Filed 7/30/19

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN J. HAGENBUCH, Plaintiff and Appellant, v. JOHN FREMONT STEEL IV et al., Defendants and Respondents.	D073394 (Super. Ct. No. 37-2016-00022478-CU-NP-CTL)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

Hosie Rice, Spencer Hosie, Diane S. Rice and Darrell R. Atkinson for Plaintiff and Appellant.

Pettit Kohn Ingrassia Lutz & Dolin, Douglas A. Pettit and Christina G. Bernstein for Defendants and Respondents Paul A. Reynolds and Solomon Ward Seidenwurm & Smith LLP.

Dunn DeSantis Walt & Kendrick, Kevin V. DeSantis and James A. McFaul for Defendants and Respondents L.B. Chip Edleson and Edleson & Rezzo.

Lewis Brisbois Bisgaard & Smith, Corinne C. Bertsche for Defendant and Respondent Shustak Reynolds & Partners, P.C.

Bradley L. Jacobs, APC and Bradley L. Jacobs for Defendants and Respondents Diabetes Research Restitution LLC, John Freemont Steel IV, Kurt B. Toneys, Charles E. 'Buzz' Dupont, Andrew Garbarini, Howard Roth and Charles Robinson.

Wilson, Elser, Moskowitz, Edelman & Dicker, Robert W. Harrison and Marty B. Ready for Defendants and Respondents Craig L. Winterman and Herzfeld & Rubin, LLP.

Lucas & Haverkamp, Stephen D. Lucas and Patricia Jo Custer for Defendants and Respondents Richard Schoninger and SoCal Beach Club Holdings, LLC.

Baker & McKenzie, Colin H. Murray and Alexander G. Davis for Defendant and Respondent Richard B. Williamson.

Plaintiff and appellant John J. Hagenbuch was the former board chairman, and a creditor and shareholder, of MicroIslet, Inc. He filed a malicious prosecution complaint against Diabetes Research Restitution, LLC (DRR), its constituent members, and their attorneys (Respondents),[1] in connection with federal and state lawsuits by DRR that alleged Hagenbuch aided and abetted a scheme by company insiders to take over MicroIslet.

---

1 Respondents are: (i) Paul Reynolds, Solomon Ward Seidenwurm & Smith LLP, L.B. Chip Edleson, Edleson & Rezzo, and Shustak Reynolds & Partners, P.C.; (ii) DRR, John Freemont Steel IV, Kurt B. Toneys, Charles E. 'Buzz' Dupont, Andrew Garbarini, Howard Roth, and Charles Robinson; (iii) Craig L. Winterman and Herzfeld & Rubin, LLP; (iv) Richard Schoninger and SoCal Beach Club Holdings, LLC (SoCal); and (v) Richard B. Williamson.

When Hagenbuch filed his complaint, he possessed documents from the underlying litigation. The parties stipulated to a timeframe for Respondents to file special motions to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute. Hagenbuch's counsel subsequently alerted Respondents' counsel to a potential privilege issue, and discussions ensued. Respondents proceeded to file their anti-SLAPP motions. They then asked for return (or "clawed back") a large number of documents, and reproduced only a small portion. Hagenbuch moved for appointment of a discovery master to address the clawback, and included a continuance request in his anti-SLAPP opposition.

The trial court found the action was time barred as to the federal case, Hagenbuch had not met his burden on probable cause for the state case or on malice at all, and he had not established liability for those involved only in the federal case or as DRR members. The court also denied his continuance request. It granted the anti-SLAPP motions, and dismissed the action.

Hagenbuch argues the trial court abused its discretion by denying a continuance, and that he was deprived of due process. He also challenges other aspects of the court's rulings, and maintains he met his burden even without the clawed back documents. We conclude Hagenbuch does not establish reversible error based on the clawback, or otherwise, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. *Background*

MicroIslet was founded in 1998 by John Steel IV to develop new diabetes therapies. Hagenbuch, Steel's brother-in-law and an experienced investor, first purchased MicroIslet shares in 2002. In 2003, Steel, then chief executive officer (CEO), asked Hagenbuch to loan the company money; he provided $500,000, and later converted it to equity. Between 2002 and 2006, Hagenbuch acquired millions of shares of MicroIslet common stock, becoming its second largest shareholder. In January 2006, he became non-executive chairman of MicroIslet's board of directors (Board).

In November 2006, Hagenbuch provided a memorandum on financing strategy to the Board, which addressed the need for funding and raised the possibility of selling convertible debt.

In January 2007, Hagenbuch offered a $2 million bridge loan at the prime interest rate. The loan was unsecured and subordinated, with a one year maturity period and no penalty rate after maturity. The Board approved the loan. Hagenbuch indicated he would

---

2 Hagenbuch seeks to rely on evidence to which the trial court sustained objections, by arguing generally that all evidence was authenticated, providing footnotes for certain record citations, and briefly stating why exclusion was erroneous. He does not describe the evidence, specify all grounds for objection, or explain why the rulings were prejudicial. (See *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119 [appellant must show error "in the evidentiary ruling[]" and how the ruling "was prejudicial"].) We note most evidence appears to reflect undisputed matters (e.g., the company's financial challenges), not be relevant (e.g., certain events during bankruptcy), or already be in the record (e.g., a Sheppard Mullin memorandum). We do address a December 2008 e-mail from Steel, *post*.

be willing to convert the loan into equity on the same terms of any near-term financing deal. In March 2007, outside counsel Sheppard Mullin advised MicroIslet about its impending "zone of insolvency." In May 2007, Hagenbuch made another $1 million loan. The loan was unsecured (though not subordinated), and otherwise matured at the same time as the prior loan and had similar terms.

In June 2007, Hagenbuch raised the subject of recapitalizing or winding down the company. Instead, Steel approached Ronald Katz, who formed a group that would make a $1 million investment and obtain four Board seats. Hagenbuch resigned as chairman, and Katz replaced him. Other new Board members included Michael Andrews, who became CEO. When Hagenbuch stepped down, he offered to convert his debt into equity on the same terms as Katz's group, which the Board declined. Katz obtained loans with short maturity dates and penalty rates of 24 percent, ultimately placing what the parties represent was millions in debt.

In late 2007, MicroIslet had a successful meeting with the Food and Drug Administration and obtained input for their Investigational New Drug (IND) application. The IND would have been a significant step for MicroIslet.

In November 2007, Hagenbuch offered to extend his $2 million loan for one year, if the company paid the interest due and the principal of the $1 million loan. The Board rejected the offer, and MicroIslet defaulted in January 2008. Hagenbuch did not pursue collection. In July 2008, Hagenbuch e-mailed Andrews, and identified as a funding alternative a "pre-packaged bankruptcy filing" that "permits a conversion of most of the . . . debt into equity . . . ." In the summer of 2008, Hagenbuch learned from SEC

filings that other creditors received a penalty interest rate of 24 percent and asked Andrews for parity.

The Board agreed at its August 20, 2008 meeting to amend Hagenbuch's loans by increasing the penalty interest rate for the default period. The amendments extended the maturity dates to March 31, 2008 (i.e., MicroIslet remained in default), and did not contain forbearance language.

The same day, the Board resolved to form a special subcommittee to explore recapitalization alternatives. The subcommittee included Adam Lenain of Foley & Lardner, MicroIslet's new outside counsel. On August 21, Lenain circulated a memorandum titled "Restructuring Proposal," summarizing the committee's initial recommendation. In substance, it proposed existing debt holders would agree to convert their notes into newly created preferred stock, with the effect of significantly diluting existing shareholders. It also noted the possibility of reorganizing in bankruptcy.

Lenain participated in preparing a "Confidential Summary of Recapitalization Terms" (Term Sheet). The Term Sheet was "prepared for the purpose of seeking indications of interest only," and no party would be obligated until "definitive documents are signed by all parties" and approved by the Board.

On August 25, Hagenbuch and MicroIslet entered into the loan amendments.

On September 11, Hagenbuch e-mailed Andrews (copying Katz and another individual), stating in part, "I want to be joined at the hip with you and your team and believe that the number of shares that you as a group will receive as a result of this

recapitalization transaction should be fixed at a maximum number . . . ." On September 15, 2008, Hagenbuch signed the Term Sheet.[3]

In November 2008, MicroIslet filed for a Chapter 11 reorganization bankruptcy. Steel and Charles "Buzz" duPont formed an Ad Hoc Shareholders Committee, in part to object to the reorganization plan, and retained counsel. In January 2009, duPont e-mailed Hagenbuch, stating it was his impression Hagenbuch was "not necessarily allied with the 'insiders' at MicroIslet that commenced the voluntary bk plan"; he "would like to be able to communicate . . . in an effort to resolve this mess short of litigation"; and he could "forward some information" that "may assist you in resolving this matter quickly. . . ." In February 2009, the bankruptcy converted to a Chapter 7 liquidation.

In April 2009, Steel told Hagenbuch he had done "nothing wrong," requested he join a lawsuit against Katz and the insiders, and sent him a draft complaint. According to Hagenbuch, Steel asked him to join and/or fund the lawsuit again in February 2010 (indicating he was "not one of the bad guys" and requesting he "throw in a few shekels" to fund the suit), July 2010, and November 2011.

Steel and duPont formed the Bankruptcy Acquisition Corporation, which acquired the litigation claims against MicroIslet in August 2010 and converted to DRR in October 2010. The DRR Limited Liability Company Agreement (DRR Operating Agreement)

---

[3] Respondents state Hagenbuch received a presentation. Their citations reflect Andrews indicated Hagenbuch "was impressed by what he saw in the presentation . . . ." Hagenbuch did not recall a meeting with this type of presentation. In any event, there is no dispute he was familiar with the recapitalization plan.

reflected DRR's purpose is to pursue the MicroIslet claims. It provided for management and control by a Board of Managers. It also recognized the "[r]ight of [m]embers to [p]articipate in [l]itigation" and required managers to keep members informed of the litigation status (including monthly updates); permitted members "reasonable access" to counsel; and mandated that members be involved in settlement and consent to certain expenditures.

II. *Federal Case*

In December 2010, Craig Winterman, with Herzfeld & Rubin, LLP, filed a federal lawsuit on behalf of DRR against Katz, Hagenbuch, and many others, followed by an amended complaint (i.e., the federal case). It alleged a takeover scheme based on saddling MicroIslet with debt, and included causes of action for: (i) violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 United States Code section 1962; (ii) breach of fiduciary duty of corporate directors and officers; (iii) aiding and abetting breaches of fiduciary duty; and (iv) conspiracy to injure and convert property.[4] The RICO claim alleged the insiders committed mail and wire fraud while causing MicroIslet to become indebted, citing communications to investors and a press release, and Hagenbuch and other creditors agreed to participate through the making of loans. The breach, aiding and abetting, and conspiracy claims alleged the insiders either actively participated in the scheme or failed to protect the company; Hagenbuch and others knowingly aided and abetted those breaches; and defendants

---

4 DRR also asserted an insider trading claim, which is not at issue.

conspired to implement the scheme and wrongfully obtain ownership of MicroIslet. Paul Reynolds of Solomon Ward associated in as counsel, and Winterman withdrew.

The district court dismissed the RICO claim, finding in part that the reliance necessary to establish fraud could not be established because the investors had been turned down. The court dismissed the state claims without prejudice and delayed entry of the dismissal to allow "refil[ing] in state court with the applicable statutes of limitations tolled."

III. *DRR*

In January 2012, DRR retained L.B. Chip Edleson, of Edleson & Rezzo, as co-counsel to Reynolds, and filed a complaint in San Diego Superior Court (*DRR*). The operative first amended complaint alleged claims for breach of fiduciary duty and aiding and abetting such breach. For breach, DRR alleged that "[w]hen it became apparent that MicroIslet was on the verge of becoming immensely valuable, the Defendants developed and pursued a scheme to steal the business by saddling it with expensive debt that could not or would not be repaid and that they could then convert to ownership." It further alleged that rather than "seeking or accepting available funding," they made loans themselves or through associates, which was "all designed to cause the debt to go unpaid . . . ."

The aiding and abetting claim alleged defendants "knowingly conspired to implement the scheme . . . ." It further alleged, as to Hagenbuch, that Katz and others approached him "to join their scheme in order to make the debt harmonization approach work smoothly and consistently and, because Hagenbuch owned the only other large

outstanding debt . . . to avoid likely confrontation and challenge." It also stated he received the Lenain memorandum and debt harmonization agreement, and rather than resisting, agreed to become part of the plan, "which gave him a retroactive bump in interest . . . and converted his existing loans" to "the same toxic terms" given to the new creditors.[5]

Hagenbuch and the other creditor defendants demurred, which the trial court overruled. It found "the complaint allege[d] facts sufficient to support a cause of action for aiding and abetting against the demurring creditor Defendants—knowledge of the officer/director Defendants' breach of fiduciary duty by employing a 'scheme to steal the business' . . . and that the creditor Defendants gave substantial assistance or encouragement to the director/officer Defendants." It explained the complaint alleged the creditors knew about Katz's plan; had received "a key attorney-client memo (the Lenain memo) outlining the scheme in detail"; and "were given an agreement to 'harmonize' their debt and convert it to equity."

Hagenbuch and the creditor defendants successfully moved for summary judgment. Pertinent here, the trial court determined they established there was no triable issue of material fact as to the actual knowledge component of the aiding and abetting claim. It found there was no evidence defendants had knowledge of Katz's alleged plan, that there was other financing available and being turned down, or that the insiders were saddling the company with debt that could not be repaid. It also found the evidence DRR

---

5 The "debt harmonization agreement" appears to refer to the Term Sheet.

relied upon did not support knowledge of the alleged scheme. DRR appealed, and this court affirmed. (D069796, unpub. op., June 9, 2017.) Like the trial court, we found DRR's evidence lacking or insufficient, and determined it did not show the existence of a triable issue on actual knowledge.[6]

IV. *Proceedings Below*

On July 5, 2016, Hagenbuch filed a complaint for malicious prosecution, with the first cause of action based on the federal case and the second based on *DRR*.[7] On August 23, 2016, the trial court stayed proceedings pending conclusion of the appeal in *DRR*. As noted, that appeal concluded on June 9, 2017. On August 21, 2017, the parties stipulated for the court to terminate the stay and require any special motion to strike to be filed within 30 days (i.e., September 21), which the court approved the following day.

On September 8, 2017, Spencer Hosie, Hagenbuch's attorney, e-mailed Brad Jacobs, counsel here for DRR and certain of its members. Hosie indicated he was going through the *DRR* document productions; saw documents that might be privileged; and asked if they could indicate if there were any they wanted to claw back.

On September 9, Jacobs responded and asked Hosie to send him the documents. Hosie said he did not have a specific subset in mind. On September 13, Douglas Pettit,

---

6 Hagenbuch seeks judicial notice of the *DRR* court's April 2019 statement of decision following a trial as to other defendants. We decline to take notice, as this document is not relevant to the issues before us. (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6 [declining to take judicial notice of irrelevant court records].)

7 Hagenbuch also asserted claims for abuse of process, which are not at issue.

counsel for Reynolds and Solomon Ward, asked Hosie for the return of any privileged documents. He explained documents were produced in *DRR* "on an automated basis"; there was a clawback agreement requiring return of privileged documents; and failure to do so could "result in disqualification."

On September 14, Diane Rice, also counsel for Hagenbuch, responded, asking DRR to conduct a privilege review and provide a privilege log. She stated that if an "agreement . . . cannot be promptly reached, we will need to bring this matter to the Court's attention forthwith . . . ." The same day, Edleson wrote to defense counsel in *DRR*, alerting them to the privilege issue, asking for return of any documents reflecting communications between DRR and counsel, and stating they were "not aware of any inadvertently produced privileged documents."

On September 18 and 20, Hosie provided Pettit with exemplars, indicating he was uncomfortable continuing to go through the production due to the threat to disqualify.

On September 21, 2017, Respondents filed their anti-SLAPP motions, set for a hearing date of November 9, 2017, as well as demurrers and a motion to quash.[8] They submitted declarations denying ill will toward Hagenbuch, affirming a good faith belief he was liable, and/or reflecting they had not met him until the case or ever.

On September 25, Pettit indicated their clients identified a flaw in their screening process that "allowed some privileged documents to be inadvertently disclosed" and they "hope[d] to have a list for you and counsel in the underlying action shortly."

---

8 Williamson filed his motion later, but it was heard at the same time.

On September 28, Pettit advised Hosie there were "many inadvertently produced privileged communications" and asked for return of 197,954 pages of documents. Pettit explained counsel in *DRR* would reproduce documents after removing the privileged materials and "[i]f you believe this requires a continuance of the hearing date, please contact us to discuss logistics." Hosie responded that day, stating "this is on its face improper . . . ." Pettit replied, "I understand your frustration on timing and believe that we [sic] reach a solution."

On September 29, Hagenbuch filed a case management statement, in which he explained the clawback issue. He stated "Defense counsel have indicated that they understand that this could well jeopardize the briefing and hearing schedule, as indeed it will," and that he "hope[d] to discuss it substantively with defense counsel and the Court in the CMC scheduled for October 6." No transcript for the October 6 conference appears to be in the record.

On October 6, James McFaul, counsel for Edleson, told Hosie that Respondents expected to reproduce documents the following week. He proposed requesting a new hearing date in December. Hosie asked when they would get a privilege log, and did not address the hearing date. Pettit indicated they had not made a document production in this case, Hosie had not sent requests, and they were not providing a log. Hosie stated, "We agreed to reuse discovery from the prior case." Pettit replied, stating "[w]e never gave you documents" and he did not "recall any 'agreement' that you could use discovery from the underlying case." McFaul then said, "[i]f we are going to try to keep the

November 9th hearing date . . . , I think the most practical approach here would be for you to provide us the documents that you have identified to use in your opposition . . . ."

On October 11, Pettit e-mailed Hosie, adding 19,326 pages to the clawback and stating "the new production should be available tomorrow so we should be able to stay on track with the hearing date." On October 12, Hosie e-mailed Pettit, asking "Are you reproducing docs today? I am running out of time." Pettit stated the materials were being sent overnight. McFaul explained DRR removed and individually reviewed certain documents, which had been sent out; were "commencing the process of individually reviewing all of the potentially privileged documents"; and "[i]f non-privileged documents [were] located . . . , DRR [would] make a supplemental production."[9]

On October 13, Hagenbuch filed his opposition to the motion to quash, asking in the alternative for a continuance for discovery and to address the clawback. On October 18, Hagenbuch asked Respondents to agree to a discovery master, but they declined. Additional documents were reproduced the following week. Hagenbuch represents that a total of 18,363 pages were reproduced, while Respondents indicate it was approximately 25,000 pages.

On October 24, Hagenbuch filed a motion for appointment of a discovery master. He contended that, to the extent the anti-SLAPP discovery stay applied, the scope of the

---

9 On reply, Hagenbuch suggests that on October 12, Respondents' counsel "refused to continue" the hearing. His record citation is to Respondents' reply brief for anti-SLAPP motion, filed on November 2. Respondents did oppose his continuance request, but Hagenbuch does not identify an earlier refusal to continue.

claw-back constituted exceptional circumstances warranting a special master to resolve the privilege issues. He noted Respondents refused to produce a privilege log. Hosie provided a declaration stating "Hagenbuch['s] counsel and defense counsel in this case agreed that the parties would simply use the documents produced in the prior litigation."

On October 26, Hagenbuch filed an omnibus opposition to the anti-SLAPP motions. He requested that if the court did not deny the motions, that it continue them to allow for the special master assignment. The same day, the trial court issued a tentative ruling on the motion to quash, to continue that motion for jurisdictional discovery. It noted the clawback issue and cited standards for privilege logs, but did not propose a ruling on it.

On October 27, the trial court heard the motion to quash and addressed case management. Hosie indicated that at the October 6 case management conference, "defense counsel promised the Court that they would substantially reproduce the Friday [of] that week," and did not do that. The court asked Respondents how they make a privilege claim without "a [compliant] privilege log . . . ." Pettit stated there was never an agreement to use the documents and there had been no discovery, so there was no basis to object to the lack of a privilege log. Hosie maintained there were conversations about the earlier production, and he "may well have an email on it." The court stated, "If he has an email saying, yes, we agree you can use the documents that were produced in the underlying case, I think the problem is with the producing party." Pettit responded, "I don't believe he has such an email . . . ." The court determined "[t]here are more than two sides to this story" and indicated it would only rule on a discovery referee pursuant to a

formal motion. It also confirmed its tentative ruling on the motion to quash, and Hosie agreed to limit that discovery to jurisdictional facts.

On November 2, Respondents filed replies for their anti-SLAPP motions and attorney declarations. Pettit stated Hosie obtained the documents "from defense counsel in the underlying matter." Reynolds said they were "continuing to review the withheld documents . . . , and anticipate[d] that [they would] be making supplemental production(s) down the road."

On November 9, the trial court heard and granted the anti-SLAPP motions, and denied Hagenbuch's request for a continuance. At the hearing, Hosie argued he would have proof of his claims if not for the clawback. The court stated, "Your adversary says, if he could prove that, it was his duty to bring those papers in and seek leave to use them. Not give me a hearing date in a month and I'll do it in a year-long struggle with the discovery referee." Hosie responded, in part, that once they did the clawback, he "had no choice . . . ."

The trial court provided a written order. It explained any claim arising from the federal case accrued when it terminated, and Hagenbuch's complaint was not filed until years later—outside the applicable statutes of limitations. It further explained the federal and state cases were "two separate actions, as exhibited by plaintiff pleading two separate malicious prosecution counts . . . ."

The trial court then turned to *DRR*, and quoted its demurrer ruling at length. Focusing first on the attorneys, the court stated that "because the allegations in the complaint were true to the best of the lawyers' knowledge at the time the complaint was

filed, and because the trial court overruled the demurrer, the lawyers necessarily had probable cause to bring the claims in the underlying case." It then addressed whether there was a lack of probable cause for them to continue the lawsuit, and found Hagenbuch "failed to offer any evidence of an objective lack of probable cause in bringing the claims by DRR against him after the demurrer ruling (and before)." The court also found he did not establish the DRR defendants pursued *DRR* without probable cause, before or after the demurrer.

The trial court next determined there was no evidence of malice, for the federal case or *DRR*. It found the evidence showed the attorneys "bore no ill will towards Hagenbuch"; had "never met . . . Hagenbuch before the underlying lawsuits were filed"; and "assisted DRR since they believed Hagenbuch had acted wrongfully . . . . ." As for the DRR defendants, the court found Hagenbuch "offered no evidence in this respect" and their declarations "negate the existence of malice."

The trial court then addressed defendants who filed their own motions. It found attorney Winterman and Herzfeld & Rubin were only involved in the federal case; that cause of action was time-barred; and they could not be liable as to *DRR*. With respect to SoCal, a DRR member, and its owner Schoninger, the court found the complaint pled "limited charging allegations"; there was "no evidence that the prior lawsuits were brought" by them; and "no authority is cited that holds one . . . making an investment in an entity that brings a lawsuit is sufficient conduct to create liability for malicious prosecution." As for Williamson, another DRR member, the court found the complaint

similarly contained limited charging allegations, and his declaration established he did not direct Hagenbuch be sued and had not harbored ill will toward him.

