

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.

**RECEIVER'S RESPONSE TO BANK OF AMERICA, N.A.'S
MOTION FOR PROTECTIVE ORDER STRIKING RECEIVER'S
DISCOVERY REQUESTS AND CROSS-MOTION TO COMPEL DISCOVERY**

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, the "Receivership Entities"), hereby files this Response in Opposition to Bank of America, N.A.'s ("Bank of America") Motion For Protective Order Striking Receiver's Discovery Requests (the "Motion to Strike") [DE 39] and Cross-Motion to Compel Discovery and states as follows:

PRELIMINARY STATEMENT

Bank of America has willfully ignored this Court's Order Setting Trial Date and Discovery Deadlines (the "Case Management Order") [DE 8] and has failed in every respect to

comply with the pretrial obligations proscribed by the Federal Rules of Civil Procedure. Specifically, their infractions are as follows:

- (1) failure to file initial disclosures pursuant to Fed. R. Civ. P Rule 26(a)(1);
- (2) failure to participate in good faith in a discovery conference pursuant to Fed. R. Civ. P. Rule 26(f)(1) and 26(f)(2); and
- (3) failure to cooperate in good faith with opposing counsel to establish a discovery plan pursuant to Fed. R. Civ. P. Rule 26(f)(3).

Incredibly, by virtue of filing the Motion to Strike, Bank of America now seeks an order from this Court condoning their unabashedly defiant behavior. As grounds for their request, Bank of America argues that because they have filed a motion to stay this proceeding (the “Motion to Stay”) [DE 27], that they should somehow be absolved from compliance with all pretrial mandates.

As set forth below, Bank of America’s arguments are entirely without merit. The mere filing of the Motion to Stay simply does not in any way relieve a party from pretrial and discovery obligations. To the contrary, prevailing case law labels such defiance as contemptuous and sanctionable. The Motion to Strike should be denied and Bank of America should be compelled to respond to the Receiver’s discovery requests in good faith and further ordered to pay the Receiver’s attorneys’ fees and costs associated with the preparation and filing of this response.

Finally, in response to Magistrate Hopkins’ recent Order taking the Motion to Strike Under Advisement [DE 40], it should be noted that Bank of America has misled the Court by stating in its Motion to Strike that the Receiver’s proposed depositions in this matter were scheduled without “conferring with opposing counsel.” As set forth in detail below, upon

scheduling the depositions, counsel for the Receiver offered to accommodate the schedules of Bank of America's witnesses and counsel and requested that opposing counsel provide alternate deposition dates as necessary. The e-mail correspondence among counsel clearly reflects the Receiver's effort to offer all necessary courtesies in this regard.

FACTUAL AND PROCEDURAL BACKGROUND

This entire dispute arises from Bank of America's refusal to cooperate in any fashion in preparing a discovery plan for this case. On August 1, 2011,¹ counsel for the Receiver sent an e-mail to counsel for Bank of America proposing dates for a discovery conference. *See* e-mail from Receiver's counsel dated August 1, 2011, **Exhibit "A."**

The parties ultimately agreed to conduct the discovery conference via telephone on August 15, 2011. On August 3, 2011, twelve days prior to the scheduled discovery conference, Receiver's counsel delivered a proposed discovery plan to Bank of America, requesting that the plan be considered and used as a platform for discussion during the discovery conference. The proposed discovery plan was detailed and addressed all of the discovery requirements of Fed. R. Civ. P 26(f) as augmented by this Court's Case Management Order. *See* e-mail from Receiver's counsel dated August 3, 2011, **Exhibit "B."**

On August 15, 2011, counsel for the Receiver hosted a "dial-in" conference call for the purpose of conducting the proposed discovery conference. Although counsel for Bank of America attended the conference call, they refused to participate in any substantive manner in the discovery conference. Instead, the Receiver was informed that Bank of America intended to file their Motion to Stay seeking to stay all activity in the case pending the resolution by the Court of their previously filed Motion to Dismiss the Receiver's Complaint [DE 17.] Bank of

¹ Ten days after Bank of America filed its Reply to the Receiver's Response in Opposition to Bank of America's Motion to Dismiss [DE 22], the final responsive pleading in this case to date.

America took the position that discovery was not warranted in light of their intention to file the Motion to Stay. Counsel for the Receiver expressed objections to Bank of America's refusal to participate in discovery and reiterated, to no avail, its request to proceed in good faith with the completion of the discovery conference. The telephone call was then terminated.

Later in the day on August 15, 2011, Bank of America filed its Motion for Stay [DE 27.] The Receiver's Response in Opposition to the Motion for Stay was filed on August 30, 2011 [DE 29.] Bank of America filed a reply to the Receiver's Response on September 9, 2011 [DE 31.] The Motion to Stay is thus fully briefed and the parties await the Court's ruling.

On September 21, 2011 the Receiver filed its initial disclosures in this case pursuant to Fed. R. Civ. P. Rule 26(a)(1) and served a courtesy copy upon Bank of America via e-mail just prior to filing. In their accompanying correspondence to counsel for Bank of America, the Receiver's counsel informed Bank of America that the Receiver intended to proceed with discovery in accordance with his proposed discovery plan, including the service and filing of written discovery and the scheduling of depositions. The Receiver again expressed his objections to Bank of America's position regarding discovery, noted that no stay of the case had been issued by the Court, and requested that Bank of America cooperate with the Receiver in all respects concerning the Receiver's discovery requests so that Court intervention would not be necessary. Specifically, the Receiver stated as follows:

Attached please find an advance courtesy copy of the Receiver's initial disclosures pursuant to Fed. R. Civ. P. Rule 26. The disclosures will be e-filed either today or tomorrow. I also direct your attention to the e-mail below which was sent to you on August 3, 2011 outlining the Receiver's proposed discovery plan. During our conference call on August 15, 2011, which was scheduled as a discovery conference under the federal rules, you informed us that Bank of America declined to discuss and agree to a discovery plan, citing the filing of BOA's motion to stay discovery as your reason therefor.

As you are aware the Court has not ruled upon BOA's motion, and there is no stay of discovery presently in effect. The Receiver disagrees with BOA's position to refuse to discuss and agree to a discovery plan, and notwithstanding such refusal, intends to conduct discovery in anticipation of a potential trial in this matter. Accordingly, please be advised that in addition to filing the attached initial disclosures, the receiver anticipates issuing document requests to BOA and scheduling the depositions of key witnesses (including BOA employees) in the very near future. Your cooperation in conducting such discovery, including your agreement to mutually convenient deposition dates would be appreciated in order to avoid needlessly involving the Court in any potential discovery disputes.

See e-mail from Receiver's counsel dated September 21, 2011, **Exhibit "C."**

On October 14, 2011, the Receiver noticed the depositions of six employees of Bank of America. Courtesy copies of the deposition notices were sent to counsel for Bank of America via e-mail prior to filing. The proposed dates for the depositions were chosen in advance based upon the availability of the Receiver's counsel. Contrary to Bank of America's suggestion in the Motion to Strike that the Receiver is somehow unwilling to accommodate Bank of America's counsel with regard to deposition scheduling, the Receiver pointedly informed Bank of America that it would cooperate to explore mutually convenient deposition dates for all counsel and witnesses and invited Bank of America to suggest alternate dates and times. The relevant portion of the Receiver's correspondence in this regard states as follows:

Given Bank of America's refusal to participate in a discovery plan as required by the Court, we have anticipated that you will object to these depositions in their entirety, as it appears that BOA has taken the position that discovery is wholly unwarranted at this stage of the proceedings. Therefore we felt that it was necessary to serve and file the notices prior to discussing witness availability in order to establish a record on the docket. However, should your client agree to proceed with the depositions, we will of course make every reasonable attempt to reschedule as necessary to accommodate the witnesses and defending counsel. In this regard, if the proposed dates are unmanageable, please provide us with alternate dates and times between now and November 22, 2011.

See e-mail from Receiver's counsel dated October 14, 2011, **Exhibit "D."**

On October 18, 2011, the Receiver served his First Request for Production of Documents upon Bank of America. *See* Exhibit "A" to Bank of America's Motion to Strike.

On October 25, 2011, Receiver's counsel was contacted on the telephone by counsel for Bank of America. The Receiver was then informed that Bank of America intended to file the Motion to Strike based upon their position that discovery was not warranted while a ruling was pending on Bank of America's Motion to Stay. The Receiver informed Bank of America that it was changing the tentative dates for the proposed depositions in order that timely subpoenas could be served upon the proposed deponents. Receiver's counsel reiterated the Receiver's willingness to cooperate with counsel on the actual dates for the depositions pending the Court's ruling on the motion for protective order. *See* e-mail from Receiver's counsel dated October 25, 2011, **Exhibit "E."**

As set forth below, there is no good faith justification for Bank of America's abject refusal to participate in discovery and refusal to comply with court-ordered pretrial procedures. The Motion to Strike should be denied, and Bank of America should be sanctioned and ordered to pay the Receiver's attorneys' fees and costs incurred in responding to the Motion to Strike.

LEGAL ARGUMENT

A. Bank of America Has Failed to Comply with Federal and Local Rules Regarding Discovery

There is simply no support in the local or federal rules for the refusal of Bank of America to meaningfully participate in a discovery conference, make initial disclosures, and otherwise participate in discovery. Although Bank of America has filed a motion to stay discovery, the Court has not ruled on it, and therefore discovery is not stayed. Bank of America is still required

to comply with the federal and local rules regarding their discovery obligations. *Polzin v. Unifund CCR Partners*, 2009 WL 2474668 at *4 (E.D. Wis. 2009). “The pendency of defendants' motion to stay discovery was not a valid reason for refusing to respond to plaintiff's discovery requests. A motion to stay is not self-executing. Until an order granting the motion is entered, discovery is not stayed, and a party cannot simply ignore valid discovery requests on the grounds that the motion to stay might be granted.” *Id.* See also *Omega Patents, LLC v. Fortin Auto Radio, Inc.*, 2006 WL 2038534 at *3 (M.D. Fla. 2006) (Noting there is no support for the proposition that discovery is stayed merely because a motion to dismiss or motion to stay discovery is pending).

B. Bank of America Should Be Sanctioned for Failure to Comply with This Court's Case Management Order

Bank of America's intentional failure to engage in discovery in this case amounts to contempt. They are willfully and knowingly ignoring this Court's Case Management Order. This contemptuous conduct is further perpetuated by the bad-faith filing of the Motion to Strike. The Federal Rules of Civil Procedure empower this Court to sanction such behavior. Fed. R. Civ. P. 37(b)(2) provides in relevant part that:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery ... or *if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just . . .* (.)

Fed. R. Civ. P. 37(b)(2) (emphasis added).

The Supreme Court has encouraged strict adherence to Rule 37, and noted that such enforcement will prevent parties from “flout[ing] other discovery orders.” *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam); see also

Roadway Express, Inc. v. Piper, 447 U.S. 752, 763 (1980) (“Rule 37 sanctions must be applied diligently . . . to penalize those whose conduct may be deemed to warrant such a sanction. . .”). To enforce its orders, the Court has broad discretion to impose sanctions. *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1048 (11th Cir. 1994).

Furthermore, Fed. R. Civ. P. 37(d) provides that “[t]he Court **shall require** the party failing to act or the attorney advising that party or both to pay reasonable expenses, including attorneys' fees, caused by the failure unless the Court finds that the failure was substantially justified or that the circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(d) (emphasis added). The Receiver should therefore be awarded reasonable attorneys’ fees and costs because there can be no substantial justification for Bank of America’s actions. They audaciously chose to substitute their judgment for that of this Court, with total disregard for prevailing rules of law and the Case Management Order.

CONCLUSION

For the reasons set forth above, the Receiver respectfully requests the following relief:

- (1) that Bank of America’s Motion to Strike be denied;
- (2) that this Court enter an order approving the discovery plan set forth by the Receiver as detailed in Exhibit “B” herein and compelling Bank of America to comply with said discovery plan in all respects;
- (3) that this Court enter an order compelling Bank of America to respond to the Receiver’s First Request for Production within 30 days of the date of service of same;
- (4) that this Court enter an order compelling Bank of America to produce for deposition those deponents identified in the Receiver’s deposition notices on dates

- mutually agreed to among the parties on or before November 22, 2011;
- (5) that this Court enter an order requiring Bank of America to reimburse the Receiver for all reasonable attorneys' fees and costs incurred in responding to the Motion to Strike; and
- (6) all other relief which this Court deems necessary and appropriate.

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

We hereby certify that in compliance with Local Rule 7.1(a)(3) we have conferred with opposing counsel concerning the issues raised in this Motion and that they do not agree with the relief requested herein.

Dated: October 28, 2011
Miami, Florida

Respectfully submitted,

By: s/David P. Lemoie

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David P. Lemoie (FBN: 188311)
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-and-

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2699 South Bayshore Drive, 7th Floor
Miami, FL 33133
Telephone: (305) 445-3800
Facsimile: (305) 448-5800
Attorneys for Receiver, Jonathan E. Perlman, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 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.

By: s/David P. Lemoie _____
Attorney

SERVICE LIST

**JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al. v. BANK OF AMERICA, N.A.
CASE NO. 11-80331-CIV-HURLEY/HOPKINS
United States District Court, Southern District of Florida**

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Attorneys for Plaintiff Jonathan E. Perlman, Esq.

as Court Appointed Receiver

Served via CM/ECF

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Co-Counsel for Plaintiff Jonathan E. Perlman, Esq.

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Reed Smith Centre

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Attorneys for Defendant Bank of America

Served via CM/ECF

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J. Randolph Liebler

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Telephone: (305) 379-0400

Facsimile: (305) 379-9626

Attorneys for Defendant Bank of America

Served via CM/ECF

10501-002/128

EX. "A"

From: [Contreras-Martinez, Carmen](#)
To: [Dora F. Kaufman](#); [Juan A. Gonzalez](#); [Randy Liebler](#); mhackett@reedsmith.com; dpickens@reedsmith.com
Cc: mri@iosephsjack.com; [Lemoie, David](#)
Subject: Perman v. BOA
Date: Monday, August 01, 2011 2:47:41 PM
Attachments: [DE 8 ORDER Setting Trial Date & Discovery Deadlines, Referring Case to Mediation & Referring Discovery to United States Magistrate Judge.pdf](#)
Importance: High

Counsel,

As you are aware, the trial Order issued by Judge Hurley excuses the parties in this case from preparing and filing an agreed scheduling order regarding discovery and other pretrial matters. Nonetheless, the Order does require the parties to conduct a discovery conference in order to address the scope and timing of discovery.

We are available on the following dates and times:

Tuesday, August 9	after 10am
Wednesday, August 10	after 1pm
Thursday, August 11	after 10am
Friday, August 12	before 4pm

Please confirm your availability on one of these dates. We will circulate call-in information along with a proposed discovery plan.

Regards,

Carmen

GENOVESE
JOBLOVE &
BATTISTA
PA
Attorneys at Law

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Miami, Florida 33131
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Fax: (305) 428-8812
Email: ccontreras@gjb-law.com
Website: www.gjb-law.com

Miami | Fort Lauderdale

EX. "B"

From: Contreras-Martinez, Carmen
To: "Dora F. Kaufman"
Cc: mri@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler
Subject: RE: Perlman v. BOA
Date: Wednesday, August 03, 2011 4:07:01 PM

Counsel,

This will confirm that our discovery conference will take place on **Monday, August 15 at 3pm.**

As I previously advised, the trial order issued by Judge Hurley excuses the parties in this case from preparing and filing an agreed scheduling order regarding discovery and other pretrial matters. Nonetheless, the Order does require the parties to conduct a discovery conference under Rule 26(f) of the Federal Rules of Civil Procedure in order to address the scope and timing of discovery. In anticipation of our discovery conference call, the Receiver offers the following discovery plan in compliance with Rule 26(f):

(a) In connection with their initial disclosure obligations, the parties will serve their initial disclosures, as required by Federal Rule of Civil Procedure 26(a)(1) and S.D. Fla. Local Rule 26.1(A), by **August 29, 2011.**

(b) Both parties will likely seek discovery from, among others, the Receivership Entities; individuals and business entities related in any manner to George Theodule and/or involved in the Ponzi scheme alleged in the Receiver's Complaint; alleged victims; expert witnesses; current or former employees, officers, and directors of Defendant, Bank of America; and any other person or entity who may have relevant knowledge of the claims or defenses pertaining to this matter, including but not limited to the facts and circumstances surrounding the banking relationship among and between Bank of America, George Theodule, and the Receivership Entities. Defendant will seek also discovery from the Receiver and the SEC. The parties do not believe that they should conduct discovery in phases or be limited to particular issues (other than the broad limitations imposed by the Federal Rules of Civil Procedure.)

(c) Whenever feasible, the parties will produce all electronically stored information in Bate-stamped, OCR text, or PDF format. Alternatively, if unable to produce electronically stored information in such a manner, the parties will produce the information in the currently stored format. The parties further agree that they will maintain all relevant electronically stored information in its original format until final resolution of this matter.

(d) The parties have agreed that if any party inadvertently produces electronically stored information, or other documents, that the producing party claims after production are privileged, they will notify the opposing party or parties within a reasonable time frame of learning that an inadvertent production had occurred, then all parties who had received such information shall promptly return, sequester or destroy it, and must take reasonable steps to retrieve the information from third parties, including expert witnesses. However, the parties reserve their right to claim that the information disclosed was not privileged or that the privilege was waived.

(e) The parties do not believe it will be necessary to exceed the limitation provided by

Federal Rule of Civil Procedure 30(a)(2)(A) regarding oral/videographic depositions without leave of court, but reserve their right to seek such leave if necessary.

(f) The parties are not requesting that the Court issue any other orders under Federal Rules of Civil Procedure 16(b)-(c) or 26(c).

We look forward to discussing this proposed discovery plan on our conference call.

Regards,

Carmen

GENOVESE
JOBLOVE &
BATTISTA
PA
Attorneys at Law

Carmen Contreras-Martinez, Esq.

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Email: ccontreras@gjb-law.com

Website: www.gjb-law.com

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From: Dora F. Kaufman [mailto:DFK@lgplaw.com]

Sent: Tuesday, August 02, 2011 12:37 PM

To: Contreras-Martinez, Carmen

Cc: mrj@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com);

dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler

Subject: RE: Perlman v. BOA

Carmen, et al.,

Either 8.15.2011 or 8.16.2011 (after 2 pm on either date) will work for our co-counsel at Reed Smith and me. We look forward to receiving the call-in information for calendaring.

Dora F. Kaufman, Esq.

LIEBLER, GONZALEZ & PORTUONDO, P.A.

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you are hereby notified that any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please immediately notify us by reply e-mail, by forwarding this email to dfk@lgplaw.com, or by telephone at 305/379-0400, and destroy the original transmission and its attachments without reading, saving or copying in any manner.

From: Contreras-Martinez, Carmen [mailto:ccontreras@gjb-law.com]
Sent: Monday, August 01, 2011 6:49 PM
To: Dora F. Kaufman
Cc: mrj@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler
Subject: RE: Perlman v. BOA

Dora,

No problem with scheduling for the following week. Enjoy your time off.

The Receiver's counsel is available on the following dates:

Monday, 8/15	anytime after 1 pm
Tuesday, 8/16	anytime after 10am
Thursday, 8/18	anytime after 10am

Please advise which date works best for you and your co-counsel.

Thanks.

Carmen

From: Dora F. Kaufman [mailto:DFK@lgplaw.com]
Sent: Monday, August 01, 2011 3:33 PM
To: Contreras-Martinez, Carmen
Cc: mrj@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler
Subject: RE: Perlman v. BOA

Counsel,

I am out of state and not anticipated to be available next week (longstanding pre-paid travel plans).

Please provide us with dates/times for the discovery conference during the week commencing 8.15.2011, and we (and our co-counsel at Reed Smith) will confirm availability.

Thank you.

Dora F. Kaufman, Esq.
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From: Contreras-Martinez, Carmen [<mailto:ccontreras@gjb-law.com>]
Sent: Monday, August 01, 2011 2:48 PM
To: Dora F. Kaufman; Juan A. Gonzalez; Randy Liebler; mhackett@reedsmith.com; dpickens@reedsmith.com
Cc: mrj@josephsjack.com; Lemoie, David
Subject: Perlman v. BOA
Importance: High

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Friday, August 12	before 4pm

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Regards,

Carmen

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Email: ccontreras@gjb-law.com
Website: www.gjb-law.com

GENOVESE
JOBLOVE &
BATTISTA
PA
Attorneys at Law

Miami | Fort Lauderdale

EX. "C"

From: Lemoie, David
To: "Dora F. Kaufman"; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com
Cc: mri@josephsjack.com; Contreras-Martinez, Carmen; Cimo, David C.; Perlman, Jonathan
Subject: RE: Perlman v. BOA
Date: Wednesday, September 21, 2011 3:39:57 PM
Attachments: Rule 26(a) Initial Disclosures.doc

Counsel:

Attached please find an advance courtesy copy of the Receiver's initial disclosures pursuant to Fed. R. Civ. P. Rule 26. The disclosures will be e-filed either today or tomorrow. I also direct your attention to the e-mail below which was sent to you on August 3, 2011 outlining the Receiver's proposed discovery plan. During our conference call on August 15, 2011, which was scheduled as a discovery conference under the federal rules, you informed us that Bank of America declined to discuss and agree to a discovery plan, citing the filing of BOA's motion to stay discovery as your reason therefor.

