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

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

13 vs.

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 SUR-REPLY ISO
FURTHER BRIEFING ON THE
EFFECT OF THE FINALITY OF
STATE COURT APPEAL (D075308)
ON THIS COURT’S STAY AND
ORDER OF DECEMBER 2019
(ECF NO. 73)**

COURTROOM: 15A
Honorable Judge Marilyn L. Huff

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

23 Pursuant to the Court’s order, ECF No. 107, Plaintiff Anthony Johnson
24 (“Johnson”) hereby submits this sur-reply to the reply in support of further briefing
25 on the effect of the California Court of Appeal’s opinion and the Court’s order and
26 stay of this action (ECF Nos. 111, “Reply”) submitted by defendants Manuel
27 Altamirano, Richard Turner, David Kinney, and David Huffman (collectively,
28 “Defendants”).

1 **I. INTRODUCTION**

2 Defendants have filed six briefs on the same Motion to Dismiss spanning
3 almost two years, but still fail to identify any *specific* claims or *identical* issues that
4 were litigated or decided in the consolidated state actions (“State Actions”) that are
5 preclusive to Johnson’s remaining claims of conversion and the second count of
6 breach of fiduciary duty.

7 After nearly two years, Defendants continue to treat their motion to dismiss
8 (“Motion”) as an evidentiary hearing. But, rather than providing evidence disproving
9 Johnson’s claims, they submit evidence to try and disprove the delayed discovery of
10 the conversion. Defendants can’t deny they converted nearly half a million dollars
11 from Johnson’s earnings while he was on a medical leave they didn’t expected him to
12 return from. It took years for Johnson to finally discover the real reason those he’d
13 entrusted with his life’s work forced him into litigation against his own company. All
14 the litigation costs they imposed on Storix served only to conceal their conversion.
15 Johnson asks that the Court realize it was equally mislead and finally allow him the
16 opportunity to recover a small fraction of what was unlawfully and maliciously taken
17 from him.

18 The Court should consider Defendants’ Motion a summary judgment motion
19 under Rule 56 because it refers to extrinsic evidence that only raises questions of fact.
20 Defendants provide no showing that the breach of fiduciary duty and conversion
21 claims, or any operative facts, have ever before been litigated or decided. Also,
22 because the statute of limitations, especially involving delayed discovery, are factual
23 issues for a jury to decide, the Court should deny summary judgment and expedite
24 the proceedings given all the unnecessary cost and delay Defendants have already
25 caused.

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1 **II. DISCUSSION**

2 **A. Defendants Incorrectly Apply Legal Standards for Res Judicata**
 3 **and Collateral Estoppel**

4 Defendants are incorrect in applying federal *res judicata* principles to a state
 5 court judgment or a federal court sitting in diversity. “Federal Courts look to state
 6 law to determine the preclusive effect of a state court judgment.” *Palomar*
 7 *Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir.1993).
 8 “[A] federal court sitting in diversity must apply the *res judicata* law of the state in
 9 which it sits.” *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir.
 10 1982) (citations omitted).” “The prerequisite elements for applying the doctrine to
 11 either an entire cause of action or one or more issues are the same: (1) A claim or
 12 issue raised in the present action is identical to a claim or issue litigated in a prior
 13 proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and
 14 (3) the party against whom the doctrine is being asserted was a party or in privity
 15 with a party to the prior proceeding. [Citations.]” *People v. Barragan* (2004) 32
 16 Cal.4th 236, 252-253.

17 “In determining whether two proceedings involve identical causes of action
 18 for purposes of claim preclusion, California courts have ‘consistently applied the
 19 “primary rights” theory.’” *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788,
 20 797 (citing *Slater v. Blackwood*, 15 Cal.3d 791,795 (1975).) Under this theory, “[a]
 21 cause of action ... arises out of an antecedent primary right and corresponding duty
 22 and the delict or breach of such primary right and duty by the person on whom the
 23 duty rests ,” *Id.* at 797-798 (citing *McKee v. Dodd*, 152 Cal 637,641 (1908).) “Thus,
 24 under the primary rights theory, the determinative factor is the harm suffered. When
 25 two actions involving the same parties seek compensation for the same harm, they
 26 generally involve the same primary right.” *Id.* at 798.

