

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**ALYSSON MILLS, IN HER CAPACITY
AS RECEIVER FOR ARTHUR LAMAR
ADAMS AND MADISON TIMBER
PROPERTIES, LLC,**

Plaintiff,

VS.

**MICHAEL D. BILLINGS and
MDB GROUP, LLC;
TERRY WAYNE KELLY, JR. and
KELLY MANAGEMENT, LLC;
and WILLIAM B. MCHENRY, JR. and
FIRST SOUTH INVESTMENTS, LLC,**

Defendants.

Case No. 3:18-cv-000679

*Arising out of Case No. 3:18-cv-252,
Securities Exchange Commission v.
Arthur Lamar Adams and Madison Timber
Properties, LLC*

**Hon. Carlton W. Reeves, District Judge
Hon. F. Keith Ball, Magistrate Judge**

**WILLIAM B. MCHENRY, JR. AND FIRST SOUTH INVESTMENTS, INC.'S
RESPONSE IN OPPOSITION TO RECEIVER'S MOTION FOR SUMMARY
JUDGMENT ON RECEIVER'S FRAUDULENT TRANSFER CLAIMS**

William B. McHenry, Jr. and First South Investments, LLC (“First South” and collectively, “McHenry”) file this response in opposition to the Receiver’s Motion for Summary Judgment on the Receiver’s Fraudulent Claims (“Receiver’s Motion”) in Counts I and II of the Amended Complaint as follows:

1. Receiver’s Motion seeks a summary judgment on Counts I and II of her Amended Complaint. Count II does not relate to McHenry, and thus requires no response.

2. Receiver contends she is entitled to summary judgment against McHenry on Count I based upon the Fifth Circuit’s decision setting out a Ponzi scheme presumption of insolvency which effectively disallows any showing, by a third party, of reasonable equivalent value given in return for a payment, even though acting in good faith. Accordingly, Receiver states no

reasonable value could (ever) be provided by anyone such as advisor, broker or other well-intended intermediary who received a payment in connection with the Ponzi scheme. In particular here, Receiver seeks a judgment against McHenry for all payments received from “Madison Timber” from 2010 through April 2018 for a total of \$3,473,320. *See* Para. 7, Declaration of Alysson Mills [Dkt. 16-1] and Para. 4 and Exhibit A, Declaration of J. Lester Alexander, III [Dkt. 16-2].

3. It cannot be disputed that Madison Timber Properties, LLC did not exist prior to its organization on August 17, 2012. The Mississippi Secretary of State organizational records are attached as Exhibit “A.” As set out in her Declaration, the Receiver was appointed for Receivership of “Arthur Lamar Adams” (“Adams”) and “Madison Timber Properties, LLC.” Payments made prior to August 2012 did not come from the Madison Timber Properties, LLC, the entity in Receivership. The pre-August 2012 payments were made by another independent entity, Madison Timber Company, Inc. There is no Receivership estate or insolvency finding for Madison Timber Company, Inc.

4. The Receiver’s initial report to the Court demonstrates Adams had substantial assets. *See* Receiver’s Report of August 21, 2018 (Updated August 29, 2018) [Dkt. 40-1], *SEC v. Arthur Lamar Adams, et al.*, U.S. District Court, Southern District of Mississippi, Case No. 3:18-cv-252. Even if the Court disregards the different entity, there has been no showing nor “confession by Adams” of insolvency by Madison Timber Company, Inc. in 2010, nor, for that matter, his personal insolvency for the period 2010 through August 2012. These issues are not addressed by the Receiver. Moreover, the Receiver’s report demonstrates a factual question exists about Adams solvency during this earlier time period.

5. Receiver’s Motion primarily points to Fifth Circuit law developed in the *Stanford* Ponzi scheme. The *Stanford* cases do not deal directly and specifically with Mississippi

Fraudulent Conveyance Act. As demonstrated by the decision of the Texas Supreme Court, to which the Fifth Circuit certified a question about the Texas Fraudulent Conveyance Act, the Ponzi scheme presumption of insolvency, thus no good faith-reasonable equivalent value defense, does not necessarily extend to payments made to third parties during the course of the Ponzi scheme. *Janvey v. Golf Channel, Inc.*, 487 S.W. 3d. 560 (Sup. Ct. Tex. 2016).

6. The Fifth Circuit said the Texas Supreme Court decision did not apply outside that jurisdiction. *Janvey v. Golf Channel, Inc.*, 834 F.3d. 570, 573 (5th Cir. 2016). The Fifth Circuit also viewed the Texas Fraudulent Conveyance Act as being unique among fraudulent-transfers laws. *Id.* Nevertheless, it is notable the contours of the application of the Mississippi Fraudulent Conveyance Act to third party payments in the course of a Ponzi scheme have not been clearly drawn by the Mississippi Supreme Court. For example, the Supreme Court of Minnesota has essentially rejected this “Ponzi scheme presumption” automatic application to third parties. *See Finn v. Alliance Bank*, 860 N.W. 2d. 638 (Sup. Ct. Minn. 2015). Thus, it does not necessarily follow that the Mississippi Supreme Court would follow Fifth Circuit precedent.

7. The Adams related payments received by First South prior to the formation of Madison Timber Properties, LLC on August 17, 2012 total \$393,570, including \$10,000 received on August 17. As noted, the Receiver’s Motion does not address this pre-formation period nor Adams solvency at that time. Thus, these amounts, taken from Exhibit A to the Declaration of J. Lester Alexander, III, are not subject to the Ponzi scheme presumption. Alternatively, even if the Court accepts statements at Adams sentencing to effect his Ponzi scheme started in 2011, that does not cover 2010. Total Adams related payments to First South in 2010 were \$108,470. There is simply no evidence to automatically bring these 2010 and pre-August 18, 2012 payments within the Ponzi scheme presumption so as to foreclose any factual dispute.

8. Without benefit of a definitive decision from the Mississippi Supreme Court, the current Fifth Circuit law appears to establish a Ponzi scheme presumption of insolvency for which there can be no reasonable equivalent value defense which otherwise flows from McHenry's good faith belief the subject timber harvesting rights were valuable and loans to procure those cutting rights were viable and secure. At a minimum, however, the Court can only apply current Fifth Circuit law to payments during the period in which Madison Timber Properties, LLC legally existed.

THIS the 22nd day of January, 2019.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: /s/ Frank W. Trapp

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ATTORNEY FOR WILLIAM B. MCHENRY,
JR. AND FIRST SOUTH INVESTMENTS, LLC

CERTIFICATE OF SERVICE

I certify that I have this day filed this documents with the Clerk of the Court using the ECF system, which sent notification of such filing to all counsel of record.

This the 22nd day of January, 2019.

/s/ Frank W. Trapp
FRANK W. TRAPP

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RAWLINGS & MACINNIS, P.A.

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MICHAEL S. MACINNIS*

*ALSO ADMITTED IN GEORGIA

EMAIL: MIKEMS@BELLSOUTH.NET

August 15, 2012

Office of the Mississippi Secretary of State
P.O. Box 136
Jackson, MS 39205-0136
Attn: Corporations/LLC's

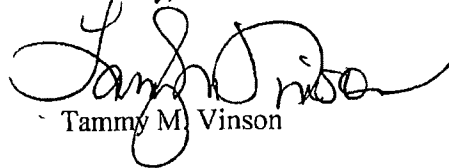
RE: Madison Timber Properties, LLC – Certificate of Formation

To Whom It May Concern:

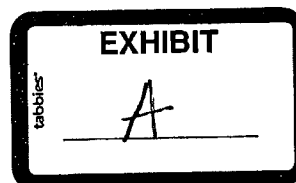
Enclosed please find an original of your form F0100-Certificate of Formation for the above-referenced matter, along with a check in the amount of \$50.00 for filing fees associated therewith. Please return a filed copy to us at your earliest convenience.

Thank you for your assistance in this matter.

Sincerely,


Tammy M. Vinson

/TMV
Enclosure



3115935

Business ID: 1006857
Date Filed: 08/17/2012 08:00 AM
C. Delbert Hosemann, Jr.
Secretary of State

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DELBERT HOSEMANN
Secretary of State

OFFICE OF THE SECRETARY OF STATE
P O BOX 1020, JACKSON, MS 39215-1020 (601)359-1633

Mississippi LLC Certificate of Formation

The undersigned hereby executes the following document and sets forth:
(fields marked with an asterisks are required)

1. Name of the Limited Liability Company: (The name must include the words "Limited Liability Company" or the abbreviation "LLC" or "L.L.C.")

⇒ * Madison Timber Properties, LLC

2. The future effective date is _____ Business Email Address: lamar@timberzone.net
(Complete if Applicable)

3. Federal Tax ID if available (Do not put Social Security Number in the box)
⇒ Applied For

4. Name and Street Address of the Registered Agent and Registered Office is (must be in Mississippi)

⇒ *Name Lamar Adams

⇒ *Physical Address 742 Magnolia Street

⇒ P.O. Box 1381

*City Madison * State MS * Zip5 - Zip4 39130-1381

5. If the Limited Liability Company is to have a specific date of dissolution, the latest date upon which the Limited Liability Company is to dissolve is

⇒ _____

6. Other matters the managers or members elect to include: (Attach additional pages if necessary)

⇒ _____

⇒ _____

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Page 2 of 2

OFFICE OF THE SECRETARY OF STATE
P O BOX 1020, JACKSON, MS 39215-1020
(601)359-1633

Certificate of Formation

7. Signatures: This certificate must be signed by at least one member, manager, or organizer. The name, title, and address of each signer should be included in the spaces indicated. This page may be duplicated for additional signatures.

* Printed Name Lamar Adams * Title Manager

* By: Signature  (please keep writing within blocks)

Street and Mailing Address

⇒ * Physical Address 742 Magnolia Street

⇒ P. O. Box 1381

⇒ * City Madison State MS Zip5 - Zip4 39130-1381

Printed Name _____ Title _____

By: Signature  (please keep writing within blocks)

Street and Mailing Address

⇒ Physical Address _____

⇒ P. O. Box _____

⇒ City _____ State _____ Zip5 - Zip4 _____