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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JANE DOE, Plaintiff, Cross-defendant, and Respondent, v. CURTIS OLSON, Defendant, Cross-complainant, and Appellant.	B286105 (Los Angeles County Super. Ct. No. SC126806)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Affirmed in part and reversed in part.

Buchalter, Eric Kennedy, and Robert M. Dato for Defendant, Cross-complainant, and Appellant.

Martinez Business & Immigration Law Group and Gloria P. Martinez-Senftner for Plaintiff, Cross-defendant, and Respondent.

INTRODUCTION

In seeking a civil harassment restraining order, Jane Doe accused Curtis Olson of sexual harassment and other misconduct. The two parties settled the action via mediation by agreeing in writing "not to disparage one another" for three years. Within a year, Doe filed administrative agency complaints and a civil complaint against Olson, repeating the same disparaging allegations at issue in the prior action. Olson responded with a cross-complaint accusing Doe of breach of contract and seeking specific performance of the mediation agreement.

On appeal, we face the following question: as a matter of law, are Doe's allegations protected by the litigation privilege, precluding Olson's causes of action for breach of contract and specific performance? The answer is a yes and a no. We hold Olson's cause of action for breach of contract is precluded as to Doe's statements included in her administrative complaints. We hold Olson's breach of contract cause of action is not precluded as to Doe's statements included in her civil action. For the reasons stated herein, the cause of action for specific performance fails in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Relevant Factual Background*

Jane Doe (Doe) and Curtis Olson (Olson) worked together to acquire and preserve a historic apartment building (the Building) on Wilshire Boulevard in Los Angeles. Olson acquired the building, converted it to eight condominium units and—with Doe's help—successfully had the Building listed on the National Register of Historic Places.

Olson became the owner of the building, a part-time resident of one of the eight condominium units, and the president of the Building's Homeowners Association (HOA) Board from 2013 to January 2016. Doe secured for herself a condominium unit in the Building in return for her "sweat equity" in connection with the time she spent "saving [the Building] by making it a historic landmark[.]"

B. *Doe's Application for a Civil Harassment Restraining Order*

On October 13, 2015, Doe applied for a civil harassment restraining order (CHRO) against Olson. She described many instances of harassment by Olson, most recently on September 24, 2015, when Olson "sexually forced himself on [her]," "jumped on [her], pushed [her] down, pinned himself ontop [*sic*] of [her]," and grabbed her hair, face, and breasts. Doe's "friends were present and saw this happen." Doe notified the property manager who, in turn, told her: "Olson was warned to stay away from you[,] but he won't listen[.] What he is doing is illegal[.] Call the Police!"

Doe described numerous occasions where Olson peeped into her place of residence and attempted to take photos of her while she was in her bedroom or bathroom. Doe described how Olson "hire[d] other people to harass" her and to "peep photograph[s] of [her]." Doe alleged two peeping incidents occurred on September 5, 2015, when witnesses saw Olson "repeatedly looking into [her] windows and back door which is on the opposite side of his condo unit"; Doe ultimately reported Olson to the police.

Doe also alleged Olson verbally yelled and swore obscenities at her in their "complex public common areas, on the phone and in letters." She alleged Olson threatened her life and

reminded her that he "has a 'club' that can kill [her] because he is so wealthy." Doe alleged Olson also had his friends harass her and call her obscene names.

In applying for the CHRO, Doe requested that the court issue personal conduct orders against Olson, requiring him not to: 1) harass, intimidate, attack, or threaten Doe; and 2) contact her, either directly or indirectly, in any way. Doe also requested that the court issue stay-away orders, requiring Olson to stay away from Doe, her home, her place of work, her vehicle, her garage, and her basement storage unit in the building.

The court issued a temporary restraining order granting Doe's requested personal conduct orders as to Olson, but denying her request for a stay-away order.

In opposing Doe's request for a CHRO, Olson vehemently denied what he called "numerous outrageous and ridiculous allegations" about his alleged conduct generally and on September 5, 2015 and September 24, 2015. As to the alleged sexual assault allegations of September 24, 2015, Olson declared he was in Orange County the entire day with his daughter and son and his "children's nanny will testify to this fact." He referred to the HOA's "well-documented history of problems with [Doe] in connection with her use and residency" at the Building,[1] and described Doe's CHRO application as "a calculated attempt

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[1] The HOA's history of alleged problems with Doe include, inter alia: 1) Doe listing her unit on the AirBnB website as a short-term vacation rental unit for her "personal financial gain" in violation of the building's covenants, conditions, and restrictions (CC&Rs); and 2) Doe using the building's common area "as a film location" without HOA approval.

