

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Energy Transfer LP (formerly known as Energy Transfer Equity, L.P.), Energy Transfer Operating, L.P. (formerly known as Energy Transfer Partners, L.P.), and Dakota Access, LLC,

Court File No. 27-CV-22-9790
Judge Joseph R. Klein

Plaintiffs,

v.

Greenpeace International (also known as “Stichting Greenpeace Council”); Greenpeace, Inc.; Greenpeace Fund, Inc.; Red Warrior Society (also known as “Red Warrior Camp”); Cody Hall; Krystal Two Bulls; and Charles Brown,
Defendant.

ORDER

The above-captioned matter came on for a hearing before the Honorable Joseph R. Klein, Judge of District Court, on September 21, 2022, upon Plaintiff’s Motion to Compel Compliance with Third-Party Subpoenas.

Based upon the files, records, and proceedings herein, the court makes the following:

ORDER

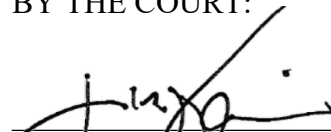
1. Plaintiff’s Motion to Compel Compliance with Third-Party Subpoenas is **DENIED**.
2. Niko Georgiades must produce a log of all responsive documents and answers claimed as privileged.
3. Unicorn Riot must produce a log of all responsive documents and answers claimed as privileged.
4. If called upon by the Court, Niko Georgiades and Unicorn Riot shall produce, for in camera inspection, any and all documents identified in their respective privilege logs. The

Court, in its discretion, shall consider any requests for in camera review on the logs have been produced.

5. The attached memorandum of law is incorporated herein.

BY THE COURT:

Dated: December 16, 2022



Joseph R. Klein
Judge of District Court

FINDINGS OF FACT

In July of 2016, as completion of the Dakota Access Pipeline neared, Greenpeace and other protestors gathered in an effort to halt construction of the pipeline. Greenpeace and its allies caused a shutdown of pipeline construction through such efforts as locking themselves to construction equipment, trespassing on DAPL land, and other apparently unlawful activity. These efforts continued through at least September 14.

Unicorn Riot is a “non-profit media organization of journalists” that “engages and amplifies the stories of social and environmental struggles from the ground up.” During the DAPL protests, Unicorn Riot and its journalists, including Niko Georgiades, “embedded” themselves in the pipeline protestors, much the same way that war correspondents embed themselves into military units. Several members of Unicorn Riot were arrested during the protests and some of their arrests were livestreamed. Criminal charges against the reporters were ultimately dropped.

In February 2019, Plaintiffs filed suit against Greenpeace, alleging the criminal conduct and property destruction was part of a civil conspiracy to hinder construction of the pipeline. As part of that suit, subpoenas duces tecum were served upon Georgiades and Unicorn Riot in Minnesota on March 18, 2021, seeking the production of documents and communications related to the protests and Unicorn Riots’s coverage.

Unicorn Riot refused to produce documents or communications, arguing that they were privileged under the First Amendment of the US Constitution and the Minnesota Free Flow of Information Act. Plaintiff filed a Motion to Compel on June 24, 2022, and the matter came before the Court in a hearing on September 21, 2022. The issue was taken under advisement.

CONCLUSIONS OF LAW

The Minnesota Rules of Civil Procedure provide that a party is entitled to discovery regarding “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Minn. R. Civ. P. 26.02(b). Additionally, “[i]nformation within this scope of discovery need not be admissible to be discoverable.” *Id.* Rule 45 imposes a duty on a party served a subpoena to respond, and Rule 45 states that “[a] person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.” *Id.* at 45.04(a)(1). If the subpoenaed party objects, the serving party may, “upon notice to the person commanded to produce, move at any time for an order to compel the production[.]” *Id.* at 45.03(b)(2). The party objecting has the burden of proving whether a claimed privilege applies. *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 701 (Minn. 1954).

Rule 25.03(c) provides that a “court on behalf of which a subpoena was issued shall quash or modify the subpoena if it . . . (C) requires disclosure of privileged or other protected matter and no exception waiver applies, or (D) subjects a person to undue burden.” Unicorn Riot claims that the subpoenas seek information privileged by the Minnesota Free Flow of Information Act, that the subpoenas seek information privileged by the First Amendment of the United States Constitution, and that the subpoenas are overly broad and unduly burdensome.

I. The Documents Sought by the Subpoenas Are Privileged by the Minnesota Free Flow of Information Act

The Minnesota Free Flow of Information Act provides that:

no person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission,

dissemination or publication to the public shall be required by any court . . . to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained.

Minn. Stat. § 595.023. The purpose of the statute is to “protect the public interest and the free flow of information” by granting “news media . . . the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information.” *Id.* § 595.022. The statute further contains two exceptions: one for defamation suits and one for certain criminal suits. *Id.* § 595.024, 595.025.

A. Unicorn Riot and Niko Georgiades Are News Media as Defined in the Statute

The statute protects any person “who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public.” Minn. Stat. § 595.023. By Plaintiff's own admission, Georgiades and Unicorn Riot “conducted interviews with the protestors and recorded sound and video images of the activities” They did so for the purpose of disseminating the interviews and messages of the protestors to the public. Under a plain reading of the statute, Georgiades and Unicorn Riot are news media whose sources and unpublished information should be protected.

B. The Subpoenas Likely Seek Information Protected by the Statute

Plaintiff's subpoena contained two and a half pages of document requests, many of which are almost certain to request the disclosure of information and documents privileged by the statute. For example, Plaintiff requested “[d]ocuments and

communications, including video and audio recordings, between July 2016 and April 2017, concerning the use of, or trespass onto, any Dakota Access land or DAPL construction site” A full response is certain to require the production of “unpublished information procured by [Georgiades and Unicorn Riot] in the course of work” and their “recording tapes.”

**C. Plaintiff Has Failed to Establish That the Information Sought Falls
Under the Statutory Exceptions**

The statute provides two exceptions which allow the courts to require the production of otherwise-privileged information and documents. One applies only to defamation actions and, as such, is not applicable here. Minn. Stat. § 595.025. In order to invoke the other, Plaintiff must show, by clear and convincing evidence, three conditions:

(1) That there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor or felony, or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained, (2) that the information cannot be obtained by alternative means or remedies less destructive of first amendment rights, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

Minn. Stat. § 595.024 subd. 2.

Plaintiff fails to meet this burden at this time. While the record indicates that several members of Unicorn Riot were charged with criminal trespass as a result of their role in the protests, the record does not indicate the severity of the charges or whether the information sought would tend to identify its source or the means through which it was obtained. Additionally, it appears that all charges were dropped and the statute is unclear on its face how it applies in such a situation.

Additionally, Plaintiff fails to argue that the information cannot be obtained by “alternative means or remedies less destructive of first amendment rights.” *Id.* As Georgiades and Unicorn Riot argue, much of the information sought by Plaintiff in the subpoenas is available to them from other, non-privileged sources, such as depositions of Unicorn Riot members.

Plaintiff has failed to show by clear and convincing evidence that the statutory exception applies. Plaintiff’s additional argument that tortious or illegal conduct completely precludes invocation of the Minnesota Free Flow of Information Act appears to have no basis in either statute or case law as no citation to either has been made. As it is otherwise clear that Georgiades and Unicorn Riot fall under the scope of the statute and the Plaintiff seeks productions that are likely to be protected, Plaintiff’s Motion to Compel is denied as to all privileged information at this time.

It is possible, however, that Niko Georgiades and Unicorn Riot’s blanket claim of privilege has shielded responsive documents and answers that are not protected by the privilege. As it stands, Plaintiffs have no notice of whether any documents exist, much less the specific nature of the privilege claimed for each one. Once Plaintiff knows of the existence of documents or information claimed privileged and the nature of that privilege, Plaintiff may foreseeably be able to make a case that would bring some such claims of privilege within the statutory exceptions.

Georgiades and Unicorn Riot also argued that the documents requested are protected by a journalist’s privilege derived from the First Amendment to the United States Constitution, a legal theory that does not appear to have been expressly examined in Minnesota. As the documents that would be privileged by that legal theory are almost

certainly also privileged under the MFFIA, the Court declines to examine the parties' arguments on that matter. The Court likewise declines to consider the argument of the production requests being overly broad and unduly burdensome.

II. NON-PARTIES ARE NOT REQUIRED TO PRODUCE PRIVILEGE LOGS BUT MAY BE ORDERED BY A COURT TO DO SO

Finally, Plaintiff is incorrect in its assertion in its assertion that Georgiades and Unicorn riot must produce a privilege log as the requirement contained in Minnesota Rules of Civil Procedure 26.02 applies only to parties and Plaintiff subpoenas are to a non-party. The Advisory Committee Comment on the 2000 Amendment to Rule 26 makes it clear that Minnesota did not adopt the requirement that non-parties asserting a privilege. The comment clarifies however, that a court may require a non-party to create a privilege log by declaring that the difference in rules between Minnesota and the Federal Rules of Civil Procedure "should not prevent a court from ordering production of a privilege log by a non-party in appropriate cases." Because Niko Georgiades and Unicorn Riot are claiming that all documents requested by Plaintiff are privileged, the Court finds that requiring privilege logs is appropriate.

JRK