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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EARTHRENEW, INC.,

Cross-complainant and Respondent,

v.

CROP PRODUCTION SERVICES, INC.,

Cross-defendant and Appellant.

F059906

(Super. Ct. No. 09CECG02733)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald R. Franson, Jr., Judge.

O'Melveny & Myers, Daniel M. Petrocelli and David Marroso for Plaintiff and Appellant.

Heffernan, Seubert & French, William J. Frimel and Christopher Edgar for Defendant and Respondent.

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Respondent EarthRenew, Inc. (ER), as the developer of a specialized organic fertilizer product (the Product), sought to market the Product in the Western United States. Appellant Crop Production Services, Inc. (CPS) is a large distributor of agricultural products in that region. In May 2009, an agreement was signed by representatives of ER and CPS, giving CPS the exclusive right to retail the Product in the Western United States and obligating CPS to purchase a large percentage of the Product to be produced there by ER (the Contract). At that time, ER was in the process of raising capital through a private placement facilitated by Royal Bank of Canada, which would provide the financing needed for the construction of production facilities in the Western United States. ER informed CPS of this fact and that, in seeking such financing, ER was relying on the revenue it would receive from the Contract with CPS. Two months after the Contract was signed, CPS filed a lawsuit for declaratory relief asking the trial court to declare the Contract void or invalid based on an alleged lack of authority of the person who signed it on behalf of CPS. The next day, a CPS director personally contacted Royal Bank of Canada and notified it of CPS's lawsuit to nullify the Contract with ER. As one might expect, ER's financing efforts through Royal Bank of Canada fell through. ER then filed a cross-complaint which, after an amendment, included tort causes of action against CPS for deceit, intentional and negligent interference with prospective economic advantage (the amended cross-complaint).¹ CPS responded by filing a special motion to strike the tort causes of action in the amended cross-complaint under Code of Civil Procedure section 425.16 (also known as an anti-SLAPP motion).² The trial court denied

¹ The amended cross-complaint also alleged causes of action for breach of contract.

² Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

“SLAPP” is “an acronym for ‘strategic lawsuit against public participation.’” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

the motion on the ground that CPS failed to make a threshold showing that the tort causes of action in the amended cross-complaint arose out of conduct protected by section 425.16. CPS appeals from that order, arguing that (i) it demonstrated the challenged causes of action arose out of protected conduct, and (ii) ER failed to establish a probability of prevailing on those causes of action. We agree with CPS on both points, and accordingly reverse with instructions that the trial court enter a new order granting the special motion to strike.

FACTS AND PROCEDURAL BACKGROUND

Negotiations and Preliminary Agreements

In early 2009, ER approached CPS with an “exclusive opportunity” to retail ER’s “premium, proprietary Organic Matter Fertilizer” (the Product). CPS was interested in the proposal, and the parties began negotiations.

In one of the early negotiating sessions, ER informed CPS that it had 1,500 tons of the Product (at that time ER’s entire inventory) at the ER facility in Canada. CPS informed ER that it wanted to purchase the entire inventory. On March 26, 2009, the parties entered a “Purchase Agreement–Bulk Product” (Initial Purchase Agreement), under the terms of which CPS purchased 1,500 tons of the Product, with payment due in 30 days. The Initial Purchase Agreement made CPS a nonexclusive retailer of the Product. The Initial Purchase Agreement called for the Product to be delivered at ER’s Canadian facility. However, at CPS’s request, ER arranged to deliver the Product to CPS’s Bakersfield, California facility, in two shipments that took place between April and June 2009. In making these shipments, the parties discovered that CPS, as the importer, was required to obtain a permit to receive the Product. Accordingly, CPS applied for a permit that was issued in July 2009.

On April 7, 2009, the parties signed a letter of intention stating their mutual objective to form a future business relationship consisting of (i) a product offtake agreement giving CPS the exclusive right to retail the Product produced at ER’s

Canadian facility and at six planned facilities to be built in the Western United States and (ii) a branding license agreement.

