

**Davidson Kempner Capital Mgt. LP v Wow Media,
Inc.**

2023 NY Slip Op 32689(U)

August 4, 2023

Supreme Court, New York County

Docket Number: Index No. 152219/2023

Judge: Erika M. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

-----X

DAVIDSON KEMPNER CAPITAL MANAGEMENT LP,

Petitioner,

- v -

WOW MEDIA, INC.,

Respondent.
-----XINDEX NO. 152219/2023MOTION DATE 03/08/2023MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Upon the foregoing documents, for the reasons set forth herein and as discussed on the record during oral argument on June 27, 2023, the court grants in part Petitioner Davidson Kempner Capital Management LP's ("Petitioner") Verified Petition to quash the out-of-state Judicial Subpoena for Appearance & Duces Tecum issued by Respondent Wow Media, Inc. ("Respondent") and for issuance of a protective order, to the extent that the court quashes the subpoena and determines that Petitioner is not required to produce a witness for deposition, nor provide the documents or information sought in the subpoena, without costs to any party.

Petitioner is a non-party in Respondent's action pending in the Superior Court of California, County of Los Angeles, Case No. 22STCP04006, entitled *Wow Media, Inc. v. California Department of Transportation*. In the California action, Respondent, who is in the outdoor advertising business, sought an order compelling the California Department of Transportation to disclose records and information requested by Respondent regarding disclosure of the Federal Highway Administration's "Outdoor Advertising Reviews" dated September 2020 and June 16, 2022. The California Department of Transportation refused to fully comply with the

requests and it refused to disclose any communications with any person or entity outside of the agency regarding the Reviews. Respondent alleges that such refusal was in violation of the California Public Records Act.

Petitioner brought this special proceeding against Respondent seeking a protective order, an order quashing, denying, limiting, conditioning, and/or regulating Respondent's out-of-state subpoena and for attorneys' fees and costs. Respondent served Petitioner with the Judicial Subpoena for Appearance & Duces Tecum on February 8, 2022, pursuant to CPLR 3119 of the Uniform Interstate Depositions and Discovery Act, seeking deposition testimony and the production of documents. Respondent sought documents and information related to Petitioner's receipt of copies of the Federal Highway Administration's "Outdoor Advertising Reviews" dated September 2020 and June 16, 2022, all communications between Petitioner and the California Department of Transportation regarding the September 2020 Review and all communications between Petitioner and the Federal Highway Administration related to the June 2022 Review. Petitioner argues in substance that Respondent's true motive is a fishing expedition to obtain communications and documents from Petitioner which were in the possession of the California Department of Transportation, but which were not disclosed, so Respondent can identify individuals or entities for Respondent to potentially sue in future proceedings. Therefore, Respondent seeks from Petitioner the identity of the individual or entity who provided the Reviews to Petitioner to aid Respondent in future law suits, which is unrelated to the pending underlying California action.

Respondent opposes the Verified Petition and argues in substance that the court should deny the Verified Petition and enforce the subpoena because it seeks information material to the underlying California action where it seeks to compel the California Department of

Transportation to comply with Respondent's demands for the production of information regarding communications involving the Reviews in violation of the California Public Records Act. Respondent further argues in substance that such information sought is material and necessary for Respondent to prevail in the underlying California action.

CPLR 3101(a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR 3101[a]). CPLR 3103 governs protective orders to prevent abuse and the court has discretion to suppress information to prevent disclosure of information that has been improperly or irregularly obtained so that a substantial right of a party is prejudiced (CPLR 3103).

Courts have held that an individual or entity seeking a protective order bears the initial burden of showing that the information sought is irrelevant or that it is obvious that it will not lead to legitimate discovery (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403 [1st Dept 2018] [internal quotations and citations omitted]). Once this burden is met, then the party seeking the subpoenaed information has the burden to establish the relevancy of the information by demonstrating that the information sought is “material and necessary” to the prosecution or defense of an action (*id.*). The phrase “material and necessary” is interpreted liberally “to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Kapon v Koch*, 23 NY3d 32, 38 [2014]).

Additionally, the subpoenaing party must sufficiently state the circumstances or reasons underlying the subpoena when seeking discovery from a nonparty, and the witness moving to quash must establish that the discovery was utterly irrelevant to the action or that the futility of

the process to uncover anything legitimate was inevitable or obvious (*Kapon*, 23 NY3d at 36; CPLR 3101[a][4]).

Here, the court grants the portion of the Verified Petition seeking an order quashing the subpoena and grants a protective order. The court agrees with Petitioner and quashes the subpoena for procedural and substantive reasons. The court finds that Petitioners met their initial burden of demonstrating that Respondent's subpoena is "utterly irrelevant" to the claims raised in the California action and that it is obvious that disclosure would not lead to legitimate discovery in the underlying action. Additionally, the court finds that Respondent failed to demonstrate that the information sought is "material and necessary" to the prosecution of that action.

The court finds that Respondent's subpoena is procedurally flawed because Respondent failed to state the circumstances or reasons such disclosure is sought or required, as required by CPLR 3101(a)(4), and the original subpoena failed to include an affidavit showing good cause for the production and additional details as required by California Code of Civil Procedure § 1985(b). Although Respondent attempted to cure the defects by serving a new subpoena with the required affidavit, the second subpoena does not cure the defect in the initial subpoena, which is the subject of this proceeding.

Additionally, the court finds that Respondent failed to demonstrate that it is entitled to the relief requested pursuant to the applicable California statute governing the underlying action. The California action involves the California Department of Transportation's refusal to disclose alleged public information sought by Respondents in violation of the California Public Records Act. Petitioner is a non-party to that action and it is not a California governmental entity. Therefore, it cannot be compelled to disclose information pursuant to the California Public

Records Act. Additionally, there is no reasonable view of the evidence from which to infer that Petitioner had any involvement with, nor that it can be held responsible for, decisions made by the California Department of Transportation regarding whether to disclose certain communications to Respondent. Therefore, Petitioner demonstrated that the information sought is “utterly irrelevant” to the prosecution of the underlying action and Respondent failed to demonstrate that the information sought is “material and necessary” to the prosecution of the underlying action.

Finally, Petitioner has already advised Respondent that it had no communication with the California Department of Transportation, nor the Federal Highway Administration regarding either Outdoor Advertising Reviews. Therefore, the deposition and material sought by Respondent in this proceeding will have no impact on the California Court’s decision regarding whether to compel the California Department of Transportation to disclose the information sought in the underlying action.

Therefore, the court quashes the subpoena and issues a protective order. However, the court denies the remainder of the relief requested, including Petitioner’s request for attorneys’ fees and costs.

The court has considered any additional argument raised by the parties, but not discussed herein and the court denies any additional requests for relief, not specifically granted herein.

As such, it is hereby

ORDERED and ADJUDGED that the court grants in part Petitioner Davidson Kempner Capital Management LP’s Verified Petition to quash the out-of-state Judicial Subpoena for Appearance & Duces Tecum issued by Respondent Wow Media, Inc. on or about February 8, 2023, and for issuance of a protective order, to the extent that the court issues a protective order

quashing the subpoena and determines that Petitioner Davidson Kempner Capital Management LP is not required to produce one or more witnesses for a deposition or any of the documents or information sought by the subpoena; and it is further

ORDERED that the court denies the remainder of the Petition, without attorneys' fees or costs to any party.

This constitutes the decision and order by the court.

Erika M. Edwards
202308041657485EEDWARDS126984578707420090519548C060EE63

<u>8/4/2023</u> DATE					<hr/> ERIKA M. EDWARDS, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE