

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

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

REPORTER'S TRANSCRIPT ON APPEAL

Monday, April 30, 2018

(Pages 2965 through 3005/3550, Inclusive)

Volume 19

1100 Union Street, Department 904  
San Diego, California

Reported By:  
Leyla S. Jones  
CSR No. 12750

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

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

Hon. Kevin A. Enright

Plaintiffs,

vs.

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

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

Defendants,

STORIX, INC., a California  
corporation;

Motion

Nominal Defendant.

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AND CONSOLIDATED ACTIONS  
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TRANSCRIPT OF PROCEEDINGS

(Pages 2965 through 3005/3650, Inclusive)

Volume 19

April 30, 2018

9:03 a.m.

1100 Union Street, Dept. 904  
San Diego, California

REPORTED BY:

Leyla S. Jones

CSR No. 12750

## 1 APPEARANCES:

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28

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INDEX OF WITNESSES

2

(None called.)

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INDEX TO EXHIBITS

8

(None marked or received.)

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1 SAN DIEGO, CALIFORNIA;

2 MONDAY, APRIL 30, 2018; 9:03 A.M.

3 \* \* \*

4  
5 THE COURT: Good morning.

6 MR. SULLIVAN: Good morning.

7 MR. KING: Good morning.

8 THE COURT: All right. Let's proceed the  
9 way we mentioned before. All counsel are present.  
10 And Mr. Johnson, Ms. Sassi, and Mr. Huffman are  
11 present, as well as many others.

12 And what I'd like to do is start with the  
13 standing issue and hear argument. I have read and  
14 considered all of the moving opposition and reply  
15 papers and attachments. That's true with regard to  
16 the request for permanent injunction as well. But  
17 let's start with the standing, if that makes sense.

18 MR. AVENI: Thank you, Your Honor. And  
19 before we do that, Your Honor --

20 THE COURT: And again, and so I don't need  
21 a lot of argument, I don't think, because remember  
22 I've heard a several-week long trial and I think  
23 I -- and I have read and considered all the papers,  
24 and I know this is hotly contested. But I want you  
25 to be able to fully and fairly argue, but understand  
26 I have a lot of information before anything's said.

27 So, Mr. Aveni.

28 MR. AVENI: Thank you, Your Honor. Very

1 briefly, there's one other issue I also wanted to  
2 raise for the Court's attention, which is before the  
3 jury trial commenced, we had a motion in limine with  
4 regard to Mr. Smiljkovich and the somewhat salacious  
5 nature of one of his personal charges. And  
6 Your Honor granted that motion in limine, and then  
7 there were some papers filed by Mr. King which did  
8 not redact that material out. We have -- and  
9 Your Honor instructed Mr. King to correct that.

10 We have that same issue again, Your Honor,  
11 with regard to the trial brief that he filed on  
12 Friday. And I wanted to raise that to the Court's  
13 attention and ask that that be dealt with so that  
14 that's not a matter of public record.

15 THE COURT: Mr. King?

16 MR. KING: Didn't -- I wasn't aware that I  
17 raised that issue or had mentioned that in the trial  
18 brief. If I did -- I take counsel's word that I  
19 did. I will -- if I did, it was in error and I will  
20 redact it and submit a redacted copy.

21 THE COURT: Okay. Thank you.

22 MR. AVENI: Thank you.

23 THE COURT: That should take care of it.

24 MR. AVENI: Yes.

25 THE COURT: All right. So standing,  
26 Mr. Aveni?

27 MR. AVENI: First of all, Your Honor, I  
28 wanted to very, very briefly -- not to harp on it,

1 but point out the issue that I raised first in our  
2 reply brief, which is the grossly untimely nature of  
3 the opposition we received on the standing motion.  
4 And I don't want to harp on that, and I don't want  
5 to sit here and grouse about things.

6 But I do raise it because I think it's very  
7 significant and relevant to the issue of whether  
8 Johnson and Sassi are fair and adequate derivative  
9 plaintiffs here, because time and time again, they  
10 have failed to follow the Court's instructions.  
11 They have failed to file things on time.

12 And in this instance, they filed their  
13 opposition papers the day that my reply brief was  
14 due. And that gave me, literally, a matter of hours  
15 to prepare my reply brief. Again, obviously, I got  
16 it done, but the issue is that's really prejudicial  
17 and it's unfair, and it's happened time and time  
18 again.

19 It happened in motions in limine where  
20 Your Honor chastised Mr. Johnson and Ms. Sassi for  
21 filing their motions in limine five days late. It  
22 happened again this weekend. Your Honor ordered  
23 them to provide a finalized list of witnesses. That  
24 never happened, even though I asked for it. So this  
25 is a continuing pattern throughout the case. It's  
26 been -- they have been chastised for it in the past.  
27 It's continued to happen.

28 And the fair and adequate standard stems

1 from the class action rules, and there one of the  
2 issues is whether the plaintiffs can be a fair and  
3 adequate representative, and that includes whether  
4 they're able to litigate the matter in a fair way.

5 They're just putting aside the substance.

6 And my point, Your Honor, is that their  
7 constant ignoring of Court orders and filing things  
8 late -- I mean, filing an opposition the day the  
9 reply brief is due is very frustrating. So again,  
10 not to grouse, I do think that that's another reason  
11 why they're not fair and adequate and also that  
12 their opposition should be stricken.

13 Turning to the substance, I think  
14 Your Honor said it best. The jury's spoken. The  
15 jury found that Anthony Johnson breached his  
16 fiduciary duty of loyalty to this company. And if  
17 he's breached his fiduciary duty of loyalty, the  
18 very same duty that he needs to exercise as a  
19 derivative plaintiff, I don't see how he can be a  
20 fair and adequate representative of the company  
21 itself, which is what he purports to do here.

22 I don't want to harp again on all the  
23 different things. Your Honor's heard a lot of  
24 evidence. You don't need to hear me recite all the  
25 different ways why the jury's finding was based upon  
26 the evidence. It was based on an overwhelming  
27 amount of evidence, but that jury verdict should be  
28 conclusive with regard to Mr. Johnson's ability to



1 fairly and adequately represent the company.

2 I also want to point out that there's a  
3 direct economic benefit here. Now, I mentioned it  
4 in my papers, but I think it's very important.  
5 Mr. Johnson throughout the three-week jury trial  
6 emphasized -- his view is that he created Janstor to  
7 wait in the wings, as it were. If Storix fails, he  
8 was going to swoop in, take over the assets in  
9 bankruptcy, and be able to continue with the -- with  
10 the company and with his -- the product, the  
11 software product.

12 I think Mr. Johnson's made it clear that's  
13 exactly what he wants to have happen. He wants to  
14 have control of his own software, which is why he  
15 brought the copyright infringement suit, which is  
16 why he's been endlessly litigating against the  
17 company and the director/management defendants.  
18 That's what he wants.

19 And if he's allowed to serve as a  
20 derivative plaintiff, what he's going to get to do  
21 is to keep spending company money -- and we've  
22 covered all the reasons why the company is not only  
23 spending money on its own attorneys, but also  
24 advancing defense costs. The litigation expenses  
25 just continue to roll.

26 And that's to Mr. Johnson's economic  
27 benefit, because if Storix fails -- and he's the one  
28 saying the company has spent millions of dollars in

1 litigation. Look how badly -- this is Mr. Johnson's  
2 view, look how badly the company is doing. That's  
3 what he wants, because if the company goes under,  
4 then he gets to pick up the pieces in bankruptcy.  
5 So he has an economic benefit in destroying Storix.  
6 That's why Judge Huff found that he had that  
7 economic benefit, and that's what's exactly been  
8 going on, as he constantly makes litigation threats.  
9 Judge Huff found that he was trying to destroy the  
10 company for that very purpose.

11 And so allowing him to serve as the  
12 derivative plaintiff stepping into -- and  
13 representing the interest of the very company he  
14 seeks to destroy, he's constantly acted to destroy,  
15 and, in fact, has an economic interest in  
16 destroying, demonstrates why he absolutely cannot be  
17 a fair and adequate representative of the company.

18 The same is also true of Ms. Sassi.  
19 There -- again, I don't want to layout all the  
20 reasons in our briefs why she is, in effect --  
21 allowing her to serve as a derivative plaintiff  
22 would be no different than allowing Mr. Johnson to  
23 do so.

24 She has worked on his behalf tirelessly.  
25 She did it during the jury trial even though she had  
26 no interest -- she claims she had no interest. And  
27 she did it constantly throughout the history of the  
28 copyright infringement case. And in every step of

1 the way, she's been on his side. In fact, she  
2 admits she's on his side.

3 Mr. Johnson has been paying for this entire  
4 litigation. So I mean, if Mr. Johnson was not  
5 allowed to be a derivative plaintiff but Ms. Sassi  
6 were, he'd still be running the show behind the  
7 scenes.

8 And that's exactly why Judge Prager found  
9 that she's not allowed to access the books and  
10 records either, because she's collaborating with  
11 Anthony Johnson to destroy Storix. That was Judge  
12 Prager's ruling. And that's precisely why manages  
13 sass should be viewed as tainted by the precisely  
14 the same conflict of interest as Anthony Johnson.

15 Thank you, Your Honor.

16 THE COURT: Mr. King?

17 MR. KING: On the issue of the timeliness,  
18 when we set this -- the hearing and briefing  
19 schedule on this when we were in your chambers, I  
20 remember the Court said, Okay, you guys should  
21 probably, you know, file a short brief, and, you  
22 know, how long do you need to respond, Mr. King? We  
23 said a week is fine.

24 And I think you even made a comment that  
25 the defendants -- You guys probably have already  
26 filed your brief basically in a motion in limine. I  
27 don't know if you need to file another one. I was  
28 expecting -- I think we were all expecting shorter

1     briefs both on the injunction issue and on the  
2     derivative standing issue.  The -- what I got  
3     instead was two 20-page briefs.

4             Now, at that point, I didn't have a choice.  
5     I could say, all right -- I can come in and ask for  
6     more time or I can do my best to try to get them in  
7     and keep the ball rolling and keep the show on the  
8     road, and that's what I did.  I got it in.  I  
9     finished it a day late.

10            Now, it filed the Friday after the Thursday  
11     it was due.  Unfortunately, for the opposition brief  
12     on Defendants' derivative standing issue, there's a  
13     problem with the e-file and it didn't end up getting  
14     filed until Monday.  And I'm not sure if it -- if  
15     the e-service didn't go through until Monday, but  
16     that's -- I realized it then and I re-certed on  
17     them.  And yes, that was a mistake, but it wasn't --  
18     this wasn't a some sort of gamesmanship or some sort  
19     of effort to pull the levers and, you know, gain an  
20     advantage.  I had five days -- I had seven days to  
21     do oppositions to two 20-page briefs, and I worked  
22     nonstop the entire time.

23            Now, this isn't a summary judgment.  This  
24     isn't even a noticed motion.  This is a set hearing.  
25     The Court's got discretion to hear it on the merits,  
26     and I think the Court should.  Even if the Court  
27     were inclined to disregard the brief, I think that  
28     it -- I think that it still really wouldn't change

1 the lay of the land, because the arguments against  
2 the standing attack are really the same.

3 So to go to the merits of this, they --  
4 briefly, the 10,000-foot overview, the standing  
5 element that they argue is pulled from the Federal  
6 Rules of Civil Procedure 23.1, which follows Federal  
7 Rules of Civil Procedure 23. They were enacted at  
8 the exact same time in, I believe, the early '60s.

9 The point of the standing issue in the  
10 derivative federal rules context was just like class  
11 actions, contemplated we're going to have big  
12 massive classes of derivative -- of derivative  
13 plaintiffs, some of whom are going to be  
14 representative plaintiffs and are going to be  
15 present at trial represented by counsel, and some of  
16 whom are going -- many of whom -- most of whom, like  
17 in a class action, are going to be absent and are  
18 not going to be represented. The point of the  
19 adequacy of representation is about representing the  
20 people and the interested shareholders who are not  
21 able to attend trial and not able to be represented  
22 by counsel at trial.

23 In contrast to that circumstance, which is  
24 what the rule contemplates, we have everyone who's a  
25 shareholder -- everyone who's an interested party in  
26 this case is represented by counsel here. There's  
27 no problem of whether or not we're going to do a  
28 sufficient job of representing 10,000 absent

1 shareholders. That's not the issue.

2 And I think that's instructive as to why  
3 California derivative rules don't have that same  
4 standard, which is what Judge Wohlfeil found when  
5 denied Defendants' motion on summary judgment.

6 In fact, California law, as Your Honor  
7 knows, is pretty clear. There's some claims that  
8 are derivative claims. There's shareholders.  
9 There's some claims that are direct claims.  
10 Defendants are arguing that in a closely held  
11 corporation, there is now a new impediment to  
12 bringing a derivative claim that can't be brought as  
13 a direct claim, and they're now arguing that there  
14 should -- the Court should adopt and apply an  
15 adequacy standard that doesn't exist for a reason  
16 that's absent from this case right here, that there  
17 are -- it -- that there are absent plaintiffs or  
18 shareholders that need to be protected. That's not  
19 the case here. Everyone who is a party to the  
20 lawsuit is a shareholder.

21 Shareholders have -- shareholders have the  
22 right to bring a derivative action. And not only  
23 that, they have a right to bring a derivative action  
24 at the same time that they bring a direct action and  
25 also at the same time that they bring a direct  
26 action against the company, not just fellow  
27 shareholders as well.

28 One of the things that I think that is --

1 is just misguided about this is that it would  
2 eviscerate the remedy of a derivative action in a  
3 small shareholder context, or it would at least put  
4 a unnecessary obstacle that the legislature didn't  
5 prescribe, that the courts haven't prescribed in  
6 California, when a California plaintiff in a  
7 share -- in a small corporation wants to bring a  
8 derivative claim.

9           There's plenty of instances where you can  
10 see where this would go awry. Someone -- you're a  
11 shareholder in a small corporation. Someone's  
12 wasting money. What's your claim? If -- they have  
13 got to claim that you're inadequate because you've  
14 also got a claim directly against the corporation,  
15 which is what their claim is, that we've got a  
16 conflict because Mr. Johnson has a claim directly  
17 against the corporation.

18           Mind you that claim is being resolved, is  
19 almost resolved, but it's resolved almost entirely  
20 on the merits. It's only got a hearing on  
21 attorney's fees left in the federal Court. That's  
22 the only pending direct litigation for Mr. Johnson  
23 and the corporation, but they want to use that as a  
24 bar to say Mr. Johnson has a conflict of interest  
25 and that he can't bring a derivative claim which  
26 California gives him the right to bring.

27           They talk about -- counsel argued that  
28 Mr. Johnson wants Storix to continue incurring

1 litigation expenses in this case. That could be --  
2 that's the furthest from the truth. The issue in  
3 this case is whether -- one of the primary issues in  
4 this case is whether Storix should even be paying  
5 for the defendants' litigation expenses at all.  
6 That's one of the main reasons why we're bringing  
7 this claim; not to increase litigation fees to the  
8 company, but to stop them.

9 We brought a motion for preliminary  
10 injunction, which was denied. We brought several  
11 motions for appointment of a receiver, also which  
12 were denied. But the whole point of Mr. Johnson's  
13 derivative action or one of the larger points of it  
14 has been to stop the corporation from -- stop the  
15 defendant from taking money from the corporation to  
16 pay for their attorney's fees. Johnson has  
17 absolutely no interest in driving up fees.

18 Now, they talk about Mr. Johnson's plans  
19 for Janstor -- contingent plans for Janstor in 2015  
20 based on his idea at the time for a moment that  
21 Janstor might -- that Storix might be going  
22 bankrupt. And yes, Johnson was legitimately  
23 concerned about that.

24 But notice what hasn't happened in the  
25 meantime. Janstor since been dissolved. Johnson  
26 has done nothing but still remain on the board and  
27 still try to fight for what he believes is best for  
28 Storix. He has no interest in seeing Storix fail.



1 To the contrary, he wants Storix to succeed.

2 But he is -- he is adamant that -- and  
3 rightfully so -- that these issues, especially the  
4 issue of software security, especially the issue of  
5 Defendants taking money from the corporation to pay  
6 for their own legal fees, Defendants taking other  
7 money from the corporation to enrich themselves,  
8 Defendants taking money from the corporation to pay  
9 for nonlitigation attorney fees that are only in  
10 their own interests, and Defendants wasting money on  
11 bonuses, salary increases. That's Mr. Johnson's  
12 point of bringing this case, not to run up a legal  
13 bill for either himself or Storix.

14 Counsel argued that Judge Huff found  
15 Mr. Johnson tried to destroy Storix. That's simply  
16 not true. In fact, when Storix brought the motion  
17 for preliminary injunction, similar in many respects  
18 to the motion they bring here, in front of Judge  
19 Huff, she denied it on the basis that all of the  
20 facts that they allege for their preliminary  
21 injunction occurred -- stopped occurring as of 2016.  
22 And, of course, it's the same five e-mails that they  
23 repeated ad nauseam at trial. That's their whole  
24 basis for preliminary injunction, that Johnson  
25 incorporated a company named Janstor and sent some  
26 e-mails and that there was their basis for  
27 preliminary injunction.

28 And judge Huff wisely noted that at the end

1 of 2016, that since all that flurry of activity in  
2 2015, Johnson had done nothing else, had indicated  
3 no desire to compete or hurt or act adversely to the  
4 company, and denied their request for injunctive  
5 relief because there's no basis for it.

6 I don't know if we even have to get there,  
7 but the idea that Ms. Sassi is somehow also  
8 forfeiting her rights to bring a derivative claim  
9 simply because she agrees with Mr. Johnson, even if  
10 you -- even in -- even if you can conceive of some  
11 way where Mr. Johnson has a disqualifying conflict  
12 of interest, I don't understand how Ms. Sassi, by  
13 virtue of her agreeing, taking a side in litigation,  
14 automatically becomes tainted.

15 Under that -- under that concept or under  
16 that articulation of the rule, anyone if we were --  
17 if we were in a situation where we had a thousand  
18 absent shareholders, anyone who wanted to say,  
19 "Okay. Mr. Johnson is inadequate. I want to step  
20 up, because I agree with him," they would be  
21 inadequate too because they agree with him. They  
22 take his side. It has to be something more than  
23 taking his side.

24 They can't point to anything even remotely  
25 wrongful that Ms. Sassi has done. They brought no  
26 lawsuit against Ms. Sassi. They allege no breach of  
27 fiduciary duty against Ms. Sassi. They can't point  
28 to anything she's done other than attend corporate

1 board meetings, voice her opinions, and vote. They  
2 just don't like the way she votes.

3 They don't want to disqualify her because  
4 she's inadequate or because they don't think they're  
5 going to do a good enough job in defending against  
6 these claims. They want to disqualify her because  
7 they disagree with the merits of her position.  
8 That's not grounds for disqualification. Even if  
9 there was some sort of inadequacy standard for  
10 derivative claims under California law, it's not met  
11 here.

12 THE COURT: On the procedural point, the  
13 defense position is that you gained a procedural  
14 advantage, not only in this issue on standing, but  
15 throughout the litigation by being late, and then  
16 they're forced to scramble to get things done on  
17 time. In other words, it's -- it's a -- if it's not  
18 intentional, the effect is prejudicial to them.

19 Thoughts?

20 MR. KING: What's the prejudice?

21 THE COURT: To do a reply on a hyphenated  
22 time period.

23 MR. KING: They managed to get the reply  
24 in. If there was serious prejudice, if there was an  
25 argument that they needed to make, they had the last  
26 four weeks to come to the Court and bring it to the  
27 Court's attention. There's no prejudice.

28 If they want to talk about some other point

1 in the past, what's the prejudice? They wanted to  
2 get their case to jury trial. They have -- at all  
3 times have had at least four or five times as many  
4 attorneys as have been litigating the case on this  
5 side with countless more support staff and  
6 resources, not to mention, from -- since the  
7 corporation's paying for everything over there.

8           Whatever prejudice -- and if -- first of  
9 all, if there was prejudice, they need to articulate  
10 what it is and they need to come out and say, This  
11 is what happened. This is why we were prejudiced.  
12 Otherwise, we would have been able to do this --  
13 make this argument.

14           They haven't articulated that. There's no  
15 reason to -- there's no reason to disregard a brief  
16 simply because there's an allegation of -- you know,  
17 that someone makes an allegation of prejudice  
18 without actually articulating a reasonable basis to  
19 believe there's prejudice.

20           Is it -- is it unfortunate that they had to  
21 get a reply brief done in shortened time? Yes. And  
22 I certainly don't like it when people do that to me.  
23 I don't have any intention of doing that to them.

24 But is that sufficient enough basis to deny Johnson  
25 and Sassi a hearing on the merits of the derivative  
26 claim that they have been litigating  
27 for 2 1/2 years? I don't think it is.

28           THE COURT: And why was the opposition

1 late?

2 MR. KING: The opposition was late because  
3 when we agreed to the briefing schedule on this, I  
4 was expecting that we would get short,  
5 less-than-ten-page briefs on a derivative standing  
6 issue and on the preliminary injunction issue.

7 And I was also expecting a preliminary  
8 injunction motion that was limited to the request  
9 for -- I'm sorry -- permanent injunction motion that  
10 was limited for the request of injunction that were  
11 articulated in the complaint.

12 Instead what I got was 20-page briefs on  
13 each issue. The permanent injunction brief had 11  
14 bases for instruction, 11 specific requests for  
15 injunction that were not articulated in the  
16 complaint. That required extensive time and  
17 research to respond. You read the brief. There was  
18 no shortage of issues that were -- that were  
19 difficult and somewhat novel at times to research  
20 and analyze and get done.

21 And I got the brief on Thursday. I had  
22 stuff on Friday, on Saturday, and Sunday. On  
23 Monday, I worked nonstop on both of these briefs. I  
24 had no help. I did it and I got them finished and  
25 filed on Friday.

26 Now, again, I didn't mean to -- you know,  
27 for there to be an error in filing, but it happened.  
28 And, you know, I regret that. I apologize for it,

1 but it was certainly not my intention. I certainly  
2 gained no advantage from it. And the defendants  
3 have articulated no prejudice or reason for denying  
4 Johnson and Sassi a hearing, a trial, on the  
5 claimants that they have been litigating for this  
6 time.

7 THE COURT: Mr. Aveni, on the procedural  
8 issue?

9 MR. AVENI: Thank you, Your Honor. Just on  
10 the procedural issue then, the rules have to mean  
11 something, Your Honor. And again, I don't want to  
12 sit here and grouse. Mistakes happened. What I'm  
13 concerned about is the pattern and practice, and  
14 this has gone on through this entire litigation.  
15 It's not just this issue.

16 Mr. King talks about how Mr. Ms. Sassi and  
17 Mr. Johnson are represented just by Mr. King. They  
18 had Mintz Levin before Mr. King was on the case.  
19 The pattern and practice continued. And the effect  
20 absolutely prejudicial when you get a opposition  
21 brief which was due on Thursday and you get it on  
22 Monday.

23 And I got my brief done. I sat down at my  
24 desk and I typed up my reply brief on day, in one  
25 workday, not a full day. I had a few hours. My  
26 brief was 16 pages. I don't know how long  
27 Mr. Sullivan's brief was. There's no reason -- I  
28 mean, if I can get my nine-page reply brief done in

1 a day -- I mean, I killed myself, but I got it  
2 done -- there's no reason Mr. King can't respond to  
3 a 16-page brief in two days.

4 But the rules mean something. If Mr. King  
5 thought he couldn't get his brief done, his duty was  
6 to come in and tell the Court and ask for more time,  
7 rather than simply ignore the Court's order, violate  
8 the Court's order, and take away all of our time  
9 that we would have had to respond to those briefs.

10 Again, I don't want to sit here and grouse  
11 about it. But the pattern -- over and over again,  
12 this happens, again, including this weekend.  
13 Your Honor, expressly ordered us to meet and confer  
14 with regard to what would be happening this week in  
15 trial, and I immediately attempted to do that.

16 One of the things we were supposed to talk  
17 about was -- you ordered Mr. King to give me his  
18 final list of witnesses. I never received it. I  
19 expressly asked for it. I didn't get it. As I sit  
20 here right now, I have no idea. I have some idea,  
21 but he didn't tell me what his final order of  
22 witnesses is. That's yet again causing me to  
23 scramble. And it's just the pattern and practice,  
24 Your Honor, that's frustrating, the continuous  
25 ignoring Court orders on that issue. That's just on  
26 the procedural issue.

27 THE COURT: All right. And do you need  
28 more time on your reply?

1           MR. AVENI: No, Your Honor. I scrambled  
2 and got it done. But my point is I ended up filing  
3 a nine-page reply, which was almost as long as  
4 Mr. King's opposition, and I did it in one workday.  
5 And Mr. King ultimately had 11 days that he took to  
6 get those two briefs done.

7           I just don't understand why it couldn't  
8 have been done in compliance with the Court's order,  
9 and if he couldn't get it done, then anybody would  
10 come in and talk to the Court about it or at least  
11 meet and confer with me about it. I was surprised  
12 on Monday morning to find a brief sent to me the day  
13 my reply was due. I had heard nothing from opposing  
14 counsel as to status, even though it was due on  
15 Thursday.

16           THE COURT: All right.

17           MR. AVENI: And my point is that that is  
18 all relevant to the fair-and-adequate standard.

19           THE COURT: I understand.

20           MR. AVENI: Does Your Honor want me to  
21 address any of the substantive issues?

22           THE COURT: Not yet.

23           Mr. King, on the substance, how is it that  
24 Mr. Johnson would be appropriate under the  
25 fair-and-adequate standard in light of the jury's  
26 finding that -- to the question "Did Anthony Johnson  
27 breach his duty of loyalty by knowingly acting  
28 against Storix, Inc.'s interests while serving on



1 the board of directors of Storix, Inc.?" Answer

2 yes. I heard the same evidence.

3 How is it, in light of that finding and  
4 recognizing that the Court is not bound by that  
5 finding -- but I heard the same evidence, and I  
6 guess I wonder about Mr. Johnson's fair-and-adequate  
7 representation.

8 MR. KING: So first --

9 THE COURT: You don't have to repeat  
10 yourself, but I want everyone to know my thinking.

11 MR. KING: So this is -- this is -- the  
12 first thing I would say in response to that is let's  
13 look at what the jury actually did find. They were  
14 given -- they were given two questions on liability:  
15 One, Mr. Johnson acted adverse to the corporation;  
16 two, did Mr. Johnson misuse confidential  
17 information -- confidential information of the  
18 corporation to his benefit or to the corporation's  
19 detriment. They found yes on the first question, no  
20 to the second.

21 What damages did they award? This is  
22 really instructive. The only damages they awarded  
23 were approximately \$3,700 attributable to the  
24 customer e-mail on October 6th, 2015. That's what  
25 the jury found was a breach of fiduciary duty, one  
26 instance.

27 Has it repeated itself in the nearly three  
28 years since then? No. Has Johnson done anything

1 since then that would indicate there is a  
2 continuing, ongoing pattern or effort to harm  
3 Storix? No.

4 But even -- let's just say hypothetically  
5 that we can say that the jury's verdict implies that  
6 Mr. Johnson's adverse -- in acting adverse in the  
7 past and forever will continue, and that's what the  
8 jury's finding was. And let's just say that's what  
9 Your Honor says -- interprets the evidence to be.

10 Even if that were the case, the adequacy of  
11 Mr. Johnson's claims in his derivative case rests on  
12 the merits of those claims themselves. If  
13 Mr. Johnson's claims are not meritorious, then they  
14 are -- that's the test for inadequacy. If they are  
15 meritorious, is it proper to deny Mr. Johnson and  
16 Ms. Sassi the right to pursue those claims to seek  
17 the remedies that they have asked for and protect  
18 the corporation from --

19 THE COURT: I'm talking about Mr. Johnson  
20 only right now.

21 MR. KING: Yes. Well, sure. And even  
22 if -- if you could say that he -- there was a breach  
23 of fiduciary duty, he's acted adverse before and  
24 after, and continues to, even if you were to make  
25 that assumption, that shouldn't be the basis for  
26 adjudicating his derivative claims.

27 If the derivative claims have merit,  
28 they're -- they're adequate. He's adequate to bring

1     them.  If they don't have merit, that's the -- then  
2     they're inadequate.  That should be the test for  
3     inadequacy, especially when we have everyone  
4     represented here by counsel -- especially when we  
5     have all the shareholders here represented by  
6     counsel to make arguments and address our arguments.  
7     That should be the test for adequacy.

8             THE COURT:  Mr. Aveni?

9             MR. AVENI:  First of all, I think it goes  
10    beyond saying we don't agree with regard to what the  
11    jury found.  And the jury heard a lot of evidence  
12    and then was simply asked to determine whether  
13    Mr. Johnson breached his duty of loyalty, and they  
14    found he did.

15            Now, they -- the damages were what they  
16    were because the jury didn't necessarily find a  
17    monetary injury to some of the other acts.  But at  
18    its core, that case was heavily about the injunctive  
19    relief, which we're about to talk about.  That has  
20    nothing to do with the jury's finding.  And

21    Your Honor heard all of that evidence that showed  
22    why -- you know, that Mr. Johnson had acted against  
23    Storix's interests, and it wasn't just one instance.

24            With regard to Ms. Sassi, Mr. King is  
25    saying it's nothing more than Ms. Sassi agrees with  
26    Mr. Johnson.  With respect, it's much more than  
27    that.  I've laid it out in our briefs, and I don't  
28    want to reiterate all of that.  But what all of that

1 shows -- what all of the evidence shows is that she  
2 is his proxy.

3 And again, that was the basis for Judge  
4 Prager's ruling with regard to the books-and-records  
5 issue. She acts as his proxy. So if she is allowed  
6 to continue and he isn't, it's the same as  
7 Mr. Johnson litigating the case. And he's paying  
8 for it behind the scenes, and he's -- you know,  
9 she's following his plan. This was a case he filed.

10 And then once their game plan with regard  
11 to her passing information to him had been  
12 discovered, that's only when she joined as another  
13 derivative plaintiff. This is Mr. Johnson's show,  
14 and she is acting as his proxy, as all the evidence  
15 I laid out shows. So there's no sense in  
16 allowing -- in a sense, in allowing her to continue  
17 but barring him. It's one in the same.

18 Now, Mr. King said that Judge Huff didn't  
19 find that Anthony Johnson tried to destroy Storix.  
20 Actually, she did. If you'll recall, what she found  
21 was one of his bad-faith litigation tactics in the  
22 copyright infringement case was trying to -- I'm  
23 using her words, quote, For Storix to close its  
24 doors. Now, that's right in her order. He was  
25 trying to do that by a variety of ways, but  
26 essentially trying to drive them out of business so  
27 they couldn't fight back against his copyright  
28 infringement claim. She found that. So dead wrong

1 about what Judge Huff found with regard to his  
2 antagonism to Storix.

3 Mr. King also said that Mr. Johnson doesn't  
4 have an interest in driving up attorney's fees here.  
5 Again, there was a lot of evidence during the jury  
6 trial about Mr. Johnson weaponizing litigation. He  
7 made those threats both towards Storix and toward  
8 the director/management defendants.

9 Now, sure, to the degree Mr. Johnson wants  
10 to hurt director/management defendants personally,  
11 yeah, he would love to see them paying their own  
12 attorneys' fees. And that's why he said over and  
13 over again -- and all this was covered in the jury  
14 trial, that he was making direct threats to them,  
15 that they would lose their homes or this or that,  
16 because he wanted to hurt them personally.

17 But he also did the same thing towards  
18 Storix. And again, that's covered in Judge Huff's  
19 opinion, that he acted intentionally, including, for  
20 example, sending out the e-mail to customers, to try  
21 to force Storix to close its doors so that it  
22 couldn't afford its attorneys' fees and it wouldn't  
23 be able to fight back against what was his real  
24 desire, which was to get the copyright and take the  
25 software for himself. So he does, in fact, have a  
26 direct interest in driving Storix out of business.

27 Mr. Johnson -- Mr. King also talked about  
28 the -- our entire claim as to standing is the fact

1 he's got a direct lawsuit, as well as a derivative  
2 suit. Obviously, it's much more than that. In  
3 fact, at this point I think the key problem for him,  
4 the most important one in terms of his standing, is  
5 the jury verdict, not just the fact that there's  
6 another lawsuit out there.

7 Mr. King tried to argue that there is no  
8 fair and adequate standard, but of course it was set  
9 out by the Supreme Court. The California Supreme  
10 Court actually laid out that exact same standard and  
11 adopted it in Grosset vs. Wenaas, adopting the  
12 federal standard.

13 And even if that's not the case, what the  
14 California Supreme Court basically said was it's  
15 obvious that the derivative plaintiff must be a fair  
16 and adequate representative of the company. So  
17 there is such a standard.

18 Mr. King said Judge Wohlfeil denied the  
19 motion for summary judgment on this issue. As we  
20 briefed, actually, what happened was Judge Wohlfeil  
21 said he -- and I'm using his words -- said he was  
22 going to kick the can down the road, and that's why  
23 we're talking about this today.

24 One of Mr. King's main points on the  
25 standing issue, one he just raised, is with regard  
26 to his notion that in a closed corporation, all of  
27 the shareholders are in the suit. And so he's  
28 trying to say there shouldn't be a fair and adequate

1 standard because everybody's got counsel and  
2 everyone's on one side or the other.

3 But the problem with that argument is that  
4 it's been rejected expressly, and I cited some case  
5 law in my reply brief. This refers to what's known  
6 as class-of-one cases, you know, where it's a closed  
7 corporation. There's a few shareholders on one  
8 side. "Class of one" means there's only one  
9 shareholder on the other side, and they're saying,  
10 Well, I'm the only interested -- I only have to  
11 represent similarly situated shareholders, and I'm  
12 the only one, so I can proceed.

13 And what the case law says is nope, you're  
14 also representing the company itself. And because  
15 you need to represent the company fairly, there is,  
16 in fact, a fair and adequate standard, not just with  
17 regard to other shareholders.

18 I talked at some length about the ShoreGood  
19 Water Company case in my brief on this. And what  
20 the Court in response to that exact argument said  
21 was the plaintiff must not have ulterior motives and  
22 must not be pursuing an external personal agenda.  
23 The Court was saying in that case that the  
24 plaintiff, even in a class-of-one situation, must  
25 represent the corporation itself in a fair and  
26 adequate manner, not just other shareholders.

27 And last, Your Honor, if Anthony Johnson is  
28 a fair-and-adequate representative of Storix, it's

1 difficult, if not impossible, to think of a  
2 circumstance when somebody wouldn't be fair and  
3 adequate. I mean, he has a jury verdict that he's  
4 breached the duty to the corporation that he would  
5 owe here. So if that doesn't make him fair and  
6 adequate, then it's hard to see how the standards  
7 set out by the California Supreme Court would mean  
8 anything.

9 And the same is true for Ms. Sassi, because  
10 she has over and over again acted as his proxy, as  
11 his agent. She's can't be allowed to proceed with  
12 him pulling the strings behind the scenes. It's one  
13 and the same. So if the plaintiffs can be fair and  
14 adequate representatives here, then we may as well  
15 scratch out from the California Supreme Court's  
16 Grosset vs. Wenaas opinion, the adoption of the  
17 fair-and-adequate standard.

18 Thank you.

19 THE COURT: So I understand the argument  
20 that Ms. Sassi is Mr. Johnson's proxy, but she was  
21 not a party in the jury trial. She testified  
22 extensively. There's a lot of communications to and  
23 from her with regard to her involvement. I think  
24 she comes to this dispute with a different  
25 involvement than Mr. Johnson and maybe a different  
26 motivation.

27 And if, as a system of jurisprudence, we  
28 desire a trial on the merits, as opposed to not, I'm



1 concern -- I think I under -- I understand  
2 everybody's position here, but I guess I'm wondering  
3 about the precipitous nature of denying her standing  
4 when she's never had her day.

5 Now, I expect that her testimony will be  
6 very similar in many respects to things I've already  
7 heard. But I guess I'm wondering, when we talk  
8 about she's his proxy and Judge Prager's rulings on  
9 the books and records, is that enough to say,  
10 "Ms. Sassi, you're done. We're in recess. Continue  
11 on with your litigation in this case to both sides."  
12 Seemingly a little precipitous as to Ms. Sassi.

13 So you don't know -- you don't have to  
14 repeat. I think I understand your -- again, I'm  
15 asking this maybe rhetorically. You can consider it  
16 that way. But everyone's entitled to my thinking  
17 and my view. I may be wrong. I may be very wrong.  
18 I may be right. But I want you to know my thinking,  
19 if anyone's interested.

20 So I guess, Mr. Aveni, I wonder about that.  
21 And again, you don't have to argue this because --  
22 again, you can treat it rhetorically. So --

23 MR. AVENI: Can I take ten seconds?

24 THE COURT: Yes, and even maybe 11.

25 MR. AVENI: Thank you. I appreciate the  
26 leeway.

27 Judge Prager didn't even use the term  
28 "proxy," although I think he could have. He used

1 the term "colluded." And in fact, one of  
2 Ms. Sassi's texts uses the exact same word,  
3 colluded. It's -- she is acting as his proxy, but  
4 it's -- she is attempting to do the exact same  
5 things for him that he's trying to do himself. And  
6 she did -- you know, she acted -- even after -- she  
7 continued to do it even after she was a Storix  
8 director and had her own fiduciary duties to the  
9 company.

10 She learned -- just as one example, she --  
11 there was now doubt from all the evidence that she  
12 was perfectly aware of Mr. Johnson's efforts to  
13 compete against Storix, and she admitted she didn't  
14 tell anybody at Storix. She said she didn't  
15 because, well, Anthony Johnson already told them.  
16 But Mr. Johnson emphatically denied that he had. In  
17 fact, he said nobody knew about Janstor at all other  
18 than Robin Sassi.

19 So right there is a breach of her fiduciary  
20 duties to the company. She had a duty to the  
21 company to alert them to that, but instead she  
22 continued, just as Judge Prager found, to collude  
23 with him. And it's that collusion that created the  
24 problem. Because there's no dispute Mr. Johnson is  
25 paying for this litigation. Even if Mr. Johnson is  
26 excluded as a derivative plaintiff, he will continue  
27 to pay for it. And she just is set up as the figure  
28 head at counsel table.

1           Surely, you can't circumvent the fairly and  
2       adequate standard by finding someone else to stand  
3       in your shoes while you're the real actor behind the  
4       scenes. And if we have enough evidence here -- and  
5       just as Judge Prager found, I think we do -- that  
6       that's what's going on, then it's certainly within  
7       the Court's discretion to say, "I'm not going to  
8       allow you to circumvent those rules simply by  
9       finding somebody to sit there and be the name on the  
10      caption while I'm still pulling the levers behind  
11      the scenes." I mean, that would ruin the standard  
12      if you could do that.

13           Thank you, Your Honor.

14           THE COURT: Mr. King? I think I understand  
15      everybody's position, so you don't have to say  
16      anything, but I want to let everybody have their  
17      say.

18           MR. KING: Then I'll be brief. I think  
19      Your Honor is right. I think Ms. Sassi has not had  
20      her day in court. And I to describe her as merely a  
21      proxy and a puppet of Mr. Johnson denies her her own  
22      agency and her own self-interested judgment or her  
23      own interests and her own judgment and her own  
24      reasons she may have for pursuing this.

25           The testimony that she gave was clear that  
26      she is not simply parroting Mr. Johnson's  
27      motivations. She has her own reasons for doing  
28      this. She has her own interests, and it's not fair

1 to call her simply Mr. Johnson's proxy.

2 THE COURT: Okay. Anything else on  
3 standing?

4 All right. Going back to the 10,000-foot  
5 view that Mr. King referenced, I've asked the  
6 parties, through counsel, to take a deep breath,  
7 take two steps back, giant steps back, and from a  
8 10,000-foot view, reassess life in litigation or  
9 outside of litigation in light of the jury verdict.  
10 And here we are. Enough said.

11 But if we're going to go forward, the  
12 question is whether the Court grants Defendants'  
13 motion to deny standing to either of the -- either  
14 Mr. Johnson or Ms. Sassi. And as you've heard from  
15 my questions, the Court wants to try the case on its  
16 merits when at all possible, not only this one, but  
17 every case, unless there's some good reason not to;  
18 in other words, procedurally or substantively,  
19 there's a reason not to pursue that.

20 In this case, I see Mr. Johnson in a  
21 different position than I see Ms. Sassi, and what  
22 I'm talking about now is the shareholder derivative  
23 suit. From Mr. Johnson's point of view -- I won't  
24 repeat what it already said in the question, but the  
25 jury made a distinct finding that he breached his  
26 duty of loyalty by knowingly acting against Storix,  
27 Inc.'s interests while serving on the board of  
28 directors of Storix, Inc.

1           The Court heard the same evidence as the  
2 jury did in a weeks' long trial. The Court agrees  
3 with the jury's finding as to that question. The  
4 Court adopts the jury's finding as to that question.

5           So what does that mean relative to this  
6 motion? In my view, we do have a lot of federal  
7 statutory and case law, as well as California  
8 statutory and case law, that's cited by both sides  
9 and. I commend you, once again, for your briefing  
10 on these issues.

11           But I think that in reading the California  
12 Supreme Court's position -- and specifically, it's  
13 Grosset, G-r-o-s-s-e-t, vs. Wenaas, W-e-n-a-a-s,  
14 42 Cal.App.4th 1100. That's 2008 California Supreme  
15 Court case. I don't think anyone is reading that,  
16 nor do I, as saying that the California standard  
17 refuses to give credence, give authority, to the  
18 federal standard of fair and -- fair-and-adequate  
19 representation of representative plaintiffs.

20           In fact, I read it as a rejection of the  
21 Section 800 lack of that wording, "fair and  
22 adequate," and the rejection means something in my  
23 mind -- and I'm thinking others as well -- something  
24 that's significant, and that is that fair and  
25 adequate seems to be the appropriate standard.

26           And based on what I've heard and what I've  
27 just stated and what the jury found, I don't think  
28 Mr. Johnson meets that standard. So for that

1 reason, the motion to deny standing to Mr. Johnson  
2 on the shareholder derivative suit is granted.

3 As to Ms. Sassi, I do see her in a  
4 different position. She was not a party to the jury  
5 trial. There was extensive testimony from her on  
6 direct and cross. There were many communications,  
7 much evidence with regard to her role in this case.  
8 But as stated, I think she comes to the -- to this  
9 dispute, which has been long and arduous and hotly  
10 contested, I understand, in a different manner than  
11 Mr. Johnson does and for different reasons. And as  
12 I mentioned, she may have a different motivation for  
13 her involvement in this suit.

14 But in any event, the question is for the  
15 Court to grant or deny the motion as to whether  
16 Ms. Sassi has standing. The Court denies the  
17 motion. The Court finds that Ms. Sassi does have  
18 standing to bring the shareholder derivative suit.  
19 And ultimately, the question is: Is she  
20 appropriate? Is she fair and adequate? And the  
21 Court finds, yes, she is.

22 Now, going back to the 10,000-foot view, I  
23 recognize that that ruling probably makes neither  
24 side happy. And I recognize the allegations of  
25 motivations and other things make that really  
26 something like a tie in a football game or -- we've  
27 heard a lot of cliches. And it doesn't say  
28 anything, Judge. Thank you very much for your

1 ruling.

2 But I'm ruling on the law and the evidence,  
3 and that's the Court's ruling. I feel comfortable  
4 with that ruling. It doesn't stop the Court's view  
5 or alter the Court's view about looking at this case  
6 from the parties' point of view from the 10,000-foot  
7 level, but that's not my domain. I want to assist  
8 the parties, but that's -- I'm not being asked to do  
9 that now, other than resolve factual and legal  
10 disputes. And I'll continue happily in that role.

11 But -- so with regard to this, the next  
12 issue is the injunction. And my thought would be  
13 why don't we take a break right now. And then my  
14 thought would be this: We could argue the  
15 injunction, but my thought is, Mr. Sullivan, I think  
16 you have a desire to call some -- another witness or  
17 put on some other evidence.

18 MR. SULLIVAN: There was I believe an  
19 e-mail from Mr. Johnson recently that we would  
20 reference. I don't know that we necessarily need a  
21 witness for that or testimony.

22 THE COURT: However you want to proceed.  
23 It should probably be, one way or the other, part of  
24 the record, depending on how you want to do this.

25 But my thought would be to make that record  
26 however you want to do it. It may even be by  
27 stipulation if we're just talking about one e-mail,  
28 but -- in other words, that it was sent. But then

1     once we have that evidence, that record, then argue  
2     the injunction and -- wherever that leads us, and  
3     then proceed with the shareholder derivative suit,  
4     if that makes sense. And I'm amenable to however  
5     counsel want to do this.

6             MR. SULLIVAN: Perhaps I'll confer with  
7     Mr. King and see if we can reach a stipulation on  
8     that.

9             THE COURT: And no one has to stipulate to  
10    anything, of course.

11            Fast-forwarding to the shareholder  
12    derivative suit -- and I've said this I think every  
13    time we've met -- I've heard a lot of evidence.  
14    I've read a lot of briefs, and I would just assume  
15    not do a redo. I don't want to get redo, undo. I  
16    want to -- as I said at the outset, the Court has  
17    considered and will consider the evidence in the  
18    jury trial as part of the shareholder derivative  
19    suit to the extent that it's relevant to this  
20    shareholder derivative suit. And then so what I'd  
21    like do in putting on evidence is only new things,  
22    new evidence, new facts.

23            Okay. Let's do this. Let's take  
24    15 minutes, please. Thanks.

25            (Whereupon the requested portion for appeal  
26            concludes at 10:01 a.m.)

27                   \* \* \*

28



1     STATE OF CALIFORNIA     )  
2     COUNTY OF SAN DIEGO    )

3

4             I, Leyla S. Jones, a Certified Shorthand  
5     Reporter, do hereby certify:

6             That prior to being examined, the witness  
7     in the foregoing proceedings was by me duly sworn to  
8     testify to the truth, the whole truth, and nothing  
9     but the truth;

10            That said proceedings were taken before me  
11     at the time and place therein set forth and were  
12     taken down by me in shorthand and thereafter  
13     transcribed into typewriting under my direction and  
14     supervision;

15            I further certify that I am neither counsel  
16     for, nor related to, any party to said proceedings,  
17     nor in any way interested in the outcome thereof.

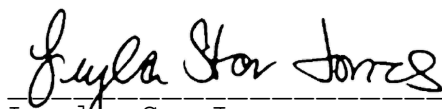
18            In witness whereof, I have hereunto  
19     subscribed my name.

20

21     Dated:   June 16, 2019

22

23



24

\_\_\_\_\_  
Leyla S. Jones  
CSR No. 12750

25

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27

28

(The transcript pages are numbered using  
block numbering. No pages were omitted. The next  
page number is 3551, Volume 20.)