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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

**MEMORANDUM, OF POINTS
AND AUTHORITIES IN SUPPORT
OF PLAINTIFF’S MOTION FOR
ENTRY OF PARTIAL FINAL
JUDGMENT UNDER RULE 54(b)
OR CERTIFICATION UNDER
28 U.S.C. 1292**

Telephonic Appearance

Courtroom: 15A (Carter/Keep)
Judge: Hon. Marilyn L. Huff

Hearing Date: January 21, 2020
Hearing Time: 10:30 AM
Complaint Filed: June 24, 2019
Trial Date: Not Set

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I. INTRODUCTION

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2 Plaintiff Anthony Johnson submits that the interests of all parties, and of the
3 public, will be best served by prompt appellate review of the December 2, 2019
4 Orders Granting in Part/Denying in Part defendants' Motions to Dismiss and Anti-
5 SLAPP Motions to Strike (ECF No. 73, "Order"). The Order dismisses all claims
6 against defendants Storix, Inc., Paul Tyrell and Sean Sullivan with prejudice, and
7 dismisses all claims against defendants Manuel Altamirano, Richard Turner, David
8 Kinney and David Huffman with prejudice except for a claim of breach of fiduciary
9 duty and conversion. Johnson respectfully requests that the Court enter partial final
10 judgment under Rule 54(b) as to those claims dismissed by the Court's Order.

11 If the Court denies the motion for entry of partial judgment Under Fed.R.Civ.P.
12 Rule 54(b) as to the First Cause of Action for malicious prosecution, in the alternative,
13 plaintiff moves the Court to certify, pursuant to 28 U.S.C. 1292, its order of December
14 2, 2019 denying a stay of the malicious prosecution cause of action pending appeal of
15 the underlying state court judgment. (ECF No. 72.)

II. AUTHORITY

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17 "Rule 54(b) permits district courts to authorize immediate appeal of dispositive
18 rulings on separate claims in a civil action raising multiple claims." [Gelboim v. Bank](#)
19 [of Am. Corp., 135 S. Ct. 897, 902](#) (2015). In determining whether to certify an order
20 under Fed.R.Civ.P. 54(b), the district court must first determine whether the order is a
21 final judgment. See [Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7](#) (1980).
22 The district court must then determine whether there is any just reason for delay. See
23 [Id. at 8](#). The court should consider: (1) the interrelationship of the certified claims and
24 the remaining claims in light of the policy against piecemeal review; and (2) equitable
25 factors such as prejudice and delay. See [Id. at 8-10](#); [Gregorian v. Izvestia, 871 F.2d](#)
26 [1515, 1518-20](#) (9th Cir. 1989); see also [Noel v. Hall, 568 F.3d 743, 747](#) (9th Cir.
27 2009).
28

1 An order is appealable as a collateral order under 28 U.S.C. § 1291 if its
2 decisions "are (1) conclusive, (2) that resolve important questions separate from the
3 merits, and (3) that are effectively unreviewable on appeal from the final judgment in
4 the underlying action." [DC Comics v. Pacific Pictures Corp.](#), 706 F.3d 1009, 1013
5 (9th Cir. 2013) (citing [Mohawk Indus., Inc. v. Carpenter](#), 558 U.S. 100, 130 S.Ct. 599,
6 [605](#) (2009)).

7 III. ARGUMENT

8 A. The Court Should Enter Partial Final Judgment as to All 9 Dismissed Claims

10 1. The Court's Order Appears to Be Final

11 With respect to finality, "Rule 54(b) relaxes 'the former general practice that, in
12 multiple claims actions, all the claims had to be finally decided before an appeal could
13 be entertained from a final decision upon any of them.'" [Gelboim, supra](#), 135 S. Ct. at
14 [902](#) (quoting [Sears, Roebuck & Co. v. Mackey](#), 351 U.S. 427, 434 (1956)). It offers a
15 route to appellate review for "orders that would be 'final' if entered in a simple single-
16 claim, two-party case." [DeMelo v. Woolsey Marine Indus., Inc.](#), 677 F.2d 1030, 1032
17 (5th Cir. 1982) (citing [Sears, Roebuck](#)). "It must be a 'judgment' in the sense that it is
18 a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it
19 is 'an ultimate disposition of an individual claim entered in the course of a multiple
20 claims action.'" [Curtiss-Wright Corp. v. General Elec. Co., supra](#), 446 U.S. 1, 7.

21 2. The Dismissed Claims are Separate

22 The only remaining claims are a conversion claim and a claim of breach of
23 fiduciary duty by using shareholder funds to defend against a shareholder derivative
24 lawsuit. These do not rely on the same facts and evidence as any of the claims that
25 were dismissed. A decision by the Ninth Circuit on the dismissed claims will have no
26 bearing on the remaining claims, and no decision of this Court will bear on the appeal.
27 This factor further favors immediate appeal.

1 **3. There is No Just Reason for Delay**

2 Because the grounds for dismissal of each claim were pure issues of law, there
3 is no risk of the Court of Appeals having to consider the issues twice if plaintiff is
4 permitted to appeal now. This factor favors entry of a partial judgment. See *H & W*
5 *Indus., Inc., v. Formosa Plastics Corp., USA*, 860 F.2d 172, 175 (5th Cir. 1988)
6 (quoting *Curtiss-Wright Corp., supra*, 446 U.S. at 8) (a major factor that the district
7 court should consider is whether the appellate court “would have to decide the same
8 issues more than once even if there were subsequent appeals”).

9 Furthermore, the two remaining claims in this case are simple and in the “early
10 stages of litigation” in which no discovery has been conducted. This weighs in favor
11 of permitting plaintiff to appeal the Order now, rather than awaiting final disposition
12 of the remaining claims. *Sanders v. Wash. Mut. Home Loans, Inc.*, 2007 WL 734402
13 (E.D. La. Mar. 5, 2007), *aff’d sub nom*, *Sanders v. Wash. Mut. Home Loans, Inc. ex*
14 *rel. Wash. Mut. Bank*, 248 F. App’x 513 (5th Cir. 2007).

15 This case also involves unique equitable concerns that weigh strongly in favor
16 of an immediate appeal. Currently, the Court’s decision to deny a stay of the malicious
17 prosecution action and dismissing the claim with prejudice precludes plaintiff from
18 refileing the claim even if favorable termination is established by the pending appeal of
19 the underlying lawsuit. An appeal will involve important questions of law regarding
20 severability of appealed claims in the underlying action when determining the
21 favorable termination element of a malicious prosecution action, and dismissal with
22 prejudice rather than staying the action pending the appeal.

23 Finally, awaiting final judgment before filing an appeal of the dismissed claims,
24 and likely having to re-litigate at all or some of the dismissed claims from scratch,
25 would subject all parties to costly delay and stress, and add years of interest accrued
26 on any eventual monetary judgment.

B. The Court Should Certify the Order Denying a Stay of the Malicious Prosecution Cause of Action Under 28 U.S.C § 1292

As argued in Johnson’s concurrently filed motion for reconsideration, the Court should allow the malicious prosecution to proceed or allow a stay pending appeal of a claim in the underlying state lawsuit that is not subject to the malicious prosecution action. If not, the Court’s decision to dismiss, rather than stay the claim pending appeal of the underlying lawsuit, demands immediate review. The dismissal allows the statute of limitations to continue running once the state appeal is decided. The dismissal *with prejudice* prevents refiling the claim, even if the appeal is successful, before the statute of limitations expires. As such, Johnson’s only current remedy is to appeal the order dismissing the claim, which must first await final judgment in this lawsuit on the remaining claims. The more proper remedy would be to certify the Stay Order as a collateral order in order to allow immediate review.

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 in this lawsuit would render it moot.

IV. CONCLUSION

For the above reasons, subject to the concurrently filed motion for reconsideration, the Court should enter a partial final judgment as to all dismissed claims in accordance with Rule 54(b). Otherwise, the Court should certify the order denying the motion to stay the malicious prosecution cause of action as a collateral order under 28 U.S.C § 1292.

DATED: December 9, 2019

Respectfully submitted,

By:



ANTHONY JOHNSON, In Pro Per