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

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

VS. **CIVIL ACTION NO. 3:19-cv-941-CWR-FKB**

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

JUD WATKINS' REPLY IN SUPPORT OF HIS MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

The questions before the Court is whether there is a valid arbitration agreement between Jud Watkins and Madison Timber Properties, LLC ("MTP") and if *so under that agreement*, who decides the threshold question of arbitrability of the dispute. It is of no moment that there was no arbitration agreement between MTP and Trustmark. The Receiver does not dispute that there is a valid arbitration agreement (the "Agreement") between MTP and RiverHills and that it unambiguously applies to disputes between the Receiver and RiverHills' officers like Watkins. Instead, the Receiver argues that because her claims against Watkins straddle his tenure at Trustmark and because MTP had no arbitration agreement with Trustmark, there is no applicable arbitration agreement. The Receiver's argument is a question of scope that the Receiver tries to disguise as a question of whether there is a valid arbitration agreement. Whether the claims regarding Watkins' employment at Trustmark arise out of "past interactions" is a threshold issue delegated to the arbitrator.

The Receiver offers no argument as to why the arbitration "inherently conflicts with the policies underlying the receivership." The purposes of the federal equity receivership (marshal assets, preserve value, equitability distribute to creditors and either reorganize, if possible, or order to liquidate") can be accomplished through arbitration. That is, through a successful arbitration she can marshal assets from Watkins. If she recovers at arbitration, she receives it into the receivership estate and can equitably distribute the funds. The Complaint should be dismissed because all of the claims against Watkins are subject to arbitration. Thus, there is no valid reason to stay the case pending Watkins' arbitration.

II. ARGUMENT

1. The Arbitration Agreement applies to all the claims asserted against Watkins.

The Receiver asks the Court to ignore its own precedent and the Supreme Court admonition "that courts 'rigorously enforce agreements to arbitrate.'" *Graham v. American Bankers Ins. Co.*, 2007 WL 4333833, at *2 (S.D. Miss.) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Receiver ignores the plain language of the arbitration agreement as well as mischaracterizes the issue in *Henry Schein, Inc.*

The Receiver does not dispute that the Agreement applies to claims against Watkins while an employee of RiverHills. She avoids any discussion of the actual language of the Agreement because she knows it cuts against her. First, the Agreement is not limited to disputes arising out of the Deposit Account. It applies to any claim "arising from or relating to *any* matter, including but not limited to, this Agreement, the Deposit Account . . . ." (emphasis added). Thus, it applies to "any matter" between MTP and "Covered Persons," and not just matters arising from the Deposit Account. Second, it applies to "pre-existing" claims and "any past . . . interactions, business or dealings, or interactions . . . between Customer and the Covered

Persons." The Receiver's claims against Watkins while he was at Trustmark includes allegations arising from or relating to past interactions, business or dealings between MTP and Watkins. Third, the dispute between Watkins and the Receiver is not just "pre-existing" or "past." That is, the Receiver claims that Watkins participated in one scheme, a Ponzi scheme.[1] The Receiver claims Watkins was involved in one conspiracy and one racketeering enterprise. She does not allege that there are two separate distinct enterprises in which Watkins allegedly participated. She does not allege that he aided and abetted in two different Ponzi schemes. Rather, she brings several counts arising out of his alleged participation in *the* Ponzi scheme.

The Receiver attempts to sidestep the flaws in her arguments by mischaracterizing the issue in *Henry Schein, Inc.* The Receiver states (rather misstates) "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'" [Dkt. #49, p. 9]. The first sentence, which she truncates, states in whole:

> *According to Archer and White*, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part.

Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S.Ct. 524, 528 (2019) (emphasis added). But, like the Receiver, Archer and White were wrong. The Supreme Court stated that the actual question was:

> The question presented in this case is whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act.

Id at 528.

