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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SHERA BECHARD,

Plaintiff,

v.

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.

[Assigned for all purposes to Hon. Elizabeth A. White]

Case No. BC712913

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT AVENATTI'S SPECIAL MOTION TO STRIKE

[*Concurrently filed with Declaration of Shaun P. Martin*]

Date:	September 7, 2018
Time:	8:30 a.m.
Dep't:	48

HEARING ORDERED BY THE COURT

Action Filed:	July 6, 2018
Trial Date:	None Set

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Plaintiff Shera Bechard hereby opposes Defendant Michael Avenatti's Special Motion to Strike, filed August 13, 2018.

INTRODUCTION

Ms. Bechard expected Defendant Elliott Broidy to honor his agreement to pay the remaining $1.2 million owed to her pursuant to a Settlement Agreement negotiated for Ms. Bechard by her then-lawyer, Keith Davidson. But Broidy refused to pay any of that $1.2 million because Davidson told Michael Avenatti about the existence and terms of the Settlement Agreement. So Bechard rightly asserts in her Complaint that Avenatti tortiously interfered with her contracts and prospective economic advantage (and conspired with Davidson). The factual basis for her claims is simple. Avenatti broke the law by soliciting confidential information from Davidson; indeed, according to Davidson, he did so aggressively and by fraudulent promising to keep it secret.

Consistent with his infamous self-serving invocation of "free speech," Avenatti moves to strike these claims pursuant to a prohibition on strategic lawsuits against public participation (the "anti-SLAPP" statute). But Avenatti is surely aware that requesting and receiving confidential information from a lawyer (Davidson) about his client (Bechard) in a private conversation does not trigger the anti-SLAPP statute at all. Consequently, Avenatti labors mightily in his motion to create the appearance that he has been sued by Bechard for tweeting about the confidential Settlement Agreement (which he called a "hush NDA") minutes after learning about it from Davidson.

Make no mistake: Bechard sues Avenatti for improperly soliciting and receiving confidential information about her ***from Davidson***. She has never alleged that Avenatti's tweet was the unlawful act; indeed, her Complaint expressly alleges to the contrary. (Complaint, ¶ 97 (making clear that the causes of action arose and were complete upon disclosure by Davidson to Avenatti in their private conversation, not the subsequent Twitter disclosure).)[1]

Put simply, the anti-SLAPP statute is not triggered by this lawsuit, because Ms. Bechard's

[1] Ms. Bechard's complaint mentions the tweet for two obvious reasons. First, the tweet was the clearest evidence (prior to post-filing admissions by Avenatti and Davidson) that Avenatti had requested and received confidential information from Davidson. (Complaint, ¶ 97.) And second, the tweet is clear evidence of Avenatti's motive – i.e., a seemingly unquenchable desire for attention. Indeed, the very next day, Avenatti returned to Twitter, writing in response to a *Wall Street Journal* story: "I tweeted the facts on this last night. Always good to be proven correct. But attribution would have been nice." (Martin Decl., ¶ 2.)

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claims arise not out of the exercise of Avenatti's constitutional free speech rights, but rather his illegal, private solicitation of information from Ms. Bechard's attorney. Moreover, even if the statute did apply, Avenatti's motion should be denied because—as explained below—Bechard has easily made out *prima facie* claims against him. At a minimum, Bechard would be entitled to discovery (including the depositions of Avenatti and Davidson) before the motion could be granted.

LEGAL STANDARD

As the California Supreme Court has explained:

> Resolution of anti-SLAPP motions involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 426.16. If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing the probability of success. We have described this second step as a summary-judgment-like procedure. The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.

(*Baral v. Schnitt* (2016) 1 Cal. 5th 376, 384-85 (*Baral*), citations omitted.) Moreover, before an anti-SLAPP motion may be granted, a plaintiff is entitled to conduct formal discovery if such discovery has a probability of establishing the merits of her claims. (Code Civ. Proc., § 425.16(g).)

Avenatti's motion fails on both independent prongs of the anti-SLAPP inquiry, and should thus be denied straightaway. Moreover, that motion could not be granted without giving Ms. Bechard the opportunity for discovery on the merits.

