

1 Michael P. McCloskey, Esq. (SBN 106051)
Marty B. Ready, Esq. (SBN 239135)
2 **WILSON, ELSER, MOSKOWITZ,**
EDELMAN & DICKER LLP
3 401 West A Street, Suite 1900
San Diego, CA 92101
4 Telephone: (619) 321-6200
Facsimile: (619) 321-6201
5 E-mail: michael.mccloskey@wilsonelser.com
marty.ready@wilsonelser.com

6 Attorneys for Defendants,
7 Manuel Altamirano, Richard Turner, David Kinney and David Huffman

8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 ANTHONY JOHNSON, an individual,)

12 Plaintiff,)

13 vs.)

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

18 Defendants.)
19

Case No. 19CV1185-H-BLM

**DEFENDANTS' REPLY IN
SUPPORT OF FURTHER BRIEFING
IN SUPPORT OF MOTION TO
DISMISS PLAINTIFF'S
COMPLAINT**

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

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

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21 Defendants Manuel Altamirano, Richard Turner, David Kinney, and David
22 Huffman (collectively, "Defendants") hereby submit their reply in support of further
23 briefing, as requested by the Court, on the issue of whether Plaintiff Anthony
24 Johnson's ("Johnson") current claim for conversion is barred by *res judicata*.

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1 **I. DISCUSSION**

2 The analysis required by the court to determine whether the doctrine of *res*
3 *judicata* applies in the instant case is firmly established and settled in this District.
4 The doctrine of *res judicata* will act as a bar to a later suit if there was an
5 adjudication in a previous suit that 1) involved the same ‘claim’ or issue as the later
6 suit; 2) reached a final judgment on the merits; and 3) involved the same parties or
7 their privies. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

8 As discussed below, Defendants satisfy each of the elements establishing
9 applicability of the doctrine of *res judicata* to Johnson’s conversion claim.
10 Defendants’ motion to dismiss should be granted without leave to amend.

11 **A. Johnson Is Repackaging A Previously Litigated “Claim” As**
12 **Conversion**

13 For Defendants to successfully assert the doctrine of *res judicata* as an
14 affirmative defense to Johnson’s conversion claim, they must satisfy the first
15 requirement under *Nordhorn* that the current claim be the same as the claim Johnson
16 litigated in the Derivative Suit and/or Direct Suit. Courts in the Ninth Circuit
17 consider the following factors when determining whether two claims are the same for
18 purposes of *res judicata*: 1) whether rights or interests established in the prior
19 judgment would be destroyed or impaired by prosecution of the second action; (2)
20 whether substantially the same evidence is presented in the two actions; (3) whether
21 the two suits involve infringement of the same right; and (4) whether the two suits
22 arise out of the same transactional nucleus of facts.

23 **1. Defendants’ rights established in the prior suits would be**
24 **destroyed by prosecution of Johnson’s conversion claim**

25 Defendants’ rights in the prior Derivative and Direct Suits were established by
26 the Judgment on Consolidated Actions Following Trial. (Doc. No. 30-3, Ex. 1.)
27 This judgment was rendered in favor of Defendants on all causes of action asserted
28 by Johnson. (*Id.* at p. 8.) The claims supporting Johnson’s causes of action asserted

1 against Defendants were heavily litigated over a three-week jury trial and one-week
2 bench trial. Those claims are the same Johnson seeks to assert under his conversion
3 theory in the instant matter before this Court.

4 For example, in the Direct Suit, Johnson asserted in his Cross-Complaint
5 claims for breach of fiduciary duty, fraud, and civil conspiracy against Defendants.
6 (Doc. No. 30-3, Ex. 3.) One of the claims supporting Johnson’s breach of fiduciary
7 duty cause of action was Defendants “using their majority control of the Board of
8 Directors...to increase their personal interest in Storix.” (*Id.* at ¶ 60.) The harm
9 Johnson allegedly suffered by Defendants actions was “by being denied distributions
10 from Storix profits.” (*Id.* at ¶ 63.) Similarly, in the Derivative Suit, Johnson asserted
11 claims for breach of fiduciary duty, abuse of control, corporate waste, and accounting
12 against Defendants. (Doc. No. 29-3, Ex. 5.) The claims supporting these causes of
13 action included Defendants’ “scheme and conspiracy to hide their corporate waste
14 and self-dealing, obviously orchestrated to obstruct Plaintiffs’ investigation of their
15 wrongdoing;” “various actions taken to promote their financial self-interest at the
16 expense of Storix and its minority shareholders;” and engaging in “self-dealing and
17 corporate waste as described above, misappropriating funds that belong to Storix and
18 its shareholders.” Doc. No. 29-3, Ex. 5, ¶¶ 138, 155, 165.) Thus, previously litigated
19 was Johnson’s claim that Defendants’ engaged in acts to the detriment of Storix, its
20 minority shareholders, and Johnson. One of the harms Johnson alleges he suffered
21 personally and derivatively was the denial of “distributions from Storix profits.”
22 (Doc. No. 30-3, Ex. 3, ¶ 63.) That is the very same harm Johnson alleges he suffered
23 by way of Defendants’ conversion – “Johnson was owed all undistributed profits¹ of
24 Storix earned prior to Partner-Defendants became shareholders.” (Doc. No. 1, ¶ 50.)

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¹ Under California law, corporate profits cannot be issued as a dividend to shareholders
absent approval and by resolution of the corporation’s board of directors. Cal. Corp. Code
§ 500(a). The actions of the Board of Directors of Storix was front and center in the
Derivative and Direct Suits namely because Defendants occupy a majority of the Board
and due to the claims of breach of fiduciary duty.

1 Because the Judgment on Consolidated Actions Following Trial established
2 Defendants had not committed the acts alleged nor caused the harm Johnson sought
3 redress for, any subsequent claim by Johnson based on the same alleged harm would
4 essentially unwind the judgment in Defendants favor. (Doc. No. 30-3, Ex. 1.) In
5 other words, the previous judgment established Defendants did not engage in self-
6 dealing, did not breach any rights of the minority shareholders, and did not deprive
7 Johnson or minority shareholders of distributions from Storix profits. Prosecution of
8 Johnson's conversion cause of action based on a claim he was denied profits of
9 Storix would therefore destroy Defendants' rights established by the previous
10 judgment. This factor weighs in favor of a finding the claims of the Derivative and
11 Direct Suits are the same as Johnson's conversion claim.

12 **2. The same evidence proffered in the previous suits would be**
13 **presented in defense of Johnson's conversion claim**

14 Because the harm Johnson claims he suffered by being denied profits of
15 Storix, by way of an alleged conversion, was previously litigated in the Derivative
16 and Direct Suits, it stands to reason the same evidence would be proffered in defense
17 of the conversion claim. As discussed above, Johnson's conversion claim seeks to
18 redress the same harm he alleges he suffered at the hands of Defendants in the
19 Derivative and Direct Suits. Because Johnson prosecuted an accounting claim in the
20 Derivative Suit and presented expert CPA testimony at trial to establish his claims
21 regarding self-dealing and denial of distributions, Defendants would use the exact
22 same evidence from the previous litigation to establish Johnson's current conversion
23 claim is without merit. (Doc. No. 29-3, Ex. 5; Doc. No. 30-3, Ex. 1 at Ex. A, p. 4;
24 Doc. No. 30-3, Ex. 3, ¶ 63.) The same witnesses are involved, the same time period,
25 and the same corporate financials are at issue. This factor weighs in favor of a
26 finding the claims of the Derivative and Direct Suits are the same as Johnson's
27 conversion claim.

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1 **3. Johnson’s conversion claim and the rights established in the**
 2 **previous suits involve infringement of the same right**

3 As discussed above, Johnson is asserting, and asserted in the Derivative and
 4 Direct Suits, Defendants used their position of majority shareholders “to deny rights
 5 and take unfair advantage of Johnson as a minority shareholder.” (Doc. No. 1, ¶ 33.)
 6 This was the entire basis of Johnson’s claims in the Derivative and Direct Suits. (See
 7 gen. Doc. No. 30-3, Ex. 3 and Doc. No. 29-3, Ex. 5.) The infringement of Johnson’s
 8 rights as a minority shareholder is the gravamen of Johnson’s litigation. As a result,
 9 Johnson’s conversion claim and the Derivative and Directs Suits involve
 10 infringement of the same right. This factor weighs in favor of a finding the claims of
 11 the Derivative and Direct Suits are the same as Johnson’s conversion claim.

12 **4. Johnson’s conversion claim arises out of the same**
 13 **transactional nucleus of facts from the previous lawsuits**

14 Johnson’s conversion claim allegedly arose from Defendants converting
 15 “undistributed profits of Storix earned prior to Partner-Defendants became
 16 shareholders.” (Doc. No. 1, ¶ 50.) Defendants were issued shares of Storix in
 17 September 2011. (*Id.* ¶ 12.) This 2011 event, Defendants becoming shareholders of
 18 Storix, precipitated all of the alleged conduct of Defendants, as now majority
 19 shareholders, in oppression of Johnson as a minority shareholder. In other words, the
 20 subsequent conduct of Defendants, who were now in control of Storix, led to
 21 Johnson’s claims in the Derivative and Direct Suits as well as his instant complaint,
 22 including the current conversion claim, because they were now the majority
 23 shareholders of Storix. This transactional nucleus of facts forms the basis of the
 24 entire grievance Johnson has with Defendants. (See Doc. No. 30-3, Ex. 3, ¶ 60; Doc.
 25 No. 29-3, Ex. 5, ¶¶ 138, 155, 165; Doc. No. 1, ¶33.) As a result, Johnson’s
 26 conversion claim that he alleges took place after Defendants became Storix
 27 shareholders arises from the same operative nucleus of facts at issue in the Derivative
 28 and Direct Suits. This factor weighs in favor of a finding the claims of the Derivative

1 and Direct Suits are the same as Johnson’s conversion claim.

2 Because Defendants have established the same claim supporting Johnson’s
3 conversion claim was previously litigated in the Derivative and Direct Suits, the
4 Court must determine whether the two remaining elements are met therefore barring
5 Johnson’s conversion claim based on the doctrine of *res judicata*.

6 **B. The Derivative Suit and Direct Suit Reached A Final Judgment On**
7 **The Merits**

8 The Judgment on Consolidated Actions Following Trial is clear – the
9 Derivative Suit and Direct Suit, including Johnson’s cross-claim, was a final
10 judgment on the merits in favor of Defendants. (Doc. No. 30-3, Ex. 1.) There is no
11 need to belabor this point and this element is satisfied.

12 **C. Johnson And Defendants Were Parties To The Derivative Suit And**
13 **Direct Suit**

14 Similar to the “judgment on the merits” element, the final element to establish
15 Johnson’s conversion claim is barred by the doctrine of *res judicata* is easily
16 established. In the Direct Suit, Johnson filed a cross-claim against Defendants,
17 which is clear from the caption. (Doc. No. 30-3, Ex. 3.) In the Derivative Suit,
18 Johnson sued Defendants derivatively, which is also clearly set forth in the caption.
19 (Doc. No. 29-3, Ex. 5.) The third element is therefore satisfied, and Defendants have
20 established the doctrine of *res judicata* bars Johnson’s conversion claim.

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1 **II. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request the Court grant
3 their motion and dismiss Johnson’s First, Second, Third, Fourth, Fifth, Sixth, and
4 Seventh causes of action pursuant to Fed. R. Civ. Proc. 12(b)(6).

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6 Dated: November 15, 2019

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

7 By:

8 /s/ Marty B. Ready, Esq.

9 Michael P. McCloskey, Esq.

Marty B. Ready, Esq.

10 Attorneys for Defendants

Manuel Altamirano, Richard Turner,

11 David Kinnev and David Huffman

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

6 On November 15, 2019, I caused to be served the following document(s)
described as follows:

7
8 **DEFENDANTS' REPLY IN SUPPORT OF FURTHER BRIEFING IN
SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

9 on the following parties in this action:

10 ***Plaintiff, Pro Se***
Anthony J. Johnson
11 1728 Griffith Avenue
Las Vegas, NV 89104
12 Telephone: (619) 246-6549
Email: flydiversd@gmail.com

13 ***Attorneys for Defendants Storix, Inc.,***
Paul Tyrell & Sean Sullivan
Paul A. Tyrell, Esq.
14 Sean M. Sullivan, Esq.
15 PROCOPIO CORY HARGREAVES & SAVITCH LLP
16 525 B Street, Suite 2200
San Diego, CA 92101
17 Telephone: (619) 238-1900
Facsimile: (619) 235-0398
18 Email: paul.tyrell@procopio.com
sean.sullivan@procopio.com

19 By the following method of service:

20 **BY ELECTRONIC TRANSMISSION VIA ECF** – I electronically filed the
21 foregoing document(s) with the Clerk of the Court through the CM/ECF
22 system for the San Diego County Superior Court, Central Division, via
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23 Upon completion of transmission of said documents, a certified receipt is
issued to the filing party acknowledging receipt by the CM/ECF system.

24
25 Executed on November 15, 2019, at San Diego, California. I declare under
penalty of perjury under the laws of the State of California, that the above is true and
correct.

26 

27
28 Irene Gonzales