Docket No. 18-56106

IN THE 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.

Appeal From a Post-Judgment Order Issued by the United States District Court for the Southern District of California

Honorable Marilyn L. Huff, District Judge

Case No. 14CV1873-H (BLM)

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Storix, Inc. has no parent corporation. There is no publicly held company that owns 10% or more of Storix, Inc.'s stock.

DATED: January 23, 2019

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INTRODUCTION

This is the second appeal filed by Plaintiff and Appellant Anthony Johnson ("Johnson") following a 2015 jury trial and resulting judgment entered against Johnson and in favor of Defendant and Appellee Storix, Inc. ("Storix"). On December 19, 2017, this Court affirmed the judgment based on the jury's liability verdict, as well as the district court's decision to award Storix attorneys' fees pursuant to 17 U.S.C. § 505. [Excerpts of Record "ER" 1.]. However, this Court held that the amount of the fee award was "unreasonable," and remanded with instructions for the district court "to reconsider the amount." [ER 1 at 7.] Even though the district court had reduced the fee award from the $1,078,232 incurred by Storix to $543,704, this Court determined the amount awarded was still too much since Johnson's claims had survived summary judgment and because he was by that time a self-represented individual rather than a company. *Id*. The sole issue on remand was "the amount of reasonable attorneys' fees to be awarded to Storix." [ER 2 at 10:4-5.]

Following briefing and a hearing, the district court extensively considered its prior orders, additional briefing by the parties and whether the attorneys' fees awarded met with the Copyright Act's goal of compensating those that advance a meritorious copyright defense, as well as the goal of deterring improper conduct and motive in pursuing a copyright infringement claim. The district court

determined that in compliance with the directive from this Court to award a reasonable amount, Storix's fees would be reduced by an across the board reduction of 25% to $407,778 so that Storix recovered only approximately one-third of the fees it had incurred. The district court likewise ordered that Storix was entitled to recover interest on the amount of the reduced judgment from the date of entry.

Johnson now appeals the district court's second attorney fee order, claiming the district court's decision to award fees was an abuse of discretion. However, the district court's decision to award fees was already affirmed by this Court and is not subject to a second challenge. Johnson also urges that the amount of fees awarded against him is unreasonable because the district court "failed to consider required factors" and did not accept his interpretation of disputed facts. Not satisfied with the district court's further $135,926 reduction of its prior $543,704 award to $407,778 (which is an award of less than 1/3 of the fees actually incurred by Storix), Johnson now proposes that Storix be awarded no fees at all, or only a "nominal" amount.

The district court thoroughly considered every required factor, as well as this Court's directive, before exercising its discretion. Johnson has failed to establish the district court's additional 25% across the board reduction was not an equitable way for the Court to take into account the objective reasonableness of Johnson's

claims and his status as an individual without unfairly impugning the work done by Storix's attorneys in successfully defending a "bet-the-company" case. Johnson's assertion that the attorney fee award should be reversed or reduced to a nominal amount lacks merit. The second amended judgment of the district court should be affirmed.

STATEMENT OF ISSUES

Whether the amount of attorneys' fees awarded to Storix against Johnson was an abuse of discretion?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Background Facts.

Storix is a business devoted to the development and sale of one particular software product, known as "SBAdmin," which streamlines the backup and recovery of computers in the event of potentially disruptive events. (Doc. 145 at 1127-1128, 1168-1169.) Johnson is Storix's founder and largest shareholder. (Doc. 145 at 50:3-5.)

On March 15, 2004, Johnson signed a 2003 Annual Report ("Annual Report") he personally drafted that memorialized the transfer of "all assets" to Storix. (Doc. 165-5 at 35 ¶ 2.) The Annual Report stated: "All assets from Storix

Software were transferred to Storix Inc., as of its incorporation as of February 24, 2003." (*Id.*)

Johnson quit working at Storix ten years later in 2014. Then, based on a 1999 copyright registered in the name of Storix's predecessor sole proprietorship, Johnson for the first time claimed ownership of copyrights to SBAdmin and claimed Storix had no right to sell the software that is the core of its business. (Doc. 1.) Since then Johnson has continued to wage war against Storix and its management, suing for copyright infringement, filing claims against Storix's management and shareholders in three state court actions[1], telling management to "get the [expletive] out" and threatening them with the loss of their homes while simultaneously trying to undermine the company by telling customers to stop paying for software licenses. (Doc. 66-1, Huffman Decl., Exh. A at 5-9; Doc. 66-1, Huffman Decl., Exh. B at 10-11, and at 16.) As addressed below, the district court found Johnson's motivation in filing suit was not simply to win damages for alleged copyright infringement, but instead to "wrest control of the company from its majority shareholders and to force the company to 'close its doors.'" (ER 2 at 11:2-6.)

[1] *Johnson, et al. v. Huffman, et al.*, Case No. 37-2015-00034545-CU-BT-CTL; *Johnson v. Huffman, et al.*, Case No. 37-2016-00030822-CU-MC-CTL and *Johnson v. Huffman*; Case No. 37-2019-00002457-CU-BT-CTL, most recently filed on January 14, 2019.

Johnson likewise continued to pursue litigation against Storix even when overwhelming evidence was presented defeating his claims. (*Id*. at 28-31.) Among other things, the evidence established the "clickwrap" license used for SBAdmin stated the copyright was owned by Storix, Inc. (*Id*. at 30.) Johnson likewise made multiple representations by email to third parties that Storix, Inc. was the owner of the SBAdmin copyright, as well as to Storix employees. (Id. at 30-31.) As determined by the district court, "[i]n the face of overwhelming evidence, it was unreasonable for Plaintiff Johnson to maintain he did not intend to transfer the copyright." (*Id*. at 31:17-19.)

B. Operative Pleadings.

On August 8, 2014, Johnson filed a complaint alleging copyright infringement. (Doc. 1.) On September 19, 2014, Storix filed an answer and counterclaim seeking a declaratory judgment that it did not infringe on any copyright and that it owned copyrights in the SBAdmin software at issue. (Doc. 5.)

C. Cross-Motions for Summary Judgment.

On October 2, 2015, both parties filed motions for summary judgment (Docs. 47, 50), followed by oppositions (Docs. 56, 60) and replies (Docs. 64, 70). On October 30, 2015, the district court denied summary judgment to both parties. (Doc. 84.) Johnson was able to overcome summary judgment by arguing it was not his subjective intent to memorialize a transfer of "all assets," including the

SBAdmin copyrights to Storix, even though he drafted and signed the Annual Report memorializing the transfer of all assets. (ER 2 at 29:25-27.) Even though the district court found the phrase "all assets" is clearly broad enough to memorialize the transfer of a copyright and that evidence was presented that, as used, "all assets" included the SBAdmin copyrights, the district court denied Storix's motion for summary judgment, ruling that Johnson's stated subjective intent in drafting the Annual Report raised a triable issue of fact. (Doc. 84 at 5-6; see also ER 3 at 71-73.)

D. The 5-Day Jury Trial.

On December 8, 2015, the jury trial commenced. (Doc. 142.) Overwhelming evidence was produced that Johnson transferred the SBAdmin copyrights to Storix and the jury unanimously rejected Johnson's infringement claims, finding Storix owned all copyrights to all versions of SBAdmin. (Doc. 160.) On December 18, 2015, the district court entered judgment in favor of Storix. (Doc. 164.)

E. The District Court's First Attorneys' Fees Order.

On January 4, 2016, Storix filed a motion pursuant to 17 U.S.C. § 505 seeking costs not taxable under 28 U.S.C. § 1920 as well as attorneys' fees. (Doc. 165 (motion), 180 (opposition), 184 (reply).) While the motion was pending the Supreme Court issued its opinion in *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S.Ct. 1979 (2016), and therefore the district court provided the parties an

opportunity to submit supplemental briefing regarding the impact of the decision. (ER 2 at 24.)

In applying *Kirtsaeng*, and analyzing the nonexclusive factors a court may consider in determining whether a proposed award "advances the Copyright Act's goals" of "encouraging and rewarding authors' creations while also enabling others to build on that work," the district court concluded that "Johnson's motivation, the degree of . . . Storix's success, and the need to advance considerations of compensation and deterrence all weigh[ed] heavily in . . . Storix's favor." (*Id*. at 27.) The district court noted that these factors outweighed the fact that Johnson's case survived summary judgment, even after the district court gave substantial weight to that fact. (*Id*., see *Kirtsaeng*, 136 S.Ct. at 1988–89 (holding that "a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses").

Among other things, "Storix adduced overwhelming evidence demonstrating the Annual Report did in fact memorialize Plaintiff Johnson's intent to transfer the copyright in SBAdmin." (ER 2 at 30:7-9.) The district court also noted that when confronted at trial with representations Johnson had made to third parties regarding Storix owning the SBA copyright, Johnson stated: "Yeah, I lied. I admit it. I lied." (*Id*. at 31:12-14.) The district court found Johnson's motivation in filing suit was not simply to win damages for alleged copyright infringement, but

instead to "wrest control of the company from its majority shareholders and to force the company to 'close its doors.'" (*Id*. at 28:7-9.) Johnson's trial testimony and documentary evidence demonstrated his pre-lawsuit hope that threatening a copyright infringement action would result in a change in Storix management. (Doc. 49-1, Tabs 34-36.) The district court likewise rejected Johnson's claim that an email entitled "Buckle up Boys!" authored by Johnson, and sent a few weeks before trial to Storix management and employees, evidenced proper motivation or was a settlement proposal. In that email Johnson referred to the other Storix shareholders as "a bunch of spineless, greedy, ungrateful bastards," and demanded that they surrender their shares for nothing, and that they "Get the [expletive] out!" Only then would Johnson agree to remove their names "from the derivativeaction [sic], giving you some hope of keeping your homes and perhaps finding other jobs." (ER 2 at 11.) At trial, Johnson admitted that "it was threatening, and I meant every word of it…" (Doc. 147 at 55:19-20.) Johnson also sent an announcement to Storix customers in which he demanded they cease paying Storix for the use of its software. The district court found Johnson contacted Storix customers in an effort to have them stop paying for software so that Storix would not have the funds to defend against his litigation. (ER 2 at 11:16-22.)

Even after return of the jury's verdict, Johnson engaged in conduct requiring deterrence and evidencing his lawsuit was not filed for a proper purpose. Johnson

asked an employee at Storix to secretly communicate regarding what was going on within the company and instructed the employee to delete his correspondence. (ER 2 at 32.) He likewise refused to return materials related to SBAdmin to Storix. (*Id*.) In short, the evidence established Johnson pursued this lawsuit for an improper purpose and continued to pursue Storix even when overwhelming evidence was adduced establishing his claims were not well-founded.

On October 31, 2016, following briefing regarding the amount of fees that Storix should be awarded (Doc.234 (memorandum), 239 (objections), 240 (reply)), the district court awarded $543,704 in attorneys' fees to Storix, a reduction of Storix's actual fees by almost half. (ER 2 at 15:12-14.) In its ruling, the district court found that Storix's timesheets were professional and detailed, that Storix's attorneys had not spent excessive time or used excessive staff litigating the case, and that Johnson was not entitled to a fee offset in light of the Storix shares that he owns. (*Id*.) The district court further awarded fees incurred for the litigation necessary to resolve Storix's attorneys' fees motion. (*Id*.) Nonetheless, the district court only awarded Storix fees "it incurred in this case on and after October 6, 2015, the date of Plaintiff Johnson's email that sought to convince customers to cease paying Defendant Storix so that Defendant Storix would have insufficient funds to continue defending the lawsuit." (*Id*. at 35:21-25.) Upon further briefing, the district court made additional deductions and reviewed in extreme detail the

bills supporting Storix's fee request. For instance, the district court excluded from the award amounts incurred related to:

> Opposing Johnson's motions *in limine* to preclude the testimony of Barbara Frederiksen-Cross ($19,851);
>
> The mediation in which the parties participated before the magistrate judge in the spring of 2016 ($26,806.50);
>
> Supplemental briefing required due to the Supreme Court's decision in *Kirtsaeng* ($37,558.25);
>
> Storix's motion for further relief pursuant to 28 U.S.C. § 2202 ($53.914.25);
>
> Costs beyond those taxable under 28 U.S.C. § 1920 ($236,943.96).

(ER 2 at 42-43.)

In arriving at its final figure, the district court recognized that Storix had complied with the district court's order requiring it to submit "tables in its memorandum identifying each time entry excluded from the award," as well as an appendix "which lists every invoice entry, noting which entries were excluded and why they were excluded." (*Id*. at 43.) Further, the district court addressed Johnson's claim that the case was inefficiently staffed, noting Storix's counsel "leanly staffed" the "bet-the-company" case, which "many other firms would have had junior attorneys billing in addition to the senior attorneys." (*Id*. at 45-46.) The district court also addressed Johnson's specific claim of "excessive hours" spent on particular tasks, noting that the time spent was reasonable. (*Id*.) This comported with the guidance in this circuit as to time spent on cases by victorious counsel.

See Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[T]he court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.").

Johnson filed a motion for reconsideration of the district court's order granting Storix an award of attorneys' fees. (Doc. 233.) The district court denied that motion. (Doc. 238.) The district court entered an amended judgment reflecting the fee award on November 16, 2016. (Doc. 246.)

F. This Court's Opinion.

As a result of Johnson's first appeal, this Court affirmed in part and reversed in part the district court's amended judgment. (ER 1.) The Court rejected each of Johnson's challenges to the jury's verdict, and held that the district court "did not abuse its discretion in choosing to award fees to Storix[.]" (*Id.)* However, the Court further held "that the amount of the award was unreasonable." (*Id*.) The Court observed that because "Johnson's claims were neither unreasonable nor frivolous, the amount of $543,704 was excessive." (*Id*.) The Court further observed that Johnson "is an individual plaintiff, rather than another company," and that the "'relative financial strength of the parties is a valid consideration' in determining 'what amount is reasonable.'" (*Id*. (quoting *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)).) While the Court declined to "'pass judgment on what the

award should be,'" it remanded with instructions for the district court to "reconsider the amount." (*Id.* (quoting *Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005)).)

Storix filed a Petition for Limited Rehearing on the grounds that the issue of reasonableness of fees, as opposed to the decision to award fees, had not been challenged by Johnson on appeal and there was no opportunity to address the issue because the Court granted Johnson's request for no oral argument over Storix's objection. Among other things, Storix pointed out that Johnson was represented by multiple counsel throughout the two years the case was litigated, including an AmLaw 100 law firm, and had boasted about his ability to outspend the company.

Johnson likewise filed a Petition for Rehearing and Petition for Rehearing En Banc. The parties' petitions for rehearing were denied. (Doc. 278.) Johnson thereafter filed a Petition for Writ of Certiorari with the Supreme Court, which was also denied.

G. Proceedings Following Limited Remand.

The parties submitted supplemental briefing addressing this Court's decision and instructions on remand. (Doc. Nos. 285, 288, 289.) Johnson argued that the district court should award no fees at all, although he specifically did not dispute the reasonableness of the hours and rates charged. (Doc. No. 288 at 1:19-20 and 19; ER 3 at 70.) Storix argued that the district court's original award was

fundamentally reasonable, and that the district court should therefore impose no more than a 10% reduction on remand. (Doc. No. 285 at 19.) Following a hearing (ER 3) the district court awarded Storix $407,778.00 after applying an across the board twenty-five percent (25%) reduction.

H. Johnson's Statement of the Case Relies on Unsupported Argument and Irrelevant Facts.

Johnson cites primarily to summary judgment briefing (s*ee, e.g*. Opening Brief, pp.2-4) and his argument presented in pro per during the second attorney fee hearing (*id*. p. 5) as support for his statement of case. Johnson's version of the disputed facts is unsupported and was rejected by the jury's verdict and/or the district court. Johnson also offers inaccurate facts regarding a separate state court proceeding involving Johnson and Storix (*id.* pp. 6-7) that occurred after the December 2015 trial herein and is therefore not relevant to the district court's fee award. Storix objected to this "evidence" below. (Doc. 290.)

SUMMARY OF ARGUMENT

On appeal Johnson challenges the trial court order awarding attorneys' fees pursuant to 17 U.S.C. § 505 as an abuse of discretion. This Court has already determined that the district court's decision to award attorneys' fees to Storix was well-within its discretion and consistent with the Supreme Court decision in *Kirtsaeng v. John Wiley & Sons*. The only remaining issue is whether the amount awarded by the district court was unreasonable and an abuse of discretion.

Johnson misunderstands copyright law in arguing attorneys' fees can only be awarded for work performed and fees incurred as a result of misconduct. The standard for discovery sanctions pursuant to the federal court's inherent sanctioning power and the standard for an award of attorneys' fees under the Copyright Act are different and serve different purposes. Under the Copyright Act the sole focus is not on whether fees should be awarded based on conduct that should be deterred. Instead, fees are also properly awarded to a defendant who succeeds, as Storix did here, in protecting its copyright. Johnson has likewise failed to establish the district court failed to comply with this Court's mandate, or that the award of attorneys' fees was based on clear error. The district court considered the parties' relative financial strength and Johnson's in pro per status. Johnson is a 40% shareholder of Storix, who boasted throughout the litigation regarding his ability to outspend Storix and ability to force Storix to close its doors. At no point did Johnson substantiate the record with evidence that Storix maintained a financial advantage against him simply because it is a corporation and he is an individual. The district court's across the board reduction of its prior fee award, which had already reduced Storix's fees by nearly fifty percent, recognized Storix's success in defending this "bet-the-company" litigation and was the most efficient way to fully and faithfully comply with this Court's mandate.

ARGUMENT

I. JOHNSON IS BARRED FROM APPEALING ISSUES ALREADY DECIDED BY THE COURT.

The district court previously decided that an award of attorneys' fees to Storix was warranted on the facts of this case. The district court's decision to award fees was affirmed. (ER 1.) The same arguments Johnson makes here were already considered and rejected by this Court. (See Doc. 53 at 19-21.) This Court's limited remand "to reconsider the amount" of fees to be awarded to Storix did not permit the district court to reexamine whether to award fees at all.[2] See, e.g., *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled . . . . [The lower] court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal . . . ."); *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006) ("[W]e have repeatedly held, in both civil and criminal cases, that a district court is limited by this court's remand in situations where the scope of the remand is clear."); *Planned Parenthood of*

[2] The district court recognized it did have discretion to award a low or nominal sum of attorney fees; however, concluded that a minimal fee award would be inappropriate in light of the facts of this case. (ER 23 at 16, fn. 3.)

Columbia/Willamette Inc. v. Am. Coalition of Life Activists, 422 F.3d 949, 966 (9th Cir. 2005). Further, the district court determined on remand that fees were, in any event, justified. (ER 2 at 17:6-8.)

The district court endeavored to comply with this Court's remand instructions to reduce Storix's attorney fee award. In doing so, the district court attempted "to do rough justice, not to achieve auditing perfection," taking into account the fact that Johnson "is an individual plaintiff, rather than another company" and that "Johnson's claims were neither unreasonable nor frivolous[.]" (*Id.* at 16-21, citing 716 F. App'x at 632 (citations and internal quotation marks omitted).)

Johnson asserts that the panel that decided his first appeal "did not review the findings of fact underlying the fee determination." (AOB, p. 12) There is no basis for this statement. There is also no basis for Johnson's claim that the district court failed to reconsider the underlying issues or rebalance the factors it felt favored an attorney fee award. The district court reviewed its prior findings supporting the award of attorneys' fees against Johnson in detail (ER 2) and attempted to explain the court's rationale during the second fee motion hearing. (ER 3.) In awarding fees, the district court considered and reconsidered every factor. Johnson's blanket statement that the district court "abused its discretion by failing to reconsider relevant facts and issues Johnson raised on remand" is

unsupported. (AOB, p. 14.) There is no evidence the district court failed to consider any factor in properly exercising its discretion and issuing a reasonable fee award.

II. THE FEE AWARD WAS WITHIN THE DISTRICT COURT'S BROAD DISCRETION

A. Standard of Review.

Section 505 of the Copyright Act provides:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. District courts have two tasks in applying section 505: first, deciding whether an award of attorneys' fees is appropriate and, second, calculating the amount of the award. *See The Traditional Cat Ass'n, Inc. v. Gilbreath*, 340 F.3d 829, 832-33 (9th Cir. 2003). This Court reviews the district court's award of attorneys' fees under the Copyright Act for an abuse of discretion, *Maljack Productions v. GoodTimes Home Video Corp*., 81 F.3d 881, 889 (9th Cir. 1996). "A district court's fee award does not constitute an abuse of discretion unless it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 556 (9th Cir. 1996) (citation omitted).

