

12/14/98

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13 IN THE SUPREME COURT FOR THE
14 FEDERATED STATES OF MICRONESIA
15 TRIAL DIVISION - STATE OF POHNPEI

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17 STATE OF CHUUK, et al.,) CIVIL ACTION No. 1995-085
18)
19 Plaintiffs,) DEFENDANTS' REPLY MEMORANDUM
20) RE MOTION FOR PROTECTIVE ORDER
21 vs.) TO STAY DISCOVERY
22)
23 SECRETARY OF DEPARTMENT OF)
24 FINANCE, et al.,)
25)
26 Defendants.)

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28 Defendants' motion sets forth good cause for the issuance of a protective order under
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30 FSM Civil Rule 26(c) to stay discovery pending the Court's determination of defendants' motion
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32 to dismiss, both in terms of the facts of this case and supporting legal authority. Rather than
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34 responding to this authority, the States' opposition to the motion relies solely on cases in which
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36 discovery was not stayed because the party seeking discovery needed the discovery to enable it
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38 to respond to a motion for summary judgment filed against it. The States' reliance on such cases
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40 is misplaced because they are completely irrelevant to a determination of whether discovery
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42 should be stayed in this action pending resolution of defendants' motion to dismiss in which the
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44 States' factual allegations are assumed to be true for purposes of the motion. (See Memorandum
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Accordingly, wholly apart from the Court's resolution of the motion to dismiss, that portion of defendants' motion for a discovery order should be granted as unopposed.

For the reasons set forth above and in the memorandum filed in support of defendants' motion for a protective order, the Court should stay discovery pending its ruling on defendants' motion to dismiss. In addition, the Court should deny the States' motion to compel and require the parties to meet and confer regarding a discovery plan after the Court issues its ruling on defendants' motion to dismiss.

Respectfully submitted this 17th day of December, 1995.

FEDERATED STATES OF MICRONESIA
CAMILLO NOKET, ATTORNEY GENERAL

By: Carole Rafferty
Carole Rafferty
Assistant Attorney General

Certificate of Service

Pursuant to agreement with counsel for plaintiffs, two copies of this ~~notice of motion and motion and the accompanying~~ memorandum of points and authorities were served on December 14, 1995 by hand delivery to the office of counsel listed below. CR

Hand Delivery:

Andrea Hillyer
Office of the Attorney General
State of Pohnpei
Kolonias, Pohnpei 96941

Carole Rafferty

Defendants.)
_____)

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION
FOR PROTECTIVE ORDER TO STAY DISCOVERY

I. Introduction.

Plaintiffs filed and served a Request for Production of Documents on Defendants on August 17, 1995, pursuant to Rule 34, Rules of Civil Procedure. Defendants objected to these requests in their response to the Plaintiffs' Request for Production of Documents dated September 17, 1995. Plaintiffs next filed a Motion to Compel Discovery on November 7, 1995, accompanied by a Memorandum of Points and Authorities that explains the relevancy of the requested documents and responds to Defendants' arguments that Plaintiffs' request is unduly burdensome and interferes with the attorney-client and the work-product privileges. Then, Defendants filed a Motion for Protective Order to Stay Discovery, dated November 17, 1995, which argues again that Plaintiffs' document request is unduly burdensome and seeks irrelevant materials, and also asserts that all discovery should be stayed pending a determination of Defendants' Motion to Dismiss the Complaint. This Memorandum responds to Defendants' November 17, Motion.

II. The Requested Documents Are Relevant.

The basic philosophy that underlines modern Rules of Civil Procedure such as those adopted by the FSM is that every party to a civil action is entitled to the disclosure of all relevant information prior to trial. 4 James W. Moore et al., Moore's Federal Practice 26-232 (1986). As this Honorable Court has previously noted, the language of FSM Civil Rule 26(b)(1) states

that any information reasonably calculated to lead to the discovery of admissible evidence may be sought. The Court will not intrude at the deposition stage to declare what is relevant. That determination is a matter for the trial judge at the time evidence obtained in the form of deposition testimony is sought to be admitted at trial.

Nahnken of Nett v. United States (II), 6 FSM Intrm. 417, 423 (Pon. 1994). This Honorable Court has also noted that "[u]nder FSM Civil Rule 26 evidence may be discovered even if it would be inadmissible on relevancy grounds at trial, as long as 'the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'" McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 490 (Pon.' 1994). Under these standards, Plaintiffs are certainly entitled to the information they have requested.

Plaintiffs' Complaint submits that the revenues received from the fishing licenses are "taxes" and thus that at least 50 percent of these revenues must be distributed to the states pursuant to Article IX, Section 5 of the FSM Constitution. Copies of the fishing license agreements are relevant to establish that the amount collected from each fishing operation is based on a fixed percentage of the landed catch, and is thus a "tax."

The records, documents, and writings pertaining to the collection of fees pursuant to Title 24 are relevant to the question whether the revenues collected under the fishing licenses substantially exceed the cost of administering and regulating the activity for which the fees are charged. If they do, then they would be "taxes," thus validating Plaintiffs' position.

Plaintiffs also claim that the appropriate percentage of the revenues collected as fines and forfeitures from illegal fishing has not been distributed to the states as required by 24 F.S.M.C. 510, and the records pertaining to the collection of these fines and forfeitures are certainly relevant to this claim.

Citations supporting Plaintiffs' right to these materials are provided in Plaintiffs' November 7 Memorandum of Points and Authorities. Defendants have not cited any contrary authority.

III. Plaintiffs' Requests Are Not Unduly Burdensome.

Again without citation or authority, Defendants argue (at pages 6-7 of their November 17, Memorandum) that Plaintiffs' requests for documents are unduly burdensome. Defendants present the specter that they will be required to produce documents detailing all expenditures from the General Fund. Plaintiffs' request is not as wildly broad as the Defendants would have this Honorable Court believe. If the revenues received from the fishing licenses are deposited in the General Fund, then that is all the information that needs to be provided. Plaintiffs need simply to know how much money is collected and where it then goes - for internal administrative expenses or into the General Fund. This information is central to the present claim, and Plaintiffs are entitled to this information.

IV. The Court Should Not Stay Discovery Pending Its Ruling on Defendants' Motion to Dismiss.

Defendants argue (at pages 3-4 of their Motion for a Protective Order) that all discovery should be stayed pending this Honorable Court's ruling on Defendants' Motion to Dismiss on grounds of sovereign immunity. It first needs to be noted that

"courts do not generally grant protective orders without a showing of 'good cause'....And the burden of establishing 'good cause' lies with the party seeking the protective order." Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985) citing Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982), and 8 C. Wright and A. Miller, Federal Practice and Procedure, sec. 2035, at 264-65 (1970)).¹

"Such motions [to stay discovery] are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261 (M.D.N.C. 1988). In a case involving litigation against the United States, where the United States had filed a motion for summary judgment, the U.S. Claims Court wrote that:

suspension of discovery is not always appropriate when a dispositive motion is pending. When a dispositive motion is pending, the question of whether to suspend discovery depends upon the relevancy of the purported discovery requests, whether the facts have been stipulated to, and whether further discovery would uncover facts which would aid the party seeking discovery in its opposition to the dispositive motion. See generally, Wall Industries v. United States, 4 Cl. Ct. 659, 660-61 (1984).

Reliance Insurance Co. v. United States, 18 Cl. Ct. 359 (1989).

Other decisions confirm that "the Court ordinarily should not stay discovery which is necessary to gather facts in order to defend"

¹ This Honorable Court has noted that references to U.S. decisions regarding discovery are appropriate in the absence of relevant FSM precedents. McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 489 n.1 (Pon. 1994) (citing Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984)).

against the motion." Simpson v. Specialty Retail Concepts, Inc., supra, 121 F.R.D. at 263 (citing Wilderness Soc. v. Griles, 824 F.2d 4 (D.c. Cir. 1987); and Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550 (11th Cir. 1985)). See also Hachette Distribution, Inc. v. Hudson County News Co., 136 F.R.D. 356 (E.D.N.Y. 1991) ("Discovery should be stayed...only when there are no factual issues in need of further immediate exploration...").²

In the present case, Plaintiffs have requested documents to confirm that the revenues collected from fishing licenses are "taxes," and if Plaintiffs are successful in this effort they will be able to establish that Defendant has waived immunity in 6 F.S.M.C. 702(1) for taxes "erroneously or illegally collected." The information sought by Plaintiffs will also establish that there has been an "improper administration" of laws by Defendants, thus confirming that Defendants have waived immunity under 6 F.S.M.C. 702(2). This information should also prove that Defendant Secretary of Finance committed a "wrongful act...while acting within the scope of his office or employment" in not distributing at least half of the revenues to the Plaintiff States and thereby causing them an "injury," thus establishing that

² This point is also acknowledged in Williamson v. U.S. Dept. of Agriculture, 815 F.2d 368, 382 (5th Cir. 1987), the one case cited by Defendants, where the court stated that "a ruling that denies a party an adequate opportunity to discover facts to oppose a motion for summary judgment is unreasonable if summary judgment is subsequently entered against that party." The Williamson court sustained the cut-off of discovery in that case because of concern that "uncontrolled discovery in the course of insubstantial lawsuits constitutes a form harassment imposing an undue burden on public officials and government agencies." *Id.*

The present case, in contrast, is not an "insubstantial lawsuit." It is instead a very important suit designed to restore the balance between the national and state governments to the blueprint established in the FSM Constitution, to provide the states with adequate finances so that they can provide the services needed by their citizens, and thus to preserve the unity of the Federated States of Micronesia.

Defendants have waived immunity under 6 F.S.M.C. 702(4) and (5).

~~It is thus inappropriate to deprive Plaintiffs of their~~
ability to collect through the discovery process the information
necessary to defeat Defendants' Motion to Dismiss.

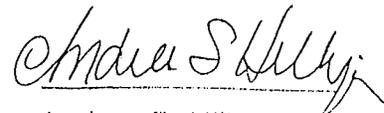
V. Conclusion

For the reasons stated above, Defendants' Motion for
Protective Order to Stay Discovery should be denied.

DATED: Peilapalap, December 4, 1995.


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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above document on the following person by hand delivery to the Office of the person identified below on

December 4, 1995:

Carole Rafferty
Chief, Division of Litigation
Office of the Attorney General
FSM National Government
Pohnpei, FM 96941



12/19/95

IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
TRIAL DIVISION

STATE OF CHUUK, et al.

Plaintiffs,

vs.

THE SECRETARY OF THE
DEPARTMENT OF FINANCE,
et al.

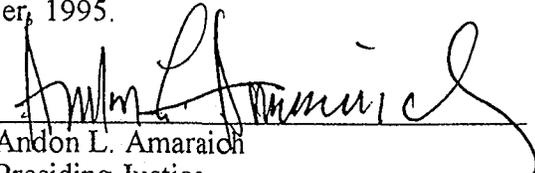
Defendants.

) CIVIL ACTION NO. 1995-085
)
)
) ORDER
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The Plaintiffs' having filed their Motion for Enlargement of Time in which to respond to Defendants' Motion for Protective Order to Stay Discovery and the Defendants' having not objected to the Motion,

IT IS THEREFORE ORDERED that the Plaintiffs' Motion for Enlargement of Time, filed on November 27, 1995, is granted and the Plaintiffs' are allowed until December 5, 1995 in which to respond to Defendants' Motion for Protective Order to Stay Discovery.

So Ordered this 31st day of December, 1995.


Andon L. Amaraich
Presiding Justice

Entered this 1st day of December, 1995.


Joseph M. Teller
Clerk