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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL

STORIX, INC., a California corporation,

Plaintiff,

v.

ANTHONY JOHNSON; JANSTOR TECHNOLOGY, a California corporation; and DOES 1-20,

Defendant.

ANTHONY JOHNSON, an individual,

Cross-Claimant,

v.

DAVID HUFFMAN, an individual, RICHARD TURNER, an individual MANUEL ALTAMIRANO, an individual, DAVID KINNEY, an individual, DAVID SMILJKOVICH, an individual, and DOES 1-5,

Cross-Defendants.

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

STORIX, INC.'S OPPOSITION TO ANTHONY JOHNSON'S MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT

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

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

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I. INTRODUCTION

As alleged in the Second Amended Complaint ("SAC"), Plaintiff Anthony Johnson got caught in the act of engaging in competition with Storix and trying to destroy Storix's customer and employee relationships, all while sitting on the Storix board of directors and owing the fiduciary duties that come with that position. Storix – the entity to whom Johnson owes those fiduciary duties – properly filed this action against Johnson seeking actual and punitive damages as well as a permanent injunction precluding Johnson from engaging in such tortious conduct in the future. [1]

Johnson now wants to avoid the consequences of his despicable conduct by striking the demand for exemplary damages at the pleading stage and arguing that this Court should not be able to impose injunctive relief to prevent further harm to Storix. Johnson also asks to strike other factual allegations simply because he disagrees with them. The court should deny Johnson's motion to strike in its entirety.

Punitive damages are proper based on the allegations of the SAC. Johnson's conduct has been truly outrageous and certainly meets the threshold for exemplary damages under any standard. Further, his efforts to argue the underlying facts are improper in a motion to strike.

The need for injunctive relief in this case is clear as well. As shown by the facts alleged in the SAC, Johnson has demonstrated his intent to harm Storix far beyond its bottom line. The SAC plainly alleges, among other things, harassment and threating employees, disruption of customer relationships and disloyal competition. Such activities are well within the court's power to enjoin, and Storix should not be limited to monetary damages[2] or be forced to wait for Johnson's next disloyal ploy to materialize.

There is also no basis to strike the various factual allegations that Johnson seems to disagree with. Factual disputes are to be decided at trial, not by motion to strike.

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[1] The parties are involved in other contentious litigation, including a copyright suit that Johnson filed against Storix. Johnson lost and Storix won at trial on all counts in December 2015. Storix has been awarded much of its attorney fees against Johnson, in part as deterrence for his improper litigation conduct, which final total award is expected to be in excess of $500,000. Johnson also brought a derivative suit in California Superior Court against Storix's other director/shareholders in late 2015.

[2] What amount of money is sufficient to replace a valued employee chased away by Johnson? What dollar amount makes up for a strained customer relationship?

Johnson's motion to strike should be denied in its entirety.

II. DISCUSSION

A. Standard for a Motion to Strike

In ruling on a motion to strike, the allegations in the complaint are considered in context and presumed to be true: "(J)udges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." *Clauson v. Sup.Ct.,* 67 Cal.App.4th 1253, 1255 (1998). A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. *Blakemore v. Superior Court,* 129 Cal. App. 4th 36, 53 (2005). In challenging the sufficiency of the facts alleged in a count of a complaint to constitute a cause of action, a demurrer, rather than a motion to strike, is the better practice. *Cameron v. Ah Quong*, 8 Cal.App. 310 (1908).

The same liberal policy regarding amendment of pleadings applies as on sustaining demurrers. Therefore, if a defect is correctible, an amended pleading should be allowed. *See Grieves v. Sup.Ct.*, 157 Cal.App.3d 159, 168 (1984) [relying on C.C.P. § 576 which authorizes court to allow amendment of pleadings at any time "in furtherance of justice"]; *Price v. Dames & Moore,* 92 Cal.App.4th 355, 360 (2001).

B. Johnson's Recent Purported Move to Florida Provides No Justification for Granting the Motion to Strike, Nor Immunity from Liability for his Tortious Acts

Johnson appears to be under the false belief that somehow his decision to move out of state renders Storix incapable of pursuing him for his tortious acts. He asks that the Court strike several portions of the SAC which contain allegations related to his California "citizenship and residency" and allegations regarding "events occurring when Johnson was not a resident or citizen of California" as being false. While he does not explain why striking such alleged "falsities" are critical to his defense, he apparently believes that by striking those allegations he can escape this dispute altogether on a jurisdictional technicality. He is wrong.

