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7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
10

11 ANTHONY JOHNSON, an individual,

12 Plaintiff,

13 v.

14 MANUEL ALTAMIRANO, an individual,
15 RICHARD TURNER, an individual,
16 DAVID KINNEY, an individual,
17 DAVID HUFFMAN, an individual,
18 PAUL TYRELL, an individual,
19 SEAN SULLIVAN, an individual,
20 STORIX, INC., a California Corporation,
and DOES 1-5, inclusive,

21 *Defendants.*

Case No. 3:19-cv-1185-H-BLM

**PLAINTIFF'S MOTION TO
RECUSE**

Judge: Marilyn L. Huff
Complaint Filed: June 24, 2019

[28 U.S.C. Section 144 and
28 U.S.C Section 455(a)]

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1 **MOTION TO RECUSE**

2 Pursuant to 28 U.S.C. §§ 144 and 455(a), self-represented plaintiff, Anthony
3 Johnson (“Johnson”), moves to recuse the assigned judge, Hon. Marilyn L. Huff,
4 from this case. This motion is both timely and sufficiently supported by affidavit –
5 *Declaration of Anthony Johnson in Support of Motion to Recuse* concurrently filed
6 herewith. As such, and pursuant to 28 U.S.C. § 144, Johnson requests that Judge
7 Huff proceed no further on this motion or in this action and that another district
8 court judge for the Federal District Court for the Southern District of California be
9 assigned to hear and decide this motion.

10 This case involves various torts and malicious prosecution committed by
11 majority shareholders and corporate counsel of Storix, Inc. The case strictly involves
12 matters of California state law but was brought under diversity jurisdiction because
13 Johnson is an out-of-state plaintiff. The case was originally assigned to Hon. Judge
14 Janis L. Sammartino under case number 3:19-cv-1185-JLS-JLB but was transferred
15 to Judge Huff by the court clerk before any action was taken in the case, and without
16 notifying Johnson of the transfer.

17 For the reasons described below, this action should be reassigned to a judge
18 who does not hold bias or prejudice against Johnson or favoritism toward the
19 attorney defendants in this case.

20 **I. AUTHORITIES**

21 A party may petition the district court to recuse the assigned judge under two
22 different statutes. A party may allege bias of a district court judge pursuant to 28
23 U.S.C. § 144 and seek to have a neutral district court judge determine whether such
24 bias exists. Also, a party may move to have a district court judge recused pursuant to
25 28 U.S.C. § 455, by establishing that the judge’s impartiality might reasonably be
26 questioned. Here, Johnson moves to recuse Judge Huff pursuant to both statutes.
27 Nevertheless, the standard for recusal under both statutes is the same. *United States*
28 *v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986).

1 The question is whether a reasonable person with knowledge of all the facts
2 would conclude that the judge’s impartiality might reasonably be questioned. *Id.*
3 (quoting *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984)). Thus, on review, a
4 court does not have to conclude that actual bias exists, but rather that a judge’s
5 impartiality might reasonably be questioned. This standard is similar to that which
6 the Ninth Circuit applies when considering whether to order that a case be
7 reassigned when claims of bias by the district judge are raised on appeal.

8 For reassignment, the relevant question is whether circumstances establish
9 that “to a reasonable outside observer . . . reassignment ‘to maintain the appearance
10 of justice’ is necessary.” *Nat.l Council of La Raza v. Cegavske*, 800 F.3d 1032,
11 1045-46 (9th Cir. 2015) (quoting *United States v. Kyle*, 734 F.3d 956, 966–67 (9th
12 Cir. 2013). Although recusal often requires extrajudicial evidence, a party can
13 establish a proper basis for recusal without such evidence where on-the-record
14 statements demonstrate a “deep- seated . . . antagonism that would make fair
15 judgment impossible.” *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

16 II. ARGUMENT

17 A. This Motion is Timely and Proper

18 Johnson seeks no strategic gain from this motion. The new case itself does not
19 question Judge Huff’s prior rulings, raise any issues, nor rely on any underlying
20 facts relevant to the prior copyright case. The copyright case involved a federal
21 question of copyright ownership, while the instant lawsuit involves different
22 defendants and various tort claims that must be substantially resolved by California
23 law.¹

24 1. The Motion To Recuse Is Well-Supported By Affidavit and an 25 Established Public Record.

26
27 ¹ Defendants’ own litigation conduct and insistence that Johnson post yet another
28 \$160,000 plaintiff’s bond induced Johnson to dismiss the state case and refile in
federal court under diversity jurisdiction.

1 A distinction between 28 U.S.C § 144 and 28 U.S.C. § 455(a) can be found in
2 certain prerequisites imposed by section 144. Section 144 requires that the motion be
3 supported by a “sufficient affidavit” and provides for a neutral judge’s review of a
4 recusal motion and the allegations of bias. An affidavit is considered “sufficient”
5 when the affidavit “specifically alleges facts that fairly support the contention that
6 the judge exhibits bias or prejudice directed toward a party.” *United States v. Sibla*,
7 624 F.2d 864, 868 (9th Cir. 1980) (citations omitted).² The affidavit that
8 accompanies this motion is sufficient to support Johnson’s motion pursuant to 28
9 U.S.C. § 144. (*See Declaration of Plaintiff Anthony Johnson in Support of Motion to*
10 *Recuse* filed concurrently with this motion.) This motion and its supporting affidavit
11 sufficiently allege facts that support the contention that Judge Huff exhibits bias or
12 prejudice toward Johnson making a fair judgment impossible.

13 **2. This Motion Was Timely Filed.**

14 When analyzing the “timeliness” component of the analysis, the Ninth Circuit
15 has imposed no strict timeframe within which a recusal motion must be filed.
16 *Preston v. United States*, 923 F.2d 731, 732-33 (9th Cir. 1991). At the center of the
17 analysis, the court must give consideration to whether the motion would result in a
18 waste of judicial resources and whether the motion is a result of a party merely
19

20 ² Although the *Sibla* court included a requirement that the bias or prejudice “[stem]
21 from an extrajudicial source,” *id.*, the Supreme Court has subsequently clarified that
22 this is not always the case, *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).
23 Where on-the-record statements demonstrate a “deep-seated . . . antagonism that
24 would make fair judgment impossible,” recusal is appropriate. *Id.* at 555. *Liteky*
25 specifically holds that the absence of an extrajudicial source does not necessarily
26 preclude recusal, and that what had been considered the “extrajudicial source
27 doctrine,” is better considered as a significant “factor,” rather than an unbending
28 requirement. *Id.* at 554-55. The Court stated that, although judicial rulings *alone*
almost never constitute a valid basis for recusal, comments or opinions expressed by a
judge are a different matter. *Id.* at 555. Although such judicial remarks *ordinarily* do
not support a bias challenge, they *will* do so if they “reveal such a high degree of
favoritism or antagonism as to make fair judgment impossible.” *Id.*

1 seeking some strategic gain. *Id.* at 733. Thus, where a motion to recuse comes after
2 the judge has spent significant judicial resources and time or after an adverse
3 decision has been rendered, such a recusal motion is necessarily untimely.

4 Here, the district court clerk issued a report that this case be transferred to
5 Judge Huff based on the “Low-Number Rule”.³ Judge Sammartino signed the order
6 transferring the case on July 18, 2019, but Johnson was not notified by the district
7 court. (Johnson Decl. at ¶ 28.) Johnson learned of the transfer on July 31, 2019 when
8 the opposing counsel referenced Judge Huff and the new case number in an *ex parte*
9 application to extend the deadline to answer. (*Id.*)⁴ Johnson brings this motion at the
10 earliest opportunity and before any court has acted in this case. Thus, this motion
11 and its supporting affidavit are timely.

12 **3. Granting This Motion Will Cause No Prejudice or Added Burden on**
13 **the Court**

14 The clerk’s transfer order indicates this case was transferred to Judge Huff
15 based on her having presided in a copyright infringement lawsuit between Johnson
16 and Storix, Inc. (“Storix”), case number 3:14-cv-11873-H-BLM, that was decided
17 by a jury in December 2015. The transfer order indicates “The above low-numbered
18 case and the present case appear: (1) to arise from the same or substantially identical
19 transactions, happenings or events; or (2) involve the same or substantially the same
20 parties or property; or; ... (4) call for determination of the same or substantially
21 identical questions of law; or ... (6) for other reasons would entail unnecessary[sic]
22 duplication of labor if heard by different judges.” None of these criteria actually
23 apply because the claims of the two lawsuits are unrelated and the prior lawsuit
24 named only Storix as the sole defendant out of seven defendants in the current
25 action, and Storix was only named as a defendant because its

26 _____
27 ³ For convenience, **Attachment 1** contains the order transferring the case.

28 ⁴ Johnson has opposed the motion to extend the deadline to answer since all parties have been aware of these claims since January 2019.

1 management/defendants insisted that only Storix can be held liable for their actions.
2 (Johnson Decl. ¶ 27.) The prior lawsuit dealt entirely with federal issues of copyright
3 ownership and infringement, whereas the current lawsuit deals entirely with issues
4 of California tort law and malicious prosecution of a state lawsuit unrelated to the
5 federal copyright dispute.

6 Particularly since no action has been taken in this case and no issues have yet
7 to be determined on the merits, there is no reason any party would be prejudiced by
8 having the case transferred to a different judge. Furthermore, the court has not yet
9 expended any judicial resources and there will be no duplication of efforts since the
10 underlying facts and issues are entirely different.

11 **B. Judge Huff Should Not Preside Over This Case Because a**
12 **Reasonable Person With Knowledge of All the Circumstances**
13 **Would Conclude That Judge Huff Holds a Personal Bias or**
14 **Prejudice Against Johnson.**

15 Judge Huff tried the prior copyright infringement case Johnson brought
16 against defendant Storix, Inc. to enforce his registered copyrights. In December
17 2015, Judge Huff adopted a jury finding that Johnson *intended* to transfer his
18 copyright ownership to Storix, Inc. upon its formation and thereby granted Storix
19 ownership the software Johnson created and developed for over 15 years. (Johnson
20 Decl. ¶ 8.) Johnson exhausted all efforts to appeal the decision and makes no effort
21 to do so here. Nor does Johnson attempt to have Judge Huff recused because of a
22 bad ruling. However, her unyielding determination to continue punishing Johnson
23 years after she effectively gave his entire company and his life's work to his former
24 employees *for free* raises the reasonable question of whether Judge Huff can now be
25 impartial in a case against the same individuals and attorneys that have ever since
26 been the sole beneficiaries of Johnson's life's work.

27 Judge Huff should be recused from this case because her bias or prejudice
28 against Johnson, as demonstrated below, makes fair judgment impossible.

1 **1. Judge Huff’s opinion of Johnson took an unexpected turn after the**
2 **Supreme Court issued a ruling that didn’t support an award of**
3 **attorney fees against Johnson.**

4 Two months after the jury trial, Judge Huff held the first hearing on attorney
5 fees. At the time, Judge Huff took no issue with Johnson’s motivation not found any
6 need for deterrence and even rejected Storix counsel’s attempts to draw attention to
7 Johnson’s emails she refused to consider at the summary judgment hearing a few
8 months earlier:

9 *THE COURT:* ... **Motivation, that's mixed on both sides.** This is his baby.
10 This is his life, and he believed in his own view that there wasn't --
11 sometimes rewriting history is what people do, and he believed that there
12 wasn't a sufficient memorandum of transfer.

13 (Johnson Decl. ¶ 9, Ex. A, p. 38; bold added.)

14 *MR. SKALE:* The one factor I think the Court seemed to be focusing on --
15 and correct me if I'm wrong, please, your Honor, is the motivation factor.
16 You note it --

17 *THE COURT:* I don't think I'm focusing on that. I just say, oh, there's --
18 there's a variety of factors, and **the motivation I think cuts both ways.**

19 (Johnson Decl. ¶ 9, Ex. A, p. 46; bold added.)

20 *MR. Tyrell:* ... But **in terms of this deterrence issue,** it's not just how he
21 responded to the discovery. It's -- it's the entirety of his behavior. Mr.
22 Johnson is still reaching out to Storix employees and directing them to
23 delete evidence. He hasn't learned his lesson, and he needs to be deterred.
24 Now, this issue of compensation --

25 *THE COURT:* **But that's not related to this case.**

26 *MR. TYRELL:* Well, your Honor, he -- he's still claiming that he owns the
27 copyright. He's still instructing the employees to delete evidence. All of the
28 behaviors, all of the misconduct and the inappropriate behaviors, he hasn't
29 learned his lesson. Deterrence is still appropriate. And on that issue, your
30 Honor --

31 *THE COURT:* **So I don't think that's the point --**

32 *MR. TYRELL:* But, your Honor, the --

33 *THE COURT:* -- **of fees.**

34 (Johnson Decl. ¶ 9, Ex. A, p. 61; bold added.) Judge Huff further recognized the

1 tragic circumstances that resulted in his former employees – the Management
2 Defendants in this case – taking advantage of Johnson:

3 THE COURT: ... And under the equitable circumstances of the case, I guess
4 we say don't look a gift horse in the mouth or whatever the other sayings are.
5 It's a pretty sympathetic case for the Plaintiff saying he developed it. He had
6 it. He had tragic circumstances in his life. He didn't give it away to his sister,
7 which he could have. Instead, he gave it to his employees, and now lost
8 majority control of the company.

9 (Johnson Decl. ¶9, Ex. A at p. 31.)

10 Judge Huff allowed further briefing following a pending a Supreme Court
11 decision in *Kirtsaeng v. John Wiley & Sons, Inc.* (2016) 136 S. Ct. 1979
12 (*Kirtsaeng*).⁵ Without explanation, six months later, Judge Huff's entire opinion of
13 Johnson unexpectedly changed. (Johnson Decl. ¶ 12.) The *Kirtsaeng* decision
14 virtually eliminated attorney fees in copyright cases where a losing party had an
15 "objectively reasonable" position absent "litigation misconduct" or "overaggressive
16 assertion of copyright claims". (*Kirtsaeng* at 1989; Attachment 2 at p. 8.) Judge Huff
17 had already found Johnson's copyright claim to be objectively reasonable – a factor
18 *Kirtsaeng* requires be given "substantial weight" in order to "encourage parties with
19 strong legal positions to stand on their rights." (*Id.* at 1986; Attachment 2 at p. 7.)
20 But Judge Huff ignored the substance of the *Kirtsaeng* ruling and awarded
21 \$555,118.64 in fees against Johnson based entirely on the *same emails* she
22 previously found irrelevant. (Johnson Decl. ¶ 9, Ex. F.)

23 Judge Huff was repeatedly made aware that the Management Defendants
24 directed the Attorney Defendants in this case to file a frivolous lawsuit against
25 Johnson *on the morning of the mandatory settlement conference* in the copyright

26 ⁵ Johnson requests judicial notice of the *Kirtsaeng* decision from the Westlaw site
27 (2016 WL 3343758) that includes a "KeyCite" flagging *Johnson v. STORIX, INC.*,
28 No. 16-55439 (9th Cir. Dec. 19, 2017) as the only case declining to extend the
Kirtsaeng decision. For convenience, the Westlaw record is attached as **Exhibit B**.

1 case to impose added financial burden on Johnson. (Johnson Decl. ¶ 22, Ex. I at pp.
2 36-37.) She was also aware that Johnson responded by threatening and eventually
3 filing a shareholder derivative suit *on Storix's behalf* to try to end their abuse –
4 despite Storix's own attorneys – the Attorney Defendants in this case –defending the
5 Management Defendants against the company's claims. (Johnson Decl. ¶ 22, Ex. I at
6 pp. 9, 33-34, 45-46.) But, rather than acknowledge any of these facts, Judge Huff
7 imposed an historic attorney fee award against Johnson based on Storix counsel's
8 assertion that Johnson only claimed ownership of the software *he created* and
9 *registered in his name* for 15 years in order to destroy the company *he founded*.
10 (Johnson Decl. ¶ 13, Ex. C at p. 3, ¶ 13, Ex. E at pp. 6 & 7, ¶ 23, Ex. J at p. 15.)

11 Whether or not Judge Huff was correct in finding that Johnson's intent to
12 transfer ownership of all his copyrights to Storix amounted to an actual transfer is
13 immaterial. What is relevant is Judge Huff's stated sympathy for Johnson's
14 circumstances in stark contrast to her forcing Johnson to pay "Storix" attorney fees
15 that would never have been incurred had its Management Defendants not decided to
16 take *for free* everything Johnson spent a lifetime creating.

17 The fee award against Johnson was based on nothing more than a few emails
18 that had nothing to do with the copyright issues, pertained to different litigation, and
19 resulted in no attorney fees.⁶ Judge Huff nevertheless awarded the defendants in the
20 instant case (i.e. "Storix") four times the largest attorney fee award against any
21 author of a creative work in U.S. history. (Johnson Decl. ¶ 15.) Even if such an
22 unprecedented fee award doesn't prove actual bias, any reasonable person with
23 knowledge of the entire facts would question Judge Huff's impartiality.

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27 ⁶ The attorney fee award is currently pending second appeal in Ninth Circuit
28 Case number 18-56106 largely based on these factors.

1 **2. Judge Huff made unwarranted and unsupported comments about**
2 **Johnson’s character and intentions and refused to acknowledge**
3 **any evidence to the contrary.**

4 Judge Huff showed increasing disdain for Johnson after the copyright trial
5 even though Johnson took no action contrary to the court’s ruling and was not seen
6 in Judge Huff’s court again until the remand hearing. Judge Huff’s post-trial orders
7 all centered around a couple of angry emails Johnson sent to his former employees
8 in response to their having used Storix to file a frivolous lawsuit alleging that
9 Johnson was operating a “secret” competing business.

10 One email contained a single “F-word” that Judge Huff found so offensive it
11 became the focus of Johnson’s character rather than evidence of his efforts to save
12 the integrity of his software and his company from financial ruin. Judge Huff’s
13 recollection of Johnson’s words became increasingly exaggerated as the post-trial
14 hearings progressed: “The **vulgar** language that came out *in some of the documents*
15 was not helpful for him. Pretty sad.” (Johnson Decl. ¶ 9, Ex. A at p. 33; emphasis
16 added.) “[T]here was some **vulgar** stuff going back and forth, and -- He might have
17 taken it a step too far.” (*Id.* at p. 47; emphasis added.) Judge Huff denied Johnson’s
18 motion for new trial in part because, “Defendant Storix provided additional evidence
19 *in support of its position*, including Plaintiff Johnson’s **vulgar** email
20 correspondence.” (Johnson Decl. ¶ 10, Ex. B at p. 6; emphasis added.) Johnson’s
21 email was inflammatory, but that one word wasn’t even used in a vulgar fashion.
22 Despite Johnson’s repeated efforts, Judge Huff refused to acknowledge the event
23 that triggered the email.

24 At trial, Storix counsel badgered Johnson on the stand over a statement he
25 made in an email to an attorney regarding the number of years Storix had been in
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1 business. An exhausted and frustrated Johnson finally said he “lied”, believing it to
2 be a benign issue.⁷ Judge Huff accepted Storix’s fabrication of Johnson’s trial
3 testimony despite Johnson’s repeated efforts to set the record straight. The order
4 denying Johnson’s new trial motion referred to “his admissions to having lied to a
5 third party when he sought to sell Storix, Inc.” (Johnson Decl. ¶ 10, Ex. B at p. 6.)
6 At the hearings for attorney fees: “It's saying to -- it's lying to third parties.” (*Id.* at p.
7 27), “it was quite telling on cross examination when he disassembled and said ‘All
8 right. I admit it. I lied.’” (Johnson Decl. ¶ 12, Ex. D at p. 15.) “It's all of his
9 behavior after. It's saying to -- it's lying to third parties. ... It's admitting on the stand
10 that he lied to people.” (*Id.* at p. 27.) In Johnson’s motion for reconsideration, he
11 provided a transcript of the *actual trial testimony* proving Storix’s counsel
12 intentionally misconstrued Johnson’s statement. (Johnson Decl. ¶ 26, Ex. M at pp. 6-
13 7.) Judge Huff nevertheless stated in her order denying the motion, “At trial,
14 Johnson admitted a lie. ... The Court does not agree that the lie was misconstrued.”
15 (Johnson Decl. ¶ 11, Ex. C at p. 15.) Even two years later, Judge Huff’s order on
16 remand states, “When confronted at trial with the representations he made to third
17 parties when he sought to sell Storix, Inc., Plaintiff Johnson stated, ‘Yeah, and I lied.
18 I admit it. I lied.’” (Johnson Decl. ¶ 23, Ex. J at p. 15.) The alleged “lie” had nothing
19 to do with efforts to sell Storix, wasn’t made to any potential buyer, nor did it
20 misleading anyone in any way.

21 After the Management Defendants filed the frivolous state lawsuit against
22 Johnson, he sent an email to one of them saying, “As I mentioned, this [threat of a
23 shareholder derivative lawsuit] was a last resort, but if I wait until Oct 30, the MSJ
24 will be decided and Storix will *close its doors* ... To try to avoid that, the only
25 alternative is for you and everyone else to forfeit their shares and leave.” (Johnson

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27 ⁷ Johnson said the company had been in business 12 years, but Storix insisted
28 Johnson was lying because Storix had only been *incorporated* for 8 years.

1 Decl. ¶ 17, Ex. H at p. 10.) Judge Huff knew Johnson’s email threatened to bring a
2 lawsuit against the individuals *on Storix’s behalf*, but interpreted those three words
3 in for the next three years as: “Plaintiff Johnson demonstrated that his motives [in
4 bringing the copyright suit] were not merely to secure a copyright infringement
5 judgment, but also to wrest control of the company from its majority shareholders
6 and to force the company to ‘*close its doors*’.” (Johnson Decl. ¶ 13, Ex. C at p. 3, ¶
7 13, Ex. E at pp. 6 & 7, ¶ 23, Ex. J at p. 15; emphasis added.)

8 Judge Huff cited another portion of Johnson’s email: “Only then your name
9 will be removed from the derivative[]action, giving you some hope of keeping your
10 homes and perhaps finding other jobs” (Johnson Decl. ¶ 11, Ex. C at p. 3) as
11 “threatening the company’s directors with the loss of their homes.” (*Id.* at p. 5.)
12 Johnson begged Judge Huff to consider her opinion at the remand hearing:

13 “My threatening, this is something the Court noted several times, that I
14 threatened them with the loss of their homes, but I guess I would ask the
15 Court to actually look at the -- the actual statements regarding homes,
16 and informing them that, you know, let's get out -- let's get everyone out
17 of this before you end up losing your homes was effectively the
18 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.”

19 (Johnson Decl. ¶ 22, Ex. I at p. 63.)

20 Judge Huff noted twice in her fee order following the hearing that “It was also
21 inappropriate for Plaintiff Johnson to threaten Defendant Storix’s directors with the
22 loss of their homes while he was telling the customers to stop paying Storix to
23 undermine the company.” (Johnson Decl. ¶ 23, Ex. J at pp. 3 & 6.) Judge Huff
24 reiterated in the order that “an award of reasonable attorney fees to Storix is justified
25 in light of Johnson’s unreasonable and inappropriate litigation conduct.” (*Id.* at p. 9.)
26 But Judge Huff has never referenced any conduct other than three emails Johnson
27 sent clearly to try and convince his former employees to stop using his company to
28 destroy him.

1 No reasonable person would believe Judge Huff was impartial after she
2 imposed \$555,118 of attorney fees on Johnson for simply lashing out at the
3 Management Defendants in the instant case after what they've done to him. Judge
4 Huff knew Johnson gave 60% of his company to the Management Defendants *for*
5 *free* after he was diagnosed with terminal cancer, and that the copyright litigation
6 was prompted by their having forced him out of the company after he unexpectedly
7 recovered. (Johnson Decl. ¶¶ 3-4.) The Management Defendants got everything they
8 wanted, taking not only Johnson's entire life's work but also his *entire company* as a
9 direct result of Judge Huff's scathing account of Johnson's character in her rulings.

10 The Ninth Circuit found the attorney fee award excessive and unreasonable,
11 but that made no difference to Judge Huff. No matter what evidence Johnson
12 showed that her opinions of him were unfounded and that his opposing party was
13 lying to her, she simply refused to acknowledge the Management Defendants or
14 Attorney Defendants were anything less than exemplary. There is no reason to
15 expect Judge Huff can now set aside the opinions she previously refused to abandon
16 now that those whose character she never questioned are now defendants.

17 **3. After the fee award was reversed, Judge Huff ignored facts and**
18 **circumstances proving the fees were unwarranted.**

19 The Ninth Circuit reversed the fee award as "excessive" and "unreasonable",
20 noting the relative financial strength of Johnson, *pro se*, against a company, and
21 remanded for reconsideration. (Johnson Decl. ¶ 22, Ex. I at pp. 7-8.) Based on the
22 contempt Judge Huff exhibited toward Johnson in the post-trial hearings, Johnson
23 filed a motion with the Ninth Circuit to reassign and remand the decision to a
24 different district court judge. (Johnson Decl. ¶ H, Ex. H.) The Ninth Circuit
25 summarily denied Johnson's petition.

26 At the remand hearing, Judge Huff refused to acknowledge any facts or
27 circumstance that warranted any reduction of attorney fees and reissued her prior
28 order with a 25% discount only to "comply with the Ninth Circuit's directive to

1 reduce the award.” (Johnson Decl. ¶ 23, Ex. J at p. 11.) Judge Huff acknowledged
2 Johnson was still a 40% owner of Storix, but gave no consideration to the fact that
3 the Management Defendants used his entire income to litigate against him in both
4 the copyright and state court lawsuits. (Johnson Decl. ¶ 22, Ex. I at pp. 7 & 8.)
5 Johnson showed that Storix’s claim against him in State court, demanding almost
6 \$1.3 million in “unjust enrichment”, was flatly rejected by a jury and Storix obtained
7 a mere \$3,739 Storix in total damages as a result of the same emails from which her
8 prior fee award was based. (*Id.* at p. 43.) Johnson begged Judge Huff to consider the
9 shareholder derivative suit he filed “*to try and save the company from this waste and*
10 *mismanagement, and I paid for that myself on behalf of the company. Is that not*
11 *evidence that I was not trying to destroy the company?”* (*Id.* at pp. 45-46.) Judge
12 Huff nevertheless reissued her prior ruling based on the same emails, still accusing
13 him of trying to destroy Storix, and still granting Storix a massive award of
14 \$419,193. (Johnson Decl. ¶ 24, Ex. J at p. 3.)

15 Johnson’s is now only three times the largest attorney fee award against any
16 individual in U.S. history, but also the only fee award since *Kirtsaeng* against any
17 party with an objectively reasonable case, and the only case that declined to extend
18 the *Kirtsaeng* Supreme Court decision. (Johnson Decl. ¶ 15; Attachment 2.) Judge
19 Huff’s refusal to abandon prior opinions despite any evidence to the contrary makes
20 her recusal necessary.

21 **4. Knowing Johnson Was Financially Devastated by Her Rulings, Judge** 22 **Huff Imposed Even More Unnecessary Burden**

23 In the amended judgment, Judge Huff added three years of interest from the
24 date of the original judgment that was not previously awarded. (Johnson Decl. ¶ 24,
25 Ex. K at p. 3.) After Johnson filed notice of the second appeal, he petitioned Judge
26 Huff to release the difference between the first and second judgments from his prior
27 supersedeas bond. Knowing Johnson had already sold his house to afford the first
28 bond and was forced to live with in Las Vegas with family (Johnson Decl. ¶ 22, Ex.

1 I at pp. 13-14, 65), Judge Huff nonetheless ordered that, for Johnson to obtain any
2 relief from the *reversed* judgment, he had to post a second bond for the new
3 judgment amount, and only then “the Court will release his first bond **after the**
4 **second bond has been posted.**” (Johnson Decl. ¶ 25, Ex. L at p. 2; bold in original.)

5 Judge Huff’s determination to financially destroy Johnson was evidenced by
6 one unprecedented decision after another. Judge Huff will not explain why Johnson
7 should be the sole exception to the *Kirtsaeng* decision or how the purpose of the
8 Copyright Act is served by awarding Storix attorney fees for claiming ownership of
9 a copyright it paid nothing for – especially when Johnson is the only person with the
10 skills to build on it. (Johnson Decl. ¶ 4.) Johnson would never have tried to protect
11 the integrity of his software if he had any idea the punishment Judge Huff would
12 inflict on him after effectively invalidating his 1999 U.S. Copyright registration.

13 **5. Judge Huff Refused to Acknowledge the Litigation Misconduct of**
14 **Storix’s Attorneys – The Same Attorneys Who Are Now Defendants in**
15 **the Current Lawsuit**

16 Johnson’s every effort to draw the court’s attention to his “side of the story”
17 only resulted in increasingly contemptuous and exaggerated comments by Judge
18 Huff regarding Johnson’s character and his perceived motivation to “destroy Storix”.
19 Judge Huff never made any mention of the misconduct of the Storix’s attorneys,
20 their false statements and intentionally misquoted testimony, or any other action
21 they took that would normally result in severe sanctions. Instead, she simply recited
22 their assertions about Johnson, ignored any facts to the contrary, then punished
23 Johnson with a \$555,000 fee award – **to be given to Storix’s attorneys** – because
24 he threatened State court litigation against the majority shareholders and directors
25 they support.

26 Judge Huff was reminded that Storix’s counsel filed the State court action
27 against Johnson on the morning of the mandatory settlement conference in the
28 copyright case. (Johnson Decl. ¶ 22, Ex. I at pp. 36-37.) She was also aware Storix

1 obtained nothing after a jury rejected their \$1.3 million claim that Johnson was
2 operating a “secret” competing business in California *after* he moved to Florida.
3 (Johnson Decl. ¶ 22, Ex. I at p. 43.) Johnson testified that Storix, after 3 ½ years
4 suing him for competing, was awarded only the exact amount demanded as a result
5 of Johnson’s customer email – **\$3,739.14**. That is the same email Judge Huff found
6 warranted a \$555,000 attorney fee award against Johnson despite it having nothing
7 to do with the copyright litigation. (*Id.* at pp. 41-43.)

8 For years, the Attorney Defendants were free to do anything to Johnson while
9 Judge Huff turned a blind eye, and Judge Huff supplied them the orders they needed
10 to continue litigating against Johnson in State court without cause. No judge ever
11 questioned Judge Huff’s conclusion that Johnson tried to compete with or otherwise
12 destroy Storix, thereby rejecting all Johnson’s efforts to dismiss the complaint for
13 lack of any evidence, instead denying Johnson any access to his own company and
14 records needed to fully prove his claims or defenses and allowing the Attorney
15 Defendants to be paid all Storix profits otherwise owed to Johnson. After 3 ½ years,
16 Johnson finally disproved their \$1.3 million claim to a jury that rejected their theory
17 that Johnson was “unjustly enriched” by his alleged competing business.

18 The current lawsuit involves substantial claims against the Attorney
19 Defendants and the Management Defendants for filing and continuing the frivolous
20 and malicious lawsuit against Johnson in State court for years, and for *illegally*
21 defending against the shareholder derivative lawsuit Johnson brought on Storix’s
22 behalf – all while taking millions of dollars from Storix what was otherwise owed to
23 Johnson. Judge Huff accepted everything the Attorney Defendants said about
24 Johnson without question and awarded historic attorney fees against Johnson based
25 on *their* interpretation of his motives and intentions extracted from a few sentences
26 in three emails.

27 Judge Huff never questioned the honesty or integrity of the Attorney
28 Defendants, and to do so now would bring her own unprecedented decisions against

1 Johnson into question. Judge Huff cannot be impartial in the current case where the
2 same Attorney Defendants are now being sued by Johnson for the misconduct she
3 refused to acknowledge while insisting they be awarded fees against Johnson for *his*
4 “inappropriate conduct”. (Johnson Decl. ¶ 23, Ex. J at p. 9.) It’s not unreasonable to
5 think Judge Huff would be invested in Johnson’s failure to prove his claims since
6 Johnson’s success in proving the lies and other unethical conduct of the Attorney
7 Defendants alleged in this complaint would also render Judge Huff’s basis for
8 ordering Johnson to pay attorney fees to those same attorneys untenable.

9 No reasonable person with knowledge of the entire facts and circumstances
10 would expect Judge Huff to be impartial under these circumstances, and it would be
11 unjust and improper for Judge Huff not to recuse herself.

12 **III. CONCLUSION**

13 It was improper to assign this case to Judge Huff given that the issues and
14 claims are unrelated to the copyright litigation and Johnson’s prior efforts to have
15 any further decisions removed from her court. Pursuant to 28 U.S.C. § 455, Judge
16 Huff should recuse herself from this case given her stated contempt for Johnson and
17 reasonable interest in seeing Johnson’s claims against the defendants in this case
18 dismissed. Otherwise, pursuant to 28 U.S.C. § 144, a neutral district court judge
19 should determine whether such bias exists, if Judge Huff’s impartiality might
20 reasonably be questioned, or if reassignment is necessary to maintain the appearance
21 of fairness and justice.

22 DATED: August 6, 2019

Respectfully submitted,

23
24 By:



ANTHONY JOHNSON, In Pro Per

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned certify and declare as follows:

3 I am over the age of eighteen years and not a party to this action. My address is 1728
4 Griffith Ave., Las Vegas, Nevada, which is located in the county where the service described
5 below took place.

6 On August 6, 2019, from my address in Las Vegas, Nevada, I served a copy of the
7 following document(s):

8 **1. PLAINTIFF’S MOTION FOR RECUSAL AND ATTACHMENTS**

9 **2. DECLARATION OF PLAINTIFF ANTHONY JOHNSON IN SUPPORT OF**
10 **MOTION TO RECUSE (AND ATTACHED EXHIBITS)**


11 by depositing the document(s) in a sealed envelope with the U.S. Postal Service. The undersigned
12 hereby certifies that he caused a copy of the foregoing document(s) to be delivered to the Clerk of
13 the U.S District Court, Southern District of California, by thereby mail.

14 The undersigned also certifies that the following recipients have consented to service by email and
15 have been delivered a copy of the document(s) by sending to the email addresses listed below:

<p>14 Marty B. Ready 15 WILSON ELSER MOSKOWITZ EDELMAN 16 & DICKER, LLP 17 401 West A Street, Suite 1900 18 San Diego, CA 92101 19 Email: marty.ready@wilsonelser.com 20 Tel: (619) 881-6431 (Attorney for Defendants Altamirano, Turner, Kinney & Huffman)</p>	<p>Paul A. Tyrell Sean Sullivan PROCOPIO, CORY, HARGREAVES & SAVITCH LLP 525 B Street, Suite 2200 San Diego, CA 92101 Email: paul.tyrell@procopio.com Email: sean.sullivan@procopio.com Tel: (619) 619.238.1900 (Defendants, Attorneys for corporate defendant, Storix, Inc.)</p>
---	---

21 I certify and declare under penalty of perjury under the laws of the United States of
22 American and the State of California that the foregoing is true and correct.

23 Executed on August 6, 2019, in Las Vegas, Nevada.

24 By: 
25 _____
26 Matthew Johnson
27
28

ATTACHMENT 1

ATTACHMENT 1



United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Anthony Johnson

Plaintiff,

Case No. 19CV1185-JLS(JLB)

V.

Manuel Altamirano

Defendant.

REPORT OF CLERK AND ORDER OF TRANSFER PURSUANT TO "LOW-NUMBER" RULE

REPORT OF CLERK PURSUANT TO LOW NUMBER RULE

FILED

JUL 18 2019

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *JMS* DEPUTY

Re: "Low-Numbered Case No.: 14CV1873-H(BLM)

Title: Johnson v. Storix, Inc.

Nature of Case: 17:0101 Copyright Infringement (definitions)

The above "low-numbered" case and the present case appear:

- (1) to arise from the same or substantially identical transactions, happenings or events; or
- (2) involve the same or substantially the same parties or property; or
- (3) involve the same patent or trademark or different patents or trademarks covering the same or substantially identical things; or
- (4) call for determination of the same or substantially identical questions of law; or
- (5) where a case is refiled within one year of having previously been terminated by the Court; or
- (6) for other reasons would entail unnecessary duplication of labor if heard by different judges.

New Case #: 19CV1185-H(BLM)

This case was transferred pursuant to the Low-Number Rule. The related cases have been assigned to the same judge and magistrate judge but they are NOT CONSOLIDATED at this point; all pleadings must still be filed separately in each case.

John Morrill, Clerk of Court,

Dated: 6/27/19

By: s/J. Petersen

J. Petersen, Deputy

ORDER OF TRANSFER PURSUANT TO "LOW-NUMBER" RULE

I hereby consent to transfer of the above-entitled case to my calendar pursuant to Local Rule 40.1, Transfer of Civil Cases under "Low-Number" Rule.

Dated: 7/15/19

Marilyn L. Huff
Marilyn L. Huff
United States District Judge


It appearing that the above-entitled case is properly transferable in accordance with the provisions of the Low-Number Rule, IT IS HEREBY ORDERED that this case is transferred to the calendar of Judge Marilyn L. Huff and Magistrate Judge Barbara L. Major for all further proceedings.

Dated: 7/18/19

Janis L. Sammartino
Janis L. Sammartino
United States District Judge

ATTACHMENT 2

ATTACHMENT 2

 KeyCite Yellow Flag - Negative Treatment

Declined to Extend by *Johnson v. Storix, Inc.*, 9th Cir.(Cal.), December 19, 2017

136 S.Ct. 1979
Supreme Court of the United States

Supap KIRTSAENG, dba Bluechristine99, Petitioner
v.
JOHN WILEY & SONS, INC.

No. 15–375.
|
Argued April 25, 2016.
|
Decided June 16, 2016.

Synopsis

Background: Following remand in copyright infringement action brought by a textbook publisher, 133 S.Ct. 1351, the United States District Court for the Southern District of New York, Donald C. Pogue, J., 2013 WL 6722887, denied motion for attorney fees by the prevailing defendant, a student who imported and resold copyrighted textbooks published abroad. The United States Court of Appeals for the Second Circuit, 605 Fed.Appx. 48, affirmed, and certiorari was granted.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] district court, in exercising its authority under the Copyright Act to award a reasonable attorney's fee to the prevailing party, should give substantial weight to the objective reasonableness of the losing party's position, abrogating *Bond v. Blum*, 317 F.3d 385, and *Hogan Systems, Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, and

[2] when awarding attorney fees, district court was required on remand to give substantial weight to the reasonableness of the publisher's litigating position, but also take into account all other relevant factors.

Vacated and remanded.

West Headnotes (17)

[1] Copyrights and Intellectual Property

 Attorney fees

A district court, in exercising its authority under the Copyright Act to award a reasonable attorney's fee to the prevailing party, should give substantial weight to the objective reasonableness of the losing party's position; but the court must also give due consideration to all other circumstances relevant to granting fees, and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense; abrogating *Bond v. Blum*, 317 F.3d 385, *Hogan Systems, Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319. 17 U.S.C.A. § 505.

32 Cases that cite this headnote

[2] Copyrights and Intellectual Property

 Attorney fees

A district court may not award attorney's fees in a copyright case as a matter of course; rather, a court must make a more particularized, case-by-case assessment. 17 U.S.C.A. § 505.

25 Cases that cite this headnote

[3] Copyrights and Intellectual Property

 Attorney fees

In awarding attorney's fees to a prevailing party in a copyright case, a court may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be encouraged to litigate meritorious copyright defenses to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. 17 U.S.C.A. § 505.

9 Cases that cite this headnote

[4] Copyrights and Intellectual Property

 Attorney fees

Nonexclusive factors that inform a court's fee-shifting decisions in a copyright case include frivolousness, motivation, objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence. 17 U.S.C.A. § 505.

[38 Cases that cite this headnote](#)

[5] Copyrights and Intellectual Property

🔑 Attorney fees

The Copyright Act's attorney fee provision grants courts wide latitude to award attorney's fees based on the totality of circumstances in a case. 17 U.S.C.A. § 505.

[11 Cases that cite this headnote](#)

[6] Courts

🔑 Discretion of court in general

In a system of laws, discretion is rarely without limits.

[1 Cases that cite this headnote](#)

[7] Federal Civil Procedure

🔑 Discretion of court

A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.

[Cases that cite this headnote](#)

[8] Copyrights and Intellectual Property

🔑 Nature of statutory copyright

Copyright law ultimately serves the purpose of enriching the general public through access to creative works. U.S.C.A. Const. Art. 1, § 8.

[10 Cases that cite this headnote](#)

[9] Copyrights and Intellectual Property

🔑 Nature of statutory copyright

The Copyright Act achieves its purpose of enriching the general public through access

to creative works by striking a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work. 17 U.S.C.A. § 101 et seq.

[12 Cases that cite this headnote](#)

[10] Copyrights and Intellectual Property

🔑 Attorney fees

Attorney fee awards under the Copyright Act should encourage the types of lawsuits that promote the Act's purposes of encouraging and rewarding authors' creations while also enabling others to build on that work. 17 U.S.C.A. § 505.

[12 Cases that cite this headnote](#)

[11] Copyrights and Intellectual Property

🔑 Attorney fees

If some court confuses the issue of liability for copyright infringement with that of reasonableness, its attorney fee award should be reversed for abuse of discretion. 17 U.S.C.A. § 505.

[4 Cases that cite this headnote](#)

[12] Copyrights and Intellectual Property

🔑 Attorney fees

Objective reasonableness of the losing party's position in a copyright case can be only an important factor in assessing attorney fee applications—not the controlling one. 17 U.S.C.A. § 505.

[14 Cases that cite this headnote](#)

[13] Copyrights and Intellectual Property

🔑 Attorney fees

In any given copyright case, a court may award attorney fees even though the losing party offered reasonable arguments or, conversely, deny fees even though the losing party made unreasonable ones. 17 U.S.C.A. § 505.

[30 Cases that cite this headnote](#)

[Cases that cite this headnote](#)

[14] Copyrights and Intellectual Property

 [Attorney fees](#)

A court may order fee-shifting in a copyright case because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses. [17 U.S.C.A. § 505](#).

[5 Cases that cite this headnote](#)

[15] Copyrights and Intellectual Property

 [Attorney fees](#)

A court may order fee-shifting in a copyright case to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, even if the losing position was reasonable in a particular case. [17 U.S.C.A. § 505](#).

[10 Cases that cite this headnote](#)


[16] Copyrights and Intellectual Property

 [Attorney fees](#)

Although objective reasonableness of a party's position carries significant weight when awarding attorney fees in a copyright case, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals. [17 U.S.C.A. § 505](#).

[21 Cases that cite this headnote](#)

[17] Federal Courts

 [Determination of damages, costs, or interest;remittitur](#)

In determining whether to award attorney fees to student who prevailed in textbook publisher's copyright infringement action based on student's importation and resale of copyrighted textbooks published abroad, district court was required on remand to give substantial weight to the reasonableness of the publisher's litigating position, but also take into account all other relevant factors. [17 U.S.C.A. § 505](#).

1981 Syllabus

In *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. —, 133 S.Ct. 1351, 185 L.Ed.2d 392 this Court held that petitioner Supap Kirtsaeng could invoke the Copyright Act's "first-sale doctrine," see [17 U.S.C. § 109\(a\)](#), as a defense to the copyright infringement claim filed by textbook publisher John Wiley & Sons, Inc. Having won his case, Kirtsaeng returned to the District Court to seek more than \$2 million in attorney's fees from Wiley under the Copyright Act's fee-shifting provision. See [§ 505](#). The District Court denied Kirtsaeng's application because, it reasoned, imposing a fee award against a losing party that had taken reasonable positions during litigation (as Wiley had done) would not serve the Act's purposes. Affirming, the Second Circuit held that the District Court was correct to place "substantial weight" on the reasonableness of Wiley's position and that the District Court did not abuse its discretion in determining that the other factors did not outweigh the reasonableness finding.

Held :

1. When deciding whether to award attorney's fees under [§ 505](#), a district court should give substantial weight to the ***1982** objective reasonableness of the losing party's position, while still taking into account all other circumstances relevant to granting fees. Pp. 3–11.

(a) [Section 505](#) states that a district court "may ... award a reasonable attorney's fee to the prevailing party." Although the text "clearly connotes discretion" and eschews any "precise rule or formula," *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455, the Court has placed two restrictions on that authority: First, a court may not "award[] attorney's fees as a matter of course," *id.*, at 533, 114 S.Ct. 1023; and second, a court may not treat prevailing plaintiffs and prevailing defendants differently, *id.*, at 527, 114 S.Ct. 1023. The Court also noted "several nonexclusive factors" for courts to consider, *e.g.*, "frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence," *id.*, at 534, n. 19, 114 S.Ct. 1023 and left

open the possibility of providing further guidance in the future, *id.*, at 534–535, 114 S.Ct. 1023.

This Court agrees with both Kirtsaeng and Wiley that additional guidance respecting the application of § 505 is proper so as to further channel district court discretion towards the purposes of the Copyright Act. In addressing other open-ended fee-shifting statutes, this Court has emphasized that “in a system of laws discretion is rarely without limits,” and it has “found” those limits by looking to “the large objectives of the relevant Act.” *Flight Attendants v. Zipes*, 491 U.S. 754, 759, 109 S.Ct. 2732, 105 L.Ed.2d 639. In accord with such precedents, this Court must determine what approach to fee awards under § 505 best advances the well-settled objectives of the Copyright Act, which are to “enrich[] the general public through access to creative works” by striking a balance between encouraging and rewarding authors' creations and enabling others to build on that work. *Fogerty*, 510 U.S., at 527, 526, 114 S.Ct. 1023. Fee awards should thus encourage the types of lawsuits that advance those aims. Pp. 1984 – 1986.

(b) Wiley's approach—to put substantial weight on the reasonableness of a losing party's position—passes this test because it enhances the probability that creators and users (*i.e.*, plaintiffs and defendants) will enjoy the substantive rights the Act provides. Parties with strong positions are encouraged to stand on their rights, given the likelihood that they will recover fees from the losing (*i.e.*, unreasonable) party; those with weak ones are deterred by the likelihood of having to pay two sets of fees. By contrast, Kirtsaeng's proposal—to give special consideration to whether a suit meaningfully clarified copyright law by resolving an important and close legal issue—would produce no sure benefits. Even accepting that litigation of close cases advances the public interest, fee-shifting will not necessarily, or even usually, encourage parties to litigate those cases to judgment. While fees increase the reward for a victory, they also enhance the penalty for a defeat—and the parties in hard cases cannot be confident if they will win or lose.

Wiley's approach is also more administrable. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable position. By contrast, a judge may not know whether a newly decided issue will have broad legal significance. Pp. 1986 – 1988.

(c) Still, objective reasonableness can be only a substantial factor in assessing fee applications—not the controlling one. In deciding whether to fee-shift, district *1983 courts must take into account a range of considerations beyond the reasonableness of litigating positions. Pp. 1988 – 1989.

2. While the Second Circuit properly calls for district courts to give “substantial weight” to the reasonableness of a losing party's litigating positions, its language at times suggests that a finding of reasonableness raises a presumption against granting fees, and that goes too far in cabinining the district court's analysis. Because the District Court thus may not have understood the full scope of its discretion, it should have the opportunity to reconsider Kirtsaeng's fee application. On remand, the District Court should continue to give substantial weight to the reasonableness of Wiley's position but also take into account all other relevant factors. Pp. 1988 – 1989.

605 Fed.Appx. 48, vacated and remanded.

KAGAN, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

E. Joshua Rosenkranz, New York, NY, for Petitioner.

Paul M. Smith, Washington, DC, for Respondent.

Elaine J. Goldenberg for the United States as amicus curiae, by special leave of the Court, supporting the respondent.

Sam P. Israel, Eleonora Zlotnikova, Sam P. Israel, P.C., New York, NY, E. Joshua Rosenkranz, Annette L. Hurst, Lisa T. Simpson, Thomas M. Bondy, Andrew D. Silverman, Christopher J. Cariello, Orrick, Herrington & Sutcliffe LLP, New York, NY, for Petitioner.

Paul M. Smith, Matthew S. Hellman, Ishan K. Bhabha, Jenner & Block LLP, Washington, DC, for Respondent.

Opinion

Justice KAGAN delivered the opinion of the Court.

[1] Section 505 of the Copyright Act provides that a district court “may ... award a reasonable attorney's fee

to the prevailing party.” 17 U.S.C. § 505. The question presented here is whether a court, in exercising that authority, should give substantial weight to the objective reasonableness of the losing party's position. The answer, as both decisions below held, is yes—the court should. But the court must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense. Because we are not certain that the lower courts here understood the full scope of that discretion, we return the case for further consideration of the prevailing party's fee application.

I

Petitioner Supap Kirtsaeng, a citizen of Thailand, came to the United States 20 years ago to study math at Cornell University. He quickly figured out that respondent John Wiley & Sons, an academic publishing company, sold virtually identical English-language textbooks in the two countries—but for far less in Thailand than in the United States. Seeing a ripe opportunity for arbitrage, Kirtsaeng asked family and friends to buy the foreign editions in Thai bookstores and ship them to him in New York. He then resold the textbooks to American students, reimbursed his Thai suppliers, and pocketed a tidy profit.

Wiley sued Kirtsaeng for copyright infringement, claiming that his activities violated *1984 its exclusive right to distribute the textbooks. See 17 U.S.C. §§ 106(3), 602(a) (1). Kirtsaeng invoked the “first-sale doctrine” as a defense. That doctrine typically enables the lawful owner of a book (or other work) to resell or otherwise dispose of it as he wishes. See § 109(a). But Wiley contended that the first-sale doctrine did not apply when a book (like those Kirtsaeng sold) was manufactured abroad.

At the time, courts were in conflict on that issue. Some thought, as Kirtsaeng did, that the first-sale doctrine permitted the resale of foreign-made books; others maintained, along with Wiley, that it did not. And this Court, in its first pass at the issue, divided 4 to 4. See *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40, 131 S.Ct. 565, 178 L.Ed.2d 470 (2010) (*per curiam*). In this case, the District Court sided with Wiley; so too did a divided panel of the Court of Appeals for the Second Circuit. See 654 F.3d 210, 214, 222 (2011). To settle

the continuing conflict, this Court granted Kirtsaeng's petition for certiorari and reversed the Second Circuit in a 6-to-3 decision, thus establishing that the first-sale doctrine allows the resale of foreign-made books, just as it does domestic ones. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. —, —, 133 S.Ct. 1351, 1355–1356, 185 L.Ed.2d 392 (2013).

Returning victorious to the District Court, Kirtsaeng invoked § 505 to seek more than \$2 million in attorney's fees from Wiley. The court denied his motion. Relying on Second Circuit precedent, the court gave “substantial weight” to the “objective reasonableness” of Wiley's infringement claim. See No. 08-cv-07834 (S.D.N.Y., Dec. 20, 2013), App. to Pet. for Cert. 18a, 2013 WL 6722887, *4. In explanation of that approach, the court stated that “the imposition of a fee award against a copyright holder with an objectively reasonable”—although unsuccessful—“litigation position will generally not promote the purposes of the Copyright Act.” *Id.*, at 11a (quoting *Matthew Bender & Co. v. West Publishing Co.*, 240 F.3d 116, 122 (C.A.2 2001) (emphasis deleted)). Here, Wiley's position was reasonable: After all, several Courts of Appeals and three Justices of the Supreme Court had agreed with it. See App. to Pet. for Cert. 12a. And according to the District Court, no other circumstance “overr[o]de” that objective reasonableness, so as to warrant fee-shifting. *Id.*, at 22a. The Court of Appeals affirmed, concluding in a brief summary order that “the district court properly placed ‘substantial weight’ on the reasonableness of [Wiley's] position” and committed no abuse of discretion in deciding that other “factors did not outweigh” the reasonableness finding. 605 Fed.Appx. 48, 49, 50 (C.A.2 2015).

We granted certiorari, 577 U.S. —, 136 S.Ct. 890, 193 L.Ed.2d 783 (2016), to resolve disagreement in the lower courts about how to address an application for attorney's fees in a copyright case.¹

II

Section 505 states that a district court “may ... award a reasonable attorney's fee to the prevailing party.” It thus authorizes fee-shifting, but without specifying standards that courts should adopt, or *1985 guideposts they should use, in determining when such awards are appropriate.

[2] [3] [4] In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994), this Court recognized the broad leeway § 505 gives to district courts—but also established several principles and criteria to guide their decisions. See *id.*, at 519, 114 S.Ct. 1023 (asking “what standards should inform” the exercise of the trial court’s authority). The statutory language, we stated, “clearly connotes discretion,” and eschews any “precise rule or formula” for awarding fees. *Id.*, at 533, 534, 114 S.Ct. 1023. Still, we established a pair of restrictions. First, a district court may not “award[] attorney’s fees as a matter of course”; rather, a court must make a more particularized, case-by-case assessment. *Id.*, at 533, 114 S.Ct. 1023. Second, a court may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be “encouraged to litigate [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.*, at 527, 114 S.Ct. 1023. In addition, we noted with approval “several nonexclusive factors” to inform a court’s fee-shifting decisions: “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.*, at 534, n. 19, 114 S.Ct. 1023. And we left open the possibility of providing further guidance in the future, in response to (and grounded on) lower courts’ evolving experience. See *id.*, at 534–535, 114 S.Ct. 1023; *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140, n., 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (noting that *Fogerty* was not intended to be the end of the matter).

[5] The parties here, though sharing some common ground, now dispute what else we should say to district courts. Both Kirtsaeng and Wiley agree—as they must—that § 505 grants courts wide latitude to award attorney’s fees based on the totality of circumstances in a case. See Brief for Petitioner 17; Brief for Respondent 35. Yet both reject the position, taken by some Courts of Appeals, see *supra*, at 1984, n. 1, that *Fogerty* spelled out the only appropriate limits on judicial discretion—in other words, that each district court should otherwise proceed as it sees fit, assigning whatever weight to whatever factors it chooses. Rather, Kirtsaeng and Wiley both call, in almost identical language, for “[c]hanneling district court discretion towards the purposes of the Copyright Act.” Brief for Petitioner 16; see Brief for Respondent 21 (“[A]n appellate court [should] channel a district court’s discretion so that it ... further[s] the goals of the Copyright

Act”). (And indeed, as discussed later, both describe those purposes identically. See *infra*, at 1986.) But at that point, the two part ways. Wiley argues that giving substantial weight to the reasonableness of a losing party’s position will best serve the Act’s objectives. See Brief for Respondent 24–35. By contrast, Kirtsaeng favors giving special consideration to whether a lawsuit resolved an important and close legal issue and thus “meaningfully clarifie[d]” copyright law. Brief for Petitioner 36; see *id.*, at 41–44.

[6] [7] We join both parties in seeing a need for some additional guidance respecting the application of § 505. In addressing other open-ended fee-shifting statutes, this Court has emphasized that “in a system of laws discretion is rarely without limits.” *Flight Attendants v. Zipes*, 491 U.S. 754, 758, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989); see *1986 *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, — U.S. —, —, 136 S.Ct. 1923, 1931, — L.Ed.2d —, 2016 WL 3221515 (2016) *ante*, at 8. Without governing standards or principles, such provisions threaten to condone judicial “whim” or predilection. *Martin*, 546 U.S., at 139, 126 S.Ct. 704; see also *ibid.* (“[A] motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles” (quoting *United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (C.C.Va.1807) (Marshall, C. J.))). At the least, utterly freewheeling inquiries often deprive litigants of “the basic principle of justice that like cases should be decided alike,” *Martin*, 546 U.S., at 139, 126 S.Ct. 704—as when, for example, one judge thinks the parties’ “motivation [s]” determinative and another believes the need for “compensation” trumps all else, *Fogerty*, 510 U.S., at 534, n. 19, 114 S.Ct. 1023. And so too, such unconstrained discretion prevents individuals from predicting how fee decisions will turn out, and thus from making properly informed judgments about whether to litigate. For those reasons, when applying fee-shifting laws with “no explicit limit or condition,” *Halo*, — U.S. at, —, — S.Ct., at —, *ante*, at 8, we have nonetheless “found limits” in them—and we have done so, just as both parties urge, by looking to “the large objectives of the relevant Act,” *Zipes*, 491 U.S., at 759, 109 S.Ct. 2732 (internal quotation marks omitted); see *supra*, at 1985 – 1986.

[8] [9] [10] In accord with such precedents, we must consider if either Wiley’s or Kirtsaeng’s proposal well advances the Copyright Act’s goals. Those objectives

are well settled. As *Fogerty* explained, “copyright law ultimately serves the purpose of enriching the general public through access to creative works.” 510 U.S., at 527, 114 S.Ct. 1023; see U.S. Const., Art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts”). The statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work. See *Fogerty*, 510 U.S., at 526, 114 S.Ct. 1023. Accordingly, fee awards under § 505 should encourage the types of lawsuits that promote those purposes. (That is why, for example, *Fogerty* insisted on treating prevailing plaintiffs and prevailing defendants alike—because the one could “further the policies of the Copyright Act every bit as much as” the other. 510 U.S., at 527, 114 S.Ct. 1023.) On that much, both parties agree. Brief for Petitioner 37; Brief for Respondent 29–30. The contested issue is whether giving substantial weight to the objective (un)reasonableness of a losing party's litigating position—or, alternatively, to a lawsuit's role in settling significant and uncertain legal issues—will predictably encourage such useful copyright litigation.

The objective-reasonableness approach that Wiley favors passes that test because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant—whether plaintiff or defendant—is clearly correct, the likelihood that he will recover fees from the opposing (*i.e.*, unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small; and likewise, a person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney's fees in a protracted suit might be as or more costly than a settlement. Conversely, when a person (again, whether plaintiff or defendant) has an unreasonable litigating position, the likelihood that he will have to pay two sets of fees discourages *1987 legal action. The copyright holder with no reasonable infringement claim has good reason not to bring suit in the first instance (knowing he cannot force a settlement and will have to proceed to judgment); and the infringer with no reasonable defense has every reason to give in quickly, before each side's litigation costs mount. All of those results promote the Copyright Act's purposes, by enhancing the probability that both creators

and users (*i.e.*, potential plaintiffs and defendants) will enjoy the substantive rights the statute provides.

By contrast, Kirtsaeng's proposal would not produce any sure benefits. We accept his premise that litigation of close cases can help ensure that “the boundaries of copyright law [are] demarcated as clearly as possible,” thus advancing the public interest in creative work. Brief for Petitioner 19 (quoting *Fogerty*, 510 U.S., at 527, 114 S.Ct. 1023). But we cannot agree that fee-shifting will necessarily, or even usually, encourage parties to litigate those cases to judgment. Fee awards are a double-edged sword: They increase the reward for a victory—but also enhance the penalty for a defeat. And the hallmark of hard cases is that no party can be confident if he will win or lose. That means Kirtsaeng's approach could just as easily discourage as encourage parties to pursue the kinds of suits that “meaningfully clarif[y]” copyright law. Brief for Petitioner 36. It would (by definition) raise the stakes of such suits; but whether those higher stakes would provide an incentive—or instead a disincentive—to litigate hinges on a party's attitude toward risk. Is the person risk-preferring or risk-averse—a high-roller or a penny-ante type? Only the former would litigate more in Kirtsaeng's world. See Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 399, 428 (1973) (fees “make[] the expected value of litigation less for risk-averse litigants, which will encourage [them to] settle[]”). And Kirtsaeng offers no reason to think that serious gamblers predominate. See, *e.g.*, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636, n. 8, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (“Economists disagree over whether business decisionmakers[] are ‘risk averse’ ”); *CIGNA Corp. v. Amara*, 563 U.S. 421, 430, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011) (“[M]ost individuals are risk averse”). So the value of his standard, unlike Wiley's, is entirely speculative.²

What is more, Wiley's approach is more administrable than Kirtsaeng's. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense. That is closely related to what the court has already done: In deciding any case, a judge cannot help but consider the strength and weakness of each side's arguments. By contrast, a judge may not know at the conclusion of a *1988 suit whether a newly decided issue will have, as Kirtsaeng thinks critical, broad legal significance. The precedent-setting, law-clarifying value of a decision may

become apparent only in retrospect—sometimes, not until many years later. And so too a decision's practical impact (to the extent Kirtsaeng would have courts separately consider that factor). District courts are not accustomed to evaluating in real time either the jurisprudential or the on-the-ground import of their rulings. Exactly how they would do so is uncertain (Kirtsaeng points to no other context in which courts undertake such an analysis), but we fear that the inquiry would implicate our oft-stated concern that an application for attorney's fees “should not result in a second major litigation.” *Zipes*, 491 U.S., at 766, 109 S.Ct. 2732 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). And we suspect that even at the end of that post-lawsuit lawsuit, the results would typically reflect little more than educated guesses.

[11] Contrary to Kirtsaeng's view, placing substantial weight on objective reasonableness also treats plaintiffs and defendants even-handedly, as *Fogerty* commands. No matter which side wins a case, the court must assess whether the other side's position was (un)reasonable. And of course, both plaintiffs and defendants can (and sometimes do) make unreasonable arguments. Kirtsaeng claims that the reasonableness inquiry systematically favors plaintiffs because a losing defendant “will virtually *always* be found to have done something culpable.” Brief for Petitioner 29 (emphasis in original). But that conflates two different questions: whether a defendant in fact infringed a copyright and whether he made serious arguments in defense of his conduct. Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety. And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.³

[12] [13] [14] [15] [16] All of that said, objective reasonableness can be only an important factor in assessing fee applications—not the controlling one. As we recognized in *Fogerty*, § 505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions. See *supra*, at 1985. That means in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the

losing party made unreasonable ones). For example, a court may order fee-shifting *1989 because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses. See, e.g., *Viva Video, Inc. v. Cabrera*, 9 Fed.Appx. 77, 80 (C.A.2 2001). Or a court may do so to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case. See, e.g., *Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 593–595 (C.A.6 2008) (awarding fees against a copyright holder who filed hundreds of suits on an overbroad legal theory, including in a subset of cases in which it was objectively reasonable). Although objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals.

[17] And on that score, Kirtsaeng has raised serious questions about how fee-shifting actually operates in the Second Circuit. To be sure, the Court of Appeals' framing of the inquiry resembles our own: It calls for a district court to give “substantial weight” to the reasonableness of a losing party's litigating positions while also considering other relevant circumstances. See 605 Fed.Appx., at 49–50; *Matthew Bender*, 240 F.3d, at 122. But the Court of Appeals' language at times suggests that a finding of reasonableness raises a presumption against granting fees, see *ibid.*; *supra*, at 1983 – 1985—and that goes too far in cabining how a district court must structure its analysis and what it may conclude from its review of relevant factors. Still more, district courts in the Second Circuit appear to have overly learned the Court of Appeals' lesson, turning “substantial” into more nearly “dispositive” weight. As Kirtsaeng notes, hardly any decisions in that Circuit have granted fees when the losing party raised a reasonable argument (and none have denied fees when the losing party failed to do so). See Reply Brief 15. For these reasons, we vacate the decision below so that the District Court can take another look at Kirtsaeng's fee application. In sending back the case for this purpose, we do not at all intimate that the District Court should reach a different conclusion. Rather, we merely ensure that the court will evaluate the motion consistent with the analysis we have set out—giving substantial weight to the reasonableness of Wiley's litigating position, but also taking into account all other relevant factors.

* * *

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 Compare, e.g., *Matthew Bender & Co. v. West Publishing Co.*, 240 F.3d 116, 122 (C.A.2 2001) (giving substantial weight to objective reasonableness), with, e.g., *Bond v. Blum*, 317 F.3d 385, 397–398 (C.A.4 2003) (endorsing a totality-of-the-circumstances approach, without according special significance to any factor), and with, e.g., *Hogan Systems, Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, 325 (C.A.5 1998) (presuming that a prevailing party receives fees).
- 2 This case serves as a good illustration. Imagine you are Kirtsaeng at a key moment in his case—say, when deciding whether to petition this Court for certiorari. And suppose (as Kirtsaeng now wishes) that the prevailing party in a hard and important case—like this one—will probably get a fee award. Does that make you more likely to file, because you will recoup your own fees if you win? Or less likely to file, because you will foot Wiley's bills if you lose? Here are some answers to choose from (recalling that you cannot confidently predict which way the Court will rule): (A) Six of one, half a dozen of the other. (B) Depends if I'm feeling lucky that day. (C) Less likely—this is getting scary; who knows how much money Wiley will spend on Supreme Court lawyers? (D) More likely—the higher the stakes, the greater the rush. Only if lots of people answer (D) will Kirtsaeng's standard work in the way advertised. Maybe. But then again, maybe not.
- 3 Kirtsaeng also offers statistics meant to show that in practice, even if not in theory, the objective reasonableness inquiry unduly favors plaintiffs; but the Solicitor General as *amicus curiae* has cast significant doubt on that claim. According to Kirtsaeng, 86% of winning copyright holders, but only 45% of prevailing defendants, have received fee awards over the last 15 years in the Second Circuit (which, recall, gives substantial weight to objective reasonableness). See Reply Brief 17–18; *supra*, at 1983 – 1985. But first, the Solicitor General represents that the overall numbers are actually 77% and 53%, respectively. See Tr. of Oral Arg. 41. And second, the Solicitor General points out that all these percentages include default judgments, which almost invariably give rise to fee awards—but usually of a very small amount—because the defendant has not shown up to oppose either the suit or the fee application. When those cases are taken out, the statistics look fairly similar: 60% for plaintiffs versus 53% for defendants. See *id.*, at 42. And of course, there may be good reasons why copyright plaintiffs and defendants do not make reasonable arguments in perfectly equal proportion.