

# Exhibit A

UNITED STATES DISTRICT COURT

for the

District of Maine

McFADYEN, et al.

Plaintiff

v.

DUKE, et al.

Defendant

Civil Action No. 1:07 cv 953

(If the action is pending in another district, state where: Middle District of North Carolina)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Dr. Robert David ("KC") Johnson
5 Shipwreck Road
Scarborough, ME 04074

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Exhibit "A" attached.

Place: PretiFlaherty
One City Center
Portland, ME 04112-9546

Date and Time:
July 30, 2012 4:00 p.m.

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: July 9, 2012

CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR [Handwritten Signature]
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) DUKE UNIVERSITY DEFENDANTS, who issues or requests this subpoena, are:

Thomas H. Segars tom.segars@elliswinters.com
Ellis & Winters LLP, 1100 Crescent Green, Suite 200 Cary, NC 27518

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

This subpoena for *(name of individual and title, if any)* K.C. Johnson  
was received by me on *(date)* \_\_\_\_\_.

I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
\_\_\_\_\_ *Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

## Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

**(c) Protecting a Person Subject to a Subpoena.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** 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. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

**(i)** At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

**(ii)** These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

**(i)** fails to allow a reasonable time to comply;

**(ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

**(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

**(iv)** subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

**(i)** disclosing a trade secret or other confidential research, development, or commercial information;

**(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

**(iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

**(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

**(ii)** ensures that the subpoenaed person will be reasonably compensated.

**(d) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

**(i)** expressly make the claim; and

**(ii)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

## EXHIBIT A

### INTRODUCTION

1. The plaintiffs in the McFadyen Action (defined below) have brought claims against Duke (defined below) related to the Lacrosse Incident (defined below).

2. References to You (defined below), to Your Durham-in-Wonderland blog (defined below), and to Your book, Until Proven Innocent (defined below), during depositions taken in the McFadyen Action and in Documents (defined below) produced by parties in the McFadyen Action suggest that You possess information and Documents that are relevant to the claims and defenses alleged in the McFadyen Action.

3. Moreover, a September 1, 2008 post on the Durham-in-Wonderland blog refers to “discovery files” and “author interviews” with Duke Lacrosse Players (defined below), attorneys for certain of those players, and Duke employees as “source notes” for accounts of events that relate to claims in the McFadyen Action.

4. Accordingly, Documents likely to be uniquely within Your possession and information likely to be uniquely within Your knowledge appear to be directly relevant to the claims and/or defenses alleged in the McFadyen Action.

## DEFINITIONS

1. The term “Communication” means any writing, or oral conversation, including, but not limited to, telephone conversations and meetings, letters, e-mails, facsimiles, or memoranda.

2. The terms “You” and “Your” refer to Dr. Robert David (“KC”) Johnson.

3. The phrase “McFadyen Action” means the case captioned *McFadyen, et al. v. Duke University, et al.*, 1:07-cv-953-JAB-JEP, proceeding in the Middle District of North Carolina, and all the allegations contained in the McFadyen Complaint. The term “McFadyen Complaint” means the Second Amended Complaint filed in the McFadyen Action. The McFadyen Complaint is available online through the PACER website (<https://pacer.login.uscourts.gov/cgi-bin/login.pl>). Alternatively, if You would like a copy of the McFadyen Complaint, You may contact the undersigned attorney who will provide You with a copy.

4. The term “Duke” means Duke University, its employees, agents, representatives, attorneys and all persons acting on its behalf.

5. The phrase “Duke Lacrosse Player” means any member of the 2005-2006 Duke University men’s lacrosse team. These members include Breck Archer, Edward Carrington, Casey Carroll, Michael Catalino, Thomas Clute, Kevin Coleman, Joshua Coveleski, Edward Crotty, Matt Danowski, Edward Douglas,

Kyle Dowd, David Evans, Collin Finnerty, Daniel Flannery, Richard Fogarty, Zachary Greer, Erik Henlekman, John Jennison, Ben Koesterer, Fred Krom, Peter Lamade, Adam Langley, Christopher Loftus, Daniel Loftus, Kevin Mayer, Anthony McDevitt, Ryan McFadyen, Glenn Nick, Nicholas O'Hara, Daniel Oppedisano, Sam Payton, John Bradley Ross, Kenneth Sauer, Steve Schoeffel, Robert Schroeder, Reade Seligmann, Devon Sherwood, Daniel Theodoridis, Bret Thompson, Christopher Tkac, John Walsh, Michael Ward, Robert Wellington, Matthew Wilson, William Wolcott, Michael Young, Matt Zash.

6. The term "Lacrosse Incident" refers to the investigation, and ultimate exoneration, of members of the 2005-2006 Duke men's lacrosse team stemming from false allegations of rape made by Crystal Mangum relating to a party taking place at 610 North Buchanan in Durham, North Carolina on March 13, 2006.

7. The phrase "Until Proven Innocent" refers to the book: Stuart Taylor Jr. & KC Johnson, UNTIL PROVEN INNOCENT, Tomas Dune Books/St. Martin's Griffin (2008).

8. The term "Durham-in-Wonderland" refers to the blog You maintain at <http://durhamwonderland.blogspot.com>.

9. The term "DukeCard Data" means information associated with the use by any Duke Lacrosse Player of his DukeCard between March 13, 2006 and March 14, 2006 inclusive, as referenced in Count 24 of the McFadyen Complaint.

10. The term “Document” means all items subject to discovery pursuant to Rule 34 of the Federal Rules of Civil Procedure. Without limiting the generality of the foregoing, the term “Document” shall have its customary, broad sense to include written or graphic matter of every kind or description, including hard copy materials and electronically stored information. “Document” also includes the original of any Document in whatever medium it may exist and any copy of such original differing in any way from such original.

11. The term “Information Concerning Pending Claims” means information regarding, concerning, discussing, or reflecting any one or more of the following subjects: (a) the disclosure of DukeCard Data to the Durham Police Department, the subsequent subpoena that was issued to Matthew Drummond on May 31, 2006, seeking production of DukeCard Data by Duke, or the responses to that subpoena; or (b) information regarding the disciplinary proceedings concerning Breck Archer, the disciplinary proceedings concerning Matthew Wilson, or the interim suspension of Ryan McFadyen.

### **INSTRUCTIONS**

1. Any singular form of any word shall be construed to include the plural and any plural form shall be read to include the singular. Any past tense of a verb shall be construed to include the present tense and any present tense shall be construed to include the past tense.



2. To the extent that You consider any of the following requests or questions objectionable, respond to as much of each and every part thereof which is not objectionable in Your view, and separately state the part that is objectionable and the ground for each objection.

3. If You object to any discovery request on the basis of attorney-client privilege, work-product doctrine, or any other privilege, state the privilege claimed, and identify the Document or Communication for which such privilege is claimed, stating the following:

- a) The date of the Communication;
- b) The description of the Document or Communication protected, including the identity of all persons present or all persons who authored, transmitted or received a copy of such Communication, and the number of pages, if written;
- c) The subject matter of the Document or Communication;
- d) The basis on which the privilege is claimed, including with regard to any claim of attorney-client privilege the identity of the attorney(s) with whom You contend You engaged in a privileged Communication.

## DOCUMENTS AND TANGIBLE THINGS REQUESTED

1. All notes, including written Documents, audio recordings, and/or any other forms of memorialization, from interviews with the following individuals that are identified as “source notes” for portions of Until Proven Innocent in the September 1, 2008 Durham-in-Wonderland blog post titled “Paperback Source Notes” during which any Information Concerning Pending Claims was discussed: Ryan McFadyen, Robert Ekstrand, Samantha Ekstrand, Stefanie Sparks Smith, Christopher Kennedy, Peter Lange, Kerstin Kimel, and Michael Pressler.

2. All Documents constituting “discovery files,” as such term is used in the September 1, 2008 Durham-in-Wonderland blog post titled “Paperback Source Notes,” that contain any Information Concerning Pending Claims.

3. All Documents reflecting correspondence with Robert C. Ekstrand, Stefanie Sparks Smith, or any other attorney or employee of Ekstrand & Ekstrand LLP that contain any Information Concerning Pending Claims.

4. All Documents reflecting correspondence with any Duke Lacrosse Player that contain any Information Concerning Pending Claims.

5. All Documents reflecting correspondence with any Duke employee that contain any Information Concerning Pending Claims.

6. All Documents reflecting correspondence with any Duke alumnus that contain any Information Concerning Pending Claims.

7. All Documents that concern, discuss, or reflect any payments made to a Duke Lacrosse Player for that person's time or information relating to the Lacrosse Incident.

8. All Documents that concern, discuss, or reflect any payments made to Robert C. Ekstrand, Stefanie Sparks Smith, or any other attorney or employee of Ekstrand & Ekstrand LLP for that person's time or information relating to the Lacrosse Incident.

9. All policies or contractual agreements that concern, discuss, or reflect the management of Durham-in-Wonderland.

10. All policies or contractual agreements that concern, discuss, or reflect the removal of comments posed on the Durham-in-Wonderland.