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

Alysson Mills, as Receiver for
Arthur Lamar Adams and
Madison Timber Properties, LLC — Plaintiff

v. — No. 3:19-cv-00941-CWR-FKB

Trustmark National Bank,
Bennie Butts, Jud Watkins,
Southern Bancorp Bank,
and Riverhills Bank — Defendants

Trustmark's Motion to Dismiss

Defendant Trustmark National Bank respectfully moves the Court to dismiss the Plaintiff's Complaint in its entirety with respect to Trustmark, for the following reasons:

1. The Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), because it does not state a claim upon which relief may be granted against Trustmark.

A. Mississippi's "Wrongful Conduct Rule" bars all claims. The Receiver's claims arise directly from Adams's crimes. The Receiver "stands in the shoes" of Adams. Therefore, the Receiver's claims are barred entirely by Mississippi's "Wrongful Conduct Rule."

B. *In pari delicto* bars all claims. Standing in the shoes of Adams/Madison Timber, the Receiver carries the weight of Adams's fraud. When parties are *in pari delicto*, Mississippi law holds the Court must leave them where they find them.

C. Count I, Civil Conspiracy, fails because the Complaint does not adequately allege that Trustmark entered an agreement to perpetrate fraud with Adams.

D. Count II, Aiding and Abetting, fails because (1) Mississippi does not

recognize a claim for aiding and abetting. To allow the aiding and abetting claim to go forward would exceed this Court's authority to interpret state law. (2) The Complaint fails to state a claim for aiding and abetting, even under the laws of other jurisdictions.

E. Counts III and IV, Negligence, fail because the Complaint does not identify any duty of care owed by Trustmark to protect anyone from Adams's illegal acts, or even to report suspicions of illegal acts. No such duty exists under Mississippi law.

F. Count V, Fraudulent Transfers, fails because the Complaint does not identify even one "transfer" of Madison Timber assets to Trustmark as required by the Mississippi Uniform Fraudulent Transfer Act, and because the Complaint fails to identify factually the other elements of a claim under that Act.

G. Count VI, Mississippi RICO, fails because Mississippi's RICO act requires that a defendant be convicted of a predicate state-law crime before civil liability can be imposed on that defendant. No such conviction has occurred – not of Trustmark or any defendant. Plaintiff has also failed to plead any facts whatsoever that would justify her RICO claim against Trustmark.

2. The Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), because the Court lacks subject matter jurisdiction due to lack of standing. Lamar Adams/Madison Timber did not sustain any losses. The Plaintiff stands directly in their shoes. She lacks standing because she has not identified any "injury in fact."

The grounds for Trustmark's motion are explained further in Trustmark's supporting memorandum brief, which is incorporated into this motion by reference.

WHEREFORE, PREMISES CONSIDERED, Trustmark National Bank respectfully moves the Court to dismiss all claims against Trustmark. Since Plaintiff's Complaint contains deficiencies that cannot be cured by amendment, the Complaint should be dismissed with prejudice.

Respectfully submitted, this the 30th day of April, 2020.

TRUSTMARK NATIONAL BANK

By: /s/William F. Ray
William F. Ray

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 30th day of April, 2020.

/s/William F. Ray
William F. Ray

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Trustmark National Bank,
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and Riverhills Bank — Defendants

Memorandum in Support of Trustmark's Motion to Dismiss

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Memorandum in Support of Trustmark's Motion to Dismiss

The Receiver's Complaint does not state a claim upon which relief may be granted against Trustmark under controlling Mississippi law. Further, the Receiver lacks Article III standing, and therefore the Court lacks subject matter jurisdiction. The Complaint should be dismissed under Rule 12(b)(6) and Rule 12(b)(1).

I. Introduction

The Receiver is the legal surrogate for Lamar Adams. She has no rights beyond Adams's rights. She stands in the shoes of a criminal, and the criminal's conduct bars his successor's claims. All of the Receiver's claims must be dismissed, because they are not viable under Mississippi law, or they are not adequately supported with fact allegations per *Iqbal* and *Twombly,* or both. Further, Madison Timber never owned or lost a dime -- the only losses were incurred by investors. The Receiver lacks an "injury in fact," and this Court lacks subject matter jurisdiction.

The Receiver has no rights except Madison Timber's rights. Legally, the Receiver is Lamar Adams according to Mississippi law. She has no claim against Trustmark, unless Adams/Madison Timber would have that claim outside a receivership. Trustmark's defenses against Adams/Madison Timber are equally valid against the Receiver. Under Mississippi law, it would be error to place the Receiver in a better position than Adams/Madison Timber, to the detriment of Trustmark. *Gardner v. Martin*, 85 So. 182, 182 (Miss. 1920).

Mississippi's "Wrongful Conduct Rule" bars all claims. The Receiver's claims arise directly from Adams's crimes. The Receiver "stands in the shoes" of Adams. The Receiver's claims are barred entirely by Mississippi's "Wrongful Conduct Rule." *Price v. Purdue Pharma Co*., 920 So.2d 479 (Miss. 2006); *Cahn v. Copac, Inc*., 198 So.3d 347 (Miss. Ct. App. 2015).

In pari delicto bars all claims: Standing in the shoes of Adams/Madison Timber, the

Receiver carries the weight of Adams's fraud. When parties are *in pari delicto*, Mississippi law holds the Court must "leave them where they find them." *Lowenburg v. Klein*, 87 So. 653, 654 (Miss. 1921).

Each Count is deficient on the face of the Complaint. In addition to the global defenses described above, each of the Counts in the Complaint fail individually:

Count I, Civil Conspiracy, fails because the Complaint does not adequately allege that Trustmark entered an agreement to perpetrate fraud with Adams. *MultiPlan, Inc. v. Holland*, 937 F.3d 487, 495 (5th Cir. 2019). The Receiver's conclusory allegations do not meet the requirements of *Twombly* to plead a conspiracy. *Corr Wireless Commun., L.L.C. v. AT & T, Inc*., 2013 WL 4829287 (N.D. Miss. 2013).

Count II, Aiding and Abetting, fails because (A) Mississippi does not recognize a claim for aiding and abetting. *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011). To allow the aiding and abetting claim to go forward would exceed this Court's authority to interpret state law. *In re Depuy Orthopedics, Inc.*, 888 F.3d 753 (5th Cir. 2018). (B) The Complaint fails to state a claim for aiding and abetting under other states' law. The source of the Receiver's claim is the *Restatement (Second) of Torts*, § 876, "Persons Acting in Concert" (1969). There is a new Restatement, specific to aiding and abetting claims, demonstrating that the Receiver's Complaint is deficient because it does not allege facts demonstrating that Trustmark "knowingly and substantially" assisted Adams. *Restatement (Third) of Torts: Liab. for Econ. Harm* § 28, "Aiding and Abetting" (2020).

Counts III and IV, Negligence, fail because the Complaint does not identify any duty of care owed by Trustmark to protect anyone from Adams's illegal acts, or even to report suspicions of illegal acts. No such duty exists under Mississippi law. *Holland v. Murphy Oil USA, Inc*., 290 So.3d 1253 (Miss. 2020); *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 519 (5th Cir. 2018).

Count V, Fraudulent Transfers, fails because the Complaint does not identify even one "transfer" of Madison Timber assets to Trustmark as required by the Mississippi Uniform Fraudulent

Transfer Act, Miss. Code Ann. § 15-3-101 *et seq*.

Count VI, Mississippi RICO, fails because Mississippi's RICO act requires that a defendant be convicted of a predicate state-law crime before civil liability can be imposed on that defendant. Miss. Code Ann. § 97-43-9. No such conviction has occurred – of Trustmark, or any defendant.

The Court lacks subject matter jurisdiction due to lack of standing. Under Article III of the Constitution, a plaintiff must plead an "injury in fact" to present a justiciable claim and to have standing. "Madison Timber" was a one-man shell. The Receiver admits the assets of Madison Timber "were nonexistent." (Compl. ¶ 143.) Madison Timber never lost a dime. The only losses were sustained by individual investors. Madison Timber sustained no "injury in fact."

II. Rule 12(b)(6), *Iqbal*, and *Twombly* Govern the Court's Review of the Receiver's Fact Allegations and Complaint.

To survive Trustmark's motion to dismiss, each count of the Receiver's Complaint must meet the strengthened pleading standard of Rule 8. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead factual allegations that, if true, 'raise a right to relief above the speculative level.' . . . That is, the well-pleaded facts must make relief plausible, not merely possible." *Benfield v. Magee*, 945 F.3d 333, 337 (5th Cir. 2019).

The Court must accept only the *factual allegations* in the Receiver's claims as true. The Receiver's labels, legal conclusions, and naked assertions devoid of facts are not "factual matter" and must be disregarded in the plausibility analysis. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678-79. Those rules are especially important in cases like this one, involving imaginative pleadings with thin legal bases, seeking massive amounts of money. The Supreme Court's enhancement of pleading requirements was based in part on the fact that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 559. "It is no answer to say that a claim just shy of plausible entitlement can be weeded out

early in the discovery process. . . ." *Id*. at 546; *see also Corr Wireless Comm. LLC v. A.T.&T., Inc*., 893 F.Supp.2d 789, 809 (N.D. Miss. 2012) ("If Rule 8(a)(2) allowed a pleader to overcome a motion to dismiss for failure to state a claim simply by stating that discovery could reveal such a claim, even though the 'existence and content' of the claim is not yet known, Federal Rule 12(b)(6) would become utterly futile.")

The Receiver's Complaint describes ordinary banking relationships, and jumps to conclusions that are not supported by the specific facts she has pled – at most, her allegations are "merely consistent with" her theories. That is not enough under *Iqbal* and *Twombly*. When there are "more likely explanations" of the alleged facts, the complaint does not "plausibly establish" the plaintiff's conclusion. *Iqbal*, 556 U.S. at 681. *See also Twombly,* 550 U.S. at 567 (while behavior of defendants "could very well signify" unlawful conduct, "here we have an obvious alternative explanation . . . a natural explanation" which was normal business conduct).

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"" *Petersen Industries, Inc. v. Hol-Mac Corp*., 2011 WL 577377, at *2 (S.D. Miss. 2011). The "more likely explanation" of the facts in the Complaint is that Trustmark simply dealt with its customer in good faith (while performing due diligence all the while). Under *Iqbal* and *Twombly*, the Receiver's conclusory assertions of misconduct are disregarded.

III. Fact Allegations in the Complaint Regarding Trustmark

The Complaint contains two categories of allegations against Trustmark: First, that Trustmark conducted banking business for Madison Timber (which certainly does not suggest any liability of Trustmark), and second, that Trustmark suspected and/or detected Madison Timber's criminal activity, but didn't stop it. Even if true, those facts would not support a judgment against Trustmark.

The Complaint alleges that Trustmark was Adams/Madison Timber's primary bank

until October of 2016, and that Adams used accounts at Trustmark for financial transactions through which he accomplished his Ponzi scheme -- i.e., payments to and from investors and recruiters. The Complaint alleges that Trustmark made loans to Adams and Madison Timber, and that those loans somehow "masked" the scheme's "insolvency." (*E.g.*, Compl. ¶¶ 28, 101.)

The Complaint also alleges that Adams's conduct was suspicious, and that Trustmark should have detected his crimes. Despite noting that Trustmark raised questions about the account and even terminated the business relationship, the Receiver infers that "for years Trustmark suspected that Madison Timber was a Ponzi scheme but did nothing." (Compl. ¶ 29.) Trustmark allegedly "could see," but deliberately "looked away" from, or "provided cover" for, Adams's suspicious acts. (*E.g.*, Compl. ¶ 56.) Again, those conclusory allegations are not supported by specific facts.

Indeed, the Complaint asserts facts that undermine suggestions of unlawful conduct by Trustmark. The Complaint recognizes that over time, Trustmark's Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") department began to suspect Adams of misconduct (without knowing the true nature of Adams's acts). Trustmark's suspicions allegedly progressed from March of 2014, when an employee suspected possible "floating,"[1] until October of 2016, when some Trustmark's employees suspected and then "concluded" that Madison Timber was a Ponzi scheme.

According to the Complaint, Trustmark's BSA/AML team was "alerted" to suspicious activity of Madison Timber. That team made inquiries, and received explanations from Adams. (Compl. ¶¶ 42-43.) The Receiver admits that Trustmark's BSA/AML personnel continued to monitor the Madison Timber accounts, and to make inquiries and receive explanations from Adams. Indeed, the Complaint quotes internal communications at Trustmark demonstrating the bank's diligence. In May of 2015, the Complaint acknowledges that Trustmark directed detailed questions to Madison Timber – and received written answers. (Compl. ¶¶ 45-46.) "In a follow-up exchange,

[1] Abuse of the "float" can indicate check kiting, which does not suggest the existence of a Ponzi scheme. *In re P. Forest Products Corp.*, 2006 WL 8433477, at *7 (S.D. Fla. May 24, 2006).

Moncrief [a BSA/AML officer] asked Adams for 'a copy of one of the promissory notes used when people invest in a track of timber.' Adams obliged . . . ." (Compl. ¶ 46.)

Trustmark's scrutiny of the accounts continued. "In June 2016, [the BSA/AML officer] reviewed Madison Timber's account activity again. This time she zeroed in on the absence of income from lumber mills." The BSA/AML officer contacted Adams directly, and sought detailed information about the timber mills with which he dealt. The Complaint acknowledges that "Adams . . . explained that payments from timber companies were not included in the Trustmark accounts, because 'I keep those separate and use 3 other Banks.'" (Compl. ¶¶ 48-49.)

Eventually, Trustmark personnel "met privately to discuss Adams and Madison Timber" on October 4, 2016, and one day later, "Mel Channel, Trustmark's Senior Vice President/ Director of Corporate Security, called Adams to ask him to close his account. He advised Adams that he would give him at least 30 days, or until November 7, 2016, to move Madison Timber's business to another bank." (Compl. ¶ 50.) Channel met with Adams and his colleague, Wayne Kelly, on October 11, 2016. "Unsatisfied by Adams's answers, Trustmark did not revisit its prior decision to ask Adams to move Madison Timber's business to another bank." (Compl. ¶ 52.)

The "more likely explanation" per *Twombly* is that Trustmark was duly diligent, but was cautious about concluding Adams was a criminal. While Trustmark's BSA/AML department scrutinized the account and questioned Adams, Trustmark employee Bennie Butts obviously still believed that Adams – his friend, as well as his customer – was not a crook. Butts "pleaded with Channel to give Adams a chance to explain," and "called Trustmark's decision [to terminate the business relationship] 'the biggest disappointment' in his career." (Compl. ¶ 51.)

In summary, the Complaint alleges that Trustmark provided ordinary banking services to Adams, and that Trustmark detected suspicious activity, and monitored the accounts, increasing its attention and inquiries until insisting that the accounts be closed – even though employee opinions differed about the nature of Adams's business. ***Those are the Receiver's own allegations***.

The Receiver applies hindsight conjecture to urge that Trustmark should have figured something out earlier, or differently. (Compl. ¶¶ 55-65). Those allegations are nothing but spin – about what Trustmark "could see," or "could easily see," or "would have known." The Receiver tops it off with the bald-faced invention that Trustmark "chose to look away or, worse, to provide cover," and "lent legitimacy and cover to Adams and Madison Timber" by "their silence." No fact allegation supports those statements, which are a nullity under *Iqbal* and *Twombly*.

The Complaint leaps to conclusions that, if Trustmark had done something differently (the Complaint doesn't say what), then somehow Adams would have been stopped. (*E.g.*, Compl. ¶¶ 65, 123.) There is no fact allegation supporting a proximate cause argument. (Indeed, the Complaint admits that, after Trustmark terminated the relationship, the Ponzi scheme continued.)

The Complaint also does not identify any damages. The only "injury" the Receiver seeks to remedy is an increase in the "liabilities" of Madison Timber's "estate," or the "increased debts" of Madison Timber – that is, debts to the investors who were defrauded by Adams/ Madison Timber. (E.g., Compl. p. 2, and ¶¶ 6, 105, 116, 153.) Of course, those "debts" are investor losses, not losses of Adams/Madison Timber.

IV. The Complaint Fails to State a Claim Upon Which Relief May be Granted.

A. The Receiver, Madison Timber, and Lamar Adams are Legally the Same Person.

The "entity" in receivership is a one-man LLC. "Madison Timber was an insolvent, illegal enterprise from its inception." (Receiver's brief, Case No. 3:19-cv-00196, doc. 54, p. 42.) Under Mississippi law, transfer of Adams/Madison Timber's rights to a receivership does not enhance those rights. Appointment of a receiver does not reduce defendants' rights.

Madison Timber was Lamar Adams's alter ego – legally, Adams and Madison Timber are the same person. *Jarrett v. Dillard*, 167 So. 3d 1147, 1152 (Miss. 2015). And it is long established that the Receiver's rights against Trustmark cannot exceed Adams/ Madison Timber's rights. It is "entirely correct" that "the receiver stands in the shoes of the company, and has no higher rights than

the corporation . . . ." *White v. Ewing*, 159 U.S. 36, 40 (1895). "The receiver has . . . no greater right than the [entity in receivership]: he stands in its shoes. If the [entity in receivership] could not have enforced a liability upon the defendants against its agreement that they should not be held liable, the receiver cannot enforce it." *Davis v. Brown*, 94 U.S. 423, 427 (1876). *See also Fourth St. Nat. Bank v. Yardley*, 165 U.S. 634, 653 (1897) (receiver "took no greater rights . . . than that which the insolvent bank possessed.").

Mississippi has always followed that fundamental, established rule. "The receiver acquires no other or better or greater interest than had the person out of whose hands it was taken." J. Shelson, *Mississippi Chancery Practice* § 20:12, "The Effect of a Judgment of Receivership" (Westlaw 2019 ed.). *See also Gardner v. Martin*, 85 So. 182, 182 (Miss. 1920) ("The receiver in this case stands in the shoes of the owner of the property, and is liable for whatever damages the owner would be.").

> It is generally held that a receiver can occupy no better position than those for whom he acts and is appointed, that he is in the place of the ones he represents, and has only such rights as they had, so that the rights and liabilities of third parties are not increased, diminished, or varied by his appointment. There passes to the receiver the property and the rights of the one from whom he takes, precisely in the same condition and subject to the same equities as before his appointment, and any defense good against the original party is good against the receiver.

Citizens' Bank of Greenville v. Kretschmar, 44 So. 930, 932, 91 Miss. 608 (1907). *See also Sayers & Scovill Co. v. Doak*, 127 Miss. 216, 218-19 (1921) ("The receiver here stands in the same attitude as the debtor, Meaders, with reference to this mortgage. Meaders could not contest it on any of the grounds mentioned. The receiver is a mere volunteer, with no greater rights than the debtor.").

To abandon these long-established rules would invite abuse of the receivership process. A court must not allow parties to use receivership proceedings to gain strategic advantages in civil litigation, or to deprive defendants of rights. *Gardner*, *supra*, 85 So. at 182-83 (Miss. 1920) (receivership did not eliminate claim for punitive damages against carrier in receivership; "If such were the rule, it would be better for all common carriers and persons or corporations engaged in

hazardous businesses to place the operation of these concerns in the hands of a receiver.").

The Receiver may try to avoid defenses under the guise of "equity." It is not "equitable" to shift losses from Adams's investors (who willingly pursued "implausibly high and consistent guaranteed" returns, Compl., p. 17) to Trustmark or its shareholders.

Cases that put receivers into better positions than their predecessor entities (e.g., by dodging *in pari delicto*) – such as the Receiver's favorite rulings in the Stanford receivership cases – rely on other states' law and do not apply here. Those cases are governed by state law, not by some federal "law of receivership." Indeed, the Supreme Court has held there is no "federal common law" of receiverships. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994).

In *O'Melveny*, a federally-chartered savings and loan ("S&L") was placed into receivership. The receiver, FDIC, sued a law firm that had represented the institution in connection with real estate deals. The law firm argued that "(1) it owed no duty to [S&L] or its affiliates to uncover the S&L's own fraud; (2) that knowledge of the conduct of [S&L's] controlling officers must be imputed to the S&L, and hence to respondent, which, as receiver, stood in the shoes of the S&L; and (3) that respondent [receiver] was estopped from pursuing its tort claims against petitioner because of the imputed knowledge." The receiver sought to avoid attribution of the S&L officers' knowledge and fraudulent conduct to the receiver, arguing that "a federal common-law rule and not California law" determined whether corporate officer knowledge was imputed to the corporation. The FDIC receiver also argued that "federal common law determines . . . whether knowledge by officers so acting will be imputed to the FDIC when it sues as receiver of the corporation." *Id*. at 83.

The Supreme Court held the FDIC's argument for a "federal common law" rule of imputation of officer knowledge "need not detain us long, as it is so plainly wrong. 'There is no federal general common law,' *Erie R. Co. v. Tompkins*, 304 U.S. 64 . . . ." The Court firmly rejected the FDIC's argument that, since a "federal" receiver had been appointed, "federal" common law (or a supposed "majority rule" of American jurisdictions) should govern the defendants' substantive defenses.

O'Melveny, 512 U.S. at 83-86.

The Supreme Court in *O'Melveny* scoffed at the notion that the receiver should be allowed to avoid defenses available to the law firm under California law, because "more money" would thus be available to the FDIC fund, and public interests would supposedly be served. *Id*. at 88-89 ("Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected 'more money' arguments remarkably similar to the one made here."). And the Court found "even less persuasive" the FDIC's argument that "it would 'disserve the federal program' to permit California to insulate 'the attorney's or accountant's malpractice,' thereby imposing costs 'on the nation's taxpayers, rather than on the negligent wrongdoer.'" The Court explained that "[b]y presuming to judge what constitutes malpractice, this argument demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id*.

O'Melveny makes clear that this Court must not succumb to the Receiver's invitation to apply special rules to her claims, because she is a receiver. As an alter ego, Madison Timber is Lamar Adams – nothing more or less. And therefore in this lawsuit, the Receiver is Lamar Adams – nothing more or less – with respect to her rights against Trustmark. The Receiver must allege every fact that Adams would have to allege in order to avoid dismissal. Defenses against Adams are defenses against the Receiver. Mississippi law does not allow a court to disregard defenses based on the "policy" ground of getting more money for a receivership. There is no "federal receivership law" to help the Receiver avoid that point.

B. Mississippi's "Wrongful Conduct Rule" Requires Dismissal of this Lawsuit.

Some states, including Mississippi, prohibit claims that rely directly on the injured party's unlawful conduct. In those states, "the wrongful conduct rule is a well-settled rule of law." *Inge v. Covenant Medical Group*, 2018 WL 1322148 *3 (D. N.M. 2018). The rule is "a fundamental common-law maxim" that applies "when a plaintiff's action is based, in whole or in part, on his

illegal conduct." *Orzel by Orzel v. Scott Drug Co*., 537 N.W.2d 208, 212 (Mich. 1995). "Under the wrongful conduct rule, a person cannot maintain an action if, in order to establish the cause of action, the plaintiff must rely, in whole or in part, on an illegal or immoral act or transaction to which the plaintiff is a party." 1A C.J.S. Actions § 92, "Nature, effect, and source of defense to action" (Westlaw 2020).

Mississippi's Wrongful Conduct Rule is a particularly powerful defense to the Receiver's claims. In *Price v. Purdue Pharma Co*., 920 So.2d 479 (Miss. 2006), plaintiff sued doctors, pharmacies and drug manufacturers, due to addiction and other injuries plaintiff sustained from using OxyContin. Plaintiff's obtaining of OxyContin by fraud was a crime. *Id*. at 484.

"The trial judge granted [defendants'] summary judgment motions because the facts revealed the plaintiff's claim arose from his own behavior which amounted to fraud and subterfuge, namely acquiring multiple prescriptions from multiple doctors during concurrent time periods." *Id*. at 481. The Mississippi Supreme Court affirmed the summary judgment based on the Wrongful Conduct Rule:

> ¶ 13. This Court has long recognized the maxim, from the words of Lord Mansfield, in *Holman v. Johnson*, 1 Cowper. 341, decided in 1775, "*ex dolo malo non oritur actio*," which means that **"[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act**." *Morrissey v. Bologna*, 240 Miss. 284, 300–01, 123 So.2d 537, 545 (1960). Nearly a century ago, this Court laid out the rule in Mississippi.
>
> > If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. It has been said that the objection may often sound very ill in the mouth of the defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties.
> >
> > The principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or illegal act.

Price, 920 So.2d at 484 (emphasis added) (quoting *Western Union Tel. Co. v. McLaurin*, 66 So. 739, 740 (Miss. 1914)).

The Wrongful Conduct Rule applies when, as in the present case, the wrongful act is an

"integral and essential" part of plaintiff's case. *Id*. at 485, citing *Meador v. Hotel Grover*, 9 So.2d 782, 786 (Miss. 1942) and *Capps v. Postal Telegraph–Cable Co*., 19 So.2d 491, 492 (Miss. 1944). The Supreme Court noted that "Price's entire claim is wholly rooted in his own transgressions taking place at the time his alleged injury occurred. . . . Price absolutely requires the essential aid from his own misdeed to establish his claim." *Price*, 920 So.2d at 485. "This Court 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. *See also Cahn v. Copac, Inc*., 198 So.3d 347, 354-57 (Miss. Ct. App. 2015) (thoroughly describing history and development of Mississippi Wrongful Conduct Rule).[2]

In the present case, Lamar Adams's breach of the law is, without question, "an integral and essential part of" the Receiver's case. The only "injury" the Receiver seeks to remedy is an increase in the "liabilities" of Madison Timber's "estate," or the "increased debts" of Madison Timber – that is, debts to repay the money stolen by Adams/ Madison Timber. (E.g., Compl. p. 2; ¶¶ 6, 105, 116, 153.) Those "debts" would not exist without Adams/ Madison Timber's illegal acts; the Receiver cannot plead or prove her case without those illegal acts – and those acts bar the Receiver just as they would bar her legal predecessor, Adams, from making the claims.

The Receiver may argue that, since she did not personally commit the crimes in question, she should escape the Wrongful Conduct Rule. But her claims are directly dependent on Adams's crimes, and the doctrine bars the claims of innocent plaintiffs as well as the claims of immediate wrongdoers. *See, e.g*., *Downing v. City of Jackson*, 24 So.2d 661 (Miss. 1946) (widow's claims were barred due to her husband's wrongful conduct – even though the widow was blameless).

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[2] *See also Western Union,* 66 So. at 740 (plaintiff could not recover from telegraph company that publicized private messages disclosing plaintiff's relationship with a prostitute; "If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. . . ."); *Capps*, 19 So.2d at 492 (plaintiff's claim against telegraph company for failing to transmit agreement was barred because the "hedging contract" was illegal under Mississippi law; "it was essential that appellants rely on the hedging contract, but so to do they must rely on that which is illegal and void and this brings into application the familiar rule that if a plaintiff requires essential aid from an illegal transaction to establish his case, he has no case.").

In a case directly addressing this point, the bankruptcy court applied Michigan's Wrongful Conduct Rule against a trustee in *In re Munivest Services, LLC*, 500 B.R. 487 (Bankr. E.D. Mich. 2013), dismissing claims against accountants who provided services to a Ponzi scheme, Munivest. A defendant accountant's misconduct "enabled DeMiro and MuniVest to temporarily evade detection of their Ponzi scheme by the IRS and others." *Id*. at 491.

The bankruptcy trustee sued the accountants, asserting tort claims on behalf of the bankruptcy estate, and on behalf of defrauded investors who assigned their claims to the trustee for the benefit of the estate. *Id*. at 492-93. The trustee's claims against the accountants included negligence, aiding and abetting of fraud and breach of fiduciary duty. Relying on Michigan's Wrongful Conduct Rule, the accountants moved to dismiss the claims. *Id*. at 494. The trustee argued that since "the wrongdoer" was not the plaintiff, and since the trustee made the claim "for the benefit of the innocent victims of the Debtors' Ponzi scheme," the court could "decline to apply the wrongful conduct rule" in the name of "equity." *Id*. at 496. The *MuniVest* court rejected that argument, concluding that the trustee "prosecutes such claims standing in the shoes of the debtor, subject to any state law defenses that would be applicable to the claims if they were brought by the debtor." *Id*. at 498.

> The Trustee argued that . . . there are "no hard and fast rules," and courts are free to apply them, or not apply them, based upon the courts' perception of public policy. But courts are not roving equity doers. . . . **Even in a case like this, where the Debtors unquestionably operated a criminal Ponzi scheme, and where any recovery by the Trustee would go to the victims of that Ponzi scheme, this Court is still required to apply Michigan law as stated by the Michigan Supreme Court**.
>
> To be sure, there is appeal to the Trustee's argument that the wrongful conduct rule should not apply to the Trustee. But the law is clear. Michigan subscribes to the wrongful conduct rule. . . . **That the Debtors' claims against Metzler are not brought by the Debtors, but instead are brought by the Trustee, who himself is guilty of no wrongdoing, and is only seeking recovery for the Debtors' victims, does not change the outcome**. . . . The Trustee stands in the shoes of the Debtors.

Id. at 500 (emphasis added).

The same rule applies here. Mississippi's Wrongful Conduct Rule bars the Receiver's specious claims that Trustmark somehow "increased the liabilities" of Madison Timber.

C. The Receiver's Claims are Also Barred by *In Pari Delicto*.

The long-established doctrine of *in pari delicto* refers to "[t]he principle that a plaintiff who has participated in a wrongdoing may not recover damages resulting from the wrongdoing." *Latham v. Johnson*, 262 So. 3d 569, 581 (Miss. Ct. App. 2018), *cert. denied,* 260 So. 3d 798 (Miss. 2019). When parties are *in pari delicto*, "the court will not . . . interfere for the relief of either party; but will leave them in their respective conditions." *McWilliams v. Phillips*, 51 Miss. 196, 197-98 (1875).

Standing in Adams's shoes, the Receiver is barred based on Adams's wrongdoing. The Receiver has argued that Mississippi law allows the court to reject an *in pari delicto* defense based on "public policy." But the "public policy" cited by the Receiver is simply that she should win, so she can take money from some private parties, and distribute it to others.

There is no public policy reason to change the rules in order to shift losses from investors (who dealt directly with the Receiver's criminal predecessor, and who had ample opportunity to protect themselves) to a peripherally-involved bank. No "public policy" of Mississippi would deprive Trustmark of its defenses, so that Trustmark's own shareholders or customers bear the losses of transactions that were deliberately entered by Madison Timber and its investors.

The *in pari delicto* doctrine has been exhaustively briefed in other Madison Timber cases before this Court, and by other defendants in this case. Trustmark will refrain from repeating those arguments in detail. The Receiver's claims are entirely barred by *in pari delicto*.

D. Each of the Receiver's Causes of Action Fail to State a Claim.

The Complaint asserts six Counts, each of which must be dismissed under Rule 12(b)(6).

1. Count I, Civil Conspiracy, Fails to State a Claim.

The conspiracy claim fails to allege that Trustmark entered an agreement with Adams to do something unlawful, which is an essential element of the tort. Beyond the naked statement that "Defendants conspired with Adams to commit the tortious acts alleged in this complaint" (Compl. ¶ 99), the Complaint merely states that the defendants "facilitated the financial transactions on which

Madison Timber relied," and "chose to look away" from "indicia of fraud" (Compl. ¶ 102).

> Under Mississippi law, the elements of a civil conspiracy are: "(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, (4) and damages to the plaintiff as a proximate result." *Bradley v. Kelley Bros. Contractors*, 117 So.3d 331, 339 (Miss. Ct. App. 2013) (quoting *Gallagher Bassett Servs. v. Jeffcoat*, 887 So.2d 777, 786 (Miss. 2004)).

Rex Distrib. Co., Inc. v. Anheuser-Busch, LLC, 271 So.3d 445, 455 (Miss. 2019). "There must be a 'meeting of the minds on the object or course of action.' . . . Additionally, the alleged conspirators "must be aware of the fraud or wrongful conduct at the beginning of the agreement.'" *MultiPlan, Inc. v. Holland*, 937 F.3d 487, 495 (5th Cir. 2019) (citations omitted); *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 519 (5th Cir. 2018) (same, applying Mississippi law).

"There is no such thing as accidental, inadvertent or negligent participation in a conspiracy." *Indep. Tr. Corp. v. Stewart Info. Services Corp*., 665 F.3d 930, 938-39 (7th Cir. 2012). An agreement must, by definition, be knowing and intentional. "[A]ccidental, inadvertent, or negligent participation in a common scheme does not amount to conspiracy," and "[m]ere knowledge of the fraudulent or illegal actions of another is also not enough to show a conspiracy." *Redelmann v. Claire Sprayway, Inc*., 375 Ill. App. 3d 912, 924 (Ill. App. 1st Dist. 2007).

Twombly was a conspiracy case. The plaintiffs alleged that regional phone companies "conspired" to restrain trade by "agreements . . . to refrain from competing against one another" (certainly a more specific "agreement" allegation than the Receiver's pleading here). The *Twombly* allegations of "agreements" were further "to be inferred" from defendants' common activities, and from a statement by a defendant's CEO that appeared to discourage competition. 550 U.S. at 550-51. The allegations were inadequate to state a claim of conspiracy:

> An allegation of parallel conduct is thus much like a **naked assertion of conspiracy** in a § 1 complaint: it gets the complaint close to stating a claim, but **without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief**." *Cf. DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (C.A.1 1999) ("**[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a**

> **more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint**").

Twombly, 550 U.S. at 557 (emphasis added). Under *Twombly*, the Receiver's naked assertion of conspiracy is inadequate to survive a Rule 12(b)(6) motion. *See also Jones v. Hosemann*, 2020 WL 1510408, at *3 (5th Cir. Mar. 27, 2020) ("But as the Supreme Court counseled in Twombly, the 'naked assertion of conspiracy' without 'factual enhancement' is generally inadequate.").

2. Count II, Aiding and Abetting, Fails to State a Claim.

The Receiver's claim "for Aiding and Abetting Against All Defendants" fails for two reasons: There is no "aiding and abetting" claim in Mississippi, and the Receiver has not pled facts that support an "aiding and abetting" claim against Trustmark, even under non-Mississippi law.

a. There is No "Aiding and Abetting" Claim Under Mississippi Law.

It is beyond debate that Mississippi has not adopted "civil aiding and abetting." *Fikes v. Wal-Mart Stores, Inc*., 813 F.Supp.2d 815, 822 (N.D. Miss. 2011) ("The Mississippi Supreme Court has never recognized aiding and abetting as a civil cause of action . . ."); *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011) ("No Mississippi court has ever recognized any of the subsections of the Restatement (Second) of Torts § 876 as viable causes of action. . . . Additionally, no Mississippi court has recognized a claim for civil aiding and abetting, whether under § 876(b) or § 876(c)."). Civil aiding and abetting is hardly a traditional common law doctrine. It is a novel invention of the American Law Institute, which based it on an "ancient criminal law doctrine;" as a tort theory "[t]he doctrine has been at best uncertain in application. . . ." *Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 181 (1994) (rejecting aiding and abetting as a private cause of action under Securities Exchange Act § 10(b)). "Indeed, in some States, it is still unclear whether there is aiding and abetting tort liability of the kind set forth in § 876(b) of the Restatement." *Id*. Yet, the Receiver expects this Court to exceed Mississippi law by improper *Erie* guesswork, and allow an aiding and abetting claim to proceed.

In re Depuy Orthopedics, Inc., 888 F.3d 753, 781 (5th Cir. 2018) prevents this Court from guessing that Mississippi would adopt aiding and abetting. Plaintiffs' aiding and abetting claims were governed by Texas law. The Fifth Circuit held that the district court erred by failing to dismiss the aiding and abetting claim, because that theory had not been adopted by the state courts of Texas:

> **[T]he Texas Supreme Court "has not expressly decided whether Texas recognizes a cause of action for aiding and abetting," and the parties disagree at length about whether Texas courts, if squarely presented with the question, would fashion an aiding-and-abetting cause of action**, outside of the conspiracy context, when the predicate offense sounds in strict liability.
>
> But that debate is beside the point. **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. Here, despite ample warning, the district court exceeded its circumscribed institutional role and "expand[ed] [Texas] law beyond its presently existing boundar[y].**"

*Id.*at 781 (emphasis added). The Fifth Circuit held that Johnson & Johnson was entitled to judgment as a matter of law on the aiding and abetting claim. *Depuy* closes the door on aiding and abetting claims in this case.

The Receiver attempts to distinguish *Depuy* by suggesting that *Depuy* was limited to aiding and abetting in strict liability cases. *See, e.g.,* Doc. 66 in Case 3:18-cv-00866-CWR-FKB at 22 n.36. There is no good-faith argument to read *Depuy* so narrowly. In fact, the Fifth Circuit recently applied *Depuy* in affirming dismissal of claims for aiding and abetting in a financial fraud case. *Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N. A.*, 800 F. App'x. 239 (5th Cir. 2020) (unpublished). Any "contention that *DePuy*'s holding is limited to 'aiding and abetting strict liability' is misplaced." *Taylor v. Rothstein Kass & Co.*, 2020 WL 554583, at *5 (N.D. Tex.) (dismissing receiver's claim for aiding and abetting securities fraud, pursuant to Rule 12(b)(6)).

The Receiver has even argued that *Depuy* should be distinguished because the Mississippi Supreme Court, unlike the Texas Supreme Court, has not "explicitly stated that it 'has not expressly decided'" whether it recognizes civil aiding and abetting. Doc. 66 in Case 3:18-cv-00866-CWR-FKB at 22 n.36. That makes no sense. *Depuy* holds that a federal court "cannot recognize a claim

that the [state supreme court] has yet to *expressly adopt*." *Midwestern Cattle*, *supra* (emphasis added). What matters is that the cause of action "is not yet recognized by the state courts." *Depuy*, 888 F.3d at 781. Aiding and abetting simply does not exist as a civil claim under Mississippi law.

Defying *Depuy*, the Receiver has continued to rely on federal district court cases, primarily *Dale v. Ala Acquisitions, Inc*., 203 F. Supp. 2d 694, 700-01 (S.D. Miss. 2002). In *Dale*, the court did not have the benefit of *Depuy*. The Receiver has also argued that "every Mississippi federal court to consider the issue has agreed that Mississippi law would recognize a claim for civil aiding and abetting as set forth in the Restatement (Second) of Torts section 876(b)." Doc 65 in Case 3:18-cv-00866 at 12. That statement is wrong.[3] In reality, the cases in this district to address the question do little but cite *Dale*, without performing the proper *Erie* analysis under *Depuy*.

Regardless, the Receiver cannot justify an aiding and abetting claim by citing federal court decisions that have "exceed[ed] the bounds of … legitimacy" by allowing an "action not yet recognized by the state courts." *Depuy*, 888 F.3d at 781. Federal district court decisions are not entitled to deference on matters of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239 (1991). Lower federal court decisions are due no deference in the determination and cannot supply authority for an *Erie* guess that is unsupported by decisions from the state's highest court. *Centennial Ins. Co. v. Ryder Truck Rental, Inc*., 149 F.3d 378, 382, n.10 (5th Cir. 1998) (citing *Salve Regina Coll., supra*).

Civil aiding and abetting lies beyond "presently existing boundaries" of Mississippi law. *Depuy*, 888 F.3d at 781. Count II must be dismissed.

[3] *In re Evans* stated that "[n]o Mississippi court has ever recognized any of the subsections of the Restatement (Second) of Torts § 876 as viable causes of action," and did not opine whether that would change. The court acknowledged *Dale*, calling it an "*Erie* guess," but did not state whether it agreed with *Dale*. In fact, the court rejected the argument that Mississippi would adopt aiding and abetting under § 876(c). 467 B.R. at 409.

b. Even Under the Laws of Other Jurisdictions, the Complaint Fails to State a Claim for Civil Aiding and Abetting.

Second, the Receiver has failed to plead facts sufficient to state a claim for aiding and abetting, even as that claim exists in other jurisdictions.

The Complaint relies on the *Restatement (Second) of Torts* § 876, "Persons Acting in Concert" (1979), which suggests that "for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." The Restatement was unclear about the level of knowledge required for "aider" liability, and about the type of activity that would constitute "substantial assistance." That lack of clarity has been leveraged into efforts to expand tort liability to remotely-connected actors, especially when the culprit has no assets.

The American Law Institute recently made things clearer with a new Restatement, specifically covering civil aiding and abetting. *Restatement (Third) of Torts: Liability for Economic Harm*, § 28, "Aiding and Abetting" (2020). According to ALI, the *Restatement (Third)* supersedes the *Restatement (Second)* cited by the Receiver. (ali.org/publications/show/restatement-law-third-torts-liability-economic-harm/, last visited 4/28/2020.) The ALI concluded that aiding and abetting should require proof that the defendant knowingly assisted in committing or concealing a tort:

§ 28 Aiding and Abetting

> A defendant is subject to liability for aiding and abetting a tort upon proof of the following elements:
>
> (a) a tort was committed against the plaintiff by another party;
>
> **(b) the defendant knew that the other party's conduct was wrongful;**
>
> **(c) the defendant knowingly and substantially assisted in the commission or concealment of the tort; and**
>
> (d) the plaintiff suffered economic loss as a result.

Id. (emphasis added). The ALI insists that actual knowledge is essential:

> c. Knowledge. Liability under this Section requires proof that the defendant **knowingly aided** the commission of a tort. Negligence will not suffice**; nor is it enough to prove that the defendant should have known of the primary actor's wrongful conduct but did not**. The defendant's knowledge must be actual.

Id. comment c. (emphasis added).

The *Restatement (Third)* also makes it clear that "substantial assistance" "ordinarily means something more than routine professional services provided to the primary wrongdoer." *Id*. comment d., *substantial assistance*. And the new Restatement provides an illustration that eviscerates the Receiver's claim against Trustmark in this case:

> 5. Swindler establishes a fraudulent investment firm. Customer, unaware of the fraud, wires money to Swindler in hopes of making a profit. Swindler disappears with Customer's money. Customer sues Bank for aiding and abetting Swindler's misconduct. Customer offers evidence that Bank had documents revealing that Swindler's enterprise was fraudulent, and that Bank nevertheless processed customer's wire transfer. **Customer's claim fails because Bank's possession of revealing documents is not "knowledge," and because processing a routine wire transfer, without more, is not substantial assistance of Swindler's wrongdoing**.

Id. Illustration 5 (emphasis added).

Sensing the substantive weakness of her claim, the Receiver has repeatedly quoted *Rotstain v. Trustmark Nat'l Bank*, 2015 WL 13034513 at *11 (N.D. Tex. Apr. 21, 2015) for the proposition that "routine banking services" can satisfy the "substantial assistance" prong of aiding and abetting. *Rotstain* cited no authority for that bald statement, and the *Restatement (Third)* authors rejected it, with a direct reference to *Rotstain*. *See* Restatement (Third) § 28, Reporter's Notes d., *substantial assistance*, noting *Rotstain* with respect to Illustration 5.[4]

[4] The Restatement contrasted *Rotstain* in identifying *Rosner v. Bank of China*, 528 F.Supp.2d 419 (S.D.N.Y. 2007) as authority for Illustration 5. *Rosner* held a bank's provision of "its usual banking services" to a perpetrator was insufficient to fulfill the "substantial assistance" prong of aiding and abetting, stating "**Financial transactions that are not considered 'atypical' or 'non-routine' do not constitute substantial assistance**." *Id*. at 426-27, citing *Cromer Fin. Ltd. v. Berger*, 137 F.Supp.2d 452, 470–72 (S.D.N.Y.2001) (clearing broker does not provide substantial assistance to or participate in a fraud when it merely clears trades, even though Ponzi scheme customer was allowed to violate rules, and even though Ponzi scheme "may only have been possible because of [broker's] actions, or inaction") and *Mazzaro de Abreu v. Bank of Am.*

The new Restatement is consistent with well-reasoned opinions limiting the scope of aiding and abetting liability. Even jurisdictions that adopt the cause of action require a "'high degree of scienter … to extend fraud liability on an aiding-and-abetting theory'" in order to "prevent banks, attorneys and others from incurring near-strict liability for the torts of their clients." *El Camino Res., LTD v. Huntington Nat'l. Bank*, 722 F. Supp.2d 875, 905 (W.D. Mich. 2010) (quoting *Nat'l. Westminster Bank v. Weksel*, 511 N.Y.S.2d 626, 630 (N.Y. App. Div. 1987)). They also require "substantial assistance to the breach of duty, not merely to the person committing the breach." *Id*. at 911 (quoting *Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 774-75 (S.D. 2002)). "[M]erely providing routine professional services that aid the tortfeasor in remaining in business, but do not proximately cause the plaintiffs' harm" is not enough. *Id*. And "a bank does not aid and abet its customer's wrongdoing merely by providing routine banking services to its customer." *Id*.

The Complaint fails to allege facts that state a claim under these authorities. Count II alleges "aiding and abetting" in mere conclusory terms, alleging defendants "assisted" Adams by performing ordinary banking services. *See* Compl. ¶¶ 111-12. The Complaint lacks factual content to remotely, much less plausibly, suggest that Trustmark had "actual knowledge of [any] principal wrong." *El Camino Res.,* 722 F. Supp. 2d at 905. The Complaint is equally devoid of facts making it plausible that Trustmark *knowingly* provided "substantial assistance *to the breach of duty*, not merely to the person committing the breach." *Id.* at 911 (emphasis added). The Complaint lacks factual content to suggest how any alleged assistance "further[ed] *the fraud itself,*" as contrasted with just providing "general aid to the tortfeasor" in the form of routine professional services. *Id*. (emphasis added).

The Complaint fails to state an aiding and abetting claim, as explained by courts that accept

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Corp., 525 F.Supp.2d 381, 390-91 (S.D.N.Y.2007) ("the 'mere fact that participants in a fraudulent scheme use accounts at a bank to perpetrate it, without more, does not in and of itself rise to the level of substantial assistance'" by bank; bank's noncompliance with AML rules and violation of its own rules also did not amount to "substantial assistance.")

the theory and by the ALI – the originator of the theory. Count II should be dismissed.

3. Count III, Negligence ("Reckless, Gross Negligence, and at a Minimum Negligence") Must Be Dismissed Due to Absence of Duty.

The Complaint fails to state a claim of negligence, because Trustmark did not have a duty to detect, report, or prevent Adams's criminal acts under Mississippi law. Two obvious questions about duty are never answered, even implicitly, in the Complaint:

- **A duty *to whom***? Trustmark had no duty to protect Adams/Madison Timber from itself. And Trustmark owed no duty of care to third parties (the investors), with respect to Madison Timber's bank accounts. Mississippi law is clear on that point.

- **A duty *to do what***? The Receiver relies on hindsight conclusions about things Trustmark "should have known." But the Complaint does not identify anything Trustmark should have done. Even if Trustmark became suspicious, Trustmark had no duty to notify the public, or the press, or the police, about Adams's financial activities. Private citizens have no common law duty to report suspicions. (There are carefully limited statutory obligations to report criminal acts under Mississippi law, but none apply here – the exceptions prove the rule. *See* n. 9, *infra*.)

"Generally, one has no duty to control the conduct of another to prevent harm, and no duty to warn those who may be endangered by harmful conduct, including the criminal acts of a third person. However, a duty may be imposed by statute, or may arise out of special circumstances or a special relationship." 65 C.J.S. Negligence § 60, "Protection Against Acts of Third Persons" (Westlaw 2020). "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Restatement (Second) of Torts* § 314, "Duty to Act for Protection of Others" (1965); *Restatement (Third) of Torts* § 40, "Duty Based on Special Relationship with Another" (listing seven "special relationships" that can give rise to a duty to protect a plaintiff from harm by a third party, such as common carrier-passenger, innkeeper-guest, and school-students.) Banks have no such relationships

with customers or with the third-party victims. Mississippi follows those longstanding rules of law.

"Duty is essential to a negligence claim." *Holland v. Murphy Oil USA, Inc*., 290 So.3d 1253, 1256 (Miss. 2020). *Holland* reinforces Mississippi's policy that private citizens do not have a duty to protect others from crime.

In *Holland*, plaintiff was shot in a parking lot. The assailant came from a vacant lot owned by Murphy. *Id*. at 1255. The trial court granted summary judgment to Murphy, based on absence of duty, and the Mississippi Supreme Court affirmed:

> ¶6. [T]he central issue is whether Murphy Oil had a duty to protect Holland from the third-party assailant who caused Holland's injuries. The duty to control the conduct of others is a narrow one. *Doe v. Hunter Oaks Apartments*, L.P., 105 So. 3d 422, 426 (Miss. Ct. App. 2013). Generally, no such duty exists absent a special relationship between the actor and the third party that imposes a duty for the actor to control the third party or absent a special relationship between the actor and the injured party that gives the injured party a right to protection. *Id*. (quoting *Restatement (Second) of Torts* § 315 (Am. Law Inst. 1965)).
>
> . . .
>
> ¶8. No special relationship spawning a right to protection existed between Murphy Oil and Holland. The Court of Appeals has noted that, generally, four special relationships may give a right to protection. *Id*. Those relationships are: "(1) a common carrier and its passengers, (2) an innkeeper and his guests, (3) a landowner and his invitees, (4) a custodian ... and a person who is deprived 'of his normal opportunities for protection ....' " *Id*. (quoting *Restatement (Second) of Torts* § 314A (Am. Law Inst. 1965)). None of those relationships exist between Murphy Oil and Holland.
>
> ¶9. Consequently, no legal duty from Murphy Oil to Holland exists. Duty is essential to a negligence claim. *Strantz v. Pinion*, 652 So. 2d 738, 742 (Miss. 1995).

Holland, at 1256. *Holland* reflects Mississippi's reluctance to impose duties on private parties to protect the public from the crimes of others. No duty existed for Trustmark to protect Adams/ Madison Timber from himself, or to protect anyone else from Adams. None of the "four special relationships" required by Mississippi law were present.[5]

[5] Legal foreseeability is required before a duty is imposed, and Mississippi views most criminal acts as unforeseeable. In *Williams ex rel. Raymond v. Wal-Mart Stores East, L.P*., 99 So.3d 112 (Miss. 2012), Wal-Mart sold handgun ammunition to a minor, who used the ammo to kill his mother's boyfriend. The sale violated federal law and Wal-Mart corporate policy. *Id*. at 115. The trial court granted summary judgment to

Mississippi has never imposed a duty on banks to prevent their customers from committing crimes. To the contrary, our courts and legislature protect banks from such claims – even when fiduciary accounts are involved (which is not the case here). In *Citizens Nat'l. Bank v. First Nat'l. Bank*, 347 So.2d 964 (Miss. 1977), a criminal bank customer, Duran, kited checks between accounts at Citizens National Bank and First National Bank. First National discovered the kiting scheme, but did not report it to Citizens. Instead, First National continued to accept Duran's deposits, accumulating funds in the accounts to protect its own interests. *Id*. at 966. The trial court dismissed the case, and Citizens appealed. The Mississippi Supreme Court held First National had no duty to report its customer's criminal act to the victim, Citizens:

> On appeal Citizens National Bank argues that the chancellor was in error in sustaining the demurrer for several reasons. **However, these contentions are based upon the premise that upon discovery of the check kiting on the part of Duran, there was a duty on the part of First National Bank to immediately notify Citizens National Bank**. . . . **Consequently, the first question to be determined is whether First National Bank had a legal duty to notify Citizens National Bank that it was convinced that Duran was kiting checks**. . . . The bill does not allege any circumstances or facts that tend to show that a confidential or fiduciary relationship existed between these two banks, neither does it show that there is any requirement in the banking field that one bank notify another of its discovery of a customer kiting checks. **In the absence of a fiduciary or confidential relationship, or some other legal duty, First National Bank had no duty to inform Citizens National Bank that Duran was kiting checks**.

Id. at 967 (emphasis added).

In *Collier v. Trustmark Nat'l. Bank*, 678 So.2d 692 (Miss. 1996), a "family's accountant and trustee of its four trust accounts systematically embezzled funds from the trust accounts [at

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Wal-Mart, because under Mississippi precedent, the minor's criminal act was not legally foreseeable. *Id*. The Mississippi Supreme Court affirmed, even though violation of the federal law constituted negligence *per se*, because under Mississippi law, a criminal act was an independent intervening cause that "broke the causal connection" between Wal-Mart's negligent act and the killing. *Id*. at 116-17, quoting *Robinson v. Howard Brothers of Jackson*, 372 So.2d 1074 (Miss.1979).

As Justice Randolph explained (in a specially concurring opinion joined by a majority of the court), Mississippi law is that "'[t]he criminal act cannot be said to have been within the realm of reasonable foreseeability because the defendants, although negligent per se, could reasonably assume that Alexander would obey the criminal law.'" *Williams*, 99 So.3d at 122-23 (Randolph, J., concurring; emphasis in original). Under Mississippi law, "all have the right to assume that others will obey the criminal laws." *Id*. Furthermore, any breach of a standard of care by Wal-Mart was not legally a proximate cause; the shooting

Trustmark] and placed the funds into his personal checking account." *Id*. at 694. The trust beneficiaries and a new trustee sued the bank for "gross negligence in failing to supervise and train its employees to deter misappropriation of customers' funds . . . ." *Id*. at 695. The Mississippi Supreme Court held the bank had no duty to the trust beneficiaries absent "actual knowledge" that the trustee was embezzling funds.[6] The Supreme Court rejected plaintiff's argument that Trustmark "should have known" of the trustee's improprieties, stating the plaintiffs "confuse 'actual knowledge' with 'constructive knowledge.'" The court defined "actual knowledge" as "awareness at the moment of the transaction that the fiduciary is defrauding the principal. It means express factual information that funds are being used for private purposes in violation of the fiduciary relationship." *Id*. at 697.

Holifield v. BancorpSouth, Inc., 891 So.2d 241 (Miss. Ct. App. 2004) was a Ponzi scheme case in which the Mississippi Court of Appeals (by Judge Southwick) rejected investor claims that a bank should have prevented the perpetrator's withdrawal of funds from trust accounts. The criminal, Harrell, established accounts at BancorpSouth, and deposited investor funds into those accounts. "BancorpSouth was said to have been negligent by permitting Harrell to take large sums of money from these accounts and wire the funds to European destinations. The investors argue that, without the negligent actions of the bank, Harrell would not have been able to defraud them." *Id*. at 243. Similar to the Receiver's claims here, the plaintiffs tried to leverage claims of bank employee suspicions into inferences of knowledge – "The investors argue[d] that a bank officer thought that the investment arrangement Harrell was conducting was 'too good to be true.'" Plaintiffs also relied on numerous "alleged indicia of suspicious conduct," including increased flows of money in and out of

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was an intervening, superseding cause. *Id*. at 124.

[6] The Court cited a trust statute, Miss. Code Ann. § 91-9-115, and a banking statute, § 81-5-53, in holding that the bank had no duty to the trust beneficiaries absent "actual knowledge" that the trustee was embezzling funds. § 81-5-53 provides that a bank dealing with a corporate agent is not obligated to inquire as to any limitation on that person's power because he makes checks payable to himself, or because of the descriptive words used in the accounts. Clearly, the Mississippi legislature's policy is to shield banks from claims based

the accounts, and wiring of funds overseas. *Id*. at 249. Relying on *Collier*, *supra*, the Court of Appeals affirmed summary judgment for the bank, holding "[t]he bank cannot be liable to the investors if there was no actual knowledge of Harrell's wrongdoings. . . . BancorpSouth had no duty to ensure that the funds of the trust account were properly being spent." *Id*. at 249. The court reaffirmed the definition of "actual knowledge" provided in *Collier*, *supra*.

The Fifth Circuit has properly refused to presume under Mississippi law that banks have a duty to protect third parties from the crimes of bank customers. *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507 (5th Cir. 2018) involved facts remarkably comparable to the Receiver's allegations here. The perpetrator, Rawls, did business through an LLC. Plaintiff, Midwest, provided financing for Rawls to purchase livestock. Rawls was supposed to buy livestock with the borrowed funds, sell the livestock to third parties, and have the sale proceeds deposited to Midwest's account. *Id*. at 510.

A Mississippi bank, Bank of Franklin, issued loans to Rawls, who opened a checking account at Bank of Franklin. Rawls began overdrawing the account, but his banker – who was also a personal friend – worked with Rawls, approving wire transfers despite the overdrafts, and calling Rawls about forthcoming deposits. Rawls "became one of the top customers" at the bank, and he received "favorable treatment" from the bank. *Id*. at 511.[7]

Midwest alleged that "during his time as a customer, Rawls began using . . . [Bank of Franklin] to commit fraud." The parallels to the Receiver's allegations in the present case are clear:

> Midwest alleges that Rawls raised red flags for "check kiting." Rawls regularly moved money between banks; he deposited into his BOF account checks drawn on his Alva Account. Midwest alleges that several BOF officers and executives were aware of this. Indeed, in October 2011, Magee became aware that "Robert Rawls was depositing certain checks payable to sellers into his checking account." Magee claims

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on improper acts of authorized account users, like Adams in this case.

[7] *Compare* facts in *Midwest Feeders* with Receiver's allegations that Adams and bankers were friends with "shared social interests," that Madison Timber's bank accounts at Trustmark were frequently overdrawn, that Trustmark waived overdraft fees, that Adams provided explanations when questions were asked, and Adams communicated with bankers regarding large transactions. Compl., pp. 9-11.

> that Rawls, when confronted, explained that this was a "common practice" in the livestock industry. Magee accepted Rawls's explanation that "depositing checks issued to sellers of cattle into his business checking account" had a legitimate business purpose.

Id. at 511-12. While a Bank of Franklin customer, Rawls created fictitious transactions and diverted money for his personal use. Midwest sued Bank of Franklin to recover its fraud losses under numerous theories, including U.C.C. statutory theories, negligence, negligent hiring and supervision, and civil conspiracy. *Id*. at 512.

The Fifth Circuit reviewed *Citizens National*, *Holifield*, and other Mississippi case law, and believed that Mississippi law was inconclusive.[8] Therefore, the Fifth Circuit surveyed law from other jurisdictions, musing that "caselaw supports the idea" that a bank may owe a duty to a non-customer, if the bank knows that a fiduciary duty exists between the customer and non-customer, and "the bank has actual knowledge of its customer's misappropriation." *Id*. at 519. But the Fifth Circuit acknowledged it could not expand Mississippi law to include such a "new regime of liability" for banks:

> Despite the merits of this line of [non-Mississippi] cases, we recognize that we cannot use our *Erie* guess to impose upon Mississippi a new regime of liability for its banks. . . . **Given the current state of Mississippi's caselaw, including *Holifield*, see supra note 5, we do not predict that the Mississippi Supreme Court would impose upon [Bank of Franklin] a duty of reasonable care to Midwest, a non-customer. Therefore, we AFFIRM the district court's summary judgment**.

Id. at 519 (emphasis added). Thus, under controlling state law as established by Mississippi appellate courts, and under the Fifth Circuit's assessment of Mississippi law, Trustmark owed no "duty of care" to prevent third parties from being defrauded by Adams/Madison Timber.[9]

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[8] Frankly, Trustmark disagrees with the Fifth Circuit's view that Mississippi law was uncertain. As shown above, Mississippi law does not impose a duty on a bank to protect third parties from the bank's customer.

[9] The Receiver never identifies any action Trustmark allegedly should have taken to fulfill any duty of care. Tellingly, the Receiver refrains from expressly stating that Trustmark (or anyone else) had a legal duty to report its suspicions about Adams to law enforcement, or perhaps to make public proclamations that Adams might be a crook. It is slander *per se* to accuse someone of criminal conduct. Mississippi Law of Torts § 11:13, Libel and slander – Slander per se, (2d ed. Westlaw 2020). The Receiver would improperly impose a common-law duty on Trustmark, or other private citizens, to inform authorities when they suspect a crime,

In summary, Mississippi courts have not imposed a duty on banks to prevent their customers from transacting illegal business, or to report suspected illegality. It is not the job of this Court to create such a duty for Mississippi banks.

4. Count IV, "Negligent Retention and Supervision," Must Also Be Dismissed.

The "negligent supervision and retention" count (Count IV, pp. 31-32) is just another expression of negligence, which adds nothing, since the Complaint identifies no duty of care owed by Trustmark. The Complaint cites *Backstrom v. Briar Hill Baptist Church, Inc.*, 184 So. 3d 323, 327 (Miss. App. 2016) for the proposition that "an 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." (Compl. ¶ 131.) As shown above, Trustmark owed no duty of care to prevent Adams's crimes; therefore, it owed no duty to perform that duty by "supervision" or otherwise. Further, under *Iqbal* and *Twombly*, the Receiver has failed to plead facts showing that Trustmark employees breached a legal duty to Madison Timber, and that the employees were "incompetent" or "unfit," and that Trustmark knew about it. No such facts are alleged.

5. Count V, "Violations of Mississippi's Fraudulent Transfer Act," Does Not State a Claim.

The Complaint fails to state a viable claim under Mississippi's Uniform Fraudulent Transfer Act ("MUFTA"), Miss. Code Ann. § 15-3-101 *et seq.*,[10] because no transfer is identified. The

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and take the risk of civil liability for mistaken accusations. No such duty has ever been created by Mississippi courts.

In rare circumstances when Mississippi has imposed a statutory duty to report suspected criminal acts, that duty is coupled with immunity. A limited group of private citizens has a statutory duty to report suspicions of child abuse, neglect, or human trafficking (Miss. Code Ann. § 43-21-353, "Reporting abuse or neglect"). Anyone doing so in good faith "shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed." Miss. Code. Ann. § 43-21-355. Similar statutory duties exist to report suspected abuse or neglect of vulnerable persons in nursing homes, or suspected sexual misconduct involving students and employees, and similar immunity is provided. Miss. Code Ann. § 43-47-37, Miss. Code Ann. § 97-5-24.

[10] MUFTA provides that a transfer "is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor." § 15-3-107. "Creditor" means "a person who has a claim." In this case, the Receiver attempts to play the role of both "creditor" and the "debtor" who made the transfer – under the statute, she would only be the debtor. She has

Complaint vaguely alleges a claim "against all defendants" for "violations of Mississippi's fraudulent transfer act." (Compl., p. 33.) The Complaint generally alleges the Receiver is entitled to return of "all fees and other such payments paid by Adams or Madison Timber to Defendants," but does not identify any such "fee" or "payment," or describe a single transfer of any Madison Timber asset to Trustmark.

The Receiver alleges in conclusory fashion that unidentified transfers "were made with the actual intent to hinder, delay, or defraud its creditors." (Compl. ¶ 142.) As with other types of fraud, "[c]laims of fraudulent transfer or fraudulent conveyance are also subject to the heightened standard of Rule 9(b)." 5A Wright & Miller Fed. Prac. & Proc. Civ. § 1297, Pleading Fraud with Particularity – In General (Westlaw 4th ed. 2020).[11] "Federal Rule of Civil Procedure 9(b)'s particularity requirement applies to plaintiffs' claims under the Uniform Fraudulent Transfer Act. . . . To satisfy Rule 9(b), a plaintiff 'must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.'" *Pricaspian Dev. Corp. v. Martucci*, 759 F. App'x. 131, 135 (3d Cir. 2019).

In order to adequately plead a claim under the Uniform Fraudulent Transfer Act, a plaintiff must specifically allege the following, "for each transfer:" the date and amount or value of the transfer; the name of the transferor; the name of the initial transferee; and the consideration paid, if any, for the transfer. *In re NM Holdings Co., LLC*, 407 B.R. 232, 261-62 (Bankr. E.D. Mich. 2009). The Receiver has not identified a single transferred asset – much less the date, amount, or other details of a transfer. The Complaint fails to state a claim under MUFTA.

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also failed to plead facts sufficient to show that any transfer to Trustmark was made with actual intent to defraud Madison Timber, or for that matter anyone. And the Complaint fails to allege that Trustmark received any transfer, other than "in good faith and for a reasonably equivalent value." Miss. Code. Ann. §15-3-113(1).

[11] The Fifth Circuit has recognized that "at least" the First, Second, and Eighth Circuits require compliance with Rule 9(b) in pleading a fraudulent transfer claim. *Matter of Life Partners Holdings, Incorporated*, 926 F.3d 103 (5th Cir. 2019). In addition, the Fifth Circuit cited unpublished decisions of three more Circuits to the same effect, and stated the remaining Circuits "have not yet addressed the issue." *Id.* at 118 and n. 7. It thus appears that every Circuit to have answered the question has applied Rule 9(b) to UFTA claims.

6. Count VI, Mississippi RICO Claim, Fails Because the RICO Act Does Not Allow Civil Liability Unless the Defendant Has Been Criminally Convicted of a Predicate Crime.

Count VI seeks recovery "against all defendants" for "violations of Mississippi's Racketeer Influenced and Corrupt Organization Act." (Compl. ¶¶ 146-154.) The relevant RICO statute, Miss. Code Ann. § 97-43-9, provides a civil remedy to victims of racketeering only if the defendant has been convicted of a specified state-law criminal offense.

When Mississippi's RICO Act was adopted in 1984, the statute did not require a defendant to be convicted of a crime before being held civilly liable. It was sufficient to prove the plaintiff was injured "by reason of any violation of" the RICO Act. Miss. Laws 1984, Ch. 433. Mississippi added the "prior conviction" requirement for civil litigation in response to *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479 (1985), which reversed the Second Circuit's holding that prior convictions of RICO predicate acts were a condition for federal RICO civil liability.

"In response to *Sedima*, Mississippi amended its 'little RICO' Act to require a prior criminal conviction of the predicate acts as a condition precedent to a civil RICO action. *See* Miss. Code Ann. § 97-43-9(5) (Supp. 1986)." E. Hale, "Civil RICO and Intellectual Property After *Sedima*," 56 *Miss. L.J.* 567, 636 and n. 4 (1986). The Mississippi RICO Act was thus amended in 1986. Miss. Laws 1986, Ch. 461. The express purpose of the amendment was "to provide that civil proceedings instituted pursuant to this Act shall be limited to proceedings against any person or enterprise convicted of violating this Act." *Id.* Since 1986, the Mississippi RICO Act has stated as follows:

> (5) Any aggrieved person may institute a civil proceeding under subsection (1) of this section **against any person or enterprise convicted** of engaging in activity in violation of this chapter. . . .
>
> (6) Any person who is injured by reason of any violation of the provisions of this chapter shall have a cause of action **against any person or enterprise convicted of** engaging in activity in violation of this chapter for threefold the actual damages sustained and, when appropriate, punitive damages. . . .

Miss. Code Ann. § 97-43-9 (supp. 2019).[12]

To state a claim under the Mississippi RICO Act, the Receiver would be required to plead that Trustmark has been convicted of one of the twenty-nine state-law "Racketeering Activity" crimes listed in Miss. Code Ann. § 97-43-3. Of course, that has not happened – in fact, to the best of Trustmark's knowledge, no state-law convictions of anyone have occurred in connection with Madison Timber. Count VI must be dismissed.[13]

V. The Court Lacks Subject Matter Jurisdiction Because There is No "Injury in Fact" and No Article III Standing.

Since the Receiver has no legally compensable damages under Mississippi law, she lacks standing, and this Court lacks subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Latitude Solutions, Inc. v. DeJoria*, 922 F.3d 690 (5th Cir. 2019).

Under Article III of the Constitution, federal courts' subject matter jurisdiction is limited to justiciable controversies. A key component of justiciability is "the doctrine of standing." *Lujan,* 504 U.S. at 560. "The requirement that a litigant have standing derives from Article III of the Constitution, which confines federal courts to "adjudicating actual 'cases' and 'controversies.'" *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017) (affirming this Court's dismissal based on lack of Article III standing). Standing requires an "injury in fact," that is, "an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical'. . . ." *Lujan,* 504 U.S. at 560.

"The party invoking federal jurisdiction bears the burden of establishing these elements,"

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[12] A member of the Mississippi Legislature has twice offered legislation to remove the "prior conviction" condition on RICO suits. Those bills died. *See* Mississippi Bill History, 2012 Regular Session, House Bill 1199, and Mississippi Bill History, 2013 Regular Session, House Bill 31, both titled "An Act . . . to Amend Section 97-43-9, Mississippi Code of 1972, **to Remove the Requirement That a Person or Entity Be Convicted of Engaging in Racketeering Activity Before He Can Be Named as a Defendant in a Civil Action** Seeking Injunctive Relief or Damages for Injury . . ." (Emphasis added.)

[13] Of course, the Receiver has utterly failed to plead facts that would support a RICO claim, even absent the requirement to prove a conviction of a predicate crime. Trustmark incorporates the arguments of the other defendants to make that point. *See, e.g.*, Doc. #32, Southern Bancorp Bank's brief, at pp. 17 *et seq*.

whether "at the pleading stage," or "in response to a summary judgment motion," or "at the final stage" of trial. *Id*. at 561. The Receiver must meet *Iqbal* and *Twombly* standards in pleading an injury in fact, in order to avoid dismissal. *Cohan v. California Pizza Kitchen, Inc*., 2019 WL 4189482, at *6 (E.D. Mich. 2019).

Madison Timber's "increased liabilities" or "increased debts" are not an injury in fact under Article III. The Fifth Circuit's recent decision in *DeJoria* is directly on point. The bankruptcy trustee of a failed business, LSI, sued insiders for breach of fiduciary duty. The trustee claimed LSI "was a sham company set up to fail from the outset," and a vehicle for securities fraud. 922 F.3d at 693. The trustee sought "damages" for the amount of debt owed by the estate to a creditor – "the reasonable cash market value of liabilities incurred by LSI as a proximate cause of that defendant's breach of fiduciary duty, which liabilities are still owed and have not yet been paid, if any" ("Damages Element 1" in the opinion). *Id*. at 694-95. The trial court entered judgment on a jury verdict, based on that theory of damages. *Id*. at 695.

The Fifth Circuit reversed, explaining that "the millions of dollars awarded under Damage Element No. 1 represent [the creditor's] injury, not LSI's." *Id*. at 696. The Fifth Circuit also made it clear that the same rule applies to receivers. *Id*., favorably citing *Reneker v. Offill*, 2009 WL 804134, at *6 (N.D. Tex. Mar. 26, 2009) (receiver lacked article III standing because "the only harm alleged is the Receivership Estate's inability to satisfy its liabilities," but "[t]he Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harm[ed] the investors," not the receiver.). The Fifth Circuit noted "the receiver [in *Reneker*] and the bankruptcy trustee [in *Dejoria*] are similarly situated." *Dejoria*, 922 F.3d 690 at 696. The Fifth Circuit held that "[a]ccordingly, all damages awarded under Damage Element No. 1 against any defendant must be reversed for lack of Article III standing (thus leaving no actual damages against DeJoria)." *Id*. at 697.

The Receiver's lack of standing to seek damages for "increased liabilities" of Madison

Timber has been thoroughly briefed in other cases pending in this Court. Trustmark therefore will not burden the Court with additional briefing on this point, except to explain briefly that the Receiver's reliance on *Zacarias v. Stanford Int'l. Bank, Ltd.*, 945 F.3d 883 (5th Cir. 2019) is misplaced.

The Fifth Circuit noted in *Zacarias* that standing was not contested, and stated, without explanation or citation to authority, that "[t]he district court had subject matter jurisdiction over these claims." *Zacarias*, 945 F.3d at 899. But *Zacarias* absolutely did not hold that "increased liabilities" constitute an injury in fact under Article III. Nor did the Fifth Circuit overrule, or distinguish, or even mention, *DeJoria*.

Neither the parties nor the court mentioned *DeJoria* in any opinion or brief – tacitly acknowledging that the "increased debts" theory of injury and standing simply were not at issue in the *Zacarias* appeal. Further, the claims and defenses in this case – unlike the *Zacarias* case – are governed by Mississippi law. Therefore, whether an "injury in fact" exists is determined by analyzing the Receiver's claims under Mississippi law, not Texas law (as in the Stanford receivership) and certainly not under some notion of "federal common law." *AT&T Mobility, LLC v. Natl. Ass'n for Stock Car Auto Racing, Inc*., 494 F.3d 1356, 1360 (11th Cir. 2007) ("The question of whether, for standing purposes, a non-party to a contract has a legally enforceable right is a matter of state law.").[14]

Mississippi has never recognized a claim for "increased debts," "increased liability," or "deepening insolvency" – all of which are the nonsense theory that a thief is damaged by the money he steals, because he owes it back to his victims. Adams/ Madison Timber were not damaged by

[14] *See also Miree v. DeKalb Cnty, Georgia*, 433 U.S. 25, 28-29 (1977) (whether third-party contract beneficiaries had standing to sue county depended on state law); *League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 436, n. 1 (5th Cir. 2012) (Article III standing evaluated based on state-law voting rights injury). *Barraza v. Bank of Am., N.A.*, 2012 WL 12886438, at *3, n.3 (W.D. Tex. 2012) ("Thus, the Court considers Texas law in analyzing whether Mrs. Barraza has suffered an injury sufficient to confer standing.").

Adams's crimes. They have no claim based on the amounts Adams stole. The Receiver thus likewise has no injury in fact. And her vague reference to "assignments" cannot change that conclusion.[15]

"Dismissals for lack of Constitutional standing are granted pursuant to Rule 12(b)(1)." *Moore v. Bryant*, 853 F.3d at 248, n. 2. Since the Receiver has no "injury in fact," her claims must be dismissed for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

VI. Conclusion

The Complaint does not state a claim against Trustmark upon which relief may be granted. Further, standing in the shoes of Madison Timber, the Receiver has no legally compensable injuries. She therefore has no standing under Article III, and this Court lacks subject matter jurisdiction over this case. The Complaint must be dismissed.

Respectfully submitted, this the 30th day of April, 2020.

TRUSTMARK NATIONAL BANK

By: /s/William F. Ray
William F. Ray

[15] In a ploy to avoid dismissal for lack of standing, the Receiver vaguely states that "To remove any doubt, in aid of the Receivership Estate's recovery, investors have assigned their claims against Defendants to the Receiver, 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." (Compl. ¶ 8.)

The bald assertion that the receiver is an assignee of unknown claims, from unknown people, is not sufficient under Rule 12(b)(6) to identify an assigned claim, and is not sufficient under Rule 12(b)(1) to establish jurisdictional standing. "[A] plaintiff must plausibly plead underlying facts demonstrating a valid assignment of benefits. . . . To do so, a plaintiff may include in its complaint the particular language of the assignment or "include the assignment of benefit document itself. . . . But a conclusory statement merely alleging that a provider was assigned plan benefits from its patients does not plausibly demonstrate standing." *Progressive Spine & Orthopaedics, LLC v. Empire Blue Cross Blue Shield*, 2017 WL 751851, at *5 (D.N.J. 2017). In this case, the Receiver does not name a single assignor, and she does not explain the assigned claims or the terms of the assignments.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 30th day of April, 2020.

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