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Pro Se

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

v.

MANUEL ALTAMIRANO, an individual, RICHARD TURNER, an individual, DAVID KINNEY, an individual, DAVID HUFFMAN, an individual, PAUL TYRELL, an individual, SEAN SULLIVAN, an individual, STORIX, INC,. a California Corporation, and DOES 1-5, inclusive,

Defendants.

Case No. 3:19-cv-1185-H-BLM

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES ISO OPPOSITION TO SPECIAL MOTION TO STRIKE OF DEFENDANTS TYRELL AND SULLIVAN

Hearing Date: October 7, 2019
Hearing Time: 10:30 a.m.
Judge: Hon. Marilyn L. Huff
Dept.: Courtroom I 5A

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

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I. INTRODUCTION

Plaintiff respectfully submits this Opposition to the defendants' *Special Motion to Strike Plaintiff's Complaint* (hereafter "Motion") filed by defendants Paul Tyrell and Sean Sullivan (hereafter "Defendants") pursuant to Cal. Code Civ. Proc. § 425.16 (California's anti-SLAPP statute.) References are herein made to the lawsuit underlying the malicious prosecution claim, San Diego Superior Court Case No. 37-2015-00028262-CU-BT-CTL (hereafter "Janstor Action"), and the shareholder derivative lawsuit Johnson filed on Storix's behalf, Case No. 37-2015-00034545-CU-BT-CTL ("Derivative Suit").

Johnson herein incorporates his concurrently-filed request for judicial notice (hereafter "RJN"). For clarity and consistency with their concurrent motions and filings, Johnson herein incorporates the request for judicial notice filed by defendants Storix, Tyrell and Sullivan in support of their *Special Motion to Strike* ("Storix RJN"). The complaint in this action (ECF No. 1) is hereafter referenced as "Complaint".

Johnson's malicious prosecution claim, by definition, pertains to protected activity, but is well supported by facts and evidence that Defendants instituted and maintained the Janstor Action without probable cause and with malicious intent. Defendants argument that the underlying Janstor Action did not terminate in Johnson's favor ignores the "severability rule" that removes the claim Defendants introduced at trial from the "entire lawsuit" when determining favorable termination. Defendants' attempts to manufacture probable cause from prior rulings that didn't address the merits of any claims are equally unavailing. Characteristically, Defendants misrepresent the underlying rulings by misquoting the actual orders.

Defendants' objective in bringing their motion is unclear. They bring the motion under Cal. Code Civ. Proc. § 426.16, insisting Johnson's cause of action must fail as a matter of law. But they also argue Johnson hasn't stated sufficient facts to prove malice. Unless their Motion challenges such facts (thereby warranting

review under summary judgment standards), the Motion is reviewed under the same standards as a Rule 12(b)(6) motion to dismiss. Defendants brought a concurrent motion to dismiss, adding only an argument in this Motion that Johnson didn't sufficiently plead malice. As such, the motions are duplicative. If the Court finds that Defendants challenge not only the sufficiency of the Complaint, but the sufficiency of facts, the Court must review Defendants' Motion under summary judgment standards. In either case, Johnson provides evidence to support the facts of the Complaint. If the Court finds the evidence insufficient, Johnson must be allowed to perform discovery before the Court rules on the Motion.

II. LEGAL STANDARD

Johnson herein incorporates the legal standards provided in Defendants' Motion. "'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 46 Cal.Rptr.3d 638, 652, citation omitted.) "In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff. . . .' The plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." (*Id*. at 662-663, citations omitted.) The court should consider "'the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based.' [Cal. Code Civ. Proc. § 425.16(b)(2)] [but] neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [the court must] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Id*. at fn. 3.) "[T]he anti-SLAPP statute requires only 'a minimum level of legal sufficiency and triability'." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 74 P.3d 737, 738, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5.)

"[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. And, on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court." (*Planned Parenthood v. Center for Medical Prog.* (9th Cir. 2018) 890 F.3d 828, 834, citing *Hanna v. Plumer* (1965) 380 U.S. 460, 465; See also *Rogers v. Home Shopping Network, Inc*. (C.D. Cal. 1999) 57 F.Supp.2d 973, 983.)

Dismissal for failure to state a claim under Fed.R.Civ.P. § 12(b)(6) is a disfavored remedy and may only be granted in extraordinary circumstances. (*Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963, 966 (9th Cir. 1981).) On this motion, all allegations of material fact must be accepted as true and construed in the light most favorable to Plaintiff. (*Cahill v. Liberty Mut. Ins. Co*., 80 F.3d 336, 337-8 (9th Cir. 1996); *In re Silicon Graphics, Inc. Sec Litig.,* 183 F.3d 970, 983 (9th Cir. 1999).) The Court must also draw all reasonable inferences in favor of the non-moving party. (*Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).) If the Court finds the Complaint inadequate, it 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. § 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962).)

III. BACKGROUND FACTS

Defendants provide factual background by reference to the Complaint, adding only conclusory and misleading assertions of Johnson's intentions unsupported by facts. Defendants also quote the allegations of the Complaint, but dispute none of

them. The Court must therefore regard the allegations as true. The following facts supplement those in Defendants' Motion as relevant to this opposition.

Johnson founded Storix and created the SBAdmin product. (Complaint ¶ 10.) Johnson gifted 60% share of Storix to Defendants, his long-term employees, after he was diagnosed with terminal cancer. (Complaint ¶ 12.) Since then, Defendants maintained at least a 52% share of Storix, the board majority, and all officer positions. (*Id*. ¶ 32.) Defendants forced Johnson out the company (Complaint ¶ 13), denied him access to Storix's financial records (*Id*. ¶ 30), and ceased shareholder distributions to deprive him any income from the company since. (*Id*. ¶ 19.)

Defendants characterize Johnson's efforts to protect the integrity of his life's work as "Johnson's quest to destroy Storix or its management." (Motion at p. 4.) But Defendants were first to mention litigation when they threatened to sue Johnson for "securities fraud" if he didn't abandon his claim of ownership to the SBAdmin copyrights. (Complaint ¶ 14.) Johnson filed the copyright infringement lawsuit in this Court, and Defendants filed a counter-claim for declaratory judgment of copyright ownership on Storix's behalf. (*Id*.) In December 2015, this Court ruled, and the Ninth Circuit later affirmed, that the "Storix 2003 Annual Report" signed by Johnson in 2004 confirmed a prior oral assignment of ownership of all copyrights to Storix. (Complaint ¶ 22; RJN, Ex. 3 at p 12.)

In August 2015, a few months before the copyright trial, Defendants filed the Janstor Action against Johnson on the morning of a settlement conference. (Complaint ¶ 17; Storix RJN, Ex. 8.) Defendants never informed Johnson of any concerns before filing the lawsuit. (*Id*.) The complaint falsely alleged Johnson resided in San Diego (*Id*. ¶ 18; Storix RJN, Ex. 8 ¶ 3), but Johnson was served the complaint at his home in Florida. (Complaint ¶ 18; RJN, Ex. 1.) The complaint alleged that Johnson's competing company ("Janstor") did business in San Diego. (Storix RJN, Ex. 8 ¶ 4.) Defendants knew the allegation was false because they

possessed records showing Janstor had the same address as the San Diego home Johnson sold before moving to Florida. (RJN, Ex. 2.)

In March 2016, Defendants amended the complaint in the Janstor Action (FAC) prior to a demurrer hearing, adding an allegation of Johnson "manifesting his intent to directly compete with Storix" by sending an email in October 2015 to some undisclosed customers ("Customer Email"). (Storix RJN, Ex. 9 ¶ 17.) The Customer Email occurred two months *after* the Janstor Action was filed. (RJN, Ex. 4.) The Customer Email states, "As Storix has been well aware since my departure, I continued development of the software, believing we would eventually work out our differences. I made no effort to disparage or compete with Storix in any way." (*Id*.) The FAC continued to allege Johnson was using Janstor to compete, but Defendants possessed records of the State long before filing the FAC showing Janstor had been dissolved. (RJN, Ex. 5.)

Before the FAC was filed, this Court denied Storix's demand for a restraining order against Johnson, finding that Storix was "unable to cite harm that has befallen it as a result of Plaintiff's email to customers." (RJN, Ex. 6 at p. 22.) The FAC nevertheless demanded injunctive relief, alleging that the Customer Email demonstrated Johnson's "plans and activities designed to compete with Storix[.]" (Storix RJN, Ex. 9 ¶ 28.) The FAC also falsely alleged the Customer Email occurred while Johnson resided and Janstor did business in San Diego. (Storix RJN, Ex. 9, ¶¶ 3-4, 7-8.)

In August 2016, another state court found the Customer Email insufficient to support injunctive relief and granted Johnson's motion to strike. (Storix RJN, Ex. 10.) To restore their injunctive relief, Defendants amended a second time (SAC) only to add an allegation that "Johnson stole a development copy" of Storix's proprietary software when he resigned in 2014. (Storix RJN, Ex. 11 ¶20.) The SAC still alleged that Johnson's "formation of a new corporation" was "done in

furtherance of his efforts to create a business to directly compete" (*Id*. ¶ 25) and that all events took place in San Diego. (*Id*. ¶¶ 3, 4, 8.)

After Defendants brought the Janstor Action against him, Johnson responded by bringing and funding the Derivative Suit on Storix's behalf. (Storix RJN, Ex. 14.) Defendants persistently interfered and obstructed Storix's own claims. (Complaint ¶ 34.) Defendants acted to prevent Johnson and Robin Sassi, the other shareholder plaintiff in the Derivative Suit, from having access to Storix's financial records. (Complaint ¶¶ 30, 32.) Defendants filed a workplace violence restraining order against Johnson that included declarations of the defendants stating that Johnson brought the Derivative Suit "against the company" (RJN, Ex. 11, Huffman Decl. ¶ 2 at p. 87) to "drive the company out of business through ruinous litigation" (*Id*. ¶ 3) and was "terrorizing Storix and its employees for the past several years." (*Id*., Smiljkovich Decl. ¶ 4 at p. 90.) Johnson traveled to San Diego to appear at the hearing where he disproved the allegations, and the court dismissed the restraining order "with prejudice in its entirety", finding that "respondent's threats are legal threats." (RJN, Ex. 12.)

In February 2018, the partner-defendants testified at trial that Defendants advised them not to communicate with Johnson before filing the Janstor Action against him. (RJN, Ex. 10 at pp. 78-80.) The partner-defendants testified that they had no knowledge of Johnson marketing or selling any product or of any harm he caused Storix before the Janstor Action was filed. (*Id*. at p. 80-84.) They testified that they knew Johnson had moved to Florida but nevertheless maintained the lawsuit for over 3 ½ years to *prevent* Johnson from competing. (*Id*.) The jury rejected Storix's entire claim of **$1,255,996** for unjust enrichment based on Johnson allegedly obtaining an "unfair head start" using Storix's confidential information in his competing business. (RJN, Ex. 8 at p. 51; Storix RJN, Ex. 17 at p. 203 [Special Verdict Question Nos. 4, 7].) Defendants introduced a new claim for "employees'

lost productivity" in closing arguments, demanding **$3,739.14** in damages resulting from the Customer Email. (RJN Ex. 8 at pp. 51-52.)

Defendants now state, "Storix sued Johnson on a single cause of action for breach of fiduciary duty" (Motion at p. 4, underline added) and "Storix prevailed on its sole cause of action against Johnson with a jury finding he breached his fiduciary duty to the company." (Motion at p. 5, underline added.) This is in contrast to Defendants' post-trial motion for eleven (11) demands of injunctive relief, stating that "Johnson committed numerous acts which the jury determined breached his fiduciary duty to Storix" because "Johnson engaged in significant efforts to pursue Janstor as a vehicle to compete." (RJN, Ex. 9 at p. 65, underline added.) Yet, in the same motion Defendants admitted, "The jury awarded Storix $3,739.14 in monetary damages for Johnson's breach of his fiduciary duty. That figure was solely based on the cost of employee time associated with dealing with the fallout of Johnson sending the Announcement Email to Storix's customers." (*Id*. at p. 61.) The court denied all Storix's demands for injunctive relief. (Storix RJN, Ex. 22 at p. 237.) The Customer Email claim is pending appeal. (Complaint ¶ 39, fn. 6.)

IV. ARGUMENT AND AUTHORITIES

A. Johnson's Malicious Prosecution Claim Arises from Acts of Protected Activity

Defendants are correct that Johnson's malicious prosecution claim, by definition, arises from protected activity. Since the claim satisfies prong one of the anti-SLAPP statute, the Court must determine if the Complaint properly states a claim for malicious prosecution.

B. Johnson Has Established a Probability of Prevailing on His Cause for Malicious Prosecution Against Movants

The facts stated in the Complaint and the factual background above is more than sufficient to show that Defendants filed and maintained the Janstor Action against Johnson without probable cause and with malicious intent. Defendants are

wrong that Johnson must "*prove* that malice, i.e., actual ill will or improper purpose, drive the pursuit of the state court litigation against him." (Motion at pp. 11-12, italic added.) This Court has authority to hear this Motion brought under Cal. Code Civ. Proc. § 425.16 in a diversity action. But the Court must apply federal rules, not state rules, when assessing the sufficiency of the claim. As such, the Complaint is reviewed under Fed.R.Civ.P § 12(b)(6) standards, which requires that "all allegations of material fact must be accepted as true and construed in the light most favorable to Plaintiff." (*Cahill v. Liberty Mut. Ins., supra,* 80 F.3d at 337.) As such, the Complaint states a legally sufficient claim, including favorable termination of the Janstor Action, and that Defendants initiated or maintained the relevant claim without probable cause. The "malice" element of a malicious prosecution action is a factual issue, not a legal one. Therefore, the facts of the Complaint, regarded as true, and the evidence herewith provided, need only show a "minimal probability" that the Janstor Action was brought against Johnson with malice.

1. The Janstor Action Terminated in Johnson's Favor Based on the 'Severability Rule'

Defendants are wrong that Johnson cannot satisfy the favorable termination element of a malicious prosecution claim. They ignore the "severability rule" and attempt to misapply the "interim adverse judgment rule."

Storix's only successful claim against Johnson was $3,739.14 for "employees' lost productivity" due to the "fallout" of the Customer Email. The claim is severable from the *entire lawsuit* when determining favorable termination because:

(a) Defendants falsely alleged the event occurred when Johnson was living in California;

(b) The claim didn't accrue until after the Janstor Action was filed;

(c) The claim was not pled or asserted during the litigation;

(d) The claim was based entirely on facts separate from Storix's unsuccessful claim on which this malicious prosecution action is based;

(e) The claim could been brought as an independent action;

(f) Multiple courts denied injunctive relief based on the email; and

(g) The claim is pending appeal.

It would do violence to Johnson's right to petition if Defendants were allowed to use such a trivial claim to bar Johnson's malicious prosecution action. Fortunately the "severability rule" is designed to prevent plaintiffs and attorneys, as in this case, from asserting trivial claims to protect themselves from liability for pursuing malicious lawsuits. No claim better warrants severability than the Customer Email claim. Any one of the above facts is sufficient to sever the claim from the Janstor Action, and Johnson has pled and proven each fact.

"[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 460 (citing *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1152-1153); See also *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789, 794 (*Tabaz*) (holding that a plaintiff may base a malicious prosecution claim on individual claims if the other claims are severable and not "simply different theories for recovering on the same injury".) The "severability rule" was created in *Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360, based on the severability analysis in *Albertson v. Raboff* (1956) 46 Cal.2d 375 (*Albertson*).

Defendants make only an ambiguous reference to *Lane v. Bell* (2018) 20 Cal.App.5th 61 (*Lane*), which didn't actually involve severable claims but refers to severability of claims established by *Albertson*. Defendants fail to understand that "[a] claim for malicious prosecution need not be addressed to an entire lawsuit; it may, as in this case, be based upon only some of the causes of action alleged in the underlying lawsuit." *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333.) In *Paramount*, the court reversed a lack of favorable termination determination in stating, "[T]he fact that [defendant's] numerous claims

may all be broadly deemed to be alleged breaches of fiduciary duty does not enable [defendant] to sidestep the severability rule... ." (*Id*. at 370.) The Defendants in this case attempt to do just that.

Defendants provide no authority that defeats severability of the Customer Email claim. Neither Lane, nor the cases it cites in which favorable termination was based on the "entire lawsuit" involved severable claims, nor did they disapprove the severability rule. Lane refers to *StaffPro, Inc. v. Elite Show Servs., Inc*. (2006) 136 Cal.App.4th 1392, 1403 (*StaffPro*), which also didn't disapprove severability, but didn't find favorable termination because "the underlying defendant did not prevail on every claim asserted in the underlying action … because the judgment awarded affirmative relief to the underlying plaintiff[.]" (*Lane, supra,* 20 Cal.App.5th at 74, underline added.) Storix's only successful claim was never asserted in the underlying litigation (until closing arguments), and Storix was denied all eleven demands for injunctive relief based on all the facts – including the email on which Storix's belated claim was based.

Crowley v. Katleman (1994) 8 Cal.4th 666 (*Crowley*) is the hallmark case on the favorable termination issue. "*Crowley* specifically approved *Freidberg's* conclusion there was *no* favorable termination under the facts of Freidberg." (*Lane* at p. 75, underline added.) "[T]he action had evidently not terminated favorably to *Freidberg* because the judgment assessed substantial damages against him." (*Ibid*.) Also, the *Friedberg* claims were not severable because "Reasonable value of services, joint venture and tortious interference were simply different theories for recovering on the same injury: the failure to share attorney fees." (*Tabaz* at p. 794; citing *Freidberg v. Cox* (1987) 197 Cal.App.3d 381, 388.) *Friedberg* expressly recognized, however, that the result would have been different had the causes of action been severable. (*Friedberg* at p. 387-388.) *StaffPro* didn't reject the severability rule, but rejected favorable termination because "[t]he trial court's order in the underlying action required StaffPro to take remedial action with respect to

many of the core allegations[.]" (*StaffPro*, *supra,* 136 Cal.App.4th at 694.) *Lane* and *StaffPro* properly found an absence of favorable termination under the facts of Friedberg, but Storix's only successful claim was based on entirely different facts and theories and all demands for injunctive relief were denied.

Lastly, *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, supra,* 8 Cal.4th 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.) Johnson is appealing the severable claim, thereby removing it from the "entire lawsuit" and establishing favorable termination. Even if Johnson had not appealed the claim, he still would have established favorable termination since the Customer Email claim met other criteria of severability and the malicious prosecution action is directed only to a remaining *non-severable* claim. (Complaint ¶¶ 39-40.)

For all the reasons set forth above, Johnson has shown the Janstor Action terminated in his favor.

2. Johnson Has Established That the Janstor Action Was Initiated *and* Maintained Without Probable Cause

Defendants' arguments that they had probable cause to bring the Janstor Action against Johnson are baseless, and their weak evidence showing Johnson *intended* to compete during the 3 ½ years they sued him is irrelevant. Defendants cannot establish a legal basis for bringing the lawsuit, much less a factual one.

"A claim for malicious prosecution need not be addressed to an entire lawsuit; it may ... be based upon only some of the causes of action alleged in the underlying lawsuit." (*Lane* at fn. 6.) "As our Supreme Court stated in *Singleton* v. *Perry* (1955)

45 Cal.2d 489, 497 [289 P.2d 794], 'Indeed, it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability ....'" **(***Tabaz at p. 792,* citing *Singleton v. Perry* (1955) 45 Cal.2d 489, 497; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 ["An action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted"].) Johnson directed the cause of action for malicious prosecution only to Storix's unsuccessful claim related to his alleged secret competing business. (Complaint ¶¶ 39-40.)

Defendants attempt to expand the "interim adverse judgment rule" described in *Parrish v. Latham & Watkin* (2017) 3 Cal.5th 767 (*Parrish*), arguing that "numerous interim (and post-trial motion) orders establish that Storix acted with probable cause." (Motion at p. 11.) A post-trial order is not an *interim* order. Nevertheless, "[I]f a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' [Citation.]" (*Parrish* at 776.) Defendants blindly refer to "dispositive pretrial motions" and "post-trial motions" that in no way invoke the rule. (Motion at pp. 10-11.) Their arguments, however, not only fail for a number of reasons, but actually demonstrate both a lack of probable cause and malicious intent.

First, Defendants ignore the words "on the merits" when citing post-trial orders denying Johnson's JNOV and new trial motions. (Motion at p. 11.) The orders indicate there was "sufficient evidence to support the verdict." (Storix RJN, Exs. 21, 23.) Defendants attempt to encompass their malicious claim in the judgment based entirely on the Customer Email. The "sole cause of action Storix brought against [Johnson] for breach of fiduciary duty" (and the only claim to which this malicious prosecution claim is directed) was that Johnson allegedly obtained an "unfair head start" from which he was "unjustly enriched" by over $1.2 million. Defendants salvaged Storix's "prevailing party" status by introducing the Customer

Email as a new claim in closing arguments. However, their success on that trivial claim has no bearing on Johnson's cause of action for malicious prosecution directed at the malicious claim.

Second, Defendants assert that "the trial court denied a motion for summary judgment, or summary adjudication, based on the existence of disputed material facts." (Motion at p. 11.) The only issue addressed by the court was whether Storix had "standing to bring this suit" given the fraudulent act of ratification by which Defendants successfully opposed the motion. (Storix RJN, Ex. 16 at p. 2.) The court didn't address any *claims* of the Janstor Action, finding only that "[i]t is disputed whether this ratification and authorization is sufficient." (*Ibid*.) Significantly, "[I]f denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence." (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal. App. 4th 438, 451, underline added.) That is exactly what Defendants did.[1]

Third, Defendants misquote a prior court, saying it "expressly [found] Storix pursued the case against Johnson in 'good faith'." (Motion at pp. 11, 12.) The court "expressly" found no such thing. The court made no reference to the merits of the *unsuccessful claim* or that it was brought in "good faith." Defendants extract portions of the court's *post-trial* comment, which was related to awarding costs to Storix as the prevailing party in the entire action. The court stated only that "Storix reasonably and in good faith brought an *unlimited* civil action against Johnson believing that the ultimate recovery would exceed the limited jurisdictional limit."

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[1] Johnson argued the board didn't approve the Janstor Action before it was filed and the partner-defendants couldn't ratify it two years later because they were not disinterested. Defendants argued it was ratified by a majority of board members, but wouldn't say which ones. Summary judgment was denied because Johnson didn't identify in his motion the partner-directors who voted ratify the lawsuit. Intentionally omitting material facts is the same as submitting false facts.

(Storix RJN, Ex. 24, italic added.) The comment was extraneous to the court's ruling, and the ruling has no relevance to this action. Whether Defendants believed "in good faith" they could obtain a larger amount from Johnson is immaterial. Defendants likely brought the action expecting Johnson to *settle* for a greater amount regardless of whether it was brought with probable cause. For a court's finding to be considered an "interim adverse judgment", it must be an interim ruling, adverse to Johnson's assertion that the *claim* lacked probable cause, and a judgment reflecting on the merits of the claim. The court's comment is none of these things.

Fourth, "[E]ven where a ruling is based on the court's evaluation of the merits of the claim, the ruling does not establish the existence of probable cause if the ruling is 'shown to have been obtained by fraud or perjury.'" (*Parrish, supra* at 778; citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) The Complaint alleges perjury, and Defendants dispute none of those allegations. (Complaint ¶¶ 18, 23, 40.) Had Defendants not falsely alleged Johnson resided in San Diego, Storix would have no standing and thus *no* favorable rulings.

Fifth, "[T]he probable cause element calls on the trial court to make an objective determination of the `reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable." (*Parrish, supra,* 3 Cal.5th at 776.) "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Defendants knew Janstor was inoperable before they filed the *original* complaint and that Janstor was dissolved long before they amended it. The second amended complaint, filed more than a year after the original, still alleged no harm related to Johnson's alleged competing business. Defendants could not have believed the claim was legally tenable.

Finally, after the jury rejected the claim of Johnson competing, Defendants tried to justify the millions of dollars and 3 ½ years spent suing Johnson by echoing the trial testimony of the partner-defendants – that the Janstor Action wasn't brought because Johnson *breached* a fiduciary duty, but only to *prevent* Johnson from competing. Defendants now assert that their demands for injunctive relief in the Janstor Action alone justified the lawsuit because, "Based on its swift action in seeking to end Johnson's disloyalty, the company was able to stem Johnson's conduct, at least for now, and mitigate its financial harm." (RJN, Ex. 7 at p. 31.) A demand for injunctive relief cannot stand alone in a lawsuit. "A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate. [Citation.]" (*Grail Semiconductor, Inc., v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 800, underline added.) Even if Defendants lack the legal experience to know this, it's the Court's objective determination of whether the claim was legally tenable, not the Defendants' subjective belief, that matters.

Defendants have no excuse, legal or otherwise, for filing or continuing the Janstor Action against Johnson.

3. Johnson Has Pled and Substantiated Sufficient Facts to Show a Minimum Probability That the Janstor Action Was Initiated or Maintained With Malicious Intent

Cases cited by Defendants pertain to the type of motions that require a plaintiff *prove* malicious intent. Johnson need only *plead* facts that demonstrate a "minimal probability" that the Janstor Action was initiated or maintained due to ill-will or improper purpose. Defendants done dispute the factual assertion of malice, but only argue it isn't sufficiently pled. The Court should review the Motion under the same standard as Defendants' concurrently-filed *Motion to Dismiss* (Rule 12(b)(6)) and deny the Motion on this issue since Johnson provides judicially

noticed evidence to supplement the Complaint. If the Court considers malice a disputed fact, then the Motion should likewise be denied under federal summary judgment (Rule 56) standards since Defendants offer no evidence that defeats Johnson's showing. Even if Defendants provided evidence that defeated Johnson's assertion, Johnson must be allowed to perform discovery before the Court rules on this Motion. However, Johnson put forth substantial facts and evidence showing the Janstor Action was initiated and maintained with malicious intent. The issue of malice remains an issue for the trier of fact to resolve.

In any case, the "malicious" element of malicious prosecution is satisfied if the case was initiated *or* maintained with malicious intent. (*Parrish v. Latham, supra,* 3 Cal.5th at p. 775.) The Complaint is far from "boilerplate" and asserts substantial facts that sufficiently, if not certainly, show malice. Importantly, "Although lack of probable cause alone does not automatically equate to a finding of malice, it is a factor that may be considered." (*Ross v. Kish, supra*, 51 Cal.Rptr. at 497.) "[M]alice may still be inferred when a party knowingly brings an action without probable cause. [Citations.]" (*Ibid.*, quoting *Swat-Fame, Inc. v. Goldstein,* 101 Cal.App.4th 613, 634, italics omitted.) The facts and evidence establish that the Janstor Action was initiated *and* maintained by Defendants with full knowledge the allegations were false and that Storix suffered no harm. Therefore, the claim to which Johnson's cause of action for malicious prosecution is directed was legally untenable.

Defendants repeat the blind references to court orders in attempt to bar Johnson's claim by misapplying the "interim adverse judgment rule." For all the reasons set forth in the previous section, their arguments are without merit. Defendants have not defeated Johnson's showing of malice. As such, their Motion must be denied as to this issue.

V. CONCLUSION

Johnson has far exceeded the low burden required by the anti-SLAPP statute of establishing a minimal probability of success on his cause of action for malicious prosecution, and Defendants provide no argument or evidence to defeat his showing. Furthermore, Defendants attempt to take advantage of a self-represented litigant by misapplying law, distorting the record, and misquoting evidence, prior rulings and case precedents. Defendants bring baseless arguments and concurrent duplicative motions to cause delay and inflict additional burden on Johnson. As such, Johnson request that the Court order sanctions to deter such misconduct in the future.

For all the foregoing reasons, the Court should deny Defendants' special motion to strike Johnson's complaint and require defendants Paul Tyrell and Sean Sullivan to answer without further delay.

DATED: September 12, 2019

Respectfully submitted,

By: _____

ANTHONY JOHNSON, In Pro Per

CERTIFICATE OF SERVICE

I, the undersigned certify and declare as follows:

I am over the age of eighteen years and self-represented in this action. My address is 1728 Griffith Ave., Las Vegas, Nevada, which is located in the county where the service described below took place.

On September 12, 2019, from my address in Las Vegas, Nevada, I served a copy of the following document(s):

1. **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES ISO OPPOSITION TO SPECIAL MOTION TO STRIKE OF DEFENDANTS TYRELL AND SULLIVAN**

by depositing the document(s) in a sealed envelope with the U.S. Postal Service. The undersigned hereby certifies that he caused a copy of the foregoing document(s) to be delivered to the Clerk of the U.S District Court, Southern District of California, by thereby mail.

The undersigned also certifies that the following recipients have consented to service by email and have been delivered a copy of the document(s) by sending to the email addresses listed below:

Marty B. Ready Michael P. McCloskey WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP 401 West A Street, Suite 1900 San Diego, CA 92101 Email: marty.ready@wilsonelser.com Email: michael.mccloskey Tel: (619) 881-6431 (Attorney for Defendants Altamirano, Turner, Kinney & Huffman)	Paul A. Tyrell Sean M. Sullivan PROCOPIO, CORY, HARGREAVES & SAVITCH LLP 525 B Street, Suite 2200 San Diego, CA 92101 Email: paul.tyrell@procopio.com Email: sean.sullivan@procopio.com Tel: (619) 619.238.1900 (Defendants, Attorneys for corporate defendant, Storix, Inc.)

I certify and declare under penalty of perjury under the laws of the United States of American and the State of California that the foregoing is true and correct.

Executed on September 12, 2019 in Las Vegas, Nevada.

By: _____
Matthew Johnson