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-866

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
Hon. F. Keith Ball, Magistrate Judge

RECEIVER'S MOTION FOR LEAVE TO FILE RESPONSE TO BAKER DONELSON'S SUPPLEMENTAL MEMORANDUM

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, respectfully moves for leave to file the attached response to the supplemental memorandum filed by Defendant Baker, Donelson, Bearman, Caldwell & Berkowitz PC ("Baker Donelson"). In support:

1.

Last Monday, July 29, 2019, Baker Donelson moved for leave to file a supplemental memorandum in further support of its pending motion to dismiss. The supplemental

memorandum directs the Court's attention to two recent opinions of the Fifth Circuit—*Ebert v. DeJoria*, 922 F.3d 690 (5th Cir. 2019), and *Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830 (5th Cir. 2019)—which Baker Donelson contends establish that the Receiver has no standing to allege, and therefore that this Court has no subject matter jurisdiction to decide, the Receiver's claims against Baker Donelson.

2.

Baker Donelson omitted from its supplemental memorandum *Zacarias v. Stanford International Bank, Limited* (*Willis*), No. 17-11073, --- F.3d ----, 2019 WL 3281687 (July 22, 2019), the Fifth Circuit's most recent opinion in the *Stanford* case. In *Willis*, the court affirmed the Stanford receiver's standing to allege, and therefore the district court's subject matter jurisdiction to decide, the very same type of claims the Receiver alleges here. The Receiver's alleged injury in this case is the same injury the Stanford receiver alleged in *Willis*. *Willis* fully undermines all of Baker Donelson's contentions.

3.

The Court has not yet granted Baker Donelson's motion for leave to file its supplemental memorandum, therefore no response from the Receiver is due. If the Court grants Baker Donelson's motion for leave to file its supplemental memorandum, the Receiver will have 14 to respond.

4.

The Receiver, however, does not need 14 days to respond. The Receiver has already prepared a response that addresses *DeJoria*, *Lloyds*, and *Willis*, and in the interests of avoiding any further delay she attaches it here.

5.

If Baker Donelson's supplemental memorandum is filed in the Court's record, the Receiver requests that her response be filed at the same time.

Dated: August 5, 2019

Respectfully submitted,

/s/ Lilli Evans Bass

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CERTIFICATE OF SERVICE

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

/s/ Kristen D. Amond

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RECEIVER'S RESPONSE TO BAKER DONELSON'S SUPPLEMENTAL MEMORANDUM

The Receiver respectfully responds to Baker Donelson's supplemental memorandum.

Introduction

Baker Donelson contends two recent opinions of the Fifth Circuit—*Ebert v. DeJoria*, 922 F.3d 690 (5th Cir. 2019), and *Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830 (5th Cir. 2019)—establish that the Receiver has no standing to allege, and therefore that this Court has no subject matter jurisdiction to decide, the Receiver's claims against Baker Donelson.

Baker Donelson reads too much into *DeJoria*. In that case the court held a bankruptcy trustee lacked standing to pursue a discrete claim that belonged only to a single distinct creditor.

Baker Donelson also misreads *Lloyds* entirely. In that case the court held the Stanford receiver lacked standing to settle Stanford's employees' claims against Stanford's insurers arising from the insurers' denials of coverage because those separate, "non-derivative"—*i.e.*, non-investment-related—claims did not affect the receivership estate. By contrast, the court affirmed that the Stanford receiver had standing to settle *investors'* claims against the same insurers.