Finally, the trial court denied Hagenbuch's request to continue the anti-SLAPP motions to permit appointment of a discovery referee. It explained:

> "This action has been pending for more than one year, well before the document 'claw back'. Plaintiff should have had admissible evidence to support his claims when he filed this action. He has had ample time to develop admissible evidence to support his counts (even while the case was stayed). Our system presupposes adequate prefiling legal research and factual investigation. (Citation.) Plaintiff seeks to turn this foundational notion on its head by seeking leave to conduct this investigation after filing the complaint. Further, the satellite litigation contemplated by the continuance request (plus the proposed appointment of a discovery referee) would consign the court to at least an additional year of litigation. This is antithetical to the policies underlying the Legislature's decision to enact section 425.16 in the first place."

Hagenbuch timely appealed.

DISCUSSION

I. *Anti-SLAPP Principles and Standard of Review*

Courts apply a two-step analysis when ruling on a motion to strike under the anti-SLAPP statute. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) A malicious prosecution action satisfies this step. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-734 (*Jarrow*).)

Second, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at p. 384.) Courts "have described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to

whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.* at pp. 384-385.) The trial court "should grant the motion 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." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*), superseded by statute on other grounds as noted in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547.)

Discovery is stayed upon the filing of an anti-SLAPP motion. (§ 425.16, subd. (g).) The trial court may still "on noticed motion and for good cause shown, . . . order that specified discovery be conducted . . . ." (*Ibid*.; see *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1189-1190; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499 [failure to comply with statute "by making a timely and proper showing" makes "discovery request meritless"].)

On appeal, we apply de novo review to the trial court's grant of an anti-SLAPP motion. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.) We review discovery and continuance rulings for abuse of discretion. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 191 (*Schroeder*) [anti-SLAPP action; reviewing court "may not disturb the trial court's ruling" on request for specified discovery "absent an abuse of discretion"]; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1060-1061 (*Contemporary Services*) [no abuse of

discretion in denying ex parte application to continue anti-SLAPP motion to permit taking of deposition].)

" 'The burden of affirmatively demonstrating error is on the appellant.' " (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) In appellate briefing, all points must be supported by legal argument and authority, or we may deem them forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [accord].) Further, an appellant must raise any points it wishes to address in its opening brief. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 (*Stroh*) ["Points raised for the first time in a reply brief will ordinarily not be considered . . . ."].)

II. *Clawback of Documents*

Hagenbuch contends the trial court abused its discretion by denying his request for a continuance, and that the clawback was a violation of due process. Respondents disagree, and further argue he was not prejudiced by the denial. Hagenbuch does not establish reversible error in connection with the clawback.

A. *Abuse of Discretion*

The trial court denied the continuance based on Hagenbuch's inadequate efforts to obtain evidence and policy considerations. This was not an abuse of discretion.

First, the trial court focused on Hagenbuch's efforts. It found the case was pending for a year before the clawback; he should have had admissible evidence when he filed the

action and had "ample time" to develop it; and, instead sought leave to investigate later. In short, the trial court essentially found Hagenbuch failed to act diligently to secure the evidence he sought to rely upon. The record supports that conclusion.

Hagenbuch's case was filed on July 5, 2016, and was pending for over six weeks when it was stayed on August 22, 2016. Once the stay was lifted effective August 21, 2017 (on the parties' stipulation), the anti-SLAPP motion deadline was a month away, on September 21. Hagenbuch took no action to preserve his evidence, such as proposing a stipulation or serving discovery requests, either before the case was stayed, or after the stay was lifted and before discovery was stayed by the anti-SLAPP motions. His counsel stated that there was an agreement to use the underlying documents, but Hagenbuch has identified no evidence of such and Respondents' counsel denied there was an agreement. Hagenbuch also failed to contact Respondents about potentially privileged documents until September 8, 2017, after the anti-SLAPP motion deadline was set. Even after Hagenbuch became aware of the scope of the clawback in late September, and delays ensued, he *still* waited until October 24 to move for a discovery master, and until October 26 to ask for a continuance in his opposition. He did not file a motion to continue, or for ex parte relief. Perhaps most perplexing, when Respondents' counsel raised the possibility of a continuance—twice—Hagenbuch's counsel did not accept.

We recognize Respondents' treatment of their privileged documents, both during *DRR* and here, could be viewed as dubious. But the trial court reasonably focused on Hagenbuch's diligence and, on this record, we cannot say it abused its discretion.

Hagenbuch's arguments lack force. He argues that although the court "castigated [him] for not having this evidence," he had it prior to the clawback. He also contends he was not seeking discovery, reiterating it was Respondents who deprived him of evidence he already had. Hagenbuch appears to assume that because he had the documents, he had a right to use them. But he cites no authority that he was entitled to such use. And there is no indication the trial court was unaware of why Hagenbuch lacked evidence. It simply found his efforts to secure it, including before the clawback, inadequate. On reply, Hagenbuch cites authority reflecting a court can abuse its discretion in denying a continuance where there is no lack of diligence. (See *Denton v. City and County of San Francisco* (2017) 16 Cal.App.5th 779, 791-92 (*Denton*) [court abused discretion by denying continuance for summary judgment opposition where record did not support lack of diligence].) Here, the trial court could reasonably conclude there was.

Hagenbuch also seeks to explain the delay in seeking a continuance, focusing on Respondents' representations regarding when they would reproduce documents. He misses the mark. The issue was not simply that he waited so long to obtain judicial assistance, but that he failed to secure his evidence at the outset of his case. And one could reasonably conclude that the explanation itself does not support delay.[10]

---

10 He states counsel said they would reproduce the documents, citing Pettit's October 11 e-mail that they "should be able to stay on track with the hearing date." He explains that "[g]iven the promised and imminent reproduction," his counsel "agreed to keep the anti-SLAPP hearing on schedule." He elsewhere states "counsel said that the parties should stay with the existing hearing date," again citing Pettit. Pettit did not say they should stay with the date, he said they "should be able to . . . ." He also indicated the clawback was being expanded. And Hagenbuch e-mailed him on October 12, stating

Second, the trial court found a discovery master appointment would lead to extended litigation, contrary to anti-SLAPP policy. The court properly recognized the anti-SLAPP policy in favor of early resolution, supporting its exercise of discretion. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1294 [recognizing "legislative policy of early evaluation and expeditious resolution of claims arising from protected activity"]; see *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126 [exercise of discretion will be upheld if, among other things, it "complies with legal principles and policies appropriate to the case"].)

Hagenbuch acknowledges the trial court's concern that a discovery master could cause delay. However, he contends it was "arbitrary and capricious for the court to dismiss [his] case given a problem that the DRR counsel created," which "would be very time-consuming to resolve." He provides no record citations here, but we assume he is referring to the tentative ruling and hearing for the motion to quash, which he discusses in his factual background. The argument lacks merit.

For one thing, the trial court did not find Respondents created the problem. What the court said was that if Hagenbuch's counsel had an e-mail reflecting an agreement to use the documents, then it thought "the problem [was] with the producing party." As noted, Hagenbuch has not provided documentation of the agreement. And although the court did discuss privilege logs, it did not rule that Respondents improperly failed to provide one. Rather, the court recognized there were "more than two sides to this story"

"Are you reproducing docs today? I am running out of time."

and declined to address the need for a discovery master at that time. As for Hagenbuch's suggestion that the trial court granted the anti-SLAPP motions *because* of the clawback issue, and the time it would require for resolution, this is belied by the court's anti-SLAPP order. The court explained why the malicious prosecution claims failed, and only then addressed why it was denying the continuance, for each set of defendants.[11]

B. *Due Process*

Hagenbuch also argues he was denied due process in connection with the clawback, and de novo review applies. He establishes no due process violation.

