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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

17 MATT JONES, BRYSON DECHAMBEAU,
18 PETER UIHLEIN, and LIV GOLF INC.,

19 Plaintiffs,

20 v.

21 PGA TOUR, INC.,

22 Defendant and
23 Counter-Plaintiff,

24 v.

25 LIV GOLF INC., THE PUBLIC
INVESTMENT FUND OF THE KINGDOM
OF SAUDI ARABIA, AND YASIR
26 OTHMAN AL-RUMAYYAN,

27 Counter-Defendants.

Case No. 5:22-cv-04486-BLF

**AMICUS BRIEF OF THE KINGDOM OF
SAUDI ARABIA IN SUPPORT OF THE
PUBLIC INVESTMENT FUND OF THE
KINGDOM OF SAUDI ARABIA AND HIS
EXCELLENCY YASIR O. AL-
RUMAYYAN'S MOTION FOR RELIEF
FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE**

Judge: Hon. Beth Labson Freeman

Date Filed: August 3, 2022

Trial Date: January 8, 2024

1 The Kingdom of Saudi Arabia (“Saudi Arabia”) is a sovereign nation. The Public
2 Investment Fund (“PIF”) is Saudi Arabia’s sovereign wealth fund, and His Excellency Yasir O.
3 Al-Rumayyan is its Governor and holds the rank of a Minister in Saudi Arabia’s government.

4 The February 9, 2023 Order enforces a Rule 45 subpoena issued by a private party against
5 an instrumentality of a foreign sovereign and a senior foreign official acting in his official
6 government capacity. That is unprecedented. Even private foreign entities and “foreign nationals
7 are beyond the court’s subpoena power.” *Relational, LLC v. Hodges*, 627 F.3d 668, 673 (7th Cir.
8 2010); *SiteLock, LLC v. GoDaddy.com, LLC*, 338 F.R.D. 146, 148 (D. Or. 2021). Such entities
9 and individuals “owe no allegiance to the United States,” *KLP Indus., L.L.C. v. Pelaez*, 2006 WL
10 8434699, at *5 (S.D. Fl. Dec. 19, 2006), and discovery from them may be compelled only through
11 an applicable international convention or through a letters rogatory process that seeks, but cannot
12 require, a foreign country’s assistance in obtaining discovery. *See* 28 U.S.C. 1781(b); *see also*
13 *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 782 (S.D.N.Y. 2012).
14 Here, Saudi Arabia is not a party to any applicable international convention, *see In re Terrorist*
15 *Attacks on Sept. 11, 2001*, 2020 WL 8611024, at *3 (S.D.N.Y. Aug. 27, 2020), *aff’d*, 2021 WL
16 2227204 (S.D.N.Y. June 2, 2021), and no letters rogatory have been issued. The rule that foreign
17 non-parties are beyond Rule 45’s subpoena power has even greater force as to subpoenas issued to
18 an instrumentality of a foreign government and to a senior foreign official. Enforcing such
19 subpoenas would improperly “threaten a foreign sovereign with contempt sanctions if it does not
20 comply with legal processes that it . . . does not ascribe to.” *Id.* at *5. The February 9, 2023 Order
21 identifies no source of authority for a court to enforce a Rule 45 subpoena against a foreign
22 sovereign or official or any court that has done so over a sovereign’s objection.

23 Even if a district court could issue a subpoena to a foreign sovereign or its officials, and
24 even if the targets of those subpoenas were not immune, established principles of comity preclude
25 the enforcement of such subpoenas. Private litigants in U.S. court cannot simply subpoena records
26 and testimony from the United States government, its agencies, or officials when they are non-
27 parties to the underlying litigation. Any such efforts are subject to agency-specific regulations and
28 ultimately the agency’s own determination of whether to provide discovery, which courts review

1 under a deferential arbitrary-and-capricious standard. *See United States ex rel. Touhy v. Ragen*,
2 340 U.S. 462 (1951); *In re Elko Cnty. Grand Jury*, 109 F.3d 554, 557 n.1 (9th Cir. 1997).
3 “[C]omity dictate[s] that [the court] accord the same respect to foreign officials” and sovereigns as
4 it does “to [its] own.” *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998).

5 Saudi Arabia’s law provides no mechanism for litigants in its own courts (and certainly not
6 those of other countries) to compel discovery or testimony from any non-party government entity
7 or official. It further prohibits disclosure of the internal operations of Saudi Arabia’s government,
8 including those of PIF. *See* ECF No. 306-1 (Alarfaj Expert Opinion), at ¶¶ 20-27; ECF No. 166-4,
9 at 16 (PIF Law art. 17, protecting “Board members and Fund Employees[’]” confidential
10 information); ECF No. 211-7, at 5 (Penal Law on Dissemination and Disclosure of Classified
11 Information and Documents art. 5 providing that disseminating or disclosing classified
12 information or documents will be punished by imprisonment). Those laws are “not merely
13 protective of private interests but expressive of a public interest,” *Motorola Credit Corp. v. Uzan*,
14 73 F. Supp. 3d 397, 404 (S.D.N.Y. 2014), and deserve respect as a matter of comity. *See Société*
15 *Nationale Industrielle Aéropatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

16 The Court, however, need not decide this novel issue or the other weighty sovereign-
17 immunity and personal-jurisdiction issues raised by the February 9, 2023 Order in the context of
18 the current Rule 72 objections. The Court has held that both PIF and the Governor may be added
19 as counter-claim defendants. *See* ECF No. 280. They will be parties to the suit once service is
20 made, at which point any discovery must be governed by Rules 30 and 34. *See Peyton v. Burdick*,
21 2008 WL 880573, *1 (E.D. Cal. Mar. 31, 2008) (holding that even if Rule 45 applies to party
22 discovery, the Rules concerning party discovery govern); *Rogers v. Bellerose*, 2020 WL 6075621,
23 at *2 (N.D. Cal. Oct. 15, 2020) (prohibiting a party from seeking “supplemental responses” from
24 Rule 45 subpoena recipient who had become a party). Before any such discovery may occur, the
25 Court must resolve PIF’s and the Governor’s immunity from suit as well as personal jurisdictional
26 issues. *See Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 305 (9th Cir. 1997). Those complex
27 issues are better evaluated after full briefing on the forthcoming motions to dismiss, rather than on
28 the truncated briefing on the current Rule 72 objections.

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Respectfully submitted,

By: /s/ Michael K. Kellogg

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