

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHEVRON CORPORATION,

Plaintiff,

v.

CRISTÓBAL BONIFAZ and THE LAW OFFICES
OF CRISTÓBAL BONIFAZ,

Defendants.

No. 09-05371 CW

ORDER GRANTING
DEFENDANTS' ANTI-
SLAPP MOTION TO
STRIKE, GRANTING
PLAINTIFF'S
MOTION FOR LEAVE
TO SUBMIT
ADDENDUM TO
SUPPLEMENTAL
BRIEF AND DENYING
PLAINTIFF'S
MOTION FOR LEAVE
TO FILE A MOTION
FOR
RECONSIDERATION
(Docket Nos. 25,
54, 60)

Plaintiff Chevron Corporation brings this action for malicious prosecution against Defendants Cristóbal Bonifaz and The Law Offices of Cristóbal Bonifaz (collectively, Bonifaz). Bonifaz has moved to strike Chevron's action pursuant to California's anti-Strategic Lawsuit Against Public Participation (SLAPP) statute, Cal. Civ. Proc. Code § 425.16. On May 12, 2010, the Court granted Bonifaz's motion in part, deferred its decision in part and afforded Chevron sixty days to conduct discovery.

The parties have filed supplemental briefs. Chevron moves for leave to file an addendum to its supplemental briefing and a motion for reconsideration of the Court's May 12, 2010 Order. Bonifaz

1 opposes Chevron's motions. The motions were taken under submission
2 on the papers. Having considered the papers submitted by the
3 parties, the Court GRANTS Chevron's motion for leave to file an
4 addendum, DENIES Chevron's request for leave to file a motion for
5 reconsideration and GRANTS in full Bonifaz's anti-SLAPP motion to
6 strike.

7 BACKGROUND

8 The current malicious prosecution suit arises from the
9 initiation and continued prosecution of claims in Gonzales v.
10 Texaco Inc., No. 06-02820 WHA (N.D. Cal.). Because the Court's May
11 12, 2010 Order provides sufficient background on the Gonzales
12 action, only the relevant allegations and facts will be discussed
13 here.

14 I. Underlying Case

15 In April, 2006, nine plaintiffs from the Amazon rainforest
16 region of Ecuador brought claims against Chevron and two of its
17 subsidiaries, Texaco and Texaco Petroleum Company (TexPet).¹ The
18 plaintiffs claimed they suffered injury arising from pollution
19 allegedly caused by Texaco and TexPet's oil exploration and
20 production activities in that region of Ecuador. Bonifaz
21 represented the plaintiffs, along with other attorneys, including
22 Terry Collingsworth, Paul Hoffman, Othni Lathram, Dennis Patanzis
23 and Natacha Thys.

24 In bringing the case, Bonifaz and his co-counsel relied on
25 information furnished by Dr. Gerardo Peña Matheus, an attorney

26 _____
27 ¹ For brevity, the Court hereinafter refers to the Gonzales
28 defendants as Chevron.

1 practicing in Ecuador with whom Bonifaz had previously worked.
2 Peña, along with his paralegals, identified and interviewed the
3 Gonzales plaintiffs. Bonifaz never met with the plaintiffs.

4 Luisa Maribel Jame Gonzales, one of the plaintiffs, alleged
5 that she "was diagnosed with breast cancer in April 2005" and that
6 her exposure to the pollution "caused her physical injury on a
7 cellular and subcellular level, impairing her immune system and
8 substantially increasing her risk of developing cancer and/or other
9 latent diseases." Gonzales 2d Am. Compl. ¶ 8. Her husband, Nixon
10 Rodriguez, likewise alleged that the pollution impaired his immune
11 system and increased his risk for cancer and disease. In addition,
12 he averred that he suffered emotional distress, incurred medical
13 expenses "for his own medical monitoring and for his wife's medical
14 monitoring and treatment" and experienced a loss of consortium.
15 Id. ¶ 13. Gloria Carmina Vera Chamba alleged that, in October,
16 2002, her son was diagnosed with leukemia. She also averred harm
17 to her immune system and an increased risk of disease. These
18 Gonzales plaintiffs, along with the six others, sought recovery for
19 negligence, intentional or reckless infliction of emotional
20 distress and battery.

21 The plaintiffs did not prevail; all of their claims were
22 dismissed with prejudice or summarily adjudicated against them.
23 Also, the court, on its own motion, imposed monetary sanctions
24 under Federal Rule of Civil Procedure 11 against Bonifaz,
25 Collingsworth and Hoffman, based on the claims asserted by Jame,
26 Rodriguez and Vera. Gonzales v. Texaco Inc. (Gonzales Sanctions
27 Order), 2007 WL 3036093 (N.D. Cal.). Collingsworth and Hoffman

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1 appealed the sanctions; Bonifaz paid the sanctions and did not
2 appeal. The Ninth Circuit vacated the award of sanctions and
3 remanded the matter for further proceedings. Gonzales v. Texaco
4 Inc., 344 Fed. App'x 304, 308-09 (9th Cir. 2009). On remand, the
5 Gonzales court declined to impose sanctions.

6 II. Current Action

7 On November 13, 2009, Chevron initiated its current malicious
8 prosecution action, only against Bonifaz. It avers that the
9 prosecution of the Gonzales action was part of an extortion scheme
10 by Bonifaz and others.

11 On January 13, 2010, Bonifaz filed his motion to strike
12 Chevron's action as a SLAPP. Chevron opposed the motion, asserting
13 that it demonstrated a sufficient probability of success on the
14 merits because it substantiated its allegations that Bonifaz lacked
15 probable cause to bring and maintain the Gonzales action. As
16 relevant here, Chevron argued that Jame's intake form failed to
17 provide Bonifaz with probable cause to bring claims on her behalf.
18 It also pointed to Jame's May, 2007 deposition testimony that, two
19 months earlier, she had told Lathram and Patanzis that she did not
20 have cancer. Chevron offered no evidence that Bonifaz knew of this
21 purported statement, but argued that he should have known about it
22 and dismissed Jame's claims as a result.

23 As noted above, Rodriguez's claims were based, in part, on
24 damages purportedly related to his wife's alleged cancer. Chevron
25 asserted that Bonifaz lacked probable cause to bring Rodriguez's
26 claims because Rodriguez never submitted an intake form and never
27 expressed to Bonifaz that he suffered the harm alleged.

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1 Finally, Chevron maintained that Bonifaz lacked probable cause
2 to bring Vera's claims because her intake form did not reflect the
3 complaint's specific allegations that her son had leukemia but only
4 that she suspected he had cancer. Chevron also argued that Bonifaz
5 lacked probable cause to maintain her suit after he obtained her
6 son's medical records, which did not mention leukemia.

7 In its May 12, 2010 Order, the Court struck most of Chevron's
8 action. As relevant here, the Court concluded that Chevron did not
9 satisfy its prima facie burden to show that Bonifaz initiated or
10 continued to prosecute claims by Rodriguez and Vera without
11 probable cause. The Court also held that Chevron failed to
12 substantiate its allegation that Bonifaz lacked probable cause to
13 bring suit on behalf of Jame, but deferred ruling on whether
14 Chevron met its burden as to his continued prosecution of her
15 claims. In particular, the Court found, Bonifaz may have lacked
16 probable cause to pursue her claims if he knew of her purported
17 statement that she did not have cancer. Chevron was granted sixty
18 days to conduct discovery on this issue.

19 III. Facts

20 Chevron did not provide any additional evidence on the issue
21 for which the Court granted discovery. The state of the evidence
22 on the issue remains that Lathram and Patanzis deny that Jame told
23 them that she did not have cancer and deny that they told Bonifaz
24 that she did not have the disease. Bonifaz denies that he was
25 told.

26 Instead, Chevron asserts that the record supports an inference
27 that, by at least December, 2006, Bonifaz knew that Jame did not
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1 have breast cancer. Chevron possessed most of the evidence on
2 which it now relies for this claim when it first opposed Bonifaz's
3 motion to strike, but did not present it at that time.

4 In December, 2006, the Gonzales plaintiffs' attorneys produced
5 documents to Chevron, including medical reports referring to
6 diagnostic tests conducted on Jame. In a report dated August 16,
7 2006, a pathologist from the National Oncology Institute in Ecuador
8 stated that a biopsy of tissue from Jame's right breast did not
9 reveal any "malignant neoplastic changes" and diagnosed her with an
10 "ectopic mammary gland." Nierlich Decl., Ex. 14. The report did
11 not indicate when the tissue had been removed. The December, 2006
12 document production also included two ultrasound reports. Nierlich
13 Decl. ¶ 16. One report dated August 4, 2006 stated that an
14 ultrasound of Jame's breasts did not show any solid nodules.
15 Nierlich Decl., Ex. 15 at 2. However, solid nodules were observed
16 later, according to another ultrasound report dated December 1,
17 2006. Id. at 3.² Neither of the ultrasound reports indicated the
18 dates of the tests discussed. In his deposition, Bonifaz stated
19 that he knew that a biopsy report was produced to Chevron, but
20 there is no evidence that he knew of the contents of the biopsy
21 report or of the ultrasound reports. There is no evidence of the
22 medical significance of the biopsy and ultrasound reports.

23 On February 27, 2007, Chevron was served with Jame's
24 supplementary interrogatory responses, signed by Collingsworth with
25 the initials of Thys. The following interrogatories and answers

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27 ² The two ultrasound reports were in Spanish. Chevron did not
28 provide English translations.

1 were contained therein:

2 INTERROGATORY NO.6:

3 For each physical or emotional injury suffered by YOU
4 that YOU allege was caused by any act or omission of
5 DEFENDANTS, separately describe each injury and with as
6 much detail and specificity as possible the circumstances
7 of the injury including without limitation when
8 DEFENDANTS' acts or omissions first produced the injury
9 in YOU, when symptoms of the injury began and what those
10 symptoms were, when and by whom YOUR condition was
11 diagnosed and when the injury ended if it has.

12 . . .

13 ANSWER NO.6

14 I do not know with medical certainty when I was injured
15 the first time. Now I am in treatment in SOCAL
16 (Guaranda). I was diagnosed with a tumor in my armpit in
17 2006. I am convinced that I suffer from cancer.

18 . . .

19 INTERROGATORY NO.8:

20 For each physical or emotional injury suffered by YOU
21 that YOU allege was caused by any act or omission of
22 DEFENDANTS, describe with as much specificity and detail
23 as possible the circumstances of the discovery of the
24 cause of the injury, including without limitation when,
25 how and who discovered the cause of YOUR injury and when,
26 how and from whom YOU discovered the cause of YOUR
27 injury.

28 . . .

ANSWER No. 8

I went to the doctor who detected the tumors. Dr. Manuel Jimenez told me that this was because pollution. Texaco works near the 10 of August farm and I believe that they provoked my illness with their pollution.

Nierlich Decl., Ex. 17 at 7-8.

On March 29, 2007, Chevron's counsel sent a letter to Thys and Collingsworth, requesting additional information concerning Jame's alleged disease. In an April 2, 2007 email to his colleagues, Bonifaz indicated that "the new attorneys" would "meet with the clients on April 22-25 and will cure any deficiencies in the

1 responses upon their return in plenty of time for the scheduled
2 depositions at the end of May." Nierlich Decl., Ex. 13 at 2.

3 On April 22, 2007, Lathram and Patanzis traveled to Ecuador to
4 meet with the plaintiffs, along with Dr. Juan Romero, who is
5 licensed as a physician in Honduras and worked in the United States
6 as a medical technician. Lathram, Patanzis and Romero met with
7 Jame on this trip.

8 Romero interviewed Jame and conducted a basic physical
9 examination. At the time of their meeting, Romero apparently did
10 not have access to all of Jame's medical records. See, e.g.,
11 Nierlich Decl., Ex. 8, Patanzis Depo. 72:22-73:9, 120:17-121:10.
12 However, Jame provided a biopsy report and an "ultrasound
13 photograph." Nierlich Decl., Ex. 10, Lathram Depo. 125:13-126:5.
14 The biopsy report was the above-mentioned August 16, 2006 report, a
15 copy of which had been produced to Chevron in December, 2006. Id.
16 at 103:18-104:12; Nierlich Decl. ¶ 15. Presumably, the ultrasound
17 photograph referred to one of the ultrasound reports described
18 above.

19 In his report, Romero indicated that Jame had a family history
20 of breast cancer. He also stated that she experienced "oppressive
21 pain" in her right arm and "on her right breast and the right side
22 of her chest that also radiates to her back." Nierlich Decl., Ex.
23 16 at 2. Further, he noted that a "report showed she had an
24 ectopic breast gland," id., apparently referring to the August 16,
25 2006 biopsy report. He also noted that a "Right Breast Nodule" was
26 removed in December, 2006. Id. It is not clear whether this was
27 the solid nodule observed in the December 1, 2006 ultrasound

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1 report. His physical examination of Jame revealed "no masses" in
2 her breasts. Id. at 2-3. Romero did not opine as to whether Jame
3 had breast cancer. On May 2, 2007, Bonifaz received Romero's
4 report, but testified that he did not read it.

5 On May 4, 2007, the Gonzales plaintiffs' counsel held a
6 telephone conference, during which Romero's findings were
7 discussed. Bonifaz did not deny that he participated in the call.
8 The attorneys discussed how to develop a "fuller interrogatory
9 response." Nierlich Decl., Ex. 10, Lathram Depo. 47:6-7.

10 On May 9, 2007, Chevron was served Jame's amended supplemental
11 interrogatory responses, which were signed by Thys. The following
12 supplemental answers to the interrogatories described above were
13 included therein:

14 ANSWER NO.6

15 I do not know with medical certainty when I was injured
16 the first time. I began experiencing symptoms of pain
17 sometime in 2005. In February 2006, the pain was very
18 severe. I had this pain on my right arm that moves to my
19 back and my chest. I also had numbness and weakness in
20 the same arm. At this time, I sought treatment for the
21 pain with Dr. Manuel Jimenez in Archidona who detected a
22 growth in my armpit/breast area. This same month, I had
23 a biopsy on my right breast in February 2006 with Dr.
24 Martha Vargas of SOLCA (Guayaquil). Later in August
25 2006, I had an ultrasound of my right breast. This was
26 done by Dr. Victoria Gordilla also at SOLCA (Guayaquil).
27 I then saw Dr. Raul Goatherd at SOLCA (Guaranda) sometime
28 in September or October 2006 and he told me that because
of the tumor I had to be under observation and undergo
treatment.

23 . . .

24 ANSWER No. 8

25 I went to the doctor who detected the tumors, Dr. Manuel
26 Jimenez. He told me that my tumors were because of
27 pollution. I believe he explained this to me February
28 2006. Texaco works near the 10 of August farm so I did
believe that they provoked my illness with their
pollution after speaking with Dr. Jimenez. The oil is on

1 the ground where I live and on the trees. It gets on my
2 skin and on my clothes so I understood I had been
3 affected by the pollution. There is no way to get it off
4 other than to use diesel fuel. I also drink the water
5 from wells where I live. I must add Clorox to use for
6 cooking, cleaning and bathing.

7 Nierlich Decl., Ex. 19 at 5 and 7.

8 On May 28, 2007, Jame was deposed through an interpreter. On
9 several occasions, Jame appeared not to understand the questions
10 asked by Chevron's counsel, who, during the deposition, moved to
11 strike many of her answers as non-responsive. See, e.g., Bonifaz
12 Decl. in Support of Mot. to Strike, Ex. I, Jame Depo. 33-61.
13 Approximately two hours into the deposition, the following exchange
14 took place between Chevron's counsel and Jame:

15 Q . . . You didn't know that you had breast cancer,
16 did you, when you sued?

17 A Yes.

18 Q But you still sued Texaco for money, didn't you?

19 A Yes.

20 Q Claiming that you had breast cancer, even though you
21 knew -- didn't know whether you did or not?

22 A Yes.

23 Q Ms. Jame, when was the first time you knew you
24 didn't have cancer?

25 A When I was given the biopsy from SOLCA.

26 Q Did you tell your lawyers at that time that the
27 biopsy showed you didn't have cancer?

28 A Yes.

Q When was that?

A It was about two months ago.

Q Who did you tell?

1 A My attorneys.

2 . . .

3 Q So you told your attorneys two months ago that you
4 do not have cancer?

5 A Yes.

6 Q Is it the attorneys Mr. Patanzis and Mr. Lathram
7 that are sitting in the room?

8 A Yes.

9 Nierlich Decl., Ex. 21, Jame Depo. 61:3-62:10.

10 Although the questions and Jame's answers were, at times,
11 ambiguous and convoluted, they could be construed to mean that Jame
12 did not know with certainty whether she had breast cancer at the
13 time the lawsuit was filed in April, 2006. However, she clearly
14 had reason to believe then that she had cancer. At around that
15 time, a mass had been observed in her right breast, and her doctor
16 had referred her to the National Oncology Institute for a biopsy.
17 Her pain and other symptoms were apparently similar to those of her
18 aunt, who had been diagnosed with breast cancer. See Bonifaz Decl.
19 in Support of Mot. to Strike, Ex. I, Jame Depo. 45:6-16.

20 Her belief by the time of her deposition that she did not have
21 cancer seemed to be based on the biopsy. Her statement that she
22 told Lathram and Patanzis that she did not have cancer correlates
23 roughly with their visit to Ecuador, at which time she gave them
24 the August 16, 2006 biopsy report. However, this was the report
25 that Chevron already had, which did not rule out a cancer
26 diagnosis.

27 As noted above, Lathram and Patanzis deny Jame told them she
28 did not have cancer and deny they told Bonifaz this. Further,

1 Bonifaz denies that he was told that Jame told Lathram and Patanzis
2 that she did not have cancer.

3 In an attempt to demonstrate that Lathram knew Jame did not
4 have cancer, Chevron proffers handwritten notes that contain the
5 words "Not Cancer" in the context of other phrases that Chevron
6 maintains are associated with Jame.³ These notes were found in a
7 journal that Lathram's former law firm produced in response to
8 Chevron's subpoena for documents related to this case; the
9 custodian of records certified that the journal was "prepared by"
10 Lathram. Mot. for Leave to File Supp. Brief, Ex. 2. Chevron did
11 not ask Lathram to authenticate the notes or explain their meaning;
12 it obtained the notes after his deposition. Nevertheless, Chevron
13 maintains that they were his and demonstrate that he knew that Jame
14 did not have cancer. Even if these notes supported the inferences
15 Chevron draws from them, they do not indicate that anyone
16 communicated to Bonifaz a belief that Jame did not have cancer.

17 On June 15, 2007, Chevron moved for terminating sanctions or,
18 in the alternative, summary judgment. Referring in large part to
19 Jame's deposition testimony, Chevron asserted that terminating
20 sanctions were warranted because she had deceived the court. In
21 response, Lathram filed a brief stating that Jame had provided
22 "information which became the basis of this action which was not
23 fully accurate," Nierlich Decl., Ex. 6 at 2, although he did not
24 specify what was inaccurate. Lathram asked the Gonzales court to
25 dismiss Jame's and her husband's claims. In the alternative,

26
27 ³ The Court GRANTS Chevron's motion for leave to file an
addendum to its supplemental brief.

1 Lathram sought leave to amend Jame's complaint based on medical
2 tests, taken after Jame's deposition, that purportedly "revealed
3 the existence of an ovarian abnormality which may be cancerous in
4 nature." Id. The Gonzales court rejected these requests and
5 imposed terminating sanctions and summary judgment against Jame.
6 Order of Aug. 3, 2007, at 6, Gonzales v. Texaco, 06-2820 WHA (N.D.
7 Cal.).

8 DISCUSSION

9 I. Bonifaz's anti-SLAPP Motion to Strike

10 California's anti-SLAPP statute provides,

11 A cause of action against a person arising from any act
12 of that person in furtherance of the person's right of
13 petition or free speech under the United States
14 Constitution or the California Constitution in connection
15 with a public issue shall be subject to a special motion
16 to strike, unless the court determines that the plaintiff
17 has established that there is a probability that the
18 plaintiff will prevail on the claim.

19 Cal. Civ. Proc. Code § 425.16(b)(1). California anti-SLAPP motions
20 to strike are available to litigants proceeding in federal court.

21 Thomas v. Fry's Elecs., Inc., 400 F.3d 1206, 1206 (9th Cir. 2005).

22 Courts analyze these motions in two steps. "First, the court
23 decides whether the defendant has made a threshold showing that the
24 challenged cause of action is one arising from protected activity."

25 Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 67 (2002).

26 Second, the court "determines whether the plaintiff has
27 demonstrated a probability of prevailing on the claim." Id.

28 At the second step, which is often described as the "minimal
merit prong," a plaintiff must show "only a minimum level of legal
sufficiency and triability." Mindys Cosmetics, Inc. v. Dakar, 611

1 F.3d 590, 598 (9th Cir. 2010) (citations and internal quotation
2 marks omitted). "To establish 'minimal merit,' the plaintiff need
3 only 'state and substantiate a legally sufficient claim.'" Id.
4 (quoting Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 741
5 (2003)). "'Put another way, the plaintiff must demonstrate that
6 the complaint is both legally sufficient and supported by a
7 sufficient prima facie showing of facts to sustain a favorable
8 judgment if the evidence submitted by the plaintiff is credited.'" Mindys,
9 611 F.3d at 599 (quoting Wilson v. Parker, Covert &
10 Chidester, 28 Cal. 4th 811, 821 (2002)). A "defendant's anti-SLAPP
11 motion should be granted when a plaintiff presents an insufficient
12 legal basis for the claims or when no evidence of sufficient
13 substantiality exists to support a judgment for the plaintiff."
14 Price v. Stossel, ___ F.3d ___, 2010 WL 3307482, at *6 (9th Cir.)
15 (citation and internal quotation marks omitted); see also Mindys,
16 611 F.3d at 599 (stating that an anti-SLAPP motion should be
17 granted if "'the defendant's evidence supporting the motion defeats
18 the plaintiff's attempt to establish evidentiary support for the
19 claim'" (quoting Wilson, 28 Cal. 4th at 821)).

20 A claim for malicious prosecution requires a plaintiff to
21 prove that a defendant's earlier litigation:

- 22 (1) was commenced by or at the direction of the defendant
23 and was pursued to a legal termination in [the
24 plaintiff's] favor; (2) was brought without probable
cause; and (3) was initiated with malice.

25 Estate of Tucker ex rel. Tucker v. Interscope Records, Inc., 515
26 F.3d 1019, 1030 (9th Cir. 2008) (quoting Zamos v. Stroud, 32 Cal.
27 4th 958, 965 (2004)) (emphasis in original). Liability can also

1 lie for "continuing to prosecute a lawsuit discovered to lack
2 probable cause." Zamos, 32 Cal. 4th at 973.

3 "The tort of malicious prosecution is disfavored both because
4 of its potential to impose an undue chilling effect on the ordinary
5 citizen's willingness to report criminal conduct or to bring a
6 civil dispute to court and because, as a means of deterring
7 excessive and frivolous lawsuits, it has the disadvantage of
8 constituting a new round of litigation itself." Zamos, 32 Cal. 4th
9 at 966 (citation and internal quotation marks omitted). "A
10 preferable approach is 'the adoption of measures facilitating the
11 speedy resolution of the initial lawsuit and authorizing the
12 imposition of sanctions for frivolous or delaying conduct within
13 that first action itself.'" Wilson, 28 Cal. 4th at 817 (quoting
14 Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 873 (1989)).
15 The California Supreme Court has cautioned against expanding the
16 scope of the tort. See Zamos, 32 Cal. 4th at 966.

17 With these policies in the background, California courts have
18 delineated rules to govern the probable cause analysis. First,
19 "the existence or nonexistence of probable cause is a legal
20 question to be resolved by the court in the malicious prosecution
21 case; litigants are thus protected against the danger that a lay
22 jury would mistake a merely unsuccessful claim for a legally
23 untenable one." Wilson, 28 Cal. 4th at 817 (citing Sheldon Appel
24 Co., 47 Cal. 3d at 874-77). Further, the probable cause inquiry is
25 objective and made "without reference to whether the attorney
26 bringing the prior action believed the case was tenable." Wilson,
27 28 Cal. 4th at 817. Probable cause "exists if any reasonable
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1 attorney would have thought the claim tenable." Id. (citation and
2 internal quotation marks omitted). The California Supreme Court
3 has emphasized that this is a "rather lenient standard," which
4 ensures that only "those actions that any reasonable attorney would
5 agree are totally and completely without merit may form the basis
6 for a malicious prosecution suit." Id. In assessing legal
7 tenability, a "court is to construe the allegations of the
8 underlying complaint liberally, in a light most favorable to the
9 malicious prosecution defendant." Sycamore Ridge Apartments, LLC
10 v. Naumann, 157 Cal. App. 4th 1385, 1402 (2007) (citation omitted).

11 Attorneys will be deemed to have lacked probable cause to
12 bring or maintain an action if (1) they relied upon facts which
13 they had "no reasonable cause to believe to be true" or (2) if they
14 sought "recovery upon a legal theory which is untenable under the
15 facts known to" them. Soukup v. Law Offices of Herbert Hafif, 39
16 Cal. 4th 260, 292 (2006) (citation and internal quotation marks
17 omitted). "In a situation of complete absence of supporting
18 evidence, it cannot be adjudged reasonable to prosecute a claim."
19 Id. However, despite adverse evidence, an attorney may act
20 reasonably by continuing to litigate claims "in light of the
21 possibility that the defense will . . . prove less than solid."
22 Zamos, 32 Cal. 4th at 970 n.9.

23 If "there is a dispute as to the state of the defendant's
24 knowledge and the existence of probable cause turns on resolution
25 of that dispute . . . the jury must resolve the threshold question
26 of the defendant's factual knowledge or belief." Sheldon Appel, 47
27 Cal. 3d at 881. However, if there is no dispute as to the facts
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1 known by the attorney in prosecuting the underlying action, "the
2 question of whether there was probable cause to institute that
3 action is purely legal." Ross v. Kish, 145 Cal. App. 4th 188, 202
4 (2006).

5 As noted above, the Court deferred deciding whether to strike
6 Chevron's action insofar as it rests on Bonifaz maintaining Jame's
7 claims. The question left open was whether Bonifaz knew that he
8 did not have probable cause to continue to prosecute Jame's case
9 because she purportedly told Lathram and Patanzis that she did not
10 have cancer.

11 Jame's deposition testimony in May, 2007 that she did not have
12 cancer appeared to be based on the August 16, 2006 biopsy report,
13 which Chevron had already received in December, 2006. Jame had
14 shown Lathram, Patanzis and Romero the report during their April,
15 2007 visit to Ecuador. This could explain Jame's statement that,
16 about two months before her deposition, she told Lathram and
17 Patanzis that she did not have cancer, a belief she formed based on
18 a biopsy. Nierlich Decl., Ex. 21, Jame Depo. 61:14. However,
19 there is no medical evidence that the biopsy report showed Jame did
20 not have cancer, especially in the light of the subsequent
21 ultrasound finding of solid nodules and removal of a nodule. In
22 sum, the biopsy report does not establish that Jame did not have
23 cancer, even if she thought that it did.

24 At any rate, Chevron offers no evidence that Bonifaz knew what
25 Jame told Lathram and Patanzis. Jame testified in her deposition
26 that she had told Lathram and Patanzis that she did not have
27 cancer; the attorneys maintain that she did not. To impeach

28

1 Lathram's testimony, Chevron points to handwritten notes, asserts
2 that they are his and argues that they demonstrate that Jame told
3 him that she did not have cancer. Even if the notes supported the
4 inferences Chevron advocates, they are not probative of whether
5 Lathram or Patanzis told Bonifaz what Jame said she told them.
6 Lathram, Patanzis and Bonifaz say they did not; Chevron offers no
7 evidence to suggest that they did.

8 Having failed to unearth new evidence on this issue, Chevron
9 instead now argues that other evidence supports an inference that
10 Bonifaz knew, irrespective of any statement by Jame, that she did
11 not have cancer. As noted above, most of the evidence on which
12 Chevron now relies, such as the biopsy and ultrasound reports, was
13 available at the time it filed its opposition to Bonifaz's motion.
14 Chevron, however, did not refer to this evidence then.

15 First, Chevron repeats its argument that Bonifaz lacked
16 probable cause to bring Jame's claims because, although she
17 represented that she had cancer, she did not substantiate it with
18 any medical evidence. The Court rejected this argument in its May
19 12, 2010 Order. Generally, "a lawyer is entitled to rely on
20 information provided by the client." Daniels v. Robbins, 182 Cal.
21 App. 4th 204, 223 (2010) (citation and internal quotation marks
22 omitted). Such reliance is reasonable until "the lawyer discovers
23 the client's statements are false." Id. Chevron points to no
24 evidence that, at the time he initiated the suit based on the
25 information provided by Peña, Bonifaz had reason to know that he
26 would not be able to obtain evidence to support Jame's belief that
27 she had cancer. See id. at 222. Indeed, it was not unreasonable
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1 for Bonifaz to rely on information furnished by Peña. In Schwartz
2 v. Millon Air, Inc., the Eleventh Circuit reversed a district
3 court's award of sanctions, which was based on a conclusion that
4 the plaintiffs' counsel unreasonably relied on information obtained
5 from an attorney practicing in Ecuador. 341 F.3d 1220, 1224-28
6 (11th Cir. 2003). The court stated,

7 This case involves special circumstances. It involves
8 great distances across international borders. It also
9 involves foreign languages and foreign cultures. And it
10 involves medical records and a great many clients.
11 Taking these uncommon circumstances into consideration,
12 we cannot conclude that Appellants acted much (if at all)
13 outside of the range of reasonable conduct by relying
14 upon the representations of Briones, the duly licensed
15 Ecuadorian counsel who referred the cases to them.

16 Id. at 1226. That Jame did not present Bonifaz, through Peña, with
17 medical evidence did not render her claims legally untenable. And
18 that Bonifaz could have investigated her claims further does not
19 expose him to liability for malicious prosecution; "the adequacy of
20 an attorney's research is not relevant to the probable cause
21 determination." Sheldon Appel Co., 47 Cal. 3d at 883.

22 Thus, to substantiate its malicious prosecution claim, Chevron
23 must present sufficient evidence to support an inference that
24 Bonifaz subsequently learned that Jame did not in fact have cancer
25 and failed timely to dismiss her claims. It does not do so. The
26 record does not contain evidence that would inform any reasonable
27 attorney that Jame did not have cancer. Nor is there evidence that
28 Bonifaz knew that Jame was cancer-free.

The August 16, 2006 biopsy report of tissue from Jame's right
breast revealed no "malignant neoplastic changes" and reflected a
pathologist's diagnosis of an "ectopic mammary gland." Nierlich

1 Decl., Ex. 14. These terms are not defined in the record. An
2 August 4, 2006 report noted that an ultrasound test did not show
3 solid nodules in Jame's breasts. A later December 1, 2006 report
4 noted that an ultrasound test did reveal solid nodules. In his
5 May, 2007 report, Romero noted that a breast nodule had been
6 removed in December, 2006 and that he had not observed masses in
7 Jame's breasts in April, 2007; he did not opine, however, as to
8 whether she had breast cancer. Chevron offers no evidence to
9 support an inference that these ambiguous reports would have
10 communicated to any reasonable attorney that Jame did not have
11 cancer. There is no medical evidence as to the significance of
12 these observations. Nor is there any expert testimony that Jame is
13 cancer-free. These reports did not require Bonifaz to dismiss
14 Jame's claims as legally untenable. Indeed, despite obtaining the
15 biopsy and ultrasound reports in December, 2006, Chevron did not
16 move for terminating sanctions until June, 2007. It continued to
17 serve interrogatories to clarify Jame's alleged injury. If the
18 biopsy and ultrasound reports demonstrated that no reasonable
19 attorney would have found Jame's claims legally tenable, as Chevron
20 now suggests, one would expect that it would not have continued
21 discovery and waited six months to move for terminating sanctions.
22 To be sure, Chevron's failure to do so does not establish that
23 Bonifaz had probable cause to continue to prosecute Jame's claims,
24 but it weighs against a conclusion that the reports plainly proved
25 her claims meritless.

26 The inconclusive medical evidence presented by Chevron is
27 dissimilar to the type of subsequently discovered evidence that

1 California courts have deemed to extinguish probable cause. In
2 Zamos, an attorney asserted a claim for malicious prosecution
3 against his former client who had brought a fraud action against
4 him. 32 Cal. 4th at 961. In the underlying suit, the client
5 alleged that Zamos made fraudulent representations. Id. Shortly
6 after the client initiated her fraud action, Zamos presented her
7 counsel with hearing transcripts that clearly contradicted her
8 allegations. Id. For instance, although the client alleged that
9 Zamos promised to continue to represent her in an action, a
10 transcript reflected that she did not oppose his motion to
11 withdraw. Id. at 971. The client also alleged that Zamos promised
12 to represent her in a malpractice lawsuit, even though a transcript
13 showed that she agreed with him in open court that he was not going
14 to do so. Id. at 972. The California Supreme Court ruled that
15 these manifest contradictions, along with others, demonstrated a
16 lack of probable cause to maintain the client's fraud claims, which
17 substantiated Zamos's claim for malicious prosecution. Id. at 971-
18 73.

19 In Sycamore Ridge, the lawsuit underlying a subsequent
20 malicious prosecution action involved claims against an apartment
21 complex and its management arising from poor living conditions and
22 unfair business practices. 157 Cal. App. 4th at 1392-93. The
23 court concluded that attorneys lacked probable cause to maintain a
24 client's eighteen causes of action in light of her interrogatory
25 responses. Id. at 1403-06. Although the complaint plead
26 employment claims, there was no evidence to suggest that the client
27 was ever an employee of the apartment complex. Id. at 1403. The
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1 complaint also plead an emotional distress claim based on the
2 alleged presence of mold in the apartment complex; however, in an
3 interrogatory response, the client stated that she suffered
4 emotional injury because of the management's "dishonesty." Id. at
5 1404. And even though the client stated in another response that
6 she did not suffer any property damage, the attorneys filed a
7 statement on her behalf indicating that she suffered \$2,000 in
8 property damage. Id.

9 In Zamos and Sycamore Ridge, the malicious prosecution
10 defendants were presented with evidence that clearly negated their
11 clients' claims, vitiated probable cause and eliminated any
12 reasonable belief that they could have rehabilitated the respective
13 lawsuits.

14 Chevron also argues that Jame's February, 2007 interrogatory
15 responses are evidence that Bonifaz knew that Jame did not have
16 cancer because the statements were evasive, "do not contain the
17 definitive allegation of breast cancer" and "ignore[] the negative
18 biopsy and ultrasound results." Pl.'s Supp. Brief at 6. Of
19 course, the biopsy and ultrasound reports had already been provided
20 to Chevron. There is no evidence that Bonifaz drafted Jame's
21 answers, as Chevron intimates; Jame and Bonifaz's co-counsel, not
22 he, signed the document. These interrogatory answers do not raise
23 an inference that Bonifaz knew that Jame did not have cancer.

24 Finally, Chevron complains that Bonifaz did not dismiss Jame's
25 claims immediately following her May 28, 2007 deposition. As
26 already explained, the basis of Jame's testimony appears to have
27 been the August 16, 2006 biopsy report, which did not establish

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1 that she did not have cancer. Nonetheless, on July 5, 2007, in
2 response to Chevron's June 15, 2007 motion for terminating
3 sanctions and summary judgment, Lathram filed his brief asking the
4 Gonzales court to dismiss Jame's claims or, in the alternative,
5 grant leave to amend her complaint. Nierlich Decl., Ex. 6 at 2.
6 Although there is no authority that presents a time frame by which
7 an attorney must dismiss a client's case after discovering adverse
8 evidence, it was not unreasonable for Bonifaz and his associates to
9 wait a little over a month to seek leave to amend or dismiss Jame's
10 claims. Attorneys must be afforded some time to evaluate the best
11 course of action for their clients, in light of adverse
12 developments. The alternative could encourage the proliferation of
13 malicious prosecution suits and the premature dismissal of clients'
14 meritorious cases by their attorneys who fear tort liability, two
15 results eschewed by the public policy that has limited the scope of
16 the malicious prosecution tort.

17 The Gonzales litigation ended with the imposition of
18 terminating sanctions against some plaintiffs, including Jame, and
19 monetary sanctions against Bonifaz, Collingsworth and Hoffman.
20 Public policy in California favors deterring meritless litigation
21 by way of sanctions, in lieu of "initiating one or more additional
22 rounds of malicious prosecution litigation after the first action
23 has been concluded." Sheldon Appel Co., 47 Cal. 3d at 873-74.
24 Although some medical evidence called Jame's case into question,
25 Bonifaz was never presented with any evidence that definitively
26 indicated that she was free of cancer. To conclude that the
27 equivocal medical evidence Chevron cites obviated probable cause
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1 would elevate the lenient probable cause standard, have a chilling
2 effect on attorneys and litigants prosecuting arguably meritorious
3 actions that involve medical evidence and encourage prevailing
4 defendants to file malicious prosecution suits.

5 Accordingly, the Court grants Bonifaz's motion to strike in
6 its entirety.

7 II. Chevron's Motion for Leave to File a Motion for
8 Reconsideration

9 Under Civil L.R. 7-9, a party may ask a court to reconsider an
10 interlocutory order if the party can show:

11 (1) That at the time of the motion for leave, a material
12 difference in fact or law exists from that which was
13 presented to the Court before entry of the interlocutory
14 order for which reconsideration is sought. The party
15 also must show that in the exercise of reasonable
16 diligence the party applying for reconsideration did not
17 know such fact or law at the time of the interlocutory
18 order; or

19 (2) The emergence of new material facts or a change of
20 law occurring after the time of such order; or

21 (3) A manifest failure by the Court to consider material
22 facts or dispositive legal arguments which were presented
23 to the Court before such interlocutory order.

24 Chevron argues that Mindys, decided after the Court issued its
25 May 12, 2010 Order, presents a change of law. In particular,
26 Chevron points to the Mindys court's instruction that, in
27 evaluating whether plaintiffs have demonstrated a "probability of
28 success" under the anti-SLAPP statute's second prong, courts do not
"weigh the credibility or comparative probative strength of
competing evidence.'" 611 F.3d at 599 (quoting Wilson, 28 Cal. 4th
at 821). Chevron also highlights the court's explanation that
plaintiffs need only make a "sufficient prima facie showing of

1 facts." Mindys, 611 F.3d at 599 (quoting Wilson, 28 Cal. 4th at
2 821). These principles are not new. In reviewing the anti-SLAPP
3 analysis, the Mindys court relied on California Supreme Court
4 precedent cited by this Court in the May 12 Order. Thus,
5 Mindys does not constitute a material change in the law that
6 warrants granting leave.

7 Chevron also argues that the Court applied a "substantially
8 higher burden" than Mindys requires. Mot. for Leave at 2. In
9 particular, Chevron argues that the Court improperly credited
10 Bonifaz's testimony that his associates told him that Vera told
11 them about her son's leukemia. See Mindys, 611 F.3d at 599.
12 Chevron offered no evidence to suggest that Bonifaz's associates
13 did not meet with Vera, that she did not tell them that her son had
14 leukemia or that Bonifaz's associates did not tell him so.
15 Instead, it referred to Vera's intake form, which indicated that
16 she suspected her son had cancer but did not explicitly state that
17 he suffered from leukemia. In particular, Chevron pointed to "the
18 absence of any date of diagnosis, the lack of any reference to a
19 doctor or any medical records, and the absence of any evidence, or
20 even claim, of causation." Chevron's Opp'n to Mot. to Strike at
21 28:3-6. The intake form is not inconsistent with Bonifaz's
22 statement. As Mindys instructs, a court should grant an anti-SLAPP
23 motion to strike "'if, as a matter of law, the defendant's evidence
24 supporting the motion defeats the plaintiff's attempt to establish
25 evidentiary support for the claim.'" 611 F.3d at 599 (quoting
26 Wilson, 28 Cal. 4th at 821); see also Price, 2010 WL 3307482, at *6
27 (stating that a court must grant an anti-SLAPP motion if "no
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1 evidence of sufficient substantiality exists to support a judgment
2 for the plaintiff"). Here, Bonifaz's affirmative evidence defeated
3 Chevron's attempt to draw a negative inference, based on the
4 absence of information on the intake form, that Vera never told
5 Bonifaz's co-counsel that her son had leukemia.

6 Chevron next asserts that the Court ruled contrary to Mindys
7 by concluding that the Gonzales court's sua sponte sanctions order
8 did not substantiate Chevron's malicious prosecution action.
9 However, the Court did take into account that court's subsequently
10 reversed imposition of Rule 11 sanctions. The Gonzales court did
11 not analyze the legal tenability of the plaintiffs' claims under
12 California precedent regarding malicious prosecution. As explained
13 above, California law provides that "the adequacy of an attorney's
14 research is not relevant to the probable cause determination."
15 Sheldon Appel Co., 47 Cal. 3d at 883. Most of the Gonzales court's
16 analysis focused on whether Bonifaz, Collingsworth and Hoffman
17 conducted a reasonable and competent investigation into the
18 Gonzales plaintiffs' claims. See Gonzales Sanctions Order, 2007 WL
19 3036093, at *11-*12. Chevron does not argue that the sanctions
20 order has a preclusive effect on this Court's decision. Indeed, it
21 would make little sense, given that the California Supreme Court
22 instructs that the imposition of sanctions is the preferable
23 approach to deter frivolous suits, to hold that sanctions could, on
24 their own, support malicious prosecution actions. Absent other
25 indicia of a lack of probable cause to bring or maintain the
26 Gonzales plaintiffs' claims, the sanctions order does not
27 substantiate Chevron's case.

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1 Chevron then maintains that the Court failed to address
2 dispositive legal arguments, particularly by making "no mention of
3 the conflict between the anti-SLAPP statute and Rule 8"
4 Mot. for Leave at 4. Mindys, however, countenances the use of the
5 anti-SLAPP statute in federal court, including the
6 "'summary-judgment-like procedure'" employed at the second stage of
7 the anti-SLAPP analysis. 611 F.3d at 599 (quoting Soukup, 39 Cal.
8 4th at 278).

9 This Court's decision in Keller v. Electronic Arts, Inc., 2010
10 WL 530108 (N.D. Cal.), is distinguishable and does not support
11 Chevron's position. That action involves claims for breach of
12 contract and violations of common-law and statutory rights of
13 publicity, among others. The Court's analysis, which was based on
14 a limited record comprised of the plaintiff's pleadings and
15 associated documents, focused primarily on the legal question of
16 whether the plaintiff's right of publicity claims could stand
17 despite one of the defendant's asserted defenses under the First
18 Amendment. Here, in contrast, Chevron asserts a claim for
19 malicious prosecution, which entails review of volumes of evidence
20 presented or generated in the underlying litigation. Based on the
21 elements of that tort, the record before the Court and the standard
22 set forth in Mindys, Chevron fails to substantiate its claim.

23 Finally, Chevron asserts that the Court failed to consider the
24 Edelman Declaration, filed in support of Chevron's request for a
25 continuance pursuant to Federal Rule of Civil Procedure Rule 56(f).
26 However, the Edelman Declaration, which was considered by the
27 Court, did not raise specific facts relevant to the probable cause
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1 inquiry, other than those on which the Court granted discovery.
2 Further, the Edelman Declaration did not attest, as required under
3 Rule 56(f), that the sought-after facts existed. See Family Home &
4 Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827
5 (9th Cir. 2008).

6 Accordingly, the Court denies Chevron's motion for leave to
7 file a motion for reconsideration.

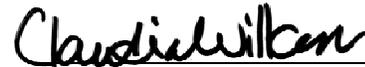
8 CONCLUSION

9 For the foregoing reasons, the Court GRANTS Chevron's motion
10 for leave to file an addendum (Docket No. 60), DENIES Chevron's
11 motion for leave to file a motion for reconsideration (Docket No.
12 54) and GRANTS Defendants' motion to strike in its entirety (Docket
13 No. 25).

14 The Clerk shall enter judgment and close the file. Defendants
15 shall recover costs from Chevron.

16 IT IS SO ORDERED.

17 Dated: 10/8/2010



CLAUDIA WILKEN
United States District Judge

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