Patrick J. Kearns, Esq. (SBN 241602)
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
401 West A Street, Suite 1900
San Diego, CA 92101
Telephone: (619) 321-6200
Facsimile: (619) 321-6201
E-mail: patrick.kearns@wilsonelser.com

Attorney for Defendants,
Marty Ready, David Aveni, and Michael McCloskey

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

vs.

DAVID KINNEY, an individual, RICHARD TURNER, an individual; MANUEL ALTAMIRANO, an individual, DAVID HUFFMAN, an individual, DAVID SMILJKOVICH, an individual; PAUL TYRELL, an individual, SEAN SULLIVAN, an individual, MARTY READY, an individual; DAVID AVENI, an individual; MICHAEL MCCLOSKEY, an individual; STORIX, INC., a California Corporation; JUDGE MARILYN HUFF, an individual; JUDGE RANDA TRAPP, an individual; JUDGE KEVIN ENRIGHT, an individual; JUDGE KATHERINE BACAL, an individual,

Defendants.

Case No. 3:20-cv-01354-CAB-MSB

DEFENDANTS MARTY READY, DAVID AVENI, AND MICHAEL MCCLOSKEY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

[FED. R. CIV. PROC. 12(b)(6)]

Hearing Date: September 30, 2020
Hearing Time: 10:30 a.m.
Dept.: Courtroom 4C

District Judge: Cathy Ann Bencivengo
Magistrate Judge: Michael S. Berg

Complaint Filed: July 16, 2020
Trial Date: Not Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

Defendants Marty Ready, David Aveni, and Michael McCloskey ("Movants") have been representing Co-Defendants David Kinney, Richard Turner, Manuel Altamirano, and David Huffman ("Management Defendants") since 2016 in contentious litigation instituted by Plaintiff Anthony Johnson ("Johnson") in State and Federal Courts.[1] The dispute, which ultimately led to this lawsuit, began in 2011 when Johnson, due to a serious medical issue, transferred operation and management responsibilities in Storix to Management Defendants. Unfortunately, the relationship between Management Defendants and Johnson was less than amicable, resulting in a series of disputes and an extensive litigation history.

Johnson's litigation campaign began in August 2014, when Johnson sued Storix for copyright infringement based on its SBAdmin software. Storix, represented by Paul Tyrell and Sean Sullivan ("Procopio Defendants"), obtained a unanimous verdict in December 2015. Johnson appealed the jury's verdict and the court's award of discretionary attorneys' fees. Johnson has exhausted his appeals and the copyright matter has been closed.

While the copyright case was pending, Storix learned Johnson, as a Storix director, formed a new entity and intended to pursue a competitive business using a "rebranded" version of Storix's own software. Upon learning Johnson had stood up a competing company, Storix immediately sued Johnson in San Diego Superior Court to protect its interests. Johnson responded with cross-claims against Management Defendants, including David Smiljkovich, asserting a number of claims related to management of Storix. While this matter was pending, Johnson and his co-shareholder and confidant, Robin Sassi (an attorney), sued Management Defendants in a derivative action. These two cases, and a third personal injury suit Johnson filed against Management Defendants, were consolidated. The consolidated matter went

[1] Movants previously represented David Smiljkovich until his resignation from Storix, Inc. ("Storix") in 2018.

to trial in early 2018 in San Diego Superior Court before the Honorable Kevin Enright. Storix prevailed on its sole cause of action against Johnson for breach of fiduciary duty, and obtained money damages. Johnson also lost on every single claim, both derivative and direct, he had asserted against the Management Defendants, including David Smiljkovich.

Undeterred by and displeased with the adverse rulings in the consolidated matters and the copyright action, a year later Johnson filed another complaint against Management Defendants in the San Diego Superior Court, the Honorable Katherine Bacal, presiding. This matter was short-lived as Johnson dismissed the complaint without prejudice before Management Defendants' anti-SLAPP, demurrer, and Cal. Civ. Proc. Code § 1030 motions were heard.

