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

The proceedings thus far

The Receiver filed a 45-page complaint against Baker Donelson and others on December 19, 2018. The complaint was not an average complaint. It told an unprecedented story in careful

detail. 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.

Like most defendants do, Baker Donelson moved to dismiss the Receiver's complaint. It argued the Receiver had not alleged sufficient facts to state a claim against Baker Donelson. It argued the Receiver had no standing to sue Baker Donelson to recover money for defrauded investors.

The Receiver pointed out the flaws in Baker Donelson's arguments. The Receiver showed the complaint alleges more than enough facts to meet every element of every claim against Baker Donelson. The Receiver showed that she has standing to sue third parties, including Baker Donelson, whose actions contributed to the success of the Madison Timber Ponzi scheme and therefore to the debts of the Receivership Estate.

Baker Donelson got the last word, which was its right, but that was not enough for it. Baker Donelson not only filed a reply to the Receiver's response to its motion, it filed two more unsolicited briefs, both insisting that the Receiver is not the proper party to hold Baker Donelson liable because, it argued, the Receiver lacked standing to sue.

In the face of all of Baker Donelson's hems and haws, on October 1, 2019, the Court instructed the Receiver to amend her complaint to address Baker Donelson's arguments. The Receiver filed an amended complaint on November 22, 2019. The amended complaint states the Receiver's best case based on facts known to her. Baker Donelson complains that the amended complaint "makes no new factual allegations."[1] That is not entirely true—but yes, the amended

[1] Doc. 60 at 8.

complaint looks a lot like the original complaint. That is not a weakness. The original complaint was powerful, and the amended complaint is equally or more so.

The amended complaint's most meaningful addition, which Baker Donelson glosses over, is the addition addressing the Receiver's standing, at paragraphs 5 through 8. For more than a year, Baker Donelson has argued that the Receiver lacks standing to sue Baker Donelson to recover money for defrauded investors. Baker Donelson is wrong, as the Receiver has and will again show, but because Baker Donelson showed no sign of giving in, for her amended complaint, the Receiver took a different tack. To remove any doubt that the Receiver has standing to sue Baker Donelson or any third party whose actions contributed to the success of the Madison Timber Ponzi scheme, investors voluntarily assigned their claims against Baker Donelson and others to the Receivership Estate. The result is that the Receiver now has standing to sue Baker Donelson in not one but two ways: because she is the court-appointed receiver for Madison Timber *and* because investors have executed assignments that entrust the right to sue to her.

Undeterred, Baker Donelson filed another motion to dismiss, which looks a lot like its original motion to dismiss, and which still argues that the Receiver lacks standing to sue. If Baker Donelson's arguments were weak the first time, they are even weaker now. It is telling that in making its arguments this time, Baker Donelson glosses over the fact that investors have assigned their claims to the Receivership Estate. For the past year, Baker Donelson's main grievance has been that the Receiver stands only in the shoes of Lamar Adams and Madison Timber. Now that the Receiver stands in the shoes of investors, too, virtually all of Baker Donelson's legal arguments crumble.

The alleged facts

As for the alleged facts, they are still damning and still more than sufficient to establish Baker Donelson's liability. Baker Donelson contends Brent Alexander's and Jon Seawright's work for Madison Timber was "separate" from and "unaffiliated" with the firm's business. The amended complaint tells a different story.

The amended complaint alleges 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.[2] Alexander and Seawright relied heavily on their affiliation with Baker Donelson to recruit investors, and Baker Donelson knew it.[3] Yes, Alexander and Seawright 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, and Baker Donelson allowed them to do it.[4]

Alexander and Seawright 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.[5] 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 Lawyers* as a Rising Star, as well as one of the nation's top attorneys, and represents

[2] Doc. 57 at ¶¶ 78–91.

[3] Doc. 57 at ¶¶ 83, 85.

[4] Doc. 57 at ¶¶ 78, 86.

[5] Doc. 57 at ¶ 84.

> a range of national and regional clients, specializing in complex business transactions, mergers and acquisitions and taxation. . . . [6]

In assessing an investment, potential investors reasonably counted Madison Timber's and Alexander and Seawright's affiliations with Baker Donelson "to the good."[7]

Alexander and Seawright's investment business was not "separate" from or "unaffiliated" with the firm's business—it was inextricably intertwined. Baker Donelson allowed Alexander and Seawright to use Baker Donelson's Jackson address for their investment business.[8] Alexander and Seawright 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] Baker Donelson allowed Alexander and Seawright to use Baker Donelson's conference rooms to make presentations to potential investors, accountants, and advisors.[10]

Alexander and Seawright enlisted their colleagues at Baker Donelson, including from offices in other states, to introduce them to potential investors.[11] Baker Donelson allowed Alexander and Seawright to target 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 expenses" would "come out of our share."[13]

Baker Donelson allowed Seawright, a lawyer, to draft subscription agreements and accompanying documents for investments in Madison Timber, which Seawright sent to Adams

