No. 21-55614

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY JOHNSON,
Plaintiff, Appellant,

v.

MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, DAVID HUFFMAN, PAUL TYRELL, SEAN SULLIVAN, and STORIX, INC.,
Defendants, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTHERN CALIFORNIA (SAN DIEGO)
CASE NO. 3:19-cv-1185-H-BLM

HONORABLE MARILYN L. HUFF, DISTRICT JUDGE

APPELLEES' BRIEF OF PAUL TYRELL AND SEAN SULLIVAN

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF ISSUES 3

STATEMENT OF THE CASE 3

I. FACTUAL BACKGROUND 3

A. The Prior Federal Action 3

B. The State Court Actions 4

1. Storix's Complaint for Breach of Fiduciary Duty 4

2. Johnson's Cross-complaint and Derivative Lawsuit Against Storix and Its Officers and Directors 5

3. Johnson Loses His Affirmative Claims and Is Held Liable for Breach of Fiduciary Duty 6

4. Johnson's State Court Malicious Prosecution Lawsuit and Unsuccessful Appeal 9

II. PROCEDURAL BACKGROUND 10

A. Johnson's Malicious Prosecution Complaint 10

B. The District Court's Order Granting Tyrell and Sullivan's Motions 12

C. The District Court Order Denying Johnson's Motion for Reconsideration Based on the Decision in *Storix, Inc. v. Johnson*, Case No. D075308 13

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE DECISION OF THE DISTRICT COURT STRIKING JOHNSON'S MALICIOUS PROSECUTION COMPLAINT AGAINST TYRELL AND SULLIVAN SHOULD BE AFFIRMED 16

A. Step One: As Johnson Concedes His Malicious Prosecution Claim Arises from Acts Protected by California's Anti-SLAPP Statute....17

B. Step Two: Johnson Failed to Establish a Probability of Prevailing on His Claim for Malicious Prosecution....19

1. Johnson Cannot Establish Favorable Termination as Required to State a Claim for Malicious Prosecution....19

2. The District Court Was Correct in Rejecting Johnson's Attempt to Establish a Favorable Termination Based on the "Severability Rule"....22

3. The Judgment of the District Court Should Be Affirmed on the Alternative Ground That Johnson Cannot Establish a Lack of Probable Cause....25

II. THE ORDER DISMISSING JOHNSON'S COMPLAINT PURSUANT TO FEDERAL RULE 12(b)(6) SHOULD BE AFFIRMED....29

A. Legal Standards for Review of a Motion to Dismiss....29

B. The District Court Correctly Granted Tyrell and Sullivan's 12(b)(6) Motion....31

III. THE DISTRICT COURT CORRECTLY DENIED JOHNSON'S MOTION FOR RECONSIDERATION....31

A. Legal Standards Governing Motions for Reconsideration....31

B. The District Court Was Well Within Its Discretion in Denying Johnson's Motion....32

CONCLUSION....35

STATEMENT OF RELATED CASES....36

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)....37

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ashcroft v. Iqbal
556 U.S. 662 (2009) 29, 30

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters
459 U.S. 519 (1983) 30

Badgley v. United States
957 F.3d 969 (9th Cir. 2020)..25, 28

Bell Atl. Corp. v. Twombly
550 U.S. 544 (2007) 29

Conservation Force v. Salazar
646 F.3d 1240 (9th Cir. 2011)..29

Coto Settlement v. Eisenberg
593 F.3d 1031 (9th Cir. 2010)..30

DeVaughn v. Cty. of Los Angeles
No. CV 08-1461 AB (FFM), 2018 WL 7324527, (C.D. Cal. Dec. 12, 2018), *report and recommendation adopted*, No. CV 08-1461 AB (FFM), 2019 WL 631887 (C.D. Cal. Feb. 13, 2019)..23

Flores v. Emerich & Fike
385 Fed. Appx. 728 (9th Cir. 2010) 18

Graham-Sult v. Clainos
756 F.3d 724 (9th Cir. 2014)..17

Maraziti v. Thorpe
52 F.3d 252 (9th Cir. 1995) 32

McQuillion v. Schwarzenegger
369 F.3d 1091 (9th Cir. 2004)..26

Mendiondo v. Centinela Hosp. Med. Ctr.
521 F.3d 1097 (9th Cir. 2008)..30

Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.
768 F.3d 938 (9th Cir. 2014)..30

Sekiya v. Gates
508 F.3d 1198 (9th Cir. 2007)..25, 28

Travelers Casualty Insurance Company of America v. Hirsh
831 F.3d 1179 (9th Cir. 2016)..17

United States v. Black
482 F.3d 1035 (9th Cir. 2007)..30

CALIFORNIA CASES

Albertson v. Raboff
46 Cal. 2d 375 (1956) 22, 24, 25

Antounian v. Louis Vuitton Malletier
189 Cal. App. 4th 438 (2010)..27

Arias v. Superior Court
46 Cal. 4th 969 (2009) 33

Baral v. Schnitt
1 Cal. 5th 376 (2016)...17

Bernhard v. Bank of America Nat. Trust & Savings Ass'n
19 Cal. 2d 807 (1942) 34

Briggs v. Eden Council for Hope & Opportunity
19 Cal. 4th 1106 (1999) 17, 18

Casa Herrera, Inc. v. Beydoun
32 Cal. 4th 336 (2004) 20

Church of Scientology v. Wollersheim
42 Cal. App. 4th 628 (1996) 17

Crowley v. Katleman
8 Cal. 4th 666 (1994)...passim

Equilon Enterprises v. Consumer Cause, Inc.
29 Cal. 4th 53 (2002)..17, 19

Hagenbuch v. Steel
No. D073394, 2019 WL 3423451 (Cal. Ct. App. July 30, 2019), as modified on denial of reh'g (Aug. 16, 2019) 23

Jarrow Formulas, Inc. v. LaMarche
31 Cal. 4th 728 (2003) 18, 19

Lane v. Bell
20 Cal. App. 5th 61 (2018) .... passim

Ludwig v. Superior Court
37 Cal. App. 4th 8 (1995) 17

Navellier v. Sletten (2002)
29 Cal. 4th 82 18

Park v. Board of Trustees of California State University
2 Cal. 5th 1057 (2017) 16

Parrish v. Latham & Watkins
3 Cal. 5th 767 (2017) 20, 26, 27

Rohde v. Wolf
154 Cal. App. 4th 28 (2007) 18

Rosenthal v. Great Western Fin. Securities Corp.
14 Cal. 4th 394 (1996) 19

Rusheen v. Cohen
37 Cal. 4th 1048 (2006) 18

Sheldon Appel Co. v. Albert & Oliker
47 Cal. 3d 863 (1989) 20, 26

Siebel v. Mittlesteadt
41 Cal. 4th 735 (2007) 20

Staffpro, Inc. v. Elite Show Servs., Inc.
136 Cal. App. 4th 1392 (2006) 14, 20, 23, 24

Takahashi v. Board of Education
202 Cal. App. 3d 1464 (1988) 33, 34

Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.
58 Cal. 2d 601 (1962) 33

Weissensee v. Argentos
2018 WL 5730273 (Cal. Ct. App. Nov. 2, 2018) 23

Wilson v. Parker, Covert & Chidester
28 Cal. 4th 811 (2002) 19, 26, 27

Zhang v. Jenevein
31 Cal. App. 5th 585 (2019) 16

FEDERAL STATUTES, REGULATIONS, AND RULES

28 United States Code
§ 1292 13

Federal Rules of Appellate Procedure
Rule 28(a)(8)(A) 25

Federal Rules of Civil Procedure
Rule 8(a)(2) 29
Rule 12(b)(6) .... passim
Rule 54(b) 13

CALIFORNIA STATUTES, RULES, AND REGULATIONS

Code of Civil Procedure
§ 425.16 .... 1, 12, 16, 18
§ 425.16(b)(1) 16, 18
§ 425.16(e)(2) 16

INTRODUCTION

Appellees Paul Tyrell and Sean Sullivan are counsel to Storix, Inc.[1] For several years Tyrell and Sullivan have represented Storix in unfortunately contentious litigation waged by Appellant Anthony Johnson. Johnson lost all of his claims against Storix and its managers in state and federal court. He was also found to have breached his fiduciary duty to Storix and held liable for monetary damages. Nonetheless, despite having lost his affirmative claims and having been held liable on Storix's sole claim for breach of fiduciary duty, Johnson has sued Tyrell and Sullivan for malicious prosecution.

In order to prevail on his complaint for malicious prosecution, Johnson must establish that Storix's breach of fiduciary duty claim (1) was filed or pursued without probable cause; (2) was filed or pursued with malice; and (3) that the claim was favorably terminated in his favor. The district court correctly granted Tyrell and Sullivan's motions to dismiss Johnson's malicious prosecution claim pursuant to California's anti-SLAPP statute codified at California Code of Civil Procedure section 425.16 and Federal Rule of Civil Procedure 12(b)(6) because Johnson could not, as a matter of law, establish the required elements to state a claim.

---

[1] Storix is an appellee and defendant herein and continues to be represented by Tyrell and Sullivan.

There is no dispute Johnson's malicious prosecution complaint challenges petitioning activity protected by the anti-SLAPP statute. It also cannot be disputed that the underlying litigation was not terminated in Johnson's favor. Johnson lost all of his affirmative claims and was ordered to pay Storix monetary damages on its only claim for breach of fiduciary duty. Regardless of how liberally Johnson's complaint is construed, no amendment can cure this defect.

Johnson's argument that Storix's breach of fiduciary duty claim against him can be "severed" into separate claims for the purpose of determining whether the underlying action terminated in his favor lacks merit. Johnson was required to establish under California law that he obtained a favorable termination as to the *entire* underlying litigation. The complained of acts that supported the verdict and judgment against Johnson were part and parcel of the same series of conduct that breached his fiduciary duty to Storix, and not some distinct "claims." That Storix was awarded only part of the damages it sought to recover from Johnson does not change this result. Storix (and its counsel) pursued a single cause of action for breach of fiduciary duty against Johnson and prevailed. The judgment of the district court was correct and should be affirmed.

Alternatively, even if this Court were to disagree, Johnson cannot establish Tyrell and Sullivan acted without probable cause as is required to state a malicious prosecution claim. Under the "interim adverse judgment" rule success on pretrial

motions ordinarily establishes the existence of probably cause. Storix prevailed on multiple interim and post-trial motions reaffirming the merit of Storix's claim for breach of fiduciary duty. Although it was unnecessary for the district court to decide this issue, the district court's judgment in favor of Tyrell and Sullivan may be affirmed, if necessary, on this additional ground.

STATEMENT OF ISSUES

(1) Whether the district court correctly granted Tyrell and Sullivan's motion to strike pursuant to California's anti-SLAPP statute on the ground that Johnson failed to establish he could reasonably prevail on his malicious prosecution claim?

(2) Whether the district court correctly granted Tyrell and Sullivan's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that Johnson failed to state a claim?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Prior Federal Action

The parties' dispute started in August 2014, when Johnson sued Storix for copyright infringement after Johnson quit the company. (3 ER 444, Ex. 1.) The action was tried before a jury resulting in a jury verdict in favor of Storix on all causes of action. (3 ER 473, Ex. 3; 3 ER 474, Ex. 3.) Specifically, the jury found

that "Storix, Inc. proved by a preponderance of the evidence that Anthony Johnson's copyright infringement claim against Storix, Inc. is barred because Anthony Johnson transferred ownership of all pre-incorporation copyrights, including SBAdmin Version 1.3, in writing from himself to Storix, Inc." (*Id.*)

The district court entered an amended judgment incorporating the jury's verdict "in favor of Defendant and Counter-Claimant Storix, and against Plaintiff Anthony Johnson." (3 ER 475, Ex. 3.) The judgment of the district court was appealed by Johnson and affirmed. *See Johnson v. Storix, Inc.*, 716 F.App'x 628 (9th Cir. 2017), *cert. denied*, 139 S.Ct. 76 (2018).) Storix was ultimately awarded $407,778 in attorneys' fees based on Johnson's wrongful litigation conduct. (3 ER 476-527, Exs. 5 & 6.)

B. The State Court Actions

1. Storix's Complaint for Breach of Fiduciary Duty

Storix learned during the pendency of the copyright case that Johnson formed a new entity called Janstor Technologies and intended to pursue a competitive business using a "rebranded" version of Storix's own copyrighted software even though Johnson remained a Storix director. (SER 3-19.) Two days after electing himself to a director position on Storix's board, Johnson set up the Janstor entity, reserved a website, and within a few months after that had reserved two "port" numbers that are necessary to operate the software. (*Id.*, Exs. 1-4.) Johnson also tried

to harm Storix's business by instructing its customers to cease paying Storix its software. (*Id.*, Ex. 5.)

Storix was forced to sue Johnson to stymy his efforts and succeeded in doing so. Storix sued Johnson on a single cause of action for breach of fiduciary duty, and Janstor for aiding and abetting breach of fiduciary duty (the "Janstor Action"). (3 ER 529, Ex. 8.) Storix amended its complaint in March 2016, to address Johnson's continued hostile acts towards Storix, including his sending of "announcement" emails to its customers in an attempt to interfere with Storix's customer relations (3 ER 536, Ex. 9; SER, Ex. 5) and later filed a Second Amended Complaint. (3 ER 546, Ex. 11.) Johnson moved for summary judgment; however, the trial court rejected Johnson's argument that "no triable issues of material fact exist," and denied the motion. (3 ER 573, Ex. 16.)

2. Johnson's Cross-complaint and Derivative Lawsuit Against Storix and Its Officers and Directors

Johnson responded to the Janstor Action with cross-claims against Storix's officers and directors individually, asserting numerous alleged wrongs. (3 ER 559, Ex. 13.) Johnson, and his co-shareholder and confidant, Robin Sassi, then sued the Storix officers and directors in a derivative action. (3 ER 573-580, Exs. 14, 15.) The superior court ordered that the Janstor Action, Johnson's cross-claims, the derivative

case, and a personal injury suit Johnson filed against Storix's officers and directors, be consolidated.

3. Johnson Loses His Affirmative Claims and Is Held Liable for Breach of Fiduciary Duty

After a three-week trial, Storix prevailed on its sole cause of action against Johnson with a jury finding he breached his fiduciary duty to the company. (3 ER 575, Ex. 17.) The jury's verdict found that "Anthony Johnson breach[ed] his duty of loyalty by knowingly acting against Storix, Inc.'s interests while serving on the Board of Directors of Storix, Inc." (*Id.*) The jury awarded Storix $3,739.14 "as a result of Anthony Johnson's acts or conduct in breach of a fiduciary duty or duties owed to Storix, Inc." (3 ER 576, Ex. 17.) The jury also rejected Johnson's cross-claims. (*Id.*)

Following a bench trial, the state court issued a decision and order on the claims in the derivative action, finding against Sassi. (3 ER 588, Ex. 20.) The state court then entered a consolidated judgment in the two actions as follows: (1) "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc's complaint for breach of fiduciary duty;" (2) "Cross-Complainant Anthony Johnson shall take nothing from Cross-Defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich, or any of them, on the Cross-Complaint filed in Case No. 37-2015-00028262-CU-BT-CTL;" (3) "Plaintiffs

Anthony Johnson and Robin Sassi shall take nothing from Defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich, or any of them on the First Amended Derivative Complaint filed in Case No. 37-2015-00034545-CUBT-CTL." (3 ER 595, Ex. 22.)

While Johnson avoided the imposition of a post-trial permanent injunction, he only did so because Storix's suit served as the catalyst to stop his breaching conduct and therefore the trial court viewed a formal injunction as "superfluous." (3 ER 584, Ex. 19.) The trial court noted that "[w]hile Johnson has indeed threatened to harm Storix's business, his words and conduct, while no doubt frustrating and upsetting to Storix, do not show an ongoing course of conduct." (*Id.* at p. 586:15-16.) And further that Johnson's "most significant and provocative emails" were sent more than two years earlier. (*Id.*) "This past conduct, along with the jury's verdict that Johnson breached his fiduciary duty of loyalty to Storix as one of its directors, does not show that Johnson will continue to seek to harm Storix's business in the future." (*Id.*) As to other requests for injunctive relief to limit Johnson's "inspection rights," the trial court noted that prior orders limiting such rights "still stand, making an injunction superfluous." (*Id.* at p. 587.)

Following the jury trial, the trial court adopted the jury's verdict that Johnson had breached his fiduciary duty to Storix, and therefore lacked standing to sue as a representative plaintiff of the company in a derivative suit. (3 ER 581, Ex. 18.)

Though Sassi continued through trial as the lone representative plaintiff in the derivative suit, the defendants prevailed. (3 ER 588, Ex. 20.)

After the jury and bench trials concluded, but before entry of final judgment, Johnson moved for judgment notwithstanding the verdict. Johnson argued that there was insufficient evidence to support the jury's verdict against him and in Storix's favor in the Janstor Action, and argued that the litigation privilege shielded his tortious conduct. The trial court denied Johnson's JNOV motion, finding "there is sufficient evidence to support the verdict. The court rejects Johnson's arguments raised in the JNOV." (3 ER 594, Ex. 21.) The trial court both rejected Johnson's "litigation privilege" claims, and found the "evidence presented at trial undermines" Johnson's claim that Storix lacked proper authority to file the Janstor Action. (*Id.*) The trial court then issued a judgment on the consolidated action following trial, "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor Technology on Storix Inc.'s claim for aiding and abetting a breach of fiduciary duty." (3 ER 595, Ex. 22.)

After entry of final judgment, Johnson filed a motion for a new trial. The trial court denied the motion in its entirety, stating in part:

> the court has considered Johnson's various arguments under this ground and finds that after weighing the evidence, it is not convinced from the entire record, including reasonable inferences therefrom, that the jury should have reached a different verdict. There was an

> abundance of evidence presented in this three-week jury trial regarding all the parties' actions in the operation and running of this business. The evidence supports that Johnson breached his fiduciary duty to Storix. The court will not disturb the jury's finding on that claim.

(3 ER 615, Ex. 23.) The trial court also deemed Storix the "prevailing party" and awarded it costs, while expressly finding that Storix pursued its action in "good faith." (3 ER 617-619.) Johnson then appealed the September 12, 2018 consolidated judgment to the California Court of Appeal. *See Storix, Inc. v. Johnson,* No. D075308 (Cal. App., filed Dec. 10, 2018); 2 ER 123.

4. Johnson's State Court Malicious Prosecution Lawsuit and Unsuccessful Appeal

While the appeal was pending in *Storix, Inc. v. Johnson*, Johnson filed a state court complaint against defendants Huffman, Altamirano, Turner, and Kinney alleging claims for malicious prosecution, breach of fiduciary duty, conversion, economic interference, fraud/constructive fraud, and civil conspiracy. (5 ER 924.) Tyrell and Sullivan were not named as defendants to that action. (*Id.*) Defendants Huffman, Altamirano, Turner, and Kinney responded to the complaint by filing an anti-SLAPP motion challenging the claims. (Doc. No. 104.) Johnson responded by voluntarily dismissing the action without prejudice. (*Id.*) The defendants in that action were awarded $2,364.45 in costs and $12,237.50 in attorney fees. (*Id.*) On December 18, 2019, Johnson also appealed this order to the California Court of

Appeal. *See Johnson v. Huffman*, Case No. D077096 (Cal. App., filed Jan. 15, 2020). Johnson's appeals were later consolidated.

