UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC, Plaintiff, v. TRUSTMARK NATIONAL BANK; BENNIE BUTTS; JUD WATKINS; SOUTHERN BANCORP BANK; and RIVERHILLS BANK, Defendants.	Case No. 3:19-cv-00941 Arising out of Case No. 3:18-cv-252, *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC* Hon. Carlton W. Reeves, District Judge

RECEIVER'S OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, opposes the motions to dismiss filed by Defendants Southern Bancorp Bank ("Southern Bancorp"); Bennie Butts; RiverHills Bank ("RiverHills"); and Trustmark National Bank ("Trustmark").[1]

[1] Docs. 31–32 (Southern Bancorp); Docs. 33–34 (Bennie Butts); Docs. 37–38 (RiverHills); Docs. 39–40 (Trustmark). Because the motions present the same arguments and the underlying facts and applicable law overlap, the Receiver responds to all four motions in this one brief. She sometimes refers to all defendants collectively as "Defendants."

It is the Receiver's practice to file one brief in response to several motions, see Doc. 54 in *Alysson Mills vs. BankPlus, et al.*, No. 3:19-cv-00196 (S.D. Miss), and Doc. 43 in *Alysson Mills vs. The UPS Store, Inc., et al.*, No. 3:19-cv-00364 (S.D. Miss.), and, as of this filing, all Defendants except Southern Bancorp have consented.

Because it cuts the number of pages the Receiver devotes to this matter by more than half, filing a single brief does not give the Receiver an unfair advantage. Even in a single brief the Receiver addresses each defendant separately, to the extent a defendant raises a separate argument. Each defendant still gets to file its own reply brief. If Southern Bancorp finds this one brief lacking, it will have an opportunity itself to tell the Court.

INTRODUCTION

The Court is already familiar with the Madison Timber Ponzi scheme. Defendants are the financial institutions and professionals who provided banking services to Lamar Adams and Madison Timber. The complaint alleges Defendants could see Adams's fraud long before his surrender and confession on April 19, 2018, but they looked away or, worse, provided Adams cover.

Defendants do not dispute that they had before them the nuts and bolts of Madison Timber's fraud: large and highly suspicious transfers of money; routine and large overdrafts; implausibly high and consistent guaranteed returns; no purchases of timber; and no money received from any mills. Defendants do not dispute that they saw the tell-tale pattern of a Ponzi scheme. Defendants instead contend "in Mississippi, a bank has no duty of inquiry."[2] Defendants say they "did not have a duty to detect, report, or prevent Adams's criminal acts under Mississippi law."[3] Maybe Mississippi banks should make Ponzi schemes a line of business, if they are so sure they are immune from liability.

Defendants blame the victims, who they say "signed up for a get-rich-quick scheme"[4] and "had ample opportunity to protect themselves."[5] "No 'public policy' of Mississippi," they say, supports "shifting losses" to banks—it would be "not 'equitable,'" they say.[6] Apparently, Defendants' defense, in a nutshell, is Mississippi public policy favors Ponzi schemes.

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[2] Doc. 32 at 10.

[3] Doc. 40 at 24.

[4] Doc. 32 at 29.

[5] Doc. 40 at 16.

[6] Doc. 40 at 11, 16; Doc. 32 at 29.

Defendants' other arguments are all variations on familiar themes. Contrary to their representations, this is not a "red flag" case. The activity between Adams's and Madison Timber's accounts was not, as Southern Bancorp puts it, "lawful, unchoreographed, free-market behavior."[7] The complaint's allegations do not amount to "negligence in the air" (Bennie Butts's words[8]) and are not "imaginative" (Trustmark's[9]). The Receiver obtained the facts alleged in the complaint from Defendants' own documents. Those facts are damning enough, and the Receiver expects she will obtain more in discovery.

RiverHills says it provided "routine banking transactions and nothing more."[10] But the complaint alleges RiverHills's employees had to organize themselves in shifts to process hundreds of wires for Madison Timber on the first and fifteenth of each month.[11] Is it routine for a "one-man shell" (Trustmark's words[12]) to take in and send back out $15,000,000 in the same month? A good question for a jury to decide.

Trustmark calls itself a "peripherally-involved bank."[13] But Trustmark was Madison Timber's primary bank for years and during that time Adams ran the biggest Ponzi scheme in this state's history out of a single account. For years Trustmark's anti-money laundering officer Wanda Moncrief complained internally while Bennie Butts and Judd Watkins joked about it. ("If anybody can have Wanda eating out of his hand it might be Lamar."[14]) Trustmark had actual knowledge that

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[7] Doc. 32 at 3.

[8] Doc. 34 at 23.

[9] Doc. 40 at 5.

[10] Doc. 38 at 1.

[11] Doc. 1 at ¶¶ 82–85.

[12] Doc. 40 at 5.

[13] Doc. 40 at 16.

[14] Doc. 1 at ¶ 44.

Madison Timber was a Ponzi scheme when, in October 2016, Trustmark encouraged Adams to move Madison Timber's business to another bank and even extended Adams's personal line of credit by an additional 30 days to make the transition easier for Adams.[15] Incredibly, Trustmark now asks if it could have done "something differently"?[16] Another good question for a jury.

Defendants will have an opportunity to retell the facts in their own words. For now, it is enough that the facts alleged in the complaint are more than sufficient to state claims against each of the Defendants for civil conspiracy; aiding and abetting; recklessness, gross negligence, and at a minimum negligence; negligent retention and supervision; violations of Mississippi's Fraudulent Transfer Act; and violations of Mississippi's Racketeer Influenced and Corrupt Organization Act.

ARGUMENT

"When considering a motion to dismiss under Rule 12(b)(6), the Court accepts the plaintiff's factual allegations as true and makes reasonable inferences in the plaintiff's favor." *Handy v. U.S. Foods, Inc.*, No. 3:14-cv-854, 2015 WL 1637336, at *1 (S.D. Miss. Apr. 13, 2015) (citing *Iqbal*, 556 U.S. at 678). A complaint should state "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (quotation marks omitted).

At least one Defendant contends that the complaint must satisfy Rule 9(b)'s heightened pleading standard because its claims involve "a Ponzi scheme, and thus a fraud."[17] In fact, the

[15] Doc. 1 at ¶¶ 50–53.

[16] Doc. 40 at 9 ("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.").

[17] Doc. 38 at 3.

complaint does not allege that Defendants are liable for fraud; neither fraud nor scienter are elements of the Receiver's claims. "Where averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated." *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001).

Nevertheless, the complaint easily meets Rule 9(b)'s standard. The complaint specifically alleges that from January 2011 until Madison Timber's collapse on April 19, 2018, Defendants substantially assisted Madison Timber's growth by facilitating the financial transactions on which Madison Timber relied—payments to and from its investors, payments to and from its recruiters, and transfers, or "loans," to and from Adams and Madison Timber that masked Madison Timber's insolvency;[18] and enabling and sustaining Madison Timber by providing banking services that gave to Adams and Madison Timber the imprimatur of a sophisticated financial institution.[19] The allegations in the complaint undoubtedly provide Defendants with "adequate notice of the nature and grounds" of the Receiver's claims.

If the complaint lacks the requisite particularity (and it does not), the remedy is not dismissal, but amendment. Fed. R. Civ. P. 15(a) ("The court should freely give leave [to amend] when justice so requires."); *Lone Star Ladies Inv. Club*, 238 F.3d at 367 (5th Cir. 2001) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) ("Not surprisingly, denying leave to amend, absent articulable reason, is 'not an exercise of discretion' but rather 'abuse of . . . discretion.'").

I. THE RECEIVER HAS STANDING.

Defendants argue the Receiver lacks standing to sue them. Defendants' arguments are largely academic, but the Court need not write a treatise on federal equity receivers' standing to

[18] *See, e.g.*, Doc. 1 at ¶¶ 28, 37, 67, 96.

[19] *See, e.g.*, Doc. 1 at ¶¶ 65, 96, 103, 114.

answer the question, because either way Defendants lose. The Receiver has standing in two ways. The Receiver has standing to sue any third party whose actions contributed to the success of the Madison Timber Ponzi scheme because 1) she is the court-appointed receiver for Madison Timber and, separately, 2) because investors have executed assignments that entrust the right to sue to her.

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

Trustmark, RiverHills, and Bennie Butts point to two opinions of the Fifth Circuit—*Ebert v. DeJoria*, 922 F.3d 690 (5th Cir. 2019), and *Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830 (5th Cir. 2019)—to argue court-appointed receivers lack standing to sue third parties to recover money for defrauded investors. Defendants both read too much into and misread *DeJoria* and *Lloyds*.

Defendants also either completely ignore or all but ignore a more recent opinion of the Fifth Circuit, *Zacarias v. Stanford International Bank, Limited* (*Willis*), 945 F.3d 883 (5th Cir. 2019), which wholly undermines their position.

DeJoria

Defendants rely on *DeJoria* to argue that the Receiver lacks standing because "an estate's unpaid debts do not injure the estate."[20] Defendants read too much into *DeJoria*. In that case the court held a bankruptcy trustee lacked standing to pursue a discrete claim that belonged only to a single distinct creditor.

In *DeJoria*, the company in question, LSI, was a publicly traded company that developed patented technology for the treatment of wastewater for the oil and gas industry. *DeJoria*, 922 F.3d at 693. LSI contracted with Jabil, a manufacturer, to provide equipment to LSI. *Id.* at 696. Jabil

[20] *See* Doc. 34 at 9; *see also* Doc. 40 at 34 ("Madison Timber's 'increased liabilities' or 'increased debts' are not an injury in fact under Article III.").

delivered the equipment to LSI, but LSI never paid Jabil's invoice. *Id.* After LSI filed for bankruptcy, the bankruptcy trustee leased and eventually sold the equipment. *Id.* Jabil filed a claim for $9.55 million in LSI's bankruptcy proceedings. *Id.* at 694.

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

The Fifth Circuit vacated the jury's verdict, holding the trustee was not entitled to damages for an injury that Jabil alone suffered. *Id.* at 696. The court observed that LSI itself was not injured by the contract with Jabil: LSI received the equipment without paying for it and even benefited from it by leasing and eventually selling it. *Id.* The court expressly did *not* hold the trustee could never recover damages arising from the defendants' breaches of fiduciary duty—but instead only that, under the circumstances, the trustee was not entitled to damages *that belonged solely to a single distinct creditor*. *Id.* at 697 n.6 ("We need not address and therefore do not hold that there could not possibly be an Article III injury in fact stemming from Cohen and DeJoria's breaches of fiduciary duty. Instead, we hold there is no Article III injury stemming from the claims Ebert asserted and Damage Element No. 1 of the jury instruction.").

Context is important. The trustee in *DeJoria* narrowed her case at trial *to a single contract that injured a single creditor*. Although she tried to paint LSI as a fraud from its inception, the court observed both that LSI was a publicly traded company that developed patented technology, *id.* at 693, and that the trustee herself had attempted to find investors to keep LSI operating, *id.* at

694. *LSI was not a Ponzi scheme.*[21] In a Ponzi scheme case, the underlying business is a fraud from its inception. The Ponzi scheme's perpetrators misuse the underlying business entity to perpetrate *one singular fraudulent scheme* that injures the entity and investors in the same way. The entity and investors both seek recovery to address the same harms sustained by the same conduct. The fact that investors were injured does not mean that the entity was not. This is why, in Ponzi scheme cases, it is often said that investors' injuries are "redundant," *see Lloyds*, 927 F.3d at 844, 850 (Stanford investors' claims were "redundant"), or "derivative," *see id.* at 847–48 (Stanford employees' claims, by contrast, were "non-derivative"), or "duplicative," *see id.* at 844; *Willis*, 2019 WL 6907376 at *7 (investors' lawsuits would result in "duplicative litigation"), of the entity's.

The fact that LSI's trustee lacked standing in *DeJoria* does not mean the Receiver lacks standing here. The injury in *DeJoria*, arising from a single contract, was unique to Jabil—so much so that the trustee told the jury to "forget about the other hundred and something creditors,"

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

Reneker was not a Ponzi scheme case.

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

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

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

None of the three *Reneker* opinions, all unpublished, support granting Defendants' motions to dismiss here.

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

DeJoria, 922 F.3d at 695—and actually benefited LSI, which not only applied the money it owed Jabil to other, arguably legitimate, purposes but also profited from the lease and sale of Jabil's equipment. By contrast, the injury here is not unique to any one party; the fraudulent scheme injured Madison Timber and investors in the exact same way. The fact that investors were injured does not mean that Madison Timber was not.

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

Lloyds

RiverHills and Bennie Butts also point to the Fifth Circuit's decision in *Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830 (5th Cir. 2019) for the proposition that "[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entity in receivership[.]"[22] That proposition is not new. For completeness's sake, the actual language from the Fifth Circuit's opinion is as follows:

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

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

Defendants misuse *Lloyds* to suggest an either/or proposition: either investors are injured, or the entity in receivership is injured, but never both. That proposition is false. The fact that investors are injured does not mean the entity in receivership is not. The fact that investors were injured here does not mean the Receiver may not sue Defendants to redress injuries to Madison

[22] Doc. 34 at pp. 9–11 (quoting *Lloyds*, 927 F.3d at 841); *see also* Doc. 38 at 5.

Timber.[23] The question is simply whether the entity in receivership was injured—and here it was: Madison Timber was a fraud from its inception. Lamar Adams misused Madison Timber to perpetrate a Ponzi scheme and Defendants assisted him. The Receiver alleges an injury-in-fact. An entity in receivership often alleges claims that overlaps with claims of investors, as *Lloyds* illustrates.

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

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

Nevertheless, the Fifth Circuit readily agreed that the Stanford receiver had standing to settle *the investors' claims*. The investors argued the Stanford receiver had no right to "control the

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

settlement of a claim it does not own." *Id.* at 850. The court agreed with that proposition but explained that "here, the Receiver had standing to pursue *its own* claims," and the investors' claims were merely "redundant." *Id.* (emphasis in original). The fact that investors had claims did not mean that the Stanford receiver did not. Nothing in *Lloyds* calls into question the Receiver's standing. To the contrary, the opinion supports it.

Willis

If there remained any doubt that the Receiver has standing to pursue her claims against Defendants, the Fifth Circuit's opinion in *Willis* dispels it.[24] In that case the court affirmed the Stanford receiver's standing to allege, and therefore the district court's subject matter jurisdiction to decide, the very same type of claims the Receiver alleges here.

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

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

[24] On rehearing, the Fifth Circuit withdrew and substituted its original opinion. *Zacarias v. Stanford International Bank, Limited* (*Willis*), 931 F.3d 382, 397 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 945 F.3d 883 (5th Cir. 2019). The new opinion in *Willis* does not change the analysis or the result.

> letters in furtherance of the Stanford Ponzi scheme, *causing exponentially increased liabilities and the misappropriation of billions of dollars*[.]

Willis, 945 F.3d at 893 (emphasis added).

The Stanford receiver and the defendants entered a settlement whereby the defendants would pay the receiver $132.85 million in exchange for the Stanford receiver's obtaining from the district court an order that barred any actions against the defendants arising from the Stanford Ponzi scheme. *Id.* at 893–94. A group of individual Stanford investors objected to the bar order because it extinguished claims against the same defendants that the investors had filed in state court. *Id.* at 894–95. The district court entered the bar order over the investors' objections.

On appeal, the investors argued the district court lacked subject matter jurisdiction to bar claims not before it. The Fifth Circuit rejected that argument, observing:

> It is necessarily the case that where a district court appoints a receiver to coordinate interests in a troubled entity, that entity's investors will have hypothetical claims they could independently bring but for the receivership: the receivership exists precisely to gather such interests in the service of equity and aggregate recovery.

Id. at 899. It is only through the receivership, the court explained, that a recovery can be equitably distributed:

> Exercising their jurisdiction under the securities laws, federal district courts can utilize a receivership where a troubled entity, bedeviled by their violation, will be unable to satisfy all of its liabilities to similarly situated investors in its securities. Without a receiver, investors encounter a collective-action problem: each has the incentive to bring its own claims against the entity, hoping for full recovery; but if all investors take this course of action, latecomers will be left empty-handed. A disorderly race to the courthouse ensues, resulting in inefficiency as assets are dissipated in piecemeal and duplicative litigation. The results are also potentially iniquitous, with vastly divergent results for similarly situated investors.
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> The receiver, standing in the shoes of the injured corporations, is entitled to pursue the corporation's claims "for the benefit not of [the wrongdoers] but of innocent investors." The receiver is therefore allowed to curb investors' individual advantage-seeking in order to reach settlements for the aggregate benefit of investors under the court's supervision. *As directed by the court, a receiver may*

> *systematically use ancillary litigation against third-party defendants to gather the entity's assets*. Once gathered, these assets are distributed through a court-supervised administrative process.

Id. at 896–97 (emphasis added).

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

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

Id. at 899–900 (emphasis added).

In short, a receiver has standing in a Ponzi scheme case to recover damages from defendants whose acts contributed to the debts of the receivership estate, including from the increase in "unsustainable liabilities inflicted by the Ponzi scheme." This otherwise undisputed proposition is "good law" in the Fifth Circuit[25]—hardly "nonsense theory" (Trustmark's words[26]).

[25] Neither *Willis* nor *DeJoria* overruled other *Stanford* cases explicitly holding that a receiver has standing to bring tort claims against third parties for increased liabilities to the receivership estate. *See, e.g.*, *Rotstain v. Trustmark Nat'l* Bank, No. 3:09-CV-2384-N, 2015 WL 13034513, at *9 (N.D. Tex. Apr. 21, 2015); *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at

Even Judge Willett, who dissented in *Willis*, did not dispute the Stanford receiver's standing to pursue the Stanford entities' claims. *Id.* at *15 (Willett, J., dissenting). The panel was not divided on the question that matters here.

Only Trustmark bothers to address *Willis*, but even Trustmark minimizes it, contending that the panel in *Willis* "absolutely did not hold that 'increased liabilities' constitute an injury in fact under Article III."[27] But the same question of standing was unavoidable in *Willis*. The parties in *Willis* disputed whether the district court had subject matter jurisdiction, and the *Willis* opinion had to first analyze the receiver's standing in order to conclude: "The district court had subject matter jurisdiction over these claims." *Id.* at 899. Standing is not something parties can simply agree not to dispute. That the *Willis* opinion said there was "no dispute" that the receiver had standing does not mean the question of standing was not essential to the court's decision and should be disregarded here. *Willis* speaks directly to this case.

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

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

The Receiver has standing not only because she is the court-appointed receiver for Madison Timber, but also because investors have executed assignments that entrust to her the right to sue. The Receiver now stands in the shoes of investors, too.

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*4 (N.D. Tex. Dec. 17, 2014); *Janvey v. Willis of Colorado, Inc.*, No. 3:13-CV-3980-N, 2014 WL 12670763, at *3 (N.D. Tex. Dec. 5, 2014); *Janvey v. Adams & Reese, LLP*, No. 3:12-CV-0495-N, 2013 WL 12320921, at *1 (N.D. Tex. Sept. 11, 2013).

[26] Doc. 40 at 35.

[27] Doc. 40 at 35.

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

Defendants do not and cannot challenge the Receiver's right to accept assignments from investors, nor investors' right to assign their claims to the Receivership Estate. Defendants complain that the complaint 1) does not identify the assignors' claims and 2) does not identify the assignors.

Defendants' first complaint can be addressed simply: The assignors' claims are the very claims the complaint alleges. The Receiver alleges the claims both in her capacity as the court-appointed receiver for Madison Timber[29] and in her capacity as holder of assignments.[30] The claims need not be distinct;[31] in either capacity, the Receiver's object is the same: to "seek recovery to address the same harms sustained by the same conduct in the same Ponzi scheme."[32]

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[28] Doc. 190, *Securities & Exchange Commission v. Adams, et al.*, No. 3:18-cv-252 (S.D. Miss.).

[29] Doc. 1 at ¶¶ 6–7.

[30] "[I]n 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." Doc. 1 at ¶ 8.

[31] Southern Bancorp complains that "[a] suit by the Receiver on the whole Ponzi scheme, on behalf of some investors, will subject the defendants to multiple liabilities for the same acts if other investors bring their own actions." Doc. 32 at 29. But investors' claims against third parties have always existed, whether assigned to the Receiver or not. The risk that investors would sue Southern Bancorp always existed. If Southern Bancorp's interest is in efficiency, it should want to resolve all claims in this lawsuit. The Receiver has considered recommending orders barring further lawsuits relating to the Madison Timber Ponzi scheme as part of settlements with defendants in other cases.

[32] *Zacarias v. Stanford International Bank, Limited* (*Willis*), 931 F.3d 382, 397 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 945 F.3d 883 (5th Cir. 2019).

That the complaint does not identify the assignors by name is no cause to dismiss the complaint.[33] Rule 8 does not require "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. 544, 555 (2007)) ("the pleading standard Rule 8 announces does not require "'detailed factual allegations'"). It is enough that the complaint provides Defendants fair notice of the claims against it and the grounds on which they rest. *Id.* at 698–99 (citing *Twombly*, 550 U.S. at 555). The complaint amply sets forth the grounds for the claims alleged. The complaint sufficiently identifies the assignors as investors in the Madison Timber Ponzi scheme.[34] Defendants cannot dispute that investors have standing to pursue claims against third parties such as Defendants whose actions contributed to the Madison Timber Ponzi scheme's success.

This Court took great care to protect investors' names from public disclosure at Adams's sentencing, and the Receiver is only following suit. As the Receiver has stated elsewhere,[35] the Receiver takes investors' privacy seriously. Investors are victims of a massive fraud, and the Receiver thus far has prevented their names and identifying information from being publicly

[33] Some Defendants point to out-of-Circuit, inapposite cases for the proposition that the Receiver must identify by name each assignor-investor. In *Perkumpulan Investor Crisis Center Dressel-WBG v. Wong*, No. 09-cv-0526, 2009 WL 10676449 (W.D. Wash. Oct. 30, 2009), the plaintiff sued Regal Financial Bancorp for its alleged participation in a Ponzi scheme. The court found the plaintiff's "naked allegation" that it was "empowered" to sue on behalf of an amorphous group of Indonesian investors insufficient to confer standing. *Id.* at *5. Here, there is no question that the Receiver is "empowered" to accept assignments. *See* Doc. 190 (empowering the Receiver "to accept on behalf of the Receivership Estate assignments of rights or interests that persons or entities may choose to assign to the Receivership Estate"). The other cases cited—*MAO-MSO Recovery II, LLC v. Boehringer Ingelheim Pharm., Inc.*, 281 F. Supp. 3d 1278 (S.D. Fla. 2017), *MSP Recovery Claims, Series LLC v. Tech. Ins. Co., Inc.*, No. 18 CIV. 8036 (AT), 2020 WL 91540, at *1 (S.D.N.Y. Jan. 8, 2020), *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 09-1115 SI, 2009 WL 4874872, at *4 (N.D. Cal. Oct. 6, 2009), and *Progressive Spine & Orthopaedics, LLC v. Empire Blue Cross Blue Shield*, No. CV 16-01649, 2017 WL 751851, at *1 (D.N.J. Feb. 27, 2017)—are entirely factually distinguishable. In those cases, there was no federal equity receiver and no express permission given by a court for the plaintiffs to accept assignments, as there is here.

[34] Doc. 1 at ¶ 8.

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

disclosed. The Receiver of course will make available to Defendants any information to which they are entitled, subject to appropriate protections. The Receiver's sensitivity to these important considerations is no basis for Defendants to question the Receiver's standing.

II. THE COMPLAINT STATES A CLAIM FOR CIVIL CONSPIRACY.

A conspiracy is "a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Shaw v. Burchfield*, 481 So. 2d 247, 255 (Miss. 1985). An agreement to conspire "may be express, implied, or **based on evidence of a course of conduct**." *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (emphasis added). The three elements of a civil conspiracy claim are: "(1) the existence of a conspiracy, (2) an overt act in furtherance of that conspiracy, and (3) damages arising therefrom." *Wells v. Shelter Gen. Ins. Co.*, 217 F. Supp. 2d 744, 753 (S.D. Miss. 2002) (citing *Delta Chem. & Petroleum, Inc. v. Citizens Bank of Byhalia*, 790 So. 2d 862, 877 (Miss. App. 2001)). In determining whether a civil conspiracy exists, damages—as opposed to the agreement—"are the essence." *Rex Distrib. Co., Inc. v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019) (quoting *Bradley*, 117 So. 3d at 339) ("The elements [of a claim for civil conspiracy] are quite similar to those required of a criminal conspiracy, with the distinguishing factor being that an agreement is the essence of a criminal conspiracy, while damages are the essence of a civil conspiracy.") (internal quotation marks omitted).

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

Although she may do so, the Receiver is not required to show that Defendants committed an overt act in furtherance of the conspiracy, only that they "agreed to and participated in [Lamar Adams's] course of action." *Rex Distrib.*, 271 So. 3d at 455. The Mississippi Supreme Court made

clear that it is "a fundamental misstatement of the nature of civil conspiracy" to contend that liability for civil conspiracy depends on every alleged coconspirator having committed an overt act that damaged the plaintiff. *Id.* Civil conspiracy "exists as a cause of action to hold nonacting parties responsible." *Id.* (emphasis added). To state a claim for civil conspiracy, the Receiver "has to show an unlawful overt act and [she] has to show damages, but the overt act need not be by [any of the Defendants]." *Id.* It is enough that the Receiver shows an overt act by Lamar Adams and that Defendants participated in Adams's "course of action."

It is undisputed that Lamar Adams committed unlawful overt acts in furtherance of the Madison Timber Ponzi scheme. The complaint alleges Defendants agreed to and participated in Adams's "course of action" by, among other things, facilitating the financial transactions on which Madison Timber relied—payments to and from its investors, payments to and from its recruiters, and transfers, or "loans," to and from Adams and Madison Timber that masked Madison Timber's insolvency.[36] Simply put, Defendants "agreed to and participated in [Lamar Adams's] course of action." *Rex Distrib.*, 271 So. 3d at 455. The complaint's allegations are more than sufficient to state a claim for civil conspiracy.[37]

[36] *See, e.g.*, Doc. 1 at ¶¶ 28, 37, 67, 96.

[37] For reasons lost on the Receiver, RiverHills makes the off-hand, incredible statement that "[T]he claim of conspiracy rings especially hollow in light of the acquittal of Adams long time business partner[,] William McHenry." Doc. 38 at 14. RiverHills should take no comfort in McHenry's acquittal. The Government presented a narrow case, calling only one Madison Timber victim to testify. Before deliberating McHenry's guilt, the jury did not hear from any other of the dozens of victims of Madison Timber. These victims were defrauded not just by Adams and McHenry, but by RiverHills and Jud Watkins, who knew that Madison Timber was a fraud but turned a blind eye.

B. But Defendants also knew that Madison Timber was a fraud.

Defendants argue they cannot be liable for civil conspiracy because the Receiver cannot allege that they had actual knowledge that Madison Timber was a fraud.[38] Defendants misunderstand what is required of the Receiver at this early stage of litigation. A conspiracy can be formed by a "mere tacit understanding between the conspirators to work to a common purpose." *Aetna Ins. Co. v. Robertson*, 94 So. 7, 22 (1922), *modified on suggestion of error for other reasons*, 95 So. 137 (1923). The Receiver need only show that Defendants "agreed to and participated in [Adams's] course of action." *Rex Distrib.*, 271 So. 3d at 455.

Defendants all cite *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 520 (5th Cir. 2018), for the general proposition that civil conspiracy requires proof that the coconspirator "knew of [the] fraudulent scheme." In fact, in affirming summary judgment in that case, the Fifth Circuit nevertheless observed that "civil conspiracy can be—and often is—established through circumstantial evidence." *Id.* at 520. Indeed, the district court in *Midwest Feeders* denied a motion to dismiss because alleged "circumstantial evidence" created "a factual inquiry regarding a civil conspiracy." *Midwest Feeders, Inc. v. Bank of Franklin*, 114 F. Supp. 3d 419, 431 (S.D. Miss. 2015). Where one conspirator had "confessed to fraudulent activity," it was sufficient, at the motion to dismiss stage, that his coconspirators were alleged to have failed to investigate. *Id.*

The complaint alleges more than sufficient facts to establish that Defendants saw Adams's fraud and knew it was fraud.[39] The complaint alleges that for years Trustmark's anti-money

[38] *See* Doc. 32 at 13–16; Doc. 34 at 9–11; Doc. 38 at 14; Doc. 40 at 16–18. RiverHills does not expressly make this argument; it argues only that the Receiver did not allege the existence of an agreement between it and Adams or an overt act by RiverHills committed in furtherance of the conspiracy. Doc. 38 at 13. As discussed above, the Receiver need not make such a showing.

[39] Doc. 1 at ¶¶ 55–65, 87–96.

laundering officer Wanda Moncrief complained internally while Bennie Butts and Judd Watkins joked about it:

> 39. Madison Timber's purported business was selling timber to lumber mills, but the financial statements prepared by his accountant did not show any account receivables from lumber mills. Adams explained to Butts and Watkins: "Guys, [my accountant] doesn't include my Account Receivables from the Mills on my end of year Balance Sheet because of the different dates of the Contracts." Adams separately provided his own list of "MTP Receivables" to Butts and Watkins, which they accepted as sufficient.
>
> 40. Sometimes Adams made suspiciously large cash deposits in Madison Timber's account. To avoid questioning, he developed the habit of first contacting Butts and Watkins so they could alert branch office managers who otherwise would view the deposits as suspicious.
>
> 41. Madison Timber's account was routinely overdrawn by large amounts, sometimes as much as several hundred thousands of dollars, sometimes several times in the same thirty-day period. Trustmark waived for Madison Timber the substantial fees that any other customer would have to pay for the overdraws. Watkins defended the overdraws in a November 2013 email to his colleagues, turning cause for alarm into a business opportunity, proposing a revolving line of credit for Adams:
>
> > Madison Timber is Lamar Adams' company. From time to time Lamar will have multiple items hitting the OD report. When this occurs he completes a deposit the same day. I think he has operated in this fashion for some time. Bennie [Butts] might be able to shed more light. Ideally I think Madison Timber would be a good candidate for a $100M RLOC with a sweep. That would solve the last minute transfers into the account. I haven't reviewed Madison Timber's financials, but they do run a considerable amount of money through their Trustmark account and they keep average deposits of $192M.
>
> 42. As Madison Timber grew, its account activity grew more suspicious. In March 2014, a Trustmark employee responsible for reviewing accounts annually emailed Butts to report "Madison Timber's account still looks a little suspicious":
>
> > Benny, my yearly review of Madison Timber's account still looks a little suspicious, the deposit amounts have increased immensely and still checks from the Trustmark account deposited a day earlier at Bank Plus which implies floating on the account. If you are still comfortable with the customer please let me know.

Butts replied: "jud watkins is the servicing officer, but I am still in the loop. Let me visit with jud and let's you, jud, and me talk next week." Presumably Butts and Watkins allayed the employee's concerns.

> 43. By June 2014, Wanda Moncrief, Trustmark's BSA/AML (Bank Secrecy Act/Anti-Money Laundering) Officer, had been alerted to Madison Timber's suspicious activity. She observed that in March 2013 Trustmark had noticed that each month Adams wrote two checks from his personal account to Wayne Kelly in the amount of $9,333. Adams told Trustmark at the time that payments to Kelly were for "consulting" and that Adams saved "tax money" by making the payments from his personal account. Trustmark found the answers suspicious and inquired again months later. This time Adams told Trustmark that Kelly "pays the loggers" when he is out of town, and the payments reimburse Kelly. Moncrief wrote Butts: "I know that you know this customer and his business well. . . . The answers do not make sense in relation to the business. . . . Please call me to discuss."
>
> 44. Butts promised Moncrief he would discuss the issues with Adams. Butts and Adams must have agreed that Adams would reach out to Moncrief directly because Butts shared Moncrief's

contact information with Adams, and Adams began communicating with Moncrief himself. Butts joked to Watkins: "If anybody can have Wanda eating out of his hand it might be Lamar."

45. In May 2015 Moncrief had new questions regarding Adams's and Madison Timber's business. The questions related to Kelly's work for Madison Timber as well as the nature of ingoing and outgoing transactions:

> 1. What does Wayne Kelly do relative to the business? I see a lot of checks written to Kelly Management which is Wayne's business? What work is he paid for and when is he paid relative to the timber investments and cuttings? Yesterday Bennie stated he was a small shareholder employee but we see that he writes as many checks out as Mr. Adams does and he also writes checks back to the business on a regular basis from his business account for Kelly Management, LLC (BankPlus account). This seems to contradict the "small shareholder employee" status.
>
> 2. Why are multiple checks written to various individuals that clear at other banks – but then an amount close to the total written to those other individuals comes immediately back into the Madison Timber account via wire for almost the same amount? NOTE – the check dates are within one to two days of the wire.
>
> 3. Why are so many checks written in the same amount to multiple individuals or to the same individual? i.e. $9,333.33, $4,666.66, $9,500.00, $7,062.50, etc. Likewise, what are the numbers in the memo lines of the checks and what do they mean? "1, 2, 3, 4, or etc".

46. Moncrief directed her questions to Butts, but Butts simply forwarded them to Adams. Butts told Adams he did not know what "BSA-AML" (Bank Secrecy Act/Anti-Money Laundering) stood for:

> Lamar,
> Below are the questions that are [sic] BSA-AML Department asked in case you want to look over before Lunch today. Not sure what all the initials stand for, but I will try to find out. We look forward to seeing you at Lunch today. Please let us know if you have questions.

Butts and Adams met for lunch and immediately after Adams provided a written response to Moncrief's questions. In a follow-up exchange, Moncrief asked Adams for "a copy of one of the promissory notes used when people invest in a track of timber." Adams obliged and added: "BTW, those documents were done by Baker Donelson Law Firm, as they have 2 lawyers that Joint Venture timber tracts with us."

Trustmark knew that Madison Timber was a fraud but continued to facilitate investments in Madison Timber until October 2016. Before it finally quietly, politely closed Adams's account, it extended Adams's personal line of credit to make his move to another bank easier:

48. In June 2016, Moncrief reviewed Madison Timber's account activity again. This time she zeroed in on the absence of income from lumber mills. She asked Butts, "[C]an [Adams] confirm who or what entities he sells timber to after purchasing the timber from land owners? We cannot identify timber companies . . . "

49. Moncrief emailed Adams herself, asking, "[W]hat timber companies do you use to harvest timber? We think we can't see part of the transactions – we do not see any incoming payments from timber companies. How do they primarily pay Madison Timber, what account are timber payments deposited into, etc?" When Adams did not answer the first time, Moncrief followed up again: "One final question – in regards to the timber companies you contract with. We almost never see any incoming payments from them into the Madison Timber account. Where do payments go?

> Into another account at another bank perhaps?" Adams bluffed an answer to the question, following Moncrief's lead: "Yes. I keep those separate and use 3 other Banks."
>
> 50. On October 4, 2016, Trustmark personnel met privately to discuss Adams and Madison Timber. On October 5, 2016, Mel Channel, Trustmark's Senior Vice President of Director-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.
>
> 51. Butts later called Trustmark's decision "the biggest disappointment" in his career. He pleaded with Channel to give Adams a chance to explain.
>
> 52. Channel gave Adams and Kelly a chance to explain at a meeting at Trustmark 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.
>
> 53. Trustmark did, however, agree to extend Adams's personal line of credit by an additional 30 days from its November 30, 2016 maturity date to assist Adams with the transition.

The complaint alleges that after Adams moved Madison Timber's business to RiverHills and Southern Bancorp, they saw the same patterns Trustmark saw. Anyone could see the money flowed in and then flowed right back out. As just one example, the complaint alleges the RiverHills account took in $15,000,000 and sent back out $15,000,000 in the same month.[40] The Southern Bancorp account took in $1,000,000 and sent back out $1,000,000 in the same day.[41]

Investors could not see what Defendants saw. Defendants saw that none of the hundreds of millions of dollars of investors' money was used to purchase timber.[42] Defendants saw that Madison Timber's accounts never received any money from any mills.[43] Defendants saw the tell-tale pattern of a Ponzi scheme and, instead of stopping it, continued its "course of action."

[40] Doc. 1 at ¶¶ 82–85.

[41] Doc. 1 at ¶¶ 76–77.

[42] Doc. 1 at ¶¶ 59–60, 90–91.

[43] Doc. 1 at ¶¶ 59–60, 90–91.

In summary, applying precedent, reading the complaint's allegations in a light most favorable to the Receiver, and indulging reasonable inferences in her favor, the complaint unquestionably states facts supporting a civil conspiracy claim sufficient to survive a motion to dismiss.

III. THE COMPLAINT STATES A CLAIM FOR AIDING AND ABETTING.

A. This Court has recognized a claim for aiding and abetting.

Defendants all argue that Mississippi law does not recognize a claim for civil aiding and abetting.[44] Although no Mississippi state court has had the occasion to address the issue, Mississippi federal courts to address the issue have 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). This includes the United States Bankruptcy Court for the Southern District of Mississippi in *In re Evans*, 467 B.R. 399 (Bankr. S.D. Miss. 2011), which Southern Bancorp and Bennie Butts selectively quote in their memoranda.

As the *In re Evans* court explained, this Court in *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694 (S.D. Miss. 2002), made an *Erie* guess that Mississippi would recognize a cause of action under section 876(b) of the Restatement "(1) because a majority of other jurisdictions have done so and (2) because Mississippi recognizes the analogous tort of civil conspiracy." *In re Evans*, 467 B.R. at 409.[45] Since *Dale*, this Court has consistently recognized a cause of action for

[44] Doc. 32 at 5; Doc. 34 at 16; Doc. 38 at 15; Doc. 40 at 18. Short of arguing that Mississippi does not recognize a claim for aiding and abetting, Southern Bancorp makes no other arguments challenging the Receiver's aiding and abetting claim against it.

[45] Defendants point to the Fifth Circuit's opinion in *In re Depuy Orthopaedics, Inc., Pinnacle Health Implant Prods. Liab. Litig.*, 888 F.3d 753, 781 (5th Cir. 2018), for the proposition that "[w]hen sitting in diversity, a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by state courts." They then argue this Court should not recognize a cause of action for aiding

aiding and abetting under Mississippi state law.[46] The *In re Evans* court recognized the viability of a cause of action based on section 876(b) but declined to hold that Mississippi law would recognize a cause of action based on section 876**(c)**. 457 B.R. at 409. The Receiver's cause of action arises under section 876(b), not section 876(c).[47]

B. The complaint alleges sufficient facts to state a claim for aiding and abetting.

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENT (SECOND) OF TORTS § 876(b).

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and abetting. *Depuy* applied Texas law, and the "novel issue" was "an aiding-and-abetting cause of action, outside of the conspiracy context, when the predicate offense sound[ed] in strict liability." 888 F.3d at 781. Unlike the Mississippi Supreme Court, the Texas Supreme Court had explicitly stated that it "has not expressly decided whether Texas recognizes a cause of action for aiding and abetting." *Id.* (quoting *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 244 (Tex. 2017)).

The recent cases cited by Trustmark do not change this result. In *Midwestern Cattle Mktg., LLC v. Legend Bank, N.A.*, 800 F. App'x 239 (5th Cir. 2020), the Fifth Circuit simply reiterated its holding in *Depuy* that the district court "exceeded its circumscribed institutional role" because it recognized a cause of action for aiding and abetting under Texas law even though the "Texas Supreme Court 'has not expressly decided whether Texas recognizes a cause of action for aiding and abetting.'" *Id.* at 250; *see also Taylor v. Rothstein Kass & Co.*, 2020 WL 554583 (N.D. Tex. Feb. 4, 2020) (applying *Depuy* to dismiss claim of aiding and abetting breach of fiduciary duty under Texas law). The Mississippi Supreme Court, unlike the Texas Supreme Court, has made no pronouncement expressly declining to adopt a claim for aiding and abetting.

Further, contrary to Trustmark's contention, the Receiver does not argue—here or in previous briefing—that *Depuy* (or now *Midwestern Cattle*) applies onto to strict liability cases. She has simply quoted the Fifth Circuit's own description of the issue before it.

[46] *See Natchez Reg'l Med. Ctr. v. Quorum Health Res., LLC*, 879 F. Supp. 2d 556, 574 (S.D. Miss. 2012) (declining to grant summary judgment to defendants on an aiding and abetting fraud claim); *Dickens v. A-1 Auto Parts & Repair, Inc.*, No. 1:18-cv-162, 2019 WL 508074, at *2 (S.D. Miss. Feb. 8, 2019) ("Federal courts in this district have concluded that Mississippi courts would recognize a claim of aiding and abetting fraud or civil conspiracy under the Restatement (Second) of Torts § 876(b)."); *U-Save Auto Rental of Am., Inc. v. Moses*, No. 1:02-cv-689, 2006 WL 211955, at *1 (S.D. Miss. Jan. 27, 2006) (denying a motion to dismiss a claim for aiding and abetting breach of contract); *see also Wright v. Life Investors Ins. Co. of Am.*, No. 2:08-cv-3, 2008 WL 4450260, at *1 (N.D. Miss. Sept. 26, 2008) (denying a motion to dismiss a claim for aiding and abetting fraud).

[47] Doc. 1 at ¶ 96.

Trustmark and RiverHills argue that the Third Restatement now applies to the Receiver's aiding and abetting claim.[48] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 28.[49] As far as the Receiver can tell, not a single court in the country has applied Section 28. In any event, whether the Court applies Section 876(b) of the Second Restatement or Section 28 of the Third, the result is the same—the complaint alleges that Defendants actually knew that Madison Timber was a fraud.[50] The Receiver need not *prove* any element of her claims, including that Defendants' knowledge, at the pleadings stage.

The complaint further alleges that Defendants knew that Lamar Adams was the manager of his company, Madison Timber.[51] They therefore knew that Adams owed Madison Timber fiduciary duties of care.[52] Mississippi law requires a manager to discharge his duties in good faith, with fair dealing, with ordinary care, and in a manner that he reasonably believes is in the best interests of the company. *See* MISS. CODE ANN. § 79-29-123(6)(a). Adams breached those duties by misusing Madison Timber's corporate form to sustain a Ponzi scheme. *E.g., Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-cv-4641, 2014 WL 12572881, at *8 (N.D. Tex. Dec. 17, 2014) ("the underlying fiduciary duties on which Plaintiffs' claims are based are

[48] Doc. 38 at 15; Doc. 40 at 21.

[49] Section 28 provides:

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.

[50] Comment (c) provides that a claim under Section 28 requires proof of actual knowledge. RiverHills and Trustmark contend this dooms the Receiver's claims. Not so, but certainly not yet.

[51] Doc. 1 at ¶ 111.

[52] Doc. 1 at ¶ 111.

those owed by directors and officers of the Stanford Financial Group to their respective Stanford entities").

The complaint alleges that Defendants, by facilitating the financial transactions upon which Madison Timber relied, aided and abetted Adams in "committing breaches of duties owed by him to Madison Timber and in other tortious conduct."[53] *E.g.*, *Janvey v. Proskauer Rose LLP*, No. 3:13-CV-0477-N, 2015 WL 11121540, at *6 (N.D. Tex. June 23, 2015) ("acts in furtherance of Stanford's scheme amount[ed] to 'substantial assistance'"). Among other breaches of duty, the complaint specifically alleges that Defendants were reckless, grossly negligent, and at a minimum negligent because they were in advantageous positions to discover that Madison Timber was a fraud, and despite seeing fraud for themselves, failed to act as reasonable bank and financial services professionals.[54]

The complaint alleges all Defendants "could see all the indicia of fraud but chose to look away. Defendants had before them the nuts and bolts of the Madison Timber Ponzi scheme: large and highly suspicious transfers of money; implausibly high and consistent guaranteed returns; no purchases of timber; and no money received from any mills. Defendants had unique information from which they could have reached only one conclusion: Madison Timber was a fraud."[55] RiverHills and Bennie Butts contend "red flags" are not enough,[56] but this is more than a "red flag" case. As summarized above, the complaint alleges Defendants saw Adams's fraud and knew it was fraud. Defendants' knowledge of certain facts, alongside indicia of fraud, unquestionably create a "plausible inference of [Defendants'] actual knowledge" that Madison Timber was a Ponzi

[53] Doc. 1 at ¶ 110.

[54] Doc. 1 at ¶¶ 119–129. The complaint further alleges the underlying torts of negligent supervision and retention. Doc. 1 at ¶¶ 130–139.

[55] Doc. 1 at ¶ 113.

[56] Doc. 34 at 17; Doc. 38 at 16.

scheme—"which they then aided and abetted by permitting the fraud to continue through use of its accounts after it had actual knowledge of the scheme." *Perlman v. Wells Fargo Bank, N.A.*, 559 F. App'x 988, 996 (11th Cir. 2014). In Ponzi scheme cases decided in the Fifth Circuit, even an awareness that an investment offered "unrealistic rates of return" supports knowledge for aiding and abetting purposes. *Janvey v. Proskauer Rose LLP*, No. 3:13-cv-0477, 2015 WL 11121540, at *5 (N.D. Tex. June 23, 2015).

The complaint also sufficiently alleges that Defendants gave substantial assistance and encouragement to Adams by facilitating payments to and from Madison Timber's investors, payments to and from Madison Timber's recruiters, and transfers, or "loans," from Adams that masked Madison Timber's insolvency; providing banking services that gave to Adams and Madison Timber the imprimatur of sophisticated financial institutions; and lending legitimacy and cover to Adams and Madison Timber. As just one example that is easy to visualize, on the first and fifteenth of each month, RiverHills's employees organized themselves in shifts to process hundreds of wires for Madison Timber.[57] Trustmark is wrong to argue that this kind of assistance did not "further the fraud itself" but instead only provided general aid to Adams in the form of routine banking services.[58] Defendants' facilitation of Madison Timber's financial transactions was "essential to the growth of the Madison Timber Ponzi scheme," without which, "Madison Timber would not have continuously grown."[59] *See, e.g.*, *Rotstain*, 2015 WL 13034513, at *11 (even the provision of "routine banking services" is "sufficient to allege substantial assistance and

[57] Doc. 1 at ¶¶ 82–85.

[58] Doc. 40 at 21.

[59] Doc. 1 at ¶¶ 115–16.

an overt act in furtherance of a conspiracy" if those services "inherently facilitated the financial transactions and operations that formed the lifeblood of the [Ponzi] scheme").[60]

In summary, applying precedent, reading the complaint's allegations in a light most favorable to the Receiver, and indulging reasonable inferences in her favor, the complaint states a claim for aiding and abetting.

IV. THE COMPLAINT STATES A CLAIM FOR RECKLESSNESS, GROSS NEGLIGENCE, AND AT A MINIMUM NEGLIGENCE; AND FOR NEGLIGENT RETENTION AND SUPERVISION.

A. The complaint states a claim for recklessness, gross negligence, and at a minimum negligence.

"Negligence is a failure to do what the reasonable person would do under the same or similar circumstances." *Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1128 (Miss. 2014). Recklessness "is a failure or refusal to exercise any care." *Maldonado v. Kelly*, 768 So. 2d 906, 910 (Miss. 2000).[61]

"To prevail in any type of negligence action, a plaintiff must first prove the existence of a duty." *Griffith v. Entergy Mississippi, Inc.*, 203 So. 3d 579, 585 (Miss. 2016) (quoting *Enter. Leasing Co. S. Cent. v. Bardin*, 8 So. 3d 866, 868 (Miss. 2009) (citing *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897, 904 (Miss. 2007)). "In the context of an ordinary negligence action the

[60] Trustmark contends that the comments to Section 28 provide that "substantial assistance" "ordinarily means something more than routine professional services provided to the primary wrongdoer." Doc. 40 at 22 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 28, cmt. d). Trustmark disparages the Receiver for her reliance on the *Rotstain*, wrongly asserting that the Restatement reporters "rejected" it. Doc. 40 at 22. The Restatement's reporters drafted an illustration based on a case that came out a different way and invited readers to compare two cases, including *Rotstain*, that reached different results. *Rotstain* was not overturned by the Fifth Circuit.

[61] *See also Dame v. Estes*, 101 So. 2d 644, 645 (Miss. 1958) ("Gross negligence is that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them.").

duty of care is the requirement 'to conform to a specific standard for the protection of others against the unreasonable risk of injury. . . .'" *Clausell v. Bourque*, 158 So. 3d 384, 391 (Miss. Ct. App. 2015) (quoting *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897, 904 (Miss. 2007)). For banks, Mississippi law provides a specific standard: they have a statutory duty of ordinary care, which is defined as "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." MISS. CODE ANN. § 75-3-103(a)(9); *see also Delta Chem. & Petroleum, Inc. v. Citizens Bank of Byhalia, Miss.*, 790 So. 2d 862 (Miss. Ct. App. 2001) (considering whether bank was negligent for failing to apply "reasonable commercial standards").

Trustmark, RiverHills, Southern Bancorp, and their employees had a duty to use ordinary care, that is to observe reasonable commercial standards, in the conduct of their business.[62] They breached that duty: The complaint alleges that Defendants were in "advantageous positions" to discover that Madison Timber was a fraud[63] and "not only failed to exercise due care, they failed or refused to exercise any care at all in their dealings with Madison Timber."[64] The complaint separately alleges that Lamar Adams, with the assistance of Defendants, breached duties owed to Madison Timber by misusing its corporate form to sustain a Ponzi scheme. *E.g.*, *Greenberg*

[62] Southern Bancorp, RiverHills, and Trustmark argue they cannot be liable for negligence because they had no duty to stop Adams's criminal conduct. This is a red herring. As alleged in the complaint, Southern Bancorp, RiverHills, and Trustmark didn't just fail to stop the Madison Timber Ponzi scheme—they were part of it. There is no question that they owed duties to the Receivership Estate, and ultimately to Madison Timber investors.

[63] Doc. 1 at ¶ 122 ("From their advantageous positions, Defendants could see all the indicia of fraud but chose to look away. Defendants had before them the nuts and bolts of the Madison Timber Ponzi scheme: large and highly suspicious transfers of money; implausibly high and consistent guaranteed returns; no purchases of timber; and no money received from any mills. Defendants had unique information from which they could have reached only one conclusion: Madison Timber was a fraud."). The complaint further alleges "[a] reasonable bank in same or similar circumstances would have stopped the fraud. Defendants chose instead to enable and sustain it by providing banking services that gave to Adams and Madison Timber the imprimatur of sophisticated financial institutions." Doc. 1 at ¶ 123.

[64] Doc. 1 at ¶ 108.

Traurig, LLP, 2014 WL 12572881, at *8 ("the underlying fiduciary duties on which Plaintiffs' claims are based are those owed by directors and officers of the Stanford Financial Group to their respective Stanford entities").

All Defendants argue they did not owe any duty to Adams or Madison Timber, even if Adams and Madison Timber were their customers.[65] Defendants contend banks have no duty to monitor a customer's account activity. But Defendants can point only to a handful of cases in which a bank was found to have exercised reasonable care under the facts of those cases.[66] The cases do not stand for the proposition that a bank has no duty of care to anyone, ever. This is not a single-instance-of-embezzlement case. This is a case involving a years-long Ponzi scheme.

Defendants also argue they owe no duty either to the Receiver or to Madison Timber's investors because they were not Defendants' customers. On this point Mississippi statutory law is clear: "In all causes of action for . . . economic loss brought on account of negligence, . . . **privity shall not be a requirement** to maintain said action." MISS. CODE ANN. § 11-7-20 (emphasis added). The complaint expressly alleges "economic loss brought on account of [Defendants]

[65] *See, e.g.*, Doc. 32 at 8 ("The gist of her claim is that Southern failed to monitor activity in the Adams-controlled accounts and thereby became a guarantor for all criminal acts of its accountholders. But courts consistently refuse to recognize such 'nebulous' duty.").

[66] Defendants point to the Supreme Court of Mississippi's opinion in *Collier v. Trustmark Nat'l Bank*, 678 So. 2d 693 (Miss. 1996), for the proposition that "[t]here is no duty in Mississippi upon a bank to inquire as to whether a fiduciary 'has the authority to write checks on the fiduciary account and make them payable to himself." Doc. 32 at 10; *see also* Doc. 40 at 27 ("The Mississippi Supreme Court held [in *Collier*] the bank had no duty to the trust beneficiaries absent 'actual knowledge' that the trustee was embezzling funds."). First, *Collier* was decided on summary judgment, not at the pleadings stage. (Notably, many, if not most, of the cases cited by Defendants were decided at the summary judgment stage.) Second, this case does not involve trust accounts or a trustee's embezzlement of funds. Third, and most importantly, the complaint in this case **alleges actual knowledge of Defendants.** *See also, e.g.*, *Burgess v. BankPlus*, 830 So. 2d 1223 (Miss. 2002) (mortgagee bank owed no duty to customers who defaulted on notes arising out of reaffirmation of debt); *Citizens Nat'l Bank v. First Nat'l Bank*, 347 So. 2d 964 (Miss. 1977) (bank had no "fiduciary or confidential relationship" with **a competing bank** such that it had a duty to disclose customer's check kiting); *Holifield v. BancorpSouth, Inc.*, 891 So. 2d 241 (Miss. Ct. App. 2004) (granting summary judgment because there existed no evidence of bank's actual knowledge whether "funds of the trust account were properly being spent").

negligence": "But for Defendants' recklessness, or at a minimum negligence, Madison Timber would not have continuously grown—it would have failed before ensnaring hundreds of new unwitting investors."[67] The complaint states a claim for negligence.[68]

Defendants rely for their argument on the Fifth Circuit's opinion in *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507 (5th Cir. 2018). The Fifth Circuit in *Midwest Feeders* did not take into account section 11-7-20, which is controlling. MISS. CODE ANN. § 11-7-20 ("In all causes of action for . . . economic loss brought on account of negligence, . . . **privity shall not be a requirement** to maintain said action.") (emphasis added). The Fifth Circuit observed only that Mississippi case law did not "directly address[] whether a bank may owe a duty to a non-customer in circumstances resembling [that] case." *Midwest Feeders, Inc.*, 886 F.3d at 515. Relying on other courts' interpretations of other states' laws, the Fifth Circuit concluded that the bank in *Midwest Feeders* did not owe a duty to the non-customer in that case. The Fifth Circuit nevertheless acknowledged that "a bank may owe a duty to a non-customer in certain circumstances." *Id.* at 518. Applying *Midwest Feeders* here, even if Madison Timber's investors were not Defendants' customers, this case would fall within the Fifth Circuit's own exception: "[W]hile a bank generally owes no duty to a non-customer, the bank may owe such a duty to a non-customer where 'a fiduciary relationship exists between the customer [Adams] and the non-customer [investors], the

[67] Doc. 1 at ¶ 126.

[68] Trustmark contends that the Receiver's negligence claim fails because the complaint "never identifies any action Trustmark allegedly should have taken to fulfill any duty of care." That is not an element of a negligence claim that the Receiver is required to plead. Trustmark further surmises that the Receiver suggests Trustmark had the legal duty to "report its suspicions about Adams to law enforcement, or perhaps to make public proclamations that Adams might a crook," an action that Trustmark contends "is slander *per se*." Doc. 40 at 29 n.9. Unaware whether Trustmark's statement is sarcasm, the Receiver points to the words of the complaint—Trustmark, Butts, and Watkins could have stopped the fraud years before it ensnared unwitting investors, including Trustmark's customers, but instead they chose to enable and sustain Madison Timber by providing banking services that gave to Adams and Madison Timber the imprimatur of a sophisticated financial institution. Doc. 1 at ¶ 65.

bank knows or ought to know of the fiduciary relationship, and the bank has actual knowledge of its customer's misappropriation.'" *Id.* at 519 (quoting *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1094–95 (11th Cir. 2017)); *see also id.* ("Banks are discouraged from willfully ignoring warning signs that its customer may be committing an intentional tort against the non-customer (with whom the customer as a fiduciary relationship).").

These same principles apply to all Defendants, each of whom owed a duty of care to Madison Timber to "to conform to a specific standard for the protection of others against the unreasonable risk of injury. . . ." *Clausell*, 158 So. 3d at 391. Far from "negligence in the air," the complaint's allegations are rooted in inescapable facts. Defendants knew that Madison Timber purported to purchase timber with investors' money, but that none of the hundreds of millions of dollars of investors' money was used to purchase timber.[69] Defendants knew that Madison Timber purported to have timber deeds and cutting agreements between landowners and Madison Timber and contracts between Madison Timber and mills, but that Madison Timber's accounts never received any money from any mills.[70] Defendants saw the tell-tale pattern of a Ponzi scheme and, instead of stopping it, abetted it.

Defendants had a duty to use ordinary care in their dealings with Adams and Madison Timber. They breached their duties when, "[f]rom their advantageous positions, Defendants could

[69] Doc. 1 at ¶¶ 59–60, 90–91.

[70] Doc. 1 at ¶¶ 59–60, 90–91.

see all the indicia of fraud but chose to look away"[71] and "not only failed to exercise due care, they failed or refused to exercise any care at all in their dealings with Madison Timber."[72]

Defendants' acts, which they undertook in concert with Adams, are not "remote," as Southern Bancorp suggests.[73] Defendants' acts increased Madison Timber's liabilities and, today, the Receivership Estate's debts. *E.g.*, *Greenberg Traurig, LLP*, 2014 WL 12572881, at *6 (defendants caused damages to the Stanford receivership estate because "they contributed to the size and scope of the underlying scheme, which ultimately resulted in Stanford's financial ruin").

In short, the complaint alleges facts sufficient to establish each of the elements of recklessness, gross negligence, and at a minimum negligence. Defendants have stated no basis for dismissing the Receiver's claim.

B. The complaint states a claim for negligent retention and supervision against Trustmark, RiverHills, and Southern Bancorp.

Separately, the complaint states a claim for negligent retention and supervision. A claim for negligent retention and supervision is "simply a negligence claim." *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1229 (Miss. 2005). "[A]n employer will be liable for negligent hiring or retention of his employee when an employee injures a third party if the employer knew or should have known of the employee's incompetence or unfitness." *Backstrom v.*

[71] Doc. 1 at ¶ 122. The complaint further alleges that "[a] reasonable bank in same or similar circumstances would have stopped the fraud. Defendants chose instead to enable and sustain it by providing banking services that gave to Adams and Madison Timber the imprimatur of sophisticated financial institutions." Doc. 1 at ¶ 123.

[72] Doc. 1 at ¶ 124.

[73] Doc. 32 at 11–12. Southern Bancorp also suggests that its actions did not cause any harm. It posits that Adams could have opened accounts at any bank, so "it cannot be reasonably inferred that, without Southern, the Ponzi scheme would have been averted or diminished in any way." Doc. 32 at 12–13. The Receiver doesn't blame Southern Bancorp for wishing that Adams had opened his accounts elsewhere. But he didn't. He instead received the protection of Southern Bancorp's assistance to facilitate the Madison Timber Ponzi scheme until its collapse.

Briar Hill Baptist Church, Inc., 184 So. 3d 323, 327 (Miss. Ct. App. 2016) (quoting *Parmenter v. J&B Enters. Inc.*, 99 So. 3d 207, 217 (Miss. Ct. App. 2007)).

RiverHills contends that it "cannot be deemed to have actual or constructive knowledge for the time Watkins was employed at Trustmark."[74] The Receiver does not understand the import of that proposition, and RiverHills cites no legal authority to support it. Jud Watkins was RiverHills's employee, and he knew what he knew. RiverHills is liable for acts committed by Watkins while he was employed by RiverHills. Period. Watkins's and Bennie Butts's acts were "of the kind [they were] employed to perform" by Trustmark and RiverHills. *Id.* (quoting Restatement (Second) of Agency § 228(1)(a)).

At a minimum, Trustmark, RiverHills, and Southern Bancorp had a duty to supervise acts that their employees, including Watkins and Butts, undertook within their offices and in reliance on their name and resources. The complaint alleges sufficient facts to establish that they failed to do so. When a receiver adequately pleads that an employee "provided material assistance" to a Ponzi scheme, a motion to dismiss a negligent retention or supervision claim should be denied because it is "not unreasonable to infer" that employers "were aware to some degree" of the material assistance, "[a]ssuming an ordinary degree of supervision." *Proskauer Rose LLP*, 2015 WL 11121540, at *8.[75]

The complaint states claims against Trustmark, RiverHills, and Southern Bancorp for negligent retention and supervision.

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[74] Doc. 38 at 10.

[75] The court in *Proskauer* applied Texas law to explain that negligent supervision "requires a plaintiff to demonstrate that the employee's tortious conduct was foreseeable to the employer." Texas's standard for negligent supervision is the same as Mississippi's. *CoTemp, Inc. v. Houston W. Corp.*, 222 S.W.3d 487, 492 (Tex. App. 2007) ("The basis of responsibility under the doctrine of negligent retention is the master's negligence in retaining in his employ an incompetent servant whom the master knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others.").

V. THE COMPLAINT STATES A CLAIM UNDER MISSISSIPPI'S RICO ACT.

Mississippi's Racketeer Influenced and Corrupt Organization Act (the "Mississippi RICO Act") makes it unlawful for any person "employed by, or associated with, any [fraud] enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity . . . . " MISS. CODE ANN. § 97-43-5(3).

The complaint alleges that Defendants "associated with"[76] the Madison Timber "fraud enterprise."[77] An enterprise, as defined by the Mississippi RICO statute, is "any individual, sole proprietorship, partnership, corporation, union or other legal entity, or any association or group of individuals **associated in fact** although not a legal entity." MISS. CODE ANN. § 97-43-3(c) (emphasis added).[78] Madison Timber was a "fraud enterprise" because a fraud enterprise includes one conducted by "mail or other means of communication," and Lamar Adams was convicted of wire fraud. *See* MISS. CODE ANN. § 97-43-3.1.[79] Defendants "associated together [with Madison Timber] for a common purpose of engaging in a course of conduct." *Boyle*, 556 U.S. at 946 (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)) ("[A]n association-in-fact enterprise is 'a group of persons associated together for a common purpose of engaging in a course of conduct.'").

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[76] *See* Miss. Code Ann. § 97-43-3 ("It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.").

[77] Doc. 1 at ¶¶ 149–50.

[78] "[T]he existence of an enterprise is an element distinct from the pattern of racketeering activity" *Boyle v. United States*, 556 U.S. 938, 947 (2009). But the evidence used to prove both elements "may in particular cases coalesce"; in other words, "proof of a pattern of racketeering activity may be sufficient . . . to infer the existence of an association-in-fact enterprise." *Id.* at 947, 951 (internal quotation marks omitted).

[79] RiverHills and Trustmark contend that the Receiver's RICO claim fails because Adams was not convicted under Mississippi law. Doc. 38 at 18, Doc. 40 at 33. Mississippi's RICO statute does not mandate that Adams be convicted of a crime under Mississippi law—it instead provides that a "fraud enterprise *applies to conduct*" in certain provisions, including fraud by mail or other means of communication. Miss. Code Ann. § 97-43-3.1(1).

At the motion to dismiss stage, a complaint sufficiently alleges an association-in-fact if it "alleges the relationships among the individuals associated with the enterprise, the purpose of the enterprise . . . , and longevity" sufficient to permit the associates to pursue the enterprise's purpose. *E.g.*, *Hanover Am. Ins. Co. v. Gibbs*, No. 15-cv-559, 2015 WL 5971139, at *5 (E.D. La. Oct. 14, 2015). The complaint alleges Madison Timber was a fraud enterprise, which Defendants do not dispute, and further that Defendants associated with Madison Timber—more than associated with, they facilitated its continuation; you cannot have a Ponzi scheme without a bank—notwithstanding their knowledge that Madison Timber never used the hundreds of millions of dollars of investors' money in its accounts to purchase timber[80] and it never received any money from any mills.[81]

Mississippi's RICO statute has a lower standard than its federal analog for the "participation" element. Mississippi law prohibits participation in the enterprise's course of conduct generally, **directly or indirectly**. *Compare* MISS. CODE ANN. § 97-43-5(3) ("It is unlawful for any person . . . to . . . participate, **directly or indirectly**, in such enterprise . . .") (emphasis added) *with* 18 U.S.C. § 1962(c) ("It shall be unlawful for any person . . . to . . . participate . . . in the conduct of such enterprise's affairs . . ."). The complaint expressly alleges Defendants' general participation in Madison Timber's course of conduct: Defendants "facilitate[ed] the financial transactions on which Madison Timber relied—payments to and from its investors; payments to and from its recruiters; and transfers, or "loans," to and from Adams and Madison Timber that masked Madison Timber's insolvency."[82]

[80] Doc. 1 at ¶¶ 59–60, 90–91.

[81] Doc. 1 at ¶¶ 59–60, 90–91.

[82] Doc. 1 at ¶¶ 28, 67.

Southern Bancorp argues the complaint does not allege a pattern of racketeering activity.[83] For there to be a pattern, there must be "at least two (2) incidents of racketeering conduct." MISS. CODE ANN. § 97-43-3(d). The incidents must "have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." *Id.* Racketeering activity means "to commit, to attempt to commit, **to conspire** to commit . . . any crime which is chargeable under [Mississippi's RICO Act]." MISS. CODE ANN. § 97-43-3 (emphasis added).

The complaint alleges that Adams was convicted of wire fraud and pleaded guilty to a "scheme and artifice to defraud,"[84] a crime Adams committed with the assistance of, and in conspiracy with, Defendants. Alleging that Defendants conspired with Adams to commit wire fraud is enough—but the complaint goes farther. It alleges that Defendants' association with Madison Timber "allowed the Madison Timber 'fraud enterprise' to continuously grow."[85] The complaint then details specific incidents—certainly more than the two required—in which Defendants participated in Madison Timber's scheme. The complaint alleges that, among other things, Defendants facilitated hundreds of wire transfers each month;[86] oversaw financial payments to and from its investors, payments to and from its recruiters, and transfers, or "loans," to and from Adams and Madison Timber that masked Madison Timber's insolvency;[87] and enabled

[83] Doc. 32 at 20.

[84] Doc. 1 at ¶ 22.

[85] Doc. 1 at ¶ 151.

[86] *See, e.g.*, Doc. 1 at ¶ 83.

[87] *See, e.g.*, Doc. 1 at ¶¶ 28, 37, 67, 96.

and sustained Madison Timber by providing banking services that gave to Adams and Madison Timber an imprimatur of a sophisticated financial institution.[88]

Finally, the complaint alleges facts sufficient to show that Defendants had knowledge of the racketeering activity. Defendants argue the complaint does not allege that they had the requisite knowledge of the wrongful activity. Defendants ignore the allegations made in paragraphs 55 through 65 and 87 through 96 of the complaint, which expressly allege Defendants' actual knowledge. As discussed above, the Receiver's allegations meet both the standards of Rule 8(a) and 9(b).[89] There can be no question that Defendants were "subjectively aware of a high probability" that Madison Timber was a fraud. *Chaney v. Dreyfus Service Corp.*, 595 F.3d 219 (5th Cir. 2010).

RiverHills and Bennie Butts's reliance on the Fifth Circuit's opinion in *Chaney* for the proposition that "red flags" are insufficient to plead knowledge of unlawful actions does not help them. In *Chaney*, the Fifth Circuit affirmed the district court's grant of summary judgment on a receiver's RICO claim because "the record [did] not establish that any individual at [the defendant's office] was subjectively aware of a high probability that [the fraudster] was engaged in money laundering." *Id.* The "red flags" in *Chaney* were insufficient to establish knowledge for RICO purposes only because the defendant's employees were not trained to recognize the "red flags" associated with money laundering. *Id.* The court recognized that "red flags" may have been sufficient to establish knowledge if the defendant's employees were "trained to recognize the 'red flags' associated with money laundering." *Id.*

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[88] *See, e.g.*, Doc. 1 at ¶¶ 65, 96, 103, 114.

[89] RiverHills goes as far as to say that the Receiver must show it acted with criminal intent. Doc. 38 at 18. Not so. The Receiver brings her claim pursuant to Section 97-43-5(3), which does not require proof either of the defendant's criminal intent or that the defendant "received any proceeds derived" from the fraud enterprise.

Here, by contrast, the complaint alleges numerous facts that were sufficient to alert Defendants, financial institutions with "special sophistication and experience," that Madison Timber was a fraud.[90] Trustmark, for instance, employed an anti-money laundering officer, with expertise to recognize such red flags, to monitor Madison Timber's accounts.[91] Having held themselves out as professionals knowledgeable in such matters, they cannot avoid liability simply by proclaiming their ignorance in a motion to dismiss. Defendants employed, and utilized, exactly the type of employee the court in *Chaney* observed would show a RICO defendant is "subjectively aware of a high probability that [a fraudster] was engaged in money laundering." *Chaney*, 595 F.3d at 240.

The complaint states a claim for RICO liability under Mississippi law.[92]

VI. THE COMPLAINT STATES A CLAIM UNDER MISSISSIPPI'S UNIFORM FRAUDULENT TRANSFER ACT.

Under Mississippi's Uniform Fraudulent Transfer Act ("MUFTA"), the Receiver is entitled to avoid any transfers made with "actual intent to hinder, delay or defraud any creditor." MISS. CODE ANN. § 15-3-107(1). In the Fifth Circuit, "proving that [a transferor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made." *Janvey v. Alguire*, 647 F.3d 585, 598 (5th Cir. 2011) (quoting *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (alteration in original)) (analyzing Texas's Uniform Fraudulent Transfer Act).

[90] Doc. 1 at ¶¶ 61, 62, 65, 92, 93, 96.

[91] *See* Doc. 1 at ¶¶ 43–54.

[92] Southern Bancorp points to this Court's requirement in federal RICO cases that a plaintiff submit a "RICO Case Statement." Doc. 32 at 19. Neither this Court—nor any other Mississippi court—has required a RICO case statement to be filed in connection with a claim under Mississippi's RICO Act. In any event, the complaint sufficiently alleges the RICO claim asserted against Southern Bancorp and all other Defendants and how those allegations satisfy Mississippi's RICO statute.

A. The Receiver has standing to pursue her fraudulent transfer claims.

Southern Bancorp and Trustmark argue the Receiver has no standing to assert fraudulent transfer claims because she is not a creditor. The Fifth Circuit has rejected this argument. *See Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377, 385 (5th Cir. 2017) ("Janvey has standing to bring a TUFTA claim on behalf of a Stanford entity."); *Janvey v. Brown*, 767 F.3d 430 (5th Cir. 2014) ("[B]ecause the Ponzi scheme principals—Stanford and Davis—caused the Stanford entities to make fraudulent transfers that harmed the entities by dissipating their assets without receiving reasonably equivalent value in return, the Stanford principals are properly viewed as debtors under TUFTA, and the Stanford entities are the defrauded creditors under TUFTA.")[93]; *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 192 (5th Cir. 2013) ("[W]e conclude that the Receiver has standing to assert the claims of [a Stanford entity], and any other Stanford entity in receivership, against the [defendants] to recover the contributions made to them without reasonably equivalent value by the Stanford Ponzi operation."); *Janvey v. Suarez*, 978 F. Supp. 2d 685, 698 ("[The Receiver and OSIC] on behalf of the receivership entities, act as creditors in this context by bringing claims for equitable disgorgement of the receivership estate's former assets that were allegedly transferred in a fraudulent setting to Suarez, who holds the role of a debtor in this context.").

Suarez noted that the definitions of relevant terms under TUFTA—which are identical to the definitions provided in MUFTA—"solidify the conclusion" that a receiver acts as a creditor in the context of fraudulent transfer claims. The court stated:

> Under TUFTA, a "creditor" simply means a "'person' . . . who has a claim." TEX. BUS. & COM. CODE ANN. § 24.002(4) (West 2013). In turn, a "person" is defined as "an individual, partnership, corporation, association, organization, government or

[93] TUFTA, like MUFTA, provides remedies for "creditors" to recover fraudulent transfers. *Compare* MISS. CODE ANN. § 15-3-111 *with* TEX. BUS. & COM. CODE ANN. § 24.008.

> governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity." *Id.* § 24.002(9). This broad definition of a person captures Plaintiffs' roles as a Receiver and an organization acting on behalf of those that form the receivership estate, which makes Plaintiffs creditors for TUFTA purposes. Further, Plaintiffs' allegations in the Complaint constitute TUFTA "claims" because the term is defined as "a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 24.002(3).

Id. MUFTA's definitions of "creditor," "person," and "claim" are identical to the definitions of those terms in TUFTA, and a "creditor" under MUFTA "means a person who has a claim." MISS. CODE ANN. § 15-3-101(c), (d), (i). The Receiver is a defrauded creditor under MUFTA.

B. The complaint alleges that fees and other payments to Defendants are fraudulent transfers.

Defendants feign ignorance as to the basis of the Receiver's fraudulent transfer claims against them.

RiverHills, for one, seems to grossly misunderstand the Receiver's fraudulent transfer claim, arguing that the Receiver does not state claim under MUFTA because RiverHills never "maintained dominion or control" over the funds it received from FNBC and then wired to investors.[94] But RiverHills is not "left to guess" as to which transfers are fraudulent; the Complaint states it clearly: "[Defendants] collected fees for their facilitation of the financial transactions that made the Madison Timber Ponzi scheme possible."[95] The fees and other payments made by Adams to RiverHills for RiverHills's facilitation of Adams's accounts are fraudulent transfers. (The Receiver assumes RiverHills did not service Adams's accounts for free.).

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[94] *See* Doc. 38 at 20.

[95] Doc. 1 at ¶ 37; *see also id.* at ¶¶ 65, 96, 103, 114, 143–45 (""The Receiver is entitled to a judgment against Defendants to the Receivership Estate of all fees and other such payments by Adams or Madison Timber to Defendants.").

Trustmark too acts as though it is unaware of the transfers Adams made to it over the many years Trustmark served as the primary bank through which Adams conducted Madison Timber's business. According to Trustmark, the complaint must detail each of the (likely thousands of) transfers that Adams made to Trustmark over the years. Not so, and the Receiver is not required to meet the pleading requirements of Rule 9(b) as Trustmark suggests. In support of its position, Trustmark cites the Fifth Circuit's opinion in *Matter of Life Partners Holdings, Inc.*, 926 F.3d 105 (5th Cir. 2019), arguing that "[t]he 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" and that it "appears that every Circuit to have answered the question has applied Rule 9(b) to UFTA claims."[96] Trustmark, however, does not tell the whole story and misses the punch line. The Fifth Circuit noted that some circuits "have not yet addressed the issue" of whether Rule 8(a) or 9(b) applies to fraudulent transfer claims, and others "like ours, are divided." *Matter of Life Partners Holdings, Inc.*, 926 F.3d at 118. The Fifth Circuit did not overrule the Texas district court's application of Rule 8(a) to a receiver's fraudulent transfer claims and instead declined the opportunity to "weigh in on this vexing question." *Id.* The Rule 8(a) pleading standard therefore applies to the Receiver's fraudulent transfer claims. In any event, like the allegations in *Matter of Life Partners Holdings, Inc.*, the Receiver's allegations meet either standard.

C. Transfers from a Ponzi scheme are presumptively made with fraudulent intent and without reasonably equivalent value.

RiverHills and Southern Bancorp argue that the transfers to them are not voidable because they were not made with fraudulent intent and instead were taken in good faith. RiverHills

[96] Doc. 40 at 31.

contends the complaint must plead each of the fourteen "badges of fraud" listed in MUFTA to establish Adams's fraudulent intent. *See* MISS. CODE ANN. § 15-3-107(2).

But Madison Timber was a Ponzi scheme, and "[i]n [the Fifth] circuit, proving that [a transferor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made." *S.E.C v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007); *see also Quilling v. Schonsky*, 247 Fed. App'x 583, 586 (5th Cir. 2007) ("[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception.").[97]

Moreover, in a Ponzi scheme case, a "transferee[']s] knowing participation is irrelevant" to whether a transfer was fraudulent. *Janvey v. Alguire*, 647 F.3d 585, 598 (5th Cir. 2011). A receiver's proof of the existence of a Ponzi scheme "obviat[es] the need to prove fraudulent intent of the *transferees*," in this case, Defendants. *Id.* at 599 (emphasis in original). Defendants' good or bad faith is therefore irrelevant.[98] A receiver need only show "that each individual received transfers of money from the Ponzi scheme" to establish that the transfers were fraudulent. *Id.*

[97] RiverHills challenges the Ponzi scheme presumption, arguing that, based on Minnesota law, "[i]t is not always clear that every transfer is fraudulent" because "[s]ome Ponzi schemes start out as a legitimate business and others have other legitime businesses for which there are legitimate transfers." Doc. 38 at 22. To be clear: Madison Timber was never a legitimate business. It made no legitime transfers. Every dollar that flowed through Madison Timber was derived from defrauded investors. RiverHills's invitation to consider Minnesota law over the established law of the Fifth Circuit should be rejected.

[98] Defendants cannot argue that they received fees in exchange for reasonably equivalent value. The "primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved." *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006). "It takes cheek," the court wrote, "to contend that in exchange for the payments [the defendant] received, the RDI Ponzi scheme benefitted from [the defendant's] efforts to extend the fraud by securing new investments." *Id.* "We need not draw a conclusion on good faith," the court wrote, "as his defense would still fail because he did not receive the transfers from RDI in exchange for reasonably equivalent value." *Id.*; *see also* MISS. CODE ANN. § 15-3-113(1) (A defendant may keep money transferred to him if he proves he "took in good faith *and* for reasonably equivalent value.") (emphasis added).

The complaint alleges that Defendants "collected fees for their facilitation of the financial transactions that made the Madison Timber Ponzi scheme possible."[99] Because Madison Timber was a Ponzi scheme, it follows that Madison Timber's transfers of money to Defendants were "presumptively made with the intent to defraud." *Quilling*, 247 Fed. App'x at 586.

VII. THE *IN PARI DELICTO* AND "WRONGFUL CONDUCT" DOCTRINES DO NOT BAR THE RECEIVER'S CLAIMS.

Defendants all argue that the Receiver's claims against them are barred by the *in pari delicto* doctrine. Some argue that the Receiver's claims are barred by Mississippi's "wrongful conduct rule." In both instances, Defendants argue that the Receiver, having "stepped into the shoes" of Adams and Madison Timber, can have no right of action against them.[100] Now that the Receiver stands in the shoes of investors, too, the argument is academic. Nevertheless, Defendants' arguments have no support in law or equity.

[99] Doc. 1 at ¶ 37; *see also id.* at ¶¶ 65, 96, 103, 114, 143–45.

[100] Southern Bancorp contends the doctrine relieves it of liability because an "active wrongdoer" is more at fault than a "passive wrongdoer," and, according to Southern Bancorp, Lamar Adams was the "active" wrongdoer. Doc. 32 at 25. Southern Bancorp cites *Long Term Care, Inc. v. Jesco, Inc.*, 560 So. 2d 717 (Miss. 1990). Doc. 32 at 25. *Long Term Care* considered whether, under the doctrine of "common law indemnity," a tortfeasor who volunteered payment to the injured plaintiff in a premises liability case was entitled to indemnity from its fellow tortfeasor. The question here is not one of indemnity. And this is not a premises liability case. *Reed v. D & D Drilling & Expl., Inc.*, 27 So. 3d 414, 416 (Miss. Ct. App. 2009) (declining to consider an argument related to passive negligence because the case was not a premises liability case). In any event, Southern Bancorp was not a "passive wrongdoer." *See Borne v. Estate of Carraway*, 118 So. 3d 571, 588 (Miss. 2013) (quoting *Titus v. Williams*, 844 So. 2d 459, 466 (Miss. 2003) ("One is only passively negligent if he merely fails to act in fulfillment of duty of care which law imposes upon him, while one is actively negligent if he participates in some manner in conduct or omission which caused injury."); *J.B. Hunt Transp., Inc. v. Forrest Gen. Hosp.*, 34 So. 3d 1171, 1174 (Miss. 2010) (for a wrongdoer to be "passive," he must be "free of fault" and must not have "actively or affirmatively participate[d] in the wrong"). As expressly alleged in the complaint, Southern Bancorp actively participated in growing the Madison Timber Ponzi scheme.

A. The *in pari delicto* doctrine does not bar the Receiver's claims.

The *in pari delicto* doctrine is an equitable, affirmative defense, which provides that "a wrongdoer is not entitled to compel contribution from a joint tortfeasor." *Sneed v. Ford Motor Co.*, 735 So. 2d 306, 308 (Miss. 1999).

Trustmark spills a lot of ink arguing the Receiver, Madison Timber, and Adams are legally the same person.[101] It is true that the Receiver is the receiver for the estates of both Lamar Adams and Madison Timber Properties, LLC.[102] This does not mean, as Trustmark contends, that the Receiver wrongfully "enhance[s]" Adams or Madison Timber's rights or "reduce[s]" a defendants' rights just by the creation of the receivership estate. The Court's order of appointment vests in the Receiver the power to bring legal actions, including ones asserting tort claims, as the Receiver deems necessary.[103] Trustmark and the other Defendants are not forever absolved from liability just because Lamar Adams was a bad actor.

In federal equity receiverships, the Fifth Circuit has adopted what RiverHills's motion calls the "innocent successor" exception to the doctrine of *in pari delicto*. This exception allows a receiver to assert tort claims against professionals even though she has stepped into the wrongdoer's shoes. The rationale for applying the "innocent successor" exception in a federal equity receivership such as this is straightforward: A receiver has a duty to maximize the value of a receivership estate for the benefit of victims, and "[a]pplication of *in pari delicto* would undermine one of the primary purposes of the receivership." *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012). Applying the *in pari delicto* in a federal equity receivership would also "be inconsistent with the purposes of the [*in pari delicto*] doctrine," which is "not for the

[101] Doc. 40 at 9–11.

[102] Doc. 33, Securities & Exchange Commission v. Adams, et al., No. 3:18-cv-00252 (S.D. Miss.).

[103] Doc. 33, Securities & Exchange Commission v. Adams, et al., No. 3:18-cv-00252 (S.D. Miss.).

benefit of either party and not to punish either of them, but for the benefit of the public." *Id.* (quoting *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146, 151 (1947)). *See also Janvey v. Adams & Reese, LLP*, No. 3:12-CV-0495-N, 2013 WL 12320921, at *3 (N.D. Tex. Sept. 11, 2013) ("In other words, whether to apply *in pari delicto* typically depends on what best serves public policy.").

"It is [therefore] well established [in the Fifth Circuit] that when the receiver acts to protect innocent creditors . . . [s]he can maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so." *Jones*, 666 F.3d at 966 (internal quotation marks and citation omitted).[104] Indeed, the *Stanford* court has refused to apply the doctrine of *in pari delicto* to that receiver's claims against professionals. *See, e.g.*, *Greenberg Traurig, LLP*, 2014 WL 12572881, at *4 ("This Court has already held that the *in pari delicto* defense has little application when a receiver seeks to reclaim assets for innocent investors."); *Janvey v. Willis of Colorado, Inc.*, No. 3:13-CV-3980-N, 2014 WL 12670763, at *4 (N.D. Tex. Dec. 5, 2014) (same); *Adams & Reese, LLP*, 2013 WL 12320921, at *3 ("The Fifth Circuit, when applying Texas law, seems to hold the view that when a receiver is protecting innocent creditors or recovering assets for investors and creditors, the defense of *in pari delicto* should be rejected generally.").[105]

[104] Bennie Butts, apparently in an attempt to avoid Fifth Circuit and Mississippi law supporting the Receiver's claims, states that the Receiver's argument is "based in large part" on the Fifth Circuit's ruling in *Jones*. Butts's analysis of *Jones* is flawed and misses the point. First, the Receiver was appointed for the estate of Madison Timber *and* Lamar Adams. Second, *Jones* makes clear that the receiver in that case "brought this suit on behalf of [the receivership entity] to recover funds for defrauded investors and other innocent victims. Application of *in pari delicto* would undermine one of the primary purposes of the receivership established in this case, and would thus be inconsistent with the purposes of the doctrine." *Jones*, 666 F.3d at 966. This is exactly what the Receiver is charged to do in this case. It's not just *Jones*, but the litany of other Fifth Circuit and Mississippi law, that support the Receiver's standing to bring claims against Butts and the other Defendants.

[105] Trustmark disparages the Receiver's reliance of the *Stanford* cases, arguing the Receiver asks the Court to "apply special rules" or some sort of "federal common law" to her claims. Doc. 40 at 11–12. Not so. There is no question that Mississippi law applies to the Receiver's tort claims, but the Receiver is a federal equity receiver—she is specifically charged by Court order to institute litigation against third parties to

RiverHills speculates that Mississippi would not recognize the "innocent successor" exception.[106] RiverHills premises its argument, also espoused by Southern Bancorp, on the Seventh Circuit case *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F.3d 230 (7th Cir. 2003). The Fifth Circuit in *Jones*, however, considered *Knauer* and found it inapplicable, noting that "the equities of that case [decided under Indiana law] favored application of *in pari delicto* because the defendants were neither directly involved in the embezzlements at issue nor benefitted from them." *Jones*, 666 F.3d at 968, n.12. No Mississippi court—state or federal—has cited *Knauer*. Neither RiverHills nor Southern Bancorp explain why they believe Mississippi courts would look to courts in the Seventh Circuit for guidance, when courts in the Fifth Circuit have addressed the issue repeatedly and convincingly. Neither RiverHills nor Southern Bancorp explain why they believe Mississippi courts would reject the Fifth Circuit's rationale in virtually identical cases.

Indeed, Mississippi courts have long recognized "important limitations" to the *in pari delicto* doctrine. *Morrissey v. Bologna*, 123 So. 2d 537, 543 (Miss. 1960).[107] "Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him." *Id.*; *see also Rideout v. Mars*, 54 So. 801, 802 (Miss.

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maximize the benefit to the Receivership Estate. She, like any other plaintiff in a civil lawsuit, must (and will) prove each element of each of her claims against Defendants. The Receiver relies on the *Stanford* cases not to espouse that "federal common law" governs her claims, but because those cases, also within the Fifth Circuit, bear significant factual and legal similarity to the cases brought by the Receiver.

[106] Doc. 38 at 7–8.

[107] Southern Bancorp and Bennie Butts cite *Latham v. Johnson*, which states only the black-letter law that the *in pari delicto* doctrine "only 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." 262 So. 3d 569, 582 (Miss. Ct. App. 2018). The issue in *Latham* was whether the defendant waived the affirmative defense of *in pari delicto* by failing to plead the defense in its answer. *Latham* did not address the merits of the *in pari delicto* doctrine in Mississippi and did not involve a federal equity receivership.

1911) ("However, there is a well-defined exception to that rule, which is that, where the paramount public interest demands it, the court will intervene in favor of one as against the other.").

Trustmark contends "[i]t is not 'equitable' to shift losses from Adams's investors (who willingly pursued 'implausibly high and consistent guaranteed' returns) to Trustmark or its shareholders."[108] Trustmark says the only public policy that supports the Receiver being able to bring her claims "is simply that she should win, so she can take money from some private parties, and distribute it to others."[109] To be clear, the Receiver is not attempting to "shift losses" from the victims of the Madison Timber Ponzi scheme; she is seeking to hold accountable not just "some private parties," but those third parties, including Trustmark who participated the Ponzi scheme and without whose assistance those investors would have not become victims. According to Trustmark, the Receiver should not be able to bring her claims because victims of the Madison Timber Ponzi scheme "had ample opportunity to protect themselves."[110] It takes cheek for Trustmark to make that argument. Investors could not see what Trustmark saw. Trustmark new Madison Timber was a Ponzi scheme and instead of shutting it down helped Adams move it to a new bank.

Plainly, there is a "paramount public interest" in the Receiver's recovery. There is no public interest in, and the purpose of the *in pari delicto* doctrine is not served by, barring the Receiver from pursuing claims against defendants who are alleged to have knowingly facilitated the banking transactions underlying each Madison Timber investment. Excepting the Receiver from the *in pari delicto* doctrine is prudent and consistent with Fifth Circuit **and** Mississippi law.

[108] Doc. 40 at 11.

[109] Doc. 40 at 16.

[110] Doc. 40 at 16.

Trustmark contends that to allow the Receiver to assert tort claims on behalf of the Receivership Estate would "invite abuse of the receivership process," allowing the Receiver to "gain strategic advantages in civil litigation, or to deprive defendants of rights."[111] Nonsense. Courts in the Fifth Circuit have flatly rejected the argument that a federal equity receiver lacks standing to assert tort claims against third parties. A federal equity receiver may pursue any claims against any third parties whose actions contributed to the success of a Ponzi scheme, and therefore to the debts of a receivership estate. *See, e.g., Willis*, 945 F.3d at 899 ("There is no dispute that the receiver and Investors' Committee had standing to bring their [aiding and abetting, breach of fiduciary duty, and other tort claims] against Willis and BMB. They bring only the claims of the Stanford entities—not of their investors—alleging injuries only to the Stanford entities, including the unsustainable liabilities inflicted by the Ponzi scheme."); *Rotstain v. Trustmark Nat'l Bank*, No. 3:09-CV-2384-N, 2015 WL 13034513, at *9 (N.D. Tex. Apr. 21, 2015) ("The Court has rejected [the argument that the Receiver has no standing to bring tort claims] in the past and held that the Receiver has standing to assert tort claims based on the harm to the Receivership Estate's ability to repay its creditors."); *Greenberg Traurig, LLP*, 2014 WL 12572881, at *4 ("This Court has held that the Receiver may assert tort claims against third parties based on allegations that the third parties' torts contributed to the liabilities of the Receivership Estate."); *Willis of Colorado, Inc.*, 2014 WL 12670763, at *3 (N.D. Tex. Dec. 4, 2015) (allowing the receiver to pursue "common law tort claims because they allege that Defendants' participation in a fraudulent marketing scheme increased the sale of Stanford's CDs, ultimately resulting in greater liability for the Receivership Estate"); *Adams & Reese, LLP*, 2013 WL 12320921, at *1 (N.D. Tex. Sept. 11, 2013) (allowing the receiver to pursue civil conspiracy claim is for conspiracy to commit fraud,

[111] Doc. 40 at 10.

breaches of fiduciary duty, fraudulent transfers, and conversion because the lawyer defendants "were in advantageous positions to discover Stanford's fraud and . . . they either failed to discover it or discovered it and chose not to act because they benefitted from the enterprise through their director fees or legal fees"); *see also Marion v. TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010) ("[a] receiver no doubt has standing to bring a suit on behalf of the [receivership entity] against third parties who allegedly helped that [receivership entity's] management harm the [receivership entity].").[112]

Like the courts before it, this Court too should find "*in pari delicto* no impediment to the Receiver's standing to assert [her] tort claims." *Greenberg Traurig, LLP*, 2014 WL 12572881, at *4.

B. Mississippi's "wrongful conduct rule" does not bar the Receiver's claims.

Trustmark and Bennie Butts argue that Mississippi's "wrongful conduct rule" is a "particularly powerful" bar to the Receiver's claims.[113] Because this rule effectively mirrors the *in pari delicto* maxim, their arguments fail for the same reasons discussed above.

Trustmark and Butts rely heavily on *Price v. Purdue Pharma Co.*, 920 So. 2d 479 (Miss. 2006). The plaintiff in *Price* sued medical professionals who prescribed OxyContin to Price for, among other things, negligence, malicious conduct, fraud, and malpractice. Price had devised a scheme in which he saw multiple medical professionals, requested OxyContin prescriptions, and then used several pharmacies to acquire the drugs. The *Price* court granted defendants' motions for

[112] This Court too, in a related action in which the Receiver asserts nearly identical claims against Defendants who contributed to the growth of the Madison Timber Ponzi scheme, has found that "Fifth Circuit and Mississippi law support the Receiver's causes of actions." Doc. 49, *Alysson Mills v. The UPS Store, Inc., et al.*, No. 3:19-cv-00364 (S.D. Miss.); *see also* Doc. 134 at 3, *S.E.C. v. Adams, et al.*, No. 3:18-cv-252 (S.D. Miss.) (noting that the Receiver has standing to pursue a variety of actions, including tort actions, against third parties).

[113] Doc. 40 at 13; Doc. 34 at 29. RiverHills makes only passing mention of the "wrongful conduct rule." Doc. 38 at 8.

summary judgment, finding that Price's scheme to illegally procure multiple prescriptions of a Schedule II drug barred him from then seeking damages, because "Price absolutely requires the essential aid from his own misdeeds to establish his claim." *Id.* at 485.

Obviously, *Price* is factually distinguishable from this case. To start, *Price* is not a Ponzi scheme case and does not involve a receiver. Neither Trustmark nor any defendant cites a case from a Mississippi court in which the "wrongful conduct rule" was applied in these circumstances.[114]

Accepting Trustmark and Butts's position, no federal equity receiver in a Ponzi scheme case could ever sue anyone to recover funds for defrauded investors. That just simply is not the law. Mississippi's "wrongful conduct rule" does not bar the Receiver's tort claims.

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[114] Trustmark grasps at straws by pointing to an opinion from a Michigan bankruptcy court for support. In *In re Munivest Servs., LLC*, 500 B.R. 487 (Bankr. E.D. Mich. 2013), the United States Bankruptcy Court for the Eastern District of Michigan applied Michigan's "wrongful conduct rule" to a bankruptcy trustee's claims against an accounting firm for its assistance in the debtors' Ponzi scheme. Under Michigan's jurisprudence, a court need not look to the policies underlying the applicability of the wrongful-conduct rule to a specific case. Trustmark points to no similar rule in Mississippi. The *In re Munivest Services* court noted that the trustee's position that Michigan's wrongful-conduct rule could not apply to him because he did not participate in the debtors' misconduct "is not without logic or support," and "**with the exception of the Fifth and Ninth Circuits**," other courts "held that under § 541, if *in pari delicto* would apply under state law to bar claims brought by the debtor, then in pari delicto likewise bars the same claims even if brought by a bankruptcy trustee." *Id.* at 498 (emphasis added).

Importantly, the Fifth Circuit in *Jones* expressly noted the differences between bankruptcy trustees and federal equity receivers—"Wells Fargo relies upon a number of cases that have applied the *in pari delicto* doctrine against bankruptcy trustees. These cases, however, are plainly distinguishable . . . . **We therefore are not persuaded by Well Fargo's analogy to bankruptcy trustees**." *Jones*, 666 F.3d at 967–68 (emphasis added).

The other cases cited by Trustmark are likewise inapposite. *See Cahn v. Copac, Inc.*, 198 So. 3d 347 (Miss. Ct. App. 2015) (wrongful conduct rule applied in medical malpractice and wrongful death action against treatment facility in connection with death of parents' son after he ingested controlled substance); *Western Union Telegraph Co. v. McLaurin*, 66 So. 739 (Miss. 1914) (wrongful conduct rule barred plaintiff's claims when his relationship with a prostitute was revealed to his mother and the community by incorrect delivery of telegrams).

CONCLUSION

Defendants have not stated a basis for dismissing any of the Receiver's claims against them. The Receiver asks to be permitted to proceed with discovery, in anticipation of presenting of her case to a jury.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Date: May 21, 2020 */s/ Kristen D. Amond*