UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIKE COLLINS, FRANK GREENE and NATURE'S DISCOUNT, INC., Individually and on behalf of all others similarly situated, Plaintiffs, v. ADSURFDAILY, INC., *et al.*, Defendants.	Civil Division Case No.: 1:09-cv-00100-RMC Hon. Rosemary M. Collyer

PLAINTIFFS' MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF OPPOSITION TO DEFENDANT BANK OF AMERICA'S MOTION TO STAY

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I. INTRODUCTION

By providing an array of essential banking services to Defendants ADSURFDAILY, INC., ("ASD") Thomas Bowdoin ("Bowdoin"), and Robert Garner ("Garner") (the "RICO Defendants), Defendant BANK OF AMERICA N.A. ("Bank of America") played an indispensible role in the success of an illegal Ponzi scheme that took in hundreds of millions of dollars and ensnared well over 100,000 participants from across the United States. For well over two years Bank of America embraced and never said no to the RICO Defendants who operated this nationwide scheme from a former floral shop in tiny Quincy, Florida. ASD's legitimacy and business model were never questioned despite being borne out of the demise of "*12Daily Pro and Phoenix Surf*" which were nothing more than naked Ponzi schemes investigated and eventually prosecuted by the Securities and Exchange Commission in 2006. (US Complaint, Exhs. 1&2 (US Doc. no. 1).

All the more startling, Bank of America, one of the world's largest financial institutions, enjoyed a front row seat to ASD's massive fraud. Its very own branch manager (and branch employees) worked on site and directly for the RICO Defendants. (FAC at ¶ 88). Adding to Bank of America's direct knowledge was a Bank of America Vice President who visited the scheme's headquarters, questioned the RICO Defendants and approved Bank of America's continued relationship with this dubious and now determined by this Court to be a criminal scheme. (Id. at ¶ 89). Even when two other banks in the Quincy area refused to open one account for the RICO Defendants and shunned their business, Bank of America allowed the RICO Defendants to open up to fifteen (15) separate accounts. Through these accounts the Government's forfeiture Complaint claims in one month alone $90 million was deposited.

Despite being at the heart of the ASD scheme, the Bank seeks to avoid all financial responsibility for its role by requesting what would in effect be an indefinite stay of this proceeding. Before any discovery of its wrongdoing can commence, Bank of America claims: (1) $80,000,000[1] seized by the government in the Civil Forfeiture Proceedings from accounts held at Bank of America should adequately compensate victims; and (2) because they only provided "legitimate banking services" its pending motion to dismiss will be granted and at a minimum a stay of discovery should be in place until that dismissal is granted.

The request for a stay based on the pendency of the Civil Forfeiture Proceedings follows from a fundamental misconstruction of the purpose and nature of those proceedings. They were not brought by the government to once again bail out Bank of America (after already providing an estimated $45 billion from taxpayers in 2008) for a business culture that seems to place increased revenue and profits above basic compliance and sound decision-making. Similar to losses suffered from: the frenzy to provide no-document mortgages, seemingly easy profits in sub-prime lending activities and the creation and sale of exotic financial instruments, Bank of America hopes once again to take advantage of government money; this time $80 million recovered from the accounts of the RICO Defendants (and now belonging to the US Treasury). This Court should reject that attempt.

Bank of America should be held accountable for its actions and if they are found liable, either pay the victims directly, or reimburse the government for the funds they have chosen in their discretion to return to victims. Moreover, no stay should be granted before Bank of America provides plaintiffs and this court with a proffer documenting how much money was, in

[1] Bank of America cites an $80 million dollar figure; however, approximately $15 million of that amount are funds seized from Bank of America accounts relating to Golden Panda Ad Builder, which is not specifically part of this litigation, and without discovery from Bank of America, Plaintiffs cannot prove how much, if any, of the $15 million came from ASD.

fact, deposited in the RICO Defendants' accounts. Bank of America's silence on this critical factual issue is telling. How can they seek a stay when the $80 million held by the government if it only represents a fraction of the total losses? They alone, not the plaintiffs have this information.

Bank of America's second basis for a stay should also be rejected. Their claim they provided "*nothing more than legitimate banking services*" is a half truth at best and insufficient to support their motion to dismiss. First, the depth and scope of Bank of America's involvement with the RICO Defendants was extraordinary by any measure. The services provided, day in and day out were "atypical" and gave Bank of America countless opportunities to infer and obtain actual knowledge of the RICO Defendants operation of an illegal Ponzi scheme. (FAC, ¶¶ 65-100). For over two years they supported this scheme, when other banks shunned the RICO Defendants. They gained actual knowledge of the scheme through their branch manager and Quincy employees who worked directly for the RICO Defendants. Second, a bank vice president from nearby Tallahassee paid a visit to the RICO Defendants and after a day of interviews with Defendants, learned the precise workings of the scheme and despite that knowledge continued to provide assistance. Finally the sheer volume of activity (deposits of tens of millions of dollars month after month to a tiny branch) unrelated to any legitimate business model or the sale of a product or service created a strong inference of actual knowledge. Finally, the claim that they were merely making available "legitimate banking services" misses the mark. Those services, whatever label you place on them, provided "substantial assistance" to this scheme. By allowing for the opening of 15 separate "dba" accounts, providing a nationwide branch for remote deposits, wire transfers, deposit and pay out capabilities, the direct assistance of experienced branch personnel and the imprimatur of Bank of America's legitimacy this criminal scheme was

given the mechanism to exist, flourish and thrive. (Id. at ¶¶ 66-91). What might be legitimate business practices to a lawful enterprise becomes substantial assistance to a criminal enterprise like ADSURF. Without Bank of America, ADSURF could have only existed in the dark alleys of the financial world where they would need to rely on off-shore accounts and questionable deposit facilities. There this scheme would have been far less likely to metastize and wreak the havoc it did on so many people. Thus the stay requested by Defendant should be rejected.

II. FACTUAL BACKGROUND

A. The Civil Forfeiture Proceedings

Following an investigation by a United States Secret Service Task Force, on August 5, 2008, the United States (the "Government") instituted civil forfeiture proceedings against certain real properties located in Quincy, Florida and Myrtle Beach, South Carolina and personal property consisting of approximately $53 million in funds held in 15 accounts maintained by Bank of America. (*See* Complaint for Forfeiture *In Rem* (US Doc. No. 1), ¶¶4-5, 14-15 ("US Complaint")) The Government alleged that the funds maintained in Bank of America of America accounts and the funds used to acquire or maintain the real properties at issue constitute proceeds of a wide-spread Internet-based Ponzi scheme that operated in violation of federal wire fraud laws. (*Id.* at ¶8) Specifically, the Government alleged that ASD, through its owner and president, Bowdoin, and other management staff, represents itself as multi-level marketing company that offers online advertising services. ASD promises its members that they can earn large profits by (1) paying fees to advertise webpages through purchases of "ad packages",; (2) surfing other members' webpages; and (3) recruiting more members to do the same. In return, ASD claims that members will earn a rebate of up to 125% of the amount paid to purchase their ad packages and will be paid commissions for referring new members. The United States further

alleged that, absent continued membership growth, ASD does not, in fact, sell any products or services sufficient to generate the revenue necessary to pay the promised rebates and commissions to members. (*Id.* at 14-17.)

On August 15, 2008, Claimants Bowdoin and ASD filed verified claims for the funds in 10 of the 15 seized Bank of America accounts with W. Charles Busby and Golden Panda Ad Builder filing verified claims for the funds in the 5 remaining seized Bank of America accounts.[2] (*See* Verified Claims of Claimants (US Doc. Nos. 6 & 10)) Shortly thereafter, on August 18, 2008, ASD filed an emergency motion for the return of the seized funds and motion to dismiss claiming that without immediate emergency relief, "the company will soon collapse completely, its member base, its most important asset, will disappear, and its employees will be out of work." (Emergency Mtn. at 1 (US Doc. Nos. 7)) In the interest of justice, the Court granted request for an evidentiary hearing. (Minute Entry Order dated September 18, 2008)

Commencing on September 30, 2008, the Court held a two-day evidentiary hearing on ASD's emergency motion.[3] Based upon the testimony from ASD's witnesses and the proffered exhibits, the Court found that ASD failed to rebut that the payment of the promised rebates and commissions to existing members could be sustained without the influx of money from new members through their purchase of ad packages. The Court held:

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[2] Bowdoin/Harris Enterprises, Inc. submitted a verified claim for the real property in Quincy, Florida. (*Id.*)

[3] On the eve of the start of the evidentiary hearing, Bowdoin and ASD filed a proposed Compliance and Oversight Plan, which, among other things, provided that Bowdoin and ASD would voluntarily repatriate and deposit in the restricted accounts the over $1 million maintained in a bank account in Antigua as well as the millions of dollars held with Solid Trust Pay in Canada, which are beyond the reach of the Government. (*See* Notice of Filing of Claimants' Proposed Compliance and Oversight Plan ("Compliance Plan") at 2 (US Doc. no. 27)) In addition, under the Compliance Plan, Bowdoin would no longer be an employee, officer or director of ASD, but would only serve as a consultant to ASD. (*Id.* at 3.) The Court ultimately rejected the plan and the RICO Defendants have not repatriated the money in foreign banks.

> Thus, ASD purports to operate a circular system: advertisers pay to advertise and become members, earn "rebates" of 125% of their advertising costs by viewing (but not buying from) other advertisers' sites, and earn commissions on sales of ad packages from their personal referrals and second level referrals. Even Mr. Grayson recognized that ASD's revenue growth was not sustainable and that when it decreased, ASD would have to decrease its rebates and/or commissions. *Id.*, 75:14-17, 75:22 - 76:8 (Grayson). He also opined that when that happened, ASD might no longer offer a cost-effective form of advertising. *See id.* at 75:25 - 78:13 (Grayson).
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> The lay testimony of Mr. Grayson belies the expert testimony of Mr. Nehra. Mr. Nehra repeatedly asserted that ASD does not "guarantee" rebates under the Terms of Service, see Terms of Service at 2 (Ad Packages and Credits) ("ASD does not guarantee any earnings and/or rebates"), but his testimony cannot be relied upon because (1) it is contradicted by come-on statements on the ASD website and Mr. Grayson's testimony and (2) it relied solely on the written words contained in the Terms of Service without independent investigation or review of ASD's business records to ascertain how ASD operates in fact before opining. On the current record, the Court must conclude that ASD promises a return on payments, in various forms, to induce a participant (advertiser or advertiser/member) to put money into the program. When its phenomenal growth spurt stops, even Mr. Grayson can see that ASD will collapse on itself.

(Memorandum Opinion dated November 19, 2008, at 17).

The Court determined that ASD did not offer a legitimate product or service sufficient to sustain the business and thus, could not demonstrate a "cadre of true customers" as distinguished from the member-income-seekers, explaining:

> . . . [O]nly advertisers who are not members and not participants in the rebate program might be considered "true customers." Thus, the rebate program disintegrates the traditional distinction between the income opportunity seeker and the "true customer" because in ASD's business structure, not only is the member who purchases ad packages and sells ad packages through referral commissions "pay[ing] to play," but so too is the advertiser (the purchaser of ad packages) who earns rebates for viewing other advertisers' webpages on the ASD rotator.

(*Id.* at 18). The Court concluded that "the record strongly suggests that absent continuous membership growth, ASD has no means to generate the returns that it represents it will pay to those who join its program. It thus has failed to demonstrate, on this record, that the ASD business model constitutes a legitimate business." (*Id.* at 19). The Court denied ASD's motion and directed

ASD and Bowdoin to file an answer by December 15, 2008. (Order dated November 19, 2008 (US Doc. no. 36))

ASD and Bowdoin filed their answer on December 15, 2008, which denied the material allegations of the Government's forfeiture complaint. (Answer (US Doc. no. 37) However, after further contemplation of the crushing blow dealt by the Court's opinion as well as a second forfeiture complaint filed by the Government seizing additional property and funds and further detailing Bowdin's and ASD's fraudulent conduct, Bowdoin finally came clean. Bowdoin signed a "proffer letter" reflecting the Government's agreement not to use any of his proffered statements in any criminal proceedings instituted against Bowdoin and then proffered statements to law enforcement agents admitting that the material allegations in the Government's forfeiture complaint were all true.[4] (*See* Plaintiff's Opposition to Thomas A. Bowdoin, Jr.'s "Notice of Rescession (sic) and Withdrawal of Release of Claims to Seized Property and Consent to Forfeiture" at 7)

After admitting that he operated ASD as an illegal Ponzi scheme in violation of federal wire fraud laws, Bowdoin and ASD moved the Court for leave to: (1) withdraw and release with prejudice the verified claims previously filed in this action (2) consent to forfeiture of certain real properties and the 10 Bank of America accounts in the name of Thomas A. Bowdoin, sole proprietor, d/b/a AdSurfDaily.[5] (Motion for Leave to Withdraw Claims Release of Claims to

[4] In the proffer letter, the Government and Bowdoin only agreed that Bowdoin's proffered statements would not be used against him in connection with criminal proceedings. The letter explained that the statements could be used for other purposes, including in connection with the civil case. (*See* Plaintiff's Opposition to Thomas A. Bowdoin, Jr.'s "Notice of Rescession (sic) and Withdrawal of Release of Claims to Seized Property and Consent to Forfeiture" at 7)

[5] On September 23, 2008, Busby and Golden Panda Ad Builder filed a motion to dismiss with the Government's consent, which dismissed their verified claims against 5 of the seized Bank of America accounts. (Consent Motion to Dismiss Golden Panda Claims (US Doc. no. 24)) The Court granted the motion and dismissed Busby's and Golden Panda's verified claims.

Seized Property and Consent to Forfeiture (US Doc. no. 39)) On January 22, 2009, the Court granted ASD's and Bowdin's motion and vacated an earlier order setting the Initial Scheduling Conference based on the Government's representation that the withdrawal of ASD's and Bowdoin's verified claim eliminated the need for the scheduling conference.[6] (US Doc. no. 41)

On May 11, 2009, the Government filed a Proof of Service on all Defendants *In Rem* in accordance with applicable procedural rules. According to the Proof of Service, the Government seized funds in the aggregate amount of $65,838,999.70 from the ten (10) Bank of America accounts under the control of Bowdin designated therein as "the 'Ad Surf Daily' accounts" and funds in the aggregate amount of $14,045,598.07 from the five (5) Bank of America accounts under the control of Busby or Stowers designated therein as "the 'Golden Panda Ad Builder' accounts." (*See* Proof of Service on all Defendants *In Rem* at 2 (US Doc. no. 68)) On May 15, 2009, the Clerk declared each of the "Golden Panda Ad Builder" accounts in default. (US Doc. no. 70) On June 1, 2009, the Government moved the Court for entry of a default judgment of order of forfeiture against the five (5) Golden Panda Ad Builder accounts. The motion remains pending. The Government has not yet sought default against the "Ad Surf Daily" accounts.

