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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SHERA BECHARD,

Plaintiff,

vs.

ELLIOTT BROIDY, an individual, KEITH DAVIDSON, an individual; MICHAEL AVENATTI, an individual; DAVIDSON & ASSOCIATES, PLC, a professional limited liability company; and DOES 1 through 20, inclusive,

Defendants.

Case No. BC712913

Assigned for all purposes to the Hon. Samantha Jessner, Dept. 31

DEFENDANT MICHAEL J. AVENATTI'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE (Code Civ. Proc. § 425.16)

[Filed Concurrently with Notice of Motion, Declaration of Michael J. Avenatti and Proposed Order]

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Hearing Dept.: 31

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Complaint Filed: July 6, 2018
Trial: Not Yet Assigned

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I. INTRODUCTION

Plaintiff Shera Bechard ("Bechard") has brought two legally and factually unsupported causes of action against Defendant Michael J. Avenatti ("Avenatti"). Bechard's claims against Avenatti are based entirely on conduct protected by California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16). Bechard's claims must be struck for at least the following reasons.

First, Bechard's claims invade conduct subject to, and protected by, the anti-SLAPP statute. Specifically, her claims target speech concerning issues of public interest. Her claims are also subject to the anti-SLAPP statute because they target events that occurred in the course of Avenatti representing his client Stephanie Clifford ("Clifford") in litigation. For the same reason, Avenatti is immune under the litigation privilege doctrine.

Second, Bechard's claims against Avenatti fail because he did not know that his actions would induce a breach of any contract or would interfere with prospective economic relations. Nor does Avenatti owe any duties of confidentiality to Bechard, a non-client, or any contractual duties because he is not a party to the agreement at issue in this case.

Third, Bechard's claims against Avenatti fail because Avenatti cannot be the cause of Bechard's injury. Defendant Elliott Broidy ("Broidy") stopped making payments to Bechard because of the alleged disclosure of a non-disclosure and settlement agreement (the "Settlement Agreement") to Avenatti *by Bechard's attorney Defendant Keith Davidson* ("Davidson"). Further, Avenatti could not be the cause of Bechard's injury when the *Wall Street Journal* learned of the affair from some other source.

Fourth, Avenatti's actions are protected by the First Amendment because he merely received information from Davidson and published it on Twitter.

Fifth, Bechard cannot prevail on her tortious interference with contract cause of action unless she can establish that there was a valid contract that was breached. In addition, Avenatti's actions are justified, precluding liability.

Sixth, Bechard cannot prevail on her interference with prospective economic advantage claim because she has not established that a business relationship was interfered with. She has also failed to allege any independently wrongful action by Avenatti.

Finally, Avenatti cannot be liable for conspiracy to commit breach of fiduciary duty because he did not have any agreement with Davidson and does not owe Bechard a fiduciary duty.

II. LEGAL STANDARD

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." Baral v. Schnitt (2016) 1 Cal.5th 376, 384 (citation omitted). The Supreme Court has characterized this motion as a "summary-judgment-like procedure." Id. However, there is one crucial distinction: unlike an anti-SLAPP motion, a motion for summary judgment "places the initial burden of production on the moving defendant to demonstrate the opposing plaintiff cannot establish one or more elements of his or her causes of action." Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1239 (explaining that plaintiff was wrong to believe that the defendant had any initial burden other than to show that claims were covered by 425.16). Therefore, Bechard must prove each element of each of her claims against Avenatti.

III. ARGUMENT

A. Bechard's Claims Against Avenatti are Subject to the Anti-SLAPP Statute.

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1). "The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights." San Diegans for Open Government v. San Diego State University Research Foundation (2017) 11 Cal.App.5th 477, 493 (citations omitted). "The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." Id. (emphasis in original). "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." Bleavins v.

Demarest (2011) 196 Cal.App.4th 1533, 1540 (emphasis in original; citation omitted).

An "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e).

1. Bechard's Claims Target Speech Concerning Issues of Public Interest.

Bechard's claims against Avenatti center on a Twitter posting about a matter of public interest. "Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute." Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41. Avenatti's tweet, which Bechard alleges publicized her affair with Broidy, was therefore made on a public forum and protected by the anti-SLAPP statute. [Complaint ¶ 38.] However, "protection under section 425.16 for statements in connection with a public issue or an issue of public interest is not dependent on those statements having been made in a public forum. Rather, subdivision (e)(4) applies to private communications concerning issues of public interest." Hailstone v. Martinez (2008) 169 Cal.App.4th 728, 736. This protection extends to gathering information that subsequently is used in a publication about a public issue. See Lieberman v. KCOP Television, Inc. (2003) ("Because the surreptitious recordings here were in aid of and were incorporated into a broadcast in connection of a public issue, we conclude that [the plaintiff's] complaint fell within the scope of section 425.16.") Bechard thus cannot escape the anti-SLAPP protections afforded to Avenatti by arguing that she is suing Avenatti for *obtaining* the details of the affair rather than *publicizing* them.

"'[A]n issue of public interest' . . . is *any issue in which the public is interested.* In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." Nygard, Inc. v. Uusi-Kerttula (2008) 159 Cal.App.4th 1027, 1042

(emphasis added). "[A] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." D.C. v. R.R. (2010) 182 Cal.App.4th 1190, 1215. Even "celebrity gossip" constitute "statements in connection with an issue of public interest." Jackson v. Mayweather (2017) 10 Cal.App.5th 1240, 1254.

Here, the involvement of Michael Cohen, President Donald Trump's personal attorney and fixer, in facilitating a hush money payment on behalf of a prominent GOP donor to a woman with whom he had an affair, impregnated, and forced to have an abortion, is certainly an issue of public interest. While reporting on a prominent Republican donor's affair would certainly constitute protected "celebrity gossip," the Settlement Agreement was independently significant because of its political implications and connections to other matters already in the media. As reported by the *Wall Street Journal* when it first revealed the affair and hush agreement, Defendant Broidy served as the deputy finance chairman of the Republican National Committee. He was represented in connection with the agreement by Cohen—the same man who also assisted with at least two other hush money deals shortly before the 2016 election for women claiming affairs with Trump (i.e., Karen McDougal and Stephanie Clifford aka Stormy Daniels). [Avenatti Decl., Ex. 4.] Moreover, Bechard was represented by Defendant Davidson, who also represented McDougal and Clifford (aka Stormy Daniels), in negotiating their hush agreements to prevent them from discussing their affairs with Trump. [Id.] Avenatti published his tweet just days after the FBI raided Cohen's office as part of an extensive investigation. [Id.]

In addition, Broidy's prominent role within the Republican Party makes him a person in the public eye and makes coverage of his payments a public issue. See Sipple v. Foundation For Nat. Progress (1999) 71 Cal.App.4th 226, 239 (domestic abuse allegations against media strategist for numerous Republican political campaigns concerned issues of "public interest"). In fact, he was already attracting media attention even before news of the affair broke. First, it was reported as early as March of this year that Broidy was "one of President Donald Trump's earliest campaign financiers and subsequently the vice chairman of his Presidential Inaugural Committee," and that since April 2017, he "has had incredible access to the president — and has reportedly taken full advantage of it to reap profits and advance the agendas of foreign actors." [Avenatti Decl., Ex. 6.] He has continued to attract media

attention for many other stories garnering the public's interest. [Id., Exs. 7-12.] Publication of the affair, and especially Cohen's involvement, only added a new link in the web of intrigue that linked Broidy to Trump.

