6th Civil No. H025069

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THOMAS M. SIEBEL,

Plaintiff and Appellant,

vs.

CAROL L. MITTLESTEADT and
E. RICK BUELL,

Defendants and Respondents.

Appeal from Santa Clara Superior Court, No. CV790935
Honorable Gregory H. Ward

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Here is the case Tom Siebel planned to present to a jury, until the trial court's summary judgment ruling stopped him:

Attorneys for a disgruntled, at-will female employee, fired for poor performance, implement a plan they have successfully used before. They sue the corporation-employer *and* Chief Executive Officer *personally*, peppering the complaint with baseless claims of wrongful termination in violation of public policy, Labor Code violations, and (the kicker) sex discrimination. They time the filing of the complaint to coincide with the company's initial public offering, hoping that the company and CEO will write a large check to make them go away.

But the CEO in this case, Tom Siebel, doesn't write the check. Instead, he fights on the merits and wins. First, he wins dismissals of most of the claims before trial, including all but one of the media-grabbing sex discrimination claims. Then, on the eve of trial, the former employee voluntarily dismisses the last sex discrimination claim. Finally, Mr. Siebel wins before a jury on the remaining claims.

That is what Mr. Siebel would have told the jury in this malicious prosecution action had the trial court not cut the case short by granting summary judgment for defendants—the attorneys of the former employee. Its reason: The parties to the underlying employment termination case had settled after judgment while the case was on appeal. Even though Mr. Siebel retained every penny of his costs judgment, and even though the parties expressly excluded the defendant-attorneys from the settlement's release, the trial court concluded that because of this settlement, as a matter of law Mr. Siebel could not prove that the action terminated favorably to him.

The trial court was wrong. True, a settlement that occurs *before* an adjudication on the merits may preclude a later malicious prosecution action because there is no way of knowing who would really have won if the case had gone to trial. But where, as here, the settlement occurs *after* a judgment, that reasoning does not apply. Mr. Siebel unambiguously won every single cause of action on the merits. The fact that the losing plaintiff threw in the towel on appeal does not diminish that victory, now set in stone as a final judgment.

Mr. Siebel's case is different from *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, which the trial court erroneously found controlling. In *Ferreira*, the parties stipulated to an amended judgment that supplanted the jury's merits determination—not our case. Rather, the more recent *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179 should have guided the trial court. *Mattel* held that *the parties'* post-judgment settlement does not bar a malicious prosecution action against *the attorneys* who instigated the underlying action—just as Mr. Siebel's post-judgment settlement with the former employee cannot bar this malicious prosecution action against the former employee's attorneys.

The judgment must be reversed and the case allowed to proceed through discovery to trial.

STATEMENT OF THE CASE

Because this is an appeal from a defense summary judgment, we state the facts in the light most favorable to the plaintiff, Thomas M. Siebel ("Siebel"). (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

A. The Parties.

1. Plaintiff and former defendant Tom Siebel.

Plaintiff Tom Siebel is the Chairman and Chief Executive Officer of Siebel Systems, Inc. ("SSI"). (Appellant's Appendix ["AA"] 4, 414, 609.) SSI is a leading provider of CRM (customer relationship management) applications software, which enables corporations to sell to, market to, and serve customers across multiple channel and lines of business. (AA 4.) Siebel co-founded SSI in 1993 with Patricia House (AA 3, 414), who is currently SSI's Vice Chairman.

2. Former plaintiff Debra Christoffers.

SSI hired Debra Christoffers in February 1995 and fired her ten months later for poor work performance. (AA 4, 6.) The next summer, Christoffers retaliated with a lawsuit against SSI and Siebel personally ("Christoffers action"). (AA 149-170.) That action underlies this malicious prosecution suit.

3. Defendants Carol Mittlesteadt and E. Rick Buell.

Carol Mittlesteadt: Before Christoffers joined SSI, she had been involved in disputes with two past employers, where, represented by defendant Carol Mittlesteadt, she had accused each of the employers of sex discrimination and harassment. (AA 5, 340, fn. 2; see also AA 521-522, 595-596.) After one suit, according to Christoffers' former boss,

Christoffers admitted that her sex discrimination claims were baseless and brought solely on Mittlesteadt's advice that "making the exaggerated claim of sexual discrimination" would be "traumatic" to the employer, who was undergoing a corporate acquisition, and would "get attention and get a quick settlement." (*Ibid*.)

E. Rick Buell: Buell formally associated as Mittlesteadt's co-counsel in the Christoffers action in January 1997. (AA 90.) Siebel's request to the trial court for a Code of Civil Procedure section 437c, subdivision (h) continuance is based, in part, on the need for discovery regarding "the nature and extent of co-defendant Buell's pretrial involvement in the Christoffers' Action." (AA 425.)

B. The Underlying Christoffers Action.

1. SSI terminates Christoffers.

Before Siebel and House formed SSI, Siebel had been the Chief Executive Officer of Gain Technology, Inc. ("Gain"). (AA 4, 613.) In that position, he had hired Debra Christoffers to work for Gain. (AA 416, 613.)

In 1995, SSI hired Christoffers as a sales director with Siebel's approval. (AA 4, 416.) She received more favorable compensation terms than males hired at approximately the same time in comparable positions. For example, she received more stock options than male sales representatives. (AA 415, 615-617.) Also, of the ten persons employed by SSI in Christoffers' position, Christoffers was paid the second highest amount of draw during 1995 and 1996. (AA 415, 618.)

In December 1995, SSI fired Christoffers for unsatisfactory job performance. (AA 5-6, 609.) SSI was unhappy with her misuse of key company personnel in performing her duties, her poor account management,

her lack of follow-through with existing and potential customers, and her record of customer complaints. (AA 6, 620-621.)

2. Christoffers retaliates with a sex discrimination/wrongful termination lawsuit.

In June 1996, Mittlesteadt timed the filing of Christoffers' complaint against SSI and Siebel to coincide exactly with SSI's initial public offering ("IPO").[1] (AA 8-9, 341.) In a nutshell, Christoffers alleged that Siebel lured her from her previous employer to SSI with false promises of large commissions and lucrative stock options, but that once Christoffers joined SSI, Siebel discriminated against her on account of her sex, refused to pay her commissions, and terminated her to avoid the vesting of her stock options and paying her commissions. (AA 365.) Her sex discrimination claims included an allegation that Siebel preferred a "more passive and less aggressive female who earned less money," while she was a "very strong, assertive, driven, and successful sales person," who "d[id] not match the stereotype generally associated with women." (AA 178, 180.)

Christoffers' claims against SSI and Siebel fell into five categories:

(1) Count 1: Wrongful termination to avoid paying compensation (a so-called "*Gould* claim," from *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137).[2]

(2) Counts 2-4: Sex discrimination.

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[1] Siebel's complaint alleges in detail how Christoffers and Mittlesteadt specifically targeted SSI's IPO date, then manipulated the state administrative process to obtain a "right to sue" letter in time to meet that target. (AA 7-9.)

[2] Following the convention used below, we refer to Christoffers' causes of action as "counts," and the six causes of action that form the basis of the malicious prosecution action as the "Six Counts." (AA 9-10.)

Count 2: Sex discrimination in violation of Fair Employment and Housing Act (Government Code, sections 12940 et seq.).

Count 3: Sex discrimination in violation of the California Constitution.

Count 4: Wrongful termination in violation of public policy against sex discrimination.

(3) Counts 5-6: Inducing Christoffers to move for purposes of employment and then wrongfully terminating her, both in violation of Labor Code section 970.

(4) Counts 7-8: Fraud/promissory estoppel based on hiring representations.

(5) Counts 9-14 (against SSI only): Various claims for unpaid compensation arising from employment.

(AA 173-197.)

The claims in the first three categories are the Six Counts that form the basis of Siebel's malicious prosecution action. (AA 10.)

3. Siebel obtains pretrial rulings dismissing five of the Six Counts, and Christoffers voluntarily dismisses her sex discrimination claims.

Each of the Six Counts was dismissed before trial as follows:

1st AMENDED COMPLAINT	CLAIM	DISPOSITION	BASIS FOR DISPOSITION
Count One	Wrongful termination in violation of public policy against terminating employees to avoid paying compensation	Summary adjudication	Siebel was not Christoffers' employer. (AA 296.)
Count Two	Sex discrimination – violation of FEHA [Gov. Code, §12940]	Demurrer	Siebel was not Christoffers' employer. (AA 253-254, 280.)
Count Three	Sex discrimination – violation of California constitution [Art. I, §8]	Voluntarily dismissed (AA 304.)	See discussion immediately below.
Count Four	Wrongful termination in violation of public policy against sexual discrimination	Summary adjudication	Siebel was not Christoffers' employer. (AA 296.)
Count Five	Violation of Labor Code §970	Summary adjudication	Christoffers did not relocate. (AA 297.)
Count Six	Wrongful termination in violation of public policy [Lab. Code, §970]	Summary adjudication	(i) Christoffers did not relocate; (ii)Siebel was not Christoffers' employer. (AA 296, 297.)

The chart is self-explanatory except for Count 3 (sex discrimination in violation of the California Constitution).

Siebel moved for summary adjudication of Count 3. (AA 283.) The court denied his motion, finding triable issues of fact as to whether Christoffers' termination was "motivated by sexual stereotyping discrimination." (AA 296-297.) Nine days before trial, immediately after a settlement conference, Christoffers voluntarily dismissed without prejudice *all* of her sex discrimination claims against Siebel and SSI, including Counts 2 and 4, which had been dismissed pursuant to the trial court's earlier rulings. (See chart, *ante*; AA 14, 304, 423, 505.)

During previous depositions, Christoffers admitted:

- Siebel had not discriminated against her at Gain, and she had no reason to believe he was biased against women in any way while there. (AA 416, 613.)
- Siebel did not discriminate against any other women at SSI. (AA 417, 614-615.)
- SSI's co-founder, Patricia House, was a driven, successful woman against whom Siebel did not discriminate. (AA 615.)

Also during the litigation, Buell admitted to Siebel's counsel that he had advised dropping the discrimination claims because they were baseless, and would tend to cause a jury to discredit Christoffers' other claims. (AA 10-11, 338, 423-424.) Buell said that he, personally, "would never have brought the gender case" and that the claims were "bogus." (*Ibid.*)

4. Siebel is victorious at trial.

The case proceeded to trial against Siebel on only Christoffers' fraud-related causes of action (Counts 7-8), and against SSI on Christoffers' *Gould*, fraud, and unpaid compensation causes of action. (AA 599.)

Siebel was vindicated. The jury returned a defense verdict for both Siebel and SSI on the fraud claims. (AA 135-136.) The jury awarded Christoffers $193,000 plus interest on her unpaid commission claims against SSI (AA 137, 143), to which the court added $40,662.25 in prejudgment interest (AA 143).

5. Siebel moves for attorneys' fees and recovers costs.

After trial, Siebel and SSI moved for attorneys' fees under Government Code section 12965 on the ground that Christoffers' sex discrimination claims were frivolous. (AA 307-308, 589-606.) Siebel and SSI sought partial reimbursement for the total of $1,700,000 they had incurred in attorneys' fees through January 1998, when Christoffers dismissed her sex discrimination claim. (AA 606.) Siebel also moved for his prevailing party costs. (AA 313-314.) Christoffers moved for prevailing party fees against SSI. (AA 311-313.)

The motions were heard by a new judge.[3] (AA 310-314.) As to Christoffers' fees motion, the court noted, "Much of plaintiff's effort was attempting to portray Thomas Siebel as a bad actor. Such efforts were not reasonable time spent." (AA 311.) The court therefore "eliminated the extensive time spent attempting to portray Thomas Siebel as a bad man"

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[3] The change to a Santa Clara County judge—Christoffers filed her action in San Mateo County—apparently happened because Mittlesteadt had become a San Mateo superior court judge. (AA 43, fn. 1; 47, fn. 5.)

from the lodestar figure. (AA 312, fn. 2.) The court awarded Christoffers $145,312.50 against SSI in prevailing party attorneys' fees and $30,792.30 in costs, both against SSI only. (AA 312-313.) Her total judgment, including the jury award, prejudgment interest, fees, and costs, was approximately $410,000.

The court awarded Siebel $51,829.92 in costs as the prevailing party. (AA 314.) The court "decline[d] to exercise its discretion" to award Siebel and SSI Government Code section 12985 fees, observing that "[i]t would be inappropriate to adopt a hindsight logic, especially where the undersigned was not the trial judge." (*Ibid*.) While finding it "not an easy call," the court ruled that "this Court cannot conclude from a reading of the record that plaintiff's action [in filing and prosecuting Counts 2 through 4] was 'frivolous, unreasonable, or without foundation.'" (*Ibid*.)

6. The parties dismiss their appeals pursuant to an agreement that releases Christoffers but not her attorneys.

Both sides appealed. (AA 317-328.) During the appeal, the parties entered into a settlement agreement in which Christoffers agreed to pay Siebel's court-awarded costs in full ($51,829.92), and SSI agreed to pay Christoffers approximately 85% of her total judgment, or $352,000. (AA 68-69.) All parties otherwise agreed to bear their own attorneys' fees and costs. (AA 69.) SSI, Siebel, and Christoffers agreed to dismiss all their appeals and cross-appeals, and they executed mutual releases. (AA 69-73.) The parties, however, expressly carved from the release Siebel's claims against Mittlesteadt and Buell:

> "Siebel and SSI do not release or waive any claims that they, or either of them, may have had, may now have, or in the

> future may have against Christoffers' attorneys [*sic*], E. Rick Buell II, and Christoffers' former attorney, Carol L. Mittlesteadt, including, but not limited to, claims arising from or in connection with the initiation of prosecution of the Action against Siebel and/or SSI." (AA 73.)

The parties also included a provision expressly reserving Siebel's claims against the attorneys:

> "Nothing in this Agreement is intended to modify, or does modify, the final termination of the Action entered in favor of Siebel for purposes of pursuing claims against Buell or Mittlesteadt, or otherwise prevent Siebel from pursuing any claims against Buell or Mittlesteadt that he may have related to the Judgment in this Action." (AA 74.)

Pursuant to the agreement, the parties voluntarily dismissed their appeals. (AA 330-331.)

C. The Present Litigation.

1. Siebel sues defendants for malicious prosecution.

In July 2000, Siebel filed his malicious prosecution suit against Mittlesteadt and Buell. (AA 3, 17-18.) In a nutshell, he alleges that defendants knew the Six Counts "were without merit, objectively baseless, and were fabricated in order to extract a substantial settlement at a critical juncture for SSI given its pending IPO"; that defendants "intended in filing such claims against Siebel personally, particularly the gender discrimination claims, that Siebel would be intimidated by the pendency of these claims and expeditiously settle"; and that both defendants "were aware that filing and prosecuting [the Six Counts] against Siebel personally, particularly the

gender discrimination claims, would baselessly label SSI in the industry as hostile to female employees thereby potentially impairing SSI's efforts to recruit and employ talented female personnel." (AA 11.)

2. Defendants obtain a protective order halting all depositions.

Siebel noticed the depositions of defendants and Christoffers. (AA 425-427.) After agreeing to cooperate, defendants moved for a protective order to prevent Siebel from taking any depositions, arguing that the case could be decided on purely legal issues and no fact-finding was necessary. (AA 426-29, 652, 656.) The trial court stayed the depositions pending a ruling on defendants' summary judgment motion, which they had filed in the meantime. (AA 693-694.)

3. The trial court grants summary judgment, ruling that the settlement of the Christoffers action barred Siebel's action.

Defendants moved for summary judgment on three grounds:

(1) Because the Christoffers action ended in a settlement, Siebel did not receive a favorable termination. (AA 36, 50-53.)

(2) Defendants were unable to defend themselves without violating the attorney/client privilege, which Christoffers' attorney advised Christoffers would not waive. (AA 36, 53-54.)

(3) Defendants had probable cause to file and prosecute the Six Counts. (AA 36, 54-59.)

Siebel opposed their motion on all three grounds. He also requested a continuance pursuant to Code of Civil Procedure section 437c,

subdivision (h) so that he could take the depositions he had noticed of Christoffers and defendants—which were halted by the court's protective order—and thereby seek to learn what Christoffers and defendants knew when they filed her complaint, dismissed the sex discrimination claims, and settled with Siebel and SSI on appeal. (AA 333-357, 422-425.)

The trial court granted defendants' motion on the favorable-termination ground, relying on *Ferreira v. Gray, Cary, Ware & Freidenrich, supra,* 87 Cal.App.4th 409. (Reporter's Transcript ["RT"] 8; AA 692.) The court did not reach defendants' other two grounds. It denied Siebel's request for a continuance. (AA 691.)

4. The trial court denies Siebel's new trial motion.

Siebel moved for a new trial on the basis of a newly published decision, *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps, supra,* 99 Cal.App.4th 1179, which held that a favorable termination could exist where the underlying action settled after judgment. (AA 697-710.) The trial court denied Siebel's motion. (AA 746.)

D. Statement Of Appealability.

Appealability: The judgment, filed June 26, 2002 (AA 739-740), resolves all issues between the parties and is appealable. (Code Civ. Proc., § 904.1, subd. (a)(1).)

Timeliness: Defendants served notice of entry of judgment on July 16, 2002. (AA 737.) Having previously filed a Notice of Intention to Move for New Trial on July 10, 2002 (AA 697), Siebel filed his notice of appeal on September 30, 2002 (AA 749), within thirty days after the trial court denied his new trial motion on September 6, 2002 (AA 746, 748).

STANDARDS OF REVIEW

A. Summary Judgment Generally.

Review of a summary judgment is de novo; this Court "must independently examine the record to determine whether triable issues of material fact exist." (*Saelzler, supra*, 25 Cal.4th at p. 767.) The Court "must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [plaintiff's] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Id*. at p. 768.) The test is whether defendants have shown that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case" as to one or more of the elements of his claim. (*Ibid*.)

B. Substantive Issues.

Favorable Termination. The trial court concluded that as a matter of law, a post-judgment settlement per se bars a malicious prosecution plaintiff from establishing a favorable termination. That is a question of law that this Court reviews de novo. (See *People v. Rells* (2000) 22 Cal.4th 860, 870.)

Probable Cause. "The question of probable cause is one of law," and therefore review is de novo. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1154.) But "if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question." (*Ibid*.)

Attorney-Client Privilege. Whether a defendant's assertion of the attorney-client privilege is a per se bar to a legal action brought by a party who does not hold the privilege is (as long as the material facts are

undisputed) a question of law which this Court reviews de novo. (See *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451.)

C. Continuance For Further Discovery.

When the non-moving party meets the requirements of Code of Civil Procedure section 437c, subdivision (h)—a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to summary judgment motion—a continuance is mandatory. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395-396.) Otherwise, the trial court's denial of a continuance is reviewed for abuse of discretion. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 313-314.)

I.

GOVERNING PRINCIPLES.

A. The Reasons For The Malicious Prosecution Tort.

The malicious commencement of a civil proceeding is actionable for two reasons: "'[I]t harms the individual against whom the claim is made,'" and "'it threatens the efficient administration of justice.'" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 677, quoting *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) It harms the individual sued because "'he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings.'" (*Id.* at p. 693, quoting *Bertero*, 13 Cal.3d at pp. 50-51.) And "'[t]he judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals ". . . as instruments with which to maliciously injure their fellow men."'" (*Id.* at p. 693, quoting *Bertero*, 13 Cal.3d at p. 51.)

While malicious prosecution has been called a disfavored tort, the California Supreme Court has warned that "'[t]his convenient phrase should not be employed to defeat a legitimate cause of action.'" (*Id.*, at p. 680, quoting *Bertero*, 13 Cal.3d at p. 53.) Courts "'"should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority."'" (*Ibid*.)

B. The Elements Of The Tort.

A plaintiff suing for malicious prosecution must demonstrate that the prior action was:

(1) commenced by or at the direction of the defendant and pursued to a legal termination in the plaintiff's favor;

(2) brought without probable cause; and

(3) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.)

Defendants obtained summary judgment on the first element, favorable termination. In Section II, we show why this was wrong. Defendants alternatively argued that all Six Counts were supported by probable cause. Since the trial court did not reach that ground, this Court cannot affirm on that basis without allowing the parties an opportunity to present supplemental briefs on it. (Code Civ. Proc., § 437c, subd. (m)(2).)[4] The probable cause arguments are multi-pronged and complex. However, because the issue of the factual tenability of the sex discrimination claims (Counts 2 through 4) so clearly raises triable issues that preclude summary judgment, we have taken the liberty of briefing the issue in Section III, so as to demonstrate why the Court need look no further to reverse.

In Section IV we show why defendants' other alternative summary judgment ground—Christoffers' stated intent to assert the attorney-client

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[4] Subdivision (m)(2) was enacted in 2002 and became effective January 1, 2003. (Stats. 2002, ch. 448 (S.B. 688), § 5; Cal. Constitution, Article IV, § 8, subd. (c)(2); *People v. Jenkins* (1995) 35 Cal.App.4th 669, 673.) Because this brief is filed and oral argument will be heard after the law's effective date, these appellate proceedings are governed by the amendment. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288-289; *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 213.)

privilege—is also meritless. Although the trial court did not reach that issue either, we address it because it, too, is relatively simple and straightforward.

C. Defendants' Burden When Moving For Summary Judgment In A Malicious Prosecution Action.

Defendants moved for summary judgment of Siebel's entire malicious prosecution action, not summary adjudication of any particular Count that forms the basis of Siebel's malicious prosecution action. (AA 35-36.) Thus, if Siebel shows triable issues as to favorable termination and lack of probable cause as to *even one* of the Six Counts, this Court must reverse.[5] (Cal. Rules of Court, rule 342(b); *Jimenez v. Protective Life Ins. Co.* (1992) 8 Cal.App.4th 528, 534, 535; *Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 974, fn. 4.)

[5] Indeed, it is doubtful defendants could have moved for summary adjudication at all, which may only be granted "if it completely disposes of a *cause of action*, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1), emphasis added.) Siebel's complaint contains only one cause of action for malicious prosecution. (AA 15-18.)

II.

THE JUDGMENT IN THE CHRISTOFFERS ACTION ESTABLISHED FAVORABLE TERMINATION REGARDLESS OF THE LATER SETTLEMENT.

A. Christoffers' Voluntary Dismissal Of All Three Sex Discrimination Counts Was A Favorable Termination As To Those Counts, Precluding Summary Judgment.

A voluntary dismissal, including one without prejudice, is a favorable termination because it is an implicit concession that the claim has no merit. (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185, disapproved on other grounds in *Sheldon Appel*, *supra*, 47 Cal.3d at pp. 882-883.) After all, "one does not simply abandon a meritorious action once instituted." (*Minasian v. Sapse* (1978) 80 Cal.App.3d 823, 827 [dismissal for failure to prosecute is favorable termination]; see also *Lumpkin v. Friedman* (1982) 131 Cal.App.3d 450, 453-454 [plaintiff's opinion that his case lacks merit can be inferred from plaintiff's failure to press his cause].)

Christoffers' voluntary dismissal of her sex discrimination claims (Counts 2 through 4) was such an admission. Counts 2 and 4 had previously been dismissed on Siebel's demurrer and summary adjudication motion. (AA 280, 296.) By later voluntarily dismissing them, Christoffers abandoned any right to appeal the trial court's orders, thereby acquiescing to the adverse rulings. Christoffers dismissed her remaining sex discrimination claim—Count 3—nine days before trial, when she presumably had nothing to lose by presenting this most emotionally charged claim to the jury. A jury could properly infer that once the three sex discrimination claims had lost their value in leveraging a quick, lucrative

settlement, she chose to dismiss them rather than undermine her credibility by exposing meritless allegations to the jury. By dismissing the inflammatory sex discrimination claims, Christoffers reduced her case to the straightforward business dispute it should have been from the beginning.

When Christoffers voluntarily dismissed her sex discrimination claims, they died. With the entry of judgment after trial, the dismissals became a partial favorable termination that independently supported Siebel's malicious prosecution action on those claims. (*Crowley, supra,* 8 Cal.4th at pp. 685-686; *Sierra Club, supra,* 72 Cal.App.4th at pp. 1152-1153; *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789, 792-793; see also *Jenkins v. Pope* (1990) 217 Cal.App.3d 1292, 1299 [voluntarily dismissed claim actionable as favorable termination upon entry of judgment in entire action].)

Defendants, as moving parties, offered nothing to undermine the inference that their dismissal of the sex discrimination claims was an implicit concession that the claims lacked merit. Summary judgment was therefore inappropriate. In any event, any evidence they might have produced would simply have created disputed factual issues. (*Weaver, supra,* 95 Cal.App.3d at pp. 185-186.) As long as there are triable issues involving the circumstances explaining the termination of an action or cause of action, "the trier of fact should decide that conflict." (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1811.)

At the very least, there can be no summary judgment until Siebel has a full opportunity for discovery. The court stopped Siebel's noticed depositions only because defendants incorrectly represented that their summary judgment motion would not implicate factual issues. (AA 655-

656, 693-694.) When Siebel requested a continuance to take Buell's deposition—citing Buell's own characterization of the sex discrimination claims as "bogus" and specifically requesting a chance to ask Buell about his statements (AA 423-424)—Siebel demonstrated that "facts essential to justify opposition may exist but [could] not, for reasons stated, then be presented." (Code Civ. Proc., § 473c, subd. (h).) Siebel also asked for discovery regarding what happened at the Settlement Conference that might have caused defendants to dismiss the sex discrimination claims the same day, just nine days before trial. (AA 423.) Finally, Siebel must also be allowed to prove that Christoffers fabricated her sex discrimination allegations and that defendants knew it. (See Section III.A, *post*.) If he succeeds, that is compelling evidence that defendants dismissed the claims rather than expose their falsity to a jury.

Since Siebel adequately demonstrated that facts essential to justify opposition to defendants' motion existed but could not be presented because of the discovery stay imposed at defendants' urging, the trial court abused its discretion by not granting Siebel his requested continuance under Code of Civil Procedure section 473c, subdivision (h). (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 635.)

B. Siebel's Judgment Was A Favorable Termination Of The Entire Christoffers Action.

1. The judgment in the underlying action is what determines favorable termination.

Christoffers' sex discrimination claims are also a favorable termination for the same reason all Six Counts are: They are all incorporated into a final judgment entirely favorable to Siebel. (AA 142-143, fn. 2; see *Jenkins, supra*, 217 Cal.App.3d at p. 1299.)

Where the action has not been voluntarily dismissed but is litigated to a judgment, then "'the decree or *judgment itself* in the former action is the criterion by which to determine who was the successful party in such proceeding.'" (*Crowley, supra,* 8 Cal.4th at p. 685, emphasis added.) A judgment on a defense verdict is the clearest example of a favorable termination. (*Weaver, supra,* 95 Cal.App.3d at p. 184.)

When the underlying action is terminated by a settlement *before* a judgment—not our case—there generally is no favorable termination. The rule, derived from criminal law, is that if "the accused has consented to a termination which leaves open the question of his guilt and possible conviction," he "cannot take advantage of" that termination "after the prosecutor has foregone the opportunity of proving that there was really guilt." (Prosser & Keeton, Law of Torts (5th ed. 1984) § 119, p. 875; see also *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150-152.) The rule makes sense in civil cases, too, because plaintiffs settle for many reasons: They may be tired, broke, stressed, risk-averse, or at odds with their lawyers over strategy. (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1338.) Because a pre-judgment settlement therefore generally does not "reflect[] the opinion of either the court or the prosecuting party that the [underlying action] would not succeed," courts bar the defendant from taking advantage of it. (*Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 827; see also *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 29 ["There is no legal way for a defendant who elects to settle a suit *rather than going to trial* to demonstrate that the dismissal resulting from the settlement constituted a favorable termination on the merits," emphasis added]; *Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814 [settlement "'reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus *leaving open the question of defendant's guilt or*

innocence,'" emphasis added]; *Villa, supra,* 4 Cal.App.4th at p. 1336 ["[t]he purpose of a settlement is to *avoid a determination on the merits*," emphasis added].)

2. A post-judgment settlement cannot erase prior merits determinations.

The situation is completely different in a post-judgment settlement context. When the plaintiff's claims have been dismissed on the merits before trial (by the court or the plaintiff), or when the defendant has won before a jury, then there is no ambiguity. A judgment in that situation does not "leav[e] open the question" of the defendant's liability (*Minasian, supra*, 80 Cal.App.3d at p. 827, fn. 4)—*the defendant won*.

Here, the Six Counts were dismissed before trial, either by the court on motion or by Christoffers' voluntary dismissal. The jury also decided for Siebel on Christoffers' remaining fraud claims (Counts 7 and 8). Judgment was entered accordingly. (AA 134-143.) Nothing that happened afterwards changed the judgment.

After entry of judgment the parties appealed, then settled. That settlement did nothing to detract from Siebel's victory; rather, it *underscored* the victory: Christoffers agreed to pay Siebel his awarded costs *in full*; Siebel expressly *did not* release Christoffers' attorneys; and both sides affirmed the favorable termination below for purposes of Siebel's intended malicious prosecution suit against the attorneys. (AA 74.)

When the Court of Appeal dismissed the parties' appeals pursuant to their stipulation, there was "no inference that the jury or trial court erred." (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 282-283; see also *In re Sade C.* (1996) 13 Cal.4th 952, 994 ["[a]n appealed-from

judgment or order is presumed correct," and presumption remains after parties abandon appeal].) Upon the Court's dismissal and issuance of the remittitur, the case returned to the trial court, where the judgment became final. (*Barkley v. City of Blue Lake* (1996) 47 Cal.App.4th 309, 312; *Bellows v. Aliquot Associates, Inc*. (1994) 25 Cal.App.4th 426, 433.)

Siebel's judgment now stands as the final adjudication of the parties' rights and duties, barring further litigation of the issues resolved in the action. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1017-1018 [dismissal of appeals on mootness grounds rendered underlying judgments final for res judicata purposes]; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936-937 [once appeal settled favorably to plaintiff then dismissed "trial court judgment reemerges with sufficient finality to permit the application of collateral estoppel"]; *Harsh v. Broad* (1961) 198 Cal.App.2d 128, 130 [upon appellant's voluntary abandonment of appeal, judgment became final and issues determined res judicata].) The judgment, being entirely in Siebel's favor, is therefore a favorable termination in every sense of the term.

That would be end of the "favorable termination" discussion, except for a single Court of Appeal decision that held, without much analysis, that a post-judgment settlement voids an otherwise favorable termination. That decision, *Ferreira v. Gray, Cary, Ware & Freidenrich*, *supra*, 87 Cal.App.4th 409 ("*Ferreira*"), is at odds with a later decision, *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, *supra*, 99 Cal.App.4th 1179 ("*Mattel*"). It is also at odds with the very reasons for the settlement rule itself.

This Court should follow *Mattel*, not *Ferreira*.

3. *Mattel*: The parties' post-judgment settlement does not bar a malicious prosecution action against the attorneys who instigated the underlying action.

Mattel sued a doll-making company and related individuals for copyright infringement. One of the individuals, Christian, cross-complained. His suit was dismissed on summary judgment and one of his attorneys, Hicks, was sanctioned in Rule 11 proceedings for bringing a frivolous action. (*Mattel, supra*, 99 Cal.App.4th. at pp. 1183-1184.) The *parties* settled the entire action. (*Id*. at p. 1184.) Mattel then brought a malicious prosecution against Christian's *attorneys*, who opposed on the ground that the settlement operated as a per se bar to Mattel's suit. (*Id*. at p. 1191.)

While the parties disputed whether the settlement involved Christian's claims or "other" claims (*id*. at p. 1184), the Court treated that question as a non-issue. Recognizing the validity of the settlement rule, the Court nevertheless determined the rule "ha[d] no application to the facts of th[e] case." (*Id*. at p. 1191.) "The fact that Christian ultimately resolved his participation in the underlying action does not alter the fact that judgment on the merits was entered in favor of [Mattel] or change the finding, now affirmed on appeal, that Hicks prosecuted a meritless claim." (*Ibid*.)

Likewise, the fact that the parties in the Christoffers action ultimately resolved their dispute could not alter the fact that Siebel prevailed on the merits in three different ways: by pretrial dispositive rulings, by voluntary dismissal, and—the final nail in the coffin—by the jury's verdict, followed by entry of judgment. That judgment, like Mattel's summary judgment, is the predicate of Siebel's malicious prosecution action

against Christoffers' *attorneys*, who, Siebel will show, prosecuted meritless claims against him.

4. *Ferreira*'s contrary result is wrong on the law and distinguishable on its facts.

a. *Ferreira*'s holding that a post-judgment settlement is a per se bar to a malicious prosecution action is overbroad and unsupported by the reasons for the settlement rule.

Ferreira sued his former girlfriend, Debra, and her mother and sister for the return of gifts he had given during the couple's relationship. The women cross-complained for, among other torts, battery, stalking, conversion, wiretapping, and emotional distress. (87 Cal.App.4th at pp. 411-412.) The jury found for Debra on her conversion claims, but awarded no damages (*id*. at p. 412); it found for the mother on her wiretapping/emotional distress claims and awarded $500 (*ibid*.); and it awarded Ferreira $76,000 on his claims (*ibid*.). After entry of judgment, the parties agreed to settle in a way that completely restructured the judgment: (1) Judgment would be entered for Ferreira, instead of for the mother, on the mother's wiretapping/emotional distress claims; (2) Ferreira would retain his $76,000 judgment, but he would accept $3 in full satisfaction of his judgment against the three women; and (3) the women would not appeal. An amended judgment was entered accordingly. (*Ibid*.)

When Ferreira tried to sue the women's attorneys for malicious prosecution, the Court of Appeal held that he could not establish favorable termination: "[W]hile arguably Ferreira may have received a favorable determination at one point in the proceeding," the litigation "*terminated* as a

result of a negotiated settlement in which both sides gave up something of value to resolve the matter." (*Id.* at p. 413.)

The Court erred in overemphasizing the "final" rather than the "favorable" component of favorable termination. (*Jaffe*, *supra*, 18 Cal.2d at p. 154 [warning against error of placing "[m]istaken emphasis" on the idea of "final" rather than "favorable" part of the favorable termination element].) The relevant question was whether the parties' termination—whenever or however it occurred—"reflected the opinion of *someone*, either the trial court *or* the prosecuting party, that the action lacked merit." (*Stanley v. Superior Court* (1982) 130 Cal.App.3d 460, 464-465, emphasis added, citing *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.) Since the litigation had resulted in a jury verdict, the jury's opinion, as set forth in the original judgment, should have been the favorable termination touchstone.

With reference to the judgment on the jury verdict, Ferreira unquestionably prevailed against some of Debra's and her mother's claims, and the proper inquiry therefore was whether his partial victory would have supported a malicious prosecution action. (*Crowley*, *supra*, 8 Cal.4th at p. 686 [whether a partial favorable termination is sufficient to support a malicious prosecution action is a question of policy under the substantive law of the tort]; see also Section II.A, *ante*.) But instead of pursuing that inquiry, the Court of Appeal applied a per se rule that a settlement *always* bars a later malicious prosecution suit, even after a full adjudication of plaintiff's claims at the trial court level. (*Ferreira*, *supra*, 87 Cal.App.4th at p. 413.) By doing so, it stretched the settlement rule beyond its rationale.

b. *Ferreira* is distinguishable, because it involved an amended judgment that arguably created ambiguity about the merits.

While *Ferreira*'s per se rule is overbroad and should not be followed, the actual result in the case can be justified in one respect that underscores the difference between *Ferreira* and this case.

In *Ferreira*, the jury decided *for* the mother on the wiretapping/emotional distress claims, but the parties later agreed to entry of judgment *against* her, obviously to enable Ferreira to sue her attorneys for malicious prosecution. Further, while the jury awarded Ferreira $76,000, he settled for $3. These compromises indisputably "did not reflect the merits of the underlying action" (*Ferreira*, *supra*, 87 Cal.App.4th at p. 413)—they were altered to suit the parties' needs.

The infirmity of this approach emerges when one realizes what would have happened if Ferreira's malicious prosecution case had gone forward. The trial court would have been presented with two inconsistent judgments—the jury's and the parties' amended judgment. It would have had no way to choose which one to use in applying the rule that "'the decree or judgment itself in the former action is the criterion by which to determine who was the successful party in such proceeding.'" (*Crowley*, *supra*, 8 Cal.4th at p. 685; see also *Citizens for Open Access, etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065 [judgment entered by consent or stipulation is nonetheless a judgment on the merits with full res judicata effect].)

Ferreira should therefore properly be read as holding only that when the malicious prosecution plaintiff stipulated to a judgment purporting to change the basic result obtained in the trial court, he is barred from using

that judgment as the basis for his malicious prosecution suit.[6] Here, by contrast, there was no amended judgment—only the judgment on the verdict and dismissed claims. Once the time for a new trial motion or motion to vacate judgment expired, the trial court lost any power to change that judgment. (*APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181-185; *Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177.) Further, the parties' settlement actually confirmed the judgment by preserving Siebel's right to his entire $51,829.92 costs award, and merely stopped the appeals. In other words, the settlement expressly *affirmed* the judgment. In the absence of a stipulated reversal, the parties' dismissal of their appeals pursuant to settlement set the judgment in stone, making it immune to any alteration.[7] (See Section II.B.2, *ante*.)

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[6] That interpretation is consistent with *Dalany v. American Pacific Holding Corp. supra*, 42 Cal.App.4th 822. There, the court declined to look behind the parties' stipulated judgment, entered pursuant to a settlement in which the plaintiff accepted considerably less than he had sued for. (*Id.* at pp. 828-829.) Even though the plaintiff had obtained summary adjudication of some of the claims in defendants' cross-complaint prior to entry of the stipulated judgment, plaintiff could not use those adjudications as a basis for his later malicious prosecution action because there was no judgment on the merits of the cross-complaint as a whole. (*Id.* at pp. 829-830.) *Dalany* has no bearing here, where the judgment was not the product of the parties' compromise and disposed of all of Christoffers' claims.

[7] We have found only one other California case that discusses the effect of a post-judgment settlement on a favorable termination. In *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 794, fn. 9, the California Supreme Court noted in a footnote in dictum that a settlement on appeal might bar a malicious defense action—if California were to recognize such a tort. But the Court's speculation, which was untied to any actual controversy, did not address the concerns raised in this appeal, is not a holding and is not binding.

5. Fairness considerations favor allowing Siebel's action.

Siebel and SSI together incurred over $1,700,000 in attorneys' fees through January 1998, when Christoffers dismissed her sex discrimination claim. (AA 606.) A quarter of that amount was spent defending against just the bogus sex discrimination claims. (*Ibid.*) All the claims against Siebel proved meritless, and Siebel believes he can prove that six of them were frivolous. Three—the sex discrimination claims—were even worse: Siebel will prove they were aimed at publicly besmirching Siebel's name and reputation. All the reasons for the creation of the tort of malicious prosecution are present here in abundance. (See Section I, *ante*.)

Defendants nevertheless contended below that it would be unfair to let Siebel's malicious prosecution action continue, because when Christoffers dismissed her appeals, defendants were denied "the opportunity to obtain a reversal and retrial that would have established Siebel's liability and undercut any malicious prosecution claim." (AA 641.) Defendants' fairness concerns do not tip the balance in their favor.

If Christoffers had simply decided not to appeal for whatever personal reason, the judgment would unquestionably have been a termination in favor of Siebel that could support a malicious prosecution action. (Prosser, Law of Torts (4th ed. 1971) §119, p. 838; *Feld v. Western Land & Development Co.* (1992) 2 Cal.App.4th 1328, 1334.) It would not become "ambiguous" because of the theoretically uncertain outcome of a hypothetical appeal. The result would be the same if Christoffers had unilaterally dismissed her appeal after filing it. There is no reason why the result should change because she agreed to dismiss.

