**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

**CASE NO.: 19-cv-21724-BLOOM**

HAVANA DOCKS CORPORATION,

Plaintiff,

v.

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

Defendant.
_____/

# CARNIVAL CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STAY DISCOVERY PENDING A RULING ON ITS MOTION TO DISMISS

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The Eleventh Circuit has clearly, recently, and repeatedly expressed its preference that potentially case-dispositive motions to dismiss be decided prior to potentially costly and unnecessary discovery. *See, e.g.*, *Roman v. Tyco Simplex Grinnell*, 732 F. App'x 813, 815 (11th Cir. 2018); *Roberts v. FNB S. of Alma*, 716 F. App'x 854, 857 (11th Cir. 2017). These decisions make good sense: after all, the federal pleading rules contemplate that a well-pleaded complaint, not just any complaint, triggers discovery, *Carter v. DeKalb County*, 521 F. App'x 725, 728 (11th Cir. 2013), and waiting for a well-pleaded complaint to begin discovery can only save the parties and the Court time and resources. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). Nonetheless, Plaintiff insists that it is entitled to discovery to prosecute its wholly untested legal theory now. Not so. Under well-trodden precedent from the Circuit and this District, Carnival's motion to stay should be granted.

## ARGUMENT

### I. CARNIVAL HAS SHOWN GOOD CAUSE FOR A STAY

#### A. Carnival's Motion to Dismiss Is Case Dispositive, and Therefore, Discovery Should Be Stayed

As Carnival explained in its motion to stay, the Eleventh Circuit has repeatedly instructed that potentially dispositive motions should be decided prior to discovery. (*See* Dkt. 36 at 2-3.) For this reason, courts in this District have asked only whether a motion to dismiss is "[p]otentially dispositive" when considering a stay request. *See Solar Star Sys., LLC v. Bellsouth Telecomms., Inc.*, 10-21105-CIV, 2011 WL 1226119, at *1 (S.D. Fla. Mar. 30, 2011); *accord Fondo De Proteccion Soc. De Los Depositos Bancarios v. Diaz Reus & Targ, LLP*, 16-21266-CIV, 2016 WL 10952495, at *1 (S.D. Fla. Dec. 29, 2016). That is exactly the situation here: Carnival has filed a motion to dismiss, which if granted, would fully dispose of Plaintiff's lone claim. (*See* Dkt. 17.)

Plaintiff does not—and truthfully could not—dispute much of this analysis. Plaintiff does not contest that Carnival's motion to dismiss is potentially case dispositive. Nor does Plaintiff dispute that substantial Eleventh Circuit law provides that district courts should decide potentially dispositive motions prior to allowing discovery.

Instead, citing a two-decade-old Middle District of Florida opinion, Plaintiff claims that it does not matter if the motion is potentially dispositive because, on its view, a discovery stay is only appropriate if the motion to dismiss "appears to be clearly meritorious." (Dkt. 40 at 4 (quoting *Feldman v. Flood*, 176 F.R.D. 651, 652-53 (M.D. Fla. 1997)).) Applying this legal rule, Plaintiff claims a stay is not needed. (*Id.* at 7-9.) But Plaintiff is wrong twice over: *first*, its "clearly

meritorious and nothing else" legal rule is wrong, and, *second*, in any event, Carnival's motion to dismiss meets Plaintiff's unnecessarily high standard.

*1. A stay is warranted when a motion to dismiss could potentially resolve the whole case*

Starting with the legal rule, Plaintiff's position runs headlong into a series of Eleventh Circuit and District Court decisions. Indeed, contrary to Plaintiff's "clearly meritorious" rule, the Eleventh Circuit has repeatedly made clear that "in general, motions to dismiss for failure to state a claim 'should be resolved before discovery begins.'" *Roberts*, 716 F. App'x at 857 (quoting *Chudasama*, 123 F.3d at 1367); *see also Dragash v. Fed. Nat'l Mortgage Ass'n*, 700 F. App'x 939, 946 (11th Cir. 2017); *Stepanovich v. City of Naples*, 728 F. App'x 891, 903 (11th Cir. 2018); *Rivas v. The Bank of N.Y. Mellon*, 676 F. App'x 926, 932 (11th Cir. 2017). Indeed, the Circuit has recently gone a step further, and stated that "a motion to dismiss for failure to state a claim *must* be resolved before discovery begins." *Roman*, 732 F. App'x at 815 (emphasis added). Dutifully applying these cases, Courts in this District have stayed discovery when a motion to dismiss is "potentially dispositive." *Solar Star Sys.*, 2011 WL 1226119, at *1; *accord Landmark Equity Fund II, LLC v. Residential Fund 76, LLC*, 13-20122-CIV, 2013 WL 12144068, at *1 (S.D. Fla. Nov. 21, 2013); *see also DeBoskey v. SunTrust Mortgage, Inc.*, 8:14-CV-1778-MSS-TGW, 2016 WL 11504673, at *1 (M.D. Fla. Oct. 26, 2016).

