



**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

**PUBLIC VERSION**

Filed: March 10, 2023

**PLAINTIFF'S MOTION FOR AN ADVERSE INFERENCE**

1. Everyone knew the challenged transaction (the “Merger”) would face litigation.<sup>1</sup> At the start of negotiations in January 2021, Sullivan & Cromwell (“S&C”)<sup>2</sup> [REDACTED]<sup>3</sup> MSGE’s privilege log asserted that litigation was anticipated as early as January 20.<sup>4</sup>

2. Discovery revealed concerted efforts to sanitize the record. Bankers warned colleagues, [REDACTED]  
[REDACTED]<sup>5</sup> and suggested sensitive topics should be [REDACTED]<sup>6</sup>  
Company executives [REDACTED]<sup>7</sup> Others stamped

<sup>1</sup> Ex. 1 at 319:23–24 (“[REDACTED]”).

<sup>2</sup> S&C represented both Madison Square Garden Entertainment Corporation (“MSGE”) and MSG Networks, Inc. (“MSGN”).

<sup>3</sup> Exs. 2 at MSGE\_00350684; 3 at MSGE\_00006544.

<sup>4</sup> See, e.g., Ex. 4, Mixed Log Entry 736.

<sup>5</sup> Ex. 5.

<sup>6</sup> Ex. 6.

<sup>7</sup> Ex. 7.

“Attorney-Client Privileged” on [REDACTED]<sup>8</sup> S&C told management [REDACTED]  
[REDACTED]<sup>9</sup> and instructed directors to  
[REDACTED]<sup>10</sup>

3. Defendants Kristin Dolan and Marianne Dolan Weber went further still. Both manually deleted texts or emails from the relevant period.<sup>11</sup> Defendant Charles F. Dolan recklessly allowed all of his emails to be deleted by failing to disable an auto-delete function.<sup>12</sup> Other senior executives who worked for MSGE and MSGN manually deleted texts or failed to disable auto-delete functions.

4. “Because spoliation inhibits the search for truth and the administration of justice, it is anathema to our courts[.]”<sup>13</sup> “It is the duty of a court, in such a case of wil[l]ful destruction of evidence, to adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit. The maxim is that everything will be presumed against the despoiler.”<sup>14</sup>

5. MSGE and MSGN executives [REDACTED]

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<sup>8</sup> Ex. 8 at MSGE 00394475; 9 at MSGE 00161180; Ex. 10 at 335:21-23 (“[REDACTED]”).

<sup>9</sup> Ex. 11.

<sup>10</sup> Ex. 12 at MSGE\_00004486, -4492.

<sup>11</sup> Exs. 13 at 17; 14 at 6-7; 15 at 59:14-60:15.

<sup>12</sup> Ex. 13 at 28.

<sup>13</sup> *Chrome Sys., Inc. v. Autodata Sols., Inc.*, 2016 WL 5112061, \*1 (Del. Ch.).

<sup>14</sup> *Equitable Tr. Co. v. Gallagher*, 102 A.2d 538, 541 (Del. 1954).



that Kristin manually deleted her text messages every day.<sup>19</sup> She produced zero texts.

- **Marianne Dolan Weber** deleted her emails every day<sup>20</sup> and produced zero emails from her custodial file.
- **Charles F. Dolan** failed to turn off auto-deletion on his inbox; all of his emails were deleted.<sup>21</sup> He testified that he often prints emails and stores them at work or at home,<sup>22</sup> but produced only one such hard copy.<sup>23</sup>
- **Gregg Seibert**, Vice Chairman of MSGE and MSGN and Jim Dolan's [REDACTED]<sup>24</sup> "delet[ed] all text messages during the relevant periods," including at least [REDACTED] [REDACTED] that were discovered via review of other custodians' text messages.<sup>25</sup>

MSGE did not reveal until after Plaintiff moved to compel that Seibert had deleted text messages *after* approving MSGE's litigation hold notice.<sup>26</sup>

Having previously claimed that Seibert received a litigation hold on April 23, 2021,<sup>27</sup> MSGE now says that Seibert's email had a "setting that 'suppressed' emails from MSGE's legal hold software," which Seibert neither knew about nor turned on.<sup>28</sup>

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<sup>19</sup> Ex. 14 at 6-7; Ex. 15 at 59:14-60:15.

<sup>20</sup> Ex. 13 at 17.

<sup>21</sup> *Id.* at 28.

<sup>22</sup> Ex. 18 at 38-42.

<sup>23</sup> Exs. 19; 39.

<sup>24</sup> Ex. 20.

<sup>25</sup> Ex. 21.

<sup>26</sup> Ex. 22.

<sup>27</sup> Ex. 23, Appendix A.

<sup>28</sup> Ex. 21 ¶13.

Phone records show that Seibert exchanged thousands of SMS messages during the relevant time period, including with other custodians who deleted texts: [REDACTED]<sup>29</sup>

[REDACTED] likely texted other custodians who deleted their texts too.<sup>30</sup>

- **Andrea Greenberg**, MSGN’s CEO “had a practice of deleting all text messages during the relevant period,” including at least [REDACTED] that were discovered via review of other custodians’ text messages.<sup>31</sup>

Greenberg testified that she continued to [REDACTED]

[REDACTED]<sup>32</sup>

- **Andrew Lustgarten**, MSGE’s President, set his phone “to automatically delete texts after 30 days during the relevant periods,” including at least [REDACTED] that were discovered via review of other custodians’ text messages.<sup>33</sup>

After Plaintiff moved to compel his texts, MSGE revealed that, after receiving a litigation hold notice, Lustgarten disposed of his phone without imaging its contents.<sup>34</sup>

- **Mark Cresitello**, MSGN’s Associate General Counsel, “delet[ed] all texts during the relevant periods” including at least [REDACTED] that was discovered

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<sup>29</sup> Exs. 24-25.

<sup>30</sup> The phone logs capture only SMS messages (*i.e.*, not iMessages sent between iPhone users). Most of the custodians who deleted their text messages, including Seibert, used an iPhone during the relevant period. Ex. 21. Seibert’s phone logs thus capture only a small percentage of his text messages.

<sup>31</sup> Ex. 21.

<sup>32</sup> Ex. 10 at 345:11-346:5

<sup>33</sup> Ex. 21.

<sup>34</sup> Ex. 26 at 3.



via review of other custodians' text messages.<sup>35</sup>

- **Ari Danes**, head of Investor Relations for MSGE and MSGN, “regularly deleted text messages during the relevant period” including at least [REDACTED] that were discovered via review of other custodians' text messages.<sup>36</sup>
- **Adam Levine**, Executive Vice President at MSGN, [REDACTED]<sup>37</sup>
- **Colin Kelly**, Vice President of Corporate Development at MSGE, set his phone “to automatically delete texts after 30 days during the relevant periods,” including at least [REDACTED] that were discovered via review of other custodians' text messages.<sup>38</sup> After Plaintiff moved to compel his texts, MSGE revealed that Kelly had deleted text messages.<sup>39</sup>
- **Emma Barnett**, in-house counsel, left MSGE in October 2021, and the Company promptly “erased all contents and settings” from her phone.<sup>40</sup> Through other custodians' text messages, Plaintiff has learned that Barnett texted about MSGE business.<sup>41</sup>

7. The deliberate spoliation by individual custodians was compounded by counsel's reckless disregard for this Court's guidance that “ESI ... may be lost ... absent affirmative steps to preserve it,” “frequent problem areas include ... text

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<sup>35</sup> Ex. 21.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Ex. 26 at 3.

<sup>40</sup> Ex. 21 at Ex. BB ¶8.

<sup>41</sup> Ex. 27.

messages,” and “the procedures used to collect ... documents generally should include interviews of custodians”:<sup>42</sup>

- The Dolan Defendants’ counsel did not ask their clients about text messages until after Plaintiff successfully moved to compel.<sup>43</sup> By then, Kristin Dolan’s texts had all been deleted.
- S&C did not conduct a custodial interview of a single MSGE custodian until late January 2023 (after losing motions to compel).<sup>44</sup> By then, eight MSGE custodians had deleted texts.
- Charles F. Dolan received a [REDACTED]  
[REDACTED]—a company he controls<sup>45</sup>—[REDACTED]  
[REDACTED]<sup>46</sup>
- Marianne Dolan Weber [REDACTED]<sup>47</sup>

## **ARGUMENT**

### **A. Defendants And Their Employees Engaged In Deliberate Spoliation**

8. “A party in litigation has an affirmative duty to preserve potentially relevant evidence”<sup>48</sup> that arises as soon as there is a “reason to anticipate

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<sup>42</sup> Practice Guidelines § 7.

<sup>43</sup> Transcript of Sept. 6, 2022 Hearing at 16.

<sup>44</sup> Ex. 21.

<sup>45</sup> Ex. 40 ¶¶20, 27; Transcript of Nov. 3, 2022 Hearing at 51.

<sup>46</sup> Ex. 13 at 28.

<sup>47</sup> *Id.* at 13.

<sup>48</sup> *Shawe v. Elting*, 157 A.3d 142, 150 (Del. 2017) (cleaned up).

litigation.”<sup>49</sup> [REDACTED]

[REDACTED] 50

9. When a party destroys or allows the destruction of evidence, the Court can draw an adverse inference as long as the aggrieved party has demonstrated a “reasonable possibility” that “access to the lost material would have produced evidence favorable to [its] cause.”<sup>51</sup> Where, as here, defendants deliberately destroy evidence, the Court may simply presume that the evidence would have helped the plaintiff.<sup>52</sup> “If a party intentionally destroys evidence, it is reasonable to infer that the evidence was not favorable to that party.”<sup>53</sup>

10. As set forth above, Kristin Dolan manually deleted her texts and Marianne Dolan Weber manually deleted her emails. MSGE and MSGN employees—Seibert, Greenberg, Lustgarten, Cresitello, Danes, and [REDACTED]—manually deleted texts. Even after litigation holds were sent, Seibert and Greenberg deleted texts, Lustgarten got rid of his phone, and MSGE intentionally wiped

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<sup>49</sup> *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009).

<sup>50</sup> Ex. 2 at MSGE\_00350684; Ex. 3 at MSGE\_00006544.

<sup>51</sup> *In re Happy Child World, Inc.*, 2020 WL 5793156, \*9 (Del. Ch.) (cleaned up).

<sup>52</sup> *Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980) (“where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case.”); *In re Shawe & Elting LLC*, 2016 WL 3951339, \*15 (Del. Ch.).

<sup>53</sup> *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006).



Barnett's phone. Meanwhile, Defendants and MSGE recklessly allowed Charles F. Dolan and Kelly's texts and emails to be auto-deleted.

11. The destruction was compounded by Defendants' failures to come clean. Both Kristin Dolan and MSGE opposed motions to compel texts without disclosing the extent of evidence destruction. If the motions were denied (or never filed), the truth might never have been revealed. To argue that the deletions did "little harm because no one can prove how much information [was] eradicated [would] take[] immense chutzpah."<sup>54</sup>

#### **B. The Court Should Draw Adverse Inferences**

12. The Court has broad discretion to fashion a remedy for spoliation—up to and including a default judgment.<sup>55</sup> In determining a remedy, the Court considers: "(1) the culpability of the spoliating party; (2) the degree of prejudice suffered by the aggrieved party; and (3) the availability of lesser sanctions that could both avoid unfairness to the aggrieved party and serve as an adequate penalty to deter such future conduct."<sup>56</sup> Each factor supports an adverse inference here.

13. *First*, Defendants are highly culpable. Kristin Dolan, Marianne Dolan Weber, and Charles F. Dolan are directly responsible for their own spoliation.

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<sup>54</sup> *TR Inv'rs, LLC v. Genger*, 2009 WL 4696062, \*16 (Del. Ch.).

<sup>55</sup> *BDO USA, LLP v. EverGlade Glob., Inc.*, 2023 WL 1371097 (Del. Super. Ct.); *DG BF, LLC v. Ray*, 2021 WL 5436868 (Del. Ch.).

<sup>56</sup> *Genger*, 2009 WL 4696062, \*18.

They—and the other Defendants—should also be held responsible for the spoliation by MSGE and MSGN custodians. While Delaware courts have not yet confronted this question, other jurisdictions hold that a non-party’s spoliation can be imputed to a party where, as here, the party had either “the legal right or the practical ability to obtain” the spoliated materials.<sup>57</sup>

14. The Defendants had both. Each was a director with the legal right to “unfettered access to the books and records of the corporation[.]”<sup>58</sup> And Delaware law further presumes that MSGE and MSGN executives could not act independently of the Dolans.<sup>59</sup> Finally, if there was any doubt of his practical influence over preservation, [REDACTED]<sup>60</sup>

As [REDACTED] testified [REDACTED]<sup>61</sup> The buck stops with him and the other Defendants.

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<sup>57</sup> *GenOn Mid-Atl., LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 355 (S.D.N.Y. 2012) (collecting cases) *report & rec. aff’d*, 2012 WL 1849101 (S.D.N.Y.); *In re SuperMedia LLC*, 2016 WL 1367070, \*8 (Bankr. D. Del.) (same); *Crown Battery Mfg. Co. v. Club Car, Inc.*, 185 F. Supp. 3d 987, 997 (N.D. Ohio 2016) (same); *Luellen v. Hodge*, 2014 WL 1315317, \*5 (W.D.N.Y.) (same) (collecting cases); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (same).

<sup>58</sup> *Intrieri v. Avatex Corp.*, 1998 WL 326608, \*1 (Del. Ch.).

<sup>59</sup> *Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016).

<sup>60</sup> Ex. 28.

<sup>61</sup> Ex. 29 at 851:20-21.

15. *Second*, Plaintiff has been prejudiced by Defendants’ systematic spoliation, which “impair[ed] the truth-seeking function of the discovery process.”<sup>62</sup> Some of the most probative documents in the case were deleted by one custodian and uncovered (in some instances, very late in the discovery process) only because another kept them:

- [REDACTED]<sup>63</sup>
- [REDACTED]<sup>64</sup>
- [REDACTED]<sup>65</sup>
- [REDACTED]<sup>66</sup>

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<sup>62</sup> *In re Shorenstein Hays-Nederland Theatres LLC Appeals*, 213 A.3d 39, 79 (Del. 2019).

<sup>63</sup> Ex. 30.

<sup>64</sup> Ex. 16.

<sup>65</sup> Ex. 15.

<sup>66</sup> Ex. 31 at MSGE\_00429646.

16. Plaintiff will never know whether similarly probative communications were exchanged between custodians who *both* engaged in document destruction. For example: Matthew Blank, one of the two members of MSGE's Special Committee, was appointed as CEO of Dolan-controlled AMC Networks shortly after the challenged Merger closed.<sup>67</sup> [REDACTED]

[REDACTED]<sup>68</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>69</sup> [REDACTED]

[REDACTED]<sup>70</sup> Did they text or email about Blank's appointment? If so, when? We will never know.

17. Of particular concern are lost texts between Seibert and senior executives. Seibert is Jim's Dolan [REDACTED]<sup>71</sup> and nearly every deponent who

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<sup>67</sup> Ex. 41.

<sup>68</sup> Ex. 29 at 821:1-17.

<sup>69</sup> Ex. 15 at 78-80.

<sup>70</sup> Ex. 42 at 10-13.

<sup>71</sup> Ex. 20 at Moelis-00042406.

worked at MSGE or MSGN [REDACTED] [REDACTED]

[REDACTED]<sup>73</sup> and—as noted above—engaged in at least one text conversation that was devastating for Defendants. He texted with multiple other custodians whose texts were also deleted and acknowledged that it was possible [REDACTED]<sup>74</sup>

18. Importantly, this is a zero-sum scenario with no neutral option. If the Court does not draw an adverse inference against Defendants, then it is Plaintiff who must suffer from any evidentiary gaps caused by the widespread document destruction. The Court should not allow that result. Defendants controlled MSGE and MSGN; Defendants [REDACTED] and Defendants understood they would have to satisfy entire fairness review. They could and should have ensured that MSGE and MSGN preserved evidence. Delaware courts have long recognized that “the production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse.”<sup>75</sup> Defendants should face that same inference where evidence

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<sup>72</sup> Ex. 32 at 38:24-39:12; Ex. 33 at 107:4-11; Ex. 34 at 108:9-19; Ex. 35 at 68:12-20; Ex. 8 at 106:14-107:25; Ex. 36 at 187:2-9; Ex. 37 at 105:2-5; Ex. 38 at 104:13-105:5.

<sup>73</sup> Ex. 1 at 350-51; Ex. 29 at 724-25.

<sup>74</sup> Ex. 1 at 319, 338-41.

<sup>75</sup> *Smith v. Van Gorkom*, 488 A.2d 858, 878 (Del. 1985).



is not available because they and their employees destroyed it.

19. *Finally*, no lesser sanction is available. Even a seven-figure fee-shifting award would be a net positive for Defendants when balanced against the value of reducing their risk of a nine-figure damages award. “If there is any conduct this court needs to deter in future litigation, it is the spoliation committed here.”<sup>76</sup> The Court must ensure that the risks of spoliation outweigh the potential benefits.

### **CONCLUSION**

20. The Court should grant the Motion and infer that MSGN’s [REDACTED]

[REDACTED]

[REDACTED]

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<sup>76</sup> *BDO*, 2023 WL 1371097, \*16.

Dated: March 3, 2023

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