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.

BUTLER SNOW LLP; BUTLER SNOW ADVISORY SERVICES, LLC; MATT THORNTON; BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC; ALEXANDER SEAWRIGHT, LLC; BRENT ALEXANDER; and JON SEAWRIGHT,

Defendants.

Case No. 3:18-cv-00866

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

RECEIVER'S OPPOSITION TO BAKER DONELSON'S MOTION TO DISMISS

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, opposes the motion to dismiss filed by Defendant Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("Baker Donelson").

INTRODUCTION

If this lawsuit is unprecedented, it is because there is no precedent for this set of facts. It is not every day that a law firm such as Baker Donelson allows its agents, including a member of its board of directors, to use their positions of trust and their firm's name and resources to sell

investments of any kind—much less investments in a Ponzi scheme—to unsuspecting individuals, including firm clients.

Baker Donelson distances itself from its codefendant Butler Snow on the premises that, unlike Butler Snow, Baker Donelson did not have an attorney-client relationship with Madison Timber and did not form a separate LLC to provide Madison Timber "non-legal business advice." Unlike Butler Snow, Baker Donelson contends its agents' work for Madison Timber was "separate" from and "unaffiliated" with the firm's business.

The complaint, however, tells another story. The complaint alleges that it was their affiliation with Baker Donelson that enabled Brent Alexander and Jon Seawright, a Baker Donelson lobbyist and lawyer, to recruit new investors to the Madison Timber Ponzi scheme.[1] Alexander and Seawright relied heavily on their affiliation with Baker Donelson to recruit investors.[2] Yes, they formed a separate LLC for their investment fund and named it after themselves—but they pitched their fund as a "friends and family" fund for preferred Baker Donelson partners and clients.[3] They referred potential investors to Baker Donelson's website, which shows that Jon Seawright is not merely a shareholder in Baker Donelson's Jackson office but an elected member of the firm's national governing board of directors.[4] They made a pitchbook that emphasized their affiliation with Baker Donelson:

> Brent Alexander is a senior public policy advisor at Baker, Donelson, Bearman, Caldwell and Berkowitz ("Baker Donelson") one of the nation's largest law firms. He provides strategic business consulting for the firm's clients and serves as a national recognized lobbyist both regionally and federally. . . .
>
> Jon Seawright is a senior shareholder at Baker Donelson and a member of the firm's Board of Directors. Seawright has been deemed by peer-reviewed *Super*

[1] Doc. 1 at ¶¶ 79–84, 193–94.

[2] Doc. 1 at ¶ 80.

[3] Doc. 1 at ¶¶ 75, 80.

[4] Doc. 1 at ¶ 81.

> *Lawyers* as a Rising Star, as well as one of the nation's top attorneys, and represents a range of national and regional clients, specializing in complex business transactions, mergers and acquisitions and taxation. . . . [5]

In assessing an investment, potential investors reasonably counted Madison Timber's and Alexander and Seawright's affiliations with Baker Donelson "to the good."[6]

Baker Donelson knew that Alexander and Seawright used their affiliation with Baker Donelson to recruit new investors to Madison Timber, and allowed it.[7] Alexander and Seawright's investment business was not "separate" from or "unaffiliated" with the firm's business—it was inextricably intertwined. Alexander and Seawright used Baker Donelson's Jackson address for their investment business.[8] They met with Lamar Adams, investors, and potential investors at Baker Donelson's offices for "closings" and used Baker Donelson's runners to pick up investors' checks.[9] They used Baker Donelson's conference rooms to make presentations to potential investors, accountants, and advisors.[10] They enlisted their colleagues at Baker Donelson, including from offices in other states, to introduce them to potential investors.[11] They specifically targeted clients of Baker Donelson for whom Baker Donelson had recently closed transactions, because they knew those individuals had money available to invest.[12] They told one such client, "[r]unning funds through us or BD [Baker Donelson] escrow is not a problem" and all "legal and other admin

[5] Doc. 1 at ¶ 103.
[6] Doc. 1 at ¶ 105.
[7] Doc. 1 at ¶ 82.
[8] Doc. 1 at ¶ 83.
[9] Doc. 1 at ¶ 83.
[10] Doc. 1 at ¶ 102.
[11] Doc. 1 at ¶ 84.
[12] Doc. 1 at ¶ 78.

expenses" would "come out of our share."[13] Third parties, including Adams, investors, and potential investors, reasonably believed that the investments were backed by Baker Donelson.[14]

That Alexander and Seawright did not share their Madison Timber commissions with Baker Donelson does not absolve Baker Donelson of liability for the Madison Timber Ponzi scheme fallout. This lawsuit does not "compound the harm of the Ponzi scheme" by seeking to hold Baker Donelson liable for its allowance of unprecedented acts by its lawyer and lobbyist. Baker Donelson is not "blameless." But for Baker Donelson's recklessness and willful blindness, the Madison Timber Ponzi scheme would not have continuously grown.[15]

The complaint alleges claims against Baker Donelson for aiding and abetting; civil conspiracy; recklessness, gross negligence, and at a minimum negligence; and for negligent retention and supervision. The complaint also alleges Baker Donelson is vicariously liable for the acts of its agents Alexander and Seawright. The Receiver need not prove Baker Donelson's or Alexander and Seawright's actual knowledge that Madison Timber was a Ponzi scheme to survive Baker Donelson's motion to dismiss. It is sufficient that the complaint expressly alleges they knew or should have known, and there are ample facts that if true establish that they did.

The Receiver does not lack standing to pursue her claims. The Receiver filed this lawsuit in her capacity as Receiver and pursuant to the powers vested in her by the Court's orders and applicable law. The Receiver has standing to pursue, *inter alia*, claims against third parties whose actions contributed to the success of the Madison Timber Ponzi scheme, and therefore to the debts of the Receivership Estate. As the Fifth Circuit has held in comparable cases, the doctrine of *in pari delicto* does not apply.

[13] Doc. 1 at ¶ 71.
[14] Doc. 1 at ¶ 79.
[15] Doc. 1 at ¶ 183.

The Receiver responds to Baker Donelson's legal arguments below.

ARGUMENT

A complaint should state "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "When considering a motion to dismiss under Rule 12(b)(6), the Court accepts the plaintiff's factual allegations as true and makes reasonable inferences in the plaintiff's favor." *Handy v. U.S. Foods, Inc.*, No. 3:14-CV-854-CWR-LRA, 2015 WL 1637336, at *1 (S.D. Miss. Apr. 13, 2015) (citing *Iqbal*, 556 U.S. at 678).

1. Baker Donelson is responsible for the acts of Alexander and Seawright, its agents.

"A domestic or foreign professional corporation whose employees perform professional services within the scope of their employment **or** of their apparent authority to act for the corporation is liable to the same extent as its employees." MISS. CODE ANN. § 79-10-67(2) (emphasis added).

Baker Donelson argues that it is not responsible for Alexander and Seawright's acts, but it concedes that it would be if Alexander and Seawright acted "**either** 'within the scope [1] of their employment **or** [2] of their apparent authority to act for [Baker Donelson].'"[16] The complaint alleges facts that would establish Baker Donelson's liability under either scenario. The Receiver addresses apparent authority first.

