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

JOINT MOTION TO DISMISS APPEAL AND VACATE THE JUDGMENT

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People for the Ethical Treatment of Animals ("PETA"), Defendants-Appellees David John Slater and Wildlife Personalities, Ltd.'s (collectively, "Slater"), and Defendant-Appellee Blurb, Inc. ("Blurb") (collectively, the "Parties") have reached a settlement in this matter. Pursuant to the terms of the Parties' settlement agreement, and Federal Rules of Appellate Procedure 27 and 42, the Parties jointly move for an order dismissing the appeal and vacating the judgment below.[1]

Dismissal with vacatur is just and proper where, as here, the Plaintiff is not a party to the settlement. While the settlement resolves all disputes arising out of this litigation as between PETA and Defendants, the settlement also renders moot the appeal filed on behalf of the Plaintiff Naruto. Insofar as the Defendants argued in this appeal that PETA has not satisfied the requirements under Federal Rule of Civil Procedure 17, and therefore cannot assert claims on behalf of Naruto, PETA contends it would be just and proper to not bind Plaintiff Naruto by the judgment of the district court in light of the dispute concerning PETA's status to file the complaint which resulted in that judgment.

Accordingly, the Parties respectfully request dismissal of the appeal and vacatur of the judgment below.

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[1] Defendants join in PETA's request for dismissal of the appeal in light of the settlement. Pursuant to the terms of the parties' settlement agreement, Defendants also join PETA's request for vacatur, without joining or taking any position as to the bases for that request.

I. BACKGROUND

On September 21, 2015, a lawsuit was filed against Defendants in the Northern District of California on behalf of Naruto, a seven-year old crested macaque living on the island of Sulawesi in Indonesia. Dkt. 18 (Appellants' Excerpts of Record ["ER"]) at 19-30. The Complaint was filed by Next Friends PETA, a non-profit dedicated to promoting animal rights, and Antje Engelhardt, Ph.D ("Dr. Engelhardt"), a primatologist and ethnologist whom the Complaint alleged had known, monitored, and studied Naruto since his birth. ER 23. The Complaint alleged that Defendants infringed Naruto's rights under the Copyright Act by publishing and selling photographs taken by Naruto using Defendant Slater's unattended camera equipment (the "Monkey Selfies"). ER 20.

Defendants moved to dismiss on the grounds that Naruto lacked standing to enforce the Copyright Act and that the Complaint failed to state a claim. ER 12. They did not challenge PETA's or Dr. Engelhardt's standing to act as Next Friends pursuant to Federal Rule of Civil Procedure 17, and the district court made no finding regarding Next Friend standing. Instead, it granted the motions on the ground that Naruto lacks standing to pursue claims under the Copyright Act because the Act does not expressly grant standing to animals. ER 14.

PETA and Dr. Engelhardt filed this appeal on March 20, 2016. Dkt. 1. While the appeal was pending, Dr. Engelhardt filed a Notice of Withdrawal on May 4, 2016. Dkt. 10. The Court construed this Notice as a motion by Dr.

Engelhardt to dismiss her own appeal, which the Court granted on May 18, 2016. Dkt. 14.

This Court heard oral argument and submitted the matter on July 12, 2017. Dkt. 45. Following oral argument, the Parties began settlement discussions. Dkt. 48 at 1. To facilitate these discussions, the Parties requested that this Court stay the appeal through and including September 8, 2017 so that they could continue to negotiate settlement terms. *Id.* The Court granted the Parties' request on August 11, 2017. Dkt. 49.

The Parties executed a final settlement agreement effective as of September 8, 2017. As part of the settlement, the Parties agreed to jointly dismiss this appeal and request that this Court vacate the judgment below. They now so move.

II. RELIEF REQUESTED

The Parties have agreed to settle their respective claims. There is thus no longer any live case or controversy before this Court. *See Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009) ("[W]hen a party settles all of his personal claims before appeal, an appeals court must dismiss the appeal as moot[.]").

"When a case becomes moot on appeal, the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)).

"Vacatur in such a situation 'eliminat[es] a judgment the loser was stopped from opposing on direct review.'" *Id.* (quoting *Arizonans for Official English,* 520 U.S. at 71). Indeed, "vacatur is generally 'automatic' in the Ninth Circuit when a case becomes moot on appeal." *Id.* (quoting *Publ. Util. Comm'n v. FERC,* 100 F.3d 1451, 1461 (9th Cir. 1996)).

The Supreme Court has held that "vacatur is not always appropriate if the case is moot only because the parties settled while appeal was pending." *NASD Dispute Resolution*, 488 F.3d at 1068. (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994)). Here, however, PETA contends that "automatic" vacatur is still warranted. *See id*. The central inquiry under *Bonner Mall* is whether the *party* against whom judgment was entered "caused the mootness by voluntary action" by that party. *See Bonner Mall,* 513 U.S. at 25. While vacatur may not be warranted where a party voluntarily gives up his or her appeal, "[a] party who . . . is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id*.

Here, the settlement is between PETA and Defendants. Accordingly, under *Bonner Mall,* PETA maintains that Naruto should not be "forced to acquiesce" to the district court's judgment that he lacks standing under the Copyright Act where the appeal will be mooted by an agreement by PETA and PETA's Next Friend

status is contested and undecided.[2] Rather, PETA maintains that it would be just and proper to vacate the judgment of the district court.[3]

If the Court does not believe that the automatic vacatur rule applies in this circumstance, the Parties respectfully request that it should dismiss the appeal and remand with instructions that the district court decide whether vacatur of the judgment is appropriate. District courts "enjoy greater equitable discretion when reviewing [their] own judgments than do appellate courts operating at a distance." *American Games, Inc. v. Trade Prod., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998). Thus, even where the party seeking vacatur causes the appeal to become moot because of his or her own voluntary conduct, a district court has the power to vacate its own judgment based on equitable grounds, a decision which Defendants here would not oppose. *See NASD Dispute Resolution, Inc.*, 488 F.3d at 1069 ("In the case of such a settlement, vacatur may still be granted; appellate courts can remand to the district court to decide whether the facts suggest that vacatur is still

[2] Defendants contend that they did not previously challenge Next Friend standing because the Complaint adequately alleged Next Friend standing on the part of Dr. Englehardt. Once Dr. Englehardt's appeal was dismissed, leaving PETA as Naruto's only alleged Next Friend, all Defendants challenged PETA's Next Friend standing in their responding briefs to this Court. Dkt. 26 (Slater's Answering Brief) at 8-11; Dkt. 28 (Blurb's Answering Brief) at 7-10. PETA contends that it can satisfy the Next Friend requirements, or should be permitted the opportunity to do so before the district court, if the appeal is not dismissed.

[3] Subject to the settlement with PETA, Defendants reserve all rights, arguments, and defenses with respect to any claims that might hereafter be brought by or on behalf of Naruto.

appropriate."); *see also* C*ammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (noting that "the district court is not precluded by our denial [of vacatur] from vacating its own judgment after an independent review of the equities").

It is PETA's position (and, pursuant to the settlement, Defendants do not dispute) that remand is not necessary, and that this Court has the authority and discretion to vacate the judgment. If this Court declines to do so, the Parties respectfully request that the Court direct the district court to decide whether vacatur is appropriate.

Respectfully Submitted,

Dated: September 11, 2017

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Dated: September 11, 2017

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9th Circuit Case Number(s) 16-15469

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