On April 8, 2009, ER met with Bruce Waterman, a director of CPS and the chief financial officer of Agrium, Inc., the parent company of which CPS was allegedly a wholly owned subsidiary. They discussed the agreements contemplated in the letter of intention, and ER advised Waterman that it was seeking substantial financing to construct the planned facilities in the Western United States. ER provided Waterman with a copy of the offering memorandum relating to ER's financing efforts through Royal Bank of Canada. Waterman was allegedly advised that ER "would be relying on the significant and continuing stream of revenue it could expect in the coming years as a result of the proposed [ER]-CPS agreements." Allegedly, Waterman told ER that the proposed agreements had his full support, and Waterman left the negotiation of the agreements outlined in the letter of intention to Bob Duckworth, CPS's general manager of fertilizer and chemical purchasing, and to CPS's outside counsel. Waterman allegedly told ER's chief executive officer that in negotiating with Duckworth, ER was "talking to the right guy."

The Contract is Executed

On May 20, 2009, representatives of ER and CPS executed a product offtake agreement and a licensing agreement, as contemplated by the letter of intention. The two agreements also incorporated the Initial Purchase Agreement. Allegedly, Duckworth directed Phil Mullins, CPS's new products and marketing manager, to execute the two agreements. For convenience, we refer to the two agreements executed on May 20, 2009, as simply the Contract. Under the terms of the Contract, CPS was given the exclusive right to retail the Product in the Western United States, and CPS had the obligation to purchase, on a monthly basis, a minimum of 80 percent of the total of the Product produced by ER in that territory.

The day after the parties executed the Contract, they issued a press release to announce their newly formed business relationship, and this news received widespread coverage in an array of business media outlets.

CPS Repudiates the Contract

One week after the Contract was signed, a division manager at CPS informed ER that “certain executive management at CPS believed the [Contract was] invalid because Mr. Mullins did not have the authority to sign [it].” According to ER, it tried to resolve the situation with CPS, and Duckworth allegedly assured ER that the issues had been “smoothed over” and that CPS was in the process of working on the logistics of moving the Product from ER’s facility to CPS. ER then resumed trying to raise capital from various investors through Royal Bank of Canada.

Near the end of June 2009, invoices presented to CPS had become due. ER attempted to find out why the invoices had not been paid pursuant to the Contract. ER tried to contact Duckworth at CPS, but could not reach him. ER then contacted Stephen Dyer, the regional manager of the western region of CPS. In July 2009, Dyer told ER that he did not have the invoices or the Contract, and was not aware of them. ER promptly sent those documents and other information to Dyer. On July 27, 2009, Christianne Carin, ER’s chief executive officer, and Dustin Gemmill, ER’s in-house counsel, spoke to Dyer by telephone. ER emphasized that its financing was contingent on moving forward with the Contract, and Gemmill sent Dyer the then current offering memorandum, which ER had previously sent to Duckworth and Waterman.

On or about July 30, 2009, Dyer wrote to ER by e-mail that he “was only recently informed about the [Contract] between [ER] and CPS,” that “there are serious issues about the validity and enforceability of [the Contract],” and that “[the Contract], therefore, should not be relied upon by you or others.” ER promptly replied that they had not received notice of any invalidity of the Contract, the parties had been performing their obligations under the Contract for the past two months, and ER had relied on the

Contract by substantially changing its position with financial advisors, investors, debt providers and others.

On July 31, 2009, Carin e-mailed Waterman, stating that she believed Dyer, “being new to the position, is not fully informed about a number of points and may not fully understand the seriousness” of the situation. Carin reminded Waterman that ER was finalizing its equity financing and that the Contract was critically important to that financing.

On August 3, 2009, Waterman responded that “we have filed a legal proceeding asking for a declaration that the [C]ontract is not valid or enforceable.” The following day, Waterman called Royal Bank of Canada—ER’s financial consultant—to inform the bank that CPS had filed a lawsuit against ER alleging that the Contract was void or invalid. As a result of CPS’s course of conduct, ER was unable to obtain the financing it sought under the offering memorandum through Royal Bank of Canada.

CPS’s Declaratory Relief Action and ER’s Cross-complaint

As indicated, CPS filed a complaint for declaratory relief against ER on August 3, 2009. In that complaint, CPS alleged the Contract was signed on behalf of CPS by a low-level employee, who “had no actual authority” to sign such documents or bind the company. Accordingly, CPS sought a judicial declaration that the Contract was “void, invalid, and unenforceable” based on said lack of authority, as well as on the further grounds of alleged unconscionability, mistake, and fraud in the inducement.