On December 31, 2020, the California Court of Appeal issued its opinion in the consolidated appeals: *Storix, Inc. v. Johnson*, Case No. D075308 and *Johnson v. Huffman*, Case No. D077096. (Doc. No. 104.) In the opinion, the California Court of Appeal affirmed all challenged judgments and orders. (*Id.* at 3, 47.) Specifically, the Court of Appeal affirmed the judgment in the Janstor Action. (*Id.* at 47.) In addition, the Court of Appeal affirmed the order in *Johnson v. Huffman* and remanded that case to the trial court to determine the individual defendants' entitlement to fees and costs arising from the SLAPP issue. (*Id.*) Johnson then filed a petition for review with the California Supreme Court, which was denied. (*Id.*) On April 22, 2021, the California Court of Appeal issue its remittitur. (*Id.*)

II. PROCEDURAL BACKGROUND

A. Johnson's Malicious Prosecution Complaint

On June 24, 2019, Johnson, proceeding *pro se*, filed a complaint against defendants Manuel Altamirano, Richard Turner, David Kinney, David Huffman, Paul Tyrell, Sean Sullivan, and Storix, Inc., alleging causes of action for: (1) malicious prosecution; (2) breach of fiduciary duty; (3) conversion; (4) economic interference; (5) breach of contract; (6) rescission; and (7) indemnification. (5 ER 1074.) Specifically, despite having lost his claims and Storix having prevailed on its

claim for breach of fiduciary duty, Johnson sued Tyrell and Sullivan for malicious prosecution based on their filing of the successful Janstor Action on behalf of Storix. (5 ER 1078-1083, ¶¶ 17, 18, 38.)

Johnson asserts that "During the 3 ½ years litigating the Direct Suit, all Defendants continued to assert that Johnson was operating a 'secret' business in California and was actively marketing Storix's proprietary software as a competing product." (*Id*. at pp. 1079-1080, ¶ 24.) "All Defendants possessed evidence months before bringing the Direct Suit that Johnson had no intention of competing with Storix, and no evidence to the contrary was produced since." (*Id*.) Johnson claims that he "prevailed" against Storix since the damages awarded against him were just over $3,700, and the court did not enter a permanent injunction. (*Id*. at p. 1080, ¶¶ 26, 27.)

According to Johnson, "[Tyrell and Sullivan] and Partner-Defendants initiated and continued the Direct Suit against Johnson without probable cause, without stating a cause of harm, and without the approval of any disinterested directors or shareholders of Storix. No reasonable person in these circumstances would have believed there were grounds to bring the cause of action against Johnson." (*Id.* at p. 1083, ¶ 38.) "The Direct Suit was instituted for malicious purposes other than to succeed on the merits, and the claim was pursued to a legal termination on its merits in Johnson's favor." (*Id*. at ¶ 39.) "[Tyrell and Sullivan] knew the claim was false

and legally untenable when they filed the lawsuit. [Tyrell and Sullivan] continue to represent Storix in post-trial motions involving the Direct Suit. All defendants took extraordinary actions to continue the lawsuit long after evidence proved its primary claim to be patently false." (*Id*. at 1084, ¶ 40.)

B. The District Court's Order Granting Tyrell and Sullivan's Motions

In response to Johnson's lawsuit, Tyrell and Sullivan filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and a motion to strike pursuant to California Code of Civil Procedure section 425.16. (3-4 ER 438-722.) Johnson opposed the motions and Tyrell and Sullivan filed a replies. (2 ER 358-376; 2 ER 261-274.) Thereafter, the district court granted the motions. (1 ER 29; Doc. No. 73.)

In dismissing Johnson's complaint against Tyrell and Sullivan the district court ruled that Johnson's malicious prosecution claim failed because Johnson could not satisfy the essential element of a "favorable termination" to support the claim since a judgment was entered against him in the state court on Storix's claim for breach of fiduciary duty. (1 ER 38-41 [citing *Lane v. Bell*, 20 Cal. App. 5th 61, 76 (2018); *Crowley v. Katleman*, 8 Cal. 4th 666, 686 (1994)].) The district court also later denied Johnson's motion for reconsideration and Johnson's motion for entry of

a partial final judgment under Federal Rule of Civil Procedure 54(b) or, in the alternative, for certification under 28 U.S.C. § 1292. (2 ER 148.)[2]

C. The District Court Order Denying Johnson's Motion for Reconsideration Based on the Decision in *Storix, Inc. v. Johnson*, Case No. D075308

On December 31, 2020, the California Court of Appeal issued its decision in *Storix, Inc. v. Johnson*, Case No. D075308. Johnson thereafter requested the district court to reconsider its dismissal of his malicious prosecution claim in light of the opinion. (2 ER 110-111; 2 ER 87-88.) According to Johnson, the district court's dismissal of his malicious prosecution claim was improper because the claim was directed only to one of Storix's "two separate and distinct claims for breach of fiduciary duty," and he prevailed on that one claim in accordance with the "severability" rule. (*Id.*)

In denying Johnson's motion, the district court rejected Johnson's argument based on the "severability" rule and found instead that "a review of the California Court of Appeal's opinion filed December 31, 2020 reinforces the Court's dismissal of Plaintiff's claim for malicious prosecution with prejudice." (1 ER 25-26; Doc. No. 104 at 3, 47.) Citing to the opinion, the district court order states:

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[2] In the same order, the district court granted defendants Altamirano, Huffman, Kinney, and Turner's motion to stay the action pending the appeal in *Storix, Inc. v. Johnson*, Case No. D075308 for six months from the date of the order, January 30, 2020. (*Id.*)

> "[Johnson] argues that because the jury rejected Storix's $1.2 million 'unfair head start' claim and awarded Storix only $3,739.14 for lost employee productivity on their breach of fiduciary duty cause of action, we should sever the employee-productivity claim from the unrelated 'unfair head start' claim and declare he prevailed.
>
> *The argument is unavailing because Storix's breach of fiduciary duty claim is not severable.* The fact Storix's claim for unfair head-start damages terminated in Johnson's favor is insufficient to establish Johnson prevailed against Storix. (*Staffpro*, *supra*, 136 Cal. App. 4th at p. 1405 ['[S]everability analysis is improper in determining whether a malicious prosecution plaintiff has demonstrated favorable termination of an underlying lawsuit.'].)
>
> Because the entire Storix action was not terminated in Johnson's favor, he cannot establish the essential element of favorable termination and his malicious prosecution claim fails. (*Lane, supra*, 20 Cal. App. 5th at pp. 66, 76 [malicious prosecution plaintiffs could not establish the essential element of favorable termination because the entire underlying action was not terminated in their favor].)"

(1 ER 25, emphasis added.) Thus, the district court correctly noted that the California Court of Appeal expressly rejected Johnson's assertion that Storix's breach of fiduciary duty claim is severable. (*Id.,* [citing *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal. App. 4th 1392, 1405 (2006)].) Accordingly, Johnson's motion for reconsideration was denied. (1 ER 26 ["As such, the Court's dismissal of Plaintiff's claim for malicious prosecution with prejudice remains proper."].)

SUMMARY OF ARGUMENT

There is no dispute that Johnson's malicious prosecution claim against Tyrell and Sullivan arises from protected activity. The sole issues on appeal are whether

Johnson established a reasonable probability of prevailing on his malicious prosecution claim under the second prong of the anti-SLAPP statute and whether Johnson can state a claim for malicious prosecution pursuant to Federal Rule of Civil Procedure 12(b)(6).

The law requires that in assessing the first element of malicious prosecution, the plaintiff must establish a favorable termination of the *entire* prior action. Absent that showing, a malicious prosecution claim cannot survive. Because Storix (represented by Tyrell and Sullivan) and not Johnson obtained judgment in its favor in the prior state court litigation, Johnson cannot establish a reasonable probability that he will prevail. Consistent with the decision by California Court of Appeal in *Storix, Inc. v. Johnson*, Storix's breach of fiduciary duty claim is not severable. The fact that Storix's claim for unfair head-start damages arguably terminated in Johnson's favor is insufficient to establish Johnson prevailed against Storix given the jury still awarded monetary damages with respect to the same claim. The complained of acts that supported the verdict and judgment against Johnson were part and parcel of the same series of conduct that breached his fiduciary duty to Storix, and not some distinct "claims" as Johnson urges. Storix (and its counsel) pursued a single cause of action for breach of fiduciary duty against Johnson with probable cause. Accordingly, the district was correct in ruling that Johnson cannot establish favorable termination as is required to state a claim for malicious

prosecution. The judgment of the district court may also be affirmed on the alternative grounds that Johnson cannot establish lack of probable cause.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT STRIKING JOHNSON'S MALICIOUS PROSECUTION COMPLAINT AGAINST TYRELL AND SULLIVAN SHOULD BE AFFIRMED

The anti-SLAPP statute enables defendants to quickly terminate meritless actions against them that are based on their constitutionally protected rights to speak freely and petition for redress of grievances. Cal. Code Civ. Proc. § 425.16. It allows litigants to file a special motion to strike "at an early stage," in which the trial court uses a "summary-judgment-like procedure" to evaluate the claims. *Zhang v. Jenevein,* 31 Cal. App. 5th 585, 592 (2019). In considering a special motion to strike, courts employ a two-step process. *Park v. Board of Trustees of California State University,* 2 Cal. 5th 1057, 1061 (2017). In the first step, defendants must show that the claims they challenge are based on conduct "aris[ing] from" an act that furthers their speech or petition rights. Cal. Code Civ. Proc. § 425.16, subd. (b)(1). This includes, among other things, any "writing made in connection with an issue under consideration or review by a . . . judicial body." Cal. Code Civ. Proc. § 425.16, subd. (e)(2).

If defendants can make this initial showing, the burden shifts to the plaintiffs in the second step to demonstrate a prima facie case that would enable them to

prevail on the challenged claims. *Baral v. Schnitt,* 1 Cal. 5th 376, 384–385 (2016). At this stage, "[t]he court does not weigh evidence or resolve conflicting factual claims . . . [but rather] accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.*)

A motion to strike under California's anti-SLAPP statute is available to defendants in federal court. *Graham-Sult v. Clainos*, 756 F.3d 724 (9th Cir. 2014); *Travelers Casualty Insurance Company of America v. Hirsh*, 831 F.3d 1179 (9th Cir. 2016).

A. Step One: As Johnson Concedes His Malicious Prosecution Claim Arises from Acts Protected by California's Anti-SLAPP Statute

It is well established that filing a lawsuit is an exercise of a party's constitutional right of petition. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999); *see Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 19 (1995); *Church of Scientology v. Wollersheim,* 42 Cal. App. 4th 628, 647–648 (1996), disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*,29 Cal. 4th 53, 68, fn. 5 (2002). " ' "[T]he constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action." ' " *Briggs,* 19 Cal. 4th at 1115, citations omitted; *Ludwig,* 37 Cal. App. 4th at 19. Further, the filing of a judicial complaint satisfies the "in connection with a

public issue" component of Section 425.16, subdivision (b)(1) because it pertains to an official proceeding. *Id.* at 1109.

Under these accepted principles, a cause of action arising from a defendant's alleged improper filing of a lawsuit is appropriately the subject of a Section 425.16 motion to strike. *See Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006) (striking abuse of process claim based on filing of allegedly perjured declaration of service). As confirmed by the California Supreme Court, malicious prosecution, which by its nature involves protected court-petitioning conduct, is subject to scrutiny under the anti-SLAPP statute. *See Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 741 (2003) ("[W]e hold that this action is not exempt from anti-SLAPP scrutiny merely because it is one for malicious prosecution."); *Flores v. Emerich & Fike*, 385 Fed. Appx. 728, 732 (9th Cir. 2010); *see also Rohde v. Wolf*, 154 Cal. App. 4th 28, 35 (2007) ("Section 425.16 is construed broadly, to protect the right of litigants to the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions." [citations and quotations omitted].

Here, Johnson's complaint is based entirely on the protected act of filing the complaint against him, an act Storix, through its counsel, indisputably took "in furtherance of [their] right of petition . . . ." Cal. Code Civ. Proc. § 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 90 (the constitutional right of petition encompasses the basic act of filing litigation). Applying the de novo

standard of review, this Court should find that Johnson's claim for malicious prosecution against Tyrell and Sullivan satisfies prong one of the anti-SLAPP statute.

B. Step Two: Johnson Failed to Establish a Probability of Prevailing on His Claim for Malicious Prosecution

1. Johnson Cannot Establish Favorable Termination as Required to State a Claim for Malicious Prosecution

If a court ruling on an anti-SLAPP motion concludes the challenged cause of action arises from protected petitioning, it then "determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Equilon*, 29 Cal. 4th at 67. To satisfy this prong, the plaintiff must "state[ ] and substantiate[ ] a legally sufficient claim." *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal. 4th 394, 412 (1996). "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002); *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th at 741. The district court correctly determined Johnson's complaint fails as a matter of law.

In California, a claim for malicious prosecution "consists of three elements. The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the

malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; and (iii) initiated or maintained with malice." *Parrish v. Latham & Watkins*, 3 Cal. 5th 767, 775 (2017). The California Supreme Court has noted that "[m]alicious prosecution actions have traditionally been disfavored as potentially chilling the right to pursue legal redress and report crime." *Siebel v. Mittlesteadt*, 41 Cal. 4th 735, 740 (2007); accord *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 872 (1989).

" 'Favorable termination . . . is an essential element of the tort of malicious prosecution, and it is strictly enforced.' " *Lane v. Bell*, 20 Cal. App. 5th 61, 68 (2018), review denied (Apr. 18, 2018) (A partial victory in an underlying action is not favorable termination); *see* also *Siebel*, 41 Cal. 4th at 741 (" '[I]t is hornbook law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' " [quoting *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 341 (2004)].

California courts look to the "judgment as a whole" when determining whether favorable termination exists. *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal. App. 4th 1392, 1403 (2006) (internal quotation marks omitted). Under this rule, it is not sufficient that some or most of the claims in the prior action terminated in favor of the malicious prosecution plaintiff. *Lane*, 20 Cal. App. 5th at 70 (2018). Rather, for a malicious prosecution claim to lie under California law, "there must

first be a favorable termination of the *entire* action." *Crowley v. Katleman*, 8 Cal. 4th 666, 686, (1994), as modified (Nov. 30, 1994) (emphasis in original).

The judicially noticeable state court documents establish that Storix asserted a single cause of action for breach of fiduciary duty against Johnson in the Janstor Action. (3 ER 438, Exs. 8, 9, 11.) Following a jury trial, the jury returned a verdict finding that "Anthony Johnson breach[ed] his duty of loyalty by knowingly acting against Storix, Inc.'s interests while serving on the Board of Directors of Storix, Inc." (3 ER 438, Ex. 17.) In addition, the jury found Johnson was in breach of a fiduciary duty or duties owed to Storix, Inc." (*Id.*) The state court entered judgment in the consolidated action: "[i]n favor of plaintiff Storix., Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty." (*Id.* at Ex. 22.] That judgment was affirmed by the California Court of Appeal on December 31, 2020. (Doc. No. 104 at 3, 47.)

Johnson conceded in his briefing below that he "didn't succeed in defending the 'entire action.'" (2 ER 113.) As such, Johnson cannot plausibly allege a favorable termination of the entire underlying action in his favor. The prior action concluded with a judgment against him supporting the district court's determination that Johnson's claim for malicious prosecution should be dismissed with prejudice because it fails as a matter of law. *See Crowley*, 8 Cal. 4th at 686; *Lane*, 20 Cal. App. 5th at 76.

2. The District Court Was Correct in Rejecting Johnson's Attempt to Establish a Favorable Termination Based on the "Severability Rule"

The California Court of Appeal for the Fourth District, Division One in *Lane* and the California Supreme Court in *Crowley*, specifically addressed the cases that Johnson relies upon to argue application of the severability rule. The decision in *Lane* provides a thorough discussion of the cases and history of the severability rule, including a comprehensive analysis of the progeny of cases from *Albertson v. Raboff*, 46 Cal. 2d 375 (1956), to *Crowley* nearly forty years later, as well as multiple California court of appeal cases interpreting *Crowley*, and correctly concludes the severability analysis does not apply to the favorable termination element of a malicious prosecution claim. *See Lane,* 20 Cal. App. 5th at 75-78. Instead, the decision in *Lane* confirms the rule that the "a malicious prosecution plaintiff [must] show 'there [was] a favorable termination of the entire [underlying] action' in the plaintiff's favor," such that "a partial recovery against the malicious prosecution plaintiff in the underlying action is fatal to showing the favorable termination element." *Id.* at 75 (brackets added). "Any other rule would strip the 'favorable termination' requirement of its independent significance because any individual

'claim' that lacks probable cause will necessarily be terminated in the underlying defendant's favor." *Id.*[3]

Johnson mischaracterizes the district court's order in claiming that "[t]he district court noted 'a malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor.'" [AOB, p. 16.] The district court merely acknowledged some intermediate appellate decisions have so held, but then correctly rejected those decision because they are contrary to the California Supreme Court's holding in *Crowley*. (1 ER 39.) As explained by the court in *Staffpro*, "*Paramount General,* predates *Crowley* and relies on *Freidberg* for its conclusion that favorable

[3] Both state and federal courts have followed the analysis set forth in *Lane*. *See*, e.g., *Hagenbuch v. Steel*, 2019 WL 3423451, at *12 (Cal. Ct. App. July 30, 2019), *as modified on denial of reh'g* (Aug. 16, 2019) ("An entire action must favorably terminate to support a malicious prosecution action," and expressly stating that the court "also rejected cases that held favorable termination could be based on a severable claim," citing *Lane*); *Weissensee v. Argentos*, 2018 WL 5730273 (Cal. Ct. App. Nov. 2, 2018) (Court explaining that "while the underlying action was resolved generally in favor of" the plaintiffs, a ruling by the court in defendant's favor "in several particulars" meant "[s]imply, plaintiffs cannot show 'a favorable termination of the entire action,'" *citing Crowley*, 8 Cal. 4th at 686); *DeVaughn v. Cty. of Los Angeles*, 2018 WL 7324527 (C.D. Cal. Dec. 12, 2018), *report and recommendation adopted*, at *9, 2019 WL 631887 (C.D. Cal. Feb. 13, 2019) (Relying on *Lane*, *Crowley*, and *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal. App. 4th 1392, 1403 (2006), in recognizing the rule that "it is not sufficient that some or most of the claims in the prior action terminated in favor of the malicious prosecution plaintiff," but that "for a malicious prosecution claim to lie under California law, there must first be a favorable termination of the entire action.")

termination can be established through a severability analysis. *Crowley's* explicit disapproval of the severability analysis in *Freidberg* (*see Crowley, supra,* 8 Cal. 4th at pp. 683–686, 34 Cal.Rptr.2d 386, 881 P.2d 1083) necessarily implies similar disapproval of that same analysis in *Paramount General.*" *Staffpro, Inc.,* 136 Cal. App. 4th at 1404. Thus, the decisions relied upon by Johnson (*Freidberg, Paramount*) have been disapproved and/or abrogated. Johnson's assertion that this case "is highly analogous to *Paramount*" (AOB, p. 17) only serves to solidify the district court's dismissal order.