One month after he voluntarily dismissed this latest action, Johnson refiled the action in the U.S. District Court for the Southern District of California against Management Defendants and Procopio Defendants.[2] This matter is currently pending before the Hon. Marilyn L. Huff, Case No. 19CV1185-H-BLM. The Court stayed the matter pending the results of Johnson's state court appeal of the consolidated matter to determine whether the doctrine of *res judicata* bars Johnson's claims.[3]

Johnson now comes back to federal court, after voluntarily dismissing another complaint filed this year in San Diego Superior Court, to attack not only Storix and Management Defendants with already-litigated issues and claims but to bring also constitutional and conspiracy claims against members of the judiciary and attorneys involved in Johnson's currently pending and past litigation. Johnson's complaint is that he lost all of the prior litigation, and that the lawyers who represented his litigation opponents therefore must have conspired with the judges to cause Johnson to lose each case. Johnson's claims appear to be motived by his unending thirst for

[2] The Procopio Defendants were dismissed from the case after a successful motion to dismiss.

[3] Management Defendants renewed their motion for a stay pending the state court appeal, which was granted by the court on August 25, 2020. (Case No. 19CV1185-H-BLM, Doc. No. 97.)

retribution against those who have opposed him, and to strip his opponents of their legal counsel by including their lawyers as defendants in the suit. Johnson's new FAC is frivolous and should be dismissed.

As it pertains to Movants, Johnson asserts two claims: 1) conspiracy to interfere with civil rights under 42 U.S.C. § 1985(2); and 2) neglect to prevent conspiracy to interfere under 42 U.S.C. § 1986. As an initial matter, Johnson cannot meet an essential element of his § 1985(2) claim because he has not alleged a class-based, invidiously discriminatory animus.

Second, the *Rooker-Feldman* doctrine bars Johnson's claims against Movants because he is seeking a de facto appeal of a state court decision.

Third, the litigation privilege is an absolute bar to Johnson's claims against Movants and must be dismissed with prejudice.

Fourth, Johnson's § 1985(2) claim fails because he did not meet the heightened pleading standard required for conspiracy claims.

Fifth, Johnson's § 1986 claim fails because he has not, and cannot, establish, as a matter of law, a cognizable § 1985(2) claim.

Finally, the respective statute of limitations bars Johnson's §§ 1985 and 1986 claims.

For these reasons, Movants respectfully request the Court grant their motion to dismiss Johnson's second and third causes of action asserted against Movants without leave to amend.

II. RELEVANT FACTUAL BACKGROUND

The allegations supporting Johnson's conspiracy claims against Movants are limited and are summarized as follows.

- Johnson asserts "Wilson/Elser represented Management as defendants, and demanded Johnson post a $50,000 shareholder plaintiff's bond to

/ / /

/ / /

secure his standing as a derivative plaintiff which Johnson voluntarily paid. Wilson/Elser sent all their bills Storix to payment." (Doc. No. 5, ¶ 25.)

- Johnson further contends "Procopio and Wilson/Elser demanded and were granted multiple trial continuances." (*Id*. at ¶ 35.)
- Johnson alleges "Judge Enright allowed Procopio and Wilson/Elser to sit together at the plaintiff's table at trial, granted their pre-trial motions precluding Johnson from saying he supported Storix or that Storix endorsed the Derivative Suit." (*Id*. at ¶ 36.)
- "Judge Enright granted Wilson/Elser's motion to dismiss Johnson as a derivative plaintiff because he couldn't fairly and adequately represent the interests of the Management shareholder based on the *2015 Email* claim." (*Id*. at ¶ 39.)
- "Johnson opposed Procopio's and Wilson/Elser's separate motions for costs and fees, raising numerous legal arguments including that the $3,739.14 judgment was based solely on the *2015 Email* claim he was afforded no opportunity to dispute, that Management incurred no legal expenses, and that it was unlawful for Management to use Storix funds to pay Procopio to defend against the company's own derivative claims against them." (*Id*. at ¶ 42.)
- "Wilson/Elser filed their concurrent demurrer and special motion to strike (anti-SLAPP motion)." (*Id*. at ¶ 53.)
- "Wilson/Elser (representing Procopio and Management) and Procopio (representing Storix) brought three Rule 12(b)(6) motions and two anti-SLAPP motions to dismiss Johnson's claims."[4] (*Id*. at ¶ 55.)

/ / /

[4] Wilson Elser did not represent Procopio but only represented Management Defendants. (*See* Civil Docket for Case No. 19CV1185-H-BLM.)

Based *solely* on these allegations, Johnson alleges two causes of action against Movants for conspiracy to deprive him of his constitutional rights. Johnson asserts:

> "Defendants used the *2015 Email* against Johnson in violation of his First Amendment right to free speech. Defendants relied on each other's pleadings, orders and allegations based on the *2015 Email* that was neither a valid claim nor ever litigated." (*Id*. at ¶ 72.)

Further he asserts:

> "Defendants unlawfully denied Johnson rights to his own company records and knowingly imposed unnecessary bonds and substantial costs and fees on Johnson, intentionally ignored and misrepresented statutes and controlling law, in attempt to prevent Johnson from defending himself, litigating his claims, and affording an attorney to represent him on appeal." (*Id*. at ¶ 73.)

It is these collective actions taken by Movants during litigation Johnson now asserts as the basis for his conspiracy claims to deprive him of his constitutional rights.

III. LEGAL STANDARD

Dismissal under Rule 12(b)(6) is appropriate if Johnson's First Amended Complaint ("FAC") lacks a "cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). All material allegations are taken as true and construed in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). "For a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it "may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment,

Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

IV. DISCUSSION

A. Johnson Has Not Alleged A Cognizable Claim Under 42 U.S.C. § 1985(2)

Johnson's Second Cause of Action, Count I, against Movants asserts conspiracy to interfere with civil rights under 42 U.S.C. § 1985(2). (Doc. No. 5, ¶¶ 71-74.) Johnson's claim must fail because Johnson does not allege class-based, invidiously discriminatory animus as required. Nor could Johnson allege such a claim.

§ 1985(2) contains two clauses giving rise to separate causes of action. *Portman v. County of Santa Clara*, 995 F.2d 898, 909 (9th Cir. 1993). The first clause, not at issue in this case, concerns access to federal court and the second clause concerns access to state courts. *Id.* A cause of action may be asserted under the second clause of § 1985(2):

> "if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws." 42 U.S.C. § 1985(2).

Here, Johnson's second cause of action against Movants only involves the second clause of § 1985(2). The FAC alleges "Defendants violated Johnson's constitutional rights as part of a conspiracy to impede, hinder, obstruct and defeat Johnson's due course of justice with intent to deny Johnson the equal protection of

the laws, and to injure Johnson for lawfully enforcing and attempting to enforce his rights to equal protection of the laws." (Doc. No. 5, ¶ 74.)

In addition to the elements expressly set forth in the statute, and importantly, to state a cognizable claim under the second clause of § 1985(2), there must be an allegation of class-based, invidiously discriminatory animus. *Bretz v. Kelman*, 773 F.2d 1026, 1029 (9th Cir. 1985). This requirement results from the language of the second clause of § 1985(2) requiring an intent to deprive of equal protection of the laws. *Bretz*, 773 F.2d at 1029 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Thus, as an initial matter, to survive a pleading challenge to a claim under the second clause of 42 U.S.C. § 1985(2), plaintiff must allege membership in a protected class - Johnson has not.

Johnson's FAC does not contain any allegations of his membership in a protected class such that he could allege class-based, invidiously discriminatory animus as required under the second clause of 42 U.S.C. § 1985(2). Rather, the only allegation Johnson asserts under the second clause of 42 U.S.C. § 1985(2) is a conclusory allegation "Defendants violated Johnson's constitutional rights as part of a conspiracy to impede, hinder, obstruct and defeat Johnson's due course of justice with intent to deny Johnson the equal protection of the laws." (Doc. No. 5, ¶ 74.) But Johnson provides no other allegations to support his conspiracy claim other than actions taken by Movants as counsel to Management Defendants during litigation. (*See* the summary of allegations in Section II above.) It is clear from Johnson's allegations, his entire basis for the conspiracy claims is derived from his perception the underlying state court proceedings were unfair and as a result of some alleged impropriety. (*See* Doc. No. 5, ¶ 92.) Johnson's alleged conspiracy has nothing to do with him being deprived of equal protection of the laws based on a racial or class-based animus. Because Johnson has not met the initial gate-keeping element of his claim under the second clause of 42 U.S.C. § 1985(2), Movants motion to dismiss should be granted without leave to amend.

B. The *Rooker-Feldman* Doctrine Prevents District Court Review of State Court Judgments

The relief requested in Johnson's FAC constitutes a de facto appeal of a state court decision, and as such, is an improper attempt to challenge the rulings made by the California Superior Court. The *Rooker-Feldman* doctrine prohibits Johnson's challenge.

