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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DISTRICT

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| ANTHONY JOHNSON and ROBIN SASSI, derivatively on behalf of STORIX, INC., a California corporation,<br><br>Plaintiffs,<br>vs.<br><br>DAVID HUFFMAN, an individual; RICHARD TURNER, an individual; MANUEL ALTAMIRANO, an individual; DAVID KINNEY, an individual; DAVID SMILJKOVICH, an individual; and DOES 1-20,<br><br>Defendants,<br><br>STORIX, INC., a California corporation;<br><br>Nominal Defendant.<br><br>AND CONSOLIDATED ACTIONS | Lead Case No.: 37-2015-00034545-CU-BT-CTL (Consolidated with Case No.: 37-2016-00030822-CU-MC-CTL and 37-2015-00028262-CU-BT-CTL)<br><br>**IMAGED FILE**<br><br>PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION<br><br>Assigned for all Purposes to The Honorable Joel R. Wohlfeil Department C-73 |

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TABLE OF CONTENTS






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TABLE OF AUTHORITIES

***Case Law***



***Statutes and Rules***





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Plaintiffs Anthony Johnson and Robin Sassi submit this opposition to the motion for summary judgment and summary adjudication filed by defendants David Huffman, David Kinney, David Smiljkovich, Richard Turner, and Manuel Altamirano

## I
## INTRODUCTION

Plaintiffs are two of Storix, Inc.'s ("Storix's") six shareholders and they are prosecuting derivative claims for waste, self-dealing, and misappropriation against the defendants, who control and manage Storix. Every shareholder is a party to this lawsuit and every shareholder is represented by competent, experienced counsel. Defendants do not challenge the merits of plaintiffs' derivative claims. Instead, they ask this court to dismiss the derivative lawsuit and absolve them of all liability in this action because, in their view, plaintiffs cannot adequately prosecute these claims against them.

Defendants' arguments fail because (1) California shareholders may assert derivative claims on behalf of the corporation while simultaneously pursuing direct claims against the corporation, and (2) plaintiffs' personal interests do not go to the subject matter of the lawsuit and do not conflict with the similarly situated shareholders whose interests they seek to represent. Because their interests do not conflict, they are adequate plaintiffs, and defendants' motion for summary judgment on the derivative action should be denied.

Defendants next argue that Johnson's false imprisonment claim should be dismissed because there was no physical restraint preventing Johnson from moving away from the door. This argument fails because defendants restrained Johnson with the threat of arrest once they called the police. Whether defendants are liable for false imprisonment is a factual dispute that should be resolved at trial. Defendants' argument that Johnson cannot seek garden-variety emotional distress damages for false imprisonment is likewise without merit. In any event, Johnson may always seek nominal damages for being falsely imprisoned, and defendants' motion for summary adjudication on this claim should be denied.



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The third part of defendants' motion seeks summary adjudication on the fraud claim Johnson filed against them directly. Defendants argue that Johnson suffered no damages and that he would not have done anything differently even if defendants had told him the truth from the outset. These arguments fail because (1) if he would have known the facts defendants concealed from him, Johnson would not have given Storix nine months of full-time work for less than one-third his regular, full-time salary; and, as a result, (2) Johnson was damaged by the amount he would have charged Storix for his full-time services, less the amounts Storix actually paid him.

## II
## FACTUAL BACKGROUND

Storix sells software designed and developed by Johnson in 1998 and copyrighted by Johnson, DBA "Storix Software" in 1999 (Plaintiffs' first amended complaint ("FAC"), FAC ¶12.) Johnson incorporated and became "Storix, Inc." in 2003. He was initially its sole shareholder, officer and director. (Declaration of Anthony Johnson ("Johnson decl."), ¶2.)

