

No. _____

**In the United States Court of Appeals
for the Ninth Circuit**

In Re ANTHONY JOHNSON,
Petitioner.

*On Petition for a Writ of Mandamus to the U.S. District Court for the Southern
District of California in Case No. 3:19-cv-1185-H-BLM*

PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Pursuant to the All Writs Act, 28 U.S.C § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, plaintiff and Petitioner Anthony Johnson (Johnson) respectfully asks this Court to issue a writ of mandamus directing the district court to vacate all orders dismissing Johnson's claims and staying further proceedings, and to reverse the case transfer to Judge Huff or assign the case to another judge.

Judge Huff violated Johnson's **constitutional right to due process** by granting Rule 12(b)(6) motions to dismiss his well-supported claims with prejudice based on arguments raised *sua sponte* in an order issued without a hearing, thereby affording Johnson no opportunity to dispute the arguments or amend his complaint. Judge Huff exceeded all bounds of reason by blatantly arguing the defendants' case, ignoring any arguments or authority to the contrary, and otherwise issuing arbitrary decisions to prevent Johnson's claims from being heard.

Judge Huff had this case transferred to her court even as Johnson's second appeal is pending on the unprecedented copyright attorney fee award the Ninth Circuit previously found unreasonable and excessive. Johnson previously moved the Ninth Circuit to have the fee decision remanded to a different judge based on the appearance of bias. Two years later, Johnson petitioned the Ninth Circuit to reverse Judge Huff's order transferring this case to her court or otherwise reassign the case to a different judge based on the appearance of bias. Since that petition

was denied, Judge Huff abandoned any pretense of impartiality and her decisions that followed can no longer be explained or ignored.

Johnson does not herein challenge Judge Huff's rulings underlying the dismissal of his well-established claims. Johnson simply requests the Court's intervention to vacate orders issued in violation of his due process rights, and preserve the future appearance of fairness and justice by having the same motions decided by a different judge. No prejudice will be caused by granting this Petition, since there has been no discovery or rulings on the merits of the claims and further proceedings are currently stayed pending a state appeal that has no bearing on the claims. Granting the Petition will prevent at least year of unnecessary delay, the inevitable appeal of the dismissed claims, and eventually starting the entire litigation over 2-3 years from now.

II. RELIEF SOUGHT

Johnson respectfully requests this Court issue a writ of mandamus directing the district court judge to vacate the orders dismissing his claims with prejudice and staying further proceedings.

Johnson requests that the Court reconsider its previous decision to deny Johnson's petition for a writ of mandamus to reverse the *Order of Transfer* and

thereby return this case to the originally assigned judge.¹ If the Court finds insufficient sufficient grounds to reverse the case transfer, Johnson requests the Court reconsider its decision to deny Johnson's request in the same petition to assign the case to another judge.

If Court denies the above requests, Johnson alternatively requests the Court issue a writ of mandamus directing the district court to reverse its order denying Johnson's motion to stay the malicious prosecution claim, thereby reversing the subsequent dismissal of that claim.

III. ISSUES PRESENTED

- (1) Whether the district court violated Johnson's constitutional right to due process by: (a) dismissing his claims based on *sua sponte* arguments raised in its order without a hearing or (b) refusing to stay Johnson's malicious prosecution claim pending a state appeal and then dismissing the claim based on the underlying state judgment.
- (2) Whether sufficient grounds existed for the district court judge to transfer this case to her court, especially in light of Johnson challenging her impartiality in a prior case.

¹ Ninth Circuit Case No. 19-72507, filed on October 3, 2019 and summarily denied on November 22, 2019 (*see Attachment 2.*)

- (3) Whether the cumulative acts of unfairness and unequal treatment, and violations of Johnson's right to due process described herein warrant the district court judge's recusal.

IV. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

A. The Copyright Attorney Fee Award

After trial of a copyright lawsuit in 2015, Judge Huff ordered Johnson to pay unprecedented attorney fees to these same defendants for exercising his constitutional rights to petition and free speech during the copyright litigation.² The award was based entirely on three emails in 2015, wherein Johnson (1) threatened litigation against the defendants after they brought the state lawsuit against him that is the subject of the current malicious prosecution claim, and (2) sought to enforce his rights under the Copyright Act before the court found he implicitly transferred his registered copyrights to the defendants.

