UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIKE COLLINS, FRANK GREENE, and NATURES DISCOUNT, INC., Individually and on behalf of all others similarly situated, Plaintiffs, v. ADSURFDAILY, INC., BANK OF AMERICA, N.A., THOMAS ANDERSON BOWDOIN, JR., WALTER CLARENCE BUSBY JR., and ROBERT GARNER, Defendants.	Civil Division Case No.: 1:09-cv-00100-RMC

DEFENDANT BANK OF AMERICA, N.A.'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO STAY

Douglas K. Spaulding
Michael B. Roberts
Reed Smith LLP
1301 K. Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
(202) 414-9200 telephone
(202) 414-9299 facsimile

Mary J. Hackett
Sharon L. Rusnak
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3250 telephone
(412) 288-3063 facsimile

Attorneys for Defendant
BANK OF AMERICA, N.A.

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

A. Plaintiffs Offer No Compelling Reason Why This Case Should Not Be Stayed Pending Disbursement of $80 Million in Forfeited Assets to Former ASD Members Through the Civil Forfeiture Laws 3

B. Plaintiffs Cannot Ignore Their Prior Efforts to Ride the Coat Tails of the Forfeiture Proceeding to Avoid a Stay Here 5

C. A Stay Pending Resolution of Bank of America's Motion to Dismiss Is Warranted 6

CONCLUSION 8

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INTRODUCTION

Bank of America, N.A. ("Bank of America") is seeking a stay of this case for several, independent reasons. First, the Government is pursuing an *in rem* civil forfeiture action involving property of ASD[1] and others including approximately $80 million previously held in accounts at Bank of America. See Forfeiture Proceeding, Docket Entry No. 1, Complaint ¶¶ 4-5; Docket Entry No. 68, Proof of Service.[2] The Department of Justice ("DOJ") has advised the public that compensation to former ASD members for losses will be accomplished by distributing the forfeited assets. A stay to permit the DOJ to complete this process is appropriate, and likely will render this case moot. Second, in addition to seizing all of ASD's assets, the Government seized evidence as well, and thus a brief stay is necessary until resolution of the Forfeiture Proceeding to avoid compromising the proceedings here. Finally, Bank of America moved to dismiss Plaintiffs' amended complaint, and a stay — particularly of discovery — is warranted pending resolution of that motion.

Despite their twenty-two page opposition brief, Plaintiffs offer nothing of substance to oppose a stay. First, Plaintiffs do not (and cannot) dispute that the DOJ's asset distribution process in connection with the Forfeiture Proceeding aims to accomplish the same result as the purported claims in this litigation — *i.e.,* to reimburse Mike Collins, Frank Greene, Natures Discount, Inc. and others for money allegedly lost as a result of their involvement with ASD. If

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[1] As used in the Amended Complaint, the term "ASD" includes AdSurfDaily as well as the related businesses AdSurfDaily Cash Generator, Golden Panda Ad Builder, and La Fuente Dinero.

[2] See United States v. 8 Gilcrease Lane, Quincy, Florida 32351, et al. & AdSurfDaily, Inc., Thomas A. Bowdoin, Jr., and Bowdoin Harris Enters., Inc., Civil Action No. 08-1345 (RMC) ("Forfeiture Proceeding"). While the Complaint in the Forfeiture Proceeding alleges $53 million in funds seized from Bank of America accounts, the Government's proof of service indicates that the amount is approximately $80 million.

the named Plaintiffs in this case have no damages, then they cannot pursue their claims here, let alone act as lead plaintiffs for a class of other similarly situated plaintiffs. Further, Plaintiffs' strained argument that they are somehow prejudiced by allowing the reimbursement process to run its course because this case allows them to pursue money without the DOJ's "stringent" requirements lacks any merit. See Plaintiffs' Opposition Brief ("Pl. Opp.") at pp. 16-17.

Second, despite reciting verbatim from the Forfeiture Proceeding complaint and hearing transcripts and, importantly, advising the Court that this case is "related" to the Forfeiture Proceeding, Plaintiffs now claim that the two cases are "different." In response to Bank of America's argument that the proceedings here will be prejudiced and compromised given the seizure of evidence in the Forfeiture Proceeding, Plaintiffs offer barely a footnote concluding that there is no prejudice because all the "relevant information" for the case will be from Bank of America. See Pl. Opp. Brief at p. 18 n.12. Certainly Plaintiffs will need more than deposit account statements to prove their claims. Under these circumstances, the Court should enter a brief stay of this case pending resolution of the Forfeiture Proceedings and disbursement of the forfeited assets to former ASD members.

