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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN DIEGO

10 CENTRAL DIVISION

11 ANTHONY JOHNSON, and ROBIN SASSI,  
derivatively on behalf of STORIX, INC., a  
12 California corporation,

13 Plaintiffs,

14 v.

15 DAVID HUFFMAN, an individual, RICHARD  
TURNER, an individual, MANUEL  
16 ALTAMIRANO, an individual, DAVID KINNEY,  
an individual, DAVID SMILJKOVICH, an  
17 individual and DOES 1-20,

18 Defendants.  
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AND RELATED CASES.

Case No. 37-2015-00034545-CU-BT-CTL  
(consolidated with Case Nos.  
37-2015-00028262-CU-BT-CTL and  
37-2016-00030822-CU-MC-CTL)

STORIX, INC.'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT  
ANTHONY JOHNSON'S MOTION FOR  
SUMMARY JUDGMENT OR IN THE  
ALTERNATIVE SUMMARY  
ADJUDICATION

IMAGED FILE

Date: June 9, 2017  
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Judge: Hon. Joel R. Wohlfeil

Complaint Filed: August 20, 2015  
Trial Date: November 16, 2017

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1     **I.     INTRODUCTION**

2             Defendant Anthony Johnson (“Johnson”) has filed a motion for summary judgment, or  
3     summary adjudication, on Storix, Inc.’s (“Storix”) breach of fiduciary duty claims. He is seeking a  
4     free pass for the wrongful conduct that he acknowledges he committed. He asks for summary relief  
5     on the theory that either (a) Storix lacks authority to pursue such claims, or (b) Storix failed to  
6     establish any recoverable damages. Both arguments fail.

7             Storix sued Johnson after learning that he, then a member of Storix’s board of directors, had  
8     formed a new corporation, defendant Janstor Technology (“Janstor”), intending to offer a software  
9     product in direct competition with Storix. Moreover, Johnson based his new “re-branded” software on  
10    a version of Storix’s own source code he stole when he resigned as a Storix employee. In discovery  
11    responses Johnson suggests he was innocently putting planning to compete with Storix only in the  
12    event Storix, perhaps, ran into financial trouble and went out of business. In reality, Johnson was  
13    actively working to undermine Storix hoping it would fail, so that he could then swoop in and fill the  
14    resulting market void.<sup>1</sup> Luckily for Storix, it learned of Johnson’s covert plan and sued to prevent him  
15    from actually entering the marketplace with a competing product, at least for now. Caught red-  
16    handed, Johnson tried to cover his most visible tracks by shuttering Janstor, but he has apparently  
17    continued his improper and unauthorized development of his competing software product.

18            Johnson’s claim that Storix lacked authority to sue him is easily disposed of. Storix’s  
19    President and its officers, and a majority of Storix’s board of directors were informed of the planned  
20    lawsuit and affirmatively agreed with and authorized that planned course of action. Storix’s President  
21    had the authority to cause Storix to go forward with the litigation against Johnson for breaching the  
22    duties he owed the company. The lawsuit was duly authorized. Moreover, that action was  
23    subsequently ratified by board action, and so stands as a valid and authorized corporate act.

24            Having paused his plan once it was exposed, Johnson now argues that, despite admitting to  
25    such conduct, he should suffer no consequences because he never made a competing sale; therefore,  
26    he contends, Storix was not harmed. Fatally, Johnson provides no separately stated undisputed facts

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28    <sup>1</sup> The appointed referee in this case, Hon. Ronald S. Prager, Ret., succinctly captured the history of events in the first line  
of his recent order: “Anthony Johnson (Johnson) founds Storix, gives up control, returns, leaves and tries to destroy  
Storix.” (See Exhibit AA, p. 1:24-25).

1 on that issue. Moreover, Johnson disregards overwhelming precedent that allows a plaintiff to pursue  
2 a defendant that is guilty of breaching a fiduciary duty for, among other things, injunctive relief and  
3 disgorgement of any advantages wrongfully obtained. This includes unfair head starts like Johnson  
4 obtained by basing his “new” software upon Storix’s code. Moreover, Storix incurred expenses  
5 responding to Johnson’s acts, including investigative costs, and evidence suggests it may have even  
6 lost sales as a result of Johnson’s disloyal actions. Of course, Storix has also been forced to devote  
7 time, energy and other resources to fighting to maintain customers. At a minimum there are disputed  
8 issues of fact to be resolved at trial. It would be unjust and unfair to Storix and inconsistent with  
9 established authority to allow Johnson to dodge any liability and escape injunctive relief after  
10 admittedly committing the breaching conduct, which he appears intent on continuing to this day.  
11 Storix should be allowed to have a jury resolve the fact issues, and obtain appropriate relief. The fact  
12 that Johnson was caught in the act before he could inflict greater harm does not bar Storix from  
13 obtaining injunctive and other relief. To grant his motion would be to encourage him to try again. The  
14 motion must be denied.

## 15 **II. BACKGROUND FACTS**

### 16 **A. Brief History of Storix and its Management**

17 Storix develops and sells software called “System Backup Administrator,” aka “SBAdmin.”  
18 SBAdmin streamlines the backup and recovery of computer systems, allowing for “bare metal  
19 backup,” i.e., recovery of a backed-up system on new out-of-the-box computers in the event of a  
20 system failure or loss of data. SBAdmin is used by some of the country’s best known businesses.  
21 Johnson founded Storix in 1998 as a sole proprietorship and incorporated the Company in 2003.  
22 Originally its only shareholder, officer and director, for health reasons in September 2011 Johnson  
23 resigned as an officer and director, and transferred management and operational responsibilities to  
24 then-employees, David Huffman, Richard Turner, Manuel Altamirano and David Kinney. *See*  
25 *Separate Statement of Additional Facts in Support of Storix’s Opposition (“SSAF”)*, No. 12. To  
26 entice them each to continue running Storix, so as to provide Johnson with a continued income  
27 source, Johnson caused Storix to grant new shares to Huffman, Turner, Altamirano and Kinney,  
28

1 amounting to a combined 60% stake in Storix, while Johnson maintained the other 40%.<sup>2</sup> *Id.*  
2 Huffman, Turner, Altamirano and Kinney were also then elected directors, and Huffman became  
3 President/CEO. *Id.* Storix hired David Smiljkovich as its CFO in 2013. *See* Declaration of David  
4 Smiljkovich, ¶ 2. (Collectively, Huffman, Turner, Altamirano, Kinney and Smiljkovich are referred  
5 to herein as “Individual Defendants.”)

6 **B. Johnson’s Failed Copyright Infringement Lawsuit Against Storix**

7 After Johnson regained his health, he returned to Storix in 2013 to work on a possible future  
8 release of SBAdmin. However, by May 2014 he felt his work was not being recognized or  
9 appreciated, and otherwise had trouble adjusting to the new management structure since he was not in  
10 a leadership position, so he quit. *See* Response to Johnson’s Statement of Undisputed Facts (“JSUF”)  
11 No. 5; SSAF No. 13. Soon after quitting, in the summer of 2014, Johnson demanded that Storix cease  
12 and desist all sales of its flagship product, SBAdmin, which is the principal source of its revenues.  
13 SSAF No. 13. He also demanded that changes be made to Storix’s management structure and  
14 personnel. *Id.* Johnson premised his demand on a copyright he claimed to own for SBAdmin, and  
15 soon after making his demand that Storix stop all sales, he sued it for copyright infringement in the  
16 United States District Court for the Southern District of California (*Johnson v. Storix*, Case No. Case  
17 No. 14CV1873H BLM; the “Copyright Action”). Storix had no choice but to vigorously defend the  
18 Copyright Action. SSAF No. 14.

19 After more than a year of contentious litigation, culminating in a week-long trial held in  
20 December 2015, before United States District Judge Marilyn L. Huff, Storix obtained a unanimous  
21 jury verdict against Johnson on his infringement claim and in favor of Storix on its counterclaim,  
22 resulting in a declaration that Storix owned all copyrights to all versions of SBAdmin. SSAF No. 15.  
23 It was a total victory for Storix. After trial, Judge Huff amended the judgment against Johnson to  
24 include a discretionary award of attorneys’ fees and costs under the Copyright Act, finding, among  
25 other things, that Johnson had repeatedly engaged in inappropriate behavior designed to harm Storix,  
26 including the following inappropriate acts enumerated by Judge Huff:

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27 <sup>2</sup> Johnson has several times inaccurately referred to the share issuance as a “gift” to Individual Defendants. In reality, the  
28 individuals received their shares pursuant to written *Compensatory* Stock Agreements requiring them to work for two  
years for the shares to fully vest. Each individual receiving shares met the requirements for the shares to vest and paid  
income tax on the shares based on estimated values.

- 1 • “It was inappropriate for Plaintiff Johnson to tell Defendant Storix’s  
2 shareholders to ‘get the [expletive] out’ and to attempt to coerce them into  
3 surrendering control of the company. (Doc. No. 66-1, Huffman Decl. Ex. A,  
4 at 5-9.)” (Ex. 1, p. 11.)
- 5 • “It was inappropriate for Plaintiff Johnson to demand that Defendant Storix’s  
6 customers stop paying for the use of its software in an attempt to prevent  
7 Defendant Storix from having enough money to continue defending the  
8 lawsuit. (Doc. No. 66-1, Huffman Decl. Ex. B, at 10-11, Huffman Decl. Ex.  
9 D, at 16.)” (Ex. 1, p. 11.)
- 10 • “It was also inappropriate for Plaintiff Johnson to threaten Defendant  
11 Storix’s directors with the loss of their homes while he was telling the  
12 customers to stop paying Storix to undermine the company. (Doc. No. 66-1,  
13 Huffman Decl. Ex. A, at 5-9, Huffman Decl. Ex. 14 D, at 16.) (Ex. 1, p. 11.)

14 The court concluded: “This inappropriate conduct should be deterred.” SSAF No. 16; Order,  
15 Ex. E, at p. 11). Based on its findings, the court awarded Storix attorneys’ fees and costs of  
16 \$555,118.64. *Id.*; Ex. F.

17 **C. Johnson’s Formation of Janstor as a Competing Business and Affirmative Steps**  
18 **to Compete with Storix**

19 During discovery in the Copyright Action, Storix learned that within *days* after his election to  
20 its board of directors, Johnson began preparing to launch a competing company—Janstor—to sell an  
21 unauthorized “re-branded” version of SBAdmin which Johnson apparently took and modified after  
22 resigning his employment. SSAF No. 17-18. In pursuit of his competitive endeavor, Johnson  
23 registered two “network port<sup>3</sup>” numbers with the Internet Assigned Numbers Authority (IANA),  
24 under Janstor’s name, showing that Janstor’s product would function like and would compete with  
25 Storix’s SBAdmin. SSAF No. 19. He also purchased the domain name for “www.janstor.com.” *Id.*

26 **Storix is not just speculating that Johnson intended to compete against it.** Johnson detailed his  
27 competitive plans in an email to his friend, explaining that he planned to force Storix out of business  
28 through litigation and/or direct competition, had acquired domain names, “filed for new corporation,  
and re-branded the software under the new name.” SSAF No. 20.

Upon learning of Johnson’s plans to commence a competing venture, Storix filed the instant  
suit against him for breaching his fiduciary duties to Storix. Yet, even after being served with the  
complaint, Johnson continued his anti-competitive assault against Storix by trying to interfere directly

<sup>3</sup> Network port numbers are necessary for products like SBAdmin to function.

1 with its customer relationships and revenue streams. In October 2015, Johnson used his access to a  
2 confidential Storix customer list to send an email blast to Storix customers, trying to harm Storix's  
3 customer relationships and demanding that they "cease any further payment to Storix in relation to  
4 this software and refrain from downloading any further copies." SSAF No.21. Johnson preceded this  
5 blast email with a bullying email attack on the Individual Defendants, and other non-shareholder  
6 employees of Storix. In that email, entitled "Buckle up boys!", Johnson demanded that the Individual  
7 Defendants walk away from the Company with nothing. It also threatened that they would lose their  
8 homes and jobs if they refused. SSAF No. 22.

9 Even after Storix's victory in the Copyright Action, Johnson continued his efforts to  
10 undermine Storix's interests. Johnson more recently emailed a non-shareholder employee of Storix to  
11 threaten that if the employee did not serve as Johnson's mole, Johnson would not protect the  
12 employee's job once Johnson regained company control. SSAF No. 23. In doing so, he also boasted  
13 that he possessed a "marketable" competing product that he intended to deploy. Johnson directed the  
14 employee to "delete" the email to erase any trace of their communication. *Id.*

#### 15 **D. Storix's Customers Respond to Johnson's Anti-Storix Email Blast**

16 Johnson's October 2015 email blast did not go unnoticed. Storix received several calls of  
17 concern from customers, as well as emails seeking clarification as to the basis of such claims by  
18 Johnson. SSAF No. 23. Recently, Johnson produced an email that he received from a Storix  
19 customer, which states, in part: "In the future, I would still like to use your product and will wait  
20 patiently." SSAF No. 25. Thus, as to at least one recipient, Johnson's email had its intended effect.  
21 Storix is unable to determine whether further relevant responses exist in Johnson's possession, and  
22 discovery is continuing. Even as recently as May 2017, Storix is receiving inquiries from customers  
23 regarding Johnson's efforts to disrupt its customer relationships. SSAF No. 26.

### 24 **III. SUMMARY JUDGMENT STANDARD**

25 A party moving for summary judgment bears the burden of proving that the claims of the  
26 adverse party are entirely without merit on any legal theory. *Mann v. Cracchiolo*, 38 Cal.3d 18, 35-36  
27 (1985). The party opposing the motion must then demonstrate only the existence of at least one  
28 triable issue of fact. *AARTS Productions, Inc. v. Crocker National Bank*, 179 Cal.App.3d 1061, 1065

(1986). All doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. *Molko v. Holy Spirit Assn.*, 46 Cal.3d 1092, 1107 (1988). Summary judgment is improper when the defendant has failed to address a theory of liability or cause of action alleged by the plaintiff, even if it is not separately pleaded in the complaint. *Scripps Clinic v. Superior Court*, 108 Cal.App.4th 917, 929 (2003); see *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal.App.4th 1509, 1534 (1998). “If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. The moving defendant whose declarations omit facts as to any such theory...permits that portion of the complaint to be unchallenged. [Citation.] Thus, even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact.” *Wright v. Stang Manufacturing Co.*, 54 Cal.App.4th 1218, 1228 (1997)(Internal citations and quotes omitted).

#### IV. ANALYSIS AND ARGUMENT

Johnson largely concedes the allegations of his wrongful conduct in his motion. Unable to deny his actions, he seeks to avoid liability for such acts by arguing (1) Storix was not authorized to pursue a lawsuit against him, and/or (2) Storix has not suffered resulting harm. Neither argument justifies granting summary judgment for Johnson, given the clear basis for Storix’s claims and authority to pursue them.

##### A. Storix’s Lawsuit Against Johnson is a Proper Direct Lawsuit, and Storix Had Authority to Pursue its Claims Against Him

Johnson’s first attack is that Storix is either not authorized to pursue this case because it did not conduct a pre-lawsuit board vote to authorize the filing and/or that it lacks standing as a result. Johnson disregards the relevant authorities and sequence of events.

The President is the general manager of a corporation unless otherwise provided in the articles or bylaws. Cal. Corp. Code §312(a). A corporation is generally bound by the acts of its officers, as the agents of the corporation, within the scope of their authority, actual or apparent, either conferred by the board or within the agency power of the officer. Cal. Corp. Code §208(b). In this case, Article IV, Section 5(d) of Storix’s bylaws provides that, subject to control of the board, the President has general supervision, direction and control of the business of the corporation.

Whether actual authority has been conferred is a question of fact; however, the fact that the

1 board knows of the officer's acts and does not object is evidence of actual authority. *See Englert v.*  
2 *IVAC Corp.*, 92 Cal.App.3d 178, 190 (1979). *See also* Civ. Code §2316 [Actual authority defined:  
3 "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by  
4 want of ordinary care, allows the agent to believe himself to possess."].

5 Here, Storix's President, its officers, and a majority of its directors authorized the filing of the  
6 lawsuit. SSAF No. 27. Thus, if viewed as a questions of the President's authority, the majority of the  
7 Board made aware of the President's actions and intent to pursue this action in the name of the  
8 corporation, and did not object. Further, the majority of the Board affirmed their approval of such  
9 planned conduct. Three of Storix's five board members were advised of Storix's plan to file suit  
10 against Johnson for breach of fiduciary duty as a result of his disloyal conduct. Those three of five  
11 directors—a majority—indicated their approval of that plan. SSAF No. 27.<sup>4</sup> Subsequently, a formal  
12 board vote was conducted to ratify that approval as a board decision. SSAF No. 28.

13 **B. Storix's Damages Include Johnson's Unjust Enrichment and the Unfair Head**  
14 **Start He Obtained by Admittedly Taking Storix's Property**

15 Johnson next argues that since he was caught red-handed before his competing company  
16 achieved success, Storix suffered no damages. Therefore, he contends, he should escape liability by  
17 way of summary judgment. Fatally, his Separate Statement contains no facts supporting his argument.  
18 Moreover, the law and facts are to the contrary and warrant denying his motion.

19 Admittedly, Johnson departed Storix in May 2014 with a copy of its SBAdmin source code,  
20 and for the next 8 months-2+ years—including while he was a director—he was "working feverishly"  
21 on revisions that he planned to deploy as a direct competing product. SSAF No. 18. While he claims  
22 to have never ultimately released his "re-branded" software into the market (at least not yet), the fact  
23 is that he has based his unauthorized derivative product on Storix's own software, thus obtaining a  
24 huge competitive advantage to which he was not entitled given his fiduciary relationship with Storix.

25 California courts have recognized that damages for breaching a fiduciary duty can be  
26 measured by the unfair advantage or head start that the defendant obtains due to wrongful actions,  
27 rather than just the loss (if any) that the plaintiff suffers. "Active participants in the breach of

28 <sup>4</sup> Moreover, the only other directors were Johnson—the defendant—and Robin Sassi, who the referee appointed in this matter, Hon. Ronald S. Prager, Ret., has ruled that the facts make it "abundantly clear that Sassi is colluding with Johnson against Storix." *See* SSAF No. 34, Ex. AA, at p. 4:24-26.

