**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, 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-CWR-FKB **Hon. Carlton W. Reeves**

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ PC'S MOTION TO DISMISS THE COMPLAINT

Baker, Donelson, Bearman, Caldwell & Berkowitz PC ("Baker Donelson") respectfully requests leave to file a supplemental memorandum in support of its pending Motion to Dismiss the Complaint, Doc. No. 28. A copy of the proposed filing is attached as Exhibit A to this Motion.

The Supplemental Memorandum argues that the Complaint against Baker Donelson should be dismissed because the Receiver lacks Article III standing. That result follows from two recent Fifth Circuit opinions issued after briefing concluded on Baker Donelson's Motion to Dismiss: *Latitude Sols., Inc. v. DeJoria*, 922 F.3d 690 (5th Cir. April 30, 2019), and *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830 (5th Cir. June 17, 2019).

The Court should entertain this supplemental brief, *first*, because *DeJoria* and *Stanford* are newly decided, binding cases and, *second*, because Article III standing is jurisdictional and

"[a] lack of subject matter jurisdiction may be raised at any time[.]" *Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 935 (5th Cir. 2012); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Resolving the issue of standing on this motion will ensure that the parties and the Court do not undertake additional proceedings and motions practice only to find that the Receiver all along lacked standing to bring the Complaint against Baker Donelson.

For the foregoing reasons, the Court should grant leave to file the attached Supplemental Memorandum. Due the brevity and nature of this Motion for Leave, Baker Donelson respectfully requests that the motion and its exhibit be deemed sufficient and that Baker Donelson be excused from submitting a supporting brief.

Dated this 29th day of July, 2019

Respectfully submitted,

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ PC

/s/Craig D. Singer

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Craig D. Singer
Craig D. Singer

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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.

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Hon. Carlton W. Reeves

ORAL ARGUMENT REQUESTED

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ PC'S MOTION TO DISMISS THE COMPLAINT

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EXHIBIT A

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INTRODUCTION

Since briefing concluded on Baker Donelson's motion to dismiss the Complaint, the Fifth Circuit has issued two new opinions on Article III standing that are dispositive of the Receiver's claims in this case.

- In *Latitude Sols., Inc. v. DeJoria*, 922 F.3d 690 (5th Cir. April 30, 2019), the Fifth Circuit held that a bankruptcy trustee does not have standing to sue for an alleged increase in the debtor entity's liabilities to a third party – debts that the entity never paid. The trustee in that circumstance cannot show the injury-in-fact required for Article III standing, because any injury is to the third-party creditors who are owed the debts, not to the debtor entity that owes them. *Id.* at 696.
- In *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830 (5th Cir. June 17, 2019), the Fifth Circuit clarified that a federal-court-appointed equity receiver lacks standing to sue for creditors' injuries. "'Like a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entities in receivership[.]'" *Id.* at 841 (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995)).

The only theory of injury-in-fact the Receiver alleges is that Baker Donelson "contributed . . . to the debts of the Receivership Estate to investors." Compl. at 1. As *DeJoria* and *Stanford* make clear, that does not suffice to allege standing: The receivership estate's unpaid liabilities to third parties are not injuries to the company, and receivers cannot sue for injuries to the estate's creditors. Because Article III standing is jurisdictional, the Court lacks subject-matter jurisdiction and the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, Rule 12(b)(6). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

ARGUMENT

The Receiver Lacks Standing to Sue for an Increase in Unpaid Liabilities.

In *DeJoria*, a clean-water company, LSI, entered into a contract with a third-party manufacturer, Jabil, Inc., to produce remediation equipment. Jabil manufactured and delivered the equipment, but LSI failed to pay Jabil for it. When LSI later entered bankruptcy, Jabil became a creditor with a claim for $9.5 million in outstanding debt. The bankruptcy trustee sued the LSI officers who had arranged the contract. The trustee alleged that the officers had operated LSI as an engine to perpetrate securities fraud against third parties, and that the purchase of equipment from Jabil was an effort to make the company appear legitimate; but the debt to Jabil allegedly caused LSI to collapse. *Id*. at 697. The trustee claimed that LSI had been injured through the increase in its balance-sheet debt and sought to recover the value of the outstanding liabilities. The trustee prevailed at a jury trial, and the officers appealed from the $9.5 million judgment against them. *Id.* at 695.

The Fifth Circuit reversed the judgment and held that the trustee lacked standing. *Id.* at 698. That is because Article III standing requires a plaintiff to have "suffered an 'injury in fact,'" *Lujan*, 504 U.S. at 560, "for each form of relief sought," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). But the unpaid debt "represent[s] Jabil's injury, not LSI's." *DeJoria*, 922 F.3d at 696. LSI actually benefitted from the exchange: it received the equipment, which it later sold in bankruptcy, and it "did not pay the invoices" for that equipment. *Id.* Accordingly, the Fifth Circuit reasoned, LSI "benefitted and even had cash available for other needs." *Id.* Without an injury to the debtor company, the trustee had no standing. The Fifth Circuit therefore reversed the district court's judgment on the jury verdict and rendered judgment for the defendants on that claim. *Id.* at 700. The Trustee petitioned for rehearing and requested en banc review; both were denied. *DeJoria*, Orders of May 31 and June 12, 2019, Case No. 18-10382.

While *DeJoria* concerned a bankruptcy trustee, its holding applies equally to equity receivers in federal securities cases. *DeJoria* explained that "the receiver and bankruptcy trustee are similarly situated." *DeJoria*, 922 F.3d at 696. Even more recently, in *SEC v. Stanford Int'l Bank*, the Fifth Circuit emphasized the fundamental limitation of "the Receiver's standing: '[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entities in receivership[.]'" 927 F.3d 830, 841 (5th Cir. 2019) (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995)). In *Stanford*, the Fifth Circuit reversed a district court's order approving a receiver's settlement agreement that would have extinguished claims held by third parties other than the receivership estate. *Id.*

Baker Donelson's original motion to dismiss argued that the Receiver could not assert claims held by anyone other than Madison Timber and Adams. Mot. 16. That is clear both from the law governing receivership standing and from the plain language of this Court's order appointing the Receiver. *See id.* The Receiver did not dispute this legal principle then, *see* Opp'n 24; after the *Stanford* case, she certainly cannot dispute it now.

Before *DeJoria*, the Fifth Circuit had "not squarely addressed Article III standing under the circumstances presented in this case," 922 F.3d at 696, and some district courts had concluded that receivers or trustees could recover for the estate's increased debts to third parties. *See, e.g.*, *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, 2014 WL 12572881, at *4 (N.D. Tex. Dec. 17, 2014); *SEC v. Stanford Int'l Bank Ltd.*, 2017 WL 9989250, at *4 (N.D. Tex. Aug. 23, 2017); *Janvey v. Adams & Reese, LLP*, 2013 WL 12320921, at *8 (N.D. Tex. Sept. 11, 2013); *SEC v. Cook*, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001). Those cases no longer are good law in the Fifth Circuit.

In contrast, the *DeJoria* court endorsed the reasoning in *Reneker v. Offill*, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009), which dismissed a similar claim on standing grounds. *See DeJoria,* 922 F.3d at 696. In *Reneker*, an SEC receiver sued a law firm that had represented the receivership entities, alleging that the firm's negligence allowed the entities "to continue their illegal [securities] sales . . . [and] thereby rendered [them] liable to third party investors in the sum of at least $36.5 million." *Id.* (internal quotation marks omitted). The Fifth Circuit agreed with the *Reneker* court that the receiver lacked Article III standing because "'[t]he Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harm[ed] the investors,' not the receiver." *DeJoria*, 922 F.3d at 696 (quoting *Reneker*, 2009 WL 804134 at *6); *see also Reneker v. Offill*, 2012 WL 2158733, at *6 (N.D. Tex. June 14, 2012) (after further proceedings, dismissing receiver's "professional negligence claim for lack of standing to the extent it is based on liabilities incurred to defrauded investors or the increased amount of such liabilities").[1]

The Receiver's theory of injury in this case is precisely the theory that *DeJoria* rejects. The Receiver expressly identifies as her basis for "standing" Baker Donelson's alleged "contribut[ion] . . . to the debts of the Receivership Estate." Compl. ¶ 5. She alleges that "Madison Timber would not have grown without Defendants' encouragement and assistance" and that the "Defendants contributed . . . to the debts of the Receivership Estate to investors." *Id.* at 1. The alleged "growth" came from "hundreds of new unwitting investors" who gave their capital to Madison Timber and are owed repayment. *Id.* ¶ 123. Each count of the Complaint

[1] The Receiver's theory in this case is more obviously meritless because, unlike the law firm in *Reneker*, Baker Donelson did not represent the receivership entity, Madison Timber, and had no duty to Madison Timber to prevent it from incurring liabilities to third parties. In any event, such debt is not an injury-in-fact and does not confer standing on the Receiver.

alleges as its corresponding injury "the Receivership Estate's liabilities today." *Id.* ¶¶ 123, 132, 142, 157, 174, 184. No other theory of injury-in-fact appears in the Complaint.

After *DeJoria*, the Receiver lacks standing to sue on that theory. Madison Timber received the benefit of its bargain with investors when it obtained their funds. The company then received more than it bargained for when it misappropriated those funds and did not repay them. As the entity that committed the fraud and stole the investors' money, Madison Timber was the fraud's beneficiary, not its victim. Madison Timber's unpaid debts are injuries to the investors who are out the money; they are not injuries-in-fact to Madison Timber. *DeJoria*, 922 F.3d at 696. Just as the trustee in *DeJoria* could not sue to recover liabilities that "are still owed and have not yet been paid," *id.* at 695, the Receiver cannot sue to recover "the Receivership Estate's liabilities today."

CONCLUSION

For the foregoing reasons, in addition to the reasons discussed in Baker Donelson's prior filings in support of its Motion to Dismiss, the Complaint should be dismissed with prejudice.

Dated this XX day of XXXX, 2019

Respectfully submitted,

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ PC

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