IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

BETH SAFFER and ARTHUR ROBINS, individually and on behalf of others similarly situated,

Plaintiffs,

Case No. 50-2023-CA-015733

v.

SANDRA KLIMAS, an individual; ROBERT THOM aka ROB THOM, an individual; ANTHONY DiGENNARO, an individual; and ROBERT STERN aka BOB STERN, an individual,

Defendants.
_____/

OPPOSITION BY PLAINTIFFS TO MOTION TO STAY ALL DISCOVERY

Plaintiffs Beth Saffer and Arthur Robins, individually and on behalf of all others similarly situated, hereby respectfully file their opposition to the Defendants' motion for a blanket protective order staying all discovery ("Motion"), and claim and allege as follows:

I. PRELIMINARY STATEMENT

Yesterday, Plaintiffs separately moved to strike Defendants' Motion as a result of Defendants' egregious failure to adhere to the meet and confer certification requirements pursuant to Local Rule 4. This resulted in defense counsel filing an amended notice of hearing falsely claiming to have satisfied the certification requirements, when the record — discussed below — demonstrates that the core ground for relief advanced by the Defendants was never so much as ***disclosed*** in the email trail leading to the filing of the Motion. The entirety email trail was concealed from the

Court in the attachments to the Defendants' Motion, but Plaintiffs attach it for the Court's convenience now. *See,* Supplemental Botwin Declaration, Exhibit 1.

The foregoing is emblematic of why the Court should strike the Defendants' Motion, since it is obvious that proper conferencing was not held by Plaintiffs. Indeed, once the Defendants actually meet and confer with Plaintiffs as required by Local Rule 4, Plaintiffs are reasonably certain that Defendants will consensually withdraw their Motion considering controlling case law in this jurisdiction. Nevertheless, Plaintiffs now proceed to formally oppose Defendants' Motion and invite the Court's attention to the substantive reasons the Defendants' Motion is frivolous.

II. INTRODUCTION

The Defendants' Motion reflects an unfortunate lack of candor that is becoming commonplace on their part with respect to this high stakes lawsuit involving the Defendants' systematic fraudulent misconduct. Ignoring their own theft, fraud and deceit that Plaintiffs are prepared to demonstrate with documentary evidence, the Defendants ask this Court to stay ***all*** discovery on the grounds that they are ***"statutorily immune from suit."*** Motion, pages 4 (¶11) and 8 (emphasis added).

In reality, the Defendants' contention that they are ***"statutorily immune from suit"*** is a knowingly false statement on their part. Florida law has long held that condominium directors have never been ***"immune from suit"*** but instead enjoy ***limited immunity from liability*** for claims sounding in ordinary negligence. *See, e.g., Sonny Boy, L.L.C. v. Asnani,* 879 So.2d 25, 27 (Fla. 5th DCA 2004) (holding that condominium directors are "personally liable" where they act with "fraud, self-dealing and betrayal of trust"), and discussion, *post,* pp. 8, 9.

The Complaint on file in this matter includes ***only*** such claims of "fraud, self-dealing and betrayal of trust" and clearly goes far beyond claims of ordinary

negligence since the Defendants' misconduct here was and continues to be intentional and designed to hurt a class of Defendants well exceeding 1,000 homeowners in order to gain favor with the developers of a $200,000,000 real estate development ongoing within the community and to squeeze out "financially weak" residents.

To make matters worse, the Defendants ***grossly*** misstate the law regarding when Florida courts are willing to grant a stay of discovery and fail to cite (let alone recognize) controlling authority adverse to their Motion. Contrary to the Defendants' claims, granting a stay of all discovery is improper in cases where there is only a claim of ***immunity from liability,*** as opposed to cases involving ***immunity from suit.*** Condominium directors are never immune ***from suit*** but only enjoy limited immunity ***from liability*** in claims sounding in ordinary negligence. *Id.* What is inexcusable is that the Defendants actually misrepresented to this Court the holding of the one case they cited regarding the issue of litigation stays, *Bank of Am., N.A. v. De Morales,* 314 So. 3d 528, 530 (Fla. 3d DCA 2020), which the Defendants cited on pages 5 and 6 of their Motion. ***Specifically, the Defendants concealed from this Court the clear instruction of the Third DCA in De Morales that a stay may only "lie in cases where the immunity asserted is from litigation altogether, and not just from liability." Id., at 531 (emphasis added).***

