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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HEALTHSMART PACIFIC, INC., et al. Plaintiffs and Appellants, v. ARTHUR GOLIA et al. Defendants and Respondents.	B266311 (c/w B269627) (Los Angeles County Super. Ct. No. BC578484)

APPEALS from a judgment of dismissal and order awarding attorney fees of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Horvitz & Levy, Jeremy B. Rosen, John F. Querio, Scott P. Dixler; Keith Fink & Associates, Keith A. Fink, and Olaf J. Muller for Plaintiffs and Appellants.

Buchalter, Harry W.R. Chamberlain II, Robert M. Dato, and Efrat M. Cogan for Defendants and Respondents Kabateck Brown Kellner LLP, Brian S. Kabateck, Robert B. Hutchinson, Cotchett Pitre & McCarthy LLP, Knox Ricksen LLP, Frank M. Pitre, Alexandra A. Hamilton, Joanna W. Licalsi,

Eric Danowitz, Maisie C. Sokolove, Joseph M. Barrett, Lina Melindonian, Richard A. Dicorrado, and Benjamin S. Hakimfar.

Kabateck Brown Kellner, Brian S. Kabateck, Shant A. Karnikian; Knox Ricksen, Thomas E. Fraysse, Maisie C. Sokolove; Cotchett, Pitre & McCarthy, Frank M. Pitre, and Robert B. Hutchinson for Defendants and Respondents Arthur Golia, Mary Bravo, Derika Moses, Stacy Averhart, Linda Cahill, Ronald Cichy, Kim Coslett, Yvette Arroyo, Mark Dail, Jo Elizabeth Dixon, Rose Duron, Zettie Epps, Jaime Espinoza, Gisela Fabila, John Gutkowski, Kathleen Gonzales, Rose Ann Heath, Joanna Lorton, Patricia Marciel, Rehta Mashtalier-Scott, Shawn McAlonan, Coleen Mejia, Ava Perry, Gary Phillips, Laura Plescia, Matthew Toppel, Carmen Yolanda Vargas, Richard Ventimiglia, Phillip Williams, and John Wilson.

The question before us is whether the trial court erred in granting the special motions to strike brought under the anti-SLAPP[1] statute, Code of Civil Procedure section 425.16, by

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[1] "SLAPP" stands for "Strategic Lawsuit Against Public Participation."

30 patient defendants[2] and 14 lawyer defendants[3] in a malicious prosecution action filed by plaintiffs Michael Drobot (Drobot) and his companies, Healthsmart Pacific, Inc. (Healthsmart) and International Implants LLC (International Implants). The malicious prosecution action arose from 30 individual complaints filed by the patient defendants, alleging that plaintiffs participated in a broad conspiracy that encompassed insurance fraud, kickbacks, and inflated billing for spinal implants, as well as the manufacture, sale and use of "counterfeit" and unsafe spinal hardware possibly implanted in the patient defendants. The lawsuits named as defendants a host of medical device manufacturers and distributors, hospitals, marketers, and doctors who had also been named in a qui tam action allegedly arising from the same scheme. But none of the 30 patient defendants alleged that her or his surgery had been performed at

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[2] The patient defendants include Arthur Golia, Mary Bravo, Derika Moses, Yvette Arroyo, Stacy Averhart, Linda Cahill, Ronald Cichy, Kim Coslett, Mark Dail, Jo Elizabeth Dixon, Rose Duron, Zettie Epps, Jaime Espinoza, Gisela Fabila, John Gonzales, Rose Gutowski, Kathleen Ann Heath, Joanna Lorton, Patricia Marciel, Rehta Mashtalier-Scott, Shawn McAlonan, Coleen Mejia, Ava Perry, Gary Phillips, Laura Plescia, Matthew Toppel, Carmen Yolanda Vargas, Richard Ventimiglia, Phillip Williams, and John Wilson.

[3] The lawyer defendants include Brian S. Kabateck, Kabateck Brown Kellner LLP, Robert B. Hutchinson, Cotchett Pitre & McCarthy LLP, Knox Ricksen, LLP, Frank M. Pitre, Alexandra A. Hamilton, Joanna W. Licalsi, Eric J. Danowitz, Maisie C. Sokolove, Joseph M. Barrett, Lina Melidonian, Richard A. Dicorrado, and Benjamin S. Hakimfar.

Pacific Hospital of Long Beach (Pacific Hospital), a facility owned and operated by Healthsmart.

Reviewing the matter de novo, we conclude that plaintiffs have failed to establish a probability of prevailing on their malicious prosecution claims, as required to defeat an anti-SLAPP motion. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Drobot's Plea Agreement

Drobot owns and operates Healthsmart, which owned and operated Pacific Hospital from approximately 1997 until October 2013. Pacific Hospital specializes in spinal surgeries and spine-related procedures.

In February 2014, Drobot pled guilty in federal court to charges of conspiracy to violate certain federal statutes (18 U.S.C. § 371)[4] and payment of kickbacks in connection with a federal health care program (42 U.S.C. § 1320a-7b(b)(2)(A)).[5]

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[4] Title 18 United States Code section 371 makes it a crime to conspire with another "to commit any offense against the United States, or to defraud the United States, or any agency thereof " and to have any member of the conspiracy "do any act to effect the object of the conspiracy." The federal offenses Drobot conspired to violate are mail fraud (18 U.S.C. § 1341); honest services mail fraud (18 U.S.C. § 1346); interstate travel in aid of a racketeering enterprise (18 U.S.C. § 1952(a)(3)); money laundering (18 U.S.C. § 1957); and payment of kickbacks in connection with a federal health care program (42 U.S.C. § 1320a-7b(b)(2)(A)).

[5] Title 42 United States Code section 1320a-7b(b) provides: "(1) [w]hoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe or rebate) directly or

According to his plea agreement, Drobot "conspired with dozens of doctors, chiropractors, marketers, and others to pay kickbacks in return for those persons [referring] thousands of patients to Pacific Hospital for spinal surgeries and other medical services paid for primarily through the Federal Employees' Compensation Act ('FECA') and the California Workers' Compensation System ('CWCS')."

Drobot generated funds for the kickbacks by using either his own company, International Implants, or a co-conspirator distributor to inflate fraudulently the price of medical hardware purchased by Pacific Hospital for use in spinal surgeries. As part of this scheme, surgeons received larger kickbacks if they used hardware supplied by a specified distributor, usually International Implants. For surgeries covered by CWCS, International Implants or the co-conspirator distributor charged Pacific Hospital a price inflated far beyond the price at which the distributor had purchased the medical hardware from the manufacturer. Pacific Hospital then submitted the inflated invoices, plus an additional $250, to workers' compensation insurance carriers. The costs for medical hardware submitted in Pacific Hospital's claims were thousands of dollars, or even tens

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indirectly, overtly or covertly, in cash or in kind—[¶] (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a [f]ederal health care program, or [¶] (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a [f]ederal health care program, [¶] shall be guilty of a felony."

of thousands of dollars, higher than the prices charged by the manufacturers. Although International Implants was not a manufacturer, Drobot and his co-conspirators included on the company's invoices stamps falsely stating that International Implants was an "FDA Registered Manufacturer." According to Drobot's plea, from 2008 to 2013, Pacific Hospital billed workers' compensation insurance carriers approximately $500 million in claims for thousands of spinal surgeries resulting from the payment of kickbacks, and Drobot and his co-conspirators paid between $20 million and $50 million in kickbacks relating to those claims.

Drobot also admitted that he "provided a stream of financial benefits to California State Senator Ronald S. Calderon" to influence Senator Calderon to support legislation and regulations that allowed hospitals to "pass through" to workers' compensation insurance carriers the entire cost of medical hardware used in spinal surgeries.[6] These benefits included payments to Senator Calderon's son for work as a summer file clerk, trips to "exclusive, high-end golf resorts," "expensive dinners," and "free flights on a private plane."

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[6] Although not specified in the plea agreement, the referenced legislation apparently included former Labor Code section 5318, subdivision (a), which was amended in 2003 to provide: "Implantable medical devices, hardware, and instrumentation for [certain medical services] shall be separately reimbursed at the provider's documented paid cost, plus an additional 10 percent of the provider's documented paid cost, not to exceed a maximum of two hundred fifty dollars ($250), plus any sales tax and shipping and handling charges actually paid." (Stats. 2003, ch. 639, § 44, p. 4933.) This statute was repealed in 2013. (Stats. 2012, ch. 363, § 78.)

Neither the charging pleading in the federal criminal case nor Drobot's plea agreement referred to plaintiffs or anyone else manufacturing, purchasing, or using any counterfeit or "non-FDA-approved" medical hardware or devices. Nor did either of these documents state that plaintiffs or anyone else supplied prostitutes or "adult entertainment" as part of the kickback or bribery schemes.

B. The Qui Tam Action

A qui tam action (*State of California ex rel. Mark Sersansie and William Reynolds v. Garden Regional Hospital Management Co.*) describing an insurance fraud scheme similar to that admitted by Drobot was filed by Mark Sersansie and William Reynolds, alleging violations of the Insurance Frauds Prevention Act, Insurance Code section 1871 et seq., and the False Claims Act, Government Code section 12650 et seq.[7] The qui tam plaintiffs were represented by attorneys from the law firm Cotchett, Pitre & McCarthy LLP, one of the lawyer defendants in the instant action.

The qui tam complaint alleges a scheme involving a number of Southern California hospitals in addition to

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[7] The procedural history of the qui tam action is not clear from the record. Defendants state in their respondents' brief that the action was filed in February 2014 and refer to Los Angeles Superior Court case No. 536466. The document in the record to which they cite is a qui tam complaint filed in camera and under seal in Sacramento Superior Court on May 25, 2012, and ordered unsealed by the court on July 24, 2013, following a notice of declination by the State of California. In the request for judicial notice to which this document is attached, however, the document is identified as Los Angeles Superior Court case No. BC534466.

Pacific Hospital. It names as defendants individuals, including Drobot; hospitals, including Pacific Hospital; distributors and marketers, including International Implants and Spinal Solutions, LLC (Spinal Solutions); Crowder Machine & Tool Shop; and surgeons, including Jack Akmakjian, M.D. and G. Sunny Uppal, M.D.

In addition to alleging a kickback scheme and fraudulent claims to insurance carriers inflating the cost of spinal hardware, the complaint alleges that "several of the Defendants . . . manufacture and/or knowingly utilize counterfeit screws and rods" in spinal surgeries with the defendant hospitals' "knowledge or reckless disregard for the truth." The complaint specifically alleges that International Implants purchased counterfeit screws and implant systems from Spinal Solutions and resold those systems to hospitals.

C. The Medical Fraud Lawsuits

1. Thirty-two Individuals, Including Patient Defendants, Filed Medical Fraud Actions Naming Drobot, Healthsmart, and International Implants as Defendants

Beginning in June 2014 and through October 2014, the lawyer defendants filed 32 lawsuits on behalf of individuals (including the 30 patient defendants) who had undergone spinal fusion surgeries involving the implantation of medical hardware. Like the qui tam action, these suits alleged a broad scheme of insurance fraud, inflated billing, kickbacks, "sham" distributorships, and "sham" consulting agreements as a cover for the hospitals' payment of kickbacks. The complaints additionally alleged that the kickbacks included prostitutes and " 'adult

entertainers' for the spinal surgeons' enjoyment" aboard airplanes owned or leased by Roger Williams, the owner of Spinal Solutions. They named as defendants an array of hospitals, distributors, manufacturers, marketers, surgeons, and other individuals—most of them the same entities and individuals named in the qui tam action. Each of the suits named Drobot, Healthsmart, and International Implants as defendants.

The complaints alleged that, as part of the conspiracy to defraud insurance carriers and increase profits from spinal surgeries, "Defendants manufactured, distributed, sold, purchased, and/or implanted counterfeit, non-FDA approved,[8]

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8 The parties employ the terms "FDA-approved" and "non-FDA approved," but do not clarify what they mean by the terms in a given context. The United States Food and Drug Administration (FDA) permits medical devices to come to market via different pathways. Certain devices must receive "premarket approval" from the FDA. (21 U.S.C. §§ 360c(a)(1)(C), 360e.) Other devices may enter the market through what is known as a "510(k) application"—so named for the relevant section of the Medical Device Amendments [MDA] of the Food, Drug and Cosmetic Act, 21 U.S.C. section 360c et seq. (See 21 U.S.C. § 360c(f)(1)(A).) As one court explains: "Some devices . . . enter the market through Section 510(k) of the MDA. This section applies to any device which the manufacturer submits as, and the FDA finds to be, '*substantially equivalent'* in design and function to a '*predicate device'* (i.e., a device which was on the market prior to the effective date of the MDA or was lawfully sold as a substantially equivalent device). [Citations]." (*James v. Diva International, Inc.* (S.D.Ind. 2011) 803 F.Supp.2d 945, 947.) While devices cleared through the 510(k) process may be lawfully sold and used, an FDA regulation provides that clearance of a device through the 510(k) process "does not in any way denote official approval of the device" and the regulation prohibits "[a]ny

'knock-off ' spinal fixation implant devices." The complaints specifically named Spinal Solutions, its subsidiary Orthopedic Alliance, LLC (Orthopedic Alliance), its owner Roger Williams, Williams' wife, and Jeffrey Fields, the operations manager for Spinal Solutions and Orthopedic Alliance, as the parties who allegedly requested and directed the manufacture of counterfeit devices. They named William Crowder as an individual who allegedly "attempted to copy and/or counterfeit authentic FDA-approved product." The complaints alleged that the hospital defendants "knowingly and willingly entered into agreements with the Distributor Defendants, Marketer Defendants, and/or Doctor Defendants" for the purchase of counterfeit medical hardware and "knew, or should have known through reasonable inspection and due diligence" that doctors performing surgeries at the hospitals were designating counterfeit medical hardware for use in their surgeries.

The complaints further alleged that the surgeon(s) performing an individual plaintiff's surgery knowingly implanted

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representation that creates an impression of official approval of a device" cleared through the 510(k) process. (21 C.F.R. § 807.97.) Thus, lawfully used devices may be "non-FDA-approved." The FDA also regards as "misbranded" a device "manufactured, prepared, propagated, compounded, or processed in an establishment . . . not duly registered" under Title 21 United States Code section 360. (21 U.S.C. § 352(o).) While it is not entirely clear, the patient defendants' allegations regarding "non-FDA approved" hardware appear to refer to components that were not "cleared" by the 510(k) process and/or were manufactured by an unregistered establishment and/or were fraudulently passed off as the product of an FDA-registered manufacturer.

non-FDA-approved medical hardware in patients and conspired to conceal from the plaintiff the source, manufacturer, and identity of the hardware used in her or his surgery. Thirty of the complaints alleged that the spinal surgeries had taken place at hospitals other than Pacific Hospital.

The actions included claims of battery, fraud (concealment and intentional misrepresentation), breach of fiduciary duty, intentional infliction of emotional distress, and negligence against Drobot, Pacific Hospital and International Implants as "Aiders and Abettors and/or Co-Conspirators."[9]

The individual actions were ordered related, along with the qui tam action, under Judge Berle.

2. The Trial Court Sustained Plaintiffs' Demurrers to Three of the Medical Fraud Complaints and the Patient Defendants Dismissed Plaintiffs From Their Suits

Plaintiffs subsequently demurred to the operative complaints of patient defendants Arthur Golia, Mary Bravo, and Derika Moses on the grounds that the three could not state any cause of action against Drobot, Pacific Hospital, or International Implants because these individuals had no relationship with plaintiffs and plaintiffs thus owed them no duty of care.[10]

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[9] Eight complaints asserted causes of action against Drobot and International Implants plaintiffs directly—not exclusively on theories of conspiracy or aiding and abetting. One complaint asserted causes of action directly against all three plaintiffs.

[10] Seventeen demurrers were filed by the various defendants in the medical fraud actions against the complaints of

Plaintiffs contended that the surgeries complained of by Golia, Bravo, and Moses did not take place at Pacific Hospital, and the spinal implants they received were neither manufactured nor distributed by plaintiffs. Relying on *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, and other cases, plaintiffs argued that for tort liability to attach under a conspiracy theory, an alleged co-conspirator must be legally capable of committing the alleged underlying tort. A party cannot be liable for civil conspiracy, plaintiffs argued, if the alleged conspirator was not personally bound by the duty violated by the alleged tortious conduct.

Plaintiffs additionally argued that the complaints failed to plead facts sufficient to hold plaintiffs liable under a theory of aiding and abetting. Citing *American Master Lease, LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1475-1476, plaintiffs maintained that because aiding and abetting focuses on whether a defendant knowingly provided substantial assistance to the primary tortfeasor, a sufficient complaint must plead facts demonstrating causation—that the defendant's alleged assistance constituted a substantial factor in causing the alleged harm. Relying on *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145, plaintiffs contended that a complaint must allege a defendant's actual knowledge of "*the specific primary wrong*" the defendant allegedly assisted.

Golia, Bravo, Moses, and Mary Cavalieri. Plaintiffs did not demur to the complaint of Cavalieri, whose surgery was allegedly performed at Pacific Hospital.

The patient defendants (plaintiffs in the medical fraud actions) countered by arguing that conspiracy "may be alleged in general terms" and that acts constituting the conspiracy itself, as distinct from the acts performed *pursuant* to the conspiracy that inflicted the alleged wrong, need not be alleged. Even so, they cited as specific allegations of conspiracy the alleged consulting agreements ("examples of sham agreements between two or more Defendants designed to camouflage their concerted wrongful acts"), as well as the larger scheme involving the payment and receipt of kickbacks. In response to the contention that liability for conspiracy attaches only when an alleged conspirator owes a duty violated by the tortious act, they cited *Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, which held "an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Id.* at p. 1048.)

The trial court sustained the demurrers on February 20, 2015. Citing *Kidron v. Movie Aquisition Corp.* (1995) 40 Cal.App.4th 1571, the trial court observed that "conspiracy defendants must . . . have actual knowledge that a tort is planned, and concurred in the tortious scheme with knowledge for its unlawful purpose." It found that "[d]emurring hospitals had no knowledge of these non-patient plaintiffs'[11] surgeries—what was not disclosed or misrepresented to them about the implanted device." In making this finding, the trial court pointed to allegations identifying only specific doctors and the hospitals where the surgeries were performed as having

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11 In the trial court, plaintiffs referred to the patient defendants as the "Non-Patient Defendants."

"knowledge and/or access to knowledge as to the true [source] and/or FDA status of the surgical hardware."

The court also found the pleadings did not allege that the demurring hospitals owed a duty to patients treated at other hospitals, and thus the hospitals could not be liable under a conspiracy theory. It rejected the applicability of the *Mosier* "financial gain" exception, reasoning that "it does not logically follow that one hospital stood to gain anything by another hospital's surgery and billings practices." The court likewise rejected the contention that participation in the insurance fraud scheme established a conspiracy relevant to the medical fraud actions, and it found the complaints "bereft of any allegation that the demurring hospital[s] share a common plan or agreed to perpetrate a battery, fraud, breach of fiduciary duty, or infliction of emotional distress on surgical patients at other hospitals."

As for the aiding and abetting theory, the trial court found the complaints alleged no facts showing the demurring parties rendered substantial assistance in wrongfully causing injury.