B. Authority Governing the Award of Attorney Fees.

The Copyright Act provides the district court discretion to award "a reasonable attorney's fee to the prevailing party as part of the costs." 10 U.S.C. §505. "When calculating the amount of attorney fees to be awarded in a litigation, the district court applies the lodestar method, multiplying the number of hours reasonably expended by a reasonable hourly rate." *Ryan v. Editions Ltd. West, Inc.*, 786 F.3d 754, 763 (9th Cir. 2015). "When a party seeks an award of attorneys' fees, that party bears the burden of submitting evidence of the hours worked and the rate paid. In addition, that party has the burden to prove that the rate charged is in line with the prevailing market rate of the relevant community." *Carson v. Billings Police Dep't*, 470 F.3d 889, 891 (9th Cir. 2006) (citations and quotation marks omitted). The court may adjust the lodestar figure in light of twelve factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Carter v. Caleb Brett LLC, 757 F.3d 866, 869 (9th Cir. 2014).

In *Kirtsaeng*, the Supreme Court held that a district court must give "substantial weight to the objective (un)reasonableness of a losing party's litigating

position" in fashioning an award of attorneys' fees. 136 S. Ct. at 1986. However, "objective reasonableness can only be an important factor in assessing fee applications—not the controlling one." *Id*. at 1988. The Copyright Act "confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions." *Id*. "For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses." *Id*. at 1988–89; see also *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 in a copyright case).

The Ninth Circuit has held that in deciding an appropriate fee award, "a district court may reduce attorneys' fees by a percentage, so long as the court sets forth clear and concise reasons for adopting this approach." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008); see also *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1199 (9th Cir. 2013); *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 909 (9th Cir. 1995). Johnson has failed to establish the district court's percentage reduction of its initial attorney fee order was an abuse of discretion.

C. The District Court's Percentage Based Approach Was Eminently Reasonable.

The district court thoroughly reviewed this Court's Opinion, the parties' arguments, the relevant law, and the district court's prior Orders regarding attorneys' fees. After undertaking this examination, the district court applied a 25% across the board reduction to the original fee award. The district court determined that a percentage based approach was the most effective way to fully and faithfully comply with this Court's mandate. "Storix's attorneys submitted clear and professional timekeeping reports justifying the fees they sought, and did not either charge excessive rates, overstaff this 'bet-the-company' case, or spend excessive time litigating it. There is thus 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." (ER 2 at 19.) Moreover, the district court noted that it was ordered to use an essentially equitable approach in determining Storix's fees – "to do rough justice, not to achieve auditing perfection." (ER 2, citing 716 F.App'x at 632 (citation and internal quotation marks omitted). A percentage based approach permitted the district court to take into account the objective reasonableness of Johnson's claims and his status as an individual without unfairly impugning the work done by Storix's attorneys. (*Id.* at 19:9-12.)

In reducing Storix's attorneys' fees by 25%, the district court considered the fact that Johnson is an individual now proceeding pro se. (*Id.* at 11:13-15.)

However, the district court also noted that Johnson had been represented by counsel during all proceedings for which the Court awarded attorneys' fees. Throughout trial, Johnson was represented by Gary Eastman of Eastman & McCartney, LLP. On January 12, 2016, the district court granted Johnson's motion to substitute Andrew Skale of Mintz Levin Cohn Ferris Glovsky & Popeo, PC ("Mintz Levin") as his attorney of record. Mintz Levin is a large 500-attorney law firm ranking in the Am Law 100. (Doc. Nos. 172, 173.)[3] On May 5, 2017, Johnson parted ways with his attorneys from Mintz Levin, (Doc. Nos. 265, 266), and subsequently retained Bernard F. King, III as his counsel of record. (Doc. No. 267.) Johnson only began appearing pro se in the district court on March 28, 2018. (Doc. Nos. 280, 281.) The district court awarded attorneys' fees for litigation that took place between October 6, 2015 and November 16, 2016; i.e. a time period when Johnson was continuously represented by counsel. (ER 2at 19, fn. 3.)

The district court also noted that Johnson was represented by three attorneys (Gary Eastman, Tifanie Nelson, and Joseph Harkins) at trial, as compared with only two attorneys for Storix (Paul Tyrell and Sean Sullivan). (Doc. No. 148.) Johnson later sued his attorneys from Mintz Levin—who handled his posttrial representation—in the San Diego County Superior Court after paying them

[3] *See* https://www.mintz.com/about-us/our-culture (Noting the firm has "eight offices and 500 attorneys").

$375,000 for nine months of legal work. (Doc. No. 285-1, Tyrell Decl., Ex. B.) The district court found that the amount Johnson paid for his own high-end legal representation post-trial undercuts any argument that the fees Storix requested were unreasonably inflated. (ER 2 at 19, fn. 3.)[4]

Further, while Johnson's claims were reasonable enough to survive summary judgment, Johnson's conduct during this litigation was found to have gone well beyond what was necessary to protect his asserted legal interests. (Id. at 19:15-17.) The district court found: "There is simply no justification for Johnson's decisions to send threatening emails to Storix employees, and to try to interfere with Storix's client relationships in the explicit hope of leaving Storix too financially crippled to defend this lawsuit. Nevertheless, this deterrence must not go so far that it deters plaintiffs (like Johnson) with reasonable claims from filing suit at all. And the Court applies the Ninth Circuit's guidance to take into account the fact that Johnson 'is an individual plaintiff, rather than another company.'" (Doc. 299 at 11-12, citing 716 F.App'x at 632.) The district court therefore determined that applying a 25% reduction in Storix's fees leaves an award that is sufficient to deter Johnson's conduct, without being excessive or unreasonable under the circumstances. (*Id*. at 20.)

[4] The fact Johnson was ostensibly able to incur and pay such large legal bills also refutes his claim that he was at a financial disadvantage as against Storix simply as a result of being an individual.

As also noted by the district court, its 25% reduction took into account the district court's prior reductions of Storix's attorneys' fees incurred for its four unsuccessful motions in limine (Doc. Nos. 134, 135, 136, 137), and its post-verdict briefing on its motion for attorneys' fees and nontaxable costs, as not advancing the purposes animating the Court's fee award. (*Id*. at 20.) As the district court previously explained, Storix's fee award was made after balancing Johnson's improper motivations in bringing this suit, the need to deter his inappropriate litigation conduct, and Storix's success, with the fact that Johnson's claims were objectively reasonable as a matter of law. (Id. at 35.)[5]

D. Johnson's Arguments Fail.

1. Johnson's Authority Regarding Inherent Authority to Award Discovery Sanctions is Inapplicable.

Johnson cites authorities holding that although the federal court has inherent authority to sanction a litigant for bad faith discovery misconduct, such an award is limited solely to those fees directly caused by the sanctionable misconduct. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1186 (2017) ("such a sanction, when imposed pursuant to civil procedures, must be compensatory rather

[5] The district court made this finding consistent with this Courts holding in *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016). However, the district court also noted the tension between the holding in *VMG Salsoul, LLC*, that cases that proceed to trial are objectively reasonable, and the Supreme Court's observation that an attorney fee award in a copyright case is meant to give a litigant with a meritorious case "an incentive to litigate the case all the way to the end." *Kirtsang*, 136 S.Ct. at 1986. (ER 2 at 17, fn. 4.)

than punitive in nature."). Johnson's citations miss the mark, however, because different considerations apply when a court is considering an award of attorneys' fees pursuant to the Copyright Act.

The Supreme Court has identified the following non-exclusive list of factors to guide the award or denial of attorneys' fees: "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case), and the need in particular circumstances to advance considerations of compensation and deterrence." *Ets–Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) ("*Fogerty I*")). The Ninth Circuit has "added as additional considerations: the degree of success obtained, the purposes of the Copyright Act, and whether the chilling effect of attorney's fees may be too great or impose an inequitable burden on an impecunious plaintiff." *Id*. (citing *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 559-60 (9th Cir. 1996) ("*Fogerty II*")). These factors "may be considered but are not exclusive and need not all be met." *Fogerty II*, 94 F.3d at 558. Indeed, the Supreme Court has found copyright defendants play an important role in ensuring the purposes of the Copyright Act are served:

> [b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them.... Thus a successful defense of a copyright infringement

> action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.

Fogerty I, 510 U.S. at 527.

Johnson's arguments premised on the federal court's inherent power to sanction are inapplicable to a fee award under the Copyright Act. (AOB, pp. 14-15.) The Copyright Act does not require that the losing party be culpable or blameworthy to be subject to an attorney fee award. *Fogerty II* at 558. There is also no requirement that the fees incurred be caused solely because of the misconduct at issue. However, even if that were a requirement, the fees incurred by Storix were caused by Johnson's continued pursuit of this case even after overwhelming evidence was adduced that his claims lacked support. Johnson also cannot plausibly contend that his conduct threatening Storix employees and contacting Storix customers during the litigation to deprive Storix of the ability to fund its defense was in keeping with the purposes of the Copyright Act. While the district court previously found Johnson's claims to not be frivolous, the district court noted that Johnson's "litigation tactics became increasingly unreasonable as the case progressed." (ER 2 at 28.) The district court recognized that in the face of overwhelming evidence, "it was unreasonable for Plaintiff Johnson to maintain that

he did not intend to transfer the copyright." (*Id.* at 9.)[6] Thus, fees incurred in defending Johnson's meritless claims were caused by his continued litigation of this matter and improper motivation *as evidenced by* Johnson's admissions to having lied, his threatening and vindictive letters to several Storix directors and employees demanding that the directors resign, Johnson's letter to Storix customers demanding they stop paying Storix for the use of its software and Johnson's admission that he hoped the letter to Storix customers would cause Storix to run out of money so it could not defend his lawsuit. As found by the district court, Johnson filed suit to wrest control of the company from its shareholders and to force the company to "close its doors." (ER 2 at 9.)

2. Johnson's Mischaracterization of the Evidence Does Not Establish Clear Error.

Johnson mischaracterizes the record in arguing the district court based its fee award on only "a few benign statements or issues it found 'inappropriate', but never actually rising to the level of litigation misconduct." (AOB, p. 16.) The district court clearly found Johnson engaged in misconduct and that Johnson's

[6] Other district courts have recognized post-*Kirtsaeng* that cases or tactics may become unreasonable as the parties learn facts during discovery refuting their claims. *See*, e.g., *Urban Textile, Inc. v. Specialty Retailers, Inc.*, 2017 WL 5983761, at *3 (C.D. Cal. June 15, 2017) (Granting $223,473.14 in fees in a copyright case after entry of summary judgment, noting: "As Defendants point out, Urban had decreasing support for its claims in this case as the litigation continued, but its tactics only became more aggressive.").

claim he did not intend to transfer the copyright was unreasonable. Johnson's emails were not the "entire basis" for the district court's award even though they did evidence his improper motivation in attempting to use his litigation to take control of Storix.[7]

Johnson's effort to explain away his pre-trial and post-trial emails by citing to his own argument while representing himself in pro per at the attorney fee hearing before the district court should be rejected. (AOB, p. 17-19) Johnson's argument is obviously not evidence. It is his rejected spin on disputed facts. The district court was within its discretion in accepting a different interpretation of the evidence. The district court did not commit clear error in rejecting Johnson's after-the-fact excuses and attempts to rationalize his conduct. The district court was likewise not required to find that a specific email resulted in specific harm to Storix. The issue is whether the award is reasonable in light of Storix's successful defense and whether conduct Johnson engaged in should be deterred. The district

[7] There is no basis for Johnson's claims the district court speculated regarding his motivation. (AOB, p. 12.) The district court reviewed the evidence and drew reasonable conclusions from Johnson's threats to close down the company, to cause Storix employees to lose their homes and from his communications with Storix customers demanding that they stop paying Storix in an effort to deprive Storix of the revenues need to fund the defense to Johnson's litigation. Johnson's claims the district court punished him for bringing his lawsuit (AOB, pp. 12-13) are also meritless. The district court expressed some sympathy to Johnson, but found that his misconduct and continued pursuit of his claims after overwhelming evidence established they lacked merit did not serve the purposes of the Copyright Act.

court was within its discretion in finding Johnson's conduct was inappropriate and a basis for awarding attorneys' fees.

3. The Reasonableness of Johnson's Claims is Not Dispositive.

Johnson asserts the district court's finding that an award of attorneys' fees was appropriate was an abuse because "no other case involving a copyright transfer absent a written agreement has ever survived summary judgment." (AOB, p. 20.) Johnson misstates the law governing copyright transfers, which only requires written evidence of a transfer, not a "written agreement." In any event, that finding was previously affirmed in Storix's favor and is not before this Court. There is no basis for Johnson's supposition or his assertion that reasonableness trumps all other factors considered by the district court in awarding attorneys' fees. It used to be that "a copyright defendant had to show that the plaintiff's claim was frivolous or made in bad faith in order to be entitled to fees," but this is no longer the rule. *Mattel, Inc. v. MGA Entm't, Inc.*, 705 F.3d 1108, 1111 (9th Cir. 2013). Frivolousness is one of many factors the court weighs in determining whether to award attorneys' fees. *Kirtsaeng*, 136 S.Ct. at 1985. And again, the district court's decision to award fees despite the initial objective reasonableness of Johnson's claims has already been affirmed and is not subject to a second challenge.

4. Johnson's Arguments Lacking Authority Should be Deemed Waived.

Johnson asserts the district court's attorney fee award, based in part on Johnson's threatening emails to Storix's employees and customers, was used "to chill Johnson's exercise of free speech and his right to petition on unrelated matters." (AOB, p. 21.) Johnson fails to cite any authority or to provide any analysis supporting this claim. Federal Rule of Appellate Procedure 28(a)(4) states that an appellant's brief must contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Pro se litigants are not excused from supporting their claims with legal argument. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). Johnson has failed to cite to any legal authority and has failed to provide any reasoned argument supporting his claim.

5. The District Court Did Not Abuse its Discretion in its Consideration of the "*Kerr* Factors."

Johnson argues the district court failed to consider awards in other cases as a factor when awarding attorneys' fees. (AOB, p. 22) The district court specifically listed and considered all of the "*Kerr*" factors in its order awarding attorneys' fees. (ER 2 at 17-18.) There is nothing in the record establishing the district court did not consider other awards in applying its 25% reduction to Storix's already reduced fees. *See Truck Terminals, Inc. v. Commissioner of Internal Revenue*, 314

F.2d 449, 454–55 (9th Cir. 1963) ("The fact that particular items of evidence were not mentioned in the findings or opinion of the Tax Court does not establish that they were not considered by that court").

Johnson also fails to cite to or elaborate regarding any specific case that should have been considered and which would have compelled a different result. As found by the district court, this was a "bet-the-company" litigation. Johnson was represented by multiple counsel, including an AmLaw 100 law firm to which Johnson paid nearly $400,000 just for post-trial motion work. There was no evidence of over-staffing or over-billing by Storix's counsel. A percentage-based reduction was the fairest way to take into account the objective reasonableness of Johnson's claims and his status as an individual without unfairly impugning the work done by Storix's attorneys successfully defending Johnson's claims. (ER 2 at 19.)

6. The District Court Considered Both the Relative Financial Strength of the Parties and Johnson's Current Pro Se Status.

Apart from the *Kerr* factors, courts can consider the relative financial strength of the parties. Johnson asserts the district court ignored the imbalance of financial hardship in issuing its award. (AOB, p. 23.) However, the district court's order establishes the district court specifically considered that Johnson was an individual and his in pro per status. Throughout the litigation Johnson repeatedly

emphasized that his financial position is superior to that of Storix. As found by the district court, Johnson was represented from the inception of the litigation through trial by a team of attorneys at multiple different law firms, including the 500-attorney law firm of Mintz Levin. It was only after the filing of Johnson's reply brief on appeal that Johnson began to represent himself in pro per.

This case likewise did not involve a stereotypical David versus Goliath situation simply because Johnson was an individual suing a company. Johnson is a 40% shareholder of Storix and boasted throughout the litigation regarding his superior financial condition.[8] For instance, during a post-trial status conference in December 2016—a year after the conclusion of the jury trial—Johnson's counsel at Mintz Levin, argued that Johnson should not have to post a bond to secure the fee award given his substantial wealth. Mr. Skale represented as follows:

> MR. SKALE: [W]ith respect to having a bond, Plaintiff still strongly believes that no bond is required. If the Court would like, **I'm happy to put forth a declaration explaining Mr. Johnson's assets**. I can tell you right now, and **I'm going to put it on the record so it's there and the Court can consider it, Mr. Johnson has about $1,000,000 in liquid assets. He's got about $2,000,000 in total assets, and that does not include his Storix stock**. Right now he's living on about $40,000 a year except for his legal fees, which are obviously costing him a lot more. **So there shouldn't be any concern about having to collect on a judgment after an appeal about a year that he will have more than sufficient**

[8] Johnson has already posted a bond in the full amount of the initial award of fees and costs totaling $555,118.64 (Doc. 274), and a subsequent bond for the reduced fee award.

> **assets to keep Storix happy**, including -- and this is a more important thing – his stock, because the stock there, as your Honor may remember from the trial, Defendant's own witness put a value of around two and a half to three million for the value of the company. So that puts his stock somewhere around one – one to one and a half millionish.
>
> * * *
>
> So our position still is that the stock is more than sufficient, and he's happy to encumber it any which way that the Court would like to keep everyone happy such that the stock was there as an asset if -- if the judgment is not reversed on appeal. But if the Court would like, we can put forward a declaration explaining his assets and that even outside the stock, he has more than sufficient money to pay for any type of judgment that would come down."

(Doc. 285, Tyrell Dec., Exh. A, pp. 2-3 (emphasis added).

In other correspondence sent by Johnson during the litigation, he boasted regarding his financial ability to outspend Storix in litigation. (Trial Ex. NJ, Doc. 165-5, p. 83 of 86 [Johnson stating: "If you have about $1M sitting around, this shouldn't worry you. I do. That 60% stock I gave you served me well."].) Johnson also represented he was proceeding in this case pro se by choice, and not due to financial hardship. Johnson's claims regarding the purported need to sell his house are not evidence of his financial wealth, and are not supported anywhere in the record with competent, admitted evidence. Rather, Johnson admitted to moving to Florida to protect his assets from collection. (ER 3 at 89.)

7. Storix is Entitled as a Matter of Law to Recover Interest.[9]

Federal law provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). Indeed, an award of post judgment interest on a district court judgment is mandatory. *Barnard v. Theobald*, 721 F.3d 1069, 1078 (9th Cir. 2013). Further, "[w]here a single item such as attorneys' fees is reduced on appeal, the district court's determination should be viewed as correct to the extent it was permitted to stand, and interest on a judgment thus partially affirmed should be computed from the date of its initial entry." *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672, 767 (9th Cir. 1973).

Johnson argues the district court was not permitted to award interest to Storix on remand. (AOB, p. 24.) There is no basis for Johnson's argument. The single case of *In re Sanford Fork & Tool Co* cited by Johnson is inapposite. The Supreme Court in that case emphasized that, in addition to the mandate itself, "[t]he opinion by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate...." 160 U.S. 247, 256 (1895). The Court added that it is important, in determining "what was heard and decided" by the appellate court, to bear in mind the "settled practice" of courts with respect to

[9] It is unclear whether Johnson has challenged the district court's award of interest. Storix therefore addresses the statements regarding interest in Johnson's Opening Brief out of an abundance of caution.

the applicable substantive law. *Id*. Thus, in construing a mandate, the lower court may consider the opinion the mandate purports to enforce as well as the procedural posture and substantive law from which it arises. The ultimate task is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not:

> When a case has once been decided by this court on appeal, and remanded to the circuit court, whatever was before this court, **and disposed of by its decree**, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

Id. at 255 (emphasis added) (lower court free to grant plaintiff leave to amend on remand where case was "left open by the opinion and mandate of this court, and by the general rules of practice in equity.")

CONCLUSION

Based on the foregoing, Storix respectfully requests that the district court's order awarding Storix attorneys' fees in the amount of $407,778 and order awarding interest be affirmed and that Storix be awarded its attorneys' fees and costs on appeal.

DATED: January 23, 2019

PROCOPIO, CORY, HARGREAVES
AND SAVITCH LLP

By: *s/Kendra J. Hall*
Paul A. Tyrell
Kendra J. Hall
Sean Sullivan
Attorneys for Appellee

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6(b), Appellee hereby advises the Court that this case is related to a prior appeal previously brought by Johnson and heard in this Court entitled *Johnson v. Storix, Inc*; Case No. 16-55439.

DATED: January 23, 2019

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: *s/Kendra J. Hall*
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

This brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 9,437 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

DATED: January 23, 2019

PROCOPIO, CORY, HARGREAVES AND SAVITCH LLP

By: *s/Kendra J. Hall*
Paul A. Tyrell
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CERTIFICATE OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 525 B Street, Suite 2200, San Diego, California 92101.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 23, 2019.

APPELLEE'S ANSWERING BRIEF

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

Executed on January 23, 2019, at San Diego, California.

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