

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO. BCD-WB-07-317

FIBER MATERIALS, INC.,

Plaintiff,

v.

ORDER ON DEFENDANTS' MOTIONS TO
STAY AND FOR ENLARGEMENT OF TIME
IN WHICH TO FILE COUNTERCLAIMS

MAURICE SUBILIA, ET AL.,

Defendants

Before the Court are the defendants' motions to stay this action for a period of six months and to allow an enlargement of time in which to file counterclaims.¹

BACKGROUND

The thrust of this case involves the assertion by the plaintiff Fiber Materials, Inc. ("FMI") that Maurice Subilia engaged in a scheme with various family members and business associates to use information gained by him during his tenure as President of FMI to benefit himself and those family members and business associates to the detriment of FMI.

It is relevant to an analysis of the motion that the defendants Maurice Subilia ("Subilia"), Lealagi, Inc. and Sage Technologies, Inc. (collectively, "Target-Defendants") are currently the targets of a federal investigation by the offices of the United States Attorney for the District of Maine and the Northern District of Alabama regarding allegations that they violated the federal

¹ In all, there are fifteen defendants in this action. Although the motion to stay was originally filed by the defendants Maurice Subilia, Lealagi, Inc. and Sage Technologies, Inc., and the analysis of whether a stay is appropriate focuses primarily on Maurice Subilia, all of the remaining defendants have joined the motion.

Economic Espionage Act by stealing trade secrets from FMI.² (Sipperly Aff. ¶¶ 3 & 6.) The criminal investigations are relevant because Count VI of the Complaint in this civil action similarly deals with allegations that the Target-Defendants are liable for Subilia's alleged improper use and disclosure of FMI's trade secrets in violation of Maine's Uniform Trade Secrets Act. (Compl. ¶¶ 129 & 131.) Although the Target-Defendants have yet to be indicted for any federal crimes, they assert that indictments are imminent either in Maine, the Northern District of Alabama, or in both locations. (Sipperly Aff. ¶ 7.)

DISCUSSION

The Target-Defendants argue that a stay is necessary because any discovery conducted in this case will put them in the untenable position of having to choose between (a) asserting their *Fifth Amendment* privilege against self incrimination and incurring the negative inference permitted by such an election in a civil action, and (b) answering discovery fully, which could aid the federal investigations and any resulting prosecutions.

The Law Court has long recognized that “[i]t is within the inherent power of the Superior Court, under its general supervisory power over its own process, to stay temporarily a proceeding before it.” *Culer Assoc., Inc. v. Merrill Trust Co.*, 395 A.2d 453, 456 (Me. 1978). The decision whether to grant such a stay is “not a matter of right but a matter of grace.” *Id.* When arguing to stay civil litigation in deference to a parallel criminal proceeding, the movant carries a heavy burden and must demonstrate a clear case of hardship. *Microfinancial, Inc. v. Premier Holidays Int'l*, 385 F.3d 72, 77 (1st Cir. 2004). Although “pre-indictment stays of parallel civil proceedings occasionally have been granted an unindicted defendant who argues that going

² Additionally, other defendants in this action are currently under investigation, but are not “targets”. so-called.

forward with a civil proceeding will jeopardize his *Fifth Amendment* rights[, those cases] usually present [] a much less robust case for such extraordinary relief." *Id.* at 79.

The First Circuit has developed a list of seven factors for trial courts to consider when deciding whether to grant a stay in situations such as this:

- i) the interests of the civil plaintiff in proceeding expeditiously with the civil litigation, including the avoidance of any prejudice to the plaintiff should a delay transpire;
- ii) the hardship to the defendant, including the burden placed upon him should the cases go forward in tandem;
- iii) the convenience of both the civil and criminal courts;
- iv) the interests of third parties;
- [] (v) the public interest[;] . . .
- (vi) the good faith of the litigants (or the absence of it) and
- (vii) the status of the cases.

Id. (The trial court must determine whether "the interests of justice counsel in favor of such a course.") Although not binding authority, these factors are instructive. In particular, three are relevant to the analysis in the present case.

The Target-Defendants argue that the burden placed on them by virtue of the negative inferences that could result from the exercise of their *Fifth Amendment* right is a hardship so great that it outweighs any other factors. This is clearly a large burden, but not an uncommon one for a defendant to be forced to endure.

FMI argues that the delay that will necessarily follow the granting of a stay undermines their strong interest in proceeding expeditiously with this lawsuit. However, that interest is relatively small in this case. There are no allegations of ongoing misbehavior by any of the defendants and many of FMI's allegations involve behavior that occurred several years ago.

There is also the matter of inconvenience to the civil court. This case is assigned to the court's Business and Consumer Docket (BCD). Among the purposes and goals of the BCD is the promotion of "an effective and efficient process for resolving" business disputes. Maine Supreme Judicial Court Administrative Order JB-07-1 (eff. June 1, 2007); *see also* M.R. BCD P.

1.2. A stay in this case certainly impacts those purposes and goals. Because there is no parallel pending federal action, there is no issue of inconvenience to any criminal court.

Against the backdrop of these factors, there is an additional consideration involving Subilia's claim that his attorney-client privilege was violated by FMI's counsel. His allegations are these:

When Subilia resigned as President of FMI, he returned to FMI the company-owned laptop computer that had been used exclusively by him during his employment. Subsequently, FMI's in-house counsel accessed files and documents on that computer and discovered a memorandum containing a legal opinion produced for Subilia, personally, by a lawyer at Verrill Dana, LLP ("Legal Memorandum"). The memorandum was directed to issues of Subilia's fiduciary duty and his duty of loyalty to FMI regarding matters of some relevance to this case. The contents of the Legal Memorandum were shared with others by FMI's counsel and some of that information was included in FMI's complaint in this case (*See* Compl. ¶¶ 103-104.)

Normally, a memorandum such as this would clearly be privileged as a "confidential communication made for the purpose of facilitating the rendition of professional legal services to [a] client [] between [a] client . . . and the client's lawyer." M.R. Evid. 502(b). However, FMI argues that because of its written policy that employees have no reasonable expectation of privacy with respect to any information on their company-owned computers, the Legal Memorandum was not confidential and therefore may be introduced as evidence in this case. Not surprisingly, the Target-Defendants disagree with FMI and have filed motions to strike paragraphs 103-104 of the Complaint and have FMI's counsel disqualified from this case.

All counsel agree that some discovery will be required in order to fully address and resolve the motions to strike and to disqualify and, if for no other reason than that, it should have

occurred to FMI that the Legal Memorandum was at least arguably confidential material and that including portions of it in the Complaint would needlessly complicate the early stages of this litigation, which it has. Absent that legal complication, the court might have been able to accommodate FMI's otherwise meritorious suggestion, made at the motion hearing, that the court fashion a partial stay to allow discovery to go forward in ways that would not implicate the Target-Defendants' *Fifth Amendment* rights. However, because FMI's counsel viewed the memorandum and used portions of it in the Complaint, the motions to strike and disqualify must be decided before the commencement of discovery in this case, other than limited discovery necessary to decide the issues underlying the motions to strike and disqualify.³

Further complicating matters is the fact that Subilia's state of mind regarding his expectation of privacy in his work computer may be an issue relevant to whether the Legal Memorandum is privileged material. As things now stand, however, questions that the parties may wish to pose to Subilia about his state of mind could implicate the same *Fifth Amendment* issues that attend the motion to stay and complicate discovery in this case. As a result, the same factors that tend to support a temporary stay of this action similarly support a temporary stay of a decision on the defendants' motions to strike and to disqualify.

At oral argument on the motions to stay there was substantial agreement among defense counsel that federal indictments would likely be returned within 90 days. On balance, a stay for this period of time, as opposed to six months, more reasonably comports with the interests of the parties and the convenience of the court. It should also be sufficient to enable the court to be better informed about the progress and likely consequences of the federal investigations, and to

³ Otherwise, if the Court were to subsequently rule that the Legal Memorandum is confidential and that FMI's counsel is disqualified, discovery prior to that determination could be tainted by counsel's knowledge of the contents of the memorandum.

decide whether, in the face of that information or in spite of it, this action should go forward or be further stayed.

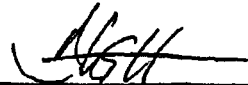
DECISION

Based upon the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order in the Civil Docket by a notation incorporating it by reference and the entry is

Defendants' motions to stay this action and to allow an enlargement of time in which to file counterclaims are GRANTED, as follows:

- A. Unless otherwise ordered, this case shall be stayed until April 25, 2008, and a further Case Management Conference shall be held on April 30, 2008 at 9:00 AM at the Cumberland County Courthouse; and
- B. Defendants shall have twenty (20) days from expiration of the stay of this action within which to file counterclaims.

Dated: January 30, 2008



Justice, Superior Court