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UNITED STATES DISTRICT COURT

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. 19CV1185-H-BLM

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AN ORDER REQUIRING PLAINTIFF TO COMPLY WITH STATUTORY UNDERTAKING REQUIREMENT: C.C.P. § 1030

Hearing Date: October 7, 2019
Hearing Time: 10:30 a.m.

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

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action was filed by Plaintiff Anthony Johnson ("Johnson"), a non-California resident, against Defendants, among others, David Huffman, Richard Turner, Manuel Altamirano, and David Kinney (collectively "Defendants"). Defendants are shareholders, and current or former officers and directors of Storix, Inc. ("Storix"). Plaintiff should be ordered to file an undertaking to secure an award of costs and attorneys' fees, pursuant to Cal. Civ. Proc. Code § 1030[1], as a condition precedent for prosecuting his lawsuit against Defendants. The motion should be granted because: (1) Plaintiff is not a California resident; and (2) Defendants have more than a reasonable possibility of obtaining judgment in the action. Defendants anticipate incurring costs and attorneys' fees in the amount of $85,000.00. (Declaration of Marty B. Ready ("Ready Decl.") ¶¶ 2 - 8.)

This current lawsuit is merely a continuation of Johnson's string of legal proceedings against Defendants and Storix motivated by his deep resentment and hostility toward the current management and majority of the board and shareholders of Storix. Undeterred by rulings and judgments in favor of Defendants and Storix, Johnson, in this Complaint, asserts claims for malicious prosecution, breach of fiduciary duty, conversion, economic interference, breach of contract, rescission, and indemnification. Johnson's current Complaint asserts frivolous claims and is the result of blatant forum shopping to avoid adverse rulings from a voluntarily dismissed state court action filed by Johnson against Defendants in January of this year. The actions of Johnson and meritless nature of the claims he asserts against Defendants is precisely the type of frivolous lawsuits against California residents Section 1030 was designed to prevent.

[1] All statutory references are to the Cal. Code of Civ. Proc. unless otherwise indicated.

Given the facts, as will be discussed in more detail below, there is more than a reasonable possibility Defendants will obtain judgment. Specifically, Defendants' success on the merits is supported by various legal theories, including, without limitation, failure to state a claim, the doctrine of *res judicata*, and statute of limitations.

II. PROCEDURAL BACKGROUND

This current lawsuit represents the sixth proceeding instituted by Johnson against Defendants and/or Storix as part of his litigation campaign to wrest control of Storix and its flagship software product SBAdmin from Defendants. The collective results of these proceedings, however, have not concluded in Johnson's favor.

The inception of Johnson's campaign dates back to August 2014 when Johnson sued Storix for copyright infringement, in this U.S. District Court, Southern District of California ("Copyright Action"). As this Court is aware, in December 2015, a unanimous jury returned a verdict in favor of Storix and against Johnson. On December 19, 2017, the United States Court of Appeals for the Ninth Circuit affirmed the jury's verdict on liability, as well as this District Court's decision to award Storix attorneys' fees but remanded with instruction to reconsider the amount of the fees awarded. On August 7, 2018, this District Court issued its Order Awarding Attorneys' Fees on Remand. Johnson currently has a Motion to Recall the Mandate in the Copyright Action pending before the United States Court of Appeals for the Ninth Circuit.

While the Copyright Action was pending, Johnson, as a director of Storix, continued his campaign against the company and Defendants and took steps to set up a competing business. In response, Storix filed a complaint, and ultimately a first and second amended complaint, against Johnson and his competing company, Janstor Technologies ("Direct Suit"). (*See* Request for Judicial Notice ("RJN"), Ex. 1.) After a series of unsuccessful attacks on the pleadings in the Direct Suit, Johnson

filed a cross-complaint against Defendants on April 13, 2016 ("Cross-Complaint"). (*Id.*, Ex. 2.) On March 6, 2017, the court struck portions of the Cross-Complaint based on California's anti-SLAPP statute and awarded Defendants attorneys' fees. (*Id.*, Ex. 3.)

After learning of the Direct Suit, Johnson, in October 2015, filed a shareholder derivative suit and a subsequent first amended derivative complaint against Defendants ("Derivative Suit"). (*Id.*, Ex. 4.) As a direct result of the extensive litigation between Johnson and Defendants, on October 31, 2016, the Direct Suit and Cross-Complaint were consolidated with the Derivative Suit in Department C-73 of the San Diego Superior Court, the Honorable Joel R. Wohlfeil presiding.[2] For the next year and three months, the consolidated matters were heavily litigated and ultimately reassigned to Department 904 of the San Diego Superior Court for trial, the Honorable Kevin A. Enright presiding.

The Direct Suit and Cross-Complaint were tried before a jury, which returned a verdict in favor of Storix in the Direct Suit and in favor of Defendants on Johnson's Cross-Complaint. (*See* RJN, Ex. 6.) Specifically, the jury found that Johnson breached his duty of loyalty by knowingly acting against Storix's interest and found for Defendants on all causes of action in the Cross-Complaint. (*Ibid.*) The Derivative Suit was tried before the bench, Judge Enright presiding, who found in favor of Defendants on all causes of action. (*Id.* at Ex. A.)

On January 14, 2019, undeterred by and displeased with the adverse rulings in the consolidated matters, Johnson filed yet another complaint against Defendants in the San Diego Superior Court, the Honorable Katherine Bacal, presiding. (*See* RJN, Ex. 7.) This complaint again asserted the same causes of action asserted in the Cross-Complaint for breach of fiduciary duty, fraud, and civil conspiracy and added claims for wrongful use of civil proceedings, conversion, and economic interference

[2] Also consolidated was Johnson's pro se complaint against Defendants and their attorneys for various intentional torts. (*See* RJN, Ex. 5.) This case was settled during trial.

("State Action"). (*Ibid.*) The complaint raised a number of issues previously litigated and decided in the consolidated matters and was based on allegations that were protected activity under the anti-SLAPP statute. As a result, Defendants filed an anti-SLAPP motion, demurrer, and motion for an order requiring Johnson, an out-of-state plaintiff, to provide an undertaking pursuant to Section 1030. Defendants' motions were never opposed or heard because Johnson dismissed his complaint without prejudice prior to the date oppositions were due.

On June 24, 2019, less than one month after Johnson voluntarily dismissed the State Action, Johnson refiled the action in the U.S. District Court for the Southern District of California ("Federal Action") against Defendants and added new parties – Storix and attorneys Paul Tyrell and Sean Sullivan of Procopio, Cory, Hargreaves & Savitch, LLP. (ECF No. 1.) Johnson admits he refiled the State Action in Federal Court because of his inability to amend his complaint due to the pending anti-SLAPP motion and to avoid the undertaking demanded by Defendants in the State Action. (ECF Nos. 14, ¶ 7; 16, fn 1.) Accordingly, the Federal Action asserts the same causes of action asserted in the State Action but adds claims for breach of contract, rescission, and indemnification in place of fraud and conspiracy.

III. LEGAL STANDARD

The Federal Rules of Civil Procedure do not contain a provision permitting a defendant to request a bond to secure their costs. "However, the federal district courts have inherent power to require plaintiffs to post security for costs. Typically federal courts, either by rule or by case-to-case determination, follow the forum state's practice with regard to security for costs, as they did prior to the federal rules; this is especially common when a non-resident party is involved." *Simulnet E. Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994) (internal citations omitted).

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In California, to protect defendants from risks associated with defending lawsuits filed by non-residents, the legislature enacted Cal. Civ. Proc. Code § 1030. The statute provides in relevant part:

> "When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding. For the purposes of this section, 'attorney's fees' means reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract."
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> "The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding." Cal. Civ. Proc. Code, § 1030(a), (b).

"The purpose of the statute is to enable a California resident sued by an out-of-state resident to secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not within the court's jurisdiction." *Yao v. Superior Court,* 104 Cal.App.4th 327, 331 (2002) (internal quotation marks and citation omitted). Section 1030 acts as a deterrent "to prevent out-of-state residents from filing frivolous lawsuits against California residents." *Ibid.*

To be successful the Defendants must make a factual showing Plaintiff resides out of state and there is a reasonable possibility they will obtain judgment. The reasonable possibility standard is a low standard, and Defendants are "not required to show that there [is] no possibility that [Plaintiff] could win at trial, but only that it [is] reasonably possible that [Defendants will] win." *Baltayan v. Estate of Getemyan,* 90 Cal.App.4th 1429, 1432 (2001).

In addition to the requirements of Section 1030, the District Court balances three factors to determine the propriety of the undertaking requirement. Specifically, the Court weighs:

(i) the degree of probability/improbability of success on the merits, and the background and purpose of the suit;

(ii) the reasonable extent of the security to be posted, if any, viewed from the defendant's perspective; and

(iii) the reasonable extent of the security to be posted, if any, viewed from the nondomiciliary plaintiff's perspective.

Simulnet, 37 F.3d at 576.

