

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

STORIX, INC.,)	
)	
Plaintiff/Respondent,)	
vs.)	FROM SAN DIEGO COUNTY
)	HON. KEVIN A. ENRIGHT
)	
ANTHONY JOHNSON,)	COA NO. D075308
)	
Defendant/)	SUPERIOR COURT NO.
Cross-Complainant/)	37-2015-00034545-
Appellant;)	CU-BT-CTL
)	
DAVID HUFFMAN, et al.,)	
)	
Defendants/)	
Cross-Defendants/)	
Respondents.)	
)	

REPORTER'S TRANSCRIPT ON APPEAL

Thursday, February 15, 2018

(Pages 2765 through 2938, Inclusive)

Volume 17

1100 Union Street, Department 904
San Diego, California

Reported By:
Leyla S. Jones
CSR No. 12750

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

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

Hon. Kevin A. Enright

Plaintiffs,

vs.

CASE NO. 37-2015-
00034545-CU-BT-CTL
(Consolidated with
Case Nos.: 37-2016-
00030822-CU-MC-CTL
and 37-2015-
00028262-CU-BT-CTL)

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

Defendants,

Trial, Day 12

STORIX, INC., a California
corporation;

Nominal Defendant.

AND CONSOLIDATED ACTIONS

TRANSCRIPT OF PROCEEDINGS

(Pages 2765 through 2938, Inclusive)

Volume 17

February 15, 2018

9:03 a.m.

1100 Union Street, Dept. 904
San Diego, California

REPORTED BY:

Leyla S. Jones

CSR No. 12750

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INDEX OF WITNESSES

2

(None called.)

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INDEX TO EXHIBITS

5

(None marked or received.)

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1 SAN DIEGO, CALIFORNIA;

2 THURSDAY, FEBRUARY 15, 2018; 9:03 A.M.

3 * * *

4

5 THE COURT: All right. Good morning.
6 Okay. And we're on the record. All counsel are
7 present.

8 My clerk was just asking on the false
9 imprisonment, the case number in its entirety is
10 dismissed; is that correct?

11 MR. KING: That is correct.

12 THE COURT: Yes.

13 THE CLERK: Thank you.

14 THE COURT: Okay. Let's do this. I'd like
15 the modified instructions now. I have the modified
16 verdict form. I asked for that while we were
17 waiting, Mr. King. So I have that, but I'd like
18 the -- other modified instructions. I understand
19 some are on their way.

20 Did you modify any, Mr. King?

21 MR. KING: I did not get a chance to do
22 that, so I still got to modify the ones that we
23 discussed were mine.

24 THE COURT: Okay. All right. Well, then
25 let's do this. It's about 9:06. I want to start at
26 10:00, so I'm going to move pretty quickly, but I
27 wanted to start with the motion for directed
28 verdict. And the Court's read and considered the

1 defendants' motion and I've considered arguments.

2 And I had a question, Mr. King, on punitive
3 damages. And I would like to -- the standard, as
4 you know, is clear and convincing malice,
5 oppression, or fraud. And if we look, for instance,
6 at Mr. Kinney, I'm interested in knowing the
7 evidence, clear and convincing, where he engaged in
8 despicable conduct, malice, oppression, or fraud.

9 MR. KING: I think all of the defendants
10 engaged --

11 THE COURT: And I know that's not an easy
12 question, and you just got here.

13 MR. KING: It's easier than you think,
14 actually. All the defendants -- and there's
15 evidence -- engaged in fraudulent concealment. I
16 think they all knew exactly --

17 THE COURT: No, and I'm not talking about
18 the cause of action. I'm talking specifically about
19 punitive damages. And fraud by concealment or fraud
20 in any other form is different than the standard of
21 clear and convincing malice, oppression, or fraud.

22 MR. KING: Yes, exactly. So I think
23 that -- I think that the standard is met for
24 fraudulent concealment. As far as individually for
25 each one having specific -- specific intent
26 necessary for punitive damages, I agree there might
27 be no specific evidence of Mr. Kinney being -- being
28 directly involved in that, but there was evidence

1 that all of them were updated and apprised of
2 Mr. Smiljkovich's activities that were going on as
3 they were working alongside Mr. Johnson when he
4 returned in 2013. They all knew about it. There's
5 evidence of that in the record. The claim is that
6 they intentionally concealed that from
7 Mr. Johnson --

8 THE COURT: So --

9 MR. KING: -- in order to induce
10 Mr. Johnson to --

11 THE COURT: And I understand the theory on
12 the cause of action. But I wonder, based on what
13 you just said -- you sued the defendants
14 individually. There's a motion before me on a
15 directed verdict on behalf of them. And I wonder
16 about the despicable conduct that Mr. Kinney has
17 engaged in. It doesn't, as you know, have to be
18 despicable. It can be malice. It can be oppression
19 or fraud.

20 MR. KING: I think the entirety of the
21 conduct is -- what the defendants did to Mr. Johnson
22 is despicable. I think that does meet the standard.
23 And I think that these -- there's plenty of evidence
24 that indicates every one of these guys, regardless
25 of how active their role was, were all in agreement
26 on this, that they were going to act as one block.
27 And they have consistently.

28 THE COURT: Okay. Then maybe there's a

1 conspiracy, but -- okay. Tell me as to Mr. Huffman
2 the malice, oppression, or fraud proven by you by a
3 clear and convincing standard. In other words, have
4 you met the burden to show that Mr. Huffman engaged,
5 by clear and convincing evidence, punitive damage
6 appropriate conduct.

7 MR. KING: I look at the facts in the case.
8 I see someone who trusted 60 percent of their
9 company with four specific individuals, and
10 Mr. Huffman was at the helm of that. And what --
11 what transpired, the way that Mr. Johnson was
12 treated and then shut out, I think that's despicable
13 in and of itself. That offends me.

14 THE COURT: And tell me -- now, anger and
15 frustration is not the standard, and what may be
16 despicable to you may not be the legal standard.
17 I'm not saying you need to concede, but I guess I am
18 thinking about this.

19 I am wondering -- in other words, give me
20 your best shot as to how you've met the standard on
21 punitive damages against any one of the individual
22 defendants. Not talking about Storix, not talking
23 about anything other than what did Huffman do? What
24 did Turner do? And I'm not talking about the causes
25 of action.

26 MR. KING: When Mr. Johnson returned, they
27 had him working on a separate -- essentially a
28 project on his own by himself. When he asked for

1 help, they said no. When he finally -- when it
2 finally -- you know, he got so frustrated that they
3 came to argument about it, they told him, "We don't
4 even want what you're doing. No one wants it."

5 They let him -- they let him work by
6 himself in a corner on what he thought was something
7 really important, and then they tell him, "We don't
8 want it." Turner and Huffman, that's what led
9 Mr. Johnson to resign.

10 And then they say, "Well, we'd love to have
11 you back. We want you here." Johnson sends e-mails
12 back, goes back to Mr. Altamirano back and forth.
13 Before there's any condition, before there's any
14 demands, he says, "I want to meet. Let's talk about
15 it." No. Done. There's no more place for you
16 here. That's malicious. It's malicious because it
17 was -- it was now -- now they are in control.
18 They're the boss and they get to be -- they get to
19 be the dictator now.

20 THE COURT: Evidence of malice, oppression,
21 or fraud? I mean, I recognize personalities. I
22 recognize disagreements. I recognize vehement
23 disagreement by technical people doing very specific
24 things. But what I'm looking for is legal standard,
25 clear and convincing evidence, despicable conduct.

26 Now, fraud smacks of that. But fraud,
27 cause of action, preponderance of the evidence, I
28 would suggest is different than fraud by clear and

1 convincing evidence or malice or oppression.

2 MR. KING: So --

3 THE COURT: And we throw these words around
4 easily, but I wonder has the legal standard been met
5 on the issues before me on the directed verdict.

6 MR. KING: So it's interesting because the
7 breach of a fiduciary duty in a majority/minority
8 shareholder conference is often referred to as
9 shareholder oppression.

10 So when you have the majority denying
11 minority members things that they're entitled to,
12 breaching their -- using their power, their control,
13 for their own benefit to the detriment of the
14 minority, that's defined as oppression.

15 Now, I don't know exactly how the punitive
16 damages' definition of oppression differs from that.
17 But the ultimate -- I guess the highest best case we
18 have for despicable conduct is this. And this is
19 the -- this is the best case we can make for it --
20 is that -- you look at the evidence and you say,
21 okay, not only did these guys not disclose going
22 after a buy-sell agreement, not only did they not
23 disclose that they were pursuing a loan to purchase
24 shares pursuant to a buy-sell agreement or something
25 like that, but they actually had a plan to induce
26 Mr. Johnson to return to work, enact a buy-sell
27 agreement or lull him into agreeing to a buy-sell
28 agreement so that when he returned, he would be

1 subject to it, and then fire or cause him to resign
2 or terminate his employment with the intent that
3 then he would have to sell or forfeit his shares.

4 Now, that ultimately was never consummated,
5 but that -- I think you can look at the evidence and
6 say that's what happened. I think that meets the
7 standard for punitive damages.

8 THE COURT: All right. Mr. Aveni?

9 MR. AVENI: Thank you, Your Honor. Let me
10 address each of the points I heard from Mr. King.

11 THE COURT: Well, let me -- I'm ready to
12 rule.

13 MR. AVENI: Oh.

14 THE COURT: But I want to let everybody be
15 heard. So when you say each of the points, I want
16 to start at 10:00, and we've got a lot to talk about
17 on the instructions.

18 MR. AVENI: I'll defer to you, Your Honor,
19 unless you want to hear from me.

20 THE COURT: With regard to this, the
21 directed verdict is directed to all the causes of
22 action of the cross-complaint, as well as punitive
23 damages.

24 And with regard to this, the Court's ruling
25 is -- well, the standard for the Court is the
26 directed verdict may be granted only when
27 disregarding conflicting evidence giving the
28 evidence of a party against him the motion is

1 directed all the value to which it is legally
2 entitled and indulging in every legitimate inference
3 when such evidence in favor of that party -- the
4 Court nonetheless determines that there is no
5 evidence of sufficient substantiality to support the
6 claim or defense of the party opposing the motion or
7 a verdict in favor of that party.

8 The Court finds that that standard has not
9 been met with regard to the fraud causes of action
10 against the defendants. That standard has not been
11 met with regard to the breach of fiduciary cause of
12 action against the defendants. That standard has
13 not been met, although it's obviously -- the
14 conspiracy -- civil conspiracy cause of action is
15 obviously reliant on the underlying cause of action.
16 That standard has not been met, but it has been met
17 on the punitive damages against all individual
18 defendants.

19 And so the Court grants the motion as to
20 punitive damages, denies as to the balance of the
21 motion on directed verdict. So that will be the
22 ruling. And that means that 3941 and 3942 will not
23 be given by the Court, and we'll show that as being
24 refused.

25 I'd like to go through the -- all the
26 modified instructions, and I want to say before we
27 get to that that I appreciate counsel staying late
28 last night and staff and going through these

1 instructions and the verdict form. And I know we
2 had a lot of discussions. And as I promised, I
3 would let everybody put their positions on the
4 record this morning.

5 But what I'd like to do is this. I'd like
6 to go through my notes, and there's a lot of
7 instructions we need to talk about and I want to see
8 where we -- where we are after -- after our
9 conference, any further thinking, any further
10 argument -- and we are on the record -- with regard
11 to this.

12 MR. MCCLOSKEY: Your Honor, may I interrupt
13 just for a moment?

14 THE COURT: Yes.

15 MR. MCCLOSKEY: We -- I have retrieved the
16 sanitized jury instructions, to the extent that may
17 help you with your discussion right now.

18 THE COURT: Yes, it does. Thank you.

19 And, Mr. Sullivan, I have all of yours?

20 MR. SULLIVAN: I believe so, the corrected
21 ones we discussed yesterday.

22 THE COURT: Okay. Thank you. Now, let me
23 ask --

24 Oh, this is a full set, Mr. McCloskey?

25 MR. MCCLOSKEY: Yes, Your Honor, with the
26 exception of Mr. King's instructions. We haven't
27 received those.

28 THE COURT: Okay. We're going to need

1 those, obviously, pretty quickly. Are they on their
2 way, Mr. King? You have them now?

3 MR. KING: I do not have them now.

4 THE COURT: Okay. Do you need to make a
5 call, or are they on their way? Or we're going
6 to -- I just assume not kind of cut and paste
7 through this process now.

8 MR. KING: I have to just -- I started
9 them. I have to take a look at them. And then once
10 they're done, I can e-mail them to Robin or have
11 them printed out.

12 THE COURT: Do you have an ETA?

13 MR. KING: Ten minutes.

14 THE COURT: Okay. All right. That's fine.
15 I want to start argument with all the instructions
16 in place. Okay. Let me -- I'm going to do this
17 going to -- well, have you seen their modified?

18 MR. KING: I've seen their modified special
19 verdict.

20 THE COURT: What about instructions?

21 MR. KING: I just was looking at those.

22 THE COURT: Okay. Well, let's -- let's
23 start with 3700, because that is important as to how
24 we're going to do this. Does everyone agree to 3700
25 as modified?

26 MR. MCCLOSKEY: We sent these to Mr. King
27 last night, Your Honor.

28 THE COURT: Ready? Ready? The only thing

1 I would say on 3700 is we really need to define
2 "agency and/or agent." And when it says
3 "corporation may authorize," what I'm really looking
4 for is "corporation acts."

5 MR. AVENI: Acts, Your Honor?

6 THE COURT: In other words, corporation is
7 not just a thing. It's operated by people. People
8 make decisions. People act or don't act. And this
9 is "may authorize." That's clear. But what I
10 really want is -- well, how does Storix do stuff?
11 And it is a little bit different, because you have
12 the corporation and the individual defendants.

13 And so what I'm thinking is a corporation
14 acts through -- and I don't know how you want to do
15 this, but we could say directors, officers, or
16 employees. And that's probably maybe all we need.
17 Once we get into agency, I think we need to define
18 it. And I'm not sure it's an issue. That's why I
19 asked for this. And then this determines what --
20 well, it has an effect on 3602.

21 MR. KING: I've seen the 3700. I have no
22 objection to the way -- they phrased it as being --

23 THE COURT: Okay. Well, let me just say
24 that -- ask that.

25 And I know I'm interrupting, Mr. King.

26 But if you're all in agreement as to this
27 version, then that's fine. The only thing I'm
28 wondering about is what I said. And if no one's

1 concerned about it and I'm the only one concerned
2 about it then I withdraw my concern. If everybody
3 is in agreement with this 3700, I'm fine.

4 MR. SULLIVAN: I haven't had a chance to
5 review it, so --

6 THE COURT: Okay. Everybody we --

7 MR. MCCLOSKEY: Can we go over it just once
8 more, Your Honor? I think we can do this off the
9 record. Can you give me what it is that you're
10 proposing?

11 THE COURT: Well, Mr. King's not objecting.
12 And so the way it reads is, "A corporation may
13 authorize directors, officers, or employees to act
14 on its behalf."

15 MR. MCCLOSKEY: We're fine with that,
16 Your Honor.

17 THE COURT: "This relationship is called
18 'agency.' The one giving the authority is call the
19 'principal.' The person to whom who authority is
20 given is called the 'agent.'"

21 MR. MCCLOSKEY: We're fine with that,
22 Your Honor.

23 MR. SULLIVAN: No objection, Your Honor.

24 THE COURT: Okay. Then I'll give 3700.
25 Thank you. Let's go back then to 3602, and it's
26 actually -- oh, it's following 3700. My feeling in
27 looking at the use note is that it does not apply,
28 because the issue there is conspiring with the

1 entity. And there -- there's no allegation that
2 that's the case.

3 Am I correct, Mr. King?

4 MR. KING: That is correct. Absolutely.

5 THE COURT: I mean, they're conspiring
6 among themselves, as I understand it.

7 MR. KING: Yes.

8 THE COURT: So if that's true, I don't
9 think 3602 applies, and I can read you the first
10 sentences and the directions for use. "This
11 instruction is for use if an individual defendant is
12 alleged to have conspired with an entity." And that
13 allegation is not made.

14 Now, maybe there's inferences. Maybe
15 there's implications, maybe, and inferences drawn,
16 but I don't think 3602 applies. But I offer this
17 and I offer you to speak and say I'm wrong or --

18 MR. MCCLOSKEY: I think you're right,
19 Your Honor. Withdraw.

20 THE COURT: All right. We'll show --

21 Mr. Sullivan, is that fine?

22 MR. SULLIVAN: That's fine with me,
23 Your Honor.

24 THE COURT: Well, I guess it doesn't really
25 affect you. All right. We'll show it's withdrawn.
26 And by the way, is 8 withdrawn, Special 8? That's
27 the standing lack of authority.

28 MR. KING: Yes. Actually, I'd like to have

1 it as refused, but --

2 THE COURT: Okay. That's why I had it in
3 the refused pile. I was thinking -- okay. We'll
4 show it as refused.

5 Then -- all right. Then I want to look at
6 the modifications to 4102 and 4103. Are we --

7 MR. SULLIVAN: So I modified 4102 with
8 respect to Storix's claims and I included two
9 versions of 4103. The CACI on 4102 does have a
10 blank where it says, "Insert description of conduct
11 alleged to violate the duty of loyalty."

12 But on the duty of confidentiality, it
13 doesn't have that same block for insertion. So the
14 preference would be to have it has originally
15 drafted consistent with CACI. I have included an
16 alternative instruction that has a further
17 description of confidential information.

18 THE COURT: Okay. I think the difficulty
19 with 4103 was the addition of "to the detriment of
20 Storix" --

21 MR. SULLIVAN: Oh.

22 THE COURT: -- as I recall.

23 MR. SULLIVAN: Oh, okay.

24 THE COURT: Is that correct?

25 MR. KING: That's correct.

26 THE COURT: So my feeling is to -- well --

27 MR. SULLIVAN: I have no objection to that.

28 THE COURT: Okay. So what I'll do --

1 MR. SULLIVAN: I must have misstated in my
2 notes what was required to be modified.

3 THE COURT: Okay. I have two. One is
4 shorter than the other one.

5 MR. SULLIVAN: The shorter one is the
6 preferred one. It should be the -- the Post-it note
7 that says original.

8 THE COURT: Okay. And I don't have any
9 Post-it notes on this, but I'm looking at -- Element
10 2 is shorter than Element 2 on the alternative.

11 MR. SULLIVAN: Correct. That should be
12 the --

13 THE COURT: Okay. I'll do that. I'll
14 strike "or to the detriment of Storix, Inc."

15 Agreed?

16 MR. KING: Yes.

17 MR. MCCLOSKEY: Agreed.

18 THE COURT: Then going back to 4102,
19 everybody in agreement?

20 MR. KING: So my -- my concern is that the
21 "in connection with" language assumes facts that
22 are, I think, you know, obviously in dispute. So in
23 the -- if you look at Number 2, the first paragraph,
24 it says, "In connection with his efforts in pursuit
25 of Janstor Technology." No objection to that part.

26 And then it says, "And related acts in
27 furtherance of his intent to compete with Storix,
28 Inc." That's -- that's a factual issue that's in

1 dispute. Now, perhaps there's a way we could say
2 something --

3 THE COURT: Well, Storix has to prove it.
4 These are the elements Storix has to prove --

5 MR. KING: Right.

6 THE COURT: -- on loyalty. CACI says
7 insert one of the following, and we've got four on
8 Element 2.

9 MR. SULLIVAN: Correct.

10 THE COURT: So do we want to do one or --

11 MR. SULLIVAN: Well, I think they're
12 perhaps different bases of violations of duty of
13 loyalty.

14 THE COURT: So the way CACI reads is you're
15 either knowingly acting against or you're acting on
16 behalf, et cetera. And they're not alternative.
17 It's pick one. And if you're all in agreement with
18 the way it is now, that's fine. Or if you are not,
19 let me know.

20 So I guess, Mr. King, your thoughts?

21 MR. KING: I agree. I think -- well --

22 MR. SULLIVAN: There will be two 4102s
23 rather than trying to deal with a single
24 instruction. That was what we were trying to avoid,
25 I think, with including more.

26 THE COURT: Now, why two? Because Johnson
27 breach of fiduciary duty?

28 MR. SULLIVAN: Well, I'm trying to pull up

1 the instruction here, but I thought the concern was
2 with respect to the acts that are identified in
3 Number 2 that are violative of the duty and whether
4 or not the instruction anticipates including only
5 one description or multiple.

6 THE COURT: I think the concern was -- and
7 I'm looking at the notes on the master sheet here.
8 Element 2 requires defendant knowingly act against
9 Plaintiff interests, quote, in connection with --
10 and then it says "description of transaction." And
11 so we need to describe the transaction, but I'm
12 wondering if we need four alternatives, as opposed
13 to pick one.

14 MR. SULLIVAN: So I think on the one hand,
15 you have the Janstor and related efforts. On the
16 other hand, you have breach of loyalty related to,
17 you know, contacting customers, which may be related
18 to that effort or it may be independent, an
19 independent breach, similar with contacting
20 Mr. Bonert, an employee of Storix, and seeking to
21 settle discord within the employment force of the
22 company. I don't know necessarily if that were
23 related to Janstor. So if we were to limit it to
24 efforts made to Janstor, we're kind of excising
25 other acts that were violated.

26 THE COURT: All right. So if we include
27 those two as alternatives, will that do it? There's
28 four here. I think three and four can be combined.

1 MR. SULLIVAN: Yeah, and probably one and
2 two can be combined two, because they both relate to
3 Janstor.

4 THE COURT: Can we do that then?

5 MR. SULLIVAN: Yeah.

6 THE COURT: If we did that, Mr. King, is
7 that okay?

8 MR. KING: I think so.

9 THE COURT: And I think it would be
10 "and/or." I don't like "and/or." It's really "or."
11 It's really an alternative.

12 MR. SULLIVAN: I could do "or."

13 THE COURT: All right. Then do "or," and
14 then modify that so instead of four, we have two.
15 And if you can do that pretty quickly, obviously. I
16 want the instructions in place before we argue.
17 Okay? Thank you.

18 And that would be agreeable in theory,
19 Mr. King?

20 MR. KING: Yes.

21 THE COURT: Thank you. Going to unjust
22 enrichment, positions? I know counsel were going to
23 think about it further and do research.

24 MR. SULLIVAN: Yes, Your Honor. In fact, I
25 had a chance to look at -- a limited chance to look
26 at some cases. And I think your initial question
27 was whether or not it perhaps is a separate cause of
28 action or a remedy.

1 And the Melchior vs. New Line Production
2 case, 106 Cal.App.4th 779, says unjust enrichment is
3 not as a cause of action. California is, instead,
4 synonomous with the circumstances in which a
5 plaintiff is entitled to restitution as a remedy.

6 There's also cases that allow the question
7 of unjust enrichment despite someone having an
8 equitable origin or nature being submitted to the
9 jury, including breach of fiduciary duty cases.

10 We saw that the proposed CACI instruction
11 doesn't actually include the misappropriation of
12 trade secret series, but there are cases allowing
13 that question to be submitted to the jury on breach
14 of fiduciary duty. I do have a short brief
15 addressing some of these authorities if Your Honor's
16 interested.

17 THE COURT: Well, I'm obviously interested.
18 The question is time.

19 MR. SULLIVAN: Yeah, I understand that.

20 THE COURT: We don't have the luxury of
21 time, necessarily. But if you want to submit it and
22 file it, I'll consider that. And a copy to
23 Mr. King.

24 MR. SULLIVAN: Sure.

25 THE COURT: Mr. King, your position?

26 MR. KING: It's an equitable remedy.
27 Restitution, that's something for the Court to
28 decide.

1 THE COURT: And my concern was not so much
2 cause of action as it was legal or equitable. And
3 we talked about it last night. The fact that it's
4 in CACI means maybe it's legal, but that's in a
5 specific area of CACI; namely, trade secrets.

6 Here's -- a thought is to -- and I
7 recognize we've talked a lot about this. But in
8 thinking about it, my thought is to let it go to the
9 jury and we can then later, with the luxury of time,
10 if there's a finding on it, we can talk about
11 whether that's an appropriate question for the jury.

12 But in any event, the Court is in a
13 position, regardless, to consider it as advisory
14 only. And so that's -- that's kind of my thinking,
15 at least as it stands now.

16 But I wanted to get, Mr. King, your --

17 In other words, so I -- I'm not saying it's
18 a separate cause of action, but it is a form of
19 restitution.

20 MR. SULLIVAN: Sure.

21 THE COURT: And restitution, to me, is
22 equity.

23 MR. SULLIVAN: In the Court of Appeals
24 in -- American Master Lease, LLC, vs. Idanta
25 Partners, 225 Cal.App.4th 1451, actually was
26 addressing a breach -- aiding and abetting breach of
27 fiduciary claim and talked about at length that the
28 jury was provided the question of enrichment.

1 That case actually reversed and remanded
2 the instructions that were provided, not because
3 they were improperly submitted to the jury, but
4 there were problems with the calculations performed,
5 but it remanded for a jury trial.

6 And in discussing, it noted that Plaintiff
7 is entitled to a jury trial on claim for unjust
8 enrichment seeking restitution and money unjustly
9 retained, citing Lectrodryer v. SeoulBank case,
10 77 Cal.App.4th 723, and Holson v. Dillely
11 (phonetic), a Northern District of Illinois case
12 from 1998, noting that the amount of restitution is
13 a question of fact for the jury. That's on the
14 page 2 of the brief I submitted.

