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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

v.

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; MICHAL McCLOSKEY, an individual; STORIX, INC., a California corporation; JUDGE MARILYN HUFF, an individual; JUDGE RANDA TRAPP, an individual; JUDGE KEVIN ENRIGHT, an individual; and JUDGE KATHERINE BACAL, an individual,

Defendants.

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

DEFENDANTS DAVID KINNEY, RICHARD TURNER, MANUEL ALTAMIRANO, DAVID HUFFMAN, AND DAVID SMILJKOVICH'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS UNDER FED. R. CIV. PROC. 12(b)(1) AND (6)

Judge: Hon. Cathy Ann Bencivengo
Magistrate: Hon. Michael S. Berg
Dept.: Courtroom 4C

Hearing Date: October 2, 2020

PER CHAMBER RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT

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I. INTRODUCTION

Plaintiff Anthony Johnson's ("Johnson") sixth action against Defendants David Huffman, David Smilkovich, Richard Turner, Manuel Altamirano, and David Kinney (collectively "Management Defendants") has no more merit than the previous five actions. Defendants are shareholders, and current or former officers and/or directors of Defendant Storix, Inc. ("Storix"), who were represented by Defendants Michael McCloskey, David Aveni, and Marty Ready ("the Wilson Elser Defendants") in the prior actions. The only conspiracy alleged in Johnson's First Amended Complaint is the successful defense of the Management Defendants in those actions by the Wilson Elser Defendants. There is no allegation of any actual conspiracy with the Judicial Defendants – Hon. Marilyn Huff, Hon. Randa Trapp, Hon. Kevin Enright, and Hon. Katherine Bacal. To the contrary, the conspiracy alleged amounts to nothing more than the successful – and privileged – defense of Johnson's prior lawsuits. As a matter of law, the defense of those lawsuits cannot form the basis of Johnson's alleged claims of "Conspiracy to Interfere with Civil Rights (42 U.S.C. § 1985(2))" and "Neglect to Prevent Conspiracy to Interfere (42 U.S.C. § 1986))."

II. STATEMENT OF RELEVANT FACTS

As alleged in Johnson's First Amended Complaint ("FAC"), Johnson was Storix's sole shareholder until 2011.[1] FAC, p. 3, ll. 12-14. In 2011, Johnson announced that he'd been diagnosed with cancer and transferred operation and management responsibilities in Storix to Defendants. *Id.* at p. 3, ll. 15-18. Johnson returned to Storix in 2013, but resigned again in 2014. *Id*. at p. 3, ln. 27 – p. 4, ln. 2. Since that time, he has been engaged in a continuous progression of lawsuits against Storix and the Management Defendants. In the instant lawsuit, he has also added his opponents' attorneys and the judges that heard his cases, alleging a conspiracy to

[1] For purposes of this 12(b)(6) motion only, all material allegations will be 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).

deprive him of his civil rights.

A. Johnson Lost the First Three Actions After Two Jury Trials and One Bench Trial.

In October of 2014, Johnson filed his first lawsuit against Storix, alleging copyright infringement by Storix. FAC, p. 4, ll. 8-10. In August of 2015, Storix filed a breach of fiduciary duty action against Johnson in California Superior Court. FAC, p. 4, ll. 21-23. In October of 2015, Johnson filed his own action in the Superior Court alleging derivative claims against the Management Defendants. FAC, p. 5, ll. 8-10. In 2016, Johnson filed a cross-complaint against the Management Defendants in Storix's Superior Court action. FAC, p. 7, ll. 1-5.

Judge Huff was the judicial officer assigned to the Federal trademark action. FAC, p. 4, ln. 11. Judge Trapp was assigned to Storix's Superior Court action. FAC, p. 4, ln. 26. Judge Joel Wohlfeil was assigned to Johnson's derivative Superior Court action. FAC, p. 5, ll. 8-11. Storix's and Johnson's Superior Court actions were consolidated prior to trial. FAC, p. 7, ll. 14-15. Judge Enright was the judicial officer who conducted both the jury and bench trials in the consolidated Superior Court actions. FAC, p. 7, ln. 25 – p. 9, ln. 10.

Defendants Paul Tyrell and Sean Sullivan represented Storix in the above-referenced actions. FAC, p. 2, ll. 26-28, p. 5, ll. 2-3, and p. 4, ll. 21-23 and 16-18. Defendants Marty Ready, David Aveni, and Michael McCloskey represented the Management Defendants in the consolidated Superior Court actions. FAC, p. 3, ll. 1-3 and p. 5, ll. 14-17.

Johnson lost both the Federal copyright action and the consolidated Superior Court action. FAC, p. 6, ll. 3-9; p. 8, ll. 7-9 and 16-18; and p. 8, ll. 25-27. A jury found for Storix in Johnson's copyright case, a jury found for Storix and the Management Defendants in Storix's breach of fiduciary duty action, and Judge Enright found for Storix on Johnson's derivative claims. *Ibid*. Johnson appealed both cases. FAC, p. 6, ll. 18-21 and p. 10, ll. 8-10; p. 9, ll. 20-21. The copyright action

appeal has been resolved, but the Superior Court judgment remains on appeal. *Ibid*.

B. Johnson Has Filed Four New Actions Since Losing the First Three Trials.

Having lost all three trials against Storix and the Management Defendants, Johnson filed a new lawsuit against the Management Defendants in early 2019 alleging conversion of retained earnings and malicious prosecution. FAC, p. 10, ll. 22-24. That case was assigned to Judge Bacal. *Id*. at p. 10, ll. 25. He voluntarily dismissed that action with both a demurrer and anti-SLAPP motion pending, after he was unable to convince Judge Bacal to enter a default against the Management Defendants. FAC, p. 11, ll. 20-23.

Hoping to find a more receptive forum for his claims, Johnson re-filed his conversion and malicious prosecution action in this Court, adding Storix's attorneys as defendants on the malicious prosecution claim. FAC, p. 11, ll. 23-24. The case was assigned to Judge Huff. FAC, p. 11, ll. 27-28. Thereafter, on Defendants' motions to dismiss and anti-SLAPP motions, Judge Huff dismissed five of Johnson's seven claims. FAC, p. 12, ll. 5-13.

Subsequently, Johnson decided to try the Superior Court again, filing a new complaint against Storix seeking the same retained earnings that were the subject of his earlier conversion lawsuit. FAC, p. 13, ln. 27 – p. 14, ln. 2. That case was assigned to Judge Bacal. *Id*. at p. 14, ll. 21-22. Johnson then dismissed that Superior Court lawsuit and filed the instant action in this Court. *Id*. at p. 14, ll. 21-22.

C. The Allegations of Johnson's First Amended Complaint are Limited to a Recital of the Procedural History of The Prior Actions – There Are No Allegations of Any Actual Conspiracy.

Johnson's First Amended Complaint asserts two causes of action (the Second and Third Causes of Action) against the Management Defendants: "Conspiracy to Interfere with Civil Rights (42 U.S.C. §1985(2))," and "Neglect to Prevent Conspiracy to Interfere (42 U.S.C. § 1986)." However, Johnson's First Amended Complaint contains no allegations of any such conspiracy. Paragraphs 14 through 66, titled "Statement of the Case," recite a detailed history of the Parties' past litigation,

including the juries' verdicts and the Judicial Defendants' rulings on various contested motions and other issues. Johnson does not assert there was any type of *ex parte* communications or meetings between the Defendants; only that the Management Defendants and their counsel took certain positions in the litigation itself, and that the Judicial Defendants – like both juries – were not persuaded by Johnson's allegations and ruled in Storix's and/or the Management Defendants' favor in the prior actions. *Ibid*.

III. ARGUMENT

A. Johnson's Second and Third Causes of Action are Subject to Dismissal Under Rule 12(b)(6).

Dismissal under Rule 12(b)(6) is appropriate where a complaint 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).

However, the courts are not required to "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).

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1. Johnson's First Amended Complaint Fails to State Sufficient Facts to Support the Causes of Action Alleged Under 42 U.S.C. §§ 1985(2) and 1986.

a) Johnson has not alleged the basic elements of a conspiracy, as required by 42 U.S.C. § 1985.

Johnson asserts a claim against the Management Defendants under 42 U.S.C § 1985(2). The essential elements of a claim under Section 1985 are: (1) existence of conspiracy, (2) for purpose of depriving the plaintiff of equal protection, (3) an act in furtherance of conspiracy, and (4) an injury to the plaintiff's person or property, or deprivation of any right of a citizen of the United States. *See, e.g.*, Knight v. City of New York, 303 F.Supp.2d 485, 501 (S.D. NY, 2004). Conspiracy is an essential element of a claim under Section 1985(2). U.S. ex rel. Simmons v. Zibilich, 542 F.2d 249, 261 (5th Cir., 1976). To prove a conspiracy, a plaintiff must prove there was an agreement between the co-conspirators to inflict a wrong against the plaintiff. Avalos v. Baca, 517 F.Supp.2d 1156, 1170 (C.D. Cal., 2007) (holding "there must be an agreement or meeting of the minds"), *citing* Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir., 1989). 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. 2006).

Here, Johnson has not alleged facts sufficient to show these basic conspiracy elements. Johnson makes no allegation that the Management Defendants ever reached any agreement or meeting of the minds with any of the other Defendants to deprive Johnson of his civil rights. To the contrary, Johnson alleges that the Management Defendants simply defended Johnson's prior claims, and were successful in that defense. This falls far short of the Ninth Circuit's heightened pleading standards. Under the Ninth Circuit's heightened pleading standard, a 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." Jones v. Tozzi, *supra*, 2006 U.S. Dist. LEXIS 63278 at **37-38, *citing*, Harris v. Roderick, 126 F.3d 1189,

1196 (9th Cir. 1989).

The successful defense of Johnson's prior claims by the Management Defendants does not amount to a conspiracy between the Management Defendants and the Judicial Defendants. Judges rule on motions and other matters all the time – one side has to win and one side has to lose most of the time. To hold that adverse rulings or the lack of success in litigation supports a cause of action for conspiracy between opposing parties and judges would mean every ruling a judge makes amounts to a conspiracy with the prevailing party. Hence, the need for a specific, heightened pleading identifying who conspired and how they conspired. It is not sufficient simply to allege that Johnson lost, and therefore a conspiracy must have existed.

Likewise, there is no *factual* allegation that any of the Defendants intended to deprive Johnson of any civil rights. Johnson pursued his claims – and continues to pursue his claims – through multiple lawsuits. There is no allegation that any Defendant sought to hinder his access to the courts. Rather, the allegations are that in those court proceedings, the Defendants denied Johnson's right to inspect Storix's records, imposed bonds on him, and ignored statutes and controlling law. FAC, p. 16, ll. 1-5. Even if taken as true, these allegations merely amount to a misguided complaint that the Judicial Defendants got it wrong in the prior litigation when they ruled in the Management Defendants' favor on these issues. An adverse ruling in litigation does not amount to evidence that the Defendants intended to deny the losing party any civil rights.

It is not enough to say that the courts ruled against him in favor of the Management Defendants, and therefore there must have been a conspiracy between the Defendants. Johnson has to plead *facts* showing there was an agreement or meeting of the minds between the Defendants, and that they took specific action designed to deprive him of his civil rights. He has not done so, and the Court is not required to accept his conclusory allegations that his constitutional rights were

violated. Accordingly, his First Amended Complaint fails to plead sufficient facts to support his cause of action under Section 1985(2).

b) Johnson has not alleged the required racial, or other protected class, animus required by 42 U.S.C. § 1985(2).

In addition to the basic elements of conspiracy, in order to sustain a claim under Section 1985(2), a plaintiff must allege that there was a racial, or other protected class-based reason behind the conspiracy. "A cognizable claim under the relevant clauses of § 1985 requires an allegation of racial or class-based animus." Sharnese v. California, 547 Fed.Appx. 820, 823 (9th Cir. 2013), *citing* Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir.1987). "To withstand a motion to dismiss claims under Section 1985(2), a plaintiff must allege facts demonstrating that class-based discrimination was the reason for defendants' conduct." Love v. Bolinger, 927 F.Supp 1131 (S.D. Ind., 1996), *citing* Kush v. Rutledge, 460 U.S. 719, 726 (1985). "To establish racial or class-based animus, a plaintiff must show 'invidiously discriminatory motivation ... behind the conspirators' action.'" Usher, *supra*, 828 F.2d at 561, *citing* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The lack of such an allegation is sufficient in and of itself to grant a motion under Rule 12(b)(6). Bretz v. Kelman, 773 F.2d 1026, 1029-1030 (9th Cir. 1985).

Here, Johnson's failure to plead such an allegation in his First Amended Complaint is fatal to his Section 1985(2) claim. There is no allegation anywhere in the First Amended Complaint that any Defendant acted based on some race or other protected class-based animus. At best, the First Amended Complaint could be read to allege that the Management Defendants acted as they did in order to convert the $875,000 of "past income" Johnson claims in Count 2 of his Section 1985(2) cause of action.[2] That is not sufficient to satisfy the required racial or other discriminatory basis for a viable claim under Section 1985(2).

[2] A claim that was already the subject of Johnson's prior conversion claims, as discussed in more detail below.

c) Johnson has failed to plead facts sufficient to support his claim under Section 1986.

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). If Plaintiff fails to state a claim under Section 1985, there can be no liability under § 1986. Dacey v. Dorsey, 568 F.2d 275, 277 (2d Cir. 1977). By its own express terms, 42 U.S.C. § 1986 presupposes the existence of a conspiracy under 42 U.S.C. § 1985: "Every person who, having knowledge that *any of the wrongs conspired to be done, and mentioned in section 1985*, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured…" 42 U.S.C § 1986. Thus, there must be an actual conspiracy in existence for a defendant to be liable for failing to prevent that conspiracy from succeeding. As set forth above, Johnson has not plead sufficient facts to establish the existence of a conspiracy between and amongst the Defendants. The lack of facts supporting the existence of a conspiracy is fatal not only to Johnson's claim under Section 1985(2), but also to his claim under Section 1986.

Additionally, Section 1986 requires a plaintiff to prove that the defendant had both "knowledge of" and the "power to prevent or aid in preventing the commission" of an act interfering with the plaintiff's civil rights. *See, also,* Brandon v. Lotter, 157 F.3d 537, 539 (8th Cir. 1998) (Section 1986 claims depend on "proof of actual knowledge by a defendant of the wrongful conduct"). Here, Johnson's First Amended Complaint is silent on facts demonstrating the Management Defendants had knowledge of any interference with his civil rights, or that the Management Defendants had the power to stop it. Reading the First Amended Complaint in the

light most favorable to Johnson, his theory appears to be that the Management Defendants should not have defended the prior lawsuits (despite the juries' and judges' rulings in their favor), and should have stood aside and let Johnson prevail on his claims. Not only is that complete and utter nonsense, but it is woefully far from alleging facts capable of supporting a claim under Section 1986.

Finally, Section 1986 requires that the wrongful act that is the subject of the conspiracy must actually be committed. 42 U.S.C. § 1986 ("if such wrongful act be committed"). Here, Johnson has not plead facts demonstrating that his civil rights were actually interfered with.[3] As noted above, Johnson admits in his allegations that he has always had full access to the courts, he just does not like the way the juries and judges have ruled against him. There is no factual allegation that his rights were actually interfered with, and as such his claim under Section 1986 cannot stand.

2. The Alleged Acts Are Protected By California's Litigation Privilege.

Johnson cannot maintain his claims against Management Defendants because they are immunized from liability by the litigation privilege. Count 1 of Johnson's conspiracy cause of action allege that "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 an attempt to prevent Johnson from defending himself, litigating his claims, and affording an attorney to represent him on appeal." Johnson's neglect to prevent conspiracy under Section 1986 incorporates these allegations.

