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.	**CASE NO. 3:18-cv-866-CWR-FKB**
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**

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FILED BY ALEXANDER SEAWRIGHT, LLC, BRENT ALEXANDER, AND JON SEAWRIGHT

Setting aside the rhetoric in the Receiver's Response, an analysis of the legal elements of the Receiver's claims against the Alexander Seawright Defendants[1] in Counts I, II, III, V, and VI and the Complaint's allegations related to those claims demonstrates that the Complaint fails to state a claim for which relief could be granted. Accordingly, the Alexander Seawright Defendants respectfully submit that the Court should dismiss those claims in the Complaint.

First, the Receiver has not adequately pled the *knowledge* element required to state a claim under Counts I (civil conspiracy), II (civil aiding and abetting), V (RICO), and VI (joint venture). Instead, the Receiver clings solely to conclusory allegations that the Alexander Seawright Defendants: (1) "knew or should have known that Madison Timber was a Ponzi scheme" based on "numerous glaring red flags"; and (2) "falsely represented that they personally

[1] Brent Alexander ("Alexander"), Jon Seawright ("Seawright"), and Alexander Seawright, LLC ("Alexander Seawright") will be collectively referred to as the "Alexander Seawright Defendants."

inspected the timber and 'mill contracts' underlying each Madison Timber investment." Resp. at 3 (citing Comp. at ¶¶ 129, 94-100, 86-88). Even if true—and they are not—those allegations are insufficient as a matter of law. Second, the Complaint does not state any duty the Alexander Seawright Defendants allegedly owed to Lamar Adams or Madison Timber, as required for negligence, gross negligence, or recklessness claims under Count III. Third, because the Receiver stands in the shoes of Adams and Madison Timber, the Court should dismiss Counts I, II, III, V, and VI pursuant to the doctrine of *in pari delicto*. And finally, the Receiver's claims against Alexander and Seawright individually should be dismissed because the Receiver has not sufficiently alleged facts to allow her to pierce Alexander Seawright's LLC veil.[2]

ARGUMENT

I. Counts I, II, III, V, and VI of the Complaint Do Not State a Claim upon which Relief may be Granted against the Alexander Seawright Defendants.

"'Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief.'" *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (quoting 2A Moore's Federal Practice ¶ 12.07 at 12–91) (internal brackets omitted). And the Court should "'accept all *well-pleaded* facts as true'" but should not "'accept as true conclusory allegations or unwarranted deductions of fact.'" *Great Plains Trust Co. v. Morgan Stanley Dean & Witter & Co.*, 313 F.3d 305, 312-13 (5th Cir. 2002) (emphasis added) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)). "When considering a motion to dismiss for failure to state a claim . . . conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284

[2] The Alexander Seawright Defendants have produced to the Receiver in good faith all documents, emails, correspondence, text messages, and other information in their possession that might be relevant to her claims. *See* Compl. ¶¶ 70, 71, 75, 77. If facts existed that would allow the Receiver to cure the Complaint's defects, she would have alleged them. Accordingly, dismissal should be with prejudice.

(5th Cir. 1993)). A court should not accept "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

A. The Court should dismiss Counts I, II, V, and VI because the Receiver has not sufficiently pled the required element that the Alexander Seawright Defendants *knew* Madison Timber was a Ponzi scheme.

Actual knowledge of Adams's fraud is a required element of the Receiver's claims in Counts I, II, V, and VI. The Receiver states that what the Alexander Seawright Defendants "mean by their argument is they do not believe the Receiver will ever obtain direct evidence of their actual knowledge." Resp. at 3. Not so. What the Alexander Seawright Defendants said and mean is that the Receiver failed sufficiently to plead facts demonstrating that they knew Madison Timber was a Ponzi scheme, which is a required element of her claims. To support the knowledge element for each of her claims, the Receiver cites allegations from the Complaint that the Alexander Seawright Defendants (1) "knew or should have known that Madison Timber was a Ponzi scheme" based on purported "red flags"; and (2) "falsely represented that they personally inspected the timber and 'mill contracts' underlying each Madison Timber investment." *See* Resp. at 6-10, 17-18. Neither allegation is sufficient.

First, the allegation that the Alexander Seawright Defendants "knew or should have known" Madison Timber was a Ponzi scheme due to purported "red flags" is the epitome of a "legal conclusion masquerading as factual conclusions" which should not "suffice to prevent a motion to dismiss." *Fernandez–Montes*, 987 F.2d at 284.[3] In fact, the Complaint contains zero facts establishing the Alexander Seawright Defendants *actually were aware* Adams was operating a Ponzi scheme. As for the Receiver's claim that they *should have known* of the Ponzi

[3] As Baker Donelson pointed out, "[t]hat the Receiver felt obliged to hedge her claim ("or should have known") underscores that she cannot in good faith allege the required actual knowledge." Doc. 36 at 10 (citing, among others, *Litson-Gruenber v. JPMorgan Chase & Co.*, 2009 WL 4884426, at *2 (N.D. Tex. Dec. 16, 2009) (dismissing claims in a Ponzi-scheme case because "pleading based on an allegation the defendant 'knew or should have known' is insufficient" for actual knowledge)).

scheme, the Complaint's "red flags" allegations are merely recitations of what the Receiver thinks the Alexander Seawright Defendants should have done in dealing with Adams. *See* Comp. at ¶ 95 ("Neither Alexander nor Seawright, nor anyone at Baker Donelson, ever called a landowner or checked a tract's title."); ¶ 96 ("Neither Alexander nor Seawright, nor anyone at Baker Donelson, ever called a mill."); ¶ 97 ("[N]either Alexander nor Seawright, nor anyone at Baker Donelson, questioned this requirement [to abstain from recording deeds]."); ¶ 98 ("The profit that Adams promised . . . should have been a glaring warning sign"); ¶ 99 ("Neither Alexander nor Seawright, nor anyone at Baker Donelson, ever evaluated the investment in light of such [market] information."); ¶ 100 ("Seawright blindly passed on to investors the dubious explanation that mills shut down in December for OSHA inspections . . . ."). Those allegations do not set forth facts demonstrating the required knowledge element, and the statement that the Alexander Seawright Defendants "should have known" is nothing more than a legal conclusion.

Second, the Receiver's reliance on allegations in Complaint paragraphs 86-88 that Alexander and Seawright falsely "led investors to believe" that they would "personally inspect" the timber and mill agreements as support for having pled the required knowledge element is puzzling at best. Even if the allegations in those paragraphs are accepted as true—and they are not because they are not well pled—they do not in any way demonstrate that Alexander and Seawright were aware Adams was operating a Ponzi scheme.[4] And assuming *arguendo* that the

[4] Moreover, the allegations in Complaint paragraphs 86-88 are "unwarranted factual inferences." *Ferrer*, 484 F.3d at 780. The Complaint cites a March 5, 2017 Equity Term Sheet to support the allegation that "Alexander and Seawright" agreed to inspect the timber and mill agreements. *See* Resp. at 8-9. However, the Equity Term Sheet defines "Company" as Alexander Seawright Timber Fund I, LLC, a separate legal entity that is not a defendant in this action, not Alexander and Seawright individually. A copy of the March 5, 2017 Equity Term Sheet is attached as Exhibit A. "Documents attached to a motion to dismiss that are 'referred to in the plaintiff's complaint and . . . central to [plaintiff's] claim,' however, are considered part of the pleadings for purposes of a motion under 12(b)(6)." *Greene v. Indymac Bank, FSB*, 2012 WL 5414097, at *2 (S.D. Miss. Nov. 6, 2012) (quoting *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004)). The Receiver agrees. *See* Resp. at 14, n.34.

Alexander Seawright Defendants were obligated to inspect the timber and mill agreements, the false allegation that they failed to do so does not equate to an allegation that they allegedly failed to do so *because they knew* Adams was operating a Ponzi scheme. Thus, the Complaint fails to sufficiently plead that the Alexander Seawright Defendants knew Madison Timber was a Ponzi scheme, and the Court therefore should dismiss Counts I, II, V, and VI.

1. Failure to state a claim for "civil conspiracy" (Count I)

The Receiver cites *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013), for the statement that an "agreement to conspire . . . 'may be express, implied, or based on evidence of a course of conduct.'" Resp. at 9. The Receiver conveniently ignores the court's clarification of that point: "For a civil conspiracy to arise, the alleged confederates must be aware of the fraud or wrongful conduct at the beginning of the agreement." *Bradley*, 117 So. 3d at 339 (citing 16 Am. Jur. 2d Conspiracy § 51); *see also Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 520 (5th Cir. 2018) (civil conspiracy requires proof that conspirator "knew of [the] fraudulent scheme"). Thus, even if an agreement could be shown by a course of conduct to sufficiently plead a claim for civil conspiracy, Mississippi law requires facts establishing *knowledge of the fraud or wrongful conduct at the beginning of the alleged agreement*.[5] The Receiver has failed to plead a claim in that regard.[6]

[5] The Receiver's allegations show the Alexander Seawright Defendants attempted to evaluate whether "Lamar is a fraud" before doing business with him, but there was "no evidence of that." Compl. at ¶ 70.

[6] The Receiver cites *Rotstain v. Trustmark Nat'l Bank*, 2015 WL 13034513, at *11 (N.D. Tex. Apr. 21, 2015), for the proposition that "[f]acts 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.'" Resp. at 9-10. That is beside the point, however, because the Receiver has not alleged facts to support the required element of knowledge. The Receiver cites *Aetna Ins. Co. v. Robertson*, 94 So. 7, 22 (Miss. 1922), for the proposition that a conspiracy may lie where there is a "tacit understanding between the conspirators." *Id.* But the Receiver again ignores binding Mississippi law that requires her to sufficiently plead allegations of knowledge and awareness of the fraud at the beginning of the "tacit understanding."

Moreover, the Receiver failed to plead that Adams and the Alexander Seawright Defendants had a "meeting of the minds" as to "the object or course of action" to commit an "underlying tort which could support a claim for conspiracy," as is required by Mississippi law. *Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011). In addition to failing to satisfy the knowledge element, the Receiver also failed to allege facts establishing an "underlying tort" committed by the Alexander Seawright Defendants. Although the Alexander Seawright Defendants pointed out this legal insufficiency in their initial brief, the Receiver declined to address it in her Response. For these reasons, the Court should dismiss Count I.

2. Failure to state a claim for "aiding and abetting" (Count II)

The Receiver admits that Mississippi courts have never recognized a civil cause of action for aiding and abetting. Resp. at 4. And the Receiver does not dispute the Fifth Circuit's instruction that "a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liability Lit.*, 888 F.3d 753, 781-782 (5th Cir. 2018). Instead, the Receiver attempts to distinguish *In re DePuy Orthopaedics* on the basis that "the Texas Supreme Court had explicitly stated that it 'has not expressly decided whether Texas recognizes a cause of action for aiding and abetting.'" Resp. at 5, n.14 (quoting *DePuy*, 888 F.3d at 781). Needless to say, the Receiver clings to a distinction without a difference—the Receiver admits that the Mississippi Supreme Court has never recognized the civil aiding and abetting cause of action, and it would not make that fact truer if the Court merely stated as much in an opinion.

Further, even if Mississippi courts had recognized a claim for civil aiding and abetting, the Receiver concedes that to state such a claim she must sufficiently plead "know[ledge] that the other's conduct constitutes a breach of duty . . . ." Resp. at 5 (quoting Restatement (Second)

of Torts § 876(b)). As demonstrated at length above, the allegations in the Receiver's Complaint are legally insufficient to satisfy the required element of knowledge.[7]

The Receiver cites only *Janvey v. Proskauer Rose LLP* in support of her position that "red flags" support "knowledge for aiding and abetting purposes." Resp. at 8 (citing 2015 WL 11121540, at *5 (N.D. Tex. June 23, 2015)). In *Proskauer Rose*, however, the court found the plaintiff "sufficiently alleged that [defendant—an attorney hired to defend the Ponzi scheme operator in an SEC enforcement action—]was aware that Stanford was engaged in a fraudulent enterprise, and that the enterprise was very possibly a Ponzi scheme." 2015 WL 11121540 at *5. In making its finding, the court noted: (1) defendant became aware that Antiguan regulators were not independent from Stanford; (2) defendant was aware Stanford was offering unrealistic rates of return on his products; and (3) defendant was aware the unrealistic rates of return supported the SEC's belief that Stanford was operating a fraudulent scheme. *Id.* Here, the Complaint sets forth no facts demonstrating that the Alexander and Seawright Defendants actually became aware of facts to show Adams was conducting a fraudulent scheme. And unlike in *Proskauer Rose*, the Complaint in this case contains no factual allegations that before Adams turned himself into authorities, the Alexander Seawright Defendants were aware that the SEC believed Adams was operating a fraudulent scheme.[8] Thus, the Court should dismiss Count II.

[7] Further, as Baker Donelson states in its Reply, that the Alexander Seawright Defendants might have known "that Adams owed Madison Timber fiduciary duties" does not establish that they knew Adams was breaching that duty by operating a Ponzi scheme. Doc. 36 at 12; Resp. at 5-6.

[8] As asserted by Baker Donelson in its Reply brief, "red flags" do not support an allegation of actual knowledge. Doc. 36 at 10-11 (citing *Rosner v. Bank of China*, 2008 WL 5416380, at *6 (S.D.N.Y. Dec. 18, 2008) ("courts overwhelmingly recognize" that "actual knowledge of a fraud" is not established "based on allegations of . . . ignorance of obvious 'red flags'"), *aff'd*, 349 F. App'x 637 (2d Cir. 2009); *Honig v. Kornfeld*, 339 F. Supp. 3d 1323, 1344 (S.D. Fla. 2018) ("red flags fail to establish actual knowledge"); *Chemtex, LLC v. St. Anthony Enterprises, Inc.*, 490 F. Supp. 2d 536, 547 (S.D.N.Y. 2007) ("even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege actual knowledge"); *In re Int'l Mgmt. Assocs., LLC*, 563 B.R. 393, 420 (Bankr. N.D. Ga. 2017) ("allegations of 'red flags' were insufficient to establish the bank's actual knowledge of existence of the Ponzi scheme")).

3. Failure to state a RICO claim (Count V)

As asserted in the Alexander Seawright Defendants' initial brief, to state a claim that they violated Mississippi's Racketeer Influenced and Corrupt Organization ("RICO") Act, the Receiver must sufficiently plead that they "at least kn[e]w of the conspiracy and 'adopt[ed] the goal of furthering or facilitating the criminal endeavor.'" *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 239 (5th Cir. 2010) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). The Receiver states that the Alexander Seawright Defendants *should have recognized* the "red flags" as evidence of the Ponzi scheme because of their respective professions. But that is, again, a legal conclusion, and moreover, "[n]either awareness of some probability of illegal conduct nor a showing the defendant should have known is enough" to establish the element of knowledge. *Id.* at 239-40. The Complaint sets forth no facts whatsoever showing that the Alexander Seawright Defendants, with *actual knowledge* of the Ponzi scheme, adopted "the goal of furthering or facilitating the criminal behavior." *Id.* Accordingly, the Court should dismiss Count V.

4. Failure to state a claim for "joint venture liability" (Count VI)

As the Alexander Seawright Defendants demonstrated in their initial brief, the Complaint fails to plead a claim for "joint venture liability" because it sets forth no factual allegations regarding the alleged "partnership" or "joint venture"[9]other than to state that Madison Timber paid Alexander Seawright loan-origination fees. This is insufficient under Mississippi law to state a claim for joint venture liability. [10]

[9] "A partnership and a joint venture are identical 'except the latter has limited and circumscribed boundaries.'" *Carlson v. Brabham*, 199 So. 3d 735, 742-43 (Miss. Ct. App. 2016) (quoting *Hults v. Tillman*, 480 So. 2d 1134, 1141 (Miss. 1985)). "'A joint venture is a form of contract, and [is] governed by contract law.'" *Id.* Here, as in *Carlson*, the "parties did not have an agreement recognizing the existence of a joint venture, written or otherwise." *Id.* And such is not alleged.

[10] The Mississippi Uniform Partnership Act defines "partnership" as "an association of two (2) or more persons to carry on as co-owners a business for profit . . . ." Miss. Code Ann. § 79-13-101(8); *see also*

The Receiver's reliance on *Smith v. Redd* does not support her position. *See* Resp. at 13-16 (citing 593 So. 2d 989 (Miss. 1991)). In that case, Smith sought to have the court declare a partnership existed with Redd in a sawmill operation. *Id.* at 991. Smith and another gentleman, Lea, were approached by Redd about "going into business together." *Id.* Smith and Lea "joined Redd at the sawmill" and "brought all of their logging equipment . . . to the mill site and began working to get the mill operating." *Id.* Evidence was presented regarding: ownership percentages held by each of the men; that each had the ability to make decisions at the mill and hire and fire employees; that they jointly discussed business decisions; that each had check-signing authority; that money received by the mill was split among them; and that Redd offered Smith a lump-sum amount to dissolve. *Id.* at 992. Clearly, the Receiver has not set forth similar allegations in the Complaint to establish a "joint venture" or "partnership." Finding that a partnership existed in *Smith*, the Mississippi Supreme Court held: "Generally, a partnership exists when two or more persons join together with their money, goods, labor, or skill for purposes of carrying on a trade, profession or business with a community interest in the profits and losses." *Id.* at 993-94 (citations omitted). By contrast, the Complaint does not sufficiently plead that the Alexander Seawright Defendants joined with Adams to "carry on the business" of Madison Timber, and it does not allege they had a "community interest" in Madison Timber's "profits *and losses*."

The Receiver agrees the applicable considerations in determining whether a partnership exists are: "'(1) the intent of the parties, (2) the control question, and (3) profit sharing.'" *Walker v. Williamson*, 2016 WL 2771792, at *2 (S.D. Miss. May 12, 2016) (quoting *Smith*, 593 So. 2d at 994). With respect to the first consideration, "the parties must have . . . expressed an intention to

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Miss. Code Ann. § 79-13-202(a). Again, Adams and the Alexander Seawright Defendants did not "carry on as co-owners a business for profit." Alexander Seawright and Madison Timber are separately formed limited liability companies; not a single business for profit. The Alexander Seawright Defendants coordinated loans to be made from Alexander Seawright Timber Fund I, LLC to Madison Timber.

form a partnership." *Smith*, 593 So. 2d at 994. In *Smith*, the Court found "intent to form a partnership" because Smith brought logging assets into the sawmill business, prepared the plant site without remuneration, and ran the sawmill business. *Id.* at 994. The Complaint sets forth no similar facts to show the Alexander Seawright Defendants intended to carry on a jointly-owned business with Adams. The Complaint merely concludes "Defendants Alexander Seawright, Alexander, and Seawright formed a joint venture with Adams and Madison timber, as evidenced by their stated intent to form a fund to invest other people's money in Madison Timber and to split the 'profits' with Adams." Comp. at ¶ 161. It is true the Alexander Seawright Defendants coordinated loans from Alexander Seawright Timber Fund I, LLC to Madison Timber, but coordinating loans from one legal entity to another is not "carry[ing] on as co-owners a business for profit," Miss. Code Ann. § 79-13-101(8), and it is not "join[ing] together with their money, goods, labor, or skill for purposes of carrying on a trade, profession or business with a community interest in the profits and losses," *Smith*, 593 So. 2d at 993.[11]

Second, the Receiver states "the 'control question' asks whether one had any control over the *joint venture's* business." Resp. at 14 (emphasis added). That is a misstatement of the law. The Receiver again cites *Smith v. Redd*, but that case expressly states: "Participation in the control of *the business* is indicative of whether a partnership exists." 593 So. 2d at 994 (emphasis added). In *Smith*, the business was the sawmill, where "Redd . . . handle[d] the financial matters . . . Lea and Smith . . . direct[ed] the sawmill operations . . . [and a]ll parties made business decisions." *Id.* at 995. Here, "the business" is Madison Timber's purported timber business, not

[11] Under the Receiver's approach, every lender in the country would be deemed a legal "partner" or member of a "joint venture" with any person or entity to which it made a loan. That obviously is not the law. The Receiver states that the factual circumstances from which the Court might infer intent are "too numerous to summarize." Resp. at 14. The Receiver cites only ¶¶ 161, 35, and 72-74. Paragraph 161 states a legal conclusion; paragraph 35 addresses Adams conduct related to "individual investors;" and paragraphs 72-74 address the loan-origination fees paid by Madison Timber to Alexander Seawright, which are not representative of "profits and losses" required to establish a joint venture.

the Alexander Seawright Defendants' separate lending business, which itself became a victim of the Ponzi scheme. The Complaint fails to plead that the Alexander Seawright Defendants exercised any control whatsoever over Madison Timber.[12]

Lastly, the Receiver argues that the "Mississippi Uniform Partnership Act provides that the receipt of profits is *prima facie* evidence that a person is a partner in a business." Resp. at 16 (purporting to cite "Miss. Code Ann. § 79-12-13(4)"). That is incorrect. The Receiver mistakenly cites to a section of the Mississippi Code that has been repealed since 2005. Instead, the Mississippi Uniform Partnership Act actually makes clear that Madison Timber's payment of loan-origination fees to the Alexander Seawright Defendants does not create a joint venture:

> A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . [f]or services as an independent contractor . . . [or] [o]f interest or other charge on a loan, even if the amount of payment varies with the profits of the business . . . .

Miss. Code. Ann. § 79-13-202(c)(3). The Alexander Seawright Defendants cited this statutory authority in their initial brief, but the Receiver did not address it. And in *Smith v. Redd*, the Court's discussion of "profit sharing" makes clear the pertinent consideration is whether partners shared "profits and losses." 593 So. 2d at 994. The Complaint does not even allege the Alexander Seawright Defendants shared in Madison Timber's "profits and losses."[13] Accordingly, the Court should dismiss Count VI.

[12] The Receiver all but acknowledges the weak footing of her "control" argument, citing *Century 21 Deep S. Props., Ltd. v. Keys*, 652 So. 2d 707, 715 (Miss. 1995), for the proposition that "lack of control is not enough by itself to disprove partnership."

[13] In *Walker*, the court found the plaintiff failed to plead sufficient facts to show defendants intended to establish a joint venture or controlled the relevant actions. 2016 WL 2771792, at *3-4. The court found that payment of fees did not establish a larger agreement to split profits, but even if the shared-profits element was established, it would not have been enough to overcome lack of intent and control. *Id.*

B. The Complaint does not state a claim for "Recklessness," "Gross Negligence," or "Negligence" (Count III).

Breach of a duty owed by the Alexander Seawright Defendants to Adams and Madison Timber is a required element of the Receiver's claims in Count III. *See Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134, 1143 (Miss. 2004). Whether a duty exists is a question of law for the Court to decide. *Id.* "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928) (citations and internal quotation marks omitted). Here, the Complaint does not sufficiently plead any duty owed by the Alexander Seawright Defendants to Adams and Madison Timber, "the observance of which would have averted or avoided" the significant damages and injury caused by Adams's operation of a Ponzi scheme. *Id.*

In her Response, the Receiver attempts to argue for the first time that a "statutory duty" allegedly arises from the "joint venture partnership" that she claims exists between Adams and the Alexander Seawright Defendants. Resp. at 11. According to the Receiver, this satisfies the "duty" element of her claims under Count III. As shown above, however, no such "joint venture partnership" exists, and the Complaint therefore does not sufficiently plead a "statutory duty."

The Receiver also argues "as a general proposition, 'all individuals owe a duty to exercise reasonable care to avoid foreseeable injury to others.'" Resp. at 11-12 (citing *Fed. Sav. & Loan Ins. Co. v. Tex. Real Estate Counselors, Inc.*, 955 F.2d 261, 265 (5th Cir. 1992)).[14] Under Mississippi law, no duty is owed to unforeseeable plaintiffs. *Rein*, 865 So. 2d at 1143. The foreseeability of injury to Adams and Madison Timber, in whose shoes the Receiver stands, is a function of "duty" and is therefore a question of law for the Court. *Id.* ("'[t]he important

[14] The case the Receiver cites is a Fifth Circuit case analyzing a professional negligence claim under Texas law. 955 F.2d at 265. Moreover, the language the Receiver selectively quotes is dicta. *Id.*

component of the existence of the duty is that the injury is reasonably foreseeable, and thus it is appropriate for the trial judge to decide'") (emphasis omitted) (quoting *Lyle v. Mladinich*, 584 So. 2d 397, 399 (Miss. 1991)). "Under Mississippi law, for a person to be liable for another person's injury, the cause of an injury must be of such a character and done in such a situation that the actor should have reasonably anticipated some injury as a probable result." *Id.* at 1144 (citing *Mauney v. Gulf Ref. Co.*, 9 So. 2d 780, 781 (Miss. 1942)). The Complaint fails to plead facts to show that the Alexander Seawright Defendants "should have reasonably anticipated some injury as a probable result" of the loans they facilitated from Alexander Seawright Timber Fund I, LLC to Madison Timber. *Id.*

"Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of *negligence in the air*, so to speak, will not do." *Palsgraf*, 162 N.E. at 99 (citation and internal quotation marks omitted) (emphasis added).[15] The Receiver separately claims that the purported "red flags" show what amounts to "negligence in the air," but that is not enough. *See* Comp. at ¶ 138. And the Receiver cannot square her statement that "a reasonable person in the same or similar circumstances would have discovered Adams's fraud" with her assertions that Adams "defrauded hundreds" of others in similar circumstances. Because the Complaint does not sufficiently plead a duty owed by the Alexander Seawright Defendants to Adams and Madison Timber, the Court should dismiss Count III.

[15] As noted by Baker Donelson, the law does not impose duties on citizens to stop criminal conduct. *See, e.g., Cuyler v. United States*, 362 F.3d 949, 954 (7th Cir. 2004) ("no common law duty to warn or rescue"). And as *the perpetrators* of the criminal conduct, Adams and Madison Timber certainly cannot claim a duty owed *to them*. *See, e.g.*, *Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953, 954-55 (Ala. 1993) (thief cannot recover in tort for injury while stealing); *Amato v. United States*, 549 F. Supp. 863, 867 (D.N.J. 1982) (criminal cannot recover for injury during robbery on theory that "the government was negligent in not arresting [him] sooner"), *aff'd*, 729 F.2d 1445 (3d Cir. 1984).

II. The Doctrine of *In Pari Delicto* Bars the Receiver's Claims against the Alexander Seawright Defendants in Counts I, II, III, V, and VI.

The Receiver acknowledges that the doctrine of *in pari delicto* is an "equitable, affirmative defense" that prevents a tortfeasor from recovering against an alleged joint tortfeasor. Resp. at 21 (citing *Sneed v. Ford Motor Co.*, 735 So. 2d 306, 308 (Miss. 1999)). As stated in the Alexander Seawright Defendants' initial brief, the *in pari delicto* doctrine "applies where the plaintiff is equally or more culpable than the defendant," and the *in pari delicto* defense should bar the Receiver's tort claims because it is apparent from "the face of the complaint" that Adams and Madison Timber, in whose shoes the Receiver stands, were far more culpable than the Alexander Seawright Defendants. *See Latham v. Johnson*, 2018 WL 3121362, at *10 (Miss. Ct. App. June 26, 2018) (citing 27A Am. Jur. 2d, Equity § 103, p. 641 (2008)), *cert. denied* 260 So. 3d 798 (Miss. 2019); *Alexander v. Verizon Wireless Servs.*, 875 F.3d 243, 249 (5th Cir. 2017).

The Receiver's objection to this Court's application of the *in pari delicto* doctrine is based on the Fifth Circuit's interpretation of Texas law in *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955 (5th Cir. 2012). The Receiver claims the "exception" to the *in pari delicto* doctrine recognized in *Jones* "allows a receiver to assert tort claims against professionals even though she has stepped into the wrongdoer's shoes." Resp. at 21. The Receiver's analysis is an overstatement of *Jones* and its alleged application to the facts of this case. *Id.* at 21-24.

In *Jones*, the fraudster, Wahab, was just one of several owners of W Financial, the business from which the fraudster stole funds.[16] 666 F.3d at 958. Jones, the receiver for W Financial (but not Wahab), filed conversion and breach-of-contract claims against Wells Fargo to

[16] Wahab withdrew $1,701,250 from W Financial's account at a Wells Fargo branch in Houston, Texas. Wahab used the funds to buy a cashier's check payable to another group of people, but Wahab later returned to a different Wells Fargo branch in Texas and deposited the cashier's check into the Wells Fargo account of a separate entity of which Wahab was the managing member and only authorized signer on the account. Wells Fargo stamped the back of the check as follows: "CREDITED TO THE ACCOUNT OF WITHIN NAMED PAYEE LACK OF ENDORSEMENT GUARANTEED WELLS FARGO BANK, N.A." *See* 666 F.3d at 958.

recover amounts Wahab stole from W Financial. Wells Fargo asserted the *in pari delicto* defense because Wahab was "primarily at fault for the conversion of the cashier's check." *Id.* at 965. The Fifth Circuit affirmed that *in pari delicto* was inapplicable there because "Wahab's actions could not be rightfully imputed to W Financial because Wahab's actions were taken against the interest and authorization of the principal." *Id.* (internal quotation marks omitted). The Court elaborated:

> Wells Fargo's *in pari delicto* argument fails to acknowledge the important distinction between W Financial as a corporation and Wahab as an individual. While it is undisputed that Wahab played a central role in the conversion of the cashier's check, W Financial is composed of more than Wahab or the other individuals who operated the company. . . . To conclude that W Financial stands *in pari delicto* simply because Wahab is a wrongdoer ignores the fundamental distinction between a corporation and its officers.

Id. at 965-66.

