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6 Attorneys for Defendants,
7 Manuel Altamirano, Richard Turner, David Kinney and David Huffman

8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 ANTHONY JOHNSON, an individual,)
12 Plaintiff,)

13 vs.)

14 MANUEL ALTAMIRANO, an)
individual, RICHARD TURNER, an)
15 individual; DAVID KINNEY, an)
individual, DAVID HUFFMAN, an)
16 individual, PAUL TYRELL, an)
individual, SEAN SULLIVAN, an)
17 individual, STORIX, INC., a California)
Corporation and DOES 1-5, inclusive,)
18 Defendants.)

Case No. 19CV1185-H-BLM

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
DISMISS PLAINTIFF'S
COMPLAINT**

Hearing Date: October 7, 2019
Hearing Time: 10:30 a.m.

Judge: Hon. Marilyn L. Huff
Dept.: Courtroom 15A

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

21 Defendants Manuel Altamirano, Richard Turner, David Kinney, and David
22 Huffman (collectively, "Defendants") hereby submit their Reply in support of their
23 Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6).

24 **I. INTRODUCTION**

25 Defendants Motion to Dismiss should be granted, without leave to amend,
26 based on Plaintiff Anthony Johnson's ("Johnson") own pleadings and judicially
27 noticeable facts confirming Johnson has failed to state a claim for relief against
28 Defendants on all causes of action asserted in his Complaint. Johnson's opposition

1 fails to provide any applicable authority for his position but instead relies on
2 conclusory allegations of law Johnson asserts as fact. Johnson's opposition is
3 premised on inapplicable law and a complete mischaracterization of decisions of this
4 Court and decisions from the state court consolidated actions. Defendants
5 respectfully request the Court grant their motion to dismiss without leave to amend
6 and put an end to Johnson's litigation campaign against Defendants.

7 **II. DISCUSSION**

8 **A. Claim 1: The Underlying Judgment Did Not Terminate In Johnson's** 9 **Favor**

10 The judgment in the prior action is "the criterion by which to determine who
11 was the successful party." *Crowley v. Katleman*, 8 C4th 666, 684-686 (1994).
12 Johnson, however, completely ignores the reality of the underlying action (and
13 judgment) and instead asserts he is entitled to sever certain claims when analyzing
14 favorable termination. The cases Johnson asserts support this severability rule,
15 however, were specifically addressed in *Lane v. Bell*, 20 Cal.App.5th 61 (2018) and
16 previously by the California Supreme Court in *Crowley v. Katleman*, 8 C4th 666
17 (1994). In sum, there is no severability rule when determining favorable termination.
18 A favorable termination must be to the entire underlying action, and here, judgment
19 was entered in favor of Storix, Inc. ("Storix"). Johnson's cannot state a cause of
20 action for malicious prosecution.

21 The *Lane* case, decided in 2018, called out and discussed the cases, which
22 Johnson contends creates a severability rule. *See Lane*, 20 Cal.App.5th at 75-78. The
23 *Lane* court thoroughly analyzed the progeny of cases since *Albertson v. Raboff*, 46
24 Cal.2d 375 (1956) and *Crowley* and correctly concluded severability analysis does
25 not apply to the favorable termination element of a malicious prosecution claim.
26 Here, the judgment as a whole in the underlying action did not terminate in Johnson's
27 favor as required by *Crowley* and *Lane*. As a result, Johnson cannot satisfy the first
28 gate keeping element of a malicious prosecution claim. Because Johnson cannot

1 satisfy this gate keeping element, the Court need not consider the probable cause¹
 2 and malice elements of malicious prosecution. *See Lane*, 20 Cal.App.5th at 64.

