UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

McFADYEN, et al.,

v.

DUKE UNIVERSITY, et al.,

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

ORAL ARGUMENT
REQUESTED

CARRINGTON, et al.,

v.

DUKE UNIVERSITY, et al.,

**ROBERT DAVID JOHNSON'S OBJECTION
TO MAGISTRATE JUDGE'S MEMORANDUM DECISION AND ORDER
ON MOTION TO COMPEL AND TO QUASH SUBPOENA**

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I. INTRODUCTION

This action arises from the efforts of Duke University and several of its employees (collectively, "Duke") to subpoena and depose an author and blogger, Robert David Johnson, to obtain confidential, non-published communications he had with former Duke lacrosse players, their current lawyers, and those lawyers' employees. Duke wants access to Dr. Johnson's journalistic work product even though: (1) all of the purported information it seeks is of no direct relevance to the case; (2) the information can be obtained from other sources (including the parties to the litigation); and (3) enforcing the subpoena will interfere with Dr. Johnson's ongoing reporting on the lacrosse case.

Duke bears a heavy burden to justify the discovery it seek because of the serious threat it poses to the First Amendment. "Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information." *Cusumano v. Microsoft Corp*., 162 F.3d 708, 714 (1st Cir. 1998). The applicable precedent requires the Court to balance the moving party's need for and the relevance of the information sought against the journalist's interest in preserving the confidentiality of its sources and the public's interest in protecting the free flow of information in other cases. *Id.* at 716. In this case, that balance plainly favors of Dr. Johnson. Duke's alleged need for the information is fatally undercut by (a) its inability to prove that the discovery is relevant or necessary to the defense; and (b) Duke's ability to directly subpoena and depose all of the parties to the litigation.

Dr. Johnson, on the other hand, has a constitutionally protected interest in safeguarding his independence and ability to assure sources that they may entrust him with confidential information, particularly as he continues to cover this case. The First Amendment interests at stake are underscored by Duke's decision to single him out for repeated subpoenas and to subject him to a prior deposition that focused on questions concerning his editorial judgment and fairness to Duke in reporting on the lacrosse scandal. None of the other numerous reporters that

have covered this case have faced this gauntlet, raising the specter of harassment that the Supreme Court has made clear is constitutionally intolerable. *See Branzburg v. Hayes*, 408 U.S. 665, 707-708 (1972); *see also id.* at 710 ("if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered") (Powell, J., concurring).

The Magistrate Judge below granted Duke's motion to compel. In doing so, he plainly misapplied the *Cusumano* test and failed to engage in the exacting, detailed review required by the First Amendment and binding precedent. This matter now comes before the District Court on *de novo* review. For the reasons described below, Dr. Johnson respectfully requests that the Court deny Duke's motion to compel, grant his cross-motion to quash, and vindicate the First Amendment's protection of the free exchange of information and ideas.

II. JURISDICTION

Jurisdiction over this case arises pursuant to 28 U.S.C. §§ 1332 and 1367(a) and Fed. R. Civ. P. 45(c). This Court's review of the Order is authorized by 28 U.S.C. § 636(b), Fed. R. Civ. P. 72, and Local Rule 72.1.

III. STANDARD OF REVIEW

This is a miscellaneous action involving Duke's attempt to enforce its subpoenas and Dr. Johnson's attempts to quash them. Because these motions will resolve the entirety of the legal issues raised in this case, the Order is dispositive for purposes of Rule 72(b), and this Court's review is *de novo* under 28 U.S.C. § 636(b)(1). *See In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 68 (1st Cir. 2011) (noting that magistrate judge's purported "order rather than a recommendation" on motion to quash was "problematic, given the dispositive character of the motion"). *See also In re Subpoena to TD Bank N.A.*, No. 8-101-P-S, 2008 WL 5156612, *1 (D. Me. Dec. 1, 2008) (Kravchuk, M.J.) (recommending that the district court "perform a *de novo*

review" of a magistrate judge's decision in a miscellaneous case "commenced solely for purposes of subpoena enforcement") (citation omitted); *In re Dep't of Justice Subpoenas to ABC*, 263 F.R.D. 66, (D. Mass. 2009) (*de novo* review by district court of order on motion to compel).

IV. FACTS

A. Dr. Johnson's Reporting on the Duke Lacrosse Case

In the spring of 2006, several players on Duke's lacrosse team were falsely accused of rape by a stripper they hired to perform at an off-campus house party. The ensuing rush to judgment, filing of criminal charges, exoneration of the students and revelations of misconduct by police and prosecutors unleashed a wave of national public interest and outrage. Among those who took interest in the story was Dr. Johnson, a history professor at Brooklyn College who now lives in Scarborough, Maine. Dkt. # 5, Ex. 1 ¶¶ 1-2.[1] In August 2006, Dr. Johnson created a blog dedicated to the lacrosse case, *Durham-in-Wonderland*.[2] *Id.* ¶¶ 3-6.

Over the following months, the blog became one of the preeminent national sources of information about the case. Dr. Johnson's analysis -- which often was sharply critical of Duke administrators' handling of the allegations -- attracted hundreds of thousands of readers. Unless otherwise agreed, sources for the blog expected (and were provided) with confidentiality as to their non-published communications with Dr. Johnson. *Id.* ¶¶ 9-12.

On several occasions, Dr. Johnson traveled to Durham, North Carolina, to cover live events in the case. His expertise led to a consulting role with a network news operation and increased contact with those at the heart of the controversy. *Id.* ¶ 7. This involvement culminated in his collaboration with journalist Stuart Taylor in 2007 to co-author a book about the false accusations and related fallout, *Until Proven Innocent. Id.* ¶¶ 18-19. Again, Dr. Johnson and Mr. Taylor relied upon confidential sources in writing their book. *Id.* ¶¶ 23-24. Dr.

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[1] In the interest of efficiency, documents previously filed in this matter will be referred to by their docket number and/or exhibit number, rather than re-filed with this Court.

[2] The blog and its complete archives are located at http://durhamwonderland.blogspot.com

Johnson continues to blog about the case at *Durham-in-Wonderland*.

B. The Pending Litigation in North Carolina

Underlying these subpoenas are two ongoing, large-scale civil suits that former members of the Duke lacrosse team brought against Duke, the City of Durham, Durham County, and dozens of their employees and agents. The *Carrington* and *McFadyen* complaints each alleged dozens of claims against the various defendants; a number of which survived the defendants' motions to dismiss. *See* Dkt. # 1, Exs. A & C. Because of a pending interlocutory appeal, discovery currently is limited to a handful of claims unique to Duke. *See* Duke Motion to Compel, Dkt. # 1, Exs. A-D. These are:

- Claims for fraud arising from alleged "misrepresentations in letters to Plaintiffs regarding Plaintiffs' Duke Card information," which was given to Durham police in alleged violation of federal privacy law and Duke's policies.[3] Duke Ex. B, at 8; Duke Ex. D at 8. *See* Count 8 in *Carrington* and Count 24 in *McFadyen*.

- A breach of contract claim alleging that "Duke imposed disciplinary measures against Plaintiffs … without providing them with the process that was promised." Duke Ex. B, at 8. *See* Count 21 in *McFadyen*.

- A claim alleging that certain Duke administrators "created a relationship of trust and confidence and then abused that relationship for Duke's benefit." Duke Ex. D, at 8. *See* Count 11 in *Carrington.*

- A claim for negligent supervision "as to the underlying tortious conduct alleged as part of Count 8 and 11 [in *Carrington*]." *Id. See* Count 19 in *Carrington*.

As part of the discovery in these cases, Duke took the depositions of all of the plaintiffs, many of their parents, and other potential witnesses in the case. *See* Dkt. # 1, at 7-8. Duke also has obtained documents from the players, including more than 70 emails reflecting communications with Dr. Johnson. None of the players have indicated that their email or other communications with Dr. Johnson are unavailable. *See* Dkt. # 5, at Exs. 4 & 5. In fact, Duke itself was responsible for maintaining the student email accounts of the lacrosse players at the

[3] A "Duke Card" is a student ID card used for a variety of purposes on Duke's campus.

time of the specific events in question. *Id.*, Ex. 4.

C. Duke's Subpoenas of Dr. Johnson

In July 2012, Duke served upon Dr. Johnson the four subpoenas at issue in this case. On their face, these subpoenas were extremely broad, seeking a wide variety of documents -- including correspondence with any Duke lacrosse player, Duke employee or Duke alumnus, documents related to payments made to Duke lacrosse players and their attorneys, and policies and contractual agreements related to *Durham-in-Wonderland*. Dkt. # 1, *id.* at ¶¶ 5-11. The breadth of these categories belies Duke's assertions below that it always has sought "only … non-confidential communications with … publicly-acknowledged sources," Dkt. # 1, at 4. *See also* Dkt. # 13, at 1 ("Duke has narrowly tailored the discovery it seeks from Dr. Johnson").

In response to the subpoenas, Dr. Johnson identified some categories for which he had no responsive documents. Dkt. # 1, Duke Ex. G, at 2. He also noted that any responsive information that he had was not directly relevant and was available from other sources, including the parties. *Id.* at 2-3. Dr. Johnson also asserted objections under the applicable federal rules, the First Amendment, and to the wording of some of the specific requests. *Id.* at 3-4.

Dr. Johnson then noted that Duke's attorneys improperly questioned him in a prior deposition he appeared for in June 2012, taken on behalf of some of the same Duke defendants in an unrelated case.[4] The transcript of that deposition reveals that Duke's attorneys spent considerable portions of the deposition questioning Dr. Johnson's editorial judgment, including:

- His specific reporting methods, including whether "the blog is not as well sourced as your academic material." Dkt. # 5, Ex. 2, at 26:5-27:19; 60:9-10.
- What was the "theme" of particular blog posts, and whether Dr. Johnson stands by the editorial judgments he made in those posts. *Id.*, at 64:3-9; 65:22-66:3.

[4] The separate case involves a lawsuit by a former Duke student, Katharine Rouse, who claims that Duke created a hostile environment for her following her rape at a fraternity party.

- Whether it was "misleading" or "important" for Dr. Johnson not to include a statement from a week-old Duke press release in a 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.

Finally, Dr. Johnson noted that Duke had singled him out for non-party discovery. In response, Duke insisted Dr. Johnson was a proper target and noted that he "continues to this day to blog about the events underlying this litigation." Dkt. # 1, Duke Ex. J, at 4.

D. The Proceedings Below

On September 17, 2012, Duke opened this miscellaneous action and filed a motion to compel compliance with the subpoenas. Dkt. # 1. Duke argued that the information it sought was not confidential, and emphasized that it needed information from Dr. Johnson to challenge privilege assertions that some lacrosse players had made at their depositions. *Id. at* 6-10. Duke also allowed in a footnote (for the first time) that it "would be willing to narrow its subpoena requests" to cover only communications about the subject matter of the pending claims that occurred between Dr. Johnson and the players, their parents, and their lawyers. *Id.* at10 n.4.

Dr. Johnson filed a consolidated opposition and cross-motion to quash on September 21, 2012.[5] Dkt. # 5. Dr. Johnson noted that Duke's offer to "narrow" its subpoenas was in fact an attempt to <u>expand</u> them to cover the parents of the lacrosse players. *Id.* at 3. He then argued that Duke had failed to meet its burden in demonstrating that the discovery sought by Duke was proper under the federal rules governing non-party discovery. Moreover, because the unpublished documents at issue were confidential and subject to First Amendment protection, Dr. Johnson argued that Duke could not meet the heightened burden that applies when parties seek to subpoena the notes and testimony of reporters. *Id.* at 8. Finally, Dr. Johnson noted that Duke's prior abusive and irrelevant questioning of him was precisely the kind of harassment and

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[5] Dr. Johnson agreed to an expedited briefing schedule below, in light of the discovery cutoff in the underlying case. Throughout this dispute, Dr. Johnson has attempted to minimize delays and inconvenience to Duke while preserving his right to oppose the disclosure of unpublished material in his possession.

intrusion on First Amendment rights that the qualified privilege is intended to prevent. *Id.* at 10.

Duke filed a response on September 27, 2012. Duke claimed that it had satisfied its burden of proving that Dr. Johnson was likely to have communications that could not be obtained elsewhere, and contended that Dr. Johnson had waived any right to assert privilege because he was copied on some emails with some of the lacrosse players' lawyers, *see id.* at 5-6.[6] Finally, Duke contended that the Rouse deposition did not establish any First Amendment threat, actually "engendered more speech" because Dr. Johnson later blogged about one question he was asked. *Id.* at 7 (emphasis in original).

E. The Magistrate Judge's Decision

The Magistrate Judge granted, in most respects, Duke's motion to compel and denied Dr. Johnson's motion to quash. *See* Dkt. # 18, Order dated 10/12/2012. At the outset, Judge Rich properly noted that Duke had not requested Dr. Johnson's communications with the parents in the original subpoena, and that he would "not order Dr. Johnson to produce any documents not reasonably within the scope of the initial subpoena." Order, at 4 n.4. Judge Rich further limited Duke's motion to compel only to those topic areas described in footnote 4 of its motion.[7] The Magistrate Judge also correctly determined that the motions were controlled by *Cusumano*, which sets forth a careful balancing test designed to ensure proper protection for prepublication research and other materials in the possession of journalists and academics. *Id.* at 5.

The Magistrate Judge then determined that, based on the four partial transcripts Duke attached to its reply brief, Duke had shown that it was likely that additional communications between Dr. Johnson and the lacrosse players existed. *Id.* at 5-6. Although he noted that Duke's

[6] Duke later conceded that Dr. Johnson was, in fact, a journalist for purposes of the reporters privilege. *See* Hearing Tr. 28:21-23.

[7] These topics are, again, "(a) events occurring between March 13, 2006, and March 28, 2006, (b) the subpoena for Duke Card information served by the Durham, North Carolina police, (c) Duke's prior release of Duke Card information to the Durham police, and (d) any disciplinary action taken against a plaintiff in the McFadyen case." Order, at 4.

proffered interest in these materials for impeachment or for the purpose of challenging privilege was insufficient to justify its production, *id.* at 6 n.6, he nonetheless held that "[t]he relevance of such communications is fairly obvious: Dr. Johnson wrote about the very incidents that are at issue in the underlying actions." *Id.* at 6.

Judge Rich then held that Dr. Johnson, in turn, had "adequately shown that he and the plaintiffs in the underlying actions had an expectation of privacy" in the unpublished communications. But the Court held that was not enough, because "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." *Id.* The Magistrate Judge opined that revealing these communications would not chill Dr. Johnson's efforts to obtain information from other parties and that "[p]eople who bring suit must expect that their prior statements that are relevant to their claims cannot be hidden from those whom they are suing." *Id.* at 6-7.

Without further analysis, the Magistrate Judge concluded that "the *Cusumano* balance tips in favor of Duke" because the "narrowed" request for communications from the players and their lawyers would not "affect the free flow of information sufficiently to require that the modified subpoena be quashed." *Id.* at 7. He also concluded that, in light of this decision, the depositions could proceed, although he noted that the types of questions that Duke asked Dr. Johnson in the previous deposition "would not be appropriate . . . because they are well beyond the limited scope of discovery allowed by the trial court in North Carolina." *Id.* at 7-8.

V. ARGUMENT

This dispute concerns the degree of protection afforded, under First Circuit precedent, when a journalist or academic researcher is subpoenaed for discovery of his or her private, unpublished communications and materials. The case law firmly establishes that courts presented with this question must remain mindful that "important First Amendment values are at

stake," *Cusumano*, 162 F.3d at 710, and employ "special procedures . . . with a heightened sensitivity to any First Amendment implication that might result from the compelled disclosure of sources." *Bruno & Stillman, Inc. v. Globe Newspaper Co*., 633 F.2d 583, 596 (1st Cir. 1980).

Under the established approach, the burden is on Duke, as moving party, to demonstrate its entitlement to the documents at issue. Moreover, the concerns underlying this test are heightened in this case, because Duke seeks to obtain documents from and depose a journalist who continues to cover the fallout from the lacrosse case. It is thus necessary to deploy the "heightened sensitivity" to the process required by the First Circuit. Under that process:

- Duke has the burden of demonstrating the need for the information, which must be "relevan[t] in an important sense," *Bruno & Stillman*, 633 F.2d at 597-98; *see also Cusumano*, 162 F.3d at 716.

- If the party seeking disclosure meets its initial burden, the objecting party must establish a basis for withholding the information, such as an expectation of confidentiality or the prospect of other harm that would result from disclosure. *Bruno & Stillman*, 633 F.2d at 597; *Cusumano*, 162 F.3d at 716.

- Finally, the court considers whether the asserted interest in disclosure outweighs the resulting harm to the free flow of information, and whether the competing interests may be accommodated by measures such as requiring the exhaustion of alternative sources, deferring disclosure until summary judgment has been decided. *Bruno & Stillman*, 633 F.2d at 597-98; *Cusumano*, 162 F.3d at 716-17.

"[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." *Cusumano*, 162 F.3d at 717. And because of "the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights" . . . "detailed findings of fact and explanation of the decision would be appropriate." *Bruno & Stillman*, 633 F.2d at 595, 598.

Because both parties agreed below that *Cusumano* controls the outcome in this case,[8] it is useful to review the decision to illustrate the exacting nature of the First Circuit's test.

[8] Even if the heightened protection of *Cusumano* did not apply, the subpoenas should be quashed because non-public information is protected by the privilege, *see Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995), and because the third-party subpoenas fail to meet the general requirements of Rule 45. *See* Dkt. # 5, at 5-7.

Cusumano involved a non-party subpoena that Microsoft, a defendant in a federal antitrust case, served upon two professors who wrote a book about its rival, Netscape. The book was based in large part on extensive interviews that the authors conducted with the employees. The employees received verbal assurances that they could review their quotes and correct any misstatements. When Microsoft obtained a copy of the manuscript for the book, it sought to subpoena the authors' communications with the employees, reasoning that commentary from Netscape employees about the so-called "browser wars," which were at the heart of the antitrust action, might be useful. *See Cusumano*, 162 F.3d at 710-12.

After deciding that the professors received the same First Amendment protection as journalists, the First Circuit considered whether the authors' nonpublished communications with the sources for the book (all of whom were named and quoted in the book itself) were confidential communications entitled to protection. The court determined that the answer was yes, in part because the sources were told that they would have the opportunity to review and correct their quotes before publication. These assurances were "a species of confidentiality" that were "sufficient to justify significant protection." *Id.*, 162 F.3d at 714-15.

With that in mind, the First Circuit employed the balancing test set forth above. It noted at the beginning that Microsoft's primary defense to the antitrust action was that its rival Netscape had "suffered a series of self-inflicted wounds" that explained Microsoft's ascendency. 162 F.3d at 716. Because the published communications included accounts of missteps by Netscape, the Court held that it was reasonable to assume the unpublished communications also contained relevant information. *Id.* But the First Circuit discounted Microsoft's alleged need for the unpublished material because "the same information was otherwise available to Microsoft by direct discovery" -- including depositions of the individuals quoted in the book. *Id.* at 716-17.

Turning to weigh the researchers' interests in protecting their unpublished communications from discovery, the Court found the pan of the scale to be "brim full." *Id.* at

717. Specifically, the court noted that scholars rely on participants to provide them with candid information, and that "allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents' future research efforts but also those of other similarly situated scholars." *Id.* Because these effects threatened the "loss of theoretical insight into the business world" and "would infrigidate the free flow of information to the public," the court concluded the balance tipped against disclosure and quashed Microsoft's subpoena. *Id.*

In this case, Duke fell far short of meeting its burden under *Cusumano*. The Magistrate Judge failed to apply the rigorous standard required by the First Circuit, instead accepting many of Duke's arguments at face value and without detailed analysis. As a result, he overvalued the alleged relevance and need for the information, undervalued the independent interests of reporters and the public in discouraging the compelled disclosure of reporters' notes and communications, and ultimately permitted Duke free license to obtain any documents relevant to claims upon which discovery is currently permitted. This Court -- applying *de novo* review -- thus should carefully scrutinize Duke's arguments and consider the full ramifications of disclosure even under the "narrowed" subpoena. Properly applied, *Cusumano* and other authority support the denial of these subpoenas and the granting of the motion to quash.

A. Duke Has Not Met Its Burden of Demonstrating the Need and Relevance of the Information It Is Seeking.

Duke bears the initial burden of demonstrating the "need and relevance" of the information. *Cusumano*, 162 F.3d at 716. Duke cannot satisfy either requirement.

1. Duke has not met its burden of showing that the communications it seeks are relevant "in an important sense."

Dr. Johnson is not a percipient witness to any of the events in question, including the meetings and events described by Duke in footnote 4 of its Motion to Compel. Nor did he obtain any information about such claims from any source before he began to blog upon the case full-

time in August 2006 -- months after the meetings and events in question. Dkt. # 5, Ex. 1, ¶ 3. Duke has thus greatly overstated both the "contemporaneous" nature of communications it seeks and their alleged value to its case. Indeed, throughout the four months of this litigation Duke has identified just four reasons as to why communications that plaintiffs had with Dr. Johnson are relevant in its case. None of these reasons are persuasive, and they certainly are not relevant "in an important sense." *Bruno & Stillman*, 633 F.2d at 598.

First, Duke contended that the communications were necessary to test certain privilege assertions made by some players at their depositions. *See* Dkt. # 1, 8-10; Ex. H, at 1-10. But the deposition transcripts themselves indicated that the published statements of the plaintiffs and others could test those assertions, and the Magistrate Judge recognized the insufficient nature of the relevance of these documents. Order at 6 n.6 (stating that Duke's "professed concern for 'testing' the plaintiffs' claims of attorney-client privilege should be addressed to the trial judge").

Second, Duke has contended that the communications could be used to contradict statements from or to refresh recollections of certain witnesses. *See* Dkt. # 1, 8-10; Ex. H, at 11; Ex. J 3-4. Again, Judge Rich correctly noted that "Duke's proffered interest in possible impeachment of the plaintiff lacrosse players' testimony, standing alone, is not enough to justify production." Order, at 6 n.6 (citing *In re Bextra & Celebrex Marketing Sales Practices & Product Liability Litig*., 249 F.R.D. 8, 12 (D. Mass. 2008)).

Third, Duke has identified one email in which a player wrote, after reviewing a draft chapter of a book titled *It's Not About the Truth*, that some players "didn't know that [Dean Sue Wasiolek] was an attorney at the time." Dkt. # 13, at 2-3. Duke claims this is probative to the claims in *Carrington* that the players "enjoyed a confidential relationship with Dean Wasiolek based, in part, upon her status as an attorney." Dkt. # 13, at 2-3. But the Complaint states that

Dean Wasiolek's ethical obligations as an attorney were only one of several bases for why she served in a role of trust and confidence to the plaintiffs. *See* Dkt. # 13, at 2-3; Ex. B., at ¶¶ 550-551. Certainly, this statement cannot be characterized as relevant "in an important sense" -- particularly because Duke had the ability to directly ask every plaintiff, under oath, when and how they discovered Dean Wasiolek was an attorney. *Cf. Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 41-42 (1st Cir. 2003) (noting that even if documents sought have "some relevance," a non-party subpoena is properly quashed if it "cast too wide a net" and was not probative to "the threshold issue" in the underlying litigation).

