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

14 ANTHONY JOHNSON, an individual,
15 Plaintiff,

16 v.

17 DAVID KINNEY, an individual;
18 RICHARD TURNER, an individual;
19 MANUEL ALTAMIRANO, an individual;
20 DAVID HUFFMAN, an individual; and
21 DAVID SMILJKOVICH, an individual;
22 PAUL TYRELL, an individual; SEAN
23 SULLIVAN, an individual; MARTY
24 READY, an individual; DAVID AVENI, an
25 individual; MICHAEL MCCLOSKEY, an
26 individual; STORIX INC., a California
27 corporation; JUDGE MARILYN HUFF, an
28 individual; JUDGE RANDA TRAPP, an
individual; JUDGE KEVIN ENRIGHT, an
individual; JUDGE KATHERINE BACAL,
an individual,

Defendants.

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

DEFENDANT STORIX, INC.'S
REPLY IN SUPPORT OF ITS
MOTION TO DISMISS
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12

**PER CHAMBERS RULES, NO
ORAL ARGUMENT UNLESS
SEPARATELY ORDERED BY
THE COURT**

Date: September 30, 2020
Courtroom: 3A (3rd Floor)
Judge: Hon. Todd W. Robinson

I. INTRODUCTION

1
2 Defendant Storix, Inc. seeks dismissal of all claims against it on several
3 grounds, each of which is dispositive. Johnson’s opposition argues that “common
4 sense” should defeat Storix’s arguments and applicable authorities, but he does not
5 substantively analyze those arguments or authorities. Opposition (“Opp.”) at 1.
6 Johnson also argues that the court should convert this motion to one for summary
7 judgment because Storix asks for judicial notice of certain facts and documents. But
8 he does not object to or deny that those items qualify for judicial notice, nor does he
9 identify any particular disputed fact that might change the outcome. Since Johnson
10 does not articulate valid reasons to oppose several grounds in Storix’s motion, this
11 reply does not restate each point made in the opening brief and Storix stands on its
12 motion. Even so, Storix clarifies a few points in reply.

13 First, Johnson admits in his opposition that he merely seeks to reassert claims
14 he has already lost by retitling them. The court should not permit such tactics as it
15 undermines the finality and force of prior rulings against him.

16 Second, his prior litigation efforts refute his present claim that an implied
17 contract exists. He cannot avoid the judicial estoppel created by such admissions,
18 which also preclude him from avoiding the preemptive effect of the Copyright Act.

19 As to his Common Count 2 for money had and received, he cites no authority
20 to overcome his lack of standing to pursue a substantively derivative claim. Thus,
21 Storix’s motion on that point remains un rebutted.

22 And Johnson fails to plead any facts that would entitle him to delayed
23 discovery to avoid the statutory time bar. He merely recites boilerplate language
24 with no facts about how or why he failed to learn of the claim earlier. That does not
25 meet the requirements of the law. Thus, Storix’s motion should be granted in its
26 entirety.

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II. ARGUMENT

A. Johnson Concedes He Merely Reasserted Claims He Lost at Trial and the Court Already Dismissed with Prejudice

As Storix explained in its motion, Johnson’s latest Common Count 1 based on an implied contract is just an effort to relitigate a claim he lost twice before. First, he lost the Copyright Action. Second, he lost a breach of oral contract claim seeking payment for “his” SBAdmin copyright. In opposing Storix’s motion, Johnson now admits he simply retitled the claim again:

After the Copyright Suit ruling, Johnson brought a federal diversity lawsuit against Storix for failure to compensate him for the copyrights under an oral contract between himself and Storix upon its formation once his participation in the company ended. FAC ¶¶ 13, 80. Judge Huff dismissed the claim by misquoting his allegations as an oral contract to transfer ownership of the copyrights to Storix. *Id.* ¶ 51. Johnson therefore included in this action a similar claim for compensation under an implied promise. *Id.* ¶ 80.

Opp. at 2:6-12. To justify his retitling, Johnson now asserts he “mistakenly referred to the agreement as ‘oral contract’” in the prior suit, and tried to explain that he truly intended to pursue an “implied contract” theory of *quantum valebant*. *Id.* at 3:27-28.

Courts disregard the distinction drawn by Johnson when prohibiting such renaming tactics. As Storix explained in its motion a plaintiff cannot substitute a common count in place of a failed specifically pleaded cause of action. *See Orloff v. Metro. Tr. Co.*, 17 Cal. 2d 484, 489 (1941) (Rejecting claims for rescission, conspiracy, and constructive trust and explaining that the common count of money had and received also failed in view of the failure of the more specific allegations). As a result, the court should prevent his pursuit of this twice-defeated claim under a new name, and enter a dismissal order.

B. Johnson Fails to Rebut the Preemptive Effect of the Copyright Act or Establish All Requisite Elements for His Common Count 1

Johnson relies on two Ninth Circuit cases allowing California common law

1 claims for implied promises to pay for copyrightable works disclosed to third parties
 2 despite the preemptive effect of the Copyright Act. Opp. at 6. Yet those cases are
 3 distinguishable and Johnson’s own allegations together with his judicially-noticeable
 4 pleadings estop him from establishing the requisite elements of a so-called *Desny*
 5 claim or avoiding preemption.

6 *1. Requisite Elements of a Desny Claim*

7 Under California and Ninth Circuit law, a plaintiff can avoid copyright
 8 preemption and sue to recover money for an idea disclosed to another party absent an
 9 explicit contract only on an express promise to pay, or if “the circumstances
 10 preceding and attending disclosure, together with the conduct of the offeree acting
 11 with knowledge of the circumstances, show a promise of the type usually referred to
 12 as ‘implied’ or ‘implied-in-fact.’” *Daniels v. Walt Disney Co.*, 958 F.3d 767, 774
 13 (9th Cir. 2020), *quoting Desny v. Wilder*, 46 Cal. 2d 715, 738 (1956). Courts
 14 consider three factors in evaluating *Desny* claims: (1) whether the plaintiff prepared
 15 or created the work, (2) whether the work was disclosed to the defendant for sale,
 16 and (3) whether the disclosure was made “under circumstances from which it could
 17 be concluded that the offeree voluntarily accepted the disclosure knowing the
 18 conditions on which it was tendered and the reasonable value of the work.” *Id.*,
 19 *quoting Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004).

20 As to the third element, a plaintiff must show: “(1) that he or she ‘clearly
 21 conditioned his offer to convey the idea upon an obligation to pay for it if it is used
 22 by the offeree,’ (2) that the offeree, ‘know[s] the condition before he knows the
 23 idea,’ and (3) that the offeree voluntarily accepts the disclosure on the conditioned
 24 basis. (Citation). ‘If disclosure occurs before it is known that compensation is a
 25 condition of its use, ... no contract will be implied.’” *Merino v. Cool Gear Int’l,*
 26 *LLC*, No. 316CV01192BENBGS, 2017 WL 11421544, at *3 (S.D. Cal. Jan. 19,
 27 2017) (*quoting Aliotti*, 831 F.2d at 902 (9th Cir. 1987) (internal quotation and
 28 citation omitted)). Such claims hinge on “a bilateral expectation that he would be

1 compensated for use of the idea, [which is] the essential element of a *Desny* claim
 2 that separates it from preempted claims for the use of copyrighted material.” *Montz*
 3 *v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 977 (9th Cir. 2011) (brackets
 4 added).

5 Most recently, the Ninth Circuit rejected a claim for breach of implied contract
 6 based on a plaintiff’s alleged disclosure of a movie idea to a studio since the plaintiff
 7 failed to present sufficiently detailed allegations. In *Daniels v. Walt Disney Co.*, 958
 8 F.3d 767, 775 (9th Cir. 2020), plaintiff sued The Walt Disney Co. and its affiliate
 9 Pixar over their movie *Inside Out*, which plaintiff alleged infringed her copyright in
 10 her emotions-based characters, The Moodsters. Plaintiff also asserted a *Desny* claim
 11 for breach of implied contract. *Id.* at 770. The Ninth Circuit affirmed dismissal of
 12 the *Desny* claim, since the plaintiff

13 offers only bare allegations, stripped of relevant details that might
 14 support her claim for an implied-in-fact contract. No dates are alleged,
 15 and no details are provided. There is no basis to conclude that Disney
 16 either provided an express offer to pay for the disclosure of Daniels’s
 17 idea or that the disclosure was made “under circumstances from which
 18 it could be concluded that [Disney] voluntarily accepted the disclosure
 knowing the conditions on which it was tendered and the reasonable
 value of the work.” *Id.*

19 To survive a motion to dismiss, Daniels is required under California
 20 law to do more than plead a boiler-plate allegation, devoid of any
 21 relevant details. The district court did not err in dismissing Daniels’s
 claim for an implied-in-fact contract.

22 *Id.* at 775. See also *Novak v. Warner Bros Pictures, LLC*, 387 F. App’x 747, 750
 23 (9th Cir. 2010) (“Nor have the Producers produced evidence of disclosure of their
 24 work under conditions that would permit a jury to find an implied contract under the
 25 rule of *Desny v. Wilder*, 46 Cal.2d 715, 738–39, 299 P.2d 257 (1956).”).

26 In cases involving non-preempted claims, including those cited by Johnson,
 27 the court found circumstances showed that a third-party defendant expressly or
 28 impliedly acknowledged the plaintiff’s expectation of payment for the disclosure.

1 Johnson cites *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967-68 (9th Cir. 2004),
 2 *opinion amended on denial of reh'g*, 400 F.3d 658 (9th Cir. 2005), in which the court
 3 help the plaintiff pleaded a *Desny* claim for breach of implied contract based on his
 4 disclosure of a movie screenplay about poker to a studio who later produced a movie
 5 with similar ideas and themes without paying him. The court noted that plaintiff
 6 alleged that “the idea was submitted by Plaintiff to Defendants with the
 7 understanding and expectation, fully and clearly understood by Defendants that
 8 Plaintiffs would be reasonably compensated for its use by Defendants.” *Id.*

9 In the other case Johnson cites (and misquotes), *Landsberg v. Scrabble*
 10 *Crossword Game Players, Inc.*, 802 F.2d 1193, 1196 (9th Cir. 1986), the court,
 11 without addressing preemption, noted that a *Desny* claim survives only “[i]f
 12 disclosure occurs before it is known that compensation is a condition of its use” or
 13 else “no contract will be implied.” The Ninth Circuit affirmed the district court’s
 14 finding that defendants conditioned use of the disclosed work on payment. *Id.*

15 Likewise, in *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d at 978, the
 16 Ninth Circuit found plaintiff adequately pleaded an implied contract for his
 17 disclosure of a show idea involving the search for ghosts. In that court’s view,
 18 *Desny* claims fill “the gap that would otherwise exist between state contract law and
 19 copyright law in the entertainment industry.” *Id.* at 981. *See also Benay v. Warner*
 20 *Bros. Entertainment, Inc.*, 607 F.3d 620 (9th Cir. 2010), *overruled on other grounds*
 21 *in Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (Allowing implied
 22 contract claim based on alleged disclosure of the screenplay for *The Last Samurai*).

23 Yet when the parties did not have a relationship justifying the expectation of
 24 payment, the Ninth Circuit has rejected *Desny* claims. In *Del Madera Props. v.*
 25 *Rhodes & Gardner, Inc.*, 820 F.2d 973, 978 (9th Cir.1987), *overruled on other*
 26 *grounds by Fogerty v. Fantasy, Inc.*, 510 US 517, 114 S. Ct. 1023 (1994) the court
 27 held claims for unfair competition and unjust enrichment arising from the plaintiff’s
 28 claims for payments owed for time and effort spent creating copyrightable maps

1 were preempted since there was “no relationship between Del Madera and the
2 defendants to justify such an expectation” of payment. That rendered the state law
3 claims equivalent to the copyright claim.

4 2. *Johnson Fails to Plead the Elements of a Desny Claim and His*
5 *Prior Testimony Prevents Him from Doing So*

6 Johnson cannot establish the requisite elements of a *Desny* claim to avoid
7 preemption or dismissal under Rule 12(b)(6), because he has not pleaded and cannot
8 plead and prove Storix acknowledged his expectation of future payment. As in
9 *Daniels v. Walt Disney*, he relies merely on “bare allegations, stripped of relevant
10 details,” here that he made a promise to himself creating an implied contract.

11 This case does not involve the entertainment industry or circumstances leading
12 to an agreement by a third party to meet an author’s expectation of payment for
13 disclosure. Rather than plead circumstances supporting such an implied agreement,
14 Johnson just alleges Storix “requested, by words or conduct, that Johnson provide it
15 copyrights to the SBAdmin software. An implied promise existed between Johnson
16 and defendant, wherein defendant derived income from its use of the copyrights in
17 exchange for future payment to Johnson when his participation in Storix terminated.”
18 FAC ¶ 82. Johnson’s boilerplate allegations are even thinner than those rejected in
19 *Daniels v. Walt Disney*.

20 Johnson never asserted in the Copyright Action that any agreement (implied or
21 otherwise) existed by which he conditioned the transfer of copyright ownership, or
22 even rights of use, on some future payment obligation. To the contrary, Johnson
23 alleged, testified and argued throughout the Copyright Action that he never agreed to
24 a transfer and he limited Storix’s rights to a license revocable at his whim. See, e.g.,
25 Complaint filed in *Johnson v. Storix*, Case No. 3:14-cv-01873-H-BLM, Dkt No. 1 ¶
26 7 (“Plaintiff did not transfer ownership of the Software to Storix at any time.”);
27 Johnson’s Answer to Counterclaim filed in *Johnson v. Storix*, Case No. 3:14-cv-
28 01873-H-BLM, Dkt No. 8 at p. 7 (“...no license either express or implied in his

1 copyrights was ever granted to Counter-Claimant and that if such a license was
 2 granted, it is revokable [sic] at any time by Counter-Defendant.”). His prior outright
 3 denial of a transfer or even a license is grossly inconsistent with the notion that the
 4 transfer he now claims he agreed to also involved any clearly communicated or
 5 accepted conditions and large payments.

6 Even so, he tries to backtrack and claim such an agreement existed (with
 7 himself): “any agreement between Johnson and Storix in 2003 would have been with
 8 only himself since he was Storix’s sole owner, officer and director. FAC ¶ 13.” Opp.
 9 at p. 4. And, conveniently, only he knows the terms: “Storix’s new management
 10 cannot question an implied or oral agreement they were no party to.” *Id.* His
 11 inconsistent positions are just a convenient story for his present litigation. That also
 12 contravenes the purpose of the corporate separateness doctrine and would constitute
 13 a fraud and improper use of the corporate entity. *See, e.g., Bd. of Trustees of Mill*
 14 *Cabinet Pension Tr. Fund for N. California v. Valley Cabinet & Mfg. Co.*, 877 F.2d
 15 769, 774 (9th Cir. 1989) (“We perceive no valid distinction between forming a
 16 corporation with fraudulent intent and subsequently using a corporate shell to
 17 perpetrate a fraud. Consequently, we hold that post incorporation misuse of the
 18 corporate form in appropriate cases can satisfy the fraudulent intent element.”).

19 Johnson cannot meet the elements of a *Desny* claim and the Copyright Act
 20 preempts his claims so Common Count 1 should be dismissed with prejudice.

21 **C. Johnson Does Not Rebut the 2-Year Statute of Limitations Bar to**
 22 **His Common Count 1**

23 Storix moved to dismiss Johnson’s Common Count 1 under the applicable 2-
 24 year statute of limitations. In response, Johnson simply asserts “there is no statute of
 25 limitations in this case.” Opp. at 7. He then tries to differentiate claims for quantum
 26 valebant and quantum meruit, seeming to argue that no statute of limitations applies
 27 to the former. That is not correct. The statute of limitations is two years for “[a]n
 28 action upon a contract, obligation or liability not founded upon an instrument of

1 writing.” Code Civ. Proc. § 339. A claim for quantum valebant is “not founded
2 upon an instrument of writing,” so is subject to a two-year statute of limitations.

3 As Johnson characterizes his claim, the payment obligation arose “when his
4 participation in Storix terminated.” FAC ¶ 82. That happened when he resigned in
5 2014, as he did not restart his participation until he became a board member in
6 February 2015. *Id.* ¶ 17. Johnson does not address this issue, but only glosses over
7 it by asserting it “has no bearing since the facts throughout the FAC clearly show
8 Johnson’s continued participation by, at the very least, serving on the board and
9 litigating the shareholder derivative claims on Storix’s behalf through 2018.” Opp.
10 at 7. Courts have rejected similar attempts to avoid time bars claiming an initial
11 breach does not trigger the statute. *See Traverso v. Department of Transp.*, 87
12 Cal.App.4th 1142 1151 (2001) (“Plaintiffs cannot evade the bar of the statute by
13 skipping lightly over the first breach of duty and claiming to found their action on
14 some subsequent conduct in line with it. If this could be done ... the operation of the
15 statute of limitations could be entirely defeated.” (Quotation omitted)). Thus,
16 Johnson’s own allegations undermine the timeliness of his claim and dismissal
17 should be granted on this issue.

18 **D. Johnson Fails to Establish His Standing to Pursue a Derivative**
19 **Claim**

20 Storix explained in its motion that Johnson’s Common Count 2 for Money
21 Had and Received is a derivative claim that he lacks standing to pursue as a former
22 Storix shareholder. *See* Motion at 18. Johnson’s response addresses none of the
23 authorities cited by Storix, and merely relies on his own allegations in the FAC.
24 Johnson cannot transform a substantively derivative claim into a direct one just by
25 convenient pleading or on his beliefs of the rights he thought he had in 2011. He
26 fails to address or overcome the legal grounds of Storix’s motion, and so the motion
27 should be granted.
28

1 E. Johnson Does Not Allege Adequate Facts to Rely on Delayed
2 Discovery to Save Is Common Count 2 for Money Had and
3 Received

4 Johnson acknowledges that he needs to establish a basis to rely on delayed
5 discovery to save his Common Count 2 from the statutory time bar of Code of Civ.
6 Proc. § 338(d). He contends there are fact issues about accrual that cannot be
7 satisfied at the pleading stage, and he adequately pleaded facts to survive a motion to
8 dismiss. He is wrong.

9 Johnson does not plead specific facts about his inability to discover the claim
10 due to the supposed fraud by Storix. As for his entitlement to rely on delayed
11 discovery he vaguely asserts: “Johnson was unable to reasonably discover the money
12 owed until 2018 because Management directed Storix’s attorneys to substantially
13 interfere with his rights to financial records as a major shareholder and company
14 director. Johnson demanded the amount owed and was refused payment.” FAC ¶ 88.
15 He does not identify the documents and particular information in them that Storix
16 withheld from him or that led him to learn of the claim. He does not describe the
17 steps that he took to obtain the information in 2018 after prior efforts failed. He
18 relies on a mere boilerplate recitation of the delayed discovery rule which does not
19 satisfy his burden. See *Grisham v. Philip Morris USA, Inc.*, 40 Cal.4th 623, 638
20 (2007). Given his pleading failures, Storix’s motion should be granted.

21 III. CONCLUSION

22 For these reasons, Johnson fails to state a valid cause of action against Storix
23 and its motion should be granted in whole. And because Johnson cannot overcome
24 such failures by amendment, the motion should be granted without leave to amend.

25 DATED: September 23, 2020

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

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28 By: /s/Sean M. Sullivan

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