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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO



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| ERIC SWALLOW et al.,<br><br>Cross-complainants and Respondents,<br><br>v.<br><br>BRYAN J. ROBERTS,<br><br>Cross-defendant and Appellant. | B290542<br><br>(Los Angeles County Super. Ct. No. BC603331) |

APPEAL from an order of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Affirmed in part, reversed in part, and remanded with directions.

Skiermont Derby, Paul B. Derby, John J. O'Kane IV and Drew E. Anderson for Cross-defendant and Appellant.

Grignon Law Firm, Margaret M. Grignon, Anne M. Grignon; Vakili & Leus and Sa'id Vakili for Cross-complainants and Respondents.

Plaintiff and cross-defendant Bryan Roberts appeals from an order denying his motion to strike the cross-complaint of defendants and cross-complainants Eric Swallow and Profitable Casino, LLC (Profitable Casino) under the anti-SLAPP statute (Code Civ. Proc., § 425.16).[1] We reverse in part. Swallow's cross-complaint alleges two categories of claims. The first category includes causes of action for fraud and breach of contract. Each of those causes of action is based upon Roberts's act of filing his complaint in this lawsuit. Each therefore arises from petitioning activity that is protected under the anti-SLAPP statute, and each is barred by the litigation privilege established by Civil Code section 47, subdivision (b).

The second category (the Penal Code Claims) includes claims alleging that Roberts violated several Penal Code sections by accessing and sharing computerized documents belonging to Swallow. Those documents resided on an old server in Roberts's possession that Roberts had previously used while working with Swallow. That relationship ended, but Roberts continued to possess the server. Roberts accessed the server to share information with law enforcement officials who were investigating Swallow's business endeavors. Roberts claims that Swallow authorized him to provide the computerized information to the government; Swallow denies that he gave permission.

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[1] Subsequent undesignated statutory references are to the Code of Civil Procedure. "SLAPP" refers to a " '[s]trategic lawsuit against public participation.' " (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 882, fn. 2 (*Wilson*).)

We refer to Swallow and Profitable Casino collectively as "Swallow."

We conclude that, while Roberts's conduct in retrieving and providing the data to law enforcement was protected petitioning activity under section 425.16, subdivision (e), Swallow's evidence was sufficient to show that the access itself was unauthorized and unlawful. Evidence of the alleged unlawful access is not subject to the litigation privilege and is adequate to satisfy Swallow's burden under the second step of the anti-SLAPP procedure to show that his claims have minimal merit. We therefore affirm the trial court's denial of Roberts's anti-SLAPP motion with respect to the Penal Code Claims.

## BACKGROUND

### 1. The Parties' Allegations

#### a. *Roberts's complaint*

In his operative second amended complaint (Complaint), Roberts alleges that he developed casino management software pursuant to an oral partnership agreement with Swallow. Roberts is a software developer. Swallow was a casino operator and Roberts's business mentor.[2]

##### i. *The parties' partnership agreement*

In May 2007, Swallow approached Roberts with the idea of marketing software solutions specific to the casino industry. After some discussion, Swallow "proposed that the two become partners in a business to develop, prove, market, and sell casino management software, with the goal of earning profits, which profits they would split evenly among them." Roberts agreed,

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[2] We previously considered this Complaint in reversing the trial court's ruling sustaining a demurrer filed by another defendant (not a party to this appeal) without leave to amend. (See *Roberts v. Secure Stone, LLC* (Aug. 5, 2019, B285549 [nonpub. opn.]) (*Secure Stone*).)

and the two formed a partnership for that purpose. Roberts understood that the parties would create a company to license the software to casinos and would equally split licensing fees and related revenue.

To further their arrangement, the parties executed a "Software Services Agreement" (the Services Agreement). The Services Agreement provided that Roberts would be paid $15,000 for his services over a limited number of hours in installing the casino management software (the Software) and training employees.

The Services Agreement referred to a separate software license agreement, which was never actually drafted. The Services Agreement also contained a provision specifying that Swallow and Roberts "shall own any and all documentation used in connection with the provision of Services, together with any computer source and object code developed in conjunction with the provision of Services."

**ii. *Roberts's software services***

Roberts developed the Software as agreed. Swallow told Roberts that they needed to prove the functionality of the Software before they could market it effectively. Swallow therefore proposed that Roberts go to work as an IT professional at Casino M8trix, where Swallow was a part owner, so that they could demonstrate that the Software would work.[3]

Roberts worked at Casino M8trix setting up the Software for the number of hours specified in the Services Agreement. Thereafter, Casino M8trix hired and paid Roberts as an

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[3] Casino M8trix at one point was named Garden City Casino. To avoid confusion, we refer to it only as Casino M8trix.

independent contractor. Roberts continued to work at Casino M8trix until October 2014.

In addition to payments from Casino M8trix, Roberts received payments for software services that he provided to other casinos and to a casino "banking" entity at Swallow's request. Roberts understood that these payments were for his software work and were separate from any licensing fees for the Software itself.

#### iii. *Swallow's alleged scheme to obtain licensing fees*

Profitable Casino was an entity that Swallow incorporated. Swallow told Roberts that Profitable Casino would be "the face of the Casino Software to the casino industry," but that the two would split the profits obtained from software licensing. In actuality, Swallow's true intent was to "control and dominate the affairs of Profitable Casino, using the entity to license the Casino Software for Swallow's own and exclusive financial benefit, and to hide his conduct from Roberts."

Swallow concealed from Roberts that Casino M8trix actually paid licensing fees for the use of the Software. Swallow also concealed that he received licensing fees from other casinos in which the Software was installed, including the Hollywood Park casino, which Swallow had plans to purchase.

At Swallow's request, Roberts developed related software for casino "bankers," which play the traditional role of the "house" in California casinos, paying out when the dealer loses. Swallow also received licensing revenues from this software that he did not disclose to Roberts.

In May 2014, the Attorney General filed an accusation seeking to revoke Swallow's gaming license. During the ensuing

administrative trial, the Attorney General presented evidence that Swallow and Profitable Casino had received millions of dollars in licensing fees. Swallow's gaming license was revoked, and Swallow was fined more than $14 million.[4]

Roberts's Complaint alleges that Swallow received more than $19 million in licensing fees that he concealed from Roberts.

**b.** ***Swallow's cross-complaint***

Swallow's operative first amended cross-complaint (FACC) alleges that Roberts agreed to develop the Software for a fixed fee. Swallow "made it clear to Roberts that Swallow's expectation was to sell the [Software] through a company that would be the sole recipient of the profits therefrom absent further agreement to the contrary among the parties."

Roberts agreed to abide by that agreement, but he actually had no intention of keeping his promise. Rather, Roberts intended to receive large fees from Swallow and his affiliated entities for developing the Software and then later to assert a claim that he owned half the Software. Pursuant to this plan, Roberts received fees of more than $1 million, "not asserting any ownership in the profits from the Software until the filing of this action in 2015."

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[4] This fine (in actuality approximately $13.7 million) and Swallow's license revocation were ordered by the California Gambling Control Commission (Commission). In connection with this appeal, we have taken judicial notice of an order of the Sacramento Superior Court partially granting a petition for writ of mandate that Swallow filed challenging the Commission's ruling. The court's order affirmed the license revocation, but concluded that the Commission's penalty violated the statutory limits of $20,000 per violation.

The FACC also alleges that, "starting in or around mid-2015, Roberts unethically and illegally accessed one or more of Swallow's servers without authorization." Roberts allegedly accessed thousands of Swallow's e-mails, including attorney-client communications. Roberts shared these confidential documents "with his agents, attorneys, employees, and various third parties including state and city actors."

The FACC asserts causes of action for fraud and breach of contract based upon Roberts's alleged misrepresentation of his intention to accept a fixed fee for his software services. It also asserts causes of action under Penal Code sections 502 and 496 for Roberts's alleged unauthorized access to, use, and concealment of Swallow's computerized documents. The FACC also includes a claim for unfair business practices under Business and Professions Code section 17200.

**2. Roberts's Evidence**

Roberts filed an anti-SLAPP motion seeking to strike the entirety of Swallow's FACC. He submitted his own declaration in support.

Consistent with his Complaint, Roberts's declaration states that he and Swallow agreed to become partners in the development and marketing of the Software. Roberts was paid for Software services that he performed, but those payments were separate from his partnership interest in licensing royalties. Roberts understood that Profitable Casino "was the business vehicle through which our partnership would market the software I created."

In August 2007, at Swallow's request and to save money, Roberts set up an old server that Roberts owned and kept in his home (the Server) to host Profitable Casino e-mails. From the

parties' discussions, Swallow knew that Roberts had access to all content on the Server as the administrator.

Sometime later in 2007 or 2008, also at Swallow's request, Roberts configured Swallow's e-mail so that his Profitable Casino e-mails would be automatically forwarded to his Casino M8trix e-mail address. Roberts and Swallow discussed that e-mails would continue to be stored on the Server once they had been forwarded.

Roberts "decommissioned" the Server in 2013. At that time, he switched the host for the Profitable Casino e-mails from the Server to a "dedicated GoDaddy.com server." This did not affect any data that was already on the Server.

In mid-2013, Swallow told Roberts that the Division of Gaming Control of the San Jose Police Department might contact him about the banking software that Roberts had developed. Swallow told Roberts "to cooperate with the government and its investigators." Swallow never told Roberts to conceal or withhold any documents or e-mails, and never asked him to deny a request for documents or e-mails. Roberts in fact was interviewed by a senior auditor with the San Jose Police Department.

In or about September 2014, Casino M8trix terminated Roberts's services. Casino M8trix owed Roberts money, and Roberts tried to collect. Representatives of the casino told Roberts that he would not be paid until he agreed to an interview with the California Attorney General, which was monitoring payments to and from the casino.

Roberts ultimately agreed to an interview and traveled from Texas to California for that purpose on July 9, 2015. He was interviewed by Deputy Attorney General William Torngren and an investigator named Teng. At the law enforcement

officers' request, Roberts provided some documents prior to the interview.

Following the interview, Roberts recalled some additional information relevant to the interview topics, and Torngren asked some follow-up questions. During his search for additional information, Roberts found the Server in his home. He rebooted the Server and found that it still contained e-mails that might be relevant to the Attorney General investigation. For preservation purposes, he copied the e-mail files relating to Profitable Casino onto an external hard drive.

"[A]t the Attorney General's request," Roberts reviewed some of the e-mails and found files that were responsive to the government's inquiries. He informed Torngren and Teng and gave them copies of the relevant documents. He also provided copies of the same documents to representatives of Casino M8trix, who Roberts understood were cooperating with the Attorney General investigation.

**3. Swallow's Evidence**

Swallow submitted his own declaration in opposition to Roberts's anti-SLAPP motion.

Swallow confirmed that he and Roberts executed the written Services Agreement "that governed our relationship for many years." Swallow stated that, "[a]lthough Roberts promised to abide by his agreement," Roberts had "no intention" of keeping his promise. Swallow testified that Roberts obtained payments "of more than $1 million for his services over a period of several years," but "[o]nly later, when filing this action, did Roberts assert an ownership in the profits from the Software."

Swallow also explained that the Server in Roberts's possession hosted documents for two e-mail addresses that

Swallow used, erics@profitablecasino.com and erics@eswallow.com. In September 2014, Swallow requested that the "web and email servers" for profitablecasino.com be "taken off-line." Once they were off-line, he "did not authorize Roberts to access them again for any purpose."

In March 2013, Roberts informed Swallow that he was "shutting down the existing eswallow.com web and file servers and transferring them to a new location." Once Roberts had done so, Swallow "never authorized Roberts to access them again for any purpose."

**4. The Trial Court's Order**

The trial court denied Roberts's anti-SLAPP motion. The court ruled that Roberts's motion to strike Roberts's fraud, breach of contract, and unfair competition causes of action was untimely because a prior version of Swallow's cross-complaint, which was filed several years earlier, had contained "the same causes of action." (§ 425.16, subd. (f).)

With respect to the Penal Code Claims, the court concluded that the claims arose from protected activity because Roberts's cooperation with law enforcement was protected petitioning conduct. The court rejected Swallow's argument that Roberts's conduct was not within the scope of the anti-SLAPP statute because his unauthorized access to Swallow's data was illegal as a matter of law.

In considering whether Swallow had sufficiently supported the merits of his Penal Code Claims in the second step of the anti-SLAPP procedure, the court found that "Roberts' protected activity came within the litigation privilege . . . and therefore was absolutely privileged." However, the court found that "Swallow's evidentiary showing is sufficient to establish a prima facie claim."

## DISCUSSION

### 1. The Anti-SLAPP Procedure

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

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must show that the challenged claims arise from protected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).) Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, at p. 396.)

Without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Baral, supra,* 1 Cal.5th at p. 396.) The plaintiff's burden at this stage is "a limited one." (*Wilson, supra,* 7 Cal.5th at p. 891.) The plaintiff need not prove his or her case, but must only demonstrate that his or her claims have " 'minimal merit.' " (*Ibid.,* quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier I*).)

Section 425.16, subdivision (e) defines the categories of acts that are in " 'furtherance of a person's right of petition or free speech.' " Those categories include "any written or oral

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subds. (e) & (2).) Section 425.16, subdivision (e) also identifies a catch-all category of protected conduct, consisting of "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

An appellate court reviews the grant or denial of an anti-SLAPP motion under the de novo standard. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

**2. Swallow's Claims For Fraud and Breach of Contract Must Be Stricken**

**a. *Roberts's anti-SLAPP motion was timely***

Section 425.16 requires that a defendant bring an anti-SLAPP motion "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f).)[5]

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[5] Section 425.16, subdivision (h) includes a cross-complaint within the definition of "complaint," a cross-complainant within the definition of "plaintiff," and a cross-defendant within the definition of "defendant." For simplicity we similarly refer to Swallow as the "plaintiff" and Roberts as the "defendant" in discussing Roberts's anti-SLAPP motion.

In *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637 (*Newport Harbor*), our Supreme Court considered how this rule should be applied to an amended complaint. The court adopted the holding of the Court of Appeal in that case, which explained that " '[a]n amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion.' " (*Id.* at pp. 641, 646, quoting *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1219.)

Swallow's FACC satisfies the second clause of this standard. Swallow added allegations for the first time in his FACC that made his previously pleaded causes of action for fraud and breach of contract subject to an anti-SLAPP motion.

The gist of the allegations in both the original cross-complaint and the FACC is that Roberts promised to comply with the Services Agreement, which Swallow characterized as memorializing an agreement that Roberts would develop software for a fee and permit Swallow's company to keep the profits from sales. However, Roberts allegedly did not intend to keep his promise and later claimed to own half the Software and a share of the profits.

The critical difference between the two versions of the cross-complaint is how they explain that Roberts demanded a share of the Software profits. The original cross-complaint contained only the vague allegation that Roberts did not assert "any ownership in the profits from the Software until 2012." It did not provide any other information about where, how, or to

whom Roberts made this alleged assertion. It clearly did not refer to Roberts's complaint in this case, which was first filed on December 4, 2015.

In contrast, the FACC expressly alleges that Roberts did not assert "any ownership in the profits from the Software until the *filing of this action* in 2015." (Italics added.) Thus, for the first time in the FACC, Swallow alleged that the critical event underlying his breach of contract and fraud claims—Roberts's alleged breach of a promise that he would simply accept a fee for services—occurred in the form of a pleading that Roberts filed in this action.

A pleading filed in litigation is a paradigm example of protected petitioning conduct under section 425.16, subdivision (e)(2). (See *Navellier I, supra,* 29 Cal.4th at p. 90.) An action that arises from such a filing therefore may be challenged as a SLAPP. (*Ibid.*)

Swallow argues that the trial court nevertheless properly exercised its discretion to deny Roberts's motion to strike the FACC because the motion followed a series of procedural tactics that required Swallow to expend significant resources before Roberts filed his motion. The argument is based on a false premise. Under section 425.16, subdivision (f), a trial court only has discretion to decline to hear an anti-SLAPP motion that is *untimely*. A trial court may not refuse to consider a timely motion. And *Newport Harbor* makes clear that an anti-SLAPP motion is timely if it is filed within 60 days of an amended complaint that for the first time makes allegations that provide the basis for such a motion. The court explained that, in such a circumstance, " '[a]n amended complaint reopens the time to file

an anti-SLAPP motion *without court permission.*' " (*Newport Harbor, supra,* 4 Cal.5th at p. 641, italics added.)

Swallow misinterprets the holding in *Newport Harbor* in arguing that "an anti-SLAPP motion may not be brought against claims in an amended complaint that were part of an earlier complaint." That interpretation disregards the second part of the governing standard that the court adopted, which permits a timely motion in response to "new *allegations* that make previously pleaded causes of action subject to an anti-SLAPP motion." (*Newport Harbor, supra,* 4 Cal.5th at p. 641, italics added.)

Permitting an anti-SLAPP motion to challenge new allegations that for the first time provide the basis for such a motion makes sense in light of the rationale underlying the timing requirement in section 425.16, subdivision (f). In *Newport Harbor,* the court explained that subdivision (f) "should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier (subject to the trial court's discretion to permit a late motion)." Such an interpretation "maximizes the possibility the anti-SLAPP statute will fulfill its purpose while reducing the potential for abuse." (*Newport Harbor, supra,* 4 Cal.5th at p. 645.)

Roberts filed his anti-SLAPP motion within 60 days of a cross-complaint that for the first time provided the basis for such a motion. His motion was therefore timely.

### b. *Swallow's claims for fraud and breach of contract arise from protected petitioning conduct*

The allegations in the FACC that first created the basis for an anti-SLAPP motion also show that Swallow's fraud and breach of contract causes of action arise from protected petitioning conduct. Both causes of action are expressly based on claims that Roberts has asserted in this lawsuit.

A defendant meets his or her burden in the first step of the anti-SLAPP process by "demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16],' and that the plaintiff's claims in fact *arise* from that conduct." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 620, quoting *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.)

To "aris[e] from" protected petitioning conduct, it is not sufficient that a complaint merely follow such conduct, or even that it was triggered by such conduct. Rather, "the critical consideration is whether the cause of action is *based on* the defendant's . . . petitioning activity." (*Navellier I, supra,* 29 Cal.4th at p. 89.) This means that "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) In making this determination, a court should "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park v. Board of Trustees of California State University*, *supra*, 2 Cal.5th at p. 1063.)

Here, Swallow's FACC itself shows that his causes of action for breach of contract and fraud arise from protected petitioning conduct. (See *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 929 ["when the complaint itself alleges protected activity, a moving party may rely on the plaintiff's allegations alone in arguing that the plaintiff's claims arise from" a protected act].) According to the FACC, Roberts's alleged act of "asserting . . . ownership in the profits from the Software" in "*the filing of this action*" is both what breached the contract and what allegedly injured Swallow. (Italics added.) In short, it is the basis for Swallow's cross-complaint.[6]

Roberts's act of filing this lawsuit is also a necessary element of both Swallow's breach of contract claim and his fraud claim. Swallow alleges that Roberts's assertion of his right to Software profits in this lawsuit was the act that breached his promise to "abide by their agreement." The fact of breach is of course a required element of a breach of contract claim. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (*Oasis*).)

Causes of action for both breach of contract and fraud also require proof of the element of damage. (*Oasis, supra,* 51 Cal.4th

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[6] This allegation distinguishes this case from *C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, which Swallow cites. In that case, the court held that indemnity claims in a cross-complaint arose from the alleged breach of an agreement to indemnify, not from the filing of a lawsuit asserting claims. The court concluded that the filing of the lawsuit was not the wrongful act forming the alleged basis of liability; rather, the wrongful act was the failure to indemnify. (*Id.* at pp. 700-701.) Here, Swallow's allegation is that the filing of Roberts's lawsuit itself was the wrongful act forming the basis for liability.

at p. 821; *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) Roberts's claim to Software profits in this lawsuit is the basis for Swallow's allegation that he suffered damage from Roberts's alleged misrepresentation of his intent to abide by the parties' agreement. Swallow does not allege that Roberts failed to meet any of his performance obligations under the Services Agreement. Rather, Swallow alleges that he was harmed by Roberts's claim for a different form of compensation. If Roberts had not asserted any claim to the software profits, Swallow would not have suffered any injury.

*Navellier I* involved analogous claims. The plaintiff in that action (Navellier) was the organizer of and investment adviser for an investment fund for which the defendant (Sletten) was a trustee. (*Navellier I, supra,* 29 Cal.4th at p. 85.) Navellier had previously sued Sletten in federal district court for failing to renew Navellier's investment adviser contract. After Navellier had filed that lawsuit, Sletten agreed that Navellier could return as an investment adviser for the fund and, as part of that agreement, executed a release. (*Id.* at pp. 85–86.) Sletten subsequently filed counterclaims in the federal lawsuit. The federal court dismissed most of Sletten's counterclaims based upon the release, and Sletten lost the others at trial. (*Id.* at pp. 86–87.)

Navellier then filed a state action alleging claims for fraud and breach of contract on the theory that Sletten had misrepresented his intention to be bound by the release, inducing Navellier to incur litigation costs. (*Navellier I, supra,* 29 Cal.4th at p. 87.) Sletten filed an anti-SLAPP motion. The trial court denied the motion, and the Court of Appeal affirmed. (*Ibid.*)

Our Supreme Court reversed. The court held that Navellier's fraud and breach of contract claims arose from protected litigation activity in the federal lawsuit. (*Navellier I, supra,* 29 Cal.4th at p. 90.) The court explained that "Sletten is being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and Sletton's alleged actions taken in connection with that litigation, [Navellier's] present claims would have no basis." (*Ibid.*)

Similarly, here, Roberts is being sued for fraud and breach of contract because of the complaint that he filed in this action. Swallow's fraud and breach of contract claims would have no basis but for Roberts's act of filing his lawsuit.

Swallow cites *City of Cotati* for the principle that the anti-SLAPP statute applies to petitioning conduct itself, not to conduct that underlies the petitioning (such as fraud). (*City of Cotati, supra,* 29 Cal.4th 69.) That case is not analogous. In *City of Cotati,* mobilehome owners filed a federal lawsuit challenging a city rent stabilization measure. In response, the city filed a declaratory relief action in state court, admittedly to seek a more favorable forum for the dispute. Our Supreme Court held that the city's state lawsuit did not arise from the prior federal action for purposes of the anti-SLAPP statute. Rather, the city's lawsuit simply sought declaratory relief concerning the same underlying controversy—the constitutionality of the city's ordinance. (*Id.* at p. 80.)

The court noted that the city's complaint repeatedly referred to the "underlying subject matter" of the prior federal action, i.e., the validity of the ordinance, but contained "no reference to the action itself." (*City of Cotati, supra,* 29 Cal.4th at p. 77.) The court concluded that it was not sufficient that the city

filed the state action after the federal action or because of that action. Rather, to arise from protected conduct a claim must be *based on* that conduct.

Here, in contrast to *City of Cotati,* Swallow's common law claims are explicitly based on Roberts's protected petitioning conduct. Swallow's FACC does not simply seek declaratory relief concerning the underlying controversy—i.e., the proper interpretation of the parties' contract—but seeks damages from Roberts's act of filing his lawsuit.

Our Supreme Court distinguished *City of Cotati* on a similar basis in *Navellier I.* In *Navellier I,* the court explained that the claim at issue in *City of Cotati* "arose from a controversy between the parties respecting mobilehome park rent control, not from any statement or writing in connection with judicial proceedings." (*Navellier I, supra,* 29 Cal.4th at p. 91, fn. 6.) The court noted that Navellier's claim did not simply seek a "declaration of rights" concerning the underlying controversy. Rather, it sought "damages for Sletten's allegedly having raised additional, independent claims in the earlier suit." (*Ibid.*) Moreover, Navellier's complaint, unlike the complaint in *City of Cotati*, expressly referred to activity protected under the anti-SLAPP statute, including Sletten's pleading of "counterclaims in the federal action."[7]

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[7] The court in *Navellier I* also noted that the alleged underlying misrepresentation in that case—"Sletten's negotiation and signing of the release"—itself concerned an issue that was then under consideration by a judicial body, because the misrepresentation related to the ongoing federal litigation. (*Navellier I, supra,* 29 Cal.4th at p. 91, fn. 6.) In contrast,

### c. *Swallow has failed to show a probability of success on his fraud and breach of contract claims*

Because Swallow's fraud and breach of contract claims arise from protected petitioning conduct, they must be stricken unless Swallow has met his burden to show that those claims have the minimal merit necessary to proceed. (*Wilson, supra,* 7 Cal.5th at p. 891.) In meeting that burden, Swallow may not rely on the allegations of his FACC, but must show a probability of success based upon " 'competent admissible evidence.' " (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.)

Swallow has failed to make such a showing for two reasons. First, he has failed to provide evidence that Roberts made any promise that he failed to meet. The only evidence that Swallow submitted of any promise by Roberts (and the only evidence of such a promise that he cites on appeal) is Swallow's own testimony in his declaration. But Swallow did not testify that Roberts promised to accept only a fixed fee for his Software

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Roberts's alleged misrepresentation in 2007 did not relate to any ongoing litigation. However, as discussed above, Roberts's conduct in filing this lawsuit is the event that allegedly caused Swallow damage. Moreover, as in *Navellier I,* Roberts's "repudiation" of the underlying agreement occurred in a pleading that was clearly a statement " 'made before a . . . judicial proceeding.' " (*Id.* at p. 90, quoting § 425.16, subd. (e).) And, as in *Navellier I,* Swallow's FACC "expressly refers" to Roberts's protected conduct of filing his complaint in this action. (*Navellier I*, at p. 91, fn. 6.)

development efforts. Rather, Swallow testified simply that Roberts "promised to abide by" the Services Agreement.

In the absence of any evidence that Roberts promised to abide by *Swallow's* interpretation of the Services Agreement, Swallow's declaration does not show that Roberts made any misrepresentation (for purposes of Swallow's fraud claim) or that Roberts breached any promise (for purposes of Swallow's breach of contract claim). Swallow's declaration shows nothing more than Roberts's agreement to abide by the written agreement that he executed.

The parties of course have very different interpretations of that agreement. This court has already held that the language of the Services Agreement does not preclude Roberts's interpretation. (See *Secure Stone, supra*, B285549, at p. 21 ["The language of the Services Agreement does not foreclose the possibility of a separate oral agreement governing software licensing"].) Roberts's agreement to abide by the terms of the Services Agreement therefore does not establish that he agreed to forgo any right to software profits.

Thus, Swallow did not provide evidence that Roberts's claim to software profits in this lawsuit breached any promise to accept only a fixed fee for software services. Nor did Roberts's act of filing this lawsuit itself breach any provision of the Services Agreement. Indeed, the agreement anticipates such a lawsuit by permitting an award of attorney fees to the prevailing party in any action to "enforce the terms hereof or declare rights hereunder."

Swallow argues that the FACC includes an "alternative[ ]" fraud theory that Swallow was damaged by Roberts's retention of all of the fees that he was paid under the Services Agreement.

Swallow argues that he would be entitled to half of those payments if Roberts in fact was his partner. But that theory also depends upon evidence that Roberts promised to accept only a fixed fee for his services. Absent such an alleged misrepresentation, there was no fraud, but simply a debt owed to Swallow. The theory therefore does not support a fraud claim, but shows only that Swallow might be entitled to a set-off for anything he owes Roberts for licensing profits.[8] Indeed, that is how Swallow describes the theory in his declaration, which is the only evidence supporting such an alternative theory in the record.[9]

Second, even if Swallow had provided evidence that Roberts misrepresented his intentions, Swallow could not prove his fraud or breach of contract claims because evidence crucial to those claims would be precluded by the litigation privilege. Civil Code section 47, subdivision (b) protects communications in a judicial proceeding. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212;

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[8] Moreover, even if Swallow had provided evidence of such a representation, he has not shown how it could support his alternative fraud theory. Swallow's alternative theory is based on the assumption that the parties in fact agreed to a partnership. Swallow does not offer any explanation, and has not provided any evidence, showing how he could have reasonably relied on a representation by Roberts that Roberts expected only a fixed fee when that representation was inconsistent with the parties' alleged agreement to split licensing profits as partners.

[9] Swallow testified that, "[t]o the extent that the Court at some future point in . . . time determines we were business partners (we were not), I would be asserting that the $1.5 million [Roberts] received from the various casino ventures I was involved with should be deemed partnership proceeds."

*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 770 (*Navellier II*).) The privilege is "absolute in nature." (*Silberg*, at p. 215.) Thus, the privilege would preclude using Roberts's Complaint in this action as evidence that he breached a promise to accept a fixed fee under the Services Agreement.

Swallow argues that the litigation privilege would not bar his fraud claim because the fraud occurred in 2007 when Roberts misrepresented his intentions, not in 2015 when Roberts filed his lawsuit. The court rejected a similar argument in *Navellier II*. The Court of Appeal in that case considered the second step of Sletten's anti-SLAPP motion on remand from the Supreme Court. The Court of Appeal held that the plaintiff, Navellier, had not shown a probability of success on his claims. Among other things, the court concluded that Navellier's fraud claim was precluded by the litigation privilege. The court reasoned that, although Sletten's fraud had occurred when he signed the release rather than when he filed his federal counterclaims, "it is also true that damages from the fraud were caused by the counterclaim's assertion." (*Navellier II, supra,* 106 Cal.App.4th at pp. 771–772.)

Similarly, here, it was the filing of Roberts's lawsuit that allegedly damaged Swallow. Absent Roberts's claim to Software profits in his complaint, Roberts would have done nothing inconsistent with his alleged representation to accept a fixed fee for his services, and Swallow would have suffered no injury from allegedly relying on that representation.

Roberts's lawsuit was also the event that allegedly breached his agreement with Swallow. Absent evidence of Roberts's Complaint, Swallow could not prove breach.[10]

Swallow has failed to show a probability of success on his fraud and breach of contract claims. Those claims must therefore be stricken.[11]

**3. The Trial Court Correctly Declined to Strike Swallow's Penal Code Claims**

The trial court found that Swallow's Penal Code Claims arise from Roberts's protected petitioning conduct, but that

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[10] The court in *Navellier II* assumed, without deciding, that the litigation privilege did not apply to Navellier's breach of contract claim. However, the court's rationale does not apply here. The court based its decision primarily on the conclusion that a release amounts to a contract not to assert a claim, which implicitly includes a waiver of anti-SLAPP protection. (*Navellier II, supra,* 106 Cal.App.4th at pp. 773–774.) In entering into the Services Agreement, Roberts did not waive the right to assert a claim. Indeed, as discussed above, the Services Agreement anticipated that a party might file an action to interpret or enforce the agreement. Moreover, as the court noted in *Navellier II*, a number of cases have applied the litigation privilege to breach of contract claims. (*Ibid.*; see also *McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1169; *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 276 [the litigation privilege applied to a breach of contract claim because the contract that the defendant allegedly breached did not prohibit the statements in court that the plaintiff challenged].)

[11] Swallow's claim for unfair business practices appears to be based, at least in part, on his fraud claim. However, for the reasons we explain below, that claim will not be stricken because it is also apparently based on Swallow's Penal Code Claims.

Swallow met his burden to show he would likely succeed on those claims. We agree with the trial court in both respects.

**a. *Swallow's Penal Code Claims arise from protected petitioning conduct***

**i. *Roberts showed that his challenged conduct facilitated communications with law enforcement officials***

To meet his burden under the first step of the anti-SLAPP procedure, Roberts need only present a prima facie case that Swallow's claims arise from protected conduct. (*Wilson, supra,* 7 Cal.5th at p. 897.) Roberts argues that he made out a prima facie case of protected petitioning conduct with evidence showing that Swallow's Penal Code Claims challenge Roberts's communications with law enforcement officials. We agree.

Numerous Court of Appeal decisions hold that communications with law enforcement officials are protected petitioning conduct under section 425.16, subdivision (e). (See, e.g., *Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 Cal.App.4th 705, 714–716 [insurance company's communications with federal authorities relating to potential insurance fraud were protected conduct]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783–784 [communications preparatory to requesting an investigation by the California Attorney General were protected]; *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941–942 [filing a police report was protected conduct].)

In addition, in the analogous area of the litigation privilege, our Supreme Court has held that the privilege applies to statements made in police reports. (*Hagberg v. California*

*Federal Bank FSB* (2004) 32 Cal.4th 39 (*Hagberg*).) Although the litigation privilege and the anti-SLAPP statute are not "substantively the same," the litigation privilege can aid in construing the scope of section 425.16 subdivision (e) and (2). (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322–323 (*Flatley*).)

Swallow's FACC acknowledges Roberts's cooperation with law enforcement. It alleges that Roberts accessed confidential e-mails and other documents belonging to Swallow without permission and shared them with "various third parties including state and city actors." It also alleges that Swallow suffered damages from such disclosure as a result of the need to "incur significant attorneys' fees, costs and expenses in order to defend against and respond to claims brought against them involving the use of the" confidential data.

As discussed above, Roberts explained in his declaration that he found and accessed the Server as a result of his contacts with law enforcement. He found and searched the Server only after his July 9, 2015 interview with officials from the Attorney General's office and after those officials had asked him for information and documents. In addition to his declaration, Roberts submitted evidence of e-mail communications that he had with the law enforcement officials. The e-mails informed the officials that Roberts had located and accessed the Server and included responses and follow-up questions from the officials.

Evidence that Swallow submitted in opposition to Roberts's motion also acknowledged Roberts's cooperation with law enforcement. In his declaration, Swallow quoted a portion of Roberts's interview with Torngren and Teng in which Roberts disclosed that he "still have access to [Swallow's] server," and told the officials, "I should be able to look into the database and tell

you the email addresses, so if you need, if you need that, I can." Swallow testified that, "[a]fter Roberts illegally accessed my profitablecasino.com and eswallow.com web and email mail servers, he gathered information that he then provided to Torngren as well as to my former Casino partner, Lundardi."

The cases make it clear that, to the extent Swallow's Penal Code Claims challenge Roberts's *disclosure* of Swallow's alleged confidential data to law enforcement, those claims arise from protected conduct. However, Swallow's claims also challenge Roberts's alleged wrongful *access to* and *retention* of that data.[12] We conclude that those aspects of the claims also arise from protected conduct, as they challenge conduct that facilitated Roberts's communications with the government.

As discussed above, Roberts testified that he accessed and copied Swallow's data on the Server as a result of, and in connection with, his effort to provide information to law

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[12] Citing *Optional Capital, Inc. v. Akin Gump Strauss Hauer & Feld LLP* (2017) 18 Cal.App.5th 95 (*Optional Capital*), Roberts argues that he need only show that the "gravamen" of Swallow's causes of action under the Penal Code are based on protected conduct. Other cases have questioned whether this "gravamen" approach is still appropriate following our Supreme Court's explanation in *Baral* of the proper method of identifying the claims that an anti-SLAPP motion challenges. (See *Baral, supra,* 1 Cal.5th at p. 396; *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1170; *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48; *Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 772, fn. 19.) We need not address this issue because, as discussed below, we conclude that the entirety of Swallow's Penal Code Claims arise from protected conduct.

enforcement officials. Under the catch-all provision in section 425.16, subdivision (e), protected conduct is not limited to protected *communications*, but also extends to "any other conduct in furtherance of the exercise of the constitutional right of petition" or free speech. (§ 425.16, subd. (e)(4).) As our Supreme Court has explained, the reference in section 425.16, subdivision (e)(4) to "acts 'in furtherance' of speech or petitioning rights can also reasonably be read to extend to at least certain conduct that, though itself contains no expressive elements, facilitates expression." (*Wilson, supra,* 7 Cal.5th at p. 893 [media company's decision to discharge an employee allegedly to enforce its anti-plagiarism policy arose from protected conduct].)

Roberts's conduct in accessing and copying Swallow's data occurred because of, and in connection with, his communications with law enforcement. It facilitated those communications by unearthing information in which the government was interested. We therefore conclude that Swallow's allegations challenging Roberts's access to and copying of Swallow's data arise from protected petitioning conduct.[13]

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[13] Roberts also *retained* the data after he disclosed it to law enforcement. However, Roberts testified that he was already considering this lawsuit at the time he searched the Server, and he in fact filed his complaint in this case only months later. Moreover, the government investigation was ongoing. Roberts's retention of the data was therefore related to his petitioning conduct in communicating with the government and his filing of this lawsuit. Indeed, had Roberts destroyed potentially relevant documents prior to filing this litigation, he might have faced allegations of destruction of evidence.

Swallow also alleges that Roberts disclosed confidential documents to Lundardi, Swallow's former business partner and co-owner of Casino M8trix. Roberts admitted that he provided some of the documents from the Server to "Casino representatives." However, he testified that he did so with the knowledge that those representatives were cooperating with the government investigation. He therefore provided prima facie evidence that those disclosures were also protected conduct.

**ii. *Roberts's challenged conduct was not illegal as a matter of law***

Swallow's primary argument concerning the first step of the anti-SLAPP analysis is that, even if Roberts's conduct in accessing and disclosing Swallow's computer data facilitated the government investigation, it was illegal as a matter of law. Swallow relies on our Supreme Court's decision in *Flatley,* which held that "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley, supra,* 39 Cal.4th at p. 317.)

However, this rule applies only when "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley, supra*, 39 Cal.4th at p. 320.) The circumstances in *Flatley* were "specific and extreme." (*Id.* at p. 332, fn. 16.) There was no question in that case that the defendant's challenged conduct amounted to illegal extortion. Subsequent cases have emphasized the narrow scope of the rule that *Flatley* established. (See, e.g., *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210 [*Flatley*

established a "very narrow exception"]; *Optional Capital, supra,* 18 Cal.App.5th at p. 115, fn. 7 [same].)

In *Flatley,* the court explained that, if "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first [anti-SLAPP] step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley, supra,* 39 Cal.4th at p. 316.) Such a factual dispute exists here.

Swallow alleges that Roberts violated Penal Code sections 502 and 496. Penal Code section 502 broadly prohibits accessing, use, or copying of computerized data, but requires that such conduct be "without permission." (Pen. Code, § 502, subd. (c).) Penal Code section 496 primarily addresses receipt of stolen property. The section also provides that a person who "conceals" or "withholds" property from the owner may violate the statute, but requires that the violator know that the property was stolen or obtained through theft or extortion. (Pen. Code, § 496, subd. (a).)

As discussed above, Roberts testified in his declaration that Swallow instructed him in 2013 to cooperate with government investigators. Roberts explained that Swallow "specifically told me to cooperate with the government and its investigators" and "never once told me to conceal or withhold any document or email" or "told me to deny a request for access to documents or email."

Roberts also testified that Swallow was aware of communications that he had in late 2014 with representatives of Casino M8trix about cooperating with the Attorney General investigation and accessing data. In support of his testimony, Roberts submitted a string of e-mails between him and Casino

M8trix representatives on which Swallow and Torngren were copied. E-mails in the string referred to: (1) a requirement by the Attorney General's office that the Casino hold Roberts's payments until Roberts participated in an interview with "counsel for the Casino and the Attorney General's office"; (2) Roberts's request for a list of documents he would need for the Attorney General interview; and (3) Roberts's availability to "remove . . . data from the server."[14]

Thus, evidence submitted by Roberts indicated that: (1) Swallow had previously instructed Roberts to cooperate with government investigators; (2) Swallow was aware of Roberts's communications with the Attorney General in 2014 and plans for him to provide information to investigators; and (3) Swallow was aware of some plan for Roberts to access Casino M8trix computer data *after* Casino M8trix and Swallow had terminated their professional relationship with Roberts. While far from dispositive, this evidence at least created a factual dispute as to whether Swallow was aware of, and at least tacitly authorized, Roberts's conduct in providing information to the Attorney General's office and his access to Swallow's computer data.

Roberts also argues that, if he proves his claim that he was Swallow's partner, he had a legal right to access data concerning Profitable Casino, as it was the parties' partnership vehicle. (See *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 567.) This

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[14] The record is unclear whether this reference was to the Server in Roberts's possession or some other server on which Casino M8trix data resided. Either way, the e-mails showed that Swallow was aware that Roberts had plans to access computer data concerning Swallow's business ventures long after Roberts had ceased to work for Casino M8trix.

claim of partnership is highly dependent on factual issues concerning the parties' conduct, communications, and expectations. (See *id.* at p. 566.) The argument therefore provides another reason to reject Swallow's claim that the evidence "conclusively establishes" illegality. (*Flatley, supra,* 39 Cal.4th at p. 320.)

**b. *Swallow met his burden to show a probability of success***

While evidence that Roberts submitted creates a factual dispute concerning the legality of his conduct, in considering the second step of the anti-SLAPP procedure we must credit *Swallow's* evidence. (*Baral, supra,* 1 Cal.5th at p. 396.)

Swallow denied authorizing Roberts to access the Server after Swallow severed his relationship with Roberts. As discussed above, Swallow testified that, in or around September 2014 (when Casino M8trix terminated its relationship with Roberts), "I requested the web and email servers for profitablecasino.com, which were located on a server owned by Roberts, be taken off-line. Once they were taken off-line, I did not authorize Roberts to access them again for any purpose." Similarly, he testified that the data on the eswallow.com web, e-mail, and file servers were transferred to a new location in March 2013, and after that transfer "I never authorized Roberts to access them again for any purpose." Swallow also did not authorize Roberts to access any of his postal mail, which he alleges Roberts also retrieved through the Server.

Roberts argues that, regardless of whether Swallow authorized his conduct, Roberts's "cooperation" with law enforcement was protected by the litigation privilege, and his access to data on the Server therefore cannot form the basis for a

claim. Roberts is correct that his communications with law enforcement are protected by the privilege. In *Hagberg*, our Supreme Court held that the unqualified privilege under Civil Code section 47, subdivision (b) protects reports of suspected criminal activity to law enforcement, and that such reports may support a tort claim only if a plaintiff can establish the elements of malicious prosecution. (*Hagberg, supra,* 32 Cal.4th at p. 355.) In doing so, the court approved a long line of cases holding that the litigation privilege protects communications with law enforcement authorities. (*Id.* at pp. 362–366.)

However, as discussed above, Swallow's Penal Code Claims allege liability for conduct beyond disclosure. Penal Code section 502 authorizes a civil claim for unauthorized *access* to computer data, and Penal Code section 496 permits an action for concealment of stolen property. (Pen. Code, §§ 502, subds. (c) & (e), 496, subds. (a) & (c).) Swallow's declaration, which we must credit at this stage of the anti-SLAPP procedure, states that Roberts accessed and took Swallow's confidential data without authorization, and that Swallow did not discover this until he later saw e-mail communications between Roberts and Torngren.

In considering the scope of the litigation privilege, our Supreme Court has distinguished between claims that allege injury from protected *communications* and claims that allege injury from unlawful or tortious noncommunicative conduct that preceded such protected communications. For example, in *Ribas v. Clark* (1985) 38 Cal.3d 355 (*Ribas*), the defendant secretly monitored a telephone conversation on a telephone extension in violation of Penal Code section 631. The court held that the litigation privilege applied to the plaintiff's tort claim to the extent the claim was based on the defendant's *testimony* about

the telephone conversation in a subsequent arbitration. However, the privilege did not preclude statutory damages for the secret monitoring itself, because the right to such damages "accrues at the moment of the violation." (*Ribas*, at p. 365.)

In *Kimmel v. Goland* (1990) 51 Cal.3d 202 (*Kimmel*), the court subsequently explained that "implicit" in its decision in *Ribas* was "the distinction between injury allegedly arising from communicative acts, i.e., the . . . testimony, and injury resulting from noncommunicative conduct, i.e., the invasion of privacy resulting from the . . . eavesdropping." (*Kimmel*, at p. 211.) In *Kimmel,* the court held that the litigation privilege precluded recovery for the defendant's communications during the course of litigation. However, the privilege did not bar recovery for *noncommunicative conduct* consisting of the illegal recording of telephone conversations, even if that conduct was for the purpose of gathering evidence in anticipation of the litigation. (*Id.* at p. 205.)

The court suggested an analogy to explain the unacceptable consequences of a contrary decision: "Suppose, a prospective defendant kept important documents at home. If a prospective plaintiff, in anticipation of litigation, burglarized defendant's premises in order to obtain evidence, plaintiffs here would apparently apply the privilege to protect the criminal conduct. Such an extension of [the litigation privilege] is untenable." (*Kimmel, supra*, 51 Cal.3d at p. 212.)

The same principle applies here. Unauthorized access to computerized data is illegal under Penal Code section 502. That Roberts accessed Swallow's data to use in connection with a government investigation does not extend the litigation privilege to the alleged unlawful access itself. Otherwise, a pending

government investigation could provide a justification for all manner of illegal conduct to obtain evidence, including the burglary that the court hypothesized in *Kimmel*.

Roberts relies on our Supreme Court's description of the litigation privilege in *Rusheen, supra,* 37 Cal.4th 1048, and *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 952 (*Jacob B.*). In *Rusheen*, the court explained that, where a cause of action is "based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." (*Rusheen*, at p. 1052, quoted in *Jacob B.*, at pp. 956–957.) The court further explained that "[t]he distinction between communicative and noncommunicative conduct hinges on the gravamen of the action." (*Rusheen*, at p. 1058.)

*Rusheen* was an action for abuse of process. The court held that the litigation privilege extended to the act of levying on property pursuant to a judgment that the defendant had allegedly procured through perjured testimony. (*Rusheen, supra,* 37 Cal.4th at pp. 1061–1062.) The court reasoned that "the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service." (*Id.* at p. 1062.)

In *Jacob B.,* the court concluded that the privilege applied to a letter from officials of a county victim witness program identifying a person who had previously been investigated for child molestation when he was a minor. The letter was used in judicial proceedings to modify restraining orders applying to the suspected person, and that person sued for invasion of privacy. (*Jacob B., supra,* 40 Cal.4th at pp. 952–954.)

In both cases, it was important that the only wrongful conduct creating the injury at issue was the privileged communication itself. In *Rusheen,* the court noted that the "Court of Appeal failed to identify any allegedly wrongful conduct . . . other than simply filing perjured declarations of service." (*Rusheen, supra,* 37 Cal.4th at p. 1062.) And in *Jacob B.*, the court explained that the action of accessing the information in the county witness program "by itself, was noncommunicative, but that act (*which plaintiff does not even contend was unlawful*), is not the gravamen of the action." (*Jacob B., supra,* 40 Cal.4th at p. 957, italics added.) The court explained that the alleged injury in that case " 'stems from the *publication* of the information in a judicial proceeding, thereby exposing it to public view.' " (*Ibid.*)

The court did not overrule *Ribas* or *Kimmel* in either case. Nor did the court disapprove the analysis in those cases that the litigation privilege does not extend to noncommunicative conduct that causes injury separate from the protected communication. Indeed, in *Rusheen,* the court cited *Ribas* in noting that the "testimonial use of illegally overheard conversation[s]" is privileged, but the eavesdropping itself is not. The court also cited *Kimmel* for its holding that "prelitigation illegal recording of confidential telephone conversations" is not privileged. (*Rusheen, supra,* 37 Cal.4th at p. 1058.) The court explained that "the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Ibid.*)

Roberts argues that Swallow's Penal Code Claims seek damages only from the government's subsequent use of the data that he accessed, not from the access itself. But Swallow testified

that he devoted time and effort to determining what data Roberts had accessed, which is a form of injury. Moreover, in addition to compensatory damages, both Penal Code sections 502 and 496 also permit attorney fees and punitive damages for violations, and section 502 permits injunctive relief. (See Pen. Code, §§ 502, subd. (e), 496, subd. (c).)

Another important form of injury is present here. Statutes that criminalize unauthorized access to confidential or private information have at their core the principle that such access causes injury through an invasion of privacy. (See Pen. Code, § 502, subd. (a) ["The Legislature further finds and declares that protection of the integrity of all types and forms of lawfully created computers, computer systems, and computer data is vital to the protection of the privacy of individuals as well as to the well-being of financial institutions, business concerns, governmental agencies, and others"].) In this respect, the unauthorized access to computerized data prohibited by Penal Code section 502 is similar to the unauthorized monitoring or recording of private telephone communications prohibited by the statutes at issue in *Ribas* and *Kimmel*. (See Pen. Code, § 630 ["The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal

liberties and cannot be tolerated in a free and civilized society"].)[15]

We therefore conclude that the litigation privilege does not apply to Roberts's alleged unauthorized *access* to Swallow's data, and that Swallow has therefore sufficiently demonstrated the minimal merit necessary for his Penal Code Claims to proceed.[16]

**4. Swallow's Cause of Action for Unfair Business Practices Cannot Be Stricken**

Swallow's cause of action for unfair business practices under Business and Professions Code section 17200 does not specifically identify the conduct that he claims is unfair, unlawful, or fraudulent, but simply incorporates preceding allegations. Thus, the claim appears to be based in part on allegations underlying Swallow's fraud claim. To that extent, it is subject to Roberts's motion to strike. However, the claim also appears to be based on allegations concerning Roberts's alleged wrongful use of Swallow's data that we hold below should not be stricken. That is apparent in the remedy Swallow seeks, which

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[15] Swallow testified in his declaration that private personal documents were among those that Roberts accessed, including Swallow's postal mail that was stored digitally on the Server and emails from Swallow to his attorneys.

[16] Although the litigation privilege does extend to Roberts's communications with government officials, Roberts has not identified any particular portions of Swallow's Penal Code Claims that are subject to a motion to strike on that basis. (See *Baral, supra,* 1 Cal.5th at p. 396 ["At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them"].) We therefore decline to order any specific language in those claims stricken.

includes "restitution" of confidential and privileged documents in Roberts's possession.

Roberts has not identified any particular portion of the unfair business practices claim that is based solely on Swallow's fraud claim and that he seeks to strike on that basis. We therefore have no basis to strike any particular portion of that cause of action. Because the cause of action is also based on the alleged Penal Code violations, we will not order the entire claim stricken. (See *Baral, supra,* 1 Cal.5th at p. 396 ["Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing"].)

**5. Attorney Fees**

A defendant who prevails on an anti-SLAPP motion is entitled to his or her attorney fees. (§ 425.16, subd. (c)(1).) Here, as a result of our ruling, Roberts's motion was partially successful, resulting in the dismissal of two of Swallow's claims for relief. We leave for the trial court to exercise its discretion to determine the proper amount of attorney fees to award Roberts based upon the successful portion of his motion, including appellate fees and costs. (See *Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 604–605.)

## DISPOSITION

The trial court's order denying Roberts's motion to strike under Code of Civil Procedure section 425.16 is reversed in part. Swallow's causes of action for fraud and breach of contract are ordered stricken. On remand, the trial court shall determine reasonable attorney fees and costs, including appellate attorney fees and costs, to award Roberts based on his partial success on his motion.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.