As noted *ante*, we review discovery and continuance rulings in anti-SLAPP proceedings for abuse of discretion. (*Schroeder*, *supra*, 97 Cal.App.4th at p. 191; *Contemporary Services*, *supra*, 152 Cal.App.4th at pp. 1060-1061.) Courts have acknowledged the potential impact of the anti-SLAPP discovery procedures, but have determined that when "properly applied," they "do[] not infringe due process." (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593, fn. 18.)

---

11 We need not consider the points Hagenbuch raises on reply and would reject them if we did. First, he contends requiring expediency must "cede to resolving cases on the merits." His cases recognize there are balances to be struck. (See, e.g., *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 644 [noting policies supporting resolution on merits and efficiency]; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1269 [requiring objections to plaintiff's evidence on anti-SLAPP motions maintains balance between interests of parties].) Hagenbuch does not establish the balance here was beyond reason. Second, he argues the size of the clawback and failure to reproduce were "unfair surprise warranting a continuance," citing *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163. That case involved unexpected testimony, not losing access to evidence one had not secured. (*Id*. at p. 1171.)

Hagenbuch does not even contend the trial court misapplied the anti-SLAPP discovery procedures. Rather, he argues the court denied him a hearing on the clawback, and did not "hold defense counsel to their written promise to reproduce documents fairly to preserve the hearing date" or require "production of a privilege log." But the trial court never reached these matters, due to Hagenbuch's delay. They were encompassed in the discovery master motion, which he did not file until October 24. This resulted in the hearing being scheduled after the anti-SLAPP hearing, and, as discussed *ante*, the trial court reasonably rejected his request for a continuance. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 288 ["[W]e find no lack of due process since Jones's failure to present witnesses on her own behalf was due to her own lack of diligence."].)

The cases cited by Hagenbuch do not require a hearing under these circumstances, or otherwise support a lack of due process here. (See, e.g., *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 610 [de novo review applied to due process issue involving conservatee consultation]; *Estate of Buchman* (1954) 123 Cal.App.2d 546, 560 [executor impermissibly removed without due process]; *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1325-26 [impermissible for court to review records in camera for fee award, without making them available to opposing party].)[12]

---

12 On reply, he also cites *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389 and *Denton, supra*, 16 Cal.App.5th at p. 792 for the principle that refusing a continuance with the effect of denying a fair hearing is reversible error. They are distinguishable. Among other things, both cases indicated there was no lack of diligence. (*Oliveros*, at pp. 1395-1396; *Denton*, at p. 792.)

Hagenbuch also contends he was "depriv[ed] . . . of the very evidence [he] had when he filed the . . . case." He states "It cannot be right that defense counsel can file motions arguing that there was 'no evidence,' while erasing that record providing exactly that evidence." If he is suggesting he can establish a due process violation based on the clawback itself, rather than the trial court's denial of a continuance to address it, he provides no authority for this position, and we decline to consider it. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

C. *Prejudice*

Having concluded the trial court did not err here, we need not reach Respondents' arguments for why Hagenbuch could not establish prejudice. However, we elect to address two issues. First, Respondents contend privilege was later "litigated in [*DRR*] by [the remaining defendants] and they lost," seeking judicial notice of a *DRR* order. We take notice of the order, to clarify that the *DRR* court denied the motion because it was untimely, not on the merits. (Evid. Code §§ 452(d); 459.) Second, Respondents contend Hagenbuch did not explain how having the clawed back documents would change the outcome. Hagenbuch argues, among other things, that prejudice should be assumed under the circumstances. But he also contends he met his burden without the clawed back documents (see discussion *post*), which would suggest the continuance denial was harmless—not prejudicial.

III. *Probability of Prevailing at Trial*

A. *Overview of Malicious Prosecution*

Malicious prosecution "consists of three elements. The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; and (iii) initiated or maintained with malice." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 (*Parrish*).)

B. *Analysis*

1. *Favorable Termination*

Hagenbuch contends the trial court erred by finding the federal case favorably terminated, treating it as separate from *DRR*, and determining the cause of action based upon it was time-barred. We agree the federal case did not favorably terminate, but Hagenbuch does not establish it was the same proceeding as *DRR*. Thus, the federal case still could not support malicious prosecution liability, and Hagenbuch does not show reversible error. (See *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16 ["A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct."].)

"Favorable termination 'is an essential element of the tort of malicious prosecution, and it is strictly enforced.' " (*Lane v. Bell* (2018) 20 Cal.App.5th 61, 68 (*Lane*).) The " 'theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused.' " (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750 (*Lackner*).)

An entire action must favorably terminate to support a malicious prosecution action. (See *Dalaney v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 829 (*Dalaney*) [no favorable termination where defendant obtained summary adjudication on certain issues, and settled others; " '[T]hat a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause [citation] does not alter the rule there must first be favorable termination of the *entire* action' "], quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 686 (*Crowley*); *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341 [for favorable termination, "we 'look at the judgment as a whole' "]; *StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392, 1403 (*StaffPro*) [accord].) We recently confirmed this principle in *Lane*, where we held the plaintiffs could not establish favorable termination because the judgment, "while partially in [plaintiffs'] favor, was also partially in favor of [defendant]." (*Lane*, *supra*, 20 Cal.App.5th at p. 76; see *id.* at p. 65 [*Crowley*, while "technically dicta" on favorable termination, was persuasive].) We also rejected cases that held favorable termination could be based on a severable claim. (*Lane*, at p. 75; see *StaffPro*, at p. 1403 [accord].)

Hagenbuch argues, and we agree, that dismissal of the federal case did not constitute a favorable termination. The RICO claim was dismissed on the merits, but the district court simply declined to maintain jurisdiction over the state claims. (*Doe v. San Diego-Imperial Council* (2017) 16 Cal.App.5th 301, 314 [reasons for termination "must be examined" to see if it reflects opinion of the court that "the action would not succeed"]; cf. *Lackner*, *supra*, 25 Cal.3d at p. 750 [" '[A] dismissal . . . for lack of

jurisdiction [citation omitted] not only is not on the merits, it is unreflective of the merits' "].) Viewing the dismissal as a whole, as we must, it did not reflect Hagenbuch was innocent. (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855 [if resolution "leaves some doubt" as to liability, it bars malicious prosecution]; *Lane*, *supra*, 20 Cal.App.5th at p. 74 [where party "did not prevail on *every* claim," that " ' "reflects ambiguously on the merits of the action" ' "]; see *Dalaney*, *supra*, 42 Cal.App.4th at p. 829.)

However, we disagree with Hagenbuch that "the same underlying dispute continued in state court" for purposes of favorable termination. He relies on *Lane* and *StaffPro*'s rejection of severable claims as a basis for favorable termination, and the focus on overall innocence. But *Lane* and *StaffPro* involved single lawsuits, and Hagenbuch identifies no authority addressing innocence across multiple cases. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343 ["A decision, of course, does not stand for a proposition not considered by the court."].) Hagenbuch does argue "causes of action are peeled off lawsuits all the time" and accrual upon dismissal of one would require "repetitive malicious prosecution claims." But this is an argument against basing favorable termination on a severable claim within one lawsuit. The issue here is whether a court must consider *multiple* lawsuits together.[13]

---

13 Hagenbuch also contends the claims at issue were sufficiently related that DRR alleged supplemental jurisdiction and the district court kept the case open to permit refiling with the statute tolled. The cases plainly involved overlapping claims. But we do not see how federal jurisdiction principles and a federal court's decision to aid refiling bear on whether multiple lawsuits must be considered together in a malicious prosecution suit under California law.

Respondents cite *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1153 (*Graham*), which held in part that favorable termination of a federal case was not impacted by the later settlement of an independent state proceeding. (*Id.* at pp. 1152-1153; *ibid*. [plaintiffs, courts, and relief were different]; *id.* at p. 1152, citing, *inter alia*, *Camarena v. Sequoia Ins. Co.* (1987) 190 Cal.App.3d 1089, 1094-1095 [declaratory relief action had "procedural life of its own" from personal injury suit; factors include whether it was a " 'separate proceeding,' whether it was adversarial, and the expense and trauma of preparing a response"].) Hagenbuch argues *Graham* is distinguishable, contending the cases here had the same plaintiff and were not independent (for which he cites the same claims and conduct being at issue and the district court permitting refiling). Notwithstanding the same plaintiff, they were separate proceedings. They were in different courts, with overlapping but not identical claims; they were adversarial; and they had different results. Even if certain situations might warrant considering multiple cases together, *Graham* supports separate treatment here.

Finally, the issue before us is whether the trial court's anti-SLAPP ruling regarding the cause of action based on federal case was in error. To defeat an anti-SLAPP motion, a plaintiff must "demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, *supra*, 1 Cal.5th at p. 396.) Hagenbuch himself included separate causes of action for the federal case and *DRR*. And he alleged the *DRR* pleading "differed from the prior federal Complaint in material ways." Hagenbuch does not establish the trial court erred by concluding the federal case did not support malicious prosecution liability.

2. *Probable Cause*

In his opening brief, Hagenbuch argued that even without the clawed back documents, he "met his burden," by presenting evidence that Respondents sued him in bad faith and knew he did nothing wrong, as evidenced by asking him to be a plaintiff. He also disputed the relevance of the *DRR* demurrer ruling in *DRR*. On reply, he contended there was no factual basis for the aiding and abetting claim. We address these issues in turn, and conclude Hagenbuch does not establish a reasonable likelihood of establishing an absence of probable cause.

a. *Overview of Applicable Law*

" '[T]he probable cause element calls on the trial court to make an objective determination of the "reasonableness" of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable. A claim is unsupported by probable cause only if ' " 'any reasonable attorney would agree [that it is] totally and completely without merit.' " ' [Citations.] 'This rather lenient standard for bringing a civil action reflects "the important public policy of avoiding the chilling of novel or debatable legal claims." ' [Citation.] The standard safeguards the right of both attorneys and their clients ' " 'to present issues that are arguably correct, even if it is extremely unlikely that they will win.' " ' " (*Parrish*, *supra*, 3 Cal.5th at p. 776; see *Wilson*, *supra*, 28 Cal.4th at p. 822 [one who "possesses competent evidence" does not "act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim."].)

"[T]he existence of probable cause is a question of law . . . ." (*Parrish*, *supra*, 3 Cal.5th at p. 776.) In determining "whether the action was supported by probable cause, the court is to construe the allegations of the underlying complaint liberally, in a light most favorable to the malicious prosecution defendant." (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200.)

The claim at issue here is aiding and abetting a breach of fiduciary duty. It has multiple elements, but the contested element in *DRR* was whether Hagenbuch had "actual knowledge of [the] breach of fiduciary duties . . . ." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343; see *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145 [liability requires "proof the defendant had actual knowledge of the specific primary wrong"].)

b. *Respondents' Purported Bad Faith and Subjective Knowledge*

Hagenbuch argues generally in his opening brief that he met his burden, based on Respondents' bad faith and purported knowledge he did nothing wrong.

Any reliance on bad faith to establish a lack of probable cause is misplaced. Bad faith and probable cause are distinct concepts, and not mutually exclusive. (*See Parrish*, *supra*, 3 Cal.5th at p. 779 ["subjective bad faith is relevant to . . . whether the suit was brought with malice, which . . . concerns a litigant's subjective belief. [Citation.] But it is a separate question whether, objectively speaking, defendants' suit was supported by probable cause."]; *ibid.* [findings of bad faith were not "inconsistent with the court's earlier determination that the suit had sufficient arguable merit to survive summary

judgment."]; see *Crowley, supra*, 8 Cal.4th at p. 686 [favorable termination and probable cause "serve different purposes"].)

Hagenbuch's attempt to establish Respondents knew he did nothing wrong also does not establish a lack of probable cause. Although "in some cases the defendant's subjective belief may be relevant to the probable cause issue, . . . the 'belief' in question related to the defendant's belief in, or knowledge of, *a given state of facts*, and not to the defendant's belief in, or evaluation of, *the legal merits of the claim*." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 879 (*Sheldon Appel*); see e.g., *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 453 [no probable cause where litigant " 'relies upon facts which he has no reasonable cause to believe to be true' "].) Thus, Hagenbuch would have to show Respondents knowingly relied on false or baseless allegations. He does not do so.

First, Hagenbuch contends Respondents "repeatedly" said he did nothing wrong and asked him to join their case, and "sued him only because he refused to join," citing communications with Steel and duPont. Those communications do not establish reliance on false allegations.

For Steel, Hagenbuch argues his complaint alleges proof he was lying about initially thinking Hagenbuch had done nothing wrong, including a February 2009 e-mail to duPont that purportedly addressed the Lenain memorandum, Term Sheet, and loan modifications. Hagenbuch is contrasting this with Steel's declaration in *DRR* that Hagenbuch had been "telling [him] that he had 'never met or spoken to' Ron Katz and the other debt holders," and he later learned Hagenbuch misled him and about other events

reflecting his role in the takeover plan (including the loan modifications). To the extent there were discrepancies in Steel's statements, this would not necessarily undermine his explanation. As for duPont, Hagenbuch points to the January 2009 e-mail in which duPont suggested he was not necessarily allied with the insiders who "commenced the voluntary bk plan" and referred to "resolv[ing] this mess short of litigation." We do not see how this amounts to a request to *join* litigation with DRR, particularly as DRR did not exist and duPont was referencing the bankruptcy proceedings (with which he and Steel had issues).[14]

Ultimately, even if Steel and duPont did target Hagenbuch because he would not join them, during the bankruptcy or later, this still would not establish they relied on false allegations in bringing *DRR*. Indeed, much of Respondents' evidence concerned undisputed events, such as Hagenbuch's signing of the Term Sheet.

Second, Hagenbuch tries to rely on certain of those undisputed events—his loans and loan modifications—as evidence Respondents knew he did nothing wrong. He argues Respondents knew the loans were welcomed by MicroIslet, and he "amended his loan terms before they even alleged he joined a conspiracy." Hagenbuch's disagreement

---

14 Hagenbuch also cites a December 2008 e-mail from Steel to duPont regarding debt conversion that states, in part, that Hagenbuch's failure to come to their "side of the table" could get him "stuck in his compound for a long time." The e-mail notes his "considerable net worth" and describes his 2007 loans as "toxic." Hagenbuch provided this e-mail in opposition to the motion to quash, not the anti-SLAPP motions; the trial court sustained a hearsay objection; and Hagenbuch does not establish that ruling was prejudicial. Even if we considered it, it does not establish they sued Hagenbuch because he failed to join them. Again, DRR did not even exist yet.

as to the significance of the loans and their modification does not mean Respondents knowingly relied on false allegations.[15]

Finally, Hagenbuch cites *Daniels v. Robbins* (2010) 182 Cal.App.4th 204 (*Daniels*) for the proposition that " '[w]hen there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief.' " (*Id*. at p. 223.) This is true, as far as it goes, but Hagenbuch does not establish such a dispute exists here. In *Daniels*, the "absence of any witnesses, documents, or other evidence" to support the allegations in the underlying lawsuit was sufficient to establish a likelihood of prevailing on probable cause. (*Id*. at p. 224.) Here, Respondents did provide evidence; Hagenbuch simply questions their motives. (Cf. *Sheldon Appel*, *supra*, 47 Cal.3d at p. 881 [a jury question exists when "there is evidence that the defendant may have known" the factual allegations were untrue].)[16]

c. *Demurrer Ruling*

Hagenbuch challenges the trial court's reliance on the demurrer ruling in *DRR*, contending it "could not establish the merits of the DRR case as filed." We disagree.

---

15 Hagenbuch also indicates he had evidence DRR acquired its claims through fraud, and suggests this is pertinent to probable cause, but does not explain why.

16 Respondents state that "[e]ven if Steel and duPont did not actually believe the charges . . . , so long as the evidence known to them could support an objectively reasonable suspicion, there is objective probable cause." Hagenbuch says this is "just wrong." Reliance on false allegations could impact probable cause, but this is not an admission and Hagenbuch does not establish such reliance.

Under the interim adverse judgment rule, "if an action succeeds after a hearing on the merits, that success ordinarily establishes the existence of probable cause (and thus forecloses a later malicious prosecution suit), even if the result is overturned on appeal or by later ruling of the trial court." (*Parrish, supra,* 3 Cal.5th 767 at p. 771.) This doctrine rests on the principle that such claims "are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness." (*Wilson*, *supra*, 28 Cal.4th at p. 818.) It applies "even if the court later rules, after the evidence has been subject to adversarial testing, that the inferences [that would justify a favorable ruling] have proved false." (*Parrish*, *supra*, 3 Cal.5th at p. 782.) At the same time, "an attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 960 (*Zamos*).)

The *DRR* trial court overruled the demurrers of Hagenbuch and creditor defendants, finding the complaint alleged sufficient facts for aiding and abetting. The trial court here found this ruling, coupled with the allegations being "true to the best of the lawyers' knowledge at the time," established probable cause. It also found there was probable cause to continue the lawsuit. These determinations are consistent with the interim ruling doctrine. (See *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 621, 624-626, disapproved on another point in *Zamos*, *supra*, 32 Cal.4th at page 973 [demurrer supported probable cause for fraud lawsuit by employee, even though employer prevailed on summary adjudication; "Because the allegations in the complaint were true to the best of the lawyers' knowledge . . . , and because the trial court overruled

Swat-Fame's demurrer to the fraud claim, the lawyers necessarily had probable cause to bring the claim for fraud."].)

Hagenbuch's arguments are not persuasive. He contends the demurrer ruling does not reflect on the merits, because it "says nothing about . . . belief in the merits, or knowledge of falsity, or the presence or absence of false testimony" and "[w]hether the party actually believes the allegation to be true" is the "central question here . . . ." Not so. Objective tenability is the question here, and Hagenbuch's arguments regarding Respondents' knowledge lack merit for the reasons discussed *ante*. He also argues "a decision on a demurrer does not even address conduct post-demurrer." The interim adverse judgment doctrine focuses on interim events, and regardless, the trial court did address post-demurrer probable cause.

d. *Factual Support for Claims*

On reply, Hagenbuch contends Respondents had no factual support for the aiding and abetting claim, focusing on the *DRR* rulings and Respondents' evidence. We need not consider points raised on reply, and deem them waived. (*Stroh*, *supra*, 10 Cal.App.4th at p. 1453.) Nonetheless, we elect to address certain of Hagenbuch's arguments, and conclude they would not establish a lack of probable cause.

Hagenbuch begins by contending that in *DRR*, both the trial court and this court determined Respondents had no evidence to support their aiding and abetting claim. The *DRR* decisions do not establish a lack of probable cause.

At summary judgment, Hagenbuch argued he was unaware of the alleged takeover scheme. Respondents maintain there was circumstantial evidence of actual knowledge,

including the signing of onerous loan modifications five days after the Board approved the recapitalization plan, with no benefit to the company; Hagenbuch's September 11, 2008 e-mail to Andrews indicating he "want[ed] to be joined at the hip with you and your team"; and his signing of the Term Sheet.[17] This court and the *DRR* trial court did find this evidence insufficient. But the inability to marshal evidence to survive summary judgment is not dispositive of probable cause. (*Jarrow*, *supra*, 31 Cal.4th at pp. 742-743 ["summary judgment on the underlying claim does not establish lack of probable cause"; "[p]lainly, a claim that appears 'arguably correct' or 'tenable' when filed . . . may nevertheless fail . . . for reasons having to do with the sufficiency of the evidence actually adduced as the litigation unfolds"]; *Wilson*, *supra*, 28 Cal.4th at p. 822 [noting Court of Appeal held evidence was insufficient to proceed, but "did not hold or imply that a reasonable attorney could not have believed the case had potential merit"].)

Next, Hagenbuch focuses on certain factual issues, and his arguments again lack merit. First, he maintains his loans were welcome, contends they saved the company, and states Respondents knew the loans were not toxic when made. Respondents' position does not appear to be that the loans were unwelcome when made, but, rather, that they made Hagenbuch an important part of the purported scheme—and, once modified, did burden MicroIslet.

---

17 Respondents also cite, among other things, Hagenbuch's financing strategy memorandum in November 2006, and his July 2008 e-mail to Andrews identifying the possibility of a bankruptcy reorganization plan.

Second, Hagenbuch disputes Respondents' claim that his loan amendments had onerous terms, and provided nothing in return. He contends the amendments benefitted both him and the company, stating it is undisputed he did not know about the Katz loans, he only asked for rate parity later, and the Board approved it. These assertions do not respond to Respondents' claim, much less show the amendments helped MicroIslet. Hagenbuch also argues he "did not execute on the defaulted loans at any time; he forbore." It appears he refrained from collection, but the amendments had no forbearance language.

Third, Hagenbuch contends Respondents' "timeline . . . is incorrect," explaining the loan amendments were approved by the Board on August 20, before the recapitalization plan was approved on August 21. He appears to take issue with Respondents' description of the amendments as being signed five days after the recapitalization plan approval. But Respondents were not wrong. They just used the date of signing, instead of approval. And the precise date is not critical to their point; namely, that the overall timing suggests the "transactions were related" and that Hagenbuch "demanded the highly favorable terms in exchange for his agreement . . . ."

Hagenbuch also disagrees the timing is proof of wrongdoing, citing *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1107 (*Cole*). *Cole* reversed the grant of an anti-SLAPP motion in a malicious prosecution case and held, in part, that there was no probable cause. (*Id.* at pp. 1101, 1107.) Addressing alleged insider trading, the court stated defendants were "unable to pinpoint what [made the trading] suspicious," noting that "[t]o the extent . . . [the] stock price was fraudulently

inflated during that period, . . . that does not automatically establish he had knowledge of the fraud." (*Id.* at p. 1107.) *Cole* did not hold timing was never relevant; rather, it found defendants failed to articulate suspicious activity based on conduct at a particular time. Respondents did explain what they viewed as problematic about the loan amendments, which included the timing.

Fourth, Hagenbuch criticizes Respondents' reliance on the Term Sheet, arguing such documents are commonplace and the witnesses indicated it was not definitive. Respondents rely on the Term Sheet as part of their circumstantial evidence, and do not contend there was a binding agreement. Hagenbuch also dismisses as speculation a purported argument by Respondents that because he did not oppose the plan, he "must have been part of a toxic conspiracy . . . ." He does not cite Respondents' brief here, and regardless, their position appears to be that he was a willing participant.

Finally, Hagenbuch contends Respondents "mischaracterize communications from [him] in an attempt to fabricate 'suspicious' inferences." Focusing on the September 11, 2008 e-mail to Andrews, he argues "it is clear" the " 'joined at the hip' e-mail reflected different opinions about preferential anti-dilution of management's shares—not some agreement to join a scheme." It was not unreasonable for Respondents to rely on the e-mail as circumstantial evidence. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 48 [" 'conspirators rarely . . . document their illicit agreements' "].) Hagenbuch's characterization of his e-mail does little to impact the analysis. (See *People v. Silva* (2001) 25 Cal.4th 345, 369 ["rational trier of fact could disbelieve those portions of defendant's statements that were obviously self-serving"].)

3. *Malice*

We now turn to malice. The trial court determined Hagenbuch did not meet his burden on malice for either the federal case or *DRR*.[18] Hagenbuch does not show this was error. He incorrectly states in his opening brief that the trial court did not assess malice for "the RICO case" (i.e. the federal case); does not specifically argue he could show malice for that case; and forfeits any challenge there. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.) The arguments he does make regarding malice lack merit.

Malice "relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) "The motive . . . must have been something other than . . . the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive." (*Ibid.*, citing *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494]; see also *Daniels*, *supra*, 182 Cal.App.4th at p. 221 [malice cannot be imputed to attorney based on client].) A lack of probable cause alone does not establish malice. (See *Jarrow*, *supra*, 31 Cal.4th at p. 743 [lack of legal tenability " '*without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective

---

[18] The court addressed malice for the attorneys, DRR defendants, and Williamson. It determined Hagenbuch did not meet his burden as to the others for different reasons.

malicious state of mind.' "]; cf. *Daniels*, at p. 226 [malice can be inferred where a party " 'knowingly brings' " action without probable cause, emphasis omitted].)

First, Hagenbuch maintains Respondents "sued him only because he refused to join" *DRR*. As discussed *ante*, he does not establish this. Further, the respondents who either asked him to join or purportedly did (Steel and duPont) provided declarations indicating they sued in good faith.

Second, Hagenbuch argues on reply that "[b]y filing despite the lack of evidence of [his] wrongdoing, Respondents were at minimum grossly indifferent" and "indifference can suffice" for malice. Even if we addressed this belated argument, Hagenbuch does not establish Respondents sued without evidence, just because the courts found it insufficient. (See *Jarrow*, *supra*, 31 Cal.4th at p. 743 ["summary judgment . . . does not necessarily establish" malice, even assuming trial court found "no competent evidence"].) The cases cited by Hagenbuch involve defendants who, unlike here, made no effort to research law or acquire evidence. (*Medley Capital Corp. v. Security National Guaranty, Inc.* (2017) 17 Cal.App.5th 33, 49 [lack of evidence that counsel "did anything to research the applicable facts, or applicable law" indicated "degree of indifference from which one could infer malice"]; *Cole*, *supra*, 206 Cal.App.4th at p. 1115 [malice shown where, among other things, defendants lacked "direct or circumstantial evidence" and there was a "dearth of evidence about their actual investigation"]; compare *Daniels*, *supra*, 182 Cal.App.4th at p. 227 ["sustained inability" of attorneys "to provide any support for [plaintiff's] allegations, on its own" did not support malice].)

4. *Other Respondents*

Finally, Hagenbuch challenges the trial court's grant of anti-SLAPP motions by respondents Winterman and his firm Herzfeld; SoCal and its owner Schoninger; and Williamson. He did not even discuss the rulings for anyone but Williamson, or provide legal authority, until his reply brief. (See *Stroh*, *supra*, 10 Cal.App.4th at p. 1453; *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.) Even if he had preserved his arguments here, we would reject them.

a. *Winterman and Herzfeld*

The trial court determined Winterman and Herzfeld could not be liable because they were counsel only in the federal case. Hagenbuch maintains Herzfeld is liable for initiating and maintaining "the RICO and state-based claims" between 2010 and 2012; i.e., the federal case. But Hagenbuch has not shown he can base malicious prosecution liability on that case, and does not dispute Winterman and Herzfeld did not participate in *DRR*.

b. *SoCal and Schoninger*

The trial court found there were limited charging allegations; no evidence SoCal and Schoninger brought the lawsuits; and Hagenbuch cited no authority that investment in a suing entity was sufficient for liability.

Malicious prosecution requires that the underlying action be "initiated or maintained by, or at the direction of, the defendant . . . ." (*Parrish*, *supra*, 3 Cal.5th at p. 775.) An injured plaintiff "may seek compensation from any person who procures or is actively instrumental in putting the litigation in motion or participates after the

institution of the action." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131, fn. 11.)

Hagenbuch contends the complaint establishes SoCal "was an active participant" in the litigation; Schoninger participated in DRR through his company SoCal; and he and SoCal were "actively recruited" to join DRR. He also contends the DRR Operating Agreement gave them a right to participate in litigation, and they recalled many documents reflecting communications with DRR lawyers, which "is active involvement." None of this has merit.

First, the complaint does not allege SoCal actively participated in the litigation. It simply contends SoCal was a DRR member, and that Schoninger participated in DRR through SoCal, his company. The complaint does state they were "actively recruited," but Hagenbuch does not explain why this is relevant.[19]

Second, if Hagenbuch is suggesting that membership in an entity like DRR constitutes participation in litigation for malicious prosecution purposes, he provides no authority supporting this position. The cases he does cite are inapposite. (See *Lugan v. Gordon* (1977) 70 Cal.App.3d 260, 262 [allegation that attorney who filed action acted as agent of other attorneys was sufficient to charge other attorneys]; *Jacques Interiors v.*

---

19 The allegations were: (i) "Richard Schoninger is 30-year veteran of the financial services industry and has served as the Senior Managing Director and Head of Investment Banking at Prudential Securities and as the President of Longwing Real Estate Ventures, LLC. Schoninger is a DRR syndicate member, through his company SoCal Beach Club Holdings, LLC"; and (ii) ". . . Steel and duPont then actively recruited litigation syndicate members. Ultimately, DRR included: . . . . Richard Schoninger through his company SoCal Beach Club Holdings, LLC."

Petrak (1987) 188 Cal.App.3d 1363, 1366, fn. 1 & 1373 [affirming malicious prosecution verdict against claims adjuster who manipulated report to conceal evidence, after insurance company sought subrogation based on report].)

Finally, the DRR Operating Agreement and clawback of communications with counsel appear to provide little to no evidence of participation in litigation. DRR's purpose was to pursue the claims, and a Board of Managers controls DRR. The members are entitled only to updates and inclusion in settlement and funding decisions. (Cf. *Otay Land Co., LLC v. U.E. Limited*, L.P. (2017) 15 Cal.App.5th 806, 857 ["whether someone controls an entity implicates corporate formalities."].) As for counsel communications, witnesses, experts, and other non-litigants routinely engage with counsel during litigation.

To the extent joining a suing entity could support malicious prosecution liability, Hagenbuch does not establish such liability exists for SoCal and Schoninger.[20]

c. *Williamson*

The trial court granted Williamson's anti-SLAPP motion because the complaint had only limited charging allegations, and Williamson's declaration established he did not direct Hagenbuch be sued or harbor ill will toward him. In the factual background of his opening brief, Hagenbuch noted the ruling against Williamson, and suggested the DRR agreement and clawback provided evidence of participation. If he is arguing the

---

20 Because Hagenbuch does not establish error, we need not address SoCal and Schoninger's argument that Hagenbuch had to address alter-ego liability for Schoninger.

Williamson ruling was in error on the participation issue, his reliance on the DRR agreement and clawback is misplaced for the reasons discussed *ante*. On reply, Hagenbuch disputes Williamson's argument in his respondent's brief that he did not represent the clawed back evidence would establish malice. Hagenbuch cites pleadings purportedly reflecting he made such representations. Regardless, he identifies no evidence presently in the record to show malice by Williamson, and does not establish the trial court's other grounds for dismissal were in error.[21]

DISPOSITION

The order is affirmed. Respondents are awarded costs on appeal.

McCONNELL, P. J.

WE CONCUR:

IRION, J.

DATO, J.

---

21 Hagenbuch asks us to reverse the fee and cost award if we conclude Respondents should not have prevailed. We affirm, and therefore decline this request.