After the Ninth Circuit reversed the attorney fee award as unreasonable and excessive, Johnson filed a motion with the Court to reassign the attorney fee decision on remand to a different judge based on the appearance of bias. **Exhibit 12** at p. 216. The Court summarily denied the motion. At the remand hearing, Johnson showed Judge Huff that every fact on which she based the award had

² The attorney fee award is pending a second appeal in Ninth Circuit Case No. 18-56106, fully briefed as of February 1, 2019, based largely on these grounds.

since been disproven in a state court trial. **Exhibit 13** at p. 237. Contrary to Judge Huff's conclusion that Johnson's motive in bringing his copyright claim was to try to destroy Storix, "the fact that Johnson was concurrently funding a shareholder derivative lawsuit on Storix's behalf shows that Johnson was *never* out to harm Storix." *Id.* at p. 246 (emphasis in original.) Notably, Johnson argued that the unethical conduct of Storix's attorneys should be considered. "Storix counsel fought against the company's interest throughout in [sic] the derivative action, even sitting on the side of the management defendants at trial." *Id.* at p. 255.

Judge Huff ignored all facts presented and reissued the order based on the same facts, applying only a minor discount to comply with the Ninth Circuit mandate. **Exhibit 1** at p. 15.

B. Johnson's Motion to Reverse the Case Transfer or Recuse Judge Huff

This case was filed in June 2019 and assigned to district court Judge Janis L. Sammartino. No notice of related cases was filed, but Judge Huff ordered the case transferred to her court. **Exhibit 2** at p. 58. Johnson filed a motion to reverse the case transfer, for Judge Huff to recuse herself under 28 U.S.C. § 455(a), or to have another judge decide the motion under U.S.C. § 144. *See Id.* at pp. 80-98. Notably, Johnson argued that Judge Huff cannot be expected to be impartial in a malicious prosecution case against the same attorneys whose unethical conduct she previously refused to acknowledge when ordering Johnson to pay their fees in the

copyright case. *Id.* at pp. 96-98, *See also Id.* at pp. 107-108, *Johnson’s Declaration in Support of Motion to Recuse* (exhibits omitted.)

Referring to the copyright case tried in 2015, Judge Huff refused to reverse the case transfer based on the “low number rule” because “the two actions *still* involve some identical parties, Plaintiff Johnson and Defendant Storix”. **Exhibit 2**, at p. 98, fn. 2 (italic added.) Judge Huff also refused to recuse herself or to allow another judge rule on the Johnson’s motion. *Id.* at pp. 113-117.

Johnson petitioned the Ninth Circuit for a writ of mandate “directing the district Court Clerk to transfer this case back to the originally assigned judge or to assign the case to a different district court judge.” **Exhibit 2**, *Petition for Writ of Mandamus*, Ninth Circuit Case No. 19-72507, at p. 43. The primary basis for recusal was that “No reasonable person would expect Judge Huff to be impartial in deciding a malicious prosecution claim against the same attorneys whose misconduct she refused to acknowledge for years, especially since any ruling in Johnson's favor would substantiate his current and past claims of judicial bias in her court.” *Id.* at p. 45. The Ninth Circuit summarily denied the petition. **Exhibit 3** at p. 99.

C. Defendants’ Motions to Dismiss Johnson’s Claims

The defendants filed motions to dismiss all Johnson’s claims under Fed. R. Civ. Proc. § 12(b)(6) and motions to strike Johnson’s malicious prosecution claim

under Cal. R. Civ. Proc. § 425.16 (California’s anti-SLAPP statute) on the sole ground that the “entire lawsuit” underlying the claim did not terminate in Johnson’s favor. *See Exhibits 14-18*. Johnson opposed the argument by providing controlling California cases that establish and approve the “severability rule” which removes a claim pending appeal from the favorable termination analysis when the malicious prosecution action is directed only to non-appealed claims. *See Exhibits 19-23*.

After Johnson filed his oppositions, Judge Huff ordered further briefing, noting that “Plaintiff argues that his conversion claim is not barred by the statute of limitations because he did not discover the alleged conversion until December 2018.” *Exhibit 4*, at p. 101. Judge Huff referred to a state court order denying the “accounting claim” Johnson brought on Storix’s behalf and another order directing Storix to provide Johnson limited company records, suggesting the orders contradicted Johnson’s allegation that “he did not discover the alleged conversion until December 2018.” *Ibid*. She then recommended the defendants provide further argument as to “whether Plaintiff’s current claim for conversion is barred by *res judicata*, whether by claim preclusion or issue preclusion, in light of the prior state court judgment.” *Id.* at p. 102. Defendants’ further briefing generally referred to the consolidated state action, but didn’t identify any identical claims or specific issues decided contrary to Johnson’s allegations. *See Exhibit 25* at p. 496.

D. Johnson’s Motion to Stay the Malicious Prosecution Claim

After Judge Huff allowed the defendants to provide further arguments, Johnson filed an *ex parte* motion to stay the malicious prosecution claim (if the court still found lack of favorable termination) until the entire underlying case was finally decided by the state appeal. *See Exhibit 5* at p. 105. Johnson further showed that the same cases cited by the defendants to support the argument that the “entire lawsuit” did not terminate in Johnson’s favor specifically approve the “severability rule” exception as to appealed claims. *Id.* at p. 109-110. Johnson then provided substantial authority requiring that, even when a malicious prosecution claim is directed to the “entire lawsuit” (and thus the appealed claims), the proper remedy is to stay, rather than dismiss, the action pending the underlying appeal. *Id.* at p. 111.

Judge Huff vacated the hearing on Johnson’s motion to stay, made no reference to Johnson’s arguments and authority, and raised a new argument on defendants’ behalf in the order, thereby depriving Johnson any chance to respond. The order concludes that Johnson’s claim was “premature” and denied Johnson’s motion. **Exhibit 6** at p. 116.

E. Defendants’ Motions to Dismiss and Strike Johnson’s Claims

Judge Huff vacated the hearing on defendants’ motions to dismiss and special motions to strike. **Exhibit 24** at p. 494. The same day Judge Huff denied

Johnson's motion to stay the malicious prosecution claim, she granted defendants' motions to dismiss five of Johnson's seven claims with prejudice, including the malicious prosecution claim, making no reference to Johnson's arguments and authority contrary to her conclusions. *See Exhibit 7* at p. 118.³

Judge Huff raised five new arguments on defendants' behalf in the order, again providing Johnson no opportunity to dispute her findings. *See Exhibit 8* at pp. (#@#) After dismissing all claims against the attorney-defendants and Storix, Judge Huff noted that "a judgment is not final for purposes of *res judicata* during the pendency of and until the resolution of an appeal." *Exhibit 7* at p. 145. She therefore denied the motion to dismiss as to the two remaining claims *without prejudice*, and instructed the defendants to re-raise the *res judicata* and statute of limitations defenses at summary judgment after a state appeal is decided. *Id.* at p. 146, fn. 7; p. 149, fn. 8.

F. Johnson's Motion for Reconsideration

Johnson filed a motion for reconsideration of both the district court's order dismissing his claims and the order denying his motion to stay of the malicious prosecution action. "The Court failed to address most of Johnson's facts, arguments and authorities contrary to its conclusions of law, and dismissed many

³ The special motions to strike attacked only the malicious litigation claim but were duplicative since defendants raised only affirmative defenses and the motions were all reviewed under Rule 12(b)(6) standards.

of Johnson's claims based on arguments raised *sue sponte* without a hearing, thus allowing Johnson no opportunity to argue prior to this motion." **Exhibit 8** at p. 163. Furthermore, the court "made no reference to Johnson's well established arguments when dismissing his claims with prejudice, without a hearing, and with no opportunity to argue or amend." *Ibid.* Johnson provided argument and authority demonstrating clear error of fact and law in all the *sue sponte* arguments raised in the order. *See Id.* at pp. 164-178. Because the court did not acknowledge Johnson's arguments and authority that defeated defendants' only defense to the malicious prosecution claim, Johnson provided added authority showing the dismissal of the claim was a clear error of law. *Id.* at pp. 165-167. Johnson also demonstrated that the case cited by the court to support dismissing the malicious prosecution actually supported Johnson's position, but under other circumstances required a stay, rather than dismissal. *Id.* at pp. 167-168.

Johnson further cited Supreme Court cases that precluded her from arguing on defendants' behalf. **Exhibit 8**, pp. 178-179. He reasserted his argument that defendants' motions must have been reviewed under summary judgment standards because factual issues were raised (*Id.* at pp. 179-180), and that it was improper for Judge Huff to raise factual issues and allow further briefing – not so the parties can dispute a specific finding of *res judicata* – but to permit defendants a second chance to research and find facts to support a *res judicata* defense. *Id.* at pp. 180-

181. Finally, Johnson argued that the consolidated shareholder derivative lawsuit referenced in her order involved Storix's claims, not his, and also was not subject to the state appeal. He therefore requested Judge Huff issue a final ruling on the two remaining claims, rather than unnecessarily stay further proceedings. *Id.* at p. 181.

Defendants offered no opposition to any arguments in Johnson's motion other than to restate Judge Huff's order. *See Exhibits 28-29* at pp. 522, 530. Judge Huff denied reconsideration because:

“Plaintiff does not identify any new evidence or intervening change in law that would justify reconsideration of the prior order. Rather, Plaintiff argues that the Court clearly erred in dismissing his claims for malicious prosecution, economic interference, breach of contract, rescission, and indemnification with prejudice. (Doc. No. 74-1 at 3-16.) But, in attempting to establish error, Plaintiff relies on arguments that he either did raise or reasonable could have raised in his oppositions to Defendants' motions to dismiss these claims. In essence, Plaintiff disagrees with the Court's prior order dismissing his claims with prejudice and seeks to relitigate Defendants' motions to dismiss through a motion for reconsideration. This is not a proper basis for reconsideration of a prior order, and the Court denies Plaintiff's motion for reconsideration on this basis alone.”

Exhibit 10 at p. 196. Judge Huff nevertheless addressed a few arguments in Johnson's motion, but only restated her prior conclusions, except for one.

To defeat Johnson's contract claim, she raised a new argument in the order denying reconsideration. She argued Johnson's contract claim fails because Johnson alleged he “provid[ed] Storix the copyrights to SBAdmin needed to

conduct its business for over fifteen (15) years.” Since the 2015 judgment in her court was that Johnson transferred *ownership* of all his copyrights to Storix in 2003, his contract claim failed as a matter of law because he no longer had any rights to convey. **Exhibit 10** at pp. 198-199.⁴ Judge Huff’s only response to Johnson’s argument that it was unfair for her to raise new arguments and authorities on the defendants’ behalf was that “in resolving legal issues presented to the Court by the parties, a district court is not limited to the specific authorities presented in the parties’ briefing.” *Id.* at p. 200.

G. Johnson’s Motions for Certification

Concurrent with the motion for reconsideration, Johnson filed a motion for entry of partial final judgment pursuant to Fed. R. Civ. Proc § 54(b). *See Exhibit 9* at p. 182. Judge Huff denied the motion because (1) “there is some overlap in facts between the five dismissed and the two remaining claims”, (2) “there is a substantial risk of piecemeal appeals”, and (3) “there is no indication that the entry of a Rule 54(b) partial final judgment as to the five dismissed claims has the

⁴ Again, Johnson doesn’t try to reargue his case, but it’s relevant that Judge Huff raised another new argument on defendants’ behalf. Had Johnson been able to respond, he would have shown that any allegation suggesting he provided Storix rights for 15 years could easily be amended to clarify that he provided Storix rights in 2003 that it benefitted from for 15 years. She dismissed all claims with prejudice under a Rule 12(b)(6) motion, thereby depriving Johnson of his right to amend the complaint.

potential to streamline the ensuing litigation.” **Exhibit 10** at p. 203. No overlapping facts were identified in the order.

Johnson further requested that, unless the court reversed the decision to dismiss the malicious prosecution action or grant a partial appeal, it should certify, pursuant to 28 U.S.C. § 1292(b), the order denying his *Motion to Stay* the malicious prosecution claim pending the state appeal. **Exhibit 9** at p. 186. The motion asserts that the stay order is “(1) conclusive, (2) resolves an important question of whether a stay of a malicious prosecution action is warranted pending appeal of a claim in the underlying lawsuit that is not subject to the action, and (3) is effectively unreviewable on appeal because awaiting final judgment would render it moot.” *Ibid.* (underline added.) The court denied certification on the sole ground that the order denying the stay did not involve a controlling question of law. **Exhibit 10** at p. 205.

H. Defendant’s Motion to Stay All Proceedings Pending the State Appeal

Defendants brought a motion to stay proceedings on Johnson’s two remaining claims until a state appeal is decided. They assert that “[t]he two remaining claims in this matter [] involve the same parties and legal and factual issues already decided in proceedings before a state court of this district” (**Exhibit 11** at p. 210), “the appellate ruling in the State Court Action will substantially limit or possibly completely eliminate the issues to be decided in this current

proceeding before this Court” (*Id.* at p. 213), and “claims and legal issues in the State Court Action and the current proceedings are virtually identical.” *Id.* at p. 214. Judge Huff granted the motion to stay because “[i]n light of Defendants’ asserted *res judicata* defense, a stay of the action pending resolution of the state court appeal has the potential to narrow and/or clarify the remaining issues in this case.” **Exhibit 10** at p. 207. Defendants did not assert a *res judicata* defense until Judge Huff instructed them to do so in their further briefing. **Exhibit 4** at p. 100 (“Although the Defendants raise the issue of *res judicata* as to other claims ... they do not raise the issue of *res judicata* as to Plaintiff’s claim for conversion.”)

V. REASONS FOR GRANTING THE WRIT

A. **A Writ of Mandate is the Only Available Remedy Under the Circumstances**

“A writ of mandamus is an extraordinary remedy that is not available when the same review may be obtained through contemporaneous ordinary appeal.” *Snodgrass v. Provident Life And Accident Ins. Co.*, 147 F.3d 1163, 1165 (9th Cir. 1998) (internal quotations and citation omitted); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1357 (9th Cir. 1988). A writ is appropriate under the circumstances because Johnson exhausted every alternative. First, Johnson brought a motion in the district court for entry of partial final judgment pursuant to Fed. R. Civ. Proc § 54(b), which the court denied. **Exhibit 9** at pp. 183-184; **Exhibit 10** at pp. 201-203. Johnson also requested certification of

the stay order from the district court under 28 U.S.C. § 1292(b), which the court also denied. **Exhibit 9** at p. 186; **Exhibit 10** at pp. 203-205. Because the district court dismissed all but two claims and then stayed further proceedings pending a state appeal that is unlikely to be heard for many months, a contemporaneous ordinary appeal is not an option.

A writ of mandate directing that the district court vacate its orders and assigned the case to another judge is Johnson's only reasonable remedy to prevent an added 2-3 years of litigation, and serves judicial economy, and preserves the appearance of fairness and justice.

B. Due Process Violations Warrant the Court's Immediate Intervention

“[A] ‘fair trial in a fair tribunal is a basic requirement of due process.’” *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (citing *In re Murchison*, 349 U.S. 133, 136 (1955).) “The federal courts traditionally have used the writ only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’ [Citation.] In accord with this historic practice, courts have held that “‘exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify issuance of the writ.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S. Ct. 1133 (1988) (internal citations omitted.) Violating Johnson's constitutional right to due process is not a “lawful

exercise” of the district court’s jurisdiction. A writ is necessary both to correct and to prevent further violations.

1. The dismissal of Johnson’s claims was a due process violation.

Judge Huff argued defendants’ case, which is unfair and unequal treatment of the parties. “[A]llowing courts *sua sponte* to invoke collateral-attack waivers contravenes ‘the usual rule in our party-presentation system,’ which ‘requires the parties to invoke their own claims and defenses.’ [Citation.] ‘If a court engages in what may be perceived as the bidding of one party by raising claims or defenses on its behalf, the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice.’” *United States v. Sainz*, No. 17-10310 (9th Cir. Aug. 12, 2019), quoting *Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir. 2017). “‘The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.’” *Ibid.*, quoting *United States v. Burke*, 504 U.S. 229, 246 (S.Ct. 1992).

Johnson does not ask the Court to review the correctness of Judge Huff’s rulings in dismissing his claims. However, the basis of her decisions show clear bias and deprivation of due process. Judge Huff blatantly took the side of two large law firms against a *pro se* plaintiff. Most notably, she vacated hearings and raised arguments *sua sponte* in her orders that Johnson had no opportunity to dispute.