As explained in Storix's concurrently filed opposition to Johnson's demurrer, Johnson's attempt to avoid this lawsuit based on a personal jurisdiction challenge fails *because he has already generally appeared in the action.* California courts have long held "a party waives any

objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action." *Roy v. Sup. Ct.*, 127 Cal.App.4th 337, 341 (2005). A general appearance operates as a consent to jurisdiction of the person. *Dial 800 v. Fesbinder*, 118 Cal.App.4th 32, 52 (2004). Code of Civil Procedure section 1014 reads: "A defendant appears in an action when the defendant answers, demurs, files a notice of motion to strike,... or when an attorney gives notice of appearance for the defendant... ." Section 1014's list of general appearance acts "is not exclusive; 'rather the term may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person...' [Citation.]" *Hamilton v. Asbestos Corp.*, 22 Cal.4th 1127, 1147 (2000). "[A] defendant may appear in ways other than those specifically designed in section 1014." *Slaybaugh v. Sup. Ct.*, 70 Cal.App.3d 216, 222 (1977). "As a general rule, a defendant makes a general appearance when he or she takes any part in the action or proceeding." *In re Marriage of Fitzgerald & King*, 39 Cal.App.4th 1419, 1428 (1995). "A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act." *Mansour v. Sup. Ct.*, 38 Cal.App.4th 1750, 1756 (1995); *see also Hamilton v. Asbestos Corp.*, 22 Cal.4th at 1147. "'[I]f a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court had jurisdiction of his person, then he...made a general appearance.' [Citation.]" *Bank of America v. Harrah*, 113 Cal.App.2d 639, 641 (1952).

Storix filed this action on August 20, 2015. Johnson, through his then-counsel, Gary Eastman, appeared and filed a demurrer challenging the allegations of the Complaint, but not raising any issue of personal jurisdiction. (ROA ##10-11). Storix filed an Amended Complaint on March 14, 2016. (ROA #24). Johnson, appearing *pro se*, filed a demurrer to the FAC, arguing that Storix failed to state facts sufficient to constitute a cause of action under C.C.P. §430.10(e), but again did not raise any personal jurisdictional challenge. (ROA ##39-41). He filed a motion to strike the FAC as well. (ROA ##42-45). Johnson also filed a cross-complaint against individual

officers, directors and shareholders of Storix, seeking damages and injunctive relief. (ROA #36). Johnson filed and appeared for an *ex parte* application for a writ of mandate on June 14, 2016 (ROA #72) and then filed a noticed motion on his writ of mandate on August 22, 2015. (ROA ##99-104). Johnson participated in the writ of mandate motion hearing on August 26, 2016. Any one of the foregoing actions by Johnson would be sufficient to constitute a "general appearance," and together there is no question that he has submitted to the jurisdiction of this Court. His personal jurisdiction challenge is entirely meritless and has been waived.[3]

Even if relevant, the question of whether and when Johnson permanently moved to Florida are fact issues not appropriately determined via a motion to strike. Regardless, as a result of his general appearance, his challenge to the allegations regarding his state of residency are entirely immaterial, as he has waived any challenge to personal jurisdiction.

Moreover, the allegations are stated on information and belief: "Plaintiff ***is informed and believes*** that Defendant Anthony Johnson was ***at the time of the events alleged herein*** a citizen of the State of California and resident of the County of San Diego." (SAC ¶3 (emphasis added)). And, Storix alleges that he lived in California "at the time of events," not that he still resides there. A "[p]laintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true." *Doe v. City of Los Angeles*, 42 Cal.4th 531, 550 (2007). Storix understands that Johnson did live in California at the time of the events alleged in the SAC, many of which occurred prior to July 2015, when he claims to have moved to Florida. In any event, there is no legitimate reason to strike the allegations of Johnson's residency.

C. It is Improper for Johnson To Try To Challenge Facts and Raise Fact Disputes

Johnson makes a broadside attack on the substance of the SAC, alleging its claims regarding his competitive efforts fail to validly state a cause of action because Storix does not state "a single fact showing that Johnson either intended or did cause harm to Storix." (*See* Motion, p.

