

1 Paul A. Tyrell (Bar No. 193798)  
2 E-mail: paul.tyrell@procopio.com  
3 Sean M. Sullivan (Bar No. 254372)  
4 E-mail: sean.sullivan@procopio.com  
5 PROCOPIO, CORY, HARGREAVES &  
6 SAVITCH LLP  
7 525 B Street, Suite 2200  
8 San Diego, CA 92101  
9 Telephone: 619.238.1900  
10 Facsimile: 619.235.0398

11 Attorneys for Defendants Storix, Inc.,  
12 Paul Tyrell, & Sean Sullivan

13 UNITED STATES DISTRICT COURT  
14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

15 ANTHONY JOHNSON, an individual,  
16 Plaintiff,

17 v.

18 MANUEL ALTAMIRANO, an individual,  
19 RICHARD TURNER, an individual,  
20 DAVID KINNEY, an individual, DAVID  
21 HUFFMAN, an individual, PAUL  
22 TYRELL, an individual, SEAN  
23 SULLIVAN, an individual, STORIX, INC.,  
24 a California corporation, and DOES 1-5,  
25 inclusive,  
26 Defendants.

Case No. 19-cv-01185 H (BLM)

REPLY IN SUPPORT OF THE  
SPECIAL MOTION TO STRIKE  
PURSUANT TO CALIFORNIA  
CODE OF CIVIL PROCEDURE  
§ 425.16 BY DEFENDANTS PAUL  
A. TYRELL AND SEAN M.  
SULLIVAN

Filed: June 24, 2019  
Hearing: October 7, 2019  
Time: 10:30 a.m.  
Judge: Hon. Marilyn L. Huff  
Court: Courtroom 15A

## I. INTRODUCTION

Anthony Johnson’s entire opposition to the special motion of Storix’s attorneys Paul Tyrell and Sean Sullivan (“Movants”) to strike<sup>1</sup> the malicious prosecution claim against them relies on acceptance of the “severability rule” that has now been expressly rejected by the California Court of Appeal as applied to the first element of malicious prosecution, namely the favorable termination analysis.<sup>2</sup>

Johnson concedes that the complained of conduct arises from protected activity, invoking the protections of California’s anti-SLAPP statute, Code of Civil Procedure section 425.16. However, Johnson errs in contending that he can establish a probability of prevailing on the merits to avoid an order granting the motion to strike his malicious prosecution claim against Movants.

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. That is the situation here, as Storix, not Johnson, obtained judgment in its favor in the prior state court litigation. Since Johnson cannot overcome the first hurdle, the court need not even address whether there are any “severable” claims to address probable cause. Apart from this fatal flaw in Johnson’s case, he conflates the favorable termination analysis with that of probable cause to argue that some semblance of the “severability rule” survives. But even if it did, the court would conclude, just like the state trial court, that 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 now tries to recharacterize events.

---

<sup>1</sup> Johnson questions the filing a motion to dismiss under Rule 12 and a special motion to strike under Code Civ. Proc. § 425.16. Generally, this motion may provide the court with additional latitude to consider materials beyond the pleadings, restricts interim efforts to amend, if granted does not contemplate leave to amend, and may involve awards of fees and costs to prevailing defendants.

<sup>2</sup> This reply essentially tracks the argument Movants set forth in their concurrently-filed reply to Johnson’s opposition to their pending Motion to Dismiss, since the bases of Johnson’s opposition briefs were largely the same.

1 In other words, Storix (and its counsel) pursued a single cause of action for breach of  
2 fiduciary duty against Johnson with probable cause. Accordingly, Movants’ motion  
3 should be granted, since Johnson cannot establish the requisite elements of malicious  
4 prosecution as a matter of law, and so there is no probability he can prevail on the  
5 merits.

## 6 **II. ARGUMENT AND AUTHORITIES**

### 7 **A. Johnson Misconstrues Legal Authorities and Cannot Establish a** 8 **“Favorable Termination” as a Matter of Law**

9 Johnson faces an insurmountable obstacle in pursuing a malicious prosecution  
10 claim against Movants (or Storix) because he had a judgment rendered against him in  
11 the prior litigation, so cannot establish a “favorable termination” of the entire action.  
12 Johnson wrongly seeks to rely on the severability rule to circumvent this required  
13 first element of a malicious prosecution claim.

14 The judgment in the prior action is “the criterion by which to determine who  
15 was the successful party.” *Crowley v. Katleman*, 8 Cal.4th 666, 684-686 (1994).  
16 Johnson, however, completely ignores the reality of the underlying action (and  
17 judgment) and instead asserts he is entitled to sever certain claims when analyzing  
18 favorable termination.

19 The appellate court in *Lane v. Bell*, 20 Cal.App.5th 61 (2018) (“*Lane*”), and  
20 the California Supreme Court in *Crowley v. Katleman*, 8 Cal.4th 666 (1994)  
21 (“*Crowley*”), specifically addressed the cases that Johnson relies upon to argue  
22 application of the severability rule. In sum, those courts concluded that the  
23 severability rule does not apply when determining the first element of malicious  
24 prosecution, i.e., favorable termination. Instead, a malicious prosecution plaintiff  
25 must establish that he obtained a favorable termination as to the entire underlying  
26 action. The Fourth District California Court of Appeal’s 2018 *Lane* opinion,  
27 authored by Associate Justice Dato, provides a thorough discussion of the cases and  
28 history of the severability rule on which Johnson seeks to rely. *See Lane*, 20

1 Cal.App.5th at 75-78. The *Lane* court thoroughly analyzed the progeny of cases from  
2 *Albertson v. Raboff*, 46 Cal.2d 375 (1956), to *Crowley* nearly forty years later, as  
3 well as multiple Court of Appeal cases interpreting *Crowley*, and correctly concluded  
4 that the severability analysis does not apply to the favorable termination element of a  
5 malicious prosecution claim. Instead, it confirmed the rule that the “a malicious  
6 prosecution plaintiff [must] show ‘there [was] a favorable termination of the entire  
7 [underlying] action’ in the plaintiff’s favor,” such that “a partial recovery against the  
8 malicious prosecution plaintiff in the underlying action is fatal to showing the  
9 favorable termination element.” *Lane v. Bell*, 20 Cal.App.5th at 75 (brackets added).  
10 “Any other rule would strip the ‘favorable termination’ requirement of its  
11 independent significance because any individual ‘claim’ that lacks probable cause  
12 will necessarily be terminated in the underlying defendant’s favor.” *Id.*

13 Subsequent courts, including a recent California district court, have agreed  
14 with the analysis set forth in *Lane* and have followed the rule requiring a favorable  
15 termination of the entire action to support a malicious prosecution claim. *See, e.g.,*  
16 *Hagenbuch v. Steel*, No. D073394, 2019 WL 3423451, at \*12 (Cal. Ct. App. July 30,  
17 2019), *as modified on denial of reh’g* (Aug. 16, 2019) [“An entire action must  
18 favorably terminate to support a malicious prosecution action,” and expressly stating  
19 that the court “also rejected cases that held favorable termination could be based on a  
20 severable claim,” citing *Lane*]; *Weissensee v. Argentos*, No. A151726, 2018 WL  
21 5730273, at \*7 (Cal. Ct. App. Nov. 2, 2018) [Court explaining that “while the  
22 underlying action was resolved generally in favor of” the plaintiffs, a ruling by the  
23 court in defendant’s favor “in several particulars” meant “[s]imply, plaintiffs cannot  
24 show ‘a favorable termination of the entire action,’” citing *Crowley*, supra, 8 Cal.4th  
25 at 686]; *DeVaughn v. Cty. of Los Angeles*, No. CV 08-1461 AB (FFM), 2018 WL  
26 7324527, at \*9 (C.D. Cal. Dec. 12, 2018), *report and recommendation adopted*, No.  
27 CV 08-1461 AB (FFM), 2019 WL 631887 (C.D. Cal. Feb. 13, 2019) [Relying on  
28 *Lane*, *Crowley*, and *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal.App.4th 1392,

1 1403 (2006), in recognizing the rule that “it is not sufficient that some or most of the  
 2 claims in the prior action terminated in favor of the malicious prosecution plaintiff,”  
 3 but that “for a malicious prosecution claim to lie under California law, there must  
 4 first be a favorable termination of the entire action.”]

5 Here, Storix obtained entry of judgment in its favor against Johnson on **its sole**  
 6 **cause of action for breach of fiduciary duty**. See Request for Judicial Notice (“RJN”)  
 7 No. 22. Based on this fact alone Johnson cannot state a cause of action for malicious  
 8 prosecution. His reliance on the severability analysis to overcome this first required  
 9 showing fails to follow the law. Here, the judgment as a whole in the underlying  
 10 action did not terminate in Johnson’s favor as required by *Crowley* and *Lane*. As a  
 11 result, Johnson cannot satisfy the first gate keeping element of a malicious  
 12 prosecution claim, and so the Court need not even consider the probable cause and  
 13 malice elements of malicious prosecution. See *Lane*, 20 Cal.App.5th at 64. He cannot  
 14 establish a probability of prevailing on the merits, and the motion to strike should be  
 15 granted.

