

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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 IN RE MADISON SQUARE GARDEN : CONSOLIDATED  
 ENTERTAINMENT CORP. STOCKHOLDERS : C.A. No.  
 LITIGATION : 2021-0468-KSJM  
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 IN RE MSG NETWORKS INC. : CONSOLIDATED  
 STOCKHOLDERS CLASS ACTION : C.A. No.  
 LITIGATION : 2021-0575-KSJM  
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Chancery Courtroom 12C  
 Leonard L. Williams Justice Center  
 500 North King Street  
 Wilmington, Delaware  
 Tuesday, January 17, 2023  
 1:30 p.m.

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BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

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ORAL ARGUMENT ON PLAINTIFFS' MOTIONS TO COMPEL THE  
PRODUCTION OF TEXT MESSAGES, ADDITIONAL 30(b)(6)  
TESTIMONY, AND DOCUMENTS REGARDING THE DEPARTURE OF  
KEY MSGE EMPLOYEE and PARTIAL RULINGS OF THE COURT

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 CHANCERY COURT REPORTERS  
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## 1 APPEARANCES:

2 KIMBERLY A. EVANS, ESQ.  
Block & Leviton LLP

3 -and-

4 JOEL FLEMING, ESQ.  
of the Massachusetts Bar  
Block & Leviton LLP

5 -and-

6 MAE OBERSTE, ESQ.  
ANDREW E. BLUMBERG, ESQ.  
Bernstein Litowitz Berger & Grossmann LLP

7 -and-

8 J. DANIEL ALBERT, ESQ.  
of the Pennsylvania Bar  
Kessler Topaz Meltzer & Check, LLP

9 -and-

10 DAVID TEJTEL, ESQ.  
CHRISTOPHER M. WINDOVER, ESQ.  
of the New York Bar  
Friedman Oster & Tejtel PLLC  
for Plaintiffs in C.A. No. 2021-0468-KSJM

13 CHRISTINE M. MACKINTOSH, ESQ.  
Grant & Eisenhofer P.A.

14 -and-

15 ROBERT J. KRINER, JR., ESQ.  
SCOTT M. TUCKER, ESQ.  
Chimicles Schwartz Kriner & Donaldson-Smith LLP

16 -and-

17 CARL L. STINE, ESQ.  
of the New York Bar  
Wolf Popper LLP  
for Plaintiffs in C.A. No. 2021-0575-KSJM

23 Appearances Cont'd ...

1 APPEARANCES (continued):

2

RAYMOND J. DiCAMILLO, ESQ.

3

KEVIN M. GALLAGHER, ESQ.

4

CAROLINE M. McDONOUGH, ESQ.

5

JORDAN L. CRAMER, ESQ.

6

MORGAN R. HARRISON, ESQ.

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Richards, Layton & Finger, PA

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-and-

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MATTHEW A. SCHWARTZ, ESQ.

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of the New York Bar

11

Sullivan & Cromwell LLP

12

for Non-Party Madison Square Garden

13

Entertainment Corp.

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16 OTHER COUNSEL PRESENT

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1 THE COURT: Good afternoon, everyone.  
2 Sorry to cram you in here. It's good to see you.

3 Shall we start with appearances.

4 ATTORNEY EVANS: Good afternoon, Your  
5 Honor. Kim Evans with Block & Leviton on behalf of  
6 the MSGE plaintiffs. Here with me today are my  
7 colleagues: Joel Fleming from Block & Leviton, Dan  
8 Albert from Kessler Topaz, and Mae Oberste from  
9 Bernstein Litowitz. And in the back I have Andrew  
10 Blumberg from Bernstein Litowitz, and Dave Tejtzel and  
11 Chris Windover are from Friedman Oster & Tejtzel.

12 ATTORNEY TUCKER: Good afternoon, Your  
13 Honor. Scott Tucker with Chimicles Schwartz Kriner &  
14 Donaldson-Smith on behalf of the MSGN plaintiffs.  
15 Today with me at counsel table are Robert Kriner from  
16 my firm, Christine Mackintosh from Grant & Eisenhofer,  
17 and Carl Stine from Wolf Popper.

18 ATTORNEY DiCAMILLO: Good afternoon,  
19 Your Honor. Raymond DiCamillo on behalf of Madison  
20 Square Garden Entertainment. Here with me this  
21 afternoon from Sullivan & Cromwell is Matt Schwartz  
22 and Chase Shelton. And from my office: Kevin  
23 Gallagher, Jordan Cramer, Caroline McDonough, and  
24 Morgan Harrison.

1 I'm going to be doing the presentation  
2 on the text message motions. And with the Court's  
3 permission, Mr. Schwartz will address the 30(b)(6) and  
4 the Lorraine Peoples' motion.

5 THE COURT: Have you conferred on an  
6 order of presenting the motions?

7 ATTORNEY DiCAMILLO: We have.

8 ATTORNEY EVANS: Yes, Your Honor. So  
9 the parties have conferred, and with Your Honor's  
10 permission, of course, we'd like to do the two motions  
11 regarding text messages first, where I propose, if  
12 it's okay with Your Honor, for Mr. Fleming to present  
13 argument on that motion on behalf of the MSGE  
14 plaintiffs, followed by Mr. Tucker to address the MSGN  
15 motion on text messages, followed by defendants'  
16 response; and then the 30(b)(6) motion, where  
17 Mr. Albert, with your permission, will handle that  
18 argument on behalf of MSGE; and followed by the  
19 Lorraine Peoples' motion, if that's okay with Your  
20 Honor.

21 THE COURT: Great. Thank you.

22 ATTORNEY FLEMING: Good afternoon,  
23 Your Honor. Joel Fleming of Block & Leviton for the  
24 MSGE plaintiff. As Ms. Evans just explained, I'll

1 address the motion to compel regarding text messages.

2           There have been a number of  
3 developments since we filed that motion and where we  
4 are today. Frankly, many of those developments are  
5 pretty troubling.

6           When we first filed the motion, we  
7 were seeking a Foulds chart; text messages from  
8 Cresitello, Danes, Kelly, Barnett, and Schoenfeld, as  
9 well as an attempt to recover texts that had been  
10 deleted by Lustgarten; and then, finally, the right to  
11 redepose any MSGE witness whose texts were produced  
12 after their deposition took place.

13           If Your Honor looks at Exhibit P to  
14 MSGE's opposition, you'll see that after we filed the  
15 motion, MSGE tried to get us to agree to withdraw the  
16 motion by offering to review text messages that were  
17 custodial to Cresitello, Danes, and Kelly. We  
18 rejected that offer.

19           So MSGE boasted in its opposition to  
20 the motion that it would be reviewing texts from  
21 Cresitello, Danes, and Kelly and assured the Court  
22 that the company was also "reviewing" the texts of  
23 Mr. Packman and Mr. Seibert.

24           What MSGE didn't tell us, or the

1 Court, was that Cresitello, Danes, Kelly, and Seibert  
2 had all deleted their text messages. MSGE didn't  
3 reveal any of that until after we filed our reply.

4 MSGE also didn't reveal until after we  
5 filed our reply that there was a similar story with  
6 Barnett, whose phone was wiped by MSGE in October 2021  
7 after the litigation was already underway. And Your  
8 Honor can see all of that in the email chain that was  
9 attached to the first of two letters that we had to  
10 send the Court last week after learning new  
11 information.

12 So to sum up, there's now evidence  
13 that responsive electronic communications were deleted  
14 by seven senior officers of MSGE or MSGN: Lustgarten,  
15 Greenberg, Seibert, Danes, Kelly, Cresitello, and  
16 Barnett. That's in addition to texts or emails being  
17 deleted from at least three of the Dolan directors --  
18 Charles Dolan, Kristin Dolan, and Marianne Dolan  
19 Weber -- that we learned about earlier in this case.  
20 A total of ten different custodians.

21 I've never seen a case with this  
22 degree of spoliation. And as Your Honor would  
23 probably expect, plaintiff will at some point be  
24 asking the Court to draw some adverse inferences. But

1     that's a question for a later day.

2                     What's left of today's motion is the  
3     request for a Foulds chart, the request to redepose  
4     witnesses, and a request for a review and production  
5     of texts from Schoenfeld.

6                     Let's start with the chart.  MSGE says  
7     that we are not entitled to a chart because it has  
8     been "fully transparent" about its text message review  
9     and collection throughout the discovery process.

10                    With all due respect, I don't think  
11    there's any way to look at the record here and agree  
12    with that statement.  We gave some examples in the  
13    briefing, and I'm happy to discuss them if the Court  
14    has questions, otherwise I'd like to spend a bit of  
15    time talking about the 20-page affidavit and the  
16    300 pages of exhibits that were dumped on us on Friday  
17    afternoon.

18                    As we noted in the motion, MSGE's  
19    initial interrogatory response failed to identify  
20    texts as a possible source for any custodian.  In its  
21    opposition, MSGE tried to portray that interrogatory  
22    response simply as a statement that it was refusing to  
23    produce text messages.  But based on the affidavit  
24    that we received on Friday, MSGE does now seem to



1 concede that, as we had always argued, the  
2 interrogatory response was actually denying the  
3 existence of texts. That statement was, of course,  
4 not true, as we now all know and agree. But still to  
5 this day, MSGE has never supplemented or corrected  
6 that interrogatory response.

7               Now, I expect that when I sit down,  
8 Mr. DiCamillo will get up and say that whatever  
9 happened in the past, we don't need a chart because we  
10 now have the affidavit. Obviously, we object to  
11 receiving this affidavit on the last business day  
12 before the hearing. There's no reason MSGE couldn't  
13 have provided that affidavit with its opposition so  
14 that we'd have the opportunity to provide a proper  
15 written response in our reply rather than having to  
16 address it on the fly today.

17               But I'm not asking the Court to ignore  
18 it. To the contrary. I'd urge Your Honor to read the  
19 affidavit very carefully. There's a lot in there.  
20 And most of it paints an extremely unflattering  
21 picture of the way that MSGE and its counsel  
22 discharged their discovery obligations.

23               For the moment, I just want to focus  
24 on a couple of key points to explain why the affidavit

1 doesn't moot our request for a Foulds chart. Let's  
2 start with the last paragraph of the affidavit,  
3 paragraph 32.

4           In paragraph 32, the affidavit says,  
5 "Because MSGE was advised by all of the individuals  
6 who responded to the Document Collection  
7 Questionnaires that their text messages did not  
8 contain potentially responsive information and because  
9 Plaintiffs have not requested that MSGE produce text  
10 messages from the remainder of the MSGE Custodians,  
11 MSGE has not sought to determine [] whether these  
12 individuals potentially have responsive text messages  
13 or [] whether they deleted any potentially responsive  
14 text messages."

15           This is a surprising paragraph for a  
16 couple of reasons.

17           First, we have requested text messages  
18 for all MSGE custodians. We set that out in the  
19 motion and the accompanying exhibits. There are lots  
20 of examples. I'd direct Your Honor in particular to  
21 Exhibit 6, which is the email from Mr. Cook clearly  
22 seeking text messages for all MSGE custodians.

23           What actually happened is that  
24 throughout the discovery process, we have been relying

1 on MSGE's representations that there were no text  
2 messages. We have pushed back where for specific  
3 custodians we have been able to identify evidence,  
4 either in emails or testimony, suggesting that there  
5 were texts. But the idea that we have only -- we only  
6 want texts from some subset of custodians is just not  
7 true.

8           It's also unacceptable that we're only  
9 learning on the eve of the hearing, months after the  
10 close of fact discovery, that MSGE never went back and  
11 asked custodians whether they had texts after  
12 receiving this clear evidence that the document  
13 collection questionnaire process had failed.

14           At paragraph 9 of the affidavit, it  
15 says that MSGE sent the questionnaire to 30 people,  
16 that it received 26 responses, and that no respondent  
17 identified text messages as potentially containing  
18 relevant information.

19           I'll note that nowhere in the  
20 affidavit does it identify who those four recipients  
21 are who just didn't return the questionnaire. I'll  
22 also note that the affidavit goes on to say in  
23 paragraph 9 that questionnaires weren't even sent to  
24 Mr. Lustgarten or Mr. Seibert, two of the most-senior

1 executive officers at MSGE after Jim Dolan.

2 But in any event, we know that even  
3 though no one identified text messages on the  
4 questionnaires, there were texts, a lot of them.

5 According to paragraph 29 of the  
6 affidavit, there were more than 15,000 texts that MSGE  
7 ended up reviewing. How many of those texts were sent  
8 to other MSGE custodians who claim not to have texts?  
9 We don't know, and the affidavit doesn't say.

10 But given that there were at least  
11 15,000 texts that were reviewed by MSGE, why did none  
12 of these custodians identify texts as a potential  
13 source on the questionnaires?

14 I'm not sure if Your Honor has  
15 actually looked at the questionnaire itself. It's  
16 Exhibit 6 to the affidavit. It's worth looking at.  
17 The phrase "text messages" appears nowhere -- and I  
18 have a copy if that's easier.

19 THE COURT: Give me a second. It's  
20 just a lot to navigate here. I have a lot of  
21 exhibits, but I don't know where Exhibit 6 to the  
22 affidavit is.

23 Cheers for James.

24 ATTORNEY FLEMING: That was a test for

1 James, and he passed with flying colors.

2                   So if you look at Exhibit 6, the  
3 phrase "text messages" appears nowhere on it. And I  
4 think, frankly, it would be hard for any reasonably  
5 intelligent layperson to read this questionnaire and  
6 come away with any understanding that they were being  
7 asked about text messages. And it's clear to me that  
8 many recipients didn't understand that given that no  
9 one identified them in response to this questionnaire  
10 even though there were tens of thousands of texts that  
11 hit on our key words.

12                   There's a reason that this Court's  
13 practice guidelines, which we're now allowed to cite,  
14 use the word "interviews." They say very clearly that  
15 the procedures used to collect and review documents  
16 generally should include "interviews" of custodians  
17 who may possess responsive documents. MSGE knows  
18 that. And if they didn't know that, they should have  
19 learned that the last time we were here on a motion to  
20 compel text messages, where we briefed and we talked  
21 about Your Honor's ruling in the *CVR* case, where Your  
22 Honor gave very clear guidance to the bar that you  
23 will ask about text messages, custodians will say "oh,  
24 I don't text," and you are supposed to push back on

1 that. Clearly, that didn't happen here.

2           There's no way to completely fix the  
3 mess now. But at a minimum, we are entitled to a  
4 chart. And we need it for a couple of reasons.

5           First, because, as I said, down the  
6 road, we are almost certainly going to be moving for  
7 an adverse inference, and we're entitled to understand  
8 just how bad it was.

9           And second, when we get to trial,  
10 defendants are going to do what every defendant does:  
11 They are going to ask the Court to conclude that  
12 absence of evidence is evidence of absence. They'll  
13 say that Your Honor can conclude if there's no  
14 documents saying X, no documents saying Y, that must  
15 mean that X or Y didn't happen.

16           In order for us to have a fair chance  
17 to respond to that, we need to be able to push back  
18 and say, well, maybe the reason there's no documents  
19 saying X or Y is that the relevant custodian deleted  
20 all of their text messages. The chart helps us do  
21 that.

22           Unless Your Honor has questions on  
23 that point, I'd turn to the request for depositions.

24           As we framed that part of the request

1 when we filed, the motion was seeking the redeposition  
2 of any MSGE witness whose texts were produced after  
3 their deposition. Given what we now know about the  
4 various custodians who have deleted texts from whom we  
5 are not going to get any, I think this is really now  
6 just a request for a focused redeposition of  
7 FitzPatrick and Seibert based on the texts that were  
8 produced after their depositions.

9                   Obviously, if Your Honor grants our  
10 other motion that Mr. Albert is going to discuss about  
11 30(b)(6), the company may wish to designate  
12 Mr. FitzPatrick as a 30(b)(6) designee again. Those  
13 are separate questions, but we could certainly combine  
14 that into a single deposition.

15                   I want to focus the Court's attention  
16 in particular on two text exchanges that weren't  
17 produced until after the depositions.

18                   The first is the text that was  
19 Exhibit 4 to our motion. And we screenshotted it on  
20 the first page of the motion. This is the exchange  
21 between FitzPatrick and Danes where they discuss the  
22 drop in MSGE's share price after a Bloomberg News  
23 story reporting on a leak that talks were underway  
24 between MSGE and MSGN, and they discuss how the drop

1 was "100%" attributable to the potential deal because  
2 no one likes the idea. We agree.

3           The second text we didn't get until  
4 last Thursday night. It's attached as Exhibit 1 to  
5 the second letter that we put in. That was on Friday.  
6 And in that chain, we see -- in that chain, we see  
7 Mr. FitzPatrick and Mr. Seibert discussing a second  
8 drop in MSGE's stock price. This is the drop that  
9 happens on the day that the transaction is announced  
10 to the market. FitzPatrick suggests the drop is  
11 likely attributable to a market correction that was  
12 underway, a broader market correction affecting  
13 network stocks, like MSGN. Again, we agree.

14           These are very, very important texts.  
15 They are critical to understanding the damages story.  
16 We have now served opening expert reports. And one of  
17 the key areas of disagreement between the reports --  
18 both experts agree that there were two statistically  
19 significant drops: one when the Bloomberg report comes  
20 out; one when the news of the deal is announced. Both  
21 experts agree that those drops are statistically  
22 significant and resulted in hundreds of millions of  
23 value being destroyed.

24           The key question is what caused the



1 drop. Our expert says it's news about the merger.  
2 Their expert says no, maybe it's the market inferring  
3 that MSGE had to do this merger in order to gain cash  
4 flows to pay for the Sphere. Again, inferences,  
5 might.

6 That's not a dispute the Court has to  
7 resolve today. But those texts go to the heart of the  
8 question: What's causing these drops? And it  
9 suggests that senior members of MSGE management agree  
10 with our expert and disagree with defendants. We  
11 should have the opportunity to ask the CFO and the  
12 vice chairman, Mr. Seibert, about them.

13 Unless Your Honor has questions on  
14 that, the last issue is Schoenfeld. Just very briefly  
15 here.

16 We know he texted. There's a  
17 screenshot of a text exchange with him in Exhibit 10  
18 to our motion. It's cut off. We can't see the  
19 substance of the text, but we know he was texting.  
20 And we know from the context of the other texts that  
21 are in that exchange that this was a period when a lot  
22 of texts were flying around about the merger.

23 MSGE's opposition claimed that  
24 Schoenfeld was a litigator with "no responsibility at

1 all during the relevant period for any topic of  
2 relevance ...."

3 As we point out in our reply, you can  
4 see at Exhibit 24 it appears that Schoenfeld, in fact,  
5 was taking point on pulling together information about  
6 the value of MSGE's air rights. That's, again,  
7 something that's important to the valuation story, and  
8 we're entitled to any texts that he might have about  
9 it.

10 That's all I have, unless Your Honor  
11 has questions.

12 THE COURT: Thank you, Mr. Fleming.

13 ATTORNEY TUCKER: May it please this  
14 Court. Mr. Fleming just provided a pretty decent,  
15 detailed explanation of the text issue. The MSGN  
16 plaintiffs' motion is on a similar factual basis, so  
17 I'll try to avoid duplicating statements.

18 The MSGN plaintiffs filed their second  
19 motion to compel seeking a forensic vendor to recover  
20 spoliated evidence. At the time of the filing of the  
21 motion, we had come to understand that a single  
22 custodian, Andrew Lustgarten, had deleted potentially  
23 relevant text messages. And, in addition, the  
24 parties, MSGE and MSGN plaintiffs had been negotiating

1 production of additional text messages from  
2 Messrs. Seibert and Packman. And while MSGE had  
3 committed to producing such texts, they had yet to be  
4 produced coming up on their depositions. At this  
5 point, that portion of the motion is moot, so we won't  
6 have to worry about that.

7           We also moved to produce texts from  
8 Mr. Schoenfeld and Ms. Barnett. Those two items are  
9 still on the table. Mr. Fleming mentioned  
10 Mr. Schoenfeld. MSGN plaintiffs I don't think were  
11 ready to give up on Emma Barnett as a form of relief.  
12 We would ask -- we know that MSGE has said that they  
13 wiped her phone in October of 2021 when Ms. Barnett  
14 left the company. That's concerning, as litigation  
15 holds had already been sent out and within two months  
16 MSGE, in its interrogatory responses, identified  
17 Ms. Barnett as potentially having relevant information  
18 in response to 11 separate interrogatories. We would  
19 still ask that MSGE be required to also process  
20 Ms. Barnett's custodial file, whatever they may have  
21 backed up from the phone, if anything was backed up  
22 from the phone, for any saved text messages that may  
23 have survived the wiping of the phone.

24           Throughout the briefing on the second

1 motion to compel, the pattern of MSGE slowly trickling  
2 out information regarding the maintenance and  
3 construction of text messages continued. After our  
4 opening brief, but before the reply, we found out that  
5 Andrea Greenberg had also deleted relevant text  
6 messages and had been allowed to self-select based on,  
7 as she testified, her own business judgment which text  
8 messages were not responsive to discovery in this  
9 action and which she could delete on her own. As  
10 such, in our reply we requested that an order be  
11 issued that a forensic vendor also review  
12 Ms. Greenberg's phone for spoliated evidence.

13 And then after our reply was served,  
14 again, on December 15th and 21st, MSGE notified the  
15 MSGN plaintiffs that Gregg Seibert, Ari Danes, Colin  
16 Kelly, and Mark Cresitello had all potentially deleted  
17 text messages. We had filed a motion to file a  
18 sur-reply. It's currently *sub judice*, but we felt  
19 inclined that we needed to at least get that  
20 information out to the Court's attention. Those  
21 deletions have been addressed in Mr. DiCamillo's  
22 affidavit, so I would suspect that they are ripe for  
23 discussion today.

24 As I mentioned, the big -- one of the

1 big requests that we have with our motion was to get  
2 an affidavit from senior Delaware counsel describing  
3 the steps that MSGE had taken to identify, maintain,  
4 and produce text messages in this case. And  
5 Mr. DiCamillo's affidavit, while providing answers to  
6 some of the questions that the MSGN plaintiffs  
7 specifically delineated in their motions and proposed  
8 order, it has not addressed some very specific  
9 questions. But it also has raised additional  
10 questions.

11 In fact, after reviewing  
12 Mr. DiCamillo's affidavit and the motion practice in  
13 this case, it appears that MSGE, rather than outside  
14 counsel, had an outsized role in the identification  
15 and collection of relevant discovery, chose what to  
16 produce to its counsel, and failed to adhere to its  
17 obligations to maintain potentially relevant discovery  
18 materials resulting, in the end, in some blatant  
19 spoliation.

20 The timeline of the events detailed in  
21 Mr. DiCamillo's affidavit really show that MSGE never  
22 put in place any effort to retain text messages.

23 For example, at paragraphs 2 and 5 of  
24 Mr. DiCamillo's affidavit, he mentions that MSGE

1 issued hold notices to approximately 30 custodians to  
2 retain, among other things, text messages, and a  
3 subsequent hold notice was sent out in June. However,  
4 despite turning off automatic-deletion settings on  
5 emails on April 22nd and 30th, as stated in the  
6 affidavit, the record appears to demonstrate that MSGE  
7 took no steps to ensure custodians were retaining text  
8 messages, ensuring that any custodian turned off any  
9 auto-delete functions for text messaging, or collected  
10 custodians' text files in order to preserve any  
11 potential relevant text messages.

12           The fact that these litigation holds  
13 went out as early as April, May 2021 also raises  
14 significant questions as to why MSGE wiped  
15 Ms. Barnett's phone, apparently without backing up the  
16 data first, when she left the company in October of  
17 2021. And as I mentioned previously, MSGE identified  
18 Ms. Barnett in response to 11 interrogatory responses  
19 as having potentially relevant information and  
20 produced nearly 2,000 documents from her custodial  
21 file in this case -- her email file, excuse me, just  
22 to clarify.

23           In addition, the DiCamillo affidavit  
24 mentions that due to some oversight, Gregg Seibert did

1 not receive a litigation hold. Due to the late  
2 production of the affidavit, we have not been able to  
3 submit a written response to that. However, in  
4 reviewing the discovery produced to date, Mr. Seibert  
5 and Jim Dolan both received litigation -- draft  
6 litigation holds in April of 2021 and were asked to  
7 review and for Mr. Dolan to approve them before they  
8 were sent out to defendants. If the Court would like,  
9 I brought copies of those. I can hand them up. I  
10 know you have a lot of paper.

11 THE COURT: I don't know if I need  
12 additional paper.

13 ATTORNEY TUCKER: So to claim that  
14 Mr. Seibert, due to some oversight, did not receive  
15 the litigation hold and that somehow absolves him of  
16 not deleting text messages, I believe, is a stretch.  
17 Also the fact that Mr. Seibert and Mr. Dolan, neither  
18 of which are attorneys, were given review/approval  
19 rights of litigation holds before they were sent out  
20 raises additional questions as to MSGE's outsized  
21 control of the discovery process in this case.

22 I'd also note that Mr. Dolan waited  
23 nearly a week to approve the litigation hold before it  
24 was sent out. Just suspicious as to why it took that

1 long to approve something that should have been just  
2 been sent out by attorneys.

3           MSGE's control of the discovery  
4 process and bad faith conduct is also evidenced by the  
5 conferrals that the MSGN plaintiffs and MSGE had  
6 throughout this case regarding text messages. As  
7 Mr. Fleming mentioned, paragraph 32 of the DiCamillo  
8 affidavit states that MSGE has made no effort to  
9 review any custodial file for anyone that was not  
10 specifically mentioned by a plaintiff in this case.  
11 That has been the pattern of the text message  
12 meet-and-confers. Plaintiffs have to identify an  
13 issue. MSGE only looks at that person who was  
14 identified regardless of whom they were texting with.

15           For example, one of the custodians,  
16 Mr. Lustgarten -- it was no later than August 9th that  
17 plaintiff requested text messages from Mr. Lustgarten.  
18 I say "no later than" because I know Mr. DiCamillo's  
19 affidavit points to a letter from August 9th. Our  
20 recollection is July. But to be nice, we'll say  
21 August 9th.

22           However, it appears that MSGE did not  
23 approach Mr. Lustgarten to collect his text messages  
24 until September 27th, more than a month and a half



1 later, at which time Mr. Lustgarten advised MSGE that  
2 he had his phone set for a 30-day delete.

3 Three days later, after MSGN  
4 plaintiffs followed up on the status of  
5 Mr. Lustgarten's texts, MSGE just advised the MSGN  
6 plaintiffs that it was still collecting  
7 Mr. Lustgarten's text messages without mentioning the  
8 auto-delete. In fact, it wasn't until  
9 Mr. Lustgarten's November 4th deposition in which  
10 Mr. Lustgarten testified he had deleted his text  
11 message -- he had the 30-day auto-delete function on  
12 for his text messages.

13 MSGE also concealed the fact that  
14 Mr. Lustgarten had, in fact, exchanged his phone in  
15 September for a new phone until December 15th. Once  
16 plaintiffs in the MSGN action found out about that, we  
17 followed up to find out what was the exact date in  
18 which Mr. Lustgarten had exchanged his phone and were  
19 then advised that it was nine days before it appears  
20 that MSGE had even reached out to Mr. Lustgarten.

21 In addition, on July 6th, plaintiffs  
22 requested text messages from Ms. Greenberg's custodial  
23 file. MSGE was supposed to produce text messages from  
24 Ms. Greenberg by October 4th. We did not receive

1 anything that day.

2                   On October 5th, the MSGN plaintiffs  
3 reached out to MSGE to ask what the status of the  
4 production was. MSGE explained the lack of production  
5 by stating MSGE searched Ms. Greenberg's text messages  
6 and none were responsive to the search terms.

7                   During a call later that day, my  
8 co-counsel pointed out that there are text exchanges  
9 between Ms. Greenberg and one of the special committee  
10 members for MSGN, Mr. Cohen, and asked why those text  
11 messages had not been produced, to which he was told  
12 they had identified them but de-duplicated those off  
13 of Mr. Cohen's custodial file and just didn't produce  
14 the subsequent productions.

15                   When we found out about  
16 Mr. Lustgarten's deletion, we decided -- the MSGN  
17 plaintiffs circled by with MSGE just to get a  
18 confirmation that Ms. Greenberg's texts were, in fact,  
19 identified and de-duplicated. It was at that time  
20 that we were then informed by MSGE that, in fact, the  
21 texts were not de-duplicated against Mr. Cohen's  
22 custodial file but, in fact, had been deleted. And as  
23 I mentioned earlier, during her deposition,  
24 Ms. Greenberg stated that -- while she testified

1 although she didn't delete anything merger related,  
2 she still maintained the habit of deleting her text  
3 messages and determined, based on her own business  
4 judgment, what was responsive in this case and what  
5 was not.

6           The pattern of discovery defaults  
7 appear to evidence MSGE had an outsized role in the  
8 discovery process and abused its role to spoliage,  
9 obfuscate, and obstruct relevant evidence. In the  
10 mind of the MSGN plaintiffs, the only plausible  
11 explanation -- this is the only plausible explanation  
12 as to why it took nearly two months after we requested  
13 an affidavit from senior Delaware counsel for  
14 Mr. DiCamillo's affidavit to be produced.

15           In closing, I believe the only item --  
16 what plaintiffs are seeking is we request an order  
17 that requires MSGE, their senior Delaware counsel, to  
18 provide a subsequent affidavit that provides a  
19 detailed explanation as to the steps taken to collect,  
20 retain, and identify relevant text messages. This  
21 includes, as Mr. Fleming had noted, the custodians  
22 that have not been identified by name.

23           MSGE has stated in paragraph 32 of  
24 Mr. DiCamillo's affidavit that they have not even

1 attempted to go back to see who has relevant text  
2 messages or who has deleted relevant text messages.  
3 And they point to this document collection  
4 questionnaire, which, based on the evidence at this  
5 point, there's no basis to rely on the answers to  
6 those questionnaires.

7                   We also ask that the affidavit state  
8 the specific reasons why Ms. Greenberg had been  
9 allowed to use her business judgment to determine what  
10 text messages are potentially relevant to this case,  
11 why MSGE's counsel misled plaintiffs about  
12 Ms. Greenberg's texts being de-duplicated from those  
13 produced by Mr. Cohen, and why Ms. Greenberg's  
14 deletion of text messages was not disclosed to the  
15 MSGN plaintiffs until November 22nd despite the fact  
16 that we asked for her texts in July.

17                   In addition, we would ask that the  
18 affidavit detail why Mr. Lustgarten was not asked  
19 about his text messages until approximately  
20 September 27th, despite MSGE having agreed no later  
21 than September 12th to produce his text messages and  
22 plaintiffs having requested those text messages a  
23 month prior.

24                   Unless Your Honor would like, I won't

1 go into why we're requesting the Barnett and  
2 Schoenfeld text messages. I think it's pretty  
3 straightforward.

4                   And as for the redeposing of  
5 witnesses, our request -- the MSGN plaintiffs' request  
6 was to have permission to redepose any previously  
7 deposed witness who was an author or recipient of text  
8 messages produced after the date of their deposition.  
9 At this point, we're going to keep -- we would like to  
10 keep it that broad because MSGE last night sent us an  
11 email confirming that they are running forensic scans  
12 on phones for those who were identified as deleting.  
13 We have no idea what, if anything, will be produced  
14 from that.

15                   In addition, as I mentioned, there are  
16 a universe of custodians that have not been asked  
17 about what relevant text messages they may or may not  
18 have, and we would like the opportunity, if additional  
19 text messages are produced related to witnesses we  
20 have already deposed, to redepose them on those  
21 subsequent texts.

22                   Thank you.

23                   THE COURT: Thank you.

24                   Mr. DiCamillo, it's clear to me that

1 this was an imperfect process. It's not totally clear  
2 to me how bad it was or what relief is appropriate, if  
3 any. I wanted to flag that for you so you don't spend  
4 a ton of time telling me how perfect the process was,  
5 and then you can deal with my concerns.

6 ATTORNEY DiCAMILLO: Thank you, Your  
7 Honor. I'm not going to stand here and tell Your  
8 Honor that it was a perfect process. It wasn't.  
9 Unfortunately, that's the case in many cases. We try  
10 to do our best. Sometimes we succeed; sometimes we  
11 don't. I think what -- and I won't try to convince  
12 Your Honor that it was a perfect process.

13 What I will say before focusing on the  
14 things that are still at issue is if you do look at  
15 the back-and-forth, what it reflects is plaintiffs  
16 asking questions -- the MSGN plaintiffs starting in  
17 July, the MSGE plaintiffs starting in October, both  
18 shortly before depositions were about to embark --  
19 about text messages, us responding, there being  
20 agreements and disagreements along the way.

21 THE COURT: I think there was a  
22 February email, too, about text messages long before  
23 that. I could be wrong.

24 ATTORNEY DiCAMILLO: I think there was

1 an initial one in February. I think the heart of the  
2 discussion happened early in July extending into  
3 October.

4 And what there was was an attempt to  
5 answer their questions. And we tried to answer their  
6 questions along the way. We had to do investigation  
7 along the way. And we continued to go back and forth.  
8 We have now -- with respect to particular custodians,  
9 we've agreed to either produce or do forensic  
10 examinations on all of the custodians that they have  
11 requested, with the exception of Barnett and  
12 Schoenfeld, which we'll talk about.

13 We've agreed to do the forensic  
14 investigation. We've provided the affidavit from  
15 Epiq, provided my affidavit that explains what  
16 happened. They may not like what happened. But the  
17 point of the affidavits was to explain what happened.  
18 We've explained what happened. They may have  
19 additional questions. And if they ask us additional  
20 questions, we will answer those questions.

21 THE COURT: Out of curiosity, who were  
22 the four custodians who didn't return the emails?

23 ATTORNEY DiCAMILLO: I don't know for  
24 sure. I can find that out. But they were none of the

1 people that are at issue. I did ask that question.  
2 But I can find out the answer to Your Honor's  
3 question.

4                   So we've heard that they are going to  
5 make some motion for spoliation and adverse  
6 inferences. I fully expect that they will do that,  
7 and we can deal with that at the appropriate time.  
8 What I want to focus on this afternoon -- and,  
9 obviously, I'll answer any of Your Honor's  
10 questions -- is on what remains for this motion to  
11 compel.

12                   And as far as I can tell, based on  
13 letters and emails received and argument today, there  
14 are a few things that still remain.

15                   One is the production of a chart with  
16 respect to text messages and searching for text  
17 messages. We have -- they've requested a chart for  
18 every one of the 39 custodians in the case even though  
19 we've focused for the past few months on specific  
20 people. But now they are looking for a chart for  
21 everybody, many of whom were not senior officers of  
22 either company. The demand is burdensome but not  
23 proportional to their stated need of understanding  
24 what happened with MSGE's text messages collection.



1 We've provided information. As I said, if they have  
2 additional questions, we will endeavor to answer them.

3 Also, we've already given them a  
4 chart. It's found in our opposition to the MSGE  
5 plaintiffs' motion at Exhibit X. It's also found in a  
6 couple other places. But it details custodians from  
7 whom text messages have been collected, search  
8 protocols, date ranges, a hit report, and dates on  
9 which the texts were produced. We also provided the  
10 15-page affidavit from Epiq and my 20-page affidavit.

11 It's not clear to me what else they --  
12 I know they want it for every other custodian, so I  
13 understand that. But with respect to the custodians  
14 that they physically asked about, it's not clear to me  
15 what else they want. Mr. Tucker says he wants a  
16 detailed explanation of the process. I think we've  
17 given that. As I said, they may not like it, but  
18 we've provided the facts.

19 So in terms of a motion to compel, we  
20 think the chart is unwarranted, given the information  
21 that we have given them both informally and through  
22 the affidavits.

23 There's also the request to redepose  
24 witnesses. Until today, there was no attempt to

1 specifically identify what witnesses they wanted and  
2 on what topic. To his credit, Mr. Fleming did  
3 identify two things that they wanted today:  
4 Mr. FitzPatrick and Mr. Seibert. Now that we have  
5 those specific requests, I'm certainly happy to take  
6 that back to the client and discuss that and have a  
7 discussion with Mr. Fleming about those witnesses.

8           Mr. Tucker's position is that they  
9 want a blanket order being able to redepose any  
10 witness who has produced text messages, but they have  
11 not -- they have identified a few text messages that  
12 have been produced. None of them are really about  
13 earth-shattering topics.

14           And if you look at -- and focusing  
15 back on whether there's been spoliation or not. There  
16 have been text messages produced from other  
17 custodians, and that's how they've been able to  
18 determine that certain of the MSGE custodians texted.  
19 They have those text messages, and they really haven't  
20 articulated how those text messages are not cumulative  
21 of the thousands and thousands and hundreds of  
22 thousands of pages of documents that have already been  
23 produced through emails and what they specifically  
24 need for deposition. If we have requests like that,

1 we can consider them.

2           As I said, Mr. Fleming did make two  
3 specific requests today, which we will consider. But  
4 we don't think it's appropriate to have a blanket  
5 order that just says they get to redepose any witness  
6 they want just because a text message was produced,  
7 particularly given when they started asking about text  
8 messages.

9           And I think the final issue is  
10 Ms. Barnett and Mr. Schoenfeld. Mr. Schoenfeld is a  
11 litigation lawyer. The MSGE plaintiffs claim that he  
12 was charged with pulling together work that MSGE  
13 management had done on air rights. That's true, but  
14 they received air rights documents. They have made no  
15 demonstration of why they need text messages from a  
16 litigation lawyer about a topic on which they received  
17 discovery.

18           The MSGN plaintiffs argue that  
19 Mr. Schoenfeld is an influential MSGE executive who  
20 worked on problems with both Sphere costs and with  
21 MSGE's credit quality stemming from the COVID-19  
22 pandemic, but they have not alleged that  
23 Mr. Schoenfeld was involved in Sphere cost estimates  
24 and disclosures. They really only point to

1 Mr. Schoenfeld's involvement in the Sphere at all  
2 after the transaction was signed, and his only  
3 purported involvement related to costs already  
4 incurred, not the estimates the plaintiffs claim are  
5 central to this case.

6 And I'll point out that Mr. Schoenfeld  
7 was not an identified custodian in this document, and  
8 neither was Ms. Barnett. So they haven't made any  
9 showing as to why they'd need his text messages in  
10 particular and that any text messages are likely to  
11 shed new evidence that they don't already have.

12 Really the same with Ms. Barnett.  
13 She's also a lawyer. She was involved with the  
14 post-signing disclosures. Her superiors, Scott  
15 Packman and Mark Cresitello, are text message  
16 custodians. Plaintiffs point to one pre-signing text  
17 that she was on. They also point to the fact that she  
18 was "the baby-sitter of the board," and they also  
19 argue that she was tracking the Sphere costs.

20 Whether or not she was tracking the  
21 Sphere costs really is irrelevant. They have not  
22 alleged that she was involved in approving the Sphere  
23 cost estimates, drafting disclosures for the Sphere  
24 cost estimates, or presenting Sphere cost estimates to

1 the board. Whether she collected documents to  
2 transmit to another MSGE custodian, Mr. Packman, is  
3 irrelevant to this action. It's also irrelevant  
4 whether she was "the baby-sitter of the board." That  
5 phrase was used, but all it implies is she was  
6 involved in scheduling board meetings, and that's what  
7 she meant.

8                   So there's been no demonstration that  
9 she has any noncumulative -- or that she's likely to  
10 have any noncumulative evidence. And as we indicated  
11 in my affidavit, her cell phone has been wiped. So we  
12 think it's unlikely there's any text messages on her  
13 phone.

14                   THE COURT: Let me pause and say the  
15 term "baby-sitter" seems to be -- you seem to be  
16 narrowly defining that. What's the record basis for  
17 the notion that it just means scheduling? In my  
18 world, as a mother, "baby-sitter" implies keeping  
19 people from harm as well.

20                   ATTORNEY DiCAMILLO: I agree with  
21 that.

22                   If you look at the text, it certainly  
23 doesn't imply anything other than scheduling meetings  
24 and organizing meetings, getting people together for

1 meetings. And certainly we've talked to the client,  
2 and that was her role, organizing meetings. And we've  
3 indicated what her role was.

4 So that's the basis for the position  
5 that -- there's really no evidence that "baby-sitter"  
6 means anything other than acting in an administrative  
7 function and scheduling and organizing board meetings.

8 Just in conclusion, Your Honor,  
9 there's various questions that they say they want  
10 answered. I believe that my affidavit and the Epiq  
11 affidavit answer all, if not most, of those questions.  
12 And as I said, to the extent that there are -- they  
13 have specific questions based on my affidavit, they  
14 should ask them, and we will endeavor to answer them.  
15 But we don't think it's necessary to compel a further  
16 affidavit from me or anyone else.

17 With that, given the remaining -- I  
18 just don't think there's anything left to compel here,  
19 Your Honor. They will have their opportunity to argue  
20 that there's been spoliation and that there are -- may  
21 be consequences that flow from that, and we can argue  
22 that at the appropriate time. Otherwise, the motions  
23 that they brought here today should be denied.

24 THE COURT: Thank you.

1                   ATTORNEY DiCAMILLO: Thank you, Your  
2 Honor.

3                   THE COURT: So you are free to  
4 respond, Mr. Fleming and Mr. Tucker. I'm going to  
5 give you an indication of what I'd like to see happen  
6 first.

7                   I'm going to take these two motions  
8 under advisement. What I'd like to see happen before  
9 the end of the day tomorrow -- so midnight tomorrow --  
10 is the plaintiffs confer on a joint form of order that  
11 will identify what remains of their requests for  
12 relief because it's been a moving target. I just need  
13 you to put a fine point on what specifically you are  
14 asking for.

15                  I'd then like for Mr. DiCamillo to  
16 take 24 hours to look at what you are asking for and  
17 determine whether it's stuff he's already agreed to  
18 give or which he would have been willing to give had  
19 the discussion occurred before today.

20                  Then, Mr. DiCamillo, you can write to  
21 me and let me know your position on the form of order  
22 proposed. I'll then take those documents and continue  
23 thinking about what the appropriate outcome is as to  
24 these two motions.

1                   ATTORNEY DiCAMILLO: Can I just ask  
2 one question on that, Your Honor?

3                   THE COURT: Sure.

4                   ATTORNEY DiCAMILLO: The plaintiffs  
5 are to confer about a form of order. Are they then  
6 supposed to submit that to Your Honor or just to me?

7                   THE COURT: How about they just send  
8 it to you. That way you can decide what remains that  
9 you are willing to give or what you've already agreed  
10 to give. And then you can all submit whatever is left  
11 of the dispute by midnight on Thursday.

12                   So does that process make sense to  
13 you, Mr. DiCamillo?

14                   ATTORNEY DiCAMILLO: It certainly  
15 makes sense to me, Your Honor.

16                   ATTORNEY FLEMING: I think it makes  
17 sense. There are slightly different requests between  
18 the two motions, so we might identify them as MSGE  
19 plaintiffs or as MSGN.

20                   THE COURT: I would appreciate that.  
21 But if there are overlapping requests, that both sets  
22 of plaintiffs are requesting this, the Entertainment  
23 plaintiffs only are requesting this, the Networks  
24 plaintiffs only are requesting this, that would be



1 good.

2 ATTORNEY TUCKER: We have no objection  
3 to that.

4 THE COURT: Thank you. Do you want to  
5 make some points on reply, Mr. Fleming? I didn't mean  
6 to cut you off.

7 ATTORNEY FLEMING: Sure. I'm aware  
8 that we have some other stuff to talk about today and  
9 a short time period.

10 Again, I heard a couple responses to  
11 this idea that we started asking in October. I think  
12 Your Honor has got it. Exhibit 6 to our motion is a  
13 February 18th email. Our document requests defined  
14 "documents" to include text messages. We didn't get  
15 even answers to those document requests until January.  
16 We have been asking about texts from the very  
17 beginning of the case. It wasn't until the fall of  
18 last year that we actually had evidence to show that  
19 MSGE's representations in the interrogatory that there  
20 were no texts were false. But the idea that we have  
21 not been asking for texts for every single MSGE  
22 custodian is not supported by the record.

23 Why we need a chart from all  
24 custodians? Because they never asked, which we

1 learned on Friday. They had an obligation when they  
2 served that interrogatory response representing that  
3 none of those custodians had texts as a possible  
4 custodial source -- they should have talked to each  
5 and every one of those people. It's not a burden to  
6 now go back and do what they should have done more  
7 than a year ago. That's on the chart.

8                   On the redeposition. It has been a  
9 moving target because we've been learning new things  
10 since we filed the motion and since the briefing was  
11 complete. The request was always for redepositions of  
12 witnesses whose texts were produced after their  
13 depositions. It now appears, and it should have been  
14 pretty obvious to MSGE, that the only people that  
15 seems to apply to are FitzPatrick and Seibert.

16                   Currently under the schedule, rebuttal  
17 expert reports are due January 30th. So getting  
18 kicked back into a meet-and-confer process where they  
19 go talk to the client to see if maybe FitzPatrick and  
20 Seibert would agree to this -- we've been asking for a  
21 redeposition of FitzPatrick both on texts and on  
22 30(b)(6) for months. It would be great if we could  
23 get that to incorporate in the rebuttal report rather  
24 than having it sucked up into a meet-and-confer

1 process.

2 And then, finally, as to Schoenfeld  
3 and the fact that he wasn't originally identified as a  
4 custodian. True. But again, we're confronting a  
5 scenario where ten custodians have deleted texts.

6 So I think as Your Honor recognized in  
7 the *Twitter v. Musk* case, when you have spoliation,  
8 that requires going out and doing things -- maybe it's  
9 a broader collection and protection of texts either  
10 from other custodians or without keywords or something  
11 to account for the fact that there has been spoliation  
12 and deletion. So maybe Mr. Schoenfeld wasn't  
13 originally a custodian, but through his texts, maybe  
14 we would be able to get text messages with another  
15 custodian who deleted theirs.

16 That's all I have, unless Your Honor  
17 has questions.

18 THE COURT: I do not. Thank you.

19 ATTORNEY TUCKER: I'm going to  
20 piggyback off Mr. Fleming to keep this short again.

21 In addition, for Mr. Schoenfeld, he  
22 was also identified in no less than five  
23 interrogatories as having relevant information related  
24 to the planning and structuring of the transaction,

1 providing and requesting diligence or evaluation  
2 materials, and other matters of providing public  
3 disclosures and drafting proxies. They identified him  
4 as relevant. I don't know why now they are claiming  
5 he's not.

6 And just to circle back, Mr. DiCamillo  
7 mentioned "noncumulative" several times as to reasons  
8 why redepositions should not be allowed.  
9 Noncumulative is not the standard for discovery. So I  
10 would not put much weight behind that. Also, how do  
11 we know it's not cumulative when so much has been  
12 destroyed or we don't know what's been destroyed and,  
13 you know, to the point of not speaking with other  
14 custodians, what hasn't been produced yet.

15 Thank you.

16 THE COURT: Thank you.

17 All right. Next motion.

18 ATTORNEY ALBERT: Good afternoon, Your  
19 Honor. It's a pleasure to be before the Court again.  
20 We are here now on plaintiffs' motion to compel  
21 additional Rule 30(b)(6) testimony. I can tell you,  
22 Your Honor, that plaintiff does not relish having to  
23 bring yet another motion to compel in this matter.  
24 But I think, as Your Honor has recognized, the

1 discovery process in this action has been, let's  
2 charitably say, less than optimal, and plaintiff is  
3 simply striving to present this Court with a complete  
4 and accurate factual record for trial.

5 As Your Honor is well aware, a  
6 Rule 30(b)(6) deposition is very different than a  
7 deposition on an individual defendant's personal  
8 knowledge. A Rule 30(b)(6) deposition is not directed  
9 at an individual but, rather, at an organization. In  
10 this case, it's Madison Square Garden Entertainment.

11 As the Court of Chancery rule states,  
12 a person designated as a Rule 30(b)(6) deponent "shall  
13 testify as to matters known or reasonably available to  
14 the organization."

15 As the case law indicates, this  
16 requires a different degree of preparation than simply  
17 preparing for a deposition based on the deponent's  
18 personal knowledge, especially where, as here, MSGE  
19 chose to designate one deponent across numerous topics  
20 and where Mr. FitzPatrick was clearly not the most  
21 knowledgeable person concerning those topics.

22 The Court's colloquy in *Fitzgerald v.*  
23 *Cantor*, which is at 1999 WL 252748, I think, is quite  
24 instructive on this matter. As the Court stated,

1 "Another approach is for an organization to designate  
2 as a witness a person or persons from within the  
3 organization who may not be the most knowledgeable on  
4 the matters set forth in the subpoena and to prepare  
5 the witness or witnesses to testify on the  
6 corporation's behalf in response to questions on each  
7 matter set forth in the subpoena. ... This approach  
8 most likely will require more preparation on behalf of  
9 the designated witnesses." That's at page 3 of the  
10 opinion.

11                   Here, however, just one week before  
12 his scheduled individual deposition, MSGE chose to  
13 designate Mr. FitzPatrick as its 30(b)(6) designee.  
14 This was despite the fact that Mr. FitzPatrick had  
15 been fired by Mr. Dolan effectively in late 2021 and  
16 ended his official tenure with MSGE in April 2022 --  
17 that's at pages 343 and 344 of Mr. FitzPatrick's  
18 deposition -- and no longer had any contact with his  
19 former MSGE colleagues or any access to MSGE's  
20 materials. As a result, Mr. FitzPatrick's ability to  
21 prepare and testify as to matters known or reasonably  
22 available to MSGE was severely curtailed.

23                   Indeed, Mr. FitzPatrick testified that  
24 his only preparation for his Rule 30(b)(6) deposition

1 was to meet with Sullivan & Cromwell for two days  
2 directly after he was designated as MSGE's  
3 Rule 30(b)(6) witness to review a circumscribed  
4 selection of documents curated exclusively by Sullivan  
5 & Cromwell. That's at pages 20 to 21 of  
6 Mr. FitzPatrick's deposition. I believe this, in and  
7 of itself, calls into question the adequacy of  
8 Mr. FitzPatrick.

9 But to further highlight the lack of  
10 earnest preparation demonstrated by Mr. Fitzpatrick  
11 for his 30(b)(6) deposition, when initially presented  
12 with a 30(b)(6) deposition notice at his deposition,  
13 Mr. FitzPatrick's response as to whether he had seen  
14 the document before was "No." After I began to  
15 explain what the document was to Mr. FitzPatrick, he  
16 recanted and, almost as a question, turned to his  
17 counsel and said, "This is the one you guys showed me  
18 the other day, yes?"

19 Mr. FitzPatrick's testimony did not  
20 get any better concerning his preparation for the  
21 30(b)(6) topics for which he was designated. When  
22 asked what he had done to prepare for Topic 1 in the  
23 30(b)(6) notice, Mr. FitzPatrick responded that he  
24 "looked at the projections." That's at page 23 of his

1 deposition.

2                   When asked if he had any conversation  
3 with anyone at MSGE to prepare for Topic 1, he  
4 responded, "No."

5                   When asked if his answer as to how he  
6 prepared for all the other topics he had been  
7 designated for would be the same as his answer for  
8 Topic 1, he answered, "Yes." That's also at page 23  
9 of his deposition.

10                  Based on Mr. FitzPatrick's testimony,  
11 I don't think that MSGE gets the benefit of the doubt  
12 that it attempted to adequately prepare its corporate  
13 designee, Your Honor. Considering the foregoing, it  
14 is unsurprising that the thrust of MSGE's opposition  
15 is generally to sidestep these preparation issues and  
16 argue that Mr. FitzPatrick did a good enough job in  
17 the topics he was designated for, so effectively no  
18 harm, no foul.

19                  Well, plaintiff takes issue with  
20 Mr. FitzPatrick's adequacy with regard to numerous  
21 topics, as outlined in plaintiffs' briefing. I intend  
22 to focus my presentation today on Topic 7 regarding  
23 MSGE's valuation of air rights over Madison Square  
24 Garden, where Mr. FitzPatrick's lack of adequacy and



1 preparation is abundantly clear because  
2 Mr. FitzPatrick was simply not aware of MSGE's  
3 valuation analyses of MSG's air rights. And it  
4 appears clear that the documents concerning the  
5 valuation of MSG's air rights, which were only  
6 produced to plaintiff after Mr. Fitzpatrick's  
7 deposition, were never put before Mr. FitzPatrick in  
8 preparation for his deposition. As a result,  
9 Mr. FitzPatrick's testimony regarding MSGE's valuation  
10 of MSG's air rights was unknowledgeable, incomplete,  
11 and factually inaccurate.

12 I'd like to start with  
13 Mr. FitzPatrick's testimony concerning MSGE's  
14 valuation of MSG's air rights. In response to the  
15 question "While you were CFO of Madison Square Garden  
16 Entertainment, did management ever attempt to value  
17 Madison Square Garden air rights?" Mr. FitzPatrick  
18 testified, in his individual capacity, "I did not. I  
19 was not involved in the valuation. I did not do it,  
20 no. I can't say somebody did it within the  
21 organization, but I was never involved." That's at  
22 page 172 of his deposition.

23 This testimony alone demonstrates  
24 Mr. FitzPatrick's inadequacy as an MSGE designee on

1 the topic of the valuation of air rights and shows he  
2 did nothing to inform himself on the topic beyond his  
3 individual knowledge, which he explicitly recognized  
4 was incomplete.

5           *Fitzgerald v. Cantor* makes abundantly  
6 clear that this does not satisfy the standard for a  
7 Rule 30(b)(6) designee. As it states, "the deposition  
8 testimony should be based on the organization's full  
9 knowledge and the information readily available to it  
10 and not limited to the witnesses' personal first-hand  
11 knowledge of the matters at issue." That's at page 2  
12 of *Fitzgerald v. Cantor*.

13           Ultimately, in *Fitzgerald*, the Court  
14 held under similar circumstances that the CFO 30(b)(6)  
15 designee was inadequate in part because he failed to  
16 speak to anyone at the company concerning the topics  
17 for which he was not the most knowledgeable and only  
18 relied on his outside counsel.

19           Later in his deposition,  
20 Mr. FitzPatrick subsequently attempted to testify on  
21 behalf of MSGE as a 30(b)(6) witness in connection  
22 with the air rights topic, which resulted in entirely  
23 factually inaccurate testimony. At the deposition, I  
24 asked: "[I]s your testimony that you don't know

1 during your time period as CFO whether anyone  
2 attempted to value the air rights, or you just didn't  
3 discuss the value of the air rights with anyone during  
4 your time as CFO?"

5 To which Mr. FitzPatrick responded:  
6 "My testimony is that while I was CFO there -- not at  
7 the executive level was there a discussion of the --  
8 how to value, and value those air rights."

9 However, as demonstrated by  
10 Exhibits A, B, and C to plaintiffs' reply brief, there  
11 were extensive discussions concerning the valuation  
12 and monetization of Madison Square Garden's air rights  
13 in 2020 and 2021 at the executive level, including,  
14 among others, Mr. Lustgarten, the company's president;  
15 Mr. Burian, the executive vice president of corporate  
16 development for MSGE; Mr. Packman, the company's  
17 general counsel; and Colin Kelly, the vice president  
18 of corporate development and Mr. FitzPatrick's direct  
19 report.

20 Now, Mr. FitzPatrick's inaccurate  
21 testimony is not his fault *per se* because for some  
22 unknown reason, which plaintiff would certainly like  
23 to investigate in a proper 30(b)(6) deposition,  
24 despite being the company's CFO, Mr. FitzPatrick was

1 studiously left off the valuations and analyses done  
2 by MSGE management and his third-party consultants in  
3 valuing Madison Square Garden's air rights that were  
4 performed in 2020 and 2021 during his tenure.

5                   However, this is exactly the reason  
6 that MSGE knew or should have known that  
7 Mr. FitzPatrick was an inadequate 30(b)(6) deponent  
8 with respect to this topic. And for him to have  
9 testified competently, he would have needed to be  
10 extensively prepared regarding the company's air  
11 rights valuations and analyses.

12                   Defendants make three arguments  
13 concerning Mr. FitzPatrick's adequacy regarding the  
14 air rights topics. So let's go through each of those  
15 in turn.

16                   First, MSGE points to five pieces of  
17 Mr. FitzPatrick's testimony regarding air rights that  
18 it purports demonstrate that he was an adequate  
19 designee.

20                   First, MSGE cites that Mr. FitzPatrick  
21 testified that "he did not attempt to value the air  
22 rights during his tenure." This is wholly irrelevant  
23 to his adequacy as a 30(b)(6) designee and purely goes  
24 to his individual knowledge.

1                   Second, MSGE cites that  
2 Mr. FitzPatrick testified that management "talked  
3 about that they had value. We didn't talk about how  
4 much they were valued at."

5                   This testimony is simply inaccurate,  
6 as demonstrated by the exhibits attached to  
7 plaintiffs' reply brief. Management did discuss the  
8 value of air rights, receiving a valuation from  
9 third-party consultants that the MSG air rights were  
10 worth \$1.1 billion discounted back to a present value  
11 of 290 to \$360 million. That's at Exhibit C at  
12 MSGE 429435 to 436, which is attached to our reply  
13 brief. Mr. Fitzpatrick just wasn't privy to those  
14 discussions.

15                   Third, MSGE cites that Mr. FitzPatrick  
16 testified that he was informed that there was a  
17 discussion with a third party, Vornado, of potentially  
18 monetizing those assets, but the "transaction never  
19 came about." Plaintiff believes this is in reference  
20 to certain discussions MSGE had with Vornado in 2017  
21 and 2018 which were not the subject of the 30(b)(6)  
22 deposition. And Mr. FitzPatrick's knowledge of those  
23 discussions does not mean that he was adequately  
24 prepared to discuss the company's consideration of the

1 valuation of MSG's air rights in 2020 and 2021.