As you are aware the Court has not ruled upon BOA's motion, and there is no stay of discovery presently in effect. The Receiver disagrees with BOA's position to refuse to discuss and agree to a discovery plan, and notwithstanding such refusal, intends to conduct discovery in anticipation of a potential trial in this matter. Accordingly, please be advised that in addition to filing the attached initial disclosures, the receiver anticipates issuing document requests to BOA and scheduling the depositions of key witnesses (including BOA employees) in the very near future. Your cooperation in conducting such discovery, including your agreement to mutually convenient deposition dates would be appreciated in order to avoid needlessly involving the Court in any potential discovery disputes.

Regards

David Lemoie

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Attorneys at Law

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Website: www.gjb-law.com

Miami | Fort Lauderdale

From: Contreras-Martinez, Carmen
Sent: Wednesday, August 03, 2011 4:07 PM
To: 'Dora F. Kaufman'
Cc: mri@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler

Subject: RE: Perlman v. BOA

Counsel,

This will confirm that our discovery conference will take place on **Monday, August 15 at 3pm.**

As I previously advised, the trial order issued by Judge Hurley excuses the parties in this case from preparing and filing an agreed scheduling order regarding discovery and other pretrial matters. Nonetheless, the Order does require the parties to conduct a discovery conference under Rule 26(f) of the Federal Rules of Civil Procedure in order to address the scope and timing of discovery. In anticipation of our discovery conference call, the Receiver offers the following discovery plan in compliance with Rule 26(f):

(a) In connection with their initial disclosure obligations, the parties will serve their initial disclosures, as required by Federal Rule of Civil Procedure 26(a)(1) and S.D. Fla. Local Rule 26.1(A), by **August 29, 2011.**

(b) Both parties will likely seek discovery from, among others, the Receivership Entities; individuals and business entities related in any manner to George Theodule and/or involved in the Ponzi scheme alleged in the Receiver's Complaint; alleged victims; expert witnesses; current or former employees, officers, and directors of Defendant, Bank of America; and any other person or entity who may have relevant knowledge of the claims or defenses pertaining to this matter, including but not limited to the facts and circumstances surrounding the banking relationship among and between Bank of America, George Theodule, and the Receivership Entities. Defendant will seek also discovery from the Receiver and the SEC. The parties do not believe that they should conduct discovery in phases or be limited to particular issues (other than the broad limitations imposed by the Federal Rules of Civil Procedure.)

(c) Whenever feasible, the parties will produce all electronically stored information in Bate-stamped, OCR text, or PDF format. Alternatively, if unable to produce electronically stored information in such a manner, the parties will produce the information in the currently stored format. The parties further agree that they will maintain all relevant electronically stored information in its original format until final resolution of this matter.

(d) The parties have agreed that if any party inadvertently produces electronically stored information, or other documents, that the producing party claims after production are privileged, they will notify the opposing party or parties within a reasonable time frame of learning that an inadvertent production had occurred, then all parties who had received such information shall promptly return, sequester or destroy it, and must take reasonable steps to retrieve the information from third parties, including expert witnesses. However, the parties reserve their right to claim that the information disclosed was not privileged or that the privilege was waived.

(e) The parties do not believe it will be necessary to exceed the limitation provided by Federal Rule of Civil Procedure 30(a)(2)(A) regarding oral/videographic depositions without leave of court, but reserve their right to seek such leave if necessary.

(f) The parties are not requesting that the Court issue any other orders under Federal Rules of Civil Procedure 16(b)-(c) or 26(c).

We look forward to discussing this proposed discovery plan on our conference call.

Regards,

Carmen

GENOVESE
JOBLOVE &
BATTISTA
PA
Attorneys at Law

Carmen Contreras-Martinez, Esq.

100 SE 2nd Street, 44th Floor

Miami, Florida 33131

Direct: (305) 913-6684

Main: (305) 349-2300

Fax: (305) 428-8812

Email: ccontreras@gjb-law.com

Website: www.gjb-law.com

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From: Dora F. Kaufman [<mailto:DFK@lgplaw.com>]

Sent: Tuesday, August 02, 2011 12:37 PM

To: Contreras-Martinez, Carmen

Cc: mrj@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler

Subject: RE: Perlman v. BOA

Carmen, et al.,

Either 8.15.2011 or 8.16.2011 (after 2 pm on either date) will work for our co-counsel at Reed Smith and me. We look forward to receiving the call-in information for calendaring.

Dora F. Kaufman, Esq.
LIEBLER, GONZALEZ & PORTUONDO, P.A.
Courthouse Tower
44 West Flagler Street, 25th Floor
Miami, Florida 33130
ph (305) 379-0400
fax (305) 379-9626
email dfk@lgplaw.com

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From: Contreras-Martinez, Carmen [<mailto:ccontreras@gjb-law.com>]
Sent: Monday, August 01, 2011 6:49 PM
To: Dora F. Kaufman
Cc: mrj@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler
Subject: RE: Perlman v. BOA

Dora,

No problem with scheduling for the following week. Enjoy your time off.

The Receiver's counsel is available on the following dates:

Monday, 8/15	anytime after 1 pm
Tuesday, 8/16	anytime after 10am
Thursday, 8/18	anytime after 10am

Please advise which date works best for you and your co-counsel.

Thanks.

Carmen

From: Dora F. Kaufman [<mailto:DFK@lgplaw.com>]
Sent: Monday, August 01, 2011 3:33 PM
To: Contreras-Martinez, Carmen
Cc: mrj@josephsjack.com; Lemoie, David; Hackett, Mary J. (MHackett@ReedSmith.com); dpickens@reedsmith.com; Juan A. Gonzalez; Randy Liebler
Subject: RE: Perlman v. BOA

Counsel,

I am out of state and not anticipated to be available next week (longstanding pre-paid travel plans).

Please provide us with dates/times for the discovery conference during the week commencing 8.15.2011, and we (and our co-counsel at Reed Smith) will confirm availability.

Thank you.

Dora F. Kaufman, Esq.
LIEBLER, GONZALEZ & PORTUONDO, P.A.
Courthouse Tower
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Miami, Florida 33130
ph (305) 379-0400
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From: Contreras-Martinez, Carmen [<mailto:ccontreras@gjb-law.com>]
Sent: Monday, August 01, 2011 2:48 PM
To: Dora F. Kaufman; Juan A. Gonzalez; Randy Liebler; mhackett@reedsmith.com; dpickens@reedsmith.com
Cc: mri@josephsjack.com; Lemoie, David
Subject: Perlman v. BOA
Importance: High

Counsel,

As you are aware, the trial Order issued by Judge Hurley excuses the parties in this case from preparing and filing an agreed scheduling order regarding discovery and other pretrial matters. Nonetheless, the Order does require the parties to conduct a discovery conference in order to address the scope and timing of discovery.

We are available on the following dates and times:

Tuesday, August 9	after 10am
Wednesday, August 10	after 1pm
Thursday, August 11	after 10am
Friday, August 12	before 4pm

Please confirm your availability on one of these dates. We will circulate call-in information along with a proposed discovery plan.

Regards,

Carmen

GENOVESE
JOBLOVE &
BATTISTA
PA
Attorneys at Law

Carmen Contreras-Martinez, Esq.
100 SE 2nd Street, 44th Floor
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Main: (305) 349-2300
Fax: (305) 428-8812
Email: ccontreras@gjb-law.com
Website: www.gjb-law.com

EX. “D”

From: Lemoie, David [<mailto:Dlemoie@gjb-law.com>]
Sent: Friday, October 14, 2011 11:14 AM
To: 'Dora F. Kaufman'; Hackett, Mary J.; Juan A. Gonzalez; Pickens, Dustin; Randy Liebler
Cc: Contreras-Martinez, Carmen; Cimo, David C.; Perlman, Jonathan; mri@josephsjack.com
Subject: Perlman vs. Bank of America - Deposition notices

Counsel:

Attached please find deposition notices for the following proposed witnesses. All depositions are scheduled to be held at our offices in Miami:

- | | |
|--------------------------|-----------------------------|
| 1. Gabriela Payot-Borges | November 1, 2011 at 9:30 AM |
| 2. Armogan Manikum | November 1, 2011 at 2:00 PM |
| 3. Mario Panaif | November 2, 2011 at 9:30 AM |
| 4. Ida Verrelli | November 2, 2011 at 2:00 PM |
| 5. Amy Lerna | November 4, 2011 at 9:30 AM |
| 6. Richard Graham | November 4, 2011 at 2:00 PM |

Given Bank of America's refusal to participate in a discovery plan as required by the Court, we have anticipated that you will object to these depositions in their entirety, as it appears that BOA has taken the position that discovery is wholly unwarranted at this stage of the proceedings. Therefore we felt that it was necessary to serve and file the notices prior to discussing witness availability in order to establish a record on the docket. However, should your client agree to proceed with the depositions, we will of course make every reasonable attempt to reschedule as necessary to accommodate the witnesses and defending counsel. In this regard, if the proposed dates are unmanageable, please provide us with alternate dates and times between now and November 22, 2011.

Finally, I note that we still await your response concerning the selection of a mediator. We have previously proposed four mediators. You proposed one mediator, who was ultimately rejected by

the Receiver. Please advise as to whether any of our proposed mediators are acceptable to you.

Regards

David

GENOVESE
JOBLOVE &
BATTISTA
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Main: (305)349-2300
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Website: www.gjb-law.com

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* * *

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EX. "E"

From: Lemoie, David
To: "Culleiton, Joseph E."
Cc: Contreras-Martinez, Carmen; mri@iosephsjack.com; Cimo, David C.; Perlman, Jonathan
Subject: RE: Perlman vs. Bank of America - Deposition notices
Date: Tuesday, October 25, 2011 4:46:22 PM
Attachments: [Re-Notice Lerma & Graham.pdf](#)
[Re-Notice Panaif & Verrelli.pdf](#)
[Re-Notice Pavot & Manikum.pdf](#)
[graham subpoena_10252011.pdf](#)
[lerma subpoena_10252011.pdf](#)
[manikum subpoena_10252011.pdf](#)
[panaif subpoena_10252011.pdf](#)
[pavot-borges subpoena_10252011.pdf](#)
[verrelli subpoena_10252011.pdf](#)

Joe:

Pursuant to our conversation earlier today, attached please find new deposition notices and subpoenas for the Bank of America employees previously identified in my e-mail of October 14, 2011. The new proposed deposition dates are November 9, 10 and 11 as indicated in the notices for the respective deponents.

You have informed us that Bank of America intends to file motions for protective orders with regard to each of the depositions. We await your motions and will respond accordingly once received.

Regards

David Lemoie

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PA
Attorneys at Law

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Main: (305)349-2300
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Email: dlemoie@gjb-law.com
Website: www.gjb-law.com

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From: Culleiton, Joseph E. [<mailto:JCulleiton@ReedSmith.com>]
Sent: Monday, October 24, 2011 3:24 PM
To: Lemoie, David
Subject: FW: Perlman vs. Bank of America - Deposition notices

David,

My name is Joe Culleiton and I'm one of the lawyers working on the Perlman v. Bank of America matter at Reed Smith. I tried calling your offices today, but I'm having a hard time getting through. At your earliest convenience, could you please give me a call at 412-288-7216 regarding this case.

Thanks.

Joe

Joseph E. Culleiton

jculleiton@reedsmith.com

+1 412 288 7216

Reed Smith LLP

Reed Smith Centre

225 Fifth Avenue

Pittsburgh, PA 15222-2716

T: +1 412 288 3131

F: +1 412 288 3063

reedsmith.com

From: Lemoie, David [<mailto:Dlemoie@gjb-law.com>]

Sent: Friday, October 14, 2011 11:14 AM

To: 'Dora F. Kaufman'; Hackett, Mary J.; Juan A. Gonzalez; Pickens, Dustin; Randy Liebler

Cc: Contreras-Martinez, Carmen; Cimo, David C.; Perlman, Jonathan; mri@josephsjack.com

Subject: Perlman vs. Bank of America - Deposition notices

Counsel:

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Finally, I note that we still await your response concerning the selection of a mediator. We have previously proposed four mediators. You proposed one mediator, who was ultimately rejected by

the Receiver. Please advise as to whether any of our proposed mediators are acceptable to you.

Regards

David

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* * *

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