But most importantly, Baker Donelson omits from its supplemental memo *Zacarias v. Stanford International Bank, Limited* (*Willis*), No. 17-11073, --- F.3d ----, 2019 WL 3281687 (July 22, 2019), the Fifth Circuit's most recent opinion in the *Stanford* case. In *Willis*, the court affirmed the Stanford receiver's standing to allege, and therefore the district court's subject matter jurisdiction to decide, the very same type of claims the Receiver alleges here. The Fifth Circuit summarized:

> This litigation is one of several ancillary suits under the primary SEC action that enforces the federal securities laws against Robert Allen Stanford and his Ponzi-scheme co-conspirators. There is no dispute that the receiver and Investors' Committee had standing to bring their claims against the Willis Defendants and BMB. They bring only the claims of the Stanford entities—not of their creditors—alleging injuries only to the Stanford entities, including from the increase in their unsustainable liabilities resulting from the Ponzi scheme. The receiver and Investors' Committee "allege that Defendants' participation in a fraudulent marketing scheme increased the sale of Stanford's CDs, ultimately resulting in greater liability for the Receivership Estate," and that defendants "harmed the Stanford Entities' ability to repay their creditor investors." The receiver and Investors' Committee sought to recover for the Stanford entities' Ponzi-scheme harms, monies the receiver will distribute to investor-claimants. The district court had subject matter jurisdiction over these claims.

Willis, 2019 WL 3281687 at *7. The Receiver's alleged injury in this case is the same injury the Stanford receiver alleged in *Willis*. *Willis* fully undermines all of Baker Donelson's contentions.

The Receiver addresses *DeJoria*, *Lloyds*, and *Willis* more fully below.

DeJoria

Baker Donelson's recitation of *DeJoria*'s facts is largely correct, but it omits important context.

The company in question, LSI, was a publicly traded company that developed patented technology for the treatment of wastewater for the oil and gas industry. *DeJoria*, 922 F.3d at 693. LSI contracted with Jabil, a manufacturer, to provide equipment to LSI. *Id.* at 696. Jabil delivered the equipment to LSI, but LSI never paid Jabil's invoice. *Id.* After LSI filed for bankruptcy, the bankruptcy trustee leased and eventually sold the equipment. *Id.* Jabil filed a claim for $9.55 million in LSI's bankruptcy proceedings. *Id.* at 694.

The bankruptcy trustee tried to recoup Jabil's loss by suing LSI's officers, who she alleged improperly entered the contract with Jabil. *Id.* at 695. At trial, the trustee argued Jabil specifically had been misled. *Id.* She told the jury to "forget about the other hundred and something creditors . . . focus on Jabil"—"the fraud, the improper conduct, was entering into the Jabil contract." *Id.* The jury found for the trustee. *Id.*

The Fifth Circuit vacated the jury's verdict, holding the trustee was not entitled to damages for an injury that Jabil alone suffered. *Id.* at 696. The court observed that LSI itself was not injured by the contract with Jabil: LSI received the equipment without paying for it and even benefited from it by leasing and eventually selling it. *Id.* The court expressly did *not* hold the trustee could never recover damages arising from the defendants' breaches of fiduciary duty, only that under the circumstances, the trustee was not entitled to damages that belonged solely to a single distinct creditor. *Id.* at 697 n.6 ("We need not address and therefore do not hold that there could not possibly be an Article III injury in fact stemming from Cohen and DeJoria's

breaches of fiduciary duty. Instead, we hold there is no Article III injury stemming from the claims Ebert asserted and Damage Element No. 1 of the jury instruction.").

Context is important. The trustee in *DeJoria* narrowed her case at trial to a single contract that injured a single creditor. Although she tried to paint LSI as a fraud from its inception, the court observed both that LSI was a publicly traded company that developed patented technology, *id.* at 693, and that the trustee herself had attempted to find investors to keep LSI operating, *id.* at 694. LSI was not a Ponzi scheme.[1] In a Ponzi scheme case, the underlying business *is* a fraud from its inception. The Ponzi scheme's perpetrators misuse the underlying business entity to perpetrate one singular fraudulent scheme that injures the entity and investors in the same way. The entity and investors both "seek recovery to address the same harms sustained by the same conduct." *Willis*, 2019 WL 3281687 at *8. The fact that investors were injured does not mean that the entity was not. This is why, in Ponzi scheme cases, it is often said that investors' injuries are "redundant," *see Lloyds*, 927 F.3d at 844, 850 (Stanford investors' claims were "redundant"), or "derivative," *see id.* at 847–48 (Stanford employees' claims, by contrast, were "non-

[1] Baker Donelson observes that the Fifth Circuit in *DeJoria* cited approvingly *Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009), in which a court held a receiver lacked standing to purse claims against a law firm.