15 And that the -- pages 3 through 5 of the
16 brief are a recitation of several of the authorities
17 that were addressed in Storix's opposition to
18 Mr. Johnson's summary judgment motion addressing
19 that unjust enrichment is a proper remedy in breach
20 of fiduciary duty cases. And it looks to the
21 benefit -- profit or benefit that the defendant
22 obtained in breaching the duty, regardless of any
23 detriment suffered by the plaintiff.

24 THE COURT: Mr. King?

25 MR. KING: There's a good reason why unjust
26 enrichment would be a different scenario than trade
27 secrets. Because once you have a trade secret, once
28 you know of a trade secret, it makes sense that you

1 can't just forget it. There's less of an equitable
2 concern.

3 In other context -- and I think it is
4 reflected in CACI by the fact that there's no other
5 unjust enrichment instruction mentioned on any other
6 series of causes of action -- unjust enrichment is
7 an equitable remedy.

8 THE COURT: And I understand. We talked
9 about that. I think I was one who raised it last
10 night. But I guess I'm wondering, in light of the
11 brief and looking at the brief, what Mr. Sullivan is
12 citing. In other words, in a breach of fiduciary
13 duty, it's appropriate to have it to go to the jury,
14 CACI cited. Mr. -- that was remanded.

15 Mr. Sullivan, is it Meister (phonetic?).

16 MR. SULLIVAN: American Master Lease. I
17 have a copy of it if you'd like.

18 THE COURT: Okay. American Master Lease
19 was remanded for a jury trial on the issue of unjust
20 enrichment in a breach of fiduciary duty context.

21 MR. KING: The concern -- the concern I
22 have with this is that the case that's cited, at
23 least in the block text, is -- it says, "Defendants
24 do not argue, however, the trial Court erred by
25 submitting the issue of unjust enrichment to the
26 jury."

27 THE COURT: Which means everyone agreed.

28 MR. KING: Right. Which means the decision

1 and comments about whether or not it was a jury
2 issue are not really before the Court, not central
3 to its holding.

4 MR. SULLIVAN: Of course the Lectrodryer
5 case cited in that case and then quoted below in the
6 next paragraph, quote, SeoulBank's assertion that
7 the case, nonetheless, should have been tried to the
8 Court because the claim required the application of
9 equitable principles is thus -- (inaudible).

10 THE REPORTER: I'm sorry. We can't hear
11 you.

12 MR. SULLIVAN: And then Lectrodryer had a
13 right to a jury trial, and the jury's unanimous
14 verdict was not merely advisory.

15 MR. KING: It was -- Lectrodryer was -- was
16 that -- sorry. I'll look it up.

17 THE COURT: No. Go ahead.

18 MR. KING: I mean, my question about
19 Lectrodryer is I don't know what the context -- if
20 that's misappropriation of trade secrets, if that
21 was also a breach of fiduciary duty. I'm not sure
22 how that arose.

23 THE COURT: Mr. Sullivan?

24 MR. SULLIVAN: I don't recall the specific
25 facts of that case right now, but it would seem that
26 we're talking about a particular remedy. And if the
27 Court is treating that remedy as available, then
28 largely, the basis for the liability is irrelevant

1 whether or not it's a jury question.

2 I think the cases that talk about whether
3 or not it's an equitable question for the Court or
4 perhaps a mixed equitable legal issue for the jury
5 focus on the relief in how you calculate it.

6 In this case, we have unrebutted testimony
7 from Mr. Bergmark on how you can go about
8 calculating what the unjust enrichment was. So this
9 is not a situation where the jury might be looking
10 at other factors that would make it more equitable
11 in nature, and there's a unrebutted valuation of
12 software that Mr. Johnson obtained.

13 THE COURT: Well, does anyone disagree with
14 the concept that -- let's assume it's equitable. I
15 mean, it's a form of restitution, which is
16 equitable. But in light of the authority cited in
17 Mr. Sullivan's brief, in looking at that and reading
18 that, I guess I am wondering about the concept of
19 treating it either as the jury finding, one, or,
20 two, the jury finding in an advisory capacity only.
21 In other words, the Court -- and that means the
22 Court can reject it. The Court can accept it. In
23 other words, the jury is advising the Court. And
24 I -- so I'm wondering about the concept of --

25 Let's say, Mr. King, you're right. Then do
26 you disagree with the concept that the Court can
27 treat it as an advisory-only opinion?

28 MR. KING: I don't. In fact, the Court can

1 do that with -- I believe the Court has the
2 discretion to do that in any nonjury case if the
3 Court wants to.

4 THE COURT: Well, I don't know that I'd
5 submit an injunction.

6 MR. KING: That's true.

7 THE COURT: But I understand what you're
8 saying.

9 MR. KING: Ultimately, the decision is
10 yours.

11 THE COURT: Okay. So let's do this then.
12 We'll show over objection, I'm giving 4410. Now,
13 it's been modified from CACI, because that's a trade
14 secret instruction. On the language of 4410 as
15 submitted, I'll give it over objection. But I want
16 to make sure there's no disagreement on the
17 language, assuming I'm giving it. And just so you
18 know, I'm going to be giving it out of the
19 instructions I just received this morning, the new
20 complete set, so everybody knows.

21 MR. SULLIVAN: I don't believe it was
22 modified further after last night.

23 THE COURT: Okay. So, Mr. King, any --

24 MR. SULLIVAN: Actually, I think I did
25 modify it to take out the reference to Janstor.

26 THE COURT: I think that's --

27 MR. KING: The second paragraph, not really
28 an objection so much as I'm a little bit unclear on

1 the language. In the second sentence, "It says
2 first determine the value of benefit Anthony Johnson
3 would not have been achieved except for his breach
4 of fiduciary duty." I suspect they're --

5 MR. SULLIVAN: On the then maybe -- would
6 not have achieved -- gotcha.

7 MR. KING: Okay.

8 THE COURT: What?

9 MR. SULLIVAN: I think there's an extra
10 word in there. "Would not have been achieved"
11 should be would have -- "would have achieved."

12 THE COURT: No. That's right out of CACI.
13 My preference is to use CACI.

14 MR. SULLIVAN: Okay. That's fine.

15 THE COURT: All right. Anything else,
16 Mr. King, on that?

17 MR. KING: No.

18 THE COURT: Okay. Then -- all right --

19 MR. KING: And --

20 THE COURT: Go ahead.

21 MR. KING: I just sent the special -- the
22 revised majority shareholder fiduciary duty
23 instruction that we discussed last night with
24 redactions, and I copied counsel on it.

25 THE COURT: Okay. Is that Number 3? No.

26 MR. KING: It was -- it was marked
27 originally as 4400, Version 2, or the second 4400.

28 THE COURT: Oh, that's right.

1 MR. KING: And so I just have it now as
2 majority shareholder fiduciary duties.

3 THE COURT: In other words, it would --
4 okay. It's 4100 modified?

5 MR. KING: Yes.

6 THE COURT: And everyone in agreement or
7 have you seen it?

8 MR. MCCLOSKEY: I think he just sent it.

9 MR. KING: You can take a look at my --

10 THE COURT: Well, that was a second ago.

11 MR. MCCLOSKEY: I'm sorry.

12 THE COURT: That was a second ago, so
13 you --

14 MR. MCCLOSKEY: I know I'm behind the time,
15 Your Honor.

16 THE COURT: I'm kidding.

17 MR. MCCLOSKEY: I'm sorry about being slow.

18 THE COURT: So can we print out what
19 Mr. King has sent so that they can see it?

20 THE CLERK: I don't see it.

21 THE COURT: Okay. She hasn't received it
22 yet. Now, any preference on where I get the
23 specials in terms of order? I don't want to give
24 them after I give the 5000 series. While we're
25 waiting, I'm looking at Special 2 and Special 4.

26 Any objection to those, Mr. King?

27 These are modified in accordance with our
28 discussion, Mr. McCloskey?

1 MR. MCCLOSKEY: Yes, Your Honor.

2 MR. KING: I mean, the same objection I had
3 last night. The Court's already ruled on it, so
4 nothing else.

5 THE COURT: All right. The Court will give
6 Special 2. And I think the objection on Number 2
7 was there were dueling versions. And Mr. King's
8 request on his version was to add language after
9 "business decision," quote, "in their capacity as
10 directors," end quote. The Court has deleted that
11 over objection. I'm going to give the version --
12 because I think it's redundant because it's clearly
13 talking about the directors of the corporation,
14 which follows the proposed language. And that's in
15 the version that I have before me.

16 So I'm going to give -- I think there's
17 agreement to give 2. It's a question of whether
18 we're going to add, quote, "in their capacity as
19 directors." And the Court is overruling or is not
20 going to give that, and so the Court's going to give
21 the version that's submitted without that language.

22 Is that a fair recitation?

23 MR. KING: Yes.

24 THE COURT: Then on 4, this was quite
25 lengthy and the Court asked that it be modified,
26 take out references to 317(e) and (g), which has
27 been done, and also delete references to any other
28 Corporation Code section and that's been done.

1 So any objection to 4?

2 MR. KING: Same objection I had last night,
3 which is I think that bylaws control on this issue.
4 Mentioning that portion of the code which has been
5 restricted by more specific requirements in the
6 bylaws is -- it's going to mislead the jury into
7 thinking that that's a third option or a third way
8 of approving advancement above and beyond what the
9 bylaws have already restricted.

10 THE COURT: Well, I'll summarize. The
11 discussion that we had was -- that concern is
12 expressed by Mr. King. Mr. McCloskey view was this
13 gives stamp of approval to the bylaws.

14 No one is arguing that Special
15 Instruction 4 is what controls this factual
16 scenario. You're both going to argue that it's the
17 bylaws, and you're all going to argue that it's the
18 bylaws; am I right?

19 MR. MCCLOSKEY: Correct, Your Honor.

20 THE COURT: So just, as I say, it's in the
21 form of a stamp of approval. I don't think they'll
22 be confusing to the jury with regard to it in light
23 of everyone agreeing that the bylaws language
24 controlled. So the Court will give 2 over
25 objection.

26 Now, the question comes up, where do you
27 want me to give it? And thoughts there?

28 MR. MCCLOSKEY: That's a great question,

1 Your Honor. Let me --

2 THE COURT: Well, let me do this, just to
3 make it easy. I'll give it in front of 2513. I'll
4 give both.

5 MR. MCCLOSKEY: You'll give --

6 THE COURT: After out-of-pocket damages.
7 And the title has been deleted, so it just says 1923
8 damages.

9 Is that agreeable, Mr. King, on 1923?

10 MR. KING: Yes.

11 THE COURT: All right. So between 1923 and
12 what I -- it will follow that. Is that agreed?

13 MR. KING: Yes.

14 THE COURT: Two and four. Is that fine?

15 MR. MCCLOSKEY: Yes, Your Honor.

16 THE COURT: I don't want to give it after
17 the 5000 series.

18 MR. MCCLOSKEY: Agree?

19 THE COURT: Okay. Then with regard to --
20 do we have the modification yet?

21 MR. KING: You know what? It just said it
22 went through.

23 MR. SULLIVAN: Yeah, I just got it.

24 THE COURT: Okay. So of all the specials,
25 is it correct that we're giving just 2 and 4?
26 Others were withdrawn, refused. We're giving 1?

27 MR. MCCLOSKEY: I think we're giving 1.

28 THE COURT: I don't know that I have 1. I

1 don't have 1 in the new packet. Okay. I misspoke.
2 I do have 1.

3 Any objection to 1, Mr. King?

4 MR. KING: No objection to 1.

5 THE COURT: All right. I'll give 1. I
6 don't have 3, though.

7 MR. AVENI: We withdrew that.

8 MR. MCCLOSKEY: We withdrew it, Your Honor.

9 THE COURT: Okay. That explains that.
10 I've got 2 and 4. I think 5 and 6 were withdrawn.
11 And I think 8 was refused.

12 With regard to 8, we had a discussion about
13 that and a brief filed by Mr. Sullivan. And I think
14 after the discussion --

15 Well, why don't you state it instead of me
16 stating it, Mr. King, on standing authority. This
17 is -- this is Number 8. Because I'm showing it's
18 refused, and I want there to be a record of why it's
19 refused.

20 MR. KING: Yeah. I -- I think that the
21 arguments have been made. I think that the --

22 THE COURT: And they were made last night.
23 I just want to put something on the record as to
24 your position.

25 MR. KING: Yeah. My position is that that
26 instruction should go forward. But on -- that's my
27 position, and the instruction has been refused,
28 so --

1 THE COURT: Okay. And, Mr. Sullivan, why
2 don't you put your position on? I just want there
3 to be --

4 MR. SULLIVAN: Understood.

5 THE COURT: -- a record as to why it was
6 refused, even though we had this discussion last
7 night.

8 MR. SULLIVAN: Sure. Very briefly,
9 Your Honor, Storix's position is that the proposed
10 instruction is not truly a standing issue. Standing
11 is whether or not Storix is the real party in
12 interest that suffered the harm it's seeking to
13 address for in this action. That issue was
14 determined at the demurrer phase, and the objection
15 was overruled twice on demurrer.

16 The issue is really as to lack of
17 authority, essentially, lack of capacity to come
18 into Court. That would be a complete abatement,
19 which is a defense that's waived if not raised at
20 the first opportunity. It's never been pled before,
21 and the authorities cited in the brief discuss that.

22 THE COURT: All right. And with regard to
23 this, the -- we had a lengthy discussion, and the
24 discussion was -- I believe we reached somewhat of a
25 consensus. But with regard to --

26 MR. KING: Actually, that's correct. If
27 you want me to -- because I do recall that. I think
28 we said that it was probably -- that this was -- I

1 think the argument was this was probably an issue of
2 law, because there's no -- not a -- disputed facts,
3 and whatever the issue is an issue for the Court.
4 My position is that it should go forward, but I
5 understand.

6 THE COURT: Okay. And it was the question
7 of law. In the scenario that is presented to the
8 Court here -- and that, is it's undisputed what the
9 facts are -- the interpretation of the facts is
10 subject to dispute. But the facts are that three of
11 the directors of five, the majority, in other words,
12 voted to proceed on the lawsuit against, at that
13 time, Janstor and Mr. Johnson.

14 And on those undisputed facts, the thought
15 was and my thought is that that is a question of
16 law, not for the jury. And so for that reason, as
17 well as everything else that's been stated by both
18 sides, the Court is going to refuse Number 8. Thank
19 you.

20 Then Number 7, I'm looking at my notes and
21 I'm wondering -- was that withdrawn?

22 MR. KING: And so just briefly --

23 THE COURT: Yes.

24 MR. KING: -- we -- I would just like to
25 raise that issue if it -- as a -- and I can actually
26 withdraw. We can put it in that we're withdrawing
27 that special instruction and just dispense with it,
28 the one about --

1 THE COURT: Eight?

2 MR. KING: Yes.

3 THE COURT: You don't have to do that. I
4 just want there to be a record of why I'm refusing.

5 MR. KING: Right, right. So what I'd like
6 to do is also just make an oral motion for directed
7 verdict on that, because undisputed facts, legal
8 issue, and have that on the record.

9 THE COURT: Okay. So you're moving --

10 MR. KING: Oral -- moving to have a
11 directed verdict against Storix's claim against
12 Mr. Johnson on the grounds that the corporation did
13 not properly authorize the filing of that lawsuit or
14 properly ratify it with a majority vote of
15 disinterested directors.

16 THE COURT: Mr. Sullivan?

17 MR. SULLIVAN: I'm not sure if that's a
18 motion on standing grounds or this unpled lack of
19 authority events. If it's unstanding -- for the
20 reasons stating in the brief, it's not a standing
21 issue.

22 And to the extent that it is, the facts
23 establish that there was a vote of disinterested
24 directors. None of the directors voting in favor of
25 the action were interested in the action. They're
26 not parties, no financial interest in it. We heard
27 from Mr. Walt what a materially interested director
28 requires. That standard is not met here, so there

1 was authority for it.

2 The additional facts cloak the president
3 with actual implied or apparent authority to pursue
4 litigation on behalf of the company. Mr. Johnson,
5 as president of the company, had previously, on
6 numerous occasions, instituted litigation as the
7 president without a board vote. So there's
8 authority there.

9 Further, there's a subsequent ratification
10 in by disinterested directors who had no financial
11 stake in the Janstor action itself. It might have
12 been countersued, but that does not mean they have a
13 material financial interest in the Janstor action.
14 That ratification is retroactive and authorized the
15 corporation at a formal noticed board meeting.

16 So any one of those scenarios would provide
17 the authority for the corporation to pursue its
18 action. And to the extent that this is truly a
19 lack-of-authority defense, it was waived by never
20 being pled.

21 THE COURT: Anything else, Mr. King?

22 MR. KING: The issue has been around in
23 this case from the very beginning, and it was argued
24 exhaustively and in a detail in our motion for
25 summary judgment, which was denied. The Court found
26 factual issues.

27 But with respect to the initial
28 authorization, it had to be -- it always had to be

1 authorized by a majority vote of disinterested
2 directors.

3 Now, yes, presidents can authorize
4 litigation if it's in the ordinary course of
5 business. Now, a lawsuit against a 40 percent
6 shareholder, of a director, that's an extraordinary
7 event and something that requires board approval,
8 and that didn't happen before a lawsuit was filed.

9 The attempt to rectify that was May of
10 2017, a shareholder meeting where there was a vote
11 to ratify that. And the directors voting in favor
12 of it, the three that were opposing Mr. Johnson and
13 Sassi, were not disinterested because at that point
14 they are now in a consolidated action against
15 Mr. Johnson. They have a financial interest,
16 material financial interest, in having that lawsuit
17 go forward.

18 More importantly, though, is that if they
19 authorize the filing of that lawsuit without proper
20 authority, at that point, now that they're ratifying
21 their prior action to spend corporate money on this
22 lawsuit, they have a financial interest in
23 protecting themselves from unauthorized expenditure
24 of corporate funds previously. They're materially
25 interested in that vote.

26 MR. SULLIVAN: There's been no contrary
27 evidence, no conflicting expert opinions, on that
28 issue. The corporations can always ratify. If it

1 was truly an issue of standing, then the standing
2 would have been assessed at the time. Ratification
3 wouldn't be an issue. That's why it's not an issue
4 of standing. It's a issue of authority, and
5 ratification cures that to the extent there was a
6 defect, which there wasn't, given the facts in this
7 case, which clearly, there was authority for, to the
8 extent it was necessary at all.

9 THE COURT: Anything else?

10 MR. KING: I think you got it.

11 THE COURT: All right. Citing to the same
12 standard that I earlier cited to on directed
13 verdict, that standard has not been met. So that --
14 the directed verdict on behalf of Mr. Johnson with
15 regard to the standing/lack of authority to sue is
16 denied.

17 And for all the same reasons, the Court
18 refuses to give -- all the same reasons previously
19 referenced, the Court refuses to give Special
20 Instruction Number 8.

21 And I know you said you can withdraw it,
22 but I'll leave it in the refused in light of the
23 status. Okay.

24 MR. SULLIVAN: Your Honor, just going back,
25 I don't know that we made a record today, but we did
26 discuss it yesterday -- was -- Storix's request that
27 it be allowed to have instructions on punitive
28 damages according to proof at trial, which were

1 subject to a motion to strike by Judge Trapp early
2 on without leave to amend. We discussed that
3 yesterday, and the request was denied. I just want
4 to make sure we have that on record.

5 THE COURT: All right. And it is denied.
6 As I mentioned, I think it's a matter -- this is
7 Storix's claim for punitive damages against Johnson.

8 MR. SULLIVAN: Correct.

9 THE COURT: I think there's a due process
10 issue at this point if I was to reinstate, and I
11 recognize that counsel have previously litigated
12 this before Judge Trapp and she did not allow the
13 punitive damages to go forward on behalf of Storix.
14 And the Court is going to standby that decision.
15 Nothing in the trial has changed my view of that,
16 and so the Court will not allow punitive damages to
17 go forward. As it turns out, neither side is going
18 to be allowed to pursue any punitive damages against
19 the other, despite the level of frustration and
20 anger, which is not the standard, as I said.

21 Okay. Do we have those instructions?

22 MR. MCCLOSKEY: One last thing, Your Honor.

23 THE COURT: Yes.

24 MR. MCCLOSKEY: The revised shareholder
25 fiduciary duty instruction that Mr. King just
26 sent --

27 THE COURT: Yeah.

28 MR. MCCLOSKEY: -- we have no issues with

1 it. It's an issue now of location in the jury
2 instructions, and I would suggest that it replace
3 4100 and the modified 4100 that we talked about
4 yesterday.

5 THE COURT: In other words, following 4100?

6 MR. MCCLOSKEY: Instead of 4100,
7 Your Honor.

8 THE COURT: In other words, not give CACI
9 4100?

10 MR. MCCLOSKEY: No. I think we were going
11 to do that yesterday. It was -- no. It was right
12 after 4100, CACI. That's right. I'm sorry.

13 THE COURT: But the language as modified by
14 Mr. King is agreeable?

15 MR. MCCLOSKEY: Yes, Your Honor, so it
16 comes right after 4100.

17 THE COURT: And, Mr. Sullivan, agreeable?

18 MR. SULLIVAN: That's fine, Your Honor.

19 THE COURT: And thank you, Mr. King, for
20 doing that. I'll give it right after 4100.

21 I have a modified 4103. Is that in
22 agreement?

23 MR. KING: Yes.

24 THE COURT: What that does is delete the
25 language of "to the detriment of Storix."

26 So anything else, Mr. Sullivan, on that?
27 In other words, we had a discussion.

28 MR. SULLIVAN: Yes, correct.

1 THE COURT: Is this mod- --

2 MR. SULLIVAN: That's the modification I
3 made and e-mailed to Robin.

4 THE COURT: Yes. Thank you. All right.
5 Now, it's a little bit after 10 o'clock. Are there
6 any other instructions --

7 MR. SULLIVAN: Was Special 7 addressed?
8 I'm told it's in there, so.

9 THE COURT: Now, I don't have Special 7.

10 MR. SULLIVAN: That's the one with
11 economical damages and nominal damages. It should
12 be after 3900.

13 THE COURT: Okay. Was it listed by number?

14 MR. SULLIVAN: It should --

15 THE COURT: Yes, it's 3902 as modified.
16 In agreement, Mr. King?

17 MR. KING: Yes.

18 THE COURT: Okay. And what was the
19 modification to that again?

20 MR. SULLIVAN: That's the one that includes
21 a description of nominal damages in lieu of --

22 THE COURT: Yes. Okay. And we include
23 both A and B. All right. Thank you. Then any
24 other instructions that we haven't talked about?

25 Okay. As promised -- and I know you've
26 already done it in part or maybe in whole. I
27 promised I would allow counsel to put anything on
28 the record about our instruction conference last

1 night, which was lengthy.

2 Now, Mr. Sullivan? And I know you've
3 already addressed some of these things.

4 MR. SULLIVAN: There's -- I think it's
5 conceded at this point. But just on the nominal
6 damages issue, Civil Code 3360 says when a breach of
7 duty has caused no appreciable detriment to the
8 party affected, he may yet recover nominal damages.

9 THE COURT: All right. Mr. King?

10 Or anything else, Mr. Sullivan? This is
11 the time if you wanted to put --

12 MR. SULLIVAN: Understood. I believe the
13 issues have been --

14 THE COURT: I think -- well, I just want to
15 give, as promised, the opportunity. And there will
16 be a record with regard to all these instructions
17 refused, given, modified, withdrawn.

18 Mr. King?

19 MR. KING: The -- I did have one question
20 about closing argument, and that is can we publish
21 the jury instructions the Court's approved to the
22 jury during closing argument?

23 THE COURT: Yes. That's why we do this and
24 spend this time. Anything else? No.

25 Mr. McCloskey?

26 MR. MCCLOSKEY: Nothing, Your Honor. Thank
27 you.

28 THE COURT: Okay. Thank you. I appreciate

1 counsel's efforts in doing this.

2 All right. Special verdict. It has been
3 modified in conjunction with the heading. I haven't
4 had a chance to review it. It was just handed to
5 me. I want to make sure that counsel are all in
6 agreement.

7 I know, Mr. McCloskey, you were going to
8 modify --

9 MR. MCCLOSKEY: Yeah.

10 THE COURT: -- the cross-complaint part.

11 MR. MCCLOSKEY: We did. We took out the
12 business necessity portion of the special verdict
13 form. We now need to take out the
14 clear-and-convincing portion of the punitive
15 damages, and we will do that.

16 MR. SULLIVAN: And I believe Your Honor
17 might have received alternate copies this morning
18 based on the unjust enrichment issue of the first
19 series of --

20 THE COURT: Okay. I thought I just had
21 one.

22 MR. SULLIVAN: You might.

23 THE COURT: I only received one. A lot of
24 paper up here.

25 MR. SULLIVAN: So it might be highlighted
26 in the copy you received. We'll correct that where
27 it's not highlighted.

28 THE COURT: Okay. Thank you.

1 Mr. King, is it in order?

2 MR. KING: On the special verdict form,
3 we -- I saw there was added a question about waiver
4 on the breach of fiduciary duty, which is -- makes
5 sense because there's an instruction about it. But
6 there was also added a question about waiver on the
7 fraud claim, and I don't think waiver applies there.
8 That was Question 12 on page 5.

9 THE COURT: Okay. If somebody has another
10 copy, I am buried in paper here and I must have
11 misplaced --

12 Robin, did I give it to you?

13 THE BAILIFF: From Mr. King.

14 THE COURT: Okay. Thank you. Okay. This
15 is a different one. I need the -- I'll need the one
16 with the heading, the one that was handed to me this
17 morning. Thank you.

18 So defense position, Mr. McCloskey,
19 Mr. Sullivan?

20 MR. MCCLOSKEY: I'm thinking it through,
21 Your Honor.

22 THE COURT: Okay. Take your time.

23 MR. MCCLOSKEY: I think Mr. King is right.
24 I think waiver ought to come out for the fraud, and
25 we will do that.

26 THE COURT: Okay. And this has gone -- I
27 can tell you from our discussion last night and this
28 morning, I appreciate counsel's candor and thinking

1 and -- because what you're doing is helping me make
2 the right decision, and that's the highest form of
3 advocacy in my view. And so -- and Mr. King has
4 done that and Mr. Sullivan has done that and
5 Mr. Aveni. I commend all of you.

6 So can we make that modification?

7 MR. MCCLOSKEY: And we will remap the
8 numbers as well, Your Honor.

9 THE COURT: And, Mr. King, otherwise, is
10 the verdict form fine?

11 MR. KING: It is.

12 THE COURT: And, Mr. Sullivan, the verdict
13 form is fine?

14 MR. SULLIVAN: Yes, Your Honor.

15 THE COURT: Mr. McCloskey, the verdict form
16 is fine?

17 MR. MCCLOSKEY: Yes, Your Honor.

18 THE COURT: As we're going to modify.

19 MR. MCCLOSKEY: As modified.

20 THE COURT: All right. Thank you.

21 Anything else before -- I would like to give you a
22 chance to take a short break before we commence
23 argument, and we'll see what happens with the lunch
24 hour. We'll take a break after your -- the estimate
25 is an hour. These are not time limits. I'm just
26 trying to get the lay of the land so we can actually
27 get the case to the jury. As I say, I need about
28 330 on to instruct. And so we'll see where we are.

1 MR. SULLIVAN: I'll be done by then. I
2 don't know about these guys.

3 MR. MCCLOSKEY: We'll get you there,
4 Your Honor.

5 THE COURT: Okay. Thank you.

6 MR. KING: There's one thing before --

7 THE COURT: Yes.

8 MR. KING: And we talked about it briefly
9 last night. And I understand the Court had a
10 different view on it than I did, but I want to get
11 it on the record, and that is the order of the
12 argument. You know, we have a cross-complaint. If
13 we were a plaintiff, we would have -- we would go
14 first and we would have a second. And I know that
15 this is a complex case and multiple parties.

16 My concern is this: Is that -- we have one
17 side and we another side, and Side A goes first and
18 then Side B and then Side A and then Side A. And
19 it's going to be a one-two punch without any chance
20 of rebuttal. I'm not asking for any additional
21 time. I'm just -- anything -- any amount that I
22 have to reserve to rebut arguments on -- rebut
23 arguments that follow my closing argument, that's
24 what I request.

25 THE COURT: Do you have an estimate of
26 about how long that will be? I know you haven't
27 heard the argument, but you can totally anticipate
28 it.

1 MR. KING: Fifteen minutes.

2 MR. SULLIVAN: I imagine, Your Honor, if I
3 have any rebuttal, it will be minimal and it will
4 not revoke Mr. McCloskey's issues. So to the extent
5 that's the case, this is just a typical plaintiff/
6 defendant/cross-complainant/cross-complainant/
7 defendant situation that doesn't warrant a further
8 tennis match. And to the extent that any further
9 argument would be granted, I ask that it be limited
10 to only issues raised by Mr. McCloskey in his
11 closing.

12 THE COURT: Mr. McCloskey?

13 MR. MCCLOSKEY: I agree with Mr. Sullivan.
14 I think that's proper in terms of the order.
15 Cross-complainants aren't entitled to rebuttal. So
16 if Mr. King is looking to rebut, I guess he's
17 rebutting as a cross-complainant.

18 THE COURT: That's what he is requesting.
19 Correct?

20 MR. KING: Correct.

21 MR. MCCLOSKEY: I don't think they're
22 entitled to that, Your Honor.

23 THE COURT: And I think you're correct. I
24 guess in thinking about this further from our
25 discussion last night, I was thinking there has been
26 a dispute. There's -- when we started this case,
27 there was four separate lawsuits. And now there's
28 three, one to be tried with the Court.

1 And we had a discussion and we talked about
2 architecture, and I think that led to one juror
3 being confused as to why Mr. McCloskey and Mr. Aveni
4 are sitting at the counsel table where it says
5 "Plaintiff," which is visible to her.

6 And -- so I guess I'm wondering. I can
7 tell you what I've done in the past, and it's been
8 by stipulation. I have allowed two rebuttals; in
9 other words, complaint and cross-complaint. And
10 complaint gets rebuttal obviously, and then
11 cross-complaint gets rebuttal. But that was done by
12 stipulation because everybody agreed.

13 And here we had a little discussion -- and
14 that's probably being diplomatic and understating --
15 who's plaintiff and who goes first, et cetera,
16 et cetera. So I guess I'm wondering about the
17 fairness and equity of if Mr. King is allowed to
18 rebut, that it be very limited in time and that it
19 be very limited on issues. In other words, he's not
20 going to be able to talk about defending -- that
21 would be inappropriate -- defending the Storix
22 complaint. Can't go there.

23 MR. KING: That's right.

24 THE COURT: Implication, throwing things
25 out to allow the jury to infer, nothing about Storix
26 complaint.

27 But I'm wondering, in light of our
28 discussion, about the equity, the fairness.

1 Everybody -- this is everyone's one shot at the
2 trial Court level to right the wrong, and I'm
3 wondering about giving everybody their full shot.

4 MR. SULLIVAN: Sure. So when our -- we
5 initially had that discussion, the landscape was
6 different. We had Mr. Johnson as a plaintiff in the
7 assault-and-battery and false imprisonment lawsuit.

8 THE COURT: And that's true.

9 MR. SULLIVAN: And we also had the --
10 Johnson and Sassi as plaintiffs in the derivative
11 suit, which has been bifurcated to a bench trial.
12 So to the extent he's a plaintiff and those equities
13 favored him potentially sitting at Plaintiff's
14 table, reordering the proof those issues have either
15 been resolved by the settlement or going be to
16 addressed at the bench trial, which he'll be the
17 plaintiff and allowed, I would imagine, opening and
18 rebuttal on closing.

19 This case now is solely the case Storix
20 instituted by filing against Mr. Johnson and Janstor
21 in his cross-complaint. There are no equities that
22 favor reordering of proof or changing the normal
23 rules that apply. We've addressed those, and those
24 issues should be handled at bench trial.

25 THE COURT: And that's all correct. But if
26 it was allowed, it would be strictly, as I said; in
27 other words, it's purely to allow rebuttal to
28 Mr. McCloskey's argument defending the

1 cross-complaint, and it cannot -- I recognize
2 there's a lot of overlap, but it's going to be very
3 narrow.

4 MR. SULLIVAN: And if I -- if I chose not
5 to do a rebuttal, would that mean the case ends
6 after Mr. McCloskey, or would Mr. King be allowed
7 further rebuttal at that point? In other words --

8 THE COURT: So you're offering to waive
9 your rebuttal so he doesn't get one?

10 MR. SULLIVAN: Potentially.

11 MR. MCCLOSKEY: Your Honor, what would
12 happen if the cross-complaint was back against
13 Storix? Why is it that there's any difference in
14 terms of treatment just because they decided to
15 cross-complain against five individuals? It's still
16 a cross-complaint.

17 And if you're not going to grant rebuttal
18 in that complaint that theoretically,
19 hypothetically, would have a cross-complaint against
20 Storix, there ought to be no difference in how it
21 treated just because they decided to bring its
22 officers and directors.

23 THE COURT: Well, but they're different
24 parties.

25 MR. MCCLOSKEY: Sure. And I understand
26 that, Your Honor, but it's still a cross-complaint
27 that they had filed. Had they filed it against
28 Storix, they're not going to get a rebuttal. It's

1 still a cross-complaint. And the only basis, the
2 only standing that they can come in and present that
3 would accommodate the rebuttal is as a
4 cross-complaint. Who they're suing should not make
5 any difference.

6 THE COURT: Mr. King?

7 MR. KING: It makes a huge difference. In
8 a two-party case, a cross-complaint has a chance to
9 rebut the arguments made by the other party in their
10 first argument. So they have got -- they hear --
11 they hear what they make, and they get to rebut
12 those arguments when they make it. I'm going to be
13 making my argument without hearing anything from
14 Mr. McCloskey.

15 THE COURT: You have a pretty good idea, I
16 suppose, about what he's going to say.

17 MR. KING: You know, I do, but one of
18 the -- the thing with trials is you can never ever
19 be sure about anything.

20 THE COURT: On that point, Mr. McCloskey?
21 In other words, you talked about Storix. Let's say
22 the cross-complaint includes Storix. Now he's
23 saying he never gets to hear in that standard
24 situation. That's why we have that rule.
25 Cross-complainant doesn't get rebuttal because he's
26 going to be hearing it, in theory, on Storix's
27 opening.

28 MR. MCCLOSKEY: I --

1 THE COURT: He's never going to hear from
2 you. So if you have the smoking gun or if you have
3 something that is going to knock the jury's socks
4 off, he just has to sit, when, in effect, on his
5 case, he's plaintiff.

6 MR. MCCLOSKEY: And I understand that. And
7 if that existed in this case, it may be different.
8 But like you said, he knows what we're going to talk
9 about, Number 1.

10 Number 2, in a different case in terms of a
11 cross-complaint that brings in additional parties,
12 if this Court would authorize the
13 cross-complainant -- i.e., Defendant -- to rebut the
14 cross-defendants' arguments, then that's what this
15 Court's going to do. And I'm not quarreling with
16 that if that's what the intent is. I'm just saying
17 he's not entitled to it.

18 THE COURT: And you are correct. I mean --
19 And the way the discussion ended last
20 night, Mr. King, was I asked -- after denying the
21 request, I asked if you -- I allowed you to present
22 me authority, as opposed to weaving from -- asking
23 me to weave from whole cloth, Judge, do what you
24 think is fair. And that's what judges do, but
25 judges like to have authority, as opposed to just
26 kind of going off and doing our own thing.

27 MR. KING: So I agree there's no
28 entitlement to it. The question is whether or not

1 the Court has authority to manage this courtroom,
2 manage the trial, manage the order of evidence and
3 argument. And I think the Court has pretty broad
4 authority, and I think it encompasses the authority
5 to do this, especially in light of the circumstance
6 that the -- even though there are two different
7 parties, there are two different lawyers
8 representing two different groups of parties, they
9 are, in substance, in reality, on one team. And
10 this is a matter of fairness. I think it makes
11 sense that we have some opportunity to rebut
12 Mr. McCloskey.

13 MR. MCCLOSKEY: If we were on one team,
14 Your Honor, that would augurate against his
15 argument. We are unified. We are a party
16 plaintiff, according to Mr. King. In that case,
17 he's not entitled to rebuttal.

18 MR. KING: That would be true if they were
19 really unified and they were just doing one -- if
20 they were doing one argument together, and then I
21 had my argument and then they had one rebuttal
22 together, I wouldn't disagree.

23 But they're -- it's a team, but it's -- you
24 know, it's -- the way that gets treated, because we
25 recognize the corporation is a separate entity, it's
26 separate. So they get two lawyers. They get to
27 argue twice on that.

28 My point is just that it's clear that --

1 and if Mr. Sullivan argues and puts up clips of
2 Mr. McCloskey deposing Mr. Johnson about a bunch of
3 things on Janstor, they use that. They coordinate
4 and combine on what they asked at deposition and
5 what they present and -- and vice versa, and they
6 can do that on argument to and it can -- it can
7 prejudice our ability to respond to things.

8 THE COURT: There's a double-edged sword
9 aspect to your argument, Mr. McCloskey, because if
10 it is true that you and Mr. Sullivan are united --
11 clearly, you represent different clients -- then, in
12 effect, it's not just two arguments. It's three.

13 MR. MCCLOSKEY: I agree with you.

14 THE COURT: Three to one.

15 MR. MCCLOSKEY: I agree with that. But
16 this is -- this is, in fact, a formulation of
17 Mr. King's thought process. I'm not agreeing. This
18 was Mr. King's thought. Well, wait a minute these
19 guys get to gang up on me, so they get three versus
20 one. That's not the case. I'm just taking his
21 hypothetical. I don't think that's the case at all,
22 and I think he just said it wasn't the case.

23 So that we are -- look at this. Let's say
24 any other case you got a plaintiff that sues a
25 defendant. Defendant turns around and sues folks
26 who are not the plaintiff. Does that defendant, as
27 a cross-complainant suing the folks who are not the
28 plaintiff, then get a right to rebut the

1 cross-defendants argument? Not so, Your Honor.

2 THE COURT: All right. I appreciate
3 everybody's sentiment. My concern is, as a
4 practical matter, it's now 10:20. I wanted to start
5 at 10:00. And if I allow it, that's five arguments.
6 We are not going to finish, and I don't want to
7 break argument from doing two or three and then
8 coming back for four and five -- or five, even
9 worse, next week, as in Tuesday. That's really not
10 fair. It's not appropriate.

11 And I don't want to abuse the jury. We're
12 abusing them now by having them sit out in that
13 hall. But I don't want to abuse the jury further by
14 arguing until 9 o'clock tonight. Five arguments is
15 a lot.

16 MR. MCCLOSKEY: And I only get one of them,
17 Your Honor.

18 THE COURT: Pardon?

19 MR. MCCLOSKEY: And I only get one of them.

20 MR. KING: I'm happy to limit my time,
21 total amount of time. So if I take it all up on my
22 first one, I don't get it.

23 THE COURT: Meaning?

24 MR. KING: If I --

25 THE COURT: And the amount of time is how
26 much?

27 MR. KING: I think I said last night no
28 more than an hour and a half, but I know I have to

1 cut that down if we're going to get it done today.

2 THE COURT: Well, I think probably you all
3 are if -- even if we do four, if I'm going to
4 instruct. Okay.

5 If you're agreeable -- it wouldn't be fair
6 to impose time limits on you and not on them. And
7 I've said from the get-go I'm not going to time
8 limit the arguments, but I'm very concerned about
9 the practicality. It's not like they're coming back
10 tomorrow morning and can sleep on it. They're going
11 to sleep on it for a long time, many days. And
12 that's just not, in my view, fair at all to anybody.

13 So I suppose this, Mr. King. If you're
14 willing to -- if I allow it, meaning rebuttal on the
15 cross-complaint only -- in other words, you're
16 rebutting McCloskey, not Sullivan --

17 MR. KING: Yes.

18 THE COURT: -- to manage you're time so
19 that opening and -- opening and closing, yes, on a
20 rebuttal is no more than a hour and a half. But I'm
21 not going to say that. I'm not going to impose a
22 time limit. So what I'm doing is I'm asking you, as
23 an officer of the Court, in good faith if you're
24 willing to do that.

25 MR. KING: I'm willing to do that.

26 THE COURT: And I'm not going to do that
27 for them, because I've told you this. And what
28 I'm -- what -- I'm not going to put time limits on

1 you, but I'm asking you to comply with what you said
2 you would do. And I -- without me even asking, I
3 would expect that you would do what you were going
4 to say you were going to do.

5 MR. KING: That's correct.

6 THE COURT: So that probably is an
7 unnecessary conversation, but I'm thinking this
8 through. And one aspect -- and I want to get going
9 is -- another factor, and it may not be a huge
10 factor, is that these are consolidated cases. So
11 it's a little bit different than a standard
12 complaint and cross-complainant.

13 MR. SULLIVAN: Except we don't have any
14 consolidated case.

15 MR. MCCLOSKEY: It's not a consolidated
16 case anymore. This is just a complaint.

17 THE COURT: And you are correct. I stand
18 corrected. I was thinking of the cross-complaint as
19 a separate lawsuit. It's not, correct?

20 MR. SULLIVAN: Correct.

21 MR. KING: That's correct.

22 THE COURT: Nevertheless, I'm thinking
23 under all the circumstances here -- and I'm
24 recalling our discussion and motions with regard to
25 this -- I think, in fairness, I'm going to allow it
26 over objection of Mr. Sullivan and Mr. McCloskey.
27 But under the circumstances, I'm going to allow it,
28 meaning a rebuttal on the cross-complaint only.

1 Okay. Let's do this. I would ask everyone
2 to be mindful of what I talked about. But again,
3 there's no time limits on anybody. But if I'm going
4 to instruct, I need to really have the case, I
5 suppose, at -- the very last moment would be 3:45.
6 And we'll try to do an abbreviated lunch.

7 Okay. Let's take five minutes and we'll
8 come back. Now, the other thing, counsel, is we
9 don't have the final verdict form done yet. I know
10 it's in route. Is everybody okay to go forward with
11 the argument without it? Is everybody okay to go
12 forward without it?

13 MR. MCCLOSKEY: I am, Your Honor.

14 THE COURT: Mr. Sullivan?

15 MR. SULLIVAN: Yes, Your Honor.

16 THE COURT: Is that fine, Mr. King?

17 MR. KING: What's that?

18 THE COURT: Not going -- going forward and
19 arguing without the final verdict form in place. In
20 other words, it's being modified.

21 MR. KING: Yes, I'm fine with that.

22 THE COURT: Okay. Thank you. We'll start
23 in about four minutes. Thanks.

24 (Brief recess.)

25 (Whereupon the jurors enter the courtroom.)

26 THE COURT: Good morning, ladies and
27 gentlemen. Thank you very much for your patience.
28 I know it's long after 10 o'clock. But the good

1 news is we've done everything that we need to do
2 outside of your presence last night and this
3 morning, and so that's completed and now is the time
4 for argument.

5 You've heard all the evidence. It's now
6 time to hear argument of counsel. You will recall
7 that what counsel say is not evidence. Each counsel
8 will outline for you his interpretation as to what
9 the evidence shows. First, Plaintiff's counsel will
10 give a closing argument, followed by defense
11 counsel's closing argument, followed by
12 Cross-Defendants's closing argument and then two
13 rebuttals, one by plaintiff, one by defendant.

14 I will give you the concluding instructions
15 on the law which applies to the facts of this case
16 after argument. I will ask the attorneys to try to
17 avoid interrupting each other during argument. If
18 any of the attorneys misstate the evidence or the
19 law, you will rely on the evidence as presented as
20 you recall it and the law as stated by the judge.

21 Mr. Sullivan, closing argument on behalf
22 Plaintiff, Storix.

23 MR. SULLIVAN: Thank you, Your Honor.

24 May it please the Court, counsel, ladies
25 and gentlemen of the jury, at the very beginning of
26 this case, I told you this was a case about loyalty.
27 I told you that this was going to be a complex case
28 with lots of evidence, lots of facts. It's taken us

1 three weeks to get here. And I told you my part
2 would be very simple. I would prove to you that
3 Defendant Anthony Johnson was pursuing his own
4 interests while the director of Storix and owing it
5 a duty of loyalty.

6 Now, the answer to that is obvious from
7 what we've seen. It's grounded in Mr. Johnson's own
8 words, his own conduct. After being refused control
9 of Storix upon his return, he set out to destroy --
10 he set out to destroy it by whatever means
11 necessary, all the while acting with only his own
12 self-interest in mind. Defendant Anthony Johnson
13 breached the fiduciary duties he owed to Storix as
14 company director.

15 So what happened? We've heard a lot of
16 evidence, seen a lot of witnesses. What's the story
17 we are to believe? I told you at the very beginning
18 I would show you a lot of evidence of precisely what
19 Mr. Johnson himself said and did in breaching the
20 duties he owed Storix. Did I live up to my promise?

21 I also said that I knew what Mr. Johnson
22 had said and done in the past and that he would come
23 and testify before you. But I had no idea what he
24 was going to say on the stand in this trial. Now
25 we've all seen it. We've seen what he said in the
26 past, and we heard him testify in this trial.

27 Did his answers always match up with what
28 he had said and done in the past? Did we learn the

1 truth? Truth is not a relative concept. It doesn't
2 matter what context you find yourself in. It's
3 based on objective facts, the evidence.

4 Did Mr. Johnson testify truthfully? Was he
5 credible? Did we see any answers changing based on
6 the circumstances he found himself in, based on his
7 present needs of his case? Was he testifying as
8 Mr. Johnson? Berg? Milton? I'm not sure.

9 It's your role as the jury to decide what
10 to believe, who to find credible. In making the
11 decision, the Court has instructed you what you can
12 consider. This includes how well a witness
13 remembered the events they're testifying to. How
14 did the witness look on the stand, act, or speak
15 while testifying? Did that witness have any reason
16 to tell something other than the truth? What was
17 that witness' attitude like when testifying?

18 In assessing credibility, you can believe
19 all, some, or none of a witness' testimony. Now,
20 Storix's claim against Mr. Johnson is for breach of
21 fiduciary duty. As the plaintiff, Storix carries
22 the burden of proving that claim. Breach of duty of
23 loyalty requires proving that a corporate director
24 owing a duty of loyalty knowingly acts against
25 Storix's interest and Storix did not consent, that
26 Storix was harmed, and that Defendant's conduct was
27 a substantial factor in causing that harm.

28 It's also a breach of duty of

1 confidentiality. Did the defendant possess
2 information known to belong to Storix's confidential
3 information and use that to his benefit? Did Storix
4 consent to that? Was Storix harmed? And did those
5 acts constitute substantial factor in causing that
6 harm?

7 You'll be instructed on what the burden is
8 in proving a claim. In civil cases like this, it's
9 by a preponderance of the evidence. Essentially,
10 that boils down to more likely than not. Now, did
11 the evidence we saw at trial prove to you each of
12 these elements of Storix's cause of action?

13 We line up the facts on a timeline. We can
14 recall the critical event in this case,
15 Mr. Johnson's election to the board of directors.
16 When we go back even further, we can see origins of
17 his plans that he implemented after he became a
18 director. So let's take a quick trip after some of
19 the events we learned about in this trial.

20 May 2014, Mr. Johnson resigned. He was
21 unable to continue working at Storix. He felt he
22 was not appreciated enough. We saw how his
23 resignation letter was fairly cordial at the time.
24 He was disappointed, but not the level of anger we
25 saw later on.

26 Immediately, you see responses from his
27 coworkers. Mr. Huffman responds the same day, a few
28 hours later, expresses regret that Mr. Johnson feels

1 he has to leave. Mr. Turner, likewise, responds to
2 Mr. Johnson's resignation, expressing regret that
3 Mr. Johnson decided to leave. He tells him how
4 important he is to the company. He tells him, We
5 want you here.

6 But Mr. Johnson is told that he needs to
7 find a way to work well with others, be part of the
8 team. That's not the groveling that Mr. Johnson
9 wanted to hear. He did not feel part of a team
10 because he was used to being the dictator. The guys
11 at Storix did not beg him hard enough to return.

12 He sends a follow-up e-mail late May.
13 Again, Mr. Huffman responds. Mr. Altamirano, sales
14 and marketing, worked with Mr. Johnson for years,
15 not one of the type of guys that had issues that led
16 to Mr. Johnson's resignation. He attempts to
17 intervene and deal with Mr. Johnson.

18 Now, we've heard conflicting evidence on
19 what happened in those discussions. Did Mr. Johnson
20 come hat in hand and say, "I'm sorry. I want to
21 come back, no conditions attached"? Mr. Altamirano
22 had a different story. There were always conditions
23 attached, and it required removal of Mr. Huffman and
24 Mr. Turner.

25 July 2014, things are not going well for
26 Mr. Johnson. He hasn't found a way to get back
27 control of Storix. Nobody is kneeling to his
28 demands. So what does he do? He approaches the one

1 person who might have a bigger ax to grind against
2 Mr. Huffman than himself, Ms. Sassi. A friendship
3 is sparked early on.

4 Within days Mr. Johnson -- or at that time,
5 he writes to Ms. Sassi, "I can start a well-funded
6 and more professionally staffed company. I feel bad
7 for the current shareholders, but they bit the hand
8 that fed them, refused to talk. I'm taking it all
9 back now." The plan starts forming in his head.

10 Days later, he sends a notice e-mail to
11 Storix. He tells Storix, "Do whatever you want with
12 Storix, but you'll do it without my software. I no
13 longer feel bound to any former promises." He's
14 telling him it's his way or the highway. And as
15 promised, days later, he sues Storix for copyright
16 infringement.

17 Now, as that case progressed and litigation
18 ensued, Ms. Sassi and Mr. Johnson formed a bond,
19 became besties. He e-mails her about six months
20 later a potential letter to Storix. What does he
21 tell her? In that e-mail exchange, Ms. Sassi first
22 warns him, "Be careful too. They may be your
23 competitors and you might be giving them information
24 to compete against you."

25 Mr. Johnson, "To tell the truth, I'm about
26 50-50 as far as whether it's best for me to return
27 or start a new business. In one case, I get back to
28 the business I built. And in the other, I can get

1 better people I can now afford to hire with
2 100 percent of the stock. I really don't care."

3 Now, this is about three weeks before the
4 infamous February 2015 meeting. We saw it drawn on
5 the board. We've heard so much about it. So you
6 get to assume a fiduciary role. So why is this
7 important? Mr. Johnson is revealing to his best
8 friend his intent, his plan. It's there in black
9 and white.

10 Here's what he had to say about this at his
11 deposition November of 2017, "And you were 50-50,
12 you said, 50 percent, perhaps, waiting for Storix to
13 fail or something along those lines, right?"