2. Avenatti's Communications with Davidson and Tweet Were Made in Connection with Ongoing and Anticipated Litigation.

"[A] statement is 'in connection with' litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." Neville v. Chudacoff (2008) 160 Cal.App.4th 1255, 1266. This provision "has been held to protect statements to persons who are not parties or potential parties to litigation, provided such statements are made 'in connection with' pending or anticipated litigation." Summerfield v. Randolph (2011) 201 Cal.App.4th 127, 136; Neville v. Chudacoff (2008) 160 Cal.App.4th 1255, 1270. "Communications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute." Comstock v. Aber (2012) 212 Cal.App.4th 931, 943. "[A]n attorney who has been made a defendant in a lawsuit based upon a written or oral statement he or she made on behalf of clients in a judicial proceeding or in connection with an issue under review by a court, may have standing to bring a SLAPP motion." Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624, 629. Here, the information disclosed by Davidson to Avenatti regarding Cohen's involvement in the hush money payment from Broidy to Bechard was made in connection with both actual and anticipated litigation. This conclusion is readily discernable from Avenatti's declaration and Davidson's verified answer.

Specifically, Avenatti spoke with Davidson on the phone on April 12, 2018. The purpose of the call was for Avenatti to obtain Clifford's client file from Davidson (Clifford's prior counsel) to use information in the file as potential evidence in the pending Clifford v. Trump[1] action. [Avenatti Decl. ¶ 3.] Avenatti contemplated filing a separate action against Davidson on behalf of Clifford if Davidson refused to turn over the entire file,[2] which Clifford was forced to do on June 6, 2018 in the Clifford v.

[1] Stephanie Clifford v. Donald J. Trump, et al., Case No. 2:18-cv-02217-SJO-FFM (C.D. Cal.).

[2] Clearly, additional evidence of the collusive relationship between Cohen and Davidson would be relevant to the breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims against the two defendants in that action, which Bechard recognized when she made similar allegations in her Complaint. [Complaint ¶ 5, 24, 35-36, 86(a); Avenatti Decl., Ex. 3.]

Davidson[3] action. [Avenatti Decl. ¶ 3, 10.] It was during this call that Davidson, without any persuasion from Avenatti, disclosed to Avenatti the fact that Davidson and Cohen had been involved in another hush money deal in which Cohen represented a prominent GOP donor who had an affair with a woman from Los Angeles who he impregnated and subsequently forced to have an abortion. [Avenatti Decl. ¶ 3.] Davidson told Avenatti that the *Wall Street Journal* had called Davidson and knew about the details, and that they would be running a story soon (which they did, on April 13). [Avenatti Decl. ¶ 3, Ex. 4.] Davidson did not disclose the identities of the GOP donor and the woman. [Avenatti Decl. ¶ 3; Davidson Answer ¶ 43, 67, 68, 74.] Davidson also did not disclose to Avenatti the existence of a written non-disclosure agreement (NDA); Avenatti surmised on his own that an NDA must have been entered. Davidson contends that the details of the affair and the hush money deal were leaked by the FBI following the FBI's raids of Cohen on April 9. [Davidson Cross-Complaint ¶ 4.]

Shortly after the call, Avenatti tweeted information about the hush money deal, but did not disclose the identities of Broidy and Bechard (as he did not know of their involvement): "In last 18 mos, Mr. Cohen negotiated yet another hush NDA, this time on behalf of a prominent GOP donor who had a relationship with a LA woman, impregnated her and then made sure she had an abortion. The deal provided for multiple payments across many months. #basta." [Avenatti Decl., Ex. 2.]

In other words, although Avenatti did not persuade Davidson to disclose any of the details at issue (Davidson did so voluntarily and unprompted), Davidson's disclosures were plainly made in connection with not only then-*existing* litigation (i.e., the Clifford v. Trump case) for the purpose of evidence gathering, but also *anticipated* litigation in the event Davidson did not turn over Clifford's files. Indeed, there is no other context in which Davidson made the statements to Avenatti, as he and Davidson are not personal friends or colleagues. [Avenatti Decl. ¶9.] In addition, Avenatti's tweet clearly related to his representation of Clifford because it began with the phrase that "In last 18 mos, Mr. Cohen negotiated yet another hush NDA," and therefore serves to demonstrate that Clifford's circumstances were part of a broader pattern involving other women. [Aveantti Decl. Ex,. 2.] Bechard's claims thus reach litigation-related activity protected by the anti-SLAPP statute.

[3] Stephanie Clifford v. Keith M. Davidson and Michael Cohen, Case No. SC129384.

