IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MADISON SQUARE GARDEN ENTERTAINMENT CORP. STOCKHOLDERS LITIGATION	:	CONSOLIDATED C.A. No. 2021-0468-KSJM

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, November 3, 2022
9:08 a.m.

- - -

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

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ORAL ARGUMENT ON DEFENDANT MADISON SQUARE GARDEN ENTERTAINMENT CORP.'S MOTION FOR A PROTECTIVE ORDER, PLAINTIFFS' OMNIBUS MOTIONS and RULINGS OF THE COURT HELD VIA ZOOM

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THE COURT: Good morning, everyone.

COUNSEL: Good morning, Your Honor.

THE COURT: I apologize for the delay. I was experiencing some technical difficulties.

Karen, can you hear me okay?

THE COURT REPORTER: Yes, Your Honor.

THE COURT: Great. Thank you. Let's have appearances for the record.

ATTORNEY VARALLO: Good morning, Your Honor. Greg Varallo with Bernstein Litowitz Berger & Grossman for the MSG plaintiffs. I have with me in my office today Andrew Blumberg from my firm.

ATTORNEY KRINER: Good morning, Your Honor. Bob Kriner on behalf of the MSGN Networks plaintiffs.

ATTORNEY GOLAN: Good morning, Your Honor. Jeffrey Golan of Barrack, Rodos & Bacine, also on behalf of the MSG Networks plaintiffs.

ATTORNEY TUCKER: Good morning, Your Honor. Scott Tucker with Chimicles on behalf of MSGN plaintiffs.

ATTORNEY MACKINTOSH: Good morning, Your Honor. Christine Mackintosh from Grant & Eisenhofer on behalf of the MSGN plaintiffs.

ATTORNEY STINE: Good morning, Your Honor. Carl Stine from Wolf Popper, also on behalf of the MSGN plaintiffs.

ATTORNEY EVANS: Good morning, Your Honor. Kim Evans of Block & Leviton on behalf of the MSGE plaintiffs.

THE COURT: All right. Thank you.

Have you conferred on an order of presenting the pending motions?

ATTORNEY VARALLO: We have, Your Honor. If it's acceptable to the Court, Mr. Mastro has a deposition he's got to get to. We thought we would start with his matter and allow him to present, if that's acceptable to Your Honor.

THE COURT: Sure. Thank you.

ATTORNEY MASTRO: Thank you, Your Honor. Randy Mastro from King & Spalding for MSG Entertainment, seeking a protective order to block the deposition of one of its senior in-house counsel, Hal Weidenfeld.

May I be heard on the application, Your Honor?

THE COURT: Yes.

ATTORNEY MASTRO: Thank you.

Your Honor, this is a pretty straightforward proposition. The plaintiffs have noticed the deposition of an in-house lawyer, who, by all admissions, knows nothing about the underlying merits and had no involvement in the underlying merits of this litigation. No involvement in the merger, has never been identified in any pleading or any discovery as having any knowledge.

So why are the plaintiffs doing this? Because MSG Entertainment implemented a policy that it did not want to do business with law firms suing it in current litigation. Ninety-plus firms got the same notice. Regardless of what one thinks of that policy, it was not something --

THE COURT: That policy is the stupidest thing I've ever read. I'll tell you, I was shocked when I saw it. And the crazy thing about the motion that you're presenting right now is regardless of how I rule, plaintiffs win because it's a vehicle for them to put that letter in front of me. So please make your presentation, but they've won.

This was a little bit shocking. I couldn't think of a good analogy, but I thought about the tort plaintiff suing a McDonald's or Walmart and

getting a letter from those institutions saying: If you attempt to buy a Big Mac, you know, we're going to kick you out.

It just seemed totally crazy, and it played into every single one of plaintiffs' case themes. So, I mean, this is unusual stuff.

Please proceed.

ATTORNEY MASTRO: Your Honor, regardless of what one thinks of the merits of the policy, it was a policy that was applied across the board to over 90 law firms currently in suit with Madison Square Garden.

And, Your Honor, I will simply say, this has been litigated about whether Madison Square Garden has the right to have such a policy. And under New York law, the Court has already rejected an attempt to gain access again to Madison Square Garden, finding that there was no legal basis for such a claim because, under New York law, an operator of a private entertainment venue has the right to limit access for any reason or no reason at all. I hear what Your Honor is saying, but that's a different question, Your Honor, what Your Honor thinks of the merits of the policy. It is a lawful policy under New York law and

it's been applied uniformly across the board to law firms suing Madison Square Garden.

And I should add, Your Honor, I think people have right, private parties, have the right to decide not to do business with people who sue them. It's not uncommon for someone to think: I don't want that person around.

Leaving that aside, Your Honor, I think they have achieved the purpose of their motion just by what Your Honor -- the purpose of what they wanted to achieve by serving the deposition notice and putting the issue before Your Honor. That's a different question than whether legally Your Honor should exercise your discretion under Delaware law, which discourages depositions of lawyers because of the potential for harassment. And they should only occur when they are absolutely necessary to the underlying merits of the case, have some direct relationship to the underlying merits, and there's no other way to get information relating to the underlying merits.

This has nothing to do with the underlying merits of this case. So no matter what one thinks of the merits of the policy, under Delaware law

and under law of other jurisdictions, this is not an appropriate deposition to proceed because plaintiffs don't like the policy because they feel aggrieved by the policy. That has nothing to do with the underlying lawsuit.

And the tenuous connection they attempt to draw, while stated somewhat more broadly, about what a particular executive at MSG is like and how decisions are made there, that would mean that any decision made at MSG and any employee who was involved in any decision could be deposed on that kind of tenuous basis when the individual had no role whatsoever in connection with the decision in the underlying suit that is at issue in this case.

Your Honor, I respectfully suggest that no matter what you think of the merits of the policy -- and I heard what Your Honor said -- that this is not a case where frolic and detour should permit a deposition to go forward of that in-house lawyer who his only role in connection with the decision of this policy a year later having nothing to do with, not targeting in any way any particular firm, nothing to do with the underlying litigation, knows nothing about the underlying litigation, how this

decision was made -- which I respectfully submit, Your Honor, would involve classic attorney-client communications between lawyer and executives at the company.

So for all of those reasons, Your Honor, the fact that it is a lawful policy under New York law, nothing to do with the underlying merits of this suit whatsoever, the individual knows nothing about the underlying merits, no attenuating as to fall squarely within the category of cases where courts, including in Delaware, have held that not just counsel in the underlying litigation but in-house counsel shouldn't have to be deposed, cases like *Shelton* out of the Eighth Circuit which has been applied here in Delaware in the *CNH* case --

THE COURT: I know you're short on time, Mr. Mastro, so let's go to Mr. Varallo on this one.

ATTORNEY MASTRO: Yes, Your Honor, but I just wanted to point out that Delaware law supports a protective order under these circumstances, even if Your Honor doesn't like the policy. Thank you.

THE COURT: Thank you.

ATTORNEY VARALLO: Your Honor, I'll be

brief. I know your schedule is pressed and I know Mr. Mastro, my friend, is trying to get to a deposition.

Just a moment on the facts, if I can. First of all, as we set forth in our briefing, all the lawyers on this case, the lead lawyers, got these letters. And the letters purported to ban all of the lawyers in each of their firms.

Your Honor, suggesting that sometimes fact is stranger than fiction, my friend Ms. Mackintosh reached out to me the other day to say that quite unexpectedly her partner in New York City, a lawyer by the name of Barbara Hart, was stopped at Madison Square Garden and ejected. It turns out Ms. Hart not only was not a lawyer working on this case, she didn't even know about this ban letter.

It appears that my friends at Madison Square Garden have used facial recognition software to come in and scrape all the web pages of all the firms involved and then used that facial recognition software at the Garden and other venues. We put an affidavit in to that effect.

We're not challenging the ban itself. The ban itself is as misguided as could be. The idea

that I've been found out that my evil plan to go to the garden and talk to the pretzel vendor about litigation strategy has been uncovered and is going to be estopped and policies like this are going to be vindicated, that's not what we're here talking about, Your Honor.

What we're talking about is a controller unchecked and simply out of control. We originally put a brief before the Court which relied on a document. That brief was -- soon after we put the brief in, my friend Mr. Gallagher reached out to us, clawed back the document -- as is his right under the protective order. We took the brief back, we omitted the document, we redacted any reference to the document, and then we resubmitted the brief.

But, Your Honor, I guess the question for the Court today is: Why is it that we should take this deposition? Well, here's what we know. We know that Mr. Dolan is a retributive controller. And we know that in part based upon press reports that when a fan at a Knicks game chanted "Sell the Knicks," not only was that fan ejected but that fan was banned from attending future games at Mr. Dolan's instruction.

I would suggest to Your Honor that it

is not a large step to assume that the controller who bans fans who chant at the Knicks game would be a little more upset -- and let me put it politely -- at lawyers who had the temerity to sue him and his board over a misguided merger.

Your Honor, we may have the burden at trial of demonstrating that this is a controlled -- that this is a controller. Certainly our cases, cases like *Viacom* and *CBS* which I had the opportunity, I have the opportunity to be involved in, the decisions there by Vice Chancellor Slights, former Vice Chancellor Slights, and the decision in *Pure Resources* that then-Vice Chancellor Strine put out, all focus on controllers who take retributive action as part of the analysis of independence of the board.

And, Your Honor, that's part of what we're here about. We think it's clearly likely that we'll be able to demonstrate that Mr. Dolan had something to do with this. We also believe that at the end of the day that fact makes Your Honor's fact finding -- helps Your Honor's fact finding in the underlying case. And that's what we want to take a deposition about.

I will also say, Your Honor,

understanding that time is short, that this is a little bit of a strange circumstance in that Mr. Mastro, when he changed firms, reached out to me and said: Look, I've got a client, deposition is coming, you've noticed the deposition. I'd like the courtesy of an extension.

I said, sure, Randy, we'll give you an extension.

Mr. Mastro sent me an email. That email is contained in the record. It's attached at our submission. And Randy wrote to me as follows: "Here's my request. Let's reschedule Hal Weidenfeld's noticed deposition date for October 26, and let's agree the deposition will be done remotely by Zoom, and let's agree that the document response and production will be due on October 1. Does that work? And if so, can you please confirm this deposition date also works for plaintiffs' counsel in the other case in which the deposition has been noticed? Thanks for your consideration."

Well, Your Honor, you'll note that the request Mr. Mastro made was to schedule, and it was -- it doesn't contain any reservation of rights to bring a motion.

Thereafter, Mr. Mastro honored his undertaking and produced documents, and then we got this motion. So it's a strange motion to begin with, a stranger circumstance. And I'll end by saying I don't miss having to deal with corporate clients one bit.

Your Honor, the motion ought to be denied, and we ought to be allowed to try to develop further the record of Mr. Dolan's unchecked control.

THE COURT: Thank you, Mr. Varallo.

Mr. Mastro, you're welcome to respond. I do have a bench ruling prepared, but I'm not going to read it until the end of this hearing. I'll try to eliminate all the motions being heard today in one fell swoop if possible.

Anything further, Mr. Mastro?

ATTORNEY MASTRO: Thank you, Your Honor.

To be clear, the issue is not whether -- how Mr. Dolan makes decisions generally, or in this particular instance whether he was involved in the decision. The issue here is whether an in-house senior lawyer should be deposed in connection with this case, and the issues involved in this case and

how this decision was made when he is not the right person to depose about the issues in this case or even that issue. He is an in-house lawyer who, whatever his knowledge is of how the decision was made, is going to be protected by attorney-client privilege.

So this is not the right person to be attempting to depose, both because he is an in-house lawyer with no knowledge of the underlying facts, and anything he would know about this issue, even if they had the right to probe this issue -- which they shouldn't because it is so attenuated -- is going to be covered by attorney-client privilege.

And I just have to say one last thing. Mr. Varallo knows from the moment we first spoke on the phone, and he acknowledged it in his papers, I objected to the deposition. I tried to explain to him why it shouldn't go forward and why it was wrong that it go forward, that this is exactly what Delaware law and federal law says shouldn't happen with a lawyer.

So regardless of whether one questions the underlying policy and the fact that it was uniformly applied to over 90 law firms and the lawyers at those firms, the fact of the matter is this is frolic or outside the scope of this case. And under

Delaware law, lawyers, in-house or otherwise, should not have to be deposed about issues so attenuated. They really have no connection to the underlying merits of this case and they're not the only source of information relating to the case. In fact, the opposite. He has no knowledge of this case.

Thank you, Your Honor.

THE COURT: Thank you.

Let's move on to the omnibus motion.

ATTORNEY MASTRO: May I please be excused, Your Honor?

THE COURT: Yes, thank you, Mr. Mastro.

ATTORNEY MASTRO: Thank you, Your Honor. Much appreciated.

ATTORNEY VARALLO: With Your Honor's permission, I'll take this up as well. I'll be very brief.

We initially had three different sets of issues to deal with today, but happily Mr. Thomas Dolan has retained new counsel. That counsel has made clear to us his client's intention to fully comply with the Court's order and to sit for deposition. So we can pass that portion of the motion at this point

without prejudice, in the event we run into execution problems. But we don't anticipate such problems and I'll say no more about it if that's acceptable.

Your Honor, that leaves us with two topics to deal with. The first is the motion to compel depositions of three director defendants, Messrs. Aiden, Quentin, and Charles P. Dolan. And we've already dealt with Weidenfeld. So that's all we're dealing with now is the compelling depositions.

With respect to those depositions, this is a case where defendants in the two cases have simply refused to appear for their depositions. The facts are pretty straightforward. The parties refusing to appear are Aiden Dolan, Quentin Dolan, and Charles P. Dolan. All three were directors, in the case of Quentin and Charles, of MSGE, and in Aiden's case, MSGN. All voted for the transaction that is challenged in the litigations. All earned substantial compensation for their roles as directors. And all three are defendants in the litigations.

Through their counsel at Potter Anderson, these named defendants have simply refused to sit for depositions. They assert they weren't directly involved in the negotiations of the deal and

that there are many other depositions that were either taken or scheduled of persons more knowledgeable than they claim to be. We brought the motion upon receiving their refusal to be deposed.

Simply put, Your Honor, there's no basis on which a director of a public company can refuse to sit for a deposition about a transaction that he or she voted to approve. The fact that other directors were deposed is not conclusive of whether these directors may have relevant probative information about the transaction or the board meeting at which it was approved.

Moreover, the authorities that these defendants rely upon actually make the case kind of nicely for us. One was an expedited case where the would-be deponents were not defendants. One was an expedited case heading for preliminary injunction where the Court made clear that the parties simply didn't have the time to permit deposition of all potentially relevant witnesses. One dealt with the scope of jurisdictional discovery. And one involved a protective order granted on the motion of Mr. Michael Dell of Dell Technologies in a case that involved a labor issue in which Mr. Dell wasn't directly

involved.

To be clear, none of these precedents reads in any way on the current situation. These are all defendants. They each attended the key board meetings. They each voted for the deal. They each have knowledge about what happened at the key board meetings and why they voted as they did. We're simply entitled to take the depositions. And their refusal to appear for the noticed depositions should lead to the entry of an order to compel an appearance.

In addition, Your Honor, and we don't do this often, this is conduct -- refusing to participate in deposition when you're a party -- is conduct for which costs ought to be shifted.

I promised to be brief. I don't have anything more to say unless Your Honor has questions.

THE COURT: Thank you. I do not.

ATTORNEY VARALLO: Thank you, Your Honor.

ATTORNEY RALSTON: Good morning, Your Honor. Brian Ralston of Potter Anderson & Corroon. I'll be presenting argument on behalf of Messrs. Aiden, Quentin, Charles P. Dolan in opposition to the motion.

I believe our position is laid out in the briefing, so I'll try to keep my remarks brief and focus on responding to the points raised by plaintiffs in the reply and here this morning.

We do accept discovery as broad, but it does have limits. And in our view, we've reached those limits. Aiden Dolan, Quentin Dolan, and Charles P. Dolan were not a part of the conception or negotiation of the merger challenged by the plaintiffs. They have no unique knowledge regarding the relevant issues. There's nothing contained in the papers and nothing that we heard this morning from Mr. Varallo that suggests otherwise. And in our view, the depositions would be purely cumulative and duplicative.

Now, plaintiffs say that sitting for a deposition is part of the job of being a director. It certainly can be, but it's not automatic, I would submit. Typically directors who are deposed have some involvement in the conception or negotiation of the challenged transaction. Just the mere fact that you're a director does not mean that by default you should be compelled to sit for a deposition.

Plaintiffs make the point that some of

the authority we rely on was in the context of expedited litigation. And, yes, that's true, but just because a case is not expedited does not mean discovery should be boundless and inefficient. There's obviously more time to permit broader discovery in a nonexpedited action, but there's still limits. And the same rationale should apply regarding proportionality to the needs of the case.

I do think it is an important point that Aiden, Quentin, and Charles P. Dolan were not part of the original omnibus deposition notice, and that comports with their lack of knowledge and involvement.

Plaintiffs most certainly reviewed carefully all the documents that were produced by the plaintiffs [sic] before serving that notice and included everyone they could think of who should be deposed based on the document. As Your Honor saw from the papers, there's at least 30 depositions already scheduled. So this is not an opportunity, as Mr. Varallo wants to suggest, where we are refusing to submit to discovery. We certainly have.

And it is -- oftentimes you do add depositions from the initial ask, but that's because a

party learns of facts suggesting the new individual has unique and relevant information that requires a deposition, and that's just not the situation here.

Finally, I just want to speak to the two areas of questioning that plaintiffs included in their reply to justify the depositions. The first area being whether the MSG and directors were advised to destroy notes at the March 25, 2021, meeting where the board approved the merger.

Other directors are being deposed that have been asked that question and can be asked that question. It's also something that could have been posed in an interrogatory that would be much more efficient than having someone sit for a deposition. And the deposition of one board member when others are being deposed just for the purpose of asking questions about notes, I would submit is not necessary.

The second area relates to whether or not Marianne Dolan-Weber attended the MSGE board meeting on March 25, 2021, where the board unanimously approved the merger. The minutes indicated she did attend the meeting. However, when she was deposed, Ms. Dolan-Weber did not recall attending the meeting. And plaintiffs make a point of this in their paper and

point to deposition testimony to say that she testified she did not attend the meeting.

But looking at the totality of the Ms. Dolan-Weber's testimony, I think it's important to point out that she did not say that she did not attend the meeting. In fact, at page 99, lines 5 through 6, she testified, "I was there but I don't remember from that that I was there." And the "that" she's referring to was the minutes, when she was presented with the minutes.

She went on to testify at page 100, lines 1 to 2, that "I don't remember that, no. Back then I don't remember anything."

Now, Ms. Dolan-Weber's lack of memory relating to that time frame is understandable because at the time she was caring for her husband who was undergoing cancer treatment.

Again, other directors are being deposed who can be asked about the question of her attendance. But more to the point, we pulled Ms. Dolan-Weber's phone records, which we will produce to the plaintiffs, and they show that Ms. Dolan-Weber dialed into a Zoom meeting on March 25, 2021, for 74 minutes. These records show that Ms. Dolan -- or will

show that Ms. Dolan-Weber did, in fact, attend the meeting. And they should dispel any inference that plaintiffs are trying to draw that the minutes are inaccurate or that Ms. Dolan-Weber did not cast a vote on the merger. And they should also dispel the need for a deposition of Quentin Dolan or Charles P. Dolan to cover this topic.

Finally, on the question of fees. I would submit they're not -- first of all, Your Honor should deny the motion. But if Your Honor were to grant the motion, our opposition is substantially justified and no fee shifting is warranted under the circumstance.

Unless Your Honor has questions, I have nothing further.

THE COURT: No questions. Thank you, Mr. Ralston.

Mr. Varallo, back to you.

ATTORNEY VARALLO: Your Honor, I'm going to be very brief.

You know, in discovery, sometimes it's interesting to ask a question of a witness: Why did you vote for this? What facts -- what was in your mind when you did this?

Because invariably we see witnesses come to court, take an oath, and say "I tried hard. I did my best. Here's why I did what I did."

I kind of like to know in advance of trial what a witness is going to say about that. And I think I have a right to ask every deponent who is a director: Why did you do what you do?

My friend said a lot of things that are interesting that I won't address. But he didn't address the basic necessity of taking depositions to determine why directors cast their vote.

I won't say anything more. I appreciate Your Honor hearing us on such short notice.

THE COURT: Thank you.

All right. I'm going to take about a ten-minute break to gather my thoughts. And then I'll deliver a bench ruling for you-all.

(Court in recess 9:36 a.m. to 9:42 a.m.)

THE COURT: Thank you for your presentations this morning. I'm particularly grateful that you made them short. I'll now deliver bench rulings addressing several pending discovery motions. And I did so and I scheduled this hearing today so that you have the benefit of these rulings in advance

of the November 16th substantial discovery completion deadline.

By way of background, this is a consolidated action alleging breach of fiduciary duty against the board and controlling stockholders of Madison Square Garden Entertainment -- or at least the motion was pursued in that action -- in connection with the merger of MSG Networks, Inc., which I'll call "Networks." I'll call Madison Square Garden Entertainment. Corp. "Entertainment" for the purpose of this bench ruling.

The Entertainment stockholder plaintiffs allege that members of the Dolan family, who collectively control Madison Square Garden-related companies, merged the companies on terms that were unfair to Entertainment and uniquely beneficial to the Dolans.

