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. JON DARRELL SEAWRIGHT, Defendant.	Case No. 3:20-cv-232 Related to Case Nos. 20-ap-11, *Alysson Mills v. Jon Darrell Seawright*; 19-bk-3921, *In re: Jon Darrell Seawright*; 3:18-cv-866, *Alysson Mills v. Butler Snow LLP, et al.*; and 3:18-cv-252, *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC* Hon. Carlton W. Reeves, District Judge Hon. F. Keith Ball, Magistrate Judge

RECEIVER'S OPPOSITION TO JON DARRELL SEAWRIGHT'S MOTION TO DISMISS

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, opposes the motion to dismiss filed by Defendant Jon Darrell Seawright.

INTRODUCTION

The Receiver's original complaint

On December 19, 2018, the Receiver filed a 45-page complaint against Jon Seawright, Brent Alexander, their company Alexander Seawright, LLC, and their employer Baker Donelson.[1] The complaint was not an average complaint. It told an unprecedented story in careful detail. It is not every day that a law firm such as Baker Donelson allows its agents, here Jon Seawright and Brent Alexander, to use their positions of trust and their firm's name and resources to sell

[1] Doc. 1, *Alysson Mills v. Butler Snow LLP, et al.*, No. 3:18-cv-866 (S.D. Miss.).

investments of any kind, much less investments in a Ponzi scheme. The complaint alleged against Seawright claims for aiding and abetting; civil conspiracy; recklessness, gross negligence, and at a minimum negligence; fraudulent transfer; and violations of Mississippi's Racketeer Influenced and Corrupt Organization Act.

Everyone filed motions to dismiss the Receiver's complaint. Everyone argued the Receiver had not stated sufficient facts to establish their liability. Everyone argued the Receiver had no standing to sue them to recover money for defrauded investors.

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

After the motions to dismiss had been fully briefed, Baker Donelson filed two more unsolicited briefs, both insisting that the Receiver is not the proper party to hold Baker Donelson liable because, it argued, she lacked standing to sue it. On October 1, 2019, the Court instructed the Receiver to file an amended complaint to address Baker Donelson's arguments.

Seawright's petition for bankruptcy

On November 3, 2019, Seawright filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code.[2] In his filings he represents that he has a net worth of $1.29 million but owes creditors up to $166 million. Of that amount, he attributes $165 million to the Receivership Estate. Seawright purports to have no assets available to pay creditors—nevertheless he seeks a discharge of all debts.

[2] Doc. 1, *In re: Jon Darrell Seawright*, No. 19-03921 (Bankr. S.D. Miss).

In filing his petition for bankruptcy, Seawright availed himself of the automatic stay provided to petitioners for bankruptcy pursuant to 11 U.S.C. § 362.

The Receiver's amended complaint

The Receiver filed an amended complaint against Seawright, Alexander, Alexander Seawright, LLC, and Baker Donelson on November 22, 2019.[3] The amended complaint acknowledged that, at the time of its filing, litigation against Seawright was stayed.

The amended complaint's most meaningful addition is at paragraphs 5 through 8 and addresses the Receiver's standing. To remove any doubt that the Receiver has standing to sue any third party whose actions contributed to the success of the Madison Timber Ponzi scheme, investors voluntarily assigned their claims against third-party defendants, including Seawright, to the Receiver. The result is that the Receiver now has standing to sue third-party defendants, including Seawright, in not one but two ways: because she is the court-appointed receiver for Madison Timber and also because investors have executed assignments that entrust the right to sue to her.

Alexander, Alexander Seawright, LLC, and Baker Donelson moved to dismiss the amended complaint on the same bases that they moved to dismiss the original complaint. Those motions are still pending.

The Receiver's adversary complaint

On February 7, 2020, the Receiver filed an adversary complaint in Seawright's bankruptcy proceeding that objects to the discharge of his debt to the Receivership Estate on the basis that the

[3] Doc. 57, *Alysson Mills v. Butler Snow LLP, et al.*, No. 3:18-cv-866 (S.D. Miss.).

debt flows from his false pretenses, false representations, and fraud.[4] On March 16, 2020, the Receiver moved to withdraw the reference—that is, to transfer the adversary complaint from the bankruptcy court to this Court.[5]

The adversary complaint includes a lot of the same facts as those alleged in the Receiver's amended complaint, with which the Court is already familiar. Relevant to Seawright, both complaints allege that, from 2011 until April 2018, Seawright and his partner, Alexander, invested other people's money in Madison Timber and split the "profits" with Lamar Adams.[6] They pitched their fund to potential investors, including Baker Donelson clients, as an exclusive "friends and family" fund.[7] They specifically targeted clients for whom Baker Donelson had recently closed transactions because they knew those individuals had money to invest.[8]

Seawright's motion to dismiss represents that Seawright merely "coordinat[ed] loans" to Madison Timber. [Doc. 8 at 2 ("That is the total extent of Seawright's involvement with Adams and Madison Timber.")]. That is simply untrue. In his own words, Seawright was responsible for everything: "papering everything, liaison with Lamar, monitoring process of sale, acquisition of timber rights, proper recording of documents, etc. . . . otherwise managing the investment."[9]

Seawright's motion to dismiss represents that Seawright "undertook meaningful evaluations" of the investments. [Doc. 8 at 3]. That also is simply untrue. In the beginning, Seawright asked questions such as "Who bears the loss with respect to the destruction of timber?

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[4] Doc. 1, *Alysson Mills vs. Jon Darrell Seawright*, No. 20-ap-11 (Bankr. S.D. Miss.).

[5] Doc. 1. The adversary complaint is Doc. 1-3. Seawright did not oppose the Receiver's motion, which the Court granted on May 12, 2020. Doc. 12.

[6] Doc. 1-3 at ¶¶ 28–30.

[7] Doc. 1-3 at ¶ 31.

[8] Doc. 1-3 at ¶ 32.

[9] Doc. 1-3 at ¶ 27.

For example, if there is fire, beetles, hurricane, whatever, who is on the hook? Is it an insured risk?" But he accepted Adams's answers to his questions without follow-up. Adams told Seawright that Madison Timber had "umbrella [insurance] on all tracts" (he added, "Expensive, don't need it but have it"). Seawright never asked to inspect the insurance, which did not exist.[10]

Seawright and Alexander led investors to believe that Seawright and Alexander personally inspected the timber underlying each investment. They gave investors term sheets that expressly represented that they, Seawright and Alexander, would personally inspect the property in question:

> Company [Seawright and Alexander] will inspect the property related to the Timber Rights, must receive the original, executed Note and timber deed and will inspect the executed agreement(s) with the timber mill(s).

Seawright and Alexander could not and did not inspect the property in question—nor "the executed agreement(s) with the timber mill(s)"—because such did not exist. The term sheets were patently false.[11]

Seawright and Alexander even devised a "Timber Rights Investment Closing Checklist" that included among its list of things to do "Review Mill Contract" and "Review Land re Timber." Seawright and Alexander could not and did not review any "Mill Contract" or "Land re Timber" because there was no "Mill Contract" or "Land re Timber" to review.[12] On information and belief, Seawright and Alexander "inspected" a purported timber tract only once or twice, at the very inception of their partnership with Adams. The "inspection" was hardly professional. Email traffic indicates "inspection" meant "[grab] a cooler of beer and make a loop."[13]

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[10] Doc. 1-3 at ¶ 33.

[11] Doc. 1-3 at ¶ 34.

[12] Doc. 1-3 at ¶ 35.

[13] Doc. 1-3 at ¶ 36.

As investors now know, the timber deeds and cutting agreements between landowners and Madison Timber were fake. Neither Seawright nor Alexander, nor anyone at Baker Donelson, ever called a landowner or checked a tract's title.[14] Adams required that an investor agree that he or she would not record the deed by which Madison Timber purported to grant its own rights to the investor unless and until Madison Timber failed to make a payment due under the promissory note. Seawright, a lawyer to whom his clients and investors looked to evaluate the investment, never questioned the requirement.[15]

In 2014, Adams decided that he did not want to have to manage Madison Timber during the month of December. He told his "bird dogs," including Seawright and Alexander, that Madison Timber would not issue checks in December going forward; what had been a 12-month payoff would become a 13-month payoff, skipping the last month of the year. Seawright passed on to investors the false explanation that mills shut down in December for OSHA inspections:

> In December 2014, we were notified that the mills intended to shut down operations in December to allow a break for the holidays and complete OSHA required inspections. With their operations down, they requested that no payment be made in December. The broker we worked with agreed to this, but on the condition that the interest rate is increased by 1%, which they agreed to. This increase is passed on to investors, so now all rounds pay out in 12 payments over 13 months, with a total interest of 13%. The result is the annual effective interest rate increased to 10.15%, so while the payments are stretched out by a month, the interest rate is better.[16]

Seawright and Alexander at one point bragged that they had "invest[ed] more than $20 million" of other people's money in Madison Timber.[17] On April 19, 2018, the day the Madison

[14] Doc. 1-3 at ¶ 43.

[15] Doc. 1-3 at ¶ 45.

[16] Doc. 1-3 at ¶ 48.

[17] Doc. 1-3 at ¶ 52.

Timber Ponzi scheme collapsed, they were getting ready to "take it to the next level"[18] by "deploying at $1 million a month beginning May 1."[19] "We pull this off," Alexander told Seawright, "we get rich."[20]

Between 2011 and April 2018, Seawright and Alexander withdrew over $980,000 from their fund, representing their "shares" of investors' returns. In addition Adams separately paid Seawright and Alexander over $600,000 representing undisclosed "birddog fees."[21]

Seawright's motion to dismiss

Seawright's motion to dismiss the Receiver's adversary complaint argues 1) the Receiver lacks standing to challenge the discharge of his debts; 2) the Receiver has not stated a claim for nondischargeability under 11 U.S.C. § 523(a), because, he says, she has not alleged false pretenses, false representations, or actual fraud (§ 523(a)(2)(A)); has not alleged fraud or defalcation while acting in a fiduciary capacity (§ 523(a)(4)); and has not alleged willful and malicious injury (§ 523(a)(6)); and, finally, 3) the doctrine of *in pari delicto* and the wrongful conduct rule bar the Receiver's claims anyway.[22] None of Seawright's motion's arguments have merit.

ARGUMENT

Because Federal Rules of Bankruptcy Procedure Rule 7012(b) incorporates Federal Rules of Civil Procedure Rule 12(b), the familiar standards apply. *See* Fed. R. Bankr. P. 7012(b). A complaint should state "factual content that allows the court to draw the reasonable inference that

[18] Doc. 1-3 at ¶ 49.
[19] Doc. 1-3 at ¶ 59.
[20] Doc. 1-3 at ¶ 50.
[21] Doc. 1-3 at ¶ 37.
[22] Doc. 8.

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

I. THE RECEIVER HAS STANDING.

Seawright argues the Receiver lacks standing to challenge the discharge of his debts because, he says, a) she is not a "creditor" because "she has not been declared to have a valid claim" and b) she lacks standing to sue for the reasons separately argued by Baker Donelson and Alexander in response to the Receiver's amended complaint.

The Receiver is a "creditor" of Seawright because she has a claim against him. *See* 11 U.S.C. § 101(10)(A) ("entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor"). Seawright cites no legal authority for the proposition that the Receiver's claim is not valid because it has not been reduced to final judgment. Indeed, contrary to his present argument, in his bankruptcy filings Seawright identifies the Receivership Estate as his biggest creditor (he says it accounts for $165 million of his alleged $166 million liabilities).[23]

The Receiver has standing to sue in not one but two ways. She has standing to sue any third party whose actions contributed to the success of the Madison Timber Ponzi scheme because 1)

[23] Doc. 3 at 15, *In re: Jon Darrell Seawright*, No. 19-03921 (Bankr. S.D. Miss).

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. No doubt the Court is already familiar with the parties' standing arguments. Seawright's motion to dismiss merely incorporates Baker Donelson's and Alexander's arguments by reference. To save the Court's time, the Receiver also incorporates by reference her responses to those arguments, as set forth in her oppositions to Baker Donelson's and Alexander's motions to dismiss.[24]

II. THE RECEIVER ALLEGES THREE SEPARATE GROUNDS FOR NONDISCHARGEABILITY.

Not every debtor is afforded a fresh start under the Bankruptcy Code. That opportunity is limited to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). When it allowed debt to be discharged, Congress did not intend to favor "the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Id.* The Bankruptcy Code therefore excepts certain debts from discharge in Section 523(a).

A. The Receiver alleges false pretenses, false representations, or actual fraud (§ 523(a)(2)(A)).

A debt is nondischargeable to the extent it arises from "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). "The United States Supreme Court has distinguished between 'false pretenses and representations' and 'actual fraud,' and recognized two distinct paths for nondischargeability under 523(a)(2)(A). Satisfaction of the elements of either path is sufficient." *In re Burk*, 583 B.R. 655, 665 (Bankr. N.D. Miss. 2018) (citing *Husky Int'l Elecs., Inc. v. Ritz*, —— U.S. ——, 136 S. Ct. 1581, 1586 (2016)).

[24] Docs. 65 and 66, *Alysson Mills v. Butler Snow LLP, et al.*, No. 3:18-cv-866 (S.D. Miss.).

For the first path, "false pretenses and representations," the Receiver must allege "(1) a knowing and fraudulent falsehood (2) describing past or current facts (3) that was relied on by the other party." *Id.* (citing *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir. 1992)). A claim of false pretenses "may be premised on misleading conduct without an explicit statement by the debtor." *In re Winstead*, 605 B.R. 432, 440–41 (Bankr. S.D. Miss. 2019). "The creditor's reliance need not be objectively reasonable, just subjectively justifiable." *In re Burk*, 583 B.R. at 665 (citing *Field v. Mans*, 516 U.S. 59, 76 (1995)). As summarized above, the Receiver alleges several knowing and fraudulent falsehoods regarding past or current facts on which investors relied and without which Madison Timber would not have grown. Among other things, Seawright represented *in writing* that he personally inspected the "property" and the "executed agreement(s) with the timber mill(s)" for each investment—factual impossibilities because there was no property, no timber, and certainly no executed agreements with timber mills.

For the second path, "actual fraud," the Receiver need only allege that Seawright participated in a fraudulent scheme. The Supreme Court recently held that actual fraud under § 523(a)(2)(A) "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs., Inc.*, 136 S. Ct. at 1586; *see also In re Cowin*, 864 F.3d 344, 351 (5th Cir. 2017) (quoting *MacDonald v. Buck (In re Buck)*, 75 B.R. 417, 420–21 (Bankr. N.D. Cal. 1987) ("[A] debtor who has made no false representation may nevertheless be bound by the fraud of another if a debtor is a knowing and active participant in the scheme to defraud.").[25] Willful blindness is no defense. A debtor who acts with "wrongful intent,"

[25] In addressing the effect of *Husky*, the Fifth Circuit noted on remand that *In re Acosta*, 406 F.3d 367, 372 (5th Cir. 2005), the case predominantly relied upon by Seawright, is "effectively overruled" to the extent that it "and other prior Fifth Circuit cases required that a debtor make a representation in order for a debt to be nondischargeable under § 523(a)(2)(A) [for actual fraud]." *Matter of Ritz*, 832 F.3d 560, 565 n.3 (5th Cir. 2016).

including with "reckless indifference to the truth," acts with the requisite knowledge. *In re Burk*, 583 B.R. at 666 (quoting *Farmers & Merchants State Bank v. Perry (In re Perry)*, 448 B.R. 219, 226 (Bankr. N.D. Ohio 2011) ("Willful blindness does not provide a defense to an action brought under § 523(a)(2)(A), and may instead be used as a factor indicative of fraud.") (internal quotation marks and alterations omitted). As summarized above, Seawright participated in a years-long scheme, from 2011 to 2018, to procure investments in Madison Timber. Seawright knew the scheme was a fraud—he himself made false representations of fact in furtherance of the scheme—but at a minimum the Receiver alleges facts that if true establish he was recklessly indifferent to the truth.

There also can be no question that Seawright benefitted from the Madison Timber Ponzi scheme because he received several hundreds of thousands of dollars in "commissions." "[A] person who knowingly receives fraudulent funds has committed fraud and the debt is nondischargeable." *In re Burk*, 583 B.R. at 667 (citing *Husky*, 136 S. Ct. at 1589); *see also id.* ("One who knowingly receives embezzled money is practicing the same level of deception as the recipient of a fraudulent conveyance who knows that he is receiving funds that he should not.").

B. The Receiver alleges fraud or defalcation while acting in a fiduciary capacity (§ 523(a)(4)).

A debt is nondischargeable to the extent it arises from "fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4).

Seawright contends § 523(a)(4) only applies to "technical trusts." [Doc. 8 at 7]. Not true. Section 523(a)(2)(4) applies equally to "debts arising from misappropriation by persons serving in a traditional, pre-existing fiduciary capacity, as understood by state law principles (e.g., bank officers, executors, guardians, receivers)." *In re Smith*, 585 B.R. 359, 372 (Bankr. N.D. Miss. 2018). The adversary complaint alleges that Seawright and his company, Alexander Seawright,

LLC, formed a joint venture with Adams and Madison Timber and therefore Seawright owed a statutory duty to Adams and Madison Timber to refrain from "engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." Miss. Code Ann. § 79-13-404(c).[26] The adversary complaint also alleges that Seawright knew that Adams owed Madison Timber fiduciary duties of care and aided him in breaching those duties by assisting Adams in sustaining a singular fraud over many years.[27]

Furthermore, "the intent and actions of co-conspirators is sufficient to support nondischargeability under § 523(a)(4)." *In re Cowin*, 864, F.3d 344, 350 (5th Cir. 2017). The Receiver's adversary complaint[28] explains that the Receiver's amended complaint asserts claims against Seawright for, among other things, civil conspiracy. In support, the amended complaint expressly alleges that Seawright conspired with Adams to recruit new investors to Madison Timber; that Madison Timber was a Ponzi scheme therefore Seawright's and Adams's purpose was unlawful; and that Seawright acted unlawfully—he did not have a license to broker securities, the securities were not registered, and he made material misstatements.[29] Among other overt acts, Seawright pitched Madison Timber to potential investors, including his clients; consummated sales of Madison Timber to investors; and received commissions from Adams for his assistance in growing Madison Timber's business.[30]

Seawright contends the Receiver does not allege facts which would establish "defalcation" because she does not allege Seawright's "actual knowledge." [Doc. 8 at 9]. Also not true. Again,

[26] Doc. 1-3 at ¶ 77.

[27] Doc. 1-3 at ¶¶ 75–76.

[28] Doc. 1-3 at ¶¶ 7, 70, 79.

[29] Doc. 57 at ¶¶ 123–136, *Alysson Mills v. Butler Snow LLP, et al.*, No. 3:18-cv-866 (S.D. Miss.).

[30] Doc. 57 at ¶ 129, *Alysson Mills v. Butler Snow LLP, et al.*, No. 3:18-cv-866 (S.D. Miss.).

Seawright knew Madison Timber was a fraud—he himself made false representations of fact in furtherance of the scheme. Among other things, Seawright falsely represented *in writing* that he personally inspected the "property" and the "executed agreement(s) with the timber mill(s)" underlying each investment. But even if he did not know for a fact that Madison Timber was a fraud, his conduct evinced his conscious disregard to a substantial and unjustifiable risk. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274 (2013) ("Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty."). In any event, "[w]hether a defalcation occurred is a fact specific question and requires an examination of the total circumstances." *In re Jackson*, 141 B.R. 909, 918–19 (Bankr. N.D. Tex. 1992). Such questions are not appropriately decided on a motion to dismiss.

C. The Receiver alleges willful and malicious injury (§ 523(a)(6)).

A debt is nondischargeable to the extent it arises from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). An injury is "willful and malicious" when the court finds "either an objective substantial certainty of harm or [the debtor's] subjective motive to cause harm." *Berry v. Vollbracht (In re Vollbracht)*, 276 F. App'x 360, 361 (5th Cir. 2007).

"A debtor's subjective motive to cause harm is a question of fact." *In re Burk*, 583 B.R. at 672 (citing *Kungys v. United States*, 485 U.S. 759 (1988)). "Because debtors generally deny that they had a subjective motive to cause harm, most cases that hold debts to be non-dischargeable do so by determining whether '[the debtor's] actions were at least substantially certain to result in injury.'" *In re Vollbracht*, 276 F. App'x at 361–62 (quoting *In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998)). "Substantial certainty does not mean absolute certainty" and "requires an assessment

of all of the relevant facts and circumstances." *In re Burk*, 583 B.R. at 672. "When the debtor has knowingly participated in a Ponzi scheme, courts have found willful and malicious injury for purposes of section 523(a)(6)." *In re Donnan*, No. 11-31083-JPS, 2013 WL 3992411, at *11 (Bankr. M.D. Ga. Aug. 1, 2013).

The Receiver alleges that, his knowledge and numerous red flags notwithstanding, Seawright knowingly lent his influence, his professional expertise, an even his clients to Adams. He lied, as described above, all the while collecting commissions for each dollar of every investment that he brought in. The fraudulent scheme perpetrated by Adams, with Seawright's assistance, created an "objective substantial certainty of harm" to the Receivership Estate generally and Seawright's clients and investors specifically. What did Seawright expect when he falsely represented *in writing* that he personally inspected property and agreements with timber mills *that did not exist*.

III. THE DOCTRINE OF *IN PARI DELICTO* AND THE WRONGFUL CONDUCT RULE DO NOT BAR THE RECEIVER'S CLAIMS.

Seawright contends that Adams's conduct was at least "equally or more culpable," and because the Receiver stands in Adams's shoes, the doctrine of *in pari delicto* bars her claims. No doubt the Court is already familiar with the argument. Almost every third-party defendant has made the same argument in all the Receiver's cases.

As the Receiver has explained in responses to motions to dismiss in other cases, 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). It is not without exceptions. One exception, the "innocent successor" exception, applies in federal equity receiverships. Because "[a]pplication of *in pari delicto* would undermine one of the primary purposes of the receivership," "[i]t is 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 v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012). Indeed, the *Stanford* court has refused to apply the doctrine of *in pari delicto* to that receiver's claims against professionals. *See, e.g.*, *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at *4 (N.D. Tex. Dec. 17, 2014) ("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); *Janvey v. Adams & Reese, LLP*, No. 3:12-CV-0495-N, 2013 WL 12320921, at *3 (N.D. Tex. Sept. 11, 2013) ("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.").

In addition, Mississippi courts have long recognized "important limitations" to the *in pari delicto* doctrine. *Morrissey v. Bologna*, 123 So. 2d 537, 543 (Miss. 1960).[31] "Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him." *Id.*; *see also Rideout v. Mars*, 54 So. 801, 802 (Miss. 1911) ("However, there is a well-defined exception to that rule, which is that, where the paramount public interest demands it, the court will intervene in favor of one as against the other."). There is

[31] Seawright cites *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.

no public interest in, and the purpose of the *in pari delicto* doctrine is not served by, barring the Receiver from pursuing claims against Seawright.

Seawright contends that the wrongful conduct rule also bars the Receiver's claims. According to Seawright "but for the illegal and immoral actions of Lamar Adams, by and through Madison Timber, the Receiver would have no claims." Seawright cites *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 court granted defendants' motions for 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. No third-party defendant in any of the Receiver's cases has pointed to a case from a Mississippi court in which the "wrongful conduct rule" was applied in these circumstances. Accepting Seawright's argument, no federal equity receiver in a Ponzi scheme case could ever sue anyone to recover funds for defrauded investors. That just is not the law.

Seawright's arguments all assume that the Receiver stands solely in Adams's shoes. As explained, the Receiver has standing in not one but two ways. She has standing 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. To the extent the Receiver stands in investors' shoes, Seawright's arguments are irrelevant.[32]

CONCLUSION

Seawright has not stated a basis for dismissing the Receiver's adversary complaint against him. The Receiver asks to be permitted to proceed with discovery, in anticipation of proving that Seawright's debts to the Receiver are nondischargeable.

[32] The Receiver has responded to the same arguments regarding standing, the *in pari delicto* doctrine, and the wrongful conduct rule in her oppositions to other third-party defendants' motions to dismiss. The Receiver has attempted here to respond directly to Seawright's arguments only, but to the extent it is helpful to the Court, the Receiver incorporates by reference her most recent and comprehensive response to date, filed last week in *Alysson Mills vs. Trustmark, et al*., No. 3:19-cv-00941 (S.D. Miss.), *see* Doc. 48 at 5–17, 44–51.

May 28, 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 28, 2020 */s/ Kristen D. Amond*