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Pro Se

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

vs.

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

Defendants.

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

PLAINTIFF'S 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

Plaintiff Anthony Johnson ("Johnson") hereby submits this Further Briefing on the effect of the California Court of Appeal's December 31, 2020 opinion and April 22, 2021 remittur on the Court's stay of this action and the Court's December 2, 2019 order (ECF No. 73, "Order"). In addition, Johnson responds to the further briefing submitted by defendants Altamirano, Turner, Kinney and Huffman ("Defendants") as to the effect of the appeal on their motion to dismiss ("Motion") on the ground of "failure to state a claim upon which relief can be granted." (FRCP § 12(b)(6).)

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL STANDARDS 2

III. THE COURT SHOULD RECONSIDER THE ORDER AS TO ALL ISSUES AFFECTED BY THE OPINION OF THE CALIFORNIA COURT OF APPEALS 3

A. There Were No Claims or Issues in the State Actions Preclusive to Any of Johnson's Claims 3

1. The Conversion Claim is Not Barred By the Statute of Limitations 4

2. The Conversion Claim is Not Barred Res Judicata 5

3. The Second Count of Breach of Fiduciary Duty is Not Barred by Res Judicata 6

B. The Opinion of the Court of Appeals Resolves an Important Issue in Conflict with the Order Dismissing Other Claims 7

1. The Court Should Vacate the Dismissal of Johnson's Malicious Prosecution Claim 8

2. The Court Should Vacate the Dismissal of Johnson's Indemnification and Breach of Fiduciary Duty Claims 9

IV. CONCLUSION 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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23
24
25
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TABLE OF AUTHORITIES

CASES

(*Ward v. Westinghouse Canada,* Inc., 32 F.3d 1405, 1408 (9th Cir. 1994)................. 3
Albertson v. Raboff (1956) 46 Cal.2d 375 9
Association of Irritated Residents v. Department of Conservation (2017) 11 Cal. App. 5th 1202 3
Boeken v, Philip Morris USA, Inc. (2010), 48 Cal.4th 788 2
Crowley v. Katleman (1994) 8 Cal. 4th 666 9
Dalany v. Am. Pac. Holding Corp. (1996) 42 Cal. App. 4th 822.............................. 10
E-Fab, Inc. v. Accountants, Inc. Services (2007) 64 Cal.Rptr.3d 9, 17 3
Eichman v. Fotomat Corp. (1983) 147 Cal. App.3d 1170 2
Groth Bros. Oldsmobile v. Gallagher (2002), 97 Cal. App. 4th 60 10
Lane v. Bell (2018), 20 Cal. App. 5th 61 9
Lanz v. Goldstone (2015) 243 Cal.App.4th 441 9
McKee v. Dod (1908) 152 Cal 637 2
Ovando v. County of Los Angeles (2008) 159 Cal.App.4th 42 3
Paramount General Hospital Co. v. Jay (1989) 213 Cal.App.3d 360......................... 9
Sierra Club Foundation v. Graham (1999) 72 Cal.App.4th 1135............................... 9
Slater v. Blackwood (1975) 15 Cal.3d 791 2
Tabaz v. Cal Fed Finance (1994) 27 Cal.App.4th 789 9

STATUTES

California Corporations Code § 317(d) 10

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I. INTRODUCTION

In light of the fact that an appeal was pending in the matters of *Storix, Inc. v. Johnson*, San Diego Superior Court Case No. 2015-00028262-CU-BT-CTL ("Direct Suit") and *Johnson v. Huffman, et al.*, Case No. 2015-00034545-CU-BT-CTL ("Derivative Suit"), "the Court request[ed] further briefing from the parties on the effect, if any, of the California Court of Appeal's December 31, 2020 opinion and April 22, 2021 remittitur on the Court's stay of this action and the Court's December 2, 2019 order." (ECF No. 107, p. 8.)

As set forth in the order for further briefing, the Court denied Johnson's motion to stay the action pending the state appeal, then issued the December 31 order ("Order") dismissing five of Johnson's claims. The Order denied Defendants' motion to dismiss the two remaining claims without prejudice specifically so Defendants could raise *a res judicata* or statute of limitations defense once the state appeal was decided. The Court then stayed the action pending resolution of the state appeal.

The Order specifically directed Defendants to raise or re-raise a statute of limitations or *res judicata* defense "at a later state of the proceedings" – specifically "at summary judgment." (Order, pp. 29-30 at fn. 7-8.) But, since the Court is revisiting its Order as to Defendants' defenses, it's only fair that it also consider the effect of the Court of Appeal's opinion on the dismissed claims.

As set forth below, the opinion of the Court of Appeals had no preclusive effect on any of Defendants' defenses, but it did provide a finding contrary to the Court's basis for dismissing Johnson's claims for malicious prosecution, indemnification, and breach of fiduciary duty by failing to provide indemnification. Furthermore, the Court denied Defendants' Motion as to the conversion and breach of fiduciary duty claims for reasons other than the pendency of the state appeal. Defendants ask the Court to reconsider the Order denying the dismissal of claims, but offer no argument as to how the appeal affected its prior ruling.

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II. LEGAL STANDARDS

"The doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (*Boeken v, Philip Morris USA, Inc*. (2010), 48 Cal.4th 788,797 (citations omitted).) "In determining whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the 'primary rights' theory." (*Id*., citing *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) "Under this theory, '[a] cause of action ... arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests.'" (*Id.* at 797-798, quoting *McKee v. Dod* (1908) 152 Cal 637, 641.)

"California law defines a cause of action 'by focusing on the "primary right" at stake: if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.] A cause of action is based upon the nature of a plaintiff's injury. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the *facts* from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong. [Citation.]'" (*Eichman v. Fotomat Corp*. (1983) 147 Cal. App.3d 1170, 1174-1175, italics in original, internal quotation marks omitted.)

"Although collateral estoppel (unlike res judicata) does not require the same cause of action to be present in the two proceedings, the issue litigated must be identical. [Citation.] 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.' [Citation.] Where the subsequent action involves only parallel facts, but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel. [Citation.] '[I]f the very same facts and

no others are involved in the second case, … the prior judgment will be conclusive as to the same legal issues which appear … . But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.' [citations.]" (*Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal. App. 5th 1202, 1230-1231, citations omittted.)

"Under California law, the question of when [the plaintiff] was on inquiry notice of potential wrongdoing is a factual question." (*Ward v. Westinghouse Canada,* Inc., 32 F.3d 1405, 1408 (9th Cir. 1994).) "Resolution of the statute of limitations issue is normally a question of fact. More specifically, as to accrual, once properly pleaded, belated discovery is a question of fact." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 64 Cal.Rptr.3d 9, 17.) "The question when a plaintiff actually discovered or reasonably should have discovered the facts for purposes of the delayed discovery rule is a question of fact unless the evidence can support only one reasonable conclusion." (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 61.)

III. THE COURT SHOULD RECONSIDER THE ORDER AS TO ALL ISSUES AFFECTED BY THE OPINION OF THE CALIFORNIA COURT OF APPEALS

A. There Were No Claims or Issues in the State Actions Preclusive to Any of Johnson's Claims

Defendants have now been given a third chance to find any judicially noticeable facts to disprove as a matter of law Johnson's allegation that they converted $475,000 of his Storix earnings to their personal account or that the discovery of that conversion did not occur until 2018. The Court declined to dismiss the conversion claim "as barred by the applicable statute of limitations [] without prejudice to Defendants asserting their statute of limitations defense at a later stage of the proceedings, such as through a motion for summary judgment." (Order at p. 32,

fn. 8.) The Court further "decline[d] to dismiss Plaintiff's conversion claim" as to the defense of *res judicata* because the state appeal was pending. (*Id*. at fn.9.)

Rather than explain how any rulings by the California Court of Appeals effect the Order, Defendants simply state that "for all the reasons set forth in Defendants' motion" (ECF No. 30-1, "Motion"), Johnson's breach of fiduciary duty and conversion claims are barred by the doctrine of *res judicata.* (ECF No. 108 at pp. 4-5.) They made no new arguments, provide no new facts, and make no attempt to argue that Johnson's claims were barred by collateral estoppel (issue preclusion) or by statute of limitations in the Motion or in their further briefing.

1. The Conversion Claim is Not Barred By the Statute of Limitations

Defendants assert no defense of statute of limitations in their further briefing. In the Motion, they argued that, because a state court "allowed Johnson to inspect the books and records of Storix but *limited this right* due to Johnson's litigation against Storix in the Copyright Action and Derivative Suit", this somehow proved that Johnson *could have* discovered the conversion. (Motion, p. 10, italics added.)[1] It makes no sense that Defendants efforts to "limit" Johnson's access to records somehow disproves delayed discovery. In any event, the Court rejected the argument because the order was issued within the 3-year statute of limitations of bringing the conversion claim. (Order at p. 31.)

The Court previously declined to dismiss the conversion claim based on the statute of limitations and Defendants provided no new argument as to why it should now reverse its decision.

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[1] Once again, Defendants falsely allege that Johnson brought the Derivative Suit against Storix knowing full well that *they were the defendants* in that case and Johnson was funding *Storix's claims* against them.

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2. The Conversion Claim is Not Barred Res Judicata

Defendants didn't argue *res judicata* in the Motion, and they provided no further briefing on how any rulings in the state courts should bar Johnson's conversion claim. Instead, they simply incorporated their original motion and reply briefs. (ECF No. 108 at p. 4, referring to ECF Nos. 30 & 54 ("Motion".) Neither of those briefs argued a defense of *res judicata*, so the Court should again deny the Motion as to that defense. Even if the Court were to reconsider all three sets of briefings on the issue, nowhere do the Defendants identify any prior claims or issues that were preclusive to Johnson's conversion claim.

After Defendants filed the Motion, but prior to issuing the Order, the Court requested further briefing as to how the Court of Appeals decision might permit Defendants to later assert a *res judicata* defense. Therein, the Court noted that "in the prior state court derivative action, Plaintiff brought a claim for an accounting against Defendants[.]" (ECF No. 62 at p. 2) It further noted that "the state court issued an order and decision finding 'that plaintiff has failed to meet the burden of proof on the four causes of action alleged in the First Amended Derivative Complaint[, including plaintiff's claim for an accounting].' … ." (*Id*. at p. 3.) Defendants therefore argued in their further briefing that "the Derivative Suit and the Direct Suit adjudicated Johnson's claim for an accounting and his access to the books and records." (ECF No. 66, p. 6.) They don't say how the "accounting claim" is the same as the conversion claim, so it appears they're alleging collateral estoppel (issue preclusion) rather than *res judicata* (claim preclusion). Either way, the state court denying the accounting only furthers Johnson's position that he did not discover the conversion until after the state trial. Johnson responded that "[t]he accounting claim was never litigated because its purpose was to obtain records necessary to determine actual damages following a judgment of liability. The court found no liability, thus no need for the accounting." (ECF No. 67, p. 10.) Defendants provided no further response.

This action remains at the pleading stage after almost two years. After three sets of briefings on the same Motion to dismiss, Defendants have still not identified a prior conversion claim or any issues previously litigated or decided that disprove, as a matter of law, Johnson's facts pertaining to delayed discovery. Should they wish to continue asserting their implausible *factual assertion* that Johnson knew of the conversion as early as 2011 but decided not to mention it during the 4 years they were using his own company to sue him, they must do so before a jury.

3. The Second Count of Breach of Fiduciary Duty is Not Barred by Res Judicata

As the Court acknowledged, Johnson alleged multiple claims for breach of fiduciary duty against Defendants: "First, Plaintiff alleges that these defendants breached their fiduciary duty to Plaintiff by denying Plaintiff indemnification for his defense[. …] Second, Plaintiff alleges that these defendants breached their fiduciary duty by using Storix profits that would have otherwise been owed to Plaintiff to defend against the claims in the state court derivative action[]." (Order at p. 27.) The Court dismissed the first claim with prejudice, but declined to dismiss the second claim because Defendants raised a *res judicata* defense while the appeal in the underlying state actions was pending. (Order at p. 29, fn. 7.)

Defendants provided no new facts or argument as to how the state appeal affects the Order, but simply refer to the arguments in their Motion regarding the applicability of *res judicata* to the remaining breach of fiduciary duty claim. Johnson likewise incorporates his opposition to Defendants' Motion (ECF No. 40) in which he argued:

> "There are no claims in Johnson's cross-complaint related to litigation expenses, and nothing in the Derivative Suit or any court order refers to legal actions or funds taken by Defendants to defeat the Derivative Suit itself. A court found only that the bylaws adopted by the Defendants mandated advancement of their fees against Johnson's cross-complaint.

> (MTS RJN, Ex. 7 at p. 117.) Also, no claim was ever asserted and no issue determined regarding Defendants 'direct[ing] Attorney-Defendants to obstruct, interfere and otherwise defend against claims in the Derivative Suit brought on Storix's behalf.' (Complaint ¶ 46.)"

