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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO, CENTRAL DIVISION
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12 ANTHONY JOHNSON and ROBIN SASSI,
derivatively on behalf of STORIX, INC., a
13 California corporation,

14 Plaintiffs,

15 vs.

16 DAVID HUFFMAN, an individual; RICHARD
17 TURNER, an individual; MANUEL
ALTAMIRANO, an individual; DAVID
18 KINNEY, an individual; DAVID
SMILJKOVICH, an individual; and DOES 1-20,

19 Defendants,
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21 STORIX, INC., a California corporation;

22 Nominal Defendant.
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Lead Case No.: 37-2015-00034545-CU-BT-CTL

Consolidated with Case No.: 37-2016-00030822-
CU-MC-CTL and Case No.: 37-2015-00028262-
CU-BT-CTL

**DEFENDANT ANTHONY JOHNSON'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT OR IN THE
ALTERNATIVE, MOTION FOR
SUMMARY ADJUDICATION**

Date: June 9, 2017
Time: 9:00 am
Dept: C-73
Judge: Joel R. Wohlfeil

Complaint Filed: October 13, 2016
Trial Date: July 13, 2017

1 ANTHONY JOHNSON (“Johnson” or “Defendant”) hereby respectfully submits this
2 Memorandum of Points and Authorities in support of his Motion for Summary Judgment or in the
3 alternative, Motion for Summary Adjudication.

4 I. INTRODUCTION

5 Plaintiff Storix is under the control of a majority of directors (themselves elected as majority
6 shareholders) who are now defendants in the consolidated action based on their misconduct.¹
7 Plaintiff’s Complaint against Johnson alleges breach of fiduciary duty, and aiding and abetting
8 breach of fiduciary duty. However, these directors have admitted that they failed to obtain approval
9 to file the Janstor lawsuit against Johnson. Accordingly, Storix lacks standing to bring this suit.

10 Turning to what is alleged, Plaintiff has not, and cannot, provide any facts or evidence to
11 show that any of the allegations of Johnson’s breach of fiduciary duty, and its aiding and abetting
12 allegation, caused Plaintiff any harm. As such, Plaintiff’s causes of action against Johnson must
13 fail. As such, Johnson respectfully requests that the Court grant this motion.

14 II. FACTUAL BACKGROUND

15 Storix is a small corporation in the business of sales and support of a software product called
16 “System Backup Administrator” (“SBAdmin”), a product which allows for the backup and
17 restoration of computer systems and data. (Storix Second Amended Complaint “SAC” ¶ 2.)²

18 Defendant and Cross-Claimant, Anthony Johnson (“Johnson”), is the author of SBAdmin,
19 Storix’s founder, and was the sole shareholder and director until September 2011. (Separate
20 Statement of Undisputed Facts (“SS”) ¶ 1; SAC ¶¶ 9-10.) Johnson was a citizen of the State of
21 California and resident of the County of San Diego, California until July 2015. Since then, Johnson
22 has been a citizen of the State of Florida and resident of the County of Broward, Florida.

23 (Declaration of Anthony Johnson ISO Defendant’s Motion for Summary Judgment, or in the
24 alternative, Summary Adjudication of Issues (“Johnson Decl.”) ¶ 2.) Johnson is, and at all times

26 ¹ The Complaint to which Johnson refers was originally affixed with Case No. 37-2015-00028262-CU-BT-CTL. To
27 lessen confusion with the multiple cases that were consolidated into one, Johnson will refer to the instant Summary
28 Adjudication Motion as against the first cause of action in former Case No. 37-2015-00028262-CU-BT-CTL (the
“Janstor lawsuit”).

² This Second Amended Complaint refers to the “Janstor Lawsuit.”

1 relevant to this motion has been, a duly elected Director. (SS ¶ 4; Johnson Decl. ¶ 3.)

2 Beginning in September 2011, Storix has acted through the “majority” of Directors on the
3 Board, consisting at one time or another of David Huffman (“Huffman”), Richard Turner
4 (“Turner”), Manuel Altamirano (“Altamirano”), David Kinney (“Kinney”), and David Smiljkovich
5 (“Smiljkovich”) (hereafter collectively referred to as “Cross-Defendants”). (Johnson Decl. ¶ 31).

6 In September 2011, Johnson gifted 60% of the stock in the company to Huffman, Turner,
7 Altamirano and Kinney, who were long-term employees, due to what was expected to be a terminal
8 illness. (SS ¶ 2; Johnson Decl. ¶ 4.) This resulted in Johnson’s ownership interest in Storix being
9 reduced to 40%. (SS ¶ 3; SAC ¶ 10) Johnson then reduced what he was paid to less than 1/3 his
10 former pay, and offered to assist new management periodically with software changes when needed.
11 (Johnson Decl. ¶ 4.)

12 In February 2013, Johnson announced his unexpected recovery and returned to help with the
13 software in October 2013. (Johnson Decl. ¶ 5.) Johnson worked tirelessly for 9 months to update
14 the SBAdmin software, which had been neglected during his medical leave and in dire need of
15 security enhancements. (Johnson Decl. ¶ 5.) At that time, Storix’s profits had already declined
16 over 30% from the time of Johnson’s departure. (Johnson Decl. ¶ 32.) Although Johnson
17 continued to make less than half of what he should have made, Johnson did not ask for additional
18 money because he believed he would be compensated by increased profits from his remaining 40%
19 ownership once his improvements to the software were implemented. (Johnson Decl. ¶ 6.)

20 In May 2014, Johnson resigned after he could no longer tolerate the hostile treatment he
21 received from the new management he left in charge. (SS ¶ 5; Johnson Decl. ¶ 7.)

22 While Johnson then informed the Board in January 2015 that he may start a competing
23 business if they were unwilling to work with him, (Johnson Decl. ¶ 18, Ex. 12.), importantly,
24 Johnson **never started a competing business**. (Johnson Decl. ¶ 33.) While Johnson had formed a
25 new company, Janstor Technology (“Janstor”) in February 2015, (SS ¶ 8; Johnson Decl. ¶ 19, Ex.
26 13), Janstor was never funded, and never operated as a business. (Johnson Decl. ¶ 19). Janstor is a
27 dissolved Corporation. (SS ¶ 9.) Plaintiff even alleges Johnson performed all the alleged breaches
28 in San Diego, even during September-October 2015. (SAC ¶¶ 3, 7-8, 17-18). Yet, Plaintiff knew

1 Johnson lived in Florida since early July 2015, as he was served with the original complaint at his
2 Florida home on August 20, 2015. (Johnson Decl. ¶13, Ex. 7.) This too demonstrates the falsity of
3 the allegations.

4 Because Johnson never actually operated a competing business, or competed in anyway with
5 Storix, Plaintiff has not, and cannot, allege Johnson caused it any harm. In fact, the fourth quarter
6 of 2015, showed increased sales of new product and customer maintenance contracts over all prior
7 quarters in 2015. (Johnson Decl. ¶ 17, Ex. 11.)

8 **III. STANDARD FOR SUMMARY JUDGMENT**

9 Summary judgment or, in the alternative, summary adjudication should be granted if there is
10 no merit to one or more causes of action or claims for damages. (Code Civ. Proc. § 437c.)
11 Summary judgment should be granted where the plaintiff cannot provide evidence to establish a
12 cause of action, or where the defendant can provide a complete defense. (*Id.* at § 437c(o)(2);
13 *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1252 (“Summary judgment must be granted
14 when the moving party's evidence is sufficient to sustain a judgment in its favor and the opposing
15 party does not present evidence raising a triable issue of material fact.”)) Further, a defendant
16 moving for summary judgment is not required to “conclusively negate an element of the plaintiff’s
17 cause of action.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 855.) Rather, “all that
18 the defendant need do is to show that the plaintiff cannot establish at least one element of the cause
19 of action - for example, that the plaintiff cannot prove element X.” (*Id.* at 837.) Once defendant
20 satisfies that burden, the party opposing the motion is “...subjected to a burden of production of his
21 own to make a prima facie showing of the existence of a genuine issue of material fact.” (*Id.* at
22 845; Cal. Civ. Proc. Code § 437c(p)(2)

23 **IV. PLAINTIFF’S CLAIM AGAINST JOHNSON FOR BREACH OF FIDUCIARY** 24 **DUTY FAILS AS A MATTER OF LAW**

25 This Complaint was never authorized by Storix, and therefore Storix is not a proper
26 Plaintiff. Thus, Storix has no standing to bring this suit.

27 Plaintiff’s cause of action for breach of fiduciary duty also fails as a matter of law. The
28 elements of breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach,

1 and (3) damage proximately caused by that breach. *Daly v. Yessne* (2005) 131 Cal.App.4th 52, 64.
2 As noted above, because Plaintiff cannot show it was damaged in any way by any alleged breach by
3 Johnson, its claim fails in its entirety, as does its associated claim for aiding and abetting breach of
4 fiduciary duty.³

5 **A. Plaintiff Caused the Suit to Be Filed Without Board Approval or Authorization**

6 “The authority to manage the business and affairs of a corporation is vested in its board of
7 directors, not in its shareholders. (Corp. Code § 300, subd. (a)) This includes the authority to
8 commence, defend, and control actions on behalf of the corporation.” (*Grosset v. Wenaas* (2008)
9 42 Cal.4th 1100, 1108; *see also Bader v. Anderson* (2009) 179 Cal. App. 4th 775, 787.)
10 Additionally, “...the basic principle of corporate governance is that the decisions of a corporation—
11 including the decision to initiate litigation—should be made by the board of directors or the
12 majority of shareholders.” (*Daily Income Fund, Inc. v. Fox*, (1984) 464 U.S. 523.)

13 By Storix does not deny that the board of directors never approved filing this lawsuit against
14 Johnson. It is an undisputed fact that neither the Board nor the shareholders approved the suit. (SS
15 ¶ 11; Johnson Decl. ¶ 25, Ex. 19.) Plaintiff admits that the Board of Directors did not approve this
16 lawsuit, but [Cross-Defendants] “*could have obtained it.*” (Johnson Decl. ¶24, Ex. 18, *Cross-*
17 *Defendants’ Memo of P&As ISO Special Motion to Strike*, p. 14:21-24). Further, at the time this
18 lawsuit was filed, shareholder (since 2013)⁴ and board member (since 2015)⁵ Robin Sassi
19 (Declaration of Robin Sassi (“Sassi Decl.”) ¶¶ 2-3), who was not a party to any action (Sassi Decl. ¶
20 4), had not been informed and was unaware of this lawsuit or any allegations made by Storix
21 against Johnson. (Sassi Decl. ¶ 5.) Sassi even requested, and was provided, the minutes of every
22 board and shareholder meeting since Storix’ inception, and there was no mention of any litigation.
23 (Sassi Decl. ¶ 6.) This was further confirmed by an email exchange between Sassi and cross-

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27 ³ As a reminder, the Court on September 8, 2016, struck all allegations pertaining to punitive damages (RJN ¶ 3, *Order*
Overruling Defendant’s Demurrer & Granting in Part Defendant’s Motion to Strike, Ex. 3, dated 8/26/16).

28 ⁴ SS ¶ 6.

⁵ SS ¶ 7.

1 defendant David Smiljkovich, who admitted that no board meetings were taking place without her
2 knowledge. (Sassi Decl. ¶ 7, Ex. 1.)

3 Although it is unknown *who* caused this lawsuit to be filed against Johnson, it is a clear and
4 undisputed fact that it was not approved by the Storix board. As such, the action against Johnson
5 fails as a matter of law because this was a suit brought by others under the guise of Storix, Inc. so as
6 to impose the cost of their personal grudge against Johnson on the company they claim to be
7 protecting.

8 **B. The Board Does Not Have Standing to Bring this Lawsuit**

9 Even if the Board had properly approved of a lawsuit against Johnson, Storix has no
10 standing to bring this lawsuit as a *direct action* because Storix is not a proper plaintiff. Except as
11 otherwise provided by statute, “every action must be prosecuted in the name of the real party in
12 interest . . .” (CCP § 367; *see Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995.)
13 Johnson, as a director of Storix, has a fiduciary duty to the company and its shareholders, not other
14 directors. Yet, Storix, the Plaintiff never approved of the filing of this lawsuit.

15 As Storix, the named plaintiff, never approved this lawsuit, it has no standing here.

16 **C. No Harm Was Caused by any of Johnson’s Alleged Breaches of Fiduciary Duty**

17 An essential element to showing breach of fiduciary duty by a director is harm to the
18 company. (*Daly*, 131 Cal. App. 4th at 64.) Storix has demonstrated no such harm, because Johnson
19 did not cause any harm to the company. Accordingly, this motion must be granted.

20 **1. Storix’s Allegations of a Breach of Fiduciary Duty**

21 Storix has alleged that Johnson breached his fiduciary duty to Storix by: forming a new
22 company (Janstor), registering the “janstor.com” domain name, use of Janstor to reserve port
23 numbers, emailing customers, threats to employees, creating a business to compete with Storix, and
24 creating a competing product. (SAC ¶¶ 25, 27). However, none of these actions caused Storix
25 harm.

26 **2. Neither Johnson nor Janstor Ever Competed With Storix**

27 It is undisputed that Johnson never actually competed with Storix. (Johnson Decl. ¶ 33)
28 Thus, forming the company, registering a domain name, and reserving Internet port numbers, and

1 creating a business cannot be the basis of any harm, as none of those actions actually resulted in any
2 competition to Storix. Thus, those allegations must all fail. And Johnson undisputedly did not
3 create a competing product, as he never actually competed with Storix, so again, no harm befell
4 Storix.

5 While Storix may allege that Johnson intended to compete, the act of competing against a
6 company and the intent of competing are two entirely different things. Yet, intended to do
7 something is not doing that thing. The fact that no such actual competition took place is
8 undisputed, and therefore Storix cannot show that any competition cause harm to Storix.

9 Plaintiff bases its cause of action not on Johnson actually competing with Storix (as he never
10 did), but instead of Johnson *intending* to compete. In *Bankcroft-Whitney*, the court noted that the
11 employee was disloyal not by failing to disclose his intentions to work for the competitor, or by
12 making preparations to compete, but rather because the employee's actions resulted in the employer
13 losing a number of its employees. (*Bankcroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 347.)

14 Here, it is undisputed that Johnson never actually competed with Plaintiff. As such, Plaintiff
15 was not harmed, because Johnson did not compete against Storix.

16 **3. The Customer Email Caused No Harm To Storix**

17 Storix also alleges Johnson emailed customers and allegedly threatening customers. That
18 allegation is based on a single email, from which Storix quotes from two partial sentences (SAC
19 ¶21), which Plaintiff alleges was sent to “past, current and possible future customers” (SAC ¶ 25).
20 Storix alleges that Johnson's email stated that recipients where in “possession of unauthorized and
21 infringing copies of [SBAdmin]” and demanded that customers “cease any further payment to
22 Storix in relation to this software and refrain from downloading any further copies.” (*Id.*)

23 **However, it is undisputed that this email caused no harm to Storix.** That is why Plaintiff has
24 not alleged any such harm. First, there is not even evidence as to a list of people who actually
25 received this email. Second, of the people that did, there is no evidence it had any effect on any of
26 them. Finally, most importantly, it has been judicially determined that this email ***caused Storix no***
27 ***harm.***

1 Storix has sought a restraining order and/or injunctive relief multiple times based on this
2 same email, and none have succeeded. Three times, Judge Huff, in the related Copyright Suit,
3 determined that Storix was not harmed by Johnson's email. Weeks after the email was sent, Judge
4 Huff noted, "none of [Storix'] customers had, to the best of [Storix'] knowledge, made any
5 decisions adverse to [Storix] as a result of [Johnson's] October 6, 2015 email." (SS ¶ 10; RJN ¶ 1,
6 Ex.1, *Order Denying Defendant's Motion for a Preliminary Injunction*, at 2: 5-8, dated 10/30/15),
7 and "[Storix] is unable to cite harm that has befallen it as a result of Plaintiff's email to customers."
8 (*Id.* at 2: 27-29.) Over a year later, Judge Huff reiterated that "...almost a year has elapsed since
9 Johnson wrote the email, ... Thus, based on the present record, Storix has not demonstrated a
10 likelihood of irreparable harm." (SS ¶ 10; RJN ¶ 2, Ex. 2, *Order Denying Defendant's Motion for*
11 *Further Relief*, at 6:26-28; 7:1-2.)

12 That it is undisputed that Storix was not harmed by any acts or intentions of Johnson are
13 further supported by Cross-Defendant David Smiljkovich, Storix' CFO: "As Storix's CFO, I am
14 familiar with its financial condition. Storix's annual revenue for 2014 and 2015 was in excess of \$2
15 million for each year. Although final numbers are not yet known, it appears that the company's
16 revenue for 2016 is on track to be similar to those years and if trends continue, Storix will be
17 profitable in 2016." (Johnson Decl. ¶ 30, Ex. 24, "*Declaration of Smiljkovich ISO Storix Inc.'s*
18 *Opposition to Plaintiff's Motion to Appoint a Limited Receiver*" ¶ 3, dated 01/23/17.) To further
19 demonstrate there was no damage caused by Johnson, Storix sales and maintenance were consistent
20 throughout each quarter of 2015, including the three months following Johnson's email. (Johnson
21 Decl. ¶17, Ex.11.)

22 Thus, not only has Plaintiff failed to offer evidence of harm, a federal Judge has found that
23 these actions caused Plaintiff no harm.

24 **4. Johnson's Possession of the Software is Not Unlawful and Caused No Harm**

25 While not a basis of any cause of action, Plaintiff contends that Johnson formed a business
26 in February 2015 (SAC ¶14), nine (9) months after he allegedly "stole a copy of the [software]."
27 (SAC ¶¶ 20, 27).

1 Plaintiff reference to a vague and irrelevant act fails to support any claim that Johnson
2 “unlawfully competed” with Storix. Plaintiff claims that “Johnson stole the source code to an in-
3 development version of SBAdmin when he resigned, and used it as a basis to create a competing
4 product.” (SAC ¶¶ 20, 27.) Plaintiff omits that Johnson simply took home a copy of the software
5 he created, and that he has always had a copy in his possession. Plaintiff has not alleged any
6 misappropriation, conversion, or illegal disclosure, provided no facts to support their contentions
7 that Johnson “stole,” intended to use the software to compete, that Storix was deprived access to the
8 software, nor that Johnson’s possession is even unlawful.⁶ (SAC ¶ 27.)

9 The allegation of “stealing” of the software again fails to shown any harm to Storix.
10 Clearly, Johnson was not a director in 2014, yet Plaintiff claims he breached his fiduciary duty as a
11 director in May, 2014. Plaintiff says the software code was only available to employees (SAC ¶
12 20), but also that Johnson owed a fiduciary duty as a “former employee.” (SAC ¶ 24.) Johnson
13 never had an employment contract with the company he founded, or a non-disclosure agreement or
14 non-compete clause regarding the software he authored. Nevertheless, by Plaintiff’s own
15 statements, Johnson could not have stolen the software because he was still on Storix’ payroll
16 through May 31, 2014. (Johnson Decl. ¶ 20, Ex. 14.)

17 Furthermore, Plaintiff was informed that Johnson intended to retain his copy of the software
18 until after the copyright ownership decision was appealed. (Johnson Decl ¶ 23, Ex. 17.) Plaintiff
19 cannot claim Johnson stole the software because the ownership of the copyright to the software is
20 still pending appeal. (RJN ¶ 5 Ex. 5, 9th Circuit Assignment of Appeal, Docket No. 16-555439.)

21 **5. Plaintiff Cannot Support Its Claim that Johnson Threatened an Employee**

22 Finally, Plaintiff claims that Johnson “directed threats to non-shareholder employees of
23 Storix” (SAC ¶¶ 18,25,28), but doesn’t say what threat was made. Again Plaintiff quotes only a
24 partial sentence from a lengthy email saying “you and the other innocent employees are about to
25 lose your jobs” (SAC ¶ 18), then builds a false narrative around those few words.

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28 ⁶ Johnson was a director since February 2015 (SAC ¶¶ 13-14, 21), entitling him to a copy of any corporate records according to Cal. Corp Code § 1602, yet Plaintiff has never stated why Johnson’s possession is “unlawful.”

1 Again, Plaintiff provides no facts to support their contention that this was a threat to the
2 employee. Plaintiff does not state that the employee actually felt threatened, that the employee left
3 the company (he has not), that the company was harmed, or what harm this caused. That is because
4 the email caused no such harm. As Storix has failed to put for the any evidence that any of the
5 alleged breaches of fiduciary duty actually harmed Storix, this motion should be granted.

6 **D. The Aiding and Abetting Cause of Action Falls with the Breach of Fiduciary Duty Claim**

7 Storix alleges that Johnson aided and abetted Janstor into performing the above acts. But
8 none of those acts resulted in any harm to Storix. Moreover, Janstor owed no duty to Storix, and no
9 such duty is alleged. Thus, as the above acts fail to result in any breach of fiduciary duty, the aiding
10 and abetting claim falls too.

11 **V. CONCLUSION**

12 Plaintiff's board of directors never approved the filing of this lawsuit, and thus, it must be
13 dismissed as Storix is not the proper party. Putting that aside, Storix's claim must fail as none of
14 the alleged actions by Johnson caused Storix any harm. As such, the breach of fiduciary duty claim
15 must fail, along with the associated aiding and abetting claim.

16 For all of the foregoing reasons, the Court should grant Johnson's motion for summary
17 judgment or, in the alternative, summary adjudication of as to Plaintiff's breach of fiduciary claims.

18 Dated: March 24, 2017

19 Respectfully submitted,
20 MINTZ LEVIN COHN FERRIS GLOVSKY AND
21 POPEO P.C.

22 

23 By: ANDREW D. SKALE
24 JOSEPH R. DUNN
25 Attorneys for Plaintiffs,
26 Anthony Johnson
27 and Robin Sassi, on behalf of Storix, Inc.
28

1 **PROOF OF SERVICE**

2 I am employed in the County of San Diego, State of California, over the age of eighteen
3 years, and not a party to the within action. My business address is 3580 Carmel Mountain Road,
Suite 300, San Diego, California 92130. On March 24, 2017, I served the within document:

4 **DEFENDANT ANTHONY JOHNSON'S MEMORANDUM OF POINTS AND**
5 **AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE**
ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION

6 **PERSONAL SERVICE:** I caused the document(s) listed above to be
7 personally served on the person(s) at the address(es) set forth below.

8 **ELECTRONIC MAIL:** By sending such document by electronic mail on
9 March 24, 2017. To the best of my knowledge, the transmission was reported
10 as complete and no error was reported that the electronic transmission was
not completed.

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17
18 I am readily familiar with the firm's practice of collection and processing correspondence
19 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day
with postage thereon fully prepaid in the ordinary course of business.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 Executed on March 24, 2017, at San Diego, California.

22 
23 _____
Kerry Winterson
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