No. 18-_____

IN THE
Supreme Court of the United States

WILLIAM H. COSBY, JR.,

Petitioner,

v.

JANICE DICKINSON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to the decision of the California Court of Appeal, an attorney's statement denying wrongdoing on behalf of a client who has been publicly accused of serious misconduct enjoys constitutional protection, as the First and Third Circuit Courts of Appeals have found.

PARTIES TO THE PROCEEDING

Petitioner William H. Cosby, Jr. was the defendant-appellant in the court of appeal. The respondent, Janice Dickinson, was the plaintiff-appellant in the court of appeal. Martin D. Singer, who is not a party before the Court, was the defendant-respondent in the court of appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William H. Cosby, Jr. respectfully petitions for a writ of certiorari to the Court of Appeal of the State of California, Second District, Division Eight.

OPINIONS BELOW

The opinion of the California Court of Appeal, App. 1a, is reported at 17 Cal. App. 5th 655. The order of the California Supreme Court denying the petitions for review, App. 87a, is not reported. The ruling and relevant proceedings of the California Superior Court for Los Angeles County, App. 56a & 59a, are not reported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

The opinion of the California Court of Appeal was entered on November 21, 2017. Petitions for review were filed in the California Supreme Court and deemed timely pursuant to the California Rules of Court. The petitions for review were denied on March 14, 2018.

On June 4, 2018, Justice Anthony Kennedy granted an extension of time to file this Petition for a Writ of Certiorari to and including July 12, 2018.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

INTRODUCTION

Nearly thirty years ago, this Court recognized that an attorney's response to public accusations against a client lies at the very heart of the truth-finding process so valued by the First Amendment. Justice Kennedy, writing for a plurality, explained:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . . [A]n attorney may take reasonable steps to defend a client's reputation . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991) (Kennedy, J.) (plurality opinion).

The California Court of Appeal's published decision ignores this well-established principle, and subjects attorneys and clients alike to defamation liability for any public denial that the attorney issues on a client's behalf. Such a decision will improperly chill attorneys' speech and prevent any person—the innocent along with the guilty—from relying upon

his or her attorney to respond to public accusations of misconduct.

This action concerns statements attorney Martin D. Singer made in late 2014 in response to public accusations of serious misconduct against his client, Mr. Cosby. Those public accusations devastated Mr. Cosby's reputation and career.

In November 2014, after several other women had accused Mr. Cosby of misconduct, Janice Dickinson, who describes herself as the "world's first supermodel," and as a "colorful, raw, sometimes loud, sometimes vulnerable" television personality, gave a number of televised interviews and other media appearances to publicize her own accusations against him. These new accusations directly contradicted prior, public accounts Ms. Dickinson had provided regarding her interactions with Mr. Cosby, including the "honest account" she provided in her 2002 autobiography, *No Lifeguard on Duty: The Accidental Life of the World's First Supermodel*.

When Mr. Singer learned of Ms. Dickinson's new accusations, he reacted swiftly, investigating Ms. Dickinson's claims and issuing a confidential legal demand letter to the media outlets then clamoring to publish her new accusations. That demand letter, and the press release Mr. Singer issued the following day, denied the truth of Ms. Dickinson's accusations, identified the inconsistencies in her story, and informed the public of where to find her previous statements—all of which denied that there had been any illicit contact between her and Mr. Cosby. Mr. Singer issued similar statements regarding other of Mr. Cosby's accusers.

Ms. Dickinson and several other women retaliated by filing lawsuits against Mr. Cosby, and, in this instance, against Mr. Singer, for defamation and related claims. Each lawsuit alleges that the plaintiff was defamed by the denials Mr. Singer issued on behalf of his client. The U.S. Courts of Appeals for the First and Third Circuits held Mr. Singer's statements to be constitutionally protected, and affirmed trial court orders dismissing those claims. *See Hill v. Cosby*, 665 Fed. Appx. 169 (3d Cir. 2016); *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017).[1] In this action, however, the California Court of Appeal came to the opposite conclusion, allowing Ms. Dickinson's claims to proceed based on the court's improper determination that Mr. Singer's statements are not entitled to constitutional protection. App. 41a-53a. The California court's conclusion—like those of the First and Third Circuits—relied upon this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which lower courts have often struggled to apply.

The Court's intervention on this issue is critical. The California court's decision did not turn on any unique factual circumstances. Instead, the decision turned on the flawed presumption that an attorney's statement denying accusations against his or her client necessarily implies a provably false statement of fact concerning those accusations. Unfortunately

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[1] Ms. McKee's counsel filed a petition for a writ of certiorari on April 19, 2018, seeking review only of the First Circuit's determination that Ms. McKee was a limited-purpose public figure. The arguments presented in that petition have no impact here, particularly given all parties' agreement that Ms. Dickinson was a public figure at all relevant times.

for freedom of speech, this means that by merely alleging that an accusation is true and that the denial is false, any accuser can successfully plead a claim for defamation.

This Court should grant review to revisit *Milkovich* and clarify where the boundary lies between actionable defamation and constitutionally protected speech, particularly in the context of an attorney's statements to the press. It is difficult to conceive of a more important issue to attorneys and clients alike—particularly given how routinely accusations of misconduct now arise and how quickly those accusations can be disseminated worldwide. Indeed, if the California court's decision is allowed to stand, attorneys will be faced with an impossible choice: either provide a swift and decisive response to accusations against a client, thereby placing both the attorney and client at risk of a defamation suit; or remain mute in the face of highly publicized accusations, and risk the devastating harm to the client that flows from leaving such accusations unanswered.

STATEMENT OF THE CASE

Mr. Cosby is a well-known comedian, actor, and philanthropist, who first gained success in the 1960s with the release of multiple Grammy-winning comedy albums. He went on to win additional acclaim for his television and film work, including *I Spy*, for which Mr. Cosby became the first African-American Emmy winner for a lead role, and *The Cosby Show*, Mr. Cosby's primetime sitcom.

Together with his wife of more than fifty years, Camille, Mr. Cosby spent decades channeling his

considerable commercial successes into philanthropic efforts, committing the couple's time and resources to a variety of charitable causes. In 2002, Mr. Cosby was awarded the Presidential Medal of Freedom in recognition of these contributions to American society.

In 2002, Ms. Dickinson published an autobiography about her life as "the world's first supermodel," in which she specifically described her interactions with Mr. Cosby. Janice Dickinson, *No Lifeguard on Duty: The Accidental Life of the World's First Supermodel* (2002). According to that autobiography, Ms. Dickinson met Mr. Cosby in Lake Tahoe, Nevada in 1982 with plans to perform as his opening act. *See id.* at 201. In the book, Ms. Dickinson claims that the two had dinner, and Mr. Cosby invited her back to his room afterwards. *Id.* at 202. Ms. Dickinson's autobiography states that she rejected Mr. Cosby, telling him that she was "exhausted." *Id.* The book describes the rest of the encounter as follows:

> He waved both hands in front of my face, silencing me. Then he gave me the dirtiest, meanest look in the world, stepped into his suite, and slammed the door in my face. *Men.*
>
> Back in my room, I found a tiny bottle of Courvoisier in the minibar, poured it into a plastic cup . . . I dug through my bag for my bottle of Vitamin C and popped two Quaaludes and drifted off to sleep.

Id. (emphasis in original).

Nowhere in her autobiography does Ms. Dickinson even suggest that Mr. Cosby engaged in inappropriate contact with her. Neither did Ms. Dickinson report any issues to law enforcement. App. 3a-4a.

Ms. Dickinson repeated the same description of her interactions with Mr. Cosby after her autobiography was published, and did so publicly in an interview with the *New York Observer*. App. 4a. That interview reiterates her account that "she didn't want to go to bed with him and he blew her off." Philip Weiss, *Interview With the Vamp*, N.Y. Observer (Sept. 9, 2002), http://observer.com/2002/09/interview-with-the-vamp/.

Twelve years later, and more than thirty years after the alleged meeting in Lake Tahoe occurred, a number of other women began publicly accusing Mr. Cosby of serious misconduct. App. 4a. On November 18, 2014, Ms. Dickinson gave a nationally televised interview to *Entertainment Tonight*. App. 4a-5a. For the first time, Ms. Dickinson publicly accused Mr. Cosby of misconduct, describing an interaction that completely contradicted the detailed account in her autobiography. App. 5a. According to *Entertainment Tonight*'s online publication, *ETOnline*, Ms. Dickinson claimed that these allegations were kept out of her 2002 autobiography because Mr. Cosby and his legal team pressured her publisher to kill the story. App. 5a.

Mr. Singer learned of Ms. Dickinson's new accusations the same day, November 18, 2014, after several media outlets contacted Mr. Cosby's representatives seeking comment. App. 5a. Following his investigation into Ms. Dickinson's accusations, Mr. Singer sent a demand letter to

several of the media outlets that were expected to run stories about Ms. Dickinson's claims (the "November 18 Statement"). App. 5a.

The November 18 Statement identified Mr. Singer as Mr. Cosby's "litigation counsel," and began with the prominent captions: "CONFIDENTIAL LEGAL NOTICE" and "PUBLICATION OR DISSEMINATION IS PROHIBITED." App. 130a. The November 18 Statement also denied Ms. Dickinson's accusations, stating, in relevant part: "Ms. Dickinson's new assertion that she was raped by my client back in 1982 is belied by her own words, which completely contradict her current fabrications. We caution you in the strongest possible terms to refrain from disseminating the outrageous false Story." App. 134a.

The following day, November 19, 2014, Mr. Singer issued a press statement (the "November 19 Statement"), again denying Ms. Dickinson's allegations and noting the dramatic change from her original account:

> Janice Dickinson's story accusing Bill Cosby of rape is a lie. There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002. Ms. Dickinson did an interview with the *New York Observer* in September 2002 entitled "Interview With a Vamp" completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said "she didn't want to go to bed with him and he blew her off."

> Her publisher Harper Collins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book. The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off. *Documentary proof and Ms. Dickinson's own words* show that her new story about something she now claims happened back in 1982 is a fabricated lie.

App. 135a (emphasis added).

Over the next two days, November 20 and November 21, 2014, Mr. Singer issued additional press releases denying other women's accusations against Mr. Cosby. These later statements have not been considered by the California Court of Appeal.[2] App. 16a n.4. However, the press release issued on November 21, 2014 was thoroughly evaluated by the Third Circuit in *Hill*, 665 Fed. Appx. 169. That press release reads:

> The new, never-before-heard claims from women who have come forward in the past two weeks with unsubstantiated, fantastical stories about things they say occurred 30, 40, or

[2] Ms. Dickinson has since amended her complaint to add claims based on both of these later statements, as well as claims against Mr. Singer. App. 16a n.4.

> even 50 years ago have escalated far past the point of absurdity.
>
> These brand new claims about alleged decades-old events are becoming increasingly ridiculous and it is completely illogical that so many people would have said nothing, done nothing, and made no reports to law enforcement or asserted civil claims if they thought they had been assaulted over a span of so many years.
>
> Lawsuits are filed against people in the public eye every day. There has never been a shortage of lawyers willing to represent people with claims against rich, powerful men, so it makes no sense that not one of these new women who just came forward for the first time now ever asserted a legal claim back at the time they allege they had been sexually assaulted.
>
> This situation is an unprecedented example of the media's breakneck rush to run stories without any corroboration or adherence to traditional journalistic standards. Over and over again, we have refuted these new unsubstantiated stories with documentary evidence, only to have a new uncorroborated story crop [up] out of the woodwork. When will it end?
>
> It is long past time for this media vilification of Mr. Cosby to stop.

Id. at 172.

Six months later, on May 20, 2015, Ms. Dickinson sued Mr. Cosby for defamation, false light, and intentional infliction of emotional distress, all predicated upon the November 18 and November 19 Statements, and, more specifically, the denials contained therein. App. 10a.

Mr. Cosby timely responded to Ms. Dickinson's complaint on June 22, 2015, by filing a demurrer[3] and a special motion to strike the complaint pursuant to section 425.16, subdivision (b)(1) of the California Code of Civil Procedure (the "anti-SLAPP" statute). App. 11a & 12a.[4] Mr. Cosby argued that Mr. Singer's statements were constitutionally protected, that the complaint therefore failed to state a cause of action based upon those statements, and that Ms. Dickinson could not establish a probability of prevailing upon any of her claims. App. 12a-13a. Mr. Cosby also argued that the November 18 Statement was protected under California's litigation privilege. App. 12a.

On March 29, 2016, the trial court granted Mr. Cosby's anti-SLAPP motion as to all claims based upon the November 18 Statement, finding that

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[3] Mr. Cosby's demurrer was subsequently taken off calendar to allow the anti-SLAPP motion to proceed. App. 11a.

[4] The anti-SLAPP statute provides that a cause of action arising from any act in furtherance of the right to free speech shall be subject to a special motion to strike. *See Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 832-33 (9th Cir. 2018) (citing Cal. Civ. Proc. Code § 425.16). The special motion to strike "should be granted when a plaintiff presents an insufficient legal basis for his or her claims *or* when no sufficiently substantial evidence exists to support a judgment for him or her." *Id.* at 833 (emphasis in original).

statement to be covered by California's litigation privilege. App. 21a. The court denied the motion as to the claims based upon the November 19 Statement, finding that the later statement was actionable because, according to the trial court, the statement was provable as true or false, as the gist of the statement was "that Plaintiff is lying about the rape occurring." App. 21a-22a.

Mr. Cosby timely appealed the ruling to the California Court of Appeal on April 28, 2016, arguing that the order denying Mr. Cosby's anti-SLAPP motion as to the November 19 Statement should be reversed because, among other things, the statement contained only Mr. Singer's nonactionable opinion. App. 23a. On May 9, 2016, Ms. Dickinson cross-appealed the trial court's order as to the November 18 Statement, arguing that the statutory litigation privilege did not apply to that statement. App. 23a.

The California Court of Appeal issued a published decision as to both appeals on November 21, 2017, reversing the trial court's decision as to the November 18 Statement and affirming the trial court's decision as to the November 19 Statement. App. 54a-55a. The court first ruled that the November 18 Statement was not protected under California's litigation privilege. App. 41a. The court further held that Mr. Singer's message in both statements necessarily implied "a provably false assertion of fact—specifically, that Cosby did not rape Dickinson," and the court therefore concluded that both statements were actionable statements unprotected by the First Amendment. App. 45a.

The California Court of Appeal acknowledged that this decision conflicted with those of the First

and Third Circuits, both of which had deemed Mr. Singer's statements on behalf of Mr. Cosby to be constitutionally protected. App. 49a-50a. The California court dismissively rejected the federal decisions as having been decided under the defamation laws of other states, failing to recognize that the constitutional protections afforded by the First Amendment presented the critical issue in each case. App. 49a. The California court posited:

> The federal court opinions did not give sufficient weight to the fact that Singer was making the statements as Cosby's agent. When a man is publicly accused of raping a woman and responds with a public statement claiming the accusation itself is false, it is reasonable that a member of the public hearing the statement would *not* think the denial means, "I'm neither affirming nor denying that I raped her, but look at all this evidence challenging her credibility." That the speaker making the denial is himself the accused rapist strongly implies that the denial includes a denial of the rape itself. Here, the speaker was the accused's attorney, speaking with presumed agency. We see no reason the result should be different.

App. 49a-50a (emphasis in original).

Mr. Cosby timely petitioned the California Supreme Court for review, arguing, among other things, that the California Court of Appeal's decision failed to adequately consider the constitutional protections afforded to Mr. Singer's statements under the First Amendment. App. 88a. The

California Supreme Court denied that petition for review, necessitating the instant Petition. App. 87a.

REASONS FOR GRANTING THE PETITION

"Modern defamation law is a complex mixture of common-law rules and constitutional doctrines." *McKee v. Cosby*, 236 F. Supp. 3d 427, 437 (D. Mass. 2017), *aff'd* 874 F.3d 54. While the elements of a defamation claim are governed by state law, the question of whether a particular statement is actionable "must be measured by standards that satisfy the First Amendment." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *see McKee*, 874 F.3d at 60 ("Superimposed on any state's defamation law are First Amendment safeguards.").[5]

"The necessity for this protection is clear[:] 'The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.'" *See Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (In Bank) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984)); *see also Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1399 (Cal. Ct. App. 1999) ("The First Amendment 'safeguards a freedom which is the matrix, the indispensable condition, of

[5] The same standards apply to the related claims of false light and intentional infliction of emotional distress. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (right to privacy (false light)).

nearly every other form of freedom.'" (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (internal quotation marks omitted))).

Here, the California Court of Appeal failed to adequately consider the important First Amendment implications of attorneys' speech, and ignored the fact that defense counsel, in particular, may be obligated to speak on behalf of their clients to protect against "the substantial undue prejudicial effect of recent [adverse] publicity." Cal. R. Prof'l Conduct r. 5-120(C); Model Rules of Prof'l Conduct r. 3.6(c) (Am. Bar Ass'n 1983).[6] Instead, the California court set forth a new, sweeping rule—based upon its interpretation of *Milkovich*—that where an attorney responds to accusations against his or her client with any sort of denial, that denial is an actionable defamatory statement. App. 48a-49a. This rule conflicts with the holdings of the First and Third Circuits—both of which evaluated statements Mr. Singer made as Mr. Cosby's attorney—and would apply to any statement by any attorney asserting his or her client's innocence. The Court's intervention on this issue is critical, as the California court's decision, if left to stand, would improperly

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[6] *See* Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L.J. 859, 861 (1998) ("[A] lawyer's duty to zealously represent a client often is best served by the attorney speaking to the press. Indeed, what generally has been overlooked is how attorney speech about pending cases can advance the interests of the client and the justice system.").

chill attorneys' speech[7] and thwart their ability to protect clients.

I. This Court Should Grant Certiorari to Resolve a Conflict Among State and Federal Courts as to How *Milkovich* Applies to Statements Denying Public Accusations.

Ms. Dickinson was just one of a number of women to publicly accuse Mr. Cosby in late 2014. Mr. Singer's public response to those accusations resulted in several defamation lawsuits. In each action, the court evaluated Mr. Singer's statements using this Court's decision in *Milkovich*, but the California court arrived at a starkly different conclusion from those of the First and Third Circuits. This conflict reflects a broader divergence as to how the lower courts have applied *Milkovich*, and this Court should grant certiorari to provide clarity regarding that seminal holding.

A. The California Court's Decision Conflicts with Two Federal Courts as to Whether an Attorney's Statements Conveying the Same Message on Behalf of the Same Client Are Protected by the First Amendment.

The Third Circuit was the first appellate court to consider Mr. Singer's statements. In *Hill*, that court

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[7] "Forcing a speaker to engage in a contextual assessment, which may or may not coincide with the analysis by a factfinder, before speaking or risk being subject to a lawsuit would bring an undesired chilling effect." Brent McIntosh, Comment, *Speak No Ill of the Dead: When Free Speech and Human Dignity Collide*, 2 Ala. C.R. & C.L. L. Rev. 209, 216 (2011).

determined that the November 21 Statement—which is substantively similar to the statements evaluated by the California Court of Appeal—enjoyed constitutional protection as a nonactionable statement of opinion based upon "adequately disclosed" facts. 665 Fed. Appx. at 176. As that court explained:

> Responding to a media firestorm in which several women (including [the plaintiff]) had made public accusations of serious wrongdoing against Cosby, Singer explained on his client's behalf why he believed these accusations were nothing but lies: (1) the alleged acts of abuse "occurred 30, 40, or even 50 years ago;" (2) "it is completely illogical that so many people would have said nothing, done nothing, and made no reports to law enforcement or asserted civil claims if they thought they had been assaulted over a span of so many years;" (3) and "[l]awsuits are filed against people in the public eye every day," and "[t]here has never been a shortage of lawyers willing to represent people with claims against rich, powerful men, so it makes no sense that not one of these new women who just came forward for the first time now ever asserted a legal claim back at the time they allege they had been sexually assaulted."

Id. at 175-76. The Third Circuit affirmed the trial court's order dismissing the claims,[8] reasoning that the statement "allowed the recipient to draw his or her own conclusions 'on the basis of an independent evaluation of the facts'" and was thus nonactionable under the First Amendment. *Id.* at 176.

Similarly, in *McKee*, the First Circuit affirmed the dismissal of all claims, determining that Mr. Singer's letter to a media outlet that had intended to nationally broadcast an interview with one of Mr. Cosby's accusers enjoyed constitutional protection. 874 F.3d at 63-64. That court assumed that Mr. Singer's letter could be read "as asserting both that McKee lacks credibility and that McKee's rape allegations are not truthful," and determined that, under either reading, Mr. Singer had "adequately disclosed the non-defamatory facts underlying these assertions, thereby immunizing them from defamation liability." *Id.* at 63. The First Circuit went on to explicitly reject the notion—later adopted by the California Court of Appeal—that a reader would necessarily "infer that Singer was basing his assertions about McKee's credibility on

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[8] The district court had dismissed the claims on the basis that Mr. Singer's statement was "pure opinion," recognizing: "[A]ny attorney for any defendant must advance a position contrary to that of the plaintiff. . . . Defendant, through his attorney, publicly denied [the] claims by saying the 'claims' are unsubstantiated and absurd – which is his legal position. This sort of purely opinionated speech articulated by Defendant's attorney is protected and not actionable as defamatory speech." *Hill v. Cosby*, No. 15-cv-1658, 2016 WL 491728, at *5 (W.D. Pa. Feb. 9, 2016).

knowledge of undisclosed facts" merely because he represented Mr. Cosby, explaining:

> [T]he Letter details upfront, in multiple bullet points footnoted with citations and hyperlinks to the underlying sources, the "published information" that, according to the view expressed in the Letter, undermines the credibility of McKee's allegations. As the Letter is "based on facts accessible to everyone," a reasonable reader would not understand Singer "to be suggesting that he was singularly capable of evaluating" McKee's credibility based on undisclosed evidence. Rather, the reader can "draw [his] own conclusions" from the information provided.

Id. at 63-64 (internal citations omitted); *see McKee*, 236 F. Supp. 3d at 440 ("The Singer Letter ostensibly recites all the facts supporting the opinions and provides no indication that the opinions are based upon undisclosed objective facts.").[9]

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[9] The same district judge who dismissed the claims in *McKee* had, two years earlier, denied a motion to dismiss in a separate case involving Mr. Singer's statements. *See Green v. Cosby*, 138 F. Supp. 3d 114 (D. Mass. 2015); *see also Hill*, 665 Fed. Appx. at 176 n.6 (discussing *Green* and concluding: "[W]e have serious doubts with respect to the Massachusetts district court's ruling on this point . . . [because] it did not really explain why (as Hill puts it) the Singer Statement 'relies on undisclosed facts.'"). Addressing these divergent results, the district court later lamented that "these cases certainly demonstrate the 'complex' and 'dizzying' nature of judicial interpretation and application of defamation law." *McKee*, 236 F. Supp. 3d at 442 n.13.

In direct contrast to these earlier cases, the California Court of Appeal concluded that Mr. Singer's November 18 and 19 Statements were defamatory specifically because they were made by Mr. Cosby's attorney, reasoning that Mr. Singer's role necessarily implied the existence of undisclosed facts:

> The rape allegations against Cosby were a subject of national attention and much public speculation. It would perhaps be unactionable opinion if an unrelated individual, with no actual knowledge of the rape, chatting in a public forum, were to say, "Dickinson lied about the rape; after all, she told a different story in her book." That may be unactionable opinion because it is based on disclosed facts and the speaker would not be presumed to be basing the opinion on anything else. But here, the demand letter was authored by Cosby's attorney, who was speaking for Cosby, who, in turn, would certainly know whether or not he sexually assaulted Dickinson. Cosby's agent's absolute denial is a factual one. At the very least, the demand letter is susceptible of this interpretation, which is sufficient to establish Dickinson's burden at this stage of the proceedings.

App. 48a-49a.

In reaching this conclusion, the California court departed from the objective analysis of whether a reasonable reader would understand Mr. Singer's statements to suggest "that he was singularly

capable of evaluating" the accuser's credibility based upon undisclosed evidence, *McKee*, 874 F.3d at 64, and instead applied an unprecedented test that focused on what the California Court of Appeal presumed Mr. Singer to have known before making the statements. App. 48a-49a. Although the California court acknowledged its departure from the federal courts' holdings, it offered no justification for reaching such a disparate result, instead criticizing what it perceived to be a failure to consider the implications of the attorney-client relationship. App. 49a-50a.

B. Only This Court Can Clarify *Milkovich*'s Distinction Between Nonactionable Statements of Opinion and Actionable Statements of Fact.

Despite the fact that the California Court of Appeal came to a different conclusion from the First and Third Circuits, all three appellate courts relied upon *Milkovich* as the basis for their analysis. *See Hill*, 665 Fed. Appx. at 174-75; *McKee*, 874 F.3d at 60; App. 42a. This reflects the difficulty that lower courts have encountered when attempting to apply *Milkovich*'s analysis as to whether a statement of opinion is actionable, particularly where the statement in question is that the plaintiff "lied" or lacks credibility about an issue of public interest or concern. *See, e.g.*, *Gill v. Del. Park, LLC*, 294 F. Supp. 2d 638, 647 (D. Del. 2003) (applying pre-*Milkovich* law and holding that statement that plaintiff was a "liar" was nonactionable because "[t]he average reader, confronted with these statements, is more likely to view the term 'liar' as an epithet, rather than a statement of fact"); *Wood v. Del Giorno*, 974 So. 2d 95, 100 (La. Ct. App. 2007)

(applying *Milkovich* and holding that "remarks that [plaintiff] is a fraud and a liar cannot be understood to convey to the average listener that [plaintiff] is a person lacking moral character or untruthful in his business practices" because "in the context of a heated discussion over a controversial topic," such remarks "were nothing more than opinions and hyperbole"); *Brach v. Congregation Yetev Lev D'Satmar*, 265 A.D.2d 360, 361 (N.Y. App. Div. 1999) (finding statements that plaintiff had engaged in "lies and deceit" during court proceeding to be actionable because they implied facts unknown to the reader).

In *Milkovich*, this Court examined a sports columnist's statements theorizing that the petitioner had lied at a court hearing in order to persuade the court to overturn an athletic association's disciplinary ruling. 497 U.S. at 4-5 & 6 n.2. The Court rejected the respondents' argument that statements of opinion are inherently protected under the First Amendment, concluding that "the 'breathing space' which '[f]reedoms of expression require in order to survive,' is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." *Id.* at 19 (internal citations and quotation marks omitted). Turning to the statements before it, the Court reasoned that there was nothing within the sports column at issue that would "negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury," and concluded that the statements were actionable because "the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false." *Id.* at 21.

While this holding provides "general guidance for identifying when statements of opinion imply assertions of fact," further guidance is necessary. *Id.* at 25 (Brennan, J., dissenting).[10] As Justice Brennan thoughtfully explained:

> [this issue] is a matter worthy of further attention in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." Although statements of opinion *may* imply an assertion of a false and defamatory fact, they do not *invariably* do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts.

Id. at 25-26 (emphasis in original) (internal citation omitted); *see McKee*, 236 F. Supp. 3d at 442 n.13 (noting the "complex" and "dizzying" nature of

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[10] *See* Len Niehoff & Ashley Messenger, Milkovich v. Lorain Journal *Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. Mich. J.L. Reform 467, 489 (2016) (recognizing that all statements may be unprotected "if we pay no attention to the complexities of language, understanding, and context and if our analysis begins and ends with the question of whether someone might think that the accusation was informed by undisclosed facts").

defamation law and the unpredictability as to how any particular court will interpret a statement).

The lower courts' application of *Milkovich* over the last twenty-eight years has resulted in thoroughly divergent results. *Compare Hill*, 665 Fed. Appx. at 174-75 (opinion that accusations were false deemed nonactionable), *and McKee*, 874 F.3d at 60 (same), *with* App. 42a (opinion that accusations were false deemed actionable as implying statement of fact).[11] Indeed, as the decisions regarding Mr. Singer's statements demonstrate, there is no certainty or even predictability as to whether any given court of law will deem a particular statement to be protected or unprotected by the constitutional right to freedom of speech. That uncertainty is antithetical to the very notion of free speech. *See Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (recognizing the chilling effect that occurs where "[p]eople 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application'" (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))). The Court should grant certiorari and provide this additional guidance,

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[11] These results have led to a call for further guidance. *See, e.g.*, Niehoff & Messenger, *supra*, at 489 ("We need criteria for determining when an accusation of lying signals the existence of such facts and when it does not."); Ashley Messenger, *The Problem with* New York Times Co. v. Sullivan*: An Argument for Moving from a "Falsity Model" of Libel Law to a "Speech Act Model"*, 11 First Amend. L. Rev. 172, 209 (2012) ("[T]he Milkovich standard does not fully consider the range of expressive possibility between 'factual assertions' and 'opinions,' and the failure to do so perpetuates the confusion about what kind of statements should receive constitutional protection.").

particularly given the chilling effect that the California Court of Appeal's published decision may have, and the disastrous consequences it may hold for the attorney-client relationship. *See*, *infra*, Part III.

II. The California Court of Appeal's Ruling Is Wrong.

This Court has stated that "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Milkovich*, 497 U.S. at 18 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)). Thus, although there is no "wholesale defamation exemption for anything that might be labeled 'opinion,'" *id.*, statements of opinion are actionable only where they: (1) are based upon stated facts that are themselves false or demeaning; or (2) imply that there are undisclosed facts on which the opinions are based. *See* Restatement (Second) of Torts § 566 cmt. b (Am. Law Inst. 1977). The California Court of Appeal's decision focused on the latter category,[12] concluding that Mr. Singer's statements necessarily implied additional

[12] The California court also held that one of the stated bases for Mr. Singer's opinion—that "HarperCollins can prove her rape allegation is false"—was itself false so as to impose defamation liability. App. 47a. This finding, however, misreads Mr. Singer's statement. Mr. Singer never claimed that HarperCollins, Ms. Dickinson's publisher, could verify the truthfulness of her allegations regarding the underlying conduct; instead, he stated only: "Harper Collins can confirm that no attorney representing Cosby tried to kill the alleged rape story." App. 8a.

undisclosed facts simply because Mr. Singer served as Mr. Cosby's attorney. App. 48a-51a.

This decision was made in error. First, the California court's analysis turns *Milkovich* on its head by assuming that there were additional facts underlying Mr. Singer's opinions, even where no such facts were referenced or implied by the statements of opinions themselves. *See* 497 U.S. at 20 (holding statements nonactionable where they adequately disclose the basis for the speaker's opinions). Second, the California court failed to adequately consider the circumstances in which Mr. Singer's statements were made, and, in doing so, failed to recognize that the statements comprise the type of "rhetorical hyperbole" this Court has held to be constitutionally protected. *See id.* at 16-17 (recognizing "constitutional limits on the *type* of speech which may be the subject of state defamation actions" (emphasis in original)).

A. Mr. Singer Adequately Disclosed The Underlying Facts Supporting His Opinion.

The California court improperly looked beyond Mr. Singer's statements and engaged in pure speculation as to what else Mr. Singer *might* have known and relied upon in forming his opinion about the truthfulness of Ms. Dickinson's accusations. Such an analysis cannot serve as a proper test for determining whether a statement of opinion is actionable. *See Milkovich*, 497 U.S. at 20 n.7 (noting that the issue of falsity relates only "to the *defamatory* facts [that are actually] implied by a statement" (emphasis in original)). Indeed, the Restatement (Second) of Torts, which was cited extensively in *Milkovich*, instructs that the speaker's

actual knowledge of additional facts is of no importance; a statement of opinion is constitutionally protected unless the statement itself "creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts." Restatement (Second) of Torts § 566 cmt. c(4); *see* 497 U.S. at 12-14 & 19 (citing the Restatement).[13]

In *McKee*, the plaintiff-appellant urged the First Circuit to engage in precisely the same speculative inquiry, insisting that "Singer's opinion is that McKee is lying about the Cosby rape, and that opinion is based upon facts, both disclosed and non-disclosed." Reply Brief of Appellant Kathrine Mae McKee at 9, *McKee v. Cosby*, No. 17-1256 (1st Cir. Aug. 30, 2017). The First Circuit, however, declined to engage in such improper analysis, correctly rendering its opinion based upon the language of the statement itself. *See* 874 F.3d at 63 ("McKee posits that a reader would infer that Singer was basing his

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[13] The Restatement (Second) of Torts similarly instructs that where a speaker discloses comprehensive facts in support of an opinion, his or her statement of opinion is nonactionable because no reader could infer that there are additional, undisclosed facts. *See* Restatement (Second) of Torts § 566 cmt. c, illus. 4. Other authorities are in accord. *See, e.g.*, *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 731 (1st Cir. 1992) (finding statements to be nonactionable opinion because no reader could view the statements as implying undisclosed defamatory facts given "the comprehensive nature of the information provided"); *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) ("[R]eaders will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts.").

assertions about McKee's credibility on knowledge of undisclosed facts. Nothing in the Singer Letter warrants such an inference.").

In this action, as in *McKee*, Mr. Singer adequately disclosed the underlying facts supporting his statements:

- ***Fact 1:*** "There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002." App. 8a & 135a.
- ***Fact 2:*** "Ms. Dickinson did an interview with the New York Observer in September 2002 entitled 'Interview With a Vamp' completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said 'she didn't want to go to bed with him and he blew her off.'" App. 8a & 135a.
- ***Fact 3:*** "Her publisher Harper Collins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story . . . or tried to prevent her from saying whatever she wanted about Bill Cosby in her book." App. 8a & 135a.
- ***Fact 4:*** "The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off." App. 8a & 135a.

Based on these facts, Mr. Singer stated his opinion that "[d]ocumentary proof and Ms. Dickinson's own words show that her new story about something she now claims happened back in 1982 is a fabricated lie," implicitly inviting readers to draw their own

conclusions from the information provided. App. 8a, 135a; *see Phantom Touring, Inc.*, 953 F.2d at 730-31 (holding statements of opinion to be nonactionable where they did not suggest that the speaker "was singularly capable of evaluating the plaintiffs' conduct"); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987) ("The premises are explicit, and the reader is by no means required to share [defendant's] conclusion."). Thus, the California court erred in determining that Mr. Singer's statements were actionable.

B. Mr. Singer's Statements Are Nonactionable "Rhetorical Hyperbole."

The California Court of Appeal also erred in failing to give adequate consideration to the circumstances in which Mr. Singer's statements were made. In so doing, the California court ignored this Court's mandate that certain types of statements are nonactionable. *See Milkovich*, 497 U.S. at 16-17 (recognizing constitutional limitations upon the types of statements that may be actionable). The court also ignored Mr. Singer's professional responsibilities, as an attorney, to protect his client from the harm that could result from Ms. Dickinson's accusations. *See* Cal. R. Prof'l Conduct r. 5-120(C); Gerald F. Uelmen, *Leaks, Gags and Shields: Taking Responsibility*, 37 Santa Clara L. Rev. 943, 951-52 (1997) ("[T]he defense lawyer may share a client's concern for his reputation or public image apart from the pending charges. A client who is never prosecuted, or who is prosecuted and acquitted, may have been ill-served by a lawyer who allowed public speculation about his guilt to go unchallenged.").

Given the attorney-client relationship between Mr. Singer and Mr. Cosby, the California Court of

Appeal should have concluded that Mr. Singer's statements could not be understood as stating or implying provably false facts. More specifically, the court should have recognized Mr. Singer's statements as being the sort of "rhetorical hyperbole" that is understood not as provable fact but, rather, as an effort to "persuade others to their positions." App. 44a; *see Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) ("[L]itigants frequently disparage an opponent's suit as a meritless tactical device. Such charges may not be commendable, but they are highly unlikely to be understood by their audience as statements of fact rather than the predictable opinion of management for one side about the other's motives.").

Indeed, this is precisely the setting where the public would understand that an attorney denying accusations against his or her client is making statements trying to persuade the public to their client's side. *See Info. Control Corp.*, 611 F.2d at 784 (finding that where the statement is of a type "typically generated in a spirited legal dispute in which the judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended in the media and other public forums, the statement is less likely to be understood as a statement of fact rather than as a statement of opinion"); *Indep. Living Aids, Inc. v. Maxi-Aids, Inc.*, 981 F. Supp. 124, 128 (E.D.N.Y. 1997) (finding that a person's denial of the accusations against him "cannot be construed as defamatory" because "[e]ven the most careless reader must have perceived that the words were no more than rhetorical hyperbole, a vigorous epithet used by [defendant] who considered himself unfairly treated and sought to bring what he alleged were the true

facts to the readers" (internal brackets and quotation marks omitted)).[14] Other courts and commentators have expressly recognized this fact in deeming Mr. Singer's statements to be nonactionable opinion. *See Hill*, 2016 WL 491728, at *5 ("Defendant, through his attorney, publicly denied [the] claims by saying the 'claims' are unsubstantiated and absurd – which is his legal position. This sort of purely opinionated speech articulated by Defendant's attorney is protected and not actionable as defamatory speech."); Clay Calvert, *Counterspeech, Cosby, and Libel Law: Some Lessons About "Pure Opinion" & Resuscitating the Self-Defense Privilege*, 69 Fla. L. Rev. 151, 154 (2017) ("Singer was merely adding more speech to the metaphorical marketplace of ideas to counter the claims of Cosby's accusers and to provide the public with another, different perspective to consider in searching for the truth, as it were, about the comedian's conduct." (footnotes omitted)).

The Court should grant certiorari to correct the California court's errors and prevent others from relying upon that court's faulty analysis.

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[14] At common law, statements made in this particular setting—where a person is responding to specific accusations—are covered by the self-defense privilege, which permits every person "to defend his [or her] character against false aspersion." *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559-60 (4th Cir. 1994); *see* Restatement (Second) of Torts § 594 cmt. k (Am. Law Inst. 1977) ("A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself.").

III. The Court Should Grant Certiorari to Settle the Important and Recurring Question of Whether an Attorney's Response to Public Accusations Against His or Her Client Is Protected by the First Amendment.

This Court has characterized the First Amendment as providing a "broad protective umbrella" that should not be displaced unless the statements in question form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Bose Corp.*, 466 U.S. at 513; *id.* at 504 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). This Court has never held that an attorney's public defense of his or her client is of "such slight social value" as to be unprotected by First Amendment principles. To the contrary, the Court has recognized that the First Amendment does, in fact, apply to an attorney's statements to the press precisely because those statements contribute to the important function of public debate.[15] *See Gentile*, 501 U.S. at 1054 ("And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First

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[15] "Aside from defense lawyers' role as zealous representatives of their clients, they also have an interest in exposing corruption among the police, prosecution, and the judiciary, and in increasing the public's understanding of flaws in the trial process. These public functions justify the constitutional protection of their extrajudicial speech." Leigh A. Krahenbuhl, Comment, *Advocacy in the Media: The Blagojevich Defense and a Reformulation of Rule 3.6*, 61 Duke L.J. 167, 187-88 (2011) (internal footnotes omitted).

Amendment principles in the case of speech by an attorney regarding pending cases."); *id.* at 1058 (plurality opinion) ("[I]n some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts.").

Nowhere is that function more important than where a person is accused of criminal conduct. As this Court has explained, "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Gentile*, 501 U.S. at 1035 (plurality opinion) (quoting *In re Oliver*, 333 U.S. 257, 270-71 (1948)). Indeed, the ability to defend oneself against public accusations, which often requires a statement or at least the clear implication that those accusations are unfounded, is not only a fundamental right of the accused but is also the best way to discover the truth. *See Hustler Magazine, Inc.*, 485 U.S. at 51 ("[T]he ultimate good desired is better reached by free trade in ideas—[and] the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

This issue is of exceptional importance because it impacts attorneys' ability to represent their clients. If attorneys are unable to speak publicly on behalf of their clients, for fear that the attorney or the client

will be sued for defamation, then constitutional guarantees will be eliminated for all persons, whether innocent or guilty, who face public accusations. In the absence of a public denial, the public—and potentially the jury—will be left to assume the worst in every case. *See Salinas v. Texas*, 570 U.S. 178, 186 (2013) (prosecution's use of defendant's noncustodial silence did not violate Fifth Amendment); *People v. Tom*, 331 P.3d 303, 311-12 (Cal. 2014) (same). Thus, statements refuting an allegation of wrongdoing lie at the heart of First Amendment protection, not outside of it. *See Gentile*, 501 U.S. at 1055 (plurality opinion) ("All of these factors weigh in favor of affording an attorney's speech about ongoing proceedings our traditional First Amendment protections."). As noted constitutional law professor Erwin Chemerinsky has explained, "the First Amendment can tolerate restrictions of speech only if the harm of the expression is proven, while the attorney should always speak out and counter potentially harmful publicity unless the harm is clearly trivial." Chemerinsky, *supra*, at 868; *see id.* at 867-68 ("[T]here are times that effective representation of a client requires statements to the press. . . . [A] lawyer cannot take the chance that media publicity has no impact and should counter adverse publicity concerning his or her client.").

The California Court of Appeal's opinion ignores this important role that the attorney plays in public debate, and presumes that the attorney's denials on behalf of his or her client have no social value. Critically, however, the California court also specifically used the fact that Mr. Singer was acting as an attorney in order to find, under the principles

of agency, that a defamation action lies against both the speaking attorney and his or her client because, according to the California court, the attorney's denials must be read to imply the existence of undisclosed facts, namely, whether the client did, in fact, engage in the alleged conduct. App. 46a-51a.

This holding stands in direct contrast to how commentators and other members of the public understood the statements. *See* Niehoff & Messenger, *supra*, at 480 ("We recognize that when Cosby's lawyer says these women have 'fabricated stories' what he is *really* saying is that he believes his client's version over the versions of his accusers (and, of course, we also recognize that he gets paid to do so). When the rest of us--spectators to these events--express our own views ('Cosby is lying' or 'His accusers are in it for a shakedown') we are doing the same thing." (emphasis in original) (footnotes omitted)).

Particularly in the current age of social media, where even an off-hand comment concerning allegations of misconduct can "go viral" in a matter of minutes, attorneys must have the ability to respond swiftly to accusations, and this Court should therefore grant certiorari to resolve the constitutional issue of freedom of speech for attorney statements that deny public accusations against a client.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

[Filed 11/21/17]

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B271470
(Los Angeles County Super. Ct. No. BC580909)

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JANICE DICKINSON,

Plaintiff and Appellant,

v.

WILLIAM H. COSBY, JR.,

Defendant and Appellant;

MARTIN D. SINGER,

Defendant and Respondent.

———

APPEAL from orders of the Superior Court of Los Angeles County. Debre Katz Weintraub, Judge. Affirmed in part and reversed in part.

Liner, Angela C. Agrusa; Greenberg Gross and Alan A. Greenberg for Defendant and Appellant William H. Cosby, Jr.

The Bloom Firm, Lisa Bloom, Jivaka Candappa and Alan Goldstein for Plaintiff and Appellant Janice Dickinson.

Horvitz & Levy, Jeremy B. Rosen and Felix Shafir; Lavely & Singer and Andrew B. Brettler for Defendant and Respondent Martin D. Singer.

Buchalter and Harry W.R. Chamberlain II for Amicus Curiae on behalf of Association of Southern California Defense Counsel.

California Anti-SLAPP Project and Mark A. Goldowitz for Amicus Curiae on behalf of California Anti-SLAPP Project.

Plaintiff Janice Dickinson went public with her accusations of rape against William H. Cosby, Jr. Cosby, in turn, through his attorney, Martin Singer, reacted with (1) a letter demanding media outlets not repeat Dickinson's allegedly false accusation, under threat of litigation ("demand letter"); and (2) a press release characterizing Dickinson's rape accusation as a lie ("press release"). Dickinson brought suit against Cosby for defamation and related causes of action. Cosby responded with a motion to strike under Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute).[1] When Cosby's submissions indicated that Singer might have issued the statements without first asking Cosby if the rape accusations were true, Dickinson filed a first amended complaint, adding Singer as a defendant. Cosby and Singer successfully moved to strike the first amended complaint because of the pending anti-SLAPP motion. The court then heard Cosby's anti-SLAPP motion, granting it as to

[1] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 678, fn. 2.) The statute is designed to provide a quick and easy means by which a defendant can obtain dismissal of a meritless lawsuit "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).)

the demand letter, and denying it as to the press release.

Dickinson appeals the order granting the motion to strike her first amended complaint; and the grant of the anti-SLAPP motion with respect to the demand letter. Cosby appeals the order denying his anti-SLAPP motion with respect to the press release. We conclude: (1) the court erred in striking Dickinson's first amended complaint, as it pertains only to a party, Singer, who had not filed an anti-SLAPP motion; (2) the court erred in granting the anti-SLAPP motion with respect to the demand letter; and (3) the court correctly denied the anti-SLAPP motion with respect to the press release. Accordingly, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Alleged Rape

According to Dickinson, Cosby drugged and raped her in 1982. Dickinson was a successful model; Cosby was a famous comedian and television actor. They met for dinner, and Dickinson complained to Cosby of menstrual cramps. Cosby offered her a pill that he said would help; the pill was actually a narcotic which heavily sedated her. Later that night, he sexually assaulted her, committing vaginal and anal rape. Dickinson did not report the crime, due to fear of retaliation by Cosby, "a wealthy, powerful celebrity." The evidence would show, however, that she did tell some close friends.

2. Dickinson's Autobiography

In 2002, Dickinson's autobiography, *No Lifeguard on Duty*, was published by Regan Books, an imprint of HarperCollins. Dickinson's evidence in opposition

to the anti-SLAPP motion shows the following: Dickinson disclosed the rape to her ghostwriter, Pablo Fenjves, and wanted it included in the book. The president of Regan Books, Judith Regan, discussed the matter with the legal department at HarperCollins, which said the rape could not be included without corroboration. Regan thought corroboration would be difficult, but believed Dickinson to be credible and argued to include the rape. As the HarperCollins legal department refused to publish the rape allegations, Fenjves wrote a "sanitized version of the encounter," in which Dickinson "rebuffed Cosby's sexual advances and retreated to her room." The book stated that when Dickinson turned Cosby down, "he gave [her] the dirtiest, meanest look in the world, stepped into his suite, and slammed the door in [her] face." According to Regan, Cosby was "mentioned in the book to satisfy Ms. Dickinson in some way; however the story was modified to deal with the issue without any legal problems."

In September 2002, shortly after publication of the book, the *New York Observer* published an interview with Dickinson. The article begins with the interviewer discussing highlights from the book, including that Dickinson believed Cosby when he told her that she had a good singing voice, "that is, until she didn't want to go to bed with him and he blew her off." The interviewer later asked Dickinson about the Cosby encounter from her book, to which Dickinson is quoted as responding, "'Oh, he's so sad.'" Dickinson did not mention rape in the published portion of the interview.

3. *The November 18, 2014 Disclosure*

By late 2014 – 12 years after Dickinson's book had been published – other women had publicly accused Cosby of drugging and raping them. On November 18,

2014, in a television interview with *Entertainment Tonight*, Dickinson disclosed that Cosby had raped her. By this time, Dickinson had become a successful reality television personality. Her accusation garnered substantial media attention.

Cosby would subsequently make much of the point that, in addition to accusing him of rape, Dickinson may have also accused him of killing the rape story in her autobiography. A story on ETOnline states that Dickinson wanted to write about the rape, "but claims that when she submitted a draft with her full story to HarperCollins, Cosby and his lawyers pressured her and her publisher to remove the details." While it is true that the ETOnline story states this, it is not completely clear whether Dickinson had actually made that statement to *Entertainment Tonight* – or instead, ETOnline may have misconstrued Dickinson's explanation as to why the rape was omitted from her autobiography. A transcript of Dickinson's actual interview with *Entertainment Tonight* makes no mention of Cosby or his lawyers pressuring HarperCollins.

4. *The Demand Letter*

After the *Entertainment Tonight* interview went public, several media outlets contacted the Cosby camp, indicating an intention to run follow-up stories and seeking Cosby's comment. In response, that same day, Singer, on behalf of Cosby, sent a demand letter to the executive producer of *Good Morning America*, with similar letters to other media outlets. The demand letter was over two pages long, on letterhead from Singer's law firm, and began with the warnings: "CONFIDENTIAL LEGAL NOTICE" and "PUBLICATION OR DISSEMINATION IS PROHIBITED."

The body of the letter started with, "We are litigation counsel to Bill Cosby. We are writing regarding the planned *Good Morning America* segment interviewing Janice Dickinson regarding the false and outlandish claims she made about Mr. Cosby in an *Entertainment Tonight* interview, asserting that he raped her in 1982 (the 'Story'). That Story is fabricated and is an outrageous defamatory lie. In the past, Ms. Dickinson repeatedly confirmed, both in her own book and in an interview she gave to the *New York Observer* in 2002, that back in 1982 my client 'blew her off' after dinner because she did not sleep with him. Her new Story claiming that she had been sexually assaulted is a defamatory fabrication, and she is attempting to justify this new false Story with yet another fabrication, claiming that Mr. Cosby and his lawyers had supposedly pressured her publisher to remove the sexual assault story from her 2002 book. That never happened, just like the alleged rape never happened. Prior to broadcasting any interview of Ms. Dickinson concerning my client, you should contact HarperCollins to confirm that Ms. Dickinson is lying."