B. Plaintiff Is Not Likely to Prevail on Her Claims.

After the defendant has established that the plaintiff's claims are subject to the anti-SLAPP statute, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." Baral 1 Cal.5th at 384 (citation omitted). The Supreme Court has characterized this motion as a "summary-judgment-like procedure." Id. However, unlike an anti-SLAPP motion, a motion for summary judgment "places the initial burden of production on the moving defendant to demonstrate the opposing plaintiff cannot establish one or more elements of his or her causes of action." Tuchscher Development Enterprises, Inc. 106 Cal.App.4th at 1239. Therefore, Bechard must prove each element of each of her claims against Avenatti.

1. Avenatti is Protected by the Litigation Privilege.

The litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1241. It "operates to bar civil liability for any tort claim based upon a privileged communication, with the exception of malicious prosecution." Hagberg v. California Federal Bank (2004) 32 Cal.4th 350, 375. The privilege protects communications made in contemplation of future litigation. See Neville v. Chudacoff (2008) 160 Cal.App.4th 1255, 1269. "[A]cts falling within the anti-SLAPP statute because of their connection with judicial proceedings do not inevitably fall within the litigation privilege; however, the privilege plainly informs interpretation of the 'arising from' prong of the anti-SLAPP statute." Gallanis-Politis v. Medina (2007) 152 Cal. App. 4th 600, 617 n. 14. Here, Avenatti is entitled to substantive immunity under the litigation privilege doctrine for the same reasons that the claims against him fall under Code of Civil Procedure section 425.16(e)(2). This ends the analysis. For this reason alone, all of Bechard's claims against Avenatti are barred.

2. Bechard's Allegations Against Avenatti Do Not Constitute Tortious Interference With Contract or Prospective Economic Advantage.

The elements of a cause of action for intentional interference with contractual relations are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4)

actual breach or disruption of the contractual relationship; and (5) resulting damage." Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 55. The elements of tortious interference with prospective economic advantage are similar: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1153.

a) Avenatti Did Not Intend to Induce a Breach of Any Contracts or Disrupt an Economic Relationship.

A defendant can only be liable for tortious interference with contract if he "knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action." Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 56. Therefore, the plaintiff must establish that the defendant *intended* to disrupt the contractual relationship. See Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 619 (no claim for tortious interference with contractual relations for doctor's harassment of other employees because there is "no logical inference that [the doctor] intended to disrupt [the plaintiff's] relationship with [the hospital] by his harassment of other employees"). The intent element for interference with prospective economic advantage is essentially the same and requires the plaintiff to show that "the defendant knew that the interference was certain or substantially certain to occur as a result of its action." Korea Supply Co. 29 Cal.4th at 1153. Therefore, the plaintiff must establish that the defendant was aware of the specific terms of the contractual relationship or parameters of the prospective economic relationship. See Winchester Mystery House, LLC v. Global Asylum, Inc. (2012) 210 Cal.App.4th 579, 597 (affirming summary judgment where the plaintiff had failed to produce evidence that the defendant's production and distribution of film would interfere with the plaintiff's contractual obligation with third party).

Here, Avenatti did not intend to interfere with Broidy's contractual or prospective economic relationship with Bechard (or Davidson's relationship with Bechard). [Avenatti Decl. ¶¶ 4, 6.] While

Bechard makes speculative and conclusory allegations to the contrary, Avenatti had no knowledge of the specific terms of any agreements at issue here. [Avenatti Decl. ¶ 4.] In fact Avenatti was not even aware that there was a written nondisclosure agreement or that the terms of the agreement were confidential and did not agree to maintain confidentiality. [Avenatti Decl. ¶¶ 3, 4, 5.] Indeed, as an outsider to the deal and a person who was not a party to the Settlement Agreement, there is no conceivable monetary benefit or other advantage Avenatti stood to gain from disrupting any relationship or contract. More fundamentally, without knowledge of the Settlement Agreement, he could not possibly have known that interference was certain or substantially certain to occur as a result of his actions. Avenatti could not have known that Broidy would regard the Settlement Agreement as having been breached as a result of actions by a non-party like *Avenatti*, rather than Bechard. Nor could Avenatti know whether Davidson was a party to the Settlement Agreement or whether Bechard had authorized Davidson to speak to Avenatti.

b) Bechard Cannot Establish Avenatti Caused Her Damages.

