Court of Appeal of the State of California

Fourth Appellate District, Division One

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

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

Honorable Judges Kevin A. Enright and Joel R. Wohlfeil

PETITION FOR REHEARING

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INTRODUCTION

Johnson brings this Petition for Rehearing in accordance with Rule 8.268 following the decision by the Court of appeals affirming all judgments and orders against Johnson in the above-captioned consolidated appeals and in favor of Storix, Inc. ("Storix") and cross-defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich, (collectively, "Individual Defendants").

This case involves the most extraordinary abuse of majority control and minority shareholder abuse of a closely-held corporation on record. But the Order makes no reference to either issue despite their relevance to every argument, claim and defense. Johnson urged the panel to finally acknowledge that *the Individual Defendants are Storix,* and only by ignoring that fact could any of their arguments even seem rational. Instead, they ignored nearly all Johnson's arguments, accepted all the unsupported arguments of two separate parties (including those raised for the first time on appeal), added a number of *sua sponte* arguments on their behalf, and supplemented all their arguments with over 40 new case citations.

A best-selling author and retired attorney found the facts and decisions in this case (and the prior copyright case) so compelling that he's writing a book entitled *"Summarily Denied"* based on Johnson's 5-year experience as a *pro se* civil litigant trying to survive two behemoth law firms and the judges who support them. Johnson expected a 3-judge panel to be different, but he receive no more consideration than he did in the trial court and the Order on appeal only contributed to the same narrative.

Johnson requests a rehearing based on clear errors of law, relevant omitted and misleading jury instructions, and many issues and arguments raised in the his briefs and at oral argument that have still never been addressed.

ARGUMENT

I. GENERAL LEGAL PRINCIPALS GOVERNING APPEALS WERE NOT FOLLOWED

The Order states that, "[a]lthough Johnson is representing himself in this litigation, appellate rules apply with equal force to self-represented parties. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) A litigant "appearing in propria persona, . . . is entitled to the same, but no greater, consideration than other litigants and attorneys." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638 (Order, p. 8.) "Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' (*Nelson v. Avondale Homeowners Assn*. (2009) 172 Cal.App.4th 857, 862.)" (*Id*.)

Johnson was diligent at supporting all facts with citation to the record and provided relevant authority to support his arguments, and the Respondents provided conclusory facts unsupported by the record, arguments without authority, or failed to argue at all. Far lesser consideration was afforded Johnson, a *pro se* appellant, than the two attorneys being paid his own money to opposed him.

II. ARGUMENTS AND FACTS THAT WERE LEFT OUT

The following is a summary of dispositive and undisputed arguments properly raised in the lower court and on appeal but were not addressed:

A. The fiduciary Duty Action Against Johnson

1. The Customer Email claim was first raised in closing arguments.

Respondent never disputed that the Customer Email claim was first raised in closing arguments. The Order raises the *sua sponte* argument that "[t]he court never limited the admission of the email to issues relating to the Individual Defendants' defense, and Johnson was clearly on notice that

Storix intended to use the email as evidence to support its affirmative claims." (Order, p.21-22.) The Order makes no reference to the transcripts showing that the trial court and parties agreed the email could *only* be used as evidence, but not as the basis of a claim. (AOB, pp.27-28.)

2. The argument that the president approved the lawsuit against Johnson was raised for the first time on appeal.

Respondents admitted at trial that they, as the Storix board *majority*, personally decided to file the lawsuit against Johnson, but that there was no board meeting. After Johnson showed, as a matter of law, that such a decision could not be made without a board meeting, Respondents raised the contradictory argument for the first time on appeal that Storix's president approved the lawsuit. The panel didn't acknowledge that their argument was not raised below and thus not considered on appeal. (AOB, p.10, citing *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 569.)