B. The Private Plaintiffs' Proceedings

On January 15, 2009, Plaintiffs brought this action against ASD, Bowdoin, Robert Garner, and Bank of America[7] on behalf of themselves and other similarly-situated individuals

[6] In late February and early March, after firing his original attorneys, Bowdoin filed various *pro* se motions seeking, among other things, to withdraw his and ASD's release of their verified claims and consent to forfeiture. Subsequently, on April 24, 2009, Bowdoin's and ASD's new counsel filed a motion seeking to withdraw Bowdoin's *pro se* motion to withdraw the release of ASD's and Bowdoin's verified claims until he had an opportunity to review all the facts. ASD's and Bowdoin's new counsel stated any new motion to withdraw would be filed by May 15, 2009. To date no renewed motion has been filed.

[7] Plaintiffs originally named Busby as a defendant, but subsequently voluntarily dismissed Busby on June 15, 2009. (Doc. no. 26)

who have lost any money paid to ASD. In addition to seeking declaratory and injunctive relief against all Defendants, Plaintiffs and the Class seek to recover damages from that ASD, Bowdoin and Garner (hereinafter sometimes referred to as the "RICO Defendants") for violations of RICO and breach of fiduciary duty. Plaintiffs and the Class seek to recover damages from Bank of America for aiding and abetting breach of fiduciary duty and fraud. Plaintiffs and the Class seek treble damages under RICO, compensatory, special and general damages on all other claims, as well as prejudgment interest. (FAC at pp. 49-50) The Court and parties have not yet attended the Initial Scheduling Conference and have not commenced discovery.

Plaintiffs' claims arise out of the illicit Ponzi scheme concocted by the RICO Defendants to defraud thousands of individuals out of millions of dollars and implemented with the indispensible assistance provided by Bank of America. ASD's business model is and always was intended to operate as a pure Ponzi scheme – a fact which Bowdoin has seemingly admitted in his proffered statements to the Government and in filings with this Court in the civil forfeiture proceedings.[8] The concept for ASD was borne out of the collapse in early- to mid-2006 of two other confirmed Ponzi schemes – 12Daily Pro and Phoenix Surf – which were targets of investigations and subsequent litigation by the Securities Exchange Commission. (US Complaint, Exhs. 1&2 (US Doc. no. 1)) Bowdoin, Garner, and other co-conspirators seized upon the opportunity to fill the void created by the collapse of these schemes and sought to improve upon the core Ponzi business model with the goal of developing the largest internet auto-surf program in operation. (FAC, ¶22). In customizing their Ponzi scheme, the RICO

[8] (*See* Plaintiff's Opposition to Thomas A. Bowdoin, Jr.'s "Notice of Rescession (sic) and Withdrawal of Release of Claims to Seized Property and Consent to Forfeiture" at 7; Motion to Dismiss for Lack of Fair Notice at 1 (US Doc. no. 50)).

Defendants coined new (or slightly revised) terms for old concepts and made a few adjustments to the model and its operation not in an effort to create a legal business, but rather to "fix" areas that contributed to the collapse of the prior schemes and to shield the Ponzi scheme from increased scrutiny by regulators or law enforcement personnel.

Bowdoin, Garner, and other co-conspirators implemented some adjustments to the program such as forbidding the use the term "investment" in connection with the sale of ad packages to ASD members and instituting an open-ended time period for earning the "promised" maximum rebate on purchased ad packages. The key innovation, however, that Bowdoin contributed in an effort to improve the core Ponzi business model was to create a cloak of legitimacy by publicizing relationships – whether real or fabricated – between ASD and high-profile and well-established companies.

From the launch of ASD in late 2006 until its collapse in 2008, Bowdoin and others touted its relationship with Bank of America to manufacture the perception of legitimacy. As alleged in Plaintiffs' First Amended Complaint, Bank of America was not merely a passive bystander, but rather played a knowing and critical role in the perpetuation of the RICO Defendants fraudulent scheme. (FAC, ¶¶65-100) Plaintiffs' allegations demonstrate that Bank of America knew of Bowdoin's and ASD's illegal scheme and that Bank of America substantially assisted Bowdoin and ASD to commit fraud and breach of fiduciary duties owed to Plaintiffs and the Class. Throughout its relationship with Bowdoin and ASD, Bank of America ignored, eased or went beyond its typical banking services and procedures. (*Id.* at ¶¶ 66-91) For instance, Bank of America was aware of the daily transactions involving millions of dollars moving in, out and between Bowdoin's various accounts. (*Id.* at ¶ 86) This alone should have been sufficient to trigger Bank of America's duty to investigate and report suspicious activities.