In a letter decision issued on October 21, 2022, I scheduled this hearing to handle the outstanding discovery requests at issue. At the time, there were, by my count, seven motions pending; two motions for leave to file summary judgment as against certain groups of defendants, plaintiffs' motions to compel third-party production of emails,

which I call the *Asia Global* motion; defendant Entertainment's motion for a protective order precluding the deposition of an in-house attorney named Hal Weidenfeld, which I call the "Weidenfeld motion;" Thomas C. Dolan's counsel's motion to withdraw; plaintiffs' additional discovery motion filed on October 20th, 2022, which I call the "Omnibus motion"; and a motion for expedited briefing on the omnibus motion.

As I stated in my October 21st letter, I'll resolve the summary-judgment-related motions on the papers. They have been fully briefed, as I understand it, except that the non-committee independent director defendants have not yet filed a reply brief to plaintiffs' opposition letter as to Bandier, Tese, and Thomas. And that letter was dated October 11th. So once that's completed, I'll take it under advisement.

My October 21st letter also addressed the motions to expedite and withdraw and stated that plaintiffs' *Asia Global* motion is denied. I promised to provide my reasoning for denying the *Asia Global* motion by a bench ruling, which I will do today. We have also heard oral argument on the Weidenfeld motion

and the omnibus motion, and I'm prepared to deliver bench rulings on those motions as well.

To streamline my bench rulings, I'll assume the parties' familiarity with the basic facts of the case and will summarize only the facts germane to each pending motion. I'll also refer to members of the Dolan family by their first name and/or middle initial, but I intend no disrespect or familiarity when using these designations.

I'll start with the Weidenfeld motion which was filed on October 6, 2022, at Docket No. 265. Entertainment seeks a protective order to prevent the deposition of Mr. Weidenfeld, who was a senior vice president of Legal & Business Affairs for Venues & Labor at Entertainment.

On behalf of Entertainment, Weidenfeld sent a letter dated June 24, 2022, to approximately 90 law firms that were involved in litigation adverse to Entertainment and its affiliates, including plaintiffs' counsel in this action. The letter is attached as Exhibit A to the Weidenfeld motion. The letter stated that no attorneys at any of these 90 firms could enter Madison Square Garden, the Hulu Theater at Madison Square Garden, the Beacon Theater,

Radio City Music Hall, or the Chicago Theater. I'll just collectively refer to those as the "venues."

The reason for this rash instruction was "[the] adversarial nature inherent in litigation proceedings, and because of the potential for contact with the Company's employees and disclosure outside proper litigation discovery channels."

The letter cited concerns about improper disclosures that could arise if plaintiffs' counsel or other law firms entered the venues without authorization, and then did something as horrific as watch a play, a sporting event, order a hot dog, or use the bathrooms, these sorts of threatening acts.

Plaintiffs seek discovery into why exactly Entertainment decided to send this letter. Plaintiffs' working theory is that James, or "Jim," Dolan, also a defendant in this action, was behind the policy as a petty tit-for-tat in response to the parties suing his companies. The plaintiffs say that Jim Dolan has a "reputation for being a bully" which could "lead to admissible evidence this case" about Dolan's management of Entertainment in general and with respect to the merger in particular. I quoted paragraphs 4 and 6 of plaintiffs' opposition to the

Weidenfeld motion.

On August 25, 2022, plaintiffs noticed Weidenfeld's deposition. After the parties discussed scheduling for logistical reasons, plaintiffs served an amended notice on September 9. On September 30th, counsel for Entertainment alerted plaintiffs that Entertainment would instead seek a protective order to block the deposition. Entertainment filed its motion for a protective order on October 6, 2022. Plaintiffs filed the opposition on October 14, 2022.

Under Court of Chancery Rule 26(b)(1), parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense proportional to the needs of the case. It is not a ground for objection that the information sought will be inadmissible at trial. Relevance is the touchstone of discovery under Rule 26(b)(1). Evidence is relevant if it is reasonably calculated to lead to the discovery of admissible evidence. Relevant evidence is discoverable, even if it may not be admissible. So, in short, relevance poses a low threshold.

This Court may issue a protective order against discovery or a deposition under

Rule 26(c) as "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." As discussed in *Dart v. Kohlberg, Kravis, Roberts & Co.*, this Court has granted protective orders against parties seeking intrusive depositions that "may create an abuse in attempting to acquire privileged information and are easily susceptible to being used merely to harass an opponent."

I found it very ironic that the case law and argument cited by Entertainment in this action had to deal with the harassment of an opponent.

In any event, Entertainment advances two arguments for a protective order. Entertainment first argues that Weidenfeld possesses no relevant information on the parties' claims and defenses. Entertainment says he only has information on the June 24, 2022, letter, which is not directly at issue in the challenged merger. Entertainment argues that Weidenfeld's position in the letter was consistent with an internal policy later solidified by the company in an internal memorandum dated July 28.

Entertainment next argues that the attorney-client privilege would protect anything

Weidenfeld might have to say about the letter because he is internal counsel at the company. Entertainment cites case law from both Delaware and elsewhere saying that depositions of counsel are rare.

As stated earlier, by contrast, plaintiffs suspect that Jim Dolan is behind the letter. They think his potential involvement in, and apparent pettiness, in having it sent are relevant to Entertainment's merger with Networks because they indicate a rude, bullying approach to managing various entities. This, in turn, raises questions about how he handles his fiduciary obligations to the company. Plaintiffs also believe that Entertainment's attorney-client privilege concerns may be addressed on a question-by-question basis.

