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**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY JOHNSON, an individual,

Plaintiff,

v.

MANUEL ALTAMIRANO, an individual,
RICHARD TURNER, an individual,
DAVID KINNEY, an individual,
DAVID HUFFMAN, an individual,
PAUL TYRELL, an individual,
SEAN SULLIVAN, an individual,
STORIX, INC,. a California Corporation,
and DOES 1-5, inclusive,

*Defendants.*

Case No. 3:19-cv-1185-H-BLM

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES ISO OPPOSITION TO SPECIAL MOTION TO STRIKE OF DEFENDANTS ALTAMIRANO, TURNER, KINNEY AND HUFFMAN**

Hearing Date: October 7, 2019
Hearing Time: 10:30 a.m.
Judge: Hon. Marilyn L. Huff
Dept.: Courtroom I 5A

Complaint Filed: June 24, 2019
Trial Date: Not Set

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## I. INTRODUCTION

Plaintiff respectfully submits this Opposition to the defendants' *Special Motion to Strike Plaintiff's Complaint* (hereafter "Motion") filed by defendants Altamirano, Turner, Kinney and Huffman (hereafter "Defendants") pursuant to Cal. Code Civ. Proc. § 425.16 (California's anti-SLAPP statute.) References are herein made to the lawsuit underlying the malicious prosecution claim, San Diego Superior Court Case No. 37-2015-00028262-CU-BT-CTL (hereafter "Direct Suit"), and the shareholder derivative lawsuit Johnson filed on Storix's behalf, Case No. 37-2015-00034545-CU-BT-CTL ("Derivative Suit").

Johnson herein incorporates his concurrently-filed request for judicial notice (hereafter "RJN"). For clarity and consistency with their concurrent motions and filings, Johnson herein incorporates Defendants' request for judicial notice in support of their *Special Motion to Strike* ("MTS RJN") and Storix's and the attorney-defendants' request for judicial notice (hereafter "Storix RJN"). The complaint in this action (ECF No. 1) is hereafter referenced as "Complaint".

Johnson's malicious prosecution claim, by definition, pertains to protected activity, but is well supported by facts and evidence that Defendants instituted and maintained the Direct Suit without probable cause, with malicious intent, and knowing the claim was false. Defendants' effort to dismiss Johnson's breach of fiduciary duty causes of action fails because the claims pertain to *illegal* conduct, not protected activity. Furthermore, the Complaint neither asserts any claims nor attempts to resolve any issues previously decided.

Johnson need only show a minimal probability of success to defeat Defendants' Motion, and the Complaint alone far exceeds this low bar. Although neither the Defendants or the attorney-defendants' Anti-SLAPP motions dispute the merits of any claims, Johnson nevertheless provides evidence to support his claims.

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## II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

Defendants provide factual background by reference to the Complaint, adding conclusory and misleading assertions of Johnson's intentions unsupported by facts and references to prior rulings that contradict the actual record. The following facts correct and supplement those in Defendants' Motion as relevant to this opposition.

Johnson founded Storix and created the SBAdmin product. (Complaint ¶ 10.) Johnson gifted 60% share of Storix to Defendants, his long-term employees, after he was diagnosed with terminal cancer. (Complaint ¶ 12.) Since then, Defendants maintained at least a 52% share of Storix, the board majority, and all officer positions. (*Id.* ¶ 32.) Defendants forced Johnson out the company (Complaint ¶ 13), denied him access to Storix's financial records (*Id.* ¶ 30), and ceased shareholder distributions to deprive him any income from the company since. (*Id.* ¶ 19.)

Defendants allege that Johnson "embarked on a campaign against Defendants *and Storix.*" (Motion at p. 2.) But Defendants were first to mention litigation when they directed the attorney-defendants to threaten Johnson with a lawsuit for "securities fraud" if he didn't abandon his claim of ownership to the SBAdmin copyrights. (Complaint ¶ 14.) Johnson filed the copyright infringement lawsuit in this Court, and Storix filed a counter-claim for declaratory judgment of copyright ownership. (*Id.*) In December 2015, this Court ruled, and the Ninth Circuit later affirmed, that the "Storix 2003 Annual Report" signed by Johnson in 2004 confirmed a prior "oral assignment" of ownership of all copyrights to Storix. (Complaint ¶ 22; RJN, Ex. 3 at pp 12-13.)

In August 2015, a few months before the copyright trial, Defendants directed the attorney-defendants to file the Direct Suit against Johnson on the morning of a settlement conference. (Complaint ¶ 17; Storix RJN, Ex. 8.) Defendants never informed Johnson of any concerns before filing the lawsuit. (*Id.*) The complaint falsely alleged Johnson resided in San Diego (*Id.* ¶ 18; Storix RJN, Ex. 8 ¶ 3), but Johnson was served the complaint at his home in Florida. (Complaint ¶ 18; RJN, Ex.

1.) The complaint alleged that Johnson's competing company ("Janstor") did business in San Diego. (Storix RJN, Ex. 8 ¶ 4.) Defendants knew the allegation was false because they were in possession of records showing Janstor had the same address as the home Johnson sold before leaving San Diego. (RJN, Ex. 2.)

In March 2016, Storix amended the Direct Suit (FAC) prior to a demurrer hearing, adding an allegation of Johnson "manifesting his intent to directly compete with Storix" by sending an email in October 2015 to some undisclosed customers ("Customer Email"). (Storix RJN, Ex. 9 ¶ 17.) The Customer Email occurred two months *after* the Direct Suit was filed. (RJN, Ex. 4.) The Customer Email states, "As Storix has been well aware since my departure, I continued development of the software, believing we would eventually work out our differences. I made no effort to disparage or compete with Storix in any way." (*Id.*) The FAC continued to allege Johnson was competing by way of Janstor, but Defendants possessed records long before filing the FAC showing Janstor had been dissolved. (RJN, Ex. 5.)

Before the FAC was filed, this Court denied Storix's demand for a restraining order against Johnson because Storix was "unable to cite harm that has befallen it as a result of Plaintiff's email to customers." (RJN, Ex. 6 at p. 22.) The FAC also demanded injunctive relief because the Customer Email demonstrated Johnson's "plans and activities designed to compete with Storix". (Storix RJN, Ex. 9 ¶ 28.) The FAC falsely alleged the Customer Email occurred while Johnson resided and Janstor did business in San Diego. (Storix RJN, Ex. 9, ¶¶ 3-4, 7-8.)

In August 2016, another state court found the Customer Email insufficient to support injunctive relief and granted Johnson's motion to strike. (Storix RJN, Ex. 10.) To restore their injunctive relief, Storix amended again (SAC) only to add an allegation that "Johnson stole a development copy" of Storix's proprietary software when he resigned in 2014. (MTS RJN, Ex. 2 ¶ 20.) The SAC still alleged that Johnson's "formation of a new corporation" was "done in furtherance of his efforts

1 to create a business to directly compete" (*Id*. ¶ 25) and that all events took place in
2 San Diego. (*Id*. ¶¶ 3, 4, 8.)

3 After Defendants brought the Direct Suit against him, Johnson responded by
4 filing and funding the Derivative Suit on Storix's behalf. (MTS RJN, Ex. 5.)
5 Defendants directed the attorney-defendants to interfere and obstruct the company's
6 claims against them. (Complaint ¶ 34.) Defendants also directed the attorney-
7 defendants to take legal actions to prevent Johnson and Robin Sassi, the other
8 shareholder plaintiff in the Derivative Suit, from having access to Storix's financial
9 records. (Complaint ¶¶ 30, 32.) Defendants directed the attorney-defendants to file a
10 workplace violence restraining order against Johnson. Defendants provided
11 declarations falsely stating that Johnson brought the Derivative Suit "against the
12 company" (RJN, Ex. 11, Huffman Decl. ¶ 2 at p. 86) to "drive the company out of
13 business through ruinous litigation" (*Id*. ¶ 3) and was "terrorizing Storix and its
14 employees for the past several years." (*Id.,* Smiljkovich Decl. ¶ 4 at p. 90.) Johnson
15 appeared in San Diego, disproved their claims, and the court dismissed the
16 restraining order "with prejudice in its entirety", finding that "respondent's threats
17 are legal threats." (RJN, Ex. 12.)

18 Johnson filed a cross-complaint to the Direct Suit for his personal damages.
19 (MTS RJN, Ex. 3.) Defendants brought an anti-SLAPP motion, which the court
20 granted *only* to strike language pertaining to their bringing the Direct Suit without
21 the authorization or approval of Storix. (MTS RJN Ex. 4.) A year later, another court
22 granted Defendants' pre-trial motion to dismiss Johnson as a plaintiff in the
23 Derivative Suit because he could not fairly represent other shareholders' interests.
24 (Storix RJN, Ex. 22 at p. 227.)

25 In February 2018, Defendants testified at trial that they had no knowledge of
26 actual harm to Storix before filing the Direct Suit but maintained the lawsuit to
27 *prevent* Johnson from competing. (RJN, Ex. 10 at pp. 81-84.) The jury rejected
28 Storix's entire claim of $1,255,996 for unjust enrichment based on Johnson

obtaining an "unfair head start" by operating a competing business. (RJN, Ex. 8 at p. 51; MTS RJN, Ex. 7 at p. 108 [Special Verdict Question Nos. 4, 7].) Defendants state that "the jury found that Johnson breached his duty of loyalty by knowingly acting against Storix's interests" (Motion at p. 3), but they omit that the jury awarded Storix only $3,739.14. (MTS RJN, Ex. 7 at p. 108 [Special Verdict Question No. 8].) That claim was never pled and was first introduced in closing arguments. (RJN Ex. 8 at pp. 51-52; *See* MTS RJN, Ex. 2.)

After trial, Defendants admitted the jury award was "solely based" on "employee time *associated* with *dealing* with the *fallout*" of the Customer Email. (RJN, Ex. 9 at p. 61.) Again, Storix made eleven (11) demands for injunctive relief, stating that "Johnson committed *numerous* acts which the jury determined breached his fiduciary duty to Storix" because "Johnson engaged in significant efforts to pursue Janstor as a vehicle to compete", and "he can presumably quickly form a new entity in Florida." (RJN, Ex. 9 at p. 65.) The court denied all injunctive relief. (Storix RJN, Ex. 22 at p. 237.) Defendants incurred no costs or fees in the consolidated actions because they self-approved having their personal legal expenses advanced by Storix. (Complaint ¶ 34; *See* Storix RJN, Ex. 20 at p. 217.)

Johnson demanded indemnification for his defense of the claim that he was competing with Storix in the Direct Suit. (Complaint ¶ 30.) Defendants refused to allow Storix to indemnify Johnson because he was not the "prevailing party" based on the $3,739 judgment. (Motion at p. 14.) The claim is pending appeal. (Complaint ¶ 39, fn. 6.)

The Motion states that this Complaint asserts causes of action and raises issues previously litigated and decided in prior state litigation (Motion at p. 3), but the Motion refers no such causes of action. No claims in the Complaint have been raised, addressed, or litigated in any prior action.

## III. LEGAL STANDARDS

Johnson herein incorporates the legal standards provided in Defendants' Motion. "'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 46 Cal.Rptr.3d 638, 652.) "In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff. . . .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. [Citation.]" (*Id*. at 662-663.) "We consider `the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based.' [Cal. Code Civ. Proc. § 425.16(b)(2)]. However, we neither `weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*Id*. at fn. 3.) "[T]he anti-SLAPP statute requires only 'a minimum level of legal sufficiency and triability'." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 74 P.3d 737, 738, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5.)

"[A] claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. [Citations.]" (*Yeager v. Holt* (2018) 23 Cal.App.5th 450, 456, italic in original.) A court must "determine whether the *asserted cause of action* arises from activity protected under the statute and, if so, whether the plaintiff has shown a probability of prevailing on the merits." (*Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345, 1350, italics added.) In other words, "The question is what is pled—not what is proven." (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942.)

“[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. (*Planned Parenthood v. Center for Medical Prog.* (9th Cir. 2018) 890 F.3d 828, 834, citing *Hanna v. Plumer* (1965) 380 U.S. 460, 465; See also *Rogers v. Home Shopping Network, Inc*. (C.D. Cal. 1999) 57 F.Supp.2d 973, 983.) Dismissal for failure to state a claim under Fed.R.Civ.P. § 12(b)(6) is a disfavored remedy and may only be granted in extraordinary circumstances. (*Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963, 966 (9th Cir. 1981).) On this motion, all allegations of material fact must be accepted as true and construed in the light most favorable to Plaintiff. (*Cahill v. Liberty Mut. Ins. Co*., 80 F.3d 336, 337-8 (9th Cir. 1996); *In re Silicon Graphics, Inc. Sec Litig.,* 183 F.3d 970, 983 (9th Cir. 1999).) The Court must also draw all reasonable inferences in favor of the non-moving party. (*Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).) If this Court finds the Complaint inadequate, it should “freely give leave to amend when there is no undue delay, bad faith, dilatory motive, undue prejudice to the opposing party by virtue of.... the amendment, [or] futility of the amendment.” (Fed.R.Civ.P. § 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962).)

## IV. ONLY JOHNSON’S MALICIOUS PROSECUTION CLAIM AROSE FROM PROTECTED ACTIVITY

Defendants are correct that Johnson’s malicious prosecution, by definition, involves claims arises from protected activity. They are wrong, however, that the anti-SLAPP statue applies to the claims of breach of contract. The fact of Defendants “funding this lawsuit and defending the Derivative Suit deprived Johnson of profits” (Motion at p. 5) is not an allegation on which the cause of action for breach of fiduciary duty is based. Defendants’ conduct may have caused Johnson *harm* in the form of lost profit distributions, but that is not the *claim*. Defendants

cannot apply the statute in a way that protects them from liability for unlawful conduct simply because such conduct involved litigation.

### A. Claim 1, Malicious Prosecution: The Anti-SLAPP is Triggered Because Johnson Claims Defendants Commenced the Direct Suit

Johnson does not dispute that his cause of action for malicious prosecution is based on protected activity.

### B. Claim 2, Breach of Fiduciary Duty: The Anti-SLAPP Statute is Not Triggered Because Johnson's Claims Are Not Based on Defendants Defending the Derivative Suit

An "act in furtherance of a person's right of petition or free speech" includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding *authorized by law*[.]" (Cal. Code Civ. Proc. §425.16, subd. (e), italics added.) "By necessary implication, the statute does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights." (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 704-705.) "[I]n affirming an order granting an anti-SLAPP motion – '[t]he question is what is pled—not what is proven.'" (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, quoting *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942.) Claims asserting illegal activity are not "*authorized by law*."

First, "Without approval from any independent or disinterested authority, Partner-Defendants used Storix's funds to pay their personal attorneys and corporate counsel to defend the Derivative Suit claims against them." (Complaint ¶ 34.) Defendants advanced themselves attorney fees, which is not lawful without "a determination that indemnification of the agent is proper" by "(1) A majority vote of a quorum consisting of directors who are not parties to such proceeding; (2) … by independent legal counsel in a written opinion; (3) Approval of the shareholders [not including the vote of the defendant]; or (4) The court in which the proceeding is or

was pending …" (Cal. Corp. Code § 317(e).) Defendants admittedly self-approved all transactions involving the advancement of their own fees. The fact that they eventually defeated the Derivative Suit doesn't excuse their unlawful conduct of using Storix's funds and depriving Johnson any income for years to do so. There is no ruling of any court to the contrary.

Second, "Attorney-Defendants acted under the exclusive direction of the Partner-Defendants, against Storix's interest, and for the sole benefit of Partner-Defendants" (Complaint ¶ 34), including "directing Attorney-Defendants to obstruct, interfere and otherwise defend against claims in the Derivative Suit brought on Storix's behalf." (*Id*. ¶ 46.) "It held the corporation 'is a nominal party only' with no 'right to … attempt to defeat what is practically its own suit and causes of action. Nor have the two individual defendants, in control thereof, any right to use the corporation for any such purpose or to impose on the corporation the burden of fighting their battle.' [Citation.] 'There is no occasion for the corporation to intermeddle in the controversy' as 'the corporation is required to take and maintain a wholly neutral position, taking sides neither with the complaining stockholder nor with the defending director'." (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1008 [internal citations omitted].) Under no circumstances was it lawful for Defendants to use Storix's funds to pay the attorney-defendants to defeat the company's own claims against them.

The Complaint specifically *asserts* that Defendants' conduct giving rise to the claim of breach of fiduciary duty was illegal. Defendants took "unlawful measures to ensure Johnson could not interfere with their decisions and conduct" (Complaint ¶ 33) and "conducted Storix's business unlawfully" (*Id*. ¶ 35) "including unlawful payments to Attorney-Defendants". (*Id*. ¶ 36.) Because Johnson asserted illegal conduct and Defendants have not disputed the allegations, Johnson's facts are regarded as true. Defendants' unlawful conduct is not protected activity.

Importantly, "[I]f the plaintiff contested the validity of the defendant's exercise of protected rights 'and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.'" *Flatley v. Mauro* (2006) 46 Cal.Rptr.3d 606, 618, quoting *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367.) Defendants have never contested, and therefore concede, that their unlawful conduct is not protected activity.

Defendants are wrong that, because Johnson incorporated facts into various causes of action, he is somehow basing a *claim* on every such fact. Defendants' assertion that "Johnson's own litigation against Defendants trigger[ed] the necessity of a defense" (Motion at p. 7) is immaterial because there are no claims against Defendants for defending a lawsuit. Defendants are being sued for illegally using Johnson's money to do so.

## V. JOHNSON HAS ESTABLISHED A PROBABILITY OF PREVAILING ON HIS CLAIMS AGAINST DEFENDANTS

The facts and evidence provided in the factual and procedural background above is enough to prove beyond any reasonable doubt the malicious prosecution and breach of fiduciary duty claims against the Defendants. Johnson has far exceeded the "minimum probability of success" requirement of Section 425.16.

### A. Claim 1: Johnson Has Shown a Probability of Prevailing on His Malicious Prosecution Claim

Defendants are wrong that Johnson cannot satisfy the favorable termination element of a malicious prosecution claim. They fail to understand the severability rule and misapply the interim adverse judgment rule.

Defendants can't escape liability for commencing and maintain a malicious action simply because Johnson sued them "in their capacity of shareholders."

Defendants escaped liability in prior actions by asserting were sued "in their capacity as officers and directors" and thus broadly asserted the business judgment rule. That defense does not apply when they are sued "as majority shareholders", so Defendants assert without authority that they can't be held liable as shareholders either. They are wrong. "All persons who are shown to have participated in an intentional tort are liable for the full amount of the damages suffered. [Citations.]" (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379-1381.) "Shareholders, officers, and directors of corporations have [also] been held personally liable for intentional torts when they knew or had reason to know about but failed to put a stop to tortious conduct." (*Id.* at pp. 1387-1388.) More importantly, a malicious prosecution cause of action stands on "a prior action [that] was commenced by or at the direction of the defendant[.]" (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50, underline added.) There "does not appear to be any good reason *not* to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 264.)

### 1. The Direct Suit Terminated in Johnson's Favor Based on the 'Severability Rule'

The only successful claim against Johnson was based entirely on an email Defendants claimed Johnson sent to all Storix's customers. Under the exclusive control of Defendants, Storix demanded $3,739.14 for "employees' lost productivity" due to the "fallout" of Johnson's email. The claim is severable from the *entire lawsuit* when determining favorable termination because:

(a) Defendants falsely alleged the event occurred when Johnson was living in California;

(b) The claim didn't accrue until after the Direct Suit was filed;

(c) The claim was not pled or asserted during the litigation;

(d) The claim was based entirely on facts separate from Storix's unsuccessful claim on which the malicious prosecution action is based;

(e) The claim could been brought in an independent action;

(f) Multiple courts denied injunctive relief based on the email; and

(g) The claim is pending appeal.

It would do violence to Johnson's right to petition if Defendants were allowed to use such a trivial claim to bar Johnson's malicious prosecution action. Fortunately the "severability rule" is specifically designed to prevent plaintiffs and attorneys, as in this case, from asserting trivial claims to protect themselves from liability for malicious lawsuits. No claim better satisfies the severability ruld than in these circumstances.

"[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 460 (citing *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1152-1153); See also *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789, 794 (*Tabaz*) (holding that a plaintiff may base a malicious prosecution claim on individual claims if the other claims are severable and not "simply different theories for recovering on the same injury".) The "severability rule" was created in *Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360, based on the severability analysis in *Albertson v. Raboff* (1956) 46 Cal.2d 375 (*Albertson*).

Defendants' arguments rely on *Lane v. Bell* (2018) 20 Cal.App.5th 61 (*Lane*) and its references *to Crowley v. Katleman* (1994) 8 Cal.4th 666 (*Crowley*), the hallmark case on the "favorable termination" issue. Neither case actually involved severable claims but nonetheless refer to severability of claims established by *Albertson*. Defendants state that "*Lane* rejected prior cases that held favorable termination could be based on a 'severable' claim." (*Id*.) This is not true. *Lane* noted the severability analysis of the cases it cited, which found that favorable termination

was not established because the underlying claims were not severable. Defendants' argument is nonetheless inapplicable because Johnson does not assert favorable termination *based on the severable claim* but based on those that are *not severable*. Defendants fail to understand that "[a] claim for malicious prosecution need not be addressed to an entire lawsuit; it may, as in this case, be based upon only some of the causes of action alleged in the underlying lawsuit." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333.) In *Paramount*, the court reversed a lack of favorable termination determination in stating, "[T]he fact that [defendant's] numerous claims may all be broadly deemed to be alleged breaches of fiduciary duty does not enable [defendant] to sidestep the severability rule... ." (*Id*. at 370.) The Defendants in this case attempt to do exactly that.

Defendants provide no authority that defeats severability of the claim in Johnson's Complaint because the cases they cite that base favorable termination on the "entire lawsuit" didn't involve severable claims, nor did they disapprove the severability rule. Defendants' argue that "*Lane* rejected prior cases" by making an ambiguous reference to *StaffPro, Inc. v. Elite Show Servs., Inc*. (2006) 136 Cal.App.4th 1392, 1403 (*StaffPro*). (Motion at p. 5.) *StaffPro* didn't disapprove severability, it just didn't find favorable termination because "the underlying defendant did not prevail on every claim asserted in the underlying action … because the judgment awarded affirmative relief to the underlying plaintiff[.]" (*Lane, supra,* 20 Cal.App.5th at 74, underline added.) Storix's only successful claim was never asserted in the underlying litigation (until closing arguments), and Storix was denied all eleven demands for injunctive relief based on all the facts – including the email on which Storix's belated claim was based.

"*Crowley* specifically approved *Freidberg's* conclusion there was *no* favorable termination under the facts of Freidberg." (*Lane*, *supra*, 20 Cal.App.5th at 75, underline added.) "[T]he action had evidently not terminated favorably to *Freidberg* because the judgment assessed substantial damages against him." (*Ibid*.)

Also, the *Friedberg* claims were not severable because "Reasonable value of services, joint venture and tortious interference were simply different theories for recovering on the same injury: the failure to share attorney fees." (*Tabaz*, *supra*, 27 Cal.App.4th at 794; citing *Freidberg v. Cox* (1987) 197 Cal.App.3d 381, 388.) *Friedberg* expressly recognized, however, that the result would have been different had the causes of action been severable. (*Friedberg* at 387-388.) *StaffPro* didn't reject the severability rule, but rejected favorable termination because "[t]he trial court's order in the underlying action required StaffPro to take remedial action with respect to many of the core allegations[.]" (*StaffPro, supra*, 136 Cal.App.4th at 694.) *Lane* and *StaffPro* properly found an absence of favorable termination under the facts of Friedberg, but Storix's only successful claim was based on entirely different facts and theories and all demands for injunctive relief were denied.

Lastly, *Crowley* relies "exclusively on the settled rule that an appeal may be taken from only a portion of a judgment when that portion is 'severable' in the sense that the issues raised in the appeal can be resolved without regard to the issues determined by the portion of the judgment that was not appealed." (*Crowley, supra,* 8 Cal.4th at 387, citing, *inter alia*, *American Enterprise, Inc.* v. *Van Winkle* (1952) 39 Cal.2d 210, 216-217.) The disposition of a separate and independent claim which is *not* appealed from may be considered final for the purposes of malicious litigation. (*Albertson*, *supra*, 46 Cal.2d at 378.) Johnson is appealing the severable claim, thereby severing it from the "entire lawsuit" and establishing favorable termination. Had Johnson not appealed the claim, he still would have established favorable termination since he directed the probable cause element of the malicious prosecution action to only the *non-severable* claim. (Complaint ¶¶ 39-40.)

**2. Johnson Has Established Lack of Probable Cause**

In stating that "[a] verdict favorable to Storix in the underlying action conclusively establishes … probable cause", Defendants conflate the favorable termination and lack of probable cause elements of a malicious prosecution action.

(Motion at p. 6.) "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may ... be based upon only some of the causes of action alleged in the underlying lawsuit." (*Lane, supra,* 20 Cal.App.5th at fn. 6.) "As our Supreme Court stated in *Singleton* v. *Perry* (1955) 45 Cal.2d 489, 497 [289 P.2d 794], 'Indeed, it would seem almost a mockery to hold that, uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability ....'" (*Tabaz, supra*, at 792*,* citing *Singleton v. Perry* (1955) 45 Cal.2d 489, 497; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 ["An action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted"].) Johnson directed the cause of action only to Storix's unsuccessful claim that Johnson was operating a competing business. (Complaint ¶¶ 39-40.) The fact that Storix prevailed on a different claim doesn't establish probable cause for bringing or maintaining the malicious one.

"[T]he probable cause element calls on the trial court to make an objective determination of the `reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable." (*Parrish v. Latham & Watkin* (2017) 3 Cal.5th 767, 776 (*Parrish*).) "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Even the second amended complaint alleged no harm related to Storix's claim of a competing business. Based on the allegations of the Complaint, accepted as true, Defendants instituted and maintained the claim knowing it was untenable.

Next, Defendants fail to understand that the "interim adverse judgment rule" is used in determining probable cause and thus applies to claims and not entire lawsuits. They also attempt to invoke the rule without reference to any order or judgment to which it applies, much less the relevant claim. Notably, the only case

cited by Defendants actually defeats their argument. "[E]ven where a ruling is based on the court's evaluation of the merits of the claim, the ruling does not establish the existence of probable cause if the ruling is 'shown to have been obtained by fraud or perjury.'" (*Parrish*, *supra*, 3 Cal.5th at 778; citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) As noted above, the Complaint alleges perjury (Complaint ¶¶ 18, 23, 40), without which Storix would have no standing and thus *no* favorable rulings, and Defendants do not dispute those allegations.

Defendants fail to explain how denial of summary judgment in the Direct Suit establishes probable cause. "[I]f a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' [Citation.]" (*Parrish, supra,* 3 Cal.5th 767 at 776, underline added.) The only issue addressed by the court was whether Storix had "standing to bring this suit" given the fraudulent act of ratification by which Defendants attempted to escape liability. (MTS RJN, Ex. 9 at p. 145.) The court didn't address any claims of the Direct Suit, finding only that "[i]t is disputed whether this ratification and authorization is sufficient." (*Ibid*.) Whether the lawsuit was properly approved is irrelevant because Defendants aren't being sued for not obtaining proper approval. Notably, "[I]f denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence." (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal. App. 4th 438, 451, underline added.) This is exactly what Defendants did.[1]

[1] Johnson argued the board didn't approve the lawsuit before it was filed and that Defendants couldn't ratify it two years later because they were not disinterested. Storix argued that it was ratified by a majority of board members, but wouldn't say which ones. Summary judgment was denied because Johnson didn't specifically identify the directors who ratified the lawsuit in his motion.

Finally, Johnson has also shown a probability of prevailing on the merits of the cause of action of malicious prosecution. In addition to committing perjury, Defendants possessed evidence showing Janstor was inoperable before they filed the *original* complaint and knew Janstor was dissolved before filing the second. Defendants testified at trial that they knew of no harm related to Johnson's alleged competing business, and admitted they maintained the lawsuit for 3 ½ years only to *prevent* Johnson from competing.

Johnson provided facts in the Complaint, strengthened with judicially noticed documents, that establish Defendants lacked probable cause in bringing the Direct Suit against him. Johnson need only show a minimal probability of prevailing on the cause of action, and Defendants produced no evidence to defeat Johnson's assertion that they lacked probable cause in bringing *or* maintaining their malicious claim.

### B. Claim 2: Johnson Has Shown a Probability of Prevailing on His Breach of Fiduciary Duty Claim

Defendants argue they cannot be held liable as "majority shareholders" of Storix even though they directed, participated or acquiesced in the atrocious wrongs committed against Johnson. Defendants further argue that Johnson is "precluded from litigating *this* claim" of breach of fiduciary duty against the Defendants because he brought *different* claims of breach of fiduciary duty against them in the past. (Motion at p. 12.) Defendants' arguments are without merit.

The Complaint properly alleges that Defendants breached their fiduciary duty to Johnson by denying benefits of Storix they afford only themselves. (Complaint ¶ 45.) The Complaint alleges various breaches of fiduciary duty, including failure to provide indemnification and using company profits otherwise owed to Johnson to pay attorneys to commit acts solely for Defendants' personal benefit.

#### 1. Res Judicata Does Not Bar Johnson's Fiduciary Duty Claim

Defendants note Johnson's allegations of breach of fiduciary duty, generally alleging that "These allegations were previously litigated in the Derivative Suit."

(Motion at p. 13.) Although *res judicata* applies to a claim, not an allegation, Defendants nevertheless fail to reference any claims or allegations in any prior litigation. They broadly assert that because "'plaintiff failed to meet the burden of proof on all causes of action in the Derivate Suit' including breach of fiduciary duty" (*Id*. at p. 13), Johnson is barred from bringing a different claim of breach of fiduciary duty against them. Defendants blur the distinction between different claims by lumping them together as "breach of fiduciary duty", which is not itself a cause of action, but only a label.

Defendants misinterpret "harm suffered" as indistinctly applicable to *res judicata* and the cause of action it pertains to. Harm resulting from a breach of fiduciary duty is distinguishable from harm to a primary right. The case cited by Defendants states that *res judicata* acts as "a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.' [Citations.]" (*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 797 (*Boeken*) [italics in original].) Defendants argue that, because Johnson previously alleged "loss of money in defending a suit", he is precluded from bringing a claim for "being denied distributions from Storix profits, as all profits were spent in litigation." They argue that "the compensation Johnson seeks … is the very same harm previously litigated … ." (Motion at p. 13.) *Res judicata* only bars the cause of action if based on the same harm to Johnson's primary right, not similar harm to Johnson's bank account.