The panel nevertheless found that "Storix's bylaws provided that, subject to the board's control, the president has general supervision, direction, and control of the corporation's business" and "[t]he corporation is bound by such dealings, if they were 'within the scope of the authority, actual or apparent, conferred by the board or within the agency power of the officer executing it. . . .'" (Order, p.11, citing Corp. Code § 208(b).) The panel didn't acknowledge Johnson's argument that (1) the president has no inherent authority to act on behalf of the board, (2) the board never authorized the president to act, and (3) filing a lawsuit against a 40% owner and director of the company is not within the scope of Storix's business. (ARB, pp.10-12.) There is no case that supports a president using the company to sue a director sitting on the board *under which he serves*.

3. Johnson's opening brief serves as notice of appeal of the cost orders.

The court found "no jurisdiction to review these contentions because Johnson failed to appeal from the post-judgment cost and attorney fees awards." (Order, p.40.) The panel didn't respond to the authority in Johnson's reply brief that it may consider the appeal as a writ of mandate. (ARB, p.20.) It also didn't respond to Johnson's oral argument that his opening brief should serve as notice of appeal since it was filed only 10 days after entry of the orders and encompasses all requirements of a notice of appeal. The court has jurisdiction to hear the cost orders and there is no prejudice to any party in doing so.

B. Johnson's Cross-Complaint

1. The order granting in part the anti-SLAPP motion is appealable after final judgment.

There is no authority to support that an anti-SLAPP motion granted *in part* must be immediately appealed, especially when the appellate court in this case would have been called upon to decide an issue still under dispute in the trial court. The Order states that, "[s]ubject to certain exceptions not relevant here, an order granting or denying a special motion to strike a SLAPP cause of action is appealable." (Order, p.23.) Johnson argued that removing the language pertaining to the Respondents filing the Fiduciary Duty Action without board approval didn't dispose of the issue since it still had to be litigated as his defense and as Storix's claim in the Shareholder Derivative Action. This is one of the exceptions that make the order non-appealable.

As argued in Johnson's supplemental brief, "When *partially* granting Cross-Defendants' anti-SLAPP motion, '[t]he Court decline[d] to strike the entire Cross-Complaint or an entire cause of action. (5CT1289.)" Johnson emphasized at the hearing that this actual wording in the order informed

Johnson that it was not appealable because a special motion to strike pursuant to Code Civ. Proc. § 425.16 is specifically used to strike a "cause of action."

2. The "at-will employment" jury instruction was not an applicable defense to Johnson's claim of minority shareholder oppression.

The panel found that "The [at-will employment] instruction was a correct statement of the law, and was relevant to Johnson's testimony that the Individual Defendants breached a fiduciary duty by *ousting him* or refusing him a position at Storix." (Order, p. 27; underlines added.) The panel did not respond to Johnson's brief or oral argument that at-will employment is only a defense to wrongful termination claims and irrelevant to his actual claim of a reasonable expectation to a position in a closely-held corporation by a 40% shareholder. The fact that Johnson was *ousted* from the company is irrelevant because he was not suing anyone (especially Storix) for wrongful termination. At-will employment only pertains to FEHA claims (AOB, p.46, f.6) and is not a defense against breach of fiduciary duty claims against majority shareholders.

3. The court specifically refused to allow Johnson to argue a relevant and applicable exception to at-will employment.

The trial court specifically precluded Johnson from alleging a "hostile work environment" at trial based on *Storix's* motion in limine to "exclude Johnson's claims of wrongful termination or harassment." Johnson's attorney didn't object to the "at-will employment" instruction because Johnson his claim was not based on wrongful termination. (AOB, p.46-47; 8CT2038; 6RT581-2.)

Even if the court intended to allow Respondents to use at-will employment to support Johnson "waiving" his right to a position in his own company, it was clear error to preclude Johnson from arguing a relevant exception that was *specifically alleged* in his cross-complaint. (3CT34-38,

60.) Resignation due to a "hostile work environment" is a "constructive discharge … that transforms what is ostensibly a resignation into a firing." (*See* Storix's MIL, 8CT2041.)" The panel didn't respond to Johnson's argument, and the Order makes no reference to Johnson resigning due to a hostile work environment.