16 **B. There are No “Severable” Claims to Support a Claim of Lack of**  
 17 **Probable Cause**

18 Even if the Court were to assess the probable cause element, notwithstanding  
 19 the fact that it need not do so for the reasons stated above, Johnson still could not  
 20 survive Movants’ motion.

21 As a threshold matter, he fails to rebut the application of the interim adverse  
 22 judgment rule. While Johnson merely states that his failed summary judgment  
 23 motion does not invoke application of the interim adverse judgment rule, he  
 24 disregards the express language of the court’s order. The court stated as follows:

25 **The Motion** (ROA # 327) **of Defendant Anthony Johnson**  
 26 (‘Johnson’ or ‘Defendant’), pursuant to Code of Civ. Proc. 437c and  
 27 437c(f)(1), **for summary judgment** of the Second Amended  
 28 Complaint (‘SAC’) in consolidated case number 2015-00028262, or  
 in the alternative, summary adjudication of issues in favor of

1 Defendant, on the grounds that no triable issues of material fact  
 2 exist and Defendant is entitled to judgment as a matter of law as to  
 3 Plaintiff STORIX, INC.'s first cause of action for breach of fiduciary  
 4 duty and second cause of action for aiding and abetting breach of  
 fiduciary duty, is DENIED.

5 RJN No. 16. The court did not accept Johnson's contention that "no triable issues of  
 6 material fact exist." In other words, triable issues of material fact *did exist* that  
 7 required denial of the motion. That is precisely the type of order that implicates the  
 8 interim adverse judgment rule.<sup>3</sup> Further, in its post-trial orders, the trial court  
 9 repeatedly issued orders recognizing the "probable cause" supporting Storix's breach  
 10 of fiduciary duty claim against Johnson, irrespective of any remedy ultimately  
 11 awarded. *See, e.g.,* RJN Nos. 21, 23, 24.

12 Finally, Johnson attempts to recast the jury's verdict and judgment rendered  
 13 against him. The jury did not find him liable for sending a single email, as he now  
 14 argues. Rather, Johnson's breaching conduct involved a series of actions taken to  
 15 undermine Storix. This included standing up the Janstor entity and taking other  
 16 efforts to prepare that company to directly compete with Storix, as well as Johnson's  
 17 repeated harassment of Storix's customers and employees via email. The jury found  
 18 Johnson breached his duty of loyalty to Storix. *See* RJN No. 17, Dkt. 34-4, p. 202-  
 19 203. It did not limit its verdict to particular acts. Johnson's arguments about Storix's  
 20 "claims" and whether they were "actually asserted" simply mischaracterizes the  
 21 events and the trial.

22 And, as the trial court ruled: "Storix reasonably and in good faith brought an  
 23 unlimited civil action against Johnson." RJN No. 24, Dkt. 34-4, p. 245. Nothing  
 24 Johnson now argues can change that conclusion.

### 25 III. CONCLUSION

26 Johnson relies on outdated, rejected authorities to try to circumvent the

27 <sup>3</sup> Johnson makes a baseless accusation that somehow the court's denial of his  
 28 summary judgment motion was based on "perjury." *See* Opp. at p. 9. He submits no  
 evidence whatsoever to establish this frivolous accusation.

1 required showings for a valid malicious prosecution claim. Because he cannot  
2 establish any of the elements as a matter of law, Movants' motion should be granted  
3 in its entirety, and the malicious prosecution claim should be stricken in its entirety.  
4

5 Respectfully submitted,

6  
7 DATED: September 30, 2019

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

8  
9 By: s/ Sean M. Sullivan

10 Paul A. Tyrell

11 Sean M. Sullivan

12 Attorneys for Defendants Storix, Inc.,

13 Paul Tyrell, & Sean Sullivan  
14

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on Monday, September 30, 2019, I electronically filed the  
17 foregoing through this Court's electronic transmission facilities via the Notice of  
18 Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are  
19 determined this date to be registered CM/ECF Users set forth in the service list  
20 obtained from this Court on the Electronic Mail Notice List.  
21

22 s/ Sean M. Sullivan

23 Sean M. Sullivan  
24  
25  
26  
27  
28