IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC — **PLAINTIFF**

vs. — **CASE NO. 3:19-cv-941-CWR-FKB**

TRUSTMARK NATIONAL BANK; BENNIE BUTTS; JUD WATKINS; SOUTHERN BANCORP BANK; and RIVERHILLS BANK — **DEFENDANTS**

MOTION TO DISMISS CLAIMS AGAINST BENNIE BUTTS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and for the reasons set forth in his accompanying Memorandum in Support of this Motion to Dismiss, Defendant Bennie Butts moves the Court to dismiss with prejudice all of the claims against him set forth in the Receiver's Complaint. Bennie Butts requests such other and further relief that the Court deems to be just and appropriate under the circumstances.

Date: April 30, 2020.

Respectfully submitted,

BENNIE BUTTS

By: */s/ R. David Kaufman*
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CERTIFICATE OF SERVICE

I, R. David Kaufman, hereby certify that on April 30, 2020, I caused the foregoing pleading to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and registered participants.

/s/ R. David Kaufman
R. David Kaufman

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MEMORANDUM OF LAW IN SUPPORT OF BENNIE BUTTS'S MOTION TO DISMISS

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INTRODUCTION

The Complaint does not allege facts to show that Bennie Butts ever had actual knowledge that Adams and Madison Timber were engaged in what federal prosecutors have described as a complex financial fraud. The Receiver does not allege any facts to show Butts knew about the fraud or agreed to further it, because he did not. The Complaint does not allege facts to show Adams or Madison Timber ever paid a dime to Butts, because they did not. And the Complaint does not allege Butts owed any duty to Adams or Madison Timber or that he breached such a duty. Accordingly, the Complaint alleges no facts to demonstrate that Butts (a) conspired with Adams; (b) aided or abetted Adams; (c) was negligent; or (d) accepted monetary transfers—fraudulent or otherwise—from Adams or Madison Timber. The Complaint is simply devoid of any factual allegations supporting the Receiver's claims against Butts.

In her introductory remarks, the Receiver alleges "Defendants are financial institutions that provided banking services that enabled and sustained the Madison Timber Ponzi Scheme," and "looked away while they collected fees." Doc. 1 at 2. Butts is obviously not a "financial institution" with whom Adams conducted business, and the Complaint alleges no facts to show Butts ever "collected fees" of any kind from Adams or Madison Timber. The Receiver attempts to use allegations that Butts and Adams "were close friends" to imply that Butts somehow must have known about Adams's fraud and is therefore culpable. *See* Doc. 1 at 9. Put simply, however, that is not the legal standard, and the Receiver has alleged no facts whatsoever to demonstrate that Butts, or Trustmark for that matter, knew about Adams's fraudulent scheme. It is unclear why the Receiver has sued Butts in his individual capacity, but it is clear that her claims against Butts should be dismissed with prejudice.

The Receiver's Complaint asserts five causes of action against Butts individually: civil conspiracy (Count I); aiding and abetting (Count II); "recklessness, gross negligence, and at a

minimum negligence" (Count III); "violations of Mississippi's Fraudulent Transfer Act" (Count V); and "violations of Mississippi's Racketeer Influenced and Corrupt Organization Act" (Count VI). Complaint at ¶¶97–129, 140–154. Not one should survive the motion to dismiss.

Before addressing the elements of the Receiver's claims, the Court should find that the Receiver lacks standing to bring her claims against Butts. The Receiver stands in the shoes of Madison Timber and Adams, and she sues on their behalf to recover "damages" in the form of an alleged increase in the debts of the Receivership Estates to third parties. Under controlling Fifth Circuit law, the Receivership Estate's unpaid liabilities to third parties are injuries to those third parties—not to the Estate. In addition to not being able to allege an injury-in-fact, as a matter of law the Receiver cannot sue on behalf of Adams and Madison Timber for injuries to third parties. And to the extent the Receiver purports to sue on assigned claims, she has not alleged sufficient information about the assignors, their claims, or the scope of assignments. *Id.* at ¶¶6–8.

Even if the Court finds that the Receiver has standing, the Court should dismiss the claims against Butts because the Receiver has failed to allege facts to demonstrate that (a) Butts *actually knew* about the fraud perpetrated by Adams, much less *agreed* to participate in it, or (b) Butts accepted any monetary transfers from Adams or Madison Timber. Indeed, to attempt to establish Butts's knowledge of Adams's fraud, the Receiver alleges: "From their advantageous positions, Trustmark, Butts, and Watkins could see all the indicia of fraud but chose to look away or, worse, to provide cover." Doc. 1 at ¶56. And therefore, "Trustmark, Butts, and Watkins knew or should have known that Adams was engaged in illegal banking activity." *Id.* at ¶ 63. The Receiver rests her claims solely on conclusory allegations of "knew or should have known," which are insufficient as a matter of law.

Moreover, the Court should dismiss the Receiver's negligence claim because the Receiver has not alleged that Butts owed any legal duty to Adams or Madison Timber, in whose shoes she stands. She cannot because no such duty exists as a matter of law. Even if such a duty existed, the Receiver has set forth no factual allegations to demonstrate Butts breached it.

Further, because the Receiver stands in the shoes of Adams and Madison Timber, the Court should dismiss the claims against Butts pursuant to the doctrine of *in pari delicto*, which bars claims brought on behalf of a primary wrongdoer against other alleged wrongdoers. In other words, even if Butts was a wrongdoer—which he plainly was not—the Receiver stands in the shoes of the primary wrongdoers, Adams and Madison Timber. Under Mississippi law, Adams and Madison Timber cannot recover from Butts on the Receiver's claims. For the same reasons, the Receiver's claims are barred by Mississippi's wrongful conduct rule.

Finally, even if the Receiver's allegations against Trustmark had merit—and they do not—the Receiver cannot, as a matter of law, establish liability against Butts individually because the Receiver failed to set forth factual allegations to show that Butts actively participated in the alleged tortious acts.

FACTUAL ALLEGATIONS

As alleged in the Complaint, Butts has at all relevant times been employed by Trustmark National Bank ("Trustmark"). Doc. 1 at ¶10. In his role at Trustmark, Butts assisted Lamar Adams in opening various bank accounts (as he would do with any other customer) and evaluated various real estate transactions for which Adams requested financing from Trustmark (as he would do with any other customer). Doc. 1 at p. 8-10. The Receiver alleges that Adams used deposit accounts at Trustmark for purposes of handling funds derived from Madison Timber's Ponzi scheme. Doc. 1 at p. 8-9. Even if true for purposes of this motion to dismiss, the Complaint sets forth no factual allegations to demonstrate that Butts or Trustmark was ever

aware of Adams's fraudulent scheme, much less that they were complicit in furthering it. And the Complaint sets forth no factual allegations to support the claim that Butts accepted commissions or other fees from Adams or Madison Timber. He did not. Instead, the Receiver continues to rely on insufficient, conclusory allegations that Butts "knew or should have known that Adams was engaged in illegal banking activity." *Id.* at ¶63.