Finally, sifting through the rhetoric, Plaintiffs' opposition confirms that a stay would also be appropriate while the Court considers Bank of America's Motion to Dismiss. Indeed, Plaintiffs' opposition essentially ***concedes*** that Bank of America only provided legitimate banking services to ASD, which is a fatal deficiency in Plaintiffs' claims (among others). Plaintiffs claim that because ASD is accused of being an alleged Ponzi scheme, this somehow transforms legitimate banking services into "substantial assistance for a criminal enterprise." See Pl. Opp. at p. 4 ("What might be legitimate business practices to a lawful enterprise becomes substantial assistance to a criminal enterprise like ADSURF"). But, as explained more fully below and in Bank of America's Motion to Dismiss papers, the law does not comport with Plaintiffs' theory. Accordingly, at a minimum, a stay until Bank of America's Motion to Dismiss is decided is necessary to avoid any undue burden and expense in prematurely litigating deficient claims.

ARGUMENT

A. Plaintiffs Offer No Compelling Reason Why This Case Should Not Be Stayed Pending Disbursement of $80 Million in Forfeited Assets to Former ASD Members Through the Civil Forfeiture Laws

Plaintiffs first claim that the DOJ's disbursement of the $80 million dollars in forfeited funds to the former ASD members is a "government bailout" of Bank of America. See Pl. Opp. at p. 2. Plaintiffs offer no authority for such a ridiculous argument. Congress enacted the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") so that the Government can recover and then forfeit property for the benefit of alleged victims in civil forfeiture proceedings such as the one pending before this Court. See 18 U.S.C. § 981(e)(6) (government is authorized to transfer forfeited property "as restoration to any victim of the offense giving rise to the forfeiture."). To that end, the DOJ has in its possession $80 million with which to compensate Plaintiffs here, to the extent that they had any loss as a former member of ASD.

Plaintiffs purport to represent the same people who could submit a claim for disbursement to the DOJ – that is, all persons who "have lost any money paid to ASD." See Amended Complaint ¶139. However, Plaintiffs claim that the $80 million dollars may not be enough to compensate former ASD members for their losses and demand that before a stay is entered, Bank of America provide information on the total losses of former ASD members. See Pl. Opp. at p. 2. This is the very point that a stay is needed – to determine if $80 million will moot the claims here – and particularly those of Plaintiffs Mike Collins, Frank Greene, Natures Discount, Inc. Further, Bank of America has no information to provide on alleged losses of ASD members – again, ASD simply maintained checking accounts with the Bank. The DOJ, however, has, or will have, this information – the DOJ is currently in the process of determining who among the former ASD members have losses.[3] It is also entirely plausible that some former

[3] See www.usdoj.gov/usao/dc/Victim_Witness_Assistance/adsurfdaily.html. The DOJ has created an online form available at this website for former ASD members to complete as a prelude to a petition for restitution of any funds previously provided to ASD and its related entities. A copy of this form was attached to Bank of America's Motion to Stay as Exhibit 1.

ASD members ***made money*** from the alleged scheme and the DOJ's individualized claims process under the civil forfeiture laws is the best venue to investigate and address such issues. Accordingly, a brief stay is necessary to permit the process to run its course.

In opposing the stay, Plaintiffs further claim that the DOJ is going to keep the $80 million in forfeited funds, despite the DOJ's explicit intention and efforts to date to disburse such funds to former ASD members. See Pl. Opp. at p. 15. In support of this incredulous argument, Plaintiffs cite to the "stringent guidelines" for reimbursement under the forfeiture laws – namely that a victim must be able to substantiate – under oath – a loss. Because of such onerous requirements, Plaintiffs claim that it is clearly the DOJ's intent to keep the funds and therefore Plaintiffs should pursue recovery here. See id. at p. 17. Plaintiffs also offer their misperception that it will be much easier for them to prove damages here than to substantiate a loss under oath to the DOJ. Plaintiffs miss the point. To the extent that Plaintiffs are unable to substantiate a loss as former ASD members, it is dispositive as to whether they even have standing to assert any claims or to proceed as lead plaintiffs here.

Finally, Plaintiffs claim that there is a "preference" under the civil forfeiture laws that plaintiffs institute actions to independently seek restitution. In support of this proposition, Plaintiffs cite to one Nevada case which does not involve Plaintiffs' advocated interpretation of the civil forfeiture laws. Rather, the case involved a criminal forfeiture proceeding and a determination of a third party's potential interest in the criminally forfeited property. See United States v. Power Co. Inc., No. 2:06-CR-00186, 2008 WL 612207, at *2 (D. Nev. Feb. 28, 2008). Plaintiffs' support for their proposition in the language of the forfeiture laws fares no better. Indeed, as set forth in Bank of America's moving brief, the civil forfeiture laws specifically provide that a victim is prohibited from obtaining a double-recovery for the same alleged loss. See 28 C.F.R. § 9.8(f).[4] While the language of 28 C.F.R. § 9.8(f) is unambiguous, Plaintiffs

[4] See 28 C.F.R. § 9.8(f): *Reimbursement*. Any petitioner granted remission pursuant to this part shall reimburse the Assets Forfeiture Fund for the amount received to the extent the individual later receives compensation for the loss of the property from any other

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argue that the statute demonstrates a preference for seeking relief in civil proceedings first before seeking recovery under the civil forfeiture laws. Nothing in the language of the statute comports with Plaintiffs' interpretation.

B. Plaintiffs Cannot Ignore Their Prior Efforts to Ride the Coat Tails of the Forfeiture Proceeding to Avoid a Stay Here

Plaintiffs initially filed this action in Florida federal court. See Natures Discount v. Bowdoin, AdSurfDaily, et al., No. 4:08-cv-00516-RH-WCS (N.D. Fla.). After the Government filed the pending Forfeiture Proceeding, Plaintiffs wasted no time in voluntarily dismissing the Florida action and promptly re-filed it here, claiming that this action is "related" to the Forfeiture Proceeding. See Docket Entry No. 2. Moreover, Plaintiffs claim that this action "grows out of the same events and transactions" as the Forfeiture Proceeding. See Amended Complaint ¶11; see also id. at ¶108 ("[t]he facts and alleged offenses in the related forfeiture proceedings are the same …").

However, faced with a stay of this action pending resolution of the related Forfeiture Action, Plaintiffs now claim that the two cases are "fundamentally different." Plaintiffs further claim that because the actions are not wholly "duplicative" a stay may not imposed. Plaintiffs again miss the point. Given that the DOJ has implemented a process to disburse nearly $80 million in forfeited assets to former ASD members for the same losses which are alleged here, a stay to allow the process to be completed is warranted, particularly where as here, the claims will most likely be rendered moot. See, e.g., Craggs Constr. Co. v. Fed. Ins. Co., No 6:06-cv-682-Orl-18JGG, 2007 WL 1452938 (M.D. Fla. May 15, 2007) (granting a motion to stay for a limited period because pending state litigation might render the federal claims moot).

Moreover, given that the Government seized ASD's records as well as its assets in the Forfeiture Proceeding, permitting this case to go forward without the ability to discover those

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source. The petitioner shall surrender the reimbursement upon payment from any secondary source.

records here will prejudice and compromise the proceedings. Plaintiffs' sole argument on this point is that the only "relevant information" is information held by Bank of America. See Pl. Opp. at p. 18 n.12. Plaintiffs have taken extraordinary efforts here to align this case with the Forfeiture Proceedings, and cannot now escape by claiming that such information is irrelevant to their claims here. Indeed, these proceedings will be severely compromised because of the Parties' inability to initiate discovery in the usual course and build their respective cases in chief. Accordingly, a stay to permit the Forfeiture Proceeding to conclude is thus warranted.

C. A Stay Pending Resolution of Bank of America's Motion to Dismiss Is Warranted.

Plaintiffs concede here that Bank of America provided legitimate banking services to ASD. Indeed, Plaintiffs "accuse" Bank of America of activities such as "opening 15 separate dba accounts" as well as providing ASD with "deposit and pay out capabilities" (i.e., checks). See Pl. Opp. at p. 3. Plaintiffs' liability theory rests on the notion that since ASD was later accused of being an alleged Ponzi scheme, these legitimate banking activities morph to something untoward. However, the law is simply inapposite to Plaintiffs' theory.

In this case, it is not enough to plead that Bank of America allowed ASD to conduct banking activities. Moreover, it is insufficient to allege that Bank of America *should have known* that the RICO Defendants' conduct was wrongful. Rather, the complaint must allege that Bank of America had *actual knowledge* of the wrongful conduct and intentionally assisted the alleged breach of fiduciary duty and/or fraud. See Rosner v. Bank of China, No. 06-CV 13562, 2008 WL 5416380, at **15-16 (S.D. N.Y. Dec. 18, 2008) (granting motion to dismiss where plaintiff failed to plead facts that support the conclusory allegation that the bank had actual knowledge of and substantially assisted its customer's alleged scheme). Moreover, a bank's alleged ignorance of "red flags" as to customer activities does not equate to actual knowledge of the fraud. See id. at *6.

Given the fatal deficiencies in Plaintiffs' amended complaint, a stay of this case, and particularly a stay of all onerous and expensive discovery, is warranted until the Court

determines whether Plaintiffs have even stated a claim here. See, e.g., DSM Desotech Inc. v. 3d Sys. Corp., No. 08-CV-1531, 2008 WL 4812440, at *2-*3 (N.D. Ill. Oct. 28, 2008) (granting motion to stay discovery pending resolution of a motion to dismiss, and noting that "stays are granted with some frequency.").

Plaintiffs' opposition does not appear to disagree in some respect with this proposed stay. While Plaintiffs spend the majority of their energy opposing Bank of America's Motion to Dismiss here, with respect to a stay, Plaintiffs note that, in terms of timing, a ruling is likely to occur prior to any discovery anyway. See Pl. Opp. at p. 18. Accordingly, this Court should enter a stay of all discovery until a ruling on Bank of America's Motion to Dismiss.

CONCLUSION

Because Plaintiffs' claims could be paid in full and rendered moot, Defendant Bank of America, N.A., respectfully requests that this action be stayed until resolution of the civil Forfeiture Proceeding and until such time as those assets are liquidated and disbursed to Plaintiffs. Alternatively, Defendant Bank of America requests that this Court stay this action until the Court rules on the Bank's Motion to Dismiss.

Respectfully submitted,

By: /s/ Michael B. Roberts
Michael B. Roberts
D.C. I.D. No. 976409
Douglas K. Spaulding
D.C. I.D. No. 936948
Reed Smith LLP
1301 K. Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
(202) 414-9200 telephone
(202) 414-9299 facsimile
mroberts@reedsmith.com

Mary J. Hackett
PA I.D. No. 51215
Sharon L. Rusnak
PA I.D. No. 84339
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3250 telephone
(412) 288-3063 fax

Attorneys for Defendant
BANK OF AMERICA, N.A.

DATED: July 20, 2009

CERTIFICATE OF SERVICE

I certify that on this 20th day of July, a true and correct copy of the foregoing Defendant Bank of America, N.A.'s Reply Memorandum and Points of Authorities in Support of Its Motion to Stay was electronically filed with, and is available for viewing on, the Court's electronic filing system and was served on the following counsel of record in the manner indicated below:

Steven N. Berk, Esquire
Berk Law LLC
1225 Fifteenth Street, NW
Washington, D.C. 20005
Via the Court's electronic service system

Jonathan W. Emord, Esquire
Emord & Associates P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Via the Court's electronic service system

Mark A. Chavez, Esquire
Lisa Fialco, Esquire
Chavez & Gertler LLP
42 Miller Avenue
Mill Valley, CA 94941-1904
Via U.S. First Class Mail

Andrew S. Friedman, Esquire
Francis J. Balint, Jr., Esquire
Kimberly C. Page, Esquire
Bonnett, Fairbourn, Friedman & Balint, P.C.
2901 N. Central
Suite 1000
Phoenix, Arizona 85012-2730
Via U.S. First Class Mail

Todd M. Schneider, Esquire
Garrett W. Wotkyns, Esquire
Schneider, Wallace, Cottrell Brayton Konecky LLP
180 Montgomery Street
Suite 2000
San Francisco, CA 94104-4207
Via U.S. First Class Mail

Robert Garner, Pro Se
P.O. Box 13002
Greensboro, NC 27415
Via U.S. First Class Mail

/s/ Michael B. Roberts
Michael B. Roberts
D.C. I.D. No. 976409
mroberts@reedsmith.com
Reed Smith LLP
1301 K. Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
(202) 414-9200 telephone
(202) 414-9299 facsimile