

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-62644-CIV-SCOLA/OTAZO-REYES

CARLOS ZELAYA, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO STAY DISCOVERY
AND PLAINTIFFS' MOTION TO COMPEL**

THIS CAUSE is before the Court upon Defendant's Motion to Stay Discovery [D.E. 50] and Plaintiffs' Motion to Compel the United States to Respond to Plaintiff's Discovery Requests (hereafter, "Motion to Compel") [D.E. 51]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Robert N. Scola, Jr., United States District Judge [D.E. 5, 33 & 62]. The undersigned held a hearing on the motions on February 14, 2013. In accordance with the undersigned's rulings in open court, the Motion to Stay Discovery is DENIED and the Motion to Compel is DENIED WITHOUT PREJUDICE based on the parties engaging in the targeted discovery prescribed herein.

I. BACKGROUND

On December 13, 2011, Plaintiffs filed this lawsuit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), §§ 2671-2680, seeking to hold the Securities and Exchange Commission ("SEC") liable for financial losses they suffered as a result of investing in a Ponzi scheme operated by Robert Allen Stanford [D.E. 1]. On September 7, 2012, the Court granted in part and denied in part Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Plaintiffs filed the Amended Complaint on September 21, 2012 asserting the sole FTCA claim that survived after the Court's Order [D.E. 39]. On September 24, 2012, Plaintiff served Defendant with their First Request for Production of Documents. On October 19, 2012, Plaintiffs served Defendant with their First Set of Interrogatories. Defendant served its responses to the First Set of Interrogatories on November 21, 2012 and the First Request for Production of Documents on November 27, 2012. On November 30, 2012, Defendant filed the Motion to Dismiss First Amended Complaint for Lack of Subject Matter Jurisdiction (hereafter, "Second Motion to Dismiss") [D.E. 47].

II. MOTION TO STAY DISCOVERY

Defendant is seeking an order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, staying discovery until such time as the Court rules on the Second Motion to Dismiss. Plaintiffs respond that the Southern District of Florida's discovery approach provides for a general denial of such motions, absent a showing of "prejudice or burdensomeness." Response to Motion to Stay Discovery [D.E. 54 at 2].

In deciding whether to stay discovery pending resolution of a motion to dismiss, the court "must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery." McCabe v. Foley, 233 F.R.D. 683, 685 (M.D. Fla. 2006). To this end, the court "must take a preliminary peek at the merits of a dispositive motion to see if it appears to be clearly meritorious and truly case dispositive." Id. (citation omitted). A stay may be warranted if the motion to dismiss is so clear on its face that there is "an immediate and clear possibility that it will be granted." Feldman v. Flood, 176 F.R.D. 651, 653 (M.D. Fla. 1997) (citation omitted).

Defendant contends that a stay will not prejudice Plaintiffs and that it would be subject to

a “considerable burden” in producing a vast amount of documents and records. However, any burden on Defendant can be alleviated by narrowing the scope of the discovery requests and adopting a sequential approach to the discovery process, pending a ruling on the Second Motion to Dismiss. Further, as announced at the hearing, the undersigned has undertaken a “preliminary peek” at the merits of the Second Motion to Dismiss and determined that it is not obvious that the motion will succeed. Therefore, having balanced the appropriate considerations and determined that the Second Motion to Dismiss is not “clearly meritorious and truly case dispositive,” the undersigned denies the Motion to Stay Discovery.

III. MOTION TO COMPEL

Plaintiffs are seeking to compel better responses to Interrogatory Nos. 1-8 and Request Nos. 1-2, 13-16. In Defendant’s Response in Opposition to the Motion to Compel, Defendant states that if discovery is not stayed it agrees to provide the names and contact information for the Fort Worth District Office staff members in connection with Interrogatory No. 1, subject to an appropriate protective order. See Response to Motion to Compel [D.E. 55 at n. 8]. In their Reply, Plaintiffs state that they are amendable to taking a deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure if Defendant agrees to respond in good faith to a notice of deposition and targeted document requests with the right to renew the motion to compel at a later date, if necessary. See Reply [D.E. 57 at 4]. Accordingly, the Motion to Compel will be denied without prejudice, subject to the terms set forth below.

IV. CONCLUSION

In accordance with the foregoing and the undersigned’s rulings in open Court, it is

ORDERED and ADJUDGED as follows:

1. The Motion to Stay Discovery [D.E. 50] is **DENIED**.

2. The Motion to Compel [D.E. 51] is **DENIED WITHOUT PREJUDICE** as to Request No. 1 and Interrogatory No. 6 based on Defendant's agreement to supply the names and contact information of the SEC Fort Worth District Office staff members in response to Interrogatory No. 1. Such information is hereby designated as "CONFIDENTIAL, FOR ATTORNEYS' EYES ONLY," and shall be provided to Plaintiff's counsel by February 19, 2013.

3. The Motion to Compel [D.E. 51] is **DENIED WITHOUT PREJUDICE** as to Request Nos. 2, 13-16 and Interrogatory Nos. 1-5, 7-8 subject to the following terms. Plaintiffs may notice a Rule 30(b)(6) deposition of the SEC, designating as categories the information sought in their discovery requests, but narrowed in terms of time, entity and scope as more fully explained at the February 14, 2013 hearing. Within one week of receipt of the Rule 30(b)(6) Notice of Deposition, Defendant may submit a letter to the undersigned setting forth any objections to the designated categories at the undersigned's e-file address, otazo-reyes@flsd.uscourts.gov. Plaintiffs may respond to any such objections, by the same means, within one week. Thereafter, the undersigned will rule on the objections or, if necessary, set a telephonic hearing to address them. The parties' letters will be appended to the Order on the objections.

The Rule 30(b)(6) deposition of the SEC shall be scheduled on a date that is mutually agreeable to the parties, and at a time when the undersigned will be available to rule on any disputes that may arise regarding its scope. To this end, counsel may contact Chambers to coordinate the deposition date. Further, the parties may submit a proposed confidentiality order prior to the deposition.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of February,
2013.



ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: Counsel of Record
United States District Court Judge Robert N. Scola, Jr.