The Complaint alleges no facts to show that any of the ordinary real estate transactions for which Butts assisted Adams in obtaining financing from Trustmark had anything to do with the Madison Timber Ponzi scheme. In fact, the Receiver has not alleged any facts to show that any of the "separate LLCs" identified in the Complaint were actually related to, or used for the purposes of, the Ponzi scheme. *See* Doc. 1 at ¶32 (identifying Confederate Dline, LLC; 747, LLC; Wolf Lake, LLC; KAB, LLC; Swede Camp, LLC; MASH Farms, LLC; and Delta Farm Land Investments, LLC). Instead, the Complaint shows that all of the transactions that Butts evaluated for Trustmark involved other individual members or business owners who formed a separate LLC with Adams for the purpose of investing in real estate. *Id.* The Receiver does not allege that any of those business deals involved Madison Timber as a member or participant. Of course, even if Adams used Madison Timber "investor money" for his ownership share of those LLCs, the Complaint contains zero factual allegations to show that Butts or Trustmark knew that was the case or that they had a duty to prevent it.

The Receiver likewise sets forth no facts to support her bald allegation that Butts and Trustmark "could see all the indicia of fraud but chose to look away or, worse, to provide cover." Doc. 1 at ¶56. To the contrary, the Complaint itself rebuts any implication that Butts or Trustmark failed to take appropriate action to address any suspicious account activity. Indeed, the Complaint acknowledges that Butts timely responded to inquiries about Adams's account

activity, addressed the activity directly with Adams, and even put representatives of Trustmark's Bank Secrecy Act and Anti-Money Laundering Department in contact with Adams to discuss the account activity. *Id.* at ¶¶42–46, 48–49. Accordingly, the Receiver's reliance on the conclusory allegation that Butts and Trustmark "knew or should have known that Adams was engaged in illegal banking activity" is insufficient as a matter of law. *See id.* at ¶63.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, the Receiver bears the burden to plead facts sufficient to establish a justiciable case or controversy, including that she has standing to assert the claims she brings on behalf of the Receivership Estate. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341–42 (2006); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly allege facts demonstrating' each element" of standing, including "injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). "'[S]tanding is not dispensed in gross.'" *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). "To the contrary, 'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Id.*

To survive a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the Complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *In re S. Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir. 2008).[1] "'Dismissal is proper if the complaint lacks an allegation regarding a required

[1] Although the well-pleaded facts in the Complaint must be accepted as true for purposes of this Motion to Dismiss, Butts does not concede that any of the Receiver's factual allegations are true.

element necessary to obtain relief.'" *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (quoting 2A Moore's Federal Practice ¶ 12.07 at 12–91) (internal brackets omitted). And the Court should "'accept all *well-pleaded* facts as true'" but should not "'accept as true conclusory allegations or unwarranted deductions of fact.'" *Great Plains Trust Co. v. Morgan Stanley Dean & Witter & Co.*, 313 F.3d 305, 312-13 (5th Cir. 2002) (emphasis added) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)). "When considering a motion to dismiss for failure to state a claim . . . conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)). A court should not accept "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

As shown below, the Receiver has not alleged sufficient facts under the applicable law to raise a reasonable expectation that she will be able to establish the elements of her claims against Butts. Accordingly, the Receiver's claims against Butts should be dismissed with prejudice.

ARGUMENT

I. The Receiver Lacks Standing to Bring Claims Against Butts on Behalf of Adams and Madison Timber.

The "issue of standing is one of subject matter jurisdiction." *Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006). Foremost among standing requirements is that the plaintiff must have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "We have made it clear time and time again that an injury in fact must be both concrete and particularized." *Spokeo*, 136 S. Ct. at 1548 (citing, among others, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). The "'injury in fact' test requires . . . that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*,

405 U.S. 727, 734–35 (1972)). The Receiver does not have standing to bring her claims against Butts because the Receivership Estate has not been injured by Butts, as a matter of law.

The Receiver alleges that her basis for "standing" to bring claims is Butts's alleged "contribut[ion] . . . to the debts of the Receivership Estate." Doc. 1 at ¶¶ 6, 105, 116, 127, 153. Under the Fifth Circuit's recent decision in *Latitude Solutions, Inc. v. DeJoria*, however, an estate's unpaid debts do not "injure" the estate and therefore do not bestow Article III standing upon the Receiver. 922 F.3d 690, 696 (5th Cir. Apr. 30, 2019), *cert. denied*, Case No. 19-340, 2019 WL 6107784 (Nov. 18, 2019). In *DeJoria*, the trustee for LSI's bankruptcy estate argued at trial that a $9.5 million debt owed by LSI to Jabil (an equipment manufacturer) was the result of securities fraud perpetuated by LSI's officers and therefore constituted an injury to the bankruptcy estate, even though Jabil actually manufactured and delivered the equipment at issue to LSI. 922 F.3d at 694–697. The trustee sought to recover from LSI's officers the $9.5 million debt owed by LSI to Jabil. The trustee prevailed at trial, but the officers appealed. The Fifth Circuit reversed the trial court's judgment and held that the trustee lacked standing to bring that claim on behalf of LSI's bankruptcy estate because the estate was not injured. The Fifth Circuit held that the $9.5 million debt represented "Jabil's injury, not LSI's." *Id.* at 696. The Court reasoned that LSI actually "benefitted" from receipt of the equipment, for which it never paid, and which it later sold through the bankruptcy proceedings. *Id.*[2]

DeJoria controls in this case, despite the fact that it concerned a bankruptcy trustee and not a receiver in a federal securities case. The Court in *DeJoria* explained that "the receiver and bankruptcy trustee are similarly situated." *Id.*; *see also SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 841 (5th Cir. June 17, 2019) (discussing "Receiver's standing" and reiterating that "'[l]ike a

[2] The trustee petitioned for rehearing and requested en banc review, but both were denied. *DeJoria*, Orders of May 31 and June 12, 2019, Case No. 18-10382. The trustee also petitioned for certiorari to the U.S. Supreme Court, but that was denied. *See* Case No. 19-340, 2019 WL 6107784 (Nov. 18, 2019).

trustee in bankruptcy . . . an equity receiver may sue only *to redress injuries to the entities in receivership* . . . .'") (emphasis in original) (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995)); *Reneker v. Offill*, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009) (cited favorably by *DeJoria* and holding that the receiver lacked Article III standing because "the only harm alleged is the Receivership Estate's inability to satisfy its liabilities").

The Receiver's theory of injury has been flatly rejected by the Fifth Circuit in *DeJoria*. The Receiver alleges that "Defendants were essential to the growth of the Madison Timber Ponzi scheme" and that "[b]ut for Defendants' encouragement and assistance, Madison Timber would not have continuously grown." Doc. 1 at ¶¶104, 115, 126, 152. Pursuant to *DeJoria*, however, that theory of injury does not give the Receiver standing to bring claims against Butts. Adams and Madison Timber benefitted from their fraud—they kept the money that they fraudulently misappropriated and did not repay it to investors. Thus, the unpaid debts of Adams and Madison Timber do not constitute an injury to the Receivership Estate.

The Complaint mentions that certain unnamed "investors have assigned their claims against Defendants to the Receiver." Doc. 1 at ¶ 8. But no "investors" have any claims against Butts individually, and the Complaint does not allege otherwise. Mississippi law does not recognize any duties owed by Trustmark, much less Butts, which do not arise directly under the customer's agreement with the bank. *See, e.g.*, *United Plumbing & Heating Co. v. AmSouth Bank*, 30 So. 3d 343, 348 (Miss. Ct. App. 2009); *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 234 (5th Cir. 2010). The Receiver sets forth no allegations regarding any duties arising under Adams's or Madison Timber's agreements with the bank. And of course, neither Trustmark nor Butts owed any duties to non-customers of the bank.[3]

[3] In *Midwest Feeders*, the Fifth Circuit held, under Mississippi law, that a non-customer of the bank could not maintain a negligence action against the bank for negligent failure to discover and report alleged

The Receiver's general allegations regarding assignments fail as a basis for standing. "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted). The Receiver does not identify any of the alleged assignors and she sets forth no allegations regarding the scope or terms of the purported assignments, including what claims against which defendant were allegedly assigned. Accordingly, the purported assignments, and the dearth of facts related to them, do not create a basis for the Receiver's standing.[4] Therefore, the Court should dismiss the Receiver's claims against Butts for lack of standing.

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

The Court should dismiss Counts I, II, III, V, and VI of the Complaint against Butts because those Counts do not state a claim for which relief can be granted. Mississippi law applies to the Receiver's claims. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). It is "well-settled" that the Receiver's state law claims at issue here, including the fraudulent transfer claims, "are governed by the forum state in which the federal court is sitting." *Janvey v. Brown*, 767 F.3d 430, 434 (5th Cir. 2014) (citations omitted)

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fraudulent activity of one of its customers. *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 519 (5th Cir. 2018) (citing *Red Rock v. Jafco, Ltd.*, 79 F.3d 1146, at *4 (5th Cir. 1996) ("A bank, however, owes no legal duty of care to investigate or disclose its customers' conduct or intent to third parties with whom the bank's customers do business.").

[4] *See Perkumpulan Inv'r Crisis Ctr. Dressel-WBG v. Wong*, 2009 WL 10676449, at *5 (W.D. Wash. Oct. 30, 2009) (plaintiff failed to establish standing to litigate rights of aggrieved investors because plaintiff's complaint failed to mention a single investor's name), *aff'd*, 395 F. App'x 442 (9th Cir. 2010). *See also MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharm., Inc.*, 281 F. Supp. 3d 1278, 1283 (S.D. Fla. 2017) ("Plaintiffs allege that they have valid assignment agreements from the MAOs, but they plead no facts supporting that legal conclusion. Plaintiffs fail to allege the identity of the MAOs whose reimbursement rights they claim to own, the dates of the assignments, or the essential terms . . . Plaintiffs have failed to show that they have suffered an injury in fact, and therefore they lack standing.").

(citing, among others, *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989) ("A federal court exercising pendent jurisdiction over state law claims, must apply the substantive law of the state in which it sits.").

Further, and importantly, allowing the Receiver to amend the Complaint will not reasonably cure its defects. Butts has already produced to the Receiver the documents, emails, correspondence, and other information that might be relevant to the Receiver's claims. *See* Compl. ¶¶ 29, 31, 33, 34, 35, 39, 41–54. If facts existed that would allow the Receiver to cure the defects discussed below, she would have alleged them in the Complaint. But the truth is the Receiver is fully aware that Butts (a) *did not know* Adams was operating a Ponzi scheme, (b) *did not act with the purpose* of furthering the fraudulent scheme, (c) *did not owe any legal duty* to Adams or Madison Timber and never actively participated in a tortious act, and (d) never accepted any fees, commissions, or other payments from Adams or Madison Timber. Moreover, both the doctrine of *in pari delicto* and Mississippi's wrongful conduct rule legally bar the Receiver's claims. And the Receiver's claims against Butts fail because the Complaint does not allege facts to show Butts "actively participated" in any alleged tortious acts. Under applicable law, it is clear the Receiver "can prove no set of facts in support of [her] claim that would entitle [her] to relief." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) ("if a complaint alleges the plaintiff's best case, there is no need to remand" and dismissal with prejudice is proper). Accordingly, the Court should dismiss all of the Receiver's claims against Butts with prejudice.

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

As discussed below, well established law makes clear that *actual knowledge* of Adams's fraud is a required element of the Receiver's claims against Butts in Counts I, II, and VI. The Receiver does not come close to setting forth facts to demonstrate Butts *actually knew* Adams

was operating a complex financial fraud. The totality of allegations in the Complaint by which the Receiver attempts to imply knowledge of the Ponzi scheme can be summarized as follows: Butts worked at Trustmark and had access to the financial information of Trustmark's customers; Adams was a customer of Trustmark; Butts had a business relationship with Adams; Butts should have used his access to financial information to more closely monitor Adams's accounts and investigate Adams's business; and if he would have done that more diligently, he surely would have discovered that Adams was operating a Ponzi scheme. *See* Doc. 1 at ¶¶55–65. Notwithstanding the fact that Butts had no legal duty to take any such actions, the Receiver's allegations are wholly insufficient to demonstrate the required *actual knowledge* of fraud.

The Receiver alleges that "Trustmark, Butts, and Watkins knew or should have known that Adams was engaged in illegal banking activity" because "they had before them the nuts and bolts of the Madison Timber Ponzi scheme." *Id.* at ¶¶63-64. As the Court is aware, those allegations are not only speculative but they are far from sufficient to state a claim for which relief can be granted against Butts under Counts I, II, and VI. The allegation that Butts "knew or should have known" Adams was operating a Ponzi scheme due to the purported presence of "indicia of fraud" (which is the same as saying "red flags") is the epitome of a "legal conclusion masquerading as factual conclusions" that should not "suffice to prevent a motion to dismiss." *Fernandez–Montes*, 987 F.2d at 284.[5] In fact, the Complaint contains zero facts establishing that Butts *actually was aware* Adams was operating a Ponzi scheme. And the Receiver's claim that Butts *should have known* of the Ponzi scheme because of his alleged ability to see the "nuts and bolts" of the fraud from his so-called "advantageous position" is supposition and speculation.

[5] That the Receiver felt obliged to hedge her claim ("or should have known") underscores that she cannot in good faith allege the required actual knowledge. *Litson-Gruenber v. JPMorgan Chase & Co.*, 2009 WL 4884426, at *2 (N.D. Tex. Dec. 16, 2009) (dismissing claims in Ponzi-scheme case because "pleading based on an allegation the defendant 'knew or should have known' is insufficient" for actual knowledge)).

Indeed, the Receiver's allegations regarding purported "indicia of fraud" are merely recitations of what the Receiver thinks Butts should have discovered in his role as an employee of the bank. *See* Doc. 1 at ¶57 (Butts "could see that Adams's personal financial statements reported a positive net worth by grossly inflating the value of Adams's interests in his separate LLCs" and Butts "would have known that no independent appraisals would have supported those inflated values."); ¶58 (Butts "could see that Adams's tax returns showed substantial carry-forward business losses in addition to substantial debt because Madison Timber's purported interest expense nearly equaled its fictitious reported 'profits.'"); ¶59 (Butts "knew that Madison Timber purported to purchase timber with investors' money because . . . Butts . . . knew [his] customers." And Butts "knew that Adams and Madison Timber purported to have timber deeds and cutting agreements between landowners and Madison Timber and contracts between Madison Timber and mills."); ¶60 (Butts "could easily see that none of the hundreds of millions of dollars of investor money that was deposited into Trustmark's Madison Timber account was ever used to purchase timber" and Butts "could easily see that Trustmark's Madison Timber account never received any money from any mills."); ¶61 (Butts "knew that Adams and Madison Timber guaranteed a 13% return—better than any return for any other asset-backed investment" and "knew that Adams and Madison Timber purported to have identified mills with an insatiable demand for timber at uniform prices."); ¶62 ("But as a . . . professional[] with special sophistication and experience" Butts "easily knew that Madison Timber's high and consistent returns over such a long period of time were implausible.").[6] Even if those allegations are

