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

DEFENDANT BANK OF AMERICA, N.A.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STAY

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I. INTRODUCTION

Before the Court is Defendant Bank of America, N.A.'s Motion to Stay this action. This is the second action the Receiver has filed seeking recovery for losses arising out of a Ponzi scheme that the Receiver Entities perpetrated. This Court granted Wells Fargo Bank's motion and entered a stay of discovery in the first action. *See Perlman v. Wells Fargo Bank, N.A.*, Case No. 10-81612-CIV-HURLEY/HOPKINS (the "*Wells Fargo* Action"). [Dkt. 27] at Exhibit A. For the same and additional reasons, the Court should enter an order staying in this action as well.

In granting Wells Fargo's motion to stay, this Court noted that Wells Fargo's motion to dismiss raised serious doubts as to the validity of the Receiver's claims, that there are "serious questions regarding [the Receiver's] standing" and that "the standing issue is potentially dispositive of the entire action." *Id.* Bank of America's Motion to Dismiss similarly challenges the Receiver's standing, and a stay of proceedings pending the outcome of the Wells Fargo action or, alternatively, pending this Court's adjudication of the fully briefed Motion to Dismiss is, therefore, warranted. No amount of additional discovery or amended pleading will save the Receiver's claims where, as here, the Receiver lacks standing to pursue his claims against Bank of America in the first instance.

Further, while the Receiver baldly claims that he is not seeking the same recovery in both this action and the *Wells Fargo* Action, he never explains or supports this contention. To the contrary, in both actions, the Receiver is seeking to recover losses incurred by investors in the Ponzi scheme. As the complaints confirm, the causes of action and the requested relief are the same. Accordingly, pending the outcome of the *Wells Fargo* Action or, in the alternative, until this Court rules on Bank of America's fully briefed Motion to Dismiss, this action should be stayed.

II. ARGUMENT

In his Response to Bank of America's Motion to Stay, the Receiver both mischaracterizes the reasons Bank of America has moved to stay discovery and diminishes this Court's authority to grant a stay. Notwithstanding the Receiver's contentions, Bank of America's Motion to Stay should be granted because: (a) the Receiver is seeking to recover the same relief here as in the *Wells Fargo* Action; (b) Bank of America's motion to dismiss will dispose of *all* of the Receiver's claims; (c) Bank of America and this Court will be prejudiced if discovery proceeds at this time; and (d) the Receiver does not need discovery to defend a fully briefed motion to dismiss challenging the legal sufficiency of his claims.

A. This Court Should Stay This Action Pending Disposition Of The *Wells Fargo* Action.

As noted above, the Receiver offers nothing but his bald contention that he is not seeking the same relief and pressing the same claims here and in the *Wells Fargo* Action. There simply can be no genuine doubt that rulings in the *Wells Fargo* Action against the Receiver, as well as any recovery in the investor's favor, will have an impact on this action. Further, the Receiver has no serious rebuttal that the parties and this Court will save time and effort by addressing certain dispositive issues in the first-filed action against *Wells Fargo*. First and foremost is the threshold question of whether the Receiver even has standing to seek relief in either case. This case should be stayed pending disposition of the *Wells Fargo* Action to, *inter alia*, avoid the potential for duplicative recovery by the Receiver, allow for judicial economy, minimize the potential for inconsistent rulings, and avoid the sizable cost and expense (and burden) to all parties and the Court if the Receiver is permitted to simultaneously pursue multiple actions for the same alleged losses.

B. Bank Of America's Motion To Dismiss Will Dispose Of All Of The Receiver's Claims.

In the alternative, this Court should stay this action pending this Court's ruling on Bank of America's motion to dismiss. Despite the Receiver's claims to the contrary, Bank of America does not contend that *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), stands for the proposition that discovery must be stayed, *per se*, during the pendency of a motion to dismiss. Rather, *Chudasama* and its progeny stand for the straight-forward and sensible proposition 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 Redford v. Gwinnett Cnty. Judicial Circuit*, 350 F. App'x 341, 346 (11th Cir. 2009) (The *Chudasama* court determined that "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."); *Moore v. Potter*, 141 F. App'x 803, 807-08 (11th Cir. 2005) (per curiam); *Staup v. Wachovia Bank, N.A.*, No. 08-60359, 2008 WL 1771818, at *1 (S.D. Fla. Apr. 16, 2008); *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006). Because discovery "imposes costs on parties and taxes judicial resources when discovery disputes arise," there is no need for discovery prior to a court ruling on a dispositive motion that presents purely legal questions. *McCabe*, 233 F.R.D. at 685; *see also Carcamo v. Miami-Dade Cnty.*, No. 03-20870-CIV, 2003 WL 24336368, at *1 (S.D. Fla. Aug. 1, 2003) (citing *Chudasama*, 123 F.3d at 1367). "In 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." *McCabe*, 233 F.R.D. at 685 (internal citations omitted); *see also Jackson-Bear Group, Inc. v. Amirjazil*, No. 2:10-cv-332-FtM-29SPC, 2011 WL 720462, at *1 (M.D. Fla. Feb. 22, 2011). "This involves weighing the