14 "Well, maybe I mischaracterized waiting for
15 Storix to fail. I know why I was under the
16 understanding that Storix was already at this point
17 in financial trouble. They stopped making
18 shareholder distributions and haven't made any
19 since. And they have been in debt ever since, which
20 is what I anticipated would happen. I didn't
21 anticipate, given the state of the company, even at
22 the early stages, that they would even make it to
23 trial before being dissolved."

24 He expected Storix to be dissolved. He
25 wanted to be free and clear of Storix so he could
26 own 100 percent of the stock of a new company and
27 not be interfered with by anybody else. No former
28 promises would interfere with him moving forward.

1 With that company, Storix did not fail fast
2 enough, clearing the way for him and his new plan.
3 When he was unable to regain control of his own
4 product, SB Admin, what did he do? He sought other
5 ways to hurry its demise.

6 January 23rd, 2015, Mr. Johnson e-mails
7 Mr. Turner, Mr. Altamirano, and Mr. Kinney, "Final,
8 final thoughts." What did he say? "The fact is I'm
9 almost 50 and have no intention of starting all over
10 now. I can start a new company, something that
11 actually excites me, but I can't start over with a
12 new product. That is why I've been working
13 feverishly on the software for the last eight months
14 since I left you. For a while, it was intended to
15 give to Storix at no cost, but that shipped sailed.
16 One way or the other, it will be on the market
17 soon."

18 So what is Storix left to think at this
19 point? They're in the midst of contentious
20 litigation with Mr. Johnson. Mr. Johnson is telling
21 them one way or another he will have a product on
22 the market that is a derivative of the only product
23 they sell.

24 Three weeks later, what happens? The
25 infamous February 12th, 2015, board meeting. We've
26 all heard about the shareholder meeting. This is
27 the one with all my fictional colleagues that were
28 there. I'm still waiting to meet them.

1 Now, how many versions of what happened at
2 that meeting have we heard from the defense table?
3 We heard one from Ms. Sassi, one from Mr. Johnson,
4 and yesterday, in a late breaking surprise, a new
5 one from Mr. Eastman.

6 In any event, regardless of who's on first
7 or what's on second or whose story we believe, that
8 result -- that election resulted in Mr. Johnson's
9 election to the board of directors and,
10 consequently, a duty of loyalty. He and Ms. Sassi
11 assumed fiduciary duties to Storix, Inc., to look
12 out for the company's best interests. That was
13 their choice in pooling their votes to elect
14 themselves to the board of directors.

15 As part of the fiduciary duties,
16 Mr. Johnson owed a duty to remain loyal to Storix
17 and to maintain the company's confidences. Now,
18 Storix, it assumed, despite all that had gone on up
19 to that point, to abide by those new lease and
20 duties. After all, he chose to become a board
21 member. They didn't force him on the board. He
22 used his own shares to put them on that board.

23 Yet what is the first thing he did after
24 being elected to the board of directors? Texts his
25 good friend Ms. Sassi that afternoon, [as read] "I'm
26 going to finally catch up on my drinking tomorrow --
27 my drinking. Tomorrow I'm applying for a business
28 license and acquiring a website. Well, if I sober

1 up enough."

2 Now, why would he be doing that if he just
3 joined Storix's board of directors? Well, that's
4 precisely what he did. The next day, we saw how he
5 hired LegalZoom to form a new corporation, Janstor
6 Technology. He's finally putting his plan into
7 action, the one he told everybody about before
8 becoming a director.

9 At the same time, he's forming Janstor. He
10 reserved two website domains, Janstor.com and
11 Janstor.net. You'll recall from his testimony that
12 he privately registered those so nobody would see
13 his name when they searched the ownership
14 information.

15 Within days of hiring LegalZoom, Janstor is
16 an active corporation with the Secretary of State.
17 I think you'll recall Mr. Walt, the corporate expert
18 that testified, and he testified Janstor was in
19 operation once the articles of incorporation were
20 filed with the Secretary of State.

21 Now, what was Janstor? What does that
22 mean? Mr. Johnson told us J, Johnson, a-n, Anthony,
23 s-t-o-r. Now, at trial, he told us perhaps that
24 meant "storage." In his deposition, he told me that
25 meant Storix software. Even in naming his new
26 company, Mr. Johnson was putting himself above
27 Storix.

28 We saw text messages from Ms. Sassi and

1 Mr. Johnson in the course of the copyright case
2 looking for the smoking gun. We hear that term in
3 a lot of cases. You might have heard it on TV.
4 Sometimes they talk about the bloody glove. Where's
5 the bloody glove? Where's the smoking gun? Well,
6 sometimes it's as simple as nine words in a text
7 message, "I've been working at getting Storix's new
8 competitor set up."

9 When he testified in court, he wanted us to
10 believe this was all an inside joke between he and
11 his good friend Ms. Sassi. Do you see any Emojicons
12 there laughing? I don't. You don't get a more
13 clear statement of fact than those nine words. He
14 told his best friend what he was doing.

15 A couple days later, he e-mails another
16 good friend, Jeff Harding, a softball buddy, the guy
17 he tried to get elected to Storix's board. What did
18 he tell Mr. Harding? While Mr. Harding [sic] is
19 venting about the state of affairs with his dispute
20 with Storix, Mr. Harding advises, "Take the money
21 and start another company. You can start another
22 company. You have more resources now than when you
23 started."

24 Mr. Johnson responds, "Always a
25 possibility, but a last resort. Would still have to
26 rewrite much of the current code and the entire
27 website and web interface for the product. But so
28 as not to waste any more time, depending on how this

1 goes, I recently acquired domain names, filed for a
2 new corporation, and rebranded the software under
3 the new name."

4 Mr. Johnson never says to his dear friend
5 Mr. Harding he is now a Storix director following
6 the duty of loyalty. He never says that as a result
7 of his new position that any plans to form a
8 potential competitor had to stop. Instead, he's
9 worried about wasting time.

10 Now, how is he wasting time? Is serving on
11 Storix's board of directors a waste of time? Was it
12 a waste of time to respect the duties he assumed?
13 Mr. Johnson now claims that this was a conversation
14 between he and a friend, much like those with
15 Ms. Sassi, which he never expected to have to defend
16 in court. But isn't that when people tell the
17 truth, when talking to close friends when they think
18 no one else is listening or reading what they're
19 writing?

20 He already said he continued to work
21 feverishly on the software, even before becoming a
22 director. This e-mail is in February 2015. Did he
23 change the behavior, working feverishly on the
24 software, now that he was a director of Storix?

25 Well, what did he do next? April 1st,
26 2015, about six weeks later, he files an application
27 for a port registration with IANA, all the -- issues
28 in registrations. This is six weeks after

1 presumably completing more feverish work on the
2 software.

3 And what does he say in his application?
4 "Development is complete for a new product to be
5 released around June of this year. This is a
6 derivative of a former product." At his deposition
7 and in court, he denies that was true. He now
8 claims development is not complete. He is being
9 dishonest IANA. The product was not ready for
10 release. He said he was trying to give a sense of
11 urgency to IANA to approve his application. He
12 claims he was lying then but telling us the truth
13 now. I don't know what to believe.

14 Now, he also tried to tell us in court that
15 the port registrations were no big deal, but he
16 testified at his deposition they're required for
17 that software to work. So what is the truth? What
18 he said when he was motivated to get what he wanted
19 or what he said when he was in court trying to
20 minimize the steps he had taken in violation of his
21 duties of loyalty?

22 He continued the application process with
23 IANA. We learned about Mr. Berg. What is the big
24 deal with using a fake persona to get what you want?
25 That was Mr. Johnson's question. His sister did it
26 too, so what's the big deal? He was using whatever
27 means necessary to accomplish what he wanted
28 regardless of if it required lying or using fake

1 people.

2 Ultimately, his application was approved.
3 I'm sorry. Here's the Berg e-mail. He references
4 Storix is using 5026 and 5027, but the app isn't
5 widely used. We heard from Storix's marketing and
6 sales people that that product was very marketable,
7 selling like gang busters. Mr. Johnson [sic]
8 ultimately approves the two ports June 8, 2015.

9 You recall Mr. Bergmark, the financial
10 expert. He testified that a website's domains and
11 ports can all constitute assets of a corporation
12 like Janstor. Mr. Walt had testified it would be
13 operating at the time of articles of incorporation.

14 By now, June 8th, several months after it
15 was formed, Janstor was operating and had assets.
16 You heard no contrary expert testimony on those
17 issues. Johnson himself represented to IANA the
18 software would be released in June. Here we are in
19 June. What happened next? He gets caught. Two
20 days later, Johnson is imposed in the copyright
21 action, and he was confronted with Janstor.

22 Ms. Sassi, she told us that everyone at
23 Storix knew about Janstor. What did Mr. Johnson say
24 about that? At his deposition in November of 2017,
25 "But you don't believe it was ever public where
26 somebody else --"

27 Answer, "It was never public and nobody
28 ever knew anything about it. Until Paul Tyrell

1 asked me what Janstor was, I don't think that the
2 word Janstor had ever been mentioned to anybody ever
3 before outside of, you know, assigning a port number
4 and registering with LegalZoom. I don't even think
5 Robin Sassi knew at that point."

6 Then Mr. Johnson tried to tell us that
7 Janstor is no big deal, because he'd already tried
8 to dissolve it by his deposition. He apparently
9 lost interest in it.

10 Two months, later Janstor is still an
11 active corporation. Storix is concerned based on
12 Mr. Johnson's own words that he's continued to
13 feverishly work on the software. You heard
14 testimony from Brian Bonert, seated in the back row
15 today, Mr. Altamirano, seated in the second row, the
16 sales guys at Storix, how detrimental to the company
17 the release of a competing product by Mr. Johnson
18 would be. Mr. Johnson himself testified he would be
19 able to shut Storix down if he started competing
20 within six months. So Storix filed a suit in August
21 of 2015.

22 Then what happens? A month later, an
23 application to dissolve Janstor is filed with the
24 California Secretary of State. Three days after
25 that, that application is approved. Janstor has
26 been dissolved.

27 What did Mr. Johnson say about how it would
28 look if he filed the dissolution papers after the

1 lawsuit was filed against him? Well, let's read it.
2 [As read] "I'm going to attach the cross-complaint
3 in the Janstor lawsuit and a few more exhibits, but
4 I wanted to read from it and I'll hand it -- and
5 I'll hand you paragraph 48 of it just to make sure
6 I'm reading correctly. Let me read it for the
7 record. Janstor Technology was dissolved sometime
8 in August 2015, having never operated, acquired any
9 assets, or making itself known to the public since
10 Johnson was no longer living in California. Did I
11 read that first sentence of paragraph 48?"

12 Apologies. I can't read the remainder.
13 There's a page missing. "I would probably have
14 given up the" -- well, we're missing the key part.
15 He said he was guilty and foolish, and that's the
16 big surprise. And that's what he did. He filed it
17 after he was sued. Did that make him look guilty
18 and foolish?

19 He now tells us that Janstor was all about
20 rebranding. It was all for Storix's benefit.
21 Really? Did he ever once present his plan to Storix
22 to rebrand as Janstor or did he hide in the shadows
23 and do everything he could to conceal his plan until
24 he was ready to launch; that is, until he got
25 caught?

26 Apparently, angry that he might have to
27 answer for his actions after being sued, how did he
28 respond? He sends what we've actually come to know

1 as the "Buckle up, boys" e-mail we've seen so many
2 times. He warned Storix, [as read] "Customers and
3 business partners are innocent bystanders too, and
4 I'd bet they'd all be interested in the story here.
5 Take some liberties of explaining a bit more than I
6 need to, and you can certain sue me. Ha-ha. You're
7 going to see this in an announcement board on every
8 message I can get to. Good luck finding another
9 job. Sure, get your lawyers to sue me. It worked
10 so well before."

11 Mr. Johnson was unhappy he could not
12 control Storix. He was furious his Janstor plans
13 were derailed, so he decided it was time to burn it
14 all down. Was this e-mail in any way going to
15 benefit Storix or its employees? I guess we're not
16 going to get cooperation from this. In short, no.

17 Clearly, making the threat wasn't enough.
18 He had to follow through. Johnson sends an
19 announcement e-mail to Storix customers just days
20 later. What does he tell them? "I must demand that
21 you cease further payment to Storix in relation to
22 the software and refrain from downloading any
23 further copies."

24 What does Storix do? Sells software. How
25 does it stay in business? Selling software. [As
26 read] "The security enhancements to the software
27 have been completed" -- he was referring to his
28 work -- "along with much more. Unfortunately, far

1 too much damage has been done to me personally and
2 financially to allow these greedy individuals to
3 profit from my work any longer. It pains me to
4 inform you that support for Storix SB Admin will
5 likely -- will very likely end when a ruling is made
6 on the copyright case at the end of the month."

7 Looking out for his own interests, his
8 work, his finances. Why did he send this? He told
9 us on the stand his attorney guaranteed him a win in
10 three weeks on a motion in the copyright case. What
11 did his attorney tell us? He's never guaranteed a
12 win in his life. He doesn't believe it's ethical
13 for attorneys do so. He thinks he's prohibited from
14 guaranteeing a witness. Again, what do you believe?

15 Now, did sending this e-mail satisfy his
16 need to keep threatening Storix? Absolutely not.
17 He was not done with his parade of threats.
18 Mr. Johnson sends an e-mail to Mr. Kinney about his
19 "Buckle up, boys" e-mail, realizing Mr. Kinney was
20 left out since he left the company.

21 You remember Mr. Kinney. He's the
22 peacemaker sitting in the front row there on the
23 left. He moved to Minnesota to try to avoid all of
24 this. He apparently didn't move far enough away.

25 What does Mr. Johnson tell Mr. Kinney? [As
26 read] "Below this e-mail, you'll find the e-mail I
27 sent to you, your co -- your conspirators, and some
28 of the employees at Storix. It is followed by the

1 e-mail I sent to a large number of customers
2 yesterday. Storix is today in a panic. Their
3 phones are ringing off the hook, and attorneys are
4 gathering. Ultimately, Procopio is notorious for
5 dropping it's clients" -- hold on. Excuse me.
6 "Unfortunately, Procopio is notorious for dropping
7 its clients as soon as they can pay their bills --
8 can't pay their bills. This will end Storix's
9 ability to bring in any more income from my work
10 that they just keep using to attack me."

11 He hoped Storix would lose its attorneys,
12 and he wanted to end Storix's ability to bring in
13 any more income. That was his expressly stated
14 goal. What did he testify to in court? He said he
15 designed that customer announcement e-mail to go to
16 spam folders. He wanted it to just go to one or two
17 contacts to try to prove a point to take him
18 seriously. Is that the store -- is that story in
19 any way believable in light of what he was telling
20 Mr. Kinney at the time?

21 December of 2015, the copyright verdict,
22 but not the one Mr. Johnson was guaranteed he would
23 get. He lost. He could not deal with losing. So
24 what did he do? He went back to his tried-and-true
25 practice issuing threats.

26 The next month, he e-mails Mr. Bonert, the
27 employee of sales and marketing at Storix. What
28 does he tell him? He said, [as read] "Brian, it's

1 important I talk to you, but best you keep quiet
2 about it for now if you want to save your job. I'm
3 contacting you to let you know that you and the
4 other innocent employees are about to lose your
5 jobs. Understand I've still been working on the
6 market -- on the software for two years now. I have
7 a marketable product and you don't. They tell you
8 they own the copyright, but they don't."

9 He continues, "The judge, after reading the
10 verdict, even looked at them as she referred to the
11 moral issues in the case. There will be a retrial
12 based on the way their unequally unethical attorneys
13 prejudiced the jury in such a blatant and obvious
14 way. I had to fire my own attorney for not
15 listening to me and acting on it as I saw it
16 unfolding. Storix has just been informed they have
17 another long, expensive battle ahead. Trust me
18 they're scared. They deserve to be."

19 He tells Mr. Bonert further, "There's no
20 reason you can't communicate with me, and no reason
21 you should to -- tell anyone else, especially
22 Manuel. Mr. Kinney ignored a subpoena to testify by
23 faking a move to Minnesota."

24 Good fake move, Mr. Kinney. Very
25 convincing.

26 "I take a chance e-mailing you only because
27 Huffman is probably keeping tabs, so delete this and
28 call me if you want to talk. But if you don't --

1 and I don't mean this as a threat -- I won't bother
2 trying to help the company anymore. I may lose a
3 valuable resource, but I will have my software."

4 How did Mr. Bonert take this e-mail? What
5 did he interpret this to be? You heard him on the
6 stand. When somebody tells you it's not a threat,
7 it's a threat. You also heard him say the
8 statements in this e-mail were disconnected from
9 reality. How on earth was this e-mail designed to
10 benefit Storix, the company to which Mr. Johnson
11 owed fiduciary duties?

12 When you step back and look at the history
13 of events, the story becomes very clear.
14 Mr. Johnson disregarded his duties from Storix from
15 the day he assumed them. He was solely focused on
16 his own interests no matter what the cost and by any
17 means necessary.

18 So what is the result of all of this? If
19 you recall, we heard from Mr. Brian Bergmark, the
20 expert source called on financial and accounting
21 issues. He explained this chart to us. He
22 explained that we could calculate the value of the
23 benefit that Mr. Johnson obtained from Storix and
24 that he used for his Janstor pursuit naming the
25 value of developing the cost of that software. That
26 value was an estimate of what it would take in labor
27 costs to create the software that Mr. Johnson took
28 and used for Janstor.

1 Now, how did Mr. Bergmark arrive at this
2 opinion? Funny enough, he largely relied on the
3 work of Mr. Johnson's own expert, Mr. Taylor, who
4 you also met in this case. Mr. Bergmark provided
5 two estimates for development costs. First, in the
6 left-hand column, a market rate salary of a software
7 programmer at \$96,000. That is the salary
8 Mr. Taylor opined was reasonable in the copyright
9 action.

10 When you take that salary and multiply it
11 by the amount of time Mr. Johnson said he worked on
12 the software at Storix, you arrive at a figure of
13 \$71,994. That's equivalent to the market rate of
14 what a company would have to pay a software
15 developer to work that amount of time.

16 You would add that to the \$1,163,000. Now,
17 what is that? That is the opinion Mr. Taylor
18 provided in the copyright case for the development
19 costs of SB Admin Version 7.2 copied forward in the
20 Version 8 -- 8.2 at the time. When you add that to
21 the work Mr. Johnson did in further developing the
22 software before he resigned, you get a combined cost
23 to develop the SB Admin software of \$1,234,994.

24 Now, Mr. Bergmark provided us with a second
25 opinion. The second column is based on a market
26 rate salary for a software developer of \$124,000.
27 Why do we have two figures? The second column is
28 the market rate software programmer salary

1 Mr. Taylor opined about in this case. So whether
2 you use Mr. Taylor's opinion from the copyright case
3 or his opinion from this case, we have different
4 figures.

5 You do the same calculation. Work --
6 amount of work done by Mr. Johnson times the market
7 rate hourly rate, before his resignation, he would
8 get a \$92,996 amount. You would again add that to
9 the estimated value of the labor cost to develop the
10 SB Admin at the time and arrive at \$1,255,996.

11 Now, I asked Mr. Taylor, Mr. Johnson's
12 expert, if he had any criticism of Mr. Bergmark's
13 work or opinions in this matter and he did not.
14 Mr. Bergmark's opinions remain unrebutted. Why are
15 these figures important? Because of the value of
16 the unfair head start Mr. Johnson obtained for
17 Storix in violating his fiduciary duties to the
18 company.

19 Essentially, he found himself on third base
20 acting as if he just hit a triple. Storix got that
21 hit, not him. The only reason he was ready to
22 release the Janstor product in June of 2015 is due
23 to his breach of a fiduciary duty to Storix by
24 taking advantage of Storix's property.

25 What other harm did Mr. Johnson cause with
26 his disloyal acts? When Mr. Bergmark was here, he
27 explained how he might value the cost associated
28 with employees' lost productivity in dealing with

1 the fallout from Mr. Johnson's conduct.

2 He said you could take the annual salary of
3 the employee, arrive at an estimated hourly rate by
4 dividing the estimated hours worked in a year, which
5 he estimated at 2,080, 52 weeks times 40 hours a
6 week, and you multiply that figure by the estimated
7 hours spent in addressing the conduct. That would
8 give you, essentially, the estimated value of the
9 employee time addressing that issue, and you add
10 those together to arrive at a total.

11 You heard from each of the employees at
12 Storix who had to deal with the customer fallout of
13 Mr. Johnson's conduct. Each of them told us about
14 their salary and about the estimated hours. For
15 Mr. King's benefit, I've done the math for you and
16 calculated the estimated hour -- or the estimated
17 hourly rate by dividing 2,080 and multiplying by the
18 estimated time they said they worked on this.

19 There are ranges for several of them,
20 estimating that their total value of employee time,
21 and then estimated total time value of between
22 \$2,570.86 and \$3,739.14. Thankfully, given their
23 extensive efforts, their relationships with their
24 customers, their technical know how, those numbers
25 are not much higher.

26 You heard from Mr. Altamirano that we may
27 never know the true extent of the impact of
28 Mr. Johnson's conduct. Some customers simply don't

1 renew their service contracts and they don't give a
2 reason why. We may never know who Mr. Johnson
3 actually even contacted. We heard he selected names
4 from a list of over 2,000 somewhere in the range of
5 50, but don't know. We heard from Mr. Altamirano
6 and Mr. Bonert they each had communications with 20
7 to 30 customers about this issue. How are we ever
8 going to know the full extent?

9 Well, here's one way we can measure it.
10 The harm has -- luckily for Storix, these numbers
11 aren't much larger. The harm that has been done has
12 been significant. You've seen the human toll this
13 dispute has had on the individuals at Storix, the
14 lies, the betrayal, the hostility, the threats, the
15 curse words.

16 When you retire to the jury room to
17 deliberate, I want you to look at the evidence.
18 Take some time. Consider how many of those things
19 came from the Storix side. Match that up to how
20 many things did you see come from Mr. Johnson.

21 In opening statement, I told you that you
22 would be charged with answering a verdict form that
23 boils down to a pretty simple idea: Whose interests
24 was Mr. Johnson pursuing while he was the director
25 of Storix? When you return to deliberate in the
26 room, one of your co-jurors might ask you, "So
27 what's the big deal?"

28 Why don't you go ahead and read aloud

1 "Buckle up, boys" e-mail. Go ahead and read aloud
2 the Brian Bonert e-mail. Go ahead and read aloud
3 the customer e-mail. Look through that Berg e-mail,
4 all those documents organizing Janstor Technology,
5 getting it ready to operate, the e-mails and texts
6 between Ms. Sassi and Mr. Johnson, and ask your
7 co-juror if any of this had been done to benefit
8 Storix. The answer's simple. It could not have
9 been.

10 It's been a long trial. I was remiss in
11 opening in not introducing and thanking
12 Ms. Alcutara (phonetic), our dutiful paralegal.
13 Without her in this trial, the presentation of the
14 evidence could not have happened. So we thank her
15 greatly.

16 Most importantly, I want to thank each and
17 every one of you for your jury service, your
18 commitment, and your attention. The jury process is
19 an institution that's a cornerstone of our society.
20 It's the part -- it's part of what makes this
21 country unique, the system of laws. We no longer
22 settle disputes in the streets. We settle them here
23 by presenting claims and evidence and asking you as
24 citizens and peers of the parties to decide a just
25 resolution. Storix is asking for you to reach a
26 just resolution in this case. Thank you for your
27 time.

28 THE COURT: May I see counsel over here for

1 a moment, please.

2 (Sidebar discussion held without the
3 reporter.)

4 THE COURT: Ladies and gentlemen, that was
5 a discussion about trying to accommodate everyone so
6 we're not interrupting argument but we're still
7 taking lunch. And I think, in light of our
8 discussion, what we'll do now -- I know it's early.
9 But take lunch now, abbreviate the lunch hour, and
10 come back at 12:30. It's 11:25 now. That's okay
11 with everybody? I know sometimes we have lunch
12 plans. Are you okay?

13 UNIDENTIFIED JUROR: Yeah.

14 THE COURT: Okay. So remember the
15 admonition. Have a great lunch. See you back at
16 12:30. Thank you.

17 (Whereupon the jurors exit the courtroom.)

18 THE COURT: We're outside the presence of
19 the jury, and I don't like talking about
20 instructions while we're in the middle of argument.
21 But I wanted you to answer some questions for me,
22 and I want to make sure that we're all on the same
23 page.

24 I've been comparing the different sets of
25 instructions I've gotten at different times with
26 what I have now, and there's some changes and I want
27 to make sure we're all on the same page. So bear
28 with me, please.

1 I want to make sure Special Number 3 was
2 withdrawn. I'm pretty sure it was. The invitation
3 of directors.

4 MR. MCCLOSKEY: It was, Your Honor. Thank
5 you.

6 THE COURT: All right. And then -- I'll do
7 this in numerical CACI order from here on. There's
8 not that many.

9 1605, I think the way we left that,
10 Mr. McCloskey, was you might be drafting a modified
11 privilege, which is a modified 215, modified 1605.
12 1605 was intentional misrepresentation. I was
13 saying that's not here, and I talked about the other
14 things about no one to claim privilege on the stand.
15 So I want to make sure that there's no
16 modification -- I don't have one -- or if you still
17 intend to do one.

18 MR. MCCLOSKEY: We withdraw that.

19 THE COURT: All right. Withdraw 1605?

20 MR. MCCLOSKEY: Yeah. It's IID instruction
21 Your Honor.

22 THE COURT: Okay. The 1605?

23 MR. MCCLOSKEY: Yes, Your Honor.

24 THE COURT: All right. It's withdrawn.

25 The next one is 1901. I do have now
26 Mr. King's modification. I want to make sure that
27 that's all right with everyone. Counsel probably
28 haven't had a chance to look at it, but in effect,

1 the blanks are filled in.

2 What did you do, Mr. King, on this one? It
3 looks like you took the first element and made A and
4 B and then deleted everything else.

5 MR. KING: Yeah. There were a bunch of
6 alternative ones about partial misrepresentation or
7 they prevented him from discovering, and that's not
8 what's going on here. It's -- I tried to track the
9 special verdict form as much as possible.

10 THE COURT: And, Mr. McCloskey, if you'd
11 like, so we can take a break -- are you okay?

12 MR. MCCLOSKEY: I don't know. I haven't
13 seen it.

14 THE COURT: Oh, I thought you were looking
15 at it.

16 MR. KING: I e-mailed it to Marty. Marty
17 sent it back.

18 MR. MCCLOSKEY: E-mailed it to Marty when?

19 MR. KING: Just when we were --

20 THE CLERK: I can print out copies of it.

21 THE COURT: Robin will print it out.

22 All right. Let's hold that thought so we can get
23 everyone on their way here.

24 The next one is 3900. I think what we were
25 going do there is we were going to blend. Instead
26 of me reading it twice, we were going to give one.
27 The one I have is Johnson only, so I think I need
28 one from Storix. I still have that, but I'm

1 wondering if we blended that to make a generic
2 claim. Did we do that? Can we do that?

3 MR. MCCLOSKEY: I don't know that we can.

4 THE COURT: I think that relates to Storix
5 and Johnson.

6 MR. SULLIVAN: Gotcha. We'll do it at
7 lunch.

8 THE COURT: Can you do that?

9 MR. SULLIVAN: Yes.

10 THE COURT: Okay. Thank you. Then the
11 next one is 4101. I had that at one time. Now I
12 don't. I want to make sure that we're all on the
13 same page as -- that it's correct that I don't have.
14 4101 is fair to use reasonable care, and that's in
15 the breach of fiduciary duty.

16 MR. KING: That's correct. That was
17 essentially ours and we have withdrawn that.

18 THE COURT: Okay. And everybody else
19 agreed?

20 MR. MCCLOSKEY: I think that's right,
21 Your Honor.

22 THE COURT: Okay. Thank you.

23 The last one is 4410. And in looking at
24 that more closely, I now understand the confusion.
25 And the confusion is that I said yes, let's use
26 CACI.

27 But, Mr. Sullivan, what you've got in there
28 is Johnson instead of Storix, and that's why it

1 reads in a confusing way. So when you get to the
2 second paragraph, it should read, "To decide the
3 amount of any unjust enrichment, first determine the
4 value of Storix's benefit that would not have been
5 achieved except for its misappropriation." And that
6 is the way I'm reading CACI.

7 Now, the way you've got it is Johnson in
8 both blanks, and the "his" in CACI may actually
9 refer to Johnson. So I think that's the reason for
10 the confusion. You've got Johnson in the first
11 bracket, and I think it should be Storix. Query
12 whether -- who should be in the second bracket. And
13 if you want to look at the book -- I know it's hard.
14 If you want to visualize this, you may.

15 MR. SULLIVAN: I have the electronic copy I
16 can look at at lunch, and I'll see if we can correct
17 that.

18 THE COURT: Okay. But I think that's -- I
19 think what you were concerned about is that would
20 not have been achieved except for the
21 misappropriation, and that is CACI language. The
22 reason it doesn't make sense is because you got
23 Johnson in there twice. And the question I have is:
24 Should Johnson -- I think it's Storix in the first
25 bracket, and there's a question whether it should be
26 Johnson in the second or Storix.

27 If I'm -- so but CACI says, on the second
28 bracket, "his, her, or its." If my grammar is

1 right, "his" would refer to the last, and the last
2 would be Storix instead of Johnson. But you're not
3 claiming Storix misappropriated.

4 MR. SULLIVAN: Correct.

5 THE COURT: So that's what is a little
6 confusing. So if you could look at that and modify
7 it, and that's all I had. Have a great lunch.
8 We'll see you back at 12:30. Thank you.

9 (Afternoon recess taken from 11:31 to 12:30.)

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1 SAN DIEGO, CALIFORNIA;
2 THURSDAY, FEBRUARY 15, 2018; 12:30 P.M.

3 * * *

4 THE COURT: Okay. We're outside the
5 presence of the jury. Modifications? There's
6 another one that needs to be modified, 3924,
7 punitive damages, that I didn't tell you about. But
8 I think what I'll do is make it generic myself.

9 MR. MCCLOSKEY: 3924.

10 THE COURT: I have two versions. It should
11 be generic.

12 MR. MCCLOSKEY: We took a shot at it,
13 Your Honor. Do you want to see it?

14 THE COURT: Oh? 3924?

15 MR. MCCLOSKEY: Well, we haven't given you
16 the newest since the lunch hour.

17 THE COURT: All right. Thank you.

18 MR. MCCLOSKEY: This is the newest set of
19 instructions and the special verdict form.

20 THE COURT: Oh, another set.

21 MR. MCCLOSKEY: Yeah. Well, that's what
22 happens when you get stuff at 11:30.

23 THE COURT: I can find the ones in here
24 that have been modified, right?

25 MR. MCCLOSKEY: The ones I just gave you
26 includes modifications, if that answers your
27 question.

28 THE COURT: Thank you.

1 MR. MCCLOSKEY: For example, 3924, we tried
2 to make generic, defendants and cross-complainants.

3 THE COURT: In here?

4 MR. MCCLOSKEY: In what I just gave you.

5 MR. SULLIVAN: And, Your Honor, once we
6 agree on the final form, are we still going to
7 discuss the order? because I think as it stands now,
8 we have, for instance, some of the damages
9 instructions prior to the liability instructions
10 based on CACI numbering.

11 And, for instance, unjust enrichments is in
12 the 4400 series, but it logically makes sense to be
13 with the damages questions. And in order to do
14 that, you have to have the fiduciary duty breach
15 explained first.

16 THE COURT: Okay. Let me ask Mr. King.
17 Have you had a chance to look at these?

18 MR. KING: Which ones are we talking about?

19 THE COURT: The modifications I requested,
20 including 4410.

21 MR. KING: I looked at 4410, and I have no
22 objection to those.

23 THE COURT: Now, that is contrary -- excuse
24 me. It's not contrary. So you're both in agreement
25 as to its language?

26 MR. SULLIVAN: I think so. I hope I
27 addressed the confusion.

28 THE COURT: No. I think that there was

1 confusion on my part based on defendant, plaintiff,
2 cross-complainant, cross-defendant.

3 MR. SULLIVAN: On 4410?

4 THE COURT: On 4410.

5 MR. SULLIVAN: Okay.

6 THE COURT: Because you've got Johnson in
7 there.

8 MR. SULLIVAN: 4410 on unjust enrichment
9 would be just against him.

10 THE COURT: Okay. Thank you. So where do
11 you want that?

12 MR. SULLIVAN: I think it would make sense
13 with the -- when we read the damages' instructions.
14 But since it refers to a breach of fiduciary duty, I
15 think we need to have the fiduciary duty instruction
16 first. My thought was if we do the instructions on
17 the claims and then get into the damages
18 instructions after the claims are read.

19 THE COURT: Okay. So is it agreed then
20 that I do the 4100 series, let's say, after the
21 conspiracy theories? Is that good?

22 MR. KING: I have no objection to that.

23 MR. MCCLOSKEY: No objection on this end,
24 Your Honor.

25 THE COURT: Okay. Then I'll do that, which
26 would include the 4410. Okay.

27 MR. KING: Okay.

28 THE COURT: And then are we okay on the

1 rest of them or have you had a chance to look at
2 them, Mr. King?

3 MR. MCCLOSKEY: We have an issue with 1901,
4 Your Honor, concealment.

5 THE COURT: Okay. Go ahead.

6 MR. MCCLOSKEY: 1(a) says,
7 Director/management defendants with controlling
8 shareholders of Storix. That's the first element to
9 establish a claim that Mr. Johnson must prove. That
10 implies that as controlling shareholders of Storix,
11 there's a duty to disclose. That's not the case.

12 THE COURT: Mr. King?

13 MR. KING: The -- we have an instruction in
14 there that says there's a fiduciary duty between
15 controlling shareholders and minority shareholders.
16 I don't think that's in dispute. Fiduciary duties
17 imply or include the duty to disclose material
18 facts.

19 THE COURT: So how should it be modified,
20 Mr. McCloskey?

21 MR. MCCLOSKEY: The director/management
22 defendants had a duty to disclose to Storix or a --
23 excuse me -- had a duty to disclose, I guess.

24 THE COURT: Well, You're talking about 1(a)
25 or 1(b)?

26 MR. MCCLOSKEY: 1(a). And then with 1(b),
27 the failure to disclose has to be certain material
28 facts.

1 MR. KING: So the modification for 1(a)
2 would strike the part that says, "were controlling
3 shareholders of Storix," and that -- and instead put
4 "that director/management defendants had a duty to
5 disclose"?

6 MR. MCCLOSKEY: To Mr. Johnson, right.

7 MR. KING: Got it.

8 MR. MCCLOSKEY: Yes.

9 THE COURT: Is that agreed?

10 MR. KING: Yes.

11 THE COURT: Agreed, Mr. Sullivan? I know
12 it's not your --

13 MR. SULLIVAN: Yeah.

14 THE COURT: Okay. Can we modify it that
15 way then?

16 MR. KING: Yes.

17 MR. MCCLOSKEY: And then 1(b) would be
18 intentionally failed to disclose material of --
19 certain material facts.

20 MR. KING: No objection to that one either.

21 THE COURT: Certain material?

22 MR. MCCLOSKEY: Yes, sir.

23 THE COURT: Okay. Thank you. Anything
24 else? Otherwise, it's okay?

25 MR. MCCLOSKEY: Otherwise, it's all right
26 with our defendants, Your Honor.

27 THE COURT: Okay. Then --

28 MR. SULLIVAN: 4102 I still need to

1 compress that down --

2 THE REPORTER: I can't hear you.

3 I'm sorry, Mr. King, can you just step
4 aside a little.

5 MR. SULLIVAN: Compress that down into two
6 instead of four categories. That's the duty of
7 loyalty.

8 THE COURT: Okay. And is that one okay?

9 MR. SULLIVAN: I'm working on that.

10 THE COURT: Oh, okay. All right. And all
11 the other ones have been modified as I requested,
12 Mr. McCloskey?

13 MR. MCCLOSKEY: Yes, Your Honor.

14 THE COURT: Okay. Then are we ready?

15 MR. KING: We are ready.

16 MR. MCCLOSKEY: We're ready, Your Honor.

17 (Whereupon the jurors enter the courtroom.)

18 THE COURT: Welcome back, ladies and
19 gentlemen. Thank you for your patience.

20 And, Mr. King, closing argument on behalf
21 of Mr. Johnson as a defendant and cross-complainant.

22 MR. KING: Good afternoon. We're here at
23 the end of the -- almost at the end of the road,
24 right? So you saw on Mr. Sullivan's argument --
25 Mr. Sullivan's a fine attorney. He did a very good
26 job piecing a lot of stuff together, putting
27 together a very good time line.

28 But the thing that struck me the most were

1 two numbers, \$2,570 on the low end, \$3,739 on the
2 high end. That's it. That's why we are here, not
3 because Anthony Johnson was angry, not because
4 Anthony Johnson was betrayed, not because Anthony
5 Johnson lost his temper in an e-mail. We're here
6 because they have got \$3,000 of damages. Three
7 weeks. Now, we've got part of our claim too, but
8 that's their claim against Mr. Johnson, \$3,500 of
9 damages.

10 You heard zero evidence of one client, of
11 one customer, who stopped paying Storix any money
12 because of anything Mr. Johnson did. They have
13 regular communication with their customers. If
14 there was even the slightest hint that any customer
15 said, "I'm not buying your product any more,"
16 because of something Mr. Johnson did, that would be
17 up there. They would be hammering it home every
18 second of this trial. But it's not there because it
19 doesn't exist.

20 What does exist? \$3,739. That's what --
21 that's what they want all of us to spend all this
22 time, years of litigation, that's what they want to
23 be awarded to Mr. Johnson. But you guys are smarter
24 than that. You know there's got to be something
25 more, and I think you can probably piece it together
26 because Mr. Walt testified to it yesterday.

27 If Anthony Johnson wins, if they can't show
28 any damages, okay, the company has to pay back

1 Mr. Johnson's defense costs defending against this
2 claim. So they just want you to award \$1, and that
3 way, Anthony Johnson doesn't get to have his
4 costs -- his attorney fees reimbursed. That's what
5 this is all about. That's why you're here. That's
6 why this -- that's why all this work was done on
7 that claim. That's the damage. If there was real
8 damage, you would hear about it. You would know.

9 Now, Mr. McCloskey talked a lot at the
10 beginning of jury selection about frivolous claims,
11 frivolous lawsuits. And usually, you think that
12 involves, "Oh, I slipped and hurt my back and it's a
13 soft-tissue injury and I can't really prove it, but,
14 you know, give me \$100,000." There's some like
15 those.

16 But there's another type of frivolous
17 lawsuit, one where there's not really any damage,
18 where it's a strategic reason to take up everyone's
19 time and to go through all this. That's what this
20 claim against Anthony Johnson is about. That is a
21 frivolous lawsuit. Do any of you here honestly
22 believe we would be here if the only damage that
23 existed was \$3,700? The question answers itself.

24 Now, I have to say you're going to make
25 some -- you're going to have to decide who you
26 believe. You're going to have to decide who's
27 telling the truth. You're going to have to decide
28 what sounds credible to you. One thing that I urge

1 you not to consider, because it's not relevant, is
2 the fact that I am here by myself with my clients.
3 Okay. I -- sometimes I may -- you know, I may be a
4 little bit flustered maybe because we only have a
5 few hands helping. Don't hold that against my
6 clients. Judge this on the facts.

7 I drew diagram of a conference room, and
8 they have made a lot about the number of Ls that I
9 added. Don't hold the number of Ls that I added to
10 the conference room table against my client. That
11 was, obviously, an exaggeration on my part. Don't
12 hold what I drew against my clients.

13 I want to talk again more about damage,
14 because other than the \$3,700 in damage, what is
15 their damage? And let's be fair. It's not just
16 3,700 they're asking for. They actually want -- I
17 think it's somewhere north of 1.3 million. Wow.
18 That's pretty serious. What's their basis for that?

19 Well, when I asked Mr. Bergmark on the
20 stand, you remember. "What does your number have to
21 do with damages in this case?"

22 "Well, I'm not sure. I was just called to
23 calculate the value of the software."

24 Okay. What does the value of software have
25 to do with Mr. -- damages Mr. Johnson caused Storix
26 when he was a director because he breached the
27 fiduciary duty? This was their theory is. Because
28 Mr. Johnson has a copy of the software he wrote, has

1 always had it for 20 years, okay, they want you to
2 make Mr. Johnson pay Storix for the value of the
3 software copy that he has. That's what they want.

4 Okay. I can understand why they want
5 money. What's the basis for that claim? This claim
6 is a breach of fiduciary duty. Mr. Johnson is a
7 director. Did Mr. Johnson -- did any of the things
8 Mr. Johnson did that he's alleged to have done as a
9 breach of fiduciary duty involve him taking
10 software? He had the software. He's always had the
11 software. Yes, Storix owns the copyright. We know
12 there was a trial on that. I'm not disputing that.
13 Authors keep copies of their work. That's just the
14 way it is.

15 Mr. Johnson didn't do anything in breach of
16 his fiduciary duty as a director to take or steal a
17 copy of Storix software. He had it. If -- it might
18 be different if Mr. Johnson, the day after becoming
19 a director, walked into Storix's office, took a copy
20 of the software that he didn't have any right to
21 have, took it home. Okay. Maybe that's different.
22 Maybe that's a breach of fiduciary duty as a
23 director that steals some value of property.

24 But what he did before he was a director is
25 not relevant. It's not part of this claim. What
26 Mr. Johnson did as a director, what he was alleged
27 to do -- and let's be clear about this. He's
28 alleged to have formed a corporation through

1 LegalZoom. Okay. That's something you can do as
2 quickly and easily as ordering something on Amazon.
3 He's alleged to have secured some ports, network
4 ports, and registered a domain name, not even have a
5 website, just registered a domain name.

6 No evidence that he sold anything. No
7 evidence that he's marketed anything. No evidence
8 that he's ever even done anything to advertise, hire
9 employees, or anything along those lines, and
10 there's a very good reason why and he explained it.

11 But there's a lot in this case, and so I
12 want to go over again why, why Janstor. What's the
13 whole point of this? Because their theory -- he's
14 competing the day after he becomes a director. He
15 gets his fiduciary duty and the first thing he does,
16 "I'm going to start up a competing company because
17 I've got this duty, and I'm going to breach it the
18 first day." That's their theory. It doesn't make
19 any sense.

20 So let's take a look at one of the e-mails
21 that is front and center of their case. This is
22 February 26, 2015, e-mail between -- two e-mails
23 between Mr. Johnson and his friend Jeffrey Harding.
24 So I'm on the other one, actually.

25 THE COURT: Oh, you're on -- ah.

26 MR. KING: Now, remember, Mr. Harding is
27 telling him -- okay. This is his friend. He's
28 saying, Hey, drop the litigation. Stop trying to --

1 stop trying to -- give up this dream that you're
2 going to come back to Storix and that you're going
3 to be -- you're going to be able to fix the
4 software, and you're going to be able to right the
5 ship at Storix. Mr. Harding is saying, Stop it.
6 Start a new company and just get away and compete
7 with them.

8 And Mr. Johnson says, Okay. Maybe, but
9 that's a last resort. And he goes on to say all the
10 reasons why he can't do it. Now, yes, he does say,
11 I did these minimal things. I filed domain names,
12 formed a corporation, rebranded the software. Okay.
13 Again, things you can do probably in the bathroom on
14 your phone nowadays.

15 But this -- this is one that they haven't
16 shown you, this paragraph. But it is -- it's really
17 the most revealing. Mr. Johnson then says, "The
18 biggest problem I face is that they claim copyrights
19 to the product or at least any derivatives since
20 Storix, Inc., was formed. That includes their claim
21 to all the work I did to add the network security
22 the last year before they ran me out. The updates
23 they said they didn't want and no one asked for that
24 caused this entire stink they now claim ownership
25 of. Even though they don't have the talent to
26 finish it and have already said they don't plan to
27 use it, they just don't want me using it either. If
28 I start a new company, I'm just asking them to come

1 after me, and I'll have much more to lose. This is
2 why I need the copyright issue settled before I can
3 move."

4 This is, honestly, everything you need to
5 know about Janstor. He was disputing the copyright.
6 He probably considered if I do win the copyright
7 lawsuit and these guys still won't listen to me,
8 maybe I'm going to need to have another company if
9 I'm -- if I'm determined to be the owner of the
10 software. Maybe if these guys keep spending so much
11 money that the company has to go bankrupt, maybe I'm
12 going to need to have, after this copyright trial,
13 another company so I can continue doing the thing
14 that I've done my whole life. So he says, "That's
15 why I need the copyright issue settled before I can
16 move."

17 Now, he, obviously, thought it was going to
18 be settled in his favor. It wasn't. As a result,
19 he didn't move. There's not a breach until you
20 move, until you compete. To say every time -- every
21 time you think, you contemplate, you intend to do
22 something that that's a breach of a fiduciary duty
23 you owed to your company as a director, it's not
24 true.

25 You have to harm them. You have to -- you
26 have to put some -- you -- there has to be some sort
27 of evidence that you really intend do this, that
28 this is more than just I'm -- you know, I'm just

1 kind of prepping to do this, you know, in the event
2 that I win and I have to -- you know, I can't use
3 Storix anymore.

4 He wanted to get this settled. He wanted
5 to get it resolved. Now, the copyright case get
6 resolved. If he was going to compete against
7 Storix -- and he testified to this -- he would have
8 done it. He would have resigned as a director. He
9 would have just said, No, whatever. I'm not -- I
10 don't want any part of this corporation anymore.
11 I'm not going to try to -- I don't care about it.
12 I'm going to do my own thing. He stayed as a
13 director this entire time. Why would someone who
14 wants to compete and destroy the company do that?
15 There's no intention to do that.

16 They make a lot of Johnson's angry e-mails.
17 And what can I say? He was angry. Can't say that
18 I'd use the same words, but I can tell you that I'd
19 probably feel as angry if I were betrayed in the
20 same way he was too.

21 I -- every case lawyers do, there's always
22 technical elements of each claim and then there's
23 the moral issue of it, the right and the wrong.
24 That's why we're here. It's not something you can
25 just consult on a book and check boxes on. That's
26 why we have juries. That's why we have trials.

27 Where's the wrong in this case? Was the
28 wrong done by Mr. Johnson to Storix \$3,700? Was

1 that the real wrong here? Was the wrong Mr. Johnson
2 being angry in an e-mail? Was that the real wrong
3 here? The real wrong starts, as I said in my
4 opening statement, before there's any litigation.
5 The real wrong started when Mr. Johnson wasn't going
6 to die anymore.

7 Hang on one second. June 2011, Anthony,
8 100 percent owner of the company, gets diagnosed
9 with melanoma, says he's going to die, expects it's
10 going to be two years. So he proposes giving
11 60 percent of Storix to these guys.

12 His sister comes in in July 2011 to help
13 out and September 21, 2011, Anthony steps away from
14 the company signs over 60 percent of Storix to
15 Huffman, Turner, Altamirano and Kinney. They join
16 the board with Michelle. Anthony, no longer at the
17 company.

18 You heard Mr. Huffman testify. After
19 Anthony stepped down, did he have any obligation to
20 come in? No. Did he have any obligation to do
21 anything? No. Did he have any obligation to help
22 out or program? No longer any obligations. But you
23 also heard that there was an agreement that he would
24 still stay on the payroll, \$50,000 a year plus
25 health insurance.

26 Now, I think that everyone can understand
27 why he wanted to do that. He was looking -- he was
28 fighting -- he was fighting a serious illness. He

1 needed to get healthcare. So part of what he did is
2 he said, All right. I'm going to invite you guys --
3 my employees, four longest-serving employees, I'm
4 going to invite you to be my partner, be a partner
5 in my business.

6 Now, if you've never had -- if you've never
7 gone into business with someone else, whatever form,
8 it's hard to conceptualize it. The best -- I think
9 the thing that everyone probably has the most -- the
10 most ubiquitous experience of partnership is usually
11 marriage. I think that's the most common
12 partnership.

13 But the point of any partnership -- anytime
14 you go into business with someone, you join up with
15 someone -- is that you trust them. I think Anthony
16 definitely did. He trusted these guys with
17 60 percent of his company.

18 And the fact that they didn't put this
19 agreement in writing that he said, "I trust you
20 guys. I'm going to go fight this disease, and I
21 trust that you won't turn around the next day and
22 cancel it," that implies some amount of trust. And
23 they didn't.

24 In the meantime, however, Mr. Huffman hires
25 Mr. Smiljkovich in 2012 to come in and look at the
26 company books. Smiljkovich was there -- I honestly
27 forget whether it was one day or two days. One or
28 two days. The first day he was there, Michelle

1 testified that the first thing he asked was not
2 profit or loss statement, was not tell me how much
3 the company is making, it's, "What's going to happen
4 to your brother's shares after he dies?"

5 Okay. Now, maybe that was
6 Mr. Smiljkovich's at the time acting on his own, on
7 his own accord. Maybe he didn't have any
8 instruction from Mr. Huffman on that. That was --
9 if that was just a one-off incident, I'd probably
10 agree, but it wasn't.

11 And we know that -- that the concern -- the
12 consistent emphasis on what's going to happen to
13 Anthony's shares. We have to get Anthony's shares
14 because we have to keep this company owned by the
15 employees. There's no dispute about that.

16 They had an expert come up and say, Hey,
17 that's a legitimate thing. We -- you guys should --
18 we definitely want to do that. That's a great thing
19 we should do. The companies do this all the time.

20 That's their argument. They just want --
21 they don't even deny. They wanted to keep it owned
22 just by the employees. But here's the thing, when
23 Anthony invited them to be partners with him in his
24 business, they accepted that invitation to be
25 partners. They accepted obligations of trust that
26 go along with that, especially assuming the majority
27 ownership and control of the company.

28 The question that you guys will have to

1 decide later today is whether or not they breached
2 that trust. Ask yourself -- before all of the angry
3 e-mails, before everything broke down, before
4 Johnson filed a copyright lawsuit, before he sent an
5 e-mail saying, I've got all these conditions I'm
6 returning, ask yourself who breached that trust?
7 Who started this?

8 It sounds -- it sounds childish, because if
9 you've ever had kids, you know, "He started it. She
10 started it," da, da, da. And unfortunately, there's
11 an element of that in this case where it started,
12 and then it continued to escalate, both sides. My
13 mom used to always tell me it takes two to fight.
14 It doesn't matter. Both sides continued to
15 escalate.

16 So look first to see who breached that
17 trust first. Let's look. Let's look at what the
18 evidence shows. Anthony returns in 2012, meets the
19 fellow shareholders for a meal at the Cheesecake
20 Factory, talk about coming back and doing some work.
21 So he says okay. He returns January to March 2013.
22 He's doing two tiny projects, small projects, SEO
23 updates and updates to Version 8.1. Okay. Helping
24 out. Sounds like everyone's doing good so far.
25 Sounds like everything's okay.

26 From Anthony's perspective, what he knows
27 at the time, hey, he's back. He's working with his
28 team. His employees got the ball. Everything is

1 great. He's with his friends again. He's with the
2 people that he thought were more than just
3 employees. They were now partners. They were now
4 friends with him. Everything is going fine as far
5 as Anthony is aware.

6 But what Anthony doesn't know, January 4th,
7 2013, David Smiljkovich e-mails the DenHerder law
8 firm. He asks for -- he -- he wants to enter into a
9 legally binding agreement between Storix, Inc., and
10 Anthony Johnson's estate to automatically buy back
11 his shares at a set price upon his death. That
12 would be wholly normal, a perfectly legitimate
13 request, if he had talked to him about it with
14 Anthony first.

15 Now, maybe this was one instance. Maybe
16 Mr. Smiljkovich didn't have time, forgot, didn't see
17 him around the office that day. If that was it, we
18 probably wouldn't be here, right? But you know
19 that's not it. Mr. Johnson's still working there.
20 Later that month, he learns his melanoma is gone.
21 He's no longer going to die. He tells people and he
22 puts an announcement on Facebook.

23 Now, February 4th, somewhere between
24 Mr. Smiljkovich's e-mail to the DenHerder firm on
25 February 4th, Ms. Sassi got wind of what
26 Mr. Smiljkovich was trying to do. She is in the
27 middle of marital settlement negotiations. She
28 immediately gets concerned that her friend, David

1 Smiljkovich, her lifetime friend, is working with
2 Huffman to try and do something that would prevent
3 her from getting a fair shake in that settlement
4 negotiation, a fair split in the property, whatever
5 it was.

6 So Mr. Smiljkovich, he says, Hey, Robin,
7 I'm feeling horrible about the situation. I'm doing
8 my best to stay in control. Truly sorry. As a sign
9 of good faith on my part, I'm forwarding my e-mail
10 conversation to you. I'm disclosing this to you as
11 I sign of my good faith. Doesn't even owe her a
12 duty, other than they're friends. There's some
13 trust in between them.

14 But he recognizes I got -- I want to tell
15 you this. I want to disclose it to you. He knows
16 that this is -- this is an important thing. This is
17 an important thing that he should disclose, but not
18 to Anthony. He -- he's going to disclose it to
19 Robin, not even a shareholder yet. He's going to
20 show -- he's going to show his good faith to Robin.
21 He's going to obey the instructions and requests of
22 his employer, the four shareholders, Mr. Huffman
23 directly, because he's got a job there. He wants --
24 he wants to stay in good favor of Mr. Huffman.

25 And okay. If I were an employee, I'd
26 probably want to do the same thing too. But
27 ultimately, someone's responsible for not telling
28 Mr. Johnson. Someone -- they're -- Mr. Smiljkovich

1 isn't the only one that knows what's going on here.

2 So he goes on to say, "I normally would
3 have contacted you about the situation, but I knew
4 this was partially an estate issue." This was
5 really -- he's saying this was -- I would have
6 contacted you about this, but this is an issue
7 between us and Anthony estate.

8 That's kind of accurate at this point,
9 right? because he still thinks Mr. Johnson is going
10 to pass away soon. But again, where's the good
11 faith towards Mr. Johnson. And this is just the
12 first e-mail, right? And if this was it, again, a
13 couple e-mails, a month later, okay, doesn't
14 disclose to Mr. Johnson right away, probably -- I'd
15 be able to chalk that one up as a mistake. Maybe
16 they're busy, didn't get around to it. Maybe they
17 just -- you know, just did one e-mail, no one got
18 back to them, and they said, Ah, we're dropping it.
19 If that were the case, I might agree with them.
20 Probably don't even need to bring it up to
21 Mr. Johnson.

22 But was that the case? No, it wasn't.
23 This -- this is what Mr. Smiljkovich writes to now
24 his insurance broker, Mr. Cogdill, three days later,
25 February 7th. Now something's changed. All right.
26 First DenHerder request, what was that for? That
27 was, Oh, we want to buy Anthony's shares after he
28 dies, because he's going to die and we want to buy

1 his shares, buy him out.

2 But what's changed now? Now he says, "I'm
3 not talking just in the event of death. But if one
4 of the shareholders were to suddenly decide to leave
5 the company or get divorced, we want to make sure we
6 have the financial ability to buy back those shares
7 to maintain control of the company."

8 I mean, they're not hiding it in any of
9 these e-mails. They're explicit about what they
10 want to do. They want control of the company. They
11 want to keep control of the company. They want
12 100 percent control of the company.

13 Now, if -- if your -- if I imagine myself
14 in some hypothetical business situation, partner,
15 and my partner is doing this, the first thing I'd
16 say to myself is, Why haven't you told me this?
17 Why? This seems kind of relevant to me. You're
18 talking about getting my share of the company that I
19 founded, that I gave to you, that I trusted you
20 with. Why aren't you talking to me about this?

21 And what's the reason? What's the excuse?
22 What's the excuse they give? He didn't need to
23 know. We didn't have an obligation to tell him. No
24 statute that says you have to tell Mr. Johnson that
25 you are thinking about buying his shares and
26 enacting this agreement that would require him to
27 sell you shares if he terminates his employment
28 after he signs the agreement.

1 There's no statute that says that. Okay.
2 That's why we have fiduciary obligations. That's
3 why we have -- that's why we enforce trust
4 relationships. When you put your trust in someone
5 and they breach that trust and they betray your
6 trust, that's why we have the litigation system. In
7 fact, their own expert even told you that yesterday.
8 What's Mr. Johnson's remedy? File a breach of
9 fiduciary lawsuit.

10 Now, Mr. Johnson is -- I mean, he's -- you
11 know, he's a fiercely motivated individual. Okay.
12 That's -- and what happened to him was -- it's not
13 happened to me, so I can't say I've ever been in his
14 shoes. But it's a betrayal. If you've been
15 betrayed, you know how angry you are.

16 You've seen the darkest corners of
17 Mr. Johnson's thoughts, his e-mails. His response
18 to his betrayal. And there's a lot of -- a lot of
19 their case is: Judge him based on his response to
20 being betrayed; judge him based on what he writes in
21 these e-mails; punish him for what he says.
22 That's -- that's a large part of their case. Show
23 these e-mails. He swears. All these words, he's
24 mad.

25 People get mad. They get angry. And when
26 they do, it's, you know, I'm not going to try to
27 sugarcoat it. It's not something that -- you know,
28 it's not something that is pleasant. If you want to

1 talk about it and make -- make a big part of, you
2 know -- it's not something you want -- that you want
3 to focus on. But in litigation, we do that.

4 But bear in mind everything Mr. Johnson
5 threatened to do, everything Mr. Johnson actually
6 did was what? Expressed how mad he was, threatened
7 to do things he had a legal right to do, to sue.
8 It's not illegal to say, "If you don't do what I
9 want and make this right, I'm going to file a
10 lawsuit." That's actually your right to do that.

11 Now, it's not -- it's not legal to threaten
12 to hurt someone, threaten to do something that you
13 don't have a right to do. But that's where
14 Mr. Johnson was. And I've never been in that
15 situation, but it -- you know, without having been
16 in his shoes, I can't say that I wouldn't have acted
17 the same way or in a similar way or had these
18 similar feelings.

19 So we're now in February 7th. Mr. Cogdill
20 responds. Mr. Smiljkovich writes back on
21 February 11th, "Okay. That sounds like we're on the
22 right track. I'll check with the banker as well and
23 let you know what they say. I'll begin working
24 diligently on valuation for the company. We can't
25 go anywhere until we know how much money we are
26 talking about to start with." February 11th.

27 So you heard his testimony. The next day,
28 he calls California Bank & Trust, talks about

1 getting a loan to purchase Anthony's shares. Now,
2 the following day, the banker who he talked to at
3 California Bank & Trust, Lea Zanjani, she writes
4 back. She says, "My SBA specialist put together an
5 Excel worksheet based on a \$1 million loan."

6 He says okay. He laid out a game plan in
7 his -- in his e-mail to Mr. Cogdill. He said, [as
8 read] "I'll chat with a banker and let you know what
9 they say. They will probably want me to apply for a
10 line of credit, which we would -- which we would
11 draw upon to buy back stock in the short term. I'll
12 start doing that, start working on a valuation. The
13 good part, though, is that I got the president and
14 the vice president discussing the issue, and they
15 absolutely see the need."

16 The funny thing is, as he goes on, he says,
17 [as read] "These are del -- very delicate
18 discussions that the shareholders need to have with
19 each other, and I'm doing my best to nudge and guide
20 them in the right direction."

21 Is he? Mr. Johnson doesn't even know about
22 this, and it's expressly for the purpose of
23 purchasing his shares, for buying his share of the
24 company. If my partner does this in business, at
25 this point, I'm starting to feel betrayed. If this
26 is all he's doing and he's not telling me, I feel
27 betrayed.

28 Now, fast-forward to August 2013.

1 Mr. Johnson comes back to work full-time on
2 Version 9.1. You guys have heard a lot about the
3 software Version 9.1. I'm not going to bore you
4 with that. There were -- you guys have heard all
5 the testimony about how they had a different way of
6 doing things and everyone was going to do it all on
7 their own and finish it individually. And then when
8 it was ready to go, they'd put it together.

9 And that was their version of a team
10 atmosphere. Instead of people working on the same
11 thing together, it was everyone works on their own
12 on a different thing, and then -- okay. That's"
13 what he starts doing August 2013.

14 But again, Mr. Smiljkovich to Ms. Sassi,
15 the same month that he starts says, "Anthony's stock
16 is 40 percent of the company's value, so we get
17 \$1.36 million. Theoretically, that's how much the
18 stock is worth."

19 She testified that the -- conversations
20 with her about buying Mr. Johnson's shares. Again,
21 Mr. Johnson, no idea. But he's committing himself
22 to a long-term project with his partners that he
23 trusted for -- it turned out it be seven months. It
24 was probably actually going to be about a year. But
25 he's committing himself to it, and they don't tell
26 him this. You partner with someone. You commit
27 yourself to a long-term project. If they don't tell
28 you that, do you feel betrayed? I would.

1 What happens next? He returns.

2 Smiljkovich talks to Sassi about the plan. Everyone
3 develops their software, move to a new office.

4 2014, Mr. Smiljkovich in conversations now again,
5 this time with Wells Fargo, a new banker. And now
6 he's talking about a line of credit and all that
7 stuff. Did things change? Did he no longer want to
8 buy Anthony's shares? Well, let's take a look.

9 March 27, Celine Ghebbano, Wells Fargo
10 Banker, says, "Also, I have reviewed Storix's
11 financials in view of the purchase of Anthony
12 shares." Talks about a loan and how to finance
13 that. A few weeks later, "Let me know if you have
14 any questions regarding the SBA proposal for the
15 purchase of Anthony's shares."

16 I mean, this is explicit, right? This is
17 not purchase of shares in the event that, you know,
18 you need to buy someone out because of some
19 shareholder -- it's explicit. You guys know this.
20 Of course, no update to Mr. Johnson, no information
21 to Mr. Johnson, nothing at this point. He's now
22 worked for the company this whole time this is going
23 on. No one's told him. This is up to the people he
24 trusted with his company. This is what's going on
25 behind his back.

26 Now, they say -- Mr. Smiljkovich said, Oh,
27 I never brought it up to Ms. Ghebbano. She was
28 selling it to me. She brought it up. I had

1 nothing -- no. It's only a coincidence that the
2 same SBA loan that Ms. Zanjani proposed is also the
3 same one that Ms. Ghebbano is talking about here.

4 You read and -- you heard in Ms. Ghebbano's
5 deposition testimony that I read to you yesterday,
6 she was clear, Mr. Smiljkovich brought this up to
7 her. Share acquisition loan for Mr. Johnson's
8 shares.

9 What else is going on in March 2014?
10 Mr. Smiljkovich writes his own performance review.
11 Now, to be fair, Mr. Smiljkovich claims that this
12 was not dated. This was misdated. That this was
13 actually May, 30th, 2014. That's not what what's on
14 there, but he did say he didn't write this to
15 transmit to anyone. It's for his own edification.
16 It's his own thoughts, his own summary of how he did
17 his first year.

18 I may actually credit him on that. Maybe
19 he was wrong. Maybe he wasn't, but maybe he was
20 wrong on that date. But most importantly, let's
21 look at what he writes. "In the near future, I will
22 begin working on amending the company bylaws to
23 promote the shareholder vision of maintaining an
24 employee-owned and managed company."

25 Again, they're not hiding this. They want
26 the company. They want to own it. He wants to make
27 the banking and credit card relationships more
28 independent from Anthony Johnson. Again, there's

1 other ways to do this. One of them is just to ask
2 Anthony, "Hey, do you want -- can you add us to this
3 account? Can you help us? Can we work with you?"
4 That's not how they chose to go about it. Is that
5 how business partners operate?

6 Well, Mr. Johnson is now, unbeknownst to
7 him, trusting -- the gentlemen that he trust -- that
8 he trusted his company with, has now worked for
9 seven months updating this software. He
10 testified -- you heard him -- he would not have
11 worked there for no increase in what he was being
12 paid. He had the \$50,000 that he didn't have to do
13 anything for. That was the testimony. That was --
14 you're leaving. Here you go.

15 Now, maybe there was some expectation that
16 that wasn't to be forever, because the expectation
17 was that Mr. Johnson was going to pass away. I can
18 see -- that's probably correct. That's probably --
19 that sounds right. But that highlights a very
20 important thing, that the expectations of the
21 parties aren't always written down in a perfect
22 contract that spells everything out, especially when
23 you trust someone and you go into business with
24 them.

25 When you trust someone to be your partner,
26 you don't always spell out every different way that
27 they can betray your trust and breach -- breach
28 the -- the obligation to act with good faith between

1 each other. You can't. It would be ludicrous to
2 expect that. But it highlights the fact that they
3 acknowledge that, that they had expectations it was
4 only going to be until he died.

5 So what happens in May 2014? This is
6 where -- you heard it. I'm not going to rehash it.
7 You know, there was a fight. Mr. Johnson, working
8 on his own with no help. And then when he tries to
9 merge with the work they did, there's problems.
10 Now, some say it was Mr. Johnson's fault. Some say
11 it was their fault.

12 Well, the undisputed testimony on their
13 side is that Mr. Johnson's the most-skilled and
14 experienced programmer. I'm going to assume that if
15 there was anyone at fault on that, it would be the
16 person that they admit is the most-skilled -- it
17 wouldn't be the person they admit is the
18 most-skilled and experienced programmer. But
19 whatever. I don't want to get into a debate about
20 whose software is better. That's not why we're
21 here.

22 The point is that Mr. Johnson did all this
23 work, worked hard, tried hard to work within these
24 rules, this team environment where everyone works
25 alone as a team. And then they say, Well, no one
26 really wanted the thing you were working on anyway.
27 Who wants it? Why? Who cares? No one wants the
28 thing you were working on.

1 So he -- I mean, how would you feel? You
2 devote seven months of your life to something, and
3 it's not just -- it's not just a job. It's the
4 thing you created. The thing you've worked 20 years
5 of your life for. It's your creation and you've
6 devoted seven months of your life to improving it
7 and helping these guys you trusted with your company
8 that you thought were your partners, help them make
9 it better. And they say, All that work, sorry. No
10 one wants it. I don't think we're even going to use
11 it.

12 You'd feel betrayed. Mr. Johnson felt
13 betrayed. And he put his -- he put his comments
14 down in e-mails, resigning. You saw that. The
15 funny thing is you saw these e-mails from
16 Mr. Huffman and Mr. Turner back and Mr. Kinney
17 saying, Hey, we want you here. We want you to come
18 back. We want you to come back.

19 And Mr. Johnson writes an e-mail saying,
20 Oh, you know, I -- all these things of -- all these
21 complaints about how things are going, and here's my
22 feelings.

23 And Mr. Huffman's response -- this is the
24 first -- first, I think -- if you were going to look
25 for where does it start, I mean, it's hard to say.
26 Some of it, maybe it started already. But I think
27 at this point, they're kind of doing a little dance.
28 You know, I left. You know, I want you back. I

1 mean, there's kind of an expectation that everyone
2 wants him back. He wants to return.

3 But then what happens? There's a fight.
4 Anthony resigns, e-mails. Turner responds. Kinney
5 responds. Anthony's last day. Anthony sends his
6 final thoughts. Huffman writes back. This is
7 Exhibit 197. You guys, remember, this is in
8 response to Anthony, "Thank you for reaching out to
9 explain your feelings on the matter. I wish we
10 could have come to a closer agreement. David
11 Smiljkovich will be mailing out a separation
12 agreement," polite, dry, business way of saying,
13 "Good-bye. You're done. That's it. Our
14 relationship is now over."

15 Maybe Mr. Huffman -- fine. Maybe that's
16 the way it was. Maybe that's the way it should have
17 been, but why? Was that what everyone expected?
18 Was that what Mr. Johnson expected? I don't think
19 so. I don't think he expected that it would just
20 end. I think everyone was still in the process of
21 saying, All right. Find a way back.

22 Well, someone does response to Mr. Johnson.
23 Mr. Altamirano responds. And Mr. Altamirano --
24 there's e-mails on this in evidence and you'll see.
25 Mr. Altamirano replies back, kind of continues the
26 "You're awesome. You're great. We've got to work
27 on things." He listens to him. They start talking
28 on the phone back-and-forth, "I want to come back.

1 Can you talk to these guys? Can you sit down -- can
2 we have a sit-down conversation? Can we work things
3 out?"

4 And then -- I believe it was -- let's see.
5 I think it was July 15th. Exhibit 338 is Anthony's
6 e-mail the following day, and he says there, This
7 is -- I was -- I can't get over the fact that you
8 told me they didn't want to compromise, they weren't
9 willing to talk about it, that I didn't have -- I
10 wasn't coming back.

11 Now, when I asked Mr. Altamirano about this
12 on the stand, I asked him, "You had those
13 conversations? This day, you told Mr. Johnson that
14 he was not welcome back?" Mr. Altamirano didn't
15 [sic] say "Oh, I didn't use the words 'He wasn't
16 welcome back.' I said, 'You're not a good fit.
17 You're not -- you know, you should move on.'"
18 Whatever the words were, Mr. Altamirano's testimony
19 was crystal clear that yes, Mr. Johnson was done.
20 He wasn't coming back.

21 That was it. He gave control of the
22 company to his employees. He trusted them. He
23 comes back to work. There's some disagreements. He
24 resigns, just like he resigned before. And now,
25 instead of like in 2012 when he was not working,
26 resigned, came back, they said, "Oh, yeah, come
27 back. We want your help." Now, he can't come back.
28 Why? What's changed? He resigns in 2011; he can

1 come back. Resigns in 2014; you can't come back.

2 Now, they say -- this is the ploy that you
3 can't get distracted by. They say that
4 Mr. Johnson -- oh, the reason why he -- we didn't
5 want him back or couldn't have him back is because
6 he was demanding conditions. He demanded that
7 Mr. Huffman step down. He demanded that we go off
8 the board. He wanted to control the company again.
9 He did make those demands after they told him he
10 wasn't welcome back.

11 Read Exhibit 338. That's the first time he
12 mentions a copyright lawsuit, and it's in response
13 to that e-mail that morning on July 16th that
14 Mr. Johnson says -- that Mr. Altamirano calls him.
15 And then in that phone conversation, "Set forth your
16 written conditions for coming back." Mr. Johnson's
17 already, you know, threatened the copyright lawsuit.
18 Now he sets forth his written conditions. Yes, he
19 sent those, but that was after they said, "You're
20 done. You're out. You're not coming back."

21 That conversation where they said -- they
22 communicated through Mr. Altamirano to Mr. Johnson,
23 "You're not coming back," that is where the betrayal
24 happened. When you go back to deliberate, look very
25 closely. Everything you read from Mr. Johnson
26 before July 15th, everything you read from
27 Mr. Johnson after July 15th, it is two separate
28 people. One is very angry. One is the type of

1 person who was just betrayed by the people he
2 trusted the most. The other one is a person who
3 just survived a harrowing medical condition and is
4 confused about why his employees who now run the
5 company, they can't get along with him.

6 One is Mr. Johnson still thinking and
7 acting in good faith, trying to get along. And the
8 other Mr. Johnson is the one who's been betrayed by
9 the people he trusted most. That betrayal is a
10 breach of trust here. That is the breach of
11 fiduciary duty here.

12 We talked a lot about things that happened
13 after that. And I mean, honestly, I think we
14 probably spent too much time on things that happened
15 after that, the shareholder agreement, shareholder
16 meeting. I did that to illustrate -- I wanted you
17 guys to see that to illustrate that the -- the
18 escalation that happened after that was both sides.
19 Mr. Johnson escalated. They escalated. They kept
20 on fighting. They were fighting. But no one --
21 that's -- I mean, it's not war. That's on a totally
22 different level. But this was -- in a way somewhat,
23 they were at war. Who started it? July 15th,
24 Mr. Johnson, you're done. It's ours.

25 So what are the damages? Mr. Taylor had
26 showed this loss summary, and he provided some
27 numbers based on Mr. Johnson living to some age or
28 whatever he's going to be and getting \$50,000 a

1 year. And why -- how is that relevant to damages,
2 and what's your job as a jury?

3 You don't have to believe that Mr. Johnson
4 would be -- live until some certain age. You don't
5 have to accept that as true. You don't have to
6 accept Mr. Taylor's numbers. The point is that
7 Mr. Johnson had an expectation that if he would
8 somehow survive, he was going to be still involved
9 with the company in some position working on the
10 software.

11 And honestly, I think the cross-defendants,
12 they had the exact same expectation too, because by
13 their own admission, what did they say when
14 Mr. Johnson comes back? They say, Hey -- basically
15 sat him down and offered him -- "Do you want a
16 controlling role in the company? Do you want to say
17 decision-making role?" Johnson says, "Not yet. I'm
18 not ready yet. I want to come back and do some
19 coding."

20 They had an expectation that maybe the guy
21 who was the most experienced, the guy who founded
22 the company, the guy who wrote the software would
23 naturally be the person to come back and take
24 control of some of this stuff if he were to return
25 healthy. And so they offered him that position
26 because that's what they expected.

27 Why did they offer it to him in 2013 and
28 why not in 2014? What changed? They didn't want

1 him. They were done with him. Who knows? They
2 didn't like him. They were fine taking his --
3 accepting the stock that he offered them, accepting
4 the share of the company, accepting all the profits
5 that they made for, you know -- since -- after 2011.
6 They loved that. They didn't like the fact that the
7 guy that was their partner -- they didn't like him.

8 So Mr. Johnson had -- he expected -- he
9 trusted them that he would have some role in the
10 company. Now, what kind of roll in the company?
11 Now, you know, probably it would be more than
12 \$50,000 a year if he was going to come back. He was
13 making three times that before. But I don't -- I
14 want to have the most reasonable number we could
15 come up with, which was the number that he was
16 getting when he left -- they agreed -- \$50,000 a
17 year. That number, I think at a minimum, was the
18 most reasonable expectation he would have. It's at
19 least what he would reasonably expect, because, A,
20 that's what they agreed; and B, it's far less than
21 he would have otherwise made.

22 So if you think the
23 defendants/cross-defendants breached the trust that
24 Mr. Johnson put in them before the litigation war
25 broke out between them, if you think that's what
26 happened, you decide for how long, for how much
27 Mr. Johnson -- that's going to cost Mr. Johnson.

28 This is what it's cost Mr. Johnson so far,

1 which I think is reasonable for the last three years
2 or since Mr. Johnson was -- you know, since
3 Mr. Johnson was pushed out of the company, but you
4 guys decide that. You guys decide how much he lost
5 in the past. You guys decide how much he'll lose in
6 the future. You don't have to accept Mr. Taylor's
7 numbers. You don't have to accept anyone's numbers
8 or anyone's representations. You decide. This
9 is -- this is your job.

10 This, again, the loss of salary
11 differential, that's what Mr. Johnson -- that's the
12 difference between what Mr. Johnson gave during the
13 seven months that he worked there in excess of what
14 they paid him, because he wouldn't have done it if
15 they had told him -- if they hadn't concealed what
16 they were doing behind his back. And honestly, if I
17 was in his shoes, I probably wouldn't have done it
18 either.

19 So he gave -- and I don't think they
20 dispute this. He gave \$124,000 worth of services.
21 He was paid 50-. The prorated difference for that
22 seven months is \$56,000.

23 Thank you for putting up with us this whole
24 time. Thank you for putting up with me, and let's
25 go. We'll move on and hear some more arguments, and
26 we'll get the show on the road. Thank you.

27 THE COURT: Ladies and gentlemen, let's
28 take our afternoon recess. We'll be in recess

1 15 minutes. Remember the admonition. Thank you.

2 (Whereupon the jurors exit the courtroom.)

3 THE COURT: We're outside the presence of
4 the jury. I need one more instruction, 430,
5 substantial factor. If somebody can get that for
6 me.

7 MR. SULLIVAN: We have a 4102 being revised
8 on its way back.

9 THE COURT: Has it been revised yet?

10 MR. SULLIVAN: I sent a revision.

11 Mr. Ready (phonetic) is --

12 THE COURT: Okay. Those are the only two
13 things, so I need those two. And thank you. We're
14 in recess.

15 (Brief recess.)

16 THE COURT: Okay. I've got 430, 1901 as
17 modified, and 14 -- I mean 4102 that have been
18 handed to me. And are we all in agreement?

19 MR. SULLIVAN: I believe so.

20 MR. KING: Yes.

21 MR. AVENI: Do you want another copy,
22 Your Honor?

23 THE COURT: No, that's fine. These are
24 fine.

25 So everyone's in agreement?

26 Mr. McCloskey?

27 MR. MCCLOSKEY: Yes, Your Honor.

28 THE COURT: Mr. Sullivan?

1 MR. SULLIVAN: Yes.

2 THE COURT: Mr. King?

3 MR. KING: Yes.

4 MR. SULLIVAN: They were going to modify
5 1901.

6 MR. AVENI: We're going to add material
7 facts in 1901.

8 THE COURT: I'm seeing it on 1(b) already.

9 MR. AVENI: It is in 1(b).

10 MR. MCCLOSKEY: He was talking about adding
11 it to 1(a), Your Honor.

12 MR. AVENI: Mr. King was talking about
13 adding it to 1(a), you have a duty to disclose
14 material facts. And B --

15 THE COURT: I thought he said that you
16 wanted that.

17 MR. MCCLOSKEY: Well, we did not say that,
18 Your Honor, but I'm fine with it.

19 MR. KING: If you want to keep it that way,
20 that's fine too. I just wanted to bring it to
21 everyone's attention.

22 THE COURT: Okay. I'll do whatever
23 everyone wants.

24 MR. MCCLOSKEY: We'll add material facts.
25 Can we just interlineate it in here?

26 THE COURT: That's fine.

27 And that's agreeable, Mr. King?

28 MR. KING: Yes, it is.

1 THE COURT: Thank you. Let's bring the
2 jury. Thanks for doing this so quickly.

3 (Whereupon the jurors enter the courtroom.)

4 THE COURT: Welcome back, everyone.

5 Mr. McCloskey, closing argument on behalf
6 of cross-defendants.

7 MR. MCCLOSKEY: Thank you, Your Honor.

8 Ladies and gentlemen, as to the first order
9 of business, I want to thank you for your patience.
10 We've been at this three weeks. We've all been here
11 together. We've all gotten 3 weeks older together.
12 I want to thank you for being here, and I want to
13 thank you for your attention.

14 You know, the beauty of our justice system
15 is that it brings folks like you together, 12, now
16 15, people who are sitting in judgment on folks.
17 You bring with you an extraordinary mix of
18 background, an extra mix of experiences. We have an
19 airline pilot. We have an architect. Go down the
20 row. We got a mechanical engineer, and we got a guy
21 who keeps the Marine Corps out of environmental
22 trouble, and everything in between. It's
23 extraordinary. And what that does is it brings a
24 collectively wisdom that you bring into bear in
25 judgment on this case. So to -- bring that
26 collective wisdom with you as we review what's
27 happened in this case.

28 If you recall, during my opening statement,

1 I mentioned this case is as simple as ABC. I want
2 to go back and revisit that. Let's talk about the
3 A. The A is arrogance. I talked about that in my
4 opening statement.

5 And let me confess something to you. Maybe
6 someone who started a company, maybe he's entitled
7 to be a little bit arrogant. He stood it up. Maybe
8 we ought to give credit to Mr. Johnson for standing
9 up Storix. Maybe there is a little bit of arrogance
10 there that ought to be yielded to. Maybe possibly
11 even excusing -- that arrogance even excusing him
12 being a benevolent dictator, maybe just a little bit
13 here. There was Mr. Johnson and then there was
14 everybody else. Before he left in 2011, he called
15 the shots. Everyone else was there to support him.
16 Maybe there's legitimacy to that.

17 Mr. Johnson then gets the news no one wants
18 to get with a terminal illness, and he says then
19 that he gave away 60 percent of his enterprise,
20 60 percent of Storix. But the evidence shows,
21 ladies and gentlemen, he didn't give away anything.

22 He did transfer 60 percent of the interest,
23 but that was in exchange for a two-year commitment.
24 The same thousand shares he had when he started is
25 the same thousand shares he has as he sits here
26 today. He didn't give away any of his shares. If
27 he had, unless he did -- the likes of Mr. Huffman
28 here, but he's going back to school. And that's

1 what the evidence shows. And absent an exchange of
2 some consideration, Mr. Hoffman -- Huffman was on
3 his way.

4 Now, Mr. Johnson claims that Mr. Huffman
5 and the other four **director/management** defendants
6 are a bunch what spineless, greedy, and ungrateful
7 people. This even though Mr. Huffman put his
8 educational future on hold to service the likes of
9 Storix.

10 Now, at the same time, Mr. Johnson, the
11 evidence shows, unilaterally reduced his
12 compensation to \$50,000. That's what happened. So
13 I'm short one way. He's looking at two years. And
14 remember Mr. King, he said that the defendants
15 agreed to keep Mr. Johnson on the payroll, but
16 that's not what happened at all. This is back in
17 the days of benevolent dictatorship. No one agrees
18 with the benevolent dictator.

19 What happened was Mr. Johnson, by way of
20 executive fiat, said, I'm going to take \$50,000.
21 I'm going to go off on the waning days of my life,
22 and I'm going to do what I'm going to do. Given
23 Mr. Johnson's leadership style at the time, these
24 **director/management** defendants had no say-so in the
25 decision. So is that a matter of agreement? It was
26 a matter of doing what Mr. Johnson decided.

27 But the key is that Mr. Johnson was kept on
28 Storix's payroll. Mr. King said that. He was kept

1 on his payroll. Mr. Johnson got a W-2. Mr. Johnson
2 paid federal tax. He paid state income tax. Why?
3 Because he's an employee. He's still hired. He's
4 still working for Storix to present some value.

5 Now, the reason that they did that is
6 because Mr. Johnson needed at the time to remain
7 qualified for health insurance. Pre-existing
8 condition was to kill him otherwise. So he needed
9 to be an employee. He needed to be drawing a
10 salary. He needed then to be qualified for health
11 insurance, and that's precisely what happened.

12 Now Mr. Johnson comes into this Court and
13 he claims that he's entitled to \$50,000 for life,
14 and he's entitled to \$795 a month for health
15 insurance premiums until he reaches age 65. Ladies
16 and gentlemen, where's the agreement here?
17 Remember, that's an executive fiat. That's not an
18 agreement, oral, implied, written, otherwise. This
19 is a dictating term that Mr. Johnson imposed. It's
20 not an agreement. There's certainly no agreement to
21 pay him \$50,000 for the rest of his life.
22 Apparently, you know, Mr. Johnson doesn't remember
23 saying that.

24 He testified to the contrary in his
25 copyright trial. This is his testimony here. He
26 knew -- he knew that by resigning his employment, he
27 was giving up his \$50,000 salary, which makes sense
28 because no longer is he an employee, no longer does

1 he get a W-2, no longer does he pay state and --
2 he's no longer an employee. So as a result, he no
3 longer gets the \$50,000 salary, and he admitted it
4 under oath at the copyright trial.

5 Now he comes in here and says, Wait a
6 minute. They said they were going to give me
7 \$50,000 for life. And as a result, I'm entitled to
8 1.4 million bucks. That's what he's come in here
9 claiming. It's just not the case and that's not
10 truth.

11 You know, what the principal advantage of
12 the truth is? You don't have to remember it. He
13 didn't remember the truth. He didn't remember what
14 he said in the copyright trial under oath. That's
15 because what he says in here, \$50,000 a year for
16 life, is not the truth. He couldn't remember what
17 he said. That's the truth, ladies and gentlemen.

18 I mentioned this in opening statement. I'm
19 going to reiterate it. You sit as fact finders in
20 judgment on Mr. Johnson and every other witness'
21 credibility. You decide to believe him or her, or
22 you decide not to believe him or her.

23 Remember him in his deposition. During my
24 opening statement, I played his deposition clip.
25 And he told me that if he's grilled, I would never
26 get the real truth. This is a person testifying
27 under oath now. He demonstrated that in spades in
28 this trial. I cross-examined him for a day. You

1 saw it. I grilled him. Did you get the real truth?
2 If we didn't listen to his depo, we'd never get it.

3 He also demonstrated a marked facility to
4 deceit. Let me go over a couple of those things.
5 Remember IANA, the port registration thing? He was
6 applying to get two port registrations. What did he
7 do? Created a fictional character, Berg, and he did
8 that to try to get around whatever he had to get
9 around to get port registrations.

10 Now, justified? Who knows. But the fact
11 is that he's willing to engage in a scheme to
12 defraud. It's a deceptive practice to get what he
13 wants. He's come in here testifying on this -- at
14 this trial doing the same thing. Is he trying to
15 get what he wants? Can you believe him?

16 He also testified that he dissolved Janstor
17 before the trial, before this lawsuit. But then
18 he's confronted with the dissolution papers that
19 shows that no, no, no, you didn't dissolve it until
20 after this lawsuit was filed. And as a result, one
21 could at least reasonably imply that the reason you
22 dissolved it is because you got caught. That's the
23 lawsuit. That's why he dissolved it. He admitted
24 as much in his testimony. He'd be crazy to dissolve
25 it afterwards. Well, he did.

26 Now he says, Well, wait a minute. There's
27 some other thing out there, some other dissolution
28 paper filed with the Secretary of State in

1 California. Where is it? It doesn't exist.
2 Instead of dealing straight with the likes of
3 Storix -- Storix, instead of dealing straight with
4 them, what does he do? He conscripts Ms. Sassi over
5 here. He conscripts her as a mole, my term, not
6 hers. He conscripts her to engage in fact
7 gathering, intelligence gathering, whatever it is
8 that you want to call -- and she did so and, in the
9 process of doing so, betrayed -- betrayed a
10 lifelong, since-childhood relationship with a very
11 close friend. That's what we're talking about.
12 These are the people that we're dealing with.

13 Later what does Mr. Johnson do? He tries
14 to screw up Mr. Bonert as well. Mr. Bonert was here
15 testifying. Remember what he said. Sent that to
16 Mr. Bonert. Now, delete this e-mail and call me
17 back. He didn't want anybody to discover that he
18 had sent him this e-mail.

19 And remember the many times that
20 Mr. Johnson testified regarding exaggeration. I
21 think Mr. King called it "he got mad." Does that
22 justify lying under oath? He got mad. We're going
23 to talk about getting mad in a minute.

24 Next thing we're talking about is the many
25 times that he confessed exaggeration. Is this an
26 exaggeration? An e-mail sent on October 7th to who?
27 Mr. Kinney. Saying that today Storix is in a panic.
28 This is right after that delightful e-mail this

1 Mr. Johnson wants to send to Storix's customers. He
2 sends this to Mr. Kinney in Minnesota. He starts,
3 In a panic, phones ringing off the hook. Attorneys
4 are gathering. This is the day after he sent it.
5 Exaggeration? Was he mad when he sent it?

6 You also heard from Mr. Johnson's sister.
7 Do you remember Ms. Orr or Ms. St. Claire or
8 whatever her name was? Seems like they're cut from
9 the same cloth. Demonstrated the same comfort with
10 deception. Instead -- if you remember, instead of
11 dealing with Storix creditors honestly up-front over
12 the phone, what does she do? She created this
13 fictional character, not Berg. She created a
14 fictional character called Holly, told the assistant
15 to the European trademark attorney for Storix that
16 Holly was the new Storix rep to manage payables.
17 Also maintained that Holly was hearing impaired and
18 worked only electronically, so send all your bills
19 to her. And Mr. Johnson got on the stand
20 afterward -- do you remember his comment about that?
21 He thought that was kind of clever.

22 Now, her testimony revealed that when
23 Mr. Johnson brought her in at \$120,000 a year that
24 she didn't have much qualification, if any, really,
25 to kind of take over the enterprise. But regardless
26 Mr. Johnson's sister -- he can appoint who he wants
27 at the time. Does so, pays her \$120,000 for the
28 year or annually.

1 And what happens then? She then butts
2 heads with Mr. Huffman, trying to develop the
3 love-hate relationship. On the one hand, after
4 Ms. Holly or St. Claire or Orr leaves, she wants
5 Mr. Huffman to pad her LinkedIn resume, if you
6 recall that, to avoid the appearance the job
7 hopping. But on the other hand, she testifies in a
8 deposition in a copyright case that she hoped
9 Mr. Huffman died in a fiery inferno. So love-hate?
10 Who knows.

11 But after Mr. Johnson left in 2011, the
12 benevolent dictator goes out the door and the
13 environment then migrates into one that's team
14 oriented. No longer were the director/management
15 defendants supporting cast for Mr. Johnson. And the
16 culture shift, how did that work out for everybody?
17 It's positive.

18 In the midst of a recession, what do you
19 have here? Mr. Johnson leaving and sales going up.
20 So it went from something just minus -- just below
21 2 million bucks, sales go up to almost 2 1/2 million
22 bucks, not bad for the key coder/programmer to be
23 gone. That team-oriented culture worked. That was
24 the final analysis.

25 But when he returned, Mr. Johnson just
26 thought like it was as if he never left, things are
27 going to go back to the way they were. Now,
28 Mr. King, in his closing, he called that a betrayal.

1 There's no betrayal. The fact of the matter -- the
2 reality of the case is that Mr. Johnson just
3 couldn't stomach the new reality that Storix now
4 worked as a team.

5 Mr. Johnson, he wasn't working full-time
6 when he came back, right? He showed up when he
7 wanted to. But the fact was he was no longer in
8 charge, and that got nasty. No longer were the
9 other folks there to clean up after him. So what
10 did he do? He quit. Now, he's off payroll, no W-2,
11 no federal tax, no income tax. Why did he quit?
12 Because he didn't need the \$50,000 anymore and he
13 didn't need health insurance.

14 So Mr. King he asks, Well, wait a minute.
15 What's the wrong in this case? Here's the wrong.
16 The wrong is when Mr. Johnson quit, he then
17 commenced a relentless campaign, personal attacks,
18 and almost ceaseless litigation. Mr. Johnson claims
19 that the **director/management** defendants forced him
20 to resign? Do you recall that testimony? He
21 forced -- these folks forced him to sign his name or
22 send an e-mail that says, Hey, I quit.

23 Well, wait a minute. You got Mr. Huffman
24 and you got Mr. Turner four hours later, maybe six
25 hours later, sending Mr. Johnson an e-mail saying,
26 Hey, wait. You can't do that. We love you. Come
27 back -- that kind of thing -- but you got to work as
28 a team. That's the issue.

1 So undeterred, Mr. Johnson faults these
2 folks for not begging him to come back, but all he
3 had to do was join the team. That's all he had to
4 do. That's why he demanded -- then demanded for
5 Mr. Altamirano -- a few days after he resigned he
6 demanded that Mr. Huffman and Mr. Turner immediately
7 step down from the board and David to resign as
8 president.

9 Mr. Johnson gets up on the stand and says,
10 Oh, wait a minute. There was phone calls. There
11 was this, that, and the other thing before this
12 e-mail. If I were to come back, I would have been a
13 star employee, or whatever he said. But there's no
14 evidence to that.

15 Mr. Johnson is a prolific e-mail writer.
16 If we learned anything in this case, he loves to
17 communicate by e-mail. Where are those e-mails?
18 Mr. Altamirano, he gets on the stand and says,
19 That's not the way I recall it. Yeah, I remember
20 phone calls with Mr. Johnson, but it was kind of
21 like it was when he left in 2011. He just rants and
22 raves and rants and raves. That's why
23 Mr. Altamirano asked Mr. Johnson, Hey, look. Stop
24 this. Just put it in writing. So he did and that's
25 the writing. But I'm going to come back, no
26 conditions? We haven't seen that e-mail.

27 And it's curious that he would say that.
28 Come back, no conditions, because this is from a guy

1 who a week after he was elected to the board, he
2 goes to his softball buddy and he tells him he
3 doesn't care about the company. He wants to come
4 back as an employee to a company he doesn't care
5 about? That doesn't make sense. That, ladies and
6 gentlemen, is arrogance.

7 Now I'm going to go to B, bullying. I
8 mentioned it during my opening statement, and I
9 think the evidence has shown that in this case,
10 Mr. Johnson wasn't the victim. Mr. Johnson was the
11 bully. Why was he the bully? Why do I say that?
12 Weaponizing litigation. That's what he did. He was
13 on a crusade. He was weaponizing litigation by
14 suing the pants off everybody, trying to get them to
15 come out of pocket to pay for their own attorney's
16 fees. That's what he's trying to do. For whatever
17 reason, for the good or the bad, this is what he
18 did. But don't come in here and complain, C, that
19 you're bullied, B, because you're so arrogant, A.
20 No. That doesn't fly. That's the collective wisdom
21 you have to bring to this whole process.

22 Mr. King said that with Mr. Johnson there's
23 no way -- there's nothing wrong with threatening
24 lawsuits here. There's nothing wrong with that.

25 Maybe to some degree that would be the
26 case, but that's like saying you have a first
27 amendment right to free speech. You got a first
28 amendment right to say what you want to say. But,

1 ladies and gentlemen, you have no first amendment
2 right to go into a crowded theater and yell "fire."
3 So what's the difference? Is he mad, threatening
4 litigation? Did he go into a theater and yell
5 "fire"? Let's go through that.

6 Early manifestation of his litigation
7 weaponizing. This is correspondence with Manuel
8 Altamirano. It's the last page. "Unless Dave and
9 Rich make serious concessions, Storix can expect a
10 very difficult and expensive legal battle." Next
11 sentence, "Will begin this legal action in the next
12 few days." Now, is that mad or is he yelling "fire"
13 in a crowded theater?

14 Next, aware the impact, he says, [as read]
15 "I'm aware of the impact of the suit severely
16 impacting Storix's shareholders, its employees, it's
17 ability to conduct daily business, or any M&A
18 activity should they wish to fight this battle,
19 know -- know that it will likely end with Storix
20 having no cash, no product to sell, and/or owing
21 royalties for future and even past sales." Is that
22 mad or is that yelling "fire" in a crowded theater?
23 [As read] "Should Storix wish to fight, know it will
24 have no cake -- no cash."

25 But not three months after resigning,
26 Mr. Johnson sues Storix. He filed a lawsuit.
27 That's how this all started. We're in one of those
28 sequence of lawsuits, the first one of which he

1 filed. Mr. King says, Well, wait a minute. Going
2 back and forth, you know, who broke up with who? Is
3 that really at issue? Well, perhaps not.

4 But who started this mess? It's
5 Mr. Johnson that filed the copyright lawsuit back in
6 August 2014, and why did he do that? He rested --
7 wanted to rest control of Storix. Why? Because he
8 wanted to compete with them. Whether or not that
9 competing was legitimate is a different issue. But
10 what he really wanted was pick up his bat, pick up
11 his ball, and go home. I'm not part of the team.
12 I'm out of here. And I'm going to get my software
13 back that I worked on for so long. And you
14 ungrateful bastards, you're not giving it to me, so
15 I'm going to go sue you. And that's what he did.
16 He sued hem. Arrogance undeterred, Mr. Johnson,
17 what does he do? He blames the director/management
18 defendants for forcing him to file that lawsuit.

19 Go to another exhibit here. The e-mail
20 that Mr. Johnson sends to Mr. -- a week after both
21 were elected -- to Ms. Sassi, a week after both were
22 elected to the board. Mr. Huffman here, David, [as
23 read] "Still proud of how well he screwed me over,
24 but he has no clue of the storm that's coming his
25 way, he says. Is that mad or is that yelling
26 "fire"?

27 Second fall out, [as read] "They have now
28 strengthened the minority shareholder oppression

1 suit, what will" -- all caps, apparently an
2 expression of intent -- "be added against them if
3 litigation continues. No job -- that means no job,
4 no dividends for a year, and they'll be fighting
5 personal legal battles the company will not pay
6 for." There is the motivation. I'm going to make
7 the director/management defendants come out of
8 pocket. Is that mad or is that yelling "fire" in a
9 crowded theater?

10 Mr. Johnson's singular focus right now is
11 about now getting these director/management
12 defendants to come out of pocket and pay legal
13 expenses. He wants to make them hurt. He wants to
14 make them bleed. You can file a lawsuit if you
15 want. Maybe you can even yell at people if you
16 care, if you're mad, but you can't yell "fire" in a
17 crowded theater. It's just the way it is.

18 Okay. So he sends in the "Buckle up, boys"
19 e-mail. We've all seen it. That's his one option
20 that he's giving. He also says in there, [as read]
21 "Give your stock back, resign the board seat,
22 terminate employment, and only then will the
23 director/management defendants not be sued." That,
24 ladies and gentlemen, is weaponizing litigation.

25 Then he sent the letter to the customers
26 that was unforgivable. You've seen it. It's the
27 e-mail he sent saying, Stop paying Storix. We've
28 all seen it. Now, was he mad then when he told the

1 customers, Hey, stop paying? Was he mad then when
2 he told the customers of the organization which he
3 is now a member of the board that you shouldn't pay
4 them any more money for the sole product that they
5 make?

6 He also said in an e-mail to Mr. Kinney, he
7 says -- he brags about it really. He says to
8 Mr. Kinney, "It is followed" -- that's the "Buckle
9 up, boys" e-mail -- "followed by the e-mail I sent
10 to" -- what -- "a large number of customers."

11 And you remember him on the stand here
12 saying, I just sent it to a few, a few customers.
13 No harm no foul. I don't know why the day
14 afterwards he's telling Mr. Kinney he sent it to a
15 large number of customers. Look at that. "Storix
16 is in a panic. The phones are ringing off the hook.
17 Attorneys are gathering." You saw that in spades
18 here. That, ladies and gentlemen, is weaponizing
19 litigation. That's bullying.

20 Now, Mr. Kinney, he's the one that was on
21 the stand just a couple of days ago. He's the guy
22 from Minnesota. All right. He's got no appetite
23 for this. He's trying to get away from all this.
24 Mr. Johnson apparently knows he went back home,
25 because Mr. Johnson sends him a text threatening to
26 sue his parents.

27 Mr. Kinney, he's the guy that Mr. Johnson
28 told Mr. Bonert that Mr. Kinney ignored a subpoena

1 to testify by faking a move to Minnesota. That's
2 what he is telling Mr. Bonert, who's sitting right
3 in the back there.

4 Not to be out done, Ms. Sassi enlists the
5 assistance of a friend to drop off a package of
6 financial documents or other documents at the
7 doorstep of Mr. Kinney's parents in Minnesota.
8 That's weaponizing litigation. This lawsuit,
9 further evidence of weaponizing litigation.

10 The only damage Mr. Johnson claims in this
11 case -- the only evidence you've seen of any damage
12 whatsoever is \$50,000 per year for life and \$795 per
13 month for insurance premiums until age 65. But
14 this, again, is what he said in the copyright trial.
15 When he quit, he gave up the \$50,000. That's
16 because he didn't need the medical insurance. Now
17 he's asking to give \$795 a month until he hits 65.
18 This is what he said in previous testimony.

19 Now, even if he didn't give it up, even if
20 he said, "Oh, that never happened, and I'm entitled
21 to it," and so forth -- if you recall my
22 cross-examination of Mr. Johnson, I said, "Why are
23 you suing these guys? These guys don't write your
24 checks. They're not obligated to give you \$50,000 a
25 year for life and \$795 a month for health insurance
26 premiums. That's your compensation when you're on a
27 payroll. Who owes you that compensation?
28 Mr. Huffman? Mr. Turner? Mr. Smiljkovich?

1 Mr. Kinney? Mr. Altamirano in the back? No. This
2 is a Storix obligation. He's suing the wrong
3 people. That's weaponizing litigation.

4 Mr. Harding -- Mr. Johnson is not seeking
5 salary and benefits from Storix. He could care less
6 about that. Mr. Johnson is doubling down, like he
7 told his softball buddy. He's going to file another
8 lawsuit. This one in state court. That's why
9 you're here. That's weaponizing litigation. Ladies
10 and gentlemen, Mr. Johnson is not a victim here.
11 He's the bully. There's no evidence to the
12 contrary.

13 Let me move on. C, final letter, constant,
14 constant, constant, constant complaining. That's
15 all you've heard during the closing argument in this
16 case. It's more complaining. You heard an earful
17 from Mr. King regarding the complaints Mr. Johnson
18 had. He doesn't like the way he's being treated.

19 I get it. You don't like the way you're
20 being treated. You don't like the fact that when
21 you come into a team-oriented environment that your
22 benevolent dictator ways don't wash anymore. I
23 understand that, but that's a complaint that not
24 compensable. Fine. You don't like being
25 treated [sic]. So what?

26 So what is it? Hurt feelings? Is that
27 what Mr. Johnson is complaining about? His feelings
28 are hurt? Where's the damage from that? He's

1 claiming \$50,000 a year salary for the rest of his
2 life. That's not for hurt feelings.

3 Now, in my opening statement I told you
4 that you're also going to listen to a laundry list
5 of corporate governance complaints and, in fact, you
6 did. Let me go through at least some of them,
7 because you also heard from Mr. Walt yesterday. He
8 was the corporate governance expert. He testified
9 and we kind of picked them off one by one.

10 Curious. Where's the expert corporate
11 governance person that came in on behalf of Johnson
12 and said everything that Mr. Walt said is wrong?
13 There is no expert because it isn't wrong. His
14 expert testimony is unrebutted.

15 He testified regarding corporate democracy,
16 the business judgment rule, the duties of loyalties
17 and care. He went through the entire laundry list
18 of corporate governance complaints. And he said, in
19 general, but I'm going to pick off a few. He said
20 that everything that these director/management
21 defendants did was consistent with their duty of
22 loyalty and care. Where is evidence to the
23 contrary? There's no rebuttal expert. And
24 rightfully so, because there's nothing to rebut.
25 Truth is unrebuttable.