[6] Such alleged "indicia of fraud" or "red flags" do not support an allegation of *actual knowledge*. *See Rosner v. Bank of China*, 2008 WL 5416380, at *6 (S.D.N.Y. Dec. 18, 2008) ("courts overwhelmingly recognize" that "actual knowledge of a fraud" is not established "based on allegations of the bank's suspicions or ignorance of obvious 'red flags' or warning signs indicating the fraud's existence"), *aff'd*, 349 F. App'x 637 (2d Cir. 2009); *Honig v. Kornfeld*, 339 F. Supp. 3d 1323, 1344 (S.D. Fla. 2018) ("red flags fail to establish actual knowledge"); *Chemtex, LLC v. St. Anthony Enterprises, Inc.*, 490 F. Supp. 2d

accepted as true—and they are not because they are not well pled—they do not in any way demonstrate that Butts actually was *aware* that Adams was operating a Ponzi scheme. Because Butts did not reach the alleged "only conclusion" that the Receiver says he should have reached does not equate to an allegation that Butts did not reach that conclusion *because he knew* Adams was operating a Ponzi scheme. The Receiver's allegations do not set forth facts sufficient to demonstrate the required element of *actual knowledge*, and the Court therefore should dismiss the Receiver's claims against Butts in Counts I, II, and VI.

1. The Complaint does not state a claim for civil conspiracy (Count I).

"To establish a civil conspiracy, the plaintiff must prove (1) an agreement between two or more persons, (2) to accomplish an unlawful purpose or a lawful purpose unlawfully, (3) an overt act in furtherance of the conspiracy, and (4) damages to the plaintiff as a proximate result." *Orr v. Morgan*, 230 So. 3d 368, 375 (Miss. Ct. App. 2017) (citations, brackets, and ellipsis omitted). "Under Mississippi law, '[a] conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully.'" *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004) (quoting *Levens v. Campbell*, 733 So. 2d 753, 761 (Miss. 1999)). "It is elementary that a conspiracy requires an *agreement* between the co-conspirators." *Id.* (emphasis added) (citing *Brown v. State*, 796 So. 2d 223, 226-27 (Miss. 2001)

536, 547 (S.D.N.Y. 2007) ("even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege actual knowledge"); *Ryan v. Hunton & Williams*, 2000 WL 1375265, at *9 (E.D.N.Y. Sept. 20, 2000) (allegations of suspicious banking activity, bank's position of being able to observe that activity, branch manager's suspicion that certain accounts may have been vehicles for fraudulent activity, and the branch manager's referral of those accounts to the in-house fraud investigation unit were not sufficient to "raise an inference of actual knowledge"); *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, 1999 WL 558141, at *7 (S.D.N.Y. July 30, 1999) (allegations that bank knowingly or recklessly disregarded several "badges of fraud" in accounts involving millions of dollars did not give "rise to an inference . . . that the bank actually knew of, and participated in" the fraud); *Nathel v. Siegal*, 592 F.Supp.2d 452, 469 (S.D.N.Y.2008) (explaining in its discussion of *Ryan* that "[e]ven where a bank was on notice of 'red flags' that indicated certain accounts may have been vehicles for fraudulent activity and referred the case to its internal fraud unit, the bank had only suspicions but not actual knowledge of fraud"); *In re Int'l Mgmt. Assocs., LLC*, 563 B.R. 393, 420 (Bankr. N.D. Ga. 2017) ("allegations of 'red flags' were insufficient to establish the bank's actual knowledge of existence of the Ponzi scheme")).

("'persons must agree . . . for a conspiracy to exist'")). Contrary to the Receiver's allegations, to state a claim for civil conspiracy, the Receiver must plead sufficient facts to show Butts *knew* Adams was operating a fraudulent scheme and *agreed* to unlawfully conspire with him to further the scheme. The Receiver pleads no such facts.

"For a civil conspiracy to arise, the alleged confederates must be aware of the fraud or wrongful conduct at the beginning of the agreement." *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (citing 16 Am. Jur. 2d Conspiracy § 51); *see also Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 520 (5th Cir. 2018) (civil conspiracy requires proof that conspirator "knew of [the] fraudulent scheme"). Again, the Receiver has not alleged sufficient facts demonstrating that Butts knew Adams was operating a fraudulent Ponzi scheme. And if Butts had no knowledge of Adams's fraudulent conduct, he could not have agreed to further Adams's fraudulent scheme. To that point, the Receiver does not allege any facts whatsoever demonstrating Butts agreed with Adams to further his fraudulent scheme.

The Receiver does not allege that Adams and Butts had a "meeting of the minds" as to "the object or course of action" to commit an "underlying tort which could support a claim for conspiracy," as is required by Mississippi law. *Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011). Instead, the Receiver claims: Butts and Trustmark "knew or should have known that Adams was engaged in illegal banking activity." Doc. 1 at ¶ 63. That is not enough. Accordingly, the Court should dismiss the claims in Count I against Butts.

2. The Complaint does not state a claim for aiding and abetting (Count II).

First, the Court should dismiss Count II because "[n]o Mississippi court has ever recognized any of the subsections of the Restatement (Second) of Torts § 876 as viable causes of action." *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011). To be clear, "no Mississippi court has recognized a claim for civil aiding and abetting, whether under § 876(b) or § 876(c)."

Id. The "Mississippi Supreme Court has not expressly recognized the tort of aiding and abetting fraud." *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694, 700-01 (S.D. Miss. 2002). "When sitting in diversity, a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts." *In re Depuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liability Lit.*, 888 F.3d 753, 781-782 (5th Cir. 2018) (reversing jury verdict because, among other things, district court recognized an aiding-and-abetting claim under Restatement § 876(b) when the Texas supreme court had not yet recognized that claim).[7]

Further, even if a civil claim for aiding and abetting existed in Mississippi, which it does not, as the Receiver has acknowledged "a defendant is liable [under a claim of aiding and abetting] if he '*knows* that the other's conduct constitutes a breach of duty . . . .'" Doc. 1 at ¶109 (emphasis added) (quoting Restatement (Second) of Torts § 876(b) (1979)). As stated above, the Receiver has not even alleged facts demonstrating that Butts actually *knew* about the fraud, or that he actually *knew* that Adams's conduct constituted a breach of some duty, at any point in time that he conducted business with Adams on Trustmark's behalf.[8]

[7] The *Dale* court made an *Erie* guess that such a claim would be viable under Mississippi law, reasoning that a majority of other jurisdictions have recognized such a claim and that Mississippi recognizes the analogous tort of civil conspiracy. *Dale*, 203 F. Supp. 2d at 701; *In re Evans*, 467 B.R. at 409. To date, however, the Mississippi Supreme Court has not recognized the tort as viable, and therefore, this Court should follow *In re Depuy Orthopaedics*, which restrains the Court from recognizing the "novel" aiding and abetting cause of action under § 876(b) of the Restatement (Second) of Torts. 888 F.3d at 781; *see also Fikes*, 813 F. Supp. 2d at 822-23 (finding "Mississippi Supreme Court has never recognized aiding and abetting as a civil cause of action" but declining to make an *Erie* guess because plaintiff failed to allege separate underlying tort and thus failed to state claims for conspiracy and aiding and abetting).

[8] The Receiver's allegations that Butts was in an "advantageous position" to "see all the indicia of fraud" from which he "could have reached only one conclusion" of fraud fall short of establishing that he "knew about conduct constituting a conspiracy." *Dickens v. A-1 Auto Parts & Repair, Inc.*, No. 1:18-cv-162-LG-RHW, 2018 WL 5726206, at *3 (S.D. Miss. Nov. 1, 2018) (dismissing under Rule 12(b)(6) a claim for civil aiding and abetting). Further, courts in jurisdictions that recognize civil liability for aiding and abetting routinely hold that allegations of "red flags" are insufficient. *El Camino Res., LTD. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 907-08 (W.D. Mich. 2010) (internal quotation marks omitted) (collecting authority), *aff'd*, 712 F.3d 917 (6th Cir. 2013); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006) ("red flags" were "insufficient to establish a claim for aiding and abetting fraud"); *Glonti v.*

And the implication that Butts might have known "that Adams owed Madison Timber fiduciary duties" does not establish that he knew Adams breached any such duties by operating a Ponzi scheme and does not support a claim for aiding and abetting. *Id.* at ¶ 111; *see Lerner*, 459 F.3d at 294 ("'A claim for aiding and abetting a breach of fiduciary duty requires . . . that the defendant *knowingly* induced or participated in the breach[.]'") (emphasis added) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (N.Y. App. Div. 2003)). "A showing of actual knowledge of the alleged fraud is required to support a claim for aiding and abetting fraud; constructive knowledge—the possession of information that would cause a person exercising reasonable care and diligence to become aware of the fraud—is insufficient." *de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 316, 322–23 (S.D.N.Y. 2011). Here, the Complaint sets forth no allegations demonstrating that Butts actually became aware that Adams was conducting a fraud. Accordingly, the Court should dismiss the claims against Butts in Count II of the Complaint.[9]

3. The Complaint does not state a claim for "violations of Mississippi's Racketeer Influenced and Corrupt Organization Act" (Count VI).

The Receiver's claim in Count VI for alleged violations of Mississippi's Racketeer Influenced and Corrupt Organization ("RICO") Act likewise is legally insufficient. At the core of

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Stevenson, 2009 WL 311293, at *8 (S.D.N.Y. 2009) ("Actual knowledge, not mere notice or unreasonable unawareness, is therefore essential [to support a claim for aiding and abetting fraud].").

[9] In states that recognize claims for civil aiding and abetting under § 876 of the Restatement, three elements are required: "(i) the existence of a violation by the primary wrongdoer; (ii) knowledge of this violation by the aider and abettor; and (iii) that the aider and abettor *substantially assisted* in the primary wrong." *In re Consol. Meridian Funds*, 485 B.R. 604, 615–16 (Bankr. W.D. Wash. 2013) (emphasis added); *see* Doc. 1 at ¶109 (defendant liable if he "gives substantial assistance or encouragement to the other so to conduct himself"). In addition to failing to allege facts to show Butts knew of the fraud, the Receiver has not alleged facts to show that Butts "substantially assisted" in the fraud. For the "substantial assistance" element of § 876 to be satisfied, the plaintiff in a Ponzi scheme case must prove "'(1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed'; and (2) 'the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.'" *In re Consol. Meridian Funds*, 485 B.R. at 615–16 (quoting *In re Agape Lit.*, 681 F. Supp. 2d 352, 364 (E.D.N.Y. 2010)). In *Agape Litigation*, the court acknowledged that "[t]he caselaw is clear that opening accounts and approving transfers, even where there is a suspicion of fraudulent activity, does not amount to substantial assistance." 681 F. Supp. 2d at 365.

any claim under Mississippi's RICO Act is evidence that the defendant was aware of, and a willing participant in, the wrongful racketeering activity proscribed by the RICO Act. *See* Miss. Code Ann. §§ 97-43-1 through 97-43-11. "A person cannot be held liable for a RICO conspiracy 'merely by evidence that he associated with other . . . conspirators or by evidence that places the defendant in a climate of activity that reeks of something foul.'" *Marlin v. Moody Nat. Bank, N.A.*, 248 F. App'x 534, 538 (5th Cir. 2007) (quoting *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998)). "'A conspirator must *intend* to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he *adopt the goal* of furthering or facilitating the criminal endeavor.'" *Id.* (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997) (emphasis added). Here, the Receiver does not even allege facts establishing that Butts was ever *actually aware* that Adams was engaged in any illegal activity, much less that he knowingly participated, adopted, managed, supervised, or otherwise engaged in the illegal activity. This is fatal to the Receiver's RICO claim.

The Receiver's purported "indicia of fraud" are simply not enough to state RICO claims. *See Chaney*, 595 F.3d at 239–240 (assertion of purported red flags and insinuations that defendants "should have known" is not enough to maintain RICO conspiracy claim). The Receiver alleges that Butts "should have known that Adams was engaged in illegal banking activity" due to Butts's so-called "advantageous position" at the bank to be able to access "unique information." Doc. 1 at ¶¶56, 63, 64. That is a highly speculative legal conclusion. "Neither awareness of some probability of illegal conduct nor a showing the defendant should have known is enough" to establish the element of knowledge. *Chaney*, 595 F.3d at 239–240. The Complaint sets forth no facts whatsoever showing that Butts, with *actual knowledge* of the

Ponzi scheme, adopted "the goal of furthering or facilitating the criminal behavior." *Id.* Accordingly, the Court should dismiss Count VI against Butts.[10]

Moreover, the Receiver's RICO claims against Butts should be dismissed because Butts has not been convicted of any crime. Pursuant to Mississippi Code Annotated § 97-43-9, the civil remedy bestowed upon alleged victims of RICO activity is available only if the RICO defendant has been criminally convicted of an underlying RICO offense. "Any aggrieved person may institute a civil proceeding under . . . this section against any person or enterprise *convicted* of engaging in activity in violation of this chapter." Miss. Code Ann. § 97-43-9(5) (emphasis added). For the simple reason that Butts has not even been charged with any crime, much less convicted, the Court should dismiss the Receiver's RICO claim against Butts.

B. The Court should dismiss the claims in Count III against Butts for "recklessness," "gross negligence," or "negligence" because Butts did not owe any duty to Adams or Madison Timber, and the Complaint contains no factual allegations to show he breached any duty.

