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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION
10

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

13 v.

14 ANTHONY JOHNSON, JANSTOR TECHNOLOGY,
15 a California corporation, and DOES 1-20,
16 Defendants.
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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 SAC AND EACH
CAUSE OF ACTION STATED THEREIN
[FILED CONCURRENTLY WITH
MOTION TO STRIKE PORTIONS OF
PLAINTIFF'S SAC]**

Date: October 16, 2016
Time: 11:00AM
Dept: C-70

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I. INTRODUCTION

Plaintiff brings this *direct* lawsuit against one of its own directors, without any meeting or approval of its Board. A director has a fiduciary duty to the company and its Shareholders, not other directors. As such, any action against Johnson, in his capacity as a Director, must be brought as a *derivative* action by the Shareholders to which Johnson owes such a duty. Storix has no standing because it is an improper Plaintiff. Plaintiff also falsely states that Johnson was a resident of San Diego at the time of all of the allegations set forth.

The SAC and its sole cause of action are defective and subject to demurrer because Plaintiff fails to state facts sufficient to constitute a cause of action for breach of fiduciary duty. No facts are alleged in the SAC from which the Court may conclude that Johnson had a fiduciary duty owed to Plaintiff to refrain from any of the actions which Plaintiff alleges amount to misconduct. Likewise, no facts are alleged in the SAC from which the Court may conclude that Johnson's alleged affirmative acts or nondisclosures caused *actual* detriment to Plaintiff.

Plaintiff is pleading intentional torts when the pled facts simply do not support the cause of action. The SAC is filled with allegations of "intent", "efforts" and "desire", which do not support a breach of fiduciary duty. Plaintiff accuses Johnson of "stealing" software and having "unauthorized possession", even though Johnson authored the software, is a director of Storix, and has possessed a copy of the software since 1998. Plaintiff states no cause of harm in this or any other allegation.

The complaint is also extremely vague and ambiguous, consists of uncertain allegations, relies heavily on unsubstantiated legal conclusions, and thus is uncertain, ambiguous, and fails to sufficiently state a cause of action.

The cause of action against Johnson for breach of fiduciary duty is defective and subject to demurrer because: the SAC does not state facts sufficient to constitute a cause of action (Code of Civil Proc. ("CCP") §430.10(e)); Storix is not a proper Plaintiff (CCP §430.10(d)); and because the SAC is uncertain. (CCP §430.10(f).)

II. KEY ALLEGATIONS

As alleged in the SAC, Johnson formed the corporation Storix, Inc. (Plaintiff) in 2003. (SAC ¶9.) In May 2014, Johnson resigned from his position as an employee of the corporation. (SAC ¶11.)

1 Johnson was elected to the board of directors of the corporation in February 2015. (SAC ¶13.)

2 Also in February 2015, Johnson allegedly registered the Internet domain name “janstor.com” and
3 formed a new California corporation named Janstor Technology. (SAC ¶14.) In June 2015, Johnson
4 allegedly reserved two port numbers in the name of Janstor. (SAC ¶15.) Plaintiff complains that
5 Johnson allegedly failed to disclose his conduct to Plaintiff or otherwise seek prior approval from
6 Plaintiff to engage in the alleged acts. (SAC ¶¶14-16, 25.)

7 Additional allegations are that Johnson “threatened to and did send an email notice to Storix’s
8 past, current, and/or potential future customers, ... written in a way that was intended to tarnish the
9 reputation of Storix, Inc.” (SAC ¶17), “directed threats to non-shareholder employees of Storix, Inc.”
10 (SAC ¶18), and “Johnson stole a developmental copy of Storix Inc.’s [] software code” (SAC ¶20.)

11 The SAC provides only one cause of action against Johnson: *Breach of Fiduciary Duty*. To
12 support the cause for breach of fiduciary duty, Plaintiff alleges that Johnson “owed and continues to owe
13 fiduciary duties to Storix, including but not limited to duties of loyalty and care.” (SAC ¶23) and that
14 each allegation of Johnson’s conduct was “furtherance of his efforts to create a business to directly
15 compete with and otherwise cause harm to Storix, Inc., all in breach of the fiduciary duties owed to
16 Storix, Inc.” (SAC ¶25.)

