UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION, and

OFFICE OF THE ATTORNEY GENERAL, STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS,

Plaintiffs,

v.

GLOBAL E-TRADING, LLC, a Florida limited liability company, also d/b/a CHARGEBACKS911,

GARY CARDONE, individually and as an officer of GLOBAL E-TRADING, LLC, and

MONICA EATON, individually and as an officer of GLOBAL E-TRADING, LLC,

Defendants.

Case No. 8:23-cv-796-MSS-CPT

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY PENDING RULING ON AMENDED MOTION TO DISMISS

I. INTRODUCTION

Defendants' Motion to Stay Discovery Pending Ruling on Amended Motion to Dismiss (Dkt. #36) ("Motion") should be denied. A stay of discovery in this case is inappropriate because: (1) Defendants fail to demonstrate the requisite good cause, reasonableness, necessity, and appropriateness for the proposed stay, in particular because they cannot point to any unusual circumstance that may cause them to suffer prejudice or undue burden from responding to Plaintiffs' initial discovery requests; (2) Defendants' Motion to Dismiss fails to establish that Plaintiffs' claims are unmeritorious, and most of Defendants' arguments, even if valid, would not entirely dispose of this action; and (3) Defendants' attempt to derail the discovery schedule agreed upon by all parties and the deadlines set by this Court would, at a minimum, unnecessarily delay Plaintiffs' efforts to protect consumers from Defendants' misleading chargeback dispute practices. Defendants' sweeping motion for a stay of all discovery should therefore be denied.

II. PROCEDURAL HISTORY

On April 12, 2023, the Federal Trade Commission ("FTC") and the Office of the Attorney General, State of Florida, Department of Legal Affairs ("Florida AG") (jointly, "Plaintiffs") filed their Complaint (Dkt. #1) against Defendants Global E-Trading, LLC (dba "Chargebacks911"), Gary Cardone, and Monica Eaton (collectively, "Defendants") for their unfair practices related to chargeback mitigation services in violation of the Federal Trade Commission Act ("FTC Act") and the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). 15 U.S.C.

§ 45; Chapter 501, Part II, Florida Statutes. On June 29, 2023, Defendants filed their Amended Motion to Dismiss (Dkt. #26) and Plaintiffs responded with an Opposition (Dkt. #31) filed on July 20, 2023. The Court issued an order (Dkt. #36) granting Defendants' Unopposed Motion for a Reply (Dkt. #35), and Defendants filed their Reply in support of their Amended Motion to Dismiss (Dkt. #37) on August 17, 2023.

The parties conducted the Case Management Report ("CMR") planning conference on July 10, 2023, and subsequently filed a joint CMR (Dkt. #29) on July 18, 2023, detailing the agreed-upon discovery schedule.[1] Defendants filed the instant motion approximately three weeks after the parties agreed to a proposed discovery schedule. Thereafter, this Court entered its Case Management and Scheduling Order (Dkt. #39) scheduling this case for the March 2025 trial term and setting a June 10, 2024 deadline to complete discovery, among other deadlines included therein.

III. LEGAL STANDARD

Courts in this District have repeatedly and explicitly recognized that the pendency of a motion to dismiss normally will not justify a stay of discovery pending the court's resolution of the motion to dismiss. *See, e.g.*, *White v. Venice HMA, LLC*, No. 8:22-cv-1989-CEH-AEP, 2022 U.S. Dist. LEXIS 218716, at *2 (M.D. Fla. Dec. 5, 2022) (citing Middle District Discovery (2021) at Section I.E.4); *In re Winn Dixie*

[1] Defendants' references to the dates the CMR planning conference was held and the CMR was filed are off by one day. (*See* Mot. at 4, 11.)

Stores, Inc. ERISA Litig., No. 3:04-cv-194-VMC-MCR, 2007 U.S. Dist. LEXIS 47014, at *2 (M.D. Fla. June 28, 2007). The Discovery Handbook plainly states:

> STAYS OF DISCOVERY. 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. Indeed, "a stay of discovery pending the resolution of a motion to dismiss is the exception, rather than the rule." *Jolly v. Hoegh Autoliners Shipping AS*, No. 3:20-cv-1150-MMH-PDB, 2021 U.S. Dist. LEXIS 65616, at *1 (M.D. Fla. Apr. 5, 2021).

Additionally, for a unilateral motion to stay discovery to be successful, courts in this District have stated the moving party must show good cause and reasonableness as well as the necessity and appropriateness of the proposed stay. *See, e.g.*, *Feldman v. Flood*, 176 F.R.D. 651 (M.D. Fla. 1997); *see also Seniuk v. JPMorgan Chase Bank, N.A.*, No. 8:15-CV-2424-SDM-JSS, 2016 U.S. Dist. LEXIS 17269, at *3 (M.D. Fla. Feb. 9, 2016) (citing Fed. R. Civ. P 26(c)(1)); *McCrimmon v. Centurion of Fla., LLC*, No. 3:20-cv-36-BJD-JRK, 2020 U.S. Dist. LEXIS 199518, at *5 (M.D. Fla. Oct. 27, 2020); *Norris v. Honeywell Int'l, Inc.*, No. 8:22-cv-2210-CEH-MRM, 2023 U.S. Dist. LEXIS 111732, at *7 (M.D. Fla. June 28, 2023).

In determining whether to stay discovery pending the resolution of a motion, courts "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." *Feldman*, 176 F.R.D. at 652. When balancing these considerations, the court may take a "preliminary peek" at the merits of the purportedly dispositive motion to determine if, on the motion's face, "there appears to be an immediate and clear possibility" that the court will grant the motion, which supports entering a stay. *Id.* The court generally denies motions to stay absent a clear indication that the court will dismiss the action in its entirety. *McCrimmon*, 2020 U.S. Dist. LEXIS 199518, at *5 (collecting cases); *Jolly*, 2021 U.S. Dist. LEXIS 65616, at *4.

IV. ARGUMENT

A. Defendants Have Failed to Meet the Requisite Standard for a Stay of Discovery

Defendants' Motion does not cite to, or meet, the well-established legal standard for a stay, nor does it meet the District's guidance in the Discovery Handbook. Defendants' Motion fails to show good cause, reasonableness, necessity, and appropriateness for their proposed stay, and, more specifically, Defendants cannot identify any unusual circumstance that may cause them to suffer prejudice or an undue burden from responding to Plaintiffs' initial discovery requests. *See Feldman*, 176 F.R.D. at 652; *White*, 2022 U.S. Dist. LEXIS 218716, at *5; *McCrimmon*, 2020 U.S. Dist. LEXIS 199518, at *4; Middle District Discovery (2021) at Section I.E.4. Defendants mistakenly rely on *Chudasama v. Mazda Motor Corp.*, to argue that a motion to dismiss should be resolved before discovery begins. (*See* Mot. at 5 (citing *Chudasama*, 123 F.3d 1353, 1367 (11th Cir. 1997))). However, as a court in this District recently explained, "*Chudasama* and its progeny actually 'stand for the

[narrow] proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount.'" *White*, 2022 U.S. Dist. LEXIS 218716, at *3 n.1 (quoting *Winn Dixie*, 2007 U.S. Dist. LEXIS 47014, at *4–5) (alteration in original). Simply filing a motion to dismiss does not permit a party to forgo discovery.

All that Defendants can offer the Court is speculation and an unsubstantiated assertion that discovery in this case is "likely to be both costly and highly burdensome." (*See* Mot. at 11.) The only specific burdens that Defendants claim to face are the ordinary burdens of litigation—i.e., producing responsive documents. (*See id.*) Defendants' claim that they may need to produce documents "possibly covering a decade's worth of material" (*id.*), even if true, would be insufficient to distinguish this matter from other matters alleging a similar magnitude of harm. The fact that they have already produced materials to Plaintiffs during the pre-Complaint investigation (*see id.*) only further reduces their burden in discovery and undercuts their position with respect to a stay. In any event, Defendants offer no reason why their concerns about the cost of producing documents cannot be addressed through Rule 26's proportionality requirements. *See* Fed. R. Civ. P. 26(b)(1). Moreover, assuming Defendants plan to seek their own discovery in this matter, it is simply not true that "only Defendants" will incur costs associated with discovery. (*See* Mot. at 11.) Plaintiffs are unaware of any waiver by Defendants of their right to seek discovery related to Plaintiffs' claims.

In sum, Defendants are unable to show any unusual circumstances that may justify a stay of discovery upon a specific showing of prejudice or undue burden. Defendants' Motion is therefore insufficient because it fails to meet the legal standard set in this District.

B. A Preliminary Peek at Defendants' Motion to Dismiss Reveals that the Arguments Are Wholly Without Merit and Would Not Dispose of the Entire Action

As stated above, a court generally denies motions to stay absent a clear indication that the court will dismiss the action in its entirety. *McCrimmon*, 2020 U.S. Dist. LEXIS 199518, at *5 (denying the defendants' motion to stay discovery). Accordingly, a preliminary peek at the Motion to Dismiss will show that, unlike the claim at issue in *Chudasama*, Plaintiffs' claims are not "especially dubious." *See id*. at *4–7 (quoting *Chudasama*, 123 F.3d at 1368).

Plaintiffs' Complaint alleges that Defendants have violated state and federal consumer protection laws through their use of misleading information to dispute consumers' chargeback requests and their use of microtransactions to undermine fraud monitoring systems implemented to protect consumers. (Dkt. #1.) A preliminary peek at Defendants' Motion to Dismiss reveals that the motion fails to establish that any of these claims would fail to clear the low threshold required to survive a motion to dismiss, let alone that "all claims against Defendants are likely to be dismissed." *See McCrimmon*, 2020 U.S. Dist. LEXIS 199518, at *7. It is therefore insufficient to warrant a stay of discovery.

As fully briefed in Plaintiffs' Opposition to the Amended Motion to Dismiss (Dkt. #31), each of Defendants' purported bases for dismissal of the Plaintiffs' claims fails on the merits. Plaintiffs have more than sufficiently pleaded an "Unfair Act" under both the FTC Act and FDUTPA; Plaintiffs have alleged facts sufficient for injunctive relief; the FTC had reason to believe Defendants are violating or are about to violate the law; and the Florida AG's claims are not time barred or blocked by FDUTPA's exception for banking activities. *Id.*

In order to state a claim for unfairness, both Plaintiffs must allege that an act or practice (a) "causes or is likely to cause substantial injury to consumers," (b) "which is not reasonably avoidable by consumers themselves," and (c) which is "not outweighed by countervailing benefits to consumers or to competition." *See* 15 U.S.C. § 45(n); *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1098 (Fla. 3d DCA 2014). A preliminary peek at the Complaint confirms that Plaintiffs adequately alleged the elements of an unfairness claim.

1. Unfairly Injuring Consumers by Submitting Misleading Chargeback Documentation

With respect to Defendants' misleading chargeback dispute practices, the Complaint alleges that consumers have reported to their banks that they had been charged without their knowledge and consent (Dkt. #1 ¶ 26); Defendants have submitted representments (chargeback disputes) purporting to show that consumers knew about and consented to the charges (*id.* ¶¶ 30, 34, 36); and, as a result, banks likely have been misled into denying the consumers' valid chargebacks (*id.* ¶¶ 37, 40).

The Complaint further alleges that in drafting and submitting representments (*id.* ¶ 28), Defendants have ignored repeated red flags that their website screenshots are misleading and inaccurate (*id.* ¶¶ 43–67) and have disregarded suspicious behavior by merchants that put them on notice that merchants were engaged in fraud (*id.* ¶¶ 68–75). In some instances, Defendants have affirmatively doctored screenshots or concealed damaging information to bolster a merchant's case. (*Id.* ¶¶ 42, 77–78.)

In addition, consumers whose chargebacks are denied suffer direct financial injury, and Defendants' practices affected a staggering number of consumers. For just the three fraudulent merchants identified in the Complaint, Defendants disputed more than 165,000 chargebacks. (*See id.* ¶ 27.) Few, if any, consumers should lose a chargeback dispute to these fraudulent merchants, but Defendants' practices were lucrative enough to persist on a massive scale for years. (*See id.* ¶¶ 26–27.)

The Complaint sufficiently alleges that consumers cannot reasonably avoid injury from Defendants' practices because they have no reason to anticipate that Defendants will dispute a valid chargeback with a misleading representment, nor can consumers choose not to engage with Defendants. (*See id.* ¶¶ 3, 19.) Finally, the injury here cannot be outweighed by offsetting benefits to consumers or competition because there are no benefits to disputing chargebacks with "misleading or inaccurate documentation." (*See id.* ¶ 95.)

//

//

//

2. Unfairly Injuring Consumers by Administering VAP

With respect to Defendants' scheme to undermine fraud monitoring systems with sham sales transactions, the Complaint sufficiently pleads facts to support an unfairness claim. Defendants' "Value Added Promotions" ("VAP") service helped fraudulent merchants avoid the consequences of their high chargeback rates, including additional monitoring requirements, penalties, and termination of their merchant accounts. (*See id.* ¶¶ 6, 79–82, 87.) As a result, VAP enabled these merchants to continue harming consumers with their deceptive marketing practices. (*See id.*) If VAP had not been a successful tool for maintaining access to merchant accounts that should be subject to scrutiny, there would be no reason for more than 30 merchants to pay Defendants for more than four million VAP transactions over the course of several years. (*See id.* ¶¶ 79, 86, 88.) Also, if VAP were a genuine promotional program, there would be no reason for Defendants to conceal it. (*See id.* ¶ 85 ("[C]an [you] drip them a little slower to not make it look suspicious[?]").)

Further, consumers had no way to avoid the harm caused when fraudulent businesses evaded chargeback monitoring systems that should have been triggered. Indeed, the point of those systems was to help consumers avoid harm and, as noted above, Defendants took steps to conceal the scheme from the systems. (*See id.* ¶¶ 6, 79–82, 85.) Last, VAP could not generate benefits to outweigh the harm it caused because its purpose was to undermine chargeback monitoring safeguards that were intended to protect consumers. (*See, e.g.*, *id.* ¶¶ 79–80.)

//

3. Basis for Injunctive Relief

With respect to whether Plaintiffs sufficiently pleaded the allegations supporting the need for injunctive relief, a preliminary peek reveals Plaintiffs have alleged ongoing conduct: Defendants have submitted and continue to submit misleading representments to challenge chargebacks. (*See id.* ¶¶ 4–5.) Even assuming arguendo that Defendants' misleading representments were all in the past, Plaintiffs have provided sufficient allegations to demonstrate a likelihood that Defendants would violate the law in the future. Defendants' conduct was egregious and recurrent, they have actively avoided responsibility for their actions, and they have ample opportunity to continue their unlawful practices. (*See id.* ¶¶ 27, 41–42, 60–67.) Moreover, Defendants' brazen use of VAP further demonstrates their disregard for the law. (*See id.* ¶ 85.) Therefore, Plaintiffs sufficiently alleged that Defendants are likely to continue to injure consumers and harm the public interest, and the FTC reasonably believes that violations of the FTC Act are about to occur. Defendants also conveniently ignore that the Florida AG can seek an injunction based solely on past conduct. Fla. Stat. 501.207(b). Therefore, Plaintiffs will likely prevail on the Motion to Dismiss with respect to the basis for their request for an injunction.

4. Violations of FDUPTA

Finally, regarding the Florida AG's FDUPTA counts (Counts III, IV, and V), both attacks presented by Defendants fall short of the low threshold to survive a motion to dismiss. Simply put, as alleged in the Complaint, the FDUPTA counts are

not time barred as many of the Complaint's factual allegations refer to business practices or other at-issue conduct that started in the past and continue into the present. (*See* Dkt. #1 ¶¶ 4–7, 28–37, 42–44, 72, 78, 89–92, 116–20, 122–25, 127–28, 130–31, 134–38, 140–49.) Additionally, the Complaint is full of factual allegations of ongoing business practices or practices that occurred within the past four years that would allow this Court to make the reasonable inference that Defendants have violated FDUTPA. (*See id*. ¶¶ 21, 27, 38–40, 51, 58–59, 67, 72(c), 79.) Finally, Defendants' conduct is not exempt from FDUTPA as a "banking activity" under Section 501.212, Florida Statutes, given that Defendants do not even perform services for financial institutions, but rather, they help merchants fight chargebacks initiated by consumers. (*See* Dkt. #1 ¶¶ 3, 21-24, 26.) The tasks performed by Defendants on behalf of their merchant customers include compiling and submitting representments on behalf of merchants, gathering information from the merchant regarding the product at issue, collecting images of the merchant's website, and providing text boxes and overlays on such images to emphasize information that may be relevant. (*See id*. ¶¶ 21, 28, 43, 29, 32–33.) Even just a preliminary peek at the Motion to Dismiss and the Complaint will likely find Defendants' at-issue conduct is not exempt from FDUTPA.

5. Defendants' Arguments Do Not Support Full Dismissal

In any event, Defendants' arguments for dismissal do not apply equally to both Plaintiffs or to all five of the counts alleged in the Complaint. As a result, any one of Defendants' arguments, even if it had merit, would not entirely resolve this

matter. Absent a clear inclination to dismiss the action in its entirety, the Court should deny Defendants' motion to stay. *See McCrimmon*, 2020 U.S. Dist. LEXIS 199518, at *5 (denying the defendants' motion to stay discovery).

6. Defendants Cite Inapposite Cases

In an attempt to align this case with other cases where this Court has granted a motion to stay, Defendants cite a variety of cases that do not actually lend support to the instant motion. In *DeBoskey v. SunTrust Mortgage, Inc.*, after a stay pending the resolution of the *pro se* plaintiff's state court appeal was lifted, the plaintiff filed an amended complaint against twenty-seven defendants related to a state foreclosure action that occurred two years after the initiation of the matter. No. 8:14-cv-1778-MSS-TGW, 2016 U.S. Dist. LEXIS 203235, at *3–4, (M.D. Fla. Oct. 26, 2016) (Scriven, J.). In granting the motion to stay, this Court had before it the argument that the amended complaint "is exceedingly vague, overly broad and conclusory, and appears to be a 'shotgun pleading' . . . [where] this Court even gave Plaintiff notice that his claims suffered from several 'infirmities' in its Order Staying the Proceedings." *DeBoskey v. SunTrust Mortg., Inc.,* No. 8:14-cv-1778-MSS-TGW, Defendants' Joint Motion for Temporary Stay of Discovery Dkt. #162.[2] In *Tibbetts*

[2] Defendants also cite *Latell v. Triano*, No. 13-cv-565-FTM-29CM, 2014 U.S. Dist. LEXIS 26777, at *4 (M.D. Fla. Feb. 28, 2014), for the proposition that "[d]elaying discovery until the Court rules on whether . . . Plaintiff has stated a viable cause of action will cause Plaintiff little harm." (Mot. at 12.) Similar to this Court's evaluation in *Debosky*, the *Latell* court previously dismissed the *pro se* plaintiff's "shotgun pleading" and the amended complaint likely suffered the same deficiencies. *Id.* at *3. Ultimately, the court granted only a limited 90-day stay of discovery. *Id.* at *3–4.

