Court of Appeal of the State of California

Fourth Appellate District, Division One

STORIX, INC., Plaintiff and Respondent v. ANTHONY JOHNSON, Defendant, Appellant.	Court of Appeal No. **D075308** Superior Court Case No. 37-2015-00028262-CU-BT-CTL Consolidated under Lead Case No. 37-2015-00034545-CU-BT-CTL
ANTHONY JOHNSON, Cross-Claimant, Appellant v. DAVID HUFFMAN, RICHARD TURNER, MANUEL ALTAMIRANO, DAVID KINNEY, and DAVID SMILJKOVICH, Cross-Defendants, Respondents.	

Appeal from Judgments and Orders of the
Superior Court, County of San Diego

Honorable Judges Kevin A. Enright and Joel R. Wohlfeil

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court 8.208

Other than the parties in the case, there are no other entities or persons with an ownership interests of 10 percent or more in plaintiff Storix, Inc. (C.R.C §8.208(e)(1).) The following entities or persons have a financial or other interest in the outcome of the proceeding (C.R.C. §8.208(e)(2)) that the justices should consider in determining whether to disqualify themselves:

1. Attorneys Paul Tyrell, Sean Sullivan, and the law firm of Procopio, Cory, Hargreaves & Savitch, LLP. Although attorneys for plaintiff Storix, Johnson's cross-claims allege abuse of legal process by the cross-defendants whom the attorneys exclusively supported against Storix's interests. Therefore, the attorneys have a personal interest in defeating this appeal beyond the scope of their representation.

Dated: August 12, 2019

Respectfully submitted,

By: /s/ Anthony Johnson
Pro Se Appellant

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INTRODUCTION

Defendant and cross-claimant Anthony Johnson ("Johnson") is the author of the SBAdmin software, founder and still largest shareholder of plaintiff and respondent Storix, Inc. ("Storix"). When Johnson contracted terminal cancer, he gifted 60% share of Storix to his long-term employees, cross-defendants and respondents Huffman, Turner, Altamirano, Kinney, later joined by Smiljkovich (hereafter, collectively "Cross-Defendants"). After Johnson's unexpected recovery and return to Storix, Cross-Defendants used their new combined controlling interest to drive him back out of the company, claimed ownership of his copyrights, cut off his shareholder distributions, and used Storix to sue him for *intending* to compete. Johnson responded by threatening and eventually filing a shareholder derivative lawsuit for Storix's damages caused by their majority abuse.

It's impossible to limit this appeal to only a few primary issues because it is the combined effect of numerous rulings against the law, ignorance of facts and circumstances, and abuse of discretion that defeated Johnson at every turn and ultimately gave his company to those who continue to this day to wield it as a weapon against him. At every stage of the litigation, Johnson provided indisputable facts, legal arguments and authorities showing Storix had no standing to sue him. The court never acknowledged Johnson's arguments when denying six otherwise dispositive motions, thereby forcing Johnson to defend an unlawful lawsuit against the same company he tried to shield from all litigation expense. Johnson persistently raised the fact that every action and decision of Storix was (and still is) exclusively that of Cross-Defendants, and none were of benefit to anyone else. The courts turned a blind eye to the conflict of interest of Storix's corporate counsel as they defended Cross-Defendants against the company's own derivative claims and took extraordinary legal

actions to prevent Johnson's access to his own company and its financial records. Johnson's efforts to stop Cross-Defendants from using Storix's profits (and his only remaining income) to fund their defense in every action proved equally fruitless. The court found it unnecessary to upset the "status quo" only three months before trial, then granted Storix and Cross-Defendants three continuances over Johnson's objections that extended the trial 15 months at Johnson's sole expense.

Johnson was *pro se* during the earlier stages of the litigation, but was represented by counsel when the consolidated cases finally reached a jury. Johnson expected to finally show that Storix and Cross-Defendants were one and the same, but he couldn't have been more wrong. Their separate counsel sat together at the plaintiff's table, joined in a single trial brief and in pre-trial motions, collectively referred to themselves as Storix's "Director/Management Defendants", and the court granted their motion to preclude Johnson from saying he represented Storix's interests or that Storix endorsed his efforts. The jury flatly rejected Storix's claim that Johnson was operated a "secret" competing business, but awarded Storix a mere $3,739 on a separate claim first introduced in closing arguments. Cross-Defendants' and Storix's counsel coordinated their efforts to defeat Johnson's cross-claims using combined irrelevant and misleading jury instructions that convinced the jury that Cross-Defendants were blameless because they were acting under Storix's authority.

The court granted Cross-Defendants' motion to preclude Johnson from demanding any damages in the jury trial that affect all shareholders. Then, after the jury trial, the court granted Cross-Defendants' motion to dismiss Johnson as a shareholder plaintiff, found in favor of Cross-Defendants' on all derivative claims, and didn't address the claims removed from the jury. The court awarded Johnson's $50,000 shareholder plaintiff's bond to pay Cross-Defendants' attorney fees and further ordered Johnson to

separately pay Storix and Cross-Defendants over $80,000 in costs and fees for all consolidated actions, including Storix's expenses in unlawfully defending Cross-Defendants against even its own derivative claims.

The extraordinary prejudice Johnson suffered throughout the litigation culminated in an unfair trial laced with misleading jury instructions followed by numerous ambiguous rulings against well-established law. This Court should reverse the judgment in favor of Storix and finally dismiss the lawsuit against Johnson. The Court should reverse the judgment and orders in favor of Cross-Defendants and grant Johnson a new trial on all his cross-claims. Finally, the Court should order Johnson's shareholder plaintiff's bond returned to him and reverse the order awarding costs to Storix and Cross-Defendants.

STATEMENT OF THE CASE

Cross-Defendants filed the above-captioned direct lawsuit against Johnson in the name of Storix. The complaint generally alleged a breach of fiduciary duty of loyalty and confidentiality to Storix and demanded unspecified monetary damages and injunctive relief. (1CT49.) Johnson herein appeals the final judgment on grounds of standing and privileged communications that resulted in a jury award of only $3,739 on Storix's claims of almost $1.3 million in damages. (13CT3371.)

Johnson filed the cross-complaint against Cross-Defendants alleging breaches of fiduciary duty, fraud and conspiracy. (3CT585.) Johnson appeals the judgment on grounds of instructional error and undue prejudice resulting in a jury verdict in favor of Cross-Defendants. (13CT3371.)

Cross-Defendants brought special motion to strike Johnson's cross-complaint and a subsequent motion for attorney's fees. (6CT1422.) Johnson herein appeals the order granting in part the special motion to strike (5CT1289) and the subsequent award of $28,884.15 in attorney's fees

(6CT1485) because the court improperly struck allegations of unlawful activity that effectively removing a valid claim. (6CT1485.)[1]

Following the bifurcated bench trial, Johnson brought a motion for judgment notwithstanding the verdict on Storix's claims. (12CT3288.) Johnson appeals the order denying the motion (12CT3335) because the court failed to address factual and legal issues that deprived Storix standing to sue Johnson and because the verdict was based on protected communication.

Notice of entry of judgment was served on September 21, 2018. (12CT3346.) The judgment was in favor of Storix on the its claims against Johnson (12CT3347), in favor of Cross-Defendants on Johnson's cross-claim (12CT3351), in favor of Cross-Defendants on all causes of action in the Derivative Suit (*Id.*), and in favor of Cross-Defendants on their partially successful anti-SLAPP motion. (12CT3352.) The judgment awarded Storix $3,739.14 in damages and Cross-Defendants $29,884 in attorney fees. (12CT3353.) The judgment denied Storix's motion for further injunctive against Johnson. (12CT3352.)

On September 24, 2018, Johnson filed a motion for new trial and to set aside or vacate the verdict, raising the same issues upon which this appeal is based. (13CT3390). Johnson also filed a motion to release the $50,000 bond he posted to secure his standing as a shareholder derivative plaintiff. (14CT3820.) On November 16, 2018, the court denied both motions (14CT3817; 14CT3820.) The court later ordered Johnson's bond released to Cross-Defendants to reimburse Storix for their defense.

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[1] Johnson appeals the order after final judgment because striking the claim from Johnson's cross-complaint had no effect on the litigation since the stricken allegations still had to be litigated in the consolidated shareholder derivative action and as a defense against Storix's lawsuit.

(14CT3914.) Johnson herein appeals the orders related to the bond on grounds that the purpose of the bond was abandoned, Cross-Defendants were not the prevailing party, and it was improper to award fees to Storix for unlawfully defending its own claims.

Notice of entry of the order denying new trial was served on November 26. (14CT3862.) On December 9, 2018, Johnson timey filed notice of this appeal. (14CT3868.)

After this Court filed the record for this appeal, Johnson filed a motion to strike or tax Storix's and Cross-Defendants' cost memorandums which encompassed all costs of all actions. (13CT3504.) On August 2, 2019, the court rejected all Johnson's arguments and authorities and ordered him to pay $80,206 to cover all costs of all parties in all consolidated actions. (*RJN,* Ex. 2 at p. 14.)[2] Johnson appeals the order on grounds that Storix obtained a *de minis* judgment and because the court erred in naming Storix a prevailing "nominal defendant". Johnson further appeals the order on grounds that Cross-Defendants incurred no costs in any action, were not the prevailing party in the Derivative Suit, and all expenses are limited to the bond already taken from Johnson.

STATEMENT OF APPEALABILITY

This appeal is proper under Code Civ. Proc. (C.C.P.) section 904.1, subd. (a)(1) because it follows a final judgment disposing of all issues between the parties. (C.C.P. §577.) Johnson appeals the final judgment and the following orders appealable after final judgment:

1. An order denying a motion for judgment notwithstanding the verdict. (C.C.P. §904.1(a)(4).) "An appeal may be taken from an

[2] Request for judicial notice of superior court records occurring after the designation of record of this appeal is filed concurrently herewith.

order denying a motion for JNOV even where the trial court has granted, or denied, a new trial motion." (*Saxena v. Goffney* (2008) 159 Cal.Rptr.3d 469, 475; C.C.P. § 629(c).)

2. An order granting in part a special motion to strike pursuant to C.C.P. §425.16. The order is appealable after final judgment because it left the underlying issues to be determined and did not terminate the litigation between the parties. (*Melbostad v. Fisher (2008)* 165 Cal. App. 4th 987, 995-996; *See also Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal. 4th 1, 5.) The appellate court may review "an intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." (C.C.P. §906.)
3. An order granting attorney fees after the afore-mentioned special motion to strike. The order is appealable as a subsequent "order made after a judgment" pursuant to C.C.P. §904.1(a)(2). (*Ellis Law Group v. Nevada City Sugar Loaf Properties* (2014) 230 Cal.App.4th 244, 251; *Melbostad v. Fisher*, supra, at 996.)
4. An order denying the release of a supersedeas bond to plaintiff posted under Corp. Code section 800 and the subsequent order releasing the bond to Cross-Defendants. The orders are appealable orders made after final judgment pursuant to C.C.P. §904.1(a)(2).
5. An order granting costs to Storix and Cross-Defendants and against Johnson in all consolidated actions. The order is an appealable order made after final judgment pursuant to C.C.P. §904.1(a)(2).

