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Pro Se

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

v.

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 MEMORANDUM OF POINTS AND AUTHORITIES ISO OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS ALTAMIRANO, TURNER, KINNEY AND HUFFMAN

Hearing Date: October 7, 2019
Hearing Time: 10:30 a.m.
Judge: Hon. Marilyn L. Huff
Dept.: Courtroom I 5A

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

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I. INTRODUCTION

Plaintiff respectfully submits this Opposition to the Defendants' *Motion to Dismiss Plaintiff's Complaint* (hereafter "Motion") filed by defendants Altamirano, Turner, Kinney and Huffman (hereafter "Defendants") pursuant to Fed.R.Civ.P. § 12(b)(6) for failure to state a claim upon which relief can be granted.

References are herein made to the lawsuit underlying the malicious prosecution claim, San Diego Superior Court, Case No. 37-2015-00028262-CU-BT-CTL (hereafter "Direct Suit") and the shareholder derivative lawsuit Johnson filed *on Storix's behalf*, Case, No. 37-2015-00034545-CU-BT-CTL ("Derivative Suit"). For clarity and consistency with their concurrent motions and filings, Johnson herein incorporates Defendants' request for judicial notice in support of their *Special Motion to Strike* (hereafter "MTS RJN"). The complaint in this action (ECF No. 1) is hereafter referenced as "Complaint".

Defendants attempt to dismiss Johnson's complaint by making numerous legal conclusions without providing any authority, and based on facts unrepresented in the Complaint or any judicially noticeable documents. Johnson satisfied his low burden of showing the causes of action in the Complaint are sufficiently pled.

First, the malicious prosecution claim is based on an action filed and maintained under the direction of the Defendants, wherein Storix's only successful claim is severable from the complaint when determining favorable termination of the underlying litigation for numerous substantial reasons. Second, Defendants assert *res judicata* on nearly every cause of action without reference to any prior claims, rulings or relevant issues decided in any prior litigation. Third, Defendants ignore the delayed discovery rule when asserting that Johnson's conversion claim is barred by the statute of limitations. Fourth, Defendants were not protecting Storix by causing it to breach its contract with Johnson, and Defendants were strangers to the contract. Fifth, as majority shareholders, Defendants are liable for Storix's breach of contract. Defendants provide no reference to facts or authorities supporting their

contention that the claim is barred by *res judicata* or statute of limitation. Sixth, Johnson properly alleged rescission as an alternative to the breach of contract claim, which is properly asserted against Defendants for rendering Storix insolvent for their personal gain. Finally, Johnson's indemnification claim is properly asserted against Defendants for all the same reasons as the rescission and breach of contract claims.

Johnson respectfully request the Court deny Defendants' Motion, thereby requiring Defendants to answer the Complaint without further delay.

II. LEGAL STANDARD

Dismissal for failure to state a claim under Fed.R.Civ.P. § 12(b)(6) is a disfavored remedy and may only be granted in extraordinary circumstances. (*Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963, 966 (9th Cir. 1981).) On this motion, all allegations of material fact must be accepted as true and construed in the light most favorable to Plaintiff. (*Cahill v. Liberty Mut. Ins. Co*., 80 F.3d 336, 337-8 (9th Cir. 1996); *In re Silicon Graphics, Inc. Sec Litig.,* 183 F.3d 970, 983 (9th Cir. 1999).) The Court must also draw all reasonable inferences in favor of the non-moving party. (*Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).) If this Court finds the Complaint inadequate, it should "freely give leave to amend when there is no undue delay, bad faith, dilatory motive, undue prejudice to the opposing party by virtue of.... the amendment, [or] futility of the amendment." (Fed.R.Civ.P. § 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962).)

III. ARGUMENT

A. Claim 1: Plaintiff's Claim for Malicious Prosecution Does Not Fail as a Matter of Law

Johnson's claim is legally sufficient in that it establishes liability of the Defendants regardless of the capacity in which they committed the tortuous acts. Johnson established favorable termination of the underlying litigation after severing

the unrelated claim and directing the malicious prosecution action to only the non-severed claim.

1. The Underlying Action Was Commenced and Maintained Under the Direction of the Defendants

Defendants can't escape liability for commencing and maintain a malicious action simply because Johnson sued them "in their capacity of shareholders." Defendants escaped liability in prior actions by asserting were sued "in their capacity as officers and directors" and were thus shielded by the business judgment rule. Here, Defendants assert without authority that they can't be held liable as shareholders either. They are wrong. "All persons who are shown to have participated in an intentional tort are liable for the full amount of the damages suffered. [Citations.]" (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379-1381.) "Shareholders, officers, and directors of corporations have [also] been held personally liable for intentional torts when they knew or had reason to know about but failed to put a stop to tortious conduct." (*Id*. at pp. 1387-1388.) More importantly, a malicious prosecution cause of action stands on "a prior action [that] was commenced by or at the direction of the defendant[.]" (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50, underline added.) There "does not appear to be any good reason *not* to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 264.)

2. The Direct Suit Terminated in Johnson's Favor Based on the 'Severability Rule'

The only successful claim against Johnson was based entirely on an email Defendants claim Johnson sent to all Storix's customers. Under the exclusive control of Defendants, Storix demanded $3,739.14 for "employees' lost productivity" due to the "fallout" of Johnson's email. (Complaint ¶ 27.) The claim is severable from the "*entire lawsuit"* when determining favorable termination because:

(a) Defendants falsely alleged the event occurred when Johnson was living in California (*Id*. ¶ 23);

(b) The email didn't exist until after the Direct Suit was filed (*Id*. ¶ 23);

(c) The claim was not pled or asserted during the litigation (*Id*. ¶ 27);

(d) The claim was based entirely on facts separate from Storix's unsuccessful claim on which the malicious prosecution action is based;

(e) The claim could been brought in an independent action;

(f) The claim is pending appeal (Complaint ¶ 27, fn. 5).

Defendants were notified in the Complaint that the claim was severed from the favorable termination determination. (Complaint ¶ 27, fn. 5). As a result, they attempt to misconstrue cases that don't address the severability of claims into ones that "disfavor" severability. It would do violence to Johnson's right to petition if Defendants were allowed to use such a trivial claim to bar Johnson's malicious prosecution action. Fortunately the "severability rule" is specifically designed to prevent plaintiffs and attorneys, as in this case, from asserting trivial claims to protect themselves from liability for malicious lawsuits. There are no circumstances that better warrant severing a claim than this.

"[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 460 (citing *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1152-1153); See also *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789*,* 794 (*Tabaz*) (holding that a plaintiff may base a malicious prosecution claim on individual claims if the other claims are severable and not "simply different theories for recovering on the same injury".) The "severability rule" was created in *Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360, based on the severability analysis in *Albertson v. Raboff* (1956) 46 Cal.2d 375 (*Albertson*).

Defendants' arguments rely on *Lane v. Bell* (2018) 20 Cal.App.5th 61 (*Lane*) and its references *to Crowley v. Katleman* (1994) 8 Cal.4th 666 (*Crowley*). Neither case actually involved severable claims but both reference the severability of claims established by *Albertson*. Defendants state that "*Lane* rejected prior cases that held favorable termination could be based on a 'severable' claim." (Motion at p. 5.) This is not true. *Lane* noted the severability analysis of the cases it cited, which often found that favorable termination was not established because the underlying claims were not severable. Their argument is also inapplicable because Johnson does not assert favorable termination *based on the severable claim* but based on those that are *not severable*. Defendants fail to understand that "[a] claim for malicious prosecution need not be addressed to an entire lawsuit; it may, as in this case, be based upon only some of the causes of action alleged in the underlying lawsuit." *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333.) In *Paramount*, the court reversed a lack of favorable termination determination in stating, "[T]he fact that [defendant's] numerous claims may all be broadly deemed to be alleged breaches of fiduciary duty does not enable [defendant] to sidestep the severability rule... ." (*Id*. at 370.) The Defendants in this case attempt to do exactly that.

Defendants provide no authority that defeats severability of the claim in Johnson's Complaint because the cases they cite that base favorable termination on the "entire lawsuit" didn't involve severable claims, nor did they disapprove the severability rule. Defendants' argue that "*Lane* rejected prior cases" by making an ambiguous reference to *StaffPro, Inc. v. Elite Show Servs., Inc*. (2006) 136 Cal.App.4th 1392, 1403 (*StaffPro*). (Motion at p. 5.) *StaffPro* didn't disapprove severability, it just didn't find favorable termination because "the underlying defendant did not prevail on every claim asserted in the underlying action … because the judgment awarded affirmative relief to the underlying plaintiff[.]" (*Lane, supra,* 20 Cal.App.5th at 74, underline added.) Storix's only successful claim

was never asserted in the underlying litigation (until closing arguments), and Storix was denied all eleven demands for injunctive relief based on all the facts – including the email on which Storix's belated claim was based.

Crowley is the hallmark case on the "favorable termination" issue. "*Crowley* specifically approved *Freidberg's* conclusion there was *no* favorable termination under the facts of Freidberg." (*Lane, supra,* 20 Cal.App.5th at 75, underline added.) "[T]he action had evidently not terminated favorably to *Freidberg* because the judgment assessed substantial damages against him." (*Ibid*.) Also, the *Friedberg* claims were not severable because "Reasonable value of services, joint venture and tortious interference were simply different theories for recovering on the same injury: the failure to share attorney fees." (*Tabaz, supra, 27 Cal.App.4th* at 794; citing *Freidberg v. Cox* (1987) 197 Cal.App.3d 381, 388.) *Friedberg* expressly recognized, however, that the result would have been different had the causes of action been severable. (*Friedberg* at p. 387-388.) *StaffPro* didn't reject the severability rule, but rejected favorable termination because "[t]he trial court's order in the underlying action required StaffPro to take remedial action with respect to many of the core allegations[.]" (*StaffPro, supra,* 136 Cal.App.4th at 694.) *Lane* and *StaffPro* properly found an absence of favorable termination under the facts of Friedberg, but Storix's only successful claim was based on entirely different facts and theories and all demands for injunctive relief were denied.

Lastly, *Crowley* relies "exclusively on the settled rule that an appeal may be taken from only a portion of a judgment when that portion is 'severable' in the sense that the issues raised in the appeal can be resolved without regard to the issues determined by the portion of the judgment that was not appealed." (*Crowley, supra,* 8 Cal.4th at 387, citing, *inter alia*, *American Enterprise, Inc.* v. *Van Winkle* (1952) 39 Cal.2d 210, 216-217.) The disposition of a separate and independent claim which is *not* appealed from may be considered final for the purposes of malicious litigation. (*Albertson, supra,* 46 Cal.2d at 378.) Johnson is appealing the severable

claim, thereby further severing it from the "entire lawsuit" and establishing favorable termination. Had Johnson not appealed the claim, he still would have established favorable termination since he directed the probable cause element of the malicious prosecution action to only the *non-severable* claim. (Complaint ¶¶ 39-40.)

3. Johnson Has Established Lack of Probable Cause

In stating that "[a] verdict favorable to Storix in the underlying action conclusively establishes … probable cause", Defendants conflate the favorable termination and lack of probable cause elements of a malicious prosecution action. (Motion at p. 6.) "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may ... be based upon only some of the causes of action alleged in the underlying lawsuit." (*Lane, supra,* 20 Cal.App.5th at fn. 6.) "As our Supreme Court stated in *Singleton* v. *Perry* (1955) 45 Cal.2d 489, 497 [289 P.2d 794], 'Indeed, it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability ....'" **(***Tabaz , supra, 27 Cal.App.4th* at 792*,* citing *Singleton v. Perry* (1955) 45 Cal.2d 489, 497; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 ["An action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted"].) Johnson directed the cause of action only to Storix's unsuccessful claim that Johnson was operating a competing business. (Complaint ¶¶ 39-40.) The fact that Storix prevailed on a different claim doesn't establish probable cause for bringing or maintaining the malicious one.

"Where there is no dispute as to the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute that action is purely legal." (*Ross v. Kish*, 51 Cal.Rptr.3d 484, 495.) "[T]he probable cause element calls on the trial court to make an objective determination of the `reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally

tenable,' as opposed to whether the litigant subjectively believed the claim was tenable." (*Parrish v. Latham & Watkin* (2017) 3 Cal.5th 767, 776 (*Parrish*).) "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Even the second amended complaint alleged no harm related to its claim of a competing business. (Complaint ¶ 38.) It also repeated false allegations Defendants knew not to be true. (*Id*.) Based on the allegations of the Complaint, accepted as true, Defendants instituted and maintained the claim knowing it was untenable.

Next, Defendants fail to understand that the "interim adverse judgment rule" is used determining probable cause and thus applies to claims and not entire lawsuits. They also attempt to invoke the rule without reference to any order or judgment to which it applies, much less the relevant claim. Notably, the only case cited by Defendants actually defeats their argument. "[E]ven where a ruling is based on the court's evaluation of the merits of the claim, the ruling does not establish the existence of probable cause if the ruling is 'shown to have been obtained by fraud or perjury.'" (*Parrish*, 3 Cal.5th at 778; citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) As noted above, the Complaint alleges perjury (Complaint ¶¶ 18, 23, 40), without which Storix would have no standing and thus *no* favorable rulings, and Defendants do not *do not dispute* those allegations.

Defendants fail to explain how denial of summary judgment in the Direct Suit establishes probable cause. "[I]f a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' [Citation.]" (*Parrish, supra,* 3 Cal.5th at 776, underlines added.) The only issue addressed by the court was whether Storix had "standing to bring this suit" given the fraudulent act of ratification by which Defendants attempted to escape liability. (MTS RJN, Ex. 9 at p. 144.) The court didn't address any claims of the Direct Suit, finding only that "[i]t is disputed

whether this ratification and authorization is sufficient." (*Ibid*.) Whether the lawsuit was properly approved is irrelevant because Defendants aren't being sued for not obtaining proper approval. Notably, "[I]f denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence." (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal. App. 4th 438, 451, underline added.) This is exactly what Defendants did.[1]

Johnson stated facts in the Complaint that establish Defendants lacked probable cause in bringing the Direct Suit against him. Johnson need only show a minimum possibility of prevailing on the cause of action. Defendants produced no evidence to defeat Johnson's assertion that they lacked probable cause in bringing or maintaining the malicious claim. (Complaint ¶ 38.)

B. Claim 2: Breach of Fiduciary Duty – Defendants are the Proper Party and Johnson's Claim is Not Barred by Res Judicata

The Defendants, as majority shareholders in a close corporation, have a fiduciary duty to minority shareholders (Complaint ¶ 31) and are thus liable for any injuries they impose on the minority.

1. Johnson's Claim is Properly Asserted Against the Defendants

It doesn't matter whether Defendants committed tortuous acts and deprived Johnson rights in their capacity as majority shareholders, officers or directors. "Shareholders, officers, and directors of corporations have been held personally liable for intentional torts when they knew or had reason to know about but failed to put a stop to tortious conduct." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379-1381.) "A corporate officer or director is, in general, personally liable for all

[1] Johnson argued the board didn't approve the lawsuit before it was filed and that Defendants couldn't ratify it two years later because they were not disinterested. Storix argued that it was ratified by a majority of board members, but wouldn't say which ones. Summary judgment was denied because Johnson didn't specifically identify the directors who ratified the lawsuit in his motion.

torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." (*The Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996).) "[T]he true rule is, of course, that an agent is liable for his own acts, regardless of whether the principal is liable or amenable to judicial action." (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505, quoting *James v. Marinship Corp*. (1944) 25 Cal. 2d 721, 742–43.)

Defendants self-approved an exclusive shareholder agreement between Storix and themselves that ensured they would always retain the Storix board majority. (Complaint ¶ 16; *See also* ¶ 33.) Liability is imposed on shareholders who enter into a "shareholders' agreement, which relates to any phase of the affairs of a close corporation, including but not limited to management of its business, … ." (Cal. Corp. Code § 300(b).) "An agreement of the type referred to in subdivision (b) shall, … impose upon each shareholder who is a party thereto liability for managerial acts performed or omitted by such person pursuant thereto that is otherwise imposed by this division upon directors, … ." (Cal. Corp. Code § 300(d).)

"The alter ego doctrine does not immunize officers, directors or shareholders of a corporation from tortious conduct that they themselves commit in the course of acting for the corporation." (*Filet Menu, Inc. v. CCL&G., Inc. (2000)* 94 Cal.Rptr.2d 438, 477.) "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, … [w]hen his acts are wrongful in their nature." (Cal. Civ. Code § 2343.) "As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation." (*Mesler v. Bragg Management Co.* (1985) Cal.3d 290, 300, underline added.)

Defendants provide no authority to defeat Johnson's assertion that they are personally liable for wrongful acts they commit under the guise of Storix. Johnson alleged all elements of breach of fiduciary duty for each separate claim, and alleged facts sufficient to hold Defendants personally responsible for their conduct.

2. Res Judicata Does Not Bar Johnson's Fiduciary Duty Claim

Noting Johnson's allegations of breach of fiduciary duty, Defendants generally state that "These allegations were previously litigated in the Derivative Suit." (Motion at p. 8.) Although *res judicata* applies to a claim, not an allegation, Defendants nevertheless fail to reference any claims or allegations in any prior litigation. They broadly assert that because "'plaintiff failed to meet the burden of proof' on all causes of action in the Derivate Suit' including breach of fiduciary duty." (*Id*. at p. 9.) Johnson is not barred from bringing a *different claim* of breach of fiduciary duty against them. Defendants blur the distinction between different claims by lumping them together as "breach of fiduciary duty", which is not itself a cause of action, but only a label.

Defendants also misinterpret "harm suffered" as indistinctly applicable to *res judicata* and the cause of action it pertains to. Harm resulting from a breach of fiduciary duty is distinguishable from harm to a primary right. The case cited by Defendants states that *res judicata* acts as "a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.' [Citations.]" (*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 797 (*Boeken*) [italics in original].) Defendants argue that, because Johnson previously alleged "loss of money in defending a suit" he is precluded from bringing a claim for "being denied distributions from Storix profits, as all profits were spent in litigation." They argue that "the compensation Johnson seeks … is the very same harm previously litigated … ." (Motion at p. 9.) *Res judicata* only bars the cause of action if based on the same harm to Johnson's primary right, not similar harm to Johnson's bank account.

"The *primary right* was the right not to be wrongfully deprived of spousal companionship and affection, and the *corresponding duty* was the duty not to wrongfully deprive a person of spousal companionship and affection." (*Boeken* at 798, italics in original.) In that case, the plaintiff was barred from bringing a second claim for the same harm (violation of her right not to be deprived companionship) under different legal theories. If afforded Defendants' interpretation, *res judicata* would preclude the *Boeken* plaintiff from suing the same defendant for killing her next husband too (even by different means).

Defendants properly cite *Boeken* in saying, "Under this theory, '[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests.' Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term. . . .' (*McKee v. Dodd* (1908) 152 Cal. 637, 641.)" But Defendants argue that "the primary right asserted by Johnson is the right not to be wrongfully deprived of his rights as a minority shareholder." (Motion at p. 8.) Defendants misinterpret the primary rights theory as a catch-all that allows them, as majority shareholders, to group all their wrongs into a single cause of action, thereby protecting them from liability for *various* and *repeated* wrongs committed in violation of Johnson's rights.

Johnson's current and prior actions contain some of the same facts, but the "causes of action" (as they pertain to *res judicata*) are entirely different. Johnson has a primary right to be free from legal harassment, and not to be deprived indemnification he's entitled to, money owed to him, or property taken without consideration. The causes of action in the Complaint are unique in that, even where they involve injury to similar primary rights, they involve Defendants committing different wrongs. *Res judicata* doesn't bar future claims against Defendants based on different or continuing wrongful acts.

Defendants argue that a current claim related to "advancement of Defendants' defense costs" is identical to claims in Johnson's cross-complaint and the Derivative Suit. (Motion at p. 13.) There are no claims in Johnson's cross-complaint related to litigation expenses, and nothing in the Derivative Suit or any court order refers to legal actions or funds taken by Defendants to defeat the Derivative Suit itself. A court found only that the bylaws adopted by the Defendants mandated advancement of their fees against Johnson's cross-complaint. (MTS RJN, Ex. 7 at p. 117.) Also, no claim was ever asserted and no issue determined regarding Defendants "direct[ing] Attorney-Defendants to obstruct, interfere and otherwise defend against claims in the Derivative Suit brought on Storix's behalf." (Complaint. ¶ 46.)

C. Claim 3: The Conversion Claim is Not Barred by the Statute of Limitations

Defendants argue that Johnson is bound by the 3-year statute of limitations for his Conversion claim, recognizing but incorrectly applying the "delayed discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. (*Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1109.) Johnson alleged that he first discovered the conversion in December 2018, informed Defendants of the discovery, and received no response. (Complaint ¶ 30.)

Defendants argue that Johnson was afforded certain rights to inspect Storix's records, thus *could have discovered* the conversion earlier. (*Motion* at p. 10.) Whether Johnson could have discovered the conversion earlier is irrelevant. The statute of limitations is tolled at least until Johnson had reason to suspect the conversion had occurred. "He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on *inquiry*'." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398, original italics.) Johnson's inability to discover the conversion was amplified because, "While Johnson was on medical leave in 2011-2013, Defendants changed the company's accounting method,

amended tax filings, and thereafter directed Attorney-Defendants to prevent Johnson from accessing financial records which would have raised his suspicions and provided a reasonable opportunity for Johnson to discover this fact earlier." (Complaint ¶ 8.) In any case, even if the three-year statute of limitations began to accrue, as Defendants claim, when Judge Trapp allowed him limited access to Storix's records, the order was issued in September 2016, so the Complaint was still filed within the statute of limitations.

In addition, "Ordinarily the statute of limitations applying in conversion actions [] begins to run from the date of the conversion even though the injured person is ignorant of his rights. [Citations.] This rule, however, is not absolute; for example, where there has been a fraudulent concealment of the facts the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion. [Citations.]" (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 916-917.) As alleged throughout the Complaint, Defendants "[a]t all times since being issued their stock, … maintained sole possession and exclusive control of all accounts and records of Storix" (*Complaint* ¶ 32), "misrepresented and concealed the conversion of Johnson's retained earnings at a time when Johnson placed faith and trust in Defendants, and Defendants acted to prevent Johnson from discovering the conversion until late 2018". (*Id.* ¶ 51.)

Johnson alleged all elements of conversion, including delayed discovery. Defendants cannot escape liability for their *theft*, after which they imposed years of litigation on Johnson and Storix to try and conceal.

D. Claim 4: The Economic Interference Claim Does Not Fail as a Matter of Law

The Complaint properly alleges that "Defendants were not parties to the contract", "had personal interest in interfering with the contract", "acted with specific intent to interfere with Johnson's right to receive the benefits of the

contract", and "knew their actions would result in a breach of contract." (Complaint ¶ 55.) Facts supporting each element are also alleged. (*Id*. ¶¶ 11, 29.) The Complaint states all elements of economic interference, and Defendants provide no reference to judicially noticeable facts to the contrary. Defendants' motion to dismiss must therefore be denied. Johnson nevertheless responds to Defendants arguments.

1. Defendants Had Knowledge of the Oral Contract

Defendants allege they had no knowledge of the existence of the oral contract between Johnson and Storix in 2003. (Motion at p. 11.) Defendants also allege that Johnson made admissions in various pleadings that showing they had no knowledge of the contract but make no reference to any such pleadings.

Storix, under the direction of all Defendants, counter-sued Johnson for declaratory judgment of ownership of his copyrights on the basis that Johnson agreed to transfer copyright ownership to Storix via an oral assignment. They benefitted from their position that Johnson transferred all his rights via that agreement by assuming exclusive control of the SBAdmin software he created.

Defendants assert that "Defendants could not possibly know of the existence of an oral contract between Johnson and himself" and Johnson "never raised the issue of monies owed" in the copyright litigation. (Motion at p. 11.) Yet, Defendants obtained a judgment on Storix's behalf in the copyright litigation based on their assertion of an oral contract between Johnson and Storix. After applying *contract* interpretation principles to determine the meaning of the term "all assets" in Storix's 2003 Annual Report, this Court found, and the Ninth Circuit affirmed, that "[t]he Annual Report qualified as a 'note or memorandum' that was signed by Johnson and memorialized a transfer of assets." (Complaint ¶ 22.) There is sufficient evidence of a contract when "[t]here is a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker." (Cal. Civ. Code § 1624(3)(D).)

2. Defendants Are Strangers to the Oral Contract

Defendants argue in a single paragraph that they are "agents of Storix" and a "contracting party", then "neither a party nor the agent of a party". (Motion at p. 12.) Defendants then conclude they are "agents of Storix and therefore cannot be liable for interfering with what is essentially their own contract." (*Id*. at pp. 11-12.) The cases cited by Defendants also conflict with their argument that they're "not strangers" to the contract.

"[S]trangers [are] interlopers who have no legitimate interest in the scope or course of the contract's performance. [citations] As such, "a contracting party is incapable of interfering with the performance of his or her own contract[.] … [citations] Because the subcontracts at issue here provided for [defendant's] performance, neither [defendant] nor his agents can be liable for the tort of interfering with the subcontracts." (*Ibid*.) (*PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 65.) Defendants are strangers because they have no interest in "the scope" of the contract and the contract is not dependent on their "performance". The fact that Defendants are agents of Storix doesn't make it "their own contract" unless their performance, as agents, is necessary to the contract. Defendants interfered with Storix's performance, not their own. They are shareholders with a personal interest in *interfering* with the contract – not in its scope or performance.

3. Manager's Privilege Is No Defense to Economic Interference

In asserting manager's privilege, Defendants essentially argue that, as agents of Storix, they intentionally induced Storix to breach its contract for its own benefit. There's no *benefit* to Storix in breaching the contract in which it obtained the software product that generates its only revenue. Manager's privilege is nevertheless an invalid defense that cannot be asserted by Defendants given they obtain personal financial gain by interfering with the contract. "The manager's privilege does not exempt a manager from liability when he or she tortiously interferes with a contract or relationship between third parties. (*Klein v. Oakland Raiders, Ltd.* (1989) 211

Cal.App.3d 67, 80.)" (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 966–968.)

4. Johnson Had an Existing Relationship With Veeam

The Complaint states facts contrary to Defendants' position that "the 'business opportunity' with Veeam software was not an existing relationship of Johnson's" and "the threat of continued litigation is not itself an independent wrongful act by any legal measure sufficient to establish this tort." (Motion at p. 14.)

Storix was engaged for months in negotiations with Veeam. (Complaint ¶ 25.) If Johnson was not an integral part of Storix's relationship with Veeam, Defendants wouldn't have belatedly involved Johnson in the contract negotiations. The Complaint states that Defendants knew the relationship existed (Complaint ¶ 56) and that "Johnson attempted to salvage the perpetual license agreement Veeam originally wanted." (*Id.* ¶ 25.) Defendants further argue that because Veeam was "a competitor, any expectation of a relationship would not be current and existing but at some time in the future, which is insufficient to sustain Johnson's claim." (Motion at p. 14.) There is no authority to support that position, since a relationship clearly must be established before engaging in negotiations with a competitor.

Defendants next argue that "the threat of continued litigation is not itself an independent wrongful act[.]" (Motion at p. 14.) Defendants subordinate the facts actually stated in the Complaint. "[Defendants] would not approve the sale unless Johnson dismissed all personal and derivative claims against them and used his share of the sale to pay the outstanding debt they imposed on Storix for their defense. Defendants also refused to dismiss the Direct Suit against Johnson unless he signed the deal." (Complaint ¶ 25.) The Complaint properly alleges *wrongful* conduct in that Defendants "attempt[ed] to extort Johnson with the threat of continued litigation and deepening financial hardship." (*Id.* ¶ 56.) "It was therefore filed in an 'extortive context' and not in furtherance of a right of petition. As a

matter of law, it was illegal and not a protected activity." (*Cohen v. Brown* (2009) 173 Cal.App.4th 302, 314.)

"Defendants knew the interference was substantially certain to occur as a result of their actions and intended the interference to occur unless Johnson accepted their demands. As a result of Defendants' acts, the economic relationship was disrupted." (*Id*. ¶ 56.) The Complaint states facts sufficient to support all elements of interference with prospective economic advantage, including wrongful conduct and disruption of the relationship.

E. Johnson Properly Alleged Breach of Contract Against Defendants

Upon terminating his involvement in Storix, Johnson is owed substantial money under the contract. (Complaint ¶ 29.) Defendants spent Storix into insolvency litigating against Johnson to conceal Storix's financial records and shield themselves from liability, and used all Storix's profits to pay their personal legal expenses while disregarding Storix's own financial obligations. (Complaint □□ 30-35.) Under such circumstances, Storix's debts fall on the Defendants.

1. Johnson Does Not Need to Pierce the Corporate Veil, Nor Can Defendants Hide Behind It

Defendants' sole support for their argument that they cannot be held liable for the acts of Storix is that "a corporation is a legal entity distinct from its shareholders, directors, and officers." (Motion at p. 15.) Defendants cite a 7th Circuit case, *Wachovia Securities, LLC v. Loop Corp* (2013) 726 F.3d 899, 908, arguing that Johnson "should not be entitled to now disregard [Storix's] existence for his own benefit." (Motion at p. 15.) It appears Defendants are referring to the 7th Circuit's application of Illinois law, providing that a party "cannot assert the equitable doctrine of piercing the corporate veil to disregard the separate corporate existence of a corporation he himself created to gain an advantage which would be lost under his present contention." (*Ibid*.) But *Wachovia's* statement was used to apply other

Illinois law, wherein, "Defendants have uniformly been denied the opportunity to pierce their own corporate veil in order to avoid liability." Johnson is not attempting to pierce the corporate veil to avoid liability – Defendants are trying to *shield* themselves in the corporate veil to avoid liability.

"A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." (*The Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996).) Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. (See *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc*. (1970) 1 Cal.3d 586, 595.) "Directors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable." (*Frances T. v. Village Green Owners Ass'n.* (1986) 42 Cal.3d 490, 504.) "This liability does not depend on the same grounds as 'piercing the corporate veil,' on account of inadequate capitalization for instance, but rather on the officer or director's personal participation or specific authorization of the tortious act." (*Ibid*.)

Defendants cannot hide behind the corporate veil. "Whether the corporate veil should be pierced depends upon the innumerable individual equities of each case." (*United States v. Standard Beauty Supply Stores, Inc*. (1977) 561 F.2d 774, 777.) "[C]ourts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form." (*Bangor Punta Operations v. Bangor & Aroostook R.R* (1974) 417 U.S. 703, 713.) Liability in may be imposed on those equitable owners of a corporation who "provide inadequate capitalization and actively participate in the conduct of corporate affairs." (*Minton v. Cavaney* (1961) 56 Cal. 2d 576, 580.)

As argued in Section IV:B(1), Defendants are similarly liable as majority shareholders of a *close corporation*. Johnson entered into a contract with Storix and,

Defendants are jointly liable for Storix's breach because they personally participated in the breach after rendering Storix insolvent and unable to perform its contractual obligations. (Complaint ¶ 61.)

2. Res Judicata Does Not Bar the Breach of Contract Claim

Defendants argue Johnson's contract claim is barred by *res judicata* because he should have sued Storix for breach of contract as part of the prior copyright litigation. They base the argument on the event triggering Storix's obligation to perform under the contract – the end of Johnson's involvement in the company. The argument fails for two obvious reasons.

First, Defendants misunderstand Johnson's *involvement* in Storix when arguing it was terminated when they forced Johnson out of the company in 2014. They ignore that "Johnson used his shares to elect himself to the board in order to continue his involvement in the company and to avoid triggering Storix's obligation to pay for the copyright he then knew Storix could no longer afford." (Complaint ¶ 15.) "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.) Johnson remained on the board until he chose not to re-elect himself in August 2018. "This finally terminated Johnson's involvement in Storix and triggered Storix's obligation to pay Johnson for his copyrights." (*Id*. ¶ 29.)

Second, *res judicata* bars a future claim that could have been raised in prior litigation. Had Johnson chosen to demand compensation for the copyrights in 2014 (and Storix refused), Johnson still couldn't include a breach of contract claim in a copyright infringement action. As set forth in the next sections, no breach of contract claim had accrued until 2018, and contracts are nevertheless only enforceable under state law.

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3. The Statute of Limitations Does Not Bar the Breach of Contract Claim

Defendants argue Johnson's claim was barred by the 2-year statute of limitations for oral contracts on the belief that the claim accrued in 2014. This is not true. Even if Storix's *obligation* under the contract had been triggered in 2014, Storix didn't *breach* the contract until Storix refused to compensate him for the copyrights in 2018. (Complaint ¶ 29.)

"A contract cause of action does not accrue until the contract has been breached." (*Spear v. Cal. State Automobile Ass'n* (1992) 2 Cal.4th 1035, 1042.) The statute of limitations only commences to run 'after the cause of action shall have accrued' (Code Civ. Proc. § 312) and the 'cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time." (*Maddox v. Rainoldi* (1958) 163 Cal.App.2d 384, 392.) "[T]he period cannot run before plaintiff possesses a true cause of action, by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy[.]" (*Hydro-Mill v. Hayward, Tilton and Rolapp*, (2004) 10 Cal.Rptr.3d 582, 594, citations omitted.)

4. The Copyright Act Does Not Preempt Johnson's Claim for Breach of Contract

Defendants argue that "Johnson's breach of contract claim arises from matters involving copyrightable subject matter, and Johnson isseeking [sic] to enforce rights subject to the Copyright Act by way of his state law claim." (Motion at p. 17.) Johnson's contract claim is not seeking to enforce any rights under the Act, nor does it ask the Court to determine any copyright issues under federal law. "State laws granting or protecting other rights (such as breach of contract, conversion, defamation, etc.) have not been preempted. [Citations.]" (*In re Marriage of Worth* (1987) 195 Cal.App.3d 768, 778.) The states are expressly allowed to regulate "activities violating legal or equitable rights that are not equivalent to any of the

exclusive rights within the general scope of copyright ...." (17 U.S.C. § 301(b)(3).) Defendants provide no authority or explanation for why this contract claim would be preempted by federal copyright law.

F. Claim 6: Johnson's Claim for Rescission Fails Does Not Fail

1. Johnson Does Not Need to Pierce the Corporate Veil as to Defendants for Rescission

For the same reasons set forth in Section E(1), Defendants cannot hide behind the corporate veil, nor does Johnson need to pierce it.

2. Res Judicata Does Not Bar Rescission

Johnson doesn't dispute that "this Court conclusively established Storix as the owner of SBAdmin." (Motion at p. 18.) The Complaint doesn't involve a copyright claim, nor does it raise any issues previously decided. Johnson's rescission claim has not been before any court.

A party to a contract may rescind if "the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause." (Cal. Civ. Proc. § 1689(b)(4).) Johnson's rescission claim is simply an alternative to his breach of contract claim. As such, Johnson demands "consideration of the fair value of Johnson's copyrights or, in the alternative, a declaratory judgment of rescission of Johnson's contract with Storix and return of Johnson's copyrights." (Complaint ¶ 75.) Johnson is not "improperly asking this Court for a new trial or relief from judgment", but is properly alleging a claim for rescission based on lack of consideration. *Res judicata* is inapplicable to this case because Johnson's breach of contract and rescission claims have never been heard in any court, not does Johnson ask this Court to re-decide any previously decided issues.

G. Johnson's Claim for Indemnification Suffers No Defects

1. Johnson Does Not Need to Pierce the Corporate Veil as to Defendants for Indemnification

For the same reasons set forth in Section E(1), Defendants cannot hide behind the corporate veil, nor does Johnson need to pierce it.

2. Res Judicata Does Not Bar Indemnification

Defendants assert that *res judicata* applies to Johnson's indemnification claim. It's unclear how, since the issue has never decided in any court. Nonetheless, Defendants argument that "Johnson was not the successful party in the Direct Suit" has no bearing on his right to indemnification for the "successful defense of any issues, claims or matters in the Direct Suit." (Motion at p. 19.) Cal. Corp Code § 317(d) and Storix's bylaws mandate Johnson's indemnification.

Defendants hypocritically argue without authority that Johnson is not entitled to any indemnification under Cal. Corp. Code § 317. They argue that they sued Johnson "as a director" for an act "outside of his role as a director" when he "sought to stand up a competing business for his personal gain." (Motion at p. 19.) Johnson sued Defendants for acts they committed outside their duties of officers or directors, yet Defendants personally approved Storix indemnifying and advancing *their* legal defense for all actions. Defendants effectively argue that they, as majority directors, are entitled to use Storix to bring any claim against Johnson, a minority director, as long as they allege he was acting against Storix. And they assert that Johnson isn't entitled to no recovery even after finally disproving their false claim.

A jury found that Johnson didn't commit the alleged wrongful act, so how could he have done so outside his role of a director? Defendants provide no authority to support their absurd legal conclusion that effectively deprives Johnson both his statutory right to indemnification and due process in obtaining restitution for *their* wrongful acts. Nonetheless, their argument has no merit. Defendants used Storix to sue Johnson "as a director" and their claim could not have been brought

had Johnson not been a director. Indemnification must be provided by the corporation when a director successfully defends a claim brought "by reason of the fact that the person is or was an agent of the corporation." (Cal. Corp. Code § 319(c) and (d).)

No court has ever ruled on Johnson's statutory right to indemnification or that Defendants are entitled to deny Johnson that right. Johnson properly alleged all elements of an indemnification cause of action. (Complaint ¶¶ 69-71.)

IV. CONCLUSION

Defendants' defense of *res judicata* is inapplicable since they identified no claims or relevant underlying issues that were raised or decided in any prior action. Also, all Johnson's claims are brought within the applicable statute of limitations.

Defendants have not identified any of Johnson's causes of action that are insufficiently pled. This Court must therefore deny Defendants' motion to dismiss as to all causes of action. However, if this Court finds Johnson's Complaint inadequate, he should be freely granted leave to amend.

DATED: September 12, 2019

Respectfully submitted,

By: _____

ANTHONY JOHNSON, In Pro Per

CERTIFICATE OF SERVICE

I, the undersigned certify and declare as follows:

I am over the age of eighteen years and self-represented in this action. My address is 1728 Griffith Ave., Las Vegas, Nevada, which is located in the county where the service described below took place.

On September 12, 2019, from my address in Las Vegas, Nevada, I served a copy of the following document(s):

1. **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES ISO OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS ALTAMIRANO, TURNER, KINNEY AND HUFFMAN**

by depositing the document(s) in a sealed envelope with the U.S. Postal Service. The undersigned hereby certifies that he caused a copy of the foregoing document(s) to be delivered to the Clerk of the U.S District Court, Southern District of California, by thereby mail.

The undersigned also certifies that the following recipients have consented to service by email and have been delivered a copy of the document(s) by sending to the email addresses listed below:

Marty B. Ready Michael P. McCloskey WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP 401 West A Street, Suite 1900 San Diego, CA 92101 Email: marty.ready@wilsonelser.com Email: michael.mccloskey@wilsonelser.com Tel: (619) 881-6431 (Attorney for Defendants Altamirano, Turner, Kinney & Huffman)	Paul A. Tyrell Sean Sullivan PROCOPIO, CORY, HARGREAVES & SAVITCH LLP 525 B Street, Suite 2200 San Diego, CA 92101 Email: paul.tyrell@procopio.com Email: sean.sullivan@procopio.com Tel: (619) 619.238.1900 (Defendants, Attorneys for corporate defendant, Storix, Inc.)

I certify and declare under penalty of perjury under the laws of the United States of American and the State of California that the foregoing is true and correct.

Executed on September 12, 2019 in Las Vegas, Nevada.

By: _____
Matthew Johnson