Lumber Co. v. Amerisure Insurance Co., this Court found a stay of discovery appropriate because the "plaintiff's causes of action raise matters of first impression and are barred by the exclusivity of Florida's Workers' Compensation Statute." No. 8:19-cv-1275-T-35AAS, 2019 U.S. Dist. LEXIS 239856, at *6 (M.D. Fla. Dec. 9, 2019) (Scriven, J.). And in *Safeco Insurance Co. of America v. Amerisure Insurance Co.*, this Court considered whether, "as is the case in most bad faith insurance disputes, . . . Safeco's claims are unripe unless and until a liability and damages determination is made in the underlying . . . [l]itigation" when it granted the motion to stay discovery. No. 8:14-cv-774-T-35MAP, 2014 U.S. Dist. LEXIS 192459, at *4 (M.D. Fla. Sept. 9, 2014) (Scriven, J.).

Similar or comparable "infirmities" addressed in *DeBoskey*, *Tibbetts*, or *Safeco* are not present here. The Complaint's detailed allegations far exceed the preliminary peek threshold of an immediate and clear possibility that the Court will dismiss the action in its entirety. *See Feldman*, 176 F.R.D. at 652; *McCrimmon*, 2020 U.S. Dist. LEXIS 199518, at *2. The Complaint sufficiently pleads allegations to allow this Court to draw a reasonable inference that Defendants' chargeback dispute and microtransactions practices are unfair. Thus, a stay of discovery based upon an improbable dismissal here is not appropriate.

C. Discovery Should Proceed in Accordance with the Court's Case Management and Scheduling Order

Approximately three weeks after all parties reached an agreement and filed the joint Case Management Report (Dkt. #29) ("CMR"), Defendants seek to derail the

very discovery schedule they submitted. The goal of the CMR is to "secure the just, speedy, and inexpensive determination of" the action. *See id.* (quoting Fed. R. Civ. P. 1). The joint report does not describe this case as one that presents unusual circumstances that may prejudice or unduly burden Defendants during the course of regular discovery obligations. Nowhere in the agreed-upon schedule do Defendants raise or contemplate moving the Court for a stay of discovery, nor did they seek to conduct discovery in phases.

On August 21, 2023, after "[h]aving considered the Case Management Report prepared by the parties," this Court entered its Case Management and Scheduling Order (Dkt. #39) setting trial in this case for the March 2025 term. The first entry on the Court's Order is "Mandatory Initial Disclosures" due on August 28, 2023. *Id.* The "Discovery Deadline" is set for June 10, 2024. *Id.* Defendants' requested stay would upend the entire schedule for discovery and trial.

Plaintiffs and the public at large have a significant interest in the speedy and just resolution of this case. Any unnecessary delay, including Defendants' requested stay, unfairly prejudices those interests. Plaintiffs are seeking critical injunctive relief to halt the injury caused or likely to be caused by Defendants' various unfair chargeback practices. The interests of consumers in avoiding concrete financial harm far outweighs Defendants' interest in delaying the ordinary costs of discovery.

//

//

//

Defendants' request for a stay of discovery should be denied.

Respectfully submitted,

Dated: August 21, 2023

/s/ *Denise M. Oki*
EVAN ROSE (Lead Counsel)
Cal. Bar No. 253478
ROBERTA DIANE TONELLI
Cal. Bar No. 278738
DENISE M. OKI
Cal. Bar No. 311212
90 Seventh St, Suite 14-300
San Francisco, CA 94103
Email: erose@ftc.gov; rtonelli@ftc.gov; doki@ftc.gov
Tel: (415) 848-5100; Fax: (415) 848-5184

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Jennifer Hayes Pinder*
Jennifer Hayes Pinder
Assistant Bureau Chief,
Tampa Fla. Bar No.: 17325
Email: Jennifer.Pinder@myfloridalegal.com
Office of the Attorney General
Department of Legal Affairs
3507 East Frontage Rd, Suite 325
Tampa, FL 33607
Phone: 813-287-7950
Fax: 813-281-5515

(Signed by filing lawyer with permission of non-filing lawyer)

/s/ *Denise M. Oki*
DENISE M. OKI