



Michael J. McKleroy, Jr.

Akerman LLP
2001 Ross Avenue
Suite 2550
Dallas, TX 75201
Tel: 214.720.4300
Direct: 214.720.4319
Fax: 214.981.9339

June 15, 2015

VIA CM/ECF SYSTEM

Lyle W. Cayce, Clerk of the Court
U.S. Court of Appeals – Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 14-20532; *Bank of America, N.A. v. Fulcrum Enterprises, LLC*

Dear Mr. Cayce:

Appellee Bank of America, N.A. (**BANA**) hereby submits this letter brief in response to the May 29, 2015, letter submitted on behalf of appellant Fulcrum Enterprises, LLC (**Fulcrum**). For the reasons set forth below, BANA respectfully requests this Court remand this case to the district court for the limited purpose of permitting BANA to conduct discovery about the citizenship of the members of Fulcrum. *Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1228 (5th Cir. 1989) (where there is some reason to believe that jurisdiction exists, the Court may remand the case to the district court for amendment of the allegations and for the record to be supplemented).

In Fulcrum's May 29, 2015, it represents, for the very first time, one of its members was a citizen of North Carolina on the date this lawsuit was filed. BANA is also a citizen of North Carolina so, if Fulcrum's representation is true, diversity jurisdiction did not exist. Throughout this litigation, however, Fulcrum has consistently maintained diversity jurisdiction did exist. *See e.g.*, ROA.671; *see also* Fulcrum's April 15, 2015, letter brief filed in this Court.¹

¹ Even at oral argument, Fulcrum insisted this Court could accept the parties' stipulation that diversity of jurisdiction exists.
akerman.com

June 15, 2015

Page 2

Fulcrum just as consistently refused to respond to discovery about its members.² For instance, on September 20, 2013, BANA served on Fulcrum written discovery which requested, among other things, Fulcrum to:

Identify each person or entity who, during the Relevant Time Period, was or is: (a) an employee of Fulcrum; (b) an officer of Fulcrum; (c) a director of Fulcrum; (d) a manager of Fulcrum; (e) a member of Fulcrum; and (f) accepted payment of any kind for services performed on behalf of Fulcrum.³

Fulcrum was further requested to produce, among other things, all agreements Fulcrum had with the persons identified in response to the foregoing interrogatory.⁴

In response, Fulcrum provided no information or documents. Instead, Fulcrum asserted, on its behalf and on behalf of "[t]he individuals who might have responsive information and would verify any responses to this request," "the Fifth Amendment objection," and claimed the "request is not relevant and not reasonably calculated to lead to the discovery of admissible evidence."⁵

² Fulcrum is a Nevada limited liability company. *See* ROA.2406. Fulcrum is not required to disclose the identity or residence of its members simply by designating the limited liability company will be governed by one or more managers. *See e.g.* NRS 86.161(1)(d) (giving a limited liability company the option to disclose only the name and address of its manager "[i]f the company is to be managed by [] one or more managers" in its articles of organization); NRS § 86.263(1)(c)(d), (2) (annual filing requires identification of "[t]he names and titles of all of its managers or, if there is no manager, all of its managing members" and "[t]he address, either residence or business, of each manager or managing member listed, following the name of the manager or managing member.")

³ *See* Declaration of Michael J. McKleroy, Jr. ¶ 2, **Exhibit 1**; *see* Plaintiff's First Request for Admission, First Set of Interrogatories and First Request for Production of Documents to Defendant at Int. 45, **Exhibit 1-A**. The term "Relevant Time Period" is defined at page 3 of BANA's discovery requests as the "period of time beginning on January 1, 2010, through the date of trial."

⁴ *See* Plaintiff's First Request for Admission, First Set of Interrogatories and First Request for Production of Documents to Defendant at RFP 46, **Exhibit 1-A**.

⁵ *See* Declaration of Michael J. McKleroy, Jr. ¶ 2, **Exhibit 1**; *see* Fulcrum Enterprises, LLC's Responses to Plaintiff's First Request for Admission, First Set of Interrogatories and First Request for Production of Documents at Int. 45, **Exhibit 1-B**.

June 15, 2015

Page 3

BANA also requested the deposition of Fulcrum's corporate representative and designated certain topics upon which it desired testimony. *See* ROA.2360-ROA.2367. Among the topics BANA requested Fulcrum designate a representative to testify was "[e]ach owner, officer, director, employee or authorized agent of Fulcrum during the Relevant Time Period." ROA.2364.⁶ In response, Fulcrum again objected to this topic by asserting "the Fifth Amendment objection," and that it was "not relevant and not reasonably calculated to lead to the discovery of admissible evidence." ROA.2370.

Further, at the actual deposition itself, it was clear Fulcrum had not designated a representative who was knowledgeable—or even made an effort to become knowledgeable—about any of the topics requested. According to Lance Kerness, the representative designated by Fulcrum to testify at the deposition, he first became aware of the lawsuit filed by BANA three days before the deposition. ROA.2420.⁷ He had no idea why Fulcrum was being sued by BANA in the lawsuit, and was not even generally aware of the allegations being made. ROA.2420. Nor did he make any effort to educate himself; he testified he did not talk to anybody—not even Allan Groves—about any of the topics listed in the deposition notice, or review any documents. ROA.2418-ROA.2419.⁸ As Kerness put it, his preparation "to testify about the topics listed in the deposition notice" consisted of "[flying] down here on the airplane." ROA.2416-ROA.2417. Not surprisingly, Kerness was unable to identify any person who had an ownership interest in Fulcrum. ROA.2408.⁹

Because Fulcrum never contested the diversity of the parties (and because it had sufficient evidence to obtain judgment on its claims as a matter of law), BANA did not move to compel responses to this discovery. Without such discovery, BANA lacks sufficient information to confirm the veracity of Fulcrum's recent

⁶ Again, the term "Relevant Time Period" was defined as the "period of time beginning on January 1, 2010, through the date of trial." ROA.2363.

⁷ Kerness testified the "first time [he] became aware of this lawsuit" was "[w]hen Allen [*sic*] [Groves] called me up to come down to Texas for this deposition" on "Tuesday of this week." ROA.2420. The deposition occurred on Friday, November 1, 2013. ROA.2403.

⁸ This is particularly troubling given Kerness's admission Allan Groves had more knowledge about Fulcrum than he did. ROA.2414-ROA.2415.

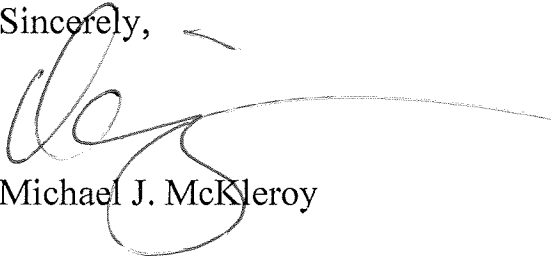
⁹ Kerness was unable to identify any person who had any affiliation with Fulcrum other than Allan Groves, and he claimed he did not even know how Allan Groves was affiliated with Fulcrum. ROA.2407-ROA.2408.

June 15, 2015

Page 4

representation. Because there is at least some reason to believe diversity of citizenship exists, this Court should remand this case to the district court for the limited purpose of permitting it to conduct discovery regarding the identity and citizenship of Fulcrum's members.

Sincerely,



Michael J. McKleroy

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of this document was served on June 15, 2015, as follows:

Jeremy J. Gaston
Hawash, Meade, Gaston, Neese & Cicack LLP
2118 Smith Street
Houston, TX 77002
VIA CM/ECF SYSTEM

/s/ Michael J. McKleroy, Jr.

Michael J. McKleroy, Jr.