The Receiver has failed to state a claim for negligence, gross negligence, or recklessness because she failed to allege any facts establishing that Butts owed a duty to Adams and Madison Timber. "Whether a duty exists is a question of law." *Midwest Feeders, Inc.*, 886 F.3d at 515 (citation omitted); *see also, e.g., Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.*, 858 So. 2d 129, 131 (Miss. 2003). The Receiver discusses the plight of other investors who were

[10] The RICO claim should be dismissed for the additional reason that the Receiver has failed to allege facts sufficient to establish a RICO "enterprise," which requires a "pattern of racketeering activity" by a "group of persons or entities associating together for the common purpose of engaging in a course of conduct," and the associated group must have "an existence that can be defined apart from the commission of the predicate acts." *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 559-562 (5th Cir. 2015) (citations and internal quotation marks omitted); Miss. Code Ann. § 97-43-5. And even if such a showing could be made, which it cannot, it is well established that *in pari delicto* is a defense to a civil RICO claim. *See Rogers v. McDorman*, 521 F.3d 381, 389 (5th Cir. 2008).

unfortunately duped by Adams, but the Receiver is not their representative. Instead, the Receiver stands in the shoes of Adams and Madison Timber, to whom Butts owed no duty.[11]

"It is quite elementary that there cannot be a tort without a breach of a legal duty." *Savage v. Prudential Life Ins. Co. of Am.*, 121 So. 487, 489 (Miss. 1929); *see also Sanderson Farms, Inc. v. McCullough*, 212 So. 3d 69, 76 (Miss. 2017). "'Duty and breach of duty, which both involve foreseeability, are essential to finding negligence and [therefore,] must be demonstrated first.'" *Sanderson Farms, Inc.*, 212 So. 3d at 76 (quoting *Griffith v. Entergy Miss., Inc.*, 203 So. 3d 579, 585 (Miss. 2016)). The Receiver fails to even allege that Butts owed a duty to Adams and Madison Timber, and no such duty existed as a matter of law.

"The Reciever[] [has] cited no cases suggesting some broad duty for financial institutions to monitor all their accounts for suspicious activity and to investigate that activity upon discovery." *Chaney*, 595 F.3d at 234. "Because there is no independent obligations [of banks] to investigate suspicious activity in non-fiduciary accounts," a bank has no duty "to make reasonable inquiry and endeavor to prevent a diversion." *Id.* at 234–35.[12] *See also Holifield v.*

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[11] *See* Order Appointing Receiver [Doc. 33], *SEC v. Adams*, No. 3:18-cv-252-CWR-FKB (S.D. Miss. June 22, 2018). It is black-letter law that the Receiver "has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors." *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013); *see also Troelstrup v. Index Futures Grp., Inc.*, 130 F.3d 1274, 1276 (7th Cir. 1997) (receiver appointed for estate of fraudster "has no possible claim against [a third-party brokerage house], or on behalf of the investors, the victims of the fraud, because he was not *their* receiver" (emphasis in original)). The Court's October 28, 2019 Order amended the 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." That Order, however, does not change the definition of the "Receivership Estate," but instead confirms that the "Receivership Estate" is comprised of the "estates of Arthur Lamar Adams and Madison Timber Properties." [Doc. 190]. Accordingly, the Receiver continues to represent only the "Receivership Defendants," Adams and Madison Timber, in connection with collecting "Receivership Property."

[12] The relationship between a bank and its depositor is simply one of debtor and creditor and does not invoke a fiduciary duty. *Wise v. Valley Bank*, 861 So. 2d 1029, 1033 (Miss. 2003) (reversing Court of Appeals holding that "bank was in a relationship of trust with Wise," which was "in direct conflict with previous decisions of this Court"). Of course, the Madison Timber accounts were ordinary business accounts, opened by Madison Timber in its own name, and not trust accounts. "[O]rdinarily a bank does

BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004) (bank had not duty to prevent withdrawal of funds from trust account absent actual knowledge of wrongdoing); *Collier v. Trustmark Nat'l Bank*, 678 So. 2d 692 (Miss. 1996) (bank had no duty to the trust beneficiaries absent "actual knowledge" that the trustee was embezzling funds).

A bank's duties are defined solely by the account agreement between the bank and its customer. *Id.* at 231 (citing *Century Bus. Credit Corp. v. N. Fork Bank,* 246 A.D.2d 395 (N.Y. App. Div. 1998) (requiring bank to monitor customers' accounts for benefit of customers' creditors would "unreasonably expand banks' orbit of duty"); *Home Sav. of Am., FSB v. Amoros*, 233 A.D.2d 35 (N.Y. App. Div. 1997) ("depository bank has no duty to monitor fiduciary accounts . . . to safeguard the funds in those accounts from fiduciary misappropriation")). The Receiver has not alleged that Trustmark or Butts was required by Trustmark's agreement with Adams or Madison Timber to monitor Adams's or Madison Timber's accounts for fraud. The Receiver has cited no duty that is derivative or independent of contracts between Trustmark and Adams or Madison Timber that required Trustmark to investigate Adams's transactions. *See United Plumbing & Heating Co.*, 30 So. 3d at 348 (bank could not be liable for negligence where plaintiff cited "no contract, statute, or law that would establish that AmSouth had a duty to . . . investigate or contradict a valid request made by its client").

"The essence of the Receiver's negligence claim is that [Trustmark and Butts] failed to monitor [Adams' and Madison Timber's] account activities." *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1322–23 (M.D. Fla. 2015). But the Receiver "points to no authority supporting such a 'nebulous' duty." *Id.* In *Wiand*, as here, the receiver stepped into the shoes of

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not owe a fiduciary duty to its debtors and obligors." *Berhow v. The People's Bank*, 423 F. Supp. 2d 562, 570 (S.D. Miss. Mar. 26, 2006); *see also Peoples Bank & Trust Co. v. Cermack*, 658 So. 2d 1352, 1358 (Miss. 1995)). For "a normal debtor-creditor relationship," claims of breach of fiduciary duty must be dismissed. *Berhow*, 423 F. Supp. 2d at 570.

the Ponzi scheme perpetrator and attempted to argue that the bank had a general negligence based duty of care that arose out of the bank's regulatory or statutory duty to investigate suspicious activity. *Id.* The Court reiterated that "there is no private right of action under those statutes and regulations." *Id.* ("To the extent federal banking statutes such as the Bank Secrecy Act impose duties on banks, those duties extend to the United States, not a bank's customers."); *James v. Heritage Valley Fed. Credit Union*, 197 F. App'x 102, 106 (3d Cir. 2006) (no private cause of action under Bank Secrecy Act). The court held that the bank could not be liable for negligence or even alleged breaches of fiduciary duties for failing to monitor loan transactions and deposit accounts of businesses and persons who were involved in the Ponzi scheme. *Id.*

There is "no duty on a bank to investigate transactions." *Wiand*, 86 F. Supp. 3d at 1322 (citing *Lawrence v. Bank of America, N.A.*, 455 Fed. App'x. 904, 907 (11th Cir. 2012)). Depository institutions "generally have no duty to investigate transactions made by authorized agents of the account holder." *Id.* (quoting *Lamm v. State Street Bank & Trust*, 748 F.3d 938, 947 (11th Cir. 2014)). That rule is in line with other jurisdictions, including Mississippi. *See id.* (citing *Sekerak v. Nat'l City Bank*, 342 F. Supp. 2d 701, 712 (N.D. Ohio 2004) (under Ohio law, custodian bank does not owe "any duties beyond those made explicit in the Custody Agreement"); *Kaiser v. First Hawaiian Bank*, 30 F. Supp. 2d 1255, 1264 (D. Haw. 1997) (under Hawaii law, custodian bank has "no duty to monitor and report on" transactions made in customer's securities account and no liability for accepting securities that are "worthless on their face"); *Abbott v. Chem. Trust*, 2001 WL 492388, at *7 (D. Kan. Apr. 26, 2001) (under Kansas law, custodian bank had "no duty to investigate" assets in customer's self-directed IRA)).