ARGUMENT

I. Defendant Has Not Satisfied His Stage One Burden.

To repeat what is express in the Complaint: Plaintiff's claims against Avenatti do not arise from the fact that he tweeted about the Settlement Agreement. (Complaint, ¶ 97.) The claims against Avenatti—namely, tortious interference with contractual relations and prospective economic advantage (Count II) and conspiracy to breach fiduciary duties (Count III) -arise instead from Avenatti procuring from Davidson information that he (and Davidson) knew violated both a contract and Davidson's fiduciary duties. (Complaint, ¶ 67.) Put simply, at issue is the private conversation in which that occurred. Because the gravamen of the Complaint is the illegal private conversation

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between Davidson and Avenatti, the anti-SLAPP statute does not apply.

A. The Acts For Which Avenatti Is Sued Do Not Satisfy Section 425.16(e)(4).

Avenatti knows full well that the basis for his liability is a ***private*** tortious transfer of information, i.e., the conversation between Davidson and Avenatti where they sold Ms. Bechard down the river by revealing her confidential information. That is why, to satisfy prong one of the anti-SLAPP inquiry, Avenatti relies on section 425.16(e)(4) rather than (e)(3). The latter requires the actionable statement(s) be made in "a public forum"—which they obviously were not. The former has no public forum requirement.

But Section 425.16(e)(4) offers Avenatti no refuge. It protects only "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech," and only when it concerns a matter of "public interest." Avenatti cannot meet either requirement.

First, Avenatti's tortious acts do not entail "conduct in furtherance of the exercise of the constitutional right of . . . free speech" under section 425.16(e)(4). Avenatti argues that simply because he effected his tortious conduct by speaking words, he was exercising his constitutional free speech rights. But he offers no authority whatsoever for the proposition that the anti-SLAPP statute sweeps so broadly. Virtually ***any*** legal wrong, from breach of contract ("I'm not paying") to bribery ("Take this and vote for me"), will be accomplished by conduct that involves speech. But a defendant cannot invoke the protections of the anti-SLAPP statute anytime he violates a contract (or, in this case, wrongfully interferes with a contract) by uttering words out loud. (*Park v. Board of Trustees* (2017) 2 Cal.5th 1057, 1063-66 (denying anti-SLAPP motion on this basis and holding that anti-SLAPP statute applies only when constitutionally protected free speech is the "gravamen" or "principal thrust" of the complaint); see also *id.* at p. 1064 (anti-SLAPP statute applies only when the "specific elements of the [] plaintiffs' claim depend[] upon the defendant's protected activity").)

But Avenatti's claim of "free speech" also suffers an additional, more serious, defect. The Court of Appeal has squarely held that the anti-SLAPP statute does not apply to an attorney sued for wrongfully obtaining the confidential information of another. (*Gerbosi v. Gaims, Weil, West & Epstein LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*).) In *Gerbosi*, a law firm was sued for tortiously eavesdropping on confidential communications and illegal wiretaps they ordered on a witness and an

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opposing party during a lawsuit. (*Id.* at p. 441.) When the law firm filed an anti-SLAPP motion, the trial court not only denied the motion, holding the anti-SLAPP statute clearly inapplicable to such claims, but also found the motion frivolous, awarding fees of over $220,000 against the law firm pursuant to section 425.16(c) of the anti-SLAPP statute. (*Id.* at p. 442-43.)

The Court of Appeal agreed. "Under no factual scenario," the Court of Appeal held, could eavesdropping on private conversations or illegal wiretapping constitute protected activities or conduct in furtherance of "the constitutional guarantees of free speech and petition" under the first prong of the anti-SLAPP statute—even though listening to speech, no less than speaking, would fall within the broad conception of "free speech" Avenatti proposes here. (*Id.* at p. 446.) The Court of Appeal instead held section 425.16 flatly inapplicable to an attorney's wrongful invasion of the confidential information of another. (*Ibid.*)

As the Court of Appeal held, "section 425.16 was not enacted to protect an attorney who allegedly hired an 'investigator' like Anthony Pellicano to wiretap telephones so as to get an unfair advantage in a client's legal matters." (*Ibid.*) And what is true for tortious eavesdropping and illegal wiretaps is equally true for unethically and illegally persuading an attorney to reveal confidential information of his client. Section 425.16 does not apply to such claims.