[3] As explained in Storix's Opposition to Johnson's Demurrer to the SAC, filed concurrently herewith, even absent his general appearance and resulting waiver of any personal jurisdiction challenge, Johnson would be subject to the Court's jurisdiction regardless of his present status as a Florida resident. To avoid redundancy, Storix incorporates by references those authorities and argument as if set forth fully herein.

4). Johnson ignores the substance of the SAC, and the applicable law.

As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice (e.g., the court's own files or records). C.C.P. § 437. Where the moving party needs to introduce extrinsic evidence to show the falsity of the pleading, the proper procedure is a motion for summary judgment under C.C.P. § 437c—rather than a motion to strike. *See* Cal. Prac. Guide Civ. Pro. Before Trial Ch. 7(I)-B (Rutter). Moreover, failure to state facts sufficient to state a cause of action is ground for general demurrer, but not for a C.C.P. § 436 motion to strike. *Ferraro v. Camarlinghi*, 161 Cal.App.4th 509, 529 (2008), *as modified on denial of reh'g* (Apr. 24, 2008).

Conclusory allegations should not be stricken where they are supported by other, factual allegations in the complaint. For example, an allegation that defendant was guilty of "oppression, fraud and malice" could not be stricken where the complaint contained sufficient facts to support such allegation. *Perkins v. Sup.Ct.*, 117 Cal.App.3d 1, 6 (1981) ["The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree"].

In shotgun fashion, Johnson contends that Storix failed to adequately allege that:

- "actual harm will befall [Storix] due to Johnson's allegations of Johnson's misconduct, stating only possible or potential harm based solely on Plaintiff's conclusions of fact." (Motion at p. 4:20-22).
- "that Johnson intended to compete with Storix, intended to tarnish Storix' reputation, had 'intent', 'desire' and 'hope' to harm Storix..." (*Id.* at p. 4:24-25).
- "that Johnson 'threatened' its employees ... and alleges that Johnson 'sought to disrupt Storix Inc.'s customer relationships'" (*Id.* at p. 5:1-2).
- That Johnson's conduct did not amount to a breach of fiduciary duty, but rather permissible solicitation by a departing employee. (*Id.* at p. 5:7-25).

None of these challenges is valid. Storix alleged sufficient facts to support the allegations and conclusions pleaded in the SAC.

1. Storix Properly Alleged Details of Johnson's Improper Competition

Johnson misconstrues a number of authorities to raise factual challenges regarding his belief that he is permitted to compete with the company. (*See* Motion at p. 5). The authorities he relies on are totally inapposite, as he was a corporate director seeking to compete with the

company. Further, his arguments are based in disputed factual contentions better suited for a closing argument and not a motion to strike.

There is no basis to strike factual allegations that are plainly relevant to the claims at issue, particularly allegations that involve Johnson's breach of fiduciary duties owed to the company. The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage. *Pellegrini v. Weiss*, 165 Cal.App.4th 515, 525 (2008), *citing City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th 445, 483 (1998). As Storix has explained at length in its concurrently filed opposition to Johnson's demurrer, because he was (and still is) as a director of Storix, Johnson owed the company fiduciary duties as a matter of law. *See* Opposition to Demurrer.

The SAC plainly alleges that Johnson was a director (a fact which he concedes), and therefore as a matter of law he owed the company fiduciary duties. None of Johnson's denials and factual challenges to the SAC's allegations regarding the details of his improper conduct have any merit and are improper to raise in a motion to strike.

Whether a finder of fact will determine that the alleged facts are true whether he can somehow avoid liability are to be decided at trial, not at the pleading stage. While "[t]he mere fact that the officer makes preparations to compete before he resigns his office is not sufficient to constitute a breach of duty[, i]t is the nature of his preparations which is significant." *Bancroft-Whitney Co. v. Glen*, 64 Cal.2d 327, 346 (1966). Courts note that "no ironclad rules as to the type of conduct which is permissible can be stated, since the spectrum of activities in this regard is as broad as the ingenuity of man itself." *Id.* The significant inquiry with respect to a fiduciary's preparations to compete with a corporation upon resignation is whether such fiduciary's acts or omissions constitute a breach under general principles applicable to performance of his trust. *Id.* at 347.

Here, as explained in Storix's opposition to the demurrer, the SAC does not merely allege that Johnson was an innocent departing officer or employee seeking to feather his nest prior to his resignation. The SAC plainly alleges that Johnson was a continuing acting director (he remains on

the board) who actually formed a competing enterprise with the express purpose of competing with Storix, and took other steps to further that effort. It is alleged (and will be proven upon undisputed evidence) that Johnson formed a separate entity to directly compete with Storix at the same time that he was actively serving as a director of Storix. (SAC ¶14). Johnson took other steps to put his plan into action, including the reservation of two port numbers (SAC ¶15), and reserving domain names (SAC ¶14, 16). Johnson then widely disseminated directions to Storix's customers to "cease any further payment to Storix" and otherwise made derogatory comments about Storix and its products with the intent to diminish Storix's sales revenues. (SAC ¶17). Johnson then sought to sow disloyalty with Storix's own employees, stating that the "innocent employees are about to lose your jobs" and that Johnson had, over two years, developed a "marketable product" based on Storix's software. (SAC ¶ 18).

In another irrelevant argument apparently related to his citation of non-fiduciary employee cases, Johnson contends: "The SAC states no facts to support its contention or conclusion that Johnson did or even intended to solicit customers." (Motion, p. 5). Johnson's argument contradicts clear law and entirely misses the mark. As a matter of law, Johnson as a Storix director owed the company fiduciary duties. Storix, as noted above, identified a number of specific actions Johnson took in contravention of the duties he owed to the company. It further alleges harm, as noted below. Whether ultimately his alleged conduct is determined to violate those duties is a question of fact to be tried, and not appropriately determined at the pleadings stage. Accordingly, his request to strike allegations related to his use of Storix's customer lists and efforts to compete, including "Paragraphs 17, 21, 25 and 28 of the SAC," should be denied.

Johnson also seeks to strike wholesale "Paragraphs 16, 17, 18, 19, 20, 25 , 28 and 31," arguing they are premised on "conclusory trigger words, and their derivatives, of 'intent', 'desire', 'hope', 'effort' and 'threat'." (Motion at p. 6). Johnson fails to identify particularized reasons why the Court should strike these paragraphs, which contain discrete factual allegations. Johnson simply appears to be disputing the facts themselves. The fact that Johnson doesn't like the alleged facts is not cause to strike those allegations from the SAC. Such allegations are plainly relevant to the

breach of the fiduciary duty allegations against Johnson, not to mention the exemplary damages claims as well.

2. Storix Adequately Alleged Harm

Regarding allegations of harm, Johnson essentially rehashes arguments from his demurrer concerning Storix's damages allegations. It is unclear why he repeats them in his motion to strike, but the same reasoning that undermines his demurrer justifies denying his motion to strike as to the same matters. In fact, in its Minute Order dated August 26, 2016, the Court expressly ruled that: "The Demurrer is overruled because **there are sufficient facts pled to support the claims for breach of fiduciary duty** and aiding/abetting breach of fiduciary duty." (Emphasis added). As harm is an element of a breach of fiduciary duty claim, the Court has previously ruled that Storix's allegations of harm are sufficient, thus negating Johnson's challenge.

Even though the matter has been clarified by the prior ruling, Storix will address it again to avoid any doubt.

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

There is no basis to strike Storix's allegations of harm resulting from Johnson's conduct. Storix alleges it has or will suffer harm as a result of Johnson's conduct due to damaged "customer relationships," "disrupting Storix, Inc.'s business," "disseminating Storix, Inc.'s confidential financial information," *See*, e.g., SAC ¶ 28. Johnson argues that his "intent cannot cause harm, and

thus Johnson cannot respond to such allegations." (Motion at p. 4:27). Regardless of intent, Storix has alleged harm. The elements of the claim for breach of fiduciary duty are simply (1) duty, (2) breach, and (3) harm (*see Pellegrini v. Weiss*, 165 Cal.App.4th at 525), and do not require proving intent. Rather, as noted below, the allegations regarding Johnson's illicit intent are relevant to issues of exemplary damages. As a result, Johnson's challenge to the allegations of harm and intent fail, and his request to strike such allegations should be denied.

D. Johnson's Request that the Court Interpret Documents and Make Factual Determinations is Improper in the Context of a Motion to Strike

While somewhat difficult to follow, Johnson appears to argue that he thinks certain allegations in the SAC either involve protected conduct, amount to "contradictory" allegations, or are disputed, i.e., false. Johnson engages in a series of factual disputes regarding how the finder of fact should ultimately interpret various documents, including emails he sent. (*See* Motion at p. 6:5-22). He apparently contends that such disputes should be resolved via motion to strike since "they state contradictory facts irrelevant to a cause of action" and are "false and misleading and thus irrelevant to a cause of action." (Motion at 8:10-13). This again is an improper request to decide fact issues which should not to be resolved by motion to strike.

Johnson also presents a largely incoherent argument that his conduct was protected and "within his rights as a director to exercise his business judgment… ." (Motion at p. 6:23-24). Johnson seems to have no idea how the business judgment rule applies and he is clearly raising factual disputes based on defenses he might try to rely on at trial. Defenses based on disputed facts outside the pleadings cannot be determined by a motion to strike. Johnson seems to think he can prove to the finder of fact that his unauthorized emails to Storix's customers were "cautionary warning to customers" and did not violate his fiduciary duty. Even so, it isn't clear that would implicate the business judgment rule, but that is beyond the scope of a motion to strike. *See*, e.g., *Palm Springs Villas II Homeowners Ass'n, Inc. v. Parth*, 248 Cal.App.4th 268, 286 (2016), *as modified on denial of reh'g* (July 14, 2016), *review filed* (Aug. 1, 2016)("In sum, the Association produced evidence establishing the existence of triable issues of material fact as to whether Parth acted on an informed basis and with reasonable diligence, precluding summary judgment based on

the business judgment rule."); *Everest Inv'rs 8 v. McNeil Partners*, 114 Cal.App.4th 411, 430 (2003)("We agree with Everest that triable issues of fact as to the existence of McNeil's improper motives and a conflict of interest preclude summary judgment based on the business judgment rule.").

Johnson tries and fails to suggest the SAC is self-contradictory, suggesting he is accused of "not *disclosing* his alleged conduct to Storix," but also that he "*communicated* his intent to compete directly with Storix." (Motion at p. 7:13-15). Johnson is plainly conflating allegations to give the suggestion of inconsistency. Johnson concealed his competing plans from his Storix co-directors. (*See*, e.g., SAC ¶1 ("Johnson secretly formed a new company to directly compete with Plaintiff"; *see also* SAC ¶14 & 15 ("Johnson did not disclose any of these acts to Storix, Inc.").

There is nothing contradictory in the SAC's allegations. Although Johnson did indeed communicate his intent to compete, those communications were with third parties that he thought would never be seen by anyone within Storix. (*See* SAC ¶16). The fact he admitted in his communications to others that he intended to compete with Storix evidences and confirms that his secretive actions were committed in breach of the duties owed to the Company. Those allegations of his admitted intent are certainly not contradictory or inconsistent in any manner whatsoever.

Further, Johnson is wrong to believe his liability arises solely form the secretive nature of his conduct. His liability arises from committing acts that violate his fiduciary duties to the company, whether he kept them secret or not. In any event, there is no basis to strike any aspect of the SAC based on such factual disputes.

In another effort to argue the veracity of certain fact allegations, Johnson argues "Plaintiff's clearly wishes to misguide the Court into believing that Johnson is a thief who intends to disclose Storix' confidential software code to the public." (Motion at 8:7-8). Again, whether Johnson was authorized or not to take the software code he is alleged to have absconded with is a question of fact to be determined at trial. It is not to be decided by motion to strike or demurrer. A jury will decide if he should be adjudged a "thief."

In the examples discussed above and throughout his motion to strike, Johnson is plainly

attempting to dispute alleged facts, and not the adequacy of the allegations under an appropriate motion to strike standard. Accordingly, his motion must be denied in its entirety. This includes denying his request to strike paragraphs 14, 15, 16, 17, 20, 21, 27, 28 and 31 of the SAC, or any others, as being contradictory, irrelevant, or "false and misleading."

E. Storix Properly Alleges Despicable Conduct Sufficient for Exemplary Damages

The substantive law applicable to a claim for exemplary or punitive damages is found in Civil Code section 3294 which states:

> "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

In *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d 22, 29 (1975), the California Court of Appeal explained requisite pleading for punitive damages:

> "When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure...." (emphasis added).

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages." *Monge v. Superior Court*, 176 Cal.App.3d 503, 510 (1986). Plaintiff is required only to plead specific facts to show defendant's conduct was committed with one of the required mental states, i.e., oppression, fraud, or malice. *See Smith v. Superior Court*, 10 Cal.App.4th 1033, 1041–1042 (1992).

