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

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[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
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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
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July 22, 2011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: APPLICATION TO QUASH SUBPOENAS TO DAILY NEWS, L.P. AND GEORGE RUSH *** DAILY NEWS, L.P., GEORGE RUSH, *Movants-Appellants,* -against- JANE DOE, *Real Party In Interest-Appellee.*	x : : : x	Case No. 10-2438 Case No. 10-2573 (consolidated)

APPELLANTS' CONSENT MOTION FOR VACATUR OF DISTRICT COURT ORDERS AND FOR DISMISSAL OF CONSOLIDATED APPEALS AS MOOT

Appellants Daily News, L.P. and George Rush (the "Daily News Parties") hereby move this Court for an Order (i) pursuant to 28 U.S.C. § 2106, vacating the two Southern District of New York orders under appeal (to wit, the District Court order entered May 21, 2010 (McKenna, J.) (the "May 21 Order") and the District Court order entered June 25, 2010 (Stein, J.) (the "June 25 Order"));[1] (ii) dismissing the above-captioned consolidated appeals as moot, without costs or attorneys' fees to any party; and (iii) granting such other and further relief as the Court may deem just and proper. Appellee Jane Doe consents to vacatur of the District Court orders and to dismissal of the appeals as moot.

[1] Pursuant to Fed. R. App. P. 27(a)(2)(B)(iii), the May 21 and June 25 Orders are annexed hereto as Exhibits 1 and 2, respectively.

PRELIMINARY STATEMENT

These consolidated appeals arise from third-party subpoenas in which appellee Jane Doe ("Doe") sought production from the Daily News Parties of a recorded off-the-record interview for use as evidence in a civil action in the Southern District of Florida, *Jane Doe v. Jeffrey Epstein*, No. 08 Civ. 80893 (the "Doe Action"), in which Doe was the plaintiff. In the May 21 Order, the District Court denied the Daily News Parties' motion seeking to quash the subpoenas on the basis of the qualified reporter's privilege and directed the Daily News Parties to produce the interview recording to Doe's counsel for use at the then-anticipated Doe Action trial; and, in the June 25 Order, the District Court held the Daily News Parties in contempt of the May 21 Order for declining to consent to production of the interview recording. These expedited consolidated appeals by the Daily News Parties followed.

Shortly after the Daily News Parties filed their Appellants' Brief with this Court, Doe settled the Doe Action prior to any trial and, pursuant to the settlement, on July 20, 2010, the Doe Action was dismissed with prejudice. Accordingly, Doe no longer seeks (nor could seek) production of the interview recording for use in the now-dismissed Doe Action, rendering this appeal from the May 21 and June 25 Orders obviously moot.

Under these circumstances, vacatur of the two orders appealed from is clearly appropriate under settled Second Circuit authority. The Daily News Parties have been deprived of their opportunity to appeal the District Court Orders due to circumstances wholly beyond their control—the very situation where this Court has held that vacatur of a mooted District Court order is warranted. It would be unfair to allow the adverse District Court Orders—and their potential persuasive or *res judicata* effect—to remain on the books when the Daily News Parties have been denied any chance to challenge those orders. And vacatur of the now-unappealable District Court decisions is particularly warranted since (as discussed below) Doe's counsel intends to subpoena the same interview recording for use in a related lawsuit.

Accordingly, with Doe's consent, the Daily News Parties respectfully request that this Court vacate the May 21 and June 25 Orders and dismiss these consolidated appeals as moot.

STATEMENT OF RELEVANT FACTS

On or about March 19, 2010, the Daily News Parties received Southern District of New York subpoenas served on them by Doe's counsel (the "Subpoenas"). (Joint Appendix, at A-38-49.)[2] The Subpoenas sought a recording

[2] All "A-___" citations are to the Joint Appendix filed by the Daily News Parties in these consolidated appeals on July 1, 2010 (Case No. 10-2438, Dkt. No. 39; Case No. 10-2573, Dkt. No. 20).

that appellant Rush, a *Daily News* reporter, had made of an off-the-record telephone interview he had conducted of Jeffrey Epstein, the defendant in the Doe Action (the "Epstein Recording"). (A-38, A-45.) On April 7, 2010 the Daily News Parties instituted an ancillary proceeding in the Southern District of New York, *In Re Application To Quash Subpoenas To Daily News, L.P. and George Rush*, No. 10 M8-85 (the "Ancillary Proceeding"), in which they moved to quash the Subpoenas based on the qualified reporter's privilege recognized in this Circuit for unpublished newsgathering materials. (*See* A-7-8 (Misc. Dkt. Nos. 160-161).)

In its May 21 Order, the District Court denied the Daily News Parties' motion to quash, granted Doe's counsel access to the Epstein Recording (as well as to a written transcript of the Epstein Recording (the "Transcript")) for use in the Doe Action trial, and directed reporter Rush to appear for deposition to authenticate the Epstein Recording and Transcript. (A-188.) The District Court further directed that the Epstein Recording and Transcript be maintained by the District Court in Chambers or under seal until after any appeal from the May 21 Order is decided. (A-189.) On June 15, 2010 the Daily News Parties timely filed a Notice of Appeal from the May 21 Order, which was docketed as Case No. 10-2438 (the "Initial Appeal"). (A-193; Initial Appeal, Dkt. No. 1.)

At the same time, because the parties were uncertain whether the May 21 Order would be deemed final and appealable as of right,[3] the Daily News Parties also filed a motion with the District Court to certify the May 21 Order for permissive interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (A-32.9 (Misc. Dkt. No. 301).) By order dated June 16, 2010, the District Court (Pauley, J.) denied permissive interlocutory appeal. (A-195-202.) In his decision, Judge Pauley further expressed the view that the May 21 Order was not a final appealable order and that the Daily News Parties must be cited in contempt of the May 21 Order to obtain appellate review. (A-199-201.) Accordingly, for purposes of securing a final appealable order, the Daily News Parties respectfully refused to consent to production of the Epstein Recording and Transcript; and, in the June 25 Order, the Daily News Parties were adjudged in civil contempt of the May 21 Order. (*See* A-207-208.)[4] On June 28, 2010, the Daily News Parties timely filed a Notice of Appeal from the June 25 Order and the underlying May 21 Order, which appeal was docketed as Case No. 10-2573 and consolidated with the Initial Appeal. (A-209; Case No. 10-2573, Dkt No. 1.)

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[3] The Daily News Parties and Doe agreed that the May 21 Order should be considered final under *Perlman v. United States*, 247 U.S. 7 (1918), and *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981), because the Daily News Parties are not in possession of the Epstein Recording, which the District Court has been maintaining pending these appeals. (*See* A-190-192.)

[4] In its June 25 Order, the District Court stayed further contempt proceedings pending appeal. (A-208.)

The Daily News Parties filed their appellants' brief and appendix with this Court on July 1, 2010. (Initial Appeal, Dkt Nos. 38-39; Case No. 2573, Dkt. Nos. 19-20.) Thereafter, on or about July 7, 2010, Doe and Epstein agreed to settle the Doe Action prior to any trial; and, on July 20, 2010, pursuant to their settlement, the Doe Action was dismissed with prejudice. *See* Declaration of Robert D. Balin in Support of Appellants' Consent Motion for Vacatur of District Court Orders and Dismissal of Consolidated Appeals, dated July 20, 2010 ("Balin Decl."), ¶ 2 and Ex. A.

Given the settlement of the underlying Doe Action, by email dated July 19, 2010, Paul Cassell, counsel for Doe, informed counsel for the Daily News Parties that the Doe Subpoenas are withdrawn and that Doe is no longer seeking production of the Epstein Recording or Transcript. Balin Decl. ¶ 3 and Ex. B.