The *Rooker-Feldman* doctrine is a rule of procedure enunciated by the United States Supreme Court in *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which holds that federal courts other than the Supreme Court should not sit in direct review of state court decisions and lack subject matter jurisdiction to do so. The *Rooker-Feldman* doctrine applies even when a state court judgment is not made by the highest state court, *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994), or when a state court order is not final, *Worldwide Church of God v. McNair*, 805 F.2d 888, 893 n.3 (9th Cir. 1986). It also applies when a plaintiff's challenge to the state court's actions involves federal constitutional issues. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483-84, (1983). As a result, a district court may not adjudicate an action seeking to reverse or nullify a final state court judgment, nor may it adjudicate issues "inextricably intertwined" with those adjudicated by the state court. *Exxon Mobil Corp. v. Saudi Basic Industries Corp*., 544 U.S. 280, 292-293 (2005).

To determine whether the *Rooker-Feldman* doctrine applies, a district court first must determine whether the action contains a forbidden de facto appeal of a state court decision. *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). A de facto appeal exists when "a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Id.* at 1164. If "a federal plaintiff seeks to bring a forbidden de facto appeal, . . . that federal plaintiff may not seek to litigate an issue that is 'inextricably

intertwined' with the state court judicial decision from which the forbidden de facto appeal is brought." *Id.* at 1158.

A federal claim is "inextricably intertwined" with a state court decision if its success depends on a determination that the state court wrongly decided the issues before it. *Davani v. Virginia Dept. of Transp.*, 434 F.3d 712, 717 (4th Cir. 2006); *Cooper v. Ramos*, 704 F.3d 772, 779 (9th Cir. 2012) ("we have found claims inextricably intertwined where the relief requested in the federal action would effectively reverse the state court decision or void its ruling") (internal quotes omitted).

Here, this Court cannot adjudicate Johnson's claims against Movants without revisiting the state court decisions at issue in this matter. Johnson's entire FAC recounts Movants, and all named defendants, participation in state court proceedings, including the filing of motions for bonds and costs, demurrers, and anti-SLAPP motions. (*See gen.* Doc. No. 5, ¶¶ 22-66.) In fact, Johnson's entire case against Movants solely relates to Movants' efforts to obtain favorable rulings on behalf of their clients in the state court proceedings, and Johnson's argument the resulting state court decisions were incorrect and unfair to him. Further, the harm Johnson allegedly suffered resulted from "having to defend invalid claims, dismissal of his valid claims, and denial of his rights to petition"…as well as seeking a declaration the state court judge defendants "treated Johnson unfairly as a *pro se* litigant." (Doc. No. 5, ¶¶ 70, 92.) And even if these allegations are not a direct attack on specific state court rulings (and they are), they are, at the very least, inextricably intertwined with the issues resolved by the state court. The actions of Movants in filing motions in the state court proceedings necessarily is inextricably intertwined with the decisions of the state court of which Johnson now complains. It is settled that "[w]here a federal plaintiff asserts both a collateral challenge to a state court ruling and a claim about the conduct of adverse parties ***or their counsel*** that resulted in that ruling, both claims are barred under the *Rooker-Feldman* doctrine." *Uziel v.*

Superior Court of California, U.S. Dist. LEXIS 88099 *17 (C.D. Cal., March 23, 2020) (emphasis added) (citing *Cooper v. Ramos*, 704 F.3d 772, 781-83 (9th Cir. 2012) (claims that defendants conspired to deny plaintiff a fair state court proceeding inextricably intertwined with challenged state court decision and barred by the *Rooker-Feldman* doctrine)).

This is precisely the scenario at issue in this matter. Johnson takes issue with the actions taken by Movants, as counsel, that Johnson now complains resulted in the decisions of the state court of which he seeks review. In other words, Johnson seeks a de facto appeal to this Court of the decisions of the state court, which Movant's actions, as counsel, were inextricably intertwined. Dismissal of Johnson's FAC under the *Rooker-Feldman doctrine* is justified on this basis alone.

C. The Litigation Privilege Is An Absolute Bar To Claims Against Movants

The litigation privilege is an absolute defense Johnson cannot overcome. The allegations against Movants are entirely related to actions taken by Movants during litigation in the discharge of their representation of Management Defendants and cannot, as a matter of law, support Johnson's conspiracy claims.

California's litigation privilege, which immunizes defendants from virtually any tort liability, with the sole exception of causes of action for malicious prosecution, applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve objects of litigation; and (4) that has some connection or logical relation to the action. *Graham-Sult v. Clainos*, 756 F.3d 724 (2014). The absolute privilege set forth in Cal. Civ. Code § 47 is not limited to the pleadings, the oral or written evidence, or to publications made in open court or briefs or affidavits, but attaches to any publication with any reasonable relation to the action and made to achieve the objects of the litigation. *Rader v. Thrasher*, 22 Cal. App. 3d 883 (Cal. App. 1st Dist. Jan. 14, 1972).

/ / /

Johnson's allegations against Movants involve actions in their capacity as attorneys, taken during litigation, and are subject to the litigation privilege. Civil Code § 47(b) defines a privileged publication or communication as one made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law…." Thus, Movants actions taken during litigation involving -

- relying on other's pleadings, orders and allegations…, unlawfully denying Johnson rights to his own company records and knowingly imposing unnecessary bonds and substantial costs and fees on Johnson, intentionally ignoring and misrepresenting statutes and controlling law (Doc. No. 5, ¶¶ 72, 73);
- filing a motion demanding Johnson post a $50,000 shareholder plaintiff's bond (Doc. No. 5, ¶ 25);
- moving for multiple trial continuances (Doc. No. 5, ¶ 35);
- filing motions for costs and fees (Doc. No. 5, ¶ 42);
- filing a demurrer and anti-SLAPP motion (Doc. No. 5, ¶ 53); and
- bringing a 12(b)(6) motion and an anti-SLAPP motion (Doc. No. 5, ¶ 55)

- are absolutely immune from tort liability. *See* *Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *McDougal v County of Imperial*, 942 F.2d 668, 673 (9th Cir. 1991) (§ 1985 conspiracy claims sound in tort.) Thus, the only allegations against Movants are entirely related to actions taken during litigation in the discharge of Movants representation of Management Defendants. The filing of motions is a privileged publication within the meaning of Cal. Civ. Code § 47 and absolutely protected by the litigation privilege. Johnson's claims against Movants must be dismissed with prejudice because Johnson cannot overcome the absolute bar of the litigation privilege.

D. Johnson Has Not Pled The 42 U.S.C. § 1985(2) Claim With The Requisite Particularity

In addition to failing to allege a necessary element to his claim under the second clause of 42 U.S.C. § 1985(2), Johnson has not pled his conspiracy claim with the requisite particularity. The Ninth Circuit applies a heightened pleading standard for conspiracy claims for the deprivation of constitutional rights. *Jones v. Tozzi*, 2006 U.S. Dist. LEXIS 63278 at **37-38 (E.D. Cal. Aug. 23, 2006). Under this heightened pleading standard, Plaintiff must "plead with particularity as to which defendants conspired, how they conspired and how the conspiracy led to a deprivation of his constitutional rights." *Tozzi*, 2006 U.S. Dist. LEXIS 63278 at **37-38 (citing, *Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1989)). Johnson's FAC, however, does not even remotely satisfy this heightened pleading standard and for that reason should be dismissed.

Rather than allege an actual conspiracy, Johnson alleges Movants, as attorneys, used evidence successfully at trial and filed motions that were granted. (*See* Doc. No. 5, ¶¶ 72, 73: "relied on each other's pleadings, orders and allegations…, unlawfully denied Johnson rights to his own company records and knowingly imposed unnecessary bonds and substantial costs and fees on Johnson, intentionally ignored and misrepresented statutes and controlling law.…") Johnson alleges these actions "prevent[ed] Johnson from defending himself, litigating his claims, and affording an attorney to represent him on appeal." (*Id.*) But what Johnson does not allege in support of his claim under the second clause of 42 U.S.C. § 1985(2), is how Movants conspired, and how the conspiracy led to a deprivation of his constitutional rights. Instead, Johnson simply alleges Movants conspired with the judges who were assigned to Johnson's cases, but without alleging a single *fact* in support of such a conspiracy. Johnson does nothing more than assert the simple (and woefully inadequate) conclusion a conspiracy existed.

