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8

9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 ANTHONY JOHNSON, an individual, )  
12 Plaintiff, )

13 vs. )

14 MANUEL ALTAMIRANO, an )  
15 individual, RICHARD TURNER, an )  
16 individual, DAVID KINNEY, an )  
17 individual, DAVID HUFFMAN, an )  
18 individual, PAUL TYRELL, an )  
19 individual, SEAN SULLIVAN, an )  
20 individual, STORIX, INC., a California )  
21 Corporation and DOES 1-5, inclusive, )  
22 Defendants. )

Case No. 19CV1185-H-BLM

**DEFENDANTS’ REPLY IN  
SUPPORT OF FURTHER BRIEFING  
ON THE EFFECT OF THE  
FINALITY OF STATE COURT  
APPEAL D075308 ON THE STAY  
AND THIS COURT’S ORDER AT  
ECF NO. 73**

Judge: Hon. Marilyn L. Huff  
Dept.: Courtroom 15A

Complaint Filed: June 24, 2019  
Trial Date: Not Set

23 Pursuant to the Order of this Court, Doc. No. 107, Defendants Manuel  
24 Altamirano, Richard Turner, David Kinney, and David Huffman (collectively,  
25 “Defendants”) hereby submit their reply in support of further briefing on the effect, if  
26 any, of the California Court of Appeal’s December 31, 2020 opinion and April 22,  
27 2021 remittitur on the Court’s stay of this action and the Court’s December 2, 2019  
28 order.

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1 **I. INTRODUCTION**

2 The December 31, 2020 opinion of the California Court of Appeal and its  
3 subsequent remittitur, on April 22, 2021, resulted in the judgment in the consolidated  
4 action becoming final for purposes of *res judicata*. The effect of having a final  
5 judgment is that Defendants now satisfy all elements required for applicability of the  
6 doctrine of *res judicata* as to the two remaining causes of action in this matter, i.e.  
7 breach of fiduciary duty and conversion. As set forth in Defendants briefing on this  
8 issue, and upon this Court’s invitation to Defendants raising their *res judicata*  
9 defense at a later stage in the proceedings when the state court judgment becomes  
10 final, the doctrine of *res judicata* bars Johnson’s two remaining causes of action.

11 Although Defendants believe they have addressed the Court’s request in its  
12 April 26, 2021 Order (Doc. No. 107), for completeness of the record, Defendants  
13 briefly provide the following response to Johnson’s May 22, 2021 further briefing  
14 (Doc. No. 109).

15 **II. DISCUSSION**

16 ***A. Res Judicata Bars Johnson’s Breach of Fiduciary Duty Cause of Action***

17 Johnson’s cause of action for breach of fiduciary duty is barred by the  
18 doctrine of *res judicata* based on the preclusive effect of the Judgment on  
19 Consolidated Actions Following Trial in favor of Defendants and Storix, Inc.  
20 (“Storix”). (*See* Doc. No. 30-3, RJN, Ex. 1.) Johnson, however, maintains that  
21 Defendants have failed to provide new arguments or new facts supporting their  
22 defense that *res judicata* bars Johnson’s causes of action. (Doc. No. 109 at 4, 6.)  
23 New facts or arguments are not required to support Defendants’ defense of *res*  
24 *judicata* as the Judgment on Consolidated Actions Following Trial in favor of  
25 Defendants and those prior proceedings provide all the information the Court needs  
26 to evaluate the preclusive effect of *res judicata* as to Johnson’s remaining causes of  
27 action.

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1 Under the *Nordhorn* factors, Johnson’s breach of fiduciary duty cause of  
2 action is the same claim Johnson litigated in the Derivative Suit and Direct Suit. (*See*  
3 Doc. No. 30-1 at 8-9.) The elements of *res judicata* are: 1) whether a previous suit  
4 involved the same ‘claim’ or issue as the later suit; 2) reached a final judgment on the  
5 merits; and 3) involved the same parties or their privies. *Nordhorn v. Ladish Co., Inc.*,  
6 9 F.3d 1402, 1404 (9th Cir. 1993). Courts in the Ninth Circuit consider the following  
7 when determining the first factor - whether two claims are the same: (1) whether rights  
8 or interests established in the prior judgment would be destroyed or impaired by  
9 prosecution of the second action; (2) whether substantially the same evidence is  
10 presented in the two actions; (3) whether the two suits involve infringement of the  
11 same right; and (4) whether the two suits arise out of the same transactional nucleus of  
12 facts. *Id.* at 1405. *In re International Nutronics, Inc.*, 28 F.3d 965, 970 (9th Cir. 1994).  
13 Although no one factor is determinative, the “last of these criteria is the most  
14 important.” *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir.  
15 1982). Courts apply a transactional test to determine whether two causes of action are  
16 similar. *Adams v. Cal. Dept. of Health Servs.*, 487 F.3d 684, 689 (9th Cir. 2007),  
17 *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880 (2008). “Whether two  
18 events are part of the same transaction or series depends on whether they are related to  
19 the same set of facts and whether they could conveniently be tried together.” *Id.*  
20 (*quoting W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992)).

21 With this guidance, it is clear Johnson’s breach of fiduciary duty cause of  
22 action is barred because: i) it was previously litigated to finality (or could have been)  
23 in the Derivative Suit and Direct Suit; ii) involves the same rights and evidence; and  
24 iii) arises from the same transactional nucleus of facts. For example, in the Direct  
25 Suit, Johnson sued the same Defendants for breach of fiduciary duty alleging  
26 Defendants used their majority control of the board of Storix to increase their  
27 personal income, which “harmed [Johnson] by...loss of money in defending a suit;”  
28 and “harmed [Johnson] by being denied distributions from Storix profits, as all

1 profits were spent instead in litigation.” (Doc. No. 30-3, RJN, Ex. 3 at ¶¶ 60, 62-63.)  
2 A comparison with Johnson’s current breach of fiduciary duty reveals the current  
3 claim is based on “the loss of Johnson’s 40% of Storix’s profits used to pay Partner-  
4 Defendants and Storix’s counsel for acts committed solely for Partner-Defendants’  
5 benefit.” (Doc. No. 1, ¶ 47.) Further, the alleged breaches of fiduciary duty include  
6 “unfairly denying Johnson benefits of Storix that Partner-Defendants afforded  
7 themselves... [and] using Storix’s profits otherwise owed to Johnson for their  
8 personal benefit, including all monies paid to their personal attorneys.” (Doc. No. 1,  
9 ¶ 46.) These very same allegations formed the basis (or could have) for Johnson’s  
10 breach of fiduciary duty claim in the Direct Suit.

11 Moreover and importantly, Johnson’s current cause of action for breach of  
12 fiduciary duty is a claim belonging to Storix, not Johnson. *See Pareto v. F.D.I.C.*,  
13 139 F.3d 696, 699 (9th Cir. 1998) (allegations of mismanagement affecting corporate  
14 assets is a claim belonging to the corporation which shareholders may only assert  
15 derivatively, not individually). But Johnson, derivatively, already litigated claims for  
16 breach of fiduciary duty, abuse of control, corporate waste, and accounting in the  
17 Derivative Suit. (*See* Doc. No. 28-3, Ex. 4.) Thus, whether direct or derivative,  
18 Johnson’s current cause of action for breach of fiduciary duty is barred by the  
19 doctrine of *res judicata*.

20 In sum, there is an identity of claims between the claims Johnson previously  
21 litigated in the Derivative Suit and the Direct Suit and this current action. In all of  
22 these matters, the allegations arise from a common nucleus of facts, i.e. post-  
23 transition of control of Storix to Defendants by Johnson and infringement of the  
24 same rights, i.e. his contention Defendants mismanaged the corporate assets causing  
25 harm to him and Storix. The same financial evidence was, and would be, submitted  
26 in support of the claims. And finally, the rights established by the Judgment on  
27 Consolidated Actions Following Trial in favor of Defendants and Storix would be  
28 substantially impaired given it has been established Defendants did not breach any

1 fiduciary duty to Johnson or Storix in the management of corporate assets. In light  
2 of the finality of the Judgment on Consolidated Actions Following Trial and  
3 satisfaction of all elements of *res judicata*, the preclusive effect of that judgment  
4 bars Johnson’s current cause of action for breach of fiduciary duty.

5 **B. *Res Judicata* Bars Johnson’s Conversion Cause of Action**

6 Johnson’s cause of action for conversion is barred by the doctrine of *res*  
7 *judicata* based on the preclusive effect of the Judgment on Consolidated Actions  
8 Following Trial in favor of Defendants and Storix. (*See* Doc. No. 30-3, RJN, Ex. 1.)

9 In the Derivative Suit, Johnson asserted causes of action for breach of  
10 fiduciary duty, abuse of control, corporate waste, and accounting. (*See* Doc. No. 28-  
11 3, Ex. 4.) In his claim for an accounting, Johnson sought a determination of the  
12 “amount of money due from Defendants to Plaintiffs.” (*Id.*, ¶ 166.) Johnson’s  
13 accounting cause of action in the Derivative Suit alleged Defendants “engaged in  
14 self-dealing and corporate waste as described above, misappropriating funds that  
15 belonged to Storix and its shareholders, and have willfully acted to conceal such  
16 facts.” (*Id.* ¶ 165). In his claim for corporate waste, Johnson alleged “Defendants  
17 wasted Storix’s corporate assets by...action taken to promote their financial self-  
18 interest at the expense of Storix and its minority shareholders, such as diverting  
19 funds.” (*Id.* ¶ 155.) In his claim for breach of fiduciary duty, Johnson again alleged  
20 “Defendants...breached their respective fiduciary duties [by] actions taken to  
21 promote their financial self-interest at the expense of Storix and its minority  
22 shareholders.” (*Id.* ¶ 138.)

23 In the Direct Suit, Johnson asserted causes of action for breach of fiduciary  
24 duty, civil conspiracy, and fraud. (Doc. No. 30-3, RJN, Ex. 3.) In his cause of action  
25 for breach of fiduciary duty, Johnson alleged Defendants used their majority control  
26 of the board of Storix to increase their personal income, which “harmed [Johnson]  
27 by...loss of money in defending a suit;” and “harmed [Johnson] by being denied  
28 distributions from Storix profits, as all profits were spent instead in litigation.”

1 (Doc. No. 30-3, RJN, Ex. 3 at ¶¶ 60, 62-63.)

2 Johnson's current conversion cause of action alleges "Johnson was owed all  
3 undistributed profits of Storix earned prior to Partner-Defendants became  
4 shareholders...[who] prevent[ed] Johnson's access to the money or records  
5 pertaining to it. (Doc. No. 1, ¶ 50.) In other words, Johnson alleges Defendants  
6 engaged in self-dealing by converting corporate profits "for their own personal  
7 benefit." (*Ibid.*) These are the same allegations and harm Johnson previously  
8 litigated in the Derivative Suit and Direct Suit. The Judgment on Consolidated  
9 Actions Following Trial held "plaintiff has failed to meet the burden of proof on the  
10 four causes of action alleged in the First Amended Derivative Complaint." (*See*  
11 Doc. No. 30-3, RJN, Ex. 1 at Ex. A, p. 5.) In other words, Johnson had failed to  
12 demonstrate Defendants owed money to the plaintiffs or "engaged in self-dealing  
13 and corporate waste..., misappropriat[ed] funds that belonged to Storix and its  
14 shareholders, and...willfully acted to conceal such facts." (*See* Doc. No. 28-3, Ex. 4  
15 ¶ 165.) Thus, *res judicata* bars Johnson's conversion cause of action in light of the  
16 preclusive effect, and finality, of the Judgment on Consolidated Actions Following  
17 Trial.

18 **1. Issue Preclusion Bars Johnson's Allegation of Lack of Access to**  
19 **Financial Records**

20 Johnson seeks to avoid application of the statute of limitations as to his  
21 conversion cause of action because Defendants prevented "Johnson from accessing  
22 financial records which would have raised his suspicions and provided a reasonable  
23 opportunity for Johnson to discovery [the conversion] earlier." (Doc. No. 1, ¶ 30.)  
24 But the issue of Johnson's access to financial records was previously litigated in  
25 the underlying consolidated actions. Issue preclusion bars Johnson from asserting  
26 this as a basis to avoid the statute of limitations.

27 In California, collateral estoppel has five requirements: (1) the issues in the  
28 two proceedings are identical; (2) the issue must have been actually litigated in the

1 former proceeding; (3) the issue must have been decided in the former proceeding;  
2 (4) the decision in the former proceeding must be final and on the merits; and (5) the  
3 party against whom preclusion is sought must be the same as, or in privity with, the  
4 party to the former proceeding. *Shuler v. City of Los Angeles*, 62 Cal. App. 5th 793  
5 (2021). *See also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th  
6 Cir. 2006) (Issue preclusion applies if the claim meets these three requirements:  
7 ““(1) the issue necessarily decided at the previous proceeding is identical to the one  
8 which is sought to be relitigated; (2) the first proceeding ended with a final judgment  
9 on the merits; and (3) the party against whom collateral estoppel is asserted was a  
10 party or in privity with a party at the first proceeding.””).

11         Johnson’s access to the financial records of Storix was extensively litigated in  
12 the underlying consolidated actions. For example, in the Derivative Suit, Johnson  
13 asserted a claim seeking an accounting. (*See* Doc. No. 28-3, Ex. 4.) After hearing all  
14 the testimony from the parties and the testimony of Johnson’s own accounting expert,  
15 the court ruled Johnson “failed to meet the burden of proof on the four causes of  
16 action[, including an accounting,] alleged in the First Amended Derivative  
17 Complaint.” (*See* Doc. No. 30-3, RJN, Ex. 1 at Ex. A, p. 5.) Similarly, Johnson filed  
18 a Writ of Mandate to compel inspection and copying of Storix’s books and records.  
19 (*See* Doc. No. 30-3, RJN, Ex. 5.) Ruling on the writ, the Court granted Johnson’s  
20 access to Storix’s books and records except as to attorney-client privileged  
21 documents and trade secret information. (*Ibid.*) As a result, the issue of Johnson’s  
22 access to Storix’s books and records was previously litigated to finality in the  
23 consolidated proceedings involving the same parties. The doctrine of issue  
24 preclusion bars Johnson’s ability to rely on this issue to avoid the statute of  
25 limitations and support his conversion cause of action.

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1           **C. There Is No Basis to Reconsider Johnson’s Malicious Prosecution and**  
2           **Indemnification Claims**

3           **1. Malicious Prosecution**

4           Based on a mischaracterization of the December 31, 2020 California Court of  
5 Appeal Opinion (“Opinion”), Johnson again asserts the Court should apply a  
6 severability analysis to his malicious prosecution cause of action. Johnson cites to a  
7 portion of the Opinion where the state appellate court summarized the jury’s  
8 findings on Storix’s complaint for breach of fiduciary duty against Johnson. Johnson  
9 cites the language as a finding of the Court of Appeal when in fact it merely restates,  
10 and summarizes, the damages the jury awarded Storix on its breach of fiduciary duty  
11 claim. (Opinion at 18-19.) Nothing in the Opinion supports Johnson’s severability  
12 analysis. Rather, the Opinion specifically found Johnson’s severability argument  
13 “unavailing because Storix’s breach of fiduciary duty claim is not severable.”  
14 (Opinion at 44.)

15           **2. Indemnification**

16           Following the same logic he applies to his malicious prosecution claim, i.e.  
17 severability of distinct claims, Johnson asserts the Court should reconsider dismissal  
18 of the indemnification claim and claim for breach of fiduciary duty for failure to  
19 indemnify Johnson. In this regard, Johnson asserts he was successful under Cal.  
20 Corp. Code § 317 for indemnification purposes because the jury did not accept  
21 Storix’s damages theory of \$1.2 million for unjust enrichment. (Doc. No. 109 at 11.)  
22 Again, the Opinion does not support Johnson’s assertion, and in fact, states the  
23 opposite. (*See* Opinion at 44.) Johnson has provided no basis for reconsideration of  
24 any causes of action dismissed by the Court with prejudice.

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1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully submit the stay of this  
3 action should be lifted and the Court should reconsider its December 2, 2019 order in  
4 light of the state court judgment becoming final for purposes of *res judicata*.

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6 Dated: May 27, 2021

**WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP**

7  
8 /s/ Marty B. Ready  
9 By: Michael P. McCloskey, Esq.  
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11 Attorneys for Defendant  
12 Manuel Altamirano, Richard Turner,  
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1 *Anthony Johnson v. Manuel Altamirano, et al.*  
United States District Court, Southern District Case No. 19CV1185 JLS JLB

2 **CERTIFICATE OF SERVICE**

3  
4 I, the undersigned, am employed in the county of San Diego, State of  
5 California. I am over the age of 18 and not a party to the within action; my business  
address is 401 West A Street, Suite 1900, San Diego, California, 92101.

6 On May 27, 2021, I caused to be served the following document(s) described  
7 as follows:

8 **DEFENDANTS' REPLY IN SUPPORT OF FURTHER BRIEFING ON THE**  
9 **EFFECT OF THE FINALITY OF STATE COURT APPEAL D075308 ON**  
10 **THE STAY AND THIS COURT'S ORDER AT ECF NO. 73**

11 on the following parties in this action:

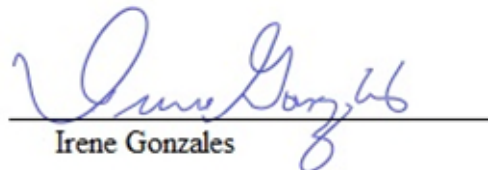
12 ***Plaintiff, Pro Se***  
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14 By the following method of service:

15  (Federal) I declare that I am employed in the office of a member of the bar of  
16 this court at whose direction this service was made.

17  **BY ELECTRONIC TRANSMISSION VIA NEXTGEN/ECF**  
18 I electronically filed the foregoing document(s) with the Clerk of the Court  
19 through the NextGen/ECF system for the Southern District Court of the  
20 United States, which system sent Notification of Electronic Filing to the  
21 persons listed on the Court's service list for this case. Upon completion of  
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acknowledging receipt by the NextGen/ECF system.

22 Executed on May 27, 2021, at San Diego, California. I declare under penalty  
23 of perjury under the laws of the State of California that the foregoing is true and  
correct.

24   
Irene Gonzales