

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

MARGARET HOWELL,

Plaintiff,

v.

DAVID HARDEN, et al.

Defendants.



CL20002006-00

ITOR

OPPS

RECEIVED

) Case No. CL20-2006

AUG 17 2020

PAUL FERGUSON, CLERK
Arlington County Circuit Court

by SE Deputy Clerk

PLAINTIFF MARGARET HOWELL'S OPPOSITION TO THIRD PARTY ZACHARY PETRIZZO'S MOTION TO QUASH SUBPOENA

NOW COMES Plaintiff Margaret Howell ("Plaintiff"), by counsel, and hereby files her Opposition to Third Party Zachary Petrizzo's Motion to Quash Subpoena, and in support, states as follows:

INTRODUCTION

On or about June 11, 2020, Plaintiff Margaret Howell ("Plaintiff") filed her Complaint for Defamation and Conspiracy ("Complaint") against Defendants David Harden ("Harden") and Susan Brewer ("Brewer") in this Court. Plaintiff's claims relate to false statements about the Plaintiff published in the Daily Dot, an online media source, written by Third Party Zachary Petrizzo ("Petrizzo"). On June 30, 2020, Plaintiff, through her counsel, issued a Subpoena Duces Tecum (the "Subpoena") against Petrizzo requesting only the following:

Any and all documents related to or referring to David Harden, Susan Brewer aka Susan Brewer Burkman or Susan Ilee Brewer, and Margaret Howell including but not limited to copies of any and all communications, texts, emails, letters, correspondences, faxes, emails and notes. Any and all documents related to or referring to the article written by you and published on the Daily Dot on December 5, 2019 titled "Jack Burkman, who accuses 2020 candidates of having lovers, has a few himself" including any notes, typed or handwritten, any and all drafts of the aforementioned article, identification of any and all sources used in drafting the article, any and all communications, texts, emails, letters,

correspondence, faxes, emails, and notes referring or related in any way to the above referenced article.

A copy of the Subpoena is attached as Exhibit A¹. After a long-winded nine pages of irrelevant information used as a “smoke and mirrors” attempt to confuse the issues and this Court, Petrizzo argues that the Subpoena must be quashed because: (a) it seeks privileged information and (b) it “is overly broad and unduly burdensome, and it seeks information not relevant to any of the Plaintiff’s claims.” *See* Petrizzo’s Motion to Quash at 15.

As further explained below, each of Petrizzo’s arguments fail as a matter of law, and therefore, Petrizzo’s Motion to Quash must be denied.

STANDARD OF REVIEW

As a general matter, the scope of discovery in the Commonwealth of Virginia is broad. Rule 4:1(b)(1) states that with certain exceptions “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” The court can limit “the frequency or extent of discovery methods if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative . . .; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account

¹ A “Declaration of Jennifer A. Nelson” is attached to Petrizzo’s Motion to Quash (the “Declaration”). Plaintiff is unable to ascertain the purpose of this Declaration. It seems that Ms. Nelson is attempting to contest service (when it is not contested or raised anywhere in Petrizzo’s Motion to Quash) and attempting to bring forth completely irrelevant issues before this Court, including a back-and-forth summary of telephone conversations between counsel. It is unclear, how these conversations between counsel are pertinent to the matters raised in the Motion to Quash. This seems to be yet another attempt by Petrizzo and his counsel to muddy and cloud the water in order to distract the Court from the real issues before the Court. This is a waste of time and judicial resources Finally, Petrizzo’s counsel agreed to accept service on behalf of her client, as a result any allegations that Petrizzo was not properly served are erroneous and moot.

the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." *Nizan v. Wells Fargo Bank*, 274 Va. 481, 500 (Va. 2007).

Further, pursuant to Rule 4:9 of the Rules of the Supreme Court of Virginia, "The court, upon written motion promptly made by the person so required to produce, or by the party against whom such production is sought, may . . . quash or modify the subpoena, or the method or form for production of electronically stored information, if the subpoena would otherwise be unduly burdensome or expensive." Petrizzo, in his Motion to Quash, is unable to properly assert any claim of privilege, nor is he able to maintain an argument that the Subpoena is "overly broad and unduly burdensome, and . . . seeks information not relevant to any of Plaintiff's claims." See Motion to Quash at 15. For these reasons, Petrizzo's Motion to Quash must be denied.

ARGUMENT

A. Contrary to Petrizzo's Contentions, No Proper Claim of Privilege Exists as to this Subpoena; Therefore the Motion to Quash Must be Denied.

Contrary to Petrizzo's contentions, Petrizzo's claim of privilege fail as a matter of law. As a result, Petrizzo's Motion to Quash must be denied.

A generation of Supreme Court jurisprudence suggests that the First Amendment does not provide the press with an absolute shield from legal process. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 165 (1979) (evidentiary rules "are applicable to the press and other defendants alike"); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (press has no special constitutional immunity from giving grand jury testimony).

Further, unlike many states in the Unites States, the Commonwealth of Virginia does not have "Shield Laws" that purport to protect journalists and reporters from revealing their sources and information provided to them by these sources. Courts in Virginia, however, have begun to

recognize, a qualified, not an absolute privilege. Courts have adopted a three-part test to determine when the qualified privilege attaches. The test balances (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information. *In re Multi-Jurisdictional Grand Jury*, 64 Va. Cir. 423 (Chesterfield 2004); *Clemente v. Clemente*, 56 Va. Cir. 530 (Arlington 2001); *Philip Morris Cos. v. Am. Broad. Co.*, 36 Va. Cir. 1, 18 (Richmond 1994); *Horne v. WTVR, LLC*, 893 F.3d 201 (4th Cir. 2018); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329 (4th Cir. 1993); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134 (4th Cir. 1986); *Gilbertson v. Jones*, Civil No. 3:16cv255 (REP), 2016 WL 6518659 (E.D. Va. Sept. 22, 2016); *Federico v. Lincoln Military Hous., LLC*, No. 2:12-CV-80, 2014 WL 3962823 (E.D. Va. Aug. 13, 2014); *Hatfill v. N.Y. Times Co.*, 459 F. Supp. 2d 462, 466-67 (E.D. Va. 2006); *Hatfill v. N.Y. Times Co.*, 242 F.R.D. 353 (E.D. Va. 2006).

In *Gilbert v. Allied Chemical Corp.*, 411 F.Supp. 505, 511 (E.D.Va.1976), where the subpoena in question requested nonconfidential, unpublished information including press clippings, UPI wire service copy, press releases, and information from other sources such as books and journals, The Eastern District of Virginia noted that “only if material requested directly leads to the disclosure of confidences does the privilege attach.” *Id.*

In *Clemente v. Clemente*, 56 Va. Cir. 530 (Arlington County, 2001), a case before this Court and the Honorable Judge Alper, this Court held that the qualified privilege did not apply. The Clemente case involved a divorce matter, wherein Wife issued a Subpoena Duces Tecum to *Virginia Business* in order to obtain information related to Husband’s net worth. *Id.* at 531. The newspaper asserted a claim of privilege, arguing that (a) the information was not relevant, (b) the information could have been obtained from another source, and (c) that “burdensome subpoenas

may stifle the free flow of information through the press.” This Court disagreed. In denying *Virginia Business*’ Motion to Quash, this Court explained,

The information sought by the Complainant is relevant because there is a central dispute in this case as to the net worth of the Respondent, Mr. Clemente. Although the editors of the *Virginia Business* article rate their confidence in the information relied upon for Mr. Clemente’s net worth as merely conjecture, it is still relevant for purposes of this proceeding. The Court does not believe that the Complainant can obtain this information from alternate sources. . . . Finally, Complainant’s interest in the information stems from her desire to obtain an accurate determination of the value of the marital estate. This information may be used to verify or challenge the information that the Complainant has obtained through other discovery methods.

Id. This Court further noted, “Mr. Clemente’s net worth is relevant to the pending divorce action and is not otherwise available to Mrs. Clemente. There is a compelling reason to obtain accurate information in this case. The fact that the information is not confidential tips the balance in favor of disclosure.” *Id.* (citing *Stickles v. General Rental Co.*, 750 F. Supp. 729, 733 (E.D. Va. 1990)).

In *Stickles v. General Rental Co.*, the Eastern District of Virginia similarly denied a Motion to Quash filed by the Daily Press, Inc. 750 F. Supp. 729. The *Stickles* case was an accident case resulting from a man lift overturning and injuring the plaintiff and causing a co-worker to be killed. *Id.* at 730. A reporter for The Daily Press was present at the scene soon after the accident. *Id.* While there he took several photographs, only some of which were later printed in newspapers. *Id.* These printed photos were made available, upon a subpoena *duces tecum*, to the defendant. *Id.* The Daily Press refused, however, to provide the defendant with copies of the unprinted photographs. *Id.* Rather, it brought a motion to quash. *Id.* The Eastern District of Virginia applied the three-part test and denied the Daily Press’ Motion to Quash explaining,

Having balanced the competing interests present, this court is of the opinion that they are not privileged. Looking at the interests enunciated in the accepted tripartite test, the documents sought are clearly relevant to the case; the

appearance and location of the man lift immediately after the accident may provide important information concerning the way it was being used at the time of the accident. This may prove critical in defendants' attempt to establish contributory negligence. In fact The Daily Press informs the Court that it has already given General the opportunity to look at the photos in question in order to decide whether they should pursue the subpoena. And, after analyzing them, General still believes that these photos would provide additional, material evidence for their case. This suggests that there are no reasonable alternative means available to General to obtain the specific information requested.

Id. at 732. As to the final prong, the Court noted, "Because there is no confidentiality at stake, the only burden on The Daily Press would be administrative." *Id.* All of these factors "weigh[ed] heavily in favor of compelling . . . disclosure." *Id.* at 733.

The case before the Court today presents a situation that is similar to the *Stickles* case and the *Clemente* case, decided by this Court. First, it cannot be disputed that the information requested is relevant to this case. Plaintiff's Complaint is based on defamatory statements in an article written by Petrizzo and published in The Daily Dot (the "Article"). Plaintiff's Subpoena is limited to information specifically addressed in the Article:

- (1) Any and all documents related to or referring to David Harden, Susan Brewer aka Susan Brewer Burkman or Susan Ilee Brewer, and Margaret Howell including but not limited to copies of any and all communications, texts, emails, letters, correspondences, faxes, emails and notes.
- (2) Any and all documents related to or referring to the article written by you and published on the Daily Dot on December 5, 2019 titled "Jack Burkman, who accuses 2020 candidates of having lovers, has a few himself" including any notes, typed or handwritten, any and all drafts of the aforementioned article, identification of any and all sources used in drafting the article, any and all communications, texts, emails, letters, correspondence, faxes, emails, and notes referring or related in any way to the above referenced article.

See Exhibit A. Plaintiff's claims are based on the defamatory statements published in the Article.

The Subpoena is not broad, but rather, is specifically limited to documents and communications surrounding the Article, and nothing more. As a result, it cannot be said that these two requests

are not relevant to the Plaintiff's claims in her Complaint. The first prong of the three-part test weighs heavily in favor of disclosure.

As to the second prong, it is also evident that the information cannot be obtained by alternate means. The Subpoena requests, among other things, "any notes, typed or handwritten, any and all drafts of the Article." *See* Exhibit A. Petrizzo, and Petrizzo alone, has access to these documents. Petrizzo attempts to argue that the Defendants have access to the information requested in the Subpoena. *See* Motion to Quash at 13. This cannot be the case. Plaintiff is not aware of any reporters or journalists, who would provide their notes and article drafts to their sources. Just as in the *Clemente* case, the information requested in the Subpoena cannot be obtained through alternate means. As a result, "there is a compelling reason to obtain accurate information in this case." *Clemente*, 56 Va. Cir. At 531 (citing *Stickles v. General Rental Co.*, 750 F. Supp. 729, 733 (E.D. Va. 1990)). Moreover "the fact that the information is not confidential tips the balance in favor of disclosure." *Id.* As explained, the second prong weighs in favor of disclosure.

As to the final prong, whether there is a compelling interest in the information, it is clear that there is. Here, just as in *Stickles* case and the *Clemente* case, there is no confidentiality that is at stake. Plaintiff is aware that the Defendants were involved in providing information to Petrizzo that resulted in the publication of the Article. Petrizzo's "sources", as a result, cannot be considered confidential. Like the *Clemente* case, decided by this Court, "there is a compelling reason to obtain accurate information in this case. The fact that the information is not confidential tips the balance in favor of disclosure." *Id.*

In adhering to its own precedent, this Court must find, in weighing the aforementioned factors, that the scales tip heavily toward disclosure. For these reasons, Petrizzo's Motion to Quash must be denied.

B. The Subpoena is Not Overly Broad and Unduly Burdensome, and Does Not Seek Information that is Irrelevant to Plaintiff's Claims.

The Plaintiff's Subpoena cannot be considered overly broad and unduly burdensome. Nor does it seek information that is irrelevant to Plaintiff's claims. As a result, Petrizzo's Motion to Quash must be denied.

"A party's request for discovery will not be denied so long as it is "relevant to the subject matter involved in the pending action." *Lyle, Siegel, Croshaw Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 438-39, 457 S.E.2d 28, 36 (1995). The rule thus establishes a "broad scope" for discovery requests, defining the relevancy of such requests by relation to the subject matter of the action," regardless of whether [they] relate to the claim or defense of the party seeking discovery or to the claim or defense of any other party. *Hall v. Hall*, Record No. 2021-04-4 (Va. Ct. App. Oct. 11, 2005). Moreover, a court will only limit discovery, "if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative . . .; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." *Nizan*, 274 Va. at 500.

Here, it cannot be said that the Subpoena is overly broad or unduly burdensome. In fact, the Subpoena requests information limited specifically to matters related to the Complaint and information that would only be in the possession of Petrizzo. Plaintiff's Subpoena is limited to the following information:

- (1) Any and all documents related to or referring to David Harden, Susan Brewer aka Susan Brewer Burkman or Susan Ilee Brewer, and Margaret Howell including but not limited to copies of any and all communications, texts, emails, letters, correspondences, faxes, emails and notes.
- (2) Any and all documents related to or referring to the article written by you and published on the Daily Dot on December 5, 2019 titled "Jack Burkman, who accuses 2020 candidates of having lovers, has a few himself" including any notes, typed or handwritten, any and all drafts of the aforementioned article, identification of any and all sources used in drafting the article, any and all communications, texts, emails, letters, correspondence, faxes, emails, and notes referring or related in any way to the above referenced article.

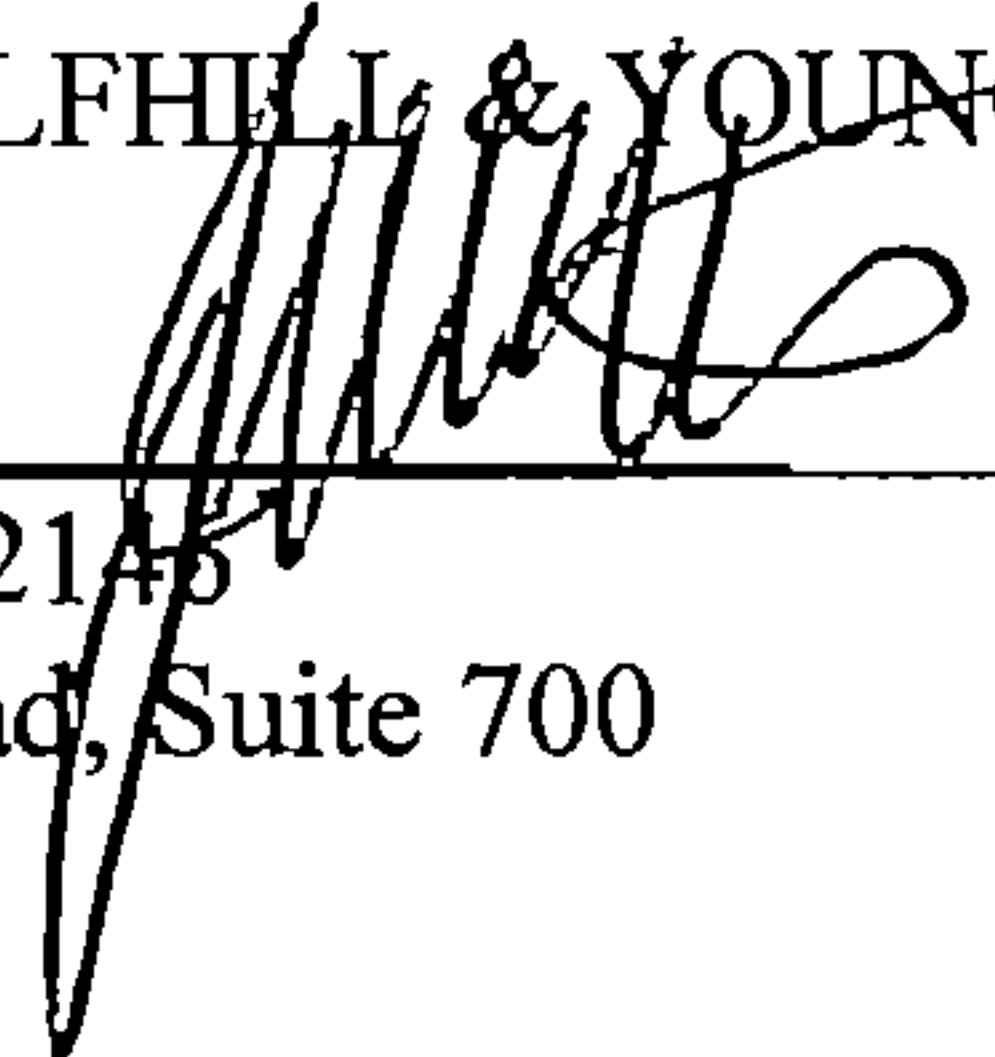
See Exhibit A. All of the information requested is easily accessible to Petrizzo and is limited in scope to cover only information related to the Complaint and documents in his possession.

Petrizzo's contention that this is a "fishing expedition" is baseless. The information is clearly relevant, as addressed *supra*. Petrizzo then argues that because the Article was published seven months ago, it would "require significant effort" to identify the relevant notes. *See* Motion to Quash at 15. With the technology available to Petrizzo, the notion that seven months is such a long time and would require "significant effort" on his part is laughable. Surely, any notes and drafts of the Article, and email communications would be easily located on Petrizzo's computer. Finally, there would be no expense to Petrizzo to produce these documents, making any argument that this request is unduly burdensome meritless.

Plaintiff's Subpoena is well within the scope of discoverable information under the Supreme Court Rules of Virginia. As such, Petrizzo's Motion to Quash must be denied.

Respectfully Submitted,
MARGARET HOWELL
By counsel

ALLRED, BACON, HALFHILL & YOUNG, PC


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was sent via first class mail, postage prepaid on this 11th day of August, 2020, to:

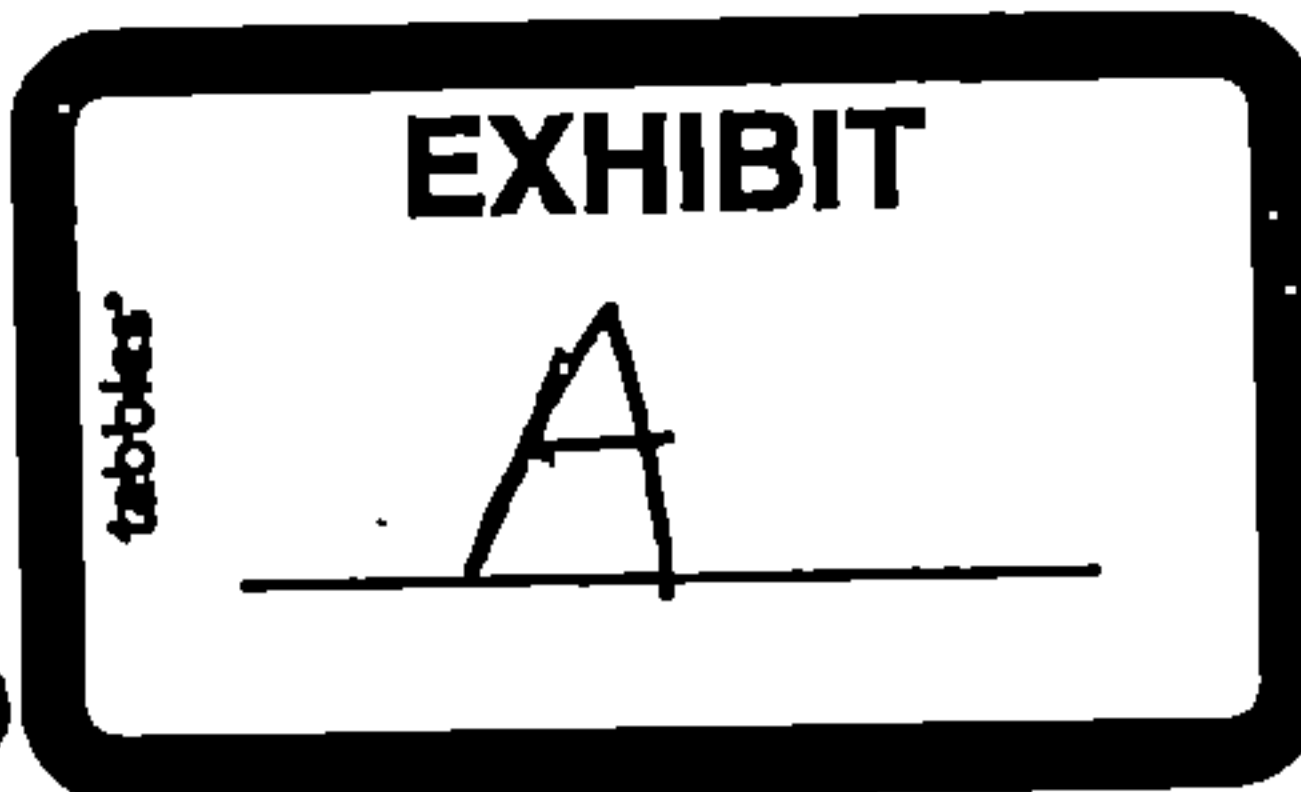
David Harden
1530 Key Boulevard, Unit 1222
Arlington, Virginia 22209
Defendant

David Harden
6520 Briar Pointe Dr
North Richland Hills, Texas 76182
Defendant

Susan Brewer
6508 Briar Pointe Dr
North Richland Hills, Texas 76182
Defendant

Jennifer A. Nelson, Esq.
1156 15th Street, NW Suite 1020
Washington DC 20005


James T. Bacon, Esq.



SUBPOENA DUCES TECUM (CIVIL)

ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265.

Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: CL20-2006

HEARING DATE AND TIME

Arlington Circuit

Court

1425 N. Courthouse Road, Arlington VA 22201

COURT ADDRESS

Margaret Howell

v./In re:

David Harden, et al.

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Zachary T. Petrizzo

NAME

3000 Washington Blvd, Apt. 922

STREET ADDRESS

Arlington

VA

22201

CITY

STATE

ZIP

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

Any and all documents related to or referring to David Harden, Susan Brewer aka Susan Brewer Burkman or Susan Ilee Brewer, and Margaret Howell including but not limited to copies of any and all communications, texts, emails, letters, correspondences, faxes, emails and notes. Any and all documents related to or referring to the article written by you and published on the Daily Dot on December 5, 2019 titled "Jack Burkman, who accuses 2020 candidates of having lovers, has a few himself" including any notes, typed or handwritten, any and all drafts of the aforementioned article, identification of any and all sources used in drafting the article, any and all communications, texts, emails, letters, correspondence, faxes, emails, and notes referring or related in any way to the above referenced article.

at July 20, 2020

LOCATION

at

5pm

DATE AND TIME

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of

Margaret Howell

PARTY NAME

James T. Bacon, Esq.

NAME OF ATTORNEY

11350 Random Hills Road Suite 700

OFFICE ADDRESS

Fairfax VA 22030

OFFICE ADDRESS

6/30/20

DATE ISSUED

22148

VIRGINIA STATE BAR NUMBER

703 352 1300

TELEPHONE NUMBER OF ATTORNEY

703 352 1301

FACSIMILE NUMBER OF ATTORNEY

SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

This SUBPOENA DUCES TECUM is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:	Zachary T. Petrizzo
ADDRESS:	3000 Washington Blvd, Apt. 922 Arlington VA 22201
<input type="checkbox"/> PERSONAL SERVICE	Tel. _____ No. _____
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/>	Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:
<input type="checkbox"/>	Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)
<input type="checkbox"/> NOT FOUND	_____, Sheriff
DATE	_____ by _____, Deputy Sheriff

CERTIFICATE OF COUNSEL

I, James T. Bacon, Esq., counsel for Margaret Howell, hereby certify that a copy of the foregoing subpoena duces tecum was mailed to all Defendants, counsel of record for _____ on the 30 day of June, 2020



SIGNATURE OF ATTORNEY

NOTICE: Upon receipt of the subpoenaed documents, the requesting party must, if requested, provide true and full copies of those documents to any other party or to the attorney for any other party, provided the other party or attorney for the other party pays the reasonable cost of copying or reproducing those documents. This does not apply when the subpoenaed documents are returnable to and maintained by the clerk of the court in which the action is pending. Va. Code § 8.01-417