UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:24-cv-22142-DPG

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

DEFENDANT WELLS FARGO BANK, N.A.'S
MOTION TO STAY DISCOVERY PENDING DISPOSITION OF ITS DISPOSITIVE MOTION TO DISMISS AND ACCOMPANYING MEMORANDUM OF LAW

Wells Fargo Bank, N.A. ("Wells Fargo"), pursuant to S.D. Fla. Local Rule 7.1 and Federal Rule of Civil Procedure 26(c), respectfully moves the Court for entry of an order staying discovery in this matter until the Court has fully adjudicated Wells Fargo's Motion to Dismiss ("Motion to Dismiss") [DE 25], the First Amended Class Action Complaint (the "Amended Complaint") filed by Plaintiffs Fanny B. Millstein ("Millstein") and Martin Kleinbart ("Kleinbart," together with Millstein the "Plaintiffs") [DE 3].

INTRODUCTION

A stay of discovery is appropriate here because, as more fully detailed in the Motion to Dismiss, the Amended Complaint filed by Plaintiffs Millstein and Kleinbart is fatally flawed.

This is a putative class action brought by Plaintiffs to hold Wells Fargo responsible for the acts of purported Ponzi schemers Marshall Seeman ("Seeman"), Eric Holtz ("Holtz"), and Brian Schwartz (Seeman, Holtz, and Schwartz collectively referred to as the "Perpetrators"), who created

the Para Longevity Companies (the "PLCs") to solicit funds used in the scheme. Wells Fargo moved to dismiss the Amended Complaint as it establishes no material connection between Wells Fargo and the Ponzi scheme. Wells Fargo simply provided routine banking services to the PLCs and is not responsible for the alleged losses.

When a motion to dismiss is pending, Eleventh Circuit law compels a stay of discovery to guard against the "significant costs" of unwarranted discovery requests. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). Accordingly, discovery against Wells Fargo should be stayed pending a decision on whether the Plaintiffs can state a viable claim against Wells Fargo.

BACKGROUND

On June 6, 2024, Plaintiffs filed their Amended Complaint alleging three counts against Wells Fargo: (1) aiding and abetting fraud; (2) aiding and abetting breach of fiduciary duty; and (3) unjust enrichment. [DE 3].

Plaintiffs allege that they and the members of the purported class are the victims of a fraudulent investment Ponzi scheme operated by the Perpetrators, whereby the Perpetrators "solicited funds from investors through the sale of Notes" to fund the purchase and payment of Stranger-Originated Life Insurance ("STOLI") policy premiums. Am. Compl. ¶¶ 33, 150; *see also* Am. Compl. ¶¶ 3, 4. In exchange for their investment, Plaintiffs allege that the investors were promised "that the proceeds from the death benefits of STOLIs would be used to fund the interest payments due to those investors and eventually return their principal." Am. Compl. ¶ 4. In reality, Plaintiffs allege that the Perpetrators used the funds "to pay existing investors, and further looted significant sums through improper, exorbitant, or fictitious fees and expenses." Am. Compl. ¶ 5. Plaintiffs allege that Wells Fargo benefitted in no way other than receipt of payment for routine

services and interest on account funds but nonetheless seek to hold Wells Fargo responsible for losses that arise entirely from the Perpetrators' dealings with the investors in the Ponzi scheme.

The Amended Complaint fails to state a claim against Wells Fargo because, while Plaintiffs seek to link Wells Fargo to the Ponzi Scheme based on Wells Fargo's banking relationship with twenty-nine of the PLCs, Plaintiffs allege no facts establishing that Wells Fargo or its employees participated in, or even knew about, the purported scheme.

Plaintiffs' unjust enrichment claim likewise fails because any fees that Wells Fargo received were bargained-for account fees for which there was adequate consideration. Further, Plaintiffs fail to allege with particularity that they conferred a direct benefit on Wells Fargo. Thus, the Amended Complaint clearly fails to state a claim against Wells Fargo and should be dismissed as a matter of law.

On August 12, 2024, Wells Fargo filed its Motion to Dismiss Plaintiffs' Amended Complaint. [DE 25]. As set forth above, Wells Fargo seeks dismissal on multiple bases. If the Court were to grant the Motion to Dismiss on the basis that Plaintiffs have failed to state a viable legal claim for relief, it would end the case entirely.

Accordingly, to avoid unnecessary burden on the parties and the Court, and consistent with Eleventh Circuit law, Wells Fargo respectfully requests that discovery in this action be stayed until such time as Wells Fargo's Motion to Dismiss is fully adjudicated.

