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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NUSCIENCE CORPORATION,

Plaintiff and Appellant,

v.

STEPHEN E. ABRAHAM,

Defendant and Respondent.

B264334

(Los Angeles County  
Super. Ct. No. BC539259)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed.

Jacobson Russell Saltz Nassim & De La Torre, Michael J. Saltz, Colby A. Petersen, and Blair Schlecter for Plaintiff and Appellant.

Law Office of Philip A. Levy and Philip A. Levy; Law Offices of Stephen Abraham and Stephen E. Abraham for Defendant and Respondent.

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This appeal is from a judgment following an order granting two separate special motions to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16, and the SLAPPback statute, section 425.18.<sup>1</sup> We find that the motions to strike were properly granted, and thus we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff/appellant NuScience Corporation (NuScience) is a California corporation that researches, develops, and distributes health and beauty products, including a nutritional supplement marketed as “Cellfood.” Defendant/respondent Stephen Abraham is counsel for David McKinney, who was NuScience’s vice president of sales and marketing until his termination in August 2008.<sup>2</sup> Robert and Michael Henkel (not parties to this appeal) allegedly are the nephews of the woman from whom NuScience purchased the Cellfood formula.

NuScience has been involved in significant litigation over the Cellfood product; some of that litigation is discussed below.

#### **I.**

#### ***Federal Court Action***

In 2008, NuScience sued the Henkels and others in federal district court for misappropriation of trade secrets, federal trademark infringement, unfair competition, false advertising, and intentional interference with business relationships. (*NuScience Corporation v. Henkel et al.*, CV-08-2661.) Neither the Henkels nor their codefendants appeared in that action, and

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<sup>1</sup> All subsequent undesignated statutory references are to the Code of Civil Procedure.

<sup>2</sup> McKinney was named as a defendant in this action, but is not a party to this appeal.

in April 2009, the court entered “Findings, Conclusions & Judgment Pursuant to Entry of Default.” As relevant to the present action, the federal default judgment found as follows:

Cellfood is a trade secret, of which NuScience is the rightful owner. NuScience “has taken reasonable measures to maintain the trade secret in confidence and to protect it from disclosure to competitors. NuScience’s trade secret is not generally known or available to the public or to NuScience’s competitors. NuScience’s trade secret is not easily ascertainable or easily developed.”

The Henkels purport to possess information concerning Cellfood’s ingredients and formula. The Henkels have offered to sell the formula to third parties, including NuScience’s customers, and Robert Henkel has used the formula to produce and market a version of Cellfood, which he calls Deutrocell. Robert Henkel’s and Deutrocell’s use of NuScience’s formula to make Deutrocell “amounts to misappropriation of NuScience’s trade secret.”

NuScience had been granted trademark registration for “Cellfood,” “Everett Storey,” and “Deutrosulfazyme.” Robert Henkel and Deutrocell registered the domain names [www.evstorey.com](http://www.evstorey.com) and [www.deutrocell.com](http://www.deutrocell.com) in efforts to sell Deutrocell. Henkel’s and Deutrocell’s websites contain a webpage stating that Deutrocell is “Uncle Ev’s” original formula underneath a photograph captioned “Everett Story.” Henkel and Deutrocell sent emails to NuScience’s customers stating, “Would you be interested in distributing EV STOREYS (*sic*) ‘ORIGINAL’ KITCHEN FORMULA (DEUTROCELL)?” Henkel’s and Deutrocell’s uses of “Ev Storey,” “Everett Storey,” and “Deutrocell” in connection with the sale of their product

Deutrocell are “infringement[s] of NuScience’s [trademarks] and likely to cause confusion.”

Based on these findings, the federal court permanently enjoined the Henkels from selling or marketing NuScience’s trade secrets or products based on NuScience’s trade secrets; representing to third persons that they possess any of NuScience’s trade secrets; using the “Everett Storey,” “Deutrosulfazyme,” and “Cellfood” trademarks and any variation thereof; and contacting any of NuScience’s competitors, suppliers, customers, or distributors. The court also awarded NuScience compensatory and punitive damages.

## II.

### *NuScience v. McKinney* (*NuScience I*)

#### A. *Background*

NuScience terminated McKinney in August 2008. Upon McKinney’s termination, the parties entered into a written separation agreement pursuant to which McKinney agreed, among other things, to maintain the confidentiality of certain matters related to NuScience. (*NuScience v. McKinney* (Nov. 2, 2012, B237119 [nonpub. opn.], p. 2 (*NuScience I*).

In June 2010, NuScience received an email from a man named Tom Myers, which included the following email string:

—Robert Henkel to David McKinney, January 22, 2010: “Did you receive the samples I sent you? Let me know what you think.”

—McKinney to Henkel, January 22, 2010: “I did receive the samples and I have been using them and I have to say I am impressed. . . . [¶] I am definitely interested in seeing where we can go with this that would be profitable for all of us and offset

some of the damage that has been done. Have you talked with your brother about our discussions yet? Let's talk next week and see what we can come up with. [¶] Would you be so kind as to send just a small sample of the 'seed' or whatever you call it. I am interested in comparing what I know with what you have. [¶] The other thing I was thinking about was the production issues. [¶] Are you producing the bulk and having it bottled somewhere else, or are you bottling it yourself? What is your capacity for bottling? I have some contacts in Asia that may be interested in several hundred thousand bottles if we can produce them. [¶] It goes without saying perhaps . . . all conversations and e-mails between us are strictly confidential. Whatever we do together will be completely between us. I know how hard certain individuals tried to find out who your customers are and who you may have 'sold' the formulation to. As we get further down the road with one another, we have to have a strategy that will insulate either one of our companies from further problems. I have some ideas on how we may be able to do that."

—Henkel to McKinney, January 22, 2010: "Dave, [¶] That's great to hear you like the product. I have spoken with my brother and we are game for any business opportunity. [¶] As far as the 'seed' goes, are you talking about what you said [M]s. [K]im shows up with and gives to Kevin? . . . [A]s for production, we have been selling it in one gallon jugs and five gallon buckets, bottling it ourselves. [W]e can produce the bulk but it would have to be bottled elsewhere with those kind[s] of numbers."

—McKinney to Henkel, January 23, 2010: "Hey Bob, [¶] Yes I am talking about what Kim is giving to Kevin . . . . I'd just like to compare the two for fun really . . . . [¶] Bulk would be ok,

we can get it bottled somewhere else . . . what's the prices on one gallon and 5 gallon?"

