No. 21-55614

United States Court of Appeals for the Ninth Circuit

ANTHONY JOHNSON,

Plaintiff, Appellant,

– v –

MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, DAVID HUFFMAN, PAUL TYRELL, SEAN SULLIVAN, and STORIX, INC.

Defendants. Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTHERN CALIFORNIA (SAN DIEGO)
CASE NO. 3:19-cv-1185-H-BLM

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

The district court and this Court have subject-matter jurisdiction over this case pursuant to 28 U.S.C. §1332 as a diversity action involving California state claims. This Court has jurisdiction over this appeal pursuant to 29 U.S.C. §1291 because the judgment below is a final judgment of the district court.

On July 18, 2019, Judge Huff signed an order transferring this case to her court. (1-ER-78.) The order is a collateral order appealable after final judgment. On September 30, 2019, the district court entered an order denying appellant's motion to reverse the case transfer or to recuse herself under 28 U.S.C. §144 & 455. (1-ER-70.) An order denying recusal or disqualification is appealable after final judgment. *United States v. Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978).

On December 2, 2019, the district issued its order granting in part appellees' motions to dismiss under Fed.R.Civ.P. Rule[1] 12(b) and special motions to strike under Cal.Code.Civ.Proc. §425.16. (1-ER-29.) On June 8, 2021, the district court issued its order granting Partner-Defendants' Rule 12(b) motion as to the remaining claims and ordered entry of judgment. (1-ER-3.) The Court has jurisdiction to review orders granting motions to dismiss and special motions to strike after final judgment. *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010).

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[1] "Rule" hereafter refers to a Federal Rule of Civil Procedure.

The clerk entered judgment on June 8, 2021. (1-ER-2.) Notice of this appeal was timely filed on June 10, 2021. (5-ER-1092.)

STATEMENT OF ISSUES

1. Whether the court erred in referring only to a small claim underlying the **malicious prosecution** action that was first introduced in closing arguments, thereby ignoring California's "severability rule" that allows favorable termination to be established according to separate and distinct claims litigated on the merits and decided in appellee's favor.

2. Whether the district court erred in dismissing the **conversion** claim as barred by *res judicata* based on a demand for an accounting in an unrelated California shareholder derivative lawsuit, and by ignoring facts showing the conversion was discovered after the derivative lawsuit was tried.

3. Whether the court erred in dismissing the **indemnification** claim and related **breach of fiduciary duty** claim as requiring success of an entire underlying lawsuit rather than any "claims, issues or matters therein" as provided by California statues and the corporate bylaws.

4. Whether the court erred in dismissing the **breach of fiduciary duty** claim for using shareholder profits to defend the company's own shareholder derivative claims as barred by *res judicata* according to a prior unrelated claim involving the use of shareholder profits to defend different third-party claims.

5. Whether the court erred in dismissing the **breach of contract, rescission**, and **contractual interference** claims as barred by a prior copyright infringement or ownership decision that is not disputed and has no bearing on the claims.

6. Whether the court erred in dismissing the **interference in prospective economic advantage** claim as too speculative and lacking economic relationship, ignoring undisputed facts to the contrary and denying leave to amend.

STATEMENT OF THE CASE

Shortly after it was filed, the district court judge had this case transferred to her court. (1-ER-78.) Plaintiff and appellant, Anthony Johnson ("**Johnson**") filed a motion requesting the transfer be vacated, that the judge recuse herself under 28 U.S.C. §455, or that another judge decide her recusal under §114. (5-ER-947.) The district court denied the motion as to all relief. (1-ER-70.)

Appellees Storix, Inc. ("**Storix**"), Manuel Altamirano, Richard Turner, David Kinney and David Huffman ("**Partner-Defendants**")[2] and Paul Tyrell and Sean Sullivan ("**Attorney-Defendants**") brought three motions to dismiss under Rule 12(b)(6) and two Anti-SLAPP special motions to strike under

[2] Some claims were brought against both Storix and Partner-Defendants since Partner-Defendants were in exclusive control of Storix and personally approved or committed the wrongful acts alleged. (*See* 5-ER-1090 ¶¶61,67,71.) References to Storix herein should be construed as also referring to Partner-Defendants.

Cal.Code.Civ.Proc. §425.16. The court granted the motions as to seven of the nine claims with prejudice. (1-ER-29.) The court stayed the action for 16 months before dismissing the remaining two claims with prejudice. (1-ER-3.)

STATEMENT OF FACTS

A. Relevant Facts Giving Rise to the District Court Case

In February 2003, Johnson formed Storix, Inc. to sell the software (SBAdmin) he designed and developed in 1998. (5-ER-1076 ¶10.) As the sole shareholder, officer and director, Johnson granted Storix the rights to market, sell, copy and distribute SBAdmin in exchange for future compensation if or when his participation in the company ended. (*Id.* ¶11.)

In 2011, after being diagnosed with terminal cancer, Johnson gifted 60% of Storix's shares to Partner-Defendants, who were his long-term employees. (5-ER-1076 ¶12.) As collective majority shareholders, Partner-Defendants have since exercised 100% control of the Storix board, all officer positions, and had exclusive control of all company records and decisions. (5-ER-1082 ¶32.)

In 2013, Johnson unexpectedly returned to Storix with a clean bill of health but was forced out of the company a year later by Partner-Defendants. (5-ER-1077 ¶13.) When Partner-Defendants refused to allow Johnson to continue improving the SBAdmin software, he threatened and eventually filed a copyright infringement

lawsuit (*Id*.; 3-ER-444, "**Copyright Suit**"). There have been no new releases or features added to SBAdmin since. (5-ER-970 ¶4.)

Storix filed a counter claim in the Copyright Suit for a declaration of ownership of all SBAdmin versions created after the company was incorporated, therein admitting that Johnson "granted Storix, Inc. a license to use, sell, distribute, license and create (and commercialize) derivative works from the Original Software." (3-ER-465-468 ¶¶12,16,19,31,36,37.)[3]

In 2015, Johnson reelected himself to the Storix board to continue his company participation. (5-ER-1076 ¶15.) The majority directors thereafter voted to cease all shareholder distributions, and Johnson has received no income from Storix since. (5-ER-1078 ¶19.)

Johnson sold his San Diego home and moved to Florida due to the cost of the copyright litigation. (5-ER-1078 ¶17.) A few weeks later, Storix filed a direct lawsuit against Johnson in state court claiming he breached a fiduciary duty by failing to inform the board of his intent to operate a competing business in California. (5-ER-1078 ¶18; *See* 3-ER-529, "**Direct Suit**".) All appellees knew

[3] Storix referred to all version of SBAdmin created before it was incorporated as the "Original Software" and those created after it was formed as the "Storix, Inc. Software" based on its assertion that it owned any work Johnson created thereafter because he was a work for hire.

Johnson lived in Florida, but the complaint falsely alleged that he resided in San Diego. (*Id*., 3-ER-530 ¶¶3,8; *See also* 5-ER-972 ¶18.)

Johnson and another shareholder filed a shareholder derivative lawsuit in state court against Partner-Defendants "on behalf of Storix, Inc." for breach of fiduciary duty, abuse of control and waste of corporate resources. (5-ER-1078 ¶19; *See* 3-ER-620, "**Derivative Suit**".)[4] Johnson funded the lawsuit which sought only relief for Storix's benefit. (5-ER-973 ¶20.) Without notice or approval, Partner-Defendants used all remaining shareholder profits to pay their personal attorneys and Attorney-Defendants (herein acting as Storix's counsel) to obstruct and defend the company's claims against them. (5-ER-1082 ¶¶34-35.)

In December 2015, a jury in the Copyright Suit found that Johnson "transferred ownership of [SBAdmin] in writing from himself to Storix, Inc." (3-ER-526.) The jury did not decide if Johnson was compensated for his copyrights. (5-ER-1079 ¶22.) The district court upheld the verdict based on a Storix annual report Johnson signed in 2004 (3-ER-479) that "reflecte[d] a transfer of assets broad enough to include a copyright." (3-ER-483; 5-ER-972 ¶8.)

Storix filed a second amended complaint to the Direct Suit adding that Johnson sent an email to Storix's customers to support its demand for injunctive

[4] Appellees and district court refer to this as the "State Action", which is misleading because references are to the consolidated Derivative Suit wherein Storix was the real plaintiff.

relief (3-ER-552 ¶28)[5], but it still falsely alleged that Johnson resided in California when the case was filed and all events occurred. (3-ER-548-549 ¶¶7-8.)

In September 2017, a Storix competitor, Veeam, provided a letter of intent to purchase Storix for $5 million. (5-ER-1080 ¶25.) As a 40% owner of Storix, Johnson was part of the relationship and stood to make $2 million from the sale. (5-ER-1087 ¶57.) Partner-Defendants refused to approve the sale unless Johnson dismissed all claims against them, paid the outstanding legal debt they imposed on Storix, and threatened to continue using Storix to sue him unless he agreed. (5-ER-1060 ¶25.)

In February 2018, a jury rejected Storix's entire $1.25 million claim against Johnson in the Direct Suit for "unjust enrichment" and "unfair head start" for allegedly intending to compete, specifically finding Johnson did not use Storix's confidential information for his benefit or interest and that he received no benefit from any breach of fiduciary duty to Storix. (5-ER-1080 ¶26; 3-ER-576.) However, the jury awarded Storix $3,739 for a "loss of employee productivity" claim raised for the first time in closing arguments and based on Johnson sending the customer email. (5-ER-1080 ¶27; 5-ER-973 ¶21.)

[5] The court granted Storix leave to amend the first amended complaint only to add facts to support injunctive relief and punitive damages. (3-ER-545.) Storix was never granted leave to add a new claim.

In the bench trial that followed, the state court denied all Storix's demands for injunctive relief in the Direct Suit. (5-ER-1080 ¶27; 3-ER-587.) In deciding the Derivative Suit claims against Partner-Defendants for misuse of company funds, the court ruled that "[t]he jury found against Johnson on his cross-complaint, thus entitling defendants to indemnification for *those* fees and costs." (3-ER-590, italic added.)

Johnson chose not to reelect himself to the Storix board, thereby terminating his involvement in Storix and triggering Storix's obligation to compensate him for its continued use of the copyrights. (5-ER-1081 ¶29.) Johnson demanded payment and Attorney-Defendants responded without explanation that Storix would pay him nothing. (*Id.*) Johnson rescinded the oral contract based on Storix's failure to perform its obligation, and the Storix board responded that they rejected the rescission. (*Id.*)

Johnson sent a written demand for indemnification for his expenses incurred in successfully defending the Direct Suit claim against him for competing with Storix, but he received no response. (5-ER-1081 ¶30.)

In December 2018, Johnson obtained information showing that Partner-Defendants converted $475,000 of his earnings to their personal equity accounts while he was on medical leave between 2011 and 2013. (5-ER-1081 ¶30.) Johnson informed Storix of his finding and again received no response. (*Id.*) Throughout

the state litigation, Partner-Defendants directed Attorney-Defendants to obstruct and interfere in every attempt by Johnson to obtain Storix's financial records that might have raised his suspicion and afforded him a reasonable opportunity to investigate the conversion earlier. (*Id*.)

In January 2019, Johnson filed a state lawsuit against only Partner-Defendants that included three of the claims alleged in this complaint: (1) wrongful use of civil proceedings (malicious prosecution), breach of fiduciary duty, and conversion. (5-ER-944, "***Altamirano***".) A few weeks later, Johnson voluntarily dismissed the complaint without prejudice, revised and refiled it in this federal diversity action "because defendants' counsel deprived [him] the right to amend [his] complaint, refused to [allow him to] dismiss substantial claims, and filed a motion demanding another $160,000 bond against [him] as an out-of-state plaintiff." (5-ER-975 ¶27.) Neither Storix nor Attorney-Defendants were named in the prior action, but they were named in this action "because [Partner]-Defendants insisted that Storix is liable for their actions." (*Id*. ¶28.)

B. Facts Relevant to Judge Huff's Disqualification

Judge Marilyn Huff presided over the Copyright Suit trial in 2015 and, in 2016, ordered Johnson to pay Storix $543,704 in attorney fees based entirely on three emails unrelated to the litigation she found "inappropriate." (5-ER-1007-1008.) The Ninth Circuit reversed the fee award as "excessive" and remanded with

instructions to determine a more "reasonable amount." (5-ER-1020.) Johnson filed a motion to remand the decision to a different district court judge that was denied. (5-ER-1022.)

In 2018, Judge Huff was shown on remand that the entire factual basis for awarding the fees had since been disproven by the state litigation. (5-ER-1045-1059.) She made no reference to the facts or evidence presented when reissuing the fee award at $419,193 on the same factual basis. (3-ER-487,504-505,527.)

In July 2019, Judge Huff had this case reassigned to her court shortly after it was filed. The order indicates the transfer was based on a "lower numbered case" (the Copyright Suit), and that this case (1) arose from the same or substantially identical transactions, (2) involves the same or substantially the same parties or property, (3) calls for a determination of the same or substantially the same questions of law, and (4) for other reasons that would entail unnecessary duplication of labor. (1-ER-78.)

Johnson filed a motion to have this case transferred back to the original judge or that Judge Huff be recused in accordance with 28 U.S.C. §114 and §455. (5-ER-947.) Johnson provided a declaration with attached evidence to support the grounds stated in the motion. (5-ER-969.)

On September 30, 2019, Judge Huff refused to vacate the case transfer on the sole ground that Storix was a defendant in the Copyright Suit. (1-ER-76-77.)

She refused to allow another judge to determine the motion to recuse by finding Johnson's declaration insufficient. (1-ER-75-76.) She then denied her recusal by finding without reference to the motion or declaration that Johnson's allegations of bias were based entirely on adverse rulings. (1-ER-73-75.)

The next day, Judge Huff vacated the hearing on all motions to dismiss and anti-SLAPP special motions to strike. (2-ER-259.) A week later, she informed the parties that Partner-Defendants failed to raise a *res judicata* defense, directed them to an "accounting claim" in the Derivative Suit complaint, and ordered further briefing on "whether Plaintiff's current claim for conversion is barred by res judicata, whether by claim preclusion or issue preclusion, in light of the prior state court judgment." (2-ER-256.)

In December 2019, Judge Huff dismissed seven of the nine claims with prejudice, leaving only the conversion claim and one count of breach of fiduciary duty against Partner-Defendants. (1-ER-29-69.) Johnson filed a motion for reconsideration (2-ER-177) and motion for entry of partial final judgment to allow an appeal of the dismissed claims. (2-ER-172.) Judge Huff vacated the hearings (2-ER-149), denied both motions, then granted Partner-Defendants' motion to stay the remaining claims pending the appeal of the consolidated state actions. (2-ER-127.)

Sixteen months later, Judge Huff "request[ed] further briefing from the parties on the effect, if any, of the [finality of the state appeal] on the Court's stay of this action and the Court's December 2, 2019 order." (2-ER-119.)

On June 8, again without a hearing, Judge Huff issued an order and judgment dismissing the remaining two claims with prejudice as barred by *res judicata* without reference to any operative facts, claims or issues actually litigated or previously decided. (1-ER-2-28.)

SUMMARY OF ARGUMENT

Johnson respectfully requests the Court review the district court's orders dismissing and/or striking all nine causes of action pursuant to Rule 12(b)(6) for failure to state a claim. All claims were dismissed with prejudice, without any hearings, without leave to amend, without reference to any operative facts in the complaint, and most based on arguments and issues raised *sua sponte*.

The district court dismissed Johnson's conversion, breach of fiduciary duty, and breach of contract claims as barred by *res judicata* without reference to any transactional (or operative) facts in the complaint or any court order or transcript showing any identical claims or issues that were ever litigated or decided.

The malicious prosecution claim was dismissed for failure to allege favorable termination of the underlying lawsuit by erroneously referring to two separate and distinct claims as a single claim, thereby ignoring California authority

allowing a malicious prosecution action to be directed to a severable claim. The court similarly found that the indemnification claim requires that Johnson prevail on the entire underlying lawsuit despite California statutes and Storix's bylaws expressly mandating indemnification for the successful defense of any claim, issue or matter therein.

The court further dismissed all contract-related claims by altering or omitting facts in the complaint, thereby finding the contract unenforceable but also rejecting its recission and return of any consideration or unjust enrichment obtained under an unenforceable contract as required by California law.

Although *pro se*, Johnson has extensive legal knowledge and experience, his complaint is well-pled, and every element of all causes of action is factually and legally supported. Appellees provided about 500 pages of external documents from which they improperly argued affirmative defenses and other factual and legal issues improper for a motion to dismiss under Rule 12(b)(6). The parties' briefs are referenced herein to demonstrate that (1) appellees failed to address Johnson's arguments or provide authority to support their legal conclusions, (2) the court did not consider Johnson's facts, arguments or authority, and (3) the court raised affirmative defenses *sua sponte* on behalf of all represented appellees.

Should the Court reverse the orders as to any dismissed claims, it should then determine whether further proceedings should be remanded to a different

judge based on the district court transferring the case without proper cause, self-denying Johnson's motion to recuse, and then depriving Johnson due process throughout all subsequent proceedings.

ARGUMENT

A. THE COURT SHOULD REVERSE THE DISMISSAL OF ALL JOHNSON'S CLAIMS

Standards of Review: Dismissals for failure to state a claim under Rule 12(b)(6) are review de novo. *Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1127 (9th Cir. 2012). "Such review is generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of judicial notice. In undertaking this review, [the court must] accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs, and [we] will hold a dismissal inappropriate unless the complaint fails to state a claim to relief that is plausible on its face." *Ibid.* (quotations and marks omitted.)

The preclusive effect of a prior judgment, whether based on claim or issue preclusion, is a question of law reviewed de novo. *See Jacobs v. CBS Broadcasting, Inc.*, 291 F.3d 1173, 1176 (9th Cir. 2002). A dismissal without leave to amend is reviewed de novo when based on legal determinations. *See Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004). A court 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. Rule 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The granting of an anti-SLAPP special motion to strike is reviewed de novo. *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1009 (9th Cir. 2017). "[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*., 890 F.3d 828, 834 (9th Cir. 2018).

