EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RYAN McFADYEN AND EDWARD CARRINGTON, Plaintiffs, v. DUKE UNIVERSITY, Defendant	)	**NO. 2:12-mc-00196-JHR**

MEMORANDUM OF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, MAINE PRESS ASSOCIATION, MAINETODAY MEDIA, INC., BANGOR PUBLISHING CO. AND MAINE ASSOCIATION OF BROADCASTERS IN SUPPORT OF ROBERT DAVID JOHNSON'S OBJECTION TO MAGISTRATE JUDGE'S MEMORANDUM DECISION AND ORDER ON MOTION TO COMPEL AND TO QUASH SUBPOENA

The magistrate's decision in this case to force Dr. Johnson to comply with the subpoenas must be overturned. The order misapplies the precedent in *Cusumano v. Microsoft*, 162 F.3d 708 (1st Cir. 1998) and *Bruno & Stillman v. Globe Newspapers*, 633 F.3d at 597 (1st Cir. 1980), which lay out the reporter's privilege in the First Circuit. It disregards the important principle that journalists must be free to work independently of the judicial process, ignores the public interest in a reporter's right to keep information confidential (casting it instead as the source's right of privacy that can be easily overcome), and dismisses the very real chilling effect that a decision like this will have on the public's receipt of information in important controversies.

Allowing this decision to stand will have an unsettling impact well beyond this particular discovery dispute. It treats the issue of a reporter's privilege – and therefore the fundamental

First Amendment rights of journalists – as an ordinary discovery dispute without consideration of the public's interest in free and robust reporting of current events.

ARGUMENT

I. The First Circuit standard

The standard set out in *Cusumano* is at the heart of this case. The parties agreed that it was the relevant standard, and the magistrate judge purported to apply it. Mem. Dec. at 5 [ECF No. 18]. *Cusumano* primarily looked at the privilege issue as a question of burden of proof:

> This test contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case. Each party comes to this test holding a burden. Initially, the movant must make a prima facie showing that his claim of need and relevance is not frivolous. Upon such a showing, the burden shifts to the objector to demonstrate the basis for withholding the information.

162 F.3d at 716, citing *Bruno & Stillman*, 633 F.2d at 597.

Cusumano's approach builds upon *Bruno & Stillman*, which itself contains language that more precisely defines the reporter's privilege test:

> In the instant case the district court approximated the balancing approach we have outlined . . . relevance in an important sense to plaintiff's claim; availability of the information from other sources; and non-frivolousness of the cause of action.

633 F.2d at 598.

This standard echoes the similar three-part tests found in the state shield laws of Maine[1] and North Carolina,[2] where the underlying action originated. This common three-part test makes

[1] Maine's statutory shield law protects the identity of a source, any information that could be used to identify a source, and "[a]ny information received in confidence by the journalist acting in the journalistic capacity of, gathering, receiving, transcribing or processing news or information for potential dissemination to the public." 16 M.R.S. § 61(1). A court may compel disclosure notwithstanding the privilege only where the party seeking to overcome the privilege makes a showing "by a preponderance of the evidence" that the source information is (1) "material and relevant[;]" (2) "critical or necessary to

clear that the reporter's privilege inquiry must go much deeper than simply balancing the competing interests. In fact, it is on the issue of relevance – "relevance in an important sense" to the claim, in the words of *Bruno & Stillman* – that the magistrate's findings fall short.

The heightened standard of relevance reveals the speculative nature of the subpoena in the present case – Duke does not know the contents of the communications between the students and Johnson (or the extent to which such contents are relevant to pending claims in the underlying case, breach of contract, fraud or misrepresentation). Thus, Duke cannot come close to showing that the information held by Johnson is sufficiently relevant. Instead of focusing on this point, the magistrate's order noted that it is likely that some communications exist between the author and players, and concluded that the relevance is fairly obvious, since the journalist wrote about the very incidents at issue, Mem. Dec. at 5-6. This suggests the magistrate looked at relevance in only the most generic pre-trial discovery sense of whether the newsgathering materials generally were relevant to the Duke lacrosse scandal. The magistrate should have inquired more specifically into whether the materials sought by the subpoena were relevant to a claim that could not be proven any other way. Because Duke does not even know what it is hoping to find in these materials, the subpoena is not sufficiently targeted to meet this heightened standard of relevance. Without this more precise examination of relevance, it would become

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the maintenance of a party's claim, defense or proof of an issue material to the claim or defense[;]" (3) "not obtainable from any alternative source or alternative means or remedies less destructive of First Amendment rights[;]" and (4) that there is "an overriding public interest in the disclosure." 16 M.R.S. § 61(2)(A).

[2] North Carolina's shield law is codified at N.C. Gen. Stat. § 8-53.11. This statute gives a qualified privilege to "any person . . . engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium." To overcome the privilege, the subpoenaing party must show that the information (1) [i]s "relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought; (2) [c]annot be obtained from alternate sources; and (3) [i]s essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought."

impossible for journalists to maintain their independence from the judicial process, so they can gather information and report news to the public without being compromised by litigants with a claim to pursue.