Plaintiff does not—and cannot—explain how its "clearly meritorious" rule is consistent with these cases. Instead, Plaintiff attempts to wish away years of Eleventh Circuit case law by claiming that each case involved a *pro se* Plaintiff. (Dkt. 40 at 5-6.) But that is simply not true. For example, in *Stepanovich*, the Circuit repeated its rule that "motions to dismiss for failure to state a claim should be resolved before discovery begins" in a case that was counselled from the beginning. 728 F. App'x at 903 (internal citations and quotation marks omitted). Likewise, in *Solar Star Systems*, the Court stayed discovery pending a motion to dismiss in a counselled case because the motion to dismiss was "potentially dispositive." 2011 WL 1226119, at *1.

But in any event, the presence or absence of counsel is irrelevant. The Eleventh Circuit certainly did not cabin its decisions to *pro se* litigants, and Plaintiff points to no reason why it should be entitled to immediate discovery because it has the means to hire "experienced" counsel (Dkt. 40 at 7), while *pro se* parties should be forced to wait. To the contrary, the same rules govern *pro se* and counselled parties, *Grant v. Wachovia Mortgage FSB*, 09-60520-CIV, 2009 WL 10667045, at *1 n.1 (S.D. Fla. May 14, 2009), and accordingly, there is little reason to think that

the Eleventh Circuit implicitly adopted a *pro se* specific rule. More than that, if *pro se* status should matter at all in accessing discovery, it would seem that *pro se* litigants should have more of a right to immediate discovery, not less. After all, *pro se* parties are "held to less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and *pro se* parties are more freely given leave to amend than counselled ones, *Lee v. Alachua Cty.*, 461 F. App'x 859, 860 (11th Cir. 2012). Thus, if *pro se* status matters at all—and the Circuit has never said that it does—Plaintiff's distinction would cut the wrong way.

Retreating from its position that *pro se* status can distinguish away years of on-point case law, Plaintiff next claims that all of this contrary Eleventh Circuit law traces to *Chudasama*, which Plaintiff, citing a single 2012 District Court case, claims is distinguishable. (Dkt. 40 at 6-7.) But the Circuit Court has not distinguished *Chudasama* as Plaintiff suggests. Indeed, far from cabining *Chudasama* to its facts, the Circuit Court has repeatedly cited *Chudasama* for the general point that resolving motions to dismiss should generally precede discovery. *See, e.g.*, *Roberts*, 716 F. App'x at 857 (citing *Chudasama*, 123 F.3d at 1367); *Dragash*, 700 F. App'x at 946 (same). (*See also* Dkt. 36 at 2-3 (collecting cases).)

That makes sense because the efficiency rationale of *Chudasama* applies anytime a motion to dismiss could save the Court and parties from wasting time and money on unnecessary discovery. As the *Chudasama* Court explained, discovery imposes substantial costs on both parties and the courts. 123 F. 3d at 1367-68. These costs can potentially be avoided without causing any mischief by ruling on a purely legal motion to dismiss before discovery begins. *Id.* at 1368. After all, "[i]f the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided." *Id.* at 1368. Critically, and contrary to Plaintiff's circumscribed reading of *Chudasama*, this efficiency rationale applies anytime a non-meritorious claim is disposed of on a motion to dismiss. *Race v. Bradford Cty*, 3:18-CV-153-J-39PDB, 2019 WL 1755808, at *2 (M.D. Fla. Apr. 19, 2019)

For these reasons, recent case law runs against Plaintiff's position. For example, the Court in *Cook v. Taylor*, 2:18-CV-977-WKW, 2019 WL 1233853 (M.D. Ala. Mar. 15, 2019), rejected a near replica of Plaintiff's argument. There, counselled plaintiffs brought suit against Alabama challenging the State's rule that allowed driver's licenses to be suspended for failure to pay a traffic ticket. *Id.* at * 1. The State moved to stay discovery pending a ruling on its motion to dismiss. *Id.* In response, the plaintiffs argued that a stay was only proper if the motion to dismiss was "clearly

meritorious." *See* Pls.' Br. at 6, *Cook v. Harris*, 2:18-CV-977-WKW (M.D. Ala. 2019), ECF No. 33. The Court rejected the plaintiffs' argument. As the Court explained, although the plaintiffs cited scattered district court precedent for their test, "[t]he authorities that are binding . . . are those of the Circuit, and those authorities signal that the court should not allow discovery in the face of a pending motion to dismiss that tests the legal sufficiency of the complaint[.]" *Cook*, 2019 WL 1233853, at *2.[1]

Finally, without case law to turn to, Plaintiff claims that a stay is inconsistent with Rule 26 and this Court's Scheduling Order. (Dkt. 40 at 2, 9.) Not so. To begin, Rule 26 says nothing about how a motion to dismiss should impact the timing of discovery; it simply says that discovery generally cannot begin until a Rule 26(f) conference has occurred. Fed. R. Civ. P. 26(d)(1). But that silence is not an accident; instead, the sequencing of discovery after a valid complaint comes from the pleading rules, not from Rule 26. As the Supreme Court explained, "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). For this reason, "[t]he Eleventh Circuit has recognized repeatedly . . . that discovery follows a well pleaded complaint—not the other way around." *Gibbons v. McBride*, CV 114-056, 2014 WL 5460593, at *4 (S.D. Ga. Oct. 27, 2014). Nor does

[1] Plaintiff also contends that a stay is inconsistent with this Court's practices. (Dkt. 40 at 2.) But each case Plaintiff cites is distinguishable. In *Hicks v. Comcast Cable Commc'n, LLC*, No. 18-CV-61384, 2018 WL 6573121, at *5 (S.D. Fla. Dec. 13, 2018), this Court denied the Motion to Stay Discovery in the context of holding that the case would "proceed summarily to trial on the question of whether the Plaintiff entered into a valid agreement to arbitrate." "Given that the court [was to] conduct a factual finding regarding the issue of whether an arbitration agreement existed between the parties, the Court [found] that the granting of the Motion to Stay Discovery . . . would inhibit the Parties' ability to adequately prepare for the bench trial." *Id*. Plaintiff has pointed to no similarly pressing need for immediate discovery here. In *United States ex rel. Carmen Medrano v. Diabetic Care RX, LLC*, No. 15-CV-62617 (D.E. 99) (S.D. Fla. Nov. 20, 2018), the Defendant sought a Motion to Stay Discovery based on a pending criminal investigation. This Court denied the motion because no pending criminal proceeding existed and the Defendant could move "for a protective order with respect to specific requested discovery or testimony that may, in fact, elicit incriminating evidence." *Id*. at *4. Here, however, there is no overlapping criminal investigation. In *Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp.*, 232 F. Supp. 3d 1239 (S.D. Fla. 2017), this Court did not separately consider the Motion to Stay. Rather, the Motion to Stay was denied as moot when this Court denied the motion to dismiss. *Id*. at 1243. Finally, in *Koppelman v. Galt Ocean Manor Condo. Ass'n, Inc.*, No. 16-CV-62175, 2016 WL 6777896 (S.D. Fla. Nov. 16, 2016), unlike here, the Defendants had yet to file a motion to dismiss. *Id*. at *2.

this Court's Scheduling Order compel the rejection of a stay. To the contrary, the Scheduling Order says nothing about when discovery should begin—only when discovery should end. (*See* Dkt. 29.) Accordingly, the Scheduling Order says nothing about the sequencing of the motion to dismiss and discovery.

In the end, Plaintiff provides no reason to depart from the Eleventh Circuit's teachings: potentially case dispositive motions to dismiss should be resolved before discovery. *Roberts*, 716 F. App'x at 857. Because Carnival's motion is undoubtedly "potentially dispositive," a stay is proper. *Solar Star Sys.*, 2011 WL 1226119, at *1.

*2. Even if Carnival's motion must be "clearly meritorious," a stay is proper*

As explained, Plaintiff advocates an incorrect legal standard. But even granting Plaintiff's argument that only "clearly meritorious" motions to dismiss merit stays, Carnival satisfies this legal standard. Carnival has moved to dismiss on two grounds, both of which will fully dispose of the case.

*First*, Plaintiff did not—and cannot—plead that Carnival "trafficked" within the meaning of Helms-Burton because all of Carnival's travel was incident to lawful travel to Cuba. Plaintiff claims that this argument will not resolve the case because the "lawful travel" clause, on its view, is an affirmative defense. (Dkt. 40 at 7.) But, as Carnival explained in its reply brief supporting its motion to dismiss, the "lawful travel" clause is a definition of an element, not an affirmative defense, and therefore, must be pleaded. (*See* Dkt. 39 at 2-7.) Moreover, even if "lawful travel" is an affirmative defense, Plaintiff pleaded into the defense, and therefore, dismissal is still proper. (*Id.* at 8-10.) Plaintiff, despite having Carnival's reply when it filed its opposition to the stay (and even though it took a day beyond its deadline to file that opposition) says nothing about these points.

*Second*, and independently, Plaintiff's own Complaint conclusively shows that Carnival did not traffic in the same property to which Plaintiff owns a claim. As Carnival explained in its motion to dismiss, Helms-Burton requires that a plaintiff show that the defendant is trafficking in the same property to which the plaintiff owns a claim. (Dkt. 17 at 11-16.) Plaintiff cannot do that here because the property it owns a claim to is a time-limited concession to the Havana Docks, which expired in 2004. (*Id.*) Quite simply, because Plaintiff's claim covers only a property interest that expired in 2004, Carnival could not traffic in the property Plaintiff holds a claim to in 2016. (*Id.*)

In short, even applying Plaintiff's erroneous "clearly meritorious" standard, Carnival is entitled to a stay.

**B. A Stay Is Justified Apart from the Pending Motion to Dismiss**

Carnival's pending motion to dismiss fully justifies a stay under settled Eleventh Circuit law. But even if it did not, a stay is still justified. In the absence of a dispositive motion, Courts will grant a stay based on the following factors "(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Chico v. Dunbar Armored, Inc.*, 17-22701-CIV, 2017 WL 4476334, at *2 (S.D. Fla. Oct. 6, 2017) (quoting *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010)). Plaintiff disclaims *Chico* because "[n]o dispositive motion was pending" there. (Dkt. 40 at 10.) But that is exactly the point—although Carnival's potentially dispositive motion is sufficient for a stay—*Chico* shows that a stay would be proper even if there were no motion to dismiss. That is because, properly construed, all four *Chico* factors support a stay.

**Early Stage**: Plaintiff claims that the case is no longer at an early stage because the motion to dismiss is "fully briefed" and the Court has issued a Scheduling Order. (Dkt. 40 at 10.) But Courts in this District have found cases to be at their early stages even when discovery had already begun. *See JLIP, LLC v. Stratospheric Indus., Inc.*, 1461798CIVCOHNSELTZE, 2015 WL 11197779, at *3 (S.D. Fla. Feb. 25, 2015); *see also E-Z-GO (a division of Textron Inc.) v. Club Car, Inc.*, CV 109-119, 2010 WL 11610229, at *2 (S.D. Ga. Jan. 12, 2010) (litigation at early stage even though Rule 26 disclosures had occurred). That makes sense because in those cases, like this one, trial was "in distant view." *IP Co., LLC v. Tropos Networks, Inc.*, 1:06-CV-0585-CC, 2014 WL 12622444, at *2 (N.D. Ga. Mar. 5, 2014).

**Prejudice**: Next, Plaintiff claims it will be prejudiced by a brief discovery stay because it "require[s] every bit" of the year remaining in the discovery window to effectively prosecute its claims. (Dkt. 40 at 10.) But Plaintiff's own conduct belies that claim. For one, when Plaintiff proposed its own timeline for discovery, it told the Court it only needed nine months for fact discovery. (Dkt. 24 at 4.) More than that, Plaintiff's decision to refrain from serving discovery is flatly inconsistent with its professed need for "every bit of" time to conduct discovery. Regardless, Plaintiff's prejudice argument is premature. If it proves difficult for Plaintiff to timely get the

discovery it needs by the Court's deadline, then Plaintiff should have little trouble showing "good cause" to amend the schedule. Fed. R. Civ. P. 16(b)(4).

