NO. D075308

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

STORIX, INC.,

Plaintiff and Respondent,

v.

ANTHONY JOHNSON,

Defendant, Appellant.

ANTHONY JOHNSON,

Cross-Claimant, Appellant.

v.

DAVID HUFFMAN, RICHARD TURNER, MANUEL ALTAMIRANO, DAVID KINNEY, and DAVID SMILJKOVICH,

Cross-Defendants, Respondents,

On Appeal from Judgments and Orders in
the Superior Court for the County of San Diego
Case No. 37-2015-00028262-CU-BT-CTL
Consolidated under Lead Case No. 37-2015-00034545-CU-BT-CTL

Honorable Kevin A. Enright, Judge Presiding

RESPONDENT'S BRIEF OF STORIX, INC.

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208)

These entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

1. David Huffman
2. Richard Turner
3. Manuel Altamirano
4. David Kinney
5. Anthony Johnson
6. Robin Sassi

DATED: November 13, 2019 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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I.
INTRODUCTION

Appellant Anthony Johnson ("Johnson") appeals a judgment entered in favor of Respondent Storix, Inc. ("Storix") following a three-week jury trial.[1] The lawsuit arose from Johnson's breaches of fiduciary duty while he was a member of Storix's board of directors. Storix filed the lawsuit after learning Johnson formed a new corporation called Janstor Technology ("Janstor"). Despite his role as a Storix director, Johnson intended to commercialize a "re-branded" version of Storix's software under the Janstor name in direct competition with Storix. Johnson based the Janstor software on a version of Storix's source code he kept after resigning as a Storix employee.

After being served with the complaint, Johnson sent an email entitled "Buckle up boys!" ("Buckle up email") to his Storix co-shareholders, who also served as officers and directors, and to other non-shareholder employees. The email demanded that

[1] This consolidated action involved Storix's complaint against Johnson for breach of fiduciary duty and for an injunction. Johnson also cross-complained against the individual respondents herein and initiated a related derivative action. Issues relevant to the cross-complaint and derivative action are primarily addressed in the individual respondents' separate brief.

David Huffman, Richard Turner, Manuel Altamirano, David Kinney and David Smiljkovich (the "Individual Respondents") resign or risk losing their homes and jobs.[2] Johnson then used his access to a confidential Storix customer list to send an email blast to Storix customers ("Customer email") demanding that customers "cease any further payment to Storix in relation to this software and refrain from downloading any further copies."

At trial, Storix employees testified regarding the time and expense associated with responding to customers and the actions taken to minimize harm caused by Johnson's efforts to undermine Storix's success. The existence of damages was undisputed and conceded by Johnson's counsel during closing argument:

> "I want to talk again more about damage, because other than the $3,700 in damage, what is their damage?"[3]

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[2] Johnson boasted he would outspend Storix due to his great wealth and confirmed at trial he had millions. [See, e.g., 12RT 1760, 14CT 2172-2173; 4NOL Tab 71, Exh. 356 ("If you have about $1 million sitting around, this shouldn't worry you. I do."] Indeed, Johnson has been represented by multiple different attorneys and law firms and only recently has appeared in pro per.

[3] 17RT 2866.

The jury not surprisingly found Johnson liable for breach of his duty of loyalty to Storix and awarded $3,739.14 in damages.

Johnson ignores the evidence of his course of conduct breaching his fiduciary duty to Storix and the damage that resulted. Instead, his brief makes numerous unsupported statements untethered to the record. [AOB, pp.10-12.] He also fails to explain why the granting of continuances, where counsel sat during trial, and why the order preventing Johnson from saying he represented Storix, among other complaints, support reversal of the judgment. Notwithstanding the foregoing, Johnson appears to raise three primary issues on appeal.

First, under the guise of a "standing" challenge, Johnson contends Storix lacked authority to sue him because Storix did not hold a formal board meeting and vote to authorize the lawsuit. This argument fails for several reasons. Johnson waived this defense by failing to raise it prior to trial. Even if considered, Storix's president and its officers, a three-fifths majority of Storix's board of directors, were informed of the planned lawsuit and authorized that it be filed. Moreover, Storix's president had the authority to authorize a suit against Johnson for breaching the duties he owed the company. Indeed,

when Johnson was president of Storix he had authorized lawsuits multiple times. The board of directors also subsequently ratified the decision to file this action, with retroactive effect, confirming it as a valid and authorized corporate act.

Second, without summarizing the testimony and evidence on damages, Johnson claims the Customer email is the only evidence supporting the jury's verdict and that the trial court abused its discretion by not excluding the email based on the litigation privilege. Johnson has waived challenge of this issue by failing to adequately summarize the evidence. Even if considered on the merits, Johnson has failed to establish his communication was logically related to litigation and served a necessary or useful purpose as required for the litigation privilege to apply.

Third, Johnson challenges the trial court's determination that Storix was the prevailing party entitled to costs. Procedurally, the trial court's order was issued post-judgment and has not been appealed. Johnson also failed to designate a reporter's transcript to facilitate this Court's review. If considered on the merits, Johnson's appeal fails because Storix obtained a positive net recovery of damages in addition to

substantial injunctive relief against Johnson prior to trial. The fact that Storix caught Johnson establishing a competing business before he could inflict greater harm does not allow Johnson to evade liability for prevailing party costs.

Johnson's appeal is not based on a verdict that is unsupported by substantial evidence or trial court error. Instead, this appeal is driven by Johnson's desire to have Storix pay his attorney fees in defending the underlying action. As Johnson's counsel advised the jury during closing *after conceding Storix incurred damage:*

> If Anthony Johnson wins, if they can't show any damages, okay, the company has to pay back Mr. Johnson's defense costs defending against this claim. So they just want you to award $1, and that way, Anthony Johnson doesn't get to have his costs - - his attorney fees reimbursed. That's what this is all about.

[17RT 2848-2849.] The judgment and award of costs to Storix should be affirmed.

II.
STATEMENT OF FACTS

A. The Parties.

Storix develops and sells software called "System Backup Administrator," aka "SBAdmin." SBAdmin streamlines the backup and recovery of computer systems in the event of a

system failure or loss of data and is used by some of the country's best known businesses. [8RT 805-806; 10RT 1244.]

Johnson founded Storix in 1998 as a sole proprietorship and incorporated the Company in 2003. [10RT 1244.] Johnson was originally its only shareholder, officer and director. [11RT 1338.] In September 2011 Johnson resigned as an officer and director for health reasons. He transferred management and operational responsibilities to then-employees, Huffman, Turner, Altamirano and Kinney and also caused Storix to grant them new shares, amounting to a combined 60% stake in Storix. [11RT 1338-1339, 1343-1345, 1355.] Johnson retained the other 40%. [11RT 1355.][4]

The arrangement provided incentive for the then-employees to continue running Storix, and permitted Johnson to attend to his health while receiving $50,000 in annual income and health insurance. [8RT 824; 11RT 1356.] Huffman, Turner, Altamirano and Kinney were elected directors of Storix and

[4] Johnson characterizes the share issuance as a "gift," however, the individuals received their shares pursuant to written Compensatory Stock Agreements requiring them to work for two years for the shares to fully vest. [8RT 812-823; 10RT 1148; 1NOL Tab 13, Exh. 268.]

Huffman became Storix's president and chief executive officer. [8RT 821-823; 1NOL Tab 13, Exh. 268.] Storix hired David Smiljkovich as its CFO in 2013.

B. Johnson's Failed Copyright Infringement Lawsuit Against Storix.

After Johnson regained his health, he returned to Storix in 2013 to work on a possible future release of SBAdmin. [9RT 1013; 11RT 1367.] Johnson felt his work was not being recognized or appreciated, and otherwise had trouble adjusting to the new management structure since he was not in a leadership position. As a result, Johnson resigned. [9RT 885-889, 906; 10RT 1122-1123, 1203; 2NOL Tab 27, Exh. 138; Tab 30, Exh. 196, Tab 32, Exh. 28; Tab 33, Exh. 197; Tab 89, Exh.118.]