STATEMENT OF FACTS

Johnson founded Storix Software in 1998 and was its sole proprietor. (7CT1780.) Johnson designed, developed and registered the copyright to the software ("SBAdmin") that remains Storix's only product. (*Id*.) In 2003, Johnson incorporated Storix to continue business under a corporate entity (7CT1727) and was the sole shareholder, officer and director. (16CT1633.)

In 2011, due to a terminal cancer diagnosis, Johnson stepped down from his leadership position and gifted a sixty percent share of to his four long-term employees, Cross-Defendants Huffman, Turner, Altamirano and Kinney. (3CT702; 7CT1780.) For the next two years, Johnson continued periodic research and development projects for Storix. (15CT3928.) After an unexpected full recovery, Johnson returned to Storix to continue improving the software. (*Id*.) Cross-Defendants antagonized Johnson until he resigned due to the hostile work environment. (15CT3928; 7CT1781.)

When Cross-Defendants locked him out of the office and refused to talk to him, Johnson eventually threatened to withdraw Storix's copyright license to sell the SBAdmin software if they continued to refuse him a role in the company. (7CT1782.) Instead, they threatened to sue Johnson for breach of fiduciary duty and securities fraud if he did not abandon his copyright ownership claim. (7CT1783.) Johnson eventually filed the copyright infringement lawsuit in federal court, and Storix filed a counter-claim of copyright ownership.

In February 2015, Storix held an annual shareholder meeting, where Johnson, with 40% of Storix's shares (6CT1532), and Robin Sassi ("Sassi"), with 8% shares (6CT1532), elected themselves to two of the five Storix board seats. (7CT1784.) Cross-Defendants used their combined 52% shares to elect Huffman, Turner and Altamirano to the other three board positions. (1CT75; 7CT1784.) Three months later, the Cross-Defendant

directors voted for new bylaws (7CT1785; 5CT1150), new board policies (2CT500) and a shareholder agreement between only themselves and Storix. (7CT1785; 1CT139.) Soon thereafter, Storix ceased all shareholder distributions, and Johnson has received no distributions since. (5CT1131.) Johnson discovered during the copyright case discovery that Cross-Defendants secretly engaged in a plan to force Johnson to give up his remaining shares after his return from his medical leave. (11CT1149.)

At all times relevant to this litigation, Cross-Defendants occupied the majority of board seats of Storix (1CT75; 2CT426; 7CT1784; 13CT2427) and voted against Johnson and Sassi on every issue. (7CT1784.) Less than eight people are employed at Storix, including four Cross-Defendants. (2CT453.) No visible changes to SBAdmin have been released over 5 ½ years. (4CT882.)

A. Storix's Complaint Against Johnson ("Janstor Suit")

In July 2015, Johnson sold his San Diego home and moved to Florida due to the increasing cost of the copyright litigation. (11RT1479; 2CT325.) A month later, Storix counsel filed the above-captioned *direct* lawsuit against Johnson (1CT49) three hours before a mandatory settlement conference in the copyright case. (11RT1480; 2CT412.) The single claim in the Janstor Suit was that Johnson, as a director, breached a fiduciary duty to Storix by not disclosing his "efforts to create a business to directly compete" with Storix. (1CT52.)

Storix held a board meeting three weeks after the Janstor Suit was filed. (2CT426.) Prior to the meeting, Johnson sent an email to the board in which he raised numerous issues of "business judgment" and "shareholder oppression" to discuss at the meeting, but Cross-Defendants would not allow Johnson to discuss the issues. (2CT420; 2CT431.) There was no mention at the meeting of any claims against Johnson or the pending lawsuit. (2CT426.) Johnson was unaware he was being sued until the

complaint was served at his home in Florida later that same day. (16CT4278.)

In October 2015, Johnson sent an email to a few of Storix's past customers (hereafter the "Customer Email"), informing them of the impending copyright litigation and that further purchases of SBAdmin prior to a ruling on the copyright ownership may be infringing. (7CT1788; 15CT4061.) Storix filed a motion for an injunction in the federal court, which was denied because Storix was "unable to cite harm that has befallen it as a result of Plaintiff's email to customers." (15CT4080.) Seven months later, Storix amended the Janstor complaint to allege that Johnson "manifest[ed] his intent to directly compete with Storix" by sending the Customer Email to "Storix's past, current and/or potential future customers". (2CT306.) After a federal court ruled that Johnson implicitly transferred to Storix his copyright ownership, Storix amended a new allegation that Johnson "stole a copy" of SBAdmin when he left the company two years earlier. (3CT821.)

Johnson filed motions to strike and demurrer to the second amended complaint (SAC) because it falsely alleged that he resided in California when the lawsuit was filed and the relevant events occurred. (16CT4267; 16CT4292; 16CT4304.) Judge Trapp granted Johnson's request for judicial notice of the summons (16CT4269) served at his Florida residence (16CT4277), but denied the motion to strike because it relied on "facts outside the pleadings." (16CT4382.) Johnson also demurred on the ground of defect or misjoinder of parties because the action "must be brought as a *derivative* action by the Shareholders". (16CT4289.) The demurrer was overruled without addressing the issue.

Johnson filed a motion for summary judgment, arguing that the Storix board did not authorize or approve the Janstor Suit (5CT1310) and Storix had no standing to bring a *direct* lawsuit against its own director.

(5CT1311.) Before opposing the motion, Storix held a board meeting where three Cross-Defendants voted to ratify their decision to bring the lawsuit two years earlier. (13RT1998; See 13CT3427.) Storix then opposed summary judgment on grounds that the lawsuit had been ratified by the board. (6CT1506.) Judge Wohlfeil denied the motion because there remained a dispute over "whether this ratification and authorization was sufficient." (6CT1595.) The court did not address whether the lawsuit must have been a derivative action.

B. The Shareholder Derivative Complaint ("Derivative Suit")

Two months after the Janstor Suit was filed, Johnson and Sassi filed the consolidated Derivative Suit alleging breaches of fiduciary duty by Cross-Defendants, abuse of majority control, and waste of company resources. (3CT608.)[3] Johnson funded the action on Storix's behalf. (4CT882.) The Derivative Suit included a claim that Cross-Defendants filed the Janstor Suit against Johnson without approval. (3CT632, 638.) Cross-Defendants brought a motion to demurrer on grounds that Johnson and Sassi failed to make a pre-lawsuit demand that Storix bring the claims itself (1CT182) and because Johnson and Sassi could not adequately and fairly represent Storix's interests. (1CT184.) Judge Wohlfeil denied the demurrer, finding that such a demand was futile because Cross-Defendants were in majority control of the Storix board and thus "could not be expected to fairly evaluate the claims of the shareholder." (3CT793.)

For a year and a half, Johnson and Sassi, while directors, attempted to inspect Storix's financial records to determine if Cross-Defendants were using corporate funds for their defense, but Cross-Defendants physically

[3] Superior Court Case No. 37-2015-00034545-CU-BT-CTL. The judgment is not subject to this appeal, but the lawsuit's existence, purpose and parties are relevant facts.

denied them access to the premises. (12RT1740; 15CT4128; 15CT4148.) Following Johnson's attempt, Storix filed for a workplace violence restraining order against Johnson. (4CT1018.) Huffman and Smiljkovich testified that they "interpreted" Johnson's as "threats of violence", "terrorizing" and "stalking the company employees" for years (4CT1021; 4CT1024), and again referred to the Derivative Suit as "against the company." (4CT1020.) Johnson traveled from Florida to represent himself at the hearing, proved he hadn't been in San Diego in over two years but for a few legal proceedings, and produced records revealing Cross-Defendants' similar efforts to prevent his and Sassi's access to Storix's financial records. (4CT968; 4CT982-989.) The court found Johnson had only asserted "legal threats" and denied the restraining order "with prejudice in its entirety." (4CT997.) Throughout the litigation, Storix's counsel acted to prevent Johnson any access to company records on the basis that there was a claim against him for competing. Johnson tried to stop the attorneys from imposing unnecessary discovery cost on Storix by filing a writ of mandate to compel Storix's board to allow *all directors* access to Storix's financial records. (12RT1740; 15CT4085.) Storix opposed the motion arguing Johnson's "outright hostility towards Storix" (16CT4190) and because he was adverse to Storix in the Janstor Suit. (16CT4201.) Judge Trapp adopted Storix's assertion that the Derivative Suit was filed "against Storix" and that Johnson was competing with Storix, thereby allowing Storix to withhold any "documents that could be used against the corporation." (16CT4264.)

C. Johnson's Cross-Complaint

In April 2016, Johnson filed the above-captioned cross-complaint against Cross-Defendants alleging various breaches of fiduciary duty, fraud and conspiracy. (3CT585.) The complaint alleged efforts by Cross-Defendants "to force Johnson to resign from the company and force him to

sell his stock back to the company, increasing the value of their own." (3CT589.) The acts included creating a "hostile work environment", not allowing Johnson "to participate in the decision making process of the software development" (11CT590), and "act[ing] in concert to file suit in the name of Storix without approval". (3CT595.)

In March 2017, the court granted in part Cross-Defendants' special motion to strike Johnson's cross-complaint, removing all allegations pertaining to Cross-Defendants filing the Janstor Suit against Johnson without board approval. (5CT1289.) Judge Wohlfeil found the allegations to be grounded in protected activity but did not determine if the claim had any probability of success. (5CT1292.) Cross-Defendants demanded $78,484 in attorney's fees for bringing the special motion to strike (6CT1425) and were awarded $29,884 for their partial success. (6CT1485.)

D. The Jury Trial

Due to a scheduling conflict, the jury trial was assigned to Judge Enright's court. The court bifurcated the jury and non-jury issues, and granted Cross-Defendants' pre-trial motion to exclude comment or evidence during the jury trial of any damages alleged in Johnson's cross-complaint suffered by other shareholders. (10CT2804.) Johnson thereby removed all cross-claims to the bench trial except for loss of past and future employment benefits by being unfairly denied a position in the company. (11CT3056.)

During a 10-day trial, Cross-Defendants sat with Storix at the plaintiff's table and joined in examining and cross-examining every witness during Storix's prosecution of the Janstor Suit and against Johnson's cross-claims. (*See generally* 8RT799 – 16RT2731.) On the third day, the jury expressed their belief that Cross-Defendants were all plaintiffs, posing the question, "Does Mr. Sullivan represent one group of the plaintiffs and Mr. McCloskey represent a different group of the plaintiffs?" (11CT2835.)

Cross-Defendant's Huffman and Turner admitted they never asked Johnson if he had any intention of competing and didn't inform Johnson of any concerns in advance of filing the Janstor Suit. (9RT1044; 10RT1180.) Huffman admitted that, before the Janstor Suit was filed, he didn't know if Johnson was competing (9RT1045-1046), he knew Johnson had moved to Florida, and heard Johnson previously testify that Janstor wasn't intended to compete and wasn't doing any business. (9RT1046.) Huffman further testified that corporate counsel advised him not to inform Johnson of the claim before filing suit. (9RT1043.)

Huffman admitted the shareholder agreement between Storix and Cross-Defendants was so Storix would "remain to be an employee-owned company" (9RT996), "so were looking at the four current shareholders, who were employees, of ways to try to keep it within the company. That was the intent." (9RT997.) Johnson produced records showing Cross-Defendant Smiljkovich, Storix's former CFO, had done a valuation of Johnson's shares after Johnson returned from medical leave. (14RT2035-2036.) Smiljkovich denied trying to obtain a loan for Storix to buy back Johnson's shares and that a bank rep was pushing the idea he was not interested in. (14RT2041.) Johnson produced emails from the bank rep stating, "I have reviewed Storix's financials in view of the purchase of Anthony's shares" (14RT2040) and read her deposition testimony stating that Smiljkovich approached her with the idea of an "acquisition loan" specifically to purchase Johnson's shares. (16CT2702.) Johnson was working at Storix but never made aware of Cross-Defendants' efforts to purchase his shares. (15RT2443.)

Cross-Defendant Turner admitted that Johnson and Sassi asked at a board meeting if Cross-Defendants were using corporate funds for their defense against the Derivative Suit and were told they were not. (10RT1181.) Smiljkovich admitted the "board did not vote on the

advancement issue." (14CT2147.) Cross-Defendants' corporate governance expert testified that it was "within their discretion" to advance defense cost to themselves and not Johnson. (16RT2670.) Huffman admitted that Storix was advancing all legal expenses of Cross-Defendants (9RT1007) and that Storix's counsel recommended Johnson not be advanced fees. (9RT1008.) Turner testified that Cross-Defendants were advanced fees because they were sued in their "capacity as directors." (10RT1181.)

Smiljkovich admitted to lying in his deposition when Johnson confronted him with $2000 of personal charges made to the company credit card. (14RT2044.) Smiljkovich testified that Johnson's fees were not paid because he was "competing against the company". (14RT2138.) Huffman admitted to firing Smiljkovich for the theft (9RT970) but that Smiljkovich's defense costs were nevertheless advanced by Storix. (9RT1007.)

Huffman testified that he knew of no damage caused to Storix by Johnson's alleged competing business (9RT1048), but they filed and maintained the Janstor Suit to prevent him from competing. (9RT1049.) Storix's financial expert testified that he was aware of "Storix's claims and the directors' claims" (13RT1938), and estimated total cost of developing SBAdmin at about $1,255,996. (13RT1944.) Storix presented no evidence of Johnson actually operating a competing business, but claimed that amount as damages for "unjust enrichment" and "unfair head start" related to Johnson's alleged *intent* to compete. (17RT2847-2848, 17RT2927.) Storix's expert was asked how he would go about quantifying damages related to customer interference, but there was no mention of any specific interference. (13RT1940.) The expert testified that his analysis was to quantify the total cost of the software and not to quantify damages. (13RT1953.)

Johnson brought a motion for directed verdict on the ground that "the corporation did not authorize the filing of the [Janstor Suit] or properly

ratify it with a majority vote of disinterested directors." (17RT2802.) The court denied the motion without explanation. (17RT2805.) The court also denied Cross-Defendants' motion for directed verdict on all causes of action but granted it as to punitive damages. (17RT2776.)

Although Storix's financial expert made no such valuation, Storix introduced a new claim in closing arguments for "employees' lost productivity" related to the 2015 Customer Email. (17CT2848-2849.) The jury awarded Storix nothing related to Storix's claim that Johnson either intended or actually operated a competing business (17RT2927), but found Johnson breached a fiduciary duty by sending the Customer Email and awarded Storix the exact amount it demanded – $3,739.14. (11CT3054.)

Johnson's financial expert showed $1,393,643 in damages for his loss of past and future employment benefits due to Cross-Defendants unfairly depriving him a position in the company. (15RT2458.) The jury generally found in favor of Cross-Defendants on Johnson's cross-claim. (11CT3055-3056.)

E. The Bench Trial

Two months after the jury trial, Cross-Defendants' brought a motion to dismiss Johnson and Sassi as shareholder plaintiffs on grounds they could not fairly and adequately represent Storix's interests. (11CT3061.) Based on Storix's award of $3,739 against Johnson, the court granted the motion as to Johnson's standing but denied the motion as to Sassi. (19CT3002.)

After hearing "Sassi's claims", the court found that she "failed to meet the burden of proof on the four causes of action alleged in the First Amended Derivative Complaint." (12CT3359.) The court provided no specific finding on the derivative claims that Cross-Defendants abused majority control or wasted corporate resources by filing the Janstor Suit without authority, refusing Johnson and Sassi access to company records,

or giving themselves raises and bonuses as Storix's debt increased. The court also issued no findings on Johnson's cross-claims removed from the jury related to Cross-Defendants forcing him out of the company, secretly planning to force Johnson to relinquish his remaining stock, or directing all Johnson's shareholder income to legal actions against him.

ARGUMENT

I. THE JANSTOR SUIT AGAINST JOHNSON SHOULD BE DISMISSED IN ITS ENTIRETY

A. The Judgment Was Based on an Improper Claim

Standard of Review: De Novo. Pure questions of law are reviewed de novo. (*People v. Cromer* (2001) 103 Cal.Rptr.2d 23, 25 (*Cromer*).) Questions of statutory interpretation are reviewed de novo. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311 (*Tobacco*).) Where no disputed facts exist, the availability of the litigation privilege is determined as a matter of law. (*Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 93 (*Sonoma*).)

1. The customer email was protected by litigation privilege.

The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants …; (3) to achieve the objects of the litigation; and (4) have some connection or logical relation to the action. [Citations.]" (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 262 (quoting *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212); Code Civ. Proc. section 47, subd. (b)(2).) To encourage open communications in legal disputes, "the litigation privilege is absolute and applies regardless of malice. … [and] has been given broad application." (*Rusheen v. Cohen* (2006) 128 Cal.Rptr.3d 516, 527 [internal citations omitted]; *Kashian v. Harriman* (2002) 120 Cal.Rptr.2d 576, 598 ["communications made in connection with litigation do not necessarily fall outside the privilege

merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal."].)

Johnson testified in deposition and at trial to sending the Customer Email to a few of Storix's customers, notifying them of the pending copyright litigation to protect his rights to the software he created and registered in 1999. (15CT4061.) The Customer Email states:

> "This letter is to inform you that you may be in possession of unauthorized and infringing copies of Storix System Backup Administrator (SBAdmin). I am the author of the software, which is protected by US Copyright Registration No. TXu000988741, and expert testimony in the US Southern California District Court case No. 14-cv-1873 H (BLM) has indisputably determined that I am the owner. … you may continue using the current software, even if you received an infringing license after it was revoked. However, I must demand that you cease any further payment to Storix in relation to this software and refrain from downloading any further copies."

(15CT4061.)[4] The Customer Email was, on its face, directly related to Johnson's then-pending copyright infringement action against Storix. It specifically described the copyright litigation, prominently identified the case number and his 1999 copyright registration, and expressly sought to protect and secure his ownership rights to SBAdmin.

The Customer Email served the same purpose and was directly related to his copyright infringement lawsuit. Johnson alleged that he was the owner of the copyright and filed the action to secure and protect his ownership rights against all parties – not just Storix. The email expressly sought to stop further copyright infringement – one objective of the lawsuit.

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[4] The email further noted that Johnson expected his copyright ownership to be confirmed at the MSJ in three weeks, after which he planned to provide Storix's customers with improvements to fix vulnerabilities in the network security of the software.

Johnson's notice was fully consistent with, and indeed contemplated by, the "innocent infringer" defense to copyright infringement. (*See* 17 U.S.C. section 405, subd. (b) [providing "innocent infringer" defense to licensees until they receive actual notice of copyright from the true owner].) It doesn't matter if Johnson hoped the email would result in a settlement or give him a litigation advantage, the litigation privilege still applies. (See *Blanchard v. DIRECTV, Inc.* (2004) 20 Cal.Rptr.3d 385, 390 [litigation privilege protected cease and desist letters sent to thousands of customers who purchased illegal devices for pirating satellite signals].)

The federal court did not rule on the ownership of the copyright as Johnson expected, instead finding disputed facts. At the same time, the court heard Storix's motion for an injunction, finding that:

> "Defendant is unable to cite harm that has befallen it as a result of Plaintiff's email to customers. Defendant has not satisfied the elements necessary to obtain a preliminary injunction, especially in light of the significant First Amendment issues at stake."

(15CT4079 [italics added].) Storix nevertheless used the same harmless email to support its untenable claim that Johnson intended to compete and to demand injunctive relief in state court.

2. The court and parties agreed that the customer email would not be used as the basis of a claim.

Storix opposed Johnson's motion in limine to exclude the Customer Email on the basis of litigation privilege, arguing that "[t]he primary claim … is that Johnson engaged in wrongful conduct … as a director by taking steps to compete against Storix. The [Customer Email] at issue here is strong evidence of [of that claim]." (10CT2642.) Cross-Defendants also opposed the motion because "The litigation privilege bars claims, not defenses." (10CT2617.) The court denied Johnson's motion specifically to allow Cross-Defendants to use the email as evidence in their defense:

> "So the litigation privilege has its place. But to preclude the defense from not being able to utilize those e-mails in defending, for instance, the Johnson cross-complaint seems to be a broadening of the litigation privilege[.]" (6RT553.) "[T]here's a distinction between what comes into evidence and what the jury verdict form says and how this case is going to proceed by way of a legal theory. … Verdict form, different issue. But in terms of keeping it out, denied."

(6RT559.) By not allowing a verdict question on the issue, the court and parties appeared to agree that it would not be the basis of a claim. Storix never indicated it intended to base a claim on the email and there was no further discussion on the topic.

Even if this Court finds it appropriate to base a claim on the Customer Email, it was nevertheless an *abuse of discretion* for the lower court to allow Storix to introduce the claim when it was too late for Johnson to provide rebuttal. Although the abuse of discretion standard is deferential, reviewing courts "should not rubberstamp a decision of the trial court when the totality of the circumstances indicates the court's discretion has been abused." (*People v. Harvey* (1984) 151 Cal.App.3d 660, 667.) Johnson opposed the claim in his new trial motion on the ground of "accident or surprise" (Code Civ. Proc. section 657, subd. (3)) due to Storix introducing the claim in closing arguments. (13CT3405; See §1:A[2].)

3. The jury's verdict was based entirely on the customer email.

The jury returned a verdict that Johnson did not "breach his duty of confidentiality by using Storix, Inc.'s confidential information for his own benefit or interest" and did not "receive a benefit that he otherwise would not have achieved or to which he was not entitled as a result of breaching the duty of loyalty or duty of confidentiality that he owed to Storix, Inc." (11CT3054.) The jury thereby rejected the allegation of Johnson operating a competing business, and awarded Storix nothing on its nearly $1.3

million claim for "unjust enrichment" and "unfair head start". However, the jury found that Johnson's "acts or conduct in breach of a fiduciary duty or duties that he owed to Storix" entitled Storix to $3,739.14 for "total value of employee time" responding to the Customer Email. (17CT2849; 11CT3054.) Storix admitted post-trial, "That figure was solely based on the amount of estimated cost of employee time associated with dealing with the fallout of Johnson sending the Announcement Email to Storix's customers." (12CT3098.) Storix demanded monetary damages for each claim of breach of fiduciary duty and got exactly what was demanded as a result of the Customer Email – and nothing else.

The judgment on the Janstor Suit should be reversed in its entirety because the Customer Email – the only basis for Storix's trivial award – was an improper claim.

B. The Janstor Suit Was Never Approved or Ratified by a Disinterested Board

Standard of Review: De novo. De novo standard of review applies to issues of standing. (*San Luis Rey Racing, Inc. v. California Horse Racing Board* (2017) 15 Cal.App.5th 67, 73 (*San Luis Rey*).) Questions of statutory interpretation are reviewed *de novo.* (*Tobacco, supra* at p. 311.) Pure questions of law are reviewed de novo. (*People v. Cromer, supra*, at p. 25.) The de novo standard of review applies in cases involving questions of law arising from undisputed facts. (*See Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 (*Ghirardo*); *See also Jenkins v. County of Riverside* (2006) 41 Cal.Rptr.3d 686, 694.) Whether a lawsuit is properly authorized is an essential element of standing. (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 757 (*Pillsbury*) [plaintiff lacked standing when institutional trustee had not granted him authority to sue on behalf of trust.].) "Lack of standing is not waived by the failure to raise it in the trial

court; it may be raised at any point in the proceedings." (*Killian* v. *Millard* (1991) 228 Cal. App.3d 1601, 1605).

"[A] director is independent when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences." (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1367 (quoting *Kaplan v. Wyatt* (Del.Super.Ct. 1985) 499 A.2d 1184, 1189).) A transaction may only be approved or ratified in good faith, without counting the votes of interested directors. (Corp. Code section 310, subd. (a)(2).) Any action taken by a board without a meeting requires the written consent of all directors, not just the majority. (Corp. Code section 307, subd. (b).)

1. The court denied summary judgment without resolving whether the lawsuit was approved or ratified by Storix.

Johnson brought a motion for summary judgment, arguing there was no Storix board decision to bring the Janstor Suit. (5CT1310.) Johnson's *Statement of Undisputed Facts* included, "The Storix Board of Directors never approved the Complaint against Johnson." (6CT1533.) Storix generally objected to this fact without providing evidence to the contrary, and the court overruled the objection. (6CT1594.) Storix included in its statement of undisputed facts that "Prior to the filing of this lawsuit, three of the five directors … acknowledged and approved of the plan." (6CT1536.) Robin Sassi, a director when the suit was filed, provided a declaration stating that she was not made aware of the claim and no board meeting was held to discuss or approve the lawsuit. (5CT1322.)

Before Storix opposed Johnson's summary judgment motion, Cross-Defendants quickly called a special board meeting where directors Huffman, Altamirano and Smiljkovich voted to ratify the decision of Huffman, Altamirano and Turner to file the lawsuit two years earlier. (6CT1528; 13RT1998.) Sassi voted against the ratification. (13RT2000.)

Storix then argued in opposition to Johnson's summary judgment that "a formal board vote was conducted to ratify that approval as a board decision." (6CT1506.)

Johnson's right to have the lawsuit dismissed cannot be defeated by Cross-Defendants' belated attempt to ratify their prior unlawful decision. The "right to a dismissal cannot be taken away by a later ratification." (*Dominguez v. Superior Court* (1983) 139 Cal.App.3d 692, 695 (citing Civ. Code, section 2313 ["No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent."]).) When they voted to ratify the lawsuit, all Cross-Defendants were already being sued in the Derivative Suit for filing and pursuing the lawsuit without authority. (3CT632.)[5] A transaction approved by the board is not valid unless it's "just and reasonable as to the corporation at the time it was authorized, approved or ratified." (Corp. Code section 310, subd. (a)(3).) The ratification was of no benefit to Storix and served only to relieve Cross-Defendants from liability for filing and continuing the unauthorized lawsuit without cause.

Johnson raised the arguments above in reply to Storix's opposition (6CT1546) and reiterated in oral arguments that "the only directors that voted on the ratification … are all now parties to the litigation. They are all now interested." (4RT306.) The court denied summary judgment, noting only that "It is disputed whether this ratification and authorization is sufficient." (6CT1595.)

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[5] The Court didn't address the claim in the Derivative Suit that Cross-Defendants' filed the lawsuit without board approval, but found in favor of Cross-Defendants on all causes of action. (12CT3346.)

2. The court erred by not allowing the jury to determine if the board was disinterested.

Johnson proposed a special jury instruction indicating that Storix had no "**Standing/Authority to Sue**" unless the lawsuit was authorized, approved or ratified by an independent and disinterested board or shareholder majority. (11CT3023.) The court noted that three of the five directors "voted to proceed on the lawsuit", refused the instruction (11CT3023), and reserved the decision until *after* the jury trial concluded. (17RT2801.) As such, there was no special finding requested from the jury. (11CT3053.)

If a factual dispute existed as to whether the board was disinterested, the court should not have refused Johnson's jury instruction so the parties could present specific evidence on the issue and a special verdict question to the jury. "Code of Civil Procedure section 597 provides the trial court with authority to hear first a special defense that would bar a recovery by the plaintiff … [and] 'places an imprimatur upon a practice which contemplates a trial first of the severable issues which if determined adversely to the plaintiff will obviate the necessity of a protracted trial of issues which by such determination are rendered irrelevant and immaterial.'" (*Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 100 Cal.Rptr.2d 478, 487 (quoting *Silver v. Shemanski* (1949) 89 Cal.App.2d 520, 530.) The court should have "proceed[ed] to the trial of the special defense or defenses before the trial of any other issue in the case." (Code Civ. Proc. section 597.)

During a full jury trial on the Janstor Suit and Johnson's cross-complaint, the following undisputed facts were established:

a) Cross-Defendants Huffman, Altamirano and Turner were the Storix directors who decided to file the Janstor Suit. (4RT308; 14RT2252; *See* 16RT2561, 1CT75.[6])
b) There was no board meeting and neither Johnson nor Sassi were not notified or consulted before the Janstor Suit was filed. (9RT1044.)
c) Cross-Defendants Huffman, Altamirano and Smiljkovich were the directors who voted at a special board meeting to ratify the decision to file the Janstor Suit. (13RT1998.)

Even if there had been a board meeting to approve the lawsuit, Cross-Defendants could not have voted to sue Johnson *after* he threatened to sue them for majority shareholder oppression. (6RT590.) Cross-Defendants were clearly not disinterested in voting to ratify the Janstor Suit two years later and after the Derivative Suit was filed – especially when it included *Storix's* claim of their filing the lawsuit without approval. (3CT608, 3CT649.)

The court ignored the above facts and generally found after the jury trial that "there was authority to bring this lawsuit." (*See* §I:C[1].) The court erred by not allowing the jury to decide a factual issue on which it later based its legal conclusion. "[A] special verdict must present the conclusions of fact … as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc. section 624.) When a special verdict is used, the jury must make findings on every controverted factual issue. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242.)

[6] The referenced document is a prior record of admitted trial Exhibit 515.

C. The Court Erred in Denying Johnson's Post-trial Motions to Dismiss the Janstor Suit

Standard of Review: Mixed. Generally, in reviewing an order denying a motion for judgment notwithstanding the verdict ("JNOV"), the court must determine whether *substantial evidence* supports the jury's verdict. (*Dell'Oca v. Bank of New York Trust Co.* (2008) 71 Cal.Rptr.3d 737, 757.) However, a *de novo* review is appropriate in cases involving pure questions of law (*People v. Cromer*, *supra*, at p. 25), questions of law arising from undisputed facts (*Ghirardo v. Antonioli, supra*, at p. 799) and issues of standing (*San Luis Rey, supra*, at p. 73). Where no disputed facts exist, the availability of the litigation privilege is determined as a matter of law (*Sonoma, supra*, at p. 93), as is the question of whether the Janstor Suit was properly authorized – an essential element of standing. (*Pillsbury, supra*, at p. 757.) An *abuse of discretion* review normally applies to orders denying new trial motions. However, "the deference it calls for varies according to the aspect of a court's ruling under review. [1] The trial court's findings of facts are reviewed for *substantial evidence*, [2] its conclusions of law are reviewed *de novo*, and [3] its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 76 Cal. Rptr. 3d 250, 256-257 [fns. omitted; italics added].) If the assertion underlying a motion for new trial is an error of law, then independent review is appropriate. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 [independent standard of review on new trial predicated on assertion of erroneous summary judgment].)

1. The court erred in denying Johnson's JNOV motion.

"A trial court must grant a motion for JNOV whenever a motion for a directed verdict for the aggrieved party should have been granted. 'The power of the court to direct a verdict is absolutely the same as the power of

the court to grant a nonsuit.' 'A motion for a directed verdict … concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom.'" (*Santos v. Kisco Senior Living, L.L.C.* (2016) 1 Cal.App.5th 862, 870 [internal quotes omitted].)

Johnson requested a judgment notwithstanding the verdict for two reasons: "(1) The jury's award of damages against Johnson was premised entirely on a communication protected by the litigation privilege; and (2) Storix did not have board approval to bring the lawsuit and, as such, the lawsuit was not properly authorized." (12CT3292.) Johnson's arguments as to the Customer Email being protected by litigation privilege are set forth in §I:A[1]. Storix opposed Johnson's JNOV argument regarding the lawsuit not being approved by Storix only by saying:

> "Johnson failed to ask for a jury instruction or verdict question on the issue of Storix's authority to pursue this lawsuit. If, as Johnson contends, he believes Storix lacked such authority, it was incumbent on him to ask the jury to determine such facts. Authority is a quintessential fact question for the jury to decide. *See*, e.g., *Guipre v. Kurt Hitke & Co.* 109 Cal.App.2d 7[, 16] (1952) [citations]."

(12CT3228 [underlines added].) Here, Storix attempted to re-write the record. Storix was well-aware that Johnson proposed that very instruction, Storix opposed it, and the court refused it. (See §I:B[2].)

The court rejected Johnson's JNOV motion, finding only that "The evidence presented at trial undermines [Johnson's argument] and the court finds that there was authority to bring this lawsuit." (12CT3335.)[7] If evidence was necessary to resolve whether the lawsuit was approved or

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[7] Johnson established at trial that there was no board meeting to approve the lawsuit and the board was not disinterested in ratifying it two years later. (*See* §I:B[2].) If a review of *substantial evidence* is necessary, there was no evidence presented at trial to the contrary.

ratified by a disinterested board, the court should not have refused Johnson's jury instruction. (*See* §I:B[2].)

2. The court erred in denying Johnson's new trial motion without addressing Johnson's arguments.

An order denying a motion for new trial is non-appealable but may be reviewed on appeal from the underlying judgment. (*Walker v. MTA* (2005) 104 P.3d 844, 23 Cal.Rptr.3d 490, 491.) A motion for new trial may be used to challenge an appealable order on a motion as well as a decision or verdict in a conventional civil action. (*See In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 720-721.) "If the motion for [JNOV] is denied and if a new trial is denied, the appellate court shall, if it appears that the motion for [JNOV] should have been granted, order judgment to be entered on appeal from the judgment or order denying the motion ... ." (Code Civ. Proc. section 629, subd. (c).)

Because Johnson's JNOV motion was denied without explanation, Johnson raised the same issues again in his motion for new trial. (13CT3402.) The *doctrine of implied findings* requires that "All intendments and presumptions are indulged to support [the statement of decision] on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The court's "Decision and Order Thereon" was silent on the issues of whether the Janstor Suit was approved or ratified by a disinterested board and whether the Janstor Suit should have been brought as a derivative action. (12CT3279.)

> "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court in

> favor of the prevailing party as to those facts or on that issue."

(Code Civ. Proc. section 634.) Furthermore, if the jury or court finds in favor of the plaintiff on a special defense, "all rulings on the trial thereof shall be deemed excepted to and may be reviewed on motion for a new trial or upon appeal from the judgment." (Code Civ. Proc. section 597.)

Johnson attempted to clarify the judgment by raising the arguments again in his motion for new trial (section 657) and to set aside the judgment (section 663). In denying the motions, the court stated only that:

> "Johnson reasserts his arguments raised pre-trial and in the JNOV regarding standing, whether the lawsuit was properly authorized, and the applicability of the litigation privilege. These issues have already been adjudicated in this court and it was determined that they have no merit."

(14CT3814.) The court erred in refusing to reconsider issues raised in a new trial motion based on a prior ambiguous JNOV ruling.

This Court should reverse the decision on Johnson's JNOV motion and dismiss the Janstor Suit on grounds that it was never approved by Storix and its only successful claim was based on a protected communication.

D. The Janstor Suit Must Have Been Brought As a Shareholder Derivative Action

Standard of Review: De Novo. Pure questions of law are reviewed de novo (*People v. Cromer, supra*, at p. 25) as are cases involving questions of law arising from undisputed facts (*Ghirardo v. Antonioli, supra*, at p. 799) and issues of standing (*San Luis Rey, supra*, at p. 73)

An action is derivative if "the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance of distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets." (*Jones*

v. H.F. Ahmanson & Co. (1969) 1 Cal.3d 93, 106-107 (quoting *Gagnon Co., Inc.* v. *Nevada Desert Inn, Inc.* 45 Cal.2d 448, 453).) The Janstor Suit alleged only injury to the corporation and demanded relief from damages affecting all shareholders including an injunction.

"'[W]e have found no presumptive or implied authority … to institute litigation in the name of the corporation against a co-director ... The proper vehicle for such a suit, when the gravamen of the complaint is injury to the corporation, is a shareholder's derivative action.'" (*Anmaco, Inc. v. Bohlken* (1993), 13 Cal.App.4th 891, 899-900 (citing Corp. Code section 800; *Jones v. H.F. Ahmanson, supra*, at 106).) No case cited throughout this litigation involved a board majority filing a civil suit against one of its own co-directors. Such actions would allow any board majority (as in this case) to simply sue any co-director who opposed them or threatened to expose their misconduct.

Johnson raised the above arguments and authorities in his motions to demurrer to the FAC (15CT3925) and SAC (15CT4291), and for summary judgment (4RT306), judgment notwithstanding the verdict (12CT3299) and new trial. (13CT3404.) Every motion was denied without acknowledging this dispositive argument.

1. Judicial estoppel bars Storix and Cross-Defendants from asserting that the Janstor Suit was a proper direct action.

"[T]he doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

Cross-Defendants argued at every turn that "Johnson does not have standing to bring his claim for breach of fiduciary duty because it is a derivative action, not a direct claim" (15CT3963), and Johnson can't bring direct claims against *them* for injury shared by "all shareholders equally." (13CT3543.) The court granted Cross-Defendants' motion in limine to preclude Johnson from providing evidence of claims affecting other shareholders based on their argument (8CT2012), thereby forcing Johnson to remove all but one of his cross-claims from the jury. Cross-Defendants relied on their argument to obtain a ruling in their favor, thus judicial estoppel "prevents [them] from asserting a position in a judicial proceeding that is contrary or inconsistent with a position previously asserted in a prior proceeding." (*Intern. Engine Parts v. Feddersen* & Co. (1998) 75 Cal. Rptr. 2d 178, 181.)

Johnson had only Storix's interests in mind when he funded the Derivative Suit on its behalf. It's a miscarriage of justice that Johnson had to defend the Janstor Suit for years because Cross-Defendants had Storix bring their shareholder claims directly to avoid any personal expense. This Court should dismiss the Janstor Suit because it must have been brought as a derivative action.

II. JOHNSON SHOULD BE GRANTED A NEW TRIAL ON HIS CROSS-COMPLAINT

A. The Court Erred in Partially Granting a Special Motion to Strike Johnson's Cross-Claims

Standard of Review: De novo. "A ruling on a Code Civ. Proc. section 425.16 motion is reviewed de novo. [citation] We review the record independently to determine whether the *asserted cause of action* arises from activity protected under the statute and, if so, whether the plaintiff has shown a probability of prevailing on the merits." (*Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225

Cal.App.4th 1345, 1350 [italics added].) "Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal." (*ComputerXpress, Inc. v. Jackson* (2001) 113 Cal.Rptr.2d 625, 632.)

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech […] shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. section 425.16, subd. (b)(1).) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Schwarzburd v. Kensington Police, supra*, at 1350 (citing *Navellier v. Sletten* (2002) 124 Cal.Rptr.2d 530, 536).)

The legislature enacted the anti-SLAPP statute with the intent of preventing "abuse of the judicial process." (Code Civ. Proc. section 425.16.) As demonstrated below, the court's application of the statute specifically permitted the very abuse it was designed to prevent.

1. The court erred in striking a claim of illegal activity.

A court must first determine "whether plaintiffs cause of action arose from acts by defendant in furtherance of defendant's right of petition or free speech in connection with a public issue. [citations.] 'A defendant meets this burden by demonstrating that the *act underlying* the plaintiffs cause fits one of the categories spelled out in section 425.16, subdivision (e).'" (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 126 Cal.Rptr.2d 560, 566 [italics in original] (quoting *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043).) An "act in furtherance of a person's right of petition or free speech" includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial

proceeding, or any other official proceeding *authorized by law*[.]" (Code Civ. Proc. §425.16, subd. (e) [italics added].)

The *asserted* act was that Cross-Defendants "act[ed] in concert to file suit in the name of Storix without approval of Storix" and that Johnson was harmed by "loss of money in defending a suit that was not authorized by Storix". (3CT595 [underlines added].) The court found the claim was "grounded in petitioning activity" and struck all allegations related to the claim from the cross-complaint. (5CT1289.) However, the court's order refers to the claim as Cross-Defendants "caus[ing] Storix, Inc. to initiate legal action against Johnson" and making a "decision to initiate the Storix lawsuit." (*Id*.) By omitting the words "without approval" and "not authorized by Storix", the court transformed an asserted claim of *illegal* activity into one of *protected* activity. "[I]n affirming an order granting an anti-SLAPP motion – '[t]he question is what is pled—not what is proven.'" (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203 (quoting *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942).)

The claim asserted that Cross-Defendants named Storix as a plaintiff without its approval, and the court failed to determine if the asserted act was "authorized by law." (See *Gallimore v. State Farm, supra*, at 566; Code Civ. Proc. section 425.16, subd. (e).) "'By necessary implication, the statute does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights." (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 704-705.) "If the defendant's act is not constitutionally protected how can doing that act be 'in furtherance' of the defendant's constitutional rights?" (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819.)

2. The court failed to determine if the claim had a probability of success.

"To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [citations] … [The court] should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [citation] In making this assessment it is 'the court's responsibility … to accept as true the evidence favorable to the plaintiff. …' [citation] The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to be stricken as a SLAPP." (*Soukup v. Law Offices of Herbert Hafif* (2006) 46 Cal.Rptr.3d 638, 662 [citations omitted].)

The court found that "Cross-Complainant has not demonstrated a probability of prevailing as to the claims premised on protected activity *because of* the 'litigation privilege.'" (5CT1292 [italics added].) Referring to *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 ["Allegations of protected activity supporting the stricken claim are eliminated from the complaint"], the order states, "Given this ruling, the Court does not address whether Cross-Complainant has produced sufficient admissible evidence supporting these claims." (5CT1292.) The court conflated the two prongs of the analysis in finding that the existence of petitioning activity instantly defeats the probability of success since such activity is, by definition, protected by litigation privilege.

"The privilege afforded by Civil Code section 47(b) broadly applies to all torts except malicious prosecution actions." (5CT1292; citing *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) "[T]he privilege applies to any communication: (1) made in judicial or quasi-judicial proceedings; (2) by

litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Id.*) In arguing against the merits of Johnson's claim, Cross-Defendants stated:

> "Because Cross-Defendants hold the majority of board seats, there is no dispute Cross-Defendants had sufficient votes to cause the board to authorize the lawsuit. […] In fact, the board at any time today or in the future could ratify the prior decision to file suit, and again, there is no dispute Cross-Defendants have the board votes to do so."

(5CT1388.) In other words, the board did not authorize the lawsuit, but Cross-Defendants claim they could have because they were (and still are) the board majority. Unless Cross-Defendants were acting with board authority, they were not "participants authorized by law", so their act was not protected by litigation privilege.

Johnson provided substantial evidence of Cross-Defendants' animosity toward him *before* he was served the Janstor Suit, including their efforts to obtain a company loan to purchase his shares without his knowledge. (*See* 5CT1127.) Even if there had been a board meeting, Cross-Defendants could not have voted because they were clearly not disinterested in suing Johnson, most notably after "us[ing] the existence of this lawsuit as justification for preventing me from exercising my rights as a director and shareholder to access any corporate records[.]" (11CT1130.) Johnson's evidence must be accepted as true since Cross-Defendants produced no evidence to defeat Johnson's showing, relying instead on their objections to Johnson's declaration and evidence (5CT1273) which the court overruled. (5CT1285.)

3. The court improperly awarded anti-SLAPP attorney fees to Cross-Defendants.

Standard of review: Abuse of Discretion. An appellant court reviews the amount of attorney fees awarded by the trial court to a defendant who

successfully brings an anti-SLAPP motion for abuse of discretion. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.)

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc. section 425.16, subd. (c)(1).) "[F]ees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way." (*Mann v. Quality Old Time Service, Inc.* (2006) 42 Cal.Rptr.3d 607, 619.) A fee award is not required when the motion, though partially successful, was of no practical effect. (*Moran v. Endres* (2006) 37 Cal.Rptr.3d 786, 789.)

Striking the allegations had no practical effect because the unresolved primary issue (whether the Janstor Suit was approved by Storix) remained an issue underlying a claim in the Derivative Suit as well as a defense to the Janstor Suit. Cross-Defendants argued they "are entitled to reimbursement of their reasonable attorneys' fees and costs incurred in connection with bringing their successful anti-SLAPP motion." (6CT1425.) Cross-Defendants incurred no expenses because they self-approved having Storix pay all legal expenses on their behalf. (5RT1131; *see also* 13CT3479, 12CT3281.) The ruling effectively forced Johnson to pay Cross-Defendants for fees they never incurred, even after they used Johnson's shareholder income to fund their motion. (See §III:C.) Cross-Defendants took $78,484.30 from Storix to bring the motion (6CT1425) and were awarded $29,884.15 for their partial success. (6CT1485.) Johnson and Storix each lost about $50,000 on a motion Cross-Defendants *profited* from.

"If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant

to Section 128.5." (Code Civ. Proc. section 425.16, subd. (c)(1).) "An anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit." (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 625-626.) Cross-Defendants insisted all discovery be stayed for *all consolidated actions* during the eight (8) months this motion was pending. (1RT112; 2RT137; 6CT1542.) After the anti-SLAPP hearing, they demanded the first of three trial continuances that needlessly pushed the trial 12 months at no expense to themselves. (2RT137.)

This Court should reverse the decision on the anti-SLAPP motions and remand with instructions to award attorney's fees to Johnson for defending a frivolous motion intended only to profit Cross-Defendants.

B. The Court Approved and Rejected Jury Instructions Prejudicial to Johnson's Claims

Standard of Review: De novo. "The legal adequacy of jury instructions is a legal issue subject to the de novo standard of appellate review." (*Isip v. Mercedes-Benz, supra*, at 698.) "Whether a jury has been misled by an erroneous instruction or by the overall charge must be determined by an examination of all the circumstances of the case including a review of all of the evidence as well as the instructions as a whole. [Citations.]" (*Bartero v. National General Corp.* (1974) 13 Cal.3d 43, 59.) "Generally speaking if it appears that error in giving an improper instruction was likely to mislead the jury and thus to become a factor in its verdict, it is prejudicial and ground for reversal." (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670.)

"[F]ailure to object does not waive any right to the instruction because it is incumbent upon the trial court to instruct on all vital issues in the case." (*Green v. State* (2007) 64 Cal. Rptr. 3d 390, 399.) "[P]arties have

the 'right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court.' [Citation.] '*A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable* since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented.'" (*Ayala v. Arroyo Vista Family Health Center* (2008) 73 Cal.Rptr.3d 486, 491 [italics in original] (citing *Freeze v. Lost Isle Partners* (2002) 116 Cal.Rptr.2d 520, 525).)

1. The court gave an irrelevant and misleading "At-Will Employment" instruction.

In pre-trial discussions regarding Johnson's use of the term "hostile work environment", the court stated, "I don't think it arises to and the Court's not going to give because it's not pled, amongst other reasons, any wrongful termination instruction." (6CT581.) But the court approved Cross-Defendants' proposed jury instruction, "**At-Will Employment**" which stated:

> "In California, employment is presumed to be 'at will.' That means that an employer may discharge an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a discriminatory reason."

(11CT2999.)[8] The instruction was only applicable to wrongful termination actions against a company and irrelevant to Johnson's claim that Cross-Defendants, as majority shareholders, abused their fiduciary duty of

[8] The instruction originated as "2513 Business Judgment" under CACI Series 2500 (Fair Employment and Housing Act) and refers to Labor Code section 2922 (At-will employment).

fairness to Johnson by refusing him a position at Storix to which he had a reasonable expectation. (See §II:B[2].)

The court granted Storix's motion in limine to "Exclude Johnson's Claims of Wrongful Termination or Harassment" (8CT2038) wherein Storix argued that "Johnson has admitted that he voluntarily resigned from his at-will employment at Storix" (8CT2041) and "Johnson has never asserted a claim against Storix, his former employer, for wrongful termination, either by actual or constructive termination." (8CT2044 [underlines in original].) Johnson didn't oppose the motion since he was not suing Storix for wrongful termination. Too late, it became apparent that *Storix's* motion was actually intended to preclude Johnson from arguing an exception to *Cross-Defendants'* defense. Citing *Turner v. Anheuser-Busch, Inc. (1994)* 7 Cal. 4th 1238, 1251, Storix's motion specifically precluded Johnson from arguing that "constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing." (8CT2041.) Johnson's cross-complaint alleged that "Johnson resigned as a result of the hostile and oppressive work environment created by Cross-Defendants." (3CT590; 5CT1129.) Cross-Defendants only defense against Johnson's claim (of unfairly being refused a position in the company) was that he quit. (14RT2194-2195; 17CT2925.)

Cross-Defendants' jury instruction, "**336 Affirmative Defense – Waiver**" states, "Director/Management Defendants claim that they did not have to rehire Anthony Johnson because Anthony Johnson gave up his right to have future employment. […] A waiver may be oral or written or may arise from conduct that shows that Anthony Johnson gave up that right." (11CT2990.) The jury was not instructed, nor is there any authority, means or circumstances in which a 40% owner of a closely-held corporation *gives up a right* to future employment.

2. The court refused an instruction on majority shareholders duties specific to Johnson's claims.

"The jury was not instructed as to what [plaintiff's] duties as a majority shareholder were; nor was it instructed as to the scope of such duties within the circumstances of this case, even though both issues were questions of law for the court to decide." (*Nelson v. Anderson* (1999) 84 Cal.Rptr.2d 753, 760; *Jones v. H.F. Ahmanson*, *supra*, at 115).) Johnson proposed a modified CACI "**4100 'Fiduciary Duty' Explained**" instruction that included the following:

> "A fiduciary duty imposes on majority shareholders a duty to act with the utmost good faith in the best interests of the corporation and the minority shareholders. […] When a minority shareholder holds a reasonable expectation of employment with the corporation, majority shareholders may breach their fiduciary duties by denying the minority shareholder a position with the company."

(*Motion to Augment*, Attachment 1 at p. 20.) The Court gave the generic CACI 4100 instruction instead, followed by a new instruction entitled "**Majority Shareholder Fiduciary Duties**" created from Johnson's modified instruction. The new instruction did not include the language above and pertained only to the general duty of a majority not to "control corporate activities to benefit themselves alone or in a manner detrimental to the minority." (11CT3003.)

Omitting the proposed language rendered the instruction meaningless to Johnson's claim because refusing him a position in the company was of no benefit to Cross-Defendants or detrimental to Johnson if, according to Cross-Defendants, he was an "at-will employee" not entitled to a job in the first place. (See §II:B[1].)

3. The court refused Johnson's instruction and gave a misleading instruction on the Business Judgment Rule.

The court refused Johnson's modified jury instruction which included California authority showing that the business judgment rule applies only to Cross-Defendants' business decisions "in their capacity as directors" and not in their capacity of officers. (11CT3026 [underline in original].) "Mr. King's request on his version was to add language after 'business decision,' quote, 'in their capacity as directors,' end quote. The Court has deleted that over objection." (17RT2796.)

Even if Cross-Defendants were entitled to deny Johnson a position in the company, that was a decision of company officers, not directors. Cross-Defendant Huffman testified that he (as president) had "the power to terminate at will" and "the power to decide whether or not [Johnson] could come back or not". (9RT181.) After Cross-Defendants' corporate governance expert testified that the business judgment rule applied "as long as the directors acted in accordance with the duty of loyalty and care" (16RT2626) he was asked, "[A]re those director duties applicable to officers?" The expert ambiguously replied, "There are no specific duties specified in the California Corporations Code for officers." (16RT2627.) In closing arguments, Cross-Defendants misstated his testimony as:

> "[The expert] said that everything these director/management defendants did was consistent with their duty of loyalty and care. Where is evidence to the contrary? There's no rebuttal expert."

(17RT2916 [underline added].) Johnson himself was designated as the *rebuttal* witness on corporate governance issues, but the court granted Cross-Defendants' pre-trial motion "To Preclude Anthony Johnson From Testifying as an Expert Witness on Corporate Governance Issues." (11CT2808.) The court found in favor of Cross-Defendants on all shareholder derivative claims largely because "[their expert] testified that

the intent of the business judgment rule applies to officers as well. His testimony was unrebutted." (12CT3280.) The court was wrong. None of the claims complained of were acts of corporate directors.

Based on the omission of a proper instruction limiting the Business Judgment Rule to directors, the testimony of the expert, and Cross-Defendants' closing arguments, the jury was effectively misled to believe all Johnson's claims were barred.

4. Combined, the instructions were highly prejudicial to Johnson's cross-claims.

"In the case of civil state law error, [miscarriage of justice] is met when `there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.'" (*Elsner v. Uveges* (2004) 22 Cal.Rptr.3d 530, 546 (citing *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574).) "[T]he totality of all the matters to be discussed, in combination, in light of the demonstrably close case herein, does reach, we feel, the level of harmful prejudice." (*People v. Williams* (1971) 22 Cal.App.3d 34, 40.)

The jury returned a special verdict, generally finding that Cross-Defendants owed a fiduciary duty to Johnson but did not breach that duty. (11CT3055.) The special findings were ambiguous as to what duties, claims or defenses they pertained to. The jury may have believed Johnson was owed a duty as a minority shareholder but the claim only pertained to duties of officers and directors (or vice-versa). "Where it seems probable that the jury's verdict may have been based on the erroneous instruction, prejudice appears and this court 'should not speculate upon the basis of the verdict.'" (*Seaman's Direct Buying Service, Inc. v. Standard Oil* (1984) 36 Cal. 3d 752, 774 (quoting *Robinson v. Cable* (1961) 55 Cal.2d 425, 428.)

The jury likely found that the "at-will employment" (a duty of the company and its officers) defeated Johnson's claim of unfair treatment (a

duty owed by majority shareholders), thus Johnson could not satisfy the requisite element of harm. Johnson's breach of fiduciary duty and fraud claims were dependent on the underlying factual issue of whether Johnson had a reasonable expectation of a position in the company. (3CT595.)

The misleading "At-Will Employment" instruction further trumped Johnson's claim of unfairness to a minority shareholder by instructing the jury that Cross-Defendants could terminate him "for no reason, or for a good, bad, mistaken, unwise, or even unfair reason". (11CT2999 [underline added]; See §II:B[1].) Johnson couldn't prove Cross-Defendants breached their fiduciary duty without an instruction defining the scope of the duties they owed as majority shareholders. (See §II:B[2].) The overriding factor was Cross-Defendants improper application of the "Business Judgment Rule" to all Cross-Defendants' decisions regardless of whether they were acting as majority shareholders or a corporate board. (See §II:B[3].) Storix's president (an officer) testified that he had "the power to terminate at will". (9RT1031.)

Johnson's fraud claim alleged that Cross-Defendants "concealed that they were attempting to oust him from Storix and force him to give up his remaining shares" (3CT596) and Johnson "reasonably relied on Cross-Defendants representations by diligently working on the security measures in spite of the hostile work environment." (3CT597.) The jury could not find that Johnson was harmed by Cross-Defendants' concealment if (according to them) Johnson was an at-will employee who could not have *relied* on a company position.

Cross-Defendants' only defense for unfairly denying Johnson a position in his company was that Storix didn't have to hire him because he was an at-will employee. Cross-Defendants concluded their closing arguments by saying, "He's not employed because he quit. He needs to stop complaining. He's not the victim. He's the bully. He weaponized litigation

and it has cost Storix dearly." (17CT2925 [underline added].) This statement is consistent with Cross-Defendants repeatedly misinforming the jury that they *are* Storix and Johnson is *against* Storix. Their argument for directed verdict encapsulates their reliance on the combined misleading instructions:

> "Without an employment contract, Johnson was an at-wil1 employee, who could not reasonably expect entitlement to a job. Storix's President, David Huffman, was entitled to terminate Johnson's at-will employment at any time."

(11CT2942 [underline added]; see also 16RT2746.) The jury instructions misled the jury to believe Cross-Defendants were entitled to deny Johnson a right to participate in his own company, and therefore Johnson suffered no harm.

The court denied without explanation Johnson's motion for new trial on the ground of irregularity of the proceedings based on the misleading jury instructions. (14CT3818.) This Court should reverse the judgment on the cross-complaint and grant Johnson a new trial.

III. JOHNSON'S SHAREHOLDER PLAINTIFF'S BOND SHOULD BE RELEASED BACK TO HIM

Standard of Review: De Novo. Pure questions of law are reviewed de novo. (*Cromer, supra, at p.* 25.) Questions of statutory interpretation are reviewed de novo. (*Tobacco, supra* at p. 311.)

Cross-Defendants filed a motion demanding that the shareholder plaintiffs post a $50,000 bond to represent Storix based on the ground that "there is no reasonable probability the prosecution of the cause of action alleged in the complaint will benefit the corporation or its shareholders. Cal. Corp. Code § 800(c)." (1CT56.) Pursuant to Section 800(e), Johnson voluntarily posted the bond, thus dismissing the motion and allowing the shareholder claims to proceed. (1CT171.)

Prior to the jury trial, the court granted Cross-Defendants' motion to remove Johnson's claims affecting all shareholders from the jury. (10CT2804; 8CT2010). Then, after the jury trial, the court granted Cross-Defendants' motion to dismiss Johnson as shareholder plaintiff on grounds he could not fairly and adequately represent Storix.[9], but allowed the trial to proceed with Robin Sassi as the only remaining plaintiff. (19CT3002.) The court thereafter found in favor of Cross-Defendants on all "Sassi's claims" (12CT3359) without addressing Johnson's claims removed from the jury.

After trial, Johnson filed a motion to release his shareholder plaintiff's bond to which he was the only principal. (14CT3820.) The court denied Johnson's motion (14CT3820) and released the bond to the Cross-Defendants instead. (14CT3914.) Johnson makes no further effort to represent Storix's interests. But, as the sole aggrieved party, appeals the orders denying the release of his shareholder plaintiff's bond (14CT3820) and awarding it to Cross-Defendants (14CT3914) on the grounds set forth below.

A. The Purpose of Johnson's Bond Was Abandoned

"[T]he corporation or the defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish a bond as hereinafter provided." (Corp. Code section 800, subd. (c) [underline added].) Section 800 provides that "the stockholder who would act as in the nature of a guardian ad litem must, as a condition of prosecuting the action on behalf of the corporation, either show a reasonable probability that the

[9] The court ignored a prior court's finding that, because Cross-Defendants were in majority control of Storix, they "could not be expected to fairly evaluate the claims of the shareholder." (3CT793.) There is no authority providing *defendants* the right to have a derivative plaintiff dismissed because he doesn't represent *their* shareholder interests, especially when no other shareholders support their position.

suit will be successful or secure the payment of the defendants' expenses should they prevail." (*Donner Management Co. v. Schaffer* (2006) 48 Cal. Rptr. 3d 534, 537 (Donner) (citing *Beyerbach v. Juno Oil Co.* (1954) 42 Cal.2d 11, 23-24) [underlines added].)

The Court decided Johnson had no standing to *bring* claims on Storix's behalf based on the jury's verdict related to the Customer Email. The email occurred before the derivative suit was filed, thus Johnson had no standing as a derivative plaintiff even before he voluntarily furnished the bond. Johnson testified as a witness at trial, but not as a plaintiff "prosecuting the action" on Storix's behalf. (See *Donner, supra*, at 537.) Although the court allowed the bench trial to proceed on "Sassi's claims", the bond cannot be enforced against Sassi because Johnson is the only bond principal. Storix or Cross-Defendants could have objected at any time to the bond having an insufficient principal, but they did not. (Code. Civ. Proc. section 995.920(c).)

The court erred in denying Johnson's motion to release the bond because the purpose of the bond was abandoned before any liability had been incurred (Code. Civ. Proc. section 995.430(b)) and because the bond was no longer in force and effect. (Code. Civ. Proc. section 995.360(b).)

B. Cross-Defendants Were Not the Prevailing Party in the Derivative Suit

"[S]ection 1032 provides for recovery of costs as a matter of right if the party fits one of the four prevailing party definitions listed in section 1032, subdivision (a)(4). […] If a party satisfies one of these four definitions of a prevailing party, the trial court lacks discretion to deny prevailing party status to that party. [Citation.]" (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 741.) "'Prevailing party' includes the party with a net monetary recovery, […]. If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as

determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not…" (Code Civ. Proc. section 1032, sub. (a)(4).)

The Derivative Suit expressly sought to remove Cross-Defendant Smiljkovich, Storix's CFO, as an "unjustifiable wastes of corporate resources" because his "unnecessary salary expense reduces profits to Storix shareholders." (3CT615.) The complaint also sought to "recover money improperly taken from Storix for Cross-Defendants' personal benefit" (3CT639) and alleged that "Smiljkovich willingly participates in their corporate wronging and assists in allowing personal expenses to be wrongfully paid by Storix." (3CT615.)

The court noted that Cross-Defendant Smiljkovich, Storix's CFO, "without any oversight, took over $2000 for his own use" from Storix, was terminated after he was caught, and paid Storix back the stolen money. (12CT3358.) Cross-Defendant Huffman, Storix's CEO, testified that the first learned of the theft when Johnson confronted Smiljkovich during his deposition in this case. (9RTR970.) Smiljkovich testified that he (and all Cross-Defendants) signed an undertaking to repay Storix the legal expenses for his defense if he were found liable. (14RT2136.)

The court erred in deeming Cross-Defendants the prevailing parties (14CT3914) because the Derivative Suit achieved two specific objectives – a "net monetary recovery" of $2,000 and other relief in excess of $150,000 to date by having Smiljkovich removed from the company.

C. Cross-Defendants Incurred No Expenses in the Derivative Suit

Cross-Defendants brought a motion demanding Johnson's bond be released to *them* to "secure[] a mere fraction of the attorneys' fees incurred by the Director/Management Defendants in defense of Plaintiffs' derivative claims." (14CT3829.) Cross-Defendants incurred no expense because they

invoked Corp. Code sections 317(c) and (f) to impose all expense and liability for their defense on Storix. (6RT668; 16RT2664; 14RT2136.) Cross-Defendants were thereby absolved of liability "*unless* it shall be determined ultimately that the agent is not entitled to be indemnified." (Corp. Code section 317, subd. (f).)

The court denied Johnson's motion to release his bond because "A defendant who prevails in the derivative suit, in which the plaintiff posted a security, is entitled to recourse for 'reasonable expenses, including attorney's fees' arising from the action. (Corps. Code § 800(d).)" (14CT3820.) The court actually conflated two statutes:

a) The court may order a bond "for reasonable expenses, including attorneys' fees, which may be incurred … in connection with the action, including expenses for which the corporation may become liable pursuant to Section 317." (Corp. Code section 800, subd. (d).); and
b) "To the extent that an agent of a corporation has been successful on the merits [], the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith." (Corp. Code section 317, subd. (d).)

There is no authority providing a Section 800 bond to a defendant *after* he invoked Section 317 since "the agent" thereafter incurs no "actual" expenses. Cross-Defendants actually *profited* from having Storix pay both Storix's counsel and their own drive up the cost of the litigation.

Lastly, "The motion [to release of the bond] shall not be made until after entry of the final judgment … or, if an appeal is taken, until the appeal is finally determined." (Code Civ. Proc. section 996.440, subd. (b).)

D. Storix is Not Entitled to Costs or Fees After Unlawfully Defending its Own Claims

In opposition to Johnson's motion to strike Storix's cost memorandum (*RJN*, Ex. 1 at p. 2), Storix argued that "Storix is entitled to recover its costs as a prevailing defendant against Johnson on the consolidated derivative action, even as a nominal defendant." (14CT3785.) There is no authority allowing a *nominal defendant* corporation in a derivative suit to defend against its own claims, especially when the corporation is under the exclusive control of the *defendants*.

> "It held the corporation 'is a nominal party only' with no 'right to here step in and, by answer, attempt to defeat what is practically its own suit and causes of action. Nor have the two individual defendants, in control thereof, any right to use the corporation for any such purpose or to impose on the corporation the burden of fighting their battle.' [Citation.] 'There is no occasion for the corporation to intermeddle in the controversy' as 'the corporation is required to take and maintain a wholly neutral position, taking sides neither with the complaining stockholder nor with the defending director'."

(*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1008 [internal citations omitted].) Whether they identify as "Storix" or "Director/Management Defendants", neither Cross-Defendants nor corporate counsel should be rewarded for their unlawful conduct in interfering and obstructing Storix's claims in the Derivative Suit.

For all the reasons set forth above, this Court should reverse the order granting Johnson's shareholder derivative plaintiff's bond to Cross-Defendants, and remand with instructions that it be released back to Johnson and that Cross-Defendants pay Johnson costs and interest in obtaining the bond they demanded.

IV. JUDGE ENRIGHT DEMONSTRATED CLEAR BIAS IN ORDERING JOHNSON TO PAY ALL COSTS OF ALL PARTIES IN ALL CONSOLIDATED ACTIONS

Standard of Review: Mixed. Pure questions of law are reviewed de novo. (*People v. Cromer, supra*, at p. 25.) Questions of statutory construction are reviewed *de novo*. (*Tobacco, supra* at p. 311.) The normal standard of review for a cost or fee award after trial is *abuse of discretion*. However, the Court reviews the legal basis for such awards independently as a matter of law. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) "[A] trial court is deemed to have abused its discretion if its decision was arbitrary, capricious, or patently absurd and resulted in a manifest miscarriage of justice." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1081.)

Until now, Johnson avoided an explicit claim of judicial bias, but such an assertion can no longer be avoided since Judge Enright abandoned all pretenses a year after trial. On August 2, ten days before Johnson filed this brief, Judge Enright ignored every statute and authority to the contrary when ordering Johnson (and only Johnson) to pay all costs of all parties in all consolidated actions *in addition* to his $50,000 shareholder plaintiff's bond. Judge Enright again ignored all laws designed to protect minority shareholders from an abusive majority and issued another absurd ruling that effectively condoned all the unlawful conduct of Cross-Defendants and Storix's corporate attorneys.

Johnson futilely argued again that Storix cannot claim any costs because its counsel was still acting under the exclusive direction and for the sole benefit of the Cross-Defendants and that it was a conflict of interest for

corporate counsel to defend against the company's claims in the Derivative Suit. (*RJN*, Ex. 1 at p. 6.) For the first time, the court acknowledged the argument, but ambiguously found, "*Johnson's argument that Storix and the individual defendants are not separate and distinct parties is not persuasive*." (*RJN*, Ex. 2 at p. 14.)

As set forth in all the preceding sections, this Court should reverse the judgments underlying Storix's and Cross-Defendants' cost memorandums, rendering the order granting their costs moot. The Court should nevertheless review Judge Enright's final order granting costs against Johnson since it encapsulates the inescapable bias Johnson endured at all stages of the litigation and the manifest injustice that cannot be ignored or excused.

A. All Costs of the Consolidated Actions Are Limited to Johnson's Shareholder Plaintiff's Bond

1. All expenses in the Derivative Suit are limited to Johnson's bond.

The court found "no merit in Johnson's argument that Storix is prohibited from recovering court costs under Code of Civil Procedure section 1032(b) because of the $50,000 bond posted." (*RJN*, Ex. 2 at p. 14.) The court is wrong. Costs under Section 1032 only are allowable to a prevailing party "[e]xcept as otherwise expressly provided by statute". Corp. Code section 800 is a bond or security statute, and "allows a prevailing defendant to recover its attorney fees and costs out of the bond, if one is posted." *West Hills Farms, Inc. v. RCO AG Credit, Inc.* (2009) 170 Cal. App. 4th 710, 713. The Supreme Court emphasized that "[s]ince the liability and remedy are created by statute, *there can be no recovery except by recourse to the security as provided by the statute.*" (*Id.* at 718 (citing *Freeman v. Goldberg* (1961) 55 Cal.2d 622, 626) [italics in original].) "[S]ection 800 means what it says and is a *bond or security* statute.

[citation] And contrary to defendant's contentions, the statute does not provide for recovery of attorney fees and costs independent of the bond." (*Id.* at 719 [italics in original].)

2. Neither Storix nor Cross-Defendants were prevailing parties in the Derivative Suit.

The court granted Cross-Defendants' motion to dismiss Johnson as a shareholder plaintiff before trial, but continued to prosecute "Sassi's claims." (See §III:A.) The court nevertheless found, "The individual defendants also prevailed against Johnson on the derivative suit because Johnson was dismissed from the action." (*RJN*, Ex. 2 at p. 15 [underlines added].) There is no authority for deeming a defendant a prevailing party simply because a single plaintiff (rather than the lawsuit) was dismissed. The court nevertheless ordered *only* Johnson to pay all costs for all parties. (*Id.*) Cross-Defendants never demanded costs or fees from Sassi – the only *actual* derivative plaintiff at trial.

The court awarded all costs to Storix in the Janstor Suit because, "So long as the party obtains a 'net monetary recovery,' a prevailing party can be the party who receives only partial recovery by succeeding on only one of several causes of action. (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1199.)" (*RJN*, Ex. 2 at p. 14.) The court chose not to apply the same standard when awarding all costs in the Derivative Suit to Cross-Defendants even after obtaining a net monetary recovery against them. (See §III:B.)

The court made no reference to Storix's argument that it was a prevailing "nominal defendant" or Johnson's argument that a corporation is prohibited from has no right to defend its own derivative claims, especially since Storix was not "a person *against whom* a [derivative suit] is filed. (C.C.P § 1032(a)(2))". (*RJN*, Ex. 1 at p. 6; *See also* §III:D). To acknowledge

the arguments would shed light on years of unlawful conduct and conflict-of-interest of Storix's attorneys.

3. All costs in the consolidated actions were in connection with the Derivative Suit.

The statutes limit all expenses "in connection with the action" to the $50,000 bond. (Corp. Code sections 800(d) and 317(d).) Neither Storix nor Cross-Defendants have any right to recover any expenses beyond the bond-limit because all underlying issues, every motion, and all discovery in the consolidated cases were "in connection" with the Derivative Suit.

The Derivative Suit alleged, among other things, that Cross-Defendants' abuse of control, wasteful spending and mismanagement resulting in Storix's damages due to their depriving Johnson a position in the company, failing to improve the company's software (now) for over 5 ½ years, frivolous legal actions taken to prevent Johnson's and Sassi's access to any company records, including filing the Janstor Suit without board approval. (3CT646-650.) Johnson's cross-complaint involved the many of the same issues even though he demanded relief for his personal damages beyond that of Storix. Even Storix's only successful ($3,739) claim against Johnson was based on an email expressing Johnson's reasons for bringing the Derivative Suit.

All costs in all consolidated actions are either directly related to the Derivative Suit or rely on the same underlying facts and issues. Cross-Defendants should not be able to circumvent the purpose of the bond they demanded in order to impose more financial burden on Johnson – a burden they've never shared.

B. Cross-Defendants Are Entitled to No Costs Because they Incurred No Costs

Johnson again argued that Cross-Defendants incurred no attorney fees or costs in any of the consolidated actions. (*RJN*, Ex. 1 at p. 7; *see*

§III:C). The court found that "*Johnson fails to support this argument that the individual defendants did not incur costs.*" (*RJN*, Ex. 2 at p. 15.) To the contrary, Cross-Defendants admitted at trial they incurred no expenses because they self-approved having Storix incur all expenses on their behalf. (9RT1007; 10RT1181.)

C. Storix Is Entitled to No Costs in the Janstor Suit

Johnson argued Storix's damages were insignificant compared to those reasonably sought. (*RJN*, Ex. 1 at p. 4; see *Biren v. Equality Emergency Medical Group, Inc.* (2002) 125 Cal. Rptr. 2d 325, 334; Chavez v. City of Los Angeles (2010) Cal. 4th 970, 984.) Johnson further referenced Code Civ. Proc. (C.C.P.) sections 1032 and 1033 in arguing that:

a) The judgment was below the unlimited jurisdiction threshold. (*RJN*, Ex. 1 at p. 5; C.C.P. §1033(a).)

b) Storix should have brought its claim against Johnson in small claims court rather than an unlimited action. (*RJN*, Ex. 1 at p. 5; C.C.P. §1033(b)(1).)

c) Storix/Defendants brought the lawsuit with no notice or any opportunity to avoid litigation. (*RJN*, Ex. 1 at p. 5; C.C.P. §1033(b)(2).)

The court's only reference to Johnson's arguments was that "Storix reasonably and in good faith brought an unlimited civil action against Johnson believing that the ultimate recovery would exceed the limited jurisdictional limit." (*RJN*, Ex. 2 at p. 14-16.) Whether Storix *believed* it would obtain recovery in excess of the unlimited jurisdictional limit is irrelevant. Section 1033(a) doesn't refer to a plaintiff's intent, but an actual judgment "that could have been rendered in a limited civil case." Storix obtained a mere 0.3% of damages it sought and none of the eleven (11) demands for injunctive relief. Johnson calculated that, at most, Storix should be awarded no more than $26.80 in relative costs. (*RJN*, Ex. 1 at p. 9.)

"When the party could not have brought the action in small claims court, … costs shall only be awarded to the plaintiff if the court is satisfied that prior to the commencement of the action, the plaintiff informed the defendant in writing of the intended legal action …" (C.C.P. §1033(b)(2).) Section 1033(b)(2) is not discretionary. Cross-Defendants admit they chose not to inform Johnson of the claim before filing the lawsuit against him. (9RT1033-1034; 10RT1180.) If Storix could *not* have brought the lawsuit in a limited case, the court must deny Storix costs for having prevented any resolution of the claim out of court. If Storix could have brought the judgment as a small claim, then court abused its discretion awarding costs against Johnson, especially given the extraordinary amount.

This Court should reverse the cost award against Johnson and order Cross-Defendants to pay all Johnson's and Sassi's costs as prevailing derivative plaintiffs, including the return of Johnson's $50,000 bond and all related fees and interest accrued thereon. (*See* C.C.P. §995.250(a).)

CONCLUSION

After four years, Storix obtained a mere $3,739.14 judgment against Johnson. Yet, on that basis alone, Johnson lost his entire investment in his defense against Storix's malicious lawsuit, the shareholder claims, his cross-claims, the company he founded, his home and income for five years. Still not enough, Judge Enright ignored all statutes and further punished Johnson with over $160,000 in costs and fees.

The extraordinary abuse by majority shareholders and directors of a close corporation and company counsel demonstrated throughout this litigation is unprecedented. This Court should finally recognize that Storix and its counsel were (and still are) under the exclusive control of Cross-Defendants and the absurdity of Johnson being deemed the only person adverse to Storix's interests. The lower courts' failure to acknowledge

undisputed facts and circumstances caused extraordinary prejudice to Johnson, denied Johnson due process, misled the jury, and imposed unfair restrictions and financial burden on Johnson alone.

All appealable judgments and orders described above should be reversed, the direct lawsuit against Johnson dismissed, and Johnson should be granted a new trial granted on all his cross-claims. In order to preserve the appearance of fairness, any further proceedings should be remanded to a different superior court judge.

Dated: August 12, 2019

Respectfully submitted,

By: s/Anthony Johnson

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed **APPELLANT'S OPENING BRIEF** is produced using a 14-point Roman type font, including footnotes, and contains 15,701 words, which is less than the total of 16,000 words approved by the Appellate Court's grant of a 2,000-word extension of the 14,000 words allowed by the rules of court. I relied on the word count of Microsoft Word used to prepare this brief.

Dated: August 12, 2019

Respectfully submitted,

By: s/ Anthony Johnson
Pro Se Appellant

DECLARATION OF SERVICE

I, Anthony Johnson, declare that I am over the age of 18 and self-represented in the foregoing action. I am familiar with the business practice for electronic filing and service through the TrueFiling system, pursuant to which practice I served the foregoing **APPELLANT'S OPENING BRIEF** by electronic filing and by sending to the e-mail addresses of counsel listed below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 12, 2019 at Las Vegas, Nevada.

s/ Anthony Johnson