No. 16-55439

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY JOHNSON,
Plaintiff-Appellant,

v.

STORIX, INC., a California corporation,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
DOCKET NO. 3:14-CV-01873-H-BLM
THE HONORABLE MARILYN L. HUFF, DISTRICT JUDGE

APPELLEE'S OPPOSITION TO MOTION FOR STAY OF EXECUTION OF THE ATTORNEYS' FEE AWARD

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Storix, Inc. states that it is not a publicly traded company.

Respectfully submitted,

DATED: December 29, 2016

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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

STATEMENT OF RELATED CASES

There are no related cases of which Defendant-Appellee Storix, Inc. is aware that satisfy the Criteria listed in Ninth Circuit Local Rule 28-2.6.

Respectfully submitted,

DATED: December 29, 2016

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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

INTRODUCTION

Plaintiff/Appellant Anthony Johnson created this copyright infringement dispute when, after resigning his employment with Defendant/Appellee Storix, he demanded that Storix immediately cease and desist all use and sales of its flagship software product SBAdmin. He made that demand despite that: (1) when Storix was incorporated in 2003, Johnson transferred ownership of all pre-incorporation copyrights for SBAdmin to Storix; and (2) Johnson had, for more than 10 years, repeatedly represented that all copyrights to SBAdmin belonged to Storix. When the company refused to give in to his unreasonable demand, Johnson sued for copyright infringement. (Doc. 1) A unanimous jury rejected Johnson's claims. (Doc. 160) As stated by the district court, "Storix adduced overwhelming evidence demonstrating that the Annual Report did in fact memorialize Plaintiff Johnson's intent to transfer the copyright in SBAdmin." (Doc 256-2 at 8:7-8)

The district court subsequently awarded $543,704 in attorney fees and $11,414.64 in costs to Storix and entered an amended judgment accordingly. (Doc. 246) As noted by the district court, fees were warranted, in part, because "Johnson took a number of actions demonstrating that his motivation was not simply to win damages for alleged copyright." (Doc. 256-2, at 5:6-7.) "In this case, Plaintiff Johnson demonstrated that his motives were not merely to secure a copyright infringement judgment, but also to wrest control of the company from its majority

shareholders and to force the company to "close its doors." (Doc. 256-2 at 6:7-9.)

Consistent with his stop-at-nothing tactics, Johnson filed a motion to stay enforcement of the judgment pending appeal in the district court. The motion was deficient in every respect – no evidence, no financial information, not even a single declaration supporting the request. (Doc. 254) Nonetheless, the district court issued an order ("Bond Order") conditionally granting the motion to stay enforcement of the judgment pending appeal if Johnson posts a supersedeas bond in the amount of the full judgment—$555,118.64. (Doc. 256) This amount was far less than the $693,898.30 Storix believed was warranted. (Doc. 254 at 2).

Johnson now seeks an emergency stay urging that the decision of the district court was "arbitrary" and "unexplained." (Mot. p.5)[1] Yet, Johnson's motion for stay is arbitrary and unsupported. The stay request is based on nothing more than the desire not to "tie up assets" and represents a continuation of Johnson's vendetta against Storix in support of a meritless appeal. (Mot. p. 29) Johnson asks this Court to let him treat a final money judgment in favor of Storix as a nullity even though he has not disclosed his income, assets or any specifics at all about his ability to pay, offering only a conclusory, cursory and self-serving affidavit that says nothing meaningful to a judgment creditor (or to a court evaluating a stay request). Instead,

[1] In addition to being substantively without merit, Johnson procedurally has failed to comply with Circuit Rule 27-1(d) by filing a 30-page motion—10 pages over the limit. Johnson's motion should be denied on this ground alone.

he says he would have "difficulty liquidating my assets" and would have to put half-million dollars in a bank account that would no longer generate income.

Johnson's motion is not based on established irreparable harm, nor does he offer any assurance or proof that Storix's ability to collect would not be endangered absent a bond. Johnson simply does not want to pay the judgment or post a bond. He does not want any limitations placed on his ability to spend money exactly as he pleases, with no constraints on his spending no matter how lavish. He does not want any limitations placed on his ability to dissipate assets and offers no security to protect Storix from being prejudiced in its ability to collect the judgment. In short, Johnson does not want any of the obligations and responsibilities all other judgment debtors have, and instead wants to go on exactly as he could if the district court never entered a final money judgment against him.

As justification for this extraordinary relief, Johnson offers only the fact that he has filed an appeal from the judgment. He inaccurately claims the district court did not offer reasons for its order, ignoring all the reasons the district court gave in denying Johnson's motion for new trial and in granting in part and denying in part Storix's motion for attorney fees—orders that the district court attached to the Bond Order. Johnson's motion for stay to this Court is merely a re-hash of the same arguments considered and rejected by the district court.

The merit of Johnson's appeal is not a close call. The appeal follows a jury

trial and verdict that were well-supported. Johnson's arguments for reversal are patently meritless, and even if they were not, he should not be permitted to treat a money judgment as though it didn't exist just because he filed an appeal. The usual rule is that a judgment debtor must post a bond in order to obtain a stay of a money judgment. Courts depart from that rule only where the debtor makes a showing of unusual circumstances. As this Court is well-aware, Johnson's unsupported assertion that stays are "routinely" granted is false. No unusual circumstance justifies a stay without a bond. To the contrary, it would be a gross miscarriage of justice to grant Johnson a stay of execution without a bond.

I. STATEMENT OF FACTS

In August 2014, Johnson filed a complaint alleging copyright infringement of a software program. (Doc. 1) Storix filed an answer and counterclaim seeking a declaratory judgment that it did not infringe any copyright and that it owned copyrights in the software. (Doc. 5) Following a 5-day trial, the jury returned a unanimous verdict in favor of Storix. (Doc. 160) In its special verdict, the jury considered the question, "Has Storix, Inc. proved by a preponderance of the evidence that Anthony Johnson's copyright infringement claim against Storix, Inc. is barred because Anthony Johnson transferred ownership of all pre-incorporation copyrights, including SBAdmin Version 1.3, in writing from himself to Storix, Inc.?" (Doc. 160 at 2) The jury answered "Yes." (*Ibid.*)

Johnson filed a motion for new trial challenging the sufficiency of the evidence in support of this finding. (Doc. 176-1) He also argued whether a written transfer satisfies the Copyright Act is a question of law for the court rather than for the jury– an argument that directly contradicted his prior position that the writing in question was ambiguous and required a factual determination by the jury. (*Id*. at 8.) Finally, Johnson argued that the jury instructions regarding copyright transfer were incorrect, even though he never objected to them at or before trial. (*Id*. at 17-19.) Following a lengthy hearing, the district court issued a detailed order that analyzed and denied Johnson's arguments. (Doc. 256-1)

After the court entered judgment, Storix moved for its attorney fees and costs pursuant to the Copyright Act. (Doc. 165) The district court exercised its discretion and granted in part and denied in part the motion (Doc. 230), awarding $555,118.64 in fees and costs in favor of Storix. (Doc. 246) In so ruling, the district court gave substantial weight to the objective reasonableness of Johnson's claim in that Johnson defeated summary judgment by raising a triable issue as to his intent in transferring the copyright. (Doc 256-2, p.9) However, the district court ultimately found that various factors weighed in favor of an award. (Doc 256-2 at 5-13) Among other things, the district court noted that when confronted at trial with representations he had made to third parties confirming the copyrights had been transferred from Johnson to Storix he testified: "Yeah, and I lied. I admit it. I

lied." (Doc 256-2 at 9, quoting Doc. No. 146, Trial Transcript Vol II at 203.)

II. ARGUMENT

A stay is an "intrusion into the ordinary processes of administration and judicial review," and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009)(cit. omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34 (cit. omitted). The factors that must be evaluated to determine whether the party seeking the stay has met its burden are:

> [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). A substantial showing on the first factor is essential – merely showing that the likelihood of success is "better than negligible" does not pass muster. *Nken*, 556 U.S. at 434. In addition, "simply showing some 'possibility of irreparable injury,' fails to satisfy the second factor." *Id*. at 434-35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). Johnson has not come close to satisfying his burdens.

A. The District's Court's Conditional Order Granting a Stay of Execution Was Well-Within Its Discretion.

Johnson offers no authority supporting his request that this Court review the district court's denial of his request for stay. Regardless, Johnson's motion to the

district court was deficient in every respect. (Doc. 246, 254) Johnson failed to file a single declaration or offer any evidence supporting the bald assertion that a stay was needed to avoid irreparable harm. He supplied no evidence regarding his ability to pay nor provided any basis for the district court to find that Storix's ability to collect the judgment would not be unduly jeopardized absent a bond. Instead, he merely argued "there is no concern about Johnson's ability to pay." (Doc 246 at 7) The district court acted well within its discretion in requiring Johnson to post a bond for the full judgment of $555,118.64 to stay enforcement.

Contrary to Johnson's claim, courts do not "routinely" stay execution. Likewise, it is irrelevant whether courts require a bond for injunction orders (Mot. p.4). The district court required a bond for a money judgment. While noting the order was based on the entire record, the district court cited its two prior orders denying Johnson's new trial motion and granting, in part, Storix's motion for attorney fees. Likewise, as noted by the district court at oral argument:

> The Court believes that a bond in this instance is warranted. It's discretionary with the Court. I've considered all the facts and circumstances, and exercising the Court's discretion, conclude that a bond in the amount of $555,118.64 is appropriate.
>
> I did say at the earlier hearing that I alternatively thought about a 75 percent amount of the bond, but then after considering all of the circumstances and doing research, it's obviously a matter that's committed to the sound discretion of the Court.
>
> In this instance, notwithstanding the Plaintiff's suggestion that he is liquid, we don't have proof of that at this point. Even if you provided

> proof tonight by way of a declaration, given the vagaries of the market, up and down, the uncertainties of what happens, the fights over Storix in State Court, other circumstances, the requirement for attorneys' fees and living expenses, all in all, I think that Storix is legitimately entitled to request a bond pending appeal. Otherwise, under the law, after 14 days from the judgment, arguably even going back to the original judgment and then on amended judgment, then they could begin execution.
>
> So this preserves Johnson's right to appeal, but it also preserves Storix's right to have a bond for the amount of the judgment. So that will be the order of the Court. (Trans., pp. 11-12).

Even if reviewable in the context of this motion (which it is not), the district court properly exercised its discretion. Johnson's mere argument that there were "ample grounds" submitted to the district court without more does not establish error. Johnson has liquid assets. His bald assertion that Storix is mismanaged is unsupported by any evidence whatsoever in the record (Mot. p.6) and, in any event, totally irrelevant to the issues before the district court and now this Court.

B. Johnson Fails To Establish That He Is Entitled To The "Extraordinary Relief" Of A Stay Of Execution Of Judgment

The purpose of the supersedeas bond is to protect the appellee from loss resulting from the stay of execution. *Rachel v. Banana Republic, Inc*., 831 F.2d 1503, 1505 n.1 (9th Cir. 1987). Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of its judgment, a full supersedeas bond is the requirement in normal circumstances. *Id*. Only in unusual circumstances may the court order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery. *See, e.g.,*

Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n, 636 F.2d 755, 761-62 (D.C. Cir. 1980)(noting "the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery"); *Morgan Guar. Tr. Co. v. Republic of Palau*, 702 F.Supp. 60, 65 (S.D.N.Y. 1988)(same). The burden rests on Johnson, as the party seeking stay of execution on the judgment, to establish that the stay would not harm Storix. *See, e.g., Kansas City Royals Baseball Corp. v. MLB Players Ass'n*, 409 F. Supp. 233 (W.D. Mo. 1976), aff'd, 532 F.2d 615 (8th Cir. 1976).

Even where (unlike Johnson) an appellee is unable to afford a supersedeas bond, courts reject requests to waive the bond requirement where the appellee fails to propose alternatives to secure the payment of the judgment. *See, e.g., HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 512 (E.D. Pa. 1995)("It is the appellant's burden to demonstrate objectively that posting a full bond is impossible or impracticable; likewise, it is the appellant's duty to propose a plan that will provide adequate (or as adequate as possible) security for the appellee"); *Bank of Nova Scotia v. Pemberton*, 964 F.Supp. 189, 192 (D.V.I. 1997)(denying motion to stay because movant "utterly failed to satisfy his burden of proposing a plan to provide adequate alternate security for the prevailing parties").

Johnson has not presented sufficient objective proof to establish financial hardship or the inability to obtain a supersedeas bond. While he provides no

specific or verifiable information about stocks, bonds, cash, financial accounts, etc. his attorney indicated that Johnson has "about $1 million in liquid assets" and that he could secure a bond if he puts aside some of those assets as security. (Trans. pp. 2-4). Johnson's own declaration similarly establishes he has significant assets, he just does not *want* to use them for a bond. (Johnson Dec,¶3.)

C. Johnson Has Not Established The Factors To Support The Extraordinary Relief Sought

The "factors regulating the issuance of a stay" are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton*, 481 U.S. at 776. None of the factors support a stay of execution of the judgment against Johnson.

1. Johnson Is Not At All Likely To Succeed On The Merits.

(a) The Evidence Established Johnson Transferred the Copyrights.

Pursuant to 17 U.S.C. § 204(a), "[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." *See also Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 754 (9th Cir. 2008); *Effects Associates, Inc. v. Cohen*, 908

F.2d 555, 556 (9th Cir. 1990). At trial, Storix presented Storix Software's 2003 Annual Report, a writing signed by Johnson that states:

> "All assets from Storix Software were transferred to Storix Inc., as of its incorporation as of February 24, 2003."

(Trial Exhibit CD.) Facially, this writing alone encompasses all of Storix Software's assets, including its copyrights. Johnson wrote and signed the Annual Report. Even though Johnson attempted to argue (as he does in his motion) he only did so in his capacity as Storix's president, rather than individually, the jury heard his testimony and unanimously rejected his claim. (Trial Trans., Day 2, pp. 207:2-7; Day 1, p. 132:14-23). The jury correctly found the 2003 Annual Report satisfies the writing requirement of Section 204 and that Storix is the owner of the copyrights.

Before and during trial Johnson urged that "all assets" as used in the Storix Software's Annual Report didn't really mean "all" assets, contending that a triable issue of fact existed. Based on Johnson's claims, the jury further heard the evidence he contended established why the writing was ambiguous and why copyright ownership was not transferred. Only now, in an effort to fall within a more favorable standard of review following the jury's rejection of his claims, does Johnson change course and argue that no writing exists as a matter of law.

It is undisputed a signed "note or memorandum" sufficient to meet the statutory requirements for a transfer under Section 204 of the Copyright Act

exists.[2] Johnson seeks to engraft non-existent additional terms into the plain language of the statute by arguing that it requires a detailed document evidencing a negotiation of terms and other magic words. (Mot. p. 21) "No magic words must be included in a document to satisfy § 204(a)." *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 927 (9th Cir. 1999). The document "can use terminology such as 'all assets' that clearly includes copyrights." *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 931 (7th Cir. 2003). Regardless of the terminology used, "the parties' intent as evidenced by the writing must demonstrate a transfer of the copyright." *Radio Television*, 183 F.3d at 927 (citing Nimmer on Copyright, § 10.03[A][2] at 10–37 ("As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties.")); *see also Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992) (writing not including word "copyright," but indicating seller sold "all assets" satisfied section 204); *see also ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 931 (7th Cir. 2003)(Explaining that a writing can satisfy section 204 by using "terminology such as 'all assets' that clearly includes copyrights.").

[2] "[A]n earlier oral assignment can be confirmed later in a writing." *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1156 (9th Cir. 2010). *See also Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1429 (9th Cir. 1996)(Noting "the conveyance is between John Magnuson as CEO of Columbus [a suspended corporation], and John Magnuson as owner of John Magnuson Associates" and holding "that the memorandum of conveyance satisfied the writing requirement of the 1909 Copyright Act, even though it was not executed at the time of the transfer." (Brackets added)); *Imperial Residential Design, Inc. v. Palms Dev. Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995)("a copyright owner's later execution of a writing which confirms an earlier oral agreement validates the transfer *ab initio*.").

Johnson's authorities do not support his claim that the Annual Report could not qualify as suitable written evidence of a copyright transfer. None of the cases Johnson cites lead to a result that contradicts the jury's verdict, as those cases invariably involve disputes between unrelated parties negotiating at arm's length wherein they each contemplated later signing formal written contracts that ultimately remained unsigned. *See*, e.g. *Konigsberg Intern. Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994)(letter written years after alleged oral agreement referencing certain unsigned contracts and not referencing a "transfer" was too remote in time and did not reflect intent to transfer the copyright under Section 204); *Lyrick Studios, Inc. v. Big Idea Productions, Inc*., 420 F.3d 388, 390, 391, 396 (5th Cir. 2005)(transfer required a signed formal agreement because the parties contractually agreed in another key document "for both of our protection, no contract will exist until both parties have executed a formal agreement"); *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549 (2d Cir. 1995)(court deferred to district court's determination it was impossible to determine the intent of the parties to transfer given no direct evidence and conflicting evidence of industry custom and Playboy's usual practice).[3] Other cases Johnson cites involve no signed writing whatsoever, a situation entirely unlike that presented to the jury in this case. *See*,

[3] Had *Playboy* not involved a bench trial, presumably the question of intent would have been a jury question, and the Second Circuit would have appropriately deferred to the factfinder's conclusion regarding the conflicting evidence.

e.g., *Effects Associates, Inc.*, *supra*, 908 F.2d at 556 (Court noting that "no one disputes that Effects is the copyright owner of the special effects footage used," and that defendant merely "suggests that section 204's writing requirement does not apply to this situation, advancing an argument that might be summarized, tongue in cheek, as: Moviemakers do lunch, not contracts.").

Unlike Johnson's authorities, this case did not involve an arm's length transaction that specifically contemplated and required the execution of a formal, written agreement. Rather, Johnson himself created and signed a "note or memorandum" that was made part of *Storix's own records* (even if he was the only officer at the time), that referenced and confirmed a transfer of "all assets." (Doc. 256-1 at 4-5) Johnson never disputed that he signed the Annual Report, or that it was intended to summarize an actual transfer of assets that had occurred, since, as noted above, he further concedes that a transfer of *some* assets did in fact occur. Johnson simply disputes whether he intended "all assets" to include the copyright to SBAdmin, a question properly submitted to the jury. *See Welles v. Turner Entm't Co.*, 503 F.3d 728, 737 (9th Cir. 2007)(jury weighs extrinsic evidence regarding meaning of a copyright's instrument of conveyance or memorandum of transfer). As detailed in the order denying Johnson's motion for new trial, "Defendant Storix adduced significant evidence confirming that the Annual Report memorialized Plaintiff Johnson's intent to transfer the copyright in SBAdmin."

(Doc. 256-1 at 5)

Intent was the principal issue in interpreting "all assets." (Doc 256-1 at 7) Storix presented substantial evidence regarding Johnson's intent to transfer the SBAdmin copyright to Storix—the contracts, the revised copyright notices, Johnson's correspondence with third parties stating that the company owned the copyright, the efforts to sell the company and obtain valuations. (*Id*.) Despite his arguments to the contrary, Johnson's own authorities confirm that custom and practice is appropriate evidence to consider in interpreting the meaning of writings under section 204. *See Playboy*, *supra*, 53 F.3d at 557, 560.[4]

Johnson desperately tries to distinguish a variety of evidence, claiming none of it constitutes a section 204 "writing." (Mot., pp. 7, 12-14.) However, Johnson misconstrues what the evidence at trial proved. The Annual Report is a writing signed by Johnson that satisfies section 204. The other written evidence is consistent with the plain language of this document, and proved that when Johnson transferred "all assets" he meant "all assets." No evidence established Johnson intended to exclude the copyrights.

(b) The District Court Did Not Abuse Its Discretion in Denying Johnson's Motion for New Trial.

A district court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Traver v. Meshriy*, 627 F.2d 934, 940–41 (9th Cir. 1980)("In

[4] *See* Civil Code § 1856(c)(Stating contract terms "may be explained or supplemented by course of dealing or usage of trade or by course of performance.")

determining whether to grant a new trial, the district court must decide whether, in its conscientious opinion, the verdict is clearly contrary to the weight of the evidence. On appeal, this court will not disturb a verdict unless, viewing the evidence in a manner most favorable to the prevailing party, we can say that the trial court abused its discretion." (internal citations omitted).) Johnson offers no meaningful discussion of how the district court supposedly abused its discretion. Johnson claims error because the "question of a writing" was submitted to the jury, but then claims another "trial is needed to correct this error." (Mot. p. 17) Johnson had his trial to resolve the ambiguity he claimed existed in the transfer document. He lost. The jury's verdict is supported by substantial evidence. (*See* Doc 256-1 at pp. 2-8) Moreover, the district judge specifically stated in her order:

> The Court notes that, if it had been correct to resolve this issue as a matter of law, the Court would have concluded that the Annual Report, according to its plain and intended meaning, did satisfy the writing requirement of 17 U.S.C. § 204 based on the evidence in the record.

(Doc. 256-1, fn.1) Thus, whether viewed as a jury question or question of law, Johnson will not prevail on the merits.

Johnson's complaint that a new trial should have been granted because Jury Instruction No. 34 was improper is equally unavailing. (Mot. p.18) Johnson never raised any timely objections about jury instructions or verdict questions of which he now complains. A party may claim error (a) for an instruction given, only if it

properly objected to that instruction, and (b) for an instruction not given, only if the party both requested the instruction and properly objected to the instruction not being given (unless the court rejected the request in a definitive ruling on the record). Fed.R.Civ.P. 51(d)(1). Johnson consistently contended that the jury should address such matters, and he even proposed verdict questions precisely on these matters. (Doc. 147; Trial Trans., Day 3, pp. 215-216, pp. 284-285, 297-298; Doc. 150; Day 4, p. 98). Likewise, the instruction properly explained the law. (Doc. 256-1 at 8-9.) Extrinsic evidence was not offered as a substitute for the writing, but instead was offered to aid in its interpretation. (*Ibid*.)

Finally, Johnson failed to establish prejudicial error. Legal error, including erroneous jury instructions, is not grounds to grant a new trial if the error is harmless. *Casumpang v. International Longshore & Warehouse*, 411 F.Supp.2d 1201, 1214 (D. Haw. 2005). In other words, a new trial is not justified if an error was harmless. *Id*., *citing Glanzman v. Uniroyal, Inc*., 892 F.2d 58, 61 (9th Cir. 1989)("If an error does 'not affect the substantial rights of the parties' it will be deemed 'harmless' and not grounds for reversal or appeal."). Johnson contends that somehow the jury was duped into finding his case time-barred by being confused on the question of transfer. (Mot. p. 20) The jury was presented with evidence that, beginning in 2003, Johnson signed and knew of documents stating: "Title to our copyrights, patents, and any other intellectual property rights in the Code and

Storix Product(s) documentation remain with [Storix]." (Trial Ex. BK, p. 3, § 13.3). And, in 2004, he signed documents stating:

> STORIX **claims and reserves to itself all right in the Software** and any associated documentation and all benefits afforded **under U.S. copyright law**, all international copyright conventions, and U.S. and international intellectual property law.

(Trial Ex. CC, p.3, § 2.8, emphasis added) Having signed those documents (and many others), he cannot claim ignorance of Storix's ownership claim. *See Seven Arts Filmed Ent., Ltd., v. Content Media Corp. PLC*, 733 F.3d 1251, 1257 (9th Cir. 2013)(CEO, who signed and negotiated agreements, "cannot claim ignorance about Paramount's interest in, and distribution of, the pictures during the statutory period."). Based on his actual knowledge that Storix claimed ownership of the copyrights to SBAdmin as early as 2003/04, Johnson's ownership claim accrued 10+ years before he filed suit. Accordingly, the jury was clearly capable of finding his claims time-barred under 17 U.S.C. § 507(b) without ever referencing Instruction No. 34, or any facts relevant to the transfer analysis, and so he inevitably would have lost in any event.

(c) The District Court Did Not Abuse Its Discretion in Award Storix Attorney Fees.

The Supreme Court recently confirmed that there are a number of nonexclusive factors that courts may consider to determine if an award of fees "advances the Copyright Act's goals" of "encouraging and rewarding authors' creations while also enabling others to build on that work." *Kirtsaeng v. John Wiley & Sons, Inc.*,_ U.S. _, 136 S.Ct. 1979, 1986 (2016). Substantial weight is to be given to the reasonableness of the losing party's position; however, the issue is not dispositive. Courts "must also give due consideration to all other circumstances

relevant to granting fees." (*Id*. at 1983.)

Johnson cites this authority, but then ignores it. According to Johnson, the district court's finding that his case was objectively reasonable because he raised enough of a factual issue to survive summary judgment prevents an award of fees, even though that is only *one factor* to be considered. (Mot. p. 22) However, the district court correctly weighed *all* of the factors and then awarded fees. (Doc 256-2 at 5-12) Johnson did not file suit to vindicate his rights, he has sought to use the litigation to put Storix out of business and has threatened Storix employees with losing their homes. (Doc. 256-2 at 5-6) When questioned about representations he made to third parties confirming Storix's ownership of the copyrights, Johnson stated: "Yeah, and I lied. I admit it. I lied." (*Id*., at 9:12-13) Thus, it was unreasonable for Johnson to maintain he did not intend to transfer the copyright when the only "evidence" he had to try and defeat the plain meaning of the Annual Report was to claim *he* was not credible. Likewise, as noted by the district court, this was not a case in which Storix achieved only a limited degree of success; instead the jury found Storix "owns all rights to the copyrights to all versions of SBAdmin." (*Id*., at 10:5-9) Finally, the district court determined Johnson "engaged in a variety of behavior that should be deterred. (*See Id*., at 10-11) Johnson's disagreement with the district court's findings does not establish the district court abused its discretion or that the findings are unsupported.

2. Johnson Does Not Demonstrate Irreparable Injury If The Stay Is Not Granted

Johnson seeks to stay execution on a money judgment and to avoid the cost of a bond or other security for the judgment pending appeal based on a naked claim that execution or a bond premium to obtain a stay would cause financial harm. Johnson confuses inconvenience with injury. As the Ninth Circuit observed, "It is well established, however, that such monetary injury is not normally considered irreparable." *L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). The Supreme Court has explained:

> [T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury . . . . "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974)(quot. omitted). The fact of a judgment cost or a bond premium to obtain a stay is thus not "irreparable harm." Likewise, that Johnson would have "difficulty liquidating assets" or have to set aside monies in a bank account is equally unavailing. Johnson argues that there is only a "low" bar for him to establish irreparable harm (Mot. p. 26), but a finding that Johnson has met his burden in this case would essentially mean there is no bar at all.

3. The Balance Of Equities Does Not Favor Johnson

Although not entirely clear, it appears Johnson incorrectly believes by posting a bond Storix will receive the money and there is some risk Storix will be

unable to pay it back—neither of which is true. (Mot. p. 27) Johnson's assertion that there is "self-dealing" and "mismanagement" at Storix based on his "belief" is not evidence, nor is his speculation relevant to this Court's inquiry. Johnson engaged in a vendetta against Storix and lost—as noted by the district court, even after the jury's verdict Johnson's windmill tilting has been unrelenting. (Doc 256-2 at 10:18-11:3) The district court exercised its discretion and found Storix was entitled to attorney fees and costs. As the judgment creditor, Storix is entitled to have that judgment protected while Johnson pursues his meritless appeal. The parties need not "incur additional legal fees to coordinate repayment of fees" (Mot. p.30) if Johnson posts a bond. Johnson's focus on *Storix's* solvency instead of his own financial situation is both telling and totally misdirected. Johnson's desire not to "tie up" his substantial assets is not a hardship or a basis to subject Storix to the burden of having to pursue its recovery post-appeal, with the risk that those assets will be dissipated. Johnson offers no reason why Storix should not be protected.

4. **Public Interest Does Not Favor A Stay Without A Bond**

Johnson's discussion of this factor is nonsensical and conclusory. (Mot. p. 30) There is no public interest at stake in this private dispute and most certainly no public interest weighs in favor of providing Johnson a stay without a bond.

CONCLUSION

Johnson does not come close to meeting his heavy burden to prove that he is entitled to the extraordinary relief of a stay of execution of judgment without the

requisite supersedeas bond. His declaration is devoid of any financial information, except that he does not want to stop earning interest on available assets. His motion for stay is essentially a request to permit him to go along with business as usual without any regard whatsoever for the district court's judgment establishing his debt and the resulting harm to Storix. Having failed to demonstrate that any of the four required factors militate in favor of a stay, especially given the "low" likelihood of success on the merits of the appeal, Johnson's motion must be denied.

Respectfully submitted,

DATED: December 29, 2016

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CERTIFICATE OF SERVICE

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 December 29, 2016.

APPELLEE'S OPPOSITION TO MOTION FOR STAY OF EXECUTION OF THE ATTORNEYS' FEE AWARD

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF.

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

Executed on December 29, 2016, San Diego, California.

By: *s/Paul A. Tyrell*
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