A. Alexander and Seawright acted with apparent authority.

"Whether an agent has the apparent authority to bind the principal is a question of fact" that looks to "(1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third

[16] Doc. 29 at p. 5 (quoting MISS. CODE ANN. § 79-10-67(2)) (emphasis added).

person as a result of that reliance." *Eaton v. Porter*, 645 So. 2d 1323, 1325 (Miss. 1994). The complaint alleges facts sufficient to establish each of these three prongs.

"(1) acts or conduct of the principal indicating the agent's authority"

The first prong is "fulfilled merely by acts of the principal which clothed the agent with indicia of authority." *Id.* at 1326. How the principal, here Baker Donelson, "held itself out to the general public" is irrelevant; the Mississippi Supreme Court "care[s] not whether anyone from [Baker Donelson] but its agent[s] . . . made any representations to [third parties]." *Id.* The "key is how . . . particular third parties . . . perceived the actions of the agent[s]." *Id.*

Eaton v. Porter is instructive. In that case, J.W. Eaton, Sr., an employee of Eaton Motors, represented to the Porters that their car would be repaired at the Eaton Motors shop. *Id.* at 1324. Instead he arranged for a different auto body shop to perform the repairs, and that shop's repairs were defective. *Id.* After the Porters sued J.W. Eaton, Jr. d/b/a Eaton Motors for the defective repairs, Eaton, Jr. argued Eaton, Sr. had no apparent authority to bind Eaton Motors because Eaton Motors did not "h[o]ld itself out to the public as a repair business" and because Eaton, Jr. never met the Porters nor made any representations to them. *Id.* at 1326. The Mississippi Supreme Court explained that Eaton Motors' argument "misconstrue[d] our case law." *Id.*

Eaton Motors had "provided Eaton, Sr. with a desk on its premises" and Eaton, Sr. was listed on Eaton Motors' business cards. *Id.* Eaton, Sr. endorsed checks on behalf of Eaton Motors and signed the repair estimate in question with his name and "Eaton Motors." *Id.* These facts were "sufficient evidence to show that Eaton, Jr. d/b/a/ as Eaton Motors, had clothed Eaton, Sr. with the necessary indicia of authority." *Id.* In another case, the Mississippi Supreme Court held it was sufficient, for apparent authority purposes, that a business named its agent "Secretary of the Department of Finance, charg[ed] him with the duty to write checks for the [business], and

provid[ed] him with [the business's] Department of Finance letterhead." *Christian Methodist Episcopal Church v. S & S Constr. Co.*, 615 So. 2d 568, 573 (Miss. 1993).

Applying this precedent, the Receiver's complaint alleges more than sufficient facts to establish Baker Donelson "clothed [Alexander and Seawright] with the necessary indicia of authority." *Eaton*, 645 So. 2d at 1326. Among other things, Baker Donelson allowed Alexander and Seawright to use Baker Donelson's Jackson address for their investment business.[17] Baker Donelson allowed Lamar Adams, Alexander, and Seawright to hold "closings" in Baker Donelson's office and to use Baker Donelson's runners to pick up investors' checks.[18] Other Baker Donelson shareholders, including from offices in other states, referred potential investors to Alexander and Seawright.[19] Baker Donelson allowed Alexander and Seawright to target clients of Baker Donelson for whom Baker Donelson had recently closed transactions.[20] Echoing *Eaton*, Seawright even "drafted subscription agreements and accompanying documents" for investments in Madison Timber that he sent to Adams from his Baker Donelson e-mail address.[21]

While Mississippi law cares not how Baker Donelson "held itself out to the general public," *id.*, it nevertheless bears mention that Baker Donelson employed, and continues to employ, Alexander as a "Senior Public Policy Advisor" and a "Broker-Dealer/**Investment Adviser**."[22] Seawright was, and is, a Baker Donelson shareholder and "a member of Baker Donelson's Board of Directors," with "Practices" including "**Securities**" and "**Emerging**

[17] Doc. 1 at ¶ 83.

[18] Doc. 1 at ¶ 83.

[19] Doc. 1 at ¶ 84.

[20] Doc. 1 at ¶ 78.

[21] Doc. 1 at ¶ 74. *See* Exhibit A. As Baker Donelson acknowledges, "[w]hen a plaintiff quotes from a document used as a foundation for allegations in the complaint, the Court may examine the entire document to review a motion to dismiss." *Thornton v. Micrografix, Inc.*, 878 F. Supp. 931, 933 (N.D. Tex. 1995). Paragraph 72 of the complaint quotes the email that is Exhibit A.

[22] Doc. 29-1 at 4.

Companies."[23] Baker Donelson argues that additional language on its website qualifies the practices of Alexander and Seawright to exclude the activities Alexander and Seawright performed relating to Madison Timber investments,[24] but that argument only raises a factual issue that should not be resolved on a motion to dismiss.

In short, the complaint alleges more than sufficient "acts or conduct of [Baker Donelson] indicating [Alexander and Seawright's] authority."

"(2) reasonable reliance upon those acts by a third person"

The second prong asks whether it was reasonable for a third party to rely on the indicia of authority. What is reasonable is a question of fact, improperly decided on a motion to dismiss.

It is relevant, however, that in *Eaton* the Porters' reliance was reasonable in part because Eaton, Sr. met with them at Eaton Motors. *Eaton*, 645 So. 2d at 1327. Here, too, Alexander and Seawright met with Lamar Adams, investors, and potential investors at Baker Donelson's offices for "closings"[25] and investment-related presentations.[26] In *Christian Methodist Episcopal Church*, a third party's reliance was reasonable because it had received a letter "written on [the principal's] Department of Finance letterhead." 615 So. 2d at 573. Here, too, Alexander and Seawright communicated with Adams, investors, and potential investors using their Baker Donelson email accounts; indeed, Seawright sent Adams legal documents from his Baker Donelson e-mail address.[27]

[23] Doc. 29-1 at 2, 5.
[24] Doc. 29 at 6-7.
[25] Doc. 1 at ¶ 83.
[26] Doc. 1 at ¶¶ 83, 102.
[27] *See e.g.*, Exhibit A.

These facts, coupled with the facts, among others, that Alexander and Seawright emphasized their affiliation with Baker Donelson in their pitchbook,[28] and that Alexander and Seawright represented that an investor's funds could be "run" through "BD [Baker Donelson] escrow,"[29] are sufficient to establish that any third party—Adams, investors, and potential investors—reasonably relied on Alexander and Seawright's indicia of authority.

Baker Donelson argues that even if investors reasonably relied on Alexander and Seawright's indicia of authority, the same reliance by Adams and Madison Timber could not be reasonable and therefore the Receiver, who stands in the shoes of Adams and Madison Timber, cannot invoke apparent authority. This argument ignores the complaint's allegations that Alexander and Seawright held themselves out as agents of Baker Donelson to Adams as well—by sending legal documents to Adams from their Baker Donelson email accounts, inviting Adams to "closings" at Baker Donelson's offices, and pitching the Madison Timber investment to Baker Donelson clients. Far from offering any proof that Adams had "actual knowledge of the limits of the agents' authority," Baker Donelson suggests only that Adams "presumably did not care whether Baker Donelson supported the investments."[30] That suggestion does not undermine reasonable reliance by Adams or Madison Timber as a matter of law.

