IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13031
D.C. Docket No. 1:14-CV-02926-ELR

RYAN PERRY,

Plaintiff-Appellant,

versus

CABLE NEWS NETWORK, INC., a Delaware corporation, and
CNN INTERACTIVE GROUP, INC., a Delaware corporation,

Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Georgia

APPELLANT'S REPLY IN SUPPORT OF MOTION FOR SANCTIONS UNDER 11TH CIR. R. 27-4

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Plaintiff-Appellant certifies that the following parties have an interest in the outcome of this appeal:

1. Ryan D. Andrews (attorney for Plaintiff-Appellant)

2. Alan W. Bakowski (attorney for Defendants-Appellees)

3. Rafey S. Balabanian (attorney for Plaintiff-Appellant)

4. Courtney C. Booth (attorney for the Plaintiff-Appellant)
5. Alan J. Butler (attorney for *amicus curiae*)
6. Cable News Network, Inc. (Defendant-Appellee)
7. Clinton E. Cameron (attorney for Defendant-Appellee)
8. CNN Interactive Group, Inc. (Defendant-Appellee) (wholly owned subsidiary of Cable News Network, Inc.)
9. Electronic Privacy Information Center (*amicus curiae*)
10. Historic TW Inc. (parent company of Turner Broadcasting System, Inc.)
11. Jay Edelson (attorney for Plaintiff-Appellant)
12. Jonathan S. Frankel (attorney for Defendants-Appellees)
13. Jennifer Auer Jordon (attorney for Plaintiff-Appellant)
14. Jeffrey G. Landis (attorney for Defendants-Appellees)
15. James A. Lamberth (attorney for Defendants-Appellees)
16. James D. Larry (attorney for Plaintiff-Appellant)
17. J. Aaron Lawson (attorney for Plaintiff-Appellant)
18. Roger Perlstadt (attorney for Plaintiff-Appellant)
19. Benjamin H. Richman (attorney for Plaintiff-Appellant)

20. Hon. Eleanor L. Ross (presiding district court judge)

21. Marc Rotenberg (attorney for *amicus curiae*)

22. Jacob A. Sommer (attorney for Defendants-Appellees)

23. Aimee D. Thomson (attorney for *amicus curiae*)

24. Time Warner, Inc. (NYSE:TWX) (parent company of Historic TX Inc.)

25. Turner Broadcasting System, Inc. (parent company of Defendants-Appellees)

26. Marc J. Zwillinger (attorney for Defendants-Appellees)

No person or entity holds more than 10% of Time Warner Inc.'s (NYSE:TWX) outstanding common stock.

Dated: July 25, 2016

Respectfully submitted,

RYAN PERRY,

By: s/ J. Aaron Lawson
One of Plaintiff-Appellant's Attorneys

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CNN acknowledges that this Court has jurisdiction to hear Mr. Perry's appeal, that it sought the wrong relief in its motion, and that it probably should have included its arguments in its merits brief. But CNN fails to grasp the implications of its concessions. As Mr. Perry has already explained, so long as this Court has appellate jurisdiction, there is no reason to dismiss this appeal as CNN requested. *See* 28 U.S.C. § 2106. Not surprisingly, CNN's reply in support of its "motion to dismiss" pivots, and now seeks remand, rather than dismissal. It is therefore, just as Mr. Perry pointed out in his motion for sanctions, nothing more than an opening brief. CNN's filing therefore serves a slew of improper purposes: to gain the first word in the appeal despite prevailing in the court below, to exceed the word limits established by Appellate Rule 32, and to needlessly drive up the cost of litigation. CNN's filing is sanctionable. *See* 11th Cir. R. 27-4(c) (authorizing sanctions for motions filed for an improper purpose, such as to cause unnecessary delay, or needlessly increase the cost of litigation).

CNN has cited not a single case in which a federal court has *dismissed* an appeal because of an error in an appealable judgment. This, too, is unsurprising. As Mr. Perry noted in moving to sanction

CNN, "the question of standing does not go to whether or not the appeal should be heard, but rather to its merits." *In re Pittsburgh & L.E. R. Co.*, 543 F.2d 1058, 1064 (3d Cir. 1976). And this Court has made clear that it can hear an appeal anytime it is authorized by statute and the appellant is adverse to the district court's judgment. *See OFS Fitel, LLC v. Epstein, Becker & Green, PC*, 549 F.3d 1344, 1355-57 (11th Cir. 2008).

Instead, CNN offers a series of misplaced points in an attempt to justify the filing of its motion. CNN first surveys the various circuit rules of sister appellate courts. This survey simply highlights CNN's misunderstanding of appellate jurisdiction and why its motion was improper. For instance, the Eighth Circuit's rules state that motions to dismiss may be filed "on the ground the appeal is not within the court's jurisdiction." 8th Cir. R. 47A(b). First Circuit Rule 27.0(c) says the same thing. These rules simply request early motions to dismiss for lack of *appellate* jurisdiction, which CNN concedes this Court possesses.

CNN in particular highlights the Seventh Circuit's Rule 3(c)(1) and opinion in *United States v. Lloyd*, 398 F.3d 978, 979-81 (7th Cir. 2005), not only to suggest that its "motion to dismiss" was proper, but also that it will actually save the resources of the Court and the parties.

But *Lloyd* explicitly disapproves of such motions as underhanded tactics to postpone briefing (which CNN also requests in its response), and condemns motions like CNN's as frivolous and a drain on judicial and party resources. The court's three-paragraph explanation is particularly relevant in this case:

> When the time came for the United States to tender a brief, it filed instead a motion to dismiss the appeal. The gist of its argument is that Lloyd lacked our permission to commence a second collateral attack. **What that has to do with the propriety of an appeal is a mystery. The district court made a final decision, and Lloyd filed a timely notice of appeal. What more is necessary to appellate jurisdiction?** Lloyd is entitled to appellate review to test whether the United States is right about the characterization of his motion in the district court (or whether, as the district judge thought, it is defective for some other reason). Instead of asking us to dismiss Lloyd's appeal, the United States should have asked us to vacate the district court's decision and remand with instructions to dismiss for want of jurisdiction.
>
> * * * [a brief discussion of 28 U.S.C. § 2244 is omitted]
>
> What led us to issue a published opinion, however, is not these oversights but the litigation strategy adopted by the United States. It is a strategy that is all too common, has been disapproved, yet continues. The strategy is this: instead of filing a brief on the due date, the appellee files something else, such as a motion to dismiss. The goal and often the effect is to obtain a self-help extension of time even though the court would be unlikely to grant an extension if one were requested openly.

> It also creates busywork for the court and its staff. One of the prosecutor's motions (to defer briefing while the motion to dismiss was under advisement) went to a staff attorney and then to a motions judge; several orders were entered (including one directing Lloyd to respond); next the motion to dismiss and response were routed to a different motions judge (the identity of the motions judge changes weekly), who had to convene a three-judge motions panel to rule on the dispositive motion. **Because the United States' position is frivolous (it does not begin to demonstrate that *this court* lacks jurisdiction), the normal result would have been an order denying the motion.** Next the United States would have filed a brief, following several months' delay while the motions were kicking around inside the court, and the appeal would have been submitted to another panel. By then seven appellate judges (plus two or three staff attorneys) could have become involved in three waves of motions and briefs. And for what? Just because one attorney let an appeal get too close to a briefing deadline and decided to file a three-page motion in lieu of a ten-page brief?

Lloyd, 398 F.3d at 979-80 (emphasis added).

CNN remaining arguments warrant only a brief response, and come nowhere close to demonstrating that sanctions are unwarranted. As to CNN's suggestion that the Court may wish delay the appeal by staying merits briefing in light of its motion, there is no need. Circuit Rule 31-1(d) states that a stay is warranted only where it appears the Court lacks appellate jurisdiction (and appears to say that a stay will issue only where the Court itself requests briefing on a jurisdictional question). CNN concedes that this is not the case here. CNN's

attachment, a letter filed by the Sixth Circuit in response to a motion to dismiss, again misses the point. Not only does a review of the docket in that case suggest that the letter was issued as a matter of course, as it came mere minutes after the motion was filed, and mere hours before the appellants were scheduled to file their principal brief, but the filing in that case invoked an actual intervening change in law (a statutory amendment), which is not present here.

CNN argues that Mr. Perry did not identify *Church v. Accretive Health, Inc.*, --- F. App'x ---, 2016 WL 3611543 (11th Cir. July 6, 2016), as unpublished, or inform the Court that that case involves "an entirely different statute and wholly different facts." But Mr. Perry identified the case as slated for inclusion in the Federal Appendix, which indicates the case's unpublished nature. And Mr. Perry's contention was not that the case was on all fours with this appeal. Instead he used it, properly, as persuasive authority regarding the role of Article III in this appeal, in much the same way that CNN attempts to use *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), another case involving "an entirely different statute and wholly different facts."

At bottom, CNN asserts that Mr. Perry is responding to a straw man. CNN clearly doesn't believe its own argument; it changed tack (and no longer sought dismissal) as soon as Mr. Perry pointed out that CNN's "motion to dismiss" was without merit. And CNN's "strawman" argument is a red herring: Any problem with Mr. Perry's standing to sue is not grounds to dismiss the appeal, which is the relief CNN asked for. *See* Fed. R. App. P. 28(a)(9) (requiring parties to state "the precise relief sought"). Thus, CNN's motion can be explained only as an attempt to subvert the Federal Rules of Appellate Procedure by arguing in a motion what should be argued in a brief, and gaining 30 extra pages in which it can defend the judgment of the district court. That this was CNN's goal is apparent: Its 20-page filing and 10-page supporting reply devote nearly as much attention to the merits of the appeal as they do to CNN's misreading of *Spokeo*. This is improper. Mr. Perry thus requests reasonable sanctions against CNN, as outlined in his motion.

Dated: July 25, 2016

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, J. Aaron Lawson, an attorney, hereby certify that I served the foregoing ***Appellant's Reply in Support of Motion for Sanctions under 11th Cir. R. 27-4***, by causing true and accurate copies of such paper to be transmitted to all counsel of record via the Court's CM/ECF electronic filing system on July 8, 2016.

/s/ J. Aaron Lawson