

No. 21-55614

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ANTHONY JOHNSON,  
*Plaintiff, Appellant,*

v.

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

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTHERN CALIFORNIA (SAN DIEGO)  
CASE NO. 3:19-cv-1185-H-BLM

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**APPELLEE'S BRIEF OF  
STORIX, INC.**

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## **CORPORATE DISCLOSURE STATEMENT**

Storix, Inc. has no parent corporation. There is no publicly held company that owns 10% or more of Storix, Inc.'s stock.

DATED: November 12, 2021

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## INTRODUCTION

For several years, Appellee Storix, Inc. and its management team have endured seemingly endless litigation and extra-judicial attacks by Appellant Anthony Johnson. Johnson has lost all of his claims against Storix and its managers in state and federal court. When Storix had to sue Johnson for breaching his fiduciary duty to the company, he lost that case, too, and judgment was entered against him on Storix's single claim for breach of fiduciary duty.

Unwilling to accept defeat, Johnson has continued to repackage and refile his claims in different courts, hoping to achieve a different result. In his more recent filings, he has also sought retribution against those he thinks have wronged him in the course of his past actions and has named state and federal judges and his opposing counsel as defendants under various baseless theories. This appeal arises from one such action and is typical of Johnson's duplicative and vindictive approach.

As it relates to Storix, Johnson's complaint in the underlying action sought to (1) litigate around the loss that Johnson suffered when he sued Storix for copyright infringement and was adjudged to have no rights to the copyrights at issue; and (2) force Storix to indemnify him pursuant to California Corporations Code §317 ("Section 317") for fees incurred in a state court action where he was found liable for breaching fiduciary duties to Storix. The district court correctly

granted Storix’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

In dismissing Johnson’s copyright-related claims for breach of contract and rescission, the district court found that those claims failed under res judicata and collateral estoppel principles in view of the final judgment in the 2014 copyright action—in which it was established that Storix “owns all rights to the copyrights to all versions of SBAdmin”—and because Johnson’s newly contrived copyright theory did not satisfy the writing requirement of 17 U.S.C. §204(a). The district court was correct, but even if this Court were to disagree, it could affirm the dismissal of Johnson’s copyright-related claims on any of several alternative grounds, including preemption of Johnson’s state law claims by the Copyright Act, application of the two-year statute of limitations, and/or Johnson’s lack of standing to sue on a copyrighted work he does not own.

As for Johnson’s indemnification claim, the district court dismissed it because there was no “favorable termination” for Johnson in the state action in which he was adjudged to have breached his fiduciary duty to Storix. Therefore, he could not satisfy the standards that California courts have established for an indemnification claim under California Section 317(d). Again, the district court was correct, but this Court could affirm on other grounds as well. Specifically, because Johnson was sued for engaging in conduct that was hostile to Storix, and

not for any acts taken in connection with the *performance of corporate acts*, he was not sued “by reason of the fact” that he was an agent and thus cannot satisfy Section 317. Moreover, it would violate the very policy behind Section 317 and yield absurd results if agents adjudged to have breached their fiduciary duties could try to parse their loss so as to claim “success” as to sub-issues within their failed defense.

Whether for the reasons set forth in the district court’s lengthy and reasoned ruling granting Storix’s motion to dismiss, or for any of the alternative grounds discussed herein, the district court’s judgment in favor of Storix may be affirmed.

Finally, Johnson’s attempt to besmirch the district court judge and reargue his motion for recusal are without merit. Neither prior rulings against him nor his vindictive lawsuit against her and other judges warrants recusal or reversal.

### **STATEMENT OF ISSUES**

1. Whether Johnson’s breach of contract and rescission claims are properly subject to dismissal under Federal Rule of Civil Procedure 12(b)(6).
2. Whether Johnson’s claim for indemnity under California Corporations Code section 317 is properly subject to dismissal under Federal Rule of Civil Procedure 12(b)(6).

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

#### A. Founding of Storix and Origins of the Parties' Dispute

Johnson founded Storix, which sells system backup software, as a sole proprietorship around 1998. He incorporated the business in 2003, was its sole shareholder until 2011. That year, after receiving a dire health diagnosis, he agreed to transfer a collective 60% majority stake in the company and operational control to several longtime employees, in exchange their continuing employment with the company. He kept 40% of the company, but resigned as an officer and director. Johnson recovered and returned to work as a Storix programmer in 2013. Yet internal strife led him to resign in 2014. He then claimed he owned the copyright to Storix's software, and threatened to sue it unless the company followed his software design and management orders.

#### B. The SBAdmin Copyright Litigation

Johnson sued Storix in July 2014 for copyright infringement for selling its software product, SBAdmin. [3-ER-444, Ex. 1 ("Copyright Action")]. Storix answered, denied his claims, and counterclaimed that it owned the SBAdmin copyrights or had a license. [3-ER-454, Ex. 2]. In December 2015, a jury rejected the infringement claims and found Storix owned all copyright to all versions of SBAdmin due to a transfer memorialized in writing upon Storix's incorporation in 2003. [3-ER-474, Ex. 3]. The jury found post-incorporation versions constituted

works-for-hire. [*Id.*]. The district court entered judgment based on the jury’s verdict, which Johnson appealed to the Ninth Circuit. [3-ER-475, Ex. 3].

In 2017, the Ninth Circuit affirmed that Storix owned the SBAdmin copyrights and remanded as to the amount of fees awarded to Storix under 17 U.S.C. § 505. *See Johnson v. Storix, Inc.*, 716 F. App’x 628 (9th Cir. 2017), *cert. denied*, 139 S.Ct. 76 (2018). On remand, the district court awarded Storix \$407,778 in attorneys’ fees plus costs and entered a second amended judgment, which the Ninth Circuit affirmed. [3-ER-476-527, Exs. 5 & 6]. *See Johnson v. Storix, Inc.*, 792 F.App’x 501 (9th Cir.), *cert. denied*, 141 S.Ct. 162, 207 L.Ed.2d 1099 (2020). Johnson failed to obtain rehearing or Supreme Court review. *Id.*

### **C. The Consolidated State Court Litigation**

Before the Copyright Action trial, Storix learned Johnson formed a new California corporation, Janstor Technology, to sell a “rebranded” version of Storix’s software. [3-ER-94]. After electing himself to Storix’s board of directors in February 2015, Johnson incorporated Janstor, reserved a website, and later reserved two “port” numbers needed to operate software like SBAdmin. [*Id.*, p. 531-532 ¶¶12-16; DktEntry: 22, Exs. 1-5].

Storix sued Johnson on one cause of action for breach of fiduciary duty and Janstor for aiding and abetting (“Janstor Action”). [3-ER-529]. Storix amended the complaint [3-ER-536], and filed a second amended complaint (“SAC”). [3-ER-

546]. Johnson continued his hostile acts towards Storix, including threatening employees and emailing customers to stop Storix from earning revenues for SBAdmin licenses. [3-ER-549 ¶¶17-18; DktEntry: 22, Ex. 5]. He hoped to starve it of money and fill the void.

Johnson crossclaimed against Storix's individual officers and directors for breaches of fiduciary duties, conspiracy and fraud. [3-ER-559]. Johnson and his co-shareholder, Robin Sassi, also filed a derivative suit on similar grounds. [3-ER-620; 4-ER-639]. The court consolidated the Janstor Action, cross-claims, the derivative case and a personal injury suit Johnson filed against the same defendants. [4-ER-884].

The consolidated state action trial commenced in early 2018. After a three-week trial, a jury found for Storix and against Johnson (Janstor defaulted) on its one cause of action finding that Johnson breached his fiduciary duty to the company and rejected each of Johnson's cross-claims. [3-ER-575]. The court agreed that Johnson breached his fiduciary duty to Storix and held he lacked standing to sue derivatively. [3-ER-581]. Sassi continued as the derivative plaintiff, but the court ruled for the defendants on all derivative claims. [3-ER-595-613].

While Johnson avoided a permanent injunction, he did so because Storix's lawsuit effectively stopped his competitive and breaching conduct. An injunction became "superfluous" given the verdict and prior orders against him, as the court

said that “[w]hile Johnson has indeed threatened to harm Storix’s business, his words and conduct, while no doubt frustrating and upsetting to Storix, do not show an ongoing course of conduct.” [3-ER-612:15-17]. Johnson sent his “most significant and provocative emails” more than two years earlier, such that his “past conduct, along with the jury’s verdict that Johnson breached his fiduciary duty of loyalty to Storix as one of its directors, does not show that Johnson will continue to seek to harm Storix’s business in the future.” [*Id.*]. As limiting his “inspection rights,” the court noted that prior orders restricting his rights “still stand, making an injunction superfluous.” [*Id.* at 612-13].

Johnson failed to overturn the jury’s verdict, and the court entered 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].

Johnson sought a new trial, but the court denied the motion given the “abundance of evidence presented in this three-week jury trial regarding all the parties’ actions in the operation and running of this business. The evidence supports that Johnson breached his fiduciary duty to Storix. The court will not disturb the jury’s finding on that claim.” [3-ER-615, Ex. 23]. The court ruled that

Storix was the “prevailing party” as against Johnson and that it pursued the action in “good faith.” [3-ER-617-619].

On December 31, 2020, the California Court of Appeal affirmed the judgment and all interim orders. [*See Storix, Inc. v. Johnson*, No. D075308 (Cal. App., filed Dec. 10, 2018); 2-ER-123; Storix SER003]. The California Supreme Court denied Johnson’s petitioned for review. [1-ER-8].

## **II. PROCEDURAL BACKGROUND**

### **A. Johnson’s New Federal Lawsuits**

While his state appeal remained pending, Johnson filed a new federal lawsuit<sup>1</sup> against Storix, the individual officers and directors, and Storix’s attorneys, Paul Tyrell and Sean Sullivan, for: (1) malicious prosecution; (2) breach of fiduciary duty; (3) conversion; (4) economic interference; (5) breach of contract; (6) rescission; and (7) indemnification. [5-ER-1074].

In his fifth claim for breach of contract and his sixth claim for rescission against Storix, Johnson asserts that Storix owes him \$2.75 million based on an oral contract that he claims governed his transfer of the SBAdmin copyright to Storix. [5-ER-1087-88 ¶¶58-61]. He seeks damages and rescission, thus resulting in his reacquisition of the SBAdmin copyrights. [5-ER-1088-89 ¶¶62-67].

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<sup>1</sup> Johnson first sued Storix’s individual managers in superior court. He did not like his judicial assignment, so dismissed and sued in federal court, adding Storix and its counsel. [5-ER-924].

In his seventh claim for indemnification, Johnson alleges that he “prevailed” in the Janstor Action because Storix won just over \$3,700 against him and he avoided an injunction. [*Id.* at 1080 ¶¶26, 27]. Thus, Johnson demands Storix indemnify him under Corporations Code section 317 for his defense costs and fees. [*Id.* at 1089].

Storix moved to dismiss Johnson’s claims given finality of the Copyright Action and on other grounds. [4-ER-723]. Storix also challenged Johnson’s allegation of an oral contract involving the supposed retransfer of the SBAdmin copyright for failing to satisfy the writing requirement under 17 U.S.C. § 204(a). [*Id.*] And, the Copyright Act preempts Johnson’s new claims, the statute of limitations bars such claims and he lacks standing to enforce such rights. [*Id.*]

As to indemnification, Storix sought dismissal since the jury and court found Johnson breached his fiduciary duties, such that he did not successfully defend the Janstor Action and cannot satisfy the statutory requirements for indemnification under section 317. Nor was he sued “by reason of the fact” that he was performing corporate duties, but rather for actions he took for personal gain or interests. [*Id.*]

#### **B. The District Court’s Dismissal Order**

The district court granted Storix’s motion to dismiss and disposed of the copyright-related contract and rescission claims and Johnson’s indemnification

claim. [1-ER-29].<sup>2</sup> The court found that Johnson’s contract and rescission claims failed under res judicata and collateral estoppel given the final judgment in the Copyright Action, and he did not meet the writing requirement of 17 U.S.C. §204(a).

As to indemnity, the court held Johnson failed to show entitlement to indemnity under section 317. A party claiming mandatory indemnification under section 317(d) “must make the same showing of a prior favorable termination required to maintain a malicious prosecution action,” which Johnson could not do. [1-ER-42-43; *Johnson v. Altamirano*, 418 F.Supp.3d 530, 549 (S.D. Cal. 2019).]

“The policy considerations behind [Section 317 is] that persons who serve the corporation in good faith should, in the absence of certain conduct (fraud, breach of fiduciary duties, etc.) be free from liability for corporate acts; indemnification encourages capable persons to perform their duties, secure in the knowledge that expenses incurred by them despite their honesty and integrity will be borne by the corporation.” *Plate v. Sun-Diamond Growers*, 225 Cal.App.3d 1115, 1122–23 (1990); *accord Wilshire-Doheny Assocs. Ltd. v. Shapiro*, 83 Cal.App.4th 1380, 1388–89 (2000).

Under California Corporations Code § 317(d), “[i]f the corporate agent accused of wrongdoing wins a judgment on the merits in defense of the action, indemnification is mandatory.” *Groth Bros. Oldsmobile v. Gallagher*, 97 Cal.App.4th 60, 73, (2002) (emphasis removed). But section 317(d), by its terms, requires “a showing that the agent has been ‘successful on the merits in defense of [the] proceeding.’ ” *Wilshire-*

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<sup>2</sup> The district court took appropriate judicial notice of the filings from the Copyright Action and the state court actions. (*Id.*, see *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007)). Storix requests, as necessary, that this Court take judicial notice of such items.

*Doheny*, 83 Cal.App.4th at 1391 (quoting Cal. Corp. Code § 317(d)). The California Court of Appeal has explained that in order for a plaintiff to recover under section 317(d), the plaintiff “must make the same showing of a prior favorable termination required to maintain a malicious prosecution action.” *Dalany*, 42 Cal.App.4th at 830.

[*Id.*]

In light of the State Action judgment against Johnson on Storix’s breach of fiduciary duty claim, the district court ruled that Johnson’s claim failed as a matter of law and dismissed it with prejudice. [*Id.*, citing *Dalany v. Am. Pac. Holding Corp.*, 42 Cal.App.4th 822, 830 (1996) (“after finding that plaintiff could not establish the favorable termination element of his malicious prosecution claim, holding that ‘his indemnity cause of action is also defective’”); *Johnson v. Altamirano*, 418 F.Supp.3d at 549.] The district court later denied Johnson’s motion for reconsideration. [2-ER-127].

After the California Court of Appeal affirmed the State Action judgment, the district court dismissed Johnson’s remaining claims [1-ER-3] and entered judgment [1-ER-2]. Johnson then filed this appeal.

## **SUMMARY OF ARGUMENT**

### **Breach of Contract and Rescission Claims**

The question of ownership of the copyrights to SBAdmin was fully and finally adjudicated and affirmed by this Court in a prior action in which it was determined that Storix owns all copyrights to all versions of SBAdmin. The

copyright-related claims for breach of contract and rescission seek to litigate claims that were raised or could have been raised in the prior Copyright Action and issues that were adjudicated therein. Accordingly, those claims are barred by claim preclusion and issue preclusion principles. The final determination that Storix owns the copyrights also means that Johnson lacks standing to pursue his claims.

Because Johnson also contended in the prior action that he had revoked any license to SBAdmin as of July 22, 2014, his claims here are also barred by the 2-year statute of limitations. Separately, Johnson's allegations of an oral agreement for the retransfer of the copyrights fail as a matter of law by admitting failure to satisfy the writing requirement under 17 U.S.C. §204(a).

### **Indemnification Claim**

There is no dispute that Johnson was adjudged in the State Action to have breached his fiduciary duty to Storix and damages were awarded. As a result, Storix prevailed on its sole claim, and Johnson cannot satisfy the requirement of a "favorable termination", as is necessary for an indemnification under Section 317(d).

Johnson also cannot satisfy Section 317 because Storix did not sue him for his performance of any corporate functions; the complained-of acts that supported the judgment against him involved series of conduct for his personal benefit, including the formation of Janstor as a vehicle to compete with Storix and efforts

to discourage customers from paying Storix. Thus, the “by reason of the fact” requirement of Section 317 cannot be satisfied.

Requiring Storix to indemnify Johnson after it successfully sued him for conduct hostile to the company and unconnected to his corporate functions would undermine the policy behind Section 317 and invite absurd results.

Last, the argument that the judge in the district court was biased and should have recused herself is based on Johnson’s dislike for prior rulings his pending action against a host of judges. Those facts do not support recusal or reversal.

## **ARGUMENT**

### **I. THIS CIRCUIT SHOULD AFFIRM THE DISTRICT COURT’S ORDER DISMISSING JOHNSON’S CLAIMS AGAINST STORIX**

#### **A. Legal Standards for Review of a Motion to Dismiss**

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiffs fails to state a claim upon which relief can be granted. *See Conservation Force v. Salazar*, 646 F.3d 1240, 1241 (9th Cir. 2011). Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” This is to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). Thus, dismissal for failure to state a claim is proper where the claim “lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendonado v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

In reviewing a Rule 12(b)(6) motion, a court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the claimant. *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). A court need not accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. It is also improper to assume the claimant “can prove facts which it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

A court may consider documents incorporated into the complaint by reference and those subject to judicial notice. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). A district court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007).

“A district court may deny a plaintiff leave to amend if it determines that ‘allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency,’ or if the plaintiff had several opportunities to amend its complaint and repeatedly failed to cure deficiencies.” *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (internal quotes and citations omitted).

Johnson asserted claims against Storix for breach of contract, rescission and indemnification. [5-ER-1074]. The district court’s dismissal of those claims under Rule 12(b)(6) are reviewed de novo. *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019); *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019); [1-ER-46-49].

**B. The Court Correctly Dismissed Johnson’s Contract and Rescission Claims Based on Claim and Issue Preclusion**

Res judicata or claim preclusion “bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.” *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). “The doctrine is

applicable whenever there is “(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties.” *Owens v. Kaiser Found.*

*Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (quoting *W. Radio Servs.*, 123 F.3d at 1192).

Collateral estoppel or issue preclusion “bars relitigation of issues adjudicated in an earlier proceeding if three requirements are met: ‘(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.’” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (quotation omitted).

Courts assess four criteria, though not “mechanistically,” to determine if two suits involve the same claim: “(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions.” *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005).

1) **The Copyright Action and Johnson’s New Suit Arise From the Same Transactional Nucleus of Facts**

The Ninth Circuit uses a “transaction test” to assess whether two suits arise from a common nucleus of operative fact. *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1026–27 (9th Cir. 2019). That test considers whether the two events are “related to the same set of facts and whether they could conveniently be tried together.” *Id.* (quotation omitted). This Circuit has “repeatedly found” the “common nucleus criterion” to be the “most important” and “outcome determinative” in assessing preclusion. *Id.* [finding common-nucleus criterion to be outcome determinative where alleged patent and copyright claims arose from same transaction, and rejecting plaintiff’s “categorical contention” that such claims “cannot ‘involve infringement of the same right’” given their protection of “distinct rights.”].

The Copyright Action involved extensive litigation of all issues and claims about the rights to the SBAdmin copyrights as between Storix and Johnson, whether based on license or ownership. Yet Johnson now asserts he had an oral contract (never before disclosed) “for future compensation for the copyright if or when [his] participation in Storix ended.” [5-ER-1076 ¶11]. He claims an obligation arose in 2018 for Storix to pay him \$2.75 million. [*Id.* at 1087-88 ¶¶59-60]. He asserts Storix breached the agreement by failing to pay him that amount

when he made a demand for it, so he can rescind the contract thus returning “Johnson’s ownership of all copyrights to SBAdmin....” [*Id.* at 1088 ¶64].

To avoid the preclusive effect of the Copyright Action, Johnson argues there is no “‘common nucleus of operational facts’ as the infringement claim” decided in the Copyright Action. [AOB at 41]. He argues that he can now sue for money he claims Storix owes him for using the SBAdmin copyrights and somehow the Copyright Action “judgment requires that Storix compensate him for ownership rights instead.” [*Id.* at 42].

The Copyright Action finally resolved any and all issues related to ownership rights to the SBAdmin copyrights, which Johnson concedes. [AOB at 42 (“Johnson is not relitigating an infringement or ownership claim and does not dispute any of the court’s prior findings.”)]. Yet he then does contest the Copyright Action judgment as he seeks to enforce rights enmeshed in the copyright ownership and non-infringement analysis, including as to a license and a retransfer of copyright ownership.

The district court properly rejected this same argument in denying Johnson’s motion for reconsideration:

Thus, Storix, not Johnson, owned those copyrights upon its formation in 2003, and Storix has continued to own those copyrights. Plaintiff cannot allege that he conferred any rights to SBAdmin during the 15 years at issue because Plaintiff did not own those rights during that period, Storix did. In sum, Plaintiff’s allegations of an

alleged oral contract between Johnson and Storix fail as a matter of law, and, thus, his claims for breach of contract, rescission, and intentional interference with contractual relations all fail as matter of law.

[2-ER-139.] Johnson still has not overcome this bar to his claims.

2) **Allowing Johnson to Pursue his new Claims Would Destroy or Impair Storix’s Rights Established in the Copyright Action**

As confirmed in the Copyright Action, Storix owns the right to sell, copy, or license SBAdmin, or to exercise any other right belonging to a copyright owner, with no obligation to pay Johnson or anyone else, and has since 2003. That determination will be undermined if Johnson’s claims are allowed.

Without meaningful explanation Johnson asserts that he could not have pursued a “demand for payment for copyright ownership in the same suit in which he claimed infringement of non-exclusive licenses.” [AOB at 42]. Johnson cites no authority for this contention. To the contrary, issues of copyright ownership and license are routinely pursued in the same action, since ownership is a necessary element of infringement and license is a defense. *See Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (addressing case in which “the gravamen of a copyright infringement suit is ownership,” and recognizing that “Copyright infringement claims have two basic elements: ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’”

Johnson's attempt at claim splitting is improper. "The fact that a copyright owner may bring successive suits for successive infringement does not mean that the copyright owner may split its claims for rights arising from the same transactional nucleus of facts." *Indigo Grp. USA, Inc. v. Polo Ralph Lauren Corp.*, No. CV-14-4657-MWF (CWX), 2014 WL 12597145, at \*5 (C.D. Cal. Aug. 27, 2014), *aff'd sub nom. Indigo Grp. USA, Inc. v. Ralph Lauren Corp.*, 690 F. App'x 945 (9th Cir. 2017).

Johnson's admission that he is pursuing payments under a non-exclusive license which he never disclosed, as well as a retransfer of ownership rights, confirms that such claims are barred by res judicata. The only way Johnson can pursue his new contract theories is by undermining the final result of the Copyright Action, which cannot be allowed. [See 2-ER-139.]

**3) Johnson's Claims here Involve an Infringement of the Same Rights and Substantially the Same Evidence as the Copyright Action**

Even though Johnson tries to distinguish his contract and rescission claim, in truth he is pursuing the same rights as in the Copyright Action and will need identical evidence.

As this Circuit has recognized, a license is a contract governed by ordinary principles of state contract law. *Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 828 n.11 (9th Cir. 2001). And license is an affirmative defense to

infringement, whether exclusive or non-exclusive. *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1051 (9th Cir. 2020).

As Johnson admits, Storix pleaded a license defense in the Copyright Action. [3-ER-454, 460]. Johnson took inconsistent and evolving positions as to whether any license existed. Throughout most of the Copyright Action, he adamantly denied that ever granting Storix any license for SBAdmin. [RJN 2 (“no license either express or implied in his copyrights was ever granted to Counter-Claimant and that if such a license was granted, it is revokable at any time”).] He moved for summary judgment, denying the existence of “any oral agreement regarding a transfer of ownership of, or license to use, Johnson’s copyrighted materials in the Original Work.” [RJN 4 at 7.] He asserted: “Storix, Inc. has not produced any evidence that Johnson received specific consideration from Storix, Inc. for an implied license at the time Johnson formed Storix, Inc. in 2003.” [*Id.* at 20.] Johnson argued “even if” a non-exclusive license existed, he “revoked it as of July 22, 2014.” [*Id.* at 21.] “There is no evidence that Johnson even discussed the subject of a license with anyone from Storix, Inc.,” and “[t]here clearly was no meeting of the minds regarding the scope of any purported license.” [*Id.* at 22.] At trial, Johnson changed his story again and stated that he *had* granted Storix an implied license, though “not consciously.” [RJN 3 at I-135-136.]

“A court must construe the license to evaluate its effect on a claim of copyright infringement.” *Oracle Am., Inc.*, 971 F.3d at 1051. The Copyright Action jury found Johnson’s infringement claim failed given the defenses and Storix prevailed on its counterclaim that it owned any and all SBAdmin copyrights upon its incorporation in 2003. [3-ER-473, Ex. 3]. The interrelatedness of such claims and defenses shows that the infringement case involved the same claims as Johnson is pursuing here.

Johnson now tries to avoid the Copyright Action judgment by arguing he agreed to a non-exclusive license with Storix *after* its formation in 2003 (when he was its sole shareholder and director). He seems to contend the Copyright Action judgment conferred ownership rights in Storix beginning in 2004. [See AOB at p. 41 (“The 2003 oral agreement between Johnson and Storix involved non-exclusive rights, and the declaration was that all exclusive and irrevocable rights (i.e. ownership) were transferred to Storix in writing in 2004.”)] Johnson misconstrues the record, contradicts his past arguments and testimony, and his new complaint which seeks a retransfer of ownership rights based on an alleged oral agreement he made with himself. Even so, the Copyright Action involved extensive evidence of the events surrounding Storix’s incorporation, its acquisition of the SBAdmin copyrights upon formation, and any supposed agreements Johnson then entered into (or not). The district court recognized this. [2-ER-139.]

Johnson does not explain why he failed to pursue a claim for payment from a non-exclusive licensee in the Copyright Action apart from his infringement claim. In fact, the parties litigated those issues extensively and Johnson lost. Storix obtained a judgment confirming its ownership of all rights to pre- and post-incorporation SBAdmin copyrights. [3-ER-473, Ex. 3]. The jury found “Storix, Inc. proved by a preponderance of the evidence that it owns all rights to the copyrights to all versions of SBAdmin.” [*Id.*]. “Johnson transferred ownership of all pre-incorporation copyrights, including SBAdmin Version 1.3, in writing from himself to Storix, Inc.” [*Id.*]. The jury’s unequivocal findings, as confirmed in the judgments affirmed by the Ninth Circuit, leave no question that all rights, whether characterized as ownership or licenses, belong to Storix as of its 2003 incorporation. [3-ER-474].

The record reveals that the claims and issues addressed in the Copyright Action share a common nucleus of operative fact with the contract-based claims here. Relitigating such matters would impair Storix’s determined rights, and involve assessing the same rights and evidence. As a result, his new claims are barred by claim preclusion.

**C. Johnson’s Contract and Rescission Claims are Barred by Issue Preclusion**

Johnson’s breach of contract and rescission claims are also barred by issue preclusion. “Issue preclusion ‘bars successive litigation of an issue of fact or

law’—such as copyright infringement—‘actually litigated and resolved in a valid court determination essential to the prior judgment....’” *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d at 1025, quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Issue preclusion applies if these three requirements are met: ““(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.”” *Reyn’s Pasta Bella*, 442 F.3d at 746.

The district court held the elements of issue preclusion exist here. Johnson does not contest that the Copyright Action led to a final judgment on the merits involving the same parties. He simply argues that his new complaint raises issues not decided in the Copyright Action. But he is wrong.

The Copyright Action resulted in a specific finding that Storix “Anthony Johnson transferred ownership of all pre-incorporation copyrights, including SBAdmin Version 1.3, in writing from himself to Storix, Inc.” [3-ER-525, 526.] He should not be allowed to relitigate the final determination of that issue now. *See Reyn’s Pasta Bella*, 442 F.3d at 746.

Johnson seeks to relitigate the issue of the terms of a license that he denied existed and now says applies to all of Storix’s past SBAdmin sales. As detailed,

both in defense to his infringement claim and in Storix's counterclaim, the parties litigated license issues. He now seeks to relitigate that issue, contending he *expressly* licensed Storix to use the copyrights to SBAdmin with a revocable transfer via an oral contract in exchange for future compensation (which he told no one about). [5-ER-1074, 1076 ¶ 11, 1087 ¶ 59, 1088 ¶ 63]. That contradicts his own testimony that any permission was "not consciously" granted. [RJN 3.]

Given the preclusive effect of the judgment in the Copyright Action, Johnson cannot establish the elements for a claim for breach of contract or rescission. *See Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011) ("existence of a contract" is an element for breach of contract); *Viterbi v. Wasserman*, 191 Cal. App. 4th 927, 935 (2011) ("A prerequisite to any claim for rescission is a contract between the parties"). Thus, the dismissal should be affirmed on these grounds.

**D. Johnson Misconstrues and Misapplies Jurisdictional Requirements to try to Avoid Preclusion**

Johnson next contends he "could not have included a state contract claim in the Copyright Suit because diversity jurisdiction was unavailable to him." [AOB at 42]. But Johnson did not need diversity jurisdiction in the Copyright Action for any "state contract claim," since the court had supplemental jurisdiction over such claims.

The Copyright Action invoked the district court’s federal question jurisdiction under the Copyright Act, Title 17 of the U.S. Code. “[T]he federal courts’ original jurisdiction over federal questions carries with it jurisdiction over state law claims that ‘derive from a common nucleus of operative fact,’ such that ‘the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.’” *City of Chicago v. Int’l College of Surgeons*, 522 U.S. 156, 164–65 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). Congress codified supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). *See, e.g., S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1091 (9th Cir. 1989) (“The state law account stated claim and federal law copyright claims derive from a common nucleus of operative fact, such that [the parties] would ordinarily be expected to try them all in one judicial proceeding.” (internal quotations omitted)).

Johnson’s argument that he lacked jurisdiction for a licensing claim related to the SBAdmin copyrights conflicts with governing law.

**E. Johnson’s Accrual Argument Lacks Merit Given Storix’s Prior Repudiation of His Ownership and Infringement Claims**

Finally, Johnson argues he could not have brought the breach of contract claim earlier because it did not “accrue until Storix’s obligation was triggered and payment was refused three years after the Copyright Suit was tried.” [AOB at 42]. Again, this assertion is incorrect.

When a defendant “plainly and expressly repudiated” a claim to copyright ownership, including as to any “right to distribute the [the copyrighted work] or collect any sums due as respect to” the copyrighted work, the claim accrues and the statute of limitations is triggered. *Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1257 (9th Cir. 2013) (brackets added).

No doubt by 2014 Storix plainly and expressly repudiated Johnson’s claims for any payments owed for SBAdmin sales, including payments tied to ownership, licensing, use, sale or distribution of the copyrights. Storix counterclaimed that “Johnson, through his words and actions, explicitly and/or implicitly granted Storix, Inc. a license to use, sell, distribute, license and create (and commercialize) derivative works from the Original [SBAdmin] Software.” [3-ER-465 ¶12 (brackets added)]. In seeking a declaration of non-infringement, Storix disputed Johnson’s ownership and infringement claims and asserted that the “license, transfer, assignment, or consent by Johnson is binding and irrevocable as against Johnson and in favor of Storix, Inc., since Johnson received valuable consideration from Storix, Inc.” [*Id.* at 468 ¶32]. Storix also sought a declaration of ownership of SBAdmin, including all versions, and that “Storix Inc. has the right to continue making derivative works which incorporate the Original [SBAdmin] Software as a result of the irrevocable license granted by Johnson.” [*Id.* at 469 ¶37]. If ever any doubt about accrual existed, Johnson resolved it by contending he “revoked any

such implied license in July 2014.” [RJN 4 at 1]. On top of the jury’s determination that Storix owned all rights to all versions of SBAdmin, it also found Johnson’s copyright claims barred by statute of limitations. [3-ER-474, Ex. 3].

The Copyright Action resolved all rights related to SBAdmin, whether for ownership, license or contract. Any claim Johnson had to payments related to sales of SBAdmin was, could and should have been pursued in the Copyright Action. His new allegations of later-arising events triggering any payment obligation are baseless.

**F. Johnson’s Contract-Based Claims Fail to Meet the Writing Requirement of 17 U.S.C. §204(a)**

Johnson next tries to avoid the preclusive effect of the Copyright Act’s writing requirement for transferring exclusive rights by asserting he seeks to enforce non-exclusive rights. Johnson misapplies the law.

Under the Copyright Act, a copyright owner may grant non-exclusive rights orally, but the transfer of exclusive rights must meet the writing requirement of 17 U.S.C. § 204. *Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 825 (9th Cir. 2001). Claims for breach of contract based on oral agreements are also barred under section 204 if they amount to exclusive claims. *See Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 774 (9th Cir. 1989) (“Section 204(a) not only bars copyright infringement actions but also breach of contract claims based on oral agreements.”); *accord Radio Television Espanola S.A. v. New World Entm’t, Ltd.*,

183 F.3d 922, 929 (9th Cir. 1999); *Time, Inc. v. Kastner*, 972 F. Supp. 236, 238 (S.D.N.Y. 1997).

Johnson's complaint alleges that when he chose to not re-elect himself to Storix's board of directors in August 2018, that "terminated Johnson's involvement in Storix and triggered Storix's obligation to pay Johnson for his copyrights." [5-ER-1081 ¶29]. He claims to have "sent Storix an invoice for \$2.75 million, a substantial discount to the actual value of the copyrights from which Storix derived over \$2 million in annual sales through the end of 2018." [*Id.*]. He now asserts that "[u]pon rescission of the contract, the parties were returned to their respective positions prior to the contract's formation, including Johnson's ownership of all copyrights to SBAdmin and Storix's grant of implied, non-exclusive copyright licenses needed to conduct its business until such time Storix's implied license was revoked in writing." [5-ER-1088 ¶ 64].

Far from just a non-exclusive license, Johnson's rescission claim, and his breach of contract claim, amount to a retransfer of ownership of the SBAdmin copyright. Since he admits any agreement supposedly underlying those claims lacked any writing to satisfy section 204, the district court correctly concluded those claims are barred. His attempt to reframe those arguments as involving claims for restitution, unjust enrichment or promissory estoppel fail for the same reasons. [AOB at 45].

Johnson plainly seeks to effectuate an oral retransfer of exclusive rights to the SBAdmin copyrights. Thus, section 204 bars his claims and the district court's dismissal should be affirmed.

## **II. ALTERNATIVE GROUNDS SUPPORT AFFIRMING DISMISSAL OF JOHNSON'S CONTRACT AND RESCISSION CLAIMS**

Because the district court dismissed Johnson's contract and rescission claims as a matter of law under the doctrines of res judicata and claim preclusion, and in view of the writing requirement under 17 U.S.C. § 204(a), it did not address additional grounds supporting dismissal. [1-ER-52, n.6]. Those other grounds provide independent reasons to affirm dismissal.

### **A. The Copyright Act Preempts Johnson's Claims for Breach of Contract and Rescission**

The Copyright Act of 1976 expressly preempts Johnson's state law claims. The act 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). Here he seeks to assert rights under section 106, so his claims are 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). The Ninth Circuit uses a two-part preemption

test: (1) whether the work at issue comes within the subject matter of copyright and (2) whether the rights granted under state law are “equivalent to any of the exclusive rights within the general scope of copyright” as set forth in the Act. *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). To avoid preemption under the second prong, “the state cause of action must protect rights which are qualitatively different from the copyright rights. [Citation] The state claim must have an ‘extra element’ which changes the nature of the action.” *Id.* at 977 (Citation omitted). *Cf. Valente–Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990) (claim for fraud under California law contains extra element of misrepresentation and is not preempted by the Copyright Act). *See Del Madera*, 820 F.2d at 976 (claims for unfair competition and unjust enrichment based on the defendants’ alleged misappropriation of a copyrighted map of a real estate development, supporting documents and time creating the map and documents were preempted as being within the subject matter of copyright and lacking an “extra element.”); *see also Kodadek v. MTV Networks, Inc.*, 152 F.3d at 1213 (claim preempted since it was “clear that [the plaintiff’s] state law unfair competition claim is based solely on rights equivalent to those protected by the federal copyright laws.” (brackets added)).

Here the Copyright Act preempts Johnson's contract and rescission claims since those involve copyrightable subject matter and rights equivalent to and addressed by the Copyright Act. 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 ¶11].

Under the first prong, SBAdmin is copyrightable and is registered with the U.S. Copyright Office. [3-ER-445 ¶ 6].

On the second prong, Johnson asserts rights equivalent to those addressed by the Copyright Act. Section 106 provides the copyright owner "has the exclusive rights to do and to authorize" the reproduction of works, the creation of derivative works, and the distribution of copyrighted work by sale, transfer, lease, rental, or lending. 17 U.S.C. §106(1)-(3). Those are the rights Johnson seeks to prohibit with his contract and rescission claims. As the district court recognized: "any assertion or allegation of an agreement between Johnson and Storix where Johnson provided certain rights to SBAdmin to Storix upon its formation and for the next 15 years fails as a matter of law. In the prior action, it was determined that Johnson transferred ownership of all copyrights, included the rights to SBAdmin, to Storix

upon its formation in 2003.” [2-ER-139.] Thus, the Copyright Act preempts his new state law claims against Storix.<sup>3</sup>

**B. The Statute of Limitations Bars Johnson’s Contract and Rescission Claims**

Despite Johnson’s mischaracterization of accrual, Johnson’s claims against Storix for breach of contract and rescission are also time-barred.

A court may dismiss a claim under Rule 12(b)(6) as being barred by the applicable statute of limitations if “the running of the statute is apparent on the face of the complaint.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2009). In this diversity case, California law provides the applicable statute of limitations. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 110 (1945). In California, the statute of limitations on an oral contract is two

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<sup>3</sup> This action is not one for implied-in-fact contracts for the disclosure of copyrighted works which require “circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as ‘implied’ or ‘implied-in-fact.’” *Daniels v. Walt Disney Co.*, 958 F.3d 767, 774 (9th Cir. 2020), quoting *Desny v. Wilder*, 46 Cal.2d 715, 738 (1956). Those claims have three requirements: (1) plaintiff created the work, (2) the work was disclosed to defendant for sale, and (3) the disclosure was made “under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Id.* (quotation omitted). “If disclosure occurs before it is known that compensation is a condition of its use, ...no contract will be implied.” *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987); *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 977 (9th Cir. 2011). Johnson cannot show Storix acknowledged an expectation of payment or a contingent disclosure. The litigation record and his own testimony refute such allegations.

years. *See* Cal. Code Civ. Proc. §339(1). The same period applies for rescission, which “begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred.” *Id.* §339(3). Copyright infringement claims accrue when ownership rights are placed in dispute and are clearly repudiated. *Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1257 (9th Cir. 2013). If a breach of contract claim is “predicated on the same events” as the copyright infringement claims, the breach of contract claims accrue too. *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d at 1026.

Johnson’s new causes of action for breach of contract and rescission accrued more than two years before suing. 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 ¶11]. Johnson alleges he returned to Storix from medical leave in 2013, but that in May 2014, he “could no longer tolerate the hostility and resigned from Storix in protest.” [*Id.*, ¶13]. Thus, his own allegations clarify that his “participation in Storix ended,” no later than May 2014. And he previously asserted he “revoked any such implied license in July 2014.” [RJN 4] Based on Johnson’s allegations and record, Storix’s obligation to “compensate” him for the SBAdmin copyright arose, if ever, in May or July 2014, yet it never paid him.

His return to Storix's board in February 2015, does not save his untimely claims, as he alleges specifically that the contract became due and owing "if or when Johnson's participation in Storix ended." *See Traverso v. Dept. of Transp.*, 87 Cal.App.4th 1142, 1151 (2001) ("Plaintiffs cannot evade the bar of the statute by skipping lightly over the first breach of duty and claiming to found their action on some subsequent conduct in line with it. If this could be done ... the operation of the statute of limitations could be entirely defeated."). His contract claim accrued if ever in 2014, but he did not sue until June 2019, making his contract and rescission claims untimely. And, of course, as detailed above the parties extensively litigated the issue of rights to SBAdmin, including license or ownership rights in the Copyright Action, thus reinforcing the accrual of such causes. In sum, Johnson's claims are barred by the applicable statute of limitations.

**C. Johnson Lacks Standing to Sue For Breach of Contract Based on a Copyrighted Work He Does Not Own**

As reflected in the judgment affirmed in the Copyright Action, Storix owns the copyright to any and all versions of SBAdmin, including derivatives. Johnson has zero ownership interest in such copyrights, and has not since Storix's incorporation in 2003. [2-ER-139.] Thus, he lacks standing to assert rights over such copyrights since then, which he is now trying to do.

"The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any

infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b). Section 106 sets forth an exhaustive list of those exclusive rights. *Id.* § 106; *Silvers v. Sony Pictures Entm't., Inc.*, 402 F.3d 881, 887 (9th Cir. 2005) (en banc). “They are the rights ‘to do and to authorize’ others to do six things with the copyrighted work: to reproduce the work, to prepare derivative works based upon the work, to distribute copies of the work, to perform the work publicly, to display the work publicly, and to record and perform the work by means of an audio transmission.” *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1002 (9th Cir. 2015) (quoting 17 U.S.C. § 106). *See DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC*, 870 F.3d 978, 983 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 1559 (2018)

After a copyright owner has fully transferred an exclusive right, only the transferee has standing to sue for that particular exclusive right. *See* 17 U.S.C. § 501(b); *Righthaven v. Hoehn*, 716 F.3d 1166, 1170 (9th Cir. 2013); *see also* 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 12.02[c] (2017).

Johnson has not owned any rights to the copyrights to SBAdmin since Storix’s incorporation in 2003. He lacks standing to assert any rights in or to the copyrighted works, including any license agreement he now seeks to enforce.

### **III. THE DISTRICT COURT CORRECTLY DISMISSED JOHNSON'S INDEMNIFICATION CLAIM**

Despite Johnson's endless pursuit of litigation, he has not prevailed on a single claim. That was true in the State Action, where he failed in his defense against Storix's single cause against him for breach of fiduciary duty. Despite (1) the judgment against him establishing Johnson's liability on Storix's sole cause of action against him for breach of fiduciary duty [3-ER-595; 3-ER-575; RJN 1], (2) the court's determination that Johnson lacked standing to pursue his derivative claims [3-ER-581], and (3) the state court's determination that Storix, not Johnson, was the prevailing party [3-ER-618], Johnson claims that Storix must indemnify him for the expenses he incurred for what he calls his "successful" defense. [5-ER-1074, 1081 ¶¶30, 1089 ¶¶69-70.]

The district court granted Storix's motion to dismiss Johnson's indemnification claim since he was found liable for breaching his fiduciary duty to Storix so cannot establish that a favorable termination of the State Action, rendering his indemnification claim defective as a matter of law. *Johnson v. Altamirano*, 418 F.Supp.3d at 549. The district court had proper grounds for dismissal, but could have relied on a number of other reasons too.

**A. The District Court Correctly Determined That Johnson Could Not Establish He Obtained a Favorable Outcome**

Section 317(d) states: “To the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in subdivision (b) or (c) or in defense of any claim, issue, or matter therein, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith.” Corp. Code §317(d). Section 317(d) requires “a showing that the agent has been ‘successful on the merits in defense of [the] proceeding.’” *Wilshire-Doheny Assocs. Ltd. v. Shapiro*, 83 Cal.App.4th 1380, 1391 (2000) (quoting Corp. Code § 317(d)). California courts have explained that in order for a plaintiff to recover under Section 317(d), the plaintiff “must make the same showing of a prior favorable termination required to maintain a malicious prosecution action.” *Dalany v. Am. Pac. Holding Corp.*, 42 Cal.App.4th at 830.

Storix asserted a single cause of action for breach of fiduciary duty against Johnson in the State Action. [3-ER-438, Exs. 8, 9, 11.] At trial the jury returned a verdict finding that “Anthony Johnson breach[ed] his duty of loyalty by knowingly acting against Storix, Inc.’s interests while serving on the Board of Directors of Storix, Inc.” [3-ER-575.] The jury found Johnson’ breach of fiduciary duty harmed Storix, and awarded damages against him. [*Id.*] The state court entered judgment: “[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.’s complaint for breach of fiduciary duty.” [3-ER-595.] The trial court

also deemed Storix the “prevailing party” and awarded it costs, while expressly finding that Storix pursued its action in “good faith.” [3-ER-617-619.] The California Court of Appeal affirmed that judgment. [RJN 1.]

Johnson thus cannot establish that he achieved a favorable termination in the State Action. Faced with that impossibility, Johnson tries to recharacterize and parse the State Action to misleadingly portray himself as the victor, alleging that he “successfully defended Storix’s primary claim representing 99.7% of all monetary relief and all eleven (11) claims for injunctive relief demanded by Storix.” [5-ER-1089 ¶69.] He also tries to portray himself as the victor in his malicious prosecution claim against the individual appellees, where he alleges that Storix’s claim against him in the State Action was “pursued to a legal termination on its merits in Johnson’s favor.” [5-ER-1083-84 at ¶¶37-43.]

The district court, given the judicially noticeable history that belied Johnson’s claim of victory, dismissed the indemnification claim since he could not, as a matter of law, show a favorable termination. [1-ER-41-43; *Johnson v. Altamirano*, 418 F.Supp.3d at 549.]

“The policy considerations behind [Section 317 is] that persons who serve the corporation in good faith should, in the absence of certain conduct (fraud, breach of fiduciary duties, etc.) be free from liability for corporate acts; indemnification encourages capable persons to perform their duties, secure in the knowledge that expenses incurred by them despite their honesty and integrity will be borne by the corporation.” *Plate v. Sun-Diamond Growers*, 225 Cal. App. 3d 1115,

1122–23 (1990); *accord Wilshire-Doheny Assocs. Ltd. v. Shapiro*, 83 Cal. App. 4th 1380, 1388–89 (2000).

Under California Corporations Code § 317(d), “[i]f the corporate agent accused of wrongdoing wins a judgment on the merits in defense of the action, indemnification is mandatory.” *Groth Bros. Oldsmobile v. Gallagher*, 97 Cal. App. 4th 60, 73, (2002) (emphasis removed). But section 317(d), by its terms, requires “a showing that the agent has been ‘successful on the merits in defense of [the] proceeding.’ ” *Wilshire-Doheny*, 83 Cal. App. 4th at 1391 (quoting Cal. Corp. Code § 317(d)). The California Court of Appeal has explained that in order for a plaintiff to recover under section 317(d), the plaintiff “must make the same showing of a prior favorable termination required to maintain a malicious prosecution action.” *Dalany*, 42 Cal. App. 4th at 830.

[*Id.*]

In light of the State Action judgment against Johnson for breach of fiduciary duty, the district court found his claim defective as a matter of law and dismissed it with prejudice. [*Id.*].

**B. Johnson Was Not Sued “By Reason of the Fact” that He Was an Agent of the Corporation.**

The indemnification claim fails for another reason: Johnson was not sued “by reason of the fact” that he was an agent of the corporation. “Section 317 indemnification is founded on policy considerations “that persons who serve the corporation in good faith should, in the absence of certain conduct (fraud, *breach of fiduciary duties*, etc.) be free from liability *for corporate acts*; indemnification encourages capable persons to *perform their duties*, secure in the knowledge that expenses incurred by them despite their honesty and integrity will be borne by the

corporation.” *Wilshire-Doheny Assocs. Ltd*, 83 Cal.App.4th at 1388–89 (citations omitted; emphasis added). Consistent with that policy, to be eligible for indemnification under Section 317, the person seeking indemnification must have been sued “by reason of the fact” that he was performing his corporate duties (as a director, officer, employee, or other agent). Corp. Code § 317(b), (c).

“Section 317 is an indemnity statute, not an attorney fee statute. The Legislature did not provide therein for an award of attorney fees whenever an agent is successful in litigation with a corporate principal. Rather, indemnification is limited to actions in which a person is involved ‘by reason of the fact that the person is or was an agent of the corporation.’” *Channel Lumber Co. v. Porter Simon*, 78 Cal.App.4th 1222, 1230 (2000).

“In other words, the conduct of the agent which gives rise to the claim against him must have been performed in connection with his corporate functions and not with respect to purely personal matters.” *Plate v. Sun-Diamond Growers*, 225 Cal.App.3d 1115, 1123 (1990) (citation omitted). The “by reason of the fact” prerequisite is not met “[w]here *personal motives*, not the corporate good, are predominant in a transaction giving rise to an action.” *Id.* (emphasis added). For example, “[i]t would ... appear unlikely that an officer could properly claim that he was entitled to indemnification as the result of litigation brought [against him] to recover short-swing profits or profits from trading in the stock of his corporation

on the basis of inside information....” *Id.* (citation omitted); *see also Allergia, Inc. v. Bouboulis*, 229 F.Supp.3d 1150, 1159-1160 (S.D. Cal. 2017) (allegations of complaint revealed corporate officer was not sued “by reason of the fact” that he was an agent and/or officer inasmuch as his alleged filing of secret and competitive patent applications demonstrated a motive to retain sole ownership in those applications; “the Court cannot discern how any of these alleged actions benefit Plaintiff in any way or were performed by Defendant in furtherance of his corporate functions.”)

Section 317 is intended not only to afford reasonable protection to corporate agents, but to protect shareholders by restricting indemnity to situations in which alleged liability for an individual arises due to the person’s actions as an agent of a corporation, i.e., based upon acts or omissions in which, under general principles of agency law, the person was charged with acting for and in the place of the corporation. *Channel Lumber Co.*, 78 Cal.App.4th at 1231; *see Wilshire-Doheny Assocs. Ltd.*, 83 Cal.App.4th at 1389 (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 matters,” and “[t]he agent must have been acting to promote the corporate good, not personal profit or interests.” (Quotes omitted).)

While Storix based its claims against Johnson in the State Action on a breach of the duty he *owed* as a director, the claims did not arise out of actions he *took* as a director. To the contrary—he committed the tortious acts for his own personal gain. The breach of fiduciary duty claim Storix made (and won) against Johnson arose from his activities outside of his role as a Storix director, namely pursuing a competitive venture against Storix and seeking to undermine its success, all for his personal interests. [*See*, e.g., 3-ER-546 ¶1.]

Johnson’s own allegations and arguments eliminate any dispute that he was sued for actions taken for personal gain and not for his duties as a director. For example, in his complaint in the district court, Johnson emphasizes that Storix sued him for trying to establishing a company to compete with Storix:

The complaint [by Storix in the State Action] alleged a single cause of action – that Johnson, as a Storix director, breached a fiduciary duty by failing to inform the board of his intent to start a competing business in California.

[5-ER-1078 ¶18.]

During the 3 ½ years litigating the Direct Suit, all Defendants continued to assert that Johnson was operating a “secret” business in California and was actively marketing Storix’s proprietary software as a competing product.

[5-ER-1079 ¶24.]

Similarly, in this appeal Johnson repeatedly states that the State Action was based on his intent and efforts to operate a business in competition with Storix.

For example:

...Storix filed a direct lawsuit against Johnson claiming he breached a fiduciary duty by failing to inform the board of his intent to operate a competing business in California.

[AOB at 5.]

In February 2018, a jury rejected Storix's entire \$1.25 million claim against Johnson in the Direct Suit for "unjust enrichment" and "unfair head start" for allegedly intending to compete..."

[*Id.* at 7.]

The only cause of action against Johnson in the three Direct Suit complaints involved his alleged *intent* to compete....

[*Id.* at 18 (emphasis in original).]

Defendants... maintained the lawsuit for three years while asserting only that Johnson *intended* to compete....

[*Id.* at 26 (emphasis in original).]

...the Direct Suit alleged that Johnson breached a fiduciary duty by intending to "compete directly with Storix" while serving "[a]s a current director of Storix."

[*Id.* at 32, citing 3-ER-539-540 ¶¶16, 20.]

Storix does not adopt Johnson's version of events and outcomes of prior litigation; nonetheless, taking them at face value, it is clear that Storix sued Johnson not for acts taken to fulfill his duties as a Storix director, but for taking

steps to compete with Storix for his personal interests. As such, he was not sued “by reason of the fact” that he was a director, the State Action is not a proceeding referred to in section 317(b) or (c), and he is not entitled to indemnification under section 317(d).

Despite acknowledging Storix’s position that he was not sued “by reason of the fact” that he was an agent, Johnson’s opening brief does not meaningfully address that argument, stating only that if he was not a director, he would not have been sued. (AOB at 32.) The authorities discussed above refute that argument, as the party seeking indemnification “must establish, however, their agency, i.e., that the alleged acts, for which they were made parties to the lawsuit, were “performed in connection with [Johnson’s] corporate functions and not with respect to purely personal matters.” *Wilshire-Doheny Assocs. Ltd*, 83 Cal. App. 4th at 1394, *quoting Plate, supra*, 225 Cal.App.3d at 1123 (citations omitted in original; brackets added). The mere fact that Storix sued Johnson for breaching duties he owed it as a director does not satisfy the “by reason of the fact” test under California law. *See id.*; *see also Allergia, Inc., supra*, 229 F.Supp.3d 1159-1160 (where corporate officer sued for failing to disclose his filing of a secret competing patent application, court “declines to conclude that the core of the allegations ... were in

furtherance of his corporate functions or the corporate good.”<sup>4</sup>). As such, he is not entitled to indemnification.

**C. Johnson Failed to Timely Seek an Indemnification Determination From the Court in the State Action**

Being ineligible for mandatory indemnification under Section 317(d), Johnson’s sole judicial recourse was to seek an order *from the state court in which the State Court Action was pending* determining that indemnification was “proper in the circumstances because the agent has met the applicable standard of conduct set forth in subdivision (b) or (c).” *See* Corp. Code § 317(e); *see also* subd. (c) (prohibiting indemnification “unless and only to the extent that *the court in which the proceeding is or was pending* shall determine...the person is fairly and reasonably entitled to indemnity for expenses....”).

(e) Except as provided in subdivision (d), any indemnification under this section shall be made by the corporation *only if authorized in the specific case, upon a determination that indemnification of the agent is proper in the circumstances* because the agent has met the applicable standard of conduct set forth in subdivision (b) or (c), *by any of the following*:

- (1) A majority vote of a quorum consisting of directors who are not parties to such proceeding.
- (2) If such a quorum of directors is not obtainable, by independent legal counsel in a written opinion.

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<sup>4</sup> The court in *Allergia, Inc.*, noted that Delaware courts employ a more liberal standard than California for the “by reason of the fact” indemnification standard. 229 F.Supp.3d 1158, n.6 (declining to adopt Delaware’s more liberal standards in the face of available guidance from California courts).

(3) Approval of the shareholders (Section 153), with the shares owned by the person to be indemnified not being entitled to vote thereon.

(4) *The court in which the proceeding is or was pending* upon application made by the corporation or the agent or the attorney or other person rendering services in connection with the defense, whether or not the application by the agent, attorney or other person is opposed by the corporation.

Corp. Code § 317(e), emphasis added.<sup>5</sup>

There is nothing in Section 317(e) that allows the district court or this court to make such a determination. Johnson never brought that motion in the State Action, and that case is now final since Johnson exhausted his appellate rights.

**D. Requiring Indemnification Would Violate Public Policy and Lead to Absurd Results**

As noted, California courts interpreting Section 317(d) have held that a Plaintiff seeking mandatory indemnification under that section “must make the same showing of a prior favorable termination required to maintain a malicious prosecution action.” *Dalany*, 42 Cal.App.4th at 830. That is consistent with the policy considerations behind Section 317, which is that persons who serve the corporation in good faith should, in the absence of certain conduct (fraud, breach of fiduciary duties, etc.) be free from liability for corporate acts (*Plate, supra*, 225 Cal.App.3d at 1122-23; *Wilshire-Doheney Assocs. Ltd., supra*, 83 Cal.App.4th at

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<sup>5</sup> The standards include that “the person acted in good faith, in a manner the person believed to be in the best interests of the corporation and its shareholders.” Corp. Code § 317(c).

1388-89) and the intent of Section 317, which is not just to afford reasonable protection to corporate agents, but also to protect shareholders (see *Channel Lumber, supra*, 78 Cal.App.4th at 1231).

Johnson argues that no showing of favorable termination is required and that he is entitled to indemnification merely by declaring “success” on certain sub-issues within the defeat he suffered on Storix’s sole claim for breach of fiduciary duty. Absurdity would abound under Johnson’s interpretation.

Accepting Johnson’s proposition would mean that every “agent” ever sued by a corporate principal could claim victory and entitlement to indemnity for “winning” inconsequential issues throughout the case, or upon a finding of lesser damages than were sought, even after losing on the merits of a claim by the company and even if found to have breached fiduciary duties to the company. Like Johnson, those agents could argue that their lack of success on the actual claims and even an adjudication of disloyalty should be ignored. Rather, they will demand scrutiny of their litigation loss to parse out any level of “success,” then entirely disregard any bad faith, fraud, breaches or other despicable conduct they committed. Then, having artificially manufactured a “success” from within the wreckage of their failed defense of the actual claims in the litigation, they will demand indemnification from the company that they harmed. For example, a

losing defendant might point to a mixed ruling on a discovery motion to claim indemnification for winning an “issue.”

This case demonstrates such an absurd result. Johnson did not prevail on a single claim in the State Action, and he has never prevailed on any claim in any of his multiple actions. Thus, Johnson has never been “successful on the merits.” Yet, he has scrutinized and parsed his failed defense against Storix’s actual claim to manufacture an artificial “success” which he measures by a smaller damages award and denial of an injunction remedy that the State Court found to be unnecessary. Those are not the types of success contemplated by Section 317, and he is not the type of litigant the legislature designed the code to protect.

The above-discussed “favorable termination” requirement articulated by California courts and cited by the court below is consistent with the policies behind indemnification of corporate agents and avoids absurd results. Johnson’s interpretation would encourage every losing corporate agent to demand indemnity for meaningless “successes” within their litigation losses, even after being held liable for breaching their fiduciary duties or otherwise taken actions hostile to their corporate principals. Such a result cannot be tolerated.

**E. Johnson’s Conclusory Reference to Storix’s Bylaws Does Not Change the Outcome**

Without any articulation, Johnson asserts that he alleged entitlement to indemnification because his complaint refers to Storix’s bylaws. Johnson’s entire argument is one-paragraph:

Furthermore, the complaint states that “Storix was required to reimburse Johnson ‘for any claim, issue or matter’ within 90 days pursuant to California Corp. Code §317(d) and Storix's new bylaws.” (5-ER-1081 ¶30, underline added.) A corporation’s bylaws cannot impair rights granted by statute, but it can expand them. *See* Corp. Code §317(g). Even ignoring the California indemnification statute, the undisputed facts of the complaint show that Storix is required by its own bylaws to indemnify Johnson. There is no authority to support the court’s finding that any indemnification requires the successful defense of an entire lawsuit.

[AOB at 33-34.]

Johnson’s argument mischaracterizes his own allegations and relies on incomplete and misleading citation to Corp. Code §317(g).

**1) The Complaint’s Conclusory and Factually-Devoid References to the Bylaws Are Properly Disregarded**

The complaint refers to Storix’s bylaws only twice in connection with his indemnification claim. The first is at paragraph 30, which alleges that the bylaws were mentioned in Johnson’s September 2018 written demand for indemnification, alleging that “Johnson noted that Storix was required to reimburse Johnson ‘for any claim, issue or matter’ within 90 days pursuant to California Corp. Code

§ 317(d) and Storix’s new bylaws.” [5-ER-1081 ¶30.] Second, he makes a conclusory allegation that he “is entitled to indemnification by Storix, according to California Corp. Code § 317 and Storix’s bylaws, for all expenses incurred in connection with his successful defense of any issues, claims or matters in the Direct Suit.” [*Id.* ¶69.]

These allegations do not support Johnson’s contention on appeal that “the undisputed facts of the complaint show that Storix is required by its own bylaws to indemnify Johnson.” [AOB at 34.] In fact, the two references to the bylaws contain no facts and are bald conclusions which must be disregarded for purposes of a motion to dismiss. *See Iqbal, supra*, 556 U.S. at 678. Because the complaint does not contain any factual allegations supporting indemnification under Storix’s bylaws, Johnson’s argument regarding the bylaws is unavailing.

**2) Corporations Code §317(g) Includes Restrictions that Preclude Indemnification Here**

Johnson cites Corporations Code §317(g) as allowing a corporation’s bylaws to expand rights granted by statute. [AOB at 34 (“A corporation’s bylaws cannot impair rights granted by statute, but it can expand them. *See* Corp. Code §317(g).”).] Although subdivision (g) does allow a corporation’s organizational documents to provide for additional indemnification, that subdivision contains significant limitations that would preclude indemnification here.

First, Section 317(g) does not directly authorize a corporation's bylaws to expand indemnification for breaches of duty to the corporation. Rather, its reference to "other rights...under any bylaw" is in a sentence that makes it clear that it is referring to indemnification for "acts, omissions, or transactions while acting in the capacity of, or while serving as, a director or officer of the corporation *but not involving breach of duty to the corporation and its shareholders.*" Corp. Code §317(g)(emphasis added).

Second, to the extent that section 317(g) recognizes that a corporation may expand indemnification via provisions in its articles or bylaws, it expressly states that such provisions are subject to "the limitations required by, paragraph (11) of subdivision (a) of [Corporations Code] Section 204...." *Id.*

Corporations Code section 204(a)(11) states that while a provision in a corporation's articles may authorize "indemnification of agents ... in excess of that expressly permitted by Section 317 for breach of duty to the corporation" it also provides the following important limitation: "provided, however, that the provision may not provide for indemnification of any agent for any acts or omissions or transactions from which a director may not be relieved of liability as set forth in the exception to paragraph (10) or as to circumstances in which indemnity is expressly prohibited by Section 317." (Corp. Code §204(a)(11).) The "exception to

paragraph (10)” is in the following description of what may be included in the articles of incorporation, and what must not:

(10) Provisions eliminating or limiting the personal liability of a director for monetary damages in an action brought by or in the right of the corporation for breach of a director’s duties to the corporation and its shareholders, as set forth in Section 309, *provided, however*, that (A) such a provision *may not eliminate or limit the liability of directors* (i) for *acts or omissions that involve intentional misconduct* or a knowing and culpable violation of law, (ii) for *acts or omissions that a director believes to be contrary to the best interests of the corporation* or its shareholders or that *involve the absence of good faith on the part of the director*, (iii) for any transaction from which a director derived an improper personal benefit, (iv) for acts or omissions that show a *reckless disregard for the director’s duty to the corporation* or its shareholders in circumstances in which the director was aware, or should have been aware, in the ordinary course of performing a director’s duties, of a risk of serious injury to the corporation or its shareholders....

Corp. Code §204(a)(10)(emphasis added).

Thus, while section 317(g), allows a corporation to provide additional indemnification to directors and officers, it and Corporations Code section 204 subd. (a)(10) and (11), “impose a good faith requirement where such additional indemnification rights are provided in the articles of incorporation.” *Wilshire-Doheny Assocs. Ltd.*, 83 Cal.App.4th at 1397. The statutory restrictions of Corporations Code section 204, coupled with the jury verdict and judgment against Johnson for breach of his fiduciary duties to Storix, means that any language in

Storix's articles purporting to indemnify him would, to that extent, be invalid pursuant to Corporations Code section 204(a).

Similarly, because Corporations Code section 204(a)(11) prohibits a corporation's articles from providing indemnification "as to circumstances in which indemnity is expressly prohibited by Section 317," the proscriptions of Section 317 discussed above apply equally to the bylaws as well.

Because Johnson's complaint does not allege facts supporting a claim for indemnification under Storix's bylaws, and because the applicable statutes would not allow Storix's governing documents to provide indemnification under the facts of this matter in any event, there is no merit to his undeveloped argument regarding Storix's bylaws.

#### **IV. THE DISTRICT COURT CORRECTLY DENIED JOHNSON'S MOTION FOR RECONSIDERATION**

##### **A. Legal Standards for Review of Motion for Reconsideration**

Johnson moved for reconsideration of the order granting Storix's motion to dismiss. [2-ER-177.] The district court denied the motion [2-ER-127], which order he has not challenged on appeal. Nonetheless, although not clear, Johnson appears to challenge the court's order confirming that his claims for breach of contract, rescission and indemnity fail as a matter of law. (AOB at 23 [Johnson complains that the district court "raised additional affirmative defenses based on the state appeal."].)

If Johnson is challenging the district court's denial of a motion for reconsideration, this Court reviews an order denying a motion for reconsideration for abuse of discretion. *See Maraziti v. Thorpe*, 52 F.3d 252, 253 (9th Cir. 1995). As addressed below, the district court acted well within its discretion in denying his motion for reconsideration.

**B. The District Court Acted Within Its Discretion in Denying Johnson's Motion for Reconsideration**

Johnson requested that the district court reconsider its dismissal of his breach of contract, rescission and indemnity claims against Storix. [2-ER-186-192.] According to Johnson, the court erred in finding his indemnity claim required a finding of "favorable termination of an entire lawsuit" and that res judicata did not bar his contract and rescission claims. [*Id.*] The district court disagreed and affirmed its conclusion that "Plaintiff's allegations of an oral contract between Storix and Johnson for the transfer of the copyrights to SBAdmin fail as a matter of law under 17 U.S.C. § 204(a)." [2-ER-138.] It also affirmed that "Plaintiff's allegations of an oral contract between Storix and Johnson for the transfer of the copyrights to SBAdmin are barred under the doctrines of claim preclusion and issue preclusion in light of the prior judgment that was entered in" the Copyright Action. [*Id.*] Specifically, the district court recognized that as a result of the final judgment in the Copyright Action,

“Storix, not Johnson, owned those copyrights upon its formation in 2003, and Storix has continued to own those copyrights. Plaintiff cannot allege that he conferred any rights to SBAdmin during the 15 years at issue because Plaintiff did not own those rights during that period, Storix did. In sum, Plaintiff’s allegations of an alleged oral contract between Johnson and Storix fail as a matter of law, and, thus, his claims for breach of contract, rescission, and intentional interference with contractual relations all fail as matter of law.”

[2-ER-139.] And, the district court explained that “because Plaintiff’s claim for malicious prosecution fails as matter of law, his claim for indemnification also fails as a matter of law.” [*Id.* at 137, *citing Dalany*, 42 Cal.App.4th at 830.]

Johnson offers no argument or authority supporting his request for reconsideration or that the court abused discretion in denying his motion.

**V. THERE IS NO MERIT TO APPELLANT’S ARGUMENTS REGARDING RECUSAL OR BIAS**

Johnson’s final argument is that the district court judge is biased and should have recused herself under 28 U.S.C. §144 or 28 U.S.C. §455, based on rulings in the Copyright Action over which she presided and statements made during argument or deliberations. Johnson’s arguments echo the baseless lawsuits he has filed against state and federal judges that have ruled against him and the lawyers who have opposed him.<sup>6</sup>

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<sup>6</sup> Johnson sued his own at the Mintz Levin firm after they ceased representing him in various actions. *See Johnson v. Skale, et al.*, Case No. 37-2018-00020890-CU-PN-CTL(Cal. Sup. Ct. San Diego Cty.)

Such accusations are symptomatic of Johnson's belief that he is not possibly responsible for his repeated losses, and that the blame must lie with the judges and lawyers that he perceives to conspire against him. Such claims entirely lack of merit.

Courts employ "an objective test for determining whether recusal is required: 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010), quoting *Clemens v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005). There are "several factors that are ordinarily insufficient to require recusal including the following: [T]he mere fact that a judge has previously expressed ... a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; [ ] prior rulings in the proceeding, or another proceeding, solely because they were adverse; [ ] mere familiarity with the defendant(s), or the type of charge, or kind of defense presented." *Id.*, citing *Clemens*, 428 F.3d at 1178-79.

Legions of cases have rejected the notion that an unsuccessful litigant can force a judge to recuse because of dissatisfaction with prior proceedings. In *United States v. Johnson*, the Ninth Circuit rejected the contention that prior adverse rulings, including sanctions, warranted recusal:

Judge Alsup's dismissal of the defendants' prior civil case, his order of sanctions against their attorney, his award of costs and fees to the civil defendants, and his referral of the matter to the U.S. Attorney's Office were judicial actions that will not serve as bases for recusal absent unusual circumstances not present here. *Liteky*, 510 U.S. at 555, 114 S.Ct. 1147. Adverse findings do not equate to bias. Nothing Judge Alsup did was outside of his official duties or even shown to be erroneous in any way. Further, the defendants' civil attorney's declaration filed under seal in their civil case did not constitute an extrajudicial source potentially prejudicing Judge Alsup; it was an event occurring in the course of prior proceedings. *Id.* It was not an abuse of discretion for Judge Ilston to conclude that Judge Alsup's prior rulings did not display a 'deep-seated favoritism or antagonism that would make fair judgment impossible,' *id.*, or suggest that 'his impartiality might reasonably be questioned,' 28 U.S.C. § 455(a).

610 F.3d 1138, 1148 (9th Cir. 2010).

Even if a judge becomes aware of extrajudicial information, recusal is not mandated automatically even if the information relates to the case at hand. This court affirmed a district court order finding that a magistrate did not need to recuse despite reading a *Fresno Bee* article that addressed the defendant's alleged illegal base jumping conduct. *United States v. Carey*, 929 F.3d 1092, 1105 (9th Cir. 2019). "In our modern, interconnected, endlessly broadcast world, complete blinders are impracticable, as a reasonable person would surely conclude. Moreover, courts have regularly held that outside knowledge does not on its own prejudice judicial proceedings." *Id.*

Here, Johnson is simply unhappy with past rulings of the court, and thinks he may find a more sympathetic judge if his case is reassigned. He argues that “Judge Huff’s animosity toward Johnson was well-documented prior to this case. Johnson tried to prevent any further due process violations but must now ask the Court to review the case transfer and denial of disqualification in light of Judge Huff’s actions in this case as set forth above.” [AOB ay 49]. That is not the standard for granting recusal, and he merely recounts grievances he has with Judge Huff’s decisions. [See, e.g, AOB at 53 (“Judge Huff repeatedly ignored relevant facts and issues that weighed against awarding fees in the Copyright Case to the same attorneys now being sued for malicious prosecution.” (emphasis original).)]

He simply does not demonstrate an objective basis to conclude the existence of wrongful bias. *Liteky v. United States*, 510 U.S. 540, 554–56 (1994) [A judge’s questioning during oral arguments, and a judge’s “expressions of impatience, dissatisfaction, annoyance, and even anger” do not typically warrant recusal.]; *United States v. Hudson*, 701 F. App’x 603, 605 (9th Cir. 2017)[“Although, here, the proceedings below were often tense and antagonistic, the judge’s actions were insufficient to require recusal.”]. Johnson has not established any bias on the part of Judge Huff, she was not required to recuse herself, and Johnson must not be allowed to judge-shop by filing frivolous actions against every judge that rules against him.

## CONCLUSION

Johnson fails to show the district court erred in dismissing his claims for breach of contract, rescission or indemnification. Not only did the court rightly decide that each of those claims should be dismissed, but it had additional grounds available to it to reach such results. For these reasons, the decision of the district court dismissing claims against Storix with prejudice should be affirmed.

DATED: November 12, 2021

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

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FOR THE NINTH CIRCUIT

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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 12, 2021.

**1. APPELLEE'S BRIEF OF STORIX, INC.;**

**2. APPELLEE'S EXCERPT OF THE RECORD, VOL. 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 12, 2021, at San Diego, California.

By: /s/ Sean M. Sullivan  
Sean M. Sullivan  
Email: sean.sullivan@procopio.com