

VIRGINIA:

FILED
CIVIL PROCESSING

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MAY 24 P 2: 14

JOHN C. DEPP, II,
Plaintiff,

CL 2019-2911

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

v.

AMBER LAURA HEARD,
Defendant

**EMERGENCY MOTION TO INTERVENE BY EHM PRODUCTIONS, INC.
FOR LIMITED PURPOSE OF ASSERTING JOURNALIST'S PRIVILEGE**

EHM Productions, Inc., the owner and operator of the celebrity news website TMZ.com (collectively "TMZ"), by and through undersigned counsel, submits this Emergency Motion to Intervene for the Limited Purpose of Asserting the Journalist's Privilege, pursuant to Supreme Court Rule 3:14. According to a published report, TMZ's former employee, Morgan Tremaine, has been called to testify at trial imminently on behalf of Plaintiff Johnny Depp regarding information provided to TMZ by a confidential source, in violation TMZ's and the source's rights under Virginia Rule of Evidence 2:508 and *Brown v. Commonwealth*, 214 Va. 755, 757 (1974) (recognizing "privilege of confidentiality of information and identity of . . . source").¹

With this motion, TMZ seeks a protective order precluding Plaintiff from eliciting or Mr. Tremaine from disclosing TMZ's privileged information during the testimony. TMZ is uncertain

¹ Although not aligned with any party, Virginia procedure requires a proposed intervenor to intervene specifically as a plaintiff or defendant. Va. Sup. Ct. Rule 3:14; *Hudson v. Jarrett*, 606 S.E.2d 827, 831 (Va. 2005). Because, on information and belief, Mr. Tremaine has been called by the plaintiff, TMZ seeks intervention here as a "defendant."

whether Mr. Tremaine is appearing pursuant to a trial subpoena. If he is, TMZ likewise requests that the Court quash the subpoena.

Journalists' promises of confidentiality are vital to reporting the news. That is why the law strongly protects the ability of journalists to keep their promises. The Court should permit TMZ to keep the promise it made here.

FACTUAL BACKGROUND

TMZ is a news organization, headquartered in California, that primarily covers entertainment and celebrity news. Decl. of Jason Beckerman ("Beckerman Decl.") ¶¶ 2, 4. On August 12, 2016, TMZ published an article titled "Johnny Depp Goes Off On Amber . . . Smashes Wine Glass, Bottle" (the "Article"). *Id.* ¶ 5. A video of Ms. Heard and Mr. Depp ("the Video") accompanied the Article. (The article and video may be seen here: <https://www.tMZ.com/2016/08/12/johnny-depp-amber-heard-throws-wine-glass-domestic-violence-video/>). *Id.* This Video was provided to journalists at TMZ, in California, by a confidential source. *Id.* ¶¶ 4, 6. TMZ promised this source that it would maintain their confidentiality and would not disclose their name or other information about them. *Id.* ¶ 6. TMZ makes such promises of confidentiality, from time to time, so that it may publish information in the public interest, and it relies on the journalist's privilege protecting the identity of confidential sources to do so. *Id.* ¶ 4. TMZ's source has not, at any time since they provided the Video, waived their right to confidentiality or indicated to TMZ that it was released from its promise of confidentiality. *Id.* ¶ 7.

Yesterday (May 23, 2022) TMZ learned from a report published in Radar Online at 3:30 p.m. (<https://radaronline.com/p/johnny-depp-amber-heard-trial-tMZ-producer-leak/>) that Plaintiff in this matter intended to call Morgan Tremaine to testify very shortly. According to the Radar

Online report, Plaintiff plans to elicit testimony from Mr. Tremaine regarding TMZ's confidential source in an effort to "impeach" the credibility of Defendant. Mr. Tremaine was a field assignment manager with TMZ at the time the Article was published, but no longer works for the company. *Id.* ¶ 8. He had nothing to do with TMZ's receipt of the Video, and on TMZ's information and belief, Mr. Tremaine lacks first-hand knowledge of the identity of the confidential source who provided TMZ with the Video. *Id.* ¶¶ 9-10. To the extent that Mr. Tremaine purports to know the identity of TMZ's confidential source, his information would be based on rumor and conjecture. *Id.* ¶ 10. Further, any information that Mr. Tremaine may provide concerning TMZ's confidential source was obtained in the course of his employment with TMZ, and he lacks the authority to breach TMZ's confidentiality agreement with its source. *Id.* ¶ 11.

