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11 **SUPERIOR COURT OF CALIFORNIA**  
12  
13 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

14 ANTHONY JOHNSON AND ROBIN SASSI,  
15 derivatively on behalf of STORIX, INC.,  
16 a California corporation,

17 Plaintiffs,

18 v.

19 DAVID HUFFMAN, an individual;  
20 RICHARD TURNER, an individual;  
21 MANUEL ALTAMIRANO; an individual;  
22 DAVID KINNEY; an individual,  
23 DAVID SMILJKOVICH, an individual  
24 and DOES 1-20,

25 Defendants,

26 and

27 STORIX, INC., a California corporation;

28 Nominal Defendant

**CASE NO.: 37-2015-00034545-CU-BT-CTL**

**OPPOSITION OF DEMURRER TO FIRST  
AMMENDED COMPLAINT OF  
DEFENDANTSW HUFFMAN, TURNER,  
ALTAMIRANO, KINNEY, AND  
SMILJKOVICH**

[IMAGED FILE]

Date: July 29, 2016

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

Complaint Filed: October 13, 2015

Trial Date: January 13, 2017

Plaintiffs ANTHONY JOHNSON (“Johnson”) and ROBIN SASSI (“Sassi”) on behalf of STORIX, INC. (“Storix”) (hereinafter collectively referred to as “Plaintiffs”), submit this Opposition to the Demurrer to FAC of Defendants Huffman, Turner, Altamirano, Kinney and Smiljkovich (“Defendants”).

1           **I.       INTRODUCTION AND SUMMARY OF ARGUMENT**

2           In derivative lawsuits, the corporation is the *real plaintiff*, but also a *nominal defendant*  
3 for the sole purpose of deciding whether or not the lawsuit serves the corporation’s interest. But  
4 here, the *real defendants* are making that determination, posing as a disinterested Board. Once  
5 again the Defendants use their majority control of the Board of Directors of Storix (“Board”)  
6 and any litigation on its behalf to shield themselves from personal expense and liability for their  
7 wrongful actions. To dismiss Plaintiffs’ First Amended Complaint (“FAC”), the only ground  
8 Defendants invoke is one which should be raised by the corporation and only if the *disinterested*  
9 corporation has determined that the lawsuit is without merit. Since this Board is clearly NOT  
10 disinterested, it should not be determining the merits of this suit.

11           Defendants attempt to introduce a “red herring” to distract the Court from the actual  
12 issues in this case. In truth, the Defendants themselves have deep-rooted, personal grudges  
13 against their former employer, Plaintiff Johnson, who generously gifted 60 percent of *his* stock  
14 in Storix to Defendants Huffman, Turner, Altamirano and Kinney before taking a medical leave  
15 in 2011 due to a terminal cancer diagnosis. Johnson also promised to provide those Defendants  
16 his remaining 40% share of Storix stock upon his death. However, after an unexpected, full  
17 recovery in 2013, Johnson returned to Storix and sought to improve its neglected software. The  
18 Defendants’ resentment and anger toward Johnson sprung from his broken promise of *not dying*  
19 and retaining his 40 percent share. The golden goose that gave up 60% of its egg did not want  
20 to cede the other 40% and the Defendants didn’t like it.

21           Upon his return, Plaintiff Johnson worked tirelessly to improve the company’s only  
22 product (refresh: he wrote it and they were unable to effectively update in his absence) without  
23 an increase in his already-reduced salary. He did so knowing these improvements would result  
24 in better product marketability and higher profits. Thus, increasing distributions for the SIX  
25 shareholders. As he toiled away, the Defendants conspired to forcefully acquire his remaining  
26 stock and force him out of the company he created (and gifted to them).

27           In May, 2014, just before completing the project, Johnson left Storix due to the hostility  
28 he faced from his former employees. Even then, Johnson offered to continue the product at

1 home, but Defendants refused to allow Johnson any further access or participation. Knowing his  
2 software was fast-becoming obsolete and uncompetitive, Johnson demanded that he be placed in  
3 charge of its development. Defendants refused, thereby forcing Johnson to *threaten* to withdraw  
4 their license to sell the software. Johnson held a Federal copyright to this software. Surprisingly,  
5 Defendants claimed ownership of Johnson’s software and forced him into a two-year copyright  
6 battle to protect his rights. The case is currently pending appeal. During this contentious period,  
7 Defendants ceased paying out shareholder distributions, thereby depriving Plaintiffs Johnson  
8 and Sassi of any company profits.

9 The Defendants, using their 3/5 Board majority, enacted every roadblock conceivable to  
10 prevent Johnson from having any access to Storix or the software he designed and developed  
11 sixteen years ago. He is being denied any participation and voice in Storix, and is being  
12 prevented, even as a Director, from seeing company financial records or otherwise investigating  
13 any alleged misconduct. Plaintiff Sassi is equally being denied all rights as a Director because,  
14 as stated in Storix’s Demurrer, she is “*similarly conflicted as she has been assisting Johnson in*  
15 *his efforts to harm the Company.*”

16 In August 2015, the Defendants, filed a bogus lawsuit against Johnson, allegedly on  
17 Storix’s behalf, claiming that Johnson *intended* to illegally compete with Storix. After  
18 Defendants amended this ridiculous suit, Johnson was forced to cross-complaint against them  
19 for damages caused to him personally. Johnson’s claims for damages therein are irrespective of  
20 damages claimed by Storix in this derivative action.

21 As of the date of this Opposition, Defendants continue to use Storix’s corporate funds to  
22 hire attorneys and to shield themselves from the personal expense of litigation.

## 23 II. PERTINENT FACTUAL BACKGROUND

24 Storix Inc. sells software designed and developed by Plaintiff Johnson in 1998 and  
25 copyrighted by Johnson, DBA “Storix Software” in 1999 (FAC ¶12.)

26 Due to his early success, Johnson incorporated and became “Storix, Inc.” in 2003. He  
27 was initially its sole shareholder, officer and director. (FAC ¶¶12-14.) Over the years, he hired  
28 Defendants Huffman, Turner, Altamirano, and Kinney as his company grew.

1 In 2011, after a terminal cancer diagnosis (FAC ¶15), Johnson transferred management  
2 and operational responsibilities of Storix to his long-term employees, Defendants David  
3 Huffman, Richard Turner, Manuel Altamirano, and David Kinney (FAC ¶¶15, 22). He then  
4 *generously* gifted them a combined 60 percent of Storix’s shares. (FAC ¶¶ 15, 22.) Johnson  
5 retained the remaining 40 percent with a plan to transfer those shares upon his death. (FAC ¶¶ 2,  
6 22, 41, 44, 104.) Johnson then resigned as President, Chief Executive Officer, and Board  
7 Director (FAC ¶¶ 15, 22.) and elected Huffman, Turner, Altamirano, and Kinney to the Board in  
8 his place. (FAC ¶15.) Although Johnson no longer managed day-to-day operations, Defendants  
9 wanted his assistance with occasional product improvements. He also remained on Storix’s  
10 payroll at less than 1/3 his former salary and retained his health insurance. (FAC ¶¶ 15, 34, 37.)

11 In September 2013, Plaintiff Sassi received a 7.84% share of Storix stock from  
12 Defendant Huffman through a divorce decree. (FAC ¶35.)

13 In 2013, Johnson's health unexpectedly improved to the chagrin to the Defendants. (FAC  
14 ¶ 9.) Johnson generously agreed to return to work at Storix full-time with no increase in pay or  
15 benefits. (FAC ¶¶ 39-40, 44.) However, problems arose when Defendants complicated his  
16 development efforts (FAC ¶¶ 48,50-51). Johnson ultimately stopped working for Storix in May  
17 2014 due to the hostile environment. (FAC ¶53.)

18 After Defendants refused to communicate with Johnson for months (FAC ¶¶64-65),  
19 Johnson eventually threatened to withdraw Storix’ license to sell the software (FAC ¶65). The  
20 Defendants then claimed ownership of Johnson’s federally-protected software (FAC ¶66-67),  
21 thus beginning two years of copyright litigation. (FAC ¶68.)

22 Johnson and Sassi formed a bond in order to work together to resolve differences  
23 between Johnson and the Defendants in order to preserve Storix’s product reputation and protect  
24 the interests of *all six* Storix shareholders. (FAC ¶63.) In February 2015, Johnson and Sassi  
25 were voted onto the Board, where they currently remain along with Defendants Huffman,  
26 Smiljkovich, and Altamirano. (FAC ¶¶75-76.)

27 More than six months into the copyright litigation, Johnson discovered documents  
28 showing that Defendants had conspired to force him to give up his remaining shares once he

1 completed his software improvements. (FAC ¶¶59-63.) Defendants planned to enact a  
2 Shareholder Buy/Sell agreement (FAC ¶¶41-42, 59-61) while attempting to secretly acquire a  
3 company loan to purchase Johnson’s shares. (FAC ¶¶46-47.) Johnson unknowingly thwarted  
4 their plans when he prematurely ended his employment. Plaintiffs believe all litigation that  
5 followed stemmed from the Defendants’ fear that Johnson would return to Storix and discover  
6 their wrongdoing.

7 **Plaintiffs Johnson and Sassi have standing to bring this derivative action on behalf**  
8 **of Storix.** (FAC ¶116) Together they represent nearly 48 percent of Storix’s shares (FAC ¶¶ 2-  
9 3) and are well-equipped to fairly and adequately represent the interests of Storix and all six  
10 shareholders (FAC ¶¶ 117-120). Further, they have no claims against Storix.

11 This Court should note that Defendants continue to stonewall Plaintiffs Johnson and  
12 Sassi every time they attempt to fulfill their duties as Storix directors and investigate the  
13 allegations of Defendants’ wrongdoings. (FAC ¶¶ 25, 81, 93, 131, 133.)

### 14 III. DISCUSSION

15 Defendants’ state only a single ground in their Demurrer to the FAC – failure to state  
16 facts sufficient to constitute a cause of action (Cal. Civ. Proc. Code § 430.10(e).) Their  
17 reasoning is that 1) Plaintiffs did not adequately plead demand futility; and 2) Plaintiffs cannot  
18 fairly and adequately represent the interests of the corporation and its other shareholders. If such  
19 issues are valid, they should be raised by the nominal defendant corporation, not the individual  
20 defendants. “*The proper party to invoke a given defense should be the party whom the defense is*  
21 *designed to protect.*” *Defenses in Shareholders' Derivative Suits-Who May Raise Them* (1952)  
22 66 Harv. L.Rev. 342, 343.

23 Defendants have become so accustomed to using their Storix Board majority to litigate  
24 against Johnson that they fail to realize this litigation was brought by Storix *against* them. Storix  
25 is a nominal defendant but the *real plaintiff*. When Defendants occupy a majority of Board  
26 seats, its common practice for the Board to engage an independent and *disinterested* party or

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1 Special Litigation Committee (SLC) to evaluate the merits of the case.<sup>1</sup> The Board has not done  
2 so. Defendants herein attempt to Demurrer to the FAC on grounds which may only be properly  
3 raised by the nominal defendant corporation. The Defendants Demurrer should be overruled in  
4 its entirety as it states no proper grounds. In the alternative, it should be overruled for the same  
5 reasons stated in Plaintiffs Opposition to Storix’s Demurrer to the FAC.

6 **A. Plaintiffs Have Adequately Pled Demand Futility**

7 Because this is a ground to be raised by the corporation, not the individual Defendants,  
8 Plaintiffs incorporate by reference the section “**Plaintiffs Have Pled Adequately to Demand**  
9 **Futility**” in the Plaintiffs Opposition to Storix’s Demurrer. The Defendants do not represent  
10 Storix in this case, but they want their *interested* “majority” to say that they did not approve this  
11 action and thus it cannot be brought against them. The requirement to bring the demand on the  
12 Board was raised in Storix’s Demurrer to the FAC and the futility of such a demand was shown  
13 in Plaintiffs Opposition to Storix’s Demurrer. There is no requirement to make such a demand  
14 on each individual Defendant.

15 Defendants then attempt to intentionally misguide the Court by revising the demand  
16 futility requirement. They say that Plaintiffs must allege particular facts showing, “*both*  
17 *director-by-director and transaction-by-transaction on each allegation of misconduct, why each*  
18 *director could not fairly evaluate Plaintiffs’ claims.*” Defendants again mislead. There is no  
19 such requirement, yet Defendants cite two cases: *Khanna v. McMinn*, 2006 WL 1388744, at \*14  
20 (Del. Ch. May 9, 2006) and *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at \*18 (Del. Ch.  
21 May 5, 2010). In neither case did the Court impose such a director-by-director transaction-by-  
22 transaction requirement. However, those courts at their own discretion turned to the arguments  
23 of the complaint when they evaluated each director’s involvement.

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27 <sup>1</sup> Defendant Huffman, CEO, stated several times that any inquiries from Plaintiffs would have to be directed to the Special  
28 Litigation Committee (SLC), but would not answer as to who was on the committee or how it was formed. (FAC ¶¶87, 109.)

1            Nevertheless, to assist the Court in this evaluation, the following table breaks down the  
2 FAC’s paragraphs showing each director, their involvement, and why each is *not disinterested*:<sup>2</sup>

Director	Paragraphs
<b>David Huffman</b>	24, 31, 33, 35, 36, 37, 40-42, 46, 50-54, 60-62, 66, 68, 71, 72*, 74-75, 77, 79-83, 85-87, 90, 93, 95-105, 108-109, 126*
<b>Richard Turner</b>	24, 31, 33, 36, 40-42, 45-46, 48, 50-52, 54, 56, 61-62, 66, 68, 72*, 74-75, 77-79-82, 94, 98-102-105, 107, 108-109, 126*
<b>Manuel Altamirano</b>	24, 31, 36, 40-42, 46, 52, 54, 58, 61-62, 66, 68, 71, 72*, 74-75, 77-83, 90, 93, 98-105, 108-109, 126*
David Kinney	31, 36, 40-42, 46, 52, 54, 57, 61-62, 66, 68, 72*, 74-75, 81, 89, 92, 98-105
David Smiljkovich	24, 31, 32, 35, 41-42, 46-47, 59-63, 68, 72*, 74-75, 79, 81, 83, 90-91, 93, 95, 96, 98-105, 108-109, 126*

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11            \* Kinney and Smiljkovich were not directors at the time the Complaint was filed.

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13            Defendants then misinterpret certain facts in the FAC as a “*wide variety of new demand*  
14 *futility allegations*,” arguing they “*have nothing to do with demand futility, and thus cannot*  
15 *excuse Plaintiffs’ failure to comply with the demand requirement*”:

- 16            1. Because of the "Urgency and Necessity" of Filing Suit Without Delay (FAC ¶126);
- 17            2. Because the Board “Illegally” Increased the Number of Board Seats (FAC ¶126);
- 18            3. Because the Defendants who are Directors Refused to Discuss any Wrongdoing  
19            (FAC ¶124);
- 20            4. Because access was Denied to Corporate Books and Records (FAC ¶126);
- 21            5. Because Defendants Participated in the Wrongful Conduct (FAC ¶127); and
- 22            6. Because Defendants Attempted to Conceal and Suppress Evidence of Illegal and  
23            Wrongful Conduct (FAC ¶129);

24            None of the facts were intended, by themselves, to excuse making a demand on the  
25 Board. These are undisputed and they support Plaintiffs’ contention that the majority of the

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27            <sup>2</sup> At the time the Derivative Complaint was filed, in October, 2015, Defendants Huffman, Turner and Altamirano were  
28            directors. At the time this Demurrer was filed, Defendants Huffman, Altamirano and Smiljkovich are directors. The 5-director  
                 board consisted of at least 3 defendants at all times relevant to this lawsuit and the allegations therein.

1 Board, consisting of the Defendants, could not reasonably be expected to fairly evaluate such a  
2 demand.

3 Defendants also argue that the Plaintiffs urgency in filing the lawsuit cannot excuse the  
4 demand because Storix “*already has been devastated financially anyway.*” In their footnote they  
5 excuse this urgency by saying “*that Plaintiffs did not seek any emergency injunctive relief*  
6 *within 90 days of filing suit (or at any other time since the case commenced) in any event.*”

7 Defendants are aware that Plaintiffs filed a motion on December 9, 2015 for injunctive relief to  
8 1) remove the Defendants from the Board; and 2) prevent Defendants from using corporate  
9 funds for their defense. Storix counsel frustrated every effort of Plaintiff’s *former* counsel in  
10 moving this case and the injunction forward, ensured Plaintiff’s former counsel that Defendants  
11 were not using Storix funds in their defense, and Plaintiff’s former counsel ultimately convinced  
12 Plaintiffs to drop the injunction before its hearing on February 26, 2016.<sup>3</sup>

13 **B. Plaintiffs Can Adequately Represent the Interests of Storix**

14 Because this is a ground to be raised by the corporation, not the Defendants, Plaintiffs  
15 incorporate by reference the section “**Plaintiffs Can Fairly and Adequately Represent the**  
16 **Interests of Storix**” in the Plaintiffs’ Opposition to Storix Demurrer.

17 Defendants claim that Plaintiffs are not qualified to bring derivative claims because they  
18 are “*in litigation against the company and working directly to compete against and undermine*  
19 *Storix.*” Their argument is not supported by facts or law, but nevertheless, would be a defense  
20 to be raised by the corporation. It’s not up to the Defendants to make this determination. The  
21 Plaintiffs can adequately represent Storix *against the Defendants*, and Plaintiffs have properly  
22 addressed this argument in the Opposition to Storix’s Demurrer.

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25 \_\_\_\_\_  
26 <sup>3</sup> Plaintiffs had demanded in October 2015 that Procopio, the firm representing Storix in this derivative action, be conflicted-out  
27 due to their having represented Storix against Johnson in the copyright litigation. Plaintiffs were unaware of Procopio’s  
28 involvement in this derivative action until after the injunction had been dropped. At the annual Board meeting on March 1, 2016  
which was held via teleconference, Storix counsel reiterated: “*I just want to clarify the record. Our firm is not involved at all in*  
*the derivative suit.*” Storix counsel had filed their demurrer to the original Complaint hours earlier.



1 The Defendants filed a direct lawsuit against Johnson, in Storix’s name but without  
2 Board approval, alleging that Johnson was illegally competing. That lawsuit, *Storix v Johnson et*  
3 *al.*, 37-2015-00028262 (“*Janstor Suit*”), is unsupported by facts suggesting actual competition.  
4 Further, it states no damages! Nevertheless, it wouldn’t preclude Johnson from suing the  
5 Defendants either directly or on behalf of the corporation. “*As a general rule, a shareholder*  
6 *may have separate direct and derivative claims and may maintain a direct action and a*  
7 *derivative action.*” *Denevi v. LGCC*, 121 Cal. App .4th 1211, 1221-22 (2004). One who has  
8 “*suffered injury both as an owner of a corporate entity and in an individual capacity is entitled*  
9 *to pursue remedies in both capacities.*” *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 106-107  
10 (1969). “*Typically, the personal and derivative claims arise out of the same course of action,*  
11 *but the plaintiff’s injuries and claims differ from those of the corporation.*” (*Id.*)

12 The fact that the Defendants are in control of Storix’s litigation against them is  
13 evidenced by the Defendants providing no facts whatsoever to support their claim that Plaintiffs  
14 cannot fairly represent Storix, but instead they “*join in and incorporate the argument on this*  
15 *issue asserted by Storix, Inc. in its demurrer to Plaintiffs’ First Amended Complaint.*” It’s  
16 interesting that the Defendants and Storix filed their demurrers on the same day, but Defendants  
17 were already satisfied with the Storix arguments.

#### 18 IV. CONCLUSION

19 Plaintiffs can fairly and adequately represent Storix in this action and have shown more  
20 than reasonable doubt that the Storix Board of Directors is not disinterested when pleading  
21 *demand futility*. Defendants’ claims in this Demurrer serve only their personal interest in  
22 defeating it, and they state no facts as to why this lawsuit is not in Storix’ interest or any threat it  
23 imposes on Storix.

24 Incorporating by reference all prior paragraphs fully set forth herein, and for all the  
25 foregoing reasons, Defendants’ demurrers should be overruled. In the alternative, Plaintiffs  
26 request leave to amend.

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Plaintiff Johnson also requests that the Court order his \$50,000 bond be released to him.<sup>4</sup>  
In the alternative, Plaintiff asks that each Defendant be required to post a similar indemnity.

Dated: July 13, 2016

LAW OFFICES OF EDWIN NEAL SCHWARTZ

By: /s/Edwin N. Schwartz  
Edwin Neal Schwartz, Esq.,  
Attorney for Anthony Johnson and Robin Sassi

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<sup>4</sup> Johnson voluntarily posted a \$50,000 undertaking immediately upon demand of Defendants and Storix counsel so as to avoid further delay. This undertaking nevertheless caused about a 2-month stay in this action.