Fourth, Duke has cited an email to a lacrosse player's parent from Dr. Johnson's co-author, Stuart Taylor. In this exchange (obtained without subpoenaing the co-author), Mr. Taylor asks for details about "Dean Sue's message" on the night she met with the team, and whether the players believed she was telling them not to tell their parents about the rape allegations. Duke contends the statement (which contains no reply from the parent recipient) is relevant because it was removed from the final draft of *Until Proven Innocent*. *See* Dkt # 13, at 2-3. A reporter's question has zero relevance to the subject matter of this case, and only demonstrated Duke's fixation on the media coverage of the events in question rather than the claims and defenses in the case. At a minimum, this again is not relevant "in an important sense."

In sum, Duke's assertions of relevance fall far short of the standard set forth by the First Circuit. *See, e.g., Cusumano*, 162 F.3d at 716 (finding burden met where book contained numerous statements about rival's business errors, which was defendant's primary defense in antitrust case). Nonetheless, the Magistrate Judge declared the relevance of Duke's request to be "obvious" because "Dr. Johnson wrote about the very incidents that are at issue in the underlying

actions." *Id.* This cannot be true. Dr. Johnson's writings themselves are of no relevance whatsoever to the claims, and Duke has failed to make any compelling case that he possesses specific statements that go to the heart of important issue in this case. If the Order is correct, then the First Circuit's "burden" on the moving party is illusory. In this case alone, there are dozens, if not hundreds, of journalists who interviewed some players or their attorneys about the events in question between March 13 and March 28, 2006. This alone cannot be enough to open the door to depositions and subpoenas for all of their records. That Duke has elected to focus its efforts on Dr. Johnson -- perhaps because he "continues to this day to blog about the events underlying this litigation," Dkt. # 1, Duke Ex. J, at 4 -- should not alter the analysis.

2. Duke has had ample opportunity to discover the information it is seeking through alternative means.

Even ignoring its attenuated claims of relevance, Duke has failed to show any real need to obtain these unpublished, confidential communications when the information it seeks is freely available elsewhere. To date, Duke has had the opportunity to depose every plaintiff, as well as many of their parents and other witnesses, about the relevant events and any communications they had with Dr. Johnson. Duke also has been provided with more than 70 emails to or from Dr. Johnson,[9] and there is no evidence that the plaintiffs lost or destroyed any communications. Duke also has the public accounts and statements by the lacrosse players.

The existence of alternative sources of information eliminates the need to subpoena a reporter or academic, and weighs heavily in favor of denying the discovery. *See, e.g*, *Cusumano*, 162 F.3d at 716-17 (noting that 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 "has available to it both its own experts as well as any publicly-available research or commentary regarding the

[9] This is based on the productions to the plaintiffs in *Carrington*. Dkt. # 5, at Ex. 4-5. To date, Duke conspicuously has failed to disclose precisely how many emails to or from Dr. Johnson it possesses.

published articles"). It does not matter that the particular documents sought are unavailable elsewhere; it is the availability of the information that counts.

The Order below contains two errors on this point. First, the Order stated that "[u]nlike the moving party in *Cusumano* . . . Duke has taken the time and made the effort to try to obtain from other sources the information that it seeks from Dr. Johnson." *Id.* at 6. But *Cusumano* makes clear that because Duke could have deposed the players and ask them directly about the relevant events, there is no additional need for the disclosure of Dr. Johnson's records. *Id.*, 162 F.3d at 717. *See also Holton v. Rothschild*, 108 F.R.D. 720, 722 (D. Mass. 1985) (rejecting subpoena for notes regarding nonconfidential sources because "it is evident that [the defendant] could obtain the information by directly deposing" the nonconfidential sources). Duke's depositions afforded it a chance to obtain the very information it now claims to need.

Second, the Order contends that Duke has "shown that it is likely that there exist more communications between Dr. Johnson and the plaintiffs than the 70 emails that Duke has been able to locate to date, and that the plaintiffs have not been able to produce them when asked to do so." Order, at 5. But Duke submitted only selective excerpts that establish, at most, that four of the lacrosse players may have had some sort of communication with Dr. Johnson at some point in time. *See* Dkt. # 1, Duke Exs.T-W.[10] None of the depositions submitted by Duke establish that those plaintiffs emailed Dr. Johnson on the relevant topics. *See id.* Nor can those selected excerpts establish that the other plaintiffs, many of whom likewise did produce communications