Reneker was not a Ponzi scheme case.

In addition, the Fifth Circuit's opinion cites *Reneker I* only. Importantly, even in *Reneker I* the court observed that, *unlike here*, the receiver had not alleged that the law firm "increased the [receivership companies'] liability to third parties or caused the [receivership companies] to be liable to third parties when they otherwise would not have been." *Id.* at *6, n.5.

After *Reneker I*, the receiver amended his complaint to expressly allege that the law firm had caused the receivership companies "to incur additional and unnecessary liabilities to third parties." In *Reneker II*, the court held the amendment was sufficient to survive the law firm's motion to dismiss for lack of standing. *Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 WL 3365616 at *2 (N.D. Tex. Oct. 20, 2009).

Years later, *after a fuller development of the case*, the court granted in part the law firm's motion for summary judgment for lack of standing in *Reneker III*. *Reneker v. Offill*, No. 3:08-CV-1394-D, 2012 WL 2158733, at *6 (N.D. Tex. June 14, 2012).

None of the three *Reneker* opinions, all unpublished, support granting Baker Donelson's motion to dismiss here.

derivative"), or "duplicative," *see id.* at 844; *Willis*, 2019 WL 3281687 at *6 (investors' lawsuits would result in "duplicative litigation"), of the entity's.

The fact that LSI's trustee lacked standing in *DeJoria* does not mean the Receiver lacks standing here. The injury in *DeJoria*, arising from a single contract, was unique to Jabil—so much so that the trustee told the jury to "forget about the other hundred and something creditors," *DeJoria*, 922 F.3d at 695—and actually benefited LSI, which not only applied the money it owed Jabil to other, arguably legitimate, purposes but also profited from the lease and sale of Jabil's equipment. By contrast, the injury here is not unique to any one party; the fraudulent scheme injured Madison Timber and investors in the exact same way. The fact that investors were injured does not mean that Madison Timber was not.

Baker Donelson is simply wrong to contend the Receiver, who stands in the shoes of Madison Timber, has no injury-in-fact. *DeJoria* is a different case altogether; it is not dispositive of the Receiver's claims.

Lloyds

Baker Donelson quotes *Lloyds* for the proposition that "[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entity in receivership[.]" Doc. 45-1 at 4 (quoting *Lloyds*, 927 F.3d at 841). That proposition is not new. For completeness's sake, the actual language from the Fifth Circuit's opinion is as follows:

> [As] to the Receiver's standing: "[l]ike a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, *an equity receiver may sue only to redress injuries to the entity in receivership*, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit."

Lloyds, 927 F.3d at 841 (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995)).

The question is whether Madison Timber was injured, and it was. Again, Madison Timber was a fraud from its inception. Lamar Adams misused Madison Timber to perpetrate a

Ponzi scheme, and the Receiver alleges Baker Donelson assisted him. The Receiver alleges an injury-in-fact. The fact that investors were also injured does not mean the Receiver may not sue Baker Donelson to redress injuries to Madison Timber.[2]

In *Lloyds*, the Stanford receiver, Stanford's employees, and certain of Stanford's investors all claimed rights to proceeds from policies issued by Stanford's insurers. The Stanford receiver and the insurers entered a settlement whereby the insurers would pay the Stanford receiver $65 million in exchange for the Stanford receiver's obtaining from the district court an order that barred any actions against the insurers arising from the policies. *Id.* at 838. The settlement would have extinguished both the employees' claims against the insurers arising from the insurers' denials of coverage and the investors' claims against the insurers arising under a state-law statute.

The Fifth Circuit held the Stanford receiver lacked standing to settle the employees' claims because they were "independent, non-derivative" of the receiver's claims, *id.* at 843, and the district court furthermore lacked authority to extinguish the employees' claims "without affording them an alternative compensation scheme." *Id.* at 848. *See also id.* at 846–47 ("Rather than extinguish the Appellants' contractual claims, the court could have authorized them to be filed against the Receivership in tandem with the Stanford investors' claims. Such 'channeling orders' are often employed . . . .").

By contrast, the Fifth Circuit readily rejected the notion that the Stanford receiver lacked standing to settle the investors' claims. The investors argued the Stanford receiver had no right to "control the settlement of a claim it does not own." *Id.* at 850. The court agreed with that

[2] *Scholes*, 56 F.3d at 755 ("We add that if in place of the receiver's actions the investors had brought a class action against the present defendants, or had sued them individually, the defendants would no doubt be arguing that the action was improper because the injury was to the corporations and only derivatively to investors in the corporations.").

proposition but explained that "here, the Receiver had standing to pursue *its own* claims," and the investors' claims were merely "redundant." *Id.* (emphasis in original).

Here, the Receiver pursues Madison Timber's own claims. Nothing in *Lloyds* calls into question the Receiver's standing.

Willis

If there remained any doubt that the Receiver has standing to pursue her claims against Baker Donelson, *Willis* dispels it.

In *Willis*, the Stanford receiver sued two of Stanford's insurance brokers for their participation in the Stanford Ponzi scheme. The Stanford receiver's claims were the very same type of claims the Receiver alleges against Baker Donelson. Relevant here, as summarized by the Fifth Circuit, the Stanford receiver alleged:

> (1) that Willis and BMB knowingly or recklessly aided, abetted, or participated in the Stanford directors' and officers' breaches of fiduciary duties towards the receivership entities, *resulting in exponentially increased liabilities and the misappropriation of billions of dollars*;
>
> (2) that Willis and BMB violated their duty of care towards the receivership entities by enabling and participating in the Stanford directors' and officers' Ponzi scheme, *resulting in exponentially increased liabilities and the misappropriation of billions of dollars*;
>
> * * *
>
> [and] (5) that Willis and BMB breached their duties of care to the receivership entities in their hiring, supervision, and retention of employees who issued comfort letters in furtherance of the Stanford Ponzi scheme, *causing exponentially increased liabilities and the misappropriation of billions of dollars*[.]

Willis, 2019 WL 3281687 at *4 (emphasis added).

The Stanford receiver and the defendants entered a settlement whereby the defendants would pay the receiver $132.85 million in exchange for the Stanford receiver's obtaining from the district court an order that barred any actions against the defendants arising from the Stanford

Ponzi scheme. *Id.* at *9. A group of individual Stanford investors objected to the bar order because it extinguished claims against the same defendants that the investors had filed in state court. *Id.* at *4–5. The district court entered the bar order over the investors' objections.

On appeal, the investors argued the district court lacked subject matter jurisdiction to bar claims not before it. The Fifth Circuit rejected that argument, observing that the investors' and the Stanford receiver's objects are the same: both "seek recovery to address the same harms sustained by the same conduct in the same Ponzi scheme." *Id.* at *8. But it is only through the receivership, the court explained, that a recovery can be equitably distributed:

