~~*TENTATIVE*~~ *RULING*

HEARING DATE: **September 7, 2018** TRIAL: Not set.

CASE: **Shera Bechard v. Elliott Broidy, et al.**

CASE NO.: **BC712913**

Opposed: **Yes.**

(1) MOTION TO STRIKE PORTIONS OF COMPLAINT;
(2) MOTION TO SEAL THE COMPLAINT;
(3) MOTION TO COMPEL ARBITRATION;
(4) ANTI-SLAPP SPECIAL MOTION TO STRIKE

MOVING PARTY: (1) "Specially appearing[1]" Defendant Elliott Broidy;
(2) "Specially appearing" Defendant Elliott Broidy;
(3) "Specially appearing" Defendant Elliott Broidy;
(4) Defendant Michael Avenatti

RESPONDING PARTY(S): (1) Plaintiff Shera Bechard;
(2) (a) Plaintiff Shera Bechard; (b) Defendant Michael Avenatti;
(c) Media Interveners ABC, Inc., The Associated Press, Cable News Network, Inc., The Daily Beast Company LLC, Dow Jones & Company, Inc., Los Angeles Times Communications LLC, and The New York Post.

PROOF OF SERVICE:

- Correct Address: (1) Yes; (2) Served by email; (3) Yes; (4) Yes.
- 16/21 (CCP § 1005(b)): (1) OK. Served by hand delivery on August 13, 2018; notice of continuance served by hand delivery on August 21, 2018; (2) Served by e-mail on July 23, 2018; no agreement on file reflecting that all parties agreed to email service; however no objection to email service was filed; (3) OK. Served by overnight mail on August 3, 2018; advanced to this date per August 16, 2018 minute order; (4) OK. Served by FedEx/Overnite on August 13, 2018; advanced to this date per August 16, 2018 minute order.

[1] Although Defendant Elliott purports to "specially appear," by seeking a substantive ruling on the motion to strike, Plaintiff has made a general appearance and thus consented to the Court's exercise of personal jurisdiction over him. "A defendant appears in an action when the defendant . . .files a notice of motion to strike, . . ." CCP § 1014.

Defendant Elliott Broidy's Motion to Strike Portions of Complaint

- **GRANT motion to strike portions of complaint without leave to amend as to the following: Page 2:5-9; Page 4:16-17; Page 4:19; Page 7:6-7.**
- **GRANT motion to strike portions of complaint in part without leave to amend, and DENY in part, as more fully set forth below, as to the following: Page 4:12; Page 4:22-6:8;**
- **DENY motion to strike portions of complaint as to the following: Page 7:22-28; Page 8:1-7; Page 8:14-17; Page 13:12-14.**
- **A 10 day stay will issue on all rulings to allow the filing of a Writ with the Court of Appeal**

Defendant Elliott Broidy's Motion to Seal Portions of Complaint

- **DENY motion to seal in its entirety.**
- **A 10 day stay will issue on all rulings to allow the filing of a Writ with the Court of Appeal**

Defendant Elliott Broidy's Motion to Compel Arbitration

- **CONTINUE hearing on motion to compel arbitration to November 15, 2018, to be heard with Broidy's motion to compel arbitration of Davidson's Cross-Complaint.**

Defendant Michael Avenatti's Anti-SLAPP Special Motion to Strike

- **DENY anti-SLAPP special motion to strike as to the second cause of action for tortious interference with contract;**
- **GRANT anti-SLAPP special motion to strike as to the second cause of action for tortious interference with prospective economic advantage and the third cause of action for conspiracy to commit breach of fiduciary duty;**
- **Defendant may bring a noticed-motion for attorney's fees; DENY Plaintiff's request for attorney's fees.**
- **This ruling is subject to an automatic right of appeal. CCP § 425.16(h)(i)**

ANALYSIS

Documents Lodged Under Seal

The only sealing order issued in this case was the Order temporarily sealing the Complaint for a period of 20 days per the July 6, 2018 ex parte order by Judge Kwan. After a series of CCP § 170.6 challenges, this matter was reassigned to Dept. 48. The Court has not issued any further order regarding the sealing of the Complaint.

Aside from the Verified Complaint lodged under seal pursuant to the above-referenced order, a variety of documents were lodged conditionally under seal—**without a sealing order**—by the parties in connection with the motions to be heard by the Court today, including all

supporting briefs. All documents so lodged **shall be immediately placed in the public file following today's hearing**. No party timely filed a motion to seal these documents as required by CRC Rule 2.551(b)(1), which provides: "A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." The only motion to seal before the Court is Defendant Broidy's motion to seal portions of the **Complaint**.

1. Defendant Broidy's Motion to Strike Portions of the Complaint.

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: [¶] (a) Strike out any irrelevant, false, or improper matter inserted in any pleading." CCP § 436(a).

Defendant Broidy moves to strike the portions of the Complaint as being sensitive and immaterial. Attached to the Declaration of Jessica Stebbins Bina is a copy of the complaint with the portions Broidy seeks to have stricken highlighted. The Court incorporates by reference this highlighted version of the Complaint, and refers only to the page and line numbers. The court notes Broidy's Motion to Seal or alternatively Strike conflates two concepts namely sealing and striking. In this case, a sealing order would result in the unredacted complaint being unavailable to the public whereas in a striking order, the original language in the unredacted complaint remains in the court file but the stricken language is removed either by interlineation (a line through the words but not blacked out) and reference to the page(s) and line(s) of stricken language in a minute order or the court's order to file an amended complaint removing the language. In any event, the effect of striking is that the public is still able to access the unredacted complaint with the record reflecting which portions are stricken.

▶ Page 2:5-9; **GRANTED without leave to amend.**

The allegations set forth at Page 2:5-9 are irrelevant. The Court exercises its discretion to strike these allegations from the Complaint.

Plaintiff argues that some of these allegations are relevant to Plaintiff's case-within-a-case claim because she alleges that Davidson committed legal malpractice by convincing her to give up a valuable palimony claim. This claim is not persuasive. Cohabitation is a prerequisite to a palimony claim. Bergen v. Wood (1993) 14 Cal.App.4th 854, 858. Plaintiff does not allege that she and Defendant Broidy lived together. As such, Davidson could not have committed legal malpractice in failing to assign value to a potential palimony claim in the Settlement Agreement.

