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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION  
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12 STORIX, INC., a California corporation,  
13 Plaintiff,

14 v.

15 ANTHONY JOHNSON, JANSTOR TECHNOLOGY,  
16 a California corporation, and DOES 1-20,  
17 Defendants.  
18  
19

Case No. 37-2015-00028262-CU-BT-CTL  
Judge: Hon. Randa Trapp

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEMURRER BY ANTHONY JOHNSON  
TO PLAINTIFF'S FAC AND EACH  
CAUSE OF ACTION STATED THEREIN**

Date: 8/26/2016  
Time: 11:00AM  
Dept: C-70

20  
21 **I. INTRODUCTION**

22 Plaintiff's First Amended Complaint (FAC) and its causes of action seek to state claims against  
23 Johnson and Janstor for damages and injunctive relief based on Johnson's alleged formation of a new  
24 corporation "Janstor Technology," registration of the Internet domain name "janstor.com," and use of  
25 Janstor to reserve of port numbers, and actions taken in September/October of 2015 and January, 2016.  
26 (See FAC at ¶22.) The FAC and each of its Causes of Action are defective and subject to demurrer  
27 because Plaintiff fails to state facts sufficient to constitute a cause of action for breach of fiduciary duty  
28 or aiding and abetting breach of fiduciary duty. No facts are alleged in the FAC from which the Court

1 may conclude that Johnson had a fiduciary duty owed to Plaintiff to refrain from forming a new  
2 California corporation, to refrain from registering the Internet domain name for his new corporation, to  
3 refrain from using his new corporation to reserve port numbers, or to communicate with employees or  
4 with customers. Likewise, no facts are alleged in the FAC from which the Court may conclude that  
5 Johnson had a fiduciary duty to disclose his alleged conduct to Plaintiff or seek prior approval from  
6 Plaintiff before engaging in the complained-of conduct. Similarly, no facts are alleged in the FAC from  
7 which the Court may conclude that Johnson's alleged formation of Janstor, registration of the Internet  
8 domain name "janstor.com," use of Janstor to reserve port numbers, or communications with employees  
9 and customers actually amounts to a breach of a fiduciary duty owed to Plaintiff. Likewise, no facts are  
10 alleged in the FAC from which the Court may conclude that Johnson's alleged nondisclosures of the  
11 same actually amounts to a breach of a fiduciary duty owed to Plaintiff. Moreover, no facts are alleged  
12 in the FAC from which the Court may conclude that Johnson's alleged affirmative acts or  
13 nondisclosures caused actual detriment to Plaintiff.

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16 Further, because Plaintiff failed to state facts sufficient to support its First Cause of Action for  
17 breach of fiduciary duty as against Johnson, it necessarily follows that Plaintiff failed to state facts to  
18 support its Second Cause of Action for aiding and abetting a breach of fiduciary duty as against Johnson  
19 and Janstor. As such, this Demur to Plaintiff's FAC and each of its causes of action is proper and should  
20 be granted.

## 21 22 **II. KEY ALLEGATIONS**

23 As alleged in the FAC, Johnson formed the corporation Storix, Inc. (Plaintiff) in 2003. (FAC at  
24 ¶ 9.) In May 2014, Johnson resigned from his position as an employee of the corporation. (FAC at ¶  
25 11.) Johnson was elected to the board of directors of the corporation in February 2015. (FAC at ¶ 13.)  
26 Also in February 2015, Johnson allegedly registered the Internet domain name "janstor.com" and  
27 formed a new California corporation named Janstor Technology. (FAC at ¶ 14.) In June 2015, Johnson  
28

1 allegedly reserved two port numbers in the name of Janstor. (FAC at ¶ 15.) Plaintiff complains that  
2 Johnson allegedly did not disclose his conduct to Plaintiff or otherwise seek prior approval from  
3 Plaintiff to engage in the alleged acts. (FAC at ¶¶ 14 and 15.)

4  
5 Plaintiff's FAC states two causes of action: (1) breach of fiduciary duty; and (2) aiding and  
6 abetting breach of fiduciary duty. (FAC, generally.) To support the First Cause of Action for breach of  
7 fiduciary duty, Plaintiff uses the boilerplate allegation that Johnson "owed and continues to owe  
8 fiduciary duties to Storix, including but not limited to duties of loyalty and care." (FAC at ¶ 20.)  
9 Plaintiff then alleges that Johnson breached this supposed fiduciary duty by "his formation of a new  
10 corporation, his registration of the Internet domain name "janstor.com", his use of Janstor to reserve port  
11 numbers", and his communications with employees and customers. (FAC at ¶ 20.) Plaintiff then  
12 concludes by using another boilerplate allegation claiming that Plaintiff "[a]s the proximate result of  
13 Johnson's conduct," "has sustained and/or will sustain damages in amounts and types according to proof  
14 at trial." (FAC at ¶ 23.)

15  
16 To support the Second Cause of Action for aiding and abetting breach of fiduciary duty, Plaintiff  
17 alleges that "Janstor is wholly owned and controlled by Johnson." (FAC at ¶ 27.) Plaintiff then alleges  
18 that Janstor has "engaged in affirmative acts to aid and abet and conceal Johnsons' breaches of fiduciary  
19 duty, including, but not limited to Janstor's registration of ports." (FAC at ¶ 28.) Plaintiff then  
20 concludes with a boilerplate allegation claiming that Plaintiff "[a]s the proximate result of Defendants  
21 conduct," "has sustained and/or will sustain damages in amounts and types according to proof at trial."  
22 (FAC at ¶ 30.)

### 23 24 **III. AUTHORITY FOR DEMURRER**

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26 A demurrer "may be taken to the whole complaint or cross-complaint or to any of the causes of  
27 action stated therein." (Code Civ. Proc., § 430.50, subd.(a).) A general demurrer tests whether the  
28 complaint states facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd.(e).)

1 To establish a cause of action is adequately pled, the Plaintiff must show that the pleaded facts are  
2 sufficient to establish every element of the case of action. (*Friendly Village Community Assn., Inc. v.*  
3 *Silva & Hill Constr., Co.* (1973) 31 Cal. App.3rd 220, 224-225.) The Complaint needs to provide the  
4 defendant sufficient notice of the cause of action stated against it to defend itself. (*Fuhrman v.*  
5 *California Satellite Systems* (1986) 179 Cal. App.3rd 408, 423.) A demurrer can be utilized **where the**  
6 **complaint itself is incomplete** or discloses some defense that would bar recovery. (*Guardian North*  
7 *Bay, Inc. v Sup.Ct. (Myers)* (2001) 94 Cal. App. 4th 963, 971-972 (emphasis added.))

9 A demurrer is properly based on the complaint itself, as well as upon such matter as the court is  
10 required to take judicial notice. (Code Civ. Proc., § 430.30, subd.(a).) The court assessing the demurrer  
11 accepts the facts pled in the complaint, but rejects contentions, deductions, and conclusions of fact or  
12 law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *Czajkowski v. Haskell & White, LLP* (2012)  
13 208 Cal.App.4th 166, 173 (“A demurrer does not admit the plaintiff’s contentions nor conclusions of law  
14 or fact.”)).

16 The court may sustain the demurrer with or without leave to amend. A trial court does not abuse  
17 its discretion by sustaining a general demurrer without leave to amend if it appears from the complaint  
18 that under applicable substantive law there is no reasonable possibility that an amendment could cure the  
19 complaint’s defect. (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486; *Dalton v. East Bay*  
20 *Mun. Utility Dist.* (1993) 18 Cal.App.4th 1566, 1570-1571.) Moreover, when a complaint is  
21 successfully challenged by a general demurrer, the burden is on the plaintiff to demonstrate how the  
22 complaint might be amended to cure it of the defect. (*Association of Community Organizations for*  
23 *Reform Now v. Dept. of Industrial Relations* (1995) 41 Cal.App.4th 298, 302.)

#### 26 IV. ARGUMENT

27 A. THE FAC AND EACH CAUSE OF ACTION IS SUBJECT TO DEMURRER BECAUSE  
28 PLAINTIFF FAILED TO PLEAD FACTS SUFFICIENT TO STATE A CAUSE OF ACTION  
FOR BRACH OF FIDUCIARY DUTY OR AIDING AND ABETTING BREACH OF  
FIDUCIARY DUTY

1 A demurrer to Plaintiff's First Cause of Action for Breach of Fiduciary Duty is proper here  
2 because Plaintiff failed to state sufficient facts to constitute a cause of action for breach of fiduciary duty  
3 by Johnson. The elements of a claim for breach of fiduciary duty are: (1) fiduciary duty; (2) breach of  
4 the duty; and (3) damage caused by the breach. (*Charnay v. Cobert* (2006) 145 Cal.App.4th170, 182.)  
5 Plaintiff's boilerplate allegations, generalized contentions, and unsupported conclusions of law and fact  
6 regarding Johnson's alleged breach of a fiduciary duty and the alleged potential damage Plaintiff will  
7 suffer as a result of Johnson's alleged breach do not satisfy California's pleading requirements.  
8

9 Plaintiff alleges that Johnson "owed and continues to owe fiduciary duties to Storix, including  
10 but not limited to duties of loyalty and care." (FAC at ¶ 20.) Plaintiff further alleges that Johnson  
11 breached this supposed fiduciary duty by "his formation of a new corporation, his registration of the  
12 Internet domain name "janstor.com," his use of Janstor to reserve port numbers," and his  
13 communications with employees and customers. (FAC at ¶ 22.) However, the mere fact that Johnson is  
14 a director, a shareholder, and a former employee of Plaintiff (FAC at ¶ 21) does not mean that Johnson  
15 has a fiduciary duty to refrain from forming a new California corporation, registering an Internet domain  
16 name for a new corporation, reserving port numbers for a new corporation, or communicating with  
17 employees and customers. Similarly, the mere fact that Johnson is a director, a shareholder, and a  
18 former employee of Plaintiff (FAC at ¶ 21) does not mean that Johnson has a fiduciary duty to disclose  
19 the alleged formation of Janstor, registration of "janstor.com," or reservation of port numbers to Plaintiff  
20 or otherwise seek prior approval from Plaintiff before engaging in the same. Further, Johnson, as  
21 shareholder and director, has a right to communicate with employees and with customers regarding  
22 Storix and does not need to seek prior approval to do so.  
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26 Likewise, no facts are alleged in the FAC from which the Court may conclude that Johnson  
27 actually breached a fiduciary duty owed to Plaintiff. The allegation that Johnson started a new  
28 corporation, registered an Internet domain name, reserved port numbers, communicated with Storix

1 employees and customers, and failed to disclose the same, even if true, does not mean that such conduct  
2 constitutes a breach of a fiduciary duty Johnson owed to Plaintiff.

3 Plaintiff further alleges that “[a]s the proximate result of Johnson’s conduct, Storix, Inc. has  
4 sustained and/or **will sustained damage** in amounts and types according to proof at trial.” (FAC at ¶ 23  
5 (emphasis added).) Harm is a required element of a claim for breach of fiduciary duty. However,  
6 Plaintiff’s own pleading by virtue of the phrase “will sustain” indicates that Plaintiff has not suffered  
7 any harm from Johnson’s alleged conduct and further establishes why a demurrer is proper. Further, no  
8 facts are alleged in the FAC from which the Court may conclude that Johnson’s alleged formation of a  
9 new corporation, registration of an Internet domain, reservation of port numbers for the new corporation.  
10 For example, Plaintiff does not plead any facts to suggest that Johnson’s alleged breach of fiduciary duty  
11 caused Plaintiff to lose profits, lose business opportunities, threatened Plaintiff’s reputation or goodwill,  
12 or otherwise resulted in any actual detriment to Plaintiff, Plaintiff’s business, or Plaintiff’s shareholders.

13 Plaintiff also fails to include complete information in it’s FAC that is pertinent to the allegations  
14 of Janstor aiding and abetting breach of fiduciary duty. Plaintiff is attempting to make the court believe,  
15 by omitting important facts, which would bar their recovery in this suit. **First, Plaintiff fails to include**  
16 **that Janstor is a dissolved corporation as of July or August 2015.** It is impossible for Janstor to aid and  
17 abet as to Johnsons communications with customers which Plaintiff claims took place in September or  
18 October 2015. (FAC at ¶ 17.) Further, Plaintiff provides incomplete facts as to when Johnson, as a  
19 director and shareholder, communicated with employees. (FAC at ¶ 18.) **In fact, that communication**  
20 **took place in 2016, long after Janstor was already dissolved. Further, Johnson moved to Florida in July**  
21 **2015, which Plaintiffs were aware of.**

22 A demurrer to Plaintiff’s Second Cause of Action for Aiding and Abetting Breach of Fiduciary  
23 Duty is also proper here because Plaintiff failed to state sufficient facts to constitute a cause of action for  
24 aiding and abetting breach of fiduciary duty. The elements of a claim for aiding and abetting a breach of  
25

1 fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual  
2 knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant  
3 to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to  
4 plaintiff. (Judicial Council of Cal. Civ. Jury Instns. (CACI) (2014) No. 3610; *American Master Lease*  
5 *LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1478.) Some cases suggest a complaint must  
6 allege a fifth element—that the aider and abettor had the specific intent to facilitate the wrongful  
7 conduct. (Directions for Use of CACI No. 3610, p. 633, citing *Schulz v. Neovi Data Corp.* (2007) 152  
8 Cal.App.4th 86, 95, 60 Cal.Rptr.3d 810.)

9  
10 As demonstrated above, no facts are alleged in the FAC from which the Court may conclude that  
11 Johnson breached a fiduciary duty owed to Plaintiff. Further, no facts are alleged in the FAC from  
12 which the Court may conclude that Janstor had actual knowledge of Johnson's alleged breach. Rather,  
13 Plaintiff merely alleges in the FAC that "Janstor is wholly owned and controlled by Johnson." (FAC at  
14 ¶ 27.) Likewise, no facts are alleged in the FAC from which the Court may conclude that Janstor  
15 engaged in substantial assistance or encouragement to Johnson's alleged breach of fiduciary duty.  
16 Rather, the only "assistance" Janstor allegedly provided to Johnson was Johnson's own registration of  
17 port numbers under the name of Janstor. (FAC at ¶ 28.) The mere allegation that Janstor reserved port  
18 numbers, even if true, does not mean that Janstor engaged in substantial assistance or encouragement to  
19 Johnson's alleged breach of a fiduciary duty. Likewise, the mere allegation that Janstor registered ports  
20 for Johnson, even if true, does not mean that Janstor's alleged conduct was a *substantial* factor in  
21 causing harm to Plaintiff.

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23  
24 Moreover, no facts are alleged in the FAC from which the Court may conclude that Janstor's  
25 alleged conduct was a substantial factor in causing harm to Plaintiff. Rather, Plaintiff merely alleges in  
26 the FAC that "[a]s the proximate result of Defendants conduct, Plaintiff has sustained and/or **will**  
27 **sustained damage** in amounts and types according to proof at trial." (FAC at ¶ 30 (emphasis added).)  
28

1 Plaintiff's own pleading by virtue of the phrase "will sustain" indicates that Plaintiff has not suffered  
2 any actual harm from Janstor's alleged conduct and further establishes why a demurrer is proper. For  
3 example, Plaintiff does not plead any facts to suggest that Janstor's alleged aiding and abetting caused  
4 Plaintiff to lose profits, lose business opportunities, threatened Plaintiff's reputation or goodwill, or  
5 otherwise resulted in any actual detriment to Plaintiff or Plaintiff's business. Plaintiff only alleges that  
6 there are damages in excess of \$25,000.00 but gives no facts to show what amounts were lost and  
7 where.  
8

9 Plaintiff's allegations of communications made to non-shareholder employees do not include  
10 facts sufficient to show how this was a breach of fiduciary duty to Storix. (FAC at ¶ 18.) The quotes as  
11 alleged are not enough facts to show intent to harm or to show that any damage was sustained as a result  
12 of such communications. Further, Defendant's comments are out of context and fail to state complete  
13 facts. In fact, Johnson made no such threats but had a personal communication with one employee as to  
14 how Plaintiff's actions were likely to cause employees to lose their jobs because. Johnson's comments  
15 that he was still working on the software and that it was a marketable product is also does not show  
16 intent to harm or any damage to Storix.  
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19 Plaintiff's allegations of communications made to customers also does not include facts  
20 sufficient to show harm to Storix. (FAC at ¶ 17.) Plaintiff does not show the quote in context and fails to  
21 provide facts as to why Johnson made the comments to customers. Given the expert opinions provided  
22 to Johnson at the time, the security risk to customers, and Plaintiff's own concerns over security  
23 vulnerabilities in the software, Johnson was within his right as a director and author of the software to  
24 issue a cautionary advisement to customers. Even when the comments are taken out of context, they are  
25 not sufficient facts to show intent to harm or how the reputation of Storix was damaged as a result.  
26 Plaintiff also fails to show how and in what way this communication caused harm to Plaintiff.  
27  
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1 When viewing both the comments Plaintiff alleges in totality, the comments Defendant made  
2 actually shows that Johnson intended to protect Storix by creating a “marketable product” that he had  
3 been “...*been working on the software for 2 years now*” and in the meantime, current customers should  
4 “...*refrain from downloading any further copies*” until the software vulnerabilities could be updated.  
5 (FAC at ¶¶17 and 18.) These two allegations added to the FAC occurred when Defendant was a resident  
6 of Florida and when Janstor was already dissolved. Although Plaintiff knew that Janstor was a dissolved  
7 California corporation which had never operated, and that Johnson was no longer a resident of  
8 California, Plaintiff proceeded with the FAC without amending Johnson’s proper residency and  
9 Janstor’s dissolved status.  
10

11  
12 There are no facts alleged in the FAC from which the Court may conclude that Johnson  
13 manifested any intent to compete with Plaintiff. The FAC filed nearly a year after the initial alleged  
14 conduct still contains no additional facts from which a Court may conclude that there is a breach of  
15 fiduciary duty. There are no facts alleged in the FAC from which the Court may conclude that either  
16 Johnson’s alleged breach of fiduciary duty or Janstor’s alleged aiding and abetting to Johnson’s alleged  
17 breach resulted in damage to Plaintiff.  
18

19 **B. THE FAC AND EACH CAUSE OF ACTION IS SUBJECT TO DEMURRER BECAUSE**  
20 **STORIX HAS NO STANDING TO BRING THE SUIT BECAUSE THERE WAS NO BOARD**  
21 **OR SHAREHOLDER APPROVAL.**

22 “[T]he basic principle of corporate governance that the decisions of a corporation, **including the**  
23 **decision to initiate litigation**, should be made by the **board of directors or the majority of**  
24 **shareholders**. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) [bold added]. Plaintiff has  
25 incomplete facts in their FAC which bars the suit as a whole. The corporation never approved of the suit  
26 against Janstor and Defendants. As a shareholder and current director, Johnson is aware that there was  
27 never a shareholder meeting or board of director’s meeting whereby the issue of the allegations in the  
28 FAC were approached. There was no meeting to discuss litigation for such a suit. There was no meeting

1 whereby shareholders or the board of directors would vote on such a suit. Therefore, Storix has no  
2 standing to bring suit since it has no authority to do so. Since Storix never received Board or  
3 Shareholder approval to bring suit, the suit is improper and should have been presented as a derivative  
4 suit by the individuals who initiated it.

5  
6 **V. CONCLUSION**

7 For the reasons stated above, Johnson's demurrer to Plaintiff's FAC and each of the causes of  
8 action should be sustained. Further, the Court should sustain without leave to amend because it appears  
9 from the face of the FAC that under applicable substantive law there is no reasonable possibility that an  
10 amendment can cure the FAC's defects. In fact, this FAC cures no defects stated in Defendants demurrer  
11 to Plaintiff's original complaint.

12  
13 DATED: April 13, 2016

14  
15 /s/ Anthony Johnson

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17 ANTHONY JOHNSON  
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