

**Case No. S228277**

2d Civ. No. B244841



SUPREME COURT

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**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

**Frank A. McGuire Clerk**

**Deputy**

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**WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS,**

Plaintiffs and Appellants,

v.

**LATHAM & WATKINS LLP AND DANIEL SCHECTER,**

Defendants and Respondents,

---

ON REVIEW OF THE COURT OF APPEAL'S JUNE 26, 2015 DECISION  
CASE No. B244841  
SECOND APPELLATE DISTRICT, DIVISION THREE

FOLLOWING AN APPEAL FROM LOS ANGELES SUPERIOR COURT  
CASE No. BC482394  
HON. JAMES R. DUNN

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**RESPONDENTS' ANSWER BRIEF ON THE MERITS**

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## INTRODUCTION

The Court of Appeal rightly affirmed the dismissal of this malicious prosecution action. It correctly held that a trial court's denial of summary judgment conclusively establishes that there is probable cause for that action and thus precludes any later finding of malicious prosecution regardless of how the action eventually resolves on the merits. That holding is consistent with this Court's precedent in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, and should be affirmed.

The Court of Appeal erred in holding that a malicious prosecution action against a lawyer for prosecuting an action on behalf of a client is not a "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services" subject to the one-year statute of limitations of Code of Civil Procedure Section 340.6(a). That holding is inconsistent with the text of Section 340.6(a) and this Court's decision in *Lee v. Hanley* (2015) 61 Cal.4th 1225, and should be reversed.

The judgment should be affirmed on both grounds.

## OVERVIEW

Petitioners Parrish and Fitzgibbons were shareholders and senior executives of Indigo Systems, a company that owned intellectual property related to high-tech infrared sensors. In 2004, Petitioners and Indigo's other shareholders sold the company for \$185 million to FLIR Systems. Petitioners remained executives at Indigo.

Less than two years later, Petitioners announced their plan to form a new company that would compete directly with FLIR in the

production of infrared components. Representing FLIR and Indigo (collectively, "FLIR"), Latham & Watkins and its partner Daniel Schechter (collectively, "Latham") filed a trade secret action in Santa Barbara Superior Court.

In that action, each Petitioner moved for summary judgment and, alternatively, for summary adjudication on each cause of action. The Court denied the motions on the merits.

However, following trial, the Santa Barbara Court ruled against FLIR and also found that the action had been brought in "bad faith" as that term is used in the California Uniform Trade Secrets Act, Civil Code section 3426.4. Petitioners argued, and the Court concluded, that its earlier denial of summary judgment was not inconsistent with its finding bad faith under the Trade Secrets Act.

More than a year after that judgment was sustained on appeal, Petitioners brought this malicious prosecution action against Latham in Los Angeles Superior Court.

Latham responded by filing an anti-SLAPP motion on two independent grounds: the interim adverse judgment rule and the statute of limitations. The Los Angeles Court granted the motion based on the statute of limitations and did not address the interim adverse judgment rule. The Court of Appeal affirmed based on the interim adverse judgment rule but concluded that the case was not barred by the statute of limitations. The Court of Appeal should have affirmed on both grounds.

**Interim Adverse Judgment Rule**

The Court of Appeal correctly applied the interim adverse judgment rule to affirm dismissal of Petitioners' claim. Under the

rule, the Santa Barbara Court's denial of summary judgment conclusively establishes that FLIR and Latham met the low threshold for probable cause, which "does not depend upon [the action] being meritorious, as such, but upon it being *arguably tenable, i.e.*, not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable." (*Wilson, supra*, 28 Cal.4th 811, 824, original italics.) Under well-established case law, including *Wilson*, dismissal of Petitioners' malicious prosecution action was compelled.

Petitioners contend that the interim adverse judgment rule should not apply because (according to Petitioners) the Santa Barbara Court denied summary judgment based on false expert declarations. But the summary judgment ruling refutes that contention. In that order, the Santa Barbara Court explained that Petitioners had themselves created a triable issue with their own evidence. The Court explained that FLIR's expert declarations were relevant only to a second independent ground for denying summary judgment.

As the Court of Appeal stated in the decision here, Petitioners do not and cannot assert that the Santa Barbara Court's first ground for denying summary judgment was induced by the challenged expert declarations. Petitioners' contention also fails because there is no evidence that the challenged declarations were false.

Nor can Petitioners avoid the interim adverse judgment rule based on the Santa Barbara Court's post-trial finding of "bad faith" under the California Uniform Trade Secrets Act. A subsequent ruling cannot undo the probable-cause-determining effect of the earlier denial of summary judgment. As this Court held in *Wilson*, the

interim adverse judgment rule applies even if the interim ruling favoring the plaintiff in the underlying action is “subsequently reversed by the trial or appellate court.” (*Wilson, supra*, 28 Cal.4th at p. 818.) A subsequent ruling that does not call into question the propriety of the earlier interim ruling cannot have a greater impact.

The interim adverse judgment rule follows from the high standard a malicious prosecution plaintiff must meet to establish a lack of probable cause. The hindsight approach urged by Petitioners is at odds with the principle that “a judge’s denial of summary judgment accurately predicts that reasonable lawyers would find a case arguably meritorious.” (*Roberts v. Sentry Life Ins.* (1999) 76 Cal.App.4th 375, 384.) The rule permits lawyers with a court-tested case to continue to represent their client without fear of potential tort liability.

In all events, Petitioners themselves successfully argued in the underlying action that the finding of bad faith was not inconsistent with the earlier denial of summary judgment. As Petitioners successfully argued, the Trade Secrets Act standard for bad faith is easier to satisfy than the requirement for “lack of probable cause” in a malicious prosecution action, so while denial of summary judgment precludes “lack of probable cause,” that same summary judgment ruling does not preclude a finding of bad faith.

In sum, as the Court of Appeal held, the denial of summary judgment on the merits in the underlying action conclusively established probable cause and precluded Petitioners from establishing the “lack of probable cause” required for their malicious prosecution claim.

### Statute of Limitations

Code of Civil Procedure section 340.6 provides a one-year statute of limitations for actions “against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.” It is undisputed that Petitioners filed this malicious prosecution action against lawyers more than one year after their claim accrued. As the Los Angeles Superior Court held, Section 340.6 therefore compelled dismissal of this action because Petitioners’ claim is based entirely on Latham’s acts “in the performance of professional services”: representing their clients in court.

The Court of Appeal disagreed based on the same division’s decision in *Roger Cleveland Golf Co. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, that Section 340.6’s one-year statute applies only to actions for professional negligence.

Shortly after the Court of Appeal’s decision in this case, this Court stated that *Roger Cleveland* was in error in limiting Section 340.6 to professional negligence claims. (*Lee, supra*, 61 Cal.4th at p. 1239.) This Court held that Section 340.6 applies more broadly to any alleged attorney misconduct so long as the alleged misconduct was “in the course of providing professional services” and would “violate a professional obligation.” (*Id.* at p. 1229.) Here, both parts of *Lee*’s test are met. Latham’s alleged malicious prosecution occurred “in the course of providing professional services” when it represented its client in court. And the alleged malicious prosecution violates “the professional obligations” found in Rule of Professional Conduct 3-200 and Business and Professions Code section 6068, a

rule and code section that bar a lawyer from acting without probable cause or with malice as a matter of professional responsibility.

The legislative history of Section 340.6 confirms that the statute rightly applies here. The legislative record establishes that the statute was intended to address the effect that liability claims against lawyers were having upon the availability of professional liability insurance, which at the time covered (and which still partially covers) malicious prosecution claims.

To overcome *Lee*, Petitioners argue, for the first time on appeal, that they reasonably relied on “settled prior law” indicating that their claim was subject only to the two-year statute for malicious prosecution claims against non-lawyers. This argument was not raised in the Los Angeles Court and was therefore waived. Moreover, there was no such settled prior law on which Petitioners could reasonably have relied. Nor does the record reflect any evidence of the requisite actual reliance. Section 340.6’s one-year limitations period applies. Petitioners’ claims are time-barred.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Petitioners’ factual recitation is incomplete and, in important respects, wrong.

##### **I. THE UNDERLYING SANTA BARBARA ACTION**

In 2004, Petitioners sold Indigo Systems and its trade secrets and intellectual property to FLIR Systems for \$185 million.

Petitioners then worked for the combined companies.<sup>1</sup> Among other things, Indigo had a business manufacturing high volume, low cost, TEC-less microbolometers—sensors used to detect infrared radiation.

In 2005, Petitioners announced that they would be leaving FLIR to start a company that would engage in the high volume production of competing microbolometers—in direct competition with FLIR. They indicated that they intended to implement a 2005 “NuCo” business plan, which they asserted was derived from a 1999 business plan that Petitioner Fitzgibbons created before joining Indigo. However, in the fall of 2005, before departing FLIR’s employ, Petitioner Parrish attempted to copy onto a portable drive a FLIR engineering database regarding the design and manufacture of its imaging products.<sup>2</sup>

In early 2006, after Petitioners left, FLIR became concerned that they would misuse its intellectual property in the new venture. On June 15, 2006, Latham, representing FLIR, filed suit in Santa Barbara alleging misappropriation of trade secrets.<sup>3</sup> That Complaint alleged that Petitioners’ 2005 NuCo business plan was not derived from the 1999 plan, but instead was taken from a 2004 business plan

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<sup>1</sup> This factual summary reflects certain undisputed facts regarding Petitioners’ conduct and the underlying Santa Barbara action which were put at issue on the anti-SLAPP motion. In support of that motion, Latham did not attempt to marshal the complete factual record which establishes probable cause.

<sup>2</sup> Sealed Volume AA 1029, electronic file P03229 at pp. 461-62; AA 0013; Sealed Volume AA 1029, electronic file 03763 at pp. 762-763, 859-860, 886-889.

<sup>3</sup> Sealed Volume AA 1029, electronic file P002929 at pp. 6-29.



that relied on trade secrets FLIR acquired through its \$185 million acquisition of Indigo just two years earlier.<sup>4</sup>

Each Petitioner filed a motion seeking summary judgment or summary adjudication as to each cause of action.<sup>5</sup> Each presented the 1999, 2004 and 2005 business plans in support of his motion.<sup>6</sup> Each argued that “[n]othing in the [2005] NuCo business plan was copied from [the 2004 business plan].”<sup>7</sup> Each asserted that the 2005 NuCo business plan was drawn solely from Petitioner Fitzgibbons’ 1999 business plan and that “a simple comparison” of these two plans would establish that the 2005 plan contained none of FLIR’s trade secret information.<sup>8</sup>

Citing *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, Petitioners also argued in their summary judgment motions that FLIR was impermissibly seeking to pursue a theory of “inevitable disclosure.”<sup>9</sup> They explained that, by “inevitable disclosure,” they meant a request for “an injunction based on speculation about future

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<sup>4</sup> Sealed Volume AA 1029, electronic file P002929 at pp. 9-10, 13-14 [¶¶ 4, 22, 23].

<sup>5</sup> Sealed Volume AA 1029, electronic file P002929 at pp. 135-138, 205-208.

<sup>6</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 308-310, 314-315, 327-329, 334.

<sup>7</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 310, 329.

<sup>8</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 314-315, 334.

<sup>9</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 313, 318, 332, 337.

misuse of trade secrets.”<sup>10</sup> In California, “inevitable disclosure” generally describes a claim based on the notion that a departing employee will “inevitably” use his former employer’s trade secrets, based on nothing more than the fact that the employee is entering the employ of an existing competitor.

FLIR opposed the motions by arguing that the 2005 NuCo plan was based on FLIR’s protected 2004 plan.<sup>11</sup> FLIR also opposed with evidence that included two very brief declarations, covering just a few pages, from industry experts stating that, other than FLIR, they were unaware of anyone who had “the requisite technology and capability to produce a high volume of bolometers at yields and costs sufficient to support” the 2005 business plan on its stated schedule.<sup>12</sup> These expert declarations addressed one of the case’s core issues: Whether Indigo’s trade secrets in the production of low-cost infrared sensors were unique, or whether some other party had technology available for license sufficient to allow Petitioners to implement their 2005 plan on its stated schedule.

FLIR also contested Petitioners’ argument that it was asserting an “inevitable disclosure” case. It explained that it was not seeking an injunction merely because Petitioners were entering into competition. Rather, FLIR argued that Petitioners had conceded that implementation of their 2005 plan required someone else’s

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<sup>10</sup> Sealed Volume AA 1029, electronic file P003229 at p. 313.

<sup>11</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 465-466.

<sup>12</sup> Sealed Volume AA 0217-0222; Sealed Volume AA 1029, electronic file P003229 at pp. 463-465.

technology, not just their own know-how, and FLIR was the only obvious source of that technology. Accordingly, FLIR asserted that it was pursuing a “threatened misappropriation” claim, as authorized by Civil Code section 3426.2,<sup>13</sup> based on, among other things, “[e]xpert testimony [that] establishes that Defendants only could meet [their NuCo business] goals by using FLIR’s trade secrets and proprietary technology.”<sup>14</sup>

On March 21, 2007, the Santa Barbara Court denied Petitioners’ summary judgment motions for two independent reasons.<sup>15</sup> First, it held that:

Defendants have failed to sustain their burden of proof on the motion. Defendants have made a compelling argument that they are entitled to judgment at this stage. Nonetheless, the concepts involved in this action are highly technical. Following a review of the [three business plans], the court is unable to find as a matter of law, for purposes of this motion only, that the plaintiffs own none of the concepts for [Petitioners’] new business, that nothing in the NuCo business plan made use of

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<sup>13</sup> Sealed Volume AA 1029, electronic file P003229 at p. 469, 473.

<sup>14</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 456, 468-469.

<sup>15</sup> AA 0081-0089.

plaintiffs' proprietary confidential information, intellectual property, or work product, or that all concepts in the NuCo plan were identical to those in the 1999 plan.<sup>16</sup>

In short, before considering any of FLIR's evidence (including the expert declarations), the Santa Barbara Court concluded, based on Petitioners' own evidence, that there was a triable issue with respect to whether their new business plan was taken only from their 1999 plan without using trade secrets embodied in FLIR's 2004 plan. Petitioners do not contend that this first independent ground for summary judgment was induced by materially false statements.

The Santa Barbara Court also identified a second alternative ground for denying summary judgment: "Even if [Petitioners] had sustained their burden of proof on the motion, plaintiffs have produced sufficient evidence, for example with the [two expert] declarations, to raise a triable issue as to misappropriation of trade secrets."<sup>17</sup> Petitioners argue that this second ground was induced by misrepresentations in the expert declarations.

Petitioners contend that "[the Santa Barbara Court in the underlying action] specifically found that FLIR (and Latham) 'opposed the summary judgment motion with expert declarations

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<sup>16</sup> AA 0087. In summarizing the parties' arguments, the Santa Barbara Court stated: "Per the defendants' declarations, nothing in the NuCo business plan was copied from the 2004 presentation. (Disputed by [FLIR] – Sundermeier declaration, Exhibit A.)" (AA 0087.)

<sup>17</sup> AA 0087.

suggesting that there was a scientific methodology to predict the likelihood of trade secret misuse.”<sup>18</sup> But the Santa Barbara Court made no such finding, and the experts never “suggested” any such thing.<sup>19</sup>

Both experts merely testified in brief declarations that they knew of no available technology, other than FLIR’s, that could support Petitioners’ business plan on its contemplated schedule.<sup>20</sup> Neither expert offered testimony regarding any “scientific methodology,” let alone one for predicting likelihood of trade secret misuse.<sup>21</sup>

In the summary judgment ruling, the Santa Barbara Court also expressly noted and implicitly addressed Petitioners’ claim that FLIR was impermissibly pursuing a claim based on “inevitable

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<sup>18</sup> POB, p.10. Petitioners repeat this misrepresentation many times. (E.g., POB 10 [“as the trial court later found”], 13 [“those courts concluded”], 17 [“it was actually determined in the Underlying Action”].)

<sup>19</sup> Sealed Volume AA 0217-0222, AA 0009-0035.

<sup>20</sup> Sealed Volume AA 0217-0222. The experts offered this testimony based on their special knowledge and experience in the infrared technology industry. (See Evid. Code § 802 [allowing expert testimony based on “special knowledge, ... experience, training, and education”].)

<sup>21</sup> On cross-examination, the experts acknowledged the uncontroversial proposition that they were unaware of a scientific method for predicting trade secret misuse. (Sealed Volume AA 1029, electronic file P001876 at transcript p. 582; Sealed Volume AA 1029, electronic file P002078 at transcript pp. 673-74.)

disclosure.”<sup>22</sup> The Court concluded, as FLIR had argued, that “threatened misappropriation may be enjoined.”<sup>23</sup>

Following a court trial, the Santa Barbara Court entered judgment for Petitioners.<sup>24</sup> The Court found that “the conduct of both [Petitioners had] raised a reasonable suspicion that they might misuse [FLIR’s] trade secrets,”<sup>25</sup> but concluded that no injunction was appropriate.<sup>26</sup> Despite that “reasonable suspicion,” the Court also awarded attorney’s fees to Petitioners based on a finding, under Civil Code section 3426.4, that the action had been brought and pursued in bad faith.<sup>27</sup> The Court concluded that this finding of bad faith was not inconsistent with its earlier denial of summary judgment.<sup>28</sup>

The judgment was affirmed on appeal. As Petitioners note, the affirming opinion stated, “[FLIR] opposed the summary judgment motion with expert declarations suggesting there was a scientific methodology to predict the likelihood of trade secret misuse.”<sup>29</sup> As discussed below, this hearsay factual recitation is erroneous and inconsistent with the declarations.<sup>30</sup>

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<sup>22</sup> AA 0087.

<sup>23</sup> AA 0087; Sealed Volume AA 1029, electronic file P003229 at pp. 456, 468-469.

<sup>24</sup> AA 0009-0035.

<sup>25</sup> AA 0021.

<sup>26</sup> AA 0020-0025.

<sup>27</sup> AA 0027-0035.

<sup>28</sup> AA 0014.

<sup>29</sup> AA 0198.

<sup>30</sup> Sealed Volume AA 0217-0222.

The remittitur in the underlying action issued on October 6, 2009.<sup>31</sup>

## **II. PETITIONERS' MALICIOUS PROSECUTION ACTION AGAINST FLIR**

On July 10, 2008, after the judgment in the underlying action, Petitioners filed a complaint against FLIR and two of its officers asserting tortious interference.<sup>32</sup>

On November 20, 2009, following the remittitur, Petitioners amended their complaint to allege malicious prosecution.<sup>33</sup> They alleged that FLIR filed the underlying action “in bad faith, with malice, without probable cause and without any valid legal or factual bases.”<sup>34</sup> More particularly, Petitioners alleged that FLIR “initiated and maintained and prosecuted [the underlying action] ... on a legal theory that [Petitioners] would misuse trade secrets in the future, ... even though the ‘inevitable disclosure’ doctrine is not supported by California law.”<sup>35</sup> They also alleged that FLIR did not have a sufficient “legal basis to initiate the lawsuit.”<sup>36</sup>

On July 20, 2010, nine months after the remittitur and with no new charging allegations, Petitioners named Latham & Watkins as a “Doe” defendant in their action against FLIR.<sup>37</sup> On August 31, 2010,

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<sup>31</sup> AA 0124-0125.

<sup>32</sup> AA 0127-0136.

<sup>33</sup> AA 0138-0154.

<sup>34</sup> AA 0141.

<sup>35</sup> AA 0144.

<sup>36</sup> AA 0142.

<sup>37</sup> AA 0204.

after Latham threatened to bring an anti-SLAPP motion, Petitioners dismissed Latham without prejudice and without any agreement to toll the statute of limitations.<sup>38</sup>

### III. THE PRESENT ACTION

On April 5, 2011, eighteen months after the remittitur and seventeen months after they filed their malicious prosecution action against FLIR, Petitioners and Latham signed a tolling agreement. This agreement provided that “in no circumstances” would it “revive any claim or defense that was already time-barred.”<sup>39</sup>

Petitioners filed this action on April 6, 2012, in the Los Angeles Superior Court.<sup>40</sup> Their allegations mirror those asserted in their November 2009 complaint against FLIR.<sup>41</sup> Although they allege that they could not have discovered their claim until after FLIR asserted the advice-of-counsel defense, the complaint is silent about why that fact was material.

Latham filed an anti-SLAPP motion arguing that Petitioners’ action was untimely under the one-year statute of limitations set forth

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<sup>38</sup> AA 0206.

<sup>39</sup> AA 0208.

<sup>40</sup> AA 0001.

<sup>41</sup> AA 0004 (Latham “in bad faith, with malice, without probable cause and without any valid legal or factual bases” filed the underlying action; Latham’s “bad faith, malice, and lack of probable cause in filing the lawsuit is evidenced by, among other things, the fact that [Latham] filed the Lawsuit in part on a legal theory that [Petitioners] would misuse trade secrets in *the future*, even though such a theory (i.e. ‘inevitable disclosure’) is not supported by California law”; Latham did not have a sufficient “legal basis to initiate the lawsuit,” original italics.)



in Code of Civil Procedure section 340.6 and that the action was barred by the interim adverse judgment rule.<sup>42</sup> The Los Angeles Court granted the motion, finding the action time-barred under Code of Civil Procedure section 340.6.<sup>43</sup> The Court declined to reach the interim adverse judgment rule.

#### **IV. THE COURT OF APPEAL DECISION**

On August 27, 2014, the Court of Appeal reversed. (*Parrish v. Latham & Watkins* (2014) 229 Cal.App.4th 264.) However, on October 6, 2014, the Court granted rehearing on its own motion, which, under Rule of Court 8.268(d), vacated its earlier decision.

On June 26, 2015, following rehearing, the Court of Appeal issued a new Opinion affirming the granting of the anti-SLAPP motion based on the interim adverse judgment rule. The Court rejected Petitioners' argument "that the interim adverse judgment rule does not preclude this malicious prosecution action because the trial court's finding of bad faith after a bench trial in the Underlying Action negates its prior ruling denying summary judgment." (*Parrish v. Latham & Watkins* (2015) 238 Cal.App.4th 81, 87.) The Court concluded that Petitioners' "hindsight approach is inconsistent with a core principle of the interim adverse judgment rule—namely, that an interim ruling on the merits establishes probable cause in the underlying action, even though that ruling is later reversed by the trial court, a jury, or an appellate court." (*Ibid.*)

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<sup>42</sup> AA 0054-0071.

<sup>43</sup> AA 1061-1062.

The Court of Appeal recognized that the Santa Barbara Court had denied Petitioners' summary judgment motion on two independent grounds. The Court observed that the triable issue identified by the Santa Barbara Court regarding the source of the NuCo business plan was not connected to the disputed expert declarations. Rather, that triable issue arose from the face of the three business plans that Petitioners themselves submitted in support of their motions. The Court of Appeal correctly noted that Petitioners do not contend that this aspect of the ruling was obtained by fraud.

The trial court in the Underlying Action, viewing the evidence in the light most favorable to Latham's clients as the non-moving parties, concluded it could not grant [Petitioners'] defense motion for summary judgment on the trade secret claim. Though it acknowledged [Petitioners] had made a "compelling argument" for summary judgment, the court ruled that, "[f]ollowing a review of the [1999 business plan submitted, the 2004 plan presented to FLIR, and the new business plan], the court is unable to find as a matter of law, for purposes of this motion only, that [FLIR] own[s] none of the concepts for [Petitioners'] new business, that nothing in the [new] business plan made use of [FLIR]'s proprietary confidential

information, intellectual property, or work product, or that all concepts in the [new] plan were identical to those in the 1999 plan.” Accordingly, the court found [Petitioners] had “failed to sustain their burden of proof on the motion.” [¶] Petitioners do not contend Latham obtained this ruling through fraud or perjury.

(*Parrish, supra*, 238 Cal.App.4th at pp. 98-99.)

Relying on this last sentence, but ignoring that “this ruling” identified by the Court of Appeal was the Santa Barbara Court’s first ground for denying summary judgment (*i.e.*, the ground that was independent of the contested expert declarations), Petitioners assert that the Court of Appeal incorrectly concluded that they were not arguing that any evidence submitted in opposition to summary judgment was fraudulent or perjurious.<sup>44</sup>

With respect to the statute of limitations, the Court of Appeal followed the same division’s own decision in *Roger Cleveland, supra*, 225 Cal.App.4th 660, and held that Code of Civil Procedure section 340.6 applies only to professional negligence claims. (*Parrish, supra*, 238 Cal.App.4th at pp. 93-94.)

## V. THE GRANT OF THE PETITION FOR REVIEW

On August 5, 2015, Petitioners petitioned for review regarding application of the interim adverse judgment rule.

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<sup>44</sup> POB, p. 2 fn.1.

On August 20, 2015, this Court decided *Lee, supra*, 61 Cal.4th 1225, addressing the scope of Code of Civil Procedure section 340.6. Among other things, this Court concluded that *Roger Cleveland* erred in concluding that Section 340.6 applies only to professional negligence claims. (*Id.* at p. 1239.)

On August 26, 2015, Latham requested that, if this Court granted review, it should also review the statute of limitations issue in light of *Lee*. The Court accepted review of both issues.

## LEGAL DISCUSSION

### I. PETITIONERS WERE REQUIRED TO SHOW A PROBABILITY OF PREVAILING ON BOTH “LACK OF PROBABLE CAUSE” AND THE STATUTE OF LIMITATIONS

Petitioners’ action was dismissed on Latham’s anti-SLAPP motion. (Code Civ. Proc. § 425.16.) On that motion, once Latham established “protected conduct” (which was not disputed), Petitioners bore the burden of establishing a “probability of prevailing on the merits.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; Code Civ. Proc. § 425.16(b)(1).) Meeting this burden requires admissible evidence constituting a “sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (*Wilson, supra*, 28 Cal.4th at p. 821; *Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Although the court “does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” (*Wilson, supra*, 28 Cal.4th at p. 821, original italics, citations and internal quotation marks omitted.)

The anti-SLAPP motion challenged Petitioners’ ability to prove the “lack of probable cause” element of their malicious prosecution claim, and their compliance with the statute of limitations. Petitioners’ burden was to demonstrate a probability that they would prevail on both issues.

## II. THE DENIAL OF SUMMARY JUDGMENT CONCLUSIVELY ESTABLISHED PROBABLE CAUSE DESPITE A LATER RULING THAT THE ACTION WAS BROUGHT IN BAD FAITH

The Court of Appeal correctly concluded that, under the interim adverse judgment rule, the denial of Petitioners' motions for summary judgment on the merits conclusively precluded them from establishing the "lack of probable cause" required for their malicious prosecution claim.

### A. In A Malicious Prosecution Action, The "Lack of Probable Cause" Element Is A High Hurdle

Malicious prosecution is a disfavored tort because of its potential to chill claims and because, as a means of deterring frivolous lawsuits, it has the disadvantage of constituting a new round of litigation. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872-873.) Accordingly, "the elements of [malicious prosecution] have historically been carefully circumscribed." (*Id.* at p. 872.)

As one element, a plaintiff must demonstrate that the defendant lacked probable cause to bring the underlying action. (*Wilson, supra*, 28 Cal.4th at p. 814.) This requirement is challenging for the malicious prosecution plaintiff, because the threshold for establishing the existence of probable cause is purposefully low. (*Roberts, supra*, 76 Cal.App.4th at p. 382 [discussing "permissive standard" for probable cause]; *Sheldon Appel, supra*, 47 Cal.3d at p. 885 ["Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win ... ."].)

"[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon it being *arguably tenable, i.e.*,

not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable.” (*Wilson, supra*, 28 Cal.4th at p. 824, original italics.) This standard is “rather lenient.” (*Id.* at p. 817.)

Probable cause is determined objectively based on the assessment of a “reasonable attorney,” not based on a subjective assessment of the plaintiff’s attorney’s personal view of a case’s merit. (*Sheldon Appel, supra*, 47 Cal.3d at p. 882.) “Only those actions that “any reasonable attorney would agree [are] totally and completely without merit” may form the basis for a malicious prosecution suit.” (*Id.* at p. 817.)

**B. A Court’s Interim Determination That A Case Has Sufficient Merit To Proceed Conclusively Establishes Probable Cause**

The interim adverse judgment rule establishes a bright line test for the objective existence of probable cause. A favorable interim ruling for a plaintiff on the merits of a case conclusively establishes that probable cause exists, unless the ruling was obtained by fraud or perjury. (*Wilson, supra*, 28 Cal.4th at p. 822.)

The rule allows a lawyer who defeats summary judgment on the merits to continue to pursue the claim “even if [the attorney is] also aware of evidence that will weigh against the claim.” (*Wilson*, 28 Cal.4th at p. 822; *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1050.) Having prevailed at an interim stage, “Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to

abandon their claim if they think it likely the evidence will ultimately weigh against them.” (*Wilson, supra*, 28 Cal.4th at p. 822.)

The interim adverse judgment rule protects both client and lawyer, and ensures that a client or lawyer who is “in possession of [evidence that a court deemed sufficient to deny summary judgment] has the right to bring the claim, even where it is very doubtful the claim will ultimately prevail.” (*Wilson, supra*, 28 Cal.4th at p. 824; see also *Roberts, supra*, 76 Cal.App.4th at pp. 383-84 [parallel holding].) “Claims that have succeeded at a hearing on the merits ... are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.” (*Wilson, supra*, 28 Cal.4th at p. 818.) This rule ““serves the policy expressed in *Sheldon Appel* to discourage dubious malicious prosecution suits.”” (*Id.* at p. 819, quoting *Roberts, supra*, 76 Cal.App.4th at p. 384.)

As this Court explained in *Wilson*, a litigant or attorney’s ability to rely on an interim court ruling in deciding whether to take a case to trial is an essential aspect of the interim adverse judgment rule. As this Court stated, ““It would be hard law which would render a plaintiff liable in damages for instituting an action, wherein he made a truthful and honest statement of the facts, in the event that, notwithstanding a judge of the superior court was satisfied that upon those facts the plaintiff had a meritorious case, a ruling to that effect should afterwards be set aside ... .”” (*Wilson, supra*, 28 Cal.4th at p. 818, quoting *Cowles v. Carter* (1981) 115 Cal.App.3d 350, 357, further internal quotation marks omitted.) As this Court further stated, “[T]he inquiry [is] not whether the plaintiff had in fact a good and



valid cause of action, but whether this was apparently true, and it was accordingly the right of the plaintiff to invoke a judicial decision concerning the merits of the case presented for determination.”

*(Ibid.)*

Importantly, the rule applies “even if that [interim] result is subsequently reversed by the trial or appellate court.” (*Id.* at p. 818; *Plumley, supra*, 164 Cal.App.4th at p. 1052 [same], *Cowles, supra*, 115 Cal.App.3d at pp. 355-356; *Fairfield v. Adams* (1959) 170 Cal.App.2d 10, 15.) A reversal establishes only that it is also possible for a different reasonable lawyer (an appellate judge) or even the same reasonable lawyer (the trial court judge) to conclude later that the case does not have merit.

This aspect of the rule is grounded in common-sense fairness. As *Wilson* holds, an alternative “hard law” permitting the imposition of liability for having proceeded following the trial court’s blessing would unfairly leave a lawyer who relied on that blessing unable to take back his or her resulting conduct. (*Wilson, supra*, 28 Cal.4th at p. 818.)

**C. Denial Of The Motions For Summary Judgment Triggered Application Of The Interim Adverse Judgment Rule**

The March 2007 denial of summary judgment and summary adjudication motions by the Santa Barbara Court was a determination on the merits that Latham had a triable case, bringing its prosecution of the trade secret action within the interim adverse judgment rule. As detailed above, this summary judgment ruling was based on two independent merits-based grounds: (1) the court’s recognition (based

solely on evidence offered by Petitioners themselves) of a triable issue regarding whether their NuCo business plan depended on protected trade secrets in FLIR's 2004 business plan, and (2) the court's determination that FLIR's expert declarations created a triable issue as to whether Petitioners could execute their business plan on its express timetable without use of FLIR's technology.<sup>45</sup>

The Court of Appeal applied well-established case law to conclude that the summary judgment ruling triggered the interim adverse judgment rule and conclusively established probable cause. As this Court has explained, “[j]ust as a trial victory by the underlying plaintiff ‘shows that the suit was [brought with] probable cause,’ so too ‘[d]enial of a defendant’s summary judgment motion provides similarly persuasive evidence that a suit does not totally lack merit.’” (*Wilson, supra*, 28 Cal.4th at p. 819 [internal citation omitted].) “A trial court’s conclusion that issues of material fact remain for trial ‘necessarily impl[ies] that the judge finds at least some merit in the claim.’” (*Ibid.*, quoting *Roberts, supra*, 76 Cal.App.4th at p. 383.) In short, “a judge’s denial of summary judgment accurately predicts that reasonable lawyers would find a case arguably meritorious.” (*Roberts, supra*, 76 Cal.App.4th at p. 384.)

**D. No Exception To The Interim Adverse Judgment Rule Applies Here**

California recognizes only one exception to the rule that probable cause is conclusively established by a favorable judicial ruling on the merits: an instance in which “the prior ruling is shown

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<sup>45</sup> AA0087.

to have been obtained by fraud or perjury.” (*Wilson, supra*, 28 Cal.4th at p. 825.)

This exception is based on logic and fairness. In deciding whether it is safe to pursue an action without fear of tort liability, a litigant or lawyer cannot properly draw comfort from a court ruling that the litigant or lawyer knows was induced by deceit.

Petitioners argue that the exception should be broader. In their view, the interim adverse judgment rule should have no application whenever it can be shown that the interim ruling was caused by a “materially false fact”—even an inadvertent misstatement unknown to the plaintiff in the underlying action or its counsel. This “exception” would undo the rule and destroy the certainty the rule provides. A central purpose of the interim adverse judgment rule is to assure a party or its counsel that they may continue to pursue a claim without fear of tort liability. (*Wilson, supra*, 28 Cal.4th at p. 824 [(“[A] claimant or attorney who is in possession of such evidence [that a court found sufficient to support denial of summary judgment] has the right to bring the claim, even where it is very doubtful the claim will ultimately prevail.”]; *Cowles, supra*, 115 Cal.App.3d at p. 357 [“It would be hard law which would render a plaintiff liable in damages for instituting an action, wherein he made a truthful and honest statement of the facts, in the event that, notwithstanding a judge of the superior court was satisfied that upon those facts the plaintiff had a meritorious case, a ruling to that effect should afterwards be set aside ... ,” internal citation omitted].)

In all events, Petitioners’ focus on the precise bounds of the exception to the interim adverse judgment rule is, in this case, not

important. As the Court of Appeal correctly noted, Petitioners do not contend that the first ground for the Santa Barbara Court's denial of summary judgment was induced by perjury, fraud, a materially false fact or any other misconduct.<sup>46</sup> (*Parrish, supra*, 238 Cal.App.4th at pp. 98-99.) Instead, that first ground for denial was based on evidence presented by Petitioners themselves.

Specifically, in support of their motions, Petitioners presented the 1999, 2004 and 2005 business plans.<sup>47</sup> They argued that “[n]othing in the [2005] NuCo business plan was copied from [the 2004 business plan].”<sup>48</sup> They asserted that the 2005 NuCo business plan was instead drawn solely from the 1999 business plan, and that “a simple comparison” of these two plans would establish that the 2005 plan contained no trade secret information.<sup>49</sup> FLIR opposed by

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<sup>46</sup> The interim adverse judgment rule also requires that the ruling be based on an assessment of the merits, not “technical” grounds such as a failure to include a separate statement of material facts. (*Wilson, supra*, 28 Cal.4th at p. 823.) Although Petitioners once contended that the first ground for denial of summary judgment was “technical,” they later conceded it was not. (Petitioners’ Pet. for Rehearing, p. 7.) In the event that Petitioners renew this “technical denial” argument, the Court of Appeal properly rejected it. (*Parrish, supra*, 238 Cal.App.4th at p. 99; see also Respondents’ Suppl. Brief, pp. 4-9.)

<sup>47</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 308-310, 314-315, 327-329, 334.

<sup>48</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 310, 329.

<sup>49</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 314-315, 334.

arguing that the 2005 NuCo plan was based on the protected 2004 plan.<sup>50</sup>

The Santa Barbara Court stated, as its first ground for denying summary judgment, that it had identified a triable issue with respect to whether Petitioners' new business plan used trade secrets embodied in FLIR's 2004 plan. The Court specifically explained that it had reached this conclusion based solely on evidence presented by Petitioners: "Following a review of the [three business plans], the court is unable to find as a matter of law, for purposes of this motion only, that the plaintiffs own none of the concepts for defendants' new business, that nothing in the NuCo business plan made use of plaintiffs' proprietary confidential information, intellectual property, or work product, or that all concepts in the NuCo plan were identical to those in the 1999 plan."<sup>51</sup>

Because Petitioners cannot argue that this first independent ground for denying summary judgment was wrongfully induced, the Court of Appeal correctly held that there was no justification for avoiding the interim adverse judgment rule, regardless of Petitioners' contention that the second independent ground was induced by wrongful conduct. (*Parrish, supra*, 238 Cal.App.4th at p. 102 fn.9.)

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<sup>50</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 465-466.

<sup>51</sup> AA 0087. In summarizing the parties' arguments, the Santa Barbara Court stated: "Per the defendants' declarations, nothing in the NuCo business plan was copied from the 2004 presentation. (Disputed by [FLIR] – Sundermeier declaration, Exhibit A.)" (AA 0087.)

That holding is sufficient to affirm the dismissal of this action, and makes it unnecessary for this Court to consider the Santa Barbara Court's second ground for denial of summary judgment. But even so, Petitioners are also wrong in their attack on that ground.

As its second ground for denying summary judgment, the Santa Barbara Court stated: "Even if defendants had sustained their burden of proof on the motion, [FLIR has] produced sufficient evidence, for example with the [two expert] declarations, to raise a triable issue as to misappropriation of trade secrets."<sup>52</sup> Petitioners charge, without record support, that this second ground was induced by fraudulent or "materially false" expert declarations.

More specifically, they contend that "[the Santa Barbara Court judge] specifically found that FLIR (and Latham) 'opposed the summary judgment motion with expert declarations suggesting that there was a scientific methodology to predict the likelihood of trade secret misuse.'"<sup>53</sup> But the Santa Barbara Court never made such a finding,<sup>54</sup> and the declarations themselves refute Petitioners' characterization.<sup>55</sup> At summary judgment, the experts merely declared that, aside from FLIR, they were unaware of anyone who had "the requisite technology and capability to produce a high volume of bolometers at yields and costs sufficient to support" the 2005 business

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<sup>52</sup> AA 0087.

<sup>53</sup> POB, p.10. Petitioners repeat this misrepresentation many times. (E.g., POB 10 ["as the trial court later found"], 13, 17 ["it was actually determined in the Underlying Action"].)

<sup>54</sup> AA 0009-0035.

<sup>55</sup> Sealed Volume AA 0217-0222.

plan on its stated schedule.<sup>56</sup> Neither expert offered testimony regarding any “scientific methodology,” let alone one for predicting likelihood of trade secret misuse.<sup>57</sup>

After the experts’ subsequent trial testimony, the Santa Barbara Court found that the experts had not successfully refuted the possibility that new innovation might allow Petitioners to meet their business plan or that Raytheon might have the necessary technology.<sup>58</sup> This trial finding, however, did not call into question the truth of the experts’ earlier statements at summary judgment that they, as experts in the field, were unaware of anyone other than FLIR that already had the necessary technology and capability.

To support the assertion that the experts falsely suggested that there was a scientific method to predict trade secret misappropriation, Petitioners rely on a single sentence in the Court of Appeal decision in the underlying case: “[FLIR] opposed the summary judgment motion with expert declarations suggesting there was a scientific methodology to predict the likelihood of trade secret misuse.”<sup>59</sup> This

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<sup>56</sup> Sealed Volume AA 0218, 0221-0222; Sealed Volume AA 1029, electronic file P003229 at pp. 463-465.

<sup>57</sup> On cross-examination, the experts acknowledged the uncontroversial proposition that they were unaware of a scientific method for predicting trade secret misuse. (Sealed Volume AA 1029, electronic file P001876 at transcript p. 582; Sealed Volume AA 1029, electronic file P002078 at transcript pp. 673-74.)

<sup>58</sup> AA 0022, 0031.

<sup>59</sup> POB, p. 10.

sentence is non-admissible hearsay.<sup>60</sup> (Evid. Code § 1200; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885 [“An appellate court’s description of facts is merely the hearsay assertions of the justices who delivered the opinion. Hearsay statements within the opinion are inadmissible unless they fall within an exception to the hearsay rule.”].)<sup>61</sup>

This hearsay does not gain weight by its publication in a court opinion. California does not allow judicial notice of the truth of facts stated in a prior court ruling. (*Plumley, supra*, 164 Cal.App.4th at pp. 1048-1051; *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 418 [“It appears that the superior court took notice not only of the existence of that opinion and the result reached, but also relied upon our statement of the facts ... to establish the truth thereof. While an appellate opinion may be judicially noticed for the first purpose, it would ordinarily be error to use it for the latter purpose.”].)

Most importantly, the Court of Appeal’s characterization of the expert declarations is flatly incorrect. The error is apparent on the face of the declarations. The expert declarations are five pages long

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<sup>60</sup> When Petitioners attempted to use the Court of Appeal’s sentence in the Los Angeles Court’s consideration of the anti-SLAPP motion, Latham objected to it as hearsay, and not supported by the record. (AA 0070-0071, 1030, 1041-1042.)

<sup>61</sup> *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 332-333, appears to indicate that an underlying trial court’s factual statements can be given evidentiary weight. But the Court did not indicate whether a hearsay objection was asserted or considered. In all events, as the dissent stated, factual statements in prior rulings “cannot be considered substantive evidence of lack of probable cause.” (*Id.* at p. 368 [Mosk, J., dissenting].)



and are reproduced in their entirety at pages 0217 to 0212 of the Sealed Volume of the Appellate Appendix.

Thus, the Los Angeles Court's dismissal also should be affirmed because Latham's evidence, including the expert declarations themselves, defeats Petitioners' attempt to establish evidentiary support for the lack of probable cause element of their malicious prosecution claim. (*Wilson, supra*, 28 Cal.4th at p. 821 [court "should grant the [anti-SLAPP] motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim," citations and internal quotation marks omitted].)

**E. The Trial Court's Later Finding Of Bad Faith Does Not Undo The Preclusive Force Of Its Earlier Summary Judgment Ruling**

Petitioners argue that the Santa Barbara Court's post-trial finding of bad faith warrants an exception to the interim adverse judgment rule's determination that the denial of summary judgment conclusively established probable cause. The Court of Appeal rightly rejected that argument.

As the Court of Appeal explained, the hindsight approach urged by Petitioners "is inconsistent with a core principle of the interim adverse judgment rule—namely, that an interim ruling on the merits establishes probable cause in the underlying action, even though that ruling is later reversed by the trial court, a jury, or an appellate court." (*Parrish, supra*, 238 Cal.App.4th at p. 87; see *Wilson, supra*, 28 Cal.4th at pp. 818; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 692 fn.15 ["an interim adverse judgment on the merits, even though

subsequently set aside on motion or on appeal, conclusively establishes probable cause for the prior action”].) A hindsight-based exception would create the “chilling effect” of potential tort liability that this Court sought to avoid. (*Wilson, supra*, 28 Cal.4th at pp. 816-817.)

This Court’s decision in *Wilson*, including its extensive discussion and endorsement of the Court of Appeal’s decision in *Roberts*, establishes that, once there has been a denial of summary judgment on the merits, probable cause is conclusively determined even if the summary judgment ruling is overturned or reversed. (*Wilson, supra*, 28 Cal.4th at pp. 818-819, 822-824; *Roberts, supra*, 76 Cal.App.4th at pp. 383-384.) As detailed above, the only subsequent ruling that can allow a finding of lack of probable cause is a determination that the denial of summary judgment was induced by fraud (or, if Petitioners were correct, a materially false fact), and there was no such ruling here.

Notwithstanding *Wilson* and its endorsement of *Roberts*, Petitioners rely on *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306, to suggest that the probable-cause-determining effect of a summary judgment ruling can be undone by a subsequent ruling that calls into question the correctness of the summary judgment ruling. In *Slaney*, the Court of Appeal determined that, notwithstanding an initial ruling denying summary judgment on the merits, a trial court’s subsequent finding that summary judgment should be granted can allow a finding of “lack of probable cause,” at least in circumstances where there is evidence of subjective malice.

*Slaney* is an erroneous outlier. When it was decided, this Court had already held in *Wilson* that the denial of summary judgment on the merits conclusively establishes probable cause and a subsequent reversal of that ruling is inconsequential. (See *Wilson, supra*, 28 Cal.4th at p. 819 [“A trial court’s conclusion that issues of material fact remain for trial ‘necessarily impl[ies] that the judge finds at least some merit in the claim. The claimant may win, if certain material facts are decided favorably. This finding (unless disregarded) compels [the] conclusion that there is probable cause, because probable cause is lacking only in the total absence of merit.’” quoting *Roberts, supra*, 76 Cal.App.4th at p. 383].) Yet the *Slaney* court did not mention *Wilson*.<sup>62</sup>

The *Slaney* Court also erred fundamentally by considering the existence of subjective malice as a relevant factor, even though the determination of probable cause is supposed to be objective. (*Sheldon Appel, supra*, 47 Cal.3d at p. 881.) As the Court of Appeal stated

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<sup>62</sup> *Slaney* considered and apparently rejected the holding in *Roberts, supra*, 76 Cal.App.4th at p. 384, that “a judge’s denial of summary judgment accurately predicts that reasonable lawyers would find a case arguably meritorious.” (*Slaney, supra*, 115 Cal.App.4th at pp. 319-321.) In doing so, however, *Slaney* failed to appreciate that this Court had endorsed *Roberts*’ holding. (*Wilson, supra*, 28 Cal.4th at pp. 816-819.)

Notably, *Slaney* stands alone. Its holding was rejected implicitly in a subsequent appellate decision that instead properly relied on *Wilson*. (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 182-184 [“reasonable cause” under Code Civ. Proc. § 1038—which is parallel to “probable cause” in malicious prosecution cases—is established by an initial denial of summary judgment even if summary judgment later granted].)

correctly here, “[c]ontrary to the *Slaney* court’s conclusion, the fact that the trial court or jury later rejects a plaintiff’s claim and, after weighing the competent evidence, finds the claim was brought with malice, does not negate other evidence which, standing alone, establishes the existence of probable cause.” (*Parrish, supra*, 238 Cal.App.4th at p. 101.)

In all events, even if a subsequent decision could somehow undo the probable-cause-determining impact of an order denying summary judgment on the merits, the subsequent ruling would, at a minimum, have to establish that the first ruling was in error. Here, the subsequent bad-faith ruling did not call into question the correctness of the order denying summary judgment.

As the Court of Appeal correctly held, the Santa Barbara Court’s post-trial finding of bad faith under Civil Code section 3426.4 is not inconsistent with that Court’s earlier denial of summary judgment (and it therefore casts no doubt on the existence of probable cause).<sup>63</sup> (*Parrish, supra*, 238 Cal.App.4th at p. 102 [“The bad faith finding does not negate the court’s prior conclusion that the trade secret claim had “at least some merit” so as to warrant a trial on the conflicting evidence.”].) A finding of bad faith (or speciousness) under Civil Code section 3426.4 does not require “that a case is

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<sup>63</sup> The Santa Barbara Court itself concluded that there was no conflict between its denial of summary judgment and its bad faith finding. (AA 0014.)

frivolous”<sup>64</sup> or lacking in probable cause.<sup>65</sup> (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1261-1262.) While claims that are frivolous or lacking in probable cause do not even superficially appear to have merit, “specious” actions warranting attorney’s fees under Section 3426.4 may have superficial merit, but fail so badly when evidence is weighed at trial that attorney’s fees may be awarded. (*Gemini, supra*, 95 Cal.App.4th at pp. 1261-1262. As the Court of Appeal stated here:

The finding, based on the more complete record developed at trial, that ... support[ed] the bad faith finding, does not establish a lack of probable cause. As noted, if FLIR and Latham had evidence to substantiate the trade secret claim, as the trial court concluded they had in denying summary judgment, there was probable cause, “even if [they were] also aware of evidence that [would] weigh against the claim.”

(*Parrish, supra*, 238 Cal.App.4th at p. 102.) Because the standards are different, there is no conflict in finding both bad faith and probable cause.

Indeed, Petitioners themselves made this very point in the underlying case. Citing *Gemini*, they argued successfully that the

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<sup>64</sup> See also AA 0107-0108 at ¶¶ 57-58.

<sup>65</sup> The test for “lack of probable cause” is parallel to the standard for frivolousness and sanctions under Code of Civil Procedure section 128.5. (See *Gemini, supra*, 95 Cal.App.4th at pp. 1261-1262.)

prior summary judgment denial did not preclude a fee award because bad faith (or speciousness) is a “different standard” that is easier to prove than a lack of probable cause:

[O]bjective bad faith under section 3426.4 does not require that all reasonable attorneys would believe that the claim is totally and completely meritless. Frivolousness is not the standard and need not be established. The “speciousness” required for objective bad faith is a lower standard, and includes trade secret claims that “may superficially appear to have merit.”<sup>66</sup>

In the underlying action, the Court of Appeal, quoting *Gemini*, adopted Petitioner’s then-current argument: “[S]ection 3426.4 requires objective speciousness ... as opposed to frivolousness.”<sup>67</sup> That holding was correct. Moreover, having prevailed in the underlying action by arguing that the bad faith is easier to show than an absence of probable cause, Petitioners are judicially estopped from arguing the opposite now. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 [judicial estoppel applies “when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally

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<sup>66</sup> Sealed Volume AA 1029, electronic file P001055 at electronic pp. 37-38.

<sup>67</sup> AA 0291.

inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.”]; *Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun v. Superior Court* (2013) 218 Cal.App.4th 577, 591 [“It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite,” internal quotation marks omitted].)

Finally, Petitioners argue that the interim adverse judgment rule should be abrogated whenever there has been a subsequent finding of bad faith, because the “effect of such a rule is that parties who believe they are being victimized by a maliciously prosecuted action will be deterred from attempting to minimize their damages by moving for summary judgment.”<sup>68</sup> In the real world, however, almost all defendants will focus on the suit facing them, not positioning for a future malicious prosecution action. Few would trade the probability of a quick summary judgment exit for the inherent uncertainty of a trial on the merits. Moreover, if a court determines (even erroneously) that the underlying case has merit, then the low threshold for probable cause has been met, and a malicious prosecution action should be barred.

**F. Latham’s Pursuit Of The Case After The Summary Judgment Ruling, Using The Same Arguments And Theories, Is Protected By The Interim Adverse Judgment Rule**

Petitioners argue for the first time on appeal that Latham committed malicious prosecution by pursuing different theories after

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<sup>68</sup> POB, p. 28.

the summary judgment ruling than it had pursued earlier in the Santa Barbara action. Petitioners, however, did not make this factual argument in opposing the anti-SLAPP motion.<sup>69</sup> The argument is therefore waived. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1398-1399 [“[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court,” citation and internal quotation marks omitted].)

The argument is also wrong and defeated by the existing record. Through trial, FLIR pursued both theories on which the Santa Barbara Court based its denial of summary judgment. At summary judgment, the Santa Barbara Court found a triable issue regarding the derivation of the 2005 NuCo business plan.<sup>70</sup> At trial, the same Court weighed the evidence on that issue and concluded that Petitioner Fitzgibbons had not used any of FLIR’s trade secrets in preparing the 2005 NuCo business plan.<sup>71</sup>

FLIR’s threatened misappropriation theory also remained consistent. At summary judgment, Petitioners contended that FLIR was arguing “inevitable disclosure,” and FLIR explained that it instead was arguing “threatened misappropriation.”<sup>72</sup> The Santa Barbara Court denied summary judgment and concluded that “threatened misappropriation” may be enjoined based in part on the

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<sup>69</sup> AA 0244-0264.

<sup>70</sup> AA 0087.

<sup>71</sup> AA 0019-0020.

<sup>72</sup> Sealed Volume AA 1029, electronic file P003229 at pp. 313, 318, 332, 337, 469; AA 87.



expert declarations regarding Petitioners' ability to implement their business plan on their stated schedule without use of FLIR's trade secrets.<sup>73</sup> Weighing the evidence at trial, the same Court concluded that FLIR's claim arose from a non-actionable concern that Petitioners would use FLIR's technology simply because they were entering into competition with FLIR, and an unreasonable assumption that Petitioners would not innovate.<sup>74</sup>

Additionally, Petitioners' malicious prosecution complaints against both Latham and FLIR consistently describe FLIR's position as unchanged before and after summary judgment, claiming the "inevitable disclosure" theory was pursued before and after summary judgment.<sup>75</sup>

For the reasons set forth above, this Court should affirm the Court of Appeal based on the interim adverse judgment rule.

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<sup>73</sup> AA 0087.

<sup>74</sup> AA 0021-0023.

<sup>75</sup> AA 0144 (FLIR "initiated and maintained and prosecuted [the underlying action] ... on a legal theory that [Petitioners] would misuse trade secrets in the future, ... even though the 'inevitable disclosure doctrine is not supported by California law.>"; AA 0004 ("[Latham] filed the Lawsuit in part on a legal theory that [Petitioners] would misuse trade secrets *in the future*, even though such a theory (i.e. 'inevitable disclosure') is not supported by California law," original italics).

**III. THIS ACTION IS ALSO BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS UNDER CODE OF CIVIL PROCEDURE SECTION 340.6(a)**

The Los Angeles Court properly concluded here that Petitioners' claim was barred by Code of Civil Procedure section 340.6(a),<sup>76</sup> which provides:

An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.

(Code of Civil Proc., § 340.6.)

Based on the same division's holding in *Roger Cleveland, supra*, 225 Cal.App.4th 660, that Section 340.6 applies only to professional negligence claims, the Court of Appeal held here that Section 340.6 does not apply to a malicious prosecution action against a lawyer. (*Parrish, supra*, 229 Cal.App.4th at p. 276.) That holding was in error.

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<sup>76</sup> AA 1059-1063.

**A. *Lee v. Hanley* Establishes The Requirements For Application of Section 340.6**

This Court's subsequent opinion in *Lee v. Hanley* specifically disapproved *Roger Cleveland*'s holding limiting the reach of Section 340.6. (*Lee, supra*, 61 Cal.4th at p. 1239.) This Court held, "the statute applies not only to actions for professional negligence but to any action alleging wrongful conduct, other than actual fraud, arising in the performance of professional services." (*Id.* at p. 1236.) *Lee* explained, "[w]e hold that section 340.6(a) applies to a claim when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation—that is, an obligation the attorney has by virtue of being an attorney—in the course of providing professional services." (*Id.* at p. 1229.)

Thus, Section 340.6 applies if the claim depends on (1) misconduct "in the course of providing professional services" and (2) misconduct that "violate[s] a professional obligation," which is "an obligation the attorney has by virtue of being an attorney." (A "professional obligation" includes, among others, "the obligations embodied in the Rules of Professional Conduct." (*Lee, supra*, 61 Cal.4th at pp. 1236-1237.))

Together, these requirements prevent Section 340.6 from applying to claims that have nothing to do with a lawyer's provision of professional services. (*Lee, supra*, 61 Cal.4th at p. 1238.) For example, although an attorney is obliged not to obtain sexual relations from a client through coercion or intimidation (Cal. Rules of Prof. Conduct, rule 3-120), a violation of that obligation does not involve providing professional services. Similarly, "[a] garden-variety theft

claim against an attorney alleges wrongful conduct, but that conduct does not arise in the performance of professional services even if the client and the attorney were discussing legal matters at the time the theft took place.” (*Id.* at p. 1231.)

**B. This Malicious Prosecution Action Falls Within *Lee*'s Pronouncement Of The Scope Of Section 340.6**

Unlike the conversion-by-a-lawyer claim analyzed in *Lee*, a malicious prosecution claim against a lawyer falls squarely within Section 340.6's text: “[a]n action against an attorney for a wrongful act or omission ... arising in the performance of professional services.” As the Court of Appeal concluded in *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 194-195 and *Vafi v. McKloskey* (2011) 193 Cal.App.4th 874, 881, a malicious prosecution claim against an attorney always entails “a wrongful act or omission” committed “in the performance of professional services.” Indeed *Lee* cites *Vafi* and *Yee* with favor as cases recognizing the application of Section 340.6 to malicious prosecution actions. (*Lee, supra*, 61 Cal.4th at p. 1236.)

Malicious prosecution claims against lawyers satisfy both of *Lee*'s conditions. A lawyer's malicious prosecution can happen only “in the course of” providing professional services to a client before a tribunal.<sup>77</sup> And, a lawyer's malicious prosecution always violates “an obligation that an attorney has by virtue of being an attorney,” including “the obligations embodied in the Rules of Professional Conduct.” A lawyer is obliged by the rules governing the profession

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<sup>77</sup> Although a lawyer could commit malicious prosecution by bring a groundless action in his or her own behalf, *pro se*, such an action would not involve the provisions of “services,” which requires one to be serving another.

not to use his or her professional skills to prosecute a baseless claim on behalf of another.

Rule of Professional Conduct 3-200 forbids a lawyer from representing a client when doing so would constitute malicious prosecution:

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

(Cal. Rules of Prof. Conduct, rule 3-200.) Rule 3-200(A) mirrors the probable cause and malice elements of malicious prosecution, and Rule 3-200(B) includes one ground for an absence of probable cause. Similarly, Business and Professions Code section 6068 provides that it is the “duty of an attorney”: (1) to “counsel or maintain” only civil actions that appear “just” to that attorney, and (2) not to commence or

continue an action from a corrupt motive. (Bus. & Prof. Code, § 6068, subd. (c) & (g).)

These are obligations an attorney has “by virtue of” being an attorney. They are proscriptions that are made express in the rules governing the conduct of attorneys exercising their exclusive right to represent others before tribunals. The Rules of Professional Conduct and the Business and Professions Code do not contain similar injunctions against other tortious conduct, like battery or negligent operation of a motor vehicle, because lawyers are not “different” from other actors in those regards. Nor do the rules set forth there apply to persons other than attorneys. Lawyers are different from other actors in being able to prosecute claims in a representative capacity. And it is the capacities in which lawyers are different that the Legislature deemed worthy of the different limitations period provided by Section 340.6.

Petitioners’ claim alleges conduct violating Rule 3-200 and Section 6068 and thus alleges a violation of a professional obligation. In their Complaint, Petitioners allege that their claim is based on Latham’s alleged pursuit of an “inevitable disclosure” theory that they assert was not warranted under existing law.<sup>78</sup> Further, in their Opening Brief in this Court, they state: “Latham ... focused entirely

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<sup>78</sup> AA 0004 (Latham’s “bad faith, malice, and lack of probable cause in filing the lawsuit is evidenced by, among other things, the fact that [Latham] filed the Lawsuit in part on a legal theory that [Petitioners] would misuse trade secrets in *the future*, even though such a theory (i.e. ‘inevitable disclosure’) is not supported by California law,” and Latham did not have a sufficient “legal basis to initiate the lawsuit,” original italics).

on the discredited and factually meritless inevitable disclosure theory.”<sup>79</sup> Latham’s alleged conduct was exclusively conduct undertaken on behalf of its clients, and so was both “in the course of” Latham’s performance of professional services and, were it proven, “in violation of” an obligation not to accept an engagement to prosecute a malicious, probable-cause-lacking action.