"(3) a detrimental change in position by the third person as a result of that reliance"

Finally, it goes without saying that Baker Donelson's apparent backing was to everyone's detriment. But for Baker Donelson's backing, the Madison Timber Ponzi scheme would not have continuously grown—it would have failed before ensnaring hundreds of new unwitting

[28] Doc. 1 at ¶ 103.

[29] Doc. 1 at ¶ 71; *see also* Exhibit B (an e-mail quoted in paragraph 71 of the complaint).

[30] Doc. 29 at 8-9.

investors.[31] Each new investor that Alexander and Seawright, with Baker Donelson's apparent backing, recruited to the Madison Timber Ponzi scheme increased Madison Timber's liabilities and, today, the Receivership Estate's debts. *E.g., Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at *6 (N.D. Tex. Dec. 17, 2014) (finding defendants had caused damages to the Stanford receivership estate because "they contributed to the size and scope of the underlying scheme, which ultimately resulted in Stanford's financial ruin").

Because Alexander and Seawright acted with Baker Donelson's apparent authority, Baker Donelson is vicariously liable for their acts. *See* MISS. CODE ANN. § 79-10-67(2).

B. Alexander and Seawright acted within the scope of their employment.

Alternatively, Baker Donelson is liable for Alexander and Seawright's acts because Alexander and Seawright acted within the scope of their employment. Baker Donelson's own website represents that the scope of professional services Alexander and Seawright offer are "Broker-Dealer/Investment Adviser" services (Alexander)[32] and "Securities" and "Emerging Companies" services (Seawright).[33]

The two cases on which Baker Donelson relies to argue Alexander and Seawright did not act within the scope of their employment are inapplicable here. Both involved employees who conducted romantic affairs at their workplace. *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So. 3d 474, 487 (Miss. 2010) (concluding that an attorney's affair with a client's wife was not related to representation of the client); *Children's Med. Grp., P.A. v. Phillips*, 940 So. 2d 931, 936 (Miss. 2006) (following "[o]ther jurisdictions [that] have specifically found that an

[31] Doc. 1 at ¶ 183.

[32] Doc. 29-1 at 4.

[33] Doc. 29-1 at 2, 5.

employee's affair with a coworker is beyond the course and scope of employment"). A romantic affair is "the quintessential example of an activity that is for purely personal benefit and outside the scope of employment." *Seay*, 42 So. 3d at 488. This lawsuit does not allege a romantic affair.

Seay also involved a Baker Donelson shareholder. In holding that the shareholder's affair with a client's wife was not within the scope of his employment, the Mississippi Supreme Court observed that his conduct was "different in kind from that authorized" by Baker Donelson. *Id.* (emphasis removed). Here, by contrast, Alexander and Seawright's acts were "of the kind [they were] employed to perform." *Id.* (quoting Restatement (Second) of Agency § 228(1)(a)). Alexander, who provides professional "Investment Adviser" services,[34] purported to provide "smart advice" to potential investors to "put [their] money to work" by "invest[ing] in [] timber round[s]."[35] Seawright, a "Securities" lawyer presumably qualified to draft legal documents,[36] drafted "subscription agreements and accompanying documents for the sales of units" in the Alexander Seawright Timber Fund, which invested solely in Madison Timber.[37]

Baker Donelson argues that the court in *Seay* emphasized that its shareholder's affair was "not in any way related to [a legal] representation."[38] But the sales of investments by professionals who hold themselves out as having the education, experience, and judgment to provide professional advice on such matters is something else. The complaint alleges Alexander and Seawright specifically targeted clients of Baker Donelson for whom Baker Donelson had recently closed transactions[39] and even told one such client, "[r]unning funds through us or BD [Baker

[34] Doc. 29-1 at 4.
[35] Doc. 1 at ¶ 77.
[36] Doc. 29-1 at 2, 5.
[37] Doc. 1 at ¶ 74.
[38] Doc. 29 at 7 (quoting *Seay*, 42 So. 3d at 489).
[39] Doc. 1 at ¶ 78.

Donelson] escrow is not a problem" and all "legal and other admin expenses" would "come out of our share."[40]

These facts are sufficient to establish that Alexander and Seawright acted within the scope of their employment, such that Baker Donelson is vicariously liable for their acts. *See* MISS. CODE ANN. § 79-10-67(2).

2. The complaint states a claim for aiding and abetting.

A. This Court has recognized a claim for aiding and abetting.

Baker Donelson represents that "Mississippi law does not recognize a cause of action for civil aiding and abetting."[41] Although no Mississippi state court has had the occasion to address the issue, every Mississippi federal court to address the issue has agreed that Mississippi law would recognize a claim for civil aiding and abetting as set forth in the Restatement (Second) of Torts section 876(b). This includes the United States Bankruptcy Court for the Southern District of Mississippi in *In re Evans*, 467 B.R. 399 (Bankr. S.D. Miss. 2011), which Baker Donelson selectively quotes in its memorandum.

As the court *In re Evans* court explained, this Court in *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694 (S.D. Miss. 2002), made an *Erie* guess that Mississippi would recognize a cause of action under section 876(b) of the Restatement "(1) because a majority of other jurisdictions have done so and (2) because Mississippi recognizes the analogous tort of civil conspiracy." *In re Evans*, 467 B.R. at 409. Since *Dale*, this Court has consistently recognized a cause of action for aiding and abetting under Mississippi state law.[42] The *In re Evans* court recognized the viability of

[40] Doc. 1 at ¶ 71; *see also* Exhibit B.

[41] Doc. 29 at 19.

[42] *See Natchez Reg'l Med. Ctr. v. Quorum Health Res., LLC*, 879 F. Supp. 2d 556, 574 (S.D. Miss. 2012) (declining to grant summary judgment to defendants on an aiding and abetting fraud claim); *Dickens v. A-1 Auto Parts & Repair, Inc.*, No. 1:18CV162-LG-RHW, 2019 WL 508074, at *2 (S.D. Miss. Feb. 8, 2019) ("Federal courts in this district have concluded that Mississippi courts would recognize a claim of aiding and abetting fraud or civil conspiracy under

a cause of action based on section 876(b) but declined to hold that Mississippi law would recognize a cause of action cased on section 876**(c)**. 457 B.R. at 409. As Baker Donelson acknowledges, the Receiver's cause of action arises under section 876(b), not section 876(c).[43]

B. The complaint alleges sufficient facts to state a claim for aiding and abetting.

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENT (SECOND) OF TORTS § 876(b).