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[6] Doc. 57 at ¶ 110.
[7] Doc. 57 at ¶ 87, 112.
[8] Doc. 57 at ¶ 87.
[9] Doc. 57 at ¶ 87.
[10] Doc. 57 at ¶ 87.
[11] Doc. 57 at ¶ 88.
[12] Doc. 57 at ¶ 89.
[13] Doc. 57 at ¶¶ 74, 89.

from his Baker Donelson email account and which Adams used generally for Madison Timber's purposes.[14]

It is simply not true that the amended complaint "does not allege that anyone at Baker Donelson had any contact with Adams and Madison Timber, with the exception of [Alexander and Seawright]."[15] The amended complaint expressly alleges on information and belief that Baker Donelson has compiled records showing numerous of its employees had contact with Adams for the purpose of finalizing investments in Madison Timber.[16] Baker Donelson did not produce these records in response to the Receiver's request for records in its possession relating to Madison Timber.[17] Those facts will unfold in discovery.

The fact that Madison Timber did not pay Baker Donelson "a single penny,"[18] if true, hardly saves Baker Donelson from liability. Baker Donelson nevertheless is liable for the acts of Alexander and Seawright and, of course, for its own recklessness and willful blindness.

Contrary to Baker Donelson's characterization, this case is about a lot more than "missed 'red flags.'"[19] Although she might do it at trial, 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 more than sufficient that, Ponzi scheme or no Ponzi scheme, the Receiver alleges that they all knew Alexander and Seawright's conduct was unlawful. They all knew that Alexander and Seawright's unlicensed sales of unregistered securities, out of Baker Donelson's office, violated federal and state law. They all knew that Alexander and Seawright made false representations of fact to encourage investments in Madison Timber.

[14] Doc. 57 at ¶ 90.
[15] Doc. 60 at 11.
[16] Doc. 57 at ¶ 91.
[17] Doc. 57 at ¶ 91.
[18] Doc. 60 at 8.
[19] Doc. 60 at 11.

Whether Alexander and Seawright knew there was no timber and no "mill contracts," they knew they had not bothered to find out, and so knew that representations that they had personally inspected the timber and "mill contracts" underlying each investment were flatly false.

The Receiver has responded to these and other of Baker Donelson's arguments before. She responds to them again 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).

I. THE RECEIVER HAS STANDING.

Baker Donelson continues to argue the Receiver lacks standing to sue Baker Donelson. Baker Donelson's arguments are largely academic, but the Court need not write a treatise on federal equity receivers' standing to answer the question, because either way Baker Donelson loses. The Receiver has standing in two ways. The Receiver has standing to sue any third party whose actions contributed to the success of the Madison Timber Ponzi scheme because 1) she is the court-appointed receiver for Madison Timber and, separately, 2) because investors have executed assignments that entrust the right to sue to her.

A. The Receiver has standing because she is the court-appointed receiver for Madison Timber.

Baker Donelson relies primarily on 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)—to argue court-appointed receivers lack standing to sue third parties to recover money for defrauded investors. Baker Donelson both reads too much into and misreads *DeJoria* and *Lloyds*.

Baker Donelson also all but ignores an even more recent opinion of the Fifth Circuit, *Zacarias v. Stanford International Bank, Limited* (*Willis*), No. 17-11073, 2019 WL 6907376 (5th Cir. Dec. 19, 2019), which wholly undermines its position.

DeJoria

Baker Donelson relies on *DeJoria* to argue that the Receiver lacks standing because "an estate's unpaid debts do not injure the estate."[20] 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.

In *DeJoria*, 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

[20] Doc. 60 at 13.

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—but instead 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.*[21] In a Ponzi scheme case, the underlying business is a fraud from

[21] 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

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. 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-derivative"), or "duplicative," *see id.* at 844; *Willis*, 2019 WL 6907376 at *7 (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.

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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.

In any event, *Reneker* certainly does not dispose of the Receiver's claims against Baker Donelson in her capacity as assignee of investors' claims.

Baker Donelson is simply wrong to contend the Receiver, standing 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 points to the Fifth Circuit's decision in *Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830 (5th Cir. 2019) for the proposition that "[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entity in receivership[.]"[22] 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)).

Baker Donelson misuses *Lloyds* to suggest an either/or proposition: either investors are injured, or the entity in receivership is injured, but never both. That proposition is false. The fact that investors are injured does not mean the entity in receivership is not. The fact that investors were injured here does not mean the Receiver may not sue Baker Donelson to redress injuries to Madison Timber.[23] The question is simply whether the entity in receivership was injured—and here it was: Madison Timber was a fraud from its inception. Lamar Adams misused Madison Timber to perpetrate a Ponzi scheme and Baker Donelson assisted him. The Receiver alleges an

[22] Doc. 60 at 14–15 (quoting *Lloyds*, 927 F.3d at 841).

[23] *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.").

injury-in-fact. An entity in receivership often alleges claims that overlaps with claims of investors, as *Lloyds* illustrates.

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 agreed that the Stanford receiver had 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 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). The fact that investors had claims did not mean that the Stanford receiver did not. Nothing in *Lloyds* calls into question the Receiver's standing. To the contrary, the opinion supports it.