While Doe no longer seeks the newsgathering materials she had subpoenaed from the Daily News Parties for use in the Doe Action, in his July 19 email Mr. Cassell advised that he has started a new process to subpoena the Epstein Recording and Transcript for use in a related Florida state court lawsuit. Specifically, Mr. Cassell stated in his email that:

> as legal counsel for Brad Edwards [who is Jane Doe's Florida attorney], I can confirm that legal process is underway in Florida state court to subpoena the same Epstein recording and transcript from the Daily News parties for use in connection with Brad Edwards' abuse of process counterclaim against

> Epstein in the case entitled *Epstein v. Rothstein*, Case No. 502009CA040800 (Fla. Cir. Ct.) [(the "Edwards Action")] . . . .

Balin Decl. ¶ 3, Ex. B.

ARGUMENT

Because these consolidated appeals have been now mooted by the Doe Action settlement, and because the Daily News Parties can thus no longer appeal the adverse District Court Orders through no fault of their own, fundamental principles of fairness warrant vacatur of the District Court Orders. The appeals should also be dismissed as moot.

I. VACATUR OF THE DISTRICT COURT ORDERS IS WARRANTED

A. The Consolidated Appeals Are Moot

An appeal becomes moot, such that the appellate court lacks jurisdiction to hear the appeal, when "there is no longer a live dispute." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006) (holding appeal moot where mootness was caused by appellee's voluntary conduct). Here, it is undisputed that the consolidated appeals from the orders below have been mooted by Doe's settlement and dismissal of the Doe Action, because Doe is now no longer seeking production of the Epstein Recording or Transcript for use at trial. *See Hatfill v. Mukasey*, No. 08-5049, 2008 U.S. App. LEXIS 23804, at *6 (D.C. Cir. Nov. 17, 2008) ("Because the underlying case has been settled . . . there is no longer a

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pending trial in which the appellee's request for disclosure can be used.") (citation and internal quotations omitted).[5]

B. Vacatur is the Appropriate Relief Since The Daily News Parties Have Been Denied the Ability to Challenge the Adverse District Court Orders by the Appellee's Unilateral Actions

Under 28 U.S.C. § 2106, "any . . . court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review." In the context of a mooted appeal, "the appellate court is not automatically compelled to simply dismiss the appeal: it retains jurisdiction to vacate the district court's judgment and remand with direction to dismiss as moot." *Russman v. Bd. of Educ.*, 260 F.3d 114, 121 (2d Cir. 2001) (citation omitted); *see also Major League Baseball Props., Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149, 151 (2d Cir. 1998) ("The power to vacate remains vested in an appellate court even if the judgment before it becomes moot").

In determining whether to vacate a district court order when an appeal has been mooted, the Supreme Court has provided the following guidance:

> A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. The same is

[5] In *Hatfill*, the D.C. Circuit also held the third-party journalist's appeal moot because the stay that had been granted of the contempt order under appeal meant that the journalist "has suffered no sanction that would preserve her appeal for review." *Id*. Here as well, the District Court stayed its June 25 contempt Order pending appeal. (A-208.)

> true when mootness results from unilateral action of the party who prevailed below.

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 25 (1994) (citations omitted).

Following *U.S. Bancorp*, this Court is "generally 'liberal in granting' [vacatur]." *E.I. Dupont*, 473 F.3d at 48 (quoting *Russman*, 260 F.3d at 121). The primary vacatur inquiry is "the fault of the parties in causing the appeal to become moot." *Russman*, 260 F.3d at 121. Thus, where, as here, "the appellee has caused the case to become moot, we [the Second Circuit] vacate the district court's judgment to prevent the appellee from insulating a favorable decision from appellate review." *Russman*, 260 F.3d at 122 (citations omitted). This is because an appellant "should not suffer the adverse *res judicata* effects of a district court judgment when it is denied the benefit of appellate review through no fault of its own." *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994) (citation omitted). Moreover, the "loss of the persuasive authority of the district court's judgment is of less compelling concern" than is the case when vacatur of an appellate decision is sought. *Russman*, 260 F.3d at 122 n.2.

