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10 **SUPERIOR COURT OF CALIFORNIA**
COUNTY OF SAN DIEGO – CENTRAL DIVISION

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

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AND SUMMARY ADJUDICATION**

[IMAGED FILE]

Judge: Hon. Joel R. Wohlfeil
Dept. C-73
Action Filed: October 13, 2015
Trial Date: July 14, 2017

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20 AND CONSOLIDATED ACTIONS.
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1 Defendants/Cross-Defendants David Huffman, Richard Turner, Manuel Altamirano, David
2 Kinney, and David Smiljkovich (collectively, “Defendants”)¹ hereby submit their motions for
3 summary judgment and summary adjudication in the consolidated actions that comprise this case.
4 There are three lawsuits brought by Plaintiffs consolidated before this Court: (1) a derivative action
5 brought by Anthony Johnson and his ally, Robin Sassi (the “Derivative Action”); (2) a duplicative
6 direct action by Johnson on his own behalf against the same Defendants based on the same alleged
7 conduct (the “Direct Action”);² and (3) a case alleging false imprisonment, assault, battery, and
8 infliction of emotional distress Johnson filed against Defendants based on an incident that occurred
9 when Johnson showed up unannounced and tried to force his way into Storix’s office (the “False
10 Imprisonment Action”).

11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 Storix is a business that develops and sells a software product called “System Backup
13 Administrator” or “SBAdmin.” (Defendants’ Separate Statement of Undisputed Fact (“SOF”) 1.)
14 SBAdmin is Storix’s sole product. (SOF 2.) Storix was founded in 2003 by Johnson who initially
15 was its sole shareholder. (SOF 3.) In 2011, in response to a serious medical issue, Johnson
16 transferred operations and management responsibilities, as well as 60% of his shares, to Defendants
17 David Huffman, Richard Turner, Manuel Altamirano, and David Kinney. (SOF 4.) Johnson also
18 told Defendants they were free to run the company as they wished, but had to remain with Storix
19 for two years to keep their stock. Johnson then resigned from his officer and director roles, and
20 Huffman, Turner, Altamirano, and Kinney became the officers and directors of the company. (SOF
21 5.) Johnson retained his 40% equity stake and remained a Storix employee so he could retain his
22

23 _____
24 ¹ Of the three consolidated cases, Huffman, Turner, Altamirano, and Smiljkovich are defendants in two of the
25 actions, and cross-defendants in the third suit. Kinney also is a defendant or cross-defendant in two of the suits,
although he is not named in the third suit. For simplicity and clarity, Huffman, Turner, Altamirano, Smiljkovich, and
Kinney uniformly will be referred to as the “Defendants” in connection with all three actions.

26 ² The Direct Action is a cross-complaint Johnson filed against Defendants in response to a complaint Storix
27 filed against him that alleges he breached his fiduciary duty as a Storix director by organizing an entity named Janstor
28 Technology to compete against Storix. That lawsuit, referred to as the “Janstor Action,” also has been consolidated as
part of this proceeding. Because the Janstor Action is brought by Storix against Johnson, it is not the subject of this
motion.

1 health insurance, but he stopped performing work with the exception of a few projects. (SOF 6.)
2 In 2012, Defendant David Smiljkovich was hired as Storix's Chief Financial Officer. (SOF 7.)

3 In 2013, Johnson's serious health crisis unexpectedly resolved and he recommenced work
4 as an employee at Storix. (SOF 8.) On more than one occasion, Johnson declined Defendants'
5 invitation to reassume a decision-making role with the company. The result was that tensions arose
6 because Johnson now had to follow the business decisions of the individuals who previously had
7 been his employees. Johnson ultimately resigned again in May 2014, although he maintained his
8 40% ownership interest. (SOF 9, 124.)

9 After his resignation, Johnson embarked on a campaign against Storix to wrest control of
10 the SBAdmin software by keeping a copy of the software with the aim to develop and sell it by way
11 of a competing enterprise he created named Janstor Technology. As part of his campaign, Johnson
12 sued Storix for copyright infringement in August 2014, based on his flawed claim he was the
13 rightful owner of the software. (SOF 13.) In December 2015, a federal court jury unanimously
14 returned a verdict in favor of Storix and against Johnson. (*See* Judgment in Favor of Defendant and
15 Counter-claimant Storix, Inc., Notice of Lodgment filed concurrently herewith ("NOL"), Exhibit
16 1.) Johnson's appeal is pending. (SOF 10.)

17 On February 12, 2015, while the copyright infringement matter was pending, Johnson and
18 his confederate, Robin Sassi, elected each other to Storix's board of directors. (SOF 11.) Sassi is
19 Defendant Huffman's ex-wife. Sassi has never worked for Storix, but rather gained her Storix
20 shares in 2013 through her divorce from Huffman. Sassi holds slightly more than 7% of Storix's
21 shares. (SOF 12.) Combined with Johnson's 40%, they were able to secure two seats on Storix's
22 five member board.

23 Although Johnson owed Storix fiduciary duties as its newly elected director, he continued
24 his campaign to organize Janstor as a competing business. Shortly after Johnson's election to the
25 Storix board, Johnson incorporated Janstor and prepared to compete with Storix by selling a version
26 of Storix's SBAdmin. (SOF 17-28.) As a result, in August 2015, Storix filed its complaint against
27 Johnson and Janstor based on their efforts to compete directly against Storix. Storix's complaint
28 alleges Johnson breached his fiduciary duties as its director by trying to market a rebranded version

1 of Storix's own software product for his own benefit. (Janstor Complaint, Dckt No. 179; Second
2 Amended Janstor Complaint, Dckt. No. 183.) Johnson responded in April 2016 by filing the Direct
3 Action against Defendants as a cross-complaint. The Direct Action raises an assortment of
4 criticisms mirroring those alleged in the Derivative Action and asserts claims for breach of
5 fiduciary duty, fraud, and conspiracy. (Direct Action Cross-Complaint, Dckt. No. 181.) In October
6 2015, shortly before the trial in Johnson's copyright infringement lawsuit against Storix, Johnson
7 and Sassi filed the Derivative Action against Defendants. (Derivative Action Complaint, Dckt. No.
8 1.)

9 **II. SUMMARY OF ARGUMENT**

10 At its core, these disputes are about Johnson's claim that Defendants breached their
11 fiduciary duties to him as fellow officers or directors of Storix, Inc. Johnson raises these
12 allegations in his breach of fiduciary duty claim that is included in the Direct Action. While
13 Defendants are confident that claim is meritless and will be rejected at trial, Defendants are not
14 seeking dismissal of that claim by way of summary judgment or summary adjudication. As a
15 result, Johnson will get his day in court on those fiduciary duty issues.

16 What Defendants seek in this motion is to streamline this action for trial, trimming the
17 legally unsupportable excess, while allowing that core dispute to proceed. First, Defendants seek
18 entry of summary judgment on the Derivative Action because Johnson and Sassi are disqualified
19 from bringing claims on Storix's behalf. Both have combined extensively to sabotage Storix's
20 legitimate business objectives, thus are conflicted from representing Storix derivatively because of
21 their antagonistic interests.

22 Second, Defendants seek summary judgment on Johnson's claims in the False
23 Imprisonment Action. Based on the undisputed facts, Johnson simply cannot sustain his burden of
24 proof to demonstrate lack of consent for what occurred, or that he suffered any damages. On the
25 contrary, Johnson readily admits he did not suffer any injury.³

26
27 ³ In the alternative, Defendants seek summary adjudication as to Johnson's claims against Defendant Rich
28 Turner in the False Imprisonment Action. As detailed below, Turner was not present during the incident that forms the
basis for Johnson's claim until after the police arrived. Thus, Turner cannot be liable and the claims against him should
be dismissed.

1 Finally, Defendants seek summary adjudication of the fraud claim in the Direct Action,
2 while leaving Johnson’s other claims in that action undisturbed. The fraud claim must be dismissed
3 because Johnson has not suffered any damage and because Johnson cannot demonstrate he would
4 have acted differently if he had known the alleged “truth.”

5 **III. DISCUSSION**

6 **A. Defendants Are Entitled To Summary Judgment In The Derivative Suit Because**
7 **Johnson and Sassi Cannot Adequately Represent The Interests of Storix.**

8 Johnson and Sassi are disqualified from bringing their derivative claims on Storix’s behalf
9 because they cannot fairly and adequately represent the interests of Storix and its shareholders.
10 Defendants previously raised this issue in their demurrer to the Derivative Action Complaint. In
11 ruling on the demurrer, this Court agreed a plaintiff who cannot fairly and adequately represent the
12 corporation and its shareholders is barred from bringing derivative claims, and the Court
13 specifically held a plaintiff “who is in litigation against a corporation has a direct conflict of interest
14 that disqualifies him from bringing derivative claims on the same corporation’s behalf.” (Court
15 Order on Defendants’ Demurrer dated April 29, 2016, Dkt. No. 110, at 1.)

16 At the time of the hearing on Defendants’ demurrer, however, the derivative case was not
17 yet consolidated with the Direct Action, and the Court thus ruled it could not consider extrinsic
18 evidence regarding the Direct Action or the federal copyright action Johnson filed against Storix,
19 nor could the Court consider the other extrinsic evidence regarding Johnson’s and Sassi’s
20 antagonism to, and conflicts of interest with, Storix. (*Id.*) As a result, although the Court agreed
21 with Defendants on the applicable law, as indicated in the Court’s Order, (*id.*), the Court noted
22 during oral argument that Defendants would need to file a motion for summary judgment for the
23 Court to consider the extrinsic evidence regarding Johnson’s and Sassi’s conflicts with Storix.

24 By way of this motion, the Court can now consider the extrinsic evidence it previously had
25 to disregard. The evidence demonstrates Johnson is barred from serving as a derivative plaintiff for
26 two compelling reasons. First, he is an opposing party in two other lawsuits against Storix. Second,
27 he is otherwise antagonistic to Storix as evidenced by his attempting to compete against Storix
28 while he was serving as a Storix director. The evidence likewise demonstrates Sassi is tainted by

1 the same conflict of interest as Johnson. As a result, both Johnson and Sassi are barred from
2 serving as derivative plaintiffs and their derivative suit must be dismissed.

3 1. Johnson Is Litigating Two Lawsuits Against Storix

4 The first of these lawsuits is a complaint Johnson filed against Storix for copyright
5 infringement, alleging he owns the copyright to Storix's software. In December 2015, Storix
6 obtained a unanimous jury verdict against Johnson on his infringement claim, and a declaration that
7 Storix owns the copyright to the software. (See Judgment in Favor of Defendant and Counter-
8 claimant Storix, Inc., Notice of Lodgment, Exhibit 1.) Johnson filed an appeal, and that appeal
9 currently is pending before the Ninth Circuit. (SOF 10.)

10 Remarkably, the trial court expressly found Johnson litigated the case against Storix with
11 improper motives and using bad faith litigation tactics. (SOF 14.) Specifically, in ruling on
12 Storix's motion for attorneys' fees, the court ruled Johnson's motive in filing the lawsuit was not
13 merely to secure a copyright infringement judgment, but also to seize control of the company and to
14 force Storix to "close its doors." (SOF 15.) The court also found "Johnson's litigation tactics
15 became increasingly unreasonable as the case progressed." These tactics included, among other
16 things, threatening Storix employees and shareholders, and contacting Storix's customers and
17 seeking to undermine their business relationship with Storix so the company would not have
18 sufficient resources to defend against Johnson's claims. (SOF 16.)

19 That Johnson prosecuted the copyright case against Storix is alone sufficient to bar Johnson
20 from serving as a derivative plaintiff. The court's ruling Johnson prosecuted it with improper
21 motives and bad faith tactics presents a self-evident irreconcilable conflict.

22 The second lawsuit between Johnson and Storix is the Janstor Action in which Storix
23 alleges Johnson breached his fiduciary duty to Storix by operating Janstor as a competing business
24 while Johnson was a Storix director. (Janstor Complaint, Dckt No. 179; Second Amended Janstor
25 Complaint, Dckt. No. 183.) As this Court held when ruling on Defendants' demurrers to the
26 Derivative Action, a plaintiff "who is in litigation against a corporation has a direct conflict of
27 interest that disqualifies him from bringing derivative claims on the same corporation's behalf."
28 (Court Order on Defendants' Demurrer dated April 29, 2016, Dkt. No. 110, at 1.) Because Johnson

1 has sued, and is being sued by, Storix in multiple lawsuits, he has an unavoidable conflict of
2 interest barring him from maintaining derivative claims on Storix's behalf. Johnson's derivative
3 claims must be dismissed on this basis alone.

4 **2. Johnson's Interests Are Antagonistic To Storix**

5 Johnson also is disqualified from bringing claims on Storix's behalf because Johnson has
6 acted with singular focus to undermine Storix's interests, thus is antagonistic to the company. First,
7 Johnson created Janstor to compete against Storix. Worse, he planned for Janstor to sell an
8 unauthorized version of Storix's own software, which Johnson kept when he resigned. (SOF 17-
9 28.) Johnson continued to organize this competing company even after he became a Storix
10 director.

11 Johnson made no secret of his intent to compete against Storix, and to do so by selling an
12 unauthorized version of SBAdmin.⁴ For example:

13 • On February 21, 2015, just over one week after Johnson and Sassi became Storix
14 directors, (SOF 11), Johnson sent a text message to Sassi expressing his intent to compete against
15 Storix. Johnson candidly stated, "*I've been working to get Storix [sic] new competitor set up.*"
16 (SOF 18.)

17 • On January 23, 2015, Johnson sent an email to Defendants stating he intended to start a
18 new company and would "rebrand" SBAdmin as a new product for his competing company. "*I can*
19 *start a new company, something that actually excites me, but I can't start over with a new product.*
20 *... And re-branding SBAdmin might actually be a good thing.*" (SOF 19.) Johnson also stated
21 that after he left Storix, he continued working to improve SBAdmin, and that while he does not
22 intend to give that new code to Storix for free, "*[o]ne way or another it will be on the market*
23 *soon,*" (SOF 20), meaning if Storix does not pay Johnson for the revised software, Johnson will sell
24 it as a competing product. Johnson also ominously warned in the same email that he was going to
25 "*start looking for office space on Monday*" for his competing company. (SOF 21.)

26 • On September 9, 2014, after Johnson resigned his employment at Storix, Johnson
27

28 ⁴ Johnson admits he kept a copy of SBAdmin and that he continued to update the source code for the software
after he resigned his employment. (SOF 17.)

1 confirmed in an email to his sister that he is still “*updating the software at home,*” meaning he kept
2 a copy of the SBAdmin software after he left Storix, and that he continued modifying it for sale
3 through a competing business. (SOF 22.)

4 • On January 16, 2016, Johnson sent an email to a Storix employee, seeking to threaten
5 and intimidate that employee into serving as Johnson’s mole within the company, secretly
6 providing information that Johnson hoped would help him in the ongoing litigation against Storix.

7 In that email, Johnson indicated yet again that he intended to sell his modified version of SBAdmin
8 in the marketplace to compete against Storix. “*I’ve still been working on the software for 2 years*
9 *now. I have a marketable product, and you don’t. They tell you they now own the copyright, but*
10 *they don’t.*”⁵ Johnson also instructed the employee to delete the email to eliminate any evidence of
11 their communication. (SOF 23; *see id.* (Johnson stating in the email that if the employee does not
12 help Johnson, then Johnson will not try to help Storix anymore, “*but I will have my software.*”))

13 Johnson’s repeated statements of intent to compete against Storix are confirmed by his
14 actions. The day after Johnson became a Storix director, he registered an internet domain name for
15 Janstor. (SOF 24.) The following week, he filed articles of incorporation for Janstor with the
16 California Secretary of State. (SOF 25.) Janstor then registered two network port numbers with the
17 Internet Assigned Numbers Authority. (SOF 26.) Network port numbers are necessary for
18 SBAdmin to function, and as a result, Storix also has registered two port numbers for itself. (SOF
19 27.) That Johnson’s company registered two port numbers demonstrates Janstor was preparing to
20 offer software functioning in the same manner as, and would compete with, SBAdmin. Right after
21 Johnson took these steps, he sent an email admitting he did so for the purpose of creating a
22 competing company, and detailed his plans to force Storix out of business through litigation or
23 direct competition. (SOF 28.).

24 Johnson also betrayed Storix by sending a treacherous email to Storix customers, after
25 Johnson became a Storix director. In the email, Johnson informed customers that he, not Storix,
26 owned the copyright to Storix’s software, and that the customers thus may be in possession of

27
28 ⁵ Importantly, Johnson made these statements after the federal court already had issued the judgment ruling
Storix, not Johnson, owned the copyright to the SBAdmin software.

1 unauthorized and infringing copies of the software. Johnson “demand[ed]” the customers “cease
2 any further payment to Storix” in relation to the software, and leveled a variety of other accusations
3 at Storix and its management, thus further disparaging the company to its customers. (SOF 29.)

4 Johnson readily admits he sent this alarming message to Storix customers. (SOF 29.)
5 Doing so is calculated to sabotage the company’s business. Because the software is Storix’s *sole*
6 *product*, (SOF 2), the message was particularly threatening to Storix’s entire revenue stream and its
7 ability to remain in business.

8 Johnson’s antagonism toward Storix is best summarized by Johnson’s own words from an
9 email he wrote in 2015: “*I no longer give a shit about the company . . .*” (SOF 30.) Johnson
10 should not be allowed to represent the very company he has been actively seeking to destroy.

11 **3. Sassi Cannot Adequately Represent The Interests Of Storix Because She**
12 **Colluded With Johnson To Damage The Company**

13 Sassi is tainted by the same conflict of interest as Johnson. Instead of being a bystander in
14 the lawsuits between Johnson and Storix, overwhelming evidence exists to show she has served as
15 his loyal confederate, assisting him in his litigation against Storix and seeking to harm the
16 company.

17 Sassi’s assistance with Johnson’s efforts against the company were the subject of a
18 recommendation and proposed order by Judge Ronald Prager, Ret., whom the Court has appointed
19 as referee in this case. On a motion by Sassi for access to Storix records, Judge Prager detailed
20 Sassi’s actions to assist Johnson in frustrating Storix’s best interests. In ruling that Sassi should be
21 denied the requested access, Judge Prager submitted a recommended order stating, “*Sassi is not a*
22 *disinterested director but is colluding with Johnson to undermine Storix.*”⁶ (See Recommendation
23
24

25 ⁶ Judge Prager also found Johnson was working against Storix’s interests. Judge Prager began “Anthony
26 Johnson (Johnson) founds Storix, gives up control, returns, leaves, and tries to destroy Storix.”. Judge Prager
27 concluded, “During the pendency of the trial Johnson prepared to launch a competing company, Janstor to sell an
28 unauthorized version of SBAdmin. He wrote a contemporaneous email to a friend that he planned to force Storix out of
business through litigation and direct competition with his new company.” (See Recommendation and Order of
Discovery Referee dated Apr. 28, 2017, submitted to Court on May 18, 2017, Dckt. No. 360, at 2.)

1 and Order of Discovery Referee dated Apr. 28, 2017, submitted to Court on May 18, 2017, Dckt.
2 No. 360, at 5.)

3 On June 6, 2017, this Court overruled Sassi's objection to Judge Prager's recommendation
4 and entered the proposed order that included this finding that Sassi colluded. (*See* Order dated June
5 6, 2017, Dckt. No. 377.) In so doing, the Court observed it was not deeming the background or
6 discussion sections of the recommendation to be dispositive of ultimate factual determinations for
7 which the trier-of-fact is responsible. However, the finding that Sassi colluded to undermine
8 Storix's interests was included in the proposed order the Court adopted as its Order. (*See id.*)
9 Because the question of whether Sassi would fairly and adequately serve the best interests of Storix
10 and its shareholders is determined by the Court, not a jury, *see Hornreich v. Plant Indus., Inc.*, 535
11 F.2d 550, 552 (9th Cir. 1976), it is appropriate for this Court to rely on the Court's prior Order on
12 this issue, concluding Sassi has colluded with Johnson.

13 Judge Prager's finding that Sassi has colluded with Johnson against Storix's interests is
14 supported by overwhelming evidence. First, before trial in Johnson's copyright case against Storix,
15 and before anyone at Storix knew Sassi had joined with Johnson, Sassi served as Johnson's "mole"
16 at Storix. She gathered information under the guise of being a loyal Storix shareholder, and
17 secretly passed that information to Johnson to help him prosecute his lawsuit. Sassi produced
18 numerous texts and emails between her and Johnson demonstrating her covert role on Johnson's
19 behalf. For example:

20 ● Sassi sent a text to Johnson, stating: "*Just had a long [conversation with] Smiljkovich*
21 *[Storix's CFO]. Call Me. Word is they are drafting a motion for summary judgment It looks*
22 *like they will bring up that 'code comparison' study they got done. Use that in the MSJ.*" Johnson
23 responded with thoughts on how he hoped to counter Storix's strategy during the copyright
24 litigation, and instructed Sassi to keep his strategy secret and not share it with Storix. Johnson
25 stated, "*just don't give them any clues.*" Sassi responded, "*Absolutely not.*" (SOF 31.)

26 ● Johnson asked Sassi to find out about a secret legal argument Johnson expected Storix
27 to use against him, which Johnson describes as a "silver bullet." In response, Sassi stated she is
28 trying to uncover that information from Storix. "*I'm working on it.*" (SOF 32.) Later, Sassi

1 reported back to Johnson what she was able to learn, and advised Johnson on her thoughts about
2 what the “silver bullet” might be. (SOF 33.)

3 • Johnson discusses the need to keep secret the fact that Sassi is passing information and
4 advice to him. *“I just hope you’re being very careful. Because you’re an attorney, I would hate*
5 *you to get in trouble for either offering advice or passing on any information, which could be*
6 *considered a conflict of interest if you were acting as a legal advisor. I hope to keep your role*
7 *quiet through to the end, but there is a good chance at some point our relationship will be*
8 *discovered.”* (SOF 34.)

9 • Sassi covertly transmitted to Johnson a variety of information she was able to gather
10 from Smiljkovich, Storix’s CFO. (SOF 35.) When her corporate espionage was discovered, she
11 told Johnson she would no longer be able press Smiljkovich for information to pass on to Johnson.
12 Sassi wrote, *“Now the fount is dry as far as Smiljkovich is concerned. But I don’t think that*
13 *matters much at this stage of the game.”*⁷ (SOF 36.)

14 In addition to her clandestine reporting to Johnson, Sassi also assisted him in the copyright
15 case by providing advice and research she thought would help his case. For example, on March 23,
16 2015, Johnson sent Sassi several emails asking for her input regarding his discovery requests he
17 planned to propound on Storix, as well as his responses to Storix’s discovery. (SOF 37.) Sassi is a
18 litigation attorney, (SOF 40.), making her advice particularly useful to Johnson in prosecuting his
19 case against Storix. Sassi responded the next day with a variety of comments and suggestions.
20 (SOF 38.) Sassi’s assistance with this discovery is particularly troubling because she had become
21 a Storix director just over a month earlier. (SOF 11.)

22 Sassi also provided legal-related research and other advice to Johnson during the copyright
23 case. (SOF 41.) Johnson admitted during his deposition that Sassi advised him regarding
24 “litigation strategy” during the copyright lawsuit. (SOF 42.) Thus, Sassi was no impartial observer
25 of Johnson’s litigation against Storix. She served as his active confederate in his effort to defeat
26 Storix, even after her election to the board required her allegiance to Storix’s best interests.

27
28 ⁷ During his deposition, Johnson acknowledged Sassi “pumped [Smiljkovich] for information” and then turned
around and provided it to Johnson. (SOF 39.)

1 Her assistance to Johnson is all the more alarming given the stakes in the copyright case.
2 Because the SBAdmin software is Storix’s only product, Johnson’s copyright infringement suit
3 threatened to evaporate Storix’s sole source of revenue. Thus, by helping Johnson against Storix,
4 Sassi worked to jeopardize Storix’s ability to remain in business.

5 In addition to all of this furtive assistance to Johnson, Sassi made it clear in other texts and
6 emails that her loyalty was to Johnson, and not to Storix. (SOF 43-47.) For example, Sassi told
7 Johnson *“I would like to see them do it [file an MSJ] just so they could lose”* (SOF 44); *“If it does*
8 *go to trial, when you win, I’m going to give you a big hug right in front of them. I won’t care what*
9 *they think at that point”* (SOF 45); and *“When was colluding ever considered a crime?”* (SOF 46.)
10 Sassi’s allegiance to Johnson is summed up well in her response to a text in which Johnson wrote
11 *“They have finally woken the sleeping dragon.”* Sassi’s response was simply, *“I Salute the*
12 *Dragon.”* (SOF 47.)

13 These undisputed facts conclusively prove Johnson and Sassi are antagonistic to Storix’s
14 interests. As a result, they are disqualified from bringing derivative claims on Storix’s behalf with
15 the result that this Court should dismiss the Derivative Action.

16 **B. Defendants’ Are Entitled To Summary Judgment In The False Imprisonment**
17 **Action**

18 The most recent lawsuit filed by Johnson against Defendants converts a corporate dispute
19 between directors and shareholders into a personal attack involving claims for assault, battery, false
20 imprisonment, intentional infliction of emotion distress, and aiding and abetting. Johnson, a
21 resident of Florida, was in San Diego to attend a hearing on his demurrer to the Janstor complaint
22 filed by Storix. (SOF 60.) At the hearing, Judge Trapp overruled Johnson’s demurrer and granted
23 Storix leave to amend its complaint. (False Imprisonment Action, Dkt. No. 106) Unhappy with
24 Judge Trapp’s decision overruling his demurrer, Johnson took advantage of his presence in San
25 Diego and arranged to have attorney Morgan Cahill-Marsland accompany him to the offices of
26 Storix on August 26, 2016 to witness and record his unannounced attempt to inspect the books and
27 records of Storix. (SOF 61.) Ms. Cahill-Marsland and Johnson arrived at the offices of Storix
28 together with Ms. Cahill-Marsland acting as Johnson’s attorney. (SOF 62.) Johnson and Ms. Cahill-

1 Marsland arrived unannounced without any prior arrangements with Storix or its corporate counsel
2 to access the books and records of the corporation. (SOF 63.)

3 Johnson knew he would not be welcome by Defendants if he arrived at the doorstep of
4 Storix unannounced. (SOF 64.) Johnson therefore devised a plan to gain entry by hiding out of
5 sight and directing Ms. Cahill-Marsland to facilitate the effort. (SOF 65.) Defendant Huffman
6 answered her knock at the door, but did not recognize Ms. Cahill-Marsland. (SOF 66.) Huffman
7 had reservations with respect to opening the door to a stranger given his knowledge that Johnson
8 was in San Diego. (SOF 67.) To ease Mr. Huffman’s concerns, Johnson whispered to Ms. Cahill-
9 Marsland the words “say David.” (SOF 68.)

10 Once the door was open, Johnson revealed himself and attempted to force his way into
11 Storix’s offices. (SOF 69.) He did so by placing his foot “well over the threshold” of the office door
12 to prevent Huffman from shutting it as his foot was the only thing preventing the door from closing.
13 (SOF 70.)

14 While Johnson alleges these facts demonstrate assault, battery, false imprisonment, and
15 intentional infliction of emotional distress, the security footage rebuts Johnson’s claims. (SOF 83.)
16 In summary, the footage captures the nature of the incident – a verbal altercation between Johnson
17 and Defendants triggered by Johnson attempting to enter Storix’s offices forcibly and then refusing
18 to leave until the police arrived. This video footage is the best evidence there are no genuine issues
19 of fact with respect to any of Johnson’s claims in the False Imprisonment Action. Accordingly, the
20 entire False Imprisonment Action should be dismissed.

21 **1. Johnson cannot prove essential elements of his claims for assault, battery,**
22 **and false imprisonment**

23 Two essential, and common, elements of Johnson’s claims for assault, battery, and false
24 imprisonment are lack of consent and damage. Johnson’s voluntarily placing his foot into the
25 offices of Storix to block the door from closing and refusing to remove his foot 1½ hours until the
26 police arrived persuasively demonstrates Johnson’s consent. In addition, Johnson is not seeking
27 any damages for physical harm to his person. (SOF 71.) Rather, Johnson wants some unarticulated
28 and unspecified compensation for humiliation and mental anguish suffered by way of Defendants

1 alleged verbal abuse. (SOF 72.) The security footage, however, demonstrates no evidentiary
2 support for Johnson's complaint and Defendants therefore are entitled to summary judgment.

3 **a. Johnson consented**

4 Johnson cannot demonstrate lack of consent when he attempted to enter Storix's office
5 forcibly and refused to remove his foot from the threshold of the office door until the police
6 arrived. Johnson voluntarily placed his foot "well over the threshold" of the office door and admits
7 the only physical contact was between Johnson's foot and the door. (SOF 70, 73.) Johnson cannot
8 now claim he did not consent to this contact when it was his decision to leave his foot across the
9 threshold of the office doorway to prevent the closure of the door until instructed by the police to
10 remove his foot.

11 In an effort to get Johnson to leave, Huffman repeatedly instructed Johnson to contact
12 Storix's corporate counsel to arrange for the inspection of the books and records. (SOF 74.)
13 Johnson refused to do so because he wanted to remain in the doorway of Storix until the police
14 arrived to ensure an accurate recordation of the incident. (SOF 75.) Huffman, out of an abundance
15 of caution and concern for the safety of his employees, had no choice but to remain in the doorway
16 and block Johnson's entry into Storix.⁸ (SOF 76.)

17 Johnson admitted in his deposition testimony that it "was not in my best interests to try [to
18 remove his foot] until he had an "opportunity to show the police...that I was doing nothing wrong."
19 (SOF 78.) After about an hour of standing in the doorway of Storix's offices, Defendants asked
20 Johnson if they could close the door to which Johnson again replied, "no you cannot." (SOF 79.)
21 Johnson reiterated he would only leave when the police arrived, recorded the incident, and
22 instructed him to leave. (SOF 80.) Accordingly, Johnson had ample opportunity to avoid the entire
23 incident and any alleged offensive contact or confinement.

24 Johnson's intentional tort claims against Huffman, Smiljkovich, and Altamirano are entirely
25 based on the contact between the door and Johnson's shoe. (SOF 81.) Johnson contends Altamirano
26 "knelt down and shouldered the door, and he and David Huffman started pushing on it as hard as
27

28 ⁸ Because of the disruption caused by Johnson arriving unannounced, all employees of Storix present in the
office on August 26, 2016 were instructed to leave and not return. (SOF 77.)

1 they could, and all it accomplished was, basically, pushing the door up over the sole of my shoe.”
2 (SOF 82.)

3 Security camera footage captured from within the offices of Storix tells a different story. It
4 reveals neither Huffman nor Altamirano shouldered the door pushing as hard as they could. (SOF
5 83.) Rather, the video footage shows Altamirano touched the door on one occasion with the sole of
6 his shoe approximately an hour and ten minutes into the incident to test whether the door could be
7 closed given the opposing force applied by Johnson’s foot. (SOF 84.) Throughout the ordeal,
8 Huffman is seen merely maintaining a position blocking Johnson’s ability to enter the offices of
9 Storix. (SOF 85.) Huffman continuously shifts his position such that no portion of his body,
10 including his hand, is in contact with the door – he simply stands in the opening of the door to
11 block Johnson from entering. (SOF 86.) Smiljkovich likewise does not apply force against
12 Johnson’s foot by pushing the door, but simply moves a doorstop in such a way as to prevent its
13 further opening.⁹ (SOF 87.)

14 The police arrived approximately 1½ hours after Johnson voluntarily placed his foot into the
15 offices of Storix. (SOF 89.) Upon their arrival, Johnson informed the police that no physical
16 confrontation had occurred. (SOF 90.) Further, Johnson identified the only problem for the police
17 stating: “*I will not remove my foot from this door is the problem. Now if you instruct me to, I will,*
18 *just so you know.*” (SOF 91.)

19 The two police officers separately interviewed Johnson and Defendants and subsequently
20 informed the parties they saw no crime being committed. (SOF 92.) The police officers took no
21 action that day, and Johnson agreed to leave the premises. (SOF 92.)

22 Johnson simply cannot support his claims for assault, battery, and false imprisonment when
23 it was his own action or inaction resulting in an alleged touching or confinement. By voluntarily
24 placing his foot over the threshold of Storix’s office door and refusing to remove his foot for 1½
25 hours, Johnson consented to any alleged assault, battery, or false imprisonment. Because Johnson
26 cannot prove lack of consent, Defendants are entitled to summary judgment.

27
28 ⁹ At one point in the alleged assault, battery, and false imprisonment, Smiljkovich inquires whether Johnson would like a glass of water. Smiljkovich obliges bringing Huffman and Johnson cups of water. (SOF 88.)

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b. Johnson suffered no damages

Johnson must have suffered some harm to sustain his burden to prove liability for the alleged intentional torts. Johnson, however, admits he is not seeking damages for physical harm. (SOF 93.) Johnson wants to be compensated for humiliation and mental anguish as a result of Defendants alleged verbal abuse. (SOF 94.) “[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances.” *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128. (internal citations omitted.) Thus, the emotional distress Johnson alleges he suffered in the form of humiliation and mental anguish must be of “substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure.” *Fletcher v. Western Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397.

Johnson cannot claim the level of humiliation and mental anguish required to support his claims because Johnson alone was responsible for enduring the 1½ hours of alleged verbal abuse by refusing to remove his foot from the threshold of the door and leave. Also fatal to Johnson’s claims is his refusal to provide any expert or medical support for the humiliation and mental anguish he claims to have suffered. (SOF 95.) Without any evidence of harm or damage, Johnson cannot prove an essential element of his intentional tort claims in the False Imprisonment Action. As a result, the entire action should be dismissed.

2. Alternatively, Turner is Entitled to Summary Judgment Because He Cannot Be Liable for Aiding and Abetting

Defendant Turner is not alleged to have participated in the acts Johnson claims constitute multiple intentional torts committed by the other Defendants. Instead, Johnson alleges only an aiding and abetting theory of liability against Turner. To aid and abet an intentional tort, the alleged conspirator must know of the commission of an intentional tort, provide substantial assistance or encouragement, and such conduct must be a substantial factor in causing harm to a plaintiff. CACI 3610.

The undisputed facts demonstrate Turner is not liable under an aiding and abetting theory because 1) Turner was not present at the offices of Storix on August 26, 2016 until after the police

1 had arrived and Johnson was no longer at the door; 2) Turner did not know of any alleged
2 intentional torts being committed; and 3) Turner did not provide substantial assistance or
3 encouragement. The only facts alleged with respect to Turner are that he was in the office for some
4 portion of the incident, that he “clearly overheard” what was happening, and that he “otherwise did
5 not appear.” (False Imprisonment Complaint ¶ 28.)

6 **a. Turner Was Not At Storix When The Incident Occured**

7 Johnson alleges Turner is liable as an aider and abettor because he knew the other
8 Defendants were engaging in allegedly tortious conduct and Turner did not come out of his office
9 to stop them. (SOF 96, False Imprisonment Complaint ¶¶ 67, 70, 73, 76.) Johnson, however,
10 admits he did not see Turner until a few seconds after the arrival of the police. (SOF 97.) Therefore,
11 Johnson’s theory for Turner’s liability is premised on Johnson’s mistaken and unsupported belief
12 that Turner was waiting outside the offices of Storix, at the direction of Defendants Huffman,
13 Altamirano, and Smiljkovich, until the police arrived. (SOF 98.) Johnson bases this belief on a
14 statement in Defendant Huffman’s declaration supporting Defendants application for a temporary
15 restraining order against Johnson. (See SOF 99, Response to Special Interrogatories, “Turner
16 appeared moments after the police arrived, after waiting outside during the incident. Defendants
17 claimed in their restraining order that they texted ‘an employee’ of the incident, telling him not to
18 return.”)

19 Johnson testified in his deposition testimony it was reasonable to assume Turner was
20 outside waiting because 1) Turner never took a lunch more than 30 minutes; 2) Turner’s entry into
21 the offices of Storix after the police is strong circumstantial evidence; and 3) Defendants stating
22 they texted “an employee” not to return “was very likely” Turner. (SOF 100.) Johnson, however,
23 does not possess, and cannot produce, any evidence of Turner’s presence at the offices of Storix on
24 August 26, 2016. That is because Turner was enjoying his day off at home. (SOF 101.)

25 As an officer and director of Storix, Turner was apprised of the incident by Smiljkovich.
26 (SOF 102.) Turner, however, remained at his house and simply inquired if there was anything they
27 needed. (SOF 103.) Because August 26, 2016 was the last day at Storix for a valued employee,
28 Turner intended to join his colleagues in celebrating at the office. (SOF 104, 105.) When Turner

1 arrived at the offices of Storix that afternoon, he was not aware Johnson or the police were still
2 there. (SOF 106.)

3 Turner's absence from the office during the incident is dispositive as to any liability for
4 aiding and abetting intentional torts. As a result, Turner is entitled to summary judgment.

5 **b. Turner had no duty to act**

6 Even assuming Turner was aware of the alleged intentional torts being committed by
7 Defendants Huffman, Altamirano, and Smiljkovich, Turner had no duty to control the actions of
8 another person. As a general principle, "mere knowledge that a tort is being committed and the
9 failure to prevent it does not constitute aiding and abetting." *Fiol v. Doellstedt*, 50 Cal. App. 4th
10 1318, 1326 (1996). An exception to this rule is when the defendant bears some special relationship
11 with either the person whose conduct needs to be controlled, or to the potential victim. *See*
12 *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal.3d 425, 435 (1976). Such special relationships are
13 rare, and frequently relate to dependant relationships such as the relationship between a parent and
14 their child, or where someone has accepted the duty to control the actions of another, such as a
15 hospital that must exercise control over a dangerous patient. *See id.* at 436.

16 Turner has no special relationship with the other defendants that would create a duty to
17 control their actions.¹⁰ A critical requirement creating a special relationship is the ability to control
18 the third-person. In the absence of an actual ability to control the third-person, it would be absurd
19 to hold a defendant liable for a failure to exert control. Turner's absence from the offices of Storix
20 at the time of the incident is fatal to Johnson's claim Turner had a duty to act. *See Wise v. Superior*
21 *Court*, 222 Cal. App. 3d 1008, 1013 (1990) ("[T]he ability to control the third party is essential.
22 The absence of such ability is fatal to a claim of legal responsibility." (emphasis in original;
23 internal quotations omitted).)

24 Turner also has no special relationship with Johnson giving rise to a duty to act. Johnson
25 alleges Turner, as an officer of Storix, had a duty to protect its shareholders. (SOF 96.) As
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27 ¹⁰ Johnson alleges Defendant Smiljkovich also aided and abetted battery by choosing not to act. (False
28 Imprisonment Complaint ¶70.) Similar to the analysis with respect to Turner, Smiljkovich had no duty to act because
the exception requiring a special relationship does not exist.

1 discussed above however, there is no dispute Turner was at home enjoying his day off and therefore
2 could not have breach any alleged duty. (SOF 101.) Accordingly, there are no genuine issues of fact
3 with respect to an alleged duty to act on the part of Turner.

4 **C. Defendants' Are Entitled to Summary Adjudication of Johnson's Fraud Claim In**
5 **The Direct Action.**

6 Johnson's fraud claim in the Direct Action must be dismissed because Johnson did not
7 suffer any damage and because Johnson cannot prove he would have acted differently if
8 Defendants' alleged fraudulently concealed plan had been disclosed. Johnson's fraud claim
9 originally contained three subparts. Johnson alleged: (1) Defendants falsely represented they had
10 authority to file the Janstor Action against Johnson, (2) Defendants falsely represented Johnson
11 needed to develop an upgrade for Storix's software when Defendants did not intend to implement
12 Johnson's work, and (3) Defendants "concealed that they were attempting to oust him from Storix
13 and force him to give up his remaining shares." (Direct Action Cross-Complaint ¶ 70).

14 The first of these alleged bases for fraud liability was stricken in response to Defendants'
15 anti-SLAPP motion. (*See* Minute Order dated Mar. 6, 2017, granting in part Defendants' anti-
16 SLAPP Motion, Dkt. No. 323, at 1.) The second alleged basis for fraud liability has been
17 abandoned by Johnson. (SOF 119.)

18 The only remaining basis for alleged fraud liability is Johnson's third theory: that
19 Defendants concealed from Johnson they were attempting to "oust" him from Storix and force him
20 to give up his remaining Storix shares. Essentially, Johnson alleges Defendants were trying to get
21 rid of him so they could take his stock for themselves, and he claims it was fraud because
22 Defendants did not tell Johnson about their plan. In discovery, Johnson explained what acts he
23 alleges constituted the plan to "oust" him from Storix and take his shares. Johnson said Defendants
24 (1) sought to have Storix take out a loan to buy Johnson's shares without his knowledge, (2) had an
25 attorney draft a buy/sell agreement to force Johnson to sell his stock if his employment was
26 terminated, and (3) then treated Johnson with hostility and made unreasonable demands on him so
27 Johnson would become frustrated, thus giving Defendants reason to terminate Johnson's
28 employment. (SOF 120.) In other words, Johnson alleges Defendants' plan was to include in the

1 buy/sell agreement a provision requiring employees to sell back their shares if their employment
2 ends. Then they would treat Johnson poorly at work, causing him to be frustrated, and giving them
3 a reason to fire him. With his employment ended, Defendants could take Johnson's shares because
4 of the buy/sell agreement. (SOF 120.)

