UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00941-CMA-BNB

FAÇONNABLE USA CORPORATION,)
A Delaware Corporation,)
)
Plaintiff,)
)
v.)
)
JOHN DOES 1-10,)
All whose true names are unknown,)
)
Defendants.)

UNOPPOSED MOTION TO VACATE MAGISTRATE JUDGE'S ORDER COMPELLING SKYBEAM TO IDENTIFY DEFENDANT DOE

Pursuant to the Court's equitable authority under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and its progeny, Skybeam moves the Court to vacate the Magistrate Judge's Order, Docket Number 15, compelling Skybeam to identify defendant Doe, for the following reasons:

1. This case began when Façonnable brought a defamation case against up to ten anonymous defendants, sued as John Does 1 to 10, who placed unflattering statements on Wikipedia about Façonnable and its parent company, the M1 Group, in light of the fact that the latter is owned by a Lebanese businessman/politician whose political coalition includes a terrorist organization, Hezbollah. The Court's subject matter jurisdiction was invoked based on diversity of citizenship.

2. Façonnable obtained leave to take early discovery from Skybeam, which in turn filed a motion to quash the subpoena. The Magistrate Judge denied that motion and ordered Skybeam to comply with the subpoena, in a ruling that squarely rejected the consensus approach followed by other courts in evaluating subpoenas to identify anonymous Internet speakers.

3. Skybeam promptly filed objections to the Magistrate Judge's order, arguing both that the

order violated the First Amendment and, indeed, that the Court lacked jurisdiction because the citizenship of anonymous defendants cannot be properly alleged. The Court stayed the order to permit Skybeam's objections to be considered; Skybeam has, therefore, not complied with the order. After this order was entered, an attorney entered his appearance for defendant Doe #1. DN 22.

4. Citing Skybeam's consent, Façonnable sought an initial extension of time to respond to Skybeam's objections, making its response due on July 12, 2011. On the morning July 11, Façonnable contacted the attorney who had appeared for the Doe, offering to dismiss its complaint without any apology and without any payment of money, if the attorney would make certain representations on behalf of the Doe he was representing, including that Doe was not one of plaintiff's competitors.[1] Relying on these settlement discussions, which Façonnable said would likely lead to dismissal of its action, Façonnable on the afternoon of July 12 sought Skybeam's consent to a motion to extend its time to respond to the objections.

5. When Façonnable sought consent for this second motion for an extension, Skybeam was concerned that the purpose of the extension was to moot out Skybeam's objections, possibly leaving Skybeam subject to very unfavorable precedent in its home district. Consequently, Skybeam urged Façonnable to consider withdrawing the subpoena without prejudice instead of seeking an extension of time to explain why the Magistrate Judge's order was justified. Instead, a few hours before that response was due, Façonnable filed a motion for leave to extend the time to respond. DN 27. Before Skybeam had an opportunity to file a brief arguing that the motion for an extension was untimely and urging that its objections be granted as unopposed, and the Magistrate Judge's order consequently vacated, the Court granted the extension. DN 28.

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[1]This description of the settlement offer is based on a description by Doe's counsel to Mr. Levy shortly after the offer was received. The actual settlement document is apparently confidential.

6. A few days later, apparently having concluded a settlement with Doe #1, Façonnable filed a voluntary dismissal of the action with prejudice. DN 30. In closing the case, DN 31, the Court did not expressly say anything about the status of the stayed order to which Skybeam has objected.

7. Although the principal rights at issue on the motion to vacate the Magistrate Judge's ruling are the Doe defendants' First Amendment right to speak anonymously, Skybeam also has a significant institutional interest at stake. The Magistrate Judge approved a much lower standard for enforcing subpoenas to identify anonymous Internet users than courts elsewhere have adopted, thus endangering the rights of other Skybeam users and, at the same time, putting Skybeam at risk of a competitive disadvantage compared to other ISP's who can tell prospective users that they can be subpoenaed only in jurisdictions that follow a tighter standard. For both reasons, it was important to Skybeam to have its objections to the Magistrate Judge's ruling resolved.

8. Despite Skybeam's best efforts to preserve its opportunity to obtain a reversal of the ruling, Skybeam's objections have become moot. It is, therefore, appropriate for the Court to exercise its equitable power to vacate the Magistrate Judge's order. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *Accord Camreta v. Greene*, 131 S. Ct. 2020, 2035 (2011). *Munsingwear* holds that the "established practice" when a case becomes moot during the course of an appeal "is to reverse or vacate the judgment below and remand with a direction to dismiss. . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Munsingwear*, 340 U.S. at 39-40.

9. There is an exception for situations when the party seeking vacatur was itself responsible

for the case becoming moot, *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994), but "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* The Tenth Circuit has consistently followed this approach—when mootness is not the result of any act of the appellants, those appellants are "**entitled** to vacatur under *U.S. Bancorp.*" *Rio Grande Silvery Minnow*, 355 F.3d 1215, 1221 (10th Cir. 2004), *quoting Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995); *see also Adarand Constructors v. Silver*, 169 F.3d 1292, 1298 (10th Cir. 1999), *rev'd on other grounds*, 528 U.S. 216 (2000).

10. No controlling Tenth Circuit cases address this precise procedural context—an order on a subpoena to a third party that has been rendered moot by a settlement between the main parties—but the Tenth Circuit has repeatedly granted vacatur at the request of third additional parties after one or both of the main parties have mooted out the case. For example, in *State of Wyoming v. United States Department of Agriculture*, 414 F.3d 1207 (10th Cir. 2005), the state challenged a rule adopted by a federal agency, and environmental groups intervened in the case to support the government. After the federal agency lost the case, it was intervenors who filed the appeal. During the pendency of the appeal, the government changed the rule at issue in the case, mooting the appeal. The Tenth Circuit granted vacatur because mootness was not caused by any action of the intervenors, but only by the action of the main party whose position they were supporting. *Id.* at 1213. Also supporting vacatur is an unreported case, *McMurtry v. Aetna Life Ins. Co.*, 273 Fed. Appx. 758 (10th Cir. 2008), where an insured person sued her insurance company; the plan offeror (the Norman Regional Hospital Authority and its long term disability plan, both called "Norman") was added as a necessary defendant. After the district court ruled for Aetna on the ground that the insurance plan was governed by ERISA and hence the lawsuit preempted grounds, both plaintiff McMurtry and

Norman appealed. McMurtry and Aetna settled during the appeal, and the appeal was dismissed as moot, but Norman was held entitled to vacatur because as a third party it could not prevent the parties from settling. Again, the third party seeking relief from the judgment was not one of the parties whose voluntary actions had caused mootness, and it was entitled to have the ruling below vacated.

11. Similar principles are commonly applied in other jurisdictions on facts closely analogous to this case—when an appeal from a ruling enforcing a subpoena to a third party witness is rendered moot by the settlement of the underlying controversy. In *Hatfill v. Mukasey*, No. 08-5049, 2008 U.S. App. LEXIS 23804, at *6 (D.C. Cir. Nov. 17, 2008), a reporter sought review of a contempt order that was issued when he refused to testify in a lawsuit by a private party against the government, but the underlying case was settled. The D.C. Circuit dismissed the reporter's appeal as moot, and vacated the contempt order under *Munsingwear*. Similarly, in *In re Application to Quash Subpoenas to Daily News,* 2010 WL 5793627 (2d Cir. July 28, 2010), a newspaper sought review of an order requiring it to produce a recording of an interview for use as evidence in a civil action; the appeal was rendered moot when the underlying lawsuit was settled and hence dismissed. Applying the *Munsingwear* doctrine, the Second Circuit granted the newspaper's motion to dismiss the appeal as moot and to vacate the orders under appeal.[2]

12. Similarly in this case, Skybeam has been deprived of the opportunity to obtain review of the Magistrate Judge's order, through no fault of its own. Indeed, Skybeam tried to preserve its opportunity for review, and the only reason why it could not obtain review is that, the day before Façonnable's response to its objections, it initiated a face-saving settlement that would avoid any

[2]The Second Circuit's order does not provide the underlying facts; a copy of the Daily News' brief is submitted with this motion.

need to explain why this Court had jurisdiction of the action and why the order compelling disclosure was justified. Skybeam firmly believes that its objections should be granted on the merits, but recognizes that the settlement of the case moots those objections. In this case, equity requires that the motion to vacate be granted so that Skybeam and its customers will not face the legal and economic consequences of a ruling that Skybeam firmly believes was erroneous.

CONCLUSION

The Magistrate Judge's ruling should be vacated.

CERTIFICATE OF CONFERENCE

Counsel for plaintiff, Peter Korneffel, stated that Façonnable does not oppose this motion. Counsel for defendant Doe #1, Brad Patrick, stated that Doe consents to this motion.

Respectfully submitted,

/s/ Paul Alan Levy
Paul Alan Levy
Michael H. Page

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

/s/ John Seiver
John Seiver

Davis Wright Tremaine LLP
Suite 800
1919 Pennsylvania Avenue NW
Washington, D.C. 20006-3401
(202) 973-4212

Attorneys for Skybeam, Inc.

July 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing a copy of the Motion to Vacate to be filed through the Court's ECF system which will serve the papers on all counsel.

/s/ Paul Alan Levy
Paul Alan Levy
Michael H. Page

Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

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