

1 ANTHONY JOHNSON
2 1728 Griffith Ave.
3 Las Vegas, NV 89104
4 Telephone: (619) 246-6549
5 Email: flydiversd@gmail.com

6 Pro Se

7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
10

11 ANTHONY JOHNSON, an individual,

12 Plaintiff,

13 v.

14 MANUEL ALTAMIRANO, an individual,
15 RICHARD TURNER, an individual,
16 DAVID KINNEY, an individual,
17 DAVID HUFFMAN, an individual,
18 PAUL TYRELL, an individual,
19 SEAN SULLIVAN, an individual,
20 STORIX, INC., a California Corporation,
and DOES 1-5, inclusive,

21 *Defendants.*

Case No. 3:19-cv-1185-H-BLM

**PLAINTIFF’S *EX PARTE* MOTION
FOR STAY OF TRIAL COURT
PROCEEDINGS**

Telephonic Appearance

Courtroom: 15A (Carter/Keep)

Judge: Hon. Marilyn L. Huff

Hearing Date: November 25, 2019

Hearing Time: 10:30 AM

Complaint Filed: June 24, 2019

Trial Date: Not Set

22 Plaintiff Anthony Johnson (“Johnson”) respectfully submits this *Ex Parte*
23 Motion to (1) stay all proceedings in this matter pending resolution of the *Petition*
24 *for Writ of Mandate* filed by Johnson in the Ninth Circuit to reverse the transfer of
25 the case to this Court or for recusal and reassignment to a different judge, and (2) to
26 conditionally stay a decision on Defendants’ motions to dismiss or strike the
27 malicious prosecution cause of action pending appeal of the judgment in the
28 underlying lawsuit.

1
2 This Motion is based on the memorandum of points and authorities in support
3 and the declaration of Anthony Johnson (“Johnson Decl.”) filed concurrently
4 herewith, all files and pleadings in this action, and on such further oral and
5 documentary evidence or argument as the Court may consider.

6 Johnson sent a copy of this proposed Motion to all opposing counsel on
7 October 20 requesting they stipulate to the requests herein or to respond with any
8 concerns. (Johnson Decl. ¶ 3, Ex. A.) No party responded to the request as of the
9 filing of the Motion.

10 **I. INTRODUCTION**

11 A stay of all proceedings in this lawsuit is warranted because no action should
12 be taken prior to a decision on the pending petition for writ of mandate with the
13 Ninth Circuit as to whether this case should remain in this Court. A stay of a
14 decision on Defendants’ motions to dismiss or strike Johnson’s malicious
15 prosecution claim in this case is warranted because an appeal of the severable claim
16 against Johnson in the underlying lawsuit is pending in the California Court of
17 Appeals. However, if the Court properly finds that the filing of the appeal itself
18 satisfies the favorable termination element of the malicious prosecution cause of
19 action, a stay of the action is unnecessary since any decision by the appellate court
20 will have no bearing on the case.

21 **II. BACKGROUND**

22 In the state court lawsuit underlying the malicious prosecution claim,
23 California Superior Court Case No. 37-2015-00034545, a jury found in Johnson’s
24 favor on the \$1.25 million claim asserted in the complaint that Johnson was secretly
25 operating a competing business using Storix’s confidential information. (Johnson
26 Decl. ¶ 4, Ex. B.) The jury found against Johnson on a \$3,739 claim related to a
27 2015 email Defendants introduced in closing arguments. (*Id.*)

28 Johnson specifically asserted in the Complaint that the lawsuit underlying the

1 malicious prosecution claim was *initiated* against Johnson without probable cause
2 and with malice, and that “the claim was pursued to a legal termination on its merits
3 in Johnson’s favor.” (Dkt. No. 1, ¶ 39, fn. 6.) The Complaint also alleges that the
4 only successful and trivial claim of \$3,739 was not alleged in the lawsuit, was first
5 introduced during trial, and that the claim is pending appeal in the California Court
6 of Appeals for the Fourth Appellate District, Case No. D075308. (*Id.* ¶ 27, fn. 5, ¶
7 39, fn. 6, see Johnson Decl. ¶ 5, Ex. C.)

8 This case was transferred to Judge Huff’s court pursuant to the “low number
9 rule” on July 18, 2019. (Dkt. No. 4.) Upon learning of the case transfer, Johnson
10 filed a motion to transfer the case back to the originating judge on the basis that no
11 criteria for transferring a case under the rule had been established. In the same
12 motion, Johnson moved for Judge Huff’s recusal pursuant to 28 U.S.C. §§ 144 and
13 455. (Dkt. No. 16.) Judge Huff rejected reversal of the case transfer, refused to
14 recuse herself, and denied the motion to have another judge hear and decide the
15 motion. (Dkt. No. 51.) Johnson filed a writ petition with the Ninth Circuit to
16 determine whether Judge Huff’s decisions on these matters were proper. (Dkt. No.
17 60, Johnson Decl. ¶ 9, Ninth Cir. Case No. 19-72507.)