**C. The Public Policy Concerns That Prompted The Legislature To Enact Section 340.6 Confirm Its Application To Malicious Prosecution Claims**

Independent of the reading given Section 340.6 in *Lee*, interpreting the language of the statute in light of its legislative purpose also requires the conclusion that Petitioners’ malicious prosecution claim is subject to the one-year limitations period. Lawyer liability for malicious prosecution was part and parcel of the concern with the cost and availability of legal services that led the Legislature to adopt that rule.

As this Court stated in *Lee*, the Legislature enacted Section 340.6 “to ‘reduce[] the cost of legal malpractice insurance’ and ‘limit[] the open-endedness’ of the various limitations periods for claims against attorneys.” (*Lee, supra*, 61 Cal.4th at p. 1234.) As the Court of Appeal stated in *Yee*, that concern reinforces the conclusion that Section 340.6 should be read, consistent with its plain text, to apply to malicious prosecution claims:

One of the purposes that the Legislature had in enacting section 340.6 ... was to attempt to reduce the costs of legal malpractice

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<sup>79</sup> POB, p. 30.

insurance. (See Sen. Com. on Judiciary, Rep. on Assem. Bill No. 298<sup>80</sup> (1977-1978 Reg. Sess.) p. 1.) California courts have acknowledged that malicious prosecution actions have an impact on attorney malpractice insurance premiums and raise the costs of practicing law. (See *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 35-36 [disallowing malicious prosecution action in family law cases, in part because of impact of malicious prosecutions on malpractice insurance premiums]; see also *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641, fn. 5 [noting that allowing malicious prosecution actions filed by one attorney against another is the type of litigation that “is a substantial reason for skyrocketing premiums for legal malpractice insurance”].)

(*Yee, supra*, 220 Cal.App.4th at p. 197.)

*Yee*'s conclusion that Section 340.6 should apply to malicious prosecution actions is confirmed by further examining the lawyer liability landscape as it existed at the time of the statute's adoption in 1977. At that time, lawyers' professional liability insurance policies specifically covered malicious prosecution liability, and insurers regularly paid on those claims. (See, e.g., *City Products Corp. v.*

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<sup>80</sup> AA 0612 (the Senate Committee report).



*Globe Indemnity Co.* (1979) 88 Cal.App.3d 31, 34 [“Upon affirmance . . . , defendant [insurer] paid plaintiff the amount of the compensatory damage award [for malicious prosecution] but refused to pay the \$10,000 in punitive damages.”].)

Moreover, in 1977, malicious prosecution claims were an important feature of the insurance burden for insurers of lawyers in California, much more so than they are today. The reason was a doctor-led backlash against the proliferation of medical malpractice claims being filed in California. That perceived abuse of the tort system led the California Medical Association to announce in 1976 that doctors would go on the offense against plaintiffs’ lawyers, with the Association even providing funding to doctors to pursue malicious prosecution actions against attorneys who filed unsuccessful malpractice claims. (Greisen, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?* (1977) 8 Pacific L.J. 897, 897.)

The threat was not idle. As one commentator noted a short while later, “[m]ost recent [malicious prosecution] plaintiffs have been irate physicians seeking revenge for an unsuccessful medical malpractice action or pursuing the belief that suing lawyers will deter future medical malpractice suits.” (Mallen, *An Attorney’s Liability for Malicious Prosecution, a Misunderstood Tort* (July 1979) 46 Ins. Couns. J. 407, 407; see also Smith, *Medical Malpractice: the Countersuit Fad* (December 1976) 12 Trial 44 [discussing “rash of recent filings” of malicious prosecution claims by physicians against opposing counsel].)

It was not until more than two decades later that an insurer's indemnification of an individual lawyer for malicious prosecution was held to be contrary to California's public policy. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 506.) But even post-*Downey Venture*, "most lawyers' errors and omissions policies include coverage for malicious prosecution claims," if only for costs of defense. (*Id.* at p. 571 ["However, section 533 does not preclude a defense for such a claim ... ."]; Hager, *Attorney Conduct: Reduce Your Malicious Prosecution Exposure* (June/July 2002) San Francisco Att'y 19, 19.)

Moreover, even under current California law, liability insurance is available to indemnify a lawyer against liability for malicious prosecution in some circumstances. These circumstances include cases in which the liability is vicarious rather than direct (such as where an employed lawyer's malicious prosecution imposes liability on an employer under the doctrine of respondeat superior), and cases in which the claim against a California lawyer arises in another state that does not share California's public policy barring such coverage. (See *Downey Venture, supra*, 66 Cal.App.4th at pp. 512-515.)

Accordingly, application of Section 340.6 to Petitioners' malicious prosecution claim is faithful to the purpose as well as the letter of the statute.

**D. The Application Of Different Limitations Periods To Different Classes Of Defendants Is Not Unique To Section 340.6 Or Otherwise Problematic**

Petitioners argue that Section 340.6 should not be applied to a lawyer's malicious prosecution because doing so would result in a

different statute of limitations applying to the plaintiff in an underlying action and to that plaintiff's lawyer, even when both committed malicious prosecution. *Yee* noted this argument's flaws, "[W]e cannot conclude that [a different limitations period for a lawyer and a client] is absurd. As we have explained, the Legislature may have valid policy reasons for providing a more circumscribed limitations period to attorney defendants than to other defendants of malicious prosecution actions." (*Yee, supra*, 220 Cal.App.4th at p. 197.)

Moreover, there is nothing unusual about different limitations periods applying to different defendants, even when they are alleged to have committed the same tort. For example, if a plaintiff sues both her lawyer and her accountant for providing the same faulty tax advice, Section 340.6 will provide a one-year statute for the lawyer, while the accounting malpractice claim will be "governed by a two-year statute of limitations under Code of Civil Procedure section 339, subdivision (1)." (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 707.) Such claims against both a lawyer and an accountant for faulty tax advice are commonplace. (See, e.g., *AFFCO Investments, LLC v. KPMG, LLP* (S.D. Texas Sept. 28, 2009) 2009 U.S. Dist. Lexis 89595, \*2-6 [accounting firm KPMG and two law firms jointly sued for allegedly misadvising clients with regard to same tax shelter].)

Not every difference in treatment is invidious. Here, the Legislature reasonably determined that the availability of legal services warranted treating lawyers differently from other defendants. The Legislature was persuaded that lawyers, like doctors, faced an insurance crisis. In particular, the Legislature would have appreciated

that lawyers who practice litigation necessarily take on the malicious prosecution risk with every case they file. (*Yee, supra*, 220 Cal.App.4th at p. 196 [“any attorney ... is more likely to be involved in litigation than the average plaintiff, and thus, may be more likely to be subject to malicious prosecution claims.”].)

**E. Petitioners’ Plea For “Prospective Application” Fails**

In the alternative, Petitioners argue that, even if Section 340.6 applies to their claim, their untimely filing should be excused by making the application of Section 340.6 prospective only. They contend that their failure to file within one year resulted from their asserted reliance on “prior law,” which they assert called for application of a two-year statute of limitations.<sup>81</sup> This argument fails on multiple grounds.

First, it comes too late. In opposing Latham’s anti-SLAPP motion, Petitioners made no argument and submitted no factual support for prospective-only application.<sup>82</sup> Accordingly, they waived this argument. (*Bank of America, supra*, 217 Cal.App.4th at pp. 1398-1399 [waiver rule particularly applicable where contention is “based upon facts or documents that are outside of the record”].)

Second, the argument also fails on the merits. In general, court decisions interpreting statutes of limitations apply both prospectively and retroactively—a rule that has been applied by this Court to a different question concerning Section 340.6. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 620 [rejecting request to apply Section 340.6 ruling

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<sup>81</sup> POB, p. 38.

<sup>82</sup> AA 259-264.

only prospectively]; see also *Woods v. Young* (1991) 53 Cal.3d 315, 330 [discussed at page 56 *infra*]; *Planning & Conservation League v. Dept. of Water Resources* (1998) 17 Cal.4th 264, 274 [giving retroactive effect to decision holding shortened time period under Code of Civil Procedure section 870, rather than longer period under Rule of Court 2(a), applied to filing of appeal]; *West Shield Investigations and Sec. Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 955 [giving retroactive effect to decision holding that tolling provisions of Code of Civil Procedure section 352 applied to minors did not apply following minor's emancipation where no prior decisional authority existed addressing issue].)

A party urging that a legal ruling be given only prospective application must demonstrate both that there was settled law to the contrary and that the party actually and reasonably relied on that settled prior law. (*Estate of Propst* (1990) 50 Cal.3d 448, 464 [“If a party ... proves such reliance” it may claim under former rule of law]; *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 455 [parties resisting retroactivity “must establish that they have ‘forgone substantial benefits’ in reliance” on prior law].) Petitioners cannot establish either of these required propositions here.

**1. There Was No Settled Prior Law Supporting A Two-Year Limitations Period For A Malicious Prosecution Claim Against A Lawyer**

Petitioners cannot point to any settled prior law on which they could have reasonably relied.<sup>83</sup> There was none. As *Vafi* itself noted, when that case was decided in 2011—months before Petitioners filed this action—“no reported decision ha[d] addressed ... which statute of limitations applies to an action for malicious prosecution against an attorney.” (*Vafi, supra*, 193 Cal.App.4th at p. 877.)

As that carefully worded observation implies, there was one unreported decision, but it did not support the longer statute of limitations urged by Petitioners. In *Anderson v. West Marine, Inc.* (Nov. 16, 2009) 2009 Cal.App.Unpub.Lexis 9048, the Court of Appeal held that Section 340.6 applied to a malicious prosecution action against a lawyer. Though not citable as authority, *Anderson* is judicially noticeable evidence that *Vafi* was not an abrupt change in the law. (See *Ray v. First Fed. Bank* (1998) 61 Cal.App.4th 315, 318 [“The decision is relevant not as legal authority but as an historical fact”]; *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212, 218 [“Although the Court of Appeal opinion ... is not published, we may take judicial notice thereof as a court record pursuant to Evidence Code section 452, subdivision (d)(1)”].)

