UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

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

Plaintiff,

v.

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-00679

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

Hon. Carlton W. Reeves, District Judge

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE RECEIVER'S FRAUDULENT TRANSFER CLAIMS

William McHenry did not provide reasonably equivalent value for the commissions he received from Lamar Adams in exchange for his recruitment of new investors into the Madison Timber Ponzi scheme. *See Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006). Neither of his two counterarguments create an "actual controversy" sufficient to overcome the Receiver's showing that she is entitled to judgment as a matter of law on her fraudulent transfer claims.

First, the Texas Supreme Court's application of a unique provision in Texas's Uniform Fraudulent Transfer Act ("TUFTA") to a distinct set of facts has no relevance here. Unlike

McHenry, the recipient of funds in that case provided legitimate business services. Under still-binding Fifth Circuit precedent, the commissions McHenry received in exchange for his recruitment of new investors to the Madison Timber Ponzi scheme were not for reasonably equivalent value as a matter of law.

Second, that McHenry received his commissions checks from non-Receivership entity Madison Timber Company, Inc. before Madison Timber Properties, LLC was formed in 2012 is of no moment to the fraudulent nature of those payments. McHenry does not dispute that all of the payments he received originated from Lamar Adams. The Receivership Estate includes Adams. Adams has admitted, and the Receiver has confirmed, that Madison Timber was a fraudulent enterprise from its inception.

I. Under binding Fifth Circuit law, McHenry did not provide reasonably equivalent value for the commission payments.

McHenry cites *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Tex. 2016) (*Golf Channel III*)[1] to argue that the Mississippi Supreme Court would "not necessarily follow" the United States Court of Appeals for the Fifth Circuit's "Ponzi scheme presumption" precedent. *See* Opposition, Docket. No. 57, at ¶ 5. But he nevertheless acknowledges, as he must, "current Fifth Circuit law appears to establish a Ponzi scheme presumption of insolvency for which there can be no reasonable equivalent value defense." Docket No. 57 at ¶ 8. In fact, the Fifth Circuit has explicitly stated that the Texas court's interpretation of reasonably equivalent value in *Golf Channel III* did not disturb "the binding effect" of its prior cases holding that "services that furthered a Ponzi scheme were not for 'value' as a matter of law because '[t]he primary consideration in analyzing the exchange of value for any transfer is the degree to which the

[1] This decision is *Golf Channel III* because it followed the Fifth Circuit's ruling that payments to Golf Channel were voidable under TUFTA, 780 F.3d 641 (5th Cir. 2015) (*Golf Channel I*), which was vacated on rehearing in favor of certifying the question to the Texas Supreme Court, 792 F.3d 539 (5th Cir. 2015) (*Golf Channel II*).

transferor's net worth is preserved.'" *Janvey v. Golf Channel, Inc.*, 834 F.3d 570, 573 (5th Cir. 2016) (quoting *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006)) (*Golf Channel IV*).

This Court therefore need not consider the *Golf Channel* cases, which are uniquely based in *Texas* law, to determine whether the Receiver is entitled to judgment as a matter of law on her Mississippi law claims. Instead, it can rely on *Warfield*'s instruction that commissions for the recruitment of new investors to a Ponzi scheme are not reasonably equivalent value as a matter of law. If this Court does determine that it should make an *Erie* guess as to how the Mississippi Supreme Court would interpret reasonably equivalent value, *Golf Channel III* is not persuasive for multiple reasons. *Warfield* is directly on point.

In *Golf Channel III*, the Texas Supreme Court answered a certified question from the Fifth Circuit: What suffices to prove the "in good faith and for reasonably equivalent value" affirmative defense to a fraudulent transfer claim under *Texas* law? *See* 487 S.W.3d at 563-64. Noting that TUFTA is "unique among uniform fraudulent-transfer laws because it provides a specific market-value definition of 'reasonably equivalent value,'" the Texas court held that under the Texas act, a transfer is made for reasonably equivalent value if "the transferee (1) fully performed under a **lawful**, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business." *Id*. at 564, 573 (emphasis added).

The specific definition in TUFTA that the Texas Supreme Court referenced explains that reasonably equivalent value includes "a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction"; the Mississippi Uniform Fraudulent Transfer Act ("MUFTA") contains no such provision. *Compare* TEX. BUS. & COM. CODE ANN. § 24.004 *with* MISS. CODE. ANN. § 15-3-105. The Washington

Uniform Transfer Act that applied in *Warfield* provides an identical definition of value to the one set forth in MUFTA. *Compare* MISS. CODE. ANN. § 15-3-105 *with* WASH. REV. CODE. § 19.40.031. The Fifth Circuit's analysis in *Warfield* is the logical one for this Court to follow.

