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13 **UNITED STATES DISTRICT COURT**  
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 ANTHONY JOHNSON, an individual,  
16 Plaintiff,

17 vs.

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

Case No. 19CV1185-H-BLM

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

**[FED. R. CIV. PROC. 12(b)(6)]**

Judge: Hon. Marilyn L. Huff  
Dept.: Courtroom 15A

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

27 Defendants Manuel Altamirano, Richard Turner, David Kinney, and David  
28 Huffman (collectively, "Defendants") hereby submit further briefing, as requested by  
the Court, on the issue of whether Plaintiff Anthony Johnson's ("Johnson") current  
claim for conversion is barred by *res judicata*.

**I. INTRODUCTION**

In addition to Johnson's conversion claim being barred by the statute of  
limitations, his conversion claim is also barred by the doctrine of *res judicata*. As

1 this Court is aware, this lawsuit represents the sixth action Johnson has initiated  
2 against Defendants and/or Storix, Inc. (“Storix”). Rather than accept the adverse  
3 judgments in the prior proceedings, Johnson continues his litigation campaign against  
4 Defendants by reasserting the same nucleus of facts in support of the same theories  
5 previously litigated. But Johnson also includes new theories based on the same  
6 nucleus of facts. To satisfy the pleading requirements as to his new theories, Johnson  
7 adds conclusory factual content not plausibly suggestive of a cognizable legal theory.  
8 Johnson’s conversion claim is a prime example.

9 Johnson’s conversion claim is based on the same nucleus of facts that  
10 supported his claims in the Derivative and Direct Suits. The events supporting his  
11 claim for conversion occurred in 2011-2013. These events, and more, were  
12 previously adjudicated on the merits in the Derivative and Direct Suit. And even if  
13 they were not part of Johnson’s causes of action in the previous suits, any claim for  
14 conversion should have been brought in those underlying proceedings. *Res judicata*  
15 therefore bars Johnson’s conversion claim.

## 16 **II. RELEVANT FACTUAL BACKGROUND**

17 “From 2003 to 2011, Johnson was the sole shareholder, officer and director of  
18 Storix and managed all Storix’s business operations.” (Doc No. 1, ¶ 10.) “In  
19 September 2011, Johnson took a medical leave from Storix due to an illness expected  
20 to be terminal.” (*Id.* ¶ 12.) Before his medical leave, Johnson hired his sister,  
21 Michelle St. Claire, to assist Storix with its financials. (*See* Doc. No. 30-3, Ex. 1 at  
22 Ex. A, p. 4.) In February 2015, “Johnson used his shares to elect himself to the board  
23 in order to continue his involvement” in Storix. (Doc. No. 1, ¶ 15.)

24 In October 2015, Johnson filed the Derivative Suit. (*Id.* ¶ 20.) The First  
25 Amended Complaint in the Derivative Suit included causes of action for breach of  
26 fiduciary duty, abuse of control, corporate waste, and accounting. (Doc. No. 29-3,  
27 Ex. 5.) On April 13, 2016, Johnson filed a cross-complaint in the Direct Suit  
28 including causes of action for breach of fiduciary duty, civil conspiracy, and fraud.

1 (Doc. No. 30-3, Ex. 3.) On September 12, 2018, judgment was entered in favor of  
2 Defendants and Storix on the Derivative Suit and Direct Suit. (*Id.*, Ex. 1.)

3 On June 24, 2019, Johnson filed the instant complaint, including a cause of  
4 action for conversion, which alleged Defendants “converted almost half a million  
5 dollars of Storix’s profits earned when Johnson was a sole shareholder to their  
6 personal equity accounts.” (Doc. No. 1, ¶ 30.)

### 7 **III. DISCUSSION**

#### 8 **A. Res Judicata Bars Johnson’s Conversion Claim**

9 Johnson’s conversion claim is barred by the doctrine of *res judicata* due to the  
10 preclusive effect of the September 12, 2018, judgment entered in favor of Defendants  
11 and Storix in the Derivative Suit and Direct Suit. Federal Courts look to state law to  
12 determine the preclusive effect of a state court judgment. *Palomar Mobilehome Park*  
13 *Ass’n v. City of San Marcos*, 989 F.2d 362, 364 (9<sup>th</sup> Cir. 1993). Under California  
14 law, the doctrine of *res judicata* applies to previously litigated causes of action and to  
15 issues necessarily decided in a prior action. *Brinton v. Bankers Pension Servs.*, 76  
16 Cal.App.4<sup>th</sup> 550, 556 (1999).

17 *Res judicata* acts as a bar to all causes of action that were previously litigated  
18 or that could have been litigated. *Allied Fire Protection v. Diede Construction, Inc.*,  
19 127 Cal.App.4<sup>th</sup> 150, 155 (2005). The doctrine of *res judicata* may not apply when  
20 “there are changed conditions and new facts which were not in existence at the time  
21 the action was filed upon which the prior judgment is based.” *Planning &*  
22 *Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4<sup>th</sup> 210, 227  
23 (2009) (emphasis added). Changed conditions or new facts, however, only prevent  
24 *res judicata* from applying when “in the interval between the first and second  
25 actions, the facts have materially changed or new facts have occurred which may  
26 have altered the legal rights or relations of the litigants.” *Smith v. Exxon Mobil Corp.*,  
27 153 Cal.App.4<sup>th</sup> 1407, 1418–19 (2007).

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1 The doctrine of *res judicata* will act as a bar to a later suit if there was an  
 2 adjudication in a previous suit that 1) involved the same ‘claim’ or issue as the later  
 3 suit; 2) reached a final judgment on the merits; and 3) involved the same parties or  
 4 their privies. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9<sup>th</sup> Cir. 1993). Courts  
 5 in the Ninth Circuit consider the following factors when determining whether two  
 6 claims are the same for purposes of *res judicata*: 1) whether rights or interests  
 7 established in the prior judgment would be destroyed or impaired by prosecution of  
 8 the second action; (2) whether substantially the same evidence is presented in the two  
 9 actions; (3) whether the two suits involve infringement of the same right; and (4)  
 10 whether the two suits arise out of the same transactional nucleus of facts. *Id.* at 1405.

11 Given this framework and the applicable standards governing the doctrine of  
 12 *res judicata*, Johnson’s conversion claim is barred because it was previously litigated  
 13 or could have been litigated. The Court should dismiss Johnson’s conversion claim.

14 **1. All facts supporting Johnson’s conversion claim existed at the**  
 15 **time of the filing of the Derivative and Direct Suit and could**  
 16 **have been litigated**

17 In his Complaint, Johnson alleges “he was owed all undistributed profits of  
 18 Storix earned prior to Partner-Defendants became shareholders.” (Doc. No. 1, ¶ 50.)  
 19 Johnson alleges further “that Partner-Defendants converted almost half a million  
 20 dollars of Storix’s profits earned when Johnson was a sole shareholder to their  
 21 personal equity accounts.” (*Id.* ¶ 30.) The Complaint alleges Defendants were issued  
 22 shares of Storix in September 2011. (*Id.* ¶ 12.) Thus, the amounts Johnson alleges  
 23 were converted, and to which he is allegedly entitled to, were earned prior to  
 24 September 2011 when Defendants became shareholders of Storix.

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1 The September 21, 2011 Minutes of Special Meeting of Board of Directors of  
 2 Storix, Inc. memorialize the issuance of shares to Defendants as alleged in paragraph  
 3 12 of Johnson's Complaint. (See Request for Judicial Notice in Support of Further  
 4 Briefing ("RJN"), Ex. 1.)<sup>1</sup> Importantly, the September 21, 2011 board minutes  
 5 reflect a resolution determining the amount of Storix profits to date, the amount of  
 6 Johnson's draws to date, and the amount of the balance owed to Johnson as of  
 7 September 21, 2011. (*Ibid.*) Johnson, as a director of Storix, consented to the  
 8 resolutions of the September 21, 2011 board meeting. (*Ibid.*) Thus, any claim  
 9 Johnson has regarding undistributed profits earned prior to Defendants becoming  
 10 Storix shareholders would necessarily be based on facts pre-dating the filing of the  
 11 Derivative and Direct Suit. Johnson had knowledge of these facts in 2011, and any  
 12 issue regarding Storix's profits earned while Johnson was a sole shareholder should  
 13 have been brought in Johnson's previous lawsuits against Defendants. Johnson's  
 14 conversion claim is therefore a claim that could have been brought at the time he  
 15 filed the Derivative Suit or his cross-complaint in the Direct Suit.

16 **2. Johnson has not and cannot allege new facts or circumstances**  
 17 **barring applicability of *res judicata***

18 Johnson has not alleged any material change in circumstances or new facts  
 19 barring application of the doctrine of *res judicata*. Johnson's only argument as to  
 20 why he did not bring his conversion claim earlier is that he did not learn of the  
 21 conversion until December 2018 because Defendants "directed Attorney-Defendants  
 22 to prevent Johnson from accessing financial records which would have raised his  
 23 suspicions." (Doc. No. 1, ¶ 30; see also ¶ 50: "preventing Johnson's access to the  
 24 money or records pertaining to it.") But this argument cannot survive the plausibility  
 25

26 <sup>1</sup> "Documents whose contents are alleged in a complaint and whose authenticity no party questions,  
 27 but which are not physically attached to the pleading, may be considered in ruling on a Rule  
 28 12(b)(6) motion to dismiss." *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9<sup>th</sup> Cir. 1996). Courts  
 may take judicial notice of matters of public record. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500,  
 504 (9<sup>th</sup> Cir. 1986). The September 21, 2011 board minutes of Storix was admitted exhibit No. 268  
 in the Direct Suit. (Declaration of Marty B. Ready ("Ready Decl."), ¶ 1; RJN, Ex. 1.)

1 smell test. For one thing, Johnson, as the sole shareholder, officer and director of  
2 Storix who managed all Storix's business operations prior to September 21, 2011, is  
3 the one individual who would have a firm grasp of what, if any, undistributed profits  
4 he would be owed prior to Defendants becoming shareholders. In addition, Johnson  
5 hired his own sister to handle Storix's finances during this transition period. If  
6 Johnson trusted his sister with Storix's finances, then any discrepancy would surely  
7 have been brought to his attention by his own sister especially given his medical  
8 diagnosis.

9 Moreover, in the Direct Suit, Johnson retained a CPA/Forensic Accounting  
10 expert to opine as to Storix's financials and stock transfers. (RJN, Ex. 2, p. 2.)  
11 Johnson's expert testified at trial. (Doc. No. 30-3, Ex. 1 at Ex. A, p. 4.) An expert  
12 forensic accountant hired by Johnson would presumably identify and alert Johnson as  
13 to any discrepancies with respect to Storix's financials and money allegedly owed to  
14 Johnson. In light of this, no reasonable inferences can be drawn from Johnson's  
15 allegations to support his conversion claim.

### 16 3. Issue preclusion bars litigation of Johnson's alleged lack of 17 access to Storix's financial records

18 The issue regarding Johnson's access to financial records of Storix was  
19 adjudicated in the Derivative and Direct Suit. Johnson, as a board member between  
20 2015 and 2018, was entitled to inspect the books and records of Storix contrary to his  
21 allegations. In particular, in the Derivative Suit, Johnson asserted a claim for an  
22 accounting. In the Direct Suit, Johnson filed a Motion for Peremptory Writ of  
23 Mandate for unfettered access to Storix's books, records, and documents. But the  
24 Derivative Suit and the Direct Suit adjudicated Johnson's claim for an accounting  
25 and his access to the books and records. Specifically, the order and decision in the  
26 Derivative Suit found "that plaintiff has failed to meet the burden of proof on the four  
27 causes of action [, including an accounting,] alleged in the First Amended Derivative  
28 Complaint." (Doc. No. 30-3, Ex. 1, p. 7.) And in the Direct Suit, the state court

1 ruled on Johnson’s writ of mandate and held that he was permitted to inspect and  
2 copy Storix’s books and records subject to just and proper conditions. (Doc. No. 30-  
3 3, Ex. 5.) As a result, this identical issue was decided on the merits in the Derivative  
4 and Direct Suit. Johnson therefore cannot rely on the issue of lack of access to  
5 support his conversion claim as it is barred by the doctrine of *res judicata*.

#### 6 4. Johnson’s conversion claim is barred by claim preclusion

7 One of the primary policies behind the doctrine of *res judicata* is precluding  
8 “piecemeal litigation by splitting a single cause of action or relitigation of the same  
9 cause of action on a different legal theory or for different relief.” *Weikel v. TCW*  
10 *Realty Fund II Holding Co.*, 55 Cal.App.4th 1234, 1245 (1997). Here, Johnson is  
11 seeking to do just that. Johnson is relitigating the same “claim” previously litigated  
12 in the Derivative Suit. *See Nordhorn*, 9 F.3d at 1404.

13 Johnson’s conversion claim arises from alleged actions of Defendants in 2011  
14 – 2013. (Doc. No. 1, ¶ 30.) This same timeframe, and the actions of Defendants  
15 during that timeframe, represented the same transactional nucleus of facts in the  
16 Derivative and Direct Suit. (*See gen.* Doc. No. 29-3, Ex. 5, ¶¶ 14 - 43.) For example,  
17 by way of his accounting claim, Johnson sought relief from the state court to  
18 determine the “amount of money due from Defendants to Plaintiffs.” (Doc. No. 29-  
19 3, Ex. 5, ¶ 166.) The accounting cause of action alleged Defendants “engaged in  
20 self-dealing and corporate waste as described above, misappropriating funds that  
21 belonged to Storix and its shareholders.” (*Id.* ¶ 165.) Additionally, Johnson alleged  
22 in his accounting claim that Defendants refused his access to Storix’s financial  
23 documents. (*Id.* ¶ 164.) These same facts form the basis of Johnson’s conversion  
24 claim. Specifically, Johnson is alleging he was denied access to Storix’s financials,  
25 which would have alerted him to an amount of money allegedly owed to him. The  
26 evidence, including expert testimony, presented at trial in the Derivative and Direct  
27 Suit would be the exact same evidence submitted in defense of Johnson’s current  
28 conversion claim. In fact, as set forth above, exhibits admitted at trial would be the

1 precise evidence presented in defense of Johnson's conversion claim. Thus, the rights  
2 established by the prior September 12, 2018 Judgment on Consolidated Actions  
3 Following Trial involving alleged infringement of the same right asserted in this  
4 action would be destroyed or impaired if Johnson was permitted to relitigate his  
5 previously adjudicated claim on a different legal theory, namely conversion.

6 The doctrine of *res judicata* prevents this type of piecemeal litigation. The  
7 preclusive effect of *res judicata* is designed to give Defendants a final resolution as  
8 to claims asserted against them by Johnson when based on the same transactional  
9 nucleus of facts. Defendants respectfully request the Court dismiss Johnson's  
10 conversion claim.

11 **IV. CONCLUSION**

12 For all the reasons set forth above in this further briefing requested by the  
13 Court as well as Defendants' Motion to Dismiss, the Court should dismiss Johnson's  
14 First, Second, Third, Fourth, Fifth, Sixth, and Seventh causes of action pursuant to  
15 Fed. R. Civ. Proc. 12(b)(6).

16  
17 Dated: October 25, 2019

**WILSON, ELSER, MOSKOWITZ,  
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