Plaintiff argues that the allegations Broidy seeks to strike are relevant to Plaintiff's theory that Davidson committed legal malpractice by failing to value those claims in negotiating the Settlement Agreement. This argument is also not persuasive. Plaintiff does not allege in the Complaint that Davidson committed legal malpractice by failing to assign a value to known claims that Plaintiff was waiving. Rather, Plaintiff's breach of fiduciary duty claim is based upon the following:

- Davidson did not tell Plaintiff about the $4.8 million penalty. Complaint, ¶ 6.

- Davidson told Plaintiff "she was not getting paid to have an abortion, but rather to give up her rights to sue Mr. Broidy and to not talk about the relationship." ¶ 26(e).

- Davidson insisted Plaintiff must get an abortion. ¶ 28.

- Davidson told Plaintiff if she didn't have an abortion, she "would never be able to move out of California due to Mr. Broidy's visitation rights" and that Broidy would sue Plaintiff for child-support payments. ¶ 28. He also issued a thinly-veiled threat that Plaintiff should be "very very careful" and she had better sign the Settlement Agreement and have an abortion. Id.

Plaintiff thus alleges that she was told these things **before** she signed the agreement and that as such, they were considered in valuing the claims.

Plaintiff alleges at ¶¶ 29, 50-53 that she was not told other material aspects of the Settlement Agreement as follows:

- Plaintiff claims unconscionable terms and terms that Davidson allegedly failed to disclose to her or that he lied about (¶ 50). For example, there was no effective remedy if Broidy violated the confidentiality or payment provisions. Id. On the other hand, Plaintiff faced a high liquidated damages penalty ($4,800,000) if she mentioned the settlement agreement or responded to Broidy's factual misstatements. ¶¶ 50, 51.

- Davidson himself increased the penalty against his client from $500,000 to $4,800,000. ¶ 51.

- The Settlement Agreement also contained deliberate falsehoods useful only to Broidy, which were disclosed by the *Wall Street Journal*, citing the Agreement. ¶ 52.

- The Agreement also contains a statement that Plaintiff claims she never had an affair with or was impregnated by Broidy. ¶ 53.
- Davidson improperly deducted from Plaintiff's settlement recovery costs Davidson incurred before Plaintiff even met Davidson. ¶ 54.

Although Plaintiff alleged all of the foregoing against Davidson, she does not allege that he undervalued her existing or potential claims, only that the Settlement Agreement contained one-sided terms against her, which Davidson did not disclose to Plaintiff.

Further, as to the valuation of her claims, Plaintiff was told that, in signing the Settlement Agreement:

- She was giving up the right to sue Broidy about everything that had previously happened between them. Complaint, ¶ 27(b).

- She was told the compensation only represented future child-support payments of $1.6 million for an 18-year old child. Complaint, ¶ 25.

Obviously, Plaintiff knew the extent to which Broidy had physically harmed or threatened her, and thus, she knew she was giving up the right to those claims (such as assault and battery). Moreover, Plaintiff does not allege that Davidson knew at the time Plaintiff signed the Settlement Agreement that Broidy had exposed Plaintiff to herpes. Davidson could not have been negligent in failing to assign a value to such exposure if he had no knowledge of such. Moreover, if Plaintiff herself knew of such exposure at the time she signed the settlement agreement (she vaguely claims she learned of this exposure "years" after their sexual relationship began—¶ 20(f)), she knew her claim was being waived without consideration being assigned to that claim.

▶ Page 4:12: **"DENIED in part and GRANTED in part without leave to amend.**

The allegation that Plaintiff was expecting Broidy's child is relevant to the underlying Settlement Agreement and is properly included in the Complaint. The motion to strike is DENIED as to this allegation. However, the allegation that Broidy engaged in "mistreatment" is irrelevant for the reasons discussed above. The motion to strike is GRANTED without leave to amend as to this allegation.

▶ Page 4:16-17: **GRANTED without leave to amend.**

For the reasons discussed above, the allegations about Broidy's behavior toward Plaintiff are irrelevant.

▶ Page 4:19: **GRANTED without leave to amend.**

This allegation is relevant as to what Davidson knew about the nature of Plaintiff and Bechard's relationship. (See below re: Page 4:22-6:8.) Plaintiff claims this relates to Davidson's malpractice and breach of fiduciary duty. However, as discussed above, Plaintiff does not allege that Davidson undervalued Plaintiff's claims arising out of Bechard's physical violence toward her. Plaintiff instead alleges a breach of fiduciary duty based upon Davidson's concealing unfavorable terms from Plaintiff. The allegation as to what Davidson learned from text messages and photographs is irrelevant.

▶ Page 4:22-6:8: **GRANTED in part without leave to amend; DENIED in part.**

These allegations pertain to the development and course of Plaintiff and Broidy's relationship, including private and intimate details. These details are irrelevant to Plaintiff's claims.

Plaintiff's claim that the allegations are relevant to a palimony, domestic violence and/or sexual assault claim is unpersuasive for the reasons discussed above. The specific details of how

Plaintiff became pregnant are irrelevant. The motion to strike is GRANTED without leave to amend as to ¶ 20(a) – (g) and ¶ 22.

However, the allegations as ¶ 21 regarding Broidy demanding an abortion are relevant. The motion to strike is DENIED as to ¶ 21.

▶ Page 7:6-7: **GRANTED without leave to amend.**

This allegation as to *why* the payments were made over eight quarterly installments is irrelevant.

▶ Page 7:22-28; Page 8:1-7; Page 8:14-17: **DENIED.**

These allegations regarding Plaintiff's attitude toward an abortion and wanting to keep the baby are relevant to her state of mind in eventually agreeing to an abortion as part of the settlement. The allegations regarding Davidson's breach of fiduciary duty toward his client in coercing her to get an abortion in connection with signing the Settlement Agreement are also relevant.

▶ Page 13:12-14: **DENIED.**

This allegation that Davidson did not inform Plaintiff about statements contained in the Settlement Agreement which favored Broidy are relevant to Plaintiff's breach of fiduciary duty claim against Davidson. As pled, the *Wall Street Journal* repeated certain statements in the Settlement Agreement. Complaint, ¶ 52.

2. Defendant Broidy's Motion to Seal Portions of the Complaint

The motion to seal seeks an order sealing the same allegations addressed in the motion to strike. The ruling on the motion to strike does not render the motion to seal moot, as the Court may simply strike out the irrelevant allegations in the Complaint by hand, reference them in a minute order or order an amended complaint to be filed deleting the stricken allegations. In no event is the stricken language sealed from public view.

