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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO - CENTRAL

10 STORIX, INC., a California corporation,
11 Plaintiff,

12 v.

13 ANTHONY JOHNSON; JANSTOR
TECHNOLOGY, a California corporation; and
14 DOES 1-20,
15 Defendant.

16 ANTHONY JOHNSON, an individual,
17 Cross-Claimant,

18 v.

19 DAVID HUFFMAN, an individual, RICHARD
20 TURNER, an individual MANUEL
21 ALTAMIRANO, an individual, DAVID KINNEY,
an individual, DAVID SMILJKOVICH, an
22 individual, and DOES 1-5,
23 Cross-Defendants.

Case No. 37-2015-00028262-CU-BT-CTL

STORIX, INC.'S OPPOSITION TO
ANTHONY JOHNSON'S DEMURRER
TO SECOND AMENDED COMPLAINT

Date: October 14, 2016
Time: 11:00 a.m.
Dept: C-70
Judge: Hon. Randa Trapp

Complaint Filed: August 20, 2015
Trial Date: Not Set

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I.

INTRODUCTION

Defendant Anthony Johnson (“Johnson”) is abusing the demurrer process to delay facing the music. As alleged in the Second Amended Complaint (“SAC”), Johnson got caught in the act of engaging in competition with Storix and trying to destroy Storix’s customer and employee relationships, all while sitting on the Storix board of directors and owing the fiduciary duties that come with that position. Storix – the entity to whom Johnson owes those fiduciary duties – properly filed this action against Johnson seeking damages as well as a permanent injunction precluding Johnson from engaging in such tortious conduct in the future. Both the existence and breach of fiduciary duties are plainly alleged, and Storix is certainly entitled to seek both damages and injunctive relief as remedies for such violations. Johnson’s demurrer should be overruled in its entirety.

If all of this sounds familiar to the Court, it is. Indeed, just weeks ago this court overruled in its entirety Johnson’s demurrer to the First Amended Complaint (“FAC”) on the same grounds Johnson now raises, finding that “there are sufficient facts pled to support the claims for breach of fiduciary duty and aiding/abetting breach of fiduciary duty.” (See Minute Order, ROA #106, dated August 26, 2016). The Court also rejected Johnson’s baseless argument that Storix lacks standing to bring this direct action against Johnson, noting that Johnson “has not shown this is a shareholder derivative lawsuit.” (*Id.*) Undeterred by the Court’s prior clear and explicit ruling, Johnson’s demurrer to the SAC presents those same arguments that the Court rejected when it overruled his demurrer to the FAC.

The only new argument before the Court is Johnson’s patently frivolous personal jurisdiction argument. Specifically, Johnson argues that because he moved to Florida at some point after his tortious conduct began, he is somehow immune to the jurisdiction of this court. That is, of course, nonsense. Even if we ignore the alleged factual underpinnings for this court’s personal jurisdiction over him (e.g.: Johnson lived in California when he committed much of the wrongdoing described in the complaint, he has caused harm in California to a California

1 corporation while sitting on the board of and violating his duties to said California corporation),
2 Johnson’s jurisdictional argument would still be untenable in light of his own litigation conduct in
3 this and other civil actions pending in this court. In this action alone, Johnson has generally
4 appeared, filed a cross-complaint and even sought writ relief.¹ A party that has appeared and
5 actively – indeed aggressively – engaged in litigation for a full year and availed himself of the
6 benefits of a court cannot plausibly turn around and argue that that same court lacks jurisdiction
7 over him as a defendant.

8 Johnson’s demurrer to the SAC should be overruled in its entirety because Storix
9 adequately alleged sufficient facts to state a cause of action for breach of fiduciary duty. Storix
10 clearly has standing, and it has properly alleged entitlement to damages, which it will prove at trial,
11 which is all that is required at the pleading stage. Accordingly, Johnson’s demurrer should be
12 overruled in its entirety.