II. The reporter's privilege, the public interest and the "chilling effect"

The reporter's privilege applied in the First Circuit recognizes that the privilege is not just some personal *privacy* interest of the source that the journalist seeks to protect. Instead, it is a privilege based on the need to inform others on matters of public concern. But stressing the "privacy" interests, the magistrate judge held:

> Dr. Johnson . . . has adequately shown that he and the plaintiffs in the underlying actions had an *expectation of privacy* . . . Yet, that is not enough, particularly where, as here, the plaintiffs are themselves the parties who stand to benefit from Dr. Johnson's invocation of the shield of privacy while pursuing claims against Duke based upon the very events about which they spoke with Dr. Johnson. Contrary to Dr. Johnson's argument, I do not see how compelling him, under these circumstances, to reveal what the plaintiffs told him will chill his efforts to obtain information about the Duke lacrosse scandal from any other individuals. . . . Duke's request for communications between the plaintiffs and/or their lawyers and Dr. Johnson, concerning a distinct period of time, and limited to three discrete issues, does not harm the *plaintiffs' expectations of privacy*, rendered ineffectual by their decisions to bring the underlying lawsuits, and does not affect the free flow of information sufficiently to require that the modified subpoena be quashed.

Mem. Dec. at 6-7 (emphasis added) [ECF No. 18].

The magistrate's narrow focus on privacy interests "is not enough." This is not a matter of personal privacy, of either the journalist or the source. It is a question of the much greater interest in serving the public good by creating informed communities. As the *Cusumano* Court held:

> Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information. Journalists are the personification of a free press, and to withhold such protection would invite a "chilling effect on speech," and thus destabilize the First

> Amendment. The same concerns suggest that courts ought to offer similar protection to academicians engaged in scholarly research.

162 F.3d at 714 (internal citations omitted).

The magistrate's finding also gives short shrift to the "chilling effect" of the subpoena. The concept of a "chilling effect" can only be fully understood when one examines how compelled testimony in *this* case affects the ability of all journalists to gain the confidence of sources in *other* cases, as the *Cusumano* Court recognized. But the magistrate judge failed to credit the broader impact of his decision on the culture of reporter-source relationships.

Journalists often have difficulty convincing reluctant sources to come forward and speak freely and openly, particularly about controversial issues. The task is even more challenging, if not impossible, if the sources sense that reporters may be compelled to serve as witnesses against those they interview.

The negative impact of compelled disclosure on sources' willingness to volunteer information to journalists is no less important where testimony regarding a confidential source is not at issue. To the contrary, the free flow of information from the press to the public is still encumbered by mandated production of non-confidential information and sources. Media subpoenas, regardless of the type of information they seek, arouse a fear in sources that speaking with reporters will expose them to unwilling and unnecessary involvement in pending litigation. "The perception created through the use of a newsperson as a . . . witness causes some reporters and their sources to become apprehensive, regardless of whether the information sought is confidential." *In re Schuman*, 552 A.2d 602, 611 (N.J. 1989). The First Circuit has held:

> We discern a 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. To the extent that compelled disclosure becomes commonplace, it seems likely

> indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding the disclosure requests or compliance therewith rather than to the basic function of providing news and comment. In addition, frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees. Finally, observing Justice Powell's essential concurrence opinion in *Branzenburg*, "certainly we do not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of government." These are legitimate concerns. They must be balanced, however, against the defendants' interests.

United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir.1988).

Likewise, the Second Circuit engaged in a detailed review of the nature of the qualified privilege for nonconfidential press materials. *Gonzales v. National Broadcasting Co., Inc*., 194 F.3d 29, 32-36 (2d Cir.1999). The Second Circuit stated:

> If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties – particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government or private parties.

Id. at 35.

CONCLUSION

WHEREFORE, *amicus* respectfully requires that the Court overturn the magistrate's order.

Dated at Portland, Maine this 2nd day of November, 2012.

Respectfully submitted,
The Reporters Committee for Freedom of the Press, Maine Press Association, MaineToday Media, Inc. Bangor Publishing Co. and Maine Association of Broadcasters

by their attorneys,
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/s/ Sigmund D. Schutz

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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, attorney for The Reporters Committee for Freedom of the Press, Maine Press Association, MaineToday Media, Inc. Bangor Publishing Co. and Maine Association of Broadcasters, hereby certify that on the above date, I electronically filed, hereby certify that on the above date, I electronically filed the *Brief Amicus Curiae of The Reporters Committee for Freedom of the Press, Maine Press Association, MaineToday Media, Inc. Bangor Publishing Co. and Maine Association of Broadcasters in Support of Robert David Johnson's Objection to Magistrate Judge's Memorandum Decision and Order on Motion to Compel and to Quash Subpoena* in this matter with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) electronically to the registered participants:

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