IV. PLAINTIFF MUST FILE AN UNDERTAKING BECAUSE THE STATUTORY REQUIREMENTS OF SECTION 1030 ARE SATISFIED

A non-resident plaintiff is required to file an undertaking upon motion by a defendant if it is shown there is a reasonable possibility the defendant will obtain judgment in the action. *Baltayan,* 90 Cal.App.4th at 1430. Moreover, given the procedural background between the parties, as set forth above, and the purpose behind Johnson's lawsuit to avoid the same motion in the State Action, this factor weighs in favor of requiring Johnson to post an undertaking. For at least these reasons and the reasons set forth below, Defendants have established Plaintiff is a non-resident, and it is more than reasonably possible Defendants will obtain judgment.

A. Plaintiff Is Not a Resident of California

Plaintiff admits that he is a resident of the County of Clark, Nevada. (ECF No. 1, ¶ 1.) As a result, Plaintiff's non-resident status is established and satisfies the first requirement of Section 1030.

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B. Defendants Have a Reasonable Possibility of Obtaining Judgment

1. Plaintiff's Claim for Malicious Prosecution Fails as a Matter of Law

Johnson has asserted a malicious prosecution claim against Defendants for "initiat[ing] and continu[ing] the Direct Suit against Johnson without probable cause." (ECF No. 1, ¶ 38.) To maintain a cause of action for malicious prosecution, the plaintiff must allege the following necessary elements: (1) a judicial proceeding was commenced by or at the direction of the defendant and was favorably terminated; (2) lack of probable cause; and (3) malice. *Bertero v. National General Corp.*, 13 Cal.3d 43, 50 (1974). Johnson's claim fails as a matter of law because he cannot establish the requisite elements of malicious prosecution. More specifically, the underlying action allegedly supporting Johnson's malicious prosecution claim did not terminate in his favor but was adverse to Johnson and in favor of Storix. In addition, the interim adverse judgment rule establishes the existence of probable cause thereby negating any claim Defendants lacked probable cause to bring the Direct Suit. As a result, Johnson's malicious prosecution claim fails as a matter of law and Defendants have more than a reasonable possibility of prevailing.

a. *The Direct Suit Did Not Terminate in Johnson's Favor*

"It is hornbook law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor." *Casa Herrera, Inc. v. Beydoun,* 32 C4th 336, 341 (2004) (internal quotes omitted). And a partial victory in an underlying action is not favorable termination. *Lane v. Bell*, 20 CA5th 61, 68-76, (2018). The court looks to the judgment in the prior action, which is "the criterion by which to determine who was the successful party." *Crowley v. Katleman*, 8 C4th 666, 684-686 (1994).

Here, Johnson claims "[t]he 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." (ECF No. 1, ¶ 27.) Johnson goes on to assert the

monetary award to Storix is severable when determining favorable termination "because it was introduced as a separate and unrelated claim at trial and is currently subject of a pending appeal." (ECF No. 1, fn. 6.) These allegations, however, are directly contrary to the Judgment on Consolidated Actions Following Trial and recent case law with respect to severability analysis being inapplicable to the favorable termination element. (*See* RJN, Ex. 6.); *see* generally, *Lane v. Bell*, 20 Cal.App.5th 61 (2018).

After trial in the Direct Suit on Storix's breach of fiduciary duty claim, the court entered final judgment "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor Technology on Storix Inc.'s claim for aiding and abetting a breach of fiduciary duty." (*See* RJN, Ex. 6, p. 8.) The judgment in favor of Storix and against Johnson conclusively establishes the Direct Suit, which Johnson alleges supports his malicious prosecution claim, did not terminate in Johnson's favor. There is no other reasonable interpretation of this result.

Moreover, Johnson cannot avoid this judgment by asserting the monetary award is severable. The California Court of Appeal recently clarified the favorable termination rule explaining that a malicious prosecution plaintiff must show "there was a favorable termination of the *entire* underlying action in the plaintiff's favor," and "that a partial recovery against the malicious prosecution plaintiff in the underlying action is fatal to showing the favorable termination element." *Lane v. Bell*, 20 Cal.App.5th at 75 (italics in original; quotations and brackets omitted). "Any other rule would strip the 'favorable termination' requirement of its independent significance because any individual 'claim' that lacks probable cause will necessarily be terminated in the underlying defendant's favor." *Id.* Further, the court in *Lane* rejected prior cases that held favorable termination could be based on a "severable" claim. *Id.*; *see Staffpro, Inc. v. Elite Show Servs., Inc.*, 136 Cal.App.4th

1392, 1403 (2006). Thus, Johnson cannot base his malicious prosecution action on a partial victory in the underlying action, where the judgment itself was adverse to Johnson. *See Lane*, 20 Cal.App.5th at 68-76.