4. The trial court refused a jury instruction and verdict question as to whether the Storix board was disinterested.

Johnson's primary defense to the Fiduciary Duty Action was that the Individual Defendants were not *disinterested* in approving or ratifying the lawsuit against him. Not once did Respondents argue they were not disinterested. The panel didn't address Johnson's argument that the trial court erred in finding Storix authorized the lawsuit by rejecting Johnson's proposed "Standing/Authority" jury instruction and refusing to allow the jury to decide if the lawsuit was approved by a majority of disinterested directors. (AOB, pp. 32.)

The court implicitly rejected a verdict question on the issue by stating he would make the decision as a matter of law based on undisputed facts. (AOB, p.33.) Johnson cited the transcript showing the court ambiguously found after the jury trial that three of the five directors "voted to proceed on the lawsuit" without reference to who they were or whether they were disinterested. (*Id.*) Johnson also provided authority that the appellate court may not infer that the trial court made the necessary underlying factual findings if the issue was raised in a new trial motion but the court remained silent. (*Id*., p.36; Code Civ. Proc. § 634.)

C. The Shareholder Derivative Action (Plaintiff's Bond)

1. Cross-Defendants were not the prevailing party in the Derivative Action.

The Order contains no reference to the lower court order showing that, as a direct result of this action, Johnson recovered $2000 in stolen

money on Storix's behalf from one of the defendants, Storix's CFO. The Order also contains no reference to the fact that Storix saved about $150,000 in unnecessary employment expense (as of 2019) when the defendant was fired for the theft. (AOB, p.55.) The undisputed facts show the CFO directed multiple legal actions against Johnson solely to prevent him from obtaining Storix's financial records showing they were all illegally taking Storix funds to defend the company's own claims. The panel didn't respond to Respondents absurd argument that they prevailed because that relief was to Storix and not the "derivative plaintiffs." (ARB, p.38.)

The panel didn't acknowledge Storix as the "real plaintiff" when ordering Johnson (and no other plaintiff) to pay all costs of all parties in the Shareholder Derivative Action. (ARB, p.38.) The panel also failed to recognize the clear statutes limiting all expenses incurred in connection with the consolidated actions to the shareholder plaintiff's bond, if posted. (AOB, p.59,61.)

2. Respondents are not entitled to costs or fees after unlawfully using Storix's resources to defend the claims.

The Individual Respondents don't dispute they illegally directed Storix's funds and corporate counsel to their defense against Storix's own claims. This fact was raised throughout the litigation and argued in Johnson's briefs never acknowledged by the trial or appellate court.

The Order makes no reference to the indisputable argument that Storix cannot recover costs and fees as a "nominal defendant" because the company is required by law to remain a neutral party. (AOB, p.57.) The facts show that the Individual Respondents unlawfully directed corporate counsel to obstruct discovery and to fight against Storix's interests at trial, ultimately defeating the company's own claims. (*Id*., pp.19-29.)

The panel also didn't respond to Johnson's argument that the $50,000 bond cannot be awarded to the Individual Respondents who incurred no expenses for the same reasons set forth in Section E below. (*Id*., pp. 55-59; ARB, pp. 22, 38.)

D. The Malicious Prosecution Action

The trial court awarded the Defendants all costs and fees for their anti-SLAPP motion because Johnson dismissed the action before it was heard. The decision was made after finding the anti-SLAPP would have been successful. The Order ignores Johnson's argument that a claim pending appeal is severable from the favorable termination element of a malicious prosecution action – as specifically stated in the primary case, *Lane v. Bell* (2018) 20 Cal.App.5th 61, on which Respondents rely. The Order also doesn't address Johnson's argument that the defendants are not entitled to anti-SLAPP motion fees if he dismissed the action for reasons other than to avoid their motion. Johnson provided undisputed facts showing his reasons for dismissing the action had nothing to do with the merits of his claims, and there was no finding by the trial court to the contrary.