Baker Donelson, Alexander, and Seawright knew that Lamar Adams was the manager of his company, Madison Timber. They therefore knew that Adams owed Madison Timber fiduciary duties of care. Mississippi law requires a manager to discharge his duties in good faith and fair dealing, with ordinary care, and in a manner that he reasonably believed was in the best interests of the company. *See* MISS. CODE ANN. § 79-29-123(6)(a). Adams breached those duties by misusing Madison Timber's corporate form to sustain a Ponzi scheme. *E.g.*, *Greenberg Traurig, LLP*, 2014 WL 12572881, at *8 ("the underlying fiduciary duties on which Plaintiffs' claims are based are those owed by directors and officers of the Stanford Financial Group to their respective Stanford entities").

The complaint alleges that Baker Donelson, Alexander, and Seawright, by recruiting new investors to the Madison Timber Ponzi scheme, aided and abetted Adams in "committing breaches of duties owed by Adams to Madison Timber and in other tortious conduct."[44] *E.g.*, *Official*

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the Restatement (Second) of Torts § 876(b)."); *U-Save Auto Rental of Am., Inc. v. Moses*, No. 1:02CV689GURO, 2006 WL 211955, at *1 (S.D. Miss. Jan. 27, 2006) (denying a motion to dismiss a claim for aiding and abetting breach of contract); *see also Wright v. Life Investors Ins. Co. of Am.*, No. CIV.A. 2:08CV3-P-A, 2008 WL 4450260, at *1 (N.D. Miss. Sept. 26, 2008) (denying a motion to dismiss a claim for aiding and abetting fraud).

[43] Doc. 1 at ¶ 127.

[44] Doc. 1 at ¶ 128.

Stanford Inv'rs Comm. v. Breazeale Sachse & Wilson LLP, No. 3:11-CV-0329-N, 2015 WL 13740747, at *9, n.11 and accompanying text (N.D. Tex. Mar. 24, 2015) (allegations that law firm referred clients to Ponzi scheme support "reasonable inference" of substantial assistance).

Baker Donelson argues it cannot be liable for aiding and abetting "because neither Alexander, Seawright, nor anyone at Baker Donelson is alleged to have known that Madison Timber was a Ponzi scheme."[45] But the complaint expressly alleges that they "knew or should have known that Madison Timber was a Ponzi scheme" in view of the numerous red flags described in the complaint.[46] These red flags, summarized in paragraphs 94–100 of the complaint, included the following:

> 95. The timber deeds and cutting agreements between landowners and Madison Timber were fake. The landowners' signatures, forged by Adams, often looked the same. A call to any one of the hundreds of purported landowners, or a simple check of the title for any one of the hundreds of purported tracts of land, would have confirmed the truth. Neither Alexander nor Seawright, nor anyone at Baker Donelson, ever called a landowner or checked a tract's title.
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> 96. Madison Timber also had no real contracts with any mills. A call to any one of the mills for which Madison Timber purported to have contracts would have confirmed the truth. Neither Alexander nor Seawright, nor anyone at Baker Donelson, ever called a mill.
>
> 97. Adams required that an investor agree that he or she would not record the deed by which Madison Timber purported to grant its own rights to the investor unless and until Madison Timber failed to make a payment due under the promissory note. Seawright quipped that "I have been clear that I am no timber expert"—but he is unquestionably a lawyer to whom his clients and investors looked to evaluate the investment's risks. Incredibly, notwithstanding the suspicious "agreement not to record," neither Alexander nor Seawright, nor anyone at Baker Donelson, questioned this requirement.
>
> 98. The "profit" that Adams promised was 300% to 400% better than that payable by any other fully collateralized investment and was uniform and consistent. This fact should have been a glaring warning sign but Alexander, who Baker Donelson presents as a qualified and experienced advisor, turned this warning sign into a selling point. Alexander bragged about his "six year perfect

[45] Doc. 29 at 14.

[46] Doc. 1 at ¶ 129.

> track record" of consistent uniform returns under his "beautiful, albeit simple, financial model."
>
> 99. Adams purported to have identified mills with an insatiable demand for timber at uniform prices. The market price for timber is readily available from multiple sources, and any one of those sources would have confirmed that the market price for timber actually rises and falls, sometimes dramatically, over short periods of time. Neither Alexander nor Seawright, nor anyone at Baker Donelson, ever evaluated the investment in light of such information. To the contrary, Seawright gloated that "[Adams] has stated that volume is not problem and indicates there are enough opportunities for him to soak up as much capital as we can raise."
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> 100. In 2014 Adams decided that he did not want to have to manage Madison Timber during the month of December. He told his "bird dogs," including Alexander and Seawright, that Madison Timber would not issue checks in December going forward; what had been a 12-month payoff would become a 13-month payoff, skipping the last month of the year. Seawright blindly passed on to investors the dubious explanation that mills shut down in December for OSHA inspections . . . .

Baker Donelson creates out of thin air a "universal rule in this country" that "banks, lawyers, brokerage houses, [or] accountants" are not liable for aiding and abetting a fraudulent scheme based on "red flags, smoke, and other irregularities."[47] Baker Donelson cites *El Camino Res., LTD v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 907–08 (W.D. Mich. 2010). The only "universal rule" to which the *El Camino* court referred is the purported principle that "a bank's relationship is with its customer and that the bank owes third parties no duty of care to monitor a customer's activities." 722 F. Supp. 2d at 907. That principle is inapplicable here, and in any event, *El Camino* is not binding on this Court. Indeed, in Ponzi scheme cases decided in the Fifth Circuit, awareness that an investment offered "unrealistic rates of return" supports knowledge for aiding and abetting purposes. *Janvey v. Proskauer Rose LLP*, No. 3:13-CV-0477-N, 2015 WL 11121540, at *5 (N.D. Tex. June 23, 2015).

Moreover, the complaint does not depend on red flags alone. The complaint expressly alleges at paragraphs 86–88 that Alexander and Seawright falsely represented that they personally

[47] Doc. 29 at 14.

inspected the timber and "mill contracts" underlying each investment. These representations were knowingly false, because there were no timber and no "mill contracts" to inspect:

> 86. Investors were led to believe that Alexander and Seawright personally inspected the timber underlying each investment. Of course they did not. Alexander and Seawright gave investors "Equity Term Sheets" that described each upcoming investment opportunity. An "Equity Term Sheet" dated March 5, 2017, for instance, explained that for the "minimum investment" of $25,000, an investor would share in the "cutting rights on tracts of land in various counties (the 'Timber Rights')." Like all of Alexander and Seawright's "Equity Term Sheets," the "Equity Term Sheet" dated March 5, 2017, expressly represented that Alexander and Seawright would personally inspect the property in question:
>
> > Company [Alexander and Seawright] will inspect the property related to the Timber Rights, must receive the original, executed Note and timber deed and will inspect the executed agreement(s) with the timber mill(s).
>
> Alexander and Seawright could not and did not inspect the property in question—nor "the executed agreement(s) with the timber mill(s)"—because such did not exist. These representations were patently false.
>
> 87. Alexander and Seawright even devised a "Timber Rights Investment Closing Checklist" that included among its list of things to do "Review Mill Contract" and "Review Land re Timber." Alexander and Seawright could not and did not review any "Mill Contract" or "Land re Timber" because there was no "Mill Contract" or "Land re Timber" to review.
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> 88. On information and belief, Alexander and Seawright "inspected" a purported timber tract only once or twice, at the very inception of their partnership with Adams. The "inspection" was hardly professional. Email traffic indicates "inspection" meant "[grab] a cooler of beer and make a loop."