A motion seeking an order sealing the record must be accompanied by "a **declaration containing facts sufficient to justify the sealing**." CRC Rule 2.551(b)(1)(bold emphasis and underlining added). "A request to seal a document . . . **must be supported by a factual declaration or affidavit explaining the particular needs of the case**." In re Marriage of Lechowick (1998) 65 Cal.App.4th 1406, 1416 (bold emphasis and underlining added).

Defendant Broidy did not submit any such declaration. The Declaration of Marvin S. Putnam in support of the motion to seal only serves to authenticate certain exhibits.

Moreover, per CRC Rule 2.550(d), a court may order that a record be filed under seal "only if it expressly finds facts that establish" all of the following:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(Bold emphasis added.)

CRC Rule 2.550(e) provides:

(1) An order sealing the record must:

(A) Specifically state the facts that support the findings;

(B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

"**Unless confidentiality is required by law**, court records are presumed to be open." CRC Rule 2.550(c)(bold emphasis and underlining added). "**The trial court cannot rely solely on an agreement or stipulation of the parties as the basis for permitting records to be filed under seal**. (Citations omitted.)" Savaglio v. Wal-Mart Stores, Inc. (2007) 149 Cal.App.4th 588, 600 (bold emphasis and underlining added).

Here, moving party has not demonstrated by way of a **factual declaration or affidavit** that **all** of the CRC Rule 2.550(d) requirements for sealing have been met.

▶ CRC Rule 2.550(d) factors:

(1) There exists an overriding interest that overcomes the right of public access to the record:

> In terms of the overriding interest requirement of a closure or sealing order, NBC Subsidiary identifies two separate elements. The first element requires the identification of an overriding interest. (NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal.4th at pp. 1217–1218; see In re Providian Credit Card Cases, supra, 96 Cal.App.4th at p. 298, fn. 3.) Defendant has identified such a potential overriding interest—a binding

contractual agreement not to disclose.

. . .

> We agree with defendant that its contractual obligation not to disclose can constitute an overriding interest within the meaning of rule 243.1(d). (Publicker Industries, Inc. v. Cohen, supra, 733 F.2d at p. 1073; NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal.4th at p. 1222, fn. 46.)

Universal City Studios, Inc. v. Superior Court (2003) 110 Cal.App.4th 1273, 1283.

Plaintiff did not submit a factual declaration or affidavit explaining why each allegation which Broidy seeks to have sealed implicates an overriding interest of privacy which overcomes the right of public access to the record. This is particularly so where, as discussed above re: the motion to strike, some allegations are relevant to Plaintiff's claims and many relate to matters which have already been publicly disclosed in the *Wall Street Journal* articles on April 13, 2018 and July 1, 2018. Complaint, ¶¶ 39, 40, 41.

This requirement is **not** satisfied.

(2) The overriding interest supports sealing the record;

For the reasons discussed above, Broidy has failed to make "a sufficient evidentiary showing that disclosure of the identity of the funding sources overcomes the **presumed right of public access to the documents**. (Rule 243.1(d)(1); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal.4th at p. 1218, fn. 38.)" Huffy Corp. v. Superior Court (2003) 112 Cal.App.4th 97, 108 (bold emphasis added).

This requirement is **not** satisfied.

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

Broidy has not presented admissible evidence that the overriding interest will be prejudiced if the record is not sealed. Broidy has not articulated, by the required declaration, a specific showing of serious injury, nor that there is a substantial probability of prejudice, if the record is not sealed:

This requirement is **not** satisfied.

(4) The proposed sealing is narrowly tailored;

Although the proposed sealing is narrowly tailored, the other factors are not satisfied.

(5) No less restrictive means exist to achieve the overriding interest.

As discussed above, Broidy has not demonstrated an overriding interest as in sealing the allegations at issue. Thus, less restrictive means need not be addressed.

As such, the motion to seal portions of the Complaint is DENIED in its entirety.

The Court will strike out the allegations ordered to be stricken above, and then the first amended complaint will be publicly filed unsealed.

3. Defendant Broidy's Motion to Compel Arbitration

Defendant Broidy moves to compel arbitration of the first cause of action, which is the sole cause of action asserted against him, and for an order staying further proceedings against him. The basis for Broidy's motion is the arbitration clause found at § 5.2 of the Settlement Agreement between Broidy and Plaintiff.

In her Opposition, Plaintiff does not dispute the existence of the arbitration agreement nor that her claim against Broidy is subject to arbitration. Instead, Plaintiff argues that, pursuant to CCP § 1281.2(c), the Court has the discretion to deny arbitration where, as here, third parties are joined in an action with the party seeking to compel arbitration, the claims against them arise out of the same set of events, and there is a possibility of conflicting rulings on a common issue of law and fact. The Court finds this argument appealing. For purposes of CCP § 1281.2, "pending court action" includes the same action in which the petition to compel arbitration is being brought. Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102, 1107-08, 1115-16.

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement (here, either Plaintiff or Broidy) is also a party to a pending court action (the instant court action) or special proceeding with a third party, **arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact**. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

. . .

(d) . . .

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration (here, Plaintiff) is also a party to litigation in a pending court action or special proceeding with a third party (here, Davidson, Avenatti and Davidson & Associates, PLC) as set forth under subdivision (c) herein, the court (1) **may refuse to enforce the arbitration agreement** and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

CCP § 1281.2 (bold emphasis and underlining added).

However, in his reply, Broidy claims that Davidson is not a "third party" for purposes of CCP § 1281.2(c) because he filed a Cross-Complaint against Broidy, relying upon a theory that he is a third party beneficiary of the Settlement Agreement. Broidy has filed a motion to compel arbitration against Davidson, which is set for hearing on November 15, 2018. Broidy asserts that Davidson is bound to arbitrate his Cross-Complaint against Broidy because Davidson is estopped from denying that he is required to arbitrate his claims against Broidy, and also because Davidson is a third-party beneficiary to the settlement agreement. In this regard, Broidy argues that, as Plaintiff's agent, Davidson is not a third party because he has the right to enforce the arbitration provision in the Settlement Agreement.

Broidy's argument may or may not have merit, as "[a] trial court does not have discretion to deny arbitration under … section [1281.2(c)], absent the presence of a third party … ." (Citation omitted.) "The term 'third party' for purposes of section 1281.2[(c)], must be construed to mean a party that is not bound by the arbitration agreement." (Citations omitted.)" Acquire II, Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959, 976-77. However, this argument is best addressed after fully briefing on Broidy's motion to compel arbitration against Davidson, to be heard on November 15, 2018.

Plaintiff also argues that her claims against Avenatti justifies application of this Court's discretion to deny arbitration of her claim against Broidy. Broidy does not dispute that Avenatti is not bound by the arbitration provision in the Settlement Agreement. It would appear that Plaintiff's claim against Avenatti involves a common issue of fact regarding what Davidson told Avenatti about the Settlement Agreement. In this regard, this issue of fact may be decided by an arbitrator if Davidson's cross-claims against Broidy and Plaintiff's claims against Broidy are compelled to arbitration. At least tentatively, the third party exception set forth in CCP § 1281.2(c) could apply regarding Plaintiff[2]'s claims against Avenatti because there is the possibility of conflicting outcomes on a common issue of fact. For example, the arbitrator may determine that Davidson and Avenatti discussed matters in such a way that Avenatti is subjected to liability, while the trier of fact in this action might find the opposite.

However, the Court reserves a full analysis on whether the third party exception in CCP § 1281.2(c) applies to Davidson and Avenatti until the November 15, 2018 hearing.

Accordingly, the hearing on Broidy's motion to compel arbitration as to the first cause of action in the Complaint is CONTINUED to November 15, 2018, to be heard with Broidy's motion to compel arbitration of Davidson's Cross-Complaint.

4. Defendant Avenatti's Anti-SLAPP Special Motion to Strike

Defendant's Evidentiary Objections

Declaration of Shaun P. Martin

No. 1: SUSTAINED. Oral testimony of contents of writing. Evid. Code § 1523(a).
No. 2: SUSTAINED. Lack of personal knowledge.
No. 3: OVERRULED. Objections inapplicable.
No. 4: SUSTAINED. Hearsay, not subject to exception because not being offered against hearsay declarant Davidson, even though he is a party to this action. Evid. Code § 1220.
No. 5: SUSTAINED. Hearsay, not subject to exception because not being offered against hearsay declarant Broidy's counsel, even though Broidy is a party to this action. Evid. Code § 1220.

Discussion

Pursuant to CCP § 425.16, Defendant Avenatti brings an anti-SLAPP special motion to strike the second and third causes of action asserted against him in the Complaint.

1. Re: Whether the Causes of Action Are Subject To Being Stricken Pursuant to CCP § 425.16.

[2] Plaintiff would be "[a] party to an arbitration agreement" for purposes of CCP § 1281.(c), and Avenatti would be a "third party" not subject to any arbitration agreement.

A. Second Cause of Action (Tortious Interference With Contract and Interference With Prospective Economic Advantage); Third Cause of Action (Conspiracy To Commit Breach of Fiduciary Duty).

Plaintiff is actually asserting three separate causes of action against Defendant Avenatti: (1) tortious interference with contract; (2) tortious interference with prospective economic advantage; and (3) conspiracy to commit breach of fiduciary duty. The Court must determine whether the principal thrust or gravamen of Plaintiff's causes of action arise out of protected activity.

"As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings. (Citation omitted.)" Paiva v. Nichols (2008) 168 Cal.App.4th 1007, 1017.

> Our Supreme Court has recognized the anti-SLAPP statute should be broadly construed (*Equilon, supra*, 29 Cal.4th at p. 60, fn. 3) and that a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90–92 [124 Cal. Rptr. 2d 530, 52 P.3d 703].) Accordingly, we disregard the labeling of the claim (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 522 [37 Cal. Rptr. 3d 381]) and instead "**examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies**" and whether the trial court correctly ruled on the anti-SLAPP motion. (*Ramona Unified School Dist.*, at pp. 519–522.) **We assess the principal thrust by identifying "[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim.**" (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 189 [6 Cal. Rptr. 3d 494].) If the **core injury-producing conduct upon which the plaintiff's claim is premised** does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. (*Martinez*, at p. 189.)
>
> Hylton v. Frank E. Rogozienski, Inc. (2009) 177 Cal.App.4th 1264, 1271-1272 (italics in original, bold emphasis and underlining added).

Plaintiff argues that she is suing Avenatti "for improperly soliciting and receiving confidential information about her from Davidson," but that she "has never alleged that Avenatti's tweet was the unlawful act; indeed, her Complaint expressly alleges to the contrary." Opposition at Page 5:19-21.

However, the principal thrust of Plaintiff's claims against Avenatti is his conduct in "assist[ing] the exposure and public promotion of the Settlement Agreement" (Complaint, ¶ 73) and that he disclosed information known by Davidson about Bechard's case including the

existence and contents of the Settlement Agreement which Avenatti "agreed to receive and received." (Complaint, ¶ 67).

In connection with the second cause of action, Plaintiff alleges that:

> 67. Mr. Avenatti knew of the Settlement Agreement by virtue of Mr. Davidson purportedly telling him about it. Additionally, as an attorney and given the nature of what he himself called the "hush NDA" agreement, Mr. Avenatti knew that Mr. Davidson was contractually and ethically bound not to disclose to Mr. Avenatti information known by Mr. Davidson about Ms. Bechard's case, including but not limited to the existence and contents of the Settlement Agreement. If Mr. Avenatti indeed **agreed to receive and received information** about the Settlement Agreement from Mr. Davidson, as alleged by Mr. Broidy, Mr. Avenatti engaged in an intentional act designed to induce breach or disruption of the Settlement Agreement and the Engagement Letter, as well as the economic relationship between Ms. Bechard, Mr. Broidy, and Mr. Davidson. Mr. Avenatti's decision to **receive** confidential information about Ms. Bechard from her attorney, including the existence and terms of the Settlement Agreement was, if Mr. Broidy's allegations are correct, accomplished through unlawful and unethical means including complicity in Mr. Davidson's violation of ethical duties owed to Ms. Bechard.

(Bold emphasis and underlining added.)

As to the third cause of action, Plaintiff alleges that:

> 73. Mr. Avenatti purportedly knew what Mr. Davidson knew, and knew that the Settlement Agreement was secret. Indeed, his tweet about it described the agreement as a "hush NDA." Mr. Avenatti, moreover, **desired to assist the exposure and public promotion of the Settlement Agreement** because he claimed entitlement to and **hoped to receive attribution as the first source of public information about it.**

(Bold emphasis and underlining added.)

Even accepting as true, for purposes of argument, that Plaintiff's second cause of action is limited to Avenatti simply receiving information about the Settlement Agreement from Davidson, this does not avoid application of the anti-SLAPP statute. Even though the conversation between Davidson and Avenatti was private, the anti-SLAPP statute applies to private communications about issues of public interest. FilmOn.com v. DoubleVerify, Inc. (2017) 13 Cal.App.5th 707, 722-23.

