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See You in Court? Not so Fast … State Secrets Litigation Traps for the Unwary, Overreaching Federal Contractor

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GRID Networks LLC v. Quantum Leap Research LLC, et al., a recent case from the US District Court for the Eastern District of Virginia (EDVA), is a fascinating illustration of the litigation challenges government contractors face when they attempt to sue their competitors and/or involve, even tangentially, their intelligence community customers in the process.

The Quantum Leap Research case, on its face, had all the hallmarks of a classic commercial dispute between competitors – but with a twist.

GRID, an entity that assists government customers with telecommunications infrastructure, internet protocol (IP) networking and secure communications in the area of national security, was started by a well-known founder and operator in the national security government contractor community. In 2018, Peraton, a large government contractor, acquired GRID (then, Strategic Resources International). A year after the acquisition, the GRID founder departed GRID and founded Quantum Leap Research, another entity providing national security services to federal intelligence community customers. Thereafter, GRID threatened to sue Quantum Leap Research.

In June 2020, GRID and Quantum Leap Research reached a resolution of their differences, under which Quantum Leap Research agreed that it would not – before April 2022 – hire any GRID employee or any person that was a GRID employee in the six months preceding the hire. Almost immediately prior to the expiration of that agreement, in April 2022, GRID again threatened to sue, claiming that Quantum Leap Research violated the parties' agreement – allegations that Quantum Leap Research denied.

On June 21, 2022, GRID filed a lawsuit in the Fairfax County Circuit Court (a Virginia state court) against Quantum Leap Research and several of its employees, claiming that they breached their contractual obligations to GRID, and that they tortiously interfered with GRID's contractual expectancies with employees and customers. GRID sought $14 million in damages, citing the alleged loss of a strategic and lucrative contract with one of its government customers purportedly due to GRID's employee churn. GRID also submitted with its complaint extensive discovery requests seeking detailed information concerning Quantum Leap Research's customer contracts, as well as details around its products and services provided to those customers.

Given the classified nature of the work that GRID and Quantum Leap Research perform for their government customers, and the fact that the GRID complaint (and discovery requests) put these matters squarely at issue, Quantum Leap Research removed the matter to federal court – the EDVA – in July 2022. Specifically, the removal motion asserted that the matter implicated a substantial question of federal law under the 150-year-old, so-called Totten Rule and/or the state secrets privilege.

Totten v. United States, 92 US 105 (1875), is a seminal US Supreme Court case, rooted in the Constitution, that prevents courts from hearing cases to the extent that litigating them could involve disclosure of contracts that provide "secret services" to the US government. The state secrets doctrine, on the other hand, is an evidentiary privilege that may be invoked only by the US to prevent disclosure of information in litigation if doing so would harm national security – see ***United States v. Reynolds***, 345 US 1 (1953). In the case at hand, Quantum Leap Research asserted that neither party could litigate the matter without delving into classified material in discovery and seeking to introduce such sensitive information as evidence in the litigation. GRID opposed the

removal and sought to remand the matter to state court, arguing that the parties could use unclassified code names to refer to the contracts and customers at issue.

Within a week of Quantum Leap Research's removal, the US government filed a notice that it was evaluating a potential intervention in the matter. (The US government can intervene in any civil suit to which it is not a party for the purpose of asserting the state secrets privilege.) Three months later, the government moved to intervene, without yet formally invoking the state secrets privilege (although the government submitted classified memoranda to the EDVA, presumably laying out its initial national security concerns implicated by GRID's filing). The EDVA, for its part, effectively stayed substantive briefing on the matter, pending the government's lengthy evaluation of the state secrets privilege against the allegations of GRID's complaint.

On March 3, 2023, nearly seven months after it first noticed its potential intervention, the government formally invoked the state secrets privilege and moved to dismiss GRID's complaint in its entirety – a move the US government typically seeks to avoid by instead engaging in an informal process with the parties directly.

The government's filing included supporting declarations from no less than two Cabinet officials – the director of national intelligence (DNI) and the secretary of defense. Under settled law, the state secrets privilege may only be invoked after a privileged claim has been lodged by the applicable head of the government department that had control over the matter "after **actual personal** consideration by that officer" *Reynolds*, at 7-8 (emphasis added). The DNI's supporting declaration stated that disclosure of the information implicated by this litigation "could result in serious, and potentially grave, damage to the security of the United States," including sources, methods, capabilities, activities or interests of the intelligence community that could be damaging to US national security. Similarly, the secretary of defense concluded that disclosure of the information implicated by GRID's complaint "would pose an unacceptable risk to sensitive military and intelligence programs."

On March 31, 2023, the EDVA denied GRID's motion to remand, thereby confirming that the US government's invocation of the state secrets privilege required the matter to remain in federal court. Apparently recognizing the practical futility of further litigation on the pending motions to dismiss (the government's on state secrets grounds and Quantum Leap Research's on the merits), GRID filed a notice of dismissal, and the EDVA dismissed the matter without prejudice on April 11, 2023 – almost exactly a year after the dispute began. Historically, few cases involving the government's invocation of the state secrets privilege proceed after the government brings a motion to dismiss.

This case is a master class on the pitfalls of overreaching in litigation. Despite the fact that the essence of GRID's underlying complaint was a routine employee poaching concern, GRID's attempt to assert a creative theory of damages unwittingly doomed its own litigation position – and potentially harmed its standing with its own customer base.

Thus, let this case be a cautionary tale for the unwary federal contractor to the intelligence community. The key lessons that every federal contractor should take from this matter are these:

1. Of course, commercial disputes arise, regardless of the industry. But if you are a federal contractor, think twice before suing your competitor if your work implicates national security.
2. If there is a reasonable path to a commercial resolution of a dispute with your competitor, take it.
3. If a resolution is truly not possible, carefully assess the litigation risk and formulate a strategy around the risk that you or your opponent will find it necessary to disclose classified information as part of the litigation process.
4. Understand that if it is necessary for you or your opponent to implicate intelligence community customers in your litigation, you probably have a losing strategy.
5. If employee attrition (particularly to a competitor) is a concern, carefully review your employment agreements with employees (and transaction documents covering your M&A activities) to ensure you have

appropriately tailored restrictions. But understand that even with careful drafting, enforcing those restrictions is procedurally challenging (as illustrated by this case). Additionally, many states have passed legislation making post-termination noncompetition agreements increasingly difficult to enforce.

6. Finally, realize that the best path to staving off employee attrition is to look inward, and ensure that your culture and compensation structures are designed to attract and retain your best talent.

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