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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

PAULA THOMAS, Plaintiff and Respondent, v. RICHARD PEDDIE et al., Defendants and Appellants.	B291513 (Los Angeles County Super. Ct. No. BC679247)

APPEAL from an order of the Superior Court of Los Angeles County. Malcom H. Mackey, Judge. Reversed and remanded with directions.

Parker Mills, David B. Parker and Steven S. Wang for Defendants and Appellants.

Dimitrios P. Biller for Plaintiff and Respondent.

Richard Peddie and his law firm, Lawstudios | Richard Byron Peddie (collectively, Peddie), appeal from an order denying his motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16).[1] Respondent Paula Thomas's claims against Peddie all concern Peddie's representation of an adverse party against her in prior litigation. Those claims therefore arise from petitioning conduct that is protected under section 425.16, subdivision (e). Thomas failed to provide evidence showing a likelihood of success, as her claims are all either barred by the litigation privilege under Civil Code section 47, subdivision (b) or lack any foundation in tort law. We therefore reverse and remand with directions to strike each of Thomas's claims against Peddie and enter judgment in his favor.

BACKGROUND

1. The Anti-SLAPP Procedure

Section 425.16 provides for a "special motion to strike" when a plaintiff asserts claims against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) Such claims must be struck "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

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[1] Subsequent undesignated statutory references are to the Code of Civil Procedure. "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1 (*Briggs*).)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the "moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).) At this stage, the defendant must make a "threshold showing" that the challenged claims arise from protected activity. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).)

Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, *supra,* 1 Cal.5th at p. 396.) Without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Ibid*.) The plaintiff's showing must be based upon admissible evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

Section 425.16, subdivision (e) defines the categories of acts that are in " 'furtherance of a person's right of petition or free speech.' " Those categories include "any written or oral statement or writing before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1)–(2).)

An appellate court reviews the grant or denial of an anti-SLAPP motion under the de novo standard. (*Park v. Board of*

Trustees of California State University (2017) 2 Cal.5th 1057, 1067.)

2. Thomas's Dispute with Thomas Wylde, LLC

Thomas is a fashion designer. In 2006, she started her own clothing business, PDTW, LLC (PDTW). In 2014 she transferred the business to a new entity, Thomas Wylde, LLC (TW), through a series of agreements, which included a substantial investment by a company named Hillshore Investment, S.A. (Hillshore). Thomas acquired a minority ownership interest in TW and, pursuant to an employment agreement (Employment Agreement), became its chief creative officer and creative director.

Thomas claims that she was persuaded to agree to this new business arrangement by her management team at PDTW, which included Jene Park, John Hanna, and a lawyer named David Schnider. Thomas alleges that Schnider and his firm (collectively, the Schnider defendants) represented her individually in negotiating the relevant agreements at the same time that they represented TW. After the transfer of PDTW's business to TW, Schnider became TW's general counsel.

In 2015, conflict developed between Thomas and TW's management. TW retained Peddie in May 2015 to represent it in this dispute.

On May 14, 2015, Peddie sent a letter to Thomas's attorney concerning Thomas's conduct and status in TW (the May 14, 2015 Letter). The letter explained that Peddie had been "engaged as litigation counsel" to TW. The letter described TW's position that Thomas had "quit her position without justification . . . through a series of breaches and wrongful acts culminating in what is, essentially, an abandonment of her post." It acknowledged that

Thomas had "later changed her mind," and referred to settlement negotiations that had occurred, but stated that TW was terminating any further negotiations. The letter accused Thomas of disparaging TW's management and misusing confidential information and informed her that TW "exercises its right to terminate her employment for cause." It requested that Thomas "cease and desist all further defamatory conduct and stop disseminating confidential information." The letter concluded by asking whether Thomas's counsel was "authorized to accept service of process," and stating that TW "intends to sue for its damages and to enjoin further defamatory conduct and breaches of its confidentiality policies."

