# Court of Appeal of the State of California

## Fourth Appellate District, Division One

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| STORIX, INC.,<br>Plaintiff and Respondent<br>v.<br>ANTHONY JOHNSON,<br>Defendant, Appellant. | Court of Appeal No. **D075308**<br><br>Superior Court Case No.<br>37-2015-00028262-CU-BT-CTL<br>Consolidated under Lead Case No.<br>37-2015-00034545-CU-BT-CTL |
| ANTHONY JOHNSON,<br>Cross-Claimant, Appellant<br>v.<br>DAVID HUFFMAN,<br>RICHARD TURNER,<br>MANUEL ALTAMIRANO,<br>DAVID KINNEY, and<br>DAVID SMILJKOVICH,<br>Cross-Defendants,<br>Respondents. | |

Appeal from Judgments and Orders of the
Superior Court, County of San Diego

Honorable Judges Kevin A. Enright and Joel R. Wohlfeil

# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Johnson herein replies to the Response Briefs submitted by Plaintiff Storix, Inc. (“Storix”) and Cross-Defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich, (collectively, "Cross-Defendants”).

The concurrent response briefs of two seemingly separate and distinct parties demonstrate the same pervasive abuse of legal process that has plagued Johnson for over four years. Cross-Defendants continue to hide behind their alter-ego of “Storix”, thereby continuing to use Johnson’s own company and his own money to litigate against him while avoiding any personal liability or expense. Storix found it necessary to defend Cross-Defendants against the shareholder derivative lawsuit Johnson and another shareholder brought on the company’s behalf. And when Johnson finally brought a cross-complaint for his personal damages, Storix came again to Cross-Defendants’ rescue and paid for their defense.

The trial court never acknowledged that Storix and Cross-Defendants are one and the same, and refused a jury instruction that tried to address whether Storix’s board was properly disinterested. Instead, Storix attacked Johnson throughout trial for litigating against its innocent “Management/Directors” and Cross-Defendants insisted they acted only as agents of Storix. Still, Johnson disproved Storix’s $1.3 million claim that he “intended” to operate a competing business, but not before Storix introduced a new claim in closing arguments Johnson had no opportunity to rebut. The court found the resulting $3,739 judgment sufficient to dismiss Johnson as a shareholder derivative plaintiff on Cross-Defendants’ motion that he couldn’t fairly represent Storix’s interests. The court then ordered Johnson to pay about $180,000 in costs and fees to Storix and Cross-Defendants for failing to defend himself or prosecute his claims.

Storix and Cross-Defendants can no longer represent themselves as separate and distinct parties. Neither response brief addressed or disputed Johnson's argument that Cross-Defendants hold the majority shares of Storix, its board majority, and all officer positions, and that every action and decision of Storix throughout this litigation were solely those of Cross-Defendants. Although Johnson replies to the arguments in each response brief separately, Storix and Cross-Defendants are hereafter collectively referred to as "Respondents".

## RESPONDENTS' STATEMENTS OF FACTS

Respondents make numerous conclusory assertions based on unsupported facts and misconstrued documents that in no way support their conclusions. Facts that do not appear in the record but are asserted in a brief must be disregarded. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

Cross-Defendants claim Johnson "incorporated a company named Janstor Technologies to compete with Storix." (Cross-Defendants' Response Brief ("**CRB**"), p. 8.) They refer to Johnson's testimony that he formed a company, but there was again no mention of competitive intent. (10RT1220-1221.) Conclusory assertions of "Johnson's inability to cope with not being the head of Storix ultimately resulted in his resignation" and Johnson "embark[ing] on a litigation campaign against Storix" are equally unsupported. (CRB, p. 8.)

Storix asserts that "Johnson detailed his competitive plans in an email to a friend boasting about his plan to force Storix out of business through litigation and/or direct competition." (SRB, p. 20.) Again, the email says nothing of the sort. Johnson's friend suggested Johnson "start a new company", and Johnson responded that he had no such desire, especially while the copyright ownership issue is pending, and that Storix

would only sue him if he did. (2NOL Tab 58, Ex. 20.)[1] A court found Johnson implicitly transferred his registered copyrights to Storix upon its formation, there was no further mention of competing, but Storix sued him anyway for "intending" to.

Storix claims Johnson threatened an employee with the loss of his job if he didn't serve as Johnson's spy, directed the employee to destroy evidence, and admitted his plans to deploy a competing product based on Storix's own software. (Storix's Response Brief ("**SRB**"), pp. 20, 23.) All this was derived from a January 2016 email that says nothing of the sort, but actually expresses Johnson's intent to provide *Storix* a more marketable product and save the jobs of the employees from the financial devastation being caused by Storix's litigious management. (4NOL Tab 78, Ex. 874; 12RT 1669.) Notably, the same employee is still employed at Storix and testified at trial, defeating the contention that Storix suffered harm from Johnson's email that justified the lawsuit against him. (13RT1965.)

Respondents' facts are the same baseless character attacks that fueled their litigation against Johnson for years and have no relevance to this appeal. Respondents assert such facts to reargue that Johnson breached a fiduciary duty by using Storix's confidential information to "stand up" a competing business. The jury flatly rejecting the claim, Storix didn't appeal the decision, and there's no reason to revisit it here. Johnson stated brief facts clearly represented in the transcripts without hyperbole. Johnson respectfully requests the Court strike all conclusory and irrelevant facts from Respondents' briefs.

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[1] Storix references "3NOL Tab 123", which doesn't exist. About half of Storix's references are to non-existent documents or incorrect pages. Johnson provides correct references, when found, but none convey Storix's narrative.

## REPLY TO STORIX'S ARGUMENT

### I. STORIX HAD NO AUTHORITY TO SUE JOHNSON

#### A. Johnson Has Not Waived Any Issue of Storix's Lack of Authority to Sue

Respondents state that "Johnson conflates the concepts of standing with authority", but their argument actually conflates authority with the "capacity to sue." (SRB, p. 30.) They are correct that capacity to sue is the right to come into court and standing is the right to relief in court. But Johnson never argued Storix had no *capacity* to sue, meaning a legal disability such as corporate suspension or tax delinquency. Johnson consistently argued that Storix had no *authority* (and thus standing) to sue him which, unlike capacity, is not a plea in abatement. Storix provided no authority to support its contention that "standing is an entirely distinct issue from whether a corporation is 'authorized' to pursue a claim." (*Id*. at p. 38.)

Whether a lawsuit is properly authorized is an essential element of standing. (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 757 [plaintiff lacked standing when institutional trustee had not granted him authority to sue on behalf of trust].) Johnson's reliance on *Pillsbury* is not misplaced. Pillsbury did not "address the distinction between standing and capacity or authority to sue." (SRB, p. 37.) *Pillsbury* addressed only the corporation's capacity to sue, not its authority to do so. "Lack of standing is not waived by the failure to raise it in the trial court; it may be raised at any point in the proceedings." (*Killian v. Millard* (1992) 228 Cal.App.3d 1601, 1605.)

Storix's lack of standing/authority to sue Johnson was a factual issue raised throughout the litigation, including Johnson's motions to demurrer to the FAC (15CT3925) and SAC (15CT4291), and for summary judgment (4RT306). Respondents had years of notice of the defense. Even if authority was not an element of standing, Johnson reserved "the right to

assert additional affirmative defenses in the event additional investigation and/or discovery indicates doing so would be appropriate." (16CT4387.)

### B. Storix's Argument That the President Had the Power to Sue Johnson Proves the Lawsuit Was Unauthorized

As a threshold issue, Respondents argued the Storix board majority ratified the decision to sue Johnson, and the trial court denied Johnson's directed verdict (17RT2802), JNOV (12CT3335; 12CT3335) and new trial motions (14CT3814) on that ground. Respondents now assert a contradictory argument not raised or decided below and thus not considered on appeal. (*Findleton v, Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 569.)

Storix argues that "all corporate powers shall be exercised by or under the direction of the board" and the board "may delegate the management of the day-to-day operation of the business of the corporation to a management company or other person[.]" (SRB, p. 32.) Only Respondents consider the act of suing the company founder and largest shareholder a "day-to day" operation. Even if "the board knows of the officer's acts and does not object is evidence of actual authority", the board wasn't made aware of the lawsuit – only the Respondents. Storix's reliance on *Sealand Inv. Corp. v. Emprise Inc*. (1961) 190 Cal.App.2d 305, 316 (Sealand) is misplaced because it didn't involve a company officer suing a director. *Sealand* found "inherent" authority may be conveyed even on a company secretary if she is responsible for the "entire management and operation of the company." (*Id*. at 314.) That is not the case here.

There was no "emergency involved in the case" that required Storix's president, Respondent David Huffman ("Huffman"), to usurp the Storix board's authority. (*Id*. at 314.) The board could have held a meeting with little or no notice, but made no attempt to ratify the decision to file the lawsuit for two years, and only then to avoid dismissal at summary

judgment. (AOB, p. 30.) Cross-defendant David Smiljkovich, a board member who voted to ratify the lawsuit, testified at trial that "there was not a board meeting scheduled" so "at the next available meeting in 2016, the board, as a whole, looked at the issue and it was approved by a majority of the board." (13CT 1999, underline added.) Smiljkovich lied. A board meeting took place only three weeks after the lawsuit was filed, and there was no mention of the lawsuit, much less a decision to ratify it. (2CT 426; 1CT 49.) Defendants misconstrued Johnson's statement: "*If I wanted to compete with Storix*, I promise you Storix would be out of business in six months." They interpret this as "he 'promised' Storix would be put out of business in six months" thus "Storix's need to protect its interests was paramount and immediate." (SRB, p. 39.) Even if Respondents found Johnson's words threatening and alarming, his testimony at trial in 2018 didn't retroactively create an urgency to sue him in 2015.

Respondents provide no support for their assertion that Johnson "render[ed] his co-directors 'interested' by later filing derivative claims." (SRB, p. 35.) Nor did Johnson "belatedly raise[] the issue of Storix's authority during trial, by posing a last-minute instruction that confused authority with standing." (SRB, p. 36.) Johnson raised the issue at every stage of the litigation. Authority is an essential element of standing that can be raised at any time in the litigation. (*See* *Pillsbury v. Karmgard, supra*, 22 Cal.App.4th at 757; *Killian v. Millard, supra*, 228 Cal.App.3d at 1605.)

Respondents argue for the first time that "none of the three directors approving the suit had a personal interest in Storix's suit against Johnson." (*Id*. at p. 36.) At trial, Johnson presented substantial evidence of Respondents' hostility toward him long before they filed the lawsuit. Johnson's statement of facts include Respondent's concealment of a secret plan to force Johnson to relinquish his remaining company shares, locking him out of the company after their plan failed, and claiming ownership of

Johnson's registered copyrights that Storix never needed before. Respondents were repeatedly impeached during trial and provided no evidence contrary to Johnson's assertion that they were not disinterested in filing the lawsuit or ratifying that decision two years later.

Respondents' argument that Johnson previously instituted legal action on Storix's behalf without a board meeting (and therefore must have done so as president) ignores relevant facts. From 2003-2011 Johnson was the president and *sole* shareholder, officer and director of Storix. (16CT1633.) The board didn't need to convey its authority to Johnson. Johnson was solely responsible for the "entire management and operation of the company" and therefore had inherent authority to take legal action on the company's behalf regardless of his capacity. (*See Sealand, supra,* 190 Cal.App.2d at 316.) Since 2011, Storix has been managed by a five-member board, multiple officers, and a president who acts only under the board's authority. No president has *inherent* authority to sue a director who threatens his position or to expose his misconduct.

Respondents failed to provide any facts or authority to support its argument that Storix authorized or approved the lawsuit against Johnson.

### C. Storix's Board Did Not Ratify the Decision with Retroactive Effect

After changing positions to allege that Storix's president authorized the lawsuit against Johnson, Respondents return to their prior position that the board ratified the informal decision of its board majority to sue Johnson. The trial court found it undisputed that "three of the directors of five, the majority, in other words, voted to proceed on the lawsuit[.]" (SRB, p. 37; 17RT 2801.) But the court never acknowledged the overriding and *undisputed* fact that those directors were also Cross-Defendants who were, at the time they ratified the lawsuit, being sued for the damages they caused *Storix* by filing the lawsuit without its authority. (AOB, p. 31.) As a matter

of law, Cross-Defendants were not disinterested since ratifying the decision to file the lawsuit would relieve them of that liability. Respondents also did not respond to Johnson's argument that the court erred in finding Storix authorized the lawsuit without allowing the jury to decide the underlying factual issue of whether the board was disinterested. (AOB, pp. 33-34.)

Respondents' reliance on *Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67 is quite misplaced. The plaintiff therein sued her ex-husband for forging her signature three years after she discovered the forgery. The court found she *ratified* his action by not suing him until after their business and marriage failed. The case in no way supports Respondents' argument that refusal to acknowledge *their own* misconduct amounted to its ratification. Two of the five directors who decided to file the lawsuit against Johnson in 2015 also voted to ratify the decision in 2017. (4RT308; 14RT2252; 9RT 1044.) Absent the votes of those directors who were ratifying their own unlawful act, there was no board majority to approve the lawsuit.

Respondents try to dismiss Johnson's citation to Cal. Corp. Code section 307, subd. (b), which requires written consent of all directors before any action can be taken by a board without a meeting. (AOB, p. 30.) Changing again to their conflicting argument that the president authorized the lawsuit (SRB, p. 41), Respondents distract from their earlier argument that "[a]n act may be expressly ratified by the board or the shareholders, provided that they had the authority to approve the act 'in the first instance.'" (SRB, p. 39.) The board cannot ratify a decision made by directors who acted without the written consent of the other directors. Robin Sassi ("Sassi") was a director in 2015, but was not informed of the meeting to approve the lawsuit. (5CT 1322.) Sassi was also the *only* director who was not a party to the lawsuit or the cross-complaint and thus the only director entitled to vote on the ratification in 2017. She voted no. (13RT 2000.)

Lastly, Respondents fail to respond to Johnson's argument that the trial court erred in refusing a pertinent jury instruction, "Special Instruction No. 8: Standing/Authority to Sue", which specifically asked the jury to determine if the Storix board was disinterested. (11CT 3023; *See* AOB, p. 31.) Respondents instead argue that Johnson failed to object to the special verdict form. The court rejected the special jury instruction before the special verdict form was complete:

> "[T]he facts are that three of the directors of five, the majority, in other words, voted to proceed on the lawsuit against, at that time, Janstor and Mr. Johnson. And on those undisputed facts, the thought was and my thought is that that is a question of law, not for the jury. And so for that reason, as well as everything else that's been stated by both sides, the Court is going to refuse Number 8."

(17CT 2801.) Because the court considered Storix's authority to sue "a question of law, not for the jury" and refused the jury instruction, there was obviously no reason for a special verdict question to decide the issue. It was also undisputed that the Storix board was not disinterested, so Johnson moved for directed verdict. Storix then argued for the first time that "[n]one of the directors voting in favor of the action were interested in the action." (17CT 2802.)[2] The court denied Johnson's motion without addressing the issue. (17CT 2805.)

### D. Storix's Direct Suit Against Johnson Was Not Proper Because It Must Have Been a Derivative Action

Respondents basically argue that, "[a] plaintiff lacks standing to sue if, for example, it [is] not a real party in interest", therefore the real party in

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[2] Respondents state that the issue was argued at summary judgment. Storix didn't argue the board was disinterested at summary judgment, only that a majority of directors ratified the lawsuit (knowing Johnson didn't provide evidence showing who those directors were).

interest must have standing. They then refer to *PacLink Communications Intern., Inc. v. Superior Court* (2001) 109 Cal.Rptr.2d 436, arguing that "Storix did not seek to redress harm suffered by its shareholders individually, and so the case was not a proper direct suit by shareholders." (SRB, p. 44.) *PacLink* actually states, "`the action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders." (*PacLink* at 439.)

Lastly, they argue that "Johnson's argument based on 'judicial estoppel' is misplaced. [AOB, pp. 38-39.] Storix never made any inconsistent arguments with respect to its ability to bring a direct claim." (*Id.*, fn.14.) Johnson didn't argue Storix made inconsistent arguments, only that they shouldn't be allowed to. As expected, they just argued the exact opposite of the position they took when obtaining a ruling that Johnson was precluded from bringing direct claims against them.

Respondents failed to rebut Johnson's argument, and the Court should therefore dismiss the lawsuit against Johnson because it was not a proper derivative action.

## II. STORIX'S ARGUMENTS REGARDING SUBSTANTIAL EVIDENCE SUPPORTING THE JURY'S DAMAGE AWARD IS MISPLACED

### A. Storix's Standard of Review is Irrelevant

Johnson did not raise the issue of whether there was *substantial evidence* to support Storix's award of $3,739.14 in damages. Johnson argued that the claim was improperly introduced in closing arguments, and nonetheless based on a protected communication. Respondents don't dispute that the "Customer Email" was improperly introduced as a new claim in closing arguments.

### B. Johnson's Statement of Facts is Not Deficient

Unlike Respondents' facts, Johnson's are supported by reference to the record and relevant to the issues of this appeal. Here, Respondents are trying to reargue the case. They assert that "Johnson does not dispute he owed Storix a fiduciary duty or that he breached that duty by pursuing a plan for a competitive business venture." (SRB, p. 49.) Of course Johnson doesn't dispute the claim in this appeal because he defeated it at trial. The jury returned a special verdict, finding that Johnson did not breach a duty of confidentiality to Storix's detriment and did not breach a duty of loyalty or confidentiality for his benefit. (11CT 3054.) The jury thereby awarded Storix nothing on its $1.3 million claim that Johnson was "unjustly enriched" by obtaining an "unfair head start" using Storix's proprietary information. Respondents chose not appeal the jury's decision and cannot do so now.

### C. There Was No Finding That Johnson Engaged in Multiple Acts that Breached His Duties as a Director of Storix

Damage is an essential element of a cause of action for breach of fiduciary duty. (SRB, p. 48; *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 525.) The jury awarded the exact $3,739.14 Storix demanded for damages resulting from "total value of employee time" related to the Customer Email. (17CT 2849; 11CT 3054.)

Respondents reassert that "Johnson instruct[ed] Storix's customers to stop paying Storix so it would be unable to defend Johnson's copyright litigation" and "threaten[ed] Storix's employees." (SRB, pp. 49-50.) They continue to speculate as to who the Customer Email was sent to and Johnson's reasons for doing so. But Storix demanded no damages related to these allegations. If they had (and won), Johnson would certainly argue the damages were unsupported by *any* evidence. However, the issue is irrelevant because Storix neither asserted nor proved any related damages,

and therefore no breaches of fiduciary duty, beyond the alleged "loss of employee productivity" caused by the Customer Email. (17CT2848-2849.)

### D. The Customer Email Was a Protected Communication

Johnson objects to Respondents' request for judicial notice of federal court rulings and proceedings on a copyright attorney fee order unrelated to the issues of this appeal. Although irrelevant, Respondents' repeated success in using the fee order to influence the state court decisions is too compelling to ignore. After the award was reversed and remanded for reconsideration, the district court reissued the award at a minor discount, but still based on facts unrelated to the issues of the copyright litigation – notably the Customer Email.[3] A second appeal is pending on substantial legal grounds Storix failed to argue. Relevantly, Respondents state that "Judge Huff's analysis of the Customer email in the district court copyright proceedings was consistent with Judge Enright's determination that the litigation privilege did not apply." This is not true. The district court similarly allowed the Customer Email to be used as *evidence* to support the decision to award fees.

Johnson admittedly conflated the issue of litigation privilege with protected communication. The issue of litigation privilege has been fully argued. However, the Customer Email was a protected communication, particularly in light of the federal court denying Storix's preliminary injunction "*in light of the First Amendment issues at stake*." (AOB, p. 27; 15CT 4079.) Johnson had every right to assert he was the owner of the software he created, which had been registered in his name with the U.S.

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[3] The only facts on which the court relied were disproven in the state trials. The fee award nevertheless remains the largest against any individual in a copyright case in U. S. history and the only award against any author of a registered work.

Copyright Office for 15 years.[4] The fact that a jury later found Johnson *implicitly* transferred all exclusive and irrevocable rights to Storix upon its formation does not retroactively make the communication unprotected.

#### 1. Storix concedes the Customer Email claim was first introduced in closing arguments.

Respondents' argue "There was no agreement by Storix to limit use of the Customer email", but ignore Johnson's citations to transcripts showing there was. (AOB, p. 27-28.) Storix referenced the email as evidence of Johnson's alleged intent to compete, and Cross-Defendants referenced the email in their defense (even though Johnson's cross-claims accrued *before* the email existed). Respondents don't dispute the claim was introduced in closing arguments, only that they mentioned "the amount of employee time expended" during trial. (SRB, p. 59.) Johnson didn't waste time disproving a seemingly benign issue because he didn't know the "amount of employee time" would become the basis of a claim.

Johnson didn't argue the merits of the Customer Email claim in his Brief because it wasn't argued in the trial court. And the issue wasn't argued in the trial court because Storix introduced it as a new claim of "employees' lost productivity" when it was too late for Johnson to do so. (17CT 2848-2849.)

### E. The Jury's Damage Verdict Was Entirely Based on the Customer Email

Respondents' arguments regarding the damage award being supported by evidence other than the Customer Email is untenable. "Several witnesses testified regarding the time taken away from the

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[4] The copyrights to SBAdmin are still registered to Johnson because Storix doesn't possess a written transfer agreement required by the Copyright Office. This was the first time a court found that an author transferred his registered copyrights absent a written agreement.

business of Storix to respond to Johnson's actions, including the Customer email." (SRB, p. 60.) Respondents reference only a single employee's testimony regarding his time spent related to the Customer Email. "Additionally, testimony was offered regarding the value of the Storix software based on a theory of 'unfair head start.'" (*Ibid*.) Storix demanded almost $1.3 million on that claim and was awarded nothing. "The jury was also instructed it could award nominal damage." (*Ibid*.) The jury didn't award nominal damage. Storix demanded $3,739.14 related to the Customer Email and was awarded $3,739.14. Respondents are desperate to attach damages to something else knowing their Customer Email claim is unlikely to survive.

### F. Johnson's Post-Trial Motions Were Improperly Denied

Respondents argue that "the trial court correctly determined authority existed to bring the Janstor lawsuit based on undisputed facts in the record." (SRB, p. 61.) Respondents reference no such facts. They argue Johnson's "assertion that '[i]f a review of substantial evidence is necessary, there was *no evidence* presented at trial to the contrary' is unsupported." (*Ibid*.) Again, Respondents reference no evidence. Johnson provided this Court substantial evidence showing the Storix board was controlled by directors with personal and financial interests in destroying Johnson financially. Respondents offered no evidence to the contrary – *not even a declaration of any director stating he was disinterested*. As such, the Court should reverse the trial court's order on Johnson's motion for directed verdict or judgment notwithstanding the verdict and dismiss the lawsuit against Johnson as a matter of law.

Finally, Respondents' argument that a "trial court is not required to provide a statement of decision in denying a motion for new trial" misses the point. (SRB, p. 61.) Johnson didn't argue the court must provide specific findings. He argued that this Court cannot *imply* the trial court

made necessary factual findings underlying its decision if raised in a new trial motion and the court remained silent on the issues.

## III. STORIX WAS NOT ENTITLED TO COSTS AS THE PREVAILING PARTY

### A. Johnson Should Not Be Required to Separately Appeal the Cost Award

Johnson concedes that he did not file a separate appeal following the trial court hearing on costs. Notice of entry of judgment was served on September 21, 2018. (12CT 3346.) Johnson served his original motion to strike or tax costs on October 15, 2018. (13CT 3504, *See also* RJN, Ex. 1 at p. 2.) The notice of ruling on Johnson's motion to tax or strike costs was on August 2, 2019 (RJN, Ex. 2) and Johnson's opening brief was filed August 12. Reversal of Storix's claim against Johnson or dismissal of the lawsuit on other grounds will establish Johnson as the prevailing party and render Storix's cost award moot. (AOB, p. 59.) Under the circumstances, if the Court does not reverse the judgment against Johnson, it should nevertheless review the cost award.

Johnson waited nearly a year for a hearing on his motion to strike or tax costs. Because Johnson had almost completed his opening appeal brief before the hearing, a separate appeal of the award and consolidation with this appeal would likely cause another year of delay. A separate appeal of the cost award would be dependent on the outcome of this appeal, thereby facilitating unnecessary delay and expense only to be rendered moot if this appeal succeeds.

"(1) Under unusual circumstances, and (2) where doing so would serve the interests of justice and judicial economy, an appellate court may use its discretion to construe an appeal as a petition for writ of mandate." (*Mon Chong Loong Trading Corp. v. Superior Court of Los Angeles County* (2013) 218 Cal.App.4th 87, 90, citing *Morehart v. County of Santa*

*Barbara* (1994) 7 Cal.4th 725, 732.) Should the Court deny Johnson's appeal of Storix's judgment against him, Johnson respectfully requests the Court consider Johnson's challenge of the underlying cost award as a petition for writ of mandate.

### B. The Trial Court's Cost Award Should be Reversed

As a threshold issue, reversal of Storix's claim against Johnson or dismissal of the lawsuit on other grounds argued herein will establish Johnson as the prevailing party, thereby rendering the appeal of Storix's cost award moot.

#### 1. The Standard of Review is Predominantly De Novo

Respondents argue the cost award is reviewed for abuse of discretion. (SRB, p. 64.) Johnson primarily appeals the cost award based on errors of law subject to *de novo* review. (*See Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237.) If the Court finds that Johnson's legal arguments lack merit, the cost award subject to review for abuse of discretion.

#### 2. Johnson did not waive challenge of the cost award.

In the cases cited by Respondents, an issue was considered abandoned when the appellant "predicates error only on the part of the record he provides the trial court[.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) Storix argues Johnson waived challenge to the cost award because he didn't provide a transcript of the hearing. The hearing was not recorded. Nevertheless, no transcript or substitute is necessary since Johnson doesn't base the appeal on new arguments or evidence raised at the hearing. Johnson included in his Request for Judicial Notice the memorandum of points and authorities in support of his motion to strike or tax costs and the resulting court order. (RJN, Exhibits 1 & 2.) The documents, in conjunction with those related to the court's earlier award of

attorney fees from Johnson's shareholder plaintiff's bond (which *is* subject to this appeal), show that Johnson raised the issues argued herein with the trial court. The issues and arguments are inter-related, particularly since "all expenses" were limited to Johnson's bond in the consolidated shareholder derivative suit (AOB, pp. 59-61) and contain costs and fees unlawfully incurred in defending against Storix's claims. (AOB, p. 57.)

**3. Johnson has established judicial bias.**

The trial court's award of costs and fees against Johnson for all consolidated actions demonstrates pervasive bias relevant to most issues of this appeal. Respondents cite *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1328, in arguing "[T]he mere fact a judicial officer rules against a party does not show bias." (*Ibid*.) Johnson didn't allege bias based on the errors in the rulings, but on Judge Enright repeatedly ignoring undisputed facts, dispositive arguments supported by well-established law, and refusing to state reasoning or authority behind his unprecedented decisions against Johnson.

It's highly relevant that Storix's attorneys unlawfully represented the defendants in the shareholder derivative suit against the company's own claims. Respondents never denied the allegations and also *ignore the argument in Johnson's brief* that such conduct must preclude an award of costs and fees. (*See* AOB, p. 57-59.) Even more relevant is the fact that the trial court knew but refused to acknowledge their unethical and unlawful conduct when rewarding Respondents by imposing their costs and fees on Johnson. (*See* AOB, pp. 58-63.) Johnson understands the Court disfavors claims of bias in the trial court proceedings, but there is simply no other explanation for the court finding Johnson the *only* person who couldn't fairly represent Storix's interests, dismissing him as a shareholder plaintiff, and then punishing him with massive cost and fee awards for failing to prosecute his claims.

### 4. Johnson's shareholder plaintiff's bond included any potential costs incurred by Storix.

Respondents argued that "Storix is entitled to recover its costs as a prevailing defendant against Johnson on the consolidated derivative action, even as a nominal defendant." (14CT3785.) The court awarded $24,493.53 that included all Storix's costs in all consolidated actions. (RJN, Ex. 2, p. 15.) Johnson argued the shareholder plaintiff's bond covers "all expenses" incurred by Storix "in connection with" the consolidated derivative action. Respondents now change their position and insist the costs of the direct lawsuit against Johnson is independent.

Johnson provided substantial authority that all expenses, including costs and fees, are limited to a shareholder derivative plaintiff's bond when posted. (AOB, pp. 59-60.) Respondents misquote the statute when arguing, "On its face, Corporations Code 800 applies to the recovery of a 'prevailing defendant'" and is therefore not applicable to the lawsuit brought against Johnson. (SRB, p. 66.) The statute makes no mention of a "prevailing defendant", but provides a bond for "reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation *in connection with the action*, including expenses for which the corporation may become liable pursuant to Section 317." (Cal. Corp. Code § 800(d) (italics added); *See* AOB, p. 61.)

When demanding nearly $25,000 in costs alone, Storix didn't separate those related to its direct lawsuit against Johnson from other costs of the consolidated actions that Storix incurred but wasn't a party to. Respondents don't dispute their cost memorandums encompass all consolidated actions. Storix's costs were not "reasonably" incurred, and Respondents failed to address Johnson's well-established authority that *all expenses*, including costs, are limited to the bond Respondents demanded.

