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NORTHERN DISTRICT OF TEXAS

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Signed November 22, 2022

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Chapter 11**
NORTHWEST SENIOR HOUSING CORPORATION	§	**Case No. 22-30659**
Debtor.	§	
NORTHWEST SENIOR HOUSING CORPORATION,	§	
Plaintiff,	§	
v.	§	**Adv. Pro. No. 22-03040**
INTERCITY INVESTMENT PROPERTIES, INC. AND KONG CAPITAL, LLC,	§	
Defendants.	§	

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL
PRODUCTION FROM THE DALLAS MORNING NEWS, IN PART

Before the Court is the *Motion to Compel Production from the Dallas Morning News* (the "**Motion to Compel**")[1] filed by Plaintiff Northwest Senior Housing Corporation (the "**Plaintiff**" or "**Debtor**"), by which the Plaintiff requests this Court enter an order, pursuant to Rule 45(d)(2)(b)(i) of the Federal Rules of Civil Procedure (the "**Federal Rules**"), requiring non-parties The Dallas Morning News, Inc. (the "**DMN**") and DMN reporter Natalie Walters ("**Walters**") (collectively, the "**Respondents**") to comply with a subpoena. On October 3, 2022, the Respondents filed their *Opposition to Plaintiff's Motion to Compel* (the "**Opposition**") requesting this Court deny the Motion to Compel pursuant to Federal Rules 26 and 45, as well as the First Amendment of the United States Constitution.[2] On October 18, 2022, the Court held an evidentiary hearing on the Motion to Compel. Counsel for the Plaintiff and Respondents appeared. The Court took the Motion to Compel under advisement.

After considering the briefing and oral arguments, the Court concludes that the Plaintiff's Motion to Compel should be **GRANTED** in part. The following constitutes the Court's analysis underlying the ruling herein.

I. Jurisdiction and Venue.

The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b), and the matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B). Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).

II. Factual and Procedural History.

On April 14, 2022, the Debtor filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code.[3] On the same day, the Debtor filed its Complaint alleging certain causes

[1] Dkt. No. 177.
[2] Dkt. No. 190.
[3] Voluntary Petition for Non-Individuals Filing for Bankruptcy, Case No. 22-30659-MVL, Dkt. No. 1 (Bankr. N.D. Tex. 2022).

of action against Intercity Investment Properties, Inc. ("**Intercity**") and Kong Capital ("**Kong**") (collectively, the "**Defendants**").[4] Central to that Complaint were allegations that certain information disclosed in connection with a Forbearance Agreement between the parties and covered by a Non-Disclosure Agreement (the "**NDA**") was disclosed by the Defendants to various third parties in an effort to damage the business of the Plaintiff and capitalize on an alternative business opportunity.[5] Of note, the Plaintiff alleged that one of such third parties was Walters in her role as a business reporter for the DMN.[6] Accordingly, the Plaintiff has alleged a cause of action for breach of the NDA against Intercity.[7] In pursuing this cause of action, the Plaintiff issued a subpoena to DMN on June 24, 2022.[8] DMN served its objections to the subpoena on July 4, 2022.[9]

III. Analysis.

As a preliminary note, it must be said that the Court's following ruling should be confined to the specific facts presented. It is undisputed that Walters is a reporter for the DMN and that she communicated with certain parties in this case in preparation for publishing articles on the Edgemere's alleged financial woes. At least one of the sources was a representative of Kong. That source was not confidential; rather, Walters quoted the Kong representative directly in the first of

[4] Dkt. No. 1. Specifically, the Plaintiff asserted seven (7) causes of action, including breach of contract, promissory fraud, tortious interference with existing contractual and business relations, tortious interference with prospective contractual and business relations, civil conspiracy, equitable subordination, and reformation of the Ground Lease. *See id.* The cause of action for tortious interference with prospective contractual and business relations has since been dismissed by Order of this Court. *See* Dkt. No. 99 at 12–15. Additionally, the Plaintiff consented to the dismissal of its claim for tortious interference with existing contractual and business relations without prejudice. *See* Dkt. No. 58 at 23–24.

[5] Dkt. No. 1 at 2 ("Despite being under a non-disclosure agreement with Edgemere, and in possession of Edgemere's confidential information, *Defendants directly contacted the press* . . . all for the singular purpose of trying to manufacture an improper basis to terminate Intercity's 52-year ground lease with Edgemere and wrongfully retake the property on which the Community sits – all so that they can repurpose it to make a windfall profit.") (emphasis added).

[6] *Id.* at 12–13.

[7] *Id.* at 17–19.

[8] Dkt. No. 177 (Exhibit "A").

[9] *Id.* (Exhibit "B").

her articles.[10] Any information provided to Walters, confidential or not, is paramount to the Plaintiff's breach cause of action, since the alleged breach itself is that exchange of information.[11] Thus, the question before the Court is whether Walters and DMN can elude a subpoena of information obtained from a *non-confidential* source in a *civil* case in which much of the information can only be obtained from the DMN itself and the information goes to the heart of the cause of action alleged. The Court finds it cannot.

Both in the Opposition and at the hearing on the Motion to Compel, the Respondents cited numerous objections to the subpoena.[12] Generally, the Respondents argued that the information sought to be produced was protected by a qualified reporter's privilege, the request for production was overly broad and burdensome, and the production would be duplicative of production from other parties to this case.[13] In response, the Plaintiff claims no such privilege exists for non-confidential information in a civil case, let alone under these specific allegations of breach.[14] The Plaintiff also asserts that the information to be produced—internal communications and memoranda regarding the article—could not be obtained from other parties and was likely minimal.[15] The Court agrees with the Plaintiff and will **GRANT** the Motion to Compel *in part*.

[10] *See* Dkt. No. 1 (Exhibit "E"). The initial DMN article, published on February 27, 2022 and entitled "High-end Dallas retirement community's financial woes worry investors, landlord," quoted Coe Schlicher in his capacity as Kong's CEO. *Id.*
[11] *See id.* at 12, 18.
[12] Dkt. No. 190 at 2 ("Respondents object to all of this discovery because it is irrelevant, disproportionate and/or overly broad, and any relevant information is duplicative of Defendants' production. Rules 26 and 45 preclude this discovery.").
[13] *See id.* at 1–2.
[14] *See* Dkt. No. 177 at 8–9.
[15] *See* at 5–8.

The Fifth Circuit has never held that there is a reporter's privilege for non-confidential information.[16] In fact, the Fifth Circuit has held the opposite as it applies to criminal cases.[17] However, the Fifth Circuit has recognized a privilege for reporters which protects the refusal to disclose *confidential* informants, but even then has held that such privilege is not absolute.[18] The Fifth Circuit has emphasized more than once that the confidentiality of the source is the paramount factor in determining the existence of the privilege.[19] Even when the source is confidential, the Fifth Circuit has provided, at least in civil libel cases, that the privilege may be overcome by showing: (1) substantial evidence that the challenged statement was published and is both factually untrue and defamatory; (2) that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and (3) that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.[20] The Fifth Circuit later extended these inquiries to non-libel cases in a general way, applying them to a dispute over discovery of a confidential informant's name in a non-libel suit where the reporter was a non-party witness.[21] But again, the Fifth Circuit has *not* found a qualified privilege for *non-confidential* information in civil cases.

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[16] *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) ("We have never recognized a privilege for reporters not to reveal nonconfidential information. In fact, this court has theorized that confidentiality is a prerequisite for the newsreporters' privilege.").

[17] *Id.* ("We conclude that newsreporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases.").

[18] *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *modified on reh'g*, 628 F.2d 932 (5th Cir. 1980) (per curiam) ("We hold that a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants, however, the privilege is not absolute and in a libel case as is here presented, the privilege must yield[.]").

[19] *Smith*, 135 F.3d at 972 ("[T]he existence of a confidential relationship that the law should foster is critical to the establishment of a privilege."); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) ("We have recognized that the first amendment shields a reporter from being required to disclose the identity of persons who have imparted information to him in confidence."); *Miller*, 621 F.2d at 725.

[20] *Miller*, 628 F.2d at 932.

[21] *Selcraig*, 705 F.2d at 799.

Despite this, the Respondents claim there is a "qualified media privilege in civil cases to protect the media from non-party discovery, *including nonconfidential sources*."[22] In support of this argument, the Respondents rely almost entirely on *Holland v. Centennial Homes, Inc.*,[23] an unpublished opinion from the Northern District of Texas (notably pre-dating the Fifth Circuit's *Smith* opinion). In *Holland*, a DMN reporter had interviewed plaintiffs related to their civil claims alleging sexual harassment in the workplace.[24] Each of these plaintiffs submitted to a recorded interview with the reporter, and the reporter published an article in the DMN on the same.[25] The defendants subpoenaed the non-party reporter, requesting that the reporter produce the interview tapes to be used for impeachment purposes in the civil suit.[26] The reporter objected on the grounds of reporter's privilege, and the defendants filed a motion to compel production.[27] The court found, despite conceding the Fifth Circuit had not extended its previous decisions to non-confidential information,[28] that such a qualified privilege existed and that the defendants had failed to meet their burden to show "some countervailing constitutional or compelling concern" warranting production.[29] Thus, the court denied the motion to compel and quashed the subpoenas.[30]

The Court does not find the Respondents' reliance on *Holland* persuasive. Even if the Court were to accept the *Holland* case as dispositive on the question of whether a reporter's privilege exists over non-confidential information in civil cases, the District Court's reasoning in *Holland* would not extend to the facts of the instant case. In *Holland*, the defendants sought the taped

[22] Dkt. No. 190 at 7 (emphasis added).
[23] No. 3:92-CV-1533-T, 1993 WL 755590, at *6 (N.D. Tex. Dec. 21, 1993).
[24] *Id.* at *1.
[25] *Id.*
[26] *See id.* at *6.
[27] *See id.*
[28] *Id.* at *3 ("However, [the Fifth Circuit] has yet to address the question of whether the journalist's privilege applies to non-confidential sources.").
[29] *Id.* at *6.
[30] *Id.*

recordings of the interviews solely for impeachment evidence.[31] The court specifically held that "[d]iscovery of the private work product of a reporter should not be compelled ***upon the mere speculation of possible impeaching material alone***, especially in a civil case ***where the reporter is neither a party nor a witness to the facts upon which the lawsuit is based***."[32] Here, the Plaintiff does not seek the information subject to the subpoena merely out of curiosity for impeachment evidence alone.[33] Rather, whether confidential information was exchanged *is the very cause of action itself*: breach of the NDA. Unlike the DMN reporter in *Holland*, Walters *is* a witness to the facts upon which the lawsuit is based. Only she, and ostensibly her editors or other staff at the DMN, know what information was exchanged in the leadup to the articles being published. As articulated in *Holland*, this is certainly the type of "compelling concern" that would overcome the reporter's privilege, to the extent such a privilege even exists.[34]

Even if the Court were to ignore the dissimilarities of the instant case and *Holland* and find such a qualified reporter's privilege exists, despite no Fifth Circuit precedent on that point, the Plaintiff has met its burden to overcome the alleged reporter's privilege. First, as the *Holland* court noted, whether the information sought is from a confidential source is a factor for the Court to review.[35] In fact, the Fifth Circuit has made clear that it is the most important factor.[36] Here, Walters's source was a representative of Kong; the representative was directly quoted in the first DMN article. There is no argument that the DMN's source was confidential. Second, as previously

[31] Each of the plaintiffs confirmed in her deposition that she was interviewed by the reporter and testified that the interview was recorded. *Id.* at *1. The subpoenas were issued for the purpose of seeking impeachment material against these plaintiffs. *Id.* at *6.
[32] *Id.* (emphasis added).
[33] *See id.* ("The press is not the investigative arm of civil litigants. In balancing the competing interests in the case at bar, [the reporter's] qualified reporter's privilege under the First Amendment outweighs the curiosity of defendants.").
[34] *See id.*
[35] *Id.* ("Whether the information sought is from a confidential source or non-confidential source is not dispositive when considering the potential adverse effects that forced disclosure would have on the First Amendment rights of the news media and their readers. Nonetheless it is a factor to be considered in weighing competing interest.").
[36] *See, e.g., Smith*, 135 F.3d at 972; *Selcraig*, 705 F.2d at 792; *Miller*, 621 F.2d at 725.

mentioned, the information sought by the subpoena goes to the heart of cause of the action pleaded.[37] It is common sense that for the Plaintiff to make its case on the breach of the NDA, it must determine the nature of the information that was provided to the DMN. Whether or not that information was confidential is the heart of the claim itself. Third, the Court finds that the essence of the Fifth Circuit's *Miller* test, to the extent it was even meant to be applied to non-confidential information in non-libel cases, has been met.[38] The Respondents are not mere observers of the case and events surrounding; they are "percipient witnesses to a fact at issue."[39] Their production is highly relevant, even vital, to the proceeding before the Court. Likewise, as discussed more fully below, much of the information sought likely cannot be obtained from other parties to the case.[40] Accordingly, the Court overrules the Respondents' objections to the subpoena based on an alleged reporter's privilege.

As to the objections lodged by the Respondents under Federal Rules 45 and 26, the Respondents argue that the production sought is overly broad, burdensome, irrelevant, and largely duplicative of discovery already produced by other parties.[41] First, the Court disagrees that the information sought is irrelevant. As already described, the heart of the Plaintiff's claim in the case depends on the nature of the information disclosed to the DMN. That information is *highly* relevant

[37] Courts across the country have analyzed this factor in determining whether a court should invade the privilege and order production. *See, e.g., Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29, 36 (2d. Cir. 1999) ("Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources."); *In re McCray, Richardson, Santana, Wise, Salaam Litig.*, 991 F. Supp. 2d 464, 468–69 (S.D.N.Y. 2013); *In re Slack*, 768 F.Supp.2d 189, 194 (D. D.C. 2011) ("[T]he court must evaluate the litigant's need for the information. As part of this consideration, the court must examine how important, not just relevant, the reporter's information is to the party's case. If the information is crucial, then the balance of interests favors disclosure.").

[38] *See generally* Miller, 628 F.2d at 932; *Selcraig*, 705 F.2d at 799.

[39] *Id.* at 798–98 ("But the fact that he is a witness to a material fact at issue makes the *Miller* test we formulated for use in libel suits, when generalized from its preoccupation with libel claims, a sufficient measure of the strength of his privilege. He is not being asked to divulge his sources to locate other witnesses or to get on the scent of evidence. He is a percipient witness to a fact at issue: the identity of the informants.").

[40] *See Miller*, 628 F.2d at 932.

[41] Dkt. No. 190 at 5–7.

and even necessary to proving the breach cause of action alleged in the Complaint. Second, on the whole, the Court finds the request neither overly broad nor burdensome. The communications between Kong and the DMN occurred during a short period time in the leadup to DMN publishing the articles.[42] The Respondents did not offer evidence at the hearing or submit an affidavit to the Court describing specifically how the discovery was burdensome or overly broad. In this District, such a failure is generally fatal to a boilerplate undue burden objection.[43] Even if they had, whatever burden present is likely slight and easily overcome when weighed against the relevance and small volume of the discovery sought in the instant proceeding.[44] Third, the Court readily recognizes that there may be *some* duplication between the documents produced by other parties to this case and the DMN's production through the instant subpoena. As such, the Court hereby orders that the parties meet and confer to minimize such duplication to the extent possible. However, the Court believes that a substantial amount of the information sought by the Plaintiff, such as internal communications regarding the articles, would not be duplicative as only the DMN itself could produce these documents.

With that said, based upon the Plaintiff's representations on the record, it is the Court's understanding that the Plaintiff is *not* seeking information or communications related to Walters' personal research; and accordingly, by this ruling, the Court is *not* ordering the production of any individual, personal research conducted by Walters in preparation for the articles. To the extent

[42] *See* Dkt. No. 177 at 4 ("DMN has previously acknowledged that the universe of responsive information it possesses is small. The Subpoena covers a limited timeframe and relates only to the facts underlying two articles that one reporter published over the course of just a few weeks. The burden on DMN is not significant, and the requested discovery is proportional to the needs of the case.").
[43] *Heller v. City of Dallas*, 303 F.R.D. 466, 490 (N.D. Tex. 2014) ("A party resisting discovery must show specifically how each interrogatory or document request is overly broad, unduly burdensome, or oppressive. This requires the party resisting discovery to show how the requested discovery was overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. Failing to do so, as a general matter, makes such an unsupported objection nothing more than unsustainable boilerplate.").
[44] *See* Dkt. No. 177 at 4.

communications produced contain such information, the communications should be redacted to exclude her research. However, the Respondents are ordered to produce all internal communications regarding the articles as they pertain to the information exchanged by Kong and the Respondents before or after publication of the DMN news articles. For sake of clarity, this would include Walters' notes from meetings with representatives of Intercity or Kong and her communications with DMN staff regarding the same, as well as any email or similar communications with ICI or Kong representatives.

The Court will also overrule the Respondents' objection to the production of responses received from readers. The Court recognizes that such commentary is relevant to certain causes of action alleged by the Plaintiff and on its damages model. Although not fully briefed in the pleadings, the evidence at the hearing indicated that DMN was previously willing to disclose this information to the Defendants. The Court further knows of no other privilege limiting production of the same. Thus, the Court orders that the Plaintiff produce such communications.[45] Any objections to a deposition of Walters on the aforementioned grounds are likewise overruled. Finally, in the event the Motion to Compel was granted, the Respondents requested their costs and fees incurred in complying with Plaintiff's requests.[46] As the Court has already mentioned, the Respondents presented no evidence or affidavits as to the burden of the production; accordingly, the Court will deny the request for costs and fees at this time.[47]

V. **Conclusion**.

The communications and information sought by the subpoena go to the *heart* of the breach of the NDA cause of action. To the extent a reporter's privilege exists over non-confidential

[45] The Respondents' right to seek a protective order to maintain the confidentiality of same (to the extent it is an issue) is hereby preserved.
[46] Dkt. No. 190 at 10.
[47] *See* Fed. R. Civ. P. 45(d)(1).

information in civil cases, that privilege has certainly been overcome. Additionally, as limited herein, the Court finds the subpoena neither overly broad nor unduly burdensome to the Respondents, particularly when weighed against the relevance of the production to the Plaintiff's case.

Therefore, based upon the foregoing and the record before the Court, it is hereby

ORDERED that the Plaintiff's Motion to Compel is hereby **GRANTED in part**, as set forth more fully in the Order.

###END OF ORDER###