

E.D.N.Y.-Bklyn
18-mj-723
Donnelly, J.

S.D.N.Y.-N.Y.C.
19-MAG-3232
19-MAG-2821
Preska, J.

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand and twenty-one.

Present: DENNIS JACOBS,
DENNY CHIN,
WILLIAM J. NARDINI,
Circuit Judges.

MICROSOFT CORPORATION,
Appellant,

-v-

20-1653, 20-3945

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellee,

-v-

19-1891

GOOGLE LLC,
Appellant.

In these tandem cases, appellants Microsoft Corporation ("Microsoft") and Google LLC ("Google") appeal from orders, respectively, of the United States District Court for the Eastern District of New York (Donnelly, J.) and the United States District Court for the Southern District of New York (Preska, J.) denying their requests to modify or vacate orders barring them from disclosing -- to their customers or otherwise -- that they had been served by the appellee United States with subpoenas seeking information relating to certain customers. After the appeals were filed, subsequent events rendered both appeals moot. The parties disagree, however, as to whether the district court's decisions in question should be vacated or permitted to stand. The Court concludes that the decisions should be vacated.

The Supreme Court has held that the "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. . . . [V]acatur 'clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.'" *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22-23 (1994) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950)). This reasoning applies as well to appeals rendered moot in this Court. *See Munsingwear*, 340 U.S. at 40 (describing this practice as "the duty of the appellate court" which, when "followed, [preserves] the rights of all parties"). "If the

case has become moot due to circumstances unattributable to any of the parties or from the unilateral action of the party who prevailed in the district court, vacatur is usually warranted. However, when 'the party seeking relief from the judgment below caused the mootness by voluntary action,' vacatur is usually not warranted." *Doe v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006) (quoting *U.S. Bancorp*, 513 U.S. at 23); accord *Hassoun v. Searls*, 976 F.3d 121, 131 (2d Cir. 2020).

Here, the case became moot upon expiration of the challenged orders. Accordingly, we will adhere to established practice.

IT IS HEREBY ORDERED:

1. In the *Microsoft* case, the government's motion to dismiss the appeals is GRANTED; Microsoft's cross-motion to vacate the district court's orders is also GRANTED; the district court's orders denying Microsoft's motions to modify the non-disclosure order are VACATED; and the consolidated appeals are DISMISSED as moot; and

2. In the *Google* case, the district court's non-disclosure orders are VACATED; the government's motion to dismiss the appeal is GRANTED; Google's conditional motion to vacate the district court's orders is also GRANTED; the district court's order denying Google's motion to vacate or modify the non-disclosure orders is VACATED; and the appeal is DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe

The seal of the United States Second Circuit Court of Appeals is circular, featuring the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with two stars on either side of the center text.