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9

10 **SUPERIOR COURT OF CALIFORNIA**

11 **IN AND FOR THE COUNTY OF SAN DIEGO – CENTRAL DIVISION (NEW)**

12 ANTHONY JOHNSON and ROBIN SASSI,)
derivatively on behalf of STORIX, INC.,)
13 a California corporation,)
14 Plaintiffs,)
15 vs.)
16 DAVID HUFFMAN, an individual, RICHARD)
TURNER, an individual, MANUEL)
17 ALTAMIRANO, an individual, DAVID)
KINNEY, an individual, DAVID)
18 SMILJKOVICH, an individual and DOES 1-20,)
19 Defendants.)

20 AND CONSOLIDATED ACTIONS.
21

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

**DIRECTOR/MANAGEMENT
DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION FOR
ATTORNEY'S FEES**

IMAGED FILE

Judge: Hon. Kevin A. Enright
Dept. 904
Action Filed: October 13, 2015
Date: January 4, 2019
Time: 10:30 a.m.

22
23 Defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David
24 Smiljkovich (collectively, the "Director/Management Defendants") submit the following
25 memorandum of points and authorities in support of their Motion for Attorney's Fees pursuant to
26 Cal. Corp. Code § 800(d).

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1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 In 2015, in response to the derivative action filed by Anthony Johnson and Robin Sassi, the
3 Director/Management Defendants filed a motion under Cal. Corp. Code § 800(c) requiring
4 plaintiffs to post security for Director/Management Defendants expenses and attorney's fees.
5 Rather than oppose the motion, Johnson and Sassi exercised their option under Cal. Corp. Code §
6 800(e) voluntarily to provide the requested \$50,000 bond in full.

7 On April 30, 2018, this Court ruled Johnson lacked standing to proceed to trial on the
8 derivative claims because he was not a fair and adequate representative of the company. Sassi was
9 allowed to proceed as a derivative plaintiff, and the Court ultimately ruled against her and in favor
10 of the Director/Management Defendants on each of the derivative claims.

11 The Director/Management Defendants are the prevailing parties in the derivative matter and
12 are entitled to recourse for their reasonable attorney's fees in the amount of the security posted by
13 Plaintiffs. There is no dispute Sassi proceeded to trial on the derivative claims and did not prevail.
14 In addition, Johnson lost the derivative case based on his lack of standing, which is a defense on
15 which the Director/Management Defendants prevailed.

16 By this motion, the Director/Management Defendants, as the prevailing parties in the
17 derivative action, seek an award of \$50,000 in attorney's fees authorized by Cal. Corp. Code §
18 800(d), (e).

19 **II. DISCUSSION**

20 **A. The Director/Management Defendants are the Prevailing Parties and Are Entitled**
21 **to \$50,000 in Attorney's Fees**

22 A prevailing party's right to recover costs is governed by Cal. Civ. Proc. Code § 1032,
23 which provides in subdivision (b) that "[e]xcept as otherwise expressly provided by statute, a
24 prevailing party is entitled as a matter of right to recover costs in any action or proceeding." For
25 the purpose of determining entitlement to recover costs, a prevailing party is typically defined as "a
26 defendant in whose favor a dismissal is entered" or a "defendant against those plaintiffs who do not
27 recover any relief against that defendant." Cal. Civ. Proc. Code § 1032(a)(4). In the context of an
28 attorney fees' statute, prevailing party status is determined by the trial court "based on whether a

1 party prevailed on a practical level.” *Donner Management Co. v. Schaffer*, 142 Cal.App.4th 1296,
2 1310 (2006) (citations and internal quotes omitted). A defendant who prevails in a derivative suit is
3 entitled to reimbursement for attorneys’ fees with a \$50,000 cap on the amount that can be
4 recovered.

5 The Director/Management Defendants prevailed at trial in the derivative matter against
6 Plaintiffs. As to Johnson, the Court ruled he lacked standing to bring the suit. When a plaintiff
7 lacks standing to bring the suit, the case is dismissed and the defendant is the prevailing party. *See*,
8 *e.g.*, *Farber v. Bay View Terrace Homeowners Assoc.*, 141 Cal. App. 4th 1007, 1016 (2006). As to
9 Sassi, she proceeded to trial on the derivative claims, and at the conclusion of that trial, judgment
10 was entered in favor of the Director/Management Defendants. (*See* ROA Nos. 789, 791.)

11 **B. The Director/Management Defendants’ Attorney’s Fees are Reasonable**

12 The Director/Management Defendants are entitled to the full amount of their attorneys’ fees
13 permitted under the statute and secured by plaintiffs’ \$50,000 bond.¹ The Director/Management
14 Defendants request for attorneys’ fees in the amount of \$50,000 is reasonable given the complexity
15 of this case, the expertise of counsel, and the amount of time involved. *See Kearney v. Foley and*
16 *Lardner*, 553 F.Supp.2d 1178, 1185 (2008). The derivative action involved numerous complex,
17 discrete issues related to alleged breaches of fiduciary duties by the Director/Management
18 Defendants. The litigation was contentious and relevant testimony elicited throughout a three week
19 jury trial was equally applicable to the five day bench trial in the derivative matter.
20 Director/Management Defendants request for \$50,000 in attorney’s fees is more than reasonable
21 and appropriately addresses the statutory purpose for the security.

