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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KAYNE ANDERSON CAPITAL ADVISORS, LP et al., Plaintiffs and Respondents, v. DAN GHAMMACHI et al., Defendants and Appellants.	B256236 (Los Angeles County Super. Ct. No. BC538378)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory Alarcon, Judge. Affirmed.

Mixon Jolly, Cameron M. Jolly; Benedon & Serlin, Douglas G. Benedon and Wendy S. Albers for Defendant and Appellant Dan Ghammachi.

Waxler Carner Brodsky, Barry Z. Brodsky and Christopher L. Wong for Defendants and Appellants Mixon Jolly, LLP, and Cameron M. Jolly.

Nagler & Associates, Lawrence H. Nagler, Charles Avrith, and David F. Berry for Plaintiffs and Respondents.

This appeal arises from a malicious prosecution action filed by two limited partnership investment firms —– plaintiffs and respondents Kayne Anderson Private Investors, LP (KAPI) and Kayne Anderson Capital Advisors, LP (KACA).[1] The appeal challenges a trial court order denying a special motion to strike the Kayne Parties' complaint pursuant to the anti-SLAPP statute. (See Code Civ. Proc., § 425.16.) We affirm the trial court order.

FACTS

General Background

In March 2009, KAPI and five individuals entered a written limited liability company operating agreement for Media Solutions Holdings, LLC (Media Solutions or the company). Media Solutions was a printer toner cartridge supply business. The 2009 operating agreement identified two classes of members—Class A and Class B—and allotted each member of Media Solutions a specified "unit" interest in the company, with associated rights to allocations of profits, to elect persons to the company's board of managers, and to the redemption of the member's unit interest. Under the terms of the agreement, upon the termination of a member's employment with Media Solutions, the company and Class A members had the "right and/or obligation" to purchase the terminated member's unit interest, as set forth in the agreement. KACA was not a member of Media Solutions, but had a connection to events because it is the general partner of another entity, Kayne Anderson Private Advisors, L.P., which is the manager of KAPI. KAPI owned a significant majority of the membership units of Media Solutions and was its managing director. One of the eventual anti-SLAPP movants, defendant and appellant Dan Ghammachi, was an individual Class B member of Media Solutions.

In September 2009, Media Solutions hired Ghammachi as the company's chief executive officer and president pursuant to the terms of a written employment contract. The employment contract included a covenant restricting Ghammachi from competing

[1] We hereafter refer to KAPI and KACA collectively as the Kayne Parties.

with the company (defined as Media Solutions) for one year following the termination of his employment.[2] The agreement also included a non-solicitation provision in which Ghammachi agreed that during and after his employment with the Company, he would not solicit or contact the company's employees or consultants for the purpose of encouraging them to leave the company or terminate a consulting relationship. The agreement further barred him from soliciting the business of any client, customer, or supplier of the company for a one-year period after the end of his employment.

During the first part of 2011, Ghammachi decided that he wanted to "transition out" of Media Solutions. He and the company's management began to negotiate the terms of a "separation agreement," part of which was to include the repurchase of Ghammachi's unit interest in the company.[3] They did not reach an agreement and, in June 2011, Media Solutions terminated Ghammachi's employment.

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[2] The agreement stated that for the one-year period following termination, Ghammachi was not to: "(i) own, manage, operate, or control, or engage, join, or participate in the ownership, management, operation, or control of, any entity that is involved in the sourcing, marketing, sale, or distribution of any product(s) or product categories, including but not limited to imaging consumables, printer parts, batteries and power related accessories for consumer electronics or computing devices, that have been, are currently, or at any time during the Employment Term and/or the Non-Compete Term are being ordered, marketed, or sold by the Company anywhere in the world; or (ii) be employed by, act as a consultant to, furnish any capital or loans to, work with, or advise or assist in any manner the business of, any person or entity that is involved in the sourcing, marketing, sale, or distribution of any product(s) or product categories, including but not limited to imaging consumables, printer parts, batteries and power related accessories for consumer electronics or computing devices, that have been, are currently, or at any time during the Employment Term and/or the Non-Compete Term are being ordered, marketed, or sold by the Company anywhere in the world."

[3] David Walsh, the managing partner of KACA, and a managing director of Kayne Anderson Private Advisors, L.P., the manager of KAPI, was primarily responsible for discussions with Ghammachi regarding his intended departure from the company and the resulting negotiations. At the time, Walsh was Chairman of the Board of Managers at Media Solutions.

The Underlying Lawsuit and Arbitration

In May 2013, Ghammachi sued Media Solutions and the Kayne Parties. He was represented by the law firm of Mixon Jolly.[4] Jolly is the second anti-SLAPP movant involved in the current appeal.

On the same day that Ghammachi filed his complaint, he also filed an arbitration claim with the American Arbitration Association (AAA) in accord with a contractual arbitration clause in his September 2009 employment agreement with Media Solutions (*ante*). The demand identified only Media Solutions as the respondent. The claim description read: "The claims against Media Solutions Holdings, LLC are stated in the attached complaint which is to be filed in the Los Angeles Superior Court." Although the attached complaint named the Kayne Parties as defendants in addition to Media Solutions, the claim description did not mention them.

The complaint alleged that in April 2011, Ghammachi advised the defendants of his desire to leave Media Solutions. According to the complaint, the defendants informed him they did not want him to leave Media Solutions to work with a former KACA employee who was engaged in the investment industry, not the printer cartridge supply industry. The complaint alleged that following negotiations, the parties reached an oral agreement in which the defendants promised Ghammachi he would be allowed to continue work on a limited basis to increase his exit bonus, and that Media Solutions would repurchase all of his member units for $240,000. However, the complaint alleged the resulting document purporting to memorialize the agreement contained unlawful restraints of trade in violation of Business and Professions Code section 16600, which sought to prevent Ghammachi from competing in the printer cartridge supply and private investment industries. When Ghammachi refused to sign, Media Solutions terminated his employment without cause. The complaint further alleged the defendants refused to purchase his unit interest as required under the operating agreement. As to KAPI, the

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[4] Hereafter Jolly. Our references to Jolly include an individual attorney, Cameron M. Jolly, as well as Cameron M. Jolly, a professional corporation, and Mixon Jolly, LLP. We refer to Ghammachi and Jolly collectively as appellants.

complaint asserted a claim for breach of contract based on the alleged refusal to repurchase his unit interest. As to both Kayne Parties, the complaint asserted claims for interference with contractual relations and interference with prospective economic relations based on alleged interference with Ghammachi's employment agreement with Media Solutions; declaratory relief with respect to the non-compete and non-solicitation provisions; and unfair competition based on the alleged illegal restraints of trade and defendants' termination of Ghammachi and refusal to pay money due to him.

On August 13, 2013, Media Solutions and the Kayne Parties collectively filed a joint AAA standard-form "Arbitration Answering Statement and Counterclaim Request" in Ghammachi's AAA proceeding, along with an "Answer to Demand for Arbitration." In their answer, Media Solutions and the Kayne Parties expressly alleged an affirmative defense that the arbitration should be "suspended" under AAA rules "to allow the Los Angeles Superior Court time to resolve [their] Motion to Compel Arbitration," which they intended to file in short order. They asserted: "All claims against all parties . . . are subject to arbitration."

On August 26, 2013, Media Solutions and the Kayne Parties collectively filed a joint motion in the trial court "for an order compelling arbitration of all alleged causes of action in [the case] against all parties, and staying [the] action pending the arbitration." In the motion, the defendants argued Ghammachi was required to arbitrate all of his claims, including any and all claims as to the Kayne Parties, based on the allegations in the complaint regarding Media Solutions and the Kayne Parties, and based on the arbitration provision, which included any dispute relating to Ghammachi's employment or termination. They specifically argued KAPI was a signatory to the employment agreement in its capacity as the Managing Director of Media Solutions, and that Ghammachi had alleged each defendant to be the "agent, employee, representative, or partner," of each co-defendant. The motion to compel arbitration further argued Ghammachi was estopped from avoiding arbitration as to the Kayne Parties because his claims against them were "inherently inseparable" from his claims against Media Solutions, since they were based on the same facts and theory.

In early September 2013, counsel for Media Solutions and the Kayne Parties informed Ghammachi's counsel (Jolly) they intended to withdraw their then-pending motion to compel arbitration and would demur to the complaint instead. Jolly responded he would not stipulate to the withdrawal of the motion, and he agreed with it. He indicated he would move to compel arbitration if Media Solutions and the Kayne Parties withdrew their pending motion.

In October 2013, Media Solutions and the Kayne Parties withdrew the motion to compel arbitration and, in November 2013, the Kayne Parties demurred to Ghammachi's original complaint in the superior court. The Kayne Parties argued KAPI could not be liable under the operating agreement because the terms of the agreement created an obligation only on the part of Media Solutions to repurchase Ghammachi's membership units. They further argued the interference claims failed because the complaint alleged the defendants had interfered with the contractual and economic relationship between Ghammachi and Media Solutions, yet it also alleged the Kayne Parties and Media Solutions were agents of one another and, under California law, corporate agents cannot be liable for inducing a breach of the corporation's contracts or for interfering with the corporation's prospective economic relations.

In January 2014, instead of opposing the demurrers, Ghammachi filed a first amended complaint which alleged the following causes of action: breach of contract against Media Solutions and KAPI based on allegations that the defendants failed to redeem his unit shares as contractually required under the 2009 operating agreement noted above; "interference with prospective economic relations" against the Kayne Parties based on allegations that the entities engaged in wrongful conduct to restrain him from working for any business in competition with Media Solutions; declaratory relief as to the Kayne Parties concerning the validity of non-compete and non-solicitation clauses in his employment agreement with Media Solutions; and violation of the Unfair Competition Law (see Bus. & Prof. Code, § 17200) based on the alleged wrongful restraint on his employment.

In February 2014, the Kayne Parties demurred to Ghammachi's first amended complaint. The second demurrer again argued KAPI had no obligation under the operating agreement to purchase Ghammachi's unit interest, thus it could not be liable for breach of contract. It further asserted the intentional interference claim failed because the complaint neither identified any specific economic relationship allegedly disrupted, nor alleged that any of the potential relationships mentioned had the probability of future economic benefit. The demurrer asserted the claims for declaratory relief and unfair competition were invalid because the covenant not to compete contained in Ghammachi's employment contract had already expired in June 2012.

Thus, by early February 2014, Ghammachi had a first amended complaint on file, with a demurrer by the Kayne Parties pending. Further, he had an AAA arbitration proceeding pending in which he had asserted claims against Media Solutions. The Kayne Parties were not named as respondents in the arbitration demand, and had not withdrawn the answer they filed jointly in the arbitration, but they had withdrawn their motion to compel arbitration. On February 13, 2014, Ghammachi filed a motion to compel arbitration of all of his claims and to stay the superior court action pending the arbitration. Appellants argued in the motion: "Kayne and KAPI admitted to the Court that this case should be arbitrated along with Plaintiff's claims against Media Solutions because of the agency and management interrelationship of the parties. After Plaintiff agreed, Kayne and KAPI withdrew their motion. Because Plaintiff agrees, and Defendants refuse to stipulate to arbitration as they had requested, Plaintiff requests the Court order this action against Kayne and KAPI to arbitration pursuant to Code of Civil Procedure § 1281.2 along with Plaintiff's pending arbitration case before the American Arbitration Association." The court set the motion for hearing on April 10, 2014, the same date as the hearing on the demurrer to the first amended complaint.

On February 20, 2014, Ghammachi filed a standard Judicial Council form request for a voluntary dismissal of the trial court case as to the Kayne Parties (but not Media Solutions) without prejudice. The clerk of the court entered the dismissal the same day.

The Current Malicious Prosecution Lawsuit and Anti-SLAPP Motion

On March 6, 2014, about two weeks after Ghammachi dismissed the superior court case, the Kayne Parties filed a civil complaint in the trial court against appellants alleging a single cause of action for malicious prosecution.

In April 2014, appellants jointly filed a special motion to strike the Kayne Parties' complaint pursuant to the anti-SLAPP statute. (Code of Civ. Proc., § 425.16.) The Kayne Parties opposed the motion. They did not contest that Ghammachi's act of filing the underlying complaint in superior court was protected activity. However, they argued they could make the required evidentiary showing to demonstrate there was a reasonable probability they would prevail on each element of their malicious prosecution claim sufficient to defeat the anti-SLAPP motion.

After the parties argued the merits of the anti-SLAPP motion, the trial court denied it. The court found that KAPI's and KACA's cause of action for malicious prosecution was subject to the anti-SLAPP statute and that they had shown at least minimal merit of the required elements of malicious prosecution necessary to defeat the motion. This appeal timely followed.

DISCUSSION

I. The Anti-SLAPP Statute

A strategic lawsuit against public participation, commonly known as a SLAPP suit, is intended to "chill" a party from exercising the constitutional rights to free speech and or to petition the government for redress of grievances; a SLAPP suit does so by causing the party to defend against a suit arising from the exercise of constitutionally protected activity. The anti-SLAPP statute provides a procedure for putting an early end to a SLAPP suit by means of a special motion to strike. (Code of Civ. Proc., § 425.16, subd. (b)(1); and see generally, *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

The anti-SLAPP statute establishes a two-step procedure to determine whether a cause of action should be stricken. In the first step, the court decides whether the movant has made a threshold showing that a challenged cause of action arises from statutorily-defined protected activity. If the court finds that such a showing has been made, it must

then determine whether the party opposing the motion has shown a probability of prevailing. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To show a probability of prevailing, the opposing party must demonstrate the cause of action is legally sufficient and supported by a sufficient prima facie showing of evidence to sustain a favorable judgment if the evidence it has submitted is credited. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965 (*Zamos*).)

In deciding the issue of potential merit, the trial court considers the pleadings and evidence submitted by both parties; the court does not assess the credibility or weigh the comparative probative strength of competing evidence. Instead, the court should grant the motion when, as a matter of law, the movant's evidence defeats the opposing party's attempt to establish evidentiary support for a cause of action. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, abrogated by statute on another ground as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547-548.) The showing required to demonstrate the probability of prevailing prong, and, thus, to defeat an anti-SLAPP motion, is "not high," and need only demonstrate a "minimum level of legal sufficiency and triability." (*Overstock.com, Inc. v. Gradient Analytics, Inc*. (2007) 151 Cal.App.4th 688, 699.) In this regard, the required showing is similar to the showing for motions for nonsuit, directed verdicts, or summary judgments. (*M.G. v. Time Warner, Inc*. (2001) 89 Cal.App.4th 623, 630.)

On appeal, we review an order on an anti-SLAPP motion de novo, meaning we employ the same two-step procedure employed by the trial court. (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1055.)

Because the Kayne Parties concede that appellants engaged in constitutionally protected petitioning activity in bringing Ghammachi's underlying lawsuit, the first step of the anti-SLAPP analysis is not an issue. The task for our court is to determine whether the Kayne Parties demonstrated their malicious prosecution complaint is supported by a sufficient prima facie showing of facts to sustain a verdict in their favor, were that

evidence presented at trial and credited by the trier of fact.[5] (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89.) "Only an action that lacks all merit is subject to a special motion to strike." (*Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 272.)

II. Malicious Prosecution

Our state's courts have long recognized the tort of malicious prosecution has the potential to create a "chilling effect" on ordinary citizens' willingness to bring civil disputes to court. (See, e.g., *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel*).) For this reason, a cause of action for malicious prosecution is "regarded as a disfavored cause of action," and the elements of malicious prosecution are "carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim." (*Ibid.*) At the same time, the California Supreme Court has noted "the characterization of malicious prosecution as a *disfavored* cause of action, 'should not be employed to defeat a legitimate cause of action' or to 'invent[ ] new limitations on the substantive right, which are without support in principle or authority.' " (*Zamos, supra,* 32 Cal.4th at p. 966.)

In accord with these principles, it is well settled that, in order to prevail on a cause of action for malicious prosecution, a plaintiff must plead and prove the following elements: (1) that the underlying action against the malicious prosecution plaintiff was terminated in the plaintiff's favor; (2) that the underlying action against the malicious

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[5] We deny the Kayne Parties' motion requesting we take evidence on appeal. Although this court has authority under Code of Civil Procedure section 909 to take evidence on appeal, the Kayne Parties have presented no exceptional circumstances justifying a departure from the general rule that appellate review is limited to the record before the trial court. (*LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 946, fn. 6.) We also note that while the evidence might support an affirmance in this case, it would not terminate the litigation. (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1451, italics omitted [" 'The power to invoke [section 909] should be exercised sparingly, ordinarily only in order to affirm the lower court decision and terminate the litigation, and in very rare cases where the record or new evidence compels a reversal with directions to enter judgment for the appellant [citation].' [Citation.]"].)

prosecution plaintiff was initiated without probable cause; and (3) that the underlying action was initiated with malice. (*Zamos, supra,* 32 Cal.4th at p. 966.)

III. Favorable Termination

Appellants contend the order denying their anti-SLAPP motion must be reversed because the Kayne Parties failed to establish a probability they would prevail on the element that Ghammachi's underlying action terminated in their favor, as case law defines the concept of "favorable termination." We disagree.

The favorable termination element is a mixed issue of fact and law — a jury decides disputed "historical facts," and the trial judge decides, based on the established historical facts, whether an earlier action ended in favor of the malicious prosecution plaintiff. Where facts are undisputed, the issue of favorable termination is a question of law. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399 (*Sycamore Ridge*); *De La Pena v. Wolfe* (1986) 177 Cal.App.3d 481, 486.)

It is undisputed that the superior court action terminated as to the Kayne Parties on February 20, 2014, when appellants filed a request for voluntary dismissal, which the clerk of the superior court entered that same day. Accordingly, the issue before us is whether the Kayne Parties established a probability of obtaining an ultimate conclusion that Ghammachi's voluntary dismissal (by the Jolly firm) reflected on the merits of his case.

In general, "[a] voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury. [Citations.] This is because ' "[a] dismissal for failure to prosecute . . . does reflect on the merits of the action [and in favor of the defendant] . . . . The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted." ' [Citation.]" (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1400.) Despite this presumption, to be a "favorable termination," a voluntary dismissal still must reflect " ' " 'the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant.' " [Citation.] . . . [¶] . . . The focus is not on the malicious prosecution plaintiff's opinion of his *innocence,* but on the opinion of the

dismissing party.' [Citation.]" (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056.)

Here, the Kayne Parties pointed to the timing of the dismissal as suggesting appellants believed the action lacked merit. Appellants dismissed the claims against the Kayne Parties two months before a scheduled hearing on their second demurrer, and the day before Ghammachi was scheduled to be deposed. (*Sycamore Ridge*, *supra*, 157 Cal.App.4th at p. 1400 [plaintiff's failure to appear for deposition relevant factor in determining whether voluntary dismissal was a favorable termination].) In addition, there was evidence, discussed more fully below, that at least some of the claims against the Kayne Parties were not viable. (*Id*. at pp. 1400-1401.) For example, appellants amended the complaint and changed their theory of some claims against the Kayne Parties in response to the demurrer. Yet, the resulting first amended complaint relied heavily on the non-compete agreement in Ghammachi's employment agreement as a basis for prospective equitable relief, despite the fact that the agreement had already expired and could no longer restrain his activities. This, in addition to the presumption arising from the voluntary dismissal, was sufficient to establish a prima facie showing of favorable termination.

Appellants proffered evidence indicating Ghammachi dismissed the claims against the Kayne Parties because it was not economically feasible to litigate his claims in both the superior court and in arbitration. According to appellants' declarations, they were concerned the Kayne Parties would drive up the costs of the superior court proceeding, all before the arbitration. Appellants contend the dismissal was solely based on their desire to litigate only in arbitration, as a means to avoid the expense of going to trial in the superior court.

While, if credited, this explanation could prevent a characterization of the dismissal as a "favorable termination," (*Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344-345), certain factors indicate this evidence did not defeat the Kayne Parties' prima facie showing that the voluntary dismissal was in fact a reflection on the merits of the case. First, appellants' evidence failed to explain why they *dismissed*

the claims against the Kayne Parties, rather than proceeding with the motion to compel arbitration, if the idea was to litigate in only a single forum against all parties. The Jolly declaration indicated the Kayne Parties had refused to arbitrate, despite filing an answer in the arbitration. Jolly declared he was concerned it would be too expensive to proceed to a jury trial in superior court, in addition to conducting the arbitration. Theoretically one purpose of appellants' already-pending motion to compel arbitration was to *avoid* having two parallel or consecutive proceedings, while maintaining the claims against all parties. Yet, appellants dismissed the claims against the Kayne Parties *before* the motion to compel arbitration and stay the action was to be heard. (See *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 456-457 [claimed financial motive for dismissal was nebulous and implausible; factfinder would be entitled to disbelieve defendant's declaration based on its contents and surrounding circumstances, thus it did not establish as a matter of law that plaintiffs would be unable to establish favorable termination].)

Moreover, to the extent appellants have suggested they simply intended to arbitrate the claims against the Kayne parties, or that the claims were not terminated because they were pending in the arbitration, appellants' evidence did not establish that "pursuing the underlying action" in arbitration ever extended to pursuing the claims against the Kayne Parties. The original arbitration demand was against Media Solutions only. This was admitted in Jolly's declaration in support of the motion to strike, in which he stated: "On May 23, 2013, the underlying case was filed in the Los Angeles County Superior Court … and pursuant to Paragraph 13 of the Employment Agreement . . . it was also filed against MEDIA SOLUTIONS with the American Arbitration Association. . . ."

In general, a person or entity cannot be considered a party to an action, including one in arbitration, unless the person or entity is formally made a party, and no judgment may be entered against a nonparty. (*Ikerd v. Warren T. Merrill & Sons* (1992) 9 Cal.App.4th 1833, 1842-1844.) "A person or entity may become a party defendant only in two ways: by being named as a defendant, or by being properly named and served as a fictitiously named defendant pursuant to [Code of Civil Procedure] section 474." (*Kerr-McGee Chem. Corp. v. Superior Court* (1984) 160 Cal.App.3d 594, 597.)

However, " '[a] party may appear though he is not named in the complaint.' [Citation.]" (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1146.) In trial court proceedings, a voluntary appearance and participation in the action will be deemed a waiver of any failure to name a person or entity as a defendant. As explained by one court, "If a complete interloper were to answer a complaint, the plaintiff could move to strike the answer. [Citations.] Arguably, the plaintiff could also demur to the answer. (Code Civ. Proc., § 430.20.) If, however, the plaintiff fails to do either in a timely manner—if the unnamed, yet answering defendant participates in the action, without any objection from anybody—the complaint should be deemed amended." (*Id.* at pp. 1146-1147.) "Even a nonparty that is not named in the pleadings makes a general appearance and submits to the court's personal jurisdiction by participating in the proceedings in such a manner [such as seeking affirmative relief or opposing a motion on the merits]." (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1029.)

But here, there was no evidence that after filing the answer, which asserted in part that the arbitration should be stayed, the Kayne Parties did anything else to participate in the arbitration. Counsel for the Kayne Parties declared that as of the time of the anti-SLAPP motion briefing, nothing had happened in the arbitration except a single telephonic status conference; the arbitration was otherwise stayed. Further, there is evidence that despite the answer, the Kayne Parties determined they would not participate in the arbitration, and, as of the time of the briefing on the motion to strike, there was no evidence appellants amended the arbitration demand to include them. Jolly's declaration in support of the anti-SLAPP motion stated appellants had not *dismissed* the Kayne Parties from the arbitration, without establishing that they were ever included in the first place. (See e.g., *Ikerd v. Warren T. Merrill & Sons, supra,* 9 Cal.App.4th at pp. 1842-1843 [arbitration judgment against corporation's president was impermissible where president was never named in arbitration demand, added to demand, or served with demand; his participation in the arbitration as a witness did not make him a party; no responsive pleading ever filed].)

Despite the Kayne Parties' initial attempt to insert themselves into the arbitration, there was no evidence before the trial court that anything ever came of that effort. No stipulation to arbitrate the claims against the Kayne Parties was ever formalized. Indeed, the evidence suggests the parties never reached an agreement regarding whether claims against the Kayne Parties would be subject to arbitration. This would explain why the Kayne Parties filed a motion to compel arbitration, and, when they reversed course and withdrew the motion, appellants indicated *they* would file a motion to compel arbitration. Indeed, Ghammachi's motion to compel arbitration did not mention the answer the Kayne Parties filed in the arbitration proceeding as an additional basis to support the motion to compel. Meanwhile, both sides actively litigated the claims in the trial court, with successive demurrers and a first amended complaint. No party appeared to be operating on the assumption that the unsolicited answer was enough to ensure the claims against the Kayne Parties would be arbitrated. And, without any such assurance, appellants unilaterally dismissed the claims in the superior court.

Thus, appellants' evidence that they dismissed the claims against the Kayne Parties purely for financial reasons, related to the desire to only litigate in the arbitral forum, did not as a matter of law defeat the Kayne Parties' evidence that the voluntary dismissal of the claims was a reflection on their merits. Given the surrounding circumstances, a jury could disbelieve appellants' declarations as to the reason for dismissing the claims. (*Drummond v. Desmarais, supra*, 176 Cal.App.4th at p. 457.) At a minimum, the parties' evidence creates a conflict as to the circumstances of the termination, rendering the determination of the reasons underlying the dismissal a question of fact. (*Sycamore Ridge, supra*, 157 Cal.App.4th at p. 1399.) The conflicting evidence does not defeat the Kayne Parties' prima facie case. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1523, 1540 (*Jay*).)

In addition, on these facts, we reject appellants' argument that the reasoning of *Brennan v. Tremco* (2001) 25 Cal.4th 310 (*Brennan*) necessarily applies to this case.[6] In *Brennan*, an employee brought a malicious prosecution action against his former employer; the case arose out of an action the employer brought against the employee which was resolved in binding contractual arbitration. Our high court ruled the employee could not state a cause of action for malicious prosecution as a matter of law because "a contractual arbitration proceeding does not result in a favorable termination of a prior action." (*Brennan, supra,* 25 Cal.4th at pp. 312, 314.) As explained by the Court, regardless of whether the prior action "started in court or in arbitration, if it ends in contractual arbitration, that termination [of the prior action] will not support a malicious prosecution action." (*Id*. at p. 314.) The Court reasoned that "to permit an action for malicious prosecution to follow contractual arbitration would defeat the purpose of that arbitration. . . . [C]ontractual arbitration is relatively quick and inexpensive, but necessarily a somewhat 'roughshod,' procedure that the parties may voluntarily choose to resolve their dispute and avoid further recourse to the courts. [Citation.]" (*Id.* at p. 316.) "[P]arties who voluntarily choose arbitration generally expect and desire that the arbitration will end their dispute . . . ." (*Id*. at p. 315.) As a result, "contractual arbitration should not lead to additional litigation in the courts." (*Id*. at p. 317.)

Here, even if the record could be construed as indicating the claims against the Kayne Parties were in some fashion "in arbitration," there is no support for the assertion that the claims *ended* in arbitration. Appellants dismissed the claims against the Kayne Parties in the superior court, in the face of the Kayne Parties' refusal to arbitrate, and the absence of an arbitration demand naming them as respondents or a court order compelling them to arbitration. While contractual arbitration cannot give rise to a malicious prosecution action under *Brennan* (*id.* at p. 317), in this case there was no

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6 The Kayne Parties contend appellants forfeited this argument by failing to raise it in the trial court. Although there are contested factual issues involved in the argument, we consider the legal question presented—whether the case provided appellants a defense to the malicious prosecution claim as a matter of law. (*Barton v. New United Motor Manufacturing, Inc*. (1996) 43 Cal.App.4th 1200, 1207.)

evidence the claims against the Kayne Parties were, or would be, arbitrated.[7] On this record, it cannot be established that *Brennan* applied as a matter of law to bar the malicious prosecution action.

The Kayne Parties have made a sufficient showing of favorable termination to overcome the anti-SLAPP motion on that ground.

IV. Probable Cause

Appellants contend the order denying their anti-SLAPP motion must be reversed because the Kayne Parties failed to establish the requisite probability that they would prevail on the element that Ghammachi initiated the action without probable cause. Again, we disagree.

" 'Probable cause exists when a lawsuit is based on facts reasonably believed to be true, and all asserted theories are legally tenable under the known facts.' [Citation.] The court must 'determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable.' [Citation.] We evaluate this question of law under an objective standard, asking whether any reasonable attorney would have thought the claim tenable." (*Jay, supra,* 218 Cal.App.4th at p. 1540.) A malicious prosecution plaintiff may defeat an anti-SLAPP motion by making a prima facie showing that any one of the theories in the underlying case was legally untenable or based on facts not reasonably believed to be true. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292; *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1106.) Stated in other words, when there is a factual dispute about the defendant's knowledge of facts, or the reasonable basis for the defendant's knowledge of the facts, the jury must resolve the threshold question of the defendant's factual knowledge. (*Sheldon Appel, supra*, 47 Cal.3d at p. 881.)

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[7] Indeed, portions of Jolly's declaration suggested the claims would not be imminently arbitrated. He indicated that in making the decision to dismiss the Kayne Parties, he "formed the opinion that the statute of limitations on the written contract claim against KAPI does not expire until mid-2015. It seemed prudent and substantially more economical to have the Arbitration proceed first."

Ghammachi sued KAPI for breach of the 2009 operating agreement. He sued the Kayne Parties for interference with prospective economic advantage based on allegations that the entities engaged in wrongful conduct to restrain him from working for any business in competition with Media Solutions in the printer industry or for any business in competition with the Kayne Parties in the investment industry. He also sued the Kayne Parties for declaratory relief concerning the validity of non-compete and non-solicitation clauses in his employment agreement with Media Solutions; and, finally, he sued the Kayne Parties and sought injunctive relief for violations of the Unfair Competition Law (see Bus. & Prof. Code, § 17200) based on the alleged wrongful restraint on his employment.

We consider first the underlying breach of contract claim alleged against KAPI. "Probable cause . . . must exist for every cause of action advanced in the underlying action. '[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted. . . .' [Citations.]" (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 292.)

KAPI made a prima facie showing that appellants lacked probable cause to bring a breach of contract claim against it. The claim was based on the 2009 operating agreement. The agreement included a term providing that, if a member's employment with Media Solutions was terminated, then "the Company [Media Solutions] and the Class A Members" — which included KAPI — had "the right and/or obligation to purchase" Ghammachi's unit interest in Media Solutions at a price fixed *according to prescribed term*s. Under those terms, Media Solutions was obligated to redeem Ghammachi's unit interest under certain circumstances. But the agreement specifically provided the Class A members the right, but not the obligation, to purchase his units.

Under the agreement, if Ghammachi voluntarily terminated his employment with Media Solutions, and Media Solutions failed to purchase his units, "the Class A Members . . . shall have the right to purchase all (but not less than all) of the terminated Member's Units." If Ghammachi's employment was terminated for cause, or without cause and not for his failure to comply with performance goals, there was no provision

for the Class A members to purchase the units, only Media Solutions. If Ghammachi's employment was terminated without cause and he failed to comply with performance goals, "first the Company and then the Class A Members . . . shall have the right, but not the obligation, to purchase . . . all of the Units then owned at the GAAP EBITDA Price."

The plain language of the contract did not support Ghammachi's claim that KAPI, a Class A Member, had any obligation to purchase his unit interest upon his separation from the company, under any circumstances. (See, e.g., *HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 216-217 [probable cause was lacking where underlying claims were contradicted by the terms of a contract giving rise to those claims].) Appellants rely on the introductory language of the repurchase provisions, which states the Company and Class A Members "shall have the right and/or obligation" to purchase all of the Units then owned by a terminated Member. Yet, this reliance ignores the full language of the provision, which specifies the right or obligation would be "as follows," and the language that followed set forth no obligation on the part of the Class A members to repurchase the units.

Appellants' only other argument is that KAPI "used its control of Media Solutions" to breach the agreement. The assertion does not support the direct breach of contract claim asserted against KAPI. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538 ["Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations."].) The operating agreement explicitly set forth separate contractual duties for KAPI, a Class A Member, and Media Solutions. Despite KAPI's alleged ability to control Media Solutions, under the agreement KAPI was an identified Class A member with no contractual obligation to repurchase Ghammachi's unit interest.

That KAPI controlled Media Solutions was not, of itself, a legally tenable theory to hold KAPI liable for Media Solutions's obligations under the operating agreement. (see Del. Code Ann. tit. 6, § 18-303 ["the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of

a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company"];[8] *Wallace v. Wood* (Del. Ch. 1999) 752 A.2d 1175, 1180; Corp. Code, § 17703.04, subd. (a)(1)-(2) [same]; see also *Potts v. First City Bank* (1970) 7 Cal.App.3d 341, 345-346 [where bank loaned money to individuals who were sole shareholders of corporation, and refused to loan the money directly to the corporation, bank could not hold corporation liable for the debt].)

As the Kayne Parties have pointed out, neither the original nor the first amended complaint alleged KAPI was liable for breach of the agreement on an alter ego theory. (See e.g., Corp. Code, § 17703.04, subd. (b); *Sonora Diamond Corp. v. Superior Court*, *supra,* 83 Cal.App.4th at pp. 538-539.) The complaint also did not, and could not allege the explicit terms of the agreement obligated KAPI for the obligations of Media Solutions in addition to its own stated duties under the agreement (see Del. Code Ann. tit. 6, § 18-303 ["under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company"]; *People v. Pacific Landmark*, LLC (2005) 129 Cal.App.4th 1203, 1212.)

In light of the unambiguous language of the operating agreement as to KAPI's contractual right—but not obligation—to repurchase Ghammachi's units, no reasonable attorney would have thought a straight breach of contract claim against KAPI was tenable.

Moreover, it is equally apparent that appellants lacked probable cause for the causes of action for unfair competition (Bus. & Prof. Code, § 17200) and declaratory relief. The unfair competition cause of action alleged the Kayne Parties engaged in unfair competition by using illegal restraints of trade in his employment agreement. The complaint sought injunctive relief preventing the defendants from "directly and indirectly enforcing the unlawful restraints of trade, from sending letters falsely representing that

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[8] The operating agreement indicates Media Solutions is a Delaware Limited Liability Company, and the agreement is to be construed according to Delaware law.

Plaintiff, and other employees, are subject to a non-solicitation agreement and covenant not to compete, and from insisting that employees sign contracts that contain illegal restraints of trade."

However, as the Kayne Parties asserted in the motion to compel arbitration and again in the first demurrer, the covenant not to compete contained in the employment agreement had a one-year term. Ghammachi was terminated in June 2011; the covenant not to compete had expired well before he filed his first complaint in 2013. Ghammachi's claims challenging the enforceability of the covenant not to compete were moot before he even filed suit. Although the Kayne Parties raised this in the demurrer to the first complaint, the first amended complaint continued to allege claims based on the covenant not to compete as it applied to him. There was no concrete dispute between the parties regarding the covenant not to compete following its expiration, and no injunctive relief was available. (*Paoli v. California & Hawaiian Sugar Refining Corp.* (1956) 140 Cal.App.2d 854, 856 [no injunction or declaratory relief was proper as challenged contract had expired].)

Appellants assert that under Business and Professions Code section 17203, injunctive relief was available so long as Ghammachi suffered a past injury. This is incorrect. (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 462-466.) Under section 17203, an injunction is inappropriate unless there is some likelihood the unlawful conduct will recur. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1015-1016.) In this case, the non-compete had expired, and there was no indication Ghammachi had any intention of working for Media Solutions again. There was no probability that the alleged unlawful conduct—the use of a covenant not to compete in an employment agreement—would recur between the Kayne Parties and Ghammachi.

The claim for declaratory relief on that ground was not tenable for the same reason. A claim for declaratory relief requires an actual controversy, and does not include "controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.' [Citation.]" (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.) Since the challenged

covenant not to compete had expired *before* appellants filed the original complaint, there was no existing controversy relating to the legal rights and duties of the parties with respect to the covenant not to compete. (*Application Group v. Hunter Group* (1998) 61 Cal.App.4th 881, 894 [vacating judgment relating to individual plaintiff's claims for declaratory relief regarding unlawful noncompetition agreement where agreement had expired as to that plaintiff; no actual controversy].)

Appellants further argue that despite the expiration of Ghammachi's covenant not to compete, he could continue to seek injunctive relief to prevent the Kayne Parties from using non-compete agreements with future Media Solutions employees. However, to procure relief on behalf of others under Business and Professions Code section 17200, section 17203 requires that a plaintiff both meet the standing requirements of section 17204, and comply with section 382 of the Code of Civil Procedure. This means the action must meet the requirements for a class action. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) Ghammachi's first amended complaint contained no facts or allegations even approaching the requirements for a class action: " '[1] the existence of an ascertainable and sufficiently numerous class, [2] a well-defined community of interest, and [3] substantial benefits from certification that render proceeding as a class superior to the alternatives.' [Citation.]" (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1221.)

Appellants also contend that despite the expiration of the non-compete agreement, Ghammachi's claims could still be adjudicated because they presented an issue that was capable of repetition, yet evading review. We disagree that this principle, which allows a court to exercise its discretion to consider questions that have become moot, provided a tenable basis for appellants to pursue the claim here. The doctrine is applied when a case has become moot *during* the pendency of the action, to matters of continuing public interest that are likely to recur in the future, or that are capable of repetition yet evade review. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 259; *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069-1070.) It is typically invoked to justify *appellate*

review of an issue rendered moot before disposition of the appeal. (See *Wilson & Wilson v. City Council of Redwood City*, *supra*, 191 Cal.App.4th at p. 1585 [trial court abused its discretion in failing to dismiss moot claims].) But even if the principle can properly be applied in the trial court, in this case the challenged covenant not to compete had expired *before* appellants filed the first complaint challenging it, not during the pendency of the action. Further, as to Ghammachi, there was virtually no possibility the claims regarding the covenant not to compete would recur. Nor can it be said the matter was one of continuing public interest which would justify any court considering the issue.

" 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' " (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200.) The Kayne Parties made a sufficient prima facie showing that appellants sought recovery upon untenable legal theories regarding the declaratory and injunctive relief concerning the covenant not to compete, and the breach of contract claim.[9] We need not consider the viability of Ghammachi's remaining claims. At a minimum the Kayne Parties made a sufficient prima showing of lack of probable cause on the breach of contract, declaratory relief, and unfair competition claim theories to withstand the anti-SLAPP motion.

V. Malice

Finally, we agree with the trial court that the Kayne Parties presented evidence establishing a prima facie showing of malice.

"The malice element of malicious prosecution goes to the defendants' subjective intent for instituting the prior case. [Citation.] Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range ' "from open hostility to indifference.

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[9] To the extent the declaratory relief claim sought a declaration of rights as to the Kayne Parties' obligation to repurchase his unit interest, the claim was untenable for the reasons explained above regarding the breach of contract claim. In addition, unlike KAPI, KACA was not a signatory to the operating agreement.

[Citations.]" ' [Citation.] Malice may be inferred from circumstantial evidence, such as the defendants' lack of probable cause, supplemented with proof that the prior case was instituted largely for an improper purpose. [Citation.] This additional proof may consist of evidence that the prior case was knowingly brought without probable cause or was brought to force a settlement unrelated to its merits." (*Cole, supra,* 206 Cal.App.4th at pp. 1113-1114.)

Further, "malice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226.)

The Kayne Parties offered evidence from which an inference could be drawn that Ghammachi's action was instituted largely for an improper purpose. They submitted evidence of a message Ghammachi left for his successor at Media Solution in June 2011, when there were still discussions about redeeming his unit interest in Media Solutions. In the message, Ghammachi referred to the parties' dispute and indicated his willingness to discuss it. However he warned: "[B]ut I want you to understand that there's going to be a time limit on this. I have a very short fuse on all this. You know, we're going to just demand arbitration or go public with this, whatever, to make Walsh and everybody's life miserable, if I have to. There's a lot of money here but, obviously, I prefer to just make this go away quickly and get back to helping you guys with transition if possible."

One permissible interpretation of this evidence would be that it illustrates Ghammachi's ill will toward the Kayne Parties, and a desire to force a settlement of his claims unrelated to their legal merits. This, combined with the untenability of the breach of contract, declaratory relief, and unfair competition claims would indicate, at a minimum, a degree of indifference from which one could also infer malice.

Moreover, malice may be found when parties continue to prosecute a lawsuit after a lack of probable cause is revealed. (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1408, fn. 12.) In this case, the first demurrer made clear that KAPI was not liable under the operating agreement for failing to repurchase Ghammachi's unit interest. However, the claim was repeated in the first amended complaint. In addition, the

covenant not to compete had expired before appellants filed the original complaint. There was no basis to seek relief from the provision since it could no longer be enforced. Even after the issue was raised in the demurrer to the complaint, the first amended complaint continued to seek relief based upon the expired covenant not to compete. At a minimum, the evidence was sufficient to support a reasonable inference that Ghammachi's attorneys acted with a degree of indifference in bringing these claims against the Kayne Parties, indifference from which one could also infer malice. (*Id.* at p. 1409.)

In summary, we find the evidence in the record is sufficient to establish a probability that the Kayne Parties would prevail on their malicious prosecution claim.[10]

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[10] On appeal, Jolly contends the trial court abused its discretion in sustaining objections to some of appellants' evidence offered in support of the anti-SLAPP motion, specifically portions of the two Ghammachi declarations. We conclude that even if the trial court erred, any error was harmless. To the extent the excluded evidence was relevant to the issues at play in the anti-SLAPP motion, such as Ghammachi's reasons for dismissing the claims against the Kayne Parties, the evidence did nothing more than create a factual conflict and did not defeat the Kayne Parties' evidence as a matter of law. (*Jay, supra*, 218 Cal.App.4th at p. 1538 [evidence excluded "ultimately of little import, due to the manner in which anti-SLAPP motions are reviewed"].) Further, similar evidence was contained in the Jolly declaration, and was not subject to objection. In addition, many of the objections Jolly challenges on appeal related to evidence to support the intentional interference claim, yet, as explained above, the Kayne Parties met their burden to show a probability of prevailing on the issue of lack of probable cause as it related to the claims for breach of contract, unfair competition, and the request for declaratory relief. Thus, even had the evidence been considered, it is not reasonably probable the trial court would have granted the anti-SLAPP motion.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Respondents shall recover their costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

OHTA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.