UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

McFADYEN, et al.

v.

DUKE UNIVERSITY, et al.

CIVIL ACTION
No. 2:12-mc-00196-JHR

CARRINGTON, et al.

v.

DUKE UNIVERSITY, et al.

MEMORANDUM OF LAW IN RESPONSE TO ROBERT DAVID JOHNSON'S MOTION TO QUASH SUBPOENAS

Dr. Johnson communicated with Plaintiffs about events that form the basis of their claims against Duke. Plaintiffs and their lawyers are expressly thanked, quoted, and identified by name in Dr. Johnson's writings. Their lawyers have trumpeted discussions with Dr. Johnson and others as insuring that their clients were "all portrayed in an accurate and positive light." [Dkt. No. 1 Ex. L.] Their lawyers have affirmatively used as a "sword" for deposition questioning the same type of information that Dr. Johnson seeks to "shield" here. See Sept. 17, 2012, Rough Dep. Tr. Robert K. Steel 62-67, attached as Ex. A. Under the liberal rules that govern discovery in federal courts, Duke is entitled to examine Dr. Johnson about those communications and to review the documents that reflect them. Duke respectfully requests that the Court deny Dr. Johnson's motion to quash.

ARGUMENT

I. The Information Duke Seeks from Dr. Johnson is Relevant to Pending Claims and Defenses and Likely in Dr. Johnson's Possession, Custody or Control.

Duke has narrowly tailored the discovery it seeks from Dr. Johnson. From its earliest discussions with Dr. Johnson's counsel through its motion to compel, Duke has made clear that it

seeks (1) non-confidential communications; (2) between Dr. Johnson and the Plaintiffs in Carrington and McFadyen (or their surrogates, including parents and litigation counsel); that (3) relate to a limited set of identified topics. [Dkt. No. 1 at 10 n.4 & Exs. H, J.]

Dr. Johnson's motion to quash ignores these concessions, inciting a First Amendment controversy where none exists. Dr. Johnson describes Duke's requests as "incredibly broad" and, in doing so, attacks a straw man: Duke's original subpoenas. [Dkt. No. 5 at 2-3.] This undermines the very purpose of conferring to narrow discovery disputes before raising them with the Court. Cf. Alden v. Office Furniture Distribs. of New England, Inc., No. 1:10–CV–00316–GZS, 2011 WL 1770948, *1 n.1 (D. Me. May 9, 2011) (discussing motion's failure to comply with good-faith conference requirements of Fed. R. Civ. P. 37(a)(1) and D. Me. Local Rule 26(b)).

Dr. Johnson's broad, unsupported assertion that Duke "does not seek any information directly relevant or of significant probative value" is false. [Dkt. No. 5 at 5.] The information that Duke seeks – Plaintiffs' prior statements, admissible under Fed. R. Evid. 801(d) – is relevant to the pending claims and defenses and, therefore, within the scope of discovery. As illustrated below, moreover, similar evidence shows the probative value of these types of communications.

For example, in alleging that one defendant (Dean Sue Wasiolek) committed a constructive fraud against them, the Carrington Plaintiffs claim that they enjoyed a confidential relationship with Dean Wasiolek based, in part, upon her status as an attorney. Carrington Compl. ¶ 550, attached as Ex. B. The Carrington Plaintiffs claimed that Dean Wasiolek "advis[ed] the plaintiff lacrosse players not to tell their parents of the rape allegations against them." Id. ¶ 551.[1] In

[1] After dismissing the bulk of the Carrington Plaintiffs' complaint against Duke for failing state a claim, the trial court agreed that these allegations were significant to the pared-down claim on which discovery was permitted to proceed: "While an administrator is not ordinarily in a fiduciary or confidential relationship with the students, an administrator who is a lawyer, who discusses pending criminal charges with her students, who affirmatively cuts them off from other advice by telling them not to seek legal advice and not to tell their parents, and who then directs them to the institution's attorney in an effort to protect the institution at the students' expense, could plausibly be liable for constructive fraud under state law." Mar. 31, 2011, Carrington Order at 79-80, attached as Ex. C.

correspondence with another author covering the Duke lacrosse case, however, one plaintiff confirmed "we didn't know she was an attorney at the time." [Dkt. No. 1. Ex. O.] Similarly, Dr. Johnson's co-author Stuart Taylor discussed by e-mail his plans to include the following in their book: "Dean Sue's message . . . was to cooperate with police and tell nobody about the rape charge. They took this to include their parents. **[Correct? Any detail on this?].**" [Id. Ex. M.] (emphasis in original). Ultimately, this statement was removed from the book.

Contrary to Dr. Johnson's assertion, Duke is not proceeding on a mere "hunch" that similar communications with Dr. Johnson exist. [Dkt. No. 5 at 5.] Numerous plaintiffs have testified that such communications do exist. [Dkt. No. 1 at 7-8; Exs. T-W.] Duke has not received these communications through document requests to those Plaintiffs, and those Plaintiffs have confirmed that they have produced all relevant documents in their possession.[2]

II. Duke's Subpoenas, as Narrowed, Do Not Raise First Amendment Concerns.

Duke expressly limited the information it seeks from Dr. Johnson to non-confidential information. [Dkt. No. 1 at 4-5.] Duke does not seek to expose confidential sources who might fear retaliation, as Dr. Johnson would have the Court believe. [Dkt. No. 5, Ex. 1 ¶ 12.] Rather, Duke seeks communications with Plaintiffs or their surrogates – individuals who publicized and put at issue their dealings with Duke when they filed a lawsuit. These concessions, which Dr. Johnson ignores, [Dkt. No. 5 at 7], obviate most of the concerns outlined in the motion to quash.

As shown in Duke's motion to compel, Dr. Johnson publicly identified the sources for his book. [Dkt. No. 1, Ex. K.] Thus, some communications between Dr. Johnson and the identified

[2] Dr. Johnson argues that the "more than 70 emails containing Dr. Johnson's email address" that Duke has obtained in discovery undermine Duke's assertion that "Plaintiffs have produced little or no correspondence with Dr. Johnson." [Dkt. No. 5 at 7.] Dr. Johnson omits a key word from his quote of Duke's brief. Duke's assertion referred to "these Plaintiffs" – i.e., those who testified about, but failed to produce their communications with Dr. Johnson. [Dkt. No. 1 at 8 (emphasis added).] In any case, the list of roughly 70 e-mails only confirms Duke's position. Several Plaintiffs identified by Dr. Johnson as sources for his book produced no communications: William Wolcott, Brad Ross, Devon Sherwood and Ryan McFadyen. Others identified as sources and listed in the letter, produced very few communications. Michael Catalino, for example, produced only one e-mail.

sources are both responsive to Duke's requests and non-confidential. Yet, Dr. Johnson claims that particular communications with those sources – and communications with other sources whose very identity is confidential – should be protected from discovery. [Dkt. No. 5 at 9-10.]

In Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980), a case upon which Dr. Johnson relies heavily, the First Circuit held:

> Not all information as to sources is equally deserving of confidentiality. An unsolicited letter may be received with no mention of an interest in anonymity; such a letter may casually mention the wish for confidential treatment; it may specifically condition use on the according of such treatment; or it may defer communication of any substance until a commitment to confidentiality is received. Oral communications could also range from the cavalierly volunteered to the carefully bargained-for undertaking.

Id. Contrary to this principle, Dr. Johnson instead asserts indiscriminately that "the emails at issue in this case are confidential" without providing a factual basis for a wholesale privilege over his potential communications with more than 40 plaintiffs. Neither Duke nor the Court can evaluate this claim as applied to the particular communicants or communications. For that reason, it is incumbent upon Dr. Johnson to justify his claim and to provide a particularized log. Precision Airmotive Corp. v. Ryan Ins. Servs., Inc., No. 2:10–mc–244–JHR, 2011 WL 148818, at *5 (D. Me. Jan. 17, 2011). Dr. Johnson has undertaken no such effort.[3]

Dr. Johnson also cites what he terms the "similar" case of In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, 249 F.R.D. 8 (D. Mass. 2008). The subpoena target in that case, however, produced 246 pages of responsive documents. Id. at 10. Moreover, Bextra held that the various privileges Dr. Johnson asserts here were not applicable, "except to the extent that they are factors in the balancing test." Id. at 12 n.3 (noting the First

[3] Again, the roughly 70 e-mails involving Dr. Johnson that Duke has discovered undermine any claim that the communications with plaintiffs were confidential. For instance, Dr. Johnson does not publicly list Glenn Nick as a source for his book. [Dkt. No. 1, Ex. K.] Nevertheless, over half of the e-mails in the list attached to Dr. Johnson's motion to quash bear a "GN" Bates label, indicating that they originated from Mr. Nick. [Dkt. No. 5, Ex. 4.]

Circuit's cautions about affording "privileged" status to information compiled pre-publication by an academic researcher). Dr. Johnson's communications here are not pre-publication academic research; rather, they formed the basis of a blog and a commercial, widely distributed publication. In any event, the court in Bextra noted "[t]he record before the Court establishes that the communications are treated as confidential." Id. at 14 n.4. The opposite is true here, where Dr. Johnson publicly listed his sources and has not undertaken to log or otherwise justify his claims on a document-by-document or communicant-by-communicant basis.

Finally, Dr. Johnson's effort to shield information from production to Duke on First Amendment grounds is further undermined by Plaintiffs' affirmative use of similar information in the underlying North Carolina proceedings. In a recent deposition of Duke trustee Robert Steel, Plaintiffs' counsel introduced a page from Dr. Johnson's book that describes a conversation between Mr. Steel and blogger Jason Trumpbour. Ex. A at 62:22-65:16. Counsel inquired about specific statements supposedly made in that conversation and the context for those statements. Id. at 66:15 – 67:14. When Duke subpoenaed documents from Mr. Trumpbour, however, he withheld several e-mails among himself, Dr. Johnson, and plaintiffs' lawyers on the ground that they "may constitute attorney work product, specifically mental impressions, conclusions, opinions or theories regarding the law or facts relevant to and gathered in anticipation of the present claims." Sept. 10, 2012, Letter from Jason Trumpbour to Thomas Segars, attached as Ex. D.[4] Among the documents Mr. Trumpbour shared with Dr. Johnson, but withheld from Duke are those that describe his conversations with Mr. Steel. Id.

Dr. Johnson's participation with Plaintiffs' lawyers in a group creating work product in the North Carolina litigation is inconsistent with his professed status as "a journalist or academic

[4] Duke has since received some, but not all of these documents. The others, which Mr. Trumpbour deposited with counsel for the McFadyen Plaintiffs, are the subject of on-going negotiations for their production.

engaged in pre-publication research." [Dkt. No. 5 at 7.][5] To the extent either of these mutually-exclusive bases for protecting his communications from discovery might have existed, those protections are now waived. See, e.g., Trudeau v. N.Y. State Consumer Prot. Bd., 237 F.R.D. 325, 339 (N.D.N.Y. 2006) ("[A] party cannot partially disclose a privileged document nor selectively waive the privilege and then expect it to remain a shield.").

III. Dr. Johnson's Assertions about Being "Singled Out" as a Subpoena Target and Subject to "Abusive Questioning and Inquiries" Are Hyperbole.

Dr. Johnson argues that because "parties to the litigation likely have responsive documents, the burden of disclosure should not fall to a third party like Dr. Johnson." [Dkt. No. 5 at 7.] Duke, however, did take steps to obtain the discovery from parties by serving document requests on each of the 41 Plaintiffs (and on counsel, Mr. Ekstrand). [Dkt. No. 5, Ex. 4.] Duke seeks these communications from Dr. Johnson only after seeking them from parties to the litigation. Tellingly, however, the Plaintiffs – who initiated this litigation in the first place, certified the completeness of their own production, [Dkt. No. at 8, n.3], and now confirm that they had no "email preservation issues," [Dkt. No. 5, Ex. 4] – resist any further discovery of their own relevant communications by supporting Dr. Johnson's motion to quash with their counsel's statements. [Dkt. No. 5, Exs. 4-5.]

Dr. Johnson also makes much of his prior deposition in a separate lawsuit against Duke. In that case, the plaintiff claimed that a Duke administrator made comments about her in an alleged television interview. Because the plaintiff produced no admissible evidence that this alleged interview even occurred, Duke sought Dr. Johnson's deposition because he included quotes from the alleged interview in his book about the lacrosse case and wrote about it on his blog. See Stuart Taylor Jr. & KC Johnson, Until Proven Innocent at 343 (Oct. 2008); KC Johnson, Double

[5] This group includes the Ekstrand & Ekstrand firm, which described its "manuscript review" on Dr. Johnson's book as "particularly important" because it "allowed [the attorneys] an opportunity . . . to ensure that the permanent, written memorializations of the events of the night, the investigation, the case, and especially the character of the boys were all portrayed in an accurate and positive light." [Dkt. No. 1, Ex. L at 2.]

Standards, Durham-in-Wonderland Blog (Feb. 22, 2007, 12:01 AM), http://durhamwonderland. blogspot.com. Duke sought Dr. Johnson's testimony to learn what sources Dr. Johnson had for this information. The questions cited in Dr. Johnson's brief all address that central concern.

Dr. Johnson argues that "left unchecked," Duke's efforts could chill further reporting. On the day after the previous deposition, however, Dr. Johnson actually blogged about the questions that he now claims chilled his speech. KC Johnson, Fairness, Durham-in-Wonderland Blog (June 27, 2012, 9:20 AM), http://durhamwonderland. blogspot.com (calling one of the exact questions cited in his brief "an interesting one"). Those questions actually engendered more speech. In any case, the notion that Dr. Johnson's speech would be chilled by sitting for a deposition on limited topics while defended by able counsel is a red herring with no bearing on the pending motions.

CONCLUSION

For the foregoing reasons, Duke respectfully requests that this Court deny Dr. Johnson's motion to quash and enter and order compelling Dr. Johnson to comply with Duke's subpoenas.

This the 26th day of September, 2012.

NORMAN, HANSON & DETROY, LLC

/s/ Peter J. DeTroy

/s/ Russell B. Pierce, Jr.

/s/ David A. Goldman

Peter J. DeTroy/Russell B. Pierce, Jr./David A. Goldman
Norman, Hanson & DeTroy, LLC
415 Congress Street, P.O. Box 4600
Portland, ME 04112-4600
(207) 774-7000
pdetroy@nhdlaw.com
rpierce@nhdlaw.com
dgoldman@nhdlaw.com

Counsel for Duke University

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September 2012, I filed the foregoing **MEMORANDUM OF LAW IN RESPONSE TO ROBERT DAVID JOHNSON'S MOTION TO QUASH SUBPOENAS** upon the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record in the above-captioned action, including counsel for the witness, Patrick Strawbridge of Bingham McCutchen LLP, One Federal Street, Boston, MA 02110.

/s/ David A. Goldman
David A. Goldman
NORMAN, HANSON & DETROY, LLC
415 Congress Street
P. O. Box 4600
Portland, ME 04112-4600
(207) 774-7000
dgoldman@nhdlaw.com

Counsel for Duke University