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
JUD WATKINS'S MOTION TO COMPEL ARBITRATION

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, opposes the motion to compel arbitration [Doc. 36] filed by Defendant Jud Watkins.

INTRODUCTION

The complaint

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.

Defendant Watkins has the distinction of having been Adams's personal banker at two banks: Trustmark and RiverHills. "Watkins was hired by Trustmark in 2001 where he remained employed until he began working at RiverHills on April 20, 2015."[1] Adams opened accounts at Trustmark for Madison Timber Company and Madison Timber Properties in 2009 and 2012, respectively, and Trustmark was the primary bank through which Adams conducted Madison Timber's business until October 2016.[2] After Adams closed Madison Timber's accounts at Trustmark in October 2016, he opened a new account at RiverHills. To explain Madison Timber's change of banks, Mike Billings, one of Madison Timber's recruiters, told investors that "[o]ur banker of some twenty plus years [Watkins] left Trustmark Bank, and we of course went with him."[3]

The complaint alleges that, at Trustmark, Watkins and his colleague Bennie Butts nurtured their relationship with Adams and protected it from scrutiny. Watkins and Butts 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. They could see the tell-tale pattern of a Ponzi scheme and chose to enable it:

> 36. While they nurtured their relationship with Adams and financed his separate "deals," when presented with Madison Timber's suspicious account activity, Butts and Watkins looked the other way or, worse, provided Adams cover.
>
> 37. Throughout this time period Trustmark, Butts, and Watkins collected fees for their facilitation of the financial transactions that made the Madison Timber Ponzi scheme possible. Every month, Trustmark watched investors' money flow into Madison Timber by wire and check. On the first and the fifteenth of every

[1] Doc. 36 at 3.

[2] Doc. 1 at ¶ 27.

[3] Doc. 1 at ¶ 79.

month, Trustmark watched the money flow back out again by wire and check. Anyone could see the tell-tale pattern.

38. Anyone could see that all of the money in Madison Timber's account came from and went back to the same people. The money never came from lumber mills.

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."

The complaint alleges that, at RiverHills, Watkins was glad to have Adams's business and helped him continue the ruse:

> 81. Watkins immediately extended home equity lines of credit to Adams and Kelly. Adams used his line of credit to move money into the RiverHills Madison Timber account when he needed it to pay investors.
>
> 82. Like clockwork, every first and fifteenth day of the month, Adams made monthly payments to investors. The wires were numerous and required careful attention. RiverHills's employees took turns attending to them. The assigned employees started preparing the wires at 3:00 p.m. on the business day before the wires were scheduled to issue. RiverHills's employees were so attentive they sometimes caught mistakes in Madison Timber's wiring instructions to them.
>
> 83. RiverHills prided itself on its efficiency. When RiverHills's employees made a mistake, Watkins wrote an eight-paragraph letter addressed to Adams and Kelly offering a formal apology. Among other things, the letter observed that RiverHills had "facilitated an average of 120 wire transfer transactions each month for [Madison Timber]" and "d[id] not take lightly" that responsibility:
>
> > Lamar and Wayne,
> >
> > First, please allow us to take this opportunity to apologize to you both for the error involving the recent wire transfers to [the investor's] account. We understand how important [the investor's] relationship is to your company. We want to assure you that we value both you and your business in that same regard.
> >
> > Yesterday, we were very concerned to learn of the difficulties you encountered over the last few days regarding a series of wire

> transfers originating on October 23rd. Madison Timber Properties is considered a core customer of RiverHills Bank. Your relationship is invaluable to us. As you know, since moving your accounts to our institution nearly one year ago we have facilitated an average of 120 wire transfer transactions each month for your company without error. Our goal is 100% accuracy.
>
> ***
>
> Although errors can happen from time to time, the most important piece that was missing in this situation was communication. We firmly believe that timely communication would have mitigated the circumstance surrounding this issue. We stressed to . . . our internal employees, that accurate and timely communication to our customers is a non-negotiable and of primary importance in maintaining a satisfactory relationship.
>
> If either of you [or the investor] have any further concerns regarding our institution and our wire transfer process we would welcome the opportunity to share information at your nearest convenience. Thank you for placing your trust in RiverHills to handle these important transactions for your company. It is a responsibility that we do not take lightly. Thank you for banking with us.

Watkins knew the letter was intended to soothe not Adams or Kelly but the affected investor. Adams thanked Watkins in an email, adding: "This will really help us out . . . . We are appreciative of you[r] efforts on our behalf. We love the relationship and hope to continue it for a very long time."

