

1 ANTHONY JOHNSON
2 1728 Griffith Ave.
3 Las Vegas, NV 89104
4 Telephone: (619) 246-6549
5 Email: flydiversd@gmail.com

6 Pro Se

7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
10

11 ANTHONY JOHNSON, an individual,

12 *Plaintiff,*

13 v.

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

22 *Defendants.*

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

**PLAINTIFF’S REPLY TO
DEFENDANTS’ OPPOSITIONS TO
MOTION FOR RECONSIDERATION**

Telephonic Appearance

Hearing Date: January 21, 2020

Hearing Time: 10:30 AM

Judge: Hon. Marilyn L. Huff

Courtroom: 15A (Carter/Keep)

Complaint Filed: June 24, 2019

Trial Date: Not Set

23 Plaintiff Anthony Johnson (“Johnson”) submits this Reply to Defendants’
24 oppositions to Johnson’s Motion for Reconsideration (Doc. No. 74, “Motion”) under
25 Fed.R.Civ.P Rules 59(e) and 60(b) to reconsider the Court’s order of December 2,
26 2019 (Doc. No 73, “Order”). Defendants submitted separate oppositions to the Motion
27 containing substantially the same arguments. (Doc. Nos. 80 & 82.) Johnson herein
28 replies to both oppositions and collectively refers to all defendants as “Defendants”.

I. SUMMARY

Defendants argue that the Court should not consider the Motion because Johnson demonstrated no instances of clear error and because Johnson's arguments could have been raised in his prior briefing. Defendants ignore the substance of Johnson's Motion and simply recycle their arguments from their motions to dismiss. Defendants fail to address and therefore concede to Johnson's arguments in response to those raised in the Order as well as those previously raised in opposition to their motions that were never considered. Johnson has demonstrated clear error that deprives him due process, therefore justifying reconsideration and setting aside the Order dismissing his well-supported claims.

II. DISCUSSION

A. Johnson Has Shown Just Cause for Reconsideration of the Court's Order Dismissing His Claims

1. Johnson Demonstrated Clear Error and Manifest Injustice

As Defendants argue, a motion for reconsideration under Rule 59(e) is "appropriate if the district court is provided with [...] clear error or manifest injustice." (Doc. No. 82, p. 1, citing *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).) In citing *McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999), they further argue that "[a] district court does not commit clear error warranting reconsideration when the question before it is a debatable one." (*Id.*, p. 2) Defendants concede that the court may grant reconsideration under Rule 60(b) for "any other reason justifying relief." (*Id.*) Johnson demonstrated clear error that resulted in manifest injustice by dismissing his well-established claims. Johnson was deprived due process by not being afforded an opportunity to argue the issues and authorities first raised in the Order. Johnson showed that the arguments and authorities raised in the Order are inapplicable to the facts and circumstances of this case. If afforded proper consideration, Johnson's arguments and authorities demonstrate legal errors that are undebatable.

1 **2. Johnson Did Not Raise Arguments for the First Time in the Motion**

2 Defendants cite *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,
3 571 F.3d 873, 880 (9th Cir. 2009) and other authorities in arguing that “Rule 59(e)
4 motions ‘may not be used to raise arguments or present evidence for the first time
5 when they could reasonably have been raised earlier in the litigation.’” (Doc. No. 82,
6 p. 2.) Johnson did not raise new arguments but responded to those first raised in the
7 Order.

8 **3. No Affidavit Was Necessary to Support the Motion**

9 Defendants omit the operative portion of Local Civ. R. 7.1(i)(1) when asserting
10 that “a motion for reconsideration *must* include an affidavit a party.” (Doc. No. 82, p.
11 3, italics in original.) The Rule does not apply to an initial motion for reconsideration,
12 but only to a “subsequent motion” for the same relief that was previously refused and
13 new facts or circumstances or exist. The Motion is not a subsequent motion, nor is it
14 based on “new and different facts and circumstances” that require an affidavit.

15 **4. The Court Did Not Consider Arguments Presented by Both Sides**

16 Defendants assert that Johnson is simply “rehashing” arguments and “the Order
17 properly considered arguments presented by both sides.” (Doc. No 82, p. 3-4.)
18 Johnson’s Motion responds to arguments first raised in the Order and reiterates
19 arguments the Court did not acknowledge when otherwise dismissing his claims. The
20 Order does not reference Defendants’ untenable arguments but instead replaces them
21 with new arguments and supplements their broad legal conclusions with added
22 authority. Because the Order raised new arguments and authorities in support of
23 Defendants’ motions that Johnson had no opportunity to argue, the Court likewise has
24 not heard or considered Johnson’s counter-arguments. Reconsideration of the Order
25 does not afford Johnson a second chance to plead his case but allows *both parties* to
26 argue the issues first raised in the Order.

27 The Court not only considered but supplemented Defendants’ arguments in the
28 Order, and Johnson’s arguments should be afforded at least the same consideration.

1 **B. Defendants Provided No Arguments in Opposition to Johnson’s**
2 **Showing of Clear Errors in the Order Dismissing His Claims**

3 Defendants assert that Johnson is “rehashing” arguments, but Johnson is doing
4 nothing of the sort. Johnson responds to arguments first raised in the Order and
5 reiterates a prior dispositive argument the Order failed to consider. Defendants oppose
6 the Motion by rehashing their prior conclusory arguments unsupported by authority,
7 but still without addressing Johnson’s arguments and authority to the contrary.
8 Defendants have now had the opportunity to respond to Johnson’s arguments in the
9 Motion but chose not to. Therefore, Johnson’s arguments are unopposed.

10 **1. Malicious Prosecution**

11 The Motion asserts that the Court did not acknowledge Johnson’s argument and
12 authority providing that an unrelated claim pending appeal is severed from the
13 underlying lawsuit, and thus not subject to the malicious prosecution action directed
14 only to a non-appealed claim. Once again, Defendants ignore the argument when
15 simply reasserting that Johnson did not establish favorable termination of the entire
16 action. They continue citing the same cases, ignoring Johnson’s repeated showing that
17 those very cases approve the severability of appealed claims. (Doc. No. 74-1, pp 4-5;
18 Doc. No. 80, p. 3.) Johnson did not simply argue his “disagreement with this Court’s
19 interpretation of the law.” (Doc. No. 82, p. 4.) Johnson argued the Court did not
20 consider the overriding law he presented. It was clear error of law to grant
21 Defendants’ motions to dismiss and special motions to strike Johnson’s malicious
22 prosecution claim.

23 **2. Indemnification**

24 Defendants ignore Johnson’s argument and relevant statutes when stating, “The
25 Court correctly found that to be entitled to indemnification under Cal. Corp. Code §
26 317, Johnson must be successful on the merits in defense of the action.” (Doc. No. 82,
27 p. 5; Doc. No. 80, pp 3-4.) The Order argued *sua sponte* that indemnification may *only*
28 be provided if a defendant successfully defends the entire lawsuit. Johnson argued that

1 no authority exists that overrides the statute *explicitly* providing indemnification for
2 the successful “defense of any claim, issue, or matter *therein*.” (Doc. No. 74-1, p. 7,
3 quoting Cal. Corp. Code § 317(d), italics added.) Defendants did not oppose
4 Johnson’s argument and thus concede it was clear error to dismiss Johnson’s
5 indemnification and breach of fiduciary duty claims simply because another court
6 denied indemnification to a plaintiff based on unrelated facts and circumstances.

7 **3. Breach of Contract and Rescission**

8 As to Storix, Defendants reassert their argument that Johnson’s breach of
9 contract and rescission claims arose from the “same nucleus of operative facts as the
10 claims for the copyright infringement and declaratory judgment in the prior federal
11 proceedings.” (Doc. No. 82, p. 5; Doc. No. 80, p. 4.) But they again fail to explain
12 how these lawsuits are related and identify no “operative facts.” They assert that
13 Johnson’s claims are barred by *res judicata*, but they simply refuse to identify any
14 claims or issues previously decided that are *contrary* to Johnson’s allegations. Instead
15 they argue that Johnson should have brought his contract claim in the copyright
16 litigation (Doc. Nos. 81, p. 5; 80, p. 4), ignoring that Johnson neither had reason to do
17 so nor could have done so. (Doc. No 74-1, p. 9.) Johnson doesn’t challenge the prior
18 decision that his copyright ownership was transferred by an oral agreement. But
19 *Defendants* challenge that decision when arguing that Johnson cannot receive
20 consideration for his copyrights because an oral transfer of copyright ownership is not
21 valid. Johnson argued that he never alleged an oral agreement to transfer copyright
22 ownership (Doc. No. 74-1, pp. 7-10), but even so it was clear error to bar Johnson’s
23 claims based on *res judicata* when no allegations contradict a prior ruling. (*Id.* p. 10.)
24 Defendants are instead barred by issue preclusion from asserting a *defense* that
25 contradicts the Ninth Circuit’s decision. (*Id.*, p. 11.)

26 Johnson opposed the *sua sponte* argument raised in the Order that defendants
27 Altamirano, Turner, Kinney and Huffman cannot be held liable for contract claims
28 because they can only be held liable for tort claims. Johnson argued that only Storix is

1 being sued for breach of contract and rescission, but the other defendants can be held
2 liable since their tortuous acts rendered Storix insolvent and incapable of performing
3 its contractual obligation. Whether those defendants should be held liable under the
4 circumstances is a factual issue for a jury. Defendants do not oppose the argument.

5 Defendants also do not oppose Johnson's arguments that, under California
6 statutes, (1) an oral contract is not valid unless valuable consideration is provided to
7 both parties; (2) a contract may be rescinded if a party fails to provide consideration;
8 and (3) a party is unjustly enriched if the consideration is found to be invalid or
9 unenforceable. (Doc. No. 74-1, p. 11.) Johnson demonstrated clear error in the Order
10 dismissing both the contract claim *and* the rescission claim. (Doc. No. 74-1 p 12.)
11 Defendants do not oppose the argument that Johnson cannot be deprived
12 compensation for his copyrights *and* the benefits they obtained from their use.

13 **4. Contractual Interference**

14 As to the claim of contractual interference, Defendants simply assert that
15 "Johnson's motion does not cite to any new evidence or authority contrary to that upon
16 which Defendants' asserted and the Court properly relied." (Doc. 80, p. 5.) Johnson
17 provided authority contrary to the *sua sponte* arguments raised in the Order, and he
18 also argued that the authority provided to supplement Defendants' arguments is
19 inapplicable to this case. (Doc. No. 74-1, pp. 14-15.) Defendants do not oppose
20 Johnson's counter-arguments and thus concede it was error of law to dismiss
21 Johnson's contractual interference claim on grounds that the contract is invalid and
22 that Defendants cannot be held liable for interference in a contract in which only he
23 and Storix are parties.

24 **5. Interference in Prospective Economic Advantage**

25 Defendants do not oppose Johnson's argument that it was improper for the
26 Court to dismiss the claim of intentional interference in prospective economic
27 advantage. The Order raised the *sua sponte* argument that Johnson's allegations were
28 too speculative, failing to acknowledge nonconclusory and undisputed facts in the

1 Complaint. (Doc. No. 74-1, p. 15.) Defendants concede it was clear error to dismiss
2 the claim based on insufficient facts.

3 **C. Defendants' Motions Should Have Been Dismissed With Prejudice –**
4 **Not Johnson's Claims**

5 Even if the Court denies this Motion and dismisses Johnson's claims, the claims
6 should not have been dismissed with prejudice. It was equally improper to deny
7 Defendants' motion to dismiss the remaining claims without prejudice specifically so
8 they could re-raise the same *res judicata* defense after an appeal that has no bearing
9 on the claims.

10 The malicious prosecution, indemnification and breach of fiduciary duty claims
11 were all dismissed on the basis that Johnson could not allege favorable termination of
12 an entire underlying lawsuit. It was clear error to base the decision on an unrelated
13 claim pending appeal, and it was nevertheless premature to dismiss the claims with
14 prejudice due to lack of favorable termination of a lawsuit that has not yet terminated.

15 The Court found Johnson's allegations pertaining to intentional interference
16 with prospective economic advantage too speculative, but expressly stated that the
17 Complaint could not be amended to cure the deficiency and dismissed the claim with
18 prejudice. Johnson's facts were explicit, not speculative. Even so, it was improper for
19 the Court to assume Johnson could not allege more substantial facts, if needed, and
20 deprive him the right to do so.

21 The Order denies the motion to dismiss of Altamirano, Turner, Kinney and
22 Huffman as to the claims of conversion and breach of fiduciary duty, but expressly
23 does so with without prejudice specifically so they can re-raise the same *res judicata*
24 and statute of limitations defenses following a state court appeal. Johnson argued there
25 are no claims or issues pending appeal that have any bearing on this lawsuit and
26 requested the Court finalize its decision as to the remaining claims. Defendants did not
27 oppose Johnson's request. There is no reason for the Court to postpone a final
28 decision as to the remaining claims.

1 **III. CONCLUSION**

2 Defendants provided no response to any of Johnson’s arguments regarding
3 errors of law in the Order. Instead, they argue the Court should not reconsider the
4 Order, even arguments and authorities first raised therein. Johnson demonstrated
5 extraordinary circumstances that justify reconsideration of the Order, particularly that
6 he was deprived the opportunity to dispute arguments raised in the Order without a
7 hearing, and that dismissing his claims under the circumstances would deprive him
8 due process. Defendants provide no plausible reason the Order should not be
9 reconsidered.

10 For all the above reasons, the Court should reconsider the Order and reverse its
11 decision to dismiss Johnson’s claims as to all Defendants. Defendants should be
12 required to finally answer to Johnson well-established claims without further delay.

13
14 DATED: December 9, 2019

Respectfully submitted,

15
16 By:



ANTHONY JOHNSON, In Pro Per