

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

MADISON SQUARE GARDEN ENTERTAINMENT
CORP. and MSG ARENA LLC,

Petitioners,

For an Order Pursuant to CPLR 2304 Quashing Subpoena
Duces Tecum and Ad Testificandum, and for a Protective
Order Pursuant to CPLR 3103, Served by:

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

In the Matter of MSG Arena LLC, License No.: OP
1288582 CN 16305, by the New York State Liquor
Authority

Index No.

PETITION

Petitioners, MADISON SQUARE GARDEN ENTERTAINMENT CORP. and MSG
ARENA LLC, by and through their attorneys KING & SPALDING LLP, respectfully allege as
follows:

NATURE OF THE ACTION

1. This is a petition to quash the New York State Liquor Authority's ("SLA")
February 2, 2023 subpoena and for a protective order. That subpoena—returnable less than two
business days after its issuance—compels counsel for parties adverse to MSG in an ongoing
litigation in Delaware, *In re Madison Square Garden Ent. Corp. S'holders Litig.*, C.A. No. 2021-
0468-KSJM (Del. Ch.) (the "Delaware Litigation"), to appear for an examination by the SLA, and
to produce confidential deposition transcripts and exhibits for several MSG witnesses, in
connection with an SLA inquiry. Mastro Aff. Ex. A, Subpoena to Mr. Jeroen van Kwawegen of
Bernstein Litowitz from New York State Liquor Authority (Feb. 2, 2023) (the "Subpoena").

2. MSG's motion to quash should be granted for the multiple reasons detailed below, and pursuant to CPLR § 3103(b), the Subpoena is stayed pending disposition of this motion.

3. At the outset, the Subpoena itself is facially deficient. The CPLR expressly requires that a subpoena recipient be served at least 20 days before the return date for an examination or production. *See* CPLR §§ 3106(b), 3120(2). But the SLA served this Subpoena with less than two business days' notice. Further, the SLA lacks the legislative authority to issue a subpoena at this stage of its inquiry. The Alcoholic Beverage Control Law ("ABCL") and CPLR do not authorize pre-action subpoenas. For these reasons, this Subpoena must be quashed.

4. In the alternative, the Court should grant a protective order limiting the Subpoena's demand for deposition transcripts and exhibits. Those deposition transcripts have been designated "Confidential" in their entirety, as have many of the exhibits used during those depositions, and are subject to a protective order precluding their production. Indeed, earlier today, the SLA confirmed in writing that "the SLA is not asking for and does not expect to receive any confidential information." Mastro Aff. Ex. E, Correspondence with SLA (February 2-3, 2023).

5. Moreover, the SLA purports to be investigating whether MSG's attorney access policy (the "Policy") renders Madison Square Garden and other MSG venues closed to the public. This is not true, as the Garden and other venues are obviously open to the public and have record attendance. Indeed, the Policy affects less than one half of a percent of lawyers in New York and less than one one-hundredth of a percent of New York State's population.

6. The SLA may only exercise its subpoena authority to seek materials relevant to the topic of a permissible inquiry, and not otherwise designated confidential under the Confidentiality Order issued in the Delaware Litigation. *See* Mastro Aff. Ex. D, Delaware Litigation Confidentiality Order. The Delaware Litigation, however, concerns a disputed merger transaction

that has nothing to do with the MSG venue policy the SLA is reviewing. The Court should therefore either now quash this Subpoena outright or grant MSG's request for a protective order.

STATEMENT OF THE FACTS

7. The SLA is a New York state agency tasked with issuing licenses and permits and ensuring compliance with the ABCL. In that capacity, the SLA issued a liquor license to MSG.

8. As part of its regular operations, MSG must renew its liquor license periodically. This license grants MSG the right to serve alcohol at its venues, which include sports arenas, performance venues, theatres, and restaurants.

9. On December 1, 2021, MSG submitted its most recent application for license renewal. The licensee is the MSG affiliate MSG Arena, LLC. The renewal license was signed by Marc Schoenfeld.

