No. 18-56106

United States Court of Appeals for the Ninth Circuit

ANTHONY JOHNSON,

Plaintiff, Counter-Defendant, Appellant,

– v –

STORIX, INC., a California Corporation,

Defendant, Counter-Claimant, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTHERN CALIFORNIA (SAN DIEGO)
CASE NO. 3:14-cv-01873-H-BLM

APPELLANT'S OPENING BRIEF

Anthony Johnson
Pro Se Appellant
1728 Griffith Avenue
Las Vegas, NV 89104
(619) 246-6549

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I. STATEMENT OF JURISDICTION

The district court and this Court have subject-matter jurisdiction over this case pursuant to the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. and 28 U.S.C. §§ 1331 and 1338(a). This Court has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291 because the judgment below is a final judgment of the district court.

On December 18, 2015, the district court entered original judgment, and the original notice of appeal was filed on March 23, 2016. On August 17, 2016, the district court ordered that Johnson pay attorney fees and costs, and an amended notice of appeal was filed on September 13, 2016. On November 16, 2016, the district court entered an amended judgment for fees and costs, and a second amended notice of appeal was filed on November 22, 2016.

On December 19, 2017 (Cir. Case 16-55439), the Ninth Circuit affirmed in part, reversed in part, and remanded the amended judgment to the district court. The district court entered second amended judgment on August 7, 2018, and notice to appeal the second amended judgment was filed on August 14, 2018.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in using the attorneys' fee award to sanction conduct unrelated to the copyright issues or having no effect on the litigation or its attorneys' fees.

2. Whether the district court erred in awarding attorneys' fees to deter conduct, including exercising rights to free speech, petition and copyrights during the litigation, or for which there is no reasonable likelihood of recurrence.
3. Whether the district court abused its discretion in awarding attorney's fees without reconsidering underlying facts and issues, or rebalancing factors including equitable issues, awards in similar cases, or the essential goals of the Copyright Act.

III. STATEMENT OF THE CASE

A. Facts Relevant to the Issues Submitted for Review

1. Circumstances Leading to the Copyright Suit

Appellant Anthony Johnson ("Johnson") first created the subject "SBAdmin" software in 1998 and registered his copyright to the software in 1999. District Court Docket Nos. ("Dkt.") 56-5 at ¶2; 47-7. Johnson sold SBAdmin as a sole proprietor under the name "Storix Software". 56-5 at ¶2.

In January 2003, Johnson formed Storix, Inc. as a vehicle to continue selling SBAdmin under a corporate name. Dkt. 56-5 at ¶2; 288-1 at ¶2; 47-10. In March 2004, Johnson drafted and signed the Storix 2003 Annual Report containing the sentence, "All assets from Storix Software were transferred to Storix, Inc., as of its incorporation of February 24, 2003." Dkt. 47-5. There is no document signed by Johnson referencing a transfer of his personal copyright to Storix. Dkt. 56-5 at ¶3.

Johnson was Storix's president and sole shareholder until 2011. Dkt. 56-5 at ¶3. Storix is a very small company with only a few employees and one salesperson. Dkts. 56-5 at ¶10; 150 at p. 40:24-41:1.

In 2011, Johnson received a diagnosis of terminal melanoma with an expected 2-year prognosis. Dkt. 56-5 at ¶4. In September 2011, Johnson gifted 60% share in Storix to his four long-term employees, David Huffman, Manuel Altamirano, David Kinney and Rich Turner (collectively "Storix management"), who elected themselves to all director and officer positions. *Id*. Johnson took a medical leave from Storix, but returned occasionally to develop improvements to the SBAdmin software. Dkts. 56-5 at ¶4; *See* also 47-47 at p. 5:10-6:6; 47-16 at p. 4:11-5:18.