It has long been the law that punitive damages are recoverable for intentional infliction of emotional distress and breach of fiduciary duty. *Sequoia Vacuum Sys. v. Stransky*, 229 Cal.App.2d 281, 289 (1964)("The breach of obligation here involved is not one based on contract but rather on the fiduciary relationship. Exemplary damages may be imposed in addition to actual damages for the breach of a fiduciary relationship." (Emphasis added)).

Johnson's conduct is not only inexcusable, but without a doubt was malicious and an intentional breach of fiduciary duty supporting the availability of exemplary damages. As alleged in the SAC, Johnson (among many other things):

- "Johnson threatened to and did send an email notice to Storix's past, current, and/or potential future customers, and demanded that the recipients 'cease any further payment to Storix in relation to [use of SBAdmin] and refrain from downloading any further copies.' Johnson's email was written in a way that was intended to tarnish the reputation of Storix, Inc. in the eyes of those who received it. (SAC ¶17) [4];
- "Johnson also directed threats to non-shareholder employees of Storix, Inc. Plaintiff is informed and believes, and based thereon alleges that Johnson sent an email to a non-shareholder employee advising that 'you and the other innocent employees are about to lose your jobs.'" (SAC ¶18);
- "Johnson stole a developmental copy of Storix, Inc.'s confidential, proprietary, and non-public software code when he resigned from the company in May 2014." (SAC ¶20);
- Johnson "demanded that the customers 'cease any further payment to Storix in relation to this software and refrain from downloading any further copies.' Defendants did not just want to compete with Storix, they wanted to bury it and force it out of business entirely. (SAC ¶21);
- Johnson "sought to disrupt Storix, Inc.'s customer relationships by broadcasting false statements about Storix, Inc.'s products and disparaging Storix, Inc.'s management…. ." (SAC ¶28).

Based on the foregoing facts, Storix alleged: "Johnson has engaged in the acts alleged herein with the intent to harm Storix, Inc., and with callous indifference or a wanton disregard for the rights of others, including Storix, Inc. and its other shareholders and employees, as demonstrated by his words threatening harm to Storix, Inc. and statements indicating that he intends to harm Storix, Inc. [… and] acted with and [has] been guilty of oppression, fraud and malice, [justifying] an award of punitive and exemplary damages against Johnson." (SAC ¶31 (Brackets added)). Accordingly, Storix has adequately alleged intentional, despicable conduct warranting exemplary damages and Johnson's motion on this issue must be denied.

[4] Of note, Johnson's actual statements underscore Johnson's hostility and despicable conduct. This included telling Storix's shareholders: "Here's your one option. Get the f**k out. Give your stock back to the company, resign your board seat, terminate your employment." Johnson used the full expletive.

F. The Prayer for Injunctive Relief Is Proper to Prevent Storix From Suffering Irreparable Harm

There is no merit to Johnson's request to strike Storix's prayer for injunctive relief, which is relief long recognized in the context of breach of fiduciary duty cases. *See Sequoia Vacuum Sys. v. Stransky*, 229 Cal.App.2d 281 at 284 ("The trial court found that appellant, while a director and officer of respondent corporation, entered into a competing business and used his position of trust and confidence to further his own private interests, and concluded that, in concealing his actions, appellant was guilty of a breach of his fiduciary relationship. The judgment against appellant granted the injunctive relief requested and awarded respondents actual damages of $1,600 and exemplary damages of $5,000. The court entered judgment in favor of the other defendants." (Emphasis added)).

As alleged in the SAC, Johnson has previously taken steps to interfere with Storix's customer base and harm its goodwill. Injunctive relief is properly issued to prevent harm to a party's reputation and goodwill where the finding of such potential harm is based on evidence rather than "platitudes." *Herb Reed Enterprises, LLC v Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9th. Cir. 2013). *See*, e.g., *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) (holding that evidence of loss of customer goodwill supports finding of irreparable harm).

Johnson sent an "announcement letter" email to an unknown number of Storix customers in which he urged those customers to cease payment to Storix and cease downloading its software. (SAC ¶17). "Johnson's email was written in a way that was intended to tarnish the reputation of Storix, Inc. in the eyes of those who received it." (*Id.*). Johnson clearly wanted to damage Storix's business reputation and goodwill. Johnson's actions demonstrate the need and appropriateness for injunctive relief, including but not limited to:

- his admitted intent to disrupt customer relationships,
- his desire to bully his way into control of the company,
- his hatred for those in control of Storix, and
- his belief that judicial inaction equates to a green light for further bad behavior.

