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Pro Se

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,
Plaintiff,
v.
DAVID KINNEY, an individual;
RICHARD TURNER, an individual;
MANUEL ALTAMIRANO, an individual;
DAVID HUFFMAN, an individual; and
DAVID SMILJKOVICH, an individual;
PAUL TYRELL, an individual;
SEAN SULLIVAN, an individual;
MARTY READY, an individual;
DAVID AVENI, an individual;
MICHAEL MCCLOSKEY, an individual;
STORIX INC., a California corporation;
JUDGE MARILYN HUFF, an individual;
JUDGE RANDA TRAPP, an individual;
JUDGE KEVIN ENRIGHT, an individual;
JUDGE KATHERINE BACAL, an individual,
Defendants.

Case No. 3:20-cv-1354-TWR-MSB

PLAINTIFF'S OPPOSITION TO STORIX, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12

Telephonic Hearing Requested

Hearing Date: June 30, 2021
Hearing Time: 1:30 PM
Judge: Hon. Todd W. Robinson
Dept.: Courtroom 3A (3rd Floor)

Complaint Filed: July 16, 2020
Trial Date: Not Set

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I. INTRODUCTION

Plaintiff Anthony Johnson ("Johnson") respectfully submits this Opposition to Storix's Motion to Dismiss Johnson's Second Amended Complaint ("SAC") (hereafter, "Motion").

The Court granted Johnson leave to amend the first amended complaint ("FAC") as to the common count against Storix for "money had and received" after finding the FAC lacked an allegation of "indebtedness."

The facts stated in the SAC are more than sufficient to defeat Storix's motion to dismiss for failure to state a claim under Fed.R.Civ.P. § 12(b)(6). Johnson properly stated facts, taken as true, that Storix is indebted to him for money had and received, and that Storix's Management and counsel acted to conceal the money owed until it was discovered in 2018.[1] Storix now argues only factual issues that are inappropriate for a motion to dismiss.

II. STORIX'S FACTUAL INACCURACIES

Many of Storix's facts are conclusory and omit relevant portions. Storix notes Johnson's allegation that he "obtained financial records showing that [Storix's] Management converted his retained earnings to their personal accounts while he was on medical leave in 2011", but that "he provides no other details on this revelation." (Motion, pp. 3-4, citing SAC ¶ 34.) Storix leaves out the rest of the allegation stating that "Johnson informed Storix and Procopio of his finding and demanded payment of the money owed to him. Johnson received no response." (SAC ¶ 34.) Storix states "Johnson has pursued this same claim in other actions under different legal theories, included contradictory allegations, and named different parties" and that his "his fact allegations have shifted" (Motion, p. 4), but it provides no actual facts to support the

[1] Referring to them as "Management" is misleading since not all are managers, nor acting as managers when concealing the conversion. However, the term is retained from the FAC wherein they are accused of using their majority control of Storix as part of the conspiracy to deprive Johnson his civil rights.

assertions. Storix concludes that Johnson "has identical claims pending against the Storix Managers", but refer only to an underlying *issue* in this case that has never been litigated.

The Motion states that "*[i]n 2015, Storix sued Johnson for breach of fiduciary duty* ***after*** *it learned about his disloyal conduct*." (Motion, p. 5.) "*Johnson filed a derivative suit .... to accuse Storix Managers of financial improprieties*." (Motion, p. 6.) The same attorneys purportedly representing Storix's interests are also defendants in this case – specifically due to their conspiracy to deprive Johnson's civil rights by unlawfully defending *against Storix's* claims in the Cal. Superior Court Case No 37-2019-00034545-CU-BT-CTL ("Derivative Suit"). They also refer to Johnson's "disloyal conduct" as giving rise to the lawsuit they brought against Johnson, Cal. Superior Court Case No 37-2019-00028262-CU-BT-CTL ("Direct Suit")[2], *before* the Derivative Suit, but the only conduct they refer to was sending an email in 2015 which they claimed, for the first time in closing arguments, Johnson cost Storix a mere $3,739.14 in employee lost productivity. Again, they omit that the email didn't even exist when they filed the Direct Suit – or that the jury completely rejected the *actual* $1.2 million claim of Johnson "intending" to compete – a claim they continued for 3 years while using its mere *existence* to justify denying Johnson access to Storix's financial records. (*See* Storix RJN, Ex. 1 ¶ 3.)