Because Alexander and Seawright were Baker Donelson's agents, their knowledge is imputed to Baker Donelson. *See Lane v. Oustalet*, 873 So. 2d 92, 95–96 (Miss. 2004) ("The law of agency generally imputes knowledge and information received by an agent in conducting the business of a principal to the principal, even where that knowledge or information is not communicated by the agent to the principal."); *see also Proskauer*, 2015 WL 11121540, at *5 (citing Texas agency law to impute a lawyer's knowledge of a Ponzi scheme to law firms where he was employed).

Reading the complaint's allegations in a light most favorable to the Receiver, and indulging reasonable inferences in her favor, the complaint states a claim for aiding and abetting.

3. The complaint states a claim for civil conspiracy.

A conspiracy is "a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Shaw v. Burchfield*, 481 So. 2d 247, 255 (Miss. 1985). An agreement to conspire "may be express, implied, or **based on evidence of a course of conduct**." *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (emphasis added). The three elements of civil conspiracy claim are: "(1) the existence of a conspiracy, (2) an overt act in furtherance of that conspiracy, and (3) damages arising therefrom." *Wells v. Shelter Gen. Ins. Co.*, 217 F. Supp. 2d 744, 753 (S.D. Miss. 2002) (citing *Delta Chem. & Petroleum, Inc. v. Citizens Bank of Byhalia*, 790 So. 2d 862, 877 (Miss. App. 2001)). Facts supporting the "substantial assistance" prong of an aiding and abetting claim also support a showing of "an overt act in furtherance of a [Ponzi scheme] conspiracy." *Rotstain v. Trustmark Nat'l Bank*, No. 3:09-CV-2384-N, 2015 WL 13034513, at *11 (N.D. Tex. Apr. 21, 2015).

Baker Donelson argues that under "settled Mississippi law," the complaint does not state a civil conspiracy claim because it "does not allege that anyone at Baker Donelson, including Alexander and Seawright, knew that Madison Timber was a Ponzi scheme."[48] This argument fails on two grounds. First, and again, the complaint expressly alleges that Baker Donelson, Alexander, and Seawright "knew or should have known that Madison Timber was a Ponzi scheme"[49] in view of the red flags summarized in paragraphs 94–100 and reproduced above. Moreover, and again, the complaint does not depend on red flags alone. The complaint expressly alleges at paragraphs 86–88 that Alexander and Seawright falsely represented that they personally inspected the timber

[48] Doc. 29 at 18. Baker Donelson also argues that the Receiver cannot base her civil conspiracy claim on Alexander and Seawright's unlawful sale of unregistered securities. The Receiver does not purport to assert a private right of action for Alexander and Seawright's sale of unregistered securities. The Receiver would be remiss, however, to fail to point to that unlawfulness, which is further "evidence of [Alexander and Seawright's] course of conduct." *Bradley*, 117 So. 3d at 339.

[49] Doc. 1 at ¶ 120.

and "mill contracts" underlying each investment. These representations were knowingly false, because there were no timber and no "mill contracts" to inspect.

Second, "settled Mississippi law" holds that a conspiracy can be formed by a "mere tacit understanding between the conspirators to work to a common purpose." *Aetna Ins. Co. v. Robertson*, 94 So. 7, 22 (1922), *modified on suggestion of error for other reasons*, 95 So. 137 (1923). Alexander and Seawright formed a common purpose with Lamar Adams to "pool other people's money to invest in Madison Timber,"[50] and Baker Donelson furthered that purpose. Baker Donelson knew that Alexander and Seawright used their affiliation with Baker Donelson to recruit new investors to Madison Timber and allowed it.[51] *See, e.g.*, *Rotstain*, 2015 WL 13034513, at *11 (even the provision of "routine [professional] services" is "sufficient to allege substantial assistance and an overt act in furtherance of a conspiracy" if those services "inherently facilitated the financial transactions and operations that formed the lifeblood of the [Ponzi] scheme").

Baker Donelson cites *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 520 (5th Cir. 2018), for the general proposition that civil conspiracy requires proof that the coconspirator "knew of [the] fraudulent scheme." In fact, in affirming summary judgment in that case, the Fifth Circuit nevertheless observed that "civil conspiracy can be—and often is—established through circumstantial evidence." *Id.* at 520. Indeed, the district court in *Midwest Feeders* denied a motion to dismiss because alleged "circumstantial evidence" created "a factual inquiry regarding a civil conspiracy." *Midwest Feeders, Inc. v. Bank of Franklin*, 114 F. Supp. 3d 419, 431 (S.D. Miss. 2015). Where one conspirator had "confessed to fraudulent activity," it was sufficient, at the motion to dismiss stage, that his coconspirators were alleged to have failed to investigate. *Id.*

[50] Doc. 1 at ¶ 70.

[51] Doc. 1 at ¶ 82.

Applying this precedent, and reading the complaint's allegations in a light most favorable to the Receiver and indulging reasonable inferences in her favor, the complaint unquestionably states facts supporting a civil conspiracy claim sufficient to survive a motion to dismiss.

4. The complaint states a claim for recklessness, gross negligence, and at a minimum negligence; and for negligent retention and supervision.

"Negligence is a failure to do what the reasonable person would do under the same or similar circumstances." *Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1128 (Miss. 2014). Recklessness "is a failure or refusal to exercise any care." *Maldonado v. Kelly*, 768 So. 2d 906, 910 (Miss. 2000).[52]

Baker Donelson argues it cannot be liable for negligence or recklessness to the Receivership Estate, because its duties of care are to its clients only. But Baker Donelson misconstrues the Receiver's claim as a claim for "**professional** negligence."[53] The complaint currently alleges a claim for professional negligence, or attorney malpractice, only against Butler Snow—not against Baker Donelson. Against Baker Donelson, the complaint currently alleges ordinary negligence only. The complaint alleges Baker Donelson, Alexander, and Seawright "were in advantageous positions to discover Adams's fraud" and "[i]n view of the numerous red flags described in this complaint, a reasonable person"—not a reasonable lawyer—"in the same or similar circumstances would have discovered Adams's fraud."[54] The complaint further alleges they "not only failed to exercise due care, they failed or refused to exercise any care at all in their dealings with Adams."[55]

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[52] *See also Dame v. Estes*, 101 So. 2d 644, 645 (Miss. 1958) ("Gross negligence is that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them.").

[53] Doc. 29 at ¶ 21 (emphasis added).

[54] Doc. 1 at ¶ 138.

[55] Doc. 1 at ¶ 139.

The case law on which Baker Donelson relies holds only that lawyers generally are not liable to non-clients for their negligent provision of legal services. *See Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 425 (Miss. 2012) ("But here, Great American has alleged nothing more than professional negligence."). Because the complaint does not allege, and the Receiver's claim does not depend, on Baker Donelson's negligent provision of legal services, that case law is inapplicable here.[56] Baker Donelson has stated no basis for dismissing the Receiver's claim for recklessness, gross negligence, and at a minimum negligence.