likely costs and burdens of proceeding with discovery." *McCabe*, 233 F.R.D. at 685. Therefore, staying discovery is appropriate where a motion will likely dispose of the entire case. *Id.*; *see also Glynn v. Basil St. Partners, LLC*, No. 2:09-cv-585-FtM-99SPC, 2010 WL 2508605, at *1 (M.D. Fla. June 16, 2010); *Jackson-Bear Group*, 2011 WL 720462, at *1. To determine as much, a court should take a "preliminary peek at the merits of [the] dispositive motion to see if it appears to be clearly meritorious and truly case dispositive." *McCabe v. Foley*, 233 F.R.D. at 685; *see also Glynn*, 2010 WL 2508605, at *1; *Jackson-Bear Group*, 2011 WL 720462, at *1. Here, a preliminary peek at Bank of America's Motion to Dismiss reveals a motion that will dispose of the entire action and entirely eliminate the need for costly discovery.

As set out in the Motion to Dismiss, at the threshold, the Receiver lacks standing to pursue his claims. Moreover, despite having access to two-plus years of discovery, including documents subpoenaed from Bank of America, the Receiver has failed to meet even the minimum pleading standards, and each of the Receiver's individual causes of action has numerous fatal defects.[1] Bank of America's Motion to Dismiss addresses and is anticipated to dispose of each and every claim the Receiver has asserted here.

Further, this Court has recognized the potentially dispositive nature of these arguments in granting Wells Fargo's similar motion to stay discovery. *See* [Dkt. 27] at Exhibit A (noting that

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[1] As set out in Bank of America's Motion to Dismiss [Dkt. 27], courts have consistently held that banks cannot be held liable in connection with a customer's perpetration of a fraudulent Ponzi scheme based merely on the provision of regular banking services. *See, e.g.*, *Lawrence v. Bank of America, N.A.*, No. 8:09-cv-2162-T-33T6W, 2010 WL 3467501 (M.D. Fla. Aug. 30, 2010); *Hines v. FiServ, Inc.*, No. 8:08-cv-2569-T-30AEP, 2010 WL 1249838 (M.D. Fla. Mar. 25, 2010); *In re Agape Litig.*, 773 F. Supp. 2d 298 (E.D.N.Y. 2011); *Sollberger v. Wachovia Securities, LLC*, No. 09-0766, 2010 WL 2674456 (C.D. Cal. June 30, 2010); *In re Agape Litig.*, 681 F. Supp. 2d 352 (E.D.N.Y. 2010); *Silverman Partners, L.P. v. First Bank*, 687 F. Supp. 2d 269 (E.D.N.Y. 2010); *Rosner v. Bank of China*, No. 06-CV-13562, 2008 WL 5416380 (S.D.N.Y. Dec. 18, 2008), *aff'd*, 349 F. App'x 637 (2d Cir. 2009).

similar arguments advanced by Wells Fargo in its motion to dismiss "raise serious questions regarding [the Receiver's] standing and present[] several facial challenges to the sufficiency of [the Receiver's] claims, and the standing issue is potentially dispositive of the entire action"). Standing is a threshold matter that should be decided before parties are burdened by discovery. *See In Re J.H. Inv. Services, Inc.*, 413 F. App'x 142, 148 (11th Cir. 2011) ("Standing presents a threshold jurisdictional question of whether a court may consider the merits of a dispute.") (internal citations omitted); *see also United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988) ("It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters."); *Chudasama*, 123 F.3d at 1367 (facial challenges to the legal sufficiency of a claim or defense and purely legal questions should be resolved before discovery begins).

The authorities the Receiver relies on are inapposite to the issue before the Court. In the majority, the pending motion to stay was denied because the resolution of the underlying dispositive motion, again contrary to Bank of America's motion here, would not dispose of the entire action – not because motions to stay discovery are wholly inappropriate. *See Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, at *2 (S.D. Fla. July 24, 2008) ("Because resolution of Defendants' Motion to Dismiss could not possibly resolve the entire case and because there is sufficient reason to question whether it will even dispose of all claims against these Defendants, it would be improper for the Court to stay discovery pending resolution of that Motion."); *S.K.Y. Mgmt. LLC v. Greenshoe, Ltd.*, No. 06-21722-CIV, 2007 WL 201258, at *2 (S.D. Fla. Jan. 24, 2007) ("another problem with the Defendant's motion is that the pending motion to dismiss will admittedly not result in a resolution of the entire case."); *S.D. v. St. Johns Sch. Dist.*, No. 3:09-cv-250-J-20TEM, 2009 WL 3231654, at *2 (M.D. Fla. Oct. 1, 2009), *order*

amended, 2009 WL 4349878 (M.D. Fla. Nov. 24, 2009) ("In the instant action, even if some or all of the individual Defendants were ultimately dismissed . . . they would still be the subject of discovery as fact witnesses regarding Plaintiffs' claims against the St. Johns County School District."); *Feldman v. Flood*, 176 F.R.D. 651, 653 (M.D. Fla. 1997) ("Both parties recognize that many of the issues which will be subject to discovery will be litigated eventually, if not in this Court, in the Delaware proceedings."). The remaining cases that the Receiver cites are distinguishable because in those cases an additional "factor" was present that made a stay inappropriate. *See Allstate Life Ins. Co. v. Estate of John Miller*, No. 03-61797-CIV, 2004 WL 141698, at *2 (S.D. Fla. Jan. 16, 2004) (involving counter-claim and a request for stay of discovery at the summary judgment stage); *In re Winn Dixie Stores, Inc. Erisa Litig.*, No. 3:04-cv-194-J-33MCR, 2007 WL 1877887, at *2 (M.D. Fla. June 28, 2007) (the action had already been stayed and "further delays in litigation are not easily justified"); *Gannon v. Flood*, No. 08-600S9-CIV, 2008 WL 793682, at *1 (S.D. Fla. Mar. 24, 2008) (the defendant did not challenge the legal sufficiency of the complaint but merely argued lack of personal jurisdiction).

The Receiver is simply wrong that Bank of America's motion to dismiss does not address every claim in this case. It does – as does Wells Fargo's motion to dismiss. It makes imminent sense for the Court to enter a stay and to decide the motions to dismiss in either or both cases before the Receiver can impose further burden and expense on the Court and the parties.

C. Bank Of America And This Court Will Be Prejudiced If Discovery Proceeds At This Time.

The Eleventh Circuit has cautioned against allowing discovery to proceed during the pendency of a motion to dismiss where the party seeking the stay may suffer prejudice. *See, e.g.*, *Chudasama*, 123 F.3d at 1367-68. Allowing discovery to proceed where, as here, the motion to

dismiss will likely dispose of the entire action would not only prejudice Bank of America, but also this Court:

> "[I]n survey of 1000 judges, abusive discovery was rated highest among the reasons for the high cost of litigation. **Discovery imposes several costs on the litigant from whom discovery is sought.** These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. The party seeking discovery also bears costs, including attorneys' fees generated in drafting discovery requests and reviewing the opponent's objections and responses. Both parties incur costs related to the delay discovery imposes on reaching the merits of the case. **Finally, discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes.**

Id. (internal citation and quotations omitted) (emphasis added).

The Receiver, on the other hand, will suffer no prejudice. First, the Receiver readily acknowledges that he obtained substantial documentation about the Receivership Entities from Bank of America as part of the underlying investigation of the underlying Ponzi scheme. Further, the Receiver sat on his hands for four months and took no action to move this case forward and should not be heard to complain about an additional stay until, at a minimum, the Court rules on Bank of America's motion to dismiss.

D. The Receiver Does Not Need Discovery To Defend A Fully Briefed Motion To Dismiss Challenging The Legal Sufficiency Of His Claims.

The Receiver's contention that discovery must be allowed to proceed so that he may defend against Bank of America's Motion to Dismiss is misguided for three reasons.

First, as the Eleventh Circuit has noted, a motion to dismiss "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." *Chudasama*, 123 F.3d at 1367-68. As a result, "[d]iscovery should follow the filing of a well-pleaded complaint;" it should not be used as a "device to enable plaintiff to make a case when his complaint has failed to state a claim." *Id.* (citation omitted).

Second, the Receiver has fully briefed his response to Bank of America's Motion to Dismiss without citing any need for discovery. Moreover, as stated in Bank of America's Motion to Dismiss, the Receiver has had over two years prior to initiating this action to gather factual support for his claims. In that time, the Receiver received substantial information about Mr. Theodule, the Receivership Entities, and their underlying Ponzi scheme – including substantial documentation from Bank of America. Yet, the Receiver is still unable to present legally sufficient and factually supported claims against Bank of America. What is more, the Receiver lacks standing to bring his claims. No amount of discovery will ameliorate that fact.

Third, the authority upon which the Receiver relies is again inapposite. In *Allstate Life Insurance Company v. Estate of Miller*, the court held that a stay was improper at the summary judgment stage where it would prevent a party opposing summary judgment from demonstrating factual disputes. 2004 WL 141698, at *1. Notably, the court also stated that discovery should be stayed "when there are no factual issues in need of further immediate exploration, and the issues before the Court are purely questions of law that are potentially dispositive." This is the case on a motion to dismiss. *See Chudasama*, 123 F.3d at 1367-68.

In short, the Receiver's contention that he requires discovery to defend against Bank of America's Motion to Dismiss only confirms why a stay should be entered. Before the Court allows the Receiver to impose additional burden and expense on this Court and Bank of America, the Court should first determine whether the Receiver has even stated a viable claim.

III. CONCLUSION

For the foregoing reasons and for those set out in Bank of America's Motion to Stay [Dkt. 27], this Court should stay discovery in this case pending a final judgment in the *Wells Fargo* Action or, in the alternative, until this Court rules on Bank of America's Motion to Dismiss.

Date: September 9, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 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/ Dora F. Kaufman
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