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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

INNOVATION VENTURES, LLC,

Plaintiff and Respondent,

v.

HOWARD W. RUBINSTEIN et al.,

Defendants and Appellants.

G046242

(Super. Ct. No. 30-2011-00501943)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Francisco F. Firmat, Judge. Affirmed in part and reversed in part.

Hinshaw & Culbertson and Filomena E. Meyer for Defendants and Appellants Howard R. Rubinstein, Richard Proaps, Harold M. Hewell, David Salazar and Salazar & Tellawi.

Tabatabai & Blonstein, Farzad Tabatabai and Robert S. Blonstein for Defendant and Appellant Vi Nguyen.

Crone Hawxhurst, Gerald E. Hawxhurst and Daryl M. Crone for Plaintiff and Respondent.

Defendants, attorneys Howard Rubenstein, Harold M. Hewell, Richard A. Proaps, David Salazar, Salazar & Tellawi, PLLC (collectively attorneys), and their client, Vi Nguyen (Nguyen), appeal the trial court's denial of their special motions to strike the malicious prosecution complaint filed against them by plaintiff Innovation Ventures, LLC (Innovation). (Code Civ. Proc., § 425.16; anti-SLAPP motion; all further statutory references are to this code unless otherwise stated.) Attorneys contend Innovation did not satisfy its burden under section 425.16. Nguyen joins in their arguments and asserts further reasons why her anti-SLAPP motion should have been granted.

We need not discuss Nguyen's additional grounds because Innovation did not satisfy its burden to demonstrate malice on her part. As to attorneys, we conclude Innovation established a prima facie case for malicious prosecution. We thus affirm the order as to attorneys but reverse as to Nguyen.

FACTS AND PROCEDURAL HISTORY

Innovation markets and sells a drink known as 5-Hour Energy (the product). Rubenstein attests he is admitted to practice law in Colorado and the District of Columbia and has previously worked with a network of local counsel from different states specializing in consumer class actions, including Salazar, licensed in Texas, and California attorneys Proaps and Hewell. Nguyen, a California resident, is the cousin of a paralegal in Salazar's former law firm in Texas.

According to declarations by attorneys, Rubenstein became interested in suing Innovation in 2009 and informed Salazar, who then mentioned it to members of his former firm. After drinking the product several times, Nguyen was introduced to Salazar by her cousin and described her experiences to him. Salazar told Nguyen to call him the next time she bought the product and had the same experience. Nguyen purchased the

product on April 7, 2010 and contacted Salazar. Later that month she agreed to serve as class representative in an action against Innovation. Salazar associated in Rubinstein, who brought Hewell into the case as local California counsel.

Rubinstein and Hewell filed an unverified complaint for unfair business competition, false advertising, breach of express warranty, and violation of the consumer legal remedies act on Nguyen's behalf. They filed an unverified first amended complaint in January 2011. Proaps appeared as co-counsel six months later.

Although Nguyen is a woman, the complaints refer to her as "Mr." and "he." Nguyen alleged she bought the product on April 7, 2010 in reliance on Innovation's "deceptive representations," would not have purchased it "had he known that those representations were not true," and suffered "financial loss" as well as physical distress in that "he felt shaky and depleted."

The federal district court denied Innovation's motion to dismiss. It also issued a case management order setting, among other things, a deadline for a hearing on a motion for class certification, which defendants never filed.

Subsequently, in her responses to special interrogatories verified in June 2011, Nguyen disavowed claiming physical or personal injury or making "any allegation in the [c]omplaint regarding any physical harm he has suffered from the product. The damages and relief sought . . . relates to financial harm . . . of an unknown nature resulting from use of the product, and . . . medical monitoring for possible future physical harm caused by her use of the product." (Capitalization omitted.)

Nguyen appeared for her deposition after verifying her discovery responses. Among other things, she testified she did not think she received a copy of the complaint or remember seeing one and if she had, she would have corrected the references to her as "him" and "Mister." She had also never seen Salazar, Hewell, or Proaps and had just met Rubinstein the day before her deposition.

Nguyen admitted she bought the product on April 7, 2010 “for the case” so she could have a receipt with which to sue Innovation. Prior to that, she had bought the product several times over other energy drinks because she wanted to try something different. She initially claimed she drank it only two or three times before April 7, 2010 but then admitted having done so “four or five times” and possibly more. She knew it would give her a “surge of energy” and a “really amped” feeling for at least “[a] good two hours.” Sometimes that sensation lasted longer than others but never for the full five hours. After the surge, she would come “back down to normal” in about “four hours.” Knowing that, she still voluntarily went back and bought more. She would not have done so unless she was satisfied with its effects on her. She was “never . . . so unhappy with it that [she] sought a refund.”

Although she never thought to ask for a refund, Nguyen testified she was seeking only to recover the purchase price because she did not think the product was worth the money she spent on it. She was not seeking damages for personal injuries or the feelings of being “amped,” “crash[ing] or . . . coming down,” and was not making a claim “for medical monitoring.” Nor was she concerned she would “suffer some adverse physical or psychological effect” due to drinking the product.

About 18 days after the first session of Nguyen’s deposition was taken, Proaps served Innovation with discovery requests. Around the same time, Innovation sought to set a second session of her deposition and to take her brother’s deposition. Innovation also served a subpoena on Nguyen’s employer for, among other things, electronic mail sent and received from her work computer. Shortly thereafter, the federal district court granted Nguyen’s request to dismiss the underlying action with prejudice.

Upon being sued by Innovation for malicious prosecution, Nguyen and attorneys responded with anti-SLAPP motions. In opposition to the motion, counsel for Innovation attested, inter alia, that Hewell had sent Innovation a pre-suit letter,

demanding payment and changes to the product label to avoid a class action lawsuit. He further declared Rubinstein had called him offering to sell “‘protection,’” the level of which would vary depending on the payment.

The court denied the motions, finding the admissions in Nguyen’s deposition would support a jury determination the dismissal reflected a lack of merit in the underlying action, “a reasonable attorney would not have had probable cause to pursue the action with . . . Nguyen as her class representative and . . . Nguyen would have disclosed those facts to her attorney prior to the deposition,” and “malice can be inferred from a lack of probable cause[and] from the allegation . . . attorneys misused the justice system to sell ‘protection’ for their personal gain.” The court also observed the absence of a “timely motion for class certification . . . would suggest recognition that the case lacked merit.”

DISCUSSION

1. Introduction

Under section 425.16, subdivision (b)(1), a cause of action against a person arising from an act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff establishes the probability of prevailing on the claim. The statute first requires a defendant to demonstrate “‘the challenged cause of action is one arising from protected activity.’” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) If that is done, the burden shifts to the plaintiff to show a likelihood of prevailing on the claim. (*Ibid.*)

We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) To show the likelihood of prevailing on the merits a plaintiff “‘must demonstrate that the complaint [was] both legally sufficient and

supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence [it] submitted . . . [was] credited.’ [Citations.]” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) “‘We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citations.]” (*Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036; *Ross v. Kish* (2006) 145 Cal.App.4th 188, 197 [once prima facie case made, court considers “‘defendant’s opposing evidence, but only to determine if it defeats the plaintiff’s showing as a matter of law’”].)

There is no dispute attorneys and Nguyen had the constitutional right to file the underlying action. Nor is there any doubt a malicious prosecution claim is subject to an anti-SLAPP motion. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at pp. 734-735.) Thus the only issues here are whether Innovation showed its complaint was legally sufficient and met its burden to establish a prima face case for malicious prosecution.

2. *Innovation’s Prima Facie Case*

To prove a malicious prosecution claim, a plaintiff must show the underlying action “‘(1) was commenced by or at the direction of defendant[s] and was pursued to a legal termination in . . . plaintiff’s[] favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ [Citation.]” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

Innovation alleges attorneys and Nguyen “initiated and continued to prosecute the action . . . even though it would be obvious to any reasonable

lawyer . . . the claims were not . . . tenable,” acted with malice in filing and pursuing the claims against them, and voluntarily dismissed the underlying action after Nguyen’s deposition testimony showed “her claims were factually and legally untenable.” Because we conclude Innovation failed to carry its burden to demonstrate a probability of prevailing on the issue of malice as to Nguyen, we consider attorneys’ arguments as applicable to her only on that issue in light of her joinder to their opening brief.

a) Favorable Termination

““[W]hen the underlying action is terminated in some manner other than by a judgment on the merits, the court examines the record ‘to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not succeed.’” [Citations.]’ [Citation.] ‘Should a conflict arise as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. [Citation.]’ [Citation.]” (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399 (*Sycamore Ridge*)). “[A] voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury.’ [Citations.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 218.)

Here, attorneys contend the underlying action was not terminated on the merits because Nguyen instructed them to dismiss it with prejudice due to her desire not to appear for another deposition, subject her brother to one, or involve her employer in litigation. But the dismissal of a lawsuit to avoid being further deposed or comply with other discovery requests “reflects adversely on the merits of the action based on the natural assumption that one does not simply abandon a meritorious action once instituted.” (*Ross v. Kish, supra*, 145 Cal.App.4th at p. 200.) A reasonable fact finder could conclude defendants’ dismissal for these reasons constituted an acknowledgement

the action lacked merit. (*Ibid.*; see also *Sycamore Ridge, supra*, 157 Cal.App.4th at p. 1400.)

Innovation also made an affirmative prima facie showing sufficient to prove the voluntary dismissal of the complaint constituted a favorable termination on the merits by presenting evidence attorneys had reason to believe the lawsuit would not have been successful in light of Nguyen's admissions in her deposition. Among other things, she had alleged she "relied on those representations in making the purchase," was "misled by the deceptive labeling . . . and would not have purchased the [p]roduct had [s]he known that those representations were not true." As a result, she suffered physically in that she felt "shaky and depleted." But at her deposition, she conceded she had bought the product before purchasing the one used for this litigation and knew she would come back "down to normal" after a few hours of being "really amped." Despite that knowledge, she voluntarily bought more and admitted she would not have done so unless she had been satisfied with its effects. She had never been so unhappy with it that she sought a refund. And contrary to the allegations of the complaint, she testified she was not asserting alleging a claim for personal injuries or seeking damages for "crash[ing]" or "coming down." Based on these admissions, it can be reasonably inferred attorneys dismissed the case because they knew it lacked merit.

Attorneys argue all Nguyen had to show in the underlying action for false or misleading packaging was the packaging was likely to deceive a reasonable consumer and actual injury. According to them, Nguyen satisfied the latter requirement by purchasing the product over the years, citing *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 330. But *Kwikset* held "[a] consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of [Business and Professions Code] section 17204 by alleging . . . she would not have bought the product but for the misrepresentation." (*Ibid.*, fn. omitted.) Nguyen's

admission she bought the product on April 7, 2010 for the purpose of suing Innovation negates such a claim. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 818-819, disapproved on other grounds in *Kwikset, supra*, 51 Cal.4th at p. 337 [party buying product suspecting it was mislabeled to pursue UCL fraud action had not established standing].)

Attorneys maintain even if Nguyen's admissions "divested [her] of standing as a class representative," that was "a jurisdictional defect which does not involve the merits and cannot constitute a favorable termination." They rely on *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, a malicious prosecution action in which the trial court in the underlying action dismissed a complaint after sustaining a demurrer without leave to amend on the ground the plaintiffs, the nieces and nephew of a decedent, lacked standing because they were not successors in interest as required by the elder abuse law. (*Id.* at p. 1592.) The merits of the allegations of elder abuse were never considered and were not related to the reasons for dismissal of the action. (*Ibid.*) Here, in contrast, defendants voluntarily dismissed the underlying action with prejudice, attesting they did so to avoid complying with discovery. The evidentiary conflict between whether the underlying action was dismissed for that reason or because Nguyen's deposition testimony showed the prior action lacked substantive merit requires the matter be decided by the jury. (*Sycamore Ridge, supra*, 157 Cal.App.4th at p. 1399.)

b) Probable Cause

A party does not have probable cause if it advances a legal theory of recovery "which is untenable under the facts known to [it]. In making its determination whether the prior action was legally tenable, the trial court must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious

prosecution defendant. [Citation.]” (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 165.)

The test is whether “‘any reasonable attorney would have thought the claim tenable.’ [Citation.]” (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817.) “Only those actions that “‘any reasonable attorney would agree [are] totally and completely without merit’” may form the basis for a malicious prosecution suit. [Citation.]” (*Ibid.*) “If there is a dispute concerning the facts or beliefs on which the former plaintiff acted, that question must be resolved by a trier of fact. [Citation.] It is a question of law for the court, however, whether the facts found support a tenable claim. [Citation.]” (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 453.)

The complaint alleges attorneys had no probable cause to file and continue to prosecute the underlying action in light of Nguyen’s admissions in her deposition and “it would be obvious to any reasonable lawyer . . . the claims were not factually or legally tenable.” In support of its prima facie case on this issue, Innovation submitted Nguyen’s deposition testimony in which she disavowed most of the allegations in the underlying complaint, including reliance. It also showed defendants continued to prosecute the case by propounding written discovery 18 days after Nguyen’s deposition testimony showed no probable cause existed. This meets Innovation’s burden to show the probability of success in proving lack of probable cause. (See *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [“attorney may be liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause”].)

Once a plaintiff makes a prima facie showing of facts that would support a judgment in its favor, the court will “consider[] the defendant’s opposing evidence, but only to determine if it defeats the plaintiff’s showing as a matter of law. [Citation.]” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.) The evidence presented by attorneys does not do so.

In contending they established probable cause to assert the claims for unfair competition, false advertising, and violation of the consumer legal remedies act, attorneys point to the declarations of Rubinstein and Hewell in support of their anti-SLAPP motion. Rubinstein attests he and Hewell were involved in a Ninth Circuit Court of Appeals opinion concluding the packaging on a Gerber product was misleading, “talked to . . . Nguyen about her experiences with the [p]roduct, . . . examined and analyzed the [p]roduct label, its [p]rincipal [d]isplay [p]anel, its store display and ingredient list[,] . . . [and] researched and looked into available information regarding the [p]roduct online and elsewhere.” Hewell’s declaration is similar except he omits any mention of having actually spoken to Nguyen prior to filing the complaint. Regardless, the Supreme Court “has rejected the notion that probable cause could be based upon a showing of reasonable investigation and diligent legal research on the part of an attorney as well as his or her subjective honest or reasonable belief in the merits of the claim asserted. [Citation.]” (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 495; see also *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 883, fn. omitted [“adequacy of an attorney’s research is not relevant to the probable cause determination”].)

Attorneys argue they were entitled to rely on Nguyen’s statements to them “she bought and drank the product based on the representations . . . and her expectation . . . she would have 5 hours of energy without side effects. Instead, each time, she experienced a surge typically lasting only about 2 hours, often followed by an unwelcome depletion of energy.” But Nguyen admitted in her deposition she did not buy the product on April 7, 2010 in reliance on Innovation’s representations, but because she was told she needed proof of purchase in order sue Innovation. Further, instead of “an unwelcome depletion of energy” or feeling “shaky and depleted,” she testified she came back “down to normal” about “four hours” after the initial “surge of energy.”

Attorneys maintain Nguyen did not buy the product only at counsel's urging because she had previously done so several times "since it was introduced in 2004" and that they just had to show she bought the product "expecting it to deliver the promise of sustained energy explicit in its name and advertising," not that she actually relied on specific representations. They cite her deposition testimony that she wanted Innovation to "correct [its] labeling[because i]t says there is no crash and there is a crash at the end" and wished she had asked for her money back because "why have the product be labeled as Five Hour and doesn't last four or five hours."

But Nguyen also testified the reason she initially bought the product was she wanted to try something different, not because she was relying on any representation or expectation. She would buy several flavors of the product again because she liked and was happy with them, and was satisfied with its effects. She was "never . . . so unhappy with [the product] that [she] sought a refund" and never thought to ask for one. She also testified that by "crash" she meant she came "back down to normal." Such conflicts in the evidence creates "a dispute as to state of the defendant[s'] knowledge and [because] 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." (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 881.)

Attorneys also claim probable cause exists due to a written CBS News article and a motion to intervene by independent parties. But the court sustained Innovation's objections to such evidence and no challenge has been made to that ruling on appeal, forfeiting any issue as to its correctness. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 739, fn. 4.) As a result, we consider the evidence to have been properly excluded and do not consider it on appeal. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196.)

Nor do we agree the federal district court's denial of Innovation's motion to dismiss the complaint in the underlying action established probable cause. Attorneys rely on two malicious prosecution cases in which summary judgment was denied in the underlying actions. Both are inapposite. *Hufstедler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55 held "where, as here, the record in the underlying action was fully developed, a court can and should decide the question of probable cause by reference to the undisputed facts contained in that record." (*Id.* at p. 62.) It concluded the undisputed facts before it, viewed objectively, established probable cause as a matter of law. (*Id.* at p. 67.) Similarly, *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375 determined "denial of summary judgment in the underlying case is a reliable indicator that probable cause is present" for several reasons, one of which was that such "motions usually are heard only after full discovery develops the evidence relevant to the claim." (*Id.* at p. 383.) Unlike these two cases, the record in the underlying case was not fully developed at the time of the motion to dismiss, as the federal district court was required to accept as true the factual allegations in the complaint (*Hemi Group, LLC v. City of New York, N.Y.* (2010) 559 U.S. 1, ___ [130 S.Ct. 983, 986-987, 175 L.Ed.2d 943]), and the evidence presented at the hearing on the anti-SLAPP motions was far from undisputed.

In sum, Innovation established a probability of success in proving the absence of probable cause on their unfair competition, false advertising, and consumer legal remedies act claims and attorneys failed to present evidence defeating that showing as a matter of law. (*Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 906.) Given our conclusion, we need not consider attorneys' additional claims their failure to timely file a motion for class certification, Nguyen's lack of a physical injury or medical monitoring claim and her backdating (what attorneys call re-dating) of her engagement agreement do not show a lack of probable cause. Nor need we address their assertion they had probable

cause to allege a breach of express warranty cause of action. (*Crowley v. Katleman, supra*, 8 Cal.4th at p. 686 [“malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause”].)

c) Malice

“[T]he “malice” element . . . relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of . . . 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.’ Improper purposes can be established in cases in which, for instance . . . the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim. [Citation.]” (*Daniels v. Robbins, supra*, 182 Cal.App.4th at pp. 224, italics omitted.) “[M]alice can [also] be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.” (*Id.* at p. 226.) “Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset.’ [Citation.]” (*Ibid.*) “Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.’ [Citation.]” (*Id.* p. 225.)

1) Attorneys

In its complaint Innovation alleges attorneys initiated and maintained the underlying action with malice because they “made little effort to prosecute [it], let alone in an objectively good faith manner,” as evidenced by their failure “to seek any discovery . . . until the eve of dismissal, at which time they withdrew their pending discovery requests” It also alleges “[s]hortly before filing the complaint, . . . Hewell

wrote to [Innovation's counsel] to demand various unwarranted changes in the labeling of the [p]roduct as well as a substantial monetary payment reflecting his and . . . Rubinstein's purported attorney[] fees. . . . Rubinstein reiterated those unsupported demands in additional pre-suit communications, in which he brazenly offered to sell 'protection' to Innovation"

The record confirms attorneys did not propound the first set of discovery until 18 days after Nguyen's deposition and moved to dismiss the underlying action with prejudice a month later. In *Sycamore Ridge, supra*, 157 Cal.App.4th 1385, the court held malice could be inferred if the defendant lawyers knew the underlying claims lacked merit and "did not take immediate steps to dismiss [them]." (*Id.* at p. 1409.) It concluded malice was shown where several "clearly untenable" facts were alleged in the complaint and the defendant lawyers pursued the case for a month before it was dismissed. (*Id.* at pp. 1409-1410.) Similarly, here, attorneys continued to prosecute the underlying case for over a month after Nguyen's deposition disclosed many of the facts alleged in the complaint were untenable.

Moreover, Innovation's counsel's declaration in opposition to the anti-SLAPP motions described a telephone conversation in which Rubinstein "offered to sell 'protection' to Innovation unrelated to the merits of the claims he and Hewell intended to pursue on . . . Nguyen's behalf. Specifically, . . . Rubinstein represented that Innovation's . . . payment would vary based on the level of 'protection' against his lawsuits that Innovation . . . desired to obtain. He said that the geographic scope of his promise to desist from filing lawsuits and the coverage of Innovation['s] . . . product line would depend on how much Innovation . . . was willing to pay him." The trial court found malice could be inferred from this. We agree this satisfies Innovation's prima facie case. (*Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 224 [improper purpose

shown where underlying action “initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim”].)

Attorneys contend “the only communication attached by Innovation to its [o]pposition relative to any pre-litigation demand by the [l]awyer [d]efendants is a . . . letter from . . . Hewell” in which he made “demands . . . reasonably related to the false and misleading advertising claims charged.” But they do not address Innovation’s attorney’s attestation Rubinstein offered to sell ““protection”” to Innovation in exchange for money. Although attorneys objected to this statement, the court overruled it and no challenge has been made to this ruling on appeal. Attorneys thus failed to present evidence to defeat as a matter of law Innovation’s prima facie showing of malice. (*Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 906.) As a result, it is unnecessary to address Innovation’s claims malice is also shown by Nguyen’s admission she bought the product on April 7, 2010 for the purpose of bringing the lawsuit, Rubinstein’s concurrent dismissal of other pending California federal district court actions, and attorneys’ failures to have a written engagement agreement with Nguyen before her deposition, file a motion for class certification, conduct reasonable pre-suit investigation of the facts alleged in the underlying action, and immediately dismiss the underlying action following Nguyen’s deposition.

2) *Nguyen*

As to Nguyen, however, we conclude Innovation did not meet its burden to show she acted with malice. In support of her anti-SLAPP motion, she attested she bore Innovation no ill will or hostility and did not pursue the underlying action for an “improper purpose or with an improper motive.” To counter that showing, Innovation argues malice may be inferred because Nguyen did not remember ever reading the complaints prepared by her attorneys, citing *Apple Computer, Inc. v. Superior Court*

(2005) 126 Cal.App.4th 1253. But that case involved a motion to disqualify two law firms where the named plaintiff in a class action lawsuit, an attorney, worked for and was represented by one of the firms and the other firm served as co-counsel with his firm in other cases. The court held both firms should have been disqualified “because an insurmountable conflict of interest exists between the class representative and class counsel . . . and the putative class” where “[a]s the class representative, plaintiff [was] obligated to seek the maximum recovery for the putative class, but plaintiff and the firms may have an interest in maximizing their recovery of attorneys’ fees.” (*Id.* at p. 1261.) In that context, it stated, “An informed and independent class representative is necessary to monitor class counsel at every stage of the litigation. [Citations.]” (*Id.* at p. 1271.) Additionally, “the oversight provided by the court *at the time of settlement* is in addition to, not in lieu of, the participation and supervision that an independent class representative should provide *from start to finish*.” (*Id.* at p. 1272.)