The Court must look to the **content** of the communication (a hush NDA involving a prominent GOP donor and a woman he had impregnated), **not the identity of the speaker** (Defendant Davidson, Plaintiff's attorney) **or audience** (Defendant Avenatti, an attorney), to

determine **whether the content of the communication concerns an issue of public interest**. Hailstone v. Martinez (2008) 169 Cal.App.4th 728, 736-37.

Here, a communication about a prominent GOP donor who had entered into a multiple-payment hush NDA with a woman he had impregnated, and as a condition of signing the NDA insured that she had an abortion, is an issue of public interest for purposes of CCP § 425.16(c)(4). The issue of NDA's involving affairs of political prominence had already become a newsworthy item in connection with President Donald Trump. The alleged communication between Davidson and Avenatti occurred sometime in 2018, as Avenatti tweeted about the affair and NDA on April 12, 2018. See Complaint, ¶ 38. According to Plaintiff's allegation, the media began to report about a disclosure agreement between Trump and Stephanie Clifford (aka "Stormy Daniels"), and an agreement between American Media, Inc. and Karen McDougal. Compliant, ¶ 35. The reporting of these agreements apparently occurred before Avenatti tweeted on April 12, 2018. Complaint, ¶¶ 35 – 38. The fact that on April 13 2018 and July 1, 2018, the *Wall Street Journal* reported details about the Settlement Agreement between Plaintiff and Broidy, further supports the conclusion that the Settlement Agreement was an issue of public interest. See Declaration of Michael J. Avenatti, ¶¶ 11, 16 and Exhs. 4, 9 thereto

The fact that Plaintiff alleges that Avenatti simply "received" confidential information from Davidson regarding Davidson's client does not prevent Avenatti from invoking the anti-SLAPP statute. Even if Avenatti was primarily a listener in the conversation between himself and Davidson, his participation in the conversation would allow him to invoke the protection of the anti-SLAPP statute in that he engaged in "**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." CCP § 425.16(e)(4)(bold emphasis added).

> "'Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit.'" (*Trapp v. Naiman* (2013) 218 Cal.App.4th 113, 120 [159 Cal. Rptr. 3d 462] [Fourth Dist., Div. Two].) The protections of the anti-SLAPP statute extend, moreover, to "any act" in furtherance of a person's right of petition. (§ 425.16, subd. (b)(1).) "'Any act' includes communicative conduct such as the filing, funding, and prosecution of a civil action." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [39 Cal. Rptr. 3d 516, 128 P.3d 713], citing *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17–19 [43 Cal. Rptr. 2d 350] (*Ludwig*) [Fourth Dist., Div. Two].) ***Ludwig* further stands for the proposition that the anti-SLAPP statute may be invoked by one who did not personally engage in the protected communicative conduct**: "A person can exercise his own rights by supporting the forceful activities of others; it would be absurd to hold that the confident opponent who takes the public podium is protected, while the shy opponent who prefers to lend moral support by standing silently in the audience is not." (*Ludwig, supra*, at p. 18.)

Lennar Homes of California, Inc. v. Stephens (2014) 232 Cal.App.4th 673, 680-681 (bold emphasis added).

Although Plaintiff alleges that Davidson's violation of his ethical and contractual duties to his client was unlawful and unethical (Complaint, ¶¶ 66, 67), this does not preclude application of the anti-SLAPP statute either because it was not a crime for Davidson to disclose such information to Avenatti. MMM Holdings, Inc. v. Reich (2018) 21 Cal.App.5th 167, 184.

"[C]ase authorities after *Flatley* have found the *Flatley* rule applies only to criminal conduct, not to conduct that is illegal because in violation of statute or common law." Bergstein v. Stroock & Stroock & Lavan LLP (2015) 236 Cal.App.4th 793, 806.

Moreover, the cases upon which Plaintiff relies in her opposition are inapposite. For instance, in Gerbosi v. Gaims, Weil, West & Esptein, LLP (2011) 193 Cal.App.4th 435, the defendant law firm engaged in wiretapping and privacy invasions as to Plaintiff's private conversations which were criminal in nature[3]. Other cases holding that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits (despite protected litigation activity featuring prominently in the factual background) are distinguishable. Those cases involve an attorney breaching the duty of loyalty by representing interests adverse to the former client, or incompetent representation, which conduct does not constitute protected speech of petitioning for purposes of CCP § 425.16. See Castleman v. Sagaser (2013) 216 Cal.App.4th 481, 490-496; Chodos v. Cole (2012) 210 Cal.App.4th 692, 702-706.

On the other hand, the receipt and use of confidential information may constitute protected activity under CCP § 425.16. Bergstein v. Stroock & Stroock & Lavan LLP (2015) 236 Cal.App.4th 793, 811, 813.

Similarly, here, Davidson did not engage in a breach of loyalty (i.e., representing someone adverse to Plaintiff as a former client), and Avenatti's receipt of the confidential information—which involved an issue of public interest—was eventually used by him in a public forum (Twitter) to engage in a public conversation about an issue of public interest. Indeed, the third cause of action alleges that Avenatti desired to expose and publicly promote the Settlement Agreement to receive attribution as the first source of public information about it. Complaint at ¶ 73. Not only would this constitute "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" (CCP § 425.16(e)(4)), but also a "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" (CCP § 425.16(e)(3)).

For the foregoing reasons, the second and third causes of action are subject to being stricken. The burden shifts to Plaintiff to demonstrate a probability that she will prevail on these claims.

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[3] "[T]he defendant may invoke the anti-SLAPP statute **unless the activity is criminal as a matter of law.** In coming to this result, the Supreme Court observed that an activity could be deemed criminal as a matter of law when a defendant concedes criminality, or the evidence conclusively shows criminality.". Gerbosi v. Gaims, Weil, West & Epstein, LLP (2011) 193 Cal.App.4th 435, 446 (bold emphasis added).

2. Re: Whether Plaintiff Has Established That There Is A Probability They Will Prevail On The Claims – CCP ¶ 425.16(b)(1).

As noted, Plaintiffs have the burden on the second prong of a SLAPP analysis to establish that there is a probability Plaintiffs will prevail on the claims. CCP § 425.16(b)(1); Kajima Engineering & Construction, Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921, 928.

As noted above, Plaintiff is actually asserting three separate causes of action against Defendant Avenatti: (1) tortious interference with contract; (2) tortious interference with prospective economic advantage; and (3) conspiracy to commit breach of fiduciary duty.

a. Tortious Interference with Contract

> [I]n California, the law is settled that "a stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract." (Citation omitted.) To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the 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**. (Ibid.) To establish the claim, the **plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action**. (Citation omitted.)

Reeves v. Hanlon (2004) 33 Cal.4th 1140, 1148 (bold emphasis added).

As for Avenatti's argument that he did not actually cause Plaintiff damages because the terms of the Settlement Agreement were actually first disclosed to the public through the *Wall Street Journal* article based upon documents obtained in the F.B.I.'s raid on Michael Cohen's office is a question for the trier of fact to ultimately determine.

The Court notes that although Plaintiff attempts to disclaim any reliance upon Avenatti's tweet as the basis for liability, this tweet is evidence that Avenatti was certain or substantially certain[4] that a breach or disruption of the confidentiality provision Settlement Agreement would occur in a manner which caused Plaintiff damage. Avenatti admits in this declaration that he "surmised on [his] own that an NDA must have been entered." Avenatti Decl. ¶ 3. Although technically, Avenatti engaging in a conversation with Davidson about the Settlement Agreement would cause Davidson to violate the terms of the Settlement Agreement, this private conversation between Avenatti and Davidson **could not cause Plaintiff any damage unless Broidy learned** that Davidson had spoken to Avenatti about the Settlement Agreement. Under the facts of this case, the means by which Broidy arguably learned of this was due to Avenatti's tweet to the public, which occurred on April 12, 2018, the day before the April 13, 2018 *Wall*

[4] In this regard, Avenatti's claim that he did not *intend* to interfere with Broidy's contractual or prospective economic relationship with Bechard does not immunize him from liability. Avenatti Decl., ¶¶ 4, 6.

Street Journal article was published. Complaint, ¶¶ 38, 39. Avenatti tweeted that he disclosed on Twitter the underlying facts the night before, and should have received credit. Complaint, ¶ 39. If so, a trier of fact could find that Avenatti was a substantial link in the chain of causation of Plaintiff's damages by giving Broidy an excuse from further performing his payment obligations under the Settlement Agreement.

Avenatti's argument that the Settlement Agreement was not a valid contract because it was void against public policy for waiving child support in exchange for $1.6 million is not persuasive.

Moreover, Avenatti cites In re Marriage of Lusby (1998) 64 Cal.App.4th 459 for this proposition. However, In re Marriage of Lusby addressed a situation where a court had acquired jurisdiction in a proceeding where child support is in issue:

> In the child support field, continuing jurisdiction over child support is the rule: **"Once acquired in a proceeding where child support is in issue**, . . . superior court jurisdiction over child support ordinarily *continues*. For example, a family court with jurisdiction over a marriage dissolution action may *first* make a child support order after the dissolution judgment becomes final (Fam. [Code,] § 2010[, subd.] (c); *Krog v. Krog* (1948) 32 [Cal.]2d 812, 816-817, 198 P2d 510, 512); and . . . the family court may exercise its continuing jurisdiction to *modify* a child support order postjudgment upon a showing of 'changed circumstances.' [Citation.]" (Hogoboom & King, Cal. Practice Guide: Family Law 1 (The Rutter Group 1998) P 6:123, p. 6-52, original italics.)
>
> Parents do not have the power to agree between themselves to abridge their child's right to support. (Hogoboom & King, Cal. Practice Guide: Family Law 1, *supra*, P 6:23, p. 6-11.) Nor can they restrict the court's power to act on behalf of the child in support, custody, or parentage proceedings. (*Ibid.*, citing § 3580, 3585; *Armstrong v. Armstrong* (1976) 15 Cal. 3d 942, 947 [126 Cal. Rptr. 805, 544 P.2d 941]; *In re Marriage of Ayo* (1987) 190 Cal. App. 3d 442, 445-449 [235 Cal. Rptr. 458].) "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. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law 1, *supra*, P 6:23, pp. 6-11 to 6-12, original italics.)

In re Marriage of Lusby (1998) 64 Cal.App.4th 459, 469 (bold emphasis added).

Here, a court never acquired jurisdiction over any proceeding in which child support was at issue. More fundamentally, though, Plaintiff alleges she was pressured into having an abortion in order to enter into the Settlement Agreement and as such no child was ever born who would require financial support.

Avenatti argues that his alleged disclosure of the Settlement Agreement was justified under the balancing of social interests and private interests because making the public aware of

the agreement was an issue of public concern. This argument is not persuasive. Avenatti simply could have said nothing, as the Settlement Agreement did not concern a matter he was handling, and he surmised that an NDA was in place. Confidentiality clauses in settlement agreements will generally be enforced, unless their purpose or effect violates public policy. Tower Acton Holdings v. L.A. County Waterworks Dist. No. 37 (2002) 105 Cal.App.4th 590, 601-602. Further, Avenatti's argument that he cannot be held liable for inducing Broidy to assert his legal rights under the contract is not persuasive. Plaintiff does not cite any case law for this proposition, only 40 Cal. Jur. 3d § 39, which is not binding authority. Brady v. Calsol, Inc. (2015) 241 Cal.App.4th 1212, 1224-25.

Avenatti argues that he is protected by the litigation privilege. Avenatti argues that the purpose of his April 12, 2018 phone conversation with Davidson was to obtain Stephanie Clifford's client file from Davidson to use information in the file as potential evidence in the pending Clifford v. Trump action, Case No. 2:18-cv-02217-SJO-FFM (C.D. Cal.). Avenatti Decl., ¶ 2 and Exh. 1 thereto. On June 6, 2018, Avenatti also filed a separate action against Davidson—Clifford v. Davidson, SC129384—on behalf of Clifford based upon Davidson's refusal to turn over Clifford's client file. Avenatti Decl., ¶ 10 and Exh. 3 thereto. Avenatti argues that during the phone call, Davidson, without any persuasion from Avenatti, disclosed to Avenatti 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 whom he had impregnated and subsequently forced to have an abortion. Avenatti claims that this conversation was in the course of the existing Clifford v. Trump case for the purpose of evidence gathering, and anticipated litigation in the event Davidson did not turn over Clifford's files. Avenatti also claims that his tweet related to his representation of Clifford because it referred to "yet another hush NDA" negotiated by Cohen.

Avenatti's argument is not persuasive. There is no showing that Davidson's disclosure of the deal he negotiated with Cohen on behalf of an unidentified GOP donor (Broidy) and an unidentified LA woman (Bechard)(i.e., Bechard v. Broidy) furthered the objects of Avenatti's representation of Clifford in either Clifford v. Trump or Clifford v. Davidson. Avenatti admits he has never represented Bechard in any manner. Avenatti Decl., ¶ 8.

