

No. D077096

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

ANTHONY JOHNSON,
Plaintiff and Appellant,

vs.

**DAVID HUFFMAN, RICHARD TURNER, MANUEL
ALTAMIRANO and DAVID KINNEY**
Defendants and Respondents.

Appeal from Order
of the San Diego County Superior Court
Case No. 37-2019-00002457-CU-BT-CTL
Hon. Katherine A. Bacal

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(California Rules of Court, Rule 8.208)

Court of Appeal Case Number: D077096

Case Name: Anthony Johnson v. David Huffman, Richard Turner, Manuel Altamirano, and David Kinney

Please check the applicable box:

☒ There are no interested entities or parties to list in this Certificate.

☐ Interested entities or parties are listed below per California Rules of Court, rule 8.208(d):

Dated: March 13, 2020 /s/ Marty B. Ready, Esq.
Signature of Attorney/Party Submitting
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Parties Represented: Defendants and Respondents *David Huffman, Richard Turner, Manuel Altamirano, and David Kinney*

TABLE OF CONTENTS

I.	INTRODUCTION	6
II.	STATEMENT OF THE CASE	6
III.	LEGAL ARGUMENT	8
A.	The Trial Court Properly Found Respondents' Would Have Prevailed on Their Anti-SLAPP Motion.....	8
1.	Prong 2: As a matter of law, Johnson cannot satisfy the gate-keeping favorable termination element of his claim	9
2.	Johnson Cannot Establish Lack of Probable Cause	13
B.	Respondents Were Entitled to an Award of Attorneys' Fees for Their Meritorious Anti-SLAPP Motion	14
C.	Respondents as Prevailing Parties Were Entitled to Their Costs.....	16
IV.	CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>Soukup v. Law Office of Herbert Hafif</i> , 39 Cal. App. 4th 260, 269, fn. 3 (2006)	8
<i>Mendoza v. ADP Screening & Selection Services, Inc.</i> , 182 Cal. App. 4th 1644, 1652 (2010)	8
<i>Baral v. Schnitt</i> , 1 Cal. 5th 376, 396 (2016)	8, 16
<i>Kenne v. Stennis</i> , 230 Cal. App. 4th 953, 962 (2014)	9
<i>Bertero v. National General Corp.</i> , 13 Cal. 3d 43, 50 (1974)	9
<i>Crowley v. Katleman</i> , 8 Cal. 4th 666, 684-686 (1994)	9, 11
<i>Casa Herrera, Inc. v. Beydoun</i> , 32 Cal. 4th 336, 341 (2004)	9, 12
<i>Lane v. Bell</i> , 20 Cal. App. 5th 61, 68-76 (2018)	10, 11, 12, 13
<i>Albertson v. Raboff</i> , 46 Cal. 2d 375 (1956)	10
<i>Johnson v. Altamirano</i> , 2020 U.S. Dist. LEXIS 15775	11
<i>Staffpro, Inc. v Elite Show Servs., Inc.</i> , 136 Cal. App. 4th 1392, 1403 (2006)	12
<i>Murdock v. Gerth</i> , 65 Cal. App. 2d 170 (1944)	13, 14
<i>Freidberg v. Cox</i> , 197 Cal. App. 3d 381, 86 (1987)	13

<i>Sheldon Appel Co. v. Albert & Olier,</i> 47 C3d 863, 886 (1989)	13
<i>Wilson v. Parker, Covert & Chidester,</i> 28 C4th 811, 817, 823-824 (2002).....	14
<i>Coltrain v. Shewalter,</i> 77 Cal. Rptr. 2d 600 (1998)	15, 16
<i>Nelson v. Anderson,</i> 72 Cal. App. 4th 111, 131 (1999)	17
<i>Santisas v. Goodin,</i> 17 Cal. 4th 599, 606 (1998)	17
Statutes	
Cal. Civ. Proc. Code § 425.16(b)(1).....	9
Cal. Civ. Proc. Code § 425.16	13
Cal. Civ. Proc. Code § 425.16(c).....	14
Cal. Civ. Proc. Code § 1032	16
Cal. Civ. Proc. Code § 1032(a)(4)	16
Cal. Civ. Proc. Code § 425.169(c).....	18
Rules	
Cal. Rules of Court 3.1700(b)(2).....	17
Cal. Rules of Court 8.204(c)(1)	19
Cal. Rules of Court 8.360(b)(1).....	19