1 fiduciary duty by another are accountable for all advantages they gained thereby and are liable to the  
2 beneficiary of the duty without reference to the amount of the fruits of the fraudulent transaction he  
3 personally obtains.” *Cty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 543 (2007), *as modified*  
4 *on denial of reh’g* (Jan. 25, 2008), *as modified* (Jan. 28, 2008). Similarly, “[d]isgorgement of profits is  
5 particularly applicable in cases dealing with breach of a fiduciary duty,” and appropriate “regardless  
6 of whether the principal suffers any damage.” *Id.*

7       Importantly, California appellate courts have recognized that damages in a breach of fiduciary  
8 duty action may involve assessing the value of the unfair head start obtained by the breaching  
9 fiduciary who absconds with company property in order to compete with the company. In *Meister v.*  
10 *Mensing*, 230 Cal.App.4th 381, 386 (2014), the Meisters, shareholders in a company called  
11 Sesame, sued the defendants alleging they colluded to secure a preferential sale of Sesame’s assets  
12 and business to rival ExtraView, thus violating fiduciary duties owed to the Meisters. Following a  
13 bench trial, judgment was entered in favor of the defendant on the breach of fiduciary duty claim,  
14 since although defendants breached their fiduciary duties to the Meisters, the Meisters had failed to  
15 adequately prove damages. *Id.* at 387. The appellate court reversed and remanded, noting the  
16 complexities sometimes involved in establishing damages in such cases, and gave an overview of  
17 some potential measures of relief, including restitution, unjust enrichment, and constructive trust:

18       “Since 2000, the Meisters invested over \$2.1 million in Sesame, and the assets  
19 gained by respondents had been developed, at least in part, through the Meisters’  
20 investments. **By obtaining these assets, ExtraView could essentially hit the**  
21 **ground running with Sesame’s intellectual property, customers, brand,**  
22 **employees, etc.** Respondents’ efforts to keep these assets under their control, rather  
than dissolve Sesame outright, evidence their conviction that it could become a  
profitable enterprise, once it was shed of its liabilities, including the liability (real  
or perceived) of the Meisters’ ownership interest.”

23 *Id.* at 400 (emphasis added). Recognizing the value acquired by “obtaining these assets,” the court of  
24 appeal went on to advise the trial court to take a broader approach and to recognize the complexities  
25 of such an assessment:

26       “Following an in camera review of ExtraView’s QuickBooks financial records, the  
27 trial court determined that the Meisters were not entitled to an award based on  
28 unjust enrichment because such an award could not be calculated in a ‘mechanical  
and undemanding’ fashion. That is not the appropriate standard, however. **The**  
**calculation of unjust enrichment is, like any other calculation, sometimes**

1       **simple and sometimes complex. Merely because the calculation is more**  
2       **complex does not mean that the remedy is unavailable, however.”**

3       *Id.* at 400–01(emphasis added).

4       In *Lund v. Albrecht*, 936 F.2d 459, 464 (9th Cir. 1991), a diversity action involving breach of  
5       fiduciary duty claims between partners adjudged under California law, the Ninth Circuit held that a  
6       partner who breached his fiduciary duty to a former partner, by not informing him of an offer for  
7       partnership property at the time the parties were negotiating termination of partnership, could be held  
8       liable to former partner not only for all losses occasioned by his breach of fiduciary duty, regardless  
9       of whether such losses were anticipated, but also an amount to prevent the defendant’s unjust  
10      enrichment. The court noted that “a breaching co-partner is **required to account for all** profits or  
11      **benefits, even if the other co-partner has not suffered a loss.**” *Id.* (emphasis added).

12      Moreover, to the extent Johnson’s claim that his unauthorized derivative work based on  
13      Storix’s SBAAdmin source code is a valuable improvement, it is valuable corporate opportunity  
14      belonging to Storix, not Johnson. California courts have long recognized that corporate fiduciaries  
15      presented with valuable business opportunity have a responsibility to pursue those interests for the  
16      company, not their individual interests:

17               “[I]f there is presented to a corporate officer or director a business opportunity  
18               which the corporation is financially able to undertake, is, from its nature, in the line  
19               of the corporation’s business and is of practical advantage to it, is one in which the  
20               corporation has an interest or a reasonable expectancy, and, by embracing the  
21               opportunity, the self-interest of the officer or director will be brought into conflict  
22               with that of his corporation, the law will not permit him to seize the opportunity for  
                himself. And, if, in such circumstances, the interests of the corporation are  
                betrayed, the corporation may elect to claim all of the benefits of the transaction for  
                itself, and the law will impress a trust in favor of the corporation upon the property,  
                interests and profits so acquired.”

23      *MacIsaac v. Pozzo*, 81 Cal.App.2d 278, 284–85 (1947), *quoting Guth v. Loft, Inc.*, 5 A.2d 503, 511  
24      (Del. 1939). In such a case, a proper judgment awards the amount by which the breaching part  
25      profited through its breach of duty, “whether it be regarded as damages presumed to have been  
26      suffered through deprivation of a business opportunity or as profits unjustly received by [the  
27      breaching party] is immaterial.” *Id.* at 285 (brackets added).

28      In this case, there is no dispute that Storix over the years has spent significant amounts to

1 develop and protect its rights in SBAdmin. It has paid employees to program and develop the  
2 software code, it has spent significant amounts on marketing and business development, and spent  
3 over a million dollars winning a copyright lawsuit against Johnson which he filed, all to defend and  
4 protect its rights in SBAdmin. SSAF No. 35. Storix highly covets its main revenue-generating  
5 product, SBAdmin. Johnson admits that he quit his job at Storix, and thereafter worked “feverishly”  
6 on creating a competing software product. *See, e.g.,* SSAF No. 18, Response to Request for  
7 Admission No. 42 [“Admit that I created a derivative version of SBAdmin while working at Storix.  
8 Admit that I rebranded a much improved derivative work under a new brand name after leaving  
9 Storix.”]. By taking Storix’s source code and modifying it, Johnson certainly was unjustly enriched  
10 even if he never sold a single copy of his “re-branded” product, as a result of the unfair head start he  
11 obtained. Moreover, to the extent his unauthorized derivative work constitutes an actual improvement  
12 over Storix’s software product, it is a valuable corporate opportunity belonging to the company, not  
13 Johnson.

