Filed 12/21/16 Vehicle Performance Systems v. Consumer Advocacy Grp CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VEHICLE PERFORMANCE SYSTEMS, INC., Plaintiff and Appellant, v. CONSUMER ADVOCACY GROUP et al., Defendants and Respondents.	B268336 (Los Angeles County Super. Ct. No. BC582894)

APPEAL from an order of the Superior Court for Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Law Office of Lawrence P. House and Lawrence P. House for Plaintiff and Appellant.

Yeroushalmi & Yeroushalmi and Reuben Yeroushalmi; Law Offices of Adam I. Gafni, Adam I. Gafni and Rabin Saidian for Defendants and Respondents.

Plaintiff Vehicle Performance Systems, Inc. (VPS) appeals from an order granting a special motion to strike its malicious prosecution action against defendants Consumer Advocacy Group, Inc., Lyn Marcus, and Michael Marcus (collectively, CAG), and Yeroushalmi & Associates, Reuben Yeroushalmi, Ben Yeroushalmi, Daniel Cho, and Tara Heckard-Bryant (collectively, Attorneys). We conclude the trial court properly found that VPS failed to establish a probability of prevailing on its claim, and affirm the judgment.

BACKGROUND

A. *Underlying Action*

In November 2013, CAG, represented by Attorneys, filed a lawsuit against Pilot Automotive, Inc. (Pilot), VPS, Wang's International, Inc. (Wang's), and other defendants under the Safe Drinking Water and Toxic Enforcement Act of 1986 (the Act), Health and Safety Code section 25249.5, et seq., commonly known as Proposition 65. We refer to this lawsuit as the Prop. 65 action. The complaint alleged that Pilot, VPS, and Wang's were manufacturers, distributors, promoters, or retailers of steering wheel covers (Covers) that contained lead, that they knew or should have known that lead has been identified by the State of California as a chemical known to cause cancer and reproductive toxicity and therefore was subject to Proposition 65 warning requirements, and that they failed to comply with those requirements. CAG sought a permanent injunction mandating Proposition 65-compliant warnings, penalties under Health and Safety Code section 25249.7, subdivision (b), and reasonable attorney fees and costs.

Pilot, VPS, and Wang's moved for summary judgment in the Prop. 65 action. The trial court denied the motion as to Pilot and Wang's, but granted

the motion as to VPS. The court found that VPS produced evidence, undisputed by CAG, that it had fewer than 10 employees and therefore Proposition 65 did not apply to it (see Health & Saf. Code, § 25249.11, subd. (b) [a "person" subject to Proposition 65 warning requirements does not include a "person employing fewer than 10 employees in his or her business"]), and that it had never manufactured, distributed, promoted, purchased, or sold any Cover. In response to CAG's contention that VPS could be held liable under the single enterprise or alter ego doctrines, the court found that CAG failed to submit sufficient admissible evidence to create a triable issue that VPS was an alter ego of Pilot or Wang's or that Pilot, Wang's, and VPS constituted a single enterprise.[1]

B. *Present Action*

Following entry of judgment in favor of VPS in the Prop. 65 action, VPS filed the instant lawsuit alleging a single cause of action for malicious prosecution against CAG and Attorneys. Most of the complaint focuses generally on what VPS asserts is CAG's and Attorneys' purportedly abusive use of Proposition 65 litigation and threats of litigation. It alleges that CAG is "but a mere instrumentality and artifice of [Attorneys], who use CAG to exploit the Act by threatening litigation under the Act and, when threats fail, [Attorneys] use CAG as their shill to commence litigation under the Act against their targeted business victims." A majority of the conduct it describes involves lawsuits other than the Prop. 65 action at issue here.

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[1] The trial court sustained VPS's hearsay and foundation objections to the evidence CAG submitted with regard to VPS, which is discussed in B.1., *post*. In ruling on VPS's motion for sanctions, however, the court found that the hearsay evidence provided "at least a factual basis to file suit against VSP."

With regard to the Prop. 65 action, VPS alleges that CAG and Attorneys initiated the action maliciously because they had no knowledge of the number of people VPS employed and did not know of any facts or evidence that VPS sold, manufactured, or distributed Covers, or that VPS knew the Covers contained lead. It also alleges that during the prosecution of the Prop. 65 action, CAG and Attorney abused the discovery process to conceal the fact that they did not have any evidence to support their claim, and that they improperly continued to prosecute the action, all the way through summary judgment, after VPS denied under oath (in response to requests for admissions) that it had 10 or more employees at relevant times or that it manufactured, purchased, sold, or distributed Covers.

1. *CAG and Attorneys File a Special Motion to Strike*

CAG and Attorneys filed a special motion to strike the complaint under Code of Civil Procedure section 425.16,[2] the so-called anti-SLAPP statute. They argued that VPS's malicious prosecution claim arose from protected activity under that statute—the filing and prosecution of a lawsuit—and that VPS could not show a probability of prevailing on its claim. They contended that CAG and Attorneys had a reasonable basis to believe that VPS, Pilot, and Wang's were a single entity and/or alter egos of each other, and were selling Covers without warnings required under Proposition 65, and that they filed and prosecuted the Prop. 65 action without malice.[3]

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[2] Further undesignated statutory references are to the Code of Civil Procedure.

[3] As noted, the trial court in the Prop. 65 action denied Pilot's and Wang's motion for summary judgment. The court found that CAG submitted evidence that Pilot and Wang's knew or should have known that they sold Covers containing lead without the required Proposition 65 notices. CAG and

In support of their motion, CAG and Attorneys submitted declarations from the persons involved in the pre-litigation investigation for the Prop. 65 action, describing that investigation and attaching documents showing the information they relied upon. For example, they submitted printouts from Pilot's website—taken from the website both before the Prop. 65 action was commenced and during its prosecution—that stated that Pilot "purchased [another company] and added Vehicle Performance Systems (VPS) in 2006," and that "VPS is our OEM[4] Division—now supplying a number of vehicle manufacturers of all types." They also submitted a copy of an undated interview[5] with Pilot's former Chief Operating Officer Mitch Williams, in which Williams stated that Pilot "launched Vehicle Performance Systems [in 2007] to focus on OEM." In addition, they submitted evidence showing that Calvin Wang and Michael Du were officers of all three companies (VPS, Pilot, and Wang's), and that the three companies shared the same office and warehouse location, which was at the same address listed on the packaging for the Covers.

CAG and Attorneys also submitted evidence to support their assertion that they had reason to continue to prosecute the claim against VPS even after VPS provided their responses to requests for admissions denying that it had 10 or more employees and denying that it had sold any Covers. One of the Attorneys, Tara Heckard-Bryant, submitted a declaration in which she

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Attorneys asked the trial court in the present action to take judicial notice of the ruling in the Prop. 65 action.

[4] "OEM" in an acronym for original equipment manufacturer.

[5] It appears the interview was found on a website related to suppliers of products that are made in China, and that it was conducted sometime in 2008.

described CAG's and Attorneys' attempts to obtain information regarding the relationship between the VPS, Pilot, and Wang's through discovery, and the efforts by those companies to avoid providing that information. For example, Heckard-Bryant attached VPS's initial responses to CAG's discovery requests; the responses were almost entirely unmeritorious objections. She also stated that CAG sought to depose Pilot's person most knowledgeable (PMK) on a number of topics, including Pilot's business relationship with VPS, but the person Pilot presented as the PMK for the deposition testified that he did not know about the relationship; instead, he indicated that Calvin Wang, the owner of Pilot, would be the PMK regarding that relationship. She attached as exhibits to her declaration the notice of deposition of Pilot's PMK, which listed the relationship of the parties as a topic to be discussed, and sought production of documents related to that topic. She also attached a letter she sent to VPS's counsel responding to VPS's objection to those topics and documents, and portions of the PMK's deposition testimony in which the PMK stated he had no knowledge of VPS's business operations or its relationship with Pilot, and that the owner of Pilot would have that information.

CAG and Attorneys argued that, in light of this and other evidence, VPS did not have a probability of prevailing on its malicious prosecution claim because CAG had probable cause to initiate the action against VPS under a single entity/alter ego theory based upon the information it and Attorneys had at the time, and that CAG was entitled to continue to prosecute the action and attempt to obtain the evidence it needed to prove its theory through discovery, but was prevented by VPS and Pilot from obtaining that evidence. CAG and Attorneys also argued there was no evidence that CAG or Attorneys acted with malice. Finally, CAG and Attorneys argued

that VPS could not prevail because it is a dissolved corporation and lacks the capacity to sue under Georgia law, its state of incorporation.

2. *VPS's Opposition*

VPS opposed the motion to strike on the grounds that (1) under section 425.17, its malicious prosecution claim is exempt from a special motion to strike because the claim involves the enforcement of an important right affecting the public interest, is necessary, and places a disproportionate financial burden on VPS; (2) CAG and Attorneys failed to meet their burden to show that the malicious prosecution claim is based upon activity protected under section 425.16 because the Prop. 65 action was brought for improper motives; and (3) VPS has a probability of prevailing because CAG's and Attorneys' investigation was inadequate, CAG did not allege that VPS and Pilot and/or Wang's were alter egos, and CAG and Attorneys did not conduct discovery on any alter ego theory.

In support of its opposition, VPS submitted numerous documents related generally to CAG and/or other cases brought by CAG (represented by Attorneys); none of those documents relates to the Prop. 65 action at issue in the malicious prosecution claim. The only documents VPS submitted that did relate to the Prop. 65 action were the prelitigation notice required under Proposition 65 that CAG sent to VPS, the Prop. 65 action complaint, CAG's requests for admissions and VPS's responses (in which VPS denied having 10 or more employees at any relevant time and denied manufacturing, distributing, or selling Covers in California), deposition testimony from Michael E. Marcus of CAG regarding his investigation of VPS, and the trial court's ruling on the summary judgment motion in the Prop. 65 action.

3. *Court's Ruling*

The trial court indicated at the outset of the hearing on the motion to strike that it was inclined to grant the motion. After hearing the arguments of counsel, the court took the matter under submission. Two weeks later, the court issued its ruling. The court found that CAG and Attorneys satisfied their initial burden to show that the action arises out of protected activity—the filing of the Prop. 65 action—and that VPS failed to meet its burden to demonstrate the probability of prevailing on the merits because it failed to present sufficient evidence to show malice. The court also granted CAG's and Attorneys' request for attorney fees, the amount to be determined by a subsequent motion.

VPS timely filed a notice of appeal from the trial court's order.

DISCUSSION

A. *VPS's Capacity to Sue*

Before addressing the merits on the special motion to strike, we first address a threshold issue, i.e., VPS's capacity to sue. As noted, CAG and Attorneys argued in their motion to strike that VPS lacked the capacity to sue because it was a dissolved corporation. They renew that argument on appeal.

CAG and Attorneys observe that VPS, which was incorporated in the State of Georgia, dissolved in December 2014, but brought the instant lawsuit in May 2015, five months after it dissolved. They contend that under Georgia law, which controls on this issue (see *CM Record Corp. v. MCA Records, Inc.* (1985) 168 Cal.App.3d 965, 969 [a foreign corporation "has no greater capacity to sue in California than in its home state"]), a dissolved corporation may not carry out any business except to wind up and liquidate it

business and affairs, and filing a lawsuit is allowed only when it is a necessary step to winding up the corporation's business and affairs.

In making their argument, CAG and Attorneys rely upon *Exclusive Properties, Inc. v. Jones* (1995) 218 Ga.App. 229 [460 S.E.2d 562], *Gas Pump, Inc. v. General Cinema Beverages of North Florida, Inc.* (1993) 263 Ga. 583 [436 S.E.2d 207], and *Crews v. Wahl* (1999) 238 Ga.App. 892 [520 S.E.2d 727]. Their reliance is misplaced. While they are correct that under those cases a malicious prosecution action would not be considered a step to winding up the corporation's business and affairs, those cases involved corporations that had been subject to administrative dissolutions. VPS's dissolution was a voluntary dissolution, which is treated differently under Georgia law. In fact, section 14-2-1408 of the Georgia Code specifically authorizes shareholders, directors, and officers of a corporation that has been voluntarily dissolved to take actions, in the corporate name, "to protect any remedy, right, or claim on behalf of the corporation." (O.C.G.A. § 14-2-1408, subd. (b); see *Flateau v. Reinhardt, Whitley & Wilmot* (1996) 220 Ga.App. 188, 191 [469 S.E.2d 222].) Therefore, we conclude that VPS had the capacity, as a voluntarily dissolved corporation, to bring its malicious prosecution claim.

B. *Special Motion to Strike*

"Section 425.16 provides an expedited procedure for dismissing lawsuits that are filed primarily to inhibit the valid exercise of the constitutionally protected rights of speech or petition. . . . [¶] A special motion to strike a complaint under section 425.16 involves two steps. First, the moving party has the initial burden of making a threshold showing that the challenged cause of action is one arising from a protected activity.

(§ 425.16, subd. (b)(1).) In order to meet this burden, the moving party must show the act underlying the challenged cause of action fits one of the categories described in section 425.16, subdivision (e). [Citation.] [¶] Once the moving party has made the threshold showing, the burden in step two shifts to the opposing party. Under step two of the statutory analysis, the opposing party must demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).)" (*Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 928.) "[T]o meet his or her burden, the plaintiff need only make a "'sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" [Citation.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1368.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

On appeal, we review the order granting the special motion to strike de novo, engaging in the same two-step process as the trial court. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1016-1017.) "We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' [Citation.] However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

1. *Step One—Arising From Protected Activity*

VPS contends on appeal that CAG and Attorneys failed to meet their burden to show that VPS's malicious prosecution claim arises from protected activity for two reasons. First, VPS asserts that section 425.17 exempts its claim from application of section 425.16. Second, it asserts that the prosecution of the Prop. 65 action was not protected because CAG and Attorneys prosecuted the case for an improper purpose. Neither assertion has merit.

a. *Section 425.17 Exemption*

Section 425.17 provides in relevant part: "Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist: [¶] (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision. [¶] (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." (§ 425.17, subd. (b).)

VPS contends its malicious prosecution claim satisfies all three conditions for section 425.17 to apply. First, it argues that it does not seek any relief greater than or different from the relief sought for the general public because it seeks only the damages it incurred in defending the Prop. 65 action, which would be the same relief any other person would be entitled

to recover. Second, VPS asserts that if its claim is successful, it would result in the enforcement of an important right affecting the public interest and would confer a significant benefit because a judgment against CAG and Attorneys would have "profound effects" on them (VPS appears to imply it would cause them to stop filing similar lawsuits under Proposition 65). Finally, VPS argues that the maintenance of its malicious prosecution action places a disproportionate financial burden on it because it must bear the expense of the litigation alone, while CAG and Attorneys share the expense of their defense.

VPS profoundly misapprehends the meaning and purpose of section 425.17. Indeed, VPS's malicious prosecution action does not meet *any* of the conditions required to be exempt from a special motion to strike.

First, the section 425.17 exception applies only to actions brought "*solely* in the public interest or on behalf of the general public." (§ 425.17, subd. (b), italics added.) In this action, however, VPS seeks to recover its own damages incurred in defending against the Prop. 65 action. As the Supreme Court held in *Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, "[t]he statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception." (*Id.* at p. 317.)

Second, the only right that would be enforced if VPS were successful in its lawsuit would be its right to recover damages for the malicious prosecution of a lawsuit against it. That VPS *believes* a monetary judgment against CAG and Attorneys would have the *effect* of chilling CAG's and Attorneys' efforts (or determination) to enforce Proposition 65, which VPS believes would confer a significant benefit on other businesses, does not mean that the malicious prosecution action would enforce an important right

affecting the public interest. In fact, the effect VPS seeks is exactly the kind of chilling effect that section 425.16 was enacted to prevent. (§ 425.16, subd. (a) ["The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."].)

VPS's last argument—that it bears a disproportionate financial burden in prosecuting its action because the eight defendants share the cost of their defense—makes little sense. The relevant comparison is the financial burden on VPS vis-à-vis what VPS would gain if successful. Here, VPS seeks to recover its damages incurred in defending itself in the Prop. 65 action. It cannot be said that VPS's financial burden in prosecuting this malicious prosecution action is disproportionate to the damages it seeks to recover.

In sum, section 425.17 does not exempt VPS's action from a special motion to strike under section 425.16.

b. *Protected Activity*

Section 425.16 provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike. . . ." (§ 425.16, subd. (b)(1).) It defines "'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'" to include "(1) any

written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (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." (§ 425.16, subd. (e).)

In this case, VPS's malicious prosecution claim arises out of the filing and prosecution of a lawsuit, a quintessential act in furtherance of a person's right of petition. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 [noting that every malicious prosecution action arises from a petition to the judicial branch, and thus falls under § 425.16] (*Jarrow*).) Nevertheless, VPS argues that CAG's and Attorneys' filing and prosecution of the Prop. 65 action was not protected activity under section 425.16 because their primary purpose in filing and prosecuting the action was to coerce VPS into paying settlement moneys even though they had no evidence that VPS violated the Act. In other words, VPS contends the filing and prosecution of the Prop. 65 action was not protected because it was not a *valid* action. The Supreme Court has rejected this argument repeatedly, noting that the argument """confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits."""" (*Jarrow*, *supra*, 31 Cal.4th at p. 740, quoting *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94.) We reject it here as well.

2. *Step Two—Probability of Prevailing*

To prevail on a cause of action for malicious prosecution, a plaintiff must prove that the underlying action was (1) terminated in the plaintiff's favor, (2) prosecuted without probable cause, and (3) initiated or prosecuted

with malice. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 973 (*Zamos*).) In this case, there is no dispute that the Prop. 65 action terminated in favor of VPS. Thus, to avoid dismissal of its complaint on the special motion to strike, VPS was required to present a "'"sufficient prima facie showing of facts [demonstrating a lack of probable cause and malice] to sustain a favorable judgment if [its] evidence . . . is credited."'" (*Jarrow*, *supra*, 31 Cal.4th at p. 741.)

a. *Probable Cause*

VPS contends that CAG and Attorneys lacked probable cause to initiate the Prop. 65 action against VPS because it failed to conduct an adequate investigation to determine whether Proposition 65 applied to VPS or whether VPS manufactured, distributed, or sold any Covers. It also contends that, even if CAG and Attorneys had probable cause to initiate the action, they lacked probable cause to continue prosecuting it once they received VPS's sworn responses to requests for admissions in which it denied having 10 or more employees and denied manufacturing, distributing, or selling any Covers.

"'Whether the facts known to [a malicious prosecution defendant] constituted probable cause to prosecute the [underlying lawsuit] is a question of law. [Citation.] The court must "make an objective determination of the 'reasonableness' of [the malicious prosecution defendant's] conduct, i.e., to determine whether, on the basis of the facts known to [the defendant], the institution [and prosecution] of the [underlying lawsuit] was legally tenable." [Citation.] The test applied to determine whether a claim is tenable is "whether any reasonable attorney would have thought the claim tenable." [Citation.]'" (*Zamos*, *supra*, 32 Cal.4th at p. 971.) "Only those actions that

any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit." (*Id.* at p. 970.)

We begin with the initiation of the Prop. 65 action. As noted, CAG and Attorneys submitted evidence in support of their special motion to strike showing that, at the time they filed the Prop. 65 action, they had discovered that Pilot (under whose name the Covers were sold) advertised on its website, and its former chief operating officer stated in an interview, that VPS was Pilot's original equipment manufacturer division. They also submitted evidence that Pilot and VPS shared corporate directors and had the same office and warehouse address, which was the same address listed on the packaging for the Covers.

VPS does not directly address this evidence. Instead, it argues that it established the lack of probable cause to initiate the Prop. 65 action through evidence it submitted showing that the person who conducted the investigation for CAG simply conducted internet searches and had no personal knowledge of the facts. But a party (or a party's attorney) is not required to have personal knowledge of all the facts necessary to prove a cause of action before filing a lawsuit, as long as he or she has sufficient information to reasonably believe that evidence to establish those facts may be obtained through discovery. Given the information CAG and Attorneys had gathered, it was not unreasonable for them to believe that VPS manufactured, distributed, or sold the Covers in association with Pilot and could be prosecuted under Proposition 65.

With regard to CAG's and Attorneys' continued prosecution of the Prop. 65 action after it received VPS's sworn responses to requests for admissions, VPS contends CAG and Attorney lacked probable cause because, although CAG and Attorneys argued the information they had gathered indicated that

VPS might be subject to and liable under Proposition 65 under an alter ego/single entity theory, CAG did not allege such a theory in its complaint and did not attempt to take any discovery related to alter ego.[6]

VPS's contention fails for two reasons. First, the absence of alter ego allegations in the complaint would not necessarily have precluded CAG from relying upon such a theory at trial, so long as VPS was made aware of the issue during discovery. (See, e.g., *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.* (1958) 166 Cal.App.2d 652, 655-656, and cases cited therein.) Second, CAG and Attorneys presented undisputed evidence in support of their motion to strike that they did, in fact, seek discovery on the alter ego issue—they sought to depose Pilot's PMK on the relationship between Pilot, VPS, and Wang's, but the person Pilot produced as its PMK did not have the requisite knowledge, and he did not produce any documents related to that subject.

In light of the facts that (1) CAG and Attorneys possessed information indicating that Pilot and VPS operated as a single entity, (2) VPS was given

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[6] We note that the fact that CAG and Attorneys received VPS's sworn denials does not necessarily mean they acted without probable cause by continuing to prosecute even if they did not intend to assert an alter ego/single entity theory. A party and counsel are entitled to test those denials through other types of discovery, such as requests for supporting documentation or deposition testimony. (See *Zamos*, *supra*, 32 Cal.4th at p. 970, fn. 9 ["Counsel who receives interrogatory answers appearing to present a complete defense might act reasonably by going forward with the defendant's deposition in light of the possibility that the defense will, on testimonial examination, prove less than solid. The reasonableness of counsel's persistence is, of course, a question of law to be decided on a case-by-case basis"].)

notice that CAG intended to proceed on an alter ego theory,[7] and (3) CAG and Attorneys attempted to take discovery to gather evidence to support that theory, we conclude that their continued prosecution of the Prop. 65 action against VPS was reasonable. Therefore, VPS failed to meet its burden to make a prima facie showing of facts demonstrating that CAG and Attorneys lacked probable cause to initiate or prosecute the Prop. 65 action.

b. *Malice*

Even if VPS had produced sufficient evidence to establish that CAG and Attorneys lacked probable cause to initiate or prosecute the Prop. 65 action, it nevertheless failed to meet its burden in opposing the special motion to strike because it failed to produce any evidence that CAG and Attorneys acted with malice. Instead, VPS simply argues that CAG and Attorneys acted with malice because they lacked probable cause. That is not enough.

"The 'malice' element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating [or prosecuting] the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive. [Citation.] It may range anywhere from open hostility to indifference.

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[7] CAG asserted an alter ego/single entity theory in opposition to VPS's motion for summary judgment in the Prop. 65 action based primarily upon the information it had gathered from the internet. As noted, the trial court sustained VPS's objections to that material and concluded that the admissible evidence CAG submitted was insufficient to raise a triable issue on the alter ego or single entity theory.

[Citation.]" (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494 (*Downey*).)

Although a lack of probable cause may be considered as a factor in determining whether a claim was prosecuted with malice, the lack of probable cause by itself is insufficient to establish malice. As the court explained in *Downey*, "[m]erely because the prior action lacked legal tenability . . . , *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind. In other words, the presence of malice must be established by other, additional evidence." (*Downey*, 66 Cal.App.4th at p. 498; see also *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218 [to prove malice, "the lack of probable cause must be supplemented by other, additional evidence"].) Because VPS failed to produce any evidence showing actual ill will or other improper ulterior motive on the part of CAG or Attorneys, the trial court properly found that VPS failed to demonstrate a probability of prevailing on its malicious prosecution claim.

C. *Request for Sanctions for Frivolous Appeal*

In their respondents' brief, CAG and Attorneys request this court to impose sanctions against VPS's attorneys for filing a frivolous appeal. A request to impose sanctions, however, cannot be made in the respondents' brief; a separate motion is required. (Cal. Rules of Court, rule 8.276(b)(1); *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919.) Therefore, we deny their request.

DISPOSITION

The order is affirmed. CAG and Attorneys shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.