About a week prior to this letter, Schnider had circulated to Peddie and TW personnel a draft of a proposed e-mail to Thomas's counsel informing her of TW's termination of the Employment Agreement for cause. Schnider asked the recipients to review and provide input on the draft. The draft described various incidents of alleged misconduct by Thomas similar to those described in the May 14, 2015 Letter, but, unlike that letter, did not accuse Thomas of abandoning her position.

After Peddie sent the May 14, 2015 Letter, Peddie engaged in some follow-up communications with Thomas's counsel, but they did not reach any resolution of the dispute.

3. The Original Litigation

Thomas (along with PDTW) filed an action in Los Angeles County Superior Court on October 1, 2015, naming as defendants TW, Hanna, Park, and several companies affiliated with Hanna (the Original Litigation). Thomas was originally represented in the Original Litigation by the law firm Kring & Chung, LLP. Peddie represented TW.

Thomas alleged that TW had breached the Employment Agreement, created a hostile work environment, and terminated her employment on April 20, 2015, in violation of various employment statutes. She also alleged that Hanna and Park breached their fiduciary duties, including by refusing to "timely provide [Thomas] with the financial books and records of TW."

TW responded with a cross-complaint against Thomas and PDTW alleging that Thomas had (1) failed to meet her obligations under the agreements establishing TW, including the Employment Agreement; (2) disparaged the company; and (3) misused confidential information. The cross-complaint asserted claims for, among other things, breach of contract, breach of fiduciary duties, and trade libel.

The Original Litigation proceeded through extensive discovery and an unsuccessful motion by Thomas to disqualify Peddie. The motion to disqualify was based in part on the ground that Thomas continued to be a shareholder of TW and that Peddie therefore could not represent TW without her consent. The trial court in the Original Litigation rejected that argument, concluding that Peddie owed a duty of loyalty to TW, not to Thomas as a shareholder. Thomas ultimately dismissed the Original Litigation.[2]

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[2] The circumstances of this dismissal are unclear from the record. Peddie claims that Thomas dismissed the Original Litigation with prejudice. However, in support of this assertion Peddie cites only to a notice filed in this action stating that Thomas had dismissed the Original Litigation "without prejudice." The discrepancy is not material to our analysis.

In addition to the Original Litigation, litigation occurred between Thomas and TW in connection with PDTW's bankruptcy proceedings and in an action that Thomas filed in federal court against TW, Hanna, Park, Schnider, and others alleging copyright and trademark infringement, fraud, and other claims.

4. Proceedings in the Trial Court

Thomas filed this action on October 11, 2017. The operative first amended complaint (Complaint) alleges claims against Kring & Chung and its lawyers, the Schnider defendants, and Peddie. Thomas's claims against Kring & Chung and the Schnider defendants include allegations of malpractice. Peddie is not included in Thomas's malpractice claim.

The Complaint does assert a negligence claim against Peddie on the ground that he allegedly breached a duty of care to Thomas. However, Thomas does not allege that Peddie ever represented her individually. Rather, she claims that Peddie owed a duty of care to "all its owners," including her. She also claims that Peddie represented TW without authorization. She alleges that TW was contractually obligated to obtain a supermajority vote for Peddie's engagement, and that it failed to do so. The allegation is based on Thomas's claim that TW's major shareholder, Hillshore, was a "dummy" corporation, and therefore could not provide a valid vote. Accordingly, Thomas claims not only that Peddie "could never represent TW," but that "no attorney for that matter can represent TW."

In addition to her negligence claim, Thomas's Complaint alleges claims against Peddie for (1) abuse of process; (2) negligent infliction of emotional distress; (3) violation of Business and Professions Code section 17200; (4) defamation; (5) intentional interference with contract; (6) intentional

interference with prospective economic advantage; and (7) negligent interference with prospective economic advantage. These claims are based on general allegations that Peddie (1) fabricated the May 14, 2015 Letter and included false and defamatory statements in it; (2) concealed and destroyed evidence; (3) made false statements and committed perjury in the Original Litigation; and (4) participated in a broad scheme by TW and others to terminate Thomas's employment and deprive her of her interest in TW.