Willis

If there remained any doubt that the Receiver has standing to pursue her claims against Baker Donelson, the Fifth Circuit's opinion in *Willis* dispels it.[24] In that case 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.

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*;
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> (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*;
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> * * *
>
> [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 6907376 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

[24] On rehearing, the Fifth Circuit withdrew and substituted its original opinion. *Zacarias v. Stanford International Bank, Limited* (*Willis*), 931 F.3d 382, 397 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 2019 WL 6907376 (5th Cir. Dec. 19, 2019). The new opinion in *Willis* does not change the analysis or the result.

Ponzi scheme. *Id.* at *5. 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 *6. 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:

> It is necessarily the case that where a district court appoints a receiver to coordinate interests in a troubled entity, that entity's investors 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.

Id. at *10. It is only through the receivership, the court explained, that a recovery can be equitably distributed:

> Exercising their jurisdiction under the securities laws, federal district courts can utilize a receivership where a troubled entity, bedeviled by their violation, will be unable to satisfy all of its liabilities to similarly situated investors in its securities. Without a receiver, investors encounter a collective-action problem: each has the incentive to bring its own claims against the entity, hoping for full recovery; but if all 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 investors.
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> The receiver, standing in the shoes of the injured corporations, is entitled to pursue the corporation's claims "for the benefit not of [the wrongdoers] but of innocent investors." The receiver is therefore allowed to curb investors' individual advantage-seeking in order to reach settlements for the aggregate benefit of investors under the court's supervision. *As directed by the court, a receiver may systematically use ancillary litigation against third-party defendants to gather the entity's assets*. Once gathered, these assets are distributed through a court-supervised administrative process.

Id. at *7 (emphasis added).

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 the unsustainable liabilities inflicted by the Ponzi scheme*":

> The case at hand is one of several ancillary suits under the primary SEC action to enforce 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 Willis and BMB. They bring only the claims of the Stanford entities—not of their investors—alleging injury to the Stanford entities, including the unsustainable liabilities inflicted by 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 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 *9 (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 inflicted by the Ponzi scheme." Contrary to Baker Donelson's argument, this otherwise undisputed proposition is "good law" in the Fifth Circuit.[25] Even Judge Willett, who dissented in *Willis*, did not dispute the Stanford receiver's standing to pursue the Stanford entities' claims. *Id.* at *15 (Willett, J., dissenting). The panel was not divided on the question that matters here.

[25] Neither *Willis* nor *DeJoria* overruled other *Stanford* cases explicitly holding that a receiver has standing to bring tort claims against third parties for increased liabilities to the receivership estate. *See, e.g.*, *Rotstain v. Trustmark Nat'l* Bank, No. 3:09-CV-2384-N, 2015 WL 13034513, at *9 (N.D. Tex. Apr. 21, 2015); *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at *4 (N.D. Tex. Dec. 17, 2014); *Janvey v. Willis of Colorado, Inc.*, No. 3:13-CV-3980-N, 2014 WL 12670763, at *3 (N.D. Tex. Dec. 5, 2014); *Janvey v. Adams & Reese, LLP*, No. 3:12-CV-0495-N, 2013 WL 12320921, at *1 (N.D. Tex. Sept. 11, 2013).

Baker Donelson minimizes *Willis*, contending that the panel in *Willis* did not actually address the question of standing so much as allude to it in dicta.[26] But the question of standing was unavoidable in *Willis*. The parties in *Willis* disputed whether the district court had subject matter jurisdiction, and the *Willis* opinion had to first analyze the receiver's standing in order to conclude: "The district court had subject matter jurisdiction over these claims." *Id.* at *9. Standing is not something parties can simply agree not to dispute. That the *Willis* opinion said there was "no dispute" that the receiver had standing does not mean the question of standing was not essential to the court's decision and should be disregarded here. *Willis* speaks directly to this case.

Given that the Receiver's alleged injury in this case is same injury that the Stanford receiver alleged in *Willis*, Baker Donelson is simply wrong to contend the Receiver lacks standing as the court-appointed receiver for Madison Timber to sue Baker Donelson.

B. The Receiver has standing because investors have executed assignments that entrust to her the right to sue.

The Receiver has standing not only because she is the court-appointed receiver for Madison Timber, but also because investors have executed assignments that entrust to her the right to sue. Baker Donelson's arguments have all flowed from the premise that the Receiver stands in the shoes of Lamar Adams and Madison Timber only. But now the Receiver stands in the shoes of investors, too.

On October 28, 2019, the Court amended the Receiver's order of appointment to allow the Receiver "to accept on behalf of the Receivership Estate assignments of rights or interests that persons or entities may choose to assign to the Receivership Estate."[27] Since then the Receiver has accepted assignments from investors in the Madison Timber Ponzi scheme.

[26] Doc. 60 at 17.

[27] Doc. 190.

Baker Donelson does not and cannot challenge the Receiver's right to accept assignments from investors, nor investors' right to assign their claims to the Receivership Estate. Baker Donelson glosses over the assignments. It complains only that the amended complaint 1) does not identify the assignors' claims and 2) does not identify the assignors.

Baker Donelson's first complaint can be addressed simply: The assignors' claims are the very claims the amended complaint alleges: Count I: civil conspiracy; Count II: aiding and abetting; Count III: recklessness, gross negligence, and at a minimum, negligence; Count VIII: negligent retention and supervision; and vicarious liability. The Receiver alleges the claims both in her capacity as the court-appointed receiver for Madison Timber[28] and in her capacity as holder of assignments.[29] The claims need not be distinct; in either capacity, the Receiver's object is the same: to "seek recovery to address the same harms sustained by the same conduct in the same Ponzi scheme."[30]

That the amended complaint does not identify the assignors by name is no cause to dismiss the amended complaint.[31] Rule 8 does not require "detailed factual allegations." *Ashcroft v. Iqbal*,

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[28] Doc. 57 at ¶¶ 6–7.

[29] "[I]n aid of the Receivership Estate's recovery, investors have assigned their claims against Defendants to the Receivership Estate, whose purpose is to maximize assets for investors' benefit. The Receiver therefore also has standing to pursue claims against Defendants as the holder of assignments executed by investors." Doc. 57 at ¶ 8.

[30] *Zacarias v. Stanford International Bank, Limited* (*Willis*), 931 F.3d 382, 397 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 2019 WL 6907376 (5th Cir. Dec. 19, 2019).

[31] Baker Donelson relies on two out-of-Circuit, inapposite cases for the proposition that the Receiver must identify by name each assignor-investor. In *Perkumpulan Investor Crisis Center Dressel-WBG v. Wong*, No. 09-cv-0526, 2009 WL 10676449 (W.D. Wash. Oct. 30, 2009), the plaintiff sued Regal Financial Bancorp for its alleged participation in a Ponzi scheme. The court found the plaintiff's "naked allegation" that it was "empowered" to sue on behalf of an amorphous group of Indonesian investors insufficient to confer standing. *Id.* at *5. Here, there is no question that the Receiver is "empowered" to accept assignments. *See* Doc. 190 (empowering the Receiver "to accept on behalf of the Receivership Estate assignments of rights or interests that persons or entities may choose to assign to the Receivership Estate"). *MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharm., Inc*., 281 F. Supp. 3d 1278 (S.D. Fla. 2017), is entirely factually distinguishable. The plaintiffs sued under the Medicare Secondary Payer Act a

556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. 544, 555 (2007)) ("the pleading standard Rule 8 announces does not require "'detailed factual allegations'"). It is enough that the amended complaint provides Baker Donelson fair notice of the claims against it and the grounds on which they rest. *Id.* at 698–99 (citing *Twombly*, 550 U.S. at 555). The amended complaint amply sets forth the grounds for the claims alleged. The amended complaint sufficiently identifies the assignors as investors in the Madison Timber Ponzi scheme.[32] Having insisted for the past year that the Receiver's claims belonged instead to investors, Baker Donelson cannot dispute that investors have standing to pursue claims against third parties such as Baker Donelson whose actions contributed to the Madison Timber Ponzi scheme's success.

As the Receiver has stated elsewhere,[33] the Receiver takes investors' privacy seriously. Investors are victims of a massive fraud, and the Receiver thus far has protected their names and identifying information from public disclosure. The Receiver of course will make available to Baker Donelson any information to which it is entitled, subject to appropriate protections. The Receiver's sensitivity to these important considerations is no basis for Baker Donelson to question the Receiver's standing.

II. 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

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pharmaceutical company for reimbursement of medical-service costs. There was no federal equity receiver and no express permission given by a court for the plaintiffs to accept assignments, as there is here.

[32] Doc. 57 at ¶ 8.

[33] Most recently in support of a protective order in the related case *Alysson Mills vs. The UPS Store, Inc., et al.*, No. 3:19-cv-00364 (S.D. Miss.).

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].'"[34] The amended 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 person as a result of that reliance." *Eaton v. Porter*, 645 So. 2d 1323, 1325 (Miss. 1994). The amended 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

[34] Doc. 60 at 18 (quoting MISS. CODE ANN. § 79-10-67(2)) (emphasis added).

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 amended 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.[35] 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.[36] Other Baker Donelson shareholders, including from offices in other states, referred potential investors to

[35] Doc. 57 at ¶ 87.

[36] Doc. 57 at ¶ 87.

Alexander and Seawright.[37] Baker Donelson allowed Alexander and Seawright to target clients of Baker Donelson for whom Baker Donelson had recently closed transactions.[38] 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.[39]

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," with "Practices" including "Broker-Dealer/**Investment Adviser**."[40] Seawright was, and is, a Baker Donelson shareholder and, at least at one time, "a member of Baker Donelson's Board of Directors," with "Practices" including "**Securities**" and "**Emerging Companies**."[41] 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,[42] but that argument only raises a factual issue that should not be resolved on a motion to dismiss.

In short, the amended 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.

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[37] Doc. 57 at ¶ 88.

[38] Doc. 57 at ¶ 81.

[39] Doc. 57 at ¶ 77. *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 75 of the amended complaint quotes the email that is Exhibit A.

[40] Doc. 61-1 at 2, 4.

[41] Doc. 61-2 at 2, 5.

[42] Doc. 60 at 12–14.

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"[43] and investment-related presentations.[44] 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.[45]

These facts, coupled with the facts, among others, that Alexander and Seawright emphasized their affiliation with Baker Donelson in their pitchbook,[46] and that Alexander and Seawright represented that an investor's funds could be "run" through "BD [Baker Donelson] escrow,"[47] 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 does not contest that investors relied on Alexander and Seawright's indicia of authority. Baker Donelson only 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 amended complaint's allegations that Alexander and Seawright held themselves out as agents of Baker

[43] Doc. 57 at ¶ 87.
[44] Doc. 57 at ¶¶ 87, 109.
[45] *See e.g.*, Exhibit A.
[46] Doc. 57 at ¶ 110.
[47] Doc. 57 at ¶ 74; *see also* Exhibit B (an e-mail quoted in paragraph 74 of the amended complaint).

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 transactions."[48] 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 investors.[49] 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).

[48] Doc. 60 at 22. Baker Donelson changed its previous—and more accurate—label of Madison Timber "investments," Doc. 29 at 15, to "transactions." To be sure, Baker Donelson knew that Alexander and Seawright were recruiting *investors* to Madison Timber.

[49] Doc. 57 at ¶ 197.

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)[50] and "Securities" and "Emerging Companies" services (Seawright).[51]

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 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,[52] purported to provide

[50] Doc. 61-1.
[51] Doc. 61-2.
[52] Doc. 61-1.

"smart advice" to potential investors to "put [their] money to work" by "invest[ing] in [] timber round[s]."[53] Seawright, a "Securities" lawyer presumably qualified to draft legal documents,[54] drafted "subscription agreements and accompanying documents for the sales of units" in the Alexander Seawright Timber Fund, which invested solely in Madison Timber.[55]

Baker Donelson argues that the court in *Seay* emphasized that its shareholder's affair was "not in any way related to [a legal] representation."[56] 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 amended complaint alleges Alexander and Seawright specifically targeted clients of Baker Donelson for whom Baker Donelson had recently closed transactions[57] and even told one such client, "[r]unning funds through us or BD [Baker Donelson] escrow is not a problem" and all "legal and other admin expenses" would "come out of our share."[58]

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).

III. THE AMENDED 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**

[53] Doc. 57 at ¶ 80.
[54] Doc. 61-2.
[55] Doc. 57 at ¶¶ 77, 90.
[56] Doc. 60 at 20 (quoting *Seay*, 42 So. 3d at 489).
[57] Doc. 57 at ¶ 81.
[58] Doc. 57 at ¶ 74; *see also* Exhibit B.

conduct." *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (emphasis added). The three elements of a 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)). In determining whether a civil conspiracy exists, damages—as opposed to the agreement—"are the essence." *Rex Distrib. Co., Inc. v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019) (quoting *Bradley*, 117 So. 3d at 339) ("The elements [of a claim for civil conspiracy] are quite similar to those required of a criminal conspiracy, with the distinguishing factor being that an agreement is the essence of a criminal conspiracy, while damages are the essence of a civil conspiracy.") (internal quotation marks omitted).

A. It is enough that the Receiver shows an overt act by Lamar Adams and that Defendants participated in Adams's "course of action."

Although she may do so, the Receiver is not required to show that Baker Donelson, Alexander, or Seawright committed an overt act in furtherance of the conspiracy, only that they "agreed to and participated in [Lamar Adams's] course of action." *Rex Distrib.*, 271 So. 3d at 455. The Mississippi Supreme Court made clear in a recent opinion that it is "a fundamental misstatement of the nature of civil conspiracy" to contend that liability for civil conspiracy depends on every alleged coconspirator having committed an overt act that damaged the plaintiff. *Id.* Civil conspiracy "exists as a cause of action to hold nonacting parties responsible." *Id.* (emphasis added). To state a claim for civil conspiracy, the Receiver "has to show an unlawful overt act and [she] has to show damages, but the overt act need not be by [Baker Donelson, Alexander, or Seawright]." *Id.* It is enough that the Receiver shows an overt act by Lamar Adams and that Defendants participated in Adams's "course of action."

It is undisputed that Lamar Adams committed unlawful overt acts in furtherance of the Madison Timber Ponzi scheme. The complaint alleges Defendants agreed to and participated in Adams's "course of action" by, among other things, recruiting investors to Madison Timber, assuring potential investors that Alexander and Seawright had personally inspected Adams's timber and mill contracts, and offering Baker Donelson's backing as additional assurance.[59] Simply put, Defendants "agreed to and participated in [Lamar Adams's] course of action." *Rex Distrib.*, 271 So. 3d at 455. The complaint's allegations are more than sufficient to state a claim for civil conspiracy.

B. Defendants knew or should have known that Madison Timber was a fraud.

Baker Donelson argues that under "settled law," the amended 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."[60] This argument fails for multiple reasons.