Had the claim against Mr. Sullivan and Mr. Tyrell not been dismissed from this action, they would finally have to answer for the millions of dollars of damage they caused Storix. Any attorney actually representing Storix's interests would have recommended Johnson simply be paid the money owed, but these attorneys will no doubt be paid far more by Storix in this case to continue concealing their own misconduct and that of the Management defendants. Here again, the decision to

[2] Consistent with the Motion, these state consolidated cases are referred to as "State Actions".

refuse to pay Johnson the money owed comes exclusively from those that stole the money from Storix and directed Storix's counsel to take any legal action against Johnson necessary to conceal it.

1. Storix's Counsel Did Not Meet & Confer With Johnson Prior to Bringing this Motion

Contrary to his declaration, Storix's counsel did not adhere to the Court's standing order before submitting this Motion. Counsel sent an email at 4 pm the day before their answer was due, and Johnson responded that evening that he did "not agree that a meet & confer is futile because you haven't explained any of your grounds for dismissing the complaint." (Sullivan Decl. Ex. A, p. 4.) Johnson also noted that he was unavailable the next day, April 29, and he received no further response from Counsel. Mr. Sullivan states that Johnson "continued to refute the basis of the motion" and that his "experience in dealing with Mr. Johnson suggests that further meeting and conferring would have not have resulted in a decision by Storix not to file the motion, or a decision by Mr. Johnson to withdraw his second Amended Complaint." (Sullivan Decl. ¶¶ 5-6.) Mr. Sullivan has not once spoken directly with Mr. Johnson and this is the first direct email exchange between them.

2. Storix's Motion to Dismiss Raises Factual Arguments Converting it to a Summary Judgment Motion

When 'matters outside the pleading are presented to and not excluded by the court,' the 12(b)(6) motion converts into a motion for summary judgment under Rule 56. Fed. R. Civ. P. 12(d)." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). "A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted.) "However, "[c]ourts may only take judicial notice of adjudicative facts that are 'not subject to reasonable dispute.'" *Ritchie* at p. 908-909 (citing Fed.R.Evid. Rule 201(b)). "But a court cannot take judicial notice of disputed facts contained in such public records."

Lee, 250 F.3d at 689. "[T]he unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); See also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (articulating standard for "plausible" claim for relief at pleading stage).

Storix requested judicial notice of various documents, not to disprove Johnson's claims, but only to dispute the factual allegations of the SAC regarding delayed discovery and Johnson having declared corporate profit distributions. Although the documents are properly subject to judicial notice, the facts therein are subject to reasonable dispute and therefore improper for a motion to dismiss under Rule 12(b)(6). The Court must therefore convert the Motion to a summary judgment motion under Rule 56.

III. ARGUMENT AND ANALYSIS

A. Relevant Standards for Motions under Rule 12(b)(6)

Dismissal for failure to state a claim under Fed.R.Civ.P. Rule 12(b)(6) is a disfavored remedy and may only be granted in extraordinary circumstances. *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963, 966 (9th Cir. 1981).

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. […] While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, supra, 550 U.S. at 555 (internal quitations omitted.)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Hartmann v. Cal. Dept. of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal* (*Ashcroft*), 556 U.S. 662, 678 (2009).) "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* at 678. "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

"In federal court, dismissal for failure to state a claim is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73(1984) (citing *Conley* v. *Gibson,* 355 U. S. 41, 45 (1957). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to *offer* evidence to support the claims." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274-1275 (9th Cir. 1993) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

"In cases involving a plaintiff proceeding *pro se*, the court construes the pleadings liberally and affords the plaintiff the benefits of any doubt." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). Courts must liberally construe "inartful pleadings" of *pro se* litigants. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992). "It is settled law that the allegations of such a complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers … .' [Citations.] Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980). "A *pro se* litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Noll v. Carlson*, 809 F.2d 1446, 1448

(9th Cir. 1987) (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.1980).)

