Docket No. 16–15469

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NARUTO, by and through his Next Friend,
Plaintiff-Appellant,

v.

DAVID J. SLATER, *et al.*,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California

APPELLANT'S OPPOSITION TO MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OUT OF TIME

David A. Schwarz
IRELL & MANELLA LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067
Telephone: (310) 277–1010
Facsimile: (310) 203–7199
dschwarz@irell.com

Attorneys for Plaintiff-Appellant Naruto by and through his Next Friend, People for the Ethical Treatment of Animals

INTRODUCTION

PETA opposes CEI's untimely motion for leave to file an amicus brief (the "Motion"). The Motion does not assist the Court in resolving this dispute. It does not serve the interests of the parties. It threatens a private settlement agreement and forces the expenditure of additional resources on a case that has already settled.

The sole question before this Court is whether to vacate the judgment in light of the fact that Naruto, the real party in interest, is not party to this settlement. This question does not implicate important legal questions. It does not affect the public interest. The only rights affected by this decision are Naruto's rights.

CEI's desire to "caution" PETA "from using the Copyright Act as an ideological weapon" is not a legitimate basis for its belated attempt to intervene in this case. If CEI wanted to challenge PETA's Next Friend status, it could have sought to intervene in the district court. If CEI wanted to "champion the district court's order," it could have filed an amicus brief during the merits stage, just as other amici did. *See* Dkt. 20. If CEI thought that a precedential decision would "deter" PETA, it would not have sat on its hands, content to believe that the Defendants would assume CEI's mantle as a protector of "individual liberty," even after this Court stayed the appeal to allow the parties to reach settlement.

None of the parties consent to CEI's Motion, and for good reason. The Motion advances no interests other than CEI's desire to wield its own "ideological weapon" in furtherance of its longstanding attacks on PETA.

ARGUMENT

I. The Motion is Untimely and Procedurally Improper

A third party may seek leave to file an amicus brief only in two circumstances: (1) "during a court's initial consideration of a case on the merits," Fed R. App. P. 29(a)(1), or (2) "during a court's consideration of whether to grant panel rehearing or rehearing en banc," Fed R. App. P. 29(b)(1). Neither situation applies here. Merits briefing was completed long ago, and there is no pending motion for rehearing.

CEI claims that PETA is attempting to "buy an eraser for the public record." Motion at 2. The district court's unpublished dismissal order "will not be ripped from Federal Supplement [3rd]. It will still be available and will still be citable for its persuasive weight. That's all the weight a district court opinion carries anyway, *outside of future litigation involving the same parties and their privies*, because a district court opinion does not have binding precedential effect." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007) (emphasis added) (citations omitted). Vacatur will not change this.

Absent vacatur, however, the district court's order will bind Naruto (and only Naruto). *Id.* As explained in the Joint Motion for Dismissal and Vacatur (the "Vacatur Motion"), this would be unjust, given the contested and unresolved question raised on appeal as to PETA's Next Friend status. While PETA believes that it is capable of representing Naruto's interests (or that it should be entitled to make this showing before Naruto may be bound by the judgment), this Court raised questions as to the potential consequences of PETA's lack of Next Friend status. At oral argument, Judge Bea specifically asked, "Why shouldn't we vacate this decision and remand to the district court with instructions to enter a dismissal with prejudice?" Dkt. 46 [filed recording of oral argument] at 3:13-3:28. This is what the Vacatur Motion requests.

CEI's improper attacks on PETA are matched by its citation of inapplicable law. There is no *per se* rule against vacating judgments following settlements. Proposed Amicus Brief at 3 (citing *Matter of Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1300, 1302 (7th Cir. 1988)). This Court has expressly rejected the *per se* approach advocated by CEI. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Seafirst Corp.*, 891 F.2d 762, 769 (9th Cir. 1989) (declining to adopt the "inflexible rule" set forth in *Matter of Memorial Hospital* because "[t]o do so would raise the cost of settlement too high."). Not one of the authorities

cited by CEI addresses the type of situation at issue here where there is a question of Next Friend standing.

II. The Proposed Amicus Brief Would Not Assist this Court in Resolving this Dispute.

CEI never accounts for *why* punishing Naruto or "warning" PETA is a proper basis to seek amicus intervention. Though CEI's Motion labels the claims as "frivolous," it never explains why, or challenges this Court's decision to hear oral argument in this matter. *See* Fed R. App. P. 34(a)(2)(A).

PETA and Defendant Slater have stated publicly that this case raises important issues about expanding legal rights for non-animals. CEI's opposition to PETA, or to its members' beliefs, does not excuse CEI from complying with the rules governing amicus intervention, or give it license to file an untimely brief in order to attack PETA's motives in bringing this case, or to question the parties' decision to settle their dispute. PETA is bound by the settlement and has agreed to dismiss this appeal. CEI's brief won't serve as a referendum on PETA's conduct; to the contrary, a judgment binding Naruto presupposes PETA's standing to pursue claims on Naruto's behalf. *See, e.g., Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1161 (9th Cir. 2002).

Other than to potentially harm the interests of real parties incapable of seeking relief on their own behalf, CEI advances no interests other than its own

self-interest. Its suggestion that the Court render an opinion after the case is settled, or its invitation to appoint a "guardian ad litem," would needlessly prolong this litigation and render this Court's Order staying this appeal pointless.

Amicus should "assist" the court in reaching a resolution in "a case of general public interest." *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). CEI is not acting as a friend of the court. It is acting on its own agenda, and seeks to use this appeal to further its self-interested and self-publicized record of attacking PETA. *See Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (Posner, J.) (disapproving of "attempts to inject interest-group politics into the federal appellate process" through amicus submissions).

PETA respectfully requests that CEI's Motion be denied.

Dated: September 20, 2017

IRELL & MANELLA LLP

By: /s/ David A. Schwarz
David A. Schwarz

Attorneys for Plaintiff/Appellant Naruto by and through his Next Friend, People for the Ethical Treatment of Animals

9th Circuit Case Number(s) 16-15469

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Sept. 20, 2017 .

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

Signature (use "s/" format) /s/ Michael D. Harbour

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)