

<b>Matter of Berkeley Educ. Servs. of N.Y., Inc. v Salas</b>
2017 NY Slip Op 32509(U)
November 28, 2017
Supreme Court, New York County
Docket Number: 153956/2017
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

In the Matter of the Application of

Index No.: 153956/2017

BERKELEY EDUCATIONAL SERVICES OF  
NEW YORK, INC.

DECISION/ORDER

Petitioner,

-against-

LORELEI SALAS AS COMMISSIONER OF  
THE NEW YORK CITY DEPARTMENT OF  
CONSUMER AFFAIRS,

Respondent.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Petition, Notice of Cross-Motion, Affidavits/ Affirmations/Memos of Law annexed	1, 2
Opposition Affidavits/Affirmations and Memo of Law annexed	3
Reply Affidavits/Affirmations/Memos of Law annexed	4, 5

*ERIKA M. EDWARDS, J.S.C.:*

Petitioner Berkeley Educational Services of New York, Inc.'s ("Berkeley") Petition to quash and/or for a protective order vacating the subpoena duces tecum, dated March 7, 2017, served by Respondent Lorelei Salas as Commissioner of the New York City Department of Consumer Affairs ("DCA") is denied and DCA's cross-motion to dismiss the Petition and to compel compliance with the subpoena is granted in part to the extent that the court limits the scope of some of the requests in the subpoena and modifies it as set forth herein. The court directs Berkeley to serve DCA with all documents necessary to comply with the subpoena as modified on or before January 12, 2018.

DCA's subpoena duces tecum includes eleven requests for documents and information related to the following:

- 1) Berkeley's ownership and corporate structure;
- 2) The identity of some of Berkeley's employees;
- 3) Berkeley's internal training material related to recruitment, admission or financial aid counseling;

- 4) Berkeley's recruitment, admission, financial aid, institutional financing and billing records related to four students;
- 5) Berkeley's debt collection documents related to two students;
- 6) Berkeley's written materials disseminated to prospective and enrolled students regarding financial aid eligibility criteria, award determination criteria and itemized course costs;
- 7) Copies of all complaints made to Berkeley and supporting documents regarding admissions, financial aid and debt collection;
- 8) Berkeley's rules and policies for creating students' financial aid packages;
- 9) Berkeley's policies regarding its institutional financing plans, including the number of students receiving such aid and the total dollar amount provided;
- 10) Berkeley's documents related to the number of students who received scholarships, grants, tuition discounts, federal work-study, or other aid from Berkeley that the students were not obligated to repay and the total dollar amount provided; and
- 11) Berkeley's policies and procedures related to debt collection owed to Berkeley by present or former students and the names and contact information for debt collection agencies or other entities used by Berkeley to collect such debt.

The time period for the subpoena is from January 1, 2015 until the date of Berkeley's response, except that Nos. 4 and 5 are from January 1, 2009 until the date of Berkeley's response. The subpoena also imposes a continuing obligation on Berkeley to produce the documents and information requested in the subpoena.

Berkeley argues in substance that DCA's subpoena is impermissibly broad and constitutes an abuse of DCA's investigatory power. The information sought by DCA includes non-public confidential and proprietary documents, student educational records protected by privacy laws, confidential employee personnel records and other information without DCA providing any factual details about the alleged complaints against Berkeley for the court to determine whether the information sought is reasonably related to the complaints.

DCA argues in substance that their investigation was based on many complaints against Berkeley and news reports about deceptive practices of for-profit institutions. DCA claims that its subpoena requests are based on the complaints, its own investigation, which included an undercover student sting operation and other information. DCA is investigating Berkeley for possible deceptive practices regarding its recruitment and retention of students, financial aid and consumer credit through institutional loans offered by Berkeley and debt collection. DCA believes that Berkeley may have misrepresented the cost of attendance; compensated its employees for engaging in deceptive practices; undermined federally-mandated disclosures regarding student loans; pressured a prospective student into borrowing money from it when the student wanted to pay in cash; improperly disparaged a competitor and engaged in illegal debt collection.

Based on the evidence presented and arguments submitted by both parties, the court determines that DCA demonstrated that it has the authority to investigate and issue the subpoena to Berkeley, that there is some basis to warrant its investigation and that the evidence sought is reasonably related to the subject of DCA's inquiry (*Matter of A'Hearn v Comm. on Unlawful Practice of Law of N.Y. County Lawyers' Assn.*, 23 NY2d 916, 918 [1969]; *Myerson v Lentini Bros. Moving & Storage Co.*, 33 NY2d 250, 256 [1973]). However, the court agrees with

Berkeley that the scope of the subpoena should be limited and the court slightly narrows the scope of some of the requests.

The parties attempted to resolve the issues in dispute in a meeting on March 30, 2017, and the parties discussed proposed modifications to DCA's requests. Based in part on Berkeley's concerns and suggestions, on March 31, 2017, Glenna Goldis of DCA sent DCA's proposed modifications in an email to Berkeley's attorneys. The court finds these proposed modifications to be reasonable and adopts many of the proposed modifications set forth in this email, but changes the deadline for Berkeley to comply with the subpoena to January 12, 2018.

The court modifies the subpoena by amending the instructions to change No. 1 regarding the relevant time period covered by the subpoena, unless otherwise stated to be from January 1, 2015 until May 1, 2017; change No. 2 to require that Berkeley's continuing obligation to produce only applies when DCA requests Berkeley to update its production and change No. 4 to permit Berkeley to produce electronic records by USB or external hard drive in addition to the formats listed in the subpoena. The court also modifies the requests as follows:

- 1) Request No. 1: Faculty is excluded from the list of employees and Berkeley is permitted to respond to the request as of January 1, 2015; April 1, 2015; July 1, 2015; October 1, 2015; January 1, 2016; and April 1, 2016; July 1, 2016; October 1, 2016; January 1, 2017; and April 1, 2017;
- 2) Request No. 2: Berkeley is permitted to respond to the request as of January 1, 2015; April 1, 2015; July 1, 2015; October 1, 2015; January 1, 2016; and April 1, 2016; July 1, 2016; October 1, 2016; January 1, 2017; and April 1, 2017;
- 3) Request No. 3: No change;
- 4) Request No. 4: Berkeley is permitted to respond to this request by including all records available to it using several electronic databases, including Peoplesoft, Salesforce.com and records related to recruitment and pre-enrollment interactions with students. Also, the relevant time period is from January 1, 2009 until May 1, 2017;
- 5) Request No. 5: The relevant time period is from January 1, 2009 until May 1, 2017;
- 6) Request No. 6: No change;
- 7) Request No. 7: Berkeley is permitted to respond to this request by limiting the type of complaints to written complaints made to Berkeley pursuant to its "Student Complaint Procedure" under "Other Non-Academic Complaints" set forth in its website, including, but not necessarily limited to, complaints made to, referred to, and/or reviewed by Berkeley's Campus Operating Officer;
- 8) Request No. 8: No change;
- 9) Request No. 9: No change;

10) Request No. 10: Berkeley's response must itemize the types of aid received by the students;

11) Request No. 11: No change.

As such, it is hereby

**ORDERED** that the court denies Petitioner Berkeley Educational Services of New York, Inc.'s Petition to quash and/or for a protective order vacating the subpoena duces tecum and the court dismisses the Petition with prejudice and without costs; and it is further

**ORDERED** that the court grants in part Respondent Lorelei Salas as Commissioner of the New York City Department of Consumer Affairs' cross-motion to dismiss the Petition and compel compliance with the subpoena to the extent that the court modifies the subpoena as set forth above and compels Petitioner Berkeley Educational Services of New York, Inc. to serve Respondent with the documents and information necessary to comply with the subpoena as modified by this Order on or before January 12, 2018.

Date: November 28, 2017



HON. ERIKA M. EDWARDS