

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL**

**MINUTE ORDER**

DATE: 04/29/2016

TIME: 09:00:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2015-00034545-CU-BT-CTL** CASE INIT.DATE: 10/13/2015

CASE TITLE: **Johnson vs. HUFFMAN [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

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**EVENT TYPE:** Motion to Quash (Civil)

MOVING PARTY: Storix Inc

CAUSAL DOCUMENT/DATE FILED: Joinder to Motion and Supporting Declarations, 04/05/2016

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**EVENT TYPE:** Motion to Quash (Civil)

MOVING PARTY: DAVID HUFFMAN, Richard Turner, David Kinney, DAVID SMILJKOVICH, Manuel Altamirano

CAUSAL DOCUMENT/DATE FILED: Motion to Quash Subpoena, 03/28/2016

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**EVENT TYPE:** Demurrer / Motion to Strike

MOVING PARTY: Storix Inc

CAUSAL DOCUMENT/DATE FILED: Demurrer, 03/01/2016

Additional events listed on last page.

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**APPEARANCES**

Robin Sassi, self represented Plaintiff, present.

Anthony Johnson, self represented Plaintiff, present telephonically.

Michael P McCloskey, counsel, present for Defendant(s).

Paul A Tyrell, counsel, present for Defendant(s).

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The Court hears oral argument and confirms the tentative ruling as follows:

The general Demurrer (ROA # 42, 74, 77) of Defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney, and David Smiljkovich ("Defendants") to the First, Second, Third and Fourth Causes of Action in the Complaint of Plaintiff ANTHONY JOHNSON, and ROBIN SASSI, derivatively on behalf of STORIX, INC., a California corporation ("Plaintiffs"), is SUSTAINED.

Plaintiffs are permitted leave to file and serve an amended pleading, addressing the deficiency set forth

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below, within twenty (20) days of this hearing.

In order for a shareholder to bring a derivative suit on behalf of a corporation, Plaintiff must establish either that Plaintiff made a demand on the board of directors to act on the corporation's behalf, which the board wrongfully refused, or such demand would have been futile. See Corp. Code, § 800(b). Failure to comply with this demand requirement deprives Plaintiff of standing to pursue his claims. To evaluate demand futility, the Court must be apprised of facts specific to each director from which it can conclude that that particular director could or could not be expected to fairly evaluate claims of shareholder. Shields v. Singleton, (1993) 15 Cal. App. 4th 1611. **The Complaint does not allege sufficient facts as to whether the demand would be futile as to each director.**

Plaintiff who cannot fairly and adequately represent the corporation and its other shareholders is barred from bringing a derivative claim. See Grosset v. Wenaas, (2008) 42 Cal. 4th 1100, 1115. Plaintiff who is in litigation against a corporation has a direct conflict of interest that disqualifies him from bringing derivative claims on the same corporation's behalf. Zarowitz v. Bank America Corp., (9th Cir. 1988) 866 F. 2d 1164, 1166. When determining whether Plaintiff would fairly and adequately represent the corporation, it is necessary for the Court to rely not only upon the pleadings, but also the affidavits submitted by the parties relating information of direct consequence to the issue before the Court. Hornreich v. Plant Industries, Inc., (9th Cir. 1976) 535 F. 2d 550, 552. **Given the necessity and use of evidence extrinsic to the Complaint, this issue cannot be addressed or resolved via a Demurrer hearing.**

Defendants' Request (ROA # 46) for judicial notice is GRANTED IN PART AND DENIED IN PART. Nos. 1, 3 and 4 are DENIED. No. 2 is GRANTED.

Defendants' objections (ROA # 63) to the declarations included in Plaintiffs' opposition, are SUSTAINED. Defendants' Supplemental Request (ROA # 91) for judicial notice, is DENIED.

The special and general Demurrer (ROA # 50) of Nominal Defendant STORIX, INC. ("Storix") to the entire Derivative Complaint ("Complaint") of Plaintiffs ANTHONY JOHNSON and ROBIN SASSI ("Plaintiffs"), is SUSTAINED IN PART AND OVERRULED IN PART.

The general Demurrer to each cause of action in the Complaint as asserted by Nominal Defendant STORIX INC. is SUSTAINED.

Plaintiffs are permitted leave to file and serve an amended pleading within twenty (20) days of this hearing.

This ruling is premised on the concurrent analysis set forth in the ruling on the Demurrer asserted by the individual Defendants.

The special Demurrer to each cause of action in the Complaint, as asserted by Nominal Defendant STORIX INC. is OVERRULED. The Complaint is not ambiguous or unintelligible.

Storix's objections (ROA # 75) to the declarations included in Plaintiffs' opposition, are SUSTAINED.

The Motion (ROA # 81) of Defendants David Huffman, Richard Turner, Manuel Altamirano, David Kinney and David Smiljkovich ("Defendants") to quash the subpoenas Plaintiffs Anthony Johnson and Robin Sassi, derivatively on behalf of Storix, Inc., served on the custodians of records of Wells Fargo

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Bank and California Bank and Trust, is GRANTED.

The Joinder (ROA # 87) of Nominal Defendant STORIX, INC. ("Storix") in the Motion to Quash Subpoenas served on Wells Fargo Bank NA ("Wells Fargo") and California Bank & Trust ("CB&T") filed by Defendants DAVID HUFFMAN, RICHARD TURNER, MANUEL ALTAMIRANO, DA YID KINNEY & SMILJKOVICH ("Individual Defendants"), is GRANTED.

Parties are directed to file a stipulation as to all related cases.

Defense counsel are directed to serve notice of today's proceedings.

*Joel R. Wohlfeil*

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Judge Joel R. Wohlfeil

ADDITIONAL EVENTS:

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**EVENT TYPE:** Demurrer / Motion to Strike

**MOVING PARTY:** DAVID HUFFMAN, Richard Turner, David Kinney, DAVID SMILJKOVICH, Manuel Altamirano

**CAUSAL DOCUMENT/DATE FILED:** Demurrer, 02/29/2016