Thus, in *E.I. Dupont*, this Court vacated a district court order denying the plaintiff-appellant's motion for injunctive relief because, as here, the appeal from that order had been mooted "through no fault or machination of [the appellant],"

but, rather, due to the appellee's conduct. 473 F.3d at 48. Similarly, in *Sackman v. Liggett Group, Inc.*, 189 F.R.D. 58, 59 (E.D.N.Y. 1999), a case directly on point, the District Court, relying on *U.S. Bancorp* and applying this Court's vacatur standard, vacated orders that had compelled intervening third parties to produce documents they claimed were protected from disclosure by the attorney-client and attorney work product privileges. Like the present case, the parties to the underlying lawsuit settled the action while the production orders were under appeal by the third parties, and so the documents at issue were never produced and the appeals were mooted. *Id.* Vacatur of the production orders was granted because, as here, the intervening third parties were "denied appellate review of [the adverse orders], even though they have taken all reasonable steps to pursue their appellate remedies. Moreover, [they] have not benefitted from the settlement and have not caused the mootness here." *Id.* *See also Hatfill*, 2008 U.S. App. LEXIS 23804, at *7 (vacating district court's contempt order against third-party journalist after her appeal was mooted by settlement of the underlying action in which discovery was sought from her).

Here, the Daily News Parties' appeals have "been mooted through no fault or machination" of their own. *E.I. Dupont*, 473 F.3d at 48. "Accordingly, it would be unfair to require that [the Daily News Parties] 'acquiesce in the judgment' of the district court." *Id.* (quoting *U.S. Bancorp*, 513 U.S. at 25). Nor have they

"benefitted from the settlement" between Doe and Epstein in the Doe Action. *Sackman*, 189 F.R.D. at 59.

Last, the fact that Doe's counsel now intends to subpoena the very same Epstein Recording for use in the Edwards Action provides yet another compelling reason why the Daily News Parties "ought not in fairness be forced to acquiesce in the [May 21 Order]." *U.S. Bancorp*, 513 U.S. at 25. The May 21 Order, which found that the reporter's privilege in the Epstein Recording had been overcome, if allowed to stand, might well be invoked and relied upon by Edwards or other parties as claimed authority supporting their request for production of the Epstein Recording. Edwards and other potential litigants should not be allowed "to pursue [similar subpoenas] … on the basis of a district court decision that [the Daily News Parties were] unable to challenge on appeal." *E.I. Dupont*, 473 F.3d at 48. *See also Russman*, 260 F.3d at 122 ("we vacate the district court's judgment to prevent the appellee from insulating a favorable decision from appellate review") (citations omitted).

Vacatur of the District Court Orders is plainly warranted here.

II. THE APPEALS SHOULD BE DISMISSED AS MOOT

As discussed above, the consolidated appeals are now moot and should therefore be dismissed, without costs or attorneys' fees to any party.

CONCLUSION

For the foregoing reasons, and upon consent of appellee Doe, the Daily News Parties respectfully request that this Court vacate the May 21 and June 25 Orders and dismiss the consolidated appeals as moot.

Dated: New York, New York
July 20, 2010

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION TO QUASH SUBPOENAS TO DAILY NEWS, L.P., AND GEORGE RUSH	M8-85 MEMORANDUM AND ORDER

McKENNA, D.J.,

1.

Daily News, L.P., the publisher of the Daily News, and George Rush, a Daily News reporter, move, pursuant to Fed. R. Civ. P. 45(c)(3)(A)(iii), for an order quashing subpoenas issued by counsel for the plaintiff in an action pending in the United States District Court for the Southern District of Florida entitled Jane Doe v. Jeffrey Epstein (08 Civ. 80893 KAM), in which the plaintiff seeks to recover damages arising out of the defendant's alleged sexual abuse of her when she was a minor. The subpoenas seek the production of "[a]ll taped conversations between George Rush and Jeffrey Edward Epstein, including telephone recordings, all emails to and from Jeffrey Edward Epstein or someone representing themselves to be Jeffrey Epstein," and the testimony of George Rush and Anne B. Carroll, a Vice President and General Counsel of Daily News, L.P. (Carroll Decl., Apr. 7, 2010, Exs. A & B.) In the alternative, the subpoenaed parties seek a protective order barring disclosure under Fed. R. Civ. P. 26(c).

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2.

The subpoenaed parties base their motion on "the qualified reporter's privilege accorded by the First Amendment to the United States Constitution and federal common law." (Revised Notice of Mot., Apr. 12, 2010, at 1.)

3.

Mr. Rush states that he (with his wife) is a weekly columnist in the Daily News, that in the fall of 2009 he began to follow criminal and civil legal proceedings in Florida relating to Mr. Epstein (Rush Aff., Apr. 6, 2010 [Carroll Decl., Apr. 7, 2010, Ex. G] ¶¶ 1-2), and that in November of 2009 he was able to arrange a telephone interview of Mr. Epstein (who was apparently in Florida) from the New York City office of the Daily News. (Id. ¶ 4.) Mr. Rush made a recording of the conversation (which lasted about 22 minutes) and a transcription thereof, both of which have been submitted to the Court for in camera inspection. Mr. Rush advised counsel for the plaintiff in Jane Doe v. Jeffrey Epstein that he had interviewed Mr. Epstein (id. ¶ 7) and declined to give counsel a copy of the interview recording. (Id. ¶ 8.) Mr. Rush subsequently corrected the date of the interview to "prior to October 22, 2009." (Rush Supp. Aff., Apr. 30, 2010 [Carroll Reply Decl., May 3, 2010, Ex. C] ¶ 2.)

At the outset of the interview, Mr Epstein said that it was off-the-record, and Mr. Rush agreed. (Rush Aff., Apr. 6, 2010

¶ 5.) Several days after the interview, Mr. Rush played a three or four minute segment of the recording to three persons whom he regarded as valuable news sources, under an agreement of strict secrecy. (Id. ¶ 6.) On an occasion after he first told counsel for Jane Doe that he had interviewed Mr. Epstein, Mr. Rush gave him "a one or two word characterization of what [he] perceived to be Epstein's overall stance and repeated to him one sentence from the interview -- both of which [he] believed made the point that there was nothing there for [counsel] or his client." (Id. ¶ 8.)

Mr. Rush also, on October 22, 2009, spoke with Michael Fisten, an investigator for counsel to Jane Doe, who had heard from a third party about Mr. Rush's interview of Mr. Epstein. (Fisten Aff., Apr. 23, 2010 [Real Party in Interest Jane Doe's Resp. in Opp'n to Mot. of Daily News, L.P., to Quash Subpoena, Ex. B] ¶ 3.) Mr. Rush paraphrased the interview relatively thoroughly. (Id. ¶ 7.)

4.

As noted above, the present motion has been argued on the qualified reporter's privilege.[1]

The Second Circuit recognizes not only a qualified

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[1] The First Amended Complaint in Jane Doe v. Jeffrey Epstein (Carroll Decl., Apr. 7, 2010, Ex. E) asserts two claims under Florida common law (Counts I & III), one claim under federal law (18 U.S.C. § 2255) (Count II), and two claims under Florida statutes (Counts IV & V); federal subject matter jurisdiction is premised on diversity of citizenship, Jane Doe being alleged to be a resident of Florida, and Mr. Epstein a resident of New York (First Am. Compl. ¶¶ 3, 4 & 7).

privilege protecting journalists' confidential sources but also a privilege that extends to nonconfidential materials. Gonzales v. Nat'l Broad. Co., Inc., 194 F.3d 29, 33 (2d Cir. 1999) ("Gonzales III").[2]

In the present case, Mr. Rush's source -- Mr. Epstein -- is not confidential: Mr. Rush disclosed his source to counsel for Jane Doe not long after the interview. The Second Circuit, in Gonzales III, held that

> while nonconfidential press materials are protected by a qualified privilege, the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought. Where a civil litigant seeks non-confidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

194 F.3d at 36.

5.

This Court has reviewed both the recording and Mr. Rush's transcript in camera. The Court finds that portions of the recording "are of likely relevance to a significant issue in [Jane

[2] In Gonzales v. Pierce, 175 F.R.D. 57 (S.D.N.Y. 1997) ("Gonzales I"), the district court granted in part and denied in part a motion to compel production of unedited videotapes from NBC and the deposition of certain NBC personnel. In Gonzales v. Nat'l Broad. Co., Inc., 155 F.3d 618 (2d Cir. 1998) ("Gonzales II"), the Second Circuit affirmed Gonzales I. In Gonzalez III the Second Circuit, on rehearing, withdrew its Gonzales II opinion (see 194 F.3d at 30 & n.**), and affirmed the district court.

Doe v. Epstein]," Gonzales III, 194 F.3d at 36, or, rather, depending on how used, two issues, liability and damages. The Court notes, in particular, a statement included in the first full paragraph attributed to Mr. Epstein at page 15 of the transcript.

The Court also finds that the materials at issue "are not reasonably obtainable from other available sources," id., since the record is quite clear that Mr. Epstein has regularly been asserting, and will continue to assert, his Fifth Amendment privilege to relevant questions. The fact that the recording is in Mr. Epstein's own voice is also significant from a trial perspective.

The deposition of Mr. Rush is to be limited to authentication of the recording and the transcript.

6.

Not everything in the recording is relevant, but some non-relevant statements may (or may not) have context value. Ultimately, the amount of the recorded conversation that it would be appropriate to admit in a jury trial is one for the trial judge, with input from counsel on both sides. This Court defers to the trial court in this regard.

7.

Plaintiff's counsel's access to the recording and transcript has been given for a specific purpose only: use in the trial of Jane Doe v. Epstein. This order does not authorize the

use of, or reference to, the conversation reflected in the recording and the transcript in any other context, unless so authorized by the trial court in the case in which such use is sought, and it does not in any way authorize dissemination to the press or other media of all or any part of the conversation, the recording, or the transcript.[3]

8.

The recording and transcript will be held in chambers or under seal until any appeal from this decision is decided or the time to file a notice of appeal has expired.

SO ORDERED.

Dated: May 18, 2010

Lawrence M. McKenna
U.S.D.J.

[3] Persons other than Jane Doe and Mr. Epstein are mentioned in the conversation.

EXHIBIT 2

Received: JUDGE SIDNEY STEIN Fax:212-805-7924 Jun 23 2010 09:18pm P002/005
305 16:09:13 06-23-2010 2/5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION TO QUASH SUBPOENAS TO DAILY NEWS, L.P., AND GEORGE RUSH

No. 10 M8-85

~~[PROPOSED]~~ CIVIL CONTEMPT ~~OPINION~~ ORDER

On or about March 19, 2010 the Daily News, L.P. and reporter George Rush (collectively, the "Daily News Parties") received Southern District of New York subpoenas served on them in New York by the attorney for the plaintiff, Jane Doe, in an action pending in the United States District Court for the Southern District of Florida, *Jane Doe v. Jeffrey Epstein* (08 Civ. 80893 KAM) (the "Doe Action"); and

The subpoenas sought a recording that reporter Rush had made of a 22-minute telephone interview he had conducted of Jeffrey Epstein and recorded on a digital hand-held device (the "Epstein Recording"); and

On April 7, 2010, the Daily News Parties instituted this ancillary proceeding in the United States District Court for the Southern District of New York, in which the Daily News Parties moved to quash the subpoenas under the qualified reporter's privilege (the "Ancillary Proceeding"); and

In connection with their motion to quash, the Daily News Parties, at the direction of the Judge then presiding over the Ancillary Proceeding (McKenna, J.), submitted the original Epstein Recording (as it exists on the hand held-digital recording device) and a written transcript thereof (the "Transcript") to Judge McKenna for *in camera* review; and

The Daily News Parties do not have in their possession a copy of the Epstein Recording; and

By Memorandum and Order dated May 18, 2010, and entered May 21, 2010, Judge McKenna denied the motion to quash, granted Doe's counsel access to the entire Epstein Recording and Transcript for use in the Doe Action and directed Rush to appear for deposition to authenticate the Epstein Recording and the Transcript (the "May 21 Order"); and

In the May 21 Order, Judge McKenna also directed that the Epstein Recording and Transcript shall be maintained by the District Court in chambers or under seal until after any appeal from the May 21 Order is decided or the time for filing appeal expires; and

Pursuant to the May 21 Order, Judge McKenna has not returned to the Daily News Parties the Epstein Recording or Transcript that had been submitted to the District Court for *in camera* review; and

The Daily News Parties are seeking appellate review of the May 21 Order by the Second Circuit Court of Appeals (the "Second Circuit"); and

The trial in the Doe Action is currently scheduled to commence on July 19, 2010, and Doe and the Daily News Parties have stipulated to expedited appellate briefing and to request the Second Circuit to review the May 21 Order and issue its decision on appeal before the July 19 commencement date of the Doe Action trial; and

On June 8, 2010, the Daily News Parties filed a motion in this Ancillary Proceeding, by way of order to show cause, requesting certification of the May 21 Order for interlocutory appeal under 28 U.S.C. § 1292(b) and expedited determination of the motion (the "Certification Motion"); and

As an alternative basis for seeking appellate review of the May 21 Order as a final order under the doctrine set forth in *Perlman v. United* States, 247 U.S. 7 (1918) and *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981), on June 15, 2010 the Daily News Parties filed a Notice of Appeal (the "Initial Appeal") from the May 21 Order; and

By order dated June 16, 2010, the Judge then presiding over this Ancillary Proceeding (Pauley, J.) denied the Daily News Parties' Certification Motion for permissive interlocutory appeal from the May 21 Order, and also expressed the view that the May 21 Order is not a final appealable order and that the Daily News Parties must be cited in contempt of the May 21 Order to obtain appellate review of the May 21 Order but that sanctions were not necessary in order to appeal; and

The parties have been diligently working together in good faith to secure prompt appellate review of the May 21 Order; and

Solely for purposes of securing a final appealable order, the Daily News Parties respectfully refuse to consent to production of the Epstein Recording and Transcript to Doe; ~~and~~ and therefore have violated Judge McKenna's May 21 Order and

Doe has stipulated and agreed with the Daily News Parties that, while she requests entry of a civil contempt citation order, she is not seeking and will not seek any contempt sanctions against the Daily News Parties; and

Doe has stipulated and agreed with the Daily News Parties that she consents to a stay of the civil contempt citation order and a stay of any production of the Epstein Recording and Transcript pending the Second Circuit's hearing and determination of the Daily News Parties' Initial Appeal and appeal from the contempt citation order; and

By letter dated June 22, 2010, Doe's counsel having applied to this Court for entry of a civil contempt citation order against the Daily News Parties, and having informed the Court that

the Daily News Parties do not oppose the application (while reserving the right to oppose any sanctions);

NOW, THEREFORE, it is ordered, adjudged and decreed that:

1. Daily News L.P. and George Rush are hereby found in civil contempt of the May 21 Order.

2. No contempt sanctions are ordered as against the Daily News Parties.

3. This civil contempt citation order, and any further proceedings in connection therewith, are hereby stayed pending the Second Circuit's hearing and determination of the Initial Appeal and of any appeal from this contempt citation order.

4. Production of the Epstein Recording and the Transcript is hereby stayed pending the Second Circuit's hearing and determination of the Initial Appeal and of any appeal from this contempt citation order.

Dated: June 23, 2010
New York, New York

SO ORDERED:

Sidney H. Stein, U.S.D.J. (Part 1)