2 Fourth, MSGE cites that  
3 Mr. FitzPatrick testified "there was never a  
4 discussion about a tangible opportunity to monetize  
5 them" during his tenure at MSGE because "there was no  
6 market for them".

7 Again, this is simply not accurate.  
8 There were discussions surrounding an analysis that  
9 management retained third-party consultants to do in  
10 June 2020 regarding a potential monetization of the  
11 air rights through a sale of the Hulu Theater to the  
12 State of New York in connection with the modernization  
13 of Penn Station. That's also Exhibit C, which is  
14 attached to plaintiffs' reply brief.

15 Moreover, again in July of 2021, just  
16 after the merger closed, management began discussing  
17 potential monetization scenarios and analysis for the  
18 air rights at the direction of Andrew Lustgarten and  
19 Jim Dolan, as detailed in Exhibit A to plaintiffs'  
20 reply brief at MSGE 00426983. However, once again,  
21 Mr. FitzPatrick was not privy to these discussions.

22 I would further point out, Your Honor,  
23 that since the filing of plaintiffs' reply brief on  
24 December 6th of last year, MSGE produced another

1 approximately 90 air rights-related documents on  
2 December 27th that show throughout July, August, and  
3 September of 2021 significant additional analysis by  
4 management of the value of the air rights and  
5 potential monetization. These documents detail that  
6 in August 2021, the company's outside consultants  
7 stood by their valuation of MSG's air rights within a  
8 range of \$275 to \$375 per square foot, which was  
9 consistent with the valuation analysis those  
10 consultants presented to MSGE in June and July of  
11 2020.

12                   The fifth and final piece of testimony  
13 that MSGE cites is Mr. FitzPatrick's testimony that  
14 "at the executive level" there was not a discussion of  
15 valuing the air rights during his tenure. As I have  
16 already addressed, this testimony is clearly  
17 uninformed and inaccurate.

18                   MSGE's second argument is nothing more  
19 than a *post hoc* semantical justification for failing  
20 to adequately prepare Mr. FitzPatrick on the topic of  
21 air rights. MSGE argues that Topic 7 sought testimony  
22 regarding any valuation of the air rights over Madison  
23 Square Garden at the time of the merger, suggesting  
24 that this absolved MSGE of needing to prepare

1 Mr. FitzPatrick for any valuations of the air rights  
2 performed by MSGE that were known at the time of the  
3 merger and its negotiations.

4 MSGE further argues that the relevant  
5 period for the 30(b)(6) notice was from November 1st,  
6 2020, through the close of the merger and then  
7 states -- I would say disingenuously -- the plaintiff  
8 pointed to no valuations of the MSG air rights done  
9 during the relevant period, which, of course,  
10 plaintiff could not have done because MSGE had  
11 withheld these air rights valuation documents at the  
12 time and only produced them after plaintiff filed yet  
13 another motion to compel those documents.

14 There are several problems with MSGE's  
15 argument.

16 First, discovery is not supposed to be  
17 a game, Your Honor. We had sought documents related  
18 to air rights for months. Had MSGE not improperly  
19 withheld those documents, then plaintiffs' 30(b)(6)  
20 notice would have obviously addressed the time period  
21 under which those valuations occurred. But moreover,  
22 these valuations were pending during the merger  
23 negotiations and the relevant period, as made clear by  
24 the documents themselves.



1                   Second, MSGE never objected to lines  
2 of questioning of Mr. FitzPatrick that sought his  
3 knowledge as a 30(b)(6) deponent during his tenure at  
4 the company relating to the valuation of air rights,  
5 and their failure to do so at the time should operate  
6 as a waiver to making this argument now.

7                   It should not be the case that the  
8 record before the Court contains inaccurate testimony  
9 because Mr. FitzPatrick was not apprised of these  
10 valuation analyses in his preparation for his 30(b)(6)  
11 deposition. If MSGE made a conscious decision not to  
12 share these documents with Mr. FitzPatrick in his  
13 deposition because MSGE purports to have taken a  
14 narrow reading of the scope of the 30(b)(6) notice and  
15 these documents purportedly fell outside of that  
16 scope, then I think MSGE must make that affirmative  
17 representation to Your Honor on the record today  
18 rather than merely implying it, as it has done in the  
19 opposition brief.

20                   Third, Mr. FitzPatrick testified as to  
21 his knowledge of the Vornado negotiations in 2017 and  
22 2018, which was well outside of the scope of the time  
23 period for the 30(b)(6) notice. And not only did MSGE  
24 not object to that, MSGE cites that in its opposition

1 as a justification for why Mr. FitzPatrick was  
2 adequately prepared. MSGE cannot have it both ways.

3 MSGE's third and final argument, Your  
4 Honor, is that plaintiff obtained limited testimony  
5 from certain other witnesses concerning MSG's air  
6 rights and, thus, apparently plaintiff was not  
7 prejudiced by Mr. FitzPatrick's lack of knowledge.  
8 This argument is specious at best.

9 First, the testimony of Mr. Burian,  
10 Mr. Seibert, and Mr. Lhota, in their individual  
11 capacities, is no substitute for a 30(b)(6) deposition  
12 seeking MSGE's knowledge regarding the valuation of  
13 MSG's air rights.

14 Second, with respect to Mr. Seibert  
15 and Mr. Lhota, who do not appear on any of the  
16 communications concerning the valuation of air rights,  
17 they, just like Mr. FitzPatrick, would not have been  
18 able to provide testimony concerning MSGE's valuation  
19 of the MSG air rights.

20 With respect to Mr. Burian, he was  
21 aware of MSGE's valuation analyses in 2020 and 2021 --  
22 he's on these documents -- and he appears to have  
23 affirmatively chosen not to volunteer that information  
24 in his deposition in an individual capacity. Thus,

1 his testimony on air rights is inadequate to satisfy  
2 MSGE's obligation to provide information known or  
3 readily available to MSGE.

4 My colleague Mr. Fleming kind of  
5 raised this in his rebuttal, but the final point I  
6 would make, Your Honor, is that there is real  
7 prejudice being suffered by plaintiff in connection  
8 with the air rights issue as a result of plaintiffs'  
9 inability to gain a full understanding of MSGE's  
10 valuation analyses of MSG's air rights and efforts to  
11 monetize them in 2020 and 2021. As Mr. Fleming  
12 pointed out, plaintiffs' rebuttal report to the expert  
13 report of Susan Fine concerning MSGE's ability to  
14 monetize MSG's air rights is due on January 30th.  
15 While plaintiffs' rebuttal expert can rely on all  
16 these newly produced documents without testimony of a  
17 duly designated 30(b)(6) witness to provide context to  
18 these documents, plaintiffs' rebuttal expert's opinion  
19 risks incompleteness and inaccuracy.

20 For this reason, plaintiff  
21 respectfully submits that the Court order a 30(b)(6)  
22 deponent knowledgeable of MSG's air rights valuation  
23 analyses be designated and that their deposition be  
24 scheduled within the next seven days so the plaintiff

1 may incorporate that testimony into plaintiffs'  
2 rebuttal expert's report.

3 If Your Honor would like, I can go  
4 into the other inadequacies in Mr. FitzPatrick's  
5 testimony concerning the other 30(b)(6) topics, but I  
6 believe those issues are well laid out in the  
7 briefing.

8 THE COURT: So you covered Topic 7,  
9 but not Topics 1, 3, and 8; is that correct?

10 ATTORNEY ALBERT: Yeah, I focused on  
11 Topic 7. I mean, I'm happy to talk about the other  
12 topics --

13 THE COURT: I just want to make sure  
14 I'm following. That's fine.

15 ATTORNEY ALBERT: Mr. FitzPatrick had  
16 no knowledge of what management conveyed to the  
17 special committee's financial advisors regarding  
18 valuation assumptions, which was primarily done by  
19 Mr. Kelly. He never spoke to Mr. Kelly, so he didn't  
20 have any idea of what that information was and  
21 couldn't testify to it. He had limited if no  
22 information regarding the company's tax treatment and  
23 use of its net operating loss carryforwards with  
24 respect to MSGE's interest in Tao nightclubs and how

1 the NOLs were applied over the projection period. He  
2 wasn't prepared for the basis for the significant drop  
3 in revenue in MSGE's final-year projections heading  
4 into the terminal period, which obviously impacts the  
5 valuation. And he also wasn't prepared to address the  
6 company's projections related to the Las Vegas Sphere  
7 and what management communicated to the special  
8 committee concerning those projections.

9 I would rest there, Your Honor, unless  
10 you have any questions.

11 THE COURT: I have no questions.  
12 Thank you.

13 How long of a deposition do you think  
14 you'd need?

15 ATTORNEY ALBERT: I would say  
16 certainly under three hours.

17 THE COURT: Thank you.

18 ATTORNEY SCHWARTZ: Your Honor,  
19 Matthew Schwartz from Sullivan & Cromwell.

20 If I may, Your Honor, I have a  
21 demonstrative. I hate to add to the paper you already  
22 have, but I hope this will help simplify things.

23 THE COURT: Sure. Pass it up.

24 ATTORNEY SCHWARTZ: So, Your Honor,

1 throughout the arguments today we've been called  
2 disingenuous and lots of other things. But I think  
3 what we're seeing right now is the attempt to sort of  
4 prejudice the Court on issues of fact by making  
5 arguments concerning discovery. I think it's  
6 inappropriate.

7 THE COURT: Isn't that the purpose of  
8 every discovery motion?

9 ATTORNEY SCHWARTZ: Yes, Your Honor,  
10 but it's not usually this transparent. And, of  
11 course, Entertainment, in this particular motion, is a  
12 nominal defendant. So the defendants that they are  
13 focusing on are not here to argue those merits. And  
14 in the Networks' case, we are a third party. So,  
15 again, the actual defendants are not here to defend  
16 themselves on those particular merits.

17 I will say that what we've heard a lot  
18 over here, especially as to air rights, which I'll get  
19 to, is completely inaccurate and ignores tremendous  
20 amounts of the testimony and the documents that have  
21 been presented in this particular litigation. Again,  
22 I'm not here arguing about that. That's for the  
23 defendants to argue. But I will address some of those  
24 inaccuracies based on the accusations that have been

1 made.

2                   The first thing I'd like to do is  
3 correct the record again as to one of the accusations  
4 against counsel that's been made in the papers.

5                   On the October 11th, 2022,  
6 meet-and-confer, parties agreed to narrow several of  
7 the topics. I think that's why Mr. Albert just  
8 completely skips over Topics 1, 3, and 8, because he  
9 knows that this narrowing is really harmful to his  
10 particular argument.

11                   Specifically, Entertainment explained  
12 to the plaintiffs that it could not produce a witness  
13 to testify to the financial projections made by  
14 Entertainment's special committee's financial advisors  
15 and its evaluations made by Entertainment's special  
16 committee's financial advisors. We weren't going to  
17 do a 30(b)(6) on what the financial advisors did. We  
18 couldn't do that. We were management. We have never  
19 said that the parties agreed that the 30(b)(6) witness  
20 did not need to be educated about what Entertainment  
21 management communicated to the special committee's  
22 financial advisors. We would not have done so,  
23 frankly, because nothing in the 30(b)(6) topics put us  
24 on notice that plaintiffs sought testimony about

1 management's communication with the special  
2 committee's financial advisors.

3           Second, Mr. FitzPatrick was properly  
4 prepared to give 30(b)(6) testimony on these topics.  
5 He met with outside and inside counsel twice. They  
6 reviewed numerous documents with him, and he was  
7 educated on topics to which he did not have personal  
8 knowledge. The fact that Mr. FitzPatrick did not  
9 speak to other current or former MSGE employees is not  
10 an issue. Mr. FitzPatrick was the CFO during the  
11 relevant period and so responsible for the process of  
12 putting together the financial projections on which  
13 the plaintiffs focus.

14           Furthermore, given the breadth of the  
15 topics -- and these are extraordinarily broad topics,  
16 Your Honor, without any actual detail in them -- it  
17 would have been impossible for Mr. FitzPatrick to know  
18 what questions to ask to other people.

19           So they complain about not knowing  
20 about the tax rate as an input -- one of the tax rate  
21 inputs as a particular model. These models have  
22 dozens of tabs and hundreds of different inputs. How  
23 is Mr. FitzPatrick supposed to sit there with any MSGE  
24 employee and actually go through every single model



1 and every single input and ask "what about this one?"  
2 "what about this one?" and then go off and memorize  
3 those and come into the 30(b)(6) testimony? That's  
4 not how a 30(b)(6) testimony works.

5 Mr. FitzPatrick testified for over  
6 13 hours, and they have come up with a handful of  
7 questions that they want, most of which are not in the  
8 topics that were noticed, are highly detailed, or were  
9 answered by Mr. FitzPatrick.

10 And, third, they are trying to infect  
11 this motion, again, with all sorts of merit stuff and  
12 with all sorts of stuff about texts. Obviously,  
13 Mr. FitzPatrick's texts do not go to his adequacy as a  
14 30(b)(6) witness. They might go to the issue that  
15 Mr. DiCamillo spoke about, about as an individual  
16 witness, but they don't go to him as a 30(b)(6)  
17 witness.

18 So, Your Honor, I'd like to go through  
19 the specific questions that plaintiffs complain about,  
20 because the devil is actually in the details on this.

21 So if Your Honor could turn to  
22 Slide 3, please. This is what Topic 1 is as modified  
23 by the meet-and-confer.

24 And if we go to Slide 4 and the next

1 few slides, they point to seven questions they believe  
2 show Mr. FitzPatrick was unprepared to testify on  
3 Topic 1. None of these is availing.

4 First, two of the questions do not  
5 fall within the topic. Plaintiff says that  
6 Mr. FitzPatrick should have been prepared to testify  
7 about whether management discussed its long-term  
8 projections or five-year projections for the Sphere  
9 with the special committee. But, again, Topic 1 asked  
10 only for financial forecasts or projections created by  
11 MSGE. It does not mention any discussions with the  
12 special committee even once. They are just reading  
13 their topic overly broadly and saying that anything  
14 that happens to do with anything involving the  
15 financial projections needed to be covered by  
16 Mr. FitzPatrick. That's not in their topic, and it's  
17 not reasonable to prepare a witness for this.