Five of Johnson's seven claims were dismissed with prejudice on a Rule 12(b)(6) motion, which is a disfavored remedy that may only be granted in extraordinary circumstances. *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963, 966 (9th Cir. 1981).

Judge Huff found the facts supporting Johnson's claim of intentional interference with prospective economic advantage "too speculative", and dismissed it with prejudice rather than allow Johnson to amend the complaint. **Exhibit 7** at pp. 143-144. Her order refers to the "\$3,739.14" state jury award as the "single cause of action for breach of fiduciary duty against Johnson." (*Id.* at p. 127.) Johnson argued that "[t]he Complaint also alleges that the only successful and trivial claim of \$3,739 was not alleged in the lawsuit, was first introduced during trial, and that the claim is pending appeal[.]" **Exhibit 5** at p. 107; *See Exhibit 30* at pp. 541, 545. Judge Huff dismissed Johnson's malicious prosecution, breach of fiduciary duty and indemnification claims because "[a] judgment was entered against Plaintiff on Storix's breach of fiduciary duty claim in the state action at issue." **Exhibit 7.** at p. 144; *See Id.* at p. 125-133. Before ruling on defendants' motions, Judge Huff refused to stay Johnson's claims "based on Plaintiff's speculation that the California Court of Appeal might reverse the judgment in the future." **Exhibit 6** at p. 116.

After dismissing Johnson’s claims, Judge Huff stayed further proceedings based on the “speculation” that defendants’ might have a *res judicata* defense following the same state appeal. Johnson argued that defendants never identified any identical claims or issues that were decided in any prior action in his opposition to their motion to dismiss (**Exhibit 21** at p. 445), in opposition to their further briefing (**Exhibit 26** at p. 518) and again in his motion for reconsideration (**Exhibit 8** at p. 180). He further argued that “no appeal was taken on the judgment on the consolidated shareholder derivative action” that defendants allege is preclusive to his claims, so the court should “issue a ruling on the remaining claims to avoid unnecessary delay.” (**Exhibit 8** at pp. 181.) Judge Huff instead granted defendants’ motion to stay all further proceedings. **Exhibit 10** at p. 206-208.

The persistently disparate treatment described above warrants vacating the order dismissing Johnson’s claims – at least as to those claims dismissed on grounds that will be rendered moot if the state appeal is successful.

2. The stay orders further deprived Johnson due process.

A case for staying civil proceeding is stronger when a Fifth Amendment privilege is threatened. *Federal Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989). Judge Huff’s decision to dismiss, rather than stay, Johnson’s malicious prosecution action was a clear error of law that deprived Johnson due process. The same order denying Johnson’s motion for

reconsideration granted defendants' motion to stay further proceedings. The stay order serves only to prevent Johnson's claims from being heard on the merits and delay final judgment in this case for another year.

This Court has jurisdiction to review the district court's orders granting or denying a motion to stay. The *Enelow-Ettelson* rule analogized certain stay orders to injunctions appealable under 28 U.S.C. § 1292(a)(1). *Mediterranean Enterprises, Inc. v. Ssangyong*, 708 F.2d 1458 (9th Cir. 1983). The Supreme Court overturned the cases that established the *Enelow-Ettelson* rule, holding that "orders granting or denying stays of 'legal' proceedings on 'equitable' grounds are not automatically appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287, 108 S. Ct. 1133 (1988). "As for orders that were appealable under § 1292(a)(1) solely by virtue of the *Enelow-Ettelson* doctrine, they may, in appropriate circumstances, be reviewed [...] by writ of mandamus." *Id.* at 1287-1288 (internal citations omitted.) The order denying Johnson's stay satisfies the *Enelow-Ettelson* doctrine because the claims are legal in nature and the stay order sought, by awaiting resolution of the state appeal, to enable a determination of whether Johnson established favorable termination of the lawsuit underlying the malicious prosecution claim – the equitable defense asserted by defendants.

The only defense against Johnson’s malicious prosecution claim in defendants’ motions was that he failed to establish favorable termination of the underlying lawsuit. Although the court expanded their arguments substantially, neither defendants’ replies, the court’s order dismissing the claim, nor the court’s order denying reconsideration acknowledge the undisputed exception cited repeatedly by Johnson – that a claim pending appeal is severable from the underlying action as long as the malicious prosecution claim is directed to only non-appealed claims.⁵

The court’s order allowing defendants further briefing on Johnson’s conversion claim alerted him of the court’s intent to dismiss all his other claims. To prevent dismissal of the malicious prosecution claim based on defendants’ only argument, Johnson filed an *ex parte* motion to stay the claim until the underlying appeal is decided. **Exhibit 5** at p. 105. Johnson cited cases explaining that, in earlier cases, the action was dismissed without prejudice to allow the claim to be refiled after the appeal terminated, but “the proper remedy is to stay the now premature malicious prosecution action, not dismiss it.” *Id.* at p. 111 (citing

⁵ Johnson also repeatedly argued that the cases cited by defendants (and the court) expressly approve the severability of appealed claims. “[T]hat part of the judgment in the former action that [was not appealed] is now final and constitutes a termination of that separable part of the proceeding favorable to plaintiff.” [Lane v. Bell \(2018\) 20 Cal.App.5th 61, 69](#) (citing [Albertson v. Raboff \(1956\) 46 Cal.2d 375, 378.](#))

Pasternack v. McCullough (2015) 235 Cal. App. 4th 1347, 1359; *Drummond v. Desmarais* (2009) 176 Cal. App. 4th 439, 458-459.)

Judge Huff ignored Johnson's authority and cited cases that were either irrelevant or involved unrelated circumstances, thereby dismissing Johnson's claim with prejudice so he couldn't refile it even if the state appeal is successful. **Exhibit 7** at pp. 129-130. No cases cited support dismissing a malicious prosecution claim with prejudice while an appeal of the underlying judgment is pending. California law provides that, under the circumstances, the court should have denied defendants' motion as to the malicious prosecution claim. Johnson doesn't herein challenge Judge Huff's ruling in dismissing his claim, but her refusal to stay the decision deprived Johnson of his right to have the claim heard.

Johnson presented added authority in his motion for reconsideration the defendants did not dispute. However, the court cited an unpublished case, *TARSADIA HOTELS v. AGUIRRE & SEVERSON*, No. D068887 (Cal. Ct. App. Dec. 30, 2016), to support its *sua sponte* argument that dismissal is proper if a malicious prosecution claim is "premature". **Exhibit 6** at pp. 116-117. In *Tarsadia*, the plaintiffs in the underlying action filed an appeal, not the defendants. It was premature for the defendants to bring their malicious prosecution lawsuit because a reversal would alter their favorable termination status established in the trial court. Johnson was the defendant in the underlying action, and he appealed only the

trivial (\$3,739) claim the defendants introduced in closing arguments at trial. *See Exhibit 2* at p. 85; *Exhibit 5* at p. 106. Johnson appealed the claim knowing the defendants would forever use it against him.⁶

If the Court still finds insufficient evidence of bias, Judge Huff's order granting the defendants' motion to stay should dispel all doubt. She granted the defendants' motion to stay all further proceedings pending the state appeal specifically so they could raise a *res judicata* defense. "In addition, the Court notes that Plaintiff previously requested that part of the action be stayed pending the resolution of the state court appeal." *Exhibit 10* at p. 207. Judge Huff did not grant Johnson's request when he needed it since "that part of the action" was dismissed *before* granting defendants' motion to stay.

Even if the Court finds insufficient reason to vacate the district court's order dismissing Johnson's claims, it should at least issue writ of mandamus to vacate the order denying Johnson's motion to stay the malicious prosecution (thereby reversing the subsequent dismissal of only that claim).

⁶ Defendants claimed a total of \$3,739 in damages related to the same 2015 email on which Judge Huff based the \$543,000 copyright attorney fee award. Defendants used that judgment to have Johnson dismissed as a shareholder plaintiff (thereby defeating Storix's claims against them) and to obtain \$85,000 in costs for all consolidated actions. Judge Huff relied on the same \$3,739 judgment to dismiss Johnson's malicious prosecution, breach of fiduciary duty, and indemnification claims.