"A *pro se* complaint must be 'liberally construed,' since 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Entler v. Gregoire*, 872 F.3d 1031, 1038 (9th Cir. 2017) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). "The rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits." *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984).

The district court dismissed all claims based on affirmative defenses and legal arguments not raised by the facts of the complaint. Since all claims were extensively argued under Rule 56 summary judgment standards, Johnson provides

both factual and legal support for his claims in hopes of avoiding unnecessary summary proceedings if the orders are reversed.

1. Malicious Prosecution Claim

Partner-Defendants and Attorney-Defendants each filed motions to dismiss and redundant anti-SLAPP motions to strike that argued only the legal sufficiency of the malicious prosecution claim. (4-ER-788.) This section addresses all motions since they involve the same issue and are reviewed under Rule 12(b)(6) standards.

In California, a claim for malicious prosecution consists of three elements. "The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; and (iii) initiated or maintained with malice." *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775. The district court addressed only the second element.

The district court noted that "'a malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor.'" (1-ER-39, quoting *Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 460; *Sierra Club Found. v. Graham* (1990) 72 Cal.App.4th 1135, 1153 (Sierra Club); *Paramount Gen. Hosp. Co. v. Jay* (1989) 213 Cal.App.3d 360, 369 (Paramount).) However, the court also noted that *Lane v. Bell*, 20 Cal. App. 5th 61 (2018) 228 Cal. Rptr. 3d 605 (Lane) and *StaffPro, Inc. v. Elite Show*

Services, Inc. (2006) 39 Cal. Rptr. 3d 682 (StaffPro), "comport with the California Supreme Court's holding in [*Crowley v. Katleman* (1994), 8 Cal.4th 666 (Crowley)] that in order for a malicious prosecution plaintiff to satisfy the favorable termination element, 'there must first be a favorable termination of the *entire* action.'" (1-ER-37, italics added to order.) The order cites additional cases, including *Siebel v. Mittlesteadt* (2004) 41 Cal.4th 735, 740 (Siebel) ("a court should consider 'the judgment as a whole in the prior action'") and *Jenkins v. Pope* (1990) 217 Cal.App.3d 1292, 1300 (Jenkins) ("there must first be a favorable termination of the entire action.") (1-ER-39.)

As with all cases cited by Defendants, references to the "entire action" or "judgment as a whole" lead back to *Freidberg v. Cox* (1987) 197 Cal.App.3d 381 (Freidberg), which provides that a plaintiff may establish favorable termination based on severable claims on which he prevailed. Although *Paramount* and *Sierra Club* involved severable claims, the court chose to follow the *Crowley* line of cases wherein the defendants, unlike Johnson, did not prevail on any severable claims. (3-ER-388; 2-ER-367; 2-ER-346.)

This situation is highly analogous to *Paramount*, where the defendant "**relie[d] on language in [*Freidberg*] at page 387 stating that `there must be a favorable termination of the entire action.' That portion of *Freidberg* is at odds with the balance of the opinion and with the severability rule of**

[*Albertson*], and we decline to follow it." *Paramount*, *supra*, 213 Cal.App.3d at 337 (bold added). The balance of the opinion in *Freidberg* distinguished itself from *Albertson* in that favorable termination could not be established only because there were no severable claims.

a) Johnson prevailed on a severable claim.

The only cause of action against Johnson in the three Direct Suit complaints involved his alleged *intent* to compete from which Storix demanded over $1.2 million at trial for "unjust enrichment" and "unfair head start." The jury found against Storix on the claim but awarded $3,737.14 on a new claim of "loss of employee productivity" raised in closing arguments that was based on an email that *didn't exist* when the Direct Suit was filed. The trial court further denied all of Storix's demands for injunctive relief.

Even if the loss of productivity claim had been alleged in the Direct Suit complaint, it doesn't change the fact that it was separate and distinct from the competition claim. Johnson directed the malicious prosecution action only to the competition claim, showing it was severable from the loss of productivity claim. (5-ER-1080 ¶27 fn.5.)

b) Favorable termination can be based on severable claims.

Defendants primarily rely on *Lane*, which found lack of favorable termination because "the judgment awarded affirmative relief to the underlying

plaintiff… .” *Lane, supra,* 20 Cal.5th 66at 73. Defendants also rely on *StaffPro*, which involved different theories of relief and not severable claims, noting that “[*Crowley*] dictates that the severability analysis implicit in *Singleton* [*v. Perry* (1955) 45 Cal.2d 489, 497 (Singleton)] is inapplicable to the favorable termination element of the malicious prosecution tort.” *StaffPro*, *supra*, 39 Cal.Rptr.3d 690. The severability analysis implicit in *Singleton* was used to determine whether a judgment involved severable claims or separate “theories of claims.” *Singleton* at 497. It in no way rejected favorable termination based on severable claims.

Singleton’s severability analysis was replaced by the “primary rights theory.” Both *Crowley* and *Paramount* found logic in *Freidberg v. Cox* (1987) 197 Cal.App.3d 381 (Freidberg), which first applied the primary rights theory to determine the severability of claims in the same manner as claim preclusion. Under the unified theory, two claims are severable if the second claim cannot be “foreclosed by the doctrine of res judicata” if the first claim had been brought in an earlier suit. *Crowley, supra,* 8 Cal.4th at 686 (underling added). In contrast, claims are not severable if “the violation of one primary right in two causes of action contravenes the rule against ‘splitting’ a cause of action.” *Id.* at 681 (citations omitted; underline added). In distinguishing *Freidberg,* the *Paramount* court found “the various theories” alleged by Ingraham were not severable and independent. Separate prosecution of Ingraham’s claims would have constituted splitting a cause

of action." *Paramount*, *supra*, 213 Cal.App.3d at 369. Following *Friedberg*, the severability of claims can be determined based on whether they can be brought in separate lawsuits without invoking the claim preclusion doctrines.

The severability rule was established by *Albertson v. Raboff* (1956) 46 Cal.2d 375 (Albertson) a year after *Singleton*. *Albertson* is a favorable termination case that both the *Crowley* and *Paramount* lines of cases follow. In that case, the defendant sued the plaintiff in the prior action on separate claims for a money judgment on a loan and for either a lien or declaration of title transfer. Because the plaintiff appealed only from the part of the prior judgment awarding money, "that part of the judgment in the former action that determined that defendant had no interest in or a right to a lien upon plaintiff's real property is now final and constitutes a termination of that separable part of the proceeding favorable to plaintiff." In other words, if the claims were separable for the purpose of appeal, they were "severable" for the purpose of establishing favorable termination.

Paramount, unlike *Crowley*, involves severable claims and therefore relies on *Albertson*. The *Paramount* court found favorable termination where "multiple causes of action which were severable and could have been the subject of separate proceedings." *Paramount*, *supra*, 213 Cal.App.3d at 363. "Thus, the fact that […] Paramount was not successful in defending the entire underlying action does not preclude it from properly pleading a favorable termination as to the causes of

action on which it prevailed." *Ibid*. It concludes that, "the element of favorable termination tends to show the innocence of the defendant in the underlying action. It also serves to prevent a collateral attack on the underlying judgment. **Neither principle is violated where a malicious prosecution action rests on a severable part of the proceeding which terminated in the defendant's favor**." *Id.* at 371-372 (citations omitted; bold added).

As in *Albertson*, Johnson appealed the $3,739.14 judgment on Storix's loss of employee productivity claim. (5-ER-1080 ¶27, fn.5.) This action was filed while the appeal was pending. Johnson argued in response to all Defendants' motions:

> "*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* 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* at p. 378.)"

(2-ER-321,347,368;3-ER-389.) Johnson alleged that there were two severable claims and the loss of employee productivity claim was pending appeal. (5-ER-1084 ¶39, fn.6.) The district court didn't acknowledge the facts or argument when dismissing the malicious prosecution claim with prejudice before staying the remaining claims pending the appeal.

The severability of the competition and loss of employee productivity claims are further supported by the fact that they could have been brought in separate lawsuits (the latter in small claims court) without invoking the doctrines of *res judicata* or claim-splitting.

c) Defendants and the district court erroneously refer to the severable claims as a single breach of fiduciary duty.

Attorney-Defendants argued that "Johnson cannot meet the threshold showing for malicious prosecution since Johnson did not obtain a favorable legal termination in his favor on the sole cause of action Storix brought against him for breach of fiduciary duty." (4-ER-696, underline added.) The district court correctly noted that "Storix's complaint, its first amended complaint, and its second amended complaint in the underlying state action all asserted a single cause of action for breach of fiduciary duty." (1-ER-39, fn.2, underline added.) But the order ambiguously refers to the verdict or judgment in the Direct Suit rather than the added claim it pertains to. (1-ER-31-33,38,40.)

Although *Paramount* and *Sierra Club* involved severable claims, the court chose to follow the *Crowley* line of cases instead, wherein the defendants, unlike Johnson, did not prevail on any severable claims. (3-ER-388; 2-ER-367; 2-ER-346.) The district court dismissed the malicious prosecution action because "the jury award[ed] Storix $3,739.14 'as a result of Anthony Johnson's acts or conduct in breach of a fiduciary duty or duties owed to Storix, Inc.'" (1-ER-38, citing 3-

ER-576.) The court failed to acknowledge any undisputed facts in the complaint showing there were severable claims or that Johnson prevailed on any part of the Janstor Suit.

This case is factually analogous to the situation in *Paramount*, where the malicious prosecution defendant similarly attempted to argue that "the underlying action here involved but one cause of action for breach of fiduciary duty." *Paramount*, *supra*, 213 Cal.App.3d at 337. The *Paramount* court found "**[t]he fact that Jay's numerous claims may all be broadly deemed to be alleged breaches of fiduciary duty does not enable Jay to sidestep the severability rule as applied in *Albertson* and *Freidberg***." *Ibid.* (bold added.)

d) The district court raised additional affirmative defenses based on the state appeal.

In denying reconsideration after the state appeal, the district court noted that the California Court of Appeal reinforced its decision to dismiss the malicious prosecution claim because it "expressly rejected Plaintiff's assertion that Storix's breach of fiduciary duty claim is severable." (1-ER-26.) Although unclear, the order implies that Johnson is collaterally estopped from alleging that there were severable claims. "[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825 (DKN

Holdings). The issue of *whether* the claims were severable was not asserted against Johnson, was never actually litigated, and wasn't necessary to the appellate court's decision. "[A] decision is not authority for what is said in the opinion but only for the points actually involved and actually decided." *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61.

The district court raised another defense that, "[b]ecause the California Court of Appeal evaluated the merits of an identical claim for malicious prosecution… and that decision is now final…, Plaintiff's claim for malicious prosecution also fails as a matter of law because it is now barred by res judicata." (1-ER-26.) The district court refers to the *Altamirano* opinion, which was based on allegations in a different complaint stating only that (1) Storix filed a single claim against Johnson for "failing to inform the board of his intent to start a competing business"; (2) the jury rejected that claim and related injunctive relief; and (3) "the claim was pursued to a legal termination on the merits in Johnson's favor." (5-ER-928-932 ¶16,34,35.) The appellate court referred only to the breach of fiduciary duty "claim" alleged in the Direct Suit complaint as referenced in the *Altamirano* complaint. Johnson voluntarily dismissed entire *Altamirano* case specifically because Partner-Defendants' manipulation of court process deprived him the ability to amend the complaint to cure the deficiencies that would have avoided this lawsuit and appeal.

Altamirano was dismissed without prejudice. (1-ER-25.) Therefore, it cannot act as a bar to the same claim refiled a month later. "Claim preclusion arises […] after a final judgment on the merits in the first suit." *DKN Holdings, supra,* 61 Cal.4th at 824. "A voluntary dismissal *without* prejudice is not a judgment." *Gassner v. Stasa* (2018) 30 Cal.App.5th 346 (italics in original, citing *Cook v. Stewart McKee & Co.* (1945) 68 Cal.App.2d 758, 760-761.); *See also H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1365 ("A voluntary dismissal … by written request to the clerk is not a final judgment, as no judgment, final or otherwise, is necessary to the dismissal."); *Gogri v. Jack in the Box Inc*. (2008) 166 Cal.App.4th 255, 261 ("[V]oluntary dismissal of an entire action deprives the court of both subject matter and personal jurisdiction in that case, except for the limited purpose of awarding costs and statutory attorney fees.") If a claim dismissed without prejudice were preclusive, then "without prejudice" would have no meaning.

Lastly, "joint and several obligors may be sued in separate actions. Claim preclusion does not bar subsequent suits against co-obligors if they were not parties to the original litigation." *DKN Holdings, supra,* 61 Cal.4th at 825 (citation omitted). Even if *Altamirano* was preclusive to this claim against Partner-Defendants, there is no bar to the against Attorney-Defendants who were not *Altamirano* defendants.

e) Johnson properly stated a cause of action for malicious prosecution.

Johnson alleged facts showing there were severable competition and loss of productivity claims and directed his malicious prosecution action only to the competition claim alleged in the Janstor Suit complaint. He showed the entire judgment was based on the loss of productivity claim raised at trial and that he prevailed on everything else. Johnson went to great lengths to properly allege all facts needed to establish favorable termination of the Janstor Suit.

"Under *Crowley, Singleton* and *Paramount,* [plaintiff's] individual claims—adjudicated in [defendant's] favor—were severable, and that adjudication supports the favorable termination requirement." *Sierra Club*, *supra*, 72 Cal.App.4th at 737. Defendant cannot use a new claim raised in closing arguments to shield themselves from liability for the years of malicious litigation that preceded it.

The district court didn't reach the issue of whether the competition claim in the Direct Suit was brought without probable cause. However, Defendants don't dispute that they falsely alleged that Johnson lived in California, maintained the lawsuit for three years while asserting only that Johnson *intended* to compete, and used the existence of the lawsuit to deny Johnson any access to his own company or its financial records for years. (5-ER-1080-1082 ¶¶17-19, 23-24.) These allegations, taken as true, are sufficient to state the lack of probable cause and maliciousness elements of a malicious prosecution cause of action.

Johnson has never done anything to harm anyone but has been harassed by his former employees and the attorneys who protect their interests while purporting to represent his own company against him for 7 years. It's a deprivation of due process and a violation of Johnson's First Amendment right to petition that this action was delayed two years before all claims were dismissed for failure to state a cause of action – without ever acknowledging a single fact in the complaint. Johnson has a constitutional right to have his claim heard by a fair tribunal.

2. Conversion Claim

Partner-Defendants filed a motion to dismiss under Rule 12(b), arguing only that the conversion claim is barred by the statute of limitations (4-ER-767), and referencing external documents to dispute Johnson's "assertion that he was prevented from accessing financial records 'which would have raised his suspicions and provided a reasonable opportunity for Johnson to discover [the conversion] earlier.'" (4-ER-768, quoting 5-ER-1081.) "Resolution of the statute of limitations issue is normally a question of fact. More specifically, as to accrual, once properly pleaded, belated discovery is a question of fact." *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 64 Cal.Rptr.3d 9, 17.

Before hearing Partner-Defendant's motion, the district court noted "they do not raise the issue of *res judicata* as to Plaintiff's claim for conversion" and "in the prior state court derivative action, Plaintiff brought a claim for an accounting"

against the same defendants. (2-ER-255.) "In light of this, the Court requests that the parties brief the issue of whether Plaintiff's current claim for conversion is barred by *res judicata*, whether by claim preclusion or issue preclusion, in light of the prior state court judgment." (2-ER-256.)

In further briefing, Johnson argued that a court can only raise a *res judicata* defense when (1) records of the same court show that a previous action covering the same matter and parties was dismissed, (2) the plaintiff apprised the court of an earlier decision arising from the same contract, or (3) both actions were brought in the same court or courts in the same district. (2-ER-213; See *Headwaters Inc. v. US Forest Service*, 399 F.3d 1047, 1054 (9th Cir. 2005); *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986); *United Home Rentals, Inc. v. Texas Real Estate Comm'n,* 716 F.2d 324, 330 (5th Cir.1983); *Boone v. Kurtz,* 617 F.2d 435, 436 (5th Cir.1980). Partner-Defendants didn't reply to the argument (2-ER-200) and it was not addressed by the court. Furthermore, a defendant is required to raise all affirmative defenses in its first responsive pleading, and defenses not so raised are deemed waived. *See* Fed.R.Civ.P. 8(c), 12(b), 12(g)(2).

The court initially declined to dismiss the conversion claim as to its own defense of *res judicata* because there was a pending appeal of the state actions. (1-ER-60, fn.9.) It therefore granted Partner-Defendants' motion to stay proceedings until the appeal was resolved. (2-ER-148.) Sixteen months later, the court

requested further briefing on the preclusive effect of the appeal on the conversion claim. (2-ER-119.) The court thereafter dismissed the conversion claim by finding it barred by *res judicata* according to an accounting claim in the Derivative Suit. (1-ER-22.)

Even in their (first) further briefing, Partner-Defendants supported the new *res judicata* defense by arguing only that the "facts supporting Johnson's conversion claim existed at the time" the Derivative Suit was filed. (2-ER-227.) They referenced the accounting claim only to dispute Johnson's "lack of access to Storix's financial records" and therefore his allegations of delayed discovery. (2-ER-289.) Even after the court specifically instructed Partner-Defendants to raise the new *res judicata* defense based on the accounting claim, they still failed to do so until their reply brief in support of the (second) further briefing after the state appeal. (2-ER-93.) Their entire defense was a general assertion that "Johnson, derivatively, already litigated claims for breach of fiduciary duty, abuse of control, corporate waste, and accounting in the Derivative Suit." (2-ER-93.) They also raised a general assertion in their second reply brief that the conversion claim is barred by *res judicata* according to Johnson's cross-complaint to the Direct Suit. (2-ER-202.) But in no instance did they cite any operative facts in the current complaint or any orders or transcripts showing an identical claim or issue that was litigated or decided in any prior action.

To support Partner-Defendant's argument, the district noted that "[u]nder California law, [a]n action for an accounting has two elements: (1) 'that a relationship exists between the plaintiff and defendant that requires an accounting' and (2) 'that some balance is due the plaintiff that can only be ascertained by an accounting.'" (1-ER-18, quoting *Sass v. Cohen* (2020) 10 Cal.5th 861, 869.) As such, an accounting claim is nothing more than a demand for access to records.

Importantly, Johnson brought the Derivative Suit "derivatively, on behalf of STORIX, Inc." (3-ER-620.) "[T]he corporation is the real plaintiff in a derivative action and the potential beneficiary of any recovery[.]" *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1004. "If successful, a derivative claim will accrue to the direct benefit of the corporation and not to the stockholder who litigated it." *Grosset v. Wenaas* (2008) 72 Cal.Rptr.3d 129, 140 (citing *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106.) The district court noted that "the state court [found] in favor of the defendants and against the plaintiff on all four causes of action." (2-ER-122.) As such, there was no "balance due" that required an accounting. Even if the Derivative Suit had succeeded, any balance due would have been owed to Storix, not Johnson.

The court also found the conversion claim *could have* been brought in the Derivative Suit, ignoring facts in the complaint showing the conversion was not discovered until after the Derivative Suit was tried. (1-ER-22.) The court further

noted that Johnson's complaint "alleges that he 'was harmed by the conversion of $475,560 owed to him'" (1-ER-19), thereby finding this identical to the accounting claim "[b]ecause the two claims seek compensation for the same harm[.]" (1-ER-21.) Harm is not an element of an accounting claim, and the accounting claim didn't allege harm or demand compensation. It demanded only access to financial records to ascertain damages after a finding of liability on a different claim. *See Sass v. Cohen*, *supra*, 10 Cal.5th at 869.

There is simply no comparison between the conversion claim and a prior accounting claim, especially in a shareholder derivative lawsuit. Even so, it's improper to dismiss a claim as barred by *res judicata* without reference to any operative facts in the complaint or any order or opinion showing that an identical claim was litigated and decided.

3. Indemnification Claim

Johnson seeks indemnification from Storix for his successful defense of the only claim alleged in the Direct Suit. "A corporation shall have power to indemnify any person who was or is a party [to an] action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was an agent of the corporation." Cal.Corp.Code §317(c) (underlines added). To try and circumvent the statute, Storix argued that Johnson "was not sued 'by reason of the fact' that he was an agent of the corporation" and "[t]he breach of

fiduciary duty claim Storix made (and won) against Johnson arose from his activities outside of his role as a Storix director[.]" (4-ER-749.)

First, the Direct Suit alleged that Johnson breached a fiduciary duty by intending to "compete directly with Storix" while serving "[a]s a current director of Storix." (3-ER-539-540 ¶¶16,20.) Storix admits in its motion that Johnson was sued as "a disloyal company director seeking to pursue a secret competitive plan[.]" (4-ER-750.) Johnson was sued "by or in the right of the corporation" and "by reason of the fact" that he was "an agent of the corporation." *See* Cal.Corp.Code §317(c). Storix sued Johnson because he was a director and couldn't have done so otherwise.

Second, "[t]o the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in subdivision (b) or (c) or in defense of any claim, issue, or matter therein, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith." Cal.Corp.Code §317(d) (underlines added). Storix misconstrues the judgment in the Direct Suit as a complete success by implying that it involved only a single claim. The undisputed facts of the complaint, taken as true, show that the jury awarded $3,739.14 on a new and distinct claim raised during trial. Storix lost on the only claim alleged in the complaint, the only claim actually litigated, and

was denied all injunctive relief. Johnson is entitled to indemnification for all expenses occurred in connection with the competition claim on which he prevailed.

The district court dismissed the claim by raising a *sua sponte* argument that indemnification must be denied because Johnson "'must make the same showing of a prior favorable termination required to maintain a malicious prosecution action.'" (1-ER-42, quoting *Dalany v. Am. Pac. Holding Corp*. (1996) 42 Cal.App.4th 822, 830 (Dalany). *Dalany* is inapposite since it was terminated by a stipulated settlement. "Where, as here, termination is by way of an agreement by the parties, there is ambiguity with respect to the merits of the proceeding and in general no favorable termination for purposes of pursuing a malicious prosecution action occurs." *Dalany* at 828. "[A] corporation shall indemnify […] '[t]o the extent that an agent of a corporation has been successful on the merits.'" *Id*. at 830 (quoting Cal.Corp.Code 317(d)). As in this case, *Dalany* included both indemnification and malicious prosecution claims. Since both required a successful defense of the underlying claims, issues or matters "on the merits", the *Dalany* court simply dismissed the indemnification claim for *the same reason* as the malicious prosecution claim. *Dalany* is inapplicable the circumstances of this action, where Johnson plainly defeated the competition claim on the merits.

Furthermore, the complaint states that "Storix was required to reimburse Johnson 'for any claim, issue or matter' within 90 days pursuant to California

Corp. Code §317(d) and Storix's new bylaws." (5-ER-1081 ¶30, underline added.) A corporation's bylaws cannot impair rights granted by statute, but it can expand them. *See* Corp. Code §317(g). Even ignoring the California indemnification statute, the undisputed facts of the complaint show that Storix is required by its own bylaws to indemnify Johnson. There is no authority to support the court's finding that any indemnification requires the successful defense of an entire lawsuit.

4. Breach of Fiduciary Duty Claims

The district court noted that "Plaintiff's claim for breach of fiduciary duty is two-part." (1-ER-55.) Johnson alleged two counts breach of fiduciary duty against Partner-Defendants even though they weren't separated by different headings.

a) Count 1: Failure to Provide Indemnification

First, Partner-Defendants argued that Johnson's indemnification claim fails because "the jury returned a verdict in favor of Storix and the judgment conclusively establishes Storix as the prevailing party." (4-ER-765.) Again, they ignore that they (as Storix) prevailed only on the small claim raised in closing arguments. The district court found that, "to the extent Plaintiff's claim for breach of fiduciary duty is based on Plaintiff's claim for indemnification, Plaintiff's claim for breach of fiduciary duty is also legally defective as a matter of law." (1-ER-55.) The court was wrong to dismiss this count of breach of fiduciary duty for the same

reason it was wrong to dismiss the indemnification claim against Storix as set forth in Section A(3).

Second, Partner-Defendants argue the claim must be brought against Storix because they, "as shareholders of Storix, do not indemnify another shareholder in defense of an action." (4-ER-765.) They provide no authority to support the argument and the district court didn't acknowledge it. But it is relevant to this overall appeal, wherein Partner-Defendants are acting as Storix. They "owed Johnson a fiduciary duty of loyalty, good faith and fidelity [] as majority shareholders and business partners in a closely-held corporation" (5-ER-1082 ¶31) and breached that duty by "unfairly denying Johnson benefits of Storix [they] afford themselves, including but not limited to indemnification for Johnson's successful defense[.]" (5-ER-1085 ¶45.) Partner-Defendants' acts were in breach of a duty owed to Johnson, not Storix. They cannot escape liability for their conduct by blaming Storix and at the same time argue *as Storix* that Johnson is not entitled to the same indemnification they provide themselves.

b) Count 2: Using Corporate Funds to Obstruct and Defend the Derivative Suit

Partner-Defendants filed a motion to dismiss and a redundant anti-SLAPP motion to strike that both raised only the legal sufficiency of the claim. (4-ER-788.) The arguments herein apply to both motions since they argue the same issues and are reviewed under the same Rule 12(b)(6) standards.

Neither Partner-Defendants nor the district court addressed the most relevant and undisputed facts underlying this claim – that Partner-Defendants unlawfully paid Storix's funds to Attorney-Defendants to obstruct and defend Storix's own claims in the Derivative Suit and to take other legal actions against Johnson for their personal benefit. (5-ER-1079-1085 ¶¶21,26,30-36,46-47.) Uncontroverted allegations in the complaint must be taken as true. *See AT & T v. Compagnie Bruxelles Lambert,* 94 F.3d 586, 588 (9th Cir.1996). These facts alone are sufficient to state a claim for breach of fiduciary duty.

Partner-Defendants asserted several incoherent arguments to say that this claim is barred by *res judicata* because it's identical to prior claims in the Derivative Suit and Johnson's cross-complaint to the Direct Suit. For instance, they argue "the primary right asserted by Johnson is the right not to be wrongfully deprived of his rights as a minority shareholder." (4-ER-766.) This circular interpretation of California's "primary rights" theory as a *right* not to be deprived a *right* is nonsensical. All arguments refer to general allegations in this and prior *complaints* rather than any transactional (or operative) facts in the current complaint and an order or opinion of a prior court showing an identical claim that was actually litigated and decided. (4-ER-766-767.)

Partner-Defendants' only citation to the state court's order on the Derivative Suit is to show that it decided an issue of "improper advancement of defense fees

and costs to Defendants." (4-ER-767; *See* 4-ER-914) This, they argue is identical to the current claim. In all three sets of briefings, Johnson argued:

> "There are no claims in Johnson's cross-complaint related to litigation expenses, and 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."

(2-ER-108; 2-ER-352; 3-ER-396.)