(ECF No. 40 at p. 13.) In their reply, Defendants respond only by reciting the last sentence above, adding that "Defendants' Motion, however, cites to judicially noticeable facts establishing Johnson's claim for breach of fiduciary duty is barred by *res judicata*." (ECF No. 54 at p. 3.) Still, they reference no such facts.

It's not Johnson's burden to prove that Defendants did not identify any specific claims or issues in the state litigation when asserting their *res judicata* defense. There has never been a claim against the Defendants for using Storix's funds to pay Storix counsel to defend against the company's own derivative claims. The conduct of the Defendants and Storix's counsel are indefensible, illegal, and they cannot escape having to defend their actions by baldly asserting that they already did.

B. The Opinion of the Court of Appeals Resolves an Important Issue in Conflict with the Order Dismissing Other Claims

The Court ordered "further briefing from the parties on the effect, **if any**, of the California Court of Appeal's December 31, 2020 opinion and April 22, 2021 remittitur on the Court's stay of this action and the Court's December 2, 2019 order." (ECF No. 107 at p. 8, emphasis added.) On appeal, Johnson raised the issue of there being two separate and distinct claims against him, and that Storix succeeded only on a single distinct claim of 'loss of employee productivity' first raised in closing arguments. The Court of Appeals noted Storix counsel's argument that:

> "Storix suffered damages of approximately $1.2 million for Johnson's act of using Storix source code to create a competing product and damages between $2,570.86 and $3,739.14 for employee lost productivity in addressing the fallout from the customer email."

(Order at p. 18.) Importantly, the panel concluded:

> "The jury found Johnson breached his duty of loyalty by knowingly acting against Storix while serving on Storix's board and Storix suffered damages of $3,739.14. Based on this verdict, it is clear the jury rejected Storix's damages claim based on Johnson creating a competing product and awarded damages solely for Johnson's act of sending the customer email."

(*Id*. p. 18.)

As alleged in the Complaint, the "customer email" claim was a separate and distinct claim from the only claim Storix alleged in its original complaint related to Johnson allegedly starting a competing business. (ECF No. 1 ¶¶ 23, 27, fn.7.) However, the Court refers to these as "a single cause of action for breach of fiduciary duty against Johnson" (Order at pp. 10, 11, fn.2) and otherwise refers only to Storix's single "claim" throughout the Order.

"In his complaint in the present action, Plaintiff alleges that in the prior action, the state court adopted the jury's verdict in his favor." (Order at p. 9, citing ECF No. 1 ¶ 27.) But this allegation is directly contradicted by the judicially noticeable state court documents." (Order, p. 9.) The only contradiction was created by the Court's omission of the remaining part of the allegation. In full, Johnson alleges that:

> "The court adopted the jury's verdict in favor of Johnson on Storix's primary claim, and further denied all eleven (11) of Storix' s demands for injunctive relief. However, the court also adopted the jury's verdict awarding Storix $3,739 for 'loss of employee productivity' on an unrelated claim Storix introduced during trial."

(Complaint ¶ 27, underline added.) In accordance with the finding of the California Court of Appeals, and in applying the California "primary rights" theory, Storix brought two separate and distinct claims against Johnson that (1) relied on different facts, (2) alleged different wrongs, and (3) sought different relief.

1. The Court Should Vacate the Dismissal of Johnson's Malicious Prosecution Claim

The Court dismissed the malicious prosecution claim on the ground that "the California Supreme Court has held that in order for the favorable termination element

1 to be satisfied 'there must first be a favorable termination of the *entire* action.'"
2 (Order. p.11, citing *Crowley v. Katleman* (1994) 8 Cal. 4th 666, 686.) The Court also
3 noted that "a 'partial recovery' against the malicious prosecution plaintiff in the
4 underlying action is fatal to showing the favorable termination element." (*Id*. at p. 77,
5 *citing Lane v. Bell* (2018), 20 Cal. App. 5th 61, 75.) However, *Crowley* and the cases
6 that rely on it, including *Lane*, didn't involve distinct claims, but different theories of
7 recovery or partial recovery on a single claim.

8 Johnson's specifically directed the malicious prosecution action only to the
9 claim on which he prevailed in accordance to the "severability rule" created by
10 *Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360, which is based
11 on the severability analysis in *Albertson v. Raboff* (1956) 46 Cal.2d 375. (*See also*
12 *Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 460; *Sierra Club Foundation v.*
13 *Graham* (1999) 72 Cal.App.4th 1135, 1152-1153); See also *Tabaz v. Cal Fed*
14 *Finance* (1994) 27 Cal.App.4th 789, 794 [holding that a plaintiff may base a
15 malicious prosecution claim on individual claims if the other claims are severable and
16 not "simply different theories for recovering on the same injury"].)

17 None of the cases cited in the Motion or Order overrule the well-established
18 severability rule that aptly applies to Johnson's action for malicious prosecution, and
19 the Court of Appeals confirmed that Johnson succeeded on Storix's $1.2 million
20 claim as separate and distinct from the $3,739 claim on which Defendants rely.

21 **2. The Court Should Vacate the Dismissal of Johnson's**
22 **Indemnification and Breach of Fiduciary Duty Claims**

23 The Court dismissed the indemnification claim against Storix and the breach of
24 fiduciary duty claim against the Defendants (based on their refusal to provide
25 indemnification) for the same reason it dismissed the malicious prosecution action.

26 The Order argues that "[u]nder California Corporations Code § 317(d), '[i]f the
27 corporate agent accused of wrongdoing wins a judgment on the merits in defense of
28 the action, indemnification is mandatory.'" (Order, p. 14, citing *Groth Bros.*

Oldsmobile v. Gallagher (2002), 97 Cal. App. 4th 60, 73.) The Court misinterpreted "judgment" to mean the "entire action", then omitted the next sentence in *Groth*, stating that "Corporations Code section 317, subdivision (d) provides: 'To the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in subdivision (b) or (c) <u>or in defense of any claim, issue, or matter therein</u>, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith.'" (*Groth* at 73, underline added.) *Groth* only involved the question of whether a voluntary dismissal amounted to a judgment "on the merits", so it's irrelevant to this case. But it confirms, as Johnson alleged in the Complaint and argued in all his prior briefs, that Corp. Code § 317 mandates indemnification for any "claim, issue or matter" on which a defendant succeeds on the merits.

The Order further argues that "The California Court of Appeal has explained that in order for a plaintiff to recover under section 317(d), the plaintiff 'must make the same showing of a prior favorable termination required to maintain a malicious prosecution action.'" (Order, p. 14, citing *Dalany v. Am. Pac. Holding Corp*. (1996) 42 Cal. App. 4th 822, 830.) The question in *Dalany* was only whether a stipulated settlement constituted "favorable termination", so it's likewise in apropos. There, the court compared indemnification and malicious prosecution claims only with respect to their each requiring a judgment on the merits. "Dalany's settlement with APHC created ambiguity with respect to the merits of the cross-complaint and accordingly, he cannot now establish the cross-complaint was terminated in his favor." (*Ibid*.)

The above cases do not require there be a "judgment on the merits" as to every distinct claim in the action. The Order nevertheless argues that "A judgment was entered against Plaintiff on Storix's breach of fiduciary duty claim in the state action at issue", so "to the extent Plaintiff's claim for breach of fiduciary duty is based on Plaintiff's claim for indemnification, Plaintiff's claim for breach of fiduciary duty is also legally defective as a matter of law." (Order. p. 27.) As the California Court of

Appeals has determined, and according to the "primary rights" theory, Storix's lawsuit against Johnson didn't involve a single claim. The Court of Appeals confirmed that the jury's verdict constituted Johnson's successful defense against Storix's primary claim of $1.2 million for "unjust enrichment". Since that was a "judgment on the merits", Johnson's indemnification is mandatory.

Whether or not the Court vacates the dismissal of the malicious prosecution claim, it should vacate the Order dismissing the indemnification and breach of fiduciary duty claims because, although Johnson didn't succeed in defending the "entire action", he is entitled to indemnification, according to California law, for successfully defending claims, issues or matters *therein*.

IV. CONCLUSION

The Court should finally deny Defendants' motion to dismiss as to the claims of conversion and breach of fiduciary duty based on the unlawful use Storix funds to defend against the derivative claims. The Court should further vacate the dismissal of Johnson's malicious prosecution, indemnification and breach of fiduciary duty claims based on Defendants unfairly denying Johnson indemnification they afforded only themselves for the last 6 years, even for *issues and matters* for which they were unsuccessful.

DATED: May 21, 2021

Respectfully submitted,

By:

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