The principle in *Gerbosi* has been similarly applied in legions of other cases, making clear Avenatti's inability to satisfy the first prong. For example, in *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481 (*Castleman*), the Court of Appeal affirmed the denial of an anti-SLAPP motion seeking to strike an invasion of privacy claim brought against an attorney who remotely accessed the confidential information of another attorney's client, holding that "actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background." (*Id.* at p. 491.) Similarly, *Ralph's Grocery Company v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245 held that even core First Amendment activity—there, collecting signatures on a petition—did not arise out of protected activity under the anti-SLAPP statute when it was tortiously conducted on private property and thus constituted a trespass. (*Id.* at p. 307-16.) When the alleged "free speech" entails the invasion of confidential information or other privacy or property rights of another, the anti-SLAPP statute does

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not apply, as it is not in "furtherance of the constitutional guarantees of free speech and petition."

Moreover, Avenatti's private, tortious receipt of information also does not concern a matter of "public interest" as independently required by the final clause of section 425.16(e)(4). Avenatti says that that his conduct implicated a matter of public interest because (1) Michael Cohen represented Broidy, and (2) Broidy's position as a Republican donor allegedly makes news about his private life a matter of public interest. But both of these arguments are wrong.

Under Avenatti's view, any client using Michael Cohen would find his behavior a matter of public interest. But that cannot be right. That a lawyer has a famous client does not mean his activities with his other clients are ones of public interest. And neither the affair nor the agreement at issue involved President Trump in any way.

The fact that Broidy was a Republican fundraiser engaging in sex does not change the analysis. It may perhaps be true, in the colloquial sense, that the public will always be "interested" in the sexual conduct of others. But the relevant inquiry is not whether the revelation of a hushed affair interests the public—the question is whether, *prior* to that revelation, that person's intimate life was a matter of public interest. Here, it indisputably was not: Avenatti cannot and does not point to a single article or other evidence of preexisting public interest in Broidy's sex life prior to Avenatti's own misconduct. That fact is dispositive. Avenatti has not satisfied his stage one burden.

The celebrity gossip cases involve ***celebrities*** people by definition of public interest—not non-celebrities who engage in private activities that might potentially pique the prurient interest of readers. A couple's sex life, for example, does not become a matter of public interest merely because people would watch a private sex tape of that couple. That does not change if the husband makes political donations. Nor in any event would the political relevance of such a donor somehow make his entirely distinct sexual affairs a matter of public interest. (See, e.g., *Time, Inc. v. Firestone* (1976) 424 U.S. 448, 454 (holding that divorce and alleged adultery of well-known owner publicized in magazine did not involve issue of public interest "even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public").)

Moreover, even if Broidy was somehow so famous that his every move or sexual partner was a matter of "public interest," Avenatti's showing still fails because he himself claims that when he

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committed his tortious conduct ***he did not know the person that he was talking about was Broidy.*** (Avenatti Decl., ¶ 3.) One is not retroactively protected by the anti-SLAPP statute merely because it turns out that the confidential information he illegally obtained involved someone famous. Nor are the sexual affairs of each and every "prominent GOP donor," which is all that Avenatti says he knew (Avenatti Decl., ¶ 3) matters of public interest. Section 425.16(e)(4) of the anti-SLAPP statute accordingly does not apply even under Avenatti's own version of the truth.

B. The Acts For Which Avenatti Is Sued Do Not Satisfy Section 425.16(e)(2).

Avenatti alternately argues that the anti-SLAPP statute protects him because his conduct was related to litigation and thus protected by section 425.16(e)(2). But this argument was squarely rejected by the authorities discussed above, in which the Court of Appeal expressly and repeatedly held that attorneys do not satisfy the first prong of the anti-SLAPP inquiry even when their tortious acquisition of confidential information was conducted on behalf of a client or in connection with actual or threatened litigation. (*Gerbosi, supra*, 193 Cal.App.4th at p. 446 (SLAPP statute inapplicable to such conduct even when directly employed by attorney to get an "advantage in a client's legal matters"); *Castleman, supra*, 216 Cal.App.4th at p. 491 (same).)

This is the controlling rule for good reason. Section 425.16(e)(2) is not free rein for lawyers to commit torts in service of litigation, nor can lawyers use this statute to seek fees (and obtain mandatory stays) against individuals who sue them for such misconduct. Avenatti cannot, for example, break into homes or threaten witnesses merely because the subsequent information obtained would aid him in connection with existing or future litigation. Nor can he persuade another lawyer to sell out his client and unethically reveal her confidential information to him. The anti-SLAPP statute simply does not apply to such conduct. As the Court of Appeal noted in *Gerbosi*:

> By way of an extreme example, if Finn filed a personal injury complaint alleging that [attorney] Gaimes physically assaulted her in an attempt to dissuade her from testifying against Pfeifer in his wrongful termination lawsuit, could [attorney] Gaimes involve the anti-SLAPP statute to strike the complaint by denying Finn's assault allegations? We are certain that the answer is no.

(*Gerbosi, supra*, 193 Cal.App.4th at p. 446.) So too here. The anti-SLAPP statute does not apply even if Avenatti convinced Davidson to sell out his client in connection with a pending litigation.

Even beyond this controlling principle, Avenatti does not satisfy his burden of establishing

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that his tortious conduct occurred in connection with a pending litigation in any event. For starters, the Settlement Agreement between Bechard and Broidy has utterly no relevance whatsoever to the pending lawsuit by Avenatti's client (Stormy Daniels) against President Trump, which simply involves whether the Trump/Daniels contract is binding even though Trump never signed it.

The Settlement Agreement (and Avenatti's tortiously obtaining its contents) simply does not affect whether Avenatti wins or loses either the Daniels litigation or any potential lawsuit against Davidson. It neither "relates to the substantive issues in the litigation" nor "is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.) The simple fact that the information exchange occurred in a conversation initially motivated by a suit between Davidson and Daniels (or possible litigation between her and Davidson) does not somehow sweep ***independent*** conversations regarding entirely ***distinct*** claims and individuals (i.e., Bechard and Broidy) ***not even represented by Avenatti*** within the ambit of subsection (e)(2).

Moreover, Avenatti fails to satisfy his stage one burden with respect to section 425.16(e)(2) even under his own version of the evidence. Avenatti swears that his conversation with Davidson merely involved Avenatti's request that Davidson produce Daniels' (not Bechard's) client file, and that Davidson ***raised on his own initiative*** the Settlement Agreement between Broidy and Bechard. (Avenatti Decl., ¶ 3.) If Avenatti never asked for this information, or thought it relevant to his pending or contemplated action, it goes without saying that the purported *sua sponte* disclosure by the other side of this wholly separate lawsuit does not satisfy section 425.16(e)(2). Because Avenatti has the burden of proof on prong one, his evidentiary showing thus fails on its own terms.

This Court need go no further. Avenatti must satisfy both prongs of the anti-SLAPP inquiry. He cannot satisfy the first. His anti-SLAPP motion must accordingly be denied.

II. Plaintiff Has Established A Prima Facie Case.

A. Count Two (Tortious Interference) Has Merit.

Count Two alleges intentional interference with contractual relations and tortious interference with prospective economic advantage. Plaintiff presents a *prima facie* case.

1. Contractual Interference

Avenatti argues Plaintiff cannot win because (1) there is no valid contract, (2) if there was,

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Avenatti did not intend to interfere with it, (3) if he did, his behavior was justified, and (4) he did not cause Ms. Bechard any damage. These arguments are meritless.

Validity. The Complaint pleads that Avenatti interfered with two contracts: (a) the contract between Ms. Bechard and Davidson, in which Davidson promised (as her attorney) to keep all information about the representation confidential, and (b) the Settlement Agreement between Broidy and Ms. Bechard. (Complaint, ¶ 64.) Avenatti's motion says not a word about his admitted inference with the Davidson/Bechard contract, which is undeniably valid. That alone is sufficient to compel denial of Avenatti's motion to strike, as this establishes a *prima facie* case.

Moreover, with respect to Avenatti's interference with the other (Broidy/Bechard) contract, there was indisputably a Settlement Agreement that entitled Bechard to monies in return for *inter alia* not revealing Broidy's affair. Avenatti argues that the Agreement's purported waiver of child support makes it void on public policy grounds and thus impossible to interfere with.

