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 CONSOLIDATED OPPOSITION TO DUKE UNIVERSITY'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS AND CROSS-MOTION TO QUASH SUBPOENAS PURSUANT TO RULE 45(C)(3)

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I. INTRODUCTION

Duke University and several of its employees (collectively, "Duke") seek, through a non-party subpoena, source notes, confidential communications, and other documents in the possession of Robert David "KC" Johnson, Ph.D., an author, blogger and professor. Duke is a defendant in two actions pending in North Carolina federal court. The plaintiffs in those cases are former members of Duke's lacrosse team whose teammates were falsely accused of rape in 2006 and subjected to an ill-fated attempted criminal prosecution. Dr. Johnson's blog, *Durham-in-Wonderland,*[1] is one of the preeminent sources of information about the case. Dr. Johnson chronicled and analyzed the case on his blog, consulted for a network news operation, and co-authored a book about the incident, *Until Proven Innocent.* He continues to blog about the case.

Duke's subpoenas seek a broad array of documents, as well as a deposition in each matter. Dr. Johnson respectfully moves this court to quash the subpoenas, because: (1) the information sought is not relevant to the underlying claims, in violation of Rule 26(b)(1); (2) the material can be readily obtained from the parties to the actions or public sources; and (3) the subpoenas infringe upon constitutionally protected interests of freedom of speech and press, as well as academic freedom. Indeed, Duke's attorneys already have subjected Dr. Johnson to a deposition in a separate case that devolved into questioning about the fairness of his reporting and his editorial judgment. This Court should quash the subpoenas and ensure that Dr. Johnson's reporting may continue without fear of further questioning or harassment from Duke.

II. BACKGROUND

A. The Claims at Issue Are Limited To Alleged Misconduct by Duke Officials, About Which Dr. Johnson Has No Firsthand Information

Discovery for most claims in *Carrington* and *McFadyen* is currently stayed. *See* Duke Motion to Compel, Exs. A-D. The live claims against the Duke defendants are as follows:

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

- Claims for fraud arising from alleged "misrepresentations in letters to Plaintiffs regarding Plaintiffs' Duke Card information."[2] Duke Ex. B, at 8; Duke Ex. D at 8. *Id.* This is Count 8 in the *Carrington* and Count 24 in the *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. This is Count 21 in the *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. This is 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.* This is Count 19 in *Carrington*.

All of these claims arise from alleged actions that Duke officials took in the Spring of 2006. Dr. Johnson was not a firsthand, percipient witness of any of those actions. *See* Ex. 1, at ¶ 7. Moreover, as Duke's own exhibits demonstrate, subsequent correspondence that Dr. Johnson had with the parties when he and Mr. Taylor were researching and writing *Until Proven Innocent* occurred months after the events at issue. *See* Duke Exs. M, N, & O (communications from November 2006 and March 2007).

B. Duke Seeks A Broad Array Of Documents From Dr. Johnson

The original subpoenas to Dr. Johnson sought an incredibly broad category of documents, mainly related to the disclosure of Duke Card information, communications between Duke administrators and the plaintiffs for a 16-day period in March 2006, and the job performance of seven Duke administrators. Duke Ex. F at 4-5. The requests included:

- "All notes" from interviews with specific individuals, Duke Ex. F at ¶ 1;

- Correspondence with the offices of the attorneys for the plaintiffs, *id.* at ¶¶ 3-4;

- Correspondence with any Duke lacrosse player, Duke employee or Duke alumnus, *id.* at ¶¶ 5-6.

As these excerpts demonstrate, nothing in the original subpoenas limited the request to

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

"non-confidential communications with … publicly-acknowledged sources," as Duke now contends. *See* Duke Motion, at 4. To the contrary, Duke sought all communications with any Duke lacrosse player, any Duke employee, any Duke alumnus, and any employee of the plaintiffs' law firms. Indeed, even in its most recent proposed compromise, Duke does not limit its request to non-confidential communications or publicly-acknowledged sources. *See* Duke Motion, at 10 n.4. Moreover, Duke's latest proposal to "narrow" its subpoena actually seeks to expand it to include, for the first time, communications with Duke lacrosse players' parents. *Id.*[3]

Dr. Johnson did not assert a "blanket objection" to the subpoena, as Duke claims. *See* Duke Motion, at 4. Rather, Dr. Johnson identified some categories for which he had no responsive documents. Duke Ex. G, at 2. Dr. Johnson also noted that virtually all responsive documents that he did have could be obtained from other sources, including the parties to the litigation. *Id.* at 2-3. In addition to general objections under the federal rules, common law and the First Amendment, Dr. Johnson asserted a number of specific objections. *Id.* at 3-4.

Finally, Dr. Johnson's objection further noted that, in a prior deposition conducted by the same attorneys, on behalf of some of the same Duke defendants, the questioning had far exceeded the scope of any relevant claims or documents. Indeed, as the transcript of that deposition reveals, Duke's attorneys spent considerable portions of the deposition questioning Dr. Johnson about his editorial judgments and analysis. For example:

- His specific reporting methods, including whether "the blog is not as well sourced as your academic material." Johnson Tr. (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.
- Whether it was "misleading" or "important" for Dr. Johnson not to include a statement from a week-old Duke press release in a particular post. *Id.* at 67:12-69.

[3] Likewise, Duke's offer to "waive" its requests for Dr. Johnson's communications with his co-author is not as generous as it seems, as the subpoena never covered these communications in the first place. *See* Duke Ex. F.

- 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.

Dr. Johnson's objection to the more recent subpoenas further noted that he appeared to have been singled out for subpoena treatment, despite the fact that a number of national and local sources had covered the Duke lacrosse case extensively and had contact with Duke's lacrosse players, their parents, employees, and alumni. Indeed, despite its alleged "critical" need for information, Duke has not even subpoenaed Dr. Johnson's co-author of *Until Proven Innocent*, Stuart Taylor. *See* Taylor Affidavit, (Ex. 3) at ¶ 5. Duke has refused to explain its focus on Dr. Johnson or its failure to subpoena other sources with similar information. *See* Duke Ex. J, at 4.

II. ARGUMENT

Contrary to Duke's arguments, the information sought by Duke is not directly relevant to the pending claims, and has little probative value. As a non-party to the underlying lawsuit, the federal rules provide special protection to Dr. Johnson from discovery of this information, particularly when it can be obtained from both his public reporting and directly from the parties to the litigation. Moreover, because the civil subpoenas seek documents obtained by Dr. Johnson in his role as a reporter, author and academic, the First Amendment provides a qualified privilege over all non-published information -- confidential or not. In this case, the information sought is sufficiently confidential to quash the subpoenas. Finally, a prior deposition of Dr. Johnson by Duke's attorneys in a similar case establishes the very real risk of abusive questioning and inquiries. Left unchecked, Duke's efforts could chill further reporting on the continuing fallout from the Duke lacrosse case -- a matter of obvious public importance.

A. The Court Has Ample Discretion To Quash The Subpoenas On The Basis of the Federal Rules Alone.

Rule 26(b)(1) allows discovery of "any nonprivileged matter that is relevant to any party's claim or defense." A party seeking broader discovery "of any matter relevant to the

subject matter involved in the action," is required to show good cause to support the request. Fed.R.Civ.P. 26(b)(1). "[W]hen an objection arises as to the relevance of discovery, 'the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it, so long as it is relevant to the subject matter of the action.'" *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008) (quoting Fed.R.Civ.P. 26, Advisory Committee Notes, 2000 Amendment).

In addition to the limits established by Rule 26, Fed. R. Civ. P. 45 provides specific protections for non-party witnesses such as Dr. Johnson. Rule 45(c)(1) requires that a "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." *Id*. And Rule 45(c)(3) provides that, on timely motion, the court "must quash or modify a subpoena" that either "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iii) and (iv).

In this case, the non-party subpoena to Dr. Johnson does not seek any information directly relevant or of significant probative value to the claims or defenses subject to discovery in the *Carrington* and *McFadyen* actions. 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.[4] 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. *See* Duke Motion, at 10 n.4. Duke's claim that Dr. Johnson had "contemporaneous communications" with the Plaintiffs is thus demonstrably incorrect. In fact, Duke is not even certain any such communications exist, arguing only that it "expect[s] to find information" allegedly relevant to its case. Hunches are not a basis for third-party discovery.

[4] Specifically, these are "(a) events occurring between 13 March 2006 and 28 March 2006; (b) the subpoena for DukeCard information by Durham police; (c) Duke's prior release of Duke Card information by Durham police; (c) Duke's prior release of Duke Card information to Durham police; and (d) any disciplinary action taken against a *McFadyen* plaintiff." Duke Motion, at 10 n.4.

See Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38, 41 (1st Cir. 2003) (noting that a "litigant may not engage in merely speculative inquiries in the guise of relevant discovery") (quotation marks omitted).

Nor are such communications essential to test the allegedly improper assertions of privilege. As an initial matter, the court in North Carolina overseeing these actions is the proper authority to settle disputed claims of privilege, and the deposition transcripts submitted by Duke provide a more-than-sufficient basis to submit that dispute to the court there. Any additional, nonpublic information Dr. Johnson has would be of little probative value and cumulative. It certainly would not outweigh a third party's substantial interest in avoiding the compliance with a subpoena. *Heidelberg Americas*, 333 F.3d at 41-42 (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"); *Witzel*, 531 F.3d at 120 (holding that the burden on a nonparty "to disclose his private communications with other nonparties outweighs any slight relevance the disputed communications might have").

Even to the extent that any of Dr. Johnson's non-public communications might contain evidence of probative value, Duke has not come close to establishing that he is the only -- or even most likely -- source of such material. First, Duke has deposed the plaintiffs themselves about their recollection of the events at issue. Second, Duke may make use of numerous published accounts attributed to plaintiffs (including *Until Proven Innocent*) to challenge privilege assertions, refresh recollections, or confront any inconsistent recollections. Third, Duke may obtain the communications it seeks directly from the plaintiffs, their families and their lawyers. Indeed, Duke's Motion to Compel reveals that it has obtained a number of such communications from the parties -- including communications with Dr. Johnson's co-author, Stuart Taylor -- without subpoenaing other media members. *See* Duke Motion at 6 & Exs. M, N & O. *See also* Ex. 3, at ¶5; Thompson Letter (Ex. 4). In fact, Duke already has available to it

through ordinary discovery more than 70 emails containing Dr. Johnson's email address, *see* Ex. 4, a fact that Duke conspicuously omits from its motion in favor of a vague, unsupported assertion that "Plaintiffs have produced little or no correspondence with Dr. Johnson." Duke Motion, at 8. Duke also fails to describe the extent of plaintiffs' attorneys production of similar communications, *see id.* at 7; *see also* Ekstrand Declaration (Ex. 5).

When, as here, parties to the litigation likely have responsive documents, the burden of disclosure should not fall upon a third party like Dr. Johnson. This is true even absent any reporter's privilege. *See, e.g. Langford v. Alegent Health*, No. 8:09CV169, 2010 WL 2732876, *1 (D. Neb. July 8, 2010) (quashing subpoena where plaintiff had not "exhausted his efforts to seek production of these materials from the defendant"); *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 2:09–mc–50356. 2009 WL 1543451, *2 (E.D. Mich. June 2, 2009).

B. The First Amendment Requires Heightened Protection From Discovery Of The Documents And Information Sought By The Subpoenas.

Duke contends that its subpoena seeks only "non-confidential communications" with "publicly identified sources," and thus no First Amendment protection applies. *See* Duke Motion at 4-5. In fact, neither the text of the subpoena nor Duke's latest proposal to "narrow" it is limited to non-confidential documents or publicly identified sources. Indeed, the emails at issue in this case are confidential, and the fact that a source may be acknowledged or have gone on record with some information hardly renders the remainder of their communications non-confidential. And even if it did, the privilege still applies.

1. Because The Unpublished Documents Sought Are Confidential, The Balance Weighs Heavily Against Enforcement

Duke does not dispute the accepted rule in the First Circuit that, where a subpoena seeks confidential information from a journalist or academic engaged in pre-publication research, a "sensitive balancing process" is required, and the court should consider:

- Whether the party seeking disclosure has met its burden of demonstrating the need for and relevance of the information. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998).

- If the party seeking disclosure meets its initial burden, whether the objecting party has shown a basis for withholding the information, such as a reasonable 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, or whether the court should require the exhaustion of alternative sources or defer disclosure until trial. *Bruno & Stillman*, 633 F.2d at 597-98; *Cusumano*, 162 F.3d at 716-17.

Moreover, "concern 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, "[m]indful that important First Amendment values are at stake," *id.* at 710, "detailed findings of fact and explanation of the decision would be appropriate." *Bruno & Stillman*, 633 F.2d at 598.

Here, Duke claims it is not seeking any confidential information. But the only evidence it offers in support of this assertion is the fact that some individuals were identified as sources or otherwise acknowledged in *Until Proven Innocent*. *See* Duke Motion, at 4. But this says nothing about the confidentiality of non-published emails. *See* Ex. 1, at ¶ 10 (noting that it was common for sources to be identified for some purposes but not others); *see also* Ex. 2, at 14:1-12 ("Simply because a person is listed in the acknowledgement doesn't mean they're not necessarily a confidential source."). Indeed, Dr. Johnson's affidavit establishes additional reasons to protect the confidentiality of sources, lest they face retaliation or cease providing information of supreme public importance and interest. *See* Ex. 1, at ¶¶ 11-15.

In a similar case seeking the same type of non-party discovery (unpublished draft articles and communications documenting the editorial process) the district court quashed the subpoena. *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litig.*, 249 F.R.D. 8 (D. Mass. 2008). It did so despite the fact that -- unlike here -- the non-party was the only

available source of the information being sought. *Id.* at 13. Even so, the court held 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 "will be harmful to the [journal's] ability to fulfill both its journalistic and scholarly missions, and by extension harmful to the medical and scientific communities, and to the public interest." *Id.* at 14.

Those precise concerns lie here. *See* Ex. 1, ¶¶ 8-16, 31. Compelled disclosure would chill the ability of Dr. Johnson (and others) to obtain information of great public interest in the future, which is important since, as Duke pointedly has noted, "Dr. Johnson also continues to this day to blog about the events underlying this litigation." Duke Ex. J, at 4. Given the alternative sources of the material Duke seeks, its subpoenas should be quashed to prevent "the potential harm to the free flow of information that might result" from their enforcement. *Bruno & Stillman*, 633 F.2d at 596. *See also Cusumano*, 162 F.3d at 717 (noting that "confidentiality comes in varying shapes and sizes" and that "determinations of where particular disclosures fall along the continuum of confidentiality, and related determinations about the degree of protection that attaches to them, must take into account the totality of the circumstances").

2. Even If The Subpoenas Sought Only Non-Confidential Information, The Privilege Would Still Apply And Weigh Against Non-Disclosure

Contrary to Duke's arguments, the reporter's privilege applies even to non-confidential notes and correspondence obtained by reporters in a newsgathering function. Indeed, the First Circuit has noted that subpoenas for journalists' notes and other unpublished material implicate serious First Amendment concerns because of the "lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, <u>even if non-confidential</u>, becomes routine and casually, if not cavalierly, compelled." *Cusumano*, 162 F.3d

at 715 (quoting *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988).[5]

Courts that have had occasion to apply the privilege analysis to civil subpoenas seeking non-confidential material have held that "a civil litigant is entitled to requested discovery…only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995). *See also In re Subpoena to Goldberg*, 693 F.Supp.2d 81, 85 (D. D.C. 2010) ("Regardless of whether [the parties seeking discovery] seek confidential or nonconfidential sources, or whether they seek disclosure or verification of statements, [they are] attempting to examine the reportorial and editorial processes. … Such discovery necessarily implicates the First Amendment interests of the journalists") (quotation marks omitted); *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).

D. The Deposition Subpoenas Should Be Quashed

For the same reasons of privilege and respect for the First Amendment, courts quashing a subpoena *duces tecum* also routinely quash accompanying deposition subpoenas. *See, e.g., Holton*, 108 F.R.D. at 722. Such an order is particularly appropriate here. Not only does Duke have numerous alternative sources of the information it seeks (to the extent it has not already been produced), but the record from the prior deposition taken from Dr. Johnson is replete with examples of improper questioning of a reporter's editorial judgments and thought processes. *See infra* at 3-4. Duke's treatment of Dr. Johnson is particularly questionable in light of its apparent failure to subpoena other sources with similar communications -- including Dr. Johnson's co-author, Stuart Taylor. *See* Ex. 3, at ¶ 5.

[5] 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).

III. 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: September 21, 2012

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CERTIFICATE OF SERVICE

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This the 21st day of September, 2012.

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