S282968

In the

Supreme Court

of

California

NEW ENGLAND COUNTRY FOODS, LLC,
Plaintiff-Petitioner,

v.

VANLAW FOOD PRODUCTS, INC.,
Defendant-Respondent.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 22-55432

OPENING BRIEF ON THE MERITS

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STATEMENT OF THE ISSUE

The United States Court of Appeals for the Ninth Circuit has certified to this Court the following question:

> Is a contractual clause that substantially limits damages for an intentional wrong but does not entirely exempt a party from liability for all possible damages valid under California Civil Code § Section 1668?

INTRODUCTION

The answer to the certified question is: "No." A contractual clause that substantially[1] limits damages for an intentional wrong but does not entirely exempt a party from liability for all possible damages is not valid under California Civil Code Section 1668 (hereinafter "Section 1668").

Here, Respondent Vanlaw Food Products, Inc. ("Vanlaw") is seeking to entirely eliminate its liability to Petitioner New England Country Foods, LLC ("NECF") for Vanlaw's intentional torts, gross negligence, and breaches of contract (express and implied terms) based on limitation-of-liability language in the agreement between the parties. Vanlaw successfully moved the trial court to dismiss all five causes of action in NECF's Complaint solely on this ground.

[1] This Court will need to define "substantially," unless this Court agrees with NECF that any limitation on damages for any intentional wrongs violates Section 1668 (which would sufficiently answer the certified question of the Ninth Circuit Court of Appeals.)

NECF contends that Section 1668 prevents the enforcement of the limitation-of-liability provisions to dismiss any of the five causes of action.

To grossly summarize, the trial court conceded that limitation-of-liability provisions that bar all recovery for intentional wrongs under all hypothetical wrongs that could be committed violate Section 1668. (1-ER-8.) But the trial court held limitation-of-liability provisions that bar all recovery for all intentional wrongs actually committed, so long as there exists at least one hypothetical wrong (that need not have been committed) where recovery would not be barred, do not violate Section 1668. (*Id.*) NECF disputes the trial court's interpretation of Section 1668 on the grounds set forth herein.

This Court's most recent decision focused primarily on Section 1668 was *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747 (hereinafter "*City of Santa Barbara*"). The present case allows this Court to prevent an end-run around its holding in *City of Santa Barbara* and Section 1668. Namely, if parties can limit damages so long as they do not entirely eliminate all potential damages, then there is nothing stopping parties from limiting any damages to one penny. Or maybe even just an apology[2]. Or parties could eliminate all damages for almost all

[2] In a split-of-authority, the Court of Appeal has suggested that **all** economic liability can be contractually exempted *ex ante* without violating Section 1668. *CAZA Drilling (California), Inc. v. Teg Oil & Gas U.S.A., Inc.* (2006) 142 Cal.App.4th 453, 471 ("The provisions at issue here do not exempt CAZA from all liability, but merely limit its responsibility with respect to economic damages.")

wrongs, except for a single wrong that was unlikely to occur (or might even be impossible). And then the liability-barred wrongs could be committed with impunity.

Allowing substantial limitations to damages for intentional wrongs – especially when damages for specific intentional wrongs are entirely eliminated as they are here – would effectively nullify Section 1668 and *City of Santa Barbara* and thus eliminate consequences for, and thus encourage, committing intentional wrongs.

In fact, allowing **any** limitations to damages for intentional wrongs cannot be harmonized with the following statutes, *inter alia*:

1. Ins. Code § 533 (insurer cannot indemnify intentional torts);
2. Intentional tortfeasors are not entitled to any contribution or several liability from even other tortfeasors. Code Civ. Proc. § 875(d); Civ. Code § 1431.2; *B.B. v. Cnty. of L. A.* (2020) 10 Cal.5th 1, 25.
3. Inability to contractually limit punitive damages. Civ. Code §§ 3294, 3513.

And **entirely** eliminating damages for specific intentional wrongs, while allowing them for others, as Vanlaw contends allows dismissal of all of NECF's claims, cannot be harmonized with a plethora of other California statutes and well-settled doctrines, including but not limited to:

4. The implied covenant of good faith and fair dealing cannot be waived. *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 91.

5. Civ. Code § 3523 ("For every **wrong** there is a remedy.") (emphasis added.)

6. The codified and common-law cannons of contractual interpretation whereby interpretations which effectively nullify material terms are avoided. Civ. Code § 1653 (words inconsistent with the main intention of the contract are to be rejected); *TitanCorp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 474 (citing *New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, 81-82.)

7. Illusory promise. *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 15.

STATEMENT OF THE CASE

As used herein, the abbreviation "ER," refers to the four volumes of the Excerpts of the Record filed in the Ninth Circuit Court of Appeals, which were then received by this Court on December 6, 2023 along with the Briefs filed in the Ninth Circuit Court of Appeals.

A. The Core Factual Allegations at Issue

Both the Original Complaint and the First-Amended Complaint allege that Vanlaw and NECF entered into two contracts in connection with Vanlaw

manufacturing food that was based on NECF's recipe, including in connection with NECF's 19-year relationship with Trader Joe's. (4-ER-692); (2-ER-130.) Both Complaints allege that Vanlaw secretly told Trader Joe's that it could clone NECF's barbeque sauce so Trader Joe's could purchase barbeque sauce directly from Vanlaw instead of going through NECF. (*Id.*) Trader Joe's agreed and terminated NECF's 19-year relationship. (*Id.*) NECF alleges this constitutes:

> (1) Breach of Contract;
> (2) Intentional Interreference with Contractual Relations;
> (3) Intentional Interference with Prospective Economic Relations;
> (4) Negligent Interference with Prospective Economic Relations; and
> (5) Breach of Fiduciary Duty of Undivided Loyalty
> (*Id.*)

Both the Original Complaint and the First-Amended Complaint allege and attach the "Mutual Non-Disclosure" and "Operating Agreement" between the parties as Exhibits A and B, respectively. (2-ER-110.); (2-ER-114.); (4-ER-702.); (4-ER-706.)

As to breach of contract, both Complaints allege:

> [Vanlaw] committed breaches of those written agreements, within the last four years, by offering to Trader Joe's to wrongfully clone [NECF]'s propriety sauce which violated: (i) the reverse-engineering prohibition in Exhibit A, paragraph 3, and (ii) the implied covenant of good-faith and fair dealing implied in both Exhibits A and B.
> (4-ER-697 ¶ 29); (2-ER-135 ¶ 31).

As to Vanlaw's claimed exculpation from all liability:

Paragraph 13 of the Operating Agreement states:

> Limitation of Liability
> To the extent allowed by applicable law: (a) in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind …
> (2-ER-118.)

Paragraph 20 of the Operating Agreement states at the top of the third paragraph:

> Notwithstanding the above, in no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind…
> (2-ER-120.)

B. Procedural Posture – The Previous State-Court Action (Provided Primarily for Context)

1. Vanlaw's December 21, 2017 Complaint in State Court

Vanlaw commenced Orange County Superior Court Case Number 30-2017-00962844-CU-BC-CJC by filing a terse complaint against NECF in state court on December 21, 2017. (3-ER-324.) Essentially the sole substantive allegation was:

> [Vanlaw] agreed to, and did, supply [NECF] with goods (bottles) pursuant to [NECF]'s Purchase Orders, in return for [NECF]'s timely payment to [Vanlaw] upon receipt of [Vanlaw]'s invoices (30 days).
> (3-ER-326.)

No agreements were attached to Vanlaw's state-court complaint. (*Id.*)

2. Vanlaw's Explanation of Its December 21, 2017 State-Court Complaint in Its State-Court Trial Brief

Vanlaw alleged that on July 22, 2015 (over three months before the Operating Agreement (2-ER-114, 4-ER-706) was signed), NECF transmitted a "blanket" purchase order to Vanlaw for 15,000 cases (360,000 bottles) of sriracha sauce, but NECF only ended up purchasing 6,515 cases (156,360 bottles). (3-ER-606.); (*See, also*, (2-ER-282.)) Vanlaw had purchased a total of 300,000 "custom" empty bottles in reliance on the "blanket" purchase order, so when NECF didn't make any additional purchases, Vanlaw still had about 5,579 2/3 cases (133,912 bottles) of unused "custom" bottles that it could not use on other products. (3-ER-606.) Vanlaw sought damages for its cost of purchasing the unused "custom" bottles it could not use, plus the costs of storing the bottles. (*Id.*) Vanlaw's claims in state court had nothing to do with Trader Joe's. (*Id.*) Trader Joe's was never even a potential customer for the sriracha sauce at issue in Vanlaw's state-court complaint. (*Id.*)

3. NECF's February 19, 2019 Cross-Complaint in State Court

On February 19, 2019, NECF filed a cross-complaint against Vanlaw in the state court action. (3-ER-336.)

4. NECF's State Court Cross-Complaint, According to Vanlaw

According to Vanlaw:

> …the original Cross-Complaint [] simply alleges that [Vanlaw] owes less than one hundred thousand dollars for failing to pay some royalty fees for products sold and charging excess on material and management fees.
> (3-ER-403, lines 6-9.)

5. NECF Unsuccessfully Seeks Leave to Amend Its Cross-Complaint in Early 2021 To Add the Allegations Now Contained in the June 16, 2021 Federal Complaint

On March 2, 2021, the state-court clerk accepted for filing NECF's January 27, 2021 motion for leave to file a first-amended cross-complaint. (3-ER-350.) The proposed first-amended cross-complaint sought to add the allegations which comprise the current federal-court complaint. (3-ER-363.)

Vanlaw opposed on the ground:

> The [Proposed First-Amended Cross-Complaint] is self-explanatory, but to highlight: (1) **it is based upon an entirely new set of facts completely unrelated** to the [February 19, 2019] Cross-Complaint that [Vanlaw] has been defending for over two years;
> (3-ER-411 lines 10-12.) (emphasis added).

The state court agreed with Vanlaw, and denied NECF's motion for leave to amend its cross-complaint on April 16, 2021:

> Based upon the grounds that allowing [NECF] to assert an **entirely new factual dispute** and four new causes of action on the eve of trial after discovery has been closed would cause [Vanlaw] substantial prejudice, the motion is denied.

(3-ER-427.) (citations omitted).

There was no finding of "bad faith" by NECF. (*Id.*)

6. NECF Prevails at Trial, Including on Vanlaw's "Limitation of Liability" Defense

NECF obtained a judgment against Vanlaw on September 9, 2021 in state court after trial. (2-ER-249.)

In its state-court trial brief filed July 9, 2021, Vanlaw had argued the limitation-of-liability provision barred a portion of NECF's recovery. (4-ER-612, lines 8 to 12, 4-ER-622, lines 13 to 15.) That argument was raised again by Vanlaw in its request for a statement of decision filed July 30, 2021. (4-ER-680, lines 4 to 9.)

Vanlaw's "limitation of liability" defense was expressly rejected by the state court as indicated in the Statement of Decision filed concurrently with the September 9, 2021 judgment:

> **[VANLAW'S] REQUEST 2**: Whether the Court found that the limitation of liability clauses in the Operating Agreement (paragraphs 13 and 20) preclude Cross-Complainant from recovering damages for Cross-Defendant's alleged failure to use commercially reasonable efforts to ship cases of BBQ Sauce.
>
> **[THE STATE COURT'S] RESPONSE 2:** The Court did not find the "limitation of liability" clauses barred any damages claimed in this Action on either side for three independent grounds:
>
> a) The testimony of Mr. Gilbert regarding the unshipped orders was that Vanlaw did not ship the December, 2017 orders because

Vanlaw believed it could not ship them before December 31, 2017. This testimony indicates Vanlaw made an intentional decision not to ship orders based on an erroneous legal understanding of the Operating Agreement, *inter alia*, as discussed in more detail in Response 3, below. Thus, the Court finds the failure by Vanlaw to ship all of the orders placed by Trader Joe's was intentional, not merely ordinary negligence. And Parties cannot, by contract, limit the damages for intentional (or even grossly negligent) conduct. Civ. Code § 1668; *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755.

b) Contractual Interpretation – The Court must interpret both the "commercially-reasonable" provision (Ex. 1 ¶ 10(e)) and the "limitation-of-liability" clauses (Ex. 1 ¶ ¶ 12, 20) in concert. Contract language must be interpreted, "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." *TitanCorp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-74. As such, a finding that the "limitation-of-liability" clauses bar claims for violating the "commercially-reasonable" provision would render the "commercially-reasonable" provision nugatory, thus the Court cannot and does not so interpret the "limitation-of-liability" clauses as such. *See, also,* Civ. Code §§ 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."), 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."), 3523 ("For every wrong there is a remedy.") As such, the Court interprets the "limitation-of-liability" clauses to limit liability for ordinary negligence of non-contractual tort duties owed by the parties to each other. This interpretation has the added benefit of according with both section 1668 of the Civil Code and *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755. As discussed above, Mr. Gilbert testified that Vanlaw (i) intentionally violated (ii) an express contractual provision – paragraph 10(e) of Exhibit 1. Thus, for both of those reasons, the "limitation-of-liability" clauses do not apply to bar any damages by NECF here.

c) Judicial Estoppel / Judicial Admission: Vanlaw sought both in its complaint (judicial admission) and at trial (judicial estoppel) incidental damages in the form of the cost of purchasing empty bottles. Namely, there is no evidence NECF ordered empty bottles from Vanlaw. Rather, Vanlaw claims in the complaint and at trial is that it was damaged because NECF failed to purchase 360,000 finished sriracha bottles pursuant to the "blanket" purchase order. (Ex. 233.) Vanlaw cannot take the inconsistent position that NECF cannot obtain damages but Vanlaw can. Even after NECF pointed out this inconsistency in its closing arguments, Vanlaw chose not to withdraw its claim from damages on the empty bottles. This Court has awarded damages on the empty bottles. Thus, Vanlaw is judicially estopped from asserting that the "limitation of liability clauses" bars NECF's damages, but not theirs, and has also judicially admitted that that the "limitation of liability clause" does not apply to incidental damages.

Relevant Testimony:
Thomson Testimony
Q: Are there 12,550 unshipped orders in Exhibit 232?
A: Yes.
Q: Could VanLaw have shipped all of those 12,550 unshipped orders using commercial and reasonable efforts, in your expert opinion?
A: Yes, very definitely.
(July 14, 2021 Transcript at 99:24-100:4.)

Gilbert Testimony
Q: Now, there is a document that I have on the screen here (indicating). This is Exhibit 232. And I'll represent to you that these are Trader Joe's-produced purchase orders, at least a table of them. And again, they were produced by Trader Joe's. And at the end here (indicating) -- oops. I did something wrong. Okay. So at the end of this document -- maybe you can call it out. Okay, there are some zeros in this particular column (indicating) -- I think I can do this -- right here. See these (indicating)?
A: Yes.
Q: Okay. And over here (indicating), these are, I'll represent to you, apparently the orders of cases, and they're zeroed out here (indicating). Do you believe that VanLaw attempted to do everything it could to fulfill their product through the end of the relationship?

A: We did everything. Yes, we did.
Q: Is there anything -- did you intentionally attempt to stop fulfilling their orders at any point?
A: Only orders that would have been required to be produced and done after the end of the agreement.
Q: To the extent that -- are you aware -- regardless of this document that we're looking at, are you aware of any orders that you were unable to fulfill?
A: Yes --
Q: Okay.
A: -- not because we couldn't make it from a manufacturing standpoint, but because we didn't have the right to make it from an agreement standpoint.
Q: After the termination of the three-year term?
A: Correct.
(July 14, 2021 Transcript at 146:9-147:15.) (emphasis added.)

Thomson Testimony
Q: NOW, YOU HEARD MR. GILBERT TESTIFY ABOUT THE FACT THAT HE BELIEVED HE COULD NOT SHIP THOSE DECEMBER 2017 ORDERS BEFORE THE CONTRACT TERMINATED, RIGHT?
A: YES.
Q: OKAY. WAS IT YOUR UNDERSTANDING OF THE OPERATING AGREEMENT THAT THE RELEVANT TIME PERIOD WAS THE DATE THE ORDERS WERE SUBMITTED, SUCH THAT IF AN WAS SUBMITTED WITHIN THE CONTRACT PERIOD THERE WAS AN OBLIGATION TO MANUFACTURE THOSE ORDERS EVEN IF THEY WERE GOING TO BE SHIPPED OUTSIDE OF THE TERMS OF THE AGREEMENT?
A: CORRECT. I WOULD JUST LIKE A SLIGHT COPY CHANGE ON THAT THAT IT WAS A MATTER OF WHEN THE ORDERS WERE RECEIVED, WHEN WE THEY WERE SUBMITTED BY TRADER JOE'S AND RECEIVED BY VANLAW. CORRECT.
Q: OKAY. AND IS PARAGRAPH 10(E) THE BASIS FOR THAT BELIEVE? I'LL SHOW YOU WHAT THAT IS VERY QUICKLY. EXHIBIT 1, PARAGRAPH 10(E). RIGHT HERE. IS THAT THE BASIS OF YOUR BELIEF? "AGREES TO USE COMMERCIALLY REASONABLE EFFORTS"?

A: CORRECT.
Q: IS YOUR EXPERT OPINION IS IT AN INDUSTRY STANDARD THAT A CO-MANUFACTURER IS RESPONSIBLE TO USE COMMERCIALLY REASONABLE EFFORTS TO MANUFACTURE ORDERS PLACED WITHIN THE CONTRACT TERM?
A: CORRECT, YES.
(July 19, 2021 Morning Transcript at 13:21-14:19.)

Relevant Closing Arguments:
NECF's Closing Argument
IN THE HEIGHT OF IRONY – WE'RE NOT ARGUING THIS. I WANT TO BE VERY CLEAR. WE'RE NOT ARGUING THAT THE INCIDENTAL DAMAGES BARRES [sic] THEIR CLAIM, BUT IT'S HIGHLY IRONIC, BECAUSE THEIR CLAIM ON THE COMPLAINT IS A COMPLAINT FOR INCIDENTAL DAMAGES, THE BOTTLES. SO THEY'RE TALKING OUT OF BOTH SIDES OF THEIR MOUTH. AND HOW THE STORAGE FEES ARE SOMEHOW DIFFERENT THAN THE BOTTLES.
(July 19, 2021 Afternoon Transcript at 57:26-58:5. Vanlaw's rebuttal, not quoted herein, at 58:26-62:19.)

(2-ER-240.)

7. Vanlaw Appealed the Judgment and Award of Fees, and Both Decisions Were Affirmed in Full

On November 8, 2021, Vanlaw filed a notice of appeal of the state-court judgment. (2-ER-166.) The judgment was affirmed in full on June 21, 2023 by an unpublished opinion. (Opinion, Ct. of App., 4th Dist., Div. 3, Case No. G060848.) On May 11, 2022, Vanlaw filed a notice of appeal of the state-court award of attorney's fees, which was affirmed in full on July 6, 2023 by an unpublished opinion. (Opinion, Ct. of App., 4th Dist., Div. 3, Case No. G061375.) There was

no Petition for Review of either Court of Appeal decision filed with this Court. (Ct.'s Docket.)

C. Procedural Posture – This Federal Action (Provided Primarily for Context)

1. NECF Commences This Action on June 16, 2021

On June 16, 2021, NECF filed its complaint against Vanlaw in this action in the Central District of California. (4-ER-692.) The federal complaint contains the new allegations it was not permitted to add to its state-court cross-complaint. *Compare* (4-ER-692) *with* (3-ER-387.)

2. The First Motion to Dismiss Is Granted with Leave to Amend

In meeting-and-conferring on the first motion to dismiss, Vanlaw wrote:

> If NECF believes the state Court should have allowed the claims in the Complaint to be in the state court action, the recourse would be an appeal of the denial of the motion to amend the cross-complaint, *not a new, separate action*.
> (2-ER-284.) (emphasis in original).

Vanlaw argued in its first motion to dismiss, filed August 26, 2021, that claim preclusion (a/k/a res judicata) and issue preclusion (a/k/a collateral estoppel) barred all of the claims in the complaint. (3-ER-315.) NECF's opposition, filed September 3, 2021, argued there was no judgment yet. (2-ER-276.) In Vanlaw's reply filed on September 13, 2021 it attached a copy of the state-court judgment, entered on September 9, 2021 in favor of NECF and against Vanlaw to support its

issue preclusion and claim preclusion arguments. (2-ER-249.)

On November 9, 2021, the district court issued the following order:

> Text Only Order re First NOTICE OF MOTION AND MOTION to Dismiss Case Pursuant to FRCP 12(b)(6)[14] by Judge David O. Carter. The Court notes from [Vanlaw's] Reply that the state court issued a final judgment in the underlying state action. The Court requests supplemental briefing of no more than ten pages from the parties on the effect of the state courts final judgment on the issue preclusion and claim preclusion arguments in [Vanlaw's] Motion to Dismiss (Dkt. 14). [Vanlaw's] briefing is due November 12 at 4:00 pm Pacific; [NECF's] briefing is due November 19 at 4:00 pm Pacific time.
> (4-ER-724 – Docket Entry No. 22.)

Vanlaw never notified the district court of its state-court appeal, even in the brief it filed about the judgment on November 12, 2021: four days after it appealed said judgment. (2-ER-166, 178.)

On November 23, 2021, the district court issued its ruling, denying all purported defenses in support of the motion except the "limitation of liability" defense. However, the district court suggested that additional pleading by NECF could defeat the defense on a subsequent motion to dismiss:

> And in *Health Net* [*of Cal., Inc. v. Dep't of Health Servs.* (2003) 113 Cal.App.4th 224, 239], the court voided a provision limiting recovery to prospective relief because it "did not compensate [plaintiff] for any lost revenue" and therefore "exempts [defendant] completely from responsibility for completed wrongs." *Id.* at 240-41. [¶] Here, no meaningful injunctive relief is available to Plaintiff, as Defendant stopped making the allegedly reverse-engineered sauce recipe after it failed to meet Trader Joe's expectations. See Compl. ¶ 23. The Court will not attempt to hypothesize what direct damages may be available to compensate Plaintiff for its alleged injuries. As such, the Court GRANTS Defendant's Motion based on the limitation on liability

provision and DISMISSES Plaintiff's Complaint. Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability.
(2-ER-149.)

3. The Complaint is Amended to Plead Facts the First Ruling Suggested Were Sufficient to Defeat a Motion to Dismiss

On December 18, 2021 NECF amended its complaint as ordered, with the only material changes being the addition of Paragraphs 26 and 27:

> 26. Upon information and belief, all of [NECF]'s harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to [NECF] from the wrongs committed by [Vanlaw] are a loss of profits.
> 27. As such, the putative limitation-of-liability provisions in the Operating Agreement ([4-ER-706] §§ 13, 20), if applied, would completely exempt [Vanlaw] from liability from the wrongs alleged herein because said provisions purport to bar all claims for, "loss of profits." [Vanlaw] should be judicially estopped from claiming otherwise because it filed a motion to dismiss the entire complaint on the ground of said limitation-of-liability provisions, inter alia. (Mot. 31:14-17: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint." ([3-ER-316]) And said motion was granted by the Court on that ground (with leave to amend). ([2-ER-142.])
> (2-ER-134.)

4. The Second Motion to Dismiss Is Granted without Leave to Amend Despite Pleading Facts the First Ruling Suggested Were Sufficient to Defeat a Motion to Dismiss

On December 22, 2021, Vanlaw filed a motion to dismiss NECF's First-

Amended Complaint solely on "Limitation of Liability" and "Speculative Damages". (2-ER-76.) NECF filed an opposition. (2-ER-66.) Vanlaw filed a reply. (2-ER-53.) The district court granted the motion without leave to amend on "Limitation of Liability" grounds only, premised almost entirely on *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126. (1-ER-7.)

5. NECF Appealed the Dismissal of The Complaint

NECF filed a notice of appeal on April 27, 2022. (2-ER-12.) While judgment was entered on February 1, 2022, the notice of appeal was nonetheless timely filed because the district court, by written order filed February 22, 2022, extended the deadline to file the notice of appeal until thirty days after the Court ruled on Vanlaw's February 15, 2022 motion for attorney's fees. (2-ER-26); (2-ER-24.) The district court denied Vanlaw's motion for attorney's fees in its entirety on March 29, 2022. (2-ER-18.) The parties stipulated that transcripts are not necessary for this appeal. (2-ER-10.)

6. The Ninth Circuit Court of Appeals Requested That This Court Decide a Question of California Law, And This Court Granted That Request

On December 6, 2023, the Ninth Circuit Court of Appeals certified the following question to this Court and requested that this Court decide:

> Is a contractual clause that substantially limits damages for an intentional wrong but does not entirely exempt a party from liability

for all possible damages valid under California Civil Code Section 1668?
(Order filed Dec. 6, 2023 with this Court.)

On February 14, 2024, this Court granted the Ninth Circuit Court of Appeals' request to decide that question of California law. (Order filed Feb. 14, 2024.)

ARGUMENT

When interpreting a statute, the fundamental task of courts is to ascertain the Legislature's intent and effectuate the law's purpose, giving the statutory language its plain and commonsense meaning. *Kaanaana v. Barrett Bus. Servs.* (2021) 11 Cal.5th 158, 168-69 (citations omitted). Courts should examine the statutory language in the context of the entire statutory framework to discern its scope and purpose and to harmonize the various parts of the enactment. *Id.* (citations omitted.) "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." *Id.* (citations omitted.) The wider historical circumstances of a law's enactment may also assist in ascertaining legislative

intent, supplying context for otherwise ambiguous language. *Id.* (citations omitted.)

A. The Plain Language of Section 1668 Permits More Than One Reasonable Interpretation

Section 1668 of the California Civil Code, enacted in 1872, states:

> All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

The Ninth Circuit Court of Appeals held:

> The statutory language of Section 1668 seems susceptible to both readings. The use of the word "exempt" in the statute may indicate that only provisions that categorically bar all liability are invalid. However, when read within its broader context—that "all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility"—the term "exempt" may be interpreted to mean that even liability provisions that bar only certain kinds of damages run afoul of this statute, because they could have the indirect effect of effectively exempting a party from liability.

(Order of 9th Cir. dated Dec. 6, 2023, p. 8.)

For the purpose of determining ambiguity of statutory text, an interpretation is unreasonable only if it is "wholly" unreasonable. *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1398. NECF contends its proffered interpretation, that any limitation of damages for one's fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law is best supported by "its plain and commonsense meaning."

See, e.g., Merriam Webster's Online Dictionary ("Exempt" defined as "free or released from **some** liability or requirement to which others are subject.[3]" (emphasis added.))

However, in light of the above statement of the Ninth Circuit Court of Appeals, and the split of authority cited by the Ninth Circuit Court of Appeals, it seems disingenuous for any party to argue that either interpretation is a "wholly" unreasonable "literal interpretation" of the statute's plain text.

B. The Legislature Could Not Have Intended for Parties to Effectively Eliminate Damages and Thus Practically Obviate Section 1668

1. If Damages Can Be Capped Without Restriction, They Could Be Capped at One Penny, Negating Section 1668

It seems beyond dispute that the Legislature did not intend for parties to be able to cap their liability for intentional torts at one penny (or an apology as noted in footnote 2, above.) So the question then becomes: if parties can cap their liability for intentional torts, but not as low as a penny (or an apology), what restrictions did the Legislature intend? NECF contends the absence of defined restrictions in Section 1668 leads to only one conclusion: that the Legislature did not intend that damages for intentional torts can be capped because the alternative, no restrictions on caps, has the absurd result of effectively negating Section 1668.

[3] https://www.merriam-webster.com/dictionary/exempt

2. If Damages Can Be Completely Eliminated on Certain Wrongful Intentional Conduct, then a Party Can Commit That Wrongful Conduct with Impunity

It also seems beyond dispute that the Legislature did not intend for parties to be able to completely eliminate their liability for intentional torts, so long as one hypothetical claim for damages exists. For example, the following hypothetical provision is clearly absurd: "Under no circumstance is any party entitled to damages of any sort. Notwithstanding the foregoing, the parties are entitled to damages for assaults occurring on the moon."

So the question then becomes: if parties can completely eliminate their liability for some intentional torts, but not all, then what restrictions did the Legislature intend? NECF contends that the absence of defined restrictions in Section 1668 leads to only one conclusion: the Legislature did not intend that liability for any intentional torts can be limited because the alternative, no restrictions on elimination of liability for intentional torts so long as one hypothetical claim remains, has the absurd result of effectively negating Section 1668.

C. Alternatively, Public Policy Supports NECF's Interpretation

As noted in NECF's December 22, 2022 Letter in Support of the Request of the United States Court of Appeal for the Ninth Circuit to Decide a Question of California Law:

> Rational actors respond to consequences. If there are no consequences, or reduced consequences, for wrongful behavior (whether that behavior is willful, grossly negligent, or simply negligent), there will be more of the wrongful behavior.

These policy considerations were discussed extensively in *City of Santa Barbara*, such as:

> [P]ublic policy precludes enforcement of a release that would shelter aggravated misconduct.

Id. at 760 (citations omitted). And:

> [A]n agreement that would remove a party's obligation to adhere to even a minimal standard of care, thereby sheltering aggravated misconduct, is unenforceable as against public policy.

Id. at 762.

Violating the duty to refrain from committing an intentional tort certainly falls well below the "minimal standard of care."

Much like "state's rights," the "freedom of contract" may be desirable in many instances, but not all. Rather, the specific right sought is highly relevant to the public policy implications. A "state's right" to violate human rights serves no legitimate public policy purpose. And the freedom to exculpate oneself from

liability for intentional misconduct similarly serves no legitimate public policy purpose. Rather it accomplishes only one thing: increasing intentional misconduct.

In sum, all legitimate public policy arguments favor full liability for intentional torts. In fact, there are codified public policy arguments in favor of increasing liability for intentional torts **beyond** compensatory damages. *See* Civ. Code § 3294 (punitive damages). The statutes and common law doctrines to harmonize, below, similarly support this public-policy argument.

D. Alternatively, Only NECF's Interpretation Is in Harmony with Other Statutes and the Common Law

Courts strive to harmonize statutes with other statutes and the common law to avoid a tacit repeal. *State Dep't of Pub. Health v. Superior Court* (2015) 60 Cal.4th 940, 955-56 (harmonize with other statutes); *California Ass'n of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 (harmonize with common law.)

There are at least seven statutes or common-law doctrines that should be harmonized with Section 1668:

1. Section 533 of the Insurance Code – Insurers Cannot Agree to Pay Any Damages on Behalf of Intentional Tortfeasors

Section 533 of the Insurance Code states:

> An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.

Section 533 of the Insurance Code was not enacted to protect insurance companies; rather, it was enacted to avoid encouragement of willful torts:

> Section 1668 of the Civil Code and section 533 of the Insurance Code establish a public policy to prevent insurance coverage from encouragement of wilful tort.

Tomerlin v. Canadian Indem. Co. (1964) 61 Cal.2d 638, 648. *See, also*, *B.B.*, 10 Cal.5th at 25.

If an insurance company cannot contract to reduce the damages imposed on an intentional tortfeasor, harmony would require that a person or entity cannot act as an insurance company and effectively "cover" damages from intentional torts by waiving them *ex ante*.

The net effect on encouraging intentional wrongs is actually worse by allowing a party to prospectively waive damages from intentional wrongs. That's because an insured with "willful tort" insurance coverage (assuming the non-existence of section 533 of the Insurance Code) would still have to exercise some caution as insurance has policy limits. Broad exculpation, as Vanlaw argues, has no "limits."

2. Intentional Tortfeasors are Not Entitled to Contribution or Several Liability

Negligent tortfeasors have the right of contribution and are only responsible for their several share of non-economic damages. Code Civ. Proc. § 875(a); Civ. Code § 1431.2. These rights are not available to intentional tortfeasors. Code Civ. Proc. § 875(d); *B.B.*, 10 Cal.5th at 25.

This Court in *B.B.* raised the interrelation of this doctrine with section 533 of the Insurance Code and Section 1668 of the Civil Code on page 25 of its opinion.

If a third-party tortfeasor cannot be compelled to pay to reduce the damages imposed on an intentional tortfeasor, harmony would certainly require that the victim cannot "contribute" toward their own damages from intentional torts by waiving them *ex ante*.

Like the insurance issue, above, the net effect on encouraging intentional wrongs is actually worse by allowing a party to prospectively waive damages from intentional wrongs. That's because the ability to actually obtain contribution is limited by the ability to collect from said third-party. Thus, intentional tort damages may not actually be reimbursed even if the theoretical right to collect from said third-party existed. Broad exculpation, as Vanlaw argues, poses no "collectability" problem for the intentional tortfeasor. And the aforementioned statutes simply reduce the damages paid by one tortfeasor by splitting them

amongst other tortfeasors, not by eliminating them entirely as Vanlaw is intent on doing here.

3. Inability To Contractually Limit Punitive Damages

While NECF was unable to find a case squarely on point, NECF believes parties are not free to limit punitive damages because punitive damages exist for a "public reason." Civ. Code §§ 3294, 3513; s*ee PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 317 (explaining why insurance companies may not indemnify insureds for punitive damages).

NECF prayed for punitive damages (2-AR-138 ¶ 4), yet its entire case was dismissed. (The "Operating Agreement" purports to entirely eliminate punitive damages. See (2-ER-120).) Section 1668 must be interpreted in harmony with this doctrine to prohibit limitation of punitive damages.

Further, it strains credibility that a party cannot limit or waive punitive damages, but could limit or waive the underlying compensatory damages. Namely NECF argues compensatory damages in cases where punitive damages are awarded serve a dual purpose, one of which is the same "public reason" as punitive damages. Thus, harmony also requires interpretation of Section 1668 to prohibit limitation of compensatory damages when punitive damages may be awarded.

4. The Implied Covenant of Good Faith and Fair Dealing Cannot Be Waived

Parties are not free to waive the implied covenant of good faith and fair dealing. *Freeman & Mills, Inc.*, 11 Cal.4th at 91. Here, Vanlaw argues that Section 1668 must be interpreted to allow waiver of NECF's claims for violating the implied covenant of good faith and fair dealing. But harmony requires an interpretation of Section 1668 that prevents such a waiver.

5. Section 3523 of the Civil Code – For Every Wrong There is a Remedy

Put simply Vanlaw argues that despite committing a wrong (which is presumed in light of the pleading stage) there is no remedy. *See, also, Marbury v. Madison* (1803) 5 U.S. 137, 163 ("where there is a legal right, there is also a legal remedy by suit, or action at law, when ever that right is invaded.")

6. Contract Interpretation – Avoiding a Nullity

To find that a party can waive liability for willfully violating express contract terms would be to make said express contract terms a nullity. This is not a permissible method of contract interpretation. Accordingly, Section 1668 should be harmonized with the cannons of contract interpretation to disallow limitation of liability for <u>willfully</u> violating express contract terms. *See* Civ. Code § 1653 (words inconsistent with the main intention of the contract are to be rejected);

TitanCorp., 22 Cal.App.4th at 474 (citing *New York Life Ins. Co.,* 38 Cal.2d at 81-82.)

7. Illusory Promise

Very similar to the argument, above, a promise to do something or refrain from doing something with no ability to enforce is an illusory promise. *Asmus*, 23 Cal.4th at 15. Therefore Section 1668 must be harmonized with the "illusory promise" doctrine to disallow the waiver of liability for willfully violating express or implied contract terms.

E. The Court of Appeal Decisions Which Facially Appear to Contradict NECF's Position Reflect the Court of Appeal's Concern About Harshly Striking Limitation-of-Liability Provisions for What is Ultimately Negligence

When reviewing the case law, it is helpful to classify the underlying wrongs alleged (or proven, depending on the procedural posture) into three classifications:

1) Ordinary negligence – no violation of law (i.e. statute or regulation)

2) Ordinary-negligent violation of law

3) Willful (and grossly negligent) acts

To be clear, the above classifications are classifications of the wrongs, not the types of claims, so for the purpose of the proffered classification system,

"ordinary negligent" breach of contract would still be included in the first or second classification. (*See, also*, section G, below.)

As to the first classification, it is beyond dispute that parties can entirely eliminate future claims for ordinary negligence in the absence of a statutory/regulatory violation, provided the *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 (hereinafter *"Tunkl"*) factors permit the elimination.

The proper treatment of the second classification of wrongs is the core of the dispute in the case law, and is where the Court of Appeal struggles and is split. This split is understandable given the competing policy reasons expounded upon in subsection 2, below.

As to the third classification, the Court of Appeal does not appear to have the same policy concerns about striking limitation-of-liability provisions as it does for the second classification. While there are suggestions in the case law that parties can "limit" but not "eliminate" liability for intentional wrongs, it appears no Court has applied that suggestion to the specific facts before said Court in any published opinion NECF could locate.

1. The Ninth Circuit Court of Appeals Has Identified Several Cases Which Appear to Conflict

The Ninth Circuit Court of Appeals cited the following cases in support of NECF's position:

- *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 98-101 (finding a limitation of liability statement void under Section 1668)
- *Health Net of Cal., Inc. v. Dep't of Health Servs.* (2003) 113 Cal.App.4th 224, 239 (hereinafter "*Health Net*").

(Order of 9th Cir. dated Dec. 6, 2023, p. 8.)

It should be noted that Vanlaw relied heavily on *Health Net* at both the district court level, and in the Ninth Circuit Court of Appeals. (2-ER-54, 58, 91, 95-99, 102, 197, 203.); (Answering Brief in the 9th Cir., pp. 34, 38, 39, 40, 41, 42, 44.) Further, this Court appears to have cited *Health Net* with approval on pages 757 and 758 of *City of Santa Barbara*. And *CAZA Drilling (California), Inc. v. Teg Oil & Gas U.S.A., Inc.* (2006) 142 Cal.App.4th 453 (hereinafter *CAZA*) cites *Health Net* with approval throughout the opinion. *CAZA* at *passim*.

The Ninth Circuit Court of Appeals cited the following cases in support of Vanlaw's position:

- *Farnham v. Superior Ct.* (1997) 60 Cal.App.4th 69, 77 (finding "that a contractual limitation on the liability of directors for defamation arising out

of their roles as directors is equally valid where, as here, the injured party retains his right to seek redress from the corporation" (emphasis in original))

- *CAZA* at 475 ("[T]he challenged provisions … represent a valid limitation on liability rather than an improper attempt to exempt a contracting party from responsibility for violation of law within the meaning of [S]ection 1668.").

(Order of 9th Cir. dated Dec. 6, 2023, p. 8.)

a. *Farnham* Is Distinguishable

Footnote 7 clarifies the holding of *Farnham*:

> We are concerned in this case with a claim of defamation, and express no view about the validity of the "sole remedy" provision if Farnham's claim alleged fraud or some other intentional tort.

Farnham, 60 Cal.App.4th at fn. 7 (citations to Ohio, Florida, Second Circuit Court of Appeals, and Georgia cases omitted.)

Thus, *Farnham* is clearly distinguishable. It should be noted that even if defamation is an intentional tort in this context, then *Farnham* appears to be internally inconsistent with its own footnote 7. It should also be noted that like *Tunkl*, *Philippine Airlines, Inc. v. McDonnell Douglas Corp.* (1987) 189 Cal.App.3d 234, 237, which appears to constitute the support for *Farnham* on the relevant proposition, is a case about ordinary negligence. *Philippine Airlines, Inc.*,

189 Cal. App.3d at 237 ("MDC's negligence in the manufacture of the aircraft was the cause of the rejected take-off.")

Farnham's statement: "In a free market society, we see no public policy reason why a business should not be allowed to insulate its directors from litigation with its employees … [w]e believe a business is entitled to protect its officers, directors and shareholders from the high cost of litigation arising out of suits by employees" is unsupported. *Id.* at 78. This logic would appear to prevent an employee from suing a director for sexual assault, *inter alia*, thus effectively encouraging said behavior. The stated concern about litigation costs can be mitigated in numerous ways that don't encourage intentional torts, including, but not limited to: joint representation (employer and director), director is a signatory to an arbitration provision, or the arbitration provision includes arbitration against directors under the non-signatory doctrines. *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513.

b. <u>*CAZA* Is Distinguishable and Predates *City of Santa Barbara*</u>

The facts of *CAZA* are fairly simple:

> In 2002, CAZA was hired by TEG to drill a well at the Tapia oil field, located in Castaic, California. The well was referred to as "Yule 6." The work was performed under a standardized contract entitled "Daywork Drilling Contract — U.S." A few days after drilling began, there was a blowout, resulting in the death of a CAZA employee, injury to others, and complete destruction of Yule 6. [¶] It is appellants' position the blowout was the result of the negligence of CAZA's crew in pulling the drillstring out of the wellhole too quickly

> (referred to as "swabbing in"), which caused a fire to ignite. Under appellants' theory, the crew committed further negligence by failing to close the blowout preventer after the fire began.
>
> *CAZA* at 458.

The contract between CAZA and TEG provided that:

> [TEG] shall be solely responsible and assumes liability for all consequences of operations by both parties while on a Daywork basis, including results and all other risks or liabilities incurred in or incident to such operations.
>
> *Id.* at 462.

The trial court granted summary judgment, and the Court of Appeal affirmed. *Id.* at 456. Relevant here, the Court of Appeal essentially found that the "negligent violation of statute" in Section 1668 doesn't really mean what it says because one who violates a statute can be punished by a government agency, so a negligent statute-violator is not exempted from liability. *Id.* at 470-75. It should also be noted that the *CAZA* Court's opinion on the aforementioned subject was essentially advisory because it found no violation of statute. *Id.* at 476-78. Also distinguishing *CAZA*: "CAZA accepted liability for the bodily injury that occurred as the result of the blowout, and has defended and indemnified [TEG], through its carrier, in the *Currington* litigation." *Id.* at 475. Further, while the allegation of gross negligence was discussed as being alleged, the *CAZA* Court did not discuss the import of the gross negligence allegations. *Id.*, *passim*. This is not terribly surprising given that *CAZA* was published August 29, 2006 while *City of Santa*

Barbara was published July 16, 2007[4]. Nor does there appear to have been evidence sufficient to establish a triable issue of fact as to "gross negligence." *CAZA*, *passim*.

Relevant here, the word "intentional" shows up exactly twice: both times in a quotation from *Farnham* (discussed, above). *CAZA* at 472. The word "willful" shows up only in literal quotes of Section 1668. Indeed, the *CAZA* Court focuses solely on negligent violation of statue. The rationale behind its holding on that subject does not apply to intentional torts.

In sum, *CAZA* is distinguishable from the present case because the rationale behind its holding on negligent violation of statute does not apply to intentional torts. In particular, Vanlaw is seeking to completely exempt itself from liability for the wrongful acts alleged, which the *CAZA* Court found material. There is no evidence of governmental or third-party consequences Vanlaw will suffer if the Complaint is dismissed. Further, NECF contends that *CAZA*'s holding is not consistent with *City of Santa Barbara* (as well as the arguments asserted in this brief.) *CAZA*'s finding that there was no violation of statute was sufficient to

[4] This Court held on pages 758 to 760 in *City of Santa Barbara* that it was unable to find any California authorities that permitted a release of liability for gross negligence. Rather, this Court found a dearth of authority: "no published California case has upheld, or voided, an agreement purporting to release liability for future *gross* negligence." *Id.* at 758 (emphasis in original.)

remove it from Section 1668's ambit (setting aside the gross negligence issue which was not analyzed by *CAZA*.)

In sum, the core holding of *CAZA* was that there was evidence of ordinary negligence, at most. *CAZA* at *passim*.

c. *Food Safety* Indirectly and Inadvertently Relies on A Construction-Defect-Specific Statute (Section 2782.5 of the Civil Code)

While not cited in the December 6, 2023 Order of the Ninth Circuit Court of Appeals, Vanlaw and the District Court relied heavily on *Food Safety Net Services*, 209 Cal.App.4th at 1118 (hereinafter "*Food Safety*"). *Food Safety* cites to *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, 714 for the proposition that:

> With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy.

Food Safety at 1126. This proposition is the sole basis for the District Court granting the motion to dismiss (the District Court even extended *Food Safety* to dismiss claims on limitation-of-liability grounds that *Food Safety* said should not be dismissed on Section 1668 grounds.) (1-ER-4-8.) The problem with *Food Safety* citing to that proposition from *Markborough California, Inc.* is a that

Markborough California, Inc. is a construction-defect case relying on a construction-defect-specific statute:

> In this case we hold that a provision **in a construction contract** limiting a party's liability to the developer of the property for damages caused by the engineer's professional errors and omissions is valid **under Civil Code section 2782.5** if the parties had an opportunity to accept, reject or modify the provision.
>
> *Markborough California, Inc.*, 227 Cal.App.3d at 708 (emphasis added).
>
> Section 2782.5 begins with:
>
> Nothing contained in Section 2782 shall prevent **a party to a construction contract** and the owner or other party …
>
> Civ. Code § 2782.5 (emphasis added).

Section 1668 is not referenced or cited at all in *Markborough California, Inc.*

Further, just like in *CAZA*, the core holding of *Food Safety* was that there was a triable issue of fact of ordinary negligence, at most. *Food Safety* at *passim*. This is consistent with *Tunkl* and NECF's position that labels on causes of action do not matter for the purpose of Section 1668. *See also* section H, below.

Finally, in reliance on Section 1668, *Food Safety* expressly **did not dismiss intentional torts** based on the limitation-of-liability provision. *Food Safety* at 1126. Rather, it affirmed dismissal of the intentional tort claims on numerous other grounds. *Id.* at *passim*.

2. The Root Cause of The Split-of-Authority is the Court of Appeal's Reluctance to Apply Section 1668 Harshly to "Ordinary-Negligent" Violation of Law

The root cause of the split of authority is not expressly stated, but it can be ascertained from the facts and tone of the opinions, above, especially *CAZA*. Namely, as this Court noted in *Tunkl*, and affirmed again in *City of Santa Barbara*, there are scenarios where the balance of public policy factors favors enforcing limitation-of-liability provisions as to ordinary negligence. Implicit in *CAZA*, and all cases with similar holdings, appears to be a frustration by the Court of Appeal that a party who clearly waived ordinary negligence, and who cannot establish the *Tunkl* factors, can nonetheless sue for ordinary negligence by searching for a statue or regulation that is arguably relevant[5]. Likely amplifying the Court of Appeal's concern is the increase in the number of laws and regulations since enactment of Section 1668 in the year 1872, including increased regulation of professions,[6] thus

[5] Ironically, as noted above, the Court in *CAZA* concluded there was no violation of statue: negligent or otherwise.

[6] NECF contends the propositions in this sentence are not subject to reasonable dispute because they are common knowledge and can be ascertained from enactment dates of statutes and regulations. Evid. Code §§ 451(f), 452(a). Further, these propositions are provided for context, not for any express findings by this Court. However, if requested, NECF will endeavor to provide specific support for these two propositions.

increasing the likelihood that acts of ordinary negligence arguably violated a statute or regulation.

However, the implicit concern is similar, in many respects, to the concern expressed to this Court in *City of Santa Barbara*: that plaintiffs will simply characterize ordinary negligence as gross negligence to avoid enforcement of the limitation-of-liability provision pursuant *Tunkl*. *City of Santa Barbara* at 766-67. While this Court validated those concerns, it ultimately held that there were sufficient protections in the law to limit such mischaracterization. *Id.*

Here, just as was done by the Court in *CAZA*, courts can simply disregard meritless assertions of violation of statute. If the California Legislature wishes to change the language of Section 1668 to exclude ordinary-negligent violation of statute from its ambits, it is certainly free to do so.

That being said, it appears that vis-à-vis limitation-of-liability, the policy arguments regarding ordinary-negligent violation of statute are similar to the policy arguments regarding ordinary negligence as discussed in *Tunkl* save two important distinctions: (1) the text of Section 1668 expressly includes negligent violation of statute, and (2) enactment of a statute governing conduct evidences the intent of the Legislature to attach particular importance of compliance with said law (this argument is weaker for a regulation as Legislative Intent does not necessarily follow).

In a statutory vacuum, public policy and economics dictate that the tortfeasor must expect to suffer at least as much harm from a violation as the violation would cause. In other words, to effectively discourage inefficient negligence[7], public policy and economics would dictate that the party seeking to enforce the limitation of liability must establish the collective harm (private and public) reasonably expected to be suffered by the party who seeks to limit their liability for a specific violation equals or exceeds the reasonably-expected collective harm (private and public) from said violation. This should be evaluated on a violation-by-violation basis to ensure that specific types of violations are not heavily (or entirely) exempted from liability, thus encouraged (or not sufficiently discouraged.)

As to the enforcement procedure for the hypothetical standard immediately above, it would appear to be a finding of fact which could only be resolved as a matter of law in extreme cases (e.g. damages capped at a penny are not allowed as

[7] Imposing the death penalty for negligence would do an excellent job of discouraging negligence. However, negligence is typically an unavoidable byproduct of a societally-beneficial activity, such as driving, construction, practicing medicine, etc. Since negligence is unfortunately typically unavoidable, over-discouragement of negligence is likely to discourage the beneficial activity as a byproduct. But under-discouragement leads to excessive risk taking and carelessness because some/all costs are externalized. Thus, a societally-optimal level of risk/care is expected from rational actors when the expected "cost" of negligence to said actor is equal to the expected collective "harm" to others. Compensatory damages embodies this concept.

a matter of law, whereas damages reduced by a penny are allowed as a matter of law).

3. The California Legislature and This Court Draw Concrete Distinctions Between Negligent and Willful Conduct

Unlike negligence, which is typically an unavoidable byproduct of a societally-useful activity as discussed in the above footnote 7, intentional torts are readily avoidable by their nature: simply don't intentionally do something wrong. There are no valid countervailing policy considerations when it comes to limiting consequences for intentional tortfeasors, especially as to compensating their victims. And certainly, there are no valid policy reasons to allow an intentional tortfeasor to pay less than the harm caused to their victim. In fact, the California Legislature proscribes monetary punishment, above and beyond the compensatory damages caused, for intentional tortfeasors. Civ. Code § 3294. And intentional tortfeasors are not permitted to avail themselves of quasi-equitable remedies, like contribution and several liability for non-economic losses. Code Civ. Proc. § 875(d); *B.B.*, 10 Cal.5th at 25. Nor can insurance indemnify intentional tortfeasors. Ins. Code § 533. In sum, the California Legislature's intent on the subject of damages owed by intentional tortfeasors is not unclear.

Thus, there are clear dividing lines between negligence – even negligent violations of statutes – and intentional torts. Even if the holding of *CAZA* is

adopted for its position on ordinary-negligent violations of statutes, said holding cannot and should not be extended to intentional torts (or even gross negligence per *City of Santa Barbara*). Namely, in light of the ambiguity of the plain text, there appears to be no reason why this Court cannot distinguish between ordinary-negligent violations of statutes and intentional torts in Section 1668 based on vastly different public policy grounds. (For the reasons stated above, this argument, which is made in the alternative, is not intended to suggest this Court should extend *Tunkl* as the standard for ordinary-negligent violations of statutes.)

F. Section 1668 Applies Equally to Entities as It Does to Natural Persons and Does Not Require a Distinct Showing of Public Interest

Vanlaw argues that Section 1668 should not apply because: "This is a fully-negotiated contract between two entities who mutually agreed to limit their damages." (Answering Brief in the 9th Cir., p. 43.) There is nothing in the text of Section 1668 to support this argument.

Further, that NECF is an entity is of no moment. Entities exist on a continuum of size and sophistication, from Microsoft to a retired person's single-member LLC that owns their modest rental property and primary source of income. A retired person is not going to have the same level of contractual sophistication as Microsoft's General Counsel. Lay owners may enter into contracts not truly understanding the implications thereof. Many people in this state rely on the good

faith of others, and the thought of needing to file a lawsuit in the future for an intentional tort is simply not in the front on their mind.

Additionally, *Health Net* at 238 applied Section 1668 to protect a corporation: a large insurance company at that.

Vanlaw also tacitly argues that Section 1668 requires a distinct showing of public interest to invoke it, noting the highly sympathetic plaintiff in *City of Santa Barbara*: "The case involved a horrible tragedy: the drowning death of a disabled young child at summer camp … [here there is] no issue of public interest." (Answering Brief in the 9th Cir., pp. 43, 44.)

However, while the plaintiff in *City of Santa Barabara* was highly sympathetic, that fact appeared to play no role in this Court's decision. Section 1668 specifies, "**All contracts** which have for their object, directly or indirectly, to exempt any one from responsibility … **are against the policy of the law**." (emphasis added). In other words, if a contract exempts one from responsibility for intentional torts, there is no need to establish additional public policy grounds for invalidity. *City of Santa Barbara* at 760 ("We find that the vast majority of decisions state or hold that such agreements generally are void on the ground that public policy precludes enforcement of a release that would shelter *aggravated misconduct*.") (emphasis in original) (citations omitted.)

This was also the holding of *Health Net*:

> a party [cannot] contract away liability for his fraudulent or intentional acts or for his negligent violations of statutory law regardless of whether the public interest is affected.

Id. at 243.

G. Section 1668 Does Not Distinguish Between Breach of Contract versus Tort; Thus, the First Cause of Action Should Not Have Been Dismissed

As discussed in numerous cases, the line between negligence and breach of contract is frequently blurred. *See, e.g., North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 773-76; *Perry v. Robertson* (1988) 201 Cal.App.3d 333; *Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665.

Furthermore, there is no fundamental distinction between breach of express terms or implied terms. *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 ("Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.")

Section 1668 proscribes exemption from liability for willful injury. The underlying theory of liability, whether based in tort or contract, is irrelevant for the purpose of Section 1668. Thus, a willful breach of contract cannot be exempted from liability under Section 1668. Just like "gross negligence" is not a distinct cause of action from a negligence cause of action as explained in *City of Santa*

Barbara, a willful breach of contract would not give rise to a cause of action distinct from an ordinary breach of contract cause of action[8]. Rather, just like gross negligence, one cannot exempt oneself from contractual liability for willful breaches of contract of express or implied terms, but the cause of action itself remains unchanged. This concept is also discussed in section D(6) and (7), above.

This proffered disregard of the labels upon a cause of action is also consistent with this Court's anti-SLAPP jurisprudence in which this Court has held courts should disregard cause-of-action labels, and instead focus solely on the conduct alleged:

> In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity.

Navellier v. Sletten (2002) 29 Cal.4th 82, 89, 95 (holding breach of contract claims are subject to anti-SLAPP motions.)

The first cause of action for "Breach of Contract" alleges intentional violations of both express and implied contractual terms. As such, the limitation-of-liability provision does not bar any damages alleged in the first cause of action. Further, parties are not free to waive the implied covenant of good faith and fair

[8] *See Copesky v. Superior Court* (1991) 229 Cal.App.3d 678, 690 ("there is only one category of business transactions which definitionally is amenable to tort actions for contract breaches, and that is insurance.")

dealing and dismissing that claim as a result of a contractual provision is an impermissible waiver. *Freeman & Mills, Inc.*, 11 Cal.4th at 91.

H. The Remaining Four Causes of Action are Intentional Torts or Contain Allegations of Gross Negligence

The second cause of action for: "Intentional Interreference with Contractual Relations" and the third cause of action for: "Intentional Interference with Prospective Economic Relations" are clearly intentional wrongs. Therefore, the limitation-of-liability provision does not bar any damages alleged in the second or third cause of action.

The fourth cause of action for: "Negligent Interference with Prospective Economic Relations" is not an intentional tort. However, it is supported by factual allegations which constitute at least gross negligence. And as the Court noted in *City of Santa Barbara*, "gross negligence" is not a distinct cause of action. *Id.* at 780 ("California does not recognize a distinct cause of action for 'gross negligence' independent of a statutory basis.") (citations omitted.) Therefore, the limitation-of-liability provision does not bar any damages alleged in the fourth cause of action.

A claim for "Breach of Fiduciary Duty" can be premised on negligent or intentional conduct. *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1276 ("breach of fiduciary duty can be based upon either negligence or fraud

depending on the circumstances.") (citations omitted). Here, the fifth cause of action for: "Breach of Fiduciary Duty of Undivided Loyalty" alleges intentional conduct. Therefore, the limitation-of-liability provision does not bar any damages alleged in the fifth cause of action.

CONCLUSION

In answering the certified question, and to provide clarity to other courts and those entering into contracts, NECF contends this Court can and should, pursuant to the Rules of Court, Rule 8.520(b)(3), expressly adopt the following propositions based on the legal support contained in the brief, above:

(1) That **any** attempts to contractually limit, modify, or cap damages *ex ante* for any sort of intentional wrongs violates section 1668 of the Civil Code and are thus such provisions are void and unenforceable.

(a) This prohibition includes a prohibition on limiting, modifying, or capping **any** damages for intentional breaches of contracts regardless of whether the breach is a breach of an express or implied terms. To be clear, this proposition should not operate to extend the "bad faith" / "tortious" breach of contract cause of action beyond the present rules (i.e. against insurance companies only.)

(2) That **any** attempts to contractually limit, modify, or cap punitive damages *ex ante* violates both sections 1668 and 3513 of the Civil Code and thus such provisions are void and unenforceable.

(3) That **any** attempts to contractually limit, modify, or cap damages *ex ante* for any sort of "gross negligence" (including "grossly-negligent violation of the law") violates section 1668 of the Civil Code and are thus such provisions are void and unenforceable.

(4) That **any** attempts to contractually limit, modify, or cap damages *ex ante* for any sort of "ordinary-negligent violation of the law" violates section 1668 of the Civil Code and are thus such provisions are void and unenforceable.

As to Proffered Proposition (4) only:

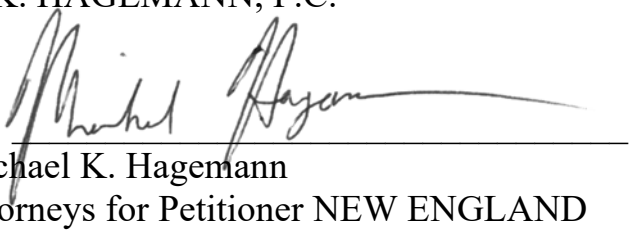
While NECF contents that proffered proposition (4) is the proposition best supported by competing public policy concerns as explained above in section E(2), NECF concedes that this Court may determine, in balancing public policy concerns, that "ordinary-negligent violation of the law" must be treated differently than intentional torts and gross negligence, and thus soften proposition (4), either by going as far as to extend the ruling in *Tunkl* to ordinary-negligent violation of

the law. Or by finding some middle ground, such as sufficiently-aligning incentives:

> The party seeking to enforce the limitation of liability must establish the collective consequences (private and public) reasonably expected to be suffered by the party who seeks to limit their liability for a specific violation equals or exceeds the reasonably-expected collective harm (private and public) from said violation. This should be evaluated on a violation-by-violation basis to ensure that specific types of violations are not heavily (or entirely) exempted from liability, thus encouraged (or not sufficiently discouraged.)

DATED: March 15, 2024

M.K. HAGEMANN, P.C.



By: _____
Michael K. Hagemann
Attorneys for Petitioner NEW ENGLAND COUNTRY FOODS, LLC

CERTIFICATE OF WORD COUNT

I, Michael K. Hagemann, certify as follows:

I am the attorney for Petitioner NEW ENGLAND COUNTRY FOODS, LLC.

On March 15, 2024 I performed a word count of the above-enclosed brief, which revealed a total of 10,665 words.

Executed on March 15, 2024, at Irvine, California.

I certify that the foregoing is true and correct.

By: _____
Michael K. Hagemann

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am an active member of the State Bar of California. I am over the age of 18 and not a party to the within action. My business address is 1801 Century Park East, Suite 2400, Century City, CA 90067. I reside in the County of Orange, State of California. My electronic service address is: mhagemann@mkhlaw.com.

On March 15, 2024 I served this Opening Brief on the Merits upon:

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(BY ELECTRONIC SERVICE) By uploading a true copy of this letter as set forth, above, to TrueFiling and instructing TrueFiling to serve said documents on said parties/attorneys. (Cal. R. Ct 8.78(a)(2)(B).)

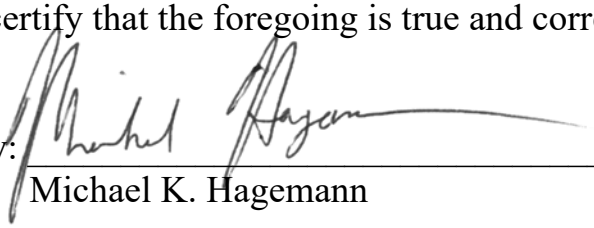
Molly Dwyer, Clerk of the Court
United States Court of Appeal for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939
Requesting Court

Honorable David O. Carter, District Judge
Ronald Reagan Federal Building and United States Courthouse
411 West Fourth Street,
Courtroom 10 A
Santa Ana, CA, 92701-4516
Trial Court

(BY FIRST-CLASS MAIL) By placing a true copy of this letter in a sealed envelope addressed as set forth, above. I deposited each such envelope, with postage thereon fully prepaid, with the United States Postal Service in Irvine, California.

Executed on March 15, 2024, at Irvine, California.

I certify that the foregoing is true and correct.

By: 
Michael K. Hagemann

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NEW ENGLAND COUNTRY FOODS v. VANLAW FOOD PRODUCTS**
Case Number: **S282968**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mhagemann@mkhlaw.com**

3. I served by email a copy of the following document(s) indicated below:

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3/15/2024
Date

/s/Michael Hagemann
Signature

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Last Name, First Name (PNum)

M.K. Hagemann, P.C.
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