13 II.

14 LEGAL STANDARDS

15 A general demurrer challenges only the sufficiency of the cause of action pleaded, and must
16 be overruled if any valid cause of action is pleaded. *Venice Town Council, Inc. v. City of Los*
17 *Angeles*, 47 Cal.App.4th 1547, 1561-1562 (1996); *Grieves v. Sup.Ct.*, 157 Cal.App.3d 159, 164-
18 165 (1984); *Caliber Bodyworks, Inc. v. Sup.Ct.*, 134 Cal.App.4th 365, 385 (2005). A special
19 demurrer challenges other defects in the complaint, including whether a pleading is uncertain.
20 (C.C.P. §430.10(f)). The term uncertain includes the issue of whether the pleading is “ambiguous
21 and unintelligible.” (*Ibid.*).

22 “All that is required of a plaintiff, even as against a special demurrer, is that he set forth in
23 his complaint the essential facts of his case with reasonable precision and with particularity
24 sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of

25 _____
26 ¹ Johnson is pursuing a multitudinous litigation strategy. In addition to pursuing counterclaims and seeking equitable
27 relief in this court, Johnson continues to pursue a derivative suit in another department of this court (pending before
28 Judge Wohlfeil) and, in a strange new twist, he recently filed a brand new lawsuit in yet another department of this
court (before Judge Strauss) against not only Storix’s management (again), but also two of Storix’s attorneys at the
Procopio firm, accusing them of “aiding and abetting” assault, battery and false imprisonment. Post-trial proceedings
are also continuing in the copyright case Johnson filed in San Diego District Court (Judge Huff)

1 action.’ [Citations omitted].) Essentially the problem is one of fairness in pleading so as to give the
2 defendant such notice by the complaint that he may prepare his case. [Citations omitted].” *Wise v.*
3 *Southern Pacific Company*, 223 Cal.App.2d 50, 63 (1963).

4 Whether considered general or special, Johnson’s demurrer to the SAC must be overruled
5 as he presents no reason for the Court to disregard its prior ruling and no new legitimate basis to
6 challenge the pleading.

7 III.

8 JOHNSON’S JURISDICTION AND STANDING ARGUMENTS ARE FRIVOLOUS

9 A. Johnson’s General Appearance Eliminates any Question of Personal 10 Jurisdiction

11 Johnson appears to be operating under the mistaken belief that by recently moving to
12 Florida he can immunize himself from the tortious conduct he committed in California. Again, he
13 is wrong, and his personal jurisdiction challenge is entirely frivolous. *Johnson has already*
14 *generally appeared in this action*, thus waiving any challenge to personal jurisdiction.

15 California courts have long held “a party waives any objection to the court’s exercise of
16 personal jurisdiction when the party makes a general appearance in the action.” *Roy v. Sup. Ct.*,
17 127 Cal.App.4th 337, 341 (2005). A general appearance operates as a consent to jurisdiction of the
18 person. *Dial 800 v. Fesbinder*, 118 Cal.App.4th 32, 52 (2004). Code of Civil Procedure section
19 1014 reads: “A defendant appears in an action when the defendant answers, demurs, files a notice
20 of motion to strike,... or when an attorney gives notice of appearance for the defendant... .”
21 Section 1014’s list of general appearance acts “is not exclusive; ‘rather the term may apply to
22 various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. .
23 . . .’ [Citation.]” *Hamilton v. Asbestos Corp.*, 22 Cal.4th 1127, 1147 (2000). “[A] defendant may
24 appear in ways other than those specifically designed in section 1014.” *Slaybaugh v. Sup. Ct.*, 70
25 Cal.App.3d 216, 222 (1977).

26 “As a general rule, a defendant makes a general appearance when he or she takes any part
27 in the action or proceeding.” *In re Marriage of Fitzgerald & King*, 39 Cal.App.4th 1419, 1428

1 (1995). “A general appearance occurs where a party, either directly or through counsel, participates
2 in an action in some manner which recognizes the authority of the court to proceed. It does not
3 require any formal or technical act.” *Mansour v. Sup. Ct.*, 38 Cal.App.4th 1750, 1756 (1995); *see*
4 *also Hamilton v. Asbestos Corp.*, 22 Cal.4th at 1147. “[I]f a defendant by his appearance insists
5 only upon the objection that he is not in court for want of jurisdiction over his person and confines
6 his appearance for that purpose only, then he has made a special appearance, but if he raises any
7 other question, or asks any relief which can only be granted upon the hypothesis that the court had
8 jurisdiction of his person, then he...made a general appearance.’ [Citation.]” *Bank of America v.*
9 *Harrah*, 113 Cal.App.2d 639, 641 (1952).