The litigation privilege established by Civil Code section 47 applies to *any* communication: (1) made in judicial or quasi-judicial proceedings; (2) made by

[3] Johnson pleads that "Defendants violated Johnson's constitutional rights[,]" in Paragraph 74 of the First Amended Complaint, but as discussed above, the Court is not required to accept alleged conclusions of law. Rather, parties are required to plead sufficient *facts* to support those conclusions.

litigants or other participants authorized by law; (3) made to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. Civ. Code § 47, subd. (b); Silberg v. Anderson (1990) 50 Cal.3d 205, 212. The California Supreme Court has described the litigation privilege as "absolute in nature" barring any "threat of liability for communications made during all kinds of truth-seeking proceedings" and "immunizing participants from liability for torts arising from communications made during judicial proceedings." Silberg, supra, 50 Cal.3d at 213-214.

The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. Id. at 213. Closely related to this principal purpose is that of promoting the "effectiveness of judicial proceedings by encouraging 'open channels of communication and the presentation of evidence' in judicial proceedings on the rationale that 'the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." Edwards v. Centex v. Real Estate Corp. (1997) 53 Cal.App.4th 15, 29. In barring subsequent actions based on the statements of witnesses, attorneys or parties during litigation, the privilege is intended to force litigants to utilize the available discovery apparatus to uncover the truth prior to final judgment. Id.

To achieve this end, the absolute privilege is interpreted broadly to apply to *any* communication having some relation to a judicial or quasi-judicial proceeding, irrespective of the communication's maliciousness or untruthfulness. Kashian v. Harriman (2002) 98 Cal.App.4th 892, 912–913 ["[p]ut another way, application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent'"]. Citations omitted. Any doubt about whether the privilege applies is resolved in favor of applying it. Id. at 913.

While it is difficult to decipher what specific wrongful actions Johnson alleges Management Defendants took as opposed to the Judicial and Attorney Defendants,

Johnson's allegations in general are impermissibly based on statements made and actions taken during prior litigation. The majority of Johnson's First Amended Complaint recites a detailed history of the Parties' past litigation, including the juries' verdicts and the Judicial Defendants' rulings on various contested motions and other issues without alleging any specific facts supporting his claimed conspiracy. (FAC 14-66.) Johnson alleges that during this prior litigation, "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." (FAC 73.) For example, Johnson alleges that "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."

However, these allegations cannot support a cause of action against Management Defendants because they are absolutely barred by the litigation privilege. The litigation privilege protects a party's presentation of evidence in judicial proceedings and thus, Johnson cannot state a claim against Management Defendants or their counsel based on their use of a 2015 Email in their pleadings or as evidence. Likewise, Johnson cannot state a claim against Management Defendants based on their statutory arguments and positions they took defending against Johnson's prior claims because the litigation privilege bars actions based on a party and their counsel's statements during litigation, regardless of whether those statements are untrue. *See* Kashian v. Harriman, supra, 98 Cal.App.4th at p. 920 ["communications made in connection with litigation do not necessarily fall outside the privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal"]. Therefore, this Court should dismiss Johnson's claims against Management Defendants because they are absolutely barred by the litigation

privilege.

3. Johnson's Claim for Conspiracy to Interfere with Civil Rights Is Barred by Res Judicata.

Though Johnson titles his claim "Conspiracy to Interfere with Civil Rights," the actual allegation of Count 2 is that "Defendants abused their shareholder majority to induce Storix to terminate Johnson's at-will employment maliciously and without justifiable cause…" FAC, p. 16, ll. 13-16. Thus, Johnson's instant Complaint asserts, for the fifth time in the progeny of litigation filed by Johnson, a claim based on the same basic factual allegations against Management Defendants. No matter how Johnson titles his claim, under the doctrine of res judicata, Johnson is precluded from re-litigating these issues in this current lawsuit under the guise of a civil rights lawsuit.

Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Mpoyo v. Litton Electro-Optical Systems, 430 F.3d 985, 987 (9th Cir. 2005). Whether two suits involve the same claim or cause of action requires courts to look at four criteria, which are not applied mechanistically: (1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions. Chao v. A–One Med. Servs., Inc., 346 F.3d 908, 921 (9th Cir.2003).

