SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

TROY ISOM, an individual; SHIRLEY ISOM, an individual; and SHIRLEY ISOM CONSTRUCTION, INC., a California Corporation

Plaintiffs,

vs.

MILLER MILLER & MENTHE, LLP, a California Limited Liability Partnership; DARREL C. MENTHE, an individual; and DOES 1 to 25 inclusive,

Defendants.

Case No. BC520564
Judge: Honorable Soussan G. Bruguera

[~~PROPOSED~~] ORDER DENYING DEFENDANTS' SPECIAL MOTION TO STRIKE

Hearing:
Date: May 27, 2014
Time: 10:00 p.m.
Dept.: 71

Action Filed: September 6, 2013
Trial Date: None set

~~[PROPOSED]~~ ORDER

Defendants Miller Miller & Menthe, LLP ("MMM") and Darrel C. Menthe ("Menthe") (collectively "Defendants") move to strike the verified first amended complaint for malicious prosecution filed by Plaintiffs Troy Isom ("Troy"), Shirley Isom ("Shirley"), and Shirley Isom Construction, Inc. ("SIC") (collectively "Plaintiffs"), pursuant to C.C.P. §425.16.

Only a complaint that satisfies "*both* prongs" of section 425.16, i.e., arises from protected activity and lacks "minimal merit," is subject to being stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Malicious prosecution claims by their very nature arise out of protected petitioning activity and are, therefore, subject to section 425.16. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal 4th 728.) However, Plaintiffs have established more than the required "minimal merit" to defeat a special motion to strike. In summary, as to each element of the cause of action for malicious prosecution:

(1) **Favorable termination:** Plaintiffs presented at least seven independent grounds from which a jury could reasonably infer the underlying lawsuits were dismissed by Defendants to avoid a trial on the merits;

(2) **Probable Cause:** Plaintiffs set forth at least fourteen legal basis for why causes of action in the underlying lawsuits lacked probable cause; and,

(3) **Malice:** Plaintiffs produced at least ten items of evidence from which a jury could reasonably infer malice.

In determining whether Plaintiffs have satisfied their burden of showing that their complaint has at least "minimal merit," this court does "not weigh the evidence, but accepts as true all evidence favorable to the plaintiff." (*Consumer Justice Center v. Trimedica International. Inc.* (2003) 107 Cal.App.4th 595, 604.) Under this standard, as discussed below, Defendants' motion must be denied.

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Ruling on Objections:

- Defendants' 10/23/13 request for judicial notice is granted. However, the Court will not take judicial notice of the truth of the matters asserted within the notice of ruling and reply briefs. (RJN, Exhibits 2-4).
- Plaintiffs' 1/8/14 evidentiary objections are overruled.
- Defendants' 1/14/14 evidentiary objections are sustained as to Nos. 1, 2, 3 (in part),[1] 4, and 5.
- Plaintiffs' 1/17/14 supplemental evidentiary objections are overruled as to Nos. 7 and 11, and sustained as to Nos. 8, 9, and 10.

In reviewing the motion, this Court did not consider any evidence to which objections have been made and sustained.

Analysis of Motion:

A. Protected Activity

Under C.C.P. § 425.16, a defendant moving to strike the complaint must prove the complaint arises from constitutionally protected activity; whereupon the burden shifts to the plaintiff to show a probability of prevailing in the litigation. (See *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal. App. 4th 141, 151. See also *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Defendants made a prima facie showing that Plaintiffs' verified first amended complaint for malicious prosecution arises from protected activity. The sole cause of action for malicious prosecution is based upon Defendants' alleged acts of filing, prosecuting, and maintaining the Gamut Action *(Gamut Construction Company, Inc. v. Isom, et al.* (KC063680)) and Bella Action *(Bella Piazza, LLC v. Isom, et al.* (KC064781)). (FAC 78-24). "It is beyond dispute the filing of a complaint is an exercise of the constitutional right of petition and falls under section 425.16." (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal. App. 4th 1118, 1125.) Likewise, the statute also protects statements and writings

[1] No. 3 is sustained only as to the following language: "In other words, Mark's own personal attorney did not feel that Mark had authority to act alone in deciding to retain counsel for litigation involving the corporation."

made in connection with litigation. (*Gene Thera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 907.) Moreover, malicious prosecution claims by their very nature arise out of protected petitioning activity. (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal 4th 728 and *('havez v, Mendoza* (2001) 94 Cal.App.4th 1083, 1087-1090.)

Based on the foregoing, Defendants met their burden of showing Plaintiffs' verified first amended complaint for malicious prosecution arises from constitutionally protected activity. Therefore, the burden shifts to Plaintiffs to demonstrate a probability of prevailing in the litigation.

B. Probability of Prevailing

"After the defendant satisfies the first step, the burden shifts to the plaintiff to demonstrate there is a reasonable probability he or she will prevail on the merits at trial. In this phase, the plaintiff must show both that the claim is legally sufficient and there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. In making this assessment, the court must consider both the legal sufficiency of and evidentiary support for the pleaded claims, and must also examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses. In considering whether a plaintiff has met those evidentiary burdens, the court must consider the pleadings and the evidence submitted by the parties. However, the court cannot weigh the evidence but instead must simply determine whether the plaintiff's evidence would, if credited, be sufficient to meet the burden of proof." (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108 (Citations Omitted).)

"To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice." (*Soukup v. Law Offices of Herbert Hafif (2006)* 39 Cal.4th 260, 292.)

(1) Legal Termination Favorable to Plaintiffs[2]

The evidence before the Court shows Defendants voluntarily dismissed the Gamut and Bella Actions. (Declaration of Menthe, ¶¶31, 45; Declaration of Dagrella, ¶¶3, 28). "A voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury." (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400.)

Defendants argue the voluntary dismissals do not reflect on the merits of the Gamut and Bella Actions and Plaintiffs' innocence of the misconduct alleged in the lawsuits because Plaintiffs conceded the current derivative actions are a mere continuation of the Gamut and Bella Actions and involve identical substance, the "substance of the underlying litigation remains pending," and the decision to pursue the derivative actions had to do with the proper form of the action, not the merits.[3] Defendants contend the Gamut and Bella Actions were "dismissed and re-filed because Mischelynn declined to authorize Gamut to sue her parents and Troy Isom declined to authorize Bella to sue him and his wife." (Motion, pgs. 10-11; Declaration of Menthe, ¶¶29-31, 44-45; see *Contemporary Services Corporation v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056-1057[4]; see also *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592 [termination of the underlying litigation for lack of standing did not constitute a favorable termination on the merits] and *Robbins v. Blecher* (1997) 52 Cal.App,4th 886, 894 ["A voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not

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[2] Defendants do not deny they maintained the Gamut and Bella Actions against Plaintiffs.

[3] In the reply, Defendants represent they do not dispute the Gamut and Bella Actions were legally terminated. (Reply, pg 2).

[4] "In order for a termination of a lawsuit to be considered favorable with regard to a malicious prosecution claim, the termination must reflect on the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit. The California Supreme Court stated, '(i)t is apparent 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense that it would support a subsequent action for malicious prosecution.' "A termination [by dismissal] is favorable when it reflects 'the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant." ... The focus is not on the malicious prosecution plaintiffs opinion of his *innocence,* but on the opinion of the dismissing party.' 'The test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt.'" *Contemporary Services Corporation at* 1056-1057 (Citations Omitted).

constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim."].)

However, as discussed below, Plaintiffs submitted evidence suggesting Defendants voluntarily dismissed the Bella and Gamut Actions because they were facing sanctions motions and/or lacked evidence to prove their claims. (See *Leonardini v. Shell Oil Company* (1989) 216 Cal.App.3d 547, 583 ["Although voluntary dismissal of the underlying action is usually considered a favorable termination of the action for purposes of a malicious prosecution action, the failure to prosecute may occasionally be attributable to other than a complainant's implicit concession as to the merits of the action. Where the evidence conflicts as to the real motive for the voluntary dismissal of the underlying action, the question of favorable termination is to be resolved by the jury." (Citations Omitted)].)

Plaintiffs submitted evidence showing they challenged Defendants' authority to represent their clients in the Bella and Gamut Actions, but Defendants did not dismiss the lawsuits until Plaintiffs filed/served C.C.P. §128.7 motions challenging the merits of the Bella and Gamut Actions. (Declaration of Dagrella ¶¶5-10, 20-21, 28-29, 34-35; Exhibits 2, 3, 4, 5, 6, 7, 11, 17. 19). As argued by Plaintiffs, "A jury could reasonably infer that Defendants were concerned about losing on the merits, as they showed absolutely no concern about the lack of authority argument from the onset of the case when it was raised as an affirmative defense and called it baseless in the face of Plaintiffs' evidence, but filed a dismissal after receiving a §128.7 motion that attacked the merits." (Opposition, pg. 6).

Plaintiffs also submitted evidence suggesting Defendants served discovery responses in the Gamut and Bella Actions that did not contain sufficient factual evidence to substantiate the claims asserted against Plaintiffs. (Declaration of Dagrella ¶¶13-18, 30-33; Exhibits 1, 8, 9, 18). Plaintiffs served Defendants with a C.C.P. §128.7 motion (in the Gamut Action), challenging the discovery responses. The motion states, in pertinent part, as follows:

> Furthermore, Mr. Menthe was principally involved in drafting responses to extensive discovery by Defendants that essentially requested disclosure of all evidence to substantiate the Complaint. After Defendants filed seven discovery motions and five months had elapsed with no discovery response, Mr. Menthe prepared

> responses with the assistance of this client, which responses clearly reflect that there is no factual evidence or legal support to substantiate the causes of action for money had and received and unjust enrichment, which form the bulk of Plaintiff's theories of recovery. Moreover, there is no legal theory asserted or factual basis for the inclusion of Shirley Isom Construction, Inc. in the lawsuit. Lastly, there is no legal basis for the claims of conversion and trespass to chattels in regards to construction equipment that was abandoned by Plaintiff...

(Declaration of Dagrella ¶10; Exhibit 7). As argued by Plaintiffs, "a jury can reasonably infer that Defendants served factually devoid discovery responses because they had no evidence to prove their case, and that they dismissed the 1st and 2nd lawsuits to avoid a trial on the merits, and then filed new lawsuits simply to continue their harassment of Plaintiffs." (Opposition, pg. 6).

In addition, Plaintiffs argue discovery played a role in Defendants' decision to dismiss the Gamut Action. Mr. Menthe declared:

> The serving of a new sanctions motion opened a 21-day safe harbor period. This was a decision point as trial was set for June 4. At this time, we did not have any substantive discovery responses from the Isoms, and only a single set of boilerplate objections, so would have needed to seek a trial continuance. We also determined that it would not be prudent to continue litigating the Gamut action without doing something to address the argument belatedly raised by the Isoms, which would potentially invalidate any relief obtained by Gamut for lack of standing.

(Declaration of Menthe ¶29). As argued by Plaintiffs a "jury could reasonably infer that Defendants dismissed their case within days of trial because they knew they could not prove up their claims based on the evidence they had on hand." (Opposition, pg. 7).

Plaintiffs also argue the Gamut and Bella Actions could have easily been converted to derivative actions without the need for filing dismissals, the derivative actions involve different parties and/or causes of action (i.e. SIC was excluded from the derivative actions, Defendants abandoned claims, etc.), the derivative actions were dismissed, and Judge Oki determined the claims against the Isoms in the Gamut derivative action lacked merit, all of which suggest the claims alleged against Plaintiffs in the Gamut and Bella Actions lacked merit and/or were filed for an improper purpose.[5] (Declaration of Dagrella ¶¶22-25, 37-40; Exhibits 12, 13, 14, 15, 20, 21, 22, 23).

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[5] Judge Oki ruled: "Plaintiff provides no evidence or argument aside from pure speculation that the Isoms are liable in

(2) Lack of Probable Cause

"The question of probable cause is 'whether, as an objective matter, the prior action was legally tenable or not.' A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.' Probable cause, moreover, must exist for every cause of action advanced in the underlying action. `[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted... I" (*Soukup* at 292 (Citations Omitted).)

Plaintiffs submitted evidence suggesting Defendants lacked probable cause to maintain the money had and received cause of action in the Gamut Action. A cause of action for money had and received requires the following elements: (1) defendant received money that was intended to be used for the benefit of plaintiff; (2) the money was not used for the benefit of plaintiff; and (3) defendant has not given the money to plaintiff. (CACI 370.) There is no allegation in the Gamut complaint suggesting Troy and Shirley received money belonging to Gamut. (Declaration of Dagrella ¶2; Exhibit 1). Moreover, Plaintiffs represent Gamut produced documents in discovery indicating the amount sought ($263,653.72) was owed by Bella Palazzo, LLC. (Declaration of Dagrella ¶15; Exhibit 9).[6] Plaintiffs also represent Defendants did not produce evidence showing Troy and Shirley were personally liable for the $263,653.72 in construction costs or that their client paid any portion of that amount. (Declaration of Dagrella ¶¶13-16). Finally, Plaintiffs contend the money had and received cause of action was barred by the statute of limitations on the face of the complaint. (Declaration of Dagrella ¶17; Exhibit 10).[7]

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their individual capacities. The court finds that Plaintiff brought the action against his former in-laws in their individual capacities for the improper purpose to harass, or to cause unnecessary delay or needless increase in the cost of litigation." (Declaration of Dagrella ¶25; Exhibit 15).

[6] See also Declaration of Troy Isom T:3; Exhibit A.

[7] The statute of limitations for a cause of action of money had and received is two years if the underlying claim is based upon oral contract. (*Franck v. J.J. Sugarman-Rudolph Co.* (1952) 40 Cal.2d 81, 90; *Warren v. Lawler* (9th Cir. 1965) 343 F.2d 351, 360.) According to Gamut's discovery responses, the dates for the $263,653.72 in alleged charges range from 11/30/2005 to 04/03/2010. (Declaration of Dagrella, ¶ 17, Exhibit 10.) The Gamut Action was filed on 09/18/2012, nearly 2 ½ years from the date of the last charge on the account.

Plaintiffs also submitted evidence suggesting Defendants lacked probable cause to maintain the conversion and trespass causes of action in the Gamut Action. Gamut alleged that Troy, Shirley, and SIC intentionally took possession of its construction equipment. Plaintiffs submitted evidence that SIC does not possess and has never had possession, custody, or control of any construction equipment owned by Gamut, "nor has it ever held an ownership interest in the property where said construction equipment is or was at any time stored." (Declaration of Shirley Isom ¶2; Declaration of Troy Isom ¶2). Plaintiffs also submitted evidence showing Troy and Shirley did not own the property where the equipment is or was at any time stored. Rather, the property was owned by a family trust, which was not named as a defendant in the Gamut Action. (Declaration of Shirley Isom ¶2; Declaration of Troy Isom ¶2). Moreover, as discussed above, the causes of action for conversion and trespass were restated in the Gamut derivative action and the trial court agreed that there was "no evidence or argument aside from pure speculation that the Isoms are liable in their individual capacities" and found that Troy and Shirley were named in the lawsuit "for the improper purpose to harass, or to cause unnecessary delay or needless increase in the cost of litigation." (Declaration of Dagrella ¶25; Exhibits 12, 15).

Plaintiffs also submitted evidence suggesting Defendants lacked probable cause to maintain the cause of action for unjust enrichment in the Gamut Action. There is case law that suggests California does not recognize a cause of action for unjust enrichment. (See *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.)

Finally, Plaintiffs submitted evidence suggesting Defendants lacked probable cause to maintain the cause of action for quiet title in the Bella Action. In the Bella Action, Bella alleged "Title to the Property should be held in the name of Bella Piazza, LLC, but currently, title to the Property is held in the name of the Isoms" and "Defendants have no right, title, estate, lien, or interest whatsoever in the... property." (Declaration of Dagrella ¶27; Exhibit 16). Plaintiffs submitted evidence that Troy and Shirley are not the owners of the property. Troy and Shirley purchased the property in 1977 and transferred their interest in the property to their family trust on February 17, 2005. (Declaration of Troy Isom, ¶4; Declaration of Shirley Isom ¶4.) (See *G.R. Holcomb Estate Company v. Burke* (1935) 4 Ca1.2d 289, 297 ["It has been repeatedly held in this

state that an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title."].)[8] Plaintiffs also submitted evidence showing they provided Mr. Menthe with the grant deed and sworn declarations and advised him Troy and Shirley should only be sued in their capacity as trustees, but he refused to dismiss them from the action. (Declaration of Troy Isom ¶4; Exhibits B, C; Declaration of Shirley Isom ¶4; Exhibits A, B). In addition, Plaintiffs submitted evidence suggesting the quiet title cause of action was founded upon an alleged oral agreement in 2005. However, such an agreement would be barred by the Statute of Frauds and Statute of Limitations.[9] (Declaration of Dagrella, ¶¶30-33; Exhibit 18.) (See Civil Code §1624(a)(3).)[10]

Defendants argue they had several important pieces of evidence to support the claims raised in the Gamut and Bella Actions. (Motion, pgs. 12-13; Declaration of Menthe, ¶50). However, Defendants failed to explain how each piece of "evidence" established probable cause for each claim asserted in the Gamut and Bela Actions. (See *Williams v. Coombs* (1986) 179 Cal. App. 3d 626, 644 ["The test in a malicious prosecution action is not whether defendant had reasonable grounds to seek some kind of relief in the original action; it is instead whether he had reasonable grounds for asserting the theory for relief contained in the complaint."].)

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[8] Defendants argue Bella sought equitable relief to establish an interest in the property. However, Bella asserted a cause of action for quiet title. As discussed above, Plaintiffs submitted evidence suggesting Defendants lacked probable cause to maintain the quiet title cause of action.

[9] The statute of limitations for quiet title is 2 years if based on oral contract. (*Ankoanda v. Walker-Smith* (1996) 44 Cal. App. 4th 610, 616.) According to paragraph 14 of the complaint in the Bella Action, construction began in 2005 and completed in late 2009 or early 2010. (Declaration of Dagrella, ¶27; Exhibit 16.) Thus, the Isoms' obligation to transfer title should have arisen either in 2005, when Gamut began construction, or, at the very latest, early 2010, when construction finished. In that case, the Complaint—filed on June 6, 2013—was barred by the two year statute.

[10] The Court notes there is clearly a dispute as to whether Defendants even had authority to maintain the Gamut and Bella Actions.

(3) Malice

"Malice is always a question of fact for the jury." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal. 3d 863, 875.) "Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inference drawn from the evidence. (Citations omitted)." (*HMS Capital, Inc. v. Lawyers Title Co.* 118 Cal.App.4th 204, 218.) In the instant case, Plaintiffs have produced at least ten items of evidence from which a jury could reasonably infer malice:

1. Evidence that Defendants demanded reductions to child support and alimony—matters wholly unrelated to the Gamut and Bella Actions—as conditions to dismiss those lawsuits. (Declaration of Dagrella, ¶37; Verified First Amended Complaint, ¶23.)
2. Evidence that Defendants attempted to reach a settlement of a promissory note—a matter wholly unrelated to the Gamut Action—as a condition to dismiss that lawsuit. (Declaration of Menthe, ¶27, Exhibit G; Declaration of Dagrella, ¶19, lines 12-14.[11])
3. Evidence that Defendants pursued the Gamut Action for an ulterior purpose, as proven by the fact they offered to dismiss the corporate lawsuit filed by Gamut Construction Company, Inc. in exchange for personal benefits to their client, Mark Scarlatelli. (Declaration of Menthe, ¶27, Exhibit G; Declaration of Dagrella, ¶19, lines 12-14.)
4. Evidence that Defendants continued to pursue the Gamut and Bella Actions despite knowledge that they lacked the facts or evidence to substantiate the claims raised in those actions. (Declaration of Dagrella, ¶¶13-18, 30-33, Exhibits 8, 9, 18.)
5. Evidence that Defendants continued to pursue the Gamut and Bella Actions in the face of evidence from Plaintiffs proving the claims to be false and without factual or legal merit. (Declaration of Dagrella, ¶¶20, 34, Exhibits 11, 19.)
6. Evidence that Defendants continued to pursue the Bella Action in the face of evidence that their own client, in a personal financial statement, had claimed no interest in the very property to which they sued for quiet title. (Declaration of Mischelynn Scarlatelli, ¶3, Exhibit A.)

[11] Defendants raised objections to the Declaration of Dagrella, ¶19, lines 4-12, but not lines 12-14. Reference herein is only made to lines 12-14, to which no objection has been made.

7. Evidence that Defendants pursued the Bella Action for the purpose of depriving Plaintiffs of the beneficial use of their property, by clouding title and interfering with a pending sale. (Declaration of Shirley Isom, ¶5; Declaration of Troy Isom, ¶5.)

8. Evidence that Defendants maintained the Gamut Action without proper authority from the client, Gamut Construction Company, Inc., and used the community business as the plaintiff in the Gamut Action without the consent of both spouses or the approval of the family court judge. (Declaration of Mischelynn Scarlatelli, ¶¶4-6; Declaration of Dagrella, ¶¶9-10; Verified First Amended Complaint, ¶¶11-12.)

9. Evidence that Defendants maintained the Bella Action without proper authority from the client, Bella Piazza, LLC. (Declaration of Troy Isom, ¶7; Verified First Amended Complaint, ¶¶18-19.)

10. Evidence that Defendants maintained the Gamut and Bella Actions for the purpose of harassing their client's in-laws and estranged wife. (Declaration of Dagrella ¶¶26, 37; Exhibits 12, 13, 14, 15).

Based on the record, the Court finds that Plaintiffs have presented sufficient evidence from which malice can be inferred. The evidence from which malice can be inferred is explained in more depth below.

(a) Attempting to Reach a Settlement Unrelated to the Merits of the Lawsuits

In *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, the Appellate Court determined that evidence that the title company had conducted minimal discovery and that its counsel had demanded payment of $25,000, without explaining its relationship to the merits of the case, could support a conclusion that the title company was simply trying to squeeze a settlement on a baseless case, and this was sufficient evidence to infer malice. (*Id.* at 219.) The Court held it was an improper purpose to maintain a lawsuit in an attempt to force "a settlement which has no relation to the merits of the claim." (*Id.* at 218.) Similarly, here, Defendants concede they conducted minimal discovery (Declaration of Menthe ¶29), and Plaintiffs submitted evidence suggesting the Gamut and Bella Actions were maintained in order to achieve a settlement

unrelated to the merits of said lawsuits. In paragraph 37 of Mr. Dagrella's declaration, submitted with the Opposition, he declares as follows:

> "37. On April 5, 2013, Mr. Menthe told me in person that if my clients did not accede to his demands, the lawsuits would never end and there would be more to come. Amongst his demands were that the Isoms' daughter agree to reductions in child support and alimony and that the Isoms release his client from a $1.1 million promissory note. True to his word, on June 6, 2013, Mr. Menthe filed a 3rd, 4th and 5th lawsuit (Case Nos. KC066075, KC066078 and KC066079). (Exhibits 12, 13 and 14.)"

(Declaration of Dagrella, ¶37.) Defendants sought to exclude evidence of similar conversations between Mr. Menthe and Mr. Dagrella that occurred in mediation—specifically, paragraphs 11 and 19 of Mr. Dagrella's declaration—on grounds of mediation privilege. However, no objection has been raised to paragraph 37 of Mr. Dagrella's declaration and, nowhere does Mr. Dagrella state that his conversations with Mr. Menthe occurred solely in mediation.

Thus, even if this court excludes paragraphs 11 and 19 of Mr. Dagrella's declaration on grounds of mediation privilege, there remains admissible evidence in paragraph 37 of that declaration regarding Mr. Menthe's inappropriate settlement demands. (See also Verified First Amended Complaint, ¶23 (*Atkins, Kroll & Co. v. Broadway Lumber Co.* (1963) 222 Cal. App. 2d 646, 654 ["A verified pleading is itself an affidavit and may be considered as such."].)

Additionally, Plaintiffs submitted evidence that on April 12, 2013, Defendants sent a letter to Plaintiffs offering to dismiss the Gamut Action with prejudice in exchange for Mark Scarlatelli's personal release from a promissory note referred to as the Elsinore Ranch Partners Note. (Declaration of Menthe, ¶27, Exhibit G; Declaration of Dagrella, ¶19, lines 12-14.[12]) The Elsinore Ranch Partners Note was not the subject of the Gamut Action and had no logical connection to any claims alleged in the Gamut Action. (Declaration of Dagrella, ¶2, Exhibit 1.)

[12] Defendants raised objections to the Declaration of Dagrella, ¶19, lines 4-12, but not lines 12-14. Reference herein is only made to lines 12-14, to which no objection has been made.

Therefore, as Plaintiffs argue, Defendants attempted to achieve a settlement wholly unrelated to the causes of action pursued in the Gamut Action.

Plaintiffs argue that Defendants had attempted to leverage legal claims owned by the business (Gamut) in exchange for personal favors to their individual client (Mark Scarlatelli). (Declaration of Menthe, ¶27, Exhibit G.) If Gamut had a legitimate legal claim to pursue, it would arguably be a breach of fiduciary duty to its shareholders to surrender that claim in exchange for personal benefits to Mark Scarlatelli. Gamut is co-owned by Mischelynn Scarlatelli and was a community asset. (Declaration of Mischelynn Scarlatelli, ¶4.) Defendants' offer to exchange Gamut's legal claims for personal benefits to Mark dilutes any value Mischelynn could obtain from a division of Gamut's assets in divorce. (Declaration of Mischelynn Scarlatelli, ¶2.) Arguably, it also harms Gamut's creditors to the extent that Defendants sought to surrender the business' claims in exchange for personal favors to Mark. The Court notes that F&D held a $2 million judgment against Gamut. (Declaration of Mischelynn Scarlatelli, ¶3, Exhibit A & ¶7.) Defendants contend their "only goal [in prosecuting the Gamut action] was to recover funds that could be used to pay down debts to F&D and other creditors", but as Plaintiffs argue, a reasonable inference can be made that the Gamut Action was prosecuted for the improper purpose of extracting personal benefits for Mark. (Declaration of Menthe, ¶27, Exhibit G.) (See *HMS Capital, Inc. v. Lawyers Title Co., supra* 118 Cal.App.4th at 218 [malice includes evidence of "intent to deliberately misuse the legal system for personal gain."].)

(b) Indifference to the True Facts

Indifference in continuing to prosecute an action after an attorney has learned that the basis of the action lacks merit is another factor demonstrating malice in a malicious prosecution case. In *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, two law firms filed anti-SLAPP motions. One of the firms, the Naumann firm, filed the underlying complaint and prosecuted it until its dismissal. The other firm, the LaFave firm, associated in as counsel over a year after the complaint had been filed and *approximately thirty days before the matter was dismissed.* (*Id.* at 1394.) Despite the LaFave's firms limited involvement in the matter, the Court denied its special motion to strike, finding that the plaintiff had established both

a lack of probable cause and malice. In so ruling and specific to the malice element, the Court noted that malice may be evidenced by the indifference shown an attorney in prosecuting the claim and also may be inferred from the facts establishing a lack of probable cause. (*Id.* at 1409.) The Court also noted that the extent of an attorney's investigation and research may be relevant to the question of whether the attorney acted with malice. *Id.* (citation omitted). Reconciling this with the LaFave firm's limited involvement, the Court noted:

> "If the LaFave defendants knew the relevant facts and did not take immediate steps to dismiss Powell's unmeritorious claims, one could infer that the continued prosecution of those claims was motivated by a malicious intent. If the LaFave defendants were not aware of the relevant facts because they failed to adequately familiarize themselves with the case before associating in as co-counsel, this would indicate a degree of indifference from which one could also infer malice."

(*Ibid.*) Addressing the LaFave firm's argument that it associated in as counsel and the case was dismissed approximately thirty days later, the Court stated:

> "Maintaining a case one knows, or should know, is untenable continues to harm the defendant as long as the case remains open, since the defendant must continue to prepare a defense to the case as long as the case appears to be moving forward."

(*Id.* at 1410.) Plaintiffs argue that the same can be said here, in that Defendants ignored the true facts while Plaintiffs were forced to mount a defense to groundless claims. As discussed above, Plaintiffs submitted evidence that, after seven discovery motions were filed, Defendants served discovery responses in the Gamut and Bella Actions that contained no factual evidence to substantiate the claims asserted against Plaintiffs. (Declaration of Dagrella, ¶¶13-18, 30-33, Exhibits 8, 9, 18.) Having prepared the discovery responses, Defendants were aware of the lack of evidence supporting the Gamut and Bella Actions. Moreover, Plaintiffs served Defendants with a C.C.P. §128.7 motion accompanied with declarations and supporting evidence challenging the merits of each cause of action in the Gamut and Bella Actions. (Declaration of Dagrella, ¶¶20, 34, Exhibits 11, 19.) Thus, Defendants were also aware of Plaintiffs' evidence that disproved the claims in the Gamut and Bella Actions.

"malice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause."

(*Daniels v. Robbins* (2010) 182 Cal. App. 4th 204, 226.) Once Defendants were on notice that the Gamut and Bella Actions lacked merit, they had a duty to immediately cease prosecuting those cases. (*Sycamore Ridge Apartments LLC v. Naumann*, supra 157 Cal.App.4th at 1409; see also *Zamos v. Stroud* (2004) 32 Cal. 4th 958, 969-970.) Yet, Defendants did not dismiss the Gamut and Bella Actions until weeks before trial, after Plaintiffs had already expended fees for trial preparation. (Declaration of Dagrella, ¶¶3, 21, 28.) This indifference further demonstrates malice.

As further evidence that Defendants knew the claims lacked merit, Plaintiffs point to a personal financial statement, approved by Defendants, in which Defendants' client claimed no ownership interest in the very property that was the subject of the claim for quiet title in the Bella Action. (Declaration of Mischelynn Scarlatelli, ¶3, Exhibit A.) Mr. Menthe represented Mark Scarlatelli in a previous lawsuit that resulted in a stipulated settlement for $2 million against his client. (*Ibid.*) The stipulated settlement states that the judgment creditor relied upon a personal financial statement attached thereto and signed by Mark as a basis for entering into the settlement. (*Id.*, see Recital H of Settlement.) The personal financial statement sought full disclosure of Mark's assets and liabilities, including any interests in business ventures. (*Id.*, see Sections 1-8 of Personal Financial Statement.) Nowhere in that personal financial statement did Mark list any interest in 328 Saddlehorn Lane, the property that was the basis for the quiet title claim in the Bella Action. Defendants argue that Mark holds only an indirect interest—not a direct, personal interest—in the property through his ownership share in Bella Piazzo, LLC, and, therefore, it is not expected that Mark would disclose this property on the personal financial statement. However, the personal financial statement seeks disclosure of both direct interests in real property as well as any interests in business ventures, yet Mark did not disclose any interest in the Bella business venture. (*Id.*, see Section 5 of Personal Financial Statement re disclosure of business ventures.) Thus, to the extent that the real property was owned by Bella—Mark would be expected to disclose his 50% interest in that entity. A judgment creditor would be interested to know that Mark held a 50% interest in an entity that purports to own valuable real property. Mr. Menthe signed the stipulated settlement thereby acknowledging he read it and

approved of its form. (*Id.*, see Settlement, pg. 11 of 11.) Thus, Mr. Menthe was on notice that his client claimed no direct or indirect interest in 328 Saddlehorn Lane, either personally or through ownership of the Bella business. Yet, only months later, Mr. Menthe prosecuted the Bella Action asserting the exact opposite—that his client owned an indirect interest in 328 Saddlehorn Lane and that said ownership dates back to year 2005.

Further, the personal financial statement identifies a debt to Troy Isom in the amount of $380,000, with the note, "unable to make payments." (*Id.*, see Section 2 of Personal Financial Statement.) Thus, Mr. Menthe was aware that his client owed Plaintiffs a considerable sum of money and that his client's reasoning for not repaying that money was that he was "unable to make payments." As discussed above, Mr. Menthe offered to dismiss Gamut's legal claims in exchange for the forgiveness of this debt owed by Mark, further evidencing an improper motive in maintaining the Gamut Action.

In sum, Plaintiffs submitted evidence that not only did the Gamut and Bella Actions lack probable cause, but that Defendant knew it and prosecuted these actions with complete indifference to the truth, desperately hoping that Plaintiffs would capitulate to a settlement unrelated to the merits.

(c) Depriving Plaintiffs of Beneficial use of Property

"Suits with the hallmark of an improper purpose include, but are not necessarily limited to, those in which… the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property." (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal. App. 4th 534, 554.) In analyzing the malice element, the *Daniels* court clarified that:

> **"malice formed after the filing of a complaint is actionable. Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset."**

(*Daniels v. Robbins, supra* 182 Cal. App. 4th at 227, citing *Zamos v. Stroud* (2004) 32 Cal.4th 958, 969.) As discussed above, Plaintiffs submitted evidence suggesting Defendants lacked

probable cause to maintain the cause of action for quiet title in the Bella Action. Plaintiffs state that the Bella Action prevented them from closing a sale on their property due to the cloud on title. (Declaration of Shirley Isom, ¶5; Declaration of Troy Isom, ¶5.) The Bella Action was filed on October 3, 2012 and alleges breach of an oral agreement from year 2005. (Declaration of Dagrella, ¶¶ 27 & 33.) Plaintiffs argue that the Bella Action was filed—seven years after the date of the alleged oral agreement, and well past the statute of limitations—for the purpose interfering with a pending sale on the property. Plaintiffs declare,

> "The 2nd Lawsuit for quiet title was brought at an inopportune time, as we were preparing to sell the property to a buyer. The lawsuit deprived us of the ability to close a sale due to the cloud on title."

(Declaration of Shirley Isom, ¶5; Declaration of Troy Isom, ¶5.) One can reasonably infer from the timing of the Bella Action that Defendants maintained the lawsuit for the purpose of depriving Plaintiffs of the beneficial use of the property, by clouding title and interfering with their efforts to sell.

(d) Prosecuting Actions without Client Authority

Malice may also be inferred from the fact that Defendants prosecuted the Gamut and Bella Actions without client authority.

With respect to Gamut, Defendants were required by corporate law to obtain permission of the board of directors to file suit. e *Corporations Code* section 300(a), ı states, "all corporate powers must be exercised by or under the direction of the board." The court in *Bader v. Anderson* (2009) 179 Cal.App.4th 775 held that the decision to file a lawsuit must be made by the board of directors:

> "It is a fundamental principle of corporate governance that the role of managing the business of the corporation is vested in its board of directors. [Citations.] This responsibility includes the prosecution, defense, and control of corporate litigation…
>
> it is axiomatic that 'decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors.' [Citations.]"

(*Id.* at 787 & 796.) The decision to pursue the Gamut Action was never presented to the board of directors of Gamut for approval. (Declaration of Mischelynn Scarlatelli, ¶¶4-6.) The board of directors of Gamut never delegated to any officer exclusive power to decide whether to file or

maintain lawsuits on behalf of the company. (Declaration of Mischelynn Scarlatelli, ¶5.) Thus, such action could only occur if approved by a majority vote of the board of directors at a scheduled meeting or by unanimous written consent of the board members. (*Corp. Code* § 307(8).)

Ms. Scarlatelli controls 50% of the board of Gamut and she was never consulted about and never authorized the filing or continued prosecution of the Gamut Action. (Declaration of Mischelynn Scarlatelli, ¶¶4-5.) Defendants were aware of these facts, as they were supplied with K-1 Tax Statements and sworn court transcripts confirming this, and they explicitly acknowledged that there was deadlock on the board of directors. (Declaration of Dagrella, ¶¶9-10.) Defendants never sought appointment of a provisional director to break the deadlock, as provided in *Corporations Code* section 308(a). (Verified First Amended Complaint, ¶11.)

Defendants were aware that their client's former counsel, Sean P. O'Connor, Managing Partner of the Orange County office of Sheppard Mullin Richter & Hampton LLP, advised that the board members must have a special meeting to "address the need to retain counsel for Gamut Construction." (Declaration of Mischelynn Scarlatelli, ¶6; Verified First Amended Complaint, ¶12.) Defendants ignored this advice from their client's former counsel and continued to prosecute the Gamut Action without board approval. (Verified First Amended Complaint, ¶12.)

Moreover, there is no evidence that the decisions to file and maintain prosecution of the Bella Action were never presented to the membership of Bella for approval. (Declaration of Troy Isom, ¶7.) A limited liability company is deemed to be "member-managed" unless both the Articles of Organization and the Operating Agreement provide otherwise. (*Corporations Code* § 17704.07(a).) There exists no Operating Agreement for Bella and its members never filed a Statement of Information with the Secretary of State designating any one individual as the "manager" of the LLC. (Declaration of Troy Isom, ¶7; Verified First Amended Complaint, ¶18.) Thus, "[t]he management and conduct of the limited liability company are vested in the members" who have "equal rights in the management and conduct of the limited liability company's activities including equal voting rights." (*Corp. Code* § 17704.07(b)(1) & (2).) By

law, a decision to file a lawsuit "shall be decided by a majority of the members of the limited liability company." (*Corp. Code* § 17704.07(b)(3).)

According to the complaint in the Bella Action, Bella is owned 50/50 by Mark Scarlatelli and Troy Isom. (Decalration of Dagrella, ¶27, Exhibit 16, para. 5.) Troy Isom was never consulted about and never authorized the filing or continued prosecution of the Bella Action. (Declaration of Troy Isom, ¶7.) Defendants were aware of these facts as they admitted the same in preparing Bella's discovery responses. (Verified First Amended Complaint, ¶19.) Since Bella is governed by its voting membership and the Bella Action was filed and maintained without approval of the membership, Plaintiffs also argue that Defendants lacked client authority to prosecute the Bella Action.

Based on the above, Plaintiffs argue that Defendants' conduct in prosecuting the Gamut and Bella Actions without client authority constituted immoral and unprofessional conduct within the meaning of *Business and Professions Code* Section 6106 and a violation of Sections 6068[13] and 6104[14] and *Penal Code* Section 182(a)(3).[15] If a jury accepts Plaintiffs' evidence, a jury could reasonable infer malice from Defendants' conduct in prosecuting the Gamut and Bella Actions without client authority.

(e) Improper Purpose

Plaintiffs submitted evidence suggesting Defendants acted with an improper or ulterior motive (i.e. to force Plaintiffs to accede to Defendants' demands). The improper or ulterior motive is revealed by the alleged statement made by Mr. Menthe to Plaintiffs' counsel, Mr. Dagrella. Mr. Dagrella declared that on April 5, 2013, Mr. Menthe told him in person that if his clients did not accede to his demands, the lawsuits would never end and there would be more to come. Mr. Dagrella declared Mr. Menthe's demands included "that the Isoms' daughter agree to reductions in child support and alimony and that the Isoms release his client from a $1.1 million

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[13] *Business and Professions Code* Section 6068 states, in pertinent part, "It is the duty of an attorney to... maintain those actions, proceedings, or defenses only as appear to him or her legal or just..."

[14] *Business and Professions Code* Section 6104 states, "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension."

[15] *Penal Code* Section 182(a)(3) states it is a crime "If two or more persons conspire... Falsely to move or maintain any suit, action, or proceeding."

promissory note." (Declaration of Dagrella ¶37). Mr. Dagrella declared that Mr. Menthe, true to his word, filed a "3rd, 4th, and 5th lawsuit" on June 6, 2013 (including the derivative claims). (Declaration of Dagrella ¶37; Exhibits 12, 13, and 14).

As discussed above, Plaintiffs further presented evidence that Defendants used the Gamut and Bella Actions to tie up Plaintiffs property, interfere with a sale, and harass Plaintiffs in hopes of extracting concessions on an unrelated promissory note and on support orders in a family court case, involving the daughter. And, Defendants used the community business as the plaintiff in the Gamut Action without the consent of both spouses or the approval of the family court judge and filed the Gamut and Bella Actions without client authority.

Further, Plaintiffs presented evidence that when the causes of action for conversion and trespass were restated in a subsequent derivative action, the trial court agreed with Plaintiffs that the claims lacked merit and found that Defendants had engaged in a pattern of filing and re-filing unmeritorious cases for the improper purpose of harassing Plaintiffs. The trial court issued an order stating,

> "MOTION OF ARMIE TROY ISOM AND SHIRLEY ISOM INDIVIDUALLY:
>
> Plaintiff contends that individual Defendants Troy and Shirley are proper parties because they are "closely intertwined with the operation of the property." (Opposition, 7:24-25.) However, on 6/27/13, the Isoms provided declarations disclaiming their individual ownership of the real property, along with the property deed. After being so notified, Plaintiff and his counsel had a duty to perform a reasonable inquiry under the circumstances that their factual contentions have evidentiary support. Plaintiff provides no evidence or argument aside from pure speculation that the Isoms are liable in their individual capacities. The court finds that Plaintiff brought the action against his former in-laws in their individual capacities for the improper purpose to harass, or to cause unnecessary delay or needless increase in the cost of litigation."

(Declaration of Dagrella, ¶ 26, Exhibit 15, pg. 6.) As a result of this finding, Defendants were sanctioned in the sum of $9,120.00 "pursuant to CCP § 128.7." (*Ibid.*) As Plaintiffs argue, if the trial court examining the same cause of action originally pled in the Gamut Action and re-pled in the derivative action, could find malice on the part of Defendants, then it is reasonable to assume that a jury could do the same.

C. Conclusion

Defendants' special motion to strike is denied.

The matter is set for telephonic status conference on Sept. 16, 2014 at 11:00am in Department 71. Plaintiff shall arrange for the conference call to the Court or counsel may agree to use Court Call

August 15 2014

Judge Suzanne G. Bruguera

Suzanne G. Bruguera

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is Dagrella Law Firm, 11801 Pierce St., Suite 200, Riverside, California 92503. On September 11, 2014, I served a copy of the following document(s):

NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' SPECIAL MOTION TO STRIKE AND NOTICE OF TELEPHONIC STATUS CONFERENCE ON SEPTEMBER 16, 2014

☒ **By e-mail or electronic transmission.** I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **By overnight delivery.** I also enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

Damion Robinson **Van Vleck Turner & Zaller LLP** **6310 San Vicente Boulevard, Suite 430** **Los Angeles, CA 90048** **Email: DRobinson@vtzlaw.com**	**For:** **Defendants Darrel C. Menthe and Miller, Miller & Menthe LLP**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 11, 2014, at Riverside, California.

Jerry R. Dagrella