MEMORANDUM OF LAW

I. Legal Standard

The Eleventh Circuit has drawn a clear rule that "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins." *Chudusama*, 123 F.3d at 1367. This type of dispute

"always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion." *Id.* (internal citation omitted). Moreover, "any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage, if possible." *Id.* at 1368; *see also Moore v. Potter*, 141 F. App'x 803, 807-08 (11th Cir. 2005) (affirming district court's order staying discovery pending ruling on defendants' motion to dismiss); *Solar Star Sys., LLC v. Bellsouth Telecomm., Inc.*, 2011 U.S. Dist. LEXIS 38150, at *2 (S.D. Fla. Mar. 30, 2011) (granting motion to stay discovery pending ruling on motion to dismiss and noting that "[p]otentially dispositive motions filed prior to discovery weigh heavily in favor of issuing a stay"); *Carcamo v. Miami- Dade County*, 2003 U.S. Dist. LEXIS 27130, at *2 (S.D. Fla. Aug. 1, 2003) (granting motion to stay discovery during pendency of motion to dismiss and explaining that discovery is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim); *Isaiah v. JPMorgan Chase Bank, N.A.*, 1:16-cv-21771-JEM, Dkt. 17 (S.D. Fla., complaint filed May 18, 2016) (granting motion to stay discovery during pendency of motion to dismiss).

In *Staup v. Wachovia Bank, N.A.*, the court observed that "[t]he Eleventh Circuit has held that the District Court has the responsibility to manage the discovery process in a manner that avoids abuse of the process and prejudice to the parties." 2008 U.S. Dist. LEXIS 31397, at *1 (S.D. Fla. Apr. 16, 2008). The court held that because discovery was not necessary to determine the legal sufficiency of the plaintiff's claim, and discovery would place an undue burden on the defendant, the defendant would not be required to comply with the initial disclosure requirements and discovery would not commence until after the court ruled on the motion to dismiss. *Id.*; *see also Koger v. Cir. County Ct. ex rel. Broward County Fla.*, 2007 U.S. Dist. LEXIS 62542, at *3

(S.D. Fla. Aug. 24, 2007) (finding discovery should remain stayed until the court ruled following the filing of an amended complaint); *Lawrence v. Governor of Georgia*, 721 F. App'x 862, 864–65 (11th Cir. 2018) (affirming stay of discovery and pretrial deadlines during pendency of motion to dismiss).

In evaluating whether a moving party has met its burden, a 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." *Bocciolone v. Solowsky*, 2008 U.S. Dist. LEXIS 59170, at *6 (S.D. Fla. July 24, 2008) (quoting *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006)). When making that determination, a court may "take a preliminary peek at the merits of the [dispositive motion] to see if it appears to be clearly meritorious and truly case dispositive." *Feldman v. Flood,* 176 F.R.D. 651, 652–53 (M.D. Fla. 1997); *see also Glynn v. Basil Street Partners, LLC*, 2010 U.S. Dist. LEXIS 68646, at *2 (M.D. Fla. June 16, 2010) (staying discovery where court took preliminary peek at dispositive motion to determine whether it was "clearly meritorious and truly case dispositive"). A preliminary peek here makes it clear that a stay is appropriate.

II. Wells Fargo Is Entitled to a Stay to Avoid Unnecessary and Costly Discovery.

a. A Preliminary Peek at the Merits of Wells Fargo's Motion to Dismiss Warrants a Stay of Discovery.

If granted, Wells Fargo's Motion to Dismiss will dispose of the case entirely because Plaintiffs' have failed to state a claim. As set forth more fully in Wells Fargo's Motion to Dismiss, Plaintiffs allege no facts sufficient to establish the claims they plead.

First, Plaintiffs allege no facts to establish Wells Fargo or any of its employees operated, had actual knowledge of, or participated in the purported scheme, dooming both aiding and abetting claims. Plaintiffs conclude that Wells Fargo knew of the purported scheme based on

alleged atypical transactions in the PLCs' accounts, and Wells Fargo's duties under banking and anti-money laundering statutes and regulations. But these bald assertions that Wells Fargo must have known of the Perpetrators' Ponzi scheme do not create a plausible inference that Wells Fargo had actual knowledge of the Perpetrators' alleged wrongdoing. *Perlman v. Wells Fargo Bank, N.A.*, 559 F. App'x 988, 993 (11th Cir. 2014). The Eleventh Circuit and this District have rejected these theories of aiding and abetting liability based on mere conclusory allegations, and Florida law does not require banking institutions to investigate its customers' transactions. *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904, 907 (11th Cir. 2012); *Peng v. Mastroinni*, 2021 U.S. Dist. LEXIS 86220, at *3 (S.D. Fla. May 3, 2021) ("The conclusory statement '[t]he Regional Center and the Developer, with knowledge of Mastroianni and the General Partner's breaches of fiduciary duty, aided and abetted, provided substantial assistance, and encouraged those breaches of duty'… does not present any facts from which a claim for aiding and abetting can be plausibly supported."); *Ajwani v. Carnival Corp.*, 2024 U.S. Dist. LEXIS 51257, at *7 (S.D. Fla. Mar. 22, 2024) (conclusory allegations without any specific detail about *how* defendant knew or should have known are insufficient to plausibly allege actual or even constructive notice). What is more, Plaintiffs' "must have known" theory of knowledge is inconsistent with the many allegations they make that Wells Fargo was unaware of and therefore failed to act on the red flags that supposedly were associated with the Perpetrators' fraud. *See, e.g.*, Am. Compl. ¶¶ 140, 161.

Second, Plaintiffs fail to allege that Wells Fargo provided any substantial assistance to the Perpetrators of the Ponzi scheme. Substantial assistance requires that there be an "affirmative step on the part of the aider-and-abettor" in furtherance of the scheme. *In re Palm Beach Finance Partners, L.P.*, 517 B.R. 310 (Bankr. S.D. Fla. 2013); *see also Pearson v. Deutsche Bank AG*, 2023 U.S. Dist. LEXIS 70367 (S.D. Fla. Apr. 22, 2023) (holding that there was substantial assistance

where bank employees instructed perpetrators on "how to circumvent Defendants' anti-money laundering and 'Know Your Customer' rules"). But no such affirmative step was alleged here; instead, Plaintiffs allege nothing more than that Wells Fargo passively failed to act to protect Plaintiffs and other investors, none of whom are alleged to have been Wells Fargo's customers. *See, e.g.*, Am. Compl. ¶¶ 79, 140, 144, 145, 151, 155, 161.

Plaintiffs' aiding and abetting fraud claim further fails as there are no allegations sufficient to plead the underlying fraud. *See Isaiah*, 2017 U.S. Dist. LEXIS 190051, at *7 (finding that "the Receiver did not adequately plead actual knowledge of *any underlying violation*. . . . Under Florida law, aiding and abetting claims must sufficiently establish-or allow the fair inference-that the defendant had actual knowledge of the *underlying tort*.") (emphasis added). The Amended Complaint is devoid of the specificity required for a fraud claim.

Third, Plaintiffs' unjust enrichment claim fails. Plaintiffs' reliance on the equitable theory of unjust enrichment to pursue disgorgement of the account services fees Wells Fargo collected from the PLCs in exchange for providing routine banking services is untenable. Plaintiffs do not allege with particularity that the Plaintiffs conferred any direct benefit on Wells Fargo required for an unjust enrichment claim. *Coffey v. WCW & Air, Inc.*, 2018 U.S. Dist. LEXIS 148122, at *2 (N.D. Fla. Aug. 30, 2018) (noting that earning fees or interest on an account is not a direct benefit under Florida law when the benefit received was obtained "performing a service for a different party"). Wells Fargo would not be unjustly enriched by retaining the bargained-for fees between itself and the PLCs.

Thus, Plaintiffs do not allege facts to plead an unjust enrichment claim upon which relief can be granted.

b. Neither the Parties Nor the Court Have Any Need for Discovery at This Juncture, So a Stay of Discovery Is Appropriate.

Wells Fargo's Motion to Dismiss implicates only legal issues, not factual issues; therefore, neither the parties nor the Court have any need for discovery at this time. *Chudasama*, 123 F.3d at 1367. Moreover, responding to the anticipated discovery will be unduly burdensome and will subject Wells Fargo to "significant costs" that it might not incur if its Motion to Dismiss is granted or if the scope of the case is substantially narrowed. *Id.* The PLCs had twenty-nine accounts at Wells Fargo between 2011 and 2021, all of which were allegedly used by the Perpetrators as part of the scheme. Am. Compl. ¶¶ 143, 156; *see also* Am. Compl. ¶ 150. Within these twenty-nine accounts, there were *numerous* transactions, with millions of dollars transferred into, out of, and between accounts. Am. Compl. ¶ 161 (alleging just "some examples of the litany of improper activities and transactions" within the accounts). With twenty-nine accounts, "numerous" transactions, and a period of ten years, there are thousands of transactions that could potentially be the subject of discovery if Plaintiffs' case is permitted to move forward. Conducting discovery regarding all of these transactions would be unduly burdensome and onerous to Wells Fargo until the Court determines whether Plaintiffs have pled claims sufficient to survive a motion to dismiss. Thus, Wells Fargo's challenges to the legal sufficiency of Plaintiffs' claims should be resolved before discovery begins. *Id.* at 1367–68. A stay of discovery will not prejudice Plaintiffs in any way, as they should be required to overcome the pending threshold challenge before unlocking the doors of discovery.

c. A Stay of Discovery Is Warranted for Judicial Efficiency.

Staying discovery here will not just be of benefit to Wells Fargo and the Plaintiffs; it will also "preserve resources for *all parties*, *including the Court*." *Chevaldina v. Katz*, 2017 U.S. Dist. LEXIS 137752, at *9 (S.D. Fla. Aug. 28, 2017) (emphasis added). "Allowing a case to proceed

through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system." *Id.*

Courts in this district "routinely exercise the power to stay a proceeding where a stay would promote judicial economy and efficiency." *Fondo De Proteccion Social De Los Depositos Bancarios v. Diaz Reus & Targ, LLP*, 2016 U.S. Dist. LEXIS 195324, at *2 (S.D. Fla. Dec. 26, 2016); *accord Theodore D'Apuzzo, P.A. v. United States,* 2017 U.S. Dist. LEXIS 173426, at *4 (S.D. Fla. Apr. 11, 2017) (granting stay of discovery where defendant "would suffer prejudice and undue burden should discovery proceed pending the Court's decision on the motion to dismiss"). As discussed, the broad scope of discovery here would cover thousands of transactions in dozens of bank accounts over many years—an incredible burden on Wells Fargo. With such a complex and voluminous endeavor, and considering the breadth of the claims and issues in the Amended Complaint, it is likely that numerous discovery disputes would be raised before the Court. This burden on the Court can be avoided if the Court simply decides the issues presented in Wells Fargo's Motion to Dismiss before permitting discovery to commence. And as noted above, nobody, and certainly not the Plaintiffs, will be harmed by this practical and necessary sequencing of the course of this lawsuit.

Here, as detailed in the Motion to Dismiss, the Amended Complaint suffers from multiple substantive deficiencies, any one of which standing alone is sufficient to support dismissal. Under these circumstances, a stay of discovery is appropriate.

CONCLUSION

WHEREFORE, based on the foregoing, Wells Fargo respectfully requests entry of an order staying all discovery in this matter until such time as Wells Fargo's Motion to Dismiss is fully adjudicated and a grant of such other and further relief as this Court deems just and proper.

Dated: August 12, 2024

Respectfully submitted,

McGUIREWOODS LLP

/s/ Emily Y. Rottmann
Emily Y. Rottmann
Florida Bar No. 93154
erottmann@mcguirewoods.com
flservice@mcguirewoods.com
clambert@mcguirewoods.com
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202
Tel: (904) 798-3200
Fax: (904) 798-3207

Jarrod D. Shaw (admitted *pro hac*)
jshaw@mcguirewoods.com
Nellie E. Hestin (admitted *pro hac*)
nhestin@mcguirewoods.com
Tower Two-Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222
Tel: (412) 667-6000

Mark W. Kinghorn *(pro hac motion forthcoming)*
mkinghorn@mcguirewoods.com
Zachary L. McCamey *(pro hac motion forthcoming)*
zmccamey@mcguirewoods.com
William O. L. Hutchinson *(pro hac motion forthcoming)*
whutchinson@mcguirewoods.com
201 N. Tryon St., Suite 3000
Charlotte, NC 28202-2146
Tel: (704) 343-2000

Attorneys for Defendant Wells Fargo Bank, N.A.

LOCAL RULE 7.1(3) CERTIFICATION

Pursuant to Local Rule 7.1(3), counsel for Wells Fargo certifies that they conferred with counsel for Plaintiffs in a good faith effort to resolve the issues raised in the motion. The Plaintiffs do not consent to the relief requested in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2024, a true copy of the foregoing was filed with the Court using the CM/ECF system, which will send notice to counsel of record.

/s/ Emily Y. Rottmann
Attorney