C. The Court Should Order the Case Transferred to a Different Judge

Based on all the forgoing, and given the court's inherent ability to reconsider its own decisions, Johnson herein renews his prior petition to have this case transferred to a different district court judge. *See Exhibit 2*, Ninth Circuit Case No. 19-72507, at p. 43.

1. Judge Huff did not have sufficient grounds to transfer the case to her court.

The only ground stated by Judge Huff when denying Johnson's request to transfer the case back to the original judge was that this lawsuit and the copyright lawsuit "still involve some identical parties, Plaintiff Johnson and Defendant Storix". *Exhibit 2* at p. 98, fn. 2. The copyright trial ended in December 2015 and the only issue remaining is the attorney fee award pending a second appeal.

The transfer order indicates that the "low number rule" applies because the two cases "arise from the same or substantially identical transactions, happenings or events", "involve the same or substantially the same parties or property, "call for determination of the same or substantially identical questions of law". *Exhibit 2* at p. 58. The cases satisfy none of these requirements.

The "low number rule" is intended to provide judicial economy by having pending cases involving substantially the same parties and issues decided by the same judge. This case does not challenge any issues in the copyright case, and Storix was the only defendant in the copyright case. Johnson is deprived due

process by the district court ignoring the mandate requiring new cases to be randomly assigned to judges, and instead requiring all future litigation between Johnson and any of these defendants to forever be heard by Judge Huff.

2. The risk of actual bias is sufficient to transfer the case to a different judge.

Judge Huff's unreasonable and arbitrary decisions only increased after Johnson accused her of bias in Ninth Circuit motion to remand the copyright fee decision to a different judge (**Exhibit 12** at p. 216) and his Ninth Circuit petition for Judge Huff's Recusal (**Exhibit 2** at p. 43). "[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. [...] Among these cases are those in which the adjudicator [...] has been the target of personal abuse or criticism from the party before him." *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S. Ct. 1456 (1975) (underline added); *Taylor v. Hayes*, 418 U.S. 488, 501-503 (1974).

Importantly, the attorney defendants in this case are the same attorneys who represented Storix against Johnson in the copyright case. In this case, "Judge Huff denied Johnson's [motion to recuse] without acknowledging the most significant argument – that the current malicious litigation action is against the same attorneys whose litigation misconduct, conflicts-of-interest, and false representations she repeatedly ignored." **Exhibit 2** at p. 53. Johnson emphasized the ethical

misconduct of the attorneys at the remand hearing in the copyright case (**Exhibit 13** at pp. 252-255) and in his motion to recuse (**Exhibit 2** at pp. 76-78), but Judge Huff has yet to acknowledge the argument. She simply will not allow Johnson's malicious litigation claim to be heard since any evidence presented or findings favorable to Johnson would further prove the unreasonableness of her decision to award the largest copyright attorney fees against any individual in U.S. history to the same attorneys.

VI. CONCLUSION

Based on the extraordinary unfairness, unequal treatment, and numerous violations of Johnson's right to due process demonstrated above, the Court should grant this Petition for a Writ of Mandamus directing the district court to vacate its orders and transfer the case to a different judge.

No prejudice will be caused any party by having another judge re-decide the defendants' motions that have been fully briefed by both sides. Vacating the current orders will serve the interests of judicial economy by avoiding an ordinary appeal that will otherwise extend the litigation between the parties another 2-3 years. Granting this Petition will also avoid the risk of future bias and preserve the appearance of fairness and justice.

Dated: February 3, 2020

Respectfully submitted,

By: *s/Anthony Johnson*
Anthony Johnson
Pro Se Appellant

Form 8. Certificate of Compliance Pursuant to 9th Circuit
Rules 28-1.1(f)

I certify that the brief is within the 5,972 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.

s/Anthony Johnson _____
Anthony Johnson
Pro Se Appellant

CERTIFICATE OF SERVICE

Ninth Circuit Case Number: _____

Case Name: In Re Anthony Johnson

*(U.S. District Court for the Southern District of California
Case No. 3:19-cv-1185-H-BLM)*

I certify that I served on the person(s) listed below, either by mail or hand delivery, a copy of the **PETITION FOR WRIT OF MANDAMUS** and any Exhibits:

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the Southern District of California by using the appellate CM/ECF system on February 3, 2019.

Executed on February 3, 2020

By: s/Anthony Johnson
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