Ambrose v. Travelers Property & Casualty Company of America Doc. 196

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH AMBROSE, D.C.,

Plaintiff,

NO. CIV. S-08-1664 LKK/GGH

v.

O R D E R

GARY COFFEY, et al.,

Defendants.
_______________________________/

Plaintiffs Ambrose, Yates, Sausedo, Vaezi, and Origel--all licensed chiropractors--bring suits arising out of an investigation of them, their arrests, and their criminal prosecutions.

Now before the court are the following two questions that arose from Defendants' motion for summary judgment and the oral argument thereon: (1) whether Plaintiffs can allege a Section 1983 substantive due process claim that survives Defendants' motions for summary judgment; and (2) whether Plaintiffs' malicious prosecution claims are barred by collateral estoppel.

////

////

////

Dockets.Justia.com

I. BACKGROUND[1]

Plaintiffs in this case assert that they performed a chiropractic procedure called Manipulation Under Anesthesia ("MUA"), believing that MUAs were within the scope of their chiropractic practice. They allege that, in violation of their federal due process rights and their rights against malicious prosecution under state law, Defendants (Travelers, an insurance provider, and its employee, William Reynolds) requested and participated in criminal actions against Plaintiffs in order to prevent future claims, and to avoid paying outstanding claims, for the performance of MUAs.

A. Undisputed Facts

According to the statements of undisputed facts submitted by Defendants in support of their motions, Plaintiffs' responses to those statements, and Defendants' replies, the parties agree that the following facts are undisputed.

Prior to filing criminal charges against Plaintiffs Ambrose, Yates, Sausedo, and Vaezi, relating to the performance of MUAs on August 23, 2005, DDA James C. Weydert ("Weydert") was aware of California Board of Chiropractic Examiners ("BCE") documents

[1] For a detailed summary of the procedural history in this case and the factual allegations contained in Plaintiffs' Second Amended Complaints, see this court's July 23, 2010 order, ruling on Defendants' motions to dismiss. Order, ECF No. 126, 1-13. Since the issuance of that order, following a stipulation by the parties, the court ordered that Defendants Weydert, Coffey, and the County of San Joaquin be dismissed with prejudice. Stipulation & Order, ECF No. 132 (Aug. 27, 2010). The only remaining defendants in this action are therefore Reynolds and Travelers.

adopting statements that "a proper chiropractic adjustment, if within the scope of practice of Section 302, is not made illegal simply because the patient is under anesthesia." Defs' Reply re: Origel, ECF No. 181 ("DRO"), ¶ 60; Defs' Reply re: Ambrose et al. ("DRA"), ¶¶ 63, 67. Similarly, Weydert was aware of the information in those documents prior to filing criminal charges against Origel relating to the performance of MUAs in March 2006. DRO ¶ 64.

Prior to filing criminal charges against Plaintiffs Ambrose, Yates, Sausedo, and Vaezi, and prior to filing criminal charges against Origel relating to the performance of MUAs, the DA's Office (including Defendant Gary Coffey, a criminal investigator with the DA's office) knew that the BCE had signed a "Final Statement of Reasons" recognizing MUAs on October 21, 2004, and that the BCE had approved continuing education classes on MUAs. DRO ¶¶ 65, 66; DRA ¶¶ 68, 69.

On or about August 23, 2005, DDA Weydert filed a criminal complaint against Plaintiffs Yates and Ambrose charging them with six counts of criminal conduct, including the uncertified practice of medicine for performing MUAs, insurance fraud, conspiracy, and grand theft. DRA ¶ 73.[2] On or about August 23, 2005, DDA Weydert filed a criminal complaint against Plaintiffs Sausedo and Vaezi charging them with three counts of criminal conduct, including the

[2] According to Plaintiffs' Second Amended Complaint, the criminal charges against Ambrose were dismissed after a hearing on his motion to dismiss on August 15, 2006.

uncertified practice of medicine for performing MUAs and insurance fraud. DRA ¶ 79.[3]

In March 2006, an amended complaint was filed by the DA's Office against Origel which included, for the first time, a charge against Origel for a violation of Business & Professions Code § 2052--uncertified practice of medicine--relating to the performance of MUAs. DRO ¶ 73.

In May/June 2006, the criminal case against Origel proceeded to a preliminary hearing in front of Judge Garrigan of the San Joaquin County Superior Court. DRO ¶ 77; DRA ¶ 88. At the preliminary hearing, which was conducted by DDAs Green and Weydert, Defendant William Reynolds ("Reynolds")--an employee of Travelers who was involved in investigating alleged workers compensation fraud--was called as a witness by the prosecution. Reynolds did not provide any testimony on the issue of MUAs, including the legality of that procedure. DRO ¶ 79.

In June 2006, Plaintiff Origel submitted a brief in the criminal case arguing that he did not have fair warning that the performance of MUAs was illegal. DRO ¶ 80; DRA ¶ 89. During oral argument at the conclusion of the preliminary hearing, Origel's attorney argued the fair warning issue. DRO ¶ 81; DRA ¶ 90. Despite those arguments regarding the alleged lack of fair warning, in June 2006, at the conclusion of the preliminary hearing, Judge

[3] According to Plaintiffs' Second Amended Complaint, the criminal charges against Sausedo and Vaezi were dismissed on March 11, 2008, on the grounds of insufficient evidence and in the interests of justice.

Garrigan found the evidence sufficient to hold Origel to answer on fifteen counts, including the charge relating to the performance of MUAs. DRO ¶ 82; DRA ¶ 91.

In March 2007, Origel filed a motion pursuant to California Penal Code § 995 to set aside the order holding him to answer following the preliminary hearing, and arguing that his federal due process rights were being violated because he was being prosecuted for performing MUAs when "no statute, case law or regulation [] states that MUAs are outside the scope of practice." DRO ¶ 83; DRA ¶ 92. The DA's Office filed an opposition to the motion, and Origel filed a reply. DRO ¶ 84; DRA ¶ 93. The motion was heard and denied in June 2007 by a different judge from the one who held Origel to answer at the preliminary hearing. DRO ¶ 85; DRA ¶ 94.

In June 2007, the criminal case against Yates proceeded to a preliminary hearing in front of Judge Garrigan of the San Joaquin County Superior Court. DRA ¶ 84. Reynolds did not testify as a witness for the prosecution at the preliminary hearing, which was conducted by DDA Sudha Rajender. DRA ¶ 85. At the conclusion of the preliminary hearing, Yate's defense attorney argued that the court should not hold Yates to answer as to the uncertified practice of medicine charge because the laws were too vague for the Court to find that MUAs were outside the scope of practice for a chiropractor. DRA ¶ 86. The state court held Yates to answer, including on the MUA charge. DRA ¶ 87.[4]

---

[4] According to Plaintiffs' Second Amended Complaint, the criminal charges against Yates were dismissed in the interests of

The criminal case against Origel proceeded to trial in 2008. After the prosecution presented its case-in-chief, Origel made a motion to dismiss the case pursuant to California Penal Code § 1118.1. The state court denied the motion. DRO ¶ 87.[5]

B. Plaintiffs' Remaining Causes of Action

Following the court's July 23, 2010 order ruling on Defendants' motions to dismiss and the stipulation and order dismissing Defendants Weydert, Coffey, and the County of San Joaquin, Plaintiffs' only remaining causes of action were against Reynolds and Travelers for "malicious prosecution resulting in violation of due process for lack of fair warning," Ambrose Second Amended Complaint ("ASAC"), ECF No. 110, ¶¶ 34-39 (First Cause of Action); Origel Second Amended Complaint, ECF No. 111 ("OSAC"), ¶¶ 60-66, and "common law malicious prosecution," ASAC ¶¶ 61-67 (Fourth Cause of Action); OSAC ¶¶ 90-96.

In the court's July 23, 2010 order, in regards to Plaintiffs' first cause of action against Reynolds and Travelers for "malicious prosecution resulting in violation of due process for lack of fair warning," this court provided as follows:

> [P]laintiffs nowhere alleged facts that directly support a conclusion that the prosecutions were

---

justice.

[5] According to Plaintiff Origel's Second Amended Complaint, all charges against Origel were dismissed in the interests of justice on November 20, 2008. OSAC, ECF No. 111, ¶ 44. In this court's December 24, 2009 order ruling on Defendants' motions to dismiss, however, the court noted that "At oral argument, defendants informed the court that Origel was tried and that the trial resulted in a hung jury." Order, ECF No. 64, 7 fn. 1.