On August 13, 2009, ER filed its initial cross-complaint, stating causes of action for breach of contract and interference with prospective economic advantage.³ The latter tort cause of action was apparently based on CPS’s breach of contract. The cross-complaint alleged as follows: “CPS intentionally engaged in wrongful conduct designed to interfere with or disrupt [ER’s] economic relationships with its financial advisors and

³ The cross-complaint was erroneously labeled a counterclaim.

the Investors. Specifically, CPS *breached its contract* with [ER] in order to jeopardize and/or destroy [ER's] ability to raise capital so that CPS could create leverage to force a walk-away or renegotiation of the [Contract] on terms far more beneficial to CPS” (Italics added.) CPS demurred to the tort cause of action on the ground that merely breaching a contract, even if intentional, is not sufficient to state a cause of action for intentional interference with prospective economic advantage.

Rather than oppose the demurrer, ER filed an amended cross-complaint against CPS. The amended cross-complaint, after alleging three causes of action for breach of contract, alleged the following *tort* causes of action: “Deceit–Suppression of Fact” (fourth cause of action); “Intentional Interference With Prospective Economic Advantage” (fifth cause of action); and “Negligent Interference With Prospective Economic Advantage” (sixth cause of action). The alleged factual basis for the fourth cause of action was CPS’s “failure to disclose” to ER that CPS “believed” as early as May 26, 2009, that the Contract was “not valid or enforceable” and “that [CPS] would not be performing under the [Contract].” More specifically, it was alleged: “[I]nstead of promptly informing [ER] of these facts, CPS held them until [ER] was close to securing funding ... and had lost months of sales cycle time. CPS then disavowed the [Contract] and *immediately* ‘informed’ [ER’s] financial advisors of this fact, so that [ER] would not be able to close its financing absent a renegotiation of the [Contract] and a re-establishment of a heavily modified contractual relationship with CPS.” Further elaboration of these events was set forth in the background allegations at paragraph 51 of the amended cross-complaint, which stated: “Seventy-four days after executing the [Contract], and knowing that [ER] was deep into and committed to its financing program (which program heavily relied on the [Contract] as demonstrative evidence of the company’s value), CPS informed [ER] *via* a lawsuit that it was now claiming that the [Contract was] void and unenforceable, and that CPS refused to perform under the [Contract]. The morning after CPS filed suit, it personally and unilaterally contacted

[ER's] financial advisors to advise them that the [Contract], in its opinion, [was] invalid. Based upon these actions, [ER] is informed and believes, and thereon alleges, that CPS timed its repudiation of the [Contract] to maximize its leverage in renegotiating the [Contract] on terms more beneficial to CPS.” These identical facts were re-alleged and incorporated into the fifth and sixth causes of action for intentional and negligent interference with prospective economic advantage.

CPS's Anti-SLAPP Motion

Because the new allegations in the amended cross-complaint alluded to CPS's lawsuit and to CPS's communication with a third party concerning that lawsuit, CPS filed a special motion to strike the fourth, fifth and sixth causes of action in the amended cross-complaint under section 425.16. CPS's motion was made on the grounds that (i) ER's tort claims arose from protected activity under section 425.16 and (ii) ER could not establish a likelihood of prevailing on the merits of those tort claims. As to the second ground, CPS pointed out that the conduct complained of was privileged under Civil Code section 47, subdivision (b),⁴ and that the conduct was not “independently wrongful” as required to maintain a claim for tortious interference with prospective economic advantage. CPS also filed a general demurrer to the same three tort causes of action, raising many of the same deficiencies.

In opposition to the special motion to strike, ER argued that the tort causes of action did not arise from CPS's conduct of filing a declaratory relief lawsuit or contacting ER's investment banker, but rather from CPS's failure to disclose for two months that it would not be performing under the Contract, all the while knowing of ER's substantial reliance on the existence of the Contract, followed by CPS's sudden disavowal at a critical moment in the financing process in order to gain unfair leverage to renegotiate. ER explained that the references in the amended cross-complaint to CPS's lawsuit and

⁴ This privilege is sometimes referred to as the litigation privilege.

communication with Royal Bank of Canada were simply to highlight the means used by CPS to communicate to ER its disavowal of the Contract and to highlight CPS's wrongful motive. In fact, at the hearing of the special motion to strike, ER's counsel offered to allow the trial court to strike out the allegations referring to the lawsuit and communication with Royal Bank of Canada. CPS objected to ER's attempt to remove said allegations and insisted that the trial court was required to rule on the causes of action "as drafted." CPS maintained that under a plain reading of the amended cross-complaint, ER's lost financing was due to CPS's "protected" conduct of filing the lawsuit and notifying Royal Bank of Canada. Further, CPS argued that even if the challenged causes of action were "mixed" in the sense that some of the alleged conduct was not protected by the anti-SLAPP statute, the motion must still be granted unless the protected activity was "merely incidental" to the causes of action, citing *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308. CPS's position was that the lawsuit and communication to the bank were not incidental.