"Courts have repeatedly rejected negligence claims based on a bank's duty [to issue a suspicious activity report], concluding the bank's duty is owed only to the government and not to

private parties." *Douglas v. Trustmark Nat'l Bank*, 201 F. Supp. 3d 800, 807–08 (S.D. Miss. 2016) (quotation and internal brackets and ellipses omitted). "Courts addressing the issue have consistently held that the Bank Secrecy Act requiring such reports does not create a private right of action or establish a duty of care to private parties." *Id.*; *see also Marlin v. Moody Nat'l Bank, N.A.*, 2006 WL 2382325, at *7 (S.D .Tex. Aug. 16, 2006) (Bank Secrecy Act "does not create a private right of action and, therefore, does not establish a standard of care."). And of course, Trustmark and Butts had no duty to prevent Adams from committing a crime. *See, e.g.*, *Citizens Nat'l Bank v. First Nat'l Bank*, 347 So. 2d 964 (Miss. 1977).

Accordingly, the Receiver cannot establish a tort duty by alleging Trustmark failed to adequately monitor the accounts at issue. But even if Trustmark had owed a duty to Adams to investigate and report to Adams his own fraud, the law certainly does not impart such a duty to Butts, and the Receiver does not allege any facts to establish a duty owed by Butts. The majority of cases hold that even if a bank owes a duty, the employee of the bank does not. *See, e.g.*, *Annechino v. Worthy*, 252 P.3d 415, 419 (2011), *aff'd*, 290 P.3d 126 (Wash. 2012) (even unusual fiduciary duty upon bank to disclose facts when dealing with customer did not "establish[] that a bank officer or employee, acting within the ordinary scope of his or her duties, can be individually liable for breaching the bank's fiduciary duty to a customer"). Accordingly, Butts owed no duty to Adams or Madison Timber, even if Trustmark owed some duty.[13]

"In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would

[13] The Receiver cites *Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1128 (Miss. 2014) for the following quote: "Negligence is a failure to do what the reasonable person would do under the same or similar circumstances." *See* Doc. 1 at ¶120. *Hixson*, however, was a legal malpractice case that analyzed duties of care and loyalty owed by a lawyer to his client. The relationship between Butts and Adams and Madison Timber was strictly limited to the accounts that Adams opened at Trustmark and the LLCs that he and other members used to borrow money from Trustmark for non-Madison Timber related investments.

have averted or avoided the injury." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928) (citations and internal quotation marks omitted). "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of *negligence in the air*, so to speak, will not do." *Id.* (citation and internal quotation marks omitted) (emphasis added).[14] The Receiver implies "indicia of fraud" show what arguably amounts to "negligence in the air," but that is not enough. The Complaint does not sufficiently plead any duty owed by Butts to Adams or Madison Timber, "the observance of which would have averted or avoided" the significant damages caused by Adams's operation of a Ponzi scheme. *Id.* at 99–100.

The Receiver alleges that Butts was "reckless" or "grossly negligent" in an effort to bolster the negligence claim into one for punitive damages, which are recoverable "only in cases where the negligence is so gross as to indicate reckless or wanton disregard of the safety of others." *Maupin v. Dennis*, 175 So. 2d 130, 131 (Miss. 1965). Again, however, the negligence analysis hinges on whether a duty existed in the first place.[15] Because no duty existed, the Court should dismiss the claims in Count III of the Complaint against Butts. Further, even if the Court finds a duty existed, the Receiver alleges nothing to show that Butts breached any such duty.

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

[15] The Receiver quotes *Maldonado v. Kelly*, 768 So. 2d 906, 910 (Miss. 2000), for the statement that recklessness "is a failure or refusal to exercise any care, while negligence is a failure to exercise due care." Under Mississippi law, "reckless disregard" is "defined as a 'higher standard than gross negligence, and it embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act.'" *Collins v. City of Newton*, 240 So. 3d 1211, 1222 (Miss. 2018) (quoting *Davis v. City of Clarksdale*, 18 So. 3d 246, 249 (Miss. 2009)). The Complaint is devoid of facts establishing Butts owed a duty to Adams or Madison Timber, much less that Butts *knowingly* or *intentionally* breached such a duty.

C. The Court should dismiss Count V for alleged violations of Mississippi's fraudulent transfer act because Butts did not accept any funds, commissions, fees, or other payments from Adams or Madison Timber.

The Receiver alleges generally, and collectively, that "Trustmark, Butts, and Watkins collected fees for their facilitation of the financial transactions that made the Madison Timber Ponzi scheme possible." Doc. 1 at ¶37, 65, 103, 114. The Receiver does not allege with any particularity what fees she believes each defendant might have received. She sets forth no factual allegations to support her conclusory allegations about payment of "fees"—such as the amount of fees paid; who paid the fees; the nature of alleged fees; the consideration for fees; when the fees were paid; or how the fees were paid. Moreover, the Receiver does not allege in any fashion that Adams or Madison Timber transferred fees directly to Butts.

The only allegations in the Complaint relevant to alleged fee transfers are apparently with regard to routine, legitimate banking fees that might have been paid by Adams or Madison Timber to maintain accounts at the banks. The payment of routine fees in exchange for legitimate banking services obviously is not a fraudulent transfer. But again, the Complaint contains no allegations that Adams or Madison Timber paid any such fees to Butts personally.

The Receiver alleges that she is "entitled to a judgment against Defendants returning to the Receivership Estate *all fees and other such payments* paid by Adams or Madison Timber to Defendants." *Id.* at ¶145. This is the equivalent of a "catch all" or "just in case" claim. The Complaint contains no factual allegations that any "fees and other such payments" were paid personally to Butts. Such an allegation is necessary to show Butts "actively participated" in any fraudulent transfers. Accordingly, the Receiver has alleged no facts whatsoever to support her fraudulent transfer claim against Butts, and the Court therefore should dismiss it.

III. The Doctrine of *In Pari Delicto* and Mississippi's Wrongful Conduct Rule Each Bar the Receiver's Claims against Butts.

Under Mississippi law, a plaintiff who is *in pari delicto* with the defendant—i.e., a "joint tortfeasor"—may not recover against that defendant. *Sneed v. Ford Motor Co.*, 735 So. 2d 306, 308 (Miss. 1999) ("a wrongdoer is not entitled to compel contribution from a joint tortfeasor . . . if [they] are in *pari delicto*"). The *in pari delicto* doctrine enforces the longstanding "principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *In Pari Delicto Doctrine*, Black's Law Dictionary (10th ed. 2014). The *in pari delicto* doctrine "applies where the plaintiff is equally or more culpable than the defendant or acts with the same or greater knowledge as to the illegality or wrongfulness of the transaction." *Latham v. Johnson*, 2018 WL 3121362, at *10 (Miss. Ct. App. June 26, 2018) (citing 27A Am. Jur. 2d, Equity § 103, p. 641 (2008)), *cert. denied* 260 So. 3d 798 (Miss. 2019). As discussed below, at this motion-to-dismiss stage, the affirmative defense of *in pari delicto* bars the Receiver's recovery because the defense is established "on the face of the complaint." *See Alexander v. Verizon Wireless Servs., LLC*, 875 F.3d 243, 249 (5th Cir. 2017).[16]

