Attorney for Plaintiff
AC

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

AC. M.D., Plaintiff, vs. SZ. M.D. et al., Defendants.	Case no. PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S SPECIAL MOTION TO STRIKE ALLEGED ANTI-SLAPP SUIT Hearing date: Time: Dept. Judge: Complaint filed Trial date not set

1. Introduction.

Defendant SD essentially claims that AC signed the written quasi-partnership agreement in August 2000, at the end of her tenure she owed him unearned "draw," and therefore his underlying cross-complaint to recover those funds was filed with probable cause. As the Court will see, SD's claim, and hence his motion, are utterly transparent and contrived.

SD claims that by her present action, AC seeks a "double recovery." Apart from being irrelevant to this motion, SD contradicts himself in the next sentence by conceding that AC was not made whole by the judgment in the underlying action. The Court should deny the motion and award attorney fees to AC.

2. Facts.

AC left her employment with SD in August 2003. After Tenet sued AC in the underlying action, she cross-complained against SD, whereupon SD filed a cross-complaint against AC on March 1, 2006. SD alleged that he and AC had signed a written agreement in August 2000 whereby AC would be "treated as a partner" and receive a "draw" of $10,000 per month against fees received from AC's patients. (M Decl. Ex. "B"). SD alleged that AC's receipts fell some $40,000 short of her draw. SD characterizes this shortfall as a "loan." (SD Decl. ¶ 8).

SD did not seek repayment of the so-called loan until March 1, 2006 when he filed his cross-complaint in the underlying action. (SD Decl. ¶ 11). SD unilaterally dismissed his cross-complaint 10 days before trial. (*Id*. ¶ 13. See Request for Judicial Notice ("RJN"), ¶ 1).

3. Summary of argument.

By his omissions and admissions, SD himself makes a prima facie showing "that would support judgment in [AC's] favor if proven." He concedes that is all that is necessary to defeat his special motion. (SD MPA 8:9). The ommissions and facts include:

A. This motion is an opportunity for SD to completely and finally extricate

himself from this case. One would think that he would give it his best shot. Yet, other than his own uncorroborated evidence, he produces not a shred of evidence supporting his far-fetched claim.

B. AC entered into a Relocation Agreement with Tenet HealthSystems Hospitals, Inc., whereby Tenet agreed to guarantee AC $23,634 per month. (M Decl. Ex. "A" p. B-1). SD's purported partnership agreement includes the following inexplicable statement:

> As per the recruitment contract with Tenet HealthCare Systems beginning August 15, 2000, Dr. AC will be considered a prospective partner and will participate as a partner.

(Ex. "A" to cross-complaint, Ex. B to M Decl. (emphasis added)).
By its plain language, the agreement doesn't mention SD and is not concerned with becoming anyone's partner. (See M Decl. Ex. "A").

C. SD and AC then entered into an oral agreement by which AC assigned to SD her right to the Tenet payments in exchange for a salary of $10,000 per month for the first two years and $11,666 per month for the third year. (SD Decl. ¶ 4; AC Dec. ¶ 3). SD has repeatedly conceded that his payments to AC consisted of "salary." (See, e.g., *ibid*. See also SD MPA p. 2).

D. Highly significantly, for each of the years 2000 through 2003, SD issued AC the IRS form for "wages," Form W-2, and never issued her a Form K-1, "Partner's Share of Income." (See AC Decl., ¶ 8).

E. Incredibly, SD has never, either in the underlying action or here, produced a partnership reconciliation or similar accounting documenting the debt alleged in his cross-complaint. The Court may presume that if SD cannot produce evidence of his alleged damages, then none exist. The Court may easily dispose of SD's motion on this ground alone.

F. Following the trial of the underlying action, Judge Turrone made a

finding of fact that AC was SD's employee.[1] And the very agreement that provides the sole basis for SD's partnership theory expressly states: "AC, M.D. is an employee of the practice of SD, M.D. . . ." (Ex. "A" to SD Cross-Compl. (M Decl. Ex. B) (emphasis added). SD concedes throughout his moving papers that AC was an "employee" (see e.g., SD Decl. ¶ 9; SD MPA p. 3 fn. 2) and that the purported written contract was an "employment agreement." (See e.g., SD MPA 3:19).

G. Probable cause for SD's cross-complaint in the underlying action depends on the premise that the money he paid to AC during her tenure was partnership draw rather than employee wages. And that in turn depends on the validity of the purported partnership agreement attached as Exhibit "A" to his cross-complaint. (M Decl. Ex. "B"). AC didn't sign the agreement and never saw it until SD filed his cross-complaint. (AC Decl. ¶ 6). In his Statement of Decision, Judge Turrone cast serious doubt on SD's claim by finding that the agreement had "disquieting implications because of its dubious authenticity." [2]

H. Even if AC had signed the alleged partnership agreement, the very face of the document shows that it did not confer a present partnership interest. Instead, the agreement says that AC would be considered a "prospective" partner and would participate as if she were a partner. (*Id*.) Most tellingly, the alleged agreement states that AC would be "considered" for a partnership one year in the future. It expressly affords the partnership an option "not to offer her a partnership" and likewise allows AC to "choose[] not to become a partner. . . ." (*Id*.) Thus, even if validly formed, the contract most certainly did not confer present partnership status on AC, especially when any ambiguities are construed against the draftsman, SD.

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1. See Statement of Decision (M Decl. Ex. "D"), pp. 2, 3. See also Findings and Orders, p. 3 (RJN ¶ 2).

2. Statement of Decision, 4:7 (M Decl. Ex. "D").

I. If AC had in fact been brought into the practice as a partner, presumably the other partner, SJ, M.D., would have known about it. Yet Dr. J's supporting declaration reflects no such knowledge.

J. The purported partnership agreement, even if properly executed, is void for vagueness in that it fails to state essential terms, most significantly, the partnership share being conferred on AC, her ownership of partnership assets, and the extent to which she would be responsible for partnership obligations. SD says "In preparing [the AC Agreement], I used the same form I had used with one of the other doctors." (SD Decl. ¶ 6). Why hasn't he identified the "other doctor"? Why hasn't he produced the form?

K. SD claims that without any preliminary discussion with AC, he entrusted an unidentified staff person to secure AC's signature on the alleged partnership agreement. SD fails to explain his failure to submit a declaration from the staff person, or for that matter even identifying him/her. Despite having been hired as an employee only weeks earlier, AC supposedly was not the least bit curious about a partnership offer out of the blue and blithely signed the agreement without seeking any explanation for her sudden good fortune.

L. SD asks the Court to believe that during AC's entire tenure, the subject of the partnership agreement never came up. Had AC been failing to earn her keep for three years, SD certainly would have sent her a memo or at least spoken to her about it. SD's supporting documents include no such written communications and his declaration is silent on the subject. SD's first mention of AC's alleged debt was his cross-complaint, filed nearly three years after AC left his office. (AC Decl. ¶¶ 7, 10).

M. SD expressly states that the reason for the purported partnership agreement was that the Santa Clara County Independent Practice Association ("SCCIPA") "asked for written documentation of AC's employment." (SD Decl. ¶ 5 (emphasis added)). AC denies any knowledge of this request. (AC Decl. ¶ 5). And

if all SD needed to satisfy SCCIPA was evidence of AC's employment, why would he draft an agreement making her a partner? Under his arrangement with Tenet and AC, SD had a guaranteed monthly income of $13,364. Why would he jeopardize such a sure thing by gratuitously making AC a partner, which would have made his profit dependent on AC's success in attracting new patients?

N. AC served a business records subpoena on SCCIPA in the underlying action requesting copies of all documents relating to AC. SCCIPA responded with a Declaration of No Records. (See RJN, ¶ 3).

O. In a nutshell: If the purported written agreement did not make AC a partner, then ipso facto she was an employee. If she was an employee, her payments from SD were wages, not "draw." If the payments were not draw, then no part of them were subject to reimbursement, as SD alleged in his cross-complaint. It follows that the cross-complaint was utterly bogus and filed without probable cause.

P. SD seeks to negate the "favorable termination" element of malicious prosecution by claiming he dismissed his cross-complaint for purely economic reasons, i.e., the high cost of retaining expert witnesses. But the 16 above-described fatal deficiencies—several of which Judge Turrone found to be true—support a presumption that SD knew his cross-action was a sham and based his decision to dismiss on those deficiencies and not the cost of hiring experts. SD exaggerates by claiming that the cost of hiring an expert would have exceeded $40,000. (SD Decl. ¶13). But again, SD expects the Court to take his word and offers no fee quotes from experts or other documentation supporting his contention. Moreover, SD admits that he did not see AC sign the purported partnership agreement (SD Decl. ¶ 7). He therefore should have anticipated that the authenticity of her signature could be an issue and factored in the cost of experts before filing his cross-complaint.

Q. In any case, SD's decision to dismiss could not, as he claims, have been

based on the cost of hiring experts. SD dismissed his cross-complaint only 10 days before trial (See RJN Ex. 1), by which time he would not have been permitted to identify expert witnesses even had he wanted to.

5. The evidence is more than sufficient to establish prima facie that AC is likely to prevail.

A. SD has not produced evidence that would be readily available to him if it existed.

As SD concedes, in order to defeat his motion, AC need only show that her complaint is "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821). At this preliminary stage, and without the benefit of discovery, AC need not prove facts supporting her cause of action by a preponderance of the evidence.[3]

In ruling on an anti-SLAPP motion, the court does not weigh the credibility or comparative probative strength of competing evidence. It may grant the motion only if, "as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Id*. (emphasis added)). Here, not only does SD fail to produce evidence sufficient to defeat AC's evidentiary support for he claim, he offers no evidence at all, other than his own carefully worded and uncorroborated declaration. SD has produced:

- No IRS K-1 form showing partnership distributions;
- No partnership reconciliation documenting AC's alleged debt;
- No declaration from Dr. Jalilie confirming AC's partnership;
- No declaration from the staff person who supposedly obtained AC's signature on the purported partnership agreement;
- No evidence of any oral or written communications with AC or Dr. Jalilie concerning the partnership over a three-year period;

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[3] Notably, AC was denied discovery in the underlying action because Dr. SD failed to appear for his duly-noticed deposition.

- No evidence that SCCIPA received a copy of the partnership agreement even though SD says the very reason he drafted it was to send it to SCCIPA

All of this evidence would be readily available to SD if it existed. By his failure to produce such evidence, the Court may presume that it does not exist.

B. AC has produced affirmative evidence establishing lack of probable cause for SD's cross-action.

In addition to not providing evidence that his cross-action was tenable, SD has affirmatively produced evidence showing that it was not. Most important, the alleged partnership agreement, even if properly executed, affirmatively provides that AC was an employee and was not at the time being made a partner. AC has confirmed her employee status by producing her W-2 forms (AC Decl. ¶ 8) as well as the Declaration of No Records establishing that SCCIPA never received the partnership agreement, or any other document regarding AC, from SD. (RJN Ex. 3).

6. SD and his attorney knew there was no probable cause for his cross-complaint at the time he filed it.

A. A reasonable attorney would have known that the purported written agreement was legally insufficient to form a partnership.

A leading cases on anti-SLAPP suits against malicious prosecution claims is *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735. In *Jarrow*, our supreme court affirmed the reversal of a judgment for the plaintiff in a malicious prosecution case. On the "probability of prevailing" prong, the Court held that probable cause exists if "any reasonable attorney would have thought the claim tenable." (*Id*. p. 742). A reasonable attorney obtains all available evidence before deciding whether to file suit. Here, that evidence, but more particularly the lack thereof, should have persuaded counsel for SD not to proceed.

And completely apart from the lack of supporting evidence, a reasonable

attorney would know the single piece of evidence that SD did produce—the purported partnership agreement—was insufficient on its face to confer a present partnership interest. The agreement is written in simple terms and requires no special knowledge to interpret its legal effect. As discussed above, on the one hand, the agreement plainly states that AC was an employee. And on the other hand, it expressly provides that (1) AC' partnership interest would arise, if at all, in the future, and (2) even at that future date, each party had the option to opt out of making AC a partner. (See *supra* p. 4).

B. SD and his attorney had all the existing evidence and knew all the relevant facts at the time they filed their cross-complaint.

"A claim that appears 'arguably correct' or 'tenable' when filed with the court may nevertheless fail . . . for reasons having to do with the sufficiency of the evidence actually adduced as the litigation unfolds." (*Jarrow* pp. 742-743). The key distinction is that at the time they filed their cross-complaint, their was no additional evidence potentially available to SD or his attorney. SD was the managing partner[4] and whatever relevant documents existed were in his possession. SD already knew all the facts at the time he filed his cross-complaint and knew there was no additional evidence to be discovered as the case unfolded.

In any event, SD and his attorney may be liable even if they learned only after filing suit that their case was not tenable. One who without probable cause "takes an active part in the . . . continuation. . . of civil proceedings . . . is subject to liability." (*Zamos v. Stroud* (2004) 32 Cal. 4th 958 966-967 (emphasis added)).

7. SZ's sole justification for suing AC—that the purported partnership agreeement was valid—is insufficient as a matter of law to establish probable cause.

[4.] See Judge Turrone's Findings and Orders, 3:18 (RJN ¶ 2): "Dr. SD [was] an experienced physician. He knows about how to run an office. [Dr. AC] didn't know, with all due respect, probably much more than how to open the front door."

SZ's assertion, that he didn't know his claim was untenable until he learned that AC contested the validity of her signature, is a red herring. None of the six evidentiary deficiencies listed above have anything to do with the contested signature. Any reasonable attorney would have known that a claim so utterly lacking in supporting evidence was untenable.

8. SD's sole justification for suing AC—reimbursement of a loan from AC's salary—is prohibited by law.

The word "wages" includes "compensation for services rendered without regard to the manner in which such compensation is computed." (Lab. Code, § 200; *Estate of Hollingsworth* (1940) 37 Cal.App.2d 432, 436). Thus, AC's compensation from SD constitutes wages, even if designated "salary."

SD repeatedly concedes that AC was an employee and that the compensation paid to AC was "salary." He claims that the amount by which her salary exceeded her revenue was a "loan." Repayment of that loan was the basis for his cross-complaint. But while a partnership may claim reimbursement of a partner's "draw," an employer most emphatically may not claim reimbursement of an employee's wages. Earned salary or wages are vested property rights. *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178). An employer has no right to assert *an off-set, withhold or make any deductions from wages due an employee. (Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 5).

9. The Court may imply that AC has made a prima facie showing of malice from the frivolous nature of SD's cross-action.

Because of its subjective nature, malice must of necessity be inferred from circumstantial evidence.

> [R]egardless of the absence of malice in the form of actually demonstrated ill will or bad faith, courts uniformly permit malice in malicious prosecution actions to be inferred from a want of probable cause. (*Singleton v. Singleton*, 68 Cal.App.2d 681, 696.) As one commentator indicates, "(r)egardless of the theory on which a court relies to find

> malice, a close factual analysis of the cases suggests that malice is almost always found from the same facts as those which establish lack of probable cause." [Citation].

Malice is particularly inerrable when the underlying action is not just lacking in probable cause, but is outright frivolous. (*George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 820 ["[O]ne inference to be drawn from the frivolous nature of [a] lawsuit[is] a malicious intent."]). Here, SD's complete failure to produce evidence of probable cause gives rise to a strong inference that both he and his attorney had actual knowledge that his cross-action was not merely untenable, but frivolous.

The Court is left with no other reasonable conclusion but that SD filed his cross-complaint for an ulterior purpose. SD adopted the age-old strategy of fighting fire with fire. He filed his cross-action not because he thought he could prevail, but solely to increase AC's costs of litigation and to thereby force her to capitulate. Filing suit without probable cause and for an improper ulterior motive establishes the "malice" element of malicious prosecution. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494).

10. SD's unilateral dismissal of his cross-complaint without negotiation or consideration was a termination favorable to AC.

A. Where the evidence is ambiguous, the issue of favorable termination is a question of fact to be decided by the jury.

In order to prevail at trial, AC must satisfy the "favorable termination" requirement by proving by a preponderance of the evidence that the facts surrounding SD's voluntary dismissal of his cross-complaint were indicative of her innocence. (*Chauncey v. Niems* (1986) 182 Cal.App.3d 967, 976). But in order to defeat the present motion, AC need only make a prima facie showing of those facts. (Code Civ. Proc., § 425.16 subd. (b)(1)). SD claims that he dismissed his cross-complaint in the underlying action for "financial reasons." In *Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, relied on by SD, the Court upheld the trial court's

denial of summary judgment on a malicious-prosecution cause of action. The defendant claimed he had dismissed the underlying action for financial reasons. But the Court held that the facts were ambiguous and therefore not an adequate predicate for summary judgment.

> [T]he fact of whether [plaintiff] lacked the financial ability to pursue the litigation and the operational effect of that circumstance on any attempt to equate her voluntary dismissal with prejudice to an unfavorable termination . . . is a question of fact for the jury to decide.

Here, the reasons for SD's dismissal of his cross-complaint are not merely ambiguous. The circumstances surrounding the dismissal overwhelmingly indicate that SD knew his cross-complaint was untenable from the time he filed it.

B. The facts surrounding SD's dismissal of his cross-complaint are inconsistent with his doing so for financial reasons.

SD relies heavily on *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337 (see SD MPA 9-10) and deceptively states that the circumstances at issue in that case were "virtually identical" to those here. In the underlying case in *Oprian*, the Court of Appeal had already decided in favor of Stern concluding that there was no substantial evidence to support the verdict on the cross-action against him. At oral argument, the appellate court asked whether Stern would retry his complaint against Oprian if the court reversed the judgment on Oprian's cross-complaint against Stern. (*Id*. p. 342). Counsel responded that Stern would probably forego further prosecution of the complaint "rather than incur additional attorney's fees and the inconvenience of pursuing a second trial." The court did reverse judgment on the cross-complaint and based on the representation of Stern's counsel, ordered his complaint dismissed. (*Ibid*.)

Oprian then sued Stern and others for malicious prosecution claiming that the Court of Appeal's order for dismissal was a termination on the merits favorable to Oprian. (*Id*.) The trial court granted summary judgment in favor of defendants and

the Fourth District affirmed. (*Id*. p. 345).

The differences between the facts of *Oprian* and the instant case are obvious: In *Oprian*, the underlying case was litigated through trial, decided on the merits by jury verdict, and reviewed on appeal. Stern agreed to dismiss his complaint rather than incur the substantial additional attorney fees it would take to go through another jury trial and quite possibly another appeal. Moreover, the court of appeal's order reversing the judgment on the cross-complaint against Stern suggested that his action against Oprian was to some degree tenable.

Here by contrast, SD claims that he dismissed his cross-complaint ten days before a nonjury trial merely in order to avoid the cost of hiring expert witnesses. The falsity of that claim is suggested by SD's outrageous statement, without any supporting evidence, that those costs would have exceeded $40,000. (SD Decl. ¶ 13).

Moreover, unlike in *Oprian*, no court order or judgment has given any indication that SD's cross-complaint was tenable.

11. Conclusion.

The evidence set forth in SD's own brief show far more than prima facie that he filed his underlying cross-complaint for the improper ulterior purpose of forcing AC to settle and with the actual knowledge that he had not a shred of evidence to support it.

On the issue of favorable termination, SD provides nothing but his own uncorroborated declaration. And the evidence strongly suggests that SD knew that his cross-action was frivolous from the outset and that he dismissed it only after realizing that his fraud had been exposed.

AC asks the Court to deny the special motion to strike and to award attorney fees in accordance with the Declaration of Carver Farrow, filed herewith.