At the conclusion of oral argument, the trial court took the special motion to strike and the demurrer under submission.

On March 22, 2010, the trial court entered its written order on the special motion to strike and demurrer. In addressing the special motion to strike, the trial court concluded that ER's tort causes of action in the amended cross-complaint did not arise out of activities protected by section 425.16, but rather out of a "disavowal" of the Contract. That is, the trial court held CPS's declaratory relief lawsuit and its communication to ER's bank were merely the method used of communicating its disavowal of the Contract, and even though such conduct may have "triggered" the events that followed, the conduct was merely *incidental* and not the basis of the

challenged causes of action.⁵ Accordingly, the trial court denied the special motion to strike based solely on the first prong of the motion.

Although the demurrer ruling is not the subject of this appeal, we note the trial court sustained CPS's demurrer as to all three tort causes of action. Leave to amend was denied as to the deceit claim, since "there can be no tort damages for the failure [of CPS] to inform [ER] when the contract was going to be breached." However, leave to amend was granted as to the two interference torts, because the trial court believed that ER might potentially be able to plead a cause of action that was not barred by the litigation privilege.

On April 2, 2010, CPS filed its notice of appeal from the trial court's order denying the special motion to strike.

DISCUSSION

I. Standard of Review

We review de novo the trial court's ruling on an anti-SLAPP motion. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) "Resolving the merits of a section 425.16 motion involves a two-part analysis, concentrating initially on whether the challenged cause of action arises from protected activity within the meaning of the statute and, if it does, proceeding secondly to whether the plaintiff can establish a probability of prevailing on the merits. [Citation.]" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699.) In our de novo review, "[w]e consider "the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based." (§ 425, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight

⁵ The trial court stated: "[F]iling the instant litigation was only the method by which the disavowal was communicated, and the method of communication cannot privilege the wrongful action. If CPS had simply disavowed the contracts in a letter, and not sued first, [ER] could have filed a lawsuit against CPS with the same causes of action on the same theories."

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.]" (*Flatley v. Mauro, supra*, at p. 326.)

II. Overview of the Anti-SLAPP Statute

Section 425.16, subdivision (b)(1), provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." An act in furtherance of a person's right of petition or free speech broadly includes, among other things, "any written or oral statement or writing made in connection with an issue under consideration" by a "judicial body." (*Id.*, subd. (e).)

"[T]he Legislature enacted section 425.16, the anti-SLAPP statute, to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]" (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315.) "The Legislature authorized the filing of a special motion to strike such claims (§ 425.16, subds. (b)(1), (f)), and expressly provided that section 425.16 should 'be construed broadly.' [Citations.]" (*Ibid.*)

The resolution of an anti-SLAPP motion requires the court to engage in a two-step process: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in

the statute. [Citation.]” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, “[i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Ibid.*) If the defendant has succeeded in showing that the challenged causes of action are based on conduct protected by the statute, and the plaintiff does not or cannot demonstrate the probability of prevailing on those claims, the special motion to strike will be granted. (§ 425.16, subd. (b)(1); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1181.)

III. Challenged Claims Arose From Protected Activity Under Section 425.16

Under the first step of the analysis under section 425.16, CPS was required to make a threshold showing that the challenged tort causes of action in ER’s amended cross-complaint arose from protected activity within the meaning of the statute. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) A party meets this burden by demonstrating the acts underlying the plaintiff’s cause(s) of action came within one of the categories of section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Under subdivision (e) of section 425.16, protected petitioning activity includes “any written or oral statement or writing made *in connection with* an issue under consideration or review by a ... judicial body.” (Italics added.) Thus, filing a civil complaint is a protected activity (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055), along with statements, writings and pleadings made in connection with civil litigation (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35). Communications made in connection with *anticipated* litigation are likewise protected. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1259, 1263, 1270.) “[C]ourts have adopted ‘a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.’

[Citation.]” (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.)