I. INTRODUCTION

This appeal arises from orders granting Defendants/Respondents' David Huffman, Richard Turner, Manuel Altamirano, and David Kinney (collectively, "Respondents") successful motion for attorneys' fees on their anti-SLAPP motion after Plaintiff's voluntary dismissal before the anti-SLAPP motion could be heard; denying Plaintiff/Appellant Anthony Johnson's ("Johnson") motion to tax or strike costs; and granting Respondents' costs as the prevailing party.

II. STATEMENT OF THE CASE

Storix, Inc. ("Storix") is a business that develops and sells a software product called "System Backup Administrator" or "SBAdmin." (1 AA 14.) Johnson founded and incorporated Storix in 2003. (*Ibid.*) In 2011, in response to a serious medical issue, Johnson transferred operations and management responsibilities, as well as 60% of Storix, to Respondents David Huffman, Richard Turner, Manuel Altamirano, and David Kinney. (*Ibid.*)

In 2013, Johnson's serious health crisis unexpectedly resolved and he recommenced work as an employee at Storix. (1 AA 14.) Upon his return, Johnson's inability to cope with not being the head of Storix ultimately resulted in his resignation in May 2014, although he maintained his 40% ownership interest. (1 AA 15.)

Johnson elected himself to the board of Storix in February 2015. (1 AA 15.) In direct contravention of his fiduciary duties to Storix, Johnson subsequently incorporated a company named Janstor Technologies to compete with Storix. (Respondents' Appendix ("RA") 502.) In response, Storix filed a complaint against Johnson for breach of fiduciary duty, the operative complaint being a second amended complaint. (RA 499.) In

February 2018, the Storix suit was tried to a jury, which returned a verdict in favor of Plaintiff Storix. (RA 584.) Johnson has appealed this verdict. (See D075308.)

This underlying action was the fifth lawsuit filed by Johnson against Respondents, and in some instances Storix, in furtherance of his campaign against Respondents to gain control of the company's software product, SBAdmin, and the company and run Respondents out of the business. (RA 436-438.) After successfully defending Johnson's previous lawsuits, Respondents were hopeful these disputes were finally put to rest. (*Id.* 584.) Unfortunately, on January 14, 2019, Respondents were presented with this action and yet another lawsuit by Johnson alleging several of the same causes of action previously litigated and based on allegations that are protected activity under California's anti-SLAPP statute. (1 AA 12.) In response, Respondents filed a timely anti-SLAPP motion attacking Johnson's first claim for wrongful use of civil proceedings, second claim for breach of fiduciary duty, third claim for conversion, and fifth claim for fraud. (1 AA 98.) Before Johnson's opposition to Respondents' anti-SLAPP motion was due, however, Johnson voluntarily dismissed his case without prejudice¹. (1 AA 229.) Respondents filed a memorandum of costs on July 16, 2019 and a motion for attorneys' fees based on Cal. Civ. Proc. Code § 425.16(c) on July 17, 2019. (1 AA 232, 240.) The trial court

¹ After his voluntary dismissal, Johnson, on June 24, 2019, refiled the complaint in the U.S. District Court for the Southern District of California against Defendants, Storix, and attorneys Paul Tyrell and Sean Sullivan of Procopio. (1 AA 272.) Johnson's June 24, 2019 complaint alleges the exact same causes of action as in this underlying matter and adds causes of action for rescission and indemnification. (*Ibid.*)

issued its tentative ruling on October 24 granting Respondents' cost bill but taking under submission the attorneys' fee motion. (2 AA 406.) On December 4, 2019, the Court ruled in favor of Respondents granting their attorney fee motion on the claim for wrongful use of civil proceedings. (2 AA 410.)

III. LEGAL ARGUMENT

A. The Trial Court Properly Found Respondents' Would Have Prevailed on Their Anti-SLAPP Motion

An appellate court reviews an order granting an anti-SLAPP motion under a de novo standard. *Soukup v. Law Office of Herbert Hafif*, 39 Cal. App. 4th 260, 269, fn. 3 (2006). Applying the de novo standard to the appellate court's review requires this Court to employ the same two-prong analysis under the anti-SLAPP statute to determine whether the trial court properly granted the motion. *Mendoza v. ADP Screening & Selection Services, Inc.*, 182 Cal. App. 4th 1644, 1652 (2010). Under the first prong of the anti-SLAPP analysis, the moving defendant bears the burden of "identifying all allegations of protected activity, and the claims for relief support by them." *Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016). If the trial court determines "relief is sought based on allegations arising from activity protected by the statute," then the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." *Ibid*.

The trial court correctly found Johnson's complaint arose from Respondents' exercise of their right of petition when it granted Respondents' motion for attorneys' fees for a successful anti-SLAPP motion as to Johnson's cause of action for wrongful use of civil proceedings. (2 AA 418-421.) Because Johnson correctly conceded his

cause of action for wrongful use of civil proceedings arose out of protected activity, prong 1 was satisfied. (2 AA 328.) The Court therefore needed only to determine whether Johnson could establish a probability of prevailing on his claim for wrongful use of civil proceedings.

1. Prong 2: As a matter of law, Johnson cannot satisfy the gate-keeping favorable termination element of his claim

Because Johnson conceded his claim for wrongful use of civil proceedings was based on activity protected under the anti-SLAPP statute, the burden shifted to Johnson to establish there was a probability he would prevail on his claims. *See* Cal. Civ. Proc. Code § 425.16(b)(1). (2 AA 328.) To satisfy this burden, Johnson must show not only that the Complaint was legally sufficient, but also that it was supported by a prima facie showing of facts that could support a favorable judgment. *See Kenne v. Stennis*, 230 Cal. App. 4th 953, 962 (2014). To maintain a cause of action for malicious prosecution, the plaintiff must allege the following necessary elements: (1) a judicial proceeding was commenced by or at the direction of the defendant and was favorably terminated; (2) lack of probable cause; and (3) malice. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 50 (1974). Johnson failed to satisfy his burden because the underlying judgment did not terminate in his favor.

The judgment in the prior action is “the criterion by which to determine who was the successful party.” *Crowley v. Katleman*, 8 Cal. 4th 666, 684-686 (1994). “It 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.” *Casa Herrera, Inc. v.*

Beydown, 32 Cal. 4th 336, 341 (2004) (internal quotes omitted). And a partial victory in an underlying action is not favorable termination. *Lane v. Bell*, 20 Cal. App. 5th 61, 68-76, (2018).

Johnson, however, completely ignores the reality of the underlying action (and judgment) and instead asserts he is entitled to sever certain issues from claims when analyzing the favorable termination element. (Appellant's Opening Brief ("AOB"), p. 14.) The cases Johnson asserts support this severability rule, however, were specifically addressed in this very Court's decision in *Lane v. Bell*, 20 Cal. App. 5th 61 (2018) and previously by the California Supreme Court in *Crowley v. Katleman*, 8 Cal. 4th 666 (1994). In sum, there is no severability rule when determining favorable termination. Rather, a favorable termination must be to the entire underlying action. Here, judgment was entered in favor of the malicious prosecution plaintiff Storix, Inc. As a matter of law, Johnson cannot establish a probability of prevailing on his cause of action for wrongful use of civil proceedings.

The *Lane* case, decided in 2018, called out and discussed the cases, which Johnson contends creates a severability rule. See *Lane*, 20 Cal. App. 5th at 75-78. The *Lane* court thoroughly analyzed the progeny of cases since *Albertson v. Raboff*, 46 Cal. 2d 375 (1956) and *Crowley* and correctly concluded severability analysis does not apply to the favorable termination element of a malicious prosecution claim. *Lane*, 20 Cal. App. 5th at 75. At most, the so-called "severability rule" enunciated in *Albertson* has limited applicability where there is a partial appeal. *Ibid*.

As in *Lane*, there is no partial appeal in this underlying matter. On the contrary, the Second Amended Complaint only contained one cause of action asserted against Johnson – breach of fiduciary duty. (RA 499.)

And the Judgment on Consolidated Actions Following Trial unequivocally ordered judgment be entered “[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix, Inc.’s complaint for breach of fiduciary duty.” (RA 584.) There is simply no ambiguity in the judgment, which found in favor of Storix and against Johnson. Because the judgment as a whole in the underlying action did not terminate in Johnson’s favor as required by *Crowley* and *Lane*, Johnson cannot satisfy the first gate keeping element of a malicious prosecution claim. Johnson’s inability to satisfy this gate keeping element is fatal to this appeal, and the Court need not consider the probable cause and malice elements of malicious prosecution. *See Lane*, 20 Cal.App.5th at 64.

The U.S. District Court for the Southern District of California has also considered and ruled on Johnson’s assertion that the severability of claims applies in the context of the favorable termination element of a malicious prosecution claim. *See Johnson v. Altamirano*, 2020 U.S. Dist. LEXIS 15775. The District Court heard the very same arguments Johnson is asserting here because Johnson dismissed this underlying state court action and refiled the exact same cause of action in the federal court. (1 AA 272.) The District Court ruled:

“[r]egardless of how [Johnson] attempts to characterize the claims that were at issue in the state court action, the judicially noticeable documents show that a judgment was entered against him in that action.... Because the prior state court action at issue concluded with a judgment against him, [Johnson’s] claim for malicious prosecution fails as a matter of law.” *Id.* at *16-17.

As the District Court correctly held, Johnson’s characterization of the underlying claim as containing severable issues is unavailing because

judgment was unquestionably entered against Johnson on the only claim asserted against Johnson by Storix.

The flaw in Johnson's argument advancing the severability rule is the failure to appreciate the theory underlying the favorable termination element. A termination favorable to the malicious prosecution defendant tends to demonstrate the "innocence of the accused." *Lane*, 20 Cal. App. 5th at 68, citing *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 341 (2004). But here, there is no question the judgment was against Johnson alleviating any concern or ambiguity as to his innocence.

Johnson cannot avoid this adverse judgment by asserting the monetary award is severable. (AOB, p. 14.) This Court has clarified the favorable termination rule explaining that a malicious prosecution plaintiff must show "there was a favorable termination of the *entire* underlying action in the plaintiff's favor," and "that a partial recovery against the malicious prosecution plaintiff in the underlying action is fatal to showing the favorable termination element." *Lane v. Bell*, 20 Cal. App. 5th at 75 (italics in original; quotations and brackets omitted). "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.* Further, *Lane* rejected prior cases that held favorable termination could be based on a "severable" claim. *Id.*; see *Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal. App. 4th 1392, 1403 (2006). Thus, Johnson cannot base his malicious prosecution action on a partial victory in the underlying action, where the judgment itself was adverse to Johnson. See *Lane*, 20 Cal. App. 5th at 68-76.

Johnson's Opening Brief asks the Court to consider the breach of fiduciary duty asserted against him by Storix as two separate claims: 1) unfair head start; and 2) loss of employee productivity. (AOB, pp. 14 - 15.) Johnson asserts the loss of employee productivity is a severable claim because it was "a claim never pled or argued but...first introduced in closing arguments." (*Id.* at 14.) This argument, however, was first addressed in *Murdock v. Gerth*, 65 Cal. App. 2d 170 (1944) finding that a judgment not based upon an allegation in a complaint can still be relied upon to determine the favorable termination element. *Murdock*, 65 Cal. App. 2d at 176-177. Consideration should be given to the judgment as a whole and to "hold otherwise would defeat the purpose of the rule which seeks to prevent collateral attack upon judgments of duly constituted courts." *Freidberg v. Cox*, 197 Cal. App. 3d 381, 386 (1987) citing *Murdock*, 65 Cal. App. 2d 170 (1944).

No matter how Johnson characterizes the underlying judgment, it is clear judgment was entered against him on Storix's breach of fiduciary duty claim and Johnson ordered to pay damages in the amount of \$3,739.14. (RA 584.) Johnson cannot establish the element of favorable termination. The trial court properly held Johnson could not establish a probability of prevailing on his claim under Cal. Civ. Proc. § 425.16 for wrongful use of civil proceedings entitling Respondents' to attorneys' fees.

2. Johnson Cannot Establish Lack of Probable Cause

Although the probable cause element need not be addressed, because Johnson's Opening Brief addresses this element, so will Respondents. Probable cause exists "if any reasonable attorney would have thought the claim tenable"—i.e., "arguably meritorious." *Sheldon Appel Co. v. Albert*

& *Oliker*, 47 Cal. 3d 863, 886 (1989) (emphasis added). Unless obtained by fraud or perjury, a favorable verdict in the prior action conclusively establishes probable cause, even if the verdict is subsequently set aside by the trial court or on appeal. *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 817, 823-824 (2002).

A verdict favorable to Storix in the underlying action conclusively establishes Respondents, and more appropriately, Storix, had probable cause to file and maintain the underlying action. Thus, the Court need only look to the judgment rendered in the trial court to determine the successful party. The language of the judgment could not be clearer where the court found “[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.’s complaint for breach of fiduciary duty.” (RA 584.) This judgment in favor of Storix conclusively establishes probable cause for the underlying action.

Johnson’s malicious prosecution claim fails as a matter of law because he cannot satisfy the gatekeeping element of his claim, i.e., favorable termination, and the lack of probable cause element. Johnson, therefore, cannot establish a probability of prevailing on his claim for wrongful use of civil proceedings.

B. Respondents Were Entitled to an Award of Attorneys’ Fees for Their Meritorious Anti-SLAPP Motion

Cal. Civ. Proc. Code § 425.16(c) states in part that a “prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” Because the trial court found Respondents’ anti-SLAPP motion meritorious as to the wrongful use of civil proceedings claim, they were entitled to their reasonable attorneys’ fees. (2 AA 410 - 413.)

Johnson's Opening Brief asserts three reasons why the attorney fee motion should have been denied: (1) Johnson did not dismiss the lawsuit to avoid the attorney fee motion; (2) the anti-SLAPP motion was of no practical benefit; and (3) the fees were unreasonable. (AOB, pp. 18 - 21.)

As to the first reason asserted by Johnson, the Opening Brief relies on *Coltrain v. Shewalter*, 77 Cal. Rptr. 2d 600 (1998) for the proposition that the court should determine prevailing party by looking to which party realized its objectives when a plaintiff voluntarily dismisses his complaint when an anti-SLAPP motion is pending. The Opening Brief asserts the reason for Johnson's voluntary dismissal was "because I saw no way to amend it, and filed it in federal court after doing so." (AOB, 19.) To allow a plaintiff to forum shop and avoid the mechanism the Legislature created to address SLAPP suits, would have a significant chilling effect on a party's right to petition the courts. There would be no downside risk for the Plaintiff filing a SLAPP suit. See *Coltrain*, 77 Cal. Rptr. 2d at 608. Under these circumstances, why Johnson dismissed his complaint does not bear on Respondents' right to attorneys' fees for a meritorious anti-SLAPP motion.

As to the second and third reason asserted by Johnson, which go to the reasonableness of the attorney fee award, the trial court considered the experience and time of the attorneys and the extent of success of Respondents' anti-SLAPP motion and attorney fee motion. (2 AA 420 - 421.) After considering the declaration and supporting documents included with Respondents' attorney fee motion, the trial court cut the hours billed by 45% and awarded a total of \$9,027.50. (1 AA 247 - 266.) This amount and deduction was entirely reasonable under the circumstances and given the litigious nature of Johnson.

Moreover, Respondents prevailed on a practical level by gaining a dismissal in their favor. Although short-lived because Johnson refiled in federal court, Johnson was forced to amend his pleadings to avoid triggering the anti-SLAPP statute. (AOB, pp. 19 – 20.); see also *Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016) (“Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.”). Given the ruling in *Baral*, Respondents achieved a significant victory by narrowing and focusing Johnson’s claims to those supported by unprotected activity. The attorneys’ fee award was justified, reasonable, and the trial court properly applied the correct standard in determining the amount awarded to Respondents.

C. Respondents as Prevailing Parties Were Entitled to Their Costs

A prevailing party’s right to recover costs is governed by Cal. Civ. Proc. Code § 1032, which provides, in subdivision (b), that “[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” For the purpose of determining entitlement to recover costs, Section 1032 defines a prevailing party as including, among others, “a defendant in whose favor a dismissal is entered” or a “defendant against those plaintiffs who do not recover any relief against that defendant.” Cal. Civ. Proc. Code § 1032(a)(4). If the items appearing in a verified memorandum of cost appear to be proper charges, then the memorandum is *prima facie* evidence the costs “were necessarily incurred by the defendant and the burden of showing that an item is not properly chargeable or is unreasonable is upon

the objecting party.” *Nelson v. Anderson*, 72 Cal. App. 4th 111, 131 (1999) (citations omitted).

Johnson had the burden of showing Respondents’ items of cost were unnecessary or unreasonable. *See* Cal. Rules of Court 3.1700(b)(2). Rather than argue the reasonableness or necessity of costs in his Motion to Tax or Strike Costs, Johnson attempted to satisfy this burden by arguing Respondents are not entitled to costs associated with their successful defense because Respondents did not incur any costs. (AOB, p. 22.) Voluntary dismissal by Johnson, within the meaning of Section 1032, was in favor Respondents entitling them to their costs. Cal. Civ. Proc. Code § 1032; *see Santisas v. Goodin*, 17 Cal. 4th 599, 606 (1998). Respondents submitted a cost bill detailing the first appearance fees and filing fees necessary in defense of the lawsuit filed by Johnson. (1 AA 232.) To counter Respondents’ cost bill, Johnson has not cited, and cannot cite, to any relevant authority establishing Respondents did not incur fees within the meaning of the statute. Moreover, Johnson did not appear and argue in support of his motion to tax. (2 AA 409.) Thus, the trial court correctly found Respondents were the prevailing party entitled to their costs.

IV. CONCLUSION

The trial court properly found Johnson’s claim was directed to Respondents’ protected petitioning activity triggering the anti-SLAPP statute. Johnson could not sustain his burden to demonstrate a probability of prevailing because Johnson cannot satisfy the favorable termination element or the probable cause element. Because Respondents’ anti-SLAPP motion was meritorious, they were entitled to an award of attorneys’ fees.

The trial court applied the correct standard in assessing attorneys' fees to Respondents and correctly found Respondents were the prevailing party entitled to attorneys' fees under Cal. Civ. Proc. Code § 425.169(c) and costs.

For all of the foregoing reasons, Respondents respectfully request the orders in their favor be affirmed in all respects. Respondents' request the matter be referred back to the trial court to award attorneys' fees and costs incurred on appeal.

Dated: March 13, 2020

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CERTIFICATE OF COMPLIANCE

Counsel of record for Respondents hereby certify that, pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 14-point Roman type including footnotes and the text of the brief consists of 4280 words counted by the Microsoft Word version 2010 word processing program used to generate this brief.

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STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18. I am not a party to this action. My business address is 401 West A Street, Suite 1900, San Diego, California 92101.

On **March 13, 2020**, the documents described as

**RESPONDENTS' BRIEF; AND
RESPONDENTS' APPENDIX**

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Irene Gonzales

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