After resigning Johnson demanded Storix stop all sales of SBAdmin—Storix's flagship product and principal revenue source. [9RT 901-905; 2NOL Tab 137, Exh. 340.] He also demanded changes to Storix's management structure and personnel. [9RT 901; 10RT 1186-1187.] Johnson premised his demand on a copyright he claimed to own for SBAdmin. [9RT 905; 10RT 1643-1652.] Johnson then sued Storix for copyright infringement in the United States District Court for the Southern

District of California (*Johnson v. Storix*, Case No. 14CV1873H BLM; the "Copyright Action"). [3CT 732.][5] Storix had no choice but to vigorously defend the Copyright Action. [9RT 905-907.]

The case ultimately went to trial before United States District Judge Marilyn L. Huff. [3CT 695.] Storix obtained a unanimous jury verdict against Johnson on his infringement claim and a declaration that Storix owned all copyrights to all versions of SBAdmin. [10RT 1209; 12CT 3284; 12RT 1589.] Judge Huff also awarded Storix a discretionary award of attorneys' fees and costs under the Copyright Act, finding that Johnson had repeatedly engaged in inappropriate behavior designed to harm Storix, including threatening Storix employees and sending the Customer email telling customers to stop paying Storix so that Storix would be unable to defend the copyright litigation. [4NOL Tab 72, Exh. 22]

C. Johnson Forms Janstor to Compete with Storix.

Johnson became a Storix board member on February 12, 2015 and immediately formed Janstor to directly compete with Storix by seeking to commercialize a "re-branded" copy of Storix's

[5] See Storix's Request for Judicial Notice filed concurrently herewith.

SBAdmin software. [10RT 1206-1207, 1210-1226; 11RT 1466; 3NOL Tabs 50-54, 59 Exhs. 142, 144-148.] Johnson testified:

> Q: We had looked at documents that said you formed the Janstor corporation the day after you were elected to the board of directors. Do you recall that?
>
> A. I believe so.

[11RT 1466: 3-7; 16RT 2624.] Johnson obtained domain names, email services, and registered ports[6] with the Internet Assigned Numbers Authority. [*Id.*; 9RT 909-912, 946-947; 3NOL Tab 59, Exh. 17; Tab 57, Exh. 19; Tabs 98-101, Exh. 143-46; Tabs 104-105, Exhs. 151-52; 4NOL Tabs 106-107, Exhs.155-156.] Johnson testified at trial:

> Q: You claim that your intention in forming Janstor was to rebrand Storix and SB Admin, right?
>
> A: It was one of the reasons.
>
> Q: You began that effort after becoming a director of Storix, right?
>
> A: I began the effort at some point after that time, yes.

[10RT 1242.]

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[6] Network port numbers are necessary for products like SBAdmin to function. [9RT 911.] In registering for ports Johnson created a fictional character named "Berg." [4NOL Tab 68, Exh. 155; 10RT 1226-1230.]

Johnson also detailed his competitive plans in an email to his friend boasting about his plan to force Storix out of business through litigation and/or direct competition. [3NOL Tab 123, Exh. 20; 10RT 1260-1261.] In an email to Robin Sassi, a cohort and minority shareholder (who obtained shares following her divorce from Huffman), Johnson stated: "I feel bad for current shareholders, but they bit the hand that fed them, refused to talk, and I'm taking it all back now." [2NOL 139, Exh. 39; 10RT 1267; see also 3RA Tab 46, Exh. 140; 1NOL TAB 96, Exh. 141.] He later threatened a non-shareholder employee of Storix, stating that if the employee did not serve as Johnson's internal company spy, Johnson would not protect the employee's job once Johnson regained company control. [10RT 1286-1297; 4NOL Tab 170, Exh. 874.] Johnson claimed he possessed a "marketable" competing product he intended to deploy and directed the employee to "delete" the email to erase any trace of their communication. [*Id.*]

By June 2015, Storix learned of Janstor, and questioned Johnson about its purpose during his deposition in the then-pending copyright litigation. [10RT 1197.] Johnson lied that he only formed the company to reserve a trade name. [10RT 1274-

1277, 1305; 12RT 1728 ("But if I actually attempted or took action to compete with Storix, then I could easily put Storix out of business.").] Further investigation revealed facts contradicting Johnson's denial of competitive intent. [1NOL Tab 96, Exh. 141, p. 4 (text message to Sassi, admitting he had "been working at getting Storix new competitor set up"); 14RT 2228.] Johnson admitted he took a copy of Storix's SBAdmin source code when he resigned from Storix and continued working on it, eventually "rebranding" it as "Janstor JTAdmin." [10AA 1206; 9RT 946-947, 1038-1039.]

As a result of these actions, Storix filed this action against Johnson for breach of fiduciary duty and against Janstor for aiding and abetting that breach. [2CT 303; 9RT 913-914.][7] The filing was approved by Storix's president David Huffman, who was also a member of the board of directors. [9RT 914.] Johnson and Sassi were the only Storix board members who were not informed of the decision in advance. [9RT 1044-1045; 10RT 1264-1265.] Huffman offered a common sense explanation at trial: "I don't think they would have liked - - they would have agreed with

[7] Storix obtained a default against Janstor.

us, because it was against him." [9RT 1045.] The filing was also approved by the two remaining board members, Rich Turner and Manuel Altamirano. [9RT 1044; 17RT 2180-2181 (Altamirano); 10RT 1136-1137 (Turner).]

After being sued, Johnson emailed Storix's managers and non-management employees warning them to "Buckle up boys!" and threatened to send an email to Storix's customers and contacts demanding, among other things, that they cease paying Storix for its software licenses. [4NOL Tab 71, Exh. 356; 9RT 915, 928-930; 10RT 1277-1283.] In the Buckle up email, Johnson demanded his co-shareholders surrender their Storix stock to him, quit their jobs, and walk away with nothing. He also threatened they would lose their homes and careers if they refused. [*Id.*] "*Here's your one option. Get the [expletive] out. Give your stock back to the company, resign your board seat, terminate your employment.*" [*Id.*][8]

Johnson then sent a slightly modified version of the Customer email to a list of Storix's customers and potential customers, demanding they "cease any further payment to Storix

[8] Johnson attempted to have this email excluded at trial as a privileged "Offer to Compromise." [9RT 921-926.]

in relation to this software and refrain from downloading any further copies." [9RT 931-933; 4NOL Tab 72, Exh. 22][9] To compound the situation, Johnson also tried to undermine Storix's relationship with one of its sales representatives, Brian Bonert threatening that he "and the other innocent employees are about to lose [their] jobs," that despite winning the copyright litigation Storix did not own the software copyright, and that Bonert had to assist Johnson to save his job ("Bonert email"). [4NOL Tab 78, Exh. 23; 12RT 1669.] Johnson ordered Bonert to "delete this and call me if you want to talk." [*Id.*]

Storix's second amended complaint included allegations related to Johnson's efforts to undermine the company, including not only his Janstor efforts, but by sending the Customer email, the Buckle Up email, and the Bonert email. [3CT 817.] Prior to trial Johnson moved for summary judgment on, among other things, Storix's damage claims. [5CT 1303.] Storix opposed, in part, on the ground that employee time and resources were

[9] Johnson refused to specifically identify the recipients of the Customer email and testified it was probably sent to 50 or so names that he selected from a list of 1,000 or more. [12RT 1645-1646, 1656-1657; see AOB, p. 26 (misstating that the email was sent to "a few" Storix customers).]

expended in responding to Johnson's conduct breaching his fiduciary duty. [6CT 1456-1457] Storix stated:

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

[*Id.* at 1456; see also 4RT 307.] The motion for summary judgment was denied. [6CT 1594.]

At trial, Johnson tried to deny that he pursued Janstor to compete with Storix, claiming instead it was part of his plan to acquire Storix's assets after the company collapsed under the pressure of the copyright litigation he filed against Storix, as if that excuse somehow justified his disloyalty. Johnson also denied he dissolved Janstor in response to being sued herein, and instead lied that he had dissolved it months earlier. [10RT 1247-1258; 3NOL Tab 152, Exh. 521.]

The jury heard evidence regarding Johnson's multiple breaches of fiduciary duty and the time and expense incurred to

counter Johnson's attacks. [9RT 933-941; 4NOL Tab 160, Exh. 772; 5NOL Tab 169, Exh. 872.] For example, Mr. Smiljkovich explained:

> We did -- took various actions; some proactive, some reactive. The proactive actions were to contact legal counsel to get advice on how we should respond. We drafted a memo that would be released to customers, and we dealt with customer calls that were coming in and proactively calling customers to let them know what had happened and to assure them that everything was indeed fine and that Storix owned the copyright.

[13RT 2000-2003; see also 14CT 2172-2173 ("[A major customer] is very concerned about this e-mail that they just received. I need you guys to explain what's going on here.").] A corporate governance expert testified regarding the seriousness of Johnson's communications to Storix's customers—the lifeblood of a company. [16RT 2671.] He likewise testified regarding the impropriety of Johnson's communications to Storix's employees—the other lifeblood of a company. [16RT 2672-2673.] In addition to interference damage, Storix presented evidence of unjust enrichment by Johnson's use of its source code for his competing business based on a theory of an unfair head start. [13RT 1939-1945.]

D. The Jury's Verdict.

The jury found Johnson breached his duty of loyalty by knowingly acting against Storix's interests while serving on the Board of Directors of Storix and awarded $3,739.14 in monetary damages. [13CT 3372-3374.]

The issue of Storix's authority to file suit against Johnson was determined pre-trial to be a question for the jury. [7RT 719-721.] The jury was instructed regarding corporate authority, but was not asked to make a specific finding in the verdict. [*Id.*; 13CT 3372-3374.] Later, Judge Enright found the facts to be undisputed and ruled that Storix had authority to file this action as a matter of law. [17RT 2801.].

E. The Shareholder Derivative Action.

Johnson and Sassi sued the Individual Respondents derivatively on behalf of Storix asserting causes of action for breach of fiduciary duty, abuse of control, corporate waste, and accounting. [12CT 3279-80.] The bench trial on the derivative suit followed the jury trial wherein Johnson was found to have breached his fiduciary duty of loyalty to Storix as a director. [12CT 3280.] In light of the evidence admitted during the jury trial phase, the trial court granted a motion finding Johnson

lacked standing to pursue the derivative action as a representative of the corporation. Johnson "was not an appropriate plaintiff because he was not a fair and adequate representative." [*Id.*] Sassi was, however, permitted to proceed. Following a bench trial, the trial court found she failed to meet her burden of proof on any of the derivative claims. [12CT 3283.][10]

F. The Trial Court's Post-Trial Rulings.

The trial court denied Storix's post-trial motion for entry of a permanent injunction based on Johnson's breaching conduct finding "[w]hile Johnson has indeed threatened to harm Storix's business, his words and conduct, while no doubt frustrating and upsetting to Storix, do not show an ongoing course of conduct."[12CT 3286.] The request for injunction was deemed superfluous due to the passage of time from Johnson's provocative emails, and Storix's success in obtaining orders preventing Johnson from using Storix's confidential information. [12CT 3286-3287; 5NOL Tab 81, Exh. 738 ("The court will allow Johnson to inspect and copy corporate records from 2014 to the

[10] Sassi later settled and the trial court approved settlement of the derivative action.

present at his expense. However, Storix may withhold or redact attorney-client privileged documents and attorney work product documents, as well as confidential, proprietary and trade secret information concerning the software which is the subject of the copyright infringement action. Storix may also redact customer names and employee information."); 5NOL Tab 85, Exh. 868.] In denying the injunction motion, the trial court recognized that the prior court orders remained in effect. [12CT 3387.]

Johnson filed a motion for JNOV and motion for new trial, both of which were denied. [12CT 3335 and 14CT 3817.]

G. Johnson's Appeal.

Johnson's motion for JNOV was denied on June 22, 2018. [12CT 3335.] Judgment was entered September 12, 2018. [12CT 3371.] Johnson's motion for new trial was denied on November 16, 2018. [14CT 3817.] Johnson filed his notice of appeal of the judgment on December 10, 2018. [14CT 3868.] The judgment was silent as to any award of costs or attorney fees. [12CT 3371.]

H. Post-Judgment Order Awarding Costs.

On August 2, 2019, the trial court heard Johnson's motion to strike or tax Storix's costs. [Johnson's Request for Judicial Notice, Exh. 2.] The motion was denied. [*Id.*] Storix and the

Individual Respondents were found to be prevailing parties. The trial court found Storix prevailed because it obtained a "net monetary recovery" pursuant to Code of Civil Procedure section 1032(a)(4). The trial court also found in its discretion that Storix was entitled to costs even though its net recovery was within the $25,000 jurisdictional limit for a limited civil action:

> The court finds that Storix reasonably and in good faith brought an unlimited civil action against Johnson believing that the ultimate recovery would exceed the limited jurisdictional limit. . . The court also finds Johnson has not shown that Storix's claims should have been brought in a limited civil case.

[*Id.*] Storix was therefore awarded $24,493.53 in costs.

Johnson has not filed a separate notice of appeal regarding this appealable post-trial order. Instead, he filed a request for judicial notice providing this Court with only a partial record of the post-trial proceedings. [See Johnson's Request for Judicial Notice, Exh. 2 (Notice of Ruling dated 8/5/19.).]

III.
STORIX HAD AUTHORITY AND STANDING TO SUE JOHNSON

Johnson argues Storix was not authorized to pursue this case against him because it did not conduct a formal pre-lawsuit board meeting and vote to authorize the filing. According to

Johnson, Storix lacked standing to sue and any subsequent ratification by Storix directors was invalid. His assertions lack merit.

A. Johnson Waived Any Issue of Storix's Lack of Authority to Sue by Failing to Plead the Defense.

Johnson conflates the concepts of standing with authority, arguing that Storix lacked authority to sue him, and consequently had no standing to do so. Johnson is wrong both as a matter of fact and law. Standing and authority (or capacity to sue) are distinct concepts. "There is a difference between the *capacity* to sue, which is the right to come into court, and the *standing* to sue, which is the right to relief in court." (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604; emphasis original; citation omitted.) "Incapacity is merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court. The right to relief, on the other hand, goes to the existence of a cause of action. It is not a plea in abatement, as is lack of capacity to sue." (*Id.*; citation omitted.)

Johnson never pled an affirmative defense based on "lack of authority." However, Johnson claims that without a formal board approval prior to filing this lawsuit, Storix lacked the

capacity to sue. Lack of capacity is a plea in abatement that is waived if not raised at the earliest opportunity. (*Washington Mut. Bank v. Blechman* (2007) 157 Cal.App.4th 662, 669-70.) "It is a technical objection and must be pleaded specifically." (*Id.* at 670.) "Thus an affirmative defense or demurrer which contains a general assertion that plaintiff has not stated a cause of action does not suffice to raise a plea in abatement.'" (*Id.*; citation omitted; see also *Rossdale Grp., LLC v. Walton* (2017) 12 Cal.App.5th 936, 945 [Finding issue of corporate suspension to be issue of lack of capacity to sue, not standing]; *Color-Vue, Inc. v. Abrams*, 44 Cal.App.4th at 1604 [Finding belated challenge to corporation's capacity to sue due to tax delinquency to be an issue of lack of a capacity to sue, which defendant waived by failing to raise at the earliest opportunity, thus reversing dismissal].) Johnson failed to plead lack of authority or capacity, and therefore the judgment may be affirmed on the ground that he waived the defense.

B. Storix's President Had the Power to Decide to Pursue Litigation on its Behalf.

Corporations Code §300(a) provides, subject to the code and articles: "the business and affairs of the corporation shall be

managed and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the day-to-day operation of the business of the corporation to a management company or other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board." The president is the general manager of a corporation unless otherwise provided in the articles or bylaws. (Corp. Code §312(a).) A corporation is generally bound by the acts of its officers, as its agents, within the scope of their authority, actual or apparent, either conferred by the board or within the agency power of the officer. (Corp. Code §208(b) [a contract made in the name of the corporation that is later authorized or ratified by the board binds the corporation].) Whether actual authority has been conferred is a question of fact; yet, the fact that the board knows of the officer's acts and does not object is evidence of actual authority. (*Englert v. IVAC Corp.* (1979) 92 Cal.App.3d 178, 190; Civ. Code §2316.)

To the extent California appellate courts have addressed a corporate president's power to pursue litigation for the corporation, they support the conclusion that the president has

such power, whether express or implied, unless directly prohibited. In *Sealand Inv. Corp. v. Emprise Inc.* (1961) 190 Cal.App.2d 305, 316 ("*Sealand*"), the court concluded that a shareholder and secretary of a closely held corporation lacked authority to institute litigation against company directors and officers, including the president, since the secretarial position was ministerial, but suggested the result may be different if the president made the decision. "Whatever actual or implied authority resides in the *president* to initiate an action in the name of a corporation, there is ordinarily no such implied, presumed or inherent authority in the secretary-treasurer or other officers of the corporation." (*Id.* at 320.) The court in *Sealand* reviewed a large body of law from other states addressing the power of the president to pursue litigation, quoting opinions recognizing: "when there has been no direct prohibition 'the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation." (*Id.*, at 316, *citing West View Hills, Inc. v. Lizau Realty Corp.* (1959) 189 N.Y.S.2d 863, 864 [president has implied authority and presumptive authority to act; See also *Elblum Holding Corp. v. Mintz* (N.J. Sup. Ct. 1938) 1 A.2d 204,

319 [the president "may employ and authorize counsel to institute necessary legal proceedings for the like purpose of preserving the interests of his corporation."].) The plaintiffs in *Sealand* were held to lack authority because the secretary, not the president, purported to instigate litigation. (*Id.* at 322.) And, there "was no emergency involved in the case in the sense that if the action was not filed and prosecuted as was attempted all would be lost forever for the corporation." (*Id.*)

Storix's bylaws, Art. IV §5(d), provide that, subject to control of the board, the president has general supervision, direction and control of the business of the corporation. [4NOL 172, Exh. 91.] The evidence admitted at trial proved that Storix's President, its officers, and a majority of its directors (3 out of 5) authorized the filing of the lawsuit.[11] The two directors not

[11] This fact alone distinguishes *Anmaco, Inc. v. Bohlken* (1993) 13 Cal.App.4th 891, selectively quoted by Johnson. The court in that case held: "[W]e agree with the New York courts that have found no presumptive or implied authority in the president to institute litigation in the name of the corporation against a codirector and equal shareholder. Pressing the corporation into litigation as a plaintiff is inappropriate where the other shareholder-director could claim equal authority to bring suit in the corporate name." (*Id.* at 899-900.)

consulted were Johnson and his close confidant and co-derivative plaintiff, Robin Sassi. Given Johnson's status as the target of the lawsuit, erratic behavior and deceit, collusion with Sassi and efforts to undermine Storix, there was good reason for not consulting them in advance of filing the lawsuit against Johnson. Even if they had been advised in advance of the filing, the three-vote majority would have controlled the decision to file. Thus, if viewed as a question of the president's authority, the board majority knew of the president's intent to pursue this action, did not object, and affirmatively approved of it. Each approving board member was disinterested, as none were parties to the complaint, and the harm was to the company.

Johnson's effort to render his co-directors "interested" by later filing derivative claims against them is unavailing. That would encourage specious derivative claims to allow disloyal directors to avoid answering for their disloyalty (the only claimed prejudice Johnson points to). Also, conclusory allegations of supposed personal liability are insufficient to establish a lack of

disinterest. (See *Charter Twp. of Clinton Police & Fire Ret. Sys. v. Martin* (2013) 219 Cal.App.4th 924, 936 ["Contrary to plaintiffs' contention, our de novo review establishes the vague, conclusory, and nonspecific allegations in the complaint are insufficient as a matter of law to create a doubt as to the disinterest of the directors on the theory they are exposed to personal liability."].) Rather, Johnson must have proven facts that "demonstrate[ ] a potential personal benefit or detriment to the director as a result of the decision." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 792.) None of the three directors approving the suit had a personal interest in Storix's suit against Johnson.

Johnson belatedly raised the issue of Storix's authority during trial, by proposing a last-minute instruction that confused authority with standing. [17RT 2799-2805; 11CT 3023.] The proposed instruction was refused, and the trial court instead read a modified version of CACI 3700: The jury was instructed:

> A Corporation may authorize Directors, Officers, or Employees to act on its behalf. This relationship is called "agency." The one giving the authority is called the "principal"; the person to whom authority is given is called the "agent."

[17RT 2778-2780; 11CT 3007.] The trial court then addressed the issue of authority as a matter of law, noting that the basis of

Johnson's standing or authority challenge rested on undisputed facts.[12] The trial court stated: "that, is it's undisputed what the facts are -- the interpretation of the facts is subject to dispute. But the facts are that three of the directors of five, the majority, in other words, voted to proceed on the lawsuit against, at that time, Janstor and Mr. Johnson." [17RT 2801.] The trial court further found the evidence at trial undermined Johnson's argument that this lawsuit was not properly authorized. [12CT 3335 ("[T]he court finds that there was authority to bring this lawsuit."); see also 14CT 3820 (denying motion for new trial on same ground).] Johnson provides no legal or factual basis to overturn those findings.

Johnson's reliance on *Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743 is misplaced. The *Pillsbury* court addressed the distinction between standing and capacity or authority to sue. In that case, the trust's beneficiary plaintiff lacked standing to sue because the law recognizes that it is the trustee that must seek such redress, and only if the trustee fails in that regard does the

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[12] Johnson's arguments regarding the trial court's denial of summary judgment are misplaced. (See *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256 ["an order denying summary judgment is not an appealable order"].)

beneficiary's standing to pursue such claims arise. (*Id.* at 758.) That is similar to a derivative lawsuit, wherein a shareholder must establish that a demand for action is ignored or such demand would be futile in order to be recognized as having standing to pursue a claim on a corporation's behalf. (Corp. Code § 800(b)(2). However, standing is an entirely distinct issue from whether a corporation is "authorized" to pursue a claim.

Moreover, evidence at trial proved that when Johnson was president of Storix he had a history of pursuing litigation on Storix's behalf without board approval, thereby establishing a precedent of the president's authority to so act. He testified that he caused Storix to pursue litigation in Germany on a trademark claim in 2006-07 without a board vote, and also litigated a trademark lawsuit in the U.S. without a board vote in 2004. [13RT 1868-1877, 1881 ("There was no board approval of any litigation in that matter either."); see e.g., 1NOL Tab 4, Exh. 492.] Thus, there was a pattern and practice of the Storix president validly exercising the authority to institute litigation on the company's behalf consistent with an interpretation of Storix' bylaws to permit a president to do so.

Further, Storix faced exigent circumstances and good reason for proceeding without a formally-noticed board meeting and approval. Johnson testified at trial that if he entered competition with Storix, he "promised" Storix would be put out of business within six months. [12RT 1727.] Storix's need to protect its interests was paramount and immediate. The trial evidence proved that only *after* Storix sued Johnson did he dissolve Janstor. [10RT 1253-1258; 3NOL Tab 55, Exh. 521]

C. Storix's Board Ratified the Decision With Retroactive Effect to the Extent a Formal Board Vote Was Required.

Prior corporate decisions can also be ratified by the board with retroactive effect. "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. [Citations.]" (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.) Ratification is retroactive in effect, absent prejudice to third parties. (*Meyers v. El Tejon Oil & Refining Co.* (1946) 29 Cal.2d 184, 187; Civ. Code § 2313.)[13] An act may be

[13] Johnson's reliance on *Dominguez v. Superior Court* (1983) 139 Cal.App.3d 692, is misplaced. The purported ratification in

expressly ratified by the board or the shareholders, provided that they had the authority to approve the act "in the first instance." (2A Fletcher Cyclopedia Corporations § 752, p. 420.) Under this principle, an action within the authority of the board may be ratified "through a resolution of its board of directors when duly assembled." (*John Paul Lumber Co. v. Agnew* (1954) 125 Cal.App.2d 613, 622; *see Doerr v. Fandango Lumber Co.* (1916) 31 Cal.App. 318, 323-324 [ratifying mortgage allegedly negotiated by corporation's president without board's authorization].) Ratification may also occur when a corporation knows of the act and "does not repudiate it within a reasonable time, but without objection acquiesces in that act." (2A Fletcher Cyclopedia Corporations §752, p. 425.)

The evidence at trial established the decision to sue Johnson was ratified. Johnson concedes in his opening brief that unrebutted trial testimony confirmed that three directors, including Huffman, Altamirano, and Turner, each approved Storix's lawsuit against Janstor and Johnson prior to its filing.

Dominguez threatened to impair third party rights beyond those directly tied to the existence of the unauthorized act itself. (*Id.* at 695.)

[AOB, p. 33; 4RT 308; 14RT 2252; 16RT 2561, 1CT 75; 17RT 2180-2181 (Altamirano); 10RT 1136-1137 (Turner); 9RT 914 (Huffman).] Johnson's contention that something more was required to justify Storix's standing or provide it any requisite authority lacks merit. Whether an issue of actual, apparent, or implied consent, Storix had proper power to proceed with the lawsuit.

Johnson cites Corporations Code section 307, subd. (b) and contends "any action taken by a board without a meeting requires the written consent of all directors, not just the majority." [AOB, p. 30.] Here, board authority was not required because Storix's president had authority to take such actions on the company's behalf, both based on the precedent of Storix's president doing so previously and the corporate by-laws vesting him with such authority. To the extent board authority was required, three-fifths of the board granted pre-suit authorization and consent, and a subsequent ratification was formally adopted by the board with retroactive effect. (See *Meyers v. El Tejon Oil & Refining* Co. (1946) 29 Cal.2d 184 [A resolution of the board of directors declaring a dividend, even though it is unlawful in its inception for lack of a duly held meeting, can be ratified by the board of

directors and such ratification does not require the holding of a regular meeting of the board or the passing of a resolution declaring the ratification.].)

Johnson's citation to Corporations Code section 310, subd. (a)(2) is equally unhelpful. According to Johnson, "a transaction may only be approved or ratified in good faith, without counting the vote of interested directors." [AOB, p. 30.] However, that section applies to a "transaction between a corporation and one or more of its directors, or between a corporation and any corporation" in which a direct has a "material financial interest and is therefore inapplicable." (Corp. Code § 310, subd (a).) Johnson's argument is that Storix required a board vote to sue him. That decision would not invoke section 310, or any issues of "interested directors." Further, to the extent section 310 is relevant at all, and involves a transaction not approved under section 310, subd. (a)(1) & (2), Storix carried its burden of "proving that the contract or transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified," as the trial court determined Storix had authority to sue Johnson. (See Corp. Code § 310, subd. (a)(3).)

Johnson cites *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1243 contending that "[w]hen a special verdict is used, the jury must make findings on every controverted factual issue." [AOB, p. 33.] He complains that "[t]he court ignored the above facts and generally found after the jury trial that 'there was authority to bring this lawsuit.'" [*Id.*] However, as held in *Taylor*, a party that fails to object to a special verdict form waives challenge on appeal. (*Taylor*, 222 Cal.App.4th at 1243.) Johnson never raised an objection to the special verdict form. In fact, his counsel consented to the form. [17RT 2778; 17RT 2809-2810.]

D. Storix's Direct Suit Against Johnson Was Proper.

Johnson's standing argument premised on a purported lack of authority to file suit is misplaced. Standing to sue is the right to relief in court. (*Color–Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604.) "A plaintiff lacks standing to sue if, for example, it [is] not a real party in interest." (*Id.* at 1604, fn. 4.) The issue of standing to sue is a threshold legal issue to be decided by the court. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 103.) "

Storix's claims against Johnson and Janstor are not derivative in nature. Storix suffered harm and had the right to seek relief in court. Storix did not seek to redress harm suffered by its shareholders individually, and so the case was not a proper direct suit by shareholders. (See *PacLink Communications Intern., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964 [demurrer challenged limited liability company members' standing where wrong was one suffered by company itself].) Storix's claim was not for harm to the company which the company refused to pursue, such that it might otherwise be brought as a derivative suit. There are no disputed issues with respect to "ownership" of the harm for which Storix sought redress.

Storix suffered harm and had the right to seek relief in court. The claim was not for harm to shareholders individually and therefore was not a proper direct suit by shareholders. (*See*, e.g., *PacLink Communications Intern., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964 [wrong was one suffered by company itself].) The claim was also not for harm to the company which the company is not pursuing and which might otherwise be brought as a derivative suit. There were no disputed issues with

respect to "ownership" of the harm for which Storix is seeking redress and therefore Storix's authority to bring this action was appropriately decided by the trial court.[14]

IV.
SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDING THAT JOHNSON BREACHED HIS FIDUCIARY DUTY TO STORIX RESULTING IN DAMAGES

A. Standards of Review.

Whether the trial court erred in admitting the Customer email is reviewed for abuse of discretion. "[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. . .." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) A "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Whether the jury's damage verdict is supported is reviewed for substantial evidence. (See *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678—"Defendants raising a claim of insufficiency of the evidence assumes (sic) a daunting burden";

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[14] Johnson's argument based on "judicial estoppel" is misplaced. [AOB, pp. 38-39.] Storix never made any inconsistent arguments with respect to its ability to bring a direct claim.

internal quotes omitted); *In re Michael G.* (2012) 203 Cal.App.4th 580, 589—"The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts"].) The same standard applies in reviewing an order denying a motion for judgment notwithstanding the verdict. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

B. Johnson Has Waived Challenge by Providing a Deficient Statement of Facts.

"'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The judgment is presumed to be correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) It is likewise presumed that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon*, 3 Cal.3d at 881.) It is the appellant's burden to demonstrate that it does

not. (*Ibid.*) In pro per litigants are held to the same standards as attorneys. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985, ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. (*Id.* at 881.) Further, the burden to provide a fair summary of the evidence "grows with the complexity of the record. [Citation.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) A recitation of only defendants' evidence is not the "demonstration" contemplated under the above rule. (*Green v. Green* (1963) 215 Cal.App.2d 31, 35.) Accordingly, if an appellant contends, "some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, *orig.*)

The testimony regarding Johnson's actions disrupting Storix's business and resulting damages was extensive. There

are 20 Reporter's Transcripts and the jury heard 10 days of trial testimony. Nearly 100 exhibits were admitted at trial. [See Respondent's Appendix.] Nonetheless, Johnson's Opening Brief cites to the Reporter's Transcript only a handful of times for procedural background or when perceived to be favorable to his position and otherwise fails to summarize the trial evidence whatsoever. Johnson has failed to provide a complete recitation of the evidence demonstrating there is no substantial evidence supporting Storix's damages. Accordingly, appeal of this issue has been waived.

C. Johnson Engaged in Multiple Acts That Breached His Duties as a Director of Storix.

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 525.) Johnson's fiduciary relationship with Storix is governed by the statutory standard requiring directors, like Johnson, to exercise due care and undivided loyalty for the interests of the corporation. (*Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 274.)

A director of a corporation owes a fiduciary duty to the corporation and its shareholders and..."must serve 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders.' (Corp. Code, § 309, subd. (a).) This duty—generally to act with honesty, loyalty, and good faith—derived from the common law." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037.) "It is a cardinal principle of corporate law that a director cannot, at the expense of the corporation, make an unfair profit from his position. He is precluded from receiving any personal advantage without fullest disclosure to and consent of all those affected." (*Remillard Brick Co. v. Remillard-Dandini* (1952) 109 Cal.App.2d 405, 419; *Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 509 [duty of loyalty requires corporate officers and directors to refrain from doing anything that would work injury to the corporation]; Corp. Code § 7231(a) [duty to act in best interest of corporation]; see also 11CT 3004 [CACI 4102].)

Although Johnson quips that he has been held liable for "intending" to compete with Storix, Johnson does not dispute he owed Storix a fiduciary duty or that he breached that duty by pursuing a plan for a competitive business venture, instructing

Storix's customers to stop paying Storix so it would be unable to defend Johnson's copyright litigation, and by threatening Storix's employees. Instead, Johnson argues the jury's damage verdict was not based on substantial evidence because his Customer email was the only act that caused Storix damage and it should have been excluded based on the litigation privilege. Johnson's argument fails for three reasons.

First, Johnson has failed to provide this Court with a complete statement of the facts to include all material evidence. Second, the litigation privilege did not prevent the admission of the Customer email into evidence. Third, Johnson is also incorrect that the Customer email is the only evidence of him breaching his fiduciary duty to Storix that caused it damage.

D. The Litigation Privilege Did Not Apply to the Customer Email.

Civil Code section 47(b) provides that a privileged communication is one made in a judicial proceeding.[15] "The usual formulation is that the privilege applies to any communication (1)

[15] The general rule is that privilege must be pled as an affirmative defense or it is waived. (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367.) Johnson failed to raise the litigation privilege as a defense until trial.

made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The requirement that the communication be in furtherance of the objects of the litigation is part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. (*Id.* at 219–220.) The litigation privilege does not apply to statements made outside of the courtroom to nonparties unconnected to the proceedings. (*Begier v. Strom* (1996) 46 Cal.App.4th 877, 882.)

A communication is not automatically privileged merely because it mentions or touches upon the subject matter of a lawsuit. "Similarity, or even identity, of subject matter is not a 'connection or logical relation' between litigation and a communication which is alone sufficient to trigger the litigation privilege." (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1146.) The "connection or logical relation" which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection. That is to say, the

communicative act—be it a document filed with the court, a letter between counsel or an oral statement—must function as a *necessary* or *useful* step in the litigation process and must serve its purposes." (*Id.*, emphasis added.)

The litigation privilege does not apply to communications that seek to achieve aspirational goals beyond what the litigant can directly achieve in the litigation. The "furtherance" test is not satisfied merely because a communication was made with an intent to achieve a litigation advantage. (*Id.* at 1147.) The test "cannot be satisfied by communications which only serve interests that happen to parallel or complement a party's interests in the litigation." For example, a defendant's desire to be vindicated of the charges against him does not mean that the litigation privilege will immunize otherwise-actionable statements that he believes will vindicate him in the eyes of others. As discussed in *Rothman v. Jackson*:

> While a person's motives for litigating a dispute may include a desire to be vindicated in the eyes of the world—a result which the litigation may achieve—this is not what is meant by the term "objects of the litigation." A party's legitimate objectives in the litigation are limited to the remedies which can be awarded by courts. Thus, the "objects of the litigation" for a plaintiff are to obtain a monetary recovery for damages or other relief; a defendant's

> "objects" are to resist a determination of liability and whatever assessment of damages, penalty or other order that the plaintiff seeks. Thus, either party's understandable desire (or motive) for vindication—particularly where such vindication is sought outside of the litigation context—is not an "object of litigation," which satisfies the "furtherance" requirement.

(*Id.* at 1147-48.) Stated another way, if the California Supreme Court's "furtherance" test is to serve its purpose, "the test can be satisfied only by communications which function intrinsically, and apart from any consideration of the speaker's intent, to advance a litigant's case." (*Id.* at 1148.)

Civil Code Section 47(b)(2) "bars certain tort causes of action which are predicated on a judicial statement or publication itself, [but] does not create an evidentiary privilege for such statements. Accordingly, when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent." (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168.)

Shortly before trial of the copyright litigation, Johnson sent the Customer email as a blast to Storix's actual or potential customers. [4NOL Tab 72, Exh. 22.] The email disparaged Storix's software, urged its customers to stop paying for licenses, and (wrongly) predicted the imminent demise of Storix, stating "…it pains me to inform you that support for Storix SBAdmin will very likely end when a ruling is made in the copyright case at the end of the month." [*Id.*]

Johnson seeks to reverse the jury's verdict, claiming the Customer email was inadmissible because it was related to Johnson's then-pending copyright infringement litigation. However, the trial court correctly determined the email did not function as a *necessary* or *useful* step in the litigation process and was not sent for the purpose of furthering any legitimate litigation goals. Instead, the email Johnson sent while he was a Storix director was designed to disrupt Storix's customer and employee relationships, deprive Storix of income so it could not defend the copyright litigation, also scare off Johnson's co-shareholders, and to set the stage for the launch of his competitive venture, Janstor.

A litigation advantage Johnson might achieve by depriving Storix of its sole source of revenue does not invoke the litigation privilege. The "furtherance" test "cannot be satisfied by communications only serving interests that happen to parallel or complement a party's interests in the litigation." (*Rothman*, 49 Cal.App.4th at 1147; *Silberg*, 50 Cal.3d. at 219-220.) Simply mentioning copyright infringement or that litigation did not invoke the privilege. (*Id.* at 1146 ["Similarity, or even identity, of subject matter is not a 'connection or logical relation' between litigation and a communication which is alone sufficient to trigger the litigation privilege."].) It "must function as a *necessary* or *useful* step in the litigation process and must serve its purposes." (*Id.*) Johnson admitted the Customer email had no legitimate necessary or useful litigation function, but instead was designed to harm Storix, as he told David Kinney the next day:

> Below this email you'll find the email I sent to you, your conspirators, and some employees at Storix. It is followed by the email I sent a large number of customers yesterday. Storix is today in a panic, their phones are ringing off the hook, and attorneys are gathering. Unfortunately, Procopio is notorious for dropping its clients as soon as they can't pay their bills, and as you may know, Storix has already spent all its money hiding behind their majority vote to try to prevent me from finding out what you've been doing to me. This will end Storix ability to bring in

> any more income from my work that they just keep using to attack me.

[4NOL Tab 73, Exh. 874; 16RT 2532-2534.] Johnson wanted to boast of his own programming prowess, demean and diminish Storix and its management, prematurely celebrate Storix's demise (both in litigation and in business, he predicted), disrupt payments to Storix, and interfere with its customer relationships.

The trial court properly-admitted evidence of Johnson's disloyalty and mal intent. [6RT 545-559; *See Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal.3d at 1168.] The Customer email was sent with the intention of promoting Johnson and his "improved" copy of SBAdmin to Storix's customers and depriving Storix of its primary source of revenue. It was part and parcel of his effort to lay the groundwork for his competitive venture, Janstor, to succeed at Storix's expense, all in dereliction of his fiduciary duties to Storix.

Johnson now claims the litigation privilege applies because the Customer email constituted a "notice" to otherwise "innocent infringers" under the Copyright Act, Title 17 of the U.S. Code. Johnson's reliance on 17 U.S.C section 405, sub. (b) [innocent infringer defense] and *Blanchard v. DIRECTV, Inc.* (2004) 123

Cal.App.4th 903 is misplaced. Johnson does not fully explain how the innocent infringer issue is relevant. The Copyright Action involved Johnson's claims against Storix for infringement, not some unknown supposed "innocent infringers." That statute has no bearing on Johnson's copyright lawsuit, and so there could not be any legitimate necessary or useful litigation function for Johnson to send the Customer email as it related to that case.

Johnson also suggests his Customer email was akin to the cease-and-desist letter at issue in *Blanchard* (2004) 123 Cal.App.4th 903. That case addressed application of the litigation privilege to a letter DIRECTV sent to as many as 24,000 customers (for using pirating technology), who DIRECTV later sued. (*Id.*, n.2.) A class of recipients of the letter sued DIRECTV for unfair competition based on their receipt of the letter. The Court of Appeal affirmed the order granting DIRECTV's special motion to strike based on Code of Civil Procedure section 425.16, since "DIRECTV demonstrated a logical relation between its demand letters and the lawsuits," thus invoking the litigation privilege. (*Id.* at 921.) This case does not involve claims by or against the recipients of the Customer email. *Blanchard* is inapposite.

