UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

McFADYEN, et al.,

v.

DUKE UNIVERSITY, et al.,

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

ORAL ARGUMENT
REQUESTED

CARRINGTON, et al.,

v.

DUKE UNIVERSITY, et al.,

ROBERT DAVID JOHNSON'S REPLY IN SUPPORT OF OBJECTION TO MAGISTRATE JUDGE'S MEMORANDUM DECISION AND ORDER ON MOTION TO COMPEL AND TO QUASH SUBPOENA

Patrick Strawbridge, Bar No. 10024
Jonathan M. Albano (pro hac vice)
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, Massachusetts 02110-1726
617-951-8000

Counsel for Robert David Johnson

I. INTRODUCTION

Although the parties dispute whether Duke is entitled to enforce its subpoena of Dr. Johnson, there is no factual dispute about the following matters:

- Forty-one former Duke students have sued the university claiming that its conduct during a sexual assault investigation violated their rights by (a) making written misrepresentations in letters to the students (b) disciplining the players in violation of a contractually-mandated process; (c) abusing a relationship of trust; and (d) negligently supervising Duke employees.

- Dr. Johnson is a non-party to this suit and has no personal knowledge of Duke's conduct.

- Dr. Johnson did not speak to any of the forty-one plaintiffs on these topics until at least five months after Duke's alleged misconduct occurred.

- The case was widely reported in the national and local media by scores of news organizations, reporters and bloggers other than Dr. Johnson.

- Dr. Johnson has criticized Duke's handling of the investigation and treatment of its students, continues to report on the case and -- as Duke knows -- plans to do so in the future.

- Dr. Johnson's reporting has displeased Duke. In a case brought by still another Duke student -- to which Dr. Johnson also was a non-party -- Duke deposed Dr. Johnson and asked him questions about whether he misled his readers by not quoting a Duke press release, whether he tried to "get Duke's side of the story," and whether he stands by his editorial judgment.

- Duke's motion seeks Dr. Johnson's communications with all 41 student plaintiffs and their attorneys, without any individualized showing that the students cannot produce this correspondence and without challenging the Magistrate's ruling that Duke is not entitled to subpoena Dr. Johnson simply to obtain impeachment material.

No non-party should be subjected to intrusive discovery under these circumstances. The sensitive analysis employed when judging subpoenas that will inhibit speech on matters of legitimate public interest by an author who criticizes a prominent institution requires that Duke's subpoena be quashed.

II. ARGUMENT

A. Contrary to Duke's Claims, This Court's Review of the Magistrate Judge's Decision is *De Novo*.

Ignoring the cases cited in Dr. Johnson's objection, Obj. at 2-3, Duke argues that because a motion to quash is not "one of the eight enumerated motions in section 636(b)(1)(A)[,]" the

motion is nondispositive and the standard of review is that of clear error. Opp. at 4. The First Circuit, however, has squarely rejected Duke's reading of the statute: "Dispositive motions include those enumerated in . . . § 636(b)(1)(A), but this list is not exhaustive; rather, it simply 'informs the classification of other motions as dispositive or nondispositive.'" *PowerShare, Inc. v. Syntel, Inc*. 597 F.3d 10, 13 (1st Cir. 2010) (emphasis added) (quoting *Phinney v. Wentworth Douglas Hosp*., 199 F.3d 1, 5-6 (1st Cir. 1999)). Because a decision on the competing motions is dispositive of this miscellaneous action, *see* Obj., at 2-3, this Court's review is *de novo*.

B. The First Circuit's Prior Application of the Qualified Reporters' Privilege Supports Dr. Johnson's Motion to Quash the Subpoenas

Duke is correct that this case is controlled by the decision in *Cusumano v. Microsoft Corp*., 162 F.3d 708 (1st Cir. 1998).[1] Duke errs, however, in arguing that the balancing test that the First Circuit laid out in that case weighs in its favor. *Cusumano* recognized the fundamental importance of protecting academic and journalistic freedom, and denied discovery far closer circumstances than those presented here. *See* Obj. at 17-19.

1. Duke has not satisfied its burden of demonstrating relevance.

As Dr. Johnson noted in his opening brief, the Magistrate Judge erred in determining that Dr. Johnson possessed relevant documents merely because he "wrote about the very incidents that are at issue in the underlying actions." Order, at 6. This was an error of law. In *Bruno & Stillman, Inc. v. Globe Newspaper Co*., 633 F.2d 583 (1st Cir. 1980), for example, the First Circuit expressly endorsed a "balancing approach" for reviewing motions to compel confidential news sources that included factors such as whether the information sought is "relevan[t] in an important sense to plaintiff's claim" and the "availability of the information from other sources." *Id.* at 598 (emphasis added). Illustrating the careful review required of such disclosure orders, the First Circuit reversed the district court for mistakenly ruling that sources that "instigated" an allegedly libelous article had played a "central role" in the defendant's conduct. *Id.*

Duke first understates its burden of demonstrating the relevance of Dr. Johnson's

[1] This is a reversal by Duke, which argued below that *Cusumano* did not control. *See* Motion to Compel, at 4-5.

unpublished email. Opp. at 4-5 & n.2. Contrary to Duke's argument, *Bruno & Stillman* expressly held that a court considering a claim of reporter's privilege must ensure that the desired information was "more than remotely relevant" *Id.* at 597 (emphasis added). Nothing in *Cusumano* overruled that language,[2] and the First Circuit has since reiterated that the information sought must be "directly relevant." *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004). Indeed, this is the standard for third-party discovery requests that do not implicate the First Amendment. *See Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 41-42 (1st Cir. 2003) (noting that even if material sought has\ "some relevance," a non-party subpoena is properly quashed if it is not probative to "the threshold issue" in the underlying litigation).

Duke also misstates the time period when Dr. Johnson spoke to his sources, using a blog post from April 2006 to recklessly accuse Dr. Johnson of misleading the Court. Opp. at 5. It is Duke that is confused. Dr. Johnson never claimed that he began blogging about the case in August; in fact, his affidavit plainly discloses that he first blogged about the case at another site in April 2006.[3] Dkt. # 5, Ex. 1 ¶ 3. The point that Dr. Johnson did make -- and that Duke cannot contest -- is that he did not "obtain any information about [the players'] claims from any source before he began to blog upon the case full-time in August 2006." Obj. at 11-12 (emphasis added). That was "months after the meetings and events in question," and refutes Duke's argument that it is seeking "contemporaneous" communications that would be directly relevant to its defense.[4]

Finally, Duke baldly asserts that it has "made out a prima facie case for relevance far stronger than required by *Cusumano*," Obj. at 6, but fails to explain how this is so. The court in

[2] Duke's argument to the contrary makes no sense. *Cusumano* repeatedly cited *Bruno & Stillman* in setting forth the test, see 162 F.3d at 716, and in context makes clear that the party seeking the information must show that the underlying claim or defense is not frivolous -- a separate inquiry from the relevance of the documents sought. *See Bruno & Stillman*, 633 F.2d at 597 (holding that the reporters privilege requires a showing that "the case does not appear frivolous . . . and that the desired information appears more than remotely relevant") (emphasis added).

[3] Curiously, Duke ignores the affidavit and instead cites an archived post that now available at *Durham-in-Wonderland*, which plainly notes it was "[o]riginally posted at Cliopatria" *See* KC Johnson, Duke News, Durham-in-Wonderland, http://durhamwonderland.blogspot.com/2006/04/duke-news.html (last visited Nov. 20, 2012).

[4] Duke's argument that the additional passage of time makes these communications *relatively* contemporaneous falls short of establishing any meaningful importance to their content, particularly since there is no evidence that plaintiffs have asserted a lack of memory regarding the specific topics to which Duke now limits its subpoena.

Cusumano considered statements by the employees of a rival firm that went directly to Microsoft's "primary defense" in its antitrust suit. 162 F.3d at 716. Duke's speculation about the potential contents of Dr. Johnson's emails is nowhere near as probative. *See* Obj. at 12-13.

2. Alternative sources of the information are concededly available.

The lacrosse players gave Duke the communications they had with Dr. Johnson. There is no suggestion that the email was destroyed, lost or inaccessible. Duke thus has failed to meet its burden of showing a need for any documents in Dr. Johnson's possession. *See* Obj. at 14-16.

In response, Duke wrongly states that the Magistrate Judge "concluded" that there was evidence that "the players lost or destroyed" their communications. Opp. at 6-7. In fact, the Magistrate Judge simply cited selective excerpts provided by Duke that, at most, establish only that four lacrosse players -- out of forty-one plaintiffs -- may have communicated with Dr. Johnson at some point. *See* Obj. at 15 & n.10. Those excerpts fall far short of satisfying Duke's burden of showing a specific need for the actual categories of documents it is seeking.[5] Indeed, Duke's argument would render the burden of showing need illusory; it is always possible that parties might not remember or might fail to produce all of their communications. This fact of life cannot justify a broad fishing expedition into a third party's files simply to test the sufficiency of a party's production -- particularly when that third party is a journalist. Duke lacks any evidence suggesting that Dr. Johnson has sole possession of any relevant information.

Any need for Dr. Johnson's email is further negated by Duke's taking of depositions from each of the players, as well as the availability of numerous published statements by the players. *Cusumano* clearly states that these kinds of alternative sources reduce a party's need for unpublished material from a journalist. 162 F.3d at 716-17 (noting the availability of "the same information" through depositions of parties quoted in a book); *Bextra*, 249 F.R.D. at 13 (noting that moving party could obtain information from its own experts, publicly-available research and

[5] Duke also incorrectly contends that Dr. Johnson did not raise this point below. *See, e.g.,* Hearing Tr. 45:1-17 (MR. STRAWBRIDGE: ". . . having reviewed those deposition exhibits, it is far from clear -- in fact, I'd suggest at least with what we've been provided it's not clear at all -- that the plaintiffs are saying they have communications with Dr. Johnson on the specific, narrow, relevant claims that are at issue in this case" (emphasis added).

commentary). Duke has failed to satisfy its burden of showing need.

3. In light of the threat to chill ongoing speech and the limited importance of any communications, the *Cusumano* balance falls heavily in Dr. Johnson's favor.

In its analysis of the balance required by *Cusumano*, Duke urges this Court to repeat the Magistrate Judge's error below: confusing the interests of the lacrosse players with those of Dr. Johnson, an independent member of the press.[6] Thus, Duke argues that the plaintiffs' failure to object to disclosure of their email as dispositive, Opp. at 7-9. But the "privilege belongs to [the reporter], not the potential witnesses, and it may be waived only by its holder." *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). *See also Palandjian v. Pahlavi*, 103 F.R.D. 410, 412 (D.D.C. 1984) ("It would have a chilling effect on the flow of information [] if the qualified privilege would disappear at the request of the subject of a journalistic work").

Similarly, Duke's claim that there is never a chilling effect in requiring a reporter to disclose his communications with a litigant finds no support in law. Duke certainly cites no authority for this novel proposition, and cases considering similar subpoenas have quashed them because of their threat to free speech. *See, e.g., Shoen v. Shoen*, 48 F.3d 412, 418 (9th Cir. 1995) (quashing subpoena of investigative book author seeking author's communications with defendant); *Jimenez v. City of Chicago*, 733 F.Supp.2d 1268, 1274 (W.D. Wash. 2010) (quashing subpoena for journalist's communications with plaintiff*); In re Subpoena to Goldberg*, 693 F.Supp.2d 81 (quashing deposition subpoena regarding journalists' communications with plaintiff).[7] Although Duke notes that First Circuit precedent largely deals with subpoenas seeking communications between reporter and a non-party, this only reflects the black-letter

[6] Duke accuses Dr. Johnson of "collaborating" with the players and their attorneys, but cites only a letter from one attorney indicating that her firm reviewed several book manuscripts, which allowed them "an opportunity to correct factual errors about the events and to ensure that the permanent, written memorializations of the events of that night, the investigation, the case and especially the character of the boys were all portrayed in an accurate and positive light." Ex. L, at 2 (emphasis added). In an egregious example of selective omission, Duke inaccurately edits this sentence to say that the review was "to ensure … the permanent, written memorialization of the events … in a positive light," Opp. at 6.

[7] Similarly, the applicable shield laws in all three states implicated in this case -- Maine, North Carolina and New York -- make no distinction between a journalists' communications with litigants and those with non-litigants. *See* 16 M.R.S.A. § 61; New York Civil Rights Law Art. 7, § 79-h; N.C. Gen. Stat. § 8-53.11.

principle that "[t]here is simply no reason to burden nonparties when the documents sought are in possession of the party defendant." *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 577 (N.D. Cal. 2007); *see also* Fed. R. Civ. P. 26(b)(2)(c)(i) (court may limit discovery where information "can be obtained from some other source that is more convenient"). In fact, this principle receives "special weight" in a reporter's privilege case. *Cusumano*, 162 F.3d at 717.[8]

Duke's assurance that its pursuit of Dr. Johnson's non-published correspondence with sources on the lacrosse team (and their attorneys) is "not controversial at all," is belied by the decision of five national and local media organizations to file an amicus brief resisting Duke's position. Those entities recognize the chilling effect inherent in Duke's position. Indeed, the First Circuit itself has emphasized the "lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled." *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).[9] Duke's subpoenas embody that threat. If, as Duke contends, any communication with a party or its attorney -- including those that occur well before any litigation commenced -- may be freely discovered from reporters, it is difficult to see how any meaningful investigative reporting on pending and current court cases could proceed. The balance thus weighs heavily in favor of denying Duke's motion to compel.

C. The Scope of Duke's Prior Questioning of Dr. Johnson is Indefensible, and Demonstrates the First Amendment Threat Presented in this Case

Dr. Johnson's reporting has often been critical of the actions of some Duke administrators and faculty -- particularly their treatment of the lacrosse players during and after the flawed criminal investigation. It is thus is not surprising that Duke's litigation strategy has involved

[8] That the plaintiff in *Witzel* may have voluntarily elected to turn over certain documents does not justify Duke's assertion that courts may compel a reporter to do the same. Opp. at 8. Indeed, while some courts have set aside the privilege when "the reporter asserting the privilege against disclosure of confidential sources is not merely a non-party witness or a defendant in a libel suit but is the party who initiated the lawsuit," *Driscoll v. Morris*, 111 F.R.D. 459, 461 (D. Conn. 1986), this is not the case here, because Dr. Johnson is not a party to this litigation.

[9] In *LaRouche*, the First Circuit held that the particular balance of factors in that criminal action weighed against the reporters' efforts to prevent in *in camera* inspection of videotaped outtakes, but specifically noted that "allowing the production for in camera inspection ordered by the district court does not foreshadow allowance of a subpoena in the ordinary run of cases" like this one. *Id.* at 1182 (emphasis added).

numerous attempts to obtain documents from Dr. Johnson and depose him, to the virtual exclusion of any other member of the media -- including the co-author of *Until Proven Innocent*, Stuart Taylor. Duke's targeting of Dr. Johnson is especially notable because he is one of the few reporters still covering the civil litigation against Duke. That Duke has cited this continued reporting to justify is subpoenas underscores the threat to free speech its subpoenas pose.

In defense of the six subpoenas it has served on Dr. Johnson, Duke first asserts that the entirety of its questioning of Dr. Johnson at the prior deposition was "vital" to determining whether Dr. Johnson had evidence about statements made by a Duke administrator regarding a former Duke student who was sexually assaulted while attending the university. Opp. at 10. But the record Duke's attorneys created in that deposition refutes this assertion. Among the lines of questioning advanced by Duke that were not remotely "vital" to establishing Dr. Johnson's possession of specific comments from a Duke administrator:

- What was the "theme" of particular blog posts, and whether Dr. Johnson stands by the editorial judgments he made in those posts. Dkt. # 5, Ex. 2, at 64:3-9; 65:22-66:3.

- Whether it was "misleading" for Dr. Johnson not to include a statement from a week-old Duke press release in a particular post. *Id*. at 67:12-69.

- Whether, in summarizing a lawsuit in a post quoting Duke's legal filings, Dr. Johnson made "any attempt…[to] get Duke's side of the story?" *Id.* at 75:3-20.

This last topic is particularly troublesome because it involved a post that had nothing to do with the facts of the case at issue, but instead critically commented on Duke's legal arguments.

Finally, Duke does not deny that it has targeted Dr. Johnson for non-party discovery -- even though hundreds of other reporters covered the Duke lacrosse case, including Dr. Johnson's co-author, and the on-campus reporters at the Duke *Chronicle*, who were the first to interview the players. It is difficult to conceive of a better way to inhibit future communications with Dr. Johnson than the needless disclosure of confidential sources that Duke is pursuing.

VI. CONCLUSION

For the reasons stated, Dr. Johnson respectfully requests that the Court deny Duke's Motion to Compel and grant Dr. Johnson's Motion to Quash.

Dated: November 23, 2012

ROBERT DAVID JOHNSON

By His Attorneys,

/s/ Patrick Strawbridge
Patrick Strawbridge, Bar No. 10024
patrick.strawbridge@bingham.com
Jonathan M. Albano (pro hac vice)
jonathan.albano@bingham.com
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, Massachusetts 02110-1726
617-951-8000

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 November 23, 2012.

This the 23rd day of November, 2012.

/s/ Patrick Strawbridge

Patrick Strawbridge, Bar No. 10024
patrick.strawbridge@bingham.com
BINGHAM McCUTCHEN, LLP
One Federal Street
Boston, MA 02110-1726
Tel.: 617-951-8230
Fax: 617-951-8736