26 So Mr. Walt walked you through the original
27 bylaws. You remember the original bylaws and the
28 amended bylaws. We talked a little bit about that.

1 The right of first refusal, we talked a little bit
2 about that. They're customary. It doesn't make any
3 difference, because it won't affect Mr. Johnson's
4 shares anyway because that was -- that bylaw
5 amendment was enacted after Mr. Johnson had his
6 shares. So it doesn't affect pre-existing shares.
7 So what's the bylaw amendment problem here? It's
8 just another complaint. I get it. You don't like
9 it. So what?

10 And when I say, "So what," I don't mean to
11 be tough. I don't. What I do mean to be is --
12 challenge you to ask yourself, Where's the damage?
13 Why would he be entitled to any compensation because
14 he really just doesn't like what is happening or
15 perhaps the way he's being treated?

16 Buy-sell agreement. God, we spent a lot of
17 time on the buy-sell agreement. Do you remember
18 this is -- this is -- what was that? There's this
19 fictional buy-sell agreement that we've -- just
20 never have seen a copy of.

21 Mr. Johnson comes in and says, Well, wait a
22 minute. This buy-sell agreement that ultimately
23 made its way into the share agreement is not the
24 buy-sell agreement he's talking about. The problem
25 is we haven't seen another buy-sell agreement
26 because there isn't another buy-sell agreement.

27 The buy-sell agreement Mr. Walt testified
28 about, it's a customary succession tool. Makes

1 sense. Mr. Smiljkovich testified, Hey, this is what
2 we're trying to do. We're trying to accommodate
3 potential outcomes. It's not just the debt or the
4 enforcement demise of the 40 percent shareholder.
5 It could be divorce. It could be you're selling
6 your shares to someone else. It could be a whole
7 host of issues, but all of that is within the ambit
8 of success planning.

9 Remember the key on a shareholder is that
10 only those who signed it are bound by it.
11 Mr. Johnson didn't sign it, so where's the problem?
12 It's just another complaint. Now, he didn't sign it
13 and he said in my examination of him because --
14 well, Number 1 he wouldn't have signed it anyway,
15 but he was never given the opportunity to deal with
16 it, to review it, to negotiate its provisions. You
17 concealed it from me. You concealed the fact that
18 you are -- you're getting loans. You're concealing
19 the fact you're getting credit cards, lines of
20 credit. You're concealing all this from me and you
21 should have told me. Because you didn't tell me,
22 you engaged in a fraudulent concealment.

23 Mr. Smiljkovich testified at length, almost
24 ad nauseam, about why it is that the revelation --
25 the disclosure of a buy-sell agreement was delayed
26 until Mr. Smiljkovich sent there -- this Exhibit 86.
27 It was delayed because he's dealing with lawyers,
28 trying to tee things up, and all of those things.

1 But who did he send it to? July 16, 2014,
2 that's 3 1/2 years ago. He sent it to Mr. Johnson.
3 So he's not given an opportunity to participate? Is
4 this fraudulent concealment?

5 Then we went through the litany of board
6 meetings and the minutes, if you recall. The first
7 one was February 12th. That's where the board --
8 board of directors was voted. That's the one where
9 this ballot issue was created.

10 We also looked at the board minutes about
11 two months later in April where the proposed
12 shareholder agreement was presented. That's the one
13 Mr. Eastman was at. He's the one that represented
14 Mr. Johnson. He's the one that wanted three
15 additional weeks to review, comment, get back, that
16 kind of a thing. And what did the board do? They
17 granted it.

18 A month later, have another board meeting.
19 You saw those minutes. Mr. Eastman, he didn't
20 bother participating. He didn't come back and say,
21 "Hey, there's a problem here." There's no notes.
22 There's no evidence of review. There's no evidence
23 of negotiation. Mr. Johnson never said, "Yeah, I
24 got back to them. I said there's this problem and
25 that problem. Let's negotiate a solution." But if
26 he wasn't involved in the process, there's some
27 fraudulent concealment here?

28 Mr. Johnson then claims, Well, wait a

1 minute. You can't vote that buy-sell agreement in
2 as a member of the board because it's an agreement
3 with Storix, the company. You're the board of the
4 company, and you have a -- you're an interested
5 director, and thus, you're disqualified.

6 Mr. Johnson says, Well, that's why I didn't
7 become a member -- a party to the shareholder
8 agreement. I'm not going to join an agreement
9 that's illegitimate.

10 What did Mr. Walt say? The three members
11 of the board that voted on that and improved that
12 buy-sell agreement did so legitimately. Why?
13 Because they're not financial interested. There's
14 no disinterested issue here. There's no issue of
15 disqualification of an interested board member.
16 That is not what disqualified the board member, thus
17 three votes against Mr. Johnson. It was enough to
18 carry the day. So there's no problem here.

19 So even though Mr. Johnson was invited to
20 participate in the negotiation and conclusion of a
21 buy-sell agreement ten months previously, even
22 though his attorney had it for review for -- for
23 weeks before, and even though Mr. Johnson said he
24 would never be party to that agreement in any event,
25 he comes into this courtroom and complains to you
26 that somehow that breaches his -- our fiduciary duty
27 to him. I don't get it. That's just complaining.

28 I'm going to go through a laundry list of

1 other things very quickly. Mr. Walt -- because it
2 seems --

3 Awfully, warm in here, Your Honor. I don't
4 know if I'm speaking on behalf of any members. It
5 seems awfully.

6 The stock option plan, do you remember that
7 part? There's no concealment here either.
8 Considering such a plan is good corporate
9 governance. Do you remember Mr. Smiljkovich talking
10 about stock option plans? Why did he do that?
11 Well, three Rs, right? Reward, recruitment,
12 retention.

13 What's happening? They're losing people.
14 They're losing coders to -- I don't know -- Google
15 or whatever they're going. The Googles of the world
16 are paying them a heck of a lot of money. How are
17 you going to keep them here? Mr. Walt said, Give
18 them some stock. And that's what the stock option
19 plan was all about, but the fact was it was never
20 enacted. So what's the complaint? Nothing ever
21 happened

22 So why are we hearing this in our ear,
23 Mr. Johnson? That's just -- it's just another
24 complaint. That, ladies and gentlemen, is arrogance
25 and it's arrogance undeterred.

26 Mr. Walt also discussed the new ballot.
27 That's getting back to that February board meeting.
28 Remember we had an issue with Mr. Altamirano going

1 out and getting a new ballot because he wanted to
2 replace the ballot that he had. They wanted to make
3 a big deal that there's some big conspiracy out
4 there.

5 Remember Mr. Eastman yesterday? He came in
6 and he can't even get the facts right. He said
7 there's some counsel that left with Mr. --
8 Mr. Kinney -- no, that left the room, and it wasn't
9 him at all. It was Mr. Smiljkovich. He can't even
10 identify Mr. Smiljkovich. So that's what happened.

11 There's no issue here with a spoiled
12 ballot. Mr. Walt talked about that and said, Hey,
13 no problem with respect to replacing ballots. It's
14 kind of like going to a polling place, right? You
15 can get a ballot replaced. Corporate governance,
16 the same way. You can get a ballot replaced.

17 And besides, these gentlemen were trying to
18 get it right, because they knew there was a storm
19 coming from Mr. Johnson given the way and manner
20 things are progressing. So they had to get it
21 right. So what did they do? They scripted it with
22 the assistance of their attorneys so they'd get it
23 right. Follow the script, everything's good, and it
24 all works. And that's what happened. There's no
25 issue here. This ballot a ruse. That's just
26 another complaint.

27 Code of conduct. Remember when he talk
28 about code of conduct? Wait a minute. You're

1 squelching me. I only get three minutes to talk.
2 Well, I think the evidence shows why it is the board
3 want to limit it to three minutes, and that was a
4 code of conduct then that was applied cross the
5 board. Everyone in this room that's a director of
6 Storix was subject to that three minutes and abided
7 by it with two exceptions, and they're both seated
8 at that counsel table.

9 They tried to govern the amount of time of
10 discussion, rightfully so, according to Mr. Walt.
11 It didn't work. Given the personalities of those
12 two that are sitting at that table, can you wonder
13 why? That's why you have a code of conduct there.

14 But perhaps most important, Mr. Johnson
15 comes in here and says, Wait a minute. I am treated
16 differently. There's dispirit conduct here because
17 Storix is advancing the defense costs of these
18 gentlemen and they're not advancing my defense
19 costs, says Mr. Johnson.

20 Mr. Walt explained why that was so. The
21 law, corporate code, corporations of -- the bylaws,
22 I should say, the corporations code, authorizes an
23 advancement of attorney's fees, defense costs, as it
24 says, so long as there is that undertaking.
25 Remember we talked about an undertaking? Hey, look,
26 here's what you go to do. You got to make a claim.
27 Go to the company and say, "Hey, I want my defense
28 fees advanced, and here's my promise to pay it back

1 if, for some reason, it's decided that I wasn't
2 entitled to it." That's the undertaking.

3 These gentlemen submitted an undertaking
4 and have their defense costs advanced. This
5 gentleman, he had no claim, provided no undertaking,
6 doesn't have his defense costs advanced. But let's
7 presume for the moment that he made a claim, made an
8 undertaking. Would it be legitimate for the company
9 to advance these defense costs but not his?
10 Mr. Walt testified to that specifically, and he says
11 absolutely.

12 These director/management defendants are
13 getting sued by Mr. Johnson because of how they
14 discharged Storix's business. Mr. Johnson, what's
15 he getting sued for? He's being sued because he was
16 discharging the business of a competitor. That's
17 the difference.

18 So even if there was an undertaking, even
19 if there was a claim, it would be well define --
20 legitimate for Storix to deny Mr. Johnson's request
21 for the advancement of defense fees while granting
22 the defense fees to the director/management
23 defendants.

24 Arrogance, that's a charitable way to
25 describe Mr. Johnson's expectation that Storix is
26 going to advance expenses to the very director it is
27 suing for starting to compete -- starting a
28 competing business. You're going to sue a director,

1 and then somehow you're going to advance him defense
2 costs to defendant against your suit? That's
3 arrogance. He's coming in here and he's telling,
4 I'm getting cheated, dispirit treatment, because
5 Storix is advancing the defense costs of these
6 gentlemen because I sued them for breach of
7 fiduciary duty. That's unfair. Just not the case.

8 Mr. King said these folks want the company.
9 Mr. King said they wanted 100 percent of the
10 company. Mr. King said they want to keep the
11 company. Ladies and gentlemen, Mr. Johnson, he's
12 still a 40 percent shareholder. He's not employed
13 because he quit. He needs to stop complaining.
14 He's not the victim. He's the bully. He weaponized
15 litigation and it has cost Storix dearly. Ladies
16 and gentlemen, enough is enough. It's as simple as
17 ABC. Thank you very much.

18 THE COURT: Mr. Sullivan, closing rebuttal
19 argument on behalf of the plaintiff?

20 MR. SULLIVAN: Thank you, Your Honor.

21 You heard Mr. King. That's it. That's why
22 we're all here, 3500 bucks. Is that really it? Why
23 did Mr. Johnson just write a check for \$3,500 if
24 that's all it was about?

25 Six months, that's how quickly he was
26 certain he could put Storix out of the business.
27 Should Storix have waited that six months in order
28 to bring a claim against Mr. Johnson?

1 Frivolous lawsuit. Did I ask for \$1 in
2 opening statement? What is frivolous about a
3 company trying to save itself from ruin?

4 Credibility is crucial to every case. You
5 heard Mr. King admit for the first time that his
6 drawing was obviously an exaggeration; don't hold it
7 against his client. Did we hear it was obviously an
8 exaggeration at the time it was drawn? Did
9 Ms. Sassi take the time to correct him and tell him,
10 "No, there weren't nine mystery lawyers in that
11 room"?

12 Credibility is everything. "Don't worry,"
13 we're told. "Authors always keep copies of their
14 works. That's just what they do." Did anybody hear
15 any expert testimony saying that's what authors
16 always do, any testimony whatsoever? Did you hear
17 any authority for that statement?

18 Regardless of how he obtained it,
19 Mr. Johnson was a director of Storix, and knew he
20 possessed the company's source code. He knew that
21 it was confidentially maintained, and he used it to
22 his own advantage.

23 Can we see the trial exhibit -- go to the
24 next page, please.

25 Mr. King drew our attention to the Jeffrey
26 Harding e-mail between Mr. Johnson and Jeffrey
27 Harding, pointing out some lines in the first
28 paragraph. One sentence he didn't highlight: The

1 last sentence, "or I need them go out of business
2 first." That's been his goal. He needed Storix out
3 of the way.

4
5 He says in the next paragraph -- he ends
6 with, "The only way I can be safe to move forward is
7 if Storix cannot harm me anymore. But time is not
8 on my side, so I'm pulling out all the stops."
9 We've seen some of those stops. Who knows if we've
10 seen them all? There may be some we'll never know
11 about.

12 So Mr. King claims that there's no big
13 deal. Janstor made no sales. No harm, no foul,
14 right? As we heard Mr. Johnson testify, he does not
15 regret his actions, just the consequences of those
16 acts.

17 Well, the judge will instruct you at the
18 end of this case. What those consequences are for
19 Mr. Johnson's acts. One of those instructions is
20 referred to as "unjust enrichment." That
21 instruction will tell you that you may award an
22 amount measured by the unfair head start Mr. Johnson
23 obtained by using the company's property. That's
24 the Mr. Bergmark software valuation we discussed.
25 Yes, it's a significant amount, and it's what the
26 law allows.

27 So is Storix just suing for \$3,500?
28 Of course not. You can make that award. This case

1 is larger than that. Storix had much more to lose
2 than \$3,500.

3 We all recall in opening statements
4 Mr. King bringing up Office Space, our good friend
5 Milton with his red stapler. Milton was the poor
6 abused employee of Initech, relegated to the
7 basement. He was fixated on his red stapler. He
8 had an unhealthy obsession with it, so much so that
9 when it was taken from him, he decided to burn down
10 the company.

11 Mr. Johnson has his own red stapler,
12 SB Admin. And I'll give you Milton was mistreated
13 at his job. Did we see any evidence that
14 Mr. Johnson was treated the way Milton was? Only in
15 his mind. Storix should not have to have weighted
16 for Mr. Johnson to succeed in burning it down before
17 taking steps necessary to pursue protecting its
18 interests.

19 Mr. King and Mr. Johnson may not like what
20 consequences follow for Mr. Johnson's acts under the
21 law, but their lights or dislikes are irrelevant.
22 Your job will be to follow the law as the judge
23 instructs you. If you do so, you will see why this
24 case is about much more than \$3,500. Don't judge
25 him, Mr. King says. Don't look at what he wrote.

26 I ask you to judge him on his acts. That
27 is what the law would require. Actions have
28 consequences. That is the message we ask you to

1 send. Thank you.

2 THE COURT: Mr. King, closing rebuttal
3 argument on behalf of Mr. Johnson?

4 MR. KING: My dad used to tell me -- he'd
5 say, "If you're accused of something, don't respond
6 by telling the person who's accusing you that they
7 did something else bad."

8 Mr. McCloskey, in his -- his statement,
9 spent a significant amount of time talking about all
10 the things that Johnson did after he was betrayed,
11 after he was denied any role in the company. And
12 that's telling, right?

13 How much time did Mr. McCloskey spend on
14 attacking whether or not these cross-defendants
15 breached their duty as majority controlling
16 shareholders to the person who gave them the stock,
17 the minority shareholder who came back to the
18 business and expected to be treated fairly? How
19 much time did he spend instead talking about how mad
20 Mr. Johnson got, how crazy this whole thing had been
21 blown up into? Why? Why would he spend all that
22 time talking about that?

23 Mr. McCloskey did have some things to say
24 in direct response to the wrongs that happened to
25 Mr. Johnson before July 15, 2014. He had a few
26 things. Mostly, it was after that. But let's look
27 at the stuff he did say.

28 He said that this was not a gift and we

1 required a two-year commitment and Mr. Huffman put
2 his education on hold, was ready to go back to
3 school, but, you know, he said, All right. I will
4 stay and do this two years. So it's not a gift.

5 Okay. I understand. Mr. Huffman decided
6 not to go back to school. What Mr. McCloskey
7 neglects to point out is what Mr. Huffman also
8 received as a shareholder. For two years, about
9 20 percent of a million dollars in profits. You'll
10 see it. When you go back in the jury room, there's
11 the evidence of the annual reports. You can go
12 right into it and see exactly how much everyone got
13 as distributions.

14 Sixty percent of a million dollars in
15 profit is what Mr. Johnson gave up. Sixty percent
16 of a million dollars in profit is what
17 cross-defendants got. That -- Mr. Johnson didn't
18 need to force anyone to stay. They wanted that and
19 that's fine. That's what Mr. Johnson wanted.

20 But to say that Mr. Huffman had to give up
21 his education just to stay and take care of the
22 company, that's not true. He was well compensated.
23 There's plenty of reason why every single one of
24 them wanted the stock and wanted to stay. It's
25 making money. Who wouldn't want it?

26 What they didn't want, though, was they
27 didn't want to be partners with the person who
28 invited them to be partners with him. Well, if that

1 happens, someone invites you to be their business
2 partner and you don't like them, well, you have a
3 choice. You can say, "I don't want to be your
4 business partner because I don't like. I don't get
5 along with you. You're just -- you're weird. I
6 don't want to work with you." So you don't go into
7 partnership with them.

8 If you accept their invitation, you become
9 their business partner and you work with them and
10 you have an obligation that partners have when they
11 take -- when they undertake an enterprise together
12 to work together in good faith and trust each other.
13 They wanted stock. They didn't want Johnson.

14 Now, Mr. McCloskey says that we're trying
15 to enforce an agreement for \$50,000 for life. And
16 again, I don't want you to be confused on this.
17 We -- Mr. Johnson is not saying that they have
18 promised to pay him \$50,000 for life and they
19 breached that promise and he's entitled -- no.

20 We're saying this: He had a reasonable
21 expectation as a business partner, as a software
22 developer. If he were to recover and come back to
23 the company, he had every expectation that he would
24 have a role in working at the company.

25 Now, yes, you saw the testimony. He did
26 resign in May of 2014. And honestly, it sounded
27 like he was -- you know, it sounded like there was
28 some issues there, but he did. But when he asks to

1 come back, which again, everyone says, "Welcome
2 back. You're a great programmer. You're the
3 most--skilled programmer in the world," what's the
4 response? No.

5 We're saying Mr. Johnson had an expectation
6 he was going to have a position at the company if he
7 wanted it. He wanted it. They said no. Now,
8 Mr. McCloskey's comment on that was, There's no
9 evidence of these phone conversations.

10 There's actually more evidence than I
11 thought we'd get in the trial of those phone
12 conversations. There are -- these are, again, the
13 phone conversations Mr. Johnson, Anthony, was having
14 with Mr. Altamirano in June -- late June and
15 July 2014.

16 Again, he was not saying in these phone
17 conversations, "I demand all these conditions. I'm
18 not coming back unless this, this, and this." No.
19 He's saying yes, probably ranting a little bit,
20 probably getting some stuff off his chest, talking
21 to someone he trusts, one of his partners. And he's
22 saying, Hey, talk to these other guys. Let's sit
23 down and see if we can work it out.

24 Sounds like a pretty reasonable thing to
25 say. And I don't think Mr. Altamirano disputed any
26 of that. Anthony says, On July 15th,
27 Mr. Altamirano, in a conversation with me, told me
28 that I wasn't welcome back. They're not willing to

1 sit down and talk with you [sic] about it.

2 Maybe I was watching a different
3 Mr. Altamirano testify in this trial, but I heard
4 him testify. You heard him testify. He was clear
5 as day that maybe he didn't use the words, "You're
6 not welcome back," but that was the message.
7 Anthony needs to move on. Anthony's not the right
8 fit here. Whatever the -- whatever the words were
9 that he used, the message was clear. I got it.
10 Everyone got it. You're not welcome back.

11 Now, up to that point, Anthony had never
12 said, "I'm going to sue you all for the copyright
13 unless you meet all these conditions." In fact, you
14 go in the exhibit room and you'll see Exhibit 338.
15 Okay. The first time -- he says the first time I'm
16 mentioning the copyright claim is July 16th. That's
17 the first mention of it after you've been told your
18 out. You're not coming back.

19 Why \$50,000 a year? I think that's
20 probably where the confusion is. That's what he
21 asked for. So it seems natural that he might be
22 saying there's a breach of and agreement, and we
23 really should be suing Storix for this employment
24 agreement. No. The defendants breached their
25 agreement -- their obligation -- sorry -- as
26 controlling shareholders in a business.

27 And their -- they have a fiduciary
28 obligation to treat a minority shareholder fairly

1 and justly, equitably. By keeping Mr. Johnson out
2 of the company by denying him a position, they
3 breached that obligation.

4 Now, why \$50,000? Honestly, if Mr. Johnson
5 were expect -- to go back, he probably expects a
6 higher wage. The reason we chose \$50,000 -- the
7 reason I'm requesting \$50,000 here is because that's
8 what they agreed to when Mr. Johnson had to do
9 nothing. So at a minimum, the reasonable
10 expectation he had was what they agreed to when he
11 left and he had to do nothing. That's what he lost.

12 Now, the damage was not caused by an
13 employer turning an employment relationship or --
14 it's caused by his business partner saying, You're
15 out. It's caused by his business partner saying,
16 You don't have a role in this company anymore. You
17 can have three minutes on a meeting, and that's it.
18 And you can get the checks that we send to you, but
19 you don't have any role. You don't have any
20 interest in -- you don't get salary. You don't get
21 any role in developing the software. That's it.
22 You're out. That's the breach.

23 Mr. McCloskey talked about Mr. Walt's
24 testimony. He said it was unrebutted. Mr. Walt is
25 an attorney, just like Mr. McCloskey. Mr. Walt is
26 an attorney, but he's acting as an expert witness.
27 So he's going to get up there and he's going to do
28 his job as -- for the people who hired him as an

1 expert witness.

2 So I have -- I'm not surprised that when
3 you hire an attorney to take your case, say things
4 to help you out, the attorney's goes to say things
5 in your favor. And he said -- Mr. McCloskey said
6 these guys didn't breach any of their duties as
7 directors or as officers.

8 But pay closer attention to what Mr. Walt
9 didn't testify to. Did you hear Mr. Walt testify
10 that these gentlemen did not breach their duties as
11 majority shareholders? No. Did you hear Mr. Walt
12 testify when I asked him, "What's Mr. Johnson's
13 remedy if these guys treat him unfairly, if these
14 guys, the day after the trial's over, dilute the
15 shares of stock, put Mr. Johnson down to 1 percent
16 and keep their percentage and continue running the
17 company as it was?"

18 He's -- he said his remedy is a breach of
19 fiduciary duty against the majority shareholders for
20 abusing their control. That's what this lawsuit is
21 about. But he didn't testify that these guys didn't
22 breach that duty. Why not? If that were my expert
23 in this case, that would be the first thing he'd
24 testified to, but he didn't.

25 Talked about this buy-sell agreement.
26 Again, it's so confusing. It's frustrating, but I
27 think you guys get it. I'm not going to belabor it,
28 but there was no original buy-sell agreement. The

1 point is not a buy-sell agreement was concealed or
2 not produced. They concealed the efforts to go
3 pursue one and have one put in place from
4 Mr. Johnson, who's sitting right there. That's what
5 they concealed. They concealed it from their
6 business partner, those efforts to get that in
7 place.

8 When you go back there and deliberate, the
9 judge is going to instruct you and you're going to
10 have a bunch of exhibits. And you're probably going
11 to get up, get out the door really quick, and you
12 probably know what you're already going to do. I
13 would urge you to take -- pay close attention to all
14 of the exhibits. Read them all.

15 If you have any concern about the
16 testimony, what the testimony was, you can ask the
17 court reporter to come in, provide you -- provide
18 you that testimony. If you have any question,
19 direct it to the judge and the judge will deal with
20 that. I urge you to be thorough. I urge you to
21 consider all the facts in this case, everything that
22 happened. Thank you. I have nothing further.

23 THE COURT: Ladies and gentlemen let's take
24 another recess. If we can try to keep this one to
25 about ten minutes, that would be great and remember
26 the admonition. See you back in about ten minutes.

27 (Whereupon jury instructions were given and
28 reported but not requested in the transcript on

1 appeal.)

2 (Jury deliberates.)

3 (The proceedings concluded at 4:20 p.m.)

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1 STATE OF CALIFORNIA)
2 COUNTY OF SAN DIEGO)
3

4 I, Leyla S. Jones, a Certified Shorthand
5 Reporter, do hereby certify:

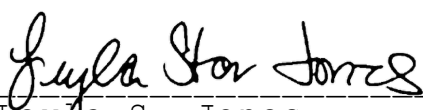
6 That prior to being examined, the witness
7 in the foregoing proceedings was by me duly sworn to
8 testify to the truth, the whole truth, and nothing
9 but the truth;

10 That said proceedings were taken before me
11 at the time and place therein set forth and were
12 taken down by me in shorthand and thereafter
13 transcribed into typewriting under my direction and
14 supervision;

15 I further certify that I am neither counsel
16 for, nor related to, any party to said proceedings,
17 nor in any way interested in the outcome thereof.

18 In witness whereof, I have hereunto
19 subscribed my name.

20
21 Dated: June 16, 2019

22
23 
24 _____
25 Leyla S. Jones
26 CSR No. 12750
27
28