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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
11

12 P6 LA MF Holdings SPE, LLC, a
limited liability company,
13
Plaintiff,
14
vs.
15
16 NMS CAPITAL PARTNERS I, LLC;
BRENTWOOD LEGAL SERVICES;
STEVEN ZELIG; GENGA &
17 ASSOCIATES, P.C.; WLA LEGAL
SERVICES, INC.; JOHN GENGA;
18 MILLER BARONDESS LLP; LOUIS
R. MILLER; JAMES GOLDMAN;
19 ALEXANDER FRID; JASON
TOKORO; AND DOES 1-10, inclusive,
20
Defendants.
21

Case No. 2:19-cv-1150-AB-AFMx
(Hon. André Birotte, Jr.)

**NOTICE OF SPECIAL MOTION
TO STRIKE COMPLAINT
PURSUANT TO CALIFORNIA
CODE OF CIVIL PROCEDURE
§ 425.16;**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

DATE: May 24, 2019
TIME: 10:00 a.m.
CRTRM: 7B

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1 **TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 24, 2019 at 10:00 a.m. or as soon
3 thereafter as the matter may be heard before the Honorable André Birotte, Jr. in
4 Courtroom 7B, located at 350 W. First Street, Los Angeles, California 90012,
5 Defendants Miller Barondess, LLP, Louis R. Miller, James Goldman, Alexander
6 Frid, and Jason H. Tokoro (the “Miller Firm”) will, and hereby do, move the Court,
7 pursuant to California Code of Civil Procedure § 425.16, for an order striking the
8 Complaint filed by Plaintiff P6 LA MF Holdings SPE, LLC on February 14, 2019
9 against the Miller Firm.

10 Section 425.16 – known as the “anti-SLAPP” statute – is a means to quickly
11 dispose of causes of action arising from a defendant’s exercise of his or her
12 constitutional right to petition for redress of grievances. The anti-SLAPP statute can
13 be used against state law claims asserted in federal court. *Thomas v. Fry’s Elecs.,*
14 *Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005) (per curiam). The anti-SLAPP analysis
15 is a two-prong inquiry: (1) the defendant(s) must show that the claims arise from
16 protected activity; and (2) the burden then shifts to the plaintiff(s) to produce
17 admissible evidence to demonstrate a probability of prevailing on the merits of the
18 claims. *Baral v. Schnitt*, 1 Cal. 5th 376, 384 (2016). “An anti-SLAPP motion is
19 available to defendants in federal court.” *Graham-Sult v. Clainos*, 756 F.3d 724,
20 735 (9th Cir. 2014).

21 The Complaint alleges a single cause of action against the Miller Firm for
22 malicious prosecution. It is well-established that a claims for malicious prosecution
23 arises from protected petitioning activity. *See* Cal. Civ. Proc. Code §§ 425.16(e)(1)
24 & (2).

25 Because the Complaint arises from protected activity, the burden shifts to
26 AEW to demonstrate a probability of prevailing on the merits. AEW cannot do so.
27 There is no evidence that the Miller Firm brought the underlying action without
28 probable cause or with malice – two requirements necessary to support a malicious

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1 prosecution claim.

2 Pursuant to Section 425.16(c)(1), the Miller Firm is entitled to and requests
3 their attorneys’ fees and costs incurred in prosecuting this Motion.¹

4 This Motion is made following the conference of counsel pursuant to Local
5 Rule 7-3, which took place on April 10, 2019.

6 This Motion is based upon this Notice, the attached Memorandum of Points
7 and Authorities, the declarations of Louis R. Miller, James Goldman, A. Sasha Frid
8 and Jason Tokoro and exhibits thereto, the concurrently filed Request for Judicial
9 Notice, the concurrently filed Appendix of Exhibits, all pleadings and papers on file
10 in this action, and such other matter and evidence as may be presented at or before
11 the hearing on this Motion.

12 DATED: April 18, 2019

GARRETT & TULLY, P.C.

16 _____
STEPHEN J. TULLY
17 Attorneys for Defendants Miller Barondess,
18 LLP, Louis R. Miller, James Goldman,
Alexander Frid, and Jason Tokoro

26 ¹ Section 425.16(c)(1) mandates that the prevailing defendant on a SLAPP motion
27 “shall” recover that party’s attorneys’ fees and costs. If the Court grants this Motion,
28 the Miller Firm will file a separate fee motion. *See Ketchum v. Moses*,
24 Cal. 4th 1122, 1131-32 (2001).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit is a strategic maneuver to gain leverage in a long-standing real estate dispute by driving a wedge between a client and its lawyers. AEW is suing the Miller Firm for doing its job and for its legal work in representing a client in a hotly contested state court lawsuit. Because AEW's sole claim against the Miller Firm for malicious prosecution arises from protected activity, California's Anti-SLAPP statute requires dismissal of this lawsuit unless AEW can prove it is likely to prevail on the merits. AEW cannot. There is no *evidence* that the Miller Firm brought the underlying action without probable cause or with malice – two requirements necessary to support a malicious prosecution claim.

Here are the facts: AEW, an East Coast hedge fund, and NMS Capital Partners I, LLC ("NMS"), a Santa Monica-based real estate developer, are locked in a major business dispute over the parties' joint venture ("JV") involving nine mixed-use apartment buildings in West Los Angeles (the "Properties").

In 2010, NMS needed an equity investor to develop the Properties and, to that end, entered into a JV with AEW. The key inducement for NMS and its principal, Neil Shekhter, was the right to take out, or monetize, AEW's interest in the JV within 5 years by paying AEW the greater of: (1) 1.75 times its invested capital, or (2) a 24% annual return (the "Monetization Formula"). After the parties signed the JV agreement ("JVA"), AEW became the "investor member" and invested \$60 million. NMS became the "operating member," transferred its Properties to the JV, and also contributed millions of dollars.

From 2010 until 2013, everything went smoothly. In June 2013, after NMS had completed or substantially completed development of the Properties, NMS sought to repay AEW's investment, tendering \$106 million: \$60 million [AEW's investment] x 24% per annum x 3 years, based on Article 6.1 of the JVA. But by 2013, the Properties had appreciated in value by a lot more than 24% per annum.

1 For that reason, AEW refused to allow NMS to take out, or monetize, AEW's
2 interest in the JV.

3 In July 2014, NMS and other related entities filed a lawsuit in Los Angeles
4 Superior Court captioned *Lincoln Studios, LLC, et al. v. DLA, et al.*, Case No.
5 BC 551551 (Hon. Suzanne Bruguera) (the "*Lincoln* Action"). In April 2015, NMS
6 added AEW as a defendant in the lawsuit. NMS's lead attorney was Steven Zelig
7 and his law firm. Skip Miller and the Miller Firm stepped in as NMS's lead counsel
8 in November 2015. Miller and the firm took immediate action, including filing a
9 Third Amended Complaint ("TAC") that streamlined the case and attached extrinsic
10 evidence confirming NMS's take-out right.

11 In January 2016, AEW filed a motion for sanctions claiming that NMS's
12 principal, Shekhter, engaged in forgery and spoliation regarding a provision of the
13 JVA – a mutual Buy/Sell right contained in Article 11 – *not* the take-out provision
14 in Article 6.1 under which NMS sought to take out AEW's interest in the JV. The
15 sanctions motion was granted, and a default judgment was entered on Plaintiffs'
16 complaint and a cross-complaint that AEW had filed against NMS. On appeal, the
17 judgment was affirmed as to NMS, but reversed as to all other plaintiffs.

18 In this lawsuit, AEW is repackaging the state court litigation into a malicious
19 prosecution claim. Because there is no evidence that the Miller Firm did anything
20 wrong, AEW attempts to impute the alleged forgery, spoliation and misconduct on
21 the part of NMS to NMS's counsel, including the Miller Firm and its lawyers. This
22 is contrary to California law, and it cannot be a basis for a malicious prosecution
23 action. *Pattiz v. Minye*, 61 Cal. App. 4th 822, 828 (1998) ("The malfeasance or
24 dereliction of a client is not imputed to his or her attorney.").

25 Indeed, AEW presented the same claims of forgery and spoliation to two Los
26 Angeles Superior Court judges and asked that the Miller Firm be sanctioned –
27 essentially the same thing they are trying to do in this lawsuit. Both judges, Hon.
28 Susanne Bruguera and Hon. Michael Johnson, refused. In fact, the *Lincoln* court

1 signed a 94-page proposed order that AEW prepared almost verbatim but deleted all
2 of the provisions that would have imposed sanctions and made adverse findings
3 against the lawyers. AEW now wants a do-over of those decisions.

4 Malicious prosecution claims against attorneys are disfavored because they
5 create a chilling effect on legal representation. In order to show that the Miller Firm
6 acted without probable cause, AEW must prove that “any reasonable attorney”
7 would agree that all of NMS’s claims were “totally and completely without merit.”
8 *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 885 (1989) (citation omitted).
9 AEW cannot come close to meeting this burden.

10 The gravamen of this lawsuit is that the Miller Firm lacked probable cause to
11 pursue the claim that NMS had a take-out right under the JVA, and that the TAC
12 was a “sham.” AEW is wrong. The take-out right is supported by substantial
13 evidence that the Miller Firm considered before moving forward with the *Lincoln*
14 *Action*: (i) the “waterfall” provision in Article 6.1 which provides that AEW’s
15 interest goes to zero once AEW’s investment is repaid; (ii) the documents reflecting
16 the pre-JVA negotiations, which confirm that AEW promised NMS that it would
17 have the right to take out or buy out AEW’s interest in the JV; (iii) an email (the
18 congratulatory “Mazel Tov” email), a term sheet, and an internal AEW memo
19 confirming the take-out right; (iv) Shekhter’s contribution of four Properties that he
20 owned into the JV for below market value, which would have made no sense unless
21 NMS had a take-out right; (v) sworn third-party witness testimony confirming that
22 AEW had promised Shekhter the take-out right; and (vi) 2013 and 2015 negotiations
23 in which AEW made offers for NMS/Shekhter to buy it out and get the Properties.
24 (*See infra* Section V.A.1.)

25 After looking at just some of this evidence, Judge Michael Johnson in another
26 action between the same parties – *P6 LA MF Holdings I, LLC v. NMS Properties,*
27 *Inc.*, LASC Case No. BC584878 (the “P6 Action”) – held that the “evidence is
28 sharply divided” and that NMS “raised legitimate issues” about the exercise of the

1 take-out right in Article 6.1. Furthermore, the Court of Appeal in the *Lincoln* Action
2 specifically held that the TAC was *not* a “sham pleading.” Those findings confirm
3 that the Miller Firm had probable cause to pursue the case, and that there was no
4 malice.

5 AEW also harps on the fact that the TAC the Miller Firm filed in the *Lincoln*
6 Action substantially reduced and streamlined the allegations and causes of action
7 pleaded in NMS’s earlier complaints. (Compl., ¶¶ 1, 29, 132.) The law not only
8 encourages lawyers to drop questionable claims, but outright precludes a claim of
9 malicious prosecution for doing so. *Jenkins v. Pope*, 217 Cal. App. 3d 1292, 1301
10 (1990) (“To allow a malicious prosecution suit to be based on a cause of action
11 dropped from an amended complaint would discourage amendment of pleadings to
12 delete theories which come to appear untenable.”).

13 With respect to the forgery and spoliation, the expert testimony was in
14 conflict. NMS’s four experts opined that the findings of AEW’s experts were
15 incorrect and unsupported by the evidence. Significantly, because the evidence was
16 so much in dispute, the Court of Appeal declined to address and affirm the *Lincoln*
17 court’s ruling that NMS engaged in forgery. The Court of Appeal’s decision to leave
18 AEW’s forgery claim unresolved renders the forgery issue an open question without
19 preclusive effect. *Samara v. Matar*, 5 Cal. 5th 322, 333 (2018). Therefore, on this
20 additional ground, AEW cannot support a claim that the Miller Firm lacked
21 probable cause, let alone acted with malice.

22 Moreover, AEW’s contention that the Miller Firm made no effort to
23 investigate the facts is false. As AEW knows, the Miller Firm diligently and
24 repeatedly sought discovery, including a forensic examination of AEW’s data and
25 percipient and expert depositions, to gather further evidentiary support that there
26 was no forgery or spoliation. But AEW blocked and obstructed that discovery at
27 every step, and went so far as to admit to a third-party witness whom the Miller
28 Firm subpoenaed that AEW’s “goal [was] to keep everyone from being deposed.”

1 The Miller Firm was blocked from taking a single deposition, and AEW refused to
2 produce a single document to the Miller Firm.

3 Finally, AEW's contention that the Miller Firm should have resigned and
4 abandoned its client goes against the foundation of a lawyer's ethical duties. Good
5 lawyers do not run for the hills when they are faced with adversity in a lawsuit or
6 when hedge fund lawyers with unlimited resources accuse their client of
7 wrongdoing.

8 Rather than allege any facts that the Miller Firm knew of, or participated in,
9 NMS's misconduct, AEW merely hypothesizes that the "only explanation" for the
10 Miller Firm's defense of NMS against AEW's claims that NMS forged and
11 destroyed evidence is that it must have been "actively involved" in NMS's
12 misconduct. This self-serving accusation comes nowhere near to meeting AEW's
13 burden to prove lack of probable cause or malice, and is on its face improper.

14 The Miller Firm did their job as competent and ethical lawyers. There is not a
15 shred of evidence that they acted without probable cause or with any malice. AEW's
16 claims are designed to stop a respected Los Angeles firm from representing its
17 client. AEW wants the Miller Firm to throw its client under the bus and abandon it.
18 That's not going to happen. This is exactly the type of lawsuits that Anti-SLAPP
19 was designed to prevent. The Motion should be granted.

20 **II. FACTS**

21 In 2010, NMS entered into a JVA with AEW, whereby NMS contributed cash
22 and real property for further development by the JV, and AEW contributed capital.
23 (Ex. "B" to TAC (Ex. 2).) In 2013, NMS communicated its intent to buy out AEW's
24 interest under Article 6.1 of the JVA. (Ex. 6.)

25 AEW has asserted that, later in 2013, it received a version of the JVA –
26 "Version 2" – in which NMS's principal, Shekhter, had unilaterally altered a
27 separate provision of the JVA – the Buy/Sell right contained in Section 11 of the
28 JVA – by changing the provision's trigger from five to three years. (Ex. 26.)

1 However, in March 2015, AEW proposed that NMS buy out its interest in the
2 JV for an amount calculated under Article 6.1 of the JVA. (Ex. 12.)

3 In July 2014, NMS and its affiliated parties filed the *Lincoln* Action. In early
4 2015, NMS filed a first amended complaint that named AEW as a defendant.
5 (Declaration of Louis R. Miller (“Miller Dec.”) ¶ 9.) The Miller Firm did not
6 represent NMS at that time. (*Id.* ¶ 9.)

7 In August 2015, AEW filed a motion for a forensic examination of NMS’s
8 data contending, among other things, that Version 2 of the JVA, a 2010 “cover
9 letter” accompanying it, and a “botched” property management agreement (“PMA”)
10 were forgeries; and in October 2015, the *Lincoln* court issued orders for that forensic
11 examination. (Ex. 36.)

12 In November 2015, the Miller Firm took over as lead counsel for NMS. The
13 Miller Firm immediately got to work reviewing the pleadings, depositions,
14 documents, and evidence, and spoke with witnesses about the events at issue.
15 (Miller Decl. ¶ 18.) Thereafter, the Miller Firm filed the TAC on January 13, 2016.
16 (Miller Decl. ¶ 21; (Ex. 2).) The TAC reduced the allegations which NMS had
17 asserted in the earlier pleadings, and streamlined the causes of action NMS alleged
18 to just six. (*Id.*) The TAC alleged that Article 6.1 of the JVA (which had been
19 invoked by NMS in 2013 and in AEW’s buy-out proposal in 2015) gave NMS the
20 right to take out AEW once AEW achieved, from NMS or from distributions from
21 the JV, a certain return on its investment in the JV. (TAC (Ex. 2) ¶¶ 8-10, 13, 22,
22 25-26.)

23 In January 2016, AEW demurred to the TAC. (Ex. 25.) In June 2016, the trial
24 court sustained AEW’s demurrer without leave to amend, and also held that NMS’s
25 complaint was a “sham” pleading.” (*Id.*, pp. 5-7) As discussed below, that ruling
26 was overturned on appeal.

27 Also, in January 2016, AEW filed a motion in the *Lincoln* Action for
28 sanctions against NMS and the Miller Firm, alleging forgeries, spoliation of

1 evidence and perjury by NMS. (Ex. 26.) The Miller Firm opposed the motion by
 2 submitting affirmative evidence that no one at the firm had any knowledge or
 3 involvement in the misconduct alleged by AEW. (Ex. 42 hereto.) The Miller Firm
 4 also advised the court that when it was retained, counsel for AEW threatened Mr.
 5 Miller and warned him to not take the case or else. (Ex. 42, (Ex. 1 thereto, ¶ 6).)

6 AEW filed another action seeking to remove NMS as manager of the
 7 properties it had contributed to the joint venture, entitled *P6 LA MF Holdings I, LLC*
 8 *v. NMS Properties, Inc.*. LASC Case No. BC584878 (Hon. Michael Johnson) (the
 9 “*P6 Action*”). In May 2016, AEW moved for a preliminary injunction. Later, in
 10 June 2016, AEW filed another motion for sanctions against NMS and the Miller
 11 Firm, which represented NMS in the *P6 Action*. In both motions, AEW relied on
 12 and alleged the same claims of forgeries, spoliation of evidence and perjury against
 13 NMS that AEW had alleged in the *Lincoln Action*. (Exs. 21, 38.)

14 In June 2016, Judge Johnson denied AEW’s motion for an injunction in the
 15 *P6 Action*, holding that the evidence of NMS’s alleged forgery and other
 16 misconduct was “sharply divided,” that the Miller Firm had raised “legitimate
 17 issues” concerning NMS’s right to buy out AEW under Article 6, and therefore
 18 AEW had “not established a reasonable probability of success” on that claim and its
 19 claim of NMS’s forgeries. (Ex. 38.)

20 On July 5, 2016, Judge Johnson issued an order denying AEW’s motion for
 21 sanctions against NMS and the Miller Firm, holding that sufficient disputed
 22 evidence existed to require that AEW’s claims of forgery and other misconduct by
 23 NMS be submitted to “the trier of fact” for adjudication. (Ex. 21.) Among the
 24 evidence the Miller Firm introduced on behalf of NMS were the declarations of four
 25 experts, each of whom disputed and disagreed with AEW’s claims of forgery and
 26 spoliation. (Exs. 16-19, 41.) AEW never moved for reconsideration or appealed any
 27 of the orders of Judge Johnson against AEW. (Miller Decl. ¶ 29.)

28 In the meantime, the Miller Firm sought both percipient and expert discovery

1 and depositions, and a forensic examination of AEW's data in the *Lincoln* Action, in
2 order to defend AEW's motion for sanctions, and to further support NMS's claims.
3 (Ex. 13.) AEW managed to block all of that discovery: AEW's former employee
4 Daniel Lennon testified that when the Miller Firm subpoenaed him for deposition,
5 AEW's counsel sought his agreement to represent him, and told him that AEW's
6 "goal" was to prevent all depositions the Miller Firm sought to take. (Ex. 14.) The
7 Miller Firm was blocked from taking a single deposition, or securing a single
8 document from AEW in the *Lincoln* Action. (Frid Decl., ¶ 12.) The *Lincoln* court
9 refused to allow the Miller Firm and NMS to take the depositions of the experts
10 AEW relied upon to support its claims of forgery and spoliation, and the court never
11 ruled on NMS's motion for a forensic examination of AEW's data. (Ex. 33.)

12 Ultimately, in contrast to the orders of Judge Johnson in the *P6* Action, the
13 court in the *Lincoln* Action granted AEW's motion for sanctions against NMS on
14 July 29, 2016, but ordered an evidentiary hearing be held to determine the nature of
15 the sanctions. (*Id.*)

16 That evidentiary hearing was conducted over eight days in October 2016. (*See*
17 Exs. 15, 28.) As in any evidentiary hearing or trial, the Miller Firm made decisions
18 concerning which witnesses to call and what evidence to introduce concerning the
19 claims of forgery, spoliation and perjury AEW relied upon to seek sanctions. (*Id.*)

20 In its closing argument, AEW aggressively argued that the Miller Firm be
21 sanctioned for its supposed knowledge of, and participation in, NMS's misconduct.
22 (Ex. 28.) In its post-hearing briefing and proposed order, AEW made the same
23 argument and submitted a draft order that included findings that sanctions should be
24 imposed on the Miller Firm based on the same supposed knowledge and
25 participation. (Exs. 27, 29-31.)

26 On November 22, 2016, the trial court signed AEW's proposed order nearly
27 verbatim. (Ex. 33.) Importantly, however, the trial court rejected AEW's claims
28 against the Miller Firm, and struck from the order any findings or sanctions against

1 the Miller Firm. (*Id.*) AEW never moved for reconsideration, nor did it appeal the
 2 trial court’s denial of AEW’s request for sanctions against the Miller Firm. (Miller
 3 Decl. ¶ 29.) In December 2016, the trial court held a “prove-up” hearing, refusing to
 4 let NMS or its lawyers participate, and entered judgment against NMS on its
 5 complaint against AEW and on AEW’s cross-complaint. (Ex. 1.) NMS timely
 6 appealed the judgment. (Ex. 3.)

7 NMS appealed from both the order granting sanctions and the judgments.
 8 (*Id.*) The Court of Appeal reversed the dismissal of the TAC, holding that it
 9 “adequately allege[d] causes of action for breach of contract, fraud and breach of
 10 fiduciary duty.” (Ex. 4, pp. 2, 12-16.) The Court only affirmed the dismissal of NMS
 11 Capital’s First Cause of Action for breach of contract (concerning Section 6 of the
 12 JVA). (*Id.*, p. 2.) It reversed with respect to all other claims and specifically held
 13 that the TAC was not a “sham pleading.”² (*Id.*)

14 With respect to sanctions, the Court of Appeal affirmed a portion of the trial
 15 court’s award of terminating sanctions against *only* NMS. (Ex. 22, p. 17.) None of
 16 the other *Lincoln* plaintiffs were terminated, and the matter was sent back to the trial
 17 court for further proceedings on plaintiffs’ claims. (Ex. 22, p. 26.)

18 **III. LEGAL STANDARD ON ANTI-SLAPP MOTIONS**

19 Pursuant to California Code of Civil Procedure section 425.16(b)(1), “[a]
 20 cause of action against a person arising from any act . . . in furtherance of the
 21 person’s right of petition or free speech . . . in connection with a public issue shall
 22 be subject to a special motion to strike, unless the court determines that the plaintiff
 23 has established that there is a probability that the plaintiff will prevail on the claim.”

24 _____
 25 ² The “sham pleading” doctrine is based on “[t]he principle . . . of *truthful pleading*.
 26 . . . the court will disregard falsely pleaded facts.” *Larson v. UHS of Rancho Springs,*
 27 *Inc.*, 230 Cal. App. 4th 344, 336 (2014) (citation omitted). By finding that the Miller
 28 Firm’s pleading of NMS’s Article 6 take-out right was not a sham, the Court of
 Appeal necessarily found that the pleading was not untruthful and that it did not
 plead any false facts.

1 In applying Section 425.16, courts consider the pleadings, affidavits and
2 declarations stating the facts upon which the liability or any defense is based. Cal.
3 Civ. Proc. Code § 425.16(b)(2); *Salma v. Capon*, 161 Cal. App. 4th 1275, 1289-90
4 (2008). The anti-SLAPP analysis has two prongs:

5 First, defendants must make a prima facie showing that the claims “arise
6 from” protected activity; namely, “any act of that person in furtherance of the
7 person’s right of petition or free speech under the United States Constitution or the
8 California Constitution” Cal. Civ. Proc. Code § 425.16(b)(1). “[A] court must
9 generally presume the validity of the claimed constitutional right in the first step of
10 the anti-SLAPP analysis.” *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089 (2001).
11 The challenged claims need only arise in part from protected activities. *Fox*
12 *Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 307-08 (2001).

13 Second, if the claims arise from protected activity, the burden shifts to
14 plaintiffs to show, by “competent, admissible evidence,” a probability of prevailing
15 on the merits. *Roberts v. L.A. Cty. Bar Ass’n*, 105 Cal. App. 4th 604, 613-14 (2003).
16 If plaintiffs cannot make this showing, the claim is dismissed and defendants must
17 be awarded attorneys’ fees and costs. Cal. Civ. Proc. Code § 425.16(c)(1).³

18 **IV. AEW’S CLAIMS ARE PROTECTED ACTIVITY (FIRST PRONG)**

19 AEW asserts a single cause of action against the Miller Firm for malicious
20 prosecution. (See Compl. ¶¶ 116-136.) A claim for malicious prosecution always
21 arises from protected activity: “[b]y definition, a malicious prosecution suit alleges
22 that the defendant committed a tort by filing a lawsuit.” *Jarrow Formulas, Inc. v.*
23 *LaMarche*, 31 Cal. 4th 728, 735 (2003); *Kleveland v. Siegel & Wolensky, LLP*, 215
24 Cal. App. 4th 534, 548 (2013). Therefore, AEW has the burden to prove “a
25 probability of prevailing” on its claim. *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th
26

27 ³ State law claims in federal complaints are subject to an anti-SLAPP motion. See
28 Thomas R. Burke, *Anti-SLAPP Litigation* § 2:110 (Sept. 2018 Update) (collecting
cases); *Thomas v. Fry’s Elecs., Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005).

1 180, 192 (2005) (citation omitted).

2 **V. AEW CANNOT ESTABLISH A PROBABILITY OF PREVAILING**
 3 **(SECOND PRONG)**

4 “To establish a cause of action for the malicious prosecution of a civil
 5 proceeding, a plaintiff must [show] that the prior action (1) was commenced by or at
 6 the direction of the defendant and was pursued to a legal termination in his,
 7 plaintiff’s, favor; (2) was brought without probable cause; and (3) was initiated with
 8 malice.” *Bertero v. Nat’l Gen. Corp.*, 13 Cal. 3d 43, 50 (1974) (citations omitted). In
 9 order to make a showing sufficient to withstand an anti-SLAPP motion, AEW
 10 “cannot simply rely on the allegations in the complaint.” *Paul for Council v.*
 11 *Hanyecz*, 85 Cal. App. 4th 1356, 1364 n. 5 (2001). Instead, AEW “must provide the
 12 court with sufficient evidence to permit the court to determine whether “there is a
 13 probability that [plaintiffs] will prevail on the claim.”” *DuPont Merck Pharm. Co. v.*
 14 *Superior Court*, 78 Cal. App. 4th 562, 568 (2000) (citation omitted). AEW cannot
 15 meet its burden here, for the reasons discussed below.

16 **A. Plaintiff Cannot Establish That The Miller Firm Lacked Probable**
 17 **Cause to Prosecute The Lincoln Action**

18 In order to establish that the Miller Firm lacked probable cause for pursuing
 19 the *Lincoln* Action, AEW must show that the Miller Firm had knowledge sufficient
 20 to convince “any reasonable attorney” that NMS’s claims were untenable and
 21 frivolous: that is, totally and completely without merit. *See Sheldon Appel*, 47 Cal.
 22 3d at 885 (in order to avoid a “chilling effect on the assertion of litigants’ rights,” an
 23 attorney’s actions should only be deemed “frivolous” where “any reasonable
 24 attorney” would agree that the action was “totally and completely without merit”
 25 (citation omitted)).

26 The existence or nonexistence of “probable cause” is a question of law to be
 27 determined by the trial court rather than the jury. 47 Cal. 3d at 884; *Plumley v.*
 28 *Mockett*, 164 Cal. App. 4th 1031, 1047 (2008). An objective test applies – i.e.,

1 whether any reasonable attorney would have thought the claim tenable. *Franklin*
 2 *Mint Co. v. Manatt, Phelps & Phillips, LLP*, 184 Cal. App. 4th 313, 333 (2010);
 3 *Marijanovic v. Gray, York & Duffy*, 137 Cal. App. 4th 1262, 1271 (2006). Under
 4 this standard, “[p]robable cause is a low threshold designed to protect a litigant’s
 5 right to assert arguable legal claims even if the claims are extremely unlikely to
 6 succeed.” *Uzyel v. Kadisha*, 188 Cal. App. 4th 866, 927 (2010); *Sheldon Appel*, 47
 7 Cal. 3d at 886. This rather lenient standard for bringing a civil action reflects “the
 8 important public policy of avoiding the chilling of novel or debatable legal claims.”
 9 *Sheldon Appel*, 47 Cal. 3d at 885. Attorneys “have a right to present issues that are
 10 arguably correct, even if it is extremely unlikely that they will win” *Id.* (citation
 11 omitted); *see also Grindle v. Lorbeer*, 196 Cal. App. 3d 1461, 1467 (1987)
 12 (“Zealous representation sometimes requires an attorney to go out on a limb, to be
 13 innovative and creative in fashioning theories of liability or defense.”).

14 In determining whether an action was supported by probable cause, the court
 15 must construe the allegations and evidence in the underlying suit liberally, and in a
 16 light most favorable to the plaintiff in that action, i.e., malicious prosecution
 17 defendant. *Sangster v. Paetkau*, 68 Cal. App. 4th 151, 164-65 (1998). The Miller
 18 Firm was not required to predict how a trier of fact would weigh competing
 19 evidence, or to abandon its claim if it thought that the evidence would ultimately
 20 weigh against its client. *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 824
 21 (2002). Indeed, the Miller Firm’s ethical obligation required that it resolve all
 22 reasonable doubts in favor of its client, NMS. *Model Rules of Prof’l Conduct*
 23 r. 3.4(b) (Am. Bar Ass’n 2018); *Model Code of Prof’l Responsibility DR 7-*
 24 *102(A)(4)*, EC 7-6 (Am. Bar Ass’n 1980). This rule is not altered by the fact the
 25 client’s adversary disputes the client’s representations, or even if the attorney doubts
 26 the client’s credibility. *Tool Research & Eng’g Corp. v. Henigson*, 46 Cal. App. 3d
 27 675, 684 (1975), *disapproved on other grounds by Sheldon Appel*, 47 Cal. 3d at
 28 882–83.

1 Finally, AEW's "group pleading" of allegations against all defendants in
 2 order to conflate the Miller Firm attorneys with its client and other attorneys is
 3 improper as a matter of law. (*See, e.g.*, Compl. ¶¶ 4, 6, 10, 61, 88-89.) AEW may
 4 not impute to the Miller Firm the knowledge or acts of its client to satisfy AEW's
 5 burden to prove a lack of probable cause on the part of the Miller Firm. *Zeavin v.*
 6 *Lee*, 136 Cal. App. 3d 766, 772-73 (1982) (client's conduct cannot be imputed to the
 7 attorney in malicious prosecution action).

8 **1. There Was Probable Cause for the Allegations in the TAC**

9 **(a) Evidence Supported the Article 6 Claim in the TAC**

10 AEW alleges that the Miller Firm did not have probable cause to plead that
 11 Article 6 of the JVA provided NMS with a take-out right, as set forth in the TAC.
 12 (Compl. ¶¶ 49, 81, 107, 131.) This is incorrect.

13 After the Miller Firm took over as lead counsel in the *Lincoln* Action, it
 14 prepared and filed the TAC. (Miller Decl. ¶ 21; Ex. 2.) The 28-page TAC
 15 streamlined the case for trial and reduced the causes of action from 34 to 6. (*Id.*) The
 16 TAC alleged that Article 6 of the JVA – which had been the basis for NMS's June
 17 2013 tender and was implicated by AEW's buy-out proposal in March 2015 – gave
 18 NMS the right to take out AEW's interest in the JV per the Monetization Formula.

19 In the streamlined TAC, NMS alleged that pursuant to Article 6 of the JVA,
 20 NMS had the right to take out, or monetize, AEW's interest within 5 years. Article
 21 6.1 prescribes different profit distributions to AEW in seven successive stages –
 22 what is known as a "waterfall provision." (Ex. "B" to TAC (Ex. 2), pp. 35-36.) As
 23 the TAC alleged, Article 6 provides that at the final stage, the distributions schedule
 24 would cease to exist because at that point AEW received all of the funds it was due:
 25 "*one hundred percent (100%) shall be distributed to Operating Member [NMS] if*
 26 *within five (5) years from the date hereof Investor Member [AEW] receives all*
 27 *amounts it is entitled to receive under Article 6.1(i) through (vi)*"; that is, either a
 28 24% return-on-investment or 1.75 times AEW's capital contributions. (Art.

1 6.1(b)(vii) (emphasis added.) Article 6 also negated AEW’s right to any
 2 distribution if the business ever liquidated. (Article 6.2 incorporates Article 6.1
 3 waterfall.) Accordingly, if “within five years,” AEW received the prescribed
 4 1.75/24%-return, AEW’s economic interest in the JV would be eliminated forever –
 5 what the parties call a “take-out.” (Ex. 2 (TAC), ¶¶ 8-10, 13, 22, 25-26.)

6 The Miller Firm’s interpretation of Article 6 was reasonable and in accord
 7 with well-settled rules of contractual interpretation. “The court will if possible give
 8 effect to all parts of the instrument and an interpretation which gives a reasonable
 9 meaning to all its provisions will be preferred to one which leaves a portion of the
 10 writing useless or inexplicable; and if this is impossible an interpretation which
 11 gives effect to the main apparent purpose of the contract will be favored.”
 12 *Heidlebaugh v. Miller*, 126 Cal. App. 2d 35, 38 (1954) (citing *McNeil v. Graner*, 91
 13 Cal. App. 2d 858, 863–64 (1949)).

14 To construe Article 6 to mean that, even after AEW had been paid its full
 15 distribution under the seventh stage of the waterfall, and regardless of whether it
 16 was paid by NMS or paid via distributions declared by AEW, AEW would remain
 17 as a member would have been contrary to the economic and practical operation of
 18 the JV. It would also have been contrary to the points negotiated by the parties, as
 19 confirmed in various documents. In short, it was reasonable to construe Article 6 as
 20 providing that upon completion of the final stage of the waterfall, AEW’s interest in
 21 the JV would be bought out by NMS and converted to money – that is, “monetized.”

22 Moreover, the law is clear that where there is extrinsic evidence relevant to
 23 contract interpretation, the evidence must be considered. Therefore, a court may not
 24 interpret a contract on demurrer “without allowing the parties an opportunity to
 25 present extrinsic evidence” relevant to the interpretation. *Fremont Indem. Co. v.*
 26 *Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 114-15 (2007).

27 The extrinsic evidence supported the allegations in the TAC that the parties
 28 knew and agreed that Article 6 of the JVA provided NMS with a take-out right as

1 distinct from the Article 11 buy/sell rights afforded to both NMS and AEW:

- 2 • May 2010 “Mazel Tov” Email: On May 19, 2010, AEW’s Eric Samek sent
3 NMS an email congratulating NMS on the deal and confirming the
4 Monetization Right: “AEW minimum equity multiple [would be] 1.75” and
5 that “[i]f NMS monetizes all of AEW’s investment within 5 years then NMS
6 will keep all proceedings above AEW’s 24% return.” (Ex. 2, Ex. A.)
- 7 • May 2010 Term Sheet: AEW further confirmed the deal by sending NMS a
8 term sheet that stated that if AEW’s investment has been “monetized ... within
9 five years,” then 100% of the JV’s proceeds would go to NMS. (Ex. 5.)
- 10 • August 2010 AEW Investment Committee Memo: An internal AEW memo
11 showed that AEW understood and based its projections on the assumption that
12 if it received a 24% return on its invested capital, its interest in the JV would
13 go to zero. (Ex. 41, p. 11.)
- 14 • Property Transfers by NMS/Shekhter: NMS/Shekhter transferred to the JV
15 four properties at below fair market value. NMS only did this because of
16 Samek’s assurances that this “would be of no moment because of [NMS’s]
17 right and intention to take-out AEW’s interest within a few years” The
18 below market transfers make no sense if NMS did not have a take-out right.
19 (Ex. 2, ¶ 21.vii.)
- 20 • April 2013 Meeting: NMS and AEW had a meeting at a restaurant in Culver
21 City where they discussed buying out AEW’s interest in the JV per the take-
22 out right. Specifically, they discussed various ways to effectuate the take-out,
23 including bringing in outside money through loans or having NMS sell or use
24 equity in their other properties to buy out AEW; and thereafter exchanged
25 projections to effectuate the take-out. (Ex. 23, ¶ 84; Ex. 37 at 163:7-169:12.)
- 26 • June 2013 Letter: Per the discussions above, NMS notified AEW that it
27 intended to pay back AEW’s interest, as provided for in Section 6.1 of the
28 JVA. NMS stated therein that, under Section 6(b) of the JVA, AEW’s interest
in the JV would become zero if, within five years of the formation of the JV,
AEW had received 1.75 times its invested capital and a 24% IRR. (Ex. 6.)

(b) **AEW’s Conduct Confirms That the Miller Firm Had
Probable Cause to Pursue the Lincoln Action**

In construing the terms of a contract, the acts and conduct of a party with
knowledge of its terms, and before a controversy arose, are relevant to the parties’

1 intentions at the time of contracting. *S. Pac. Transp. Co. v. Santa Fe Pac. Pipelines,*
2 *Inc.*, 74 Cal. App. 4th 1232, 1242 (1999).

3 AEW has asserted that when it received the allegedly forged “Version 2” of
4 the JVA on July 19, 2013, it believed at that time Version 2 “must be a forgery”
5 because the terms of the Buy-Sell in Article 11 had been changed. (Samek
6 September 21, 2015 Decl. ¶ 6 (Ex. 11).) Notwithstanding this assertion, in March
7 2015 – before AEW was sued in the *Lincoln* Action – NMS and AEW had a
8 meeting during which the parties discussed NMS’s right to take-out, or monetize,
9 AEW’s interest in the JV under Section 6. (Declaration of James Goldman
10 (“Goldman Decl.”) ¶ 9 and Ex. 12.) Shortly thereafter, in March 2015, AEW made
11 an offer to allow NMS to buy-out AEW for “24% of IRR on AEW’s capital
12 contributions, “that is, \$135 million. (Ex. 12; Goldman Decl. ¶ 10.) This buy out of
13 AEW at “24% of IRR” is quoted from Article 6.1 of the JVA which – entirely
14 consistent with AEW’s own June 2013 buy-out proposal – the Miller Firm alleged
15 in the TAC gave NMS that same buy-out right. (See March 10, 2015 AEW email to
16 NMS and attached settlement term sheet (Ex. 12); *compare to* JVA (Ex. B to TAC,
17 Ex. 2) pp. 35-36; TAC ¶¶ 8-10, 13, 22, 25-26.)

18 **(c) Third-Party Witnesses Confirmed the Take-Out Right**

19 Two separate third-party witnesses unaffiliated with NMS confirmed that
20 AEW promised NMS the buy-out right: (i) Ed Zimbler and (ii) Daniel Lennon.
21 (Zimbler Depo. (Ex. 35) at 26:15-27:16; Ex. 14.) Zimbler, the broker who put NMS
22 and AEW together, testified that he introduced NMS to AEW because AEW’s
23 Samek told him that AEW had a unique JV program under which NMS could “take-
24 out” AEW’s interest in the JV. (Zimbler Depo. (Ex. 35) at 68:19-69:18) He
25 confirmed that the take-out right was different than the buy/sell right which appears
26 in Section 11. (*Id.* at 40:24-41:2, 42:16-44:7.)

27 Lennon worked under Samek at AEW. (Ex. 14 ¶ 8.) In a sworn declaration,
28 Lennon confirmed that Shekhter’s understanding of the buy-out provision in Article

1 6 was exactly the same as AEW/Samek's. (*Id.* ¶ 10.) Samek told Lennon that NMS
 2 had the right to monetize AEW within five years by paying AEW 1.75 times AEW's
 3 investment or a 24% yearly return, whichever was greater. (*Id.*) All of AEW's
 4 underwriting on the deal was based on the same understanding. (*Id.* ¶ 11.)

5 But Samek also told Lennon that even though this was the deal, unbeknownst
 6 to Shekhter, AEW did not intend to let Shekhter monetize AEW's investment in the
 7 JV. (*Id.* ¶ 12.) AEW/Samek concealed AEW's true intentions regarding the JV from
 8 Neil. (*Id.*)⁴

9 (d) **Another Court Confirmed That NMS's Article 6 Claim**
 10 **Had Merit**

11 NMS Properties, Inc. ("NMS Properties"), an affiliate of NMS, managed the
 12 Properties. (P6 Compl. (Ex. 34), ¶ 1.) While the *Lincoln* Action was pending, AEW
 13 filed the *P6* Action. In it, AEW sought to terminate NMS Properties as manager and
 14 cause it to vacate the buildings. (*Id.*, Prayer for Relief.)

15 In June 2016, AEW sought an injunction against NMS Properties, forcing it
 16 to hand over possession of the Properties. (Ex. 38.) In opposing the motion, NMS
 17 showed that it had made a \$106 million buy-out offer under Article 6 of the JVA,
 18 thus zeroing out AEW's interest in the JV and eliminating its authority to terminate
 19 NMS Properties. (Ex. 39.) The court (Judge Johnson) denied the injunction, holding
 20 that "[o]n the merits, the evidence is sharply divided in all areas of the case" and
 21

22 ⁴ Lennon also testified that he believes he and AEW received the cover letter from
 23 Samek to Shekhter enclosing Version 2 of the JVA – which AEW contradictorily
 24 alleged in the *Lincoln* Action, and now again in its current complaint, was never
 25 received and is a forgery. (*See* Lennon Decl. (Ex. 14) ¶ 9; *cf* Compl. ¶¶ 65, 68, 82,
 26 95, 103(n), 105(b), 121.) Mr. Lennon further testified he had no reason to believe
 27 that NMS forged anything. (Lennon Decl. (Ex. 14) ¶¶ 9, 18.) At the evidentiary
 28 hearing on AEW's motion for sanctions, Lennon testified to the same effect; he said
 he had no reason to believe Version 2 of the JVA attached to the September 2010
 cover letter was a forgery. (Transcript of October 25, 2016 hearing (Ex. 15),
 pp. 139-42, 150, 155.)

1 that “[NMS] has raised legitimate issues concerning [AEW’s] authority to terminate
 2 the management agreements in light of the provisions contained in the joint venture
 3 agreement [Section 6.1].” (Ex. 38, p. 2.) Judge Johnson held: “The Court finds that
 4 the evidence is so sharply disputed that plaintiff [AEW] have not established a
 5 reasonable probability of success.” (*Id.* (emphasis added).)

6 The Miller Firm’s defeat of AEW’s injunction motion alone establishes
 7 probable cause. *See Paiva v. Nichols*, 168 Cal. App. 4th 1007, 1011 (2008);
 8 *Fleishman v. Superior Court*, 102 Cal. App. 4th 350, 357 (2002).

9 **2. The Miller Firm Had Probable Cause to Defend NMS With**
 10 **Respect to Discovery Misconduct Allegations**

11 **(a) NMS’s Experts Disproved AEW’s Allegations**

12 Counsel’s reliance on expert opinions supporting the claims of the client
 13 establishes the claims were “objectively tenable” and thus probable cause existed.
 14 *See Bixler v. Goulding*, 45 Cal. App. 4th 1179, 1189-90 (1996) (citation omitted);
 15 *New Albertsons, Inc. v. Superior Court*, 168 Cal. App. 4th 1403, 1431 (2008) (where
 16 two sets of experts offer opposing opinions concerning purported spoliation, the jury
 17 should decide the issue).

18 In January 2016, AEW filed its motion for terminating sanctions based on
 19 alleged discovery violations and the alleged forgeries. (Ex. 26) In opposition to the
 20 motion, the Miller Firm offered the testimony of four experts: Valery Aginsky,
 21 Kathleen Nicolaidis, William Flynn and Scott Cooper. These experts opined that the
 22 allegations of forgeries and spoliation against NMS were incorrect, not supported by
 23 evidence, based on the application of a methodology that is not generally accepted
 24 (and therefore inadmissible under the *Daubert* standard),⁵ inconsistent and
 25 speculative. (Ex. 16 ¶¶ 18-26; Ex. 17 ¶¶ 13-14, 38, 40-41; Ex. 18 ¶¶ 19-20, 31, 37,
 26 39, 43-44, 50-51, 54, 56, 59-60, 63-64; Ex. 19 ¶¶ 7-9, 12, 14, 16-21, 23-32, 41-44,
 27

28 ⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

1 48, 52, 58-60, 65, 69.)⁶

2
3 AEW did not subpoena any NMS witness to appear at the hearing, nor did it
4 subpoena anyone at the Miller Firm. (See, Exs. 8, 28, 32.) Yet, in this case, AEW
5 claims the Miller Firm’s decision not to call certain witnesses and introduce
6 evidence shows that the firm lacked probable cause to defend AEW’s claims.⁷
7 (Compl. ¶¶ 87, 125.) But that’s not the law. The Miller Firm may not be held liable
8 for defending AEW’s claims against NMS, because there is no such thing as
9 “malicious defense” in California. *Bertero*, 13 Cal. 3d at 52. Similarly, tactical and
10 strategic decisions of counsel at trial and in evidentiary hearings are left to the
11 judgment of counsel, and courts are loathe to second-guess such decisions. *People v.*
12 *Mitcham*, 1 Cal. 4th 1027, 1059 (1992). Such decisions are inadequate to satisfy
13 AEW’s burden to prove a lack of probable cause on the part of the Miller Firm. (*Id.*)

14
15
16 ⁶ NMS’s experts refuted AEW’s claims of forgery, testifying that based on the
17 forensic evidence, there was no evidence that Version 2, the “cover letter,” or the La
18 Cienega PMA was a forgery. (*Id.*) They also disputed AEW’s contentions regarding
19 spoliation. For example, Cooper testified that AEW’s expert Samuel Rubin’s
20 opinion that over 800 documents had not been produced by NMS was wrong. Rubin
21 in fact only identified 13 “missing” documents, and the review of Rubin’s own work
22 showed that eight of those documents had been provided by NMS – meaning that of
23 the 55 terabytes of data (the equivalent of 5.5 million bankers boxes, or 1500 miles
24 of paper laid end-to-end), AEW’s expert could only identify five missing
25 documents. (Ex. 19 ¶¶ 69, 100.) During the evidentiary hearing, Rubin admitted that
26 he had not identified any spoliation on NMS’s computer networks, servers, or
27 backup media collected through the forensic examination and that he did not
28 identify any spoliation relating to the JV records. (Ex. 32 at 6:5-19, 14:11-24,
15:21.)

⁷ As a result of AEW’s objection, the trial court prevented NMS from calling its
executive, Dino Ciarmoli (“Ciarmoli”), who would have confirmed that the JV
records were maintained on NMS’s servers – and not Shekhter’s personal home
computer – and that all of the data was provided to AEW (i.e., no spoliation).
(Declaration of Dino Ciarmoli (Ex. 40), ¶¶ 5-24.)

(b) The Miller Firm Was Blocked from Getting Discovery

1 AEW alleges that the Miller Firm conducted no investigation or discovery
 2 concerning AEW's claims of forgeries, spoliation and misconduct. (Compl. ¶ 118.)
 3 The claim is false. It is also disingenuous. In fact, the Miller Firm made substantial
 4 efforts to investigate and conduct discovery, but AEW obstructed those efforts every
 5 step of the way.

6 Among many other things, the Miller Firm requested that NMS's experts be
 7 permitted to forensically examine AEW's electronic data based on the self-evident –
 8 and fair – proposition that it was necessary to examine the data of both sides to
 9 determine whether Shekhter or AEW had created Version 2. After all, if NMS's
 10 examination disclosed that the alleged forgeries were on AEW's computers, then
 11 AEW's claims of forgery would be invalidated. (January 19, 2016 NMS motion for
 12 forensic examination (Ex. 13).) AEW refused the request and opposed NMS's
 13 motion to compel the examination. The *Lincoln* court refused to hear the motion.
 14 (Frid Decl., ¶ 11.)⁸

15 The Miller Firm also sought to depose AEW's experts, and obtain their files
 16 and documents supporting their opinions on forgery and spoliation in advance of the
 17 October 2016 evidentiary hearing. AEW refused, and blocked the depositions. The
 18 court ultimately denied NMS's motion to compel those depositions. (November 22,
 19 2016 order (Ex. 2 to Complaint) (Ex. 38), pp. 90-91.) In fact, AEW blocked all
 20 attempts by the Miller Firm to conduct written discovery and depositions of all
 21 witnesses to determine what actual evidentiary support AEW had for its claims. (*See*
 22

23
 24 ⁸ The critical need for this examination was all the more supported by the evidence
 25 of AEW's misconduct regarding the JVA: AEW itself had manipulated at least two
 26 other "versions" of the JVA by cutting and pasting NMS's signature from another
 27 agreement onto it, without authorization. (Ex. 13, NMS motion for examination
 28 January 19, 2016, p. 12; Ex. 24, Shekhter January 27, 2016 Declaration ¶¶ 9-16; *see*
 also Miller Firm's PowerPoint compendium of evidence of AEW's violations of the
Lincoln court's forensic order (Ex. 41), pp. 25-27.)

1 Lennon January 16, 2016 Declaration (Ex. 14) ¶ 19 [AEW’s counsel sought the
 2 witness’s agreement to be represented by AEW’s counsel to further AEW’s “goal . .
 3 . to keep everyone from being deposed”].⁹ The Miller Firm was prevented from
 4 taking a single deposition, and AEW never produced a single document in response
 5 to NMS’s discovery requests. (See, Frid Decl., ¶ 12.)

6 **(c) Sanctions Were Denied by Judge Johnson**

7 In June 2016, AEW filed a motion for terminating sanctions in the P6 Action
 8 based on the same facts that AEW alleged in the *Lincoln* Action – and which AEW
 9 re-alleges in this case. (See AEW motion for sanctions in P6 Action (Ex. 20), pp. 7-
 10 10 (same forgeries alleged in Complaint, e.g., ¶¶ 4-8, 10, 38-47, 54-55, 65-68, 82,
 11 95-96); pp. 10-13 (same destruction and spoliation of evidence alleged in, e.g.,
 12 Complaint, ¶¶ 73-77, 82, 86, 97-102, 103(s), (u)-(y), 106(a)-(c)); p. 15 (same
 13 allegations of knowledge, participation and “willfully blind to the truth” against the
 14 Miller Firm alleged in, e.g., Complaint ¶¶ 10, 98, 118, 122, 127).)

15 Judge Johnson denied the motion on the same record that was before Judge
 16 Bruguera. He held: “plaintiffs [AEW on behalf of P6] have accused defendant
 17 [NMS] of committing acts of serious misconduct, such as forgery, false testimony
 18 and the destruction of evidence . . . *this is a dispute for the determination by the trier*
 19 *of fact.*” (July 5, 2016 Notice and Minute Order of Judge Johnson in P6 Action
 20 (Ex. 21) (emphasis added).) Denial of a motion based on factual issues to be tried by
 21 the judge or jury demonstrates probable cause. *Roberts v. Sentry Life Ins.*, 76 Cal.
 22 App. 4th 375, 383 (1999). A claim that persuaded a judge establishes probable
 23 cause. *Cowles v. Carter*, 115 Cal. App. 3d 350, 359 (1981).

24
 25
 26 ⁹ See *Williamson v. Superior Court*, 21 Cal. 3d 829, 836-39 (1978) (agreement to
 27 suppress evidence of a witness is illegal). AEW’s obstructions implicate unclean
 28 hands as an additional defense that bars its claims of malicious prosecution against
 the Miller Firm. *Pond v. Ins. Co. of N. Am.*, 151 Cal. App. 3d 280, 289-91 (1984).

1 **B. AEW’s Claim Against The Miller Firm Is Barred By The Interim**
 2 **Adverse Judgment Rule**

3 California courts have held that certain interim rulings in the underlying case
 4 – e.g., denial of a summary judgment motion – establish the existence of probable
 5 cause to pursue the underlying claim. *See, e.g., Plumley v. Mockett*, 164 Cal. App.
 6 4th 1031, 1052 (2008).¹⁰ This has been referred to as the interim adverse judgment
 7 rule. The rationale is that the trial court had an opportunity to determine whether the
 8 underlying claim had merit when considering the motion and decided it had the
 9 minimal merit to allow it to proceed. *See Cowles*, 115 Cal. App. 3d at 358; *Plumley*,
 10 164 Cal. App. 4th at 1052 (“Claims that have succeeded at a hearing on the merits,
 11 even if that result is subsequently reversed by the trial or appellate court, are not so
 12 lacking in potential merit that a reasonable attorney or litigant would necessarily
 13 have recognized their frivolousness.” (citation omitted)).

14 As discussed above, the court in the *P6* Action denied AEW’s request for
 15 preliminary injunction on the grounds that there was a valid dispute between the
 16 parties as to whether Section 6 of the JVA permitted NMS to take-out AEW’s
 17 interest in the JV within five years. (Ex. 38.) That court also denied AEW’s motion
 18 for terminating sanctions, finding that there were issues of fact regarding AEW’s
 19 claims, and that each side had accused the other of forging certain documents. (Ex.
 20 21.) Although these findings were not binding in the *Lincoln* Action, for purposes of
 21 this case, they establish that the Miller Firm had probable cause to pursue NMS’s
 22 claims, including the claim that AEW breached Section 6 of the JVA by not

23 _____
 24 ¹⁰ *See also Wilson*, 28 Cal. 4th at 817 n.2 (citing *Bealmear v. S. Cal. Edison Co.*, 22
 25 Cal. 2d 337, 340 (1943)); *Carpenter v. Sibley*, 153 Cal. 215, 218 (1908); *Holliday v.*
 26 *Holliday*, 123 Cal. 26, 32 (1898); *Cowles*, 115 Cal. App. 3d at 356, 359; *Fairchild v.*
 27 *Adams*, 170 Cal. App. 2d 10, 15 (1959); *Crescent City Live-Stock Landing &*
 28 *Slaughter-House Co. v. Butchers’ Union Slaughter-House & Live-Stock Landing*
Co., 120 U.S. 141, 149-51 (1887); *Antounian v. Louis Vuitton Malletier*, 189 Cal.
 App. 4th 438, 450-51 (2010).

1 accepting NMS's June 2016 tender offer.

2 Probable cause is further established by the fact that AEW asked for the same
3 relief it seeks here in its sanctions motions filed in the *Lincoln* Action and *P6*
4 Action, and both courts rejected it. Specifically, AEW argued that the Miller Firm
5 should be sanctioned and held liable for AEW's attorneys' fees and costs for its
6 knowledge of and participation in NMS's alleged misconduct – the same allegations
7 AEW has made in this case. (Ex. 20, pp. 1-2, 15; Ex. 26.), pp. 23-24, 32, 40-42.)
8 AEW also asked the court to report the Miller Firm to the State Bar for its alleged
9 ethical violations. (Ex. 29, pp. 3, 41, 50.)

10 The Miller Firm opposed AEW's sanctions motion and submitted evidence
11 showing that it did not have any knowledge or involvement in any of the alleged
12 wrongdoing, and that the motion followed AEW's earlier threats against the Miller
13 Firm about representing NMS. (Nov. 7, 2016 Miller Decl., Ex. 42.) After being
14 presented with, considering, and hearing AEW's arguments and evidence –
15 including at the eight-day evidentiary hearing – Judge Bruguera rejected AEW's
16 claims against the Miller Firm. (*Compare* Ex. 29 with Ex. 33.)

17 Here, the fundamental foundation of AEW's claims are the motions, the
18 evidentiary hearing and the orders of the Superior Court in the *Lincoln* Action –
19 AEW in fact specifically relies on the pleadings and orders regarding its sanctions
20 motion, and attaches and incorporates them into its Complaint. (Compl. ¶¶ 1-11, 71-
21 136 and Exs. 1-3.) The claims of intentional wrongdoing and fraudulent
22 representation it asserts against the Miller Firm in this case are identical to the
23 claims AEW aggressively and repeatedly pursued against the Miller Firm in the
24 *Lincoln* Action. (*See, Id.* ¶¶ 10, 11, 91, 118, 122, 127-29; *compare to* Motion for
25 Sanctions (Ex. 26.), pp. 23-24, 32, 40-42.) The Superior Court rejected AEW's
26 claims. (Ex. 33.)

27 The same thing happened in the *P6* Action – AEW requested that the Miller
28 Firm be sanctioned and reported to the State Bar for pursuing NMS's claims. (Ex.

1 20, pp. 1-2, 15.) Judge Johnson also rejected AEW's claims against the Miller Firm.
 2 (See Ex. 21.)

3 At no time did AEW move for reconsideration of the orders in the *Lincoln*
 4 Action or *P6* Action. (Miller Decl. ¶ 29.) Neither did AEW appeal those orders. (*Id.*)
 5 Thus, in addition to its claims being barred under the interim adverse judgment rule,
 6 AEW's claims against the Miller Firm are also barred as an improper collateral
 7 attack on two orders of the Superior Court. See *Ricard v. Grobstein, Goldman,*
 8 *Stevenson, Siegel, LeVine & Mangel*, 6 Cal. App. 4th 157, 162 (1992); *Panos v.*
 9 *Great W. Packing Co.*, 21 Cal. 2d 636, 640 (1943).

10 **C. AEW Cannot Establish The Miller Firm Acted With Malice**

11 AEW's malicious prosecution claim separately fails because AEW cannot
 12 show that the Miller Firm acted with malice in either the filing or prosecution of the
 13 *Lincoln* Action.

14 Malice requires a showing of subjective intent or deliberate misuse of the
 15 legal system, i.e., actual hostility or ill will by the defendant towards the malicious
 16 prosecution plaintiff. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 494,
 17 498-99 (1998); *Kleveland*, 215 Cal. App. 4th at 553-54; see also *Daniels v.*
 18 *Robbins*, 182 Cal. App. 4th 204, 224 (2010) ("The motive of the defendant must
 19 have been something other than that of . . . the satisfaction in a civil action of some
 20 personal or financial purpose.") This showing must be based on affirmative
 21 evidence and not simply speculative inferences or conclusory allegations.

22 *Daniels* is on point. The Court of Appeal affirmed the trial court's grant of a
 23 SLAPP motion of a malicious prosecution lawsuit filed against attorneys where –
 24 like here – in the underlying case, the trial court granted terminating sanctions based
 25 on plaintiff's discovery misconduct. *Daniels*, 182 Cal. App. 4th at 210-11. The
 26 *Daniels* court held that attorneys in the underlying case cannot be held liable for
 27 malicious prosecution where the underlying case was terminated for discovery abuse
 28 in which the attorney was not involved. *Id.* at 227.

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1 Additionally, in *Daniels*, the court that when there is no evidence of any “ill
2 will” or “improper ulterior motive,” there can no claim for malicious prosecution.
3 *Id.* at 224. Here, there is *no evidence* that the Miller Firm harbored any ill will or
4 hostility towards AEW, or that any of its actions were driven by an intent to misuse
5 the legal process for an improper purpose. (Miller Decl., ¶ 16; Frid Decl. ¶ 19;
6 Goldman Decl., ¶ 19; Tokoro Decl., ¶ 20.) That is because none exists. The Miller
7 Firm was doing its job and representing its client in the *Lincoln* Action.

8 Instead, AEW speculates that “[t]he only explanation” for the Miller Firm’s
9 representation, defense and assertion of claims for its client NMS is that the Miller
10 Firm must have been “actively involved” in NMS’s misconduct.” (Compl. ¶¶ 98,
11 122.) Not only is this nonsense, but it also still fails to show that any of the actions
12 taken by the Miller Firm were driven by hostility towards AEW. The Miller Firm in
13 fact has shown by affirmative evidence that it did not have any knowledge of or
14 participate in the alleged misconduct. (See, Miller Decl., ¶ 13; Frid Decl. ¶ 11;
15 Goldman Decl., ¶ 13; Tokoro Decl., ¶ 13.)

16 **VI. CONCLUSION**

17 For the foregoing reasons, pursuant to Section 425.16, the Miller Firm
18 respectfully requests that the Court grant this Motion in its entirety, strike AEW’s
19 Complaint, and award the Miller Firm its reasonable attorneys’ fees and costs
20 pursuant to further motion.

21 DATED: April 18, 2019

GARRETT & TULLY, P.C.

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STEPHEN J. TULLY

Attorneys for Defendants Miller Barondess,
25 LLP, Louis R. Miller, James Goldman,
26 Alexander Frid, and Jason Tokoro
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Ventura, State of California. My business address is 4165 E. Thousand Oaks Blvd., Suite 201, Westlake Village, CA 91362-3839.

On April 18, 2019, I served true copies of the following document(s) described as **NOTICE OF SPECIAL MOTION TO STRIKE COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 425.16; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 18, 2019, at Westlake Village, California.



Rusty Holmgren

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