—Henkel to McKinney, January 23, 2010: “At this time I am not comfortable sending the ‘seed’ without a non-disclosure in place, but you are more than welcome to come here and see it all!! [¶] As for pricing, we can sell it to you for [\$]80.00 a gallon in large lots. [W]e sell it as a solvent with no guarantees expressed or implied.”

—McKinney to Henkel, January 23, 2010: “I understand your issue with non disclosure. Not a problem. I am interested in coming out and seeing you. I will talk to my other partner about timing and we may find ourselves on your doorstep. . . . I’ll be in touch.” (*NuScience I*, pp. 2–3.)

#### *B. The Superior Court Action*

NuScience filed an action against McKinney and Robert Henkel on October 27, 2010. McKinney was represented in that action by attorney Abraham. The operative complaint alleges that notwithstanding the federal judgment against the Henkels, McKinney sought out Robert Henkel in 2008 or 2009 “and conspired with Henkel to do those very acts from which Henkel was enjoined by law, including but not limited to: disclosing and conspiring to disclose [NuScience’s] Trade Secrets and other confidential and proprietary information including the identity, purchasing habits and pricing for [NuScience’s] customers/distributors; disclosing and conspiring to disclose [NuScience’s] practices and procedures; misappropriating and conspiring to misappropriate [NuScience’s] Trade Secrets and other confidential and proprietary information including the identity, purchasing habits and pricing for [NuScience’s] customers/distributors; violating and conspiring to violate the

Judgment in favor of [NuScience] and against Henkel prohibiting Henkel from using [NuScience's] Trade Secrets and/or customer/distributor information, and selling any product which is the same or similar to [NuScience's] product, CELLFOOD®; assisting and conspiring to assist Henkel in violating the Judgment by, among other things, purchasing a similar product from Henkel to sell and/or distribute to [NuScience's] customers/distributors; and defaming and conspiring to defame [NuScience's] business practices and business reputation. McKinney did these things with reckless disregard and malicious intent to inflict maximum damage to NuScience, its reputation, and its brand.” (*NuScience I*, p. 3.)

NuScience alleged this conduct gave rise to eight causes of action: (1) breach of contract; (2) trade libel; (3) & (4) misappropriation of trade secrets (statutory and common count); (5) unfair business practices; (6) conspiracy; (7) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO); and (8) intentional interference with contract. NuScience sought compensatory and punitive damages, as well as an injunction enjoining defendants from disclosing or conspiring to disclose NuScience's trade secrets and other confidential and proprietary information, including the identity, purchasing habits, and pricing for NuScience's customers and distributors. (*NuScience I*, p. 3.)

In March 2011, the court entered a default against Robert Henkel. The following month, McKinney filed a motion to compel further discovery responses from NuScience. The trial court granted the motion and ordered NuScience to provide further responses. Subsequently, McKinney filed a motion for terminating sanctions, asserting that NuScience had not

provided substantive discovery responses or documents demonstrating a factual basis for its claims. (*NuScience I*, p. 3.)

NuScience opposed the sanctions motion, asserting among other things that “[t]he responses provided by [NuScience] contained all information currently available.” Then, before the motion was heard, NuScience filed a request for dismissal without prejudice. In subsequent court filings, NuScience asserted that it dismissed the action “out of fear that the Henkels would retaliate by releasing NuScience’s most valuable trade secret on the Internet, despite having a meritorious claim against Defendant McKinney. If the Henkels carry out their threat and publicly release the formula for CELLFOOD®, NuScience will lose its entire business, which presently generates worldwide sales of over \$230 million.” (*NuScience I*, p. 3.)

Following NuScience’s voluntary dismissal, McKinney filed a motion for attorney fees and costs of \$32,842.81. McKinney asserted that under the Uniform Trade Secrets Act, Civil Code sections 3426 et seq. (UTSA), a prevailing defendant is entitled to recover fees if the action is “objectively specious”—i.e., if it “‘superficially appears to have merit but there is a complete lack of evidence to support the claim.’” With regard to NuScience’s claims against him, McKinney said, “there was not one shred of evidence that [he] ever took any information from NuScience . . . . Moreover, there was no threat that any information was ever going to be taken or disclosed by McKinney.” To the contrary, “NuScience made very clear, from the inception of its case, that it regarded the other defendants as competitors and, in fact, in front of this very court, stated that the case was being used to gather information that would be used in a separate action against the other defendants.” McKinney concluded: “Nearly a

year into the case, after having stated that it had produced more than enough evidence to support its claims, NuScience has offered absolutely no evidence of misappropriation, threatened misappropriation, imminent harm, or ongoing wrongdoing. [¶] NuScience’s absence of any evidence to support its claim has all the hallmarks of an objectively specious claim, thereby justifying an award of attorney fees to McKinney.” (*NuScience I*, p. 4.)

The trial court granted the fees motion, concluding that the record showed subjective bad faith on the part of NuScience. (*NuScience I*, p. 4.)

NuScience moved for reconsideration, asserting that after it took Henkel’s default on March 18, 2011, Henkel called NuScience’s attorney, Michael Saltz, and said that NuScience “better back off and leave [them] alone.” After that telephone call, Henkel and his brother began posting, through their website, threats to publish the Cellfood formula. In late March 2011, Saltz reported Henkel’s threats to the FBI, which informed Saltz it had assigned an agent to investigate and that the pending investigation should remain confidential. Then, in July 2011, Henkel told NuScience’s attorney that he would “release NuScience’s formula to the world unless [NuScience] dismissed this lawsuit pending against Robert and McKinney and that [NuScience] cease all enforcement of the federal judgment against the Henkels.” Only later did the FBI “reluctantly acquiesce[] in allowing [NuScience] to discuss various aspects of the investigation against the Henkels.” (*NuScience I*, p. 4.) The trial court denied the motion for reconsideration and NuScience’s subsequent motion for new trial. (*NuScience I*, p. 5.)

C. *Appeal*

NuScience appealed the order granting the fees motion. The Court of Appeal reversed, concluding that NuScience's Cellfood formula and customer lists were trade secrets, and that the email exchange quoted above provided a reasonable basis on which to file a misappropriation action. The court explained as follows:

"In the present case, the email exchange is evidence that McKinney and Henkel were engaged in 'internal experimentation with' the Cellfood formula, a trade secret. Specifically, the emails state that McKinney had been '*using* [the samples]' and intended to compare 'what I know with what you have.' (Italics added.) McKinney proposed jointly pursuing a business venture 'that would be profitable for all of us,' and Henkel responded that he and his brother 'are game for any business opportunity.' McKinney and Henkel also specifically discussed production, bottling, and sales of the product. . . .