In 2011, after a terminal cancer diagnosis, Johnson transferred management and operational responsibilities of Storix to his long-term employees, Defendants David Huffman, Richard Turner, Manuel Altamirano, and David Kinney (Johnson decl., ¶¶2-3) He also *generously* gifted them a combined 60 percent of Storix's shares. (Johnson decl., ¶2.) Although Johnson no longer managed day-to-day operations, he continued to help out as needed. He kept his health insurance, and received a salary that was less than one-third of his wages as CEO. (Johnson decl., ¶3.) During his absence, defendants ignored Johnson's advice and decided to market SBAdmin to larger, riskier networks where the software and its 15-year old security protocols were never designed to operate. (Johnson decl., ¶4.)

Plaintiff Robin Sassi is defendant Huffman's ex-wife. In 2013, Sassi received a 7.84 percent stake in Storix stock as part her marital settlement agreement with Huffman. (Declaration of Robin Sassi ("Sassi decl."), ¶2.)

Meanwhile, Johnson's health was improving, and on February 12, 2013, Johnson posted on Facebook that his cancer was in remission. (Sassi decl., ¶25) Later that year,



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defendants welcomed Johnson back to Storix to work full-time on a project to improve the software's obsolete security. Even though he was working full time, Johnson did not demand a salary increase because he expected his software improvements would generate increased sales, and in turn, increased shareholder distributions. (Johnson decl., ¶¶5-6.) Johnson did not know the defendants wanted to push him out and since at least January 2013, they had been planning ways to buy-out Johnson's stake in the company. (Sassi decl., ¶¶3-4, 6-11; NOL, Ex. 42, 43, 44.) In early 2014, Johnson was close to finishing his project when he began experiencing unprecedented hostility from defendants. Before he could finish the project, Johnson resigned from Storix in May 2014 due to the hostile environment. (Johnson decl., ¶¶7-11; NOL, Ex. 37.)

Johnson tried to work things out with his fellow shareholders, but defendants refused to communicate with him for weeks. (Johnson decl., ¶11; NOL, Ex. 37.) Johnson eventually informed them that he would withdraw Storix' license to sell the software. Defendants reacted by claiming Storix owned the rights to SBAdmin – even though the copyright was never registered to anyone other than Johnson. This compelled Johnson to file a Federal lawsuit to enforce his copyright on August 4, 2014. (Johnson decl., ¶¶12-15.)

Around this time, Johnson contacted Sassi about purchasing her shares. Throughout their conversations in the following months, they found a common interest and bonded as they were Storix's only non-employee shareholders. (Sassi decl., ¶¶16-17.) Defendants were aware Sassi was speaking with Johnson, and Sassi made no secret about it. (NOL, Ex. 37.) Defendants had every reason to expect Sassi would share anything she learned with Johnson. (Sassi decl., ¶20.) In February 2015, Johnson and Sassi were voted onto the Board, where they currently remain along with Defendants Huffman, Smiljkovich, and Altamirano. (Sassi decl., ¶22.)

In 2015, Johnson discovered that when he came back to work full time at Storix in 2013, the defendants had been planning to implement a buy-out mechanism that would require Johnson to sell his 40 percent stake back to Storix. Smiljkovich had contacted attorneys at DenHerder about this as early as January 2013. At that time, before Johnson announced he



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was cancer-free, Smiljkovich wanted a "legally binding agreement, between Storix, Inc. and Anthony Johnson's estate, to automatically buy back his shares at a set price, upon his death." (NOL, Ex. 43.) In February 2013, after Johnson's cancer free announcement, Sassi received a letter from the same firm describing a plan that would require employee shareholders to sell their stock back to Storix if their employment ends. (Sassi decl., ¶¶3-4.) When Johnson returned to Storix full time, Smiljkovich sent Sassi his estimate of how much the company would have to pay Johnson to buy-out his stock. (Sassi decl., ¶11; NOL, Ex. 44.) Over the next six months, Smiljkovich exchanged multiple, detailed emails with Wells Fargo bankers for the express purpose of getting a loan to buy-out Johnson's shares. (NOL, Ex. 42.) Throughout this entire time, defendants concealed these activities from Johnson, the founder and largest shareholder of Storix. Had Johnson known about these plans, he would not have agreed to work full-time at Storix $50,000. (Johnson decl., ¶¶ 22-26.)