After the trial court sustained the demurrers as to Golia, Bravo and Moses,[12] each of the other 27 medical fraud plaintiffs who did not allege to have received surgery at Pacific Hospital voluntarily dismissed Drobot, Healthsmart, and International Implants as defendants in their actions.

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[12] In sustaining the demurrers, the trial court neither expressly granted leave to amend nor expressly denied it. Counsel requested clarification, noting, "Your Honor didn't say whether the demurrers were sustained without leave to amend." The trial court responded, "No. I didn't say anything."

3. The Trial Court Denied a Motion for Sanctions Against the Firms of the Lawyer Defendants

Following the successful demurrers, St. Bernardine Medical Center (St. Bernardine), one of plaintiffs' codefendants in the medical fraud actions, moved pursuant to Code of Civil Procedure section 128.7 for monetary sanctions against the law firms representing the patient defendants. St. Bernardine had been named in each of the 32 complaints although none of the surgeries at issue had been performed at that hospital, and it argued that there was no proper purpose or legal basis for naming it as a defendant. St. Bernardine noted that it had raised this issue with the medical fraud plaintiffs as early as November 2014, when it served (but did not file) the sanctions motion, but the medical fraud plaintiffs had refused to dismiss.

The trial court denied the sanctions motion, stating that "there was at least an arguable basis based upon plaintiffs' investigation showing how St. Bernardine's could have been liable under the pecuniary gain exception set forth in [*Mosier v. Southern Cal. Physicians Ins. Exchange*, *supra*, 63 Cal.App.4th 1022]." The court observed that that while it rejected the "pecuniary gain" argument, "it cannot be said, based on objective standards, that the legal theory argued by the plaintiff was unreasonable as a matter of law, especially since there's no case law statute addressing the theory advanced by plaintiff."

D. Drobot's and Healthsmart's Defamation Suit

As the medical fraud claims were being filed in 2014, lawyer defendant Brian Kabateck, an attorney for the individual plaintiffs in those actions, gave an interview to Fox 11 television,

which aired on July 24, 2014. The televised report focused in particular on the complaint filed by Mary Cavalieri, who alleged that she had spinal fusion surgery performed at Pacific Hospital, and on the allegations that counterfeit surgical hardware was implanted in patients without their knowledge. The televised report was accompanied by an article on the Fox website, which stated: "The owner of [Pacific Hospital], Michael Drobot allegedly oversaw a vast scheme that included making the cheap parts, distributing them to different hospitals for a lot of money, and bribing doctors to steer patients to his hospital to have surgeries done using the knockoffs." On television, Mr. Kabateck reiterated the allegations that the kickback scheme included prostitution. (See *Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 423.)

On August 12, 2014, another lawyer defendant, Robert Hutchinson, participated in a CBS radio program called "Money 101," hosted by Bob McCormick. Hutchinson repeated the allegations regarding doctors' and hospitals' knowing use of counterfeit screws at Pacific Hospital, but did not mention Drobot.

Drobot and Healthsmart responded to the media reports by filing an action against five of the lawyer defendants—Kabateck, Hutchinson, and all three of the law firms[13] that represented patient defendants in the medical fraud actions—asserting causes of action including defamation, false light, intentional interference with actual and prospective economic relations, and violation of California's Unfair Competition Law, Business and

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[13] Kabateck Brown Kellner LLP; Cotchett Pitre & McCarthy LLP; and Knox Ricksen LLP.

Professions Code section 17200 et seq.[14] The complaint alleged that Kabateck and Hutchinson had falsely stated or implied that (1) Drobot and Pacific Hospital were involved in a scheme to purchase and use counterfeit screws for spinal surgery patients, (2) the alleged counterfeit screw scheme was related to the insurance fraud and kickback scheme to which Drobot pled guilty, and (3) the kickback scheme involved the provision of prostitutes.

In January 2015, the lawyer defendants filed a special motion to dismiss the complaint under Code of Civil Procedure section 425.16, the anti-SLAPP statute. (*Healthsmart Pacific, Inc. v. Kabateck, supra,* 7 Cal.App.5th at p. 426.) The trial court granted the motion and this Court affirmed on appeal, holding that the attorneys' statements were protected by the fair report privilege. (*Id.* at pp. 419-420.) Civil Code section 47, subdivision (d), grants an immunity from suit for " 'a fair and true report in, or a communication to, a public journal' " of judicial proceedings. (*Healthsmart Pacific, Inc.*, at p. 431.) The Court observed, however, that the fair report privilege "would not immunize the attorneys from malicious prosecution liability for prosecuting the underlying lawsuit." (*Id.* at p. 437.)

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[14] The suit *Healthsmart Pacific, Inc. et al. v. Brian S. Kabateck et al.* was originally filed on October 21, 2014 in Orange County Superior Court as case No. 30-2014-00752219-CU-DF-CJC, and subsequently transferred to Los Angeles Superior Court as case No. BC566549.

E. Plaintiffs' Malicious Prosecution Suit

At the time this Court made this observation, plaintiffs had already filed the instant lawsuit in April 2015, bringing a claim of malicious prosecution against the 30 patient defendants who had dismissed their claims against plaintiffs and the 11 attorneys and three law firms that represented them. Plaintiffs contended that no reasonable person in the defendants' position would have believed that plaintiffs could be held liable for the claims asserted against them in the 30 medical fraud actions—because plaintiffs provided no medical treatment or surgical implants to the patient defendants and the federal charges against Drobot did not include allegations that he supplied prostitutes or conspired in the sale or use of counterfeit spinal hardware.

In June 2015, the lawyer defendants and the patient defendants again filed anti-SLAPP special motions to strike the complaint. (Code Civ. Proc., § 425.16.) Two weeks later, plaintiffs filed an ex parte application seeking a three-month continuation of the hearing on the anti-SLAPP motions and permission to depose the 30 patient defendants. Defendants opposed the application and the trial court denied it. Plaintiffs then opposed the anti-SLAPP motions.

The trial court granted the motions following a hearing on July 6, 2015, with an order filed on July 20, 2015. Notice of entry of the order and of judgment dismissing the action as to all defendants was filed on July 30, 2015. Plaintiffs timely appealed on August 19, 2015. On December 10, 2015, the court awarded patient defendants statutory attorney fees of $25,000 and statutory costs of $13,170, and awarded lawyer defendants statutory attorney fees of $98,250 and statutory costs of $6,270. An amended judgment, including the fees and costs, was filed on

January 11, 2016. Plaintiffs timely appealed on January 15, 2016.

DISCUSSION

I. Legal Standards

The anti-SLAPP statute, Code of Civil Procedure section 425.16, resulted from legislative concern over "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, subd. (a).) The statute authorizes a special motion to strike a cause of action arising from a defendant's exercise of the constitutional right of petition or free speech, unless the plaintiff establishes a probability of prevailing on the claim. (*Id.*, subd. (b).)

Trial courts evaluating anti-SLAPP motions engage in a two-step process. First, the defendant bringing the motion must establish that the challenged cause of action arises from activity protected by the anti-SLAPP statute.[15] (*Jarrow Formulas, Inc. v.*

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[15] The anti-SLAPP statute provides that an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in

LaMarche (2003) 31 Cal.4th 728, 733.) The burden then shifts to the plaintiff to demonstrate a probability of prevailing on the merits of its claim. (*Ibid.*)

We review a trial court's grant of an anti-SLAPP motion de novo, following the same two-step procedure. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1105.)

II. Applicability of Section 425.16 to Plaintiffs' Malicious Prosecution Action

Plaintiffs do not challenge the applicability of the anti-SLAPP statute to their claim for malicious prosecution. Based as it is on defendants' underlying medical fraud actions, the claim plainly comes within the scope of section 425.16. It arises from written and oral statements made before a judicial proceeding and "in connection with an issue under consideration . . . by a . . . judicial body." (Code Civ. Proc., § 425.16, subd. (e); see *Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at pp. 734-735.) As the *Jarrow Formulas* Court succinctly put it, "[b]y definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit." (*Id.*, at pp. 735-736, citing *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1130-1131.)

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furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

The question before us, therefore, is whether plaintiffs have demonstrated a probability of prevailing on the merits of their malicious prosecution claim.

III. Plaintiffs' Showing as to the Probability of Prevailing on Their Malicious Prosecution Claim

To carry their burden at the second step of the anti-SLAPP analysis, plaintiffs must demonstrate that their malicious prosecution claim is "legally sufficient" and make a prima facie showing, by admissible evidence, of facts that would merit a favorable judgment on the claim, assuming plaintiffs' evidence were credited. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396; *Healthsmart Pacific, Inc. v. Kabateck, supra,* 7 Cal.App.5th at p. 427; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 584.) The court must consider not only direct evidence, but also "facts that reasonably can be inferred from the evidence." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1166, citing *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822.)

Additionally, the court must consider evidence presented by defendants. (Code Civ. Proc., § 425.16, subd. (b)(2).) "The court does not, however, weigh that evidence against the plaintiff's, in terms of either credibility or persuasiveness. Rather, the defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law." (*1-800 Contacts, Inc. v. Steinberg, supra,* 107 Cal.App.4th at p. 585, citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906; see *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

To prevail on a malicious prosecution claim, a plaintiff must prove that the prior action " '(1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' " (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) A defendant may be liable for malicious prosecution when some, but not all of the alleged grounds for liability in the prior suit were asserted with malice and without probable cause. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292; *Crowley,* at p. 671; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 56-57.) The elements of the malicious prosecution tort are "carefully circumscribed" so as not to deter litigants with potentially valid claims from asserting them. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872; see *ibid.* [malicious prosecution "has traditionally been regarded as a disfavored cause of action"].)

A. Favorable Termination in Plaintiffs' Favor

The voluntary dismissal of plaintiffs from the 30 medical fraud lawsuits plainly terminated the actions in plaintiffs' favor. When, as here, the " 'prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff's innocence of the misconduct alleged in the underlying lawsuit.' " (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 217, quoting *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 214.) A voluntary dismissal, even one without prejudice, may satisfy this requirement. (See *Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 893-894 [" 'A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may

constitute a decision on the merits' "]; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1401.) The test is whether the dismissal indicates the liability of the malicious prosecution plaintiff and the merits of the earlier suit or " 'simply involves technical, procedural or other reasons.' " (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855, quoting *Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 881.)

Plaintiffs argued below and reiterate on appeal that because defendants dismissed their claims in the 30 cases as to Drobot, Pacific Hospital, and International Implants after Judge Berle sustained plaintiffs' demurrers, the dismissals stem from a determination that the suits were without merit.[16] For their part, defendants sidestepped the "favorable termination" issue in the trial court, noting that conflicting evidence as to the reasons for the dismissals might present a question of fact. On appeal, they contend that Judge Berle's ruling turned only on the "procedural" issue of standing and was ancillary to the merits of the suit—and therefore the termination cannot support an action for malicious prosecution.[17]

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[16] In the trial court, plaintiffs stated that the demurrers were sustained without leave to amend. As discussed at footnote 12, *ante*, the record does not support this contention.

[17] Plaintiffs argue that defendants waived this issue by not raising it in the trial court. As we have noted, both in the trial court and on appeal, it is plaintiffs' burden to show a probability of prevailing on their malicious prosecution claim—by showing a termination of the prior action in their favor on the merits, among other things. Defendants have not waived their right to respond to plaintiffs' showing.

We conclude plaintiffs are correct. The demurrers went directly to the merits of the patient defendants' claims—specifically, their ability to make out necessary elements of their causes of action, such as duty and knowledge. Although the trial court's ruling was often couched as a failure of pleading, as appropriate on a demurrer, the trial court ruled that absent facts establishing that plaintiffs owed a duty of care to the patient defendants, plaintiffs' conspiracy claims failed as a matter of law.[18] Notably, defendants have produced no evidence of facts that they could allege in an amended complaint that would cure this deficiency. This is, then, a case in which it is more than reasonable to infer that the voluntary dismissal amounts to " 'an implicit concession that the dismissing party cannot maintain the action.' " (*Robbins v. Blecher, supra,* 52 Cal.App.4th at p. 894.)

B. Probable Cause

As the second step in their showing of a probability of prevailing on their malicious prosecution claim, plaintiffs were required to present a prima facie case establishing that defendants brought their claims in the underlying medical fraud cases without probable cause. We first consider the patient defendants' contention that plaintiffs *cannot* show that the

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[18] Defendants mischaracterize Judge Stern's questioning at the hearing on their anti-SLAPP motions in the trial court. Judge Stern did inquire about the outcome of the hearings on the demurrers and the motion for sanctions. He did not suggest that the ruling on the demurrers was "ancillary" to the merits, however. Rather, he emphasized that the *sanctions* motion was ancillary to the facts before the trial court on the anti-SLAPP motions.

patient defendants lacked probable cause because they relied upon the advice of counsel. We then turn to plaintiffs' prima facie case as to the lawyer defendants. As noted above, defendants asserted multiple causes of action in the underlying cases: battery, fraud (concealment and intentional misrepresentation), breach of fiduciary duty, intentional infliction of emotional distress, and negligence. They predicated plaintiffs' alleged liability for these torts on two theories: civil conspiracy and aiding and abetting. We examine whether probable cause existed for each of the two theories.[19]

1. Patient Defendants' "Advice of Counsel" Affirmative Defense

Patient defendants argue that in bringing their medical fraud actions, they relied upon the advice of counsel and therefore plaintiffs cannot show that they acted without probable cause.

When defendants in a malicious prosecution proceeding prove that "they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer," they establish probable cause.

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[19] As noted above, nine complaints in the underlying medical fraud actions assert causes of action against certain plaintiffs directly—not exclusively on theories of conspiracy or aiding and abetting. Plaintiffs did not argue, either in the trial court or on appeal, that their malicious prosecution claim was tenable because defendants had no basis for any cause of action based on direct liability, rather than conspiracy or aiding and abetting. We therefore regard any such claim as abandoned.

(*Lucchesi v. Giannini & Uniack* (1984) 158 Cal.App.3d 777, 788, disapproved on another ground in *Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 824; see *Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [" 'Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim' "]; *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 876-877 [same].) If a defendant acted in bad faith or withheld from counsel facts she or he knew or should have known would defeat a cause of action, the defense fails. (*Bertero v. National General Corp.*, *supra,* 13 Cal.3d at pp. 53-54.)

The burden of proving an affirmative defense is, ordinarily, on the party asserting it—that is, the defendant in the malicious prosecution action. (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 54.) As plaintiffs note, a number of courts reiterate this requirement in the context of an anti-SLAPP motion. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676 ["although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense"]; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969 [same].)

In contrast, other courts describe a two-step procedure more fully consistent with the scheme set forth by the second prong of section 425.16: "When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced

contrary evidence, which, if accepted, would negate the defense." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434, citing *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 715, *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398, 404; see *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 285 [when a defendant asserts an affirmative defense in support of its claim that the plaintiff cannot demonstrate a probability of prevailing, the plaintiff must either demonstrate that the defense is not applicable to the case as a matter of law or present a prima facie case of facts that, if accepted as true, would negate the defense], citing *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367, disapproved on another ground in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) We thus consider, first, the sufficiency of the patient defendants' evidence in support of their defense and then any contrary evidence proffered by plaintiffs.

a. The parties' evidence

To establish their "advice of counsel" defense in the trial court, the 30 patient defendants submitted declarations stating, among other things, that:

- They had undergone spinal fusion and implant surgeries, including the reasons for the surgeries, the dates of the surgeries, the names of the doctors who performed the surgeries, and the hospitals in which the surgeries were performed;
- They had suffered complications following the surgeries, which for some defendants included subsequent surgeries to remove the spinal implants;

- They "fully disclosed" their and their families' "dealings" with the surgeons who performed their operations and with the hospitals where the surgeries were performed and, in the case of most defendants, reviewed their medical records with counsel;
- Based on the facts disclosed, their attorneys advised them that they had potentially valid legal claims against all the named defendants in the medical fraud actions, including plaintiffs; and
- They brought suit to obtain compensation for their injuries.

In the trial court and on appeal, plaintiffs criticize the declarations as "boilerplate," arguing that the patient defendants "fail to specify in detail any facts that they allegedly provided." To be sure, the "advice of counsel" defense requires more than a conclusory statement that the defendant provided counsel with "all" relevant facts. (See, e.g., *Gordon v. Mount* (1932) 125 Cal.App. 701, 706-707). Here, however, the declarations are not as totally devoid of detail as plaintiffs contend. They provide facts related to the surgeries and complications allegedly arising from those surgeries and, for the most part, state that the patient defendants reviewed their "medical records" with counsel.

Significantly, the patient defendants identify as their surgeons individuals shown by other evidence submitted by defendants to have used spinal hardware from Spinal Solutions, a manufacturer that allegedly sold adulterated and counterfeit screws. Although the 30 patient defendants did not receive their surgeries at Pacific Hospital, evidence shows that their doctors performed other surgeries at Pacific Hospital. Thus, the patient defendants' surgeries potentially came within the ambit of the

alleged conspiracy and the identity of their surgeons supported an inference that Pacific Hospital was involved.

This case cannot be likened to those cited by plaintiffs in which courts rejected an advice of counsel defense because specific record evidence showed either that the defendant did not disclose proven facts or did not consult counsel in good faith. (*Nunez v. Pennisi, supra*, 241 Cal.App.4th at p. 877 [finding that defendant's anti-SLAPP motion failed to establish that he informed counsel of specific material facts uncovered at trial before the lawsuit was filed]; *Oviedo v. Windsor Twelve Properties, LLC, supra*, 212 Cal.App.4th at p. 115 [advice of counsel defense insufficient where record evidence established the suit was filed in bad faith]; *Ross v. Kish* (2006) 145 Cal.App.4th 188, 202-203 [rejecting advice of counsel defense where defendant's personal relations with counsel suggested possible bias on counsel's part and lack of full disclosure by defendant].)

Here, plaintiffs offer no specific evidence of undisclosed facts or bad faith on the part of the patient defendants, nor any evidence from which such bad faith or failure to disclose could reasonably be inferred. Plaintiffs argue that they should have been permitted to conduct discovery to gather such evidence, but they fail to identify any potential facts relevant to their liability as alleged co-conspirators and/or aiders and abettors that the patient defendants would likely have known and should have disclosed to their counsel. For instance, plaintiffs do not offer any reason that the patient defendants would likely have had information about the alleged conspiracy or about what plaintiffs did or did not know about the actions of the alleged co-conspirators, or about actions plaintiffs did or did not take to

conceal any counterfeit devices used in the patient defendants' surgeries.

Finally, plaintiffs argue that, at this stage of the anti-SLAPP analysis, all of the evidence must be construed in plaintiffs' favor and that defendants "bear the burden of proving that their advice of counsel defense bars plaintiffs' claim as a matter of law." Plaintiffs allude to the standard, discussed above, that pertains to plaintiffs' *own* prima facie showing. (See, e.g., *1-800 Contacts, Inc. v. Steinberg*, *supra*, 107 Cal.App.4th at p. 584.) Because patient defendants assert an affirmative defense, however, the questions here are whether their showing suffices to establish that defense, and whether plaintiffs have offered any contrary evidence that would, accepted as true, negate the defense. (*Bently Reserve LP v. Papaliolios*, *supra*, 218 Cal.App.4th at p. 434, citing *Dwight R. v. Christy B.*, *supra*, 212 Cal.App.4th at p. 715; *Traditional Cat Assn., Inc. v. Gilbreath*, *supra*, 118 Cal.App.4th at pp. 398, 404.)

We find that the patient defendants' showing is sufficient to establish the "advice of counsel" defense and that plaintiffs have produced no contrary evidence. Therefore, plaintiffs cannot establish that the patient defendants lacked probable cause in filing suit and cannot establish a probability of prevailing against these defendants on their malicious prosecution claim—as they must to defeat the anti-SLAPP motion.

b. Plaintiffs' request that the Court remand for limited discovery

Plaintiffs additionally argue that the trial court should have permitted them to depose the 30 patient defendants and, if this Court does not reverse the trial court's order granting

defendants' anti-SLAPP motions outright, it should remand with directions to permit such discovery.[20] We decline to do so.

Section 425.16, subdivision (g), provides that all discovery in an action shall be stayed upon the filing of an anti-SLAPP motion to dismiss. (Code Civ. Proc., § 425.16, subd. (g).) It further provides that, "on noticed motion and for good cause shown," the court may order that "specified discovery" be conducted, notwithstanding the stay. (*Ibid.*) We review an order denying a motion to permit discovery brought under section 425.16, subdivision (g), for abuse of discretion. (*1-800 Contacts, Inc. v. Steinberg*, *supra*, 107 Cal.App.4th at p. 593.)

Section 425.16's "good cause" standard requires a plaintiff seeking discovery to show that the defendant holds or knows of evidence needed by the plaintiff to establish its prima facie case. (*1-800 Contacts, Inc. v. Steinberg*, *supra*, 107 Cal.App.4th at p. 593, citing *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 868.) The showing should explain what facts the plaintiff " 'expects to uncover.' " (*1-800 Contacts,*

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[20] In their oppositions to defendants' special motions to strike, plaintiffs renewed their request for discovery—this time seeking to depose both sets of defendants to establish that (1) the patient defendants were solicited by the lawyer defendants to file their claims; (2) the patient defendants harbored no suspicions that plaintiffs personally were involved with their allegedly deficient medical treatment; and (3) defendants "collectively" knew the claims against plaintiffs lacked merit, but filed them to extort money from plaintiffs. Plaintiffs did not seek depositions of the lawyer defendants in their ex parte application; thus, we find no abuse of discretion in the trial court's denial of the request for such discovery when deciding the anti-SLAPP motions.

Inc., at p. 593*,* citing *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 247.) Plaintiffs' request failed to satisfy these standards.

Plaintiffs' ex parte application contended that the patient defendants might possess information related to their "advice of counsel" defense and the patient defendants' own malice. It proposed four lines of questioning:

> (1) What specific facts the non-patient defendants communicated to their counsel—the lawyer defendants—regarding the underlying "counterfeit screw" matters, including but not limited to facts regarding the plaintiffs;
>
> (2) What facts the lawyer defendants relayed to the non-patient defendants regarding the same;
>
> (3) Whether the non-patient defendants read their own complaints with accompanying exhibits filed by the lawyer defendants before they were filed; and
>
> (4) Why the non-patient defendants ultimately authorized the lawyer defendants to file suit against plaintiffs in the underlying cases.

Plaintiffs observed, for example, that while the patient defendants alleged "concerns that counterfeit hardware was used in my surgery," none explained "how they reached this rather odd and unusual conclusion, i.e. because they had the hardware removed, tested, and determined to be counterfeit by a qualified facility, because their lawyers told them it was counterfeit, etc."

Plaintiffs also noted that the complaints failed to explain the basis for the allegations of bribes with prostitutes.

The application also makes clear, however, that the facts plaintiffs *anticipated* uncovering would not be probative of either the advice of counsel defense or the patient defendants' malice. Specifically, plaintiffs stated that they expected the patient defendants to testify that (1) they did not "carefully read" or "reach some basic layperson's understanding" of their complaints; (2) they did not "carefully read" or "reach some basic layperson's understanding" of the exhibits attached to their complaints; (3) most had not heard of plaintiffs prior to conferring with their attorneys; (4) most "knew that certain critical and particularly salacious allegations" relating to plaintiffs were false; (5) most did not know why they sued plaintiffs or knew they had no cognizable claims against them; and (6) most authorized the lawsuit against plaintiffs in the hopes that plaintiffs would pay settlement monies. The renewed requests for discovery in plaintiffs' oppositions to the anti-SLAPP motions additionally stated that plaintiffs expected to establish that the patient defendants were solicited by the lawyer defendants.

Most of this anticipated testimony would simply confirm that the patient defendants relied upon counsel to assess the legal merits of their claims and to place them in the larger context of the alleged conspiracy, not that the patient defendants harbored malice toward plaintiffs or withheld relevant information from their attorneys in bad faith. Plaintiffs do not explain how the patient defendants could possibly "know" the truth or falsity of "salacious" allegations (presumably regarding the procurement of prostitutes) or any other allegations of conspiracy if they had not heard of plaintiffs previously.

Plaintiffs thus failed to establish good cause in support of their discovery request and, by their own estimation, it would have delayed resolution of the anti-SLAPP motion by three months or more. Because, as discussed above, plaintiffs fail to show the patient defendants lacked probable cause in filing suit and thus cannot establish a probability of prevailing as to these defendants on their malicious prosecution claim, we affirm the order and judgment granting the anti-SLAPP motion as to the patient defendants.

2. Plaintiffs' Prima Facie Showing of Lawyer Defendants' Lack of Probable Cause

We now consider whether the lawyer defendants filed the 30 medical fraud claims against plaintiffs with probable cause. In *Sheldon Appel,* our Supreme Court clarified that the question of probable cause in a malicious prosecution case is a question of law. (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 875.) Equally important, the Supreme Court held that the standard for assessing probable cause is an objective one. (*Id.* at pp. 878-881.) A court must "determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable," and "[t]he resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted." (*Id.* at p. 878.) At its core, the question for the court is whether "any reasonable attorney would have thought the claim tenable." (*Id.* at p. 886.)

In answering this question, the court must consider the facts *known to the litigant*. "[I]f the facts known to the litigant could support a set of inferences that would justify a favorable ruling on the merits, the litigant may rely on them in bringing suit." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 782.)

On the other hand, a litigant lacks probable cause " '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.' " (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 292, quoting *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.)

Finally, to avoid chilling novel or debatable legal claims, the probable cause determination "must properly take into account the evolutionary potential of legal principles." (*Sheldon Appel Co. v. Oliker, supra*, 47 Cal.3d at p. 886.) A claim is "tenable" for purposes of this analysis if it was "arguably correct, even if it was extremely unlikely the client would win." (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 66.)

In sum, while plaintiffs' malicious prosecution claims need possess only " 'minimal merit' " to survive an anti-SLAPP motion (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 740-741), their prima facie case must establish that defendants' underlying medical fraud claims were so legally and factually untenable that "*all* reasonable lawyers" would agree that the claims "totally lack merit." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382).

Before turning to the merits of defendants' claims, we address one additional matter. Defendants argue that because the trial court in the underlying medical fraud actions denied St. Bernardine's motion for sanctions under Code of Civil Procedure section 128.7, that ruling by itself "establishes" that the actions were " 'objectively tenable.' " As plaintiffs contend, however, the ruling cannot have preclusive effect because the sanctions motion was not brought by plaintiffs but by a codefendant. (See *Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 998 [issue preclusion requires, among other things, that " ' "the party against whom preclusion is sought must be the same as, or in privity with, the

party to the former proceeding" ' "].) In addition, none of the cases cited by defendants in support of their contention actually addresses the effect of a sanctions ruling on a later action for malicious prosecution.[21]

Those courts that *have* addressed the matter emphasize that sanctions and malicious prosecution actions address different concerns and permit different remedies. "[A] court's decision whether to award sanctions may be influenced by factors extrinsic to a malicious prosecution claim." (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1195; see *id.* at pp. 1194-1196; *id.* at p. 1191 ["issues resolved on a routine sanction motion are not entitled to preclusive effect in a later action for malicious prosecution"]; *Crowley v. Katleman, supra*, 8 Cal.4th at p. 689, fn. 12.)

Thus, while we give due weight to the trial court's sanctions ruling, as Judge Stern did below, we do not regard it as dispositive of the question of probable cause.

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[21] See *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 68-69 (while denial of plaintiff's summary judgment motion in prior case did "not itself preclude a . . . malicious prosecution claim," it supported the court's conclusion that the defendant's action was "objectively tenable"); *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384 ("denial of defendant's summary judgment motion in an earlier case normally establishes there was probable cause to sue"); *White v. Lieberman* (2002) 103 Cal.App.4th 210, 217-218 (trial court finding of slander of title supported probable cause even though overturned on appeal); *Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 885 (discussing cases addressing the standard for determining the frivolousness of an appeal).

a. Civil conspiracy

As noted above, in the medical fraud actions, defendants alleged that plaintiffs were liable as co-conspirators for battery, fraud-concealment, fraud-intentional misrepresentation, breach of fiduciary duty, intentional infliction of emotional distress, and negligence. Civil conspiracy is not an independent tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*, 7 Cal.4th at pp. 510-511.) Rather, it "imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Ibid.*) The elements of an action for civil conspiracy are " ' "the formation and operation of the conspiracy" ' " and injury arising from " ' "an act or acts done in furtherance of the common design." ' " (*Id.* at p. 511, citing *Doctors' Co. v. Superior Court*, *supra*, 49 Cal.3d at p. 44.) Knowledge of a planned tort must be combined with "intent to aid in its commission." (*Kidron v. Movie Aquisition Corp.*, *supra*, 40 Cal.App.4th at p. 1582.)

In the trial court, plaintiffs argued that the patient defendants' claims lacked probable cause given what plaintiffs termed "self-defeating allegations" in the complaints—some of which the trial court likewise had highlighted in sustaining the demurrers. We do not agree that these allegations amounted to admissions that the conspiracy claims lack all merit. For example, plaintiffs argued that defendants "admitted" within the complaints that plaintiffs "did not manufacture, distribute, select, sell, supply, implant, bill for, pay a kickback, or receive a kickback in connection with these particular procedures or parts used therein." They appear, however, to have relied only on the fact that plaintiffs are not named in the paragraphs of the

complaints making these allegations as to other defendants. This does not establish a lack of knowledge or assistance to these alleged actions.

Plaintiffs next pointed to paragraphs from the complaints highlighted by Judge Berle at the hearing on the demurrer. These paragraphs state: "Only Defendants [*names*] had knowledge [and/or] access to knowledge of the true source and/or FDA status of the surgical hardware." Although it is true that, in many of the complaints, no plaintiffs' names appear in this paragraph, in a number of complaints, International Implants and Drobot are named. The passages in which plaintiffs' names do *not* appear may well have supported a conclusion of pleading deficiency. They may support a contention that plaintiffs did not know the details of the individual surgeries. They do not establish lack of knowledge of a broader conspiracy.

On appeal, plaintiffs advance four arguments in support of their contention that defendants' conspiracy claims lacked probable cause. Two may be addressed quickly. First, plaintiffs point out that Drobot was not charged by the United States Attorney with illegally employing counterfeit hardware in surgeries at Pacific Hospital and argue that "[t]he government's failure to pursue such a theory against Drobot suggests there is no evidence to support it." Absent further information about the scope of the government's investigation, this contention is mere speculation.

Second, plaintiffs cite Drobot's declaration in the defamation action, in which he stated: "Plaintiff Healthsmart and I have **never** purchased or used **any** 'counterfeit' screws or related parts for use in [Pacific Hospital of Long Beach] spinal surgeries . . . . Plaintiff Healthsmart and I have **never** purchased

or used **any** non-FDA-approved screws or other related parts made with non-FDA-approved materials for use in PHLB spinal surgeries." Plaintiffs contend that the declaration itself "establishes a prima facie case that defendants' conspiracy claim arising from plaintiffs' alleged use of counterfeit, unsafe, or unclean medical hardware lacked any factual basis, and that no reasonable attorney could have believed otherwise."

Although plaintiffs are correct that their evidence must be credited as true for the purposes of establishing a prima facie case (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 396), they overlook that the probable cause determination considers "whether, *on the basis of the facts known to the defendant*, the institution of the prior action was legally tenable." (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 878, italics added.) Drobot's declaration is dated April 3, 2015. Defendants could not possibly have known of the declaration when they filed the medical fraud complaints between June and October 2014, and, as discussed below, the facts known to defendants at the time of those filings support an inference that adulterated or counterfeit hardware *was* used at Pacific Hospital. Nor did defendants continue to pursue the litigation against plaintiffs for any appreciable period of time after the declaration was filed.[22] Thus, the declaration, even if credited as true, does not constitute a prima facie case

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[22] Plaintiffs were dismissed from the 30 medical fraud actions either before or very shortly after Drobot completed his declaration. Although the record does not include the date(s) on which defendants dismissed plaintiffs, plaintiffs' complaint in the instant action is dated 10 days after Drobot's declaration and alleges that defendants had already dismissed plaintiffs from the 30 lawsuits.

that defendants' conspiracy claims would have appeared meritless to any reasonable attorney at the time they were filed or while they were pending.

Plaintiffs are also correct that to defeat an anti-SLAPP motion, "a malicious prosecution plaintiff may demonstrate a prima facie case of lack of probable cause merely by identifying a disputed issue of fact as to the state of the defendant's knowledge." In such a case, "the jury must resolve the threshold question of the defendant's factual knowledge or belief." (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 881.) Here, however, plaintiffs fail to identify any dispute as to *what defendants knew* when they filed suit, only a dispute as to whether the information in defendants' possession provided a minimally sufficient basis for the medical fraud claims.

This matter differs from plaintiffs' principal authorities for their position. In *Daniels v. Robbins, supra*, 182 Cal.App.4th at pp. 222-224, the court concluded that the malicious prosecution plaintiff had established a prima facie case of probable cause where there were disputes as to whether a defendant himself had heard the allegedly slanderous statements that formed the basis of the underlying lawsuit and as to what his attorneys knew about the underlying facts before filing suit. The defendants "did not disclose *any* information, documents, or other detail" supporting the claims in the underlying action. (*Id.* at p. 223.) In *Greene v. Bank of America* (2013) 216 Cal.App.4th 454, an action alleging a malicious criminal prosecution, bank employees called the police after Greene became upset at the bank's failure to cash a check, leading to Greene's arrest, trial, and acquittal for threatening to commit a crime. (*Id.* at pp. 457-461.) In Greene's subsequent malicious prosecution action, the parties presented

differing accounts of Greene's conduct in the bank, and the court ruled that, because it had to credit Greene's account as true under the anti-SLAPP standards, he had established a prima facie case that he could prevail on his malicious prosecution claim. (*Id.* at p. 464.) For purposes of the anti-SLAPP analysis, the dispute about Greene's actions was a dispute as to what the defendant bank *knew* before it called for police intervention. In contrast, here the Drobot declaration does not create a dispute about what defendants knew when they filed the claims herein.

In addition to citing Drobot's declaration and the lack of a criminal prosecution for counterfeit hardware, Plaintiffs argue that (1) the conspiracy claims were untenable as a matter of law because, as the trial court ultimately ruled, plaintiffs owed no duty to patients not treated at Pacific Hospital, and (2) "defendants have proffered no evidence showing that plaintiffs conspired with *anyone* to use counterfeit, unsafe, or unclean medical hardware." We address each of these contentions in turn.

i. The legal basis of defendants' conspiracy theory

Plaintiffs argue that defendants' conspiracy claims were legally untenable because a conspirator must be "legally capable of committing the tort"; that is, the conspirator must owe a duty to the plaintiff. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*, 7 Cal.4th at p. 511.) As the California Supreme Court has stated the general rule: "A cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing." (*Doctors' Co. v. Superior Court, supra*, 49 Cal.3d at p. 44.)

Because the patient defendants in the 30 medical fraud suits at issue were not treated at Pacific Hospital, plaintiffs argue that they did not owe a duty to the patient defendants and therefore cannot be liable for conspiracy to commit battery, concealment, or any of the other alleged torts.

In the trial court, defendants did not dispute that plaintiffs owed no duty to the patient defendants; nor do they on appeal. As noted above, when this issue arose in connection with plaintiffs' demurrers in the medical fraud actions themselves, defendants argued that their claims came within the scope of an exception to the general rule found in *Mosier v. Southern Cal. Physicians Ins. Exchange*, *supra*, 63 Cal. App.4th 1022: "We agree . . . that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. [Citations.] However, an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Id.* at p. 1048.) Relying on their characterization of the counterfeiting operation as part of the scheme of insurance fraud, overbilling and kickbacks, defendants argued that plaintiffs profited from the patient defendants' surgeries, even though they took place at other hospitals, because those surgeries were part of the larger conspiracy. As defendants explained at the hearing on St. Bernardine's sanctions motion: "Our view of the conspiracy was that the reason that all of these hospitals joined together, was because they all had an interest in preserving the status quo to keep the unlawful billing scheme going. That was their profit motive. [¶] . . . [¶] . . . [A]nd that's why we pled this as an outgrowth of the unlawful billing scheme."

Defendants effectively argued for an expansion of the *Mosier* exception such that allegations of financial gain expected from a broader conspiracy, not necessarily the specific acts for which tortious liability is sought, obviates the need to show duty. As discussed above, Judge Berle rejected this argument, reasoning that even if one accepted as true the allegation of insurance fraud and kickbacks, "it does not logically follow that one hospital stood to gain anything by another hospital's surgery and billings practices." In denying St. Bernardine's sanctions motion, however, Judge Berle characterized defendants' contentions as "a good faith reasonable argument."

On appeal, plaintiffs contend any reliance on *Mosier* was misplaced and defendants' conspiracy claims therefore lacked even minimal merit. They correctly note that two divisions of this court have rejected the exception, although neither mentioned *Mosier*. (See *1-800 Contacts, Inc. v. Steinberg, supra*, 107 Cal.App.4th at pp. 590-593; *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1106-1109.) As these cases acknowledge, the financial gain exception can be traced back to *Doctors' Co.,* in which the Court articulated what is known as the "agent's immunity" rule: "A cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty." (*Doctors' Co. v. Superior Court*, *supra*, 49 Cal.3d at p. 44.) The Court then noted an exception to this rule, observing that agents may be subject to "conspiracy liability for conduct which the agents carry out 'as individuals for

their individual advantage' and not solely on behalf of the principal [citation]." (*Id.* at p. 47.)

Both *1-800 Contacts, Inc.* and *Everest Investors 8* rejected efforts to read the financial gain exception as applicable where the alleged conspirator was not acting as an agent or fiduciary. "[T]he exception for conduct undertaken in pursuit of a personal interest or advantage applies only to the agent's immunity rule. It does not relax the requirement that to be liable for conspiracy to breach a duty, the defendant must be bound by that duty and capable of breaching it." (*1-800 Contacts, Inc. v. Steinberg*, *supra*, 107 Cal.App.4th at p. 592; see *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI*, *supra,* 100 Cal.App.4th at pp. 1107-1108.) These courts reasoned that a broader financial gain exception conflicted with the Supreme Court's articulation in *Applied Equipment* of the general rule that a party cannot actionably conspire to breach a duty to which it is not subject. (*1-800 Contacts, Inc.*, at pp. 591-592; *Everest Investors 8*, at pp. 1106-1107.)

As *Everest Investors 8* was careful to point out, however, the case law on the financial gain exception is mixed. (*Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI*, *supra*, 100 Cal.App.4th at pp. 1108-1109.) For example, in *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1106, the court relied upon *Doctors' Co.* to hold that a cause of action could lie against attorneys for the former trustees of a testamentary trust for conspiring to breach the former trustees' fiduciary duty because the attorneys allegedly acted for personal financial gain. (*Id.* at p. 1106, superseded by statute on another ground, as stated in *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 396.) Moreover, *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*,

7 Cal.4th 503, the Supreme Court case on which *1-800 Contacts, Inc.* and *Everest Investors 8* rely to reject the financial gain exception, never addressed that exception directly.

Given the existence of what this Court has dubbed a legal "fruit salad" on the question of the financial gain exception (*Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI*, *supra*, 100 Cal.App.4th at p. 1109) and "the evolutionary potential of legal principles" (*Sheldon Appel v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 886), we cannot say that defendants' conspiracy claims would have been regarded as meritless by any reasonable attorney. Plaintiffs have therefore failed to make a prima facie showing that they were likely to prevail in their malicious prosecution action on this basis.

ii. The factual basis of defendants' conspiracy theory

Plaintiffs additionally argue that defendants "proffered no evidence showing that plaintiffs conspired with *anyone* to use counterfeit, unsafe, or unclean medical hardware." They appear to assume that *defendants* have the burden to demonstrate that they had probable cause. Not so. In opposing defendants' anti-SLAPP motion, *plaintiffs* bore the burden of presenting a prima facie case showing that defendants lacked probable cause in filing their lawsuits. (*Nunez v. Pennisi*, *supra*, 241 Cal.App.4th at p. 875.) Even if plaintiffs' bare assertion of an evidentiary lack triggered an obligation by defendants to rebut it, as it sometimes does on a motion for summary judgment, we do not find defendants' showing insufficient.

While there may be no *direct* evidence that plaintiffs conspired to facilitate the implantation of counterfeit or adulterated spinal medical devices in patient defendants, the

inquiry does not end there. The "knowledge" and "concurrence" required to establish a conspiracy " ' " 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' " ' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 785, quoting *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316.) "Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt*, *supra*, at p. 785*,* quoting *Holder v. Home Sav. & Loan Assn.* (1968) 267 Cal.App.2d 91, 108.) Given the somewhat lenient standard for establishing probable cause in defending against a malicious prosecution claim and the strong policy against chilling even minimally viable claims (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 885), defendants' evidence need not *establish* a conspiracy at this juncture, only that they had a reasonable basis for inferring that one existed. In a case such as this one, "where the issue is the insufficiency of the facts known to the defendant," probable cause may be established by " 'information reasonably warranting an inference there is such evidence.' " (*Cole v. Patricia A. Meyer & Associates, APC, supra,* 206 Cal.App.4th at p. 1113, quoting *Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195; see *Daniels v. Robbins*, *supra*, 182 Cal.App.4th at p. 222 [a sufficient factual basis to establish probable cause may consist of information permitting an inference that sufficient admissible evidence can be obtained for trial].)

In support of their anti-SLAPP motion, defendants submitted declarations by the lawyer defendants attesting to the documents and information acquired in the course of the investigation conducted for the medical fraud and qui tam

actions. Defendants also submitted a request for judicial notice attaching pleadings and exhibits from these prior actions.[23]

Defendants' documents include a sworn deposition of William Crowder in a case before the Workers' Compensation Appeals Board, in which Mr. Crowder admitted to copying spinal screws and other medical devices in his machine shop in Temcula, California, at the direction of employees of Roger Williams, the owner of Spinal Solutions. Mr. Crowder further admitted that he made these articles without any specifications and in unsterile conditions.

Defendants also submitted a news story published by the Center for Investigative Reporting (CIR), dated November 3, 2014, stating that Ortho Sol, a South African surgical supply firm, repossessed some of its surgical screws after Spinal Solutions failed to pay its bills and discovered counterfeits mixed among its own screws. The article quoted an unnamed Spinal Solutions sales representative as stating that the fact that Spinal Solutions screws were counterfeits was "blatantly obvious to even the untrained eye." The article also cited an interview with Crowder in which he claimed Spinal Solutions bargained him down to $65 per screw—less than half of what the devices usually cost. While this information may not amount to legally sufficient evidence of counterfeiting at trial, plaintiffs have not

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[23] Defendants also argue that the court's denial of a demurrer in the qui tam action establishes the tenability of their claims in the medical fraud actions. The trial court's ruling on the qui tam action addressed the sufficiency of the pleading on claims of insurance fraud, however, not the factual basis for defendants' claims regarding plaintiffs in the medical fraud actions.

shown that defendants had "no reasonable cause" to believe it was true. (See *Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 292, quoting *Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at pp. 164-165 [" 'A litigant will lack probable cause for his action . . . if he relies upon facts which he has no reasonable cause to believe to be true' "].)

As further support of probable cause, defendants submitted documents related to a 2011 inspection of Spinal Solutions headquarters by the FDA, including a warning letter to Spinal Solutions. According to these documents, inspectors made numerous observations suggesting violations of FDA regulations, ranging from a failure to maintain records demonstrating that devices were manufactured in accordance with "device master records" to a failure to establish any quality system procedures and instructions. Although Spinal Solutions responded to the investigators' observations, the FDA found the responses inadequate and informed Spinal Solutions, in a warning letter dated January 19, 2012, that its spinal implant instruments were "adulterated" within the meaning of 21 U.S.C. section 351(h) "in that the methods used in, or the facilities or controls used for, their manufacture, packing, storage, or installation are not in conformity with the current good manufacturing practice requirements" codified at Title 21 of the Code of Federal Regulations Part 820. The FDA inspection observations and warning letter provided defendants reason to believe, at a minimum, that Spinal Solutions distributed spinal devices that failed to comply with FDA regulations.[24]

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[24] In their complaints, defendants drew far broader conclusions, alleging that Spinal Solutions destroyed or hid from the FDA evidence of the real origins of all spinal fixation

Defendants' information also supported an inference that Pacific Hospital purchased spinal surgery hardware from Spinal Solutions. Such information included (1) invoices from Spinal Solutions to Pacific Hospital for a variety of components for spinal surgery; (2) a spreadsheet prepared for the qui tam action listing allegedly fraudulent reimbursement claims from Pacific Hospital for spinal surgery components invoiced by Spinal Solutions; and (3) a lawsuit filed by Spinal Solutions and its subsidiary Orthopedic Alliance against Healthsmart dba as Pacific Hospital, alleging that (a) Pacific Hospital agreed to pay Spinal Solutions and Orthopedic Alliance for "spinal and orthopedic implants," (b) Spinal Solutions and Orthopedic Alliance supplied implants for 175 surgeries, and (c) Pacific Hospital failed to pay for the implants and supplies for approximately 44 surgeries.

The spreadsheet listed Dr. Uppal and Dr. Akmakjian as the surgeons for whom the components were purchased. These were the two surgeons alleged to be the treating physicians in all of the 30 medical fraud complaints. Defendants also submitted a surgical report by Dr. Uppal stating: "I have also told [the patient] that the hardware to be used is not FDA approved and may need to be removed in the future." As previously discussed, the reference to lack of FDA approval is ambiguous (see footnote 8, *ante*), but in this context, it suggests that the physician knew at least that the components might well be adulterated and used them anyway.

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components manufactured or distributed by Spinal Solutions and/or Orthopedic Alliance to hide the fact that these entities manufactured and distributed counterfeits.

Additional evidence supports an inference that not only Dr. Uppal but others at Pacific Hospital knew the components were adulterated or counterfeit. Plaintiffs submitted a declaration from Tony Feuerman, M.D., a board certified neurosurgeon, stating that "[h]ospital material departments are required to verify that a 510(k) registration of spinal instrumentation exists prior to use of the hardware in a spinal surgery." According to Dr. Feuerman, "[n]on-FDA approved spinal implantable hardware—i.e., counterfeited or knock-off hardware that was not manufactured according to FDA guidelines—would be suspected by most spinal surgeons if the hardware was not accompanied by a 510(k) registration issued by the FDA." As discussed above, Ortho Sol personnel and the Spinal Solutions sales representatives claimed that the counterfeiting was "blatantly obvious." Such evidence of Pacific Hospital's possible *knowledge* of the use of counterfeit hardware also permits an inference of Pacific Hospital's concurrence in a plan to use such hardware. Given that Pacific Hospital would be liable for any injuries resulting from the use of adulterated and counterfeit medical devices in the hospital, it is reasonable to infer that if the hospital and/or Drobot *knew* such components were being used in surgeries, they tacitly or overtly consented to it.

Finally, the relations, actions, and interests of various defendants in the medical fraud actions support an inference that they acted together to facilitate and conceal the distribution of adulterated or counterfeit medical hardware with knowledge that the hardware would be used in multiple hospitals—including those where the patient defendants' surgeries took place. (*Wyatt v. Union Mortgage Co.*, *supra*, 24 Cal.3d at p. 785, quoting

Chicago Title Ins. Co. v. Great Western Financial Corp., *supra*, 69 Cal.2d at p. 316 [the "knowledge" and "concurrence" required to establish a conspiracy " ' " 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances' " ' "].)

First, defendants' documents can be read to suggest that Dr. Uppal, Dr. Akmakjian, Spinal Solutions, and the hospitals where the patient defendants' surgeries were performed all participated in the admitted insurance fraud conspiracy. Dobrot's plea agreement acknowledged that he and Pacific Hospital conspired with a broad network of doctors, distributors and marketers in an insurance fraud scheme greased by illegal kickbacks. Insurance claims listed on the spreadsheet of allegedly fraudulent claims included many from Pacific Hospital for surgical components from Spinal Solutions used by Dr. Uppal and Dr. Akmakjian. The spreadsheet also includes many claims for surgeries with Spinal Solutions components performed by Dr. Uppal and Dr. Akmakjian at Riverside Community Hospital, Tri-City Regional Medical Center, and Parkview Community Hospital—the hospitals where the patient defendants had spinal surgery. Invoices and implant logs further indicate the use of Spinal Solutions components at these three hospitals.

Second, defendants' information supports an inference that the insurance fraud conspiracy and the alleged counterfeiting conspiracy were linked. As indicated above, Spinal Solutions, an alleged source of counterfeit hardware, supplied surgical components to the same hospitals and physicians allegedly colluding in the submission of fraudulent claims. The use of counterfeits or adulterated components would have furthered the interests of the fraud co-conspirators because the lower cost of

the counterfeits would have permitted even larger markups on insurance claims. Drobot's plea agreement admitted that International Implants falsely claimed on its invoices to be an "FDA Registered Manufacturer," giving rise to an inference that International Implants and its owner, Drobot, actively concealed the actual manufacturers of implants, thereby facilitating Spinal Solutions' counterfeiting operation. Pacific Hospital faced potential exposure of its insurance fraud if it refused to accept counterfeit hardware from Spinal Solutions or otherwise failed to conceal counterfeiting activity. As illegal actors, Spinal Solutions, International Implants, Pacific Hospital, and the other hospitals were reliant on each other for illegal kickbacks and secrecy.

While it is a close call, under *Sheldon Appel*'s lenient standard, we conclude that defendants had the necessary minimal basis for inferring that plaintiffs both knew and agreed to the broad distribution and use of adulterated and counterfeit spinal surgery components. We thus cannot conclude that no reasonable attorney would have brought the claims of conspiracy.

b. Aiding and abetting

In addition to alleging conspiracy, defendants predicated their claims against plaintiffs on a theory of aiding and abetting.[25] Liability for aiding and abetting may be imposed on

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[25] We note that the complaints typically brought the causes of action against plaintiffs "As Aiders and Abettors ***and/or*** Co-Conspirators." (Boldface added).) Although the complaints arguably did not allege both theories as to each of the named defendants, this lack of clarity would have required plaintiffs to defend against both theories.

one " ' "who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act." ' " (*Casey v. U.S. Bank Nat. Assn.*, *supra*, 127 Cal.App.4th at p. 1144, quoting *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326.)

While aiding and abetting is closely aligned with conspiracy, the two torts differ in certain respects. " '[A]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' " (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 748-749, superseded by statute on another ground as stated in *Pavicich v. Santucci*, *supra*, 85 Cal.App.4th at p. 396; see *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823, fn. 10.) Unlike liability for conspiracy, which requires that the conspirator owe a duty to the plaintiff, liability for aiding and abetting does not require an independent duty to the plaintiff on the part of defendant. (*Casey v. U.S. Bank Nat. Assn.*, *supra*, 127 Cal.App.4th at p. 1145, fn. 2; see *Neilson v. Union Bank of California, N.A.* (C.D.Cal. 2003) 290 F.Supp.2d 1101, 1133-1136 [analyzing California law].)

Plaintiffs' oppositions to defendants' anti-SLAPP motions in the trial court failed to distinguish between the conspiracy theory and the aiding and abetting theory. As discussed above, plaintiffs rely on certain allegations in the medical fraud complaints, characterizing the allegations as admissions of a lack of any knowledge or involvement in the particular surgeries at issue. On appeal, plaintiffs continue this line of argument,

relying on *Casey*, which observes that "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Casey v. U.S. Bank Nat. Assn.*, *supra*, 127 Cal.App.4th at p. 1145.) Plaintiffs argue that defendants "never allege that Drobot, Healthsmart, or International Implants knew about the particular surgeries that were challenged by the [30] patient defendants in their underlying lawsuits" or that plaintiffs "provided 'substantial assistance' to hospitals with which they have never had any affiliation."[26]

As an initial matter, plaintiffs offer no actual evidence that they "never had any affiliation" with the hospitals where the surgeries occurred. The declarations by Drobot and Randolph Taylor, Healthsmart's risk manager and Pacific Hospital's compliance officer, do not deny knowledge of the sale, distribution or use of counterfeit screws by Drs. Uppal and Akmakjian at the hospitals where the patient defendants received their surgeries.[27] Plaintiffs thus fail to establish this

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[26] Plaintiffs also argue that because the *patient defendants* stated in their complaints that they do not and cannot know the " 'origin or provenance' " of the medical hardware used in their surgeries, defendants "thus do not (and cannot) allege that Drobot, Healthsmart, and International Implants had the degree of knowledge necessary to impose aiding and abetting liability, and no reasonable attorney would think otherwise." This is a non sequitor, as the patient defendants' knowledge is not indicative of the knowledge of the plaintiffs.

[27] Drobot's declaration, dated June 22, 2015, does *not* repeat the statements he made several months earlier in his declaration in the defamation case that neither he nor

aspect of their prima facie case by a showing of admissible evidence. (See *1-800 Contacts, Inc. v. Steinberg*, *supra*, 107 Cal.App.4th at p. 584.)

As discussed above, we conclude that the evidence demonstrates that defendants had a reasonable basis to allege that plaintiffs knew of and actively participated in a scheme to sell, distribute, and implant counterfeit surgical spinal hardware. Defendants could also have reasonably inferred that plaintiffs' own role in the conspiracy aided and encouraged the patient defendants' surgeries. The evidence suggests that Drs. Uppal and Akmakjian, who performed all of the 30 patient defendants' surgeries, performed surgeries at Pacific Hospital using components purchased from Spinal Solutions. Defendants could have inferred that plaintiffs knew these doctors urged patients to have spinal surgeries they did not need and performed surgeries with Spinal Solutions hardware elsewhere. Drobot and Pacific Hospital allegedly provided the two doctors with kickbacks and legitimacy (through operating privileges). Most significantly, Drobot and Pacific Hospital allegedly encouraged and assisted Spinal Solutions' operation through its patronage, kickbacks, and concealment.

In addition, Drobot admitted in his plea agreement to activity that would have been crucial to the alleged counterfeiting scheme. He admitted that he bribed Senator Calderon to secure the Senator's assistance in preserving legislation that enabled hospitals to "pass through" to workers' compensation insurers the

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Healthsmart ever "used counterfeit screws or other related parts in any spinal surgeries conducted at [Pacific Hospital]" or "participated in any scheme in connection with the same."

entire cost of spinal surgeries. Without the "pass through" legislation, the co-conspirators may not have been able to reap sizable profits from their actions. It could therefore be inferred each of the hospitals that allegedly submitted inflated claims for the patient defendants' surgeries utilizing counterfeit or adulterated surgical hardware was aided and encouraged in these illegal acts by Drobot's admitted bribery. So too were the distributors and doctors who received kickbacks for their roles in the overall scheme.

The remaining question is whether such knowledge of and assistance to the overall counterfeiting scheme provides a minimally tenable basis for defendants' aiding and abetting claims. As plaintiffs point out, *Casey* provides that liability for aiding and abetting requires not only that a defendant had "actual knowledge of the specific primary wrong the defendant substantially assisted," but also that the defendant act " 'with knowledge of the object to be attained.' " (*Casey v. U.S. Bank Nat. Assn.*, *supra*, 127 Cal.App.4th at pp. 1146, 1152, quoting *Lomita Land & Water Co. v. Robinson* (1908) 154 Cal. 36, 47.) In making these observations, *Casey* distinguishes between a generalized knowledge of a " 'criminal and wrongful enterprise' " and knowledge of a more specific wrongful act, such as theft of corporate funds. (*Casey*, at pp. 1151-1153.) In other words, an aider and abettor must know what particular actions are being taken and what duty is being violated—rather than simply that some nonspecific misconduct is taking place. The passage from *Lomita Land & Water Co.* quoted by *Casey* (requiring the defendant to act "with knowledge of the object to be attained") simply acknowledges that to be liable for aiding and abetting a fraudulent scheme, one must act with the intent to contribute to

the fraud, rather than with ignorance of the significance of one's act. (*Lomita Land & Water Co.*, at p. 47.) Here, the evidence permits an inference that although Drobot may not have known about particular surgeries at other hospitals, he knew that counterfeit surgical hardware was being used without patients' knowledge or consent, that patients were thereby harmed physically and defrauded, and that hospitals and doctors thereby breached their fiduciary duties to patients and intentionally inflicted emotional distress on them. In the medical fraud complaints, defendants did not merely allege that plaintiffs were " 'involved in a criminal or dishonest and wrongful enterprise,' " as did the plaintiffs in *Casey*. (*Casey*, at p. 1153.) Instead, they alleged—and had reason to infer—that plaintiffs aided and abetted specific wrongful acts, including fraudulent billing, the provision of kickbacks, and the sale and use of counterfeit screws.

Again, we find it a close call, but conclude that plaintiffs' aiding and abetting claims, like their conspiracy claims, were at least minimally tenable.[28] Because plaintiffs have not shown a lack of probable cause as to any of defendants' claims, they cannot show a probability of prevailing on their malicious prosecution action. Therefore, we need not address the third element of such a claim, malice.

We conclude that defendants' special motions to strike under the anti-SLAPP statute were properly granted and affirm.

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[28] In concluding that defendants' claims against plaintiffs were at least minimally tenable based on the information known to defendants at the time the medical fraud actions were filed, we express no opinion about the merits of defendants' currently pending medical fraud actions or the qui tam action.

DISPOSITION

The judgment of dismissal and the award of attorney fees are affirmed. The defendants shall recover their costs and attorney fees on appeal. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659 ["Section 425.16, subdivision (c) provides that a prevailing defendant is entitled to recover attorney fees and costs, and does not preclude recovery on appeal"], overruled in part on other grounds by *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5).

BENDIX, J.

We concur:

ROTHSCHILD, P.J.

JOHNSON, J.