But, first off, the contract ***specifically does not waive child support.*** (Martin Decl., ¶ 2 (quoting Settlement Agreement, ¶ 2.3 ("This Settlement does not contemplate and does not include: . . . any support, financial or otherwise, of [Bechard] of the child in gestation and/or during the life of the alleged child.")).) Avenatti's argument to the contrary is frivolous.[2]

Avenatti also argues the Settlement Agreement was already breached, so he cannot have interfered with it. But the claim that one is excused from interfering with a contract because it has been breached is an affirmative defense, and Avenatti utterly fails to introduce any evidence of any such preexisting breach. That ends the matter. Moreover, not only does the record lack any such evidence, but none exists in the outside world either. That is because, in fact, there is no evidence that anyone breached the Agreement before Avenatti got his information from Davidson. Zero.

Avenatti obtained his information from Davidson about the Settlement Agreement and tweeted about its details on April 12, 2018. (Avenatti Decl., ¶ 3; Martin Decl., ¶ 2.) The *Wall Street Journal* published its story the next day. There is not a shred of evidence that this later article both

[2] Moreover, even if the Agreement did waive support, the remedy would be to void the waiver, not the contract. And even if the contract contained the alleged legal infirmity, it would merely make the contract ***voidable*** by Ms. Bechard, not unenforceable. That Ms. Bechard might have a right to escape a contract would not mean that another party was permitted to interfere with it.

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obtained its information before Avenatti did and did so in violation of the Settlement Agreement.

Davidson, Broidy, and Avenatti all deny giving information to the *Wall Street Journal*, and Avenatti says that Davidson told him that the paper already knew the details. (Avenatti Decl., ¶ 3; Martin Decl., ¶ 3.) That makes sense. The *Wall Street Journal* article was published after the FBI raided Broidy's lawyer in the Bechard deal, Michael Cohen —an attorney with a penchant for tape recording his clients and who had a copy of the Settlement Agreement and his Broidy client file in his raided law office. (Martin Decl., ¶ 4.) It is likely that the newspaper got its information from an FBI source as a result of this raid; indeed, Davidson told Ms. Bechard's attorney that's precisely how the story leaked. (Martin Decl., ¶ 5.) That is not a breach.

Moreover, Avenatti's own tweets make clear that he (correctly) believed he was the first person to obtain information in breach of the Agreement. After the WSJ story was published, Avenatti (correctly) claimed on Twitter ***that he was the first one to have obtained information about the Settlement Agreement***, demanding that the Journal "attribut[e]" the story to him. (Martin Decl., ¶ 2.) This undermines his assertion of a preexisting breach. (See *Baral*, *supra*, 1 Cal.5th at pp. 384-85 (on anti-SLAPP motion, evidentiary conflicts and inferences must be resolved in favor of the nonmoving party).)

Intent. Avenatti next says that he did not intend to interfere with the Settlement Agreement because he did not know it was confidential. This defense is as factually frivolous as his prior assertion that the Agreement is invalid because it waives child support.

First, Avenatti literally tweeted the details of the Settlement Agreement to hundreds of thousands of people, expressly telling them that it was a "hush NDA." Here's what he wrote: "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." (Martin Decl., ¶ 6.)

The reason he expressly said the Agreement was an NDA [non-disclosure agreement] is because he knew it was true. That is what Avenatti himself said. Independently, it is also what Davidson says: he says he told Avenatti on April 12 that the Settlement Agreement had a confidentiality clause before disclosing its details, and that Avenatti promised to keep all information

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about the Agreement confidential and not disclose it to anyone. (Martin Decl., ¶ 7.) Put simply, Avenatti is lying when he says he didn't know the Agreement was confidential, and in any event, a reasonable jury could so conclude. (*Baral*, *supra*, 1 Cal.5th at pp. 384-85 (all evidentiary conflicts and inferences must be resolved in favor of the nonmoving party on anti-SLAPP motion).

Second, even if Avenatti (as he claims) "surmised on his own" that the Agreement was an NDA (Avenatti Decl., ¶ 3), he would still be liable for interfering with it. One does not need to read a contract to interfere with it; one needs to correctly believe one's actions will interfere with the contract's terms. And Avenatti, an experienced attorney, surely knew what an "NDA" entailed, particularly in a contract that he admits he knew involved the affair of a married man.