"The email exchange also is evidence that McKinney intended to use NuScience's customer lists to market to buyers 'in Asia that may be interested in several hundred thousand bottles.' Since McKinney was unlikely to have derived information about customers interested in the Cellfood product *other than* through his employment with NuScience, a trier of fact reasonably could conclude that McKinney intended to use the information he derived from NuScience's customer lists to market a competing product.

"For all of these reasons, we conclude that NuScience produced evidence of actual or threatened misappropriation."  
(*NuScience I*, pp. 6–9.)

### III.

#### *McKinney v. NuScience* (*NuScience II*)

On September 13, 2011, one day after the trial court awarded attorney fees under the UTSA in *NuScience I*, McKinney, represented by Abraham, filed a malicious prosecution action against NuScience. The operative first amended complaint, filed October 12, 2011, alleged that NuScience's claims against McKinney for trade libel, misappropriation of trade secrets, and civil RICO violations in *NuScience I* were baseless and lacked probable cause. (*McKinney v. NuScience Corp.* (Nov. 25, 2013, B240831/B244074), p. 3 (*NuScience II*).

NuScience filed a special motion to strike the malicious prosecution complaint under the anti-SLAPP statute. NuScience argued the special motion to strike should be granted because the malicious prosecution activity was based on protected activity and McKinney could not establish a probability of prevailing. Specifically, NuScience asserted: McKinney would not be able to establish there had been a favorable termination of *NuScience I* on the merits because NuScience dismissed the action only because Henkel made threats of extortion; McKinney would not be able to establish lack of probable cause given the e-mail chain between McKinney and Henkel; NuScience relied on advice of counsel; and McKinney would not be able to establish malice. (*NuScience II*, p. 5.)

In support, NuScience's president, Kevin Negrete, filed a declaration, in which he said that after NuScience received the e-mail chain described above, the company hired counsel to review the evidence and advise it of its rights. NuScience provided "all

relevant facts” to its counsel. Based on advice of counsel, NuScience determined it had probable cause to pursue litigation and elected to file a complaint against McKinney and Henkel. Negrete declared: “[NuScience] filed the underlying complaint against [McKinney] based on [McKinney’s] breach of his Separation Agreement, his conversations with Robert Henkel, and in order to prevent further dissemination and misappropriation of [NuScience’s] trade secrets, and not with any bad faith intentions, personal animosity or maliciousness. It most certainly was not filed to harass or annoy [McKinney].”

McKinney opposed the special motion to strike, arguing the misappropriation action had terminated favorably on the merits because it was dismissed immediately prior to a hearing on the motion for terminating sanctions; McKinney had to establish only that *one* of the causes of action in the misappropriation action lacked probable cause, and NuScience never produced any evidence to support its theories of trade libel, trade secret misappropriation, or civil RICO violations; and the evidence was insufficient to support the advice of counsel defense. (*NuScience II*, p. 5.)

The trial court granted the special motion to strike. It rejected McKinney’s claim that the dismissal prior to the hearing on the discovery motion was a favorable termination on the merits, noting “undisputed evidence . . . that the case was dismissed in response to extortionist threats.” The trial court also determined that McKinney had not established NuScience lacked probable cause to bring the claims for misappropriation of trade secret, trade libel, and RICO violations. Finally, the trial court concluded that the evidence supported an advice of counsel

defense. (*NuScience II*, p. 5.) The court awarded NuScience attorney fees of \$129,938.75. (*NuScience II*, p. 1.)

McKinney appealed from the order striking the complaint, and the Court of Appeal affirmed. The reviewing court concluded that McKinney’s malicious prosecution action indisputably arose from protected petitioning activity and McKinney had failed to demonstrate a probability of prevailing, as follows. *First*, a voluntary dismissal is a favorable termination on the merits only if it “reflects on the merits of the underlying action.” (*NuScience II, supra*, at p. 7.) If the termination “‘does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious prosecution.’ [Citation.]” (*Ibid.*) In the present case, there was not a favorable termination on the merits because the evidence “left more than ample doubt as to whether [McKinney] was innocent of the claims in [*NuScience I*]. (*Ibid.*) *Second*, the record showed that McKinney could not establish that NuScience lacked probable cause to pursue the trade libel and RICO claims in *NuScience I*. *Third*, the evidence was sufficient to establish that NuScience relied on the advice of counsel in filing *NuScience I* because “[t]he undisputed evidence established that, after receiving the email chain, [NuScience] consulted an attorney.” (*NuScience II, supra*, p. 10)

#### IV.

### ***NuScience v. Abraham*** **(*NuScience III*)**

NuScience filed the present action against attorney Abraham and his law firm (collectively, Abraham), McKinney,

and two other individuals on March 12, 2014.<sup>3</sup> The operative complaint asserts two causes of action against Abraham: malicious prosecution (third cause of action) and intentional interference with contractual relations (seventh cause of action).

A. *Special Motion to Strike the Intentional Interference With Contract Claim*

The intentional interference with contract claim alleged that the employment and separation agreements between NuScience and McKinney required McKinney to “ ‘maintain the confidentiality of all Company confidential and proprietary information’ ” and to refrain from “ ‘disparag[ing] [NuScience] or its past or present officers, directors, employees, shareholders, agents and/or representatives in any manner likely to be harmful to them or their business, business reputation or personal reputation’ unless compelled to do so by legal process.” Abraham knew of these agreements, but nonetheless “solicited, and/or advised, and/or counseled and/or persuaded McKinney to sign multiple unnecessary declarations that Abraham prepared for McKinney to submit for the benefit of other clients of Abraham’s in civil actions in which McKinney was not [a party]. . . . Said declarations disparaged NuScience and/or its past or present officers, directors, employees, shareholders, agents and/or representatives and otherwise disclosed confidential information and confidential documents that McKinney was required to return to NuScience or destroy. [¶] Abraham engaged in such conduct, which is not protected by the litigation privilege, with

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<sup>3</sup> McKinney apparently filed for bankruptcy after NuScience initiated the present action; therefore, he did not participate in the proceedings described below.

the intent to harm NuScience financially and in its goodwill, and otherwise to induce McKinney to breach his agreements with NuScience.”

Abraham filed a special motion to strike the intentional interference with contract claim. With regard to the first prong of the statute, Abraham asserted that the intentional interference claim was based solely on the declarations he filed on behalf of his clients in judicial proceedings, and thus arose out of his clients’ protected rights of petition. With regard to the statute’s second prong, Abraham asserted that NuScience could not prevail because the filing of declarations in judicial proceedings was absolutely privileged under Civil Code section 47, subdivision (b).

NuScience opposed the motion. NuScience contended: “As the Complaint makes perfectly clear, Abraham is being sued for his *conduct* of getting his client, and former NuScience employee, David McKinney, to breach his contracts with NuScience by voluntarily preparing and signing Declarations without legal process that reveal confidential information and disparage NuScience. Abraham subsequently filed these documents in cases in which McKinney was not a party. Abraham is not being sued for his subsequent acts of filing these Declarations in court. California courts have said repeatedly that the mere fact that Abraham subsequently filed the McKinney Declarations in court does not shield his conduct preceding or collateral to the filing from liability. Abraham’s *conduct* of encouraging and getting McKinney to reveal, without the implementation of legal process, confidential and disparaging information in violation of his contracts is not a written or oral statement made before or in connection with a matter under review in a judicial proceeding.

Therefore, Mr. Abraham's conduct is not protected by the Anti-SLAPP statute. [¶] . . . [¶]

“As to the second prong of the anti-SLAPP statute, . . . the undisputed evidence is that McKinney had a contract with NuScience not to voluntarily disclose NuScience's confidential information or disparage NuScience unless required by law or legal process. The undisputed evidence is that Abraham got McKinney to breach his contract by preparing and having him sign declarations, as a non-involved person, that disclose confidential and disparaging information absent legal process. As a result, NuScience has suffered damage in the form of time and money spent addressing McKinney's reckless and false claims and the fallout among NuScience's customers. Contrary to Abraham's claims, the litigation privilege only protects speech, not conduct, and his conduct of getting McKinney to sign declarations without legal process is not privileged.”

The trial court granted the motion to strike the intentional interference with contract claim, finding as follows: “The court finds that Abraham has sufficiently demonstrated that the 7th cause of action for intentional interference with contractual relations arises from protected activity, and [NuScience] has failed to demonstrate a probability of prevailing on the merits because the absolute litigation privilege bars this claim. The court finds that [NuScience's] own complaint shows that the only conduct in which Abraham is alleged to have engaged in is the filing of declarations in federal and state court lawsuits that were signed by David McKinney ('McKinney'). The complaint is devoid of any other factual allegations showing how Abraham otherwise interfered with the contracts between [NuScience] and McKinney. There are no allegations of conspiracy. There are no

allegations of fraud. There are no factual allegations at all stating what it is that Abraham actually did to ‘encourage’ or cause McKinney to voluntarily submit the declarations in violation of McKinney’s contracts with [NuScience]. Abraham’s act of filing these signed declarations in the federal and state lawsuits is protected activity covered by the SLAPP statute. Accordingly, the 7th cause of action of plaintiff’s complaint is stricken and dismissed. . . .”

*B. Special Motion to Strike the Malicious Prosecution Claim*

The malicious prosecution claim alleged that *NuScience II*, which Abraham initiated on McKinney’s behalf, “was filed, and prosecuted, without merit. Specifically, McKinney’s claims were meritless in that he did not have any evidence to prove the elements of a favorable termination, lack of probable cause, or malice in fact given that the email chain between him and Robert [Henkel] clearly established McKinney’s guilt related to the claims brought against him by NuScience. This email evidence, admitted to as genuine by McKinney in discovery responses and known to his attorneys, undermines any reasonable belief that a cause of action for malicious prosecution was tenable against NuScience. NuScience alleges on information and belief that Defendant McKinney and his attorneys filed, and prosecuted, the malicious prosecution action against NuScience solely, and with malice, to retaliate against NuScience for exercising its legal right to seek public redress for McKinney’s evident wrongful conduct.”

Abraham separately filed a special motion to strike the malicious prosecution claim under the SLAPPback statute (§ 425.18). Abraham contended that *NuScience II* was based on

McKinney's prior litigation, and thus arose from protected activity. Further, NuScience could not prevail on its cause of action for malicious prosecution because it could not demonstrate that *NuScience II* had been brought without probable cause and with malice. Specifically, Abraham noted that the trial court in *NuScience I* had found in connection with McKinney's request for attorney fees "that NuScience initiated its action for [an] improper purpose, i.e., to use it as a 'stalking horse' to obtain discovery in" NuScience's federal action against the Henkels. Therefore, "[b]ased on the trial court's findings, rulings, orders, and judgment [in *NuScience I*], with which Abraham agreed, Abraham had an honest and reasonable belief in his client's malicious prosecution claim against NuScience."

NuScience opposed the special motion to strike. NuScience did not dispute that its malicious prosecution claim arose from protected conduct. However, it urged that it had a substantial probability of prevailing on all three elements of its malicious prosecution action. First, the underlying action (*NuScience II*) terminated in NuScience's favor because the court granted NuScience's special motion to strike. Second, NuScience had probable cause to file the present action because Abraham *lacked* probable cause to file *NuScience II*. In this regard, NuScience contended: (1) McKinney did not obtain a favorable termination on the merits in *NuScience I* because NuScience voluntarily dismissed its action; (2) NuScience had probable cause to sue McKinney in *NuScience I*; and (3) "the undisputed evidence is that NuScience did not act with malice [in filing *NuScience I*] and believed in good faith in its suit."

The court granted the special motion to strike, concluding that Abraham had demonstrated there was no probability

NuScience could prevail on the claim. Specifically, the court found “that [NuScience] cannot prove that [Abraham] lacked probable cause when he filed [*NuScience II*]. When [*NuScience II*] was filed, Judge Fahey had ruled [in *NuScience I*] that the [Uniform Trade Secrets Act] claim was filed in ‘bad faith,’ and he awarded McKinney attorney’s fees. One day after this ruling was made, [*NuScience II*] was filed based on Judge Fahey’s ruling. The ruling constituted probable cause to . . . file [*NuScience II*].” Further, the court concluded that NuScience “cannot prove that Abraham acted with malice.” It noted that NuScience cited ten items of evidence, but it concluded that none was prima facie evidence of malice. Thus, “[NuScience] cannot prove a probability of prevailing on the merits since [NuScience] cannot show lack of probable cause or malice.”

*C. Attorney Fee Award, Judgment, and Appeal*

On June 22, 2015, the court awarded Abraham attorney fees of \$99,595. The court entered judgment in favor of Abraham on July 13, 2015, and notice of entry of judgment was served the same day. NuScience timely appealed.

**DISCUSSION**

NuScience contends that the trial court erred in granting the special motion to strike the malicious prosecution and interference with contract claims, and abused its discretion in granting Abraham attorney fees. For the reasons that follow, we disagree and affirm.

**I.**

**Legal Principles**

*A. Anti-SLAPP Statute*

Section 425.16, subdivision (b)(1) provides: “A cause of action against a person arising from any act of that person in

furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” The statute “ ‘provides a procedure for the early dismissal of what are commonly known as SLAPP suits . . .—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights.’ [Citation.]” (*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 40.)

Section 425.16, subdivision (e) describes the type of activity protected by the anti-SLAPP statute. An “ ‘act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

The analysis of an anti-SLAPP motion involves two steps. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) ‘A defendant meets this burden by demonstrating that the act

underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' [Citation.] If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

"[I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only have 'stated and substantiated a legally sufficient claim.'" [Citation.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" [Citation.]" (*Navellier v. Sletten, supra*, 29 Cal.4th 88–89.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

#### *B. SLAPPback Actions*

A "SLAPPback" is "any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16." (§ 425.18, subd. (b)(1).) The purpose of a SLAPPback is to seek compensation for damages beyond the attorney fees and costs awarded to the defendant who prevails on the special motion to strike under the anti-SLAPP statute. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279–280 (*Soukup*).)

“The filing of a SLAPPback does not end the roundelay of special motions to strike under the anti-SLAPP statute. The SLAPPback defendant may in turn file such a motion arguing . . . that the filing and maintenance of the underlying action that is the basis of the SLAPPback was itself activity protected by the anti-SLAPP statute.” (*Soukup, supra*, 39 Cal.4th at p. 280.) Such motions “are subject to the usual analysis under which defendants are required to make a threshold showing that [plaintiff’s claim] arises from protected activity . . . [and] ‘whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.]’ ” (*Id.* at pp. 290–291.)

*C. Standard of Review*

We review de novo the trial court’s order granting a special motion to strike. (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.)

**II.**

**No Error in Granting the Special Motion to Strike the Intentional Interference With Contract Claim**

*A. The Intentional Interference With Contract Claim Arose from Protected Petitioning Activity*

The elements of an action for tortious interference with contract are “ ‘(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.’ ” [Citation.]” (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1196.)

NuScience’s cause of action for interference with contract concerns six declarations that Abraham allegedly drafted and filed on McKinney’s behalf. According to NuScience, the

declarations disclosed NuScience’s proprietary information in violation of McKinney’s contractual promises not to do so: “The key point is that McKinney was contractually bound not to disclose such information unless required by law to do so. Abraham knew this. Nevertheless, Abraham proceeded to have McKinney disclose confidential and disparaging information about NuScience, knowing that McKinney was breaching his duties to NuScience as a former employee.”

NuScience appears to concede—as it must—that filing documents in court is petitioning activity protected by section 425.16, subdivision (e)(1). (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [“ ‘ “[t]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action” ’ ”]; *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 [same]; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 [same].) But while NuScience concedes this general proposition, it contends that its intentional interference claim is based on Abraham’s “conduct of persuading and getting McKinney to sign Declarations that breached his contract with NuScience, *not* for his later filing of these same documents.” (Italics added.) NuScience urges: “The gravamen of NuScience’s suit is that Abraham . . . got McKinney to sign Declarations that breached his employment contract with NuScience. . . . Abraham’s later decision to file the McKinney Declarations in court does not protect Abraham [from] prior conduct of preparing the Declarations and getting McKinney to sign them. If it were otherwise, any person could cloak themselves [*sic*] from liability by simply filing any defamatory or wrongful statements in court.”

NuScience’s claim that the filing of the declarations in court should not “protect” Abraham’s prior conduct assumes that the preparation of the declarations was, itself, a tortious interference with contract. But the complaint, as well as NuScience’s arguments on appeal, establish otherwise. According to NuScience, the provisions of the employment and separation agreements that McKinney breached were the *nondisclosure provisions*, i.e., those provisions of the contracts that required McKinney to maintain the confidentiality of NuScience’s proprietary information. Specifically, the complaint alleges that the employment agreement provided that McKinney “will not at any time either while employed by the Company or after the termination of employment reveal any Confidential Information for any other person or business entity, except as required by his duties for the Company or by law.” The separation agreement provided that McKinney would “ ‘continue to maintain the confidentiality of all Company confidential and proprietary information as provided by the Employment Agreement’ ” and would “ ‘not disparage [NuScience] or its past or present officers, directors, employees, shareholders, agents and/or representatives in any manner likely to be harmful to them or their business, business reputation or personal reputation’ unless compelled to do so by ‘legal process.’ ” The complaint alleges that Abraham “intentionally interfered with” the employment and separation agreements by “preparing” and “publicly fil[ing]” declarations that “disparaged NuScience and its agents in direct violation of the Separation Agreement and purport[ed] to disclose confidential strategy information in direct violation of both the Separation Agreement and the Employment Agreement.”

As pled, therefore, there could be no breach of contract absent *a disclosure or public disparagement*—and the disclosure/disparagement NuScience alleges is Abraham’s public filing of McKinney’s declarations. Thus, the filing of the declarations, which was protected activity, was not independent of or subsequent to the alleged interference with contract—it was an essential element of the alleged interference.

For this reason, the present case is fundamentally different than *Ben-Shahar v. Pickart* (2014) 231 Cal.App.4th 1043, on which NuScience relies. In that case, Ben-Shahar was a long-time resident of a rent-controlled building in Santa Monica. The building’s owner sold the building, and the new owners served Ben-Shahar with a 60-day notice to quit. Ben-Shahar refused to vacate his unit, and the new owners brought unlawful detainer proceedings. During those proceedings, the parties entered into an agreement resolving the unlawful detainer proceedings, pursuant to which Ben-Shahar would vacate the unit, and the new owners would move in to it. Ben-Shahar moved out, but the owners did not move in. Ben-Shahar therefore brought an action for breach of the Santa Monica rent control ordinance and the unlawful detainer agreement. The owners filed a special motion to strike, which the trial court denied, and the owners appealed. (*Id.* at pp. 1046–1050.) The Court of Appeal affirmed, concluding that Ben-Shahar’s complaint did not arise out of protected petitioning activity because it was directed at the owners’ purported breach of the settlement agreement and failure to timely occupy the apartment, *not* the owner’s earlier filing of unlawful detainer proceeding. (*Id.* at p. 1053.)