First, Mississippi law actually 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). The Receiver need only show that Baker Donelson, Alexander, and Seawright "agreed to and participated in [Adams's] course of action." *Rex Distrib.*, 271 So. 3d at 455. She has done so in her amended complaint, which shows that Alexander and Seawright formed a common purpose

[59] *See, e.g.*, Doc. 57 at ¶¶ 78–90, 92–95.

[60] Doc. 57 at 25. 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.

with Lamar Adams to "pool other people's money to invest in Madison Timber,"[61] 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.[62] *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").

Second, Ponzi scheme or no Ponzi scheme, Alexander and Seawright's conduct was unlawful. Baker Donelson knew that Alexander and Seawright's unlicensed sales of unregistered securities, out of Baker Donelson's office, violated federal and state law.

Third, this is not simply a "missed 'red flags'" case.[63] Alexander and Seawright made false representations of fact to encourage investments in Madison Timber, and they knew those representations were false. The amended complaint expressly alleges at paragraphs 93–95 that Alexander and Seawright falsely represented that they personally inspected the timber and "mill contracts" underlying each investment:

> 93. Investors were led to believe that Alexander and Seawright personally inspected the timber underlying each investment. Of course they did not. Alexander and Seawright lied to investors. 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

[61] Doc. 57 at ¶ 73.

[62] Doc. 57 at ¶ 85.

[63] Doc. 60 at 11.

> 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.
>
> 94. 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.
>
> 95. 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."

Baker Donelson argues that these allegations merely show that Alexander and Seawright "[f]ail[ed] to read a document."[64] No. Alexander and Seawright did not on occasion fail to read a document. The documents never existed. There was no timber and no "mill contracts." For every investment, Alexander and Seawright told investors in writing that they personally inspected the underlying timber and "mill contracts." Alexander and Seawright knew those representations were false. Because they 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 Janvey v. Proskauer Rose LLP*, No. 3:13-CV-0477-N, 2015 WL 11121540, at *5 (N.D. Tex. June 23, 2015) (citing Texas agency law to impute a lawyer's knowledge of a Ponzi scheme to law firms where he was employed).

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

[64] Doc. 60 at 26.

"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.*

In any event, the amended complaint alleges facts sufficient to establish Defendants "knew of the fraudulent scheme." While this is not simply a "missed 'red flags'" case, there were numerous red flags, any one of which should have alerted Defendants that Madison Timber was a Ponzi scheme:

> 102. 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.
>
> 103. 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.
>
> 104. 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.
>
> 105. The "profit" that Adams promised was 300% to 400% better than that payable by any other fully asset-backed 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

> track record" of consistent uniform returns under his "beautiful, albeit simple, financial model."
>
> 106. 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."
>
> 107. 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 . . . .

In light of Alexander and Seawright's knowingly false representations; their violations of federal and state law, of which Baker Donelson was aware; and numerous red flags, the answer is easy. Applying precedent and reading the amended complaint's allegations in a light most favorable to the Receiver and indulging reasonable inferences in her favor, the amended complaint unquestionably states facts supporting a civil conspiracy claim sufficient to survive a motion to dismiss.

IV. THE AMENDED 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."[65] 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

[65] Doc. 60 at 27.

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.[66] The *In re Evans* court recognized the viability of 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).[67]

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).

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[66] *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 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).

[67] Doc. 57 at ¶ 138; Doc. 60 at 27.

The amended complaint alleges sufficient facts to show that Baker Donelson, Alexander, and Seawright knew of Lamar Adams's tortious conduct. 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 amended 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."[68] *E.g.*, *Official 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). Among other breaches of duty, the amended complaint specifically alleges that Defendants were reckless, grossly negligent, and at a minimum negligent because they were in advantageous positions to discover that Madison Timber was a fraud, but despite their knowledge and numerous red flags, failed to act as reasonably or to exercise any care at all.[69]

[68] Doc. 57 at ¶ 139.

[69] Doc. 57 at ¶¶ 101, 148–58. The amended complaint further alleges the underlying torts of negligent supervision and retention. Doc. 57 at ¶¶ 191–200.

Baker Donelson argues it cannot be liable for aiding and abetting "because, again, neither Alexander, Seawright, nor anyone at Baker Donelson is alleged to have known that Madison Timber was a Ponzi scheme."[70] But as the amended complaint explains, "Defendants need not have known that Madison Timber was a Ponzi scheme to unlawfully aid and abet Adams."[71] Instead, "Defendants knew their conduct was unlawful."[72] Alexander, Seawright, and Baker Donelson knew that Alexander and Seawright's unlicensed sales of unregistered securities violated federal and state law.[73] Alexander and Seawright falsely represented that they personally inspected the timber and "mill contracts."[74] Those false representations "give rise to the strong inference" that Defendants "knew Madison Timber was a Ponzi scheme."[75] And as set forth above, the amended complaint details numerous red flags, any one of which should have alerted Defendants that Madison Timber was a Ponzi scheme.[76]

Baker Donelson also continues to rely on the "universal rule in this country," created out of thin air in Baker Donelson's original motion to dismiss, 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."[77] 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*

[70] Doc. 60 at 27.

[71] Doc. 57 at ¶ 141.

[72] Doc. 57 at ¶ 141.

[73] Doc. 57 at ¶ 141.

[74] Doc. 57 at ¶ 141.

[75] Doc. 57 at ¶ 142.

[76] Baker Donelson cites one unreported Texas case, applying California law, to argue that "pleading based on an allegation that the defendant 'knew or should have known' is insufficient" for aiding and abetting claims. Doc. 60 at 27–28 (citing *Litson-Gruenber v. JPMorgan Chase & Co.*, 2009 WL 4884426, at *2 (N.D. Tex. Dec. 16, 2009)). That case, like *El Camino*, is not binding on this Court, which recently allowed the Receiver's similar aiding and abetting claims to proceed against the UPS Store and other defendants for their role in notarizing Adams's false timber deeds. *See* Doc. 49, *Mills v. The UPS Store, Inc., et al.*, No. 19-cv-364 (S.D. Miss. Sept. 30, 2019).

[77] Doc. 60 at 28.

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. *Proskauer Rose LLP*, 2015 WL 11121540, at *5.

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

V. THE AMENDED 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).[78]

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."[79] The amended complaint currently alleges a claim for professional negligence, or attorney malpractice, only against Butler Snow—not against Baker Donelson. Against Baker Donelson, the amended complaint currently alleges ordinary negligence only.

[78] *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.").

[79] Doc. 60 at 29 (emphasis added).

"To prevail in any type of negligence action, a plaintiff must first prove the existence of a duty." *Griffith v. Entergy Mississippi, Inc.*, 203 So. 3d 579, 585 (Miss. 2016) (quoting *Enter. Leasing Co. S. Cent. v. Bardin*, 8 So. 3d 866, 868 (Miss. 2009) (citing *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897, 904 (Miss. 2007)). "In the context of an ordinary negligence action the duty of care is the requirement 'to conform to a specific standard for the protection of others against the unreasonable risk of injury. . . .'" *Clausell v. Bourque*, 158 So. 3d 384, 391 (Miss. Ct. App. 2015) (quoting *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897, 904 (Miss. 2007)). As a general proposition, "all individuals owe a duty to exercise reasonable care to avoid foreseeable injury to others . . . ." *Fed. Sav. & Loan v. Tex. Real Estate Counselors, Inc.*, 955 F.2d 261, 265 (5th Cir. 1992).[80]

Baker Donelson thus had a duty to use ordinary care, that is, to observe reasonable commercial standards, in the conduct of their business. They breached that duty: The amended 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."[81] The amended 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."[82] Baker Donelson thus failed "to exercise reasonable care to avoid foreseeable injury to others." *Fed. Sav. & Loan*, 955 F.2d at 265.

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.*

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[80] *See also Doe ex rel. Doe v. Wright Sec. Servs., Inc.*, 950 So. 2d 1076, 1079 (Miss. Ct. App. 2007) ("The general duty is to act as a reasonable prudent person would under the circumstances.").

[81] Doc. 57 at ¶ 152.

[82] Doc. 57 at ¶ 153.

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 amended 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.[83] Baker Donelson has stated no basis for dismissing the Receiver's claim for recklessness, gross negligence, and at a minimum negligence.[84]

The amended 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

[83] Contrast the amended complaint, Doc. 57 at ¶¶ 148–58, 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."

[84] Baker Donelson, like Alexander Seawright, argues it "owed Adams and Madison Timber no duty of 'ordinary' care to prevent their Ponzi scheme." Doc. 60 at 29. Baker Donelson cites the same inapposite cases as Alexander Seawright: *Cuyler v. United States*, 362 F.3d 949, 954 (7th Cir. 2004) (recognizing "exceptions to the rule that there is no common law duty to warn or rescue" in case about whether medical personnel at Naval hospital were negligent in not reporting child's babysitter for previous abuse against another child); *Oden v. Pepsi Cola Bottling Co. of Decatur*, 621 So. 2d 953 (Ala. 1993) (granting summary judgment in favor of Pepsi for claims brought by administrator of estate of minor who was killed when soft drink vending machine fell on him while attempting to steal soft drinks from machine). In *Oden*, the majority opinion does not expressly discuss duty at all. The concurrence, however, found Pepsi owed a duty to the minor in light of numerous red flags: Pepsi knew that vending machines were being tipped for the purpose of stealing drinks, that such criminal activity had resulted in serious injuries and death, and that Pepsi refused to take any action to prevent such injuries. "Pepsi should not go unpunished for its wanton disregard of the danger posed by its vending machines." *Id.* at 961.

As alleged in the amended complaint, Baker Donelson didn't just fail to stop the Madison Timber Ponzi scheme—they were part of it. There is no question that Baker Donelson owed duties to the Receivership Estate, and ultimately to Madison Timber investors.

(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."[85] 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 "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,[86] purported to provide "smart advice" to potential investors to "put [their] money to work" by "invest[ing] in [] timber round[s]."[87] Seawright, a "Securities" lawyer presumably qualified to draft legal documents,[88] drafted "subscription agreements and accompanying documents for the sales of units" in the Alexander Seawright Timber Fund, which invested solely in Madison Timber.[89] 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 amended complaint alleges facts, described above, sufficient to establish that Baker Donelson failed to do so. When a receiver adequately pleads that an employee "provided material

[85] Doc. 60 at 24 (quoting *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So. 3d 474, 489 (Miss. 2010)).
[86] Doc. 61-1.
[87] Doc. 57 at ¶ 80.
[88] Doc. 61-2.
[89] Doc. 57 at ¶ 90.

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.[90]

VI. THE DOCTRINE OF *IN PARI DELICTO* DOES NOT BAR THE RECEIVER'S CLAIMS.

Baker Donelson contends the Receiver's claims against it are barred by the *in pari delicto* doctrine. The doctrine 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, having "stepped into the shoes" of Adams and Madison Timber, can have no right of action against Baker Donelson.[91] Now that the

[90] 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.").

[91] Baker Donelson contends the doctrine relieves it of liability because an "active wrongdoer" is more at fault than a "passive wrongdoer," and, according to Baker Donelson, Lamar Adams was the "active" wrongdoer. Doc. 60 at 31. Baker Donelson cites *Long Term Care, Inc. v. Jesco, Inc.*, 560 So. 2d 717 (Miss. 1990), for the proposition that an "active wrongdoer" is more at fault than a "passive wrongdoer." Doc. 60 at 31. *Long Term Care* considered whether, under the doctrine of "common law indemnity," a tortfeasor who volunteered payment to the injured plaintiff in a premises liability case was entitled to indemnity from its fellow tortfeasor. The question here is not one of indemnity. And this is not a premises liability case. *Reed v. D & D Drilling & Expl., Inc.*, 27 So. 3d 414, 416 (Miss. Ct. App. 2009) (declining to consider an argument related to passive negligence because the case was not a premises liability case). In any event, Baker Donelson was not a "passive wrongdoer." *See Borne v. Estate of Carraway*, 118 So. 3d 571, 588 (Miss. 2013) (quoting *Titus v. Williams*, 844 So. 2d 459, 466 (Miss. 2003) ("One is only passively negligent if he merely fails to act in fulfillment of duty of care which law imposes upon him, while one is actively negligent if he participates in some manner in conduct or omission which caused injury."); *J.B. Hunt Transp., Inc. v. Forrest Gen. Hosp.*, 34 So. 3d 1171, 1174 (Miss. 2010) (for a wrongdoer to be "passive," he must be "free of fault" and must not have "actively or affirmatively participate[d] in the wrong"). As expressly alleged in the amended complaint, Baker Donelson actively participated in growing the Madison Timber Ponzi scheme.

Receiver stands in the shoes of investors, too, the argument is academic. Nevertheless, 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.[92] Baker Donelson premises its argument on case law from the Seventh Circuit and from New York, which it characterizes as a "clear trend."[93] 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.").

Tellingly, Baker Donelson again 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

[92] Doc. 60 at 32.

[93] Doc. 60 at 34.

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.[94] 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 apply to the Receiver's fraudulent transfer claims only, not to the Receiver's tort claims. 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., Zacarias v. Stanford Int'l Bank, Ltd. (Willis)*, No. 17-11073, 2019 WL 6907376, at *7 (5th Cir. Dec. 19, 2019) ("There is no dispute that the receiver and Investors' Committee had standing to bring their [aiding and abetting, breach of fiduciary duty, and other tort claims] against Willis and BMB. They bring only the claims of the Stanford entities—not of their investors—alleging injuries only to the Stanford entities, including the unsustainable liabilities inflicted by the Ponzi scheme."); *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'

[94] Doc. 57 at ¶¶ 93–95.

participation in a fraudulent marketing scheme increased the sale of Stanford's CDs, 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").[95]

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.[96]

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.

[95] This Court too, in a related action in which the Receiver asserts nearly identical claims against Defendants who contributed to the growth of the Madison Timber Ponzi scheme, has found that "Fifth Circuit and Mississippi law support the Receiver's causes of actions." Doc. 49, *Alysson Mills v. The UPS Store, Inc., et al.*, No. 3:19-cv-00364 (S.D. Miss.).

[96] The Receiver maintains that she has standing to brings her claims on behalf of the Receivership Estate. But it is beyond question that the investors, and therefore the Receiver as the assignee of the investors' claims, has standing to bring the amended complaint's claims against Baker Donelson.

January 10, 2020

Respectfully submitted,

/s/ Lilli Evans Bass

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CERTIFICATE OF SERVICE

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

Date: January 10, 2020 */s/ Kristen D. Amond*

[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

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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
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
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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: M onday, November 5, 2018 4:04:53 PM
From: S eawright, Jon
Sent: boundary="_000_36CCD751E6AC8F4D9FA6C9EBB6A11D31E3C938D9JACKEXCH2firmbd_"MIME
To: [redacted]
Subject: R E:T imesf orc all
Sensitivity: N ormal

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

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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]