Paul A. Tyrell (Bar No. 193798)
Email: paul.tyrell@procopio.com
Sean M. Sullivan (Bar No. 254372)
Email: sean.sullivan@procopio.com
PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: 619.238.1900
Facsimile: 619.235.0398

Attorneys for Defendant Storix Inc.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

v.

DAVID KINNEY, an individual; RICHARD TURNER, an individual; MANUEL ALTAMIRANO, an individual; DAVID HUFFMAN, an individual; and DAVID SMILJKOVICH, an individual; PAUL TYRELL, an individual; SEAN SULLIVAN, an individual; MARTY READY, an individual; DAVID AVENI, an individual; MICHAEL MCCLOSKEY, an individual; STORIX INC., a California corporation; JUDGE MARILYN HUFF, an individual; JUDGE RANDA TRAPP, an individual; JUDGE KEVIN ENRIGHT, an individual; JUDGE KATHERINE BACAL, an individual,

Defendants.

Case No. 3-20-CV-01354-JO-MSB

OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER

Date: July 15, 2022
Time: 9:00 a.m.
Dept: 4C (4th Floor)
Judge: Hon. Jinsook Ohta

## I. INTRODUCTION

Anthony Johnson moves for reconsideration of the Court's order of March 30, 2022, dismissing his remaining cause of action for a "common count" for "money had and received" asserted against Storix, Inc. ("Order"; ECF No. 73). The Court dismissed Johnson's common count as impermissibly duplicative of his past conversion claim that he asserted against Storix's management, in their individual capacities, in a prior federal case, which that court likewise dismissed. This Court dismissed the common count based on application of the doctrines of claim splitting and res judicata[1], as both causes arose from the same facts, sought recovery of the same money, and were asserted against the same parties or those in privity. Yet Johnson argues the Court committed clear error in granting dismissal and so demands reconsideration. Johnson fails to come anywhere near the high bar needed for reconsideration, instead simply rehashing arguments that he raised or could have raised. In essence, he argues that the Court clearly erred by failing to agree with him. But that is not the standard for granting reconsideration, and none of the arguments he raises justify that result. The motion for reconsideration should be denied in its entirety.

## II. ARGUMENT AND AUTHORITIES

### A. Legal Standard for a Motion for Reconsideration

Johnson cites both Rule 59(e) and Rule 60(b) as potential grounds for obtaining reconsideration. "A motion for reconsideration, under Federal Rule of Civil Procedure 59(e), is 'appropriate if the district court is provided with (1) newly discovered evidence; (2) clear error or manifest injustice, or (3) if there is an intervening change in controlling law.'" *Quinones v. Chase Bank USA, N.A.*, No. 09CV2748-AJB BGS, 2012 WL 1327829, at *2 (S.D. Cal. Apr. 13, 2012), *quoting School Dist. No. 1J, Multnomah County, Or. v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see also Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011); *McDowell v. Calderon*, 197 F.3d 1253,

[1] Storix moved on other grounds that it asserts warranted dismissal. However, given the basis of its ruling, the Court declined to reach the other grounds for dismissal. *See* ECF 73 at 12.

1255 (9th Cir. 1999). This standard is a "high hurdle." *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001). A district court does not commit clear error warranting reconsideration when the question before it is a debatable one. *McDowell* at 1256. Further, **a motion under Rule 59(e) is not a vehicle permitting the unsuccessful party to "rehash" arguments previously presented or to present "contentions which might have been raised prior to the challenged judgment."** *Costello v. United States*, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991) (emphasis added). *See also Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (Rule 59(e) motions "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation."); *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003).

Similarly, Rule 60(b) only provides for extraordinary relief and only may be invoked upon a showing of exceptional circumstances. *Engleson v. Burlington N.R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1994). Under Rule 60(b), the court may grant reconsideration based on: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered before the court's decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b).

In addition, Local Civil Rule 7.1(i)(1) provides that a motion for reconsideration *must* include an affidavit by the moving party:

> "setting forth the material facts and circumstances surrounding each prior application, including inter alia: (1) when and to what judge the application was made, (2) what ruling or decision or order was made thereon, and (3) **what new and different facts and circumstances are claimed to exist which did not exist, or were not shown upon such prior application**."

Civ. L.R. 7.1(i)(1) (emphasis added).[2]

[2] Johnson did not comply with this requirement. He submitted only a Notice of Motion and a Memorandum in support which do not provide a certified statement of "new and different facts and circumstances" as the Local Rule requires.

In any event, a motion for reconsideration under the Federal Rules offers "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *White v. Sabatino*, 424 F.Supp.2d 1271, 1274 (D. Haw. 2006) (internal citations omitted). The court has discretion in granting or denying a motion for reconsideration. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991). A motion for reconsideration should not be granted absent highly unusual circumstances. *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). As made clear by the Ninth Circuit, a motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

Here, Johnson asserts the Order contains "manifest errors of law and failed to acknowledge numerous arguments and authority in Johnson's opposition." (ECF No. 76-1 p. 2). In other words, Johnson relies solely on supposed "clear error" to justify his reconsideration request. He cites no new or different facts and circumstances, and no intervening change in the law. Yet the Court's Order set forth clear legal analysis and reasons explaining why Johnson's common count failed to pass muster. The Order properly considered arguments he presented in his briefing, including his opposition (ECF No. 53) and sur-reply (ECF No. 59). Johnson's dissatisfaction with the result does not constitute clear error or any other grounds warranting reconsideration.

**B. The Court Did Not Clearly Err in Finding Johnson's Common Count Subject to Dismissal Based on Impermissible Claim Splitting or Res Judicata**

The Court found that Johnson's "common count" amounted to impermissible claim splitting, as well as being barred by res judicata, in view of the conversion claim he asserted in an earlier federal lawsuit, *Johnson v. Altamirano, et al.*, Case No. 3:19-cv-01185-H-BLM (S.D. Cal.) ("*Altamirano*"). In *Altamirano*, Johnson asserted a claim for conversion against Storix's current and former managers or directors, for the exact amount for which he sued Storix here under a common count for money had and received.

1. ***The Court Fully Considered and Rejected Johnson's Argument Against a Finding of Privity***

Johnson first argues that Storix and the defendants in *Altamirano* are not in privity, contrary to the Court's holding in the Order, so claim splitting does not bar his common count. Johnson spent several pages extensively making this exact argument in his opposition to the motion to dismiss (*see* ECF No. 53 at pp. 18-20) and in his sur-reply (*see* ECF No. 59 at pp. 4-7). He relies on the identical authorities cited in his opposition, and the same contention he's made repeatedly—because he sued individuals in one case and the corporation in the other, they cannot be considered the "same" parties or in privity.

Nor does Johnson explain how application of the doctrine of "judicial estoppel' would lead to a different result. Precisely as he did in his opposition (*compare* ECF No. 53 p. 19 *with* ECF 76-1 p. 5), Johnson again wrongly asserts that a prior court order by District Judge Huff found privity lacking between Storix and the Storix Managers. Johnson misconstrues Storix's past position, which is contrary to his argument. The cited order arose in the original Copyright Action, *Johnson v. Storix*, 14-cv-01873-H-BLM, which he quotes at length. (*See* ECF No. 53 at p. 19; ECF 76-1 at p. 5). That order granted Storix's post-judgment motion to enforce the surety's liability on the supersedeas bond under Federal Rule of Civil Procedure 65.1. Johnson tried to avoid that result by arguing that the $472,000 he alleges the Storix Managers "stole" from "his Storix retained earnings" offset the judgment entered against him in the Copyright Action which he secured with a supersedeas bond for $427,932.81. Storix correctly argued that his allegation of theft in *Altamirano*, the same one he is pursuing here as a common count, was irrelevant to the issue of enforcing the surety's liability. The court agreed. Storix never argued a lack of privity with "the *Altamirano* defendants," as Johnson repeatedly suggests.

The Court fully vetted Johnson's privity arguments, concluding: "The facts alleged by Plaintiff demonstrate sufficient commonality of interest between the company

and its Partner-Defendants to find that privity exists." (ECF No. 73 at p. 9). He provides no justification for upsetting this conclusion.

2. ***Johnson Does Not Explain Any Other Clear Error Resulting From a Misapplication of Law***

Johnson also argues that the Court clearly erred in applying federal "preclusion principles" rather than California state preclusion law, as well as the state's "primary right theory," so "neither res judicate nor claim-splitting applies." Motion at p. 3. Johnson claims that because this case invokes the Court's diversity jurisdiction, state preclusion law applies over federal preclusion principles and somehow leads to a different result than that the Court reached.

Yet Johnson is wrong, and fails to explain how application of federal law or California law on preclusion would lead to a result other than the one the Court reached. This case involves preclusion based on a prior federal court order in *Altamirano*, which in turn relied upon a prior California state court case that Johnson lost, appealed and lost. *See Altamirano*, ECF No. 113 at pp. 18-19. The *Altamirano* court relied on California preclusion law and primary rights doctrine, finding his conversion claim barred by res judicata. *Id*. at 20. In turn, this Court relied on the *Altamirano* federal court order to find res judicata applies to the common count.

While a federal court sitting in diversity applies the res judicata law of the state in which it sits, under California law, the res judicata effect of a prior federal court judgment is determined by applying federal standards. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). "Therefore, those federal standards are applicable here to determine the preclusive effect of the prior judgment."

Here, the Court appropriately applied federal authorities to its claim-splitting analysis finding that the result in *Altamirano* bars Johnson's common count. *See* ECF No. 73 at 7. In its alternative analysis, the Court did consider California state preclusive authorities in finding res judicata also bars Johnson's common count. *Id*. at 10-12. Thus, whether Johnson complains about application of federal or state law, he cannot establish

that the Court's decision is the result of clear error.

3. ***Johnson Fails to Show how the Common Count is a Different Claim from His Previously Rejected Conversion Claim***

Johnson argues again, as he did in his prior briefing, that somehow his conversion claim differed from his common count, despite being based on identical facts and seeking the same amount of money. As this Court succinctly found, "both complaints alleged that, after Plaintiff passed majority ownership of Storix to Partner-Defendants in 2011, Parnter-Defendants took actions to deprive Plaintiff of Storix's undistributed profits." ECF 73 at 7. That is the crux of each cause, and so the shared common transactional nucleus of facts renders the claims identical.

Johnson fails to explain why he should now be permitted to raise (and re-raise) issues regarding arguments made in his original papers when he had ample opportunity to do so in any one of his multiple briefs. Johnson made the arguments he believed appropriate and persuasive. He simply blames the Court for not agreeing with him. His continued insistence on rehashing the same arguments does not justify reconsidering the Court's prior thorough analysis.

Johnson points to no clear error committed by the Court. Yet that is the grounds on which he seeks reconsideration. Johnson's effort to retread ground already repeatedly covered is expressly forbidden in the context of a motion for reconsideration. As a result, his contention that the Court has reached improper conclusions either based on misinterpreting authorities or ignoring his prior pleas in a way that would require reconsideration should be rejected entirely. There are simply no legitimate grounds warranting reconsideration here.

## III. CONCLUSION

Johnson has not pointed to a single new fact, new legal authority, change in law, new argument, or any other justification for the Court to redo the work it has already

done on this action. There is zero reason for the Court to entertain his motion for reconsideration, and it should be denied in its entirety.

DATED: July 1, 2022

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: */s/ Sean M. Sullivan*
Paul A. Tyrell
Sean M. Sullivan
Attorneys for Defendant Storix Inc.