## III
## DEFENDANTS HAVE NOT MET THEIR BURDEN FOR SUMMARY JUDGMENT ON PLAINTIFFS' ABILITY TO FAIRLY AND ADEQUATELY REPRESENT THE SIMILARLY SITUATED SHAREHOLDERS

Defendants argue the entire derivative action must be dismissed, and all of their liability to the corporation should be erased, because (according to them), plaintiffs are inadequate representatives. Defendants have the burden of proving inadequacy, and they have failed to meet their burden. Plaintiffs Johnson and Sassi have a right to protect their investment and a derivative lawsuit is the appropriate vehicle for recovering money defendants improperly took from Storix. Plaintiffs will continue to fairly and adequately prosecute these claims, and defendants motion to throw out the entire derivative suit on this basis should be denied.

### A. History of the Adequacy Requirement

The adequacy requirement derives from Rule 23.1 of the Federal Rules of Civil Procedure which states:

> The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(Fed. Rules Civ.Proc., Rule 23.1(a).)



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Rule 23.1 (pertaining to derivative actions) was added to the rules at the same time as Rule 23 (pertaining to class actions). While derivative actions are distinct from class actions, they are both designed to allow a small number of representative plaintiffs to litigate common claims on behalf of a larger group of absent class members or shareholders. Thus, both class actions and derivative suits require notice to the absent class and court approval of any proposed settlement or dismissal. And just like derivative plaintiffs must fairly represent the similarly situated shareholders, Rule 23 requires the representative class plaintiffs "fairly and adequately protect the interests of the class." (Fed. Rules Civ.Proc., Rule 23(a)(4).)

Under California law, shareholder derivative actions are authorized under Corporations Code section 800. Unlike Rule 23.1, section 800 does not address the adequacy of the representative plaintiffs. However, in *Grosset v. Wenaas,* (2008) 42 Cal.4th 1100, 1115, fn. 10, the California Supreme Court rejected the "implication that section 800's failure to expressly state a fair and adequate representation requirement reflects any intent on the part of our Legislature to secure the standing of a derivative plaintiff who, for whatever reason, cannot provide fair and adequate representation." This short comment in the footnotes provides little guidance, and no other California case has considered the adequacy of a derivative plaintiff. When there is no salient state authority, California will often look to other Federal and state courts for guidance on how to approach the issue.

Rule 23.1(a) requires a plaintiff who can "fairly and adequately represent the interests of shareholders … who are *similarly situated* in enforcing the right of the corporation." (emphasis added) Adequacy of representation is a question of fact. (*Harris v. Palm Springs Alpine Estates, Inc.* (9th Cir. 1964) 329 F.2d 909, 914.) The burden of proving that the named plaintiff in a derivative action is inadequate is placed on the party challenging the representation. (*Smallwood v. Pearl Brewing Company* (5th Cir. 1974) 489 F.2d 579, 592, fn. 15.)

The first step when confronting a challenge to a plaintiff's adequacy is to define the class of similarly situated shareholders. "It is not always necessary that the minority



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shareholders bringing a derivative suit represent the interests of the majority shareholder; were the court to hold otherwise, derivative actions would be logically impossible to bring." (*Cement-Lock v. Gas Technology Institute* (N.D.Ill. 2009) 618 F.Supp.2d 856, 887-888, citing *Ohio-Sealy Mattress Mfg. Co. v. Kaplan* (N.D.Ill. 1980) 90 F.R.D. 21, 25.) "Instead, the plaintiff in a derivative action must be capable of advancing the interests of 'similarly situated' shareholders—not all or even a majority of shareholders." (*Ibid.*)

Next, the court will consider whether a plaintiff representative (1) has the capacity to vigorously and conscientiously prosecute a derivative suit; and (2) has any economic interests that are antagonistic to the interests of the class. (*Larson v. Dumke* (9th Cir. 1990) 900 F.2d 1363, 1367.) To render plaintiffs inadequate, the economic interests must be antagonistic to the class of similarly situated shareholders whose interests they seek to represent.