The district court initially denied the motion to dismiss this claim "without prejudice to Defendants raising their *res judicata* defense at a later stage in the proceedings once the state court judgment has become final." (1-ER-57, fn.7.) It therefore considered their further briefing following the state appeal as a motion for reconsideration. (1-ER-11.) Without reference to the complaint or the state court's order, the district court found that, "[a]s part of his claim for breach of fiduciary duty in the state court action, Plaintiff contended that these defendants improperly advanced defense fees and costs to themselves in the derivative action" and "[t]he state court rejected this contention in a written order." (1-ER-16, underline added.) This is simply not true. Johnson made no such contention, and the state court's order (on the Derivative Suit) states only that "[t]he jury found against Johnson on his cross-complaint, thus entitling them to indemnification for

those fees and costs." (3-ER-914, underlines added.) The Derivative Suit asserted no claim against Partner-Defendants for using company funds to defend *itself*.

California Corp. Code §317(e) expressly requires that "any indemnification" prior to judgment "shall be made by the corporation only if authorized in the specific case, upon a determination that… the agent has met the applicable standard of conduct" by (1) a majority vote of directors or shareholders "who are not parties" to the action, (2) "independent legal counsel in a written opinion", or (3) the court in which the proceeding is pending. The complaint states that Partner-Defendants used Storix funds to defend the Derivative Suit "without approval from any independent or disinterested authority." (5-ER-1082 ¶34.) Partner-Defendants deprived used Johnson his 40% of Storix's profits throughout the entirety of the state actions (and since) for their personal defense and to take other legal actions against Johnson to conceal their misconduct and protect their collective majority control of his company. (5-ER-1085 ¶¶46-47.)

The complaint contains sufficient allegations, including Partner-Defendants' duty to Johnson as majority shareholders and business partners (5-ER-1082 ¶31), to state a claim for breach of fiduciary duty.

5. The Breach of Contract and Rescission Claims

The complaint states that, in February 2003, "Johnson entered into an oral contract with Storix upon its formation, wherein Storix was granted rights to

market, sell, copy, distribute and license SBAdmin to third-parties in exchange for future compensation for the copyrights if or when Johnson's participation in Storix ended." (5-ER-1076 ¶¶10-11.) The facts in the complaint are consistent with Storix's answer and counter-claim in the Copyright Suit, wherein Storix admitted that Johnson "granted Storix, Inc. a *license* to use, sell, distribute, license and create (and commercialize) derivative works from the Original Software." (3-ER-465 ¶12, italics added.) "There is sufficient evidence that a contract has been made [… if] the party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made." Cal.Civ.Code §1624(b)(3)(C). "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Cal.Civ.Code §1589.

The district court's order repeatedly refers to allegations of a "transfer of ownership in the copyrights." (1-ER-47-49.) But nowhere does the complaint reference a transfer of *ownership*. Rather than referring to the 2003 oral agreement alleged in the complaint, the court refers to its own 2015 judgment in the Copyright Suit, wherein a jury decided that Johnson transferred ownership of his copyrights to Storix "in writing." (1-ER-47.) The court therein decided the ownership transfer was effectuated when Johnson signed the Storix "Annual Report" in 2004, which it found to be a "signed, written document" that constituted

a Copyright Act §204(a) assignment since it referenced a transfer of assets "broad enough to include the copyrights." (3-ER-481.) The court also found that, in the Annual Report, "[i]t was not necessary for Defendant Storix to provide a writing that recited details regarding price, consideration, negotiated terms, reproduction rights, or other 'magic words.'" (*Id*.)

The 2003 oral contract allowed Storix to defer its obligation to compensate Johnson for the "rights" it received until he was no longer involved in the company. "Johnson continually performed his obligation under the contract … for 15 years, during which time all profits of Storix were derived from the sales of SBAdmin." (5-ER-1076 ¶11.) In 2018, Johnson's board resignation finally triggered Storix's obligation to compensate him for the rights it obtained under the oral contract even if such rights were later expanded "in writing" to include full ownership of his copyrights. (5-ER-1081 ¶29.)

a) The claims for Breach of Contract and Rescission are not barred by res judicata.

The judgment Storix obtained in the Copyright Suit is inconsistent with its current argument, which the district court nevertheless accepted in finding the "current claims for breach of contract and rescission arise out of the same common nucleus of operative [facts] as the claims for *copyright infringement*" – specifically that "the issue of the *transfer of ownership* of the copyrights from Johnson to Storix was necessarily decided in the prior action[.]" (1-ER-49; italics added.) The

argument is confusing because copyright infringement and ownership claims are mutually exclusive. Johnson sued Storix for infringement and Storix sued Johnson for a declaration of ownership to defeat the infringement claim. Johnson is not relitigating an infringement or ownership claim and does not dispute any of the court's prior findings.

(1) Breach of Contract

The breach of contract claim did not *arise* from the same "common nucleus of operational facts" as the infringement claim. It arose from Storix's refusal to perform its contractual obligation to compensate Johnson for the rights it was provided. The jury decided the infringement claim was "barred because Anthony Johnson transferred ownership of [SBAdmin] in writing from himself to Storix." (3-ER-474.) But "the jury did not reach the question of whether Johnson was compensated for his copyrights." (5-ER-1079 ¶22.)

Nothing in the complaint contradicts the Copyright Suit judgment that Johnson's infringement claim was barred by Storix's declaratory judgment of copyright ownership. The 2003 oral agreement between Johnson and Storix involved non-exclusive rights, and the declaration was that all exclusive and irrevocable rights (i.e. ownership) were transferred to Storix in writing in 2004. If the rights had remained non-exclusive licenses, Storix could have paid Johnson a

license fee from its ongoing sales after his participation in the company ended. The judgment requires that Storix compensate him for ownership rights instead.

The court also found "the breach of contract claim could have and should have been brought in the [Copyright Suit]." (1-ER-48.) This fails for numerous reasons: (1) Johnson could not demand payment for copyright ownership in the same suit in which he claimed infringement of non-exclusive licenses; (2) Johnson could not have included a state contract claim in the Copyright Suit because diversity jurisdiction was unavailable to him; and (3) the claim for breach of contract didn't accrue until Storix's obligation was triggered and payment was refused three years after the Copyright Suit was tried.

(2) Rescission

The court found *sua sponte* that the "rights established in the prior lawsuit would be impaired by the prosecution [of] Plaintiff's present claims." (1-ER-47.) The judgment in the Copyright Suit didn't *establish* Storix's right to copyright ownership. It merely confirmed that Storix's ownership rights were established when Johnson signed the Annual Report in 2004.

Johnson has every right to rescind a contract if Storix fails to perform its obligation. "A party to a contract may rescind the contract … [i]f the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause." Cal.Civ.Code §1689. A party that accepts the

benefits of an oral contract is unjustly enriched if the contract is not enforced. *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 625-626. Johnson's rescission cause of action includes a claim of unjust enrichment. (5-ER-1089 ¶66.) "The elements of an unjust enrichment claim are the 'receipt of a benefit and [the] unjust retention of the benefit at the expense of another.'" *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593 (citation omitted.) Storix cannot refuse to perform its obligation to compensate Johnson *and* retain the property and unjust enrichment obtained under the contract at Johnson's continued expense.

b) The Breach of Contract and Rescission claims are not barred by issue preclusion.

The district court found the claims barred by issue preclusion because "the issue of the transfer of ownership of the copyrights from Johnson to Storix was necessarily decided in the prior action, and the doctrine of issue preclusion bars the re-litigation of that issue." (1-ER-49.) Again, Johnson doesn't dispute the issue of copyright ownership, and the contract claims don't require the transfer to be relitigated. The contract claims involve no facts or issues contrary to those "actually litigated and necessarily decided" in the Copyright Suit. *See DKN Holdings, supra*, 61 Cal.4th at 825.

c) The Copyright Act does not bar the Breach of Contract and Rescission claims.

In dismissing all contract-related claims, the district court argued that "'Section 204(a) not only bars copyright infringement actions but also breach of contract claims based on oral agreements.'" (1-ER-49, quoting *Valente-Kritzer Video v. Pinckney* (Valente) 881 F.2d 772, 774 (9th Cir. 1989).) The *Valente* court ruled that the oral agreement involved *exclusive* copyrights, thereby rendering it "unenforceable" because only non-exclusive rights may be granted by oral agreement. *Valente* at 774-775. Section 204(a) doesn't bar breach of contract claims brought under state law; it simply doesn't allow oral contract involving exclusive copyrights to be enforced under the Copyright Act.

"Section 204(a) requires that in order for a transfer of ownership in a copyright to be valid, 'it must be in writing.'" *Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 825 (9th Cir. 2001). "[The] writing requirement applies only to the transfer of exclusive rights; grants of nonexclusive copyright licenses need not be in writing." *Id.* at 825-826. Storix admitted in its answer and counter-claim in the Copyright Suit that Johnson granted it non-exclusive copyright "licenses" when he formed the company. The jury's verdict, confirmed by the district court's finding that the Annual Report constituted a valid writing transferring copyright ownership, didn't alter the oral contract that took place a year earlier. Even if the Annual Report served as "evidence [of] the contract by a

written instrument [it would] not interfere with the force and effect of the oral agreement." *Nolte v. Southern Cal. Home* Building Co. (1938) 28 Cal.App.2d 532, 534.

