

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LINDA PEREZ and JASON PEREZ,

Plaintiffs,

v.

SPHERE DRAKE INSURANCE, LTD.,
f/k/a SPHERE DRAKE INSURANCE,
P.L.C.,

Defendant

CIVIL NO. 2001/11

TO: Lee J. Rohn, Esq.

Treston Moore, Esq. - Fax 777-5498

John Zebedee, Esq. & Karen Boback, Esq. - Fax 775-3300

CC: Honorable Gerard Luz James, Lt. Governor - Fax 773-4052

ORDER GRANTING ST. CROIX INSURANCE INC.'S
MOTION FOR PROTECTIVE ORDER (FILED 11/12/02)

THIS MATTER came for consideration on St. Croix Insurance Inc.'s ("S.C.I.") Motion for Protective Order or, in the alternative, Motion to Quash. Plaintiffs filed opposition to the motion. No reply is required.

S.C.I.'s motion concerns a subpoena issued by Plaintiffs to Lt. Governor Gerard James, Division of Insurance, requesting production of "all files memorandums, notices, discipline, assessments, evaluations, audits, or other documents concerning St. Croix Insurance, Sphere Drake Insurance Company or Odyssey Insurance Company from 1992 to present." (Exhibit A to S.C.I.'s motion). S.C.I. asserts that it is not a party in this matter and that any documents concerning a pending audit of S.C.I. (by

the Lt. Governor as V.I. Commissioner of Insurance) are confidential and should be protected from disclosure. S.C.I. cites 3 V.I.C. § 881(g)(12) regarding the confidential nature of such documents.

In opposition to the motion, Plaintiffs contend that per allegations in their Complaint, S.C.I. as agent for Defendant negligently underwrote and issued the subject insurance policy resulting in Plaintiffs' various claims for liability.¹

Plaintiffs argue that at deposition of S.C.I.'s principal, Tom Fitzsimmons, he admitted that the Lt. Governor's Office had withheld his license and accused him of dishonesty and incompetence (Exhibit "2" to Plaintiff's opposition), and that, "Accordingly, the information requested by subpoena is relevant to Plaintiffs' claim that St. Croix Insurance, as Defendant Sphere Drake's agent, performed the underwriting of the policy in a negligent manner, and that Sphere Drake was thereby liable for breach of the insurance contract." Plaintiffs assert without citation that S.C.I.'s claim of statutory privilege "strictly applies to those documents produced, obtained or disclosed to the

1. Plaintiffs' exhibit "1" is purportedly Plaintiffs' Complaint but actually is an unrelated Complaint of "Victor Perez" and others. Plaintiffs' "Second Amended Complaint" was allowed by Order dated July 15, 2002 and is of record herein.

Commissioner of Insurance by St. Croix Insurance during the course of examination. It does not apply to documents which were produced or created by the Lieutenant Governor's Office or third parties." Plaintiffs also argue that to the extent S.C.I. has brought suit against "the Lt. Governor and Ms. Thomas" for alleged civil rights violations,² it has necessarily waived any claims of confidential privilege as to that information (citing *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981)).

S.C.I. has standing to bring this motion pursuant to Fed. R. Civ. P. 26(c) and 45(c)(3)(A)(iii). See Wright and Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2459; *Sierra Rutile, Ltd. v. Katz*, 1994 WL 185751 *3 (S.D.N.Y.). 22 V.I.C. §§ 101-108 provide procedures for the conduct of examinations by the V.I. Commissioner of Insurance including maintaining confidentiality of ongoing investigations and hearings (see e.g. §§ 105(d)(2); (d)(2)(A); (e)(1)&(2); and (f)). 3 V.I.C. § 881(g)(12) particularly provides that unless otherwise ordered, "all working

2. Although not specified by Plaintiffs, the subject case is *St. Croix Insurance, Inc. and Thomas Fitzsimmons v. Maryleen Thomas and Gerard Luz James II, Individually*, Civil No. 2002/63. The case concerns Defendants' alleged refusal to renew Plaintiffs' insurance related licenses. See also *Government of the Virgin Islands v. St. Croix Insurance, Inc. and Thomas Fitzsimmons*, St. Croix Misc. No. 2001/27.

papers, recorded information, documents or copies produced, obtained or disclosed to the Commissioner of Insurance during the course of an examination," shall be kept confidential.

Plaintiff does not claim that the subject investigation by the Commissioner of Insurance relates to any activity of S.C.I. *vis a vis* the subject policy of Dr. Wade. Although information concerning other infractions and any alleged "dishonesty or incompetence" of S.C.I. and its principal may have marginal relevance to S.C.I.'s actions as agent for Sphere Drake in this matter, such interest does not overcome the legislated public policy of perserving the confidentiality of an ongoing investigation by the Commissioner of Insurance. *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 925 (8th Cir. 1999). The pending suit brought by S.C.I. and Fitzsimmons against Thomas and James provides no blanket waiver of such protection because it is brought by the allegedly aggrieved subjects of improper actions and investigation against the perpetrators thereof (albeit in their individual capacity).³ In any event, such file is open and

3. *Permian*, 665 F.2d 1214, 1220-21, cited by Plaintiffs concerned waiving privilege and providing documents to one agency to further *Permian's* interest and then invoking privilege and confidentiality to another agency when non-disclosure better suited *Permian*. See *Westinghouse Electric Corp. et al. v.*

copies of all pleadings therein are available to Plaintiffs. Further, 22 V.I.C. § 105(e)(1) provides for opening of the **examination report** for public inspection.

Accordingly, it is hereby;

ORDERED as follows:

1. S.C.I.'s motion is GRANTED, in part, and the Lt. Governor shall not produce the following documents requested in Plaintiffs' Subpoena *Duces Tecum*: All files, memorandums, notices, discipline, assessments, evaluations, audits or other documents **concerning St. Croix Insurance that are part of any ongoing examination/investigation and are confidential pursuant to 3 V.I.C. § 881(g) and/or 22 V.I.C. § 105.**
2. The Lt. Governor shall produce any other documents requested in Plaintiffs subpoena *duces tecum* by December 20, 2002.

Republic of the Philippines et al., 951 F.2d 1414, 1426 (3d Cir. 1991) noting the distinctions between partial and selective disclosure.

3. Nothing herein shall prohibit Plaintiffs from otherwise acquiring any documents the subject hereof (e.g. from other files of public record).

ENTER:

Dated: December 10, 2002

_____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk