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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

vs.

MANUEL ALTAMIRANO, an individual, RICHARD TURNER, an individual, DAVID KINNEY, an individual, DAVID HUFFMAN, an individual, PAUL TYRELL, an individual, SEAN SULLIVAN, an individual, STORIX, INC., a California Corporation, and DOES 1-5, inclusive,

Defendants.

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' FURTHER BRIEFING IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COURTROOM: 15A
Honorable Judge Marilyn L. Huff

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

Plaintiff Anthony Johnson ("Johnson") hereby submits this Opposition to Defendants Further Briefing ("Brief") in support of defendants Altamirano, Turner, Kinney and Huffman ("Defendants") Motion to Dismiss ("Motion") on the ground of "failure to state a claim upon which relief can be granted." (FRCP § 12(b)(6).)

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I. INTRODUCTION AND SUMMARY

Defendants don't dispute they siphoned almost half a million dollars out of Johnson's earnings while he was on medical leave. Instead, they argue Johnson's allegation of delayed discovery of the conversion is implausible based on their implausible theory that Johnson must have known of the conversion as early as 2011 but chose not to mention it during the 4 years Defendants used his own company and his own money to sue him. Johnson's recent discovery of the conversion finally answered the burning question Defendants have avoided all these years. Why, after Johnson gave the Defendants $2 million worth of stock in his company *for free*, did they force him out of the company, take his entire life's work, and direct his remaining shareholder income to litigation against him? The only reasonable explanation is that Defendants never expected Johnson to live long enough to discover their conversion. Johnson not only survived his terminal cancer, but the years of frivolous legal actions taken against him solely to prevent his accessing Storix's financial records.[1]

In their Motion, Defendants argued that *res judicata* bars Johnson's claims of breach of fiduciary duty, breach of contract, economic interference, rescission and indemnification. However, Defendants referenced no specific claims or issues in the Complaint that were previously litigated or necessarily decided. The Court found that Defendants failed to raise a *res judicata* defense against Johnson's conversion claim, and therefore suggested they look to the state court judgment on the shareholder derivative lawsuit ("Derivative Suit") and provide further briefing on whether Johnson's conversion claim could also be barred by claim or issue preclusion. Given

[1] Every action was based on Defendants' disproven claim that Johnson used Storix's proprietary information to "stand up" a competing business. Defendants are precluded from further asserting *that claim* because a state court adopted a jury's verdict explicitly finding that Johnson did not use Storix's confidential information to its detriment or breach any fiduciary duty to Storix for his benefit.

a second chance, Defendants still failed to reference any claims or issues previously litigated or necessarily decided that bar Johnson's conversion claim.

No claims in the Complaint were previously litigated or decided, especially since the claims didn't accrue until long after the prior litigation was initiated or decided. The claims in the Derivative Suit don't preclude Johnson's current claims because the Derivative Suit alleged damages to Storix, not Johnson, and because Johnson was not a party or a party in privity with Storix. Defendants exceed the scope of the Court's order by indirectly referring to Johnson's *cross-complaint* as the "Direct Suit" brought against them.[2] Defendants assert that the Direct Suit bars Johnson's conversion claim on the basis of "claim-splitting", but still without identifying any identical claims.

No issues underlying Johnson's claims in this lawsuit were previously litigated or necessarily decided. Defendants' only argument pertaining to issue preclusion is that Johnson "could have" discovered the conversion earlier. But instead of identifying any ruling that shows Johnson knew or should have known of the conversion, Defendants raise factual issues suggesting Johnson could have known, ignoring that Johnson had no reason to suspect or opportunity to investigate the conversion.

Defendants failed to show that any claims in the Complaint are insufficiently pled, and dispute none of the allegations. Instead, the factual disputes raised in their Brief converts their Motion to Dismiss to a motion for summary judgment. The Court must deny Defendants' Motion in its entirety since they provided no evidence to defeat Johnson's factual allegations as a matter of law.

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[2] Defendants (as Storix) brought the Direct Suit *against* Johnson. To avoid confusion, Johnson similarly refers to his cross-complaint as the Direct Suit.

II. ARGUMENT

A. It Was Improper for the Court to Raise *Sua Sponte* a Defense of *Res Judicata* Based on Evidence Outside the Pleadings

The Court noted that Defendants raised a *res judicata* as a defense to Johnson's other claims but not his conversion claim. The Court suggested the Defendants look to prior state court decisions to defeat Johnson's allegations of delayed discovery and ordered further briefing on "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." (Doc. 62 at p. 3.)

Appellate courts have found it proper for a lower court to raise a *res judicata* defense in limited situations as long as the parties were provided an opportunity to argue the court's finding. For instance, *Headwaters Inc. v. US Forest Service*, 399 F.3d 1047, 1054 (9th Cir. 2005) (Headwaters) ("where the records of that court show that a previous action covering the same subject matter *and parties* had been dismissed"), *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986) (when the court "has been apprised by the plaintiff of an earlier decision arising out of the same contract upon which the action before the court is based"), *United Home Rentals, Inc. v. Texas Real Estate Comm'n*, 716 F.2d 324, 330 (5th Cir.1983) ("where both actions are brought in the courts of the same district"), and *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir.1980) ("where both actions were brought before the same court.") Rather than finding *res judicata* applicable based on the facts of the Complaint, the Court suggested Defendants investigate further and provide new arguments to defend Johnson's conversion claim. The Court didn't raise the issue based on an identical claim previously litigated, much less a prior dismissed complaint in its jurisdiction. Instead, the Court suggested the Defendants assert additional facts to defeat Johnson's allegations of delayed discovery.

"Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby

eroding the principle of party presentation so basic to our system of adjudication." *Headwaters, supra,* 399 F.3d at 1055 (9th Cir. 2005), citing *Arizona v. California,* 530 U.S. 392, 412-13, 120 S.Ct. 2304 (2000). "[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).

It was improper for the Court to assist the Defendants by conducting its own research into state court decisions, suggesting an added technical defense, and allowing Defendants a second chance to plead their motion to dismiss Johnson's well supported claims.

B. Defendants' Motion Relies on Unresolved Issues and Disputed Facts Not Subject to Judicial Notice

"Although a court must normally convert a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment if it 'considers evidence outside the pleadings . . . [it] may consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.'" *Vasserman v. Henry Mayo Newhall Memorial Hosp.*, 65 F. Supp. 3d 932, 942 (C.D. Cal. 2014) (citing *US v. Ritchie*, 342 F.3d 903, 907-908 (9th Cir. 2003) (Ritchie). However, "[c]ourts may only take judicial notice of adjudicative facts that are 'not subject to reasonable dispute.'" *Ritchie* at p. 908-909 (citing Fed.R.Evid. § 201(b)).

As argued below, Defendants assert conclusory facts based on general references to documents and court orders that establish no such facts but themselves contain facts subject to reasonable dispute. Even if such documents were judicially noticeable, the facts therein are irrelevant to Defendants' Motion. The Complaint alleges the conversion occurred while Johnson was on medical leave in 2011-2013 as well as facts pertaining to Defendants' efforts to prevent him from discovering the conversion until 2018. (Complaint ¶¶ 30, 50-51.) Defendants raise factual issues to suggest Johnson could have discovered the conversion at a time when the three-year statute of limitations for conversion expired before the Complaint was filed. Suggestive facts are insufficient to defeat a motion to dismiss, particularly a factual issue of delayed discovery. "Resolution of the statute of limitations issue is normally a question of fact." *Fox v. Ethicon Endo-Surgery, Inc.*, 27 Cal. Rptr. 3d 661, 670 (Cal. Sup. Ct 2005); *See also Orr v. Bank Of America, NT & SA*, 285 F.3d 764, 780 (9th Cir. 2002).

By raising factual issues in their Brief and referencing evidence not subject to judicial notice, Defendants convert their Motion to Dismiss to a Rule 56 motion for summary judgment. Defendants provided no evidence to defeat the allegations of the Complaint as a matter of law. Accordingly, the Court must deny the Motion.

C. Res Judicata Does Not Bar Johnson's Conversion Claim

Defendants argue that Johnson's conversion claim is barred because it was previously litigated and decided in the Derivative and Direct Suit. Defendants also argue that *res judicata* bars the conversion claim because it "could have been litigated" earlier. Defendants repeat these bald assertions throughout the Brief without identifying any identical claims or specific issues that were decided in prior litigation. *Res judicata* does not apply to the conversion claim because neither the claim nor any specific issues necessary to its determination were previously litigated and decided, nor could the conversion claim have been brought in an earlier lawsuit.

1. Whether facts related to the conversion existed before the Derivative and Direct Suits were filed is irrelevant.

Defendants argue that "Johnson had knowledge of [Storix's financials] in 2011", so the conversion claim "should have been brought in Johnson's previous lawsuits against Defendants." (Brief at p. 5.)

Defendants first refer to the minutes of a Storix board meeting in September 2011, where Johnson issued them 60% of the shares in Storix. (*See Defendants Request for Judicial Notice in Support of Further Briefing,* Doc. No. 66-1 ("Suppl. RJN"), Ex. 1 at p. 5.)[3] Defendants argue that the minutes reflect "the amount of Storix profits to date, the amount of Johnson's draws to date, and the amount of balance owed to Johnson as of September 21, 2011." (Brief at p. 4.) Defendants refer to the numbers as "undistributed profits earned prior to Defendants becoming Storix shareholders." But the numbers only reflect Johnson's *year-to-date* profits and draws for 2011. "Draws already taken by Anthony between 1/01/2011 and 9/21/2011 have totaled $270,000 leaving a balance due to him of $268,726.66." (Suppl. RJN, Ex. at p. 5, underline added.) Referring to the minutes, Defendants imply not that Johnson knew of the conversion, but that no conversion occurred. As alleged in the Complaint, the conversion occurred "[w]hile Johnson was on medical leave in 2011-2013", which was *after* the minutes were produced. (Complaint ¶ 30.) In any event, Johnson's knowledge of Storix's financials in no way proves he should have known of the conversion.

Ignoring the allegations of delayed discovery due to their intentionally preventing Johnson's access to Storix's financial records (Complaint ¶¶ 30, 50-51),

[3] Judicial notice of the facts contained in the document is improper because, "[o]nly if the adequacy of the disclosure or the materiality of the statement is so obvious that reasonable minds could not differ are these issues appropriately resolved as a matter of law." *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405, fn.4 (9th Cir. 1996) (internal citation omitted.)

Defendants argue that Johnson's conversion claim "could have been brought at the time he filed the Derivative Suit or his cross-complaint in the Direct Suit." (Motion at p. 5.) "It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations[. …] The rationale for the foregoing rule is that the culpable defendant should be estopped from profiting by his own wrong *to the extent* that it hindered an 'otherwise diligent' plaintiff in discovering his cause of action." *Sanchez v. South Hoover Hospital* (1976) 553 P.2d 1129, 18 Cal. 3d 93, 99 (italics in original). "It would be contrary to public policy to require plaintiffs to file a lawsuit against [defendants] at a time when the evidence available to them failed to indicate a cause of action." *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 408. Defendants don't dispute that they refused Johnson access to Storix's records or intentionally concealed the conversion.

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] ¶ A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.]" *Fox v. Ethicon Endo-Surgery, supra,* 27 Cal. Rptr. 3d at 667 (citing *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398) (underlines added). Defendants raise the questions of whether Johnson had sufficient reason to suspect the conversion and whether he had "*the opportunity to obtain knowledge* from sources open to [his] investigation." *Id.* at 688 (italics in original). Such are factual issues to be resolved by a jury.

2. Johnson does not need to allege new facts or circumstances to bar applicability of *res judicata*.

Defendants misinterpret two cases when arguing that Johnson "could have brought" his conversion claim in an earlier case. First they quote *Planning & Conservation League v. Castaic Lake Water Agency,* 180 Cal.App.4th 210, 227 (2009) (Planning) in saying that "*res judicata* may not apply when 'there are changed

conditions and new facts **which were not in existence** at the time the action was filed upon which the prior judgment is based.' (emphasis added)." (Brief at p. 3.) They quote *Smith v. Exxon Mobil Corp.*, 64 Cal. Rptr. 3d 69, 77 (2007) (Smith) in arguing that such conditions and facts "only prevent *res judicata* from applying when 'in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants.'" (Brief at p. 3.) Defendants omit the first part of the quote, which reads, "collateral estoppel '"was never intended to operate so as to prevent a re-examination of the same question between the same parties where, 'in the interval […]'" [Citations].'" (*Ibid*.)

Defendants reverse the logic of the above cases when asserting that "Johnson has not alleged any material change in circumstances or new facts barring application of the doctrine of *res judicata*." (Brief at p. 5.) Defendants basically argue that, unless a Complaint explicitly bars the application of *res judicata*, all claims must therefore be precluded. Obviously, the argument is absurd. In any case, "[C]hanged conditions and new facts which were not in existence at the time the action was filed" may require a pending complaint to be amended. *See Planning, supra,* 180 Cal.App.4th at 227. There was no pending lawsuit when the Complaint was filed. Nor was there a change in "the legal rights or relations of the litigants" "between the first and second actions." *Smith, supra*, 64 Cal.App.4th at 77. Such a change might bar application of *res judicata*, but a lack of such change doesn't automatically invoke the defense.

Defendants further argue that Johnson could have brought the claim earlier because his allegations of delayed discovery "cannot survive the plausibility smell test." (Brief at pp. 5-6.) First, they assert that, "prior to September 21, 2011, [Johnson] is the one individual who would have a firm grasp of what, if any, undistributed profits he would be owed prior to Defendants becoming shareholders." (*Id*. at p. 6.) Second, Defendants argue that Johnson retained a financial expert to determine damages in his cross-complaint, thus the expert "would presumably

identify and alert Johnson as to any discrepancies with respect to Storix's financial and money allegedly owed to Johnson." (*Ibid*.) These "presumptions" are disputable facts. In any case, any money Storix *owed* Johnson before Defendants became shareholders has nothing to do with the later conversion. The conversion claim didn't accrue when Storix owed him money, but when Defendants "refus[ed] to return Johnson's money after he discovered the conversion and demanded it be returned to him." (Complaint ¶ 50.)

3. Issue preclusion does not bar litigation of Johnson's alleged lack of access to Storix's financial records.

The Court suggested Defendants look to the judgment on the Derivative Suit for facts that defeat Johnson's allegations of delayed discovery. In doing so Defendants argue that "Johnson's access to financial records of Storix was adjudicated in the Derivative and Direct Suit." (Motion at p. 6.) Issue preclusion is inapplicable because no "identical issue" pertaining to Johnson's access to Storix's records was "asserted against Johnson" or "actually litigated and necessarily decided" in either lawsuit. *See* *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 825 (2015).

The issue of Johnson's access to records was never adjudicated in the Derivative Suit. Defendants instead refer to the Direct Suit in arguing that "Johnson filed a Motion for Peremptory Writ of Mandate for unfettered access to Storix's books" by which he was "permitted to inspect and copy Storix's books and records subject to just and proper conditions." (Brief at p. 6.) The court order providing Johnson *limited* inspection rights to Storix actually supports Johnson's allegations of delayed discovery. If Johnson was not being denied access to Storix's records he wouldn't have brought the motion. The court granted the motion "with conditions" because "[Johnson] is a defendant in a lawsuit filed by Storix, claiming he has breached his fiduciary duty to Storix by forming a new company to compete with Storix. Thus he has no right to access corporate documents … that could be used against the corporation." (Doc. No. 30-3, Ex. 5 at p. 109.) Therefore, "Storix may

withhold or redact … confidential, proprietary, and trade secret information", and Johnson must "contact counsel for [Storix] for hard copies." (*Id*. at p. 110.) Defendants used the *existence* of their later disproven claim to ensure they remained the sole arbiters of Johnson's inspection rights. The court's order supports the allegation that Defendants exercised exclusive control of Storix's records (Complaint ¶32), thereby preventing Johnson from discovering the conversion until 2018 – after the Direct Suit was tried. (*Id*. ¶51.)

Importantly, even if the court had granted Johnson "unfettered" access to Storix's records on **September 16, 2016** (*See* Doc. No. 30-3, Ex. 5 at p. 109), or Johnson was alerted to the conversion by the financial expert engaged on **October 13, 2016** (Motion at p. 6; Suppl. RJN, Ex. 2 at p. 18), the Complaint was still filed within the three-year statute of limitations.

The Court also suggested that Defendants look to the "accounting claim" in the Derivative Suit for an argument to defeat the allegation of delayed discovery. The accounting claim was never litigated because its purpose was to obtain records necessary to determine actual damages following a judgment of liability. The court found no liability, thus no need for the accounting. If the court had granted the accounting, Defendants would have been required to produce financial records, but only those needed to determine Storix's damages. Denial of the accounting in no ways suggests Johnson already *had* such records, but even so, it doesn't prove Johnson knew or should have known of the conversion. Nonetheless, even if the court granted an accounting in 2018 that revealed the conversion, the Complaint was filed only a year later.

By asserting conclusory facts based on ambiguous court findings, Defendants only created a factual dispute as to whether Johnson "could have known" of the conversion. As such, Defendants convert their Motion into a summary judgment motion, which must be denied because Defendants provided no evidence to defeat Johnson's facts.

4. Claim preclusion does not bar Johnson's conversion claim.

In their Motion, Defendants assert that Johnson's other claims are barred by *res judicata* because they were "previously litigated and decided in the Derivative Suit." (Motion at pp. 8-9.) They likewise argue in the Brief that the conversion claim is barred because "Johnson is relitigating the same 'claim' previously litigated in the Derivative Suit." (Brief at p. 7.) Again, Defendants reference no identical claims, nor could they since the Derivative Suit adjudicated only Storix's rights and Storix's damages. "*Res judicata*, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." *DKN Holdings LLC v. Faerber*, *supra*, 61 Cal. 4th at 823.

Even if Storix's damages and Johnson's damages somehow amounted to identical claims, *judicial estoppel* bars Defendants from asserting claim preclusion by reference to the Derivative Suit. "[T]he doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183. Before the trial of the Derivative Suit, the court granted Defendants' motion to dismiss Johnson as a shareholder plaintiff because he was *adverse* to Storix, finding that Johnson "was not an appropriate plaintiff because he was not a fair and adequate representative." (Doc. No. 30-3, Ex. 1 at p. 15.) The trial proceeded with Robin Sassi as the only remaining shareholder plaintiff. (*Id*. at p. 10) The court thereafter referred to Sassi as the sole "plaintiff" in its decisions. (*See gen*. *Id*. at pp. 15-18.) Defendants ensured Johnson was not a party to the Derivative Suit when the claims were litigated and decided. They can't conveniently change their position to argue Johnson was a party *in privity* with Storix after they sought and obtained a decision to the contrary.

Defendants assert that Johnson's conversion claim arose from the same "nucleus of facts" as the Derivative Suit, referring to the Accounting cause of action which alleged the accounting is necessary because Defendants "refused his access to Storix's financial documents." (Brief at p. 7.) Defendants misconstrue the denial of an accounting as a *specific* finding that they did not withhold information from Johnson. The accounting claim demanded no such finding, the issue was never litigated, and denial of the demand for an accounting just allowed them to continue denying Johnson records.

Next, Defendants argue that Johnson "could have brought" his conversion claim in an earlier lawsuit by misapprehending *Weikel v. TCW Realty Fund II Holding Co. (Weikel)*, 55 Cal.App.4th 1234, 1245 (1997). (Brief at p. 7.) *Weikel* refers to the "rule against splitting a cause of action", which precludes a plaintiff from bringing the same cause of action (defined by the "primary rights theory") in a second lawsuit under a different "legal theory." *Weikel* at p. 1246. There is no authority supporting Defendants' argument that *res judicata* requires different claims to be brought in a single lawsuit. Johnson never brought a conversion claim, nor any claim involving Defendants' injury to the same primary right and the same damages.

Finally, Defendants confusingly argue that "exhibits admitted at trial would be the precise evidence presented in defense of Johnson's conversion claim", therefore the conversion claim alleges "infringement of the same right." (Brief at p. 8.) Defendants identify no such exhibits or underlying facts to clarify their argument. "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *McClain v. Apodaca*, *supra*, 793 F.2d at 1033.

III. CONCLUSION

In the Motion, Defendants asserted a *res judicata* defense to nearly every cause of action without identifying any specific claims or issues in the Complaint that were previously litigated or decided. Their Brief is no less ambiguous but raises factual issues that convert their Motion to Dismiss to a summary judgment proceeding. Since

Defendants provide no evidence to defeat the facts alleged in the Complaint as a matter of law, the Court must deny their Motion in its entirety.

DATED: November 1, 2019

Respectfully submitted,

By: _____

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