As set forth in the Declaration of Plaintiff Beth Saffer, a 79 year old retired school teacher from New York, the theft, fraud and malfeasance of the Defendants threatens to displace hundreds of innocent homeowners who have nowhere else to go. Ms. Saffer attests to the Defendants' personal threats made directly to her and their admission of having diverted money, not to mention their open statements to the community that displacing residents of the community is one of their intentions.

Counsel for Plaintiffs have taken on this class action lawsuit *pro bono,* because it is obvious that serious harm will befall elderly Florida citizens due to the Defendants' desire to treat the condominium development as their own family business. This is not a case where Plaintiffs' counsel can honorably stand idly in the face of requests for a blanket stay order, because lives will be affected by such an incorrect result which will create delay in the search for truth that can only serve to further the Defendants' ongoing scheme. ***There is no reported case where a Florida judge has even attempted to stay discovery based upon a pending motion to dismiss invoking condominium directors' limited immunity from liability.***

The Motion should be denied.

III. RELEVANT BACKGROUND

The Complaint

As set forth in detail within the Complaint, this case involves significant malfeasance involving theft, fraud and betrayal of trust by four fiduciaries of a condominium association known as Number 2 Condominium Association – Palm Greens at Villa Del Ray, Inc. ("Association"). The Defendants are desperately hanging on to their directorships in the Association in the face of hundreds of signed recall petitions and residents clamoring for their resignations. The Defendants have involved themselves in misappropriating millions of dollars worth of assets after admitting to severe, ***intentional*** mismanagement of the Association resulting in assessments the Defendants admit are designed to squeeze out "financially weak" homeowners who have maintained their properties for decades. The Complaint specifically references the theft of at least $400,000.00, which the Defendants refuse to even address, let alone to work to return to the Association. *See,* Complaint, ¶¶ 1,

3, 4, 12, 13, 25 and 49.

When Plaintiffs began to take the Defendants to task regarding their intentional violations of fiduciary duty and malfeasance, two of them (DiGennaro and Thom) drove throughout the community and harassed homeowners including Mrs. Saffer by threatening that "this will cost you dearly." Saffer Declaration. In connection with a $200 million real estate development currently in construction on the grounds of the Association, the Defendants have formally approved of the developers' violation of a written contract entered into for the benefit of Plaintiffs and the Class they represent involving some $15 million of consideration otherwise owing directly to the benefit of the Class. *Id.*

The Propounded Discovery

Because of the Defendants' refusal to cooperate in furnishing any information to the homeowners in the Association, Plaintiffs are duty-bound to immediately pursue discovery to move this case to the quick resolution that will accompany the sweeping injunctive relief they will be seeking. Plaintiffs first propounded very basic document requests and noticed the deposition of Defendant Robert Stern.

The Defendants' Withdrawing Of Their First Objection

After the Defendants objected under the belief that Stern's deposition date was unmovable, Plaintiff's counsel El'ad Botwin made it clear that Plaintiffs would agree to take the deposition on ***any*** date convenient to Mr. Stern and his counsel. Specifically, Plaintiff's counsel said that defense counsel and Mr. Stern "may change the date of Mr. Stern's deposition to whatever you believe to be a more convenient date for your respective calendars." Supplemental Botwin Declaration, Exhibit 1 (highlighted in pink for convenience). In so doing, Mr. Botwin adhered to the policy

of his law firm — SMGQ of Miami, Florida — of always providing innumerable alternative dates and methodologies for proceeding with discovery. Mr. Botwin also offered to proceed with the deposition over Zoom application. *Id.*

The Defendants' Next, Frivolous, Objection

The Defendants did not furnish the Court with the full email trail between the parties, including the Defendants' back up position interposed once they realized that Plaintiffs were more than willing to agree to ***any*** date for Stern's deposition and that therefore the standards of courtesy requiring "mutually convenient" scheduling of matters were being fully complied with. In an email sent by attorney Kevin Yomber on December 18, 2023, the Defendants then claimed that they are not obligated to respond to ***any*** discovery of any kind (whether depositions, documentary discovery or otherwise) "until the pleadings have been closed." According to Mr. Yombor, he and his clients have absolutely no discovery obligations for a long period of time since the "[p]leadings likely won't be closed for sometime." *Id.,* Exhibit 1 (highlighted in green for convenience). The Defendants failed to include this portion of the parties' email exchange with their Motion for obvious reasons.

Indeed, the Defendants knew their "until the pleadings have been closed" rule was an embarrassment because Plaintiffs took the time to cite to significant Florida case law outlining the frivolity of that position. *Id.,* Exhibit 1 (collecting cases, highlighted in yellow for convenience). The Defendants' specific position during negotiations was that they were entitled to learn the outcome of their motion to dismiss before submitting to discovery, and that remains their position in and with respect to the Motion.[1] In Plaintiffs counsel's December 19, 2023 email to Mr.

[1] In the Motion, the Defendants added the false basis of ***"immunity from suit"*** for their request for a blanket stay yet this basis was never addressed during the parties'email

Yombor, the law contradicting the Defendants' position was clearly set forth for counsel's convenience:

> "It is well settled that 'a party may be permitted to discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence.' *Amente v. Newman,* 653 So.2d 1030, 1032 (Fla. 1995). In short, the trial court may limit discovery ***only*** when the moving party has made an affirmative showing of good cause. *Maris Distrib. Co,* 710 So. 2d at 1024–25 (citing *Deltona Corporation v. Bailey,* 336 So.2d 1163, 1169 (Fla. 1976)). ***The pendency of unresolved motions 'is not sufficient good cause shown within the purview of Rule 1.280(c) to justify postponing discovery for the protracted period of time which elapsed in the case at bar.'*** *Deltona Corp.,* 336 So.2d at 1169 (citing *Smith v. Southern Baptist Hospital,* 564 So.2d 1115, 1118 (Fla. 1st DCA 1990) (emphasis added); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.,* 316 So.2d 607, 610–611 (Fla. 4th DCA 1975))."

Botwin Declaration, Exhibit 1 (highlighted in yellow for convenience).

Exacerbated Lack of Candor

Although Plaintiffs repeatedly said they would take Stern's deposition at any time convenient for he and his lawyers, defense counsel Kevin Yombor's final email before filing his Motion falsely claimed that Plaintiffs "have no intention to reschedule the deposition." *See,* Botwin Declaration, Exhibit 1 (highlighted in purple for convenience). This stands in direct contradiction to Plaintiffs counsel's December 18 email agreeing to schedule the deposition at any point in time convenient to Mr. Stern and his lawyers. *See, id.* (highlighted in pink for convenience). Worse, Mr. Yombor's

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exchanges. Indeed, had it been addressed, Plaintiffs would have invited the Defendants' attention to controlling case law providing that condominium directors have never once been held ***"immune from suit"*** under Florida law but instead enjoy ***limited immunity from liability*** for claims not arising from fraud or intentional misconduct. Plaintiffs would have explained that no reported Florida decision has ever stayed discovery in favor of condominium directors on these grounds. In violation of Local Rule 4, the Defendants neither engaged in such a pre-motion-conference nor included the requisite certification when they first noticed the hearing with respect to their Motion. *See,* discussion, *ante,* pp. 2-5 and *post* pp. 8-14.

final email never even addressed the document production requests, let alone the law cited in Plaintiff's December 19, 2023 email. *Id.* (highlighted in yellow).