"[A]s a matter of law, a threshold causation requirement exists for maintaining a cause of action for either [interference with contractual relations or interference with prospective contractual advantage], namely, proof that it is reasonably *probable* that the lost economic advantage would have been realized but for the defendant's interference." Youst v. Longo (1987) 43 Cal.3d 64, 71 (emphasis in original). "A plaintiff, seeking to hold one liable for unjustifiably inducing another to breach a contract, must allege that the contract would otherwise have been performed, and that it was breached and abandoned by reason of the defendant's wrongful act and that such act was the moving cause thereof. Unless the act complained of was the proximate cause of the injury, there is no liability." Augustine v. Trucco (1954) 124 Cal.App.2d 229, 246.

Here, Avenatti did not cause Bechard's alleged injuries. Bechard's complaint alleges she was injured because Broidy refused to continue to make payments to Bechard after the Settlement Agreement was disclosed. [Complaint ¶ 68.] However, (1) Avenatti did not disclose Broidy or Bechard's identities in his tweet; (2) he did not know their identities, or of the existence of the Settlement Agreement, as Davidson did not disclose this information to Avenatti, (3) the details of the affair and the Settlement Agreement were first publicly disclosed by the *Wall Street Journal*, and

Avenatti did not provide any of the information reported to the *Wall Street Journal;* and (4) in fact, Davidson himself acknowledged that the *Wall Street Journal* knew the details of the story *before* Davidson spoke to Avenatti. [See Avenatti Decl., ¶¶ 3, 4, 7, Ex. 4; Davidson Cross-Complaint, ¶ 4.] At most, Avenatti generally disclosed the existence of a hush money deal between two unnamed parties in which Michael Cohen was involved. That alone, however, does not provide a basis to find Avenatti interfered with the Settlement Agreement. Rather, the *Wall Street Journal* "outed" Broidy and Bechard on April 13 independent of any disclosure or act of Avenatti.

c) Avenatti is Protected by the First Amendment.

The First Amendment also protects Avenatti from Bechard's claims. See Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, 1045 (First Amendment protected the defendant from interference with prospective economic advantage claim); Krinsky v. Doe 6 (2008) 159 Cal.App.4th 1154, 1179 (sustaining demurrer because interference with prospective economic advantage cause of action was premised on communications protected by the First Amendment). "A person cannot incur liability for interfering with contractual or economic relations by giving truthful information to a third party." Savage v. Pacific Gas & Electric Co. (1993) 21 Cal.App.4th 434, 449–450. Because Avenatti merely received information from Davidson and shared truthful information on Twitter without identifying Bechard or Broidy, there is no liability.

d) Bechard Cannot Prove the Elements of Tortious Interference With Contract.

(1) Bechard Must Establish That There is a Valid Contract.

"[A] cause of action for intentional interference with contractual relations requires an underlying enforceable contract, and where the underlying contract is unenforceable, only a claim for interference with prospective economic advantage lies." Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal.App.4th 867, 879. A plaintiff "could not posit liability for tortious interference with a contractual relationship upon a void contract." A-Mark Coin Co. v. General Mills, Inc. (1983) 148 Cal.App.3d 312, 322. Even a claim for interference with prospective economic advantage will often be impossible to prevail on because "it is unlikely that [a plaintiff] could have a protectible [sic] expectancy of future economic benefit in a relationship that was dependent for its existence upon a" void contract. Id. at 323.

Here, Bechard must establish there is a valid contract that Avenatti interfered with. However, the allegations in the Complaint suggest that the Settlement Agreement was void as against public policy because it was in reality an agreement in which Bechard would receive $1,600,000 in exchange for waiving child support. [Complaint ¶ 25.] "Agreements and stipulations compromising the parents' statutory child support obligation or purporting to divest the family court of jurisdiction over child support orders are void as against public policy." In re Marriage of Lusby (1998) 64 Cal.App.4th 459, 469.

