UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 9:24-cv-80722-DPG

DANIEL J. STERMER, as Receiver for
NATIONAL SENIOR INSURANCE, INC.
D/B/A SEEMAN HOLTZ,
CENTURION ISG SERVICES, LLC
EMERALD ASSETS 2018, LLC,
INTEGRITY ASSETS 2016, LLC,
INTEGRITY ASSETS, LLC,
PARA LONGEVITY 2014-5, LLC,
PARA LONGEVITY 2015-3, LLC,
PARA LONGEVITY 2015-5, LLC,
PARA LONGEVITY 2016-3, LLC,
PARA LONGEVITY 2016-5, LLC,
PARA LONGEVITY 2018-3, LLC,
PARA LONGEVITY 2018-5, LLC,
PARA LONGEVITY 2019-3, LLC,
PARA LONGEVITY 2019-5, LLC,
PARA LONGEVITY VI, LLC,
SH GLOBAL, LLC N/K/A PARA LONGEVITY V, LLC,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.

Defendant.
_____/

DEFENDANT WELLS FARGO BANK, N.A.'S
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY DISCOVERY
PENDING DISPOSITION OF ITS DISPOSITIVE MOTION TO DISMISS

INTRODUCTION

Wells Fargo's Motion to Dismiss[1] seeks dismissal of all of the Receiver's claims against Wells Fargo. If the Court grants Wells Fargo's motion, the case will end, and no discovery will be needed. Even if the Court partially grants Wells Fargo's motion, a substantial portion of the claims and some of the plaintiffs will be removed from this case, significantly narrowing the scope, burden, and expense of the case going forward.

For example, if the Court finds that the Receiver lacks standing to assert his claims on behalf of the fourteen Non-NSI Entities as Wells Fargo contends, discovery would no longer be needed for those entities. *See* DE, pp. 6-9. The possibility that Wells Fargo will succeed on the standing issue is not remote. As Wells Fargo explains in the motion, the Receiver fails to allege any legitimate business activities for the Non-NSI Entities, which strips the Receiver of standing to assert claims against Wells Fargo on behalf of those entities under *Isaiah v. JPMorgan Chase Bank, N.A.*, 2017 U.S. Dist. LEXIS 190051 (S.D. Fla. Nov. 14, 2017). Moreover, the Receiver's attempt to establish standing through allegations concerning Alan Hodge fails to show that he was an innocent officer, director, or stockholder of the Non-NSI Entities who had the power to thwart the alleged wrongdoing. *See* DE 45, at Section I.B. Thus, Wells Fargo's motion contains meritorious arguments related to the threshold issue of standing that would end the case for the fourteen Non-NSI Entities and significantly narrow the scope of discovery.

Similarly, if the Court grants all or part of Wells Fargo's motion concerning the Receiver's underlying causes of action of aiding and abetting fraud, aiding and abetting breach of fiduciary duty, negligence, and unjust enrichment, the case would end or be significantly curtailed. For

[1] Wells Fargo retains the same capitalized terms as included in Wells Fargo's Brief in Support of its Motion to Stay Discovery Pending Disposition of its Dispositive Motion to Dismiss unless explicitly stated otherwise.

example, Wells Fargo has meritorious arguments that both aiding and abetting claims should be dismissed because the Receiver fails to allege facts showing Wells Fargo's actual knowledge of the Ponzi scheme—a fatal flaw in the Receiver's Complaint. If the Court agrees, dismissal of those claims would also significantly narrow the scope of discovery and damages sought by the Receiver.

Under these circumstances, Eleventh Circuit precedent is clear that the Court should stay discovery pending the Court's ruling on Wells Fargo's motion. The Receiver's Response (DE 36) does not change this analysis.[2]

I. The Receiver's Argument That a Hypothetical Future Amendment to His Complaint Prevents Discovery Stay Is Meritless.

The Receiver first argues that, because he may be afforded the opportunity to amend his complaint at some time in the future, Wells Fargo's motion to dismiss "will not dispose of the entire case." DE 36, p. 3. This argument lacks support in both logic and the law. First, the Eleventh Circuit has held 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, however, be resolved before discovery begins" to avoid the unnecessary expense associated with discovery on non-meritorious claims, among other reasons. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (footnote omitted). *Id.* Notably, the Eleventh Circuit in *Chudasama* did not include the caveat that the Receiver advances here that discovery should not be stayed if a party *may* have the opportunity to amend its complaint in the future. Indeed, such a caveat would devour the *Chudasama* holding entirely, as a court almost always has the power to grant a motion to dismiss

[2] In his Response, the Receiver indicated that he was willing to negotiate a "not indefinite standdown" of discovery with Wells Fargo. DE 36, p. 1. Following the filing of the Receiver's Response, the parties met and conferred to discuss the possibility of a stipulation to stay discovery for a period of time. The parties have not yet been able to reach agreement.

without prejudice with leave to amend the complaint. If that possibility prevents entry of a stay, a stay would never issue, and the vital legal principle established by the Eleventh Circuit in *Chudasama* would be a nullity. The Court should thus reject the Receiver's argument and, instead, follow the binding guidance afforded by *Chudasama*.

Even if the Court were to consider the possibility that the Receiver could amend his complaint, the Court should still stay discovery. The Receiver, like any party, is only afforded the opportunity to amend his pleading if doing so would not be futile. *Gonzalez v. Tony*, 462 F. Supp. 3d 1357, 1359 (S.D. Fla. 2020); Fed. R. Civ. P. 15(a)(2). Wells Fargo's motion to dismiss explains in detail that the Receiver fails to allege facts establishing standing to assert claims against Wells Fargo on behalf of the fourteen Non-NSI Entities. *See* DE 30, pp. 6–9. Moreover, the Receiver fails to allege facts showing that Wells Fargo had actual knowledge of the Ponzi scheme. In fact, the Receiver affirmatively alleges that Wells Fargo failed to detect the Ponzi scheme and was "ignorant" to the red flags that allegedly should have given notice of the same, both of which allegations are fatal to the primary claims of aiding and abetting. *See* DE 30, p. 11; *see also* Compl. ¶¶ 189, 207, 220.

Standing and actual knowledge are foundational and essential to the Receiver's claims. Nevertheless, even though the Receiver has been involved in litigation concerning the Receivership Entities and this alleged Ponzi scheme since at least 2021, the Receiver fails to allege facts establishing standing for the Non-NSI Entities or facts sufficient to support his aiding and abetting claims. No new facts are likely to emerge after three years of litigation that will enable the Receiver to correct the deficiencies in his current complaint. Thus, any proposed amendment would be futile. *Gonzalez*, 462 F. Supp. 3d at 1359. And given this futility, the Court should not

subject Wells Fargo to onerous discovery until the Court determines what claims and parties are to proceed.

II. The Existence of the Class Action Case Supports Entry of a Stay, Not Proceeding with Costly, Parallel Discovery in Two Cases that May Both be Dismissed.

The Receiver next argues that the Court should deny Wells Fargo's Motion because it could make consolidated discovery with *Millstein v. Wells Fargo Bank, N.A.,* Case No. 24-22142-CIV (the "Class Action case") "very difficult, if not impossible." DE 36, p. 5. Not so. Instead, granting a stay of discovery in both cases until the Court rules on Wells Fargo's motions to dismiss provides the most efficient path forward. Without such a stay, Wells Fargo would be subjected to costly parallel discovery in two cases for claims and parties that may ultimately be dismissed at the pleadings stage.

The complaints in this case and in the Class Action case both assert nearly identical claims against Wells Fargo—both seeking to recover the same categories of alleged damages on behalf of the same investors in the alleged Ponzi scheme. Indeed, the primary causes of action asserted in both cases are aiding and abetting claims, and Wells Fargo has moved to dismiss both complaints in their entirety. *See* DE 30; *Millstein v. Wells Fargo Bank, N.A.,* Case No. 24-22142-CIV, DE 25. For the aiding and abetting claims, Wells Fargo argues in both cases that the plaintiffs fail to allege that Wells Fargo had actual knowledge of the Ponzi Scheme—a fatal flaw to these claims. *Id*. Thus, it is very possible that the Court will dismiss the two Complaints in their entirety, thereby ending both cases. Moreover, if the Court only dismisses the aiding and abetting claims in both actions, that would still significantly curtail the scope of discovery and potential damages in both cases.

Thus, while the power to grant a stay is within this Court's discretion, the case for a stay here is particularly compelling where the Court's decision on Wells Fargo's Motion to Dismiss will have a significant impact on the scope, burden, and expense of discovery. Wells Fargo should not be subjected the significant costs of responding to discovery concerning a large Ponzi scheme that allegedly spanned many entities across nearly a decade when many (if not all) of those entities could be dismissed from this case upon resolution of Wells Fargo's Motion to Dismiss. Instead, the efficient path forward is to follow *Chudasama* and decide the pending motions to dismiss before requiring the parties to expend significant resources engaging in costly discovery.

III. The Court Can Take a Preliminary Peek of All Relevant Motions and Rule Accordingly.

Finally, the Receiver argues that because Wells Fargo had not filed its motion to dismiss and motion to stay in the Class Action case by the time the Receiver filed its Response to Wells Fargo's Motion in this case, the Court cannot take a "preliminary peek" at that dispositive motion in the Class Action in deciding this Motion. DE 36, pp. 4–5. The Receiver's argument, however, is now moot as Wells Fargo's motions to dismiss and stay in the Class Action were filed on August 12, 2024. *Millstein v. Wells Fargo Bank, N.A.,* Case No. 24-22142-CIV, DE 25–26. Thus, the Court is able to take a peek if it wishes.

Moreover, while this case and the Class Action case are closely related, the cases remain separate. Wells Fargo filed its Motion to Dismiss in this case on July 29, 2024. DE 30. Thus, the Court has the ability to take the "preliminary peek" at the motion to confirm that it has the potential to be "truly case dispositive" as is discussed in *Feldman*, among others. *Feldman v. Flood,* 176 F.R.D. 651, 652–53 (M.D. Fla. 1997). Here, a preliminary peek at the Motion to Dismiss in this case shows that Wells Fargo asserts meritorious arguments in support of full dismissal. The Court need not consult any future, unfiled documents or motions as the Receiver suggests to make this

determination. *See* DE 36, pp. 4–5 (arguing that motions to stay cannot be based on filing of future motions).

Finally, if the Court is inclined to take a preliminary peek at Wells Fargo's motion to dismiss and motion to stay in the Class Action, Wells Fargo makes many of the same meritorious arguments, seeking dismissal of the aiding and abetting and unjust enrichment claims and a discovery stay pending this Court's ruling on the dispositive motion. *Id*. Just like in this matter, the plaintiffs in the Class Action fail to allege facts showing actual knowledge of and substantial assistance to the alleged Ponzi scheme. Thus, a discovery stay is just as warranted as a stay in this matter. Accordingly, the Receiver's arguments against a stay fail.

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 26, 2024

Respectfully submitted,

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LOCAL RULE 7.1(3) CERTIFICATION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 26, 2024, a true copy of the foregoing was filed with the Court of Court using the CM/ECF system, which will send notice of the electronic filing to all counsel of record.

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