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

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

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

Plaintiff,

v.

BANK OF AMERICA, N.A,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR STAY

Plaintiff Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc. and Unity Entertainment Group, Inc. (collectively referred to as the "Receivership Entities"), hereby files this Response in Opposition to Defendant Bank of America, N.A.'s ("BOA") 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 [DE 27] (the "Motion For Stay"), and in support thereof states as follows:

I. Introduction

The parties do not dispute the Court's broad discretion to manage pretrial discovery matters. However, the underlying motion to stay relies on an argument that this Court has

rejected repeatedly – as has nearly every other court to consider the question. It simply is not true that discovery presumptively should be stayed while a motion to dismiss is pending. Instead, the federal courts, and this Court in particular, have consistently held that the proper presumption is that discovery should not be denied and a stay of discovery pending resolution of a dispositive motion is warranted only where it is clear that (1) the pending motion will be successful, (2) the motion will dispose of the entire case, and (3) the movant has made a specific showing that it will suffer real prejudice absent a stay. Defendant does not meet the applicable standard here. First, Defendant's pending dismissal motion is legally deficient. Second, the dismissal motion is not likely to dispose of the entire case. Third, Defendant has failed to show any specific prejudice upon denial of a stay. Moreover, there is simply no basis for the proposition that all discovery should be stayed until after final adjudication of an entirely separate and distinct lawsuit filed by the Plaintiff, as Defendant suggests.

II. Relevant Factual Background

As alleged in the Complaint, despite Defendant BOA's policies and practices in place that made it fully aware that the Receivership Entities through George Theodule ("Theodule") were involved in a massive Ponzi Scheme, BOA enabled Theodule to transfer more than $19 million dollars of stolen investment funds via bank accounts at BOA. [DE 1 ¶ 66].

In the main receivership action, styled *The United States Securities and Exchange Commission* (the "SEC") *v. Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC and George L. Theodule*, Case No. 08-81565-CIV-HURLEY/HOPKINS, pending in this Court (the "Main Case"), the Receiver served BOA with a subpoena duces tecum. The documents that BOA produced resulted in substantial information regarding the claims alleged in the Complaint in the present case.

On May 31, 2011, BOA moved to dismiss [DE 17] the Complaint. Nearly ***three*** months later, BOA moved to stay all discovery until final disposition of the action captioned *Perlman v. Wells Fargo Bank, N.A.*, Case No. 10-81612-CIV-Hurley/Hopkins (the "*Wells Fargo* Action"), pending before this Court or, in the alternative, until the Court rules on BOA's fully briefed Motion to Dismiss Plaintiff's Complaint." [DE 27]. The stay motion acknowledges the prior discovery in the Main Case [DE 27 ¶6], and that the parties had held a discovery conference in the present case.[1]

III. Argument

A. Legal Standard

A stay of all discovery is generally disfavored, "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." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997) (citation omitted). This is especially true when, as here, resolution of a pending preliminary motion is not likely to dispose of the entire action. *Id.* (citation omitted). Further, "the Court ordinarily should not stay discovery which is necessary to gather facts in order to defend against the motion." *Id.* (citations omitted).

B. The Courts Have Rejected a *Per Se* Rule for a Stay of Discovery

In its stay motion, BOA claims that the Eleventh Circuit essentially established a *per se* rule in *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997) requiring a district

[1] Notably, counsel for BOA suggests that the Receiver has been dilatory in his efforts to move forward with this case and other cases on behalf of the receivership. In fact, the Receiver requested a discovery conference on August 1, 2011 but, August 15, 2011 was the first available date for counsel for BOA to participate in the conference. The Receiver considered it a professional courtesy to grant counsel this additional time. Further, as this Court is well aware, since his appointment, the Receiver has filed over 25 lawsuits obtaining over $7 million dollars in judgments for the benefit of the receivership estate.

court to rule on every potentially dispositive motion to dismiss before permitting discovery to proceed. [DE 27 ¶ 12]. BOA understates the proper test. As this Court has noted repeatedly, *Chudasama* "does not indicate a broad rule that discovery should be deferred whenever there is a pending motion to dismiss." *Gannon v. Flood*, No. 08-60059-CIV, 2008 WL 793682, at *1 (S.D. Fla. Mar. 24, 2008) (denying stay). *See also Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, *2 (S.D. Fla. July 24, 2008) ("*Chudasama* . . . has been analyzed on numerous occasions, and courts have consistently rejected any *per se* requirement to stay discovery pending resolution of a dispositive motion"). "Instead, [those cases] stand for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount." *In re Winn Dixie Stores, Inc. ERISA Litig.*, No. 3:04-cv-194-J-33MCR, 2007 WL 1877887, at *1 (M.D. Fla. June 28, 2007).