> Perhaps the most important element to be considered whether plaintiff's interests are antagonistic to those he is seeking to represent. … Defendant must show that a serious conflict exists and that plaintiff could not be expected to act in the interests of the other shareholders because doing so would harm his other interests. If, from the foregoing, a rule might be synthesized, it is: when a derivative plaintiff demonstrates to the court an intent and desire to vigorously prosecute the underlying corporate claim and when he has engaged competent counsel to assist in that endeavor then, absent either a conflict of interest which goes to the forcefulness of the prosecution or the existence of antagonism between the plaintiff and other shareholders arising from differences of opinion concerning the best method of vindicating the corporate claim, the representation requirement [of Rule 23.1] is met.

(*Sweet v. Bermingham* (S.D.N.Y. 1975) 65 F.R.D. 551, 554.) (Footnote and internal quotations omitted.)

B. Plaintiffs Will Fairly and Adequately Represent the Interests of Similarly Situated Shareholders

Here, plaintiffs readily satisfy the test for adequacy. First, every shareholder is a party to this case, and plaintiffs are the only shareholders similarly situated in bringing these derivative claims against the defendants. Everything they are doing is not for the benefit of themselves, but for the benefit of Storix and all of its shareholders equally. Second, plaintiffs have the capacity to vigorously and conscientiously prosecute this action, and neither Johnson



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nor Sassi have any economic interests antagonistic to the interests of the class.

1. Plaintiffs Sassi and Johnson Make Up the Class of Similarly Situated Shareholders Interested in Enforcing the Corporation's Rights Against Defendants

Neither California nor the Federal rules require a minimum number of similarly situated shareholders for a derivative action. In some cases, the class may include many non-defendant shareholders. In other cases, there may only be a class of one similarly situated plaintiff. (*Larson v. Dumke, supra,* 900 F.2d at p. 1368 ["Although the cases are not uniform, we are persuaded that a single shareholder may bring a derivative suit."]; *Angel Investors, LLC v. Garrity* (Utah 2009) 216 P. 3d 944, 951.)

In this case, every Storix shareholder is party to the derivative action. On one side we have defendants Huffman, Turner, Altamirano, and Kinney. On the other side, we have plaintiffs Johnson and Sassi. Plaintiffs allege defendants improperly diverted funds for their personal interests, and have brought this action to make defendants repay that money to Storix. Plaintiffs are clearly suited to represent the similarly situated shareholders and enforce the corporation's rights against the defendants.

2. Plaintiffs Will Continue to Vigorously and Fairly Pursue These Claims and They Have No Financial Interests Antagonistic to this Objective

There is no dispute that plaintiffs have vigorously prosecuted the derivative claim and that they have obtained competent counsel to assist them. Instead, defendants argue plaintiffs are inadequate for three reasons. First, defendants argue plaintiffs cannot fairly and adequately prosecute these claims because Johnson is adverse to Storix in the pending copyright appeal and (as a defendant) in the Janstor suit. (MSJ Memo, p. 5.) Second, defendants claim plaintiffs cannot be adequate representatives because Johnson is allegedly competing with Storix. (MSJ Memo, p. 6.) Third, defendants argue Sassi cannot adequately pursue the derivative claims because she has taken Johnson's side in this shareholder dispute. (MSJ Memo, p. 8.) None of



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these arguments support granting summary judgment against the derivative action.