17 Plaintiff then concludes by claiming that Plaintiff “[a]s the proximate result of Johnson’s
18 conduct,” “has sustained and/or will sustain damages in amounts and types according to proof at trial.”
19 (SAC ¶26.)

20 III. AUTHORITY FOR DEMURRER

21 A demurrer “may be taken to the whole complaint or cross-complaint or to any of the causes of
22 action stated therein.” (Code Civil Proc. (“CCP”), § 430.50(a).) A general demurrer tests whether the
23 complaint states facts sufficient to constitute a cause of action (CCP § 430.10(e)), if there is a defect in
24 the parties (CCP § 430.10(d)), and whether the pleading is unambiguous. (CCP § 430.10(d).) To
25 establish a cause of action is adequately pled, the Plaintiff must show that the pleaded facts are sufficient
26 to establish **every element** of the case of action. (*Friendly Village Community Assn., Inc. v. Silva & Hill*
27 *Constr., Co.* (1973) 31 Cal. App.3rd 220, 224-225 [emphasis added].) The Complaint needs to provide
28 the defendant sufficient notice of the cause of action stated against it to defend itself. (*Fuhrman v.*

1 *California Satellite Systems* (1986) 179 Cal. App.3rd 408, 423.) A demurrer can be utilized where the
2 complaint itself is incomplete or discloses some defense that would bar recovery. (*Guardian North Bay,*
3 *Inc. v Sup.Ct. (Myers)* (2001) 94 Cal. App. 4th 963, 971-972.)

4 A demurrer is properly based on the complaint itself, as well as upon such matter as the court is
5 required to take judicial notice. (CCP § 430.30(a).) “A demurrer does not admit the plaintiff’s
6 contentions nor conclusions of law or fact.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also,
7 *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173.)

8 IV. ARGUMENT

9 A. Storix, Inc. Is Not A Proper Plaintiff

10 “[T]he basic principle of corporate governance that the decisions of a corporation, **including the**
11 **decision to initiate litigation**, should be made by the **board of directors or the majority of**
12 **shareholders.** *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) [bold added]. “A director shall
13 perform the duties of a director...in good faith, in a manner such director believes to be in the best
14 interests of the corporation and its shareholders...” California Corporations Code Section § 309(a).

15 Storix has no standing to bring this lawsuit as a *direct* action because Storix is not a proper
16 plaintiff. Except as otherwise provided by statute, “every action must be prosecuted in the name of the
17 real party in interest . . .” (CCP § 367; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995.)

18 Johnson, as a director of Storix, has a fiduciary duty to the company and its shareholders, not
19 other directors. This *direct action* was brought against Johnson by unidentified persons at Storix.
20 Shareholders are the *real party of interest* because the shareholders are the beneficiaries of any potential
21 relief, and therefore only shareholders can bring an action on a corporate director. (*See* CCP § 367.) The
22 purpose of the real party in interest requirement “is to save a defendant, against whom a judgment may
23 be obtained, from further harassment or vexation at the hands of some other claimant to the same
24 demand.” *Giselman v. Starr* (1895) 106 Cal. 651, 657.) If Plaintiff’s SAC is allowed to continue,
25 nothing would prevent the same *unidentified* persons from re-litigating the same matter as shareholders.

26 The shareholders are the *owners* of the company and thus enjoy any relief. A lawsuit against a
27 company director must be brought as a *derivative action* by the Shareholders. Allowing a majority of
28 directors to bring a lawsuit in the name of the company against a *minority* director would encourage any

1 Board majority to simply sue any director who opposes them. Plaintiff is doing just that, and this
2 conduct must be deterred.

3 As demonstrated above, the Demurrer should be sustained on grounds that that there is a defect
4 of the parties because Storix is not a proper Plaintiff. (CCP § 430.10(d).)