Similarly, Johnson's citation to the district court's interim ruling denying Storix's request for preliminary injunction is irrelevant. [AOB, p. 27.] In the copyright litigation, Judge Huff cited the Customer email as evidence of Johnson's improper motivation in suing Storix, and as a factor in granting a discretionary award of attorneys' fees against him. (See Storix's Request for Judicial Notice, Exhibit A at *3 [Addressing the Customer email and other conduct, concluding "Johnson demonstrated that his motives were not merely to secure a copyright infringement judgment, but also to wrest control of the company from its majority shareholders and to force the company to 'close its doors.'"].) The Ninth Circuit affirmed the district court's exercise of discretion, while remanding for a recalculation of the total fee award. (*Id.* at Exhibit B at *2 ["The district court properly relied on other factors that outweighed its findings that Johnson's claims were not objectively unreasonable or frivolous: Johnson's motivation, the degree of Defendant Storix's success, and the need to advance considerations of compensation and deterrence."].) Thus, Judge Huff's analysis of the Customer email in the district court copyright proceedings was consistent with

Judge Enright's determination that the litigation privilege did not apply.

Johnson falsely argues Storix's damages resulting from the time, energy and other resources expended to address his disloyal conduct was a "new" claim. Evidence was presented throughout trial regarding the amount of employee time expended and the "employee time" element of damage was explicitly identified in opposition to Johnson's motion for summary judgment. [6CT 1456-1457.] Johnson never objected to the admission of evidence on this issue and had every opportunity to counter the information presented. Instead, Johnson's counsel conceded the existence of damage in his closing at trial. [17RT 2866.]

Finally, Johnson's suggestion that some sort of agreement was reached with counsel for Storix prior to trial is false. There was no agreement by Storix to limit use of the Customer email. [6 RT 547-548.][16]

[16] Storix cannot discern the basis for Johnson's argument regarding the trial court's purported refusal to allow "a verdict question on this issue." [AOB, p. 28.]

E. The Jury's Damage Verdict Was Supported by Evidence Other Than the Customer Email.

The jury was instructed regarding majority shareholder fiduciary duties and the duty of undivided loyalty. [11CT 3003-3004.] They were also instructed regarding the availability of economic and nominal damages for the breach of those duties. [11CT 3008-3012.] The jury was not asked to make a special finding regarding any particular element of damage it was awarding. Johnson's assertion that the damage award necessarily compensated Storix for lost employee time is therefore unsupported. Damages for breach of fiduciary duty are inherently difficult to quantify.

Several witnesses testified regarding the time taken away from the business of Storix to respond to Johnson's actions, including the Customer email. [13RT 1970-1973.] Additionally, testimony was offered regarding the value of the Storix software based on a theory of "unfair head start." [13RT 1939-1945.] The jury was also instructed it could award nominal damage. [11CT 3009.] Substantial evidence aside from the Customer email supports the verdict.

F. Johnson's Post-Trial Motions Were Properly Denied.

Johnson urges that the trial court erred in denying his motion for judgment notwithstanding the verdict regarding the issues of authority and application of the litigation privilege to the Customer email. [AOB, p. 35.] Johnson's arguments fail for the reasons addressed above. In ruling on a motion for JNOV, a trial judge must accept the evidence tending to support the verdict as true unless it is inherently incredible on its face. (*Tun v Wells Fargo Dealer Servs., Inc.* (2016) 5 Cal.App.5th 309, 333) Here, the trial court correctly determined authority existed to bring the Janstor lawsuit based on undisputed facts in the record. [12CT 3335.] His assertion that "[i]f a review of substantial evidence is necessary, there was no evidence presented at trial to the contrary" is unsupported.

Johnson's argument regarding the trial court's denial of his motion for new trial similarly lacks merit. A trial court is not required to provide a statement of decision in denying a motion for new trial. (*Neal v Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 931 [A specification of reasons is not required when the judges denies a new trial motion.].)

V.
STORIX WAS ENTITLED TO COSTS AS THE PREVAILING PARTY

A. Johnson Failed to Appeal the Cost Award.

"If a judgment or order is *appealable*, aggrieved parties *must* file a *timely* appeal or forever lose the opportunity to obtain appellate review." (Eisenberg, Horvitz & Wiener, Cal. Practice Guide, Civil Appeals and Writs (Rutter 2019) (Eisenberg), § 2.13, citing Code Civ. Proc. § 906 and *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967, emphasis original.) A postjudgment order which awards or denies costs or attorney's fees is separately appealable. (Eisenberg, § 2:156, p. 2–42; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 223,; *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 432; Code Civ. Proc. § 904.1, subd. (b)), and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it. (*Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357.)

An express finding of entitlement to fees and costs in the final judgment is critical to review of the postjudgment order on appeal from the judgment. Where, as here, the final judgment is silent as to attorney fees and costs (determines neither entitlement nor amount), the failure to separately appeal a

postjudgment order awarding costs and fees is a jurisdictional bar to appellate review of the fees and costs award. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 [issue of entitlement to fees and costs litigated postjudgment].) This rule means that if appellant wishes to challenge an appealable postjudgment order that is rendered after appellant files a notice of appeal from the judgment, appellant must file a separate notice of appeal from the postjudgment order. Appellant cannot obtain review of the postjudgment order simply by including the postjudgment proceedings in the record on appeal from the judgment.

Here, the appealed from judgment was silent as to the recovery of attorney fees or costs. [12CT 3353.] Entitlement to attorney fees and costs was litigated after Johnson filed his notice of appeal. [14CT 3868 (Notice of Appeal); Johnson's Request for Judicial Notice, Exh. 2 (Notice of Ruling dated 8/5/19.) Johnson thereafter did not appeal the trial court's order awarding fees. Instead, he sought judicial notice of his motion to strike or tax costs and the trial court's notice of ruling filed eight months later on August 5, 2019, which this Court has ordered will be ruled

upon concurrently with the appeal. Johnson's appeal of the trial court's award of costs has been waived.

B. The Trial Court's Cost Award Should be Affirmed.

1. Standard of Review.

The standard of review for an award of costs to a prevailing party is for abuse of discretion. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298.)

2. Johnson Has Waived Challenge of the Cost Award.

Johnson waived challenge of the trial court's order awarding costs by failing to raise any purported bias in the trial court by moving to disqualify Judge Enright pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(A) or otherwise developing or providing a factual record (including a reporter's transcript) for this Court's review. (See *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 ["in the absence of a required reporter's transcript and other [necessary] documents, we presume the judgment is correct"]; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 ["[A] a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which

may provide grounds upon which the decision of the trial court could be affirmed" (internal quotes and brackets omitted)]; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002-1003 [appellant's claim considered abandoned where appellant failed to provide reporter's transcript of relevant proceeding].)

3. **Johnson Fails to Establish Judicial Bias.**

Johnson asserts that "[u]ntil now, Johnson avoided an explicit claim of judicial bias, but such as assertion can no longer be avoided since Judge Enright abandoned all pretenses a year after trial." [AOB, p. 58.][17] The "bias" allegedly consisted of ignoring "every statute and authority to the contrary when ordering Johnson (and only Johnson) to pay all costs of all parties in all consolidated actions *in addition* to his $50,000 shareholder plaintiff's bond." [*Id.*, emphasis original.]

Johnson has failed to establish bias. "[T]the mere fact a judicial officer rules against a party does not show bias." (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1328.) "[L]itigants and attorneys sometimes manifest their emotional

[17] Johnson has also recently filed a motion to recuse Judge Huff in his newest action against Storix and its litigation counsel filed in the district court. [*Johnson v. Manuel Altamirano, et al,* USDC S. CA Case No. 19-cv-01185-H-BLM]

pique at a decision by blaming the judge for being biased." (*Id.* at 1326.)