B. The Common Count Claim for Money Had and Received Is Not Subject to Dismissal under Rule 12(b)(6) or Rule 56

"A cause of action for money had and received is stated if it is alleged [that] the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff. … The claim is viable wherever one person has received money which belongs to another, and which in equity and good conscience should be paid over to the latter." *Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454 (internal quotations and marks omitted). Rule 8(a)(2) of the Federal Rules requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The SAC contains more than the requisite "plain and simple statement" that Storix is indebted to him (SAC ¶¶ 17, 34, 38), including facts supporting the indebtedness, acts taken by the Management and the attorney defendants to prevent its discovery, and their refusal to respond to Johnson after he discovered the money owed and demanded payment. (SAC *generally*, ¶¶ 40-41.)

Storix states that "a plaintiff must not allege conduct that is merely conceivable but must allege 'enough facts to state a claim to relief that is plausible on its face.'" (Motion at p. 7, quoting *Bell Atl. Corp. v. Twombly*, *supra,* 550 U.S. at 570.) Storix therefore refers to Johnson's facts and allegations as "implausible" throughout the Motion so they need not be accepted as true. But Storix doesn't actually dispute the facts or show in any way they cannot be proven. The Motion should be denied for that reason alone. *See Hishon v. King & Spalding*, *supra*, 467 U.S. at 73; *Hughes v. Rowe*, *supra*, 449 U.S. at 9.

What *is* implausible is Storix's implication that Johnson was never entitled to *any* distributions during the 8 years he was Storix's sole shareholder, officer and director because they weren't declared. Even more absurd is Storix's assertion that

Johnson *must* have known of the money owed to him as early as 2011 but chose not to mention during the 6 years Management was directing all company profits to litigation against him.

1. Johnson Has Alleged Facts Sufficient to State a "Plausible" Cause of Action

a. Johnson's Allegation that he Declared a Distribution Supports His Claim that Storix is Indebted to Him

Although improper to argue legal issues in a motion to dismiss, Johnson responds to Storix's argument as relevant to summary judgment. Storix argues that Johnson declaring a distribution "does not transform undistributed corporate profits into his personal property." (Motion, p. 8.) Storix provides no authority for that assertion. Rather,

> "Corporate earnings and profits remain the property of the company, until severed from the assets and distributed as dividends among the stockholders entitled thereto. A stockholder has no property rights in the accumulated earnings and surplus of the corporation, and any right that he may have to cumulated undeclared dividends is not a vested property or constitutional right but is subject to change or cancellation by proper corporate law. It is the declaration of the dividend which creates both the dividend itself and the right of the stockholder to demand and receive it."

11 W. Fletcher, Cyclopedia of the Law of Private Corporations § 5321 at 613 (1971); *See also* 7 S. Thompson & J. Thompson, Law of Corporations § 5307 (3rd ed. 1927). As Mr. Sullivan's stated at the prior hearing, "Mr. Johnson did confirm what he's attempting to do with the claim for money not received is to pursue profits of the company, which were never declared as a dividend or pass-through to the shareholders." (Johnson RJN, Ex. 1, p. 8:3-6.)[3] As stated in the SAC, Johnson declared a distribution of all profits earned while he was the sole shareholder. (SAC ¶

[3] S-corp profits are not distributed as "dividends" but are always passed through to the shareholders. Johnson nevertheless refers to "distributions" as "dividends" to avoid an unnecessary debate over ownership of S-corp profits.

17.) In any event, Storix is an S-corp in which all profits "passed-through" to the shareholders, and Johnson paid personal income taxes on such profits regardless of whether he took the money out of the company's bank account. (SAC ¶ 15.)

Storix disputes Johnson's "self-created *expectation*" that company earnings would be distributed. (Motion, p. 8; italics in original.) Whether Johnson had such an expectation and whether he declared distributions are factual issues to be decided by a jury. "In making decisions with respect to dividends, the board must consider a number of factors. It must balance the expectation of stockholders to reasonable dividends when earned against corporate needs for retention of earnings." *United States v. Byrum*, 408 US 125, 140 (S. Ct. 1972).

b. Johnson's Allegation that He Declared a Future Dividend Does Not Run Afoul of the Corporations Code.

