UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

JONATHAN E. PERLMAN, Esq., as court appointed Receiver of Creative Capital Consortium, LLC, et al.,

Plaintiff,

vs.

BANK OF AMERICA, N.A.

Defendant.
_____/

CASE NO. 11-80331-CIV-HURLEY/HOPKINS

DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR STAY PENDING A FINAL JUDGMENT IN THE CASE OF *PERLMAN V. WELLS FARGO BANK, N.A.* OR, IN THE ALTERNATIVE, A RULING ON BANK OF AMERICA'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, Bank of America, N.A. ("Bank of America"), by and through its undersigned counsel and pursuant to Southern District of Florida Local Rule 7.1, moves this Court for entry of an Order staying this action until final disposition of the action captioned *Perlman v. Wells Fargo Bank, N.A.*, Case No. 10-81612-CIV-HURLEY/HOPKINS, pending before this Court or, in the alternative, until the Court rules on Bank of America's fully briefed Motion to Dismiss Plaintiff's Complaint [Dkt. 17]. In support of this Motion, Bank of America states as follows:

BACKGROUND

1. Last year, Plaintiff Jonathan E. Perlman, as Court appointed Receiver of Creative Capital Consortium, LLC, et al. (the "Receiver"), filed an action in this Court against Wells Fargo Bank, N.A. ("Wells Fargo") blaming Wells Fargo for losses incurred by the Receivership Entities and third-party investors arising out of a Ponzi scheme that the Receivership Entities perpetrated. *See Perlman v. Wells Fargo Bank, N.A.*, Case No. 10-81612-CIV-HURLEY/

HOPKINS (the "*Wells Fargo* Action"). Wells Fargo filed a motion to dismiss the Complaint filed in that action which has been fully briefed since June, 2011. The Court has stayed that action pending a ruling on the motion to dismiss. *Id.* at Dkt. 45 (attached hereto as Exhibit A).

2. In late March, 2011, the Receiver filed yet another Complaint [Dkt. 1], this time against Bank of America, blaming yet another bank for the losses incurred by the Receivership Entities and third-party investors arising out of the same Ponzi scheme. The sole basis for trying to blame Bank of America is that the principal, George Theodule, and the Receivership Entities maintained deposit accounts at Bank of America allegedly for several months in 2008. Despite two years of investigation, the Receiver has pled no other allegations against Bank of America.

3. In response to the Complaint, Bank of America also filed a Motion to Dismiss [Dkt. 17] arguing that the Receiver lacks standing to pursue his claims and that the bare bones facts of a customer maintaining deposit accounts does not constitute sufficient facts to sustain the many causes of action asserted against Bank of America.

4. After failing to seek an extension or to timely respond to Bank of America's Motion to Dismiss, the Receiver finally filed his Opposition brief [Dkt. 21] on July 8, 2011, and Bank of America timely filed its Reply in Support of its Motion to Dismiss [Dkt. 25]. Bank of America's Motion to Dismiss is fully briefed.

5. As noted above, in July, this Court entered an Order staying discovery in the *Wells Fargo* Action after the Receiver failed to timely respond to Wells Fargo's motion to stay discovery. *See* Exhibit A. In its Order staying discovery, the Court noted that Wells Fargo's motion to dismiss – like Bank of America's here – "raises serious questions regarding standing and presents several facial challenges to the sufficiency of plaintiff's claims, and the standing

issue is potentially dispositive of the entire action." *Id.* The Receiver has since moved to lift or vacate the stay order. *See Wells Fargo* Action at Dkt. 46.

6. Only after entry of this Court's Stay Order in the *Wells Fargo* Action and after making no effort to press this case for over four months, the Receiver's counsel requested that the parties conduct a discovery conference, and the parties did so on August 15, 2011. During the conference, counsel for Bank of America expressed their belief that it would be appropriate to forego discovery until disposition of the *Wells Fargo* Action. This is true given that (1) the Court's ruling on Wells Fargo's motion to dismiss in the *Wells Fargo* Action, at least as to the standing issue, could be probative in deciding Bank of America's Motion to Dismiss; (2) this Court already stayed discovery in the *Wells Fargo* Action while the motion to dismiss filed in that case is pending; (3) the Receiver cannot recover against both banks for the same losses; (4) the Receiver has not pursued discovery in over four months since this case was filed; (5) the Receiver waited more than two years to bring this action and has already obtained significant information over the last two years – including documents from Bank of America – during his investigation into Theodule's activity, so the Receiver would not be prejudiced by the stay; and (6) Bank of America had very little involvement with the Receivership Entities, which banked with Bank of America allegedly for several months, and accordingly, the interests of justice in determining whether this case can even progress beyond the motion to dismiss stage far outweigh the discovery burden the Receiver intends to impose on Bank of America.

7. The Receiver's counsel would not agree to a stay.

THIS CASE SHOULD BE STAYED

A. This action should be stayed pending resolution of the *Wells Fargo* case.

8. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). A motion for a stay calls for the court to exercise its discretion and "demands consideration of the competing interests of the parties." *City of New York v. Pierce*, 609 F. Supp. 798, 799 (S.D.N.Y. 1985) (citing *Landis*, 299 U.S. at 254).

9. Staying this case during the pendency of the *Wells Fargo* Action, including a ruling on Wells Fargo's motion to dismiss, makes imminent sense. First, the Court's rulings in the *Wells Fargo* Action, including for example, the question of whether the Receiver has standing to even pursue these claims, may provide for judicial economy in this case. Second, even if the Court denies Wells Fargo's motion to dismiss and that case progresses forward, the Receiver may only recover once for a single injury and recovery in the *Wells Fargo* Action, if any, could moot plaintiffs' claims here. If the Receiver recovers in another action, he cannot recover for the same losses here. *Williams v. Marriott Corp.*, 864 F. Supp. 1168, 1175 (M.D. Fla. 1994) ("A plaintiff cannot recover twice for the same injury . . . but only [can] be made whole.") (internal citations omitted). Any rulings in favor of Wells Fargo should inure to Bank of America and any recovery by the Receiver in that action must be taken into account in this action. This case should be stayed pending disposition of the *Wells Fargo* Action. *See, e.g.*, *Gov't of Virgin Islands v. Neadle*, 861 F. Supp. 1054, 1055 (M.D. Fla. 1994) (granting a stay in federal action that duplicated a action pending in another federal court, where defendants

opposing the stay did not demonstrate that they would suffer any hardship if the action was stayed).

10. Bank of America does not request an immoderate stay – the Court has been considering Wells Fargo's fully briefed motion to dismiss since June, 2011. There is no reason to believe that the proceedings in the *Wells Fargo* Action will not continue swiftly and efficiently, abrogating the need for any extended stay period.

11. The Receiver will not be prejudiced by the stay. First, the Receiver was appointed in 2008 and waited over two years to bring this action so it should not be heard to complain of an additional waiting period now. Second, the Receiver has already undertaken an investigation of this matter including obtaining documents from Bank of America, and third, as a matter of judicial economy, it makes no sense for this Court or the parties to press forward with two cases seeking duplicative recovery from the same Ponzi scheme and pressing some of the same legal issues. This case should be stayed pending a resolution of the *Wells Fargo* Action.

B.. In the alternative, this case should be stayed pending a ruling on Bank of America's Motion to Dismiss.

12. "[F]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). "Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion." *Id.* (internal citation omitted). It is well settled that "any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage, if possible." *Id.* at 1368; *see also Moore v. Potter*, 141 F. App'x 803, 807-08 (11th Cir. 2005) (per curiam) (affirming district

court's order staying discovery pending ruling on defendants' motion to dismiss); *Redford v. Gwinnett County Judicial Circuit*, 350 F. App'x 341, 346 (11th Cir. 2009) (same), *cert. dismissed*, 130 S.Ct. 1702, *reconsideration den'd*, 130 S.Ct. 2366 (2010); *Staup v. Wachovia Bank, N.A.*, No. 08-60359, 2008 WL 1771818, at *1 (S.D. Fla. Apr. 16, 2008) (granting stay of discovery pending ruling on facial challenges to the complaint in defendant's motion to dismiss); *Kroger v. Circuit County Court in and for Broward County, Florida*, No. 06-61655, 2007 WL 2460736, at * 1 (S.D. Fla. Aug. 24, 2007) (instructing plaintiff to file an amended complaint and staying discovery and parties' obligation to file a joint scheduling report until such time as defendant answers the amended complaint or the court rules on the subsequent motion to dismiss).

13. As this Court noted in granting Wells Fargo's motion to stay, when ruling on a motion to stay discovery, some district courts in this Circuit have taken a "preliminary peek" at a pending dispositive motion to determine if it raises meritorious challenges to the complaint. *See, e.g., Glynn v. Basil St. Partners, LLC*, No. 2:09-cv-585-FtM-99SPC, 2010 WL 2508605, at *1 (M.D. Fla. Jun. 16, 2010); *Jackson-Bear Group, Inc. v. Amirjazil*, No. 2:10-cv-332-FtM-29SPC, 2011 WL 720462, at *1 (M.D. Fla. Feb. 22, 2011). In the *Wells Fargo* Action, the Court did so and concluded that the motion to dismiss raises "serious questions regarding standing and presents several facial challenges to the sufficiency of plaintiff's claims, and the standing issue is potentially dispositive of the entire action." Exhibit A at 2. The same result should be reached here.

14. In its Motion to Dismiss, Bank of America challenges the Receiver's standing to pursue his claims and has set forth meritorious challenges to each of the Receiver's causes of action, based both upon the lack of any factual predicate and fundamental legal deficiencies,

sufficient to warrant a stay of discovery until Bank of America's fully briefed Motion to Dismiss is decided. Both Wells Fargo's and Bank of America's Motions to Dismiss could be dispositive of the cases in their entirety and completely eliminate the need for any discovery.

15. Specifically, Bank of America argued in its Motion to Dismiss that the Receiver's claims should be dismissed because the Receiver failed to comply with the requirements of Rule 8(a) of the Federal Rules of Civil Procedure when it offered only insufficient, bare bones conclusory allegations despite two years of substantial discovery. Further, the Receiver lacks standing to assert claims on behalf of entities which existed only to perpetrate the underlying fraud, and to the extent that the Receiver bases his claims on Bank of America's purported violations of the Bank Secrecy Act/ Anti-Money Laundering statute, 31 U.S.C. § 5311, *et seq.*, the Receiver's claims fail because this Act does not provide for a private cause of action. For these reasons, all of the claims should be dismissed in their entirety. More specifically, on a claim-by-claim basis, Bank of America argued in its motion that every count in the Receiver's Complaint suffers a fatal legal flaw:

- Counts I and II, the claims for aiding and abetting breach of fiduciary duty (Count I) and conversion (Count II), fail because the Receiver has not alleged and cannot allege that Bank of America knew of Theodule's alleged conduct or that Bank of America provided Theodule with the requisite substantial assistance.
- Count III fails to state a claim for common law negligence (Count III) because Bank of America owed no duty to the Receivership Entities and because the claim is barred by the economic loss rule.
- Counts IV and V for wire transfer liability under Article 4A of the U.C.C. (Count IV) or Regulation J (Count V) fail because the laws impose no duty on

Bank of America to investigate the prudence of the Receivership Entities' transactions.

- Similarly, the claims for avoidance and recovery of fraudulent transfers pursuant to the Florida Uniform Fraudulent Transfers Act ("FUFTA") (Counts VI, VII, & VIII) should be dismissed because the Receiver has failed to allege the existence of a creditor-debtor relationship and because Bank of America was not the intended recipient of the purported fraudulent transfers and never had control over the transferred funds.
- And finally, Count IX fails to state a claim for aiding and abetting fraudulent transfers because the Receiver has not alleged the requisite facts and more fundamentally, Florida does not even recognize such a cause of action.

Bank of America has raised strong grounds in its Motion to Dismiss that this case should be dismissed in its entirety.

16. As noted above, the Receiver would not be prejudiced by a stay of discovery pending a ruling on Bank of America's Motion to Dismiss. The Motion to Dismiss is fully briefed and ready for adjudication; the Receiver has declined to pursue discovery for over four months since this case was filed; and, as part of his over two years investigation prior to initiating this action, the Receiver already obtained substantial documentation from Bank of America.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

I HEREBY CERTIFY that, in accordance with Local Rule 7.1(a)(3), the undersigned has conferred with Plaintiff's counsel regarding the issues raised in this Motion, who does not agree to the relief requested herein.

WHEREFORE, Defendant, Bank of America, N.A., respectfully requests that this Court grant Bank of America's Motion to Stay, enter an Order staying this action pending resolution of the action pending before this Court captioned *Perlman v. Wells Fargo Bank, N.A.*, Case No. 10-81612-CIV-HURLEY/HOPKINS or, in the alternative, until this Court rules upon Bank of America's Motion to Dismiss, and grant other and further relief that this Court deems just and proper.

Date: August 15, 2011

Respectfully submitted,

/s/ Juan A. Gonzalez

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2011, I electronically caused the foregoing document to be filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Juan A. Gonzalez
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

JONATHAN E. PERLMAN, Esq., as court appointed Receiver of Creative Capital Consortium, LLC, et al.,

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CASE NO. 11-80331-CIV-HURLEY/HOPKINS

ORDER ON DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR STAY

THIS CAUSE having come on to be considered before the Court on Bank of America, N.A.'s Motion for Stay, and the Court, having reviewed the Motion and the file, and being otherwise duly advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. Bank of America, N.A.'s Motion is GRANTED;

2. This action is STAYED pending resolution of the action pending before this Court captioned *Perlman v. Wells Fargo Bank, N.A.*, Case No. 10-81612-CIV-HURLEY/HOPKINS.

DONE AND ORDERED in Chambers, in West Palm Beach, Palm Beach County, Florida, this _____ day of _____, 2011.

_____
HONORABLE DANIEL T.K. HURLEY

cc: Juan A. Gonzalez, Esq., J. Randolph Liebler, Esq. and Dora F. Kaufman, Esq., Liebler, Gonzalez & Portuondo, P.A., *Counsel for Defendant*, Courthouse Tower-25th Floor, 44 West Flagler Street, Miami, Florida 33130

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EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-81612-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO STAY DISCOVERY

THIS CAUSE is before the court upon defendant's motion to stay discovery pending ruling on its motion to dismiss the amended complaint and/or strike [DE # 24]. Even though plaintiff sought and received two extensions of time to respond to the instant motion, plaintiff never filed a response in opposition. The court is thus forced to consider the instant motion without the benefit of a response from plaintiff.[1]

District courts have broad discretion to managing pretrial discovery matters. *Perez v. Miami-Dade County*, 297 F.3d 1255, 1263 (11th Cir.2002). District courts may limit the scope of discovery or control its timing to protect a party from annoyance, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c). The filing of a potentially dispositive motion to dismiss before discovery weighs heavily in favor of issuing a stay. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir.1997) ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before

[1] The court notes that the failure to submit a response to a motion "may be deemed sufficient cause for granting the motion by default." S.D. Fla. L. R. 7.1(C).

discovery begins.). To determine whether to issue a stay, "it is necessary for the court to 'take a preliminary peek' at the merits of the motion to dismiss to see if it appears to be clearly meritorious and truly case dispositive." *Feldman v. Flood*, 176 F.R.D. 651, 652–53 (M.D.Fla.1997) (denying stay of discovery).

Here, defendant's motion to dismiss raises serious questions regarding standing and presents several facial challenges to the sufficiency of plaintiff's claims, and the standing issue is potentially dispositive of the entire action.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

Defendant's motion to stay discovery pending ruling on its motion to dismiss the amended complaint and/or strike [DE # 24] is **GRANTED**. Discovery in this case is **STAYED** while the court takes defendant's motion to dismiss under advisement.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 19th day of July, 2011.

Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record