3 **B. Claim 2: Johnson’s Conclusory Allegations and Arguments Do Not**
 4 **State a Cause of Action for Breach of Fiduciary Duty**

5 In his Opposition, Johnson fails to rebut Defendants’ grounds forming the
 6 basis for their Motion to Dismiss. For example, Johnson concludes “Defendants, as
 7 majority shareholders in a close corporation, have a fiduciary duty to minority
 8 shareholders (Complaint ¶ 31) and are thus liable for any injuries they impose on the
 9 minority.” (Opposition, p. 9.) Johnson continues by referencing a shareholder
 10 agreement and discussing the alter ego doctrine. (*Id.*) But Johnson never cites to any
 11 acts of Defendants that would result in personal liability for the allegations
 12 supporting his breach of fiduciary duty claim. It is therefore unclear what facts and
 13 authority, if any, Johnson believes entitle him to maintain a breach of fiduciary duty
 14 claim against Defendants.

15 With respect to Johnson’s attempt to avoid a complete bar to his breach of
 16 fiduciary duty claim based on *res judicata*, Johnson simply concludes “[t]here are no
 17 claims in Johnson’s cross-complaint related to litigation expenses, and nothing in the
 18 Derivative Suit or any court order refers to legal actions of funds taken by
 19 Defendants to defeat the Derivative Suit itself. (Opposition, p. 13.) Defendants’
 20 Motion, however, cites to judicially noticeable facts establishing Johnson’s claim for
 21 breach of fiduciary duty is barred by *res judicata*. It is clear from the judgment in the
 22 Direct Suit and Derivative Suit that Johnson is simply re-litigating that which has
 23 already been decided. Johnson has failed to state a cause of action for breach of
 24 fiduciary duty.

25 **C. Claim 3: Johnson’s Claim for Conversion is not Plausible**
 26

27 _____
 28 ¹ Johnson asserts Defendants did not cite to any underlying order in support of the interim adverse judgment rule.
 (Opposition, p. 8.) Defendants, however, cited to an order on Johnson’s Motion for Summary Judgement. (Motion, p.
 6, RJN, Ex. 2.) Johnson’s arguments are therefore without merit and fail to directly address Defendants Motion.

1 “For a complaint to survive a motion to dismiss, the non-conclusory factual
2 content, and reasonable inferences from that content, must be plausibly suggestive of
3 a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969
4 (9th Cir. 2009) (quotations omitted). Here, Johnson’s allegations are not plausibly
5 suggestive of a claim for conversion. Johnson asserts he was prevented from
6 accessing financial records “which would have raised his suspicions and provided a
7 reasonable opportunity for Johnson to discovery this fact earlier.” (ECF No. 1, ¶ 30.)
8 But Johnson has always been a shareholder, and a director from 2015-2018, of Storix
9 and entitled to inspect the books and records of the company. For Johnson to claim
10 he could not have discovered an alleged conversion of the magnitude he claims was
11 converted is not reasonable under the circumstances. Johnson cannot therefore hide
12 behind the delayed discovery rule. Johnson’s claim for conversion is nothing more
13 than a continuation of Johnson’s litigation campaign against Defendants and Storix.
14 Johnson’s conversion claim is barred by the statute of limitations.

15 **D. Claim 4: Johnson Misconstrues the Copyright Action Ruling**

16 Johnson seeks to impose upon Defendants knowledge of an oral contract
17 between himself as the author of the copyrighted material, and Johnson as the sole
18 shareholder, officer, and director of Storix. Johnson asserts that Storix “agreed to
19 transfer copyright ownership to Storix via an oral assignment” and “obtained
20 judgment on Storix’s behalf in the copyright litigation based on their assertion of an
21 oral contract between Johnson and Storix.” (Opposition, p. 15.) But this assertion is
22 a complete mischaracterization of this Court’s ruling in the Copyright Action. Rather,
23 in the Copyright Action, Johnson never asserted any right to a payment for the
24 copyright triggered by his severing ties with Storix. To assert such a claim now
25 highlights the frivolousness of this claim and action. This Court is well aware of the
26 underlying facts and rulings in the Copyright Action and should dismiss Johnson’s
27 claim for economic interference.
28

1 **E. Claims 5 – 7: Johnson’s Opposition Continues to Misconstrue The**
 2 **Previous Rulings Establishing Res Judicata**