Chudasama involved a "bizarre situation" unlike this case. *Bocciolone*, 2008 WL 2906719, *2. In *Chudasama*, the district court granted a default and a motion to compel against the defendant despite having refused for almost two years to rule on the defendant's motion to dismiss a fraud claim that was "especially dubious" under "even the most cursory review" and that "significantly enlarge[d] the scope of discovery." *Id.*, 123 F.3d at 1367-68. Under those facts, the Eleventh Circuit held that the district court had mismanaged the case and had materially prejudiced the defendant's rights by failing to rule on the motion to dismiss before compelling discovery responses. *Id.* at 1369.

Chusdasma did not hold that discovery always should be stayed until facial challenges raised by a motion to dismiss are resolved [*see* DE 24 ¶ 11], but only that a "legally unsupported claim" that would "unduly enlarge the scope of discovery" should "if possible" be "eliminated before the discovery stage." 123 F.3d at 1367-68 (noting that, "as the burdens of allowing a

dubious claim to remain in the lawsuit increase, so too does the duty of the district court finally to determine the validity of the claim"). Thus, as the Eleventh Circuit subsequently explained, whether a court needs to resolve a facial challenge to the legal sufficiency of a claim before discovery depends in part upon whether "the challenged claim will significantly expand the scope of allowable discovery," *Cotton v. Massachusetts Mut. Life Ins. Co.*, 402 F.3d 1267, 1292 (11th Cir. 2005), and in part on the validity of the claim, *Chudasama*, 123 F.3d at 1369.

Accordingly, "*Chudasama* does not revoke a district court's 'broad discretion' with respect to Rule 12(b)(6) motions and this Court is not automatically required to resolve such motions before allowing discovery to proceed." *Bocciolone*, 2008 WL 2906719, at *1. Instead, this Court has held that a stay of discovery pending resolution of a motion is "grossly inappropriate" unless it is clear that the dispositive motion not only is likely to be successful but will dispose of the entire case. *S.K.Y. Mgmt., LLC v. Greenshoe, Ltd.*, No. 06-21722-CIV, 2007 WL 201258, at *1 (S.D. Fla. Jan. 24, 2007) (denying discovery stay). *See also Feldman*, 176 F.R.D. at 653 (denying discovery stay where "defendants' motion to dismiss, while presenting substantial issues, is not so clear 'on its face' that there appears to be an immediate and clear possibility that it will be granted") (citations omitted); *Winn Dixie*, 2007 WL 1877887, at *2 (stating that, at most, *Chudasama* and *Cotton* support a discovery stay, in the court's discretion, "when an especially dubious claim would unduly expand the scope of discovery").

Moreover, the facts of this case are "a far cry from the bizarre situation in *Chudasama*." *Bocciolone*, 2008 WL 2906719, at *2. The Court in this case has not unduly delayed any rulings, as did the court in *Chudasama*. *Id.* Indeed, BOA's motion to dismiss and motion to stay discovery have only recently been filed. Moreover, as set forth in greater detail in the Receiver's response in opposition [DE 21] to BOA's motion to dismiss, the Receiver's claims against BOA

are neither "especially dubious" or duplicitous such that disposal of any particular claim by a motion to dismiss "would save needless and extensive discovery." *S.K.Y. Mgmt.*, 2007 WL 201258, at *1. Accordingly, a closer look at *Chudasama* and its progeny establishes that BOA's reliance on such authority is misplaced.

C. Good Cause and Reasonableness Do Not Support a Stay in this Case

"In order to prevail on a motion to stay discovery, the movant must show that 'good cause and reasonableness' support a stay." *Bocciolone*, 2008 WL 2906719, at *2 (*quoting McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006)). Absent, as here, a "specific showing of prejudice or burdensomeness," this Court's Local Rules state that "unilateral motion[s] to stay discovery pending a ruling on [a] dispositive motion" should be denied:

> *Stays or Limitation of Discovery*. Normally, the pendency of a motion to dismiss or a motion for summary judgment will not justify a unilateral motion to stay discovery pending a ruling on the dispositive motion. **Such motions for stay are generally denied except where a specific showing of prejudice or burdensomeness is made, or where a statute dictates that a stay is appropriate or mandatory.**

(S.D. Fla. L.R. App. A., Discovery Practices Handbook, at I(D)(5) (2010) (emphasis added)). Moreover, a motion to stay discovery "is rarely appropriate unless resolution of the [pending dispositive] motion will dispose of the entire case." *Bocciolone*, 2008 WL 2906719, at *2 (citation omitted). Accordingly, in evaluating whether the movant has met its burden, the Court "must balance the harm produced by a delay in discovery against the possibility that the [dispositive] motion will be granted and *entirely* eliminate the need for such discovery." *McCabe*, 233 F.R.D. at 685 (emphasis in original).

In determining whether the motion to dismiss will dispose of the entire case, this Court correctly notes that it may take a "preliminary peek" at the merits of the motion "to see if it

appears to be clearly meritorious and truly case dispositive." [DE 45 at 2 (citing *Feldman*, 176 F.R.D. at 652-53)]. *See also Bocciolone*, 2008 WL 2906719, at *2. Such a "peek" here reveals that the pending motion to dismiss is not likely to be clearly meritorious or truly case dispositive.

1. The Motion to Dismiss Does Not Justify a Stay of Discovery

BOA's motion to dismiss is not "so clear on its face that there appears to be an immediate and clear possibility that it will be granted," *Feldman*, 176 F.R.D. at 653, or so clear that it will "dispose of the entire case." *S.K.Y. Mgmt.*, 2007 WL 201258, at *1. Accordingly, it does not justify a stay of discovery pending its resolution.

Specifically, the stay motion identifies BOA's generalized arguments that:

(a) the Receiver lacks standing as to all Counts of the Complaint;

(b) the Receiver failed to comply with the pleading requirements of the Federal Rules of Civil Procedure;

(c) the Receiver fails to state a cause of action under the Bank Secrecy Act (the "BSA") as to all Counts of the Complaint;

(d) the Receiver fails to state a cause of action for aiding and abetting a breach of fiduciary duty as to Count I of the Complaint;

(e) the Receiver fails to state a cause of action for aiding and abetting conversion as to Count II of the Complaint;

(f) the Receiver fails to state a cause of action for common law negligence as to Count III of the Complaint;

(g) the Receiver fails to state a cause of action for wire transfer liability under the Uniform Commercial Code ("U.C.C.") as to Counts IV and V of the Complaint;

(h) the Receiver fails to state a cause of action for avoidance and recovery of fraudulent transfers under Chapter 726, Florida Statutes, as to Counts VI, VII and VIII of the Complaint; and

(i) the Receiver fails to state a cause of action for aiding and abetting fraudulent transfer as to Count IX of the Complaint.

[*See* DE 17 ¶ 15]. However, notwithstanding this "kitchen-sink" defense strategy, and as addressed in greater detail in the Receiver's opposition to BOA's motion to dismiss, the foregoing arguments are neither "clearly meritorious" nor "truly case dispositive."

Indeed, a "peek" of the Receiver's opposition itself reveals that:

(a) the Receiver does have standing to pursue all claims in the Complaint as the Complaint meets the minimum constitutional pleading requirements in this context;

(b) the Receiver's Complaint satisfies the requirements of FRCP 8(a)(2) in that the allegations in the Complaint contains extensive factual detail relating to BOA's involvement in the Ponzi scheme perpetuated by Theodule;

(c) arguments relating to the BSA are simply misplaced, as such arguments rest on BOA's misplaced interpretation of the Complaint and, as to Counts IV and V of the Complaint, the Receiver nowhere alleges duty or breach under the BSA;

(d) as to Count I of the Complaint for aiding and abetting a breach of fiduciary duty, the Receiver's allegations of BOA's "knowledge" of Theodule's wrongdoing based on the series of "atypical" banking transactions at issue, combined with allegations regarding BOA's active assistance in transferring the investment funds to third-parties and insiders for non-investment purposes, and its unexplained failure to report the suspicious banking activity, all point to BOA's "general awareness" and "affirmative assistance" in furthering Theodule's breaches of fiduciary duty;

(e) as to Count II of the Complaint for aiding and abetting conversion, the Receiver reaffirms his arguments establishing his standing, noting (with regard to the issue of standing) that the Receivership Entities themselves have suffered a separate distinct and palpable injury and noting (with regard to issues of *in pari delicto*) that the appointment of a receiver displaces any managers who may

have engaged in wrongful conduct, and thus ensures that recovery goes to a receiver and ultimately innocent creditors, rather than to wrongdoers;

(f) as to Count III of the Complaint for common law negligence, BOA's actual knowledge of fraud committed by Theodule may have given rise to a duty upon BOA to disclose facts underlying the fraud to prevent it from continuing and, separately, the Receiver's negligence claim is not barred by the economic loss rule, because the claim sounds in tort entirely independent of any implied agreement;

(g) as to Counts IV and V of the Complaint for wire transfer liability under the U.C.C., the Receiver properly alleges that BOA has violated its statutory duty of good faith under the U.C.C. in connection with processing wire transfers directed by Theodule;

(h) as to Counts VI and VII of the Complaint for avoidance and recovery of fraudulent transfers under Chapter 726, Florida Statutes, first, BOA's "mere conduit" defense is an affirmative defense that must be pleaded and proven by BOA at trial (and not in connection with a motion to dismiss), second, BOA's assertion that it never had control over the transferred funds, standing alone, is insufficient to avoid potential liability as an initial transferee and, third, the Receiver, standing in the shoes of the Receivership Entities, has a claim as a "creditor" against each one of the Receivership Entities identified as a "debtor" in the Complaint; and

(i) as to Count VIII of the Complaint for aiding and abetting fraudulent transfer, at this stage of the proceeding, and unless and until BOA is able to prove that it is not an initial transferee, the Receiver should not be precluded from pursuing his claims for aiding and abetting fraudulent transfer.

[*See generally* DE 21 at 4 - 30].

In sum, any meaningful "peek" of the issues underlying BOA's motion to dismiss shows that its motion is not "likely to be successful" or, even if partly successful, would not "dispose of the entire case," as required to justify a stay of discovery. *S.K.Y. Mgmt.*, 2007 WL 201258, at

*1-2 (denying motion to stay discovery where there was "good reason" to question whether the movant would prevail on the motion to dismiss and, even if successful, the motion would not dispose of the entire case); *Bocciolone*, 2008 WL 2906719, at *2 (denying motion to stay discovery where pending motion to dismiss "could not possibly resolve the entire case" and because "there is sufficient reason to question" whether it would even dispose of all claims against the movants); *Winn Dixie*, 2007 WL 1877887, at *2 (denying motion to stay discovery because the court "declines to find the challenged claims sufficiently dubious" and because "further delays in [the] litigation are not easily justified" given previous stays in the case caused by Winn Dixie's bankruptcy). For the same reasons, the motion to dismiss filed in this case does not justify the requested stay of discovery.

2. BOA Does Not Show Specific Prejudice Absent a Stay

The rule *against* granting a stay of discovery based solely on the filing of a motion to dismiss is so widely accepted in this district that it has been incorporated into this Court's Discovery Practices Handbook (Appendix A to the Local Rules of this Court). This Handbook provides that a motion to stay discovery should be denied unless the movant makes a "specific showing of prejudice or burdensomeness" in the absence of a stay. (L.R. App. A. at I(D)(5)). Here, BOA does not – and cannot – make such a specific showing.

BOA does not even attempt to show that it would be specifically prejudiced absent a stay. Instead, it suggests that a stay might avoid "the discovery burden the Receiver intends to impose on Bank of America." [DE 27 ¶ 6]. This is the nature of litigation. Defendants are always burdened when they are sued, whether the case ultimately is dismissed, summary judgment is granted, the case is settled, or a trial occurs. *Parker v. Stryker Corp.*, No. 08-cv-01093, 2008 WL 4457864, at *2 (D. Colo. Oct. 1, 2008). Such is a consequence of our judicial system and

the rules of civil procedure; here, therefore, there is no special burden on BOA. *Id.* Further, BOA turns this Court's rules on its head by arguing that, because the Receiver has already engaged in discovery regarding the Defendant, the Receiver "would not be prejudiced by a stay of discovery pending a ruling on BOA's Motion to Dismiss Complaint." [DE 27 ¶ 16]. As long as this Court finds that the Receiver states a claim for relief, he is entitled to discovery under Fed. R. Civ. P.26.

BOA fails to explain, as required, why proceeding with discovery would cause it any specific prejudice. *Cf. Bocciolone*, 2008 WL 2906719, at *2 (denying motion to stay where the defendants claimed that discovery would be "unusually expensive and time consuming"). Moreover, it provides no support for the proposition that a desire to avoid a "discovery burden" constitutes a "specific showing of prejudice" sufficient to satisfy this Court's Local Rules. Nor does BOA's motion to stay make any showing, or even argument, as to the specific expense or burden that would be involved with proceeding with discovery. The lack of such a specific showing of prejudice is fatal to its motion. (L.R. App. A at I(D)(5)).

D. The Court Should Not Stay Discovery Necessary to Defend Against the Motion to Dismiss

"[T]he Court ordinarily should not stay discovery which is necessary to gather facts in order to defend against the motion." *Feldman*, 176 F.R.D. at 652 (citations omitted). Additionally,

> [i]n deciding whether to stay discovery pending resolution of a pending motion, the Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery. This involves weighing the likely costs and burdens of proceeding with discovery.

Id. (citation omitted). Such a balancing in this case shows that the balance tips decidedly in

favor of permitting discovery to go forward.

Among other important factors, and as noted above with respect to the subject motion to stay, BOA has not demonstrated with any specificity whatsoever that any discovery the Receiver might seek would be "avoidable, overly broad, or broad-reaching." *See S.D. v. St. John's Cnty. Sch. Dist.*, No. 3:09-cv-250-J-20TEM, 2009 WL 3231654, at *2 (M.D. Fla. Oct. 1, 2009) (denying motion to stay discovery pending resolution of motion to dismiss second amended complaint where movant had "not demonstrated that any discovery Plaintiffs might seek would be avoidable, overly broad, or broad-reaching") (citation omitted). Similarly, BOA has not shown, or even argued, that discovery would be unnecessary to the Receiver's defense of the motion to dismiss. *Cf. Feldman*, 176 F.R.D. at 652 (citation omitted); *Allstate Life Ins. Co. v. Miller*, No. 03-61797-CIV-UNGARO, 2004 WL 141698, at *1 (S.D. Fla. Jan. 16, 2004) (noting that "[i]t is an abuse of the Court's discretion [] to stay discovery when doing so would prevent the party opposing [the pending motion in dispute] from demonstrating factual disputes relevant to the motion [in dispute]") (denying stay and "conclud[ing] that Plaintiffs should be allowed to conduct the discovery needed to establish the factual predicate" for their arguments, including those, as here, involving an alleged fraudulent scheme). Indeed, discovery in this action would unquestionably assist the Receiver in establishing the factual predicate for his arguments against BOA, including those sounding in fraud.

E. The Cases Cited by BOA in Support of a Stay of Discovery Pending the Disposition the Wells Fargo Action Are Largely Irrelevant

Incredibly, BOA suggests that this Court should stay all discovery in the present case until disposition of the *Wells Fargo* Action, a case against a different party set for trial in January 2012. This proposition is not supported by any Eleventh Circuit case law. Indeed, the opinions cited by BOA in its Motion for Stay do not contribute to a better understanding of the factors

which should be balanced in ruling on a motion for stay of discovery under the present circumstances since neither of the cases cited involve situations where the subject action is stayed, pending resolution of the case where the parties and the issues are not identical. While the *Wells Fargo* Action involves the same Ponzi scheme, it clearly involves different parties. In addition, while the claims alleged may be similar, the factual allegations against each of the Defendants are distinct, as are therefore the damages amounts alleged in each action. This Court should not rely upon BOA's cited authorities in ruling on the Motion for Stay.

For example, in *Government of Virgin Islands v. Neadle*, 861 F. Supp 1054 (M.D. Fla. 1994), the instant action was stayed in favor of another previously filed and pending suit involving the same parties and the same issue. Indeed, the allegations of the complaint in the instant action were contained, verbatim, in the complaint in the other action. *Id.* at 1055. Clearly, the situation in *Government of Virgin Islands* is not analogous to the situation before this Court because the parties in the two actions are not identical, and the factual allegations in the two cases are completely different.

Likewise, BOA's reliance on *Williams v. Marriott Corp*., 864 F. Supp. 1168, (M.D. Fla. 1994) is curious. *Williams* involved a case wherein the defendant former employer moved for judgment as a matter of law and for a new trial because, among other things, it alleged that the jury was not instructed on the issue of duplicative damage awards. The Court found the verdict forms invited duplication in that each of the two causes of action in the instant case had its own identical damages section, and did not contain a warning about duplication. Specifically, there was no evidence that the plaintiff employee had suffered separate medical injury from each of the claims, wrongful termination and hostile work environment. *Id*. at 1175. In contrast, here the Receiver has filed two separate actions against two separate defendants, albeit each is a bank,

seeking independent damages awards arising from separate and distinct losses caused by each defendant bank and as more fully identified in the respective complaints.

IV. Conclusion

For all of the foregoing reasons, staying discovery pending resolution of BOA's motion to dismiss or until final judgment in the *Perlman v. Wells Fargo Bank, N.A.* would accomplish nothing but cause delay to the detriment of the defrauded investors on whose behalf the Receiver has been appointed. The Receiver respectfully requests that this Court deny BOA's Motion for Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2011, the foregoing document was electronically 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 identified on the below Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Carmen Contreras-Martinez
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10501-002/87