5 Johnson's claim alleges fraud by concealment. The elements for a fraud claim based on
6 concealment are: (1) concealment or suppression of a material fact, (2) a duty to disclose the fact to
7 the plaintiff, (3) intentional concealment or suppression with the intent to defraud the plaintiff, (4)
8 the plaintiff must have been unaware of the fact and would not have acted as he did if he had
9 known of the concealed or suppressed fact, and (5) resulting damage. *See Boschma v. Home Loan*
10 *Center, Inc.*, 198 Cal. App 4th 230, 248 (2011).

11 Johnson's fraud claim suffers multiple fatal defects. First, Johnson could not have sustained
12 any damage from this alleged failure to tell Johnson Defendants planned to "oust" him and take his
13 shares. It is undisputed that Storix did not end up ever taking out a loan to buy Johnson's shares.
14 (SOF 121.) Johnson also did not execute any buy/sell agreement of any kind, including any alleged
15 buy/sell agreement that would require him to sell his stock if his employment with Storix ended.
16 (SOF 122.) As to the allegation Defendants treated Johnson with sufficient hostility and
17 unreasonable demands so as to give them a reason to terminate Johnson's employment, Johnson
18 was an at-will employee. (SOF 123.) Thus, Defendants did not need a reason to fire Johnson.
19 They could terminate his employment at any time. In any event, there is no dispute Johnson still
20 has his Storix shares, (SOF 124), and thus Defendants did not "oust" him and take his shares for
21 themselves. As a result, Johnson cannot establish he suffered any damage from the alleged
22 concealment of Defendants' plan to oust him and take his stock.

23 Johnson's claim also fails because Johnson cannot prove he would have acted *differently* if
24 he had been aware of Defendants' alleged plan. Johnson's claim must fail unless he can prove he
25 would have acted differently if he had known the truth. *See Boschma*, 198 Cal. App 4th at 248.
26 The Direct Action Cross-Complaint does not allege Johnson would have acted differently in any
27 manner if he had known the truth. Further, Johnson cannot prove there is anything he could have
28 done differently regarding this alleged plan. Johnson did not execute a buy/sell agreement, and he

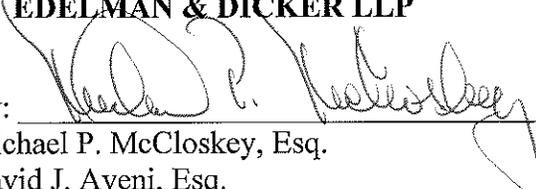
1 did not sell his shares to Defendants or Storix, nor have Defendants forced him to sell his shares.
2 (SOF 121-124.) In short, none of the portions of the alleged plan to “oust” Johnson have come to
3 fruition, so there is nothing Johnson could or would need to have done differently if he had known
4 the alleged truth. Thus, Johnson’s fraud claim must be dismissed.

5 **IV. CONCLUSION**

6 Defendants are entitled to summary judgment in the Derivative Action because both
7 Johnson and Sassi are disqualified from representing Storix. Defendants are entitled to summary
8 judgment in the False Imprisonment Action because Johnson suffered no damage and consented to
9 the alleged wrongful conduct. Alternatively, Defendant Turner is entitled to summary judgment in
10 the False Imprisonment Action because he not did not participate in the August 26, 2016 incident at
11 Storix. Defendants are entitled to summary adjudication as to the fraud claim in the Direct Action
12 because Johnson suffered no damage and would not have acted differently had the alleged
13 concealment been disclosed. Accordingly, defendants respectfully request the Court to enter
14 summary judgment in their favor in the Derivative Action and False Imprisonment Action, and
15 further enter summary adjudication in their favor on the fraud claim in the Direct Action.

16 Dated: July 28, 2017

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

17
18
19 By: 

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1 *Anthony Johnson, et al. vs. David Huffman, et al.*
2 San Diego Superior Court Lead Case No. 37-2015-00034545-CU-BT-CTL
(consolidated with 37-2015-00028262-CU-BT-CTL and 37-2016-00030822-CU-MC-CTL)

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

5 I, the undersigned, am employed in the county of San Diego, State of California. I am over
6 the age of 18 and not a party to the within action; my business address is 401 West A Street, Suite
1900, San Diego, California, 92101.

7 On July 28, 2017, I caused to be served the following document(s) described as follows:

8 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**
9 **FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION**

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

11 **SEE ATTACHED SERVICE LIST**

- 12 **PERSONAL SERVICE** - I served the documents by placing them in an envelope or
13 package addressed to the persons at the addresses listed below, and providing them to a
14 professional messenger service for service. (A confirmation by the messenger will be
15 provided to our office after the documents have been delivered.)
- 16 **BY MAIL** - As follows: I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. Under that practice it would be deposited with the
18 U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego,
California in the ordinary course of business. The envelope was sealed and placed for
collection and mailing on this date following our ordinary practices. 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 in affidavit.
- 19 **OVERNIGHT MAIL** - As follows: I am "readily familiar" with the firm's practice of
20 processing correspondence for mailing overnight via Federal Express. Under that practice it
would be deposited in a Federal Express drop box, indicating overnight delivery, with
delivery fees provided for, on that same day, at San Diego, California.
- 21 **BY E-MAIL OR ELECTRONIC TRANSMISSION** - Based on a court order or an
22 agreement of the parties to accept service by e-mail or electronic transmission, I caused the
23 documents to be sent to the persons at the e-mail addresses listed below. I did not receive,
24 within a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

25 Executed on July 28, 2017 at San Diego, California. I declare under penalty of perjury
under the laws of the State of California, that the above is true and correct.

26 
27 _____
Angela Balistreri

1 *Anthony Johnson, et al. vs. David Huffman, et al.*
2 San Diego Superior Court Lead Case No. 37-2015-00034545-CU-BT-CTL
(consolidated with 37-2015-00028262-CU-BT-CTL and 37-2016-00030822-CU-MC-CTL)

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

5 **SERVICE LIST**

6 **Attorneys for Plaintiffs, Anthony Johnson**
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