The district court apparently equated the oral contract to the ownership transfer, thereby finding it "unenforceable" because it was not in writing. Even so, "restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was … unenforceable or ineffective for some reason." *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387. Furthermore, "[t]he doctrine of promissory estoppel prevents unconscionable injury [that] would result from denying enforcement after one party has received the benefits of the other's performance." *Day v. Greene* (1963) 59 Cal.2d 404, 409-410. "Where ... there has been full performance upon the part of the party seeking to enforce the contract, the doctrine of estoppel arises." *Marr v. Postal Union Life Ins. Co*. (1940) 40 Cal.App.2d 673, 679.

Lastly, the contract claims are not barred by the Copyright Act because "[a] mere allegation of breach of contract does not create federal jurisdiction, even if the contract involves copyright." *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 584 (9th Cir. 1993). "If the suit is one brought to enforce a right based upon a contract which relates to a copyrighted production, the suit is one which arises out of the contract and is not one arising under the copyright statute[.]" *Durgom v. Janowiak*

(1999) 87 Cal.Rptr.2d 619, 623 (quotation and marks omitted). Simply put, Johnson is suing for non-payment under the contract, so the Copyright Act is not implicated. This is a state diversity action, not a federal copyright action.

d) Partner-Defendants can be held liable for Storix's breach and its failure to return the consideration Johnson provided.

The court decided, "even assuming Plaintiff was able to allege an oral contract between Storix," the claim fails because he "does not allege these defendants are parties to the contact at issue." (1-ER-50.) This is contradicted by Partner-Defendants defense to the contractual interference claim in which they argue that they are "agents of Storix and therefore cannot be liable for interfering with what is essentially *their own contract*." (4-ER-770-771; italics added.) Johnson expected they would hide behind their Storix alter-ego, so he brought the contractual interference claim against them as an alternative. As to each contract-related claim, the complaint states that, "[b]ecause Partner-Defendants were in majority control of Storix and rendered Storix insolvent by taking all [money/unjust enrichment] Storix [obtained/owed to Johnson] for their personal benefit, Partner-Defendants are personally liable for [consideration owed/restitution/ reimbursement] that Storix is unable to afford." (5-ER-1088-1090 ¶¶61,67,71.) The allegations can be supported with legal authority, but Johnson need not do so at this time since they're currently undisputed.

6. The Economic Interference Claims

a) The claim of Intentional Interference in Contractual Relations is not barred by issue preclusion.

Johnson brought this claim against Partner-Defendants as an alternative to his breach of contract claim against Storix. The district court reraised the *sua sponte* defense that Johnson is attempting to relitigate "the issue of the transfer of copyrights from SBAdmin to Storix." (1-ER-52.) Again, there are no facts in the complaint regarding a copyright ownership transfer, and this claim involves no dispute of any issues litigated or decided in the Copyright Suit.

The court raised another defense *sua sponte* that "corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." (1-ER-53, citing *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24.) *Shoemaker* and the other cases cited in the order rely on the "agent immunity rule" that applies only when an agent is acting "for and on behalf of the corporation" (*Ibid*) and "in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd*. (2004) 7 Cal.4th 503, 512, fn.4. Whether Partner-Defendants are immune from liability is dependent on a factual issue that must be decided by a jury – whether their acts were for Storix's benefit or their own. The undisputed facts of the complaint, taken as true, support the latter.

b) The facts in the Intentional Interference in Prospective Economic Advantage claim are not speculative and support an existing relationship.

Partner-Defendants argued, and the court decided, that Johnson did not have an existing relationship with Veeam Software, a Storix competitor that offered to buy all outstanding stock in the company (1-ER-54, 4-ER-771), and "the potential relationship between Veeam and Storix is too speculative." (1-ER-54-55.)

The complaint alleges facts showing (1) an offer of $5 million, (2) a letter of intent, (3) Partner-Defendants' attempt to extort Johnson with the threat of continued litigation and deepening financial hardship if he didn't agree to their personal demands as part of the deal; and (4) that their acts caused Veeam to withdraw its offer. (5-ER-1080 ¶25, 56.) Veeam's intent was to purchase all outstanding stock from Storix's shareholders, including Johnson, who stood to make $2 million from the deal. A relationship must have existed before a specific offer and letter of intent were provided.

The facts are sufficient to satisfy all elements of the cause of action. Even if the allegations were too speculative, the court should have granted Johnson leave to amend to make them less so. In any event, if a factual dispute exists as to whether a relationship existed, it's an issue for a jury to decide.

B. ANY FURTHER PROCEEDINGS SHOULD BE REMANDED TO A DIFFERENT DISTRICT COURT JUDGE

Johnson understands that the Court frowns on allegations of actual bias, so he first asks the Court to find the case transfer was improper or that Judge Huff should have recused herself based on the appearance of or potential for bias.

Johnson doesn't ask the Court to reverse or vacate the order denying the transfer and recusal, since doing so would only start the entire case over from scratch. If, however, the Court does not wish to rule on the dismissal of all the claims, Defendants' existing motions should be reheard by the district court judge originally assigned to the case without further delay or briefing.

Judge Huff's animosity toward Johnson was well-documented prior to this case. Johnson tried to prevent any further due process violations but must now ask the Court to review the case transfer and denial of disqualification in light of Judge Huff's actions in this case as set forth above. "[A]sserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case." *Betts v. Brady*, 316 U.S. 455, 462 (1942).

1. Judge Huff Transferred This Case to Her Court on Improper Grounds

In June 2019, this case was originally assigned to Hon. Judge Janis L. Sammartino. Soon thereafter, the district court clerk issued a report and "Order of Transfer" based on the "Low-Number Rule" indicating the case was related to the

Copyright Suit that terminated at trial in 2015. The order was signed by Judge Huff transferring the case to her court. (1-ER-78.)

"The clerk must […] ascertain whether any one or more civil actions or proceedings *pending* or any one or more currently filed appear (1) to arise from the same or substantially identical transactions, happenings, or events; or (2) involve the same or substantially the same parties or property, […] or (4) call for determination of the same or substantially identical questions of law; […] or (6) for other reasons would entail substantial duplication of labor if heard by different judges." CASD Local Rule 40.1(e). The Order of Transfer indicates that each of these criteria applied.

The purpose of the "Low-Number Rule" is to potentially consolidate related cases for judicial efficiency. "When actions involving a common question of law or fact are pending before the court, it ... may order all the actions consolidated... ." CASD Local Rule 42(a). The Order of Transfer indicates the cases "are not CONSOLIDATED at this point." (1-ER-78.) The transfer was improper because (1) the Copyright Suit was not pending or concurrently filed, (2) the parties are not substantially similar, and (3) there are no questions of fact or law in this case that were (or can be) litigated or decided in the Copyright Suit.

Importantly, there was no notice of related cases filed by any party. *See* CASD Local Rules 40.1(f) and (g). There was no reason for the clerk to locate any

terminated (rather than pending) cases between Johnson and each defendant (Storix being listed last), and then read both complaints to determine if they raise similar claims or issues. Even so, a quick glance would reveal the cases are unrelated.

In Johnson's motion to recuse, he asked that the order transferring the case be vacated on the above grounds. Judge Huff ordered party briefing, indicating that "Defendants should address Plaintiff's contentions that the low number rule does not apply[.]" (5-ER-945.) Only Storix replied that "the entire premise of [Johnson's] new claim is that he is owed money for the transfer of the same SBAdmin copyright that the parties litigated in [the Copyright] case." (3-ER-432.) They did not explain how this made the lawsuits related or how the current claims should be consolidated with the Copyright Suit (the low-numbered case). Judge Huff refused to vacate the case transfer solely because "the present action was properly assigned to this Court under the low number rule, Civil Local Rule 40.1(e)(2) and (i). The present action and the prior action [] both involve some of 'the same parties.'" (1-ER-76.)

A transfer requires that the cases "involve the same or *substantially the same* parties." CASD Local Rule 40.1(e) (italic added). One of the criteria defining "related actions" is that they "[i]nvolve some of the same parties *and* are based on the same or similar claims." *See* CASD Local Rule 40.1(g) (italics added.) Storix

was the sole defendant in the Copyright Suit. Neither copyright infringement nor ownership are at issue in this case, and no issues related to Johnson's current claims were decided in the Copyright Suit. Importantly, this case cannot be consolidated with one that terminated years before it was filed.

The "low number rule" was applied in a way to ensure that this and any future litigation between Johnson and Storix (or its agents) will always be heard by Judge Huff. This undermines the purpose of "the random selection system that governs the assignment of new cases to active judges." *See* CASD Local Rule 40.1(c). Judge Huff's determination to be the sole arbitrator of Johnson's claims further demonstrates a need to assign the case to a different judge.

