STAY REQUESTED
(Answers To Deposition Questions Calling For Confidential Attorney-Client Communications Ordered By No Later Than January 31, 2013; Production Of Confidential Attorney-Client Communication Documents Potentially To Be Due On Or Before January 14, 2013)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ____

TRUCK INSURANCE EXCHANGE; MID-CENTURY INSURANCE COMPANY; FARMERS INSURANCE EXCHANGE; and FARMERS GROUP, INC.,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF ALAMEDA,

Respondent.

GOLDEN STATE DEVELOPERS, INC.; CASTRO VALLEY ASSOCIATES, LP; and CASTRO VALLEY, INC.,

Plaintiffs and Real Parties in Interest.

1st Civ. No. _____

Alameda County Superior Court
Case No. RG-06-291935 c/w
RG-07-334847 & RG-10-509252

Hon. Robert B. Freedman
Department: 20
Telephone: (510) 267-6936

Trial Date: April 15, 2013
(Phase II)

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES [EXHIBITS FILED UNDER SEPARATE COVER]

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
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APPELLANT/PETITIONER: Truck Insurance Exchange; Mid-Century Insurance Company; Farmers Insurance Exchange; and Farmers Group, Inc RESPONDENT/REAL PARTY IN INTEREST: Golden State Developers, Inc.; Castro Valley Associates, LP; and Castro Valley, Inc.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (name): Truck Insurance Exchange, Mid-Century Insurance Company, Farmers Insurance Exchange, and Farmers Group, Inc.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	***** See Attached *****
(3)	
(4)	
(5)	

☑ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 26, 2012

GREINES, MARTIN, STEIN & RICHLAND LLP

Kent J. Bullard
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Attachment Question No. 2

Full Name of Interested entity or person	Nature of Interest (Explain):
1. Golden State Developers, Inc.	Plaintiff and Real Party In Interest
2. Castro Valley Associates, LP	Plaintiff and Real Party In Interest
3. Castro Valley, Inc.	Plaintiff and Real Party In Interest
4. Mid-Century Insurance Company	Defendant and Petitioner
5. Truck Insurance Exchange	Defendant and Petitioner (as an interinsurance exchange, Truck Insurance Exchange is owned by its policyholders/subscribers)
6. Farmers Insurance Exchange	Defendant and Petitioner (as an interinsurance exchange, Farmers Insurance Exchange is owned by its policyholders/subscribers)
7. Fire Insurance Exchange	Co-owner (along with Farmers Insurance Exchange and Truck Insurance Exchange) of defendant Mid Century Insurance Company (as an interinsurance exchange, Fire Insurance Exchange is owned by its policyholders/subscribers)
8. Farmers Group, Inc.	Defendant and Petitioner
9. Zurich Insurance Group Ltd.	Ultimate corporate parent of Farmers Group, Inc.
10. Gregory de la Peña	Additional Defendant Below
11. De la Peña & MacDonald LLP	Additional Defendant Below
12. Keith L. Cooper	Additional Defendant Below

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INTRODUCTION

This case demands writ relief. At issue is the court-ordered disclosure of confidential attorney-client communications. Why has the trial court ordered disclosure of otherwise privileged communications? Because it has conceived a novel and broad construction of the crime-fraud exception to the attorney-client privilege that requires neither a finding of "crime" nor "fraud" and puts confidential attorney-client communications in jeopardy not only in this case but in many others. The impact goes far beyond this case as the effect of the trial court's order is to substantially chill confidential communications between clients (not just these clients) and their attorneys in the future. Writ relief in this circumstance is the *only* available remedy.

A. The Issue: Is The Crime-Fraud Exception To The Attorney-Client Privilege Triggered (And The Privilege Vitiated) By Nothing More Than A Prima Facie Showing Of Fraud Predicated On Having Denied Summary Judgment On A Malicious Prosecution Claim?

The trial court here has ordered deponents at upcoming depositions to answer questions eliciting disclosure of confidential attorney-client communications and has filed an order regarding production of potentially hundreds of documents reflecting confidential attorney-client communications over a period of 27 months. The trial court's rulings are premised on one reason: The crime-fraud exception to the attorney-client privilege, Evidence Code section 956. According to the trial court, a prima facie case of a crime or fraud exists and that suffices to negate the attorney-

client privilege. But what's the crime or fraud? According to the trial court, the denial of summary judgment on a malicious prosecution tort suffices, without any finding of "crime" or "fraud."

Here's the factual background: An insurer (petitioners have all been sued as the insurer or related entities) issues an insurance policy covering a subcontractor and extending coverage to the developer/general contractor. There is a dispute as to whether the coverage extended to the general contractor is limited to its vicarious liability for the subcontractor's acts or more broadly covers the general contractor's own negligence. The carrier settled a claim against the subcontractor (among others) and brought subrogation actions against the general contractor for its non-vicarious liability. The general contractor cried foul. For various procedural reasons the subrogation actions were dismissed and the general contractor sued petitioners as well as their attorneys in the subrogation action for malicious prosecution, both as such and, as against petitioners, under the guise of an insurance bad faith claim. The trial court agreed to a phased trial. In the first phase, it decided that there was coverage afforded to the general contractor. The issue of fraud, however, was reserved for the second phase, which is not set for trial until April.

Based on previous court rulings denying anti-SLAPP and summary judgment motions by non-petitioner, defendant attorneys on the malicious prosecution claim, the trial court concluded that there was a prima facie showing of fraud in seeking subrogation. The court leaped to the conclusion that a prima facie showing of fraud based on a triable issue as to

malice for malicious prosecution purposes establishes the crime-fraud exception to the attorney-client privilege and justifies ordering produced all confidential communications between the carrier and its attorneys concerning the filing of the subrogation actions. When the carrier objected and pointed out that the subrogation actions in no way violated the anti-subrogation rule or were otherwise improper, the trial court added that it also had relied, "by inference," on the evidence that the plaintiffs had submitted years earlier on those motions and that its first-phase coverage finding somehow foreclosed the carrier's argument.[1]

The ramifications of the trial court's crime-fraud exception theory are breathtaking. Essentially, clients can have no assurance that their conversations with a lawyer before or in connection with filing a lawsuit are confidential. If the lawsuit does not pan out and if the opposing party then sues for malicious prosecution, a prima facie showing of malice will vitiate the privilege. What might constitute such a prima facie showing? According to the trial court, the fact that a plaintiff defeats an anti-SLAPP or summary judgment motion in the malicious prosecution action suffices. With this expansive view of the crime-fraud exception, the attorney-client privilege is likely to become a shell.

There are multiple problems with the trial court's approach. To begin with, malicious prosecution is not a crime and it is not fraud. Evidence Code section 956 is express. It directs that "[t]here is no privilege

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[1] This trial court order is attached to the Petition as Attachment 1, in addition to being included in the separately bound set of exhibits.

. . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." That's it. There's no mention of other torts or malicious prosecution, and courts are to construe the exception narrowly. Second—ill-conceived language in various cases notwithstanding—the standard for the crime-fraud exception is and should be a preliminary factual finding, *not* the mere presence of a prima facie case. The statute says nothing about a prima facie showing. It requires the lawyers' services, *in fact*, to have been sought to perpetrate a crime or fraud. And third, even if the carrier may have been wrong about the scope of its coverage endorsement (an issue that has not even been determined yet, let alone finally as there has been no opportunity to appeal), that would not make its subrogation action baseless, let alone malicious. Losing a coverage issue is far different from having no reasonable argument.

The attorney-client privilege not only protects confidential attorney-client communications retrospectively, it affords clients assurance *prospectively* that conversations with a lawyer will not be disclosed. The inevitable effect of expanding the crime-fraud exception as the trial court has envisioned it is that it necessarily will chill client communications with lawyers in the future. No client can ever rest easy that its communications with a lawyer about filing a lawsuit will be protected. Indeed, many such communications will be subject to invasion, so long as an opposing party can put together even an arguable case for malicious prosecution, whether such a claim is ever proven or not.

The issue here is of immense importance to bench and bar. It calls out for writ intervention.

B. Writ Relief Is Necessary Because, Without It, The Attorney-Client Privilege Will Be Irretrievably Lost In This Case And Undeniably Chilled In Many Others.

The loss of the attorney-client privilege here requires disclosure of attorney-client communications in this case that should never have to be disclosed and whose confidentiality can never be restored. It also chills consulting with and obtaining advice from attorneys in many, many more instances in the future.

There really can be no doubt about irreparable harm. Petitioners have no adequate appellate remedy for the trial court's rulings denying their claim of attorney-client privilege and ordering deponents to answer questions on the basis of its crime-fraud exception rulings or for the order likely requiring them to produce hundreds of pages of documents. Once the privileged communications are placed in the public domain, they cannot regain their confidentiality. For this reason, the appellate courts have repeatedly recognized the need for writ relief in the context of attorney-client privilege rulings.

"'The need for the availability of the prerogative writs in discovery cases where an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious. The person seeking to exercise the privilege must either succumb to the court's order and disclose the privileged information, or subject himself to a charge

of contempt for his refusal to obey the court's order pending appeal. The first of these alternatives is hardly an adequate remedy and could lead to disruption of a confidential relationship. The second is clearly inadequate as it would involve the possibility of a jail sentence and additional delay in the principal litigation during review of the contempt order. Thus, the use of the prerogative writ in a case [seeking review of an order compelling disclosure of records claimed to be subject to a privilege] is proper.'" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 741, citation omitted, brackets added in *Costco*; see also, e.g., *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249 [crime-fraud exception]; *Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 823, 831 [scope of privilege as regards corporate counsel who also acts as corporate officer]; *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 96-97 [scope of attorney-client privilege in corporate context].)

Writ review is also appropriate because the issue here is of critical importance to attorneys and clients far beyond the confines of this case. Mandamus is appropriate where the "issue tendered in the writ petition is of widespread interest." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) That is certainly the case here. The trial court's rulings threaten to chill the attorney-client relationship in many instances. Conscientious counsel will have to tell their clients that what is said in confidence may well *not* be protected and privileged. That's especially so if the client or counsel are pursuing a novel claim that has some prospect of

not succeeding and therefore might result in a malicious prosecution action. If such a malicious prosecution action cannot be won at the anti-SLAPP or summary judgment stage, according to the trial court, there will be no attorney-client privilege.

C. An Immediate Stay Is Necessary To Avoid Irreparable Harm; The Trial Court Has Ordered Deposition Questions Answered by January 31, And Has Filed An Order Likely Requiring Document Production Even Before Then, And Has Twice Refused A Stay Pending This Writ Petition.

On the basis of its crime-fraud exception ruling, the trial court has ordered deponents to answer questions that elicit attorney-client privileged communications at depositions to take place no later than January 31, 2013[2/] and has filed an order likely requiring production of attorney-client privileged documents by January 14, 2013.[3/] Accordingly, an immediate stay is necessary to prevent irreparable harm and the mooting of this petition and to allow this Court time to consider it.

[2/] These trial court orders are attached to the Petition as Attachments 2 and 3, in addition to being included in the separately bound set of exhibits.

[3/] At a December 18, 2012 case management conference, the trial court indicated that it would require production of documents by no later than January 14, 2013. The superior court's online docket reflects that on December 21, 2012, an order regarding the production of documents was filed, but, as of the finalizing of this petition, petitioners have been unable to obtain a copy of the order. As soon as petitioners receive a copy of the December 21 order, they will provide it to the Court in a supplemental filing.

Petitioners asked the trial court to stay its orders to allow the seeking of writ relief on a less hurried basis, but the trial court twice declined. An immediate stay, thus, is the only way to allow this Court's meaningful opportunity to consider the important attorney-client privilege issues raised here.

There is no conceivable basis why real parties in interest would be prejudiced by any stay. Trial in the next phase is not set until mid-April. And this is not a case involving any statutory priority but a dispute between business entities.

For these reasons, an immediate stay and writ relief are warranted.

PETITION

Petitioners allege and prove as follows:

A. The Parties.

1. Petitioners Farmers Insurance Exchange, Truck Insurance Exchange, and Mid-Century Insurance Company (collectively, "Farmers Defendants"), and Farmers Group, Inc. ("FGI")[4] are defendants in the action entitled *Golden State Developers, Inc., et al. v. Truck Insurance Exchange, et al.*, Alameda County Superior Court No. RG06291935. (Vol. 1, Tab 2, p. 52.)[5]

2. Real parties in interest Golden State Developers, Inc., Castro Valley Associates, LP, and Castro Valley, Inc. (collectively, "Golden State" or "plaintiffs") are the plaintiffs in that action. (*Ibid.*)

3. Respondent is the court exercising jurisdiction over the action. (*Ibid.*)

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[4] Although FGI believes that none of the documents or communications at issue here involve confidential communications to or from it or on its behalf, the trial court's orders are unclear as to whether they might govern FGI's privilege. FGI has been sued under various theories asserting that it is liable for the conduct of other defendants and at one time was represented by the same counsel as the Farmers Defendants. As such, it is potentially an interested party in this dispute and appears as a petitioner out of prudence.

[5] All exhibits are in the accompanying sequentially-paginated, 7-volume set of exhibits. Each is an accurate copy of the document identified and is incorporated into this petition by reference. The exhibits are all part of the trial court record, either as filed documents or reported transcripts of hearings. Exhibits are cited by volume, tab number and sequential page numbers as follows: "Vol. 1, Tab 1, p. 1" refers to the first volume, at the first tab and the page numbered 1.

B. The Underlying Insurance Dispute.

4. The underlying dispute arises from plaintiffs' development of a series of single family homes in Castro Valley known as The Views. Golden State acted as the general contractor (through its entities Castro Valley Associates L.P. and Castro Valley, Inc.). It hired architects and engineers to develop the site and entered into dozens of contracts with subcontractors in doing so. (Vol. 1, Tab 5, p. 125.)

5. Liberty Homes, Inc. and its successor in interest Bowers Construction, Inc. ("Bowers") entered into subcontracts with Golden State to provide framing services. (*Ibid.*)

6. Golden State carried its own general liability insurance policy with Caliber One Indemnity Company to cover accidents resulting in bodily injury or property damage. (Vol. 1, Tab 5, p. 131.)

7. Golden State required each of its subcontractors to name Golden State as an additional insured on the subcontractor's own general liability policy by adding an additional insured endorsement. (Vol. 2, Tab 11, p. 343.)

8. Mid-Century insured the framing subcontractor, Bowers, under a liability insurance policy; its policy contained an additional insured endorsement affording limited coverage to Golden State under that policy for Golden State's vicarious liability arising from Bowers' work. The relevant endorsements granting coverage to Golden State were expressly limited to liability arising out of the work of Bowers, the Farmers Defendants' named insured. (Vol. 1, Tab 5, p. 132.)

9. Bowers performed framing work at The Views from about December of 1996 through mid-1997. (Vol. 1, Tab 5, p. 125.) Some homeowners at The Views began complaining of water intrusion problems. (Vol. 1, Tab 5, p. 126.) Golden State attempted to perform warranty repairs on the homes, some of which further damaged the structures. (*Ibid.*) In March 2003, after incurring approximately $360,000 in warranty repair costs, and nearly six years after Bowers completed its operations for plaintiffs, Golden State tendered to Bowers the defense and indemnification of five homeowners' claims, despite the fact that no lawsuits had been filed. (Vol. 1, Tab 5, pp. 126-127.)

10. Golden State then sued Bowers and numerous other subcontractors, which, in turn, generated a number of cross-complaints between Golden State and the subcontractors and their insurers. (Vol. 1, Tab 5, pp. 127-128.)

11. Eventually, Bowers settled with one of the homeowners—Morrison—paying roughly $80,000. (Vol. 1, Tab 5, p. 129.) Morrison executed a settlement agreement with Mid-Century assigning his rights against the general contractor, Golden State, for construction defects, and releasing any liability of Bowers. (Vol. 4, Tab 24, pp. 595 ¶ 8, 718.)

12. Thereafter the litigation between Golden State and its various subcontractors and two other homeowners settled. (Vol. 1, Tab 5, pp. 128-129.) Thus, all the claims against Golden State and the subcontractors, including Bowers, have been dismissed. (Vol. 1, Tab 5, p. 129.)

C. The Recovery Actions.

13. In the meantime, Mid-Century filed two actions against Golden State to recover that portion attributable to the independent fault of Golden State and its subcontractors and agents of the costs that Mid-Century had incurred on Bowers's behalf in settling the Morrison claim: *Farmers Insurance Group and James Morrison v. Golden State Developers, et al.* ("Farmers/Morrison Action") and *Mid-Century Insurance Company v. Golden State Developers, et al.* ("Mid-Century Action") (collectively, "Recovery Actions"). (Vol. 4, Tab 24, pp. 731 ¶ 20, 732 ¶ 25, 733 ¶ 30.)

14. The complaint in the Farmers/Morrison Action was filed in February 2007. (Vol. 1, Tab 5, p. 129.) Golden State was dismissed as a defendant eleven months later, in January 2008. (*Ibid.*)

15. The Mid-Century Action was filed in October 2007 but not served. (Vol. 1, Tab 5, p. 130.)

D. The Malicious Prosecution/Bad Faith Action.

16. In the meantime, Golden State also sued petitioners. (Vol. 1, Tab 1, p. 1.) The operative Fifth Amended Complaint alleges causes of action for breach of contract, bad faith, fraud, and declaratory relief against the Farmers Defendants and Farmers Group, Inc. (alleged under various theories to be vicariously liable for the Farmers Defendants' conduct), and asserts an additional cause of action for malicious prosecution against them and certain attorneys ("Attorney Defendants") based on the filing and maintenance of the Recovery Actions. (Vol. 1, Tab 2, p. 52.)

E. The Phase I Court Trial Statement Of Decision In The Malicious Prosecution/Bad Faith Action.

17. The trial court ordered the action separated for trial into five phases. (Vol. 1, Tab 3, pp. 82-85.) Phase I was to focus predominantly on declaratory relief as to insurance coverage issues and also on whether certain claims were barred or released by previous settlement agreements. (Vol. 1, Tab 3, pp. 82-84.) The issue of fraud, among others, was expressly reserved for Phase II of trial. (Vol. 1, Tab 3, p. 84.) The order also specified that "[i]ssues regarding malicious prosecution and the elements of that cause of action will not be considered for Phase I." (*Ibid.*) Malicious prosecution was to be tried in Phase III. (Vol. 1, Tab 3, pp. 84-85.)

18. After Phase I, a court trial, was conducted, the trial court adopted and entered as its own Golden State' Second Proposed Statement of Decision re: Farmers Defendants. (Vol. 2, Tab 11, p. 340.) Meanwhile, the parties had been pursuing discovery in preparation for Phase II of the trial, which presently is scheduled for April 15, 2013.

F. The Discovery Dispute In The Malicious Prosecution/Bad Faith Action.

1. The discovery referee reviews the insurance claims files and recommends finding attorney-client privilege and that no crime-fraud exception applies.

19. Golden State sought to discover Mid-Century's claims files and Mid-Century interposed timely attorney-client objections. After Golden State moved to compel production, the trial court appointed Judge Bonnie Sabraw (Ret.) as a discovery referee. Among other things, Judge Sabraw

was to review in camera voluminous documents contained in the claims files as to which petitioners claimed privilege or work-product protection and related privilege logs. (Vol. 5, Tab 28, p. 878 ¶ 6.)

20. Judge Sabraw originally ruled that she "found no documents that supported Plaintiffs' claims of fraud against defendants and none are being recommended to be produced on that basis." (Vol. 4, Tab 24, pp. 594 ¶ 3, 597-600.) She submitted her recommendations to the trial court, reiterating that "no documents reviewed supported Plaintiffs' claim" that the crime-fraud exception applied, and recommended against any privileged documents being produced based on the exception. (Vol. 1, Tab 6, p. 142.)

2. The trial court, denying petitioners' requests for an evidentiary hearing, finds a face-of-the-record prima facie fraud showing predicated on malicious prosecution—which it deems as, without more, triggering the crime-fraud exception—and directs the referee to identify what documents to produce.

21. Golden State objected to the referee's recommendations. (Vol. 2, Tab 10, p. 153.) After hearing oral argument (Vol. 2, Tab 14, p. 366), the trial court, without having reviewed the actual privileged documents, concluded that "Plaintiffs have set forth a prima facie showing of fraud, at least on the part of Mid-Century Company" as to "both the initiation and maintenance of" of the Recovery Actions. (Vol. 3, Tab 15, p. 435.)

22. In so concluding, the trial court stated that it relied on denials of two prior motions brought by other parties: an April 2009 order—by the Hon. Jon S. Tigar—denying the Attorney Defendants' anti-SLAPP motion and its own January 2011 order denying the Attorney Defendants' summary judgment motion directed at Golden State' malicious prosecution cause of action based on the Recovery Actions. (Vol. 3, Tab 15, p. 435, citing Exhibits 2 and 3 to Golden State's objections; see also Vol. 2, Tab 10, pp. 217-220, 221-223.) The court remanded the matter to the referee to make further determinations as to the relevant time frame for the crime-fraud exception and which documents, if any, should be produced. (Vol. 3, Tab 15, pp. 436-438.) The trial court expressly stated that its order was not yet final. (Vol. 3, Tab 15, p. 438.)