Moreover, it is good policy to encourage settlements. Siebel's alternative was to defend the appeal to an appellate decision, then seek sanctions for a frivolous appeal—expending not only his own resources, but the Court's. And even then, assuming he obtained frivolous-appeal sanctions (which are discretionary, Code Civ. Proc., § 907; Cal. Rules of Court, rule 27(e)), he would still not be made whole—for he would still be uncompensated for all the fees and stress of defending the underlying litigation up to the appeal. Thus, the possibility of appellate sanctions was not a "better means" of addressing the problem of Christoffers' unjustified litigation. (*Sheldon Appel, supra,* 47 Cal.3d at p. 873.)

For Christoffers' part, after her utter defeat at trial, she was faced with potentially huge liability for malicious prosecution and under enormous pressure to appeal, even if just to delay the inevitable. Siebel was able to offer her a way out, by promising not to seek from her anything more than the judgment already gave him, i.e., his court costs. This was an astute decision by Siebel, since Christoffers would presumably have raised an advice-of-counsel defense in a malicious prosecution action. The settlement thus allowed Siebel to focus his attention on the individuals who he believes ultimately harmed him—Christoffers' attorneys. By settling when they did, Siebel, SSI, and Christoffers saved themselves and the Court of Appeal substantial amounts of time and money. To paraphrase one court, it would be a "sad day" if Christoffers had been "virtually compel[led]" from fear of a malicious prosecution action to "continue [the] litigation in order to place [herself] in the best posture" for a malicious prosecution action. (*Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344-345.)

C. At A Minimum, Summary Judgment Must Be Reversed Because Defendants Have Not Adduced Facts To Overcome The Inference That The Final Judgment, Wholly In Siebel's Favor, Was A Favorable Termination.

To sum up: The bright-line favorable termination test focuses on whether the termination "reflected the opinion of *someone*, either the trial court *or* the prosecuting party, that the action lacked merit." (*Stanley*, *supra*, 130 Cal.App.3d at pp. 464-465, emphasis added, citing *Lackner*, *supra*, 25 Cal.3d at p. 750.) That bright-line rule compels the conclusion that there was a favorable termination for Siebel here as a matter of law. The judgment in the Christoffers' action is an historical fact, standing as the court's and jury's objective assessment of her action, as well as Christoffers' own assessment of her sex discrimination claims, which she voluntarily dismissed on the eve of trial. Unlike *Ferreira*, Siebel did nothing to manufacture any of these results. When the parties dropped their appeals pursuant to their settlement, there was "no inference the jury or trial court erred." (*Neary*, *supra*, 3 Cal.4th at pp. 282-283; see also *In re Sade C.*, *supra*, 13 Cal.4th at p. 994 ["[a]n appealed-from judgment or order is presumed correct"].) The judgment, entirely in Siebel's favor, is now final as to all parties and issues contained in it and is the proper peg on which to hang a favorable termination.

Having established favorable termination, Siebel is entitled to this Court's reversal, and the action should proceed below on the remaining elements of Siebel's malicious prosecution claim. At the very least, however, summary judgment must be reversed because of the existence of triable issues of fact. Assuming *Ferreira* is correct in supposing, without holding, that a post-judgment settlement can displace the final judgment,

defendants have not conclusively proved that the Christoffers settlement had that effect. A cursory examination of the undisputed facts surrounding the settlement suggests it did not.

Christoffers ended up settling with SSI for nearly $60,000 *less* than what the jury awarded her. And she "settled" with Siebel for the full amount she already owed him—nearly $52,000 in court-awarded costs. In other words, she did *worse* by appealing and settling than if she had not appealed and simply enforced the judgment.[8] What Christoffers gained, however, was a release of liability for bringing the suit at all. A jury could well infer that her only reason for appealing was to use the threat of a drawn-out appeal and further defense costs to strong-arm SSI and Siebel into agreeing not to sue her later for malicious prosecution—a matter entirely collateral to her own action. Reinforcing that inference is the parties' agreement that while Christoffers would be released as a joint tortfeasor in Siebel's intended malicious prosecution action, her attorneys would not. To that end, the parties expressly clarified that nothing in the agreement would modify Siebel's favorable termination for purposes of his pursuing his claims against defendants. (AA 74.)

While in a pre-judgment settlement context it is true that courts will not normally examine the parties' settlement motivations, that is because the defendant, by settling, has avoided a determination on the merits, and courts are loath to let him take advantage of it. (See, e.g., *Ludwig*, *supra*, 37 Cal.App.4th at p. 29.) But after a judgment on the merits, there is no

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[8] SSI and Siebel cross-appealed only as a defensive measure. Had Christoffers not appealed, they would not have either—as can be seen by the fact that both of their cross-appeals were filed after the time for an initial appeal from the judgment and post-judgment order had expired. (AA 319-320, 326-327.)

ambiguity about the outcome, and no inference the court or jury erred. (*Neary*, *supra*, 3 Cal.4th at pp. 282-283; *In re Sade C.*, *supra*, 13 Cal.4th at p. 994.) Thus, the plaintiff must produce some evidence that the settlement was intended to and did displace the favorable termination established by the judgment if she is to tip the favorable termination scales in her favor.

Below, defendants argued that Siebel compromised his otherwise undeniable favorable termination by giving up his cross-appeals and agreeing to a provision that "[n]othing in this Agreement is intended to constitute, or does constitute, any admission" of any liability, and that the parties "deny any wrongdoing whatsoever in connection with the matters alleged in the Action." (AA 52, 73, 639.) But by dismissing his cross-appeals, Siebel only relinquished his right to anything *more* than the judgment already gave him; that does not cast doubt on his entitlement to *at least* his judgment for costs. As to the latter, the parties' boilerplate settlement language in which both sides agree that neither side admits liability—if it signifies anything—cannot override the fact that Siebel entirely prevailed in the Christoffers action. (*Sandoval*, *supra*, 140 Cal.App.3d at p. 940 [losing party's "facade of continued nonliability by the use of stereotyped language in the settlement agreement does not alter the fact that the [other party] prevailed in the lawsuit because of the jury's finding of a product defect"].)

At most, defendants' arguments simply point to the existence of triable issues surrounding the reasons for the litigation's termination—a dispute that goes to the jury. (*Fuentes*, *supra*, 38 Cal.App.4th at p. 1808; *Haight v. Handweiler* (1988) 199 Cal.App.3d 85, 89; *Stanley*, *supra*, 130 Cal.App.3d at pp. 465-466.)

In any event, summary judgment must be reversed because Siebel asked the trial court for a continuance precisely to allow discovery regarding the "facts and circumstances underlying the settlement of the Christoffers Action" to establish the existence of triable issues. (AA 422.) The trial court erred in denying his request.

III.

THERE ARE TRIABLE ISSUES OF FACT AS TO WHETHER CHRISTOFFERS' SEX DISCRIMINATION CLAIMS WERE FACTUALLY TENABLE.

Siebel recognizes that once he shows favorable termination, he still faces the hurdle of showing lack of probable cause. The trial court did not reach any of defendants' multiple probable cause arguments, so this Court may not decide the case on those issues without allowing the parties to brief them. (Code Civ. Proc., § 437c, subd. (m)(2).) However, we invite the Court's consideration of one of the probable cause issues, because it is both straightforward and sufficient in itself to bar summary judgment. (See Section I.C, *ante*.) This issue is the *factual* tenability of Christoffers' sex discrimination claims.

A. There Can Be No Probable Cause If Defendants Knew That The Allegations Upon Which They Based Their Suit Were False.

"[A]bsence of probable cause can be shown by proof that the initiator commenced the prior action knowing that his or her claims were false." (*Sierra Club*, *supra*, 72 Cal.App.4th at p. 1153, citing *Bertero*, *supra*, 13 Cal.3d at p. 50.) When that happens, "then defendant's knowledge of facts which would justify initiating suit is zero, and probable cause is nonexistent." (*Sierra Club*, *supra*, 72 Cal.App.4th at p. 1154; see generally *Sheldon Appel*, *supra*, 47 Cal.3d at pp. 877-882.)

The heart of Siebel's malicious prosecution action is that Christoffers and her attorneys filed sex discrimination claims against him knowing they were false. (AA 3-9, 11-12.) Siebel submitted abundant

evidence that this was so by Christoffers' own admissions in the Christoffers action:

- Siebel personally hired Christoffers at Gain and personally approved her hiring at SSI. (AA 416, 613.)[9]
- Siebel had not discriminated against Christoffers at Gain, and she had no reason to believe he was biased against women in any way while there. (AA 416, 613.) (Mittlesteadt knew Siebel had complimented Christoffers on her work there. (AA 174.))
- Siebel did not discriminate against any other women at SSI. (AA 417, 614-615.)
- Despite Christoffers' allegation that Siebel did not like "very strong, assertive, driven, and successful" women (AA 180), SSI's co-founder is a driven, successful woman and Siebel did not discriminate against her (AA 414, 611, 615). (Mittlesteadt knew of House's stature when she filed the complaint. (AA 175.))
- When Christoffers was hired by SSI, she received more favorable compensation terms than males hired at approximately the same time in comparable positions. (AA 415, 615-617.)

[9] "[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." (*Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 270-271; see also *Lowe v. J.B. Hunt Transp., Inc.* (8th Cir. 1992) 963 F.2d 173, 175 [finding "simply incredible" argument that company developed aversion to older people less than two years after hiring member of protected age group].)

- Of the ten persons employed by SSI in Christoffers' position, Christoffers was paid the second highest amount of draw during 1995 and 1996. (AA 415, 618.)
- Despite her allegations of sex discrimination, Christoffers characterized her problem with Siebel as a "personality conflict."[10] (AA 615.)
- After Christoffers was fired, her territory was assigned to a woman; SSI hired four women sales representatives; and SSI hired Christoffers' former female manager at Gain. (AA 415-416, 619-620.)

In addition:

- Christoffers and Mittlesteadt had a history of making baseless sex discrimination claims against her former employers. (AA 595-596.)
- Buell admitted to Siebel's counsel that the sex discrimination claims were "bogus." (AA 423-424.)

This evidence creates a serious question for the jury as to whether defendants commenced the Christoffers action knowing that the sex discrimination claims were false. When there is evidence that the defendant "may have known that the factual allegations on which his action depended were untrue," or that the defendant "was aware of information that established the lack of truth in his factual allegations," it is the *jury* that must determine what facts the defendant knew before there can be any legal

[10] The government "has not elected to protect against the personality conflicts endemic to any workplace." (*Keenan v. Allan* (E.D.Wash. 1995) 889 F.Supp. 1320, 1373, affd. (9th Cir. 1996) 91 F.3d 1275.)

determination of probable cause. (*Sheldon Appel, supra*, 47 Cal.3d at p. 881; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 569; *Sierra Club, supra*, 72 Cal.App.4th at pp. 1154, 1155; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 804-806 [no probable cause where plaintiff knew facts extrinsic to complaint that vitiated its complaint].)

Defendants did not respond to any of this evidence in the trial court. That fact alone precludes summary judgment, since they bore "the burden of persuasion that there is no triable issue of material fact and that [they were] entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) At a minimum, Siebel's evidentiary showing was enough to require a continuance to allow Siebel to discover additional proof that defendants knew Christoffers' allegations were false when they filed her complaint. (Code Civ. Proc., § 437c, subd. (h); *Frazee, supra*, 95 Cal.App.4th at p. 635 [abuse of discretion to deny subdivision (h) continuance on requisite showing].) This Court may not affirm summary judgment while these outstanding factual issues remain unresolved. (Code Civ. Proc., § 437c, subd. (m)(2) [summary judgment may not be affirmed on alternative grounds when opposing party shows there is additional evidence that he has not had an adequate opportunity to present or conduct discovery on].)

B. A Trial Court's Refusal to Summarily Adjudicate A Claim Does Not Establish Probable Cause When The Triable Issues Were Fabricated.

Christoffers' Count 3 (sex discrimination in violation of Article I, section 8) requires one extra comment, because defendants erroneously argued below that the denial of Siebel's summary adjudication motion in

the Christoffers action as to that Count established probable cause for Counts 2, 3 and 4 as a matter of law. (AA 55-56.)

In the Christoffers action, the trial court denied summary adjudication of Count 3, finding there were triable issues of material fact with respect to whether Christoffers' termination was motivated by sexual stereotyping discrimination and whether Siebel's and SSI's reasons for terminating were pretextual. (AA 296-297.) In many instances, the trial court cited Christoffers' deposition testimony as the evidence creating the triable issues. (*Ibid.*)

The denial of a defendant's motion for summary judgment establishes probable cause only "absent proof of fraud or perjury." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 825.) Siebel's malicious prosecution action is premised on precisely that kind of fraud: Siebel claims that Christoffers fabricated allegations that he discriminated against her, and that defendants knew it. (AA 11, 338, 353, fn. 13, 424-425.) There can be no summary judgment while this factual dispute remains unresolved.

C. A Denial Of Discretionary Prevailing Party Fees Has No Bearing On Probable Cause.

After the verdict in the Christoffers action, Siebel moved for fees under Government Code section 12965, subdivision (b), which allows a court "in its discretion" to award fees and costs to defendants who prevail against frivolous employment discrimination claims. A new judge, sitting by special assignment (see note 3, *ante*), denied the motion. But contrary to defendants' argument below (AA 56), that does not establish probable cause either.

The trial court exercised its *discretion* not to award fees *despite* having found that defendants acted unreasonably in prosecuting those claims. (AA 311-312.) Its reluctance was based not on law, but on a belief that "[i]t would be inappropriate to adopt a hindsight logic, especially when the undersigned was not the trial judge." (AA 314.) This discretionary denial—based only on a cold reading of the record—says nothing about whether a jury presented with live witnesses and additional facts obtained through discovery would conclude, as a matter of fact, that defendants knowingly prosecuted false claims. (*Crowley, supra,* 8 Cal.4th at p. 689, fn. 12 [denial of sanctions could not bar later malicious prosecution action since "trial courts may be more reluctant to charge litigants or attorneys appearing before them with bad faith than juries to whom such persons are total strangers"]; *Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1195 [sanctions orders, which are based on discretionary considerations, do not determine substantive elements of malicious prosecution action].)

Any other result would fail to recognize the limited nature of the remedy section 12965 provides—fees and costs. While an individual defendant who has been maliciously sued may suffer damage to reputation or emotional distress, section 12965 makes no provision for recovery for that kind of injury. (Compare *Del Rio v. Jetton* (1997) 55 Cal.App.4th 30, 37-38 [availability of section 1988 fees in civil rights actions in no way supplanted malicious prosecution remedy].) Thus, the Legislature, by enacting section 12965, could not have intended "to substitute this remedy for the cause of action for malicious prosecution." (*Crowley, supra,* 8 Cal.4th at pp. 687 & 689, fn. 12.)

IV.

CHRISTOFFERS' POSSIBLE ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE DOES NOT BAR THIS MALICIOUS PROSECUTION ACTION AGAINST HER ATTORNEYS.

A. No Public Policy Requires Dismissal Of Lawsuits Just Because They May Implicate A Privilege.

Defendants argued below that Siebel's suit was barred as a matter of public policy because, they claimed, they cannot defend themselves without disclosing attorney-client privileged matters, and Christoffers' counsel has advised that Christoffers will not waive the privilege. (AA 53-54, 104.) The argument has no merit.[11]

When a defendant invokes a privilege, the plaintiff's burden becomes more difficult, because he may not be able to establish what the defendant knows. But that is the plaintiff's problem, not the defendant's. (Compare *Stanley, supra*, 130 Cal.App.3d at p. 469 ["It is curious for Stanley to argue that Snowfall should not be permitted to bring a malicious prosecution action because the lack of a record will make it more difficult for Snowfall to prove its case. This would seem to be Snowfall's problem, not Stanley's"].)

[11] The trial court did not reach this issue. We brief it because, like the probable cause issue briefed above, it is straightforward.

B. Defendants' Authorities On This Point Are Readily Distinguishable.

1. *Solin* only prevents a plaintiff who holds privileged information from using the privilege as a sword—not Siebel's case.

Defendants' primary authority in the trial court for their novel privilege argument was *Solin v. O'Melveny & Myers*, *supra*, 89 Cal.App.4th 451. (AA 53-54, 641-644.) It is not on point. *Solin* addresses a situation just the opposite of ours: Where the plaintiff holds privileged information and is using his or her knowledge to gain an incurably unfair advantage.

In *Solin*, an attorney consulted a law firm about his own possible criminal exposure arising from his representation of third-party clients, and about how to structure a payment agreement with them. (89 Cal.App.4th at pp. 455, 462.) He then sued the law firm for giving him bad advice with respect to the payment issue only. (*Id*. at p. 455.) He claimed that this issue did not implicate any privileged matters. (*Id*. at p. 462.) The law firm, however, claimed it only gave the attorney criminal-law advice, not payment advice, and that it could not prove this fact without disclosing what the attorney told it—including confidential information about the clients. (*Id*. at pp. 456, 462.) Because the clients intervened to obtain a protective order that would bar disclosure of the information, the law firm could not present this crucial evidence. (*Id*. at p. 456.) The Court of Appeal held that because the protective order would strip the law firm of the ability to defend itself, the case could not proceed. (*Id*. at pp. 462-467.)

In the trial court, defendants seized on the superficial similarity of the fact that in *Solin*, as here, the defendant was barred from disclosing confidential information. But there is a crucial difference: In *Solin*, the

plaintiff had full access to the disputed information—indeed, it was he who had disclosed the information to the defendant, and the parties' claims centered on what happened in the very conversation in which the plaintiff allegedly made the disclosure. The unfairness arose because the plaintiff sought to control the rules of engagement: With full knowledge of the scope of the confidential information and of the disputed conversation, he wanted the power to frame the case in a way that would keep the law firm from presenting its own version of its communications with him.

That is nothing like this case. Here, Siebel does not hold any privileged information, and he is not entrusted with any privilege. Thus, he is not in a position to abuse the privilege as the *Solin* attorney tried to do, having "obtain[ed] an unfair advantage" in his suit "solely as a result of his disclosure of his Clients' confidences" to the law firm-defendant. (89 Cal.App.4th at p. 463.) Siebel seeks nothing more than any plaintiff seeks: to prove his case through non-privileged information, or waived-privilege information, that he already has and that he hopes he will discover. *His* burden, not defendants', will be harder to meet if Christoffers does not waive the privilege so that he can learn, from her and defendants, what information she gave to defendants. But that is a burden he is willing to shoulder.

If defendants believe, after full discovery, that Siebel cannot meet his burden of proof, they can bring a motion at the appropriate time. But defendants' mere assertion that the privilege exists at this early stage cannot "bring the civil action to a halt." (*Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 285 [defendant cannot merely assert Fifth Amendment privilege "and thereby bring the civil action to a halt"].)

Defendants also cited *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 in support of their argument, but did not discuss it. *McDermott* is even more different from our case than *Solin*. That equitable action involved shareholders who were attempting to stand in a corporation's shoes to take advantage of the privilege between the corporation and its attorneys. Siebel is not trying to stand in Christoffers' shoes or sue her attorneys on her behalf. He is suing her attorneys in his own capacity as a person directly injured by them.

Defendants argue that it would be unfair to allow a malicious prosecution action against them when Christoffers has been released, is not a defendant, and therefore (they argue) has no incentive to waive the privilege. (AA 642.) Apart from the fact that defendants' conclusion is far from obvious—since Siebel has released her from liability, Christoffers has no reason *not* to disclose her communications—the release issue is a red herring. Defendants would be in exactly the same boat if Siebel had not settled with Christoffers, and simply elected not to sue her. Either way, neither Siebel nor defendants have any control over Christoffers' assertion of the privilege. Taken to its logical conclusion, defendants' position is that attorneys can never be sued for any tort they commit with their clients—not just malicious prosecution, but fraud, defamation, interference with contractual relations or anything else—unless their clients agree to waive the privilege. Nothing in the case law suggests such broad immunity for lawyers.

2. At a minimum, defendants have not made a prima facie showing as to why or how Christoffers' assertion of the privilege will interfere with their defense.

Even if *Solin* were extended to bar all plaintiffs from bringing an action that might, in the course of prosecution, implicate privileged information (thereby barring all kinds of civil cases, not just malpractice or malicious prosecution cases) it would still require defendants to show they could not in fact adequately defend themselves. Defendants attempted no such showing here. (See *Solin*, *supra*, 89 Cal.App.4th at pp. 460-461.)

Christoffers has not been deposed because of the protective order defendants obtained. (AA 693-694.) Regardless of her new counsel's representations about what Christoffers will do, Christoffers herself has not in fact asserted the privilege in this litigation. The settlement agreement does not bar her from waiving the privilege—it simply conditions her cooperation with defendants on a subpoena or court order.[12] (AA 74.) Even if she does claim the privilege, Siebel (and defendants) can certainly discover from her the facts upon which she based her allegations. (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 349.) The truth or falsity of those facts, not defendants' legal advice, is the heart of Siebel's case. Defendants' liability, if proven, is based on their decision to knowingly prosecute factually baseless claims.

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[12] The agreement provides that Christoffers will not "cooperate or provide evidence or testimony in any dispute or litigation brought by or against Siebel and/or SSI, unless compelled by lawful subpoena or other order of a court of competent jurisdiction." (AA 74.)

Nor have defendants been deposed, so we do not know how they will assert the privilege. For example, Mittlesteadt has already answered Siebel's interrogatories where, though asserting the privilege, she nevertheless answered the questions posed. (AA 489-495.) And Mittlesteadt's pre-litigation letters to Siebel's counsel (AA 535-536), as well as the complaint allegations, already reveal much of what she knew when she filed the complaint. Buell has already opened to inquiry his stated view that Christoffers' sex discrimination claims were "bogus." (AA 423-424.)

Furthermore, defendants have not argued that their defense depends on proving that Christoffers lied to them or failed to disclose material facts.[13] (Compare *Fisher, supra*, 90 Cal.App.4th at p. 286 [affirming plaintiff's summary judgment where defendant "did not submit any evidence from which it could be inferred that he actually faced any 'dilemma' caused by the proper assertion of the privilege against self-incrimination"].) Indeed, if that was their theory, then any attorney-client privilege would evaporate under the crime-fraud exception. (Evid. Code, § 956.)

The same crime-fraud exception potentially provides Siebel a basis for obtaining discovery against Christoffers and defendants, since he contends that they both attempted to defraud the court by pursuing baseless

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[13] In fact, Mittlesteadt has already responded "Yes" when asked whether she "contend[s] that probable cause existed on June 10, 1996 to support the filing of the sex discrimination claims," and she further stated that the factual basis for the claims could be found in Christoffers' deposition testimony. (AA 492-493.) She thus essentially admitted that she is not claiming that Christoffers misrepresented or omitted anything in her communications to Mittlesteadt.

claims against him.[14] (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 649 [information in insurer's litigation unit discoverable under crime/fraud exception]; *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262-1270 [on plaintiff's prima facie showing of fraud, discovery permitted of otherwise privileged communications].)

At this point in the proceedings, defendants have not concretely shown how their defense could be compromised by Christoffers' untested assertion of the attorney-client privilege. Nor have they explained why they could not be adequately protected by a jury instruction barring comment on and inferences from the fact that a privilege has been exercised. (Evid. Code, § 913, subd. (a).) Discovery must be allowed to go forward, allowing the trial court to "apply an array of ad hoc measures from [its] equitable arsenal designed to permit [the plaintiff] to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege." (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191.)

[14] It is a crime for an attorney to deceive, collude, or consent to any deceit or collusion, with intent to deceive the court or any party. (Bus. & Prof. Code, § 6128, subd. (a).)

CONCLUSION

The tort of malicious prosecution was created to expose and remedy egregious litigation abuses. Siebel's complaint states a prima facie case that he was the victim of such abuse. He must be allowed the opportunity to prove it.

The curtains and blinds defendants have drawn are all transparently thin. Siebel entirely won in the underlying action, and he has identified triable issues of fact that entitle him to present his case to a jury. Defendants' claimed attorney-client dilemma is chimerical. The judgment must be reversed, and Siebel must have his day in court.

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