SUPREME COURT COPY

No. S228277

SUPREME COURT
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In the Supreme Court
OF THE
State of California

WILLIAM PARRISH and
E. TIMOTHY FITZGIBBONS

Plaintiffs and Appellants,

v.

LATHAM & WATKINS LLP
and DANIEL SCHECTER,

Defendants and Respondents

Review of a Decision by the Court of Appeal
Second Appellate District, Division Three
No. B244841

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

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WILLIAM PARRISH and
E. TIMOTHY FITZGIBBONS

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v.

LATHAM & WATKINS LLP
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Defendants and Respondents

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, amicus curiae The Association of Southern California Defense Counsel (hereafter ASCDC or Association) submits this application for leave to file the accompanying brief in support of Respondents Latham & Watkins, LLP and Daniel Schecter and respectfully urge this court to affirm the Court of Appeal's decision in *Parrish v. Latham & Watkins LLP* (2015) 238 Cal. App. 4th 81 (opn. superseded by order granting review).

ASCDC is a voluntary bar association comprised of approximately 1,100 attorneys, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC members routinely represent and defend professionals, businesses, civic and religious institutions that provide the goods, services, jobs and investments vital to the country's economic health and prosperity. ASCDC is dedicated to promoting the administration of justice, providing education to the public about the legal system, enhancing the standards of civil litigation and trial practice in this State.

Because ASCDC members often represent attorneys in litigation, the Association is interested in defining the standards of conduct governing the legal profession, shaping the elements and proof of claims against attorneys, and statutes of limitation applicable to those claims. The Association and its members have participated before this court for parties and as amicus curiae in many prior cases, seeking clarification of the plain meaning of Code of Civil Procedure section 340.6—including in recent terms, *Lee v. Hanley* (2015) 61 Cal.4th 1225 and *Beal Bank v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503—and in cases addressing statutory procedures to evaluate the merits of malicious prosecution claims, such as *Jarrow Formulas, Inc. v. LaMarche* (2002) 31 Cal.4th 728.

The Association and its members have been called upon many times to address similar questions of public concern regarding procedural issues and substantive rights relating to professionals who practice in this State. As a voluntary association of practicing attorneys, ASCDC and its members are particularly interested in such matters affecting the legal profession and the practice of law.

No party or other person contributed to the preparation or financing of this amicus curiae brief in support of Respondents apart from ASCDC.

ASCDC and its members have substantial interests in the resolution of the issues pending review concerning proper interpretation of section 340.6, the statute of limitation that governs any "action against [an] attorney" arising in the performance of his or her professional services, and in having the essential elements of malicious prosecution defined in a manner consistent with this court's precedent.

Accordingly, ASCDC respectfully requests leave to file the accompanying brief in support of Respondents.

Dated: May 9, 2016

Respectfully submitted,

BUCHALTER NEMER P.C.
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Robert M. Dato

By:

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

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Defendants and Respondents.

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

ISSUES PRESENTED

(1) Does the denial of former employees' motion for summary judgment in an action for misappropriation of trade secrets conclusively establish that their former employer had probable cause to bring the action and thus preclude the employees' subsequent action for malicious prosecution, even if the trial court in the prior action later found that it had been brought in bad faith?

(2) Is the former employees' malicious prosecution action against the employer's former attorneys barred by the one-year statute of limitations in Code of Civil Procedure section 340.6?

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs in this malicious prosecution action, William Parrish and Timothy Fitzgibbons (collectively, plaintiffs or "the former employees"), were former officers and shareholders of Indigo Systems Corporation, a company that developed and sold microbolometers.[1] {Typed opn. at pp. 3-4} Indigo was purchased by FLIR Systems, Inc. in 2004. {*Ibid.*}

Following FLIR's acquisition of Indigo, the plaintiffs continued to work for FLIR. They left in early 2006, when their contracts expired, to start up their own business outsourcing the manufacture of microbolometers. FLIR retained counsel, Latham & Watkins, LLP and Daniel Schecter, who sued the former employees in Santa Barbara County Superior Court for, among other things, misappropriation of FLIR's trade secrets. {Typed opn. at pp. 4-7} The trial court (Hon. James Brown) denied the former employees' motion for summary judgment. After a bench trial, however, the same judge found that FLIR had brought the trade secrets action in "bad faith," entered judgment in favor of the former employees, and awarded them attorney's fees and costs of $1,641,216.78 as a sanction under the Uniform Trade Secret Act (Civil Code, § 3426.4). Judge Brown's decision was affirmed, including the attorney fee award, and the Court of Appeal additionally awarded plaintiffs their attorney fees on appeal. {*Id.* at pp. 7-10; *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1286}

The former employees then brought this malicious prosecution action against Latham and Schecter in Los Angeles County. The attorneys filed a

