

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Berkeley County School District,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 2:18-cv-00151-DCN
)	
HUB International Limited, HUB International)	
Midwest Limited, Hub International Southeast,)	
Knauff Insurance Agency, Inc., Stanley J.)	
Pokorney, Scott Pokorney, and Brantley)	
Thomas,)	
)	
Defendants.)	
_____)	

**INSURANCE DEFENDANTS’ MOTION FOR STAY PENDING RESOLUTION
OF STATE GRAND JURY ISSUES**

Defendants HUB International Limited, HUB International Midwest Limited, Stanley J. Pokorney, and Scott Pokorney (collectively, the “Insurance Defendants”), respectfully move for a temporary stay of this action. The reasons supporting this motion are set forth in Defendants’ accompanying memorandum of law.

Respectfully submitted,

s/ Deborah B. Barbier

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**INSURANCE DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION FOR
STAY PENDING RESOLUTION OF STATE GRAND JURY ISSUES**

Defendants HUB International Limited, HUB International Midwest Limited, Stanley J. Pokorney, and Scott Pokorney (collectively, the “Insurance Defendants”), respectfully move for a temporary stay of this action. The Insurance Defendants learned that Josh Whitley, counsel for plaintiff Berkeley County School District (“District”) in this case, is included on the State Grand Jury Disclosure Order concerning the South Carolina Attorney General’s Office’s investigation into Brantley Thomas—the District’s former CFO and a defendant in this case. State Grand Jury materials are secret, and South Carolina law prohibits their unauthorized disclosure or use for any purpose other than enforcing the State’s criminal laws. Accordingly, the Insurance Defendants have filed a motion under seal with the judge presiding over the State Grand Jury to address the issue and determine what, if any, action should be taken with respect to Mr. Whitley’s dual roles as participant in the State Grand Jury and as counsel for the District in a civil case involving the

very same subject matter.¹ A stay until those proceedings are resolved is necessary to ensure that this case is not further tainted by the potential misuse of secret State Grand Jury information that may not be used for private purposes under South Carolina law.²

BACKGROUND

The District filed a civil Complaint against the Insurance Defendants and Thomas in this Court on January 18, 2018, Dkt. 1, and filed an Amended Complaint on March 19, 2018, Dkt. 36. Attorneys Joshua S. Whitley and Jeffrey A. Breit represent the District in this matter. *See* Dkt. 36 at 70. Both Complaints repeatedly cite, as support for their allegations against the Insurance Defendants, the “State Indictment” that “a South Carolina grand jury handed down . . . charging Thomas” with crimes under South Carolina law. Dkt. 1 at 9–10 (¶¶22–28); Dkt. 36 at 10–12 (¶¶26–32), 43–45 (¶¶192–201). The Complaints urge that the State Indictment corroborates the District’s claims that the Insurance Defendants engaged in “nefarious acts” with Thomas “while he was the District’s CFO.” Dkt. 1 at 4; Dkt. 36 at 4. The Amended Complaint also attaches the State Indictment as an exhibit. Dkt. 36-2.

Mr. Whitley and Mr. Breit recently informed the Insurance Defendants that Mr. Whitley has been actively participating in the South Carolina Attorney General’s Office’s investigation into Thomas’s conduct while CFO of the District. They represented that Mr. Whitley has been

¹ The Insurance Defendants are seeking confidential treatment of the motion filed under seal in state court, and opposing counsel has been served with that motion. Should this Court direct, a copy of the motion can also be provided to this Court for *in camera* review.

² Consistent with Local Civil Rule 7.02, undersigned counsel affirms that she consulted with opposing counsel prior to filing this motion. Opposing counsel does not consent to the relief requested in this motion.

sworn in to the State Grand Jury, and is listed on the State Grand Jury Disclosure Order—the same State Grand Jury that issued the State Indictment repeatedly cited in the Complaints.

Under South Carolina’s State Grand Jury Act (“the Act”), S.C. Code Ann. § 14-7-1600, *et seq.*, “State grand jury proceedings are secret.” *Id.* § 14-7-1720(A). “[T]hose involved in such proceedings are prohibited from disclosing the nature or substance” of those proceedings “unless otherwise ordered by a court.” *Evans v. State*, 611 S.E.2d 510, 515 (S.C. 2005); *see* S.C. Code Ann. § 14-7-1720(A). While the court itself may order disclosure of matters occurring before a State Grand Jury, any disclosure can only be “made in that manner, at that time, and under those conditions as the court directs.” *Id.* § 14-7-1720(A). The Act further provides that “any person to whom matters are disclosed under this item *shall not utilize that state grand jury material for purposes other than assisting the Attorney General or his designee in the performance of their duties to enforce the criminal laws of the State.*” *Id.* § 14-7-1720(B)(2) (emphasis added).

While not limited to grand jury information, South Carolina’s Rules of Professional Conduct similarly provide that “a lawyer having information that the lawyer knows is confidential government information about a person” may not represent a private client “in a matter in which the information could be used to the material disadvantage of that person.” Rule 1.11(c), RPC, S.C. Appellate Court Rules, Rule 407. The comments explain that the prohibition exists because “unfair advantage could accrue” to the lawyer’s client “by reason of [his] access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service.” Rule 1.11, cmt.4.

Upon learning of Mr. Whitley’s participation in the State Grand Jury, the Insurance

Defendants became gravely concerned that his representation of the District in this case, which involves the very same subject matter of the State Grand Jury investigation, has resulted in a violation of the Act and the improper use of confidential State Grand Jury information to the Insurance Defendants' material disadvantage. Under South Carolina law, the "presiding judge" over the State Grand Jury has jurisdiction "to hear all matters arising from the proceedings of a state grand jury." S.C. Code Ann. § 14-7-1730(A). Accordingly, on March 17, 2020, the Insurance Defendants filed a motion under seal with the judge presiding over the State Grand Jury to address potential issues arising from Mr. Whitley's representation of the District in this case at the same time he is participating in the State Grand Jury.

ARGUMENT

A district court's power to stay proceedings is "incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Courts in this District deciding whether to grant a stay consider: "(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." *Michelin Ret. Plan v. Dilworth Paxon LLP*, No. 6:16-3604-HMH-JDA, 2017 WL 2531845, at *4 (D.S.C. June 12, 2017) (quoting *Murphy-Pittman v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-3179-JFA, 2012 WL 6588697, at *1 (D.S.C. Dec. 17, 2012)). The Insurance Defendants respectfully submit that those factors favor a stay of the proceedings in this case until the judge presiding over the State Grand Jury can rule on their motion and determine what, if any, action should be taken with respect to Mr. Whitley's dual roles as participant in the State Grand Jury and as counsel for the District in a case involving the very same subject matter.

First, the interests of judicial economy favor a stay. Under this Court’s Consent Amended Scheduling Order, the parties have only about two more months, until May 22, 2020, to complete fact discovery. Dkt. 109 at 2. To meet that schedule, the parties are now actively conducting discovery, and have been coordinating and have scheduled six depositions to take place between now and April 1. It would be wasteful for the parties to continue to expend resources on conducting discovery, and unduly burdensome on the witnesses being deposed, if the state presiding judge ultimately were to conclude that the District’s current counsel is barred from representing it in matters relating to the State Grand Jury’s investigation, or to otherwise find that State Grand Jury information has been improperly used by the District’s counsel in these proceedings. Indeed, in the analogous situation where a motion to disqualify counsel is at issue, courts routinely conclude that “[s]taying discovery will avoid the possibility that the parties will unnecessarily expend time and resources conducting discovery.” *IPVX Patent Holdings, Inc. v. 8X8, Inc.*, No. C 13-01707 SBA, 2013 WL 6000590 (N.D. Cal. Nov. 12, 2013).³

Second, the Insurance Defendants will suffer hardship and inequity if the action is not stayed. The Act prohibits the use of “state grand jury material for purposes other than assisting the Attorney General . . . in the performance of their duties to enforce the criminal laws of the State.” S.C. Code Ann. § 14-7-1720(B)(2). And the South Carolina Rules of Professional

³ See also *James E. Zalewski, Draftics, Ltd. v. Shelroc Homes, LLC*, No. 1:11-CV-1159 (GLS/RFT), 2012 U.S. Dist. LEXIS 11608 (N.D.N.Y. Jan. 31, 2012) (“[T]his Court issued an Order granting Defendants permission to file this Motion to Disqualify and further stayed all proceedings pending a decision on the Motion.”); *Stratagene v. Invitrogen Corp.*, 225 F. Supp. 2d 608, 609–10 (D. Md. 2002) (noting that “the court granted a motion to stay all further action in the case pending the resolution of [Plaintiff’s Motion to Disqualify]”); *Augustine v. Family Serv. Soc’y of Yonkers, Inc.*, No. 96 Civ. 7236 (RLC)(HPB), 1997 U.S. Dist. LEXIS 13535, at *1 (S.D.N.Y. Sep. 8, 1997) (granting stay of discovery pending resolution of disqualification motion where defendant’s counsel formerly represented plaintiff).

Conduct prohibit a lawyer's use of such "confidential government information" in representing a client, Rule 1.11(c), RPC, precisely because it provides that client with an "unfair advantage" over the other side, *id.* cmt.4. Courts thus have found, in applying a similar rule, that a private party could be "materially disadvantage[d]" by an attorney's use of confidential government information obtained from grand jury proceedings in private litigation, even where the grand jury proceedings had taken place 20 years earlier and the attorney claimed to have forgotten any confidential information. *Kronberg v. LaRouche*, No. 1:09cv947 (AJT/TRJ), 2010 WL 1443934, at *5 (E.D. Va. Apr. 9, 2010). *A fortiori*, it is likely that the Insurance Defendants will suffer hardship if they must continue to litigate against Mr. Whitley, with him developing the factual record for the District in this case, at the very same time he has access to secret State Grand Jury information bearing upon this matter.

Third, the District will suffer no hardship from a brief stay of these proceedings until the judge presiding over the State Grand Jury can consider the Insurance Defendants' motion and consider what, if any, actions must be taken under South Carolina law. And any hardship that the District may try to assert would be entirely of its own making. Mr. Whitley and Mr. Breit have obviously been aware of Mr. Whitley's participation in the State Grand Jury proceedings for over a year. They could have disclosed that fact to the Insurance Defendants, and addressed its obvious legal and ethical implications, at the time Mr. Whitley was sworn in to the State Grand Jury, or at the time the Complaint in this case was filed (whichever was later). But they chose to sit on that information, making it known only when the parties are in the thick of discovery. They should not be heard to complain about any delay now.

CONCLUSION

For the foregoing reasons, the Insurance Defendants respectfully request a temporary stay of these proceedings until the presiding judge of the State Grand Jury issues a ruling on the pending motion. The Insurance Defendants offer to provide regular status reports to this Court, not less than every 15 days, regarding the status of those proceedings.

Respectfully submitted,

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