In 2013, after a miraculous recover from his cancer, Johnson returned to Storix to continue working on the SBAdmin software. Dkts. 56-5 at ¶5; 47-3 at p8:8-9:5; 47-38 at p1-10. In May 2014, Johnson resigned from Storix due to a hostile work environment and other obstacles to Johnson's progress created by Storix management. Dkts. 56-5 at ¶6; 47-42 at p. 2; 47-43 at p. 2; 47-45; 47-16 at p. 8:2-9:3. For months, Johnson went to great lengths to try to amicably and informally resolve the conflict with Storix management. Dkts. 56-5 at ¶7; 47-42 thru 47-45. Johnson finally threatened to withdraw Storix's license to sell SBAdmin if he was not allowed to improve the software that had been neglected in

his absence. Dkts. 56-5 at ¶7, 47-44. Storix management refused to respond or otherwise address his concerns. Dkt. 56-5 at ¶7. With no other option, Johnson sent a cease-and-desist letter. Dkts. 56-5 at ¶8; 47-46. Two days later, Storix responded that it owned all copyrights to SBAdmin, and threatened legal action against Johnson for breach of fiduciary duty and securities fraud if he did not withdraw his ownership claim. Dkt. 47-47. Given no other choice, Johnson commenced the copyright infringement litigation. Dkt. 1. Storix filed a counter-claim of declaratory judgment of copyright ownership. Dkt. 5.

Johnson remains a 40% owner of Storix, which is his only source of income. Dkt. 311 at pp. 48:12-13, 9:15-20, 28:22-23, 55:11-12. Storix never compensated Johnson for his copyright. Dkt. 56-5 at ¶3. During the copyright litigation, Storix management ceased all shareholder distributions. Dkts. 299-1 at ¶4; 311 at p. 38:11-16. Storix has not issued a new software release of SBAdmin since February 2014. Dkt. 288-1 at ¶8. SBAdmin sales have declined over 35%. Dkts. 288-1 at ¶10; 47-42 at p. 2.

2. The Concurrent State and Federal Court Litigation

In February 2015, Johnson and the only other non-employee shareholder, Robin Sassi ("Sassi") used their combined 48% shares to vote themselves onto Storix's board of directors. Dkts. 56-5 at ¶12.

In July, 2015, Johnson was forced to sell his home in San Diego and move to Florida due to the excessive cost of the copyright litigation. Dkts. 288-1 at ¶5; 311 at pp. 38:24-37:1, 65:8-11. A month later, Storix management brought a direct State court lawsuit against Johnson, claiming Johnson *intended* to operate a competing business in California. Dkt. 288-1 at ¶5, ¶13, Ex. C at p. 7:9-12. The lawsuit was filed three hours before a mandatory settlement conference Johnson traveled to San Diego to attend. Dkt. 311 at p. 39:19-25. Johnson was unaware of Storix's claims until the lawsuit was served on him after his return to Florida. Dkt. 288-1 at ¶6.

On September 27, 2015, Johnson sent Storix management an email threatening to bring legal action against them for shareholder oppression and other abuses of majority control, threatening to inform Storix customers of their malicious conduct and refusal to release the necessary network security changes and other software improvements he completed at home. Dkt. 66-1, Ex. A. at pp 5-9; *See also* Dkt. 311 at pp. 33:13-14, 40:19-24, 47:2-6. On October 2, Storix filed a motion for permanent injunction demanding Johnson be enjoined from communicating with Storix's employees and customers. Dkt. 46.

On October 6, 2015, Johnson sent an email to a *few* of Storix's past customers, hoping one or two would encourage Storix management to end the litigation and allow Storix to release his software improvements. Dkts. 66-1:10-11;

311 at pp. 37:1-8, 41:10-15. On October 12, Johnson and Sassi filed the shareholder derivative lawsuit in State court, demanding relief *on Storix's behalf*. Dkt. 288-1 at ¶7. On October 30, the district court denied Storix's motion for a permanent injunction, noting that Storix could not cite any harm as a result of Johnson's email. Dkt. 77:2:27-28.

In March 2016, months after the copyright trial ended, Storix amended the State lawsuit against Johnson, alleging that he *stole* a copy of Storix's copyrighted software to sell in a competing business, and that Johnson had threatened its customers and employees. Dkt. 226-2 at p. 4:22-24. On July 12, 2016, Storix again motioned the district court for the same injunctive relief it was previously denied. On November 16, the district court again denied Storix's motion. Dkt. 245.

In February 2018, a State court jury rejected Storix's $1.3M in claims related to Johnson's alleged competing business, but awarded the exact $3,739 Storix demanded for costs related to Johnson's customer email. Dkts. 288-1 at ¶14, Ex. D at p. 38:23-25; 311 at p. 45:8-17. In the bench trial that followed, the court found that the jury's verdict warranted dismissing Johnson as a plaintiff in the derivative suit and found in favor of Storix management, therefore denying Storix any relief. Dkt. 285-1 at ¶5.

In a post-trial motion, Storix demanded the same injunctive relief in State court that was twice denied by the district court, adding several "turn-over" orders,

including Johnson's software improvements he completed as the copyright litigation was pending, and restrictions of Johnson's rights to access Storix's corporate records. Dkt. 288-1 at pp. 26:20-25, 40:26-41:3. In May 2018, the State court denied all eleven (11) of Storix's demands. Dkt. 288-1 at ¶14, Ex. D.

3. The Copyright Ownership Decision

In December 2015, the jury was instructed that a copyright transfer is valid if a document signed by Johnson "reflects a transfer of assets broad enough to include a copyright." Dkt. 159, Jury Instr. No. 34. The jury found that the Storix 2003 Annual Report satisfied this requirement, and therefore Johnson transferred all copyrights to Storix upon its formation in 2003. Dkt. 160, Verdict Quest. No. 3.

4. Post-Trial Motions and the Attorney's Fee Award and Bond

On January 4, 2016, Storix filed a motion for attorney's fees. Dkt. 165. On January 15, Johnson filed a motion for new trial. Dkt. 175. On February 23, the district court denied Johnson's motion for new trial. Dkt. 193.

On August 15, 2016, following the Supreme Court ruled on *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (June 16, 2016), the court held further briefing on Storix's motion for attorney fees. Dkt. 229. On August 17, the district court granted in part and denied in part Storix's motion for attorney fees and costs. Dkt. 230. On October 13, 2016, the district court denied Johnson's motion for reconsideration of the attorney fee award. Dkt. 238.

On October 31, 2016, the district court ordered that Johnson pay attorney fees in the amount of $543,704. Dkt. 241. The same day, Storix applied for writ of execution of the judgment on attorney's fees. Dkt. 244. The district court entered an amended judgment for attorney fees and costs in the amount of $555,118.64. Dkt. 246. On December 13, 2016, the district court granted Johnson's request to stay execution of the judgment pending appeal on the condition Johnson post a bond for the full judgment amount. Dkt. 256; *See also* 285-1, Ex. A at p. 17:12-15.

Johnson sold his home in Florida in order to afford the bond necessary to stay execution of the judgment, and moved to Las Vegas where he continues to live with family. Dkts. 288-1 at ¶16; 311 at pp. 15:25-14:3, 67:6-8.

5. The Ninth Circuit Appeal

Johnson appealed the copyright ownership transfer decision on grounds that the transfer requirements of the Copyright Act §204(a) cannot be satisfied without a written agreement, that the 2003 annual report was not an agreement or assignment and did not identify the copyrights to transfer. *See* Circuit Case No. 16-55439, *Brief*, Doc. #25 at pp. 18-34. Johnson appealed the attorney fee award on grounds that Johnson's case was reasonable, not frivolous, that there was no evidence of improper motivation or conduct needing to be deterred. See *Id*. at pp. 39-44.

In December 2017, the Ninth Circuit upheld the trial court's decision that Johnson transferred all of his copyrights to Storix, finding that the 2003 Annual Report constituted a "note or memorandum" confirming a prior oral assignment. Dkt. 283 at p. 5-7; Cir. Case 16-55439, *Memorandum*, Doc. #25 at p. 4-6. The panel found that the district court did not abuse its discretion in deciding to award fees. *Id.* at p. 6-7. However, the panel found the attorney fee award of $543,704 unreasonable and excessive in light of the reasonableness of Johnson's claim, the relative financial strength of the parties, and Johnson being *pro se* and an individual against a corporation. *Id*. at p. 6-8. The Court reversed the fee award and remanded to the district court to reconsider the amount. *Id*. at p. 8.

On January 22, 2018, Johnson filed a petition for panel rehearing and hearing en banc. Cir. Case 16-55439, Doc. 75. On March 3, 2018, the petitions were denied. Dkt. 278.

6. The District Court Remand and Amended Judgment

On August 7, the district court reduced the prior attorney fee award by 25% from $543,704 to $407,778. Dkt. 299 at p. 12:20. The district court entered the second amended judgment against Johnson, including costs, for $419,192.64. Dkt. 300 at p. 3:7-8. The court added interest not previously awarded from the date of the original judgment. *Id*. at p. 3:5-7.

On August 29, the district court granted Johnson's motion to stay execution of the judgment on the condition that Johnson's prior bond remained untouched or that Johnson post a new bond *before* the prior bond is released. Dkt. 309.

On August 14, 2018, Johnson timely filed notice of this appeal of the second amended judgment. Dkt. 304.

IV. STANDARD OF REVIEW

The district court's calculation of and decision to award attorneys' fees under the Copyright Act §505 are reviewed for an abuse of discretion. *See Cadkin v. Loose*, 569 F.3d 1142, 1146-47 (9th Cir. 2009); *Perfect 10, Inc. v. CCBill LLC,* 488 F.3d 1102, 1109 (9th Cir. 2007) at 1109. The court's findings of fact underlying the fee determination are reviewed for clear error. *See Smith v. Jackson,* 84 F.3d 1213, 1221 (9th Cir. 1996). Any legal analysis or statutory interpretation pertaining to attorneys' fees is reviewed *de novo*. *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.,* 122 F.3d 1211, 1216 (9th Cir. 1997).

Questions of law, including interpretation of the Copyright Act, are reviewed *de novo*. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013); *Perfect 10, Inc. v. CCBill LLC,* 488 F.3d 1102, 1109 (9th Cir. 2007). When issues of law predominate in the district court's decision, the decision is reviewed *de novo*. *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). Mixed questions of law and fact – questions of

whether facts satisfy an undisputed rule of law – are also generally reviewed *de novo*. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The district court receives no deference on matters reviewable by *de novo* review, and this Court views the district court's ruling as if no decision had previously been rendered. *Barrientos v. Wells Fargo Bank, N.A.,* 633 F.3d 1186, 1188 (9th Cir. 2011); *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008).

V. SUMMARY OF ARGUMENT

This is the second appeal in which Johnson seeks review of the district court's order granting attorneys' fees under Section 505 of the Copyright Act. The findings of fact underlying the fee determination were clearly erroneous, and there were legal errors in calculating the attorney fee award based on dates, conduct and speculation of Johnson's motivation unrelated to Johnson's copyright claims.

In deciding whether to award fees, courts consider five factors: "(1) the degree of success obtained; (2) frivolousness; (3) motivation; (4) the objective unreasonableness of the losing party's factual and legal arguments; and (5) the need, in particular circumstances to advance considerations of compensation and deterrence." *Entm't Research Grp., Inc.,* 122 F.3d at 1229 (citing *Fogerty v. Fantasy, Inc.,* 510 U.S. 517 (1994)). The Supreme Court held that a court should give ***substantial weight*** to the objective reasonableness of the losing party's position. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016).

On first appeal, the Ninth Circuit found that the district court did not abuse its discretion in choosing to award fees because it relied on other *Fogerty* factors that it found outweighed the reasonableness of Johnson's position. The panel did not review the findings of fact underlying the fee determination. However, the Ninth Circuit found the amount of the award excessive and unreasonable given the reasonableness of Johnson's claims, and that Johnson is *pro s*e and an individual against a corporation.

On remand, the district court failed to reconsider the underlying issues or rebalance the factors it felt favored an attorney fee award in determining whether they *still* outweighed the factors that disfavor an award. The district court gave no reasonable consideration to the imbalance of hardship or other equitable issues, and the resulting award is contrary to the essential goals of the Copyright Act.

The district court speculated on Johnson's motivation in bringing his copyright claim based solely on Johnson's statements in emails unrelated to the copyright issues. The court improperly ordered Johnson to pay all of Storix's attorneys' fees incurred after the date of an email Johnson sent to a few customers, despite Storix expending no attorney fees in the copyright litigation as a result, and knowing Storix was already suing Johnson in State court over the same issue.

The district court found Johnson's case objectively reasonable and non-frivolous, but nevertheless imposed an unprecedented attorney fee award to punish

Johnson for *bringing* it. The district court abused its discretion by retroactively sanctioning Johnson with attorney fees for attempting to enforce his registered copyrights before trial. The district court further committed clear legal error in imposing attorney fees to chill Johnson's rights to petition and exercise free speech in unrelated matters.

The district court decided it could only recalculate the amount of attorney fees by reducing the "lodestar figure" by only a minimal percentage in order to comply with the Ninth Circuit mandate. The court abused its discretion in failing to reconsider its prior findings of fact that Johnson was able to argue *for the first time*, or consider the "Kerr" factors – particularly "awards in similar cases" – used to adjust the lodestar figure to a reasonable amount.

Even after remand, the attorney fee award against Johnson remains the *only* fee award against an objectively reasonable party since *Kirtsaeng*, and remains the *largest* fees ever awarded against any individual – including those with meritless claims. The fee award in this case is indefensible and reversal is warranted.

VI. ARGUMENT

A. The District Court Abused its Discretion by Failing to Reconsider Facts and Rebalance the Factors Underlying the Fees Award

The Ninth Circuit found the attorney fee award of $543,704 unreasonable and excessive in light of the reasonableness of Johnson's claims, the imbalance of financial hardship, and Johnson being an individual, *pro se*, against a corporation.

Dkt. 283 at p. 7-9. The district court states that "The Court previously decided that an award of attorneys' fees to Storix was warranted on the facts of this case, a conclusion that the Ninth Circuit affirmed." Dkt. 299 at p. 8:17-18. The Ninth Circuit did not affirm that the facts warranted attorney fees, only that the district court did not abuse its discretion in *choosing to award fees* because it "properly relied on other factors that outweighed" the objective reasonableness of Johnson's position. Dkt. 283 at p. 8. (underline added.)

The Ninth Circuit suggested equitable issues that should be factored into the district court's reconsideration of the fee amount. Such issues required the district court to rebalance the resulting *Fogerty* factors to determine if those that favored the award still outweigh the objective reasonableness and non-frivolousness of Johnson's position, and apply the *Kerr* factors in determining a reasonable amount given the totality of facts and circumstances of the case. The district court abused its discretion by failing to reconsider relevant facts and issues Johnson raised on remand as described below.

B. The District Court Erred in Awarding Fees to Sanction Conduct Unrelated to the Copyright Issues or Effect on the Attorney's Fees

1. The Court Erred in Awarding Compensatory Fees During a Period When No Misconduct Occurred or Was Likely to Recur

The district court restated its prior findings, indicating that it "exercised its discretion to reduce the fees requested by Storix in order to narrowly tailor the

award to Johnson's misconduct. Rather than awarding fees for the entirety of this litigation, the Court granted Storix only the fees it incurred from October 6, 2015—the date of Johnson's 'Buckle up boys!' email—through the end of trial." Dkt. 299 at p. 6:28-7:4.

The Supreme Court recently reversed a Ninth Circuit case, finding that "the trial court could grant all attorney's fees incurred 'during the time when [a party] was acting in bad faith." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 581 U.S., 197 L. Ed. 2d 585 (2017); See *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233 (9th Cir. 2016). But, such a sanction "is a temporal limitation, not a causal one." *Id*. When attorney fees are awarded to sanction misconduct, it "must be compensatory rather than punitive in nature" and "may go no further than to redress the wronged party 'for losses sustained.'" *Id*. at 1186 (citing *Mine Workers v. Bagwell*, 512 U.S. 821, 826-830, 114 S.Ct. 2552, 129 L.Ed.2d 642.) The district court "must determine which fees were incurred because of, and solely because of, the misconduct at issue." *Id*. at 1189. See also *Fox v. Vice*, 563 U.S. 826, 131 S.Ct. 2205, 180 L.Ed.2d 45 (2011).

The district court cited no conduct that resulted in any attorneys' fees in the copyright litigation. The district court erred in awarding fees to compensate Storix for Johnson's conduct *during* a period in which no misconduct occurred.

2. The Court Erred in Awarding Fees to Sanction Conduct It Found Merely Inappropriate

The district court cited *Kirtsaeng* at 1988–89 (holding that courts may order fee-shifting due to litigation misconduct), and *Spanski Enters., Inc. v. Telewizja Polska S.A.*, 278 F. Supp. 3d 210, 215–16 (D.D.C. 2017) (awarding attorney fees due in part to litigation misconduct). *Id*. at pp. 6:25-27, 10:13-17. *Kirtsaeng* clarifies the "deterrence" factor:

> "[A] court may order fee-shifting because of a party's litigation misconduct, … to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, …"

Id. at 1989 (emphasis added.) The district court referred only to a few benign statements or issues it found "inappropriate", but never actually rising to the level of "litigation misconduct". *Id*. at pp. 7:2, 9:8, 11:16-17, 12:7-18.

The district court noted that it undertook a thorough examination of "the Ninth Circuit's opinion, the parties' arguments, the relevant law, and the Court's prior fee Orders" in reconsidering the fee award. Dkt. 299 at p. 10:18-20. But, even after Johnson argued that the three emails that were the entire basis of the court's prior award were misconstrued and unrelated to the copyright issues, the court simply restated its prior conclusion that Johnson "engaged in a variety of behaviors that should be deterred" (*Id*. at p. 5:23) and "an award of reasonable attorney fees to Storix is justified in light of Johnson's unreasonable and inappropriate litigation conduct." Dkt. 299 at p. 9:7-8.

A review of the district court's factual findings underlying the fee award shows clear error. See *Smith v. Jackson,* 84 F.3d 1213, 1221 (9th Cir. 1996).

a) Johnson's Pre-Trial Emails

The district court referred to two emails as "pre-judgment litigation tactics [that] should be deterred." Dkt. 299 at p. 6:9. Storix management filed a lawsuit against Johnson in State court just hours before a settlement conference in the copyright case, and Johnson learned of the suit only after returning home to Florida. Dkts. 288-1 at ¶5, ¶13, Ex. C at p. 7:9-12; 311 at p. 36:19-22. Johnson sent Storix management an angry email ("Buckle Up Boys!") in response. Dkt. 66-1, Ex. A. at pp 5-9; *See also* Ex. D at p. 16-18. Therein, Johnson expressed confidence that his copyright ownership would soon be confirmed, that they would end up paying his and Storix's attorney fees, and that those who gave their stock back *to Storix* and left would avoid being named a defendant in the shareholder derivative lawsuit Johnson planned to file *on Storix's behalf*. See *Id; See also Dkt. 299 at 3:9-14.* The email "was not intended in any way to be related or anywhere within the scope of this litigation." Dkt. 311 at p. 34:1-3.

Johnson later sent an email to a few of Storix's customers. Dkt. 66-1, Ex. B at pp 10-11. Johnson notified them of Storix management's despicable conduct and asked them not to buy new SBAdmin licenses until he was in a position to release fixes to network security vulnerabilities. *Id*. Johnson expected this would happen

after his copyright ownership was confirmed at the MSJ *three weeks later*. Johnson hoped the email would reach one or two customers that would convince Storix management to end the litigation before Storix and the SBAdmin software was destroyed. Dkt. 311 at p. 41:10-15.

The district court summarized these emails as:

> "It was inappropriate for Plaintiff Johnson to tell Defendant Storix's shareholders to 'get the [expletive] out' and to attempt to coerce them into surrendering control of the company. It was inappropriate for Plaintiff Johnson to demand that Defendant Storix's customers stop paying for the use of its software in an attempt to prevent Defendant Storix from having enough money to continue defending the lawsuit. It was also inappropriate for Plaintiff Johnson to threaten Defendant Storix's directors with the loss of their homes while he was telling the customers to stop paying Storix to undermine the company."

Dkt. 299 at p. 6:9-14. The court further found that the emails demonstrated that Johnson was further motivated to "force the company to 'close its doors'." *Id.* at p. 3:6. Johnson reminded the court that he was still funding a shareholder derivative suit for *Storix's benefit*, contradicting the notion that he was wanted to destroy Storix. Dkts. 288-1 at ¶7; 311 at pp. 47:21-48:4, 40:19-24.

"[W]e're talking about a period of two days here in which virtually almost all of the evidence that they've provided of my litigation misconduct which was not conduct related to the litigation of the case or the issues of the copyright case[.]" Dkt. 311 at p. 38:3-7. The district court erred in basing the attorney fees award on

emails unrelated to the copyright issues or pertaining to different litigation, particularly when there was no resulting harm.

b) Johnson's Post-Trial Email

About a month after trial, Johnson sent an email to a salesperson at Storix. Dkt. 216-2. Johnson *explicitly* stated his desire to save Storix and the software from the declining sales and accumulating debt, noting that he continued improving SBAdmin at home and had a more marketable product than Storix was currently selling. Johnson refuted Storix management's claim that *they* owned the copyright, and asked the salesperson not share his email. See *Id*.

The court made idle reference to these facts in the attorney fee order. Dkt. 299 at p. 5:24-6:4. But the court expressed a very different opinion the same day in its order denying Storix's second motion for injunctive relief:

> "Storix cites a post-trial email and other pre-trial evidence to show that Johnson intends to re-brand an SBA derivative in order to directly compete with the company. […] Johnson stated that he still owned the copyrights, despite the declaratory judgment to the contrary. […] Johnson's email is troublesome, and it directly contradicts the declaratory judgment."

Dkt. 245 at p. 6:15-23. There is no evidence that Johnson rebranded the software to compete with Storix, and Johnson never stated or even implied that he still owns the copyright. Even if true, it's an abuse of discretion to use attorney fees to punish Johnson for potential future conduct for which no harm had yet occurred.

C. The District Court Erred in Awarding Fees to Sanction Johnson for Bringing His Reasonable Copyright Claim

The court found that Johnson had an objectively reasonable and non-frivolous case. But in speculating that there was some motivation other than "merely to secure a copyright infringement judgment", the district court punished Johnson for bringing his copyright claims anyway. Dkt. 299 at p. 20:8. The court noted that "Johnson's litigation tactics became increasingly unreasonable as the case progressed." *Id*. at p. 3:24-25. But, rather than citing such litigation tactics, the court simply recalled the circumstantial evidence Storix proffered at trial to show that Johnson *intended* for Storix to own his copyright. The court concluded, "In the face of this overwhelming evidence, it was unreasonable for Plaintiff Johnson to maintain that he did not intend to transfer the copyright." *Id*. at 3:26-5:2.

If the district court truly gave substantial weight to the objective reasonableness of Johnson's position, it would not need to subordinate its finding by repeatedly noting that Johnson's position was *only* objectively reasonable because it "survived summary judgment." *Id.* at pp. 4:1-2, 6:24-25, 11:15-16. Johnson's position was always *substantially reasonable* since no other case involving a copyright transfer absent a written agreement has ever survived summary judgment. At no point in the litigation did Johnson have reason to believe he did not own the software he created. The fact that a jury decided otherwise did not retroactively make Johnson's position any less reasonable.

D. The District Court Erred in Awarding Fees to Deter Johnson from Exercising His Rights

As described above, Johnson's emails were prompted by a State court lawsuit that Storix management brought against Johnson on unrelated issues. Johnson responded with threats of similar litigation, and an offer to settle. Dkt. 66-1:5-9. "[T]hat 'Buckle up boys' email which was a result -- a direct result and response to the State Court litigation." Dkt. 311 at p. 32:23-25. The district court erred in using an attorney fee award to chill Johnson's exercise of free speech and his right to petition on unrelated matters, even if the court found Johnson's tone or language inappropriate.

The district court also found it "inappropriate for Plaintiff Johnson to demand that Defendant Storix's customers stop paying for the use of its software". Dkt. 299 at p. 6:11-12. (underline added.) The district court erred in retroactively punishing Johnson with attorney fees for attempting to assert his copyrights *before* a jury decided that he transferred all rights to Storix, effectively awarding fees against Johnson *because* he lost.

E. The District Court Failed to Consider Required Factors in Determining a Reasonable Amount

1. The Court Ignored Attorney Fee Awards in Similar Cases

The district court decided to reduce the attorney fees it calculated under the "lodestar method" by a small percentage in order to comply with the Ninth Circuit

mandate. Dkt. 299 at p. 34:4-6. Storix argued in its brief regarding the fee award after remand that, "After determining the 'lodestar figure,' the district court may adjust the figure based on the factors enumerated in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67 (9th Cir. 1975)." Dkt. 285 at p. 14:3-5. "**The failure to consider such factors constitutes an abuse of discretion**." *Id.* at 70.

Storix determined that, "there is no basis to impose a significant reduction of the fee award" (*Id.* at 15:2-3) by citing eighteen (18) cases that satisfied the "awards in similar cases" *Kerr* factor. *See* Dkt. 285 at pp. 17-20. However, none of the cases involved an individual, an imbalance of financial hardship, or even a losing party with an *objectively reasonable* position. Most notable are those decided after the *Kirtsaeng* decision in June 2016. "The cases Storix cites involved unreasonable and meritless claims, vexatious litigants, and significant litigation misconduct, yet still resulted in far less severe attorney fee awards than Johnson's." Dkt. 288 at p. 19:19-16:9. The average fee award in the cases cited by Storix was only $170,000. *Id*.

Johnson argued the "awards in similar cases" factor at the remand hearing. Dkt. 311 at p. 60:16-22. But the court ignored this factor, finding instead that there is "no fair basis for the Court to further adjust the lodestar figure in complying with the Ninth Circuit's directive to reduce Storix's award." Dkt. 299 at 11:5-6. It was an abuse of discretion for the district court to ignore this factor, especially since

attention was drawn to it by both parties. This *Kerr* factor dictates that the fee award be eliminated or at least reduced to a *nominal* amount.

2. The Court Ignored the Imbalance of Financial Hardship and Added to Johnson's Financial Burden

The district court was aware that Johnson had to sell his San Diego home and move to Florida to manage the excessive cost of the copyright litigation. Dkts. 288-1 at ¶5; 311 at pp. 38:24-37:1, 65:8-11. The court knew Johnson had to sell the cheaper home he bought in Florida to post a bond to stay Storix's execution of the first judgment, and that Johnson had to move to Vegas to live with family. Dkt. 311 at p. 15:25-16:3.

Johnson filed a motion to stay execution pending this appeal, and requested the district court either release the surplus from his prior supersedeas bond or allow him to use the funds from the previous bond to post a new one. *See* Dkt. 303. The court conditionally granted the motion, indicating that:

> "Plaintiff may post a new supersedeas bond covering the full amount of Court's second amended judgment, plus all post−judgment interest that has accrued from 11/16/2016 until the date the new bond is issued. If Plaintiff chooses the second option, Court will release his first bond **after the second bond has been posted**."

Dkt. 309 at p. 2:14-18 (bold as indicated.) It was irrational to expect Johnson to post a second bond before releasing the first from the *reversed* judgment.

Fortunately, Johnson convinced his underwriter to use the first bond as collateral for the second, thus satisfying the district court's requirement.

The district court reduced the prior attorney fee award by only 25% to minimally comply with the Ninth Circuit's mandate, resulting in an amended judgment, including costs, of $419,192.64. Dkt. 300 at p. 3:7-8. The court offset much of the difference by adding interest not previously awarded from the date of the *original* judgment. Adding interest to the award did not conform to the intent of the Ninth Circuit or fall within the scope of the mandate to reconsider a more reasonable amount. When a case has been once decided on appeal and remanded, the lower court cannot "give any other or further relief" or go "further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co*., 160 U.S. 247, 255 (1895).

3. The Court Ignored the Essential Purpose of the Copyright Act

The Copyright Act "strik[es] a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work. Accordingly, fee awards under § 505 should encourage the types of lawsuits that promote those purposes." *Kirtsaeng* at 1986. Storix now owns the copyrights to SBAdmin *it paid nothing for* and will never build upon. Dkts. 288-1 at ¶8, 56-5 at ¶3. Johnson has now been unemployed for years and denied any income from his 40% ownership of Storix due to this litigation. Dkts. 299-1 at ¶4;

311 at p. 38:11-16. An attorney fee award serves only to further punish Johnson for losing his case.

The award defeats the *overriding* goals of the Copyright Act by discouraging other authors from litigation, instead forfeiting their works to avoid similar financial ruin at the hands of over-aggressive corporations and their attorneys.

F. The Award Should Be Reversed or Reduced to Nominal Amount

The district court noted that, although the Ninth Circuit remanded the amount and not the decision to award fees, "It could be, though, anywhere from $1.50 I guess or even .25 cents all the way up to whatever the Court considers to be reasonable under the standard set by law." Dkt. 311 at p. 13:8-11. The law requires the fee award be reasonable. The facts and circumstance of this case dictate that there be no attorney fees, but the procedural history now requires at least a nominal award. Therefore, "$0", or the smallest nominal amount is fair and appropriate.

VII. CONCLUSION

Based on the foregoing, the Court should reverse the fee award. If a further decision regarding the fee award is necessary, Johnson respectfully requests the Court remand to a different District Court.

Dated: November 21, 2018

Respectfully Submitted,

s/Anthony Johnson
Anthony Johnson
Pro Se Appellant

STATEMENT OF RELATED CASES

Appellant Anthony Johnson is aware of no other cases pending in this Court that are related to this case.

s/Anthony Johnson
Anthony Johnson
Pro Se Appellant

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f)

9th Circuit Case No. 18-56106

I certify that the brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is **5,998** words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).

s/Anthony Johnson
Anthony Johnson
Pro Se Appellant

Ninth Circuit Case Number(s): No. 18-56106

CERTIFICATE OF SERVICE

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Anthony Johnson
Pro Se Appellant
