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10 UNITED STATES DISTRICT COURT
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
 12

13 ANTHONY JOHNSON, an individual,
 14 Plaintiff,

15 v.

16 MANUEL ALTAMIRANO, an individual,
 17 RICHARD TURNER, an individual,
 DAVID KINNEY, an individual, DAVID
 18 HUFFMAN, an individual, PAUL
 19 TYRELL, an individual, SEAN
 SULLIVAN, an individual, STORIX, INC.,
 20 a California corporation, and DOES 1-5,
 21 inclusive,
 22 Defendants.

Case No. 19-cv-01185 H (BLM)

MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF THE MOTION TO
 DISMISS PURSUANT TO
 FEDERAL RULE OF CIVIL
 PROCEDURE 12 BY
 DEFENDANTS PAUL A. TYRELL
 AND SEAN M. SULLIVAN

Filed: June 24, 2019
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 24
 25
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 27
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. BACKGROUND FACTS 3

 A. Johnson’s Allegations of “Malicious Prosecution” Against Movants..... 3

 B. The Actual Details and Results of the Underlying Litigation 5

III. ARGUMENT AND AUTHORITIES 8

 A. Legal Standard for Motions to Dismiss 8

 B. The Requisite Elements of Malicious Prosecution 9

 C. Johnson Cannot Establish All the Elements of a Claim for Malicious Prosecution as a Matter of Law..... 10

 1. Johnson Did Not Obtain a Favorable Termination in the Underlying Litigation 10

 2. As a Matter of Law, Johnson Cannot Establish a Lack of Probable Cause for Storix’s Claim Against Him 12

 3. Johnson Fails to Substantiate an Improper Motive Drove the Litigation Against Him 15

 D. The *Rooker-Feldman* Doctrine Prevents District Court Review of State Court Judgments 16

IV. CONCLUSION 18

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Federal Cases

Adams v. Johnson,
355 F.3d 1179 (9th Cir. 2004) 9

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 9

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 8, 9

Carmona v. Carmona,
603 F.3d 1041 (9th Cir. 2010) 18

Cooper v. Ramos,
704 F.3d 772 (9th Cir. 2012) 17

Davani v. Virginia Dept. of Transp.,
434 F.3d 712 (4th Cir. 2006) 17

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462 (1983) 16

Erie R. Co. v. Tompkins,
304 U.S. 64, 58 S.Ct. 817 (1938) 9

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280, 125 S.Ct. 1517 (2005) 9, 16

Fayer v. Vaughn,
649 F.3d 1061 (9th Cir. 2011) (per curiam) 9

Hoblock v. Albany Cty. Bd. of Elections,
422 F.3d 77 (2nd Cir. 2005) 17

Maldonado v. Harris,
370 F.3d 945 (9th Cir. 2004) 9

Papasan v. Allain,
478 U.S. 265 (1986) 8

1 *Rooker v. Fidelity Trust Co.*,
 2 263 U.S. 413 (1923) 16

3 *Schwarz v. United States*,
 4 234 F.3d 428 (9th Cir. 2000) 9

5 *Shaw v. Hahn*,
 6 56 F.3d 1128 (9th Cir. 1995) 9

7 *Estate of Tucker ex. rel. Tucker v. Interscope*,
 8 515 F.3d 1019 (9th Cir. 2008) 15

9 **California Cases**

10 *Antounian v. Louis Vuitton Malletier*,
 11 189 Cal.App.4th 438 (2010) 13

12 *Brennan v. Tremco Inc.*,
 13 25 Cal.4th 310 (2001) 10

14 *Casa Herrera, Inc. v. Beydown*,
 15 32 Cal.4th 336 (2004) 11, 12

16 *Daniels v. Robbins*,
 17 182 Cal.App.4th 204 (2010) 15

18 *Downey Venture v. LMI Ins. Co.*,
 19 66 Cal.App.4th 478 (1998) 10

20 *HMS Capital, Inc. v. Lawyers Title Co.*,
 21 118 Cal.App.4th 204 (2004) 12

22 *Horowitz v. McGarry & Laufenber*,
 23 Case No. No. B275757, 2018 WL 5095152 (Cal. Ct. App., Oct. 19,
 24 2018) 9

25 *Lackner v. LaCroix*,
 26 25 Cal.3d 747 (1979) 11, 12

27 *Lane v. Bell*,
 28 20 Cal.App.5th 61, 68 (2018) 11, 12

Oviedo v. Windsor Twelve Properties, LLC,
 212 Cal.App.4th 97 (2012) 12

1 *Parrish v. Latham & Watkins,*
 2 3 Cal.5th 767, 775 (2017)..... 10, 12, 13, 14

3 *Sheldon Appel Co. v. Albert & Oliker,*
 4 47 Cal.3d 863 (1989).....9, 12

5 *Siebel v. Mittlesteadt,*
 6 41 Cal.4th 735 (2007)..... 10

7 *Soukup v. Law Offices of Herbert Hafif,*
 8 39 Cal.4th 260 (2006)..... 15

9 *Staffpro, Inc. v. Elite Show Servs., Inc.,*
 10 136 Cal.App.4th 1392 (2006)..... 11

11 *Wilson v. Parker, Covert & Chidester,*
 28 Cal.4th 811 (2002)..... 13, 14

12 *Yee v. Cheung,*
 13 220 Cal.App.4th 184 (2013)..... 13

14 **Federal Statutes**

15 28 U.S.C. § 1738..... 9

16 Federal Rules of Civil Procedure, Rule 8(a)(2)..... 8

17 Federal Rules of Civil Procedure, Rule 12(b)(6)..... 9

18

19 **California Statutes**

20 Code of Civil Procedure § 437c, subds. (b)(1), (b)(3)..... 14, 15

21 Code of Civil Procedure § 1032(a)..... 8, 11

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I. INTRODUCTION

1
2 Defendants Paul Tyrell and Sean Sullivan (“Movants”) are counsel to
3 defendant Storix, Inc., and for several years have represented the company in
4 contentious litigation against plaintiff Anthony Johnson.¹ The disputes started in
5 August 2014, when Johnson sued Storix for copyright infringement based on its
6 SBAdmin software. Storix, represented by Movants, won that case at trial in
7 December 2015, a result affirmed by the Ninth Circuit, and the company ultimately
8 obtained a discretionary award of attorneys’ fees from this court of more than
9 \$407,000 based on Johnson’s improper conduct. That case was just the first phase of
10 Johnson’s ever-futile attacks on Storix and its management.

11 In the course of litigating the copyright case, Storix learned that Johnson had
12 formed a new entity and intended to pursue a competitive business using a
13 “rebranded” version of Storix’s own software, at a time when Johnson served as a
14 Storix director. Johnson also engaged in other conduct designed to harm Storix’s
15 business. Storix filed a state court action to halt Johnson’s efforts, and succeeded in
16 doing so. Johnson responded with cross-claims against Storix’s officers and
17 directors, asserting a host of personal grievances over company management. Then,
18 with his co-shareholder and confidant, Robin Sassi (an attorney), Johnson sued the
19 Storix officers and directors in a separate derivative action. The San Diego Superior
20 Court ordered that those cases be consolidated, along with a personal injury suit
21 Johnson filed against Storix’s officers and directors. Trial of the consolidated cases
22 commenced in early 2018 before the Honorable Kevin A. Enright. After a three-
23 week trial, Storix prevailed on its sole cause of action against Johnson for breach of
24 fiduciary duty. Storix’s subsequent request for permanent injunctive relief was

25
26 ¹ While Johnson is now acting *pro per*, he has been represented by at least six (6)
27 different law firms in the course of the underlying state and federal litigation: The
28 Law Offices of Matthew Becker; Eastman & McCartney, LLP; Mintz Levin; The
Watkins Firm, APC; the Law Offices of Edwin Neal Schwartz; and the Law Offices
of Bernard F. King. Robin Sassi, his close friend and former co-plaintiff, is also an
attorney.

1 denied but only because Storix’s suit had served as the catalyst to stop Johnson’s
2 breaching conduct such that the court viewed a formal injunction as somewhat
3 “superfluous.” The jury also rejected all of Johnson’s cross-claims. After a bench
4 trial, the court found in favor of defendants on the derivative claims.

5 Having failed to achieve his desired outcome in his prior unsuccessful actions,
6 Johnson has returned to federal court to once again attack Storix and its management
7 and to rehash already-litigated issues and claims while also tacking on claims against
8 the company’s attorneys.² Johnson’s new complaint can only be characterized as
9 frivolous and should be dismissed altogether.

10 The claims against Movants are utterly baseless. Johnson sued Movants for
11 malicious prosecution based on Storix’s state court lawsuit against him for breach of
12 fiduciary duty for which Movants served as counsel.

13 First, Johnson cannot meet the first element for malicious prosecution because
14 he *lost* at trial. A jury rendered a verdict that Johnson breached his fiduciary duty to
15 Storix, and the court entered a final judgment “[i]n favor of plaintiff Storix, Inc. and
16 against Defendant Anthony Johnson on Storix Inc.’s complaint for breach of
17 fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor
18 Technology on Storix Inc.’s claim for aiding and abetting a breach of fiduciary
19 duty.” Eliminating any doubt, the state court expressly deemed Storix the “prevailing
20 party” and awarded it costs. Johnson cannot possibly meet the threshold showing for
21 malicious prosecution since there was no legal termination of the underlying case in
22 his favor.

23 Second, Johnson’s malicious prosecution claim fails because he cannot
24 establish as a matter of law that Movants initiated an action against him without
25 probable cause. The state trial court overruled Johnson’s demurrers, and later denied
26 his motion for summary judgment or summary adjudication based on disputed

27 ² Johnson tried this before, previously suing Storix’s attorneys as “co-conspirators”
28 in his personal injury suit, but dismissed them before suffering any consequences for
doing so.

1 material facts. The court denied his post-trial motions challenging the judgment
 2 against him, designated Storix the “prevailing party,” and expressly found that Storix
 3 had pursued its action in “good faith.” As a matter of law, Johnson cannot establish a
 4 lack of probable cause.

5 Third, Johnson cannot prove that Movants pursued a claim against Johnson
 6 with malice, particularly in light of the court’s “good faith” determination. As a
 7 result, Johnson is unable to establish any of the elements of malicious prosecution,
 8 and his complaint as to Movants must be dismissed with prejudice.

9 II. BACKGROUND FACTS

10 A. Johnson’s Allegations of “Malicious Prosecution” Against Movants

11 Below are Johnson’s allegations about the underlying state court case. Many
 12 of his allegations are inaccurate and refuted by the clear record, which is subject to
 13 Movants’ Request for Judicial Notice.³ While Movants quote Johnson’s allegations
 14 for purposes of this motion, they dispute the accuracy of many of his
 15 characterizations and deny any of his claims have merit.

16 Johnson asserts that “[o]n the morning of the settlement conference [in the
 17 Copyright Action], Partner-Defendants Altamirano, Turner and Huffman directed
 18 Attorney-Defendant Tyrell to file a lawsuit against Johnson in Storix’s name
 19 (hereafter the ‘Direct Suit’.) Johnson was never informed of the complaint or the
 20 underlying claim before the Direct Suit was filed.” Dkt. #1, Compl. ¶ 17 (brackets
 21 added). “The complaint alleged a single cause of action - that Johnson, as a Storix
 22 director, breached a fiduciary duty by failing to inform the board of his intent to start
 23 a competing business in California.” *Id.* at ¶ 18.

24 Johnson further contends that “[i]n early 2016, Attorney-Defendants amended
 25 the complaint in the Direct Suit to add an allegation that Johnson sent an email to
 26 Storix’s customers two months after the lawsuit was filed.” *Id.* at ¶ 23. “During the 3

27 ³ For consistency and ease of reference, a single Request for Judicial Notice with the
 28 appended exhibits has been filed in support of this motion, Movants’ special motion
 to strike the complaint, and Storix’s motion to dismiss.

1 ½ years litigating the Direct Suit, all Defendants continued to assert that Johnson was
2 operating a ‘secret’ business in California and was actively marketing Storix’s
3 proprietary software as a competing product.” *Id.* at ¶ 24. He claims: “All
4 Defendants possessed evidence months before bringing the Direct Suit that Johnson
5 had no intention of competing with Storix, and no evidence to the contrary was
6 produced since.” *Id.*

7 Johnson summarizes the state court trial as follows: “In January-February
8 2018, a jury trial was held on Storix’s Direct Suit and Johnson’s cross-claims against
9 the Partner-Defendants. Attorney-Defendant Sullivan sat beside Partner-Defendants’
10 counsel and joined in their defense on issues unrelated to Storix’s claim against
11 Johnson. The jury rejected Storix’s \$1.2 million claim against Johnson for ‘unjust
12 enrichment’ and ‘unfair head start’, finding that Johnson did not use Storix’s
13 confidential information to its detriment or breach his duty of confidentiality or
14 loyalty to Storix for his benefit.” *Id.* at ¶ 26. “The court adopted the jury’s verdict in
15 favor of Johnson on Storix’s primary claim, and further denied all eleven (11) of
16 Storix’s demands for injunctive relief. However, the court also adopted the jury’s
17 verdict awarding Storix \$3,739 for ‘loss of employee productivity’ on an unrelated
18 claim Storix introduced during trial.” *Id.* at ¶ 27. Just prior to the bench trial on
19 Johnson and Sassi’s derivative suit, “the court granted Partner-Defendants’ pre-trial
20 motion to dismiss Johnson as a shareholder plaintiff on grounds that he could not
21 fairly and adequately represent Storix’s interests based on the jury’s award against
22 Johnson of \$3,739.” *Id.* at ¶ 28.

23 Based on these allegations, Johnson now alleges a single cause of action
24 against Movants for malicious prosecution. He asserts:

25 “Attorney-Defendants and Partner-Defendants initiated and continued
26 the Direct Suit against Johnson without probable cause, without
27 stating a cause of harm, and without the approval of any disinterested
28 directors or shareholders of Storix. No reasonable person in these
circumstances would have believed there were grounds to bring the
cause of action against Johnson.” Compl. at ¶ 38.

1 He continues: “The Direct Suit was instituted for malicious purposes other than to
2 succeed on the merits, and the claim was pursued to a legal termination on its merits
3 in Johnson’s favor.” *Id.* at ¶ 39. “Attorney-Defendants knew the claim was false and
4 legally untenable when they filed the lawsuit. Attorney-Defendants continue to
5 represent Storix in post-trial motions involving the Direct Suit. All defendants took
6 extraordinary actions to continue the lawsuit long after evidence proved its primary
7 claim to be patently false.” *Id.* at ¶ 40.

8 **B. The Actual Details and Results of the Underlying Litigation**

9 The true facts—all of which are subject to judicial notice—differ significantly
10 from Johnson’s allegations. Storix filed its original complaint against Johnson and
11 Janstor Technologies, a company Johnson founded to commercialize a “rebranded”
12 version of Storix’s SBAdmin software, on August 20, 2015. RJN No. 8. Storix had
13 learned that, just two days after electing himself to a seat on Storix’s board of
14 directors in February 2015, Johnson set up the Janstor entity, reserved a website, and
15 within a few months after that had reserved two “port” numbers that are necessary to
16 operate software like SBAdmin. *See Id.*, ¶ 15. Storix thus needed to move quickly to
17 prevent Johnson from harming its business, in particular because the trial of the
18 Copyright Action was still several months away. Storix sued Johnson on a single
19 cause of action for breach of fiduciary duty, and Janstor for aiding and abetting
20 breach of fiduciary duty. *Id.* at pp. 4-5.

21 Storix amended its complaint in March 2016, to address Johnson’s continued
22 hostile acts towards Storix, including sending “announcement” emails to customers
23 designed to spread disinformation harmful to Storix. RJN No. 9, ¶ 17. Johnson
24 demurred to the amended complaint, which the court overruled, stating: “there are
25 sufficient facts pled to support the claims for breach of fiduciary duty and
26 aiding/abetting breach of fiduciary duty.” RJN No. 10. The court also overruled
27 Johnson’s demurrer that Storix lacked standing to bring the direct suit against him,
28 and rejected his contention that the claims must be pursued as a derivative suit, while

1 striking punitive damages allegations with leave to amend. *Id.*

2 On September 6, 2016, Storix filed its Second Amended Complaint (“SAC”).
3 RJN No. 11. While Storix added factual allegations, it still only asserted a single
4 cause of action against Johnson for breach of fiduciary duty, and a single cause
5 against Janstor for aiding and abetting. *Id.* Storix sought general and special damages
6 and injunctive relief to prevent Johnson from harming Storix’s business. *Id.* Johnson
7 again demurred to the SAC. The court overruled the demurrer again because “there
8 are sufficient facts pled to support the claim for breach of fiduciary duty and
9 aiding/abetting breach of fiduciary duty,” and since “there are sufficient facts to
10 support injunctive relief.” RJN No. 12.

11 Eventually Johnson filed a motion for summary judgment, or in the alternative
12 summary adjudication. The court denied Johnson’s motion based on the existence of
13 disputed material facts. Specifically, the court denied the motion “on the grounds
14 that no triable issues of material fact exist.” RJN No. 16. Separately, Johnson
15 challenged Storix’s “standing” to bring the Direct Suit, arguing the board never
16 authorized the filing of the lawsuit. The court denied Johnson’s motion on standing,
17 ruling that Storix had submitted evidence “that a majority of the then directors of
18 Storix approved of this legal action,” and so a disputed fact existed. *Id.*

19 The Direct Suit, with Johnson’s corresponding cross-claims, proceeded to a
20 jury trial in early 2018. After a three-week trial, the jury rendered a verdict that
21 “Anthony Johnson breach[ed] his duty of loyalty by knowingly acting against Storix,
22 Inc.’s interests while serving on the Board of Directors of Storix, Inc.” RJN No. 17.
23 Further, the jury awarded Storix \$3,739.14 “as a result of Anthony Johnson’s acts or
24 conduct in breach of a fiduciary duty or duties that he owed to Storix, Inc.” *Id.* The
25 jury also found against Johnson on all of his cross-claims against the individuals. *Id.*

26 Following the jury trial, the court adopted the jury’s verdict that Johnson had
27 breached his fiduciary duty to Storix, and ruled that Johnson lacked standing to
28 proceed as an adequate representative plaintiff of the company in a derivative suit.

1 RJN No. 18. The court issued a final order after a bench trial ruling in favor of the
2 defense on all derivative claims. RJN No. 20.

3 The court also ruled on Storix’s post-trial motion for entry of a permanent
4 injunction against Johnson. RJN No. 19. In denying the motion, the court recognized
5 that “[w]hile Johnson has indeed threatened to harm Storix’s business, his words and
6 conduct, while no doubt frustrating and upsetting to Storix, do not show an ongoing
7 course of conduct.” *Id.* at p. 3:15-16. The court noted that Johnson’s “most
8 significant and provocative emails” were sent more than two years earlier. *Id.* “This
9 past conduct, along with the jury’s verdict that Johnson breached his fiduciary duty
10 of loyalty to Storix as one of its directors, does not show that Johnson will continue
11 to seek to harm Storix’s business in the future.” *Id.* As to other requests for
12 injunctive relief to limit Johnson’s “inspection rights,” the court recognized that prior
13 court orders limiting those rights “still stand, making an injunction superfluous.” *Id.*
14 at p. 4.

15 After the jury and bench trials concluded, but before entry of final judgment,
16 Johnson moved for judgment notwithstanding the verdict (“JNOV motion”). Johnson
17 argued that there was insufficient evidence to support the jury’s verdict against him
18 and in Storix’s favor, and argued that the litigation privilege shielded his tortious
19 conduct. The court denied Johnson’s JNOV motion, finding “there is sufficient
20 evidence to support the verdict. The court rejects Johnson’s arguments raised in the
21 JNOV.” RJN No. 21. The court rejected Johnson’s “litigation privilege” claims, and
22 further found the “evidence presented at trial undermines” Johnson’s claim that
23 Storix lacked proper authority to file the Direct Suit. *Id.*

24 The court issued a judgment on the consolidated action following trial, “[i]n
25 favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix
26 Inc.’s complaint for breach of fiduciary duty and in favor of Plaintiff Storix, Inc. and
27 against Defendant Janstor Technology on Storix Inc.’s claim for aiding and abetting
28 a breach of fiduciary duty.” RJN No. 22.

1 After entry of final judgment, Johnson filed a motion for a new trial, asserting
2 as many as five different grounds. The court denied the motion in its entirety. As to
3 Johnson's claim that there was insufficient evidence to support the verdict against
4 him, the court stated:

5 "the court has considered Johnson's various arguments under this
6 ground and finds that after weighing the evidence, it is not convinced
7 from the entire record, including reasonable inferences therefrom, that
8 the jury should have reached a different verdict. There was an
9 abundance of evidence presented in this three-week jury trial
10 regarding all the parties' actions in the operation and running of this
11 business. The evidence supports that Johnson breached his
12 fiduciary duty to Storix. The court will not disturb the jury's finding
13 on that claim."

14 RJN No. 23, p. 2 (emphasis added).

15 Johnson also filed a motion to tax costs against both Storix and the individual
16 officers and directors. In denying the motion, the court held that Storix was the
17 prevailing party under Code of Civil Procedure section 1032(a), entitled to costs of
18 \$24,493.53. RJN No. 24. Further, the court stated Storix would separately be
19 awarded costs "in its discretion," and found that Storix "reasonably and in good faith
20 brought an unlimited civil action against Johnson." *Id.* Despite this record, Johnson
21 proceeded to file the complaint in this new federal action.

22 III. ARGUMENT AND AUTHORITIES

23 A. Legal Standard for Motions to Dismiss

24 Even under the liberal pleadings standard of Federal Rule of Civil Procedure
25 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to
26 relief' requires more than labels and conclusions, and a formulaic recitation of the
27 elements of a claim for relief will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S.
28 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Pursuant to
Twombly, a plaintiff must not allege conduct that is merely conceivable but must
allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

1 “A claim has facial plausibility when the Plaintiff pleads factual content that allows
2 the court to draw the reasonable inference that the Defendant is liable for the
3 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*,
4 550 U.S. at 556).

5 The Court, however, need not accept as true allegations contradicted by
6 judicially noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir.
7 2000), and it “may look beyond the plaintiff’s complaint to matters of public record”
8 without converting the Rule 12(b)(6) motion into a motion for summary judgment,
9 *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Also, the Court must not
10 “assume the truth of legal conclusions merely because they are cast in the form of
11 factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
12 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and
13 unwarranted inferences are insufficient to defeat a motion to dismiss.” *Adams v.*
14 *Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). When a party asserts the preclusive
15 effect of a state court judgment, 28 U.S.C. § 1738 requires that a federal court give a
16 state court judgment the same full faith and credit as that judgment would receive
17 under the law of the state in which the judgment was rendered. *Exxon Mobil Corp. v.*
18 *Saudi Basic Indus. Corp.*, 544 U.S. 280, 293, 125 S.Ct. 1517 (2005); *Maldonado v.*
19 *Harris*, 370 F.3d 945, 951 (9th Cir. 2004).

20 **B. The Requisite Elements of Malicious Prosecution**

21 Federal courts sitting in diversity apply state substantive law and federal
22 procedural law. *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817
23 (1938). In California, malicious prosecution is a disfavored claim. *Sheldon Appel Co.*
24 *v. Albert & Oliker*, 47 Cal.3d 863, 872 (1989). The law favors open access to the
25 courts for the redress of grievances. *Horowitz v. McGarry & Laufenber*, Case No.
26 No. B275757, 2018 WL 5095152, at *3 (Cal. Ct. App., Oct. 19, 2018). Historically,
27 the elements of the tort in California courts have been carefully circumscribed so that
28 litigants with potentially valid claims are not deterred from bringing their claims to

1 court for fear of a subsequent malicious prosecution claim. *Downey Venture v. LMI*
 2 *Ins. Co.*, 66 Cal.App.4th 478, 493 (1998).

3 To establish a claim for malicious prosecution under California law, a plaintiff
 4 must plead and prove that the underlying action was:

5 (i) initiated or maintained by, or at the direction of, the defendant, and
 6 pursued to *a legal termination in favor of the malicious prosecution*
 7 *plaintiff*;

8 (ii) initiated or maintained *without probable cause*; and

9 (iii) initiated or maintained *with malice*.

10 *Parrish v. Latham & Watkins*, 3 Cal.5th 767, 775 (2017) (“*Parrish*”) (italics added).

11 The requirements for malicious prosecution are in the conjunctive, so if a plaintiff
 12 cannot meet each of the three requirements, the claim fails. *Brennan v. Tremco Inc.*,
 13 25 Cal.4th 310, 313 (2001).

14 **C. Johnson Cannot Establish All the Elements of a Claim for**
 15 **Malicious Prosecution as a Matter of Law**

16 Johnson’s claim for malicious prosecution must be dismissed because he
 17 cannot succeed in establishing each of the requisite elements as a matter of law given
 18 the results in the underlying state court litigation. The record is clear that he did not
 19 obtain a favorable legal termination in his favor. He cannot establish as a matter of
 20 law that the claims against him lacked probable cause. Finally, he fails to allege any
 21 factual basis that malice drove the pursuit of any case brought against him.

22 **1. Johnson Did Not Obtain a Favorable Termination in the**
 23 **Underlying Litigation**

24 Johnson cannot meet the first element of a claim for malicious prosecution—
 25 that he obtained a favorable termination in the underlying litigation.

26 “It is hornbook law that the plaintiff in a malicious prosecution action must
 27 plead and prove that the prior judicial proceeding of which he complains terminated
 28 in his favor.” *Siebel v. Mittlesteadt*, 41 Cal.4th 735, 741 (2007) (quotation omitted).

1 “Favorable termination ‘is an essential element of the tort of malicious prosecution,
2 and it is strictly enforced.’” *Lane v. Bell*, 20 Cal.App.5th 61, 68 (2018). The “‘theory
3 underlying the requirement of favorable termination is that it tends to indicate the
4 innocence of the accused.’” *Lackner v. LaCroix*, 25 Cal.3d 747, 750 (1979).

5 “To determine whether there was a favorable termination, we look at the
6 judgment as a whole in the prior action” *Casa Herrera, Inc. v. Beydown*, 32
7 Cal.4th 336, 341 (2004) (internal quotations omitted). As recently clarified in *Lane v.*
8 *Bell*, the favorable termination rule requires a malicious prosecution plaintiff to show
9 “there was a favorable termination of the *entire* underlying action in the plaintiff’s
10 favor,” and “that a partial recovery against the malicious prosecution plaintiff in the
11 underlying action is fatal to showing the favorable termination element.” *Lane v.*
12 *Bell*, 20 Cal.App.5th at 75 (italics in original; quotations and brackets omitted). “Any
13 other rule would strip the ‘favorable termination’ requirement of its independent
14 significance because any individual ‘claim’ that lacks probable cause will necessarily
15 be terminated in the underlying defendant’s favor.” *Id.* Further, the court in *Lane*
16 rejected prior cases that held favorable termination could be based on a “severable”
17 claim. *Id.*; see *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal.App.4th 1392, 1403
18 (2006).

19 The state trial court entered a final judgment “[i]n favor of plaintiff Storix, Inc.
20 and against Defendant Anthony Johnson on Storix Inc.’s complaint for breach of
21 fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor
22 Technology on Storix Inc.’s claim for aiding and abetting a breach of fiduciary
23 duty.” RJN No. 22, p. 8. There is but one way to interpret that clear edict: Johnson
24 lost. The trial court further expounded on this point by deeming Storix the
25 “prevailing party” under Code Civ. Proc. § 1032(a), and awarding it costs. RJN No.
26 24. In fact, the court stated that even apart from the mandatory award under section
27 1032(a), under the court’s discretion it deemed Storix the prevailing party. *Id.*⁴

28 ⁴ If Johnson argues that he avoided suffering even greater monetary or injunctive

1 The judgment against Johnson is also fatal to his malicious prosecution claim
2 because it negates any “innocence” on his part. *See, e.g., HMS Capital, Inc. v.*
3 *Lawyers Title Co.*, 118 Cal.App.4th 204, 214 (2004) [“The basis of the favorable
4 termination element is that the resolution of the underlying case must have tended to
5 indicate the malicious prosecution plaintiff’s innocence,” *citing Casa Herrera, Inc.*
6 *v. Beydoun*, 32 Cal.4th at 341; *Lackner v. LaCroix*, 25 Cal.3d at 750]. A jury found
7 Johnson breached his fiduciary duty to Storix. Regardless of any remedy awarded,
8 there is no way to interpret that finding other than an absence of innocence, and a
9 termination of the action against Johnson.

10 By any measure, Johnson cannot establish the first element of malicious
11 prosecution.

12 **2. As a Matter of Law, Johnson Cannot Establish a Lack of**
13 **Probable Cause for Storix’s Claim Against Him**

14 Johnson’s claim for malicious prosecution against Movants fails for another
15 reason: as a matter of law, he cannot establish that Storix pursued a case against him
16 which lacked probable cause.

17 “[T]he existence or absence of probable cause has traditionally been viewed as
18 a question of law to be determined by the court, rather than a question of fact for the
19 jury.” *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d at 875. “[T]he probable cause
20 element calls on the trial court to make an objective determination of the
21 ‘reasonableness’ of the defendant’s conduct, i.e., to determine whether, on the basis
22 of the facts known to the defendant, the institution of the prior action was legally
23 tenable, as opposed to whether the litigant subjectively believed the claim was
24 tenable.” *Parrish, supra*, 3 Cal.5th at 776 (Internal quotations omitted). The
25 benchmark for probable cause is whether any reasonable attorney would have
26 thought the claim tenable. *Oviedo v. Windsor Twelve Properties, LLC*, 212

27 relief against him such that he obtained a “favorable” outcome, his effort to deem the
28 judgment against him as “severable” is meritless. As noted above, California courts
have specifically rejected that argument. *See Lane v. Bell*, 20 Cal.App.5th at 74-75.

1 Cal.App.4th 97, 114 (2012). Put differently, only those actions that any reasonable
2 attorney would agree are totally and completely without merit may form the basis for
3 a malicious prosecution claim. *See Parrish*, 3 Cal.5th at 776. This “rather lenient
4 standard” avoids the “chilling of novel or debatable legal claims,” even those that are
5 “extremely unlikely that they will win.” *Id.* (internal quotes omitted); *see Wilson v.*
6 *Parker, Covert & Chidester*, 28 Cal.4th 811, 822 (2002) (“*Wilson*”) [Recognizing
7 one who “possesses competent evidence” does not “act tortiously by bringing the
8 claim, even if also aware of evidence that will weigh against the claim.”]. In
9 determining “whether the action was supported by probable cause, the court is to
10 construe the allegations of the underlying complaint liberally, in a light most
11 favorable to the malicious prosecution defendant.” *Yee v. Cheung*, 220 Cal.App.4th
12 184, 200 (2013).

13 The trial court’s rulings also have a direct bearing on the probable cause
14 determination. It is well established that certain interim rulings on the merits may
15 provide a basis for finding probable cause to prosecute the underlying case on which
16 a malicious prosecution action is based. *Wilson, supra*, 28 Cal.4th at 817–818;
17 *Parrish, supra*, 3 Cal.5th at 776. The “interim adverse judgment” rule provides that
18 “if an action succeeds after a hearing on the merits,” including on dispositive pretrial
19 motions, “that success ordinarily establishes the existence of probable cause ... even
20 if the result is overturned on appeal or by later ruling of the trial court.” *Parrish*, 3
21 Cal.5th at 771, 776-777; *Antounian v. Louis Vuitton Malletier*, 189 Cal.App.4th 438,
22 450 (2010). As the California Supreme Court explained in *Wilson*:

23 “Denial of a defense summary judgment motion on grounds that a
24 triable issue exists, or of a nonsuit, while falling short of a
25 determination on the merits, establishes that the plaintiff has
26 substantiated, or can substantiate, the elements of his or her cause of
27 action with evidence that, if believed, would justify a favorable
28 verdict. [...] [A] claimant or attorney who is in possession of such
evidence has the right to bring the claim, even where it is very
doubtful the claim will ultimately prevail.”

1 *Wilson*, 28 Cal. 4th at 824 (brackets added). A conclusion that issues of material fact
2 remain for trial necessarily implies at least some merit for the claim exists, which
3 “compels” the conclusion that there is probable cause. *Id.* at 819; *see Parrish*, 3
4 Cal.5th at 771, 778-779 [Reaffirming principles articulated in *Wilson*, and holding
5 that interim adverse judgment rule applies even if court that denied summary
6 judgment on the merits later concludes the underlying suit was brought in bad faith].

7 Only narrow exceptions bar operation of the interim adverse judgment rule.
8 The denial of a summary judgment motion on procedural or technical grounds, rather
9 than for existence of triable issues of material fact, does not alone establish that
10 probable cause existed. *Wilson*, 28 Cal.4th at 823–824; *see, e.g., Code Civ. Proc. §*
11 *437c, subs. (b)(1), (b)(3)* [permitting denial of motion for failure to include moving
12 or opposing separate statement of undisputed facts].

13 The record here overwhelmingly establishes that Storix, and its counsel, had
14 probable cause to pursue claims against Johnson. Irrespective of any judgment
15 entered against him at trial, numerous interim (and post-trial motion) orders establish
16 that Storix acted with probable cause. As set forth above, the trial court overruled
17 Johnson’s demurrers challenging the legal aspects of the breach of fiduciary duty
18 case against him. RJN Nos. 10, 12. The trial court later denied a motion for summary
19 judgment, or summary adjudication, based on the existence of disputed material
20 facts. RJN No. 16. Under the interim adverse judgment rule, Johnson is barred as a
21 matter of law from meeting the second element of a claim for malicious prosecution
22 as probable cause existed.

23 Moreover, several post-trial rulings by the trial court refute Johnson’s claim
24 that Storix and its counsel acted without probable cause. The court denied both
25 Johnson’s JNOV motion and his motion for new trial. *See* RJN Nos. 21 & 23,
26 respectively. In doing so, the court expressly acknowledged there was “sufficient
27 evidence to support the verdict” against Johnson, and rejected “Johnson’s argument
28 that this lawsuit was not properly authorized,” finding the suit was authorized. RJN

1 No. 21. The trial court also denied Johnson’s motion for a new trial based on
 2 “insufficiency of the evidence.” RJN No. 23. “There was an abundance of evidence
 3 presented in this three-week jury trial regarding all the parties’ actions in the
 4 operation and running of this business. The evidence supports that Johnson breached
 5 his fiduciary duty to Storix.” *Id.* Most recently, the court confirmed Storix as the
 6 prevailing party, expressly finding Storix pursued the case against Johnson in “good
 7 faith.” RJN No. 24.

8 Based on the clear record, Johnson cannot, as a matter of law, establish that
 9 either Storix or its counsel pursued a case against him that lacked probable cause.

10 **3. Johnson Fails to Substantiate an Improper Motive Drove the**
 11 **Litigation Against Him**

12 Johnson’s malicious prosecution also fails because he has not pleaded facts
 13 that malice, i.e., actual ill will or improper purpose, drove the pursuit of the state
 14 court litigation against him.

15 Malice “relates to the *subjective intent or purpose* with which the defendant
 16 acted in initiating the prior action.” *Soukup v. Law Offices of Herbert Hafif*, 39
 17 Cal.4th 260, 292 (2006) (italics original). “The motive of the defendant must have
 18 been something other than ... the satisfaction in a civil action of some personal or
 19 financial purpose. The plaintiff must plead and prove actual ill will or some improper
 20 ulterior motive.” (*Id.*, internal quotations and citation omitted). Courts should not
 21 impute malice to attorneys based on clients’ misconduct. *Daniels v. Robbins*, 182
 22 Cal.App.4th 204, 221 (2010), citing *Estate of Tucker ex. rel. Tucker v. Interscope*,
 23 515 F.3d 1019, 1036 (9th Cir. 2008).

24 Here, Johnson purports to allege wrongful motives without any factual basis.
 25 Johnson merely argues that the “Direct Suit was instituted for malicious purposes
 26 other than to succeed on the merits.” Compl. at ¶ 39. He likewise asserts the case
 27 was “meritless” and pursued with the “intent to harm Johnson as demonstrated by
 28 their callous indifference or wanton disregard for Johnson’s rights and the extreme

1 financial burden their conduct was causing.” *Id.* at ¶¶ 41-42. Johnson’s use of
 2 boilerplate allegations does not satisfy his obligation to plead actual facts
 3 substantiating his allegations of malice. His complaints of his alleged stress and
 4 financial pressure associated with litigation are common to all litigation, and are not
 5 unique to him or indicative of malice. He has failed to plead what unique malice
 6 drove the pursuit of claims against him, particularly given the multiple rulings
 7 finding that the claims against him were supported by evidence and brought in “good
 8 faith.” *See, e.g.,* RJN No. 21 (“The evidence supports that Johnson breached his
 9 fiduciary duty to Storix”); RJN No. 24 (“The court finds that Storix reasonably and
 10 in good faith brought an unlimited civil action against Johnson[.]”). Thus, Johnson
 11 has failed to plead facts supporting the third element of his malicious prosecution
 12 claim.

13 **D. The *Rooker-Feldman* Doctrine Prevents District Court Review of**
 14 **State Court Judgments**

15 Johnson’s complaint constitutes an improper attempt to challenge the rulings
 16 made by the California superior court. That challenge is prohibited under the law.

17 The *Rooker-Feldman* doctrine is a rule of procedure enunciated by the United
 18 States Supreme Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and
 19 *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which holds
 20 that federal courts other than the Supreme Court should not sit in direct review of
 21 state court decisions and lack subject matter jurisdiction to do so. Thus, a district
 22 court may not adjudicate an action seeking to reverse or nullify a final state court
 23 judgment, nor may it adjudicate issues “inextricably intertwined” with those
 24 adjudicated by the state court. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,
 25 544 U.S. at 292-293.

26 There are four **requirements** for application of *Rooker-Feldman*: (1) the
 27 federal court plaintiff must have lost in state court; (2) the plaintiff must complain of
 28 injuries caused by the state court judgment; (3) the plaintiff must be asking the

1 district court to review and reject that judgment; and (4) the state court judgment
2 must have been rendered before the district court proceedings commenced. *Hoblock*
3 *v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 85 (2nd Cir. 2005). A federal claim is
4 “inextricably intertwined” with a state court decision if its success depends on a
5 determination that the state court wrongly decided the issues before it. *Davani v.*
6 *Virginia Dept. of Transp.*, 434 F.3d 712, 717 (4th Cir. 2006); *Cooper v. Ramos*, 704
7 F.3d 772, 779 (9th Cir. 2012) (“we have found claims inextricably intertwined where
8 the relief requested in the federal action would effectively reverse the state court
9 decision or void its ruling”) (internal quotes omitted).

10 Here, all of the *Rooker-Feldman* requirements are satisfied: (1) Johnson is a
11 state court loser; (2) Johnson complains he has been injured by the state court
12 judgment; (3) Johnson is expressly asking this court to review and reject the state
13 court judgment, and (4) the state court rendered judgment before this action.

14 There is no way that this Court can adjudicate Plaintiff’s claims without
15 revisiting the state court judges’ rulings on the pretrial motions, motions in limine,
16 objections made and evidence admitted during trial, jury verdicts, and bench trial
17 decisions (rulings which Johnson has already challenged with post-trial motions and
18 now appealed to the California Court of Appeal). The only way Johnson can prevail
19 is if he obtains a federal ruling that the state court erred. For instance, Johnson would
20 need this federal court to minimally determine that the state court erred in issuing the
21 following rulings:

- 22 • That Storix was entitled to a judgment against Johnson for breaching his
23 fiduciary duty to the company;
- 24 • That an “abundance” of evidence supported the jury’s verdict that
25 Johnson breached his fiduciary duty to Storix;
- 26 • That Storix was authorized to pursue a direct claim against Johnson;
- 27 • That Storix was the prevailing party against Johnson; and
- 28 • That Storix pursued its claims against Johnson in good faith.

