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13 UNITED STATES DISTRICT COURT

14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

15 ANTHONY JOHNSON, an individual,
16 Plaintiff,

17 v.

18 MANUEL ALTAMIRANO, an individual,
19 RICHARD TURNER, an individual,
20 DAVID KINNEY, an individual, DAVID
21 HUFFMAN, an individual, PAUL
22 TYRELL, an individual, SEAN
23 SULLIVAN, an individual, STORIX, INC.,
24 a California corporation, and DOES 1-5,
25 inclusive,

26 Defendants.

Case No. 19-cv-01185 H (BLM)

**OPPOSITION OF DEFENDANTS
STORIX, INC., PAUL TYRELL &
SEAN SULLIVAN TO PLAINTIFF
ANTHONY JOHNSON'S
MOTION FOR STAY OF TRIAL
COURT PROCEEDINGS**

Complaint Filed: June 24, 2019
Judge: Hon. Marilyn L. Huff
Court: Courtroom 15A

I. INTRODUCTION

1
2 Plaintiff Anthony Johnson seeks to stay his own claims on two grounds. First,
3 he argues the case should be stayed pending the outcome of his petition for writ of
4 mandamus challenging this court's denial of his motion for recusal. Second, he seeks
5 a stay to avoid dismissal of his specious malicious prosecution claims pending
6 resolution of his state court appeal of the predicate litigation. Neither argument
7 warrants a stay of this action.

8 Johnson's pursuit of a petition for writ of mandamus should not delay the
9 proceedings in this court. Johnson cites no authority for the proposition that his
10 challenge to the denial of his recusal motion should delay this action. He simply fails
11 to meet his burden of justifying a stay on such grounds.

12 Likewise, his appeal to the California Court of Appeal of the judgment against
13 him in the litigation underlying his malicious prosecution does not justify staying
14 this action. The determination of the issues on appeal in the state court will have no
15 bearing on the merits or dismissal of Johnson's malicious prosecution claim. While
16 Johnson argues that "favorable termination of the entire underlying action may still
17 be determined by the appeal," (Mot. at p. 5), he disregards the interim adverse
18 judgment rule, which bars his claims even if the underlying case is overturned on
19 appeal and even if he were to succeed in a retrial.

II. ARGUMENT & AUTHORITIES

A. Johnson Has Not Met His Burden in Seeking a Stay Based on His Petition for Writ of Mandamus

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23 After this court denied Johnson's motion for recusal, Johnson filed a petition
24 for writ of mandamus challenging that denial. He now asks that this action be stayed
25 while the Ninth Circuit considers his petition. A stay is not automatic, however, and
26 Johnson has not satisfied the heavy burden necessary to obtain a stay.

27 "A stay is not a matter of right, even if irreparable injury might otherwise
28 result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted).

1 There is no automatic stay of district proceedings while a petition for writ of
2 mandamus is pending, and any such stay is a matter of the district court's general
3 discretionary authority. *David v. Signal Int'l, LLC*, 37 F. Supp. 3d 836, 840 (E.D. La.
4 2014). The moving party bears a "heavy burden" to demonstrate that a stay is
5 appropriate. *Id.* "Where a discretionary stay is proposed, something close to genuine
6 necessity should be the mother of its invocation." *Id.*

7 The factors considered "in determining whether a stay pending petition for
8 writ of mandamus is warranted are the same as a stay pending appeal[.]" *Friends of*
9 *Earth v. Sanderson Farms, Inc.*, No. 17-CV-03592-RS, 2019 WL 330905, at *1
10 (N.D. Cal. Jan. 25, 2019). A party seeking a stay must establish that he is likely to
11 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
12 relief, that the balance of equities tip in his favor, and that a stay is in the public
13 interest. *Id.*

14 Johnson has not met his burden to show that he is likely to succeed on the
15 merits of his mandamus petition or that there are substantial questions going to the
16 merits. He provides no authority or explanation as to how he is likely to succeed on
17 the merits; instead, he complains about the order denying his recusal motion and
18 disagrees with the court's reasoning. *See* Mot. at p. 5. Because he has not shown that
19 he is likely to succeed on the merits of his writ petition and has not raised serious
20 questions going to the merits, his stay request can be denied as insufficient without
21 reaching the issue of comparative hardships the balance of equities. *See Mount*
22 *Graham Coal. v. Thomas*, 89 F.3d 554, 558 (9th Cir. 1996).

23 If the court were to consider the equities, denial of Johnson's stay request
24 would still be proper because Johnson's motion does not explain how the equities tip
25 in his favor. Moreover, it is the Defendants who would be harmed by a stay that will
26 effectively keep alive an action that ought to be dismissed. The Defendants' pending
27 motions to dismiss have been fully briefed, and the court has deemed those motions
28 suitable for resolution on the parties' papers and without oral argument. *See* ECF No.

1 59. Thus, a stay will only delay the court's ruling on dispositive motions and the
2 potential resolution of this action. It is difficult to discern any impact on the public
3 interest either way, but Johnson's failure to address that issue means that it cannot
4 weigh in favor of a stay.

5 For these reasons, Johnson's writ challenge to the denial of his motion for
6 recusal does not warrant a stay of this action.

7 **B. Johnson's State Court Appeal Does Not Justify Staying this Action**
8 **Because His Loss at the Trial Court Level Dooms His Malicious**
9 **Prosecution Claims**

10 Separately, Johnson asserts that the appeal he has filed with the California
11 Court of Appeal as to the underlying state court action should somehow lead to a
12 stay of this action, or to a partial stay as to his malicious prosecution claims – i.e., his
13 claims based on his LOSS in the state court. This alternative basis for Johnson's stay
14 request is illogical and actually underscores a fatal flaw in his malicious prosecution
15 claims.

16 When he filed this action, Johnson obviously knew that he had lost in state
17 court. By seeking a stay so that he can appeal his state court defeat, Johnson is
18 effectively conceding that it is impossible for him to satisfy the favorable termination
19 prong of his malicious prosecution claim. In the face of that fatal defect in his claim
20 in this action, Johnson argues with misplaced hope that "if the court of appeals
21 reverses the judgment, Johnson will have satisfied the favorable termination
22 requirement." Mot at p. 6. He is wrong. So says well-established California law.

23 As explained in Defendants' Motion to Dismiss, the first element of malicious
24 prosecution requires that Johnson prove he obtained a favorable termination of the
25 entire underlying litigation. In *Lane v. Bell*, cited at length in those moving papers
26 (and misconstrued in Johnson's motion to stay), the state court of appeal specifically
27 addressed this issue and the argument of "severability" now prored by Johnson. That
28 court recognized that adopting such a rule "would conflate two separate elements in

1 a malicious prosecution claim, effectively eliminating any requirement that the entire
2 underlying action terminate in the defendant’s favor.” *Lane v. Bell*, 20 Cal.App.5th
3 61, 65 (2018), *review denied* (Apr. 18, 2018). Instead, that court reaffirmed that even
4 “a partial recovery against the malicious prosecution plaintiff in the underlying
5 action is fatal to showing the favorable termination element.” *Id.* at 75.

6 Undeterred by the clear rule barring his malicious prosecution claim, Johnson
7 wishfully argues that “if the court of appeals reverses the judgment, Johnson will
8 have satisfied the favorable termination requirement.” Mot. at p. 6. Again, Johnson is
9 wrong. California law is clear on this point.

10 Under the “interim adverse judgment rule,” nothing that happens in his state
11 court appeal will save his fatally defective malicious prosecution claim. Under long-
12 established California law “if an action succeeds after a hearing on the merits, that
13 success ordinarily establishes the existence of probable cause (and thus forecloses a
14 later malicious prosecution suit), even if the result is overturned on appeal or by later
15 ruling of the trial court.” *Parrish v. Latham & Watkins*, 3 Cal.5th 767, 771 (2017),
16 *reh’g denied* (Oct. 18, 2017) [emphasis added]. “This principle has come to be
17 known as the ‘interim adverse judgment rule.’” *Id.*

18 “Because malicious prosecution suits have the potential to penalize and deter
19 the legitimate invocation of the judicial process for redress of grievances, only
20 claims that a reasonable litigant or attorney would have seen as lacking all merit
21 should form the basis for such a suit. Claims that have succeeded at a hearing on the
22 merits, even if that result is subsequently reversed by the trial or appellate court, are
23 not so lacking in potential merit that a reasonable attorney or litigant would
24 necessarily have recognized their frivolousness.” *Wilson v. Parker, Covert &*
25 *Chidester*, 28 Cal.4th 811, 817–18 (2002) [emphasis added], *abrogated by statute on*
26 *another ground, as stated in Hutton v. Hafif*, 150 Cal.App.4th 527, 547 (2007). *See*
27 *also Norton v. John M.C. Marble Co.*, 30 Cal.App.2d 451, 454 (1939) [“It has
28 become a rule of law in this state that a final judgment duly rendered after trial on the

1 merits, in a court having complete jurisdiction, adverse to the defendant in the
2 proceedings in which the judgment is rendered, is, unless procured by fraud which
3 may be either extrinsic or intrinsic, conclusive proof that the proceedings were
4 prosecuted with probable cause, notwithstanding the fact that the judgment is
5 reversed on appeal.”].

6 Even if Johnson totally succeeds on his appeal and obtains a reversal of the
7 judgment entered against him, that success will not validate his meritless malicious
8 prosecution claims. The state trial court (i) denied his summary judgment motion
9 (see ECF No. 34, ¶ 16); (ii) denied his motion for a directed verdict (see Exhibit 1 to
10 the concurrently-filed Declaration of Sean Sullivan); (iii) denied his motion for
11 judgment notwithstanding the verdict (see ECF No. 34, ¶ 21); (iv) denied his motion
12 for a new trial (see *id.*, ¶ 23); and (v) entered a valid judgment against him (see *id.*, ¶
13 22). See *Parrish v. Latham & Watkins*, 3 Cal. 5th at 776–77 [Recognizing that the
14 interim adverse judgment rule “has also been applied to the denial of defense
15 summary judgment motions, directed verdict motions, and similar efforts at pretrial
16 termination of the underlying case,” and collecting cases (internal quotes omitted)].
17 Any one of these rulings is fatal to the success of his malicious prosecution claims.
18 Taken together, they overwhelmingly refute the merits of such a case.

19 For these reasons, no matter how optimistic Johnson might feel about his
20 pending state court appeal, it just doesn’t matter. Even if he achieves great success in
21 that state appeal, it will not move the needle in this action because his prior trial
22 court losses will still prevent him from ever satisfying the elements of his malicious
23 prosecution claim. For the reasons set forth above, Johnson’s state court appeal does
24 not justify a stay of this action.

25 III. CONCLUSION

26 Stay of this action is not warranted by either Johnson’s pending writ challenge
27 to the denial of his recusal motion or by his pending state court appeal. Because
28 Johnson has not met the substantial burden justifying a stay, Defendants respectfully

1 request that the court deny Johnson’s motion and proceed to rule on the pending
2 motions to dismiss.

3 DATED: November 8, 2019

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, November 08, 2019, I electronically filed the foregoing through this Court’s electronic transmission facilities via the Notice of Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are determined this date to be registered CM/ECF Users set forth in the service list obtained from this Court on the Electronic Mail Notice List.

s/ Sean M. Sullivan _____
Sean M. Sullivan