In its appeal, CPS contends the tort causes of action in ER’s amended cross-complaint are based on protected conduct of filing the declaratory relief lawsuit and notifying an interested party, Royal Bank of Canada, of that lawsuit. CPS argues that such litigation-related conduct falls squarely within the protection of the anti-SLAPP statute.

We agree that this conduct, as such, is protected under the anti-SLAPP statute. It is not disputed that filing a lawsuit is protected activity. More importantly here, so are statements or communications made in connection with civil litigation (*Rohde v. Wolf, supra*, 154 Cal.App.4th at p. 35), including statements made to *third persons* with an interest in the litigation (see, e.g., *Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1270 [prelawsuit letter to nonparty customers about an employee in competition who allegedly misappropriated customer lists was protected by § 425.16]; *Contemporary Services Corp. v. Staff Pro Inc., supra*, 152 Cal.App.4th at pp. 1054-1055 [an e-mailed “litigation update” describing the parties’ contentions and court rulings to several nonparty customers or potential customers who had some involvement with the litigation as witnesses was protected by § 425.16]; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6 [homeowners’ association’s letter to individual members describing negative impact of party’s claims in litigation with the association was protected]).

In this case, Royal Bank of Canada clearly had an interest in the declaratory relief lawsuit in which CPS challenged the validity of the Contract, because the bank was attempting to arrange substantial financing for ER that depended on the existence of the Contract and the revenues that would be generated therefrom. ER consistently reminded CPS that Royal Bank of Canada was, in its financing efforts, specifically relying on the existence of the Contract. Royal Bank of Canada was also an interested party, because it

would inevitably be a participant in the litigation as a material witness regarding ER's damage claims. At the same time, CPS had a legitimate interest in mitigating the extent of its potential damage liability in the event it was found to have breached the Contract, which meant that it had reason to notify the bank of the lawsuit in order to prevent further reliance—by ER or anyone else—on the Contract's validity. On this record, it is apparent to us that the communication by CPS to Royal Bank of Canada was made in connection with litigation, relating to that litigation, to an interested third party. Therefore, we conclude that said communication was a protected activity under subdivision (e) of section 425.16; that is, it constituted a “statement or writing made *in connection with* an issue under consideration or review by a ... judicial body.” (§ 425.16, subd. (e), italics added.)

However, simply because a pleading refers to protected activity does not mean that the anti-SLAPP statute applies. As explained more fully below, the moving party must show that the challenged causes of action were *based on* or *arose out of* that protected activity. According to ER (and the trial court), ER's tort claims did not arise out of CPS's lawsuit or any communication related thereto, but out of unprotected activities such as CPS's misleading conduct (e.g., failure to disclose its intention to repudiate), followed by the repudiation of the Contract at a critical time in ER's pursuit of financing, in order to gain unfair leverage. In ER's view (and the trial court's as well), CPS's declaratory relief lawsuit and communication to Royal Bank of Canada were “incidental” and merely constituted methods of communication of the real dispute. In its appeal, CPS contends that the trial court erred and that ER's tort claims were necessarily based to a significant degree on the protected conduct. We agree with CPS.

A claim does not arise from constitutionally protected activity simply because it is triggered by such activity or is filed after it occurs. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 76-78.) “[T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech.

[Citations.]” (*Id.* at p. 78.) We focus on the “substance” of the lawsuit (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1568), or the “*principal thrust*” or “*gravamen*” of the action (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; accord, *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477). Accordingly, “when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” (*Martinez v. Metabolife Internat., Inc.*, *supra*, at p. 188.) “‘If the mention of protected activity is “only incidental to a cause of action based essentially on nonprotected activity,” then the anti-SLAPP statute does not apply.’ [Citation.]” (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1160.)

Here, we agree with CPS’s position that the challenged tort causes of action were *based on* the protected activity. We reach that conclusion for two reasons. First, the context in which the protected activity was inserted into the amended cross-complaint revealed the importance of that protected activity to ER’s tort claims. The initial cross-complaint said nothing about CPS filing a lawsuit or calling Royal Bank of Canada to notify ER’s financial consultant about the lawsuit. Instead, ER’s original pleading claimed that CPS’s breach of the Contract was the only conduct that interfered with ER’s prospective economic relationship with Royal Bank of Canada. It was not until after CPS demurred on the ground that something more than a breach of contract must be alleged to create *tort liability*⁶ that ER then added the new allegations referring to the protected

⁶ On this point, California law is clear that allegations that a breach was maliciously motivated or deliberately timed, so as to cause damage to the plaintiff’s business, do not convert the nature of the action from a breach of contract into a tort claim. (See, e.g., *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 182-183 (*JRS Products*); *Khoury v. Maly’s of California, Inc.* (1993) 14 Cal.App.4th 612, 618 (*Khoury*); *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 478-479 (*Arntz*).

activity. Thus, the protected activity was included in the amended cross-complaint in order to present a purported basis for tort liability.

Second, it is clear that the allegations of protected conduct were not merely incidental to ER's tort causes of action. For purposes of the interference torts, it was essential for ER to allege facts constituting an actual interference or "disruption" of a prospective economic relationship by CPS and damages "proximately caused" by CPS's independently wrongful conduct. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153-1154 (*Korea Supply Co.*)). Such an interference with and disruption of the relationship at issue required some form of communication to Royal Bank of Canada. The *only* such communication alleged in the amended cross-complaint was CPS's notification to Royal Bank of Canada that CPS had filed a declaratory relief complaint. Thus, protected conduct—namely, CPS's communication to Royal Bank of Canada—was integral to the disruption of the subject economic relationship. Similarly, as alleged in ER's deceit cause of action (and re-alleged in the other tort causes of action), CPS's communication to Royal Bank of Canada prevented the closure of financing and proximately resulted in the loss of that financing. For these reasons, the protected conduct was not merely peripheral or incidental to ER's tort claims, but played a significant role that went to the principal thrust of those claims. (See, e.g., *Wallace v. McCubbin, supra*, 196 Cal.App.4th at p. 1187 [stating rule that where cause of action involves mix of protected and unprotected conduct, the anti-SLAPP statute applies unless the protected conduct was merely incidental or collateral to unprotected activity]; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672-673 [first prong of anti-SLAPP analysis met where the allegations of substantial loss resulting from protected activity could not be considered merely

incidental or collateral].) We conclude that CPS satisfied its threshold burden of showing the tort claims were based on conduct protected by section 425.16.⁷

IV. ER Failed to Show a Probability of Prevailing on the Tort Claims

We now address the second step or prong of the statutory analysis—namely, whether ER demonstrated a probability of prevailing on the challenged tort claims. In order to establish a probability of prevailing on a cause of action in the context of an anti-SLAPP motion, a plaintiff must state and substantiate a legally sufficient claim. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) “Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” [Citations.]” (*Ibid.*) That is, the plaintiff must “““make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff’s favor.”” [Citation.]” (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010.) “In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) Accordingly, “the motion to strike should be granted if the defendant ‘defeats the plaintiff’s showing as a matter of law, such as by

⁷ We disagree with the trial court’s premise that if CPS’s communication to the bank had occurred before the lawsuit was filed (e.g., a prelitigation letter), the conduct would not have been protected. The case law clearly affirms that communications preparatory to or in anticipation of litigation are likewise protected under section 425.16. (See, e.g., *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Neville v. Chudacoff*, *supra*, 160 Cal.App.4th at p. 1268.)

establishing a defense or the absence of a necessary element.’ [Citation.]” (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344.)

CPS contends that ER has not established a reasonable probability that it will be able to prevail on its tort claims. The reasons are the same as were raised by CPS in the trial court below: namely, (i) the litigation privilege of Civil Code section 47, subdivision (b), precludes liability on the tort causes of action and (ii) ER did not allege any conduct that would satisfy the “independently wrongful” element necessary to sustain claims of intentional and negligent interference with prospective economic advantage. We find the second point to be dispositive, as we now explain, and therefore we do not reach CPS’s separate argument that the litigation privilege barred ER’s tort causes of action.

Failure to Allege Independently Wrongful Conduct

Preliminarily, we note that it is unnecessary to address the deceit cause of action. As we pointed out above, the trial court sustained CPS’s demurrer to the deceit cause of action *without* leave to amend, reasoning that “there is no ... duty to disclose of an impending breach of contract” and “there can be no tort damages for the failure [of CPS] to inform [ER] when the contract was going to be breached.” Although the trial court never reached the second prong of the anti-SLAPP motion, functionally it applied the necessary legal analysis to the deceit cause of action by determining that ER could not state such a cause of action as a matter of law. Of course, a critical aspect of the second prong of an anti-SLAPP motion is the issue of whether the plaintiff *stated* or pled a legally sufficient claim. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) Had the court proceeded to the second prong of the anti-SLAPP motion, it obviously would have reached the same conclusion it did on demurrer with respect to the deceit cause of action. Since the deceit cause of action was dismissed on demurrer without leave to amend on the ground that no such cause of action may be stated on the facts of this case, and

because neither party has appealed from that ruling, we find the deceit cause of action is effectively removed from the case.