In addition, "if a contract has already been breached by one of the parties to the contract, or has been terminated, before the occurrence of the breach allegedly induced by a third party, an action against the third party for interference with the contract must fail. Similarly, if a party has no duty or contract to perform, that another induces that party not to perform is of no consequence." 40 Cal. Jur. 3d § 10. Bechard must therefore establish that at the time of Avenatti's action, the contracts at issue were not already breached (e.g. by Davidson or whoever revealed the existence of the affair and Settlement Agreement to the *Wall Street Journal*), and that there was a duty to perform (e.g. Broidy was not released from making continued payments after any disclosure had been made by anybody).

(2) Avenatti's Alleged Disclosure of the Settlement Agreement Was Justified.

"Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties." Environmental Planning & Information Council v. Superior Court (1984) 36 Cal.3d 188, 193–194. Significantly, the Supreme Court has recognized that justification is particularly important outside of the commercial context, where courts must be especially cognizant of the social and private importance of the defendant's actions as well as his First Amendment rights. Id. at 195-197. Here, as was explained above, the existence of the Settlement Agreement is closely connected to issues of significant public concern. Making the public aware of the agreement was therefore justified, especially in light of the fact that the only action Avenatti has engaged in is disclosing information that was given to him by Davidson.

In addition, "[o]ne is not liable for inducing a breach of contract if he or she merely induces one

of the parties to the contract to assert his or her legal rights." 40 Cal. Jur. 3d § 39. If Bechard is attempting to hold Avenatti liable because he somehow publicly revealed the existence of the Settlement Agreement through a tweet that did not name Bechard or Broidy, and therefore made Broidy aware that Davidson had already revealed its existence to him, Avenatti's actions justifiably made Broidy aware that the Settlement Agreement had already been breached and induced Broidy to exercise his right to cease the periodic payments in light of the breach.

e) Bechard Cannot Prove the Elements of Interference With Prospective Economic Advantage.

(1) There Is No Prospective Economic Relationship Between Bechard and Broidy, or With Davidson.

"[T]he interests generally protected by the tort [of interference with prospective economic advantage] are *business* expectancies, and on that basis [the Supreme Court of California has] declined to expand the tort to cover interference with prospective nonbusiness relations." Youst v. Longo (1987) 43 Cal.3d 64, 75; see also Hepe v. Paknad (1988) 199 Cal.App.3d 412, 420 (a plaintiff's "interest in an unlitigated claim for punitive damages and in a possible, future judgment that may or may not remain enforceable after a defendant's bankruptcy are not the sort of economic relationships that the interference tort has traditionally protected"). By limiting the application of the tort in this manner, "there is a background of business experience on the basis of which it is *possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered.*" Youst v. Longo (1987) 43 Cal.3d 64, 75 (emphasis in original). "A cause of action for tortious interference has been found lacking when either the economic relationship with a third party is too attenuated or the probability of economic benefit too speculative." Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. (2017) 2 Cal.5th 505, 515.

Here, Bechard fails to identify what the prospective economic relationship that Avenatti interfered with could possibly be. First, the relationship cannot be the periodic payments under the Settlement Agreement. The Settlement Agreement has nothing to do with business and is not protected by the tort. In addition, there are not any *prospective* business relations that have been alleged. Bechard does not claim that Avenatti somehow interfered with an ongoing economic relationship with Davidson or Broidy. In fact, she does not allege that she continued to have anything to do with them after entering

into the Settlement Agreement. In addition, given the fact that by Bechard's own admission, Davidson had already violated the Settlement Agreement, the periodic payments cannot be the prospective economic relationship. If Broidy (rightly or wrongly) believed he was no longer under any obligation to continue paying, he was hardly likely to negotiate a new agreement with Bechard after Davidson's disclosure. Finally, the periodic payments were the result of a contract already entered into, not one that was still being negotiated.

(2) Bechard Has Failed to Allege that Avenatti's Conduct is Independently Wrongful.

"To establish a claim for interference with prospective economic advantage . . . a plaintiff must plead that the defendant engaged in an independently wrongful act. An act is not independently wrongful merely because defendant acted with an improper motive." Korea Supply Co. 29 Cal.4th at 1158 (citation omitted). "An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." Id. at 1159. Here, Bechard has failed to allege that Avenatti has engaged in an independently wrongful act. The allegations in the Complaint do not indicate that he has performed any unlawful action. Indeed, he owed no duty—fiduciary, contractual, or otherwise—to any person involved in the Settlement Agreement. He was not Bechard or Broidy's attorney. [Avenatti Decl. ¶ 8.] He was not a party to the Settlement Agreement. [Avenatti Decl. ¶ 4.] On the contrary, he was well within his rights to disclose a matter of immense public concern. Absent proof of an independently wrongful act, the interference with prospective economic advantage claim fails.

3. Avenatti Cannot Be Liable For Conspiracy to Commit Breach of Fiduciary Duty.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510–511. "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." Id. at 511. "A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement." Id. "Therefore, it is the acts done and not the conspiracy to do them which

should be regarded as the essence of the civil action." Id.

a) There Was No Agreement Between Avenatti and Davidson.

"[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission." Kidron v. Movie Acquisition Corp. (1995) 40 Cal.App.4th 1571, 1582. "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the [alleged conspirators] knew of an intended wrongful act, they must agree-expressly or tacitly-to achieve it." Choate v. County of Orange (2000) 86 Cal.App.4th 312, 333 (citations omitted). "Bare allegations and rank conjecture do not suffice for a civil conspiracy." Id. (citation and internal quotations omitted).

Here, there was no agreement between Avenatti and Davidson, let alone an agreement to carry out an "unlawful plan." Avenatti never reached an agreement with Davidson to receive the details of the Settlement Agreement from him. Avenatti was not even told that there was a written agreement. [Avenatti Decl. ¶ 5.] Bechard alleges that "[i]f Mr. Avenatti indeed agreed to receive and received information about the Settlement Agreement from Mr. Davidson," he would be liable for civil conspiracy. [Complaint ¶ 67.] However, even if this allegation could be proven (which as noted above, it cannot), this does not create an actionable conspiracy claim. Davidson's gratuitous disclosure to Avenatti is not a conspiracy to commit a tort.

b) Avenatti Does Not Owe Bechard a Fiduciary Duty.

"By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." Applied Equipment Corp. 7 Cal.4th at 511. Therefore, if a party to the purported conspiracy does not owe an independent duty to the plaintiff, "he or she cannot be bootstrapped into tort liability by the pejorative plea of conspiracy." Id. at 514. A defendant thus cannot be held liable for breach of fiduciary duty where he conspired with another individual that owed a fiduciary duty to the plaintiff unless the defendant himself *also* owed an

independent fiduciary duty to the plaintiff. In other words, "[a] non-fiduciary cannot conspire to breach a duty owed only by a fiduciary." Kidron v. Movie Acquisition Corp. (1995) 40 Cal.App.4th 1571, 1597; see also Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI (2002) 100 Cal.App.4th 1102, 1107. 1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, is on all fours with this case. There, an attorney was accused of having conspired with the plaintiff's former in house counsel to commit a breach of fiduciary duty by receiving confidential information the in house counsel had learned. See id. at 573-74. The Court granted the defendant attorney's anti-SLAPP motion because he owed no fiduciary duty to the plaintiff. See id. at 592-83. This case is no different. Avenatti does not owe Bechard a fiduciary duty because she was never his client. [Avenatti Decl. ¶ 8] Therefore, he could not have conspired with Davidson.

IV. CONCLUSION

For the foregoing reasons, Avenatti respectfully requests that the Court GRANT this motion and strike Bechard's second cause of action for tortious interference with contract and interference with prospective economic advantage and third cause of action for conspiracy to commit breach of fiduciary duty against Avenatti.

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