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January 28, 2021

ELECTRONICALLY FILED
Acting Presiding Justice Judith Haller
Associate Justice Joan Irion
Associate Justice Patricia Guerrero
California Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, California 92101

Re: Request for Publication of Decision
Storix v. Johnson (D075308) and consolidated *Johnson v. Huffman*, et al. (D077096), filed on December 31, 2020, modified January 27, 2021 (no change in judgment)

Dear Honorable Court,

Pursuant to California Rules of Court, rule 8.1120(a) permitting any person to request publication, defendant, cross-complainant and plaintiff Anthony Johnson respectfully requests publication of this court's decision in the above consolidated cases (the "Opinion"). Attached is a copy of the original Opinion as Exhibit A and the order denying Johnson's request for rehearing as Exhibit B.

Johnson is one of many minority shareholders of closely-held corporations in California that would benefit from publication of this Opinion since California lacks citable case law that would otherwise explain the state's position on the rights of minority shareholders. California superior courts rely instead on various California decisions involving differing circumstances and the decisions of out-of-state courts that this panel found non-binding and unpersuasive.

An opinion "*should* be certified for publication in the Official Report" if it meets *any* of the nine separately listed criteria in California Rules of Court, rule 8.1105(c). The Opinion squarely meets at least four such criteria in that it:

- establishes new rule of law;
- applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- addresses or creates an apparent conflict in the law; and
- involves a legal issue of continuing public interest.

(Cal. Rules of Court, rule 8.1105(c)(1)-(2),(5),(6).) The 47-page Opinion in this case demonstrates the appellate court's thorough review of the facts and law. It resolves a number of issues of first impression, most of which are issues of significant public interest. Had prior precedent existed to support such findings, much of this 5-years of litigation could have been prevented.

A. Relevant Facts

Johnson is Storix's founder, creator of its only software product, and was the company's sole shareholder until 2011. (Opinion, p. 3.) Johnson gave 60% stock in the company to his former employees (52% of which is owned by the Individual Defendants) after he was diagnosed with terminal cancer. (*Id.*, p. 4.) After his unexpected recovery and return to Storix in 2014, the Individual Defendants collectively "ousted" Johnson from the company, claimed ownership of his registered copyrights, and since directed all company profits to litigation against him. (*See* Opinion, pp. 5-7.)

The Opinion refers to the shareholder derivative action that Johnson and Sassi (an 8% shareholder) filed on Storix's behalf in response to the direct lawsuit the Individual Defendants had Storix bring against Johnson for allegedly intending to compete. (Opinion, p. 5.) Among other things, the lawsuit alleged damages to Storix based on the informal decision of "three of five directors" (including the president) for "failing to adhere to corporate formalities." (*Id.*, p. 6.) The Opinion also refers to the cross-complaint Johnson later filed which demanded personal damages against the same majority directors for "acting in concert to file suit in Storix's name without Storix's approval." (*Id.*)

A. Application of Existing Rule of Law to a Significantly Different Set of Facts in Published Opinions

1. <u>The Opinion creates new application of California's at-will employment law precluding a major shareholder of a closely-held corporation from participation in the company.</u>

"Johnson alleged he had a reasonable expectation to a position at the company and that the Individual Defendants breached their fiduciary duty to him by refusing to permit him to work at the company." (Opinion, p. 25, 27.) The trial court rejected Johnson's jury instruction stating that "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." (*Id.*, p. 29.) The Order states that Johnson forfeited the instruction because it was based on out-of-state authority. (*Id.*, p. 32.) Most states provide that closely held corporations are treated as partnerships, that major shareholders may have a reasonable expectation to a role in company management in addition to their share of company profits, and that majority shareholders have a duty to treat the minority fairly.

The trial court accepted the Individual Defendants' jury instruction stating that "In California, employment is resumed to be 'at-will'. That means that an employer may discharge an employee for no reason, or for a good, bad, mistaken, or even unfair reason, as long as its action is not for a discriminatory reason." (Opinion, p. 26.) The panel rejected Johnson's contention that at-will employment is only relevant to wrongful termination claims because "the instruction was not relevant to his claim that the Individual Defendants breached a fiduciary duty by refusing him a position at Storix." (*Id.*, p. 26-27.) The panel found that "[t]he [at-will employment] instruction was a correct statement of the law, and was relevant to Johnson's testimony that the Individual Defendants breached a fiduciary duty by ousting him or refusing him a position at Storix." (Order, p. 27.)

Publication of this Order is warranted because it creates and/or clarifies law providing that, even in a close corporation, minority shareholders have no reasonable expectation to a position in the company because, without a written employment agreement, they are at-will employees owed no duty of fairness

by the majority. Because Johnson was Storix's founder and sole owner for 12 years, and because he was didn't expected to survive his cancer, Johnson had no need of a written employment agreement. There is currently no California law providing that, by relinquishing majority ownership, a shareholder forfeits any right to a position in the company. Had such case law on the issue existed in California, Johnson would have understood the futility of taking legal action to protect his rights.

2. The Opinion establishes that the president of a corporation has authority to file a lawsuit against a director on the corporations' behalf without board approval.

The trial court rejected Johnson's proposed instruction asking the jury to determine if the Storix board was *disinterested* in filing or ratifying the lawsuit against him, but the panel didn't address the issue on appeal. (*See* Opinion, p. 14, fn. 7.) Instead, the panel affirmed the judgment on different grounds by extending the decisions in published cases to significantly different facts of this case.

The Opinion states that "a corporation has an inherent right to sue without the board adopting a resolution specifically authorizing the action." (*Id*., p. 11; citing *Canal Oil Co. v. National Oil Co.* (1937) 19 Cal.App.2d 524, 537.) This proposition was supported by the panel's finding that "a corporation may sue upon authorization of its board of directors or upon the initiative of its president or managing officer." (*Id*.; citing *American Center for Education, Inc. v. Cavnar* (1978) 80 Cal.App.3d 479 at 485, fn. 3.) The Opinion further states that, "subject to the board's control, the president has general supervision, direction, and control of the corporation's business … [and] the corporation is bound by such dealings, if they were 'within the scope of the authority, actual or apparent, conferred by the board or within the agency power of the officer executing it. …" (*Id*., p. *11*; citing § 208, subd. (b).) It goes on to say that two of Storix's five directors "confirmed and reviewed the complaint against Johnson and consented to its filing" and their "knowledge of the proposed complaint against Johnson evidenced [the president's] capacity to institute litigation on Storix's behalf." (*Id*.)

The Opinion notes that "Huffman, Storix's president and chief executive officer, testified Storix was a small company that operated without much formality." (Opinion, p. 11.) As such, Storix is a "closely held corporation … 'akin to a partnership in its informality'" not subject to the same rules governing corporate actions as large corporations. (Opinion, p. 12; citing *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565; see § 158, subd. (a).) The panel thereby dismissed Johnson's contention that Corp. Code § 307 requires that "any action taken by a board without a meeting requires written consent of all directors, not just the majority." (Opinion, pp. 13-14.) It found instead that "Storix's president had the capacity to file the complaint on Storix's behalf without board approval." (*Id*., p. 14.)

If given precedent by publication, this case was would substantially reduce shareholder derivative actions, cross-complaints, and anti-SLAPP motions by informing potential shareholder or director defendants that a corporate lawsuit may be filed against them by the company president without notice or approval by the board.

B. The Opinion Establishes a New Rule of Law

1. The Opinion establishes that a lawsuit may be ratified to preclude a defendant from asserting a standing defense.

The Opinion notes that "the Storix board later ratified the action during a special board meeting at which the then-directors (Huffman, Altamirano and Smiljkovich) voted to ratify the earlier decision of

Huffman, Altamirano and Turner to file the lawsuit." (Opinion, pp. 12-13.) The Opinion dismisses Johnson's citation to *Dominguez v. Superior Court* (1983) 139 Cal.App.3d 692 because the ratification in that case "was ineffective because it would have prejudiced a third party by precluding the defendant from asserting a statute of limitations defense and undermined the statutory scheme." (Opinion, p. 13.) Both Johnson and *Dominguez* relied on Civ. Code § 2313 which provides that ratification is only retroactive in effect absent prejudice to third parties. The circumstances of the two cases are similar with the exception that Johnson alleged a standing defense.

The Opinion thereby establishes a new rule of law that § 2313 is inapplicable to an affirmative defense of standing.

2. The Opinion establishes that a notice of appeal of post-trial orders must be separately filed and may not be contained in an appellant's brief even if it is timely and meets all requirements of a notice.

The Opinion states that "in August 2019, the court issued its ruling on Johnson's motion to tax or strike costs." (Opinion, p. 39.) Johnson's opening brief was filed on August 12, 2019, just 10 days after the order denying Johnson's motion to strike costs was issued. Johnson cited authority on appeal that the court could construe the cost order as a writ of mandate and further argued at the hearing that the opening brief should serve as the notice of appeal since it was timely and met all the statutory requirements and no party was prejudiced by construing it as a notice. (See ARB, p. 20.)

"The notice of appeal must be liberally construed." Cal. Rules of Court § 8.100(a)(2). "Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed." *(Norman, supra*, citing *Shiver, McGrane & Martin* v. *Littell* (1990) 217 Cal. App.3d 1041, 1045 [266 Cal. Rptr. 298].)

The panel rejected Johnson's argument that his opening brief met all requirements of the notice, generally finding that "[a] post-judgment order awarding or denying costs or attorney fees is separately appealable[.]" (Opinion, p.40, citing *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 [costs]; *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1015 [attorney fees].) It therefore found "no jurisdiction to review these contentions because Johnson failed to appeal from the postjudgment cost and attorney fees awards." (*Id*., p. 40.)

Publication of this Opinion would prevent an appeal from being foreclosed on other litigants who might similarly rely on their briefs as a timely notice of appeal of the post-trial orders therein.

C. The Opinion Addresses or Creates an Apparent Conflict of Law

1. The Opinion both addresses and creates an apparent conflict regarding whether a board must be *disinterested* in approving or ratifying transactions.

It's undisputed that Storix filed the lawsuit against Johnson without a board meeting and that the directors who voted to ratify it 2 years later were not disinterested since they were, at the time, being sued for Storix's damages for filing the lawsuit without authority. The interested directors nonetheless instructed Storix's counsel to continue the lawsuit to trial. The Opinion notes that a jury rejected Storix's $1.2 million claim against Johnson for allegedly "using Storix source code to create a competing

product" but awarded $3,739.14 for "employee lost productivity" caused by having to respond to the email Johnson sent after they filed the lawsuit against him. (Opinion, p. 18.)

"Citing [Corp. Code] section 310, subdivision (a)(2), Johnson maintains that a ratification could occur only without counting the votes of interested directors, thus eliminating Huffman, Altamirano and Smiljkovich because they were defendants in Johnson's derivative action. However, this section applies only to a 'transaction between a corporation and one or more of its directors, or between a corporation and any corporation … in which one or more of its directors has a material financial interest.' By its language, the section is inapplicable." (Opinion, p. 13.) The Opinion therefore established that the conflict-of-interest of directors is not subject to scrutiny unless the directors are direct parties to the transaction.

The Order, however, creates a conflict between Section 310 and Section 309 (the "business judgment rule") on which the Opinion also relies. The business judgment rule "requires a director to perform 'in good faith, and in a manner such director believes to be in the best interest of the corporation … ." (Opinion, p. 35; quoting *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 183.) "[T]he premise of the business judgment rule [is] that courts should defer to the business judgment of *disinterested* directors who presumably are acting in the best interests of the corporation." (*Gaillard v. Natomas Co.,* 208 Cal. App. 3d 1250, 1265-66. (Ct. App. 1989), italics in original.) "Although it is generally presumed that the directors of a corporation are acting in good faith [citation], a court is required to defer to the business judgment only of disinterested directors. [citation.]" (*Wolf v. CDS DEVCO* (2010) 185 Cal. App. 4th 903, 916; citing *Tritek Telecom, Inc. v. Superior Court* (2009) 169 Cal. App. 4th 1385, 1390, quoting *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366.)

The Opinion addresses a conflict between statutes requiring certain transactions to be approved by disinterested directors and the presumption that a board is always acting in the best interests of the corporation. Publication of the Order is necessary to establish that the business judgment rule applies even to interested directors as long as they are not direct parties to a transaction.

For the foregoing reasons, Johnson respectfully requests that this Court order the publication of its opinion as modified.

DATED: January 28, 2021

Respectfully Submitted,

s/ Anthony Johnson
Anthony Johnson
In Pro Per

PROOF 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 **REQUEST FOR PUBLICATION OF DECISION** 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 January 28, 2021 at Las Vegas, Nevada.

s/ Anthony Johnson