Finally, Ms. Bechard does not have to prove Avenatti's intended to disrupt her contractual relationship with either her attorney (Davidson) or the Settlement Agreement (Broidy). Avenatti is liable for tortious interference if he acted with the purpose or desire to interfere with either contract ***or*** with knowledge that such interference was substantially certain. (*Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal. 4th 1134, 1155-56 (*Korea Supply*)) There is no doubt that the evidence so establishes, particularly when all evidence is viewed (as it must be) with all inferences in Ms. Bechard's favor.

Justified. Avenatti next argues that even if he intentionally interfered with the contract, he was "justified" in doing so, and thereby excused from liability, because disclosing the Agreement was a matter of "public concern." This is a variant of his related argument that the litigation privilege and First Amendment provide him with an absolute defense. Wrong again.

First, Avenatti misunderstands the law. There is no general "public concern" exception that is a defense to tortious interference. The issue of "justification" instead goes to whether the conduct is sufficiently wrongful to warrant liability. Telling someone to break her employment contract to get out of a hostile work environment is intentional interference, but it is justified because the interferer is acting rightfully. That is far different from the type of "public concern" exception that Avenatti advances. Moreover, given that here Avenatti persuaded an attorney to breach the most sacred professional obligation known to man, all in the service of Avenatti's unquenchable thirst for personal public fame, the purported justification defense fails on its own terms.

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Second, even under a proper understanding of the law, Avenatti's conduct was not justified. Avenatti again fundamentally confuses the nature of Ms. Bechard's claim: it is not tweeting about the Agreement that tortiously interfered with Ms. Bechard's contracts, but rather privately inducing Davidson to violate his fiduciary duties by disclosing information about his client. If a prosecutor intentionally induced defense counsel to disclose his client's confidential murder confession, the prosecutor would be disbarred. So too here. The ends never justify the means with respect to wrongfully disclosing client confidences. Period.

Third, in any event, whether an adequate justification for tortious interference exists is an affirmative defense and a question of fact. (*Tuchscher Dev. Ent. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239.) A reasonable jury could find that Avenatti's unethical acts were not justified by his purported reasons, and on an anti-SLAPP motion, that is sufficient to establish a *prima facie* case and compel denial of the motion. (*Baral,* 1 Cal. 5th at pp. 384-85.)

The same is true, for the same reasons, for Avenatti's purported defenses that the litigation privilege and the First Amendment immunize his conduct. Not only do the cases discussed above squarely reject the proposition that an attorney has right to obtain confidential information of a third party, but so too do additional authorities on point. (See, e.g., Bus. & Prof. Code, § 6068 (attorneys required to protect confidential information at all costs and may only employ ethical means consistent with the truth); *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 845-47 (neither litigation privilege nor First Amendment authorize a professional to disclose or obtain confidential private information of a litigant in violation of ethical or evidentiary rules); *In Re Sawyer* (1954) 360 U.S. 622, 647 (no First Amendment right to reveal client confidences).)

Damages. Avenatti finally argues that the tortious interference claim fails because Ms. Bechard purportedly cannot establish that he caused her any damages. He argues, without apparent irony, that his actions could not have injured Ms. Bechard because it was "the *Wall Street Journal* [that] 'outed' Broidy and Bechard on April 13 independent of any disclosure or act of Avenatti. (Mot. at 10.) This argument yet again approaches (or exceeds) the frivolous.

First, Broidy's sole putative basis for refusing to pay Ms. Bechard is emphatically not the public "outing" of the Settlement Agreement, but rather its ***private disclosure to Avenatti.*** Broidy and

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his lawyers have said so repeatedly, and have asserted no other basis for refusing to pay. (Martin Decl., ¶ 8.) It is thus ludicrous to suggest Avenatti's conduct did not harm Ms. Bechard. On the contrary, Avenatti's conduct is the direct, "proximate," and "moving cause" of Ms. Bechard's injuries. (*Augustine v. Trucco* (1954) 123 Cal.App.2d 229, 246.)

