Exhibit A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff, v. AMHERST COLLEGE, CAROLYN MARTIN, JAMES LARIMORE, TORIN MOORE, SUSAN MITTON SHANNON, and LAURIE FRANKL, Defendants.	Civil Action No. 3:15-cv-30097

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE "CONFIDENTIAL DOCUMENTS" UNDER SEAL (DOCKET NO. 75)

Plaintiff opposes Defendants' gamesmanship in their labeling of discovery material as "Confidential" in violation of the "good faith" analysis required under the parties' Confidentiality Agreement, the gamesmanship being employed by Defendants in their tactics of filing certain "Confidential" material in the public record while seeking to shield other material from public view, and as a result, Plaintiff opposes Defendants' motion to seal the Molly Mead email which recorded the initial report of Sandra Jones and the interview transcript of EK. Plaintiff agrees only that student names should be protected in the way in which the parties have done so far in their public filings: by using John Doe and Sandra Jones for Plaintiff and the disciplinary complainant and initials for other Amherst College students.

i. Background

Plaintiff filed the initial complaint in this action in May 2015 alleging that Amherst College ("Amherst" or "the College") and certain of its administrators had hurt his chances at a productive career and caused extreme emotional harm by finding him guilty of sexual assault and

expelling him from Amherst based on a proceeding that was procedurally and substantively unfair, in violation of Title IX and in violation of the promises made to John Doe ("Doe") in the *Student Handbook*. Attached to Doe's complaint was the investigative report prepared by Allyson Kurker and exhibits thereto (including Jones's complaint form) and the transcript of the disciplinary hearing, among other materials.[1] On October 1, 2015 the parties filed a Joint Motion to Enter Confidentiality and Protective Order (Docket No. 34). The Court denied the motion and referred the parties to its August 12, 2014 Standing Order concerning confidentiality agreements. Thereafter, the parties entered into a Confidentiality Agreement and filed notice of that agreement (with a copy attached) with the Court (Docket No. 40). In their Confidentiality Agreement, the parties agreed to refer to Plaintiff as "John Doe" and the disciplinary complainant as "Sandra Jones" in all pleadings filed in this Court. *See* Docket No. 40-1 (Confidentiality Agreement), at p. 6, ¶10. The parties further agreed to use "appropriate pseudonyms" to protect the identities of any other Amherst College students which might be identified in public filings. *Id.* Plaintiff has used initials for other students.

Under the Confidentiality Agreement, "Confidential Information" was defined as any discovery material containing "personal information, medical information…, student information (including information that falls within the definition of 'education record' under the Family Educational Rights and Privacy Act), or any other proprietary, financial, sensitive, or confidential information." *Id.* at p. 1, ¶1. All designations of material as "Confidential Information" must be made "in good faith by the party or entity making such designation…." *Id.* at p. 2, ¶1.

[1] Doe took steps to protect the confidentiality of the names of the students involved in his disciplinary proceeding only.

Amherst College has produced 1600 pages of discovery materials to date, and Amherst has stamped each and every single page as "Confidential" under the Confidentiality Agreement, including Doe's own education record. Doe has only stamped his W-2s, containing his employer's tax ID, as "Confidential" under the agreement.

Amherst's investigator, Allyson Kurker, has produced documents pursuant to a *subpoena duces tecum*, again designating every single page (including the final investigative report, already filed publicly with the Court except for student names) as "Confidential." Ms. Kurker was deposed on March 2, 2016, and on March 24, 2016, her counsel wrote to Plaintiff's counsel to designate her entire transcript as "Confidential." Ms. Kurker thereafter, apparently at the request and in concert with Defendants, agreed to "de-designate" those pages of her deposition transcript which Defendants wished to file with the Court, and Mr. Roberts so stated in his second affidavit and attached those pages to his second affidavit at Exhibit 2 (Docket No. 77).[2]

Defendants now seek to shield from public view the April 2013 record of Jones's report to Amherst, as well as the interview transcript of Ms. Kurker's interview of EK—even though Jones's complaint form and her testimony before the hearing board are already in the public record, and even though Ms. Kurker's purported summary of her interview of EK contained in her investigative report is also in the public record. That request should be denied.

[2] At the same time that Ms. Kurker designated her entire transcript as confidential on March 24, she claimed that she did not have the transcript to review and has taken the position that since Plaintiff provided her a copy on April 4, 2016, she has another 21 days from April 4 to review the transcript and reconsider her final position on what should or should not be designated as "Confidential." It is puzzling that Ms. Kurker would make a blanket designation without reviewing the transcript, and even more concerning that she would agree to de-designate the pages Defendants wanted to file apparently based on their simple request and without even having, much less reviewing, the transcript. Clearly, Ms. Kurker will simply agree to whatever Defendants want to do with her transcript and her prior designation was not made in "good faith." Plaintiff is reserving motion practice on Ms. Kurker's materials until after April 25, in the hopes that by giving her counsel the 21 days to which they (wrongfully) claim entitlement, motion practice might be avoided. It is highly unlikely given Defendants' demands, however, that Ms. Kurker will agree with Plaintiff's position that only student names should be designated as "Confidential" under the parties' agreement.

ii. Argument

Under the Confidentiality Agreement, the burden is on Defendants to demonstrate why these materials are properly designated, in "good faith", as "Confidential" and it is also their burden to demonstrate why those materials should be hidden from public view and filed under seal. *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410-11 (1st Cir. 1987) ("The objectors—those seeking to keep the datum hidden from view—must carry the devoir of persuasion."). Defendants have failed to meet their burden.