/ / /

Moreover, Johnson's general allegations incorporated by reference into his § 1985(2) claim cannot satisfy the heightened pleading standard. As it pertains to the actions of Movants, Johnson alleges:

- Wilson/Elser filed a motion demanding Johnson post a $50,000 shareholder plaintiff's bond and sent their invoices to Storix for payment (Doc. No. 5, ¶ 25);
- Wilson/Elser demanded and were granted multiple trial continuances (Doc. No. 5, ¶ 35);
- Wilson/Elser filed motions for costs and fees (Doc. No. 5, ¶ 42);
- Wilson/Elser filed a demurrer and anti-SLAPP motion (Doc. No. 5, ¶ 53); and
- Wilson/Elser brought a 12(b)(6) motion and an anti-SLAPP motion (Doc. No. 5, ¶ 55).

Not one of the allegations against Movants identifies how they conspired, or how the alleged conspiracy deprived Johnson of his constitutional rights. The facts alleged do not give rise to a reasonable inference of a conspiracy. On the contrary, Movants had both the right, and the duty as attorneys on behalf of their clients, to engage in the acts alleged, and the acts did not cause Johnson any legally cognizable injury. *See Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765-66 (4th Cir. 2003).

In this regard, Johnson's FAC is fatally defective for not providing any notice at all as to how Movants conspired to deprive Johnson of his constitutional rights so that they could properly respond to the allegations. *See Harris*, 126 F.3d at 1195 (the heightened pleading standard "serves the limited purpose of enabling the district court to dismiss 'insubstantial' suits prior to discovery and allowing the defendant to prepare an appropriate response"). The only thing Movants have been put on notice of relates to actions taken by Movants, ***during litigation***, in the discharge of their representation of Management Defendants. Notwithstanding the existence of a litigation privilege, to be discussed below, Movants' actions taken during litigation

do not remotely approach the heightened pleading standard for conspiracy claims. Johnson's allegations fail to allege any conspiracy at all. As a result, Johnson's claims against Movants should be dismissed with prejudice.

E. Johnson Cannot State A Claim For Relief Under 42 U.S.C. § 1986

Johnson also alleges a claim against Movants under 42 U.S.C. § 1986. 42 U.S.C. § 1986 establishes a private right of action for damages against a person who knowingly failed to prevent a § 1985 conspiracy. To prevail on a § 1986 claim Plaintiff must show that: "(1) the defendant had actual knowledge of a § 1985 conspiracy; (2) the defendant had the power to prevent or aid in preventing the commission of a § 1985 violation; (3) the defendant neglected or refused to prevent a § 1985 conspiracy; and (4) a wrongful act was permitted." *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994). A successful § 1986 claim depends on "proof of actual knowledge by a defendant of the wrongful conduct." *Brandon v. Lotter*, 157 F.3d 537, 539 (8th Cir. 1998). If Plaintiff fails to state a claim under § 1985, there can be no liability under § 1986. *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir. 1977). Thus, Johnson's claim under § 1986 rises and falls with his claim under § 1985.

As discussed above, Johnson has not pled a valid claim under 42 U.S.C. § 1985(2). Specifically, Johnson has not alleged a class-based animus and has not pled with particularity the actions of Movants constituting a conspiracy. In addition, the litigation privilege and *Rooker-Feldman* doctrine are absolute bars to Johnson's conspiracy claims under § 1985. Because Johnson cannot state a valid claim under § 1985, his § 1986 claim fails as a matter of law. For these reasons, the § 1986 claim should be dismissed with prejudice.

F. The Statute Of Limitations Bars Johnson's Claims Against Movants

1. 42 U.S.C. § 1985 Statute of Limitations

Federal courts in California apply California's statute of limitations for personal injury actions to claims brought under § 1985. *See Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *McDougal v. County of Imperial*, 942 F.2d 668, 670 (9th Cir.

1991) (applying California's personal injury limitations period to claims brought under § 1983 and § 1985). The personal injury statute of limitations in California is two years. Cal. Code Civ. Pro. § 335.1. Federal law determines the date on which the limitations period begins to run. *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981). The Ninth Circuit generally applies the "last overt act" test in determining when a cause of action for conspiracy to deny civil rights accrues. *See Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983). The "last overt act" test is an application of the general rule that a cause of action accrues when a plaintiff learns of the injury and its cause. *Id*. (claim based upon conspiracy to conduct an unconstitutional search accrues on the date of the search).