10 Storix filed this action on August 20, 2015. Johnson, through his then-counsel, Gary
11 Eastman, appeared and filed a demurrer challenging the allegations of the Complaint, but not
12 raising any issue of personal jurisdiction. (ROA ##10-11). Storix filed an Amended Complaint on
13 March 14, 2016. (ROA #24). Johnson, appearing *pro se*, filed a demurrer to the FAC, arguing that
14 Storix failed to state facts sufficient to constitute a cause of action under C.C.P. §430.10(e), but did
15 not raise any personal jurisdictional challenge. (ROA ##39-41). He filed a motion to strike the
16 FAC as well. (ROA ##42-45). Johnson also filed a cross-complaint against the individual directors
17 and shareholders of Storix, seeking damages and injunctive relief. (ROA #36). Johnson filed an *ex*
18 *parte* application for a writ of mandate on June 14, 2016 (ROA #72), in which *ex parte* hearing he
19 participated, and then filed a noticed motion on his writ of mandate on August 22, 2015. (ROA
20 ##99-104). Johnson participated in the writ of mandate motion hearing on August 26, 2016. Any
21 one of the foregoing actions by Johnson would be sufficient to constitute a “general appearance,”
22 and together there is no question that he has submitted to the jurisdiction of this Court. His personal
23 jurisdiction challenge is entirely meritless and has been waived.

24 **B. Personal Jurisdiction Over Johnson is Clear From Allegations of the FAC**

25 Even if Johnson’s general appearance was not conclusive on the issue of jurisdiction,
26 Johnson would clearly be subject to the jurisdiction of this court whether under a general
27 jurisdiction analysis or a specific jurisdiction analysis.

1 Under a “general” jurisdiction analysis (also called “all-purpose” or “unlimited”
2 jurisdiction), nonresident defendants may be sued on causes of action unrelated to their activities
3 within the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-447 (1952);
4 *Cornelison v. Chaney*, 16 Cal.3d 143, 147 (1976); *Vons Cos., Inc. v. Seabest Foods, Inc.*, 14
5 Cal.4th 434, 446 (1996). “For an individual, the paradigm forum for the exercise of general
6 jurisdiction is the individual’s domicile.” *Daimler AG v. Bauman*, 134 S.Ct. 746, 760 (2014)
7 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2853-2854 (2011)).

8 Jurisdiction is “limited” or “specific” where the defendant’s in-state activity is “continuous
9 and systematic” and that activity gave rise to the “episode-in-suit.” *Goodyear Dunlop Tires*
10 *Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2848 (2011); *Young v. Daimler AG*, 228 Cal.App.4th
11 855, 859, fn. 2 (2014). Provided a “substantial connection” with the forum is created thereby, even
12 a single act may support limited personal jurisdiction over a nonresident. *McGee v. International*
13 *Life Ins. Co.*, 355 US 220, 223, 78 S.Ct. 199, 201(1957) (issuance of a single life insurance policy
14 to a California resident and collecting premiums thereon was enough to support California court
15 jurisdiction over Texas insurer). “Minimum contacts” may be created by a nonresident’s use of
16 mail, telephone or e-mail. *See Hall v. LaRonde*, 56 Cal.App.4th 1342, 1344 (1997) (nonresident
17 contracted with Calif. resident via e-mail and telephone).

18 For specific jurisdiction, plaintiff’s claim must “arise out of” or be “related to” defendant’s
19 forum activities. *See Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2184-2185 (1985). The
20 nonresident defendant must have purposefully directed its activities at forum residents, or
21 purposefully availed itself of the privilege of conducting activities within the forum state, thus
22 invoking the benefits and protections of local law. *Hanson v. Denckla*, 357 US 235, 253, 78 S.Ct.
23 1228, 1239-1240 (1958); *see Vons Cos., Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at 446. If the
24 nonresident defendant committed the liability-producing acts while physically present in
25 California, the exercise of personal jurisdiction by state courts will almost always be held
26 “reasonable.” His presence here while committing such acts will almost always constitute a
27 sufficient “contact” to satisfy due process in lawsuits arising from those acts. *Lundgren v. Sup.Ct.*,

1 111 Cal.App.3d 477, 484 (1980) (Oregon accountant participated in fraud while in California).

2 Johnson contends that he moved to Florida in July 2015. (See Motion to Strike, p. 3).
3 Johnson argues that his move somehow insulates him from being subjected to this court's
4 jurisdiction. Johnson's purported move is totally irrelevant for purposes of personal jurisdiction.

5 As alleged in the SAC, "Johnson was *at the time of the events alleged herein* a citizen of the
6 State of California and resident of the County of San Diego." (*Id.*, ¶3). Johnson was a resident of
7 California at the time of the alleged events in this case (including in May 2014, when he resigned
8 and stole the Company's software. He was still a resident in February 2015, when he was elected to
9 the board of Storix, and set up the competing venture, Janstor. (SAC ¶¶13, 14, 20). Johnson still
10 resided in California in June 2015, when he reserved the port numbers to compete with Storix. (*Id.*,
11 ¶15). On these facts alone, the Court has personal jurisdiction over Johnson.

12 Regardless, the SAC alleges "this Court has personal jurisdiction over the Defendants, and
13 each of them, because their acts and conduct relevant to the present action occurred within the
14 State of California...." (SAC ¶7). Each of the alleged acts committed by Johnson occurred in
15 California. He also directed communications and threats to Storix's California-based employees.
16 (See, e.g., SAC ¶18). This too provides a basis to exercise jurisdiction.

17 He also has purposefully availed himself of this Court's jurisdiction. As noted above,
18 Johnson generally appeared in this action, filed cross-claims, and a writ of mandate seeking the
19 affirmative relief of being granted access to Storix's financial records. Johnson also has filed
20 another pending action in this court, Case No. 37-2015-00034545-CU-BT-CTL, a derivative suit
21 which Johnson filed against the other directors of Storix, as well as a copyright action in the United
22 States District Court for the Southern District of California, Case No. 14-cv-1783H. (See SAC
23 ¶12). Clearly Johnson has consented to jurisdiction in California.

24 **C. Storix Clearly Has Standing to Pursue this Direct Action**

25 Johnson challenges Storix's SAC, claiming that as a shareholder and director he is unaware
26 of any formal act by the corporation, in the form of either a shareholder vote or director vote, to
27 authorize the lawsuit. Johnson concludes the company thus lacks standing to pursue this case,

1 arguing that a “lawsuit against a company director must be brought as a *derivative suit* by the
2 Shareholders.” (Demurrer, p. 3 (emphasis original)). That is not an accurate statement of the law,
3 which the Court recognized when it previously rejected Johnson’s demurrer to the FAC. Moreover,
4 resolution of that issue would require this Court to go far beyond the four corners of the SAC, so
5 even if it had merit, it could not be addressed by demurrer.

6 To the extent it becomes an issue, Storix will establish that ample authority to pursue the
7 claims herein exists. Director and shareholder approval is not required for every corporate act. A
8 corporation is generally bound by the acts of its officers, as the agents of the corporation, within
9 the scope of their authority, actual or apparent, either conferred by the board of within the agency
10 power of the officer. Corp. Code §208(b). Whether actual authority has been conferred is a
11 question of fact; however, the fact that the board knows of the officer’s acts and does not object is
12 evidence of actual authority. *See Englert v. IVAC Corp.*, 92 Cal.App.3d 178, 190 (1979); *see also*
13 Civ. Code § 2316 (“Actual authority is such as a principal intentionally confers upon the agent, or
14 intentionally, or by want of ordinary care, allows the agent to believe himself to possess.”).

15 Storix has standing to pursue a direct (i.e., non-derivative) claim against a director who
16 breaches a fiduciary duty by attempting to compete with it or to otherwise use its proprietary
17 materials against its best interests. *See, e.g., Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d
18 772, 792 (Del.Ch. 2004) (“Put simply, when a director of an insolvent corporation, through a
19 breach of fiduciary duty, injures the firm itself, the claim against the director is still one belonging
20 to the corporation.”); *Russell-Stanley Holdings, Inc. v. Buonanno*, 327 F.Supp.2d 252, 257
21 (S.D.N.Y. 2002) (“Furthermore, plaintiff [corporation] alleges that it suffered injury through the
22 continued misrepresentations and false statements defendant made after the Purchase Agreement,
23 while he was a director of plaintiff corporation. (*Id.*) For the above reasons, we deny defendant’s
24 motion to dismiss plaintiff’s breach of fiduciary duty claim.” (brackets added)).

25 Storix brings this against directly against Johnson for injuries he has caused directly to the
26 Storix in breach of the fiduciary duties he owes to Storix. The claim thus belongs to Storix and
27 may be maintained directly. Johnson concedes, as he must, that he is not an officer of Storix, nor
28

1 does he occupy a majority of Storix's board of directors or shareholders, and thus lacks sufficient
2 control to deny the Company its right or ability to pursue litigation involving direct claims owned
3 by the Company. Johnson's argument that this action was not appropriately authorized by the
4 Company's management is a fact issue he can try to argue at trial, where it seems he will argue
5 (against all logic) that a company cannot protect its own interests by suing to stop a disgruntled,
6 hostile director intent on taking actions directly contrary to the company's best interests and in
7 dereliction of duties owed to the company. But this is a demurrer, not a trial, and this is not the
8 time or vehicle for him to advance that weak argument.

9 Storix has standing to pursue this direct claim, and his baseless demurrer on that ground
10 should be overruled.

11 IV.

12 **STORIX HAS PROPERLY ALLEGED CLAIMS AGAINST JOHNSON**

13 As the Court previously recognized in overruling Johnson's prior demurrer, Storix has
14 sufficiently alleged a cause of action against Johnson for breach of fiduciary duty. The elements of
15 a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach
16 of the fiduciary duty; and (3) resulting damage. *Pellegrini v. Weiss*, 165 Cal.App.4th 515, 525
17 (2008), citing *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th
18 445, 483 (1998). Because Johnson cannot show a failure to allege those elements, his arguments
19 consist largely of factual arguments that are better suited for a closing argument than a demurrer.

20 **A. Johnson, a Corporate Director, Owed Fiduciary Duties as a Matter of Law**

21 As alleged in the SAC, and conceded in his opposition, Johnson was elected to Storix's
22 board of directors in February 2015. (See SAC ¶¶ 1, 13; Demurrer, p. 2). California has long
23 recognized that "directors and officers shall exercise their powers in good faith, and with a view to
24 the interests of the corporation." *Remillard Brick Co. v. Remillard-Dandini*, 109 Cal.App.2d 405,
25 417 (1952) (citing former Corp. Code §820, enacted in 1947 and based on former Civ. Code §311,
26 and now reflected in Corp. Code §309). The United States Supreme Court, in *Pepper v. Litton*, 308
27 U.S. 295, 306 (1939), unanimously recognized that a director is a fiduciary of the corporation.

1 Referring directly to the duties of a director, the Supreme Court continued:

2 “He who is in such a fiduciary position cannot serve himself first and his cestuis
3 second. He cannot manipulate the affairs of his corporation to their detriment and
4 in disregard of the standards of common decency and honesty. He cannot by the
5 intervention of a corporate entity violate the ancient precept against serving two
6 masters. He cannot by the use of the corporate device avail himself of privileges
7 normally permitted outsiders in a race of creditors. He cannot utilize his inside
8 information and his strategic position for his own preferment. He cannot violate
9 rules of fair play by doing indirectly through the corporation what he could not do
10 directly. He cannot use his power for his personal advantage and to the detriment
11 of the stockholders and creditors no matter how absolute in terms that power may
12 be and no matter how meticulous he is to satisfy technical requirements. For that
13 power is at all times subject to the equitable limitation that it may not be exercised
14 for the aggrandizement, preference, or advantage of the fiduciary to the exclusion
15 or detriment of the cestuis. Where there is a violation of those principles, equity
16 will undo the wrong or intervene to prevent its consummation.”²

17 *Id.* at 311 (emphasis added). California law is in accord.

18 This fiduciary relationship is governed by the statutory standard that requires directors to
19 exercise due care and undivided loyalty for the interests of the corporation. *Mueller v. MacBan*, 62
20 Cal.App.3d 258, 274 (1976); Corp. Code § 309(a) [“A director shall perform the duties of a
21 director, including duties as a member of any committee of the board upon which the director may
22 serve, in good faith, in a manner such director believes to be in the best interests of the corporation
23 and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent
24 person in a like position would use under similar circumstances.”]; Corp. Code § 7231(a) [“ A
25 director shall perform the duties of a director, including duties as a member of any committee of
26 the board upon which the director may serve, in good faith, in a manner such director believes to be
27 in the best interests of the corporation and with such care, including reasonable inquiry, as an
28 ordinarily prudent person in a like position would use under similar circumstances.”].

29 In the leading case of *Guth v. Loft, Inc.*, 23 Del.Ch. 255, 270, 5 A.2d 503, 510 (1939), these
30 obligations were cogently described as follows:

31 “Corporate officers and directors are not permitted to use their position of trust
32 and confidence to further their private interests. While technically not trustees,
33 they stand in a fiduciary relation to the corporation and its stockholders. A public
34 policy, existing throughout the years, derived from a profound knowledge of
35 human characteristics and motives, has established a rule that demands of a

36
37
38 ² In his concurrent motion to strike, Johnson has challenged Storix’s right to seek injunctive relief. Clearly the United States Supreme Court does not think that courts are powerless to enjoin breaches of fiduciary duties.

1 corporate officer or director, peremptorily and inexorably, the most scrupulous
2 observance of his duty, not only affirmatively to protect the interests of the
3 corporation committed to his charge, but also to refrain from doing anything that
4 would work injury to the corporation, or to deprive it of profit or advantage which
5 his skill and ability might properly bring to it, or to enable it to make in the
6 reasonable and lawful exercise of its powers.” (Emphasis added.)

7 Under both California and Delaware law the duty of loyalty requires the directors/trustees
8 not to act in their own self-interest when the interest of their corporation will be damaged thereby.

9 While Johnson contends that Storix failed to allege facts regarding the existence of a
10 fiduciary duty, there is no doubt that—as a matter of law—based on the alleged (and now
11 admitted) fact that Johnson owed and owes fiduciary duties as a director, Storix has clearly and
12 adequately alleged facts showing the existence of fiduciary duties owed by Johnson to Storix.

13 **B. The SAC Alleges Breaches of Fiduciary Duties**

14 Johnson doesn't really deny that Storix has alleged facts establishing a breach of fiduciary
15 duties. Instead, he once again slips into closing argument mode and argues why he thinks he
16 should win. In making that argument, Johnson ignores the facts that are *actually alleged* in the
17 SAC, and presents a host of denials and supposed disputed issues of fact. That is not the proper
18 function of a demurrer. Johnson also misconstrues legal authorities, citing cases involving duties
19 owed by departing non-fiduciary employees.³ There is no question that Storix has alleged breaches
20 of fiduciary duty that occurred while Johnson was a director.

21 Moreover, even if those cases are considered, they cannot be read as excusing any of
22 Johnson's behavior alleged in the SAC. While “[t]he mere fact that the officer makes preparations
23 to compete before he resigns his office is not sufficient to constitute a breach of duty[, i]t is the
24 nature of his preparations which is significant.” *Bancroft-Whitney Co. v. Glen*, 64 Cal.2d 327, 346
25 (1966). Courts note that “no ironclad rules as to the type of conduct which is permissible can be
26 stated, since the spectrum of activities in this regard is as broad as the ingenuity of man itself.” *Id.*
27 The significant inquiry with respect to a fiduciary's preparations to compete with a corporation

28 ³Johnson's citations to unfair competition and trade secret misappropriation cases involving “solicitation” by departing employees are totally inapposite. *See, e.g., Demurrer*, p. 7. However, to the extent the Court views any pleading by Storix deficient, it respectfully requests leave to allege claims for unfair competition and trade secret misappropriation in response to Johnson's invitation to substantiate such contentions.

1 upon resignation is whether such fiduciary's acts or omissions constitute a breach under general
2 principles applicable to performance of his trust. *Id.* at 347.

3 The facts in those cases are very different from what is alleged in the SAC. Storix alleges
4 Johnson was and is a director who actually formed a competing enterprise with the express purpose
5 of competing with Storix, and took other steps to further that effort. It is alleged (and will be
6 proven upon undisputed evidence) that Johnson formed Janstor to directly compete with Storix
7 while he was actively serving as a director of Storix.⁴ (SAC ¶14). Johnson took other steps to put
8 his plan into action, including the reservation of two port numbers (SAC ¶15), and reserving
9 domain names (SAC ¶14, 16). Johnson then widely disseminated directions to Storix's customers
10 to "cease any further payment to Storix"⁵ and otherwise made derogatory comments about Storix
11 and its products with the intent to diminish Storix's sales revenues. (SAC ¶17). Johnson then
12 sought to sow disloyalty with Storix's own employees, stating that the "innocent employees are
13 about to lose your jobs" and that Johnson had, over two years, developed a "marketable product"
14 based on Storix's software. (SAC ¶ 18).

15 Johnson contradicts well established law concerning fiduciary duties of directors when he
16 argues: "The mere fact that Johnson is a director of Storix does not mean Johnson has a fiduciary
17 duty to refrain from such actions." (Demurrer, p. 7). As a matter of law, Johnson as a Storix
18 director owed the company fiduciary duties. Whether his alleged conduct violates those duties is a

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20 ⁴ Johnson argument that he subsequently dissolved Janstor or that he stopped competing after he got caught are fact
21 issues beyond the scope of a demurrer. Moreover, promises of reform or even cessation of bad behavior do not avoid
22 the necessity for relief—particularly when the change in behavior only arises after being caught. *See, e.g., SEC v.*
23 *Koracorp Indus.*, 575 F.2d 692, 698 (9th Cir. 1978) (promises of reform are unpersuasive "especially if no evidence of
24 remorse surfaces until the violator is caught"); *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990)
(permanent injunction where the defendant "simply took the action that best suited him at the time [by voluntarily
25 ceasing infringement]; he was caught red-handed...[and defendant] 'suddenly reformed.'" (Brackets added)).

26 ⁵ The Court may recall that during the September 16, 2016 hearing on Johnson's Writ of Mandate, that it referred to
27 this statement as "very damning." In granting Storix's motion for attorney fees in the Copyright Action, United States
28 District Judge Marilyn L. Huff stated:

"It was inappropriate for Plaintiff Johnson to demand that Defendant Storix's customers stop paying for the
use of its software in an attempt to prevent Defendant Storix from having enough money to continue
defending the lawsuit. [Citation]. It was also inappropriate for Plaintiff Johnson to threaten Defendant
Storix's directors with the loss of their homes while he was telling the customers to stop paying Storix to
undermine the company. [Citation]. This inappropriate conduct should be deterred."

See ROA No. 110, Exhibit 17, p, 11 (Brackets added; citations omitted).

1 question of fact not appropriately determined at the demurrer stage. While Johnson now attempts to
2 distort and spin his disloyal conduct as somehow designed to be in the company's best interest, or
3 (incredibly) protected by the business judgment rule, the SAC's allegations plainly evidence that
4 Johnson's conduct is precisely the type of disloyal and despicable conduct in which fiduciaries are
5 prohibited from engaging. Johnson's denials of evil motive are not sufficient to justify a demurrer,
6 and are nothing but disputed facts which require resolution at trial.

7 **C. Storix Has Sufficiently Alleged Injury**

8 Johnson contends that because Storix has not ascribed the harm claimed in the SAC a dollar
9 figure, that the SAC is subject to demurrer as being uncertain and ambiguous and for failing to
10 state a cause of action. He is once more mistaken.

11 Although a complaint "shall contain ... [a] demand for judgment for the relief to which the
12 pleader claims to be entitled," including the amount of damages demanded (C.C.P. § 425.10(a)(2)),
13 a specific dollar amount is necessary only when a default judgment is to be entered. The purpose of
14 such a requirement is to ensure that the defendant is sufficiently aware of the consequences of not
15 answering the complaint. *Janssen v. Luu*, 57 Cal.App.4th 272, 279 (1997). However, "in any other
16 case, the court may grant the plaintiff any relief consistent with the case made by the complaint and
17 embraced within the issue." C.C.P. § 580(a). Hence, the absence of an alleged dollar amount of
18 damages is not fatal so long as the pleaded facts entitle the plaintiff to relief. *See Hunter v.*
19 *Freeman*, 105 Cal.App.2d 129, 133 (1951); *Hoffman v. Pacific Coast Const. Co.*, 37 Cal.App. 125,
20 129-130 (1918).

21 Here, Storix has alleged that Johnson's conduct has resulted and/or will result in "damages
22 in amounts and types according to proof at trial and in excess of the jurisdictional amount of this
23 court." (SAC ¶¶26, 36, Prayer). The fact that Storix's damages are not yet finalized, fully accrued
24 or determined is not a legitimate basis to sustain a demurrer. Because Storix has pleaded its
25 entitlement to recover damages suffered as a consequence of Johnson's actions, which it will prove
26 at trial, the demurrer must be overruled.

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D. Leave to Amend Should be Granted if Any Part of the Demurrer is Sustained

The Court previously and properly overruled Johnson’s nearly identical demurrer to the FAC, and the only new arguments proffered by Johnson are patently frivolous. If, however, the Court is inclined to sustain any aspect of Johnson’s demurrer, Storix should be given leave to amend to allege additional facts and to add additional causes of action. For example (and without conceding any aspect of the SAC is defective), in response to Johnson’s apparent argument that Storix’s remedies are limited because the SAC does not include a cause of action for misappropriation of trade secrets, Storix should be given the opportunity to add causes of action for trade secret misappropriation under both state and federal law.⁶ Indeed, as a general principle, it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. *Temescal Water Co. v. Department of Public Works*, 44 Cal.2d 90, 107 (1955). Such a reasonable possibility clearly exists here, and denial of leave to amend would not be appropriate.

V.

CONCLUSION

For the foregoing reasons, Storix respectfully requests that the demurrer to the SAC be overruled, and Johnson be required to answer. In the event that any aspect of the demurrer is sustained in respect, Storix respectfully requests that it be granted leave to amend to cure any perceived defect.

DATED: September 30, 2016

PROCOPIO, CORY, HARGREAVES & SAVITCH
LLP

By: _____

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Sean M. Sullivan
Attorneys for Plaintiff Storix, Inc.

⁶ Storix anticipates that if the pleadings are amended to allege a cause of action for trade secret misappropriation pursuant to the recently enacted Defend Trade Secrets Act (DTSA), Johnson will likely use that opportunity to file a notice of removal to drag Storix’s claims to federal court.

1 **PROOF OF SERVICE**

2 I am a resident of the State of California, over the age of eighteen years, and not a party to
3 the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH
4 LLP, 530 "B" Street, Suite 2100, San Diego, California 92101. On September 30, 2016, I served
5 the within documents:

6 **STORIX, INC.'S OPPOSITION TO ANTHONY JOHNSON'S DEMURRER TO
7 SECOND AMENDED COMPLAINT**

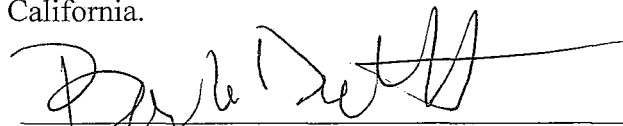
- 8 **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage
9 thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth
10 below. I am readily familiar with the firm's practice of collection and processing
11 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
12 Service on the same day with postage thereon fully prepaid in the ordinary course of business.
13 I am aware that on motion of the party served, service is presumed invalid if postal
14 cancellation date or postage meter date is more than one day after date of deposit for mailing
15 an affidavit.
- 16 **BY E-MAIL OR ELECTRONIC SERVICE (via One Legal Online Court Services):** I
17 served upon the designated recipients via electronic transmission through the One Legal
18 system on September 30, 2016. Upon completion of said transmission of said documents, a
19 certified receipt is issued to filing party acknowledging receipt by One Legal's system. Once
20 One Legal has served all designated recipients, proof of electronic service is returned to the
21 filing party.

22 Anthony Johnson
23 716 NE 20th Drive
24 Wilton Manners FL 33305
25 flydiversd@gmail.com
26 *In Pro Per*

27 Michael P. McCloskey
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david.aveni@wilsonelser.com
**Counsel for David Huffman, Richard
Turner, Manuel Altamirano, David
Kinney and David Smiljkovich**

29 (State) I declare under penalty of perjury under the laws of the State of California that the
30 above is true and correct.

31 Executed on September 30, 2016, at San Diego, California.

32 
33 _____
34 Barbara Donahoo