> initiated for the purpose of depriving plaintiffs of their right to a fair warning, but rather have alleged their purpose to be to prevent plaintiffs from billing Travelers for the performance of MUAs. Plaintiffs did not write this cause of action as the court instructed in its prior order. Specifically, the court instructed plaintiffs to plead a claim under Section 1983 for violation of their due process rights because defendants initiated a prosecution against them knowing that they lacked fair warning that their conduct was unlawful. This theory of liability was not directly premised upon malicious prosecution. The malicious prosecution theory they alleged is flawed because there are no allegations that the prosecutions were brought for the purpose of depriving them of a constitutional right, as required to state a claim for malicious prosecution under Section 1983. Awabdy [v. City of Adelanto], 368 F.3d [1062,] 1066 [(9th Cir. 2004)]. The court considered dismissal with leave to amend so as to premise plaintiff's fair warning claim as a violation of due process, and not a malicious prosecution claim. This case, however, has languished at the pleading stage, despite the fact that the parties all know what the case [is] about. Under the circumstances, dismissal and repleading appears to be no more than honoring form over substance, and the court declines to require future pleadings. That determination is especially appropriate in light of the fact that, if there is a pretrial conference in the case, the order emerging therefrom will supersede the pleadings.

Order, ECF No. 126, 26-27.

By order issued December 13, 2011, this court reiterated that it construed Plaintiff's first cause of action as a claim under Section 1983 for violation of Plaintiffs' due process rights because Defendants initiated a prosecution against them knowing that they lacked fair warning that their conduct was unlawful. Order, ECF No. 186.

D. Defendants' Motion for Summary Judgment

Defendants' filed motions for summary judgment as to

Plaintiffs' remaining claims. Defs' Mots., ECF Nos. 155, 157. The court found that: (1) Plaintiffs are not barred by collateral estoppel from bringing a claim under Section 1983 for violation of their due process rights because Defendants initiated a prosecution against them knowing that Plaintiffs lacked fair warning that their conduct was unlawful; and (2) Defendants' motions for summary judgment are granted as to Plaintiffs' Section 1983 procedural due process claims. Order, ECF No. 186, at 9-15.

At oral argument on Defendants' motions for summary judgment, Plaintiffs' counsel indicated that they had felt constrained by this court's prior order suggesting that Plaintiffs' § 1983 due process claims were most appropriately pled under a theory of procedural due process, as opposed to a theory of substantive due process. This court therefore ordered additional briefing from Plaintiffs, to designate specific facts demonstrating the existence of genuine issues for trial as to their substantive due process claim.

Additionally, because Defendants, in their reply to Plaintiffs' opposition to summary judgment, raised the argument that Plaintiffs' malicious prosecution claims were barred by collateral estoppel, the court granted the parties an opportunity to submit further briefs regarding Defendants' collateral estoppel as to malicious prosecution argument.

Plaintiffs filed briefs, presently before the court, addressing the substantive due process and collateral estoppel issues, and Defendants replied. <u>See</u> Pls' Supplemental Brs., ECF

Nos. 187, 188; Defs' Supplemental Br., ECF No. 189.

II. ANALYSIS

A. Plaintiffs' Substantive Due Process Claim

As a preliminary matter, in response to Plaintiffs' supplemental briefs, Defendants argue that the court cannot entertain a substantive due process claim by Plaintiffs because, inter alia: (1) consideration of such a claim would first require Plaintiffs to amend their complaint to add a substantive due process claim and no leave to amend should be granted because "a motion [for leave to amend] would be untimely, no good cause has been shown to justify the untimely proposed amendment, and plaintiffs should be judicially estopped from trying to assert a substantive due process claim";[6] and (2) any substantive due process claim by Plaintiffs would be barred by the applicable statute of limitations.[7] Defs' Supplemental Br., ECF No. 189, at

---

[6] Defendants' argument that amendment is required before the court may construe Plaintiffs' claim as being brought under a substantive due process theory is consistent with the transcript of the motions hearing, at which Plaintiff's counsel asked, "Does the court wish me to submit an amended pleading or just briefing on that issue?", and the court replied, "Why don't you start with briefing and we'll see whether the amendment will lie?". Tr., ECF No. 185, at 9.

[7] Additionally, Defendants twice suggest that the court's consideration of Plaintiffs' claims under a substantive due process theory, at this stage in the litigation, would violate Defendants' due process rights. See Defs' Supplement Br., ECF No. 189, at 5 ("Ironically, defendants' due process rights are now in danger of being violated."), 9 ("Allowing plaintiffs to defeat the motions for summary judgment based on new legal claims asserted for the first time at the hearing on the motions would be inappropriate and a violation of defendants' due process rights."). Defendants do not make clear which due process theory would protect their right to preclude another party from explicating their basis for a

6-14.[8]

i. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend shall be "freely give[n] when justice so requires." "In the absence of any apparent or declared reason–such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "'[T]he purpose of pleading is to facilitate a proper decision on the merits.'" Id. at 181-82, 83 S.Ct. 227 (quoting Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). The strong policy permitting amendment is to be applied with "extreme liberality." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted). Factors which merit departure from the usual "[l]iberality in granting a plaintiff leave to amend" include bad faith and futility. Bowles v. Reade, 198 F.3d 752, 757 (9th Cir. 1999).

The court first addresses whether amendment would be futile,

---

constitutional claim. In the absence of any legal support for Defendants' due process argument, the court declines to further address their due process contention.

[8]The court's citations to page numbers in the parties' supplemental briefs refer to the court's electronic pagination system.

due to the applicable statute of limitations and the merits of Plaintiffs' substantive due process argument, before turning to the remaining considerations for granting leave to amend.

a. Statute of Limitations

Defendants argue that "the statute of limitations on any substantive due process claim ran at least a year before the civil complaints were filed," based on Defendants' reasoning that Plaintiffs' cause of action accrued upon the filing of the criminal charges against Plaintiffs relating to the MUAs. Defs' Supplemental Br., ECF No. 189, at 12.

Actions brought pursuant to 42 U.S.C. § 1983 are governed by state statutes of limitations for personal injury actions. Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir. 2001); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 627 (9th Cir. 1988) (citing Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), *superceded by statute on other grounds as stated in* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377-78 (2004)). In California, the statute of limitations for personal injury actions is two years. Cal. Civ. Proc. Code § 335.1 (West 2003). Thus, Plaintiffs had two years after their substantive due process claim accrued to bring an action for violation of their substantive due process rights.

"While state law determines the period of limitations, federal law determines when a cause of action accrues." Cline v. Brusett, 661 F.2d 108, 110 (9th Cir. 1981) (internal citations omitted). Under federal law, the statute of limitations begins to run when

a potential plaintiff knows or has reason to know of the asserted injury. Action Apartment Ass'n v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1026-27 (9th Cir. 2007).

While a cause of action for malicious prosecution does not accrue until the case has been terminated in favor of the accused, see Venegas v. Wagner, 704 F.2d 1144, 1146 (9th Cir.1983), a "substantive due process violation is complete as soon as the government action occurs." Action Apartment Ass'n, 509 F.3d at 1027 (citing Macri v. King Country, 126 F.3d 1125, 1129 (9th Cir. 1997)).

Here, Plaintiffs knew or had reason to know that they were being prosecuted for the performance of MUAs, without fair warning as to any illegality of the procedure, at the time the criminal charges were filed against them for performance of MUAs. Thus, substantive due process causes of action arising from the prosecution of Plaintiffs Yates, Ambrose, Sausedo, and Vaezi, for their perfomance of MUAs, accrued on August 23, 2005. Any substantive due process cause of action arising from the prosecution of Plaintiff Origel, for his performance of MUAs, accrued in March 2006.

The statute of limitations on the substantive due process claims brought by Plaintiffs Yates, Ambrose, Sausedo, and Vaezi, therefore expired on August 23, 2007. The statute of limitations on the substantive due process claim brought by Plaintiff Origel expired in March 2008. The earliest filed complaint in this case was filed by Plaintiff Ambrose, in July 2008. Thus, all of

Plaintiffs' substantive due process claims are barred by the applicable statute of limitations.

Plaintiffs cannot successfully argue that the continuing violation theory, which is applicable to § 1983 actions and allows plaintiffs to seek relief for events outside of the limitations period, see Knox v. Davis, 260 F.3d 1009, 1013 (9th Cir. 2001), applies in their case. Because Plaintiffs do not allege a system or practice of discrimination, the only way they can show a continuing violation is to "state facts sufficient . . . [to] support[] a determination that the alleged discriminatory acts are related closely enough to constitute a continuing violation, and that one or more of the acts falls within the limitations period." Id. (citing DeGrassi v. City of Glendora, 207 F.3d 636, 645 (9th Cir. 2000)).

The Ninth Circuit has held, however, that a "mere 'continuing *impact* from past violations is not actionable.'" Id. (internal citations omitted). Here, even though the negative effects of the criminal prosecutions against Plaintiffs continued throughout the pendency of their criminal cases, the continued prosecutions were impacts of the initial filing of the criminal charges against them. Thus, the continuing violation doctrine is inapplicable to this case.

Because Plaintiffs are time-barred from bringing a claim for violation of their substantive due process rights, amendment to allow such a claim would be futile.

////

b. Merits of Plaintiffs' Substantive Due Process Claim

Although the court has concluded that Plaintiffs' substantive due process claims arising from the criminal prosecutions against them are time-barred, the court feels it necessary to address the merits of such a claim, should its first conclusion be found to be in error.

Plaintiffs' substantive due process claim has not been clearly articulated. It appears to be based on the prosecution of Plaintiffs without fair warning that the performance of MUAs was illegal, and on Defendants' abuse of the criminal process.

The substantive due process prong of the Fourteenth Amendment protects against egregious official conduct, which is "arbitrary in the constitutional sense"; that is, the conduct must amount to an "exercise of power without any reasonable justification in the service of a legitimate governmental objective." County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); Shanks v. Dressel, 540 F.3d 1082, 1088 (9th Cir. 2008). The cognizable level of executive abuse of power is that which "shocks the conscience." Costanich v. Dep't of Social and Health Services, 627 F.3d 1101, 1111 (9th Cir. 2010) (citing Brittain v. Hansen, 451 F.3d 982, 991 (9th Cir. 2006)).

Put another way, an abuse of process constitutes a substantive due process violation if it "'offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Johnson v. Barker, 799 F.2d 1396, 1400 (9th Cir. 1986) (citing

Rochin v. California, 342 U.S. 165, 169 (1952)).[9]

The protection from governmental action provided by substantive due process has most often been reserved for the vindication of fundamental rights. Halverson v. Skagit County, 42 F.3d 1257, 1261 (9th Cir. 1994) (citing Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.")). The Supreme Court has always been reluctant to expand the concept of substantive due process because it asserts that guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. Id. at 1262 (citing Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992)).[10] Where, as here, Plaintiffs rely on substantive due process to challenge governmental action that does not impinge on fundamental rights, the court does "not require that the government's actions actually advance its stated purposes, but merely look[s] to see whether the government *could* have had a legitimate reason for acting as it did." Id. (citing Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 66 (9th Cir. 1994)). Official decisions that rest on an erroneous

---

[9] While the decency and fairness inherent in our notions of justice have never been the exclusive province of "the English-speaking peoples," the court observes the meaning and import of the Ninth Circuit's statement of law.

[10] How this differs from all the cases explicating constitutional rights has not been addressed.

legal interpretation are not necessarily constitutionally arbitrary. Shanks, 540 F.3d at 1089 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128-30, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); Brittain v. Hansen, 451 F.3d 982, 996 (9th Cir. 2006)).

As to the initiation of criminal prosecution against Plaintiffs, the court previously concluded that "a reasonable prosecutor or investigator could have relied on the language in [People v. Fowler, 32 Cal.App.2d Supp. 737, 745, 84 P.2d 326 (1938)] that the practice of chiropracty is drugless to conclude that any use of drugs, regardless of who administers them, violates the Chiropractic Act." Ambrose v. Coffey, 696 F.Supp.2d 1109, 1116 (E.D. Cal. 2009). Consistent with this court's prior opinion, the court here determines that the government could have had a legitimate reason for initiating criminal prosecutions against Plaintiffs based on their performance of MUAs and, thus, the government's actions did not rise to the level of a substantive due process violation.

In sum, because Plaintiffs' substantive due process claims are time-barred, and because such claims would not succeed on the merits, amendment to allow such claims would be futile. The court, thus, need not discuss the remaining considerations for granting leave to amend under Federal Rule of Civil Procedure 15(a). See Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

////

////

B. Collateral Estoppel as to Plaintiffs' Malicious Prosecution Claim

Defendants argue that Plaintiffs' state law malicious prosecution claims are barred by collateral estoppel because the state court's finding of probable cause in the criminal prosecutions of Plaintiffs Origel and Yates, following preliminary hearings, "bars relitigation of the probable cause element" of a malicious prosecution cause of action and "entitles defendants to summary judgment as to the state law malicious prosecution claim[s]" brought by all Plaintiffs.[11] Defs' Mot., ECF No. 189, at 21.

In the malicious prosecution context, probable cause is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man to believe that the charge is true. Centers v. Dollar Markets, 99 Cal.App.2d 534, 540, 222 P.2d 136, 141 (1950). To succeed on a malicious prosecution claim, amongst other factors, the plaintiff must prove that the defendant did not have reasonable grounds for believing that the facts alleged in the criminal complaint were true. Id. at 540, 222 P.2d at 141.

Under California law, an issue is precluded if (1) the issue sought to be precluded from relitigation was identical to that decided in a former proceeding; (2) that issue must have been

[11] In order for Plaintiffs to recover on a malicious prosecution claim, they would have to prove: (1) termination of the criminal proceedings in their favor; (2) want of probable cause; and (3) malice on the part of Defendants. Sheldon Appel Co. v. Albert & Oliker, 47 Cal.3d 863, 871, 765 P.2d 498, 501 (Cal. 1989).

actually litigated in the former proceeding; (3) that issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Hernandez v. City of Pomona, 46 Cal. 4th 501, 511, 207 P.3d 506 (Cal. 2009). Of these five factors, the parties contest only the finality of the decision in the former proceeding, and the privity of the parties involved.

i. Finality

A long-standing principle of California common law is that "a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes *prima facie*--but not *conclusive*--evidence of probable cause." Awabdy v. City of Adelanto, 368 F.3d 1062, 1067 (9th Cir. 2004); cf. Haupt v. Dillard, 17 F.3d 285, 288 (9th Cir. 1994) ("The probable cause determination at [Plaintiff's] preliminary hearing was not interlocutory in any meaningful sense; it was, rather, a final, conclusive determination of the issue. . . . [because the] determination was immediately appealable"). As to the preclusive effect of a probable cause determination, the California Court of Appeal has explained that:

> A finding of probable cause to hold the defendant over for trial is a final judgment on the merits for the purposes of collateral estoppel under the California law because the accused can (1) immediately appeal the determination by filing a motion to set aside the preliminary hearing ([Cal.] Pen. Code § 995) and (2) obtain review of the

> decision on the motion to set aside the preliminary hearing by filing a writ of prohibition ([Cal.] Pen. Code § 999a). Also, the issue of probable cause cannot be litigated further because it cannot be used as a defense at trial.

McCutchen v. City of Montclair, 73 Cal.App.4th 1138, 1145-46, 87 Cal.Rptr.2d 95, 100 (Cal. Ct. App. 1999).

In June 2006, following a preliminary hearing in the San Joaquin County Superior Court, Plaintiff Origel was held to answer on criminal charges, one of which related to the performance of MUAs. In June 2007, Origel's motion to set aside the order holding him to answer for the charge relating to the performance of MUAs was heard and denied. Plaintiff Yates was similarly held to answer on a criminal charge related to the practice of MUAs, following a preliminary hearing.

The undisputed fact that Plaintiffs Origel and Yates were held to answer on criminal charges related to the performance of MUAs, after a preliminary hearing, therefore constitutes prima facie evidence that probable cause existed to proceed in their criminal prosecutions.

However, "[a]mong the ways that a plaintiff can rebut a *prima facie* finding of probable cause is by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." Awabdy, 368 F.3d at 1067; see also McCutchen, 73 Cal.App.4th at 1147 ("When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary

hearing would not preclude relitigation of the issue of integrity of the evidence.”).

