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Court of Appeal
Fourth Appellate District
Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: Respondents' Supplemental Letter Brief
Storix, Inc. v. Anthony Johnson: Case No. D075308

To the Hon. Justices:

The Court requested supplemental letter briefing addressing the timeliness of Defendant, Cross-complainant, and Appellant's appeal from the order granting Cross-defendants/Respondents' anti-SLAPP motion. Appellant is appealing the March 6, 2017 order granting in part Respondents' anti-SLAPP motion. (AOB, pp. 12, 15.) But Appellant did not file a notice of appeal of the order granting in part Respondents' anti-SLAPP motion until December 10, 2018. (14 CT 3868.) Accordingly, the appeal of this order was untimely and the Court is without jurisdiction to entertain this issue on appeal.

An order granting or denying an anti-SLAPP motion is immediately appealable. Cal. Civ. Proc. Code §§ 425.16(i), 904.1(a)(13). The timeline within which to bring an appeal of an order granting in part an anti-SLAPP motion is set by Cal. R. 8.104(a), which states in relevant part, "a notice of appeal must be filed on or before the earliest of: (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, showing the date either was served." Cal. R. 8.104(a)(1)(A). Although Cal. R. 8.104(a) is framed in the context of a judgment, Cal. R. 8.104(e) states "judgment" includes an appealable order. Cal. R. 8.104(e). Thus, Appellant had sixty (60) days from the date of service of the order granting in part Respondents' anti-SLAPP motion to file a notice of appeal. If a notice of appeal is untimely, then the Court must dismiss the appeal. Cal. R. 8.104(b).

The immediate appealability of an order granting or denying an anti-SLAPP motion is consistent with the Legislative intent behind the anti-SLAPP statute. The rationale requiring immediate appeal of an order granting or denying an anti-SLAPP motion prevents a defendant from exposure to ongoing litigation on an issue related to a defendant's constitutional rights. Conversely, the Legislature ensured the rule equally applied to a plaintiff to seek immediate appellate review of an adverse order. *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1185 & fn. 7 (2015). A plaintiff faced with an adverse ruling on defendant's anti-SLAPP

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motion as to some, but not all, causes of action must decide whether to seek immediate appellate review or forever forego that right. *Id.* And because appealability is jurisdictional, failure to timely file a notice of appeal divests the reviewing court of the ability to entertain the appeal. *Olson v. Cory*, 35 Cal. 3d 390, 398 (1983); *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, 15 Cal. 4th 51, 56 (1997).

Appellant's failure to timely file a notice of appeal **as to the order granting in part Respondents' anti-SLAPP motion** requires the Court to dismiss the appeal of this order. Cal. R. 8.104(b). Appellant's time to commence an appeal from the order granting in part Respondents' anti-SLAPP motion expired long before Appellant's notice of appeal filed December 10, 2018. The trial court granted in part Respondents' anti-SLAPP motion on March 6, 2017. (5 CT 1289.) The March 6, 2017 was immediately appealable pursuant to Cal. Civ. Proc. Code §§ 425.16(i), 904.1(a)(13). On the same date, the Clerk of the Court mail-served on all parties the five (5) page March 6, 2017 order. (5 CT 1294.) Pursuant to Cal. R. 8.104(a)(1)(A), Appellant had 60 days to file a notice of appeal. Appellant, however, did not file a notice of appeal of the March 6, 2017 order until December 10, 2018 - more than one and one-half years after the expiration of his time for appeal.

Because Appellant did not timely appeal the March 6, 2017 order granting in part Respondents' anti-SLAPP motion, the Court must dismiss this issue from the appeal.

Respectfully,

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP



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