

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 STORIX, INC.'S OPPOSITION TO  
APPELLANT'S  
REQUEST FOR JUDICIAL NOTICE**

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Appellee Storix, Inc. (“Storix”) respectfully submits the following opposition to Appellant’s Request for Judicial Notice.

## I. INTRODUCTION

In the underlying action, Appellant Anthony Johnson (“Johnson”) asserts claims against Storix for breach of contract and rescission related to copyrights concerning Storix’s software and also asserts a claim for indemnification related to Storix’s breach of fiduciary duty claim against Johnson that proceeded to judgment against him in California state court. Johnson’s contract and rescission claims come long after Storix obtained a jury verdict and judgment in its favor and against Johnson in *Johnson v. Storix*, Case No. 14-cv-01873 H (BLM) (“Copyright Action”), which was *litigated and tried before the same judge* that granted Storix’s motion to dismiss in the underlying action that is the subject of this appeal. As explained in Storix’s Appellee’s Brief, Johnson’s breach of contract and rescission claims in the underlying action failed to state a claim because they are, among other things, inconsistent with the judgment in the Copyright Action and could have been raised therein. Johnson’s indemnification claim failed to state a claim because, among other things, **Storix prevailed in the state court action on its sole breach of fiduciary duty claim against him.**

Along with his reply briefs, Johnson has asked the Court to take judicial notice of three items that he did not present to the court below and did not refer to in his

opening brief. [See Dkt. 37-2, 38.] The items for which Johnson seeks judicial notice are (1) a state court trial transcript of an expert witness on the subject of damages, (2) a demonstrative exhibit he says was “produced” in the state court jury trial, but with no indication of whether it was introduced into evidence or other foundational information and (3) a memorandum of points and authorities related to a motion for permanent injunction. Johnson seems to contend that the three items support his contention that the single claim of breach of fiduciary duty against him should be viewed as two “separate and distinct claims”. *Ibid.*

Judicial notice is inappropriate because these documents were not presented with Johnson’s opening brief, were never before the district court, and in any event, the documents do not establish that Storix’s sole breach of fiduciary duty claim were “separate and distinct” claims or that they were severable. Storix pursued a single cause of action for breach of fiduciary duty against Johnson and prevailed.

## **II. FACTS**

Multiple briefs have been filed reciting the facts of this case. Pursuant to Federal Rule of Civil Procedure 10(c), Storix incorporates by reference the factual and procedural background submitted to this Court in its Appellee’s Brief filed on November 12, 2022. [Dkt. 30.]

### III. ARGUMENT

Courts may only take judicial notice of adjudicative facts that are “not subject to reasonable dispute.” Fed. R. Evid. 201(b). Facts are indisputable, and thus subject to judicial notice, only if they are either “generally known” under Rule 201(b)(1) or “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned” under Rule 201(b)(2). *United States v. Ritchie* (9th Cir. 2003) 342 F.3d 903, 909. This Court “will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant’s opening brief.” *Padgett v. Wright*, 587 F.3d 983, 986 n.2 (9th Cir. 2009) (quoting *Int’l Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL–CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)). Moreover, “[i]t is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court.” *Kohn Law Group, Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1241 (9th Cir. 2015) (internal quotes omitted). “Just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

Storix objects to Johnson’s request for judicial notice on the grounds that the items for which he seeks judicial notice constitute new matters raised for the first time on reply. Even assuming that his new items were properly the subject of

judicial notice, Johnson could have sought notice of those items in his opening brief, but chose not to. He should not be allowed to do so for the first time in his reply. See *Padgett v. Wright, supra*, 587 F.3d at 986 n.2

Storix further objects on the grounds that Johnson has requested judicial notice of documents that were not submitted to the district court in connection with Johnson's oppositions to Storix's motion to dismiss. Moreover, Johnson's proffered materials were *never* before the district court, which distinguishes them from the materials that are the subject of Storix's request for judicial notice, which consisted of materials that were indisputably before the court below. [See Dkt. 32 (seeking judicial notice of materials from the Copyright Action and a state appellate court document mentioned by the district court in the underlying action here.)]

Finally, even if judicial notice was granted, the purported evidence does not change the fact that the complained of acts that supported the verdict and judgment against Johnson in the state court action were part and parcel of the same series of conduct that breached his fiduciary duty to Storix, and not some distinct "claims." That Storix was awarded only part of the damages it sought to recover from Johnson does not change this result or somehow convert Storix's single cause of action into multiple claims, and the materials for which Johnson seeks judicial notice are irrelevant.

#### IV. CONCLUSION

Based on the foregoing, Appellee Storix, Inc. requests that Appellant Anthony Johnson's request for judicial notice be denied.

DATED: November 29, 2021

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

By: /s/Paul A. Tyrell  
Paul A. Tyrell  
Attorneys for Appellee  
Storix, Inc.



### **CERTIFICATE OF SERVICE**

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 525 B Street, Suite 2200, San Diego, California 92101.

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 29, 2021.

**1. APPELLEES STORIX, INC.'S OPPOSITION TO APPELLANT'S REQUEST FOR JUDICIAL NOTICE**

(Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

Executed on November 29, 2021, San Diego, California.

By: /s/ Paul A. Tyrell  
Email: paul.tyrell@procopio.com