> [E]ach has the incentive to bring its own claims against the entity, hoping for full recovery; but if all creditor-investors take this course of action, latecomers will be left empty-handed. A disorderly race to the courthouse ensues, resulting in inefficiency as assets are dissipated in piecemeal and duplicative litigation. The results are also potentially iniquitous, with vastly divergent results for similarly situated creditors. So it is that at the behest of the SEC the district court may take possession of the entity and its assets, and vest control in its officer, the receiver. The court empowers the receiver to "stand[ ] in the shoes" of the troubled entity, allowing him to override holdout creditors and reach decisions for the aggregate benefit of creditors under the court's supervision. *If so directed by the court, the receiver will systematically use ancillary litigation against third-party defendants to gather the entity's assets. Once gathered, these assets are used to satisfy liabilities to the entity's creditors, not in a disorderly creditor feeding frenzy, but through a court-supervised administrative distribution process.* Receivership is thus a substitution of orderly, equitable creditor recovery for the chaos and inefficiency of individualized creditor litigation with its irrational allocation of recoveries—one born of necessity.

Id. at *6 (emphasis added).[3]

[3] *See also id.* at *8 ("It is necessarily the case that where a district court appoints a receiver to coordinate interests in a troubled entity, that entity's creditors will have hypothetical claims they could independently bring but for the receivership: *the receivership exists precisely to gather such interests in the service of equity and aggregate recovery*. While claims seeking recovery for Ponzi-scheme harms can sound in tort, contract, or numerous other causes of action, *the harms arise from a singular scheme, not isolated acts—that is, from a composite of conduct by numerous conspirators taken over years, collectively establishing and perpetuating the fraud*.") (emphasis added); *id.* at *9 ("Again, the receivership solves a collective-action problem among the Stanford entities' defrauded creditors, all suffering losses in the same Ponzi scheme. It maximizes assets available to them and facilitates an orderly and equitable distribution of those assets.").

The court next explained that the district court had subject matter jurisdiction to bar the investors' claims as part of the Stanford receiver's settlement with the defendants because the investors' claims are derivative of the Stanford receiver's claims, *for which the Stanford receiver unquestionably had standing*. Relevant here, the Stanford receiver, like the Receiver in this case, alleged injuries *"*only to the Stanford entities, *including from the increase in their unsustainable liabilities resulting from the Ponzi scheme*":

> This litigation is one of several ancillary suits under the primary SEC action that enforces the federal securities laws against Robert Allen Stanford and his Ponzi-scheme co-conspirators. *There is no dispute that the receiver and Investors' Committee had standing to bring their claims against the Willis Defendants and BMB. They bring only the claims of the Stanford entities—not of their creditors—alleging injuries only to the Stanford entities, including from the increase in their unsustainable liabilities resulting from the Ponzi scheme.* The receiver and Investors' Committee "allege that Defendants' participation in a fraudulent marketing scheme increased the sale of Stanford's CDs, ultimately resulting in greater liability for the Receivership Estate," and that defendants' "harmed the Stanford Entities' ability to repay their creditor investors." The receiver and Investors' Committee sought to recover for the Stanford entities' Ponzi-scheme harms, monies the receiver will distribute to investor-claimants. *The district court had subject matter jurisdiction over these claims.*

Id. at *7 (emphasis added).

In short, a receiver has standing in a Ponzi scheme case to recover damages from defendants whose acts contributed to the debts of the receivership estate, "including from the increase in unsustainable liabilities resulting from the Ponzi scheme." Contrary to Baker Donelson's argument, this otherwise undisputed proposition is "good law" in the Fifth Circuit. Even Judge Willett, who dissented in *Willis*, did not dispute the Stanford receiver's standing to pursue the Stanford entities' claims; he contended only that the objecting investors' injuries were sufficiently distinct therefore beyond the district court's power to bar. *Id.* at *11 (Willett, J., dissenting).

Given the Receiver's alleged injury in this case is same injury the Stanford receiver alleged in *Willis*, Baker Donelson is simply wrong to contend the Receiver lacks standing.

Conclusion

Baker Donelson has not stated a basis for dismissing the Receiver's claims against it. This Court should deny Baker Donelson's motion to dismiss so that the Receiver may to proceed with discovery, in anticipation of presenting of her case to a jury.

Dated: August 5, 2019

Respectfully submitted,

/s/ Lilli Evans Bass

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