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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 SPECIAL
 MOTION TO STRIKE
 PURSUANT TO CALIFORNIA
 CODE OF CIVIL PROCEDURE
 § 425.16 BY DEFENDANTS PAUL
 A. TYRELL AND SEAN M.
 SULLIVAN

Filed: June 24, 2019
 Hearing: October 7, 2019
 Time: 10:30 a.m.
 Judge: Hon. Marilyn L. Huff
 Court: Courtroom 15A

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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. Having lost his litigation
5 quest against Storix and its managers in state and federal court, Johnson, now acting
6 pro se, has taken to suing Storix’s attorneys. However, his claim is destined to fail,
7 and must be stricken under California Code of Civil Procedure section 425.16, which
8 prohibits lawsuits aimed at chilling privilege conduct (the “anti-SLAPP statute”).

9 Movants request that the Court strike Johnson’s cause of action for malicious
10 prosecution asserted against them under the anti-SLAPP statute, since Johnson’s
11 accusations are premised on Movants’ privileged activities, namely serving as
12 Storix’s counsel in meritorious litigation. That is quintessential protected conduct
13 falling under the anti-SLAPP statute, and meets the first prong of the anti-SLAPP
14 test.

15 Because Johnson’s claim against Movants is based on protected conduct, the
16 second prong of the anti-SLAPP statute requires that Johnson prove a probability
17 that he will prevail on his claims, which he cannot do. Johnson complains that Storix
18 sued him for breach of fiduciary duty without a legitimate basis, and so the pursuit of
19 that lawsuit constitutes malicious prosecution. Yet, Storix prevailed against Johnson
20 in the underlying state litigation, as the jury found Johnson breached his duty to
21 Storix and the court deemed Storix the “prevailing party” against Johnson.
22 Moreover, the court ruled Storix pursued the case in “good faith.” Under California
23 law to establish the first element of malicious prosecution, the plaintiff must prove
24 he or she obtained a favorable termination as to the *entire* predicate litigation. As a
25 result, Johnson cannot prove that he probably will prevail. Accordingly, Johnson
26 cannot survive this motion under California’s anti-SLAPP statute, and the claim
27 against Movants therefore must be stricken.

28

1 **II. LEGAL STANDARD**

2 A “cause of action against a person arising from any act of that person in
3 furtherance of the person’s right of petition or free speech under the United States
4 Constitution or the California Constitution in connection with a public issue shall be
5 subject to a special motion to strike, unless the court determines that the plaintiff has
6 established there is a probability that the plaintiff will prevail on the claim.” Code
7 Civ. Proc. § 425.16(b)(1). Protected conduct includes:

8 (1) any written or oral statement or writing made before a legislative,
9 executive, or judicial proceeding, or any other official proceeding
authorized by law,

10 (2) any written or oral statement made in connection with an issue under
11 consideration or review by a legislative, executive, or judicial body, or
12 any other official proceeding authorized by law,

13 (3) any written or oral statement or writing made in a place open to the
14 public or a public forum in connection with an issue of public interest,
or

15 (4) any other conduct in furtherance of the exercise of the constitutional
16 right of petition or the constitutional right of free speech in connection
with a public issue or an issue of public interest.

17 Code Civ. Proc. § 425.16(e).

18 “Resolution of an anti-SLAPP motion involves two steps.” *Baral v. Schnitt*, 1
19 Cal.5th 376, 384 (2016). The court first determines whether the defendant has met its
20 burden of making a threshold showing that the challenged claim “arises from”
21 activity protected by section 425.16. *Id.* The defendant meets this burden by showing
22 that the “act” underlying the claim—that is, the act constituting the factual basis of
23 the claim—fits one of the four categories of protected activities described in section
24 425.16, subdivision (e). *See Navellier v. Sletten*, 29 Cal.4th 82, 88 (2002). If the
25 court determines the defendant has met its threshold burden, it then determines
26 whether the plaintiff has demonstrated a probability of prevailing on the merits of the
27 challenged claim. *Baral*, 1 Cal.5th at 384-385. To meet its burden, the plaintiff must
28