b. *Johnson Cannot Establish Lack of Probable Cause*

Probable cause exists "*if any reasonable attorney* would have thought the claim tenable"—i.e., "arguably meritorious." *Sheldon Appel Co. v. Albert & Oliker,* 47 C3d 863, 886 (1989) (emphasis added). Unless obtained by fraud or perjury, a favorable verdict in the prior action conclusively establishes probable cause, even if the verdict is subsequently set aside by the trial court or on appeal. *Wilson v. Parker, Covert & Chidester,* 28 C4th 811, 817, 823-824 (2002). In addition, the "interim adverse judgment" rule provides that "if an action succeeds after a hearing on the merits," including on dispositive pretrial motions, "that success ordinarily establishes the existence of probable cause ... even if the result is overturned on appeal or by later ruling of the trial court." *Parrish v. Latham & Watkins*, 3 Cal.5th 767, 771, 776-777 (2017).

A verdict favorable to Storix in the underlying action conclusively establishes Defendants, and more appropriately, Storix, had probable cause to file and maintain the Direct Suit. Thus, the Court need only look to the judgment rendered in the Direct Suit to determine the successful party. The language of the judgment could not be clearer where the court found "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty." (*See* RJN, Ex. 6, p. 8.) This judgment in favor of Storix conclusively establishes probable cause for the Direct Suit.

Moreover, the interim adverse judgment rule bars Johnson's malicious prosecution claim because the trial court in the State Action denied Johnson's motion for summary judgment, or summary adjudication. (*See* RJN, Ex. 8.) There was therefore a genuine issue of material fact more than suggestive of probable cause to bring the Direct Suit. The denial of Johnson's summary judgment, or summary

adjudication, motion establishes the existence of probable cause for a claim of breach of fiduciary duty against Johnson in the Direct Suit. And the judgment in the Direct Suit further bolsters this fact. As a result, Johnson's malicious prosecution claim fails as a matter of law.

2. *Res Judicata* Bars the Breach of Fiduciary Duty Claim

Johnson's instant Complaint asserts, for a fourth time in the progeny of litigation filed by Johnson, a claim for breach of fiduciary duty against Defendants. Johnson couches the allegations in this current version of breach of fiduciary duty as against Defendants in their capacity as "shareholders and business partners in a closely-held corporation." (ECF No. 1, ¶ 31.) No matter how Johnson couches the allegations, under the doctrine of *res judicata*, Johnson is precluded from litigating this claim or issue in this current lawsuit.

"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.,* 48 Cal.4th 788, 797 (2010) (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,* 15 Cal.3d 791, 795 (1975). 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." *Boeken,* 48 Cal.4th at 797-798 citing *McKee v. Dodd,* 152 Cal. 637, 641 (1908). Thus, when a subsequent action involves the same parties and seeks compensation for the same harm, the actions involve the same primary right. *Boeken,* 48 Cal.4th at 798.

In the instant Complaint, Johnson alleges he has been harmed as a minority shareholder by "being deprived indemnification by Storix, and by the loss of Johnson's 40% of Storix's profits used to pay Partner-Defendants and Storix's counsel for acts committed solely for Partner-Defendants' benefit." (ECF No. 1, ¶

47.) The alleged breaches of fiduciary duty include "unfairly denying Johnson benefits of Storix that Partner-Defendants afforded themselves... [and] using Storix's profits otherwise owed to Johnson for their personal benefit, including all monies paid to their personal attorneys." (ECF No. 1, ¶ 46.)

Thus, in sum, the primary right asserted by Johnson is the right not to be wrongfully deprived of his rights as a minority shareholder. In other words, Johnson asserts the advancement of Defendants' defense costs deprived him of dividends he should have been entitled to as a 40% shareholder. This, however, is also the very same primary right Johnson alleges was breached and the same harm he alleges he suffered in his Cross-Complaint in the "Direct Suit." (*See* RJN, Ex. 2, ¶¶ 62 – 64: "harmed by...loss of money in defending a suit;" and "harmed by being denied distributions from Storix profits, as all profits were spent instead in litigation.") The compensation Johnson seeks in the instant Complaint is based on the very same harm previously litigated in the "Direct Suit."[3]

This claim was also litigated in the Derivative Suit. After a bench trial in favor of Defendants, the court found "that plaintiff has failed to meet the burden of proof on the four causes of action alleged in the First Amended Derivative Complaint" including breach of fiduciary duty. (*See* RJN, Ex. 6 at Ex. A, p. 5.) Specifically, the court considered the evidence of Defendants' expert regarding the corporation's advancement of defense costs to Defendants and found it was proper under Storix's bylaws and allowed by Cal. Corp. Code § 317. Johnson is therefore precluded from alleging the same claim for breach of fiduciary duty arising from the same primary right.

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[3] Johnson and his counsel in the "Direct Suit" submitted a jury instruction that was given entitled "Majority Shareholder Fiduciary Duties" thereby providing further support that Johnson's current claim for breach of fiduciary duty is barred by the doctrine of *res judicata.* (RJN, Ex. 9, p. 47.).

3. Statute of Limitations Bars Conversion

Johnson's third cause of action for conversion is barred by the statute of limitations. The statute of limitations for conversion is three years. Cal. Civ. Proc. Code § 338(c). The cause of action for conversion generally accrues on the date of the wrongful taking or other act constituting conversion, "even if the owner is ignorant of the wrong committed." *Naftzger v. American Numismatic Soc.*, 42 Cal.App.4th 421, 429 (1996).

In the instant Complaint, Johnson alleges Defendants' "substantially interfered with Johnson's property by knowingly and intentionally taking possession of the money Johnson was entitled to." (ECF No. 1, ¶ 50.) Johnson asserts he was entitled to "all undistributed profits of Storix earned *prior to Partner-Defendants became* [sic] *shareholders*." (ECF No. 1, ¶ 50.) (emphasis added.) Further, Johnson states that "Partner-Defendants converted almost half a million dollars of Storix's profits earned when Johnson was a sole shareholder…while Johnson was on medical leave in 2011-2013. (ECF No. 1, ¶ 30.) Thus, on the face of the Complaint, the conversion or wrongful taking took place somewhere between the time of the stock issuance to Defendants in late 2011 and his surprise clean bill of health in 2013. (ECF No. 1, ¶ 12.) Because the cause of action for conversion accrued at least in 2013, Johnson's conversion claim is barred by the three-year statute of limitations. Cal. Civ. Proc. Code § 338(c).

Johnson, however, also asserts that he was prevented from accessing financial records "which would have raised his suspicions and provided a reasonable opportunity for Johnson to discovery this fact earlier." (ECF No. 1, ¶ 30.) Johnson's characterization of this fact is inconsistent with the realities of the underlying litigation. More accurately, Johnson filed a Motion for Peremptory Writ of Mandate to compel inspection and copying of books, records, and documents of Storix in the Direct Suit. In ruling on the motion, the Hon. Randa Trapp 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. The limitation imposed by the court only dealt with attorney-client privileged documents, and confidential, proprietary, trade secret information. (*See* RJN, Ex. 10.) Thus, it is disingenuous for Johnson to assert he was denied access to the financial records of Storix and therefore could not discovery an alleged conversion.

Because Johnson's claim for conversion accrued on the date of the conversion, the three-year statute of limitations bars this claim.

4. Economic Interference Claim Fails as a Matter of Law

Johnson has asserted a claim for economic interference alleging the intentional interference with a contractual relationship and the interference with Johnson's prospective economic advantage. (ECF No. 1, ¶¶ 55, 56.)

The contractual interference claim is allegedly based on a February 2003 oral contract between Johnson and Storix "wherein Storix was granted rights to…SBAdmin…in exchange for future compensation for the copyright if or when Johnson's participation in Storix ended." (*Id.* ¶ 11.) In 2003, Johnson was the sole shareholder, officer, and director of Storix. (*Id.* ¶ 10.) Thus, on the one hand, the oral contract was between Johnson as the author of the copyrighted material, and on the other hand, Johnson as the sole shareholder, officer, and director of Storix.

a. *Defendants Had No Knowledge of the Oral Contract*

In order for Defendants to be liable for the tort of economic interference, Defendants must know of the existence of the contract. *Pacific Gas & Elec. Co. v. Bear Stearns & Co.,* 50 C3d 1118, 1126 (1990). Here, however, Defendants could not possibly know of the existence of an oral contract between Johnson and himself. To that end, Johnson concedes in his Complaint that "[n]o Partner-Defendant was a party to the contract or an agent of Storix nor had any financial interest in Storix when the agreement took place." (ECF No. 1, ¶ 11.) More importantly, Johnson, in his copyright infringement litigation, never raised the issue of monies owed related to him "providing Storix the copyrights to SBAdmin needed to conduct its business

for over fifteen (15) years." (ECF No. 1, ¶ 11.) Rather, in the copyright litigation, Johnson took the position that he individually retained all rights related to the SBAdmin copyright and Storix was infringing his copyright. (*See* RJN, Ex. 11.) The entire basis of Johnson's copyright infringement litigation was that he, as an individual, was the owner of the SBAdmin copyright. Only now that a jury unanimously returned a verdict in favor of Storix that it owned all rights to the copyrights to all version of SBAdmin does Johnson change his tune and allege that he is owed money based conveniently on an oral contract with himself. For at least this reason, Johnson cannot sustain his claim for economic interference.