[by Doe] to gain leverage and perhaps some measure of retribution against [Olson] because of the [HOA]'s enforcement actions . . . and [Olson's] role as [HOA] [p]resident . . . ." Olson believed Doe's CHRO application was retaliatory because, less than four weeks earlier, Doe had received from HOA legal counsel a notice to cease and desist her violations of the CC&Rs.

At the CHRO hearing, the trial court referred the parties to mediation supervised by a volunteer mediator for the California Academy of Mediation Professionals (CAMP). That same day, the parties entered into a one-page "Mediation Agreement" and a one-page "Mediation/Confidentiality Agreement" (collectively referred to as Mediation Agreement). Pursuant to the Mediation Agreement, Doe's CHRO case against Olson was dismissed without prejudice. The Mediation Agreement provides, in relevant part:

> (1) "CAMP and the parties to this mediation agree that the provisions of California Evidence Code Section 1119 apply to this mediation."[2]
>
> (2) The Mediation Agreement "shall be admissible in any subsequent proceeding to prove the existence of the

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[2] The effect of Evidence Code section 1119 was described in great detail in the Mediation Agreement, putting both parties on notice that "all communications, negotiations, or settlement discussions by and between participants in the course of this mediation shall remain confidential" and that "evidence of anything said, or admissions made . . . in the course of . . . this mediation" shall be inadmissible "in any arbitration, administrative adjudication, civil action, or other non criminal proceedings in which, pursuant to law, testimony can be compelled to be given."

> agreement and/or *enforce* said agreement." (Italics added.)
> (3) Olson "denies each and every allegation made by [Doe] in the dispute."
> (4) "This agreement is *made voluntarily by mutual agreement* of the parties . . . ." (Italics added.)
> (5) "The parties agree not to contact or communicate with one another or guests accompanying them, *except in writing and/or as required by law*. [¶] . . . Should the parties encounter each other in a public place or in common areas near their residences, they shall seek to honor this agreement by going their respective directions away from one another." (Italics added.)
> (6) "The parties agree not to disparage one another."
> (7) "The term of this agreement shall be three (3) years."
> (8) "By signing this agreement, the parties acknowledge that they have read and understand the information contained herein," and acknowledge that Evidence Code section 1119 applies to this mediation.

C. *Doe's Administrative Complaints*

On August 12, 2016, about nine months after executing the Mediation Agreement, Doe filed an administrative complaint against Olson with the U.S. Department of Housing and Urban Development (HUD). Doe alleged "discrimination based on sex and gender," that Olson "subjected [Doe] to unwanted sexual comments and touching," "stalked her," took pictures of her "while she is in the bathroom and in her bedroom," and "used his position as [HOA] board president to direct the maintenance man to install cameras in [Doe]'s unit."

HUD thereafter referred Doe's administrative complaint to the California Department of Fair Employment and Housing (DFEH). On September 16, 2016, DFEH indicated it would investigate the allegations and grievances set forth in the HUD/DFEH complaint.

D. *Underlying Civil Action*

1. Doe's Civil Complaint

On December 9, 2016, three months after filing the HUD/DFEH complaints, Doe filed a civil action for damages, alleging sexual battery, assault, tortious interference with economic or prospective economic advantage, interference with quiet use and enjoyment of real property, intentional and/or negligent infliction of emotional distress, defamation and/or false light, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, discrimination based on ethnicity, discrimination based on marital status, discrimination based on perceived religion, invasion of privacy and/or stalking, distribution of obscene materials without consent, quiet title of prescriptive easement, and declaratory relief. The complaint named Olson, the HOA, and various HOA board members, most of whom Doe alleged are Olson's "wealthy white 'club' friends and agents [who] aid[ed] and abet[ted] him in punishing [Doe], by stalking, defaming, discriminating, harassing, and a host of other outrageous actions."