Storix argues that, "The time of any distribution by way of dividend shall be the date of declaration thereof … ." (Motion, p. 9, quoting Cal. Corp. Code § 166.) The argument is misleading since the date of the declaration establishes the time from which the money is owed, not when must be distributed.

Next, Storix cites Section 500, providing in part that the corporation shall not make any distribution unless the board determines "in good faith" that "the amount of retained earnings … equals or exceeds the sum of (A) the amount of the proposed distribution[.]" (*Id.*; Cal. Corp Code § 500(a)(1).) Based on the statute, Storix argues that Johnson couldn't have declared a distribution without knowledge of the company's financial condition. Johnson declared that all profits be distributed, and retained earnings are simply that portion of profits that have not been undeclared as dividends. Their argument also is defeated by §500(c)(3), which states that the distribution may be based on "[a]ny other method that is reasonable under the circumstances." Whether the declaration was reasonable and whether "the company failed to pay him nearly half a million dollars" (Motion, p. 10) *under the circumstances* is another factual issue for a jury to decide.

Finally, Storix argues that Johnson's "declaration could not have been binding on Storix or its future board." (Motion, p. 10.) It supports this by asserting that declaration of dividends is "a matter committed to the sound business judgment of the corporation's board of directors." *Id*. (citing *In re Talbot's Estate* (1969) 269 Cal.App.2d 526, 537.) The declaration was made when Johnson was Storix's only director. Storix (i.e. the "future board") seemingly argues without authority that they can rescind the Johnson's declaration, thereby reclaiming any distributions owed to Johnson. Clearly, this is not a *disinterested* board since only they would benefit from that transaction.

c. Johnson Has Standing to Bring a Claim Against Storix.

Storix's argument that Johnson must bring a shareholder derivative suit for "*an injury done to the corporation*" is nonsensical because Storix committed the wrong by refusing to pay Johnson the money it owes him. (SAC ¶¶ 34, 41.) The argument that "the company and not Johnson would have suffered that harm" (Motion, p. 12) simply makes no sense. Also, as Storix is aware, Johnson is no longer a shareholder and therefore has no standing to bring a shareholder derivative suit. Even if Management had not finally succeeded in forcing Johnson to part with his remaining shares, he couldn't bring derivative claims because "Judge Enright dismissed Johnson as a derivative plaintiff because he couldn't fairly and adequately represent the interests of [Storix]." (SAC ¶ 32.) Of course, bringing shareholder derivative suit would be futile since the Court dismissed the claim against its attorneys that included their acts of defending against the Derivative Suit Johnson previously funded on Storix's behalf. (FAC ¶¶ 25-26, 36, 42, 44; *See also* Storix RJN, Ex. 1 ¶¶ 4-5.)

2. The Common Count is Not Barred by the 3-year Statute of Limitations

Storix cannot defeat Johnson's claim by simply asserting that his allegation of delayed discovery is "conclusory." (Motion, p. 12.) Johnson can and will prove his detailed allegations pertaining to delayed discovery in the SAC. But he need not prove the allegations on a motion to dismiss, and he need not provide evidence to

defeat summary judgment since Storix provided no evidence to disprove, as a matter of law, any of Johnson's facts or allegations.

a. Whether the Claim is Barred By the Statute of Limitations, Especially When Involving Delayed Discovery, is a Factual Issues for a Jury to Decide

"Resolution of the statute of limitations issue is normally a question of fact. More specifically, as to accrual, once properly pleaded, belated discovery is a question of fact." *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 64 Cal.Rptr.3d 9, 17. "Under California law, the question of when [the plaintiff] was on inquiry notice of potential wrongdoing is a factual question." *Ward v. Westinghouse Canada, Inc.*, 32 F.3d 1405, 1408 (9th Cir.1994). "The question when a plaintiff actually discovered or reasonably should have discovered the facts for purposes of the delayed discovery rule is a question of fact unless the evidence can support only one reasonable conclusion." *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 61 (citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103).

