

1 Paul A. Tyrell (Bar No. 193798)
 2 Email: paul.tyrell@procopio.com
 3 Sean M. Sullivan (Bar No. 254372)
 4 Email: sean.sullivan@procopio.com
 5 PROCOPIO, CORY, HARGREAVES &
 6 SAVITCH LLP
 7 525 B Street, Suite 2200
 8 San Diego, CA 92101
 9 Telephone: 619.238.1900
 10 Facsimile: 619.235.0398

11 Attorneys for Defendant Storix Inc.

12 UNITED STATES DISTRICT COURT
 13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 ANTHONY JOHNSON, an individual,
 15 Plaintiff,

16 v.

17 DAVID KINNEY, an individual;
 18 RICHARD TURNER, an individual;
 19 MANUEL ALTAMIRANO, an individual;
 20 DAVID HUFFMAN, an individual; and
 21 DAVID SMILJKOVICH, an individual;
 22 PAUL TYRELL, an individual; SEAN
 23 SULLIVAN, an individual; MARTY
 24 READY, an individual; DAVID AVENI, an
 25 individual; MICHAEL MCCLOSKEY, an
 26 individual; STORIX INC., a California
 27 corporation; JUDGE MARILYN HUFF, an
 28 individual; JUDGE RANDA TRAPP, an
 individual; JUDGE KEVIN ENRIGHT, an
 individual; JUDGE KATHERINE BACAL,
 an individual,

Defendants.

Case No. 3-20-CV-01354-CAB-MSB

MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF DEFENDANT
 STORIX, INC.'S MOTION TO
 DISMISS PURSUANT TO
 FEDERAL RULE OF CIVIL
 PROCEDURE 12

PER CHAMBERS RULES, NO
 ORAL ARGUMENT UNLESS
 SEPARATELY ORDERED BY
 THE COURT

Date: September 30, 2020
 Courtroom: 4C (4th Floor)
 Judge: Cathy Ann Bencivengo

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I. INTRODUCTION

1
2 Plaintiff Anthony Johnson is suing the parties and lawyers who have
3 successfully opposed him in several prior state and federal lawsuits beginning in 2014,
4 as well as most of the judges that issued rulings or entered judgments against him in
5 those actions. Johnson's original Complaint alleged a conspiracy among all the
6 defendants, including his former company, Storix, Inc. ("Storix"). Dkt. 1, Compl. ¶¶
7 68-78. In his operative First Amended Complaint ("FAC") Johnson still alleges a vast
8 conspiracy, but he excludes Storix from his conspiracy claims. Dkt. 5, ¶¶ 71-80. As a
9 result, the only claims alleged against Storix are two common counts. One follows a
10 copyright dispute adjudicated against Johnson years ago, and the other hinges on his
11 allegation that he is entitled to corporate profits earned in 2011 and before. Because
12 both of his common count claims are invalid, the entire FAC should be dismissed as
13 against Storix.

14 In the first alleged common count ("Common Count 1"; FAC ¶¶ 81-85),
15 Johnson demands a multi-million dollar payment for the copyrights to SBAdmin.
16 That claim may be dismissed on any of several grounds. First, the doctrines of res
17 judicata and issue preclusion bar Johnson's claim for payment on the copyright given
18 the results of the copyright suit he lost against Storix. The district court reached that
19 result the last time Johnson sued on this theory. *See Johnson v. Altamirano*, 418 F.
20 Supp. 3d 530, 552-53 (S.D. Cal. 2019) (barring claim for breach of oral contract under
21 res judicata and issue preclusion). Second, the Copyright Act preempts Common
22 Count 1, and that claim fails because he cannot satisfy the writing requirement
23 evidencing an intended transfer of a copyright under 17 U.S.C. § 204. Further,
24 Common Count 1 is barred by the two-year statute of limitations based on his own
25 allegations, and Johnson lacks standing to even pursue claims tied to the SBAdmin
26 copyrights.

27 Johnson's second alleged common count ("Common Count 2"; FAC ¶¶ 86-90)
28 fares no better. He alleges that Storix owes him more than \$470,000 for failing to pay

1 him its profits or “retained earnings” that he alleges the company earned in 2011 and
2 that “Management converted his Storix retained earnings to their personal equity
3 accounts ... between 2011-2013.” (FAC ¶ 47). Common Count 2 does not allege
4 facts showing that Storix had any duty to distribute its profits or retained earnings to
5 Johnson (or to any other shareholder, for that matter). Moreover, to the extent that he
6 alleges that Storix’s retained earnings were “converted,” his claim fails because
7 Johnson lacks standing to sue for the conversion of company funds. Further,
8 Common Count 2 is time-barred, and Johnson’s conclusory allegations of delayed
9 discovery are contradicted by judicially-noticeable facts that confirm Johnson’s actual
10 or constructive knowledge of more than three years before he filed this action.

11 All of these reasons warrant dismissal of the entire FAC as to Storix.

12 **II. PERTINENT BACKGROUND FACTS¹**

13 The litigation history between Storix and Johnson involves many state and
14 federal court actions and appeals dating to 2014. See, e.g., *Johnson v. Altamirano*,
15 418 F. Supp. 3d at 541-544 (outlining many cases involving the parties’ disputes and
16 results). Because this motion is limited to the two state common count claims against
17 Storix, the following summary only addresses the facts pertinent to those claims.

18 **A. The Copyright Action**

19 In 2003 Johnson incorporated Storix, which continued the software business he
20 had operated as a sole proprietorship. When facing a health crisis in 2011 he
21 transferred 60% ownership interest to four long-term employees. FAC ¶¶ 14-15. In
22 2013, Johnson returned to work for Storix, but felt unreasonably criticized and
23 antagonized so he resigned in 2014. *Id.* ¶ 17.

24 In 2014, Johnson sued Storix for copyright infringement (“Copyright Action”;
25 Case No. 3:14-cv-1873-H-BLM), claiming that he personally owned the copyright to

26 _____
27 ¹ Storix disputes many allegations of the FAC and recites them here for purposes of
28 this motion, and without waiving any right to challenge Johnson’s inaccurate
recitation of the facts.

1 the company’s flagship software, SBAdmin. *Id.* ¶ 18-19. Storix counterclaimed
 2 seeking to confirm its ownership of the copyright. That case led to a jury trial in
 3 December 2015, which Storix won in all respects, confirming it owned all copyrights
 4 to all versions of SBAdmin. *Id.* ¶ 27. Johnson’s two appeals to the Ninth Circuit
 5 failed to reverse that result, which, along with the court’s discretionary award of more
 6 than \$420,000 in fees and costs against Johnson aimed at deterring his litigation
 7 misconduct, stands as final. *See Johnson v. Storix, Inc.*, 716 F. App’x 628 (9th Cir.
 8 2017), *cert. denied* 139 S. Ct. 76, 202 L. Ed. 2d 24 (2018) (Affirming jury verdict in
 9 all respects and remanding for reconsideration of the amount of attorneys’ fees
 10 awarded under the Copyright Act); *Johnson v. Storix, Inc.*, 792 F. App’x 501 (9th Cir.
 11 2020), *cert. denied*, No. 19-1244, 2020 WL 3492676 (U.S. June 29, 2020) (Affirming
 12 revised fee award). As a result, Storix confirmed its ownership of all SBAdmin
 13 copyrights as of its incorporation in 2003.

14 **B. The Prior State Court Actions That Have Been Tried**

15 Johnson did not fare better in state court. In 2015, Storix sued Johnson for
 16 breach of fiduciary duty after it learned about his disloyal conduct, including setting
 17 up a competing venture and trying to dissuade customers from paying Storix for its
 18 software. FAC ¶ 22. Johnson responded with crossclaims against the same individual
 19 directors, officers and co-shareholders of Storix he named in this suit (“Storix
 20 Managers”), claiming financial mismanagement and other fiduciary duty breaches.
 21 *Id.* ¶ 31. He also filed a derivative suit in late 2015, joining with Robin Sassi, a
 22 minority shareholder (and ex-wife of Storix’s President, David Huffman), to accuse
 23 the Storix Managers of financial improprieties. *Id.* ¶ 25.

24 Throughout the state court litigation, Johnson alleged that the Storix Managers
 25 raided the company coffers to personally benefit themselves and so he argued that he
 26 needed to exert strict oversight. For instance, in September 2016 he sought a writ of
 27 mandamus to obtain the right to inspect the company’s financial and other corporate
 28 records. FAC ¶ 32. In November 2016, Johnson unsuccessfully moved to appoint a

1 receiver to manage Storix based on his allegations that Storix Managers continued
2 their financial mismanagement of the company and continued to deny him access to
3 Storix's books and records.² See Request for Judicial Notice ("RJN") No. 1, pp. 6-8.

4 The parties agreed to consolidate the state court cases, which went to trial in
5 January-February 2018. FAC ¶¶ 33, 36. The jury found Johnson breached his
6 fiduciary duty to the company, and rejected each of his crossclaims against the Storix
7 Managers. *Id.* ¶ 37. See *Johnson v. Altamirano*, 418 F. Supp. 3d at 543
8 (Summarizing that the jury returned a verdict "in favor of Storix and against Johnson
9 on Storix's claim for breach of fiduciary duty and against Johnson on all of his cross-
10 claims."). A bench trial soon followed which led to the rejection of Johnson and
11 Sassi's derivative claims. FAC ¶ 39.

12 C. Johnson's Recent Flurry of New Actions

13 Following the trial of the consolidated state court matter Johnson filed another
14 lawsuit in state court, this time self-represented, against the individual Storix
15 Managers once again claiming financial mismanagement. FAC ¶ 48; See *Johnson v.*
16 *Huffman, et al.*, Case No. 37-2019-00002457-CU-BT-CTL. There, as here, Johnson
17 alleged "conversion of his retained earnings," and also malicious prosecution related
18 to the state court litigation. *Id.* Facing an out-of-state plaintiff bond motion and an
19 anti-SLAPP motion, Johnson dismissed that case. *Id.* ¶¶ 49, 53.

20 Johnson then filed a similar action in federal court. *Id.* ¶ 53. In so doing, he
21 added Storix and its attorneys, Paul Tyrell and Sean Sullivan, as defendants, and
22 included claims for breach of contract based on payments he claimed Storix owed him
23 for the SBAdmin copyright and indemnification for amounts he spent litigating in
24 state court. *Id.*; see *Johnson v. Altamirano*, Case No. 3:19-cv-1185-H-BLM (S.D.
25 Cal.). As to Storix, Tyrell and Sullivan, the district court granted their motions to

26 _____
27 ² At the time, Johnson was represented by the law firm Mintz, Levin, Cohn, Ferris,
28 Glovsky and Popeo, P.C., one of many firms and attorneys who have represented
Johnson during the various actions before he started representing himself.

1 dismiss and anti-SLAPP motions. *See Johnson v. Altamirano*, 418 F. Supp. 3d at 553,
 2 *reconsideration denied, stay granted*, No. 3:19-CV-01185-H-BLM, 2020 WL 487301
 3 (S.D. Cal. Jan. 30, 2020).

4 Next, Johnson filed a new state court action in June 2020, this time against
 5 Storix, asserting similar “common counts” to those in this case. FAC ¶ 61; *Johnson v.*
 6 *Storix*, Case No. 37-2020-00019054-CU-MC-CTL. Johnson quickly dismissed that
 7 state court action.

8 Finally, Johnson filed this action in July 2020, naming Storix, Storix’s counsel
 9 Tyrell and Sullivan, the Storix Managers, their attorneys with the Wilson, Elser firm,
 10 as well as several of the various state and federal judges that have overseen Johnson’s
 11 many cases.³

12 III. ARGUMENT AND ANALYSIS

13 A. Motions to Dismiss under Rule 12(B)(6)

14 Even under the liberal pleadings standard of Federal Rule of Civil Procedure
 15 8(a)(2), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
 16 requires more than labels and conclusions, and a formulaic recitation of the elements
 17 of a claim for relief will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
 18 (2007) (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Under *Twombly*, a
 19 plaintiff must not allege conduct that is merely conceivable but must allege “enough
 20 facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has
 21 facial plausibility when the Plaintiff pleads factual content that allows the court to
 22 draw the reasonable inference that the Defendant is liable for the misconduct alleged.”
 23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Twombly*, 550 U.S. at 556). In
 24 alleging fraud or mistake, a plaintiff must “state with particularity the circumstances
 25 constituting fraud or mistake.” Fed.R.Civ.Proc. 9(b).

26 _____
 27 ³ Johnson’s initial complaint included conspiracy allegations against Storix. But in his
 28 FAC he excludes Storix from those causes and only asserts the “common count” on
 the two theories addressed in this motion.

1 The court need not accept as true allegations contradicted by judicially
 2 noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and
 3 it “may look beyond the plaintiff’s complaint to matters of public record” without
 4 converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v.*
 5 *Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the court “assume the truth
 6 of legal conclusions merely because they are cast in the form of factual allegations.”
 7 *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation
 8 marks omitted). Mere “conclusory allegations of law and unwarranted inferences are
 9 insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
 10 (9th Cir. 2004).

11 **B. Johnson’s Common Count 1 for “Failure to Compensate for Goods”**
 12 **Is Subject to Dismissal for Many Reasons**

13 The Court has many available grounds to dismiss Johnson’s Common Count 1,
 14 any one of which is fatal. Because his claim is so fatally flawed, it should be
 15 dismissed with prejudice as no amendment can save it.

16 ***1. Common Count 1 Is Simply a Retitled Claim That the Court***
 17 ***Previously Dismissed***

18 The grounds for dismissing Common Count 1 discussed below are like those
 19 successfully argued by Storix in its motion to dismiss Johnson’s last federal action.
 20 *See Johnson v. Altamirano*, 418 F. Supp. 3d at 551-554. That is because Common
 21 Count 1 is a re-labelled repeat of the breach of contract and rescission claims that
 22 Johnson unsuccessfully alleged against Storix in that prior action. *Id.* That alone
 23 supports dismissal of Common Count 1.

24 California courts have long recognized that a plaintiff may not maintain a
 25 common count as the alternative for specifically pleaded facts which do not in
 26 themselves state a cause of action. *Orloff v. Metro. Tr. Co.*, 17 Cal. 2d 484, 489
 27 (1941). That is the case here with Johnson’s latest attempt to relitigate his same
 28 grievances he has pursued for years and lost. The district court already dismissed with

1 prejudice his claim for payments owed on the SBAdmin copyright based on an oral
2 contract. *Johnson v. Altamirano*, 418 F. Supp. 3d at 552-54. Johnson cannot avoid
3 that result by simply pleading a common count as an alternative claim in a new action.

4 **2. The Doctrine of Res Judicata Bars Johnson’s Claim That He Is**
5 **Owed Money for “His” Copyright**

6 Johnson demands payment of \$2.75 million for a copyright he has not owned
7 since 2003. Because this district court’s final judgment resolved those rights in favor
8 of Storix and the Ninth Circuit affirmed, the doctrines of res judicata and collateral
9 estoppel bar Johnson’s attempt to relitigate that claim.

10 Res judicata precludes claims and “bars litigation in subsequent action of any
11 claims that were raised or could have been raised in the prior action.” *W. Radio Servs.*
12 *Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). Indeed, “[t]he doctrine of res
13 judicata is meant to protect parties against being harassed by repetitive
14 actions.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d
15 1064, 1077 (9th Cir. 2003) (citation omitted). “The doctrine of res judicata is
16 applicable whenever there is (1) an identity of claims, (2) a final judgment on the
17 merits, and (3) identity or privity between the parties.” *Owens v. Kaiser Foundation*
18 *Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Johnson’s new claims against
19 Storix meet each of these three elements and so must be dismissed.

20 a. Identity of Claims

21 Courts consider four criteria to determine whether there is an identity of claims,
22 which criteria they do not apply “mechanistically”: (1) whether the two suits arise out
23 of the same transactional nucleus of facts; (2) whether prosecution of the second
24 action would destroy or impair rights or interests established in the prior judgment; (3)
25 whether the two suits involve infringement of the same right; and (4) whether
26 substantially the same evidence is presented in the two actions.
27
28

1 *Mpoyo v Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005). “We have
2 often held the common nucleus criterion to be outcome determinative under the first
3 res judicata element.” *Id.* “Whether two events are part of the same transaction or
4 series depends on whether they are related to the same set of facts and whether they
5 could conveniently be tried together.” *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th
6 Cir. 1992) (citing Restatement (Second) Judgments § 24(2) (1982)). *See Highway J*
7 *Citizens Group v. U.S. Dep’t. of Transp.*, 456 F.3d 734, 741 (7th Cir. 2006) (Res
8 judicata bars not only the claims raised in the earlier suit, but also any claims that
9 could have been raised in that suit).

10 A creative plaintiff simply retitling his or her claims and refileing them as a
11 purported new “legal theory” or seeking a different remedy cannot avoid the res
12 judicata bar. *See, e.g., McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986)
13 (“McClain cannot avoid the bar of res judicata merely by alleging conduct by the
14 defendant not alleged in his prior action or by pleading a new legal theory.... Nor does
15 the fact that McClain’s subsequent complaint seeks a different remedy for violation of
16 the same primary right create a new cause of action.”) (*citing Costantini v. Trans*
17 *World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982)); *see also Boateng v.*
18 *Interamerican Univ., Inc.*, 210 F.3d 56, 62 (1st Cir. 2000) (holding that pursuing new
19 legal theories does not create new cause of action sufficient to avoid res judicata).

20 Courts have consistently held that res judicata bars contract and related claims
21 involving copyrighted works following the litigation of a copyright claim, since such
22 claims arise from the same nucleus of facts. “Copyright infringement claims have two
23 basic elements: ‘(1) ownership of a valid copyright, and (2) copying of constituent
24 elements of the work that are original.’” *Dolores Press, Inc. v. Jones*, 766 F. App’x
25 455, 458 (9th Cir. 2019). In *Ivanova v. Columbia Pictures Indus., Inc.*, 217 F.R.D.
26 501, 505 (C.D. Cal. 2003) , *aff’d sub nom. Laparade v. Ivanova*, 116 F. App’x 100
27 (9th Cir. 2004), the court earlier ruled that Ivanov lacked ownership rights in dozens
28 of motion pictures, and issued an injunction that “permanently enjoins Ivanova from

1 licensing, distributing, exploiting or otherwise benefitting from any of the” movies
2 (“2003 Judgment”). Ivanov and Columbia also stipulated to a judgment in a prior
3 case for payment of past and future amounts due Ivanov (“1994 Stipulated
4 Judgment”). Soon after entry of the 2003 Judgment, Ivanov sued Columbia for
5 copyright infringement, breach of contract, and other claims. *Id.* at 503. The court
6 found res judicata barred Ivanov’s claims. His breach of contract claim, which Ivanov
7 tried to base on a “distribution contract,” failed because Columbia owned the
8 copyrights at issue based on the 2003 Judgment. *Id.* at 510. The court even awarded
9 Rule 11 sanctions against Ivanov and his counsel. *Id.* at 514.

10 Other courts have reached similar results. *See, e.g., Hudson v. Universal*
11 *Studios Inc.*, 235 F. App’x 788, 790 (2d Cir. 2007) (“We affirm the district court’s
12 dismissal of Hudson’s claims regarding *No Harm, No Foul* as barred by res judicata.
13 Identical claims of copyright infringement and unfair competition regarding this work
14 were raised in an earlier action, and **the breach of contract claim could have and**
15 **should have been brought in the same action.**” (emphasis added)); *Sims v. Viacom,*
16 *Inc.*, 544 F. App’x 99, 102 (3d Cir. 2013) (Finding res judicata barred claims for
17 copyright infringement relating to distinct reality television series, even though the
18 second series had not aired when litigating the first case, since “[a] claim extinguished
19 by res judicata ‘includes all rights of the plaintiff to remedies against the defendant
20 with respect to all or any part of the transaction or series of connected transactions, out
21 of which the action arose,” quoting *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169,
22 174 (3d Cir. 2009)). *See also Lee v. Pow! Entm’t, Inc.*, No. 2:19-cv-08353 ODW
23 FFMX, 2020 WL 3470501, at *4 (C.D. Cal. June 25, 2020) (Finding identity of
24 claims where “the prior cases determined the validity of the assignment clause giving
25 rise to an assortment of intellectual property rights,” including copyrights, and issuing
26 Rule 11 sanctions of \$1 million against the plaintiff).

27 In Common Count 1, Johnson seeks to relitigate the same dispute that he has
28 now lost multiple times. Six years ago he sued Storix for copyright infringement and

1 lost. The Copyright Action involved exactly the same nucleus of operative facts—
 2 rights in and to SBAdmin—on which Johnson bases his Common Count 1. He alleges
 3 a quasi-contract claim, which he characterizes as one for quantum valebant, that
 4 somehow Storix “requested, by words or conduct, that Johnson provide it copyrights
 5 to the SBAdmin software,” and so implicitly promised a “future payment to Johnson
 6 when his participation in Storix terminated,” which he values at \$2.75 million as the
 7 “the reasonable value of his copyrights.” See FAC ¶¶ 82-85. “Quantum valebant is a
 8 type of quasi-contract action.” *Starnet Int’l AMC Inc. v. Kafash*, No. 09-CV-04301-
 9 LHK, 2011 WL 845908, at *10 (N.D. Cal. Mar. 8, 2011), citing *Jogani v. Superior*
 10 *Court*, 165 Cal. App. 4th 901, 906 (2008) (recounting history of quasi-contract
 11 actions, including quantum meruit and quantum valebant in California).

12 Johnson already litigated the ownership rights to the SBAdmin copyrights and
 13 lost. Storix owns all copyrights to all versions of SBAdmin, and has since
 14 2003. There is no basis, under any legal theory, for Johnson to now demand millions
 15 of dollars as the “reasonable value” for transferring such rights.

16 The court reached this exact same conclusion last year when Johnson sued
 17 Storix and pitched the same claim under an oral contract theory:

18 Defendants have satisfied the “identity of claims” element of their res
 19 **judicata affirmative defense**, and, thus, Plaintiff’s **claims for breach of**
 20 **contract and rescission** are barred by the doctrine of claim preclusion in
 21 light of the prior judgment that was entered in *Johnson v. Storix*, 14-cv-
 1873-H-BLM.

22 *Johnson v. Altamirano*, 418 F. Supp. 3d at 553.

23 b. Final Judgment on the Merits

24 To be barred by res judicata, there must be a final decision on the merits.
 25 *Tahoe-Sierra*, 322 F.3d at 1077. There is no question that a final judgment on the
 26 merits exists here. The Ninth Circuit affirmed both the result of the jury trial and even
 27 the court’s discretionary award of attorneys’ fees to Storix. See *Johnson v. Storix,*
 28 *Inc.*, 716 F. App’x 628, 631 (9th Cir. 2017), cert. denied, 139 S. Ct. 76 (2018)

1 (Affirming denial of Johnson’s motion for a new trial on all grounds and remanding
2 solely to reassess the amount of fees awarded against him); *Johnson v. Storix, Inc.*,
3 792 F. App’x 501, 502 (9th Cir. 2020), *cert. denied*, No. 19-1244, 2020 WL 3492676
4 (U.S. June 29, 2020) (Affirming fee award following remand). As for the Copyright
5 Action, the Final Judgment stands as final and there are no strings attached to Storix’s
6 ownership rights to the SBAdmin copyrights.

7
8 c. Privity Between the Parties

9 Both Storix and Johnson were parties to the Copyright Action, and so there is
10 an exact identity between the parties in both cases.

11 This claim meets all three elements of claim preclusion. Johnson had a full and
12 fair opportunity to pursue such claims during the Copyright Action. Allowing him to
13 proceed now would undermine and eviscerate any meaning behind the final judgment
14 entered in the Copyright Action, and leave all such cases open to indefinite future
15 collateral attacks. That is the reason the res judicata doctrine exists. Thus, Johnson’s
16 common count seeking payment for transfer or use of the rights covered by the
17 SBAdmin copyright is barred from being relitigated and must be dismissed.

18 **3. *The Doctrine of Issue Preclusion Bars Johnson’s Claim for
19 Payment Based on the SBAdmin Copyright***

20 Issue preclusion applies if the claim meets these three requirements: “(1) the
21 issue necessarily decided at the previous proceeding **is identical to the one which is**
22 **sought to be relitigated;** (2) the first proceeding ended with a final judgment on the
23 merits; and (3) the party against whom collateral estoppel is asserted was a party or in
24 privity with a party at the first proceeding.” *Reyn’s Pasta Bella, LLC v. Visa USA,*
25 *Inc.*, 442 F.3d 741, 746 (9th Cir. 2006).

26 Johnson’s claim meets the three elements for issue preclusion. Handling the
27 elements in reverse, on the third element, Plaintiff was a party in the prior federal
28 Copyright Action. *See, e.g., Johnson v. Storix, Inc.*, 716 F. App’x 628, 629 (9th Cir.

1 2017) (“Anthony Johnson (‘Johnson’) appeals the judgment in favor of Storix, Inc.”).
2 On the second element, Storix obtained entry of a final judgment in its favor and
3 against Johnson, following a jury trial on the merits on his claim for copyright
4 infringement and Storix’s declaratory judgment counterclaims. *Id.* And, as to the first
5 element, the jury found that Storix “proved by a preponderance of the evidence that
6 Anthony Johnson’s copyright infringement claim against Storix, Inc. is barred because
7 Anthony Johnson transferred ownership of all pre-incorporation copyrights, including
8 SBAdmin Version 1.3, in writing from himself to Storix, Inc.” *See Johnson v. Storix,*
9 *Inc.*, 716 F. App’x at 631 (Affirming finding Storix owned all copyrights to SBAdmin
10 since “the jury instructions correctly stated that the term ‘all assets’ could include
11 copyright ownership and that the jury could use extrinsic evidence to interpret the
12 meaning of the term. Therefore, the district court did not err in denying Johnson’s
13 motion for a new trial on the basis that the jury instructions were an incorrect
14 statement of law.”). Thus, the fact finder decided the issue of transfer of ownership of
15 the copyrights from Johnson to Storix and the doctrine of issue preclusion bars the re-
16 litigation of that issue. *See Reyn’s Pasta Bella*, 442 F.3d at 746.

17 Johnson alleges, contrary to the jury’s findings and the Court’s judgment in the
18 Copyright Action that Storix impliedly promised to compensate him at some future
19 date in exchange for transferring the copyrights to SBAdmin. (FAC ¶¶ 82-85). In
20 making these allegations, Johnson seeks to relitigate the issues of copyright transfer
21 and ownership that the jury decided against him in the Copyright Action. Storix owns
22 all copyrights as a result of his intentional transfer. Johnson’s latest allegations of an
23 implied promise by Storix as to the ownership of the SBAdmin copyrights are barred
24 by the doctrine of issue preclusion. The district court reached the same conclusion
25 when Johnson sued for breach of oral contract and rescission last year. *See Johnson v.*
26 *Altamirano*, 418 F. Supp. 3d at 554.

27
28

1 **4. The Copyright Act Preempts Johnson’s Claim for Quantum**
2 **Valebant**

3 Common Count 1 can be dismissed on an independent ground: the Copyright
4 Act preempts Johnson’s quantum valebant claim. The Copyright Act of 1976
5 preempts “all legal or equitable rights that are equivalent to any of the exclusive rights
6 within the general scope of copyright as specified by section 106 ... and come within
7 the subject matter of copyright as specified by sections 102 and 103 ...” 17 U.S.C. §
8 301(a).

9 To determine whether the Copyright Act preempts a state claim a court must
10 examine the state law claim to determine what rights the plaintiff seeks to enforce.
11 *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998). The Ninth
12 Circuit uses a two-part test for Copyright Act preemption: (1) whether the work at
13 issue comes within the subject matter of copyright, and (2) the rights granted under
14 state law are “equivalent to any of the exclusive rights within the general scope of
15 copyright” under the Copyright Act. *Del Madera Properties v. Rhodes and Gardner,*
16 *Inc.*, 820 F.2d 973, 976 (9th Cir. 1987) (“*Del Madera*”). To avoid preemption under
17 the second prong, “the state claim must protect rights which are qualitatively different
18 from the copyright rights. The state claim must have an ‘extra element’ which changes
19 the nature of the action.” *Id.* at 977. “In order not to be equivalent, the right under
20 state law must have an extra element that changes the nature of the action so that it is
21 qualitatively different from a copyright infringement claim.” *Entous v. Viacom Int’l,*
22 *Inc.*, 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001) (Quotation omitted). *Cf. Valente–*
23 *Kritzer Video v. Pinckney*, 881 F.2d 772, 776 (9th Cir. 1989), *cert. denied*, 493 U.S.
24 1062, 110 S. Ct. 879 (1990) (producer’s claim for fraud under California law against
25 author and production company contains extra element of misrepresentation and is not
26 preempted by the Copyright Act).

27 In *Del Madera*, the plaintiffs alleged claims for copyright infringement, unfair
28 competition and unjust enrichment based on the defendants’ alleged misappropriation

1 of (1) a copyrighted map of a real estate development, (2) supporting documents and
 2 (3) plaintiffs' time and effort in creating the map and documents. The Ninth Circuit
 3 found the Copyright Act preempted plaintiffs' state law claims, since the map,
 4 documents and plaintiffs' effort expended to create them all fell within the scope of
 5 copyright protection. *Id.* at 976. Neither of the state claims contained an "extra
 6 element," since the unfair competition claim for misappropriation of time and effort to
 7 create the map was "part and parcel of the copyright claim," and the unjust enrichment
 8 depended on "[defendants'] implied promise not to use or copy materials within the
 9 subject matter of copyright is equivalent to the protection provided by [the Act]." *Id.*

10 Courts have held that common counts are preempted by the Copyright Act
 11 when they amount to payment demands for exclusive rights to the copyrights. *See,*
 12 e.g., *Reinicke v. Creative Empire, LLC*, No. 12CV1405-GPC KSC, 2013 WL 275900,
 13 at *4 (S.D. Cal. Jan. 24, 2013) ("Accordingly, the Court GRANTS Defendant's
 14 motion to dismiss the quantum meruit claim as it is preempted by the Copyright Act to
 15 the extent that the allegation is based on Defendant's sale of copies of Plaintiff's Work
 16 to the public."); *Lewis v. Activision Blizzard, Inc.*, No. C 12-1096 CW, 2012 WL
 17 5199505, at *4 (N.D. Cal. Oct. 22, 2012), *aff'd*, 634 F. App'x 182 (9th Cir. 2015)
 18 ("Thus, her quantum meruit claim seeking 'compensation for the use and benefit
 19 defendants have obtained from the uncompensated use of her voice and creative
 20 content' contained in these recordings asserts rights that are equivalent to Lewis's
 21 rights under copyright law, and is also preempted."); *Einiger v. Citigroup, Inc.*, No.
 22 1:14-CV-4570-GHW, 2014 WL 4494139, at *1 (S.D.N.Y. Sept. 12, 2014) ("The
 23 Court holds that Einiger's unjust enrichment and quantum meruit claims are
 24 preempted by the Copyright Act, and that, as a result, they must be dismissed.").

25 The Copyright Act preempts Johnson's Common Count 1 since he bases it on
 26 copyrightable subject matter and seeks to enforce rights addressed by the Copyright
 27 Act. As to the first prong of the preemption test, SBAdmin no doubt qualifies as
 28 copyrightable subject matter. Johnson himself filed the Copyright Action based on

1 that work, which he first registered with the U.S. Copyright Office.⁴ On the second
2 prong, Johnson seeks to enforce rights equivalent to those provided under the
3 Copyright Act, which provides the copyright owner “exclusive rights to do and to
4 authorize” the reproduction of works, the creation of derivative works, and the
5 distribution of copyrighted work by sale, transfer, lease, rental, or lending. 17 U.S.C.
6 § 106(1)-(3). Those are the rights Johnson seeks to restrict with his Common Count 1,
7 mandating dismissal as preempted by the Copyright Act.

8 **5. Johnson Fails to Meet the Writing Requirement under 17 U.S.C.**
9 **§ 204(a) for Transferring Copyright Ownership**

10 Johnson alleges an implied agreement for the exclusive licensing and
11 distribution rights to SBAdmin, yet that claim fails as a matter of law under the
12 Copyright Act. A legally valid transfer of copyright ownership can occur only “by
13 operation of law” or through “an instrument of conveyance, or a note or memorandum
14 of the transfer, [which] is in writing and signed by the owner of the rights conveyed or
15 such owner's duly authorized agent.” 17 U.S.C. § 204(a).

16 The Copyright Action between Storix and Johnson involved an ownership
17 dispute, including compliance with section 204’s requirement that a signed writing
18 evidence a transfer of ownership. Storix met that burden, and obtained a judgment
19 affirming its ownership rights in all copyrights to all versions of SBAdmin.

20 Despite that final finding, Johnson demands a retransfer of ownership without a
21 signed writing, solely based on an implied promise he now claims existed. Johnson’s
22 claim that an implied promise can support a \$2.75 million payment obligation based
23 on exclusive copyright ownership and usage rights fails to meet the writing
24 requirement of section 204. *See Weinstein Co. v. Smokewood Entm’t Grp., LLC*, 664

25 ⁴ The U.S. Copyright Office’s records now reflect that Storix is owner of all
26 copyrights for SBAdmin. *See* Recorded Document No. V992D110, Title “Backup
27 administrator for AIX,” recording “Certified Complaint & Second Amended
28 Judgment in favor of Storix, Inc. United States District Court, Southern District of
California. Case No. 3:14-cv-1873-H-BLM.”

1 F. Supp. 2d 332, 339 (S.D.N.Y. 2009) (Ruling “any claim on the part of [Plaintiff]
 2 that it acquired an **exclusive** license without a legally sufficient writing (of some sort)
 3 is irretrievably flawed as a matter of law and, accordingly, dismissed.” (brackets
 4 added)). Once again, the district court reached this conclusion when addressing
 5 Johnson’s **breach of oral contract claim**. See *Johnson v. Altamirano*, 418 F. Supp. 3d
 6 at 554 (Holding that Johnson’s “**allegations of an oral contract between Storix and**
 7 **Johnson for the transfer of the copyrights to SBAdmin fail as a matter of law,**” under
 8 17 U.S.C. § 204(a)). **Johnson’s latest theory also fails to meet the statutory**
 9 **requirement for transferring a copyright and must be dismissed.**

10 **6. *The Two-Year Statute of Limitations Bars Johnson’s Common***
 11 ***Count for Quantum Valebant***

12 Johnson’s Common Count 1 is also time-barred. A claim may be dismissed
 13 under Rule 12(b)(6) as barred by the applicable statute of limitations when “the
 14 running of the statute is apparent on the face of the complaint.” *Von Saher v. Norton*
 15 *Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2009). In this
 16 diversity case, California law provides the applicable statute of limitations. *Guar.*
 17 *Trust Co. of New York v. York*, 326 U.S. 99, 110 (1945).

18 **In California, the statute of limitations for a common count of quantum meruit**
 19 **claim is two years.** *Cammarata v. Kelly Capital, LLC*, 339 F. Supp. 3d 1033, 1047
 20 (S.D. Cal. 2018), *aff’d*, 806 F. App’x 531 (9th Cir. 2020); *see also* Cal. Code Civ.
 21 Proc. § 339. Generally, California law provides that “[a] cause of action for a breach
 22 of an **oral contract accrues at the time of the breach**, i.e., when the party charged with
 23 the duty to **perform under the contract fails to perform.**” *Vahora v. Masood*, No. 1:16-
 24 CV-1624-LJO-SKO, 2017 WL 1213423, at *7 (E.D. Cal. Apr. 3, 2017); *see generally*
 25 *Miller v. Brown*, 107 Cal. App. 2d 304 (1951) (common count for money owed
 26 subjected to two-year statute of limitations **where premised on oral contract**). **Johnson**
 27 **alleges that his Common Count 1 seeking payment for “goods provided” accrued**
 28 **more than two years before filing his suit and so is barred by the statute of limitations.**

1 Johnson alleges that Storix “requested, by words or conduct, that Johnson
2 provide it copyrights to the SBAdmin software,” and so an “implied promise existed”
3 between them that allowed Storix “use of the copyrights in exchange for future
4 payment to Johnson **when his participation in Storix terminated.**” (FAC ¶ 82
5 (emphasis added)). Johnson also alleges he returned to Storix from medical leave in
6 2013, but that management “unreasonably criticized Johnson’s work and otherwise
7 antagonized Johnson until he resigned in 2014.” (*Id.*, ¶ 17). Thus, his own allegations
8 make it clear that Johnson’s “participation in Storix ended,” no later than May 2014 as
9 he ended his employment with Storix and did not serve as a board member until later
10 in 2015. According to Johnson’s allegations, Storix’s obligation to “compensate” him
11 for the SBAdmin copyright arose more than six years ago, in May 2014.

12 Johnson’s subsequent self-election to Storix’s board in February 2015 (FAC ¶
13 21), does not revive his untimely claims, because he specifically alleges that the
14 obligation to pay him arose “when his participation in Storix terminated.” (FAC ¶ 82).
15 That Johnson had a second stint as a director before staging a second “termination” of
16 his “participation” in Storix is irrelevant. *See Traverso v. Dept. of Transp.*, 87
17 Cal.App.4th 1142, 1151 (2001) (“Plaintiffs cannot evade the bar of the statute by
18 skipping lightly over the first breach of duty and claiming to found their action on
19 some subsequent conduct in line with it. If this could be done ... the operation of the
20 statute of limitations could be entirely defeated.”). Thus, his common count for
21 payment on the implied promise accrued no later than May 2014, and certainly when
22 Storix refuted any obligation to pay him by contesting ownership in the Copyright
23 Action..

24 **7. *Johnson Lacks Standing to Pursue a Common Count for***
25 ***Payment Based on a Copyrighted Work He Does Not Own***

26 Storix owns the copyright to all versions of SBAdmin, including any
27 derivatives . Johnson has not held an ownership interest in such copyrights since
28 2003. Thus, Johnson lacks standing to assert any such rights now.

1 “The legal or beneficial owner of an exclusive right under a copyright is
 2 entitled, subject to the [registration] requirements of section 411, to institute an action
 3 for any infringement of that particular right committed while he or she is the owner of
 4 it.” 17 U.S.C. § 501(b). The Act sets forth an exhaustive list of the exclusive rights.
 5 17 U.S.C. § 106; *Silvers v. Sony Pictures Entm’t., Inc.*, 402 F.3d 881, 887 (9th Cir.
 6 2005) (en banc). As stated in Section 501(b), and as clarified by Ninth Circuit, after a
 7 copyright owner has fully transferred an exclusive right only **the transferee** has
 8 standing to sue on that exclusive right. *See* 17 U.S.C. § 501(b); *Righthaven v. Hoehn*,
 9 716 F.3d 1166, 1170 (9th Cir. 2013); *see also* 3 M. Nimmer & D. Nimmer, Nimmer
 10 on Copyright § 12.02[c] (2017) (“Once the copyright owner grants an exclusive
 11 license of particular rights, only the exclusive licensee, and not his grantor, may sue
 12 for later-occurring infringement of those rights. Indeed, the licensor may be liable to
 13 the exclusive licensee for copyright infringement, if the licensor exercises rights that
 14 have theretofore been exclusively licensed.”)

15 The Copyright Action resulted in the final adjudication that Johnson transferred
 16 all copyrights to SBAdmin to Storix upon its formation in 2003 and that he owned no
 17 copyrights to SBAdmin. He certainly did not own such copyrights when he alleges
 18 his role in Storix “terminated.” He therefore lacks standing to assert any rights in or
 19 to the copyrighted works or payments based on such works.

20 **C. Johnson’s Common Count 2 for “Money Had and Received,” Is a**
 21 **Derivative Claim for Which He Lacks Standing, Lacks Necessary**
 22 **Elements, and Is Time-Barred**

23 In Common Count 2, Johnson alleges he is owed \$475,560 for “Storix’s profits
 24 earned while Johnson was the company’s sole shareholder” which he claims Storix
 25 unjustly retained and Storix Managers “converted” by to their own equity accounts.
 26 (FAC ¶¶ 87-90). The FAC does not explain how or why Storix had any duty to
 27 distribute any profits to Johnson (or to any other shareholder for that matter), but any
 28 claim for “conversion” of Storix’s profits or retained assets would belong to the
 company and thus Johnson lacks standing to assert it. Common Count 2 should be

1 dismissed for those reasons, and because the alleged wrongdoing occurred in 2011-
2 2013, making the claim being time-barred.

3 ***1. Johnson Lacks Standing to Pursue a Derivative Claim Based on***
4 ***“Withheld” Corporate Profits***

5 The FAC does not allege any duty on the part of Storix to distribute its profits
6 or retained earnings to Johnson. (As discussed below, the payment of dividends is
7 entirely within the board’s discretion.) If any conversion of wrongful withholding of
8 “retained earnings” or “profits earned” occurred, that gives rise to a claim for harm to
9 corporate property which a shareholder may not directly pursue.

10 “Well-established principles of corporate law prevent a shareholder from
11 bringing an individual direct cause of action for **an injury done to the corporation or**
12 **its property by a third party.”** *United States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir.
13 1996). “It is fundamental, of course, that the corporation has a personality distinct
14 from that of its shareholders, and that the latter neither own the corporate property nor
15 the corporate earnings.” *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th
16 212, 229 (2005) (quotation omitted). “Shareholders own stock in the corporation,
17 from which they derive income only upon liquidation of the corporation or the
18 declaration of a dividend by the corporate directors.” *Id.* See also *Nelson v.*
19 *Anderson*, 72 Cal. App. 4th 111, 126 (1999), *as modified on denial of reh’g* (June 14,
20 1999) (“Shareholders own neither the property nor the earnings of the corporation.
21 (Citation.) Shareholders own only stock, from which their income is derived upon the
22 liquidation of assets or the declaration of dividends by the directors.” (citation
23 omitted)). “Because a corporation exists as a separate legal entity, the shareholders
24 have no direct cause of action or right of recovery against those who have harmed it.”
25 *Grosset v. Wenaas*, 42 Cal. 4th 1100, 1108 (2008). See also *Kronk v. Landwin Grp.,*
26 *LLC*, No. SACV1000242CJCMLGX, 2011 WL 13225107, at *9 (C.D. Cal. June 7,
27 2011) (recognizing California law that lost profits belong to the corporation and not
28 the shareholders, citing *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th at

1 228-232).

2 In determining whether an individual action rather than a derivative action lies,
 3 a court looks at “the gravamen of the wrong alleged in the pleadings.” *Nelson v.*
 4 *Anderson*, 72 Cal. App. 4th at 124. “Plaintiffs cannot transform their substantively
 5 derivative claims into direct claims by merely alleging that, as a result of
 6 overpayments, they were deprived of their stockholder rights to receive dividends or
 7 liquidation payments.” *Cacciapalle v. United States*, No. 13-466C, 2020 WL
 8 3618894, at *24 (Fed. Cl. June 26, 2020) (Dismissing claims related to dissipated
 9 company profits as substantively amounting to derivative claims which the
 10 shareholder plaintiff lacked standing to pursue). *See also Pareto v. F.D.I.C.*, 139 F.3d
 11 696, 699 (9th Cir. 1998) (Allegations of mismanagement affecting corporate assets is
 12 a claim belonging to the corporation which shareholders may only assert derivatively,
 13 not individually).

14 As explained above, the gravamen of Johnson’s Common Count 2 for money
 15 had and received is an allegation amounting to an injury to Storix and not him
 16 individually, even as a shareholder in a closely held corporation. He asserts that
 17 “Management converted his Storix retained earnings to their personal equity accounts
 18 while he was on medical leave between 2011-2013.” (FAC ¶ 47). He essentially
 19 complains that company management converted retained earnings of the company
 20 rather than pay it to him. Yet retained earnings belong to Storix and those funds
 21 remain the company’s property unless it declares a dividend to shareholders. That
 22 never happened, nor did Johnson allege that Storix declared a dividend to its
 23 shareholders, including him, that he did not receive. Thus, even if as he claims
 24 “Management” converted the company’s retained earnings to their own “equity”
 25 accounts, the company and not Johnson would have suffered the harm of which he
 26 now complains. Any such action must be maintained as a derivative suit.⁵ He lacks

27 _____
 28 ⁵ Even if Johnson could meet the other statutory requirements for a derivative claim
 under Corporations Code § 800, which he cannot, he would still fail to meet the

1 standing to pursue it individually, and so the claim should be dismissed.

2 **2. *Johnson Establishes No Duty to Pay Johnson Its Profits or***
 3 ***Retained Earnings***

4 Even if Johnson could assert an individual claim, he fails to establish that Storix
 5 acted wrongfully by failing to pay out retained earnings to him as a shareholder
 6 dividend. Johnson points to no duty that a corporation must pay out all profits or
 7 retained earnings as a dividend. Rather, that is a board decision protected by the
 8 business judgment rule. *See In re Talbot's Estate*, 269 Cal. App. 2d 526, 537 (1969)
 9 (“Ordinarily, whether a private corporation is to declare and pay a dividend, or make
 10 distribution of its assets is a matter committed to the sound business judgment of the
 11 corporation’s board of directors.”); *Gabelli & Co. v. Liggett Grp. Inc.*, 479 A.2d 276,
 12 280 (Del. 1984) (“It is settled law in this State that the declaration and payment of a
 13 dividend rests in the discretion of the corporation’s board of directors in the exercise
 14 of its business judgment; that, before the courts will interfere with the judgment of the
 15 board of directors in such matter, fraud or gross abuse of discretion must be show.”).
 16 Johnson fails to state a valid claim because he cannot establish that Storix owed him
 17 an obligation to declare a dividend. If he had such a claim, it would be against
 18 Storix’s board of directors (whom he is already suing on such a theory).⁶ Yet the
 19 business judgment rule protects them too.

20
 21
 22 contemporaneous and continuous share ownership requirement. *See Grosset v.*
 23 *Wenaas*, 42 Cal. 4th 1100, 1115 (2008) (Holding “that section 800(b) is properly
 24 construed as containing a continuous ownership requirement.”). Johnson is no longer
 a Storix shareholder.

25 ⁶ *See Johnson v. Altamirano*, 418 F. Supp. 3d 530, 560 (S.D. Cal. 2019),
 26 *reconsideration denied, stay granted*, No. 3:19-CV-01185-H-BLM, 2020 WL 487301
 27 (S.D. Cal. Jan. 30, 2020) (“In the complaint, Plaintiff alleges that Defendants
 28 Altamirano, Turner, Kinney, and Huffman converted money from Storix’s profits into
 their personal equity accounts while Johnson was on medical leave from 2011 to
 2013.”)

1 3. ***Common Count 2 for Money Had and Received Is Barred by the***
 2 ***3-Year Statute of Limitations***

3 Apart from being substantively deficient, Johnson’s common count for money
 4 had and received is barred as untimely since he failed to bring it within the statute of
 5 limitations period. **Contrary to his conclusory allegations of delayed discovery, the**
 6 **pleadings and facts properly subject to judicial notice prove that his claim accrued**
 7 **more than three years before filing this case.**

8 “In a federal diversity action brought under state law, the state statute of
 9 limitations controls.” *Bancorp Leasing & Fin. Corp. v. Augusta Aviation Corp.*, 813
 10 F.2d 272, 274 (9th Cir. 1987). State law governs not only as to the length of the
 11 limitations period, but also as to when and how a claim accrues. *See Johnson v.*
 12 *Columbia Props. Anchorage, LP*, 437 F.3d 894, 900 (9th Cir. 2006); *Soliman v. Philip*
 13 *Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002). **A common count for money had and**
 14 **received based on fraud is governed by Code Civ. Proc. § 338(d).**⁷ *First Nationwide*
 15 *Sav. v. Perry*, 11 Cal. App. 4th 1657, 1670 (1992).

16 In California, the statute of limitations starts to run upon the accrual of a cause
 17 of action. Cal. Code Civ. Proc. § 312. “A cause of action accrues ‘upon the
 18 occurrence of the last element essential to the cause of action.’” *Seelenfreund v.*
 19 *Terminix of N. Cal., Inc.*, 84 Cal. App. 3d 133, 136 (1978) (*quoting Neel v. Magana,*
 20 *Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187 (1971)).

