INTRODUCTION

In its published opinion in this case, the Court of Appeal allows a corporate CEO *to settle* a wrongful termination lawsuit brought against him and his company – and then *to sue* plaintiff's lawyers for malicious prosecution. The opinion conflicts with established appellate authority governing the malicious prosecution tort in two ways:

First, it defies the traditional rule that *settlements*, at any stage of litigation and in any form, cannot be "favorable terminations" that demonstrate a defendant's complete lack of liability and, therefore, cannot serve as foundations for malicious prosecution lawsuits (the "Settlement Rule").

Second, it holds two plaintiff's lawyers potentially liable for tort damages merely because they advanced legal theories that were, at the time their client's suit was pending, the subject of conflicting appellate decisions. This ruling violates an unbroken line of appellate cases holding that reasonable attorneys may assert legal theories that are unsettled and the subject of on-going debate (the "Reasonable Attorney Rule").

If the opinion is not reviewed, it will create a conflict in authority that will have potentially serious repercussions for the settlement and

adjudication of all civil actions in California, including each of the following:

- Full and final settlements will be thwarted or discouraged as defendants maneuver to prolong litigation in derivative tort actions for malicious prosecution. Hundreds of new malicious prosecution suits will be brought, thereby creating the "unending roundelay of litigation" this court has condemned and so earnestly sought to avoid. (*Brennan v. Tremco, Inc.* (2000) 25 Cal.4th 310, 314.)
- Lawyer-client conflicts of interest will arise, clients will lose confidence in their lawyers, and independent counsel will be required in every case in which a defendant proposes a "Siebel Settlement." The attorney-client privilege and lawyer-client relationships will be undermined.
- The overriding duty attorneys owe their clients – zealous representation and vigorous advocacy – will be compromised as attorneys come face to face with damages liability merely because they lacked crystal balls to predict how a split in appellate case law would ultimately be resolved.

ISSUES PRESENTED FOR REVIEW

The Court of Appeal's decision raises the following issues:

The Favorable Termination Element and the Settlement Rule

The malicious prosecution tort requires a favorable termination of prior litigation either on the merits or in some way that demonstrates defendant's total lack of liability. Settlements of litigation cast doubt on the merits and generally preclude favorable termination. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341-342.)

1. **May a plaintiff and a defendant settle a lawsuit pending on appeal, release each other from liability, and then proclaim their settlement to be a "favorable termination" that allows the defendant to sue the plaintiff's lawyers for malicious prosecution?**

In answering this question "Yes," the Court of Appeal parted company with an unbroken line of Supreme Court and Court of Appeal cases that have recognized and enforced the Settlement Rule. Its refusal to follow the rule conflicts most directly and immediately with *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409 ("*Ferreira*"), in which the Fourth Appellate District Court of Appeal held that a postjudgment settlement did not result in a favorable termination because

the lawsuit ended by compromise and not by adjudication. (*Id*. at pp. 412-413.)

Until the conflict in appellate authority is resolved, defendants in litigation who prevail at or before trial will be able to manufacture favorable termination by creating conflicts of interest that divide plaintiffs from their lawyers, paying plaintiffs to settle, and then suing plaintiffs' lawyers for malicious prosecution. Indeed, the three-step strategy endorsed by the Court of Appeal's decision – perhaps to be known as a Siebel Settlement – will henceforth be: Divide Client From Lawyer – Pay Off Client to Avoid Risk of Appeal – Sue Lawyer.

The impact of Siebel Settlements will be profound. The bond of trust between lawyer and client will be broken at the critical postjudgment stage of litigation. Clients will have to obtain independent lawyers, as Debra Christoffers did in this case, because their interests conflict with those of their lawyers. Fewer cases will end in full and final settlements. And hundreds more malicious prosecution cases will be filed, prolonging in-court feuds. Finally and most critically, attorney advocates threatened with Siebel Settlements will be more reluctant to represent the poor and middle classes in cases with anything but slam-dunk legal theories, making justice in California even less accessible to them.

The Probable Cause Element, Conflicts In Authority, and Tenable Legal Theories

In addition to favorable termination of prior litigation, a malicious prosecution plaintiff must prove that a plaintiff's lawyer lacked *probable cause* to pursue a claim or legal theory, i.e., the theory must have been one that *no reasonable lawyer would have thought tenable* at the time the underlying case was filed and prosecuted. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 742-743 & fn. 13.)

2. Does an attorney who relies on a legal theory that is the subject of conflicting appellate decisions and an on-going and robust debate in the bench and bar become liable for malicious prosecution merely because a part of her theory is ultimately rejected by the California Supreme Court?

Under established malicious prosecution law, a lawyer has the freedom to develop legal theories and to make claims that at least some reasonable lawyers believe might be argued, even if it is extremely unlikely that those theories will ultimately prevail. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.)

Tom Siebel, the CEO of Siebel Systems (SSI), was not merely a remote presence in Debra Christoffers' employment relationship with SSI. He personally recruited her during the company's start-up phase, negotiated with her and set her compensation, interacted directly with her throughout her employment, unilaterally altered her agreed-upon compensation, and participated in her termination. Christoffers alleged in her first amended complaint that Tom Siebel's personal treatment of her was sexually discriminatory, harassing, and deceitful, leading ultimately to her wrongful discharge from employment. (AA 174-180.)

Although the Court of Appeal declined to so acknowledge, Mittlesteadt and Buell's theory of Tom Siebel's individual liability for wrongful termination was being debated in the trial and appellate courts in this state throughout the pendency of this action between its filing in 1996 and trial in May 1998. This court eventually resolved the conflict in favor of no individual liability in the context of FEHA-based discrimination claims,[1] but left open the prospect of such liability in other contexts in which constitutional or statutory provisions stating California public policy pointed to individual responsibility. (*Reno v. Baird* (1998) 18 Cal.4th 640,

[1] "FEHA" refers to the Fair Employment and Housing Act, Gov. Code, §§ 12900 et seq.

663 [no common law wrongful discharge claim against individual supervisory employees because FEHA-based "public policy" applied only to employer], reversing *Reno v. Baird* (1997) 67 Cal.Rpt.2d 671, 676 [***"We therefore conclude Reno may make a claim for unlawful discharge, and discharge in violation of public policy, against the individual [managing agent] Baird."***(emphasis added.].)

Without citing *any* authority or analyzing the *Reno* case, the Court of Appeal instead professed certainty that no tenable wrongful discharge claim could have been asserted by Mittlesteadt and Buell. Its holding reveals an approach to the probable cause element of malicious prosecution that conflicts with scores of prior cases which give counsel great leeway when decisions are in conflict and the law is evolving. (See, e.g., *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 595 [where law was in "state of flux" reasonable attorney could have considered claim tenable]; *Copenbarger v. International Ins. Co.* (1996) 46 Cal.App.4th 961, 966 [conflict in appellate decisions and absence of Supreme Court resolution gave rise to probable cause].) It will conceivably put California lawyers in the malicious prosecution dock every time they make legal arguments that are the subject of current disagreement and debate in the legal community but, from the all-revealing light of hindsight, did not prevail at the end of the day.

Lawyers are advocates, not soothsayers. If they are forced to predict accurately the outcomes of Supreme Court cases on pain of malicious prosecution actions, many attorneys will advance few, if any, debatable theories and take few, if any, clients with legally difficult cases. Under the Court of Appeal's "crystal ball" approach to probable cause, advocacy will be chilled.

DISCUSSION

I. SIEBEL, SSI, AND CHRISTOFFERS EXCHANGED VALUABLE CONSIDERATION IN A SETTLEMENT THAT ENDED THEIR LAWSUIT. THEREFORE, THE SETTLEMENT RULE PRECLUDES FAVORABLE TERMINATION.

A party is not permitted to sue his opponent or his opponent's lawyers for malicious prosecution until the underlying action against him is "favorably terminated," i.e., finally disposed of in a way that clearly establishes the defendant's "innocence" or utter lack of liability on the merits in the suit brought against him. (*Casa Herrera*, *supra*, 32 Cal.4th at pp. 341-342.) Favorable termination is traditionally proven in one of two ways: (1) by a final take-nothing judgment which, considered as a whole, shows defendant to be completely or free from liability on the claims made

against him; or (2) by a plaintiff's voluntary dismissal or abandonment of the entire lawsuit under circumstances that explicitly reveal plaintiff's own belief that the action lacks merit. (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150-152; *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.)

Based on the rationale that a favorable termination must ultimately reflect the views of either the courts or the plaintiff that the underlying action lacks any substantive merit, both this court and the Court of Appeal have consistently followed a Settlement Rule. Under the rule, settlements of litigation, in whatever form and at whatever stage, are *not* favorable terminations because they reflect ambiguously on the merits and do not definitively establish a defendant's "innocence" or lack of liability to plaintiff. (See, e.g., *Casa Herrera, supra*, 32 Cal.4th 336, 342 [settlement is not favorable termination because it "does not relate to the merits" by "reflecting . . . on innocence of [or] responsibility for the alleged misconduct"]; *Ferreira, supra*, (2001) 87 Cal.App.4th 409, 413; *Dalany v. American Pacific Holding Corp*. (1996) 42 Cal.App.4th 822, 827-829; *Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814.)

The rationale of the Settlement Rule is readily apparent: "The purpose of a settlement is to *avoid* a determination on the merits." (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) By its nature, a settlement in

which each party gives up something to obtain a final resolution of the dispute leaves at least a "residue of doubt" as to defendant's liability. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149, citing *Pattiz v. Minye* (1998) 61 Cal.App.4th 822, 827.) Even a routine postjudgment fee and cost waiver of potentially limited value to a defendant signifies a settlement and absolutely precludes, as a matter of law, a favorable termination. (*Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814; *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335-1338.)

A. The Settlement Rule as Applied in *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, Review Denied June 13, 2001 ("Ferreira"), Controls This Case.

Notwithstanding the undisputed fact that Deborah Christoffers' employment lawsuit against Tom Siebel and Siebel Systems, Inc. ended by way of a bargained-for settlement, the Court of Appeal declined to apply the Settlement Rule. Unable to disagree with the result or reasoning in *Ferreira*, the court found the decision inapplicable for reasons related solely to the "procedural posture of this case." (Opinion, p. 10.) It stated that the *Ferreira* parties embodied their settlement in an amended judgment while the *Christoffers'* parties formally left a take-nothing judgment intact, changing only the parties' rights and obligations under that judgment. This,

the court believed, made a critical difference that distinguished the two cases. (Opinion, pp. 9-10.) To bolster its conclusion, the court pointed to self-serving language in the Siebel-Christoffers settlement agreement purporting to preserve Siebel's right to sue Mittlesteadt and Buell. (Opinion, p. 10 & fn. 4.)

Thus, according to the Court of Appeal, whether a lawsuit has been favorably terminated postjudgment now turns on a purely formal matter – whether the settlement left the judgment nominally intact – and not, as the cases cited above hold, on whether the suit ended in a bargained-for agreement in which each side gave up something.

No other appellate court in California has employed similar reasoning in defining the favorable termination element. There are multiple flaws in the court's reasoning. Initially, it misreads *Ferreira* and disregards established law relying on the substance of a settlement as a bargain – and not its form – in determining favorable termination. Moreover, it is oblivious to the fact that attorneys Mittlesteadt and Buell expressly declined to consent to the settlement agreement. They cannot be bound by self-serving declarations of "favorable termination" designed to set them up for a malicious prosecution lawsuit. Finally, it ignores the numerous adverse effects of an approach to favorable termination that will inevitably

discourage settlements, disrupt the attorney-client relationship, multiply malicious prosecution suits, and chill vigorous attorney advocacy.

1. *Ferreira* Is Directly On Point. The Court of Appeal Seriously Misreads Its Holding.

Ferreira involved a lover's quarrel manifested in three successive lawsuits. Frank Ferreira became romantically involved with Debra Rushing. They broke up, reconciled, and parted a second time. Each break-up was accompanied by a Ferreira-initiated suit seeking return of gifts allegedly given in contemplation of marriage. The first suit settled. The second gave rise to a cross-complaint filed by the Gray, Cary law firm against Ferreira on behalf of Debra, her mother Maryanne, and her sister Christine for a variety of alleged torts including assault, battery, invasion of privacy by wiretapping and eavesdropping, and infliction of emotional distress. (*Ferreira*, *supra*, at pp. 411-412.)

The jury in *Ferreira* found for plaintiff on his complaint and awarded him $75,982 in damages, after specially finding he had not coerced Debra and her family into settling the first lawsuit. On the cross-complaint, the jury ruled in Ferreira's favor, finding no liability on all claims but one: It found in favor of Debra's mother on her claims for wiretapping and

intentional infliction of emotional distress and awarded her $500 in damages.[2] Judgment was entered on the verdict. (*Id.*)

Shortly after entry of judgment and before postjudgment motions or appeal, the parties entered into a global settlement of their action. Under their settlement agreement, Debra and her family waived their right to appeal and allowed the judgment to become final, except in one respect: Notwithstanding the jury's verdict and the judgment, Ferreira was to be the prevailing party on Maryanne's cross-claims of wiretapping and infliction of emotional distress. Ferreira then accepted $1.00 each from Debra, Maryanne, and Christine Rushing in full satisfaction of his money judgment on the complaint. As a result of the parties' settlement agreement, an amended judgment was entered and Ferreira acknowledged its full satisfaction.

Ferreira brought a timely malicious prosecution action – now the third suit arising from his relationship with Debra Rushing – against the Rushing family's attorneys, the Gray, Cary firm. His suit ended on summary judgment. The Fourth District Court of Appeal affirmed the

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[2] Although the jury found in favor of Debra on her claim for conversion, it awarded her no damages. (*Id.*)

summary judgment, treating it as a straightforward application of the Settlement Rule. This court denied review on June 13, 2001.

The appellate court rejected Ferreira's argument that he had received a favorable termination that was embodied in a trial-level judgment, noting that while he might have achieved a "favorable ***determination*** at one point in the proceeding, . . . **the litigation *terminated* as a result of a negotiated settlement in which both sides gave up something of value to resolve the matter."** (*Id*., at p. 413; italics in original, bold emphasis added.)

Observing that it was "not necessary to analyze the particular circumstances of the settlement or to examine the motivations of the parties," the *Ferreira* court held that the mere existence of a bargained-for compromise gave rise to doubt about the merits, precluding favorable termination under the Settlement Rule. (*Id*. at p. 414.)

Ferreira's holding applies four-square here. Initially, Ferreira received, with one $500 exception as to only one party, a take-nothing trial-level judgment on the merits against the Rushings on all their cross-claims. Tom Siebel likewise obtained such a judgment as to Christoffers' claims against him personally.[3]

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[3] If anything, Ferreira's judgment was more favorable than Siebel's. Ferreira received a $75,000 judgment against the Rushings. Tom Siebel got nothing from Debra Christoffers except costs and Christoffers succeeded in

Moreover, Ferreira chose to resolve his dispute with the Rushings by settlement. As the *Ferreira* court described the settlement there, each side gave up something of value to end litigation. (*Id*. at p. 414.) Specifically, Ferreira gave up the right to collect a $75,000 judgment from the Rushings; Maryanne gave up her right to a $500 award against Ferreira; the Rushings gave up their right to appeal. (*Id*. at pp. 413-414.)

The same thing happened here. Siebel and Siebel Systems, acting jointly and represented by the same lawyers, chose to compromise rather than further litigate their dispute with Debra Christoffers. As their settlement agreement reveals, the parties entered into "good faith, arms-length negotiations" and made an agreement "for good and valuable consideration," including "the mutual avoidance of further costs, inconvenience and uncertainties." (AA 67.) Both parties gave up valuable rights to appeal from the judgment and postjudgment orders.[4] (AA 69.)

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obtaining a $233,662.25 judgment against Siebel Systems, plus post-judgment interest and attorney fees. (AA 143; 310-314.)

[4] The Court of Appeal nowhere disputes that appeals are valuable rights. Appellate courts have the power to reverse or modify judgments on appeal and to remand cases for new trials. (Code Civ. Proc. § 906.) Appeals can change the calculus of favorable termination by turning trial-level victory into post-appeal defeat. (*Ray v. First Federal Bank of California* (1998) 61 Cal.App.4th 315, 320.)

As the Court of Appeal acknowledges: "Siebel and Christoffers agreed to new rights and obligations with respect to each other." (Opinion, p. 10.) Their settlement agreement "compromise[s] certain sums in the Judgment and the Ruling on Various Motions." (AA 69.) Money payments were exchanged. Christoffers got $351,829.92 from Siebel Systems (86% of the judgment) and paid Siebel Systems $51,829.92 for Tom Siebel's litigation costs. (Opinion, pp. 3-4.) Broad-form general releases were exchanged. Siebel and Siebel Systems gave up all their claims against Christoffers, including what he perceived to be a valuable right to sue Debra Christoffers for malicious prosecution.[5] (AA 72.) Christoffers, in turn, gave up all her employment-related claims against both defendants, whether or not they had been adjudicated at any stage of her action. (AA 70.)

Finally, in both *Ferreira* and *Siebel*, the settlements left intact trial-level take-nothing judgments in favor of defendant. Ferreira's take-nothing judgment against Debra and Christine Rushing was unchanged in the amended judgment, just as the Siebel-Christoffers agreement did not alter the form of the judgment and postjudgment order here.

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[5] Siebel obviously perceived this right to be valuable because he has accused Christoffers of knowingly giving false testimony in support of her sex discrimination claim. (Appellant's Opening Brief, pp. 36-39.)

The Court of Appeal's opinion misses the fundamental similarly of *Ferreira* and *Siebel*, both procedurally and substantively. *Ferreira* did not turn on whether the amended judgment left the original judgment favorable to Ferreira intact. It unquestionably did with respect to all parties and claims, except for Maryanne Rushing's $500 award against Ferreira. Rather, as the *Ferreira* court explained, it turned on whether "both sides gave up anything of value in order to end the litigation." (87 Cal.App.4th at p. 413.) As in *Ferreira*, Siebel and Christoffers each parted with money and made covenants to "avoid [the] further costs, inconvenience, and uncertainties" of continuing in litigation. (AA 67.) Under the Settlement Rule, neither underlying suit terminated favorably.

At bottom, *Ferreira* and *Siebel* are in direct conflict. The uncertainty that will result as appellate courts continue to grapple with malicious prosecution cases in different procedural postures is illustrated by three recent unpublished decisions from the First and Second Districts,[6] all of

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[6] Mittlesteadt and Buell are mindful of the rule against citing unpublished cases. These cases are not authority and cannot be relied on as such. They are cited here for the different purpose of showing confusion and lack of uniformity in the law, meriting this court's review under Rule 28(b)(1). (Cf. *Mangini v. J.G. Durand Int'l.* (1994) 31 Cal.App.4th 214, 219 [depublished opinions cited to illustrate recurring and unresolved issue]; see also discussion in Eisenberg, et al., California Practice Guide – Civil Writs and Appeals (Rutter Group 2004) § 11:186.5.

which faithfully cite and apply *Ferreira* in cases with a variety of procedural postures:

- *Marro v. Zigler (2003) WL 161219 (Unpub. Cal.App.1 Dist.)*: A postjudgment settlement while a case was on appeal barred favorable termination despite the defendant's attempt to preserve a malicious prosecution claim against plaintiff's counsel in the settlement agreement.
- *Cosgrove v. Antonelli (2003) WL 21235615 (Unpub. Cal.App. 2 Dist.)*: A summary judgment was not a favorable termination where plaintiff waived his right to appeal in a settlement, even though the settlement left the judgment fully intact.
- *Bayley v. Buchalter (2002) WL 31412625 (Unpub. Cal.App. 2 Dist.)*: A post-verdict settlement involving a monetary compromise and waiver of appellate rights was not a favorable termination.

Trial and appellate courts will now debate whether *Siebel* is a disguised disapproval of *Ferreira*, particularly in situations in which parties chose to settle after judgment in an agreement that aims to set up plaintiffs'

attorneys for a malicious prosecution suit. Confusion will reign unless review is granted.

2. <u>The Court of Appeal's Adherence to the Form of a Judgment Created by Collusion Exalts Form over Substance in a Way That Conflicts with Established Authority</u>.

The form of a postjudgment *settlement*, e.g. whether the judgment itself will be amended or not and how its liabilities will be handled, is obviously a matter of bargaining and adjustment by the parties to suit their respective interests.

Having received a stipulated sum of money and having been fully released by Siebel from any liability for every conceivable claim, including malicious prosecution, Debra Christoffers obviously had no interest in what the agreement said about her lawyers on the form of the judgment. She was satisfied with her rights and obligations as modified; the fate of her lawyers was no longer her concern. Siebel and his lawyers were thus free to draft and insert self-serving provisions in the settlement that purport to leave the judgment intact and loudly proclaim Siebel's favorable termination as to lawyers Mittlesteadt and Buell. (Opinion, p. 11.)

But Mittlesteadt and Buell were not parties to the Siebel-Christoffers settlement agreement. They consented only to a release of any obligation Siebel or SSI might have to pay their attorney fees, and expressly did not agree to be bound "by any other provision of [the] agreement." (AA 78-79, referencing 71-72.) Buell signed and filed Christoffers' Notice of Appeal. (AA 317.) Neither Buell nor Mittlesteadt ever consented to a dismissal of Christoffers' appeal, to the alteration of the parties' rights or obligations respecting the judgment, or to the self-serving paragraphs declaring a termination of litigation favorable to Siebel. Once Siebel chose to deal only with Christoffers, her lawyers had no control over the settlement or the language of the parties' agreement.

Members of a free society are not bound to contractual obligations without their consent merely because some other party's agreement purports to bind them. (*Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.* (1999) 72 Cal.App.4th 208, 212 ["But a party cannot bind another to a contract simply by so reciting in a piece of paper. It is rudimentary contract law that the party to be bound must first *accept* the obligation."]; see also *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557.) Nor are attorneys sued in a malicious prosecution action bound by their client's conduct preventing prosecution of an underlying lawsuit to a final judgment on the merits.

(*Zeavin v. Lee* (1982) 136 Cal.App.3d 766, 772 ["[T]he client is not the agent of his attorney."]; 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."]; *Tool Research and Engineering Corp. v. Henigson* (1975) 46 Cal.App.3d 675, 682 [same effect].)

Whatever legal effect the self-serving statements in the settlement agreement may have on Christoffers, they had no effect at all on Buell and Mittlesteadt. As in every other favorable termination case cited in the Court of Appeal's opinion, Buell and Mittlesteadt are entitled to have the court look past the form of the agreement to its effect on the rights and obligations of the parties. Its opinion refuses to do so.

Under case law establishing the Settlement Rule, the terms of a settlement are examined only to determine whether valuable consideration has been exchanged in a genuine arms-length bargain. That is conceded here. Both the Siebel-Christoffers settlement agreement and the Court of Appeal's opinion acknowledge that the parties gave up valuable rights of appeal, issued mutual general releases, and further agreed to "new rights and obligations." (AA 67; Opinion, pp. 3-4, 11.) A genuine bargain creates at least "some doubt" as to defendant's liability, precluding as matter of law a favorable termination. (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335;

see also *Dalany, supra,* 42 Cal.App.4th 822, 828-829; *Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814; see, in contrast *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 2004 WL 915105 (2d Dist.) [judgment on the merits became final because losing party did not appeal; parties compromised only $1000 in a costs bill; *Ferreira* distinguished because the parties did not "resolve *all issues* by settlement after a trial"]; *Citi-Wide Preferred Couriers v. Golden Eagle Ins. Corp*. (2003) 114 Cal.App.4th 906, 914 [insurer's abandonment of lawsuit with stipulation was "unconditional surrender" and not genuine settlement].)

No authority supports the Court of Appeal's reliance on the formal status of the judgment, rather than the existence or non-existence of a bargained-for settlement, in determining favorable termination. To the contrary, the court's form-over-substance approach collides with an established line of cases. For example, in *Dalany, supra*, plaintiff Michael Dalany filed a debt-collection action against American Pacific Holding Corporation. The corporation cross-complained against him, alleging several breaches of fiduciary duty. After Dalany succeeded in eliminating some of the cross-claims on summary adjudication, the parties reached a settlement that resolved their dispute and related litigation brought by

others. They decided to embody their settlement in the form of a stipulated judgment.

In upholding a summary judgment in Dalany's malicious prosecution action, the Fourth District Court of Appeal flatly rejected Dalany's form-over-substance distinction between settlements effected by dismissals and those effected by stipulated judgments, holding that, whenever a lawsuit ends in a bargained-for compromise, there is no favorable termination. As the Fourth District observed:

> "[T]he cases do not turn on the particular vehicle chosen by the parties to terminate prior litigation, but on whether the termination was the result of an agreement of the parties . . . [T]he ambiguity which arises when parties enter into a settlement is not resolved because instead of a dismissal the parties enter into a stipulated judgment." (*Dalany, supra*, 42 Cal.App.4th at pp. 828-829 [citations omitted].)

Siebel conflicts with *Dalany* and the cases on which it relies, all of which hold that application of the Settlement Rule turns on the substance of a settlement as a bargain that casts doubt on defendant's liability, and not its form. This conflict is a further reason for review.

B. The New Favorable Termination Rule Announced In the Court of Appeal's Opinion Will Have Adverse Consequences For Lawyers, Clients, and the Legal System.

The opinion endorses, and thereby encourages, Tom Siebel's three-step approach to using a settlement to manufacture a favorable termination. What Siebel called in the Court of Appeal his "astute" strategic decision (see Appellant's Opening Brief, p. 31) works like this: "Divide Client from Lawyer, Pay Off Client To Avoid Appeal, Sue Lawyer."

The Siebel Settlement strategy will be particularly effective when a plaintiff loses a case on demurrer or summary judgment to an institutional or other wealthy defendant. Such cases are reversed on appeal about 1/3 of the time. To prevent a potentially successful appeal that would preclude favorable termination, the defendant will now be able to create a conflict of interest between lawyer and client by offering to pay off the client in exchange for a settlement arrangement that leaves the take-nothing judgment intact and avoids the risk of appeal. This will allow the defendant to exact risk-free vengeance on the lawyers who dared to sue him.

Replacement of the traditional Settlement Rule with the Siebel Settlement Rule whenever cases settle postjudgment will have multiple adverse consequences, which can be summarized as follows:

Full Settlements Will Decrease; Malicious Prosecution Suits Will Increase. By doing an end-run around the Settlement Rule, a Siebel Settlement encourages new malicious prosecution suits and discourages full and final settlements. Defendants are given a means of walking away from litigation without risk and discouraging and demoralizing members of the bar who might oppose their interests in courtrooms. The temptation to structure these kinds of settlements will be irresistible in many cases. A barrage of freshly minted malicious prosecution suits in the Siebel style is readily predictable.

The Attorney-Client Relationship Will Be Disrupted. Siebel Settlements interfere with and sap the vitality of the attorney-client relationship. They divide the interests of lawyers and clients and break the vital bond of trust between them. (*People ex. rel. Department of Corporations v. Speedee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1146.)

Because of the conflict of interest, clients will be forced to retain independent lawyers to represent them in settlement negotiations, as

Christoffers did here. This disrupts the litigation process and costs more time and money, making it more difficult for poorer litigants to navigate the legal system. (See *Babb v. Superior Court* (1971) 3 Cal.3d 841, 846-847.)

Moreover, Siebel used the insidious tactic of requiring Christoffers to enter into a covenant not to assist her lawyers in their defense of the malicious prosecution suit. (AA 74 [Settlement Agreement: "Christoffers will not cooperate or provide evidence or testimony in any dispute or litigation brought by or against Siebel and/or SSI, unless compelled by lawful subpoena . . .].) This move effectively forces Christoffers not to waive the attorney-client privilege, thereby denying her lawyers the opportunity to disclose facts material to their defense.

Mittlesteadt and Buell argued they were entitled to dismissal of Siebel's action because they could not defend themselves, relying on *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 466-467 [dismissing legal malpractice action by attorney against a law firm he consulted where client asserted attorney-client privilege as objection to suit] and *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 [dismissing shareholder derivative action against corporation's attorney where corporation asserted attorney-client privilege]. The Court of Appeal gave short shrift to their contention, incorrectly stating that Mittlesteadt and

Buell did not claim it to be a complete defense. (Compare Opinion, p. 23 with Respondent's Brief, pp. 40-43.) Siebel's interference with the attorney-client relationship has thus impaired Mittlesteadt's and Buell's right to defend themselves.

Vigorous Advocacy Will Be Chilled. Siebel Settlements will chill vigorous advocacy and deprive ordinary citizens of access to legal counsel and the system of justice. Even if a malicious prosecution suit against lawyers is ultimately unsuccessful, it will have to be defended by the lawyers and/or their insurance carriers. Lawyers will be reluctant to represent clients in difficult cases. And, as always, it will be the parties who are the least well off – employees, minorities, disabled people, victims of civil rights violations – who will find themselves without counsel. These are precisely the kinds of consequences this court sought to avoid in 1989 when it placed the favorable termination and probable cause elements of the malicious prosecution tort squarely under the court's control and mandated their strict enforcement. (*Sheldon Appel, supra*, 47 Cal.3d 863, 873-874 & fn. 5.)

Short-Circuiting and Then Second-Guessing Meritorious Appeals. The Siebel strategy also discourages worthwhile appeals on cutting-edge issues. While this may serve to end underlying suits, it has two undesirable

consequences. *First*, cutting-edge cases that should be appealed may not be, thereby retarding the development of the law. *Second*, malicious prosecution judges and juries will have to speculate as to what might have happened had the appeal been taken – or, even worse, to merely assume the appeal would have been rejected. The former expends trial court energy, time, and expense doing guesswork that would not have been necessary had an appeal gone forward. The latter, which the Court of Appeal was apparently willing to do here, is manifestly unfair to an attorney with a solid case on appeal. That lawyer gets sued simply and only because he lost at the trial level.

In sum, much harm and no good comes from allowing the Siebel Settlement to create favorable termination. The manifest adverse consequences are a further reason for review.

II. THE COURT OF APPEAL'S "CRYSTAL BALL" THEORY OF PROBABLE CAUSE CONFLICTS WITH THE REASONABLE ATTORNEY RULE. IT WILL SERVE TO CHILL VIGOROUS ATTORNEY ADVOCACY.

California law is hardly a seamless web. As this court has consistently emphasized, lawyers need great leeway in pleading causes of action and arguing legal theories. Probable cause exists whenever "*any*

reasonable attorney would have thought the claim *tenable*" because "*counsel . . . have a right to present issues that are arguably correct, even if it is extremely unlikely they will win*." (*Sheldon Appel, supra*, 47 Cal.3d at pp. 885-886; emphasis added.) Only the small sub-group of contentions that "*all* reasonable lawyers agree *totally* lack merit" are without probable cause. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743; fn. 13; second emphasis added; first emphasis in original.) A merely *tenable* claim or theory need not be supported by the directly-on-point holdings of appellate cases. In this regard, the probable cause element must take into account "*the evolutionary potential of legal principles*." (*Sheldon Appel, supra* at p. 886; emphasis added.)

Without candidly acknowledging its profound departure from the principles just quoted, the Court of Appeal broke new ground in its interpretation of the probable cause element. It asserts: "We can find no uncertainty or conflict in the law regarding liability for wrongful termination. At the time the complaint was filed in July 1996 there was no legal basis for a wrongful termination lawsuit against supervisors, managers, or officers of a corporate employer." (Opinion, p. 18.) The court cites absolutely no authority in support of these sweeping legal pronouncements. It goes on to say that Mittlesteadt and Buell "overstate the

holdings of the cases on which they rely" because those cases did not "explicitly consider[] the viability of a wrongful termination claim against an individual." (Opinion, p. 19 & fn. 11.) It never considers whether the cases might serve as a foundation for an argument to extend the law. Its approach to the probable cause issue is inconsistent with the Reasonable Attorney Rule in numerous ways.

A. Attorneys Have Overriding Duties to Vigorously and Zealously Represent Their Clients. This Means Advancing Multiple Statutory and Common Law Theories On Behalf of Discharged Employees.

"[A]n attorney must represent his or her clients zealously within the bounds of the law." (*Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123.) In recognition of the complex and evolving character of wrongful discharge law, this court has admonished the plaintiff's employment bar to be well informed about cutting-edge legal developments and ready, willing, and able to assert multiple legal theories to advance the interests of their clients. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 74.)

In the spirit of this court's admonition, Mittlesteadt alleged in Christoffers' first amended complaint a series of distinctly and carefully

pleaded pairs of claims against Tom Siebel: (1) sex discrimination (based on the Fair Employment and Housing Act and the California Constitution), coupled with wrongful termination based on the policies underlying those provisions; (2) refusal to pay employee compensation (based on Labor Code sections, specifically including Section 216), coupled with wrongful termination based on the public policy favoring payment of compensation embodied in those sections; and (3) fraud to induce employment (based on Labor Code sections 970-972), also coupled with a parallel wrongful termination claim. (Opinion, p. 2.)

As Mittlesteadt and Buell will show, each of these theories was supported by legal sources and reasoning that established probable cause under traditional malicious prosecution law.

B. *Reno v. Baird* Established Probable Cause for Christoffers' Wrongful Termination Claims Against Tom Siebel.

As the Court of Appeal notes, Christoffers' first amended complaint was filed in July 1996.[7] But even before her original complaint was filed on June 10, 1996, this court had recognized in *Caldwell v. Montoya* (1995) 10

[7] The first amended complaint was filed July 23, 1996. The opinion incorrectly assumes this was the date suit was filed. The original complaint was filed on June 10, 1996. (AA 149.)

Cal.4th 972, 978, fn. 3, that individual defendants had been sued in FEHA cases and declared the issue of their liability to be open. Reasonable attorneys are entitled to rely on Supreme Court dictum which is "highly probative" and often followed by the courts. (*California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 114.) In *Reno v. Baird* (1997) 67 Cal.Rptr.2d 671,[8] the First District Court of Appeal, Division Two, in an opinion written by Justice Lambden and joined by Presiding Justice Klein and Justice Haerle, held that a discharged employee could state *both* a cause of action for discrimination in violation of the Fair Employment and Housing Act (FEHA) *and* a common law cause of action for wrongful termination in violation of public policy against an individual officer, supervisor, or other employer's agent. As the court's opinion stated:

> "***The clear language of the [FEHA], legislative intent, and the policy underlying the statute support imposing liability on both the employer and agent employees. We therefore conclude that Reno may make a claim for unlawful discharge, and discharge in violation of public policy, against the individual [employer's managing agent] Baird.***" (*Id.* at p. 676; emphasis added.)

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[8] This unpublished appellate opinion is not cited or relied on as legal authority. It is referred to solely to reveal the state of the law at the time the Christoffers case was prosecuted insofar as it is relevant to the probable cause element.

In support of its holding, the appellate court pointed to statutory language in the FEHA defining "employer" as including "any person acting as an agent of an employer, directly or indirectly" (*Id*. at p. 677, quoting Gov. Code, § 12926, subd.(d).). It extended the holdings in seven prior cases permitting suits against individual employees,[9] holding that California public policy supported a common law as well as a statutory wrongful discharge claim against an individual defendant. (*Id*. at pp. 686-688.)

To be sure, the *Reno* appellate decision expressly disagreed with a prior decision in *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, which came down in June 1996, just five days before the complaint in this case was filed. The disagreement gave rise to a conflict in published decisions. This court ultimately sided with *Janken* and reversed the First District when it held that individuals could not be sued under the FEHA for discrimination or for discharge in violation of FEHA-based policy. (18 Cal.4th 640, 663-664.)

But this court's decision in *Reno* came down on July 16, 1998, two months *after* the jury returned its verdict in the Christoffers case on May 15,

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[9] Two of the seven cases cited by the court were also cited by Mittlesteadt in her predominantly successful opposition to Siebel's demurrer to the first amended complaint. (*Jones v. Los Angeles Community College Dist*. (1988) 198 Cal.App.3d 794, 813 and *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 604.)

1998. (AA 139-141.) Thus, the question of individual liability for wrongful terminations in violation of FEHA was fully debatable throughout the pendency of the Christoffers' lawsuit.

The contemporary significance of *Reno* in 1996-1998 is highlighted by its treatment at the time in the leading California employment law practice guide. The CEB treatise *Wrongful Employment Termination Practice* (2d ed. 1998) that was current during the pendency of the Christoffers case makes the following statement: "***The courts are split on whether a plaintiff's co-employee may be subject to tortious termination claims***." (Chapter 5, "Public Policy Violations," §5.6; emphasis added.)[10]

The robust debate in the appellate courts during the pendency of Christoffers' lawsuit resoundingly demonstrates probable cause for lawyers Buell and Mittlesteadt to make an individual claim against Siebel. The Court of Appeal's refusal to recognize that this was so places it in direct conflict with other appellate courts. (*Copenbarger v. International Ins. Co.* (1996) 46 Cal.App.4th 961, 966 [probable cause from "conflict among the appellate judiciary" and "absence of a resolution by the Supreme Court"];

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[10] The sections of this CEB treatise dealing with wrongful termination liability of individual employer agents are included in Respondent's Request for Judicial Notice that accompanied the Petition for Rehearing in the Court of Appeal.

see also *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 595 [probable cause where law "was in a state of flux"]; cf. *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 972-973 [split in appellate authority and Supreme Court's grant of review demonstrates insurer's reasonableness in defense of bad faith claim].)

The Court of Appeal's probable cause standard is grounded in 20-20 hindsight and requires a crystal ball to meet. Even the First District Court of Appeal – which is certainty inhabited by "reasonable lawyers" – cannot make the grade. The standard defies common law and common sense.

C. Christoffers' Wrongful Termination Claims Against Tom Siebel Were Independently Supported By Arguments Based on the Plain Meaning of the California Constitution and Labor Code. They Satisfied the Reasonable Attorney Rule.

The fundamentally important public policies that serve as foundations for common law wrongful discharge claims generally must be grounded on constitutional provisions or statutes. (*Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104.) Apart from the FEHA, Christoffers' trio of theories directed against Siebel were grounded on: (1) the anti-discrimination clause of the California Constitution; (2) the

employee compensation provisions of the Labor Code; and (3) the anti-fraud provisions of the Labor Code.

1. <u>The California Constitution</u>.

In *Reno*, this court recognized the virtually complete overlap of Reno's FEHA and public-policy based claims, calling them "*essentially the same action under a different rubric*." (18 Cal.4th at p. 664; emphasis added.) It rejected Reno's common law wrongful termination claim against the individual Baird only because Baird was not subject to liability under the public policy stated in the FEHA. (*Reno, supra*, 18 Cal.4th at pp. 663-664.) This court thus left open in *Reno* the prospect that different statutory or constitutional schemes revealing other public policies applicable against an employer's agents might call for a different result.

One such possible scheme is the anti-discrimination prohibition in Article I, section 8 of the California Constitution. The opinion holds that Buell and Mittlesteadt had probable cause to sue Siebel in the third count for sex discrimination in violation of the California Constitution. (Opinion, p. 17.) Article I, section 8 of our state's constitution provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

This provision of the constitution "unquestionably reflects a fundamental *public policy* against discrimination in employment – public or private – on account of sex." As this court has held, victims of unconstitutional sex discrimination are entitled "to plead a cause of action for wrongful discharge in violation of public policy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 90-91; emphasis in original.) Thus, under *Reno*, *Rojo*, and the Court of Appeal's holding, if Mittlesteadt and Buell had probable cause for the third discrimination count against Siebel, they also had probable cause for the fourth, which was, in this court's words in *Reno*, "essentially the same action under a different rubric." (18 Cal.4th at p. 664.) The Court of Appeal's refusal to recognize the essential interrelationship between the tenability of the two claims places it directly in conflict with *Reno*.

2. Labor Code Section 216 and Case Law.

The Court of Appeal finds no probable cause for Christoffers' wrongful termination for failure to pay compensation count because *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, did not involve a wrongful termination claim against an individual employee. (Opinion, p. 19.) But neither did *Gould* hold that individual employers' agents were not liable for wrongful termination. As the opinion suggests,

that question was not presented or decided. There is no question that prompt payment of wages, mandated by various Labor Code sections, is a fundamental public policy. *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 360.) It is that public policy – as expressly embodied in Labor Code section 216 – that supports actions against *individual employer's agents* who thwart the payment of wages and cause the firing of employees to avoid payment of due compensation for work performed.

Labor Code section 216 imposes misdemeanor *criminal penalties* on employer's agents, as well as employers, who willfully obstruct the payment of wages or falsely deny liability for wages due, expressly including within its scope "***any person, or an agent, manager, superintendent, or officer thereof.***" (Emphasis added.) Tom Siebel has at all relevant times been, and still remains, "an agent, manager, superintendent, [and] officer" of Christoffers' employer, Siebel Systems.[11]

Christoffers alleged that Siebel, acting as the President and CEO of Siebel Systems, misrepresented the terms and conditions of Christoffers' employment, including her compensation, told Christoffers she was making too much money, unilaterally changed the agreed-upon methods of

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[11] In the Labor Code, "person" includes "any person . . . or corporation." (§ 18.)

calculating her commissions, and then caused her to be fired to avoid paying her the compensation she had earned. (AA 175-176, 179-181, paras. 13, 15, 21, 22, 24, 27-28.)

Under section 216, Siebel has *individual* criminal responsibility for willfully refusing to pay earned compensation and for falsely denying that it was due and owing in order to coerce, harass, and defraud Christoffers. Siebel's criminal responsibility affords a more than reasonable basis to argue his individual civil liability as well. As this court has held: "[C]ivil actions lie in favor of crime victims." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 572.)

One federal district court case has recognized a nonfrivolous argument for individual civil liability under section 216. (*Davis v. Prentiss Properties Ltd., Inc.* (C.D. Cal. 1999) 66 F.Supp.2d 1112, 1116-1117.) But like other areas of employment law, this one is controversial and its outcome remains in doubt. This court has granted review in *Reynolds v. Bement* (2003) 2 Cal.Rptr.3d 553, a case that presents an issue concerning an employer's agents' liability under section 216.

In sum, the appellate opinion in *Reno v. Baird*, the language of Labor section 216, and the *Davis* decision certainly afforded at least a reasonable, good faith argument in favor of individual liability. No legal authority

precluded such an argument at any time during the pendency of the Christoffers case.

3. Labor Code Sections 970-972 and Case Law.

The opinion also finds no probable cause for Count Six, holding that "only the claim for the actual statutory violation (the fifth cause of action), not the claim for wrongful termination in violation of public policy expressed by the statute" could conceivably be argued. (Opinion, p. 21.)

Labor Code sections 970-972 prohibit knowingly false representations about an employee's work or compensation that are made by any "*person, or agent or officer thereof*" and impose both criminal and civil liability for double damages on offending corporate agents and officers. One appellate court has imposed personal liability and a double damage award of over $400,000 on an employer's principal shareholder and managing agent for fraud committed to induce an employee to change jobs. (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547**,** 550, 552-553.) This court denied review in *Finch* on May 26, 1994. The fundamental public policy underlying sections 970-972 also supports a common law action.

D. Like Its Favorable Termination Holding, the Opinion's Probable Cause Holding Will Chill Advocacy In Developing Areas of the Law.

To determine probable cause, the court must consider existing case law and "the leeway a litigant must be given to argue for an evolution of legal precedents." (*Sheldon Appel, supra*, 47 Cal.3d at p. 886.) "It is creative and energetic counsel who from time to time challenge existing law and question past policies. This insures that the law will be a living and dynamic force." (*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 106.)

The Court of Appeal's view of probable cause places a straightjacket on legal argument. Under that view, if a theory has not been expressly and directly validated by judicial decision, a lawyer may not advance it without fear that some court – from hindsight – might find it untenable. Without doubt, the *Siebel* case will serve to deprive legal argument of vitality and chill attorney advocacy.

CONCLUSION

The issues in *Siebel* are monumentally important because they potentially affect every postjudgment settlement and every malicious prosecution action in California. This court has never explored the scope of

the Settlement Rule. Nor has it applied the Reasonable Attorney Rule to developing areas of the law. The *Siebel* case affords a significant opportunity to do both.

Dated: June 18, 2004

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 8,369 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The entire brief is double spaced. The font is 13 point Times New Roman.

Dated: June 18, 2004 LAW OFFICES OF TONY J. TANKE

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