27 Importantly, “[I]f the very same facts and no others are involved in the second
 28 case, ... the prior judgment will be conclusive as to the same legal issues which

1 appear. ... But if the relevant facts in the two cases are separable, even though they
2 be similar or identical, collateral estoppel does not govern the legal issues which
3 recur in the second case.’” *Association of Irrigated Residents v. Department of*
4 *Conservation* (2017) 11 Cal. App. 5th 1202, 1231 (citing *Flores v. Transamerica*
5 *HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 852.)

6 Defendants cite federal cases that didn’t involve preclusive state court
7 decisions when saying: “Courts in the Ninth Circuit consider the following when
8 determining the first factor - whether two claims are the same: (1) whether rights or
9 interests established in the prior judgment would be destroyed or impaired by
10 prosecution of the second action; (2) whether substantially the same evidence is
11 presented in the two actions; (3) whether the two suits involve infringement of the
12 same right; and (4) whether the two suits arise out of the same transactional nucleus
13 of facts. [Citation.] Although no one factor is determinative, the ‘last of these criteria
14 is the most important.’ [Citation.]” (Reply at p. 3.)

15 It doesn’t actually matter which principles are applied since Johnson’s claims
16 are not barred *by res judicata* under state or federal law. The claims have never been
17 litigated or decided because Johnson does not allege the same wrongful acts or
18 demand the same damages as in any prior action. His claims don’t involve the same
19 operative facts or evidence, and a finding of liability against Defendants would not
20 destroy or impair any right established by a prior judgment.

21 **B. The Second Count of Breach of Fiduciary Duty Claim is**
22 **Not Barred by Res Judicata**

23 Defendants still fail to cite any “identical claims or issues litigated in a prior
24 proceeding” that are preclusive to Johnson’s breach of fiduciary duty claim. *See*
25 *People v. Barragan, supra*, 32 Cal.4th at 252. They simply argue that “Johnson’s
26 breach of fiduciary duty cause of action is barred because “i) it was previously
27 litigated to finality (or could have been) in the Derivative Suit and Direct Suit; ii)
28 involves the same rights and evidence; and iii) arises from the same transactional

1 nucleus of facts.” (Reply, p. 3.) Yet, they still fail to cite any specific claims,
2 evidence, or *transactional facts* that were litigated or decided in the state actions.
3 Instead, they refer to the following *general allegations* in the complaints, but ignore
4 the actual facts supporting them:

- 5 (a) using “their majority control of the board of Storix to increase their
6 personal income”;
- 7 (b) “unfairly denying Johnson benefits of Storix that Partner-Defendants
8 afforded themselves”; and
- 9 (c) “using Storix’s profits otherwise owed to Johnson for their personal
10 benefit, including all monies paid to their personal attorneys.”

11 (Reply, pp. 3-4.)¹ These are not specific claims or issues, and they were never
12 actually litigated. Defendants cite no transactional (or operative) facts pertaining to
13 how they “increase[ed] their income”, what “benefits of Storix” they afforded
14 themselves, or what wrongful acts or harm involved “Storix profits” or “monies paid
15 to their personal attorneys.”

16 Defendants compare the above general allegations in the State Actions to only
17 one in the Complaint by saying “the current claim is based on ‘the loss of Johnson’s
18 40% of Storix’s profits used to pay Partner-Defendants and Storix’s counsel for acts
19 committed solely for Partner-Defendants’ benefit.”” (Reply, p. 4, citing Complaint ¶
20 47.) Again, they make no reference to a complaint or any other court record
21 explaining what those “acts” were.

22 In the Complaint, Johnson alleges that Defendants breached their fiduciary
23 duty by “unfairly denying Johnson benefits of Storix that Partner-Defendants
24

25 ¹ Defendants claim that (c) was previously decided, but the only issue decided
26 (in the *Derivative Suit*) was whether they were entitled to use company funds to
27 defend *Johnson’s cross-complaint*. The current claim involves misuse of company
28 profits for other acts that hadn’t occurred or were undiscovered when the state actions
were filed.

1 afforded themselves”, “using Storix's profits otherwise owed to Johnson for their
2 personal benefit, including all monies paid to their personal attorneys”, “enlisting
3 Attorney-Defendants to advise and assist Partner-Defendants in perpetuating and
4 protecting their dominance and control”, and “directing Attorney-Defendants to
5 obstruct, interfere and otherwise defend against claims in the Derivative Suit brought
6 on Storix's behalf.” (Complaint ¶¶ 45-46.) Again, those are *general allegations*, not
7 *transactional facts*. Defendants make no reference to the actual facts supporting those
8 allegations (Complaint ¶¶ 16, 20, 21, 26, 30, 34) or where the same facts appear in
9 any prior litigation.

10 Defendants cannot assert a *res judicata* defense by simply saying “the
11 allegations arise from a common nucleus of facts” and “[t]he same financial evidence
12 was, and would be, submitted in support of the claims.” (Reply, p. 4.)² They must
13 show what those facts are, what that evidence will be, and where they appeared in the
14 prior litigation. Importantly, Defendants can’t simply rely on the allegations of the
15 *complaints*. They must indicate the specific claim they pertain to and show the claim
16 was preciously litigated and decided.

17 Defendants attempt to sneak in a new argument that “Johnson’s cause of action
18 for breach of fiduciary duty is a claim belonging to Storix, not Johnson” (Reply, p. 4
19 citing *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). Although improper in a
20 reply brief, the argument fails for a number of reasons. First, these are same
21 Defendants as those in the Derivative Suit who obtained a ruling “dismiss[ing]
22 Johnson as a shareholder plaintiff on grounds that he could not fairly and adequately
23 represent Storix’s interests[.]” (Complaint ¶ 28.) That decision prohibits Johnson
24 from filing a derivative action on Storix’s behalf. (*Id.* ¶ 36.) Second, Johnson is no
25 longer a shareholder of Storix, so he has no standing to bring a derivative claim.

26
27 ² Of course, the evidence will differ since the harm alleged in the Complaint had
28 not yet occurred when the state actions were filed. For instance, this claim will
require the attorneys’ bills that were never before produced.

1 Third, and most relevant, is that Defendants unlawfully used Storix’s resources to
2 defeat the prior Derivative Suit Johnson brought *on Storix’s behalf*, which rendered
3 futile the entire purpose of a shareholder derivative suit. (*Id.* ¶ 34.) Defendants are
4 still majority shareholders of Storix but, unlike Johnson, they actually benefit from
5 defeating the company’s claims.

6 C. The Conversion Claim is Not Barred by Res Judicata

7 Defendants repeat the same *general allegations* from the State Actions and the
8 current Complaint as noted above, this time asserting that they constitute the same
9 claim as Johnson’s conversion claim. They just argued that the breach of fiduciary
10 duty claim is based on the “same transactional facts” as litigated in the Derivative
11 Suit, and now argue that the conversion claim is based on those “same transactional
12 facts.” For that to make sense, the breach of fiduciary duty and conversion claims
13 would also have to be the same.

14 Defendants further state that, because the Derivative Suit alleged acts of
15 corporate waste that were “taken to promote their self-interest ... such as diverting
16 funds”, the breach of fiduciary duty claim is the same because it includes a general
17 allegation of “actions taken to promote their self-interest. (Reply, p. 5.) Then, they
18 refer to the conversion claim in saying that “Johnson was owed all undistributed
19 profits” and Defendants “prevent[ed] Johnson’s access to the money or records
20 pertaining to it.” (*Id.* citing Complaint ¶ 50.) “In other words”, they argue, “Johnson
21 alleges Defendants engaged in self-dealing by converting corporate profits ‘for their
22 own personal benefit.’ These are the same allegations and harm Johnson previously
23 litigated[.]” (*Id.*, p. 6.) This conclusion is simply nonsensical.

24 For the same reasons set forth in the prior section on the breach of fiduciary
25 duty claim, Defendants provide no support for their defense of *res judicata* against
26 the conversion claim. They identify no specific claims, no identical issues, no
27 transactional facts, and they provide no showing that these “allegations” underlying
28 the conversion claim were previously litigated or decided.

1 **1. Issue Preclusion Does Not Bar Johnson’s Allegation of Lack of**
2 **Access to Financial Records**

3 Defendants state that “Johnson’s access to the financial records of Storix was
4 extensively litigated in the underlying consolidated actions.” (Reply, p. 7.) That is
5 patently false. They assume that, because there was an allegation in the Derivative
6 Suit that Johnson was not allowed access to records, a judgment on “all causes of
7 action” means the issue was “extensively litigated.” The issue of whether Johnson
8 had access to sufficient records to raise his suspicion and investigate the conversion
9 was never litigated.

10 Defendants are really arguing that Johnson didn’t bring the conversion claim
11 within the statute of limitations by trying to disprove his factual allegations of
12 delayed discovery, “[T]he question of when [a plaintiff] was on inquiry notice of
13 potential wrongdoing is a factual question.” *Ward v. Westinghouse Canada, Inc.*, 32
14 F.3d 1405, 1408 (9th Cir. 1994). “Resolution of the statute of limitations issue is
15 normally a question of fact. More specifically, as to accrual, once properly pleaded,
16 belated discovery is a question of fact.” *E-Fab, Inc. v. Accountants, Inc. Services*, 64
17 Cal.Rptr.3d 9, 17 (2007) “The question when a plaintiff actually discovered or
18 reasonably should have discovered the facts for purposes of the delayed discovery
19 rule is a question of fact unless the evidence can support only one reasonable
20 conclusion.” *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 61.
21 Whether Johnson’s discovery of the cause of action occurred within the statute of
22 limitation is a factual issue for a jury to decide.

23 **D. The Court Should Reconsider the Malicious Prosecution,**
24 **Indemnification and Breach of Fiduciary Duty Claims**

25 **1. Malicious Prosecution**

26 Defendants misrepresent the California Court of Appeals Opinion as simply
27 “summariz[ing] the jury’s findings.” (Reply, p. 8.) “Based on this verdict, it is clear
28 the jury rejected Storix’s damages claim based on Johnson creating a competing

1 product and awarded damages solely for Johnson’s act of sending the customer
2 email.” (Johnson RJN, Ex. A, p. 19.) This was a conclusion of the Court of Appeals
3 that was necessary to Johnson’s argument that “he was surprised when Storix
4 ‘introduc[ed] the claim’ during ‘closing arguments[.]’” (*Id.* p. 21.) The court
5 misapprehended Johnson’s later argument in saying it “should sever the employee-
6 productivity claim from the unrelated ‘unfair head start’ claim and declare he
7 prevailed.” (*Id.*, p. 43.) Johnson didn’t ask the court to “declare he prevailed” on all
8 claims, only the one the court “clearly” identified as separate and distinct. The court
9 found the claims were “not severable” when awarding attorney fees on anti-SLAPP
10 motion by assuming the prior malicious prosecution action (that was voluntarily
11 dismissed) was directed to the entire complaint.

12 **2. Indemnification and First Count of Breach of Fiduciary Duty**

13 Defendants state that “Johnson has provided no basis for reconsideration” of
14 these claims, but also didn’t dispute Johnson’s argument. Even if the Court does not
15 vacate its dismissal of the malicious prosecution action, the Court of Appeals
16 “clearly” recognized the distinction between the “unfair head-start” and “employee
17 productivity” claims, which this Court previously considered the same.
18 Indemnification for a successful defense of an action, or “any claim, issue or matter
19 therein” is mandated by both California law and Storix’s own bylaws. (Complaint ¶¶
20 30, 68; Cal. Corp. Code § 317(d).) Johnson brought the indemnification cause of
21 action against Storix and the breach of fiduciary duty claim for refusing to provide
22 indemnification against the Defendants. Johnson is entitled by law to be reimbursed
23 his expenses regardless of which party it comes from.

24 **III. CONCLUSION**

25 For the foregoing reasons, the Court should lift the stay of this action, deny
26 Defendants’ Motion, and vacate its dismissal of Johnson’s claims for malicious
27 prosecution, indemnification, and the first count of breach of fiduciary duty.
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DATED: May 28, 2021

Respectfully submitted,

By: 
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