Moreover, even assuming it matters who first publicly "outed" the Agreement, Avenatti's own actions belie his argument that it was the *Wall Street Journal*. Avenatti obtained the confidential information (and tweeted about it) on April 12, before the *Wall Street Journal* article the next day. And when the April 13 article was published, Avenatti tweeted: "I tweeted the facts on this last night. Always good to be proven correct. But attribution would have been nice." (Martin Decl., ¶ 2.) Avenatti ***himself*** claimed to be the first to "out" the Settlement Agreement. That is more than a sufficient *prima facie* case.

Finally, to the extent Avenatti's damages argument simply rehashes his baseless contention that he cannot be liable for tortious interference because the contract was independently breached, he is wrong for the same reasons explained above. This would be an affirmative defense, and Avenatti has offered exactly zero evidence that the *Wall Street Journal* obtained its information in a manner that breached the Settlement Agreement.

2. Economic Advantage

Avenatti's only other arguments with respect to Ms. Bechard's interference with prospective economic advantage claims are (1) that there was no prospective economic relationship between Bechard and Broidy, and (2) his conduct was not "independently wrongful" because "he owed no duty . . . to any person involved in the Settlement Agreement."

First, the Settlement Agreement itself—including the income stream Ms. Bechard expected to receive from it—plainly qualifies as a prospective economic relationship. Moreover, Avenatti again entirely ignores his interference with the separate relationship between Ms. Bechard and her attorney, which similarly gave her an income stream (the Agreement) and had economic value.

Second, intentionally and wrongfully soliciting an attorney to breach client confidences and fiduciary duties is precisely the type of "independently wrongful [act] . . . proscribed by . . . common law . . . legal standard[s]." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1159. "***[E]veryone*** owes a duty not

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to commit an intentional tort against *anyone*." (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 967 (*Fuller*), emphasis added.) Avenatti's tortious interference with contract thus ***also*** forms the basis of a valid tortious interference with economic advantage claim.

B. Count Three (Conspiracy to Breach Fiduciary Duty) Has Merit.

Ms. Bechard has also presented a *prima facie* claim for conspiracy to breach fiduciary duty (Count Three). Avenatti's sole arguments to the contrary are (1) that Avenatti allegedly never asked for or agreed to receive confidential information from Davidson, and (2) that Avenatti purportedly cannot be held liable for conspiring with Davidson to violate his fiduciary duties because Avenatti does not ***himself*** owe Ms. Bechard a fiduciary duty. Both of these arguments are incorrect.

No agreement. Avenatti's first argument is that he did not ***agree*** to receive information about the Settlement Agreement, but rather "Davidson[] gratuitous[ly] disclos[ed]" it to him. This same assertion is discussed above, and still does not pass the laugh test. It is beyond implausible to think that Davidson simply told Avenatti out of the blue—before Avenatti could stop him—about the Agreement. Moreover, Davidson expressly denies this, saying that Avenatti (1) initiated the discussion on this topic, (2) pressured him to reveal the details of the Agreement, and (3) promised to keep this information confidential. (Martin Decl., ¶ 7.) That establishes a *prima facie* case on an anti-SLAPP motion. (*Baral*, 1 Cal. 5th at pp. 384-85 (evidentiary conflicts viewed in favor of non-moving party).) A jury could reasonably disbelieve Avenatti's self-serving version of the facts.

No fiduciary duty. Avenatti finally argues that he cannot be found liable for conspiracy because he did not owe an independent fiduciary duty to the plaintiff. But Avenatti ignores a crucial distinction in the case law. Where the basis for the non-fiduciary defendant's liability involves "an intentional tort," "there can be liability for conspir[acy] . . . even *absent* any duty" owed independently to the plaintiff. (*Fuller*, *supra*, 216 Cal.App.4th at p. 967, emphasis in original.) As the Court of Appeal cogently explained in that case:

> First Franklin . . . asserts that it cannot be responsible for any nondisclosures to plaintiff because it was not in a fiduciary relationship with them. . . . However, all of these arguments entirely disregard the allegations that First Franklin *conspired* with SFM—plaintiff's broker. . . . As a federal trial court has noted in distinguishing the principle derived from these cases, "*everyone* owes a duty not to commit an intentional tort against *anyone*." Thus, there can be liability for conspiring to commit an intentional tort against *anyone*.