IV. A DISCOVERY STAY IS IMPROPER ABSENT IMMUNITY FROM SUIT

Although the Defendants' Motion attempts to conceal the holding of *Bank of Am., N.A. v. De Morales* from this Court, the Court is not required to accept the invitation to ignore the holding in *De Morales,* which ***supports*** a decision denying the Motion out of hand. In *De Morales,* the Court of Appeals clearly held that ***orders staying discovery only "lie in cases where the immunity asserted is from litigation altogether, and not just from liability."*** 314 So. 3d 528 at 530, 531 (emphasis added). The situation in *De Morales* is clearly not the situation in the case at bar, because condominium directors are ***never*** "immune from litigation altogether" but instead may be sued pursuant to the express provisions of Fla. Stat. §617.0834(1)(b)(3) (directors liable for breaches of duty involving "[r]ecklessness or an act or omission that was committed in bad faith or with malicious purpose"); Fla. Stat. §607.0831(1)(b)(5) (same); Fla. Stat. §718.303(1)(d) (holding directors personally liable for all damages occasioned by their "knowing" and "willful" failure to adhere to foundational condominium documents, including bylaws). ***The Defendants disclosed none of this to the Court, because it leads to the immediate denial of their Motion. They knew full well that their claim of total immunity from suit as a basis to resist discovery is frivolous under Florida law. And their concealing from this Court the full email trail showing that they never so much as discussed the issue with Plaintiffs' counsel before filing the Motion is inexcusable.***

As stated in the very case cited by the Defendants, *Perlow v. Goldberg,* 700 So. 2d 148, 149-50 (Fla. Dist. Ct. App. 1997), the only requirement to impose liability on a

condominium director is a showing of "more than simple negligence," which is precisely the claim set forth in great detail in the Complaint on file in this action. The Florida judiciary has instructed time and time again that intentional misconduct by condominium directors makes them personally liable. *See, e.g., Raphael v. Silverman,* 22 So. 3d 837 (Fla. Dist. Ct. App. 2009) (collecting cases). The Defendants' request for a stay because they think they are ***immune from litigation altogether*** is frivolous and should be rejected. The Defendants are not ***immune from suit*** but instead are ***immune from liability*** only in the event they ultimately demonstrate that their misconduct — which has included intentionally permitting egregious breaches of contract and assisting in the diversion of hundreds of thousands of dollars of Association money — was purely negligent in character. The Complaint demonstrates that the Defendants ability to prove they are only guilty of ordinary negligence will be a tall order indeed.

IV. DISCOVERY STAYS ARE HEAVILY DISFAVORED

There has been a simple reason for the ***narrow*** line of cases approving of stays of discovery in total immunity cases, which is this: if a party is immune from suit ***altogether,*** forcing that party's involvement in discovery would frustrate the party's total immunity. *See, e.g., DelMonico v. Traynor,* 116 So. 3d 1205, 1215 (Fla. 2013) (litigation immunity is "from suit" altogether); *Citizens Prop. Ins. Corp. v. San Perdido Ass'n,* 104 So. 3d 344, 353 (Fla. 2012) (litigation immunity intended to prevent party from becoming involved in lawsuit where the party is protected from suit "altogether"). Indeed, the application of the "immune from suit altogether" rule in Florida has been limited to ***obvious*** examples of ***complete*** immunity from litigation such as the ***complete*** immunity from suit enjoyed in actions against judicial officers, against public officials in civil rights cases, as well as in tribal sovereign immunity cases. *See, e.g., Fuller v.*

Truncale, 50 So.3d 25, 27–28 (Fla. 1st DCA 2010) (judicial officer enjoying total immunity from suit and therefore "it would be compromised, and irreparable harm sustained, simply by forcing a judicial party to become involved in litigation, irrespective of its outcome") and *Seminole Tribe of Fla. v. McCor,* 903 So.2d 353, 357–58 (Fla. 2d DCA 2005) (tribal sovereign immunity, like the qualified immunity enjoyed in civil rights cases by public officials, "involves 'immunity from suit rather than a mere defense to liability' ...") (citations and quotation marks omitted).