4. **Johnson's Shareholder Plaintiff's Bond Has No Bearing on Storix's Costs.**

On its face, Corporations Code section 800 applies to the recovery of a "prevailing defendant" and therefore has no applicability to Storix's status as the prevailing plaintiff against Johnson as to Storix's breach of fiduciary duty lawsuit. (Corp. Code § 800.) Storix obtained a judgment against Johnson with a net monetary recovery in its favor, and thus meets the statutory definition of a prevailing party under Code of Civil Procedure section 1032, such that it was entitled to costs. Corporations Code section 800 likewise does not alter the prevailing party analysis or determination by the trial court.

5. **Storix Obtained a Net Monetary Recovery Entitling It to Costs.**

Absent an exception, a "prevailing party" is entitled as a matter of right to recover costs of suit. (Code Civ. Proc. §1032(b).) The term "prevailing party" is defined as the party with a net monetary recovery, or a defendant in whose favor a dismissal is entered. (Code Civ. Proc. §1032(a)(4).) Johnson asserts that Storix should not be considered a "prevailing party" because the

amount of damages the jury awarded against him was below the unlimited jurisdiction threshold. Johnson's contention is wrong.

The jury determined Johnson breached his fiduciary duty as a director of Storix. Storix prevailed on that claim by obtaining a net monetary recovery against Johnson regardless of the amount awarded. Storix is the prevailing party as against Johnson on its claim for breach of fiduciary duty. (Code Civ. Proc. §1032(a)(4).)[18] Storix right to recovery costs is not defeated because the jury's award of damages to Storix and was below the unlimited jurisdictional threshold does not defeat Storix's right to recover its costs. The trial court correctly determined Storix's action could not have been filed as a limited civil action.

The relevant inquiry for determining if Code of Civil Procedure section 1033(a) applies is whether "the action could have been fairly and effectively litigated as a limited civil case." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 987.)

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[18] Storix also asserted a successful standing defense in response to Johnson's derivative claims and therefore was also a prevailing defendant. (See *Larry Menke, Inc. v. DaimlerChrysler Motors Co., LLC* (2009) 171 Cal.App.4th 1088, 1095 [costs awarded to defendant following dismissal of suit for lack of standing];*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983 [nominal party which actively participated entitled to fees].)

Although Code of Civil Procedure section 86 identifies certain categories of actions as limited civil cases, a case to redress a violation of a fiduciary duty is not among them. Further, permanent injunctive relief is only available in cases brought under the court's unlimited jurisdiction. (Code Civ. Proc. §§86, 88; *Ytuarte v. Superior Court* (2005) 129 Cal.App.4th 266, 275 [A plaintiff in a limited civil action may not obtain a permanent injunction].)

Storix sought permanent injunctive relief in its complaint, amongst other relief. Thus, Storix's claim against Johnson *could not* have met the definition of a limited jurisdiction case. Nor does the fact that the court denied the post-trial motion for entry of a permanent injunction render section 1033(a) applicable, since that motion could not have been "fairly and effectively litigated as a limited civil case." (*Chavez*, 47 Cal.4th at 987.) Since this action could not have been litigated as a limited civil case, section 1033(a) does not apply. Storix was therefore a prevailing party as against Johnson entitled to an award of its costs as a matter of right.

The trial court also correctly exercised its discretion in awarding Storix costs as the prevailing party. The trial court

may properly award costs to a plaintiff who recovers less than the jurisdictional amount for an unlimited civil case when there is a reasonable and good faith belief that the ultimate recovery would exceed the jurisdictional limit. (*Carter v. Cohen* (2010) 188 Cal.App.4th 1038, 1053 [Court did not err in awarding fees and costs, despite court-limited final recovery of $11,590, an amount below unlimited jurisdiction minimum].) Storix alleged entitlement to monetary relief in excess of the court's jurisdictional threshold, and sought injunctive relief. Storix could not have filed its claim otherwise. Further, the trial court recognized that Storix had largely obtained the objectives of the litigation by stopping Johnson's harmful conduct after the filing of its lawsuit, even though the court eventually denied Storix's post-trial motion for entry of a permanent injunction:

> While Johnson has indeed threatened to harm Storix's business, his words and conduct, while no doubt frustrating and upsetting to Storix, do not show an ongoing course of conduct. The most significant and provocative emails sent by Johnson are Exs. 356, 22 and 23. The last, Ex. 23, was sent on 1-16-16. Two years and four months have passed. This past conduct, along with the jury's verdict that Johnson breached his fiduciary duty of loyalty to Storix as one of its directors, does not show that Johnson will continue to seek to harm Storix's business in the future.

[12CT 3286.] In denying the injunction, the trial court recognized Storix had achieved its objective of ceasing Johnson's tortious conduct. Far from a vindication of Johnson's troubling conduct, it was merely the fact Johnson had remained dormant for a period from engaging in bad acts that allowed him to avoid an injunction. (See *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 [a lawsuit can serve as "a catalyst motivating the defendants to provide the primary relief sought."].)

The evidence admitted at trial established Johnson only folded Janstor Technology, his competitive vehicle, two months *after* being sued. [3NOL Tab 152, Exh. 521, p.3.][19] As the trial court noted in its post-trial order, Johnson's troubling email practices stopped after he faced the consequences of litigation. Accordingly, Storix's lawsuit served as the catalyst for causing Johnson to cease his tortious acts.

Johnson's citation to *Biren v. Equal. Emergency Med. Grp., Inc.* (2002) 102 Cal.App.4th 125, is inapposite. The trial court in *Biren* applied credits that prevented the plaintiff from obtaining

[19] Johnson further testified at trial that were he to proceed with competing against Storix that Storix would have been put out of business within six (6) months as a result. [12RT 1727.]

a net monetary recovery or otherwise a "mixed" result. (*Id.* at 135, 139, 140.) Unlike in *Biren*, the result here was not "mixed" nor does it involve a fee assessment under section 1717. Storix obtained a net monetary recovery against Johnson on its cause of action for breach of fiduciary duty. Johnson lost on his derivative claims (as well as his cross-claims). Storix was therefore correctly determined to be the prevailing party pursuant to section 1032(a)(4).

VI.
CONCLUSION

Johnson lacks any basis to appeal the judgment and has failed to appeal the trial court's prevailing party determination regarding costs. The trial court did not abuse its discretion in admitting the Customer email and, even if it did, substantial evidence supports the jury's damage award. The trial court also correctly determined Storix had both standing and the capacity to sue Johnson for his conduct breaching the fiduciary duties owed to Storix. The judgment and award of costs should be affirmed.

DATED: November 13, 2019 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
Kendra J. Hall
Paul A. Tyrell
Sean M. Sullivan
Attorneys for Respondent
STORIX, INC.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **RESPONDENT'S BRIEF** is proportionately spaced, has a typeface of 13 points or more, and contains 12,713 words.

DATED: November 13, 2019 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
Kendra J. Hall
Paul A. Tyrell
Sean M. Sullivan
Attorneys for Respondent
STORIX, INC.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On November 13, 2019, I served the within documents:

1. RESPONDENT'S BRIEF OF STORIX, INC.

2. RESPONDENT'S NOTICE OF LODGMENT OF EXHIBITS (VOLUMES 1-5)

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

☐ **BY OVERNIGHT DELIVERY** by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 525 "B" Street, San Diego, California the ordinary course of business on the date of this declaration.

☑ **BY E-MAIL OR ELECTRONIC SERVICE (Per CRC 8.60(f))** based upon court order or an agreement of the parties to accept service by electronic transmission, by electronically mailing the document(s) listed above to the e-mail address(es) set forth below, or as stated on the attached service list and/or by electronically notifying the parties set forth below that the document(s) listed above can be located and downloaded from the hyperlink provided. No error was received, within a reasonable time after the transmission, nor any electronic message or other indication that the transmission was unsuccessful.

SEE SERVICE LIST

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

Executed on November 13, 2019, at San Diego, California.

/s/ Kristina A. Terlaga
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