It is readily apparent from the face of the Receiver's Complaint that Adams and Madison Timber are the primary wrongdoers—far more culpable than Butts (who is not culpable at all). Unlike as to Adams, the Receiver alleges no facts establishing that Butts acted with *any knowledge* as to the illegality or wrongfulness of Adams's fraudulent scheme. Thus, there can be no dispute from the face of the Complaint that Adams's conduct was at least "equally or more

[16] The Complaint does not set forth facts to establish that Butts was a party to any criminal acts or conspiracies, but even if he was, under the *in pari delicto* doctrine the "court will not extend aid to either of the parties . . . but will leave them where their own acts have placed them." *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 965 (5th Cir. 2012). On a related note, the "*in pari delicto* defense has repeatedly been used to bar the actions of 'bankruptcy trustee[s] against third parties who participated in or facilitated wrongful conduct of the debtor[s].'" *In re Fair Fin. Co.*, 834 F.3d 651, 676 (6th Cir. 2016) (quoting *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1276 (10th Cir. 2008) (collecting cases)). Like bankruptcy trustees, the Receiver stands in the shoes of the debtors.

culpable" than that of Butts. Because the Receiver stands in the shoes of Madison Timber and has standing to assert only the claims of Madison Timber, the Court should dismiss the Receiver's claims against Butts pursuant to the doctrine of *in pari delicto*. *See, e.g., Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013).

The Receiver's objection to this Court's application of the *in pari delicto* doctrine is based in large part on the Fifth Circuit's interpretation of Texas law in *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955 (5th Cir. 2012). The Receiver claims the "innocent successor exception" to *in pari delicto* recognized in *Jones* allows her to assert claim against Butts here even though she has stepped into the primary wrongdoer's shoes. The Receiver is mistaken.

In *Jones*, the fraudster, Wahab, was just one of several owners of W Financial, the business from which the fraudster stole funds. 666 F.3d at 958. Jones, the receiver for W Financial (but not Wahab), filed conversion and breach-of-contract claims against Wells Fargo to recover amounts Wahab stole from W Financial. Wells Fargo asserted the *in pari delicto* defense because Wahab was "primarily at fault for the conversion of the cashier's check." *Id.* at 965. The Fifth Circuit affirmed that *in pari delicto* was inapplicable there because "Wahab's actions could not be rightfully imputed to W Financial because Wahab's actions were taken against the interest and authorization of the principal." *Id.* (internal quotation marks omitted). The Court elaborated:

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

Id. at 965-66. Here, the Complaint alleges no distinction between Adams and Madison Timber, and none exists; there is no allegation that Madison Timber is "composed of more than" Adams. *See* Complaint at 2 (alleging Madison Timber was one of "his companies"); *see* 3:18-cr-00088-

CWR-LRA at Doc. 1 (Bill of Information, stating: "In 2012, Adams formed and was the sole owner of Madison Timber Properties, LLC"); 3:18-cv-00252-CWR-FKB at Doc. 3 (Complaint, stating: "Arthur Lamar Adams . . . through his wholly-owned company, Madison Timber Properties, LLC . . . committed securities fraud"). Thus, Adams's actions should be "rightfully imputed to" Madison Timber, and the Court should not follow *Jones* for this case.[17] Accordingly, the Court should dismiss the Receiver's claims against Butts pursuant to *in pari delicto*.

Similarly, the Receiver's claims are barred by Mississippi's wrongful conduct rule. *See, e.g.*, *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483 (Miss. 2006) ("If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him."). In *Price*, the Mississippi Supreme Court was clear that it "will not lend aid to a party whose cause of action directly results from an immoral or an illegal act committed by that party." *Id*. at 486. Obviously, but for the illegal and immoral actions of Lamar Adams, by and through Madison Timber, the Receiver would have no claims against Butts or any of the other defendants. *See* Trustmark's arguments on this rule, which are incorporated herein by reference. For this additional reason, the Court should dismiss the Receiver's claims.

[17] *See also Jones*, 666 F.3d at 966-67 (citing *Lewis v. Davis*, 199 S.W.2d 146, 151 (Tex. 1947) for the proposition that application of *in pari delicto* "depends upon the peculiar facts and equities of the case, and the answer usually given is that which it is thought will better serve public policy"). In *Jones*, the court declined to apply *in pari delicto* because it would have the consequence of preventing other owners of W Financial from recovering against Wells Fargo Bank. *Id.* at 958. Here, Adams is the only owner of Madison Timber, and thus there are no "policy considerations" or "equitable considerations" that should prevent the Court from applying *in pari delicto*. Also in *Jones*, the receiver was appointed to pursue actions for the benefit of both W Financial and all innocent victims of the fraud. *See* 666 F.3d at 966 (noting receiver "brought this suit on behalf of W Financial . . . and other innocent victims" which allowed receiver to bring claims that W Financial would not be permitted to bring). Here, the Receiver has been appointed only to pursue claims for Adams and Madison Timber. *See* 3:18-cv-252 at Doc. 33.

IV. Butts, as an Employee of the Bank, Cannot be Held Individually Liable for Alleged Tortious Acts in Which He did Not Actively Participate.

Mississippi "follows the rule that an authorized agent for a disclosed principle cannot be liable for the acts of the agent's corporate principal." *Turner v. Wilson*, 620 So. 2d 545, 548 (Miss. 1993) (citing *Thames & Co. v. Eicher*, 373 So. 2d 1033 (Miss. 1979)). Further, "Mississippi follows the general rule that individual liability of corporate officers or directors may not be predicated merely on their connection to the corporation but must have as their foundation individual wrongdoing." *Id.*; *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174 (5th Cir.1985) ("officer to be held personally liable must have some direct, personal participation in the tort"). In other words, the corporate officer can only be held personally liable when he "directly participates in or authorizes the commission of a tort." *Wilson v. S. Cent. Miss. Farmers, Inc.*, 494 So. 2d 358, 361–62 (Miss. 1986); *see also Hughes v. United Auto Ins. Co.*, 2010 WL 2670858, at *3 (S.D. Miss. June 29, 2010).

Under Mississippi law, it is not enough that Butts might have been "actively involved in consummating the challenged . . . transaction." *Johnson v. Yerger*, 612 F.2d 953, 957 (Miss. 1980). The Court in *Johnson* held an employee was not personally liable for misrepresentation although "actively involved" in the allegedly fraudulent transaction "because he personally made no misrepresentation of material fact." *Id.*; *see also Seaboard Planning Corp. v. Powell*, 364 So. 2d 1091 (Miss. 1978) (no individual liability where employees "personally ma[de] no misrepresentation of a material fact"). Under this rule, it is not enough to allege Butts was involved in the maintenance of Adams's or Madison Timber's accounts; he must have actively participated in the allegedly tortious conduct. The Complaint is simply devoid of such allegations against Butts. Accordingly, the Court should dismiss all of the Receiver's claims against Butts.

CONCLUSION

For the reasons discussed above, Bennie Butts respectfully requests that the Court dismiss all Counts of the Complaint against him with prejudice. Bennie Butts requests such other and further relief as the Court deems just under the circumstances.

Date: April 30, 2020.

Respectfully submitted,

BENNIE BUTTS

By: */s/ David Kaufman*
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CERTIFICATE OF SERVICE

I, David Kaufman, hereby certify that on April 30, 2020, I caused the foregoing pleading to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and registered participants.

/s/ David Kaufman
David Kaufman, MSB No. 3526