ACCEPTED
14-19-00577-CV
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
11/15/2019 12:36 PM
CHRISTOPHER PRINE
CLERK

NO. 14-19-00507-CV

In the Court of Appeals
for the Fourteenth Judicial District of Texas
at Houston

The Fell Clutch, LLC,
Appellant

v.

Cherokee Black Entertainment, Inc. And Jimmie D. Wheeler,
Appellees

Appeal from the 189th Judicial District
Harris County, Texas
Hon. Scot Dollinger

SUPPLEMENT TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

This Supplement To The Appellees' Motion To Dismiss For Lack Of Jurisdiction is in support of that Motion. It does not replace it. It relates to Appellant The Fell Clutch's knowing violation of TEX. R. APP. P. 45 in continuing a frivolous appeal. The information in this document was not known when the Motion was filed.

I. SANCTIONS AGAINST THE FELL CLUTCH'S COUNSEL EVAN STONE FOR SIMILAR BEHAVIOR HAVE BEEN UPHELD BY THE FIFTH CIRCUIT COURT OF APPEALS.

The Fell Clutch's appeal is based on ignoring the clear jurisdictional requirements in TEX. CIV. PRAC. & REM. CODE §27.008(a). The problem was compounded by making an intentional representation to the Court that the notice of appeal was timely filed after missing or ignoring jurisdictional deadlines in TEX. R. APP. P. 26.1(b) and 26.3.

This is not the first time that The Fell Clutch's counsel Evan Stone has abused the litigation process. He was sanctioned for it in a federal district court in Dallas. The sanctions were upheld by the Fifth Circuit Court of Appeals after oral argument in which he claimed "extraordinary circumstances." Appellee's Exhibit 5 at 3 or *Haig* at 652.

Here he is continuing to pursue a frivolous appeal in violation of TEX. R. APP. P. 45 after knowing it should never have been filed. He knows that the trial court

issued a timely order mooting the alleged statutory grounds for the appeal. He knows that even if an interlocutory appeal were possible he missed the deadlines for the notice of appeal, yet he continues the case. His actions cannot be seen as accidental.

The case in which he was sanctioned was *Mick Haig Productions, e.K., v. Does 1-670*, Civil Action No. 3:10-CV-1900-N, N.D. Texas, Dallas Division, September 9, 2011 ("Civil Action"). There Mr. Stone represented a pornographic film maker and sued 670 unknown individuals who had allegedly downloaded a film without permission. Stone violated a court order so he could get their address information. He used that prohibited information to improperly contact them to attempt to extract settlements based on the Defendants' predicted shame[1] based in the threat of public disclosure of their possession of pornography.

The $32,000.00 in sanctions[2] against him in the Civil Action were upheld in *Mick Haig Prods, E.K. v. Doe*s *1-670*, 687 F.3d 648 (5th Cir. 2012)("*Haig*").

---

[1][Stone] has not been shy about telling the press that he expects to get settlements precisely because many people who download pornography are unwilling to risk being publicly identified as having done so. For example, he told the *Texas Lawyer,* "You have people that might be OK purchasing music off iTunes, but they're not OK letting their wife know that they are purchasing pornography."

Consequently, he bragged, once they are identified, "Most people just call in to settle. We have a 45 percent settlement rate." *Id.* at 21 (internal citation omitted) (quoting John Council, *Adult Film Company's Suit Shows Texas Is Good for Copyright Cases,* TEXAS LAWYER (Oct. 4, 2010)). Appellees' Exhibit 4, Page 6.

[2]$10,000.00 to the registry of the court and $22,000.00 in attorney fees to the *ad litems*. *Haig* at 651. Appellees' Exhibit 5 at 2 or *Haig* at 651.

Appellees' Exhibit 5.

The highlights on Page 2 of the Civil Action include:

* He "untimely filed a three-page reply in mid-December."

* "Stone finally filed a three-page response (the"Disclosure Order Response"), but did so ex parte rather than sealed, as the Court had directed."

* "The record amply supports significant monetary sanctions under Rules 26 and 45 based on Stone's issuing subpoenas in direct contravention of the ISP Order."

On Page 3, in section "B. Stone's Conduct Merits Sanctions", the court found "that Stone could not have reasonably interpreted the language of the ISP Order's one substantive page as granting the Discovery Motion. He nonetheless issued subpoenas bearing his signature to the ISPs the very next day."

Page 4 says "The only "highly irregular" activity here is Stone's disregard of the Rules and the Court's orders, which would have constituted sanctionable conduct even if the Court eventually had granted the Discovery Motion."

Footnote 10 on Page 6 says "Stone's representation to the Court that it should grant his motion so he could serve subpoenas, when in fact he had already done so, treads perilously close to violating a lawyer's duty of candor to the Court. *See* TEX. DISC. R. PROF'L CONDUCT 3.03(a)(1) ("A lawyer shall not knowingly . . . make

a false statement of material fact or law to a tribunal.").”

The appeal confirmed that “Stone even communicated with some of the Does [the represented but unserved defendants] without the presence or knowledge of the attorneys ad litem.” *Haig* at 650.

It also confirmed another missed deadline. “Stone later unsuccessfully moved the court to stay its sanctions order pending appeal two days after the deadline for bringing such a motion, raising a range of new arguments that he also now urges on appeal.” *Haig* at 651.

“Three months passed, [after the first sanctions order was entered] Stone filed no response, and the court granted the motion for additional sanctions, ordering Stone to pay $500 into the registry per day “for each day he delays compliance with the Sanctions Order, beginning one week after the date of this Order...” *Haig* at 652.

The appeal concluded “that no miscarriage of justice will result from the sanctions imposed as a result of Stone's flagrant violation of the Federal Rules of Civil Procedure and the district court's orders. Stone committed those violations as an attempt to repeat his strategy of suing anonymous internet users for allegedly downloading pornography illegally, using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars—a tactic that he has employed all across the state and that has been replicated by others

across the country." *Id.*

II. SIMILAR SANCTIONABLE CONDUCT IS PRESENT HERE.

The promises that Mr. Stone made in the August 4, 2012, Notice of Compliance With Sanction Order in the Civil Action ring hollow. Appellees' Exhibit 6. In it he took the "opportunity to apologize to the Court for my lack of a good faith interpretation/adherence to the Court's previous Orders, my lack of strict regard for the Federal Rules of Civil Procedure, my disrespectful public comments and my cheeky remarks in pleadings filed with the Court." Those promises apparently expired and did not extend to applying this Court's binding precedent, complying with Texas statutes, meeting the requirement in the Clerk's October 8, 2019, letter or showing "strict regard" for the Texas Rules of Appellate Procedure.

The October 4, 2019, letter pointed Mr. Stone directly to this Court's recent holding that "a party may not appeal an interlocutory order unless authorized by statute." *Nunu v. Risk*, 657 S.W.3d 462, 466 (Tex.App. - Houston [14th Dist.] 2019, Rehearing Denied). He did not give it the "good faith interpretation/ adherence to the Court's previous Orders" promised in his apology.

As outlined in the Motion, despite his having been given the detailed analysis in Appellees' Exhibits 2 and 3, Mr. Stone still filed the Brief after that, knowing there was a timely order from the trial court on the anti-SLAPP motion that voided any

foundation for an appeal under TEX. CIV. PRAC. & REM. CODE §27.008(a).

The Clerk's October 8, 2019, letter to counsel said "the record before this court contains no appealable order" and that it would be dismissed without a party "showing meritorious grounds for continuing" it. Appellees' Exhibit 1. He ignored that instruction. Instead, Stone's October 18, 2019, Brief put the burden on the Court to tell the trial court to pick one and start things all over for him.

As also outlined in the Motion, both the docketing statement and the untimely notice of appeal designated the case as an interlocutory appeal. When given proof of the problem in the October 4, 2019, letter that all the relevant deadlines for such an appeal had been missed he could have dismissed the case but he did not. Appellees' Exhibit 3. In spite of the contrition in the sanctions apology Stone continued as if the rules did not apply. He filed the baseless Brief on October 18, 2019. There was no regard for the rules, let alone "strict regard."

PRAYER FOR RELIEF

For the reasons set forth above, Appellees request that the Court grant their Motion To Dismiss For Lack Of Jurisdiction, require the Appellant to respond to the clear violation of TEX. R. APP. P. 45, and grant the Appellees any such further relief that they maybe required to at law and in equity.

Respectfully submitted,

/s/ Ira D. Joffe
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State Bar No. 10669900
Attorney for Appellees
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CERTIFICATE OF CONFERENCE

I hereby certify that in addition to the letters shown in Appellees' Exhibits 2 and 3 that were previously sent before the Brief was filed, on November 6, 2019, I sent an email to Appellant's counsel asking for his position on the Motion but there was no response. It is presumed he is opposed. There is no reason to suspect he is unopposed to this Supplement.

/s/ Ira Joffe
Ira Joffe

CERTIFICATE OF SERVICE

I certify that a copy of the above was served by the ECF system on November 15, 2019.

/s/ Ira Joffe
Ira Joffe

FILE COPY

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 8, 2019

Evan Stone
624 W. University Dr., #386
Denton, TX 76201-4206
* DELIVERED VIA E-MAIL *

Ira D. Joffe
6750 West Loop South, Sutie 920
Bellaire, TX 77401
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 14-19-00577-CV
Trial Court Case Number: 2017-81958

Style: Savir Productions LLC, et al.
v.
Cherokee Black Entertainment Inc., and Jimmie D. Wheeler

Counsel:

The record before this court contains no appealable order. The appeal will be dismissed unless any party files a response on or before October 18, 2019, showing meritorious grounds for continuing the appeal.

Sincerely,

/s/ Christopher A. Prine, Clerk

APPELLEE'S
EXHIBIT 1

IRA D. JOFFE
Attorney At Law

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BELLAIRE, TEXAS 77401

(713) 661-9898
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August 15, 2019

Stone & Vaughan, PLLC
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VIA email only to evan@stonevaughanlaw.com

Ms. Erin Rodgers, Esq.
Mr. Sergio Selvera, Esq.
Rodgers Selvera, PLLC
2450 Louisiana, Suite 400 #743
Houston, TX 77006

VIA email only to erin@rodgersselvera.com and sergio@rodgersselvera.com

RE: *SAVIR PRODUCTIONS, LLC, SAVIR'S PIZZA JOINT MOVIE, LLC, & THE FELL CLUTCH, LLC v. CHEROKEE BLACK ENTERTAINMENT, INC. and JIMMIE D. WHEELER*, CAUSE NUMBER 201781958, 189TH JUDICIAL DISTRICT, HARRIS COUNTY, TEXAS

Dear Mr. Stone:

Whether intentional, to do it within three minutes of the perceived deadline, or out of desperation, hoping the system would work near midnight on a weekend, your filing the Notice of Appeal at 11:57 PM on Saturday, July 20, 2019, was probably very dramatic for you. However, it is was not necessary.

The anti-SLAPP motion was filed on May 1, 2019. The deadline for the court to rule on it was "not later than the 30th day following the date of the hearing on the motion." TEX. CIV. PRAC. & REM. CODE §27.005(a).

The Order on the Motion was signed on May 20, 2019, the date of the hearing, easily meeting the 30 day requirement. The Order revising that Order was entered on June 20, 2019.

APPELLEE'S
EXHIBIT 2

Your Notice of Appeal cites to TEX. CIV. PRAC. & REM. CODE §27.008(a), which provides that "If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal." That section obviously does not apply to this case because the first order was signed the day of the hearing. It is a frivolous appeal. TEX. R. APP. P. 45.

There is no statutory basis for the interlocutory appeal of the June 20, 2019, Order.

Regardless, §27.008(b) makes any such appeal, whether allowed or not, an accelerated appeal. TEX. R. APP. P. 26.1(b) sets the deadline for the Notice of Appeal in an accelerated appeal at "within 20 days after the judgment or order is signed."

The twenty day deadline after the June 20, 2019, Order you are complaining about was July 10, 2019, not July 20, 2019. It was missed. The almost midnight filing was pointless because it was already ten days late. I hope you did not work until just before midnight thinking it gave you a strategic advantage.

There was a fifteen day extension from July 10, 2019, to July 25, 2019, that was available under TEX. R. APP. P. 26.3 if you had filed a motion in the court of appeals, but you did not and that deadline was missed too.

Please withdraw the defective interlocutory appeal. There is no jurisdiction for it. It will not get your clients any leverage at the mediation tomorrow.

Sincerely,

Ira D. Joffe, Esq.

IJ/ms

IRA D. JOFFE
Attorney At Law

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October 4, 2019

Mr. Evan Stone
Stone & Vaughan, PLLC
624 W. University Dr. #386
Denton, TX 76201

VIA email only to evan@stonevaughanlaw.com

RE: *SAVIR PRODUCTIONS, LLC, SAVIR'S PIZZA JOINT MOVIE, LLC, & THE FELL CLUTCH, LLC v. CHEROKEE BLACK ENTERTAINMENT, INC. and JIMMIE D. WHEELER,* CAUSE NUMBER 201781958, 189TH JUDICIAL DISTRICT, HARRIS COUNTY, TEXAS

INTERLOCUTORY APPEAL IN CASE NO. 14-19-00577-CV, 14TH COURT OF APPEALS

Dear Mr. Stone:

Please show this to your client. He will understand the logic of why the appeal will not be of any immediate value to him. Even if it had a statutory basis to be filed early, which it did not, the deadlines were missed. It is just an interlocutory appeal and the court has no jurisdiction to hear it until after a resolution of all the issues in the case.

The docketing statement certifies the appeal is of an order allegedly in violation of Civil Practice and Remedies Code §27.008(a), which says "Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal."

The time limit in §27.005 for the court to issue an order is "not later than the 30th day following the date the hearing on the motion concludes."

APPELLEE'S
EXHIBIT 3

That deadline was met. The hearing was held and concluded on May 20, 2019. The order says it was signed that day and it was entered two days later on May 22, 2019. That was a timely ruling. Your client may not like the order, but there was a timely ruling under the statute and therefore there was no statutory basis for an accelerated appeal for an alleged failure to rule.

Section 27.008(b) says "an appellate court shall expedite an appeal or other writ, whether interlocutory or not ... from a trial court's failure to rule on that motion in the time prescribed by Section 27.005." That makes it an accelerated appeal under TEX. R. APP. P. 28.1(a).

Even if there were a statutory basis, which, again, there was not, TEX. R. APP. P. 26.1(b) sets the time to file the notice of appeal in an accelerated appeal "within 20 days after the judgment or order is signed." Twenty days after June 20, 2019, was July 10, 2019. The notice of appeal was filed ten days late on July 20, 2019 and the deadline was missed. It could have been extended another fifteen days with a timely motion filed under TEX. R. APP. P. 26.3, but that deadline was also missed because of the failure to comply with both prongs of Rule 26.3; no timely notice of appeal was filed in the trial court and no motion complying with Rule 10.5(b) was filed in the appellate court.

The order you actually complain of was signed on June 20, 2019. That was the one that corrected the original May 20, 2019, order. There is no statutory basis for an accelerated appeal of the June 20, 2019, order.

The docketing statement further certifies that the order did not dispose of all parties and all issues and was not a final judgment. Without those conditions being met it is just an interlocutory appeal and the court has no jurisdiction to hear it at this time.

> "The order therefore is interlocutory, and a party may not appeal an interlocutory order unless authorized by statute. See Bally Total Fitness Corp. v. Jackson, 53 S.W.3d 352, 352 (Tex. 2001)." *Nunu v. Risk*, 567 S.W.3d 462, 466 (Tex.App. - Houston [14th Dist.] 2019) Rehearing denied.

Nunu was decided earlier this year by the 14th Court of Appeals, the same one your interlocutory appeal is now in. It denied a motion for rehearing. It is unlikely to reverse both itself and the Supreme Court of Texas on this issue.

You could save your client money on the appeal and we can try to reach a settlement or I can reconfigure this letter into a motion to dismiss for the lack of jurisdiction. I see no point to that avoidable expense.

Since you have this information before filing a brief there is also a possibility the court could find continuing with the case, after ignoring the statute, missing deadlines, and ignoring binding precedent, makes it a frivolous appeal. "If the court of appeals determines that an appeal is frivolous, it may – on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals." TEX. R. APP. P. 45. This letter will be filed with the court if a motion becomes necessary.

Sincerely,

Ira D. Joffe, Esq.

IJ/ms

cc: erin@rodgersselvera.com and sergio@rodgersselvera.com

MICK HAIG PRODUCTIONS, e.K., Plaintiff,

v.

DOES 1-670, Defendants.

Civil Action No. 3:10-CV-1900-N.

United States District Court, N.D. Texas, Dallas Division.

September 9, 2011.

ORDER

DAVID C. GODBEY, District Judge.

This Order addresses Defendants Does 1-670's (the "Does") motion for sanctions or, alternatively, attorneys' fees [10]. Because the Court finds that Evan Stone ("Stone"), counsel for Plaintiff Mick Haig Productions, e.K., ("Mick Haig") issued subpoenas in violation of court order, the Court grants the Does' motion and requires Stone to pay sanctions of $10,000, together with other remedial steps.[1]

I. ORIGINS OF THE DOES' SANCTIONS MOTION

This copyright infringement case began unusually, and it ends unauspiciously — at least for Stone. Mick Haig, a German producer and distributer of pornographic films, filed suit against the Does on September 21, 2010. *See* Compl. [1]. In short, Mick Haig alleged that the Does participated in online file-sharing of its film *Der Gute Onkel* ("The Good Uncle") through the use of BitTorrent protocol technology. Although Mick Haig had obtained the Does' Internet Protocol ("IP") addresses and the date and time each Doe allegedly engaged in infringing activity, the Does' "true names" remained unknown at the time of filing. *Id.* at 3. In order "to obtain the true identities and contact information of the [Does] from their internet service providers," ("ISPs") Mick Haig asked the Court for leave to take discovery prior to the customary Rule 26 conference and to authorize the issuance of Rule 45 subpoenas to the ISPs. *See* Mick Haig's Mot. for Leave to Take Discovery Prior to Rule 26(f) Conference (the "Discovery Motion") at 1 [2]; Discovery Mot. Mem. at 2 [2-2].

The Court declined to rule on Mick Haig's motion and instead ordered the Does' ISPs "to preserve existing activity records for each [IP] address . . . pending resolution of the Discovery Motion." Order of Oct. 21, 2010 (the "ISP Order") [3]. Specifically, the ISPs were "to retain activity records only for the specific date and time logged for each IP address, and then only to the extent necessary to identify each Doe defendant's name, address, telephone number, e-mail address, and Media Access Control address." *Id.* Mick Haig represented that it needed that particular information to identify the Does. Discovery Mot. Mem. at 2. The Court directed Stone to serve a copy of the ISP Order on each ISP identified in the Discovery Motion.[2]

Although somewhat unusual, Mick Haig's request was not unprecedented. Indeed, it closely resembled motions filed in similar lawsuits brought by other members of the entertainment industry to combat online file-sharing. *See, e.g.,* Genan Zilkha, *The RIAA's Troubling Solution to File-Sharing,* 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 667 (2010). As a common tactic, plaintiffs in file-sharing litigation routinely ask courts to authorize preconference discovery of unknown does' identities via subpoenas directed at ISPs. Once the plaintiffs obtain that information, they send the does demand letters, usually offering early settlement, as a prelude to formal litigation against the does as named defendants. *See, e.g., id.* at 683-90; *Maverick Recording Co. v. Harper,* 598 F.3d 193, 194-95 (5th Cir. 2010). In more than a few cases, the allegations against the does turn out to be false. *See, e.g.,* Eldar Haber, *The French Revolution 2.0: Copyright & the Three Strikes Policy,* 2 HARV. J. SPORTS & ENT. L. 297, 314 & n.85 (2011). File-sharing litigation has garnered significant attention over the past decade, even reaching the Supreme Court. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005). The similarity of this suit to other file-sharing cases was confirmed by the Court's review of over a dozen such cases filed by Stone in the Northern District that also sought preconference discovery. *See,*

APPELLEE'S
EXHIBIT 4

e.g., Discovery Mot. Mem. at 2 & n.1 ("[C]ourts throughout the country have granted expedited discovery in . . . lawsuits similar to this one" (citing *Lucas Entm't, Inc. v. Does 1-65,* Civil Action No. 3:10-CV-1407-F (N.D. Tex. filed July 17, 2010) (Furgeson, J))).[3]

The Court subsequently followed its initial response to the Discovery Motion by appointing three attorneys ad litem (the "Ad Litems") to represent the Does. *See* Order of Oct. 25, 2010 (the "Ad Litem Order") [4]. The Court appointed the Ad Litems in recognition that the Discovery Motion "concern[ed] matters that could materially affect the [Does'] interests." *Id.* Because the Does had yet to be identified, however, they could not defend those interests. *Id.* Accordingly, the Court ordered the Ad Litems to respond to the Discovery Motion no later than November 24, 2010.

The Ad Litems responded to the Discovery Motion as ordered. *See* Ad Litems' Obj. [5]. Among other things, the response strongly called into question the Court's jurisdiction over the vast majority of the Does, *see* Schoen Decl. & Ex. 1 [5-3 & 5-4],[4] as well as the propriety of Mick Haig's mass-joinder of hundreds of defendants into one suit. Mick Haig untimely filed a three-page reply in mid-December. *See* Mick Haig's Resp. to Opp. (the "Discovery Motion Reply") [7].

Before the Court could issue an order on the Discovery Motion, Mick Haig dismissed this case with prejudice on January 28, 2011 [9]. Although the ISP Order required the Does' ISPs to preserve Mick Haig's sought-after information, Mick Haig justified the dismissal by arguing that it had "lost any meaningful opportunity to pursue justice in this matter" because there was "little chance of discovery in sight." Notice of Dismissal at 2. Mick Haig also complained of the Court's appointing ad litems "renowned for defending internet piracy" rather than unspecified local counsel, the purported inadequacy and irrelevancy of the Ad Litems' seventy-one page Objection to the Discovery Motion, and the Ad Litems' ostensible failure "to engage [Stone] in a discovery conference" or to "provide[] . . . alternatives for [Mick Haig] to cure the harm inflicted on it by [the Does]."[5] *Id.* at 1-2.

In early February, the Ad Litems provided a potential explanation for Mick Haig's peculiar dismissal when they filed the instant motion for sanctions: Stone issued subpoenas to the Does' ISPs even though the Court had yet to rule on the Discovery Motion. The Ad Litems learned of Stone's actions after an alleged Doe contacted them with questions regarding a subpoena issued by Stone to Comcast Cable seeking the Doe's contact information. *See* Levy Aff. and accompanying Exhibits [10-2]. A representative from Verizon later contacted the Ad Litems concerning subpoenas Stone sent to that ISP. *See* Zimmerman Aff. [10-3]. Stone failed to respond to the Does' motion for sanctions.

In light of Stone's silence, the Court granted the Does preliminary relief on certain requests for information. The Court gave Stone two weeks "to disclose all actions taken by him in connection with issuing subpoenas, including but not limited to the disclosure of: (1) any communications with or materials produced by any [ISP]; (2) any issued subpoena and accompanying documents; (3) any communications with the Defendant Does or their representatives, excluding the [Ad Litems]; (4) any communications concerning settlement; (5) any funds received from or on behalf of any Doe Defendant." Order of Apr. 1, 2011 (the "Disclosure Order") [11]. Stone finally filed a three-page response (the "Disclosure Order Response"), but did so *ex parte* rather than sealed, as the Court had directed [12].

As a result, the Ad Litems neither received Stone's response nor saw that it had been entered on the case's docket sheet. After the Ad Litems learned of Stone's response, they requested an extension of time to file their reply, which the Court granted [13 & 14]. The Ad Litems filed their reply in early June, and this matter finally became ripe for consideration.

II. STONE ISSUED UNAUTHORIZED SUBPOENAS

The record amply supports significant monetary sanctions under Rules 26 and 45 based on Stone's issuing subpoenas in direct contravention of the ISP Order.

A. Guiding Principles for Rule 26 and 45 Sanctions

"The district courts wield their various sanction powers at their broad discretion." *Topalian v. Ehrman,* 3 F.3d 931, 934 (5th Cir. 1993) (collecting cases). Because attorneys use subpoenas to further discovery, sanctions in the subpoena context often implicate the sanction provisions in both Rules 26 and 45. *See* FED R. CIV. P. 26(g) (discovery-related

sanctions); 45(c) (subpoena-related sanctions); *Tiberi v. CIGNA Ins. Co.,* 40 F.3d 110, 112 (5th Cir. 1994) (looking to Rule 45 in overbroad subpoena case because Rule 26(c) provision at issue expressly invoked sanction authority of Rule 37); *see also Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec,* 529 F.3d 371, 386 (7th Cir. 2008) (noting that Rule 26 "factors are equally applicable to considering the imposition of sanctions" under Rule 45); *In re Byrd, Inc.,* 927 F.2d 1135, 1137 (10th Cir. 1991) (affirming sanctions ordered under Rule 26(g) for issuing invalid subpoenas). The Court draws on both Rules here because Stone sought early discovery from the ISPs via subpoenas.

Under Rule 26, "every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name." FED. R. CIV. P. 26(g)(1). When affixed to discovery requests, an attorney's signature "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry . . . [the request] is:

> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

FED. R. CIV. P. 26(g)(1)(B). "If a certification violates this rule without *substantial* justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." FED. R. CIV. P. 26(g)(3) (emphasis added).

Attorneys derive the authority to issue subpoenas from their status as court officers. Thus, "lawyer-issued subpoenas [are] mandates of the [issuing] court." FED. R. CIV. P. 45 1991 advisory committee's notes (citations omitted). With this power comes "increased responsibility and liability for [its] misuse." *Id.; see also Theofel v. Farey-Jones,* 359 F.3d 1066, 1074 (9th Cir. 2004) ("The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused."). Indeed, the magnitude of the public trust vested with attorneys in this regard is so great that some jurisdictions recognize causes of action for abuse of subpoena and malicious prosecution. *See, e.g., RRR Farms, Ltd. v. Am. Horse Protection Ass'n,* 957 S.W.2d 121, 133-34 (Tex. App.-Houston [14th Dist.] 1997, pet. den.). Under Rule 45, "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply." FED. R. CIV. P. 45(c)(1).

B. Stone's Conduct Merits Sanctions

Stone grossly abused his subpoena power. "A party may not seek discovery from *any source* before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order." FED. R. CIV. P. 26(d)(1) (emphasis added). In apparent homage to this rule, Mick Haig filed the Discovery Motion. Although Stone viewed this step as a "mere procedural formality," Discovery Mot. Reply at 1, this Court explicitly disagreed.

The ISP Order did not grant the Discovery Motion; the word "grant" appears nowhere on its face. To make that clear, the Court provided that the Order "addresse[d] matters related to" the Discovery Motion. ISP Order at 1. The ISP Order also acknowledged Mick Haig's concern that the ISPs might discard the sought-after information while the Court considered the Discovery Motion by ordering the ISPs to preserve that information "*pending resolution* of the Discovery Motion." *Id.* (emphasis added). The Court further allowed the affected ISPs a thirty-day window "to respond to the Discovery Motion, if they desire[d] to do so." *Id.* The Court therefore finds that Stone could not have reasonably interpreted the language of the ISP Order's one substantive page as granting the Discovery Motion.

He nonetheless issued subpoenas bearing his signature to the ISPs the very next day. *See* Disclosure Order Resp. Exs. (subpoenas dated October 22, 2010). Rule 26, however, "oblige[d] [Stone] to stop and think about the legitimacy of [his] discovery request" and whether it was consistent with the Rules and "reasonable under the precedents or a good faith

belief as to what should be the law." FED. R. CIV. P. 26(g) & 1983 advisory committee's notes. This standard requires only that Stone have acted objectively reasonable under the circumstances. *Id; see also* Theofel, 359 F.3d at 1074 (noting that a subpoena's issuer is "charged with knowledge of its invalidity" because he "`ought to have known in the exercise of reasonable care' of the mistake" (quoting PROSSER & KEETON ON THE LAW OF TORTS § 18 at 119 (5th ed. 1984))). A cursory review of the ISP Order would have revealed that any subpoena issued prior to the Court's ruling on the Discovery Motion would constitute a discovery request inconsistent with Rule 26(d)'s prediscovery conference requirement. *Cf.* In re Byrd, 927 F.2d at 1137 ("The inquiry is whether, with reasonable investigation, the bank could have believed such an order [to enforce invalid subpoenas] was proper. We agree... that it could not. There is no dispute that the subpoenas served on Smith were not valid.... Counsel must, or should, have known this when they reviewed the subpoenas.").

Stone's decision to issue the unauthorized subpoenas also runs afoul of Rule 45's provisions for "Protecting a Person Subject to a Subpoena." FED. R. CIV. P. 45(c). By serving invalid subpoenas, Stone necessarily "impos[ed] an undue burden or expense" on each ISP and the putative Does. FED. R. CIV. P. 45(c)(1). Stone acknowledges that four ISPs processed and acted on the subpoenas, including sending Stone some of the Does' identifying information.[6] *See* Disclosure Order Resp. at 2. Several Does responded to subpoenas issued to their ISPs. *See* Levy Aff. & Ex. 3. And, almost unbelievably, Stone used the information he received to contact an unknown number of potential Does, *see* Disclosure Order Resp. at 3, presumably in the form of demand letters and settlement offers like the example Stone provided to the Court and, as the Ad Litems argue, described in various public statements.[7] *See* Discovery Mot. Reply Ex. (second demand letter Stone sent to a doe in another Northern District case noting that the doe had previously been sent a letter detailing "the claims against [him] and a reasonable settlement offer" and extending "a second offer to settle, in the amount of $2,500") [7-1].

To say that the subpoenas imposed an undue burden on their targets fails to capture the gravity of Stone's abdication of responsibility: Because Stone obtained information that he had no right to receive, "[t]he subpoena[s'] falsity transformed the access [of the Does' information] from a bona fide state-sanctioned inspection into private snooping." *Theofel,* 359 F.3d at 1073 (citations omitted). The law, moreover, presumes that Stone "had at least constructive knowledge of the subpoena[s'] invalidity. [The subpoenas were] not merely technically deficient, nor ... borderline case[s] over which reasonable legal minds might disagree. [They] transparently and egregiously violated the Federal Rules, and [Stone] acted in bad faith and with gross negligence in drafting and deploying [them]." *Id.* at 1074 (footnote and internal quotation marks omitted). "To knowingly abuse [the subpoena] power is an affront to the fair and impartial administration of justice and is subject to sanctions under the inherent power of the court," *In re Air Crash at Charlotte, N.C.,* 982 F. Supp. 1092, 1101 (D.S.C. 1997), and the Federal Rules. Stone's wanton abuse continued until the eve of dismissal. *See* Disclosure Order Resp. at 2 (reporting that Verizon contacted Stone on January 26, 2011, to demand the return of a CD containing identifying information that Verizon had previously sent to Stone).[8] Accordingly, the Court finds that Stone's conduct merits severe sanctions under Rules 26 and 45.[9]

To summarize the staggering chutzpah involved in this case: Stone asked the Court to authorize sending subpoenas to the ISPs. The Court said "not yet." Stone sent the subpoenas anyway. The Court appointed the Ad Litems to argue whether Stone could send the subpoenas. Stone argued that the Court should allow him to — even though he had already done so — and eventually dismissed the case ostensibly because the Court was taking too long to make a decision.[10] All the while, Stone was receiving identifying information and communicating with some Does, likely about settlement. The Court rarely has encountered a more textbook example of conduct deserving of sanctions.

III. STONE PROVIDES SUBSTANCELESS EXPLANATIONS FOR HIS ACTIONS

Stone mentions several unavailing defenses in his brief Disclosure Order Response. Stone first argues that he could have issued subpoenas under a provision of the Copyright Act "without judicial oversight." Disclosure Order Resp. at 1 (citing 17 U.S.C. § 512(h)). He also contends that the subpoenas were innocuous because they "requested nothing more than identifying information of the [ISPs'] account holders," *id.,* distinguishing such individuals from alleged Does. According to Stone, these two arguments render "Defendants' claims of harm . . . without merit, thus making disciplinary

action improper." *Id.*

This Court deals in facts, not counterfactuals. Maybe Stone could have issued subpoenas under section 512(h).[11] But, he didn't. Instead, he filed the Discovery Motion asking the Court to authorize discovery on the ISPs prior to the normally mandatory Rule 26(f) conference. Maybe the Court would have granted the Discovery Motion had Stone waited for a ruling. But, he didn't. Instead Stone took matters into his own hands and then dismissed this case after he got caught. Whether section 512(h) might have allowed Stone access to the information he acquired impermissibly has no bearing on the Court's decision to impose sanctions. That decision turns on whether Stone engaged in misconduct. He did, egregiously.[12]

Second, Stone contends that when the Court appointed the Ad Litems it "robbed [Mick Haig] of [the] opportunity [to engage in a Rule 26(f) conference] altogether by ordering [the Ad Litems] to oppose [Mick Haig's] discovery efforts, *ab initio.*" Disclosure Order Resp. at 2. "By depriving [Mick Haig] the opportunity to proceed with discovery in a normal fashion, [Stone] asserts that it would be highly irregular to then sanction [him] for doing so." *Id.*

This argument also fails. Discovery proceeds in "normal fashion" according to the Rules of Civil Procedure. They provide that no discovery of any kind takes place prior to a Rule 26(f) conference unless the Court orders otherwise. Although Stone might believe that motions like the Discovery Motion are mere formalities and that courts routinely grant them, that misapprehension provides no basis for proceeding with preconference discovery without court order. The only "highly irregular" activity here is Stone's disregard of the Rules and the Court's orders, which would have constituted sanctionable conduct even if the Court eventually had granted the Discovery Motion.

The Court, moreover, appointed the Ad Litems to represent the Does' interests only through resolution of the Discovery Order. Because a Rule 26(f) conference and entry of a discovery plan could not have occurred before the Court ruled on the Discovery Motion, the Ad Litems had no authority to enter into any discovery plan. Regardless, Stone faced no impediment to seeking a conference with the Ad Litems if he truly desired one. Rule 26 makes "[t]he attorneys of record . . . jointly responsible for arranging the conference." FED. R. CIV. P. 26(f)(2). But, again, no matter how this hypothetical scenario might have turned out, it does not alter or mitigate Stone's misconduct.

In short, Stone provides no reasonable — let alone a substantial[13] — justification for his actions. The Court therefore finds that he deserves sanctions under Rules 26 and 45 for issuing invalid subpoenas. The Court also finds that a sanction of $10,000 sufficiently will deter similar misconduct and adequately reflects the gravity of the circumstances.

IV. THE COURT ORDERS ADDITIONAL SANCTIONS

To make all interested parties to this action whole, the Court further orders the following additional sanctions:

1) Stone shall serve a copy of this Order on each ISP implicated and to every person or entity with whom he communicated for any purpose in these proceedings.

2) Stone shall file a copy of this Order in every currently-ongoing proceeding in which he represents a party, pending in any court in the United States, federal or state.

3) Stone shall disclose to the Court whether he received funds, either personally or on behalf of Mick Haig, and whether Mick Haig received funds for any reason from any person or entity associated with these proceedings, regardless of that person's status as a Doe Defendant or not, (excepting any fees or expenses paid by Mick Haig to Stone).

4) Stone shall pay the Ad Litems' attorneys' fees and expenses reasonably incurred in bringing the motion for sanctions. The Ad Litems shall file an affidavit or other proof of such fees and expenses with the Court within thirty (30) days of the date of this Order. Stone may contest such proof within seven (7) days of its filing.

Stone shall comply with these directives and supply the Court with written confirmation of his compliance no later than forty-five (45) days after the date of this Order.

CONCLUSION

Stone requested that the Court approve preconference discovery aimed at identifying the Does. The Court instead ordered the ISPs to preserve Stone's desired information pending the Court's resolution of the Discovery Motion. Stone nonetheless issued subpoenas, obtained some Does' identifying information, and attempted to contact an unknown number of Does, presumably to make settlement offers. The adage "it is easier to ask forgiveness than it is to get permission" has no place in the issuance of subpoenas. The Court therefore sanctions Stone in the amount of $10,000, to be paid into the Court's registry no later than thirty (30) days after the date of this Order, and imposes additional sanctions as set forth above.

[1] The Court further orders that the Clerk of the Court unseal Mick Haig's response to the Does' motion for sanctions [12].

[2] Bresnan Communications, Charter Communications, Clearwire Corporation, Comcast Cable, Cox Communications, EarthLink, Frontier Communications, Insight Communications Company, Qwest Communications, Sprint, Sprint PCS, Road Runner, Road Runner Business, Verizon Internet Services, WideOpenWest, and Windstream Communications.

[3] *Lucas Entertainment*'s docket sheet reflects a classic file-sharing action against anonymous does. In that case, Stone requested, and was initially granted, permission to send subpoenas to several ISPs. He subsequently dismissed without explanation over a dozen does and personally named one doe defendant as a party to the suit, against whom he obtained an entry of default. Stone ultimately dismissed that case, too, after Judge Furgeson vacated his order authorizing preconference discovery, quashed all of Stone's subpoenas, and severed all defendants except the first doe.

[4] Shoen used reverse domain name service lookup to obtain the alleged Does' geographic locations based on the IP addresses and associated ISPs provided by Mick Haig. That process traced only about three dozen of the 670 IP addresses to Texas.

[5] This contradicted Mick Haig's argument — made over a month and a half after the Ad Litems' appointment — that the Court should grant the Discovery Motion because of "the outright impossibility of scheduling a discovery conference with persons unknown to the Plaintiff." Discovery Mot. Reply at 1.

[6] Stone demanded that most ISPs respond by November 23 or December 1, 2010. Two subpoenas, however, had later deadlines of December 8th and 23rd.

[7] *See, e.g.,* Ad Litems' Obj. at 20-22.

[Stone] has not been shy about telling the press that he expects to get settlements precisely because many people who download pornography are unwilling to risk being publicly identified as having done so. For example, he told the *Texas Lawyer,* "You have people that might be OK purchasing music offiTunes, but they're not OK letting their wife know that they are purchasing pornography." Consequently, he bragged, once they are identified, "Most people just call in to settle. We have a 45 percent settlement rate."

Id. at 21 (internal citation omitted) (quoting John Council, *Adult Film Company's Suit Shows Texas Is Good for Copyright Cases,* TEXAS LAWYER (Oct. 4, 2010)).

[8] The Court takes judicial notice that Stone has improperly issued subpoenas in other cases. *See, e.g.,* Order Granting Motion to Quash [8], in *In re Subpoena to Time Warner Cable,* Civil Action No. 3:11-MC-41-F (N.D. Tex. filed Mar. 31, 2011) (Furgeson, J.). In that case, Judge Furgeson quashed a subpoena sent by Stone to Time Warner Cable seeking identifying information for over 200 does. Stone sent the subpoena over a month after Judge Furgeson vacated his order allowing Stone to send subpoenas and severed all but the first doe defendant. More egregiously, Stone issued the subpoena on the *same day* that he voluntarily dismissed the underlying case, *FUNimation Entm't v. Doe 1,* 3:11-CV-147-F (N.D. Tex. filed Jan. 24, 2011) (Furgeson, J.).

[9] The Court also finds relevant the nonexclusive factors to consider in sanctioning misconduct under Rule 11:

[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants. ...

FED. R. CIV. P. 11 1993 advisory committee's notes. Although the Ad Litems have not moved under Rule 11, the Court finds that these factors also militate in favor of the sanctions assessed against Stone.

[10] Stone's representation to the Court that it should grant his motion so he could serve subpoenas, when in fact he had already done so, treads perilously close to violating a lawyer's duty of candor to the Court. *See* TEX. DISC. R. PROF'L CONDUCT 3.03(a)(1) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal.").

[11] The Court makes no statement on the merits of this argument.

[12] Stone's belief that his actions caused no or only *de minimis* harm is simply wrong. The subpoenas imposed costs and burdens on the ISPs and the Does that they would never have incurred if the Court had denied the Discovery Motion. The subpoenas also wreaked a substantial, unauthorized invasion of the Does' privacy. *See Theofel*, 359 F.3d at 1073-75.

[13] *See* FED. R. CIV. P. 26(g)(3).

687 F.3d 649 (2012)

MICK HAIG PRODUCTIONS E.K., Plaintiff,

v.

DOES 1-670, Defendants-Appellees,

v.

Evan Stone, Appellant.

No. 11-10977.

United States Court of Appeals, Fifth Circuit.

July 12, 2012.

Evan F. Stone (argued), Denton, TX, pro se.

Paul Alan Levy, Pub. Citizen Lit. Group, Washington, DC, Matthew Zimmerman (argued), Electronic Frontier Foundation, San Francisco, CA, for Defendants-Appellees.

650 *650 Before SMITH, GARZA and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Evan Stone, counsel for the plaintiff, Mick Haig Productions E.K. ("Mick Haig"), appeals sanctions imposed on him. Because he has waived all the arguments he raises on appeal, we affirm.

I.

Mick Haig, which produces pornographic films, identified 670 unnamed persons who it believed had unlawfully downloaded its film *Der Gute Onkel* using Bit Torrent, an online file-sharing program. Although Mick Haig had obtained their Internet Protocol ("IP") addresses and the names of their internet service providers ("ISPs"), it knew no other information about those 670 persons. Mick Haig sued them as John Doe defendants ("the Does"), alleging copyright infringement. Mick Haig then sought permission to expedite discovery in order to subpoena the Does' ISPs to disclose their names and contact information before the required Federal Rule of Civil Procedure 26(f) discovery conference. The district court did not immediately rule on the motion but instead entered two interim orders.

First, the court ordered the ISPs to preserve certain potentially related records and directed Mick Haig to serve the ISPs with the preservation order within thirty days. Second, the court appointed attorneys from the Electronic Frontier Foundation and Public Citizen Litigation Group (the "attorneys *ad litem*") to represent the Does in responding to the motion. Through those attorneys, the Does objected to Mick Haig's motion to expedite on jurisdictional, procedural, and constitutional grounds. Before the district court could rule on the motion to expedite, Mick Haig voluntarily dismissed its case. The notice of dismissal claimed that the delay in ruling on its motion foreclosed any relief, and it criticized the court's handling of the case.

Just before Mick Haig dropped the case, some of the Does contacted the attorneys *ad litem* because they had received notices of subpoena from their ISPs and feared that their names had been disclosed to Mick Haig in connection with a suit in which they were being accused of illegally downloading a pornographic film. Stone even communicated with some of the Does without the presence or knowledge of the attorneys *ad litem.* After the case had been dismissed, the Does, through the attorneys *ad litem,* moved for sanctions based on Stone's "serious misconduct" in violating Federal Rules of Civil Procedure 26 and 45 by issuing subpoenas to the ISPs. The Does sought interim relief until the full scope of Stone's misconduct could be determined. In support of their motion, the Does claimed that Stone had sent subpoenas to at least two ISPs while Mick Haig's motion to expedite discovery was pending and before Mick Haig had entered a notice of dismissal. The Does also presented evidence that the ISPs construed the subpoena and preservation order as directives from the district court to provide the requested information.

APPELLEE'S EXHIBIT 5

After over a month and a half passed with no response from Stone, the district court granted the Does' motion in part. The court required Stone, within fourteen days,

> to disclose [under seal] all actions taken by him in connection with issuing subpoenas, including but not limited to the disclosure of: (1) any communications with or materials produced by any Internet Service Provider; (2) any issued subpoena and accompanying documents; (3) any communications with the
651 Defendant Does or their representatives, excluding *651 the attorneys ad litem previously appointed by this Court; (4) any communications concerning settlement; (5) any funds received from or on behalf of any Doe Defendant.

Stone partly complied with that order and confirmed that he had served subpoenas on the ISPs.[1] He also disputed the merits of the motion, claiming that the Copyright Act permitted him to serve the subpoenas on the ISPs independently of any authorization from the district court, all the while again criticizing the court's handling of the case.

The court permitted the Does an opportunity to reply to Stone's response. Aside from his statement that the Copyright Act permitted his actions, the record reflects no effort on Stone's part to brief the court further on the legal issues related to the Does' motion. After three more months had passed, the court granted the sanctions motion, finding that Stone had "issued subpoenas in violation of court order," thereby "grossly abus[ing] his subpoena power." The court characterized Stone's actions as a "grave" and "wanton" "abdication of responsibility," transforming the use of subpoenas "from a bona fide state-sanctioned inspection into private snooping," and noted that Stone has abused the subpoena power before in other cases. Because Stone had "egregiously violated the Federal Rules" with "staggering chutzpah," the court imposed $10,000 in sanctions on Stone and also required the following:

> 1) Stone shall serve a copy of this Order on each ISP implicated and to every person or entity with whom he communicated for any purpose in these proceedings.
>
> 2) Stone shall file a copy of this Order in every currently-ongoing proceeding in which he represents a party, pending in any court in the United States, federal or state.
>
> 3) Stone shall disclose to the Court whether he received funds, either personally or on behalf of Mick Haig, and whether Mick Haig received funds for any reason from any person or entity associated with these proceedings, regardless of that person's status as a Doe Defendant or not, (excepting any fees or expenses paid by Mick Haig to Stone).
>
> 4) Stone shall pay the Ad Litems' attorneys' fees and expenses reasonably incurred in bringing the motion for sanctions. The Ad Litems shall file an affidavit or other proof of such fees and expenses with the Court within thirty (30) days of the date of this Order. Stone may contest such proof within seven (7) days of its filing.
>
> Stone shall comply with these directives and supply the Court with written confirmation of his compliance no later than forty-five (45) days after the date of this Order.

The attorneys *ad litem* then moved for $22,040 in attorneys' fees and costs. While that motion was pending, Stone appealed the order granting sanctions and responded to the Does' pending attorneys' fees motion, seeking only to reduce the quantum. Stone later unsuccessfully moved the court to stay its sanctions order pending appeal two days after the deadline for bringing such a motion, raising a range of new arguments that he also now urges on appeal.

652 The Does, through the attorneys *ad litem,* then moved the court to impose further *652 sanctions based on Stone's failure to comply with the first sanctions order. Three months passed, Stone filed no response, and the court granted the motion for additional sanctions, ordering Stone to pay $500 into the court registry per day "for each day he delays compliance with the Sanctions Order, beginning one week after the date of this Order, unless or until Stone posts a supersedeas bond in accordance with this Order or the Fifth Circuit grants him a stay." A motions panel of this court granted Stone a stay on all sanctions and expedited this appeal.

II.

On appeal, Stone argues that the sanctions cannot be justified under Rules 26 and 45 or under Federal Rule of Civil Procedure 11 or the inherent power of the district court. He also contends that the attorneys *ad litem* lacked standing to bring the sanctions motion and are not the proper recipients of the attorneys' fees awarded by the district court. Stone raises this last argument for the first time on appeal and raised the other arguments for the first time in his untimely motion in the district court to stay sanctions pending appeal, which was filed after this appeal was initiated. None of these arguments, thus, was preserved for purposes of appeal, nor does Stone contend they were. Accordingly, all the issues Stone raises on appeal have been waived. *Lofton v. McNeil Consumer & Specialty Pharm.,* 672 F.3d 372, 380-81 (5th Cir.2012).

Nonetheless, Stone asserted, at oral argument and for the first time, that this court can consider his arguments because his appeal is one of "extraordinary circumstances," involving only "pure question[s] of law [in which] a miscarriage of justice would result from our failure to consider [them]." *AG Acceptance Corp. v. Veigel,* 564 F.3d 695, 700 (5th Cir.2009). We conclude, however, that no miscarriage of justice will result from the sanctions imposed as a result of Stone's flagrant violation of the Federal Rules of Civil Procedure and the district court's orders. Stone committed those violations as an attempt to repeat his strategy of suing anonymous internet users for allegedly downloading pornography illegally, using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars — a tactic that he has employed all across the state and that has been replicated by others across the country.[2]

The stay of sanctions is therefore VACATED, and any sanctions imposed by the district court are AFFIRMED.

[1] Stone, however, failed to explain clearly whether he had negotiated settlements as a result of the subpoenas. In addition, Stone filed his response *ex parte* rather than sealed, in contravention of the order.

[2] *See, e.g., Raw Films, Ltd. v. Does 1-32,* 2011 WL 6182025, at *3 (E.D.Va.2011) ("This course of conduct indicates that the plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does. Whenever the suggestion of a ruling on the merits of the claims appears on the horizon, the plaintiffs drop the John Doe threatening to litigate the matter in order to avoid the actual cost of litigation and an actual decision on the merits.").

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICK HAIG PRODUCTIONS, E.K.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:10-CV-1900-N
	§	
DOES 1-670,	§	
	§	
Defendants.	§	

NOTICE OF COMPLIANCE WITH SANCTION ORDER

Plaintiff's counsel Evan Stone hereby notifies the Court that he has complied with the Court's Order granting Ad Litem's Motion for Sanctions. Stone has 1) served a copy of the sanction order on every ISP implicated and served a copy of the Order on every person or entity with whom he communicated for any purpose in these proceedings;[1] 2) filed a copy of the Order in three of the proceedings that were ongoing at the time the Order was issued and all proceedings that are still ongoing that were also ongoing at the time the Order was issued; 3) is now disclosing to the Court whether he or Plaintiff received funds for any reason from any person or entity associated with these proceedings, regardless of that person's status as a Doe Defendant or not—neither Stone nor Plaintiff received any such funds associated with these proceedings or from any person known to be associated with these proceedings; 4) has paid Ad Litems' fees in the amount the Court ruled was reasonable and has also paid the Court its own fine.

I would also like to take this opportunity to apologize to the Court for my lack of a good

[1] One individual, the account holder of the account by which John Doe #138's infringement occurred, has not been served a copy of the Order because no address is known for this person. This person contacted Stone on

APPELLEE'S
EXHIBIT 6

faith interpretation/adherence to the Court's previous Orders, my lack of strict regard for the Federal Rules of Civil Procedure, my disrespectful public comments and my cheeky remarks in pleadings filed with the Court.

Respectfully Submitted,

s/ E. F. Stone

Evan Stone
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February 16, 2011 and was told by Stone's office that the case had already been dismissed.