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[1] The trade secrets at issue in the underlying litigation involve the manufacture of microbolometers — devices for detecting infrared radiation used in connection with infrared cameras, night vision and thermal imaging. The plaintiffs agreed to assign to Indigo any intellectual property they developed during their employment with the company. {Typed opn. at pp. 3-4; the Court of Appeal's "typed opinion" refers to its second published decision issued on June 26, 2015}

special motion to strike pursuant to California's anti-SLAPP law (a strategic lawsuit against public participation — Code of Civil Procedure Section 425.16)[2] contending, in part, that (1) plaintiffs' action was time-barred by the one-year statute of limitation (Code Civ. Proc., § 340.6); and (2) the denial of the former employees' motion for summary judgment established that the *FLIR* action was brought with probable cause as a matter of law under the "interim adverse judgment rule." The trial court granted the anti-SLAPP motion solely on the statute of limitation ground, but did not expressly address the merits of other arguments. {Typed opn. at pp. 8-10}

The Court of Appeal issued two published opinions: *Parrish v. Latham & Watkins, LLP* (2014) 229 Cal.App.4th 264 (opn. vacated by order granting rehearing, B244841, Sept. 25, 2014) (*Parrish I*) and *Parrish v. Latham & Watkins, LLP* (2015) 238 Cal. App. 4th 81 (opn. superseded by order granting review, S228277, Oct. 14, 2015) (*Parrish II*).

The first decision (*Parrish I*) reversed the anti-SLAPP dismissal, holding that the applicable statute of limitation for malicious prosecution claims was not the one-year period set forth in section 340.6, but rather the two-year limitation set forth in Code of Civil Procedure section 335.1; as such, the plaintiffs' claim was not untimely. {*Parrish I*, *supra*, 229 Cal.App.4th at p. 277; cf. typed opn. at pp. 11-12} The court also addressed the second issue on the merits and concluded the interim adverse judgment rule would not apply because, in part, Latham had "sought an obviously anti-competitive injunction based on the speculative possibility that the [plaintiffs'] product might violate [FLIR's] trade secrets...." and that when plaintiffs presented evidence to Latham that there was no actual misappropriation of the business plan at issue, Latham changed the theory of

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[2] *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1 (*Jarrow Formulas*).

the case to pursue a claim that the plaintiffs could not effectuate the business plan without using FLIR's intellectual property. The Court of Appeal initially held that the plaintiffs had established a reasonable probability of prevailing on the element of lack of probable cause, and based on that rationale, reversed the trial court's order granting Latham and Schecter's anti-SLAPP motion. {*Parrish I*, *supra*, 229 Cal.App.4th at pp. 279-282}

The attorneys filed a petition for rehearing which was initially denied on September 19, 2014. But then, on the court's own motion, rehearing was granted on September 25, 2014. On June 26, 2015, the Court of Appeal issued its second decision (*Parrish II*), this time affirming the order granting the attorneys' anti-SLAPP motion on the ground that the "interim adverse judgment rule" established Latham and Schecter had probable cause to bring the action.[3] The court held that exceptions to the interim adverse judgment rule did not apply in this case because (1) the summary judgment motion was not denied on procedural or technical grounds and (2) the summary judgment motion was not obtained by fraud or perjury. {Typed opn. at pp. 17-22; compare *Parrish I*, *supra*, 229 Cal.App.4th at pp. 278-281 with *Parrish II*, *supra*, 238 Cal.App.4th at pp. 97-102}

The plaintiffs had argued below that the trial court's statement in the underlying *FLIR* action, to the effect that the "former employees failed to sustain their burden of proof on the motion," established the motion was denied merely on "technical grounds" which would not trigger the interim adverse judgment rule. The Court of Appeal disagreed, reasoning that the party moving for summary judgment bears the ultimate burden of persuasion to establish there is "no triable issue" of material fact. The existence of that

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[3] The Court of Appeal declined to revisit its earlier holding that the two-year statute of limitation of section 335.1, as opposed to the one-year limitation period of section 340.6, governed a third party's action for malicious prosecution against attorneys. {Typed opn. at p. 12}

"triable" issue demonstrated that there was sufficient probable cause for the FLIR action to proceed — negating an essential element of this malicious prosecution claim. {Typed opn. at pp. 11-12}

Alternatively, the plaintiffs argued the trial court's award of Uniform Trade Secret Act attorney fees (a form of litigation sanctions) based on a finding of bad faith should operate as an exception to the interim adverse judgment rule. The Court of Appeal disagreed with that argument as well, holding that simply because a trial court or a jury later rejects a party's claim at the time of trial, after weighing the competing evidence, does not negate other evidence which, standing alone establishes the existence of probable cause. {Typed opn. at pp. 12-14, 17-21}

This court granted review of the "Issues Presented" by both sides. ASCDC addresses those issues in reverse order.

SUMMARY OF ARGUMENT

The Court of Appeal rejected the one-year statute of limitation of section 340.6 governing "an action against an attorney" as a basis for affirming dismissal of the former employees' malicious prosecution action under the anti-SLAPP statute. {Typed opn. at p. 1} This court's more recent decision in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 (*Lee*) is dispositive of the question of whether section 340.6 applies to third party malicious prosecution claims, and the trial court's order of dismissal under the statute of limitation supports affirmance on that ground. (*D'Amico v. Board of Medical Examiners* (1970) 11 Cal.3d 1, 19 ["a ruling or decision, itself correct in law [on any valid ground], will not be disturbed on appeal"].)

Because the statute of limitation independently justifies the order granting the anti-SLAPP motion, there is no need to revisit the "interim adverse judgment" rule in malicious prosecution cases as advocated by the former employees. Even that were not so, the rule was correctly articulated

and applied by the Court of Appeal. (See typed opn. at pp. 14-22.) The ostensible "policy" arguments offered by the former employees are not persuasive to warrant additional exceptions to this longstanding doctrine.

ARGUMENT

A. Code of Civil Procedure Section 340.6's One-Year Statute of Limitation Applies to a Third Party Action for Malicious Prosecution Against an Opposing Litigant's Attorney

As relevant to this case, section 340.6, subdivision (a) provides in part: "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." (Emphasis added.)

The Legislature enacted section 340.6 in 1977 to address *any* claim of attorney-misconduct brought by "the plaintiff" arising in the performance of professional services. According to this court's most recent examination of section 340.6's legislative history in *Lee*, and regardless of whether "the plaintiff" is a client or a third party adversary: "The Legislature enacted the statute so that the applicable limitations period for such claims would turn on the conduct alleged and ultimately proven, not on the way the complaint was styled. (See *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121-1122 ... (*Prakashpalan*) [§ 340.6(a) applies to a breach of fiduciary duty claim]; *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 195-196 [same for malicious prosecution]; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881-883 [same for malicious prosecution].)" (*Lee*, *supra*, 61 Cal.4th at p. 1234, brackets in original text, internal citations omitted.)

"As in all cases of statutory interpretation, [courts] begin with the

language of the governing statute. ... [Their] role in interpreting it is 'to divine and give effect to the Legislature's intent.'" (*Beal Bank v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 507-508 (*Beal Bank*), internal citations omitted; accord *Lee*, *supra*, 61 Cal.4th at pp. 1232-1233.) When a statute is unambiguous, the plain meaning of its language controls. (*Id.*; *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911 ["If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs"].)

The same words should be accorded the same meaning consistently throughout the statute. (E.g., *People v. McCart* (1982) 32 Cal.3d 338, 344 ["When a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout"]; *Hoag v. Howard* (1880) 55 Cal. 564, 565 ["examining the provisions of a statute in order to ascertain its meaning, every part of it must be looked to, and where a word or clause is found repeatedly used in it, it will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended"].)

The use of the connective phrase "arising from," "arising in," or "arising out of" "*broadly links* a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." (*Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 328, emphasis added.)

Thus, when evaluating claims *arising out of* certain conduct or events (here, "professional services"), the all-encompassing language chosen by the Legislature has "broader significance and connotes more than causation"; it means "incident to, or having connection with." (*Davis v. Farmers Ins. Group* (2005) 134 Cal.App.4th 100, 107; *Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 806 [contract

excluded claims for '"professional services," broadly defining such services as "*arising out of* a vocation, calling, occupation or employment involving specialized knowledge, labor or skill"] (emphasis added); accord, *Allstate v. Interbank Fin. Services* (1989) 215 Cal.App.3d 825, 831.)

The Legislature chose two broad connecting phrases when it enacted the statute of limitations that specifically deals with an "Action Against Attorney": Section 340.6 applies to such actions, except those for actual fraud, brought against an attorney "for a wrongful act or omission" which arise "in the performance of professional services." (*Vafi*, *supra*, 193 Cal.App.4th at pp. 881-883, citing § 340.6, subd. (a); *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 431 [applying section 340.6 to "breach of contract" cause of action], overruled on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617 (*Laird*); see also *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805 ["unconscionable fees"].)

Historically, based upon "this plain language," the California courts have rejected the notion that section 340.6 only means "legal malpractice" when it refers to "a wrongful act or omission"—such a narrow interpretation is belied by the actual words used by the statute. (See *Vafi*, 193 Cal.App.4th at p. 882; *Lee*, *supra*, 61 Cal.4th at pp. 1235-1236.) Had the Legislature intended to limit the broad reach of section 340.6 *only* to legal malpractice actions between clients and attorneys based upon "negligence" principles, it could easily have done so. (*Ibid.*; *Vafi*, 193 Cal.App.4th at pp. 882-883; see, e.g., Code Civ. Proc., § 340.5 ["Professional Negligence Against Health Care Provider"].) It did not do so when enacting section 340.6. (*Lee*, *supra,* 61 Cal.4th at pp. 1234-1236.)

As this court recently noted in *Flores v. Presbyterian Intercommunity Hospital* (May 5, 2016, No. S209836) ___ Cal.4th ___, 2016 Cal. LEXIS 2561, the phrase "wrongful act or omission .... arising in the performance of

professional services" is not limited to negligent acts; section 340.6 more broadly encompasses "*all forms of attorney misconduct*, except actual fraud, that occur during the attorney client-relationship or entail violation of a professional obligation. (*Lee*, *supra*, 61 Cal.4th at p. 1238.)" (*Flores*, *supra*, ___ Cal.4th ___, 2016 Cal. LEXIS 2561 at p. *21, emphasis added.)

By parity of reasoning, given that section 340.6 broadly includes "an action against an attorney" brought by a "plaintiff," those broad terms cannot plausibly be construed to mean only actions by the narrower class of claimants who are among "clients" the attorney may represent. Section 340.6 does not by its language explicitly limit the broad application to "clients" or to claims for "legal malpractice." And both *Vafi* and *Yee*, in applying the one-year time limit to actions for malicious prosecution by adversary litigants, aptly rejected the constricted interpretation being advanced by plaintiffs here and in the Court of Appeal. (*Yee*, *supra*, 220 Cal.App.4th at pp. 195-196; *Vafi*, *supra*, 193 Cal.App.4th at pp. 881-883; see *Lee*, *supra*, 61 Cal.4th at pp. 1236 [citing *Yee* and *Vafi* with approval].)

In the intervening four decades since California adopted section 340.6 to govern the time limits on such actions against attorneys, two reported decisions described the limitation period as applying *only* to "legal malpractice" or "professional negligence" claims; both were expressly disapproved in *Lee*. The same division of the Court of Appeal which decided this case had narrowly interpreted section 340.6 in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 677 (*Roger Cleveland Golf*), and the appellate panel in *Lee* followed its same reasoning.[4]

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[4] The perceived "conflict" on this point might have been avoided entirely—*Roger Cleveland Golf* (like this case) arose in the context of anti-SLAPP screening. The Court of Appeal in that case held dismissal was required because the plaintiff "did not make the minimal evidentiary showing of malice" necessary to demonstrate a probability of prevailing on the merits. (*Roger Cleveland Golf*, *supra*, 225 Cal.App.4th at p. 668.)

Roger Cleveland Golf suggested its conclusion was bolstered by the rationale that the Legislature must have intended symmetry in the application of a *two-year* statute of limitation against attorneys; otherwise, their clients would be subject to a longer time limit under section 335.1.[5] On the contrary, the Legislature may decree that different statutory time limits are applicable to different defendants based on the same or similar liability claims. (See, e.g., *Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 717-718 [different statutes of limitation for negligent tax advice, and different accrual rules, may apply depending on whether a client's claims are brought against accountants or attorneys]; cf. *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 628-632 (conc. & dis. opn. of Kennard, J) [contrasting different time limits and accrual rules for professional liability claims].)

A few weeks before *Lee* was decided, the Court of Appeal in this case held: "[S]ince we have no cause to reverse our holding in *Roger Cleveland Golf*, the trial court's rationale for granting the anti-SLAPP motion is no longer viable." {Typed opn. at p. 12} Today, there is ample "cause" to reflect on the correctness of that view.

Lee disagreed with *Roger Cleveland Golf*'s interpretation of the statute and the legislative history: "Our holding today is in tension with statements in *Roger Cleveland Golf Co. Inc. v. Krane & Smith, APC, supra,* 225 Cal.App.4th 660, 677 [reading § 340.6(a) "as a professional negligence statute"] ..." (*Lee*, *supra*, 61 Cal.4th at p. 1239, disapproving *Roger Cleveland Golf*; accord *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 819 (following *Vafi* and *Yee*, and rejecting *Roger*

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[5] According to the Court of Appeal's opinion: "The statute of limitations for malicious prosecution is two years (§ 335.1), irrespective of whether the defendant is a former adversary or the adversary's attorney." (*Roger Cleveland Golf*, *supra*, 225 Cal.App.4th at p. 689, disapproved by *Lee*, *supra*, 61 Cal.4th at p. 1239.)

Cleveland Golf, holding that section 340.6 rather than section 335.1 applies to malicious prosecution claims against "attorney-defendants").

Neither the label on the cause of action nor the status of "the plaintiff" who brings the action is determinative under section 340.6. The proper test after *Lee* for the application of section 340.6 is this:

> [W]e conclude that section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.

(*Lee*, *supra*, 61 Cal.4th at pp. 1237-1238.)

The former employees' present malicious prosecution action meets the *Lee* test for applying section 340.6. Like *Lee*, as this court observed in *Jarrow Formulas* when broadly interpreting the "arising from" prong of the anti-SLAPP statute, "section 425.16 potentially may apply to every malicious prosecution action [brought against any opposing party or that party's attorneys], because every such action arises from an underlying lawsuit, or petition to the judicial branch. By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit." (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 734-735.)

Just as the cause of action for malicious prosecution "arises from" the lawyers' constitutionally-protected petition activity within the meaning of

section 425.16 (*Jarrow Formulas*, *supra*, 31 Cal.4th at p. 735), "filing or maintaining" the prior litigation on behalf of their clients likewise "arises in" and, thus, is part and parcel of the attorney's performance of "professional obligations." (*Ibid.*; cf. *Lee*, *supra*, 61 Cal.4th at pp. 1237-1238; see also *Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1138 (conc. & dis. opn. of Rothschild, P.J.) ["Plaintiffs filed suit more than 14 years after the ... [attorneys'] wrongful act or omission"]; *Vafi*, *supra*, 193 Cal.App.4th at p. 883 ["there is no dispute that the conduct at issue arose from [defendant-attorneys'] performance of their professional services to Keller [their client] in the federal trademark action"].) [6]

Plaintiffs' fallback argument—that *Lee's* dispositive interpretation of section 340.6 should not apply "retroactively" to their malicious action—is a non sequitur. {OBM at p. 33, 39} The plain meaning of the statute was applied to third party actions against attorneys, including malicious prosecution claims, in the almost 40 years before the Court of Appeal in *Roger Cleveland Golf* (and again in this case) parted company with prior reported decisions. The law did not "change." {ABM at pp. 53-56}

The "equitable tolling" component of their alternative argument also cannot pass muster under the statute. {OBM at p. 41 [urging adoption of a "discovery rule"]} "[S]ection 340.6 reflects the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims." (*Beal Bank*, *supra*, 42 Cal.4th at p. 512.) The statute's four enumerated tolling

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[6] *Jarrow Formulas* rejected any notion that "malicious prosecution claims, which by definition are based on filing or maintaining actions without probable cause, should not be eligible for anti-SLAPP protection" merely because plaintiff questions the "validity" of that action or the defendant's motives in pursuing in it. (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 734.) The same is true when analyzing malicious prosecution claims "arising in" the performance of the same "professional obligation" under section 340.6.

provisions are exclusive; any additional judicially-created exceptions "would significantly undermine the Legislature's overall purposes in adopting section 340.6." (*Ibid.*; *Laird v. Blacker, supra,* 2 Cal.4th at pp. 610-611.)

Even the disapproved *Roger Cleveland Golf* opinion rejected equitable tolling. Indeed, that was ostensibly one of the reasons why the Court of Appeal deemed it inequitable to apply section 340.6 to malicious prosecution actions: "Because section 340.6, subdivision (a) appears to exclude tolling in these circumstances, we respectfully disagree with [*Vafi v. McCloskey* (2011) 193 Cal.App.4th 874] and *Yee v. Cheung* (2013) 220 Cal.App.4th 184." (*Roger Cleveland Golf, supra*, 225 Cal.App.4th at p. 668.)

The time for commencement of a malicious prosecution action accrues when the "underlying action" is dismissed or judgment is entered by the trial court. (*Yee*, *supra*, 220 Cal.App.4th at p. 193; *Vafi*, *supra*, 193 Cal.App.4th at p. 883 [malicious prosecution "lawsuit was filed almost two years after the trademark action was dismissed, it is time-barred"].) Here, the underlying FLIR action went to trial in December 2007 resulting in the Santa Barbara Superior Court's statement of decision and the judgment on the cross-complaint awarding fees and costs. {ABM at p. 14; 1 AA 92, 107-117} That judgment was affirmed after appeal on June 14, 2009. (*FLIR Systems*, *supra*, 174 Cal. App. 4th 1270.)

This lawsuit was commenced against the attorneys on April 6, 2012 {1 AA 1}, over four years after judgment, and almost 30 months after the remittitur issued on appeal. {ABM at p. 15} Parrish's action was barred by section 340.6.

B. The "Interim Adverse Judgment" Rule Negates an Essential Element of This Malicious Prosecution Action

The Court of Appeal correctly held that the interim adverse judgment rule negated an essential element of this malicious prosecution action—lack of probable cause. Its decision relied principally upon that doctrine articulated by this court in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811 (*Wilson*). {See typed opn. at pp. 3, 14-21}

As the Court of Appeal explained: "Malicious prosecution has long been considered a disfavored tort both because of 'its "potential to impose an undue 'chilling effect' on the ordinary citizen's willingness ... to bring a civil dispute to court" and because, as a means of deterring excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself.'" (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1018 (*Paiva*); *Wilson, supra,* 28 Cal.4th at p. 817[.]" {Typed opn. at pp. 13-14}

Consequently, "the elements of [malicious prosecution] have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel*).)

An essential element of malicious prosecution requires proof that the underlying action "lacked probable cause." This presents a legal question for the court to decide: "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 (*Roberts*), citing *Cowles v. Carter* (1981) 115 Cal.App.3d 350, 355-359 [describing the "rule that 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"].) "The rationale is that approval by the

trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable. (*Cowles*, *supra*, at p. 358.) To put it differently, success at trial shows that the suit was not among the least meritorious of meritless suits, those which are totally meritless and thus lack probable cause." (*Roberts*, *supra*, 76 Cal.App.4th at p. 383.)

Likewise, under the interim adverse judgment rule, "[d]enial of a defendant's summary judgment motion provides similarly persuasive evidence that a suit does not totally lack merit." (*Roberts*, *supra*, 76 Cal.App.4th at p. 383; see also *id.* at p. 384 ["Because denial of summary judgment is a sound indicator of probable cause, it is sensible to accept it as establishing probable cause defeating a later malicious prosecution suit. Doing so serves the policy expressed in *Sheldon Appel* to discourage dubious malicious prosecution suits"].) {Cf. typed opn. at pp. 15-18}

As *Wilson* stated, "[d]enial of a defense summary judgment motion on grounds that a triable issue exists, or of a nonsuit, while falling short of a determination of the merits, establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict." (*Wilson, supra,* 28 Cal.4th at p. 824.) That is, "[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.' [Citation.] Giving effect to this conclusion 'serves the policy expressed in *Sheldon Appel* to discourage dubious malicious prosecution suits.'" (*Id.* at p. 819, first italics added, abrogated by statute on another ground, as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527,

547.)" {Typed opn. at p. 16}[7]

There are exceptions to the interim adverse judgment rule regarding pretrial rulings—the Court of Appeal discussed them {typed opn. at p. 17}:

> [I]f the interim ruling was obtained by fraud or perjury, the ruling does not establish probable cause. (*Wilson, supra,* 28 Cal.4th at pp. 817, 820.) Fraud or perjury in this sense is not established simply by showing the plaintiff or attorney discounted adverse evidence in the underlying action. An "attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim." (*Id.* at p. 822.) "[T]he fraud exception requires '"knowing use of false and perjured testimony."'" (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 452.)

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[7] *Hutton* digested the legislative history of the 2005 amendment to section 425.16, subdivision (b)(3) (Stats. 2005, ch. 535 (A.B.1158) § 1, eff. Oct. 5, 2005) in which the Legislature declined to give the same "probable cause" effect to denial of a screening-motion under the anti-SLAPP statute:

> "(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, *or in any subsequent action* ...." (Emphasis added.)

The interim adverse judgment rule otherwise remained unchanged: "Nothing in the 2005 amendment to section 425.16, subdivision (b)(3) changes the well-established rule of law applicable to a malicious prosecution complaint that the denial of a summary judgment motion in the underlying action establishes probable cause to file that lawsuit." (*Hutton, supra*, 150 Cal.App.4th at p. 550; see also *id.* at pp. 545-550, noting this "narrow abrogation" of *Wilson* did not affect denial of summary judgment.)

According to the Court of Appeal, former employees did not contend that "Latham obtained this ruling through fraud or perjury" so that exception does not apply here. {Typed opn. at p. 18} The parties apparently dispute this conclusion {cf. OBM at pp. 2; ABM at pp. 17-18}; it is of no moment.

Using this court's definition of probable cause, clients and their counsel '"have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious." (*Wilson, supra,* 28 Cal.4th at p. 822, citing *Sheldon Appel, supra,* 47 Cal.3d at p. 885.) ... [T]he 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. "A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, *even if also aware of evidence that will weigh against the claim.* 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,* at p. 822, italics added.)"' {Typed opn. at pp. 21} The risk that evidence might not prevail is not fraud or perjury.

Indisputably, plaintiffs *did* maintain on appeal that the trial court's reason for denial of summary judgment in the underlying FLIR action — "[Former Employees] failed to sustain their burden of proof on the motion" — amounted merely to a *technical ground* which should not trigger the interim adverse judgment rule. {Typed opn. at pp. 18-19} (See *Wilson, supra,* 28 Cal.4th at p. 823.) The Court of Appeal disagreed, stating specific grounds for that conclusion based upon the *conflicting evidence*:

> As our Supreme Court stated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, "the party moving for

summary judgment bears the [ultimate] burden of persuasion that there is *no triable issue of material fact* and that he is entitled to judgment as a matter of law." (Italics added.) Former Employees sought to meet that burden by demonstrating the new business plan was based on a prior business plan Fitzgibbons prepared in 1999, as opposed to the 2004 plan Former Employees developed at Indigo and presented to FLIR. As the trial court noted in its written ruling, FLIR disputed this contention in opposing summary judgment by citing the purportedly different business plans, while arguing the plans were substantively the same. [Fn omitted.] Consistent with that contention, the trial court concluded, after comparing the 1999, 2004 and new business plans, that it was "unable to find as a matter of law ... that [FLIR] own[s] none of the concepts for [Former Employees'] 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." Though the court framed its conclusion in terms of Former Employees' failure to sustain their burden as the moving party, the necessary implication of the court's ruling is that the evidence raised a triable issue of material fact. (See *Aguilar,* at p. 850.) *This is not a "technical ground," but rather an acknowledgement that FLIR's claim had some conceivable merit.* (*Wilson, supra,* 28 Cal.4th at p. 823.)