14 At a minimum it is woefully premature, and contrary to precedent, to award Johnson summary  
15 judgment on the theory that he simply failed to fully succeed in his plan to wrongfully compete with  
16 Storix. Johnson’s unjust enrichment and usurpation of company opportunities alone are sufficient  
17 grounds to warrant denial of his motion in its entirety.

18 **C. Storix Has Incurred Investigative Costs Which is a Distinct Measure of Damages**  
19 **for Johnson’s Breach of Fiduciary Duty**

20 Apart from the determination that Johnson was unjustly enriched by acquiring an unfair  
21 advantage or that Storix possibly lost revenues, Storix will prove other damages measures at trial,  
22 including its incursion of expenses associated with investigating Johnson’s breaches. One concrete,  
23 obvious and indisputable category of damages suffered by Storix—yet not addressed in Johnson’s  
24 moving papers—is the expense Storix was forced to incur in order to respond to Johnson’s e-blast  
and other efforts to preserve and protect its customer relationships and reputation.

25 California courts have recognized that a plaintiff incurs damages for purposes of pursuing a  
26 breach of fiduciary duty claim when it expends resources pursuing redress and investigation of the  
27 breaching activity. *See, e.g., Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96  
28 Cal.App.4th 1017, 1044–45 (2002)[“American was required to establish as an element of its case that

1 it suffered damages as a result of defendants' breach of fiduciary duty. It did so when it established it  
2 spent \$8,174 in attorney fees to prevent Long from serving as ADO's federal rule 30(b)(6)  
3 spokesperson," which was the basis of the breach claim.].

4 It is beyond dispute that Storix has incurred fees and costs in trying to prevent and remedy  
5 Johnson's breach of the fiduciary duty owed to Storix. In fact, the only reason he did not succeed in  
6 commencing his competitive venture was that Storix learned of such activities and confronted  
7 Johnson through pursuing this litigation. Storix employed counsel to address Johnson's wrongful  
8 actions, including by sending demand letters to Johnson to return is wrongfully obtained and  
9 maintained source code, as well as instituting the instant action once Johnson refused to comply with  
10 demands. *See, e.g., SSAF No. 29.* Once Johnson realized he had been "caught" he apparently sought  
11 to minimize the lengths to which he had gone to compete with Storix, arguing that Janstor  
12 Technology, the company he specifically formed to compete with Storix, was merely a non-operating  
13 corporate "shell" that he had since dissolved. Johnson's attempted cover-up, however, cannot absolve  
14 him of liability for his tortious activities, as Storix had already incurred harm as a result.

15 **D. Johnson's Actions Have Potentially Reduced the Value of Storix's Intellectual**  
16 **Property Rights, Thus Further Constituting Redressible Harm the Company**  
**Suffered**

17 Not only did Johnson seek to prevent Storix from selling the SBAdmin software by way of  
18 legal action and asserting rights to its copyright, but he has continuously and publicly disparaged  
19 Storix's software product in public for a—*while a company director*—in such a manner as to threaten  
20 the value of the company's software products and related rights.

21 Courts have recognized that damaging or encumbering intellectual property rights constitutes  
22 recoverable damages. In *ViChip Corp. v. Lee*, 438 F.Supp.2d 1087 (N.D.Cal. 2006), the federal court  
23 granted the plaintiff's motion for summary judgment, including on claims for breach of fiduciary duty  
24 under California law, in a case involving a former CEO, Lee, that stole proprietary information from  
25 ViChip in order to compete with it. After signing a patent assignment for a pending ViChip patent  
26 application, on which Lee was a named inventor, he later sought to split the application into two  
27 parts, since he wanted to own one patent solely in his name. *Id.* at 1091. Lee also admittedly took  
28 ViChip files and deleted electronic files. *Id.* Upon discovery of his plan, Lee was terminated as a

1 ViChip employee and officer. *Id.* Lee then filed two patent applications, naming himself as the sole  
2 inventor, both of which claimed priority over ViChip’s pending application. *Id.* at 1092. ViChip  
3 sought summary judgment on its claims, including breach of fiduciary duty, and as to that claim, the  
4 court rejected Lee’s preposterous defense that his actions were justified in light of the business  
5 judgment rule (*id.*, at 1099-1100), and further noted that “...with these facts ViChip has demonstrated  
6 damages, since its rights to its intellectual property are now encumbered, due to the competing patent  
7 filings submitted by Lee.” *Id.* at 1101.

8         Johnson has repeatedly sought to similarly encumber or impair Storix’s intellectual property  
9 rights in SBAdmin. In October 2015, subsequent to becoming a board member, Johnson filed two  
10 new applications to register copyrights in his own name for prior versions of SBAdmin, including  
11 versions 3.2 and 4.1. SSAF No. 31. These new registrations competed with Storix’s claimed  
12 ownership in all versions of SBAdmin, which claim was confirmed by a unanimous jury verdict in  
13 the Copyright Action. While Storix ultimately proved it owned all copyrights to all versions of  
14 SBAdmin, Johnson’s actions sought to encumber those rights. Thus, like in *ViChip Corp. v. Lee*,  
15 Storix will be able to establish damages by proving that Johnson’s actions encumbered its copyrights  
16 through competing applications and other disloyal conduct set forth herein.

17         Moreover, Johnson’s continuous disparagement of Storix’s SBAdmin product can constitute  
18 measurable damages. A director should seek to maintain the value of a company’s vested intellectual  
19 property rights, much the way a trustee must maintain the value of a trust corpus. A reduction in the  
20 value of a trust’s corpus due to a breach of fiduciary duties can constitute recoverable damages. *See*,  
21 e.g., *O’Neal v. Stanislaus Cty. Employees’ Ret. Ass’n*, 8 Cal.App.5th 1184, 1220 (2017), *review filed*  
22 (Apr. 3, 2017)[“If the trust fund corpus is reduced due to a breach of those duties, as opposed to a  
23 lawful reason, damages can be demonstrated through a reduction of funds that would otherwise be  
24 present absent a breach. There is thus evidence in the record to support a damages claim resulting  
25 from an alleged breach of the duty of loyalty.”]

26         While serving as a director, Johnson publicly broadcasted false statements about Storix, Inc.’s  
27 products and disparaging Storix, Inc.’s management, including by sending an email blast to Storix,  
28 Inc.’s customers advising that their versions of SBAdmin were “infringing.” He further has

1 published, and continues to publish, derogatory comments on publicly accessible websites, including  
2 false claims that Storix “failed to improve the software for over 3 years now.” *See, e.g.,* SSAF No. 32.  
3 Johnson’s effort to disparage and diminish the value of SBAdmin, in violation of his fiduciary duties,  
4 is yet another measure of recoverable harm warranting denial of his motion.

5 **E. Challenges to the Ability to Prove Damages are Premature and Present a**  
6 **Disputed Fact Question That Cannot Be Resolved by Summary Judgment**

7 As discussed above, Storix has suffered and will prove recoverable damages. At the very  
8 least, the issue of its damages is not a proper subject for summary judgment. “The issue of damages is  
9 ordinarily a triable issue of fact.” *R.J. Land & Assocs. Const. Co. v. Kiewit-Shea*, 69 Cal.App.4th 416,  
10 429 (1999). As a threshold matter, the summary judgment statute prohibits “[the] summary  
11 adjudication of a single item of compensatory damage which does not dispose of an entire cause of  
12 action.” *DeCastro West Chodorow & Burns, Inc. v. Superior Court*, 47 Cal.App.4th 410, 422 (1996),  
13 discussing C.C.P. § 437c(f)(1)[“A motion for summary adjudication shall be granted only if it  
14 completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of  
15 duty.”]. Disputed issues regarding the calculation of damages are not appropriate for determination by  
16 summary judgment. *Dep’t of Indus. Relations v. UI Video Stores, Inc.*, 55 Cal.App.4th 1084, 1097  
(1997).

17 In cases like this, which involve unique property, i.e., Storix’s rights in its proprietary source  
18 code, inherent value associated therewith, and related business opportunities, there are a variety  
19 measures that can be used for damages calculations, and courts are cognizant of the complex nature  
20 of proving same. “For the breach of an obligation not arising from contract, the measure of damages,  
21 except where otherwise expressly provided by this Code, is the amount which will compensate for all  
22 the detriment proximately caused thereby, whether it could have been anticipated or not.” Civil Code  
23 § 3333. “Where certain property has a peculiar value to a person recovering damages for deprivation  
24 thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof  
25 before incurring a liability to damages in respect thereof, or against a willful wrongdoer.” Civil Code  
26 § 3355. In any event, a plaintiff who proves a “breach of duty” but fails to show any “appreciable  
27 detriment”—i.e., damages—nevertheless “may recover” nominal damages and, when appropriate,  
28 costs of suit. Civil Code § 3360; *see Sweet v. Johnson*, 169 Cal.App.2d 630, 632-633 (1959).

1 Summary adjudication is improper on Storix’s claims because there is, at a minimum, a triable  
2 issue regarding whether Johnson’s conduct caused *any* item of alleged damages. There are numerous  
3 grounds justifying Storix’s damages claims and entitlement to injunctive relief under its breach of  
4 fiduciary duty cause. Accordingly, Johnson’s motion must be denied.

5 **F. Disputed Issues of Material Fact Regarding the Relief Sought and Harm Suffered**  
6 **by Storix Mandates Denial of Johnson’s Motion**

7 Johnson essentially argues that because he was caught so early in the act of launching his  
8 competing business, Storix was not harmed and cannot seek relief in this action. Johnson is wrong.  
9 His argument regarding damages runs contrary to a basic policy underlying California tort-law that  
10 wrongdoers should not benefit because calculating damages is made difficult by a defendant’s  
11 wrongdoing. California courts have long recognized that one whose wrongful conduct has rendered  
12 difficult ascertainment of damages cannot escape liability because damages cannot be measured with  
13 exactness. *See, e.g., Harris v. National Union of Marine Cooks and Stewards*, 98 Cal.App.2d 733  
(1950); *Johnson v. Snyder*, 99 Cal.App.2d 86 (1950).

14 Further, Johnson takes too narrow of a view the relief Storix might obtain, and the facts  
15 supporting claims of harm or damage that will be proven at trial. Johnson essentially *admits* the  
16 material elements of Storix’s claim for breach of fiduciary duty in his moving papers. He  
17 acknowledges he took a copy of Storix’s source code upon resigning and refused to return such to  
18 Storix after receiving such a demand, instead making the bizarre claim he is “entitled” to maintain  
19 possession of such either as a company director or as an “inventor.” SSAF No. 29. He concedes he  
20 formed Janstor Technology with the idea that it would be used as a vehicle to sell a “re-branded”  
21 version of Storix’s SBAdmin software. SSAF No. 18. He admits telling a close confidant, Jeffrey  
22 Harding, of his plan to form a business to compete with Storix, and had the express intent to harm  
23 Storix. SSAF No. 20. Finally, Johnson admits he sent threatening emails to Storix’s customers,  
24 managers, and employees, whereby he directed its customers to cease payments to Storix, and told its  
25 employees to leak him information or risk losing their jobs. SSAF No. 21-23. He admittedly did those  
26 things while he was a Storix director.

27 Despite all of the clearly disloyal actions Johnson committed while a director, he argues that  
28 he should be given a free pass because he never got his new company off the ground and so he does

1 not believe Storix suffered harm. Yet, there are several measures of harm Storix can and will prove at  
2 trial, which when combined with its plea for injunctive relief, demonstrate that meritless nature of his  
3 motion.

4  
5 ***1. Storix Seeks Injunctive Relief in Addition to Damages.***

6 As a threshold matter, Storix’s breach of fiduciary duty claim is not limited to seeking only  
7 monetary relief, but importantly seeks to prevent Johnson (or Janstor or any other entity or affiliate of  
8 Johnson’s), from engaging in further plans to compete with or harm Storix.

9 In fact, acts like those committed by Johnson warrant awarding injunctive and other equitable  
10 relief, including the imposition of a constructive trust over the improperly obtained software code and  
11 unauthorized derivatives created by Johnson which he refuses to return to Storix.<sup>5</sup> “A constructive  
12 trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer  
13 of property from the person wrongfully holding it to the rightful owner.” *Communist Party v. 522*  
14 *Valencia, Inc.*, 35 Cal.App.4th 980, 990 (1995). “One who gains a thing by fraud ... the violation of a  
15 trust, or other wrongful act, is ... an involuntary trustee of the thing gained, for the benefit of the  
16 person who would otherwise have had it.” Civ.Code, § 2224. “[A] constructive trust may be imposed  
17 in practically any case where there is a wrongful acquisition or detention of property to which another  
18 is entitled.” *Weiss v. Marcus*, 51 Cal.App.3d 590, 600 (1975).

19 The District Court has already established that Storix owns all copyrights to all versions of  
20 SBAdmin. Johnson admits to possessing an unauthorized derivative work based on Storix’s  
21 SBAdmin source code. SSAF No. 18. Johnson admits that he has “re-branded” the unauthorized  
22 derivative work, and has taken several other steps to market the competing product under the name  
23

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24 <sup>5</sup> Similar results occur in unfair competition and trademark cases even where no infringing sales occur, and thus no lost  
25 sales by plaintiffs result, where, like here, competition was imminent when halted. *See, e.g., De Simone v. VSL Pharm.,*  
26 *Inc.*, 133 F.Supp.3d 776, 797–98 (D. Md. 2015) [“Because the Lanham Act does not require actual sales of an allegedly  
27 infringing product, only the ‘advertising of any goods’ that allegedly infringe, the ‘use in commerce’ element appears to  
28 be satisfied]. *See Bertolli USA, Inc. v. Filippo Bertolli Fine Foods, Ltd.*, 662 F.Supp. 203, 205 (S.D.N.Y. 1987) [finding  
that although the alleged infringer’s product had ‘not been advertised or sold to the general public,’ because two samples  
of the product had been sent to distributors and ‘labels and cartons’ for the product had been printed, the product had been  
‘use[d] in commerce’ within the meaning of the Lanham Act]; *Commonwealth of Pennsylvania v. State of West Virginia*,  
262 U.S. 553, 593 (1923) [“One does not have to await the consummation of threatened injury to obtain preventive relief.  
If the injury is certainly impending, that is enough.”].

1 “Janstor.” *Id.* Despite repeated demands to return the source code and unauthorized derivatives to  
2 Storix, Johnson refuses to do so. Such actions are in contravention of Johnson’s fiduciary duties owed  
3 to Storix as a member of its board of directors. Accordingly, regardless of the extent of its damages,  
4 Storix continues to suffer harm as a result of Johnson’s refusal to comply with its demands and is  
5 entitled to injunctive relief and imposition of a constructive trust. This is an independent basis on  
6 which to deny Johnson’s motion. Even apart from the injunctive relief to which it is entitled, Storix  
7 will prove that it may recover monetary relief.

8 ***2. There Are Disputed Facts Regarding Storix’s Losses Due to Johnson’s Tortious***  
9 ***Behavior***

10 Johnson argues, without authority, that the email he sent to Storix’s customers ordering that  
11 they cease all further payments to Storix, or orders of SBAAdmin from Storix, among his other  
12 wrongful conduct, resulted in no harm to Storix. *See* Motion, p. 6. Incredibly, he argues “there is not  
13 even evidence as to a list of people who actually received this email,” or that “it had any effect on any  
14 of them.” *Id.* The irony in his statement is that, until recently revealed in discovery, he was the only  
15 one who knew the list of recipients he had “blasted.” Since filing that brief, Johnson has finally  
16 produced documents to Storix identifying the customers to whom he sent his unauthorized and  
17 improper “warning” email.

18 While Storix is still engaged in discovery on the matter, the results indicate that Johnson was  
19 less than truthful in making his argument that he was unaware of any effect his email had. For  
20 instance, one representative of a customer or potential customer wrote in response to Johnson: “Good  
21 luck and I am sorry to hear what they put you through. I hope you bounce back just like Steve Jobs  
22 did after they fired him. **In the future, I would still like to use your product and will wait**  
23 **patiently.**” (SSAF No. 25 (emphasis added)). That single response alone is sufficient to demonstrate  
24 that there is at least a material fact issue in dispute regarding the impact Johnson’s disloyal conduct  
25 had on Storix’s potential and/or actual customers, and consequential damages due to lost revenues. In  
26 any event, further fact discovery is warranted to determine the full extent of harm Johnson caused.

27 Moreover, Storix expects to support its damages claim with expert testimony. SSAF No. 30.  
28 Storix’s financial expert, Brian Bergmark, is anticipated to provide opinions and analysis regarding:

1 “Storix’s claimed harm as result of Plaintiff/Cross-Defendant Anthony Johnson’s (‘Johnson’) breach  
2 of fiduciary duties, which may include but not be limited to claimed lost earnings, lost future  
3 earnings, loss of opportunities, reputational harm, claimed expenses, claimed interest, Johnson’s  
4 acquired unfair advantage, and any and all other economic losses that Storix may have suffered.” *Id.*

5 At a minimum, there are fact issues in dispute regarding the amount of harm Storix has  
6 suffered by Johnson’s breaching and disloyal conduct, as evidenced by documents in his own  
7 possession which he just produced. Additional discovery is likely to reveal further details on the  
8 extent of harm Johnson caused Storix. On this basis alone, Johnson’s motion must be denied.

9 **G. Storix’s Aiding and Abetting Claim is Well-Founded**

10 Without authority, Johnson argues that “the aiding and abetting claim falls too.” *See* Motion at  
11 p. 9. For the reasons stated above, Storix’s breach of fiduciary duty claim is well-founded. Thus, there  
12 is a predicate claim to support the aiding and abetting charge. Moreover, Storix obtained a default  
13 against Janstor. *See* Case No. 37-2015-00028262-CU-BT-CTL, ROA #144, entered October 13, 2016  
14 [“The default filed by Storix Inc was entered as to Janstor Technology on Amended Complaint.”].  
15 Neither Johnson nor his counsel purport to represent Janstor, nor did they file the motion on its  
16 behalf. Accordingly, not only is the claim supported, they lack standing to even challenge it. Janstor  
17 stands subject to an entered default, rendering the aiding and abetting claim undisputed.

18 **H. Nothing in the Federal Court’s Orders Entered in the Copyright Action Supports Johnson’s Motion**

19 Johnson wrongly argues that somehow one or more orders issued by the federal court in the  
20 Copyright Action prevent Storix’s claimed remedies in this action. That is nonsense.

