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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
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11 ANTHONY JOHNSON, an individual,
12 Plaintiff,
13 v.
14 DAVID KINNEY, an individual;
15 RICHARD TURNER, an individual;
16 MANUEL ALTAMIRANO, an individual;
17 DAVID HUFFMAN, an individual; and
18 DAVID SMILJKOVICH, an individual;
19 PAUL TYRELL, an individual;
20 SEAN SULLIVAN, an individual;
21 MARTY READY, an individual;
22 DAVID AVENI, an individual;
23 MICHAEL MCCLOSKEY, an individual;
24 STORIX INC., a California corporation;
25 JUDGE MARILYN HUFF, an individual;
26 JUDGE RANDA TRAPP, an individual;
27 JUDGE KEVIN ENRIGHT, an individual;
28 JUDGE KATHERINE BACAL, an individual,
Defendants.

Case No. 3:20-cv-1354-CAB-MSB

PLAINTIFF'S OPPOSITION TO
DEFENDANT STORIX, INC.'S
MOTION TO DISMISS
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12

Telephonic Appearance Requested

Hearing Date: September 30, 2020
Hearing Time: 10:30 AM
Judge: Hon. Cathy Ann Bencivengo
Dept.: Courtroom 4C

Complaint Filed: July 16, 2020
Trial Date: Not Set

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I. INTRODUCTION

3 Plaintiff Anthony Johnson (“Johnson”) respectfully submits this Opposition to
4 the motion to dismiss the First Amended Complaint (“FAC”) pursuant to Fed.R.Civ.P.
5 § 12(b)(6) for failure to state a claim upon which relief can be granted (“Motion”)
6 submitted by attorney defendants Michael McCloskey, David Aveni and Marty Ready
7 (“Wilson/Elser”).

8 Wilson/Elser tries to paint Johnson as a vexatious litigant by misrepresenting
9 that Johnson filed a shareholder derivative suit (“Derivative Suit”) against their clients,
10 defendants David Kinney, Richard Turner, Manuel Altamirano, and David Huffman
11 (“Management”) in response to the state lawsuit (“Direct Suit”) that Storix, Inc.
12 brought against him. They omit that the Derivative Suit was filed by Johnson *on*
13 *behalf of Storix*, that their clients first used Storix to bring the Direct Suit against
14 Johnson even though Johnson was Storix’s largest shareholder, and that Management
15 self-approved having Wilson/Elser send all their bills to Storix to defend them against
16 both Johnson’s cross-claims and Storix’s derivative claims.

17 Johnson did not bring this action because he lost any prior lawsuits. Even so,
18 only the copyright lawsuit was finally decided *against* him. Wilson/Elser attempts to
19 turn Johnson’s allegations of their years of efforts to prevent him from affording an
20 attorney into a claim that Johnson brought this lawsuit against Management and their
21 attorneys to strip their clients of *their* legal counsel.

22 Wilson/Elser’s defenses under the *Rooker-Feldman* doctrine, the statute of
23 limitations, and litigation privilege are without merit as discussed below. Their
24 argument that Johnson improperly alleged civil rights claims under the second part of
25 42 U.S.C. §§ 1985(b), which pertains only to class-based civil rights violations,
26 should be construed as deprivations of civil rights under Section 1983. Otherwise, the
27 FAC can be easily amended to cure any deficiency.

28

II. FACTUAL BACKGROUND

Wilson/Elser refers to a few facts in the FAC that mention them directly, but they omit the civil rights violations of other defendants, including their clients, who they supported at Johnson's expense. Johnson supplements their facts with those relevant to the Motion.

Storix remains under the exclusive control of Management who obtained their collective 60% ownership in Storix as a gift from Johnson in 2011, and all actions and decisions and decisions of Storix have since been under theirs alone. (FAC ¶ 14.) Management directed Storix's attorneys, defendants Paul Tyrell and Sean Sullivan ("Procopio") to file the first state lawsuit against Johnson. (*Id.* ¶ 21.) Johnson responded by sending the "2015 email" threatening and eventually filing the Derivative Suit on Storix's behalf (*Id.* ¶ 23) and Wilson/Elser defended Management against Storix's derivative claims while sending all their bills to Storix for payment. (*Id.* ¶¶ 25.) Wilson/Elser also sent their bills to Storix to defend Management against Johnson's cross-claims (*Id.* ¶ 31) and to defend Johnson's 2019 claims against them for conversion and malicious prosecution, among other things. (*Id.* ¶ 49.)

Since Management (as Storix) brought the first state lawsuit against Johnson in 2015, Management, Procopio and Wilson/Elser have been the sole beneficiaries of over \$12 million in revenue Storix derived from Johnson's software, and Johnson received nothing. (FAC ¶43.) Wilson/Elser's collusion with Management, Procopio, and certain judge defendants is demonstrated throughout the FAC and referenced below as relevant to their argument.

III. LEGAL STANDARDS

Johnson incorporates herein the legal standards cited in the Motion. In addition, "[w]hen deciding whether to grant leave to amend, a court must consider: (1) whether the amendment was filed with undue delay; (2) whether the movant has requested the amendment in bad faith or as a dilatory tactic; (3) whether movant was

1 allowed to make previous amendments which failed to correct deficiencies of the
2 complaint; (4) whether the amendment will unduly prejudice the opposing party and;
3 (5) whether the amendment is futile. *See Eminence Capital, LLC v. Aspeon, Inc.*,
4 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Foman v. Davis*, 371 US 178, 182
5 (1962)). “Absent prejudice, or a strong showing of any of the remaining *Foman*
6 factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to
7 amend.” *Eminence*, 316 F.3d at 1052.

8 “A District Court may deny a plaintiff leave to amend if it determines that
9 ‘allegation or other facts consistent with the challenged pleading could not possibly
10 cure the deficiency.’” (*Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir.
11 2010) (internal quotation marks and citations omitted.) “Courts are particularly
12 reluctant to deny leave to amend to pro se litigants.” *Flowers v. First Hawaiian*
13 *Bank*, 295 F.3d 966, 976 (9th Cir. 2002). “Unless it is absolutely clear that no
14 amendment can cure the defect ... a pro se litigant is entitled to notice of the
15 complaint's deficiencies and an opportunity to amend prior to dismissal of the
16 action.” *Lucas v. Dept. of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

17 IV. ARGUMENT

18 A. Johnson’s Allegations Under 24 U.S.C. §§ 1985(b) and 1986 19 Should Be Construed as Deprivation of Civil Rights Under § 1983.

20 Defendants’ Motion properly brought to Johnsons attention that the *second*
21 *part* of 24 U.S.C § 1985(2) applies only to class-based civil rights claims. Johnson
22 didn’t allege nor did he intend to allege any class-based claims. Johnson stated all
23 facts necessary to support a cause of action for “deprivation of civil rights” under
24 Section 1983 but simply misinterpreted Section 1985(2) as a “conspiracy to
25 interfere” with those *same* civil rights. Johnson mistakenly grouped claims
26 pertaining to deprivation of civil rights against defendants who committed
27 independent acts under a section 1983 cause of action with others in which they
28 acted in concert or relied upon each other’s acts under a Section 1985(b) cause of

1 action. Johnson incorporated the allegations under Section 1983 into those under
2 1985(b). Wilson/Elser understood Johnson’s misconception when later arguing that
3 “Johnson simply alleges Movants conspired with the judges who were assigned to
4 Johnson’s cases.” (Motion at p. 12.)

5 This defect was partly due to Johnson being a *pro se* plaintiff who simply
6 equated language pertaining to “equal protection” as broadly applicable to civil
7 rights claims. This resulted in a pleading defect in form, rather than substance, and
8 can be easily cured by amending the FAC, if necessary, to remove the headings
9 pertaining to Sections 1985(b) and 1986 and any duplicative or superfluous language
10 specific to those statutes. The allegations of civil rights violations against all
11 defendants (except Storix) would thereby be contained under a single Section 1983
12 heading for deprivation of civil rights.

13 The FAC states sufficient facts showing that the “2015 email” threatened
14 litigation against Management. (FAC ¶¶23, 44, 72.) In violation of Johnson’s First
15 Amendment Rights, the email was nevertheless used by Wilson/Elser to demand a
16 \$50,000 bond to secure Johnsons standing as a plaintiff in the Derivative Suit (*Id.* ¶
17 25) only to use the same email three years later to have Johnson removed as a
18 shareholder derivative plaintiff. (*Id.* ¶¶ 39, 42.) They used Johnson’s own income
19 from Storix to fund all litigation against him, including Storix’s own derivative
20 claims that Johnson brought on Storix’s behalf (*Id.* ¶¶ 23, 31, 49), “in attempt to
21 prevent Johnson from defending himself, litigating his claims, and affording an
22 attorney to represent him on appeal.” (*Id.* ¶ 73.)

23 Since Johnson is a *pro se* plaintiff, the FAC should be liberally construed as
24 claims of deprivation of civil rights by all defendants. See *Eldridge v. Block*, 832
25 F.2d 1132, 1137 (9th Cir. 1987). Otherwise, the FAC can be cured by amendment
26 without adding new allegations and implicating none of the factors in Rule 15(a) for
27 denying an amendment.

1 **B. The *Rooker-Feldman* Doctrine is irrelevant Because Johnson**
2 **Doesn't Ask for Review of the State Court Judgments**

3 Wilson/Elser's argument that the FAC is an improper challenge to a state
4 court judgment is misplaced. They argued that "Johnson's entire case against
5 Movants solely relates to Movants' efforts to obtain favorable rulings on behalf of
6 their clients in the state court proceedings, and Johnson's argument the resulting
7 state court decisions were incorrect and unfair to him." (Motion at p. 9.) They
8 further argue that "the harm Johnson allegedly suffered resulted from 'having to
9 defend invalid claims, dismissal of his valid claims, and denial of his rights to
10 petition [*and due process by acts [] resulting in loss of personal finances, his*
11 *investment in Storix, destruction of his professional reputation, and substantial*
12 *mental anguish.*]' ... as well as seeking a declaration the state court judge defendants
13 '[*Judges Huff, Trapp, Enright and Bacal exhibited clear bias against Johnson,*
14 *violated his constitutional rights, and otherwise]* treated Johnson unfairly as a *pro se*
15 litigant.' (Doc. No. 5, ¶¶ 70, 92.)" The italicized text in brackets that Wilson/Elser
16 truncated show that Johnson does not seek to have this Court reverse any state
17 judgments (or Judge Huff's *federal* judgment). Johnson seeks a determination of
18 whether the judges acts were constitutional and afforded Johnson due process.

19 The FAC states facts showing facts showing that the judges "acted *ultra vires*
20 beyond their legal jurisdiction when violating Johnson's clearly established
21 constitutional rights to due process guaranteed by the Fifth and Fourteenth
22 Amendments and Johnson's valid exercise of free speech and petitioning guaranteed
23 by the First Amendment." (FAC ¶ 68.) There was no prior decision in any case as to
24 whether any judges' *acts* were proper. Johnson doesn't challenge their rulings, but
25 asks this Court to decide whether the judges deprived him his rights guaranteed by
26 the Constitution in the course of making them.

27 Wilson/Elser further alleges that "[t]he actions of Movants in filing motions in
28 the state court proceedings necessarily is inextricably intertwined with the decisions

1 of the state court of which Johnson now complains, [and] [i]t is settled that “[w]here
2 a federal plaintiff asserts both a collateral challenge to a state court ruling and a
3 claim about the conduct of adverse parties *or their counsel* that resulted in that
4 ruling, both claims are barred under the *Rooker-Feldman* doctrine. [Citation], citing
5 *Cooper v. Ramos*, 704 F.3d 772, 781-83 (9th Cir. 2012) (claims that defendants
6 conspired to deny plaintiff a fair state court proceeding inextricably intertwined with
7 challenged state court decision and barred by the *Rooker-Feldman* doctrine).”
8 (Motion at p. 9.) Wilson/Elser misrepresents *Cooper*, which “both asserts as [his]
9 injury legal error or errors by the state court *and* seeks as [his] remedy relief from
10 the state court judgment.” *Cooper* at 781 (italics in original). Nowhere in the FAC
11 does Johnson assert “legal errors”, and Johnson does not seek relief from any prior
12 state judgment. This lawsuit is in no way a “de facto” appeal.

13 **C. The Litigation Privilege is No Bar to Claims Against Movants**

14 Wilson/Elser simply lists certain facts pertaining to their *filing* of motions.
15 Johnson seeks no relief from their motions or from the resulting decisions. Although
16 Johnson admits he mislabeled his claims under 24 U.S.C. §§ 1985(b) and 1986, the
17 allegations demonstrating conspiracy still apply. (FAC ¶ 70.) The FAC contains
18 sufficient facts to show that “Defendants violated Johnson’s constitutional rights as
19 part of a conspiracy to impede, hinder, obstruct and defeat Johnson’s due course of
20 justice[.]” (*Id.* ¶ 74.)

21 Johnson was damaged “by having to defend invalid claims, dismissal of his
22 valid claims, and denial of his rights to petition and due process [] resulting in loss
23 of personal finances, his investment in Storix, destruction of his professional
24 reputation, and substantial mental anguish.” (*Id.* ¶ 70.) Johnson doesn’t base these
25 allegations on the litigation of the claims but on Wilson/Elser conspiring with their
26 clients and Storix’s counsel to use his own company profits to litigate against him.

27 Johnson seeks relief for the financial damages he suffered by Wilson/Elser’s
28 participation in the conspiracy to deprive him any rights to his own company and its

1 financial records using his own 40% of Storix’s profits. (*Id.* ¶¶ 25, 31, 49.)
2 Wilson/Elser knowingly took Storix’s funds to defend Management against even
3 Storix’s own claims in the Derivative Suit, and they demanded that Johnson post a
4 \$50,000 plaintiffs bond to secure his standing as a shareholder derivative plaintiff
5 (*Id.* ¶ 25) only to demand that Johnson be dismissed as a plaintiff three years later on
6 their basis that he could not fairly represent Storix’s interests due to *their* 2015 email
7 claim that was never litigated. (*Id.* at ¶¶ 39, 72.) Wilson/Elser’s clients were the
8 majority shareholders of Storix and the defendants in the Derivative Suit. They were
9 therefore the only ones challenging whether Johnson could fairly represent *their*
10 interests. (*See Id.* ¶¶ 15, 39.)

11 Johnson does not seek recovery from Wilson/Elser based on their litigation
12 activity. He seeks recovery from the damages he suffered by Wilson/Elser
13 unlawfully using his own money against him “in attempt to prevent Johnson from
14 defending himself, litigating his claims, and affording an attorney to represent him
15 on appeal.” (*Id.* ¶ 73.)

16 **D. Johnson Need Not Plead the § 1985(2) Claim with More Particularity**

17 As argued above, Johnson seeks to construe or amend the FAC to allege his
18 claims under Section 1983, so this issue is moot. In any event, Johnson alleged
19 substantial facts to support his claims, and Wilson/Elser provided no judicially
20 noticeable documents to disprove, as a matter of law, any of Johnson’s facts.

21 **E. The Statute of Limitations is No Bar to Johnson’s Claims**

22 Since Johnson is not alleging conspiracy or neglect to prevent conspiracy to
23 interfere in civil rights under 24 U.S.C. §§ 1985(b) and 1986, Wilson/Elser’s
24 argument is moot. To the extent their argument might apply to claims under Section
25 1983, Wilson/Elser is simply trying to reframe Johnson’s allegations as having
26 challenged their right to litigate against him. As described above, that is not the case
27 here. Wilson/Elser’s acts constitute a continuing violation at least through early
28 2019. (FAC ¶49.) “Statutes of limitations [] are intended to keep stale claims out of

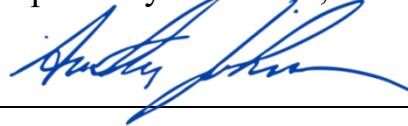
1 the courts. [Citation.] Where the challenged violation is a continuing one, the
2 staleness concern disappears.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102
3 S. Ct. 1114, (1982) (citing *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314
4 (1945).)

5 **V. CONCLUSION**

6 The Court should deny the Motion as to grounds under the *Rooker-Feldman*
7 doctrine, the statute of limitations, and litigation privilege. The Court should
8 liberally construe Johnson’s allegations as deprivations of his civil rights. Otherwise,
9 or if the Court finds the facts deficient, Johnson should be allowed to amend the
10 FAC to allege additional facts or properly allege his claims as deprivation of civil
11 rights under 42 U.S.C. § 1983.

12
13 DATED: September 2, 2020

Respectfully submitted,

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15 By:

16 ANTHONY JOHNSON, In Pro Per