> To be protected by the litigation privilege, a communication must be "in furtherance of the objects of the litigation." (Citation omitted.) This is "part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action." (Citation omitted.)

Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1251.

Avenatti argues that he is protected by the First Amendment from 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. This appears to be the general rule.

In this connection, the courts recognize a rule directly analogous to the defense of truth in causes of action for defamation. A person cannot incur liability for interfering with contractual or economic relations by giving truthful information to a third party. (*Bert G. Giannelli Distributing Co.* v. *Beck & Co., supra,* 172 Cal.App.3d 1020, 1057, fn. 15; *Masoni* v. *Board of Trade of S.F.* (1953) 119 Cal.App.2d 738, 743 [260 P.2d 205]; Rest.2d Torts, § 772; Prosser & Keeton, The Law of Torts (5th ed. 1984) § 129, p. 989.)

Savage v. Pacific Gas & Electric Co. (1993) 21 Cal.App.4th 434, 449-450.

However, the general rule may be limited to situations where the gravamen of the claim is injurious false hood:

Francis is one of several California cases that have explicitly or implicitly acknowledged the proposition that **principles applicable to actions for defamation will apply, more broadly, "whenever the gravamen of the claim is injurious falsehood."** (Blatty v. *New York Times Co.* (1986) 42 Cal. 3d 1033, 1045 [232 Cal. Rptr. 542, 728 P.2d 1177]; cf. *Morningstar, Inc.* v. *Superior Court* (1994) 23 Cal. App. 4th 676, 696 [29 Cal. Rptr. 2d 547]; cf. also *Paradise Hills Associates* v. *Procel* (1991) 235 Cal. App. 3d 1528, 1542 [1 Cal. Rptr. 2d 514]; *Hofmann Co.* v. *E. I. Du Pont de Nemours & Co.* (1988) 202 Cal. App. 3d 390, 402 [248 Cal. Rptr. 384]; *Jennings* v. *Telegram-Tribune Co.* (1985) 164 Cal. App. 3d 119, 129 [210 Cal. Rptr. 485].) In *Francis* the plaintiff had based claims for defamation, interference with prospective economic advantage, "injurious falsehood," and intentional infliction of emotional distress upon publication of a single credit report. Having concluded that the credit report was true and therefore not defamatory, the Court of Appeal also rejected the plaintiff's alternative theories, commenting that "[i]f a statement is protected, either because it is true or because it is privileged, that ' "protection does not depend on the label given the cause of action." ' . . . [P] . . . In California, truth is a complete defense to a defamation action regardless of the malice or ill will of the publisher. . .. We cannot believe this defense can be abrogated merely because an artful pleader chooses to label the cause of action [by a name other] than defamation." (3 Cal. App. 4th at p. 540.)

Francis's conclusions cannot be considered controversial. Falsity was an element of a civil action for defamation, and thus truth could be said to be a "complete defense" to defamation, at common law (2 Harper et al., Law of Torts (2d ed. 1986) § 5.0, 5.20, pp. 3, 158 et seq.), and the California statutes explicitly preserve the requirement that a defamatory publication be "false." (Civ. Code, § 44, 45, 46.) **To say that an action of which the gravamen is an allegation of injurious falsehood, and which is thus indistinguishable in substance from defamation** (cf. *Blatty* v. *New York Times Co., supra,* 42 Cal. 3d at p. 1042), **should be subject to the same rules is simply to acknowledge that substance should be more significant than form.**

But obviously these rules, born of the common law of defamation and applicable to actions analogous to defamation, do not compel a conclusion that liability can never attach to a true statement, regardless of the circumstances in which the statement is made or the theory upon which recovery is sought.

[*181] Nor would the First Amendment support the unqualified "absolute privilege" for true statements, against state action in the form of judicially supervised civil recovery, that Hickenbottom advocates. **"[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."** (Chaplinsky v. *New Hampshire* (1942) 315 U.S. 568, 571 [86 L. Ed. 1031, 1035, 62 S. Ct. 766]; cf. *Konigsberg* v. *State Bar* (1961) 366 U.S. 36, 49 [6 L. Ed. 2d 105, 115-116, 81 S. Ct. 997]; *People* v. *Luros* (1971) 4 Cal. 3d 84, 92 [92 Cal. Rptr. 833, 480 P.2d 633].) Thus, for example, "liability may exist for tortious speech" notwithstanding the First Amendment. (Michael *R.* v. *Jeffrey B.* (1984) 158 Cal. App. 3d 1059, 1070 [205 Cal. Rptr. 312]; see *Bill* v. *Superior Court* (1982) 137 Cal. App. 3d 1002, 1009 [187 Cal. Rptr. 625]; cf. also *Weirum* v. *RKO General, Inc.* (1975) 15 Cal. 3d 40, 48 [123 Cal. Rptr. 468, 539 P.2d 36] ["The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act"].) "If the speech is meant to, and does, offend the law, utterance of the words themselves may be protected; but the speaker is subject to the consequences. This state's version of the First Amendment, which is even more liberally construed . . ., says just that: 'Every person may freely speak, write and publish his or her sentiments on all subjects, *being responsible for the abuse of this right*. A law may not restrain or abridge liberty of speech or press.' (Cal. Const., art. I, § 2, subd. (a), italics added.)" (Long v. *Valentino* (1989) 216 Cal. App. 3d 1287, 1297 [265 Cal. Rptr. 96].)

Patently the grandchildren's undue influence theories did not have as their gravamen "the alleged injurious falsehood of a statement," either in the abstract or as the grandchildren pleaded the theories in their first amended complaint. (Blatty v. *New York Times Co.*, *supra*, 42 Cal. 3d at p. 1045.)

Hagen v. Hickenbottom (1995) 41 Cal.App.4th 168, 179-81 (bold emphasis and underlining added).

Similarly, here, *it is precisely because of the truth of the facts received and disclosed by Avenatti* on Twitter that Broidy has the opportunity to assert a plausible defense that there was a disclosure of the confidential terms of the Settlement Agreement by someone who had knowledge of the Settlement Agreement, which in turn constitutes a material breach[5] that

[5] "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract." Brown v. Grimes (2011) 192 Cal.App.4th 265, 277.

excuses Broidy's payment obligations under the Settlement Agreement. Injurious *falsehood*[6] of the information Avenatti received or disclosed is not the gravamen of Plaintiff's intentional interference claim. As such, the Court does not find this argument persuasive.

As such, there is a probability of Plaintiff prevailing on this cause of action as a matter of law.

The anti-SLAPP special motion to strike is DENIED as to second cause of action for tortious interference with contract.

b. Tortious Interference with Prospective Economic Advantage

Defendant Avenatti did not engage in any conduct which is independently wrongful by some measure (statute, regulation, common law) beyond the fact of the interference itself. His receipt of the information regarding the Settlement Agreement was not independently wrongful. Also, Avenatti's tweet was not independently wrongful, as it was not defamatory (i.e., it involved true facts) and he was not personally bound by the NDA. Plaintiff cannot demonstrate a probability of prevailing on this cause of action as a matter of law.

Although Plaintiff requests the opportunity to conduct limited discovery, Plaintiff does not articulate what information she could discover which would render Avenatti's conduct independently wrongful and as such the request is denied.

The anti-SLAPP special motion to strike is GRANTED as to second cause of action for tortious interference with prospective economic advantage.

c. Conspiracy to Commit Breach of Fiduciary Duty.

Before one can be held liable for civil conspiracy, he must be capable of being individually liable for the underlying wrong as a matter of substantive tort law: Chavers v. Gatke Corp. (2003) 107 Cal.App.4th 606, 611-15.

Plaintiff's citation to Fuller v. First Franklin Financial Corp. (2013) 216 Cal.App.4h 955, 967 for the proposition that conspiracy liability exists against a non-fiduciary who conspires to commit an intentional tort is inapposite. In Fuller, the Court noted that the Defendants conspired to deceive (commit fraud) against the Plaintiffs. Indeed, the Fuller court itself cited, without disapproval, Everest Investors 8 v. Whitehall Real Estate Limited Partners XI (2002) 100 Cal.App.4th 1102, 1107, which held that there is no conspiracy liability where no fiduciary duty was owed to the plaintiff by the non-fiduciary defendant[7]. Fuller v. First Franklin Financial Corp. (2013) 216 Cal.App.4th 955, 967-68.

[6] On the other hand, for example, if Avenatti had tweeted that a prominent GOP donor had entered into a hush NDA with an LA woman regarding a human trafficking claim—a falsity—Broidy would not have a plausible reason to avoid his payment obligations.

[7] "Since the only duty allegedly breached as a result of the alleged conspiracy is a fiduciary duty owed by the General Partners but not by Whitehall, Whitehall cannot be held accountable to Everest on a conspiracy [*1108]

Here, because Avenatti was not Plaintiff's attorney, he owed no fiduciary duty to Plaintiff. Accordingly, he cannot be held liable for conspiracy to to breach Davidson's fiduciary duty owed to Plaintiff.

In the opposition, Plaintiff also cites Casey v. U.S. Bank National Ass'n (2005) 127 Cal.App.4th 1138, 1144-46. However, Casey discussed aiding and abetting liability, not conspiracy liability. Plaintiff pled conspiracy liability, not aiding and abetting liability, as the basis for her third cause of action against Avenatti. The two theories, while related, are distinct:

> **California law, however, does not treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly**. . . .
>
> [T]here are two different theories pursuant to which a person may be liable for aiding and abetting a breach of fiduciary duty. **One theory, like conspiracy to breach a fiduciary duty, requires that the aider and abettor owe a fiduciary duty to the victim** and requires only that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty. (Casey v. U.S. Bank Nat. Assn, supra, 127 Cal.App.4th at p. 1144; Coffman v. Kennedy (1977) 74 Cal.App.3d 28, 32 [141 Cal. Rptr. 267].) **On this theory, California law treats aiding and abetting a breach of fiduciary duty and conspiracy to breach a fiduciary duty similarly**. Courts impose liability for concerted action that violates the aider and abettor's fiduciary duty. (See Janken v. GM Hughes Electronics, supra, 46 Cal.App.4th at p. 78; In re County of Orange, supra, 203 B.R. at p. 999.) **The second theory for imposing liability for aiding and abetting a breach of fiduciary duty arises when the aider and abettor commits an independent tort**. (See Casey, supra, at p. 1144; Saunders v. Superior Court, supra, 27 Cal.App.4th at p. 846.) This occurs when the aider and abettor makes "'**a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.**'" (Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., supra, 131 Cal.App.4th at p. 823, fn. 10; accord, Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A. (1994) 511 U.S. 164, 181 [128 L. Ed. 2d 119, 114 S. Ct. 1439].)

American Master Lease LLC v. Idanta Partners, Ltd. (2014) 225 Cal.App.4th 1451, 1471-77 (bold emphasis and underlining added)

Plaintiff is not permitted leave to amend her Complaint to allege aiding and abetting a breach of fiduciary duty.

> **When a cause of action is dismissed pursuant to section 425.16, the plaintiff has no right to amend the claim.** (Simmons v. Allstate Ins. Co. (2001) 92 Cal.App.4th 1068, 1073 [112 Cal. Rptr. 2d 397] (Simmons).) "Allowing a SLAPP

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theory. (*Doctors' Co. v. Superior Court, supra,* 49 Cal.3d at p. 45.)" Everest Investors 8 v. Whitehall Real Estate Partnership XI (2002) 100 Cal.App.4th 1102, 1107-08.

plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend." (Ibid.)

Salma v. Capon (2008) 161 Cal.App.4th 1275, 1293-94 (bold emphasis added).

For the foregoing reasons, Plaintiff cannot demonstrate a probability of prevailing on this cause of action as a matter of law.

Although Plaintiff requests the opportunity to conduct limited discovery, Plaintiff does not articulate what information she could discovery which would impose upon Avenatti a fiduciary duty and accordingly, that request is denied.

The anti-SLAPP special motion to strike is GRANTED as to third cause of action for conspiracy to commit breach of fiduciary duty.

Attorney' Fees

Defendant Avenatti may bring a noticed-motion for attorney's fees pursuant to CCP § 425.16(c)[8]. At this time, the Court does **not** express a view as to whether Avenatti is entitled to recover such fees.

City of Colton v. Singletary (2012) 206 Cal.App.4th 751, 782.

Plaintiff's request for attorneys' fees is DENIED. The Court does not find that this special motion to strike was frivolous or intended to cause unnecessary delay. CCP § 425.16(c)(1). except the Anti-SLAPP

The Court's order regarding the above motions is STAYED for 10 days to give the parties an opportunity to seek review by writ of mandate.

[8] See Notice of Motion, Page 1;12-13 and footnote 1.