Determination of whether the claim is barred by the statute of limitations is inappropriate for a motion to dismiss or summary judgment unless Storix can disprove, as a matter of law, the allegations of delayed discovery. Storix generally refers to external documents only to raise a factual dispute.

b. The Statute of Limitations is Tolled by Delayed Discovery

As Storix states, "[a]n exception to the general rule for defining the accrual of a cause of action ... is the discovery rule," which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (Motion p. 13, quoting *Norgart v.Upjohn Co.* (1999) 21 Cal. 4th 383, 397; underline added.) Johnson stated numerous facts showing he was "unable to reasonably discover the money owed because Management misrepresented, concealed and misappropriated the money owed to Johnson." (SAC ¶ 40.)

Storix cites cases that have a "heightened pleading requirement" for fraud causes of action. But allegations of fraudulent concealment of a cause of action does

not create a new cause of action for fraud. Storix's reliance on *Grisham v. Philip Morris U.S.A., Inc.* (2007), 40 Cal.4th 623, is misplaced since "[a] defendant's fraud in concealing a cause of action against him will toll the statute of limitations, and that tolling will last as long as a plaintiff's reliance on the misrepresentations is reasonable." *Id.* at 637. "'[W]hen the defendant is guilty of fraudulent concealment of the cause of action the statute [of limitations] is deemed not to become operative until the aggrieved party discovers the existence of the cause of action.'" *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 367; quoting *Pashley v. Pacific Elec. Ry. Co* (1944) 25 Cal.2d 226, 229.)

Storix argues that Johnson's allegation of delayed discovery "does not pass the plausibility smell test" (Motion, p. 14) and "Johnson had more than enough information to put him on inquiry notice." (*Id.*, p. 15.) Whether Johnson has, or should have, inquiry notice of the cause of action is a factual question. *Ward v. Westinghouse. supra,* 32 F.3d at 1408; *Ovando v. County of Los Angeles*, *supra*, 159 Cal.App.4th at 61.)

c. Storix's References Extrinsic Evidence Only to Raise Factual Disputes

First, Storix references the minutes of a board meeting that defeats their argument. The minutes reflect that Storix declared a distribution of "profit to date", indicating an "amount due" to Johnson. (Motion, p. 15.) The minutes refer to an "80% distribution" that supports Johnson's allegation that he "allow[ed] 20% to remain with Storix until the end of the year to ensure the company had sufficient working capital." (SAC ¶ 18.) Storix questions "whether the distribution he claims to have declared to himself equaled the amounts set forth in the Minutes" (Motion, p. 18), ignoring that "the new board substantially underreported Storix's annual profits and therefore the amount owed to Johnson." (SAC ¶20.)

Next, Storix argues that Johnson having to take legal action due to their concealment of financial records somehow proves Johnson knew of the money owed

to him. Storix asserts that, because the courts *limited* Johnson's access to records to those Storix counsel deemed relevant, this defeated his "conclusory claims here that he had no access to information to put him on notice of his Common Count." (Motion, p. 15.) Johnson never claimed he had "no access to information", only that he was "unable to reasonably discover the money owed" because Management and Storix's attorneys acted for years to conceal it. (SAC ¶ 40.)

Characteristically, Storix counsel misleads the Court by saying "Johnson testified he had documents that clearly prove the misconduct." (Motion, p. 15.) But, the misconduct they refer to is "alleged in *Johnson v. Huffman* and *Storix v. Johnson* cross-complaint." (Storix RJN, Ex. 8, p. 148:28.) There is no reference to the money owed or the conversion of his earnings in the State Actions because it wasn't discovered until after they were tried. (SAC ¶¶ 34, 41.) They likewise cite Johnson's declaration in opposition to the restraining order "Storix" filed against him, wherein he stated that he had financial records showing "that Storix management had embezzled in excess of $200,000" and underreported their incomes to the IRS "in excess of $1.74M." (Motion, p. 16.) Again, this had nothing to do with money owed to *him*, but it showed the true purpose of the restraining order (which was denied).

Storix also misquotes Johnson's testimony in the copyright trial by saying he "testified he knew Storix had profits of about $850,000 for all 2011." (*Id.*) Johnson was asked what the profits were "the first year following the execution of [the stock] agreement", and he responded with what he "believed were in the neighborhood of $850,000." (Storix RJN, Ex. 13,p. 204:13-18.) That in no way suggests Johnson knew the total profits earned *before* the stock transfer. In any event, this is purely factual issue.

C. The Cause of Action for Money Had and Received is not Barred by Claim Preclusion

Storix argues for the first time that Johnson's claim is barred for (1) procedural reasons, (2) by *res judicata*, (3) collateral estoppel, and (4) claim-splitting.

1. Res Judicata is Not a Bar Johnson's Common Count

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

"In determining whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.'" *Boeken v, Philip Morris USA*, Inc. (2010) 48 Cal.4th 788, 797 (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." *Id.* at 797-798 (citing *McKee v. Dodd*, 152 Cal 637,641 (1908).) "Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." *Id.* at 798.

a. <u>There is No Identity of Claims</u>

Storix cites federal cases that didn't involve preclusive state court decisions when saying: "Courts in the Ninth Circuit consider the following when determining the first factor - whether two claims are the same: (l) whether rights or interests

established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. [Citation.] Although no one factor is determinative, the 'last of these criteria is the most important.' [Citation.]" (Motion, p. 18.)

It doesn't actually matter what principles are applied since Johnson's claims are not barred *by res judicata* under state or federal law. Storix baldly asserts that "Johnson's Common Count is barred because it was previously litigated to finality (or could have been) in the State Action, involves the same rights and evidence, and arises from the same transactional nucleus of facts." (Motion, p. 19.) Yet, Storix simply refuses to identify any specific rights, evidence, or "transactional facts" in the Complaint, or any identical matters that were decided in the State Actions. This claim was never been litigated or decided because Johnson does not allege the same wrongful acts or demand the same damages as in any prior action. His claim doesn't involve the same transactional facts or evidence, and a finding of liability against Storix would not destroy or impair any right established by a prior judgment.

The remainder of Storix's arguments as to *res judicata* are simply incoherent. They provide no support for their argument that, because "all facts" existed when the State Actions were filed, or that Johnson must, for some reason "allege new facts or circumstances barring applicability of res judicata." (Motion, p. 20-21.)

b. <u>There Was No Final Judgment on the Merits</u>

Simply alleging that "[t]he State Action is now final" does not show that this claim was actually litigated or decided, much less "on its merits". Storix makes no reference to an identical claim in the State Actions.

c. <u>There is No Privity Between the Parties</u>

Storix misleadingly states that "[b]oth Storix and Johnson were parties to the State Action, and so there is an exact identity between the parties in both cases."

(Motion, p. 21-22.) Storix counsel is actually referring to the Derivative Suit in which Storix was the *real plaintiff*, not the defendant. In that case, Johnson was *in privity with Storix*. The Motion simply states there is an "exact identity between the parties in both cases", which makes no sense since Johnson cannot be in privity with the same party he's suing. Storix was not a defendant in any of the State Actions.

2. Issue Preclusion Doesn't Bar Allegations of Lack of Access to Storix's Financial Records

The issue of "lack of access" to Storix's financial records was not necessarily litigated or decided in the State Actions. "Although collateral estoppel (unlike res judicata) does not require the same cause of action to be present in the two proceedings, the issue litigated must be identical. 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.' Where the subsequent action involves only parallel facts, but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel. '[I]f the very same facts and no others are involved in the second case, … the prior judgment will be conclusive as to the same legal issues which appear … . But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.'" *Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal. App. 5th 1202, 1230-1231 (citations omitted).

Storix counsel points to no litigation of the issue, but provides external evidence of a *factual dispute* regarding whether Storix's Management and corporate counsel should be allowed to limit Johnson's access to Storix's records, citing evidence of their having *denied* him such access. (Storix RJN, Ex. 1 ¶¶ 16-17, 19, 23-24.) "Petitioner has exhausted all other means for 18 months to obtain corporate records afforded him by law[.]" (*Id*., ¶ 30.) "Storix is under the control of its Board majority, who are breaking the law by unfairly refusing the rights of the minority to

perform their respective duties to the benefit of Storix and its shareholders." (*Id.*, ¶ 33.) The court granted Johnson's writ in part, but *limited* his access to records to only those Storix's counsel was willing to produce. (*Id.*, Ex. 2 at pp. 12-13.) Following that order, Storix's counsel continued to deny Johnson access to records. (*Id.*, Ex. 3 at pp. 18-23; Ex. 10 ¶ 4; Ex. 11 ¶¶ 8, 16; Ex. 12 ¶¶ 45, 53, 55.)

Storix references these documents to create a factual dispute as to whether Johnson had access to records. But, rather than the documents proving, as a matter of law, that Johnson had sufficient access to records to cause him to suspect he was not paid the distributions he was owed and a reasonable opportunity to investigate, they show only Johnson's attempt to obtain discovery to support Storix's claims against Management in the Derivative Suit without Storix's counsel's interference.

Storix's reference the "accounting claim" in the Derivative Suit is misleading and nonsensical. The Motion states that "[t]he state court adjudicated Johnson's claim for an accounting", ruling that Johnson "failed to meet the burden of proof on all four causes of action" alleged in the Derivative Complaint. Storix therefore argues that "Johnson's claimed inability to access company financials based on wrongful denials—was litigated and finally decided against Johnson on the merits in the State Action[.]" (Motion, p. 23.) The state court denying Johnson an accounting only furthers Johnson's position that he did not discover the money owed until after the state trial. An accounting is not an actual claim, nor was it ever "litigated", because its purpose was to obtain records necessary to determine actual damages following a judgment of liability. The court found no liability, thus no need for the accounting. Storix asserts that the "issue" of an accounting was litigated, and therefore precludes Johnson from alleging he did not have sufficient access to records to discover the money owed to him. But they show nowhere in the record where the "same legal issue" involving "the same facts and no other" as Johnson's allegations of delayed discovery in the SAC were ever litigated. *Association of Irritated Residents v. Department of Conservation, supra*, 11 Cal. App. 5th at 1230.

Should Storix wish to continue asserting these preposterous arguments, they must do so before a jury. Whether this claim was brought within the statute of limitations, especially when delayed discovery is alleged, is a factual issue for the jury to decide. *See E-Fab, Inc. v. Accountants, supra,* 64 Cal.Rptr.3d at 17; *Ward v. Westinghouse*, *supra,* 32 F.3d at 1408; *Ovando v. County of Los Angeles*, *supra*, 159 Cal.App.4th at 61.

3. The Claim for Money Had and Received is not Precluded by the Claim-Splitting Doctrine

As Storix states, "[t]he "main purpose behind the rule preventing claim splitting is 'to protect the defendant from being harassed by repetitive actions based on the same claim.'" (Motion, pp. 23-24; quoting *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 328 (9th Cir.1995). Storix refers to *Johnson v. Altamirano* (Altamirano), Case No. 19-cv-01185-H-BLM, as "duplicative" but fails to show how it was in any way inconvenienced by the claim of conversion against those defendants.

Storix states that, "[t]o determine whether a suit is duplicative, courts in the Ninth Circuit borrow a two-part test from the test for claim preclusion." *Adams v. California Dept. of Health Services* (*Adams*), 487 F.3d 684, 689 (9th Cir. 2007). However, "a federal court sitting in diversity must apply the res judicata law of the state in which it sits." *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). Regardless, as described above, neither California nor federal law precludes this claim since it doesn't rely on the same facts and doesn't involve the same parties or their privies.

a. <u>Johnson Did Not File the Same Claim in Two Separate Cases</u>

Storix alleges that the SAC and the *Altamirano* case in Judge Huff's court "assert the same claim, based on the same alleged evidence, involving his same claimed right, and based on the same nucleus of facts." (Motion, p. 24.) They are wrong on all counts. Storix is correct that Johnson seeks the same amount, but from

different parties based on different facts. In *Altamirano*, the defendants are being sued as individuals for conversion, not for undistributed profits. In this case, the fact that Management (the same *Altamirano* defendants) converted Johnson's money to their personal equity accounts isn't a *claim*, but only an allegation to support the delayed discovery of the claim against Storix for the common count of money had and received.