The present case is distinguishable from *Ben-Shahar*. In that case, although the owners’ protected petitioning activity

occurred prior to the tenant’s subsequent lawsuit, it was not the basis for the lawsuit. Here, in contrast, Abraham’s *filing* of McKinney’s declarations is specifically alleged in NuScience’s complaint and is a necessary element of NuScience’s intentional interference claim. Accordingly, *Ben-Shahar* does not guide our analysis.<sup>4</sup>

The present case also is distinguishable from *Paul v. Friedman* (2002) 95 Cal.App.4th 853 (*Paul*), which NuScience cites for the proposition that Abraham’s conduct is not protected because McKinney’s declarations “were irrelevant to the proceedings in which they were filed.” In *Paul*, former clients of a securities broker brought an arbitration proceeding in which they claimed the broker violated securities laws, committed fraud, breached his fiduciary duties, and made negligent investment recommendations. In connection with the arbitration proceeding, the clients conducted an investigation of the broker that far exceeded the scope of permissible discovery. The arbitration completely vindicated the broker, who then sued the former clients, asserting that their investigation gave rise to causes of action for intentional infliction of emotional distress, libel and

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<sup>4</sup> We reach the same conclusion with regard to *Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384. There, the appellate court concluded that the gravamen of the complaint was not protected petitioning conduct because “[a] fair reading of the [plaintiff’s] complaint is that the [defendants] were being sued for wrongfully purchasing the [plaintiff’s] confidential documents from [plaintiff’s former fundraiser], not for prosecuting [a prior administrative] complaint.” (*Id.* at p. 398.)

slander, invasion of privacy, and tortious interference with economic relationships, among others. (*Id.* at pp. 856–857.)

The former clients filed a special motion to strike, urging that the broker’s action against them arose out of protected petitioning activity. (*Paul, supra*, 95 Cal.App.4th at p. 858.) The broker disagreed, asserting that the clients’ investigation involved inquiry into matters unrelated to the arbitration claims. (*Id.* at p. 859.) The trial court granted the motion in part, and both sides appealed. (*Id.* at pp. 860–861.) The Court of Appeal found the motion should have been denied in its entirety. It explained: “[Broker’s] tort causes of action plainly did not seek redress for any statements of [clients] ‘made in’ the arbitration or ‘before’ the arbitrators. (§ 425.16, subd. (e)(1).) [Broker] sought redress for a harassing investigation and disclosures made outside the arbitration. Thus, since the suit does not arise from statements ‘made before’ the arbitral body, [clients] had to show the suit arose from oral statements or writings ‘made in connection with an issue under consideration or review’ in the arbitration. (*Id.*, subd. (e)(2).) A review of [broker’s] complaint and [clients’] motion to strike makes it clear that [clients] made no such showing. ¶] In essence, [broker’s] lawsuit alleged [clients] conducted a harassing investigation that extended far beyond the scope of the issues subject to arbitration. The investigation was allegedly directed to personal matters bearing no relationship to the claims asserted in the arbitration. In the course of the investigation, [clients] allegedly made disclosures . . . about [broker’s] personal life that likewise had nothing to do with the claims under consideration in the arbitration. Fairly read, the complaint alleges [broker] was injured by acts of

[clients] that had no connection to the issues under review in the arbitration.” (*Id.* at pp. 865–866, fns. omitted.)

As the above quoted material makes clear, the *Paul* court’s statement concerning the necessary relationship between the clients’ statements and the matter under arbitral consideration related to section 425.16, *subdivision (e)(2)*. Because that subdivision protects statements or writing made “*in connection with an issue under consideration or review*” by an official body (italics added), it requires a analysis of the connection between the statement and writing, on the one hand, and the issue under review, on the other. Section 425.16, *subdivision (e)(1)*, in contrast, protects “*any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law*”—and thus does not require such an analysis. Because NuScience’s complaint alleges wrongdoing in connection with declarations filed in the district court and the superior court—i.e., in connection with written statements made *before a judicial proceeding*—subdivision (e)(1) applies, and *Paul*’s analysis of subdivision (e)(2) is inapplicable.

*B. Abraham’s Conduct Was Protected by the Litigation Privilege; Thus, NuScience Cannot Demonstrate a Probability of Prevailing*

Having concluded that Abraham’s filing of McKinney’s declarations is protected conduct under the anti-SLAPP statute, we turn to the second prong of the anti-SLAPP analysis: whether NuScience demonstrated a probability of prevailing on the intentional interference with contract claim. As we now explain, NuScience did not demonstrate a probability of prevailing because its intentional interference claim is barred by the litigation privilege.

“The litigation privilege, found in Civil Code section 47, subdivision (b)(2), ‘applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.’ (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege ‘immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution.’ (*Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333.) In the anti-SLAPP context, the litigation privilege presents ‘a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing.’ (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.)” (*Greco v. Greco* (2016) 2 Cal.App.5th 810, 826.)

“The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. [Citation.] Put another way, application of the privilege does not depend on the publisher’s ‘motives, morals, ethics or intent.’ [Citation.] Although originally applied only to defamation actions, the privilege has been extended to *any* communication, not just a publication, having ‘some relation’ to a judicial proceeding.” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.) “Doubts about the privilege’s applicability are resolved in favor of its use.” (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1430.)

The pleadings and process in a case consistently have been viewed as privileged communications (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058), and the litigation privilege has been applied specifically to claims arising out of the filing of

declarations alleged to be false or perjurious. For example, in *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1431, the court held that because a declaration “functions as written testimony,” it is a “communication, not conduct” and “is exactly the sort of communication the privilege is designed to protect.” Similarly, in *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913–915, the court held that the plaintiff’s claim that an expert witness had manufactured false evidence in a prior action was barred by the litigation privilege: “We in no way condone the alleged perjury. If the allegations in the complaint are true, [the witness’s] conduct is indeed outrageous. However, when there is a good faith intention to bring a suit, even malicious publications ‘are protected as part of the price paid for affording litigants the utmost freedom of access to the courts.’ [Citations.] Otherwise, adverse witnesses would always be fearful of subsequent civil suits and would be extremely hesitant or unwilling to testify.” (*Id.* at p. 915.)

Notwithstanding the general principle that the litigation privilege applies to declarations filed in support of motions, NuScience urges that the privilege does not apply here for two reasons. First, NuScience suggests that the essence of its cause of action is Abraham’s out-of-court conduct in getting McKinney to prepare and sign declarations, not his in-court filing of those declarations—a contention we have already rejected. Second, NuScience contends that several of the declarations were “irrelevant to the proceedings in which they were filed” because “they attempted to re-litigate the merits of the case” and “disparaged NuScience and revealed confidential information on

issues unrelated to the contempt proceedings before the court.”<sup>5</sup> We disagree. “[T]he ‘connection or logical relation’ which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection. That is to say, the *communicative act*—be it a document filed with the court, a letter between counsel or an oral statement—must function as a necessary or useful step in the litigation process and must serve its purposes. This is a very different thing from saying that the communication’s *content* need . . . be related in some way to the subject matter of the litigation. . . .” (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146 (*Rothman*); see also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 920 (*Kashian*)). A party’s pleadings “‘obviously satisfy this test.’” (*Kashian*, at p. 921.) Thus, because the declarations at issue were filed in support of motions or oppositions thereto, they were *functionally* related to the underlying litigation and, therefore, are absolutely privileged pursuant to Civil Code section 47, subdivision (b).

For all of these reasons, the trial court properly granted the special motion to strike the cause of action for intentional interference with contract.

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<sup>5</sup> For example, NuScience asserts, “McKinney purports to discuss confidential information about NuScience’s formula and alleged improprieties regarding the export of NuScience’s products to Canada. These matters had nothing to do with the Henkels’ contempt of court.”

### III.

#### Malicious Prosecution

##### A. *The Malicious Prosecution Claim is Based on Protected Activity*

“By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.’ [Citation.] The filing of lawsuits is an aspect of the First Amendment right of petition. [Citation.]” (*Soukup, supra*, 9 Cal.4th at p. 291.) Accordingly, Abraham has made the required threshold showing that the malicious prosecution claim is based on protected activity.

##### B. *NuScience Has Not Demonstrated a Probability of Prevailing on the Malicious Prosecution Claim*

###### 1. Elements of Malicious Prosecution

To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff “ ‘must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 (*Bertero*)).” (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 458.) “ ‘ “Where a prior action asserted several grounds for liability, an action for malicious prosecution will lie if any one of those grounds was asserted with malice and without probable cause.” ’ [Citation.]” (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 875.)

Probable cause to bring an action exists where the suit is “ ‘*arguably tenable*, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable.’ [Citation.] ‘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.] In view of that policy, ‘[o]nly those actions that “ ‘any reasonable attorney would agree [are] totally and completely without merit’ ” may form the basis for a malicious prosecution suit.’ [Citation.] A litigant lacks probable cause ‘ “if he [or she] relies upon facts which he [or she] has no reasonable cause to believe to be true, or if he [or she] seeks recovery upon a legal theory which is untenable under the facts known to him [or her].” ’ [Citation.]” (*Nunez v. Pennisi, supra*, 241 Cal.App.4th at p. 875.)

“Malice in connection with malicious prosecution ‘ “relates to the *subjective intent or purpose* with which the defendant acted. . . .” ’ [Citation.] Malice ‘ “may range anywhere from open hostility to indifference” ’; it is not limited to ‘ “ill will toward plaintiff but exists when the proceedings are [prosecuted] primarily for an improper purpose.” ’ [Citations.] As an element of malicious prosecution, malice ‘reflects the core function of the tort, which is to secure compensation for harm inflicted by misusing the judicial system, i.e., *using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement.*’ [Citation.]” (*Lanz v. Goldstone, supra*, 243 Cal.App.4th at pp. 466–467, italics added.)

As we now discuss, NuScience has not demonstrated that the malicious prosecution claim was initiated with malice. Therefore, we need not reach the element of probable cause to conclude that NuScience has not shown a likelihood of prevailing on the merits.<sup>6</sup>

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<sup>6</sup> In the trial court, NuScience submitted the purported expert declaration of James King, an attorney, who opined on the elements of favorable termination, probable cause, and malice.

2. NuScience Has Not Demonstrated That the Underlying Malicious Prosecution Claim Was Initiated With Malice

To establish malice, a malicious prosecution plaintiff “‘must plead and prove actual ill will or some improper ulterior motive.’ Improper purposes can be established in cases in which, for instance (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim. [Citation.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224–225 (*Daniels*).

Where malicious prosecution is alleged against a former adversary’s *attorney*, malice harbored by the adversary may not be attributed to the attorney. (*Daniels, supra*, 182 Cal.App.4th at p. 225; see also *Pattiz v. Minye* (1998) 61 Cal.App.4th 822, 828 [“The malfeasance or dereliction of a client is not imputed to his or her attorney.”].) Rather, malice must be adduced against the

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Contrary to NuScience’s appellate contention, the trial court did not err in excluding King’s declaration. “There are limits to expert testimony, not the least of which is the prohibition against admission of an expert’s opinion *on a question of law*.” (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178, italics added.) In the present case, King opined exclusively on questions of law; thus, his declaration was properly stricken. (E.g., *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1274, italics added [in reviewing a special motion to strike, the trial court considers “‘*as a matter of law* whether the evidence is sufficient to support a judgment in the plaintiff’s favor.’”].)

attorney *himself*. (*Id.* at p. 225.) “[T]he attorney is not the insurer of his client’s conduct, and the law wisely places no such burden on that party’s *attorney* solely by reason of his client’s conduct in that regard.’ [Citations.]” (*Pattiz v. Minye, supra*, 61 Cal.App.4th at p. 828.)

On appeal, NuScience identifies “10 separate pieces of evidence” that it contends establish Abraham’s malice towards NuScience. As we now discuss, none of NuScience’s “evidence” demonstrates a prima facie showing of malice:

(1) Abraham “told NuScience that he intends to destroy NuScience”: In support, NuScience cites to evidence that Abraham said in September 2013 that “ ‘NuScience will be out of business in six months’ ” and “ ‘NuScience will be done in six months.’ ” Such a statement suggests, at most, that Abraham believed the litigation would be successful and that NuScience’s demise was imminent—*not* that he intended to cause its demise. The statement does not establish malice.

(2) Abraham “lacked probable cause to file McKinney’s suit for malicious prosecution”: Lack of probable cause is insufficient to establish malice. To demonstrate malice, lack of probable cause “must be supplemented *by other, additional evidence.*” (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218, italics added.) As explained in *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498: “[B]y itself, the conclusion that probable cause is absent logically tells the trier of fact nothing about the defendant’s subjective state of mind. That being so, it does not seem logical to permit any inference to be drawn as to a *subjective* state of mind solely from the absence of *objective* tenability. Evidence Code section 600, subdivision (b), provides, ‘An inference is a deduction of fact that

may *logically and reasonably* be drawn from another fact or group of facts found or otherwise established in the action.’ (Italics added.) Merely because the prior action lacked legal tenability, as measured objectively (i.e., by the standard of whether any reasonable attorney would have thought the claim tenable [citation], *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor’s subjective malicious state of mind. In other words, the presence of malice must be established by *other, additional evidence*.” (Some italics added.) The alleged lack of probable cause to file *NuScience II*, therefore, is not evidence of malice.

(3) The trial court in *NuScience II* “granted NuScience’s Anti-SLAPP Motion to Strike McKinney’s Complaint”: The granting of an anti-SLAPP motion establishes a claim’s lack of merit, *not* a litigant’s or lawyer’s subjectively malicious state of mind. (§ 425.16, subd. (b)(1) [motion to strike shall be granted “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim”].) Thus, for the reasons discussed above, the granting of the special motion to strike, while arguably establishing the suit’s lack of demonstrable merit, does not establish malice.

(4) Abraham “deliberately misrepresented the record presented on McKinney’s appeal” in *NuScience II*: As NuScience concedes, the Court of Appeal in *NuScience II* considered and rejected the claim that McKinney’s asserted misrepresentation of the trial court record warranted sanctions. (*NuScience II, supra*, at p. 11.) We therefore decline to find this asserted misrepresentation to be evidence of malice.

(5) Abraham “continued to pursue appeals and claims against NuScience knowing they are [*sic*] frivolous”: Our Supreme Court has held that litigation is not frivolous simply because it is without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The Court of Appeal’s opinion affirming the order granting the anti-SLAPP motion in *NuScience II*, therefore, did not establish that McKinney’s malicious prosecution action was “frivolous” or brought with a subjectively improper purpose.

(6) Abraham “sought out and represented parties hostile to NuScience in no less than four cases”: The evidence NuScience cites demonstrates that Abraham represented NuScience’s litigation adversaries, *not* that Abraham “sought [them] out.” Plainly, representing a party’s litigation opponent, without more, is not evidence of malice.

(7) Abraham “used the McKinney Declarations as a vehicle to disclose NuScience’s confidential trade secret and attorney-client communications in unrelated proceedings”: The court has reviewed the six declarations cited by NuScience and finds no evidence that they revealed any of NuScience’s trade secrets. To the contrary, McKinney stated in these declarations that, “I never knew all of the ingredients of Cellfood,” “I was never told and never learned the secret ingredients of the ‘seed’ that . . . was used to make Cellfood,” “at no time did I know any of the ingredients in Cellfood beyond what was publicly disclosed,” and “I never disclosed the ingredients in Cellfood or any other trade secret to anyone outside of NuScience.” The filing of the declarations, therefore, is not evidence of malice.

(8) Abraham “represent[ed] . . . clients with multiple, non-waivable conflicts of interest”: Were this true—an issue we need not decide—it would be evidence of violation of the Rules of

Professional Conduct (see Rules of Professional Conduct, rule 3-310), *not* malice against NuScience.

(9) Abraham “was aware that Robert [Henkel] had made criminal threats that resulted in the dismissal of [*NuScience I*]” when he filed *NuScience II*: While the evidence demonstrates that Abraham was aware of Robert Henkel’s alleged criminal threats when he filed *NuScience II*, there is no evidence that he believed NuScience dismissed *NuScience I* because of such threats, rather than because of McKinney’s pending motion for terminating sanctions.

(10) Abraham “fabricated allegations that Cellfood is unsafe”: The only evidence cited by NuScience that Abraham “fabricated allegations” is the written testimony of Kevin Negrete, NuScience’s president, that, “Abraham has been claiming that NuScience’s Cellfood is ‘unsafe’ and using McKinney to do so.” Negrete’s conclusory assertion, without more, is not prima facie evidence of malice. (E.g., *People v. Alexander* (2010) 49 Cal.4th 846, 897 [“unsupported, conclusory statement” in declaration was not evidence]; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 251 [party’s conclusory assertions, unsupported by other evidence, did not satisfy burden of making prima facie showing].)

For all of these reasons, NuScience has not made a prima facie showing of malice. It thus has not demonstrated a probability of prevailing on its malicious prosecution claim, and the special motion to strike was properly granted.

#### **IV.**

#### **Attorney Fees**

NuScience’s remaining contention is that the trial court abused its discretion in awarding Abraham attorney fees in the

amount of \$99,595. For the reasons that follow, we find no abuse of discretion.

Under most circumstances, attorney fees are mandatory to a prevailing defendant under the anti-SLAPP statute. (§ 425.16, subd. (c)(1).) In contrast, a defendant who prevails on a special motion to strike a SLAPPback may recover attorney fees only if “the court finds that a special motion to strike a SLAPPback is frivolous or solely intended to cause unnecessary delay.” (§ 425.18, subd. (f).) “An order granting an award of attorney fees is generally reviewed for abuse of discretion.” (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1319–1320.)

The parties agree that (1) Abraham was entitled to recover those fees incurred to bring the special motion to strike the interference claim (i.e., the anti-SLAPP motion), and (2) Abraham was *not* entitled to recover those fees incurred to bring the special motion to strike the malicious prosecution claim (i.e., the SLAPPback motion). NuScience contends, however, that Abraham’s attorneys “improperly shifted billing entries attributable to the SLAPPback . . . to the Anti-SLAPP,” claimed an excessive number of total attorney hours in connection with the anti-SLAPP motion, and claimed to have billed an excessive number of hours on particular days. Further, NuScience urges that “[t]his claim for fees is simply not credible as a matter of law and demonstrates that Abraham is padding or making up time entries.”

It is settled that an “ ‘ ‘experienced trial judge is the best judge of the value of professional services rendered in [her] court, and while [her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.’ ’ ” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122,

1132.) In this case, the trial judge considered and rejected each of the arguments NuScience makes on appeal. Under the circumstances of this case, the trial court did not exceed the bounds of reason in exercising its discretion.

**DISPOSITION**

The judgment is affirmed. Abraham is awarded his appellate costs.

**NOT TO BE PUBLISHED IN THE OFFICIAL  
REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.