Case No. 21-55614

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY JOHNSON

Plaintiff-Appellant,

v.

MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, DAVID HUFFMAN, PAUL TYRELL, SEAN SULLIVAN, and STORIX, INC.

Defendants -Appellees

On Appeal from the United States District Court for the District of Southern California
Honorable Marilyn L. Huff, United States District Judge
(Case No. 3:19-cv-01185-H-BLM)

DEFENDANTS-APPELLEES' MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, AND DAVID HUFFMAN ANSWERING BRIEF

Michael P. McCloskey (SBN 106051)
Marty B. Ready (SBN 239135)
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
401 West A Street, Suite 1900
San Diego, California 92101
Telephone: (619) 321-6200

Attorneys for Defendants-Appellees
Manuel Altamirano, Richard Turner,
David Kinney, and David Huffman

TABLE OF CONTENTS

Page

I. STATEMENT OF JURISDICTION 1

II. STATEMENT OF THE CASE 2

A. Introduction 2

B. Procedural History 3

1. The Copyright Action 4

2. The State Actions 5

3. The Present Action 8

III. SUMMARY OF ARGUMENT 10

IV. ARGUMENT 12

A. The Judgment In The Underlying Action Is Determinative As To Whether The Element Of Favorable Termination Has Been Met To State A Claim For Malicious Prosecution 12

1. Claims cannot be severed to establish favorable termination 13

B. Johnson Failed To State A Claim For Breach Of Fiduciary Duty 15

1. The Individual Defendants cannot be liable for breach of fiduciary duty for failing to indemnify Johnson 16

2. Res Judicata Bars Johnson's Breach of Fiduciary Duty Claim 18

C. Johnson Failed To State A Claim For Conversion 21

1. Res judicata bars Johnson's conversion claim 22

a. Application of California's primary rights theory affirms Johnson's conversion claim was the same claim litigated in the Consolidated Action 22

2. Issue preclusion bars litigation of Johnson's alleged lack of access to Storix's financial records 25

D. Johnson Failed To State A Claim For Economic Interference 26

1. The Individual Defendants were privileged to interfere in the alleged contract 26

2. The Individual Defendants, as agents of Storix, cannot, as a matter of law, interfere with the alleged contract 28

3. Johnson's claim for intentional interference with prospective economic advantage fails as there was no preexisting relationship 29

4. Johnson's claim for intentional interference with prospective economic advantage fails as there was no independent legal wrong 31

E. Johnson Failed To State A Claim For Breach of Contract, Rescission, and Indemnification 32

1. Johnson concedes the Individual Defendants were not parties to the alleged oral contract 32

2. Res Judicata Bars Johnson's claims for Breach of Contract and Rescission.....33

3. The Copyright Act Preempts Johnsons' Claim for Breach of Contract.....34

4. The Individual Defendants do not indemnify Johnson.....35

1. Res Judicata Bars Indemnification 35

V. CONCLUSION.....37

CERTIFICATE OF COMPLIANCE.....39

STATEMENT OF RELATED CASES 38

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Gonzales v. Cal. Dept. of Corr.,
739 F.3d 1226 (9th Cir. 2014) 31

Himel v. Continental Ill. Nat. Bank & Trust,
596 F.2d 205 (1979).....41

Kodadek v. MTV Networks, Inc.,
152 F.3d 1209 (9th Cir. 1998) 42

Nordhorn v. Ladish Co., Inc.,
9 F.3d 1402 (9th Cir. 1993) 25

Palomar Mobilehome Park Ass'n v. City of San Marcos,
989 F.2d 362 (9th Cir. 1993) 27

State Cases

Aalgaard v. Merchants Nat'l Bank, Inc.,
224 CA3d 674 (1990) 34

Aerojet–General Corp. v. American Excess Ins. Co.,
97 Cal.App.4th 387 (2002) 41

Allied Fire Protection v. Diede Construction, Inc.,
127 Cal.App.4th 150 (2005) 28

Boeken v. Philip Morris USA, Inc.,
48 Cal.4th 788 (2010) 25, 29

Brinton v. Bankers Pension Servs.,
76 Cal.App.4th 550 (1999) 27

Crowley v. Katleman,
8 Cal.4th 666 (1994) 19, 20, 21

DKN Holdings, LLC v. Faerber,
61 Cal. 4th 813 (2015) 28

Korea Supply Co. v. Lockheed Martin Corp.
29 Cal.4th 1134 ..... 36, 38

Lane v. Bell,
20 Cal.App.5th 61 (2018) 19, 20, 21

McKee v. Dodd,
152 Cal. 637 (1908) 25

Moss v. Kroner,
197 Cal.App.4th 860 (2011) 39

Pacific Gas & Electic Co. v. Bear Stearns & Co.,
50 Cal.3d 1118 (1990) 38

PM Group, Inc. v. Stewart,
154 Cal.App.4th 55 (2007) 35

Redfearn v. Trader Joe's Co.,
20 Cal.App.5th 989 (2018) 35

Reeves v. Hanlon,
33 Cal.4th 1140 (2004) 36

Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.,
2 Cal. 5th 505 (2017) 37

San Jose Const., Inc. v. S.B.C.C., Inc.,
155 Cal.App.4th 1528 (2007) 36

Shoemaker v. Myers,
52 Cal.3d 1 (1990) 34

Slater v. Blackwood,
15 Cal.3d 791 (1975) 25, 29

Staffpro, Inc. v. Elite Show Services, Inc.,
136 Cal.App.4th 1392 (2006) 20

Weikel v. TCW Realty Fund II Holding Co.,
55 Cal.App.4th 1234 (1997) 28

Wilshire-Doheny Assocs. Ltd. v. Shapiro,
83 Cal.App.4th 1380 (2000) 43

Yosemite Portland Cement Corp. v. State Board of Equalization,
59 Cal.App.2d 39 (1943) 39

Youst v. Longo,
43 Cal.3d 64 (1987) 36

Federal Statutes

17 U.S.C. § 301(a) 41

28 U.S.C. § 1332 7

42 U.S.C. § 1983 15

42 U.S.C. § 1986 15

The Copyright Act of 1976 41

State Statutes

Cal. Civ. Proc. Code § 1030 .....7, 13, 14

Cal. Corp. Code § 207 23

Cal. Corp. Code § 317 .....23, 43, 44

Cal. Corp. Code § 317(b) 23

Rules

Fed. R. App. P. 32(a)(5) 45

Fed. R. App. P. 32(a)(6) 45

Fed. R. App. P. 32(a)(7)(B) 45

Fed. R. App. P. 32(a)(7)(B)(iii) 45

Rule 28-2.6 46

I. STATEMENT OF JURISDICTION

Plaintiff-Appellant Anthony Johnson ("Johnson") filed this action on June 24, 2019 in the U.S. District Court for the Southern District of California. The named defendants were Manuel Altamirano, Richard Turner, David Kinney, David Huffman, Paul Tyrell, Sean Sullivan, and Storix, Inc. Federal jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. Johnson was and is a resident of the State of Nevada and all defendants were and are residents of the State of California.

On December 2, 2019, the District Court granted in part and denied in part Defendants Manuel Altamirano, Richard Turner, David Kinney, and David Huffman's ("Individual Defendants") motion to dismiss; granted Defendants Storix, Inc., Paul Tyrell, and Sean Sullivan's motion to dismiss with prejudice; granted in part and denied in part Individual Defendants' anti-SLAPP motion to strike; granted Defendants Storix, Inc. ("Storix"), Paul Tyrell, and Sean Sullivan's anti-SLAPP motion to strike; and denied Individual Defendants' motion for an undertaking under Cal. Civ. Proc. Code § 1030.

On April 26, 2021, the District Court requested further briefing on the effect, if any, of the California Court of Appeal's December 31, 2020 opinion and April 22, 2021 remittitur on the Court's stay of the proceeding and the Court's December 2, 2019 order. On June 8, 2021, the District Court dismissed the remaining causes of

action with prejudice and ordered entry of judgment against Plaintiff and in favor of Defendants. Notice of appeal was timely filed June 10, 2021.

II. STATEMENT OF THE CASE

A. Introduction

At the outset, it is important to understand what this case is really about. It is a story of escalating bitterness and resentment resulting in 7 years of litigation by Johnson in an effort to exact retribution against the Individual Defendants, Storix, the lawyers representing them, and the judges involved in Johnson's litigation all based on an imagined injustice. Johnson's hostility towards these parties impairs his ability to view his current claims for what they are – a repackaging of claims previously decided adversely against him. Johnson's inability to accept this reality is the driving force behind all of his litigation. To Johnson, this is just a game that he intends to play indefinitely because he is having too "much fun." (Individual Defendants' Supplemental Excerpts of Record ("Ind.Def.SER")-71.)

Johnson's game, however, has a palpable cost that is often overlooked by litigants until they have lived through protracted litigation. Johnson is banking on this actuality to exact the retribution he hopes is inflicted on those he chooses to sue. And Johnson is not one to hide this fact as his court filings are replete with examples of his true motives. (*See e.g.* Ind.Def.SER-71.) Although the ultimate bearer of

Johnson's wrath are the litigants in this matter, there is also a burden and cost to the judicial system. At some point, enough has to be enough.

Johnson has had more than one day in court to address the perceived injustices he believes have been inflicted upon him. In fact, Johnson has litigated three matters to final judgment, all terminating adverse to Johnson. In most instances, final resolution would mean just that, final. But in the case of Johnson, he refuses to accept the finality of the proceedings, and instead, creates "new" claims based on the same factual scenario giving rise to previous litigation tried to judgment. It is Johnson's "new" claims that confront this Court on appeal. As in previous state and federal court proceedings, the District Court saw Johnson's claims for what they were and dismissed every claim with prejudice. This Court should affirm the judgment and put an end to this round of Johnson's game.

B. Procedural History

The case giving rise to the current appeal, evolved from a series of extensive litigation between Johnson and Storix that spans over 7 years, and continues, in state and federal courts. The relevance to this appeal of this extensive litigation history is the confirmation of the applicability of the doctrine of *res judicata* to most of Johnson's claims, and as to the remainder, the failure of Johnson's claims as a matter of law because of the adverse judgments against Johnson. The following summarizes the relevant procedural background.

1. The Copyright Action

On August 8, 2014, Johnson filed a complaint against Storix in federal court alleging federal copyright infringement, contributory copyright infringement, and vicarious copyright infringement ("Copyright Action"). (3-ER-444.) On September 19, 2014, Storix counterclaimed for declaratory judgment of non-infringement and that it was/is the owner of the copyrights Johnson alleged were infringed. (3-ER-454.) On December 8, 2015, the Copyright Action was tried to a jury and a unanimous verdict returned in favor of Storix finding Johnson had transferred ownership in all copyrights in writing to Storix. (3-ER-473.)

Johnson appealed the judgment in the Copyright Action to the United States Court of Appeals for the Ninth Circuit, which on December 19, 2017, affirmed the jury's finding of liability but remanded for further proceedings to reconsider the amount of attorneys' fees awarded Storix. (1-ER-5.) On August 7, 2018, the District Court entered a second amended judgment. (3-ER-525.) On February 5, 2020, the Ninth Circuit affirmed the second amended judgment. (1-ER-5.) On May 18, 2020, the District Court held an appeal mandate hearing and spread the Ninth Circuit's mandate. (*Ibid*.) Certiorari was denied by the Supreme Court on June 29, 2020. (*Ibid*.)

/ / /

/ / /

2. The State Actions

While the Copyright Action was pending, Storix learned Johnson, as a Storix director, formed a new entity, Janstor Technology, and intended to pursue a competitive business using a rebranded version of Storix's own software. (3-ER-550.) As a result, on August 20, 2015, Storix filed a state court complaint against Johnson and his newly formed company Janstor Technology alleging breach of fiduciary duty as to Johnson and aiding and abetting breach of fiduciary duty as to Janstor Technology ("Direct Suit"). (3-ER-529.)

In response, on October 13, 2015, Johnson and another Storix shareholder, Robin Sassi (the former spouse of Storix CEO and Defendant David Huffman) filed a derivative complaint against David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich alleging breach of fiduciary duty, abuse of control, corporate waste, and an accounting ("Derivative Suit"). (3-ER-620.)

On March 14, 2016, Storix filed a first amended complaint in the Direct Suit against Johnson and Janstor technology alleging the same causes of action from the original complaint. (3-ER-536.) On April 13, 2016, Johnson filed a cross-complaint against David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich alleging breach of fiduciary duty, civil conspiracy, and fraud. (3-ER-559.) On June 2, 2016 Johnson and Sassi amended the derivative

complaint alleging the same causes of action asserted in the original derivative complaint. (4-ER-639.) On September 6, 2016, Storix filed a second amended complaint against Johnson and Janstor in the Direct Suit alleging the same two causes of action as asserted in the first amended complaint. (3-ER-546.)

The Direct Suit, Johnson's cross-complaint, and the Derivative Suit were subsequently consolidated with another action filed on September 6, 2016 by Johnson, proceeding *pro se*, against David Huffman, Richard Turner, Manuel Altamirano, David Smiljkovich, Paul Tyrell, Esq. and Matthew Short, Esq., alleging assault, battery, false imprisonment, intentional infliction of emotional distress, and aiding and abetting the intentional torts (collectively these actions referred to herein as the "Consolidated Action").[1] (4-ER-884.)

The Direct Suit went to trial in January-February 2018 in San Diego Superior Court before the Honorable Kevin Enright resulting in a jury verdict in favor of Storix on its sole cause of action against Johnson for breach of fiduciary duty and against Johnson on all of his cross-claims. (3-ER-596.) The jury awarded Storix $3,739.14 on its breach of fiduciary duty claim against Johnson. (3-ER-597.)

The Derivative Suit proceeded to a bench trial on April 30, 2018 before Judge Enright resulting in a judgment in favor of defendants and against the

[1] The intentional tort action filed by Johnson, proceeding *pro se*, settled during trial of the consolidated matter.

remaining derivative plaintiff, Robin Sassi, on all four causes of action, including breach of fiduciary duty and accounting. (3-ER-600–601.) Johnson appealed the September 12, 2018 judgment in the Consolidated Action to the California Court of Appeal. (Ind.Def.SER-113, 119.)

Displeased with the adverse judgments in the Consolidated Action and the Copyright Action, Johnson, proceeding *pro se*, filed another complaint on January 14, 2019 against David Huffman, Richard Turner, Manuel Altamirano, and David Kinney in the San Diego Superior Court, the Honorable Katherine Bacal, presiding, alleging malicious prosecution, breach of fiduciary duty, conversion, economic interference, fraud/constructive fraud, and civil conspiracy. (5-ER-924.) Johnson dismissed this complaint without prejudice before defendants' anti-SLAPP, demurrer, and Cal. Civ. Proc. Code § 1030 motions could be heard. (Ind.Def.SER-46.) Judge Bacal awarded defendants' attorney's fees on their anti-SLAPP motion and costs. (Ind.Def.SER-47.) On December 18, 2019, Johnson appealed the order awarding defendants their attorney's fees and costs. (Ind.Def.SER-8.) This appeal was consolidated with the appeal of the Consolidated Action. (*Ibid*.)

On December 31, 2020, the California Court of Appeal issued its opinion in the consolidated appeals. (Ind.Def.SER-6.) The opinion affirmed all judgments and orders of the courts below. (Ind.Def.SER-52.) After Johnson's

petitions for review were exhausted, the California Court of Appeal issued its remittitur on April 22, 2021. (1-ER-3.)

3. The Present Action

The proceeding giving rise to this appeal was filed by Johnson, proceeding *pro se*, against Manuel Altamirano, Richard Turner, David Kinney, and David Huffman, Paul Tyrell, Sean Sullivan, and Storix alleging malicious prosecution, breach of fiduciary duty, conversion, economic interference, breach of contract, rescission, and indemnification. (5-ER-1074.) On December 2, 2019, the District Court granted in part and denied in part Defendants Manuel Altamirano, Richard Turner, David Kinney, and David Huffman's motion to dismiss; granted Defendants Storix, Inc., Paul Tyrell, and Sean Sullivan's motion to dismiss with prejudice; granted in part and denied in part Defendants Manuel Altamirano, Richard Turner, David Kinney, and David Huffman's anti-SLAPP motion to strike; granted Defendants Storix, Inc., Paul Tyrell, and Sean Sullivan's anti-SLAPP motion to strike; and denied Defendants Manuel Altamirano, Richard Turner, David Kinney, and David Huffman's motion for an undertaking under Cal. Civ. Proc. Code § 1030. (1-ER-29.)

The only claims remaining after the Individual Defendants' partially successful motion to dismiss were Johnson's claims against the Individual Defendants for breach of fiduciary duty and conversion. (1-ER-68.) On January 30,

2020, Manuel Altamirano, Richard Turner, David Kinney, and David Huffman's motion for a stay pending the appeal of the Consolidated Action was granted to preserve judicial resources and see to the orderly course of justice because there was no final judgment for purposes of their *res judicata* defense as to the remaining claims. (2-ER-148.)

While the present action was stayed, Johnson, on July 16, 2020, filed a new complaint in federal court against David Kinney, Richard Turner, Manuel Altamirano, David Huffman, David Smiljkovich, Paul Tyrell, Sean Sullivan, Storix, Inc., Judge Marilyn Huff, Judge Randa Trapp, Judge Kevin Enright, and Judge Katherine Bacal alleging violation of civil rights pursuant to 42 U.S.C. § 1983, conspiracy to interfere with civil rights under 42 U.S.C. § 1983, neglect to prevent conspiracy to interfere pursuant to 42 U.S.C. § 1986, failure to compensate for goods provided, and money had and received. (Ind.Def.SER-73.) Johnson amended this complaint on July 21, 2020 to add as defendants attorneys Marty B. Ready, David J. Aveni, and Michael P. McCloskey. (Ind.Def.SER-93.) All claims against defendants in this matter have been dismissed with prejudice except for the common count of money had and received as to Storix.[2] (1-ER-10.)

[2] The money had and received common count alleges Storix failed to pay Johnson $475,560 of its profits or retained earnings that allegedly were earned by Johnson in 2011 but converted by management to their personal equity accounts. (Ind.Def.SER-60.)

After the April 22, 2021 remittitur in the Consolidated Action, the court requested further briefing on the effect of the finality of the Consolidated Action on its December 2, 2019 order. (2-ER-126.) After briefing, on June 8, 2021, the Court dismissed the remaining claims for breach of fiduciary duty and conversion with prejudice. (1-ER-2.) This appeal followed.

III. SUMMARY OF ARGUMENT

Johnson has asserted seven (7) claims against the Individual Defendants of which each fails as a matter of law. The first three claims Johnson asserts against the Individual Defendants - malicious prosecution, breach of fiduciary duty, and conversion - all arise from the favorable judgment the Individual Defendants obtained in the Consolidated Action. Because the Individual Defendants, and not Johnson, were successful in the Consolidated Action, Johnson cannot validly state a claim for malicious prosecution. There is simply no conceivable and cogent argument Johnson can assert to overcome the fact the judgment did not terminate in his favor. And although Johnson is displeased with the result of the judgment in the Consolidated Action, he cannot avoid the doctrine of *res judicata* by creative pleading in an obvious effort to dance around the fact he is simply seeking redress, in this matter, for harms previously litigated in the Consolidated Action.

/ / /

/ / /

Johnson's remaining four causes of action – economic interference, breach of contract, rescission, and indemnification - also suffer from fatal defects warranting the District Court's dismissal of those claims with prejudice. Johnson's interference with contractual relations, breach of contract, and rescission claims arise from an alleged oral contract between Johnson and Storix in 2003 related to the copyrighted software at issue in the Copyright Action. Johnson now, in 2019, asserts he is entitled to $2.75 million for the transfer of the copyright. The Copyright Action, however, resulted in a judgment that Storix, not Johnson, owns the copyright and any claim Johnson may have had is precluded by the judgment in the Copyright Action. As to the Individual Defendants, Johnson readily admits they were not parties to the alleged oral contract, and for that additional reason, Johnson's claims fail as a matter of law.

In addition to interference with contractual relations, Johnson alleges intentional interference with prospective economic advantage related to an interest from a third party in acquiring Storix. The relationship was with the company, Storix, not Johnson, and was not a preexisting relationship as the third party was a competitor of Storix. The lack of a preexisting relationship that had more than a speculative economic advantage to Johnson simply cannot state a claim for an interference with prospective economic advantage.

The final claim Johnson asserts against the Individual Defendants is a claim for indemnification. Fatal to this claims are two glaring issues: 1) Johnson was not successful in the Consolidated Action where the jury determined he breached his fiduciary duty of loyalty to Storix; and 2) the company indemnifies a director not the other directors, officers, or shareholders.

The District Court's order dismissing Johnson's claims against the Individual Defendants, was correct and should be affirmed on appeal.

IV. ARGUMENT

A. The Judgment In The Underlying Action Is Determinative As To Whether The Element Of Favorable Termination Has Been Met To State A Claim For Malicious Prosecution

Johnson asserted a malicious prosecution claim against the Individual Defendants for "initiat[ing] and continu[ing] the Direct Suit against Johnson without probable cause." (5-ER-1083.) But to maintain a cause of action for malicious prosecution, the Direct Suit must have terminated in Johnson's favor. It did not.

After trial in the Direct Suit on Storix's breach of fiduciary duty claim against Johnson, the court entered final judgment "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor Technology on Storix Inc.'s claim for aiding and abetting a breach of fiduciary duty." (3-ER-602.) The judgment in favor of Storix and against Johnson

conclusively establishes the Direct Suit, which Johnson alleges supports his malicious prosecution claim, did not terminate in Johnson's favor. Because the court looks to the entire judgment in the prior action to determine who was the successful party, there can be no doubt the Direct Suit did not terminate in Johnson's favor. *See Crowley v. Katleman*, 8 Cal.4th 666, 685 (1994). As the California Supreme Court noted in *Crowley*, "[t]o hold otherwise would defeat the purpose of the rule which seeks to prevent collateral attack upon the judgments of duly constituted courts." *Ibid*.

Storix asserted one cause of action against Johnson and one cause of action against Janstor Technology. (3-ER-546.) At the conclusion of trial, the entire Direct Suit terminated in Storix's favor. (3-ER-602.) The District Court correctly ruled that Johnson's malicious prosecution claim fails as a matter of law because he could not "plausibly allege a favorable termination of the entire underlying" Direct Suit. (1-ER-38.)

1. Claims cannot be severed to establish favorable termination

Johnson attempts to skirt the holding in *Crowley* and *Lane v. Bell*, 20 Cal.App.5th 61 (2018) that "there must first be a favorable termination of the *entire* action" to maintain a malicious prosecution claim by creating a new rule. *Crowley*, 8 Cal.4th at 686; *Lane v. Bell*, 20 Cal.App.5th 61, 72 (2018). According to Johnson, if a malicious prosecution plaintiff has more than one damages theory for a cause of

action, then a jury's acceptance of one damages theory creates a severable claim as to the other damages theory for the purposes of establishing favorable termination. In other words, and as relevant here, Johnson asserts the jury's rejection of Storix's $1.2 million "unfair head start" claim and $3,739.14 award to Storix for lost employee productivity are two distinct and severable claims. (Appellant's Opening Brief ("AOB") at 18.) This assertion is directly contrary to the judgment in the Direct Suit in favor of Storix and against Johnson as well as the holdings in *Crowley* and *Lane*. (3-ER-602.)

There was but one cause of action in the Direct Suit asserted against Johnson – breach of fiduciary duty. Any assertion to the contrary is contradicted by the underlying judgment. Johnson's attempt to create a new severability rule as to the favorable judgment element of malicious prosecution has been flatly rejected by the courts. *See Staffpro, Inc. v. Elite Show Services, Inc.*, 136 Cal.App.4th 1392, 1405 (2006) ("severability analysis is improper in determining whether a malicious prosecution plaintiff has demonstrated favorable termination of an underlying lawsuit.") Johnson's proposed severability rule cannot coexist with the rule in *Crowley* requiring judgment to terminate in the malicious prosecution plaintiff's favor, which "tends to show the innocence of the defendant in the prior action." *Crowley*, 8 Cal.4th at 686. The jury in the Direct Suit found Johnson breached his fiduciary duty to Storix and this judgment confirms the District Court's analysis of

Crowley and *Lane* was correct. The District Court correctly dismissed with prejudice Johnson's claim for malicious prosecution.[3]

B. Johnson Failed To State A Claim For Breach Of Fiduciary Duty

Johnson had his day in court litigating his alleged breach of fiduciary duty against the Individual Defendants in the Consolidated Action. Now that the Consolidated Action is final, the doctrine of *res judicata* bars Johnson's identical breach of fiduciary duty claim in the present action.

In the Consolidated Action, Johnson litigated a breach of fiduciary claim in the Direct Suit and in the Derivative Suit against the Individual Defendants. In each case, judgment was entered in favor of the Individual Defendants. (3-ER-602.) Judgment is now final in the Consolidated Action after the California Court of Appeal issued its opinion and remittitur. (1-ER-10.) In light of the Court of Appeal's remittitur, the District Court reconsidered its December 2, 2019 order and properly dismissed Johnson's breach of fiduciary duty claim with prejudice as barred by the doctrine of *res judicata*. (1-ER-28.)

In the present action, Johnson's breach of fiduciary duty claim is based on two categories of alleged breaches: 1) the denial of benefits of Storix to Johnson

[3] The California Court of Appeal arrived at the same conclusion in the consolidated appeal. (Ind.Def.SER-49.)

including indemnification for the unsuccessful defense of the Direct Suit; and 2) advancement of defense costs to Defendants in defending Johnson's lawsuits. (5-ER-1085.) Johnson's breach of fiduciary duty claim fails as a matter of law for the following reasons: 1) as to the first category of alleged breaches, the company, not the Individual Defendants indemnify a director and Johnson was not successful in the Direct Suit; and 2) as to the second category of alleged breaches, Johnson's claim was already litigated in the Consolidated Action and is barred by *res judicata*.

1. The Individual Defendants cannot be liable for breach of fiduciary duty for failing to indemnify Johnson

Johnson's complaint alleges the Individual Defendants breached a fiduciary duty "by unfairly denying Johnson benefits of Storix that Partner-Defendants afforded themselves, including…indemnification for Johnson's successful defense against claims specifically brought against him as a Storix director." (5-ER-1085.) According to Johnson, the harm he suffered resulting from this breach was "being deprived indemnification by Storix." (*Ibid*.) Johnson, however, fails to explain why the Individual Defendants would be liable to Johnson on a breach of fiduciary duty claim for failing to indemnify a director who was adjudged to have breached his fiduciary duty of loyalty to the company or how Storix's indemnification of the Individual Defendants was a breach of fiduciary duty on the part of the Individual Defendants.

The plain language of Cal. Corp. Code § 317 makes it clear "the corporation shall have the power to indemnify" not other directors or shareholders. Cal. Corp. Code § 317(b). Having directors or shareholders indemnify other directors or shareholders would be contrary to the nature and purpose of the corporate structure. *See* Cal. Corp. Code § 207 (a corporation is a separate legal entity with all the powers of a natural person). This fact is fatal to Johnson's breach of fiduciary duty claim because the Individual Defendants, as managers, directors, and/or shareholders of Storix, do not indemnify another director in defense of an action. The corporation, if permitted by the Cal. Corp. Code and/or the corporation's bylaws, would be the appropriate indemnifying party. Johnson cannot state a claim for breach of fiduciary duty against the Individual Defendants for failing to indemnify Johnson and especially where Johnson, as a director, was found liable to the corporation for breaching his duty of loyalty. (3-ER-602.)

Even if the Individual Defendants were somehow responsible for indemnifying Johnson on the Direct Suit, that litigation did not terminate in Johnson's favor. The District Court correctly concluded Johnson's breach of fiduciary duty theory failed as a matter of law because Johnson was not successful in defense of the Direct Suit. (1-ER-42.) The judgment in the Consolidated Action conclusively establishes Storix prevailed in the Direct Suit against Johnson for breach of fiduciary duty. (3-ER-602.) Johnson's statements to the contrary are

directly contradicted by the judgment. In sum, Johnson's position that a director found liable for breaching his fiduciary duty should be indemnified by other directors is untenable and was properly rejected by the District Court.

2. *Res Judicata* Bars Johnson's Breach of Fiduciary Duty Claim

Johnson's complaint alleges Defendants breached a fiduciary duty by "using Storix's profits otherwise owed to Johnson for their personal benefit, including all monies paid to their personal attorneys." (5-ER-1085.) The harm Johnson alleges he suffered was "by the loss of Johnson's 40% of Storix's profits used to pay Partner-Defendants and Storix's counsel for acts committed solely for Partner-Defendants' benefit." (*Ibid.*) In other words, Johnson's complaint is that Storix did not have profits to declare dividends to its shareholders because the Individual Defendants were forced to defend against Johnson's claims in the Consolidated Action. This very claim, however, was previously litigated by Johnson and decided in the Individual Defendants' favor in the Consolidated Action. Johnson's breach of fiduciary duty claim fails under the doctrine of *res judicata*.

"The doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." *Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 797 (2010) (citations omitted). *Res judicata* will act as a bar to a later suit if there was an adjudication in a previous suit that 1) involved the same 'claim' or issue as the later suit; 2) reached a final judgment on

the merits; and 3) involved the same parties or their privies. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993). In determining whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have "consistently applied the 'primary rights' theory." *Id.* citing *Slater v. Blackwood*, 15 Cal.3d 791, 795 (1975). 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." *Boeken*, 48 Cal.4th at 797-798 citing *McKee v. Dodd*, 152 Cal. 637, 641 (1908). Thus, when a subsequent action involves the same parties and seeks compensation for the same harm, the actions involve the same primary right. *Boeken*, 48 Cal.4th at 798.

The primary right asserted by Johnson is the right not to be wrongfully deprived of his rights as a minority shareholder. Johnson asserts the advancement of the Individual Defendants' defense costs deprived him of dividends he should have been entitled to as a 40% shareholder. This, however, is also the very same primary right Johnson alleged was breached and the same harm he alleged he suffered in his Cross-Complaint in the "Direct Suit." (3-ER-569: "harmed by…loss of money in defending a suit;" and "harmed by being denied distributions from Storix profits, as all profits were spent instead in litigation.") The compensation Johnson seeks by way of the present action is based on the very same harm previously litigated in the Direct Suit. At the end of the day, Johnson's complaint, at

its core, is in the nature of a minority shareholder's oppression claim against the majority but that claim, again, was litigated by Johnson in the Direct Suit.[4]

Johnson's breach of fiduciary duty claim was also litigated in the Derivative Suit. For example, one of plaintiffs' claims in the Derivative Suit was the improper advancement of defense fees and costs to the Individual Defendants. (3-ER-606: "Plaintiff contends defendants improperly advanced defense fees and costs to themselves.") In addition, plaintiffs in the Derivative Suit claimed the Individual Defendants "abused the expense reimbursement policy of the corporation" thereby engaging in alleged self-dealing. (3-ER-607.) The trial court in the Derivative Suit, however, considering the evidence and percipient and expert testimony found that "plaintiff failed to meet the burden of proof" on all causes of action in the Derivative Suit including breach of fiduciary duty. (1-ER-601.) Thus, Johnson's breach of fiduciary duty claim was previously litigated in the Derivative Suit and decided in favor of the Individual Defendants. Johnson is thereby precluded from alleging the same claim for breach of fiduciary duty arising from the same primary right. The District Court correctly determined Johnson was precluded from

[4] In the "Direct Suit" Johnson and his counsel submitted a jury instruction that was given entitled "Majority Shareholder Fiduciary Duties" thereby providing further support that Johnson's current claim for breach of fiduciary duty is barred by the doctrine of *res judicata*. (Ind.Def.SER-28.)

asserting the same claim for breach of fiduciary duty because the Consolidated Action involved the same cause of action, between the same parties and was finally adjudged on the merits. (1-ER-17.)

C. Johnson Failed To State A Claim For Conversion

Johnson's conversion claim is barred by the doctrine of *res judicata* due to the preclusive effect of the September 12, 2018, judgment entered in favor of the Individual Defendants and Storix in the Consolidated Action. (3-ER-602.) Federal Courts look to state law to determine the preclusive effect of a state court judgment. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993). Under California law, the doctrine of *res judicata* applies to previously litigated causes of action and to issues necessarily decided in a prior action. *Brinton v. Bankers Pension Servs.*, 76 Cal.App.4th 550, 556 (1999).

Res judicata acts as a bar to all causes of action that were previously litigated or that could have been litigated. *Allied Fire Protection v. Diede Construction, Inc.*, 127 Cal.App.4th 150, 155 (2005). The doctrine of *res judicata* will act as a bar to a later suit if there was an adjudication in a previous suit that 1) involved the same 'claim' or issue as the later suit; 2) reached a final judgment on the merits; and 3) involved the same parties. *DKN Holdings, LLC v. Faerber*, 61 Cal. 4th 813, 824 (2015).

1. *Res judicata* bars Johnson's conversion claim

One of the primary policies behind the doctrine of *res judicata* is precluding "piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." *Weikel v. TCW Realty Fund II Holding Co.*, 55 Cal.App.4th 1234, 1245 (1997). Johnson's conversion claim is seeking to do just that and the District Court correctly dismissed this claim with prejudice. (1-ER-22.) The preclusive effect of *res judicata* is designed to give the Individual Defendants a final resolution as to claims asserted against them by Johnson when based on the same transactional nucleus of facts.

a. Application of California's primary rights theory affirms Johnson's conversion claim was the same claim litigated in the Consolidated Action

In determining whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have "consistently applied the 'primary rights' theory." *Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 797 (2010) citing *Slater v. Blackwood*, 15 Cal.3d 791, 795 (1975). The determinative factor when a subsequent action involves the same parties is whether the party seeks compensation for the same harm. *Id.* at 798.

/ / /

/ / /

In his complaint, Johnson alleges he "was owed all undistributed profits of Storix earned prior to Partner-Defendants became [sic] shareholders." (5-ER-1086.) Johnson alleges further that "Partner-Defendants substantially interfered with Johnson's property by knowingly and intentionally taking possession of the money Johnson was entitled to, preventing Johnson's access to the money or records pertaining to it, [and] using the money for their personal benefit." (*Ibid*.) This claim and the alleged harm is the same harm Johnson sought compensation for in the Derivative Suit.

In the Derivative Suit, Johnson and co-plaintiff Robin Sassi asserted claims for breach of fiduciary duty, abuse of control, corporate waste, and an accounting. (4-ER-639.) A review of the allegations in Johnson's Derivative Suit confirm Johnson has already sought redress for the alleged loss of undistributed profits and alleged self-dealing on the part of the Individual Defendants. For example, Johnson alleged in the Derivative Suit that the Individual Defendants breached their fiduciary duty by "various actions taken to promote their financial self-interest at the expense of Storix and its minority shareholders… [and] refusing to make available to Board members certain financial information." (4-ER-677.) Under Johnson's corporate waste cause of action, Johnson alleged the Individual Defendants "wasted Storix's corporate assets by… various actions taken to promote their financial self-interest at the expense of Storix and its minority shareholders,

such as diverting funds that could have been used for… dividends." (4-ER-680.) Under Johnson's accounting claim, he alleged the Individual Defendants "have engaged in self-dealing and corporate waste…, misappropriating funds that belonged to Storix and its shareholders, and have willfully acted to conceal such facts." (4-ER-681.) Johnson's prayer for relief in the Derivative Suit requested "payment to Storix, to be distributed to its innocent shareholders, of the amount due from Defendants as a result of the account… after they took majority control of Storix in September 2011. (4-ER-682.) Collectively, the allegations in the Derivative Suit confirm Johnson has sought redress for the harm allegedly caused by the Individual Defendants "conversion", and if not, at least suggest Johnson should have litigated this current conversion claim in his Derivative Suit as it is based on the same transactional nucleus of facts.

The harm Johnson seeks redress for by way of his conversion claim is the same harm Johnson litigated in the Derivative Action, i.e. the harm suffered by shareholders due to the Individual Defendants self-dealing by diverting funds that could have been distributed as dividends to shareholders. The alleged misappropriation by the Individual Defendants in the Derivative Suit harmed Johnson as a shareholder in the same way he was allegedly harmed by an alleged conversion of Storix's profits in the present action. Thus, the injury allegedly suffered by Johnson in the Derivative suit and in the present action was suffered as

a result of the same wrongful conduct of the Individual Defendants and the same primary right is at issue. Whether styled as a corporate waste or accounting claim or conversion, the same primary right is at stake and the doctrine of *res judicata* is applicable. *See Gonzales v. Cal. Dept. of Corr.*, 739 F.3d 1226, 1233 (9th Cir. 2014).

Johnson's conversion claim is merely a repackaged claim from Johnson's Derivative Suit. As discussed above, the Consolidated Action, including the Derivative Suit, is now final. The doctrine of *res judicata* under California law applies and bars Johnson's conversion claim against the Individual Defendants. The District Court correctly reconsidered its December 2, 2019 order and dismissed Johnson's conversion claim with prejudice.

2. Issue preclusion bars litigation of Johnson's alleged lack of access to Storix's financial records

The issue regarding Johnson's access to financial records of Storix was adjudicated in the Consolidated Action. Johnson, as a board member between 2015 and 2018, was entitled to inspect the books and records of Storix contrary to his allegations. In particular, in the Derivative Suit, Johnson asserted a claim for an accounting and sought extensive discovery in support of his allegations. (4-ER-639.) In addition, in the Direct Suit, Johnson filed a Motion for Peremptory Writ of Mandate for unfettered access to Storix's books, records, and documents. (Ind.Def.SER-228.) But the Derivative Suit and the Direct Suit adjudicated

Johnson's claim for an accounting and his access to the books and records. (Ind.Def.SER-228; 3-ER-602.) Specifically, the order and decision in the Derivative Suit found "that plaintiff has failed to meet the burden of proof on the four causes of action [, including an accounting,] alleged in the First Amended Derivative Complaint." (3-ER-601.) And in the Direct Suit, the state court ruled on Johnson's writ of mandate and held that he was permitted to inspect and copy Storix's books and records subject to just and proper conditions. (Ind.Def.SER-228.) As a result, this identical issue was decided on the merits in the Consolidated Action. Johnson therefore cannot rely on the issue of lack of access to support his conversion claim as it is barred by the doctrine of *res judicata*.

D. Johnson Failed To State A Claim For Economic Interference

Johnson's economic interference claim is two part: 1) intentional interference with a contractual relationship; and 2) interference with Johnson's prospective economic advantage. (5-ER-1087.) The District Court correctly dismissed each with prejudice.

1. The Individual Defendants were privileged to interfere in the alleged contract

Johnson's complaint alleges the Individual Defendants were not parties to the oral contract between Johnson and Storix whereby Johnson granted Storix rights to market, sell, copy, distribute and license software in exchange for future

compensation for the copyright when Johnson's participation in Storix concluded. (5-ER-1087.) Johnson alleges the Individual Defendants "induced Storix to breach the contract after Johnson had performed his obligations for fifteen (15) years." (*Ibid.*) The Individual Defendants were shareholders and managers of Storix. (5-ER-1076.)

The affirmative defense of manager's privilege is an absolute defense to Johnson's intentional interference with contract claim. If an agent of the corporation reasonably believes that a contract is harmful to the interests of the corporation, the agent is privileged to induce the breach of that contract. *Aalgaard v. Merchants Nat'l Bank, Inc.*, 224 Cal.App.3d 674, 684 (1990). The Individual Defendants, as managers and agents of Storix, could reasonably believe that an oral contract between Johnson and himself that could be triggered by Johnson simply ending his participation with Storix, at any time, thereby requiring an alleged payment of $2.75M, was not in the best interests of Storix especially in light of a unanimous jury verdict in favor of Storix regarding the ownership of the copyrights. *See Shoemaker v. Myers*, 52 Cal.3d 1, 24 (1990) ("corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract.") The manager's privilege bars Johnson's intentional interference with contract claim against the Individual Defendants and the District Court properly dismissed this claim with prejudice.

2. The Individual Defendants, as agents of Storix, cannot, as a matter of law, interfere with the alleged contract

The Individual Defendants, as agents of Storix, cannot be held liable for interference with Johnson's alleged oral contract with Storix. "The tort of intentional interference with contractual relations is committed only by 'strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance.' Consequently, a contracting party is incapable of interfering with the performance of his or her own contract and cannot be held liable in tort for conspiracy to interfere with his or her own contract." *PM Group, Inc. v. Stewart*, 154 Cal.App.4th 55, 65 (2007) (citations omitted). Persons who are not parties to the contract, but are agents of the breaching party, cannot be held liable for intentional interference with a contractual relationship. *See e.g. Redfearn v. Trader Joe's Co.*, 20 Cal.App.5th 989, 1001-1003 (2018) ("Stranger" means that defendant is neither a party nor the agent of a party; it does not mean that defendant must lack any relationship to contracting parties).

/ / /

/ / /

/ / /

/ / /

Johnson alleges the Individual Defendants "induced Storix to breach the contract after Johnson had performed his obligations." (5-ER-1087.) But the Individual Defendants, as agents of Storix, cannot be liable for interfering with what is essentially their own contract. The District Court properly dismissed Johnson's intentional interference with contract claim with prejudice.[5]

3. Johnson's claim for intentional interference with prospective economic advantage fails as there was no preexisting relationship

The threshold requirement for intentional interference with prospective interference is an existing economic relationship between Johnson and a third party that is reasonably likely to produce economic advantage. *Youst v. Longo*, 43 Cal.3d 64, 71 (1987). A mere expectation that *a relationship* will be created in the future is not sufficient. *Korea Supply Co. v. Lockheed Martin Corp*. 29 C4th 1134, 1164 (2003). In addition, the acts of interference must be independently wrongful by some legal measure. *See Reeves v. Hanlon*, 33 Cal.4th 1140, 1152 (2004); *see also San Jose Const., Inc. v. S.B.C.C., Inc.*, 155 Cal.App.4th 1528, 1544-45 (2007).

Johnson's complaint alleges the Individual Defendants "informed Johnson and Sassi that they'd been negotiating the sale of Storix to a large competitor, Veeam

[5] For reasons discussed in Section E, below, Johnson's intentional interference claim also fails because the alleged oral contract is barred by *res judicata*.

software, for several months." (5-ER-1080.) Johnson alleges the Individual Defendants interfered with his prospective economic relationship with Veeam Software "by attempting to extort Johnson with the threat of continued litigation and deepening financial hardship." (5-ER-1087.) But the business opportunity with Veeam software was not an existing relationship belonging to Johnson. The relationship, if any, belonged to the company and is speculative at best. *See Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 2 Cal. 5th 505, 515 (2017) ("a cause of action for tortious interference has been found lacking when either the economic relationship with a third party is too attenuated or the probability of economic benefit too speculative."). Johnson does not allege that he had an existing relationship with Veeam but rather states the Individual Defendants held a board meeting and announced to Johnson this *potential* opportunity. (5-ER-1080.) In fact, Johnson identifies Veeam as "a large competitor" of Storix. (*Ibid.*) As a competitor, any expectation of a relationship would not be current and existing but at some time in the future, which is insufficient to state a claim for interference with prospective economic relationship.

/ / /

/ / /

/ / /

4. Johnson's claim for intentional interference with prospective economic advantage fails as there was no independent legal wrong

To maintain a claim for interference with prospective economic advantage the interfering action must be wrongful. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1164-1165 (2003). Johnson's complaint fails to allege the Individual Defendants engaged in some independent legal wrong when interfering with an alleged prospective economic relationship. According to Johnson's complaint, the Individual Defendants interfered in the relationship with Veeam "by attempting to extort Johnson with the threat of continued litigation and deepening financial hardship." (5-ER-1087.) Whether accurate or not, the threat of continued litigation is not itself an independent wrongful act by any legal measure sufficient to establish this tort. *See Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1130 (1990) (the bringing of a colorable claim is not actionable as a claim for interference with prospective advantage). The Individual Defendants stating they would continue in the litigation with Johnson cannot satisfy the requirement that the interference itself be independently wrongful conduct. The District Court's dismissal of Johnson's claim for interference with prospective economic advantage with prejudice was correct.

E. Johnson Failed To State A Claim For Breach of Contract, Rescission, and Indemnification

1. Johnson concedes the Individual Defendants were not parties to the alleged oral contract

Johnson alleged a breach of contract claim and rescission against the Individual Defendants based on a February 2003 oral contract between Johnson and Storix "wherein Storix was granted rights to…SBAdmin…in exchange for future compensation for the copyright if or when Johnson's participation in Storix ended." (5-ER-1076.) According to Johnson, upon his unilateral decision to cease involvement with Storix, Storix was obligated to pay him $2.75 million. (5-ER-1081.) Johnson, however, admits the Individual Defendants were not a party to the alleged oral contract. (5-ER-1076.) This fact is fatal to Johnson's breach of contract claim against the Individual Defendants as it is an essential element of a breach of contract claim and rescission that a contract exist between the parties. *Yosemite Portland Cement Corp. v. State Board of Equalization*, 59 Cal.App.2d 39, 41 (1943); *see also Moss v. Kroner*, 197 Cal.App.4th 860, 878 (2011).

Johnson cannot escape this essential requirement by alleging the Individual Defendants are liable on a breach of contract claim because they "were in majority control of Storix… and personally liable for consideration owed to Johnson." (5-ER-1088.) More importantly, Johnson does not cite any authority for

this position and concludes that he need not support with authority "at this time since [the issue is] currently undisputed." (AOB at 46.) Because Johnson cannot meet the essential elements of a claim for breach of contract and rescission against the Individual Defendants, the District Court correctly dismissed these claims with prejudice.

2. *Res Judicata* Bars Johnson's claims for Breach of Contract and Rescission

Even assuming Johnson could assert a breach of contract claim and rescission against the Individual Defendants, the doctrine of *res judicata* bars these claims. In February 2003, Johnson alleges he entered into an oral contract between himself and Storix "wherein Storix was granted rights to…SBAdmin…in exchange for future compensation for the copyright if or when Johnson's participation in Storix ended." (5-ER-1076.) Thus, by the terms of the alleged oral contract, Storix's obligation to pay arose when Johnson's participation in Storix ended. By May 2014, Johnson's involvement with Storix ended because he voluntarily resigned from Storix. (5-ER-1077.) Because Johnson alleges this oral contract was made in 2003 and his involvement ended in May 2014, it was a claim he was aware of and should have brought when he filed his Copyright Action. A claim should be barred if with diligence it could have been brought earlier. *Himel v. Continental Ill. Nat. Bank & Trust,* 596 F.2d 205, 210 (1979); *see also Aerojet–General Corp. v. American Excess*

Ins. Co., 97 Cal.App.4th 387, 402 (2002) (the purpose for the rule that all claims that "could have been brought" are barred under *res judicata* is so "[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions.") Thus, by the time Johnson filed the Copyright Action in August 2014, Johnson was aware of or should have been aware of his claim for breach of the alleged oral contract based on his agreement to grant rights to his copyrighted work. The doctrine of *res judicata* therefore bars Johnson's claim.

3. The Copyright Act Preempts Johnsons' Claim for Breach of Contract

Johnson's breach of contract claim based on an alleged oral contract regarding the transfer of rights related to the SBAdmin copyrights is preempted by the Copyright Act. The Copyright Act of 1976 preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 ... and come within the subject matter of copyright as specified by sections 102 and 103 ..." 17 U.S.C. § 301(a). To determine whether a state claim is preempted, a court must examine the nature of the state law claim to determine what rights the plaintiff seeks to enforce with state law. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998).

/ / /

/ / /

Johnson's breach of contract claim arises from matters involving copyrightable subject matter, and Johnson is seeking to enforce rights subject to the Copyright Act by way of his state law claim. Johnson alleges that he "entered into an oral contract with Storix upon its formation, wherein Storix was granted rights to market, sell, copy, distribute and license SBAdmin to third-parties in exchange for future compensation for the copyright if or when Johnson's participation in Storix ended." (5-ER-1076.) Because Johnson's breach of contract claim is based on the transfer of rights associated with copyrightable material and he is seeking to enforce those rights, the Copyright Act preempts the state law claim.

4. The Individual Defendants do not indemnify Johnson

For reasons discussed above, Johnson's indemnification claim against the Individual Defendants fails because the Individual Defendants do not, and did not, indemnify Johnson for his unsuccessful defense of the Direct Suit.

1. ***Res Judicata* Bars Indemnification**

Apart from Johnson's inability to assert his claim for indemnification against the Individual Defendants, the indemnification claim fails based on the doctrine of *res judicata*. Johnson alleges he is entitled to indemnification because of his "successful defense of any issues, claims or matters in the Direct Suit." (5-ER-1089.) But this argument is contradicted by the results of the Direct Suit. The jury found that Johnson breached his duty of loyalty, and the

court entered final judgment "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor Technology on Storix Inc.'s claim for aiding and abetting a breach of fiduciary duty." (3-ER-602.) Clearly Johnson was not the successful party in the Direct Suit and therefore not entitled to indemnification.

Moreover, the actions Johnson took outside of his role as a director of Storix to stand up a competing enterprise for his personal gain constitutes conduct of a director not entitling him to indemnification under Cal. Corp. Code § 317. *See Wilshire-Doheny Assocs. Ltd. v. Shapiro*, 83 Cal.App.4th 1380, 1389 (2000) (Court discussing indemnity under Section 317, and noting "the conduct of the agent which gives rise to the claim against him must have been performed in connection with his corporation functions and not with respect to purely personal matter," and "[t]he agent must have been acting to promote the corporate good, not personal profit of interests." (quotes omitted)). Johnson's actions in setting up a competing corporation were for purely personal gain, not in the interest of Storix, and therefore contrary to the indemnification provisions of Cal. Corp. Code § 317. The District Court properly dismissed Johnson's indemnification claim with prejudice.

/ / /

/ / /

V. CONCLUSION

The District Court dismissed Johnson's claim as being barred by the doctrine of *res judicata* and for failing to state a claim for relief. Johnson's unwillingness to accept the reality that he has had his day in court is evident in his pleadings and his "new" claims are evidence of this fact. Fortunately, *res judicata* exists to prohibit Johnson's abuse of the judicial process, and the District Court's judgment should be affirmed.

DATED: November 5, 2021

WILSON, ELSER, MOSKOWITZ EDELMAN & DICKER, LLP

By: */s/ Marty B. Ready*
Michael P. McCloskey, Esq.
Marty B. Ready, Esq.
Attorneys for Defendants-Appellees, MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, DAVID HUFFMAN

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellant is unaware of any related cases pending in this Court.

DATED: November 5, 2021

WILSON, ELSER, MOSKOWITZ EDELMAN & DICKER, LLP

By: */s/ Marty B. Ready*
Michael P. McCloskey, Esq.
Marty B. Ready, Esq.
Attorneys for Defendants-Appellees, MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, DAVID HUFFMAN

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **8,883** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 and typeface of 14 point in Times New Roman style.

DATED: November 5, 2021

WILSON, ELSER, MOSKOWITZ EDELMAN & DICKER, LLP

By: */s/ Marty B. Ready*
Michael P. McCloskey, Esq.
Marty B. Ready, Esq.
Attorneys for Defendants-Appellees, MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, DAVID HUFFMAN

CERTIFICATE OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 West A Street, Suite 1900, San Diego, California 92101.

☑ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2021.

1. DEFENDANTS-APPELLEES' MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, AND DAVID HUFFMAN ANSWERING BRIEF

2. DEFENDANTS-APPELLEES' MANUEL ALTAMIRANO, RICHARD TURNER, DAVID KINNEY, AND DAVID HUFFMAN SUPPLEMENTAL EXCERPT OF RECORD - VOLUME 1 OF 1

☑ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

Executed on November 5, 2021, San Diego, California.

/s/ Marty B. Ready

Marty B. Ready, Esq.
Email: marty.ready@wilsonelser.com