E. The Cost and Fee Awards to the Individual Defendants

As argued in section II.A.2 above, the panel had jurisdiction to hear the cost orders but chose not to address most legal or any equitable issues when affirming over $160,000 in costs and fees against the only party who fought for Storix's interests while taking nothing from it. Johnson should be allowed a rehearing on the cost awards in the consolidated actions.

Johnson argued most issues in both appeals, but his brief regarding the Malicious Prosecution Action provides the most thorough explanation of what it means to "incur" costs and, according to law, the defendants incurred *nothing* because they imposed all expenses *and liability* on Storix

and that they have no obligation to repay. If the Court won't consider the legality of defendants profiting from litigation that costs them nothing, it should at least consider the equitable issue of Respondents having already taken ten times that amount from Johnson's company earnings.

III. ERRORS OF LAW

A. The Fiduciary Duty Action Against Johnson

1. The panel confused capacity with authority.

"[Johnson] contends Storix lacked standing or the capacity to bring the action against him." (Order, p.9.) "'An allegation by a plaintiff that it is a corporation is sufficient to show that it has the general capacity to sue.'" (*Id*., p. 10, citing *Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1605.) "The record reflects that throughout the litigation, Johnson challenged Storix's capacity to sue, including in a demurrer, summary judgment motion, and at trial." (*Id*., p.11.) Johnson never challenged Storix's capacity to sue. He challenged Storix's *authority* to sue, which (unlike capacity) is an element of standing that can be raised at any time, including on appeal. (ARB, p.9, citing *Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 757). It remains undisputed that the lawsuit against Johnson was *authorized* by a majority of disinterested directors or shareholders.

2. The Storix Board did not approve or ratify the lawsuit.

"Prior to the filing of this lawsuit, three of the five directors … acknowledged and approved of the plan (6CT1536)" and there was "no board meeting was held to discuss or approve the lawsuit. (5CT1322.)" (AOB, p.30.) The panel argues that "the Storix board later ratified the action during a special board meeting at which the then-directors (Huffman, Altamirano and Smiljkovich) voted to ratify the earlier decision of Huffman, Altamirano and Turner to file the lawsuit." (Order, pp.12-13.)

The panel's only response to Johnson's argument that Huffman and Altamirano had no right to ratify *their own unlawful act* was to dismiss his reference to *Dominguez v. Superior Court* (1983), 139 Cal.App.3d 692, as irrelevant because it involved ratifying a legal action to undermine a statute of limitations defense. Like Johnson, *Dominguez* relies on Civ. Code § 2313, which states that "[n]o unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent." *Dominguez* is directly applicable because Respondents ratified their action in order to undermine a standing defense, and Section 2313 is not specific to any affirmative defense.

The Order further dismisses Johnson's reference to Corp. Code §307(b), which allows a board action to be taken without a meeting only if *all directors* consent to the act in writing. The order raises the *sue sponte* argument that this is only "one way an action may be instituted [but] it is not exclusive", then argues the president can also act on the board's behalf. (Order, p.14.) As discussed below, the president didn't authorize the lawsuit, nor did he have such authority. The Order ignores Johnson's reference to the latter part of Section 307(b) which states that, if an action is taken without a meeting, "in any suit brought to challenge the action, the party asserting the validity of the action shall have the burden of proof in establishing that the action was just and reasonable to the corporation at the time it was approved." (*Id*., f.6.) Defendants never asserted, nor did any court find, that ratifying the lawsuit 2 years after it was filed was just and reasonable to Storix. The undisputed facts show that Respondents only ratified the lawsuit to relieve themselves from liability *to Storix* for filing it without authority.

3. Johnson's acceptance of the verdict form is not dispositive to Johnson's argument that the Storix board was not disinterested in suing him because the court specifically refused to allow the jury to decide the issue.

Johnson challenged the court's refusal to instruct the jury on whether Storix had standing to sue Johnson based on a majority vote of disinterested directors or shareholders. The Order states that "the trial court noted the issue presented a question of law for the court to decide (because it was undisputed that three of five Storix directors voted to proceed with the action), and Johnson's counsel did not object to this conclusion." (Order, pp. 13-14.) "Johnson did not preserve this challenge [to allowing the jury to decide the issue] because he never objected to the special verdict form and his counsel consented to the form." (Order, p.14; underline added.) There was obviously no verdict question because the court specifically stated it would make the decision based on undisputed facts. (ARB, p.14.)

The panel failed to acknowledge Johnson's argument that there was an underlying factual issue of whether the "three of five Storix directors" were disinterested. (AOB, p.32. Order, p.14.) Johnson proved they were not disinterested and *Respondents never claimed they were*, so it appeared the court would find, as a matter of law, that the Fiduciary Duty Action was not approved by a disinterested board.

1. Storix's president did not approve the Fiduciary Duty Action

As argued above, Respondents raised this issue for the first time on appeal. Nonetheless, they cited *Sealand Inv. Corp. v. Emprise Inc*. (1961), 190 Cal.App.2d 305, for the proposition that a president has *inherent* authority to file a lawsuit on the company's behalf. Johnson argued in his reply that their reference to *Sealand* is misleading because it found that only a person responsible for the "entire management and operation of the company" had such inherent authority. (*Id*. at 314; AOB, p.10.) Furthermore, "The president does not have the power to enter into contracts

or execute other instruments or render the corporation 'liable for any purposes or any amount' without board authorization." (*Anmaco, Inc. v. Bohlken* (1983) 13 Cal.App.4th 891, 898.) Storix did not authorize president to act on its behalf.

2. The majority shareholders did not authorize the Fiduciary Duty Action.

The panel raised the *sua sponte* argument that "Critically, shareholders of a statutory close corporation can bypass the board of directors or 'dispense with the board of directors entirely and authorize the shareholders themselves to adopt bylaws, elect officers and do whatever else directors do.' (Friedman et al., Cal. Practice Guide: Corporations (The Rutter Group 2020) ¶ 3:249, p. 3-57, citing § 300, subd. (b).)" (Order, p.12.) Respondents never argued that any shareholders approved the lawsuit. Even so, this citation refers to *all* shareholders acting in concert, not just a majority. Corp. Code § 300 pertains to a shareholder agreement. which is "a written agreement among all of the shareholders of a close corporation … as authorized by subdivision (b) of Section 300. (Corp. Code § 186; underline added.) No such writing exists.

3. The Customer Email was not a valid claim.

As the Order correctly states, "Based on this verdict, it is clear the jury rejected Storix's damages claim based on Johnson creating a competing product and awarded damages solely for Johnson's act of sending the customer email." (Order, p.19.) Respondents claimed $1.25 million on a claim that Johnson intended to compete, which they styled as "unfair head start" and "unjust enrichment". For the first time in closing arguments, they claimed $3,739.14 for "loss of employee productivity" based on "the amount of estimated cost of employee time associated with dealing with the fallout" of the email." (AOB, p.29; 12CT3098.)

Respondents never disputed that the email claim was first introduced in closing arguments.

"Storix amended its fiduciary duty complaint to allege … damages based on the expenses it incurred to protect its customer relationships after Johnson sent the customer email." (Order, p. 5.) The email didn't exist when the lawsuit was filed against Johnson (AOB, p.17) and no claim related to the email was included in the first amended complaint filed 9 months later. (2CT303.) The court allowed Storix to amend a second time only to add allegations to support *injunctive relief,* but Storix was not granted leave to add a new claim. (1RT114.)

The Order states that "Johnson alternatively argues the trial court abused its discretion by allowing Storix to discuss the customer email during closing argument as evidence of Storix's affirmative case against him" and "[t]he court never limited the admission of the email to issues relating to the Individual Defendants' defense, and Johnson was clearly on notice that Storix intended to use the email as evidence to support its affirmative claims." (Order, pp.21-22.) This is a misstatement of facts. Respondents never discussed the email as the basis of a claim or alleged any damage related to "loss employee productivity" associated with it until closing arguments. Johnson didn't dispute whether the email should have been introduced as evidence to support the only claim actually asserted during trial because Johnson defeated it.

Johnson clearly showed that the court allowed the email to be introduced as evidence, but all parties agreed it was not the basis of a claim, and the court rejected its use on the verdict form. (AOB, pp. 27-28.) Storix's "affirmative claims" was a single claim that Johnson intended to compete while serving as a director, and Storix introduced the email only as *evidence* to support that claim. Had Johnson known Storix would add a new $3,739 claim in closing arguments, he could have introduced evidence to

disprove it. If the Court does not find other reason to reverse the judgment, Johnson should be granted a new trial on the $3,739.14 claim he had no prior opportunity to dispute.

B. Johnson's Cross-Complaint

1. The "At-will Employment" and "Waiver" instructions were not harmless.

Johnson argued that "Respondents failed to cite any authority to support their contention that he gave up a right to future employment." (AOB, p.32.) The Order states that "Johnson cites no authority to support this argument and we treat it as forfeited." (Order, p.28.) It was *Respondents'* argument, not Johnson's, so they forfeited it.

The "at-will employment" instruction was irrelevant to Johnson's claim of being *unfairly* deprived a position at his own company by the 52% majority shareholders, but it instructed the jury that "an employer may discharge an employee for no reason, or for a good, bad, mistaken, unwise, or even *unfair reason*[.]" (Order, p.26.) Johnson didn't oppose the at-will employment instruction because the court accepted it only to preclude him from alleging a "wrongful termination" claim, and he had no intention of doing so. (AOB, p.46; 11CT2999.)

The Order raises the *sua sponte* argument that "[t]he at-will instruction did not preclude [Johnson] from arguing that he was not an at-will employee[.] … On this record, there is no reasonable probability the instruction prejudicially affected the verdict." (Order, p.28.) Johnson didn't argue he was *not* an "at-will employee" because Respondents never asked him but waited until closing arguments to say he was.

"Johnson alleged he had a reasonable expectation to a position at the company and that the Individual Defendants breached their fiduciary duty to him by refusing to permit him to work at the company." (Order, p.27.) But, as argued in the next section, the court refused Johnson's only

instruction to support that claim. To the jury, no fact was relevant except that Johnson was a mere at-will employee who was never entitled to a job since he could be terminated for *any reason*. At-will employment is irrelevant to Johnson's actual claim of minority shareholder oppression.

2. Rejection of the only jury instruction to support Johnson's claim was clearly prejudicial.

The Order cites part of the language the court ordered removed from Johnson's proposed "Majority Fiduciary Duty" jury instruction, which states, "When a minority shareholder holds a reasonable expectation of employment with the corporation, majority shareholders may breach their fiduciary duties by denying the minority shareholder a position with the company." Additional language removed was that "[a] fiduciary duty imposes on majority shareholders a duty to act with the utmost good faith in the best interests of the corporation and the minority shareholders." (Motion to Augment, Attachment 1.) Removal of this language left the jury was left with no instruction to support Johnson's claim.

The Order notes that "the court held an off-the-record discussion with counsel regarding jury instructions" and "Johnson's counsel raised no objection on the record regarding removal of the disputed paragraph." (*Id*., pp.30-31.) The Order then raises the *sue sponte* argument that "Johnson forfeited the asserted error regarding omission of the italicized language" because he "withdrew" his proposed instruction. (Order, p. p32.) Johnson did not withdraw the instruction. As Johnson's attorney testified:

> "The court refused Johnson's proposed 4100 instruction but allowed Johnson to submit a modified instruction that removed the last paragraph and the last sentence of the first paragraph."

(Decl. of Bernie King ISO Motion to Augment (King Decl.) ¶12.) Johnson was ordered to remove the language from his proposed instruction essential to his claim, and his objection is inherent.

The panel further "conclude[ed] that Johnson forfeited this argument" based on Respondents' assertion that the instruction was based on non-binding authority. (Order, p.30.) However,

> "Upon the request of opposing counsel, Johnson's proposed 4100 instruction also included citations to the same supporting legal authorities Johnson cited in his trial brief and in his oppositions to cross-defendants and Storix's motions in limine."

