

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:07cv11

ELENA M. DAVID; ARLEEN J. STACH; and
VICTOR M. HERNANDEZ,

Plaintiffs

Vs.

ORDER

J. STEELE ALPHIN; AMY WOODS
BRINKLEY; EDWARD J. BROWN, III;
CHARLES J. COOLEY; RICHARD M.
DeMARTINI; BARBARA J. DESOER;
JAMES H. HANCE; LIAM E. McGEE;
EUGENE M. McQUADE; ALVARO G.
de MOLINA; MICHAEL E. O'NEILL;
OWEN G. SHELL, JR.; R. EUGENE
TAYLOR; F. WILLIAM VANDIVER, JR.;
BRADFORD H. WARNER; CHARLES W.
COKER; STEVEN JONES; KENNETH D.
LEWIS; BANK OF AMERICA
CORPORATION; BANK OF AMERICA
CORPORATION CORPORATE
BENEFITS COMMITTEE,

Defendants.

THIS MATTER is before the court on defendants' Motion to Stay Discovery as to Issues of Market Timing Involving Bank of America and Its Affiliated Mutual Funds (#127). The court has carefully considered defendants' motion, plaintiffs'

well-argued response, and defendants' reply.

In brief, defendants seek a very short stay of discovery on but one of the matters at issue in this action, to wit, discovery related to plaintiffs' claims concerning mutual fund market timing. Defendants have shown that such issue is now before the Judicial Panel on Multidistrict Litigation (MDL-1586), which was created to avoid "duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." Order of the Judicial Panel, MDL-1586 (and others). According to defendants, a settlement in that action proposes to release claims related to market timing; such settlement is awaiting judicial approval; and, a hearing in the matter is scheduled before the Judicial Panel for September 2009. If such settlement is approved, the issue for the parties and the court in this case would be whether plaintiffs' market timing claims herein can proceed. In response, plaintiffs object to the proposed stay arguing that discovery on market timing is important to their claims asserted herein.

Determination of defendants' request for a limited stay is governed by the proportionality standard found in Rule 26(b)(2)(C), which provides, as follows:

- (C) When Required.** On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
 - (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that

- is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C). In this case, it appears that substantially similar discovery and resolution of issues of market timing are ongoing before the Judicial Panel on Multidistrict Litigation. Thus, discovery in this action would be duplicative. Further, the court notes that the Judicial Panel has already determined that scarce judicial resources may be saved through consolidated discovery in that forum. Thus, the court gives full faith and credit to the previous determination of the Judicial Panel that discovery in that forum would be more convenient, less burdensome, and less expensive. Under Rule 26(b)(2)(i), it appears that discovery on issues of market timing can be obtained more economically from the MDL forum. Further, it would appear that the Judicial Panel is on the cusp of either approving or disapproving an agreement that may well impact whether plaintiffs herein can go forward on their claims related to market timing.

The court has also considered the scope and length of the proposed stay. The proposed stay is limited to a discreet issue in the this case and that discovery efforts

in this matter can continue as to all other issues. The proposed stay will be of limited duration inasmuch as the Judicial Panel has scheduled a hearing for September 2009.

Having found that discovery is ongoing before the Judicial Panel, that a settlement is pending, that the proposed stay is limited to a discreet issue and is of limited duration, the court finds that the proposed stay is proportional under Rule 26(b)(2)(C) and the proposed stay will be allowed.

ORDER

IT IS, THEREFORE, ORDERED that defendants' Motion to Stay Discovery as to Issues of Market Timing Involving Bank of America and Its Affiliated Mutual Funds (#127) is **GRANTED**, and discovery is **STAYED** as to issues related to market timing involving Bank of America and its affiliated mutual funds pending resolution by the Judicial Panel on Multidistrict Litigation (MDL-1586) of the proposed settlement related to market timing.

IT IS FURTHER ORDERED that within 60 days of entry of this stay or issuance of a pertinent Order by the Judicial Panel, whichever first occurs, counsel for defendants shall file with the court an appropriate motion to either dissolve or continue the stay, or for such other relief as counsel may deem appropriate in light of the Order of the Judicial Panel.

Signed: August 17, 2009

Dennis L. Howell

Dennis L. Howell
United States Magistrate Judge