18 And while I'm talking about preparing  
19 a witness, the idea that a layperson, a nonlawyer, who  
20 when they sit down in a deposition and is shown a  
21 legal document, a 30(b)(6) deposition notice, and  
22 doesn't remember that that was one of many, many  
23 documents shown to that person during the time period,  
24 it's absolutely ridiculous to say that that means that

1 that person didn't see that notice or wasn't prepared.  
2 It's a typical thing that happens with witnesses, Your  
3 Honor. Anyone who has prepared a witness knows that  
4 that's what happens. The idea that this is some great  
5 piece of evidence that he wasn't prepared on is  
6 completely absurd.

7                   Second, several of these topics, if  
8 you go to Slide 5, are just too detailed to be  
9 reasonably within the notice of the broad topics.  
10 They complain that he did not recall the exact date on  
11 which the development of the fiscal year 2021 budget  
12 and long-term plan began and who decided that the  
13 long-term plan would cover five years. It's not clear  
14 from the face of the notice that plaintiffs sought  
15 testimony on this particular minutia. I mean, their  
16 topics are so broad, Your Honor, you could spend weeks  
17 and weeks trying to get everybody to cover everything  
18 to anticipate the questions that Mr. Albert asked  
19 during the deposition.

20                   In complaining that he didn't recall  
21 the exact timing of the development of the fiscal year  
22 '21 budget and the long-term plan, they ignore that he  
23 testified extensively about the development of the  
24 budget and the long-term plan. He explained the

1 bottom-up process for developing the long-term plan  
2 and the differences between the long-term plan and the  
3 budget.

4 That's what this is, Your Honor. He  
5 gave extensive testimony. He was there for 13 hours.

6 They also complain that he didn't know  
7 the exact reason for the drop in the revenue between  
8 fiscal year '24 and fiscal year '25 in the long-term  
9 projection and a 30 percent EBITDA limit in one of  
10 Entertainment's financial models. As he explained,  
11 these models are massive. They contain tens of tabs,  
12 hundreds of rows showing multiple inputs.

13 They contend that Delaware law  
14 requires us to prepare Mr. FitzPatrick and for him to  
15 prepare himself to know everything about all those  
16 inputs and anticipate what questions Mr. Albert is  
17 going to ask. That's not what Delaware law requires.  
18 This is not a memory contest, Your Honor.

19 And, third, despite their contentions,  
20 he actually responded to at least one of the  
21 questions. You can see this on Slide 6. This is  
22 specific. They say he didn't testify about how one  
23 quarter lag between Tao's financial reporting and  
24 Entertainment's reporting impacted the company's

1 long-term projections.

2 Not only did he directly answer the  
3 question, explaining that the lag "impacted the  
4 comparison in the growth ... not the numbers in the  
5 forecast," but he also testified that management  
6 adjusted the timing to remove the lag and how removing  
7 the lag allowed Entertainment to align Tao's revenues  
8 with Entertainment's revenues.

9 They might not like that answer, but  
10 it's clearly a prepared answer.

11 Topic 3, again, something Mr. Albert  
12 didn't cover. If you look at Slide 8, this is how  
13 this is modified after the meet-and-confer.

14 We can go to Slide 9. Nearly every  
15 question about which the plaintiff complains for  
16 Topic 3 was not within the notice of the topic. Of  
17 the eight questions that they cite as evidence that  
18 Mr. FitzPatrick was not prepared to respond to  
19 Topic 3, six are about what MSGE management told the  
20 special committee's financial advisors.

21 You can see them here, Your Honor.  
22 I'm not going to go through them, every single one of  
23 them, to spare the Court's time. But, again, this is  
24 not within the topic that was noticed.

1                   They try to rewrite the record in the  
2     reply and, for the first time, make new complaints  
3     about his testimony regarding management's views on  
4     these topics as opposed to what was said to the  
5     special committee's advisors about these topics. They  
6     asked him one question during those 13 hours about  
7     management's views of the perpetuity growth rate as  
8     calculated by the financial advisor to the special  
9     committee, and he responded that the growth rate was  
10    consistent with management's views. They didn't ask  
11    him about management's views about whether certain  
12    peer companies were appropriate, so they wouldn't have  
13    gotten that particular answer.

14                  They also didn't ask him whether  
15    management independently calculated a perpetuity  
16    growth rate or assessed appropriate peer companies.  
17    They merely asked whether management ever had  
18    discussions with the special committee about the  
19    advisors' perpetuity growth rates and the advisors'  
20    choice of peer companies and whether Mr. FitzPatrick  
21    had a personal belief as to whether that growth rate  
22    and those peer companies were appropriate.

23                  Your Honor, I could certainly go on.  
24    This is the basic idea for all these topics. I do --

1 because Mr. Albert spent a lot of time on Topic 7, I  
2 do want to talk about that. Obviously, what he was  
3 doing is making a merits argument on this topic, Your  
4 Honor. He didn't like the testimony that  
5 Mr. FitzPatrick gave. He didn't like the testimony  
6 that they have gotten from every single witness that  
7 they have asked about. But the testimony  
8 Mr. FitzPatrick gave was adequate, it was honest. And  
9 I'm going to go through it right now.

10 First, their concerns with his  
11 testimony are confusing. The notice asks for  
12 testimony about "Any valuation of the air rights over  
13 Madison Square Garden at the time of the Merger ...."

14 Mr. FitzPatrick testified, as  
15 Mr. Albert said, that when he worked at the company,  
16 there was never a discussion at the executive level  
17 about an opportunity to monetize the air rights  
18 because there was no market to do so. He reiterated  
19 that during his tenure as CFO, there was not even a  
20 discussion at the executive air rights about how to  
21 value -- at the executive level about how to value the  
22 air rights.

23 There's a lot of smoke and mirrors  
24 going on on the other side, Your Honor. It's not

1 clear what more they want about the air rights. They  
2 asked about the time of the merger, and  
3 Mr. FitzPatrick testified about that. The documents  
4 that they point to show that there were discussions  
5 about air rights in 2020, before the merger, and in  
6 2021, after the merger. There was no valuation of the  
7 air rights at the time of the merger, which, of  
8 course, is the topic that he was prepared on.

9                   The emails that they referenced from  
10 July 26th, 2021, postdate the merger by several weeks.  
11 They don't even mention efforts to value the air  
12 rights at the time of the merger.

13                   As they concede, other valuations were  
14 done in 2020, which was a full year before the merger.  
15 And what they don't tell Your Honor is that these  
16 valuations were done by third parties advising  
17 Entertainment.

18                   And that particular one noted that  
19 "we assume the parcel would not be sold for 25 to  
20 30 years ...." And it also states, consistent with  
21 Mr. FitzPatrick's testimony and the testimony of all  
22 other witnesses and documents produced by  
23 Entertainment, that the air rights "are valuable only  
24 to the extent that they can be monetized through



1 on-site development or sold to enable development on  
2 another site," which, given the current regulatory  
3 limitations and laws, cannot be done. And it explains  
4 that to monetize the air rights, the state would have  
5 to grant additional air rights and enable Madison  
6 Square Garden to monetize them from an off-site  
7 transfer.

8               So that the value of the potential air  
9 rights granted will depend not only on receiving  
10 approval from the state, but also on "the amount of  
11 air rights granted, [] the number of potential  
12 sites/buyers for the air rights, [] the likely use on  
13 the receiving sites, [and] [] the alternative options  
14 available to the buyers."

15               It's very clear, Your Honor, that what  
16 they are talking about, these numbers that they are  
17 calculating over here, again, which should be the  
18 subject of expert reports and testimony before Your  
19 Honor when the time is correct, not on a discovery  
20 motion -- they are not telling you the entire story,  
21 Your Honor. They are trying to make it seem like a  
22 humongous deal when, in fact, the laws and regulations  
23 prevent any monetization of the air rights right now.

24               There's testimony from lots of other

1 witnesses. Mr. Burian, who they said didn't testify  
2 about certain documents, he testified at length about  
3 this. He was asked multiple times about the air  
4 rights, and he gave the exact same testimony that I  
5 just gave, which, of course, the plaintiffs don't  
6 like.

7                   So, Your Honor, I don't really even  
8 know what to say about this. He testified for  
9 13 hours. If you look at the actual questions that  
10 they are concerned about as opposed to their attempts  
11 to argue the merits here, he answered all of these  
12 questions or they weren't in the topics that were  
13 noticed or they were just way too detailed to ask any  
14 30(b)(6) witness to reasonably answer.

15                   Thank you, Your Honor

16                   THE COURT: Thank you.

17                   ATTORNEY ALBERT: I'll be brief, Your  
18 Honor.

19                   I'm not sure how many times my  
20 colleague referenced 13 hours, but I certainly didn't  
21 depose Mr. FitzPatrick for 13 hours. It was a joint  
22 deposition between the MSGE plaintiffs and the MSGN  
23 plaintiffs. I went the first day; the MSGN plaintiffs  
24 went the second day. So it's not like I had this guy

1     hostage for 13 hours.

2                     Another remark that my colleague made  
3     was that MSGE is not a defendant here. Well, I'm  
4     pretty sure Your Honor is aware that MSGE is  
5     controlled by the Dolans. The Dolans are defendants,  
6     and they are the ones that are dictating strategy here  
7     for how MSGE is responding to discovery.

8                     There's some other things that he  
9     mentioned. You know, this idea about the special  
10    committee's financial advisors and that this was  
11    limited. We addressed that in our reply brief, Your  
12    Honor. We agreed that a 30(b)(6) designee from  
13    management would not be responsible for testifying  
14    about the valuation analyses done by the advisors.  
15    But as we explained in our reply, we specifically said  
16    that any communications between management and the  
17    advisor about management's views of the valuation  
18    assumptions and what was being communicated to the  
19    special committee's advisors was certainly within the  
20    purview of that topic. And Mr. Kelly had extensive  
21    communications with the special committee's financial  
22    advisors regarding valuation assumptions that  
23    Mr. FitzPatrick was totally unaware of.

24                     Then my colleague also said that, you

1 know, with these broad topics -- which I don't think  
2 they're that broad, Your Honor. I mean, they served  
3 my client with a 22-topic 30(b)(6) in a shareholder  
4 derivative action, where they are not even contesting  
5 the adequacy of my client, that was far broader than  
6 what I served -- than what we served on MSGE. And he  
7 says you can't know the minutiae of everything that  
8 could possibly be within the projections.

9 Well, if Mr. FitzPatrick isn't  
10 comfortable with the tax treatments of things, then  
11 Mr. FitzPatrick is not the right 30(b)(6) designee.  
12 Because as he explained in his testimony,  
13 Mr. D'Ambrosio could respond to all of these  
14 questions. So he either needs to talk to  
15 Mr. D'Ambrosio about tax treatment, or Mr. D'Ambrosio  
16 should be the one that's designated as the 30(b)(6)  
17 witness.

18 The next thing he said is that --  
19 again, he's talking about the models that -- you know,  
20 he couldn't be expected to know why revenue decreased  
21 in the last year of the projection period. That's a  
22 pretty big deal, the revenue of the company in the  
23 five-year model, why it decreased substantially right  
24 before the terminal period. I think actually that is

1 something that Delaware law would say a 30(b)(6)  
2 designee should know.

3 He talks about the perpetuity growth  
4 rate. As I said, this goes to -- and the peer  
5 companies. I mean, you can look at the transcript.  
6 It's cited in our briefing. These were things I  
7 specifically asked him about because Mr. Kelly had  
8 these communications with the special committee's  
9 financial advisors.

10 The last thing I'll talk about is with  
11 the air rights. You know, I think he's projecting a  
12 little bit that he wants to have a merits debate here.  
13 This idea that the -- that there's something -- that  
14 these documents don't show what we're saying they do.  
15 You know, yes, these memos say that the air rights  
16 would -- you know, the valuation would be based on  
17 monetizing the air rights 25 to 30 years from now  
18 because Madison Square Garden would inevitably have to  
19 be relocated. I mean, it just wouldn't be able to  
20 continue as a facility in its current location.  
21 That's why the \$1.1 billion is discounted to present  
22 value in the 250 to \$300 million range. That's what  
23 the document actually says.

24 And it says, in fact, that if Madison

1 Square Garden is relocated, which is an inevitability,  
2 then none of these restrictions about zoning and stuff  
3 like that are even in play. The restrictions about  
4 zoning and things like that that they are talking  
5 about relates to whether or not they could have  
6 immediately monetized the Madison Square Garden air  
7 rights in connection with something where there would  
8 be some sort of special administrative zone put into  
9 place or they would sell the Hulu Theater to the state  
10 and get bonus air rights. That has nothing to do with  
11 the valuation. And that's all in Exhibit C, Your  
12 Honor.

13 Unless you have any other questions, I  
14 don't have anything further.

15 THE COURT: I do not. Thank you.

16 ATTORNEY SCHWARTZ: Your Honor, could  
17 I get one second?

18 THE COURT: Sure.

19 ATTORNEY SCHWARTZ: Again, we're  
20 hearing testimony from counsel. Counsel gets up and  
21 says the Dolans are directing what Entertainment does  
22 in this litigation. There's no evidence for that  
23 whatsoever. He just gets up and makes that up, again,  
24 in order to try to infect the discovery process by

1 prejudicing Your Honor with the merits. The Dolans  
2 are represented by Debevoise and Potter Anderson.  
3 There's just no basis for so much of what's been said.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 Anything further?

7 ATTORNEY ALBERT: No, Your Honor.

8 THE COURT: I am prepared to give you  
9 a ruling on this motion. I actually have a lengthy  
10 bench ruling, but I'll spare you that and cut to the  
11 chase.

12 There are clear gaps in the testimony  
13 of Mr. FitzPatrick. I think that defendants even  
14 acknowledge that and claim that these gaps really  
15 speak to the minutiae, you know, at best. And I'm  
16 sympathetic to the idea that it's very difficult to  
17 prepare a Rule 30(b)(6) deponent to deal with minutiae  
18 or even all the aspects of valuation models or  
19 projections used by the company, particularly when  
20 that witness has been away from the company for over a  
21 year.

22 Typically, I would simply do what  
23 defendants suggested and allow for these gaps to be  
24 filled through interrogatories. But at this stage in

1 the game, I'm worried that interrogatories will simply  
2 lead to further disputes. And so I'm willing to  
3 permit an additional two hours of 30(b)(6) deposition  
4 testimony.

5 I think it would be a mistake to  
6 select Mr. FitzPatrick as the 30(b)(6) deponent this  
7 time around. He stated in his deposition that at  
8 least two other individuals were more knowledgeable  
9 about the areas that the Entertainment plaintiffs are  
10 particularly focused on, and it seems more logical  
11 that those two persons would be easier to prepare for  
12 a 30(b)(6) deposition. But that's not my choice. At  
13 least I'm not making it my choice today. I'll leave  
14 it to defense counsel to select an appropriate witness  
15 and prepare them accordingly, and it's at your own  
16 risk. If the witness is not prepared this time, it  
17 will be problematic.

18 So thank you.

19 ATTORNEY SCHWARTZ: Your Honor, may I  
20 ask one question on that?

21 THE COURT: Sure.

22 ATTORNEY SCHWARTZ: Should the  
23 preparation be limited to the specific questions that  
24 the plaintiffs have identified as not being answered



1 by Mr. FitzPatrick in their testimony? Because,  
2 again, otherwise, it's going to be very difficult to  
3 prepare an individual as to the very broad topics.

4 THE COURT: I read their papers and  
5 thought they were relatively limited in what they were  
6 striking at. I don't think it would be that difficult  
7 to prepare a witness on the issues that they are  
8 focused on now. If they ask questions that go outside  
9 of that issue, it's a waste of their time because  
10 that's not why I'm ordering the deposition.

11 ATTORNEY SCHWARTZ: Thank you, Your  
12 Honor.

13 ATTORNEY ALBERT: Just to be clear,  
14 Your Honor, with respect to the air rights, I assume  
15 that we can ask about all the new air rights documents  
16 that were produced?

17 THE COURT: Actually, I'm glad you  
18 raised that. Yes.

19 ATTORNEY ALBERT: Thank you.

20 ATTORNEY TUCKER: I believe this is  
21 the last one of the day. Your Honor, I'm going to  
22 address the MSGN plaintiffs' motion to compel  
23 production of documents regarding the departure of  
24 Lorraine Peoples, MSGE's former vice president of

1 internal audit. Plaintiffs are seeking a very narrow  
2 set of documents with this motion. Specifically,  
3 documents from the custodial file of Ms. Peoples from  
4 the time period of December 1, 2020, through the date  
5 of her departure on February 9, 2021, and materials  
6 that MSGE Management provided to Deloitte as part of  
7 Deloitte's investigation into Ms. Peoples' departure  
8 from the company.

9           The relevant standard here is that if  
10 there's any possibility that discovery will lead to  
11 relevant evidence, it should be ordered. The  
12 discovery sought here is directed at uncovering  
13 relevant evidence related to Jim Dolan's and his  
14 beholden executives' efforts to suppress and conceal  
15 information concerning the increasing Sphere costs in  
16 the midst of the negotiation of the transaction.

17           Now, the Sphere has been characterized  
18 in this litigation as a one-of-a-kind entertainment  
19 venue that MSG was developing in Las Vegas and is Jim  
20 Dolan's passion project. As part of the analysis of  
21 the transaction, the Sphere project constituted a  
22 substantial part of MSGE's future financial  
23 performance for purposes of the consideration and  
24 analysis.

1                   In plaintiffs' motion, we detail  
2 Mr. Dolan's repeated efforts from the period of 2019  
3 through early 2021 to conceal the escalating costs and  
4 build the Sphere. I won't go in-depth on that now.  
5 The real focus is on a period of February 2nd to  
6 roughly February 8th.

7                   On February 2nd, Jim Dolan was  
8 presented with revised Sphere cost estimates of  
9 \$1.842 billion by Jayne McGivern and Urenay Gokay, who  
10 were in charge of overseeing the Sphere project. The  
11 evidence has shown Mr. Dolan wanted no business with  
12 these projections. He refused to acknowledge them or  
13 discuss the estimates.

14                  These revised numbers, however, in the  
15 next week appeared to have triggered a flurry of  
16 activity, because at that time, the only number that  
17 had been publicly disclosed regarding the Sphere cost  
18 estimates was a \$1.66 billion number, and that was  
19 disclosed a year prior in February 2020. That is also  
20 the number that was provided to both the MSGE and MSGN  
21 special committees for their analysis in this  
22 transaction.

23                  The efforts to conceal this number was  
24 actually evidenced in an email exchange from Mr. Wong

1 to Joseph Yospe, who was the SVP, corporate  
2 controller, and Ms. Peoples' boss on February 5th,  
3 where he received an email that says, "Just to  
4 confirm, we don't want to flag the \$1.66 [billion]  
5 Sphere estimate cost that is being reviewed/revisited,  
6 right?" To which Mr. Yospe responded, "Looks that way  
7 ...."

8                   On that evening, Friday, February 5th,  
9 there was a disclosure committee meeting, at which  
10 Ms. Peoples attended and her subordinate, Mr. Singh,  
11 where they met to discuss the disclosure language of  
12 the Sphere that would be included in the Form 10-Q,  
13 which still indicated the \$1.66 billion number. The  
14 actual language being discussed at that meeting  
15 stated, "Our cost estimate, inclusive of core  
16 technology and soft costs for MSG Sphere at The  
17 Venetian, is approximately \$1.66 billion." That  
18 language indicates a present tense cost estimate.

19                   That is the same language that was  
20 included in a draft 10-Q provided to the audit  
21 committee later that evening for a meeting that was  
22 scheduled at 9:00 a.m. the next Monday. During the  
23 ensuing weekend, there was a flurry of activity  
24 surrounding the Sphere language, resulting in revised

1 language, which stated, "On February 7th, 2020, we  
2 announced that our cost estimate, inclusive of core  
3 technology and soft costs for MSG Sphere at The  
4 Venetian, was approximately 1.66 billion," now  
5 indicating a past tense reference, but still  
6 concealing the fact that there was a \$1.842 billion  
7 number that was presented just earlier that week to  
8 Mr. Dolan.

9                   However, late on Sunday evening, hours  
10 before the audit committee meeting was scheduled,  
11 Ms. Peoples and Mr. Singh were abruptly instructed not  
12 to attend the audit committee meeting the next morning  
13 despite the fact that they were on the agenda to give  
14 an internal audit update. This instruction came from  
15 MSGE management despite the fact that the audit  
16 committee charter and the internal audit charter  
17 expressly state that internal audit reports directly  
18 to the chair of the audit committee, Frederic Salerno  
19 at the time.

20                   Now, plaintiffs would not have learned  
21 of this instruction to Ms. Peoples until  
22 November 23rd, 2022, a week after the fact discovery  
23 deadline in this case when MSG produced a text  
24 exchange indicating that instruction to Ms. Peoples to

1 not attend.

2 In addition, MSGE produced an email  
3 exchange from February 11th, which indicated  
4 Mr. Salerno was very displeased with the situation,  
5 with everything that happened with Ms. Peoples, and  
6 was demanding that the company's audit committee  
7 charter be amended and MSGE's executives undergo  
8 compliance testing.

9 In their opposition to the motion,  
10 MSGE argues that -- and in the conferrals -- that  
11 Ms. Peoples' departure had nothing to do with the  
12 disclosure; it was all related to her uploading of a  
13 proprietary template from a prior employer. However,  
14 the language that -- strike that.

15 This is not a situation where a single  
16 low-level rogue employee was fired for cause. This is  
17 a high-ranking audit employee of MSGE and MSGN being  
18 abruptly fired on the eve of an audit committee  
19 meeting after a weekend full of edits and changes to  
20 language of a cost estimate that the controller and  
21 CEO did not want disclosed in the midst of a merger  
22 negotiation. In the best of circumstances, these  
23 events cry out for a further inquiry in this action.

24 The documents that MSGE has provided

1 with its opposition don't allay any concerns or  
2 questions. In fact, I would say they heighten them.  
3 Not a single document identifies this prior employer.  
4 Ms. Peoples' prior work history is public knowledge.  
5 It's on LinkedIn. There's no need to redact the name.

6 The document is described as a  
7 template. And MSGE states in the opposition that this  
8 template contained a prior employer's confidential  
9 information. There's no way for the Court or the  
10 plaintiffs to test that.

11 MSGE also provided an email exchange  
12 between John Eversole of MSGE's threat management  
13 department. Mr. Eversole was discussed, I believe, at  
14 the motion to compel hearing we had a few months ago  
15 back on the attorney banning and scanning of faces at  
16 MSGE-owned properties. He is known for utilizing  
17 technology to, say, snoop into employee's emails and  
18 monitor all actions at the company.

19 In fact, attached as Exhibit 1 --  
20 Exhibit 41 to the reply, there is a presentation on  
21 page 25 from the threat management department which  
22 indicates the depth of the threat management  
23 department's ability to invade employee emails.  
24 They're able to identify employees who were planning

1 on ending their employment at MSGE.

2                   And the reason this is important and  
3 raises significant questions about the process that  
4 led to Ms. Peoples' departure is there's already  
5 evidence of another situation in which Mr. Dolan  
6 directed John Eversole and the threat management  
7 department to dig into employees' emails and then  
8 covertly record them to manufacture reasons to fire  
9 them. Those two individuals were Mr. Gokay and  
10 Ms. McGivern, the people who oversaw the Sphere and  
11 were pushing for the disclosure of the higher 1.842  
12 number.

13                   Those details are in our reply brief.  
14 But specifically, Exhibit 39 is Mr. Dolan's  
15 deposition, where he admitted he instructed  
16 Mr. Eversole to do these things.

17                   Exhibit 40 is emails from Ms. McGivern  
18 where she alerts individuals that she believes  
19 Mr. Eversole is snooping in her email.

20                   And I just mentioned Exhibit 41.  
21 Exhibit 42 and 43 also relate to that topic.

22                   Now, how does this relate to the memo  
23 that's produced with MSGE's opposition? The memo is  
24 dated February 8th. And according to that memo, the



1 threat management department learned of the issue  
2 February 8th, had the time to download, it appears to  
3 be, quite a bit of emails to go scour through, draft  
4 up the email, and create an action plan.

5           Now, MSG's opposition makes it appear  
6 that Ms. Peoples was told not to go to the audit  
7 committee meeting after threat management got  
8 involved. That's not true. Ms. Peoples was  
9 instructed not to go to the audit committee meeting  
10 the evening of February 7th. The text exchange that  
11 discusses that is actually at GMT time, so there's a  
12 five-hour lag.

13           In addition, MSGE provided a single  
14 email that allegedly shows Mr. Eversole communicating  
15 with Peoples' former employer. However, the  
16 redactions to this email make it impossible to verify  
17 who Eversole was emailing and only seem to demonstrate  
18 that Mr. Eversole was the driving force in that  
19 exchange. That was Exhibit C to our reply brief.

20           MSGE also tries to walk away from the  
21 contemporaneous text exchange that Ms. Barnett  
22 participated in on February 11th where she was  
23 reporting that Mr. Salerno had requested an amendment  
24 to the audit committee charter and wanted compliance

1 testing for Mark FitzPatrick, Scott Packman,  
2 Ms. Barnett herself, and two individuals named John  
3 and Joe. I'm not sure who they are.

4                   However, when Mr. Salerno was deposed,  
5 plaintiffs only had a highly redacted version of this  
6 text chain, which was Exhibit 10 to our opening  
7 motion. Exhibit 49 is an unredacted version of the  
8 text chain, which was provided to us after  
9 Mr. Salerno's deposition.

10                   During Mr. Salerno's deposition, he  
11 testified that he never asked for the audit committee  
12 charter to be amended, and neither did he ever ask for  
13 compliance testing. Yet when we received the  
14 unredacted version of the text chain, that's not  
15 accurate. He actually not only requested the audit  
16 committee charter to be amended, he provided the  
17 language he wanted to see.

18                   Given the time frame and the speed at  
19 which Ms. Peoples was removed from the company, the  
20 fact that her entire internal audit committee  
21 department was out of the company no later than April,  
22 according to their own LinkedIn profiles, and that the  
23 audit committee's oversight of Sphere was shifted out  
24 of the audit committee's oversight to Mr. Eversole's

1 threat management department, there are significant  
2 questions as to the reasons behind her departure.

3           Among them being she was scheduled to  
4 be meeting with the audit committee that Monday, where  
5 they were going to discuss the Sphere disclosure. And  
6 in her role as MSGE's internal audit -- it was  
7 actually a dual role with MSGN and, as a MSGN  
8 employee, she would have had knowledge of that number,  
9 the 1.842 number as well.

10           Unless Your Honor has any other  
11 questions on the facts, I was just going to touch  
12 on --

13           THE COURT: I will need you to move a  
14 little faster. Unfortunately, we are over time.

15           ATTORNEY TUCKER: Sure. Just on the  
16 timeliness factor. MSGE is arguing timeliness. Prior  
17 to that November 23rd text message, plaintiffs had no  
18 documents to indicate Ms. Peoples was fired, whether  
19 she left voluntarily, the date at which she left, or  
20 the speed at which she left.

21           THE COURT: Thank you. Again, you are  
22 asking for ESI from December 1st, 2020, through  
23 February 2021, as well as whatever materials  
24 Entertainment provided to Deloitte as part of the

1 investigation?

2 ATTORNEY TUCKER: Correct. And we  
3 picked that narrower time frame for her email file  
4 because we were trying to get information related to  
5 that time period around the disclosure committee  
6 meeting and leading up to it, what did she have  
7 related to the Sphere and other issues.

8 THE COURT: Understood. Thank you.

9 ATTORNEY SCHWARTZ: Thank you, Your  
10 Honor.

11 Of course, before we got a preview of  
12 why the Entertainment plaintiffs think that  
13 Entertainment overpaid for Networks, and now we get a  
14 preview on the merits, again, from Networks plaintiffs  
15 about why the Networks plaintiff thinks that it was  
16 underpaid. I'm just going to try to stick to the  
17 actual discovery dispute here.

18 First, this motion is clearly  
19 untimely. In fact, discovery closed on November 16th,  
20 2022, more than two weeks before they asked for  
21 documents concerning Ms. Peoples' departure. They  
22 knew about the investigation surrounding Ms. Peoples'  
23 departure since at least June of 2022.

24 On June 24th, we produced to the

1 Networks plaintiffs the draft report from  
2 Entertainment to Deloitte, and the report said that it  
3 was as of March 31st, 2021. And it stated, "We have  
4 disclosed to you the results of all investigations or  
5 actions undertaken by the Company and its Board of  
6 Directors as part of their assessment of the cause and  
7 circumstances behind Lorraine Peoples' departure from  
8 the Company. Further, we have provided all details to  
9 you [regarding] her separation."

10 In other words, in June, they knew  
11 that Ms. Peoples had been terminated before  
12 March 31st, 2021. And counsel just very candidly said  
13 that they could have looked at our LinkedIn profile  
14 and seen that around that time as well. And that's,  
15 of course, the March time period. February, March is  
16 when they are claiming that there were discussions  
17 about the Sphere costs that they are interested in.  
18 Yet, they waited six months until after getting that  
19 to make their current requests.

20 They try to excuse the lateness of  
21 their requests because of so-called belated  
22 productions of certain texts, and they state that the  
23 timing of this motion was solely due to  
24 Entertainment's dilatory discovery practices.

1                   Now, let's put aside the dispute over  
2 the production, timing of those particular texts.  
3 They knew from the June 24th, 2022, production that  
4 Ms. Peoples had departed and what her timing was, and  
5 they knew what her role was. They knew that she was  
6 in the audit team. They knew that --

7                   THE COURT: Did they know that she was  
8 asked to leave the day, the precise day -- was it  
9 February 8th?

10                  ATTORNEY SCHWARTZ: I don't think they  
11 knew that, Your Honor. But, of course, they never  
12 asked, right. They knew that she was gone before  
13 March 31st, 2021. They never followed up on that,  
14 Your Honor.

15                  And I'll point out that additional  
16 documents discussing her departure and the  
17 investigations, including drafts of the May 6th, 2021,  
18 representation letter and emails between Deloitte and  
19 Entertainment related to fiscal year 2021, were also  
20 produced to the Networks plaintiffs in June 2022. And  
21 one such email even discussed, "Investigation report  
22 from MSGE's chief security officer concerning  
23 Peoples's departure."

24                  So now they are coming to Your Honor

1 months and months later after filing an untimely  
2 request for documents and they're saying, oh, we knew  
3 all of this about Ms. Peoples except for the exact  
4 date on which she left. Well, of course, they could  
5 have asked about this, Your Honor.

6                   And they spent one paragraph in their  
7 reply on timing of it. But when they go into the  
8 actual reason why they want those documents on pages 2  
9 through 4 of their reply, they quote from 16  
10 documents. Of those documents, one was produced in  
11 May of 2022; seven were produced in June of 2022; two  
12 were produced in July of 2022; one was produced on  
13 September 3rd, 2022; one was produced on October 26th,  
14 2022; and one was produced -- and that's the one we've  
15 been talking about -- on November 23rd, 2022. And the  
16 remaining documents that were produced after  
17 November 23rd that they cite, of course, are all in  
18 our opposition brief, which goes to show why their  
19 motion is not meritorious.

20                   So the timing and the production --  
21 just two of the documents that they rely on for their  
22 timeliness argument -- for their entire argument about  
23 why they are entitled to this stuff was produced after  
24 the discovery deadline. They have all these reasons

1 for why they're suspicious about her departure.

2 Almost every single thing predates it.

3           They say that they didn't know that  
4 Mr. FitzPatrick was on the hook for signing the 10-Q  
5 concerning Sphere costs. He was the CFO at the time.  
6 Of course he's signing the 10-Q, Your Honor.

7           They say that they weren't aware that  
8 Ms. Peoples did not attend the February 8th, 2021,  
9 audit committee meeting. They were aware of that,  
10 Your Honor. We produced to them on June 24th draft  
11 minutes of the meeting, which do not include  
12 Ms. Peoples as an attendee.

13           And as we explained in our opposition,  
14 Mr. Salerno testified that he was frustrated that the  
15 company would have to replace what he viewed as a  
16 competent employee. His disappointment has nothing to  
17 do with the Sphere costs at issue in this action.

18           They have already received voluminous  
19 emails, texts, and deposition discovery in this  
20 action. They have had more than 390,000 documents.  
21 They've had more than 39 depositions. It's just  
22 constantly demanding more and more and more. This was  
23 untimely. They knew more than enough before the end  
24 of the discovery deadline, Your Honor, and they are



1 just pointing to one document after the discovery  
2 deadline to say, aha, that's the reason we didn't know  
3 enough to ask.

4                   They knew she was terminated. They  
5 knew there was a security investigation. They knew  
6 she didn't go to the February 8th audit committee,  
7 despite her role on the audit team. These are all  
8 reasons why they should have asked for documents  
9 before the cutoff of discovery.

10                   But, in any event, the discovery that  
11 they asked for is not relevant. She was terminated  
12 because she was found to have stored proprietary and  
13 confidential information from her employer on  
14 Entertainment systems; that she transmitted this  
15 information to other Entertainment employees; and that  
16 she attempted to use this information as a template  
17 for documents she was generating for Entertainment.

18                   I want to address two things. First  
19 of all, this idea that there's something nefarious  
20 about the ability of a corporate employer to look at  
21 corporate employees' emails. Your Honor, they were  
22 just here several months ago pointing out that that  
23 ability to do that should breach privilege reasons and  
24 things of that sort. Your Honor knows, based on

1 everything that goes on in society, that this is a  
2 normal thing for corporations to do, and it's  
3 important to the security of a corporation. That's  
4 one thing. There's nothing nefarious about it.

5           The second thing, Your Honor, is they  
6 go after this idea that we redacted the confidential  
7 information of her former employer, who is not a party  
8 here and has nothing to do with this case. If that's  
9 really an issue, Your Honor, we'd be happy to give the  
10 unredacted documents to them and submit it to Your  
11 Honor *in camera*. I don't really see that that should  
12 be a particular big deal or a reason to justify  
13 further document production in this action.

14           At bottom, Your Honor -- and I'll wrap  
15 up because I know you're short on time. At bottom,  
16 basically what they would have you believe is that  
17 despite no evidence whatsoever -- and they haven't  
18 produced a single document showing that Ms. Peoples  
19 was upset about the Sphere costs, was going to kibosh  
20 the Sphere costs, or anything like that. What they  
21 would have you believe is that employees at  
22 Entertainment fabricated emails from Ms. Peoples,  
23 fabricated documents that showed that they were from  
24 her former employer, circulated those documents, used

1    them as a pretense to fire her, and then they would be  
2    able to produce in litigation several years later  
3    those particular documents as justification for why  
4    they fired her.  There's no evidence of any of that,  
5    Your Honor.  And we just shouldn't have to continue to  
6    keep going through discovery and keep producing more  
7    and more documents, especially when these requests  
8    were untimely.

9                   THE COURT:  What would be the burden  
10   of doing what they ask?  What's the number of  
11   documents it would capture?

12                  ATTORNEY SCHWARTZ:  Your Honor, that's  
13   one of the things.  They haven't even specified what  
14   documents they're asking for.  They're just asking for  
15   ESI.  They haven't given us search terms, date ranges.  
16   In all honesty, Your Honor, it would be yet another  
17   pull of a custodian, more document review, more  
18   document production, which, of course, is time and  
19   money.  And it's late.  It shouldn't have come.

20                  THE COURT:  We have date ranges.  I  
21   assume they want the same search terms applied that  
22   they've applied to the other custodians.

23                  ATTORNEY SCHWARTZ:  They haven't asked  
24   that, Your Honor.  We've had different search terms

1 for different dates and different sets of custodians.

2 THE COURT: Thank you.

3 ATTORNEY TUCKER: To Your Honor's last  
4 question, yes, it would be the same search terms we  
5 would like applied. The date range is narrow.

6 And just to address the point of  
7 documents that should have put us on notice. There  
8 was nothing in any of the documents that my colleague  
9 just mentioned that mentioned she was abruptly told  
10 not to attend an audit committee meeting and the  
11 entire internal audit department was told not to come  
12 and that she was promptly terminated in February. The  
13 only documents that they can point to is a disclosure  
14 which says there was an investigation on the  
15 circumstances she left. That could have been she  
16 voluntarily left, but made an accusation against the  
17 company, she was fired. There was no material there  
18 to give us the actual facts of those situations.

19 THE COURT: What made you aware that  
20 Ms. Peoples was instructed mere hours before the  
21 February 8th audit committee meeting not to attend?

22 ATTORNEY TUCKER: It was a text  
23 message exchange, which was provided late in  
24 discovery.

1 THE COURT: Was that the November  
2 exchange or October?

3 ATTORNEY TUCKER: I will double-check  
4 that. I believe that is the date. If not, it was a  
5 late October date.

6 And Mr. Salerno's deposition, which  
7 was originally scheduled for November 15th, we were  
8 slated to ask him those questions, but Mr. Salerno  
9 unilaterally decided he wanted to end his deposition  
10 before I had a chance to ask questions, and it was not  
11 rescheduled until December 6th. When he gave us the  
12 answers he gave, which we've discussed them at length  
13 in the motions, and I won't burden the Court, we  
14 promptly filed within three days to get on file based  
15 on the information received at that point.

16 THE COURT: Understood. Thank you.  
17 Anything further?

18 ATTORNEY SCHWARTZ: No, Your Honor.

19 THE COURT: All right. I am also  
20 prepared to give you a ruling on this one. I also  
21 have a lengthy bench ruling, but I am going to skip  
22 it, given the time. I'm granting the requested  
23 relief.

24 I'll pause now just to detail the

1 Networks plaintiffs' evidentiary basis for the motion.  
2 First, I'll back up and give you slightly more detail.

3           The Networks plaintiffs seek documents  
4 regarding Entertainment's vice president of internal  
5 audit, Lorraine Peoples. They say Entertainment  
6 abruptly excluded her from the audit committee  
7 meeting, during which the company approved quarterly  
8 earnings releases addressing Sphere project cost  
9 estimates. Their theory is that she was pushed out of  
10 the process "in the midst of growing pressure for  
11 [James] Dolan to disclose materially higher cost  
12 estimates for the Sphere," and that was so to taint  
13 the Networks sale process and offer a lower price.

14           Networks plaintiffs say that they only  
15 recently learned of the true motive or what they  
16 believe could be a motive for Peoples's termination.  
17 They say that the key information came to light in the  
18 form of a late-produced text message thread between  
19 FitzPatrick and Scott Packman, who was the former  
20 general counsel at Entertainment. This production  
21 perhaps cast additional light on earlier-produced  
22 documents. They also received information during  
23 Mr. Salerno's deposition that shed further light on  
24 the relevant facts.

1           As I understand it, before plaintiffs  
2 received the text messages and heard from Mr. Salerno,  
3 they knew that Peoples had left the company and they  
4 knew some of the circumstances that defendants say  
5 provide the basis for that departure, but the  
6 FitzPatrick texts revealed a few facts that cast  
7 suspicion on her departure.

8           First, FitzPatrick was concerned about  
9 having to sign and "be on the hook" for  
10 Entertainment's 10-Q. No, it is not a surprise that  
11 the CFO would have to be responsible for a 10-Q. I  
12 think the fact that was learned from this text is that  
13 he was concerned about it.

14           Second, Salerno was alerted mere hours  
15 before a February 8th, 2021, audit committee meeting  
16 that Entertainment management had instructed Peoples  
17 and other members of the internal audit department who  
18 typically attend the audit committee meetings not to  
19 attend. The February 8th audit committee meeting took  
20 place only six days after Dolan received updated  
21 estimates for the cost of completing the Sphere  
22 project, updates which the Networks plaintiffs  
23 describe as demonstrating that the true cost of the  
24 project had increased from the then-publicly disclosed

1 \$1.66 billion to more than \$1.84 billion, a fact that  
2 Dolan desired to hide according to those plaintiffs.

3           One of Packman's texts states, "Fred  
4 just called me. Not pleased about how everything  
5 happened with Lorraine. Wants us to amend our AC  
6 charter. We should talk" and "Fred has requested  
7 compliance testing for everyone involved."

8           When asked about this during his  
9 deposition, Salerno initially refused to answer.  
10 After conferring with counsel, he asserted a lack of  
11 recollection of any of the circumstances.

12           The Networks plaintiffs seek a  
13 targeted production of documents and ESI in Peoples's  
14 custodial file from December 1st, 2020, through her  
15 departure in February 2021. They also seek the  
16 materials that Entertainment management provided to  
17 Deloitte as part of the investigation.

18           Entertainment resists this motion on  
19 several grounds, and I'm not going to go through all  
20 the arguments today that have been well-developed.

21           I'll note that Rule 26 liberally  
22 permits discovery, and that's true even where  
23 late-developed facts shed light on earlier-produced  
24 information.



1           So, for example, the developing record  
2     can justify a limited additional production, and this  
3     is a circumstance where it's justified. Further  
4     document discovery or discovery into this issue might  
5     substantiate defendants' narrative. But the Networks  
6     plaintiffs are entitled to that discovery.

7           Those are my thoughts on that. That's  
8     my bench ruling. I'll stop it there.

9           Are there any questions?

10          ATTORNEY TUCKER: No, Your Honor.

11          THE COURT: Thank you. I would  
12     appreciate if you submit a form of order, Mr. Tucker,  
13     on this motion and, Mr. Albert, on the 30(b)(6). And  
14     then on the text messages, we have a process that's  
15     been put in place where I'll further consider the  
16     parties' positions.

17          ATTORNEY FLEMING: I actually  
18     realized, as I was sitting here, that we got somewhat  
19     unclear on the timing. So we are to send the proposed  
20     joint form of order to MSGE within 24 hours, and then  
21     we are to submit to the Court -- what is the deadline  
22     for MSGE to get back to us?

23          THE COURT: By midnight tomorrow  
24     please send Mr. DiCamillo the joint form of order that

1 you would send to me for my signature that conforms to  
2 the instructions I gave you. Give Mr. DiCamillo a  
3 chance to respond. It would be better if he got it  
4 before midnight.

5 ATTORNEY FLEMING: We will get it to  
6 him as early as possible. My question is only if we  
7 are supposed to wait for MSGE. Given that we have  
8 rebuttal reports due on the 30th, we would like to  
9 have a ruling as soon as possible.

10 THE COURT: Mr. DiCamillo is going to  
11 review it -- maybe there are parts of it that can be  
12 mooted or that he believes are already moot -- and he  
13 will state what he is and is not willing to agree to.  
14 And whatever is left will come to me by 9:00 a.m. on  
15 Friday morning. So Mr. DiCamillo will likely submit a  
16 letter, and you'll submit a proposed form of order.

17 You know, you could actually resolve  
18 this. I mean, that would be great.

19 ATTORNEY FLEMING: I am confident that  
20 I am mostly focused on speed. I am somewhat confident  
21 we'll be able to resolve a lot of it. 9:00 a.m.  
22 Friday. Thank you.

23 THE COURT: Anything further?

24 (No response.)

1                   THE COURT: Thank you for your  
2 presentations today. I want to thank our court  
3 reporter for staying later than usual. It's very much  
4 appreciated, Denne1.

5                   We are adjourned.

6                   (Proceedings concluded at 3:29 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 4 through 107 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 79 through 81 and pages 101 through 107, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 21stday of January, 2023.

/s/ Dennei Niezgoda

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Dennei Niezgoda  
Official Court Reporter  
Registered Merit Reporter  
Certified Realtime Reporter