Peddie filed an anti-SLAPP motion seeking to strike all of Thomas's claims against him. The trial court denied the motion. The court concluded that Thomas's claims concerned litigation, there was no concession of "criminal illegality," and therefore the anti-SLAPP statute applied. However, the court found that Thomas had adequately shown a probability of success on her claims. The court stated generally that "the voluminous underlying evidence, such as documents and depositions from underlying civil and bankruptcy proceedings, show at least minimal merit to allegations of defendants' malpractice and concealment of evidence."

DISCUSSION

1. Peddie Met His Burden to Show that Each of Thomas's Claims Against Him Arise from Protected Conduct

Communicative conduct such as the "filing, funding, and prosecution of a civil action" qualifies as an "act" that is protected under section 425.16, subdivision (b)(1). (*Rusheen*, *supra*, 37 Cal.4th at p. 1056.) "This includes qualifying acts committed by attorneys in representing clients in litigation." (*Ibid.*) Section 425.16 also protects communications that are preparatory to or in

anticipation of bringing a judicial action. (*Briggs, supra,* 19 Cal.4th at p. 1115.)

Thomas does not dispute that an attorney's representation of a client in litigation involves protected petitioning conduct. Rather, she argues that Peddie did not meet his burden to show that her claims arise from protected conduct because (1) Peddie did not adequately identify the specific portions of the Complaint that should be struck; and (2) Peddie's conduct is not protected by the anti-SLAPP statute because it was illegal as a matter of law. Neither of these arguments has merit.

A. *Peddie adequately identified the claims in Thomas's Complaint that arise from protected conduct*

Peddie argued below and argues on appeal that *all* of Thomas's claims against him arise from protected petitioning conduct. Peddie argues that each of Thomas's claims is based on allegations concerning actions that Peddie took or did not take in representing his client, TW, in the Original Litigation, and that all of those alleged actions constituted protected petitioning conduct under section 425.16, subdivision (e).

Thomas argues that Peddie's motion to strike is nevertheless fatally deficient because he has not adequately segregated the "unprotected from the protected allegations." Thomas apparently contends that Peddie was required to identify each individual portion of the Complaint that he seeks to strike to meet his burden of identifying protected conduct under step one of the anti-SLAPP procedure. We disagree.

Thomas does not cite any authority supporting the proposition that, where one defendant in a multi-defendant case moves to strike each of the claims against him or her under the

anti-SLAPP law and argues that all of the plaintiff's allegations concern protected conduct, the defendant must nevertheless identify each individual portion of the complaint that should be struck. Thomas cites our Supreme Court's decision in *Baral,* but that case does not impose such a requirement. (*Baral, supra,* 1 Cal.5th 376.) In *Baral*, the court simply held that an anti-SLAPP motion to strike can be directed against any "claim," even if the claim does not constitute an entire cause of action. (*Id.* at p. 393.) Because a "claim" is not necessarily synonymous with a cause of action, in the first step of the anti-SLAPP procedure "the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Id.* at p. 396.) The court did not direct how this must be done.

The court in *Baral* explained that, when "relief is sought based on allegations of *both protected and unprotected* activity," the unprotected activity is disregarded at this stage to determine if "relief is sought based on allegations arising from activity protected by the statute." (*Baral, supra,* 1 Cal.5th at p. 396, italics added.) However, where, as here, the plaintiff seeks relief based *only* on protected activity, the need for this sorting is absent. In that situation, one need not identify each specific allegation of protected conduct in a complaint to decide if the claims the plaintiff asserts arise from such conduct.

Thomas also cites *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574 (*Okorie*), but that case rejects the requirement that Thomas urges here. In *Okorie*, the defendants filed an anti-SLAPP motion directed to the plaintiff's entire complaint, which alleged acts of harassment underlying each of the plaintiff's employment claims. (*Id.* at pp. 582, 589.) The court concluded that the defendants had met their burden under

the first step of the anti-SLAPP procedure by showing that the "gravamen" of the plaintiff's claims was protected conduct. (*Id.* at p. 591.) The court held that, "under the facts of this case (where Plaintiffs have not specifically asked for relief as to some specified unprotected conduct that is a subpart of a cause of action), the principal thrust/gravamen analysis remains a viable tool by which to assess whether a plaintiff's claim arises out of protected activity." (*Id.* at p. 590.)[3]

The argument for requiring a list of specific challenged allegations in a complaint is even weaker here than it was in *Okorie.* In *Okorie,* the court's "gravamen" analysis was necessary because the plaintiff had alleged "protected and unprotected claims [that] are not well delineated and are even enmeshed one within another." (*Okorie, supra,* 14 Cal.App.5th at p. 589.) Here, *all* of Thomas's allegations against Peddie concern his conduct in handling the Original Litigation against her.[4] Thus, there is no

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[3] The court noted that the court rule governing "conventional" motions to strike requires only that such a motion quote the specific portions of a pleading that it seeks to strike if the motion "is directed at something less than an entire pleading or an entire cause of action." (*Okorie, supra,* 14 Cal.App.5th at p. 589, citing Cal. Rules of Court, rule 3.1322.) The court also observed that even this rule does not apply to anti-SLAPP motions. (*Okorie,* at p. 589.)

[4] Thomas attempts to identify an allegation of unprotected conduct by arguing that Peddie denied her contractual right to "inspect the company's books/records under the terms of the Operating Agreement." The argument is specious. Thomas admits that this alleged denial occurred "in the litigation process" in the context of a discovery demand. The Complaint does not

unprotected conduct that Thomas alleges as the basis for any claim against Peddie.[5]

Peddie took a reasonable approach to meeting his burden under the first step of the anti-SLAPP procedure. Thomas's lengthy Complaint repeats the same allegations of wrongful conduct by Peddie numerous times in a disorganized and sometimes random fashion. Peddie addressed these allegations by grouping them into categories of conduct and explaining why each of those categories is protected under section 425.16, subdivision (e). Peddie describes these categories of conduct as (1) "Authoring the May 14, 2015 Letter on behalf of TW"; (2) "Representing TW in judicial proceedings purportedly without authority"; and (3) "Engaging in discovery abuse by purportedly concealing and destroying evidence." That is a fair summary of

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allege that Peddie breached some obligation outside the discovery rules to provide Thomas with his client's records. Nor does Thomas explain how she could assert such a contractual claim against TW's litigation counsel even if such a claim were included in the Complaint.

[5] For that reason, we need not consider cases that have disagreed with *Okorie's* conclusion that the "gravamen" approach to analyzing a claim remains viable after *Baral*. Those cases have concluded that *Baral* requires a reviewing court to disregard allegations of unprotected conduct in determining if a claim arises from protected conduct, not simply to analyze the "gravamen" of the claim. (See *Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 772, fn. 19.) We need not take a position on that issue here because, as discussed, Thomas alleges only *protected* conduct against Peddie.

the allegations on which Thomas's claims against Peddie are based. All of that conduct concerns petitioning activity that is protected under section 425.16, subdivision (e)(1). Peddie therefore has provided a sufficient basis to conclude that each of Thomas's claims against him arises from protected conduct. No purpose would be served by imposing a further requirement that Peddie identify each specific location in the Complaint where each allegation of protected conduct appears.

B. *Peddie's alleged conduct was not illegal as a matter of law*

In *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), our Supreme Court explained that a claim arising from conduct that is "illegal as a matter of law" is not subject to an anti-SLAPP motion. (*Id.* at p. 305.) That is because unquestionably illegal conduct is "unprotected by constitutional guarantees of free speech and petition." (*Ibid.*)

However, the court also explained that a defendant is not precluded from using the anti-SLAPP procedure on this ground unless "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley, supra,* 39 Cal.4th at p. 320.) In the absence of a concession, there must be "uncontroverted and conclusive" evidence of illegality. (*Ibid.*) Evidence that is subject to a factual dispute does not suffice. (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711–713.)

There is no such concession or conclusive evidence of illegal conduct here. Thomas claims that Peddie engaged in unlawful conduct in concealing or destroying evidence; committing or

suborning perjury during litigation; offering false evidence; and violating professional rules against conflicts of interest.[6] In support of his anti-SLAPP motion, Peddie submitted a declaration denying that he concealed or destroyed evidence or committed perjury.