The "long-standing presumption" is that the public should have access to judicial records. *In re Gitto Glob. Corp.*, 422 F.3 1, 6 (1st Cir. 2005). Public access allows the public to monitor the function of the courts and fosters integrity of and respect for the judicial system. *Id.*; *see also F.T.C.*, 830 F.2d at 410-11. "Only the most compelling reasons can justify non-disclosure of judicial records." *F.T.C.*, 830 F.2d at 410. Use of the docket to "gratify spite or promote public scandal" may justify hiding records from public view. *In re Gitto Glob. Corp.*, 422 F.3d at 6. Defendants have not identified an interest which warrants the seal of the two documents at issue, which have already been redacted so as to protect the names of students referenced therein.

The EK Interview Transcript Should Not Be Sealed.

The substance of EK's interview (Exhibit 1 to the Second Affidavit of Scott Roberts) is already in the public record, as part of the investigative report attached to the original complaint. *See* Docket No. 1 (Complaint) at Ex. 2 (investigative report). The investigative report was intended to be a fair and accurate summary of the interview, and there is no reason to justify keeping the interview recording, or the transcript prepared of the audio recording, confidential *except* to protect student names. Amherst has already taken steps to protect the names of

Amherst students by using "Doe" and "Jones" for Plaintiff and the disciplinary complainant (consistent with the parties' agreement in the Confidentiality Agreement) and by using initials for other students, including EK, in the version of the interview transcript they seek to file under seal. Nothing more is appropriate or required given what is in the public domain already.

Defendants argue that Ms. Kurker made some promise of "confidentiality" to EK which the Court is obliged to recognize and enforce on their motion. There was a discussion of what would happen with the audio recording between EK and Ms. Kurker, but this colloquy occurred more than half-way through the interview, in connection with a specific question the investigator asked of EK. *See* Second Affidavit of Scott Roberts (Docket No. 77), Ex. 1 at 10:1-13. EK did not ask at the outset whether her entire interview would be kept confidential. Furthermore, what Ms. Kurker told EK in response to EK's question was that what EK told Ms. Kurker could appear in her investigative report and further that her audio recording would be subject to production to others if she received a subpoena. *Id.* There was clearly no concern, expectation or desire that the entire interview be kept confidential by EK, and there was no promise of confidentiality by Ms. Kurker. This provides absolutely no support for shielding the transcript (except student names) from the public, particularly given what is already in the public record in this case.

The April 2013 Report of Jones Memorialized by Molly Mead.

Defendants offer no real justification for maintaining the Molly Mead email as "Confidential" or filing it under seal (except as to student names, not disputed by Plaintiff), other than their contention the email would normally be treated as "confidential" under an internal Amherst policy. Ms. Mead's email records the first report by Jones to Amherst of what she labeled as sexual assault. In this account, she claims that she and Doe were out drinking together

and she invited him directly from a party to her room—that did not happen. In fact, in February 2012, Doe stumbled into a common room—clearly inebriated to the point of incapacitation—fell on Jones, and after they kissed in the common room, Jones virtually carried Doe to her room to continue their interaction privately. Doe had no knowledge of seeing or being with Jones that night whatsoever due to his black-out state. Given all the information already in the public record, including Jones's complaint form (Docket No. 1, Ex. 2 (investigative report) at Ex. B (Jones's complaint)), the notes of her investigative interview (Docket No. 1, Ex. 2 at pp. 2-6), and the testimony she gave to the disciplinary hearing board (Docket No. 1, Ex. 3 (hearing transcript)), there is no reason to keep this version of events from the public record except the unjustifiable reason: Defendants wish to shield from public view the inconsistencies in Jones's account of which ***they*** were aware at the time, and which they ***hid*** from Doe who did not see this email until it was produced in litigation. Student names may be protected pursuant to the parties' agreement and practice (and, in fact, Defendants have already scrubbed student names from even the version submitted to file under seal), but nothing more is justifiable.

iii. Conclusion

For all the reasons set out herein, Doe respectfully requests that the Court deny the motion to file exhibits under seal, and require Defendants to file the exhibits (already modified to protect student names) in the public record.

Respectfully submitted,

JOHN DOE,

By his attorneys,

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Dated: April 25, 2016

CERTIFICATE OF SERVICE

I, Megan C. Deluhery, hereby certify that this document has been 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 this date.

Date: April 25, 2016

/s/ Megan C. Deluhery
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