The complaint separately alleges a claim against Baker Donelson for negligent retention and supervision. A claim for negligent retention and supervision is also "simply a negligence claim." *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1229 (Miss. 2005). "[A]n employer will be liable for negligent hiring or retention of his employee when an employee injures a third party if the employer knew or should have known of the employee's incompetence or unfitness." *Backstrom v. Briar Hill Baptist Church, Inc.*, 184 So. 3d 323, 327 (Miss. Ct. App. 2016) (quoting *Parmenter v. J&B Enters. Inc.*, 99 So. 3d 207, 217 (Miss. Ct. App. 2007)).

Baker Donelson argues it cannot be liable for negligent retention and supervision because "employers do not have a duty to supervise their employees when the employees are off-duty or not working."[57] But the case on which Baker Donelson relies, *Seay*, is the same case on which it relies to argue Alexander and Seawright did not act within the scope of their employment. That case held only that a Baker Donelson shareholder's romantic affair with a client's wife was

[56] Contrast the complaint, Doc. 1 at ¶¶ 135–41, with the facts in *Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 425 (Miss. 2012): "Great American's claims for ordinary negligence, gross negligence, and negligent supervision all allege that Quintairos breached its duty in providing legal services to Shady Lawn. As we have said, 'a legal malpractice action is a negligence action dressed in its Sunday best.' A plaintiff, therefore, must allege something other than professional negligence to establish an ordinary negligence claim. For instance, lawyers who fail to maintain their offices in a reasonably safe manner are subject to their clients' ordinary negligence claims. But here, Great American has alleged nothing more than professional negligence."

[57] Doc. 29 at ¶ 17 (quoting *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So. 3d 474, 489 (Miss. 2010)).

"different in kind from that authorized" by Baker Donelson. *Seay*, 42 So. 3d at 487. As shown above, Alexander and Seawright's acts were "of the kind [they were] employed to perform." *Id.* (quoting Restatement (Second) of Agency § 228(1)(a)). Alexander, who provides professional "Investment Adviser" services,[58] purported to provide "smart advice" to potential investors to "put [their] money to work" by "invest[ing] in [] timber round[s]."[59] Seawright, a "Securities" lawyer presumably qualified to draft legal documents,[60] drafted "subscription agreements and accompanying documents for the sales of units" in the Alexander Seawright Timber Fund, which invested solely in Madison Timber.[61] These facts are sufficient to establish that Alexander and Seawright acted within the scope of their employment, *see* MISS. CODE ANN. § 79-10-67(2).

At a minimum, Baker Donelson had a duty to supervise acts that Alexander and Seawright undertook within Baker Donelson's offices and in reliance on Baker Donelson's name and resources. The complaint alleges sufficient facts, described above, which would establish that Baker Donelson failed to do so. When a receiver adequately pleads that an employee "provided material assistance" to a Ponzi scheme, a motion to dismiss a negligent retention or supervision claim should be denied because it is "not unreasonable to infer" that employers "were aware to some degree" of the material assistance, "[a]ssuming an ordinary degree of supervision." *Proskauer Rose LLP*, 2015 WL 11121540, at *8.[62]

[58] Doc. 29-1 at 4.

[59] Doc. 1 at ¶ 77.

[60] Doc. 29-1 at 2, 5.

[61] Doc. 1 at ¶ 74.

[62] The court in *Proskauer* applied Texas law to explain that negligent supervision "requires a plaintiff to demonstrate that the employee's tortious conduct was foreseeable to the employer." Texas's standard for negligent supervision is the same as Mississippi's. *CoTemp, Inc. v. Houston W. Corp.*, 222 S.W.3d 487, 492 (Tex. App. 2007) ("The basis of responsibility under the doctrine of negligent retention is the master's negligence in retaining in his employ an incompetent servant whom the master knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others.").

5. The doctrine of *in pari delicto* does not bar the Receiver's claims.

The doctrine of *in pari delicto* is an equitable, affirmative defense, which provides that "a wrongdoer is not entitled to compel contribution from a joint tortfeasor." *Sneed v. Ford Motor Co.*, 735 So. 2d 306, 308 (Miss. 1999). Baker Donelson argues the Receiver's claims are barred by the doctrine of *in pari delicto* because the Receiver, having "stepped into the shoes" of Adams and Madison Timber, can have no right of action against Baker Donelson. Baker Donelson is wrong.

In federal equity receiverships, the Fifth Circuit has adopted what Baker Donelson calls the "innocent successor" exception to the doctrine of *in pari delicto*. This exception allows a receiver to assert tort claims against professionals even though she has stepped into the wrongdoer's shoes. The rationale for applying the "innocent successor" exception in a federal equity receivership such as this is straightforward: A receiver has a duty to maximize the value of a receivership estate for the benefit of victims, and "[a]pplication of *in pari delicto* would undermine one of the primary purposes of the receivership." *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012). Application of *in pari delicto* in a federal equity receivership would also "be inconsistent with the purposes of the [*in pari delicto*] doctrine," which is "not for the benefit of either party and not to punish either of them, but for the benefit of the public." *Id.* (quoting *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146, 151 (1947)). *See also Janvey v. Adams & Reese, LLP*, No. 3:12-CV-0495-N, 2013 WL 12320921, at *3 (N.D. Tex. Sept. 11, 2013) ("In other words, whether to apply *in pari delicto* typically depends on what best serves public policy.").

"It is [therefore] well established [in the Fifth Circuit] that when the receiver acts to protect innocent creditors . . . [s]he can maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so." *Jones*, 666 F.3d at 966 (internal quotation marks and citation omitted). Indeed, the *Stanford* court has refused to apply the doctrine of *in pari delicto* to that receiver's claims against professionals. *See, e.g.*, *Greenberg Traurig, LLP*, 2014 WL

12572881, at *4 ("This Court has already held that the *in pari delicto* defense has little application when a receiver seeks to reclaim assets for innocent investors."); *Janvey v. Willis of Colorado, Inc.*, No. 3:13-CV-3980-N, 2014 WL 12670763, at *4 (N.D. Tex. Dec. 5, 2014) (same); *Adams & Reese, LLP*, 2013 WL 12320921, at *3 ("The Fifth Circuit, when applying Texas law, seems to hold the view that when a receiver is protecting innocent creditors or recovering assets for investors and creditors, the defense of *in pari delicto* should be rejected generally.").

Baker Donelson contends that "Mississippi courts have not yet spoken on the question" and speculates that, if asked, they would find that the "innocent successor" exception does not apply here.[63] Baker Donelson premises its argument on case law from the Seventh Circuit and from New York, which it characterizes as a "clear trend."[64] Baker Donelson does not explain why it believes Mississippi courts would look to courts in the Seventh Circuit or New York for guidance, when courts in the Fifth Circuit have addressed the issue repeatedly and convincingly. Baker Donelson does not explain why it believes Mississippi courts would reject the Fifth Circuit's rationale in virtually identical cases.

Indeed, Mississippi courts have long recognized "important limitations" to the *in pari delicto* doctrine. *Morrissey v. Bologna*, 123 So. 2d 537, 543 (Miss. 1960). "Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him." *Id.*; *see also Rideout v. Mars*, 54 So. 801, 802 (Miss. 1911) ("However, there is a well-defined exception to that rule, which is that, where the paramount public interest demands it, the court will intervene in favor of one as against the other.").

[63] Doc. 29 at 17.

[64] Doc. 29 at 19.

Tellingly, Baker Donelson fails to address the important public policy reasons for not applying *in pari delicto* in this case. *Adams & Reese,* 2013 WL 12320921, at * 3 ("The parties have not briefed any public policy rationales, and thus the Court declines to dismiss the Receiver's claims on *in pari delicto* grounds."). Plainly, there is a "paramount public interest" in the Receiver's recovery. There is no public interest in, and the purpose of the *in pari delicto* doctrine is not served by, barring the Receiver from pursuing claims against defendants who are alleged to have knowingly falsely represented that they personally inspected the timber and "mill contracts" underlying each Madison Timber investment.[65] Excepting the Receiver from the *in pari delicto* doctrine is prudent and consistent with Fifth Circuit **and** Mississippi law.

Baker Donelson argues that, even if the "innocent successor" exception to the doctrine of *in pari delicto* applies, it should except the Receiver's fraudulent transfer claims only, not the tort claims the Receiver alleges against Baker Donelson. Courts in the Fifth Circuit have flatly rejected this argument. A federal equity receiver may pursue any claims against any third parties whose actions contributed to the success of a Ponzi scheme, and therefore to the debts of a receivership estate. *See, e.g., Rotstain,* 2015 WL 13034513, at *9 ("The Court has rejected [the argument that the Receiver has no standing to bring tort claims] in the past and held that the Receiver has standing to assert tort claims based on the harm to the Receivership Estate's ability to repay its creditors."); *Greenberg Traurig, LLP,* 2014 WL 12572881, at *4 ("This Court has held that the Receiver may assert tort claims against third parties based on allegations that the third parties' torts contributed to the liabilities of the Receivership Estate."); *Willis of Colorado, Inc.*, 2014 WL 12670763, at *3 (allowing the receiver to pursue "common law tort claims because they allege that Defendants' participation in a fraudulent marketing scheme increased the sale of Stanford's CDs,

[65] Doc. 1 at ¶¶ 86-88.

ultimately resulting in greater liability for the Receivership Estate"); *Adams & Reese, LLP*, 2013 WL 12320921, at *1 (allowing the receiver to pursue civil conspiracy claim is for conspiracy to commit fraud, breaches of fiduciary duty, fraudulent transfers, and conversion because the lawyer defendants "were in advantageous positions to discover Stanford's fraud and . . . they either failed to discover it or discovered it and chose not to act because they benefitted from the enterprise through their director fees or legal fees"). Like the courts before it, this Court too should find "*in pari delicto* no impediment to the Receiver's standing to assert [her] tort claims." *Greenberg Traurig, LLP*, 2014 WL 12572881, at *4.

CONCLUSION

Baker Donelson has not stated a basis for dismissing any of the Receiver's claims against Baker Donelson. The Receiver asks to be permitted to proceed with discovery, in anticipation of presenting of her case to a jury.

March 7, 2019

Respectfully submitted,

/s/ Lilli Evans Bass

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Receiver's counsel

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: March 7, 2019 */s/ Rebekka C. Veith*

[redacted]

From: Timberzone.net Email Account [mailto:Lamaradams@timberzone.net]
Sent: Monday, August 01, 2011 4:59 PM
To: Seawright, Jon D.; wkelly@srwchemical.com
Cc: alexander@alexanderseawright.com
Subject: RE: Update

My ass would show if I tried to give you an opinion on law. I understand.
Everything else looks like it will work just fine.

Madison Timber, LLC until we finish getting the tax issue straight with Madison Timber Co., Inc.
Taylor, Powell, Wilson, & Hartford aren't concerned about it and say it is something they go through from time to time with some of their clients. Its just taking a while to get all the final info we need.

I will have Deeds ready tomm. I will get word on the Title Opinion tomm but it normally takes about a week to get the print copy. My attorney uses First American quite a bit and I believe that is who is doing this one. I'm not concerned that it will be a problem because this is the 2nd time I have handled these peoples timber for them. They are in their late 70's now and have zero debt. Do you want to draw up the Promissory Note or would you prefer to use our Standard one we used with Pinnacle? Doesn't matter to me either way.

13% and 3% are no problem.

I think that about covers it. Let me know when you guys would like to close it out.

BTW: we are still old fashioned. The 12 checks you get will be hand written. I probably need to get a little fancier but we don't care about fancy in this business. We care about profit. But, if you would prefer typed checks so they are more formal I can get Wayne to do that.

Thanks
Lamar

From: Seawright, Jon D. [mailto:jseawright@bakerdonelson.com]
Sent: Monday, August 01, 2011 3:17 PM
To: Timberzone.net Email Account; wkelly@srwchemical.com
Cc: alexander@alexanderseawright.com
Subject: RE: Update

That all makes sense Lamar. In other circumstances I might be concerned that my draft loan commitment caused me to show my ass, but I think I have been clear I am no timber expert....On the mill agreement, I am sure we can work out something satisfactory. Maybe it is a fully loaded confidentiality agreement, maybe it is just a review without keeping a hard copy. We do not need to share it with the investors and we have no interest in trying to duplicate what you are doing, but I absolutely understand your concern. We just want to make sure everything is in place that we have held out to the investors.

Obviously prepayment is fine based on your explanation.

Did I get the borrower entity correct? I saw there were two entities you had set up with some form of the name Madison Timber. I picked the LLC because it looked like the corporate entity had a notice of intent to dissolve re tax issues. I think you mentioned that before. jds

On the return calculation, I suggest having the note bear 13% interest and have the finders fee be 3 points. Let me know if that works for y'all. jds

---

From: Timberzone.net Email Account [mailto:Lamaradams@timberzone.net]
Sent: Monday, August 01, 2011 2:59 PM
To: Seawright, Jon D.; wkelly@srwchemical.com
Cc: alexander@alexanderseawright.com
Subject: RE: Update

Jon;
Most everything looks fine. There are a couple of issues I need to mention and clarify that are in there. Mostly, I think it comes just from you guys probably never having done a Timber Transaction. Here is somewhat of a Chronology:

There really isn't a formal closing. Once we get the word that we have a clear Title I will meet the landowner at the Bank, or their home, or in a good many cases they like to come to Jackson shopping and I will meet them at a Bank or my lawyers' office and his legal assistant will Notarize paperwork. Unlike a "Land Purchase" timber is a different animal and is very simplified compared to a land purchase. A Timber Deed is all the Landowner signs. Of course we are not going to buy anything without a clear Title.
Also, once I get the verbal the Title is clean we go ahead and get the Timber Deed signed. Many times we will get the Timber Deed signed BEFORE we ever cruise the property and determine the value. We do that because we want to make sure the landowner is not "kicking tires". We want to know we are dealing with a serious seller. On repeat clients we don't normally do that but on new or 1st time clients we will. We explain that to the clients and very rarely does it present a problem. We spend time and money when we cruise a tract of timber and we want to just know the Seller is serious and not using us to establish a value of their timber. Once the Cruise is completed and we agree on price, and the Title is clear, we then give them a check and we already have the signed Timber Deed.