Concerning the tort claims of intentional and negligent interference with prospective economic advantage, inasmuch as the trial court did not reach the second prong of the anti-SLAPP motion, it never addressed the independent wrongfulness requirement of these causes of action in the proceedings below under section 425.16. Although it did note, in its concurrent demurrer ruling, that a failure to disclose an intention to breach a contract could not constitute independently wrongful conduct, the trial court failed to apply that reasoning in the context of the anti-SLAPP motion where, as we have held above, the burden shifted to ER to show a reasonable likelihood that it could prevail on its tort claims. We do so now, and find that ER's alleged tort claims were nothing more than breaches of contract.⁸ Accordingly, ER failed to establish that it had a reasonable likelihood of prevailing on its tort claims and the motion to strike should have been granted.

“[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful ‘by some measure beyond the fact of the interference itself.’ [Citation.]” (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, fn. omitted (*Della Penna*)). In *Korea Supply Co., supra*, 29 Cal.4th 1134, our Supreme Court summarized this requirement as follows: “To establish a claim for interference with prospective economic advantage, ... a plaintiff must plead that the defendant engaged in an independently wrongful act. [Citation.] An act is not independently wrongful merely because defendant acted with an improper motive. As we said in *Della Penna*, ‘the law usually takes care to draw lines of legal liability in a

⁸ That is, they were wholly duplicative of the existing breach of contract claims, and did not state a separate tort cause of action.

way that maximizes areas of competition free of legal penalties.’ [Citation.] The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. [Citation.] We conclude, therefore, that an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. [Citations.]” (*Id.* at pp. 1158-1159, fn. omitted.) The same requirement of conduct that is independently wrongful applies to the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 438-440.)

Here, ER failed to assert conduct that was independently wrongful. In essence, ER’s amended cross-complaint alleged that CPS breached or repudiated the Contract with a combination of bad motives and harmful timing. Allegedly, CPS knew it would be breaching the Contract for a period of time and during that time it allowed ER to continue to rely on the Contract’s validity. Further, CPS allegedly concealed its intention to disavow the Contract until a critical moment, all with the motive of forcing a renegotiation since it knew that ER was depending on the validity of the Contract to obtain financing. At the advantageous moment, CPS then filed its lawsuit and notified Royal Bank of Canada of that lawsuit. Although the allegations present a fairly unusual situation, the only substantive cause of action reflected in the alleged facts is that of breach of contract, and ER has failed to plead or otherwise identify any independently wrongful conduct that would give rise to tort liability in these circumstances.

An act is not made independently wrongful merely because of improper motives. (*Korea Supply Co., supra*, 29 Cal.4th at p. 1158.) Nor does the timing of the breach or its harmful impact on the plaintiff’s business give rise to tort liability. (*JRS Products, supra*, 115 Cal.App.4th at p. 183 [“breach of contract claim cannot be transmuted into tort

liability by claiming that the breach interfered with the promisee's business"]; *Arntz, supra*, 47 Cal.App.4th at p. 479 ["contracting party's unjustified failure or refusal to perform is a breach of contract, and cannot be transmuted into tort liability by claiming that the breach detrimentally affected the promisee's business"]; *Khoury, supra*, 14 Cal.App.4th at p. 618 ["The effect on [the] appellant's customers ... and the damage to [the] appellant's business were simply consequences of breach of contract.... [The] appellant's third cause of action is simply duplicative of his contract claim."].)

