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Via ECF

The Hon. D. Brock Hornby
United States District Court for the District of Maine
Edward T. Gignoux Courthouse
156 Federal Street
Portland, ME 04101

Re: *Duke University v. Johnson*, Docket No. 2:12-cv-00348-DBH

Dear Judge Hornby:

I write on behalf of my client, Dr. Robert David Johnson, who has moved to quash the subpoenas issued to him by Duke University in the above-captioned matter. On February 27, Duke's counsel informed the Court of the stipulated dismissal of one of the two underlying actions pending in the Middle District of North Carolina, *Carrington, et al v. Duke University, et al*., Docket No. 1:08-cv-00119. Duke also noted that the other underlying action, *McFadyen, et al., v. Duke University, et al*., No. 1:07-cv-953, remains pending and that the dismissal of *Carrington* "does not impact" the *McFadyen* subpoenas.

Dr. Johnson disagrees. The *Carrington* dismissal severely undermines Duke's arguments regarding the relevance of the communications it is seeking, in several ways. First, *Carrington* involved several claims that are not asserted in *McFadyen*, and Duke's specific relevance arguments to date have focused on those claims. Second, *Carrington* was brought by thirty-eight former Duke lacrosse players, making it by far the larger of the two actions. *See* First Amended Complaint, Docket No. 1:08-cv-00119, Dkt. Entry # 145, at ¶ 1. The *McFadyen* action only involves three former players. The dismissal of the unique claims in *Carrington* and the conversion of the thirty-eight *Carrington* plaintiffs into third-party witnesses whose hearsay statements are not party admissions weakens Duke's already attenuated claims of relevance -- an issue on which it bears the burden. Finally, as a practical matter, Dr. Johnson does not possess any responsive documents relating to the remaining claims in *McFadyen*. Nor does he have any responsive communications with the three plaintiffs in that case.

On the first point, of the five pending claims implicated by the subpoenas, three of them were specific to *Carrington* and are not asserted in *McFadyen*. *See, e.g.*, Order of Mag. Judge Rich, dated 10/12/2012, at 3-4. The now-dismissed claims include allegations regarding an alleged relationship of trust with Dean Suzanne Wasiolek, communications with other Duke administrators, and the job performance of those administrators. *Id.* It was these claims upon which Duke based its specific arguments of relevance. *See* Duke Response (9/26/2012), at 2-3.

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On the second point, with the vast majority of the players no longer parties to the pending case against Duke, it necessarily follows that Duke's need to obtain communications from a reporter has lessened. Indeed, in arguing the relevance of the communications it sought, Duke emphasized the players' status as parties, whose statements could be admitted for their truth under Rule 801(d)(2)(A). *See* Duke Opposition Br., at 5. Likewise, it was these individuals' status as parties that colored Judge Rich's decision. *See* Order, at 6-7. That the number of parties has plunged from forty-one to three substantially diminishes the weight of Duke's claims of relevance.[1]

Finally, in light of the narrowed scope of the underlying action, it is worth noting that Dr. Johnson has no responsive communications specific to the remaining claims in *McFadyen* -- *i.e.*, regarding the alleged disclosure of DukeCard information or the disciplinary proceedings and/or suspension of the *McFadyen* plaintiffs. Moreover, even under the broader terms of Judge Rich's order, Dr. Johnson does not possess any responsive communications with the three players who remain plaintiffs in *McFadyen*.[2] To the extent Duke still seeks pre-civil litigation communications Dr. Johnson may have had with the *McFadyen* plaintiffs' attorneys -- notwithstanding the questionable relevance of such communications to any trial issue and the First Amendment burden of requiring a reporter to produce them -- there is a pending contested motion before the trial court regarding the extent to which Duke may take discovery from those attorneys. *See McFadyen*, No. 1:07-cv-953, Dkt. Entry # 294 (referred to Mag. Judge Peake on January 3, 2013). The trial court thus can rule on the relevance of such requests in the first place and (if necessary) permit Duke to obtain this information from an alternative source. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716-17 (1st Cir. 1998) (noting that the availability of "the same information" through depositions of other parties connected to the litigation).

In sum, the number of pending claims and the number of parties in the underlying actions have been substantially reduced. The dismissal of the *Carrington* action has substantially whittled down the already slender reed of Duke's relevance arguments. It also has substantially changed the facts underlying Judge Rich's decision below. For these reasons, and those set forth in his prior filings, Dr. Johnson respectfully requests that your honor grant his motion to quash the remaining *McFadyen* subpoenas.

Sincerely yours,

/s/ Patrick Strawbridge

[1] Although the plaintiffs in *Carrington* could still be witnesses in the *McFadyen* case, all of Dr. Johnson's prior points regarding Duke's failure to meet its burden on need and relevance stand.

[2] Tellingly, each of the deposition excerpts that Duke provided in support of its motion to compel involved plaintiffs in the *Carrington* action, not *McFadyen*. *See* Duke Mot. To Compel, Duke Exs. T-W.

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 February 28, 2013.

This the 28th day of February, 2013

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