

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

McFADYEN, et al.,

v.

DUKE UNIVERSITY, et al.,

CIVIL ACTION
NO. 2:12-cv-00348-DBH

CARRINGTON, et al.,

v.

DUKE UNIVERSITY, et al.,

**ROBERT DAVID JOHNSON'S MOTION
TO VACATE MAGISTRATE JUDGE'S ORDER**

In light of Duke University's decision to withdraw the subpoenas issued to Robert David Johnson in the matter of *McFadyen, et al., v. Duke University, et al.*, No. 1:07-cv-953 (Document # 14), and the dismissal of the underlying action in *Carrington, et al v. Duke University, et al.*, Docket No. 1:08-cv-00119 (Document # 12), Robert David Johnson's appeal of the Magistrate Judge's order below is now moot.

When a decision pending on appeal becomes moot, the accepted practice is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). As the Supreme Court has noted, "[t]hat procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* This procedure has been used in subpoena enforcement actions which became moot, including cases involving the same important First Amendment rights as those at issue here. *See, e.g., Morgan v. Roberts*, 702 F.2d 945, 947 (11th Cir. 1983) (dismissing appeal of order enforcing subpoenas against journalists as moot with instructions to vacate the order below); *Faconnable USA Corp. v. John Does 1-10*,

799 F.Supp.2d 1202, 1204 (D. Colo. 2011) (vacating order compelling production of information by third party that “through no fault of its own . . . has been denied review of the Magistrate Judge’s Order.”)

Dr. Johnson timely appealed the decision of the Magistrate Judge, contending it was inconsistent with the balancing test to be applied to journalist third-party subpoenas under the test set forth in *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716-17 (1st Cir. 1998). Through no fault of his own, his challenge to the Magistrate Judge’s decision can no longer be adjudicated because Duke settled one of the underlying actions and voluntarily withdrew the remaining subpoena. Vacatur of the Order will help preserve the rights of Dr. Johnson or other recipients to challenge third-party subpoenas in the future. Moreover, Duke has subpoenaed Dr. Johnson in other cases before, and there is no certainty it will not try again. Under these circumstances, vacatur will help “clear[] the path for future relitigation of the issues between the parties” if necessary. *Munsingwear*, 340 U.S. at 40.

For these reasons, Dr. Johnson respectfully requests that this court vacate the Order of the Magistrate Judge dated October 12, 2012, and dismiss this action as moot.

Dated: March 1, 2013

ROBERT DAVID JOHNSON

By His Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on March 1, 2013.

This the 1st day of March, 2013.

/s/ Patrick Strawbridge _____

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