23. The Farmers Defendants requested clarification and a full evidentiary hearing and a stay in order to have the opportunity to seek appellate relief. (Vol. 3, Tab 16, pp. 439, 448.)

24. Meanwhile, the referee reexamined the un-redacted claim files and made new recommendations required by the trial court's remand, identifying several hundred attorney-client communications that pertained to the Recovery Actions within what the referee determined was the relevant time frame of those actions. (Vol. 3, Tab 20, pp. 555-558.)

25. The Farmers Defendants objected to the referee's new recommendations (Vol. 3, Tab 23, p. 567), arguing, among other things, that:

a. Golden State had not identified any fraudulent conduct or evidence that any Farmers employee sought legal advice to commit or to plan to commit a fraud. (Vol. 3, Tab 23, pp. 573, 585-586.)

b. Filing and maintaining the Recovery Actions was not improper, let alone fraudulent or criminal. (Vol. 3, Tab 23, pp. 573-588.) Specifically, the Recovery Actions could not be improper because the "anti-subrogation rule" relied on by Golden State (see *Truck Ins. Exchange v. County of Los Angeles* (2002) 95 Cal.App.4th 13, 23-26), only applied to the extent that the insured's loss was actually covered. They argued that the policy only covered Golden State for its vicarious liability for Bowers and that the Recovery Actions sought recovery for liability not arising from Bowers' conduct. (Vol. 3, Tab 23, pp. 583-584.)

c. The Farmers Defendants were being denied their due process rights to rebut or even submit evidence on the threshold determination for application of the crime-fraud exception—whether any evidence of fraud or criminal activity exists—and were entitled to a hearing under Evidence Code section 402. (Vol. 3, Tab 23, pp. 588-589.)

d. Even if the crime-fraud exception were applicable, the referee still needed to determine if other applicable privileges precluded production of the relevant documents. (Vol. 3, Tab 23, p. 588.)

26. The trial court, on November 8, 2012, overruled the Farmers Defendants' objections for the most part:

a. It rejected that "Plaintiffs have never identified any conduct that supports a finding of prima facie evidence of fraud." (Vol. 4, Tab 27, p. 866.)[6/]

b. It reiterated its reliance on its earlier orders denying the Attorney Defendants' anti-SLAPP and summary judgment motions, adding, for the first time, "by inference, the evidence submitted by Plaintiffs in opposition to those motions." (*Ibid.*) In particular, it relied on those orders' statements that (as to the motions and parties then before the court) there was "'enough evidence from which a reasonable trier of fact could conclude that the lawsuits were brought without probable cause and were initiated with malice' (April 27, 2009 Order, p. 2), together with evidence sufficient to 'create a triable issue as to whether malice may be inferred from the circumstances leading up to the initiation of the [Recovery Actions]' (January 24, 2011 Order, p. 2)." (Vol. 4, Tab 27, pp. 866-867.)

c. It newly relied on its Phase I findings as to the scope of coverage afforded to Golden State. It concluded that, based on its ultimate findings as to insurance coverage, any argument that "the [Recovery Actions] were in no sense improper, are inconsistent with the findings of the court in the Phase I trial." (Vol. 4, Tab 27, p. 867.) It thus equated a mere loss on the merits of the coverage issue to a lack of probable cause to pursue the Recovery Actions in the first place. It so concluded even though neither the Statement of Decision nor Golden State's trial brief that it

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[6/] See Attachment 1.

incorporated by reference[7] made any mention of "fraud" or even "malice" on the part of defendants. (See Vol. 2, Tab 11, pp. 340-357; Vol. 1, Tab 4, p. 86-112.)

d. The trial court denied the Farmers Defendants' request for an evidentiary hearing, finding Evidence Code section 402 inapplicable. (Vol. 4, Tab 27, p. 867.)

27. The court, however, agreed with the Farmers Defendants that the crime-fraud exception applied to only the attorney-client privilege and therefore would not negate other privilege grounds but it determined the exception would defeat qualified attorney-work product protection. Accordingly, it again remanded to the referee to determine whether any of Farmers Defendants' other objections to production of the affected documents should be sustained. (Vol. 4, Tab 27, pp. 867-868.)

28. The trial court's November 8, 2012 order too was expressly non-final, stating that "[t]he issuance of a final order" would "await receipt and review of the Discovery Referee's further recommendations upon remand." (Vol. 4, Tab 27, p. 869.)

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[7] "[O]n this set of issues," the Statement of Decision "accept[ed] and incorporate[d] by reference in substantial part herein Plaintiffs' analysis" set forth in Golden State' Closing Trial Brief (Phase One). (Vol. 2, Tab 11, p. 356 & fn. 19.)

3. The referee issues further recommendations, to which the Farmers Defendants object, and the trial court files an order regarding the objections, likely requiring production of attorney-client privileged documents.

29. The referee again provided further recommendations, identifying hundreds of documents to be produced according to the trial court's rulings. (Vol. 6, Tab 36, p. 1302, 1304-1326.) The Referee identified more than 260 documents as to which attorney-client privilege was claimed but which fell within the temporal and subject-matter scope of the trial court's crime-fraud exception rulings. (Vol. 6, Tab 34, p. 1284.)

30. The Farmers Defendants again objected. They objected, among other things, that the court improperly relied on evidence submitted in opposition to the Attorney Defendants' earlier motions to strike and for summary judgment and that the evidence, in any event, failed to prove any the elements of fraud required to invoke the crime-fraud exception. (Vol. 6, Tab 34, pp. 1285-1289.)[8/]

31. FGI joined in both sets of the Farmers Defendants' objections to the referee's recommendations. (Vol. 3, Tab 22, p. 561; Vol. 6, Tab 35, p. 1296.)

32. During a case management conference on December 18, the court indicated it would order production of at least some documents

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[8/] In response, plaintiffs argued, for the first time, that in May 2009 Judge Tigar had similarly denied an anti-SLAPP motion brought by the Farmers Defendants and FGI. (Vol. 6, Tab 37, pp. 1330, 1340-1341.)

referenced in the referee's recommendations, indicating that it would order the documents to be produced at a date no later than January 14, 2013. (Vol. 7, Tab 47, pp. 1472-1474, 1493.) On December 21, the court filed an order regarding objections to the referee's recommendations, likely ordering production of hundreds of attorney-client privileged documents. (See Vol. 1, Tab 1, p. 51 [online docket showing order filed].)[9/]

4. Almost simultaneously, the trial court issues two orders requiring deposition answers to questions that it deems encompassed by its crime-fraud exception ruling.

33. Also on December 18, 2012, the trial court issued two orders granting Golden State's motions to compel two Farmers employees to answer numerous specific deposition questions regarding confidential attorney-client communications, determining that such communications fell within the scope of its September 14 and November 8 orders regarding the crime-fraud exception to the attorney-client privilege. (Vol. 7, Tab 44, pp. 1458-1459; Vol. 7, Tab 45, pp. 1460-1461[10/]; see also Vol. 5, Tab 31, pp. 971-995 [motion papers showing specific questions ordered to be answered based on crime-fraud exception]; Vol. 6, Tab 33, pp. 1219-1224 [same].) The court ordered those depositions to take place by no later than

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[9/] As of the finalizing of this petition on December 26, 2012, petitioners had not received a copy of the order and could not obtain a copy from the court's website. (See Vol. 7, Tab 48, p. 1498.) Once petitioners have such an order, they will provide it to this Court in a supplemental filing.

[10/] See Attachments 2 and 3.

January 31, 2013. (Vol. 7, Tab 44, p. 1459; Vol. 7, Tab 45, p. 1461.) For example, the court ordered answers from Farmers employee Vocke to the following questions:

> "Q. Did Mr. Herman [an attorney that Golden State describes as hired by the deponent to provide advice about the Recovery Actions] ever advise you that the Mid-Century Insurance case should be dismissed right away?"
>
> "Q. Did Mr. Herman ever tell you that the assignment from Mr. Morrison and the lawsuit using that assignment against the additional insureds was a mistake?"

(Vol. 5, Tab 31, pp. 991-992.)

G. Writ Relief Is Necessary.

34. Writ relief is necessary when the trial court' s order "threaten[s] the confidential relationship between [a client] and its attorney." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 741.) California courts presume irreparable harm in such cases (*id.* at p. 732), and there is no other adequate remedy than writ relief. (See, e.g., *id.* at pp. 740-741; *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249 [crime-fraud exception]; *Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818 [scope of privilege as regards corporate counsel who also acts as corporate officer]; *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93 [scope of attorney-client privilege in corporate context].)

35. Because disclosing privileged information presumptively harms the client, "a party seeking extraordinary relief from a discovery order that wrongfully invades the attorney-client relationship need not also establish that its case will be harmed by disclosure of the evidence." (*Costco, supra*, 47 Cal.4th at pp. 732, 741.) Once this privileged information is disclosed, "there is no way to undo the harm which consists in the very disclosure." (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.)

36. The Farmers Defendants have no immediate right of appeal from the orders compelling deposition answers or from an order to produce documents. (See Code Civ. Proc., § 904.1) Nor do they have any plain, speedy, and adequate remedy at law other than this petition for extraordinary relief. (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493.)

37. The trial court's rulings compelling discovery of attorney-client privileged communications are clearly erroneous and an abuse of discretion. (See *Costco, supra,* 47 Ca1.4th at p. 733; *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 102.) The trial court's crime-fraud exception ruling was a clear abuse of discretion for multiple reasons:

a. The attorney-client privilege is a vitally important privilege that admits of no implied exceptions. (*Costco, supra,* 47 Ca1.4th at pp. 732, 739.)

b. The crime-fraud exception of Evidence Code section 956 is "very limited" (*Geilim v. Superior Court* (1991) 234 Cal.App.3d 166,

174) and applies only to a crime or a fraud, not to all manner of tortious conduct. (*Nowell v. Superior Court* (1963) 223 Cal.App.2d 652, 657-658; *Freedom Trust v. Chubb Group of Ins. Companies* (C.D.Cal. 1999) 38 F.Supp.2d 1170, 1172.)

c. No authority supports the trial court's extension of the crime-fraud exception to malicious prosecution, which is not a crime and is not the equivalent of fraud. For purposes of the crime-fraud exception, fraud requires "a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely." (*BP Alaska, supra*, 199 Cal.App.3d at p. 1263; see also *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519 [elements of fraud include intent to induce reliance on the misrepresentation].)

d. Compounding the error of extending the exception to malicious prosecution, the trial court did so without making any preliminary evidentiary finding as to the factual predicate for the crime-fraud exception—consulting a lawyer to commit a crime or fraud. (See Evid. Code, §§ 405, 956.) Rather, the trial court relied solely on the existence of a prima facie case (and based only on a triable issue as to malicious prosecution, no less).

e. Rather than relying on a contemporaneously presented evidentiary record, the trial court ruled based on conjecture premised on prior resolutions of different issues as to different parties. (See Code Civ. Proc., § 425.16, subd. (b)(3) [barring any reliance on findings denying anti-SLAPP motion].) The trial court further violated the Farmers Defendants'

right to due process by relying on evidence as to which the Farmers Defendants had no meaningful notice or opportunity to respond.

f. The finding of a prima facie malicious prosecution showing was fundamentally flawed. The theory was that under the so-called anti-subrogation rule an insurance carrier may never sue its insured to contribute to a settlement effectuated by the carrier. But the anti-subrogation rule applies to loss or liability within the policy's coverage. (*Truck Ins. Exchange, supra*, 95 Cal.App.4th at p. 23.) Here, the Farmers Defendants had reasonable arguments that coverage existed only for Golden State's vicarious liability for Bowers' work and that the Recovery Actions did not seek to recover for any such liability. (See *Gemini Ins. Co. v. Delos Ins. Co.* (B239533, Dec. 5, 2012) ___ Cal.Rptr.3d ___, 2012 WL 6050774, *3 [landlord's first-party property damage carrier could seek damages from liability carrier covering both tenant and landlord as additional insured for property damage caused by tenant].) The Recovery Actions were thus not maliciously prosecuted. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 868; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973.) The trial court's Phase I decision ultimately finding coverage did not foreclose this argument; it did not mean that petitioners' position was without any reasonable basis.

38. Unless this Court grants a writ reviewing and reversing the orders to answer deposition questions and to produce documents, the Farmers Defendants will be compelled to disclose privileged information, in

violation of the attorney-client privilege. Once disclosed, confidentiality cannot be restored.

39. In addition to the factors favoring writ review inherent in every case involving threatened infringement of a privilege, the present case also raises compelling issues of widespread interest. Writ relief by way of mandamus is appropriate where the "issue tendered in the writ petition is of widespread interest." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) This case meets that criterion. The trial court's rulings have potentially chilling ramifications on the attorney-client privilege. Under the court's rulings, whenever a malicious prosecution action survives an anti-SLAPP or summary judgment motion, the attorney-client privilege will be vitiated by the crime-fraud exception, a result directly contrary to intent of the statutory provisions regarding the privilege and the exception.

H. This Petition Is Timely.

40. The trial court's previous orders, filed on September 14 and November 8, did not order the Farmers Defendants to produce any documents, remanded to the Referee for further consideration, and were expressly non-final. (Vol. 3, Tab 15, p. 438; Vol. 4, Tab 27, p. 869.) And the court did not make its likely final ruling requiring production of attorney-client privileged documents until December 21. (See (Vol. 1, Tab 1, p. 51.) Likewise, the pre-December 18 orders did not direct any deponent to answer any particular question posed. Accordingly, the issue was not ripe for this Court's review until the December 21 order

regarding production of documents or, at the earliest, the December 18 orders requiring answers to specific deposition questions regarding confidential attorney-client communications. (Vol. 7, Tab 44, p. 1458; Vol. 7, Tab 44, p. 1460.)

41. At the December 18, 2012, hearing, the trial court, for the first time, indicated that it would order the production of at least some of the documents falling within the referee's recommendation by a date certain on or before January 14, 2013.

42. A petition for common law writ typically should be filed no later than the normal 60 days after entry of the challenged order as would apply if the order in question were appealable. (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 356-357.) An order is not appealable until it is the final disposition of the issue before the court. Even collateral orders subject to interlocutory appeal are ripe for appeal only when "further judicial action is not required on the matters dealt with by the order." (*Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1545; see *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228.) The trial court's September 14 and November 8 orders were expressly not final and required further judicial action—the referee's further review of documents and recommendations to the trial court and then the trial court's review and order regarding such recommendations. Before the trial court's December 21 order, petitioners had an adequate remedy in the trial court—objecting to the referee's various recommendations, a remedy that

they pursued. Once the trial court filed its December 21 order, petitioners no longer had an adequate remedy at law.

43. This Petition is filed well within the normal time to appeal from the trial court's orders requiring answers to deposition questions and order regarding document production if those orders were to be treated as collateral orders or as otherwise appealable.

44. In any event, real parties in interest have suffered no prejudice from petitioners awaiting a final, fully crafted trial court order directing production of specific documents—or at least orders directing answers to specific deposition questions premised on the court's crime-fraud exception ruling—before seeking writ relief. If anything, petitioners have followed the most judicially efficient path by waiting to learn whether *any* privileged communications would, in fact, be ordered produced before seeking appellate court intervention.

I. A Temporary Stay Is Needed.

45. On November 19, 2012, before receiving any further recommendations from the Referee, in order to preserve and facilitate appellate review of the crime-fraud exception ruling, the Farmers Defendants requested a temporary stay of production of any documents or alternatively an order affirmatively announcing the trial court's intention to order the production of the documents the Referee would ultimately identify but staying her third review of the documents. (Vol. 5, Tab 28, pp. 875-876.) The trial court denied the Farmer Defendants' request for a stay of

production but anticipated the filing of objections to the Referee's recommendations. (Vol. 5, Tab 29, p. 892.)

46. During the December 18 case management conference, petitioners again requested a temporary stay from the trial court to allow them to seek writ review. (Vol. 7, Tab 47, pp. 1474-1475.) The trial court denied the request, stating that petitioners were "at liberty to seek a stay from the Court of Appeal." (Vol. 7, Tab 47, p. 1475; see also Vol. 7, Tab 46, p. 1462 [December 18 written order denying stay].)

47. This Court should issue a temporary stay of the orders requiring answers to deposition questions and production of documents as necessary to protect the writ petition's effectiveness. The Farmers Defendants should not be forced to comply with orders to reveal attorney-client privileged communications while this Court considers the relief requested herein.

48. Not to overstate the obvious, but after disclosure is made, the genie is permanently out of the bottle and the damage is not curable.

PRAYER

WHEREFORE, petitioners pray that this Court:

1. Issue a temporary stay of the December 18, 2012 orders granting plaintiffs' motions to compel answers to deposition questions and of the December 21, 2012 order to the extent it compels production of documents based on the crime-fraud exception and of all proceedings and efforts to enforce those orders, until further order of this Court after it has had time to consider the present petition; and, thereafter,

2. Issue a peremptory writ, or such other extraordinary relief as the facts warrant, directing respondent court to vacate the above orders;

3. In the alternative, issue an alternative writ of mandate, or such other extraordinary relief as the facts warrant, directing respondent court to show cause as to why such a peremptory writ should not issue and then issue such peremptory writ;

4. Award petitioners such other relief as is just and proper; and

5. Award petitioners their costs in this proceeding.

Dated: December 26, 2012 Respectfully submitted,

CODDINGTON, HICKS & DANFORTH
Lee J. Danforth
Jay C. Patterson

FREISLEBEN LAW GROUP LLP
Alan J. Freisleben

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Robert A. Olson
Kent J. Bullard
Lillie Hsu

By: _____
Kent J. Bullard
Attorneys for Defendants and Petitioners

VERIFICATION

I, Lee J. Danforth, declare:

I am an attorney duly licensed to practice law in California. I am one of the attorneys of record for petitioners Farmers Insurance Exchange, Truck Insurance Exchange, and Mid-Century Insurance Company in the trial court in this proceeding. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record, than my clients are. The allegations in this petition are true and correct.

I declare under penalty of perjury that the foregoing is true and correct and that this verification is executed on DEC. 26, 2012, at Redwood Shores, California.

Lee J. Danforth

VERIFICATION

I, Alan J. Freisleben, declare:

I am an attorney duly licensed to practice law in California. I am one of the attorneys of record for petitioner Farmers Group, Inc. in the trial court in this proceeding. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record, than my client is. The allegations in this petition regarding Farmers Group, Inc. are true and correct.

I declare under penalty of perjury that the foregoing is true and correct and that this verification is executed on December 26, 2012, at Costa Mesa, California.

Alan J. Freisleben

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

WRIT RELIEF IS IMMEDIATELY NECESSARY TO PREVENT THE DISCLOSURE OF HUNDREDS OF INDISPUTABLY ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS BASED ON AN UNPRECEDENTED AND ERRONEOUS EXPANSION OF THE CRIME-FRAUD EXCEPTION.

"A discovery order compelling answers that violate the attorney-client privilege constitutes an abuse of discretion." (*Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 102.) In a phrase, it is clear error. "An abuse of discretion is shown when the trial court applies the wrong legal standard." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733; accord *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493, 1493.)

Here the trial court violated both precepts. It did so by inventing an unprecedented, broad interpretation of the crime-fraud exception to encompass supposed malicious prosecution. Even if the Recovery Actions were maliciously prosecuted—they weren't—there is no authority or basis for broadening the crime-fraud exception to include the tort of malicious prosecution. Indeed, all existing authority counsels against extending the crime-fraud exception so broadly, and this Court should so clarify.

Compounding the trial court's error, there was no proper evidentiary showing of fraudulent conduct. The trial court erred in finding an exception to the privilege based on only a perceived prima facie showing, rather than

making a preliminary factual finding based on actual evidence of the elements of a crime or fraud. But even if the trial court had purported to find a preliminary fact, forfeiture of privilege cannot be based on the proponent's or court's conjecture rather than evidence. The trial court's denial of prior motions on different issues (especially as to different parties) is not prima facie evidence of anything. And the trial court's determination violated due process by relying on evidence that the Farmers Defendants had no meaningful notice of and opportunity to respond to.

Unless this Court grants writ relief, the trial court's breathtakingly broad and factually unsupported extension of the crime-fraud exception will result in a compelled disclosure of hundreds of pages of communications that should remain protected by the attorney-client privilege.

A. The Attorney-Client Privilege Is Stringently Guarded.

The attorney-client privilege "'has been a hallmark of Anglo-American jurisprudence for almost 400 years.'" (*Costco, supra*, 47 Cal.4th at p. 732, citing *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The "fundamental purpose" of the attorney-client privilege "'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.'" (*Ibid.*)

This vitally important privilege applies equally to corporations as well as natural persons. (Evid. Code, §§ 175, 954; *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 736.) The privilege transcends the needs of a particular case: "Although exercise of the privilege may

occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship." (*Mitchell, supra*, 37 Cal.3d at p. 599.)

So important is the attorney-client privilege that "courts have no power to limit [it] by recognizing implied exceptions." (*Costco, supra*, 47 Cal.4th at p. 739.)

B. The Crime-Fraud Exception Is Confined, And Properly So, To Conduct That Is Actually Criminal Or Fraudulent; It Has Not Previously Been Expanded To Cover All Manner Of Tortious Conduct.

Evidence Code section 956 creates a narrow and limited exception to the attorney-client privilege: "There is no [attorney-client privilege] . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." This exception is "very limited." (*Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174; *People v. Clark* (1990) 50 Cal.3d 583, 622 [recognizing the "limited nature" of the crime-fraud exception].) The party seeking to invoke the crime-fraud exception bears the burden of proving that the client sought or obtained legal assistance to enable or aid someone to commit a crime or fraud. (*Geilim, supra*, 234 Cal.App.3d at p. 174.)

In enacting section 956, the Legislature made clear that the crime-fraud exception extends only to crime or fraud and should not be extended to other torts. "The plain language of [section] 956 encompasses only 'a

crime or a fraud.'" (*Freedom Trust v. Chubb Group of Insurance Companies* (C.D.Cal. 1999) 38 F.Supp.2d 1170, 1172.)

The legislative history so confirms. In 1965, the California Law Revision Commission, in endorsing section 956, (1) expressly rejected a broader provision in Uniform Rules of Evidence, Rule 26, which "extends this exception to bar the privilege in case of consultation with the view to commission of *any tort*," noting that the "Commission has not adopted this extension of the traditional scope of this exception"; (2) reasoned that "[b]ecause of the wide variety of torts, and the technical nature of many, extension of the exception to include all torts would present difficult problems for an attorney consulting with his client and would open too large an area for nullification of the privilege"; and (3) pointed out that "[a] recent California decision similarly rejected this extension of the privilege. *Nowell v. Superior Court* [(1963) 223 Cal.App.2d 652]." (*Freedom Trust, supra*, 38 F.Supp.2d at p. 1172, quoting Cal. Law Revision Comm'n Tent. Rec. and Study Relating to The URE: Art. V. Privileges 226 (1964).) As *Nowell* explained, "courts generally, including those of [California], have limited the exception to contemplated crimes or fraud." (*Nowell, supra,* 223 Cal.App.2d at pp. 657-658.)

The Legislature's intent to exclude torts other than fraud from Evidence Code section 956 is evident in another way: it explicitly *included* other torts (beyond just fraud) in exceptions to other privileges. (See *Freedom Trust, supra*, 38 F.Supp.2d at p. 1172; Evid. Code, § 997 [physician-patient privilege inapplicable "if the services of the physician

were sought or obtained to enable or aid anyone to commit or plan to commit a crime *or a tort*," emphasis added]; Evid. Code, § 1018 [psychotherapist-patient privilege: no privilege if psychotherapist's services were sought or obtained to aid commission of "a crime *or a tort*," emphasis added].) That these sections explicitly apply to all torts confirms that the Legislature's choice of the word "fraud" in section 956 was intended to limit the scope of the crime-fraud exception. (*Freedom Trust*, *supra*, 38 F.Supp.2d at p. 1172.)

As distilled in a leading treatise on California discovery, the narrow limitation on the crime-fraud exception "was deliberate." (2 Hogan & Weber, California Civil Discovery (2d ed. 2005) § 12.8, p. 12-37.)

C. The Trial Court Clearly Erred In Holding That A Prima Facie Fraud Showing Based On A Triable Issue As To Malicious Prosecution Triggers The Crime-Fraud Exception, Thereby Expanding The Exception Well Beyond Its Narrow Confines.

1. As malicious prosecution is neither a crime nor fraud, it does not trigger the crime-fraud exception.

No authority exists for extending the narrow crime-fraud exception to what the trial court deemed a sufficient showing of malicious prosecution. Not only has our Supreme Court recognized "the limited nature" of the crime-fraud exception, *Clark*, *supra*, 50 Cal.3d at p. 622, but Court of Appeal decisions uniformly have strictly required the elements of civil fraud—a false representation of a material fact, knowledge of its

falsity, intent to deceive, and the right to rely—when addressing the crime-fraud exception.

The trial court here contravened these principles, ignoring legislative intent, logic, and existing California law, in holding that nothing more than malicious prosecution triggers the crime-fraud exception.

The trial court utterly failed to address the required fraud elements: "a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240 1263; see also *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519 [fraud elements include (1) a misrepresentation, including a concealment or nondisclosure; (2) knowledge of its falsity, i.e., scienter; (3) intent to induce reliance on it; (4) justifiable reliance].) Instead, the court simply equated the absence of probable cause and the presence of malice—a subset of the elements of malicious prosecution—with fraud for purposes of the crime-fraud exception. (Vol. 4, Tab 27, pp. 866-867.) But there was no basis for this equation.

Although malicious prosecution is a tort, it is not a crime and its elements are not equivalent to fraud. (See *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880-881 [plain language of statute governing actions against attorneys for "wrongful act[s] or omission[s] . . . arising in the performance of professional services" and exempting only "actual fraud" did not exempt malicious prosecution claims]; *Tur v. City of Los Angeles* (1996) 51 Cal.App 4th 897, 902-903 [malicious prosecution action "is not

an action for deceit" or misrepresentation, even though "in virtually every case of malicious prosecution the injured party can point to a 'misrepresentation' in the generic sense of the word"].) The plaintiff in a maliciously prosecuted first action cannot be said to have intended to *deceive* the then-defendant/now-plaintiff by filing the lawsuit, let alone intended to induce reliance by the then-defendant/now-plaintiff. For purposes of the crime-fraud exception, "[a] negligent fraud . . . will not suffice." (*BP Alaska, supra,* 199 Cal.App.3d at p. 1263.)

Nor can the original defendant (now plaintiff) claim that he or she (or anyone else) has a right to rely on the complaint's allegations. A lawsuit, by its nature, is an adversarial proceeding in which the defendant is expected to challenge the complaint's allegations. The initial defendant has no right to believe the complaint's allegations simply because they were made, nor does the plaintiff expect the defendant to believe those allegations. To the contrary, all parties expect the defendant to deny the key allegations of the complaint and attempt to disprove them through evidence. Indeed, even when the complaint is verified, these expectations are no different.

Not surprisingly, a party has no right to rely on the representations of an adversary in a legal proceeding. (See *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [plaintiff in action to recover money could not justifiably rely on statements made to her by defendant's counsel that allegedly induced her to dismiss the lawsuit, particularly where plaintiff consulted with her counsel regarding the dismissal].) "[I]t would

not be 'reasonable' for [plaintiff] to accept [her opposing counsel's] representations as an *adversary* without an independent inquiry." (*Id.* at p. 1332.)

Thus, even *if* the Recovery Actions lacked probable cause and were initiated with malice (neither is true), that would not establish that the Farmers Defendants intended to deceive Golden State by filing them or that Golden State had any right to rely on them. In short, the crucible of litigation is conducive to neither deceiving nor relying on an adversary.

And even a factual finding (not present here) that the Recovery Actions were initiated and maintained without probable cause and with malice would not establish the necessary fraud elements for crime-fraud exception purposes. (Cf. *Freedom Trust, supra,* 38 F.Supp.2d at p. 1173 [bad faith is not equivalent to fraud]; *People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1769 [warrant issued, upon finding of probable cause, to search offices of attorneys suspected of insurance fraud did not establish prima facie showing that the attorneys had engaged in crime or fraud for crime-fraud exception].) The trial court "simply ma[d]e a policy decision that [malicious prosecution] should not be protected" by the attorney-client privilege, and attempted to thereby shoehorn malicious prosecution into the crime-fraud exception. (See *Freedom Trust, supra,* 38 F.Supp.2d at p. 1173 & fn. 3.) But existing California crime-fraud exception jurisprudence interprets "fraud" in section 956 literally and leaves no room for courts to make such decisions. (*Freedom Trust, supra,* 38 F.Supp.2d at p. 1173 & fn. 3.)

Malicious prosecution is not a crime and it is not fraud. The crime-fraud exception by its limited terms cannot apply. For this reason alone, writ relief is required.

2. The standard to invoke the crime-fraud exception, as with any other privilege exception, should not be a prima facie showing, but rather an actual preliminary factual finding, which the trial court failed to make.

The trial court also erred in ruling that to apply the crime-fraud exception, it need not "make an ultimate finding of fraudulent conduct," but need only find that Golden State had made a prima facie fraud showing. (Vol. 4, Tab 27, pp. 866-867.) It relied on *BP Alaska, supra*, 199 Cal.App.3d 1240, for the prima facie showing standard. (Vol. 4, Tab 27, p. 866.) But *BP Alaska*'s holding that a prima facie fraud showing is sufficient, rather than just necessary, to justify the crime-fraud exception was not supported by prior authority and contravenes legislative enactments regarding the admission of evidence.

BP Alaska relied on Evidence Code section 956 and *Nowell, supra*, 223 Cal.App.2d 652. But section 956 says nothing about a prima facie case or the burden of proof necessary to apply the exception. To the contrary, it says that the attorney-client privilege is forfeited only if the client, *in fact*, seeks to propagate a fraud or crime.

Nor does *Nowell* help. There, the exception's proponent presented *no* evidence whatsoever that the client's purpose in seeking legal advice was to perpetrate a crime or a fraud. The crime-fraud exception could not

be applied based "on the mere assertion of opposing counsel"; rather, the proponent of the exception must present "evidence . . . to make a prima facie showing" of crime or fraud. (*Nowell, supra*, 223 Cal.App.2d at p. 657.) In other words, *Nowell* established that *at least* a prima facie showing of crime or fraud is required for application of the crime-fraud exception. Yet, *BP Alaska* extrapolated from this holding that a party need prove *no more than* a prima facie case.[11/]

BP Alaska's holding contravenes the normal evidentiary rules governing admissibility of evidence. Evidence Code section 405 requires that when the existence of a preliminary fact necessary to determine the admissibility of evidence is disputed, the trial court "*shall* determine the existence or nonexistence of the preliminary fact" and must then admit or exclude the evidence accordingly, as required by the applicable law and the burden of proof. (Evid. Code, § 405, subd. (a), emphasis added.) Section 405 requires a preliminary *fact* determination, not a prima facie showing.[12/]

[11/] The court in *Dickerson, supra*, 135 Cal.App.3d at p. 100, likewise relied on *Nowell* to conclude that a prima facie showing of fraud suffices to apply the crime-fraud exception.

[12/] For example, when the issue is disputed, the trial court has to make a preliminary factual determination whether an attorney-client relationship existed and whether the communication was intended to be confidential. (E.g., *People v. Gionis* (1995) 9 Cal.4th 1196, 1208-1209; *People v. Urbano* (2005) 128 Cal.App.4th 396, 402-403.) Of course, if the exception's proponent makes a prima facie case of the client's criminal or fraudulent intent *and* the trial court finds an intended crime or fraud as a preliminary fact, the prima facie evidence may *support* the trial court's factual finding.

The legislative commentary on Evidence Code section 405 explains that this procedure requires that all parties be given an opportunity to submit evidence regarding the preliminary fact, and that the trial court must make a factual finding based on all of the evidence:

> "After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is persuaded by the party with the burden of proof, he finds in favor of the party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding."

(Evid. Code, § 405, Comment—Assembly Committee on Judiciary.)

Regarding privileges, the legislative commentary further explains that a party claiming an exception to a privilege bears the burden of proving the preliminary facts necessary to establish the exception's applicability. The commentary acknowledges—but parts company with—a case that long pre-dated the enactment of sections 405 and 956[13/] and that suggested a prima facie showing might suffice to permit application of the crime-fraud exception:

[13/] Sections 956 and 405, as well as section 954, which codifies the attorney-client privilege, were enacted in 1965, operative January 1, 1967. (Evid. Code, §§ 405, 954, 956.)

> "Under this code, as under existing law, the party claiming a privilege has the burden of proof on the preliminary facts. [Citations.] The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary *to show* that an exception to the privilege is applicable. But see *Abbott v. Superior Court*, 78 Cal.App.2d 19, 21, 177 P.2d 317, 318 (1947) (suggesting that a prima facie showing by the proponent is sufficient where the issue is whether a communication between attorney and client was made in contemplation of crime)."

(Evidence Code, § 405, Comment—Assembly Committee on Judiciary, emphasis added.)

In short, under Evidence Code section 405, all parties are entitled to submit evidence on a preliminary fact—including regarding the crime-fraud exception—to the trial court, and the trial court must make a factual finding on it. A prima facie case is only a starting point. To the extent *BP Alaska* and the trial court have held otherwise, writ review is further warranted to correct this distortion of the law. (Cf. *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 636, 649 [concluding that substantial evidence supported trial court's implied finding that plaintiff made prima facie showing of crime or fraud, but noting that defendant had a full opportunity to present evidence rebutting plaintiff's showing and "the trial court allowed a full hearing on the issues"].)

3. The trial court's unprecedented decision works profound damage to the viability of the attorney-client privilege.

The trial court's decision that a malicious prosecution cause of action's mere survival past motions to strike and for summary judgment somehow constitutes a sufficient showing to trigger the crime-fraud exception vitiates the attorney-client privilege: If the trial court's ruling is correct, then in every malicious prosecution action the defendant's attorney-client privilege as to communications regarding the filing and maintenance of the underlying action will be eviscerated if the plaintiff survives a motion to strike or if the trial court denies summary judgment in the malicious prosecution action.

* * * * *

The trial court's reliance on the malicious prosecution cause of action's mere survival past summary judgment as a sufficient basis to invoke the crime-fraud exception works an unprecedented inroad into the sanctity of the attorney-client privilege that contravenes both the limited nature of Evidence Code section 956 (*Clark, supra*, 50 Cal.3d at p. 622), and our Supreme Court's prohibition against implying exceptions to the attorney-client privilege (*Costco, supra*, 47 Cal.4th at p. 739). Writ relief is warranted for this reason too.

D. The Trial Court Made Multiple Errors In Even Finding That A Prima Facie Showing Of Fraud Based On Malicious Prosecution Existed.

The party seeking to invoke the crime-fraud exception bears the burden of proving that the client sought or obtained legal assistance to enable or aid someone to commit a crime or fraud. (*Geilim, supra*, 234 Cal.App.3d at p. 174.) As just discussed, a prima facie showing should not be enough. But even if it could be, the showing here did not even reach that level and relied on matters that the Farmers Defendants had no opportunity to defend against.

1. The trial court erroneously found that a prima facie showing could be established by two prior court orders denying anti-SLAPP and summary judgment motions.

"Mere assertion of [crime or] fraud is insufficient." (*BP Alaska, supra*, 199 Cal.App.3d at p. 1262; see also *Dickerson, supra*, 135 Cal.App.3d at p. 100.) "The penetration of the privilege via the 'crime or fraud' exception requires more than the mere assertion that the purpose of the consultation was illicit." (2 Hogan & Weber, *supra*, § 12.8, p. 12-37.)

Even under a prima facie standard (which as shown above is improperly lenient), there has to be *evidence*. "[A] prima facie case [is] one which will suffice for proof of a particular fact unless contradicted and overcome by other evidence" and must be supported by "*evidence* from which reasonable inferences can be drawn to establish [crime or fraud]." (*BP Alaska, supra*, 199 Cal.App.3d at p. 1262, emphasis added; accord,

Action Performance Co. v. Bohbot (C.D.Cal. 2006) 420 F.Supp.2d 1115, 1119; see also *Cunningham v. Connecticut Mut. Life Ins.* (S.D.Cal. 1994) 845 F.Supp. 1403, 1413 ["the party seeking disclosure must establish facts 'to support a good faith belief by a reasonable person' that the exception applies"].) In other words, there has to be substantial *evidence* supporting the factual underpinnings of the claimed fraud. (*BP Alaska, supra*, 199 Cal.App.3d at p. 1262.) Plus, the exception's proponent must also establish "a reasonable relationship between the fraud and the attorney-client communication" at issue. (*Bauman & Rose, supra*, 37 Cal.App.4th at p. 1769; *BP Alaska, supra*, 199 Cal.App.3d at pp. 1268-1269.)

Whatever it means to make a prima facie showing sufficient to trigger the crime-fraud exception, it didn't happen here. Here the trial court relied on the orders denying *other parties'* (the Attorney Defendants') motion to strike and motion for summary judgment. (See Vol. 3, Tab 15, p. 435, citing Vol. 2, Tab 10, pp. 217-220, 221-223; see also Vol. 4, Tab 27, p. 866.) Those orders could not possibly support a showing of fraudulent conduct by the Farmers Defendants for myriad reasons, including:

- Neither of those orders, nor any of the trial court's orders pertaining to application of the crime-fraud exception, identifies any false representation made with knowledge of its falsity, and with an intent to deceive someone who had a right to rely on it—the elements required by *BP Alaska, supra*, 199 Cal.App.3d at p. 1263.
- The orders were merely denials of a motion for summary judgment and a motion to strike. "Denial of a motion for summary judgment

does not establish any fact or resolve any issue; it merely determines that the issues will be decided later, at the time of trial." (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1086.) Likewise, the order denying an anti-SLAPP motion *statutorily* has no effect on the remainder of proceedings. (Code Civ. Proc., § 425.16, subd. (b)(3).)

- The summary judgment order expressly found that the Attorney Defendants met their burden of showing *lack* of malice. It denied summary judgment by finding that Golden State "successfully created a *triable issue* as to whether malice may be inferred." (Vol. 2, Tab 10, p. 223, emphasis added.) Nowhere did the trial court resolve the triable issue.
- The orders resolved motions brought by the Attorney Defendants, not the Farmers Defendants, who were not parties to the motions, did not file papers supporting the motions, and did not submit any evidence on the issue of fraud. No issue was decided for or against the Farmers Defendants, let alone that their conduct was fraudulent or malicious. This is particularly problematic given that the crime-fraud exception focuses on the *client's* intent in seeking legal advice and applies "only when a client seeks or obtains legal assistance 'to enable or aid' one to commit a crime or fraud." (*Geilim, supra,* 234 Cal.App.3d at p. 174; see also *Glade v. Superior Court* (1978) 76 Cal.App.3d 738, 746 [section 956 "requires an intention on the part of *the client* to abuse the attorney-client relationship, although the

actual wrongdoing may be perpetrated by anyone," emphasis added].)

This can't possibly amount to a *showing* of fraud—prima facie or otherwise.

2. The trial court's reliance "by inference" on evidence as regards other motions and defendants and with no opportunity to respond to that evidence violated due process.

"Due process requires a meaningful opportunity to present evidence and have it considered in explanation or rebuttal." (*Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 219.) The trial court's November 8 order added for the first time that it was also relying on "by inference, the evidence submitted by Plaintiffs in opposition to [the anti-SLAPP and summary judgment] motions." (Vol. 4, Tab 27, p. 866.) But that violated due process. The Farmers Defendants had no meaningful notice and opportunity to be heard as to that evidence:

- Golden State, as proponent of the crime-fraud exception bore the burden of showing its applicability. (*Geilim, supra*, 234 Cal.App.3d at p. 174.) It did not even submit this evidence. Rather, the trial court, for the first time in its November 8 order, announced in one breath that it was "by inference" relying on evidence submitted in connection with other motions, involving other defendants, a year or more earlier. (Vol. 4, Tab 27, p. 866.) In the next breath, the court declared that it was denying the Farmers Defendants' request for an

evidentiary hearing. (Vol. 4, Tab 27, p. 867.) The Farmers Defendants never had the opportunity to counter the newly identified evidence.

- The anti-SLAPP motion to strike was filed and determined in 2009, and the motion for summary judgment in 2011. None of the evidence submitted by Golden State in opposing those motions was submitted for the purpose of establishing fraudulent conduct by the Farmers Defendants, nor was it submitted in support of a finding of a prima facie case of fraudulent conduct for the purpose of applying the crime-fraud exception. That issue first arose several years after the anti-SLAPP motion to strike was determined, and more than a year and a half after the motion for summary judgment was denied.
- The trial court never identified *what particular evidence* supposedly established a prima facie showing of fraudulent conduct by the Farmers Defendants. (Cf. *BP Alaska, supra*, 199 Cal.App.3d at pp. 1263-1265 [specifically identifying fraud evidence].) The Farmers Defendants never had notice of or opportunity to address particular evidence.
- The Court did not announce the evidentiary basis for its decision until after it had determined that it would apply the crime-fraud exception and did not give the Farmers Defendants an opportunity to address such evidence, both relieving Golden State of its burden to present *evidence* tending to prove the elements of *fraud* and depriving the Farmers Defendants of due process.

3. The trial court's determination that there was a triable issue as to whether Recovery Actions were maliciously prosecuted—the sole basis of the supposed prima facie showing of fraudulent conduct—was fundamentally flawed as a more than reasonable basis existed for petitioners' position in the underlying coverage dispute.

Even if the crime-fraud exception could be invoked by a malicious prosecution showing—which it can't, as demonstrated above—the trial court's determination here that there was a triable issue as to whether the Recovery Actions were maliciously prosecuted was fundamentally flawed.

As the Farmers Defendants explained in the trial court in connection with the crime-fraud exception issue,[14] Golden State's malicious prosecution theory fails as a matter of law: Its premise is that the Farmers Defendants had no reasonable basis on which to seek reimbursement against Golden State as an additional insured. But that is simply not so. The rule that a carrier cannot seek reimbursement from its insured only applies to a loss or liability within coverage. (*Truck Ins. Exchange v. County of Los Angeles* (2002) 95 Cal.App.4th 13, 23; see also *Gemini Ins. Co. v. Delos Ins. Co.* (2012) ___ Cal.Rptr.3d ___, 2012 WL 6050774, *3 [landlord's first-party property damage carrier could seek damages from

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[14] See, e.g., Vol. 1, Tab 5, pp. 116-117 [Defendants' June 1, 2012 brief regarding privilege log issues]; Vol. 2, Tab 14, pp. 417-418 [trial court referring to Defendants' June 1, 2012 brief during September 13, 2012 hearing]); Vol. 3, Tab 23, pp. 583-584 [Defendants' October 5, 2012 objections].)

liability carrier covering both tenant and landlord as additional insured for property damage caused by tenant].) The potentially applicable additional insured endorsements here contained language that on its face appeared to limit the additional insured coverage to that arising vicariously from Bowers: "only with respect to liability arising out of '[Bowers'] work' for [Golden State] by or for [Bowers]" or "only with respect to liability arising out of [Bowers'] ongoing operations performed for [Golden State]." (See Vol. 3, Tab 23, pp. 574-575.)

A reasonable argument existed that under the additional insured endorsement Mid-Century insured Golden State for only its vicarious liability for Bowers' conduct. Whether a court agrees or disagrees with that reading of the endorsement is beside the point. If that reading is plausible, there can be no malicious prosecution. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 868 [no malicious prosecution liability as a matter of law where claim is merely "legally tenable"]; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973-974 [no bad faith even though Supreme Court ultimately disagreed with carrier's policy interpretation].) There is no basis here to conclude that seeking reimbursement for an additional insured's separate liability in an arguably uninsured capacity (i.e., its liability for its own conduct as opposed to its vicarious liability for Bowers' conduct) was so objectively unreasonable as to support malicious prosecution.[15/]

[15/] Whether the Recovery Actions were based on a legally tenable (continued...)

The trial court did not find otherwise. Rather, it simply stated that "Defendants' arguments as to the extent of [their] duties to Plaintiffs under the applicable insurance policies and endorsements, raised in an attempt to establish that the [Recovery Actions] were in no sense improper, are inconsistent with the findings of the court in the Phase I trial." (Vol. 4, Tab 27, p. 867.) In effect, it equated losing an issue at trial with having no probable cause for commencing an action in the first place. That is wrong. (See *Sheldon Appel, supra*, 47 Cal.3d at p. 886 ["although not ultimately successful," lien claim "was legally tenable" and therefore did not lack probably cause].)

Nor can the Phase I Statement of Decision be read as establishing fraud or even malicious prosecution. Fraud was not among the issues for determination in Phase I under the operative trial management order, which clearly identifies Phase II as the one in which evidence pertaining to fraud would be admitted. (Vol. 1, Tab 3, p. 84.) Moreover, malicious prosecution was specifically reserved for Phase III. (Vol. 1, Tab 3, pp. 84-85.) Thus, there is nothing in the Phase I Statement of Decision that even addresses the issue of fraud, let alone a judicial ruling that Golden State made a prima facie showing of fraud. (Vol. 2, Tab 11, pp. 340-357.) The same is true as to malicious prosecution. (*Ibid.*)

Indeed, the Phase I findings do not address whether the Farmers Defendants owed any duties to Golden State for liabilities not based on

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[15] (...continued)
theory is a question of law. (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.)

Golden State' vicarious liability for work performed by Bowers. (*Ibid.*) Nor do the Phase I findings contravene that "a substantive investigation was conducted, including destructive testing and repairs, and [the] Farmers [Defendants] learned that the damage to the Morrison home was largely (or entirely) the fault of others [than Bowers]." (Vol. 3, Tab 23, p. 572.) Instead, the Phase I findings state merely that "[p]laintiffs *assert* that the investigation by Defendants' experts and their claims adjusters concluded with the finding that damages were caused by Bowers' work." (Vol. 2, Tab 11, p. 347, emphasis added.)

Contrary to the trial court's crime-fraud exception ruling, its Phase I findings did not gainsay the Farmers Defendants' arguments that the Recovery Actions were proper because they were seeking damages from Golden State outside the policy's coverage.

Essentially, in Phase I, the court reasoned that Golden State was *potentially* covered under the applicable insurance policies. From that it concluded that it was improper for defendants to seek recovery against Golden State through a subrogation action. But that leap is unwarranted. And it would amount, at worst, to no more than a finding of "simple bad faith," which "is not per se within the crime-fraud exception." (*Freedom Trust, supra*, 38 F.Supp.2d at p. 1173, fn. 4.)

There was an ample legally tenable basis for the Recovery Actions. The trial court's contrary conclusion is wrong as a matter of law.

CONCLUSION

The trial court's orders that the crime-fraud exception warrants that confidential attorney-client communications be revealed in answers to deposition questions and its order regarding production of hundreds of pages of documents containing such communications are clearly wrong. There is no crime, no fraud, and no required preliminary fact determination. And, there's not even a prima facie malicious prosecution showing as petitioners' coverage and subrogation positions were—and are—legally tenable as a matter of law. The erroneous orders are irretrievably prejudicial if not corrected now.

Accordingly, this Court should issue the requested writ relief and direct the trial court to vacate its orders requiring answers to deposition questions eliciting attorney-client privileged communications and its order regarding production of documents containing attorney-client privileged communications.

DATED: December 26, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF contains 11,773 words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

DATED: December 26, 2012

Kent J. Bullard

ATTACHMENT 1: ORDER RE: OBJECTIONS TO DISCOVERY REFEREE'S RECOMMENDATIONS, AND ADDITIONAL REQUESTS FOR AFFIRMATIVE RELIEF

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

GOLDEN STATE DEVELOPERS, INC., et al. Plaintiffs, v. TRUCK INSURANCE EXCHANGE, et al., Defendants.	Case No. RG06291935 Consolidated for all purposes with RG07334847 and RG10509252
THE HOUSING GROUP, et al. Plaintiffs v. CALIBER ONE INDEMNITY CO., et al. Defendants.	ORDER RE: OBJECTIONS TO DISCOVERY REFEREE'S RECOMMENDATIONS, AND ADDITIONAL REQUESTS FOR AFFIRMATIVE RELIEF
GOLDEN STATE DEVELOPERS, INC., et al. Plaintiffs. v. ALLIED INSURANCE COMPANY, et al., Defendants.	
And Related Cross-Actions.	

On September 26, 2012, discovery referee the Honorable Bonnie Sabraw, Judge of the Superior Court, retired ("Discovery Referee"), issued and served

"Recommendations Of Discovery Referee Re: Reexamination of Privilege Log Claim Files and I-Logs" ("Subject Recommendations"), the originals of which were filed herein on October 1, 2012 (appearing on the Register of Actions as "Proposed Order Filed").

PLAINTIFFS' OBJECTIONS:

On October 1, 2012, plaintiffs Golden State Developers, Inc., et al. ("Plaintiffs") filed "Objections To Referee's Recommendations Dated 9/26/12 And Further Requests Relating Thereto (Phase 2)", together with a supporting declaration. As the caption of this document indicates, along with their objections to the Subject Recommendations, Plaintiffs included various requests for affirmative relief regarding other discovery matters that may be affected by the orders approving the recommendations of the Discovery Referee, in particular the court's September 14, 2012 Order Re: Discovery Referee Recommendations, in which the court concluded that Plaintiffs had established a prima facie showing of fraud for purposes of Evidence Code section 956[1]. On October 4, 2012, defendants Truck Insurance Exchange, Mid-Century Insurance Company and Farmers Insurance Exchange ("Farmers Defendants") filed their response to Plaintiffs' October 1, 2012 filing.

Plaintiffs' objection to the Discovery Referee's recommendation that the temporal scope of the application of the Evidence Code section 956 exception

[1] The court notes that both parties submitted "Requests For Clarification" after the September 14, 2012 order was issued, and before the Subject Recommendations were issued, but the court took no action on these requests because they did not followed any cognizable procedure under which a court order would follow.

("Crime-Fraud Exception" or "CFE") to the attorney-client privilege ("ACP") end as of January 23, 2009 is OVERRULED. Plaintiffs' argument that "the correct test is when did the fraud/crime scheme stop damaging Plaintiffs" is unsupported by any authority, and is not well taken. Nor does Plaintiffs' assertion that the Farmers Defendants concealed evidence before and during the Phase I trial have any direct bearing on the issues within the scope of the discovery reference, as currently defined in the May 9, 2012 Order of Reference. Furthermore, Plaintiffs' requests for issue and monetary sanctions for these alleged discovery abuses are DENIED as not properly before the court in this context.

Plaintiffs' further requests that the court order that additional documents "that fall within the criteria of Judge Freedman's 9/14 Order also be identified and produced" is likewise DENIED. Documents that are not within the scope of the discovery reference are not properly before the court at this time, and the court will not consider the applicability of the CFE to documents in the abstract.

DEFENDANTS' OBJECTIONS:

On October 5, 2012, Farmers Defendants filed their "Objections To Recommendations of Discovery Referee and Request For Evidentiary Hearing." Farmers Defendants' objections were joined by defendant Farmers Group, Inc. ("FGI", collectively "Defendants"), and FGI also filed its own objection to that portion of the Subject Recommendations that recommends that FGI pay a portion of the Discovery Referee's fees.

FGI'S separate objection to the recommendation regarding allocation of the

Discovery Referee's fees is OVERRULED. The court will adopt the Discovery Referee's recommendation on this issue.

Defendants' objection to the Subject Recommendations based on their assertion that Plaintiffs have never identified any conduct that supports a finding of prima facie evidence of fraud is OVERRULED. For purposes of determining whether the CFE to the ACP applies in the discovery context, it is not necessary to make an ultimate finding of fraudulent conduct. Rather, evidence from which inferences can be drawn to establish the fraud is a sufficient "prima facie showing." (*BP Alaska Exploration, Inc. v. Sup.Ct.* (1988) 199 Cal.App.3d 1240, 1262-1263.)

Here, as indicated in the court's September 14, 2012 Order, the court's conclusion that Plaintiffs have set forth a prima facie showing of fraud with respect to both the initiation and maintenance of the Farmers/Morrison Action and the Mid-Century Action was based on the court order in this case dated April 27, 2009, denying the Motion of defendants Gregory de la Pena and de la Pena & McDonald LLP ("de la Pena Defendants") to Strike Plaintiffs' Malicious Prosecution cause of action, and the court order dated January 24, 2011, denying the de la Pena Defendants' Motion for Summary Judgment, and, by inference, the evidence submitted by Plaintiffs in opposition to those motions. The court is of the view that "enough evidence from which a reasonable trier of fact could conclude that the lawsuits were brought without probable cause and were initiated with malice" (April 27, 2009 Order, page 2), together with evidence sufficient to

"create a triable issue as to whether malice may be inferred from the circumstances leading up to the initiation of the Farmers/Morrison Action and the Mid-Century Action" (January 24, 2011 Order, page 2), is sufficient to establish a prima facie showing of fraudulent conduct.

The court further notes that Defendants' arguments as to the extent of its duties to Plaintiffs under the applicable insurance policies and endorsements, raised in an attempt to establish that the Farmers/Morrison Action and the Mid-Century Action were in no sense improper, are inconsistent with the findings of the court in the Phase I trial. (September 5, 2012 Statement of Decision.)

Defendants' request for an evidentiary hearing is DENIED. The court concludes that Evidence Code section 402 does not apply in this context.

Defendants' objection on the basis that the CFE affects only the ACP, however, does have merit. In this regard, the court acknowledges that its September 14, 2012 Order remanding the recommendations subject to that order to the Discovery Referee for further document review was less than clear, in that no distinction was drawn therein between documents subject to ACP objections only, and documents that were also subject to other meritorious objections, such as (a) mediation privilege, (b) third party ACP, (c) joint defense/common interest, and (d) attorney work product.[2]

[2] Defendants have included a list of documents as to which the Discovery Referee has recommended production but some other privilege orprotection applies that is not affected by the CFE as Exhibit J to the Declaration of Lee J. Danforth In Support of Defendants' Objections to Discovery Referee's Recommendations, filed on October 5, 2012. Defendants are directed to provide a courtesy copy of this list to the Discovery Referee at their earliest opportunity.

The court's poorly articulated intention was that all objections based on ACP that were sustained by the Discovery Referee in the course of her original review be reexamined for the purpose of overruling the ACP objections as to those documents that "refer to, discuss, mention, or otherwise relate specifically to the Farmers/Morrison Action or the Mid-Century Action." The overruling of the ACP objection, however, was not intended to result in an order of production where the same documents are also subject to a different and meritorious objection. The Subject Recommendations do not indicate whether, after the specified ACP objections were overruled, Defendants' other objections were considered. Accordingly, the court HEREBY REMANDS the Subject Recommendations to the Discovery Referee to determine whether any of the other objections to production of documents to which the ACP no longer applies have merit.

With respect to attorney work product protection (Code of Civil Procedure ["CCP"] section 2018.030), as extensively discussed in *BP Alaska Exploration, Inc. v. Sup.Ct.* , *supra*, 199 Cal.App.3d at 1250-1261, opinion work product, i.e. that work product subject to CCP section 2018.030(a), is not subject to the CFE, and remains absolutely insulated from discovery unless there has been a waiver of the protection. (*Id.*, at 1261.) The court rejects Plaintiffs' argument that the voluntary submission of documents for in camera review by the Discovery Referee constitutes such a waiver. The court agrees with Plaintiffs, however, that the same evidentiary showing upon which the court's ruling on the applicability of the CFE is based also suffices to defeat any "qualified" work product protection.

(Code of Civil Procedure section 2018(b).)

Apart from the remand of issues set forth above, the court HEREBY accepts the Subject Recommendations in their entirety. The issuance of a final order to this effect, however, will await receipt and review of the Discovery Referee's further recommendations upon remand.

NOV 7, 2012
Date

Robert B. Freedman
Judge of the Superior Court

ATTACHMENT 2:
MINUTE ORDER (JUDGE FREEDMAN) PARTIALLY GRANTING PLAINTIFFS' MOTION TO COMPEL RE JAY VOCKE

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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Golden State Developers, Inc. Plaintiff/Petitioner(s) VS. Truck Insurance Exchange Fa Defendant/Respondent(s) (Abbreviated Title)	No. RG06291935 Order Motion to Compel (Motion) Partial Grant

The Motion to Compel (Motion) filed for Castro Valley Inc. and Castro Valley Associates LP and Golden State Developers, Inc. was set for hearing on 12/18/2012 at 02:00 PM in Department 20 before the Honorable Robert B. Freedman. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of plaintiffs Golden State Developers, Castro Valley Associates, LP, and Castro Valley Inc. ("Plaintiffs") To Compel Vocke To Resume Depo and Answer Questions ("Motion") is ruled on as follows:

First, the court rejects the argument of Defendants that Plaintiff's agreement to go forward with the Vocke deposition without waiting for any further document production that may occur following final determination of the matters referred to the discovery referee "should be understood as acquiescence to take the deposition without inquiring into subject matters presumptively off limits as privileged, including attorney-client communications." (Opposition, page 3:25-26.)

Second, the court rejects the argument of defendants Farmers Insurance Exchange, Truck Insurance Exchange and Mid-Century Insurance Company ("Defendants") that Jay Vocke did not fail or refuse to answer any questions. An instruction by counsel to not answer a question that is complied with by the deponent is a sufficient basis for a Code of Civil Procedure ("CCP") section 2025.480 motion. While Defendants are correct that a deponent may ignore his counsel's direction and answer the question posed, questioning counsel is entitled to infer from the deponent's silence that he does not intend to do so.

Third, the court disagrees with Defendants as to the validity of Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006 ("Stewart") as authority relevant to the issues raised in this Motion. The Stewart opinion, at pages 1014-1015, includes an accurate analysis of the proper application of then CCP section 2025(m) (now CCP section 2025.460), concluding, inter alia, that "irrelevance alone is an insufficient ground to justify preventing a witness from answering a question at a deposition." (Ibid.) Here, while not necessarily endorsing the manner in which the subject questions were framed, or the relevance or propriety of any particular line of inquiry, the court concludes that instructions not to answer were given too often.

The Motion is GRANTED in part. Jay Vocke shall appear for further deposition, and shall answer questions as follows:

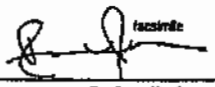
As to questions 1, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, Defendants' objections based on attorney-client privilege are OVERRULED. The court concludes that these questions fall within the scope of the findings reflected in the September 14, 2012 Order Re: Discovery Referee's Recommendations and the November 8, 2012 Order Re: Objections To Discovery Referee's Recommendations, And Additional Requests For Affirmative Relief regarding the crime-fraud exception to the attorney-client privilege. Defendant's other objections may remain in the record, but the questions must be answered.

As to questions 2, 4, 5, 18, 19 and 20, the Motion is GRANTED. Notwithstanding that some of Defendants' objections were well taken, refusal to answer was not warranted. The questions shall be answered.

Plaintiffs' request for monetary sanctions is DENIED for failure to comply with CCP section 2023.04.

Defendants shall present Jay Vocke for continued deposition under the terms of this order at a date and time by mutual agreement of the parties, but in no event later than January 31, 2013.

Dated: 12/18/2012



Judge Robert B. Freedman

ATTACHMENT 3:
MINUTE ORDER (JUDGE FREEDMAN) PARTIALLY GRANTING PLAINTIFFS' MOTION TO COMPEL RE MARK JASS

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Rene C. Davidson Alameda County Courthouse

Golden State Developers, Inc. Plaintiff/Petitioner(s) VS. Truck Insurance Exchange Fa Defendant/Respondent(s) (Abbreviated Title)	No. RG06291935 Order Motion to Compel (Motion) Partial Grant

The Motion to Compel (Motion) filed for Castro Valley Inc. and Castro Valley Associates LP and Golden State Developers, Inc. was set for hearing on 12/18/2012 at 02:00 PM in Department 20 before the Honorable Robert B. Freedman. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of plaintiffs Golden State Developers, Castro Valley Associates, LP, and Castro Valley Inc. ("Plaintiffs") To Compel Jass To Resume Depo and Answer Questions ("Motion") is ruled on as follows:

First, the court rejects the argument of Defendants that Plaintiff's agreement to go forward with the Jass deposition without waiting for any further document production that may occur following final determination of the matters referred to the discovery referee "should be understood as acquiescence to take the deposition without inquiring into subject matters presumptively off limits as privileged, including attorney-client communications." (Opposition, page 3:25-26.)

Second, the court rejects the argument of defendants Farmers Insurance Exchange, Truck Insurance Exchange and Mid-Century Insurance Company ("Defendants") that Mark Jass did not fail or refuse to answer any questions. An instruction by counsel to not answer a question that is complied with by the deponent is a sufficient basis for a Code of Civil Procedure ("CCP") section 2025.480 motion. While Defendants are correct that a deponent may ignore his counsel's direction and answer the question posed, questioning counsel is entitled to infer from the deponent's silence that he does not intend to do so.

Third, the court disagrees with Defendants as to the validity of Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006 ("Stewart") as authority relevant to the issues raised in this Motion. The Stewart opinion, at pages 1014-1015, includes an accurate analysis of the proper application of then CCP section 2025(m) (now CCP section 2025.460), concluding, inter alia, that "irrelevance alone is an insufficient ground to justify preventing a witness from answering a question at a deposition." (Ibid.) Here, while not necessarily endorsing the manner in which the subject questions were framed, or the relevance or propriety of any particular line of inquiry, the court concludes that instructions not to answer were given too often.

The Motion is GRANTED in part. Mark Jass shall appear for further deposition, and shall answer questions as follows:

As to questions 7, 8, 11, 12 and 13, Defendants' objections based on attorney-client privilege are OVERRULED. The court concludes that these questions fall within the scope of the findings reflected in the September 14, 2012 Order Re: Discovery Referee's Recommendations and the November 8, 2012 Order Re: Objections To Discovery Referee's Recommendations, And Additional Requests For Affirmative Relief regarding the crime-fraud exception to the attorney-client privilege. Defendant's other objections may remain in the record, but the questions must be answered.

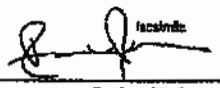
As to questions 4, 9 and 10, the Motion is GRANTED. Notwithstanding that some of Defendants' objections were well taken, refusal to answer was not warranted. The questions shall be answered.

As to questions 1, 2, 3, 5 and 6 the Motion is DENIED. The attorney-client privilege objections are SUSTAINED. The findings made by the court with respect to the applicability of the crime-fraud exception to the attorney client privilege have been clearly limited to "[o]nly those documents covered by the Subject Referee Recommendations that refer to, discuss, mention, or otherwise relate specifically to the Farmers/Morrison Action or the Mid-Century Action" (September 14, 2012 Order Re: Discovery Referee's Recommendations).

Plaintiffs' request for monetary sanctions is DENIED for failure to comply with CCP section 2023.040.

Defendants shall present Mark Jass for continued deposition under the terms of this order at a date and time by mutual agreement of the parties, but in no event later than January 31, 2013.

Dated: 12/18/2012



Judge Robert B. Freedman