Johnson is also incorrect in arguing that the California Supreme Court in *Crowley* followed *Albertson v. Raboff,* 46 Cal. 2d 375 (1956), and that the decision in *Albertson* supports applying a severability analysis in this case. While *Albertson* involved a malicious prosecution claim in which the underlying defendant was only partly successful, its "severability rule" contained no discussion or disapproval of the general principal that the favorable termination assessment requires "consideration [ ] be given to the judgment as a whole." *See Lane*, 20 Cal. App. 5th at 69–70 [citation omitted]. As explained by the court of appeal in *Lane*, "It was instead derived from the court's earlier analysis of whether the judgment on a cause of action from which no cross-appeal had been filed was a final judgment for purposes of a malicious prosecution action. *Crowley* did advert to cryptic language in *Albertson* from which the *Paramount General/Tabaz* line of cases emerged, but

only in the context of indicating how *Freidberg* unnecessarily strayed when it employed the 'primary right theory ... in order to distinguish [*Albertson*], [because] *Albertson* was distinguishable on other grounds.' " *Id.* at 72 (citation omitted).

Finally, Johnson offers no reasoned argument or authority supporting his argument that "[t]he severability of the competition and loss of employee productivity claims are further supported by the fact that they could have been brought in separate lawsuits (the latter in small claims court) without invoking the doctrines of res judicata or claim-splitting." (AOB p. 22.) The argument section must contain appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies. FRAP 28(a)(8)(A); *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007) (Bare assertions unaccompanied by analysis and completely devoid of caselaw result in waiver). Issues raised in a brief that are not supported by argument, or that are argued only in passing, are deemed abandoned. *Badgley v. United States*, 957 F.3d 969, 978-979 (9th Cir. 2020) (appellant waived argument that was "limited to two sentences and two footnotes, without a single citation to legal authority").

3. The Judgment of the District Court Should Be Affirmed on the Alternative Ground That Johnson Cannot Establish a Lack of Probable Cause

Given the district court's finding that Johnson was unable to establish favorable termination, it was unnecessary for the court to decide whether it was

reasonably possible for Johnson to establish Tyrell and Sullivan lacked probable cause to sue Johnson for malicious prosecution. However, the judgment may be affirmed on the alternative ground that Johnson cannot establish this additional element. *See McQuillion v. Schwarzenegger,* 369 F.3d 1091, 1096 (9th Cir. 2004) ("[w]e may affirm on any ground supported by the record").

Johnson cannot establish that Tyrell and Sullivan initiated an action against him without probable cause. "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury." *Sheldon Appel Co. v. Albert & Oliker,* 47 Cal. 3d 863, 875 (1989). "[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,* 3 Cal. 5th at 776 (internal quotations omitted). It is well established that certain interim rulings on the merits may provide a basis for finding, as a matter of law, probable cause to prosecute the underlying case on which a malicious prosecution action is based. *Wilson,* 28 Cal. 4th at 817–818; *Parrish*, 3 Cal. 5th at 776. The "interim adverse judgment" rule provides that "if an action succeeds after a hearing on the merits," including on dispositive pretrial motions, "that success ordinarily establishes the existence of probable cause . . .

even if the result is overturned on appeal or by later ruling of the trial court." *Parrish*, 3 Cal. 5th at 771, 776-777; *Antounian v. Louis Vuitton Malletier*, 189 Cal. App. 4th 438, 450 (2010); *see Parrish*, 3 Cal. 5th at 771, 778-779 (Reaffirming principles articulated in *Wilson*, and holding that interim adverse judgment rule applies even if court that denied summary judgment on the merits later concludes the underlying suit was brought in bad faith).

The record establishes that Storix, and its counsel, had probable cause to pursue claims against Johnson. Irrespective of any judgment entered against him at trial, numerous interim (and post-trial motion) orders establish that Storix acted with probable cause. The state trial court denied a motion for summary judgment, or summary adjudication, based on the existence of disputed material facts. (4 ER 573.) That is precisely the type of order that implicates the interim adverse judgment rule. Further, in its post-trial orders, the trial court repeatedly issued orders recognizing the "probable cause" supporting Storix's breach of fiduciary duty claim against Johnson, irrespective of any remedy ultimately awarded. (*See*, e.g., 3 ER 594, 614-619.) The trial court denied both Johnson's JNOV motion and his motion for new trial. (*Id.*) In doing so, the trial court expressly acknowledged there was "sufficient evidence to support the verdict" against Johnson, and rejected "Johnson's argument that this lawsuit was not properly authorized," finding the suit was authorized. (*Id.*) The trial court also denied Johnson's motion for a new trial based on "insufficiency

of the evidence." (*Id.*) "There was an abundance of evidence presented in this three-week jury trial regarding all the parties' actions in the operation and running of this business. The evidence supports that Johnson breached his fiduciary duty to Storix." (*Id.*) And, the court confirmed Storix as the prevailing party, expressly finding Storix pursued the case against Johnson in "good faith." (*Id.*; SER 3-19.)

Finally, Johnson misstates the facts in suggesting that the jury found him liable for breach of fiduciary duty as a result of an email that didn't exist when the original Storix complaint was filed. (AOB, pp. 7, 18.)[4] Johnson's breaching conduct involved a series of actions taken to undermine Storix. This included starting up the Janstor entity and taking other efforts to prepare that company to directly compete with Storix, as well as Johnson's repeated harassment of Storix's customers and employees via email. The jury's finding that Johnson breached his duty of loyalty to Storix was not limited to particular wrongful acts. (3 ER 575-576.) Under the interim adverse judgment rule, Johnson is barred as a matter of law from meeting the second element of a claim for malicious prosecution as probable cause existed.

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[4] Johnson asserts that lack of probable cause is established because "Defendants don't dispute that they falsely alleged that Johnson lived in California, maintained the lawsuit for three years while asserting only that Johnson *intended* to compete, and used the existence of the lawsuit to deny Johnson any access to his own company or its financial records for years." (AOB, p. 26, citing to Johnson's malicious prosecution complaint at 5-ER-1080-1082 ¶¶17-19, 23-24.) Johnson has again failed to support his argument with a reasoned analysis or supporting authority. *See Sekiya*, 508 F.3d at 1200; *Badgley*, 957 F.3d at 978-979.

II. THE ORDER DISMISSING JOHNSON'S COMPLAINT PURSUANT TO FEDERAL RULE 12(b)(6) SHOULD BE AFFIRMED

A. Legal Standards for Review of a Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has failed to state a claim upon which relief can be granted. *See Conservation Force v. Salazar*, 646 F.3d 1240, 1241 (9th Cir. 2011). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The function of this pleading requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (quoting *Twombly*, 550 U.S. at 557).

Accordingly, dismissal for failure to state a claim is proper where the claim "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

In reviewing a Rule 12(b)(6) motion to dismiss, a district court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the claimant. *See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). But a court need not accept "legal conclusions" as true. *Iqbal*, 556 U.S. at 678. Further, it is improper for a court to assume the claimant "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

A court may consider documents incorporated into the complaint by reference and items that are proper subjects of judicial notice. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). A district court " 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.' " *See United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007)

B. The District Court Correctly Granted Tyrell and Sullivan's 12(b)(6) Motion

In deciding the motions, the district court appropriately took judicial notice of the filings from the prior federal action and the state court actions submitted by the parties. (1 ER 31, fn.1.) Johnson does not contend otherwise. Johnson likewise concedes that Tyrell and Sullivan's motion to strike pursuant to the anti-SLAPP statute and motion to dismiss pursuant to Rule 12(b)(6) "involve the same issue." (AOB, p. 16.) Accordingly, for the reasons addressed above the district court was correct in ruling that Johnson's complaint failed as a matter of law to state a claim for malicious prosecution against Tyrell and Sullivan requiring that it be dismissed with prejudice.

III. THE DISTRICT COURT CORRECTLY DENIED JOHNSON'S MOTION FOR RECONSIDERATION

A. Legal Standards Governing Motions for Reconsideration

Johnson brought a motion for reconsideration of the district court's order granting Tyrell and Sullivan's special motion to strike and motion to dismiss. (Doc. 2 ER 177.) The district court order denying Johnson's motion (Doc. 103) has not been challenged on appeal. Nonetheless, although not clear, Johnson appears to challenge the district court's order following briefing regarding the effect of the California Court of Appeal's opinion in *Storix, Inc. v. Johnson*, 2020 WL 7777493, Case Nos. D075308 and D077096, to the extent it concluded the doctrine of res

judicata provided an additional basis supporting the court's prior order dismissing Johnson' malicious prosecution claim against Tyrell and Sullivan. (AOB, p. 23 [Johnson complains that the district court "raised additional affirmative defenses based on the state appeal."].)

To the extent Johnson is challenging the district court's denial of a motion for reconsideration, this Court reviews an order denying a motion for reconsideration for abuse of discretion. *See Maraziti v. Thorpe*, 52 F.3d 252, 253 (9th Cir. 1995). As addressed below, the district court was well within its discretion in denying his request for reconsideration.

B. The District Court Was Well Within Its Discretion in Denying Johnson's Motion

Johnson requested the district court to reconsider its dismissal of his malicious prosecution claim against Tyrell and Sullivan in light of the California Court of Appeal's December 31, 2020 opinion. (2 ER 100, 80.) According to Johnson, dismissal of his claim was improper because the claim was directed only to one of Storix's two separate and distinct claims for breach of fiduciary. (*Id.*) The district court disagreed and explained why the decision from the California Court of Appeal supported a conclusion to the contrary. (1 ER 23.)

Johnson offers no argument or authority supporting his request for reconsideration. Further, Johnson's disagreement with the district court's analysis

regarding whether the California Court of Appeal's opinion reinforces the district court's dismissal order is not grounds to reverse an order which is otherwise independently correct. In any event, Johnson has failed to establish that the California Court of Appeal's decision does not collaterally estop him from establishing the requisite elements of a malicious prosecution claim against Tyrell and Sullivan.

Johnson's assertion that "[e]ven if *Altamirano* was preclusive to this claim against Partner-Defendants, there is no bar to the against Attorney-Defendants who were not *Altamirano* defendants" (AOB, p. 25) is unsupported by citation to authority and presumes without analysis that Tyrell and Sullivan could be considered co-obligors with respect to a tort claim for malicious prosecution. Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.*, 58 Cal. 2d 601, 604 (1962). Mutuality of parties is not a prerequisite to asserting collateral estoppel as a defense. *Takahashi v. Board of Education*, 202 Cal. App. 3d 1464 (1988). In particular, the party seeking the benefit of the doctrine of collateral estoppel need not have been a party to the earlier lawsuit. *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

One who was neither a party nor in privity with a party to a previous action, and is therefore not bound by the judgment from that action, may nonetheless assert

an estoppel plea against one who is bound. *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 19 Cal. 2d 807 (1942). The criteria to be able to assert collateral estoppel as a defense based on an action to which one was not a party are that (1) the issue decided in the prior action must have been identical to the one presented in the action in which the defense is asserted; (2) final judgment must have been entered in the prior action on the merits; and (3) the party against whom the defense is asserted must have been a party to the prior adjudication. *Takahashi,* 202 Cal. App. 3d at 1477. Each of these elements is established here.

The California Court of Appeal's decision decided on the merits whether Storix's breach of fiduciary claim was severable as urged by Johnson in support of his claim that he could show a probability of success on his malicious prosecution claim against Storix's directors and managers. *Storix, Inc. v. Johnson*, 2020 WL 7777493, *20, Case Nos. D075308 and D077096.[5] This is the identical issue Johnson raised in this case against Tyrell and Sullivan. Johnson was undeniably a party to the state court litigation and therefore collateral estoppel is properly applied to preclude relitigation of the severability issue. Johnson has failed to establish the

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[5] Johnson's voluntary dismissal of his complaint following the state court defendants' filing of a motion to dismiss pursuant to California's anti-SLAPP suit did not prevent the California Court of Appeal from deciding the severability argument on the merits. Johnson raised the severability argument as a defense to being held liable for attorney fees and costs and therefore the appellate court's decision constitutes a final adjudication of that issue on the merits.

order of the district court denying his request for reconsideration was an abuse of discretion.

CONCLUSION

Based on the foregoing, Appellees Tyrell and Sullivan respectfully request that the judgment be affirmed.

DATED: November 5, 2021

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
Kendra J. Hall
Attorneys for Appellees
Paul Tyrell and Sean Sullivan

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Appellee hereby advise the Court that this case is related to prior appeals previously brought by Johnson and heard in this Court entitled *Johnson v. Storix, Inc.,* Case No. 16-55439 and *Johnson v. Storix, Inc.,* Case No. 18-56106.

DATED: November 5, 2021

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
Kendra J. Hall
Attorney for Appellees
Paul Tyrell and Sean Sullivan

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,333words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

DATED: November 5, 2021

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
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CERTIFICATE OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 525 B Street, Suite 2200, San Diego, California 92101.

☑ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2021.

1. **APPELLEES' BRIEF OF PAUL TYRELL AND SEAN SULLIVAN;**
2. **APPELLEES' PAUL TYRELL AND SEAN SULLIVAN'S SUPPLEMENTAL EXCERPT OF THE RECORD, VOL. 1 OF 1**

☑ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

Executed on November 5, 2021,San Diego, California.

By: /s/ Kendra J. Hall
Kendra J. Hall
Email: kendra.hall@procopio.com