Despite *Vafi*'s analysis and *Anderson*'s holding, Petitioners seek to establish uniform prior law (contrary to *Vafi* and *Lee*)

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<sup>83</sup> Petitioners mis-describe the issue as if it were whether Latham can establish that there was uniform law so that Petitioners should have concluded that Section 340.6 applied. (POB, p. 39.)

supporting a multi-year limitations period. Petitioners cite a string of cases, none of which supports their contention.

*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, pronounced no rule relevant here. There, the defendant was not a lawyer and the case did not discuss which statute would apply to a malicious prosecution claim against a lawyer. (See *Yee, supra*, 220 Cal.App.4th at p. 197.) Instead, *Stavropoulos* considered only which of two possible statutes of limitations, other than Section 340.6 (which was unmentioned because there was no lawyer defendant), should apply to a generic malicious prosecution claim. (*Stavropoulos, supra*, 141 Cal.App.4th at pp. 193-197.)

It is correct that *Silas v. Arden* (2012) 213 Cal.App.4th 75, 87-89, nevertheless held that it was reasonable, prior to *Vafi*, to rely upon *Stavropoulos* to conclude that Section 340.6 did not apply to a malicious prosecution claim against an attorney.<sup>84</sup> But *Silas*'s flawed reasoning on this point was noted in *Yee*, which concluded that it would not be reasonable to rely on a case that was decided in a context that did not involve an attorney defendant to conclude that Section 340.6 would not apply to a malicious prosecution claim against an attorney. (*Yee, supra*, 220 Cal.App.4th at pp. 197 fn.9.)

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<sup>84</sup> *Silas* also noted the trial court's "finding" there that the assumption that the two-year statute, rather than Section 340.6, governed malicious prosecution claims against lawyers was a "long accepted and widely relied-upon practice in the legal community." (*Silas, supra*, 213 Cal.App.4th at p. 86). The court cited no evidentiary basis for that "finding"—and none exists. In all events, where, as here, a new decision overruled no prior judicial authority, the decision applies retroactively regardless of whether it conflicts with a prior, mistaken "practice in the legal community."

Petitioners' reliance on *Laird, supra*, 2 Cal.4th at p. 609, is also misplaced. Although Petitioners argue that "*Stavropoulos* followed this Court's decision in *Laird* ... wherein this Court's analysis reflected that Section 340.6 relates to legal malpractice actions by clients against their counsel,"<sup>85</sup> *Stavropoulos* did not cite *Laird*. So *Stavropoulos* "followed" *Laird* only in the chronological sense.

Similarly *Laird* "reflected" that Section 340.6 "relates to legal malpractice actions" only because the case involved a tolling issue in the context of the undisputed application of Section 340.6 to legal malpractice. (*Laird, supra*, 2 Cal.4th at p. 608.) *Laird* did not address whether Section 340.6 also applies to malicious prosecution or other claims against lawyers.

*Laird*, moreover, supports the principle that statute-of-limitations decisions generally have retroactive effect. *Laird* gave full retroactive effect to its decision that the limitations period of Section 340.6 commences on adverse judgment and dismissal of the underlying action. (*Laird, supra*, 2 Cal.4th at p. 620.)

Petitioners' citation to *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, is similarly unavailing. Petitioners state:

[I]n *Knoell* the court *rejected* the proposition that a non client plaintiff could invoke the tolling provisions of Section 340.6 with respect to defamation and tortious interference claims against a lawyer which

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<sup>85</sup> POB, p. 35.



arose in the performance of professional services.<sup>86</sup>

But in *Knoell*, the tolling provision that the “non-client plaintiff” unsuccessfully sought to invoke was “the continuous representation” provision of Section 340.6(a)(2) which applies only when the defendant attorney “continues to represent the [plaintiff].” (*Knoell, supra*, 76 Cal.App.4th at p. 169.) Thus, as *Vafi* correctly observed, “[t]here is nothing in *Knoell* ... to suggest that section 340.6’s reach extends only to a client’s claim against his attorney.” (*Vafi, supra*, 193 Cal.App.4th at p. 883.)

Petitioners’ reliance on *Woods, supra*, 53 Cal.3d 315, 330, is also misplaced. There,

the issue presented ... ha[d] been presented in seven published Court of Appeal decisions. ... [A]ll seven opinions concluded that the one-year limitations period was tolled [in the circumstances presented]. ... This unanimous conclusion established a settled rule upon which plaintiff could reasonably rely in determining when to file her action.

Although Petitioners note that there were two lines of Court of Appeal decisions prior to *Woods*, they fail to acknowledge that both lines would have tolled the limitations period on that case’s facts.

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<sup>86</sup> POB, p. 35.

In sum, Petitioners cannot come close to making a showing of “prior settled law” comparable to *Woods*’ seven, unanimous Court of Appeal decisions favoring tolling. When they filed this case, no reported decision had considered whether Section 340.6 applied to malicious prosecution claims against lawyers. Petitioners do not and cannot explain why they did not recognize the risk that Section 340.6’s plain language meant that it likely covered malicious prosecution.

**2. Petitioners Did Not Show Reasonable Reliance On Any Prior Law**

Furthermore, in opposing Latham’s anti-SLAPP motion, Petitioners offered no evidence that they actually relied on any contrary settled prior law.<sup>87</sup> On appeal, they cannot offer any record citation to support their asserted reliance.<sup>88</sup>

Reliance is a factual element that cannot be presumed. In considering retroactivity, “[t]he extent and reasonableness of a party’s reliance are questions for the trier of fact.” (*Expansion Pointe Properties L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 53 [rejecting prospective-only application of ruling because party proffered no evidence of reliance].) “We cannot presume reliance or consider facts unsupported by the appellate record.” (*Id.* at p. 54.) The party seeking an “exception to the general rule of retroactivity ... [has] the burden of proof” on the reliance issue. (*In re Retirement Cases, supra*, 110 Cal.App.4th at p. 443.)

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<sup>87</sup> AA 259-264.

<sup>88</sup> POB, p. 38.

Petitioners' request for a prospective-only application of Section 340.6 to malicious prosecution claims against lawyers is unsupported. The statute's one-year limitations period applies here.

**F. The Discovery Rule Does Not Save Petitioners' Claim**

Next, Petitioners argue that the one-year limitations period did not begin to run until their "discovery," on May 6, 2010, that FLIR might assert an advice-of-counsel defense in Petitioners' malicious prosecution action against FLIR.<sup>89</sup> This argument has no merit.

Section 340.6 provides that the one-year limitations period begins running "after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." (Code Civ. Proc., § 340.6, subd. (a).)

By the conclusion of the underlying trial, Petitioners had "discovered or should have discovered" enough to allege every element of malicious prosecution that they ultimately pleaded. They were aware that the Santa Barbara Court had ruled that the action had been prosecuted in bad faith. They knew that Latham had counseled their clients, presented every witness and made every argument. They were aware of all the evidence that they cite in their complaint to support their contention that Latham lacked probable cause and acted

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<sup>89</sup> POB, p. 41.

with malice.<sup>90</sup> For example, they support both lack of probable cause and malice with their assertion that Latham pursued an “inevitable disclosure” theory, a theory that Petitioners contested at summary judgment in the underlying action.<sup>91</sup>

The assertion of an advice-of-counsel defense provided no new material information. The assertion of the defense by FLIR merely meant that FLIR would contend that it had been advised by Latham that its case was arguably meritorious. But through the course of the trial, that fact was plain. Latham had presented the case, and presumably would not have done so had it not advised its client to proceed with the case.

Finally, Petitioners’ assertion that they did not have sufficient evidence to allege malice until FLIR raised a possible advice-of-counsel defense is refuted by their own briefing in this case. They argued to the Court of Appeal that malice may be inferred from an absence of probable cause, and in so arguing, pointed entirely to facts that they had at the conclusion of the underlying action. (AOB, p. 43.)

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<sup>90</sup> AA 0004 (Latham “in bad faith, with malice, without probable cause and without any valid legal or factual bases” filed the underlying action; Latham’s “bad faith, malice, and lack of probable cause in filing the lawsuit is evidenced by, among other things, the fact that [Latham] filed the Lawsuit in part on a legal theory that [Petitioners] would misuse trade secrets in *the future*, even though such a theory (i.e. ‘inevitable disclosure’) is not supported by California law”; Latham did not have a sufficient “legal basis to initiate the lawsuit,” original italics.)

<sup>91</sup> AA 0004.

For the reasons set forth above, in addition to approving the Court of Appeal's correct application of the interim adverse judgment rule, this Court should affirm the Superior Court's judgment based on the applicability of Section 340.6's one-year limitations period.

## CONCLUSION

This Court should affirm the Court of Appeal's determination that the Los Angeles Court properly granted Latham's anti-SLAPP motion.

Furthermore, pursuant to Code of Civil Procedure section 425.16, subdivision (c)(1), Latham respectfully requests that, in addition to its costs, it be awarded its reasonable attorney's fees on appeal, in an amount to be determined as this Court may direct. (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287.)

March 14, 2016

MCKOOL SMITH HENNIGAN, P.C.

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## CERTIFICATE OF COMPLIANCE

I, Michael Swartz, counsel for Respondents, declare that the word count for this Brief, excluding Tables of Contents and Authorities, Proof of Service and this Certification is less than 13,900 words as calculated utilizing the word count feature of the Microsoft Word 2010 software used to create this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 14, 2016, at Los Angeles, California.

/s/ Michael Swartz

Michael Swartz

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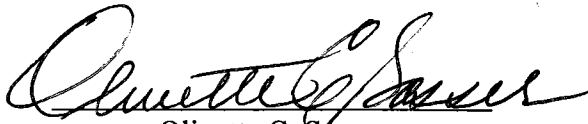
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