In the civil complaint, Doe alleged Olson's "romantic advances" towards her began as early as July 2002, despite Doe having just met Olson's pregnant wife the preceding month. Doe alleged Olson called her "mistress material" because she "was a low status, low income minority . . . ." According to Doe, after she rejected Olson's "sexual advances, a pattern of retaliatory events"

took place where "Olson and his [HOA] friends hatched an unending series of schemes to discriminate and harass [her]." Doe described many instances of harassment and discrimination she suffered at the hands of Olson and his "club" friends since 2002. She recalled having been defamed by Olson and his "cronies" on multiple occasions, having been called, among other things, "a prostitute," "a liar," and a "crazy psycho-bitch." She also recalled Olson and one of his friends asking her if she were a Jew. The friend also happened to own a condominium and reside at the Building. Finally, Doe described various examples of what she perceived to be "an abuse of the Board's power," including the new president of the HOA authorizing the building's maintenance man "to steal [Doe]'s lockbox and Unit keys . . . ."

2. Olson's Cross-Complaint

On May 18, 2017, Olson filed a cross-complaint against Doe, asserting causes of action for breach of contract and specific performance. "Doe similarly accuse[d] Olson of unlawful conduct, including sexual battery, assault, infliction of emotional distress, misogyny, anti-Semitism, invasion of privacy, and stalking. Doe's claims against Olson in this action are based on the same allegations she made in connection with her application for a restraining order and in filing her HUD Complaint and her [DFEH] Complaint." Olson argued that by repeating the allegations set forth in Doe's previously filed (and later dismissed) CHRO application, she stood in violation of the Mediation Agreement's non-disparagement clause.

With respect to the breach of contract claim, Olson alleged he had complied with his obligations under the Mediation Agreement; Doe, however, had breached the Mediation Agreement by filing the HUD/DFEH complaints and the underlying civil complaint, "each of which contain statements and allegations which disparage Olson" within the three-year time period where the parties agreed "not to disparage one another." With respect to the specific performance claim, Olson contended he had "no plain, speedy, and adequate legal remedy that would be as efficient to attain the ends of justice and its prompt administration, as a judicial decree for specific performance requiring Doe to withdraw and dismiss all claims" in her HUD/DFEH complaints and the underlying civil complaint. According to Olson, in the HUD/DFEH complaints and the civil action, Doe "disparaged [him] by resurrecting and leveling *the same* false allegations that she previously made in connection with her application for a restraining order – i.e., the same application she dismissed as part of the Mediation Agreement."

3. Doe's Special Motion to Strike Olson's Cross-Complaint

On July 17, 2017, Doe filed a special motion to strike Olson's cross-complaint as a strategic lawsuit against public participation under the anti-SLAPP statute, citing Code of Civil Procedure section 425.16, subdivisions (b)(1), (e)(1), and (e)(4).[3] She argued Olson's cross-complaint was "retaliatory litigation" meant to chill and "discourage Doe's rights of freedom of speech

[3] All further undesignated statutory references are to the Code of Civil Procedure, unless otherwise indicated.

and right to petition the courts and the executive branch for redress of grievances." She contended Olson's "oppressive conduct has constitutional implications which are protected by . . . § 425.16 and . . . Civil Code § 47. Consequently, . . . the burden shifts to Olson to present admissible evidence establishing a probability that he will prevail on his [breach of contract and specific performance] claims." Doe believed Olson could not meet that burden.

In opposition, Olson argued that because Doe entered into a valid agreement "not to disparage the other to any other party," she effectively waived her right to invoke the protection of the anti-SLAPP statute. Olson contended that Doe, having repeated the same disparaging accusations she made in support of her CHRO case, had breached the non-disparagement clause of the Mediation Agreement.

4. The Trial Court's Ruling

On September 20, 2017, the trial court granted Doe's special motion to strike Olson's cross-complaint for breach of contract and specific performance. As to the first prong, the court ruled Doe met her burden to establish that her "three filings [i.e., the HUD/DFEH complaints and the civil complaint] are protected activity." As to the second prong, the court found the litigation privilege precluded Olson's two causes of action; the court thus did not reach or analyze whether Olson demonstrated a probability of prevailing on his claims.

Olson timely appealed.

DISCUSSION

A. *Applicable Law*

Section 425.16 provides, inter alia, that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has establishes that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' " is defined in section 425.16 to include, in relevant part: "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "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." (§ 425.16, subd. (e).)

The Legislature enacted section 425.16 to prevent and deter "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Thus, the purpose of the anti-SLAPP law is "not [to] insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

When a party moves to strike a cause of action (or portion thereof) under the anti-SLAPP law, a trial court evaluates the special motion to strike by implementing a two-prong test:

(1) Has the moving party "made a threshold showing that the challenged cause of action arises from protected activity" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*)); and if it has, (2) has the non-moving party demonstrated that the challenged cause of action has "minimal merit" by making "a prima facie factual showing sufficient to sustain" a judgment in its favor? (*Baral*, *supra*, 1 Cal.5th at pp. 384–385; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93–94 (*Navellier I*); see also § 425.16, subd. (b)(1)). Thus, after the first prong is satisfied by the moving party, "the burden [then] shifts to the [non-moving party] to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, at p. 396.)

B. *Standard of Review*

We review a trial court's ruling on a special motion to strike pursuant to section 425.16 under the de novo standard. (*Monster Energy Company v. Schechter* (2019) 7 Cal.5th 781, 788 (*Monster*); *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) "In other words, we employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1652.)

As always, "our job is to review the trial court's ruling, not its reasoning." (*People v. Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 386.) We consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) In considering the pleadings and declarations, we do not make credibility determinations or compare the weight of the evidence;

instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

C. *Prong 1*: *Arising from Protected Activity*

Doe's initial burden is to show that Olson's two causes of action against her for breach of contract and specific performance arise from protected activity. (*Park*, *supra*, 2 Cal.5th at p. 1061.)

At the trial court level and on appeal, Olson concedes—as he must—that filing documents in court is petitioning activity protected by section 425.16, subdivision (e)(1). (See *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 [" '[t]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action' "]; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 766 [same].)

We agree. Doe's filing of the HUD/DFEH complaints and the civil action against Olson were acts in furtherance of her constitutional right of petition and are protected activity for purposes of the anti-SLAPP statute. The first prong of the two-step anti-SLAPP test/analysis is satisfied.

D. *Prong 2*: *Probability of Prevailing on the Claims*

Olson contends the trial court's order granting Doe's anti-SLAPP motion should be reversed because the litigation privilege did not preclude his causes of action for breach of contract and specific performance.

Accordingly, we must determine whether the litigation privilege applies. If it does not, then we must determine whether Olson has shown that his claims otherwise have minimal merit.

1. Litigation Privilege

Civil Code section 47 provides, in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] . . . In any . . . judicial proceeding, [and/or] in any other official proceeding authorized by law . . . ." (*Id.,* subd. (b).)

The litigation privilege is "relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.) Thus, Olson cannot establish a probability of prevailing if the litigation privilege precludes a finding of liability on Olson's two causes of actions.

The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of harassment in subsequent derivative actions. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) The privilege is "not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen*, *supra*, 37 Cal.4th at p. 1057.) "[W]hether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege." (*Wentland v. Wass* (2005) 126 Cal.App.4th 1484, 1492 (*Wentland*).)

a. HUD/DFEH Complaints

One of the policies underlying the privilege is to " ' "protect citizens from the threat of litigation for communications to government agencies whose function is to investigate and remedy wrongdoing." ' " (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1163.) Based on the *Silberg* factors and as it relates to Doe's administrative complaints with HUD/DFEH, we believe it goes without saying that both HUD and DFEH are governmental and administrative bodies of the United States and California, respectively, that hold "judicial or quasi-judicial" proceedings. We believe Doe's communications with HUD leading up to the filing of her administrative complaints and the HUD/DFEH complaints themselves were statements made or steps taken prior to a proceeding on Doe's alleged housing discrimination at Olson's hands. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1058; *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303 (*Wise*) ["The privilege extends beyond statements made in the proceedings, and include statements made to initiate official action."].) We also find that Doe was within her right to make the allegations and file the complaints with HUD/DFEH, as she alleged she was subjected to unlawful practices by Olson under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Her statements are directly connected to the ensuing investigation by the DFEH.

