UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GLORIA FLINN and CHRISTOPHER FLINN,	)	
Plaintiffs,	)	
v.	)	Case No. 5:15-cv-193
BANK OF AMERICA CORPORATION,	)	
Defendant.	)	

ORDER ON MOTION FOR STAY
(Doc. 22)

On September 1, 2015, Plaintiffs filed suit in this case against Bank of America ("BOA"), which is the issuer of securities they purchased through account representatives at Merrill Lynch. (*See* Doc. 1.) In April 2014—prior to bringing suit in court—Plaintiffs also demanded arbitration against Merrill Lynch and its employees under the procedures set in place by the Financial Industry Regulation Authority ("FINRA"). (*See* Doc. 22-3.)[1] The two cases are currently proceeding towards trial independently.

BOA seeks to stay this case in order to permit the arbitration to go forward and to preclude what BOA says is Plaintiffs' improper attempt to take advantage of discovery that is not allowed in FINRA proceedings. (*See* Doc. 22.) Discovery is restricted in FINRA arbitrations and has closed in the FINRA case. Plaintiffs object on grounds of delay, among other things. (Doc. 23.) The court respectfully declines BOA's request to schedule oral argument because the issues are not complicated.

[1] In their arbitration demand, Plaintiffs also asserted that their claim was against BOA. (*Id.*) BOA declined to participate in the arbitration, asserting that it is not a FINRA member firm and that it is not required to submit to arbitration before FINRA. (*See* Doc. 22-4 at 2 n.1.)

BOA concedes that it is not a FINRA member and is not a proper party to the arbitration. (*See* Doc. 22-1 at 4.) Thus there is no basis to grant a stay under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. *See Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (since defendants were not parties to arbitration agreement, granting a stay under the Arbitration Act could not be justified). However, the court retains "inherent power" to grant the stay BOA requests. *See id.*

BOA bears the "heavy burden of showing necessity for the stay." *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991). To obtain the stay, BOA must initially show that "there are issues common to the arbitration and the court proceeding, and that those issues will be finally determined by arbitration." *Iusacell, S.A. de C.V. v. Int'l Bus. Machs. Corp.*, No. 14 Civ. 2697(NRB), 2014 WL 6491757, at *4 (S.D.N.Y. Nov. 14, 2014) (internal quotation marks omitted). BOA would also have to show that it "[has] not taken nor will take any steps to hamper the progress of the arbitration proceeding, that the arbitration may be expected to conclude within a reasonable time, and that such delay as may occur will not work undue hardship." *Isbrandtsen*, 339 F.2d at 442 (footnote omitted).

The court agrees with Plaintiffs that a stay of this case would be inappropriate. BOA cannot show that the arbitration may be expected to conclude within a reasonable time. This case will become interminable if discovery and substantive motion practice are delayed until after the FINRA arbitration. A quick review of the progress of the arbitration reveals that a pre-hearing conference occurred in September 2014. (Doc. 23-2 at 1.) Hearing dates were set for June and July 2015—almost a year later. (*Id.* at 2.) These were rescheduled to October and December 2015 and then postponed again while the parties pursued mediation. (Docs. 23-4; 23-5.) The mediation did not result in a settlement, and when one of the arbitrators advised that he

preferred not travel to the northeast during the winter months, the arbitration was postponed until May 2017 with no fixed dates yet. (Doc. 23-6.)

This court cannot wait a year or more before commencing discovery. This case raises difficult issues and is likely to require considerable effort from the parties and the court during the summary judgment stage. To reach that point requires that discovery be conducted expeditiously and, especially, that the parties exchange their expert witness reports as soon as reasonably possible. That exchange and the subsequent determination of whether Plaintiffs' claim survives summary judgment is what is going to bring this case to a close.

BOA relies upon *Iusacell*, noting that the court in that case granted a stay, where the motion to stay was filed in June 2014 and the arbitration hearing was set for February 2016. 2014 WL 6491757, at *5. But in that case the pace of arbitration was still relatively speedy compared to the pace of the court proceedings, which—since the issues were complex and the claims were valued in the billions of dollars—the court predicted were unlikely to proceed to trial more quickly than the arbitration. *See id.*

This case is instead more like *Donjon Marine Co. v. Water Quality Insurance Syndicate*, 523 F. App'x 738 (2d Cir. 2013). In that case, arbitration hearings were set to begin the week after a hearing on the parties' dispositive motions in court. *Id.* at 740. The district court declined to stay the court action, and the Second Circuit affirmed. Here, the arbitration is not set to commence until May 2017—almost a full year from now. And, as in *Donjon*, it is unclear when the parties to the arbitration might expect a result after that May 2017 hearing. Since BOA can offer no assurance that the arbitration can be expected to end expeditiously, it has failed to meet its heavy burden of showing the necessity for a stay.

BOA notes that the amount at stake in Plaintiffs' case is substantially less than in *Iusacell*, and argues that there can therefore be no justification for two separate proceedings, including a court proceeding with expensive discovery. (*See* Doc. 22-1 at 14.) However, the amount in controversy in *Donjon* was on the order of several hundred thousand dollars, yet the Second Circuit did not suggest that the case might be too "small" to decline a stay. The court concludes that this case is not, either.

Since the court concludes that BOA has failed to show that the arbitration may be expected to conclude within a reasonable time, *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71 (2d Cir. 1997), is also distinguishable. In that case, there was no allegation that the arbitration would not be resolved within a reasonable amount of time. *Id.* at 76. The court's conclusion makes it unnecessary to consider the other elements that BOA would have to show to obtain a stay (e.g., common issues between the proceedings, whether BOA took any steps to hamper the arbitration, and undue hardship).

Conclusion

The motion for stay (Doc. 22) is DENIED.

Dated at Rutland, in the District of Vermont, this 1st day of June, 2016.

/s/ Geoffrey W. Crawford
Geoffrey W. Crawford, Judge
United States District Court