The facts in *Golf Channel III* are also distinguishable from the undisputed facts on which the Receiver's motion relies. Golf Channel received payments from participants in the Stanford Ponzi scheme for "television air time" that "would have been available to another buyer at market rates" if not purchased by the fraudulent enterprise. 487 S.W.3d at 570. Those payments were therefore for "performance of services with **objective, economic value** that were provided in the ordinary course of Golf Channel's business." *Id*. at 582 (emphasis added). The "linger[ing]" question that the Texas Supreme Court answered *Golf Channel III* was whether "**objectively valuable** consideration become valueless based on the true nature of the debtor's business as a Ponzi scheme or the debtor's subjective reasons for procuring **otherwise lawful** services." *Id*. at 577 (emphases added).

The defendant in *Warfield*, conversely, provided "**illegal** services" when he "extended the fraud by securing new investments." *Id*. at 580 (citing *Warfield*, 436 F.3d at 560) (emphasis added).[2] This is precisely what McHenry did for the Madison Timber Ponzi scheme. McHenry's recruitment of new investors, which "furthered a Ponzi scheme," was "not for 'value' as a matter of law because '[t]he primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved.'" *Golf Channel IV*, 834 F.3d at 573 (quoting *Warfield*, 436 F.3d at 560). It "takes cheek" for McHenry "to contend that in exchange for the payments he received, the [Madison Timber] Ponzi scheme benefited from his efforts to

[2] *See also* Memorandum in Support of Receiver's Motion, Docket No. 32, at p-7; Exhibits 1 & 2, Docket Nos. 31-1 & 31-2 (outlining the commissions paid to McHenry).

extend the fraud by securing new investments." *Warfield*, 436 F.3d at 560. McHenry's illegal services provided no objective value to the Madison Timber Ponzi scheme.

II. Every commission payment McHenry received was from a fraud.

The Receiver's motion seeks to avoid commissions McHenry received beginning in 2010. McHenry argues that the Receiver should not be able to avoid transfers McHenry received before August 2012 because there is "no Receivership estate or insolvency finding" for Madison Timber Company, Inc., the entity through which Adams issued commissions payments before Madison Timber Properties was formed. Docket No. 57 at ¶ 3. McHenry admits, however, that each of the payments originated from Adams. *See id*. at ¶ 4. Lamar Adams is in receivership. *See* Order Appointing Receiver, June 22, 2018, Docket No. 33, *S.E.C. v. Adams*. No. 3:18-cv-252 (S.D. Miss.). There is, therefore, a Receivership estate and an insolvency finding for the person who issued each commission payment to McHenry. *See* Sentencing Transcript, Oct. 30, 2018, at p. 315 ("There is no income. All of this is illusory.").[3]

A defendant's argument that he received payments from a non-receivership entity is "of no moment" to the voidability of those payments if the non-receivership entity received the "bulk of its revenue" from the fraudulent enterprise. *Janvey v. Alguire*, 647 F.3d 585, 598 (5th Cir. 2011). Adams's own admissions and the Receiver's review of the records for which she is the custodian confirm that Madison Timber Company was operated as part of the same fraudulent scheme as Madison Timber Properties.

At his sentencing, Adams told the Court that he had been "engaged in what [he] pled guilty to" since at least 2009. Sentencing Transcript, Oct. 29, 2018, at p. 135. This admission

[3] McHenry argues that the Receiver's initial report identifying assets belonging to Lamar Adams creates an issue as to his solvency. Adams admitted his income was entirely derived from the Madison Timber Ponzi scheme; that he owned assets purchased with money stolen from investors does not show he was solvent.

from Adams, who is "singularly positioned to provide insight into the workings" of the Madison Timber Ponzi scheme, is sufficient evidence to support the presumption that all the entities through which Adams conducted Madison Timber's business were part of a fraudulent enterprise during the time period in question. *See Alguire*, 647 F.3d at 598.

The Receiver has reviewed Adams and Madison Timber's bank account statements and accounting files for the entire time in question. *See* Declaration of Alysson Mills, Docket No. 31-1. Based on her review, she determined that at least since 2010, Madison Timber's only income came from sums invested by duped investors. *See id*. All of the payments at issue in the Receiver's motion are subject to the "Ponzi scheme presumption" that the transfers were fraudulent.

CONCLUSION

McHenry cannot escape the undisputed facts or the clear law. The only services McHenry provided in exchange for his commissions were the recruitment of new investors into the Madison Timber Ponzi scheme. These services were not legitimate business services; under binding Fifth Circuit law, they were "illegal." McHenry did not provide reasonably equivalent value for any of the commissions he received from Adams and Madison Timber. No evidentiary hearing is necessary; there are no factual disputes. The Receiver is entitled to judgment as a matter of law that the $3,473,320 in commission payments McHenry received from Lamar Adams are voidable fraudulent transfers.

January 29, 2019

Respectfully submitted,

/s/ Lilli Evans Bass

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the ECF system which sent notification of filing to all counsel of record.

Date: January 29, 2019 */s/ Rebekka C. Veith*