But here, the Complaint alleges no distinction between Adams and Madison Timber, and none exists; there is no allegation that Madison Timber is "composed of more than" Adams. *See* Comp. at 2 (alleging Madison Timber was one of "his companies"); *see also* 3:18-cr-00088-CWR-LRA at Doc. 1 (Bill of Information, stating: "In 2012, Adams formed and was the sole owner of Madison Timber Properties, LLC"); 3:18-cv-00252-CWR-FKB at Doc. 3 (Complaint, stating: "Arthur Lamar Adams . . . through his wholly-owned company, Madison Timber Properties, LLC . . . committed securities fraud"). Thus, Adams's actions should be "rightfully imputed to" Madison Timber, and the Court should not follow the *Jones* decision for this case.[17]

Also in *Jones*, the receiver was appointed to pursue actions for the benefit of both W Financial and all innocent investors who may have been victims of the fraud. *See* 666 F.3d at 966

[17] *See also Jones*, 666 F.3d at 966-67 (citing *Lewis v. Davis*, 199 S.W.2d 146, 151 (Tex. 1947) for the proposition that application of the *in pari delicto* doctrine "depends upon the peculiar facts and equities of the case, and the answer usually given is that which it is thought will better serve public policy"). In *Jones*, the court declined to apply *in pari delicto* because it would have the consequence of preventing other owners of W Financial from recovering against Wells Fargo Bank. *Id.* at 958. Here, Adams is the only owner of Madison Timber, and thus there are no "policy considerations" or "equitable considerations" that should prevent the Court from applying *in pari delicto*.

(noting receiver "brought this suit on behalf of W Financial . . . and other innocent victims" which allowed receiver to bring claims that W Financial would not be permitted to bring). *See also* Doc. 36 at Ex. C at 9 (receiver in *Jones* appointed as "representative of such investors"). In this case, however, the Receiver has been appointed only to pursue claims for Adams and Madison Timber. *See* 3:18-cv-252 at Doc. 33. Pursuant to the Court's Order, the Receiver has no standing to bring claims for any person or entity other than Adams and Madison Timber.[18]

Throughout her pleadings, the Receiver relies on principles of "equity" and "public policy." *See, e.g.*, Resp. at 20, 23; Doc. 26 at 2, 13-14. Yet the Receiver ignores equity and policy for her argument that she, while standing in the shoes of Adams and Madison Timber, should be able to proceed with tort claims against the Alexander Seawright Defendants. The Receiver claims there is "no public interest in" applying *in pari delicto*, but that is wrong. The Mississippi public is well-served by applying established law that prevents joint tortfeasors from suing one another for contribution. Standing in Adams's shoes, the Receiver should not be able to bring a negligence claim against those she alleges were somehow involved in Adams's Ponzi scheme. Accordingly, the Court should dismiss Counts I, II, III, V, and VI against the Alexander Seawright Defendants pursuant to the doctrine of *in pari delicto*.

III. The Receiver Cannot Pierce the Limited Liability Company Veil of Alexander Seawright to hold Brent Alexander and Jon Seawright Personally Liable.

For her argument that the Court should pierce the limited liability company veil of Alexander Seawright, the Receiver relies on *Jordan v. Maxfield & Oberton Holdings, LLC*, in which this Court employed an "alter ego" analysis for a "personal jurisdiction inquiry," not to determine whether to pierce the veil. 173 F. Supp. 3d 355, 360 n.5 (S.D. Miss. 2016). In fact, this

[18] The Alexander Seawright Defendants hereby adopt, join, and incorporate the arguments set forth on pages 13-15 of Baker Donelson's Reply brief in support of its Motion to Dismiss, which further refute the Receiver's stated basis for opposing application of the *in pari delicto* defense.

Court expressly acknowledged the "alter ego" analysis "is often discussed in conjunction with piercing the corporate veil, which has a *different application and analysis . . . .*" *Id.* at 360 (emphasis added). This Court noted that, as opposed to the "alter ego" analysis, "[p]iercing the corporate veil may initially look more rigid because it *involves a three-part test . . . .*'" *Id.* at 361 n.6 (emphasis added) (quoting *Phillips v. MSM, Inc.*, 2015 WL 420327, at *9 (S.D. Miss. Feb. 2, 2015), where this Court cited the "three-part test for piercing the corporate veil" first announced in *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1047 (Miss. 1989)).[19]

As outlined in the Alexander Seawright Defendants' initial brief, "the three-prong test for piercing the veil of corporations, established in *Gray v. Edgewater Landing, Inc.* . . . is also the appropriate test for piercing the veil of LLCs." *Rest. of Hattiesburg, LLC v. Hotel & Rest. Supply, Inc.*, 84 So. 3d 32, 35 (Miss. Ct. App. 2012). Under the *Gray* test, a court may disregard corporate formalities only if the plaintiff shows: "(a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate formalities by the defendant corporation and its principals; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder." 541 So. 2d at 1047.

The Complaint asserts in conclusory fashion that "Defendants Alexander and Seawright are liable for the acts of Alexander Seawright because they authorized or directed all acts of Alexander Seawright" and "because the three are alter egos." Comp. at ¶¶ 190, 191. In her Response, the Receiver further concludes: "The complaint sufficiently alleges facts, described herein, that if true would satisfy each prong of the test for piercing the corporate veil." *See* Resp. at 20. But the Receiver cites only paragraph 89 of the Complaint as purporting to contain such

[19] Moreover, the Receiver cites *Jordan* to argue that failing to allow the Receiver to pursue her claims against Alexander and Seawright individually "could sanction a fraud" because they "falsely represented that they personally inspected the timber mill and 'mill contracts' underlying each Madison Timber investment they sold." Resp. at 20 (citing Comp. at ¶¶ 86-88). As made clear above, the Receiver is mistaken in her assessment of the Equity Term Sheet on which she relies. *See* Ex. A.

"facts," and that paragraph states: "Between 2011 and April 2018, Alexander and Seawright withdrew over $980,000 from the Alexander Seawright Timber Fund I, representing their 'shares' of investors' returns. In addition, Adams separately paid them over $600,000 representing undisclosed 'birddog fees.'" Comp. at ¶ 89. Even if those allegations were true—and they are not—they do not amount to pleading that (a) Adams looked beyond the LLC for performance; (b) Alexander and Seawright disregarded corporate formalities; or (c) the LLC was created to further the fraud. Moreover, unlike in *Jordan*, the Complaint contains no allegations that Alexander and Seawright commingled funds or otherwise improperly used the funds of Alexander Seawright for personal objectives. Accordingly, the Complaint's allegations are insufficient to support the Receiver's request to pierce Alexander Seawright's limited liability company veil, and the Court therefore should deny the Receiver's request for "declaratory judgment" against Alexander and Seawright individually.

CONCLUSION

For the reasons discussed above and in their initial brief, Jon Seawright, Brent Alexander, and Alexander Seawright, LLC respectfully request that the Court dismiss Counts I, II, III, V, and VI of the Complaint with prejudice and deny the Receiver's request for declaratory judgment against Alexander and Seawright individually.

Dated: March 22, 2019.

Respectfully submitted,

ALEXANDER SEAWRIGHT, LLC; BRENT ALEXANDER; and JON SEAWRIGHT

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CERTIFICATE OF SERVICE

I, R. David Kaufman, hereby certify that on March 22, 2019, I caused the foregoing pleading to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and registered participants.

/s/ R. David Kaufman
R. David Kaufman

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EQUITY TERM SHEET
TIMBER RIGHTS
VARIOUS MISSISSIPPI COUNTIES
MARCH 5, 2017

Alexander Seawright, LLC is seeking co-investors (each an "Investor") to make an equity investment (the "Investment") in connection with the financing of the acquisition of the Timber Rights based on the terms and conditions outlined below:

Form of Investment:	Class III Units of Alexander Seawright Timber Fund I, LLC (the "Company")
Property:	Cutting rights on tracts of land in various counties (the "Timber Rights"), to be acquired for an aggregate purchase price of approximately $1,200,000.
Closing:	March 15, 2017
Total Invested Capital:	Approximately $400,000 (the "Invested Capital")
Minimum Investment:	$25,000
Annual Return to Investor:	10.15% (the "Investment Return")
Business Plan:	The Company will lend the Invested Capital to an established timber manager and broker (the "Broker") to be used to fund the acquisition of the Timber Rights. The Invested Capital will constitute approximately 1/3 of the Timber Rights purchase price, with the Broker contributing the remaining approximate 2/3 of the purchase price. In exchange for the loan, the Broker will issue a promissory note (the "Note") with a thirteen month term, bearing thirteen percent (13%) interest and payable in equal monthly installments of principal and interest, provided, however, that no payment will be made in December 2017. The Note will be secured by timber deeds in favor of the Company. Upon a default under the Note, the timber deed will be recorded and the Company will take title to the Timber Rights. Contemporaneously with the acquisition of the Timber Rights, the Broker will enter into sales agreements with lumber mills pursuant to which the lumber mills agree to pay for the Timber Rights over thirteen (13) months. Upon payment of all amounts under the sales agreements, the Company will cancel the timber deeds securing the Note and the Timber Rights will be transferred to the mill purchaser(s). No timber cutting is permitted by the mill until all payments are made. Payments by the mill purchaser(s) fund the payments under the Note.

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Cash Flow Priority:	All proceeds of the Note will be credited first to Investors until they receive a return of all Invested Capital and the Investment Return. No distributions will be made to Company from repayment of the Note until all Invested Capital and the Investment Return have been credited to Investors.
Governance:	The Company's designees will be the managers of the Company and responsible for all day-to-day activities and administrative functions. The Company may not use the Invested Capital for any purpose other than to lend for use to acquire the Timber Rights without the unanimous consent of the Investors.
Right to Sell Investment:	Investor may, pursuant to terms consistent with the terms and conditions of the Company operating agreement regarding such matters, sell its interest in the Company. Company agrees to cooperate in such sale process provided such cooperation does not alter the economics of the transaction and is at no cost to Company.
Expenses/Management Fee:	Returns from the Note in excess of the Investment Return will be allocated to the Company. Such allocation is expected to be 2% of the Invested Capital, payable only after the Invested Capital and Investment Return have been paid to Investor. All Company expenses shall first reduce the Company's allocable share of income. The Company does not expect Company expenses to exceed the Company's allocable share of income.
Additional Information:	Company 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).
Investor Requirements:	Investors must be "accredited investors" as contemplated by the SEC's Regulation D and must execute a subscription agreement certifying to such status.