Innovation relies on these two passages to argue “[a] party cannot lend her name to a lawsuit without knowing what was alleged or being prosecuted on her behalf, without any consequence whatsoever. At best, Nguyen was indifferent; at worst she was complicit.” But unlike *Apple Computer*, this case neither involved a disqualification motion nor a class action. As Innovation observes throughout its brief, no motion for class certification was ever made. Thus, Nguyen had no putative class to whom she owed an obligation to be informed and independent.

Even if she did, Innovation provides no authority holding the failure to comply with the duties of a class representative demonstrates malice. *Apple Computer* does not support that claim, as it never considered the issue. (See *Apple Computer, Inc. v. Superior Court, supra*, 126 Cal.App.4th at p. 1277 [““An opinion is not authority for a point not raised, considered, or resolved therein””].)

Innovation also fails to cite any evidence to support its assertion Nguyen was indifferent to, complicit in, or “feigned” her ignorance the underlying allegations in order “escape malicious prosecution liability.” She simply did not read the complaint. But that alone does not show actual ill will or any improper ulterior motive.

Neither does Nguyen’s admission she bought the product on April 7, 2010 intending to sue Innovation. Nguyen testified in her deposition either her cousin or Salazar had told her she needed proof of purchase for the lawsuit, which she believed was valid because the product did not keep her amped for the full five hours implied in its name. Malice cannot be inferred from this.

As to Innovation’s other evidence of malice addressed in the previous section of our discussion involving attorneys, these were all matters of trial strategy, which are not imputed to the client absent proof the client was involved in making the litigation decisions. (*Brinkley v. Appleby* (1969) 276 Cal.App.2d 244, 247.) Innovation refers us to no such evidence.

Instead Innovation contends Nguyen cannot rely on the advice of counsel defense because she did not show she fully disclosed all material and relevant evidence within her knowledge to her attorneys and thereafter acted in good faith on their advice. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53-54.) Although Nguyen attested she “disclosed all of the facts as [she] understood them,” and “relied in good faith” on attorneys’ advice, Innovation claims her declaration is contradicted by her deposition testimony in which she withdrew many of the allegations and claims made in the underlying complaints. But in addition to the complaints not being verified, Nguyen testified she did not believe she read or received copies of them and if she had she would have corrected the references to her as “him” and “Mister.” No contrary evidence exists and malice cannot be imputed to her on the basis she told the truth during her deposition.

Innovation additionally points to the fact Nguyen offered dates for her continued deposition while her attorneys evaluated the evidence and determined how to proceed. Although malice is inferable if a party knows an action lacks probable cause yet continues to prosecute it (*Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 226), Innovation has not demonstrated Nguyen, as a layperson, had such knowledge. Merely asserting she did, as Innovation has done, does not satisfy its burden to establish a probability of prevailing. While an attorney may be subject to liability for continuing to pursue an action after discovery of information showing the case lacks merit (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 970), it does not automatically subject clients who are unaware of those facts to liability. In such a case, counsel must inform the client of the unfavorable information and recommend dismissal. (*Ibid.*) Innovation presented no evidence attorneys gave such advice to Nguyen prior to the time the dismissal was sought.

DISPOSITION

The order denying the motion is affirmed as to appellants Rubinstein, Proaps, Hewell, Salazar, and Salazar & Tellawi, but reversed as to appellant Nguyen. Appellant Nguyen is entitled to recover her costs on appeal. In the interest of justice, respondent Innovation Ventures, LLC and appellants Rubinstein, Proaps, Hewell, Salazar, and Salazar & Tellawi shall bear their own costs on appeal pending resolution of

the underlying complaint at which time the trial court shall have discretion whether to award such costs.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.