Storix adequately alleges facts justifying the need for injunctive relief in view of Johnson's disloyal and competitive acts. It is apparent that Johnson will continue his campaign to harm Storix's reputation and relationships and to bully its management and shareholders such that injunctive relief is needed and money damages are inadequate. *See Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *also Paradise Hills Associates v Procel*, 235 Cal.App.3d 1528, 1546 (1991)(injunction may properly issue to protect business from untrue statements and harassment of customers).

As Storix alleges, Johnson's conduct will also impair the intrinsic value associated with its confidential information not being well known, which is not easily repaid with a money award:

> "The software Johnson took without Storix, Inc.'s permission when he quit is/was accessible only to employees of Storix, Inc. whose jobs required access- to the software code and developmental materials, and other reasonable measures to maintain its confidentiality. It has value as a result of its not being generally known to the public or to other persons who can obtain economic value from its disclosure or use. He took that code with the express desire and intent to modify it and 'rebrand' it under a new name in order to directly compete with Storix, Inc. Not only did Johnson hope to use Storix, Inc.'s own source code against it in competition, but Johnson intended and desired that Storix would collapse in the face of such competition. Despite repeated requests, Johnson has refused to return the unauthorized confidential and propriety software code, which he has no right to possess."

(SAC ¶20). Johnson's claim that "Storix was never deprived of the software" entirely disregards the fact that Johnson had no right to abscond with Storix's confidential property in order to seek to compete with the company and potentially disclose that information to unauthorized third parties.

Johnson's suggestion that Storix simply sue him for money damages alone, while he is free to take whatever measures he deems fit to fight dirty, cannot be reconciled with his extensive efforts at self-help prior to entry of judgment, which are designed to scare customers away from Storix and, in doing so, deprive Storix of the revenue it needs to continue litigating. For instance, he will be able to continue bad-mouthing the company and threatening its employees. (*See* SAC ¶25 ("...his direction to Storix, Inc.'s past, current, and possible future customers to cease payments to Storix, Inc., his efforts to tarnish Storix, Inc.'s reputation and his threats to Plaintiffs

employees, were all done in furtherance of his efforts to create a business to directly compete with and otherwise cause harm to Storix, Inc. ...")).

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

Injunctive relieve is appropriate under these circumstances and Storix's entitlement to such relief is adequately alleged. Thus, Johnson's motion should be denied.

III. CONCLUSION

For the foregoing reasons, Storix respectfully requests that the Court deny Johnson's motion to strike in its entirety. If the court is inclined to grant any aspect of Johnson's motion, Storix should be given leave to amend to allege additional facts and additional causes of action. For example (and without conceding any aspect of the SAC is defective), in response to Johnson's apparent argument that Storix's remedies are limited because the SAC does not include a cause of action for misappropriation of trade secrets (Motion at p. 12), Storix should be allowed to add specific causes for trade secret misappropriation under both state and federal law.[5] Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. *Temescal Water Co. v. Department of Public Works*, 44 Cal.2d 90, 107 (1955).

[5] Johnson appears to challenge the SAC for failing to adequately allege a trade secret misappropriation claim. *See* Motion, p. 12. Should the Court agree, Storix respectfully requests leave to amend to detail such a claim, as well as unfair competition which allows for restitution and injunctive relief. Storix anticipates that if the pleadings are amended to allege a cause of action for trade secret misappropriation pursuant to the recently enacted federal Defend Trade Secrets Act (DTSA), Johnson will likely use that opportunity to file a notice of removal to drag Storix's claims to federal court.

DATED: September 30, 2016

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: _____

Paul A. Tyrell
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Attorneys for Plaintiff Storix, Inc.

PROOF OF SERVICE

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

STORIX, INC.'S OPPOSITION TO ANTHONY JOHNSON'S MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT

☑ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☑ **BY E-MAIL OR ELECTRONIC SERVICE (via One Legal Online Court Services):** I served upon the designated recipients via electronic transmission through the One Legal system on September 30, 2016. Upon completion of said transmission of said documents, a certified receipt is issued to filing party acknowledging receipt by One Legal's system. Once One Legal has served all designated recipients, proof of electronic service is returned to the filing party.

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

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

Barbara Donahoo