No. 11-10977

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICK HAIG PRODUCTIONS, E.K.,

Plaintiff,

v.

DOES 1-670,

Defendants-Appellees,

v.

EVAN STONE,

Appellant.

BRIEF OF DEFENDANTS-APPELLEES

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
CA No. 3:10-cv-01900-N (Godbey, D.)

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February 9, 2012

CERTIFICATE OF INTERESTED PERSONS

Mick Haig Productions, E.K., Plaintiff v. Does 1-670, et al., Defendants-Appellees v. Evan Stone, Appellant
Case No. 11-10977

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Does 1-670, Defendants-Appellees
2. Evan Stone, Appellant
3. Mick Haig Productions, E.K., Plaintiff
4. Matthew Zimmerman and Cindy Cohn, counsel for Defendants-Appellees
5. Electronic Frontier Foundation
6. Paul Alan Levy, counsel for Defendants-Appellees
7. Public Citizen Litigation Group

Dated: February 9, 2012

Respectfully submitted,

/s/ Matthew Zimmerman

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STATEMENT ABOUT ORAL ARGUMENT

Ordinarily, a sanctioned attorney ought to be able to obtain oral argument before the Court of Appeals to explain why the sanctions are improper. However, because appellant in this case waived his appellate arguments by not presenting them in opposition to the motion for sanctions, or indeed at any time before sanctions were imposed, oral argument should not be granted in this case.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291.[1]

QUESTIONS PRESENTED

1. Did the district court abuse its discretion by imposing sanctions on an attorney who issued subpoenas to third parties before discovery was permitted under Rule 26(d) of the Federal Rules of Civil Procedure, even though he was at the same time asking the court for leave to take discovery, and who then dismissed the action with prejudice after his discovery abuse was uncovered by counsel for the appellees in an attempt to avoid a remedy for his misconduct?

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[1] While the appellant filed a notice of appeal before the district court had issued a final order regarding the specific amount of monetary sanctions for which he was responsible, meaning that the appeal was technically premature, the district court has since issued such a ruling, rendering the district court's order final. *See Young v. Equifax Credit Info. Servs.*, 294 F.3d 631, 634 n.2 (5th Cir. 2002) ("[B]ecause the order would have been appealable if the district court had certified it pursuant to Rule 54(b) and because the district court did subsequently (and prior to oral argument herein) dispose of all remaining parties and claims, this court has jurisdiction over the appeal . . . ."); *Riley v. Wooten*, 999 F.2d 802, 804-805 (5th Cir. 1993).

2. Did the sanctioned attorney waive the arguments he presents on appeal by not opposing the sanctions motion and raising those arguments in opposition to sanctions?

3. Should the district court's order that the sanctioned attorney notify all persons with whom the attorney communicated in the course of the litigation, and provide the court below with information about the consequences of the attorney's violation of the discovery rules, to which appellant's brief never specifically objects, be overturned as an abuse of discretion?

4. Should the district court's order that the sanctioned attorney file a copy of the sanctions order in other courts in which he is representing any parties be overturned as an abuse of discretion?

STATEMENT OF THE CASE

On September 21, 2010, Mick Haig Productions E.K., a German producer and distributor of pornographic films, represented by appellant Evan Stone, filed a copyright infringement lawsuit in the U.S. District Court for the Northern District of Texas against 670 unnamed defendants ("Does"). This suit claimed that the Does had participated in online file sharing of a pornographic film entitled *Der Gute Onkel* ("The Good Uncle"). On September 30, 2010, Mr. Stone filed on his client's behalf a motion seeking leave to obtain discovery prior to the Rule 26(f) conference and to do so through the issuance of Rule 45 subpoenas to the Does' Internet Service Providers (ISPs). R29-39.

Instead of granting that discovery motion, on October 21, 2010, the district court ordered the ISPs to preserve their records of the Internet activity of each Doe's Internet Protocol (IP) address pending resolution of the motion. R40. The district court then appointed three attorneys ad litem (the "Ad Litems") to represent the Does in connection with the discovery request. R62. Two of the Ad Litems, Matthew Zimmerman and Cindy Cohn, are employed by the Electronic Frontier Foundation ("EFF"), a San Francisco-based nonprofit organization dedicated to protecting civil liberties in the electronic age. The third Ad Litem, Paul Alan Levy, is employed by Public Citizen, a Washington, D.C.-based consumer

advocacy organization whose Internet Free Speech project has been engaged in protecting the right to speak anonymously online.

On behalf of their Doe clients, the Ad Litems opposed the discovery motion, R65, calling into question both the district court's jurisdiction over the majority of the Does, R75-79, and the propriety of joining hundreds of defendants in a single lawsuit. R79-83. The Ad Litems also argued that Mr. Stone had not provided sufficient evidence to demonstrate that each of the Doe defendants had downloaded plaintiff's pornographic movie, R83-92. Given the potential for embarrassment over being publicly associated with the plaintiff's movie as well as Plaintiff's threat of high statutory damages awards due to copyright infringement awards, it was particularly important to require a specific showing that each of the defendants has committed the alleged wrong before allowing Mr. Stone to obtain that defendant's identifying information. R89-91. Ad Litems also indicated that there was reason to doubt that statutory damages would be available in this case because the downloads over which Mr. Stone was suing appeared to have occurred before the copyright in the movie had been registered. 17 U.S.C. § 412. R88-89.[2]

[2] This concern turned out to be true: Copyright Office records now confirm that the effective date for copyright in the above matter was September 22, 2010, the day *after* the appellant filed suit on behalf of his client and more than three months after the initial publication of the work in question. That is, statutory damages and attorney's fees were categorically unavailable to the plaintiff Mick Haig Productions regarding *any* of the 670 John Doe defendants despite the allegation in appellant's complaint (R11) and despite any threat of such liability in this case to

On December 16, 2010, Mr. Stone filed a two-page reply brief on behalf of his client with a single-page attachment. R175-177. In this remarkable document, Mr. Stone: (1) acknowledged that the discovery motion was still pending (the brief asks the court to grant it), R176; (2) ignored the arguments of the opposition in favor of a bare assertion that the discovery sought was "a mere procedural formality," R175; and (3) admitted that he filed the lawsuit against hundreds of people without any intention of litigating against any of them, because he expected the cases to settle. *Id.* On December 23, 2010, the Does submitted a short surreply, R178-182, attaching several more decisions from other courts.

There the matter stood until January 22, 2011, when one of the Does contacted one of his Ad Litem counsel, Mr. Levy, to ask about a Notice of Subpoena that he had received from Comcast. The Doe indicated that he and his wife were "terrified" about being falsely accused of being involved with the "junk" that Plaintiff produces. R236, 238. At Mr. Levy's request, Comcast provided him with a copy of the subpoena Mr. Stone had sent, dated October 22, 2010, along with an undated cover letter. R242-243. Further inquiry by the Ad Litems

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the contrary. *See* 17 U.S.C. § 410(d) ("The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office."). Copyright registration record (judicially noticeable on appeal – *see e.g., Gov't of C.Z. v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979)) submitted as Exhibit 7 to the Affidavit of Paul Levy, filed January 30, 2012, in support of Defendants' Opposition to Emergency Motion to Stay.

revealed that Stone had sent subpoenas to several other ISPs; in the interim, the Ad Litems also heard from counsel for other Does who had received word of the subpoenas pending against them. In fact, based on the information received from the ISPs, counsel learned that the very day after the district court had refused to grant his motion for early discovery, Mr. Stone had issued subpoenas to various ISPs seeking the very discovery that had been withheld from his client pending further motion practice.

Defendants' counsel promptly and repeatedly attempted to discuss the matter with Mr. Stone, to no avail. R236-238. Consequently, Mr. Levy sent Mr. Stone a letter on January 26, 2011, asking for information about his discovery efforts, including how many subpoenas he had issued and to whom, whether any information had been produced, whether he had communicated with any of the Does, and whether he had obtained any money from any of the Does in settlement. R252-254. Mr. Levy also pointed out to Mr. Stone that any communications directly with the Does would have been unethical, because they were represented by the Ad Litems. R253.

On January 28, 2010, Mr. Stone filed on behalf of his client a voluntary dismissal of the action with prejudice. R220-21. The dismissal blamed the district judge for having failed to rule on the motion for leave to take discovery within the month after the Does had filed their final brief opposing that motion and for having

appointed counsel for the Does who, Mr. Stone complained, were not knowledgeable about the relevant law. Mr. Stone did not acknowledge that the immediate impetus for the dismissal was the letter from Mr. Levy, complaining about the subpoenas he had issued and requesting information about his subsequent communications with the ISP's and the Does. However, Mr. Stone later denounced the district judge in stronger terms to the local media, stating that the judge was "the black sheep" of the local bench and that the judge's decision to appoint counsel for the Does instead of just allowing his discovery "was totally bizarre." He added that the threat of sanctions did not bother him because "I've got too many other things going on to worry about that."[3]

Because Mr. Stone refused to answer Ad Litems' questions about whether he had communicated directly with any of the Does, and whether he had succeeded in getting any money from them, the Does, represented by their Ad Litem counsel, moved for sanctions against Mr. Stone for issuing these unlawful subpoenas. R222-33.[4] The Does asked the court to use its sanctions power to require Mr.

[3] *See* Patrick Michels, *Private Parts: Denton Attorney Pursuing Downloaders Runs Into Judge and the EFF*, Dallas Observer (Feb. 7, 2011, 3:38PM), available at http://blogs.dallasobserver.com/unfairpark/2011/02/crying_onkel_evan_stone_drops.php (last visited on February 8, 2012).

[4] Throughout his appellate brief, Mr. Stone refers to this motion and other documents as having been filed by "EFF," ignoring the fact that the motion, and every other paper in the case apart from the application for a specified amount of attorney fees (as instructed by the district court), was filed by the Doe defendants, represented by their court-appointed counsel. Neither the Electronic Frontier

Stone to provide "a complete accounting of [his] improper behavior," R229, including answering several questions under oath, and to provide copies of all documents relating to any communications with the ISPs and the Does. The Does also asked the district court to enjoin Mr. Stone and his client from disclosing the identities of the Does as well as such other relief as the court deemed proper. The trial judge was urged to withhold a final decision on the appropriate sanctions until Mr. Stone's responses to the questions revealed the complete scope of his violations, but the Does argued that *some* sanction was needed. R231, 233. The Does also urged the district court to consider awarding attorney's fees as part of the sanction. R232.

Mr. Stone failed to respond to the motion for sanctions. R3-4. On April 1, 2011, the district court ordered Stone 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. R265.

Foundation nor Public Citizen has played any role in this litigation, except insofar as they are the employers of the three attorneys whom the district judge appointed as counsel ad litem for the Does.

Mr. Stone filed a short response to this Order on April 15, 2011.[5] The response contained answers to some but not all of the questions to which the court had ordered him to respond. Stone took this opportunity to argue against the imposition of sanctions, making two arguments. First, he implicitly acknowledged that the relevant question was whether he had harmed the Does through his improper subpoenas, but claimed there was no harm done because he supposedly could have obtained discovery without judicial supervision under 17 U.S.C. § 512(h). Response (DN 12), p. 1-2. Second, he reverted to blaming the district judge:

> In fact, the Court robbed Plaintiff of this opportunity altogether by ordering Defendants to oppose Plaintiff's discovery efforts, *ab initio*. By depriving Plaintiff the opportunity to proceed with discovery in a normal fashion, Plaintiff asserts that it would be highly irregular to then sanction Plaintiff's counsel for doing so.

Response (DN 12), p. 2.

Mr. Stone did not offer any other defense for his conduct, even after the Does filed their reply brief on May 27, 2011. Thus, by the time the district court issued its sanctions order, Mr. Stone had not raised any of the legal arguments on which his appeal now depends.

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[5] Plaintiff's Response Regarding Case Activity, filed April 15, 2011 (DN 12), does not appear in the appellate record submitted by Mr. Stone, apparently because it was originally filed under seal (since unsealed by the district court (R298)). The district court's subsequent contempt sanctions order issued on January 24, 2012, was similarly not included as it was issued after the record excerpts were filed. Appellees understand that the Court is obtaining those documents.

On September 9, 2011, the trial court imposed sanctions, finding that Mr. Stone had abused the discovery process by issuing subpoenas for which he knew he needed permission, for which he did not *have* permission, and for which he *knew* he did not have permission. When lawyers issue subpoenas, the court noted, they act as officers of the court, and the subpoenas that they issue are clothed with the authority of the court. But, "[w]ith this power comes 'increased responsibility and liability for [its] misuse.'" R304 (citing FED. R. CIV. P. 45, advisory committee's notes (1991) (citations omitted); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1074 (9th Cir. 2004)). The court found that Stone had "grossly abused his subpoena power" by perpetrating the ruse of seeking early discovery even though he admitted to treating that motion as just a "procedural formality" and issuing subpoenas prior to receiving leave of court, indeed despite receiving a data-preservation order that expressly noted that the request for early discovery had not yet been resolved. R305. This conduct violated both his obligation under Rule 26 to "stop and think about the legitimacy of his discovery request," and under Rule 45 to avoid imposing an undue burden and expense on both the ISP's and those Does whom he was able to identify. R306. The court noted that Mr. Stone's incomplete response to the April 1 order admitted that he had, in fact, communicated with an unknown number of Does. Further, although Mr. Stone had not provided the required documentation that would have revealed his actual

communications, the nature of his communications with Does in other cases strongly suggested that he had used the communications to try to extort four-figure settlement payments from them:

> 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."

R307-308 (citing *Theofel*, 359 F.3d at 1073).

The district judge also responded to the only two arguments that Mr. Stone had offered in defense of his conduct — arguments that Mr. Stone has apparently abandoned. With respect to the first, the court noted that Section 512(h) had no bearing because Mr. Stone had not pursued that sort of discovery:

> 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.

R310.

The court also rejected Mr. Stone's argument that early discovery is a matter of course:

> 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 . . ..

R311.

Finally, the court noted that this was not the only case in which Mr. Stone had issued early discovery without judicial permission, citing another case pending in the Northern District of Texas in which a district judge had revoked an order granting leave for early discovery, but Mr. Stone had nevertheless issued more subpoenas one month later. Thus, there was a pattern of discovery abuse requiring a strong remedy:

> 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. 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.

R309.

In consideration of all of these factors, the court fined Stone $10,000 for issuing the invalid subpoenas in violation of Rules 26 and 45 of the Federal Rules of Civil Procedure (R311-13), citing as well the Court's inherent sanctions authority and referring to Rule 11 for analogous principles. R308-09. The court also ordered that Mr. Stone: serve a copy of the sanctions order on every ISP implicated and every person or entity with whom he had communicated for any purpose in the proceedings; file a copy of the sanctions order in every ongoing proceeding in which he represents a party pending in any state or federal court in

the United States; disclose to the court whether he or his client Mick Haig received funds for any reason from any person or entity associated with the proceedings; and pay the Does' attorneys' fees and expenses that the Ad Litems reasonably incurred in bringing the motion for sanctions. R313. The deadline for compliance was October 24, 2011.

Pursuant to the district court's sanctions order, the Ad Litems filed documentation and justification for their fees and costs to date on October 7, 2011. R315-20. Mr. Stone responded to that filing on October 14, 2011, arguing that: (1) the Ad Litems' claimed hours should be reduced (R355-56, 360); (2) Ad Litems' applicable rates should be reduced pursuant to factors identified by the Fifth Circuit in *Johnson v. Georgia Highway Exp., Inc*., 488 F.2d 714, 717-719 (5th Cir. 1974) (reversed on other grounds) (R356-60), and (3) that any award of attorney's fee be dispersed among the defendants (R361).

On October 9, 2011, Mr. Stone filed his notice of appeal (R353), and on October 26, 2011 — two days after the deadline for compliance had passed — he filed an untimely "Motion to Stay the Imposition of Sanctions Pending Appeal." He took no steps to comply with the Order during this entire period, essentially treating his stay motion as granted. The Does therefore moved to have Mr. Stone held in contempt at the same time that they opposed the stay motion. *See* Defendants' Response to Motion for Stay and for Contempt Sanctions, filed

October 29, 2011 (DN 24). Mr. Stone never responded to the contempt motion.

On January 24, 2012, the district court awarded $22,000 in attorney fees and denied the motion for a stay. DN 26; *Mick Haig Prods., E.K. v. Does 1-670*, No. 3:10-CV-1900-N, 2012 WL 213701 (N.D. Tex. Jan. 24, 2012). In addition to finding the Mr. Stone was neither at risk of irreparable injury nor likely to succeed on the merits, the court observed the public interest would not be served by allowing Mr. Stone to delay his compliance with the order that he apprise judges in his other cases of the sanction, given his history of improperly issuing subpoenas in other cases and Mr. Stone's, as plaintiff's counsel in those other cases, "has the unique power to dismiss the suit at will." DN 26 at p.9. The court imposed a $500 per day contempt sanction for each day Mr. Stone delayed compliance with the sanctions order, subject to his right to post a supersedeas bond to stay the monetary obligations.

On February 2, 2012, this Court granted Mr. Stone's motion for a stay of the district court's sanctions order pending this appeal.

SUMMARY OF ARGUMENT

Mr. Stone waived all of the arguments that he seeks to raise on appeal because he did not raise them in opposition to the sanctions motion. For that reason alone, the Court should decline to consider those arguments. Mr. Stone has not sought to explain or justify his failure to respond to the motion for sanctions in

the district court or his continued contempt of that court in failing to abide by its clear order. Nor has he provided any law or precedent that could excuse raising the arguments in his brief for the first time on appeal.

If the Court does decide to consider the arguments that Mr. Stone has raised on appeal, they are all easily dismissed. First, Mr. Stone's attempt to parse the different types of sanctions available under the Federal Rules of Civil Procedure and refute them one by one is misguided. The district court had ample authority to sanction Stone for his misconduct under Rule 26 and Rule 45, and his exercise of discretion in that regard was properly guided by reference to Rule 11 standards and to the court's inherent sanctions authority. Second, Mr. Stone's argument that the Does are not the proper beneficiaries of the sanctions order is unpersuasive. The Does are the defendants in the action, and they are the parties whose private information Mr. Stone illegally sought to obtain — the fact that he improperly sought that information by means of a subpoena to an intermediary is immaterial. Third, Mr. Stone's claim that dismissal of the case deprived the Ad Litems of the ability to seek sanctions is unavailing. Ensuring that Stone had not abused the discovery efforts that gave rise to the sanctions was well within the scope of the Ad Litems' representation, the district court had authority to issue sanctions on its own initiative, and Mr. Stone cannot be permitted to evade sanctions through a self-serving dismissal.

ARGUMENT

I. Evan Stone Waived in the District Court All of the Arguments He Seeks to Raise on Appeal.

When the Ad Litems filed their original motion for sanctions, Mr. Stone chose not to reply. Mr. Stone has neither explained nor justified that choice, but its effect was clear: he has waived the right to present new arguments against it on appeal. "The general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal." *Celanese Corp. v. Martin K. Eby Const. Co.*, 620 F.3d 529, 531 (5th Cir. 2010). *See also Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743, 747 (5th Cir. 2011). "It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered." *In re ASARCO, L.L.C.*, 650 F.3d 593, 600 (5th Cir. 2011) (quoting *In re Duncan*, 562 F.3d 688, 697 (5th Cir. 2009)).

There is no reason not to apply that bedrock principle here. Mr. Stone's new arguments are specious and hardly warrant the Court's solicitude. Further, Mr. Stone comes to this Court with unclean hands. While stayed, the district court found him in contempt of the injunction that he is appealing. DN 26. He sought permission to issue subpoenas but did not wait for it to be granted. Once exposed, he attempted to escape the consequences by dismissing the case.[6] Such conduct

[6] This is not the first time that Mr. Stone has engaged in such misconduct. As Judge Godbey noted in his sanctions order: "The Court takes judicial notice that

hardly merits special consideration. Indeed, the Fifth Circuit has held that appellants in far more sympathetic circumstances have waived their arguments against sanctions orders when they were not properly preserved on appeal. *See*, *e.g.*, *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (declining to address issues raised for the first time on appeal by a *pro se* litigant). Mr. Stone is a licensed attorney who should be aware of deadlines and the need to preserve issues for appeal. Surely he should be held to at least the same standard as a *pro se* litigant.

II. The Sanctions Were Within the District Court's Authority and Amply Justified by Mr. Stone's Violations of the Federal Rules of Civil Procedure.

The bulk of Mr. Stone's argument against the sanctions order consists of an attempt to parse Rules 26 and 45 of the Federal Rules of Civil Procedure and read each narrowly enough to exclude sanctions in this case. This attempt fails for three reasons. Mr. Stone misreads Rule 26. The reference to "discovery requests" in Rule 26 applies to subpoenas such as those issued by Mr. Stone. Mr. Stone also

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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*, 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 Mr. Stone to Time Warner Cable seeking identifying information for over 200 Does. Mr. Stone sent the subpoena over a month after Judge Furgeson vacated his order allowing Mr. Stone to send subpoenas and severed all but the first Doe defendant. More egregiously, Mr. 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.)." R308.

misreads Rule 45. The sanctions provision of Rule 45 permits the district court to remedy the significant burden that Mr. Stone's illegal subpoenas placed on the Does, even though the subpoenas were only sent to the ISPs. Moreover, Mr. Stone misleads the Court as to the scope of the district court's Rule 11 sanctions power and its inherent sanctions power. The sanctions order in this case is fully justified through either of these non-mandatory sanction powers.

A. Mr. Stone's Violations of Rule 26 Necessitated the Sanctions Order.

Rule 26 provides that "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). It further provides that this signature, when it is affixed to the document, certifies that the request, response, or objection 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). Rule 26 mandates sanctions against attorneys and/or parties that do not comply: "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." FED. R. CIV. P. 26 (g)(3).

Mr. Stone brought these mandatory sanctions upon himself by issuing subpoenas that violated Rule 26. Specifically, Mr. Stone issued the subpoenas without the district court's permission before a Rule 26(f) conference had taken place. "A party may not seek discovery from any source before the parties have conferred has required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order." FED. R. CIV. P. 26(d)(1). The district court pointed to Mr. Stone's failure to abide by this rule as a justification for sanctions, noting that Mr. Stone he could not have reasonably believed he had permission to issue subpoenas. R305-06.

Mr. Stone's only argument against imposing Rule 26 sanctions is that the phrase "discovery request" in Rule 26 excludes third party subpoenas. This assertion is specious — subpoenas are regarded as a form of discovery under the Federal Rules of Civil Procedure, not as a separate category of fact-finding. *See* FED. R. CIV. P. 45(d)(1)(D) (referring to information provided in responses to a subpoena as "discovery"); FED. R. CIV. P. 45, advisory committee notes on rules (1970) ("The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules."). Mr. Stone himself stated, in his response to the district court's initial ruling on the

motion for sanctions, that his subpoenas to the ISPs "requested" information from them. DN 12, p. 1 ("the subpoenas requested nothing more than identifying information"); *id*., p. 2 ("regarding the production of records requested in the subpoena."). Indeed, his own underlying motion — "Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(f) Conference" — asked the district court for permission to issue "discovery" in the form of Rule 45 subpoenas since the Rule 26(f) conference had not yet taken place. R35.

Mr. Stone's finds no support in the only case he cites for his new proposition that a subpoena is not a "discovery request" for Rule 26 purposes, *Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110, 111 (5th Cir. 1994). In *Tiberi*, the court merely addressed two sanctions provisions not at issue in this case, FED. R. CIV. P. 26(c) and 37(a), which, the court said, "appear to apply only to persons refusing to comply with a valid discovery request and not to persons seeking overbroad discovery." *Id.* The court declined to rest its sanctions ruling on those provisions "given the ready applicability of another rule," FED. R. CIV. P. 45(c)(1), to the overbroad subpoena that was at issue. *Id.* at 111-12. Here, by contrast, it is Rule 26(d) that was violated. That rule provides that parties "may not seek discovery from any source" before the Rule 26(f) conference, with exceptions not applicable here. Indeed, given Mr. Stone's argument that Rule 45(c)(1) limitations are inapplicable here, his

very argument (which appellees show to be erroneous infra) would deprive Mr. Stone of the benefit of the *Tiberi* dictum on which he relies.

Further, in *Tiberi*, the court did not introduce any distinction between subpoenas and discovery requests, nor did it make any statement supporting the proposition that the requirements of FED. R. CIV. P. 26(d)(1) do not apply to subpoenas or that invalidly issued subpoenas are immune from sanctions under Rule 26(g). To the contrary, courts have explicitly held that invalid subpoenas are subject to sanction under Rule 26(g). *See*, *e.g.*, *In re Byrd, Inc.*, 927 F.2d 1135, 1137-38 (10th Cir. 1991) (affirming bankruptcy court's imposition of sanctions under Rule 26(g) for issuing an invalid subpoena); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 267-68 (10th Cir. 1995) (affirming district court's imposition of sanctions under Rule 26(g) for seeking untimely discovery of documents through a subpoena *duces tecum*).

Mr. Stone's contrary argument that Rule 26(g) sanctions do not apply to subpoenas at all would lead to an absurd result. Mandatory sanctions would take effect under Rule 26(g) if a party made a discovery request against another party prior to the Rule 26(f) conference but not if that party issued subpoenas against a third party prior to the same conference. Mr. Stone's conduct notwithstanding, attorneys cannot issue subpoenas on their own timeline without regard for the sequencing of discovery in the Federal Rules.

B. Mr. Stone's Violations of Rule 45 also Invited the Sanctions Order.

Rule 45 of the Federal Rules of Civil Procedure provides that:

> 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).

By seeking to impose these subpoenas unlawfully, Mr. Stone imposed an undue burden on the ISPs and on the individuals whose information was sought. The district court observed that Mr. Stone "acknowledges that four ISPs processed and acted on the subpoenas, including sending Mr. Stone some of the Does' identifying information." R307. Mr. Stone then used that information to contact a number of potential Does, presumably by sending demand letters and settlement offers. The exact number is not known because Mr. Stone has not complied with the district court's order that he reveal that information. R265, 313. Mr. Stone has indeed publicly indicated that his litigation strategy is to embarrass people like the Does into settling, telling *Texas Lawyer* that, "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" and "Most people just call in to settle. We have a 45 percent settlement rate." John Council, *Adult Film Company's Suit Shows Texas Is Good for Copyright Cases*, TEXAS LAWYER (Oct. 4, 2010). Mr. Stone thus placed

an undue burden on both the ISPs who received his illegal subpoenas and the targets whose personal information he sought.

When a subpoena is issued unlawfully, anything done in response to it is necessarily an undue burden. *See In re Shubov*, 253 B.R. 540, 547 (B.A.P. 9th Cir. 2000) ("When a subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense' within the meaning of Civil Rule 45(c)(1)."). Mr. Stone cites no authority for the contrary position. The gravity of that burden is magnified when, as here, the issuance of the subpoena is tantamount to hijacking the machinery of justice to engage in private snooping. *See Theofel*, 359 F.3d at 1074 ("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."). And indeed, Mr. Stone's contention that the latter group receive no consideration under Rule 45 is refuted by opinions such as the Seventh Circuit Court of Appeals' decision in *Northwest Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 927-929, 938 (7th Cir. 2004). There, the court held that intrusion on a hospital's patients' interest in privacy was a "burden" that had to be considered in deciding whether to enforce a subpoena to the hospital to produce records of those patients' abortions. Moreover, although the ISPs in the immediate case may have had to extract the Does' personal information anyway to comply with the district court's preservation order, some ISPs actually passed the information on to Mr.

Stone, as his unlawful subpoenas commanded them to do, increasing the magnitude of the undue burden imposed on those Does. R309.

Mr. Stone disputes that his subpoenas placed a substantial burden on anyone, and his arguments here are sadly revealing. He assumes that all of the Does are guilty of copyright infringement notwithstanding arguments and evidence to the contrary. He further assumes that it was only a matter of time before he obtained their personal information legally, notwithstanding the fact that the Ad Litems had been appointed to address that very question and had argued at great length that Mr. Stone had no right to the information. Mr. Stone's confidence that he would have inevitably prevailed in the case is at odds with his dismissal of the claims with prejudice and the substantive and procedural shortcomings identified by the Ad Litems, and in any event his argument does not mitigate the harm caused by his unlawful subpoenas.

Mr. Stone further argues that, even if (as Ad Litems contended) many of the Does could be merely account holders whose IP addresses were used by other parties to download the film, "any privacy interest the Doe possesses is substantially offset by his negligence." Brief for Appellant at 42. The contention that anyone who has an unsecured wireless network, or otherwise allows other people to use their Internet, somehow suffers no burden if they are wrongly

accused of downloading pornography and coerced into a settlement is too frivolous to merit a detailed reply.[7]

Finally, Mr. Stone claims that he took "reasonable steps" to avoid imposing a burden because he made responding to the subpoenas easy for the ISPs. Mr. Stone's subpoenas were not burdensome because the information was difficult to collect. Rather, they were burdensome because they were illegal. He sought and obtained private information about a company's customers because he pretended that he had a court order. The only reasonable way to mitigate that burden is to not issue illegal subpoenas in the first place. *See Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683-84 (N.D. Cal. 2006) (holding that "potential for loss of user trust" is a cause of undue burden on a search engine subpoenaed to provide the details of its users' searches).

C. The District Court Had Authority to Issue the Sanctions Pursuant to its Inherent Sanctions Power and Rule 11.

Mr. Stone claims that the district court did not mention its general authority to issue sanctions in the sanctions order, and that it thereby only issued the mandatory sanctions provided by Rules 26 and 45. While the district court

[7] To the extent that Mr. Stone suggests that Internet account holders may be held liable for copyright infringement for "negligently" making their Internet connections available to others, he is incorrect: the Copyright Act does not provide for any such "negligence" theory. *See*, *e.g.*, *Sony Discos, Inc. v. E.J.C. Family P'ship*, No. H-02-3729, 2010 WL 1270342 (S.D. Tex. Mar. 31, 2010) (rejecting negligence theory of copyright infringement).

subsequently (in its contempt sanctions order (DN 26)) justified its initial sanctions order on the basis of Rules 26 and 56, that initial order articulated a sufficient basis upon which to separately justify its imposition of sanctions as an exercise of its inherent authority. Indeed, the sanctions order on appeal makes specific and explicit reference to both Rule 11 and to the court's inherent sanctions authority under *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The district court's order states: "'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." R308. The order continues, "The Court also finds relevant the nonexclusive factors to consider in sanctioning misconduct under Rule 11 . . . 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." R308-309.

The district court had ample basis in the record to draw the conclusion that Mr. Stone acted in bad faith and did so implicitly. The court's order stated: "Stone grossly abused his subpoena power", R305; "Stone could not have reasonably interpreted the language of the ISP Order's one substantive page as granting the Discovery Motion," R306; "To say that the subpoenas imposed an undue burden on their targets fails to capture the gravity of Stone's abdication of responsibility";

"[They] transparently and egregiously violated the Federal Rules, and [Stone] acted in bad faith and with gross negligence in drafting and deploying [them]" (internal quotation omitted), R308; "The Court rarely has encountered a more textbook example of conduct deserving of sanctions." R309. Mr. Stone's speculation that the district court might have come to different conclusions had it been convinced by (or, indeed, even been presented with) Mr. Stone's new arguments is irrelevant. This Court should defer to the district court below inasmuch as "district courts wield their various sanction powers at their broad discretion." *Topalian v. Ehrman*, 3 F.3d 931, 934 (5th Cir. 1995).

Finally, Mr. Stone claims that only attorney's fees are available as discretionary sanctions for his misconduct. He supports this claim by misrepresenting a quote from *Chambers*, reading the phrase "a court may assess attorney's fees when a party has acted in bad faith" as indicating that *only* attorney's fees are available in such cases. *Chambers,* 501 U.S. 32, 45 (1991).

In fact the Supreme Court explicitly recognized that sanctions are available beyond mere attorney's fees, stating that "outright dismissal of a lawsuit . . . is a particularly severe sanction, yet is within the court's discretion. . . . Consequently, the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." *Id. See also Newby v. Enron Corp*., 302 F.3d 295, 302 (5th Cir. 2002) ("Although the sanctions in *Chambers* were limited to

attorney's fees and associated expenses, the Court recognized that the outright dismissal of a lawsuit under the inherent power is within the court's discretion."). Neither of the cases that Mr. Stone cites as limiting *Chambers* sanctions to fees actually did impose such a limit; both simply assumed in passing that the doctrine extends only to fees in addressing whether to grant or affirm an award of fees on the facts of those particular cases.

III. The Does are the Proper Beneficiaries of the Sanctions Order.

Mr. Stone asserts, without authority, that because Rule 45 is directed at the parties subject to the subpoena, the Does' counsel should not receive attorneys' fees. This is incorrect. First, as has been demonstrated above, Rule 26 also provides ample justification for an award of fees. Second, the purpose of fees in the sanctions context is to punish and deter misconduct, not only to compensate the other parties. *See, e.g., Mann v. Univ. of Cincinnati,* 152 F.R.D. 119, 127 (S.D. Ohio 1993) ("[D]eterrence is the principal goal of imposing sanctions," although "compensatory and punitive purposes are also served ..." (citing Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Federal Rules of Civil Procedure § 1336 (1990)). Third, the Does were the parties actually litigating the discovery dispute. They are thus the only parties whose counsel could potentially receive attorney's fees. Finally, other courts have invoked Rule 45(c) to award

fees to parties to a lawsuit for time spent opposing subpoenas wrongly directed at third parties. *See In re Shubov*, 253 B.R. 540, 548 (B.A.P. 9th Cir. 2000).

To the extent that Mr. Stone claims the fee award should be paid directly to the Does, and that consequently the Does would have to be identified to ensure the proper distribution of the fees, his argument is foreclosed by circuit precedent. *Miller v. Amusement Enters.*, 426 F.2d 534, 539 (5th Cir. 1970) (when fees are awarded in favor of advocates who are representing clients without charge to those clients, the fees are paid directly to the advocates).

IV. The Doe Defendants, Represented by the Ad Litems, Properly Filed the Sanctions Motion.

Mr. Stone's final claim, that the district court should not have considered the sanctions motion because the Ad Litem appointment had expired, also "holds no water." Contempt Sanctions Order of January 24, 2012 (DN 26) at p.8. Stone's argument is technically incorrect because, although the lawsuit was dismissed by Mr. Stone, there was never a ruling on the discovery motion, and so the termination point contemplated by the order of appointment was never reached. Moreover, the motion was filed for conduct that stemmed directly from the subject of the Ad Litems' representation: Mr. Stone's attempt to obtain the Does' identities through discovery. The motion was filed because Mr. Stone refused to provide information that the Ad Litems needed to ensure that their clients' interests had not been violated by discovery misconduct. Indeed, Mr. Stone has still not

provided that information. The sanctions motion was thus clearly within the Ad Litems' authority, as the trial court recognized. *See id.* ("Ad Litems' motion for sanctions stemmed from Stone's discovery abuse and so was properly within the scope of Ad Litems' duties.").

Finally, a misbehaving lawyer cannot avoid consequences by depriving the other party of their ad litem representation, any more than he can avoid sanctions by dismissing any other kind of case. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990) (concluding that petitioner's voluntary dismissal did not divest the district court of jurisdiction to consider respondents' sanctions motion); *Willy v. Coastal Corp*., 503 U.S. 131, 139 (1992) (holding that federal courts have the power to impose sanctions even when it is later determined that they lacked subject matter jurisdiction). As the district court pointed out, "in the role of Plaintiff's counsel [Stone], with the consent of his client, has the unique power to dismiss the suit at will." Contempt Sanctions Order of January 24, 2012 (DN 26) at p. 9. Mr. Stone's unsupported theory would effectively create a procedural vehicle by which "egregious" discovery abusers could always escape liability once their misdeeds were exposed. There is no authority for such a remarkable and expansive theory.

Indeed, the Does did not even need to bring the motion for the district court to have the power to impose sanctions. The court had the power to impose

sanctions on its own initiative under Rules 11, 26, and 45. FED. R. CIV. P. 11(c)(3) ("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."); *id.* 26(g)(3) ("If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction."); *id.* 45(c)(1) ("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.").

CONCLUSION

For the reasons cited above, the district court's award of sanctions should be affirmed in its entirety.

Dated: February 9, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Defendants-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 9, 2012

s/ Matthew Zimmerman
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CERTIFICATE OF SERVICE

I certify that on February 9, 2012, I filed the foregoing using the Court's ECF system, which served a copy electronically on all parties.

Dated: February 9, 2012

s/ Matthew Zimmerman
Matthew Zimmerman

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