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7 Manuel Altamirano, Richard Turner, David Kinney and David Huffman

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

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

13 vs.

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

19 Defendants.

Case No. 19CV1185-H-BLM

**DEFENDANTS' REPLY IN
SUPPORT OF SPECIAL MOTION
TO STRIKE (CCP § 425.16)**

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

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21 Defendants Manuel Altamirano, Richard Turner, David Kinney, and David
22 Huffman (collectively, "Defendants") hereby submit their Reply in support of their
23 Special Motion to Strike pursuant to Cal. Civ. Proc. Code § 425.16.
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1 **I. DISCUSSION**

2 Johnson does not dispute that the anti-SLAPP statute is triggered as to his
3 malicious prosecution claim but misinterprets the statute as it applies to his breach of
4 fiduciary duty claim. With respect to the breach of fiduciary duty claim, Johnson
5 believes this claim is supported by allegations of illegal activity, which are not
6 authorized by law and therefore not entitled to the protections of the anti-SLAPP
7 statute. (Opposition, p. 8.) Specifically, Johnson alleges Defendants improperly
8 advanced their defense costs and there “is no ruling of any court to the contrary.”
9 (Opposition, pp. 8-9) But Johnson is ignoring the ruling in the Derivative Suit
10 wherein the court considered the evidence regarding Storix’s advancement of defense
11 costs and found it proper. (See RJN, Ex. 7 at Ex. A, p. 5.) As a result, Johnson’s
12 heavy reliance on unsupported conclusory factual allegations in his Complaint are
13 insufficient to establish the allegations are not directed to protected activity.

14 The allegations in Johnson’s Complaint identified by Defendants as to the
15 claim for breach of fiduciary duty constitute “communicative conduct such as the
16 filing, funding, and prosecution of a civil action,” including those acts when
17 “committed by attorneys in representing clients in litigation.” *Rusheen v. Cohen*, 37
18 Cal.4th 1048, 1056 (2006); (see also, e.g., *Chavez v. Mendoza*, 94 Cal.App.4th 1083,
19 1086 (2001); *Dowling v. Zimmerman*, 85 Cal.App.4th 1400, 1418–1420 (2001).
20 Defendants moving papers identify allegations of protected activity and the claims
21 for relief supported by them. See *Baral v. Schnitt*, 1 Cal.5th 376, 396 (2016). These
22 allegations constitute Defendants protected activity and should be stricken from the
23 Complaint. Because Johnson has failed to satisfy his burden as to the second prong of
24 the anti-SLAPP statute, Defendants’ Special Motion to Strike should be granted.

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1 **A. Johnson Failed To Establish A Probability Of Prevailing On His**
 2 **Claims**

3 Because Defendants have demonstrated Johnson’s Complaint is based on
 4 activity protected under the anti-SLAPP statute, the burden shifts to Johnson to
 5 establish there is a probability he will prevail on his claims. *See* Cal. Civ. Proc. Code
 6 § 425.16(b)(1). To satisfy this burden, Johnson must show not only that the
 7 Complaint is legally sufficient, but also that it is supported by a prima facie showing
 8 of facts that could support a favorable judgment. *See Kenne v. Stennis*, 230 Cal.
 9 App. 4th 953, 962 (2014). Johnson has failed to satisfy this burden for numerous
 10 reasons.

11 **1. Claim 1: The Underlying Judgment Did Not Terminate In**
 12 **Johnson’s Favor**

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

24 The *Lane* case, decided in 2018, called out and discussed the cases, which
 25 Johnson contends creates a severability rule. *See Lane*, 20 Cal.App.5th at 75-78. The
 26 *Lane* court thoroughly analyzed the progeny of cases since *Albertson v. Raboff*, 46
 27 Cal.2d 375 (1956) and *Crowley* and correctly concluded severability analysis does
 28 not apply to the favorable termination element of a malicious prosecution claim.

1 Here, the judgment as a whole in the underlying action did not terminate in Johnson's
 2 favor as required by *Crowley* and *Lane*. As a result, Johnson cannot satisfy the first
 3 gate keeping element of a malicious prosecution claim. Because Johnson cannot
 4 satisfy this gate keeping element, the Court need not consider the probable cause¹
 5 and malice elements of malicious prosecution. *See Lane*, 20 Cal.App.5th at 64.

6 **2. Claim 2: Johnson's Conclusory Allegations and Arguments Do**
 7 **Not State a Cause of Action for Breach of Fiduciary Duty**

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

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

3 **II. CONCLUSION**

4 Defendants have established Johnson's claims for malicious prosecution and
5 breach of fiduciary duty are based on their right of petition. Because Johnson failed
6 to demonstrate he will prevail on these claims, Defendants' Special Motion to Strike
7 should be granted.

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9 Dated: September 30, 2019

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

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12 By: /s/ Marty B. Ready, Esq.
13 Michael P. McCloskey, Esq.
14 Marty B. Ready, Esq.
15 Attorneys for Defendant
16 Manuel Altamirano, Richard Turner,
17 David Kinnev and David Huffman
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15 KINNEY, an individual, DAVID HUFFMAN,)
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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

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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 SPECIAL MOTION TO STRIKE
(CCP § 425.16)**

9 on the following parties in this action:

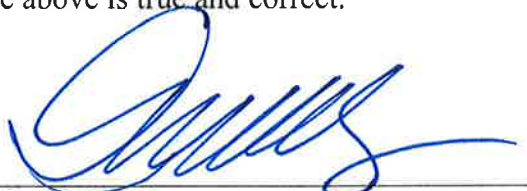
10 ***Plaintiff, Pro Se***
11 Anthony J. Johnson
1728 Griffith Avenue
12 Las Vegas, NV 89104
Telephone: (619) 246-6549
Email: flydiversd@gmail.com

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
U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego,
17 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
18 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
documents to be sent to the persons at the e-mail addresses listed below. I did not receive,
21 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