"The *primary right* was the right not to be wrongfully deprived of spousal companionship and affection, and the *corresponding duty* was the duty not to wrongfully deprive a person of spousal companionship and affection." (*Boeken*, *supra*, 48 Cal.4th at 798, italics in original.) In that case, the plaintiff was barred from bringing a second claim for the same harm (violation of her right not to be deprived companionship) under different legal theories. If afforded Defendants'

interpretation, *res judicata* would preclude the *Boeken* plaintiff from suing the same defendant for killing her next husband too (even by different means).

Defendants properly cite *Boeken* in saying, "Under this theory, '[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests.' Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term. . . .' (*McKee v. Dodd* (1908) 152 Cal. 637, 641.)" But Defendants argue that "the primary right asserted by Johnson is the right not to be wrongfully deprived of his rights as a minority shareholder." (Motion at p. 13.) Defendants misinterpret the primary rights theory as a catch-all that allows them to group all their wrongs into a single cause of action, thereby protecting them from liability for *various* and *repeated* wrongs committed in violation of Johnson's rights.

Johnson's current and prior actions contain some of the same facts, but the "causes of action" (as they pertain to *res judicata*) are entirely different. Johnson has a primary right to be free from legal harassment, and not to be deprived indemnification he's entitled to, money owed to him, or property taken without consideration. The causes of action in the Complaint are unique in that, even where they involve injury to similar primary rights, they involve Defendants committing different wrongs. *Res judicata* doesn't bar future claims against Defendants based on different or continuing wrongful acts simply because they were not found liable for prior ones.

Defendants argue that a current claim related to "advancement of Defendants' defense costs" is identical to claims in Johnson's cross-complaint and the Derivative Suit. (Motion at p. 13.) There are no claims in Johnson's cross-complaint related to litigation expenses. Nothing in the Derivative Suit or any court order refers to legal actions or funds taken by Defendants to defeat the Derivative Suit itself. A court found only that the bylaws adopted by the Defendants mandated advancement of

their fees against Johnson's cross-complaint. (MTS RJN, Ex. 7 at p. 117.) No claim was ever asserted and no issue determined regarding Defendants "direct[ing] Attorney-Defendants to obstruct, interfere and otherwise defend against claims in the Derivative Suit brought on Storix's behalf." (Complaint. ¶ 46.)

It's not enough that Defendants' conduct resulted in a successful defense against the Derivative Suit. There was no prior decision that they had a right to deprive Johnson the use of money owed to him while the litigation was pending. There was no ruling that Johnson was *not* entitled to indemnification, nor a ruling that Defendants were entitled to deprive him that right.

**2. Johnson's Claims are Properly Asserted Against Defendants**

The Complaint alleges that Defendants each owe a fiduciary duty to Johnson as majority shareholders in a close corporation. (*Id*. ¶ 35.) Ever since Johnson gave them stock in his company, Defendants used their collective majority to occupy the board majority to elect themselves to all officer positions (Complaint ¶ 32), and have exercised dominance and superior influence over Johnson as a minority shareholder." (*Id.* ¶¶ 16, 31-35.)

It doesn't matter whether Defendants committed tortuous acts and deprived Johnson rights in their capacity as majority shareholders, officers or directors. "Shareholders, officers, and directors of corporations have been held personally liable for intentional torts when they knew or had reason to know about but failed to put a stop to tortious conduct." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379-1381.) "A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." (*The Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996).) "[T]he true rule is, of course, that an agent is liable for his own acts, regardless of whether the principal is liable or amenable to judicial action." (*Frances T. v. Village Green*

*Owners Assn.* (1986) 42 Cal.3d 490, 505, quoting *James v. Marinship Corp*. (1944) 25 Cal. 2d 721, 742–43.)

Defendants self-approved an exclusive shareholder agreement between Storix and themselves that ensured they would always retain the Storix board majority. (Complaint ¶ 16; *See also* ¶ 33.) Liability is imposed on shareholders who enter into a "shareholders' agreement, which relates to any phase of the affairs of a close corporation, including but not limited to management of its business, … ." (Cal. Corp. Code § 300(b).) "An agreement of the type referred to in subdivision (b) shall, … impose upon each shareholder who is a party thereto liability for managerial acts performed or omitted by such person pursuant thereto that is otherwise imposed by this division upon directors, … ." (Cal. Corp. Code § 300(d).) Defendants cannot escape liability by simply asserting they were acting as officers or directors.

"The alter ego doctrine does not immunize officers, directors or shareholders of a corporation from tortious conduct that they themselves commit in the course of acting for the corporation." (*Filet Menu, Inc. v. CCL&G., Inc. (2000)* 94 Cal.Rptr.2d 438, 477, underline added.) "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, … [w]hen his acts are wrongful in their nature." (Cal. Civ. Code § 2343.) "As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation." (*Mesler v. Bragg Management Co.* (1985) Cal.3d 290, 300, underline added.)

"Defendants committed such acts by using Storix's corporate name and resources for perverted and illegitimate business purposes and to order, direct or authorize others to perform the wrongful acts." (Complaint ¶ 33.) Defendants were each aware of the wrongful conduct and could have simply voted his shares to cease

or prevent the tortious conduct. (*Id*.) Defendants' wrongful conduct "rendered Storix insolvent" and their acts "deepened Storix's insolvency" for their benefit. (Complaint ¶¶ 35-36.) Defendants provide no authority to defeat Johnson's assertion that they are personally liable for wrongful acts they commit under the guise of Storix.

**3. Johnson Has Shown a Probability of Success on the Merits**

Defendants hypocritically argue without authority that Johnson is not entitled to any indemnification under Cal. Corp. Code § 317. They argue that they sued Johnson "as a director" for an act "outside of his role as a director" when he "sought to stand up a competing business for his personal gain." (Motion at p. 14.) Johnson sued Defendants for acts they committed outside their duties of officers or directors, yet Defendants personally approved Storix indemnifying and advancing *their* legal defense for all actions. Defendants effectively argue that they, as majority directors, are entitled to use Storix to bring any claim against Johnson, a minority director, as long as they allege he was acting against Storix. And they assert that Johnson isn't entitled to indemnification even after he completely disproved their claim.

First, a jury found that Johnson didn't commit the alleged wrongful act, so how could he have done so outside his role of a director? Defendants provide no authority to support their absurd legal conclusion that effectively deprives Johnson both his statutory right to indemnification and due process in obtaining restitution for *their* wrongful acts. Nonetheless, their argument has no merit. Defendants used Storix to sue Johnson "as a director" and their claim could not have been brought had Johnson not been a director. Indemnification must be provided by the corporation when a director successfully defends a claim brought "by reason of the fact that the person is or was an agent of the corporation." (Cal. Corp. Code § 319(c) and (d).)

Second, Defendants are being sued "as majority shareholders" for unfair and unequal treatment of a minority shareholder, including providing only themselves

1 indemnification and using corporate profits otherwise owed to Johnson for their
2 personal benefit. (Complaint ¶¶ 33, 45-46.) Defendants directed all remaining profits
3 to the attorney-defendants to unlawfully obstruct and defend against Storix's claims
4 in the Derivative Suit aimed at ending that very abuse. (*Id.*) Defendants ceased
5 shareholder distributions in order to direct Johnson's only remaining income to their
6 malicious lawsuit against him. (Complaint ¶ 41.)

7 Johnson stated *undisputed* facts in the Complaint, strengthened with judicially
8 noticed documentary evidence, that clearly establish numerous breaches of fiduciary
9 duty to Johnson as a minority shareholder. Johnson need only show a minimal
10 probability of prevailing, and Defendants produced no evidence to defeat Johnson's
11 assertion that they breached their fiduciary duty, or that they did so to intentionally
12 inflict financial hardship. (Complaint ¶ 48.)

13 **VI. CONCLUSION**

14 Johnson far exceeded the low burden required by the anti-SLAPP statutes in
15 establishing a minimal probability of success on each cause of action, and
16 Defendants provide no argument or evidence to defeat his showing. The Court
17 should deny Defendants' motion and require them to answer Johnson's Complaint
18 without further unnecessary delay.

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20 DATED: September 12, 2019 Respectfully submitted,

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22 By:

23 ANTHONY JOHNSON, In Pro Per

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# CERTIFICATE OF SERVICE

I, the undersigned certify and declare as follows:

I am over the age of eighteen years and self-represented in this action. My address is 1728 Griffith Ave., Las Vegas, Nevada, which is located in the county where the service described below took place.

On September 12, 2019, from my address in Las Vegas, Nevada, I served a copy of the following document(s):

1. **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES ISO OPPOSITION TO SPECIAL MOTION TO STRIKE OF DEFENDANTS ALTAMIRANO, TURNER, KINNEY AND HUFFMAN**

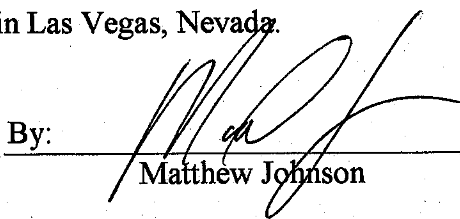
by depositing the document(s) in a sealed envelope with the U.S. Postal Service. The undersigned hereby certifies that he caused a copy of the foregoing document(s) to be delivered to the Clerk of the U.S District Court, Southern District of California, by thereby mail.

The undersigned also certifies that the following recipients have consented to service by email and have been delivered a copy of the document(s) by sending to the email addresses listed below:

| | |
|---|---|
| Marty B. Ready<br>WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP<br>401 West A Street, Suite 1900<br>San Diego, CA 92101<br>Email: marty.ready@wilsonelser.com<br>Tel: (619) 881-6431<br>(Attorney for Defendants Altamirano, Turner, Kinney & Huffman) | Paul A. Tyrell<br>Sean Sullivan<br>PROCOPIO, CORY, HARGREAVES & SAVITCH LLP<br>525 B Street, Suite 2200<br>San Diego, CA 92101<br>Email: paul.tyrell@procopio.com<br>Email: sean.sullivan@procopio.com<br>Tel: (619) 619.238.1900<br>(Defendants, Attorneys for corporate defendant, Storix, Inc.) |

I certify and declare under penalty of perjury under the laws of the United States of American and the State of California that the foregoing is true and correct.

Executed on September 12, 2019 in Las Vegas, Nevada.



By: ______________________
Matthew Johnson