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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BEVERLY ALKOW, et al., : **Case No. 07-CV-2285 (GBD)**
: ECF Case
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 Plaintiffs, :
:
 -against- :
:
LOUIS J. PEARLMAN, et al., :
:
 Defendants. :
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**STATE OF FLORIDA DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER AND TO STAY DISCOVERY**

Defendants CHARLIE CRIST; BILL McCOLLUM; DON SAXON; DANIELLE
BROOKS; the STATE OF FLORIDA; the STATE OF FLORIDA, OFFICE OF FINANCIAL
REGULATION; and the STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL

(hereafter, collectively, the "State of Florida Defendants"), by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 26(c) and S.D.N.Y. Loc. R. 5.1(b), 6.1(a) and 37.2, hereby move for a protective order that the already-noticed depositions not be had and for a stay of all further discovery pending the resolution of their previously filed motion to dismiss. Grounds for this motion are more fully set forth below.

I. Background

The State of Florida Defendants, on May 17, 2007, moved to dismiss the Complaint filed against them, based upon, among other grounds, a lack of personal jurisdiction, improper venue and under the doctrine of *forum non conveniens* (Court Doc. Nos. 8, 9). Almost two months later, on the eve of a status conference/hearing on the motion, Plaintiffs responded, filing numerous form declarations, affidavits and exhibits purporting to call into question the Florida Defendants' arguments as to personal jurisdiction and venue (Court Doc. Nos. 15-23). In their responsive motion, Plaintiffs also cross-moved for, among other things, permission to conduct limited jurisdictional discovery (Court Doc. No. 15).

At the scheduling conference held in this matter on July 11, 2007, counsel for Plaintiffs again raised the issue of what he believed was a need for limited jurisdictional discovery. Counsel for the State of Florida Defendants responded that, as the issues had been framed, there appeared to be no need for such discovery, but that the matter would be addressed once Plaintiffs indicated what "limited" discovery they believed was necessary. In response to this exchange, the Court stated:

Mr. Fagan, this is what I'm going to do with regard to discovery, because I haven't seen the papers and I don't know what the issue would be. I suggest that you speak to the other side, discuss what kind of discovery you believe is appropriate. If you can agree on it, then let me know you've agreed and how you want to handle it. To the extent that you can't agree, then just give me a letter

indicating what discovery you believe is appropriate and . . . on what schedule you want to do that discovery So then they can respond immediately to the letter if they oppose that, and then I can decide whether or not, in the context of what the issues are that have been raised by the motion and your response, I can decide whether or not further discovery is appropriate.

Transcript of Hearing of July 11, 2007, p. 8, l. 13 - p. 9, l. 2.

Since that time, counsel for Plaintiffs corresponded directly with the Court, rather than first contacting defense counsel as directed, setting forth extensive and far-reaching subjects and subject matter from whom and for which he contends the Plaintiffs should be allowed to seek discovery. (See Fagan correspondence to Honorable George B. Daniels dated July 13, August 3, 6, 8 and 13, 2007, most with numerous attachments). The State of Florida Defendants, through counsel, have responded to that correspondence (see Chiles, Stewart letters dated July 24, August 7 and 15, 2007), and have replied and responded to the Plaintiffs' opposing court papers, as well (Court Doc. Nos. 32-36). In each of those responsive letters and memoranda, the Florida Defendants have stated their opposition to the conduct of discovery at this time, showing that, as the jurisdictional and venue issues have been framed by the Plaintiffs, themselves, discovery on such issues is neither warranted nor is it necessary.

Now, in spite of this opposition, and in spite of the fact that the issue of whether discovery is to be had at all remains pending, Plaintiffs have unilaterally attempted to initiate far-reaching and extensive discovery, noticing the depositions of each of the individual Florida Defendants, the State, its Defendant Agency representatives and a non-party to the suit, all with extensive document requests attached. (See Declaration of counsel, filed separately this date.) Such depositions were noticed without consulting counsel for the State Defendants and, upon information and belief, without consulting counsel for the other parties who have noticed their appearances. In the face of these facts, the State of Florida Defendants are compelled to seek a

protective order, directing that the noticed depositions not be had, and to ask for a stay of all further discovery, pending the disposition of the jurisdictional and venue arguments raised in their motion to dismiss.

II. Argument

Rule 26(c), Fed. R. Civ. P., provides in relevant part, that

upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the . . . discovery not be had.

Id. "The grant and nature of protection [under Rule 26] is singularly within the discretion of the district court." Pavlovich v. City of New York, 1992 U.S. Dist. LEXIS 13070, *12 (S.D.N.Y. August 31, 1992), quoting Dove v. Atlantic Capital Corp., 963 F. 2d 15, 19 (2nd Cir. 1992). As a part of that discretion, this Rule provision enables district courts "to impose a stay of discovery pending the determination of dispositive motions by the issuance of a protective order." Hachette Distribution, Inc. v. Hudson County News Co., Inc., 136 F.R.D. 356, 358 (E.D.N.Y. 1991), citing Transunion Corp. v. PepsiCo, Inc., 811 F. 2d 127, 130 (2nd Cir. 1987) (issuance of protective order preventing discovery pending determination of motion to dismiss for *forum non conveniens*); Petrus v. Bowen, 833 F. 2d 581, 583 (5th Cir. 1987) ("trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined").

The plain language of the Rule requires "that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order." Pavlovich, 1992 U.S. Dist. LEXIS 13070, at *12, quoting In re Agent Orange Product Liability Litigation, 821 F. 2d 139, 145 (2nd Cir.), cert. denied, 484 U.S. 953 (1987); see also American Booksellers Association,

Inc. v. Houghton Mifflin Co., Inc., 1995 U.S. Dist. LEXIS 2044, *2 (S.D.N.Y. February 21, 1995); Spring Valley Water Co. v. Cosco Industries, Inc., 1992 U.S. Dist. LEXIS 223, *7 (S.D.N.Y. January 10, 1992); Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985); Waltzer v. Conner, 1985 U.S. Dist. LEXIS 16049, *1 (S.D.N.Y. September 12, 1985). Establishing "good cause" requires "a showing of facts militating in favor of the stay." American Booksellers, 1995 U.S. Dist. LEXIS 2044, at *2; see also Waltzer, 1985 U.S. Dist. LEXIS 16049, at *1 - *2 (movant must submit "particular and specific demonstrations of fact, as distinguished from stereotyped and conclusary statements in order to establish good cause"). Such a determination requires a case-by-case analysis, "since such inquiry is necessarily fact-specific and depends on the particular circumstances and posture of each case." Hachette Distribution, Inc., 136 F.R.D. at 358.

Here, the specific facts strongly favor the relief requested by the State of Florida Defendants. As noted above, the Court previously directed that the parties confer regarding Plaintiffs' claimed discovery needs and bring the matter to the Court if no agreement could be reached, at which time the Court would determine whether to allow discovery to proceed. Plaintiffs, rather than heeding this direction and awaiting a Court determination, have unilaterally gone forward, noticing nine (9) separate depositions, over a period of five (5) business days stretching into two (2) separate weeks, including those of three (3) of Florida's four (4) statewide, elected cabinet officials (the Governor, the Attorney General and the Chief Financial Officer), all without consulting counsel for the State of Florida Defendants (or any of the other attorneys of record, it appears) to determine whether the dates were even available or convenient.¹ Attached

¹ See Van Diepen v. Pryson-Jones, 1995 U.S. Dist. LEXIS 19131, *2 (S.D.N.Y. December 22, 1995) (granting protective order where "plaintiff's attorney served the notice of deposition without attempting to confer with his adversary regarding a mutually convenient

to each of the notices is an identical six (6) page exhibit, requesting that the deponent bring some 30 separate categories of documents or files to the deposition.²

More importantly the State of Florida Defendants have a dispositive motion pending which is at issue, has been fully briefed, and is set for oral argument on October 3, 2007. In that motion, the State Defendants, among other issues, raise lack of personal jurisdiction, improper venue and *forum non conveniens*. All of these issues must be addressed before the Court may look to the merits of the case, and any of them, if found to be well-taken, will be dispositive of the case against these Defendants in this forum. Under such circumstances, where the discovery is broad and where a ruling on the motion is expected to come shortly, "to require defendants to respond to it at this juncture, when their motion to dismiss may be granted, would be extremely burdensome [and] a stay of discovery pending a decision on the motion to dismiss is appropriate." American Booksellers Assn, Inc, 1995 U.S. Dist. LEXIS 2044, at *2 - *3. See also Spring Valley Water Co., 1992 U.S. Dist. LEXIS 223, at *8; Hachette Distribution Co., 136 F.R.D. at 358.

Plaintiffs will undoubtedly argue that the discovery they seek is directed to these very jurisdictional and venue issues, and they should thus be allowed to proceed in order that they might attempt to establish the State of Florida Defendants' contacts with New York. As pointed out in the Defendants' reply to these arguments, however, the "mere commencement of a lawsuit without the support of a threshold showing of jurisdictional prerequisites, should not entitle the

schedule," finding that the "failure of counsel to confer and agree on a mutually convenient schedule for depositions is inexcusable. If communication through motion papers was ever an appropriate means of conducting discovery, that era is long since past.")

² In view of the fact that the Notices of Deposition were served by fax and by mail on August 13, 2007, seeking to take depositions on September 4-7 and 10, 2007, not only are the document requests overly broad, onerous and burdensome, they are also not timely. See Fed. R. Civ. P. 30(b)(5), 34.

party to use the court processes to attempt to find support for having commenced the litigation. That should have been done before the litigation began." Daval Steel Products v. M.V. Juraj Dalmatinoc, 718 F. Supp. 159, 162 (S.D.N.Y. 1989), quoting Grand Bahama Petroleum Co. v. M. V. Kriti Sky, 1978 AMC 1238, 1240-41 (S.D.N.Y. 1977) aff'd mem., 580 F. 2d 1044 (2nd Cir. 1978). Moreover, as shown by the broad document request accompanying the notices, and by the high level Florida executive branch officials sought to be deposed, the requests extend far beyond anything necessary to be viewed as the "limited jurisdictional discovery" Plaintiffs claim to be seeking and appear, rather, to be a "fishing expedition" aimed at harassing Florida's highest elected officials.

Further, the bases for Plaintiffs' attempts to show personal jurisdiction and/or a proper or more convenient venue -- (1) the marketing, financing and sale of bonds in New York by the State; (2) the occasional use of New York's court system by admittedly non-party Agencies of the State; and (3) the use of mail, phones, faxes and/or e-mail by Florida investigators to communicate with those allegedly defrauded by Defendant Pearlman and/or his entities or employees -- have all been held, as a matter of law in this Circuit, to be insufficient to establish personal jurisdiction and/or proper venue. (See State of Florida Defendants' Reply to Memorandum Opposing Motion to Dismiss; Response to Cross-Motions, Court Doc. No. 33, at pp. 7-9, 11-12.)

As such, and as this Court has repeatedly recognized, "a stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion 'appears to have substantial grounds' or, stated another way, 'does not appear to be without foundation in law.'" Johnson v. New York Univ. School of Ed., 205 F.R.D. 433, 434 (S.D.N.Y. 2002), quoting In re Currency Conversion Fee Antitrust Litigation, 2002 U.S. Dist. LEXIS 974, *4 (S.D.N.Y. January

22, 2002); Chrysler Capital Corp. v. Century Power Corp., 137 F.R.D. 209, 210-211 (S.D.N.Y. 1991).

III. Conclusion

Based upon the foregoing good cause shown, the State of Florida Defendants respectfully move for a protective order, directing that the Plaintiffs' unilaterally noticed depositions not be had; that a stay of all further discovery be entered, pending the determination of the jurisdictional and venue issues raised in their motion to dismiss; and that they be awarded the reasonable expenses incurred in making this motion, including their attorney's fees, all in accordance with Fed. R. Civ. P. 26(c).

Dated: New York, New York
August 24, 2007

NABORS, GIBLIN & NICKERSON, P.A.

/s/ Harry F. Chiles

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ECF and/or U.S. Mail to EDWARD D. FAGAN, ESQUIRE, Regus Worldwide Office Centers, Five Penn Plaza, 23rd Floor, New York, NY 10001; ROBERT J. HANTMAN, ESQUIRE, Hantman & Associates, 1414 Avenue of the Americas, Suite 406, New York, NY 10019; JAMES F. LOWY, ESQUIRE, Post Office Box 10614, Tampa, FL 33679; SHEILA E. CARSON, ESQUIRE, JPMorgan Chase Bank, N.A., Legal Department, One Chase Manhattan Plaza, 26th Floor, New York, NY 10005; SHAWN PATRICK REGAN, ESQUIRE, Hunton & Williams LLP, 200 Park Avenue, New York, New York 10166; PATRICK L. ROBSON, ESQUIRE, Hunton & Williams LLP, Bank of America Plaza, 101 S. Tyson Street, Suite 3500, Charlotte, North Carolina 28280; MARTIN DOMB, ESQUIRE, Akerman Senterfitt LLP, 335 Madison Avenue, 26th Floor, New York, New York 10017; ROBERT B. RUBIN, ESQUIRE and MARC P. SOLOMON, ESQUIRE, Burr & Forman LLP, 420 North 20th Street, Suite 3400, Wachovia Tower, Birmingham, Alabama 35203; DAVID L. BARRACK, Fulbright & Jaworski, L.L.P., 666 Fifth Avenue, New York, NY 10103; SCOTT S. McKESSY, MARY J. HACKETT and SHARON L. RUSNAK, Reed Smith LLP, 599 Lexington Avenue, 29th Floor, New York, NY 10022; and MARGARET D. MATHEWS, FRANCIS M. CURRAN and BRIDGET REMINGTON, Akerman Senterfitt, SunTrust Financial Centre, 401 E. Jackson Street, Suite 1700, Tampa, FL 33602, on this 24th day of August, 2007.

/s/ Harry F. Chiles

Harry F. Chiles
Gregory T. Stewart