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Roberts v. McAfee, Inc.: Backdating-Related Malicious Prosecution Claim Dismissed

November 10th, 2011 by [Steve Wasserman](#)

The United States Ninth Circuit Court of Appeals has issued an important decision underscoring how serious an obstacle the element of lack of probable cause can be in trying to establish a claim of malicious prosecution. *Roberts v. McAfee, Inc.*, 2011 U.S. App. LEXIS 22521. Kent Roberts, the former General Counsel of McAfee, Inc., was charged with backdating stock options. McAfee conducted an internal review. Roberts and the board of directors gave very different accounts of what transpired. Lawyers for McAfee presented the results of their investigation to government lawyers. Roberts was indicted and the SEC filed a civil complaint against him.

Deposition testimony led the prosecutors to dismiss some of the charges. During trial, McAfee produced a series of exculpatory emails it had not previously disclosed. Additional evidence came to light which McAfee's attorneys had not provided to the government. The jury acquitted Roberts of two charges and deadlocked on another. Prosecutors dismissed with prejudice the outstanding counts after the verdict issued and the SEC subsequently dismissed its civil case pursuant to a stipulation by which Roberts waived any claim to attorney's fees.

Roberts then filed an action against McAfee for malicious prosecution, defamation and false light. The district court denied McAfee's anti-SLAPP motion to dismiss the malicious prosecution claim on the ground there was conflicting evidence regarding what information McAfee had provided to the government.

The anti-SLAPP analysis has two components: first, whether the conduct complained of involved the defendant's right of petition or free speech; and, second, if the defendant has made such a showing, whether the plaintiff has shown he has a probability of prevailing. The Ninth Circuit concluded that Roberts failed to carry his burden on the second component.

The Court focused on the probable cause element of the malicious prosecution claim. It concluded that if McAfee had indeed failed to disclose all evidence to government agencies or had skewed the evidence against Roberts, its conduct was inexcusable. However, the Court declared, under California law, lying about the facts is not enough to destroy probable cause. Even if a defendant were to fabricate evidence, the defendant may still have probable cause based on other, true, facts. "[A] defendant who fabricates evidence still acts with probable cause if the defendant is aware of other evidence which would make it objectively reasonable to suspect the plaintiff's guilt."

The Court went on to note that, under California law, the indictment itself created a prima facie presumption "that probable cause existed for the underlying prosecution." The Court concluded that Roberts had failed to rebut that presumption. In short, because McAfee had reason to suspect

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that Roberts had participated in wrongful backdating, its motion to strike the malicious prosecution claim should have been granted.

This opinion underscores just how high a bar malicious prosecution plaintiffs in California have to overcome in trying to establish lack of probable cause.