5 **B. Plaintiff Has Not Established that the Court Has Personal Jurisdiction of Defendant Johnson**

6 The SAC states “Plaintiff is informed and believes that Defendant Anthony Johnson was at the
7 time of the events alleged herein a citizen of the State of California and resident of the County of San
8 Diego” SAC ¶ 3), “This Court has personal jurisdiction over the Defendants, and each of them, because
9 their acts and conduct relevant to the present action occurred within the State of California, and because
10 they are California residents” (SAC ¶ 7) and “events and occurrences giving rise to the present action
11 occurred within the County of San Diego; because Johnson is, or at the time of the events alleged herein
12 was, a resident of San Diego”. (SAC ¶ 8.) As shown in the in the *Motion to Strike* filed concurrently
13 herewith, the above paragraphs should be stricken as they contain false statements as demonstrated by
14 the *Proof of Service* of the original Complaint served to Johnson at his Florida address, and dates of
15 alleged events which occurred after original complaint was served. (SAC ¶17-18; see *Motion to*
16 *Strike/RJN* ¶¶ 3-4, Exhibits 3-4.)

17 The Demurrer to the SAC should be sustained on the ground that there is a defect of the parties
18 because, after striking the aforementioned paragraphs, Plaintiff has not established that the court has
19 personal jurisdiction of Defendant Johnson. (CCP § 430.10(d).)

20 **C. Plaintiff States No Cause of Harm For Breach of Fiduciary Duty**

21 The elements of a claim for breach of fiduciary duty are: (1) fiduciary duty; (2) breach of the
22 duty; and (3) damage caused by the breach. *Charnay v. Cobert* (2006) 145 Cal.App.4th170, 182.
23 Damage is a required element of a claim for breach of fiduciary duty.

24 Plaintiff’s boilerplate allegations, generalized contentions, and unsupported conclusions of law
25 and fact regarding Johnson’s alleged breach of a fiduciary duty and the *potential* harm Plaintiff will
26 suffer as a result of Johnson’s alleged breach do not satisfy California’s pleading requirements. Plaintiff
27 alleges that “[a]s the proximate result of Johnson’s conduct, Storix, Inc. has sustained and/or will
28 sustained damage in amounts and types according to proof at trial and in excess of the jurisdictional

1 minimum of this court.” (SAC ¶26.) Plaintiff’s own pleading by virtue of the phrase “will sustain”
2 indicates that Plaintiff has not suffered any harm. Plaintiff does not plead any facts to suggest that
3 Johnson caused Plaintiff to lose profits, lose business opportunities, actually damaged Plaintiff’s
4 reputation or goodwill, or otherwise resulted in any actual detriment to Plaintiff or Plaintiff’s business.
5 Plaintiff alleges that there are damages in excess of \$25,000.00 (SAC ¶7), but provides no facts to show
6 how Johnson’s conduct has or will result in any monetary or other damage.

7 Plaintiff states “Storix, Inc. should not be required to await Johnson’s conduct to result in
8 realized financial losses, particularly when such reputational harm and loss of goodwill is inadequately
9 compensated by monetary relief.” (SAC ¶30.) Of course they should. The alternative forces Johnson, at
10 his own expense, to continue defending himself in a lawsuit against his own company *while awaiting*
11 *Plaintiff’s contention of unspecified future harm to eventually be realized.* It is ridiculous for Plaintiff to
12 complain that they must wait for harm to occur before they can impose costly litigation on themselves
13 and Johnson.

14 California courts have a well-established principle that, when reviewing the sufficiency of a
15 pleading, the court gives the complaint a *reasonable interpretation*, but does not assume the truth of
16 **contentions, deductions or conclusions of fact or law.** *Moore v. Regents of University of California*
17 (1990) 51 Cal. 3d 120, 125. Plaintiff repeatedly contends and deduces that Johnson had an “intent to
18 compete” (SAC ¶¶16-17, 20), “intended to tarnish the reputation of Storix” (SAC ¶¶17, 31), “intent to
19 harm” (SAC ¶¶19, 31) with “intent and desire that Storix would collapse” (SAC ¶¶20). Plaintiff refers
20 to Johnson’s “efforts” to cause harm, again repeatedly deducing without facts to support Johnson’s
21 alleged intent. (SAC ¶¶16, 25, 30.) It’s unreasonable for Plaintiff to pursue and continue this litigation
22 based *solely* on Plaintiff’s own assertion of Johnson’s *intent*, especially when Johnson’s alleged intent
23 has caused no *actual* harm. Even if the Court were to consider “intent” a cause of harm, Plaintiff has not
24 stated facts sufficient to support its conclusion that Johnson had such intent.

25 For the reasons above, and after striking irrelevant paragraphs as set forth in the *Motion to*
26 *Strike* filed concurrently herewith, the Demurrer should be sustained on grounds that that SAC does not
27 state facts sufficient to constitute a cause of action for breach of fiduciary duty. (CCP § 430.10(e).)
28

1 **D. Plaintiff Does Not Establish That Johnson Breached a Fiduciary Duty to Storix**

2 The elements of a claim for breach of fiduciary duty are: (1) fiduciary duty; (2) breach of the
3 duty; and (3) damage caused by the breach. *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182.
4 Plaintiff makes the broad conclusion that Johnson breached his fiduciary duty, but doesn't state facts to
5 support that claim.

6 Plaintiff states in its First Cause of Action for breach of fiduciary duty "As a current director of
7 Storix, Inc., Johnson owed and continues to owe fiduciary duties to Storix, including but not limited to
8 duties of loyalty and care." (SAC ¶23) and "Johnson also owes continuing duties, including fiduciary
9 duties, by virtue of the trust and confidence previously reposed in him by Storix, Inc., including but not
10 limited to his long-term involvement as Storix, Inc.'s founder, and his former roles as sole shareholder,
11 officer, director and employee." (SAC ¶23.) However, Plaintiff does not state how a *former* founder,
12 sole shareholder, officer or employee owes a fiduciary duty to Storix.

13 Plaintiff generally alleges that "[t]he above-described acts of Johnson were all in breach of the
14 fiduciary duties owed to Storix, Inc." (SAC ¶25.) "Facts, not mere conclusions, should be alleged to
15 establish right to specific performance of contract." *Foley v. Cowan* (1947), 80 C.A.2d 70, 181 P.2d 410.

16 The **Business Judgment Rule** sets up a presumption that directors' decisions are made in good
17 faith. *Biren v. Equal. Emergency Med. Group, Inc.*, 102 Cal. App. 4th 136 (2002) (*quoting, FDIC. v.*
18 *Castetter*, 184 F. 3d 1040, 1046 (9th Cir. 1999)). The business judgment rule "does not shield actions
19 taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.
20 [citation.] But a plaintiff must allege sufficient facts to establish these exceptions. To do so, more is
21 needed than "**conclusory allegations of improper motives and conflict of interest.**" *Berg & Berg*
22 *Enters., LLC v. Boyle*, 178 Cal. App. 4th 1045 (2009) (*quoting Everest Investors 8 v. McNeil Partners,*
23 *supra*, 114 Cal.App.4th at p. 430; *Lee, supra*, 50 Cal.App.4th at p. 715) [emphasis added].

24 The cause of action for breach of fiduciary duty is insufficient because every allegation of the
25 SAC is based on Plaintiff's **legal conclusion** that Johnson breached his fiduciary duty, and each such
26 legal conclusion is based on Plaintiff's **deduction** or **contention** of Johnson's malicious intent. Plaintiff
27 draws no nexus between a fiduciary duty owed to Plaintiff, the alleged acts, a breach of that fiduciary
28 duty, and harm caused by the alleged breach.

1 Plaintiff contends that Johnson breached his fiduciary duty by not *disclosing* his alleged conduct
2 to Storix. (§§ 14-15, 25.) Plaintiff immediately contradicts the same allegations by saying “Johnson has
3 *communicated* his intent to compete directly with Storix” (SAC ¶16), referring to the very same conduct.

4 First, Plaintiff alleges that Johnson “secretly formed a new company to directly compete with
5 Storix” (SAC ¶1) and that this and certain irrelevant acts “including his formation of a new corporation,
6 his registration of the Internet domain name ‘janstor.com’ and his reservation of port numbers were all
7 done in furtherance of his efforts to create a business to directly compete with and otherwise cause harm
8 to Storix, Inc.” (SAC §§14-16.) The mere fact that Johnson is a director of Storix does not mean Johnson
9 has a fiduciary duty to refrain from such actions. Similarly, the mere fact that Johnson is a director of
10 Plaintiff does not mean that Johnson has a fiduciary duty to *disclose* any such acts. (SAC ¶14-15, 25.)

11 Second, Plaintiff alleges that Johnson “directed threats to non-shareholder employees” then
12 “instructed the employee to delete the email” (SAC ¶18 [emphasis added].) Johnson is within his *rights*
13 and *business judgment* as a director to communicate with a Storix employee. Plaintiff **concludes** that
14 Johnson was “directing threats” without stating any facts or evidence to support that conclusion. (SAC
15 §§18,25,28.) Nevertheless, Plaintiff did not state facts sufficient to show how or why this constituted a
16 breach of fiduciary duty to Storix, or what harm, if any, was caused. Furthermore, a director owes a
17 fiduciary duty to the company and its shareholders, not other directors, and therefore is not violating any
18 loyalty in suggesting the employee refrain from sharing their communications with another director.

19 Plaintiff alleges that Johnson owes a fiduciary duty to Storix “including but not limited to his
20 long-term involvement as Storix, Inc.’s founder, and his former roles as sole shareholder, officer,
21 director and employee.” (SAC ¶ 24.) Courts have generally held that an employee does not breach his
22 duty of loyalty (or a nonsolicitation covenant) by advising his employer’s clients that he intends to
23 resign and discussing his future plans. *American Credit Indem. Co. v. Sacks*, 213 Cal. App.3d 622, 636,
24 262 Cal. Rptr. 92 (1989). Only when the communications are deemed solicitations has the employee
25 has crossed the line. Under California law, an employee is entitled to *announce* a new affiliation, even to
26 those on a customer list that may constitute a trade secret. See *Aetna Bldg. Maint. Co. v. West*, 246 P.2d
27 11,14 (Cal. 1952); *Morlife, Inc. v. Perry*, 66 Cal.Rptr.2d 731, 73 38 (Cal. Ct.App. 1997); *Moss, Adams*
28 *& Co. v. Shilling*, 224 Cal.Rptr. 456, 458-59 (Cal. Ct.App. 1986); *see also American Credit Indemnity*

1 *Co. v. Sacks*, 262 CaLRptr. 92,100 (Cal. Ct.App. 1989) ("the boundary separating fair and unfair
2 competition in the context of a protected customer list has been drawn at the distinction between an
3 announcement and a solicitation."). Even Johnson had intended to compete with Storix, his alleged use
4 of a "Storix, Inc. customer contact list" would only be a breach of duty to Storix if he expressed his
5 desire or plans to compete to those customers and solicited their business. The SAC states no facts to
6 support its contention or conclusion that Johnson expressed such an intent. The Court should strike all
7 allegations of the SAC regarding Johnson's alleged email to (possible) customers as they are irrelevant
8 to the cause of action for breach of fiduciary duty.

9 Plaintiff later expands on its factual conclusions with another **legal conclusion** that "Johnson's
10 breaches of fiduciary duties and *unlawful competition* will cause great and irreparable injury to Storix".
11 (SAC ¶27 [emphasis added].) Plaintiff fails to state how Johnson's possession of a copy of the software
12 constitutes "unlawful competition". Although Plaintiff states that Johnson "stole" the software in May
13 2014, they still have not stated a single fact to show that Johnson has engaged in *any* competition, or
14 even *intended* to. (See SAC ¶ 20, 27.) Plaintiff has not stated that the software is a trade secret, that
15 Johnson misappropriated or otherwise disclosed such a secret, or that it suffered any harm as a result of
16 any such disclosure. Therefore, Plaintiff's contention that Johnson's alleged unlawful conduct is a
17 conclusion of law unsubstantiated by facts in the SAC, thus do not support a breach of fiduciary duty.

18 There are no facts in the SAC which constitute a sufficient cause of action because and all
19 allegations involve Plaintiff's **contentions, deductions, and conclusions of fact**. Furthermore,
20 Plaintiff's assertion that Johnson breached a fiduciary duty to Plaintiff is a **conclusion of law** which,
21 even if true, is not alone a cause of action without facts supporting such a breach and showing harm.

22 For all the reasons above, and after striking irrelevant paragraphs as set forth in the *Motion to*
23 *Strike* filed concurrently herewith, Plaintiff stated no facts to show that Johnson owed or breached a
24 fiduciary duty, and thus does not plead facts sufficient to establish a cause of action for breach of
25 fiduciary duty. (CCP § 430.10(e).)

26 **E. Plaintiff's SAC is Uncertain and Ambiguous**

27 The SAC contains no allegations of misconduct by Johnson that resulted in actual harm. Every
28 allegation of the complaint bases its cause of action on the Plaintiff's contention, deduction or

1 conclusion that Johnson's actions were *intended* to cause harm to Storix, but draws no nexus between
2 the alleged misconduct, any anticipated or actual harm, and the relief requested.

3 Plaintiff states in the SAC that "Defendants engaged in the activities detailed in this pleading
4 with the intent to harm Storix, Inc. through conduct amounting to oppression, fraud, or malice, as
5 demonstrated and evidenced by a number of statements, acts and communications by Johnson." (SAC
6 ¶19.) This statement was obviously intended as a generic cause of harm for all facts alleged. Facts
7 stated in the complaint include such benign acts as "Johnson caused Storix, Inc. to issue new shares of
8 stock to four employees" (SAC ¶10), "Johnson resigned from his position as an employee" (SAC ¶11),
9 "Johnson used his 40% stock ownership to elect himself to the Storix, Inc. board". (SAC ¶13.) All such
10 factual allegations are subject to Plaintiff's contention that each was intended to cause harm Storix. It's
11 impossible for Johnson to reasonably determine what paragraphs constitute facts or allegations, which
12 he must answer, and what cause of harm he should answer to.

13 Johnson is a director and 40% shareholder of Storix (SAC ¶13), and the SAC was brought
14 against Johnson as a *direct* lawsuit by his own company. Johnson is unable to even determine who is
15 making the allegations against him or how they arrived at their conclusions. Therefore, it's impossible
16 for Johnson to know how to respond.

17 Plaintiff has stated no facts to support its conclusion that Johnson intended to cause harm, and
18 stated no facts alleging actual harm. Johnson doesn't know if he should respond to Plaintiff's
19 allegations of his "intent" or the allegation that his actions "will" cause some unknown harm in the
20 future. The complaint is uncertain because Johnson cannot reasonably determine what issues must be
21 admitted or denied, or even who the Plaintiff is, and thus cannot answer. (CCP § 430.10(f).)

22 V. CONCLUSION

23 For the reasons stated above, Johnson's demurrer to Plaintiff's SAC on all causes of action
24 should be sustained.

25 Further, the Court should sustain without leave to amend because it appears from the face of the
26 SAC that under applicable substantive law there is no reasonable possibility that an amendment can cure
27 the SAC's defects. Given the amount of time which has passed without harm caused by the alleged
28 events, and Plaintiff's clear determination to financially harm Johnson at an extreme cost and no benefit

1 to the company, the Court should also dismiss Plaintiff's SAC against Johnson with prejudice to restrain
2 Plaintiff from re-filing.

3 Although Johnson, as a Pro Se litigant, cannot represent Defendant Janstor Technology, it stand
4 to reason that Janstor should not continue to stand accused of aiding and abetting Johnson in a Cause of
5 Action which has been dismissed. The Court should therefore dismiss, at its own discretion and
6 authority, the entire SAC against all defendants for failure to state a cause of action.

7
8
9 DATED: September 21, 2016

/s/ Anthony Johnson
ANTHONY JOHNSON
Self-Represented