3 Defendants’ have cited to substantial judicially noticeable facts establishing
 4 the prior rulings in Johnson’s previous lawsuits against Defendants. Thus, when
 5 Johnson makes statements such as a “jury found that Johnson didn’t commit the
 6 alleged wrongful act” or as a director, Johnson “successfully defend[ed] a claim”
 7 entitling him to indemnification, the Court can clearly see that such claims are
 8 directly contrary to the previous court orders. (Opposition, pp. 23, 24.) Johnson’s
 9 claims for breach of contract, rescission, and indemnification are first improperly
 10 asserted against Defendants, and second barred by *res judicata*. For the reasons set
 11 forth succinctly in Defendants moving papers, Defendants request the Court dismiss
 12 Johnson’s fifth, sixth, and seventh claims.

13 **III. CONCLUSION**

14 For all the reasons set forth in Defendants’ moving papers and herein,
 15 Defendants respectfully request the Court dismiss Johnson’s entire Complaint
 16 without leave to amend. Johnson has not stated a claim for any relief for a variety of
 17 reasons but primarily because he is simply re-litigating that which was already
 18 decided in this Court and in the Direct and Derivative Suits. Johnson’s arguments in
 19 opposition ignore the realities of the underlying actions and confirm the existence of
 20 a never ending litigation campaign to destroy Storix and its employees. Johnson has
 21 not stated a cognizable legal theory upon which relief can be granted and therefore
 22 his Complaint should be dismissed without leave to amend.

23 Dated: September 30, 2019

**WILSON, ELSER, MOSKOWITZ,
 EDELMAN & DICKER LLP**

25 /s/ Marty B. Ready, Esq.
 26 By: Michael P. McCloskey, Esq.
 Marty B. Ready, Esq.
 Attorneys for Defendant
 27 Manuel Altamirano, Richard Turner,
 David Kinnev and David Huffman
 28

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18 Defendant.)
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Case No. 19CV1185-H-BLM

CERTIFICATE OF SERVICE

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1 *Anthony Johnson v. Manuel Altamirano, et al.*
United States District Court, Southern District Case No. 19CV1185 JLS JLB

2
3 **CERTIFICATE OF SERVICE**

4 I, the undersigned, am employed in the county of San Diego, State of California. I am over
5 the age of 18 and not a party to the within action; my business address is 401 West A Street, Suite
1900, San Diego, California, 92101.

6 On September 30, 2019, I caused to be served the following document(s) described as
7 follows:

8 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS
9 PLAINTIFF'S COMPLAINT**

10 on the following parties in this action:

11 ***Plaintiff, Pro Se***

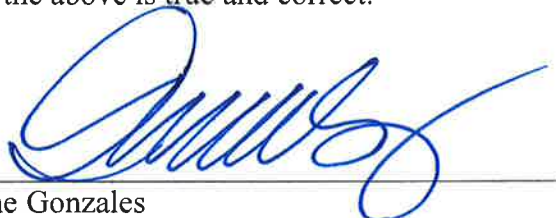
12 Anthony J. Johnson
1728 Griffith Avenue
Las Vegas, NV 89104
Telephone: (619) 246-6549
Email: flydiversd@gmail.com

13 By the following method of service:

14
15 **BY MAIL** - As follows: I am "readily familiar" with the firm's practice of collection and
16 processing correspondence for mailing. Under that practice it would be deposited with the
17 U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego,
18 California in the ordinary course of business. The envelope was sealed and placed for
collection and mailing on this date following our ordinary practices. I am aware that on
motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in affidavit.

19 **BY E-MAIL OR ELECTRONIC TRANSMISSION** - Based on a court order or an
20 agreement of the parties to accept service by e-mail or electronic transmission, I caused the
21 documents to be sent to the persons at the e-mail addresses listed below. I did not receive,
within a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

22 Executed on September 30, 2019, at San Diego, California. I declare under penalty of
23 perjury under the laws of the State of California, that the above is true and correct.

24
25 
26 Irene Gonzales