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Pro Se

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

v.

MANUEL ALTAMIRANO, an individual,
RICHARD TURNER, an individual,
DAVID KINNEY, an individual,
DAVID HUFFMAN, an individual,
PAUL TYRELL, an individual,
SEAN SULLIVAN, an individual,
STORIX, INC,. a California Corporation,
and DOES 1-5, inclusive,

Defendants.

Case No. 3:19-cv-1185-H-BLM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER

Telephonic Appearance

Courtroom: 15A (Carter/Keep)
Judge: Hon. Marilyn L. Huff

Hearing Date: January 21, 2019
Hearing Time: 10:30 AM
Complaint Filed: June 24, 2019
Trial Date: Not Set

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I. INTRODUCTION

Pursuant to Fed.R.Civ.P. Rules 59(e) and 60(b)(6), Plaintiff Anthony Johnson ("Johnson") respectfully requests that the Court reconsider its December 2, 2019 Orders Granting in Part/Denying in Part defendants' Motions to Dismiss and Anti-SLAPP Motions to Strike (ECF No. 73, "Order") .

The Order dismisses all claims against defendants Storix, Inc. ("Storix"), Paul Tyrell and Sean Sullivan ("Attorney Defendants") with prejudice, and dismisses all claims against defendants Manuel Altamirano, Richard Turner, David Kinney and David Huffman ("Partner Defendants") *with prejudice* except a claim of breach of fiduciary duty and conversion. However, the Court found against Partner Defendants on those two claims *without prejudice*, instructing them to re-raise the same affirmative defense after termination of a California state appeal. At the same time, the Court denied Johnson's motion to stay the malicious prosecution claim pending the same appeal and dismissed the claim.

The Court failed to address most of Johnson's facts, arguments and authorities contrary to its conclusions of law, and dismissed many of Johnson's claims based on arguments raised *sue sponte* without a hearing, thus allowing Johnson no opportunity to argue prior to this motion. Defendants' motions were poorly pled and their arguments untenable and unsupported by authority. The Court essentially argued defendants' motions in Order that raised numerous arguments *sua sponte* and made no reference to Johnson's well established arguments when dismissing his claims with prejudice, without a hearing, and with no opportunity to argue or amend. There is no reason attorneys representing themselves and other defendants should be held to a much lower legal standards than a self-represented plaintiff.

Johnson respectfully requests reconsideration of the Order because it (1) contains manifest errors of law; (2) dismisses claims based on arguments not raised by the defendants; and (3) failed to acknowledge arguments and authorities in Johnson's

opposition contrary to its legal conclusions. Unless the Court allows the malicious prosecution claim to proceed, Johnson also requests reconsideration of the Stay Order.

II. AUTHORITY

Fed.R.Civ.P. 60(b) states, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for … (6) any other reason that justifies relief." "[T]he language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266 (1949). "Generally, courts will reconsider a decision if a party can show (1) new evidence, (2) an intervening change in the law, or (3) clear error in the court's prior decision resulting in a manifest injustice." *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2013).

"A district court may reconsider and revise a previous interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of controlling law." *Hydranautics v. FilmTec Corp.*, 306 F. Supp. 2d 958, 968 (S.D. Cal. 2003). "However, a court should generally leave a previous decision undisturbed absent a showing that it either represented clear error or would work a manifest injustice." *Id.*; citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Ultimately, however, the decision on a motion for reconsideration lies in the Court's sound discretion. *Kona Enter. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

III. ARGUMENT

A. Clear Errors of Law Appear in the Order Dismissing Johnson's Claims

Johnson requests the Court reconsider the decisions enumerated below which represent clear error of law and result in a manifest injustice. The Complaint alleged sufficient facts to support every cause of action, and no evidence was provided to contradict those facts. It was clear error for the Court to raise numerous arguments *sua*

sponte in the Order, without a hearing, and then dismiss claims with prejudice, thereby affording Johnson no opportunity to argue or amend his Complaint.

1. The Malicious Prosecution Claim

a) The Court appears confused as to the claim underlying the malicious prosecution action.

The Court appears to confuse the claims Storix brought against Johnson in the state lawsuit underlying the malicious prosecution claim. The Order states, "In his complaint in the present action, Plaintiff alleges that in the prior action, the state court adopted the jury's verdict in his favor. (Id. ¶ 27.) But this allegation is directly contradicted by the judicially noticeable state court documents." (Order, p. 9.) The referenced paragraph refers to the Complaint stating the fact that the jury found in Johnson's favor on Storix's "primary claim" and the court denied of "all eleven (11) of Storix's demands for injunctive relief" based on that claim. (Complaint ¶ 27.) The prior paragraph identifies the primary claim as "Storix's $1.2 million claim against Johnson for "unjust enrichment" and 'unfair head start'." (*Id.* ¶ 26.) The Complaint also identifies the "unrelated claim" introduced during trial for which the jury awarded Storix "$3,739 for 'loss of employee productivity'." (*Id.* ¶ 27.)

The Order appears to conflate the "primary claim" with the "unrelated claim" when stating that "Storix asserted a single cause of action for breach of fiduciary duty against Johnson. […] [T]he jury award[ed] Storix $3,739.14 'as a result of Anthony Johnson's acts or conduct in breach of a fiduciary duty or duties owed to Storix, Inc.' […] [A] judgment was entered against Plaintiff on Storix's claim for breach of fiduciary duty." (Order, p. 10.) Misinterpreting Johnson's argument, the Order states, "Plaintiff argues that his claim for malicious prosecution can proceed despite that state court judgment because his malicious prosecution claim is *based on a different and severable claim* from the *claim [that] was adjudicated against him* in the prior action." (Order, p. 10, italics added.) Johnson argued just the opposite. The malicious prosecution was not directed to a "different claim" than was adjudicated against him.

It was directed to the *only claim* asserted in the complaint and actually adjudicated because Storix succeeded only on the "unrelated claim" of $3,739 first introduced in closing arguments that Johnson had no opportunity to dispute.

The Complaint specifically alleges the malicious prosecution is directed only to "the claim" asserted in the lawsuit, "and the claim was pursued to a legal termination on its merits in Johnson's favor." (Complaint ¶¶ 39-40.) The Complaint also alleges the "unrelated claim" introduced at trial is pending appeal. (*Id.* ¶¶ 27, fn. 5, 39, fn. 6.) "The jury rejected Storix's $1.2 million claim against Johnson for 'unjust enrichment' and 'unfair head start', finding that Johnson did not use Storix' s confidential information to its detriment or breach his duty of confidentiality or loyalty to Storix for his benefit." (*Id.* ¶ 26.) But, "the court also adopted the jury's verdict awarding Storix $3,739 for 'loss of employee productivity' on an *unrelated claim Storix introduced during trial*." (*Id.*, ¶ 27, italics added.)

As the Order states, "Storix's complaint, its first amended complaint, and its second amended complaint in the underlying state action all asserted a single cause of action for breach of fiduciary duty. (Doc. No. 34-2, RJN Exs. 8, 9, 11.)" (*Id.,* p. 11, fn. 2.) Defendants intentionally misrepresent the trivial $3,739 claim introduced in closing arguments as the "single cause of action for breach of fiduciary duty" brought against Johnson, diverting from the actual $1.2 million claim brought against Johnson that the jury completely rejected. The Order thereby refers to the verdict and judgment against Johnson based entirely on a different claim that was not asserted in any complaint.

b) Dismissing the malicious prosecution claim was an error of law.

Partner and Attorney Defendants, in their concurrent motions to dismiss and special motions to strike, argued that unless the "entire lawsuit" underlying Johnson's malicious prosecution claim terminated in his favor, the claim must be stricken or dismissed. The primary case cited by defendants and the Court, *Lane v. Bell*, 20 Cal. App. 5th 61 (2018), and the cases it relies on approve the severability of appealed

claims. Johnson opposed defendants' motions with substantial authority providing that that claims are severable from the favorable termination element of a malicious prosecution claim if they are pending appeal and the action is only directed to *non-severed* claims and not the "entire lawsuit". (ECF Nos. 41 at p. 6-7, 43 at pp. 10-11, 40 at pp. 5-7, 42 at p. 12-14, 63 at pp. p. 6-7, 70, pp. 4-5.) Defendants provided no counter-argument in their replies.

After the Court ordered further briefing on whether Johnson's conversion claim should be barred by *res judicata* (ECF No. 62), Johnson brought a motion to stay the malicious prosecution action pending the state court appeal. Therein, Johnson provided further authority supporting the severability of claims pending appeal. (ECF Nos. 63 at pp. 6-7, 70 at pp. 4-5.) Johnson's also provided authority showing that, if the Court did not allow the cause of action to proceed, the proper remedy would be to stay, rather than dismiss, the action. (*Id*. at p. 7.) Only the Attorney Defendants opposed Johnson's motion to stay, but again offered no counter-argument. (*See* ECF No. 68.) Neither the Order nor the Stay Order addressed either argument when dismissing the malicious prosecution claim against all defendants with prejudice.

Citing an unpublished district court case, *Tarsadia Hotels v. Aguirre & Severson*, No. D068887, 2016 WL 7488351 at *10 (Cal. Ct. App. Dec. 30, 2016), the Court found the proper remedy was to dismiss the action. (ECF No. 72 at p. 6.) However, *Tarsadia* and the case it relies on, *Drummond v. Desmarais* (Drummond), 176 Cal. App. 4th 439 (2009), are unrelated to the circumstances of this case and actually favor a stay rather than dismissal. In *Drummond*, the Plaintiff attempted to dismiss the complaint after an appeal was decided against him but before mandate issued. The court found the dismissal did not establish favorable termination. *See Id.* at 457. However, the court further found that "So long as the appeal is pending, the plaintiff cannot truthfully allege a termination of the action, and a malicious prosecution action is 'premature.' [Citation][…] Early cases indicated that the correct remedy was to *dismiss* the malicious prosecution complaint in the expectation that the

1 plaintiff could refile it—as a new action—upon a favorable conclusion of the appeal."
2 *Id.* at 458; citing *Friedman v. Stadum* (Friedman), 171 Cal.App.3d 775, 778-779
3 (1985). "However it has since been held that the proper remedy is to stay the action.
4 [Citation.] This is a sound approach. […] The traditional remedy, if such a plea was
5 sustained, was to dismiss the complaint without prejudice." *Ibid.*; citing *Feld v.*
6 *Western Land & Development Co.* (Feld) 2 Cal.App.4th 1328, 1335-1336 (1992)
7 (underline added). "[I]t is now settled that the correct remedy is to abate (stay) the
8 action pending resolution of the condition giving rise to the plea. [Citations.] […] So
9 long as the action is stayed it is unlikely to impose any significant burden on anyone."
10 *Id.* at 458-459. "We conclude courts in a *Friedman* situation should abate a malicious
11 prosecution action instead of dismissing the lawsuit." *Feld* at 133; *See* *Friedman* at
12 775, 778-779.
13 The Court erred in not allowing the malicious prosecution claim to proceed
14 given the action was directed the only claim *actually asserted* in the complaint and not
15 the unrelated claim pending appeal. It was nevertheless an error of law to dismiss the
16 claim, especially with prejudice, rather than stay the action pending the state appeal.
17 **2. The Indemnification Claim**
18 The Court found that "in order for a plaintiff to recover under section 317(d),
19 the plaintiff must make the same showing of a prior favorable termination required to
20 maintain a malicious prosecution action. […] ⁋ A judgment was entered against
21 Plaintiff on Storix's claim for breach of fiduciary duty in that action. [Citation.] As
22 such, Plaintiff's claim for indemnification is also defective as a matter of law, and the
23 Court dismisses Plaintiff's claim for indemnification with prejudice." (Order, p. 14-
24 15.) This issue was not raised by Storix, but only by Partner Defendants who were not
25 being sued for indemnification but for Storix's liability as controlling shareholders
26 who rendered Storix insolvent and otherwise prevented Storix from performing its
27 statutory obligation. (Complaint ¶¶ 35-36, 71.) Defendants cited no case to support
28 their legal conclusion, and the case cited by the Court is inapposite since it involved a

1 stipulated settlement that did not reflect on the merits of the case and was therefore
2 dismissed for the same reason as the plaintiff's malicious prosecution claim.
3 There is no authority providing that favorable termination of an entire lawsuit is
4 required for indemnification under section Cal. Corp. Code § 317 to apply. Section
5 317(d) expressly mandates that an agent "must" be indemnified by the corporation for
6 reasonable expenses incurred in defense of any successful "claim, issue or matter in
7 connection [with the lawsuit]." Johnson alleged that he successfully defended Storix's
8 $1.25 million claim on the merits (Complaint ⁋ 26), that the California statutes and
9 Storix's bylaws mandate his indemnification, and Storix refused. (*Id.* ⁋⁋ 30, 69.) The
10 allegations are legally sufficient to defeat a motion to dismiss.

11 **3. The Breach of Contract and Rescission Claims**

12 The Court found the breach of contract and rescission claims barred by *res*
13 *judicata* despite no such claims decided in any prior lawsuit. Importantly, these claims
14 didn't even accrue until after the prior litigation terminated.
15 The Order repeatedly refers to Johnson's breach of contract claim as alleging a
16 "**transfer of ownership in the copyrights**". The Complaint stated facts to support the
17 oral contract he had with Storix, but nowhere does he allege the agreement was to
18 transfer copyright ownership.

19 > "Johnson entered into an oral contract with Storix upon its formation,
20 > wherein Storix was granted **rights to market, sell, copy, distribute and**
21 > **license SBAdmin to third-parties** in exchange for future compensation
> for the copyright if or when Johnson's participation in Storix ended. …
22 > Johnson continually performed his obligations under the contract by
23 > providing Storix the copyrights to SBAdmin needed to conduct its
> business for over fifteen (15) years, during which time all profits of
24 > Storix were derived from sales of SBAdmin."

25 (Complaint ⁋ 11, bold added.) The terms of the oral contract between Johnson and
26 Storix has not changed since its inception. Johnson granted Storix all the copyrights it
27 needed to conduct its business in exchange for future compensation payable "if or
28 when his participation in Storix ended." Johnson always denied transferring

ownership of his copyrights to Storix, arguing that an *agreement* to transfer ownership must be in writing. The Court accepted Storix's contradictory argument that the copyright was transferred by a signed writing, but Johnson's contract claims must nevertheless be dismissed because they "effectuate an exclusive transfer of ownership without a signed writing." (ECF No. 31-1, p. 19; Order, pp. 19-22.)

The Court raised arguments *sua sponte* that rely on the mistaken assertion that Johnson alleged an oral contract involving the transfer of his copyright ownership. The oral contract provided "future compensation" for his copyrights if and when Johnson's involvement in Storix ended. A prior court finding that Johnson transferred all copyrights to Storix upon its formation doesn't relieve Storix of its contractual obligation.

a) Claim Preclusion

To establish each element of "identity of claims" in applying claim preclusion under federal law, the Court found that, "Both the present action and the prior action are related to the same set of facts, specifically *the transfer of ownership of the copyrights* to SBAdmin from Plaintiff to Storix", and "Plaintiff now alleges that he transferred the copyrights to SBAdmin from himself to Storix via an oral contract in exchange for future compensation." (Order, p. 19, italics added.) The court thereby concludes that "both actions involve the same set of facts related to the *transfer of ownership* in the relevant copyrights." (*Ibid*., italics added.)

An identity of claims is dependent on "(4) whether the two suits arise out of the same transactional nucleus of facts." (Order, p. 18.) Johnson's contract claims and Storix's copyright ownership claim are not identical simply because they involve "related" facts. They must have *arisen* from the same facts. *See United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011). The breach of contract claim arose from Storix's refusal to compensate Johnson for his copyrights after obtaining 15 years of benefit from their use. (Complaint ¶11.) The

oral contract was not at issue in the copyright lawsuit, and facts related to the copyright ownership transfer are not relevant to the claims in this lawsuit.

Storix argued the breach of contract claim could have been brought in the copyright lawsuit because "[i]dentical claims of copyright infringement and unfair competition regarding this work were raised in an earlier action." (ECF No. 31-1, p. 11.) Storix provides no explanation for this conclusion. The Order instead argues *sua sponte* that "both actions could have been tried together to resolve the issue of the transfer of the copyrights and the terms of that transfer." (Order, p. 19.) The copyright lawsuit didn't determine the terms of the transfer, only the type of licenses.[1] The type of licenses granted prior to this lawsuit is irrelevant. Johnson couldn't have tried the breach of contract claim in the copyright lawsuit because (1) The copyright ownership transfer was Storix's claim, not Johnson's; (2) The copyright lawsuit was based on federal subject matter and contract claims on state law;[2] and (3) The contract claim didn't accrue until four years after the copyright lawsuit was filed. (*See* Complaint ¶ 29.)

Next, the Order states that "rights established in the prior lawsuit would be impaired by the prosecution Plaintiff's present claims" because "Plaintiff's current claims rely on allegations that he actually transferred ownership of these copyrights via an oral agreement containing additional terms." (Order, p. 18-19.) Again, there is no such allegation, and the current claims do not rely on a copyright ownership transfer. The contract claim only seeks to enforce Johnson's right to consideration based on the terms of the oral agreement. Rescission is an *alternative* remedy for breach of contract. If Storix provides Johnson consideration for benefits received

[1] Johnson claimed the copyright licenses were implied, thus non-exclusive, revocable, and properly granted by oral agreement. Storix claimed they were exclusive and irrevocable (i.e. copyright ownership), which requires a "writing".

[2] Federal diversity jurisdiction was not available because all parties resided in California until a few months before trial.

1 under the contract, the rescission claim is moot. Even if rescission somehow impaired
2 Storix's rights established in the copyright litigation, that wouldn't bar the breach of
3 contract claim.

4 It was a error of law to dismiss the claims by precluding a claim based on the
5 issue of copyright ownership transfer not relevant to the claim or dismissing the claim
6 on the basis of *res judicata* without identifying any identical claims.

7 b) Issue Preclusion

8 The Order states that "Plaintiff is attempting to relitigate the issue of the
9 transfer of ownership in the copyrights to SBAdmin that was necessarily decided in
10 the prior action." (Order, p. 21.) The Complaint does not dispute the transfer of
11 ownership.

12 The Court dismissed the breach of contract and rescission claims as "barred by
13 issue preclusion" because "In the prior action, the jury decided that the *ownership* of
14 the copyrights was transferred 'in writing from [Plaintiff] to Storix, Inc.'" and
15 "Plaintiff alleges, contrary to the jury's findings and the Court's judgment in the prior
16 action, that the copyrights to SBAdmin were transferred from himself to Storix via an
17 oral contract in exchange for future compensation." (Order, p. 21, underlines added.)
18 Johnson does not dispute the jury's finding that "Storix obtained ownership ... from
19 Plaintiff in writing." (Order, pp. 19-20.) The Complaint alleges only that the oral
20 contract provided Storix "**rights to market, sell, copy, distribute and license**
21 **SBAdmin to third-parties.**" (Complaint ¶ 11.) The Complaint alleges no facts
22 contrary to the jury's finding and no allegation that the oral contract transferred
23 copyright ownership. The allegations are consistent with Johnson's position in the
24 copyright litigation that Storix was granted "the copyrights to SBAdmin needed to
25 conduct its business." (Complaint ¶11.)

26 Citing *Valente-Kritzer Video v. Pinckney* (Valente), 881 F.2d 772, 774 (9th Cir.
27 1989), the Order states, "Section 204(a) not only bars copyright infringement actions
28 but also breach of contract claims based on oral agreements." (Order, p. 21.) "As such,

1 Plaintiff's contract claims are barred by 17 U.S.C § 204(a)." (*Id.*, p. 22.) Obviously,
2 Section 204(a) does not bar *all* breach of contract claims based on oral agreements,
3 but only those based on a transfer of exclusive copyrights. The oral contract didn't
4 transfer exclusive copyrights because such rights weren't "needed to conduct [Storix']
5 business." (Complaint ¶11.) Johnson agrees that "Section 204(a) requires that in order
6 for a transfer of ownership in a copyright to be valid, 'it must be in writing.'" (Order,
7 p. 21, citing *Foad Consulting Grp., Inc. v. Azzalino* (Foad), 270 F.3d 821, 825 (9th
8 Cir. 2001).) "[Section] 204(a)'s writing requirement applies only to the transfer of
9 exclusive rights; grants of nonexclusive copyright licenses need not be in writing."
10 *Foad* at 825-826. The words "in writing" are derived from "the requirement that *a*
11 *contract* transferring an exclusive license in a copyrighted work be in writing."
12 *Valente* at 774 (italics added).

13 In Johnson's case, the Court found Storix's 2003 "Annual Report" satisfied the
14 writing requirements of the Copyright Act §204(a). (*See* ECF No. 34-2, Ex. 4, p. 47.)
15 The Ninth Circuit affirmed, finding "[t]he Annual Report qualified as a 'note or
16 memorandum' that was signed by Johnson and memorialized a transfer of assets."
17 (ECF No. 46, Ex. 3, p. 13; *See* Complaint ¶ 22.) There is sufficient evidence of a
18 contract when "[t]here is a note, memorandum, or other writing sufficient to indicate
19 that a contract has been made, signed by the party against whom enforcement is
20 sought or by its authorized agent or broker." Cal. Civ. Code § 1624(3)(D). These
21 decisions can be interpreted in either of two ways: (1) The Annual Report constituted
22 a writing that transferred copyright ownership, and is therefore distinct from the oral
23 contract between Johnson and Storix; or (2) The Annual Report confirmed the
24 existence of an oral agreement and defined its terms to include a transfer of copyright
25 ownership. If the latter, the Ninth Circuit's finding precludes the breach of contract
26 claim from being dismissed on the basis that the contract terms are invalid.

27 It was a error of law to dismiss Johnson's breach of contract claim based on the
28 preclusion of issues not necessary to the claim.

c) Rescission Claim

If the Court dismisses the breach of contract claim based on an invalid or unlawful oral contract, it is clear error to also dismiss the rescission claim. Johnson seeks relief based on rescission of contract as an *alternative* to the breach of contract claim, which is separately pled. As the Order states, "Under California law, '[a] party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code.'" (Order, p. 16.) A contract may be rescinded if the consideration is void or if the contract's terms are invalid or unlawful. *See* Cal. Civ. Code § 1689(b).

When goods or services are "rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit." *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 (underline added.) "The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.'" *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 (internal citations omitted.) A party that accepts the benefits of an oral contract is unjustly enriched if the contract is not enforced. *Monarco v. Lo Greco* (1950) 35 Cal. 2d 621, 625-626. "The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled." Cal. Civ. Code § 1692.

It's clear error for the court to dismiss the rescission claim simply because it dismissed the breach of contract claim.

d) Partner Defendants' Liability

The Order states that "In the complaint, Plaintiff alleges that he entered into the contract at issue with Defendant Storix, not Defendants Altamirano, Turner, Kinney, or Huffman. [] As such, Plaintiff's claim for breach of contract and his claim for rescission are legally defective as to these defendants." (Order, p. 21.) The allegations

1 of the Complaint direct the contract and rescissions claims only to Storix (Complaint
2 ¶¶ 59-60, 63-66), but also alleged that "[b]ecause Partner-Defendants were in majority
3 control of Storix and rendered Storix insolvent by taking all money otherwise owed to
4 Johnson for their personal benefit, Partner-Defendants are personally liable for
5 [consideration/unjust enrichment] owed to Johnson that Storix is unable to afford."
6 (Complaint ⁋⁋ 61, 67.)

7 The Court raised *sue sponte* an argument that Partner Defendants cannot be
8 held liable because agents can be held liable for torts and not contract claims. (Order,
9 p. 23.) The Complaint doesn't allege Partner Defendants breached the contract. It
10 alleges "tortious conduct" they may be held liable for, including negligence that
11 rendered Storix insolvent and unable to perform its contractual obligation. "Breach of
12 implied covenant of good faith and fair dealing gives rise to contract remedies and in
13 addition, to tort remedies when the breaching party also 'seeks to shield itself from
14 liability by denying, in bad faith and without probable cause, that the contract exists.'"
15 *Seaman's Direct Buying Service, Inc. v. Standard Oil Co*. (1984) 36 Cal.3d 752, 768-
16 769.

17 Partner Defendants' only argument was that they cannot be held liable because
18 Johnson cannot "pierce the corporate veil". (ECF No 30-1, pp. 14-15, 18.) Johnson
19 provided substantial facts and authority showing that the defendants cannot escape
20 liability for their own acts by hiding behind the alter-ego of "Storix." (ECF No. 40, p.
21 18-20.) "If a corporate officer or director were not liable for his or her own tortious
22 conduct, he or she 'could inflict injuries upon others and then escape liability behind
23 the shield of his or her representative character, even though the corporation might be
24 insolvent or irresponsible.'" *PMC, Inc. v. Kadisha* (2000) 93 Cal.Rptr.2d 663, 672
25 (citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal. 3d 490, 505. "They
26 may be liable, under the rules of tort and agency, for tortious acts committed on behalf
27 of the corporation." *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1
28 Cal. 3d 586, 595. Notably, "Liability may be imposed on those equitable owners of a

1 Corporation who 'provide inadequate capitalization and actively participate in the
2 conduct of corporate affairs.'" (ECF No. 40, p. 19, citing *Minton v. Cavaney* (1961)
3 56 Cal. 2d 576, 580.
4 Partner Defendants' liability for tortious conduct is a factual issue to be
5 resolved by a jury. It was clear error to grant a motion to dismiss Johnson's claims on
6 the basis that defendants cannot be held liable for their personal acts..
7 **4. Economic Interference**
8 a) Intentional Interference with Contractual Relations
9 The Court reasserts the *sue sponte* argument that Johnson's claim against
10 Partner Defendants for intentional interference in contractual relations with Storix is
11 barred by issue preclusion because "Plaintiff is barred from alleging that he had an
12 oral contract with Storix wherein he gave the copyrights to Storix in exchange for
13 future compensation." (Order, p. 24.) Johnson reasserts his arguments in Section
14 III:A[3] to the extent they support a valid contract. Whether Johnson agreed to the
15 transfer orally or in writing is not dispositive of the claim of economic interference
16 with contractual relations.
17 The Court supplemented Partner-Defendants' argument in saying "it is 'well
18 established that corporate agents and employees acting for and on behalf of a
19 corporation cannot be held liable for inducing a breach of the corporation's contract.'"
20 (Order, p. 25, citing *Shoemaker v. Myers*, 52 Cal. 3d 1, 24 (1990); *Applied Equip.*
21 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 512 fn.4 (1994).) However, these
22 cases rely on the "agent immunity rule" where an agent are not liable when acting "for
23 and on behalf of the corporation" (*ibid*.) and "where they act in their official capacities
24 on behalf of the corporation and not as individuals for their individual advantage."
25 *Applied Equip*. at 512, fn. 4. Partner Defendants are not immunized for personal acts
26 simply because they were agents of Storix at the time.
27 Partner Defendants' argued they are "agents of Storix and therefore cannot be
28 liable for interfering with what is essentially their own contract" (ECF No. 30-1, pp.

11-12) and “[t]he tort of intentional interference with contractual relations is committed only by 'strangers-interlopers who have no legitimate interest in the scope or course of the contract's performance.'” (ECF No. 30-1, p. 12, citing *PM Group, Inc. v. Stewart*, 154 Cal.App.4th 55, 65 (2007).) *PM Group* explains that a corporate contract is not “their own contract” unless their performance, as agents, is necessary to the contract.

It was an error of law to dismiss the contract interference claim based on conclusions of law dependent on a factual determination that Partner Defendants, when inducing Storix to breach the contract, acted “for and on behalf of the corporation”, not “for their individual advantage”, and within the scope and performance of “their own contract”.

b) Intentional Interference with a Prospective Economic Advantage

The Court states that “Plaintiff has failed to allege an existing economic relationship between a third party and Johnson.” (Order, p. 26.) However, the Complaint alleges that “Partner-Defendants knew that the relationship between Johnson and Veeam existed and that Johnson stood to substantially benefit from the relationship." (Complaint ⁋ 56.) The Court argues *sue sponte* that “Any potential benefit that Plaintiff might have obtained from the potential relationship between Veeam and Storix is too speculative to support a claim for intentional interference with a prospective economic advantage.” (Order, pp. 26-27.) The Court thereby found the claim “failed as a matter of law”, “cannot be cured by amendment to the pleading”, and was dismissed “with prejudice”. (*Id*, p. 27.)

First, it was not speculative that “Veeam agreed and provided Storix a letter of intent to purchase Storix for $5M." (Complaint ⁋ 25.) Second, the relationship established for the sale of Storix was not “between Veeam and Storix”, it was between Veeam and Storix’s shareholders, including Johnson, who owns 40% of Storix. The Order addressed no other arguments in Johnson’s opposition or facts in the Complaint that establish each element of interference with contractual relations. If the facts were

1 considered too speculative, Johnson should have been afforded an opportunity to
2 make it less so.

3 **5. Breach of Fiduciary Duty**

4 The Court dismissed the breach of fiduciary claim against Partner Defendants,
5 as controlling shareholders, for refusing Johnson corporate indemnification for the
6 same reason it dismissed Johnson's indemnification claim against Storix. (See Order,
7 p. 27.) For the reasons set forth in Section III:A[2], it was clear error to dismiss the
8 claim based on insufficient pleading.

9 **6. Special Motion to Strike the Malicious Prosecution Claim**

10 The Court granted Attorney Defendants' and Partner Defendants' Anti-SLAPP
11 special motions to strike Johnson's malicious prosecution claim for the same reason it
12 granted their concurrent motions to dismiss the claim. (Order, p. 34.) For the same
13 reasons set forth in Section III:A[1], the Court erred in striking the claim, which for an
14 anti-SLAPP motion is the same as a dismissal with prejudice.
15
16 **B. The Court Improperly Dismissed Claims Based on Arguments Not Raised By the Defendants**

17 "[A]llowing courts *sua sponte* to invoke collateral-attack waivers contravenes
18 'the usual rule in our party-presentation system,' which 'requires the parties to invoke
19 their own claims and defenses.' [Citation.] 'If a court engages in what may be
20 perceived as the bidding of one party by raising claims or defenses on its behalf, the
21 court may cease to appear as a neutral arbiter, and that could be damaging to our
22 system of justice.'" *United States v. Sainz*, No. 17-10310 (9th Cir. Aug. 12, 2019),
23 quoting *Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir. 2017). "'The rule
24 that points not argued will not be considered is more than just a prudential rule of
25 convenience; its observance, at least in the vast majority of cases, distinguishes our
26 adversary system of justice from the inquisitorial one.'" *Ibid*., quoting *United States v.*
27 *Burke*, 504 U.S. 229, 246 (S.Ct. 1992).
28

As noted above, the Order raised numerous arguments *sue sponte* to support dismissal of Johnson's claims with prejudice, thus providing Johnson no opportunity to argue the Court's findings. The Court conducted extensive research to provide authorities in support defendants' otherwise poorly pled claims.

C. Defendants' Motion to Dismiss Should Have Been Reviewed Under Summary Judgment Standards

Johnson argued in opposition to Partner Defendants' *Further Briefing on their Motion to Dismiss* (ECF No. 66) that factual disputes raised in their brief converted their motion to a motion for summary judgment, which should be denied in its entirety since they provided no evidence to defeat the allegations of the complaint as a matter of law. (ECF No. 67, pp. 4-5.) The Court did not address this dispositive argument.

Defendants raise factual issues to *suggest* Johnson "could have" discovered the conversion earlier, raising a number of factual issues as to whether Johnson had sufficient reason to suspect the conversion and an opportunity to obtain knowledge from sources open to his investigation. Such are factual issues to be resolved by a jury. They presented disputable facts contained in the minutes of a Storix board meeting that was not subject to judicial notice (Defs. Brief, p. 5), suggested Johnson had sufficient knowledge of Storix's financial records (*Id.*, p. 6), and produced a resume of the financial expert who testified in the copyright trial, suggesting he should have discovered and informed Johnson of any suspicious activity. (*Id.*) They further suggest Johnson could have obtained sufficient knowledge following a court ruling that *limited* his access to records (*Id.*, p. 6-7), and argued that Storix's failed "accounting claim" in the derivative suit should have informed Johnson of "money allegedly owed to him." (*Id.*)

These suggestive and conclusory facts are insufficient to grant a summary judgment motion, much less a motion to dismiss, particularly a factual issue of delayed discovery. "When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the

1 required liberality, would not permit the plaintiff to prove that the statute was tolled."
2 *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980)." It was clear legal
3 error to grant a summary judgment motion to dismiss claims dependent on unresolved
4 factual issues.

5 **D. The Court Erred in Allowing Defendants to Re-Raise a *Res Judicata***
6 **Defense Pending the State Court Appeal**

7 The Court denied Partner Defendants' motion to dismiss the claim of breach of
8 fiduciary claim for "using Storix profits otherwise owed to Johnson to defend against
9 the claims in the state court derivative action" (Order, p. 27) and Johnson's conversion
10 claim. (*Id*., pp. 31-32.)

11 Defendants asserted a *res judicata* defense, and Johnson argued in opposition
12 that there are no claims or issues related to these claims that were decided in any prior
13 action. (*See* ECF Nos. 40, p. 11-13; *See generally* ECF No. 67.) The Court denied the
14 motion as to these claims without prejudice, noting that Partner Defendants are free to
15 "raise their *res judicata* defense at a later stage in the proceedings once the state court
16 judgment becomes final." (Order p. 29, fn. 7; *See also id*. at fns. 8-9.) At the same
17 time the Court denied Johnson's motion to stay the malicious prosecution action
18 pending the state court of appeal (ECF No. 72), the Court effectively stayed the
19 decision to dismiss the only two remaining claims against Partner Defendants pending
20 the same appeal. Under the Federal Rules, a defendant is required to raise all
21 affirmative defenses in its first responsive pleading, and defenses not so raised are
22 deemed waived. *See* Fed.R.Civ.P. 8(c), 12(b), 12(g)(2).

23 Defendants did not identify any identical claims or issues in their motion to
24 dismiss that were decided in any prior action, and further failed to identify any such
25 claims or issues in their further briefing on *res judicata* as to the conversion claim.[3]
26
27
28 [3] Defendants did not raise the defense of *res judicata* as to the conversion claim in their motion, but the Court allowed further briefing to address whether *res judicata*

1 The Court erred in failing to address this dispositive issue, and further erred in
2 denying Partner Defendants' motion to dismiss the two remaining claims *without*
3 *prejudice* to allow them another opportunity to plead the same affirmative defense.
4 Johnson herein admits and/or concedes that no appeal was taken on the
5 judgment on the consolidated shareholder derivative action. Johnson appealed *pro se*
6 only the judgment on Storix's direct lawsuit and his cross-complaint. Also, the
7 derivative suit involved Storix's claims, not Johnson's, and Johnson cannot appeal on
8 Storix's behalf. The Court was fully briefed on Partner Defendants' motion to dismiss,
9 and no decision on the state appeal will bear on its decision. Therefore, Johnson
10 requests the Court issue a ruling on the remaining claims to avoid unnecessary delay.

11 **IV. CONCLUSION**

12 The Court should reconsider its Order dismissing Johnson's claims and deny all
13 defendants' motions to dismiss and special motions to strike on grounds that
14 Johnson's Complaint sufficiently alleged facts to support all causes of action.
15
16
17 DATED: December 9, 2019 Respectfully submitted,
18
19 By:

20 ANTHONY JOHNSON, In Pro Per
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applied, whether by claim or issue preclusion, to defeat Johnson's allegations of delayed discovery of the conversion. (ECF No. 62.)