"[A]bsent either a conflict of interest which goes to the forcefulness of the prosecution or the existence of antagonism between the plaintiff and other shareholders arising from differences of opinion concerning the best method of vindicating the corporate claim, the representation requirement of is met." (*Sweet v. Bermingham, supra,* 65 F.R.D. 551, 554.)

a. Neither His Individual Claims nor the Janstor Suit Prevent Johnson From Fairly and Adequately Prosecuting These Derivative Claims

Defendants suggest that Johnson cannot be a plaintiff on this derivative claim because he has individual claims against Storix, and because Storix sued him in the Janstor suit. However, there is no rule in California that precludes a shareholder from filing a derivative claim if he has other direct claims against the company. "[l]t is settled that one who has suffered injury both as an owner of a corporate entity and in an individual capacity is entitled to pursue remedies in both capacities." (*Denevi v. LGCC* (2004) 121 Cal.App.4th 1211, 1221-1222.) And the fact that Johnson has to defend against the frivolous allegations in the Janstor suit is no reason to find him an inadequate plaintiff. "[L]ess weight should be given to a corporate defendant's claim for the disqualification of the representatives of the shareholder class where the corporate defendant was the one who initiated the litigation about which it now complains." (*Vanderbilt v. Geo-Energy Ltd.* (3rd.Cir. 1983) 725 F. 2d 204, 208 ["normally he who is the first to enter the courthouse door and thereafter forces others to follow should not be permitted to use his own litigiousness as a basis to preclude others from suing him"].)

Nor would Johnson's individual claims interfere with his derivative lawsuit under the Federal rules. To warrant disqualification, the plaintiff's interest must be a "present threat to the conduct and the subject matter of the suit." (*Youngman v. Tahmoush* (Del.Ch. 1983) 457 A.2d 376, 380-381 ["[P]urely hypothetical, potential or remote conflicts of interests never disable the individual plaintiff."].) For example, in *Zarowitz v. BankAmerica Corp.*, (9th Cir. 1989) 866 F.2d 1164, 1166-67, one of the shareholders, Powers, objected to settlement of a



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derivative suit. At the same time, Powers was suing the corporation for wrongful termination. (*Ibid.)* When the corporation, the derivative plaintiffs, and the insurers reached a settlement, Powers objected "on grounds that a settlement would have an adverse effect on his damages action for wrongful termination." (*Ibid*.) The court found Powers an inadequate representative, and thus had no standing to object, because his personal litigation strategy required him to oppose any settlement offer, regardless of its benefit to the class. (*Ibid.)*

Here, there is no conflicting interest, much less one that goes to the subject matter of the suit. The copyright trial involved a completely different issue, and it is now over. Only the appeal remains, and that will have no impact on Johnson's role as a derivative plaintiff. Unlike the objector in *Zarowitz* case, Johnson's interests in prevailing on the copyright appeal and the Janstor suit do not conflict with a vigorous and conscientious prosecution on the derivative lawsuit. These lawsuits do not establish inadequacy, and defendants' argument on this point does not prove the nonexistence of triable issues of material fact necessary for summary judgment.

b. Defendants Have Not Met Their Burden to Establish the Nonexistence of Triable Issues of Material Fact on Johnson's Alleged Antagonism

For derivative plaintiffs, the defendants have the burden of proving plaintiffs' inadequacy. Since they do not challenge Johnson's diligence and capacity to prosecute these derivative claims, defendants must prove Johnson has "economic interests that are antagonistic to the interests of the class." (*Larson v. Dumke* (9th Cir. 1990) 900 F.2d 1363, 1367.)

Defendants make no effort to show any conflict which could impair Johnson and Sassi's derivative claims. Instead, they argue Johnson's alleged "competition" and "antagonism" against Storix makes him an inadequate representative. This argument misses the mark – the relevant inquiry is whether Johnson has a conflict goes to the subject matter of the suit. But even assuming these allegations are relevant to defendants' inadequacy challenge (they are not), defendants' motion falls woefully short of proving Johnson is in competition



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with Storix or is otherwise "antagonistic" to the company.

January 23, 2015 Settlement Email

Defendants first cite to an email Johnson sent to Altamirano, Turner, and Kinney on January 23, 2015. (NOL, Ex. 6.) The email must be considered in context, i.e. it was part of Johnson's negotiations to settle the case with Altamirano, Turner, and Kinney. In short, this email was intended to induce a settlement. In an email to Sassi that same day he said, "To tell the truth, I'm about 50-50 as far as whether It's best for me to return or start a new business." NOL, Ex. 23.

As Johnson has explained countless times, prior to February 2015, he was considering leaving Storix and starting up a new business. But as he admitted to Sassi on January 23, 2015, he had substantial reservations about leaving, and he put the odds at 50-50. Several weeks later, in his email responding to Jeff Harding's suggestion that he walk away from the copyright dispute and start up a new business, Johnson explained why he rejected that option: (NOL, Ex. 13 ["If I started a company today, it would be at least 6 months to have anyone trained enough to provide even basic support. And I would still have to re-write much of the current code, and the entire web site and the web interface for the product. … The biggest problem I face is that they claim copyrights to the product, or at least any derivatives since Storix Inc. was formed. … If I start a new company, I'm just asking them to come after me, and have much more to lose."].)

Janstor Technology

Defendants next offer Johnson's actions in February 2015 to set up Janstor Technology, Inc., as confirming evidence of his intent to compete with Storix. Again, Johnson has been clear about this from the start – and the evidence backs him up. While Johnson considered starting up a new, competing business, he had substantial reservations and in January 2015, that alternative only had "50-50" chance of happening. By February 2015, he had made up his mind – he was not going to start up a competing business. When his Jeff Harding, urged him to start a new company, he responded on February 26, 2015 and was clear about his decided:



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> HARDING: Take the money and start another company. That's what Steve Jobs did. Steve Jobs didn't spend all his money in a pissing match where everyone loses. You are quite successful and it would be a shame to watch you throw everything away. You can start another company. You have more resources now than when you started. Think about where you were when you started... you are better off now. Why go backwards? Everything ends. Move on. This thing is eating you up.
>
> JOHNSON: Always a possibility, but a last resort. I spent 10 years developing the company resources they now have, including the staff, equipment, certifications, business partners, sales, support and licensing apps, … If I started a company today, it would be at least 6 months to have anyone trained enough to provide even basic support. And I would still have to re-write much of the current code, and the entire web site and the web interface for the product. But so as not to waste any more time depending on how this goes, I recently acquired domain names, filed for new corporation, and re-branded the software under the new name. … The biggest problem I face is that they claim copyrights to the product, or at least any derivatives since Storix Inc. was formed. That includes their claim to all the work I did to add the network security the last year before they ran me out. … If I start a new company, I'm just asking them to come after me, and I'll have much more to lose. This is why I need the copyright issue settled before I can move.

(NOL, Ex 13 [February 26, 2015 email to Jeff Harding].)

Rather than evidence of Johnson "competing with the company," this email reveals that Johnson did not want to start up a competing company. Johnson admits that he formed a new corporation and re-branded the software, but that was "so as not to waste any more time depending on how [the copyright litigation] goes." This is why Janstor was formed, i.e. to act as a vehicle for continuing the business if Storix filed for bankruptcy. Johnson did nothing wrong by setting up Janstor and his plans bore no resemblance to defendants' incessant mantra that he was "competing with the company."

Janstor never operated, never did any business, and Johnson dissolved it before he moved to Florida in July 2015. It offers no support for Storix's attacks on Johnson, and it has no impact on Johnson's ability to fairly and adequately serve as a derivative plaintiff.

January 16, 2016 Email to Brian Bonert

Defendants cite this email, apparently in support of their claim that Johnson continues to compete with the company. While Johnson did mention improvements he made to the



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software, he says nothing in this email about competing against Storix. In fact, he explicitly said the precise opposition, i.e. that he wanted his updated software to remain with Storix:

> I will fight to the death to prevent them from laying off anyone else because I'm going to need the rest of you soon. I have no desire to run the company, but I can and will produce a product that will get the company back to what it was when I was last in charge.

(NOL, Ex. 8.)

The defendants simply have no evidence that Johnson is competing, or ever has competed, with Storix. And they certainly have not met their burden to establish the nonexistence of any material fact on the question of whether Johnson is competing with or antagonistic toward Storix.

Johnson will vigorously prosecute the derivative claims as he has done for the past two years, and his interests are aligned with Sassi, the only other non-defendant shareholder. Moreover, if he prevails, Storix (not Johnson) will receive any damages defendants must repay the company and will have updated, secure software. Johnson will continue to fairly and adequately prosecute the derivative action and defendants' motion for summary judgment on this point should be denied.

c. Defendants Have Not Met Their Burden to Establish the Nonexistence of Triable Issues of Material Fact on Sassi's Adequacy

Defendants make no effort to argue that Sassi is, by herself, an inadequate plaintiff in this derivative case. Instead, because she was supportive of Johnson's claims in the copyright litigation, defendants argue that "Sassi is tainted by the same conflict of interest as Johnson." (MSJ Memo, p. 8.) This conclusion rests on the erroneous assumption that Johnson has a conflict of interest that prevents him from adequately representing the non-defendant shareholders. No such conflict exists, and the argument must therefore fail.

But even if we assume Johnson did have some disqualifying conflict, defendants offer no authority for imputing Johnson's conflicts to Sassi. The only evidence defendants have against Sassi is her supportive correspondence with Johnson during the copyright litigation.



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Defendants offer no authority for the proposition that this disqualifies her from serving as a plaintiff on a valid derivative case. Instead, defendants sheepishly point to Judge Prager's decision denying Sassi's request to inspect corporate records. As defendants admit, the court entered Judge Prager's order but it made clear that his findings would not bind the trier of fact in subsequent proceedings in this case. There is good reason for that. Judge Prager's decision was made on a request to inspect corporate records, including privileged records. The concerns about disclosing privileged records are vastly different than concerns about Sassi and Johnson adequately representing a class of two shareholders pursuing derivative claims against the five defendants who control Storix.

Sassi and Johnson are the class of similarly situated shareholders in this case. There is no conflict within the class, and their derivative claims will directly benefit Storix. On the other hand, granting summary judgment would absolve defendants of all liability for their waste and self-dealing, and would open the flood gates for even worse oppression against Johnson and Sassi. There is no reason to grant defendants' request and their motion for summary judgment on the derivative action should be denied.

## IV
## DEFENDANTS HAVE NOT MET THEIR BURDEN FOR SUMMARY ADJUDICATION ON JOHNSON'S FALSE IMPRISONMENT CLAIM

"False imprisonment is the "nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1123.) "Restraint may be effectuated by means of physical force, threat of force or of arrest, confinement by physical barriers, or by means of any other form of unreasonable duress." (*Scofield v. Critical Air Medicine, Inc.*, (1996) 45 Cal.App.4th 990, 10007-1008.)

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A. There Are Factual Disputes as to Whether Defendants Deprived Johnson of His Freedom of Movement by Physical Barriers, Threats of Force, Menace, or Unreasonable Duress

There is no question that threatening to have someone arrested can give rise to false imprisonment. (*Vandiveer v. Charters* (1930) 110 Cal. App. 347, 351 [threat to have shopper arrested if she left was actionable false imprisonment].) Here, there is a factual dispute as to whether defendants deprived Johnson of his liberty, by putting Johnson under threat of arrest when they called the police. (See Johnson decl., ¶¶ 39-45.) This factual dispute should be resolved at trial and defendants' motion to summarily adjudicate this cause of action should be denied.

B. Johnson's Claim for Ordinary Emotional Distress Damages Is a Fact Question for the Jury

Johnson's claim for ordinary emotional distress damages does not require expert testimony and is a question of fact for the jury. Defendants' motion to dismiss his claim on this point should be denied.

C. Even Without Emotional Distress Damages, Johnson Is Entitled to Recover Nominal Damages for False Imprisonment

"False imprisonment has been characterized as a 'dignitary tort,' designed to allow recovery by one who either "knows of the dignitary invasion" or is actually harmed by it. The tort is intended to protect one's "personal interest in freedom from restraint of movement[.] In view of the nature of the interest protected, it is appropriate a cause of action may be brought even where the damage is purely nominal." (*Scofield v. Critical Air Medicine, Inc., supra,* 45 Cal.App.4th 990, 10007-1008.) Even if Johnson chooses not to seek emotional distress damages, he is still entitled to a trial on his false imprisonment claim for nominal damages.

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## V
## DEFENDANTS HAVE NOT MET THEIR BURDEN FOR SUMMARY ADJUDICATION ON JOHNSON'S DIRECT ACTION FOR FRAUD

Defendants move to summarily adjudicate Johnson's fraud claim in his direct action against them. Their motion should be denied because if defendants had disclosed their plans to buy-out Johnson's shares, Johnson would not have returned to work full time at the diminished rate of $50,000 per year. As a result of their fraudulent concealment, Johnson was damaged by the amount he would have charged for his work had he known the true facts.

### A. Johnson Would Not Have Returned to Work Full-Time for Storix At a Fraction of His Former Salary If He Had Known of Defendants' Plans to Acquire His Shares

When Johnson returned to work full time at Storix in 2013, the defendants had been planning to implement some buy-out mechanism that would require Johnson to sell his 40 percent stake back to Storix. Smiljkovich had contacted attorneys at DenHerder about this as early as January 2013. At that time, before Johnson announced he was cancer-free, Smiljkovich wanted a "legally binding agreement, between Storix, Inc. and Anthony Johnson's estate, to automatically buy back his shares at a set price, upon his death." (NOL, Ex. 43.) In February 2013, after Johnson revealed on Facebook that he was no longer dying of cancer, Sassi received a letter from the same firm describing a plan that would require employee shareholders to sell their stock back to Storix if their employment ends. (Sassi decl., ¶¶3-4.) When Johnson returned to Storix full time, Smiljkovich sent Sassi his estimate of how much the company would have to pay Johnson to buy-out his stock. (Sassi decl., ¶11; NOL, Ex. 44.) Over the next six months, Smiljkovich exchanged multiple, detailed emails with Wells Fargo bankers for the express purpose of getting a loan to buy-out Johnson's shares. (NOL, Ex. 42.)

Throughout this entire time, defendants concealed all of this activity from Johnson, the founder and largest shareholder of Storix. Had Johnson known about these plans, he would not have agreed to work full-time at Storix for less than one-third his previous full-time salary. (Johnson decl., ¶¶ 22-26.)



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B. Johnson Was Damaged in the Amount of the Difference Between What He Was Actually Paid and What He Would Have Charged for His Services Had He Known of the Defendants' Plans

Under well-established law, a plaintiff who has been defrauded may recover damages for the benefit of the bargain he would have received if he was not defrauded. This is not limited to sales of land or goods. "[O]ne may recover compensation for time and effort expended in reliance on a defendant's misrepresentation." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220.) To determine the amount of Johnson's damages in this case, the jury will (1) determine the market value of the services Johnson was fraudulently induced to provide; and (2) subtract from that number the amount Johnson was actually paid. The difference is the amount of his damages on this claim.

Accordingly, defendants have not negated an essential element of Johnson's concealment claim, and their motion for summary adjudication on this cause of action must be denied.

## VI
## CONCLUSION

For the foregoing reasons, defendants motion for summary judgment should be denied.

DATED: October 2, 2017

Respectfully submitted,

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By: _____

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PROOF OF SERVICE

I, Bernard F. King III, declare that:

I am over the age of 18 years and not a party to the action; I work in the County of San Diego, California where the mailing occurs, and my business address is 1455 Frazee Road, Suite 500, San Diego, CA 92108.

I further declare that I am familiar with the business practice for sending electronic email, pursuant to which practice I served the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION by electronic mail sent 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 and the United States of America that the foregoing is true and correct.

Executed on October 2, 2017, at San Diego, California.

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