In *Khoury*, for example, the plaintiff was a beauty shop owner that sued a distributor of hair products for breach of contract and intentional interference with advantageous business relationships. The plaintiff alleged that the distributor breached its distribution agreement "with full knowledge" of the plaintiff's relationships with its customers and of said customer's strong preference for the particular brand of hair products provided by the distributor, all to "injure, destroy and otherwise interfere with [the] plaintiff's business." It was further alleged that the distributor "wrongfully, fraudulently, knowingly, intentionally and maliciously" refused to sell its product to the plaintiff in order to "induce [the] plaintiff's customers" to "cease doing business with [the] plaintiff," and to "to ruin and interfere with [the plaintiff's] beauty and supply business." (*Khoury, supra*, 14 Cal.App.4th at p. 617.) The Court of Appeal held that the trial court properly sustained the distributor's demurrer to the intentional interference claim, explaining as follows: "The sole alleged conduct of [the] respondent was the breach of contract to supply the JPM products to [the] appellant. The effect on [the] appellant's customers (with whom [the] respondent had no relations) and the damage to [the] appellant's business were simply consequences of breach of contract. If a contract plaintiff could plead in a conclusory way that the defendant maliciously intended to drive the plaintiff out of business, the tort of interference with prospective business advantage would be routinely pleaded in breach of contract cases. [Citation.] Allowing such conclusory pleading would be contrary to the cautious policy of the courts about

extending tort remedies to ordinary commercial contracts. [Citations.] [The] appellant's third cause of action is simply duplicative of his contract claim. [Citation.]" (*Id.* at p. 618.)

Similarly, in *JRS Products*, the plaintiff sued Panasonic for breach of a franchise agreement and for intentional interference with advantageous business relationships. (*JRS Products, supra*, 115 Cal.App.4th at p. 182.) The plaintiff had alleged that Panasonic breached its franchise agreement "without good cause" and with the improper motive of reducing competition and to injure JRS Products as a competitor. (*Id.* at pp. 182-183.) The Court of Appeal concluded that no basis was presented to maintain a tortious interference cause of action: "JRS assails Panasonic for a multitude of sins. But fundamentally, ... JRS complains that Panasonic terminated the contract without good cause. This complaint sounds in contract, not tort. JRS introduced voluminous evidence at trial to prove how and why the termination was wrongful. But that evidence, voluminous as it may have been, did not change the essential nature of the claim. The termination itself may have been wrongful for any number of reasons, but it remained essentially a breach of contract. Thus, the basis for JRS's claim at trial that Panasonic violated the [California Franchise Relations] Act [(Bus. & Prof. Code, § 20000 et seq.)] and engaged in anticompetitive conduct is the *very same activity* that gave rise to the claim of intentional interference—Panasonic's termination of the JRS dealer agreement. We agree with Panasonic that, wrongful or not, the termination is not 'independent' of Panasonic's interference with JRS's interest.... [A] breach of contract claim cannot be transmuted into tort liability by claiming that the breach interfered with the promisee's business." (*Id.* at p. 183; accord, *Arntz, supra*, 47 Cal.App.4th at p. 479.)

As these cases illustrate, a plaintiff cannot transmute a breach of contract action into the tort of interference with prospective economic advantage by claiming that the breach was unjustified, malicious, intentional, or by merely alleging that the breach of contract was calculated to cause damage to the plaintiff's business or economic

relationships. The breach of contract remains only that, *unless* the plaintiff is able to plead and prove that the act was “independently wrongful” based on “some constitutional, statutory, regulatory, common law, or other determinable legal standard.” (*Korea Supply Co.*, *supra*, 29 Cal.4th at pp. 1158-1159, fn. omitted.) ER has failed to do that in this case. Although ER has attempted to characterize CPS’s conduct as wrongfully motivated and timed, the essence of the cause of action remains that ER was allegedly damaged because CPS allegedly breached (repudiated) the Contract, which repudiation was made known to an interested third party. These allegations describe a breach of contract. Moreover, ER has not cogently explained a basis for concluding that the communication of the lawsuit to Royal Bank of Canada or any of the other alleged conduct on the part of CPS was independently wrongful under the above test such that it would give rise to a tort cause of action.⁹ Accordingly, ER did not meet its burden of showing it had a reasonable probability of prevailing on its tort claims, and the special motion to strike should have been granted by the trial court.

⁹ Whatever may be the *extent* of ER’s damages if it succeeds in proving a breach of contract (see, e.g., *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 969-976 [discussing rule of *Hadley v. Baxendale* (1854) 156 Eng.Rep. 145]), the cause of action sounds in contract and not in tort.

DISPOSITION

The order denying CPS's special motion to strike is reversed, with instructions that the trial court enter a new order granting the motion. Costs on appeal are awarded to CPS.

Kane, J.

WE CONCUR:

Wiseman, Acting P.J.

Gomes, J.