As to the probable cause hearing in the criminal case against Plaintiff Origel, Plaintiffs submitted numerous email exchanges indicating that William Reynolds (“Reynolds”) was both interested in the monetary benefits to his company of declaring MUAs illegal and saw his influence as a motivating force in the criminal prosecutions. See, e.g., Pls’ Evid. Opp’n, ECF No. 162, Ex. 7 (August 25, 2005 email from Reynolds) (“Dr. Stahl: You have to love it. DOI proclaims MUA's illegal! Wow!”); Pls’ Evid. Opp’n, ECF No. 162, Ex. 9 (August 25, 2005 email from Reynolds to Steven Piper from “St. Paul Travelers”) (“I just spoke with the DOI Investigator and he states that his office wants to ‘prosecute’ all the DC's in the state for billing this service (MUA's). It would dramatically affect the insurance commissioner's budget and political standing to have a major arrest investigation of this magnitude. The financial impact would be huge! There are 18,000 DC's in the state and I bet 25% are involved in this procedure. It will be very interesting to see if we can franchise this investigation on a National Investigation. Would you like to discuss this?”); Pls’ Evid. Opp’n, ECF No. 162, Ex. 8 (October 17, 2005 email from Reynolds to a consultant for Travelers) (“Lori, This is what Frank & I have been pushing on! The San Joaquin Co. DA arrested the 4 DC's for doing this procedure.”).

Plaintiffs submitted evidence that, in a March 29, 2011 deposition of Lon Malcolm (“Malcolm”), a criminal investigator for

the California Department of Insurance Fraud Division, Malcolm testified that portions of the affidavit that he had submitted to DDA Weydert to establish the existence of probable cause to support of the search warrant were "totally based on what Mr. Reynolds [had] conveyed to [him]." Pls' Evid. Opp'n, ECF No. 162, Ex. 22, 104:3, 105:6-9; <u>see</u> <u>also</u> Pls' Evid. Opp'n, ECF No. 162, Ex. 24, 4-15 (Affidavit). The evidence before the court does not indicate that the extent of Reynolds' influence of Malcolm was raised at the preliminary hearing.

Defendants Reynolds and Travelers submitted evidence showing that Malcolm also testified that he had independently reviewed the citations to corporate law referred to in his affidavit, which "either directly or ultimately, support[ed] the Department of Workers' Compensation position on the irregularity of the MUA referral system and [the] MUA procedures described [in the affidavit]." <u>See</u> Decl. Richard Garcia, ECF No. 183, Ex. C, 107:5-11; Pls' Evid. Opp'n, ECF No. 162, Ex. 23, 17:6-9.

Given Plaintiff's evidence indicating that the prosecutions of Origel and Yates were based on Malcolm's affidavit, which was in turn based on the evidently self-interested and potentially bad faith influence of Reynolds, and the fact that the testimony regarding Malcolm's reliance upon Reynolds was not available at the time of the preliminary hearing, the court finds that Plaintiffs have presented sufficient evidence to overcome the presumption that Plaintiffs "had a full and fair opportunity to litigate the issue of probable cause during the course of [their] criminal

prosecution." See Haupt v. Dillard, 17 F.3d 285, 290 (9th Cir. 1994). Thus, the court concludes that the fact that Plaintiffs Origel and Yates were held to answer on their criminal charges is not final for collateral estoppel purposes as to Plaintiffs' state law malicious prosecution claim.

ii. Privity

Because the court determines that the state court's decision to hold Plaintiffs Origel and Yates to answer after a preliminary hearing does not, in this case, constitute a finding of probable cause for collateral estoppel purposes, Defendants cannot assert collateral estoppel on the probable cause issue against the remaining Plaintiffs.

Thus, Plaintiffs are not barred by collateral estoppel from bringing their state law claim for malicious prosecution.

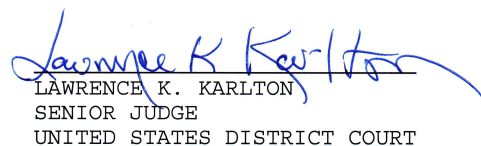
IV. CONCLUSION

For the reasons provided above, Plaintiffs may not amend their complaint to allege a substantive due process claim. Plaintiffs are not barred by collateral estoppel from bringing their state law claim for malicious prosecution.

A status conference is set for December 3, 2012 at 2:00 p.m. The parties shall file their status reports fourteen (14) days prior to the status conference.

IT IS SO ORDERED.

DATED: November 1, 2012.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT