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

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

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

Plaintiff,

v.

WELLS FARGO BANK, N.A, as successor-in-interest to Wachovia Bank, N.A.,

Defendant.
_____/

PLAINTIFF'S MOTION TO LIFT OR VACATE STAY OF 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 referred to as the "Receivership Entities'), respectfully submits this Motion to Lift or Vacate Stay of Discovery relating to the Court's July 19, 2011 Order Granting Defendant's Motion to Stay Discovery [DE # 45], which, due to an inadvertent misunderstanding on the part of the Receiver's counsel, the Court unfortunately was "forced to consider . . . without the benefit of a response from [the Receiver]." [DE 45 at 1].

Lifting of the stay is warranted because the pending motion to dismiss is legally deficient and unlikely to dispose of the entire case, and the underlying motion to stay fails to

show any specific prejudice upon its denial. Moreover, bringing this action to a grinding halt would unduly delay the instant proceeding and prejudice the Receiver in fulfilling his duties of marshalling and safeguarding the assets of the Receivership Entities.

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. Accordingly, the instant motion is well-founded, as the underlying motion to stay discovery should be summarily denied and, separately, as undue delay and prejudice would accrue if the stay order entered on July 19, 2011, were left in place.

II. Relevant Factual Background

As alleged in the Amended Complaint, Defendant Wells Fargo Bank, N.A.'s (hereinafter referred to as "Wachovia"[1]) was the "essential cog" in a massive Ponzi Scheme that enabled George Theodule to transfer more than $38 million dollars of stolen investment funds via

[1] Wells Fargo Bank, N.A. is the successor-in-interest of Wachovia Bank, N.A.

Wachovia's bank accounts. [DE 19 ¶ 55].

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 Wachovia with a subpoena duces tecum. In addition, after Wachovia's failure to respond within the allotted time, the Receiver moved to compel production of the documents requested in the subpoena, which motion this Court granted on May 4, 2010. Wachovia subsequently moved to vacate or modify the order granting the Receiver's motion to compel, which motion to vacate the Court denied on June 2, 2010. The documents that Wachovia ultimately produced (pursuant to this Court's order granting the motion to compel and separate order denying the motion to vacate in the Main Case) resulted in substantial information regarding the claims alleged in the Amended Complaint in the present case.

On April 21, 2011, Wachovia moved to dismiss [DE 23] the Amended Complaint. On same date, pending a ruling on its motion to dismiss, Wachovia concurrently moved to stay [DE 24] all discovery and other standard pretrial procedures, including even "any disclosures and the filing of any discovery plan required by Fed. R. Civ. P. 26." [DE 24 ¶ 13]. The stay motion acknowledges the prior discovery in the Main Case [DE 24 ¶ 12], but fails to mention that the parties had already held a discovery conference in the present case ten days earlier on April 11, 2011.

Intending to respond concurrently both to Wachovia's motion to dismiss and its related motion to stay, the Receiver filed his response in opposition to the motion to dismiss on May 23, 2011 [DE 36]. However, due to an inadvertent misunderstanding on the part of the Receiver's

counsel and such counsel's administrative support staff, the Receiver's opposition to the stay motion, which opposition was prepared and ready for filing, was never in fact filed concurrent with the opposition to the dismissal motion. Such failure to file a response in opposition to the motion to stay only became apparent yesterday, on July 19, 2011, upon entry of the Order Granting Defendant's Motion to Stay Discovery [DE 45]. Regrettably, faced with the lack of any response in opposition, this Court was thus "forced" to consider the subject motion to stay without the benefit of a response from the Receiver. [DE 45 at 1].[2]

The Receiver hereby files this motion for the Court's benefit in the matter, which as discussed below, warrants that the stay entered on July 19, 2011 [DE 45] be lifted or vacated.

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, Wachovia 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

[2] The Receiver sincerely regrets having placed the Court in such predicament, and has filed the instant motion in good faith to clarify the record and to provide now a full and proper basis upon which the Court might consider the matters in dispute.

court to rule on every potentially dispositive motion to dismiss before permitting discovery to proceed. [*See* DE 24 ¶¶ 7, 11]. Wachovia 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, Wachovia'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 36] to Wachovia's motion to dismiss, the Receiver's

claims against Wachovia are neither "especially dubious" or duplicitous such that disposal of any particular claim by 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 Wachovia'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)). 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 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 it is not likely to be clearly meritorious or truly case dispositive.

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

Wachovia'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 Wachovia's generalized arguments that:

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

(b) the Receivership Entities have not incurred any damages as to all Counts of the Amended Complaint;

(c) the doctrine of *in pari delicto* bars all claims as to all Counts of the Amended Complaint;

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

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

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

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

(h) 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 Amended Complaint;

(i) 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 and VII of the Amended Complaint; and

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

[*See* DE 24 ¶ 10]. However, notwithstanding this "kitchen-sink" defense strategy, and as addressed in greater detail in the Receiver's opposition to Wachovia'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 Amended Complaint as the Amended Complaint meets the minimum constitutional pleading requirements in this context;

(b) the Receivership Entities do set forth legally cognizable damages sufficient for the Receiver to maintain standing as to all Counts of the Amended Complaint;

(c) the doctrine of *in pari delicto*, first, does not apply to receivers, second, is an affirmative defense requiring factual proof and thus is an inappropriate subject for a motion to dismiss, and, third, regardless, is overcome by the adverse interest exception;

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

(e) as to Count I of the Amended Complaint for aiding and abetting a breach of fiduciary duty, the Receiver's allegations of Wachovia's "knowledge" of Theodule's wrongdoing based on the series of "atypical" banking transactions at issue, combined with allegations regarding Wachovia's active assistance in transferring the investment

(f) as to Count II of the Amended 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;

(g) as to Count III of the Amended Complaint for common law negligence, Wachovia's actual knowledge of fraud committed by Theodule may have given rise to a duty upon Wachovia 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;

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

(i) as to Counts VI and VII of the Amended Complaint for avoidance and recovery of fraudulent transfers under Chapter 726, Florida Statutes, first, Wachovia's "mere conduit" defense is an affirmative defense that must be pleaded and proven by Wachovia at trial (and not in connection with a motion to dismiss), second, Wachovia'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 Amended Complaint; and

(j) as to Count VIII of the Amended Complaint for aiding and abetting fraudulent transfer, at this stage of the proceeding, and unless and until Wachovia 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 36 at 4-28].

At bottom, any meaningful "peek" of the issues underlying Wachovia'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. Wachovia 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, Wachovia does not – and cannot – make such a specific showing.

Wachovia does not even attempt to show that it would be specifically prejudiced absent a stay. Instead, in a mere parenthetical, it suggests that a stay might "avoid *potentially* unnecessary costs." [DE 24 ¶ 12 (emphasis added)]. Indeed, Wachovia turns this Court's rules on its head by arguing that, because the Receiver has already engaged in discovery regarding the Defendant, there would "little, if any, harm to the Plaintiff or this Court in staying discovery in this case pending a ruling on Wachovia's Motion to Dismiss Amended Complaint." [*Id.*].

Clearly, Wachovia 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 "potentially unnecessary costs" constitutes a "specific showing of prejudice" sufficient to satisfy this Court's Local Rules. Nor does Wachovia's motion to stay make any showing, or even argument, as to the specific expense or burden that would involved with proceeding with discovery.[3] The lack of such a specific showing of prejudice is fatal to its motion. (L.R. App. A at I(D)(5)).

[3] Wachovia broadly claims that allowing discovery to proceed might alleviate the burden of a potentially "unduly" enlarged scope of discovery [DE 24 ¶ 11] and might "avoid potentially unnecessary costs" [DE 24 ¶ 12]. "However, 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. [] Such is a consequence of our judicial system and the rules of civil procedure; here, therefore, there is no special burden on [Wachovia]." *Parker v. Stryker Corp.*, No. 08-cv-01093, 2008 WL 4457864, at *2 (D. Colo. Oct. 1, 2008) (internal citation omitted).

D. Other Considerations Favoring Lifting of the Stay

"[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, Wachovia 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, Wachovia 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 "conclude[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 Wachovia, including those sounding in fraud.

In short, staying discovery pending resolution of Wachovia's motion to dismiss would accomplish nothing but cause delay to the ultimate detriment of the defrauded investors on whose behalf the Receiver has been appointed.

IV. Conclusion

For the reasons stated herein, and with the benefit now of the Receiver's position on Wachovia's motion to stay [DE 24], the Receiver respectfully requests that this Court lift or vacate its July 19, 2011 Order [DE 45] granting a stay of all discovery pending ruling on Wachovia's motion to dismiss [DE 23], and grant such other relief as may deemed just and proper.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that the Receiver's counsel has conferred with all parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues but has been unable to resolve the issues.

Respectfully submitted,

s/David P. Lemoie

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CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 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/David P. Lemoie
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