(King Decl. ¶10.) Respondents never objected to the authority until this appeal. Johnson provided additional authority in his reply brief, including a leading treatise, 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.)

Johnson cited two additional California cases at oral argument, but the Order states that "the cases cited by Johnson during his rebuttal oral argument [citations] do not assist him because these cases do not relate to this issue." Those cases involve this exact issue. "[T]he controlling shareholder [who] has been using his position to insure that no benefits, such as … employment, ever accrue to the owners of the minority shares" constitutes "the very misconduct and unfairness which provoked the minority shareholders to seek involuntary dissolution." (*Brown v. Allied Corrugated Box Co.* (1979) 91 Cal.App.3d 477.) "When ... there is substantial evidence that defendant ... has excluded his associate from participation in the management of the enterprise,… from all knowledge of its transactions,… [and] there is evidence of dissipation of a very considerable portion of the receipts of the enterprise and the hazarding of the loss of its sole asset, the need for the appointment of a receiver to

protect and conserve the assets … is well nigh compelling." (*Neider v. Dardi* (1955) 130 Cal.App.2d 646, 649.) These cases involve majority shareholders breaching their fiduciary duties in the same way Respondents have for over 5 years. The fact that Johnson sought a different remedy that allowed Storix to remain in business is not a relevant distinction.

3. Prejudice is clear by the individual and combined effect of the jury instructions.

As stated in the Order, "actual prejudice must be assessed in the context of the individual trial record, including"(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Order, p.32). It's unclear why the panel summarily found that "Johnson's briefs attempt no such analysis" since he set forth each instructional error, their combined effect, the counsel's misleading arguments, and exactly how the combined errors were prejudicial to his claims. (AOB, pp. 45-51.)

The Order indicates that the panel conducted an independent review of the record in finding "the parties fully litigated Johnson's right to continued employment." (Order, p.32.) "The legal adequacy of jury instructions is a legal issue subject to the de novo standard of appellate review." (*Isip v. Mercedes-Benz* (2007) 65 Cal.Rptr.3d 695, 698.) Johnson didn't request a review based on substantial evidence since the Court's only determination should be whether the jury was properly instructed as to the law. Johnson argued the instructions were inadequate because they failed to instruct the jury on the law pertaining to his claims, and *Respondents provided no argument to the contrary*.

Johnson stressed at oral argument that all his claims are based on majority abuse and minority shareholder oppression. He emphasized that he was not claiming a definitive right to a position in his company, but that it was for the jury to decide if he had a *reasonable expectation* to a position

based on all the facts. The Order makes no reference majority abuse, shareholder oppression, or the law pertaining to the reasonable expectations of a minority shareholder.

4. The attorney fees on the anti-SLAPP motion are appealable after final judgment.

The court states that "an attorney fees and costs award to a prevailing defendant on an anti-SLAPP motion is directly appealable." (Order, p.23, citing *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 782.) But *Colton* is distinguishable because the losing party on the motion appealed the order and the prevailing party argued it was not appealable. *Colton* found the order was not appealable under Section 425.16(i) of the anti-SLAPP statute, but was appealable as a "collateral order." (*Id*. at 781.) An order that qualifies as collateral is not required to be immediately appealed. "[T]he collateral order doctrine [] has been described by the California Supreme Court as follows: 'An appeal is allowed if the order is a final judgment against a party in a collateral proceeding growing out of the action.'" (*Samuel v. Stevedoring Services of America* (1994) 24 Cal.App.4th 414, 417-418; citing *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119.)