Storix provides no authority precluding Johnson from bringing separate claims against different parties for the same damages.

b. Storix is Not In Privity with the *Altamirano* Defendants

Storix fails to understand the meaning of "privity" as it pertains to claim preclusion. "Even when the parties are not identical, privity may exist if 'there is `substantial identity' between parties, that is, when there is sufficient commonality of interest.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning (Tahoe-Sierra)*, 322 F.3d 1064, 1081 (9th Cir. 2003) (quoting *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir.1983)); See also *Shaw v. Hahn*, 56 F.3d 1128, 1131-32 (9th Cir.1995) (finding privity when the interests of the party in the subsequent action were shared with and adequately represented by the party in the former action); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir.1980) ("[A] `privy' may include those whose interests are represented by one with authority to do so.") *Bernhard v. Bank of America* (1942), 19 Cal. 2d 807, more succinctly defines a privity as "one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment.'" (*Id.* at 811; quoting 1 Greenleaf, Evidence (15th ed.), sec. 523.) However, privity "is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." *Tahoe-Sierra* at 1082; *Coryell v. Phipps*, 317 U.S. 406, 63 S. Ct. 291 (1943). Simply put, Storix has no common interest in the conversion claim in *Altamirano*, has no right to defend the suit, does not represent the defendants or control the proceedings, would not be liable for a judgment against them, and cannot appeal that

judgment. Likewise, the defendants in *Altamirano* have no interest in, and are in no way liable, for Johnson's common count for money had and received against Storix in this case.

Storix states that "Johnson cannot avoid a conclusion that the parties in *Altamirano* and this action are the same or privies." (Motion at p. 25.) Yet, Storix made the opposite argument in another case, wherein Judge Huff found no privity between Storix and the *Altamirano* defendants:

> "Johnson also raises allegations that the majority shareholders of Storix stole certain funds from him. [] In response, Storix argues that these allegations are irrelevant to the present motion. [] The Court agrees with Storix. Johnson's conversion claim is pending in a different lawsuit before this Court. See Johnson v. Altamirano, 19-cv-1185, Docket No. 1 ¶¶ 49-53 (S.D. Cal., filed Jun. 24, 2019). *In that action, Johnson alleges a claim for conversion against a group of defendants who are not parties to this action. Id*. Thus, Johnson's *allegations related to these individuals are irrelevant to the present issue before the Court.*"

(Johnson RJN, Ex. 3 at pp. 20:19-22:20-1-4, italics added.) Storix also argued in the State Actions that it and the Management (*Altamirano*) defendants were separate parties. Judge Enright agreed, finding that "*Johnson's argument that Storix and the individual defendants are not separate and distinct parties is not persuasive*." (Johnson RJB, Ex. 2 at p. 11.) Storix and the *Altamirano* defendants cannot be "separate and distinct" and at the same time parties in privity.

Although this is questionably an issue of collateral estoppel, it's clearly one of judicial estoppel. "Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). "Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one." *Russell v. Rolfs*, 893 F.2d 1033, 1037

(9th Cir. 1990) (citing *Religious Technology Center v. Scott,* 869 F.2d 1306, 1311 (9th Cir.1989), Hall dissenting). In *Yanez v. US*, 989 F.2d 323, 326 (9th Cir. 1993), the Ninth Circuit affirmed that "[t]here is no requirement that the claims be in the same court, because such a requirement would subvert the reason for judicial estoppel." *Id*. at 326. Storix's inconsistent position is a perfect example of the "fast and loose" behavior that warrants application of judicial estoppel. *Ibid*.

IV. CONCLUSION

The Court should convert the Motion into a summary judgment motion. In any case, the Motion should be denied because Storix made no showing of claims or issues previously litigated that are preclusive to this action, and only raises questions of fact that just be decided by a jury.

DATED: May 29, 2021 Respectfully submitted,

By: _____

ANTHONY JOHNSON, In Pro Per