### 5. Storix's net monetary recovery is irrelevant.

Respondents ignore Johnson's argument that "Costs under Section 1032 only are allowable to a prevailing party '[e]xcept as otherwise expressly provided by statute'." (AOB, p. 59, citing Cal. Code Civ. Proc. § 1032(b).) They also ignore the argument that "[E]xpenses for which the corporation may become liable pursuant to Section 317" are limited to the bond Respondents demanded. (AOB, p. 59, citing Cal. Corp. Code § 800(d).) Respondents therefore waive their arguments related to cost awards provided by Civil Procedures sections 1032 and 1033. Johnson nonetheless responds to the arguments.

Respondents state, "The trial court correctly determined Storix's action could not have been filed as a limited action." They refer to Cal. Code Civ. Proc. § 1033(a), which pertains to a *judgment* "that could have been rendered in a limited case." In misquoting *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 (Chaves) at 987, they then assert that the "relevant inquiry for determining if [Section 1033(a)] applies is whether 'the action could have been fairly and effectively litigated as a limited civil case.'" Whether the statute *applies* is determined by whether the judgment could have been rendered in a limited case. If not, the court has no discretion to deny costs. The judgment in this case dictates that the court had such discretion.

"Section 1033(a)'s purpose is to encourage plaintiffs to bring their actions as limited civil actions whenever it is reasonably practicable to do so. […] [W]hat it requires is a realistic appraisal of the amount of damages at issue and whether the action might fairly have been litigated using the streamlined procedures of limited civil actions." *Chaves* at 988. The trial court abuses it discretion in awarding costs and fees if "plaintiff's attorney should have realized, well before the action proceeded to trial, that plaintiff's injury was too slight to support a damage recovery in excess of

$25,000." (*Id*. at 991.) Storix demanded damages caused by Johnson's alleged "unjust enrichment", but alleged only that Johnson "intended" to compete. Without actual harm, there was never a cause of action for breach of fiduciary duty. Even if it was reasonable for Respondents to expect to succeed on the Customer Email claim, Storix only demanded $3,739.14

Respondents further claim that a demand for injunctive relief supports the cost award. (SRB, p. 68.) The judgment also denied injunctive relief, so it has no bearing on the issue. Even so, for Storix to reasonably expect injunctive relief, they must also have reasonably expected to succeed on the claim to which it was attached. The Customer Email didn't exist when Respondents filed the lawsuit and therein demanded injunctive relief. Respondents state that "the trial court recognized that Storix had largely obtained the objectives of the litigation by stopping Johnson's harmful conduct after the filing of its lawsuit[.]" (SRB, p. 69.) The trial court said no such thing, nor was there any harmful conduct to deter. Likewise, they assert that "Johnson only folded Janstor Technology, his competitive vehicle, two months *after* being sued." (SRB, p. 60.) Respondents provide no evidence to support any part of their statement. Rather, the document they refer to shows that Janstor used Johnson's home address in San Diego. (NOL3, Tab 55 at p. 83.) Respondents knowingly filed the lawsuit *after* Johnson sold the home and moved to Florida. (1CT 49; 16CT4277; 2CT 325.) Respondents filed two amended complaints that still alleged Johnson was a resident of San Diego, knowing Janstor was long since dissolved, and nevertheless continued to sue Johnson *and Janstor* for three years for "intending" to compete. (2CT306; 3CT821.) Respondents admitted at trial they only filed and maintained the lawsuit to *prevent* Johnson from competing. (9RT1049.) Respondents provide no authority to support their contention that a lawsuit is a proper means of preventing an actual claim from accruing.

Each factor in Section 1033(a) and (b) used to decide whether the court should deny costs was satisfied. The trial court was aware of all *undisputed* facts asserted herein (*See* RJN, Ex. 1) and abused its discretion by ignoring those facts when awarding Storix $24,493.53 for all costs incurred in all consolidated actions solely based on a $3,739 claim first introduced in closing arguments.

## REPLY TO CROSS-DEFENDANTS' ARGUMENT

### A. The Trial Court Improperly Granted Respondents' Anti-SLAPP Motion

#### 1. Prong 1: The claim of illegal activity was apparent in the trial court proceedings.

Respondents assert that "transform[ing] an asserted claim of *illegal* activity into one of *protected* activity' is an issue that could have been raised below but was not." (CRB, p. 10.) The court's order converting the claim was not the issue being litigated. Respondents admit "Johnson took the position" at the hearing that they filed the lawsuit "without authorization." (*Id*. at p. 11.) Johnson therefore raised the argument that the conduct complained of was illegal.

Respondents' citation to *Mendoza v. ADP Screening & Selection Services, Inc*. (2010) 182 Cal. App. 4th 1644, is misleading. *Mendoza* referred to *Flatley v. Mauro*, (2006), 39 Cal.4th 299, in differentiating criminal activity in that case from conduct "merely violative of a statute." *Mendoza* at 1654. Nothing in the cases *Mendoza* relies on limits illegal conduct to criminal activity. Filing a lawsuit in the name of another without their permission is simply not constitutionally protected activity.

"The purpose of section 425.16 is to protect the *valid* exercise of constitutional rights of free speech and petition from the abuse of the judicial process … by allowing a defendant to bring a motion to strike any

action that arises from any activity by the defendant in furtherance of *those rights*." (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 705-706, italics added.) Respondents had no right to file the lawsuit without Storix's approval, so there was no *valid exercise of rights* for the anti-SLAPP statute to protect. Respondents never asserted they had a right to file the lawsuit until three months after the anti-SLAPP hearing. In opposition to Johnson's summary judgment, Respondents argued for the first time that a majority of Storix's directors ratified their decision to file the lawsuit, but intentionally concealed the fact that they were that majority. (AOB, p. 30.)

"SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." (*Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 816.) Although the statute is broadly construed, it's improper for a court to dismiss a claim under the statute without first determining if it was, in fact, a SLAPP. Johnson had a legally cognizable right to be free of an unauthorized lawsuit and to seek damages from those who instigated it.

Respondents do not dispute Johnson's assertion that they were not disinterested in bringing the lawsuit against him. At any time throughout the litigation, Respondents could have sought approval from a disinterested board majority. If no disinterested board approved the lawsuit, they could have filed a proper shareholder derivative lawsuit instead. Either way, proper approval would have avoided or dismissed Johnson's (and later Storix's) claims. Instead, Respondents self-ratified their own decision two years later when also faced with liability *to Storix* for filing the lawsuit without its authority. (AOB, pp. 29-31.) Johnson didn't seek to chill Respondents' valid exercise of free speech or petitioning activity. He wanted to stop the damage Respondents' frivolous lawsuit was causing him and Storix. The court's application of the anti-SLAPP statute defeated its

purpose by permitting Respondents to continue a lawsuit that was itself aimed at chilling Johnson's free speech.

#### 2. Prong 2: The Litigation Privilege is not a valid defense to Johnson's claim

The litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 50 Cal. 3d. 205, 212.) Respondents failed to respond to Johnson's argument that they were not "litigants or other participants authorized by law." Respondents were not the litigants because they named Storix as the plaintiff. Even if considered "other participants", their participation was not "authorized by law". Respondents cite *Albertson v. Raboff* (1956), 46 Cal.2d 375, 381, in arguing that "filing of a lawsuit is absolutely privileged." But, in reference to filing court pleadings, *Albertson* states, "If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches." (*Ibid.*) There is no law that permits someone to file a lawsuit in another's name without their permission.