The next paragraph explained that Cosby and his team had no contact with HarperCollins about any story planned for the book. It stated, "You can and should confirm those facts with HarperCollins. Because you can confirm with independent sources the falsity of the claim that my client's lawyers allegedly pressured the publisher to kill the story, it would be extremely reckless to rely on anything Ms. Dickinson has to say about Mr. Cosby since the story about the publisher is patently false."

The letter continued, again repeating that both the rape allegation and interference with HarperCollins were false – and asserting that HarperCollins could

confirm this. It threatened, "If you proceed with the planned segment with Janice Dickinson and if you disseminate her Story when you can check the facts with independent sources at HarperCollins who will provide you with facts demonstrating that the Story is false and fabricated, you will be acting recklessly and with Constitutional malice." Singer stated, "It would be extraordinarily reckless to disseminate this highly defamatory Story when Ms. Dickinson herself told an entirely different story in her book," confirmed the same story in the *New York Observer* interview, and "when you may independently confirm with her publisher the falsity of her new assertion that my client's lawyers supposedly pressured HarperCollins to delete the alleged rape story from her book, and when her new allegation of rape was made for the first time only now when it appears that she [is] seeking publicity to bolster her fading career."

The letter repeated, "Since at a minimum Ms. Dickinson fabricated the assertion that my client's lawyers pressured the publisher more than a decade ago to take out the sexual assault story – a story we heard now for the first time – it would be reckless to rely on Ms. Dickinson in this matter."

Singer's letter explicitly threatened litigation: "If *Good Morning America* proceeds with its planned segment with Ms. Dickinson and recklessly disseminates it instead of checking available information demonstrating its falsity, all those involved will be exposed to very substantial liability. [¶] You proceed at your peril. [¶] This does not constitute a complete or exhaustive statement of all of my client's rights or claims. Nothing stated herein is intended as, nor should it be deemed to constitute a waiver or relinquishment, of any of my client's rights or remedies,

whether legal or equitable all of which are hereby expressly reserved. This letter is a confidential legal communication and is not for publication."

5. *The Press Release*

The next day, November 19, 2014, Singer issued a press release, which was headed

"STATEMENT OF MARTIN D. SINGER
ATTORNEY FOR BILL COSBY"

The statement reads, in its entirety, as follows: "Janice Dickinson's story accusing Bill Cosby of rape is a lie. There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002. Ms. Dickinson did an interview with the *New York Observer* in 2002 entitled 'Interview With a Vamp' completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said 'she didn't want to go to bed with him and he blew her off.' Her publisher HarperCollins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book. The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off. Documentary proof and Ms. Dickinson's own words show that her new story about something she now claims happened back in 1982 is a fabricated lie."

6. *Demand for Retraction*

On February 2, 2015, Dickinson's counsel, Lisa Bloom, sent several Cosby attorneys, including Singer, a letter seeking retraction of both the demand letter

and the press release. Bloom's letter explains, "Ms. Dickinson has never lied about what happened between her and Dr. Cosby. She did not disclose the complete story in her autobiography or her interview with *New York Observer* per her ghostwriter's and publisher's insistence. Each of these individuals – the two individuals from her publishing house who are most knowledgeable about the book and the suppression of Ms. Dickinson's rape disclosure – confirms that Ms. Dickinson fought to have the entire story, including the rape disclosure, in the book, but they could not allow it for fear that Dr. Cosby would sue or otherwise retaliate against the publisher." Bloom attached declarations from Fenjves and Regan confirming this.

In Bloom's letter, she also stated that Singer, on behalf of Cosby, acted recklessly and with malice by circulating the demand letter and press release without confirming the facts with independent third parties. Not only did Bloom establish that Fenjves and Regan would have confirmed that Dickinson wanted to include the rape in her book, Bloom added, "our sources at HarperCollins inform us that neither Mr. Singer nor anyone from his office has ever contacted HarperCollins to 'confirm that she is lying.'"

Bloom argued that Singer's statements on behalf of Cosby had defamed Dickinson and harmed her reputation. She demanded that Cosby "immediately publicly correct the record to restore her reputation."

Neither Cosby nor Singer retracted the statements.

7. *The End of Any Assertion that Cosby Killed the Rape Story in Dickinson's Book*

On February 9, 2015, a week after Bloom's letter requesting a retraction, a telephone conference

occurred between Bloom and Cosby's litigation counsel. According to Cosby's litigation counsel, Bloom "stated that she was retracting Ms. Dickinson's allegation that Mr. Cosby's lawyers had pressured HarperCollins to remove the rape story from the Book." Bloom denied any retraction. According to her subsequent declaration, "This is categorically false. I never made that statement. What I said was that Ms. Dickinson was not making that claim, nor did she."[2]

8. *The Original Complaint*

On May 20, 2015, Dickinson filed her complaint against Cosby, stating causes of action for (1) defamation, (2) false light, and (3) intentional infliction of emotional distress. Her complaint alleged that Cosby had drugged and raped her, and she recently disclosed this publicly. "In retaliation, Cosby, through an attorney, publicly branded her a liar and called her rape disclosure a lie with the intent and effect of revictimizing her and destroying the professional reputation she's spent decades building."

The complaint alleged that both Singer's demand letter and his press release were defamatory. She specifically alleged that the demand letter was sent to

[2] Cosby's briefing on appeal relies on Cosby's counsel's recollection of the telephone call to support the repeated assertion that "Dickinson, through her lawyers, ultimately issued a public retraction of her claim that Mr. Cosby influenced the content published in the Autobiography." The evidence does not support the statement. There is no evidence that Bloom ever issued a "public retraction"; at most, she privately retracted it in a conversation with Cosby's counsel – a statement she disputes. Dickinson also disputes that she ever asserted that Cosby had pressured HarperCollins to remove the rape story.

Entertainment Tonight and BuzzFeed.com.[3] She also alleged that both the demand letter and the press release were broadcast and republished by thousands of media entities worldwide as Cosby "foresaw and intended."

Dickinson pleaded that Cosby's refusal to retract the statements after having been provided with evidence confirming that her claims were not recently fabricated "constitutes actual malice." She also argued that failure to retract "constitutes [Cosby's] acceptance, endorsement and ratification" of Singer's statements.

The false light cause of action was based on the same statements which supported the defamation cause of action. The intentional infliction of emotional distress cause of action relied on the two statements and Cosby's further conduct at a stand-up comedy show in January 2015. During his show, a woman stood up to leave. When Cosby asked where she was going, she said she was going to get a drink. Cosby responded, "You have to be careful about drinking around me." Dickinson alleged that this "comment was intended by Defendant Cosby to mock, insult, demean and humiliate Ms. Dickinson and his other accusers."

9. *Cosby Demurs*

On June 22, 2015, Cosby demurred to the complaint, for failure to state a claim. The demurrer was later taken off calendar in light of the events we next describe.

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[3] As we shall explain, this allegation was mistaken with respect to *Entertainment Tonight* – an error which resulted in additional briefing when the trial court called it to the parties' attention.

10. *Cosby's Anti-SLAPP Motion*

That same day, Cosby filed his anti-SLAPP motion.

"The anti-SLAPP statute does not 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. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, fn. omitted.)

To meet his initial burden under the first part of the anti-SLAPP procedure, Cosby argued that both the demand letter and press release constituted speech in connection with a public issue. (Code Civ. Proc., § 425.16, subd. (e)(4).) The trial court would ultimately agree with this position, and Dickinson does not contest it on appeal. We therefore say no more about Cosby's establishment of the first prong. The real battleground in this case was always the second prong, whether Dickinson could demonstrate a probability of prevailing on her complaint.

Cosby argued that Dickinson could not prevail to the extent her causes of action were based on the demand letter, because the demand letter was a pre-litigation communication protected by the absolute litigation privilege. (Civ. Code, § 47.) As to both the demand letter and the press release, Cosby argued that

Dickinson could not prevail on her defamation cause of action because both statements were, in actuality, privileged opinion – both as an opinion based on disclosed facts and as a so-called "predictable opinion." He also argued that Dickinson would be unable to establish defamation damages because the real "sting" of the statements was that Dickinson was generally a liar. This would not be actionable because: (1) she admittedly lied about the rape in her autobiography, so the accusation that she was a liar was true; and (2) Dickinson already had cultivated the professional reputation of a liar, so she was not harmed by the accusation.

Cosby also put forth a series of arguments based on the fact that the statements had been made by Singer, rather than Cosby himself. Cosby argued that he could not be held liable for Singer's conduct without evidence that he furnished or approved the statements. A failure to retract is not sufficient. He further argued that since Dickinson was a public figure, she could only prevail on her defamation cause of action if she established actual malice. He claimed that Singer had not acted with actual malice; and that, even if he had, Singer's malice could not be imputed to him as Singer's principal via respondeat superior.

Finally, Cosby argued that the false light and intentional infliction of emotional distress causes of action were duplicative of the defamation claim and subject to the same defenses.

Cosby supported his anti-SLAPP motion with Singer's declaration. Singer explained how he came to draft the two statements and why he believed their contents were true. He argued that the assertion that Cosby's attorneys had pressured HarperCollins to remove the rape story from Dickinson's autobiography

"was integral to the claims" Dickinson had asserted in her *Entertainment Tonight* interview, so he "conducted an investigation which established that this assertion was provably false." Singer believed his demand letter and press release were true, based on: (1) his knowledge that Cosby's attorneys had not pressured HarperCollins; (2) his understanding that Dickinson's autobiography had told a different story; (3) his prior experience with Dickinson in which she had made false claims against another Singer client; and (4) some internet research which revealed articles and commentary characterizing Dickinson as a substance abuser and liar.

At no point in Singer's declaration does he state that he actually spoke with Cosby to determine whether Dickinson's accusation of rape was true. Nor did Cosby file a declaration in support of the anti-SLAPP motion denying the rape accusation.

11. *The Discovery Issue*

The filing of an anti-SLAPP motion stays all discovery. (Code Civ. Proc., § 425.16, subd. (g).) "The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." (*Ibid.*)

As Cosby's anti-SLAPP motion had put Singer's malice into question, Dickinson moved to lift the discovery stay to depose Cosby and Singer on the issue.

On November 2, 2015, the court granted Dickinson's motion, vacating the discovery stay to allow Dickinson to depose both Cosby and Singer on malice. At Cosby's request, the court stayed its order to enable Cosby to challenge the ruling by writ.

Cosby filed a writ petition in this court. He argued that Dickinson had no right to discovery on actual malice until she could establish a reasonable probability of proving the other elements of her causes of action.

In opposition to Cosby's writ petition, Dickinson argued that the depositions she sought were necessary not only for the issue of malice, but also to enable her to "establish facts that [Cosby] knew about, directed, approved and ratified" the statements.

In reply, Cosby argued that the sole issue raised by the writ proceeding was "whether the Superior Court abused its discretion by ordering discovery on the issue of actual malice *before* requiring full briefing and argument on the legal defenses asserted in Defendant's special motion to strike." Cosby argued that if any of his defenses "unrelated to malice" were to be successful there would be no need "for burdensome discovery on malice, because the case will have been dismissed."

We issued an alternative writ of mandate, directing the trial court to either vacate its order lifting the discovery stay and hear the anti-SLAPP motion on the merits to determine if Dickinson has a reasonable probability of "establishing the elements of her defamation action other than actual malice" or to show cause why not. The trial court complied with the alternative writ. It vacated its order lifting the discovery stay and indicated that it would hear the anti-SLAPP motion on the merits to determine whether Dickinson had a reasonable probability of establishing the elements of her defamation action other than actual malice.

In light of the court's order, we dismissed the writ petition as moot.

12. *First Amended Complaint*

On November 16, 2015, while the writ proceeding was pending, Dickinson filed her first amendment complaint. The main distinction from the original complaint was that Dickinson now named Singer as an additional defendant.[4] It added an allegation that "[a]t all times relevant herein, Defendant Singer acted at the direction of Defendant Cosby, as an actual and/or apparent agent, authorized representative, press agent, lawyer, servant and/or employee of Defendant Cosby, acting within the course and scope of his respective employment and/or agency." It alleged that the two statements were issued by "Defendant Cosby through Defendant Singer."

Dickinson specifically alleged that Cosby knew that he had drugged and raped her. She alleged that Singer acted with reckless disregard by, among other things, issuing the statements without conducting a reasonable investigation and/or without interviewing obvious witnesses, including Cosby himself.

13. *Motion to Strike First Amended Complaint*

Cosby moved to strike the first amended complaint, on the basis that a plaintiff is not permitted to file an amended complaint while an anti-SLAPP motion is

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[4] The complaint also added allegations about two additional November 2014 statements by Cosby, through Singer, which did not name Dickinson specifically, but spoke in disparaging terms about all of the women accusing Cosby of rape. As the only amended-complaint issue presented on appeal is the correctness of the trial court's ruling dismissing the complaint as to Singer, we have no occasion to consider the additional allegations mentioned above.

pending. He argued that the first amended complaint was "nothing more than an 11th-hour attempt to plead around Defendant's pending anti-SLAPP motion."

Singer joined Cosby's motion to strike the first amended complaint, with no substantive argument of his own.

14. *Opposition to Motion to Strike First Amended Complaint*

Dickinson opposed the motion to strike the first amended complaint. She argued that, procedurally, she was permitted to amend because the court had not yet found that Cosby satisfied the first prong of the anti-SLAPP test. Moreover, she argued that she had not been trying to plead around Cosby's anti-SLAPP motion, but was simply attempting to preserve her rights against Singer before the statute of limitations expired.

15. *Singer's Reply in Support of the Motion to Strike the First Amended Complaint*

Both Cosby and Singer filed replies in support of the motion to strike the first amended complaint. Because, as we shall discuss, the court's order as to Cosby's motion is not before us, we focus only on Singer's reply.

Singer argued that Dickinson's suggestion that she filed her amendment to avoid the statute of limitations was belied by the fact that Dickinson knew of Singer's involvement from the beginning and she could have named him in her original complaint. He argued that Dickinson could have (1) amended the complaint before Cosby filed his anti-SLAPP motion; (2) sought leave of court to amend after the anti-SLAPP motion was filed; or (3) commenced a separate action against Singer. But, instead, she did what she was not

permitted to do: attempted to amend her complaint after that right was foreclosed by Cosby's filing of an anti-SLAPP motion.

Singer argued that the amendment was not just prejudicial, but "highly prejudicial" to him. Specifically, since a separate action against Singer would now be time-barred, Singer would be prejudiced if the court refused to strike the first amended complaint as to him. He also argued, "Forcing Singer to file multiple motions (i.e., the instant Motion, a subsequent anti-SLAPP motion, and a demurrer) to dispose of the action against him is inherently prejudicial as it unreasonably delays the resolution of the matter."

16. *The First Amended Complaint is Stricken*

The court granted the motion of Cosby and Singer to strike the first amended complaint, concluding that the amendment was procedurally impermissible, given the pending anti-SLAPP motion. The court believed it would cause unfair delay to permit Dickinson to amend based on facts which had been known to her at the commencement of the action.

17. *Dickinson's Opposition to Cosby's Anti-SLAPP Motion*

With the first amended complaint out of the case, the parties returned to briefing Cosby's anti-SLAPP motion.

As to Dickinson's probability of prevailing, Dickinson argued that the demand letter was not protected pre-litigation conduct because the privilege applies only if litigation was under "serious consideration." Dickinson argued that there was no evidence that Cosby seriously considered litigation and, in fact, he

never sued any of the media outlets he had threatened with legal action.

As to whether she could establish both statements were defamatory, Dickinson argued that the statements were not protected opinion, but instead provably false assertions of fact. She also argued that she had been harmed by the statements.[5]

Dickinson supported her motion with declarations of friends, who stated that Dickinson had told them about the rape in 1982, shortly after it happened. She included the declarations of ghostwriter Fenjves and publisher Regan, who agreed that Dickinson had told them about the rape and wanted to include it in the book. She relied on the declaration of her counsel, Bloom, who countered Cosby's assertion that she had "retracted" any allegation that Cosby had influenced HarperCollins to omit the rape story from Dickinson's book; stating instead that she denied Dickinson had ever made that claim. Finally, she included the declaration of her agent, who had personal knowledge that she had lost jobs as a result of being branded a liar by Cosby on the "very difficult and painful subject of rape."

18. *Cosby's Reply*

In reply, Cosby repeated his prior arguments. He again argued that the demand letter was protected pre-litigation conduct. He argued that the "gist" of the two statements was "that Plaintiff is not a truth teller,

[5] Despite the fact that the motion had been permitted to proceed on the merits *except* for the issue of malice, Dickinson briefed malice in an abundance of caution. She also briefed Singer's agency to act for Cosby.

or put another way, a liar." Armed with that characterization of the statements, he argued that the statements were both opinion and true.

19. *First Hearing*

A hearing was held on February 29, 2016. At the hearing, the court expressed confusion that plaintiff's complaint had referred to a demand letter which had been sent to *Entertainment Tonight* and BuzzFeed.com whereas Cosby's anti-SLAPP motion relied on a demand letter sent to *Good Morning America*.

The court also asked Cosby if he was asserting the litigation privilege with respect to the press release. The hearing was continued for further briefing.

20. *Cosby's Supplemental Briefing*

In Cosby's March 8, 2016 briefing, Cosby argued that the complaint was in error; there was no demand letter to *Entertainment Tonight*. Cosby attached the declaration of Singer authenticating the demand letter he sent to BuzzFeed.com. The letter was virtually identical to the letter he had sent to *Good Morning America.* It had been attached to a cover e-mail saying, "PLEASE SEE ATTACHED CONFIDENTIAL LEGAL NOTICE REGARDING THE ABOVE SUBJECT."

The brief also stated, "Defendant is not asserting the litigation privilege as to Mr. Singer's November 19, 2014 press statement, nor is he pursuing on this Special Motion to Strike the arguments advanced in the opening brief regarding agency and actual malice."

21. *Dickinson's Supplemental Briefing*

Dickinson again argued that the litigation privilege could not apply to the demand letter because the privilege only applies when litigation is contemplated

in good faith and under serious consideration, which she believed to be a disputed issue of fact.

22. *Second Hearing*

At the continued hearing, the focus was on whether Dickinson had established a probability of prevailing.

As to the demand letter, the court concluded it was a pre-litigation communication in connection with proposed litigation contemplated in good faith and under serious consideration; thus, it was subject to the litigation privilege. The court therefore concluded the litigation privilege defeated all three of Dickinson's causes of action to the extent they were based on the demand letter, and granted the anti-SLAPP motion in part. (See *Baral v. Schnitt, supra,* 1 Cal.5th at p. 382 [an anti-SLAPP motion can be granted as to a portion of a cause of action].)

As to the press release, the court reached a different result. First, the court rejected Cosby's argument that the gist of the press release was simply that Dickinson was a liar. Instead, the court believed that the gist of the statement was that "plaintiff is lying about the rape occurring." The court therefore rejected Cosby's argument that the press release constituted opinion rather than fact. The court stated, "In other words, either the rape did occur or it did not occur. And in this regard, Dickinson is either telling the truth or not telling the truth. The press statement presents the factual assertion that the rape did not occur and that Dickinson is lying. Plaintiff's factual position, on the other hand, is that the rape did occur and thus, she is not lying, contrary to what the press statement says about Dickinson." The court acknowledged that Dickinson presented evidence that she had disclosed the rape to friends, and her publisher, long before

Cosby's other accusers came forward. This was sufficient evidence to establish a prima facie case that Cosby did rape her and the press release was therefore false.

The court further concluded that Dickinson could establish all elements of defamation, including damages. The court rejected Cosby's assertion that Dickinson could not establish damages because she had already cultivated the reputation of a liar. The court stated, "Lying about trivial things that are made to entertain an audience does not mean that plaintiff's reputation is so tainted that she's impervious to a reputational harm for being accused of lying about a horrific incident to intentionally harm defendant Cosby's reputation." The court similarly found Dickinson could establish the elements of false light and intentional infliction of emotional distress with respect to the press release. Finding that Dickinson had established a probability of prevailing on all three of her causes of action, the court denied the anti-SLAPP motion as to the press release.

Despite the fact that Cosby had specifically withdrawn his arguments regarding malice, the court addressed the issue, stating that there was no evidence that Singer had investigated whether Cosby had raped Dickinson prior to issuing his statements denying the rape. Similarly, despite the fact that Cosby had specifically withdrawn his arguments regarding agency, the court addressed that issue as well, stating that Cosby had ratified Singer's statements by failing to retract them.[6]

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[6] The court later acknowledged that Cosby had withdrawn his arguments regarding agency and actual malice, and stated, "For purposes of this special motion to strike only, the court construes

23. *Notices of Appeal*

Dickinson filed a timely notice of appeal from the original order striking her first amended complaint. Cosby filed a timely notice of appeal from the ruling on the anti-SLAPP motion, to the extent it denied his motion with respect to the press release. Dickinson filed a timely notice of cross-appeal from the same ruling, to the extent it granted Cosby's motion with respect to the demand letter.

24. *Limitation of Issues on Appeal*

A. Cosby is Not a Party to the Appeal of the Order Striking the First Amended Complaint as to Singer

Cosby and Singer both moved to dismiss Dickinson's appeal from the order striking her first amended complaint. On May 27, 2016, we dismissed Dickinson's appeal from that order as it relates to Cosby (as the order was not appealable as to him), but denied the motion to dismiss the appeal as it pertains to Singer,

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this as an admission that he [Cosby] does not have evidence to rebut his [*sic*] showing of the actual malice. For purposes of this special motion to strike, the element of malice is satisfied. As such, the court finds that a continuance of this hearing for plaintiff to conduct limited discovery at this time on the issue of malice is not required." We need not decide whether Cosby's position was an actual admission. Cosby's withdrawal of his argument on malice may have been a recognition that the scope of his anti-SLAPP motion had been narrowed in response to his efforts to avoid discovery on the issue of malice – not a concession that Dickinson had presented sufficient evidence of malice. However, on appeal, Cosby does not argue that the court's rulings on malice and agency were premature, and that his anti-SLAPP motion should be reconsidered on those issues only, after Dickinson is permitted to conduct limited discovery.

as the order could be construed as a final judgment in favor of Singer.

Following that order, Cosby alone withdrew those portions of his respondent's brief which addressed the motion to strike the first amended complaint.

B. Singer is Not a Party to the Cross-Appeals Regarding the Anti-SLAPP Ruling

The parties established a consolidated briefing schedule and filed briefs accordingly. In Singer's respondent's brief in connection with Dickinson's appeal of the order striking her first amended complaint against him, Singer included over 20 pages of briefing under the heading, "THIS COURT SHOULD AVOID ISSUING ANY DECISION ON WHETHER SINGER COULD PREVAIL ON AN ANTI-SLAPP MOTION AGAINST DICKINSON. AT ANY RATE, DICKINSON'S LAWSUIT SHOULD BE STRICKEN." This included lengthy arguments under the subheadings, "The trial court properly granted Cosby's anti-SLAPP motion as to claims based on Singer's demand letter" and "The trial court erroneously denied Cosby's anti-SLAPP motion as to claims based on Singer's press statement." In her reply brief, Dickinson argued this court should disregard Singer's briefing pertaining to the cross-appeals of the order on Cosby's anti-SLAPP motion. Singer's counsel responded with a supplemental letter brief, arguing that Singer is permitted to address the issues as briefing in the appeals was consolidated. Singer further argued that, if Dickinson's first amended complaint is reinstated against him, any ruling we might make in favor of Dickinson in connection with Cosby's anti-SLAPP motion could have an injurious effect on any future

anti-SLAPP motion Singer may bring. In the alternative, he argued that we should consider his briefing as that of an amicus curiae.

Singer's only involvement as a party in this litigation was to successfully join in Cosby's motion to strike the first amended complaint. Once that motion was granted, Singer was no longer a party to the lawsuit. He did not purport to brief the anti-SLAPP motion; his only involvement was as a witness submitting a declaration. If Dickinson had never filed the first amended complaint, Singer would have had no right to appear as a party in the appeal or to file a brief without obtaining leave of court. That he is the respondent in Dickinson's appeal of the order striking her first amended complaint does not give him appellate rights with respect to the Cosby/Dickinson anti-SLAPP cross-appeals.

