section 47(*a*)—not section 47(*b*)'s litigation privilege].)

Olson's mischaracterization of out-of-state authority is even more blatant. He asserts that "sister courts" in other states "have directly considered whether the litigation privilege should apply to contract claims and *uniformly* concluded it should not." (AB 41, emphasis added.) But as Doe's survey of applications of *over a dozen* other states' law established, "courts across the country" "follow the same rule" as the one she advances. (OB 38-42.) Olson ignores those authorities altogether and instead offers applications of three other states' law that, like his newly cited California authorities, are not inconsistent with Doe's standard. One is consistent. (*Tulloch v. JPMorgan Chase & Co.* (S.D. Tex., Jan. 24, 2006, No. H-05-3583) 2006 WL 197009, at p. *7 [release with confidentiality provision in exchange for $42,250].) Another is wholly irrelevant. (*deBarros v. Walmart Stores, Inc.* (D. Or. 2012)

857 F.Supp.2d 1109, 1112-1113 ["declin[ing] . . . to examine the merits of plaintiff's absolute privilege argument" because it was "superfluous"].)

And while *Sun Life Assurance Co. of Canada v. Imperial Premium Finance, LLC* (11th Cir. 2018) 904 F.3d 1197, would appear at first glance to support Olson's position, the Eleventh Circuit's analysis and Florida precedent on which it relied establish the opposite. There, the Eleventh Circuit refused to apply Florida's litigation privilege to bar a counter-claim that the plaintiff's earlier suit seeking to void the defendant's insurance policies breached an incontestability clause. But in surveying Florida law, the Eleventh Circuit noted and analyzed *James v. Leigh* (Fla.Ct.App. 2014) 145 So.3d 1006, which had applied the privilege to the petitioner's statements about his former law partner in proceedings the petitioner had initiated in divorce court, notwithstanding a "non-disparagement" agreement between the two. The Florida Court of Appeal "reject[ed the] contention that petitioner waived the absolute litigation privilege by entering into the non-disparagement agreement" because "the absolute litigation privilege is a firmly established right of immunity designed to protect the public by ensuring the free and full disclosure of facts in the conduct of judicial proceedings" (*id.* at pp. 1008-1009) and constraining the petitioner's presentation of his case in dissolution proceedings "either [through] defamation or breach

of contract" "could have a serious 'chilling effect'" (*Sun Life*, *supra*, 904 F.3d at p. 1219, quoting *James*, *supra*, 145 So.3d at p. 1008).

All-in-all, Olson's third, "alternative" rule is no alternative at all. It is meaningfully indistinguishable from Doe's proposed rule, which is consistent with the prevailing view in California and in sister jurisdictions.

II. The Parties' Mediated Stay-Away Agreement Does Not Expressly and Unambiguously Waive or Impair Doe's Right to Bring the Underlying Lawsuit and, Thus, Cannot Support Olson's Contract Claim.

As described by this Court, the second issue presented is whether "an agreement following mediation between the parties in an action for a . . . restraining order, in which they agree not to disparage each other, bar[s] a later unlimited civil lawsuit arising from the same alleged sexual violence." That framing is consistent with how the court of appeal described the issue: whether, "when Doe signed the nondisparagement provision, she waived her right to use such disparaging comments in future litigation." (Op. 23.)

Olson makes little attempt to confront the issue presented. He passingly asserts that a non-disparagement clause should be construed broadly, unless the party negotiates for express limitations on "the time, place, or manner of the agreed upon restriction on the party's speech." (AB 50.) Elsewhere, however, Olson appears to concede that the

clause "does not operate to 'bar'" Doe's civil suit (AB 57; accord AB 59), and instead argues that it operates as mechanism to impose a "penalty of contract damages" if Doe's civil suit is unsuccessful. (AB 58-60.) Neither argument has any merit.

A. Even Without the Litigation Privilege, Olson's Contract Claim Fails as a Matter of Law Under Basic Contract Principles.

As Doe explained in her opening brief, with or without the operation of the litigation privilege, the non-disparagement clause did not waive Doe's right to sue Olson, independently defeating his breach claim. (OB 46-61.)

It is well-settled that "contracts must be strictly construed against waiving constitutional or statutory rights"—like the section 47(b) privilege or the First Amendment right to petition courts—"unless the waiver is clear and unambiguous." (OB 47.) Olson's argument that a non-disparagement clause should be given the broadest possible reading, absent an express reservation preserving one's petitioning rights (AB 50), gets the law backwards.

Moreover, as Doe established in her opening brief and Olson does not refute, the context, language, and understanding of the parties all establish that there was no waiver here:

- The context of the stay-away agreement was a civil harassment restraining order proceeding, the purpose of which is to avoid an imminent risk of harm,

and the statutory scheme expressly contemplates a petitioner like Doe "using other existing civil remedies." (OB 53, quoting Code Civ. Proc. § 526.7, subd. (w).)

- The basis for the contract claim is an entirely generic non-disparagement clause that does not refer to barring a subsequent civil action; to the contrary, the text of the stay-away agreement itself contemplates potential future legal proceedings. (OB 53-57.)

- There were no other circumstances suggesting that Doe knowingly and voluntarily impaired her right to bring a subsequent lawsuit: *e.g.*, she did not receive monetary consideration, was not represented by counsel, and did not sign a general release. Nor was there a stipulated set of facts or any suggestion by the court-appointed mediator that, by signing the agreement, she would impair her right to bring a subsequent action. To the contrary, the mediator informed her that she could do so. (OB 16-17, 51-61 & fn. 11.)

Under these circumstances, there is no plausible argument that Doe knowingly and voluntarily relinquished or impaired her right to sue Olson.[6]

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[6] Indeed, the court of appeal below did *not* find that the stay-away agreement amounted to a waiver. (Op. 23.) Instead, it held that scope of the agreement's terms was subject to competing interpretations for a "factfinder" to resolve. (*Ibid.*) The latter conclusion was error because, absent conflicting extrinsic evidence as to the parties' intent, the interpretation of a contract presents a pure issue of law. (See, e.g., *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) And here the only extrinsic evi-

B. Olson Cannot Save His Claim By Reimagining the Stay-Away Agreement as Authorizing Penalties for an Unsuccessful Suit.

Likely recognizing that he has no contract interpretation argument, Olson concocts a new theory based on the court of appeal's ruling. He contends that, because the court rejected his specific performance claim, its "judgment . . . does not bar [Doe's] unlimited civil action from proceeding." (AB 59.) Thus, his new theory is that the agreement allows him to sue in parallel to Doe's claims, and to recover contract damages as a "penalty" if Doe cannot prove her claims. (AB 59-60.) That argument fails for largely the same reasons as above: it constitutes an impermissible impairment of Doe's litigation rights and lacks any basis in the stay-away agreement.

First, a party's fundamental right of access to the courts includes the right to bring a lawsuit without fear of penalty or liability from losing, except in limited circumstances. (*Rubin*, *supra*, 4 Cal.4th at p. 1194 [emphasizing "the importance of virtually unhindered access to the courts"].) Thus, a person bringing a tort claim cannot be sued for malicious prosecution absent a showing that the suit was brought with "malice" and "without probable cause," and was resolved in the defendant's favor—restrictions that this

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dence is undisputed and supports Doe. (See OB 16-17 & fn. 2, 60-61 & fn. 11 [explaining Olson's failure to controvert Doe's extrinsic evidence].)

Court has called "essential to assure free access to the courts" and "protecting the right to judicial relief." (*Ibid.*, citation and alterations omitted.) And this Court has rejected claims that seek to impose liability on the filing of a lawsuit based on a lower of burden of proof, thus "remov[ing] existing barriers to the maintenance of malicious prosecution actions." (*Ibid.*)

Here, Olson's new contract theory may not "bar" Doe's suit itself, but it still operates to effectively waive her defenses to malicious prosecution and thus impairs her fundamental right of access. Indeed, the only thing worse than interpreting a generic non-disparagement agreement as waiving an abuse survivor's right to sue is to interpret it as containing a poison pill that threatens them with significant liability if they do. That is not and cannot be the law.

Second, Olson's new contract theory finds no basis whatsoever in the terms or context of a stay-away agreement. He cites no case interpreting a generic non-disparagement clause as creating a *sui generis* damages regime for a prevailing defendant. And he fails to explain why that would be a reasonable interpretation for an agreement arising out of the context of a petition for a civil harassment restraining order, which by statute and the terms of the agreement is *not* intended to affect other remedies. (See *supra*, at pp. 32-33.)

While non-disparagement clauses are useful in trying to keep the peace and maintain the status quo in a mediated stay-away agreement, they should not be construed so broadly as to impair fundamental litigation rights absent a clear and express waiver. No such intent appears on the face of the stay-away agreement here, regardless of whether the issue is framed around a "bar" to suit or Olson's ability to threaten Doe with the "penalty of contract damages" if she is unable to prevail. Accordingly, with or without the operation of the litigation privilege, Olson's breach claim cannot proceed as a matter of law.

III. Public Policy Demands That Doe's Claims Be Privileged.

As Doe explained in her opening brief, public policy demands that the litigation privilege protect her civil suit from Olson's retaliatory breach of contract claim because: (1) Doe's allegations of harassment and sexual violence indisputably implicate an issue of significant public concern; (2) access to civil courts without fear of retaliatory, derivative litigation is essential to ensuring that victims of such misconduct have adequate remedies available to redress the harm done to them; and (3) it would violate public policy if a court-approved mediation program were permitted to coax restraining-order petitioners into waiving their rights to bring a civil action in exchange for the immediate security of a stay-away agreement. (OB 62-66.)

Olson does not address any of these important public policy considerations. Instead, he extolls the general importance of the freedom to contract and asserts that removing his desired "penalty of contract damages" (AB 57) by "immuniz[ing]" Doe's lawsuit under the litigation privilege would be "unfair" (AB 60). He further claims this would be even more "unfair" because Doe sued under a pseudonym but named him publicly. (AB 64.) Olson's unfairness argument is wrong as a matter of policy and contrary to precedent interpreting and applying the litigation privilege; his pseudonym-based argument is waived and entirely without support.

A. Olson's "Unfairness" Arguments Are Wrong and Not Cognizable Under the Litigation Privilege in Any Event.

Public policy demands that victims of sexual assault and harassment be given unencumbered access to civil courts to seek redress for the harm done to them. Public policy so demands not only because sexual assault and harassment are irrefutably matters of public importance—as the Legislature has recognized through its amendment to section 1001 of the Code of Civil Procedure and enactment of 1670.11 of the Civil Code—but also because of the inability of criminal and restraining order courts to provide victims full relief. (OB 63-66.) Olson does not address any of these points. Instead, he expressly advocates for a regime under

which a generic non-disparagement clause in a stay-away agreement intended to expeditiously secure personal safety can cause the victim to face a "penalty of contract damages" simply because she later sought compensation to make herself whole. (AB 57.)

It is the regime for which Olson advocates that is "unfair." And while it has not chilled Doe's pursuit of redress here, it will no doubt chill and deter many others in Doe's position. None of this is to suggest that alleged perpetrators of abuse, harassment, or discrimination are without their own remedies if their accusers cannot substantiate their claims; following termination in their favor, they may be able to sue for malicious prosecution (assuming they can show malice and a lack of probable cause). Both this Court and the courts of appeal recognize that this is the orderly way to proceed in such cases.

As this Court explained in *Rubin*, application of the litigation privilege "is necessary" not just "to secure the greater interest in ensuring unhindered access to the courts, but also because . . . *the original litigation itself* provides an efficient forum in which to 'expos[e] during trial the bias of witnesses and the falsity of evidence.'" (4 Cal.4th at p. 1203, citation omitted.) That, in turn, "'avoid[s] an unending roundelay of

litigation,'" which this Court has repeatedly described as "'an evil far worse than an occasional unfair result.'"[7] (*Ibid.*)

To this end, California courts have applied the litigation privilege to numerous scenarios in which its application has been assertedly unfair, including numerous cases involving "fraudulent communications or perjured testimony" and "abuse of process" (*Silberg*, *supra*, 50 Cal.3d at 218 [collecting cases]), and where the challenged communication "violated" "confidentiality laws" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 958). The courts of appeal have also repeatedly rejected attempts to avoid the privilege's application where the claims underlying the protected activity "lacked evidentiary merit."[8] (*RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co.*, (Cal.Ct.App. Oct. 23, 2020) No. D075615,

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[7] Although Olson asserts that Doe's lawsuit undermines the finality of the restraining order judgment, given the limited nature of the restraining order proceedings and the resulting stay-away agreement, it is Olson's counter-complaint and his election to appeal its dismissal that spawned the current "roundelay of litigation" and stalled Doe's lawsuit for over three years. (*Rubin*, *supra*, 4 Cal.4th at p. 1203.)

[8] As to the merits of Doe's allegations, Olson points to his evidence that "he was in Orange County with his children when Doe's September 2015 attack supposedly took place in Los Angeles." (AB 60, citing AA 182, 195-200.) But as Doe has explained repeatedly to this Court, the court of appeal, and the superior court, Olson assaulted her in May—not September—2015. (OB 15; RB 6, 14; AA 16-17.) Olson's supposed alibi in September 2015 is thus no alibi at all.

2020 WL 6253236, at *13 [certified for publication]; see also *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 667 ["there is no 'lack of evidentiary merit exception'"]; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 25 ["Any deficiencies . . . were a matter of defense to the action and did not militate against the privilege."].)