18 After obtaining an extension of time to answer the Complaint (Dkt. No. 17),
19 Defendants Altamirano, Turner, Kinney and Huffman brought a motion to dismiss
20 and a special motion to strike the malicious prosecution cause of action based on the
21 ground that the entire lawsuit did not terminate in Johnson’s favor. (Dkt. Nos. 29 &
22 30.) The attorney defendants, Tyrell and Sullivan, brought separate but similar
23 motions on the same ground. (Dkt. Nos. 32 & 33.) The Court determined that all
24 issues were appropriate for resolution without oral arguments and vacated the
25 motion hearings. (Dkt. No. 59.)

26 On October 9, 2019, the Court reviewed Defendants’ motion to dismiss and
27 prior orders in the state court proceedings and raised *sua sponte* an issue of *res*
28 *judicata* as to whether any underlying decisions related to Johnson’s ability to obtain

1 Storix’s records were sufficient to defeat Johnson’s allegation of delayed discovery
2 and thus the statute of limitations on his conversion claim. The Court ordered the
3 parties to provide further briefing on the issue. (Dkt. No. 62.)

4 III. AUTHORITIES

5 “The District Court has broad discretion to stay proceedings as an incident to
6 its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see*
7 *also CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (district courts possess
8 “inherent power to control the disposition of the causes on its docket in a manner
9 which will promote economy of time and effort for itself, for counsel, and for
10 litigants.”); *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972);
11 *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir.
12 1983); (“A trial court may, with propriety, find it is efficient for its own docket and
13 the fairest course for the parties to enter a stay of an action before it, pending
14 resolution of independent proceedings which bear upon the case.”) A stay is
15 warranted when resolution of another action may “bear upon the case,” because a
16 stay is most “efficient for [the court’s] own docket and the fairest course for the
17 parties[.]” *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir.
18 1979). The district court should consider the “possible damage which may result
19 from the granting of a stay, the hardship or inequity which a party may suffer in
20 being required to go forward, and the orderly course of justice measured in terms of
21 the simplifying or complicating of issues, proof, and questions of law which could
22 be expected to result from a stay.” *Cmax, Inc. v. Hall, supra*, at 268.

23 IV. ARGUMENT

24 A. A Stay of All Proceedings is Necessary Pending the Ninth 25 Circuit Decision as to Whether the Case Should Remain in 26 this Court.

27 “Whenever a party to any proceeding in a district court makes and files a
28 timely and sufficient affidavit that the judge before whom the matter is pending has

1 a personal bias or prejudice either against him or in favor of any adverse party, such
2 judge shall proceed no further therein, but another judge shall be assigned to hear
3 such proceeding.” 28 U.S.C. § 144. Judge Huff found Johnson’s affidavit
4 insufficient and therefore denied Johnson’s motion to recuse or to have another
5 judge hear the motion. Judge Huff also denied the request to reverse the order
6 transferring the case to her Court on the ground that Johnson and Storix were parties
7 to a copyright infringement suit that was decided in December 2015.

8 Johnson filed a petition for writ of mandate directing the case be transferred
9 back to the originating court because the “low number rule” is not intended to ensure
10 all future lawsuits involving “some of the same parties” will always be heard by the
11 same judge, especially when involving different claims. In the same petition,
12 Johnson asserted that his affidavit was not insufficient because it was not based on
13 Judge Huff’s rulings but on her refusal to acknowledge facts, particularly the
14 litigation misconduct and conflict of interest of the attorney defendants, that are now
15 the basis of the current malicious prosecution claim.

16 The Court recently directed the Defendants to conduct further research to
17 support its *sua sponte* question of *res judicata* to defeat Johnson’s allegation of
18 delayed discovery due to Defendants’ concealment of their conversion. It would be
19 improper for Judge Huff to take further action in deciding the merits of this case
20 before the Ninth Circuit renders a decision that might transfer the case to a different
21 court.

22 **B. If the Court Finds Lack of Favorable Termination, a Stay of**
23 **the Cause of Action of Malicious Prosecution is Necessary**
24 **Pending Final Resolution of the Underlying Appeal**

25 Defendants’ assert that a new claim introduced in closing arguments at the
26 underlying state trial bars Johnson’s malicious prosecution because the claim
27 prevented the entire lawsuit from terminating in Johnson’s favor. Defendants further
28 ask the Court to reject Johnson’s argument that the claim is unrelated to the single

1 claim alleged in the complaint, is also pending appeal, and therefore severable from
2 the “favorable termination” element of the cause of action. (Dkt. Nos. 30 & 54.) If
3 the Court finds Johnson’s argument persuasive, there is no prejudice caused by
4 moving forward with Johnson’s claim because a decision by the California Court of
5 Appeals will have no bearing on further proceedings in this Court. However, if the
6 Court rejects Johnson’s argument that the claim is severable based on the pending
7 appeal and numerous other grounds stated in Johnson’s opposition (Dkt. No. 40 at
8 pp 3-7), it would be improper to dismiss Johnson’s malicious prosecution claim
9 because, if the court of appeals reverses the judgment, Johnson will have satisfied
10 the favorable termination requirement.

11 Johnson’s opposition to Defendants’ motions to dismiss cites to the same
12 case, *Lane v. Bell*, 20 Cal. App. 5th 61 (Ct. App. 2018), that Defendants rely on
13 when arguing that favorable termination is not affected by “severable” claims.
14 Defendants ignore that *Lane* specifically approved the severability of claims pending
15 appeal, and that a malicious prosecution action is not premature when directed only
16 at claims that are not appealed. “No appeal was taken from the latter part of the
17 judgment, and it became final.... [Citations.] Plaintiff’s complaint herein was filed
18 after the time for appeal had expired and was therefore not premature.” *Id.* at 69
19 (citing *Albertson v. Raboff* (1956) 46 Cal. 2d 375, 378.) “Crowley explained that the
20 discussion in *Albertson* regarding severability was primarily directed at rejecting the
21 contention that the malicious prosecution complaint was premature because an
22 appeal was still pending. [...] ‘[W]e said simply that ‘As indicated above, that part
23 of the judgment in the former action [] is now final and constitutes a termination of
24 that separable part of the proceeding favorable to plaintiff.’ [...] *Crowley* itself
25 makes clear that *Albertson*’s comments on the favorable termination requirement
26 apply, at most, in situations where a partial appeal has created a severable judgment.
27 [Citation.]” *Id.* at 72 (underlines added, citing *Crowley v. Katleman* (1994) 8 Cal.
28 4th 666, 685 [favorable termination was not established specifically “[b]ecause there

1 was no such partial appeal from the judgment.”) Defendants provided no rebuttal to
2 this argument.

3 Even if this Court disapproves the above authorities, “When a malicious
4 prosecution action is filed following the entry of a judgment in the underlying action
5 but is rendered premature by the filing of an appeal in the underlying action, the
6 proper remedy is to stay the now premature malicious prosecution action, not
7 dismiss it. [Citations.] ... [S]taying the malicious prosecution action rather than
8 dismissing it, ‘is a sound approach’ because it ‘spares the plaintiff the hazards of
9 correctly calculating the [statute of limitations] tolling period’ [Citation.]”
10 *Pasternack v. McCullough*, (2015) 235 Cal. App. 4th 1347, 1359; (citing *Drummond*
11 *v. Desmarais* (2009) 176 Cal. App. 4th 439, 458-459.) No party would be prejudiced
12 by a stay given that no decision has been made on the merits of the case, no
13 discovery or pre-trial dates have been set, and the stay will simplify and possibly
14 resolve a potentially dispositive issue.

15 **V. CONCLUSION**

16 Johnson respectfully requests no action be taken in this case until the Ninth
17 Circuit decides if the case transfer should be reversed or the case reassigned. Should
18 this Court decide to proceed, Johnson respectfully requests that, if the Court finds
19 that lack of favorable termination bars Johnson’s malicious prosecution action, the
20 cause of action be stayed pending a decision by the California Court of Appeals on
21 the underlying claim.

22 DATED: October 21, 2019

Respectfully submitted,

23
24 By:

s/Anthony Johnson
Anthony Johnson, In Pro Per

CERTIFICATE OF SERVICE

I, Anthony Johnson, declare that:

I am over the age of eighteen years and self-represented in this action. I am familiar with the business practice for electronic filing and service through the Court’s CM/ECF system and sending electronic email, pursuant to which practice I served the foregoing:

1. PLAINTIFF’S *EX PARTE* MOTION FOR STAY OF TRIAL COURT PROCEEDINGS

2. DECLARATION OF ANTHONY JOHNSON IN SUPPORT OF STAY OF TRIAL COURT PROCEEDINGS

by electronic filing and sending to the email addresses of the parties and/or counsel listed below:

| | |
|--|---|
| <p>Marty B. Ready WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP 401 West A Street, Suite 1900 San Diego, CA 92101 Email: marty.ready@wilsonelser.com Tel: (619) 881-6431 (Attorney for Defendants Altamirano, Turner, Kinney & Huffman)</p> | <p>Paul A. Tyrell Sean Sullivan PROCOPIO, CORY, HARGREAVES & SAVITCH LLP 525 B Street, Suite 2200 San Diego, CA 92101 Email: paul.tyrell@procopio.com Email: sean.sullivan@procopio.com Tel: (619) 619.238.1900 (Defendants, Attorneys for corporate defendant, Storix, Inc.)</p> |
|--|---|

I certify and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 21, 2019 in Las Vegas, Nevada.

By: s/Anthony Johnson
Anthony Johnson