Nonetheless, we acknowledge Singer's request that we not issue any opinion which may prejudice his right to pursue an anti-SLAPP motion in the future, and we consider his briefing of the anti-SLAPP issues in that light. We do not address whether anything in the trial court's rulings, or our opinion, may have any preclusive effect in any further litigation between Dickinson and Singer, as that issue is not before us.

C. Malice and Agency are Not Before Us

On appeal, Cosby briefs the issues of malice and agency on the merits – despite the fact that he had expressly withdrawn his arguments on both malice and agency before the trial court ruled on his anti-SLAPP motion. The issues were withdrawn; we therefore do not address them. Although the trial court briefly addressed malice and agency at the hearing on the anti-SLAPP motion, the court's statements must

be characterized as dicta, as the issues were no longer before it.

Because Cosby withdrew the arguments, we do not address whether Cosby is liable for Singer's statements and whether Cosby and/or Singer acted with actual malice. Cosby simply excluded these issues from the scope of his anti-SLAPP motion. The parties cannot now revive them.

25. *The Issues Before the Court*

Stripped of briefing on irrelevant issues, the appeal before us presents the following issues: (1) When a defendant's anti-SLAPP motion is pending, is the plaintiff precluded from amending her complaint to name an additional defendant? Was the demand letter in this case a pre-litigation communication protected by the absolute litigation privilege? Do the press release and demand letter contain statements of fact, capable of being proven false, which support a defamation cause of action? (4) Is the gist of the statements defamatory? and (5) Should Dickinson's false light and intentional infliction of emotional distress causes of action have been stricken?

DISCUSSION

1. *Dickinson's Absolute Right to Amend Her Complaint to Add a Defendant Was Not Foreclosed by Cosby's Anti-SLAPP Motion*

The first amended complaint was filed November 16, 2015. At that time Code of Civil Procedure section 472 provided, in pertinent part, "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and

serving a copy on the adverse party, . . .”[7] The right to file an amended pleading during this time, without leave of court, includes the right to file an amended complaint to add new parties. (*Gross v. Department of Transportation* (1986) 180 Cal.App.3d 1102, 1105.) Here, Cosby had not answered; and while he had filed a demurrer, it had not yet been heard. The amendment thus was offered “before the trial on the issue of law thereon.” Accordingly, Dickinson had a statutory right to file her first amended complaint naming Singer.

Singer argues, however, that Cosby’s filed anti-SLAPP motion cut off Dickinson’s right to amend to name a new party. As we will discuss, there is a solid line of case authority discussing limitations on a plaintiff’s right to amend the complaint when an anti-SLAPP motion is pending. However, the parties and amici have not cited, and independent research has not disclosed, any authority discussing the precise scenario at issue here – where the party challenging the plaintiff’s right to amend has not filed an anti-SLAPP motion and, in fact, is named as a new party to the litigation. As we now discuss, our review of the language in and policy behind the cases restricting amendment when an anti-SLAPP motion is pending do not support extending their holdings to cases where the plaintiff amends to add an additional defendant.

We begin our discussion with a simple premise. Although the anti-SLAPP statute does not specifically

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[7] The current version of the statute, operative January 1, 2016, replaces the arcane “trial on the issue of law thereon” with “before the demurrer is heard” and further restricts the right to file an amended pleading without leave of court to amendments “filed and served no later than the date for filing an opposition to the demurrer.”

state it, a plaintiff whose complaint is stricken by a successful anti-SLAPP motion cannot try again with an amended complaint. There is no such thing as granting an anti-SLAPP motion with leave to amend.[8] (*Mobile Medical Services, etc. v. Rajaram* (2015) 241 Cal.App.4th 164, 167; *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 629.)

The appellate courts have also addressed whether a plaintiff could avoid that bar if he or she amended after the court indicated its intention to grant the anti-SLAPP motion, but before the court actually ruled. The court in *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068 answered the question in the negative. At issue in *Simmons* was Simmons's cross-complaint, and the cross-defendant's anti-SLAPP motion. At the hearing on the anti-SLAPP motion, Simmons as counsel, "faced with an adverse tentative ruling, asked the court to grant Simmons leave to amend the cross-complaint." (*Id*. at p. 1072.) Counsel sought to "remove any allegations that might be 'objectionable' under the anti-SLAPP statute." (*Id*. at p. 1073.) The court denied leave and granted the anti-SLAPP motion. (*Id*. at p. 1072.) On appeal, the Court of Appeal affirmed, reasoning as follows: "Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing

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[8] In *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, the trial court did, in fact, purport to grant an anti-SLAPP motion with leave to amend. (*Id*. at p. 869.) In that case, a slander plaintiff had failed to plead actual malice; however, in opposition to the anti-SLAPP motion, she presented sufficient evidence of it. (*Id*. at p. 862.) The trial court granted the anti-SLAPP motion with leave for plaintiff to amend her complaint to allege malice. (*Id*. at p. 869.) The Court of Appeal construed this as an order which "effectively denied" the anti-SLAPP motion. (*Id*. at p. 865.)

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. [¶] By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. [Citation.] Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. [Citation.] This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits. [Citation.]" (*Id*. at pp. 1073-1074.)

One might then ask how far back the prohibition goes. That is, what is the first point in the process leading to a successful anti-SLAPP ruling at which the plaintiff is prohibited from amending the complaint? *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468 establishes that the point is no earlier than the filing of the anti-SLAPP motion. When a plaintiff files an amended complaint before the defendant files an anti-SLAPP motion – even by a matter of hours – the amended complaint is effective and the defendant has no right to a hearing on the anti-SLAPP motion directed to the original complaint. (*Id*. at pp. 475, 478.)

There is a disagreement in the appellate courts as to whether the bar to amendment comes into effect as soon as the defendant files an anti-SLAPP motion, or

instead only if the court has indicated the anti-SLAPP motion has some level of merit. (Compare *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1280, 1294 [extending the rationale of *Simmons* to bar attempts to amend after an anti-SLAPP motion is filed and before it is heard] with *Mobile Medical Services, etc. v. Rajaram, supra,* 241 Cal.App.4th at p. 171 [the amendment bar comes into effect once the court has found the defendant has met its burden on the first prong of the anti-SLAPP motion] and *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 881 [same].)

We need not stake out a position in this debate because even if we hold that the *Simmons* analysis applies as soon as the defendant files an anti-SLAPP motion, *Simmons* says nothing about an amendment to add a new defendant so it is not controlling of the issue presented to us. However, we take guidance from the courts which have interpreted *Simmons* as not actually preventing the plaintiff from filing an amended complaint; but instead permitting the plaintiff to file its amendment, without depriving the defendant of its right to have its anti-SLAPP motion adjudicated with respect to the initial complaint.

This hybrid result is best illustrated by *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049. In that case, Sylmar filed a cross-complaint and Pueblo filed an anti-SLAPP motion addressed to the fraud cause of action in the cross-complaint; Pueblo also demurred to the cross-complaint. Three days prior to the hearing on the anti-SLAPP motion and demurrer, Sylmar filed a first amended cross-complaint, pleading the fraud cause of action in greater detail. The trial court took the demurrer off calendar, but nonetheless granted the

anti-SLAPP motion and struck the fraud cause of action, and awarded Pueblo attorney fees as prevailing party on the anti-SLAPP motion. (*Id*. at pp. 1052-1053.) On appeal, Sylmar argued that the court erred in considering the anti-SLAPP motion, as it had amended its complaint as a matter of right prior to the hearing. Division Four of our court disagreed. As between the anti-SLAPP statute and Code of Civil Procedure section 472, the court stated, "We discern no conflict between the two sections. Sylmar received the benefit of section 472 when it was permitted to file the first amended complaint. The filing of the first amended complaint rendered Pueblo's demurrer moot since '"an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. [Citations.]" [Citation.]' [Citation.] The trial court agreed that the demurrer was moot and took it off calendar." (*Id*. at p. 1054.) However, the court refused to read section 472 as an implied condition to the operation of the anti-SLAPP law. "Thus, we conclude the determination of Pueblo's claim for attorney fees and costs was not moot and the trial court did not err in addressing the merits of the SLAPP motion. [Citations.]" (*Id*. at p. 1056.)

In short, *Sylmar* held that the cross-complainant was entitled to file the first amended cross-complaint under Code of Civil Procedure section 472, and the first amended cross-complaint was given effect with respect to the then-pending demurrer; however the amendment did not override the cross-defendant's right to adjudication of its then-pending anti-SLAPP motion on the original cross-complaint.

To similar effect are the cases holding that, if a plaintiff voluntarily dismisses the case prior to the hearing on the antiSLAPP motion, the court loses

jurisdiction to rule on the antiSLAPP motion, but retains the limited jurisdiction to consider the merits of the motion in order to decide if attorney fees and costs should be awarded the successful defendants. (E.g., *Law Offices of Andrew L. Ellis v. Yang, supra,* 178 Cal.App.4th at pp. 875-876.) In short, the dismissal is given effect, but the defendant does not lose its anti-SLAPP right to recover fees if its motion would have been successful. (*Id*. at p. 879.)

When applied to this case, it would mean that, regardless of whether the case had proceeded to the point where Dickinson's amendment as to Cosby could not preclude a hearing on his anti-SLAPP motion (an issue not before us), Dickinson's amendment as to Singer should have been given immediate effect under Code of Civil Procedure section 472. Singer had not filed an anti-SLAPP motion so there was no basis for the trial court to strike the first amended complaint as to him.

Our conclusion does not detract from the strong policy interests identified in *Simmons* and other cases. Those cases are concerned that to allow a complaint against a party to be amended when that party's anti-SLAPP motion is about to be granted (or even pending) may give the plaintiff a second bite at the apple of pleading a complaint sufficient to survive an anti-SLAPP motion. Yet, anti-SLAPP is designed as a final remedy with no second chances. Allowing a plaintiff to name a new defendant when an anti-SLAPP motion is proceeding as to the original defendant will not implicate these concerns. The motion will rise or fall

on its own merits whether the second defendant is a party or not.[9]

We reach the same result when considering the issue from the perspective of the statutory right to amend. Code of Civil Procedure section 472 grants the plaintiff an absolute right to amend to add a new defendant prior to a hearing on a demurrer. There is no reason the new defendant should be able to avoid being added to the complaint simply because an existing defendant has an anti-SLAPP motion pending. On appeal, Singer argues only that the amendment

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[9] After briefing had been completed in this appeal, Division One of the Second District Court of Appeal decided *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, petition for review filed October 2, 2017. In *Okorie*, plaintiffs argued the trial court incorrectly granted an anti-SLAPP motion with respect to several causes of action in their complaint. One cause of action was a federal civil rights claim, which plaintiffs conceded on appeal was fatally flawed, as it had been brought against an entity immune from suit under the 11th Amendment. On appeal, the plaintiffs argued that the court nonetheless erred in granting the anti-SLAPP motion with respect to this cause of action, as they could have named other (non-immune) defendants in an amended complaint following discovery. The appellate court disagreed, stating, "Whether Plaintiffs could have filed an amended complaint that could have successfully identified individual defendants against whom the federal civil rights claim could have been asserted is a question that we cannot consider. Under the anti-SLAPP analysis, we, like the trial court, must take the challenged pleading as we find it." (*Id.* at p. 598.) *Okorie* does not undermine our conclusion. The court there was not faced with an otherwise timely amendment and a new defendant attempting to avoid liability because an existing defendant had an anti-SLAPP motion pending. We agree with the *Okorie* court's analysis – consideration of Cosby's anti-SLAPP motion is properly based on the complaint to which it was addressed; the amendment as to Singer has no effect on that analysis.

"threatened to moot Cosby's anti-SLAPP motion challenging the initial complaint and to trigger the new round of anti-SLAPP litigation the statute is meant to prevent." Yet this pertains only to Dickinson's attempt to amend as to Cosby; it has nothing to do with Singer.

Finally, we are not persuaded by Singer's argument that he would have been prejudiced by the denial of his motion to strike. He argued that he would have suffered harm because, without the first amended complaint, the claim against him would have been time-barred. But having to face a timely lawsuit is not the type of prejudice from which the law protects a defendant, and it certainly has nothing to do with Cosby's anti-SLAPP motion. Singer also argued, "Forcing Singer to file multiple motions (i.e., the instant Motion, a subsequent anti-SLAPP motion, and a demurrer) to dispose of the action against him is inherently prejudicial as it unreasonably delays the resolution of the matter." But he was not forced to file the motion to strike the complaint and, as we conclude here, it should not have been filed or granted. An anti-SLAPP motion and demurrer are typical filings in any case implicating protected speech and are not prejudicial. The idea that these three motions "unreasonably delay[] the resolution of the matter" is also not prejudicial. The case against Singer did not commence until the filing of the first amended complaint, and, in the normal course, would have proceeded apace. There is no prejudice to Singer here.[10]

In fact, if any party was at risk of unfair prejudice, it is Dickinson. As we shall discuss, Cosby's anti-

[10] To the extent Singer is arguing that allowing the amendment against him would have prejudiced Cosby by delaying resolution of his anti-SLAPP motion we are unpersuaded. Even if true, that is not Singer's concern.

SLAPP motion was correctly denied with respect to the press release and should have been denied with respect to the demand letter. Nonetheless, Singer would have us affirm the dismissal of the complaint against him – thereby protecting him from any timely suit being pursued by Dickinson – simply due to the circumstance that Cosby, his eventual co-defendant, had filed an ultimately unmeritorious anti-SLAPP motion at the time Dickinson sought to include Singer as a defendant. We fail to see how justice is served by granting Singer a windfall immunity based on Cosby's pursuit of a meritless motion.

We therefore reverse the trial court's order striking Dickinson's first amended complaint as to Singer.

2. *The Anti-SLAPP Motion Should Have Been Granted in its Entirety*

A. Introduction and Standard of Review

We now turn to Cosby's anti-SLAPP motion, specifically, the second prong of the analysis and whether Dickinson has established a probability of prevailing on her defamation cause of action. We conclude that she has.

"Review 'of an order granting or denying a motion to strike under 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 150.)

B. The Litigation Privilege Does Not Defeat Cosby's Claims at the Anti-SLAPP Motion Stage

The first question we address is Cosby's affirmative defense that the demand letter is protected by the litigation privilege.[11]

"The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a 'publication or broadcast' made as part of a 'judicial proceeding' is privileged. This privilege is absolute in nature, applying 'to *all* publications, irrespective of their maliciousness.' [Citation.] '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 [has] some connection or logical relation to the action.' [Citation.]" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 (*Action Apartment*).) The privilege is given a broad interpretation. (*Ibid.*)

The privilege is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior to litigation. (*Action Apartment, supra,* 41 Cal.4th at p. 1241.) Not all pre-litigation conduct is subject to the privilege. The test is: "To be protected by the litigation privilege, a communication must be 'in furtherance of the objects of the litigation.' [Citation.] This is 'part of the requirement that the

[11] Cosby did not argue that the litigation privilege extends to the press release. He was correct not to do so. The litigation privilege does not extend to press releases. (*GetFugu, Inc. v. Patton Boggs LLP, supra,* 220 Cal.App.4th at pp. 153-154; *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1149.)

communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action.' [Citation.] A prelitigation communication is privileged only when it relates to litigation that is *contemplated in good faith and under serious consideration*. [Citations.]" (*Id*. at p. 1251, emphasis added.)

Under this standard, a demand letter written by an attorney can fall within the litigation privilege. (See, e.g., *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577 578.) However, a demand letter is privileged pre-litigation conduct only when it relates to litigation contemplated in "good faith and under serious consideration." (*Action Apartment, supra,* 41 Cal.4th at p. 1251.) The element that litigation must be under serious consideration was emphasized in *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 35, fn. 10: "The classic example of an instance in which the privilege would attach to prelitigation communications is the attorney demand letter threatening to file a lawsuit if a claim is not settled. [Citation.] Nevertheless, because the privilege does not attach prior to the actual filing of a lawsuit unless and until litigation is seriously proposed in good faith for the purpose of resolving the dispute, even a threat to commence litigation will be insufficient to trigger application of the privilege if it is actually made as a means of inducing settlement of a claim, and not in good faith contemplation of a lawsuit." (*Ibid.*) Stated slightly differently, "By the same token even a threat to file a lawsuit would be insufficient to activate the privilege if the threat is merely a negotiating tactic and not a serious proposal made in good faith contemplation of going to court." (*Id*. at p. 35.) The reason for the rule is that a successful invocation of the privilege results in the bar of a potentially meritorious claim. "'No public policy

supports extending a privilege to persons who attempt to profit from hollow threats of litigation.' [Citations.]" (*Action Apartment, supra,* at p. 1251.)

Whether litigation was contemplated in good faith and under serious consideration are questions of fact. (*Action Apartment, supra,* 41 Cal.4th at p. 1251.) The good faith inquiry is not a question of whether the statement was made with a good faith belief in its truth, but rather, whether the statement was made with a good faith intention to bring a lawsuit. (*Ibid.*) While not dispositive, whether a lawsuit was ultimately brought is relevant to the determination of whether one was contemplated in good faith at the time of the demand letter. (See, e.g., *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 909 910, 920 [defendant sent demand letters to thousands of people who had purchased devices that could pirate defendant's television programming, and ultimately sued many, but not all, of them; filing numerous lawsuits gave rise to an inference that the demand letters were sent in good faith contemplation of litigation]; *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 271 272 [the fact that the defendant did not bring suit did not undermine a finding of good faith when the recipients of the demand letters had largely complied with the demand].)

In this case, in his anti-SLAPP motion, Cosby argued that Dickinson could not establish a probability of prevailing on her causes of action arising from the demand letter, due to the affirmative defense of the litigation privilege. There is some dispute in the case law as to which party bears the burden of proof on an affirmative defense in the context of an anti-SLAPP motion. Some cases state that "although section 425.16 places on the plaintiff the burden of

substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. [Citation.]" (E.g., *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.) Others suggest that the litigation privilege presents "'a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing. [Citations.]' [Citation.]" (E.g., *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485.) Given the evidence in this case, we need not resolve the dispute here. What is important is that, regardless of the burden of proof, the court must determine whether the plaintiff can establish a prima facie case of prevailing, or whether the defendant has defeated the plaintiff's evidence as a matter of law. (*Blanchard v. DIRECTV, supra,* 123 Cal.App.4th at p. 921; see also *Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.)

We are concerned with a demand letter, sent by Cosby's attorney, Singer, to *Good Morning America* and other news outlets. According to Singer's declaration, the genesis of the demand letter was as follows. After *Entertainment Tonight* broke the story of Dickinson's rape allegations, several media outlets, including *Good Morning America*, contacted Cosby's publicist inquiring about Dickinson's allegations. Cosby's publicist forwarded the information to Singer, who drafted the demand letter and sent it to those outlets. The demand letter, which was clearly captioned as a confidential demand letter, stated that Dickinson's allegations were a recently fabricated defamatory lie, and threatened litigation if the outlets were to go ahead with their planned coverage of Dickinson's allegations. No demand letter was sent to *Entertainment Tonight*, the outlet which originally

reported Dickinson's allegations. Singer explained that he sent demand letters "only to media outlets that [he] was aware had expressed the intent to publish Ms. Dickinson's accusations, and requested a response before doing so, to place those media outlets on notice of the falsity of Ms. Dickinson's accusations, and to inform them that the publication of Ms. Dickinson's false and defamatory accusations would be actionable."

Although some, if not all, of the outlets to whom the demand letter was sent ran the story anyway, Cosby did not follow through with his litigation threat.[12] According to Bloom's undisputed declaration, Cosby "has not sued any of these media outlets. Nor has he ever sued any of the thousands of media outlets who have published stories about the over fifty women who have now accused him of attempted or actual sexual assault over the last decade."

Under the circumstances, the facts that: (1) the demand letter was sent *only* to media outlets which had not yet run the story but had indicated an intention to do so; and (2) Cosby never sued any media outlet which ran the story, give rise to an inference that the demand letter was not sent in connection with litigation contemplated in good faith and under serious consideration. Instead, these facts suggest that the demand letter was a bluff intended to frighten the media outlets into silence (at a time when they could still be silenced), but with no intention to go through with the threat of litigation if they were uncowed. Hence the letters were, in the words of our

[12] BuzzFeed.com not only ran the story, it posted Singer's demand letter in its entirety.

Supreme Court, "hollow threats of litigation." (*Action Apartments, supra,* 41 Cal.4th at p. 1251.)

As the evidence supports a prima facie inference that Cosby sent the demand letter without a good faith contemplation of litigation seriously considered, Dickinson made a showing of a probability of prevailing on the merits of the litigation privilege affirmative defense under the second prong of the anti-SLAPP statute. Accordingly, the trial court erred in granting the motion as to the demand letter.[13]

C. The Demand Letter and Press Release Contain Actionable Statements of Fact, Not Just Opinions

Dickinson's appeal and Cosby's cross-appeal raise the question of whether the demand letter and press release consist of actionable provable facts or only nonactionable opinion. For Dickinson to prevail on the second prong of the statute, she must demonstrate a probability of prevailing on the merits of her defamation claim. She cannot do so unless she establishes with respect to both the demand letter and the press release, that her claims are based on provable facts, not protected opinions. At issue is the nature of the alleged defamatory statements. We discuss the applicable law, then apply it to the demand letter and press release respectively.

1. Defamation Law – Fact and Opinion

"'Defamation is "a false and unprivileged publication that exposes the plaintiff 'to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned

[13] We do not suggest that as a matter of law Cosby cannot prevail on the litigation privilege defense, only that Dickinson has shown a probability of prevailing at this juncture.

or avoided, or which has a tendency to injure him in his occupation.' [Citation.]" [Citations.]' [Citations.] "'The *sine qua non* of recovery for defamation . . . is the existence of a falsehood." [Citation.]' [Citation.]" (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 678.)

Because defamation requires a falsehood, it is sometimes said that an opinion, which is neither true nor false, is not actionable. This is an oversimplification. Statements of opinion do not enjoy blanket protection. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 384.) The issue is whether the statement of opinion implies a statement of fact. "Statements of opinion that imply a false assertion of fact are actionable. [Citation.]" (*Id.* at p. 385.)

The distinction was illustrated by the United States Supreme Court in *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1. "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words "I think,"' [Citation.]" (*Id.* at pp. 18-19.)

"The 'crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]' [Citation.] 'Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]' [Citation.] The question is "'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact. . . .' [Citation.]' [Citation.]" (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 696.)

To make this determination, we apply a totality of the circumstances test. First, we examine the language of the statement itself, to determine whether the words are understood in a defamatory sense. Second, we examine the context in which the statement was made. (*Franklin v. Dynamic Details, Inc., supra,* 116 Cal.App.4th at p. 385.)

In considering the *language* of the statement itself, we look at whether the purported opinion discloses all of the facts on which it is based and does not imply that there are other, unstated facts which support the opinion. If that is the case, the statement is defamatory only if the disclosed facts themselves are false and defamatory. (*Franklin v. Dynamic Details, Inc., supra,* 116 Cal.App.4th at p. 387.) We also consider whether the statement was cautiously phrased in terms of the author's impression. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261.)

In considering the *context* of the statement, we look at facts including the audience to whom the statement was directed (*Baker v. Los Angeles Herald Examiner, supra,* 42 Cal.3d at p. 261 [consider how the average

reader of the statement would reasonably have understood it]), the forum in which the statement was made (e.g. *Summit Bank v. Rogers, supra,* 206 Cal.App.4th at p. 699 [anonymous misspelled rants on an internet board devoted to rants and raves are generally not expected to be taken seriously]), and the author of the statement (e.g. *Franklin v. Dynamic Details, Inc., supra,* 116 Cal.App.4th at p. 389 [finding it significant that the author did not purport to be a lawyer stating opinions as legal truths in legal verbiage]).

Another factor to consider in the context portion of the totality of the circumstances test is whether the statement is so-called "predictable opinion."[14] "Part of the totality of the circumstances used in evaluating the language in question is whether the statements were made by participants in an adversarial setting. '[W]here potentially defamatory statements are published in a . . . setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.' [Citation.]" (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401-1402; see

[14] In his brief on appeal, Cosby suggests "predictable opinion" is a defense on its own, based on the common law privilege of self-defense. We disagree; case authority is clear that this is simply part of the totality of the circumstances test. The only case on which Cosby relies for that privilege, *Foretich v. Capital Cities/ABC, Inc.* (4th Cir. 1994) 37 F.3d 1541, does not hold that the common law self-defense privilege is still viable, but simply uses it as a tool in the analysis of whether private individuals making public statements only to defend themselves have nonetheless become limited purpose public figures by having made the statements. (*Id.* at pp. 1559-1560.)

also *Information Control v. Genesis One Computer Corp.* (1980) 611 F.2d 781, 784.)