**Simplification**: Contrary to Plaintiff's assertion, there is every reason to think that the Court's order on the motion to dismiss will simplify discovery. That is not because, as Plaintiff suggests, Carnival has requested an advisory opinion. Rather, in the motion to dismiss, the Parties have teed up questions about the substantive meaning of Helms-Burton, which will impact which topics and documents are relevant for discovery. As one example among many, in its Opposition to the Motion to Dismiss, Plaintiff contended that under the "lawful travel" clause, it was relevant whether Carnival "violate[d] the law while sailing." (Dkt. 40 at 16.) In response, Carnival explained that such a free-ranging illegality inquiry was irrelevant under the Act because "the focus of the provision is not on whether Carnival violated the law while sailing, the question is whether the 'travel to Cuba' was lawful." (Dkt. 39 at 10.) If the Court reaches that issue in deciding the motion to dismiss, it could significantly simplify discovery by defining what the "lawful travel" clause means.

**Burden**: Finally, Plaintiff claims that deciding burden at this point is speculative because Plaintiff has yet to serve discovery.[2] But, Plaintiff has already indicated that it intends to seek burdensome discovery from Carnival, including "documentation that identifies whether Carnival has complied with . . . the Code of Federal Regulations[] and federal law" when it sailed. (Dkt. 40 at 10.) There is little doubt that this type of far-reaching inquiry will be quite burdensome. In any event, burden is a relative concept, and here, if Carnival is right about the motion to dismiss, any discovery will be "undu[ly] burden[some]" because it will concern a dismissed claim. *Staup v. Wachovia Bank, N.A.*, 08-60359CUV, 2008 WL 1771818, at *1 (S.D. Fla. Apr. 16, 2008) ("[D]iscovery should not commence until after the Court has issued a ruling on Defendant's Motion to Dismiss, because discovery is not needed for the resolution of this Motion and requiring discovery would impose an undue burden on the Defendant.").

Accordingly, all four *Chico* factors support Carnival, and a stay is justified.

## II. A STAY IS REASONABLE

Beyond showing good cause, Carnival has also shown that a stay here is reasonable. To begin, a short stay is unlikely to prejudice Plaintiff's prosecution of its case. After all, Plaintiff

[2] At most, Plaintiff's argument would be grounds to deny a stay without prejudice, so that Carnival can re-file once discovery is served.

still has almost a year to complete discovery, and thus, "should the case proceed, Plaintiff will have ample opportunity to conduct discovery." *Pierce v. State Farm Mut. Auto. Ins. Co.*, 14-22691-CIV, 2014 WL 12528362, at *1 (S.D. Fla. Dec. 10, 2014). Indeed, Plaintiff's own decision to refrain from serving discovery belies any claim that a short stay is unreasonable.

Besides inflicting little, if any, cost, a stay is also likely to garner significant benefits. For one, if Carnival is right and the case is dismissed, the stay will save the parties and the Court the time, resources, and energy that discovery would entail. *Chudasama*, 123 F.3d at 1367-68. Even if Carnival is wrong and this case continues on the merits, a stay will allow the motion to dismiss decision to clarify the permissible scope of discovery. Accordingly, "any resulting harm" that Plaintiff might suffer from a stay "is dwarfed by the potential benefits of preserved time, effort, and resources" that a stay would accomplish. *Bearden v. E.I. du Pont de Nemours & Co.*, 5:16-CV-158-LJA, 2016 WL 11301378, at *2 (M.D. Ga. Nov. 2, 2016).

Given these significant benefits, and exceedingly limited costs, Carnival has shown that a stay is reasonable.

## CONCLUSION

For the foregoing reasons, Carnival respectfully requests that the Court stay the case pending a ruling on its motion to dismiss.

Dated: July 17, 2019

Respectfully submitted,

By: *s/ Stuart H. Singer*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System on July 17, 2019.

By:*/s/ Stuart H. Singer*
Stuart H. Singer