We believe, as did the trial court, that *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267 (*Vivian*) is dispositive. In *Vivian,* the reviewing court held that the litigation privilege precluded a breach of contract claim brought by a deputy sheriff against his ex-wife. (*Id.* at pp. 276-277.) The ex-wife made statements about him in response to an inquiry by the county

sheriff's internal affairs department. The deputy alleged his ex-wife's statements violated the non-disparagement clause of a written agreement they had previously executed in a temporary restraining order action. As part of a settlement, each party had agreed " 'not to disparage the other to any other party.' " (*Id.* at pp. 270–271, 276–277.) He also argued his ex-wife had waived the privilege and the protection of the anti-SLAPP statute by signing the agreement. (*Ibid.*)

The *Vivian* court considered three decisions addressing the intersection of breach of contract by "prohibited" speech and the litigation privilege. In *Navellier I*, our Supreme Court declared, "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract." (*Navellier I, supra,* 29 Cal.4th at p. 94.) In *Navellier v. Sletten* (2003) 106 Cal.App.4th 763 (*Navellier II*), the court declined to apply the litigation privilege, reasoning "it 'may frustrate the very purpose of the contract' if there were a privilege to breach the covenant." (*Id.* at p. 774.)

In the third case, *Wentland*, *supra,* 126 Cal.App.4th 1484, the court did not apply the litigation privilege to bar a cause of action between business partners based on an alleged breach of an express confidentiality agreement. The court examined the public policies behind the privilege—promoting access to the court, truthful testimony, and zealous advocacy—and determined those policies would not be furthered by application of the privilege. (*Id.* at pp. 1492 & 1494.) Instead, applying the privilege would frustrate the purpose of the confidentiality agreement. " 'Allowing such comments to be made in litigation, shielded by the privilege, invites further litigation as to their

accuracy and undermines the settlement reached in the [prior litigation.]' " (*Id.* at pp. 1489-1490.)

The *Vivian* court concluded that these cases stood for the proposition that "the litigation privilege does not necessarily bar liability for breach of contract claims. Application of the privilege requires consideration of whether doing so would further the policies underlying the privilege." (*Vivian, supra*, 214 Cal.App.4th at p. 276.) It then went on to examine the underlying policies and apply the privilege to bar the deputy's breach of contract action against his ex-wife.

The policy underlying the litigation privilege is to assure " 'utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing. . . . The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual.' " (*Vivian, supra*, 214 Cal.App.4th at p. 277.)

Here, Doe made disparaging comments in the administrative complaints to HUD and DFEH. Housing discrimination is a significant public concern and the FEHA was codified " 'to provide effective remedies that will eliminate these discriminatory practices.' " (*Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 747–748.) We believe application of the litigation privilege to absolve Doe of liability for repeating the same disparaging allegations in her HUD/DFEH complaints is warranted and necessary, as it promotes full and candid discourse with a public agency whose purpose is to protect the public from illegal activity.

Olson argues *Vivian* is distinguishable because unlike the ex-wife in *Vivian*, Doe was not responding to an investigation; instead, she affirmatively went "out of her way" to disparage him. We see no meaningful difference. In *Williams v. Taylor* (1982) 129 Cal.App.3d 745, an employer affirmatively reported disparaging facts about his employee to the police. After the employee was acquitted, he sued the employer for slander. The court found the statements protected by the litigation privilege because, for public investigations to be effective, " 'there must be an open channel of communication by which citizens can call attention to suspected wrongdoing.' " (*Id.* at pp. 753-754.)

To further the public policy behind the litigation privilege, we apply it to bar Olson's causes of action for breach of contract and specific performance based on statements Doe made in her administrative complaints to HUD and DFEH.

b. Civil Complaint

As it relates to Doe having repeated the same disparaging accusations about Olson in her civil complaint for damages, the *Silberg* factors are once again satisfied. The Los Angeles Superior Court holds "judicial proceedings" and Doe's act of communicating (i.e., communicating to the court via the filing of her complaint) are statements made to initiate official action. (See *Wise*, *supra*, 83 Cal.App.4th at p. 1303.) Though an argument may be made as to whether Doe was *permitted* by law to make said communication, we believe it undisputed that she was *authorized* by law to do so. (*Silberg*, *supra*, 50 Cal.3d at p. 212 ["authorized by law"].)

As set out above, whether the litigation privilege applies depends on whether application furthers its underlying policies. (*Wentland*, *supra*, 126 Cal.App.4th at p. 1492.) Caselaw confirms

that a preexisting legal relationship between the parties may limit a party's right to petition and may affect whether application of the litigation privilege furthers its underlying policies. (*Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 787; *Wentland*, *supra*, 126 Cal.App.4th at p. 1492; *Navellier II*, *supra*, 106 Cal.App.4th at pp. 773–775.;) A court may conclude the litigation privilege does not apply if the alleged contractual breach "was not simply a communication, but also wrongful conduct or performance under the contract." (*Wentland*, *supra*, at p. 1494.) For instance, as stated above, "if one expressly contracts not to engage in certain speech or petition activity and then does so, applying the privilege would frustrate the very purpose of the contract if there was a privilege to breach it." (*Crossroads Investors, L.P., supra,* at p. 787, citing *Navellier II*, *supra*, at p. 774.)

Here is how we see the sequence of events: The parties voluntarily executed the Mediation Agreement, which specified: 1) Olson denies each and every allegation put forth by Doe; and 2) the parties shall not disparage one another for a three-year period. Doe then utilized the same exact disparaging allegations about Olson in her civil action within the specified time period.

As the *Wentland* court aptly reasoned: "In reaching settlement . . . , the parties presumably came to an acceptable conclusion about the truth of [one party]'s comments about [the other's behavior]. Allowing such comments to be made in litigation, shielded by the privilege, invites further litigation as to their accuracy and undermines the settlement reached in the [prior] matter." (*Wentland*, *supra*, 126 Cal.App.4th at p. 1494.) Following the *Wentland* court's line of reasoning as to the civil complaint, "application of the privilege in the instant case does

not serve to promote access to the courts, truthful testimony[,] or zealous advocacy. This cause of action is not based on allegedly wrongful conduct during litigation . . . . Rather, it is based on breach of a separate promise independent of the litigation . . . . This breach was not simply a communication, but also wrongful conduct or performance under the contract [and] application of the privilege would frustrate the purpose of the [prior] agreement." (*Ibid*.)

Instead of promoting access to courts, application of the privilege would immunize Doe against enforcement of the terms of the agreement she signed. Further, application of the litigation privilege does not "encourage finality and avoid litigation" (*Wentland, supra*, 126 Cal.App.4th at p. 1494), as it will allow Doe to repeat the same disparaging comments, despite her agreement not to do so.

Accordingly, we find the public policy underpinning the litigation privilege does not support barring Olson's breach of contract and specific performance causes of action based on Doe's statements in the civil complaint. We are now left to determine whether Olson has otherwise satisfied the second prong, that is, showing minimal merit to the causes of action for breach of contract and specific performance. (*Navallier*, *supra*, 29 Cal.4th at p. 94 [claims with the requisite minimal merit may proceed].)[4]

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[4] Here, because the trial court applied the litigation privilege, it had no occasion to consider the evidence presented in support of the merits of the breach of contract claim. We review de novo the probability of success on the merits and consider the evidence below. (*Monster, supra*, 7 Cal.5th at p. 788.)

2. Breach of Contract

The elements of a breach of contract cause of action are: (1) a contract; (2) Olson's performance or excuse for non-performance; (3) Doe's breach; and (4) resulting damages to Olson. (See *Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391 [elements of breach of contract].)

Doe first argues that the Mediation Agreement is "merely an 'understanding,' because it lacked the necessary elements to be a contract." She argues many "essential contractual elements" were missing, including offer, acceptance, consideration, competence, capacity, and mutual consent. She alleges she was traumatized and under duress during mediation as she was self-represented while Olson appeared with counsel.

We find these arguments unavailing, especially as the Mediation Agreement repeats not once, but twice, that the parties voluntarily and mutually agreed to the settlement. The agreement states it is enforceable and more than amply puts both parties on notice at the time of signing that they are entering into a binding agreement. The first element is satisfied.[5]

Olson presented evidence that he did not breach the agreement and that he was damaged by Doe's statements because the requirement that he personally guarantee loans for his real estate business requires that his reputation remain "impeccable." We accept Olson's evidence as true. (*Soukup,*

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[5] Doe describes in great detail extrinsic evidence of her thought process during mediation, the comments of the mediator, and her subsequent understanding of the Mediation Agreement. This is inadmissible evidence under Evidence Code section 1152. We do not consider it.

supra, 39 Cal.4th at p. 269, fn. 3.) The second and fourth elements are satisfied.

As to the third element, Doe argues the Mediation Agreement contains an "exception clause" which expressly preserved her right to sue in an unlimited case for damages. The clause states: "The parties agree not to contact or communicate with one another or guests accompanying them, *except in writing and/or as required by law*." (Italics added.) We do not agree with Doe's interpretation.

Additionally, she argues that because the Mediation Agreement does not define what constitutes "disparagement," the onus is on Olson to prove that her filing of the complaints amounts to an act of disparagement, that is, a breach of the agreement. Doe maintains Olson failed to do so and therefore, "it is virtually impossible to determine if or when a breach of the agreement can occur, if at all." She argues that an agreement not to disparage does not equate to an agreement to waive a right to sue.

Those are valid arguments, but Doe misunderstands the standard we must apply. The legal question here is whether, *as a matter of law*, a finder of fact is precluded from finding a breach of this agreement. Ordinarily, " '[i]n the absence of fraud, mistake, or another vitiating factor, a signature on a written contract is an objective manifestation of assent to the terms set forth there.' " (*Monster, supra,* 7 Cal.5th at p. 789.) Moreover, an essential element of any contract is consent. The consent must be mutual. Consent is not mutual, unless the parties all agreed upon the same thing in the same sense. The existence of mutual consent is determined by objective rather than subjective criteria,

the test being what the outward manifestations of consent would lead a reasonable person to believe.

Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved. (*Monster, supra*, 7 Cal.5th at p. 789.) On one side, Olson argues that the agreement is all-encompassing and that Doe could have inserted a savings clause expressly preserving her right to make disparaging statements in conjunction with further litigation. Instead, she agreed to a broad all-inclusive provision.[6] On the other side, Doe to argue the language of the agreement is too vague and that because Olson did not insert a clause expressly forbidding disparaging statements made in conjunction with further litigation, the agreement should be narrowly construed. She argues the parties did not consent because there was no meeting of the minds.

These are arguable issues to be decided by the trier of fact and we do not believe any argument is precluded as a matter of law. Here, a factfinder considering all the circumstances could reasonably conclude that when Doe signed the non-disparagement provision, she waived her right to use such disparaging comments in future litigation. A factfinder could also readily determine that the agreement should not in fairness

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[6] Olson compares the non-disparagement clause in the Mediation Agreement to a non-disparagement clause at issue in *Moreno v. Tringali* (D.N.J., June 27, 2017, No. 14-4002 (JBS/KMW)) 2017 WL2779746, at page *1, where the parties expressly limited the non-disparagement clause by specifying that they are not to disparage the other "except to the Prosecutor or Judge in the pending criminal litigation."

be so broadly read. In any case, we find that Olson's breach of contract claim shows the requisite "minimal merit," passing the second prong of the anti-SLAPP test. The trial court erred in granting Doe's special motion to strike the breach of contract claim as it applies to the civil complaint.

1. Specific Performance

"To obtain specific performance after a breach of contract, a plaintiff must generally show: '(1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract.' " (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472.)

As to the first element, Olson argues there is no adequate remedy at law as the "harm to Olson's reputation is difficult to quantify. . . ." As to the fourth element, Olson argues "the terms of the Mediation Agreement are specific and easily enforced." These two sentences are the only evidence, argument, and reasoning Olson provides in support of this cause of action. We believe Olson has failed to prove the requisite minimal merit. Accordingly, we find the trial court did not err in granting Doe's special motion to strike Olson's specific performance cause of action.

DISPOSITION

The order granting Doe's special motion to strike the causes of action for breach of contract and specific performance with respect to statements in Doe's administrative complaints is affirmed. The order granting Doe's special motion to strike the cause of action for breach of contract with respect to statements in Doe's civil complaint is reversed. The order granting Doe's special motion to strike the cause of action for specific performance is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.