At bottom, there is nothing unfair about Doe's proposed rule. It properly recognizes that the alleged transgression of someone in Doe's position occurs—if at all—through petitioning, an activity that needs breathing space so it is not chilled, whereas Olson's transgression occurred through physical violation of Doe's person and privacy, which deserves no special state solicitude. If Olson prevails in this case, he is free to pursue a claim for malicious prosecution, provided that he can meet the rigorous requirements of stating such claim. But it makes no sense to say that a stay-away agreement—reached through a court-appointed mediation program for the purpose of expeditiously resolving a civil harassment restraining order petition—was intended to give the alleged abuser special rights to pursue what is effectively a malicious prosecution claim without the burden of proving it.

B. Olson's Arguments Relating to Concealing His Identity Are Waived and Meritless in Any Event.

In a last-ditch effort to avoid reversal, Olson conjures a novel argument concerning application of the litigation privilege to the facts of this case. (AB 61-65.) For the first time in more than three years of litigation, Olson contends that Doe was required to file her suit under seal or to otherwise "shield" his identity using a pseudonym. (AB 62.) Because Doe, as a *pro se* plaintiff (at the time) and the victim of alleged harassment and sexual violence, did not initiate those procedures in the trial court, Olson says that she cannot benefit from the litigation privilege. The source of this purported obligation is not clear, though Olson implies that the terms of the parties' mediated stay-away agreement require such an arrangement. (AB 64.) This argument is waived and, in any event, meritless.

As an initial matter, Olson is estopped from asserting this argument for the first time on appeal. There is no dispute that Olson's novel contention—that a victim's petitioning rights are conditioned on her ability to file suit "in a manner calculated to protect" her alleged *abuser's* identity (AB 61)—was not pressed below. He instead suggests that this Court should exercise its discretion to review the issue because "it involves a pure question of law on undisputed facts." (AB 62, fn.13.)

This Court generally will not consider an issue that "could have been but was not presented to the lower court by some appropriate method." (*Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 Cal.3d 180, 185.) At the outset of the case, or at any time during the last three years, Olson could have taken affirmative steps to conceal his identity. In fact, Doe even "proposed to Olson that he could have requested that his name be redacted from the current proceedings . . . , [or] he could have asked to seal the records of each action." (AA 78.) But Olson did neither, and, as such, this Court is under no obligation to address his belated contentions. (See *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 314 [describing "waiver" as the "voluntary relinquishment of a known right" or "the loss of an opportunity or a right as a result of a party's failure to perform an act"].)

In any event, even if this Court were inclined to consider the issue, Olson offers no legal or factual support for this novel theory that Doe had a contractual duty to "designate[] Olson by a pseudonym in her unlimited civil complaint." (AB 61.) As a matter of law, the parties' mediated stay-away agreement does not clearly and unambiguously waive Doe's ability to petition the courts for redress. (See *supra*, at pp. 32-33.) And there is no way to read the parties' agreement as implicitly burdening those same litigation rights, based on Doe's ability to convince a court to seal presumptively public filings or otherwise conceal Olson's identi-

ty. A contrary conclusion would be absurd, particularly given that Doe's allegations of harassment and sexual violence implicate an issue of significant public concern. It would be unthinkable to condition a *victim's* ability to exercise her litigation rights—and seek civil remedies—on shielding the identity of her alleged *abuser*.

Moreover, Olson fails to identify any legal authority for his proposed rule. The cases that he cites—a mix of California and federal decisions—recognize, at best, that parties *may* propose using pseudonyms and courts have discretion to *allow* such arrangements. (AB 61-63; see, e.g., *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1452, fn. 7; *Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058, 1068.) None of Olson's authorities approaches establishing that an alleged victim's litigation rights must be conditioned on whether she was able to successfully shield her alleged abuser's identity from public view. As a result, this Court should reject Olson's baseless argument.

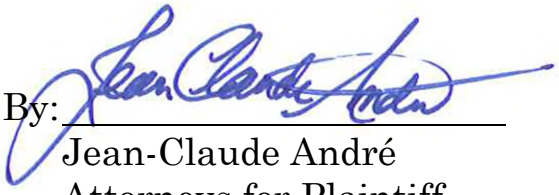
CONCLUSION

For the foregoing reasons and those stated in Doe's opening brief, the court of appeal's judgment should be reversed.

Dated: November 24, 2020

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP



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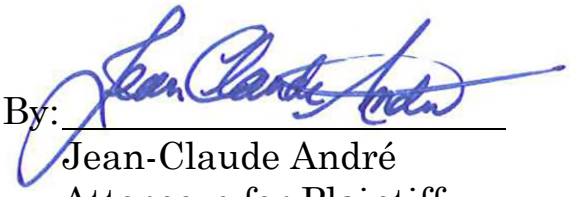

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