21 Under California law, “[a]n exception to the general rule for defining the
 22 accrual of a cause of action ... is the discovery rule,” which “postpones accrual of a
 23 cause of action until the plaintiff discovers, or has reason to discover, the cause of

24 _____
 25 ⁷ Under California law, claims for breach of oral contract, implied contract, common
 26 counts and tortious interference are subject to a two-year statute of limitations. Even
 27 giving Johnson the benefit of the doubt that the 3-year term applies does not save his
 28 claims. **Nor has he adequately pleaded facts to comply with Federal Rule of Civil**
Procedure 9(b)’s heightened pleading standard for fraud allegations, which provides
an independent basis to dismiss his claim.

1 action.” *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999); *Clemens v.*
 2 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008). “[A] plaintiff whose
 3 complaint shows on its face that his claim would be barred without the benefit of the
 4 discovery rule must specifically plead facts to show (1) the time and manner of
 5 discovery and (2) the inability to have made earlier discovery despite reasonable
 6 diligence.” *Grisham v. Philip Morris USA, Inc.*, 40 Cal. 4th 623, 638 (2007) (internal
 7 quotation marks and citation omitted). In other words, he must plead and prove “facts
 8 showing that he was not negligent in failing to make the discovery sooner and that he
 9 had no actual or presumptive knowledge of facts sufficient to put him on inquiry.”
 10 *Sun’n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 701-02 (1978). Courts regularly
 11 dismiss claims for failing to meet this pleading requirement on a motion to dismiss.
 12 See, e.g., *Plumlee v. Pfizer, Inc.*, 664 F. App’x 651, 652-53 (9th Cir. 2016); *Platt Elec.*
 13 *Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1051-52 (9th Cir. 2008).

14 On its face, the FAC alleges facts showing Johnson’s common count accrued
 15 more than three years before he sued. The basis of his claim is that Storix owes him
 16 money based on the company’s profits in 2011. Johnson fails to adequately allege
 17 facts that would entitle him to rely on the delayed discovery exception. To the
 18 contrary, judicially noticeable facts contradict that claim.

19 Johnson premises his claim on the allegations that Storix changed its accounting
 20 method while he was on medical leave in 2012, leading to the filing of an amended
 21 tax return for 2011. FAC ¶ 16.⁸ He claims the Storix Managers then “instructed
 22 Procopio to bring legal actions against Johnson to deny him access to financial records
 23 that might have raised his suspicion and afforded him a reasonable opportunity to
 24 investigate whether all profits were properly distributed to him.” *Id.*

25 In 2016, Johnson sought a writ of mandate to compel access to Storix’s books
 26 and records. In support of that effort, Johnson made allegations that refute his

27 _____
 28 ⁸ The FAC does not allege that Johnson did not receive the amended 2011 tax return
 or any subsequent Storix tax returns.

1 conclusory claims that he had no access to information that would have put him on
2 notice of his supposed claim. He testified he received “over 350,000 emails and
3 attachments” in discovery in the Copyright Action, many of which he said, “clearly
4 prove the misconduct” of the board members. See RJN No. 2, p. 8 ¶ 32. He claimed
5 he had evidence that “the Board also altered financial records,” among other things.
6 *Id.* ¶ 29.

7 In the state court litigation, Johnson filed a motion for appointment of a
8 receiver, claiming a need based on “Defendants’ Self-Dealing and Mismanagement,”
9 and that “Defendants Omit and Withhold Key Financial Information,” from Johnson.
10 See RJN No. 1, pp. 6-8. In another declaration, Johnson asserted that he had received
11 Storix’s financial records, which he had been demanding for over a year, that showed
12 “without question” that Storix management had been embezzling in excess of
13 \$200,000, and that he had “proven,” based on bank records and expert testimony, that
14 Storix management underreported income in excess of \$1.74M, which deprived him
15 of a similar tax deduction. See RJN No. 3, ¶¶ 23-24. He claimed to be sending the
16 information to the District Attorney to prosecute Storix. *Id.* ¶ 25. He later sued his
17 Mintz, Levin counsel, alleging that he hired the firm believing that an attorney there
18 “could expedite criminal claims against the [Storix Manager] defendants for
19 embezzling shareholder profits for personal use.” RJN No. 4, p. 23, ¶ 85 (brackets
20 added).

21 During the Copyright Action in December 2015, Johnson testified about
22 transferring 60% ownership in Storix. His sister, Storix’s then-VP, CFO and
23 treasurer, signed a Compensatory Stock Transfer Agreement on Storix’s behalf to
24 carry out the transfer. He specifically testified he knew Storix’s approximate profits
25 for 2011 (\$850,000), and that following the 2011 stock issuance the company changed
26 its accounting method which confused him:

27 I think that was the company profits in total, although I -- they also made
28 some changes the next year to the way the -- that they reported taxes.
You know, they changed everything from a cash to an accrual basis, and

1 it moved a lot of numbers from one bucket to another, and they actually
2 had to go back and make revisions to 2011 in order to compensate. And,
3 to tell you the truth, I didn't quite understand it, but you'll probably see
4 reports that have differing numbers based on before or after they made
5 that accounting change.

6 RJN No. 5, Transcript of Trial, Vol. 1, pp. 174:11-179:14 (December 8, 2015). He
7 also testified that he last received a dividend payment in December 2014. *Id.*

8 Johnson knew (i) about the tax accounting methodology change in 2012, (ii)
9 admitted it confused him, (iii) admitted that he had suspicions about financial
10 shenanigans and "embezzlement" by Storix Managers in 2016 and prior, (iv) had the
11 guidance of experts and counsel, and (v) the ability to determine whether any
12 mismanagement of Storix led to him not receiving what he claimed Storix owed him.
13 This is especially true for money he claims the company earned before he returned in
14 2013, when his sister served as the company's CFO. *See Grisham v. Philip Morris*
15 *USA, Inc.*, 40 Cal. 4th 623, 638 (2007) ("[A] plaintiff whose complaint shows on its
16 face that his claim would be barred without the benefit of the discovery rule must
17 specifically plead facts to show (1) the time and manner of discovery and (2) the
18 inability to have made earlier discovery despite reasonable diligence." (internal
19 quotation marks and citation omitted).) These facts, all of which occurred more than
20 three years before he sued, are more than enough to put a reasonable person on inquiry
21 notice, and he cannot establish his inability to have earlier made the discovery after
22 exercising reasonable diligence.

23 IV. CONCLUSION

24 Johnson's FAC fails to state a plausible claim against Storix. It rehashes
25 already adjudicated issues, alleges improper claims that he lacks standing to assert,
26 and it is years past any applicable statutes of limitations. Frivolous claims such as
27 these beg for dismissal, and the circumstances discussed above prove that amendment
28 would be futile. Storix requests that the entire FAC be dismissed against it, and that
the dismissal be granted without leave to amend.

1 Respectfully submitted,

2 DATED: August 26, 2020

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

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By: /s/Sean M. Sullivan

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Paul A. Tyrell

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Sean M. Sullivan

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Attorneys for Defendant Storix Inc.

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