TMZ now brings this motion to enforce its and its source's rights under the journalists' privilege and to prevent the unauthorized breach of that privilege.

ARGUMENT

I. **TMZ Should Be Permitted to Intervene for a Limited Purpose**

Intervention permits an interested non-party, with leave of the court, to voluntarily join a lawsuit already in progress so that the non-party's interest may be defended. Va. Sup. Ct. R. 3:14. The intervenor may seek to intervene in the litigation in full, or to participate in the action for a specified limited purpose. *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 942, 942 (Fairfax Co. 2008) (granting motion to intervene for a limited purpose); *Greenspon v. Hurwitz*, 89 Va. Cir. 251, 253 (same).

The claim or defense of the intervenor must be "germane to the subject matter of the proceeding." Va. Sup. Ct. R. 3:14. The germaneness requirement means that the intervenor has

an interest that is “relevant or closely allied” to some aspect of the litigation. *Tavss Fletcher Maiden & Reed v. S. Bank & Trust Co.*, 2013 Va. Cir. LEXIS 253, at *4 (Norfolk Cnty Oct. 31, 2013) (intervenor would be impacted by litigation); *see also Layton v. Seawall Enterprises, Inc.*, 231 Va. 402, 406 (1986) (“for a stranger to become a party by intervention, he must ‘assert some right involved in the suit’”). Whether to permit intervention in a pending lawsuit rests in the sound discretion of the Court. *Tavss Fletcher Maiden & Reed*, 2013 Va. Cir. LEXIS 253, at *4.

TMZ’s interest in the litigation is not only germane, but tangible and highly relevant. Namely, it seeks to preserve its statutory, constitutional and common law privilege to safeguard its newsgathering and confidential sources, which may be challenged should its former employee take the stand and be subjected to questioning.² The news media is regularly permitted to intervene in instances in which it seeks to vindicate its First Amendment rights. *See, e.g., Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 451 (2013) (trial court granted newspaper’s motion to intervene to challenge overbroad order sealing court records). Here, where the threat is to TMZ’s own ability to protect its sources, the interest is direct. Moreover, TMZ’s interest in protecting its privileged newsgathering information is not otherwise adequately represented by the current parties to the action, or by the witness, a former employee. If TMZ “did not uphold the confidentiality of its” sources, one would reasonably expect an “oppressive effect on” TMZ. *In re Subpoena Duces Tecum Am. Online, Inc.*, 52 Va. Cir. 26, 31-32 (Va. Cir. Ct. 2000), *rev’d on other grounds*, 261 Va. 350 (2001). It should be permitted to intervene for the limited purpose of vindicating its (and its source’s) rights.

² In the related context of the attorney-client privilege, it is black letter law that neither a former employee nor an employee without authority can waive the privilege on behalf of the company. Restatement (Third) of the Law Governing Lawyers § 73 (2000).

II. Virginia's Journalists' Privilege Protects TMZ's Confidential Source

Virginia courts recognize a privilege, rooted in the First Amendment, protecting the relationship between journalists and their confidential sources and preventing those confidential sources from being outed in discovery or at trial. *See, e.g., Brown v. Commonwealth*, 214 Va. 755, 757 (1974) (recognizing “newsman’s privilege of confidentiality of information and identity of his source”); *see also, e.g., Philip Morris Cos., Inc. v. Am. Broad. Cos., Inc.*, 36 Va. Cir. 1, 17 (Richmond City 1994) (“The right to gather news implies a right to a confidential relationship between a reporter and his source.”); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986) (recognizing “journalist’s privilege” for “confidential sources”); Va. R. Evid. 2:508 (codifying aspects of privilege). A similar privilege exists in California, where the newsgathering at issue in this case occurred, Beckerman Decl. ¶ 4. *See* Cal. Const. art. I, § 2(b) and Cal. Evid. Code § 1070 (providing near absolute protection of confidential source relationships when information sought in civil case).

This “privilege of confidentiality should yield only when the [party’s] need [for it] is *essential* to a fair trial.” *Brown*, 214 Va. at 757 (emphasis added); *accord Com. v. Townley*, 2018 Va. Cir. LEXIS 39, at *3 (Roanoke Cir. Ct. Jan. 31, 2018). And the Virginia Supreme Court has held that “impeachment” evidence does not qualify: When a litigant’s right to impeachment evidence “collides with the newsman’s privilege of confidentiality, the privilege prevails unless” the party seeking the impeachment evidence can show that it is somehow “material” to an element of a party’s claim or defense. *Id.* at 757-58 (declining to allow party to pierce the journalist’s privilege where it sought mere impeachment evidence); *Townley*, 2018 Va. Cir. LEXIS 39, at *4 (same). Likewise, in a defamation case, confidential source information is not “essential” where it is not directly relevant to an element of the defamation claim. *See, e.g.,*

Philip Morris Co., 36 Va. Cir. at 17 (protecting confidential source information in defamation case, noting that “the implications” of identifying “confidential sources are grave and strike at the fundamentals of a free press protected by the First Amendment” because the outing of sources will “deter” them “from divulging information and deter reporters from gathering and publishing information”); *Horne v. WTVR, LLC*, 893 F.3d 201, 213 (4th Cir. (Va.) 2018) (refusing to out source where identity not directly relevant to element of defamation claim and party seeking information “did not provide a sufficiently compelling interest in the identity of the source to overcome the competing First Amendment concerns”). *See also, e.g., Marathon Res. Mgmt. Grp., LLC v. Fresh Cuts Lawn Care Inc.*, 104 Va. Cir. 266, 267 (Richmond Cir. Ct. 2020) (quashing subpoena for confidential source information in defamation case); *Hatfill v. N.Y. Times Co.*, 242 F.R.D. 353, 357 (E.D. Va. 2006) (same).³

Here, it appears that Plaintiff seeks TMZ’s confidential source information purely for purposes of impeaching the credibility of Defendant and not because the information has anything directly to do with the elements of the underlying defamation case. As noted, an effort to obtain impeachment evidence for its own sake is insufficient to overcome the privilege, and the question of who provided a leaked tape to TMZ is irrelevant to the elements of defamation. The identity of TMZ’s source has no bearing on whether, for example, the statements Plaintiff is challenging are substantially true or whether Defendant acted with the requisite degree of fault.

³ A party seeking confidential source information may not circumvent the privilege by seeking to obtain it indirectly from someone who may happen to know it by virtue of their employment or similar relationship to the holder of the privilege. *Philip Morris Co.*, 36 Va. Cir. at 17 (refusing to allow party to obtain potential confidential source information from journalist’s phone service provider). To hold otherwise would be “an affront to the right to gather news” and could render the privilege meaningless. *Id.*

See Jordan v. Kollman, 269 Va. 569, 574, (2005) (setting out elements of defamation claim).

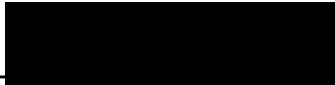
There is no basis to breach the privilege here, and a protective order should be entered.

CONCLUSION

For the foregoing reasons, TMZ respectfully requests this Court to allow it to intervene and to issue an order preventing Morgan Tremain from testifying regarding TMZ's confidential source.

Dated: May 24, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by email upon the following
on this 24th day of May, 2022:

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May 24, 2022

VIA COURIER

Chambers of The Honorable Penney Azcarate
Chief Judge
Circuit Court of Fairfax County
Fairfax County Courthouse
4110 Chain Bridge Road
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***Re: Emergency Motion of TMZ for Protective Order / Depp v. Heard
CL 2019-2011***

Dear Chief Judge Azcarate:

We represent EHM Productions Inc., the owner and operator of TMZ. Enclosed is a courtesy copy of the Emergency Motion for Protective Order that we are filing this afternoon with the Clerk of the Court in this matter. We would appreciate the opportunity to present our motion to the Court. We are available to attend the courtroom or appear by videoconference at the Court's convenience.

Respectfully,


Charles D. Tobin

Enclosure

cc: (via email) Counsel of Record