b. *Defendants Could Not Be Strangers to the Alleged Oral Contract*

Defendants, as agents of Storix, cannot be held liable for interference with Johnson's alleged oral contract with Storix. "The tort of intentional interference with contractual relations is committed only by 'strangers—interlopers who have no legitimate interest in the scope or course of the contract's performance.' Consequently, a contracting party is incapable of interfering with the performance of his or her own contract and cannot be held liable in tort for conspiracy to interfere with his or her own contract." *PM Group, Inc. v. Stewart,* 154 Cal.App.4th 55, 65 (2007) (citations omitted). Persons who are not parties to the contract, such as agents of the breaching party, therefore cannot be held liable for intentional interference with a contractual relationship. *See e.g. Weinbaum v. Goldfarb, Whitman & Cohen,* 46 Cal.App.4th 1310, 1316 (1996). For at least this reason, Johnson's economic interference claim fails.

c. *The Manager's Privilege is an Absolute Defense*

In addition to the above, Defendants have the affirmative defense of manager's privilege as to Johnson's economic interference claims. If an agent of the corporation reasonably believes that a contract is harmful to the interests of the corporation, the agent is privileged to induce the breach of that contract. *Aalgaard*

v. Merchants Nat'l Bank, Inc., 224 CA3d 674, 684 (1990). Defendants could reasonably believe that an oral contract between Johnson and himself that could be triggered by Johnson simply ending his participation with Storix, at any time, thereby requiring an alleged payment of $2.75M, was not in the best interests of Storix especially in light of a unanimous jury verdict in favor of Storix regarding the ownership of the copyrights. The manager's privilege is therefore an absolute defense to Johnson's economic interference claim.

d. *Johnson Did Not Have an Existing Relationship With Veeam*

Johnson also cannot sustain his burden to establish interference with his prospective economic advantage. The threshold requirement for this tort is an *existing* economic relationship between plaintiff and a third party that is reasonably likely to produce economic advantage. *Youst v. Longo*, 43 Cal.3d 64, 71 (1987) (emphasis added). A mere expectation that a relationship will be created in the future is not sufficient. *Korea Supply Co. v. Lockheed Martin Corp.* 29 C4th 1134, 1164 (2003). And the acts of interference must be independently wrongful by some legal measure. *See Reeves v. Hanlon,* 33 Cal.4th 1140, 1152 (2004); *see also San Jose Const., Inc. v. S.B.C.C., Inc.*, 155 Cal.App.4th 1528, 1544-45 (2007).

Here, Johnson alleges Defendants interfered with a prospective economic relationship with Veeam Software "by attempting to extort Johnson with the threat of continued litigation and deepening financial hardship." (ECF No. 1, ¶ 56.) But the "business opportunity" with Veeam software was not an existing relationship of Johnson's. Johnson does not allege that he had an existing relationship with Veeam but rather states Defendants held a board meeting and announced to Johnson this *potential* opportunity. (*Id.* at ¶ 25.) In fact, in Johnson's State Action complaint, Johnson alleges Veeam was "a competitor." (RJN, Ex. 7.) As a competitor, any expectation of a relationship would not be current and existing but at some time in the future, which is insufficient to sustain Johnson's claim.

Moreover, there is no independent legal wrong that would establish this claim. Whether accurate or not, the threat of continued litigation is not itself an independent wrongful act by any legal measure sufficient to establish this tort. As a result, Johnson cannot sustain his claim for interference with prospective economic advantage.

5. Johnson Cannot Pierce the Corporate Veil as to Defendants for an Alleged Breach of Contract

Johnson alleges Defendants breached the oral contract between himself and Storix allegedly entered into in 2003. (ECF No. 1, ¶11.) But Johnson concedes that Defendants were not "a party to the contract or an agent of Storix nor had any financial interest in Storix when the agreement took place." (ECF No. 1, ¶ 11.) Thus, any breach of contract claim should properly be asserted only against Storix – the other party to the contract. Johnson, however, is presumably attempting to pierce the corporate veil by alleging that Defendants "were in majority control of Storix and rendered Storix insolvent by taking all money otherwise owed to Johnson for their personal benefit [and as a result] are personally liable for consideration owed to Johnson that Storix is unable to afford. (ECF No. 1, ¶ 61.)

The law is clear that a corporation is a legal entity distinct from its shareholders, directors, and officers. *See Merco Constr. Eng'rs, Inc. v. Municipal Court,* 21 Cal.3d 724, 729–30 (1978). And Johnson as the original sole shareholder, officer, and director of Storix establishing this distinct legal entity should not be entitled to now disregard its existence for his own benefit. *See* e.g. *Wachovia Securities, LLC v. Loop Corp.*, 726 F.3d 899, 908 (7th Cir. 2013).