[10] Specifically, Michael Catalino testified that he may have talked with Dr. Johnson about "Crystal Magnum's allegations" and "how [he] was treated." Dkt. # 1, Ex, T, at 159:9 and 160:7-10. Anthony McDevitt testified that Dr. Johnson sent him excerpts "to verify quotes," but does not indicate the topics of those quotes. Dkt. # 1, Ex. U, 315:12-14. Edward Carrington testified only that he spoke and emailed with Dr. Johnson regarding "Crystal Magnum's allegations." Dkt. # 1, Ex. V, 246:11-13, 24-247:2. John Jennison testified only that he believed he emailed Dr. Johnson, but could not remember "whether there was a specific question and answer that actually took place." Dkt. # 1, Ex. W, 236:18-24. None of these depositions suggest the existence of communications regarding the specific "narrowed" topics upon which discovery is permitted. Moreover, it appears each of these individuals did, in fact, produce to Duke email between themselves and Dr. Johnson. Dkt. # 5, Ex. 4.

with Dr. Johnson to Duke, withheld relevant communications. These materials simply do not satisfy Duke's burden of demonstrating need.

In sum, Duke's selective submission of evidence and its mere speculation about what might exist do not satisfy its burden of demonstrating need and "relevance in an important sense." *Bruno & Stillman*, 633 F.2d at 598. At a minimum, it diminishes the weight that should be accorded to Duke in the *Cusumano* balancing test.

B. The Subpoena Seeks Confidential, Unpublished Information, the Disclosure of Which Would Chill Dr. Johnson's Ability to Continue Reporting on This Case.

Cusumano requires the court to weigh the movant's need for the information against "the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends[.]" 163 F.3d, at 716. In this case, Dr. Johnson's nonpublished, confidential communications with his sources are entitled to substantial protection because they help secure the continued flow of information essential to his reporting and the public's right to be informed. These important interests greatly outweigh Duke's tenuous allegations of relevance and need for the Dr. Johnson's communications. The Order, while recognizing that the confidential nature of the documents sought here, nonetheless erred by focusing on the lacrosse players' expectations of privacy, rather than the reporter's interest in avoiding unnecessary disclosure of and the public's interest in ensuring the continued free flow of information from all sources.

1. Dr. Johnson's confidential communications with sources are entitled to substantial protection.

Despite Duke's arguments to the contrary, Judge Rich correctly held that the *Cusumano* analysis applied to the communications at issue.[11] *See* Order, at 5-6. The communications that

[11] Duke asserted below that it was not seeking any confidential information, because some of the lacrosse players were identified as sources or otherwise acknowledged in *Until Proven Innocent*. *See* Dkt. # 1, at 4. But this says nothing about the confidentiality of non-published emails related to reporting for the book, let alone the blog. *See* Ex. 1, at ¶ 10 (noting that it was common for sources to be identified for some purposes but not others).

Duke is seeking from Dr. Johnson are of the same type at issue in *Cusumano*: exchanges that Dr. Johnson had with plaintiffs during the reporting of his book and for his blog. *See, e.g.,* Dkt. # 1 at 6 (seeking "written communications created in [the editorial] process"). And, as in *Cusumano*, there is evidence that the lacrosse players and other sources for Dr. Johnson were given the same opportunities and assurances. Dkt. # 5, Ex. 1 at ¶¶ 9-10, 19, 23-26. *See also Bextra,* 249 F.R.D. at 13-14 (holding that anonymous pre-publication communications with peer reviewers were entitled to protection). Judge Rich thus correctly held that Dr. Johnson's unpublished communications with his sources were confidential in nature.

2. Requiring disclosure would substantially impair the free flow of information and Dr. Johnson's ongoing reporting.

The First Circuit repeatedly has recognized that requiring disclosure of confidential communications between sources and journalists presents a real threat to the future flow of information. Thus, it has instructed that "courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights." *Bruno & Stillman*, 633 F.2d at 595-96. As the *Cusumano* court noted:

> 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.

Cusumano, 162 F.3d at 714 (citations and quotation marks omitted). *See also United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988) (noting 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").

In *Cusumano*, the Court held that "allowing Microsoft to obtain the notes, tapes, and

transcripts it covets would hamstring not only the respondents' future research efforts but also those of other similarly situated scholars." 162 F.3d at 717 (emphasis added). Likewise, in *Bextra*, the court looked beyond the effect disclosure would have in the instant case and noted that the expectation of confidentiality attached to the peer-review process "permits the reviewers to 'be as frank as possible in their assessments of submitted science,'" and that the journal's "ability to attract peer reviewers would be impaired by disclosure of their identities or comments." *Id.* at 13-14. The court thus held that disclosure of the unpublished information would harm the journal's "ability to fulfill both its journalistic and scholarly missions, and by extension … the medical and scientific communities, and … the public interest." *Id.* at 14.

Those precise concerns lie here. *See* Ex. 1, ¶¶ 8-16, 31. An order requiring disclosure of confidential sources invariably will discourage others from providing information to Dr. Johnson. *See id.* This plainly would chill the ability of Dr. Johnson (and other reporters, especially those covering legal issues) to obtain information of public interest -- including in this specific case. Given that Duke already has had the opportunity to obtain the information through direct discovery of the parties, and there is no indication that Dr. Johnson possesses unique documents that go to the heart of the case, the First Amendment concerns should prevail.

The Order erred in its application of the *Cusumano* balancing test by framing the confidentiality concerns in terms of an "expectation of privacy."[12] Using that construct, the Magistrate Judge simply held that the lacrosse players had essentially waived their privacy interest by bringing suit. *See* Order, at 7 (reasoning that disclosure "does not harm the plaintiffs' expectations of privacy, rendered ineffectual by their decisions to bring the underlying lawsuits"). The Magistrate Judge speculated that "the plaintiffs are themselves the parties who

[12] Neither *Cusumano* nor any of the cases applying its rule use the "expectation of privacy" terminology.

stand to benefit from Dr. Johnson's invocation of the shield of privacy while pursuing claims against Duke."[13] *Id.* at 6. But the subpoena was not directed at the plaintiffs; it was directed at Dr. Johnson. The *Cusumano* analysis purposely looks beyond the specific parties to the case, and instead considers the broader implications of disclosure. After all, the rights implicated by the subpoenas, "while lodged in the reporter and his publisher, in reality reflect an underlying interest of the public." *Bruno & Stillman*, 633 F.2d at 595-96. For these reasons, the balance in this case falls squarely in favor of granting the motion to quash.

3. The only limitation on Duke's "narrowed" subpoena is the current stay imposed by the trial court.

Duke and the Magistrate Judge also relied upon the purported "narrow" scope of the modified subpoena in justifying the disclosure of the unpublished documents in Dr. Johnson's possession. *See, e.g.,* Order at 7 ("As narrowed, 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 . . . and does not affect the free flow of information sufficiently to require that the modified subpoena be quashed"). But the "narrowness" of the modified subpoena is constrained only by the limited discovery currently permitted in the underlying action. If the pending interlocutory appeal fails, the scope of relevant discovery will greatly expand to encompass the activities of the Duke and Durham police departments, the local prosecutor's office, and the labs that processed evidence in the case. Nothing in the Magistrate Judge's Order would prevent Duke and those other parties from serving subpoenas for his communications with the lacrosse players on numerous other topics. The implication confirms the error in the Order's analysis; it cannot be that a person's decision to file a civil suit amounts to a key that unlocks a reporter's files. Otherwise, the

[13] This observation, at most, explains why the plaintiffs may not resist discovery directed at them (and there is no evidence here that they have). It should have no effect on Dr. Johnson's obligations.

protections of *Cusumano* are illusory.

C. Any Deposition is Unnecessary and Would Amount to Harassment of a Reporter Still Covering this Case.

Courts quashing a subpoena *duces tecum* also routinely quash accompanying deposition subpoenas. *See, e.g., Holton*, 108 F.R.D. at 722; *Loadholtz v. Fields*, 389 F.Supp. 1299, 1300 (M. D. Fla. 1975) (requiring a reporter to "attend the deposition and produce unpublished as well as published documents received or developed by him in the course of his duties as a reporter necessarily has a 'chilling effect' upon his functioning as a reporter and upon the flow of information to the general public"). Such an order is particularly appropriate here because Dr. Johnson continues to report upon the case. The resulting "chill on a [reporter's] willingness to interview trial witnesses or otherwise report and editorialize on completed court proceedings vital to the public interest, in the analytical fashion demanded by the reporter's duty to the public, presents an impermissible risk to First Amendment freedoms." *U.S. ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc*., 600 F. Supp. 667, 670 -671 (S.D.N.Y. 1985).

Moreover, this Court can fairly draw the inference that Dr. Johnson's ongoing coverage, and his critical analysis in the past, has motivated Duke's efforts to focus their third-party discovery on him. What else can reasonably explain Duke's decision to forego subpoenaing other authors or journalists who had extensive contact with the plaintiffs in this case and their attorneys, including Dr. Johnson's <u>co-author</u>, Stuart Taylor? Duke has not even attempted to subpoena the interview notes and correspondence of its own student newspaper, the Duke *Chronicle*, which in July 2006 was the first media outlet to interview the lacrosse players about the events in question. *See* Hearing Tr., 46:5-15; 65:7-8. There is a reason why Duke has ignored allegedly responsive materials collected by reporters on its own campus, but has served a combined six subpoenas on Dr. Johnson. These subpoenas should be quashed.

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: October 26, 2012

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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 October 26th, 2012.

This the 26th day of October, 2012.

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