{Typed opn. at pp. 18-19, emphasis added}[8]

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[8] A purely "technical or procedural ground" for avoiding summary judgment might include the moving defendant's failure to secure proper

Simply put, former employees are seeking recognition of a "bad faith" exception to the interim adverse judgment rule. {Typed opn. at pp. 19-22; OBM at pp. 3-4, 26-27: "[Latham] initiated and prosecuted in subjective and objective bad faith"]} They contend that further circumscribing the rule is necessary to advance the policy of free competition, and discourage pursuit of non-meritorious "trade secrets" claims against former employees by employers and their attorneys. {See typed opn. at p. 20; cf. Petition at p. 8; OBM at pp. 9, 27} The Court of Appeal was skeptical about the need to craft this additional exception. This court should be as well.

Former employees rely principally upon *Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306 (*Slaney*) in asserting that the doctrine does not apply in these circumstances. {Typed opn. at p. 19} *Slaney*, an insurance bad faith case, declined to apply the rule after the trial court denied summary judgment on the insurer's cross-complaint for insurance fraud. At trial, the jury rejected that claim and ruled in favor of the insured, finding that coverage was denied in bad faith and with actual malice. {*Id.* at pp. 19-20}

In light of the procedural history of this case, the Court of Appeal found *Slaney* "difficult to square with the interim adverse judgment rule's core principles as articulated in *Wilson*." {Typed opn. at pp. 20-21} It is.

The strict requirements for pleading and proving "[t]he elements of the common law malicious-prosecution cause of action have evolved over time as an appropriate accommodation between the freedom of an individual

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declarations from witnesses with personal knowledge, or other sufficient evidentiary foundation to support dismissal of the claims on the "merits." (*Wilson*, *supra*, 28 Cal.4th at p. 823; ABM at p. 27.) Or perhaps opposing arguments that did not bear on the *merits* of the claims in issue; such as, "equitable tolling" of the statute of limitation. (See, e.g., *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399 [favorable termination requires a hearing of the "merits" demonstrating "innocence"].)

to seek redress in the courts and the [competing] interest of a potential defendant in being free from unjustified litigation." (*Crowley v. Katleman* (1994) 8 Cal. 4th 666, 693, internal citation omitted.)

Balancing these interests, the California courts and Legislature have recognized: "A preferable approach is 'the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself.'" (*Wilson, supra,* 28 Cal.4th at p. 817; see also typed opn. at p. 13; accord *Rubin v. Green* (1992) 4 Cal.4th 1187, 1197 ["litigants may invoke a range of remedies, some recently made available by the Legislature ... For the plaintiff in this case, potential remedies include the recovery of attorney fees and costs"—describing available statutory remedies to a landlord for pursuit of *allegedly* frivolous litigation by mobile home park tenants]; *id.* at p. 1199.)

For example, in *Sheldon Appel, supra,* 47 Cal.3d 863, the court unanimously endorsed the proposition that "in recent years ... the large volume of litigation filed in American courts has become a matter of increasing concern ...." (*Id.* at p. 872.) After canvassing the arguments supporting restrictions on the use of the malicious prosecution tort as a means in favor of controlling excessive litigation and those against, *Sheldon Appel* concluded that "the most promising remedy for excessive litigation does not lie in an expansion of malicious prosecution liability." (47 Cal.3d at p. 873; see also *Rubin v. Green, supra*, 4 Cal.4th at p. 1197.) Particularly the expansion of cumulative, and wholly unnecessary tort "remedies" urged by the former employees as a means to curb the perceived evils of supposedly unjustified trade secrets litigation.

In this, as in many similar contexts, "there are existing and effective nontort remedies for this problem." (*Cedars-Sinai Medical Center v. Superior Court* (1999) 18 Cal.4th 1, 5, 13.) Moreover, while the award of

attorney fees under the Uniform Trade Secrets Act (Civ. Code, § 3426.4.) is not mutually exclusive of a tort claim for malicious prosecution, neither does that statutory remedy "establish" lack of probable cause to sue, as the former employees apparently contend in this action. {Cf. typed opn. at pp. 19-22; OBM at pp. 3-4} The present case well illustrates these related principles.

Judge Brown eventually ruled *after* trial in the underlying action that FLIR filed and maintained the claim in bad faith, thereby warranting an attorney fee sanction under the UTSA. However, "[t]hat conclusion is not inconsistent with the existence of probable cause or the [same] court's prior ruling denying summary judgment. ... [¶] As the trial court explained in its statement of decision, "[Former Employees'] request for a finding of bad faith was not at issue on the motion for summary judgment," and "[t]he Court had not heard all the evidence or considered witness credibility" when it denied the [summary judgment] motion." {Typed opn. at p. 22}

"Bad faith" and "lack of probable cause" under these circumstances *are not* functional equivalents. Frivolous or malicious intent *is not* required to impose the UTSA fee award. (Further distinguishing *Slaney*; cf. *Wilson*, *supra*, at p. 822.) And the "policies" that plaintiffs argue support an additional "tort" remedy have already been taken into account by the legislated remedy—in this case, resulting in significant attorney fee awards totaling over $1.6 million to the former employees in the trial court *plus* more fees and costs on appeal. (*FLIR Systems, Inc. v. Parrish*, *supra*, 174 Cal.App.4th at p. 1276 ["the word "frivolous" does not appear in section 3426.4"]; see also *id.* at pp. 1284-1285 [there is "no California authority that the denial of a summary judgment motion in a trade secret case precludes the trial court from finding [under the UTSA], after it has heard all the evidence, that the action was brought or maintained in bad faith"]; typed opn. at p. 22}

The magnitude of this fee award would doubtlessly provide strong disincentives to anyone who might be inclined to pursue doubtful claims for anti-competitive reasons or any other impermissible purpose. (*Cedars-Sinai*, *supra*, 18 Cal.4th at p. 13; *Rubin v. Green*, *supra*, 4 Cal.4th at p. 1197.)

Conversely, adding derivative tort liability to such already "extensive and apparently effective" statutory deterrents under the UTSA (cf. *Cedars-Sinai*, *supra*, at p. 13) by diminishing the stringent requirement for proving lack of probable cause in the follow-on lawsuit only serves to frustrate the policy of encouraging judicial resolution of disputes. That high hurdle of proof is a hallmark of this court's malicious prosecution jurisprudence during the past quarter-century since *Sheldon Appel*. Unlike the USTA standard for a "bad faith" fee award, objectively "frivolous" litigation conduct *is the test* required to demonstrate lack of probable cause under *Sheldon Appel*. (47 Cal.3d at pp. 872-873, 886; *Wilson*, *supra*, 28 Cal.4th at pp. 817, 822.)

Applying the interim adverse judgment rule to the denial of a pretrial summary judgment motion, as occurred in this case, the courts have aptly said: "The question, therefore, is whether [the malicious prosecution plaintiff] is *so absolutely correct* that *no reasonable attorney* would have thought otherwise." (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 67 (*Hufstedler*), emphasis added.)

When a reasonable trial judge has found "triable issues" of material fact should compel the case to proceed to trial, the answer is invariably "no." (*Hufstedler*, *supra,* 42 Cal.App.4th at pp. 67-69; accord *Roberts*, *supra*, 76 Cal.App.3d at pp. 383-384 [summary judgment denial]; *Hutton*, *supra*, 150 Cal.App.4th at pp. 545-550 [anti-SLAPP motion granted where summary judgment was denied in the underlying action, because even though plaintiff eventually prevailed, the interim adverse judgment rule applied—following *Wilson* and *Roberts*]; *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1037

[defendant prevailed on patent claims before the Patent Board of Appeals, but federal courts ultimately rejected them as "untrue"—trial court was instructed to grant anti-SLAPP motions in malicious prosecution action against defendant and his patent lawyer, again following *Wilson/Roberts*].)

According to the former employees, FLIR (assisted by their lawyers) pursued non-meritorious trade secrets claims in bad faith. The former employees were awarded substantial seven-figures for their attorney fees and costs in the underlying action. That outcome is consistent with this court's teachings "that the *original litigation itself provides an efficient forum* in which to 'expos[e] during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result.'" (*Rubin v. Green*, *supra*, 4 Cal.4th at p. 1203, emphasis added.)

There comes a time when all things, including litigation, must reach a logical end. The Legislature enacted a statutory remedy under the UTSA that *worked* as intended in handling the perceived "problem" of non-meritorious trade secrets claims. The fee award does not justify abrogating the interim adverse judgment rule or engrafting new "exceptions" on the doctrine.

Just the opposite; no legitimate purpose is served on this record by expanding litigation-related torts. (*Rubin v. Green*, *supra*, 4 Cal.4th at p. 1199 ["preferring instead the increased use of sanctions within the underlying lawsuit and legislative measures" including fee awards].)

CONCLUSION

The Court of Appeal ultimately affirmed dismissal of this malicious prosecution under the anti-SLAPP statute based upon the interim adverse judgment doctrine. Consistent with this court's recent interpretation of section 340.6 in *Lee v. Hanley*, it also might have done so by applying the one-year statute of limitation.

On either ground, or both, the decision should be affirmed.

Dated: May 6, 2016

Respectfully submitted,

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WORD COUNT CERTIFICATION [CRC 8.204(c)]

Counsel for ASCDC certifies that the Application for Leave to File Amicus Brief contains 442 contains and their accompanying Amicus Curiae Brief in Support of Respondents contains 6,879 words, including footnotes, for a total of 7,321 words as measured by the Word 2010 word processing software used in the preparation of the application and the brief.

Dated: May 9, 2016

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PROOF OF SERVICE BY MAIL
(State of California)

I am over the age of 18 and not a party to the within action. I am employed in the County of Los Angeles, State of California with my office located at 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017.

On the date set forth below, I served the within document(s) entitled:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

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

Executed this 9th day of May 2016 at Los Angeles, California.

HARRY W.R. CHAMBERLAIN II

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