So here's the punchline. With some reluctance, I'm granting this motion. The bottom line is, as I stated earlier, plaintiffs have won, solely by bringing the issue to my attention and the strategic fact that the letter plays into all of their case themes. But whether Jim Dolan bullied his attorney into sending a completely idiotic letter to 90 different adverse attorneys for presumptively vindictive reasons is a question for Jim Dolan. If he

evades the question, then that conduct speaks to the answer.

Weidenfeld is unlikely to have much relevant information on this topic beyond what is protected by the attorney-client privilege. So for these reasons, again, the motion is granted.

I'll move now to the omnibus motion. For reference, it's at Docket 286. In their motion, plaintiffs seek first to enforce this Court's prior order granting plaintiffs' motion to compel certain text messages on September 6, 2022. That's the first request for relief. The second is to compel depositions of Thomas C., Aiden, Quentin, and Charles P. Dolan. And, third, to shift costs and expenses incurred with the motion.

Thomas C. Dolan responded on October 28th. That response is available at Docket entry 306. He voiced no opposition to being deposed or producing the relevant text messages. In light of that response, plaintiff dropped the motion as to Thomas C., and I'll treat the entire omnibus motion as to Thomas C. moot. Plaintiffs' first ask compelling compliance with my September 6th bench ruling on text messages is thus also moot as it was only directed to

Thomas C.

That leaves the motion to compel depositions for Aiden, Quentin, and Charles P., along with the motion to shift fees. And I'm granting the motion to compel the depositions.

Plaintiffs state that the Dolans who are refusing to sit for depositions -- who I'll just refer to as the "Refusing Dolans" for lack of a better term -- are wrongfully evading the depositions. Plaintiffs originally noticed depositions of all three on October 7th. Despite following up on their email several days later, plaintiffs claim that they received no response for the refusing Dolans.

Plaintiffs argue that it is "simply part of the job" of being a director of either company for the refusing Dolans to have their depositions taken. That's at paragraph 12 of the omnibus motion. Each of the refusing Dolans, they say, voted to approve the merger at issue. Charles P. and Quentin are directors of Entertainment, and Aiden was the director of Networks.

Plaintiffs' reply briefs adds specificity. In particular, plaintiffs seek to understand whether Sullivan & Cromwell -- Networks's

deal counsel -- advised the Networks directors to destroy notes from the March 25th meeting. Plaintiffs have obtained a draft speech prepared by Sullivan & Cromwell to give to the Networks board advocating for this outcome. It's available at Exhibit G on Docket 315.

Plaintiffs hope that by deposing Aiden as the Networks director, they'll gather greater information on this subject matter. Plaintiffs also hope to reconcile allegedly conflicting information sources about whether Marianne Dolan-Weber attended the March 25th meeting by deposing Quentin and Charles P. That's beyond the general questions that plaintiffs want to ask concerning these persons' decisions to approve the merger.

Refusing Dolans rebut that the additional depositions are warranted. They say they'd be unreasonably cumulative or duplicative. Counsel for the refusing Dolans argue that, first, plaintiffs waited for months to notice the depositions, they waited until the end of the discovery period; second, that the refusing Dolans played no role in the "conception or negotiation of the merger at issue"; and, third, that in light of plaintiffs' already-taken

depositions of other Dolans, any further depositions will be duplicative and cumulative. In their briefing, the refusing Dolans add that neither Aidan, Charles P., nor Quentin have any unique knowledge to share about the deal.

I don't need to dwell too much on the refusing Dolans' first argument about timeliness. Plaintiffs filed their notices of deposition timely. They did not do so at the last minute. They noticed these depositions on October 7, over a month ahead of the November 16th deadline. So the first argument fails.

The next issue is relevance, which is governed by the low standard I articulated earlier. Undoubtedly, each of the refusing Dolans are a source of some relevant information as to the merger at issue. They may not have unique insights about the various board meetings or decisions, but certainly as directors of the relevant entities they possess information about the meetings, and such information would clear the low relevance threshold.

The remaining issue is defendants' final argument that these depositions would be unreasonably cumulative or duplicative. And that is

an argument that I'm receptive to, particularly in expedited litigation, but here it doesn't work. Although the refusing Dolans cite a litany of discovery efforts that they have accommodated and will accommodate -- and that is certainly laudable -- they've not shown unreasonableness to plaintiffs' ask.

It's certainly possible that plaintiffs will learn nothing new from the depositions. That's the risk plaintiffs take in investing time in taking them. The mere possibility of cumulative and duplicative information in these circumstances is not enough to establish an unreasonable burden.

So all of the depositions may be held.

Finally, I'll turn to the request for fee shifting. I'm not going to grant this. I think there have been a lot of discovery issues at play. And plaintiffs have won some and plaintiffs have lost some. In these circumstances, I don't view any of the positions as unduly unreasonable or warranting fee shifting. So each side will continue to bear their own costs.

I'll turn now to the *Asia Global* motion, which was filed on August 8th. I've already

denied the motion. I did that in my October 21st letter. So I'm just giving you some of the reasoning behind that denial.

Charles F., Kristin, and Paul Dolan were all directors of Entertainment at the time of the merger and continue as directors today. Charles F. previously served as the director of Networks through the merger and has been a director of Madison Square Garden Sports Corp., an affiliate of Entertainment and Networks since 2015. Kristin was director of Networks from 2010 to 2015, and then from 2018 to the merger. She was also a director of Madison Square Garden Sports Corp. from 2015 to December 2021. Paul was also a director of Networks from 2015 through the merger and has been a director of Madison Square Garden Sports Corp. since December 2019.

To communicate with counsel about the challenged merger, each of Charles F., Kristin, and Paul Dolan -- who I'll refer to for convenience as the "email custodians" -- used email accounts maintained at AMC Networks, Inc., or "AMC," 605.tv, or "605," and the Cleveland Guardians Baseball Company, LLC, or the "Guardians."

AMC, 605, and the Guardians are third

parties with no involvement in the relevant merger or this litigation. The email custodians have asserted attorney-client privilege over the emails and their respective AMC, 605, and Guardians accounts and they have withheld them from discovery on the grounds of privilege. Plaintiffs have moved to compel those communications, and the parties fully briefed the issues and I heard argument on September 6th.

I'm denying the motion for a couple of reasons. The first is that I'm not convinced that this is a situation in which *Asia Global* should apply. Second is that if *Asia Global* applies, it should be narrowly construed and should take into consideration the email custodians' respective positions within AMC, 605, and the Guardians.

I'll turn now to the factual background. Charles F. is a former executive chairman, current chairman emeritus, and director of AMC, of which the Dolan family indirectly owns approximately 79 percent of the voting share. He used an AMC email account to discuss Entertainment and Networks and to communicate with counsel at Debovoise.

Kristin is the founder, CEO, and director of 605, whose company email she also uses to

discuss Entertainment and Networks and to communicate with counsel at Debovoise.

Paul is the CEO, sole manager, and chairman of the Guardians, of which he owns a controlling interest as a family trust beneficiary. Paul also used his Guardians email accounts to communicate about Entertainment and Networks and to communicate with counsel at Debovoise and Baker Botts.

AMC, 605, and Guardians are third parties with no involvement in the transaction at issue or this litigation.

To support their claims of attorney-client privilege, the email custodians must demonstrate that they had an objectively reasonable expectation of confidentiality in their AMC, 605, and Guardians emails. In certain circumstances, this Court has applied the four-factor analysis of *Asia Global* to determine whether an employee had an objective reasonable expectation of privacy in personal communications in their work emails. *Asia Global* was first adopted by this Court in *In re Information Management Services, Inc. Derivative Litigation*, which I'll refer to as the "*IMS*" decision.

The *Asia Global* analysis looks to

whether a company's policies or practices reduce the employee's expectation of privacy in the employee's work emails. Applicable AMC, 605, and Guardians email policies make clear that employees have no or limited privacy interest in their work emails, and warn that the companies reserve the right to monitor those emails. Citing to the plain language of these policies, plaintiffs argue that the email custodians had no reasonable expectation of privacy in their AMC, 605, or Guardians emails, respectively.

In the interest of brevity, I won't reproduce or restate the entire relevant text from those policies, which the parties have attached as exhibits to their motions. Suffice it to say that each has carefully crafted language circumscribing the privacy expectations of employee users of company technology.

I'll just give some highlights here. AMC, for instance, says outright that "no User should have a legitimate expectation of privacy in regard to their use of Technology Resources."

605 similarly says that "[p]ersonal communications in our systems ... will be used, accessed, recorded, monitored, and disclosed by the

company at any time without further notice."

And the Guardians policy says that "[t]he Company reserves and intends to exercise the right to review, audit, intercept, access and disclose messages created, received, or sent over the Communication Systems for any purpose."

Notwithstanding these policies, each of the email custodians believed that communications in their respective work email accounts were private and that they were authorized to use their accounts for personal use on an unrestricted basis.

Having laid out the relevant background, I'll turn now to the legal analysis. Plaintiffs argue that the company policies of AMC, 605, and Guardians each expressly limit the conditions for employees' personal use of company technology. Weighing the *Asia Global* factors, they say that no expectation of privacy is reasonable.

Defendants raise two arguments in response. First, they argue that *Asia Global* is not the right standard to apply here; and, second, they argue that the email custodians enjoyed a reasonable expectation of privacy if *Asia Global* is applied.

Defendants' first argument makes a lot

of sense in my view, for reasons I'll explain. Rule 502 of the Delaware Rules of Evidence establishes the basis for attorney-client privilege. It requires confidentiality in attorney-client communications for the privilege to attach. To quote Rule 502, "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

Confidentiality for Rule 502 purposes has subjective and objective aspects. "A party's subjective expectation of confidentiality must be objectively reasonable under the circumstances."

This Court has applied the factors articulated in the 2005 bankruptcy decision out of the Southern District of New York in *Asia Global* to determine, in certain circumstances, whether a user has an objectively reasonable expectation of privacy over personal communications in their work emails. Those factors look primarily to whether the company policies and historical practices made it reasonable for the employees to expect privacy in their

company-sponsored emails.

The *Asia Global* court developed its framework when a Chapter 7 trustee successfully moved to compel production of emails sent by company executives to personal attorneys using work email accounts.

This Court first adopted the *Asia Global* standard in *IMS* in 2013. There, Vice Chancellor Laster applied the four-factor test where stockholder plaintiffs alleged breach of fiduciary duty by two IMS officers who used their work email accounts to correspond with personal attorneys regarding the alleged breach. The Vice Chancellor compelled the production of those officers' emails because the relevant policy alerted IMS employees to the possibility of internal monitoring.

Between *IMS* and *Asia Global*, the analysis of company's email policies became germane to what can be called a "first-party" context for *Asia Global*, in which an employees' emails are sought by someone standing in for the corporation's interests either, for instance, as a stockholder or a bankruptcy trustee. And in the stockholder context, it was a unique alignment of parties that allowed the Court to

look beyond the typical framework we apply in that context for determining when a stockholder is entitled to privileged communications.

In any event, in his *IMS* decision, Vice Chancellor Laster included a cautionary note, stating that when applying *Asia Global* to the context at issue, he warned that employers' access to employees' work emails comprising privilege "makes the most sense in litigation between the employer ... and the employee" and that "the corporation and its employees should be on different and stronger ground when those outside the corporation seek to compel production of otherwise privileged documents that employees have sent using work email."

This Court subsequently revisited the *Asia Global* analysis in the third-party context in the *WeWork* litigation. There, the Court compelled production of communications certain Sprint employees had in their work emails with counsel, even though Sprint was not a party to the litigation. *WeWork* had sued Softbank, its investment bank, in connection with its termination of a tender offer. The only connection to Sprint was that Softbank was a majority stockholder in Sprint at the time.

Sprint, however, maintained policies explicitly stating that employees "should have no expectation of privacy in information ... on any of Sprint's computer systems" and that Sprint reserved the right to review workplace communications such as emails. The court held that Sprint employees lacked a reasonable expectation of privacy in their Sprint emails, so production was appropriate in the *WeWork* litigation.

That was a well-reasoned decision, and certainly reasonable minds can come to that conclusion. In reaching that decision, however, the Court noted that parties failed to grapple with federal law that supported the outcome he reached.

If a few recent cases post-dating *WeWork*, the Court encountered arguments under *Asia Global*. First came Dell. There, Vice Chancellor Laster concluded, under *Asia Global*, that an outside director and former CEO of Accenture, a third party to the litigation, had a reasonable expectation of privacy under Accenture's email policies. He applied *Asia Global* but in a way that I view as a narrow construction. Because he applied *Asia Global* and the analysis disfavored production, he had no need to

address the threshold issue concerning the standing of persons to seek information found on the servers of strangers to the litigation.

The most recent application of *Asia Global* to the third-party context was in my opinion in *Twitter*. There, I considered a motion to compel Mr. Musk's emails with counsel from the servers of SpaceX and Tesla. These emails related to his acquisition of Twitter. I did not need to reach the threshold issue as to whether *Asia Global* should apply because the *Asia Global* analysis disfavored production.

So that sums up this Court's application of the *Asia Global* factors. As I noted in *Twitter*, we really haven't delineated the outer edges of when *Asia Global* applies.

And I have to say, I have concerns about expanding *Asia Global* beyond the facts of that case where, effectively, a former employee sought to assert confidentiality over communications on the server of the former employer in litigation with the former employer. I'm of the mind that objective reasonableness should have a targeted scope that looks at who is seeking the information. There's no

shortage of ways to invade the attorney-client privilege under Delaware law. And I've blown up privilege in a number of cases and had that fate inflicted on my clients in numerous lawsuits before this Court. Those are the rules of the road, and that's fair. But adding yet another broad category of pitfalls to avoid seems antithetical to the baseline assumption that privileged communications are worth encouraging and protecting. It's my personal viewpoint on the issue.

And this viewpoint informs how I apply the *Asia Global* analysis, which is quite narrowly. If *Asia Global* applies where the server provider is a stranger to the litigation, then we should look at the custodian's role within that organization when determining whether the custodian had a reasonable expectation of privacy.

Here, the email custodians were more than employees of the respective server providers. Charles F. founded the original parent company of AMC. He's both the chairman emeritus and a member of a control group of the company. Kristin is the founder, CEO, and one of three directors of 605, shares 50 percent stake in the company's equity through an

LLC co-owned alongside her co-defendant and spouse, Jim Dolan. Paul is CEO, chairman, and "sole manager" of the Guardians and owns a controlling interest in the Guardians through a family trust.

So it's more proper to view the email custodians as controllers of sorts rather than simply employees of each of their companies. And for clarity, just know that I use the term "controller" here loosely. I do not intend to import the analysis for determining whether a party is a controller with concomitant fiduciary duties.

In any event, in these circumstances the email custodians were reasonable to expect that the employee guidelines concerning privacy did not apply to them, even if these policies did not expressly create exceptions for them.

Plaintiffs worry that allowing the email custodians privacy over the emails creates a bad policy by empowering fat cats with excessive privacy while forcing the masses to play by the rules of corporate handbooks. This appeal to my egalitarian instincts is admirable, but as a matter of general corporate management, it's not irregular for corporate managers to set up rules, either expressly or

impliedly, that apply differently to different categories of employees or stakeholders.

For instance, the hand washing requirements that likely apply to hot dog vendors at Madison Square Gardens might not need to apply, at least with the same vigor, to general counsel or other staff.

With that in mind, the purpose of the reasonable expectation privacy analysis is to determine, objectively, the corporate realities on the ground that inform the objective reasonableness of the subjective beliefs of the relevant custodians. It's not to cast normative judgment on those rules or realities.

In sum, *Asia Global* probably shouldn't apply, but if it does, it should be narrowly construed and it doesn't warrant production here.

Those are my bench rulings. Are there any questions?

ATTORNEY VARALLO: None from the plaintiffs, Your Honor. We appreciate your rulings.

THE COURT: Well, thank you very much for your time this morning. Again, thank you for streamlining the presentation.

I apologize for the technical difficulties I experienced earlier. I want to thank my clerk, Sadie Kavalier, who rushed in with her laptop I'm using for this hearing. She's the hero of the day.

In any event, we are adjourned.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 10:11 a.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 5 through 53 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 28 through 52, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 7th day of November 2022.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter