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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 REPLY TO
OPPOSITION OF DEFENDANTS
STORIX, INC., PAUL TRYELL &
SEAN SULLIVAN TO MOTION
FOR STAY OF TRIAL COURT
PROCEEDINGS**

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

Complaint Filed: June 24, 2019
Trial Date: Not Set

22 **I. INTRODUCTION**

23 Defendants Storix, Tyrell and Sullivan (hereafter “Defendants”) argue that
24 there should be no stay of proceedings pending the outcome of Johnson’s pending
25 petition for writ of mandamus by ignoring two substantial grounds for the petition.
26 The petition challenges the Court’s finding that Johnson’s affidavit was insufficient
27 to have another judge rule on his motion to recuse and, more importantly, whether
28 there were proper grounds to transfer the case to this Court in the first place. It would

1 that challenges whether it should be making such decisions.

2 When deciding to stay proceedings pending a writ petition, the likelihood of
3 the petition being granted is usually a factor to consider. But that factor makes little
4 sense when the petition challenges a decision of the same court deciding the motion
5 to stay. It's unlikely any court would find merit in a petition that challenges its own
6 decision. "The District Court has broad discretion to stay proceedings as an incident
7 to its power to control its own docket." [Clinton v. Jones, 520 U.S. 681, 706](#) (1997). A
8 stay is not a *matter of right*, but is "an exercise of judicial discretion," and "[t]he
9 propriety of its issue is dependent upon the circumstances of the particular case."
10 [Nken v. Holder, 556 U.S. 418, 129 S.Ct. 1749, 1757, 1761](#) (2009). The only cases
11 cited by Defendants are irrelevant since they relate to denial of petitions for review of
12 injunctions, discovery orders, decisions of lower courts or agencies, or motions for
13 stays in the appellate court. *See Ibid.* (denied stay pending petition for review of a
14 Board of Immigration Appeals); [David v. Signal Int'l, LLC, 37 F. Supp. 3d 836, 840](#)
15 (E.D. La. 2014) (denied stay because petition not yet been filed and because writ is
16 "rarely issued with respect to discovery orders."); [Mount Graham Coal. v. Thomas,](#)
17 [89 F.3d 554, 558](#) (9th Cir. 1996) (denied stay of lower court dissolving injunction.)

18 Johnson could seek a stay pursuant to Fed.R.Ap.Proc. Rule 8(a)(2), but it
19 makes little sense to petition the Ninth Circuit to stay proceedings pending its own
20 decision on another petition. This stay would likely be for a short time, and no
21 Defendant would be burdened by the delay. Defendants argue they will be "harmed
22 by a stay that will effectively keep alive an action that ought to be dismissed." If
23 Defendants were so confident the claims would be dismissed, they wouldn't have
24 requested joint extensions of time to answer (ECF Doc. No. 5), numerous duplicative
25 dispositive motions, and opposed having the case remain in the original court.

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1 **B. Johnson’s State Court Appeal Justifies a Stay, Rather than Dismissal, of the**
2 **Malicious Prosecution Cause of Action**

3 Defendants characterize their success in introducing a new claim for \$3,739 in
4 closing arguments as Johnsons “LOSS in the state court.” (Opp. at p. 3.) Johnson
5 does not seek a stay “so that he can appeal his state court defeat”, but seeks a stay of
6 the malicious prosecution cause of action only if this Court accepts Defendants’
7 argument that a trivial claim pending appeal prevents them from being held liable for
8 the 3 ½ years of malicious litigation that preceded it. The only cases providing that an
9 “entire lawsuit” must terminate in the malicious prosecution plaintiff’s favor involved
10 a claim directed to the entire underlying lawsuit rather than the *non-severable* claims.
11 Defendants simply ignore Johnson’s argument, supported by well-established
12 California law, that a claim pending appeal is severable from the favorable
13 termination issue.

14 Defendants simply reassert the same general conclusions in their motions to
15 dismiss and special motions to strike, ignoring all authority to the contrary.
16 Defendants quote cases underlying [Lane v. Bell, 20 Cal.App.5th 61](#) (2018), generally
17 finding that ““a partial recovery against the malicious prosecution plaintiff in the
18 underlying action is fatal to showing the favorable termination element.’ [Id. at 75.](#)”
19 (Opp. at p. 4.) Defendants ignore that *Lane*, in primarily approving [Crowley v.](#)
20 [Katleman \(1994\) 8 Cal.4th 66](#) and the cases it relies on, specifically approved the
21 severability of claims pending appeal:

22 “But *Crowley* itself makes clear that *Albertson's* comments on the favorable
23 termination requirement apply, at most, in situations where a partial appeal
24 has created a severable judgment. (*Crowley, supra*, 8 Cal.4th at p. 685.) We
25 have no partial appeal in this case. That is enough for us to conclude that the
26 underlying property action did not terminate favorably to the Lanes.” [Lane](#)
[at p. 75.](#)

27 “Because there was no such partial appeal from the judgment in
28 *Freidberg*, the *Freidberg* court could have distinguished *Albertson* on
that ground alone.’ (*Crowley*, at p. 685.)” [Lane at p. 72.](#)

1 "No appeal was taken from the latter part of the judgment, and it became
2 final... [Citations.] Plaintiff's complaint herein was filed after the time for
3 appeal had expired and was therefore not premature.' (*Albertson, supra*, 46
Cal.2d at p. 378.)" [Lane at p. 69.](#)

4 Johnson appealed the severable claim before filing this lawsuit and specifically
5 directed the malicious prosecution cause of action only to the *non-severable* claim
6 that was actually asserted in the underlying complaint.

7 Defendants also improperly argue that the "interim adverse judgment" rule
8 precludes the malicious prosecution claim. The issue has no relevance to the motion
9 to stay and is argued in the briefs on their other pending motions. Nevertheless,
10 Defendants' argument that the denial of summary judgment equates to a finding of
11 probable cause is unavailing. The court didn't address the merits of any claims, only
12 whether Defendants obtained Storix's approval before filing the lawsuit. The court
13 found that disputed facts existed regarding *that* issue alone. "It is well settled that
14 language contained in a judicial opinion is `to be understood in the light of the facts
15 and issue then before the court, and an opinion is not authority for a proposition not
16 therein considered'." [StaffPro, Inc. v. Elite Show Services Inc., 39 Cal. Rptr. 3d 682,](#)
17 [686, fn. 4](#) (citing [People v. Banks \(1993\) 6 Cal.4th 926, 945.](#))

18 Furthermore, "[I]f a claim succeeds at a hearing on the merits, then, unless that
19 success has been procured by certain improper means, the claim cannot be "totally
20 and completely without merit." [Parrish v. Latham & Watkins \(2017\) 3 Cal. 5th 767,](#)
21 [776](#) (underline added). Probable cause is not established if the ruling is shown to
22 have been obtained by "fraud or perjury." [Wilson v. Parker, Covert & Chidester](#)
23 [\(2002\) 28 Cal. 4th 811, 820.](#) Johnson alleged in the Complaint that Defendants lied
24 about Johnson's residency when the underlying complaint was filed and the events
25 occurred. (ECF No. 1 ¶¶ 17, 23.) Defendants knew the facts supporting the only
26 claim asserted in the complaint were false. (*Id.* ¶¶ 18, 24.) The only judgment against
27 Johnson was obtained by improperly introducing a new claim in closing arguments.
28 (*Id.* ¶ 27.) Defendants do not dispute these allegations and thus cannot establish

1 probable cause.

2 If this Court finds Johnson's arguments and authorities insufficient to
3 overcome Defendants' argument to the contrary, Johnson requests a stay to preserve
4 the status quo of only the malicious prosecution claim until the California Court of
5 Appeals determines whether the underlying lawsuit terminated in Johnson's favor.
6 "When a malicious prosecution action is filed following the entry of a judgment in
7 the underlying action but is rendered premature by the filing of an appeal in the
8 underlying action, the proper remedy is to stay the now premature malicious
9 prosecution action, not dismiss it." [Pasternack v. McCullough, \(2015\) 235 Cal. App.](#)
10 [4th 1347, 1359](#) (citations omitted.) If Defendants are confident the state judgment
11 will be upheld, they should have no problem staying the malicious prosecution claim
12 while allowing the others proceed.

13 **III. CONCLUSION**

14 Johnson met the burden of justifying a stay of proceedings pending a
15 determination by the Ninth Circuit as to whether the case should remain in this Court.
16 Defendants do not rebut Johnson's authority that a claim pending appeal is severed
17 from the underlying lawsuit when determining the favorable termination element of a
18 malicious prosecution claim. If the Court is convinced otherwise, Johnson provided
19 further un rebutted authority that the cause of action must be stayed, rather than
20 dismissed, pending an appeal of the underlying lawsuit.

21
22 DATED: November 17, 2019

Respectfully submitted,

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24 By:

s/Anthony Johnson
Anthony Johnson, In Pro Per