Thomas's evidence of illegality cannot avoid the factual dispute created by this denial. Thomas's arguments that Peddie engaged in illegal conduct concededly depend on "circumstantial evidence that Peddie had the 'intent' to commit crimes." She identifies evidence such as the claimed small number of documents that TW produced in the Original Litigation; the production of electronic records with a limited date range; and the failure to produce backup data for financial records. These are garden-variety discovery disputes, not conclusive evidence of criminal behavior. Moreover, Thomas has not shown that these

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[6] Thomas does not provide any support for her claim that an attorney's noncriminal violation of the Rules of Professional Conduct is the type of unlawful conduct that is excluded from the protection of the anti-SLAPP statute. There is abundant authority to the contrary. Numerous cases hold that the rule from *Flatley* is "limited to criminal conduct." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 & cases cited.) "Conduct in violation of an attorney's duties of confidentiality and loyalty to a former client cannot be 'illegal as a matter of law' [citation] within the meaning of *Flatley*, so the anti-SLAPP statute is not inapplicable on this basis." (*Ibid.*, quoting *Flatley, supra,* 39 Cal.4th at pp. 316, 320.) Thus, Thomas's claim that Peddie violated professional conflict of interest rules does not suffice to exclude his alleged conduct from the protection of the anti-SLAPP law.

disputes resulted in orders to compel, much less sanctions. Peddie testified that all of Thomas's discovery motions in the Original Litigation were unsuccessful, and Thomas has provided no evidence to the contrary.

Thomas's arguments concerning alleged false statements during the Original Litigation are even weaker. Thomas claims that Peddie created fraudulent evidence by making false claims about the circumstances of Thomas's severance from TW in the May 14, 2015 Letter. However, as discussed above, the letter simply described TW's legal position concerning events relevant to the dispute with Thomas. While Thomas may disagree with Peddie's description of the events, she has not shown that his description was false as a matter of law, much less that Peddie knew it was false.[7]

Thomas also irrationally claims that Peddie's revision of Schnider's initial e-mail draft in preparing the May 14, 2015 Letter somehow created false evidence. An attorney's revision of a letter drafted by another before sending it is a daily occurrence in the practice of law, not conclusive evidence of fraud.

2. Thomas Failed to Show a Likelihood of Success on any of her Claims Against Peddie

As discussed above, Thomas's allegations against Peddie can be grouped into categories of litigation-related conduct. In addition to the three categories that Peddie identifies—(1) drafting and sending the May 14, 2015 letter; (2) concealing or

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[7] Thomas cannot point to the result of the Original Litigation as such proof. As mentioned, Thomas dismissed that litigation.

destroying documents; and (3) representing TW without proper authorization—Thomas also claims that Peddie (4) made false statements and lied under oath; and (5) knowingly participated with TW and the Schnider defendants in eliminating Thomas as a "majority unit holder" in TW and terminating her employment. Thomas's specific causes of action against Peddie incorporate her factual allegations and are therefore all based on one or more of these general categories of conduct.

In the second step of the anti-SLAPP procedure, our task is to determine if a plaintiff has shown that his or her claims arising from protected conduct are "legally sufficient and factually substantiated." (*Baral, supra,* 1 Cal.5th at p. 396.) In performing that task here, we need not reach the question whether Thomas has provided sufficient factual substantiation for the specific elements of each cause of action that she has asserted because, for the reasons discussed below, none of the categories of conduct she has alleged could support a legally sufficient claim. (See *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31 ["If the pleadings are not adequate to support a cause of action, the plaintiff has failed to carry his burden in resisting the [anti-SLAPP] motion"].)

A. *The litigation privilege precludes any claim based upon drafting and sending the May 14, 2015 Letter*

Civil Code section 47, subdivision (b) establishes an "absolute" privilege for 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, 215 (*Silberg*).)

The privilege also applies to a prelitigation communication if such a communication "relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*).)

The litigation privilege applies to all torts except malicious prosecution. (*Silberg, supra,* 50 Cal.3d at p. 212; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1132–1133 (*PG&E*).) Thus, the privilege applies to each of the torts alleged against Peddie to the extent that they are predicated on communications made in connection with litigation.

The contents of the May 14, 2015 Letter show its connection to contemplated litigation. The letter identifies Peddie's firm as "litigation counsel" for TW and demands that Thomas "cease and desist" defamatory conduct and dissemination of confidential information. The letter concludes by asking whether the recipient, Thomas's attorney, is "authorized to accept service of process on Paula Thomas's behalf." The letter advises that TW "intends to sue for its damages and to enjoin further defamatory conduct and breaches of its confidentiality policies." The letter in fact preceded litigation that Thomas filed about five months later, which later included a cross-complaint by TW. The May 14, 2015 Letter therefore on its face establishes a connection to later litigation that was "under serious consideration" at the time. (*Action Apartment, supra,* 41 Cal.4th at p. 1251; see *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577–578, fn. omitted [concluding that a prelitigation demand letter was "fully privileged under [Civil Code] section 47 as preliminary to a judicial proceeding"].)

Thomas does not dispute that the May 14, 2015 Letter related to the subsequent litigation. Rather, Thomas relies on Civil Code section 47, subdivision (b)(2), which excludes from the scope of the litigation privilege "any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section."

Thomas has not shown that this exception applies here. She has not provided any evidence that Peddie destroyed or altered evidence in connection with the May 14, 2015 Letter. As discussed above, Peddie's revision of a draft letter before sending it does not constitute the alteration or destruction of evidence.

Nor did Thomas show that Peddie intended to deprive her of the "use" of Schnider's original draft, as Civil Code section 47, subdivision (b)(2) requires. Thomas obviously has the draft, as she included it as an exhibit to her Complaint. Thus, even if Peddie's rewrite could reasonably be called an "alteration" of the draft for purposes of the statute (which it cannot), the alteration did not deprive Thomas of the use of the draft. (See *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 464 [therapist's alleged alteration of disclosure authorization form did not fall within the exception of Civil Code section 47, subdivision (b)(2), as it did not deprive the plaintiff of the use of any evidence].)

Thomas has not identified any communications other than the May 14, 2015 Letter that she claims fall within the "destruction or alteration" of evidence exception to the litigation privilege under Civil Code section 47, subdivision (b)(2). Nor does

she attempt to show how any such nonprivileged communications support any viable claim.[8] Thus, this exception to the litigation privilege is irrelevant here.

B. *The litigation privilege also precludes claims based upon Peddie's alleged perjury and false representations during the prior litigation*

The litigation privilege applies even to fraudulent communications and perjured testimony offered in litigation. (*Silberg, supra,* 50 Cal.3d at p. 218; *Flatley, supra,* 39 Cal.4th at p. 322.) Thus, Thomas's vague references to Peddie's false statements and perjury while representing TW identify no actionable claim.

C. *Peddie's alleged destruction or concealment of evidence will not support a tort claim*

For many of the same policy reasons underlying the litigation privilege, our Supreme Court has held that there is no cause of action for alleged intentional spoliation of evidence by either parties to litigation or by third parties. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 (*Cedars-Sinai*); *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 (*Temple*).) Citing its prior discussion of the litigation privilege in *Silberg,* the court in *Temple* explained that " '[t]o allow a litigant to attack the integrity of evidence after the

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[8] As discussed below, Thomas may not assert any tort claim for alleged spoliation of evidence, no matter what label she attaches to the claim.

proceedings have concluded, except in the most narrowly circumscribed situations, such as extrinsic fraud, would impermissibly burden, if not inundate our justice system.' " (*Temple,* at p. 471, quoting *Silberg, supra,* 50 Cal.3d at p. 214.) Moreover, "[r]egulatory, criminal, and disciplinary sanctions, as well as legislative measures and sanctions available to litigants within the scope of the original lawsuit, frequently are of more utility than tort litigation in accomplishing the goals of deterring and punishing litigation-related misconduct." (*Temple,* at p. 471.) On the basis of *Cedars-Sinai* and *Temple*, numerous Court of Appeal opinions have also held that there is no viable cause of action for *negligent* spoliation of evidence. (See *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1458–1459 & cases cited.)

Under these cases, claims that are based on alleged spoliation of evidence are precluded regardless of the label attached to the claim. (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 462 [trial court properly "disregarded the labels Rosen used to describe her first four causes of action and found her allegations amounted to spoliation of evidence claims barred by *Cedars-Sinai* and *Temple*"].) Thus, Thomas's claims against Peddie that are predicated on the alleged concealment or destruction of evidence have no probability of success.

D. *Thomas has no claim against Peddie for his alleged retention by TW without proper authorization*

Thomas alleges that Park retained Peddie to represent her, TW, and Hanna in the Original Litigation sometime in May 2015. She claims that the retention was improper because the amended

operating agreement "required a supermajority vote to enter into contracts and to engage in litigation costing over $100,000." She claims that Hillshore had "sufficient units of membership" to support a supermajority vote but alleges that Hillshore was a "dummy" corporation that "does not exist so it cannot vote."[9]

TW's alleged retention of Peddie without proper authorization does not itself involve communicative conduct during litigation, and therefore is not protected by the litigation privilege. But it nevertheless provides no basis for a claim by Thomas.[10]

Peddie did not owe any contractual duty to Thomas. If TW breached the amended operating agreement by retaining Peddie, Peddie is not legally responsible for that alleged breach. It is an elementary principle of contract law that a person must be a party to a contract to be liable under the contract. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576 [noninsurer defendants

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[9] It is unclear what Thomas means with this allegation. "Dummy" corporation is not a legal concept. However, we need not consider whether Thomas intended to assert an alter ego theory or make some other recognized argument concerning Hillshore's legal status, as it does not affect her claim against Peddie.

[10] Thomas makes some allegations about Peddie's conduct in this context that would be covered by the privilege. For example, she argues that Peddie "committed misrepresentations to the court" concerning the circumstances of his retention and did not "present any evidence that a supermajority vote was casted [*sic*] to retain his services" in responding to her motion to disqualify. These allegations concern privileged communications during litigation.

were not parties to the insurance agreements and therefore were not subject to a duty of good faith and fair dealing]; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1243 [nonparty to exclusive negotiating agreement was not under contractual duty to refrain from negotiating].)

Peddie also did not owe any fiduciary or other duty to Thomas. Thomas attempts to establish that Peddie breached such a duty by claiming that he accepted the retention in violation of professional conflict of interest rules. But Peddie owed no such duty to *her*. Thomas does not claim that Peddie ever represented her. Peddie did not owe a duty of care to Thomas as an adverse party. (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1313–1314.) Nor did he owe her such a duty as an individual shareholder in a corporation that he was representing. (*Skarbrevik v. Cohen* (1991) 231 Cal.App.3d 692, 704 ["corporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders"].) In the absence of any facts showing a breach of a professional duty owed to her, Peddie's retention cannot form the basis for a claim by Thomas.

E. *Thomas has no claim against Peddie for interfering with her relationship with TW*

Thomas alleges that Peddie is responsible for the alleged wrongful conduct of other defendants in causing Thomas's wrongful termination from TW and depriving her of her ownership interests. For example, she claims that Peddie conspired with the Schnider defendants to "(a) terminate Plaintiff, (b) remove Plaintiff from TW, (c) eliminate Plaintiff as

majority unit holder, (d) destroy Plaintiff, [and] (e) put her out of business in the fashion design." She also claims that Peddie assisted TW "as a front for money laundering," apparently under the theory that she was forced out of the company because of these alleged illegal activities.

However, whether or not Thomas has any viable claims against other parties for her removal from TW, she does not have any claim against *Peddie* for such conduct. This is so for several reasons.

First, Thomas has no claim against Peddie for breach of the Employment Agreement or her other agreements with TW. The Complaint contains no such claim. Nor could it. As discussed above, Peddie was not a party to Thomas's agreements with TW, and therefore could not be liable in contract for any breach of those agreements.

Second, Peddie also could not be liable for any breach of those agreements or disruption to Thomas's business relationship with TW under theories of intentional interference with contract or prospective economic advantage. Thomas's intentional interference claim alleges that Peddie interfered with the Employment Agreement, and her claim for intentional interference with prospective economic advantage alleges that Peddie interfered with her "economic relationship with TW." However, Thomas asserts that Peddie was retained in May 2015, *after* TW had already terminated her employment. And Thomas does not allege any conduct by Peddie allegedly interfering with her relationship with TW other than his representation of TW in its dispute with her. Thus, the damage to Thomas's relationship with TW had allegedly already been done by the time Peddie did anything.

Moreover, no tortious interference claim could be predicated on Peddie's advice to pursue litigation against Thomas. Apart from any issues created by the attorney client privilege,[11] our Supreme Court has held that claims for interference with contract or prospective economic advantage may not be based upon conduct inducing a party to a contract to pursue potentially meritorious litigation. (*PG&E, supra,* 50 Cal.3d at p. 1123.) The court concluded that permitting a claim based upon such conduct would be an undue burden on the right to petition even when the conduct at issue does not fall within the scope of the litigation privilege. (*Id.* at p. 1132 & fn. 12.) The court held that "a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Id.* at p. 1137.) Thomas has not made such an allegation here, and could not do so, as she dismissed the Original Litigation.

Third, Thomas cannot attribute alleged actionable tortious conduct by others to Peddie under a conspiracy theory. Conspiracy is not itself a cause of action, but is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration."

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[11] As this court observed in *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, "absent extraordinary circumstances, an attorney may not be held liable for urging a client to breach a contract with some third party." (*Id.* at p. 1329.)

(*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 510–511 (*Applied Equipment*).) But Thomas's Complaint does not actually allege any cause of action against Peddie for any tort in which he might have joint tort responsibility for Thomas's alleged wrongful termination from TW. Thomas does not allege any fraud claim against Peddie. And she admits that any alleged conspiracy to defraud actually concluded before Peddie's retention. She argues in her brief that "the gravamen to the [Complaint] is the conspiracy to defraud Thomas out of her business and IP that started in early 2014 and ended with her termination." As mentioned, Thomas alleges in her Complaint that TW terminated her employment on April 15, 2015, prior to Peddie's retention.

The claims that Thomas *has* alleged against Peddie cannot be saved by a conspiracy theory. Thomas alleges that Peddie conspired with the Schnider defendants to "conceal evidence from Plaintiff . . . and provide false testimony in the state court and bankruptcy actions." But any claims based on an alleged conspiracy with the Schnider defendants to make false statements or conceal or destroy documents in connection with the litigation are subject to the same defenses discussed above that preclude such claims based upon Peddie's conduct.

Nor can Peddie be liable for any alleged breach of duties that the Schnider defendants owed to Thomas. "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Applied Equipment, supra,* 7 Cal.4th at p. 511.) Thus, an alleged conspirator is not liable for wrongdoing committed pursuant to

the conspiracy if he or she "was not personally bound by the duty violated by the wrongdoing." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.)

3. Conclusion

Thomas's Complaint asserts claims against the attorney for an opposing party in prior litigation. The petitioning conduct that these claims attack places them in the heartland of claims that arise from protected activity under section 425.16, subdivision (e). And, despite the hyperbole of Thomas's complaints about Peddie's alleged conduct in the prior litigation, analysis of the claims that she asserts shows that they have no merit. Each of the claims in the Complaint against Peddie and the allegations supporting them must therefore be struck, and Peddie should be awarded his attorney fees pursuant to section 425.16, subdivision (c)(1).

DISPOSITION

The trial court's order denying Peddie's motion to strike under Code of Civil Procedure section 425.16 is reversed. The claims against Peddie in the Complaint and the allegations supporting those claims are ordered struck. On remand, the trial court shall award Peddie his attorney fees and costs incurred in connection with his motion to strike in the trial court and on this appeal pursuant to section 425.16, subdivision (c)(1), and shall enter judgment in Peddie's favor.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.