UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHNSON,	)	Case No. 14CV1873-H(BLM)
	)	
Plaintiff,	)	San Diego, California
	)	
vs.	)	Monday,
	)	August 6, 2018
STORIX, INC.,	)	10:30 a.m.
	)	
Defendant.	)	
_____	)	

TRANSCRIPT OF REMAND HEARING RE ATTORNEY'S FEES
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	ANTHONY JOHNSON, PRO SE
For the Defendant:	PAUL A. TYRELL, ESQ. SEAN SULLIVAN, ESQ. Procopio, Cory, Hargreaves & Savitch, LLP 525 B Street, Suite 2200 San Diego, California 92101 (619) 238-1900
Transcript Ordered by:	ANTHONY JOHNSON
Court Recorder:	Lynnette Lawrence United States District Court 333 West Broadway San Diego, California 92101

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

Transcriber: Jordan Keilty
Echo Reporting, Inc.
4455 Morena Boulevard
San Diego, California 92117
(858) 453-7590

SAN DIEGO, CALIFORNIA MONDAY, AUGUST 6, 2018 10:30 A.M.

--oOo--

(Call to order of the Court.)

THE CLERK: Calling matter three on calendar, 14CV1873, Johnson versus Storix, Inc. for a remand hearing regarding attorneys' fees.

THE COURT: Good morning. State your appearances. Welcome, Mr. Johnson.

MR. JOHNSON: Hi. I'm Anthony Johnson -- I'm sorry.

THE COURT: Pull the microphone --

MR. JOHNSON: Here we go. I'm Anthony Johnson, Plaintiff and Cross-Complainant.

THE COURT: Thank you. Cross --

MR. JOHNSON: I'm sorry. Cross-Defendant.

THE COURT: All right. Thank you. And you are representing yourself?

MR. JOHNSON: I am, yes. Thank you.

THE COURT: Thank you.

MR. TYRELL: Good morning, your Honor. Paul Tyrell for Storix, Inc., and with me is my colleague, Sean Sullivan, and also seated at counsel table is Storix's president, David Hoffman.

THE COURT: Thank you.

I was thinking of Charles Dickens' Bleak House

where maybe you would want to -- if in your spare time you read a novel, because it is a sympathetic case, as I've said from the beginning if you look at the history of the -- how Storix was transferred. At the same time, the Court of Appeals has reviewed everything and affirmed everything other than the reasonableness of the attorneys' fees, and then as an additional matter, the -- Storix is asking for prejudgment interest which under the current situation is very low rate. So I had also asked counsel -- and Mr. Johnson can also weigh in on that. It's a fixed rate that we look at as of the date of the judgment, and so then at the appropriate time, Storix counsel can then advise the Court about that.

So why don't we have Mr. Johnson begin, and then I'll ask Storix to respond.

Good morning.

MR. JOHNSON: Good morning. Thank you all, your Honor. I actually was anticipating that I would be responding to --

THE COURT: Oh, would you prefer them to go first and then you respond?

MR. JOHNSON: Yes, if it's possible, then after my response, if there is a rebuttal, that I might be afforded a second opportunity.

THE COURT: I will.

MR. JOHNSON: Thank you very much.

THE COURT: All right. Go ahead.

MR. TYRELL: Thank you, your Honor, and I'll be brief here.

As you recall, this was a company litigation. We saw it through to he end. We had a jury trial, and it resulted in a complete victory for my client.

THE COURT: The Court agrees.

MR. TYRELL: At the time we sought attorneys' fees of more than $1,000,000. It's increased since then, but at that time it was $1,000,000, and your Honor cut our fees about in half in making the award.

THE COURT: And, as I said, I had reviewed the billing records I think for a copyright case, intellectual property case. I didn't think it was overstaffed. I didn't think the rates were high. I didn't think the fees were unreasonable given the nature of the litigation. I tried to explain myself in my orders, but the Court of Appeals, whom I respect, disagreed and said take another look at that, and I take that seriously.

MR. TYRELL: And the oddity of this situation, your Honor, is that we're here on a remand from an issue that was not appealed. The amount of the fees was not appealed. So even the fact that your Honor reduced our fee request by almost half, the Ninth Circuit didn't know that.

THE COURT: There was no oral argument.

MR. TYRELL: There was no oral argument, and this issue was not briefed. You award was certainly not mechanical or formulaic, but, again, the Ninth Circuit did not know that because there was no opportunity to brief it.

Mr. Johnson, at the time of the fee award, was represented by a huge law firm with more than 500 attorneys, te Mintz Levin firm. That issue was not argued, and we don't know if it was even considered by the Ninth Circuit that viewed him at the time of its ruling as a pro se party. But, as you know, he was anything but for most of this proceeding.

So we're here in this unusual situation where an issue not appealed is here before you for reconsideration. So with minimal guidance from the Court of Appeals, the only thing to do is to reconsider, and, as we see it, the lodestar was never challenged as you just noted. It's presumed to be reasonable. There's already been a significant reduction. So if we consider the various criteria that a court can consider in deciding to adjust a lodestar, none of those factors call for any reduction beyond the nearly 50 percent that's already been applied.

THE COURT: I think so I picked a period of time, exercising the Court's discretion, and after picking that period of time, that's where the 50 percent reduction came

in, is that correct?

MR. TYRELL: That period of time and the other -- there were other limitations you asked us to exclude. They combined to make it less than -- or about half of what they incurred through that, and you didn't allow us to seek any of our post-judgment fees. So those didn't even get factored into this much less what we've incurred now on appeal. So at this point --

THE COURT: Except that on -- so the Court of Appeals did not order attorneys' fees on appeal.

MR. TYRELL: No.

THE COURT: So I think that issue is now settled.

MR. TYRELL: And I'm not asking for those today, your Honor.

THE COURT: I did in -- so kind of taking another look at additional categories the Court could reduce for the reasonableness determination, I thought that there were four unsuccessful motions in limine, that I could do that reduction. I also thought that the fees on fees, the -- I permitted recovery for litigation concerning the fees.

MR. TYRELL: I don't believe so, your Honor. I think we were -- that those were excluded as -- as were the fees on the unsuccessful motions in limine.

There were -- there were a number of carve outs, but I don't believe that we included our fees incurred in

requesting fees.

THE COURT: So let me look at the --

MR. TYRELL: If I'm wrong, I apologize, but I thought those were excluded.

THE COURT: I had thought -- and I thought I would attach the Court orders -- prior orders so that they're part of the record.

MR. TYRELL: And, your Honor, Mr. Sullivan has just reminded me there was one category of motion in limine that was excluded.

THE COURT: Only one

MR. TYRELL: Yes, your Honor.

THE COURT: And then there were some other motions in limine that either ended up being moot or not successful.

MR. TYRELL: Yes, your Honor, and at some point you cut us off on the post-verdict proceedings, but you might be right about the fees on fees having been included. I apologize if I misspoke.

THE COURT: All right. So then the question is what additional should I consider, what additional factors? The Court of Appeals said in the citation to an out-of-circuit case that I should consider the relative financial situations recognizing that Mr. Johnson is an individual and Storix is a company. The case I believe says you can consider the relative financial strengths of the parties.

Do you want to address that? I don't have a lot of information.

MR. TYRELL: So, your Honor, the record is that in post-trial proceedings before you, Attorney Skale from the Mintz Levin Firm who was representing Mr. Johnson at the time, you may recall we cited it in our papers, was arguing against the imposition of a bond. he was arguing against a bond or for reduction to a minimal amount. And in making that argument, he stridently argued that we shouldn't worry about Mr. Johnson's ability to pay, and he gave us some specific numbers. He told us Mr. Johnson had in excess of $1,000,000 in liquid assets, in excess of $2,000,000 in total assets, and that did not include the interest he held in Storix as a shareholder.

THE COURT: And what percentage does he hold in Storix as a shareholder?

MR. TYRELL: Forty percent.

THE COURT: So then how do I -- that is in the record. Then what information do I have about Storix balancing -- Storix? We know he owns 40 percent of Storix.

MR. TYRELL: That's correct, your Honor, and I don't know that there's a record of Storix's financial condition. I'd be happy to supplement if you'd like to show its financial condition.

The litigation -- this litigation and other

litigation ha been extremely painful for Storix from a financial standpoint. It has not made any shareholder distributions. Virtually all of its cash flow is going to pay current and past due attorneys' fees.

I'd be happy to make a record of that if you were interested, but this is not a behemoth corporation where this is a drop in the bucket.

THE COURT: And there were two other trials in State Court, is that right?

MR. TYRELL: There was post --

THE COURT: With the verdict here?

MR. TYRELL: Yes, your Honor, three consolidated actions that went forward as a bifurcated trial with part of it being a bench trial -- I'm sorry -- part of it being a jury trial and part of it being a bench trial in front of Judge Enright.

THE COURT: Are those concluded now or are those on appeal or what is the status? It's really not relevant to this other than I'm to take into consideration the comparison of the size according to the Ninth Circuit.

MR. TYRELL: So they're -- they're completed as far as the trial goes. The proposed judgment has been submitted and is in front of Judge Enright waiting for a signature.

THE COURT: And what is the result?

MR. TYRELL: So the result, there were two matters that went to trial. One of them was a claim by Storix against Mr. Johnson and Janstore, which is a company he set up to compete against Storix, and the company prevailed in its breach of fiduciary case against Mr. Johnson on that regard. His cross-complaint in that action was against the individual management team and other shareholders at the company. That was a complete Defense verdict on that matter. Then the bench trial was a derivative suit which Mr. Johnson and another shareholder, Mr. Sassy, filed derivative suit, meaning the company's individual shareholders and management team and directors, and that resulted in a complete defense verdict.

THE COURT: And was he represented by counsel in that case?

MR. TYRELL: Yes, your Honor, and still is as far as I know.

THE COURT: Did Ms. Levine originally represent him in that matter or was that always somebody else?

MR. TYRELL: So there's been a bit of musical chairs in terms of Mr. Johnson's counsel in the State Court matters, but at the time Mintz Levin was representing Mr. Johnson in this action, they were for part of that time also representing him in the State Court action, and then they withdrew and were replaced by other counsel.

THE COURT: All right. So you suggest a 10 percent reduction. How do you articulate what the basis would be for that?

MR. TYRELL: Well, frankly, your Honor, I have a hard time doing so other than in deference to the Ninth Circuit's ruling and because if you go beyond 10 percent, then the Court has to provide some detailed justification for going beyond that, and I can't come up with one. So I find 10 percent to be an appropriate level to satisfy and be respectful to the Ninth Circuit's ruling on that non-appealed issue. But at the same time, not go beyond what's appropriate and not go too far beyond the approximately 50 percent reduction that has already been applied.

THE COURT: On post-trial matters, did you make the Ninth Circuit aware of your contention that it was not appealed by motion?

MR. TYRELL: We tried to. We tried to seek reconsideration, and we just got a postcard denial on that. As you know, there's a challenging to get reconsidered, and we weren't able to get any reconsideration.

THE COURT: So I think the Ninth Circuit directive to the Court is clear that the Court is required to then consider a different amount and to make it reasonable. So do you have any other guidance for the Court before we address the prejudgment -- the post-judgment interest

number?

MR. TYRELL: Only -- only, your Honor, in anticipation of what you might hear from Mr. Johnson, I want to emphasize -- I know you know this, but I want to emphasize that the Ninth Circuit clearly ruled that you did not abuse your discretion in choosing to award fees to Storix, and the Ninth Circuit also --

THE COURT: 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.

MR. TYRELL: That's correct, though I would advocate for the latter. I do want to point out one quote that I think is interesting that the Ninth Circuit says to insert in its brief discussion of this issue, and that is the Court noted that it does not pass judgment on what the award should be, only that it be reasonable. And, your Honor, we believe that had the Ninth Circuit had access to the full record, it would have agreed that this was reasonable that you did not adopt a mechanical or formulaic approach, and had we been able to present the evidence, the Court would not have given much attention to Mr. Johnson's fleeting pro se status in that proceeding, and for those reasons we think that a minimal reduction is all that should be applied.

THE COURT: Under the Fougherty and Kirksang (phonetic) factors and the other factors for attorneys' fees awards, what do you think the Court should articulate in support of its determination of a reasonable award?

MR. TYRELL: Well, I think, your Honor, that you already have. I think that your prior ruling was lengthy and detailed and you gave it a lot of thought. Unfortunately, the Ninth Circuit never saw it. I don't think that there's a different reasoning that's commanded here because, again, the Court of Appeal didn't find your reasoning to be improper or deficient in any way because it didn't have it.

So I think that you've already done the analysis and that the analysis is correct -- analysis was correct. And I note that in making that ruling, on the objective reasonableness standard, your ruling indicated some -- in a footnote that there was some tension and that you were almost beholding or required to find objective reasonableness because Mr. Johnson got past the summary judgment stage, and that does seem to be in tension with the Kirksang factors and the Fougherty factors, and because of that I don't view your determination of objective reasonableness as a strident one but rather a reluctant one, and that should come into play here.

THE COURT: And, in any event, objective

reasonableness is only one factor, and Kirksang made it clear that if there are other actions that warrant a deterrent effect such as the infamous email with expletives included, that even if that alone would not warrant injunctive relief for the Court to prevent future occurrences, there still can be collateral consequences such as on balance in evaluating that plus other activity that the Court's determination that attorneys' fees are warranted trumps then or that the objective reasonableness is not the sole factor the Court should consider. The Court should consider the other factors as well.

MR. TYRELL: Certainly, your Honor. And to the extent that deterrence was one of the factors you considered, how does one deter someone who boasts in post-trial motion of having well over $2,000,000 and who, you know, we showed you the emails in our possession of Mr. Johnson boasting to the other Defendants or the other management team, "Do you have $1,000,000 to spend on this? I hope you do because I do." How do you deter something like that? You do it with a significant award of attorneys', and this case I think is one way to do that and to reduce this to an amount that's too small doesn't serve that purpose, and Mr. Johnson has not submitted any evidence as to his financial condition though he has --

THE COURT: In his declaration he does say he had

to sell his home and he had to sell his home in Florida and now he's living in Las Vegas. So that's -- that's sympathetic.

MR. TYRELL: Well, the declaration is -- is rather thin in that regard, and some people sell their properties to give the appearance of not having resources to avoid judgment or to avoid collection in some examples. We don't have enough information there to -- for me to be able to accept that as an indication of his true financial condition.

But, again, what we're looking at here was what was the appropriate award when you made it.

THE COURT: All right. What is the -- then turning to the issue of the post-judgment interest, what is your calculation of the rate?

MR. TYRELL: So the rate as we determined it, as you indicated, it's not large. It's 0.695 percent we believe is the appropriate rate based on the time of the award -- or the time of judgment.

THE COURT: The time of judgment, zero point?

MR. TYRELL: Six nine five.

THE COURT: -- six nine five.

MR. TYRELL: It's --

THE COURT: How did you do that calculator?

MR. TYRELL: May I ask Mr. Sullivan to answer that

question?

THE COURT: Yes.

MR. SULLIVAN: Thank you, your Honor. Under 28 U.S.C. 1961, it directs you to the rate equal to the weekly average one year constant maturity treasury yield as published by the Board of Governors for the Federal Reserve System for the calendar week preceding the date of the judgment. So we used the date of entry of the -- I believe the amended judgment that fixed the dollar amount.

The week prior would be the week of November 7th, 2016. We went to the Federal Board website and downloaded the data for that week -- for four days that week. The Friday was a holiday, and we averaged those amounts to come up with the number Mr. Tyrell --

THE COURT: Thank you. All right. Thank you. We'll hear from Mr. Johnson.

MR. JOHNSON: Thank you, your Honor.

THE COURT: If you prefer to come to the podium -- you may either stay at your table there, but then --

MR. JOHNSON: I appreciate that, and I --

THE COURT: Just speak into the mic.

MR. JOHNSON: -- didn't think about that because I've kind of spread my things out a bit.

THE COURT: All right.

MR. JOHNSON: So it makes it easier for me to

reference. So I appreciate the thought.

THE COURT: Just keep your vice up.

MR. JOHNSON: Thank you. I will.

Mr. Tyrell, first of all, you know, to kind of address many of the issues -- and I hope not to have to touch on all of them, but I want to start with respect to company, you know, proposition on -- that that was mentioned and has been repeatedly stated throughout many pleadings.

All evidence -- and I do mean all evidence shows -- including that submitted by both parties -- shows that at least when taken in context and read in their entirety, shows that every effort that I have made throughout the entire course of this litigation was to try to save the company from the situation that it has now found itself in and certainly to try to do so without bringing myself to this same situation. And I think that might be evident in some of the other things I'd like to address.

Secondly, there was mention of, you know, the large law firm that -- that was representing me for a short period of time. That was -- he was hired as an -- to handle the appeal in this particular care and later convinced me to also represent me in the State Court cases. That was only to be for a four-month period, however, because the original trial in the State Court cases was set for January of 2017. That didn't happen -- at least the trial didn't conclude

until April of 2018 due to four trial continuances, all of which I objected to.

During that time, obviously -- and according to the very evidence that Mr. Tyrell submitted with his declaration clearly states that my attorney withdrew because I was unable to pay him any more.

As to the degree of success, this is something that I would like to point out because degree of -- I'm sorry -- the degree of success is not one of the Fougherty or Kirksang factors that are noted, but some prior District Court cases have added the degree of success factor but, unfortunately, have also taken that factor out of context because it came from the Hearsley case that's been repeatedly noted, and the Hearsley case is civil rights case in which the degree of success as they referred to it is not used to increase the fees in a case or even substantiate the fees but is used to reduce fees only to -- basically to only include the successful claims or the attorneys' arguments that contribute to those claims. So, if anything, the degree of success, while Storix may have, yes, taken the copyright and rendered all other issues moot, it didn't necessarily mean that all of their hours were spent simply proving they owned a copyright.

I don't want to go into great detail because it wasn't my intention to go in -- to dispute bills because I

didn't think that that was an issue that -- and the billing themselves I didn't think was an issue that this Court was going to be focusing on today or at least I hope not.

I realize that Mr. Tyrell's opening brief focuses primarily on the hours and rates issue, but that wasn't really an issue under dispute, and what I would rather focus on is the intent in the Ninth Circuit in remanding this case to this Court.

THE COURT: But so if the Ninth Circuit says that an award of attorneys' fees is upheld and then directs the Court to do reasonable fees, how -- what standards do you contend under Fougherty or Kirksang or other Ninth Circuit authority does the Court use to determine what's a reasonable award?

MR. JOHNSON: Well, this is -- really brings about the main point, and this is where I believe there's some contention, and maybe the Court needs to address this issue before I even know how to proceed, and that is that the Ninth Circuit remanded the -- the reward for a more reasonable amount. I mean, in one case they said that based on the objective reasonableness of my case, they found it to be excessive. In another case they said that they remanded the case, you know, to reconsider the award and then also to reconsider the amount of the award, and this is where we have something of a conundrum because all of the factors

that this Court used as the basis of the award in Kirksang were not to determine an amount of award or how much the amount of the award should be. They were all used to determine whether or not an award should be granted.

Now, opposing counsel is focusing on the specific wording of the Ninth Circuit's decision, and in doing so, they make half of my argument there by saying that the Court cannot -- the Court -- this Court was not authorized by the Ninth Circuit to reconsider whether to grant an award but only the amount, and --

THE COURT: I tend to agree with that, but I did say, I mean, the amount could be .25 cents or it could be -- so it could be any -- any amount as long as it's reasonable.

MR. JOHNSON: I understand that, and I do appreciate that, but they also at the same time made the argument that the only issue that -- that could be considered when reconsidering the amount is the hours and rates of the attorney fees, making my point that all of the other factors are used to determine whether or not to grant an award. So the question I think that first must be answered is whether the Court is obliged or inclined to consider the intent of the Ninth Circuit's order which was the reasonableness and excessiveness of an amount based on these factors, including the objective reasonableness and the disparity of financial condition and so forth or is it

obliged to stick strictly -- or consider the explicit word "amount" which therefore limits its ability to reconsider the very issues that the Ninth Circuit asked to consider.

THE COURT: I'm going to let you make all of your arguments.

MR. JOHNSON: I appreciate that.

THE COURT: You may. And I think that the Court of Appeals said consider some -- sort of taking a more equitable approach. They said -- so you have the language of the opinion. The Court has the language of the opinion. The Court's doing its best to effectuate the intent of the Ninth Circuit.

MR. JOHNSON: Well, I appreciate that very much, and I -- I didn't want to waste the Court's time speaking about things that it might have considered irrelevant based on, you know, that particular issue. And it's for that reason that I didn't address the issue of the hours and rates because I'm not going to dispute the hours and rates at this point as -- at least as far as what was submitted before other than the fact that opposing counsel is also emphasizing once again the -- the -- I'm sorry. I'm missing the term again, but, you know, the degree of success, once again, the degree of success. This pertains to the degree in which the attorneys' arguments contributed to the successful claims, and that might be something that, you

know, if the Court is to look at this as an issue of an hour or rate dispute, we might have to revisit, and I hope that we don't.

What I would want to focus on, however, is first the objective reasonableness factor. And because that is, as you know, to be considered according to the Kirksang ruling, the -- they are given substantial weight as compared to all other factors. It was confusing to me in this Court's order, and maybe you can clarify for me, because although the Court found that my case was objectively reasonable, that -- that opinion was somewhat depleted by the statement that it was only objectively reasonable in that it survived summary judgment, and I would like to point out that -- and perhaps you -- I'm certainly welcome -- would welcome any questions you might have because I fail to understand how my case was not substantially reasonable.

THE COURT: So here's part of the Court's procedural requirements. On summary judgment, the Court is not allowed to weigh evidence. That's the role of the trier of fact, which was the jury in this case. And so if you said on summary judgment "I didn't intend to transfer the copyright," I am not allowed to say, "Well, I don't believe that" or "The facts suggest otherwise." So that's why it went to a jury who then could evaluate your testimony about all of the evidence that they heard and can evaluate all of

the contrary evidence that would indicate that the copyright was transferred, and then the jury, who is the trier of fact, then came to the determination that the copyright was transferred.

So that's why in the Court's prior order, when I set forth some of the evidence viewing it as part of the record in this case, there was substantial evidence to support the jury's determination that the copyright was transferred.

And then in -- so I did, nevertheless, say under Ninth Circuit law that was issued a couple of weeks before Kirksang, it said if you survive summary judgment, it's objectively reasonable. So I'm saying let's assume that it's objectively reasonable for you to take this position because there were some little discrepancies, like remember the trademark was officially transferred but the copyright wasn't separately transferred.

So there were some anomalies that -- in your testimony, your declaration, your deposition, your other evidence that on a summary judgment -- you're not a lawyer. So you have to understand this -- I'm not allowed to then pick and choose the evidence. I have to say "All right. Let's let the trier of fact decide." So I hope that that helps you to understand the Court's position. I do not think it helped your case when you admitted on the witness

stand that you lied. You think I'm taking that out of context, but it's a statement that was contrary to your best interests at trial, and certainly the jury could evaluate that testimony and view it negatively in light of all the other evidence in the case.

MR. JOHNSON: Certainly, but that, of course, is the jury's opinion on a particular issue that was not actually a contributing factor to the fee award. And I do -- I do understand and appreciate your comments on the summary judgment. I'm aware that you were not the trier of fact in the summary judgment, but my question is -- well, I guess I would like to ask, you know, although I may have been found to have had an objectively reasonable case, does the degree in which the case was reasonable play any factor? Does that add any weight to the substantiality?

THE COURT: I think you can -- you're free to make that argument. I just wanted to quote a sentence from Kirksang on that because clearly they say objective reasonableness you have to do it in its -- you have to give substantial weight to that. But then Justice Kagan says:

> "For example, a court may order fee shifting because of a party's litigation misconduct whatever the reasonableness of his claims or defenses."

MR. JOHNSON: Certainly.

THE COURT: So it's a snapshot -- it's sort of a -- in a sense it's a snapshot in time of the Court's assessment of the entirety of the litigation. You obviously have a completely different view of the entirety of the litigation, but the -- some of the behavior was really beyond the pale and really unnecessary to your assertion of your deeply held belief in the merits of your case and so really tipped the scale in part in looking at all of it in making the determination that the Court did, which the Court of Appeals upheld.

MR. JOHNSON: Okay. So, I mean, I guess that I -- what I'm drawing from that is that there is also a degree in which the objective reasonableness might -- might apply. What I -- what I argued in my opposition is that it was not simply objectively reasonable but it was substantially reasonable.

THE COURT: Okay. I get that, but then can you -- so you want to dispute -- so that's why I quote this sentence that says even if it's completely objectively reasonable, the court still has discretion to order fee shifting if the Court believes that it's appropriate because of litigation misconduct.

MR. JOHNSON: Well certainly if the -- if the litigation misconduct it refers to is such that it outweighs the objective reasonableness. And this is where the Court's

order was -- was confusing to me because, although it assessed the order and the issue of objective reasonableness, it found that it was effectively only objectively reasonable in that, in fact, it made it very specific that my position was objective -- objectively reasonable on the grounds that it -- the case proceeded to trial.

THE COURT: But that's where in part you say, "Wait a minute." When you were selling the company and you're telling third parties who have nothing to do with this dispute and you don't bother to tell them that, "Oh, by the way, I'm selling the company but really the company doesn't own the main thing that the company does. I own it," and you don't share that with anybody, that's a bad fact.

MR. JOHNSON: I wanted very much to avoid, you know, as much as possible trying to relitigate the issues of the case.

THE COURT: Uh-huh.

MR. JOHNSON: But I will point out on that particular issue that the -- the evidence supporting the statement that you just made was nothing more than a blanket email that I sent out as essentially notice that the company is available, and in that notice I simply said that anyone acquiring Storix will also be acquiring this wonderful

software.

That was construed by the other side to say, "Well, that must mean the company owns the software." But look at it realistically from -- for example, if I'm selling my home and I'm saying I'm going to include the furniture in the home, it's not -- this was not a negotiation. And, in fact, those announcements I sent out, there was no response to those. It wasn't a negotiation. There was no reason for me to divulge at that point that my intent was if I sell the company, I will include the software most naturally.

THE COURT: Well, so I think that that was an issue, that then the jury gets to look at all of that information. The Court also at the same time is listening to the witness testimony and the other matters, and I hear the evidence, see the witnesses, take a look at attitudes and demeanors during the trial, and form impressions which -- so you set that aside.

MR. JOHNSON: Sure.

THE COURT: Sending a buckle of boys? You know, totally unnecessary, even if you're doing it in a fit of heat. It's -- you're communicating with a representing party. You have this unique interest because you are a 40 percent owner, but it's not good. It's not good.

MR. JOHNSON: Well, I -- I understand, and that's where I would like to focus most of the remaining of my --

my remaining time, but I did want to point out though, that the confusion that I had in the Court's order based on the assumption that objective reasonableness is simply a factor of having made it through summary judgment on a disputed issue because that disputed issue then was referenced later in saying that Plaintiff -- and this is in -- in summarizing the decision and putting the factors together to decide, you know, whether a fee is warranted.

It says at the -- pardon me, your Honor, but he factors that count in Plaintiff's favor are that his case lacks frivolousness and that it survived summary judgment. Now, obviously surviving summary judgment is not a factor, but the objective reasonableness is, and the fact that it was based on that particular issue is important here because the factors in my favor being frivolousness and that it survived summary judgment and that the Court concludes that these considerations are insufficient to overcome the strength of the factors that count in Defendant Storix's favor.

I'm unable to interpret that in any way to say that my surviving summary judgment was given substantial weight because --

THE COURT: Oh, I clearly gave substantial weight to your --

MR. JOHNSON: Pardon?

THE COURT: I clearly gave substantial weight to the fact that it was not frivolous, that it was objectively reasonable, that it survived summary judgment. I clearly gave substantial weight to those factors.

MR. JOHNSON: Okay. And I won't argue --

THE COURT: But I thought that the other conduct for the limited period of time -- remember, I cut their fees substantially -- for that limited period of time warranted a fee shifting.

MR. JOHNSON: And I understand and can appreciate that as well, but then I would want -- you know, want to then address the issues that the Court found that outweighed the objective reasonableness of my case while adding to those factors those that also the Ninth Circuit found to have weighed in my favor, which is the fact that I am pro se.

THE COURT: Pro se, though, that's sort of a misnomer in this case because you weren't pro se during the time of the trial or on post-trial other than the brief period of time when you were trying to fire your lawyer during the trial.

MR. JOHNSON: But the post-trial motions were two and a half years ago, and while counsel represents that I, you know, was only pro se for a short period of time, you know, and also implies that I had difficulty getting along

with my attorneys, I assure you that really wasn't the case. But he also indicates that my -- that I became pro se only after the reply to the Ninth Circuit's appeal. But, in fact, I wrote the reply to the -- the Ninth Circuit --

THE COURT: But, nevertheless, they were counsel of record, and you didn't substitute out.

MR. JOHNSON: No, they were substituted out, but I was using a limited scope attorney who simply reviewed my reply and submitted it on my behalf.

THE COURT: This is a technical matter. On the brief, who was -- who was counsel? Were you counsel or were they counsel?

MR. JOHNSON: Mintz Levin was counsel for writing the brief and withdrew immediately after.

THE COURT: So --

MR. JOHNSON: But that was --

THE COURT: But for the period of time that I ordered fees, how is it reasonable to say you're pro se when you weren't pro se when I ordered -- for the period that I ordered fees?

MR. JOHNSON: Well, I think that because the issue has been remanded to this Court for reconsideration, the -- they -- the Ninth Circuit noted not only that I'm pro se but I'm now pro se. So I believe the fair implication there is that we should, you know, review the -- review the issues

under the current circumstances.

THE COURT: I'm just not aware that that's the test that the Court uses for an award of reasonable attorneys' fees during the period of time that the Court is making the determination about what is reasonable. Let's just say -- okay. Your -- your financial circumstance has worsened since the time of the litigation. Is that a fair statement?

MR. JOHNSON: Yes. I think that circumstances that led to that are also relevant to this, today's case.

THE COURT: And so you think that I should either not award any or make it minimal?

MR. JOHNSON: Well, most certainly, but there -- there are reasons that favor the first, that go beyond simply the dollar amount. I would want to point out first of all that I want to address what you referred to as the "Buckle up boys" email, okay. And, in fact, I would be happy to read some passages because counsel did submit that as part of the evidence.

The Court decided that at trial none of the State Court litigation was to be mentioned and that none of the issues related to the State Court be mentioned. It did, however, permit one paragraph of that "Buckle up boys" email which was a result -- a direct result and response to the State Court litigation, and that one paragraph was one that

contained the one and only one F word that this Court has seen, and used in a context that, by the way, is now acceptable on Prime Time television. I understand that --

THE COURT: Not usually acceptable in litigation.

MR. JOHNSON: Well, it might -- certainly may not be acceptable in litigation. I certainly wouldn't use it in court or in a briefing.

THE COURT: But that one paragraph directly addressed the copyright case.

MR. JOHNSON: I believe it mentioned the copyright case, but the --

THE COURT: That's the point.

MR. JOHNSON: But the email also referenced the State Court case that they brought about me and that this was -- the email was in response to that, not the copyright case. In fact, I don't believe there's any reference to the copyright case that's merits -- well, maybe it's merits, but the point, you know, of that particular email was -- was -- you know, had absolutely nothing to do with the copyright litigation, but because that one sentence was -- sorry, that one paragraph, actually two sentences were extracted from that and given to the jury, those were obviously very damaging to me and my credibility because they were obviously inflammatory. Much of it was inflammatory, but I would like to remind the -- the Court of what the

circumstances were that led to this email, which was not intended in any way to be related or anywhere within the scope of this litigation.

THE COURT: But it says in -- I mean, this may be your intent, but the actual wording says "The damages I will be granted in the copyright case will transfer from the company to you," Y-O-U in capital letters -- in the same sentence as "Get the F out." Not the same sentence, in the same paragraph.

MR. JOHNSON: Sure.

THE COURT: I misspoke.

MR. JOHNSON: You know, which actually, you know, illustrates another point, that at this point I had absolutely every reason to believe that I was the owner of the copyright and made that clear throughout the email and that that -- and, in fact, it made clear that I was 100 percent certain that the Court was going to at least acknowledge that particular issue at MSJ. I understand that I was wrong, but I -- I certainly had considerable confidence in that, and it's dictated throughout the email, but other things that -- that certainly negate what has been construed as this threatening email, well, it simply says, you know, for instance, in the fourth paragraph down it says:

"There's no point in waiting any

longer for you to completely ruin the company before your actions are brought to light. You know, you'll now be personally responsible for all the damages you've done to the company," not to me, to the company.

"I never wanted to hurt the company or the innocent employees whose lives you've risked in this needless attack."

And I indicate here that my intent if they don't stop this -- and by this I'm referring to now instigating state litigation, you know, just as the copyright litigation is about to finally end. You know, and, you know, it indicates that I'm going to file a shareholder derivative action on behalf of the company and for which only the company is to receive any benefit.

How could I possibly? And I maintained that throughout trial, despite Storix's counsel having spent three years trying to defeat it and eventually did.

I would point out also that in document -- you know, docket 46-1, which was counsel's claim for injunctive relief, at page four, line 16, this is a statement that's been repeated, you know, in this court and approximately 15 times in State Court, that, you know, it mentions my plan to file a derivative action against Storix.

I'm sure the Court understands that a shareholder derivative action is not against the company. It is against those who are harming the company's interest and, therefore, the shareholder's interest.

THE COURT: And I haven't -- in making an award of reasonable attorneys' fees in this, I have not included anything concerning the derivative action.

MR. JOHNSON: And I understand that, but my point here is that the derivative action is absolute evidence, particularly that I maintained it at my own cost for the benefit of the company, that I never had any desire to harm the company.

Now, Storix's counsel will point to a single sentence in the email that I proposed sending to Storix's customers that, you know, told them that they may be in possession of unauthorized and infringing copies and -- and suggested that they not purchase any more software, but the implication there in the full context of the email was that I fully expected that my ownership would be confirmed at the end of the month, which was three weeks away, at which time I would be able to finally release the updates the customers very much needed.

THE COURT: Why couldn't you wait three weeks?

MR. JOHNSON: Because if I waited three weeks, then -- my belief then was that they would continue to fight

over the work for hire and equitable issues, and I simply wanted to try to encourage -- my implication was that I wanted to encourage customers, not many, one or two -- that's all I was looking for -- to let them know that because they have not improved the software by this time in two and a half years, and I'm sitting here with two years of work I've done myself and at my own cost. They just wouldn't le met me release them.

THE COURT: So did that email -- you say it's a proposed email, but did it go out to at least one customer?

MR. JOHNSON: It went out to apparently at least one customer. I didn't know if it would get to a customer or not, but the interesting thing is -- and this is very important because counsel also mentioned their success in their claims against me, and I would like to point out, first of all, this is a threat to send an email, and the email that I threatened to send was not, in fact, the one that I did but one that was much more tapered down, even though I fully admit that it could have been worded better. However --

THE COURT: Or you could have just waited until -- if you were righteous and were going to win your case, wait until you won your case. You can't then just send out information and then not have the Court consider that when I'm making an award of attorneys' fees about whether that

conduct is appropriate or not.

MR. JOHNSON: And this is what I want to draw attention back to the circumstances at this time, and we'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, but, nevertheless, it's important to understand and I've tried to make this point before, that not long prior to this situation -- now, I had been completely quiet and patient for an entire year of this litigation, but they cut off my shareholder distributions knowing quite well that that was my only income, and even at this trial we've provided one of the text messages from Storix's CEO saying that they were going to cut off distributions in order to send me a message.

I then saw a financial report that showed that Storix had now recognized its first loss in its history, and that was because they simply weren't updating the software, and it was becoming obsolete, and I was so desperate to prevent that from happening.

Then there was the -- you know, a negotiation over having a settlement conference and this being the mandatory settlement conference, which by this time I already had to move to Florida because I was forced to sell my home in San

Diego in order to afford the cost of this litigation. Fortunately, I was able to move to Florida and purchase a home at about a third of the price, knowing quite well that if they were to bankrupt me throughout this, at least in the State of Texas, I would be able to keep my primary residence.

THE COURT: In the State of Texas or in the State of Florida?

MR. JOHNSON: I'm sorry. I lived in Texas before California. I meant to say Florida. Sorry. And so --

THE COURT: So that was your -- that was a strategy to protect your assets?

MR. JOHNSON: Well, it certainly was a strategy to try to keep something because there was no doubt that every effort was being made to just completely destroy me entirely, okay, and there's certainly nothing wrong with trying to, you know, establish residence in a place where you might not be homeless should that happen.

Nevertheless, I flew from -- from Florida to California for the mandatory settlement conference in which I was not given a chance to speak to anyone and there was no negotiation. I couldn't even understand why I was brought here, until I went home and shortly after getting home, I was served a summons that was a lawsuit filed three hours before the conference began.

THE COURT: So that's why you were very upset?

MR. JOHNSON: I was -- you know, I had held it in for years.

THE COURT: But so when you're very upset, what you should do is call your lawyer and say "I'm very upset. What should I do," and your lawyer would instruct you, "I'll take care of it. We're going to trial. Here's your best case at trial. Don't do anything negative."

MR. JOHNSON: Well, actually, you may not want to hear this, but my attorney's advice was that because we had fully established my ownership, the expert report was just absolutely, you know, indisputable that I have every right to tell Storix's customers that I'm the owner of the copyright.

I did not do that. I held off for about a month, but many other similar things were going on that was -- that simply seemed to be harassing me to an extent that, yes, I -- at this point -- and I'll try to be brief. I was at a point where I needed -- you know, I had threatened the derivative action against them before for things that they were doing against the company and against the share value and so forth, and they obviously didn't take it seriously. It was time to make it serious, and I made it serious in very strong words, but their response to that, of course, was to file the restraining order followed by an injunction

and -- and so forth, and that's when I --

THE COURT: Well, you did send this proposed email to them, right?

MR. JOHNSON: I -- I sent an email that I proposed to send to customers to them, but it wasn't --

THE COURT: Right, which was pretty strong.

MR. JOHNSON: -- the one that I did.

THE COURT: But it was pretty strong.

MR. JOHNSON: Yes, but what I do want to point out is that I -- they had maintained for three years in State Court that I sent this email to all of Storix's customers. In fact, I extracted a few email addresses, and I don't know if it was 20 or 30, you know, or so, to put into an email which I knew would end up in their spam folders, but I was hoping that just one or two would see it. That's all.

THE COURT: So you do agree that it was an attempt to about 20 or 30 but maybe only about one or two got it or something like that?

MR. JOHNSON: No. It was an attempt to reach one or two, and I knew that it would take 20 or 30 for one or two to reach them. That was the point. Okay. They claim that I sent it to all of Storix's 2,000 or more customers and all of its business partners, and it's simply not true.

What did happen, however, is that Mr. Hoffman go word that this email had been sent to someone, and I did, in

fact, copy all of them on it, but as they also said, it went into their spam folder. So they didn't see it right away.

Mr. Hoffman immediately sent out a notice to all of Storix's customers and business partners informing them of the copyright dispute and telling them to ignore my email, but they hadn't gotten it.

THE COURT: Of course, you could understand their frame of mind that if they had a proposed one, you hadn't said affirmatively "I'm not sending this one. I'm sending this one other one." They would put two and two together and maybe erroneously come to a conclusion that you had sent it out to everybody. And certainly on an injunctive I'm not going to restrain speech.

MR. JOHNSON: Certainly, and I -- and I --

THE COURT: But that doesn't mean -- by saying that I'm not going to issue an injunction, it doesn't mean that there might not be consequences.

MR. JOHNSON: I'm aware of that, and I don't dispute that. And -- and certainly in hindsight, this wasn't the best of ideas, but it wasn't intended to do any damage. In fact, if -- if the Court had confirmed my ownership at the MSJ, it would have served the very purpose that it intended to, because it would have at least notified them that one or two customers are saying "Why aren't you giving -- giving us these improvements to the software after

all this time," and their response could only be "Well, because we want to keep litigating over the issue."

Now, was it a good strategy? No. Was it intended to do harm to the company? No. But I -- I admit it wasn't the best of ideas. But what is important to note here -- and this goes back to opposing counsel's statement that, you know, they prevailed in their claim against me on breach of fiduciary duty. They were suing me in State Court for $1.3 million in damages not related to the email but related to what they have now for three and a half years claimed and even stated today that I am operating a company in competition with Storix. Okay. I'll get to that in a moment, but going back to the issue of this email, they -- they were well aware that that claim was not going to -- to be successful, and in closing arguments, the informed the jury that basically any damage done to the company would consider the breach of fiduciary duty and claim $3,700 in damages which they said were related to what they referred to as the fallout of Johnson's email, not -- not because customers were calling about my email or emailing about my email, but because Mr. Huffman sent this email out in response and those customers were calling and emailing about his response, not mine.

They had three years to provide any evidence of any customer that actually was -- that wanted -- was

discussing my email. But, instead, if you look at document 66-1 -- and this is an old document related to an injunction, but they referred to it and they spoke -- the second injunction and -- in both the first and second here injunctees, and they've had nothing more to add to this.

This document contains one email that is amazingly ambiguous, and this is part of Mr. Huffman's declaration where he says that, you know, he -- that he was contacted by a customer after he received a copy of my email and forwarded it to Storix employee Brian Bonard. If you look at the actual email itself, though, there's no indication that this was sent to -- well, if it was sent from Mr. Huffman to Brian Bonard, he blacked out Mr. Huffman's name, and it simply says see this email, but then when you look at the email that it's referring to, it has nothing whatsoever to do with my email. There's just absolutely nothing in here to indicate that this has anything to do with my email other than that there's -- you know, it was on the same date. I mean, they're talking about, you know, the customer's satisfaction with their software license and so forth. This is not evidence in any way.

On the very next email -- and, in fact, it shows that there's no -- I mean, there's nothing in the email to indicate that there's even an attachment to it, and there usually is. I haven't seen an email that doesn't.

Then in another email -- I'm going to page 19 of 66-1 -- this is where -- this is the only other -- the only other thing in three years that they've provided which they claim is evidence of harm I did to the company by this email. But if you look at it, this is a customer that is actually responding to David Huffman's email because he attached David Huffman's email to it, not mine.

My point here is that Storix secured a $3,700 award against me in State Court based on their claim that the company had to spend 60 to 80 hours responding to not my email but the result of the fallback of my email, and for that, they -- they got nothing for their $1.3 million claim which the jury completely dismissed because there is no competing company. There was never a competing company. There was no business. There -- and the claim was for unjust enrichment. They've always known that there was never a competing business.

I even proved to the jury using the same evidence that they have picked and chosen sentences out of, you know, even here in this court that actually a friend of mine suggests that I do so, and I expressly reject the idea, partly, in fact, that -- and I stated if I did so, they would only come after me.

THE COURT: Why did the jury make an award for them?

MR. JOHNSON: The jury made award for them because in closing arguments they were instructed that, you know, if there was any -- any action taken on my part, not as a director but while serving as a director, that resulted in any amount of harm to the company, then that was a breach of fiduciary duty. And, again, we're talking about that it resulted in harm or, as they keep saying, resulted in fall-out that caused harm.

THE COURT: So you're saying the Court's determination of litigation misconduct or improper motivation was erroneous?

MR. JOHNSON: I'm saying that -- and I -- and I tried to make this point, and I certainly don't fault the Court for this because that is only one of many examples in which a single sentence that I stated, all of which was outside the context of the copyright case and the copyright litigation, but --

THE COURT: I don't --

MR. JOHNSON: -- you know, I mean -- and you're welcome to draw, you know, any of the sentences, and I -- and I can show you not only the context but why it's clearly missing from that.

THE COURT: All right. So at least on the "Buckle up boys" it specifically references the copyright case. So I think that the Court is free to take that into

consideration.

MR. JOHNSON: Well, the fact that it mentions the copyright cases is one thing, but it mentions it only -- only to the extent that, you know, I believe I'm going to win this in three weeks, and, therefore, I want to put a stop to this before it continues beyond that point. That was the point of the email, and I fully admit it was poorly worded. But, again, there's no evidence that any customer actually saw it. I believe one might have only because David responded, you know, in the way that the did, but they've had three years, and even in State Court, even at the state trial, they didn't even produce this evidence. Thy produced no evidence of any response by any customer to this email. So I say that only because that email was so incredibly damaging to me and this Court on the grounds that I tried to destroy Storix.

Two things. One, it certainly was not trying to destroy Storix, and I did every -- made every effort to ensure that, you know, it would cause minimal damage, if any.

Secondly, I -- you know, my response to their direct lawsuit against me with the frivolous claims that I'm operating a competing business, which they were never, after three years all the way to trial, unable to -- to show any evidence of, my response was not -- was to file a

shareholder derivative suit on behalf of the company to try to save the company from this waste and mismanagement, and I paid for that myself on behalf of the company. Is that not evidence that I was not trying to destroy the company?

THE COURT: Is it -- not that you're trying to destroy the company but that you can't accept that they're management and that you're a minority owner and that you just want to see things differently than they do? And you strongly disagree with their management of the company?

MR. JOHNSON: Well, clearly because their management of the company is and has destroyed the company, and I'm a 40 percent shareholder whose entire income is dependent on the success of the company. They have no evidence that showed that I ever wanted to take over the company. I only wanted to manage the software development so I could get it back on track, and at no point have I ever said I want to run the company, and there's massive evidence also found in what opposing counsel has provided that says I don't want to do that. I just want to get this company to stop neglecting its only product.

THE COURT: So what amount of attorneys' fees do you advocate the Court should grant?

MR. JOHNSON: I advocate that zero is also an amount. If -- if it -- it must be an amount, I would much rather the Court be able to take what I believe the intent

was, which was to really reconsider perhaps in entirety but without having to necessarily dispute all of the issues in full because, you know, I can -- I can give you more examples of -- you know, and each of the factors that this Court's found to have contributed to an award for attorney fees, every single one of them was based on partial statements with single sentences and three-page emails that were completely taken out of context, and -- and most of them were influenced by this persistent claim that I'm trying to destroy the company, and -- and I understand that this Court and all the State courts were influenced by that fact because it was pushed so hard. In fact, you know, I actually started keeping track of the number of times I was accused of competing with the company up until this Court's ruling on the fee in which I effectively stopped at that point. There were 91 times in which Storix's counsel, you know, provided pleadings to the Court stating that I was in a competing business, and I -- I will refer to those provided to this Court, and, you know, stop me anywhere, but it says that, you know, I was using a copy of Storix software for sale by a newly formed company, that I rebranded a version of Storix software in order to compete directly with Storix, I had a scheme to compete. My -- well, he talks also about threatened competition, but interestingly, he says that I admitted my intent to use

materials of the company in competition with the company and that I -- now, this is very important because this is something that has been repeated so much that I -- you know, once it gets out of control and starts getting into this Court's order and that Court's order, there's simply no stopping it.

In one of the pieces of evidence, and -- and this is where I -- the one piece of evidence that they added in the fee hearing that took place after the trial was a letter that I wrote to an employee, Brian Bonard, at the company.

THE COURT: The one that said destroy it after?

MR. JOHNSON: This is very interesting because they refer to this as being an email saying that I'm trying to destroy the company, and I would most --

THE COURT: No, no, no. I'm talking about --

MR. JOHNSON: Yeah, destroy the email. I'm sorry.

THE COURT: -- destroy the email. That's --

MR. JOHNSON: Well, look at the context of the sentence there because, again, you're looking at partial sentences. They're always cut off. They're always excluded from any surrounding context. In this email by -- it uses the words "I have been working on the software at home. I have a marketable product and you don't," and at the end of the email, it says "Delete" -- it says "Delete this." Okay. Let me read for you the sentences that those are contained

within, okay, and perhaps some surrounding context.

Keeping in mind that this is a salesman of the company whose income is dependent upon the sales of the product. "I believe the feeling" --

THE COURT: Just --

MR. JOHNSON: Okay.

THE COURT: Did he testify at trial or not?

MR. JOHNSON: He didn't in the copyright but in the state trial.

THE COURT: Okay. So I have not seen him?

MR. JOHNSON: You have not seen him.

THE COURT: Okay.

MR. JOHNSON: But you've certainly seen this email, although it was excluded from trial. Actually, I'm sorry, this was after trial. This was the one that was after trial.

It says here:

> "Know that everything I've done has been to try to save the company."

I say:

> "I'm contacting you to let you know that the -- that you and the other innocent employees are about to lose your job because the company is nearly out of cash and over half million

dollars in debt. I will fight to protect them from laying anyone off. I have no desire to run the company, but I can and will produce a product that will get the company back to what it was when I was in charge. I'm still working on the software. I'm" -- I'm sorry. "I've still been working on the software for two years now. I have a marketable product, and you don't. They tell you they own the copyright to the software, but they don't."

And this is preceded by --

THE COURT: That's the bad --

MR. JOHNSON: -- numerous, numerous --

THE COURT: That's sort of a bad fact.

MR. JOHNSON: It's -- well, this is --

THE COURT: Not sort of. That's a bad fact.

MR. JOHNSON: I wanted to bring that into this because it was certainly something that appeared to infuriate the Court.

THE COURT: Not infuriate. I actually -- I'm -- I'm sympathetic to you. I let you go to trial. I think it's a sad story. I've said before I think this is a toxic relationship with you and the company, and yet you're still

a 40 percent owner, and then I see there's this litigation and this -- but that's our litigation system. So I have to make a determination, which I did at the time, and now the Ninth Circuit calls upon me to make it again to take another look at this. Well, I'm taking another look at this. I'm still sympathetic to you. I'm sympathetic to them. I'm a judge. I'm neutral. I see both sides. I see that your arguments, you're not totally off base. I see his arguments. You're advocates. I'm the neutral. I said -- remember we had a mediator who was Magistrate Judge Dembin who worked at Microsoft, so I thought he would be the best person to kind of understand and be able to bring the parties together, because it's not just -- this is one piece of a broader piece of life. So I'm not against you. I'm not against them. I'm just trying to apply the law.

MR. JOHNSON: And hopefully I didn't imply that I thought that you were, but what I'm trying to -- to illustrate here is that so many very small sentences out of great contexts have been taken so far out of context and repeatedly, persistently, and angrily by the other side for so long that it certainly is not unreasonable that one might enter into any -- any situation with the idea that I am the despicable, hateful, despiteful criminal trying to -- trying to destroy the company that they have persistently claimed me to be. Now --

THE COURT: I don't take it that way. I --

MR. JOHNSON: I have to --

THE COURT: -- don't take it that way.

MR. JOHNSON: Well, I guess -- I would just have to say it wasn't -- it wasn't apparent in your order that you didn't take it that way, okay. And maybe that's why, you know, it might seem that I'm being, you know, a little, you know, overly sensitive to this issue, because I have to admit, your Honor, I was mortified by your order, not because fees were granted but because of the things that were said about me and the things that were said about me in virtually every instance was based on what I'm explaining to you now.

THE COURT: You say it's incomplete, and that's where I say managing litigation the Court has many many years of experience. I evaluate the case based on the impressions that I get, based on the information that I have, and you're saying in your view you think it's taken out of context. I think a fair reading could be the other way, which I've tried to explain.

MR. JOHNSON: Well, this particular --

THE COURT: Not that you're trying to destroy the company but that you really want the company and you don't want them to have the company.

MR. JOHNSON: It's not about who owns the company

and who doesn't. It's trying to end the litigation before the company is destroyed and somehow get the company back to business. Now, certainly there's conflicts between individuals, and I don't want to really get into that. My -- but in this particular case, I wanted to point out that that is the one sentence -- when I said they tell you they own the copyright but they don't, this Court was very correct when it recited that very sentence by substituting the word "they" with Storix management, because that was the point I was making.

They are not Storix. I am a 40 percent shareholder and have twice the shares in the company than anyone else, but I have never in any context been referred to as Storix in any way throughout this or the state litigation. So I'm -- you know, I refrain from even talking about Storix but refer to either Storix counsel or Storix management and so forth because I have no beef with Storix. I never have.

THE COURT: You love Storix. It's your baby.

MR. JOHNSON: Well, you know, it certainly, you know, hasn't gained a lot of favor in my -- here lately, but it used to be something I was very proud of.

My point here is that this email has been repeatedly used to say that I am trying to destroy the company when every reference in here says, you know, I've

been fighting to keep the company from bankruptcy. I will fight to protect your jobs but only if you let me know what's happening so I still have time to do something about it. This has been translated to Mr. Johnson communicated with an employee of the company where he threatened the employee with the use of his job if he didn't act as his mole. And that -- that statement was made about 30 times. And, you know -- and --

THE COURT: They're allowed to take evidence on its face and then make reasonable interpretations from the evidence, and you're allowed to then dispute that, and then the Court has to ultimately -- I think we have to bring the matter to a close --

MR. JOHNSON: Sure.

THE COURT: -- because I've got another matter here -- before my 1:00 o'clock meeting. So do you want to wrap up?

MR. JOHNSON: I will do my best. If I can just touch on a couple of things because, first of all, the important thing here and the reason that I am so desperate to finally try to set the record straight is that I've never had a chance to do so before. Now, I understand that my attorneys might have had a chance to do so before, but these emails were first introduced in the TRO in 2015, then in the first injunction, again in the second attempt of injunction

during the first fee motion in February of 2016. And the Court -- you know, the Court specifically stated at the hearing when looking at this evidence that, one, it was irrelevant to fees and, secondly, that it was not relevant to this case. Those were the only references when counsel tried to introduce them in the -- during -- I'm sorry -- during the fee hearing. Those are the only references to motivation for deterrence.

So, naturally, six months later, when we had the second fee hearing, it was quite a surprise to my attorney when all of -- when these three emails that had happened years ago suddenly became the factors contributing to my -- what was now labeled litigation misconduct and motivation in bringing the case in the first place, and he wasn't obviously able to respond to that properly and nor was I because these were excluded from trial. But they are extreme --

THE COURT: Excluding from trial and having -- so like the typical litigation misconduct happens in either discovery abuse or other things. It has nothing to do -- it doesn't have to do with trial evidence necessarily. So the fact that it wouldn't be admissible in trial doesn't necessarily mean that it couldn't be a factor the Court considers after taking a look at the entirety of the record. And I would just ask you to read Kirksang again and see the

broad view that Justice Kagan gives to those matters as well. Something that could be neutral at one time then later on retrospect could become more relevant in the broad scope of the issue that the Court is deciding at that time.

MR. JOHNSON: And I assure you that I am well aware of Kirksang and have spent a great deal of time reviewing Kirksang, but Kirksang also defines -- well, I would point out, first of all, that counsel seems to have, you know, omitted from their statement of the issues to be reviewed the motivation issue, and I believe that that was, you know, conspicuously absent because the underlying issues were disproven in state trial, primarily, you know, my having made such great attempts to destroy the company.

But, you know, he also -- but he did, however, mention that the -- that this fee award, what was -- revolved primarily around the issue of need for deterrence, and this is where I guess I take the most issue in relation to the Kirksang ruling because -- and I'm sorry for -- I just needed a moment here to find it. When -- when it -- when it describes the need for deterrence, it says that a court may order fee shifting because of a -- I'm sorry -- a party's litigation misconduct and also that a court may deter repeated instances of copyright infringement or over-aggressions, over-aggressive assertions of copyright claims, and Storix has never cited a case, never cited a case in

which an award was against an objectively reasonable party in which those factors were not absent -- I'm sorry -- in which those factors were absent.

THE COURT: Of course, Kirksang only came out at point A, and then so the case law has to then evolve, but it's basically the same as other -- even though it comes from a different statutory framework, it's very similar to other attorneys' fees awards in intellectual property cases, although from a different point of view, and we use the Fougherty and Kirksang factors, but it does ultimately come down to the Court to decide what's fair and reasonable under the circumstances.

So, in conclusion, what do you say, and then I'll let Storix respond?

MR. JOHNSON: Well, in conclusion, the objection reasonableness of my case would take into account that there has never been a transfer of copyright ownership without a written agreement and never with a -- with a statement in a document that wasn't in agreement which was the -- which I guess was a -- a -- which pointed to an oral agreement. This -- this is a first, okay. And I'm not disputing the Court's ruling. And, believe me, I accepted the Court's ruling, and I have never in any way, shape or form, you know, dismissed the ruling. I've never contravened the ruling. I've never taken action, you know, against the

ruling. I've never stated that Storix should not own the software. Nor did I ever state that I did, and I want to make that clear because it's -- that's another thing that appears 62 times in opposing counsel's pleadings.

But I also want to state the fact that throughout the copyright trial, Storix has never actually cited a case that supported their arguments. If you read the case, you find that it absolutely makes the opposite, and I won't go into detail from that because I'm not disputing the ruling, but we're here to dispute a fee award, and Storix has yet to cite any case, and I'm talking post-Kirksang here, in which every case refers to the Kirksang ruling as the presiding -- presiding law. They went into great detail, and, in fact, there are 52 case references in their briefs. I took those that they specifically compared to this case, and in every single one of them, those cases involve extremely unreasonable cases, meritless claims, vexatious litigants and very significant litigation misconduct, and yet every single one of them still resulted in an attorney fee award that was roughly one-fourth of what was awarded to me as the only objectively reasonable party to date that has had an award against him.

I cited every single one of the cases that they cited and showed the actual ruling, that it -- you know, that there was certainly an award, but it was because of

their massive litigation misconduct and objective unreasonableness.

There is no case that supports a fee award in this case, and, you know, their closest cases that, you know, they relate -- that they -- that they refer to as in connection with the copyright action, they were denied fees for the copyright claims and simply awarded fees, you know, for other patent-related claims.

It is this kind of, you know, misleading information that is usually put in -- that is so widespread and so much of it that quite frankly, it's easy to overlook and easy to, you know, forget to do any fact checking. I certainly don't expect the Court to do it. I wish my attorneys had done it a bit more.

THE COURT: You're suing them.

MR. JOHNSON: No, I'm not. No, we've --

THE COURT: You withdraw that?

MR. JOHNSON: No, we --

THE COURT: You did sue them.

MR. JOHNSON: I filed a suit against them, you know, by -- it resulted in immediate settlement and we were not only -- we already settled but no hard feelings between us, and, in fact, that same attorney after that time actually provided a declaration in support of this fee hearing today.

THE COURT: All right. Thank you --

MR. JOHNSON: So that --

THE COURT: I think we need to wrap up.

MR. JOHNSON: Okay. So I thank you for my time. I know that I took a great deal, but there are a lot of issues to discuss here. If I could just conclude by saying that I hope that the Court will take into consideration the intent of the Ninth Circuit in reviewing this case, and I hope that -- I'm sorry -- the fee award. I hope that it would do so in its entirety, you know, or particularly in light of the fact that the Ninth Circuit asked them to add factors that actually weigh in my favor, and those factors cannot be added to my favor without also comparing them then with the substantial weight given to the objective reasonableness.

So I thank you very much for the --

THE COURT: Thank you.

MR. JOHNSON: -- the Court's time.

THE COURT: Counsel?

MR. TYRELL: Your Honor, I'll contain mine to less than one minute I hope.

The Ninth Circuit ruled that you did not abuse your discretion in choosing to award fees to Storix. Almost everything Mr. Johnson just argued, most of which was unsubstantiated recitations of what happened in other

courts, almost everything he just said ignores the fact that this Court's exercising discretion in deciding to award fees has been upheld. The only issue is the reasonableness of the fees. Zero is not reasonable.

You went to great lengths to determine reasonable fees before, and we think that that same rational supports minimal, if any, adjustment from that point. And with respect to Mr. Johnson's argument about what should be deterred, I won't go point by point, but I will remind you -- and you summarized this well at pages 11 and 12 of your fee ruling. Again, you can't parse these individual emails with the totality of the circumstances as you're well aware. Mr. Johnson is trying to exert external pressure on the company and its management team by threatening them -- threatening with the loss of their homes and at the same time trying o starve the company of it income by disrupting its relationship with customers, all to -- to collaterally attack rather than fight this case in litigation on its merits and take his chances in court as he should, and he ultimately lost, and I think he knew he would as the case went on, which is why the collateral attacks happened in the first place. Deterrence is appropriate. A man which boasts of well over $2,000,000 in assets when trying to avoid a bond can't then turn around and say that an award of zero will be sufficient deterrence.

Your Honor, your original award was correct. It's regrettable that the Ninth Circuit didn't have a better record when it made its determination, but we think you can respect the Ninth Circuit while only making a minimal adjustment, and we appreciate your time and presentation, your Honor. Thank you.

THE COURT: Thank you.

And I said that you could have some reply. In light of his brief reply, any brief reply on your side?

MR. JOHNSON: Of course, in response only to his statements here. he did say that the Court didn't abuse its discretion in choosing to award fees, but even in his opposition, he noted that this Court, you know, has discretion to reconsider a number of factors, including those that the Ninth Circuit Court ordered, and he added himself the deterrence factor but, interestingly, not the motivation factor. I just wanted to point out again that all of those factors as determined by Kirksang are for the purpose of deciding whether or not to award fees.

When he talks of the totality of the circumstances, this is where I'm trying to draw the Court's attention, you know, to the -- one anger-fueled email that happened three years ago that they've never shown any harm from, okay, but it was certainly -- I'm not going to say warranted, but it was certainly instigated by pressure that,

you know, had built up over quite a bit of time.

My threatening, this is something the Court noted several times, that I threatened them with the loss of their homes, but I guess I would ask the Court to actually look at the -- the actual statements regarding homes, and informing them that, you know, let's get out -- let's get everyone out of this before you end up losing your homes was effectively the statement, but they had already taken my home. I -- you know, a beautiful home in San Diego that I loved dearly that I had to sell because of this. So, you know, if nothing else, that should be a wash.

The deterrence factors, I'd just simply like to ask the Court to -- to review what factors that it found needed deterrence and ask the Court if it really feels that those factors really needed to be deterred, particularly in hindsight seeing that there has been no activity in two and a half years.

THE COURT: Maybe the award worked.

MR. JOHNSON: Pardon me?

THE COURT: Maybe the award worked.

MR. JOHNSON: Well, they were -- well, the activity was deterred virtually a year -- year and a half before the award was granted. So the -- the question then is is an -- you know, we -- this is something I'm sorry that, you know, it wasn't discussed before and I'm not going

to try to bring up new issues, but what is important is that any award of fees must promote the primary goals of the Copyright Act.

THE COURT: That's in your brief.

MR. JOHNSON: It is. And I guess I would like to ask the Court to consider if an award in this case might possibly be -- you know, might possibly discourage other authors from trying to protect their works out of fear that anything that they say or do, whether within or without the scope of litigation, might end up awarding -- you know, in the course of potentially years might end up being an award of attorney fees.

This is -- that's where the fairness comes -- not only the fairness comes in but whether this is a good idea based on its implication to other authors and simply their fear of being double punished if they lose their case.

THE COURT: I think the case law is quite clear it's not just solely plaintiffs get fees, defendants can also get fees if the Court makes a proper award, and the Court of Appeals did it.

So I think I'll submit the case.

MR. JOHNSON: Okay.

THE COURT: Anything in conclusion?

MR. JOHNSON: May I just ask for one quick point?

THE COURT: You may.

MR. JOHNSON: The bond that he refers to and the statements of my wealth, okay, that was more than two years ago, first of all. I think the Court's well aware that there's been a lot of expense since then, and I have to say my attorney was also relying on some older information.

That -- I had to sell my house in Florida in order to post that bond, and I have since been living with my brother rent free in Las Vegas. If there is -- you know, if this is to be an equitable case or if it was --

THE COURT: But the bond -- the bond issue was appealed to the Ninth Circuit, and the Ninth Circuit affirmed the bond.

MR. JOHNSON: They did. They did. I don't dispute the bond, okay, but, you know, making issue of the bond and my -- and former statements of my attorney that I could afford it and, you know, with the implication that I am not in any financial trouble here, that's simply not the case, and, you know, I -- I certainly hope that no author who, you know, is in a position where they need to protect their rights or anyone using software that is, you know, in a position where they might be sued for infringement would view this case and see, you know, how -- how -- what the consequences could be. It's just not helpful. It simply doesn't serve the purpose of the copyright, and that is the over -- that is the overriding factor according to Kirksang,

and if decided on that issue, then none of the other factors are relevant.

THE COURT: All right.

MR. JOHNSON: Thank you.

THE COURT: Thank you very much. The matter is submitted.

MR. TYRELL: Thank you, your Honor.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Jordan Keilty — 9/14/18
Transcriber — Date

FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

/s/L.L. Francisco
L.L. Francisco, President
Echo Reporting, Inc.