An order granting or denying a special motion to strike is appealable under Code Civ. Proc. § 904.1(a)(13), a separate fee order is a collateral order which may or may not be appealed after final judgment. (*See Doe v. Luster* (2006) 51 Cal.Rptr.3d 403, 406-7.) "[I]f there is any doubt whether the appeal is from an appealable judgment or order, the court is 'duty-bound' to consider the issue on its own motion." (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

C. Fees and Costs Award in Fiduciary Duty and Derivative Actions

1. Neither Storix nor the Individual Defendants are entitled to costs or fees in the Fiduciary Duty Action.

As argued above, the panel did not respond to Johnson's argument that the Court has jurisdiction to review the cost and fee awards in the Fiduciary Duty Action because his opening brief should serve as a notice of appeal. The panel nevertheless addressed Johnson's argument that the trial court exhibited extraordinary bias by awarding costs and fees to Storix and the Individual Defendants. However, it summarily decided all Johnson's arguments were without merit because they were purportedly "based solely on the court's adverse rulings." (Order, p.40)

Johnson's claims of bias were not based on adverse rulings, but on the judge refusing to acknowledge any dispositive or undisputed facts and issuing ambiguous rulings against clear law. The fact that the judge ruled against Johnson is not itself dispositive of the issue of judicial bias. However, establishing bias is not necessary to overturn the decisions. Johnson requests the Court grant a rehearing to address the underlying issues for the first time based on errors of law and abuse of discretion as described in his brief.

2. Neither Storix nor the Individual Defendants are entitled to costs or fees in the Shareholder Derivative Action

As argued above, the Respondents cannot be rewarded for their illegal conduct in using Storix's funds and having Storix's counsel defend against its own claims. And, as with all expenses in all other actions, the Individual Defendants are not entitled to any *recovery* of expenses they never incurred.

Respondents are not entitled to take even more fees from Johnson's bond shareholder plaintiff's bond after they self-approved the use of his own 40% of shareholder profits to fund their defense. The court granted

their motion to dismiss Johnson as a shareholder plaintiff minutes before trial but continued the trial with the remaining plaintiff (who never worked at Storix), thereby forcing Johnson to fund the trial on Storix's behalf he wasn't even a party to while the defendants continued using Storix to fund their defense. Finally, the court ordered Johnson to pay all costs of all parties in addition to the $50,000 shareholder plaintiff's bond he posted to *secure his standing*, but the only plaintiff who actually prosecuted the action was ordered to pay nothing even after the court found she failed to *her* claims. (12CT3359.)

These are novel issues since no other case involves such blatant abuse of majority control the Derivative Action sought to curtail, and should be addressed by this Court.

D. The Malicious Prosecution Action

The Court ignored the well-established "severability rule" that allows a malicious prosecution action to be directed toward specific claims on which a defendant is successful. The panel accepted Respondents' argument that Johnson must succeed on the "entire judgment", ignoring Johnson's showing that the cases referred to involved a single claim, an award of injunctive relief on a claim, or different theories of recovery on a single claim.

This is an important issue because the cases cited in the Order pertain to malicious prosecution claims directed to the "entire lawsuit" or lawsuits that involved only one claim. This and similar cases rely on such authority without distinguishing between lawsuits involving a single claim and those, such as this, in which a defendant was completely successful on a *separate and distinct* claim to which a malicious prosecution action is directed.

It was clear error for the court to find Johnson's malicious prosecution action could not have succeeded based on a $3,739 judgment

unrelated to the $1.25 million claim he clearly defeated. To find otherwise actually supports malicious prosecution by allowing plaintiffs, as in this case, to protect themselves from liability by simply adding trivial claims that could have been brought in small claims court.

CONCLUSION

For the reasons above, the Court should grant Johnson a rehearing. The Court should also reconsider ordering Johnson to pay costs and fees of all parties on appeal since Johnson's appeal was not frivolous and Respondents have already taken millions in fees from Johnson's company earnings to ensure he would be paid nothing.

Dated: January 14, 2021

Respectfully submitted,

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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 **MOTION FOR REHEARING** is produced using a 13-point Roman type font, including footnotes, and contains 6,075 words, which is less than the total of 7,000 words allowed by the rules of court. I relied on the word count of Microsoft Word used to prepare this brief.

Dated: January 14, 2021

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 **PETITION FOR REHEARING** by electronic filing and 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 January 14, 2021 at Las Vegas, Nevada.

s/ Anthony Johnson