

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR**

HAL WAGONET,

Plaintiff and Respondent,

v.

STEVEN FORD and JEFFREY
N. DALY,

Defendants and Appellants.

Case no. A118765

Mendocino County Case
no. SCUJ CVG 0698246

Honorable Richard J.
Henderson, Presiding

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PRELIMINARY STATEMENT

This case well illustrates why malicious prosecution actions are disfavored, and why the Legislature was wise in authorizing a special motion to strike them. (Code Civ. Proc. § 425.16) On this *de novo* review of such a motion, the Court should hold that the malicious prosecution plaintiff, respondent Hal Wagenet (“Wagenet”), did not even meet his burden to establish a favorable termination of the underlying action, let alone a lack of probable cause for filing it.

The termination was a voluntary dismissal for pragmatic purposes, as in *Contemporary Services Corporation v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043. To paraphrase from that opinion, there was no evidence “the dismissal of the complaint in the underlying action reflect[ed] [Wagenet’s] innocence of the misconduct alleged therein.” (*Id.* at 1056) Wagenet had obtained no adjudication in his favor, and it was undisputed that the underlying plaintiff, appellant Steven Ford (“Ford”), and his trial counsel, appellant Jeffrey N. Daly (“Daly”), still firmly believed in Wagenet’s liability as alleged. Indeed, Wagenet had repeatedly admitted the principal allegation against him: diverting IRA funds payable to Ford (and many other employees) for over 26 months in violation of the Unlawful Practices Act (Bus. & Prof. Code § 17200, *et*

seq.) and Section 217 of the Labor Code.¹ (AA 217, ln. 25) Wagenet merely protested he had good motives for doing so. (*E.g.*, Appellants' Appendix ["AA"] at 4-5, ¶¶ 18-20; 6, ¶ 25; 153, lns. 11-13; 169 ¶ 14)

One of many concerns about malicious prosecution actions is their misuse for tactical purposes, and here that purpose was self-evident. When Ford and Daly voluntarily dismissed Wagenet from the underlying case, other causes of action were still proceeding against the company Wagenet controlled and against Wagenet's father, the company's former owner. In other words, Ford and Daly were still pursuing Wagenet indirectly when he filed his malicious prosecution action against them. It was an obvious attempt to weaken their efforts by sowing fear and discord between them.

¹ That statute provides: "Whenever an employer has agreed with any employee to make payments to a health or welfare fund, pension fund or vacation plan, or other such plan for the benefit of the employees . . . , it shall be unlawful for such an employer willfully or with intent to defraud to fail to make the payments required by the terms of any such agreement. A violation of any provision of this section where the amount the employer failed to pay into the fund or funds exceeds five hundred dollars (\$500) shall be punishable by imprisonment in the state prison for a period of not more than five years or in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or by both such imprisonment and fine. All other violations shall be punishable as a misdemeanor." (Labor Code § 227)

Our legal system tolerates such motives if a malicious prosecution action has probable merit, but this one did not. Even if the voluntary dismissal had been a favorable termination within the meaning of *Contemporary Services Corporation*, Wagenet cannot establish a lack of probable cause. His main argument, for example, was that he had diverted the IRA funds as a mere corporate agent, so the “managerial privilege” supposedly afforded him absolute immunity. (AA149, ¶¶ 18-22; 153:18-154:12) However, well settled law supports personal liability for an agent’s personal wrongdoing — here, Wagenet’s personal violation of Labor Code § 217 and the Unlawful Practices Act. As stated in *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1381 (*review denied*), “an agent is liable for her or his own acts, regardless whether the principal is also liable.”

For that and other reasons (*post*, pp. 23-34), Ford and Daly had ample cause to seek relief for Wagenet’s diversion of IRA contributions to company debts and his own pocket. (AA 169, ¶ 7) And while the favorable termination and probable cause issues make it unnecessary to reach the issue of malice on this appeal, only one snippet of evidence could possibly support the requisite finding and a wealth of evidence cuts the other way. (*Post*, pp. 34-37)

The Legislature authorized special motions to strike because of “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (Code Civ. Proc. § 425.16(a)) Wagenet’s malicious prosecution action below is an exemplar of that disturbing trend, and this Court should order it stricken.

STATEMENT OF THE CASE

A.

WAGENET ADMITTEDLY DIVERTS IRA FUNDS BELONGING TO FORD AND MANY OTHERS

Before filing their complaint against Wagenet and others (AA 11-40), Ford and his counsel, Daly, advised Wagenet’s counsel that “skimming off employee contributions to a pension plan clearly constitutes an ‘unlawful, unfair, or fraudulent act or practice’ prohibited by Business and Professions Code § 17200.” (AA 97) Ford and Daly had ample grounds for raising that issue.

Three months before Wagenet fired Ford after 33 years with their company (AA194, ¶ 1; 199, ¶ 21), Ford had discovered and confronted Wagenet with his diversion of IRA deductions belonging to Ford and other employees. (AA 22-23, ¶¶ 26-27; 199, ¶ 20) Indeed, Wagenet

and his counsel repeatedly conceded that conduct below. (AA 4, ¶ 18; 6, ¶ 25; 168, ¶ 11; 169, ¶ 14; 193, lns. 19-24; 211 lns. 10-18)

Before being sued, Wagenet conceded that for approximately two years he had personally ordered the diversion of IRA funds belonging to Ford and other employees. Wagenet's counsel even supplied Ford and Daly with declarations from Wagenet and the company bookkeeper spelling out their wrongdoing. Wagenet stated, for example (AA 168-69, ¶¶ 11, 13, 14):

Commencing in approximately 2001 the Company experienced cash flow difficulties and on occasion I would authorize Judy Dunbar ("Judy") to make the payments necessary to keep the Company operating and to defer paying IRA contributions until cash flow permitted. That practice of occasionally not paying IRA contributions on time occurred sporadically through December 31, 2003.

Similarly, the declaration of the bookkeeper, Ms. Dunbar, stated (AA 162-163, ¶¶ 2, 3, 6, 7):

[T]here was not sufficient money to pay the principal provider of materiel [sic] to the Company, Skagit, and to make IRA contributions. . . I discussed the cash flow situation with Hal. He directed me to give priority to Skagit . . . As directed by Hal, I proceeded to pay Skagit on account and did not pay the IRA contributions on many of the due dates. . . .

The agreement was that Company would match those employee contributions. What I gave to Hal showed the amounts withheld

which had not been paid to the IRA as required under law and the agreements. The arrearage in employee deductions was around \$10,000-\$11,000. . . The Company then used the available funds to make payroll.

Wagenet admitted the diversion of IRA funds again at his deposition in the underlying case. He testified: "I authorized her [Ms. Dunbar] to prioritize the funds towards keeping our suppliers happy and catching up [with the IRA payments] when we could." (AA 193, Ins. 23-24) Indeed, Wagenet's own malicious prosecution complaint so conceded as well, as a judicial admission (AA 3, In. 12; 4, In. 23) and that Wagenet himself had "made the decision to defer payment of the IRA deductions on behalf of participants, and to use those funds to pay Skagit[.]" (AA 6, ¶ 25)

B.

WAGENET USES THE DIVERTED IRA FUNDS FOR HIS OWN COMPENSATION

As noted above, the company bookkeeper reported that the IRA funds had been diverted "to make payroll" (AA 163, ¶ 7), not just to satisfy outside creditors. But Wagenet himself was undisputedly on the company payroll. He was a company officer drawing a \$25,000 salary. (AA 166, ¶ 3) Accordingly, Ford and Daly aptly pointed out below that "[a] portion of Hal's own salary may have come out of Steve's funds."

(AA 218, Ins. 4-5) Accordingly, for this reason alone it was entirely appropriate to seek restitution from Wagenet as Ford and Daly did in their complaint. (AA 37, ¶ 60)

C.

WAGENET'S PURPORTED REIMBURSEMENT OF IRA FUNDS IS UNAUDITED AND INCOMPLETE

Months after firing Ford, Wagenet sent him two checks purporting to constitute full reimbursement of the wrongfully diverted IRA funds. However, the letters made no suggestion that an independent audit had been performed. (AA 63, Ins. 4-13; 70, ¶ 11b;² 93; 170; 171; 218, Ins. 7-11) Nor was there any subsequent evidence to that effect.

Moreover, at the time the underlying lawsuit was filed Wagenet's reimbursement calculations differed from Ford and Daly's. The company's IRA agreement indicated that more than three times the amount Wagenet sent to Ford was actually owed to him (AA 70, Ins. 6-10; 74, Ins. 11-15; 166, ¶ 3; 172; 256) — irrespective of any interest or penalties.

² This brief makes several references to a declaration by appellant Daly in support of both appellants' special motion to strike. (AA 67-77) Although Wagenet filed objections to the declaration (AA 178-184), they were so vague the trial court properly exercised its discretion by striking them. (AA 236-237) In effect, Wagenet waived any objections and the waiver applies here as well.

Thus, while Ford's complaint alleged broadly that he had been "essentially made whole" by Wagenet's two checks (AA 36, ¶ 59), Daly explained in his declaration that "further accounting, interest, penalties and other restitution had to be determined." (AA 75:27-76:3) In other words, Ford and Daly advisedly used the word "essentially" rather than "totally," although a more descriptive word would certainly have been better.³ Indeed, there was undisputed evidence below that they were counting on discovery to establish the full scope of Ford's proper reimbursement and any other rights. (AA 63, Ins. 4-13; 69-70, ¶ 11b; 72, ¶ 11h; 218, Ins. 5-11; 235, Ins. 11-17; 253)

D.

**WAGENET FIRES FORD TO PROMOTE
HIS OWN INTERESTS**

There were other ways, too, in which Wagenet unjustly enriched himself at Ford's expense. This aspect of the case requires a summary of Ford's long tenure at the company and close relationship with Wagenet's father.

³ As documented later, a complaint must be construed liberally and in favor of its sufficiency when challenged by a malicious prosecution action. (*Post*, p. 18)

Ford had worked for the same small company for 33 years until Wagenet took it over from his father. (AA 14, ¶ 9; 194, ¶11) Throughout that long period, Wagenet and everyone else at the company knew his father, Gordon, intended to give Ford part-ownership of the business and its assets, including its substantial real estate holdings. (AA 15, ¶ 15; 16, ¶ 15; 19-22, ¶¶ 20; 21-24; 39; 79-80; 83; 85; 91, ¶ 10; 187, Ins. 17-19; 189; 190:19-91; 196, ¶¶ 10, 11; 198. ¶¶ 14, 17)

But when the father was ready to retire, he authorized Wagenet to make whatever cuts were necessary to assure the retirement would be risk-free and financially comfortable. (AA 20, ¶ 21; 24, ¶ 30; 39; 85; 200, ¶ 25) As Wagenet testified in deposition:

[M]y mom and dad had said, look you've got to take this over, you've got to solve the problem, take it off our hands, relieve us of the debt, we're getting old . . . [A]t this point it became pretty clear that they were serious. They were going to unload it one way or another. And [my wife and I] thought to ourselves, well, we can gamble, take on all the debt and hope that a few years down the road that we can maybe turn it into something if all the stars line up. (AA 213, Ins. 13-23)

But Wagenet first set about securing total control of the company by getting rid of Ford, who was the father's long-time assistant, a "second son" to him (AA 80; 83; 90, ¶¶ 7, 8; 91, ¶ 11; 196, ¶ 8), and

the long-promised heir to the business. It was alleged and undisputed below that Ford was a uniquely important and valued employee. He had stayed with the company for over three decades through financially good and bad times — of which there had been many — and had willingly and repeatedly given up salary and benefits when times were hard. He was also like a son to Wagenet’s father. (AA 14-22; ¶¶ 10, 17-25; 80; 83; 91, ¶11; 196, ¶ 8)

Moreover, the father had repeatedly promised Ford, in exchange for his loyalty and sacrifices, that the business would one day *belong* to him. (AA 15-22, ¶¶ 12, 15, 17-25; 39; 79-80; 83; 85; 91, ¶10; 197-198, ¶¶ 14, 17) Thus, as events over the next year and a half confirmed, firing Ford was essential to Wagenet’s plan to gain full ownership and control of the company. (AA 212, Ins. 19-24) And his intent was to shut its business down and convert the land to a more profitable use, pocketing the proceeds himself. (AA 24, ¶ 31; 90-91, ¶¶ 7-9; 187, Ins.14-25; 188:14-189:24; 200, ¶¶ 27, 28)

For Ford, however, “it was always my goal to keep the company going as it was.” (AA 175, Ins. 18-19) It represented his career and livelihood over three decades, and its continuation as such was essential to his well being. For Wagenet, by contrast, the company was simply an outdated and expendable land use. So the firing of Ford greatly

enhanced Wagenet's personal and financial position but devastated both Ford and the company. (AA 24, ¶ 31; 90-91, ¶¶ 7-9; 166-167, ¶¶ 2-4; 200, ¶¶ 27, 28)

Further aggravating Wagenet's behavior was his firing of Ford with a lie. He said company finances required him to shut down the production end of the business, which meant they no longer needed Ford, the production manager. (AA 23, ¶ 28; 89; 166-167, ¶¶ 2-4; 199-200, ¶¶ 21, 22, 28) Other production employees, however, were retained or temporarily laid off and then hired back within a few weeks. (AA 23, ¶ 28; 89; 199, ¶ 22) But Ford was offered no terms under which he might continue with the company. (AA 24, ¶ 29; 166-167, ¶ 4; 200, ¶ 23)

E.

FORD AND DALY ATTEMPT TO RESOLVE THE DISPUTE OUT OF COURT

After Ford hired Daly to represent him, they tried to resolve all his claims amicably, including the claim involving Wagenet's admitted diversion of the IRA funds. (AA 71, ¶ 11e; 95-111) Only after months of negotiations, and after Wagenet rejected Ford's proposal to submit the dispute to mediation, did Ford and Daly file the underlying lawsuit. (AA 108; 110)

Before doing so, however, they dropped two causes of action they were considering based on information provided by Wagenet's counsel. (AA 57:25-58:4) That, too, shows that Ford and Daly were not bent on pursuing unmeritorious claims.

F.

**FORD AND DALY VOLUNTARILY DISMISS THE
CAUSE OF ACTION AGAINST WAGENET FOR
STRATEGIC PURPOSES ONLY**

Ford and Daly filed their complaint against Wagenet and the other defendants on December 22, 2005. (AA 11) Only the fourth cause of action named Wagenet (AA 36), but it incorporated all the preceding allegations. (AA 26, ¶ 57) Thus, while it mainly addressed the diversion of IRA funds, its prayer for relief was broad enough to encompass any appropriate restitutionary or injunctive relief against Wagenet or the other defendants under the Unlawful Practices Act. (AA 37-38)

Seven months later, on August 4, 2006, Ford and Daly voluntarily dismissed their fourth cause of action, also noting in the dismissal form that it resulted in the dismissal of Wagenet as a defendant. (AA 41) And it was uncontroverted below that their reasons for doing were wholly tactical.

As shown previously, at least a portion of the diverted IRA funds had already been reimbursed. (*Ante*, pp. 7-8) Accordingly, Ford and Daly explained below that the likely recovery against Wagenet was “much smaller” than against the other defendants. (AA58 ln. 11) They also explained that they dismissed the relevant cause of action “[i]n the interest of economy and to improve the chances of defeating the [pending] summary judgment motion.” (AA 58, lns. 11-12)

Although their quoted explanation appeared in their memorandum below, not a declaration, Wagenet did not object on that ground and never contested the accuracy of their explanation. Nor did he offer any contrary evidence or argument suggesting the dismissal reflected Ford or Daly’s belief in Wagenet’s innocence. Instead, he relied on his bare allegation of a favorable termination (AA 2:27 to 3:3) and this brief comment in his memorandum opposing the motion to strike:

In their Memo at page 7, lines 13-16, Defendants acknowledge that the dismissal of the UBP claim with prejudice was a favorable termination of that claim on behalf of Hal because they acknowledged that “counsel Carter for the Company and the Wagenets did not agree to waive any claims.” (AA 150, lns. 10-3)

Finally, Wagenet can point to no adjudication in his favor before the voluntary dismissal, or even an interlocutory ruling suggesting he was innocent of the misconduct Ford and Daly had alleged. The voluntary dismissal in this case was truly voluntary and tactical.

G.

WAGENET'S MALICIOUS PROSECUTION ACTION AND THE MOTION TO STRIKE IT

Wagenet, however, was not content to walk away from Ford's action in seven months and virtually unscathed. Indeed, it took him only 60 days from the voluntary dismissal to file his malicious prosecution action on December 4, 2006. (AA 1-10)

Ford and Daly moved promptly, too. They filed their special motion to strike the action on March 9, 2007 (AA 42-142), supporting it with a declaration by Daly with factual exhibits along with their legal memorandum.

While the motion concentrated on the issues of probable cause and malice, it also addressed the favorable termination issue in several ways. First, as shown previously, Ford and Daly set forth their pragmatic rationale for voluntarily dismissing the fourth cause of action and Wagenet. (*Ante*, pp. 12-13) Second, they dwelled at length on

Wagenet's liability for the allegations against him; it is impossible to discern anywhere in their showing a belief that he might be innocent of those allegations.

Finally, their motion papers included an express and pointed reference to the favorable termination rule in Daly's correspondence with Wagenet's counsel before the filing of the malicious prosecution action. Responding to the threat of such an action, Daly wrote on October 20, 2006, that it would be fruitless because, in part, "[t]he prior action must have been terminated in [Wagenet's] favor . . . and of course it has not [been.]" (AA 120) Daly even referred Wagenet's counsel (at AA 120) to *Crowley v. Kattleman* (1994) 8 Cal.4th 666, 686, a page where the Court explained that when "a prior action was terminated favorably [it] tends to show the innocence of the defendant in the prior action. . . ." (Internal cit. and quotes. omitted)

Wagenet's opposition papers (AA 143-185) likewise addressed all three elements of a malicious prosecution action, but likewise paid least attention to the favorable termination rule. As shown previously, he contented himself with a brief argument that Ford and Daly had conceded ("acknowledged") a favorable termination (*ante*, p. 13) simply by mentioning that Wagenet had not waived any claims in exchange for the voluntary dismissal. But while the parties disputed the favorable

termination issue only to the extent summarized here, it was certainly not “undisputed” in Wagenet’s favor as the superior court suggested below. (AA 238)

H.

THE DISPOSITION BELOW AND ITS APPEALABILITY

Following Ford and Daly’s reply papers (AA 214-235) and a hearing, the court issued its “Ruling Denying Defendant’s Special Motion to Strike” (AA 236-240) and a separate order (AA 241-242) on May 22, 2007. The ruling was a final disposition because it fully resolved the special motion to strike while also awarding attorneys’ fees to Wagenet. The ruling was also appealable pursuant to Section 425.16 (i).

Ford and Daly timely moved for reconsideration on June 1, 2007 (AA 243 *et seq.*), which motion was denied on July 9, 2007. (AA 289-290) A notice of appeal timely followed on August 7, 2007. (AA 291-292)

LEGAL ARGUMENT

I.

THE STANDARD OF REVIEW IS *DE NOVO*

The standard of review in this case is *de novo* for several reasons. First, that is the established standard for reviewing special motions to strike. As recently held in *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, n.3, “[r]eview of an order granting or denying a motion to strike under [Code Civ. Proc.] section 425.16 is *de novo*. . . .”

The *de novo* standard also applies because Wagenet’s malicious prosecution action was akin to a demurrer to the underlying cause of action against him. (AA 1) He claimed it was facially devoid of merit given the “manager’s privilege” and other matters he raised. (AA 8-9) Thus, although this appeal formally tests the sufficiency of Wagenet’s malicious prosecution action, the latter’s sufficiency turns on the sufficiency of the underlying allegations against him. And it is well settled that the sufficiency of such allegations is reviewed *de novo*. (*Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 495 (*review denied*))

Moreover, such allegations must be construed liberally in favor of their sufficiency. This Division held in *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151 (*review denied*), another malicious prosecution action, that courts “must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant.” (*Id.* at 165) This is to promote not only “open access to the courts,” but also “early resolution of disputes, including voluntary dismissal of suits when the plaintiff becomes convinced he cannot prevail or otherwise chooses to forego the action.” (*Id.* fn. 7)

Finally, the *de novo* standard applies not only to the relevant allegations but also to the evidence adduced below about the knowledge and reasoning of appellant Ford and his trial counsel, appellant Daly, in filing the cause of action against Wagenet and then voluntarily dismissing it. Although Wagenet had to adduce only prima facie support for his malicious prosecution action to survive the motion to strike it (*Soukup*, 39 Cal.4th 260, 291), the relevant evidence is undisputed and the prima facie test is a legal issue. Accordingly, the *de novo* standard of review applies for those reasons as well.

II.

IT WAS UNDISPUTED BELOW THAT WAGENET'S MALICIOUS PROSECUTION ACTION WAS SUBJECT TO A SPECIAL MOTION TO STRIKE

The first issue on a special motion to strike is whether the relevant statute even applies, that is, whether the conduct in question constitutes the kind of speech or petitioning activity intended to be subject to the motion. (*E.g., Contemporary Services Corporation*, 152 Cal.App.4th 1043, 1052) Here, however, Wagenet properly conceded below that his malicious prosecution action was subject to Ford and Daly's special motion to strike. (AA 151, Ins. 20-21 ["Plaintiff does not dispute that an anti-SLAPP Motion may be filed in malicious prosecution cases."])

Accordingly, "the burden then shifts and the [malicious prosecution] plaintiff must show a probability of prevailing on the claim. . . . The plaintiff must demonstrate the complaint is both legally sufficient and is supported by a prima facie showing of facts sufficient to sustain a favorable judgment if the evidence submitted by the plaintiff is given credit." (*Contemporary Services Corporation*, 152 Cal.App.4th 1043, 1052) In other words, Wagenet had the burden to establish that Ford and Daly's underlying lawsuit "(1) . . . was pursued to a legal termination in his, [*i.e.*, Wagenet's] favor; (2) was brought without

probable cause; and (3) was initiated with malice." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871)

As this brief will now demonstrate, Wagenet failed to meet his burden every step of the way — and failure on *any* step compels a grant of Ford and Daly's motion below. (*Soukup*, 39 Cal.4th 260, 292)

III.

WAGENET CANNOT MEET HIS BURDEN TO ESTABLISH THAT HIS VOLUNTARY DISMISSAL FROM THE UNDERLYING ACTION WAS A FAVORABLE TERMINATION REFLECTING HIS INNOCENCE OF HIS ADMITTED WRONGDOING

Some perspective is required at the outset, and this Division provided it in *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164:

Malicious prosecution is a disfavored action because of the potentially chilling effect it may have on the ordinary citizen's willingness to . . . bring a civil dispute to court for the resolution of conflicts or the redress of a grievance.

The first line of defense of that principle is the favorable termination rule.

"In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit.'" (*Casa Herrera, Inc. v. Beydoun*

(2004) 32 Cal.4th 336, 342; quoting *Pender v. Radin* (1994) 23 Cal. App.4th 1807, 1814 (*review denied*) Thus, a dismissal because the plaintiff is “no longer in a position to complain of the wrongdoing” is not favorable. (*Casa Herrera*, 32 Cal.4th at 348) “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 it would support a subsequent action for malicious prosecution.” (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751)

Here, of course, Wagenet can point to no judicial finding of his innocence on the allegations against him. Indeed, the only judicial finding anywhere near this subject went the other way. After Ford and Daly had dismissed their fourth cause of action and Wagenet along with it, the trial court nonetheless made a finding that “the case,” arguably meaning the *entire* case, “is not filed in bad faith. . . .” (AA 208, Ins. 23-24) Although only the first three causes of action remained at that time, the quoted finding at least inferentially supports Ford and Daly’s *bona fides* in filing their fourth cause of action as well.

Because there was no judicial finding of his innocence, Wagenet’s only recourse was to establish that the voluntary dismissal reflected Ford and Daly’s *belief* in his innocence. “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*, 152 Cal.App.4th at 1057, quoting *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881; accord, *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400 [affirming a favorable termination finding because, irrespective of any presumption, the evidence proved the dismissal was "motivated by a recognition that most of the claims made . . . in the complaint were meritless"].)

By any measure, Wagenet did not and cannot meet his burden to establish that his dismissal reflected Ford and Daly's belief in his innocence. On the contrary, their wholly pragmatic rationale for the dismissal stands uncontroverted. Nor did Wagenet adduce any evidence that, notwithstanding their stated rationale, they actually believed he was innocent of the misconduct they had alleged. Indeed, he had repeatedly admitted that misconduct under oath. (*Ante*, pp. 4-6) And the bookkeeper who had acted on his instructions likewise acknowledged under oath that "the amounts withheld . . . had not been paid to the IRA *as required under law* [.]" (AA 163, ¶ 7; italics added) So it strains credulity to suppose that Ford and Daly filed their voluntary dismissal because they had come to disbelieve Wagenet's own sworn confessions of having diverted Ford's IRA funds for two years. If anything, Wagenet's many sworn confessions affirmatively establish the

contrary — that Ford and Daly did *not* dismiss the relevant cause of action out of a belief in Wagenet’s innocence.

On this basis alone, therefore, this Court should hold that Ford and Daly’s motion to strike the malicious prosecution action should have been granted. (*Contemporary Services*, 152 Cal.App.4th at 1058) In an abundance of caution, however, we now address the other factors compelling the same disposition.

IV.

WAGENET CANNOT MEET HIS BURDEN TO ESTABLISH THAT FORD AND DALY LACKED PROBABLE CAUSE TO SEEK RELIEF AGAINST HIM FOR HIS ADMITTED WRONGDOING

Working in tandem with the favorable termination rule is the familiar requirement that probable cause be lacking. Again, this Division explained the rationale in *Sangster*:

In our system, litigants have the right to present issues that are arguably correct even if it is extremely unlikely they will win. . . . [¶] . . . When the prior action was objectively reasonable, the malicious prosecution defendant is entitled to prevail regardless of his or her subjective intent.” (*Id.* at 164)

Probable cause requires only that a challenged action be “legally tenable” at the time it was filed. (*Id.* at 165) Moreover, in assessing that

issue the court “must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant[.]” (*Id.*) Here, neither the “manager’s privilege” nor any other matter relied on below suffice to meet Wagenet’s burden to demonstrate a lack of probable cause.

A.

**NO “MANAGER’S PRIVILEGE” IMMUNIZES
CORPORATE AGENTS FOR WRONGFULLY
DIVERTING EMPLOYEE PENSION FUNDS**

Wagenet’s principal contention below borders on the frivolous for more than one reason. First, the Unlawful Practices Act itself specifies that the term “person,” for all present purposes, “shall mean and include natural persons. . . .” (Bus. & Prof. Code § 17201) Nor does it make sense to suppose that the Legislature, in creating this broad remedial scheme, intended to exempt the millions of individuals in California’s business world — corporate agents, partners, and sole practitioners — who might commit unfair or unlawful practices otherwise remediable under this statute. Limiting liability to corporate entities would carve out a huge gap in a fundamental state policy.

Second, Section 2343 of the Civil Code expressly provides, in pertinent part, that “[o]ne who assumes to act as an agent is responsible

to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: . . . (3) When his acts are wrongful in their nature.” (Emphasis added)

Nor is the term “wrongful” in that statute limited to common law torts, as Wagenet argued below. Rather, it includes conduct violating a statute. For example, *Otanez v. Blue Skies Mobile Home Park* (1991) 1 Cal.App.4th 1521, 1526, held agents are personally liable for violating the Mobilehome Residency Law (Civil Code § 798 *et seq.*).

More fundamentally, though, *PMC, Inc. v. Kadisha, supra*, 78 Cal. App.4th 1368, flatly refutes Wagenet’s attempt to limit corporate agents’ personal liability to cases of common law torts. *PMC* involved a violation of the Uniform Trade Secrets Act (Civil Code § 3426 *et seq.*), and it held broadly that “[m]isappropriation of trade secrets *is* an intentional tort.” (78 Cal.App. 4th 1382; italics added) Notably, too, the relevant statute, Civil Code § 3426.1, did not so state. It merely defined the parameters of liability for misappropriating trade secrets, in much the same way the Unlawful Practices Act and case law thereunder define the parameters of liability at issue here.

Accordingly, when *PMC* used the word “tortious” it had a statutory violation in mind — not just a common law tort — in rejecting

a claim of agency immunity indistinguishable from Wagenet's claim here:

"Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct. [Citations.] [] Directors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable. [Citations.]" (*Id.* at 1379-80, quoting *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503-04)

PMC's holding and rationale are directly and forcefully applicable here. The relevant record establishes the very opposite of what Wagenet had to establish to defend his malicious prosecution action: Ford and Daly had every right to allege personal liability on his part for diverting employee pension funds in violation of Labor Code § 227 (*ante*, p. 2, n. 1) and the Unlawful Practices Act.

Indeed, Wagenet's own cases did not even support his claim of managerial immunity. *Shapoff v. Scull* (1990) 222 Cal.App.3d 1457 (*review denied*) and *Shoemaker v. Myers* (1990) 52 Cal.3d 1 involved claims of wrongful interference with a corporation or other principal's contracts. And the holdings were simply that, because a party cannot be liable for interfering with its own contract — only for breaching it — it

would circumvent that rule to allow interference suits against the officers or agents through whom a corporate entity must act.

In addition, *Shapoff* qualified its holding as follows: “the tort liability of an owner, director or manager depends upon whether he was acting to protect the interests of the entity. Only if he was acting to protect the entity’s interests may he escape liability.” (*Id.* at 1466) Here, however, the relevant allegations and evidence demonstrate that Wagenet diverted the IRA funds at least in part to advance his own pecuniary interests. (*Ante*, pp. 6-7) Accordingly, his own cases failed to support the absolute immunity he claimed.

Finally, his claim of immunity has been weakened even further since *Shapoff* and *Shoemaker*. Another First District case, *Kuyhn v. Vu* (2003) 111 Cal.App.4th 1183, held:

when a manager stood to reap a tangible personal benefit from the principal’s breach of contract, so that it is at least reasonably possible that the manager acted out of self-interest rather than in the interest of the principal, the manager should not enjoy the protection of the manager’s privilege unless the trier of fact concludes that the manager’s *predominant* motive was to benefit the principal. Thus, in a case such as the instant one, where the manager had a material, albeit indirect, personal financial interest in the transaction, we are of the opinion that the predominant motive test should be applied.” (*Id.*

at 1198; original italics)

As shown previously, of course, the relevant pleadings and evidence placed Wagenet squarely within the foregoing holding.

In sum, the manager's privilege — Wagenet's principal defense of his malicious prosecution action — afforded him no protection from Ford and Daly's special motion to strike.

B.

FORD AND DALY SUFFICIENTLY ALLEGED AND EVIDENCED THEIR RIGHT TO SEEK RESTITUTION OR INJUNCTIVE RELIEF AGAINST WAGENET

The other principal basis for the ruling below was that the only relief authorized by the Unlawful Practices Act, restitution or an injunction, was moot in this case. But Wagenet did not meet his burden to establish a lack of probable cause on that ground, either.

1.

Injunctive Relief

Addressing the injunction issue first, the court reasoned that, because Wagenet's company "had ceased doing business" before Ford and Daly sued him, "[t]he complaint did not state any possible basis for

the necessity of an order to restrain or enjoin *future* repetitions of the allegedly unlawful or unfair conduct.” (AA 238; original italics)

With respect, however, Wagenet admitted at his deposition below, taken on July 11, 2006, that the company was still in good standing. (AA 187, Ins. 11-13) That was six months after Ford and Daly had filed their complaint against Wagenet and others on December 22, 2005. (AA 11) He alleged the same in the malicious prosecution complaint filed December 4, 2006. (AA 12, ¶ 3)

More importantly, though, it was undisputed that Wagenet was not planning to sell the company or its assets or give them away. Rather, he was actively seeking to convert those assets to what he considered a more profitable use. (See citations *ante*, p. 10.) And it follows that an injunction against further violations of Labor Code § 227 or the Unlawful Practices Act, had Ford and Daly seen fit to pursue such relief, was far from moot. This man was not heading for retirement on a mountaintop where he could no longer commit violations like those he had admittedly committed against Ford and many others. On the contrary, the record established a great likelihood that Wagenet was *already* in a position to commit similar violations as the owner and manager of the very same company, albeit in the different direction he was planning to take it or a successor enterprise.

The purpose of injunctive relief is “to prevent continued violations of the law and to prevent violators from dissipating funds illegally obtained,” (*State v. Altus Finance* (2005) 36 Cal.4th 1284, 1306; citing *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 16) That purpose was well served when Ford and Daly preserved their right to seek injunctive relief by the familiar equitable route of praying for “such other relief as the Court may deem just and proper.” (AA 38, ¶ 4)

2.

Restitutionary Relief

As for restitutionary relief, the court reasoned it was moot because Ford had “acknowledged in his complaint” he had been made “*essentially whole*” regarding his IRA funds. (AA 238; original italics) This brief has already demonstrated, however, that a liberal construction of that allegation, as required, compels its reading in accordance with Ford and Daly’s express explanation below. (*Ante*, p. 13) They never intended to allege a *total* reimbursement of Ford’s IRA funds — especially not when their calculations at that time revealed he was owed more than three times the amount Wagenet sent him after the firing. (See citations *ante*, pp. 7-8) Rather, they were counting on discovery or at least an independent audit to determine Ford’s rightful restitution.

In addition, the record establishes that Ford and Daly had every right to seek restitution of at least some of the IRA funds from Wagenet individually, not just from the company. As this brief has already documented, the company's own bookkeeper confirmed under oath that the IRA funds were diverted at Wagenet's direction "to make payroll" (AA 163, ¶ 7), not just to satisfy outside creditors as Wagenet always emphasized below. Thus, because Wagenet himself was undisputedly on the company payroll during this period, Ford and Daly aptly pointed out below that "[a] portion of Hal's own salary may have come out of Steve's funds." (AA 218, Ins. 4-5) Accordingly, basic principles of restitution made it appropriate to seek restitution from Wagenet for his own unjust (and unlawful) enrichment at Ford's direct expense.

Finally, *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 held that restitution may be ordered under the Unlawful Practices Act for improperly withheld wages. "[A]ny business act or practice that violates the Labor Code through failure to pay wages is, by definition (§ 17200), an unfair business practice." (*Id.* at 178) *Cortez* explained that "unlawfully withheld wages are property of the employee within the contemplation of the UCL." (*Id.*)

In this case, additional grounding for Ford and Daly's pursuit of restitution against Wagenet was provided by the allegations and evidence below that Wagenet had schemed to deprive Ford of the unpaid wages he had earned over many years, but had essentially deferred in exchange for the broken promise of ownership of the business. (*Ante*, pp. 8-11) Moreover, the record established that Wagenet was pursuing personal pecuniary benefits by this scheme, in the form of increased short-term income, unshared ownership of the business, and unshared profits from its planned conversion to a more profitable use. (*Ante*, p. 10) Accordingly, Ford and Daly's pursuit of restitution from Wagenet was justified on this basis, too.

More specifically, their complaint alleged that Ford had earned wages for which he had never been paid. (AA 18-19, ¶ 19; 36-37, ¶¶ 57, 59) His pay had been cut 4-6 times, and the lost salary was never repaid. (AA 197, ¶ 12) His hours were reduced to four days a week and those wages, too, were never repaid. (AA 192; 197, ¶ 12) The company required that he delay depositing his pay check because there were insufficient funds to cover it, and he was never compensated for that. (AA 197, ¶ 12)

In addition, when Wagenet successfully ran for Mendocino County supervisor (AA 22, ¶ 26; 199, ¶ 19) and was unable to handle

his managerial duties because he was out campaigning (AA 199, ¶ 19), Ford, after being promised a raise if he did so, took on Wagenet's additional duties for a full year but was never compensated for that. (AA 18-19, ¶ 19d) He also worked holidays for which he was not paid. (AA 19, ¶ 19d; 197, ¶ 12)

The Labor Code defines "wages" as "all amounts for labor performed by employees." (Labor Code section 200(a)) Thus, it was appropriate for Ford and Daly to seek restitution not only for the past unpaid wages documented above, but also for Ford's lost wages in the post-firing period as described in the fourth cause of action. He had earned those wages, too, by dint of his many years of previous work and deferred compensation in reliance on the broken promise of ownership.

Finally, *Cortez* supports a restitution claim as to the post-firing wages, too, because Ford had already earned them in the indicated manner. And Wagenet's personal and wrongful causation of this loss, and his additional pecuniary benefit from it, made it appropriate for Ford and Daly to seek this relief, too, against him. "The goal of restitution is to restore the *status quo ante* as nearly as possible." (*Tomlinson v. Indymac Bank, F.S.B.* (C.D. Cal. 2005) 359 F.Supp.2d 891, 893-94, quoting *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149, and citing *Cortez*, 23 Cal.4th 177)

In sum, Ford and Daly had ample cause to seek restitutionary relief from Wagenet as their cause of action against him expressly stated.

(AA 37, ¶ 60)

V.

**WAGENET CANNOT MEET HIS BURDEN TO
ESTABLISH THE REQUISITE MALICE**

Little need be said on the malice issue. Ford and Daly believe Wagenet will have grave difficulty persuading this Court even to reach the malice issue after considering the favorable termination and probable cause rules. It bears repeating that Wagenet must successfully defend *every* element of his malicious prosecution action on this appeal. (*Soukup*, 39 Cal.4th 260, 292)

Again following Wagenet's lead below, the court relied on Ford's deposition testimony that he told Wagenet's brother that he did not want to "hurt" Wagenet's father by filing the underlying lawsuit, but did not mind "hurting" Wagenet himself in that manner. (AA 225, Ins. 23-25; 227:21-228:7) Ford also testified, however, that "[w]hat I was referring to was just getting access to what I felt was mine and then taken away from me." (AA 228, Ins. 1-3)

Moreover, it was Wagenet himself, not the father, who was admittedly responsible for illegally diverting IRA funds belonging to Ford and many other employees. It was also Wagenet himself who mainly stood to benefit from those admitted acts of wrongdoing. And it was Wagenet himself who had fired Ford in apparent retaliation for his complaints about the IRA diversion and other complaints, to Wagenet's wife, about his absence campaigning for supervisor and other managerial deficiencies. (AA 22, ¶ 26; 199, ¶ 19)

Accordingly, if Ford's single and stray "hurt" comment can be taken as sufficient evidence of malice to justify a malicious prosecution action, that would invite and insulate such disfavored actions in practically every case. Indeed, the more *justified* a cause of action may be, and the more egregious the conduct it alleges, the more likely a malicious prosecution action will be insulated from the Legislature's intended remedy of a special motion to strike. Proper indignation at wrongful conduct, motivating no action but a peaceable petition for redress, is simply not malice for present purposes.

Here, in any event, the "hurt" comment was overwhelmed by concrete, undisputed, and far more telling evidence cutting the other way. It is undisputed that Ford and Daly did not rush to sue Wagenet the way Wagenet rushed to sue them after the voluntary dismissal. This

brief has documented Ford and Daly's vain pursuit of an amicable resolution before going to court, and their further demonstration of good faith by dropping two causes of action they had contemplated based on information supplied by Wagenet's counsel. (*Ante*, p. 12)

Finally, Wagenet's burden is not to establish malice in the abstract, but rather that the underlying lawsuit had been "*initiated* with malice.'" (*Soukup*, 39 Cal.4th at 292, quoting *Sheldon Appel*, 47 Cal. 3d at 868; italics added) Thus, any arguable probative value of the "hurt" remark is negated by an indisputable fact. Ford and Daly filed the relevant fourth cause of action not only against Wagenet but also against his father and the company. Accordingly, Wagenet will find it difficult to meet his burden to prove that, subjectively, Ford and Daly regarded the mere act of filing the fourth cause of action as the malevolent "hurt" Wagenet must make it out to be.

It is undisputed that Ford held Wagenet's father in the highest regard and affection, which is why Wagenet fully accepted Ford's testimony that he did not wish to "hurt" the father by filing the underlying lawsuit. Accordingly, Ford and Daly could not likely have regarded the mere act of filing the fourth cause of action as a malicious "hurt" against *anyone*. A trier of fact would likely conclude that the inclusion of the father as a defendant proves that Ford and Daly's only

actuating motive in filing the fourth cause of action was to recover judicial relief they believed Ford was appropriately entitled to.

Finally, the trial court itself made a finding that almost singlehandedly refutes Wagenet's claim of malice. At the hearing, the court acknowledged that "there's a dispute about reimbursement" of the IRA funds, and "there's no dispute but that Mr. Wagenet directed [the bookkeeper] to withhold [them], she did withhold, and that, at least according to declaration, that was done in order to pay creditors. . . [I]t was certainly without knowledge and approval, I understand, without the employees – I'm accepting that as undisputed." (RT 4/6/07: 8, 16)

If the extent of the IRA reimbursement remained disputed as late as the hearing below, and Wagenet's responsibility for the fund diversion remained *undisputed*, it is difficult to fathom how Ford and Daly could possibly have sued Wagenet with the requisite malice (or lack of probable cause). The court's own findings compel the conclusion that they were not seeking to "hurt" anyone, but simply to resolve a dispute and obtain any appropriate relief.

CONCLUSION

For all the foregoing reasons, this Court should reverse the rulings below, both on the principal motion and the ancillary fee award, and hold that Wagenet's malicious prosecution action must be stricken as Ford and Daly have requested. Wagenet fell far short of defending the probable merit of that action under the applicable standards.

DATED: February , 2008

Respectfully submitted,

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CERTIFICATE OF LENGTH OF BRIEF

The undersigned, counsel for appellant Jeffrey N. Daly, hereby certifies pursuant to Rule 8.204(c)(1) , California Rules of Court, that the foregoing brief is proportionately spaced, has a 13-point typeface, and contains 7,693 as computed by the word processing program (WordPerfect X3) used to prepare the brief.

DATED: February , 2008

ELLIOT L. BIEN

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served:

APPELLANTS' JOINT OPENING BRIEF; APPELLANTS' APPENDIX

by enclosing copies of same in envelopes addressed to:

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and causing same to be delivered by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at Novato, California.

DATED: February , 2008

ELLIOT L. BIEN