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13 UNITED STATES DISTRICT COURT  
14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

15 ANTHONY JOHNSON, an individual,  
16 Plaintiff,

17 v.

18 MANUEL ALTAMIRANO, an individual,  
19 RICHARD TURNER, an individual,  
20 DAVID KINNEY, an individual, DAVID  
21 HUFFMAN, an individual, PAUL  
22 TYRELL, an individual, SEAN  
23 SULLIVAN, an individual, STORIX, INC.,  
24 a California corporation, and DOES 1-5,  
25 inclusive,

26 Defendants.

Case No. 19-cv-01185 H (BLM)  
DEFENDANT STORIX, INC.'S  
REPLY IN SUPPORT OF ITS  
MOTION TO DISMISS  
PURSUANT TO FEDERAL RULE  
OF CIVIL PROCEDURE 12

Filed: June 24, 2019  
Hearing: October 7, 2019  
Time: 10:30 a.m.  
Judge: Hon. Marilyn L. Huff  
Court: Courtroom 15A

## I. INTRODUCTION

1  
2 Plaintiff Anthony Johnson’s attempted attack on Storix’s motion to dismiss  
3 fails as it is premised on several misapprehensions of the law and conflicting  
4 contentions. Johnson fails to adequately rebut any of the grounds on which Storix  
5 moved to dismiss.

6 With respect to res judicata, Johnson contends there is no “identity of claims,”  
7 since he has retitled his claims as being for breach of contract and rescission. Yet, the  
8 admissions throughout his opposition belie that contention. In fact, he repeatedly  
9 acknowledges that his new complaint is premised on the same events (i.e., nucleus of  
10 operative facts) as the prior Copyright Action. He cannot avoid the application of res  
11 judicata so easily and it is fatal to his case.

12 Johnson next misconstrues the defense of preemption. Johnson wrongly  
13 asserts that “[p]reemption of a state claim doesn’t bar the claim in federal court – it  
14 requires the claim to be brought under federal law.” *See* Opp. at p. 5. The preemptive  
15 effect of the Copyright Act means that if Johnson cannot establish a copyright claim,  
16 then he has no valid claim. Johnson has no valid copyright claim, and so is barred  
17 from seeking to enforce such rights under any other title.

18 Johnson’s various other contentions likewise fail to justify denial of the  
19 motion. He simply does not understand that he lacks standing to assert any of the  
20 rights afforded by the Copyright Act with regards to SBAdmin, which is precisely  
21 what he seeks to do with his lawsuit. Likewise, his argument that somehow he  
22 unilaterally controls the statute of limitations application, notwithstanding what he  
23 expressly alleged, is wrong as a matter of law. Many of his other arguments are  
24 nonsensical and difficult to follow. As to indemnification, Johnson flatly misstates  
25 facts and law and relies on *ipse dixit* to argue his claim should survive. Johnson  
26 musters no valid reason to deny Storix’s motion as to any of his claims, and so the  
27 motion should be granted in its entirety.

28

## II. ARGUMENT & AUTHORITIES

### A. Johnson Fails to Circumvent the Application of Res Judicata

Johnson seeks to refute the application of res judicata by simply stating the doctrine does not apply. He argues: “Storix cites no other case involving the same claims or issues raised in the Complaint because none have been previously litigated or decided.” *See Opp.* at p. 3. Storix is not sure what Johnson means by this statement, as Storix’s motion discusses at length how the Copyright Action serves as a bar to his newly asserted Complaint.

Regardless, Johnson contradicts himself as to whether his new Complaint involves claiming rights to the SBAdmin copyright. On the one hand, he argues his “*claims* don’t involve copyrights, and this Court’s ruling that Storix owned the copyrights to SBAdmin is not disputed.” *See Opp.* at p. 4. Yet, in the next breath he contends: “‘The nucleus of operative facts’ of the contract (Motion at p. 12) are Johnson’s transfer of intellectual property ownership (in contrast to a licensing agreement) and Storix’s refusal to compensate Johnson for the benefits he received. It doesn’t matter that the property was a copyright, only that Storix took ownership and possession. Federal law doesn’t govern property disputes.” *Id.* at p. 4. While Johnson is wrong as a matter of law with respect to the application of federal law to copyright issues (it undoubtedly does govern such), he admits his claim revolves around copyright ownership. That issue has been finally decided. Thus, his claims are barred by res judicata.

As Storix explained, it filed a counterclaim in the prior Copyright Action to determine ownership. If, as Johnson now claims, that a contract existed between him and Storix regarding rights to SBAdmin, he had a compulsory claim (or defense) that he failed to ever assert. The court’s prior judgment finally determined such issues as between the parties, and Johnson cannot unwind that result now.

It does not matter what position Johnson takes with respect to whether he is refuting the court’s prior judgment as to the SBAdmin copyright. Either he is not

1 challenging the prior Copyright Action judgment, in which case Storix owns the  
2 SBAdmin copyright free and clear of any claimed reversionary interest he maintains  
3 he owns, or he is challenging the judgment, which is futile as that judgment has been  
4 finally affirmed by the Ninth Circuit. Either way his claims are barred.

5 **B. Johnson Misunderstands the Preemptive Effect of the Federal**  
6 **Copyright Act Which Bars his Claims**

7 Johnson appears to not fully grasp the import of the Copyright Act's  
8 preclusive effect. He asserts that “[p]reemption of a state claim doesn’t *bar* the claim  
9 in federal court – it *requires* the claim to be brought under federal law.” *See* Opp. at  
10 p. 5. That is not entirely accurate, as such claims must not only be brought in federal  
11 court, but satisfy the elements of a copyright claim under the Act, or else be barred.

12 “The Copyright Act affords copyright owners the ‘exclusive rights’ to display,  
13 perform, reproduce, or distribute copies of a copyrighted work, to authorize others to  
14 do those things, and to prepare derivative works based upon the copyrighted work.  
15 17 U.S.C. § 106. The copyright, in other words, gives the owner ‘the right to control  
16 the work,’ including the decision whether or not to make the work available to the  
17 public.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017). “Section  
18 301 of the Act seeks ‘to preempt and abolish any rights under the common law or  
19 statutes of a State that are equivalent to copyright and that extend to works,’ so long  
20 as the rights fall ‘within the scope of the Federal copyright law.’” *Id.*, *citing* H.R.  
21 Rep. No. 94–1476, at 130 (1976). *See also Sybersound Records, Inc. v. UAV Corp.*,  
22 517 F.3d 1137, 1150 (9th Cir. 2008) (“The Copyright Act explicitly preempts state  
23 laws that regulate in the area of copyright.”).

24 Johnson appears to be conflating the requirement that copyright claims be  
25 brought in a federal forum with the preemptive effect that federal law can have on  
26 state law claims. If a state claim is preempted by the Copyright Act (like Johnson’s),  
27 and the claimant cannot meet the elements of an infringement claim under the federal  
28 Copyright Act (like Johnson cannot), then the claim *is barred* in federal (or any

1 other) court. That is the case here. As addressed at length in Storix’s moving papers,  
2 Johnson is expressly seeking to exercise rights falling within the ambit of the  
3 Copyright Act, and thus his claims are preempted and barred as a matter of law.  
4 More than just seeking compensation for a copyrighted work, Johnson seeks the  
5 return of the copyright (i.e., an ownership determination) and barring Storix’s further  
6 commercialization of SBAdmin. Those rights are plainly contemplated under the  
7 Copyright Act and preempted. Johnson does not refute the authorities or analysis set  
8 forth in Storix’s motion. Accordingly, the motion should be granted on this  
9 independent grounds.

### 10 **C. Johnson Fails to Address His Lack of Standing**

11 Johnson contends he does not understand Storix’s challenge that he lacks  
12 standing to assert what amount to copyright claims over SBAdmin ownership. The  
13 matter is straightforward, and parallels the preemption and res judicata defenses as  
14 well. Johnson does not own the copyright to any version of SBAdmin as finally  
15 determined by this court and the Ninth Circuit. Yet, he is now seeking to enforce  
16 what amounts to ownership rights in the copyright to SBAdmin. Without the  
17 exclusive ownership of the SBAdmin copyright, he lacks standing to pursue such  
18 rights.

### 19 **D. Johnson Misconstrues the Rules of Accrual for Statute of** 20 **Limitations Purposes**

21 Johnson is actually correct that a cause of action for breach of contract  
22 accrues, and the statute begins to run when the breach occurs. *See Opp.* at p. 8. But  
23 Johnson then misapplies the law, contending he unilaterally determines when that  
24 accrual begins by when he makes the demand. In his complaint, he alleges “Johnson  
25 entered into an oral contract with Storix upon its formation, wherein Storix was  
26 granted rights to market, sell, copy, distribute and license SBAdmin to third-parties  
27 in exchange for future compensation for the copyright if or when Johnson’s  
28 participation in Storix ended.” Compl. ¶ 11. Johnson quit in May 2014, thus ending

1 his participation in Storix. *Id.*, ¶ 13. The contract is not alleged to have required “a  
 2 payment demand” in order to trigger Storix’s payment obligation. Rather, Johnson  
 3 contends the obligation accrued at the time he ended his participation. Since Storix  
 4 did not pay him in 2014, regardless of his later board election in 2015, his breach of  
 5 contract claim—as alleged by him—already accrued and the statute began to run.

6 **E. Johnson Misconstrues the Writing Requirements of 17 U.S.C. § 204**

7 Johnson largely relies on general contracting principles under California law  
 8 to assert that he need not comply with the requisites of section 204 of the Copyright  
 9 Act, which invalidates any copyright transfer without “an instrument of conveyance,  
 10 or a note or memorandum of the transfer, [that] is in writing and signed by the owner  
 11 of the rights conveyed or such owner’s duly authorized agent.” 17 U.S.C. § 204  
 12 (Brackets added). Contrary to Johnson’s argument, Storix is not reversing its position  
 13 from that taken in the Copyright Action, but rather is reinforcing that position. In that  
 14 case, Storix proved, as acknowledged by the jury and the court, that “a note or  
 15 memorandum” complying with section 204(a), in the form of the Annual Report,  
 16 evidenced an intended transfer of the SBAdmin copyright from Johnson to Storix.  
 17 Johnson now seeks to effect a reconveyance of the copyright from Storix to Johnson  
 18 based on an alleged “oral contract” (of which only he knew about). Johnson admits  
 19 that no writing exists signed by Storix evidencing such a reconveyance. Thus,  
 20 Johnson’s attempted reacquisition of the SBAdmin copyright through his purported  
 21 “oral contract” fails as a matter of law.<sup>1</sup>

22 **F. Johnson Fails to Provide a Legitimate Basis to Seek Indemnity**

23 As with his other challenges to Storix’s motion, his strategy in overcoming  
 24 Storix’s motion with respect to his indemnity claim apparently is to ignore harmful

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 26 <sup>1</sup> Johnson makes a confusing reference to the status of the SBAdmin registration with  
 27 the Copyright Office. While Storix is not clear on the relevance of Johnson’s  
 28 reference to the status of the recorded registration, he is wrong as a matter of fact.  
 Following the Copyright Action, the registration records were updated with the  
 court’s final judgments to reflect that Storix has been adjudged the owner of the  
 SBAdmin copyright. *See* Doc. V9962D110, Date of Recording: 2019-04-02.

1 facts and disregard precedent. Johnson simply ignores the fact that a jury rendered a  
2 verdict against him, which the court adopted in finding that he acted contrary to  
3 Storix’s interests while serving as a director. Johnson’s avoidance of liability for  
4 some remedies sought against him does not absolve him of the entirety of the  
5 tortious acts he committed against Storix. Because he was not sued for conduct taken  
6 as a director, but rather was found liable for breaching his fiduciary duty to Storix, he  
7 is not entitled to indemnity under Corporations Code section 317 as a matter of law.

8 **III. CONCLUSION**

9 Johnson fails to overcome the bases of Storix’s motion to dismiss, and  
10 therefore the motion should be granted in its entirety.

11 DATED: September 30, 2019

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13  
14 By: s/ Sean M. Sullivan  
Paul A. Tyrell  
Sean M. Sullivan  
15 Attorneys for Defendants Storix, Inc.,  
16 Paul Tyrell, & Sean Sullivan

17  
18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on Monday, September 30, 2019, I electronically filed the  
20 foregoing through this Court’s electronic transmission facilities via the Notice of  
21 Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are  
22 determined this date to be registered CM/ECF Users set forth in the service list  
23 obtained from this Court on the Electronic Mail Notice List.

24  
25 s/ Sean M. Sullivan  
Sean M. Sullivan  
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