As far as the Agreement we have with our Mill, I don't mind giving you a copy of that but I need to get something pretty strict in writing to protect us there.
These are long term relationships and are a lifeblood to how we do business. I don't want to do anything that will jeopardize that. As far as we know, we are the only company with this type of arrangement with the Mills. It makes our life much easier and simpler not to have to deal with loggers and such. I sure don't want to get back into that end of the business again.
I don't think my Mills would be too happy knowing I was sharing our Confidential Agreement with a 3rd party.

As far as the Loan Agreement is concerned I think you might want to note a couple of possible changes. One involves pre-payment. It is rare, but it does happen from time to time that the Mills need to get the timber before 12 months. When that happens we get the FULL amount due. That's an even better return than the 12 month deal. It may be 6 months into it and they need to move on the tract so we get paid all the Balance in full.

As far as getting you a copy of the Timber Deed from the landowner to MTC, and an original Timber Deed from MTC to your LLC, a Promissory Note, and copy of Title Cert (though that may come a week later when he types it up, but we know it is clean), and your 12 post dated checks, those are no problem.

As far as this Yazoo tract is concerned, we have 14% profit in it. All I need to know is how you guys want the split done. Included in that 14% is the 2 points we discussed. 14% is the net to the Investor and we have a 2% "birddog fee" built into that.
For the 125K the Investor will receive $11,875.00 per month for 12 months.

Let me know your thoughts/questions.

Thanks,
Lamar

From: Seawright, Jon D. [mailto:jseawright@bakerdonelson.com]
Sent: Monday, August 01, 2011 1:43 PM
To: wkelly@srwchemical.com; lamaradams@timberzone.net
Cc: alexander@alexanderseawright.com
Subject: RE: Update

Lamar and Wayne,

Attached is a loan commitment that I worked up for this deal. There is some information to complete before it is final.

That said, I am not as concerned about getting it signed as I am about you reviewing and let me know if we are off base on anything. That was the real point of the exercise. Particularly on our time frame we may want to dispense with signing it, but please review and comment.

You mentioned the return on this piece would be slightly higher than normal when we met on Friday. We did not discuss specifics, but that idea was a part of the presentation to the investors to get them to move quickly. Please let me know what you have in mind on that.

I'll call one of you this afternoon to discuss the details and logistics. One of us will need to participate in the closing process so we can complete the tasks our investors expect. Please let me know if you have a firm time when you expect the closing to occur.
I look forward to talking with you soon. jds

From: Wayne Kelly [mailto:wkelly@srwchemical.com]
Sent: Monday, August 01, 2011 12:51 PM
To: Seawright, Jon D.
Cc: lamaradams@timberzone.net
Subject: RE: Update

That is great!! You can give me or Lamar a call this afternoon and we can go over the details (deed, promissory note, etc).

Thank,
Wayne
601-594-5673

From: Seawright, Jon D. [mailto:jseawright@bakerdonelson.com]
Sent: Monday, August 01, 2011 11:43 AM
To: ladams81@bellsouth.net; wkelly@srwchemical.com
Cc: Alexander, Brent
Subject: Update

Lamar and Wayne,

Exhibit A

We have a $125,000 committed for the more urgent tract. I'll touch base with you later today re logistics and a loan term sheet, but wanted to update you on latest amount. jds

Jon D. Seawright
Shareholder
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Baker, Donelson, Bearman, Caldwell & Berkowitz represents clients across the U.S. and abroad from offices in Alabama, Georgia, Louisiana, Mississippi, Tennessee, and Washington, D.C.

No virus found in this message.
Checked by AVG - www.avg.com
Version: 10.0.1390 / Virus Database: 1518/3803 - Release Date: 08/01/11

Archived: Monday, November 5, 2018 4:04:53 PM
From: Seawright, Jon
Sent: boundary="_000_36CCD751E6AC8F4D9FA6C9EBB6A11D31E3C938D9JACKEXCH2firmbd_"MIME
To: [redacted]
Subject: RE: Times for call
Sensitivity: Normal

I talked with Lamar a few minutes ago and he confirmed the payout is made as the mill payments are received, and he gets his money as the investors get theirs. He can provide more details on that during the call. Also, he is happy to show the tracts to whoever wants to see it, drive it, walk it, etc.

I will feel him out or at least give him a heads up on the proposed profit share. A 50% share may work out to a 12% return to the investor, in which case this is moot. I just don't know how the numbers fall out. To the extent a 50% share results in a smaller take by him, he'll have to decide whether that is something he is willing to do.

I agree that if this works there could be a strong long term relationship. He has stated that volume is not a problem and indicates there are enough opportunities for him to soak up as much capital as we can raise.

Unless I get a response from him that indicates the profit share idea is dead in the water, let's plan to proceed with the call. I think you and [redacted] will enjoy visiting with him. jds

_____

From: [redacted]
Sent: Wednesday, July 20, 2011 10:43 AM
To: Seawright, Jon D.
Subject: RE: Times for call

I think a fair split on the profits would be in the 50% range especially on the first deal. The twelve month pay out from the mill is unusual and something I do not understand.

If we can work this out, I think it could be a good long term relationship.

[redacted]

_____

From: Seawright, Jon D. [mailto:jseawright@bakerdonelson.com]
Sent: Wednesday, July 20, 2011 10:12 AM
To: [redacted]
Cc: Alexander, Brent
Subject: RE: Times for call

Thanks [redacted] Running funds through us or BD escrow is not a problem and what we expect too. I do not think there will be any resistance to walking the tracts either, although long-term I think Lamar is looking to establish a level of trust so he is not doing that for every tract and for every investor. But we intended to have him show them to us as well, so we can just make it a group event. Same with review of contract with the mill.

There are two items we should try to pin down today to determine whether we need a call tomorrow. On the fair split of profits, I think we can structure as debt or equity, but the fair split Lamar has in mind is 12% back to the investment group. As I understand the structure, he is going to know on the front end the total profit in the deal, so if set up as an equity investment he should be able to back into the 12% return and have the equity issued result in that amount. If your group is looking for something more than that, please let me know so I can raise it with Lamar and see if he is open to discussing further.

The other item is the timing of return. My understanding is the 1 year note structure is not meant to allow him to get in and out of the property and then hold funds as they are slowly paid out. Rather, the payments to investors are made as payments from the mill are made. So in an equity structure the cash flow would be the same as a 1 year note. I will confirm or correct that today and circle back with you, but in the meantime, assuming that is correct, let me know if that is a deal killer.

On legal and other admin expenses, that would come out of our share. jds

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[redacted]