21 Storix did file a motion for preliminary injunction in October 2015 in the Copyright Action  
22 based on Johnson’s blast email to Storix’s customers. Storix sought to enjoin Johnson from wrongly  
23 further interfering with Storix’s business. While the federal court denied the motion, it did so noting  
24 that as of October 2015, “to the best of [Storix’s] knowledge” at the time, no customer “made any  
25 decisions adverse to” Storix as a result of receiving Johnson’s email. *See* Order at p. 2. At that time,  
26 the Copyright Action trial had not occurred and so Storix’s copyright ownership had not been  
27 unanimously confirmed. *Id.* Citing “significant” First Amendment concerns regarding prior restraints  
28 on free speech, and the contested nature of the case, the court denied the motion. *Id.* at pp. 2-3.

1 However, in doing so, Judge Huff cautioned that: “If [Storix] believes that [Johnson] has committed a  
2 tort against [Storix], [Storix] may bring an action for damages in state court.” *Id.*, p. 3 n.2 (emphasis  
3 added). Thus, the order did *not* find that Johnson’s disloyal actions resulted in no harm befalling  
4 Storix, and did not in any way prevent its ability to seek redress. To the contrary, it warned him that  
5 such an outcome was likely.

6 Nor does the November 2016 order cited by Johnson, relating to Storix’s motion for further  
7 relief, indicate that Storix is somehow barred from seeking damages for his actions. That motion  
8 sought, amongst other things, an injunction restraining Johnson from competing with Storix in light  
9 of the jury’s verdict that Storix owned all SBAdmin copyrights. The court denied the motion after  
10 weighing the injunction factors. While the public interest in respecting Storix’s copyright ownership  
11 favored an injunction, the Court ruled that while “Johnson’s email is troubling, and it directly  
12 contradicts the declaratory judgment,” he had written it before certain rulings and Storix had not yet  
13 submitted further post-trial evidence of irreparable harm. *See* Order at pp. 6-8. And, noting it had  
14 awarded Storix over \$500,000 against Johnson for attorney fees already, “[s]hould Johnson continue  
15 to contravene the declaratory judgment, the Court may entertain an application for further attorneys’  
16 fees or other relief.” *Id.* at p. 7. Notably, the court did not rule on any damages claimed by Storix, and  
17 denied the motion “without prejudice” to Storix’s ability to seek redress in the future. *Id.* at p. 8.

18 Neither federal court order Johnson cites restricts Storix’s claims for breach of fiduciary duty  
19 in this action. If anything, Judge Huff warned Johnson he was likely to face state court claims. Nor  
20 did either order prevent Storix from being awarded injunctive or monetary relief, or purport to resolve  
21 any issues before this Court. Those orders were issued in the context of narrow motions at discrete  
22 points in time, and on more limited records than are now available. Storix has adequately shown a  
23 factual basis warranting denial of Johnson’s motion.

24 **I. At a Minimum, Summary Judgment Hearing Must be Continued to Permit**  
25 **Adequate Discovery on Damages Issues**

26 To the extent the Court has any inclination to consider granting Johnson’s motion, it should  
27 continue the hearing to allow for adequate discovery to be completed on relevant issues.  
28 “Subdivision (h) was added to section 437c to mitigate summary judgment’s harshness, ... [Citations]  
for an opposing party who has not had an opportunity to marshal the evidence. [Citations]. The

1 statute mandates a continuance of a summary judgment hearing upon a good faith showing by  
2 affidavit that additional time is needed to obtain facts essential to justify opposition to the motion.”  
3 *Cooksey v. Alexakis*, 123 Cal.App.4th 246, 253-254 (2004) (Internal quotes and citations omitted).

4 As set forth in the attached declaration of Paul Tyrell, a good faith showing has been made  
5 that additional time is needed to obtain further facts essential to establishing Storix’s right to  
6 injunctive and monetary relief. Johnson has yet to be deposed in this action, and he only produced  
7 some responsive documents on May 22, 2017. Tyrell Decl, ¶¶ 33-38. It is not yet clear whether  
8 further responsive documents exist, including further communications between Johnson and potential  
9 or actual customers of Storix, which would further indicate the basis for damages claims. Johnson has  
10 objected to many of the discovery requests, and the meet and confer process has not concluded given  
11 the recent nature of the responses.

12 Moreover, the documents Johnson has produced indicate further issues that require  
13 exploration before summary judgment might be considered. This includes documents produced by  
14 Johnson that he engaged a “software designer” to assist with his efforts to “re-brand” Storix’s  
15 SBAdmin software under the Janstor moniker. This is the first time that the existence of such a  
16 software designer has been revealed. Tyrell Decl, ¶ 37. Such individual will likely have discoverable  
17 information regarding terms of engagement by Johnson, statements by Johnson regarding competitive  
18 efforts and plans with respect to Storix, changes made to the software, contacts with other third  
19 parties, among other issues. *Id.* Accordingly, if Johnson’s motion is not denied outright (which it  
20 should be), at a bare minimum the hearing on this motion should be continued until such time as  
21 Storix is able to fairly explore discovery on such matters.

## 22 **V. CONCLUSION**

23 Johnson’s claim that Storix was not authorized or lacks standing to pursue this “direct” claim  
24 against him for breach of fiduciary duty lacks merit. Storix’s President, its officers, and a majority of  
25 Storix’s board of directors was informed of the lawsuit prior to its filing and approved it. As a result,  
26 Storix was authorized to pursue this lawsuit to protect its interests. Moreover, Storix has established  
27 that it is entitled to relief, both injunctive and monetary. With respect to injunctive relief, a  
28 constructive trust should be imposed over the source code and derivatives Johnson wrongly obtained

1 or created. As to monetary relief, Storix is entitled to pursue amounts measured by the unfair  
2 advantage Johnson obtained, in addition to any losses the company sustained as a result of his tortious  
3 activities. And, Storix is entitled to recoup its investigative costs and damages arising from Johnson's  
4 harm to the value of Storix's valuable rights in SBAdmin. Not only is there sufficient facts to support  
5 such relief, but Storix will support its claims with expert testimony. To the extent the court consider  
6 the motion meritorious at all, the hearing should be delayed to allow Storix a fair opportunity to  
7 conclude discovery. For these reasons, and those explained above, the motion must be denied.

8 DATED: May 26, 2017

PROCOPIO, CORY, HARGREAVES  
& SAVITCH LLP

9  
10  
11 By: 

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