In this case, Johnson filed the original complaint on July 16, 2020. (Doc. No. 1.) The FAC was filed July 21, 2020. (Doc. No. 5.) Thus, acts of Movants occurring before July 16, 2018 are barred by the two-year statute of limitations.

The FAC alleges conduct related to a conspiracy to deny Johnson's right to access to the state court beginning as early as August 2015 and continuing to early 2019. (Doc. No. 5, ¶¶ 22, 48.) As discussed above, the initial state court proceedings were consolidated and proceeded to jury trial beginning January 23, 2018 and concluding on February 20, 2018. (*See* Request for Judicial Notice ("RJN"), Ex. 1.) The bench trial portion of the consolidated action began April 30, 2018 and concluded on May 7, 2018 with the decision issued by the court on May 16, 2018. (*Id.*) Thus, the last overt act regarding actions related to the state court consolidated action occurred on May 16, 2018. Accordingly, the following allegations involving actions of Movants in support of Johnson's conspiracy claims necessarily occurred before May 16, 2018:

- Johnson asserts "Wilson/Elser represented Management as defendants, and demanded Johnson post a $50,000 shareholder plaintiff's bond to secure his standing as a derivative plaintiff which Johnson voluntarily paid. Wilson/Elser sent all their bills Storix to payment." (Doc. No. 5, ¶

25.)

- Johnson further contends "Procopio and Wilson/Elser demanded and were granted multiple trial continuances." (*Id*. at ¶ 35.)
- Johnson alleges "Judge Enright allowed Procopio and Wilson/Elser to sit together at the plaintiff's table at trial, granted their pre-trial motions precluding Johnson from saying he supported Storix or that Storix endorsed the Derivative Suit." (*Id*. at ¶ 36.)
- "Judge Enright granted Wilson/Elser's motion to dismiss Johnson as a derivative plaintiff because he couldn't fairly and adequately represent the interests of the Management shareholder based on the *2015 Email* claim." (*Id*. at ¶ 39.)

To the extent Johnson alleges the actions of Movants listed above support his conspiracy claim under § 1985, because these action occurred before July 16, 2018, they are barred by the two-year statute of limitations.

2. 42 U.S.C. § 1986 Statute of Limitations

42 U.S.C. § 1986 has its statute of limitations expressly set forth in the language of the statute stating "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." 42 U.S.C. § 1986. Any acts of Movants occurring before July 16, 2019 are barred by the one-year statute of limitations.

As an initial matter, because the actions of Movants discussed above with respect to the two-year statute of limitations applicable to claims under § 1985 occurred more than two years before the filing of Johnson's FAC they necessarily are barred by the one-year statute of limitations applicable to § 1986 claims. The only two remaining allegations against Movants supporting Johnson's conspiracy claims under § 1986 are:

- "Johnson opposed Procopio's and Wilson/Elser's separate motions for costs and fees, raising numerous legal arguments including that the

$3,739.14 judgment was based solely on the *2015 Email* claim he was afforded no opportunity to dispute, that Management incurred no legal expenses, and that it was unlawful for Management to use Storix funds to pay Procopio to defend against the company's own derivative claims against them." (*Id*. at ¶ 42.)

- "Wilson/Elser filed their concurrent demurrer and special motion to strike (anti-SLAPP motion)." (*Id*. at ¶ 53.)

But the alleged actions related to Movants' motions for cost and fees took place in October 2018. (*See* RJN, Ex. 2 at ROA 802, 804, 809, and 811.) And the alleged actions related to Movants' concurrent demurrer and anti-SLAPP motion took place on April 12, 2019. (*See* RJN, Ex. 3 at ROA 39, 45.) As a result, these alleged acts taken by Movants cannot support Johnson's conspiracy claims under § 1986 as they are barred by the one-year statute of limitations.

V. CONCLUSION

Johnson's First Amended Complaint fails to state a cause of action as to his second and third causes of action against Movants. Johnson's First Amended Complaint is a frivolous attempt to question the prior decisions of a court of this state. For all the reasons set forth above, Johnson's second and third causes of action against Movants should be dismissed without leave to amend.

Dated: August 26, 2020

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/
By: Patrick Kearns, Esq.
Attorney for Defendants
Marty Ready, David Aveni, and Michael McCloskey