(*Id.*) Moreover, Bank of America facilitated the electronic transactions by allowing Bowdoin to exceed the limit on electronic transmissions associated with his accounts and by providing Bowdoin with enhanced services to accomplish the RICO Defendants' fraudulent activities. (*Id.* at ¶79) Bank of America cannot feign ignorance of the RICO Defendants illegal activities.

Similarly fatal to any claim of ignorance of Bowdoin's and ASD's illegal conduct by Bank of America is Plaintiffs allegations that Bank of America of America branch manager in Quincy and several of her staff members went to work directly for the RICO Defendants. (*Id.* at ¶88) These Bank of America employees worked after-hours, on-site at ASD's office assisting the RICO Defendants in managing and processing large numbers of financial transactions. (*Id.*) Knowing the critical role that having access to and assistance from Bank-of-America insiders played in its perpetuation of their fraudulent scheme, ASD paid these key players a higher hourly rate than other part-time help Defendants hired. (*Id.*) While on-site, these Bank of America employees had unlimited access to the facilities and witnessed firsthand the ASD's questionable business model and practices. The circle of Bank of America employees with knowledge regarding ASDs operations was not just limited to the Quincy branch employees, but rather extended up Bank of America's corporate latter to a Bank of America Vice President located out of Tallahassee, Florida, who was tasked with analyzing Defendants' business. (*Id.* at ¶89) Bank of America never faltered in its support and assistance provided to Bowdoin and ASD.

Like the allegations of actual knowledge, Plaintiffs have sufficiently pled that Bank of America substantially assisted the RICO Defendants in defrauding hundreds of thousands of individuals. Bank of America facilitated and assisted the RICO Defendants in the commission of their fraudulent scheme by, among other things:

- Allowing the RICO Defendants to include Bank of America's address and account numbers on recruitment and contractual materials;
- Conducing onsite training to improve ASD's tracking of funds;
- Removing or relaxing maximum electronical transactional limits on ASD's accounts; and
- Ignoring or avoiding federal laws and regulations;

(*See, e.g.,* FAC, ¶¶ 70, 72, 89-91)

Within the last few months of operations, the RICO Defendants with the assistance of Bank of America, watched ASD's membership swell from around 40,0000 members to over 100,000 members, which was accompanied by the collection of over $100 million. Realizing this growth could not be sustained, especially in light of the large sums of money being funneled from Bowdoin's Bank of America accounts to fund the purchase of extravagant gifts for family members and payment of money to family and friends, the RICO Defendants began moving large sums of money to offshore accounts. (FAC ¶¶ 54, 56, 92-94) Indeed, Bowdoin and his wife were attempting to purchase a home in another country just before the raid by the Secret Service Agents, who were able to seize over $60 million in Bowdoin's Bank of America accounts before the RICO Defendants have transferred it all offshore.

III. LEGAL ARGUMENT

A. Bank of America has failed to satisfy its heavy burden justifying a stay of this litigation.

Bank of America's request that the Court stay the present litigation pending the resolution of the Government's civil forfeiture proceedings ignores the fundamental differences between the two proceedings and the extreme prejudice that Plaintiffs and the Class would suffer if they are deprived of moving forward with their litigation against Bank of America and the

other Defendants. *See George Kessel Int'l, Inc. v. Classic Wholesales,* 544 F. Supp. 2d 911, 912 (D. Ariz. 2008) ("If there is even a 'fair possibility' that the stay will harm another party, the party seeking the say must make out a 'clear case of hardship of inequity in being required to go forward.'") (citation omitted). While Plaintiffs' claims in the present case are largely based on the same illegal Ponzi scheme underlying the civil forfeiture proceedings, there are several key differences which preclude imposition of the requested stay.

First and most important the two actions do not involve any of the same parties. The civil forfeiture proceeding is brought by the Government against certain real properties and funds held in Bank of America accounts as defendants *in rem*. None of the RICO Defendants or Bank of America is a party to the civil forfeiture proceedings.[cite]. Plaintiffs should not be forced to stand aside while strangers move forward with proceedings that will not resolve any issues or claims in the case at hand. *See Chrysler Credit Corp. v. Marino,* 63 F.3d 574, 578 (7th Cir. 1995) (declining to impose stay where the two actions did not involve the same parties or the same claims).

Second, the two proceedings are not based on the same causes of action. The Government has brought civil forfeiture proceedings seeking a forfeiture order against the defendants *in rem*. In contrast, Plaintiffs and the Class are seeking to recover monetary and injunctive relief against the RICO Defendants and Bank of America based on violations of RICO, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty and fraud. Since all the claimants in the Government's civil forfeiture proceeding have withdrawn and released their claims against the defendant properties, the Government will not be litigating any issues, but rather will seek entry of a default judgment and an order of forfeiture against the defendants *in rem*. Requesting that Plaintiffs' claims against entirely different defendants based

upon different causes of action be held in abeyance while the Government pursues its uncontested forfeiture orders is fundamentally unfair to Plaintiffs and should not be allowed.

Third, contrary to Bank of America's assertion, the relief sought by Plaintiffs is broader than the relief sought in the civil forfeiture proceedings and will not be mooted by any potential disbursements of forfeited funds recovered by the Government. The Government only seeks forfeiture of certain real properties and funds held in Bank of America accounts. Plaintiffs seek a broader array of relief, including treble damages, compensatory for the alleged RICO violations, special and general damages for the alleged common law violations, as well as prejudgment interest and such other relief as the Court deems proper. Moreover, Bank of America contends that because the Government has seized all of Bowdoin's funds previously maintained in Bank of America accounts, "Bank of America has no assets to distribute even to the extent that Plaintiffs . . . could allege any damage here against Bank of America." Def. Mem. at 6. This argument simply has no basis in fact or in law. Plaintiffs seek to hold Bank of America liable in its own right for its role in aiding and abetting breaches of fiduciary duty and fraud. If successful, any recovery would be from Bank of America itself, so the fact that Bank of America no longer holds assets belonging to any of the other defendants is wholly irrelevant and unrelated to any liability imposed against Bank of America. *See Kistler Instruments v. PCB Piezotronics, Inc.,* 419 F. Supp. 120, 124 (W.D.N.Y. 1976) ("Where the issues presented in a subsequent suit are broader than those contained in a suit filed earlier, the interests of justice are not served by the granting of a complete stay of the later-filed action.").

B. Bank of America's Reliance on the Anticipated Disbursement of Funds Seized by the Government is too Remote and Indefinite to Justify Imposition of a Stay

Bank of America's claim that this litigation should be stayed based on the "substantial likelihood" that the funds seized by the Government will moot Plaintiffs' and the Class' claims

has no factual support should be rejected as a valid reason for imposing a stay. There is not even a remote possibility that Plaintiffs and the Class' claims would be mooted by any disbursement of the seized funds by the Government. First, Bank of American's argument ignores the fact that the Government is not required to disburse funds seized under the civil forfeiture statute to victims of the underlying wrongdoing. *See Perri v United States,* 340 F.3d 1337, 1343 (Fed. Cir. 2003) (explaining that payments from the asset forfeiture fund are at the discretion of the attorney general and construing the forfeiture statute as a money-authorizing statute as opposed to a money-mandating statute). Although the Government has indicated that it intends to disburse seized funds to victims of this Ponzi scheme, the funds belong to the Government who has a pecuniary interest in retaining seized funds for its own use. *See Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 629 (1989) ("[T]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets for such assets are deposited in a Fund that supports law enforcement efforts in a variety of important and useful ways.") The forfeiture statutes and regulations recognize this interest in retaining funds by establishing stringent guidelines that victims must follow in order to be eligible for disbursement of funds. Specifically, 28 C.F.R. § 9.8 sets forth the prerequisites that victims must satisfy in order to qualify for funds seized by the Government, including satisfactory demonstration that:

> (1) A pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and that the loss is supported by documentary evidence including invoices and receipts;
>
> (2) The pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of a criminal offense;
>
> (3) The victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related

> offense, that was the underlying basis of the forfeiture;
>
> (4) The victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and
>
> (5) The victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

28 C.F.R. § 9.8(a).

Indeed the prerequisites for relief from the forfeiture fund are more stringent that the standards for proving damages in the present litigation. Moreover, Bank of America has already indicated that it wants to use the results of the discretionary administrative process, which for most victims would likely be accomplished without the benefit of counsel, as a pre-emptive strike against class certification. Def. Mem. at 8-9 ("[I]f lead plaintiffs are unable to substantiate loss through the Government's process, Defendants should be entitled to explore such issues prior to this Court's consideration of class certification."). Defendant should not be able to use a stay to gain a tactical advantage by forcing Plaintiffs to pursue an out-of-court avenue of relief which appear to impose more stringent standards for proving damages.

Bank of America's argument that Plaintiffs should be forced to seek recovery for their losses from the Government first ignores the provisions in the forfeiture regulations that indicate a preference for victims to seek recovery through alternative sources other than from the Government. For example, one of the qualifications a victim must satisfy under 28 C.F.R. § 9.8(a)(5) is demonstrating that the victims do not have reasonably available other assets from which to obtain recovery for their losses. Imposing a stay to prevent Plaintiffs from pursuing relief from other sources is contrary to the intent of the regulation and would be prejudicial to Plaintiffs by not only precluding pursuit of relief before this Court, but also using the stay to

potentially prevent Plaintiffs from qualifying for relief from the Government.[9]

Finally, there is no chance that the sums recovered by the Government are sufficient to make Plaintiffs and the Class whole. ASD had over 100,000 members and damages have been estimated to range anywhere between $100 million to $400 million. There is no way that the $65 million[10] seized from Bowdoin's Bank of America accounts will be sufficient to fully compensate Plaintiffs. Bowdoin and ASD have admitted in the civil forfeiture proceedings that millions of dollars are held in accounts in foreign countries beyond the reach of the Government. The potential to be made whole from funds disbursed by the Government is even more unlikely when considering the priority for distribution of seized funds established by the regulations. Section 9.9(a), 28 C.F.R., provides that costs incurred by the Government in connection with the forfeiture proceedings receive first priority for payment from the funds seized. This section then provides that the remaining balance shall be distributed in the following order of priority: (1) owners; (2) lienholders; (3) federal financial institution regulatory agencies; and (4) victims. In the present litigation, Plaintiffs and the Class would not be behind essentially five other categories of claimants with respect to any damages awarded.[11]

In light of the preference that victims seek relief from other sources prior to seeking compensation from funds seized by the Government, Plaintiffs should be able to move forward with the present litigation. *See United States v. Power Co.,* 2008 WL 612207, *8 (D. Nev. Feb.

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[9] Section 9.8(f), 28 C.F.R., which requires victims to reimburse the Government if they subsequently are compensated for their losses from other sources also demonstrates a preference for exhausting other avenues of relief prior to seeking recovery from funds seized by the Government.

[10] Bank of America cites an $80 million dollar figure; however, approximately $15 million of that amount are funds seized from Bank of America accounts relating to Golden Panda Ad Builder, which is not specifically part of this litigation, and without discovery from Bank of America, Plaintiffs cannot prove how much, if any, of the $15 million came from ASD.

[11] Bank of America's argument that the case should be stayed based on the doctrine of "prudential standing" fails for the same reasons. *Cf.* Def. Mem. at 8 n.6.

28, 2008) (allowing a potential victim to pursue separate litigation against wrongdoer concurrently with Government's forfeiture proceedings). This is bolstered by the fact that any stay imposed would be too indefinite. The Government has indicated in its press releases regarding the status of the forfeiture proceedings that it "will take some time" before any funds will be available for distribution. The clear prejudice that a stay would inflict on Plaintiffs and the Class as well as the indefinite length of any stay imposed requires denial of Bank of America's request.[12]

C. Bank of America's Request for a Stay Pending Resolution of its Motion to Dismiss is Not Warranted.

"The right to proceed in court should not be denied except under the most extreme circumstances." *Klein v. Adams & Peck,* 436 F.2d 337, 339 (2d Cir. 1971). Bank of America has not demonstrated any extreme circumstances justifying imposition of a stay pending resolution of the motion to dismiss. Considering the stage of the litigation, the chance that Bank of America would be put to any hardship by allowing the case to move forward pending resolution of Bank of America's motion to dismiss is slim. Because of difficulty encountered serving some of the Defendants, the parties have not yet been able to hold a Rule 26(f) conference necessary to even commence discovery. Plaintiffs have now served all of the Defendants and can move forward with the Rule 26(f) conference. Briefing will be complete on Bank of America's motion to dismiss by July 30, 2009. By the time the parties hold the Rule 26(f) meeting, prepare a Rule 26(f) report, and serve, object, and meet and confer regarding discovery issues, it is likely the Court will have ruled before Bank of America has been required

[12] Bank of America's contention that the Government's investigation will hinder the parties' ability to engage in discovery in the present litigation is without merit. Bank of America is in possession of much of the relevant information to this litigation, especially with respect to Plaintiffs claims against Bank of America.

to expend significant resources dealing with discovery issues. Accordingly, in the unlikely event that the Court grants Bank of America's motion to dismiss, any time and effort spent by Bank of America on the scant amount of discovery that will have occurred up to that point does not outweigh the prejudice to Plaintiffs.

Despite the cavalier tone of Bank of America's argument, it is not a foregone conclusion that the Court will issue an order granting Bank of America's motion to dismiss. Indeed, Bank of America's blatant misrepresentation of the facts alleged by Plaintiffs in support of their claims justifies denial of the stay on that basis alone. Bank of America's representations to the Court that Plaintiffs have based their claims against Bank of America on "two simple facts" and that "Plaintiffs have not pled that any one at Bank of America knew that ASD was operating a Ponzi scheme or that any one at Bank of America aided and assisted ASD in perpetuating the scheme" exceed the realm of zealous advocacy. *See* Def. Mem. at 1. Plaintiffs have alleged in substantial detail facts supporting the Bank of America's knowledge and substantial assistance provided to the RICO Defendants to perpetrate their fraudulent scheme.

Plaintiffs have alleged facts sufficient to withstand Bank of America's motion to dismiss their claims for aiding and abetting breach of fiduciary duty and fraud. The conduct of the RICO Defendants established a fiduciary relationship with their members. Plaintiffs allege that the RICO Defendants center much of their marketing campaign on the reputation and experience of Bowdoin, represent that Bowdoin been involved in several successful businesses over the last 45 years, and stress that ASD is their chance to "lock arms" with Bowdoin to benefit from his impeccable reputation. (FAC,¶ 37) Plaintiffs further allege that Bowdoin and other ASD managers conduct weekly webinars in an effort to provide guidance and training to optimize their ASD membership. (*Id.* at ¶ 41) These facts are sufficient to withstand motion to dismiss.

See Masztal v. City of Miami, 971 So.2d 803, 809 (Fla. Ct. App. 2007) (*quoting Quinn v. Phipps,* 113 So. 419, 421 (Fla. 1927)) (describing elements necessary to show fiduciary duty).

Again, contrary to Bank of America's conclusory and unsupported contentions, Plaintiffs have alleged facts sufficient to show Bank of America's knowledge of the underlying wrong and efforts to provide substantial assistance to the RICO Defendants. The facts alleged by Plaintiffs demonstrating Bank of America's knowledge of the RICO Defendants' underlying wrongful conduct. For example, Bank of America was aware of the daily transactions involving millions of dollars moving in, out and between Bowdoin's various accounts. (*Id.* at ¶ 86) This alone was sufficient to put Bank of America on notice and trigger an investigation under applicable banking laws and regulations. Indeed another bank at which Bowdoin maintained an account was triggered by the suspicious activity surrounding his transactions, conducted an investigation, and closed Bowdoin's account on suspicion he was operating a Ponzi scheme.[13] Bank of America knew of ASD's and Bowdoin's illegal conduct and did not just look the other way, but actively facilitated the fraudulent scheme.

Bank of America's claim of ignorance is also severely undercut by Plaintiffs' allegations that the Bank of America branch manager in Quincy and several of her staff members went to work directly for the RICO Defendants. (*Id.* at ¶88) These Bank of America employees worked after-hours, on-site at ASD's office assisting the RICO Defendants in managing and processing

[13] Likewise, a bank recently suspended or closed the accounts of Adview Global due to excessive wire transactions exceeding $9500. AVG is the next iteration of the Ponzi scheme auto-surf programs, which staffed with former ASD executives and Bowdoin disciples, including George Harris, the stepson of Bowdoin, who is listed as an AVG trustee, Gary Talbert, former ASD executive served as CEO of AVG and now serves as an accountant, Nate Boyd, a former compliance officer at ASD, serves as "Protector" of the AVG association, and Chuck Osmin, a former ASD employee who testified on ASD's behalf at the evidentiary hearing before this Court last fall is a customer service representative of AVG. *See* http://patrickpretty.com/2009/03/24/breaking-news-avg-loses-banking-privileges/

large numbers of financial transactions. (*Id.*) Plaintiffs also alleged a number of facts demonstrating examples of how Bank of America ignored, eased or went beyond its typical banking services and procedures. (*Id.* at ¶¶ 66-91) These allegations are more than sufficient to withstand Bank of America's motion to dismiss.

The direct involvement of Bank of America's employees in assisting with the operation of ASD's scheme is sufficient to establish actual knowledge. *See In re First Alliance,* 471 F.3d 977, 994-95 (9th Cir. 2006). In the alternative the allegations of the atypical banking services provided by Bank of America to Bowdoin and ASA demonstrate knowledge of the wrongful conduct. In *Neilson v. Union Bank of California*, 290 F.Supp.2d 1101 (C.D. Cal. 2003), the Court found this sufficient to support the general allegations of knowledge. Importantly, the Court continued:

> While it is true the complaint does not directly state that the Banks knew Slatkin was running a Ponzi scheme and stealing investor funds, this is the net effect of allegations that the Banks knew of Slatkin's "fraud," "actively participated" in the Ponzi scheme with knowledge of his "crimes," and accommodated him by using atypical banking procedures to service his accounts.

Id. at 1121.

Similarly Plaintiffs produced sufficient evidence to withstand a motion to dismiss establishing that Bank of America substantially assisted the RICO Defendants in perpetuation of their fraud and breach of fiduciary duty. (*See, e.g.,* FAC, ¶¶ 70, 72, 89-91) As Bowdoin has admitted ASD was never a legitimate business, but rather an illegal Ponzi scheme. Essentially ASD was a sham from the start designed to defraud its members and make its owners and operators rich. *In re First Alliance*, 471 F.3d at 995 (knowingly providing assistance to a business built on a "house of cards" is sufficient to demonstrate substantial assistance).

Clearly, Bank of America is unlikely to prevail on its motion to dismiss. Moreover, Bank of America cannot and has not demonstrate any extraordinary circumstances justifying staying

this litigation pending resolution of Bank of America's motion to dismiss. Bank of America's motion for imposition of a stay should be denied.

IV. CONCLUSION

Based on the foregoing, Bank of America's Motion to Stay should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Points and Authorities in Opposition of Motion to Stay was served this the 29th day of June, 2009 via the Court's electronic filing system upon the following counsel in the manner indicated below:

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