To avail himself of this equitable remedy, Johnson must demonstrate Defendants abused the corporate form for personal gain. Presumably, Johnson seeks to establish this fact by alleging the diversion of money otherwise owed to him. (ECF No. 1, ¶ 61.) But as discussed above, the "money otherwise owed to Johnson" was the advancement of defense costs already determined, in the consolidated

actions, to be permitted under Storix's bylaws as well as the Cal. Corp. Code. (*See* RJN, Ex. 6.) As a result, Defendants could not have been abusing the corporate form for their personal benefit. *See Postal Instant Press, Inc. v. Kaswa Corp.,* 162 Cal.App.4th 1510, 1522 (2008) (Piercing the corporate veil is an equitable remedy applied when a shareholder has abused the corporate form.) Johnson cannot therefore rely on the equitable remedy of piercing the corporate veil to assert a breach of contract claim against Defendants.

a. *Res Judicata Bars Breach of Contract*

Even assuming Johnson could assert this claim against Defendants, the doctrine of *res judicata* bars this claim. In February 2003, Johnson alleges he entered into an oral contract between himself and Storix "wherein Storix was granted rights to…SBAdmin…in exchange for future compensation for the copyright if or when Johnson's participation in Storix ended." (ECF No. 1, ¶ 11.) Thus, by the terms of the alleged oral contract, Storix's obligation to pay arose when Johnson's participation in Storix ended. By May 2014, Johnson's involvement with Storix ended because he voluntarily resigned from Storix. (ECF No. 1, ¶ 13.) Because Johnson alleges this oral contract was made in 2003 and his involvement ended in May 2014, it was a claim he was aware of and should have brought when he filed his Copyright Action. A claim should be barred if with diligence it could have been brought earlier. *Himel v. Continental Ill. Nat. Bank & Trust,* 596 F.2d 205, 210 (1979); *see also Aerojet–General Corp. v. American Excess Ins. Co.,* 97 Cal.App.4th 387, 402 (2002) (the purpose for the rule that all claims that "could have been brought" are barred under *res judicata* is so "[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions.") Thus, by the time Johnson filed the Copyright Action in August 2014, Johnson was aware of or should have been aware of his claim for breach of the alleged oral contract based on his agreement to grant rights to his copyrighted work. The doctrine of *res judicata* therefore bars Johnson's claim.

b. *Statute of Limitations Bars Breach of Contract*

The statute of limitations for breach of an oral contract is 2 years. Cal. Civ. Proc. Code § 339. Johnson alleges the terms of the oral contract included an obligation on the part of Storix to pay compensation for use of SBAdmin when Johnson's involvement with Storix ended. (ECF No. 1, ¶ 11.) By May 2014, Johnson's involvement with Storix concluded because he voluntarily resigned from Storix. (*Id.* at ¶ 13.) And because Johnson was not a board member at the time, he had no involvement with Storix per the terms of the alleged oral contract. (*See id.* at ¶ 15.) Thus, Storix's obligation to pay, which they did not, on Johnson's alleged oral contract accrued in May 2014. The statute of limitations on breach of an oral contract is two years thus barring Johnson's claim for breach of an oral contract.

6. Johnson Cannot Pierce the Corporate Veil as to Defendants for Rescission

Johnson's claim for rescission is likewise a claim properly brought against Storix and not Defendants. The rescission claim is based on the same alleged oral contract between Johnson and Storix and therefore not properly alleged against Defendants. Johnson's rescission claim suffers from the same defects as discussed above in Section IV.B.5 with respect to piercing the corporate veil analysis. For those same reasons, Johnson cannot rely on the equitable remedy of piercing the corporate veil to assert a claim for rescission against Defendants.

a. *Res Judicata Bars Rescission*

Assuming Johnson's rescission claim could be maintained against Defendants, the doctrine of *res judicata* would also bar this claim. Johnson alleges that "[u]pon rescission of the contract, the parties were returned to their respective positions prior to the contract's formation, including Johnson's ownership of all copyrights to SBAdmin." (ECF No. 1, ¶ 64.) In addition, Johnson seeks "disgorgement of all benefits Storix derived from its use of Johnson's copyright after Johnson revoked Storix's license to sell SBAdmin in July 2014." (ECF No. 1, ¶ 67.)

But these issues have been determined by a unanimous jury before this Court and affirmed on appeal. The judgment in this Court conclusively established Storix as the owner of SBAdmin and Johnson's efforts to void that judgment by way of an alleged claim for rescission is precluded by *res judicata*. In effect, Johnson is improperly asking this Court for a new trial or relief from judgment under F.R.C.P. Rules 59 or 60. The time for such a request has long past and his claim for rescission is without merit.