84. Anyone could see that the money flowed into the RiverHills Madison Timber account—primarily from FNBC and Southern Bancorp but also from Adams's RiverHills line of credit—and then flowed right back out. Again, the month of March 2018 is indicative. The RiverHills Madison Timber account's balance started at $5,599,637 on March 1 and ended at $5,532,111 on March 31. In between those two dates, the account received thirty deposits totaling $15,414,790, and made 340 payments totaling $15,482,316.

85. From Madison Timber's FNBC account alone, the RiverHills Madison Timber account received wires in the amounts of $3,600,000 on February 28; $1,500,000 on March 2; $300,000 on March 6; $200,000 on March 7; $550,000 on March 8; $75,000 on March 14; $275,000 on March 16; $100,000 on March 19; $1,800,000 on April 2; $150,000 on April 6; and $1,500,000 on April 17. Adams surrendered on April 19, and the account was frozen.

86. After rumors of RiverHills's relationship with Adams and Madison Timber spread, a friend asked Watkins if RiverHills was "going to be ok." Watkins answered: "Yeah. We're fine. No risk of loss. Long story."

The complaint asserts against Watkins and his co-Defendants claims 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.

Watkins's motion to compel arbitration

Watkins's motion asks this Court to send the Receiver's claims against him to arbitration and dismiss him from this civil action. In support, Watkins points to arbitration agreements between Madison Timber and RiverHills that purport to require Madison Timber to arbitrate "any claim" it may have against Watkins.[4] Watkins argues the Receiver, standing in Madison Timber's shoes, is bound by the same arbitration agreements, therefore she must arbitrate any and all claims she may have against Watkins.

Watkins is correct that the arbitration agreements between Madison Timber and RiverHills are unlike the arbitration agreement that this Court previously addressed in the related case *Alysson Mills vs. Butler Snow, et al.*, No. 3:18-cv-00866 (S.D. Miss.). The purported arbitration agreement between Madison Timber and Butler Snow was both narrower and internally inconsistent in ways not present here.

That said, the arbitration agreements between Madison Timber and RiverHills do not require the Receiver to arbitrate any and all claims she may have against Watkins. Even assuming that the arbitration agreements are otherwise valid and enforceable, 1) they are between Madison Timber and RiverHills only and so do not apply to claims against Watkins arising from his employment by Trustmark; 2) they do not apply to the Receiver's claims to the extent she stands in the shoes of investors; 3) they apply only to claims "related to this Agreement or the Deposit

[4] Doc. 35-2.

Account," not to claims related to Watkins's role in the perpetuation of the Madison Timber Ponzi scheme; and 4) arbitration inherently conflicts with the policies underlying the receivership.

ARGUMENT

1. The arbitration agreements are between Madison Timber and RiverHills only and so do not apply to claims against Watkins arising from his employment by Trustmark.

Even assuming that the arbitration agreements are otherwise valid and enforceable, they are between Madison Timber and RiverHills only and so do not apply to claims against Watkins arising from his employment by Trustmark. Watkins writes in his motion: "The claims against *RiverHills and Watkins* arise out of and relate to Adams' use of two accounts he opened with RiverHills."[5] But Watkins ignores entirely the complaint's claims against *Trustmark and Watkins*.

To state the obvious, RiverHills and Trustmark are different banks. The arbitration agreements on which Watkins relies are between "Madison Timber Properties, LLC" and "RiverHills Bank."[6] The arbitration agreements all bear the title "DEPOSIT ACCOUNT ARBITRATION AGREEMENT" and, immediately below, the qualifier "Applicable to Account Number . . . ":

DEPOSIT ACCOUNT ARBITRATION AGREEMENT

Applicable to Account Number [redacted] **opened on** 11/21/2016.

"CUSTOMER"	"BANK"
MADISON TIMBER PROPERTIES, LLC PO BOX 1381 MADISON MS 39130-1381	RiverHills Bank 100 FOUNTAINS BLVD MADISON, MS 39110

[Doc. 35-2]

[5] Doc. 36 at 2.

[6] Docs. 35-2, 35-5, 35-8.

DEPOSIT ACCOUNT ARBITRATION AGREEMENT

Applicable to Account Number [redacted] **opened on** 10/07/2016.

"CUSTOMER"	"BANK"
MADISON TIMBER PROPERTIES, LLC PO BOX 1381 MADISON MS 39130-1381	RiverHills Bank 100 FOUNTAINS BLVD MADISON, MS 39110

[Doc. 35-5]

* All accounts now held with RiverHills Bank and all future accounts opened/held with RiverHills Bank.

DEPOSIT ACCOUNT ARBITRATION AGREEMENT

Applicable to Account Number see above **opened on** _____.

"CUSTOMER"	"BANK"
Madison Timber Properties LLC	RiverHills Bank

[Doc. 35-8]

By their own express terms, the arbitration agreements, if they apply to anything, apply only to accounts held at RiverHills. They do not apply to accounts held at Trustmark.

Watkins's motion does not purport to argue that any agreement between Madison Timber and RiverHills governs Madison Timber's separate relationship with Trustmark. Indeed, Watkins does not even acknowledge the complaint's allegations against Watkins arising out of his employment at Trustmark, much less explain how the RiverHills arbitration agreements, which are limited by their own express terms to accounts held at RiverHills, would reach those distinct claims.

Watkins attempts to sidestep that flaw in his argument by contending simply that, even if "wholly groundless," any question as to the RiverHills arbitration agreements' scope must be decided by an arbitrator. Watkins cites *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), in support, but that opinion hardly applies here. The question in *Henry Schein, Inc.*

was who got to decide "whether the parties' agreement barred arbitration of disputes when the plaintiff sought injunctive relief." *Henry Schein, Inc.*, 139 S. Ct. at 528. The Supreme Court determined the arbitrator got to decide—but it added: "To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Id.* at 530.

Watkins cites *Adams Cmty. Care Ctr., LLC v. Reed*, 37 So. 3d 1155 (Miss. 2010), for the conclusory proposition that the RiverHills arbitration agreements are "valid." *Adams Community Care Center, LLC* sets forth the elements of a valid arbitration agreement, and the first is "two or more contracting parties."[7] For the arbitration agreements in question, the purported contracting parties are Madison Timber and RiverHills—not Madison Timber and Trustmark. By their own express terms, the arbitration agreements purport to apply only to accounts held at RiverHills. If the arbitration agreements are valid, they are valid only between Madison Timber and RiverHills. They are not valid between Madison Timber and Trustmark. They do not require the Receiver to arbitrate the complaint's claims against Watkins arising from his employment by Trustmark.

2. The arbitration agreements do not apply to the Receiver's claims to the extent she stands in the shoes of investors.

Watkins's motion correctly observes the Receiver "stands in the shoes of MTP and Adams."[8] No one disputes that proposition. The complaint itself states: "Plaintiff Alysson Mills is the Court-appointed Receiver for the estates of Adams and Madison Timber. She stands in

[7] "The elements of a contract are '(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation.'" *Adams Cmty. Care Ctr., LLC v. Reed*, 37 So. 3d 1155, 1158 (Miss. 2010) (citation omitted).

[8] Doc. 36 at 8.

Madison Timber's shoes for the express purpose of maximizing assets available to Adams's victims."[9]

But Watkins's motion ignores entirely that the complaint also states that "in aid of the Receivership Estate's recovery, investors have assigned their claims against Defendants to the Receiver."[10] This case is therefore unique in that, as the holder of assignments executed by investors, the Receiver also stands in investors' shoes.

Watkins's motion does not purport to argue that the arbitration agreements bind investors. The only signatories to the arbitration agreements are Lamar Adams and Wayne Kelly. Investors are not signatories. Investors did not agree to submit their claims to arbitration. "A party will not be required to submit to arbitration 'any dispute which he has not agreed so to submit.'" *LAGB, LLC v. Total Merchant Services, Inc.*, 284 So. 3d 720, 728 (Miss. 2019) (citation omitted).

An arbitration agreement will bind a non-signatory "[o]nly in the rarest of circumstances, and with caution." *LAGB, LLC*, 284 So. 3d at 729 (citation omitted). "[A] signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies." *Olshan Foundation Repair Co. of Jackson, LLC v. Moore*, 251 So. 3d 725, 728 (Miss. 2018) (citation omitted). Neither circumstance applies here. Investors are not third-party beneficiaries of Madison Timber's contractual relationship with RiverHills because Madison Timber and RiverHills's contracts do not reference or allude to investors, *e.g., Olshan Foundation Repair*, 251 So. 3d at 730 (in action against contractor, homeowners' daughter's tort claims were not subject to arbitration, where daughter "was not mentioned in [homeowners'] contract"); *Simmons Housing, Inc. v. Shelton*, 36 So. 3d 1283 (Miss.

[9] Doc. 1 at ¶ 5.

[10] Doc. 1 at ¶ 8.

2010) (in action against mobile home seller, children were not third-party beneficiaries to sales agreement signed by their parents, where the children "were not referenced or alluded to in the contract"), and investors' claims against Watkins and RiverHills are tort claims, not contract claims, *e.g.*, *LAGB, LLC*, 284 So. 3d at 729 ("LAGB has not made a contract claim against any of the credit-card companies."); *Olshan Foundation Repair*, 251 So. 3d at 730 (in action against contractor, homeowners' daughter's tort claims were not subject to arbitration). The doctrine of equitable estoppel also does not apply here, because investors "had no knowledge of the contract, and, therefore, [they] could not have benefited knowingly from the contract." *Id.*

In short, to the extent the Receiver stands in investors' shoes, the arbitration agreements are irrelevant.

3. The arbitration agreements apply only to claims "related to this Agreement or the Deposit Account," not to claims related to Watkins's role in the perpetuation of the Madison Timber Ponzi scheme.

The arbitration agreements state that they apply to claims "related to this [Deposit Account Arbitration] Agreement or the Deposit Account."[11] The Receiver's claims relate instead to Watkins's role in the perpetuation of the Madison Timber Ponzi scheme. *E.g.*, *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170, 178 (Miss. 2007) ("Blakeney's claim of fraud in the underlying suit is civil fraud outside the scope of the arbitration agreement. Our holding in today's case, in effect, upholds the arbitration agreement as a valid agreement, but determines that Blakeney's claims are outside the scope of the arbitration agreement.").

In *Rogers-Dabbs*, the Mississippi Supreme Court acknowledged that the question of arbitrability, or scope, is often committed to the arbitrator. *Blakeney*, 950 So. 2d at 177 n.9. But

[11] Docs. 35-2, 35-5, 35-8.

there was no need to submit that question to arbitrator where "no reasonable person would submit to arbitration" a case involving "the claim of civil fraud totally outside the formation of the agreement." *Id.* at 177 ("While Blakeney no doubt agreed to arbitrate claims that originated from the sale of the vehicle or related to the sale of the vehicle, no reasonable person would agree to submit to arbitration any claims concerning a Hummer to which he would never receive a title; a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles; and the commission of civil fraud against him by misappropriating his title to the Hummer he purchased and forging his name on fake titles and bills of sale on various stolen vehicles-actions of which Blakeney was presumedly totally unaware at the time of the execution of the documents in question, including the arbitration agreement.").

4. Arbitration inherently conflicts with the policies underlying the receivership.

Even if Watkins were otherwise correct that the arbitration agreements are valid and apply to any and all claims the Receiver may have against Watkins, the Court might nevertheless decline to enforce the arbitration agreements because arbitration inherently conflicts with the policies underlying the receivership.

In her appellee's brief in Butler Snow's appeal of this Court's denial of Butler Snow's motion to compel arbitration, the Receiver argues there are compelling reasons for rejecting arbitration agreements in Ponzi scheme cases. Indeed, in *Janvey v. Alguire*, 847 F.3d 231, 240 (5th Cir. 2017), the Fifth Circuit agreed that arbitration in cases such as this raises "important concerns about undermining Congress's goal of consolidating receivership claims before a single court." The purpose of a receivership is "to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 3:09-cv-298-N, 2009 WL 8707814, at *3 (N.D. Tex. Oct. 9, 2009) (quoting *S.E.C. v. Hardy*, 803 F.2d 1034,

1038 (9th Cir. 1986)); *see also Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 895 n.27 (5th Cir. 2019) (citing *Janvey v. Alguire*, No. 09-cv-0724, 2014 WL 12654910, at *17 (N.D. Tex. July 30, 2014) ("The purpose of federal equity receiverships is . . . to marshal assets, preserve value, equitably distribute to creditors, and, either reorganize, if possible, or orderly liquidate.")). The receivership consolidates all claims related to receivership property, providing a centralized forum for their resolution. Arbitration, however, undermines that consolidation and interferes with efficient administration of the receivership estate. The policy justifications that permit a bankruptcy trustee or a liquidating agent to reject an agreement to arbitrate ought to apply with equal force to a federal equity receiver.

CONCLUSION

There are compelling reasons for rejecting the arbitration agreements in question outright—but in any event 1) they are between Madison Timber and RiverHills only and so do not apply to claims against Watkins arising from his employment by Trustmark; 2) they do not apply to the Receiver's claims to the extent she stands in the shoes of investors; and 3) they apply only to claims "related to this Agreement or the Deposit Account," not to claims related to Watkins's role in the perpetuation of the Madison Timber Ponzi scheme. For any of the reasons stated, the motion should be denied.[12]

[12] Even if the Court determines that the Receiver must arbitrate her claims against Watkins, a stay—not dismissal—is appropriate. As Watkins acknowledges, dismissal is appropriate only "when all of the issues raised in the district court must be submitted to arbitration." Doc. 36 at 9 (citing *Alford v. Dean Whitter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)).

May 21, 2020

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*