UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:19-cv-21724-BLOOM/MCALILEY

HAVANA DOCKS CORPORATION,

Plaintiff,

vs.

CARNIVAL CORPORATION d/b/a/
CARNIVAL CRUISE LINE, a foreign
corporation,

Defendant.
_____ /

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO STAY DISCOVERY

Plaintiff, Havana Docks Corporation ("Plaintiff"), hereby files its Response in Opposition to Carnival Corporation's ("Defendant" or "Carnival") Motion to Stay Discovery Pending a Ruling on the Motion to Dismiss (D.E. 36,) and states as follows:

INTRODUCTION

Carnival fails to show good cause for a stay of discovery. Carnival's Motion to Dismiss is unlikely to "entirely eliminate" the need for discovery. Thus, a stay would only serve to delay these proceedings and impede Plaintiffs' ability to efficiently prosecute its case. Moreover, Carnival fails to articulate with specificity any undue burden that is would supposedly suffer by responding to discovery while the Motion to Dismiss is pending. In fact, no discovery requests have been propounded on Carnival, making the request for a stay, at best, premature.

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

On May 2, 2019, Plaintiff, the owner of a certified claim to certain commercial waterfront property in the Port of Havana, Cuba (the "Subject Property"), sued Carnival under Title III of the LIBERTAD Act, which established a private right of action for money damages for any United States national who owns a claim to property that was confiscated by the Cuban Government on or after January 1, 1959 against any person who "traffics" in such property. *See* 22 U.S.C. § 6082.

On May 30, 2019, Carnival filed its Motion to Dismiss the Complaint, which was fully briefed on July 8, 2019. (*See* D.E. 17, 33, 39.) Carnival now moves to stay discovery pending a ruling on the Motion to Dismiss. This Motion to Stay should be denied.

MEMORANDUM OF LAW

"[A] stay of discovery pending the determination of a motion to dismiss is the exception rather than the rule." *Ray v. Spirit Airlines, Inc.*, No. 12-61528-Civ, 2012 WL 5471793, at *1 (S.D. Fla. Nov. 9, 2012) (Scola, J.). The local rules do not mandate an automatic stay of discovery at the outset of a case; rather, the presumption is that discovery will proceed as the Court considers a motion to dismiss. *See id.*; *Odes v. Harris*, 12-61561-CIV, 2013 WL 11942260, at *1 (S.D. Fla. Mar. 4, 2013). Rule 26 of the Federal Rules of Civil Procedure confirms this presumption: it provides that discovery commences after the parties complete their Rule 26(f) conferral without regard to the deadline to respond to the complaint or to the resolution of a motion to dismiss. *See* Fed. R. Civ. P. 26(d).

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

A review of this Court's jurisprudence indicates that it is in line with Rule 26 and the general practice to deny motions to stay discovery absent extraordinary circumstances. *See, e.g.*, *Hicks v. Comcast Cable Commc'n, LLC*, No. 18-CV-61384, 2018 WL 6573121, at *5 (S.D. Fla. Dec. 13, 2018) (Bloom, J.); *United States ex rel. Carmen Medrano v. Diabetic Care RX, LLC*, No. 15-CV-62617 (D.E. 99) (S.D. Fla. Nov. 20, 2018) (Bloom, J.); *Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp.*, 232 F. Supp. 3d 1239, 1240 (S.D. Fla. 2017) (Bloom, J.); *Koppelman v. Galt Ocean Manor Condo. Ass'n, Inc.*, No. 16-CV-62175, 2016 WL 6777896, at *3 (S.D. Fla. Nov. 16, 2016) (Bloom, J.).

Carnival offers no compelling reason to depart from this standard practice. Plaintiff's Response to Carnival's Motion to Dismiss establishes two important issues that militate against a stay of discovery: (1) the "lawful travel" statutory exception will not "dispose of the entire case," (D.E. 36 at 3), as Carnival submits, because it is an affirmative defense that Carnival bears the burden to prove, in part, because "Carnival has unique access to its [OFAC] license and the application materials submitted for such license[,]" (D.E. 33 at 13), and (2) the LIBERTAD Act sounds in claims, not present ownership in property, and thus, Plaintiff's certified claim states a claim for relief, in addition to the fact that "the court shall accept [the certified claim] as conclusive proof of ownership of an interest in property . . . ." 22 U.S.C. § 6083(a)(1).

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

I. Carnival Has Failed to Show Good Cause for a Stay.

Carnival submits that there is good cause for a stay because its Motion to Dismiss, if granted, will dispose of the entire case, and even if the Motion to Dismiss is denied, the Court may limit discovery to "one or two factual issues that would be case dispositive." (D.E. 36 at 3.)