The Defendants' position that their role as condominium directors provides them with the kind of ***immunity from suit*** enjoyed in sovereign immunity and judicial officer cases is preposterous and should be rejected by this Court as any sort of methodology to stay discovery in this case. The reason the Defendants try to incorrectly fit themselves into the category as being immune from litigation altogether is that Florida law is ***directly*** opposed to their other grounds for a discovery stay in this matter. The law ***heavily*** disfavors court orders blocking discovery. With particular attention to the Defendants' claims about their pending motion to dismiss, controlling authority in the State of Florida holds that the pendency of such a motion to dismiss is insufficient grounds for a discovery stay. *See, e.g., Deltona Corporation v. Bailey,* 336 So.2d 1163, 1169 (Fla. 1976). Florida courts tend to follow federal law and painstakingly apply the factors set forth in Fla. Stat. 1.280(c) in holding that a ***"strong showing"*** of good cause is required to block legitimate discovery. *See, Orlando Sports v. Sentinel Star,* 316 So. 2d 607, 611 (Fla. Dist. Ct. App. 1975) (the Fourth District Court of Appeals stating as well that "it has been the practice of the Florida courts closely to examine and analyze the Federal decisions and commentaries under the Federal rules in interpreting ours").

Because the Court should consider federal decisions in deciding whether to

block discovery in this matter, it is important to note the disfavored nature of discovery stays within the federal judiciary. ***Perhaps as a result of this rule, Plaintiffs have been unable to locate a single reported decision staying discovery in a case against condominium directors. The Defendants also failed to cite any such case.*** Instead, courts typically instruct that discovery stays are heavily disfavored

> "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. ... Thus, a stay of discovery pending the resolution of a motion to dismiss is the exception, rather than the rule. *See McCrimmon v. Centurion of Fla.,* LLC, No. 3:20-cv-36-J-39JRK, 2020 WL 6287681, at *2 (M.D. Fla. Oct. 27, 2020). Indeed, the Civil Discovery Handbook for the Middle District of Florida expressly states that: 'Normally, the pendency of a motion to dismiss or a motion for summary judgment will not justify a unilateral motion to stay discovery pending resolution of the dispositive motion. Such motions for stay are rarely granted. However, unusual circumstances may justify a stay of discovery in a particular case upon a specific showing of prejudice or undue burden.' Middle District Discovery (2021) at Section I.E.4 (emphasis added)."

Jolly v. Hoegh Autoliners Shipping AS, No. 3:20-cv-1150-MMH-PDB, 2021 WL 1822758, at *2-3 (M.D. Fla. Apr. 5, 2021) (internal citations and quotation marks omitted).

Courts around the country disfavor ordering a stay of discovery pending a dispositive motion. *See, e.g., Cafe, Gelato & Panini LLC v. Simon Prop. Grp.* , No. 20-60981-CIV-CANNON/Hunt, at *6 (S.D. Fla. May 21, 2021) ("[m]otions to stay discovery pending ruling on a dispositive motion are generally disfavored in this district," and the party seeking a stay of discovery "bears the burden of showing good cause [in support of a stay order].") (internal quotation marks and citations omitted); *Hiser v. NZone Guidance,* LLC, 1:18-CV-1056-RP, 2019 WL 2098091, at *2 (W.D.

Tex. Mar. 27, 2019) ("staying discovery based on a pending motion to dismiss is disfavored"); *Hampton v. Connett,* No. 2:14-cv-1110-GMN-VCF, at *1 (D. Nev. Apr. 20, 2015) ("stays are disfavored and parties are expected to litigate dispositive motions and conduct discovery simultaneously").

The rule disfavoring the discovery stay requested by the Defendants is particularly applicable in this case, because the Complaint alleges serious claims involving fraud, deceit and intentional misconduct. This case cannot reasonably be expected to resolve itself at the pleading stage, as important issues of fact will exist regardless of how the Defendants view this proceeding. For example, in the event it is determined — as alleged in the Complaint — that the Defendants diverted $400,000.00 in a scheme to intentionally harm Plaintiffs or the Class they represent, the factual circumstances regarding the Defendants' conversations with each other (by telephone, email and text message) are going to be critical to the resolution. The outstanding discovery is merely aimed at uncovering such communications, which are neither privileged nor otherwise of a nature where any prejudice can be shown to the Defendants from having to tell the truth about them.

V. THE DEFENDANTS HAVE NOT DEMONSTRATED GOOD CAUSE

Finally, even apart from the rule disfavoring stays of discovery pending a ruling on a motion to dismiss, the Defendants must additionally demonstrate the harm to them regarding submitting to the discovery. By way of example only, the court in *Jolly* instructed that unusual circumstances may justify a stay of discovery in a particular case upon a specific showing of prejudice or undue burden. *Jolly,* 3:20-cv-1150-MMH-PDB, 2021 WL 1822758, at *2-3 (M.D. Fla. Apr. 5, 2021). *See also, Toomey v. N. Tr. Co.,* 182 So. 3d 891, 893–94 (Fla. 3d DCA 2016) ("[w]e are not persuaded by the argument

of a minority of the beneficiary defendants that the motion to dismiss might be granted, thereby mooting the deposition controversy"); *Branch v. O'Selmo,* 147 So.3d 1089, 1093 (Fla. 3d DCA 2014) (requiring the moving party to establish any of the grounds under Florida Rule of Civil Procedure 1.280(c) of annoyance, embarrassment, oppression, undue burden or expense warranting a protective order); *Maris Distrib. Co. v. Anheuser-Busch, Inc.,* 710 So. 2d 1022, 1024–25 (Fla. 1st DCA 1998) (requiring showing of good cause); *Scott v. Nelson,* 697 So.2d 1300 (Fla. 1st DCA 1997) (even in the presence of a related settlement, the "public policy favoring settlement of disputed claims ... must give way to a litigant's need to discover potentially relevant evidence").

The Defendants have not even tried to satisfy this burden, because they cannot meet the test. The document requests are garden variety document requests at the start of a lawsuit, and the Stern deposition would occur over Zoom at a time convenient to the deponent and his lawyer. The Court should reject the Defendants' quest to delay the search for truth in this important case.

VI. CONCLUSION

It is unfortunate that the Defendants Motion is frivolous, but frivolous it is. Plaintiffs did not violate any standard of decorum, always telling the Defendants that Mr. Stern would be permitted to submit to his deposition on any date convenient for him and defense counsel. Botwin Declaration, Exhibit 1 (highlighted in pink for convenience). Most importantly, the Defendants are not "immune from suit altogether" and therefore the Defendants' citation to *De Morales* as a basis for granting the protective order is clearly baseless since their Motion is ***directly*** violative of the rule in *De Morales* which rejects relief in cases involving only limited immunity from liability.

The only way for this Court to ultimately clear its docket of this litigation

matter is to permit the "search for truth," often discussed by the Florida Supreme Court and its Courts of Appeal, to actually happen. *See, e.g., MBL Life Assurance Corp. v. Suarez*, 768 So. 2d 1129, 1135 (Fla. Dist. Ct. App. 2000) ("[i]t has long been recognized that the purpose of our adversarial system is to enhance the search for truth.") (citing *Allstate Ins. Co. v. Boecher,* 733 So.2d 993, 955 (Fla. 1999)). Blocking limited discovery at the outset of litigation is not in furtherance of such ideals. The Defendants' Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-filing, which will deliver electronic copies of this filing to the designated e-mail addresses for all counsel of record pursuant to Fla. R. Jud. Admin. 2.516, and we also certify a true and correct copy of the foregoing was furnished via e-mail, on this 28th day of December, 2023, to: KEVIN YAMBOR, ESQ., and LABEED A. CHOUDRY, ESQ., Kaufman Dolowich, LLP, Attorneys for Defendants, 100 SE 3rd Avenue, Suite 1500, Ft. Lauderdale, FL 33301 (kyombor@kaufmandolowich.com; tbell@kaufmandolowich.com; Labeed.choudhry@kaufmandolowich.com; sfranchi@kaufmandolowich.com).

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