I. MSG Receives Letter of Advice from the SLA

10. On November 29, 2022, the SLA sent a Letter of Advice to MSG, notifying MSG of a complaint alleging a violation of SLA Rule 53.1(d), 9 NYCRR 53.1(d), on a theory that the MSG's venue policy excluding adverse attorneys rendered MSG's venues no longer "open to the public." *330 Restaurant Corp. v. State Liquor Authority*, 26 N.Y.2d 375, 377 (1970).

11. MSG responded on December 12, 2022 by letter explaining why it believed that it was in full compliance with the ABCL and all SLA rules and regulations.

12. Starting from two days before Christmas, MSG has been in regular contact with the SLA's Investigator and Acting General Counsel ("SLA GC") regarding their various requests for document productions and interviews with corporate officers. MSG has fully cooperated with the SLA's requests, including making document productions and producing Mr. Dolan and another corporate executive for interviews this coming Monday, February 6.

II. The Delaware Litigation

13. The Delaware Litigation was brought in Delaware Chancery Court by minority stockholders of Madison Square Garden Entertainment Corp. and MSG Networks Inc. challenging a July 2021 merger transaction involving those two entities. *See In re Madison Square Garden Ent't Corp. Stockholders Litig.*, C.A. No. 2021-0468-KSJM; *In re MSG Networks, Inc. Stockholders Class Action Litig.*, C.A. No. 2021-0575-KSJM.

14. The Delaware Litigation has nothing to do with MSG's venue policy, which is the subject of the SLA's inquiry. Indeed, the Delaware Chancery Court recently quashed a subpoena seeking to depose an MSG corporate officer in the Delaware Litigation regarding that venue policy. *See* Mastro Aff. Ex. C, Protective Order, Trans. ID 68343723 (Nov. 3, 2022) (granting protective order precluding deposition of Hal Weidenfeld).

15. Discovery in the Delaware Litigation has been conducted pursuant to a protective order. That order protects (among other things) "deposition testimony, deposition exhibits, [and] deposition transcripts" that a party "in good faith reasonably believes contains nonpublic, confidential, personal, business, strategic, proprietary, or commercially sensitive information." Mastro Aff. Ex. D, Delaware Litigation Confidentiality Order at 2.

III. MSG Learns of the SLA's February 2, 2023 Subpoena

16. MSG learned of the Subpoena the afternoon of the day it was served, on February 2, 2023. The return date and time of the Subpoena is less than four days (and less than two business days excluding the weekend) later, on February 6, 2023 at 9:00 a.m. Mastro Aff. Ex. A, Subpoena.

17. The SLA served its subpoena on Mr. Jeroen van Kwawegen, an attorney at Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz"). Bernstein Litowitz represents parties adverse to MSG in the Delaware Litigation.

18. The Subpoena seeks “any and all” deposition transcripts and exhibits from the Delaware Litigation for ten MSG officers “if they exist.” Mastro Aff. Ex. A, Subpoena. Of those ten named individuals, four were deposed in the Delaware Litigation, and their respective transcripts (and several of their respective exhibits) have been designated confidential pursuant to the Delaware Litigation protective order.

19. Later that same day, the undersigned counsel e-mailed Bernstein Litowitz notifying that firm of MSG’s intent to move to quash the Subpoena and for a protective order before the February 6, 2023, 9:00 a.m. return date and time. Mastro Aff. Ex. B, Correspondence to Bernstein Litowitz (February 2, 2023 at 6:33 PM). Counsel advised further that MSG’s forthcoming motion would automatically stay the Subpoena, *see* CPLR § 3103(b), and asked Bernstein Litowitz to confirm that it not make any production in response to the Subpoena at this time. *Id.* Bernstein Litowitz would not confirm that it would not make a production in response to the Subpoena. Rather, Bernstein Litowitz stated it would not withhold a production until service of a notice of motion, and further claimed that under the Confidentiality Order, “nothing prevents us from complying with the subpoena” and that it has no obligation to “protect [MSG’s] confidentiality assertions.” *Id.* (February 3, 2023 at 6:39 AM).

20. Separately, on that same day, in accordance with CPLR § 2304, my co-counsel reached out to the SLA advising that the return date is improper under the CPLR, and requesting that the SLA withdraw the subpoena. The SLA did not do so, but did confirm that it is “is not asking for and does not expect to receive any confidential information.” Mastro Aff. Ex. E, Correspondence with SLA (February 2-3, 2023).

ARGUMENT

21. Pursuant to CPLR §§ 2304 and 3103, MSG moves to quash and for a protective order of the Subpoena issued to Bernstein Litowitz.

22. MSG has standing to bring this Petition. As stated herein, both Petitioners maintain that they have a “have a sufficient interest in the records sought,” *Ohi Asset (NY) 93rd Street, LLC v. Consigli Const. Co., Inc.*, No. 654936/2020, 2022 WL 3682256, at *2 (Sup. Ct. N.Y. Cnty. Aug. 25, 2022), because the documents and testimony at issue are proprietary and confidential corporate records kept in the ordinary course of business, which are in the possession of a third party only by virtue of the ongoing Delaware Litigation. *See State Comm’n on Governmental Operations of City of N.Y. v. Manhattan Water Works, Inc.*, 10 A.D.2d 306, 308 (1st Dep’t 1960) (finding standing by party to challenge subpoena seeking party’s documents held by another). Moreover, Madison Square Garden Entertainment Corp., a party to the Delaware litigation, maintains that the documents and testimony are covered by the Confidentiality Order in that action. *See id.*

A. The Subpoena Must Be Quashed Because it Fails to Provide the Requisite Notice Under the CPLR

23. The Court should quash the Subpoena because it does not provide adequate notice as required by the CPLR. Plaintiff’s subpoena authority derives from ABCL § 17(5), which states that “[a] subpoena issued under this section shall be regulated by the civil practice law and rules.” *Id.*; accord *Silverman v. State Liq. Auth.*, 47 A.D.2d 226, 229 (“subpoenas issued under [ABCL § 17’s] provisions shall be regulated by the CPLR.”). The CPLR, in turn, requires that “[u]nless a court orders otherwise . . . [a] subpoena shall be served at least twenty days before the examination.” CPLR § 3106(b). Similarly, the CPLR requires notice of “not less than twenty

days after service of the . . . subpoena” for a subpoena demanding the production of documents. CPLR § 3120(2).

24. But in this instance, the SLA served the Subpoena on Bernstein Litowitz on February 2, 2023—not even two full business days before the February 6, 2023, 9:00 a.m. return date and time. Mastro Aff. Ex. A, Subpoena. On this basis alone, the Subpoena is facially deficient and must be quashed. *See MG v. RG*, 2015 N.Y. Slip. Op. 51851(U), *2 (Kings Sup. Ct. Dec. 10, 2015) (quashing defective subpoenas under CPLR 3106(b) when they were served only nine days prior to the examination date commanded in the subpoenas); *Battaglia v. Town of Bethlehem*, 21 Misc.3d 1117(A), *1 (Albany Sup. Ct., Feb. 14, 2006) (quashing subpoena for violation of CPLR 3106(b)); *Lyons v. New York City Economic Development Corp.*, 2021 WL 1985693, *3 (May 18, 2021) (finding subpoenas facially deficient because they were undated).

B. The SLA Lacks the Legal Authority to Issue a Subpoena at this Stage of its Investigation

25. Moreover, even if the Subpoena were not facially defective, the SLA does not have authority to issue a subpoena at this stage of its investigation. The CPLR provides only very limited exceptions to the general rule that parties may not obtain pre-action disclosures. Under CPLR § 3102, a party may obtain discovery “before an action is commenced... to aid in bringing an action, [or] to preserve information,” but only by court order. Importantly, “while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing.” *Uddin v. New York City Tr. Auth.*, 27 A.D.3d 265, 266 (1st Dep’t 2006). Thus, “[p]re-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that

the information sought is material and necessary to the actionable wrong.” *Bishop v. Stevenson Commons Assocs., L.P.*, 74 A.D.3d 640, 641 (1st Dep’t 2010) (citations omitted).

26. Here, the SLA has not filed an action, whether in civil court or in an administrative proceeding. Nor did the SLA seek or receive a court order to justify issuing a pre-action subpoena. Accordingly, the Subpoena is improper and should be quashed. *See Silverman v. SLA*, 47 A.D.2d 226 (2d Dep’t 1975) (“[I]t appears to be questionable whether the [SLA] was invested by the Legislature with the power to issue subpoenas as part of an ongoing investigation”).

C. The Court Should Enter a Protective Order Limiting the Request to Produce Deposition Testimony and Exhibits

27. Pursuant to CPLR § 3103(a), the Court should grant a protective order limiting the Subpoena’s demand to produce deposition testimony and exhibits because those materials were produced or obtained in a litigation wholly unrelated to the SLA’s inquiry and are largely irrelevant to the subject matter of the SLA’s inquiry (namely, whether the Policy renders MSG venues not open to the public). Further, the requested deposition transcripts have been designated “Confidential” in their entirety, as have many of the exhibits used during those depositions, and are subject to a Confidentiality Order issued in the Delaware Litigation. *See Mastro Aff. Ex. D*, Delaware Litigation Confidentiality Order.

28. CPLR § 3103(a) provides that the Court may issue a protective order “denying, limiting, conditioning or regulating the use of any disclosure device” in order to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person.” Parties may object to an administrative agency’s subpoena for testimony on the grounds that it calls for “irrelevant or immaterial information or subjects the witness to harassment.” *Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256 (1973). “Public agencies do not have carte blanche in issuing investigative subpoenas.” *Hyatt v. State Franchise Tax Bd.*,

105 A.D.3d 186, 201 (2d Dep’t 2013) (stating witnesses subject to subpoenas issued by an administrative agency “may always challenge the subpoena in court on the ground that it calls for irrelevant or immaterial [information] or subjects the witness to harassment.”). Rather, “an agency asserting its subpoena power must show its authority, the relevancy of the items sought, and some basis for inquisitorial action.” *Myerson*, 33 N.Y.2d at 256; *see also Parkhouse v. Stringer*, 12 N.Y.3d 660, 666 (2009) (stating that *Myerson*’s “holding applies in equal force to a subpoena seeking testimony.”).

29. Here, the SLA’s demands for “any and all” “exist[ing]” deposition transcripts and exhibits for four high-level current and former MSG executives in the Delaware Litigation, which (as explained above) concerns a merger dispute and has nothing to do with MSG’s venue policy. That is precisely why the Delaware Chancery Court previously quashed as irrelevant a subpoena seeking to depose an MSG corporate officer regarding that venue policy. *See Mastro Aff. Ex. C, Protective Order*, Trans. ID 68343723. The Subpoena is clearly overbroad.

30. To be sure, CPLR § 3101(a) provides for “disclosure of all matter material and necessary.” *Id.* That said, full-scale production of the requested deposition transcripts and exhibits goes well beyond information “material and necessary” to the SLA’s inquiry into MSG’s venue policy. These requests are beyond the SLA’s subpoena power. *See Myerson*, 33 N.Y.2d at 256; *Hyatt*, 105 A.D.3d at 201.

31. In addition, the requested deposition transcripts have been designated “Confidential” in their entirety, as have the vast majority of the exhibits used during those depositions, and are subject to a protective order precluding their production. Specifically, these materials contain “nonpublic, confidential, personal, business, strategic, proprietary, or commercially sensitive information,” such as internal MSG emails, emails between MSG

personnel and MSG advisors, Board meeting materials and minutes and draft financial projections and valuations. Importantly, neither MSGE nor MSG Arena LLC has provided *any* document discovery in the Delaware Litigation on the topic of the venue policy. Hence, the Subpoena seeks confidential MSG information, most of which has no relevance to the SLA's investigation.

32. Protecting these materials from disclosure is therefore critical, especially given the possibility that information and records collected for the SLA's investigation may be subject to a FOIL request and deemed by the SLA not to fall under FOIL's exemption restricting public access to records compiled for investigatory purposes. *See* N.Y. Pub. Off. Law § 87(2)(e). In light of the increased media attention and political pressure surrounding MSG and its venue policy, the potential harm resulting from disclosure of these confidential materials is particularly acute here.

WHEREFORE, Petitioners, by their undersigned attorneys, request that the Court issue an order pursuant to CPLR § 2304 quashing the subpoena, or for a protective order pursuant to CPLR § 3106 limiting the subpoena, and granting such other, further and different relief as is just, necessary and proper.

Dated: New York, New York
February 3, 2023

By: /s/ Randy M. Mastro

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