2. Judge Huff Improperly Denied Johnson's Motion to Recuse

Johnson brought a motion to recuse Judge Huff under 28 USC §144 and §455 accompanied by a declaration stating relevant background history and grounds for recusal under both statutes. (5-ER-947, 969.)

a) Johnson's declaration was not insufficient.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. §144. Without reference to the declaration, Judge

Huff found it insufficient because "Plaintiff's affidavit is based entirely on this Court's judicial rulings, analysis, and opinions made during the course of the prior proceedings." (1-ER-75.)

Johnson's declaration noted certain adverse rulings, but it was not *based* on those rulings. Regardless, recusal may be warranted based on "the cumulative effect of the district court's numerous unfavorable rulings", but "is not required if bias or prejudice arose from conduct or rulings made during the course of proceedings." *Ketab Corp. v. Mesriani & Assocs., P.C.*, 734 F.App'x 401, 411 (9th Cir. 2018) (unpublished). The declaration doesn't allege bias that *arose* from any proceedings. It simply referred to prior rulings and transcripts of proceedings to show that Judge Huff repeatedly ignored relevant facts and issues that weighed against awarding fees in the Copyright Case to the same attorneys now being sued for malicious prosecution.

For instance, Judge Huff based the unprecedented $543,704 attorney fee award against Johnson in the Copyright Suit entirely on three emails she found merely inappropriate, while blindly accepting Attorney-Defendants' unsupported assertion that Johnson's motivation was to destroy Storix. The declaration shows that, even after the Ninth Circuit reversed the fee award as excessive, Judge Huff reissued the award at $419,193 despite new facts and evidence presented on remand showing the entire basis for the award was since disproven in the state

litigation. Judge Huff was aware that (a) Storix claimed only $3,739 in damage from the same email the entire fee award was based on; (b) Johnson funded the Derivative Suit *on Storix's behalf* simultaneously with the Copyright Suit; (c) the attorneys had already been paid Johnson's 40% of company profits to defend the Copyright Suit; and (d) Johnson would have to sell his house to pay them again. (5-ER-972-974 ¶¶15,20-24; 5-ER-1045-1059.) It was not improper for Johnson to allege bias based, in part, on an unprecedented attorney fee award founded entirely on disproven facts and matters outside the scope of the copyright litigation.

Most importantly, the declaration states "facts demonstrat[ing] the litigation misconduct, false representations, and conflict-of-interest of the defendants Judge Huff previously refused to acknowledge, particularly their obstructing and defending *against Storix's claims* in the Derivative Suit." (5-ER-972-974 ¶¶18-22.) The declaration concludes that Johnson "[does] not believe Judge Huff can impartially hear a case involving a malicious prosecution claim against the Attorney-Defendants after she turned a blind eye to their misconduct in the litigation that is now the basis of the malicious prosecution claim[.]" (5-ER-976 ¶32.)

Johnson's affidavit only needed to state that "the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of

any adverse party." 28 U.S.C. §144. The declaration was a sufficient affidavit that provided substantial facts and evidence to support the motion for disqualification.

b) Judge Huff could not have reasonably been expected to be impartial in this case.

"'The substantive standard for recusal under 28 U.S.C. §144 and 28 U.S.C. §455 is the same: Whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012) (quoting *United States v. Hernandez,* 109 F.3d 1450, 1453 (9th Cir. 1997) (per curiam)). "Under §455(a), impartiality must be 'evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance.'" *United States v. Carey*, 929 F.3d 1092, 1104 (9th Cir. 2019) (quoting *Liteky v. United States*, 510 U.S. 540, 548 (1994) (Liteky)); see *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993) ("[R]ecusal will be justified either by actual bias or the appearance of bias.") By finding the declaration insufficient, Judge Huff prevented another judge from hearing the motion, so there was no objective basis in denying her recusal.

Partner-Defendants argued, "[i]n this case, Johnson is simply unhappy with past rulings of the court, and wants to forum shop for a potentially more sympathetic audience." (3-ER-430.) Yet, Johnson was the only party willing to leave the case where it was assigned. They misconstrued *Liteky, supra,* 510 U.S. at 555 in saying that "rulings and opinions based on facts and evidence introduced in

a prior proceeding tried to jury verdict are insufficient to provide grounds for recusal." (3-ER-435.) This was apparently derived from the sentence: "judicial rulings *alone* almost never constitute a valid basis for a bias or partiality motion." *Likety* at 555 (italic added).

Attorney-Defendants cite *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010) to argue that Johnson failed to point to an extrajudicial source to establish bias. (*See* 3-ER-429-430.) But, in that case, the Court found that "extrajudicial sources are neither necessary nor sufficient alone to warrant recusal on bias or prejudice grounds." *Ibid*. (citing *Liteky, supra,* 510 U.S. at 543-544).

Johnson's motion was supported by argument, authority, facts and evidence sufficient to show, at the very least, that a reasonable person might question Judge Huff's ability to be impartial in this case. *See United States v. McTiernan*, *supra*, 695 F.3d at 891.

c) Judge Huff denied her recusal without addressing any of Johnson's issues.

Judge Huff recited appellees' general assertion that Johnson "fail[ed] to identify any extrajudicial source for the alleged bias" (1-ER-72) and that his "allegations of bias stem entirely from this Court's adverse rulings and analysis in the prior [Copyright Suit] on the issue of attorney's fees." (1-ER-73, citing *United States v. Johnson*, *supra*, 610 F.3d at 1148.)

The order states that "'judicial rulings' and 'opinions formed by the judge on the basis of facts introduced or events occurring in the course' of the proceedings almost never constitute a valid basis for a motion to recuse." (1-ER-74, quoting *Liteky*, *supra*, 510 U.S. at 555.) But the remainder of the sentence says: "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Ibid.* Johnson showed numerous instances where "Judge Huff made unwarranted and unsupported comments about his character and intentions and refused to acknowledge any evidence to the contrary." (5-ER-958-960.) Judge Huff formed her opinions based solely on bald assertions by the Attorney-Defendants, and she maintained those opinions even after they were disproven in the state trials. (5-ER-1080 ¶26; 5-ER-976-977 ¶31-32.) Her ignorance of facts and expressed vitriol toward Johnson were "so extreme as to display clear inability to render fair judgment" and demonstrated a "deep-seated ... antagonism that would make fair judgment impossible." *Liteky, supra*, 510 U.S. at 555.

"[T]he Court's precedents on judicial bias focus on the *appearance of and potential for* bias, not actual, proven bias." *Hurles v. Ryan*, 650 F.3d 1301, 1310 (9th Cir. 2011) (italics in original.) The Court need not find actual bias, but it should find sufficient cause for Judge Huff's recusal based on the appearance of or potential for bias and remand further proceedings to a different district court judge.

3. Judge Huff Demonstrated Bias in This Case

If the Court does not find a reasonable potential for bias existed prior to this case, then it should consider Judge Huff's actions since. She unnecessarily delayed this case for two years while ordering three sets of briefings on the same motions to dismiss Johnson's original complaint, eventually dismissing all nine claims with prejudice, without any hearings, and before any evidence could be presented. Judge Huff has still not acknowledged the allegations of attorney misconduct relevant to the current claims.

Judge Huff distorted facts in the complaint, refused to acknowledge Johnson's arguments or authority, raised many legal and affirmative defenses *sue sponte* on behalf of all appellees that Johnson had no opportunity to dispute, and conducted extensive research to provide 40 inapt cases to support their poorly pled briefs.

"[A]llowing courts *sua sponte* to invoke collateral-attack waivers contravenes 'the usual rule in our party-presentation system,' which 'requires the parties to invoke their own claims and defenses.' [Citation.] 'If a court engages in what may be perceived as the bidding of one party by raising claims or defenses on its behalf, the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice.'" *United States v. Sainz*, No. 17-10310 (9th Cir. Aug. 12, 2019), quoting *Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir.

2017). "'The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.'" *Ibid*., quoting *United States v. Burke*, 504 U.S. 229, 246 (S.Ct. 1992).

If the Court finds insufficient reason to recuse Judge Huff based on the appearance of or potential for bias, then her repeated violations of Johnson's constitutional right to due process in the current proceedings warrant remanding any further proceedings to a different district court judge.

CONCLUSION

The orders dismissing all claims should be reversed and further proceedings should be remanded to the originally assigned judge or another randomly assigned judge.

Dated: August 2, 2021

Respectfully Submitted,

s/Anthony Johnson
Anthony Johnson
Pro Se Appellant

Ninth Circuit Case Number(s): No. 21-55614

STATEMENT OF RELATED CASES

Appellant is not aware at this time of any cases pending in the Ninth Circuit that are related to this action as that term is defined in Circuit Rule 28-2.6.

s/Anthony Johnson
Anthony Johnson
Pro Se Appellant

Ninth Circuit Case Number(s): No. 21-55614

CERTIFICATE OF COMPLIANCE FOR BRIEFS

I hereby certify that:

1. I am a self-represented party.

2. This brief contains 13,408 words, excluding the items exempted by Fed. R. App. P. 32(f), which complies with the word limit of Cir. R. 32-1.

3. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on August 2, 2021 By: s/Anthony Johnson

Anthony Johnson
Pro Se Appellant

Ninth Circuit Case Number(s): No. 21-55614

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

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Anthony Johnson
Pro Se Appellant