1 state and substantiate a legally sufficient claim; it must show that the challenged
 2 claim is both legally sufficient and supported by prima facie evidence of facts to
 3 sustain a favorable judgment if such submitted evidence is credited. *See Navellier*,
 4 29 Cal.4th at 88-89. “In making this determination, the court shall consider the
 5 pleadings, and supporting and opposing affidavits stating the facts upon which the
 6 liability or defense is based.” Code Civ. Proc. § 425.16(h). The court does not,
 7 however, weigh defendant’s evidence against the plaintiff’s, either for credibility or
 8 persuasiveness. Rather, the defendant’s evidence is considered with a view toward
 9 whether it defeats the plaintiff’s showing as a matter of law, such as by establishing a
 10 defense or the absence of a necessary element. *1-800 Contacts, Inc. v. Steinberg*, 107
 11 Cal.App.4th 568, 585 (2003). “[S]ection 425.16 provides no mechanism for granting
 12 anti-SLAPP motions with leave to amend.” *Martin v. Inland Empire Utilities*
 13 *Agency*, 198 Cal.App.4th 611, 629 (2011).

14 A motion to strike under California's anti-SLAPP statute is available to
 15 defendants in federal court. *Graham-Sult v. Clainos*, 756 F.3d 724 (9th Cir. 2014);
 16 *Travelers Casualty Insurance Company of America v. Hirsh*, 831 F.3d 1179 (9th Cir.
 17 2016).

18 III. RELEVANT BACKGROUND FACTS

19 A. Brief Litigation History Between Storix and Johnson

20 The parties’ dispute started in August 2014, when Johnson sued Storix for
 21 copyright infringement based on its sale of its SBAdmin software after Johnson quit
 22 the company. Request for Judicial Notice (“RJN”)¹ No. 1. Storix, represented by
 23 Movants, won a judgment after trial in December 2015, that it owned the copyright
 24 to SBAdmin, which result the Ninth Circuit affirmed. RJN No. 3; *See Johnson v.*
 25 *Storix, Inc.*, 716 F.App’x 628 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 76, 202 L. Ed.
 26 2d 24 (2018). Ultimately, the company obtained a discretionary award from this

27 ¹ For consistency and ease of reference, a single Request for Judicial Notice with
 28 the appended exhibits has been filed in support of this motion, Movants’ motion to
 dismiss, and Storix’s motion to dismiss.

1 court of \$407,778 in attorneys' fees based on Johnson's wrongful litigation conduct.
2 RJN Nos. 5 & 6. That litigation did not end Johnson's quest to destroy Storix or its
3 management.

4 During the pendency of the copyright case, Storix learned Johnson formed a
5 new entity and intended to pursue a competitive business using a "rebranded"
6 version of Storix's own software under the name of his new company Janstor
7 Technologies, even though Johnson remained a Storix director. Storix learned that
8 two days after electing himself to a director position on Storix's board in February
9 2015, Johnson set up the Janstor entity, reserved a website, and within a few months
10 after that had reserved two "port" numbers that are necessary to operate software like
11 SBAdmin. Johnson also engaged in other conduct designed to harm Storix's
12 business, such as instructing its customers to cease paying Storix for SBAdmin. *See*,
13 e.g., Declaration of Sean M. Sullivan ("Sullivan Decl."), Exs. 1-5.

14 Storix swiftly sued Johnson to stymie his efforts and succeeded in doing so.
15 Storix sued Johnson on a single cause of action for breach of fiduciary duty, and
16 Janstor for aiding and abetting breach of fiduciary duty (the "Janstor Action"). RJN
17 No. 8. Storix amended its complaint in March 2016, to address Johnson's continued
18 hostile acts towards Storix, including his sending of "announcement" emails to its
19 customers. RJN No. 9. On September 6, 2016, Storix filed its Second Amended
20 Complaint ("SAC"). RJN No. 11. Eventually Johnson filed a motion for summary
21 judgment on Storix's SAC. The court rejected Johnson's argument that "no triable
22 issues of material fact exist," and denied the motion. RJN No. 16.

23 Johnson responded to the Janstor Action with cross-claims against Storix's
24 officers and directors individually, asserting a host of complaints as to how he
25 believes he was wronged. RJN No. 13. Johnson, and his co-shareholder and
26 confidant, Robin Sassi, then sued the Storix officers and directors in a derivative
27 action. RJN Nos. 14, 15.

28 The superior court ordered that the Janstor Action, Johnson's cross-claims, the

1 derivative case, and a personal injury suit Johnson filed against Storix’s officers and
2 directors, be consolidated, and a trial commenced in early 2018. After a three-week
3 trial, Storix prevailed on its sole cause of action against Johnson with a jury finding
4 he breached his fiduciary duty to the company. RJN No. 17. The jury also found
5 against Johnson on all of his cross-claims. *Id.* While Johnson avoided the imposition
6 of a post-trial permanent injunction, he only did so because Storix’s suit served as
7 the catalyst to stop his breaching conduct, and so the court viewed a formal
8 injunction as somewhat “superfluous.” RJN No. 19. In denying the motion, the court
9 recognized that “[w]hile Johnson has indeed threatened to harm Storix’s business,
10 his words and conduct, while no doubt frustrating and upsetting to Storix, do not
11 show an ongoing course of conduct.” *Id.* at p. 3:15-16. The court noted that
12 Johnson’s “most significant and provocative emails” were sent more than two years
13 earlier. *Id.* “This past conduct, along with the jury’s verdict that Johnson breached
14 his fiduciary duty of loyalty to Storix as one of its directors, does not show that
15 Johnson will continue to seek to harm Storix’s business in the future.” *Id.* As to other
16 requests for injunctive relief to limit Johnson’s “inspection rights,” the court noted
17 that prior orders limiting such rights “still stand, making an injunction superfluous.”
18 *Id.* at p. 4.

19 Following the jury trial, the court adopted the jury’s verdict that Johnson had
20 breached his fiduciary duty to Storix, and therefore lacked standing to sue as a
21 representative plaintiff of the company in a derivative suit. RJN No. 18. Though
22 Sassi continued through trial as the lone representative plaintiff in the derivative suit,
23 the defendants prevailed. RJN No. 20.

24 After the jury and bench trials concluded, but before entry of final judgment,
25 Johnson moved for judgment notwithstanding the verdict (“JNOV motion”). Johnson
26 argued that there was insufficient evidence to support the jury’s verdict against him
27 and in Storix’s favor in the Janstor Action, and argued that the litigation privilege
28 shielded his tortious conduct. The court denied Johnson’s JNOV motion, finding

1 “there is sufficient evidence to support the verdict. The court rejects Johnson’s
 2 arguments raised in the JNOV.” RJN No. 21. The court both rejected Johnson’s
 3 “litigation privilege” claims, and found the “evidence presented at trial undermines”
 4 Johnson’s claim that Storix lacked proper authority to file the Janstor Action.

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

10 After entry of final judgment, Johnson filed a motion for a new trial. The court
 11 denied the motion in its entirety. As to Johnson’s claim that there was insufficient
 12 evidence to support the verdict against him, the court stated:

13 the court has considered Johnson’s various arguments under this
 14 ground and finds that after weighing the evidence, it is not convinced
 15 from the entire record, including reasonable inferences therefrom, that
 16 the jury should have reached a different verdict. There was an
 17 abundance of evidence presented in this three-week jury trial
 18 regarding all the parties’ actions in the operation and running of this
 19 business. **The evidence supports that Johnson breached his
 20 fiduciary duty to Storix. The court will not disturb the jury’s
 21 finding on that claim.**

22 RJN No. 23, p. 2 (emphasis added). The trial court also deemed Storix the
 23 “prevailing party” and awarded it costs, while expressly finding that Storix pursued
 24 its action in “good faith.” RJN No. 24. Despite this record, Johnson filed the
 25 complaint in this action.

26 **B. Johnson’s Allegations of Malicious Prosecution**

27 Johnson’s pending appeal of the state court results apparently does not satisfy
 28 his litigation appetite. So, Johnson recently filed this new lawsuit. He has asserted a
 cause of action against Movants for malicious prosecution based on the Janstor
 Action, in which case Movants served as counsel. *See* Compl. ¶¶ 17, 18. Johnson

1 asserts that “During the 3 ½ years litigating the Direct Suit, all Defendants continued
 2 to assert that Johnson was operating a ‘secret’ business in California and was
 3 actively marketing Storix’s proprietary software as a competing product.” *Id.* at ¶ 24.
 4 “All Defendants possessed evidence months before bringing the Direct Suit that
 5 Johnson had no intention of competing with Storix, and no evidence to the contrary
 6 was produced since.” *Id.* Johnson claims that he “prevailed” against Storix since the
 7 damages awarded against him were just over \$3,700, and the court did not enter a
 8 permanent injunction. *Id.* ¶¶ 26, 27.

9 Based on these allegations, Johnson now alleges a single cause of action
 10 against Movants for malicious prosecution. He asserts: “Attorney-Defendants and
 11 Partner-Defendants initiated and continued the Direct Suit against Johnson without
 12 probable cause, without stating a cause of harm, and without the approval of any
 13 disinterested directors or shareholders of Storix. No reasonable person in these
 14 circumstances would have believed there were grounds to bring the cause of action
 15 against Johnson.” Compl. at ¶ 38. “The Direct Suit was instituted for malicious
 16 purposes other than to succeed on the merits, and the claim was pursued to a legal
 17 termination on its merits in Johnson’s favor.” *Id.* at ¶ 39. “Attorney-Defendants knew
 18 the claim was false and legally untenable when they filed the lawsuit. Attorney-
 19 Defendants continue to represent Storix in post-trial motions involving the Direct
 20 Suit. All defendants took extraordinary actions to continue the lawsuit long after
 21 evidence proved its primary claim to be patently false.” *Id.* at ¶ 40.

22 IV. ARGUMENT AND AUTHORITIES

23 A. Johnson’s Malicious Prosecution Claim Arises from Acts Protected 24 by Code Civ. Proc. § 425.16

25 To satisfy its burden at the first step, a defendant demonstrates “that the act
 26 underlying the plaintiff’s cause fits one of the categories spelled out in section
 27 425.16, subdivision (e)” *City of Cotati v. Cashman*, 29 Cal.4th 69, 78 (2002)
 28 (quotation marks omitted). To fall within the potentially protective sphere of

1 California’s anti-SLAPP statute, the conduct in question must have been “an act in
2 furtherance of ... free speech ... in connection with a public issue,” and includes:

3 (1) any written or oral statement or writing made before a legislative,
4 executive, or judicial proceeding, or any other official proceeding
5 authorized by law,

6 (2) any written or oral statement or writing made in connection with
7 an issue under consideration or review by a legislative, executive, or
8 judicial body, or any other official proceeding authorized by law,

9 (3) any written or oral statement or writing made in a place open to
10 the public or a public forum in connection with an issue of public
11 interest, or

12 (4) any other conduct in furtherance of the exercise of the
13 constitutional right of petition or the constitutional right of free speech
14 in connection with a public issue or an issue of public interest.

15 Code Civ. Proc. § 425.16(e). “The statute is to be ‘construed broadly.’” *Mindys*
16 *Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) (quoting Code Civ. Proc.
17 § 425.16(a)).

18 “The anti-SLAPP statute’s definitional focus is not the form of the plaintiff’s
19 cause of action but, rather, the defendant’s activity that gives rise to his or her
20 asserted liability—and whether that activity constitutes protected speech or
21 petitioning.” *Navellier v. Sletten*, 29 Cal.4th at 92.

22 The filing of a lawsuit qualifies as “petitioning” activity under the anti-SLAPP
23 statute. *See Philipson & Simon v. Gulsvig*, 154 Cal.App.4th 347, 358 (2007). Even
24 actions for malicious prosecution, which by their nature involve protected court-
25 petitioning conduct, are subject to scrutiny under the anti-SLAPP statute. *See Jarrow*
26 *Formulas, Inc. v. LaMarche*, 31 Cal.4th 728, 741 (2003) [“we hold that this action is
27 not exempt from anti-SLAPP scrutiny merely because it is one for malicious
28 prosecution.”]; *Flores v. Emerich & Fike*, 385 Fed.Appx. 728, 732 (9th Cir. 2010)
[Citing *Jarrow Formulas, Inc.*].

As a result, Johnson’s claim for malicious prosecution against Movants

1 satisfies prong one of the anti-SLAPP statute because the entire basis for the claim is
2 that Movants pursued a lawsuit against Johnson.

3 **B. Johnson Cannot Establish a Probability of Prevailing on His Cause**
4 **for Malicious Prosecution Against Movants**

5 If a court ruling on an anti-SLAPP motion concludes the challenged cause of
6 action arises from protected petitioning, it then “determines whether the plaintiff has
7 demonstrated a probability of prevailing on the claim.” *Equilon Enterprises v.*
8 *Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (2002). To satisfy this prong, the plaintiff
9 must “state[] and substantiate[] a legally sufficient claim.” *Rosenthal v. Great*
10 *Western Fin. Securities Corp.*, 14 Cal.4th 394, 412 (1996). “Put another way, the
11 plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported
12 by a sufficient prima facie showing of facts to sustain a favorable judgment if the
13 evidence submitted by the plaintiff is credited.’” *Wilson v. Parker, Covert &*
14 *Chidester*, 28 Cal.4th 811, 821 (2002) (“*Wilson*”); *Jarrow Formulas, Inc. v.*
15 *LaMarche*, 31 Cal.4th at 741. For many reasons, Johnson’s claims against Movants
16 fail as a matter of law.

17 Johnson has a steep burden to proving malicious prosecution. To establish a
18 claim for the malicious prosecution, a plaintiff must plead and prove that the
19 underlying action was:

- 20 (i) initiated or maintained by, or at the direction of, the defendant, and
21 pursued to a legal termination in favor of the malicious prosecution
22 plaintiff;
23 (ii) initiated or maintained without probable cause; and
24 (iii) initiated or maintained with malice.

25 *Parrish v. Latham & Watkins*, 3 Cal.5th 767, 775 (2017) (“*Parrish*”). Here, as a
26 matter of law, Johnson cannot establish the elements of malicious prosecution.

27 First, Johnson cannot meet the first element of a claim for malicious
28 prosecution because he *lost at trial*. A jury rendered a verdict that Johnson breached

1 his fiduciary duty to Storix. The state trial court’s final judgment reflects it entered
2 judgment “[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson
3 on Storix Inc.’s complaint for breach of fiduciary duty and in favor of Plaintiff
4 Storix, Inc. and against Defendant Janstor Technology on Storix Inc.’s claim for
5 aiding and abetting a breach of fiduciary duty.” RJN No. 22, p. 8. Regardless of any
6 remedy Storix obtained (which Johnson will argue was *de minimis*), Johnson cannot
7 meet the threshold showing for malicious prosecution since Johnson did not obtain a
8 favorable legal termination in his favor on the sole cause of action Storix brought
9 against him for breach of fiduciary duty. *See Lane v. Bell*, 20 Cal.App.5th 61, 68-76,
10 (2018) (A partial victory in an underlying action is not favorable termination).
11 Therefore, his malicious prosecution claim fails.

12 Second, Johnson’s cause of action fails because he cannot establish as a matter
13 of law that Movants initiated an action against him without probable cause. “[T]he
14 existence or absence of probable cause has traditionally been viewed as a question of
15 law to be determined by the court, rather than a question of fact for the jury.”
16 *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863, 875 (1989). “[T]he probable
17 cause element calls on the trial court to make an objective determination of the
18 ‘reasonableness’ of the defendant’s conduct, i.e., to determine whether, on the basis
19 of the facts known to the defendant, the institution of the prior action was legally
20 tenable, as opposed to whether the litigant subjectively believed the claim was
21 tenable.” *Parrish*, *supra*, 3 Cal.5th at 776 (Internal quotations omitted). It is well
22 established that certain interim rulings on the merits may provide a basis for finding,
23 as a matter of law, probable cause to prosecute the underlying case on which a
24 malicious prosecution action is based. *Wilson*, *supra*, 28 Cal.4th at 817–818;
25 *Parrish*, 3 Cal.5th at 776. The “interim adverse judgment” rule provides that “if an
26 action succeeds after a hearing on the merits,” including on dispositive pretrial
27 motions, “that success ordinarily establishes the existence of probable cause ... even
28 if the result is overturned on appeal or by later ruling of the trial court.” *Parrish*, 3

1 Cal.5th at 771, 776-777; *Antounian v. Louis Vuitton Malletier*, 189 Cal.App.4th 438,
2 450 (2010); *see Parrish*, 3 Cal.5th at 771, 778-779 [Reaffirming principles
3 articulated in *Wilson*, and holding that interim adverse judgment rule applies even if
4 court that denied summary judgment on the merits later concludes the underlying
5 suit was brought in bad faith].

6 The record here overwhelmingly establishes that Storix, and its counsel, had
7 probable cause to pursue claims against Johnson. Irrespective of any judgment
8 entered against him at trial, numerous interim (and post-trial motion) orders establish
9 that Storix acted with probable cause. As set forth above, the trial court denied a
10 motion for summary judgment, or summary adjudication, based on the existence of
11 disputed material facts. RJN No. 16. Under the interim adverse judgment rule,
12 Johnson is barred as a matter of law from meeting the second element of a claim for
13 malicious prosecution as probable cause existed.

14 Moreover, several post-trial rulings by the trial court refute Johnson's claim
15 that Storix and its counsel acted without probable cause. The court denied both
16 Johnson's JNOV motion and his motion for new trial. *See* RJN No. 21 & 23,
17 respectively. In doing so, the court expressly acknowledged there was "sufficient
18 evidence to support the verdict" against Johnson, and rejected "Johnson's argument
19 that this lawsuit was not properly authorized," finding the suit was authorized. *Id.*
20 The trial court also denied Johnson's motion for a new trial based on "insufficiency
21 of the evidence." *Id.* "There was an abundance of evidence presented in this three-
22 week jury trial regarding all the parties' actions in the operation and running of this
23 business. The evidence supports that Johnson breached his fiduciary duty to Storix."
24 *Id.* Most recently, the court confirmed Storix as the prevailing party, expressly
25 finding Storix pursued the case against Johnson in "good faith." *Id.*; *see also*, e.g.,
26 Sullivan Decl., Exs. 1-5.

27 Third, there is zero probability Johnson will be able to prove that malice, i.e.,
28 actual ill will or improper purpose, drove the pursuit of the state court litigation

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

10 Here, Johnson alleges wrongful motives in conclusory fashion and without
 11 any factual basis. Johnson merely argues that the “Direct Suit was instituted for
 12 malicious purposes other than to succeed on the merits.” Compl. at ¶ 39. He likewise
 13 asserts the case was “meritless” and pursued with the “intent to harm Johnson as
 14 demonstrated by their callous indifference or wanton disregard for Johnson’s rights
 15 and the extreme financial burden their conduct was causing.” *Id.* at ¶¶ 41-42.

16 Johnson’s use of boilerplate allegations does not satisfy his obligation to plead actual
 17 facts substantiating his allegations of malice. His complaints about alleged stress and
 18 financial pressure associated with litigation are common to all litigation, and are not
 19 unique to him or indicative of malice. He has failed to plead what unique malice
 20 drove the pursuit of claims against him, particularly given the multiple rulings
 21 finding that the claims against him were supported by evidence and brought in “good
 22 faith.” See, e.g., RJN No. 21 (“The evidence supports that Johnson breached his
 23 fiduciary duty to Storix”); RJN No. 24 (“The court finds that Storix reasonably and
 24 **in good faith** brought an unlimited civil action against Johnson[.]” (Emphasis
 25 added)). Thus, he cannot prove a probability of success on the third element of his
 26 cause for malicious prosecution.

27 V. CONCLUSION

28 Johnson’s cause for malicious prosecution against Movants Paul Tyrell and

1 Sean Sullivan unquestionably involves conduct protected under the anti-SLAPP
2 statute, namely serving as litigation counsel to Storix. Since Johnson cannot prove a
3 probability of success, as he cannot establish any of the elements of malicious
4 prosecution as a matter of law, Johnson’s complaint against Movants must be
5 stricken.

6 Respectfully submitted,

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8 DATED: August 30, 2019

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