22 Over the course of this litigation, the Director/Management Defendants’ incurred attorney’s
23 fees far in excess of the statutory \$50,000 bond posted as security by Plaintiffs. Plaintiff Johnson,
24 throughout this litigation and as this Court is aware, has consistently acknowledged the
25 Director/Management Defendants attorneys’ fees were far in excess of \$50,000. Thus, there can be
26 no dispute that a request by the Director/Management Defendants for attorney’s fees in the amount

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28 ¹ Because Storix advanced funds to the Director/Management Defendants for payment of their attorneys’ fees, the
Director/Management Defendants would pay the \$50,000 recovered by this motion back to Storix as reimbursement.

1 of \$50,000 is reasonable for a derivative action litigated over a 2 ½ year period and tried before the
2 bench over five days.

3 **C. The Hourly Rate of Counsel for the Director/Management Defendants was**
4 **Reasonable**

5 The Director/Management Defendants' attorneys are entitled to be compensated at rates that
6 reflect the reasonable market value of their services in the community. *Kershaw v. Maryland*
7 *Casualty Co.*, 172 Cal.App.2d 248, 258 (1959) (prima facie evidence of the reasonableness of
8 attorney fees is established by demonstrating they were paid). The hourly rates of the attorneys for
9 the Director/Management Defendants are reasonable and well within the range of market rates for
10 practicing attorneys in this area of law of equivalent experience, skill, and expertise. (Declaration of
11 David J. Aveni ("Aveni Decl."), ¶¶ 3-8.) Given the reasonable hourly rates of the attorneys for the
12 Director/Management Defendants, the \$50,000 bond secures a mere fraction of the attorneys' fees
13 incurred by the Director/Management Defendants in defense of Plaintiffs' derivative claims. (*Id.*, ¶
14 9.) The Director/Management Defendants request for \$50,000 in attorney's fees is therefore
15 demonstrably reasonable.

16 **III. CONCLUSION**

17 The Director/Management Defendants prevailed in defense of Plaintiffs derivative claims.
18 As the prevailing party, the Director/Management Defendants are entitled to their statutory
19 attorney's fees in the amount of the \$50,000 secured by the bond posted voluntarily by Plaintiffs.
20

21 Dated: November 19, 2018

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

23 By: 

24 Michael P. McCloskey, Esq.
25 David J. Aveni, Esq.

26 Attorneys for Defendants

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

1 *Anthony Johnson, et al. vs. David Huffman, et al.*

2 San Diego County Superior Court Lead Case No. 37-2015-00034545-CU-BT-CTL
3 (consolidated with 37-2015-00028262-CU-BT-CTL and 37-2016-00030822-CU-MC-CTL)

4 **PROOF OF SERVICE**
5 [CCP §§ 1013A(3) and 2015.5]

6 I, the undersigned, am employed in the county of San Diego, State of California. I am over
7 the age of eighteen (18) years and am not a party to the within action. My business address is
8 401 West A Street, Suite 1900, San Diego, California, 92101.

9 On November 19, 2018, I caused to be served the following document(s) described as
10 follows:

11 **DIRECTOR/MANAGEMENT DEFENDANTS' MEMORANDUM OF POINTS AND
12 AUTHORITIES IN SUPPORT OF THEIR MOTION FOR ATTORNEY'S FEES**

13 on the parties in this action by placing a true copy in a sealed envelope addressed as follows:

14 **SEE ATTACHED SERVICE LIST**

15 ☒ **BY ELECTRONIC TRANSMISSION VIA ECF** – I electronically filed the foregoing
16 document(s) with the Clerk of the Court through the CM/ECF system for the San Diego
17 County Superior Court, Central Division, via OneLegal, which sent Notification of
18 Electronic Filing to the persons listed. Upon completion of transmission of said documents,
19 a certified receipt is issued to the filing party acknowledging receipt by the CM/ECF
20 system.

21 Executed on November 19, 2018 at San Diego, California. I declare under penalty of
22 perjury under the laws of the State of California that the foregoing is true and correct.

23
24
25
26
27
28

Irene Gonzales

1 *Anthony Johnson, et al. vs. David Huffman, et al.*

2 San Diego County Superior Court Lead Case No. 37-2015-00034545-CU-BT-CTL
3 (consolidated with 37-2015-00028262-CU-BT-CTL and 37-2016-00030822-CU-MC-CTL)

4 **PROOF OF SERVICE**
[CCP §§ 1013A(3) and 2015.5]

5 **SERVICE LIST**

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