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(*Ibid.*, citations omitted; emphases in original.) Because Avenatti engaged in the conspiracy through the commission of an intentional tort (e.g., tortious interference), he is liable for breach of fiduciary duty even though his co-participant (Davidson) was originally the only one with such a duty.

Legions of other California cases affirm this critical distinguishing principle. For example, the Court of Appeal in *Casey v. U.S. Bank National Ass'n* (2005) 127 Cal.App.4th 1138 stated:

> The Trustee's first cause of action against the banks is for aiding and abetting breach of fiduciary duty. California has adopted the common law rule for subjecting a defendant for aiding and abetting a tort. "'Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' (Citations)" . . . .
>
> The Trustee alleges the banks knew the DFJ Fiduciaries were breaching their fiduciary duty to DFJ and substantially assisted that breach of duty by allowing the DFJ Fiduciaries' skullduggery in connection with the bank accounts. . . .
>
> "A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort.* (Citation)."

(*Id.* at pp. 1144-46.) Avenatti did precisely that; he knew that Davidson was breaching his fiduciary duty to Ms. Bechard and acted with the intent of facilitating the commission of that tort. He is thus liable for breach of that fiduciary duty.

By engaging in the wrongdoing at issue, Avenatti made himself *ex maleficio* and *in particeps criminis* alongside Davidson's breach. The rule in this regard is no different than longstanding trust law; those who wrongfully obtain the confidential information or property of other from a fiduciary take on, and are liable for, that fiduciary breach. So too with Avenatti.

III. Plaintiff Is Alternatively Entitled To Discovery.

Even with the limited information already available, Ms. Bechard has demonstrated a *prima facie* case. That ends the matter, as does Avenatti's failure to satisfy his burden on prong one.

But this is also a paradigmatic case in which limited discovery must be ordered before any anti-SLAPP motion could be granted. Although such motions generally stay discovery, discovery may be ordered for good cause. (Code Civ. Proc., § 425.16(g).) Good cause is shown if "a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case." (*1-800 Contacts, Inc.*

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v. *Steinberg* (2003) 107 Cal.App.4th 568, 593.)[3]

Were the available evidence discussed above somehow inadequate to demonstrate a *prima facie* case, Ms. Bechard would be entitled to discovery to test Avenatti's self-serving claim that he (1) did not induce Davidson to breach his duties, (2) did not know there was a non-disclosure provision, and (3) received this information to advance litigation and the greater good, including depositions of Avenatti and Davidson and obtaining documents about to their communications.

IV. Plaintiff Should Be Awarded Her Fees.

But this Court need not do so, as Avenatti already fails to satisfy either of the two prongs of the anti-SLAPP inquiry. His motion should thus be denied. Moreover, as noted, Avenatti's motion is also frivolous, as the Court of Appeal has already held that the anti-SLAPP statute does not apply to or protect an attorney sued for tortiously obtaining confidential information of a third person (including in connection with a pending litigation). (*Gerbosi, supra*, 193 Cal.App.4th at pp. 441-46 (finding contrary argument "frivolous" and awarding fees).) Avenatti should accordingly be ordered to pay Ms. Bechard's fees in opposing this motion. (Code Civ. Proc., § 425.16(c)(1) (mandatory fee award for anti-SLAPP motion that is "frivolous" or "intended to cause unnecessary delay").)[4]

CONCLUSION

The Court should deny Avenatti's special motion to strike on the merits and enter a fee award against him, or in the alternative, order limited discovery regarding Ms. Bechard's claims.

[3] Not only must courts "liberally exercise [their] discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff," but when a plaintiff properly requests it, due process requires that she "be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated." *Lafayette Morehouse Inc. v. Chronicle Pub. Co.* (1995) 37 Cal.App.4th 855, 868.

[4] Indeed, a fee award is even more warranted here than in *Gerbosi*, as Avenatti (1) not only had notice of this authority, but (2) expressly intended his motion to cause delay, personally telling all the lawyers in writing that even "in the event were are not successful on this motion, we plan on taking an immediate appeal, thus staying the case." (Martin Decl., ¶ 8 & Ex. A.)

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