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Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

**Trixie Argon**, individually and on behalf of a class of similarly situated persons,

Plaintiff;

vs.

**MegaCorp Inc.**, a California corporation, and **Does** 1 through 100, inclusive,

Defendants.

Case No. BC5551212

**Plaintiff's Notice of Motion and Motion to Compel Defendant MegaCorp to Produce Financial Records at Trial; Points & Authorities**

Complaint filed: June 9, 2008
Trial date: August 20, 2010

Assigned for all purposes to Judge Jerry Blank, Dept. 1010, Central Civil Division

## NOTICE OF MOTION

To all parties and their attorneys of record:

You are hereby notified that at a date and time to be determined, in Dept. 1010 of the above-entitled court, plaintiff Trixie Argon will move the Court for a motion to compel defendant MegaCorp to produce financial records she previously requested.

This motion is made on the ground that Ms. Argon served MegaCorp with a valid notice to produce financial records at trial. Cal. Civ. Proc. Code § 1987(c), Cal. Civ. Code § 3295(c). MegaCorp served objections and refused to comply.

Ms. Argon's notice to produce seeks information directly relevant to her trial for punitive damages against MegaCorp. Therefore, the documents are material to Ms. Argon's case and there is good cause to order them to be produced. Cal. Civ. Proc. Code § 1987(c).

The motion will be based on this notice, on the attached points and authorities, on the papers and records on file, and – if there is a hearing on this motion – on the evidence presented at the hearing.

November 19, 2010

EAGLEFEATHER LAW OFFICES

By: 

Cadmium Q. Eaglefeather

Attorney for Plaintiff

## POINTS & AUTHORITIES

Previously, the Court denied MegaCorp's motion for summary adjudication of Ms. Argon's claims for punitive damages. (Eaglefeather Decl. ¶ 1.) Ms. Argon served MegaCorp with a timely notice to produce financial records at trial. (Eaglefeather Decl. ¶ 2.) MegaCorp responded with boilerplate objections to Ms. Argon's requests and refused to produce any financial records. (Eaglefeather Decl. ¶ 3.) This motion seeks to compel MegaCorp to produce these records.

### 1. **Ms. Argon is entitled to the financial records.**

Because this is a punitive-damages case, Ms. Argon is entitled to subpoena documents "to be available at the trial for the purpose of establishing the profits or financial condition" of MegaCorp. Cal. Civ. Code § 3295(c).

Ms. Argon has a right to these records even without showing that there is a "substantial probability that [she] will prevail". **Id.** That's the rule for pretrial discovery of financial records, but not for records to be brought to trial. **Id.**

### 2. **The financial records are material to Ms. Argon's case.**

If the jury finds MegaCorp liable for punitive damages, the jury may then consider "[e]vidence of profit and financial condition" of those defendants to determine the amount of punitive damages. Cal. Civ. Code §§ 3294(a) and 3295(d); **Nolin v. Nat'l Convenience Stores, Inc.**, 95 Cal. App. 3d 279, 288 (1979).

3. **Ms. Argon will be prejudiced without the financial records, so there is good cause to compel their production.**

MegaCorp was ordered to stand trial on punitive damages. (Eaglefeather Decl. ¶ 4.) If the jury returns an initial verdict for punitive damages, Ms. Argon will need these financial records to prove the amount of punitive damages. MegaCorp cannot circumvent the trial by withholding evidence that the jury must consider. Cal. Civ. Code § 3295(d).

4. **Conclusion**

For these reasons, Ms. Argon asks that the Court order MegaCorp to produce the requested financial records.

November 19, 2010

EAGLEFEATHER LAW OFFICES

By: 

Cadmium Q. Eaglefeather

Attorney for Plaintiff

To: Cadmium Q. Eaglefeather
From: Trixie Argon
Date: 10 September 2010
**Re: Cause of action for malicious prosecution**

Malicious prosecution has three elements that must be pleaded and proved:

1) the defendant commenced a judicial proceeding against the plaintiff;

2) the original proceeding was "initiated with malice" and "without probable cause"; and

3) the proceeding was "pursued to a legal termination in [the plaintiff's] favor."

**Bertero v. National General Corp.**, 13 Cal. 3d 43, 50 (1974).

### 1. Commencement of judicial proceeding

Any civil proceeding where the plaintiff seeks affirmative relief may be the basis of a malicious-prosecution claim. The original plaintiff does not need to personally sign the complaint. If the plaintiff is "actively instrumental" or the "proximate and efficient cause" of the action, the plaintiff may be liable. **Jacques Interiors v. Petrak**, 188 Cal. App. 3d 1363, 1372 (1987).

### 2. Initiated without probable cause and with malice

The malicious-prosecution plaintiff must establish both malice and lack of probable cause by the defendant in the underlying action.

In a malicious-prosecution action against an attorney in a civil suit, the standard for probable cause is whether a reasonable attorney would have thought the underlying claim was tenable at the time the original complaint was filed. **Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 885–86** (1989). An attorney may be liable for continuing to prosecute a claim after they discover the action lacks probable cause, even if there

was probable cause at the outset. **Zamos v. Stroud**, 32 Cal. 4th 958, 970 (2004).

The adequacy of an attorney's research is not relevant, because probable cause relies on an objective standard of reasonableness. But if the court finds no probable cause, the thoroughness of the attorney's research may apply to showing malice. **Sheldon Appel Co.**, 47 Cal. 3d at 875.

The showing of malice requires evidence of "ill will or some improper purpose," ranging "anywhere from open hostility to indifference." **Grindle v. Lorbeer**, 196 Cal. App. 3d 1461, 1465 (1987). Malice may be inferred from lack of probable cause if the party's behavior was clearly unreasonable. However, this is not an automatic inference. **Grindle**, 196 Cal. App. 3d at 1468 ("Negligence does not equate with malice"). As above, failure by an attorney to conduct an adequate investigation may be evidence of "indifference" suggesting malice.

### 3. Favorable termination

Malicious prosecution requires that the underlying complaint to have been terminated in favor of the malicious-prosecution plaintiff. This means that a defendant cannot make a malicious-prosecution counterclaim as a "defense" to a complaint that appears to be malicious. Until the underlying complaint has been resolved, a malicious-prosecution claim cannot lie. **Babb v. Superior Court**, 3 Cal. 3d 841, 846-847 (1971). Thus, procedurally, the only option is to complete the underlying action, and then file a claim for malicious prosecution in a follow-on action.

"Termination" usually means the entry of judgment in favor of the malicious-prosecution plaintiff on a given claim. But any termination — for instance, deleting a claim from an amended complaint — is adequate basis for malicious prosecution. Whether the underlying claim may be revived (e.g., on appeal) is not relevant for malicious prosecution. As long as it's been judicially terminated once, it's fair game.

### 4. Defenses

The plaintiff in a malicious-prosecution action may still be barred from recovery if defendant successfully pleads an affirmative defense. The major affirmative defense is reliance on counsel, but this is not available

when the malicious-prosecution defendant is himself the counsel in the underlying action.

Another major affirmative defense is proof that the underlying action was only initiated after an independent investigation of the charges by appropriate authorities. For example, in a medical-malpractice case where the doctor had been investigated by the Board of Medical Quality Assurance, who recommended bringing the malpractice claim, the malicious-prosecution defendants successfully pled this affirmative defense. **Hogen v. Valley Hospital**, 147 Cal. App. 3d 119, 125 (1983).

The statute of limitations for malicious prosecution is two years. Ordinarily this period starts at the time of entry of judgment in the underlying action, even though that action may still be subject to appeal. However, if the appeal is filed, the statute of limitations stops running until the appellate process is exhausted, at which time it continues running. **Feld v. W. Land & Dev. Co.**, 2 Cal. App. 4th 1328, 1334 (1992).

### 5. Remedies

The successful malicious-prosecution plaintiff is entitled to compensatory damages, and in certain cases, punitive damages. Compensatory damages include reasonable attorney's fees and costs in defending the underlying action. They also can include damages for emotional distress, mental suffering, impairment to reputation, and value of time and wages lost to the underlying action. **Bertero v. Nat'l Gen. Corp.**, 13 Cal. 3d 43, 59 (1974); **Rupp v. Summerfield**, 161 Cal. App. 2d 657, 667 (1958).

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February 15, 2010

George Falkenburg
Falkenburg, Fester, and Funk LLP
1252 W. 83rd Street
Bakersfield, CA 90909

**Re: Nicholson v. Amygdala Inc., Case No. B718590125-2**

Dear Mr. Falkenburg:

In response to your recent request, I've enclosed a DVD of photographs I took during the inspection of the Amygdala facility on October 30, 2009.

I apologize for the delay, but I was recently hospitalized for a concussion sustained while rollerblading. Rest assured that I am on the mend. If you have any questions about this DVD, please let me know.

Separately: you recently served a set of **953 interrogatories** on my client. These interrogatories were **not** accompanied by the declaration of necessity that's required when serving more than 35 requests. See Cal. Civ. Proc. Code § 2030.050.

I must, therefore, ask you to withdraw these interrogatories. While you are welcome to serve them again with the necessary declaration, my client is not obligated to respond to procedurally defective discovery requests. Furthermore, if you don't withdraw these interrogatories within six days, I will file a motion for protective order and seek sanctions against you and your client.

By the way, it was great seeing you and Thelma over the holidays. I think we still have your cheesecake platter. Let's talk soon about our plans for Maui in the spring.

Sincerely,

CADMIUM Q. EAGLEFEATHER

CQE / bqe
Enclosure

# TRIXIE B. ARGON

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(323) 555-1435 TRIXIEARGON @ GMAIL.COM

## Education

### UCLA School of Law — 2007 – 10

- Cumulative GPA: 3.98
- Academic interests: real-estate financing, criminal procedure, corporations
- California Bar Exam results pending

### Harvard University — 2002 – 06

- B.A. **summa cum laude**, economics
- Extensive coursework in astrophysics, statistics
- Van Damme Scholarship

## Legal experience

### Falkenburg, Fester, & Funk LLP — 2008 – now

**Law clerk**

- Handled various litigation matters in state and federal court
- An unlawful-detainer action
- A demurrer to a breach-of-contract lawsuit in state court
- Oppositions to motions to dismiss in federal court (Fed. R. Civ. P. 12(b), 12(e), 9(b))
- Development of evidence for Internet trademark-infringement actions

## Other work experience

### Proximate Cause — 2006 – 07

**Assistant to the director**

- Helped devise fundraising campaigns for this innovative nonprofit
- Handled lunch orders and general errands

### Hot Topic — 2003 – 05

**Retail-sales associate**

- Top in-store sales associate in seven out of eight quarters
- Inventory management
- Training and recruiting