Rather than provide *any* authority to justify Respondents' majority abuse, they repeatedly cite irrelevant authorities involving entirely different facts and circumstances. Respondents misconstrue statutes and case law designed to protect rights and prevent legal abuse, applying them in a manner that protects their wrongs and encourages their majority abuse.

### B. Respondents Were Not Entitled to an Award of Attorneys' Fees for Their Anti-SLAPP Motion

Johnson didn't raise issues for the first time on appeal, nor did Johnson fail to support his points with reasoned argument and citations to authority. Respondents repeatedly assert the contrary, but without identifying any new issues or arguments lacking reason and authority.

In response to Johnson's argument that Respondents' motion didn't change the "nature and character if the lawsuit in a practical way" and had "no practical effect" (AOB, p. 44), they argue that their "partially successful anti-SLAPP motion removed claims on all three causes of action in Johnson's Cross-Complaint arising from protected petitioning activity." (CRB, p. 16.) This is patently false. According to the court order, "The Court declines to strike the entire Cross-Complaint or an entire cause of action. Instead, the Court strikes the following specific language from the Cross-Complaint: … ." (5CT 1289.) The order then lists specific words that were stricken from the cross-complaint, all of which pertained to Johnson's claim that Respondents filed the lawsuit without Storix's approval or forced Johnson to defend the unauthorized lawsuit. No other claims were affected.

Respondents claim they "achieved a significant victory by narrowing and focusing Johnson's claims to those supported by unprotected activity." (CRB, p. 17.) They fail to address Johnson's reasoned argument that the same stricken allegations "remained an issue underlying a claim in the Derivative Suit as well as a defense to the Janstor Suit." (AOB, p. 44.)

Respondents also offer no response to Johnson's arguments and evidence that they "incurred no expenses because they self-approved having Storix pay all legal expenses on their behalf" and "effectively forced Johnson to pay Cross-Defendants for fees they never incurred, even after they used Johnson's shareholder income to fund their motion." (AOB, p. 44.)

Importantly, Respondents didn't respond to Johnson's argument and authority that their motion was frivolous and intended to cause unnecessary delay, thereby entitling Johnson to an award of attorney's fees for defending their motion. (AOB, pp. 44-45.) Johnson respectfully requests the Court order Respondents to pay Johnson's fees (incurred when he was

represented by counsel) with instructions that they do not take those fees from Storix.

### C. Johnson Suffered Substantial Prejudice from the Commission and Omission of Jury Instructions

As Respondents note, factors to consider when deciding if an instructional error was prejudicial include "(2) the effect of other instructions, and (3) the effect of counsel's arguments." (CRB, p. 18.) Respondents summarize the numerous instructional errors identified by Johnson as "(1) the jury should have been instructed on non-binding authority that a 40% shareholder of a closely-held company cannot give up a right to continued and future employment, and (2) the jury instruction given on the business judgment rule should have included the refused duplicative and superfluous language. (*Ibid*.)

Johnson argued the jury was not instructed as to "authority, means or circumstances" supporting Respondents' assertion that he gave up a right to future employment. (AOB, p. 47.) Johnson proposed adding only a few words to clarify, according to California law, that the business judgment rule does not apply to corporate officers. Combined with other instructional errors, the jury was misled to believe Johnson's claims were barred *by law* regardless of any factual issues or circumstances.

#### 1. At-will employment was not applicable to Johnson's claims and erroneously applied to Respondents' defense.

Defendants' argument regarding the application of California at-will employment law diverts from the relevant issue and fails to address the actual arguments in Johnson's brief. (AOB, pp. 46-47.)

In support of Cross-Defendants defense, Storix's pre-trial motion was granted to exclude Johnson's claims of wrongful termination because "Johnson has never asserted a claim against Storix, his former employer,

for wrongful termination, either by actual or constructive termination." (8CT2044; AOB, p. 47, underline in original.) Johnson wasn't suing anyone for wrongful termination. He sued Respondents for unfair and unequal treatment of a minority shareholder, which included a right to a position at Storix if Johnson had a reasonable expectation commensurate with his company ownership. The court refused to instruct the jury on the crucial element of "reasonable expectation" but allowed instructions and arguments that effectively informed the jury that Johnson had no right to a position under *any circumstances* based on California's at-will employment law.

To support their theory that at-will employment trumped Johnson's right to a position in the company, Respondents argue, "The trial court was obligated to instruct the jury as to applicable legal authority regarding Johnson's entitlement and continued employment at Storix." (CRB, p. 19.) Johnson asserted that same argument in his motion for new trial and in his opening brief. Johnson argued that it was incumbent on the court to instruct the jury on the law applicable to Johnson's theory. Specifically, *if* Johnson held a reasonable expectation commensurate with his stock ownership, he was entitled to employment. (AOB, pp. 44-45, 48.) Employment law is irrelevant to Johnson's claim of unfair and unequal treatment of a minority shareholder, so Respondents' application of at-will employment is entirely misplaced.

Had Johnson known Cross-Defendants would defend using the at-will employment instruction that *Storix* proposed, he would have proposed a limiting instruction. "When one, who has been employed for such time as his services are satisfactory, is discharged it is 'well settled that the employer must act in good faith; and where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question is one for the jury.' [Citation.]" (*Petermann v. Int'l*

*Brotherhood of Teamsters* (1959) 174 Cal. App. 2d 184, 189.) "The presumption of at-will employment may be overcome by evidence of an implied agreement that the employment would continue indefinitely, pending occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some 'cause' for termination." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal. App. 3d 1, 14.)

**2. Respondents were not entitled to present an affirmative defense of waiver absent factual elements pertaining to its application.**

Johnson argued that Respondents failed to cite any authority to support their contention that he gave up a right to future employment. Respondents, in turn, essentially argue that Johnson failed to cite authority requiring that they should. (CRB, p. 20.) It was Respondents' argument that Johnson gave up his right, thus their burden to support it with authority.

Respondents claim their "Affirmative Defense – Waiver" instruction provided an applicable "affirmative defense to Johnson's claim that he could not give up a right to employment in California." (CRB, p. 20.) Johnson didn't assert that claim at trial, but raised the issue in his motion for new trial *after* Respondents improperly applied Storix's "at-will employment" instruction to their defense of waiver. The jury was effectively instructed that at-will employment law "waived" Johnson's right to future employment because he "resigned" (ignoring the fact that he resigned due to a hostile work environment). (AOB, p. 47; 3CT590; 5CT1129.) At-will employment is not a waiver but a *bar* to wrongful termination claims.

There was no wrongful termination claim. If there was, Johnson would have proposed a limited instruction that included relevant exceptions. The jury should have determined, based on all the facts and

circumstances, if Johnson had a "reasonable expectation" that his 40% ownership of Storix entitled him to a job. Instead, the jury was tasked with deciding, *as a matter of law*, that Johnson's claims were all barred because they relied on a right to employment precluded by at-will employment.

### 3. Johnson's proposed 'Fiduciary Duty explained' instruction was based on applicable law.

Respondents argue that Johnson's proposed jury instruction on the fiduciary duties of majority shareholders and directors was based on non-binding authority, so it was proper for the court to refuse the instruction. The court gave no reason for refusing to include Johnson's proposed language specific to the scope of his claims. Johnson proposed instructing the jury to decide if Johnson had a "reasonable expectation" of a job before deciding if Respondents breached a fiduciary duty by depriving him a position. The language was in no way prejudicial, but omitting it was.

Decisions related to the issue of "reasonable expectation" from other states are persuasive. Johnson's proposed instruction included several examples. (Motion to Augment, Attachment 1 at p. 20.) In addition, *Lintz v. Dohr*, No. G054929 (Cal. Ct. App. July 23, 2019) (unpublished) cites *Wilkes v. Springside Nursing Home, Inc.* (Mass. 1976) 353 N.E.2d 657, 664 ("denying minority shareholder corporate employment as part of freeze out scheme."); *See also Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013) ("A majority shareholder (or a coalition of shareholders) will 'oppress' a minority shareholder by freezing her out of control and employment at the corporation.") These cases and many others cite to the leading treatise on shareholder oppression in close corporations, 2 F.H. O'Neal & R.B. Thompson's *Close Corporations and LLCs* (rev. 3d ed. 2004 & supp. 2006), which defines "oppression" as "frustrating a shareholder's reasonable expectations." (*Id.*, § 9.29 at 132.) "[T]ermination of a shareholder's status as an employee is a much more common means of

oppression in a close corporation than is infringement of a shareholder's status as a shareholder." (*Id*. § 9.29 at 134; *See* *Piche v. Braaten* No. A13-0406, 2014 WL 349712, at *5 (Minn. Ct. App. Feb. 3, 2014).)

Johnson provided other authorities in his proposed instruction, which Respondents refute by misapprehending them. For example, they say "the court in *McCann v. Mccan*, 152 Idaho 809 (2012), explicitly stated a shareholder is not entitled to corporate employment." (CRB, p. 23.) *McCann* immediately clarifies that statement by saying, "However, "[s]hareholders in a close corporation usually expect employment and a meaningful role in management, as well as a return on the money paid for the shares." *McCann* at 809, fn. 6.

Respondents state that "Johnson admits he withdrew the instruction in order to provide a special instruction titled 'Majority Shareholder Fiduciary Duties." (CRB, p. 22.) Johnson withdrew his proposed instruction after the court indicated it would be combined with another to create a new instruction, but the new instruction omitted the relevant language. (AOB, p. 48.) Regardless, "[F]ailure to object does not waive any right to the instruction because it is incumbent upon the trial court to instruct on all vital issues in the case." (*Green v. State* (2007) 64 Cal. Rptr. 3d 390, 399.)

**4. The omitted language in the Business Judgment Rule instruction was not superfluous.**

Respondents argue that Johnson's proposed instruction, which only added the words "in their capacity as directors", was redundant and therefore not prejudicial to exclude it. The original instruction referred to "business decisions of a director" but didn't say the rule was limited to matters relevant to the role of a director. Johnson tried to clarify that the rule did not apply to other management decisions simply because those managers were also directors. Johnson's 5-word addition did not "unduly

overemphasize issues, theories, or defenses by repetition or singling them out or making them unduly prominent." (CRB, p. 24.) The omission of Johnson's proposed language allowed Respondents to mislead the jury to believe any decisions they made while serving as directors were protected by the business judgment rule. (AOB, p. 49.)

Johnson didn't argue the testimony of their "corporate governance" expert was prejudicial, but that Respondents' counsel misquoted his testimony to the jury while asserting the testimony was "unrebutted." (CRB, p. 24.) Johnson was designated as the rebuttal witness, but the court granted Respondents' pre-trial motion to preclude him from testifying on the issues. (AOB, p. 49.) Respondents provide no facts to support their statement that "Johnson did not have any training or education on corporate governance issues." (CRB, p. 24.) Corporate governance is not an issue beyond the comprehension of a layman that requires expert testimony. No one could have better testified on corporate governance related to this case than Johnson, who professionally managed Storix for nearly a decade without incident. Johnson's counsel didn't oppose Respondents' motion to preclude him as a rebuttal witness because the expert's testimony was limited to his simple, non-legal opinions identified at his deposition. Johnson doesn't argue the expert's testimony was prejudicial, but that prejudice was caused by Respondents misquoting his testimony in closing arguments. (AOB, pp. 49-50.)

### D. Denial of Johnson's Motion to Release His Shareholder Plaintiff's Bond and Its Subsequent Release to Respondents as an Award of Attorneys' Fees was Improper

Respondents demanded Johnson's $50,000 shareholder plaintiff's bond to pay "their" legal expenses. (14CT3829.) Only "reasonable expenses" incurred by Storix, including those "for which the corporation may become liable pursuant to Section 317", may be recovered from

Johnson's bond. (Corp. Code § 800(d).) Respondents provide no authority to support their contention that they are entitled to recover from Johnson's bond expenses they already imposed on Storix, or that Johnson's bond extended to a different plaintiff, Robin Sassi ("Sassi"), after they had Johnson dismissed as a plaintiff.

Respondents concede that Storix incurred all expenses on their behalf. If it was proper for anyone's costs or attorney fees to be taken from Johnson's bond, it was Storix's. It was therefore incumbent on Storix to request them. Importantly, Respondents demanded nothing from Sassi, the only plaintiff that prosecuted the derivative claims.

**1. The purpose of the bond was abandoned.**

Respondents allege that Johnson "cites no authority for his position a Cal. Corp. Code § 800 bond cannot be enforced against one derivative plaintiff when a second derivative plaintiff is dismissed for lack of standing." Respondents ignore the actual arguments put forth in Johnson's opposition to their fee motion and simply recite the trial court's ambiguous finding that it was "unconvinced by Johnson's arguments." (CRB, p. 26; 14CT 3821.) Johnson cited statutes and case authority to support his position.

Respondents took the position that Johnson had no standing to pursue the shareholder derivative suit on the company's behalf, thereby having Johnson dismissed and leaving Sassi as the only shareholder plaintiff. Sassi was not a principal on the bond. If Sassi succeeded in prosecuting Storix's claims, she would have no right to recover Johnson's bond even if she funded the litigation herself. Respondents argue without authority that Johnson's bond is available only to them if they prevail, but not to Sassi if she prevailed. Respondents concede the fact that the court found Johnson lacked standing to pursue claims against them even before the derivative suit was filed. They also concede that they could have

objected to the bond having an insufficient principal but didn't. (AOB, p. 54; Cal. Code. Civ. Proc. § 995.920(c).)

**2. Respondents were not prevailing parties entitled to statutory attorneys' fees.**

Respondents first argue that Johnson failed to raise the issue that they were not the prevailing party in the derivative suit. The argument is nonsensical because the court determined the prevailing party only after hearing their motion for attorney fees. Johnson can't be expected to anticipate and argue an issue that did not yet exist.

Johnson agrees that, when an attorney fee provision doesn't define a prevailing party, "prevailing party status is determined by the trial court 'based on whether a party prevailed on a practical level.'" (CRB, p. 26.) In deciding to award Johnson's bond to Respondents, the court found:

> "Johnson voluntarily posted a bond in the amount of $50,000.00 pursuant to Corporations Code section 800, the court found that Johnson lacked standing, and after a bench trial the court determined that Sassi failed to meet her burden of proof. Accordingly, Defendants are the prevailing party and are therefore entitled to reasonable attorney fees from the bond."

(14CT 3914.) The court made no finding that Respondents prevailed on a practical level, and it was an abuse of discretion to award Johnson's bond to Respondents solely because "Johnson lacked standing" and "Sassi failed to meet her burden of proof." Even if the court had based the "prevailing party status" on practical considerations, it was nonetheless an abuse of discretion to award attorney fees to Respondents knowing Johnson posted the bond to protect his own standing and not Sassi's (14CT 3878 ¶¶ 7-10), that the bond was intended only to cover expenses "incurred by the defendants" (*Id*. ¶ 11), and that Johnson would not have funded the lawsuit, much less posted the bond, if Respondents had not concealed they were unlawfully using Storix's funds to pay for their defense. (*Id*. ¶ 13-14.) It

was impractical for the court to award costs or fees to Respondents who imposed all their expenses on the same company the derivative suit sought to shield from litigation expense.

Respondents next claim that Johnson failed to argue in the trial court that they were not the prevailing party because the derivative suit obtained a net monetary recovery. (CRB, p. 27.) Respondents concede that the derivative suit achieved its stated goals of recovering funds improperly taken by Respondents for their personal use and removing Respondent Smiljkovich from the company for aiding and concealing that very misconduct. Johnson didn't need to inform the court of facts that clearly appear in the judgment. (12CT3358.) Respondents claim they prevailed because "neither the $2000 nor the $150,000 was awarded to the derivative plaintiffs." They ignore the obvious fact that the corporation is the *real* plaintiff in a derivative suit and the derivative plaintiff seeks only relief for the company's benefit. (*Patrick v. Alacer Corp.* (2008) 25 167 Cal.App.4th 995, 1003.) Storix obtained that relief even if it was subsequently taken again by Respondents to fund their opposition to this appeal.

**3. Respondents did not incur any fees in defense of the derivative action.**

Respondents attempt to divert from the fact that they never *incurred* any expenses by citing authority that provides recovery to a defendant who didn't *pay* his own fees. Respondents don't dispute they imposed all expense and liability for their defense on Storix. Respondents unlawfully invoked a statute designed to allow the company to approve indemnification and advancement of legal expenses in defense of third-party claims (Cal. Corp. Code § 317(b)) to self-approve the use of Storix's funds to defend against its own claims. Under the circumstances, Respondents had no such entitlement without the approval by a disinterested body. Cal. Corp. Code § 317(c). After circumventing the

statutes designed to prevent such corporate abuse, Respondents insist on further profiting from their unlawful conduct by demanding recovery of costs and fees they never incurred. Storix incurred all liability for Respondents' legal expenses "*unless* it shall be determined ultimately that the agent is not entitled to be indemnified." (Cal. Corp. Code § 317(f).)

Respondents admit in their response that they entered into a settlement agreement with Sassi after trial. (SRB, p. 27, fn10.) It was improper for the court to find Johnson had no standing to pursue the derivative claims, approve a settlement agreement between the remaining plaintiff and defendants, and then determine Johnson was a plaintiff only for the purpose of imposing costs and attorney fees. Respondents explicitly waived their right to take costs and fees from the only actual plaintiff who prosecuted the action. Respondents provide no argument or authority or why they should then be able take costs and fees from a non-party instead.

Respondents offered no response to Johnson's argument that it was improper for the trial court to take his bond because it was posted to secure his standing and not Sassi's. (AOB, p. 54.) The court rejected Johnson's argument because "[t]he bond states in the caption that concerns the matter of 'Anthony Johnson and Robin Sassi, derivatively on behalf of Storix, Inc.'" (14CT 3821, underling in original.) The form of the bond must include the *case title*. (Cal. Code Civ. Proc. § 995.330.) The "caption" does not define the bond or its principal, and the bond specifically identified "ANTHONY JOHNSON, as Principal, …" (1CT 171.)

**E. Respondents are not Prevailing Parties Entitled to Costs**

Respondents are wrong that "the order awarding costs to Respondents is not part of the record." Johnson augmented the record to include the court order denying Johnson's motion to strike or tax costs and granting all costs for all consolidated actions to Respondents. The order states "Storix shall recover costs against Johnson in the amount of

$24,493.53" and "The individual defendants shall recover costs against Johnson in the amount of $55,712.76". (Motion to Augment, Ex. 2 at p. 15.) Johnson replied in Section III:A to Storix's argument that a separate appeal of the cost award is required, and the same reply is applicable to Cross-Defendants' rgument.

**1. A statutory award of 'all expenses' bars Respondents' separate entitlement to costs.**

Johnson cited statutes and authority showing that Respondents were not entitled to take costs or fees from Johnson in addition to those provided according to Corp. Code § 800(d). Respondents failed to provide any argument or authority to the contrary. The trial court ignored the same statutes and authorities when awarding all costs for all consolidated actions to Respondents (as Storix and Cross-Defendants), finding that "Johnson's argument that Storix and the individual defendants are not separate and distinct parties is not persuasive." (*RJN*, Ex. 2 at p. 14.) Respondents fail to respond to the absurdity of this statement, the court misquoting the statutes to justify awarding costs and fees to Respondents in addition to Johnson's bond (AOB, p. 56), or the court's failure to acknowledge Johnson's argument that Respondents cannot be rewarded Johnson's bond to recover expenses unlawfully incurred defending the company's claims. (AOB, p. 57.)

Respondents argue here the same as their Storix alter-ego that Cal. Civ. Proc. §§ 1032(a)(4) and (b) provide statutory recovery of costs. Johnson responded to the argument in in Section III:B[4] and incorporates herein.

## CONCLUSION

The Court should recognize that Storix and the Cross-Defendants are not separate and distinct, and Johnson was prejudiced by the trial court failing to acknowledge that fact. The undisputed facts prove, as a matter of

law, that Storix did not approve or ratify the lawsuit against Johnson. Respondents do not dispute they raised a new claim in closing arguments and fail to show the judgment against Johnson was based on anything else. Storix also had no standing to bring a direct lawsuit against Johnson for shareholder claims.

Respondents failed to respond to many issues in Johnson's brief showing his cross-claims were substantially prejudiced by numerous pre-trial decisions, instructional errors, and attorney comments. Johnson should be granted a new trial on all his cross-claims, including the claim of Respondents filing a lawsuit against Johnson without authority that was erroneously stricken as protected activity.

Respondents do not dispute they unlawfully directed Storix's funds and counsel to their defense of the shareholder derivative suit. Respondents cannot be rewarded for unethical and illegal acts, and any cost or fee awards that encompass fees incurred by Storix in defense of its own claims should be reversed. Likewise, Johnson's shareholder plaintiff's bond should be returned to him.

Because most issues in this appeal involve unprecedented abuse of majority control of a close corporation, Johnson requests the Court publish its findings in hopes of deterring others from taking unfair advantage of minority shareholders and using their companies to sue minority directors.

Dated: November 19, 2019

Respectfully submitted,

By: s/Anthony Johnson

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## CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed **APPELLANT'S REPLY BRIEF** is produced using a 14-point Roman type font, including footnotes, and contains 10,726 words, which is less than the total of 14,000 words allowed by the rules of court. I relied on the word count of Microsoft Word used to prepare this brief.

Dated: November 19, 2019

Respectfully submitted,

By: s/ Anthony Johnson
*Pro Se Appellant*

## PROOF OF SERVICE

I, Anthony Johnson, declare that I am over the age of 18 and self-represented in the foregoing action. I am familiar with the business practice for electronic filing and service through the TrueFiling system, pursuant to which practice I served the foregoing **APPELLANT'S OPENING BRIEF** by electronic filing and by sending to the e-mail addresses of counsel listed below:

| | |
|---|---|
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 19, 2019 at Las Vegas, Nevada.

s/ Anthony Johnson