A. Carnival's Motion to Dismiss is Unlikely to "Entirely Eliminate" the Need for Discovery.

In assessing whether to stay discovery pending a ruling on a motion to dismiss, the Court should "evaluate whether there is a strong likelihood 'the [dismissal] motion will be granted and entirely eliminate the need for such discovery," necessitating a "'preliminary peek' at the merits of the motion." *Spirit Airlines*, 2012 WL 5471793, at *1 (quoting *Feldman v. Flood*, 176 F.R.D. 651, 652-53 (M.D. Fla. 1997)). "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." *Schreiber v. Kite King's Lake, LLC*, No. 2:10-CV-391, 2010 WL 3909717, at *1 (M.D. Fla. Oct. 1, 2010).

A stay is appropriate only if the motion to dismiss "appears to be clearly meritorious and truly case dispositive." *Feldman*, 176 F.R.D. at 652-53. "Ultimately, the proponent of the stay bears the burden of demonstrating its necessity, appropriateness, and reasonableness." *Spirit Airlines*, 2012 WL 5471793, at *1. A stay of discovery would be "grossly inappropriate," where "there is good reason to question whether Defendant will prevail on its motion to dismiss." *S.K.Y.*

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

Mgmt. LLC v. Greenshoe, Ltd., No. 06- 21722-Civ, 2007 WL 201258, at *2 (S.D. Fla. Jan. 24, 2007).

Carnival appears to suggest that the growing trend in the Eleventh Circuit is to stay discovery pending a ruling on a motion to dismiss. (*See* D.E. 36 at 3 (arguing that cases that have granted or denied a stay of discovery have "preceded the even more emphatic Eleventh Circuit cases cited above").) Yet, the cases Carnival cites are no more than a series of non-precedential decisions finding that a district court did not abuse its discretion by issuing a stay of discovery to ***pro se*** plaintiffs. *See, e.g.*, *Roverts v. FNB S. of Alma, Georgia*, 716 F. App'x 854, 855 (11th Cir. 2017) (*pro se* plaintiff); *Dragash v. Fed. Nat'l Mortgage Ass'n*, 700 F. App'x 939, 946 (11th Cir. 2017) (*pro se* plaintiff); *Rvas v. The Bank of N.Y. Mellon*, 676 F. App'x 926, 932 (11th Cir. 2017) (*pro se* plaintiff); *Redford v. Gwinnett Cty. Judicial Circuit*, 350 F. App'x 341, 343 (11th Cir. 2009) (*pro se* plaintiff); *Moore v. Potter*, 141 F. App'x 803, 807 (11th Cir. 2005) (*pro se* plaintiff).

Carnival cites to *Roman v. Tyco Simplex Grinnell*, 732 F. App'x 813, 815 (11th Cir. 2018) for the proposition that "a motion to dismiss for failure to state a claim *must* be resolved before discovery begins." (D.E. 36 at 3 (emphasis in Carnival's argument).) In *Roman*, however, the court found that the district court did not err in dismissing the ***pro se*** plaintiff's fourth amended complaint where the ***pro se*** plaintiff erroneously sought to "enter evidence into the record" for consideration at the motion to dismiss stage. 732 F. App'x at 815. The ***pro se*** plaintiff argued that the district court denied him the "opportunity to present his

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

case to a jury and enter evidence into the record." *Id.* The court stated that "a plaintiff's right to perform discovery and present his claims to a jury are not absolute." *Id.* Importantly, appellate review in *Roman* was not predicated on a motion to stay discovery. Instead, the Eleventh Circuit was faced with reviewing dismissal of a ***pro se*** plaintiff's fourth amended complaint where the district court "offered assistance to [the plaintiff]" but the ***pro se*** plaintiff seemingly could not conjure allegations that stated a claim for relief. *Id.*

Carnival also relies on a line of cases that ultimately dead end at *Chudasama v. Mazda Motor Co.*, 123 F.3d 1353 (11th Cir. 1997). *Chudasama*, however, "confronted a very specific situation involving a threefold problem—unjustifiable delay by the district court in ruling on the motion to dismiss, an erroneous decision to compel discovery from the defendant prior to adjudicating the motion to dismiss, and an especially dubious fraud claim that was likely to be dismissed." *Spirit Airlines*, 2012 WL 5471793, at *3.

In *Chudasama*, the Eleventh Circuit concluded that the district court abused its discretion through mismanagement of the case, in part by delaying a ruling on the motion to dismiss for over a year and a half while compelling discovery on a claim that "even the most cursory review" revealed was "novel and of questionable validity." 123 F.3d at 1368. Nowhere in the decision did the Eleventh Circuit address whether a stay of discovery was required or appropriate. "Instead, *Chudasama* and its progeny stand for the . . . proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

mount." *Koock v. Sugar & Felsenthal, LLP*, No. 8:09-CV- 609, 2009 WL 2579307, at *2 (M.D. Fla. Aug. 19, 2009) (citation and internal quotations omitted).

For these reasons, courts in this district have repeatedly rejected arguments—like those advanced here—that *Chudasama* announced "a broad rule that discovery should be deferred or stayed whenever there is a pending motion that is potentially dispositive." *3 Mimbs v. J.A. Cambece Law Office, PC*, No. 12-62200-Civ, 2013 WL 11982063, at *1 (S.D. Fla. June 13, 2013); *see also Bocciolone v. Solowsky*, No. 08-20200-Civ, 2008 WL 2906719, at *1 (S.D. Fla. July 24, 2008) (denying motion to stay discovery); *Spirit Airlines*, 2012 WL 5471793, at *3. To the contrary, district courts continue to be entrusted with "broad discretion over the management of pre-trial activities, including discovery and scheduling." *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1269 (11th Cir. 2001).

Further, a "preliminary peek" at the Complaint, Carnival's Motion to Dismiss and the Plaintiff's Response, reveal that Carnival's likelihood of success is nominal and that the harm to Plaintiff by delaying the prosecution of its case militate against a stay of discovery.

Unlike *Roman* and the other ***pro se*** plaintiff cases cited by Carnival, Plaintiff, which is represented by experienced counsel, has sufficiently pled the elements of a claim under the LIBERTAD Act case. The Response to Carnival's Motion to Dismiss identifies flaws in Carnival's argument. First, Carnival moves to dismiss the Complaint based on the "lawful travel" statutory exception. But this exception is an affirmative defense that Carnival bears the burden to prove. In

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

addition, the Response notes that the LIBERTAD Act sounds in **claims**, not present ownership in property. Indeed, Plaintiff lost its interest in the Subject Property when it was confiscated by the communist Cuban Government in 1960. At a minimum, Plaintiff's Complaint is a far cry from the "shotgun" complaint in *Chudasama*, which "even the most cursory review" revealed to be "especially dubious" and "of questionable validity." 123 F.3d at 1368. Staying discovery here—where there is good reason to doubt that Carnival will prevail on the arguments raised in its Motion to Dismiss—would be inappropriate.

The discovery that Plaintiff will seek from Carnival—including Carnival's Office of Foreign Assets Control ("OFAC") license, the application materials submitted for its OFAC license, and other documentation that identifies whether Carnival has complied with the terms of its license, the Code of Federal Regulations, and federal law—is indisputably relevant to the claims and defenses in this case. Although Plaintiff did not put Carnival's OFAC license at issue (as the license is not alleged in the Complaint), Carnival chose to do so by making the license central to its defense. (*See, e.g.*, D.E. 17 at 6 ("Because Carnival operated under an OFAC license, the travel-related services it provided were lawful.") Obtaining Carnival's OFAC license and documents submitted to OFAC in support of its application, and other documentation that identifies whether Carnival has complied with the terms of its license is necessary for Plaintiff to efficiently prepare its case within the case management deadlines set by the Court. *See Schreiber v.*

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

Kite King's Lake, LLC, No. 2:10-CV-391, 2010 WL 3909717, at *1 (M.D. Fla. Oct. 1, 2010) (denying motion to stay discovery).

In this case, the stay that Carnival seeks would unreasonably postpone discovery that will inevitably take place in this matter. Such delays can "create case management and scheduling problems and unfairly hold up the prosecution of the case." *Spirit Airlines*, 2012 WL 5471793, at *1; *see also Feldman*, 176 F.R.D. at 652 (stating that motions to stay discovery "'are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems.'" (*quoting Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988))). Discovery in this case is set to close on June 30, 2020. (*See* D.E. 29 at 2.) It follows that, because the Court already issued a discovery deadline, the Amended Scheduling Order does not contemplate delays associated with a stay or even with briefing a stay motion.

Under Carnival's logic, a stay would be warranted any time a plaintiff sought discovery relevant to its claims and anticipated defenses while a motion to dismiss was pending. That is simply not the case. Fed. R. Civ. P. 26(d), as well as this Court's Amended Scheduling Order, contemplate discovery proceeding while a motion to dismiss is pending. The likelihood that a stay will impede the just and expeditious resolution of this case weighs strongly against departing from the usual course here.

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

B. A Stay of Discovery Will Not Simplify the Case.

Carnival argues that the Court should grant its Motion to Stay because the Court's order on the Motion to Dismiss may limit the scope of issues that Plaintiff may seek discovery on. In support of its contention, Carnival cites to *Chico v. Dunbar Armored, Inc.*, No. 17-22701-CIV, 2017 WL 4476334, at *2 (S.D. Fla. Oct. 6, 2017). Carnival's reliance on *Chico* is misplaced. First, the procedural posture of *Chico* is entirely different than this case. No dispositive motion was pending in *Chico*; rather, the *Chico* defendants sought a brief stay of discovery (for less than a month), for the parties to participate in a settlement conference. *Id.* at *3. Second, the discovery in *Chico* consisted of 124 requests for production that seemingly had little to no relevance to the claims in the case. *Id.* at *3. In contrast, discovery requests have not yet been issued in this case.

In any event, a stay of discovery is unwarranted based on the *Chico* factors.

Early stage: Carnival's Motion to Dismiss has been fully briefed, and the Court has issued its Amended Scheduling Order. Accordingly, the litigation is not at such an early stage as suggested by Carnival.

Prejudice: A stay of discovery will prejudice Plaintiff in prosecuting this LIBERTAD Act case—the first of its kind in the United States. With the Court's discovery deadline (including expert discovery) of June 30, 2020, Plaintiff will require every bit of that time to obtain and evaluate the information in Carnival's possession to effectively prosecute its case within the deadline set by the Court.

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

Simplification: This is a one-count Complaint that is unlikely to be dismissed at the pleading stage; the issues will not be further simplified. Further, the fact that this is the first case brought under the LIBERTAD Act does not necessarily mean that the Court's order on the Motion to Dismiss will suggest to the Parties what discovery is relevant or effective. Carnival appears to request that the Court issue an advisory opinion as to the scope of discovery in this matter without Plaintiff having served discovery requests.

Burden: Carnival has suffered no burden at this time, as no discovery has been propounded on it. Carnival's speculation about burden or relevance objections it seemingly intends to make—without ever having received one discovery request—carries no weight at all. *Compare Chico*, 2017 WL 4476334, at *3 (imposing a stay where "Defendant has persuasively demonstrated that the anticipated cost and burden of the discovery process will likely far exceed the merits of Plaintiff's claim."). Put simply, Carnival is not in a position to know what—if any—objections it will assert in response to discovery.

II. A Stay Is Not Reasonable.

Carnival argues that a stay is reasonable because the Court's Amended Scheduling Order provides more than a year to complete discovery. Carnival's position fails to take into account that this is a case of first impression before any U.S. court. Indeed, the Parties' Joint Scheduling Report suggested that the case be placed on a "Complex Case Management Track" as the case presents "complex issues of first impression before any U.S. court, likely requiring discovery and

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

translation of documents maintained in foreign countries, including Cuba, and requiring over ten (10) days of trial." (D.E. 24 at 1-2.)

Finally, although Carnival states that "discovery here is likely to be especially burdensome," it fails to articulate why. Carnival notes that ***Plaintiff*** will have to pursue foreign discovery, but Plaintiff's burden is irrelevant to Carnival's Motion to Stay—Plaintiff is not seeking to stay discovery. Although Carnival makes a conclusory complaint that "there can be little doubt that discovery here will be quite burdensome," it provides no facts to support the statement. Carnival fails to make a specific showing supported by any relevant evidence that Plaintiffs' discovery requests, when they are issued, will represent a substantial burden. And Carnival fails to identify any particular burdens associated with commencing discovery at this time as opposed to waiting until after the Motion to Dismiss is adjudicated. Carnival's failure to articulate its burden with any specificity is fatal.

CONCLUSION

In sum, Carnival has failed to meet its burden of demonstrating exceptional circumstances that warrant departure from the usual course of discovery proceeding pursuant to Rule 26 while the Motion to Dismiss is considered. For the foregoing reasons, Plaintiff respectfully requests that the Court deny Carnival's Motion to Stay Discovery.

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

DATED: July 10, 2019.

Respectfully submitted,

COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134
Telephone: (305) 476-7400
Facsimile: (305) 476-7444
E-mail: eservice@colson.com

By: s/ Roberto Martinez
Roberto Martinez, Esquire
Florida Bar No. 305596
bob@colson.com
Stephanie A. Casey, Esquire
Florida Bar No. 97483
scasey@colson.com
Lazaro Fields, Esquire
Florida Bar No. 1004725
laz@colson.com

- and -

MARGOL & MARGOL, P.A.
2029 3rd Street North
Jacksonville Beach, Florida 32250
Telephone: (904) 355-7508
Facsimile: (904) 619-8741

Rodney S. Margol, Esquire
Florida Bar No. 225428
Rodney@margolandmargol.com

Attorneys for Plaintiff Havana Docks Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court. I also certify that the foregoing document is being served this 10 July 2019, on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Roberto Martinez
Roberto Martinez

Colson Hicks Eidson
255 Alhambra Circle, Penthouse, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444