7. Johnson Cannot Pierce the Corporate Veil as to Defendants for Indemnification

Johnson's claim for indemnification is asserted against Defendants but is properly brought only against Storix. As with the breach of contract claim and rescission claim, Johnson's claim for indemnification suffers from the same defects as discussed above in Section IV.B.5 & 6 with respect to piercing the corporate veil. For those same reasons, Johnson cannot rely on the equitable remedy of piercing the corporate veil to assert a claim for indemnification against Defendants.

a. *Res Judicata Bars Indemnification*

Apart from Johnson's inability to assert his claim for indemnification against Defendants, the indemnification claim fails based on the doctrine of *res judicata*. Johnson alleges he is entitled to indemnification because of his "successful defense of any issues, claims or matters in the Direct Suit." (ECF No. 1, ¶ 69.) But this argument is contradicted by the results of the Direct Suit. The jury found that Johnson breached his duty of loyalty, and the court entered final judgment "[i]n favor of plaintiff Storix, Inc. and against Defendant Anthony Johnson on Storix Inc.'s complaint for breach of fiduciary duty and in favor of Plaintiff Storix, Inc. and against Defendant Janstor Technology on Storix Inc.'s claim for aiding and abetting a breach of fiduciary duty." (*See* RJN, Ex. 6, p. 8.) Clearly Johnson was not the successful party in the Direct Suit and therefore not entitled to indemnification.

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Moreover, the actions Johnson took outside of his role as a director of Storix to stand up a competing enterprise for his personal gain constitutes conduct of a director not entitling him to indemnification under Cal. Corp. Code § 317. *See Wilshire-Doheny Assocs. Ltd. v. Shapiro*, 83 Cal.App.4th 1380, 1389 (2000) (Court discussing indemnity under Section 317, and noting "the conduct of the agent which gives rise to the claim against him must have been performed in connection with his corporation functions and not with respect to purely personal matter," and "[t]he agent must have been acting to promote the corporate good, not personal profit of interests." (quotes omitted)). Johnson's actions were for purely personal gain, not in the interest of Storix, and therefore contrary to the indemnification provisions of Cal. Corp. Code § 317. Johnson's claim for indemnification fails.

C. The Balancing Factors Weigh In Favor of the Undertaking

1. The Degree of Probability/Improbability of Success on the Merits, and the Background and Purpose of the Suit

As set forth above, Defendants have more than a reasonable possibility of obtaining judgment in this matter. Moreover, Johnson admits to blatant forum shopping and has forced Defendants to refile motions in this Court that were already pending in the State Action. Johnson's Complaint is identical to the State Action complaint but revised in an attempt to address and overcome the arguments Defendants set forth in their State Action motions. The purpose of this lawsuit is clear – Johnson was displeased with the trajectory of the State Action and wanted to avoid adverse rulings. Such conduct burdens the court system with frivolous claims and burdens California residents with costs associated with the defense of meritless claims. This is precisely the type of lawsuit the California Legislature intended to address by enacting Section 1030. This factor weighs heavily in favor of the undertaking.

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2. The Reasonable Extent of the Security to be Posted, Viewed From the Defendant's Perspective

The extent of the security requested by Defendants is reasonable. As discussed at length above, Defendants are continually hailed into court by Johnson's endless litigation. While Defendants have been successful in their defense of Johnson's claims, this success comes at a cost. As the prevailing party Defendants are entitled to their cost and must enforce the judgments against Johnson. But Defendants reasonably fear their inability to collect costs from Johnson as an out-of-state plaintiff. In addition, the success of these enforcement efforts is tenuous given Johnson admits he sold his house in San Diego "to afford the first bond and was forced to live with [sic] in Las Vegas with family." (ECF No. 16, p. 13.) As a result, this factor weighs in favor of the undertaking.

3. The Reasonable Extent of the Security to be Posted, Viewed From the Nondomiciliary Plaintiff's Perspective

Johnson has no property in California to support arguments against posting a bond. Johnson admits he sold his home in San Diego and his financial ability to satisfy a judgment and/or cost bill seems unlikely. This factor therefore weighs in favor of the undertaking.

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V. CONCLUSION

Johnson admits to being a resident of Nevada, satisfying the first requirement of Section 1030. In addition, Defendants have satisfied the second requirement of Section 1030 because there is more than a reasonable possibility Defendants will obtain judgment, given Plaintiff's own admissions, failure to state a claim, applicability of the doctrine of *res judicata*, and statute of limitations. An undertaking pursuant to Section 1030 is therefore required in the amount of $85,000.00.

Dated: August 27, 2019

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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