Courts apply a transaction test to determine whether the two suits share a common nucleus of operative fact. Int'l Union v. Karr, 994 F.2d 1426, 1429–30 (9th Cir.1993). "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." Western Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir.1992). Johnson's Conspiracy to Interfere with Civil Rights claim and prior breach of

fiduciary duty claims against Management Defendants arise from Management Defendant's conduct while Johnson was a shareholder at Storix and specifically from the events leading up to his termination. Thus, this subsequent action arises out of the same transactional nucleus of facts and satisfies the first criterion.

Likewise, Johnson's current claim involves the same rights or interests established in the prior judgment and would involve the same evidence presented in his prior actions. Notably, his current claim seeks the same lost income of $875,000 that he sought in the consolidated action that went to trial in early 2018 before the Honorable Kevin Enright. In the consolidated action, Johnson lost on every claim, including the claims he asserted against Management Defendants, including his claim for lost income damages. Johnson's current claim would also involve substantially similar evidence as his prior claims because his current claim also involves Management Defendants' termination of Johnson and the basis for their actions. Although Johnson is now alleging Management Defendants' actions infringe upon different rights, i.e. his constitutional rights as opposed to rights as a minority shareholder, this does not preclude the Court from finding res judicata applies here because the first criterion controls. See Mpoyo, supra, 430 F.3d. at 988 [even if latter three criteria do not yield a clear outcome, first criterion controls and whether cases share a common nucleus of operative fact is outcome determinative].

Since Johnson's current claim and prior claims against Management Defendants involved the same allegations and common nucleus of operative facts, this Court should find that Johnson's Conspiracy to Interfere with Civil Rights is barred by res judicata.

4. Johnson's Claims are Barred by the Applicable Statutes of Limitations.

Claims brought under § 1985 in California are subject to California's two-year statute of limitations under California Code of Civil Procedure section 335.1. *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). A cause of action for conspiracy to deny civil rights accrues when the defendants commit the "last overt act" necessary to give rise to the cause of action. *See* Venegas v. Wagner, 704 F.2d 1144, 1146 (9th Cir. 1983). In this case, Johnson expressly alleges that the Defendants were engaged in a conspiracy to deny his civil rights as early as 2015. FAC, p. 4, ln. 21 – p. 6, ln. 9 (*see, also*, FAC, p. 15, ll. 23-24 and p. 16, ll. 26-27, incorporating by reference all previously-stated allegations). At the latest, the trial in front of Judge Enright took place in January of 2018. FAC, p. 7, ll. 25-27. This action was not filed until July 16, 2020 – more than two years later.[4] Thus, the acts giving rise to Johnson's Section 1985 claim occurred more than two years before the filing of this action, and that claim is barred by the applicable two-year statute of limitations.

Likewise, Johnson's Section 1986 claim is barred by the one-year statute of limitations expressly included in that statute. Under 42 U.S.C. § 1986, "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." Johnson concedes in his First Amended Complaint that the acts of Defendants in the alleged conspiracy took place well in advance of July 16, 2019 (one year before this action was filed). Thus, the Section 1986 claim is barred by the one-year statute of limitations.

B. The Court Lacks Jurisdiction to Adjudicate Johnson's Claims Under the *Rooker-Feldman* Doctrine.

A federal court generally may not rule on the merits of a case without first determining that it has subject matter jurisdiction over the claims. Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-31 (2007). A case is properly dismissed for lack of subject matter jurisdiction under Federal Rule of Civil

[4] The Management Defendants respectfully request the Court take judicial notice of the date this action was commenced pursuant to Federal Rule of Evidence 201.

Procedure 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). When subject matter jurisdiction is challenged, a plaintiff bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists. Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010).

Though styled as a civil rights claim, Johnson's First Amended Complaint effectively seeks this Court's review of prior state court decisions in violation of the doctrine announced by the U.S. Supreme Court in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Dist. of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462 (1983). The *Rooker-Feldman* doctrine prohibits parties from seeking review – i.e. a *de facto* appeal – of state court decisions in Federal court, holding that Federal courts lack the jurisdiction to review such decisions. The *Rooker-Feldman* doctrine enforces the jurisdictional limitation imposed on lower federal courts by 28 U.S.C. § 1257. That statute provides that "[f]inal judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari." Under this provision, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgement in a United States district court," since such review is reserved by Section 1257 to the United States Supreme Court. Johnson v. De Grandy, 512 U.S. 997, 1005-1006 (1994).

Nor may the Federal courts adjudicate issues that are inextricably intertwined with such state court decisions. Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 292-293 (2005). The *Rooker-Feldman* Doctrine may apply even where a plaintiff does "not directly contest the merits of a state court decision." Ruesser v. Wachovia Bank, 525 F.3d 855, 859 (9th Cir. 2008). A court must dismiss an action for lack of subject matter jurisdiction if the claims are barred by the *Rooker-Feldman* doctrine. See, e.g., Fleming v. Gordon & Wong Law Group, P.C., 723 F.Supp.2d 1219, 1224 (2010).

To determine whether the *Rooker-Feldman* doctrine applies, a district court must first 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. That is exactly what Johnson expressly seeks in Count 1 of his civil rights causes of action under Sections 1985(2) and 1986.

- Johnson expressly alleges that "Defendants relied on each other's pleadings, orders and allegations based on the *2015 Email* that was neither a valid claim nor ever litigated." FAC, p. 15, ll. 26-27. The "2015 Email" Johnson refers to was introduced at trial in the Superior Court action before Judge Enright. FAC, p. 8, ll. 22-25.
- Johnson alleges Defendants "denied Johnson rights to his own company records…" FAC, p. 16, ll. 1-5. Judge Trapp of the Superior Court was the judge who denied those inspection rights. FAC, p. 9, ll. 1-4.
- Johnson alleges Defendants "imposed unnecessary bonds and substantial costs and fees on Johnson, intentionally ignored and misrepresented statutes and controlling law…" FAC, p. 16, ll. 1-5. He concedes Judge Bacal of the Superior Court was one of the judges who considered these bond issues and, according to Johnson, ignored statutes and controlling law. FAC, p. 10, ll. 22-28, and p. 11, ll. 1-19.

Though his allegations include gripes against Judge Huff as well, it is clear that the wrongs he claims to have suffered at Judge Huff's hands are inextricably intertwined with those he suffered in Superior Court. Thus, this Court lacks jurisdiction to hear those claims under the Doctrine.

If claims raised in the federal court action are "inextricably intertwined" with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of

state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction. Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003). Here, by finding that Johnson's civil rights were interfered with in the Superior Court actions, this Court would necessarily have to undercut the prior state court decisions at issue in this matter. Not just the ultimate outcome of those actions, but every decision made in the state court from filing of motions for bonds and costs to rulings on the Management Defendants' demurrers and anti-SLAPP motions. *See gen.* FAC ¶ 22-66. Johnson's express allegations that the harm done was "having to defend invalid claims, dismissal of his valid claims, and denial of his rights to petition," as well as the fact that he seeks a declaration stating the state court judge defendants "treated Johnson unfairly as a *pro se* litigant[,]" bar his claims under the *Rooker-Feldman* Doctrine as a matter of law. FAC ¶ 70, 92.

IV. CONCLUSION

Johnson is clearly engaged in a litigation vendetta against the individuals he perceives as having "stolen" his company, despite the fact that two juries and at least one judge disagreed in three separate trials. After those trials, he filed a new case in Superior Court in 2019, then dismissed it and re-filed in this Court, then filed another new action in Superior Court, and now has filed the current action – his fourth in just over eighteen months. This latest offering is a creative attempt to reframe the new claims as a civil rights conspiracy between his opposing parties, their attorneys, and the judges involved. The problem is he does not have the facts to support such claims, and they are subject to dismissal under Rule 12(b)(6) and 12(b)(1). The Management Defendants respectfully requests this Court dismiss the claims against the Management Defendants accordingly.

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Respectfully submitted,

Dated: August 28, 2020

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