We apply these principles and consider the demand letter and press release separately.

2. The Demand Letter Contains Statements of Fact

Cosby takes the position that the demand letter is not actionable as it is simply Singer's opinion, based on fully disclosed facts. We disagree. As we shall explain, nearly every factor of the totality of the circumstances test points strongly toward the conclusion that a reasonable fact finder could conclude the demand letter states or implies a provably false assertion of fact – specifically, that Cosby did not rape Dickinson, and she is lying when she says that he did.

We first consider the language of the demand letter. We observe that the letter is not phrased cautiously in terms of opinion. Although not dispositive, the letter does not say, "I believe Dickinson's allegations are false," or "Based on the following facts, I am of the opinion that Dickinson's rape allegation is false." Instead, it states, repeatedly and unconditionally, that Dickinson's rape allegations are "false and outlandish claims," an "outrageous and defamatory lie," a "defamatory fabrication," and "false"; and that "the alleged rape never happened." *Dreamstone Entertainment Ltd. v. Maysalward Inc.* (C.D. Cal. Aug. 18, 2014, No. 2:14-CV-02063-CAS) 2014 WL 4181026, on which Cosby relied at oral argument, is distinguishable. In that case, an attorney's press release discussing a pending lawsuit was held to be nonactionable opinion when part of the statement was cautiously phrased in terms of what a filed complaint alleged, rather than

the language of absolute facts. (*Id.* at p. *7.) Here we have no such cautionary language.[15]

Even if we were to assume the absolute factual statements in the demand letter were merely Singer's opinion, the next step in our consideration of the language of the letter is to determine whether the demand letter sets forth the factual basis for such an opinion. To the extent the demand letter sets forth its underlying factual bases, it relies on: (1) the fact that Dickinson's biography and related *New York Observer* interview told a different story; and (2) the fact that Dickinson's purported assertion that Cosby killed the rape story in Dickinson's book was a lie. The demand letter goes on to add (3) that HarperCollins can confirm that both the rape story and the assertions that Cosby pressured HarperCollins to not print it are lies.[16]

There are three reasons why the disclosure of these facts on which Singer's purported opinion is based is insufficient to render the demand letter an opinion based on fully disclosed, non-actionable facts. First, it does not disclose all of the facts on which the opinion is based. Singer's declaration admits that he reached his opinion based on two additional facts – his prior

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[15] The only conditional language appears at the end of the letter, where Singer suggests "it appears that [Dickinson is] seeking publicity to bolster her fading career."

[16] We repeat the language of the demand letter relating to HarperCollins's presumed ability to confirm the rape allegations are false: "If you proceed with the planned segment with Janice Dickinson and if you disseminate her Story when you can check the facts with independent sources at HarperCollins who will provide you with facts demonstrating that the Story is false and fabricated, you will be acting recklessly and with Constitutional malice."

experience with Dickinson and his internet research into her credibility – but neither of these facts is contained in the letter, making it impossible for the readers to judge for themselves whether the facts support the opinion. Second, Dickinson's evidence is that one of the purported facts – that HarperCollins can prove her rape allegation is false – is itself false. Dickinson's evidence is that she wanted to include the rape in her book, and that HarperCollins knew it and would say so. An opinion based on a provably false fact is itself actionable. Third, and most important, we believe that the language of the demand letter implies an additional fact – indeed, it explicitly states it: "the alleged rape never happened."

For these reasons we find distinguishable a case on which Cosby heavily relied at oral argument. In *Nygard, Inc. v. UusiKerttula* (2008) 159 Cal.App.4th 1027, a disgruntled former employee gave an interview stating, in "colorful" language that the defendant's place of business was an unpleasant place to work. Among other things, defendant stated that his former employer did not want to let his employees see a doctor when injured. This statement could have been actionable fact, but it was immediately followed by a specific retelling of an incident in which the former employee had been injured and his employer had not wanted him to take the time to seek medical assistance – the complete and undisputed factual basis for what was, in context, clearly a statement of opinion. (*Id.* at p. 1053.) Such a complete factual basis is missing in Singer's demand letter, and where a factual basis is present, it is disputed.

While our analysis of the language of the demand letter alone is sufficient to establish a reasonable fact finder could conclude the letter conveys a provably

false assertion of fact, an analysis of the context of the letter further supports that conclusion.

The statement was a demand letter, sent only to media outlets who were preparing to run Dickinson's story and had asked the Cosby camp for its response. The letter was written by Cosby's attorney, and framed in legal terms, threatening litigation for future defamatory statements which, Singer argued, would be made "recklessly and with Constitutional malice." This was not an anonymous posting on an internet message board where unsupported rants and raves are expected; this was a lawyer's letter threatening litigation and setting out the factual and legal basis for it.

Most importantly, the letter was sent by Cosby's litigation counsel, on behalf of Cosby. We again observe that, at least for purposes of the present appeal, Cosby has waived any argument that Singer was not acting as his agent when he made the statements at issue in this case. When someone is publicly accused of rape, is asked for a response, and sends back a letter from counsel saying, "the alleged rape never happened," it is reasonable for the recipient of the letter to infer that the accused is, in fact, denying the rape. The "predictable opinion" doctrine does not change this result. The statement is not full of epithets, fiery rhetoric or hyperbole; it is a clear, simple factual denial of the rape as expressed in a lawyer's letter.

The fact that Cosby's attorney authored the statement is an important factor supporting our conclusion. The rape allegations against Cosby were a subject of national attention and much public speculation. It would perhaps be unactionable opinion if an unrelated individual, with no actual knowledge of the rape,

chatting in a public forum, were to say, "Dickinson lied about the rape; after all, she told a different story in her book." That may be unactionable opinion because it is based on disclosed facts and the speaker would not be presumed to be basing the opinion on anything else. But here, the demand letter was authored by Cosby's attorney, who was speaking for Cosby, who, in turn, would certainly know whether or not he sexually assaulted Dickinson. Cosby's agent's absolute denial is a factual one. At the very least, the demand letter is susceptible of this interpretation, which is sufficient to establish Dickinson's burden at this stage of the proceedings.[17]

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[17] The parties rely, to varying degrees, on federal court decisions arising out of other claims against Cosby for defamation. The claims involve other statements that Singer made on Cosby's behalf, denying other women's claims of sexual assault. As the opinions relate to different statements, and, in nearly all of them, are not applying California law, we find them to be of limited persuasive value. (*McKee v. Cosby* (1st Cir. 2017) 874 F.3d 54 [applying Michigan law to a 6-page letter with footnotes to sources supporting each statement attacking the accuser's credibility, ruling in favor of Cosby]; *Hill v. Cosby* (3d Cir. 2016) 665 Fed.Appx. 169 [applying Pennsylvania law to a brief statement generally challenging the credibility of all of Cosby's accusers, ruling in favor of Cosby]; *Green v. Cosby* (D. Mass. 2015) 138 F.Supp.3d 114 [applying California law to one plaintiff and Florida law to two others; ruling against Cosby on his motion to dismiss].)

To the extent Cosby relies on *McKee* and *Hill* for their conclusion that the statements at issue in those cases consisted of Singer's non-actionable opinion, we are not convinced those cases are germane here. The statements were different and did not contain the repeated language in Singer's statements absolutely and unconditionally claiming Dickinson's rape allegations were false. The federal court opinions did not give sufficient weight to the fact that Singer was making the statements as Cosby's agent. When a man is publicly accused of raping a woman

3. The Press Release Contains Statements of Fact

We now turn to the press release and consider both its language and its context on the question of provable facts versus nonactionable opinion.

The language of the press release is, again, unconditional. The first line of the press release is "Janice Dickinson's story accusing Bill Cosby of rape is a lie." The statement goes on to reveal three bases for this conclusion – the same three as in the demand letter – that Dickinson told a different story in her book and the *New York Observer* interview, that nobody in the Cosby camp tried to kill the rape story, and that "[Dickinson's] publisher HarperCollins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book."

As with the demand letter, Singer fails to disclose the other facts on which he purportedly relied. As with the demand letter, Singer falsely states that HarperCollins can confirm "there was no [rape] story." As with the demand letter, Singer expressly states that the rape allegations are "a lie." The language of

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and responds with a public statement claiming the accusation itself is false, it is reasonable that a member of the public hearing the statement would *not* think the denial means, "I'm neither affirming nor denying that I raped her, but look at all this evidence challenging her credibility." That the speaker making the denial is himself the accused rapist strongly implies that the denial includes a denial of the rape itself. Here, the speaker was the accused's attorney, speaking with presumed agency. We see no reason the result should be different.

the press release is that of actionable fact, not mere opinion based on fully disclosed facts.

The context is similar to that of the demand letter, and again supports the same conclusion. The press release is captioned:

"STATEMENT OF MARTIN D. SINGER
ATTORNEY FOR BILL COSBY"

It was widely disseminated to the public, and it is reasonable the average person reading it would assume that Singer, as Cosby's attorney, was speaking for Cosby. The statement did not simply state that Dickinson's story was contradicted by her autobiography; it stated that her story "is a lie." The average person would infer that the statement was Cosby's denial of raping Dickinson. Again, the predictable opinion doctrine does not change this result; there is nothing about the fact that Cosby is responding to accusations that would make the reader assume the press release was merely opinion.

D. The Gist of the Demand Letter and Press Release was that Dickinson Lied About Cosby Raping Her

Cosby next argues that Dickinson cannot establish a probability of prevailing on her defamation claim for an additional reason. He argues that the gist or sting of the statements was not that Dickinson lied about the rape allegations, but simply that she was a liar. Armed with this reinterpretation of his defamatory statements, he argues that Dickinson will be unable to recover for defamation because (1) she actually is a liar, having lied about the rape in her autobiography; and (2) she had cultivated the professional reputation of a liar, so she was not harmed by this sting.

"The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations.] It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citation.] In this case, of course, the burden is upon petitioner to prove falsity. [Citation.] The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 516-517; see also *Summit Bank v. Rogers, supra,* 206 Cal.App.4th at p. 697.)

Cosby would have us conclude, as a matter of law, that the gist or sting of the demand letter and press release was that Dickinson is a liar, not that Dickinson lied about the rape. This is an inference we cannot make. That Cosby, through Singer, repeatedly characterized Dickinson's rape allegations as fabrication was not a "minor inaccuracy" in the statements; it was the heart of the statements. The statements were made in response to Dickinson's allegations that Cosby had raped her. The statements never said, as a general proposition, that Dickinson was unreliable and untruthful; instead, the statements repeatedly and

unconditionally asserted that Dickinson lied about Cosby having raped her.

The standard we apply is whether the allegedly defamatory statement would have a different effect on the mind of the reader from what the *pleaded* truth would have produced. The pleaded truth was that Cosby raped Dickinson; she wanted to tell the truth in her book; but her publisher forced her to replace it with a sanitized version of their encounter. The gist of Cosby's statements, to the contrary, was that he had not raped Dickinson and she told the truth in her book. The pleaded truth and the gist of the statements are incompatible.

That Cosby cannot recast the statements to a simple charge that Dickinson was a liar in general is apparent when we consider the ultimate result Cosby would reach. Cosby argues that calling Dickinson a liar is not actionable because it is substantially true – either Dickinson lied in her autobiography or lied in the *Entertainment Tonight* interview, so she is admittedly a liar. Yet there is no interpretation of Cosby's statements which allows for the possibility that Dickinson lied in her autobiography and was telling the truth now.

To the extent Cosby argues that Dickinson can show no damages because she had already cultivated the professional reputation of a liar, the argument is refuted for now by Dickinson's evidence that she did, in fact, lose jobs as the result of being branded a liar by Cosby on the subject of rape.

E. False Light and Intentional Infliction of Emotional Distress Survive the Anti-SLAPP Motion

As his final argument, Cosby contends that, even if Dickinson's defamation cause of action survives his anti-SLAPP motion, her remaining two causes of action should be dismissed as superfluous.

Depending on the specific allegations in a case, causes of action for false light and intentional infliction of emotional distress may be redundant to a defamation cause of action and subject to dismissal on demurrer for that reason. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, fn. 16; *Couch v. San Juan Unified School District* (1995) 33 Cal.App.4th 1491, 1504.) While this may be legally correct, an anti-SLAPP motion is not the appropriate time to pursue the argument. "Appellants first argue that this false light claim is 'surplusage' because the complaint also contains a specific cause of action for libel. However, an anti-SLAPP motion is not the correct vehicle for asserting this position. Rather, this argument is properly the subject of a demurrer. [Citation.]" (*Hailstone v. Martinez* (2009) 169 Cal.App.4th 728, 742.) We therefore do not order these causes of action dismissed at this time.

DISPOSITION

The order granting Singer's motion to dismiss Dickinson's first amended complaint against him is reversed. The order on Cosby's anti-SLAPP motion is affirmed in part and reversed in part. To the extent the anti-SLAPP motion was granted as to the causes of action based on the demand letter, it is reversed; to

the extent the anti-SLAPP motion was denied as to the causes of action based on the press release, it is affirmed.

Dickinson is to recover her costs on appeal from Singer and Cosby.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

RULING

DATE: 03/29/16

HONORABLE DEBRE K. WEINTRAUB JUDGE

HONORABLE JUDGE PRO TEM
#2

G. HIRONAKA C.A. DEPUTY SHERIFF

DEPT. 47

J. JIMENEZ DEPUTY CLERK

ELECTRONIC RECORDING MONITOR

FELIPE CARRILLO CSR 9555

REPORTER PRO TEMPORE Reporter

8:30 am BC580909

JANICE DICKINSON

VS

WILLIAM H COSBY JR

170.6 CCP JUDGE KENDIG(DEFT)

170.6 Judge Hess--Pltf

Plaintiff	THE BLOOM FIRM	
Counsel	BY: ALAN GOLDSTEIN	(X)
	LISA BLOOM	(X)
Defendant	QUIN EMANUEL	(X)
Counsel	BY: CHRIS TAYBACK	(X)
	CHRIS BARKER	(X)

NATURE OF PROCEEDINGS:

DEFENDANT WILLIAM H. COSBY, JR.'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16 MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF MARTIN D. SINGER, JOHN P. SCHMITT, AND LYNDA B. GOLDMAN; (C/F 2/29/16)

The matter is called for hearing.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

The Court issues its oral tentative as fully reflected in the notes of the court reporter pro tempore this date, incorporated herein by reference.

The Court, having read and considered all papers filed and heard argument, rules as follows:

Defendant William H. Cosby, Jr.'s anti-SLAPP special motion to strike is GRANTED as to the first, second, and third causes of action to the extent they are based on the November 18, 2014 letter.

The anti-SLAPP special motion to strike is DENIED as to the first, second, and third causes of action to the extent they are based on the November 19, 2014 Press Statement.

Defendant's request for attorney's fees is DENIED. Plaintiff's request for attorney's fees is DENIED.

A hearing on Defendant's demurrer to the remaining allegations in the Complaint, which was filed on June 22, 2015 should be reset on the Court Reservation System.

Plaintiff's opposition and Defendant's reply to be filed and served pursuant to code.

The Court sets a Status Conference for May 17, 2016 at 8:30 a.m. in Department 47.

The Court's ruling is more fully reflected in the notes of the court reporter pro tempore this date, incorporated herein by reference.

Plaintiff to give notice.

MINUTES ENTERED
03/29/16
COUNTY CLERK

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

Superior Court Case No. BC580909

JANICE DICKINSON,

Plaintiff,

vs.

WILLIAM H. COSBY, JR., ET AL.,

Defendants.

Department 47

Hon. Debre K. Weintraub, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TUESDAY, MARCH 29, 2016

APPEARANCES:

FOR THE PLAINTIFF:

The Bloom Firm
By: Lisa Bloom, Esq.
By: Alan Goldstein, Esq.
20700 Ventura Boulevard
Suite 301
Woodland Hills, California 91364

FOR THE DEFENDANTS:

Quinn Emanuel
By: Christopher Tayback, Esq.
By: Chris Barker, Esq.
865 South Figueroa Street
10th Floor
Los Angeles, California 90017

Felipe F. Carrillo, Csr No. 9555
Official Court Reporter Pro Tempore
Job No. 2265253

Index

Tuesday, March 29, 2016

Alphabetical/Chronological
List of Witnesses

(None)

Exhibits (None)

[1] Case Number:	BC580909
Case Name:	Dickinson vs. Cosby
Los Angeles, Ca	Tuesday, March 29, 2016
Department 47	Hon. Debre K. Weintraub, Judge
Reporter:	Felipe Carrillo, CSR No. 9555
Time:	A.M. Session
Appearances:	(As Heretofore Noted.)

* * *

THE COURT: We have a court reporter.

Would the court reporter state his name.

THE REPORTER: Your Honor, my name is Felipe Carrillo. CSR number 9555.

THE COURT: Did you sign the court reporter agreement?

THE REPORTER: Yes, Your Honor.

THE COURT: Is it your intent to fully comply with the terms and conditions?

THE REPORTER: Yes, Your Honor.

THE COURT: Very good. Thank you.

The court is appointing court reporter Pro Tem. I'm signing and dating it at this time. Thank you.

THE REPORTER: Thank you, Your Honor.

THE COURT: Counsel, please state your name for the record.

MS. BLOOM: Good morning, Your Honor. Lisa Bloom of the Bloom Firm for plaintiff Janice [2] Dickinson.

MR. GOLDSTEIN: Good morning, Your Honor. Alan Goldstein for the Bloom Firm.

MR. TAYBACK: Good morning, Your Honor. Christopher Tayback on behalf of the defendant and movement, Mr. Cosby.

Mr. Barker: Good morning, Your Honor. Chris Barker on behalf of the defendant.

THE COURT: Good morning to you all.

Everyone have a seat. Thank you.

We are here for Anti-SLAPP motion to strike. I'm going to give a tentative. Once I finish the tentative, I'll hear from each party if you would like. Plaintiff is giving notice today. You are giving notice today.

Request for judicial notice. Plaintiff's request 1 to 5 is granted; however, the court does not take judicial notice of the truth of the statements or the deposition testimony contained in those court records.

Defendant's evidentiary objections. Declaration of Judith Regan, overruled.

Sufficient foundation, personal knowledge, relevant and properly considered for the non-hearsay purpose to show the state of mind of Ms. Dickinson in 2002 when the autobiography was being written that Ms. Dickinson believed she had been raped by Bill Cosby, not for the truth of the [3] matter asserted that Mr. Cosby actually did rape plaintiff. Also, properly considered as circumstantial evidence that she expressed this belief to the ghostwriter, Mr. Fenjves. F-E-N-J-V-E-S. 2 through 8 overruled.

The declaration of Janice Dickinson, 1 to 9 and 11 to 13, overruled; 10 sustained.

The declaration of Pablo Fenjves, overruled. Relevant personal knowledge as to what Ms. Dickinson told him properly considered for the non-hearsay purpose. 2 through 8 overruled; 9 sustained.

The declaration of Drew Pinksy, 1, 3, 3 to 6, sustained; 2 to 7 overruled.

The declaration of Jonathan Silver, number 1 to 5, overruled; 6 to 12 sustained.

The declaration of Edward Tricomi, 1 overruled; 2 to 6 sustained.

The declaration of Brad Taylor, 1 to 8, 11 to 16 and 18 sustained; overruled 9, 10 and 17.

The declaration of Sandra Linter, 1 overruled; 2 to 6 sustained.

The declaration of Lisa Bloom, overruled 1, 3, 4, 8, 9, 11, 25 and 26; sustained 2, 5 to 7, 10, 12 to 24 and 27 to 31.

Plaintiff's evidentiary objections, the declaration of Martin Singer, overruled 1 to 4 and 8; sustained 5, 6 and 7 in part.

[4] Declaration of John Schmidt, 1 overruled.

Declaration of Justin Griffin, 1 to 3 overruled.

Defendant Cosby brings the Anti-SLAPP special motion to strike pursuant to CCP 425.16 directed to the original complaint filed by the plaintiff on May 20th, 2015. In ruling on special motion to strike, the trial court uses a summary judgment like procedure at an early stage of the litigation. This is a two-step process. First, the defendant must show that the act or acts of which the plaintiff complains were taken in furtherance of defendant's right of petition or free speech under the United States and California constitution in connection with a public issue.

Second, if the defendant carries that burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. The defendant has the burden on the first issue, the plaintiff on the second.

First step, whether the causes of action are subject to being stricken pursuant to CCP 425.16. Here the complaint alleges a cause of action for defamation, defamation per se, false light, and intentional infliction of emotional distress.

The alleged tortious statements, the November 18th, 2014 letter. On November 18, 2014, [5] the same day as plaintiff's first television interview detailing defendant Cosby's rape of her, defendant sent a letter about plaintiff to the news media including Entertainment Tonight, CBS and BuzzFeed.com. Hereinafter I am referring to that as the November 18th, 2014, letter. See complaint paragraph 32.

The November 18th, 2014, letter was immediately broadcast and published online and picked up and republished. See complaint paragraph 32.

At paragraph 33 of the complaint, plaintiff alleges that defendant Cosby through his authorized attorney and agent, Martin Singer, made the following purported statements of fact regarding plaintiff that the November 18th, 2014, letter sent, included, "we are writing regarding your planned story regarding Janice Dickinson's new false and outlandish claims about Mr. Cosby in her recent Entertainment Tonight interview. The story is fabricated and is outrageous, defamatory lie. The new story claiming that she had been sexually assaulted is a defamatory fabrication. That never happened. Just like the alleged rape never happened. Ms. Dickinson completely fabricated the story of the alleged rape." That was all in the letter.

Paragraph 34 of the complaint alleges that [6] each of the purported statements of fact set forth are false.

Next, the November 19th, 2014, press statement. At paragraph 35 of the complaint, plaintiff alleges that defendant Cosby through authorized attorney and agent Martin Singer published a second statement to the press about plaintiff. I'm referring to this as the November 19th, 2014, press statement which was republished by thousands of media entities worldwide.

Defendant Cosby allegedly made the following purported statement of fact regarding plaintiff in that press statement, and I'm just quoting from this. "Janice Dickinson's story accusing Bill Cosby of rape is a lie. Documented proof in Ms. Dickinson's own words show that a new story about something she now claims happened back in 1982 is a fabricated lie."

Paragraph 37 of the complaint alleges that each of the purported statements of fact set forth above is false.

The alleged ratification of the letter and press statement by defendant Cosby. Paragraphs 43 and 44 allege that plaintiff through counsel demanded a public retraction from defendant Cosby, presenting evidence that her claims were not new, that she wanted her rape disclosure included in her 2002 book, and other corroborating evidence proving [7] that the factual statements at issue were false.

Paragraphs 45 and 46 allege that the defendant ratified these statements by failing and refusing to retract them after being presented with evidence of their falsity.

The November 18, 2014, letter and the November 19th, 2014, press statement form the basis of all three causes of action. The first, second and third causes of action of are based on the letter and press statement. See complaint, paragraphs 48 through 52, 56 through 62, 68 and 69.

The letter, November 18th, and the press statement, November 19th, are acts in furtherance of defendant's right of free speech under the United States and California constitution in connection with a public issue. We have to determine that. CCP 425.16(b)(1) provides the relevant law, as does CCP -16(e).

In the instant action it cannot be disputed that both plaintiff and defendant are celebrities. The subject of the November 18th letter and the November 19th press statement come within the first general category of acts falling within CCP 425.16(e)(4). The subject of the statement or activity precipitating the claims was a person or entity in the public eye.

Moreover, the November 18th letter and the November 19th press statement involve a topic of [8] widespread public interest, namely, the public interest to know whether the allegations of drugging and raping made against a well-known celebrity such as defendant Cosby are true, especially in the climate when numerous women were coming forward with similar allegations.

Thus, the November 18th letter and the November 19th press statement come within the general category of acts falling within CCP 425.16(e)(4). The statements or activities precipitating claim involve the topic of widespread public interest.

Because all three of plaintiff's causes of action arise from the November 18th and the November 19th letter and the press statement, they all arise out of an act of defendant Cosby's furtherance of his right of free speech. Accordingly, all three plaintiff's causes of action are subject to being stricken pursuant to 425.16(b)(1). The burden now shifts to plaintiff to demonstrate a probability of prevailing on these claims.

Whether plaintiff has established there's a probability she will prevail on the claim, we must examine that. CCP 425.16(b)(1). As I noted several times before, plaintiff has the burden on this second prong to establish that there's a probability plaintiff will prevail on the claim.

[9] First cause of action, defamation and defamation per se. The November 18th, 2014, letter. The evidence before this court is that the November 18th, 2014, letter was not a press statement, but a letter from attorney Singer addressed to Tom Cibrowksi, Senior Executive Producer of Good Morning America, and a letter by Mr. Singer to Kate Arthur of BuzzFeed. See the supplemental declaration of Lisa Bloom in the opposition to defendant's special motion.

In that the letter, Singer, attorney Singer, identifies himself as litigation counsel to Bill Cosby and addresses the planned Good Morning America segment interviewing plaintiff Dickinson about her claim she made about Cosby in an Entertainment Tonight interview, asserting that Cosby raped Dickinson in 1982. Singer asserts that plaintiff Dickinson's story is fabricated and is an outrageous lie.

And I'm referring to people just by their last names.

Singer cites prior statements made by Dickinson that Cosby simply, quote, "blew off," unquote, Dickinson after dinner because she did not sleep with him. Singer asserts that Dickinson's new story claiming she'd been sexually assaulted is a defamatory fabrication, and she's attempting to justify this new false story with another [10] fabrication claiming that Mr. Cosby and his lawyers had supposedly pressured her publisher to remove the sexual assault story from the 2002 book.

Singer states, "that never happened, just like the alleged rape never happened," and I'm quoting from this portion therein.

Singer advises to check with the publisher, HarperCollins, to confirm that neither Cosby nor his

representatives ever communicated with HarperCollins about any alleged rape or sexual assault story prior to the book.

Notably Singer states, quote, "because you can confirm with independent sources the falsity of the claim that my client's lawyers allegedly pressured the publisher to kill the story. It would be extremely reckless to align anything Ms. Dickinson has to say about Ms. Cosby since the story about the publisher is patently false."

Singer also states, "If you proceed with the planned segment with Janice Dickinson, and if you disseminate her story, when you can check the facts with independent sources of HarperCollins, who will provide you with facts demonstrating the story is false and fabricated, you will be acting recklessly and with constitutional malice."

Singer further opines that "it would be extremely reckless to disseminate this defamatory story," he warns. And also states, "we caution you [11] in the strongest possible terms to refrain from disseminates this outrageous false story." And continues on, "you proceed at your peril."

The foregoing statement appears to threaten litigation, at least implicitly, if it is proceeded to air, the Dickinson segment. This would appear to bring the November 18th, 2014, letter which plaintiff characterizes as a press statement, which the court has stated it's a letter within the litigation privilege as a pre-litigation communication made in connection with the proposed litigation that is contemplated in good faith and under serious consideration.

See for guidance the Aronson versus Kinsella, Kinsella, a 1997 case, 58 Cal. App. 4th 254, and the Blanchard case, the 2004 case, 123 Cal. App. 4th 903.

The litigation privilege has been applied to a demand letter even if a complaint is never filed. See the Aronson case with respect to that.

In subsequent briefing, defendant cites the Blanchard case, the 2004 case, as recognizing that the litigation privilege applies where a demand letter is sent to prevent unlawful acts before they are committed. The court finds this case to be persuasive in favor of applying the litigation privilege to the November 18th, 2014, letter.

In Blanchard the court recognized that some [12] Recipients of the cease and desist demand letter sent by DIRECTV to thousands of people who purchased certain devices that could pirate DIRECTV television programming might not have purchased the devices or engaged – not engaged in illegal activity, yet the court held the litigation privilege would apply.

The court notes that the application of the litigation privilege to the November 18th, 2014, letter is consistent with the broad construction of the litigation privilege. The litigation privilege is broadly applied, and doubts are resolved in favor of the privilege. See the Wang versus Heck case, 2012, 203 Cal. App. 4th 677.

Plaintiff argues in her supplemental opposition that was filed on March 16th that the litigation could not have been seriously contemplated because defendant had no viable cause of action against the media based on the neutral reportage privilege, recognized by the California Supreme Court, and cites the Khawar, K-

H-A-W-A-R, 1998, 19 Cal. 4th 254. The court does not find this argument to be persuasive.

While the supreme court in Khawar discussed the neutral reportage privilege, the court's holding the case was only that the neutral reportage privilege is not recognized in California for republication of a liable concerning a private [13] figure, and the court expressly did not decide whether California recognizes a neutral reportage privilege for republication of a liable concerning a public figure.

There do not appear to be any published state law cases applying the neutral reportage privilege for republication of a liable concerning a public figure. Thus, plaintiff's argument that defendant's implicit threat of defamation lawsuit and the November 18th, 2014, letter was not viable due to the neutral reportage privilege is not supported by case law actually applying that privilege to circumstances similar to those presented in this case.

In light of the foregoing, the court finds that due to the litigation privilege, plaintiff cannot demonstrate a probability of prevailing on any of the three causes of action based on the November 18th, 2014, letter. Where the litigation privilege applies, plaintiff cannot satisfy the second prong of the Anti-SLAPP analysis as a matter of law.

Plaintiff's argument that her entire claim survives if she can show the probability of prevailing on any part of her claim is not persuasive. That rule of law applies to mixed causes of action, partial based on activity protected by the SLAPP statute and partial based on [14] some activity not protected by the SLAPP statute, unless the protected activity is merely incidental to the unprotected activity.

Here, as discussed above, both the November 18th, 2014, letter and the November 19th, 2014, press statement are protected activities under the Anti-SLAPP statute. As such, there's no unprotected activity relative to which the protected activity can be considered merely incidental.

The thrust (phonetic) of plaintiff's lawsuit is protected activity under the Anti-SLAPP. As such, the court finds the plaintiff's first cause of action is properly stricken to the extent that it's based on the November 18th, 2014, letter.

We must turn our attention now to the November 19th, 2014, press statement. The November 19th, 2014, press statement upon which plaintiff also basis her claim and attached as exhibit 17 to the supplemental declaration of Lisa Bloom in opposition to defendant's special motion to strike this November 19th, 2014, press statement does not appear to come within the litigation privilege, and defendant does not contend that it does. As such, the court proceeds to examine whether plaintiff can demonstrate a probability of prevailing based on the elements of this cause of action.

Publication. That this statement was [15] issued as a press statement for purposes of this special motion to strike, the element of publication is satisfied.

Calling someone a liar can convey a factual imputation of specific dishonest conduct capable of being proved false and may be actionable depending on the tenure and the context of the statement. See for guidance the Carver versus Bonds case, the 2005, 135 Cal. App. 4th 328.

A viable defamation claim requires the existence of a provable falsehood. Here, the November 19th, 2014,

press statement clearly accuses plaintiff of lying about the rape. And I quote, "Janice Dickinson's story accusing Bill Cosby of rape is a lie. Her new story about something she now claims happened back in 1982, i.e., the rape, is a fabricated lie."

The underlying premise of the statement is that plaintiff is lying about the rape, and that it's fabricated lie, is that the rape did not happen. A reasonable factfinder could conclude that the press statement declares or implies provable false assertions of fact, that is, that the rape never happened, a factual assertion, and Dickinson is lying, another factual assertion.

In other words, either the rape did occur or it did not occur. And in this regard, Dickinson is either telling the truth or not telling the [16] Truth. The press statement presents the factual assertion that the rape did not occur and that Dickinson is lying. Plaintiff's factual position, on the other hand, is that the rape did occur and, thus, she is not lying, contrary to what the press statement says about Dickinson.

Plaintiff has presented evidence prior to her recent statements plaintiff told other people about what had happened and wanted to publish it in her autobiography when her publisher would not permit it. See the declaration of Judith Regan.

Declaration of Janice Dickinson; the declaration of Pablo Fenjves; the declaration of Edward Tricomi; the declaration of Sandy Linter. A jury may find this to be circumstantial evidence that the sexual assault did, in fact, occur, if Dickinson talked about it to others before she wrote her book presenting a different account of the incident with Cosby and long before the recent number of accusers began to come forward.

Defendant's focus on the contradiction between plaintiff's statements in her book that Cosby – plaintiff, quote, "the dirtiest meanest look in the world when she rebuffed defendant's sexual advances," and plaintiff's recent claim that Cosby actually raped her does not mean the plaintiff is lying now. If the rape actually did occur, plaintiff was suppressing the truth in her [17] book for reasons she explains had to do with her publisher being afraid of a lawsuit. See the declaration of Judith Regan, the declaration of Janice Dickinson, the declaration of Pablo Fenjves.

In this regard as well, the defendant's focus on Cosby and his attorneys never communicating with the publisher about the rape story is rebutted by the evidence that the publisher's legal department was afraid of a possible lawsuit by Cosby out of its own caution, not because Cosby directly threatened a lawsuit. See the Regan declaration as well as the Pablo Fenjves declaration.

The court considers the pleadings and evidence submitted by both sides, but does not weigh the credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by plaintiff as a matter of law.

The trial court merely determines whether a prima facie showing has been made that would warrant the claim going forward. I'm citing from the HMS Capital Inc. versus Lawyers case, the 2004 case, 118 Cal. App. 4th 204.

As such, the court finds that plaintiff has demonstrated a provable false assertion of fact in [18] the November 19th, 2014, press statement. For purposes

of this special motion to strike, this element of defamation has been satisfied.

Defamatory, we need to look at that. Here the court finds that the statement that, quote, "Janice Dickinson's story accusing Bill Cosby of rape is a lie and her new story about something she now claims happened back in 1982, i.e., the rape is a fabricated lie," are reasonably susceptible of a defamatory interpretation; that is, the plaintiff lied about a horrific incident to intentionally harm defendant Cosby's reputation, intentionally engaged in the defamation of Cosby.

As such, it's up to the jury to determine whether defamatory meaning was, in fact, conveyed to the listener or the reader. This element is satisfied.

On privilege. As noted, this November 19th, 2014, press statement does not appear to come within the litigation privilege. And the defendant does not contend that it does. Defendant argues, though, that this statement is privileged as a predictable opinion, and it's an opinion based on disclosed facts.

The court agrees with plaintiff that the predictable opinion doctrine applies where statements are made regarding the merits of litigation by one party to the lawsuit. The [19] November 19th, 2014, statement was not made in connection with any litigation between defendant Cosby and plaintiff Dickinson. The court finds that given the facts and circumstances in this case, plaintiff's position is persuasive. The court finds that the predictable opinion does not apply.

The opinion based on disclosed facts. Defendant argues that the alleged defamatory gist of the statements that plaintiff is lying is based on disclosed facts that plaintiff told a different story in 2002, autobiog-

raphy. Plaintiff repeat the story in an interview with the New York observer. And that plaintiff fabricated the related story that Cosby's lawyers had pressured HarperCollins to keep the rape story out of the autobiography.

Defendant cites the Franklin case. That's the 2004 case, 116 Cal. App. 4th 375, for this proposition. However, Franklin's own recitation of the rule shows it would not apply because the stated fact asserted by defendant, that is, that Dickinson is lying about the rape, is itself provable false and demeaning, as this court has discussed.

Thus, while defendant is entitled to express his opinion that plaintiff is fabricating the rape story, because of the disclosed fact that plaintiff changed her story, ignores the gist of [20] the factual statement that plaintiff is lying about the rape occurring. As noted above, if the rape actually did occur, then plaintiff's recent story is true and her prior accounts suppressed the truth out of fear of being sued by Cosby.

Defendant's argument in this regard is not persuasive. As such, for purposes of this special motion to strike the unprivileged element of this cause of action is satisfied.

Next, it has a natural tendency to injure or that causes special damage. The statement that Dickinson is lying about the rape has a natural tendency to injure plaintiff's reputation because it is susceptible to the interpretation by the general public that plaintiff lied about a horrific incident to intentionally harm defendant's reputation, i.e., plaintiff engaged in defamation of Mr. Cosby.

Defendant claims that plaintiff cannot show damages because she has touted herself as a liar for commercial exploitation. This argument is not persuasive. Lying about trivial things that are made to entertain an audience does not mean that plaintiff's reputation is so tainted that she's impervious to a reputational harm for being accused of lying about a horrific incident to intentionally harm defendant Cosby's reputation. For purposes of this special motion to strike, this element is [21] satisfied.

Malice. Because plaintiff is a celebrity, she's a public figure who must demonstrate the defamatory statement was made with malice, actual knowledge of falsehood or reckless disregard for the truth, there is no evidence before this court that Mr. Singer investigated whether Cosby actually did rape plaintiff. Instead, singer claims that he investigated the inconsistencies in plaintiff's story, which she presented to the public about Cosby pressuring her to remove the rape story from her book, about Cosby simply giving her a dirty look and slamming the door in her face but not raping her, and the 2014 statement accusing Cosby of raping her. See the Singer declaration.

Singer also claims he had personal experience with plaintiff making a false paternity claim against one of singer's clients. See Singer's declaration.

Singer also claims his online research turned out plaintiff's notorious reputation as a wild and unreliable person. See Singer's declaration.

Singer claims that based on his own personal experiences dealing with plaintiff being untruthful, in his knowledge, of widely reported information and examples of plaintiff's unreliability, did not believe his statements in [22] the November 19th, 2014, press

statement were false. See Singer's declaration and his supplemental declaration.

However, as discussed above, these inconsistencies between plaintiff's story do not mean that the rape did not occur. Again, she could have been suppressing the truth in earlier stories, only to finally summon the courage to tell the truth about the rape.

Singer's research about plaintiff's reputation and his experience with her lying about his client does not address the absence of an investigation as to the actual incident at issue.

Cosby's meeting with the plaintiff in Lake Tahoe in 1982. The obvious source for that information is Cosby himself. Singer does not indicate that he discussed the incident with Cosby so as to satisfy himself that the rape never occurred. Instead, Singer uses straw man inconsistencies on collateral matters without addressing the underlying question; did Cosby rape plaintiff, yes or no?

The court finds that there is evidence that Singer acted with malice in issuing the December – excuse me, the November 19th, 2004, press statement because the inference is that he failed to investigate by going to the most direct source, Cosby himself, and instead drew inferences from [23] inconsistencies in plaintiff's story that did not prove or establish that the rape never occurred.

The court found for guidance the Sanders case, the 2013 case, 219 Cal. App. 4th 855. Moreover, the evidence is that Cosby ratified Singer's statement made on Cosby's behalf and the scope of Mr. Singer's agency as Cosby's attorney. See exhibit 5 of the declaration of bloom in a letter attached whereby plaintiff's counsel demands that Cosby immediately take corrective

action by fully and publicly retracting those statements and apologizing to Ms. Dickinson.

There is no evidence before the court that Cosby has done so. This may be deemed a ratification by Cosby as principles of agent Singer's statement issued on behalf of Cosby in the November 19th, 2014, press statement. A ratification can be made by accepting or retaining the benefit of the act with notice thereof. Here the benefit of the press statement is casting plaintiff as a liar to imply that Cosby did not rape plaintiff.

In this regard, malice may be inferred from ratifying a defamatory statement and failing to rebut the inference. See for guidance the Shumway case, 139 Cal. App. 2nd 121.

Notably, Mr. Cosby himself does not submit any declaration testifying that he lacked malice [24] toward plaintiff in failing to retract or repudiate the press statement issued by singer. A jury could infer actual malice toward plaintiff by virtue of Cosby's silence in the face of allegedly defamatory statements issued on his behalf towards plaintiff.

Further and significant, the court notes that in the defendant's supplemental brief, filed on March 8th, defendant states, "this supplemental briefing only addresses Mr. Singer's letter." It goes on, "defendant is not asserting the litigation privilege as to Mr. Singer's November 19, 2014, press statement, nor is he pursuing on the special motion to strike the arguments advanced in the opening brief regarding agency and actual malice."

For purposes of this special motion to strike only, the court construes this is as an admission that he does not have evidence to rebut his showing of the

actual malice. For purposes of this special motion to strike, the element of malice is satisfied. As such, the court finds that a continuance of this hearing for plaintiff to conduct limited discovery at this time on the issue of malice is not required.

Once the notice of entry of order ruling on this motion is filed, the automatic discovery stay will be lifted.

For the foregoing reasons, the court finds that plaintiff has demonstrated a probability of [25] prevailing on her claim for defamation based on the November 19th press statement. As such, the special motion to strike is denied as to the first cause of action to the extent it's based on that press statement.

The second cause of action, false light. The November 18th, 2014, letter. With regard to this letter, plaintiff's false light cause of action is properly stricken for the reasons discussed regarding the defamation cause of action because a false light claim must meet the same requirements of a defamation cause of action. For the reasons discussed above, the defamation cause of action which the court hereby incorporates by reference to the extent it is based on that letter, is also barred by the absolute litigation Privilege.

The November 19th, 2014, press statement. Defendant's argument is that plaintiff's false light claim fails because her defamation claim based on the same facts fails. However, for the reasons discussed above, the defamation cause of action which the court hereby incorporates by reference, plaintiff has demonstrated a probability of success on a false light claim, which the court notes for the foregoing reasons, the court finds that plaintiff has demonstrated a

probability of prevailing on this cause of action false light [26] claim based on the November 19th press statement. As such, the special motion to strike is denied as to the second cause of action to the extent it is based on the November 19th press statement.

Third cause of action, intentional infliction of emotional distress. The November 18th, 2014, letter. With regard to this, plaintiff's intentional infliction of emotional distress cause of action is properly stricken for the reasons discussed above. Because of the litigation privilege, this claim cannot go forward because it is barred by the litigation privilege as explained.

The November 19th, 2014, press statement. Here the court finds that the statements made by Mr. Cosby to the press in the November 19th, 2014, press statement, that plaintiff is lying about the rape, if a plaintiff proves the rape actually happened, may reasonably be regarded so extreme and outrageous to grant recovery of severe emotional distress. As discussed above regarding defamation, there's sufficient evidence of malice on part of Cosby which may be shown and must be shown.

Defendant admits that the cause of action rises and fails upon the defamation cause of action because plaintiff has demonstrated a probability of prevailing on a defamation cause of action, she is not foreclosed from pursuing this cause of action [27] as well. The court incorporates all its prior comments herein.

The Anti-SLAPP motion to strike is granted as to the first, second and third causes of action to the extent it is based on the November 18th 2014, letter.

The Anti-SLAPP special motion to strike is denied as to the first, second and third causes of action to the

extent it is based on the November 19th, 2014, press statement.

Attorney fees. Defendant's request for attorney fees is denied. Although he was successful in eliminating the November 18th, 2014, letter as a basis for liability, his exposure to tort liability is substantially the same based on the November 19th, 2014, press statement.

As such, defendant's special motion to strike resulted in no practical benefit, and award of attorney fees is properly denied in this court's discretion.

Likewise, the court finds plaintiff's request for attorney fees is denied. The court finds that the special motion to strike was not frivolous or solely intended to cause unnecessary delay.

A hearing on defendant's demurrer, the remaining allegations in the complaint, which was filed on June 22nd, needs to be reset on the [28] court's reservation system.

Plaintiff's opposition and defendant's reply pursuant to code. We are setting a status conference on May 17th, 2016, at 8:30. As I said, plaintiff, you are giving notice.

Now, that completes the court's tentative. Counsel, do you wish to address the court?

MR. TAYBACK: Yes, Your Honor, briefly.

THE COURT: Thank you. Please proceed.

MR. TAYBACK: Focusing on the November 19th press statement obviously. I respectfully submit that Your Honor's description of what that press statement is misses the mark. That statement, even structurally that's a single paragraph statement, structurally

reflects that it is a predictable opinion of Mr. Singer based upon the facts he disclosed in that paragraph.

And I think if you go back to – I was reading it here while Your Honor was reading her ruling. I was looking at it. If you go to English 101, you start a paragraph with your thesis; this is what my view is, my opinion is. And you conclude with that thesis; what it is, how it is that you believe you've proved that thesis. That's exactly the way Mr. Singer's statement is structured.

He says that Janice Dickinson's accusation of rape is a lie. He then goes on to say exactly [29] what the basis is for that. There is a glaring contradiction between what she is claiming now for the first time, that's an indisputably true statement, and what she wrote in her book and what she told the media back in 2002. Also, an indisputably true statement, that she said different things on two prior occasions back in 2002, than what she was uttering on Entertainment Tonight in November of 2014.

He then goes on to describe the detail of those prior statements in two or three more sentences. And then he goes on to say that, oh, the other part of her allegation, that Mr. Cosby's lawyers pressured HarperCollins not to publish it is verifiable by talking to a third party, and that is also untrue. A fact that Ms. Dickinson subsequently through her counsel has not disputed that that was a statement that's not accurate.

He then concludes with exactly the thesis that he started with, that is to say, the only story she gives 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off, period. Documentary proof, the book, the

newspaper interview, and Ms. Dickinson's own words show that her new story about something she now claims happened back in 1982 was a fabricated lie. That is Mr. Singer's stated opinion based upon those [30] disclosed facts. I think that's exactly what the kind of expectation – rather that's the kind of statement that one would expect to have here when one is accused of being a liar.

I think if you look at, for example, our reply brief at pages 7 and 8, that's the essential proposition that the court affirmed in the Hill v Cosby case, as well as in other cases, and, in fact, is stated in the restatement of torts in section 594 where it says, quote, "a privilege exists when the person reasonably believes that his interests in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself."

That's what people have lawyers for, to defend themselves publicly, even in contexts like this. And that's why that latitude that's afforded to public statements in defense of a public accusation, not a private accusation, not a letter that came to Mr. Cosby or counsel for him, but a public statement in a media outlet which was rejoined by another public statement, one that was articulated and explained by Mr. Singer.

The last point that I will make with respect to Your Honor's tentative opinion is Your Honor discussed Mr. Singer's investigation, which he described in a pretty detailed declaration [31] submitted in connection with the original motion. I don't know whether Your Honor intended this, but I would certainly object to any inference being made that he did not disclose privileged communications. And whether an inference was

being made, I would say that that would be an improper inference as a basis to –

THE COURT: So noted. Thank you. I appreciate that. Thank you.

Okay. Counsel.

MS. BLOOM: Thank you, Your Honor.

THE COURT: Thank you for not interrupting.

MS. BLOOM: Thank you, Your Honor.

Well, I was an English major, so I'd like to respond to the point that was just made. To say that this was predictable opinion, as Your Honor points out, whether a rape happened or not is not a matter of opinion. It is a matter of fact. And Mr. Singer made short, clear declarative statements. His statement was that her story of rape is a lie, period. It is an outrageous defamatory lie, period. It is a fabricated lie. That goes well beyond pointing out, for example, as Mr. Singer could have, that she made a different statement in her book or that in his opinion her statement goes too far.

You know, Mr. Singer is a very sophisticated attorney. He could have couched it [32] as a matter of opinion if he wanted to. Instead, he took the bolder statement. You know, this is not just simply pointing out a denial on behalf of Mr. Cosby. When Mr. Tayback says that's what people have lawyers for, they don't have lawyers to engage in character assassination sent out to the media that's then republished by thousands of media outlets worldwide.

And Mr. Singer based his statement, as we have pointed out, on internet trolls, on highly unreliable sources. We pointed out that in our opposition, and there was no response in the reply.

If I could just briefly address the November 18th issue.

THE COURT: Yes, of course.

MS. BLOOM: So there are multiple cases that hold that the litigation privilege applies only when litigation is under serious consideration, and I don't think that's disputed.

So how can we tell if litigation is under serious consideration when a letter is sent? Well, we can tell if litigation follows. Then I think we could conclude it was probably under serious consideration. That did not happen here.

Instead, a letter was sent out. We agree that it was a letter. It was sent out to a reporter, to a couple of reporters, in response to the reporters asking Mr. Singer for a statement. [33] Nowhere in the letter does he use the language that we quoted in the case law where litigation is threatened unless x, y or z happens.

And I think most importantly, Your Honor, although we have four attorney declarations filed in this case, including a recent one from Mr. Singer, nowhere does any attorney track the case law language saying that litigation was under serious consideration at the time of the November 18th letter. It would have been so easy to do that, and no one ever did do that. For that reason we would argue that it was not under serious consideration. They never intended to sue the media, and they never have sued the media at the time or since. Thank you, Your Honor.

THE COURT: Thank you.

Brief reply if you would like?

MR. TAYBACK: No, Your Honor. I'll submit.

THE COURT: Okay. Thank you.

I want to thank everybody for your papers and the briefing that you did, as well as your arguments that you made. The court's tentative stands. Thank you, counsel. Give notice.

Five minutes recess. Five minute recess.

MS. BLOOM: Thank you, Your Honor.

MR. TAYBACK: Thank you, Your Honor. (Proceedings concluded.)

APPENDIX D

IN THE SUPREME COURT OF CALIFORNIA

En Banc

[Filed Mar. 14, 2018]

S246185

JANICE DICKINSON,

Plaintiff and Appellant,

v.

WILLIAM H. COSBY, JR.,

Defendant and Appellant;

MARTIN D. SINGER,

Defendant and Respondent.

Court of Appeal, Second Appellate District,
Division Eight - No. B271470

The petitions for review are denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX E

IN THE SUPREME COURT OF CALIFORNIA

S246185

JANICE DICKINSON,

Plaintiff and Appellant,

v.

WILLIAM H. COSBY, JR.,

Defendant and Appellant,

MARTIN D. SINGER,

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION EIGHT, CASE NO. B271470

PETITION FOR REVIEW

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v.

WILLIAM H. COSBY, JR.,

Defendant and Appellant,

MARTIN D. SINGER,

Defendant and Respondent.

PETITION FOR REVIEW

ISSUES PRESENTED

1. Is an attorney's denial of a public accusation that a client committed a criminal act protected by the First Amendment so as to bar a defamation action against either the attorney or the client, as two federal courts of appeal have concluded with respect to the same denials by the same attorney involving the same client?

2. Should California recognize a self-defense privilege, recognized by common law and other states, that would protect an attorney's denial of a public accusation that a client committed criminal conduct?

3. When determining the application of the litigation privilege to an attorney's prelitigation demand letter, is it unnecessary and a violation of the attorney-client privilege to examine the subjective intent of the attorney?

INTRODUCTION AND REASONS FOR GRANTING REVIEW

In 2014, after decades as a much-beloved entertainer, comedian, and "America's Dad," William H. Cosby, Jr. was accused by multiple women of sexual assault, devastating his reputation and his career. One such accuser was Janice Dickinson, plaintiff here, who claimed in 2014 that Cosby had raped her in a hotel room in 1982 – notwithstanding that, in her own 2002 autobiography, she gave a contradictory account of the incident in which there was no sexual conduct whatsoever. After Dickinson made her new accusation in a nationally-televised interview, Cosby's attorney, Martin Singer, understandably responded swiftly by notifying media outlets that Dickinson's accusation was false, pointing to the direct contradiction between her current claim and the account she gave in her book and in a 2002 interview. Singer made similar denials of the accusations of other women. Dickinson and several others retaliated with lawsuits against both Cosby and Singer, alleging defamation and related claims based on Singer's denials of the accusations. In the instant case, Cosby filed a motion to strike under California's anti-SLAPP statute, but the Court of Appeal allowed the case to go forward, concluding – contrary to the conclusions of two federal courts of appeals in other Cosby cases – that Singer's statements were not protected by the First Amendment, nor were they protected under California law.

In this time of near-daily accusations of sexual misconduct against celebrities and public figures, it is critical for attorneys and their accused clients to know the boundaries of what they can and cannot say in response to highly-publicized accusations. When a client is publicly accused of wrongdoing, an attorney

has the right, and often the obligation, to provide a swift and decisive response to mitigate the devastating harm that flows from leaving such allegations unanswered. Doing so, however, places both attorney and client in peril of being sued for defamation for challenging the veracity of the accuser's claim. While such attorney statements have been and should be protected by the First Amendment, the law has become so uncertain, as reflected by the Court of Appeal's opinion here, that both attorneys and the accused must remain mute in the face of damning accusations in order to avoid being dragged into a defamation lawsuit. This Court should grant review to demarcate the boundary between actionable defamation under California law and protected speech under the First Amendment in the context of attorney statements to the press.

This Court's intervention is necessary to secure uniformity of decision on this important issue. It is difficult to conceive of a more stark conflict than is presented in this case: The Court of Appeal's opinion is in direct conflict with the decisions of two federal courts of appeals that have held denials by the same attorney in response to the same types of allegations against the same client are protected by the First Amendment. (*McKee v. Cosby* (1st Cir. 2017) 874 F.3d 54; *Hill v. Cosby* (3d Cir. 2016) 66 Fed.Appx. 169.)

As these conflicting opinions reflect, courts have created a state of confusion, and have themselves become confused and inconsistent, in determining when the denial of a crime becomes actionable defamation. The general rationale for excluding defamatory statements from First Amendment protection is that they have "no social value." But refuting an accusation of a heinous crime certainly has social value. Indeed, our justice system is premised on the notion that

hearing all sides of a story advances the ultimate quest for truth. It is critical for this Court to provide clarity because uncertainty in the law leads to a "chilling effect" that curtails the very speech the First Amendment is meant to protect.

Further, this Court should decide the important question of whether such attorney statements fall within the scope of the self-defense privilege. This Court has never addressed whether the self-defense privilege applies in California, and this case presents the perfect example of why the privilege should apply. The self-defense privilege, applicable at common l aw and adopted by numerous other states, protects statements made to "defend one's reputation in response to attack by another," including the statement that the accuser is an "unmitigated liar." (Calvert, *Counterspeech, Cosby, and Libel Law: Some Lessons About "Pure Opinion" & Resuscitating the Self-Defense Privilege* (2017) 69 Fla. L.Rev. 151, 158 (hereafter *Counterspeech, Cosby, and Libel Law*).) Without protection from defamation liability, accused persons and their attorneys are effectively muted and left powerless to add their own speech to a public debate focused on the accused person's own alleged conduct.

Finally, this Court should settle important questions in the application of the litigation privilege in California. Lower courts have been inconsistent in the standard for applying the litigation privilege to prelitigation demand letters, and important questions regarding the burden of proof remain unsettled. The Court of Appeal's opinion here imposed an unprecedented and troubling factual inquiry, looking behind an obviously litigation-related communication to evaluate the attorney's subjective intent in sending the

communication. Such an inquiry unnecessarily infringes on the important protections afforded attorney-client communication and attorneys' subjective thought processes.

This case presents an excellent vehicle for the Court to provide clarity in this area. The case was decided at the anti-SLAPP stage. California's anti-SLAPP statute provides the procedural mechanism to allow for the earliest possible resolution of litigation based on protected speech. It defeats the purpose of the anti-SLAPP statute if cases like this one are permitted to survive an anti-SLAPP motion because that subjects defendants to precisely the costly and burdensome litigation the statute was meant to avoid.

Moreover, the case presents a clean issue of first impression as to whether an attorney's statement that an accusation against his client is a "lie," coupled with non-defamatory facts to back up the statement, is actionable defamation. The Court of Appeal's decision here did not turn on unique factual circumstances, but rather on an issue of utmost interest to all California citizens and the entire legal community, namely whether attorneys are allowed to publicly deny allegations against their clients. That implication exists in virtually every case where an attorney makes a statement regarding a client's response to a public accusation. Indeed, law review articles have already cited this and the other defamation cases involving Cosby as paradigmatic examples of the collision of the First Amendment with "liar libel" in the context of "counterspeech."[1]

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[1] See, e.g., *Counterspeech, Cosby, and Libel Law*, *supra,* 69 Fla. L.Rev. at p. 158; Gutterman, *Liar! Liar? The Defamatory Impact*

This Court's intervention on these important issues is critical. As the other Cosby-related cases reflect, federal courts are frequently called upon to determine state law, and in doing so look to the opinions of the highest court of the state; if no such opinion exists, federal courts are left to predict what this Court would say. (See, e.g., *Gonzales v. CarMax Auto Superstores, LLC* (9th Cir. 2016) 840 F.3d 644, 649.) Thus, the Court should take this opportunity to provide much-needed clarity to both California and federal courts and establish rules of law, consistent with the First Amendment, regarding whether attorneys and their clients may be held liable for statements of denial made in response to public accusations.

STATEMENT OF THE CASE

A. Dickinson's 2002 Autobiography States She Did Not Engage in Sexual Conduct with Cosby

In 2002, Dickinson published an autobiography about her life as a supermodel, in which she specifically described her interaction with Cosby in 1982. Cosby invited her to open for him at a show in Lake Tahoe, so she flew from Bali to meet him. (1 CT 157.) She wrote that after her arrival the two had dinner, and Cosby invited her to his room, but she stopped at the door, telling him she was "exhausted." (1 CT 158.) She described in detail what happened next:

> He waved both hands in front of my face, silencing me. Then he gave me the dirtiest, meanest look in the world, stepped into his suite, and slammed the door in my face. *Men.*

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of "Liar" in the Modern World (2017) 27 Fordham Intell. Prop. Media & Ent. L.J. 253, 269.

> Back in my room, I found a tiny bottle of Courvoisier in the minibar, poured it into a plastic cup.... I dug through my bag for my bottle of Vitamin C and popped two Quaaludes and drifted off to sleep.

(*Ibid.*) Dickinson repeated this description of her encounter with Cosby in a 2002 interview reported by the New York Observer. (1 CT 162-171.) In neither the autobiography nor the published interview did Dickinson state that Cosby had sexually assaulted her or even that they engaged in any sexual conduct.

B. In Late 2014, Dickinson Changes Her Story to Accuse Cosby of Rape

Twelve years later, amid highly publicized accusations by other women that Cosby had raped them, Dickinson's story changed. She claimed for the first time, in a nationwide television interview on *Entertainment Tonight* on November 18, 2014, that Cosby drugged and raped her in Lake Tahoe in 1982. (1 CT 104.) An article describing the interview reported that Dickinson said the rape was not in her autobiography because Cosby and his legal team pressured her publisher, HarperCollins, to remove the story. (1 CT 104-105.)

C. Cosby's Attorney Responds to These New Allegations

1. The November 18 Letter

Immediately after Dickinson's interview aired, several media outlets contacted Cosby's representatives, indicating their intention to run follow-up stories and seeking Cosby's comment. (Op. 5.) The same day, Cosby's then-attorney, Martin Singer, responded with a confidential letter (the "Letter") to an executive

producer of *Good Morning America* (GMA), and similar letters to the other media outlets. (1 CT 173-175.) The letter identified Singer as Cosby's "litigation counsel" and was prominently captioned "CONFIDENTIAL LEGAL NOTICE" and "PUBLICATION OR DISSEMINATION IS PROHIBITED." (1 CT 173.) The letter emphatically denied Dickinson's accusation, stating it is "fabricated and an outrageous defamatory lie." (*Ibid*.) Singer explained that Dickinson's accusation was flatly contradicted by her description of the incident in her 2002 autobiography. (1 CT 173-174) Singer then pointed out that publisher HarperCollins could confirm that Dickinson's claim of pressure not to include her rape accusation in her book was also a lie. (*Ibid.*) Singer warned:

> Ms. Dickinson's new assertions that she was raped by my client back in 1982 is belied by her own words, which completely contradict her current fabrications. We caution you in the strongest possible terms to refrain from disseminating the outrageous false Story. If *Good Morning America* proceeds with its planned segment with Ms. Dickinson and recklessly disseminates it instead of checking available information demonstrating its falsity, all those involved will be exposed to very substantial liability.
>
> You proceed at your own peril.

(1 CT 175.) Singer concluded with a reservation of Cosby's rights and reiterated: "This letter is a confidential legal communication and is not for publication." (*Ibid.*)

2. The November 19 Press Statement

The following day, Singer issued a press statement, again denying Dickinson's allegations and noting the dramatic change in her story:

> Janice Dickinson's story accusing Bill Cosby of rape is a lie. There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002. Ms. Dickinson did an interview with the *New York Observer* in September 2002 entitled "Interview With a Vamp" completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said "she didn't want to go to bed with him and he blew her off." Her publisher Harper Collins can confirm that no attorney representing Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book. The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off. *Documentary proof and Ms. Dickinson's own words* show that her new story about something she now claims happened back in 1982 is a fabricated lie.

(1 CT 177.)

D. Dickinson Sues Cosby Based on Singer's Statements, and Cosby Responds with an Anti-SLAPP Motion[2]

On May 20, 2015, Dickinson filed a complaint against Cosby, alleging defamation, false light, and intentional infliction of emotional distress. (1 CT 12-34.) All causes of action were predicated upon Singer's denial of Dickinson's public allegations of sexual assault against Cosby.

On June 19, 2015, Cosby filed a demurrer and an anti-SLAPP motion seeking to strike Dickinson's complaint under Code of Civil Procedure section 425.16, subdivision (b)(1). Cosby argued that Dickinson could not establish any probability of prevailing because Singer's statements were protected by the First Amendment and California law. Cosby also argued that the Letter fell under the litigation privilege. (1 CT 85.)[3]

The trial court granted Cosby's anti-SLAPP motion to the extent the claims are based on the Letter, finding it to be covered by the litigation privilege. The court denied the motion to the extent the claims are based on the Statement, finding that the Statement was actionable because the gist of the Statement was "the factual statement that Plaintiff is lying about the rape occurring." (8 CT 1604-1605, 9 CT 1625, 1629.)

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[2] Dickinson's attempt to amend her complaint to add Singer is addressed in Singer's separate Petition for Review.

[3] For purposes of litigating the anti-SLAPP motion, Cosby did not rely on a lack of agency or the absence of constitutional malice. (See Op. 21-22, fn. 6.)

E. The Court of Appeal Concludes that Neither the Letter nor the Statement Is Protected Speech and Rejects Application of the Litigation Privilege

All parties appealed. On November 21, 2017, the California Court of Appeal issued a published opinion reversing the trial court's decision as to the Letter and affirming the court's decision as to the Statement. Relying on the fact that Mr. Cosby did not sue any of the media outlets to which Singer sent the demand letter, the Court ruled that the Letter was not protected under the litigation privilege because "the evidence supports a prima facie inference that Cosby sent the demand letter without a good faith contemplation of litigation seriously considered." (Op. 39.) The Court further held that Singer's message in both statements implied "a provably false assertion of fact – specifically, that Cosby did not rape Dickinson," (Op. 44), and therefore concluded that both the Letter and the Statement were actionable statements unprotected by the First Amendment (Op. 44-52.)

LEGAL ARGUMENT

I. This Court Should Grant Review to Settle the Important Question of Whether an Attorney's Statement Responding to Public Accusations Against the Attorney's Client Is Protected by the First Amendment

Defamation "must be measured by standards that satisfy the First Amendment." (*New York Times v. Sullivan* (1964) 376 U.S. 254, 269.) Thus, "superimposed on any state's defamation law are First Amendment safeguards." (*McKee v. Cosby*, *supra*, 874 F.3d 54, 60; see also *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 17.) This case demonstrates the urgent

need for this Court to address the intersection of First Amendment principles and California defamation law.[4]

Without review and clarification from this Court, inconsistent judicial interpretation chills an attorney's ability to effectively represent an accused client. To ensure First Amendment rights, speakers must know with certainty what defensive speech is unprotected. This Court's intervention is needed to settle the scope of First Amendment protection in this increasingly prevalent context.

A. This Court Should Grant Review to Resolve a Conflict with Federal Court Decisions Involving Statements Made by the Same Speaker Conveying the Same Message

As multiple accusers began going public with their claims, Singer consistently made statements denying the accusations. The Court of Appeal is in direct conflict with two U.S. Courts of Appeals that have concluded that the First Amendment protected Singer's statements.

In *Hill v. Cosby*, the Third Circuit held that virtually identical Singer statements were protected as non-actionable opinions. (*Hill, supra,* 66 Fed.Appx. 169.) The district court's opinion, affirmed by the Third Circuit in *Hill*, held that "any attorney for any defendant must advance a position contrary to that of the plaintiff. Here, Plaintiff publicly claimed she was sexually abused and raped by Defendant – which is her position; and Defendant, through his attorney, publicly denied those claims by saying the 'claims' are

[4] The same issues apply to the related claims of false light and intentional infliction of emotional distress, and Cosby's arguments herein pertain to all three causes of action.

unsubstantiated and absurd – which is his legal position." (*Hill v. Cosby* (W.D.Pa. Feb. 9, 2016, No. 15CV1658) 2016 WL 491728 at p. *5, aff'd *Hill v. Cosby*, *supra*.) In affirming the dismissal of the case, the Third Circuit stated that, "responding to a media firestorm," Singer's implication that Hill lied "'adequately disclosed' the factual basis for the attorney's position," thus shielding the statements from defamation claims. (*Hill v. Cosby*, *supra*, 66 Fed.Appx. at pp. 175-76.)

Citing *Hill*, the First Circuit reached the same conclusion, holding that Singer's statements were constitutionally protected, non-actionable opinions and affirmed the dismissal of a defamation lawsuit. (*McKee v. Cosby*, *supra*, 874 F.3d 54.) In *McKee*, the New York Daily News published an article in December 2014, reporting on McKee's accusation that Cosby raped her in his hotel room in 1974. In response, Singer wrote a letter to the Daily News providing a litany of reasons to question the truthfulness of McKee's accusations. The First Circuit concluded that, "even if we treat the Singer Letter as asserting both that McKee lacks credibility and that McKee's rape allegations are not truthful, Singer adequately disclosed the non-defamatory facts underlying those assertions, thereby immunizing them from defamation liability." (*Id.* at p. 63.)[5]

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[5] Ironically, the same district judge who dismissed the complaint in *McKee* denied a motion to dismiss in another nearly identical case involving Singer's statements. (*Green v. Cosby* (D.Mass. 2015) 138 F.Supp.3d 114.) The Third Circuit in *Hill* expressed, "we have serious doubts with respect to the Massachusetts District Court's ruling." (*Hill*, *supra*, 66 Fed.Appx. at p. 176, fn. 6.)

In direct contrast to the First and Third Circuits, the court here concluded that the message that "the alleged rape never happened" conveyed an "actionable statement of fact." (Op. 40, 46.) The court concluded that the statements implied provably true or false factual assertions because they were "authored by Cosby's attorney, who was speaking for Cosby, who in turn would certainly know whether or not he sexually assaulted Dickinson." (*Id*.) Yet, the same was true of the statements at issue in *McKee* and *Hill,* and those courts nevertheless concluded, correctly, that the attorney's assertion that the plaintiff's accusation was a lie was a protected opinion, not an "actionable statement of fact."

The Court of Appeal also departed from the analysis in *McKee* and *Hill* in concluding that Singer's recital of facts supporting the conclusions in his statements was insufficient to shield the statements from defamation liability. In both *Hill* and *McKee*, the courts applied an objective test, focusing on whether a *reasonable reader* would understand Singer "to be suggesting that he was singularly capable of evaluating" the accuser's credibility based on undisclosed evidence. (*McKee*, *supra*, 874 F.3d at p. 63.) Here, however, the court applied an unprecedented subjective test, focusing on what Singer actually knew before he issued the statement. The court pointed to Singer's statement in his declaration that two additional facts beyond those disclosed in his letter supported his opinion. (Op. 46.) The Court of Appeal failed to explain how the existence of *additional* facts *supporting* an opinion somehow converts the opinion to a statement of fact, or has any relevance to the analysis at all.

While the court acknowledged its inconsistency with these other appellate decisions, it failed to provide any

justification for reaching an inconsistent result. (Op. 48, fn. 17.) First, the court dismissively noted that *McKee* and *Hill* were not applying California law. The court overlooked that the relevant principles here are those of First Amendment law, not state law, and failed to explain any material difference between California's and other states' laws. Second, the court asserted that the statements at issue in *McKee* and *Hill* were different because they did not contain the same language as here, expressly stating that the rape allegations were false or that the accuser was lying. However, in both *McKee* and *Hill*, the courts assumed that the statements *did* in fact convey that the accusers were lying but nevertheless constituted protected opinion. (See *McKee, supra,* 874 F.3d at p. 63; *Hill, supra,* 66 Fed.Appx. at pp. 173-174.) Speakers cannot be made to parse their own language to determine whether the First Amendment protects their statements.

This split between California and federal appellate courts on the same constitutional law question necessitates this Court's intervention. To provide certainty, the highest court of this state should provide its view of the protection provided to attorneys' statements to the press.

B. This Issue Is of Exceptional Importance Because Resolution of the First Amendment Issue Is Necessary to Avoid a Chilling Effect on Speech

The Court of Appeal's opinion sets forth a sweeping and startling proposition that an attorney's statement denying an accusation is an actionable statement of fact. The court rested its conclusion on the premise that Singer's statements necessarily implied the provably false fact of whether or not Cosby committed

the alleged conduct – a premise that would apply to any statement by any attorney asserting his client's innocence of a charge.

Defamatory statements can fall into one of the narrow categories of unprotected speech where they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Balboa Island Village Inn., Inc. v. Lemon* (2007) 40 Cal.4th 1141, 1147, citing *Bose Corp. v. Consumer Union of U.S., Inc.* (1984) 466 U.S. 485, 503-04.) Neither the United States Supreme Court nor this Court has ever held that an attorney's denial of an accusation against a client is of "such slight social value as a step to truth" that it falls outside the First Amendment's protection. Nor could there be such a rule because a response to a public accusation lies at the very heart of the truth-finding process.

1. The Court of Appeal's Analysis Oversimplifies Supreme Court Jurisprudence and Unconstitutionally Expands the Category of Speech Falling Outside of First Amendment Protection

The court's simplistic conclusion that Singer's statements were not constitutionally protected because they contained "statements of facts" misreads *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19. There, the United States Supreme Court rejected an "artificial dichotomy between 'opinion' and fact." (*Ibid.*)

The Court of Appeal turned *Milkovich* on its head and created just such an artificial dichotomy. The court engaged in a circular analysis that an attorney's

denial of an accusation against his client is unprotected because it necessarily implies the supposedly "undisclosed fact" that the accusation is a lie. In so holding, the court misapplied the fundamental holding of *Milkovich,* which was to reject precisely this sort of formulaic labeling. (See *United States v. Alvarez* (2012) 567 U.S. 709, 719 (Kennedy, J.) ["The Court has never endorsed the categorical rule ... that false statements receive no First Amendment protection"].) The court here, by placing the Singer statements in the category of unprotected defamatory statements, impermissibly expanded that category far beyond its intended narrow scope. (*Id.* at pp. 717, 722.)

2. A Public Response to a Public Accusation Furthers the Social Value of the Adversary Process of Truth-Finding

The United States Supreme Court has long held, in describing the value of our adversarial system, that "[t]ruth ... is best discovered by powerful statements on both sides of the question." (*United States v. Cronic* (1984) 466 U.S. 648, 655.) Nowhere is this rational discourse more essential than when an individual is accused of a crime. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (*Herring v. New York* (1975) 422 U.S. 853, 862.)

This intersection of the purpose of the adversarial system and the First Amendment protection of the "marketplace of ideas" highlights the social value of conflict and debate. The ability to defend oneself against public accusations, which often requires a statement or at least the clear implication that the accuser has lied, is not only a fundamental right of the

accused but is also the best way to discover the truth. If attorneys are muted in the exercise of their right to speak on behalf of their clients, accusations are left unanswered. The silence of the accused in the face of serious accusations can be used against him, not only in the court of public opinion, but in a court of law. (See *Salinas v. Texas* (2013) 570 U.S. 178; *People v. Tom* (2014) 59 Cal. 4th 1210, 1223-1224 [citing cases].) This is no adversary process at all, much less a fair one. Thus, statements refuting an allegation of wrongdoing lie at the heart of First Amendment protection, not outside of it.

This proposition finds support in California's "predictable opinion" doctrine. "[W]here potentially defamatory statements are published in a ... setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401-1402.) The doctrine is particularly apt here. After Cosby was publicly accused of serious criminal misconduct, his attorney made statements denying the charge. If an attorney's statement in this context is not a "predictable opinion," it is difficult to imagine what is.

The Court of Appeal's opinion has ramifications not only for cases involving past statements, but more troublingly, for future speech.

"Forcing a speaker to engage in a contextual assessment, which may or may not coincide with the analysis by a factfinder, before speaking or risk being subject to a lawsuit would bring an undesired chilling effect." (Comment, *Speak No Ill of the Dead: When Free*

Speech and Human Dignity Collide (2011) 2 Ala. C.R. & C.L. L.Rev. 209, 216.) Without this Court's intervention, accused persons and their attorneys face the Hobson's Choice to either ignore the accusations and see their reputations destroyed or to deny the accusations and be sued for defamation.

3. The Court of Appeal's Opinion Also Fails to Recognize the

Important Social Value of the Attorney-Client Relationship California law, United States Supreme Court authority, and scholarly commentary, all recognize the need to protect attorney speech to the press. The California Rules of Professional Conduct specifically allow attorneys to "make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client." (Rules Prof. Conduct, rule 5-120(C).)

In *Gentile v. State Bar* (1991) 501 U.S. 1030, all nine justices agreed that attorney statements mitigating bad publicity are protected by the First Amendment. Justice Kennedy, writing for a plurality, stated that "[a]n attorney's duties do not begin inside the courtroom door.... [A]n attorney may take reasonable steps to defend a client's reputation...including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." (*Id*. at p. 1043.) As noted constitutional law professor Erwin Chemerinsky has elaborated, "the First Amendment can tolerate restrictions on speech only if the harm of the expression is proven, while the attorney should always speak out and counter potentially harmful publicity unless the harm is clearly trivial." (Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment* (1998) 47

Emory L.J. 859, 868.) "[S]o long as both sides ha[ve] equal access to the media ... there [is] little reason to fear that lawyer speech would distort the process in favor of either side." (*Ibid.*)

The Court of Appeal's opinion places attorneys in the untenable position of being unable to zealously represent their clients for fear of subsequent tort actions against themselves and their clients. When only one side effectively has access to the media, public perception is distorted with no opportunity to evaluate an opposing position.

Instead of recognizing the non-actionable nature of attorney statements in defense of clients, the court flipped the fact that Singer was an attorney against both him and Cosby. In so doing, the court impermissibly intruded upon the attorney-client privilege. According to the court, Singer's statement of his client's innocence must be read to imply the existence of undisclosed facts, namely whether Cosby did or did not commit the alleged acts.

California law provides the utmost protection for the attorney-client privilege. Evidence Code section 913, subdivision (a) provides that "no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." Yet, the Court of Appeal did precisely that in reaching its conclusion, necessarily presuming the content of privileged communication and effectively penalizing both attorney and client for its nondisclosure.

This Court should grant review to provide attorneys with workable guidelines as to the boundary between their ethical obligations, the attorney-client privilege,

and defamation liability. Such clarity is essential to safeguard First Amendment protections and the rights of the accused.

II. This Court Should Recognize the Common Law Privilege of Self-Defense

The Court of Appeal dismissed Cosby's contention that the common law self-defense privilege shielded Singer's statements from liability, suggesting that the privilege is not "still viable" in California. (Op. 43, fn. 14.) Yet, California courts have never expressly considered and rejected the self-defense privilege, and lower courts' passing references to the issue have been inconsistent. This Court should clear up the confusion and adopt a self-defense privilege that protects the rights of accused persons and their attorneys to respond meaningfully to public accusations of serious wrongdoing.

Common law has long recognized a privilege for statements made in self-defense:

> Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties that he owes to himself and to his family. Therefore communications made in fair self-defense are privileged. If I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant, when such retort is a necessary part of my defense, or fairly arises out of the charges he has made against me.

(*Foretich v. Capital Cities/ABC, Inc.* (4th Cir. 1994) 37 F.3d 1541, 1559, quoting Odgers, A Digest of the Law of Libel and Slander (1st Am. ed. Bigelow 1881).) The self-defense privilege thus applies to "statements

made to defend one's reputation in response to attack by another." (1 Smolla, Law of Defamation, note 54, § 8:47 (2016); see also Sack, Sack on Defamation: Libel, Slander and Related Problems, note 62, § 9.2.1 (4th ed. 2016) ["An individual is privileged to publish defamatory matter in response to an attack upon his or her reputation...."].) The Restatement recognizes that the self-defense privilege includes the right to call an accuser an "unmitigated liar." (Rest.2d Torts, § 594, com. k.) In general, other states that have expressly considered the issue have recognized some form of the self-defense privilege.[6]

One commentator discussing the Cosby cases has suggested that, given the inconsistencies in how courts apply the "pure opinion" doctrine to these cases, the self-defense privilege may provide a better framework for analyzing attorney statements in defense of the accused:

> If the pure opinion privilege does not work in such situations – it did in *Hill*, but not in *Green* – then perhaps states like Florida that have not adopted the self-defense privilege should give it a second look. It may just be

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[6] See, e.g., *Lewis v. NewsChannel 5 Network L.P.* (Tenn. Cir. Ct., Jan. 10, 2005) 2005 WL 3237681, at *7, affd. (Tenn. Ct. App. 2007) 238 S.W.3d 270; *DeLong v. Yu Enterprises, Inc.* (2002) 334 Or. 166, 170 [47 P.3d 8, 10]; *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (Ohio Ct. App. 1996) 108 Ohio App.3d 637, 648 [671 N.E.2d 578, 575]; *McDermott v. Hughley* (1989) 317 Md. 12, 29 [561 A.2d 1038, 1046-1047]; *Barnett v. Mobile County Personnel Bd.* (Ala. 1988) 536 So.2d 46, 53; *Abofreka v. Alston Tobacco Co.* (1986) 288 S.C. 122, 125-126 [341 S.E.2d 622, 624 625]; *Hall v. Brookshire* (Mo. App. 1955) 285 S.W.2d 60, 66; *Conroy v. Fall River Herald News Co.* (1940) 306 Mass. 488, 488-490 [28 N.E.2d 729, 730-731].

> time to resuscitate the self-defense privilege for precisely such scenarios.

(Calvert, *Counterspeech, Cosby, and Libel Law*, *supra*, 69 Fla. L.Rev. at pp. 178-179.) Calvert's suggestion has even more force now, as two more courts (*McKee* and *Dickinson*) have reached diametrically different conclusions in applying the "pure opinion" analysis to Singer's statements.

The Court of Appeal's decision to give short shrift to the self-defense privilege was incorrect and problematic. In *Green v. Cosby* (D.Mass. 2015) 138 F.Supp.3d 114, 141, a district judge erroneously concluded that California courts have "rejected" the self-defense privilege. The only authority cited for that proposition was a lone Court of Appeal opinion where review was granted and then dismissed due to settlement. (*Ibid.*, citing *Finke v. Walt Disney Co.* (2003) 110 Cal.App.4th 1210 [2 Cal.Rptr.3d 436], review granted (2003) 6 Cal.Rptr.3d 424, review dismissed as settled (2004) 19 Cal.Rptr.3d 828.) *Finke* did not analyze the issue but instead boldly asserted that "California does not recognize 'self-help' as an independent privilege." (*Finke*, *supra*, 2 Cal.Rptr.3d at p. 459.) No court has ever held that the self-defense privilege does not apply in California. In fact, at least one other Court of Appeal has suggested the privilege is applicable. (See *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 595, fn. 6.)

As Calvert suggests, it "may just be time" for this Court to consider the applicability of the self-defense privilege in California. This case presents the perfect vehicle to consider the issue, as the accusations against Cosby are exactly the sort of damaging allegations an individual must be permitted to rebut in his defense.

III. This Court Should Grant Review to Clarify the Standard for Applying the Litigation Privilege to Prelitigation Communications

The purpose of the litigation privilege is to protect litigants' right of "utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5; citing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) To serve this purpose, the privilege includes the ability to assert viable legal claims and protect litigants from harm before litigation is initiated. (See, e.g., *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251; *Rubin, supra,* 4 Cal.4th at p. 1194.) It is not necessary that litigation ultimately ensue for the privilege to apply. (See, e.g., *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 271-272.) This Court has stated that the standard for determining whether prelitigation communication is privileged is whether it "relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment, supra,* 41 Cal.4th at p. 1251.)

The Court of Appeal's interpretation of the "good faith and under serious consideration" standard, however, is problematic in that it invites a subjective, fact-intensive inquiry that delves into privileged attorney-client communications and attorney work-product. Rather than focus on the nature of the communication, which obviously supports application of the litigation privilege here, the court second-guessed the stated purpose of the Letter and Singer's declaration.

The ramifications of this dangerous precedent are enormous. Every time an attorney sends a cease-and-desist or demand letter, she and her client risk being

"harassed subsequently by derivative tort actions" that turn on the subjective thought processes of the attorney and client. Indeed, as one commentator on the Court of Appeal's opinion observed, "[I]s a lawyer (and a client) now at risk of being sued for defamation every time such a letter is sent without following up with a lawsuit? Doesn't that encourage – in fact almost mandate – that more lawsuits be filed?" (McPherson, *When Is a Demand Letter Considered Just a 'Bluff'?*, L.A. Daily J. (Nov. 22, 2017).)

This Court should revisit the standard for applying the litigation privilege to make clear that it does not demand a fact-based inquiry into attorney-client privileged communications and attorney work product. The Court should also resolve conflicts in the lower courts regarding whether efforts at prelitigation settlement are privileged and regarding the burden of proof in establishing the applicability of the litigation privilege.

A. The Court Should Clarify that Application of the Litigation Privilege Turns on the Nature of the Communication, Not on Subjective Intent

The litigation privilege, though codified in California (Civ. Code, § 47, subd. (b)), is rooted in common law. (See Rest.2d Torts § 586.) The phrase "good faith and under serious consideration," derives from comments to the Restatement:

> As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration.

(*Id.*, com. e.) Other comments in the Restatement make clear, however, that the privilege is absolute and an attorney's "purpose" in making the statement is irrelevant. (*Id*., com. a.)

This Court has never held to the contrary that the "good faith and under serious consideration" standard requires inquiry into an attorney's subjective "purpose." The Court of Appeal misinterpreted the standard to require just such an inquiry. The Letter on its face was a communication "preliminary to a proposed judicial proceeding." It was written on Singer's law firm letterhead, was captioned a "Confidential Legal Notice," and identified Singer as "litigation counsel." (1 CT 173.) It notified media entities of Cosby's legal and factual basis for a defamation claim, and specifically informed them that they would be "acting recklessly and with Constitutional malice" – the legal standard for a defamation claim – if they disseminated Dickinson's allegations. (1 CT 174.) The letter explicitly referenced proposed litigation, stating that if they recklessly disseminated the information, "all those involved will be exposed to very substantial liability" and would "proceed at [their] peril." (1 CT 175.) The letter concluded:

> This does not constitute a complete or exhaustive statement of all of my client's rights or claims. Nothing stated herein is intended as, nor should it be deemed to constitute a waiver or relinquishment, of any of my client's rights or remedies, whether legal or equitable all of which are hereby expressly reserved. This letter is a confidential legal communication and is not for publication.

(*Id*.) Notwithstanding its obvious litigation-related content, the Court of Appeal looked behind the Letter

to question Singer's subjective intention and to find "a prima facie inference that Cosby sent the demand letter without a good faith contemplation of litigation seriously considered."

The court's opinion is in conflict with other courts that have held that the litigation privilege applies "without regard to 'morals, ethics or intent.'" (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922.) Courts have found demand letters and other similar prelitigation communications to be covered by the litigation privilege without an analysis of the subjective intention of the speaker. (See *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577-578 [demand letter by general counsel accusing plaintiff of fraudulently misrepresenting creditworthiness of debtor]; *Izzi v. Rellas* (1980) 104 Cal.App.3d 254, 262, [attorney's response to plaintiff's demand letter, accusing plaintiff of extortion]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 782-783, [letter articulating legal claims and threatening to file complaint with Attorney General's office].)

In reaching its contrary conclusion, the Court relied heavily on *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, where the court concluded that the litigation privilege did not protect prelitigation communications between parties who ultimately ended up in litigation. In *Edwards,* however, "the record show[ed] that appellants never suggested litigating their claims, threatened lawsuits, or even made any settlement demands...such as would justify respondents in a good faith apprehension that appellants *in fact* proposed resorting to the court to resolve their dispute." (*Id.* at p. 38.) The court here took a giant leap when it applied the standard to second-guess

a "confidential legal communication" from "litigation counsel" that threatened litigation and set forth the viable legal bases for a lawsuit.

Intervention is necessary to clarify that determining the applicability of the litigation privilege to a facially litigation-related communication does not require a foray into the mental processes of the attorney making the communication. Such mental processes are well-guarded by the privileges and protections afforded attorney-client communications and attorney work product. Requiring proof of an attorney's subjective intent encourages discovery and testimony regarding confidential information revealing the strategy of an attorney and client in making prelitigation demands, undermining the attorney-client relationship:

> Another lawsuit creates the potential for a conflict of interest with the client should the attorney find it necessary to disclose client confidences for a successful defense. The attorney may also be subject to intrusive discovery proceedings questioning his or her motives, strategies, and work product.

(Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers* (2004) 31 Pepp. L.Rev. 915, 923.)

A better formulation can be found in *Izzi, supra,* where the Court of Appeal stated that the statement must be made during "proceedings which have the real potential for becoming a court concern." (*Izzi, supra,* 104 Cal.App.3d at p. 262.) A "real potential" standard would exclude truly "hollow threats of litigation" and would recognize that "most potential abuse of this privilege for prelitigation communications can be prevented by enforcement of the relevancy requirement."

(*Lerette, supra,* 60 Cal.App.3d at p. 578 & fn. 6.) Statements, such as Singer's, that identify real legal claims and discuss facts that are directly related to those claims, are properly included within the litigation privilege.[7]

B. The Court Should Secure Uniformity of Decision on the Issue of Whether the Litigation Privilege Protects Statements Made in Furtherance of Prelitigation Settlement

The Court of Appeal's basis for finding an inference that Singer's letter did not fall within the litigation privilege was that "(1) the demand letter was sent *only* to media outlets which had not yet run the story but had indicated an intention to do so; and (2) Cosby never sued any media outlet which ran the story." (Op. 39.) The court thus relied on the fact that the letter was seeking a non-litigation resolution of the stated legal claims – the non-publication of the defamatory material – as its justification for not applying the litigation privilege. The courts of appeal have been conflicted on the applicability of the litigation privilege to such cease-and-desist demands.

In *Lerette*, *supra*, the court held the litigation privilege protected a settlement demand letter:

> [A]s any competent attorney is aware, access to the courts is not an end in itself but only one means to achieve satisfaction ... If this can be obtained without resort to the courts, even without the filing of a lawsuit – it is

[7] This Court should also clarify that, with the standard properly formulated to focus primarily on primarily objective factors rather than subjective intent, applicability of the litigation privilege will ordinarily be a question of law, not fact. (See, e.g., *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.)

> incumbent upon the attorney to pursue such a course of action first.... It is equally well established legal practice to communicate promptly with a potential adversary, setting out claims made upon him, urging settlement, and warning of the alternative judicial action.

(*Lerette*, *supra*, 60 Cal.App.3d at p. 577 [citations omitted].) Other cases have similarly applied the litigation privilege to demand letters and cease-and-desist letters. (See, e.g., *Blanchard, supra,* Cal.App.4th at pp. 920, 922 [plaintiffs may not "avoid the litigation privilege by arguing that the statements were published to coerce a settlement"]; *Aronson*, *supra*, 58 Cal.App.4th at pp. 270-271 [litigation privilege applied to demand letter].)

Here, the Court of Appeal relied upon *Edwards, supra*, which held that the litigation privilege did not apply to certain prelitigation settlement communications. The *Edwards* court rejected other courts' rationale that settlement is a necessary and desirable part of the litigation process:

> The strong public policy favoring settlement and the resolution of disputes without resort to litigation, with which we agree, is simply unrelated to the rationale of encouraging free access to the courts on which the privilege is based.

(*Edwards*, *supra*, 53 Cal.App.4th at p. 33; see also *id.* at p. 35, fn. 10.) However, the "settlement" communications at issue in *Edwards* were years-long discussions between the parties that made no reference to litigation. (*Id.* at pp. 37-38; see also *Aronson*, *supra*, 58 Cal.App.4th at pp. 267-268 [noting that "in *Edwards*,

the court was faced with an extreme situation, where the statements were very remote in time from the actual litigation"].)

The Court of Appeal's extension of *Edwards* to the letter here creates a troubling precedent that places at risk every attorney who writes a demand or cease-and-desist letter. Such letters are an important, often critical, part of an attorney's representation of a client in litigation. Frequently, the interests of both the clients and the courts are better served by informal resolution than by litigation. (See *Lerette*, *supra*, 60 Cal.App.3d at p. 577.) Here, Singer's letter played the additional essential role of putting the media outlets on notice that the statements they were planning to disseminate were false. Because knowledge of falsity or reckless disregard of the truth were necessary predicates to a defamation action by a public figure, the letter furthered the litigation purpose of developing the proof to sustain the action. This Court should make clear that such letters fall within the litigation privilege.

C. The Court Should Resolve the Conflict Among California Courts Regarding the Burden of Proof in Establishing the Litigation Privilege

As the Court of Appeal noted, "there is some dispute in the case law as to which party bears the burden of proof on an affirmative defense in the context of an anti-SLAPP motion." (Op. 37-38.) While some courts have stated that "a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense" (see, e.g., *Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676), most have concluded that the litigation privilege presents "a

substantive defense a plaintiff must overcome to demonstrate a probability of prevailing[.]" (See, e.g., *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485; *Rohde v. Wolf*, *supra*, 154 Cal.App.4th at pp. 35-37; *Dove Audio*, *supra*, 47 Cal.App.4th at pp. 782 784.)

The Court of Appeal claimed that it "need not resolve the dispute here." (Op. 38.) However, the court in fact *did* place the burden on Cosby. Despite the fact that the substance of Singer's letter asserted legally viable claims and explicitly threatened litigation, the court placed an additional burden on Cosby to prove that litigation was actually seriously contemplated.

The facts the court relied upon do not support an inference that litigation was not in good faith under serious contemplation. That Singer approached the media outlets before they ran the story is irrelevant to whether litigation was under serious contemplation. As discussed, it is common for an attorney to communicate a demand to refrain from conduct in an attempt to head off litigation or, if that is not possible, to establish the necessary predicates to litigation. Such conduct is consistent with, not antithetical to, the purposes of the litigation privilege.

Second, the fact that litigation did not ultimately ensue is insufficient to render a demand letter not in "good faith." Courts have repeatedly found the failure to institute a lawsuit does not remove a prelitigation communication from the privilege. (See, e.g., *Blanchard*, *supra*, 123 Cal.App.4th at pp. 920-921; see also *Aronson*, *supra*, 58 Cal.App.4th at pp. 270-271; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 36.)

The holding of the court here creates a precedent that discourages meaningful communications to

resolve disputes, and instead encourages attorneys to file protective lawsuits. It also creates a break with California policy which has long been protective of the attorney-client privilege. There are myriad practical and strategic reasons why attorneys and their clients choose not to initiate litigation, yet this opinion would force attorneys and their clients to divulge their strategic thought process in order to establish the litigation privilege. This Court should address these unsettled, critical issues. Without this Court's review, attorneys, who often rely on the "demand letter" as an effective litigation tool, are left guessing when they may use it to promote settlement or to protect the rights of their clients.

CONCLUSION

For the reasons set forth above, this Court should grant Mr. Cosby's petition for review.

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DATED: January 2, 2018

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this document consists of 8,300 words as counted by the Microsoft Word processing program used to generate the petition.

Dated: January 2, 2018

/s/ Becky S. James
Becky S. James

APPENDIX F

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November 18, 2014

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Re: Bill Cosby / Janice Dickinson, *et al.*

Dear Mr. Cibrowski:

We are litigation counsel to Bill Cosby. We are writing regarding the planned *Good Morning America* segment interviewing Janice Dickinson regarding the false and outlandish claims she made about Mr. Cosby in an *Entertainment Tonight interview,* asserting that he raped her in 1982 (the "Story"). That Story is fabricated and is an outrageous defamatory lie. In the past, Ms. Dickinson repeatedly confirmed, both in her own book and in an interview she gave to the *New York Observer* in 2002, that back in 1982 my client "blew her off" after dinner because she did not sleep with him. Her new Story claiming that she had been sexually assaulted is a defamatory fabrication, and she is attempting to justify this new false Story with yet another fabrication, claiming that Mr. Cosby and his lawyers had supposedly pressured her publisher to remove the sexual assault story from her 2002 book. That never happened, just like the alleged rape never happened. Prior to broadcasting any interview of Ms. Dickinson concerning my client, you should contact Harper Collins to confirm that Ms. Dickinson is lying.

Neither Mr. Cosby nor any of his attorneys were ever told by Harper Collins that Ms. Dickinson had supposedly planned to write that he had sexually assaulted her, and neither Mr. Cosby nor any of his representatives ever communication with the publisher about any alleged rape or sexual assault story planned for the book. You can and should confirm those facts with Harper Collins. Because you can confirm with independent sources the falsity of the claim that my client's lawyers allegedly pressured the publisher to kill the story, it would be extremely reckless to rely on anything Ms. Dickinson has to say about Mr. Cosby since the story about the publisher is patently false.

Ms. Dickinson completely fabricated the Story of alleged rape. In a transparent effort to justify the glaring contradiction between her new rape claim and what she wrote in her book and what she told to the *New York Observer* in her September 9, 2002 interview *"Interview With a Vamp,"*[1] she also manufactured the story that my client and my client's lawyers pressured her publisher to take the purported rape story out of her 2002 book. If you contact Harper Collins, the publisher will undoubtedly confirm that Mr. Cosby and his lawyers were never told that Ms. Dickinson claimed she had been raped and intended to write about it in her book. The first Mr. Cosby and his lawyers ever heard of Ms. Dickinson's specious rape allegation was not back in 2002, it was <u>now</u>, in Ms. Dickinson's *Entertainment Tonight* interview, a dozen years after Ms. Dickinson's book was published, a dozen years after she confirmed to the *New York Observer* what she wrote in her book, and more than 30 years after their dinner in Lake Tahoe.

Prior to publication of Ms. Dickinson's book, her publisher sent the pages about Mr. Cosby to his publicist, who responded "good luck." There was no mention of rape or sexual assault whatsoever. Nobody tried to kill any sexual assault or rape story. These facts can be confirmed with the publisher. If you proceed with the planned segment with Janice Dickinson and if you disseminate her Story when you can check the facts with independent sources at

[1] <http://observer.com/2002/09/interview-with-the-vamp/>

Harper Collins who will provide you with facts demonstrating that the Story is false and fabricated, you will be acting recklessly and with Constitutional malice.

It would be extraordinarily reckless to disseminate this highly defamatory Story when Ms. Dickinson herself told an entirely different story in her book, when she confirmed that same entirely different story in an interview with the *New York Observer* a dozen years ago, when you may independently confirm with her publisher the falsity of her new assertion that my client's lawyers supposedly pressured Harper Collins to delete the alleged rape story from her book, and when her new allegation of rape was made for the first time only now, when it appears that she seeking publicity to bolster her fading career.

More than three decades have passed since the 1982 Lake Tahoe dinner described in Ms. Dickinson's book about how she was *not* intimate with my client, and a dozen years have passed since her book came out and she confirmed that same story to the media. You can easily confirm that the manufactured story that my client's lawyers pressured the publisher to take the rape story out of the book is utterly fabricated. Since at a minimum Ms. Dickinson fabricated the assertion my client's lawyers pressured the publisher more than a decade ago to take out the sexual assault story – a story we heard now for the first time – it would be reckless to rely on Ms. Dickinson in this matter.

Ms. Dickinson's new assertion that she was raped by my client back in 1982 is belied by her own words, which completely contradict her current fabrications. We caution you in the strongest possible terms to refrain from disseminating the outrageous false Story. If *Good Morning America* proceeds with its planned segment with Ms. Dickinson and recklessly disseminates it instead of checking available information demonstrating its falsity, all those involved will be exposed to very substantial liability.

You proceed at your peril.

This does not constitute a complete or exhaustive statement of all of my client's rights or claims. Nothing stated herein is intended as, nor should it be deemed to constitute a waiver or relinquishment, of any of my client's rights or remedies, whether legal or equitable, all of which are hereby expressly reserved. This letter is a confidential legal communication and is not for publication.

Sincerely

/s/ Martin D. Singer
Martin D. Singer
Of
Lavely & Singer
Professional Corporation

MDS/lbg

cc: Greg Macek, Principal Counsel, ABC, Inc. (via email), Mr. William H. Cosby, John Schmitt, Esq. (via email), Mr. David Brokaw (via email), Lynda B. Goldman, Esq.

APPENDIX G

STATEMENT OF MARTIN D. SINGER
ATTORNEY FOR BILL COSBY

Janice Dickinson's story accusing Bill Cosby of rape is a lie. There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002. Ms. Dickinson did an interview with the *New York Observer* in September 2002 entitled "Interview With a Vamp" completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said "she didn't want to go to bed with him and he blew her off." Her publisher Harper Collins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book. The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off. Documentary proof and Ms. Dickinson's own words show that her new story about something she now claims happened back in 1982 is a fabricated lie.

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