In *Schein,* the contract provided arbitration of all disputes "except for actions seeking injunctive relief in disputes related to trademarks, trade secrets, or other intellectual property of [Schein]." *Id*. at 528. Archer and White's complaint sought both money damages and injunctive

[1] The Receiver claims it is "*one singular fraudulent scheme.*" [Doc.# 48, p.8].

relief. Archer and White's argument was that because part of the claim was not subject to arbitration, the entire claim was not subject to arbitration. The import of *Schein* is that under no circumstance does the court decide the threshold issue of arbitrability when there is a delegation clause, as there is here.[2] Applying *Schein* to the instant action, only the arbitrator can decide whether those Trustmark claims are subject to arbitration.[3]

The Receiver's argument also fails because she does not challenge the delegation provision. A delegation clause is treated as "an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Rent-A-Center, West, Inc., v. Jackson*, 130 S.Ct. 2772, 2779 (2010). Therefore, unless the Receiver "challenge[s] the delegation provision specifically" the court must enforce the delegation provision and "leave any challenge to the validity of the arbitration agreement as a whole for the arbitrator." *Id*. Here, the Receiver has failed to challenge the delegation clause, so even if there is a question of the existence of an enforceable arbitration agreement for Watkins' time at Trustmark, it belongs to the arbitrator.

2. The arbitration agreements apply to all of the Receiver's claims notwithstanding the purported assignments.

The Receiver's claim that an alleged assignment by investors is a trump card that defeats the arbitration agreement is without merit. **First**, even if the Receiver stood in the shoes of the investors, it does not permit MTP to avoid its contractual obligation to arbitrate its disputes with Watkins. There is a "federal policy favoring arbitration" and mandating that courts "rigorously enforce agreements to arbitrate." *East Ford Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002).

[2] "[O]r the validity, enforceability or scope of this Agreement . . . shall be resolved . . . by BINDING ARBITRATION." [Doc. #35-2, p.1].

[3] The Receiver appeals to *Rogers Dabbs Chevrolet-Hummer, Inc. v. Blakeney* a 2007 Mississippi Supreme Court case which followed the "wholly groundless" exception. But *Schein* has rejected that exception.

Thus, rigorous enforcement of the arbitration agreement requires MTP to arbitrate all of its disputes with Watkins.

Second, the Receiver possesses no authority to obtain assignments and bring claims on behalf of the creditor investors. The Receiver encourages the Court to look to policy justifications in bankruptcy cases for guidance. A bankruptcy trustee has no authority to bring claims of creditors even if the trustee receives an assignment. In *Williams v. California 1st Bank,* the Ninth Circuit considered a bank's motion to dismiss the trustee's action against the bank for violation of the federal securities laws on behalf of creditors who had been bilked in a Ponzi scheme. 859 F. 2d 664, 665 (9th Cir. 1988). Hoping to avoid dismissal for lack of an injury-in-fact, the trustee obtained an assignment of the claim from some of the investors. *Id.* Despite the voluntary assignments, the Ninth Circuit held that under the Supreme Court's decision in *Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416, 428–30 (1972), the trustee did not have standing to pursue the claim against the bank and the case should be dismissed. The court gave three specific reasons for dismissal. First, the trustee did not have power to collect money not owed to the estate: the court reasoned that the assignment of their claims notwithstanding, the investors remained the real parties in interest. *Williams,* 859 F.2d at 666–67. Second, the debtor had no independent claim against the bank. *Id.* at 667. Third, allowing the trustee to bring a suit raised the potential for inconsistent actions between the trustee and those investors who had not assigned their claims, potentially creating a conflict of interest and the proliferation of litigation. *Id.*

The same reasoning applies here. The receivership statutes do not allow the Receiver to take on the claims of the creditor investors. The general powers and duties of the Receiver permit her to "preserve all of [the Receivership Defendants' claims." The Receiver does not

name the assignors and does not attach a form assignment. It may be that the assignments are not unconditional or that some or all of the assignor creditors did not receive wire transfers from RiverHills. The creditor investors have no claim against Watkins. The conflict arises in the Receiver bringing the assignors investors' claims because she is bound to arbitrate. Accordingly, the assignment of investors' claims does not have any bearing on whether the Receiver's claims are subject to arbitration.

Third, although the Receiver states that she has received assignments from the investors, she does not purport to bring her complaint in the name of and on behalf of the investors. The complaint is brought on behalf of "Alysson Mills, in her Capacity as Receiver for Arthur Lamar Adams and Madison Timber Properties, LLC." It does not include the language "in her capacity as assignee for assignors X, Y and Z." Her first paragraph states she is bringing the complaint "in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC" and not as assignee of investors. The alleged assignments are simply another means of carrying out her duties of preserving value and providing an equitable distribution to creditors, including investors.

Finally, the Receiver claims that investors' claims are derivative of the claims of the Receiver.[4] If so, like in *Wiand v. Schneiderman*, 778 F.3d 917 (11th Cir.), she must arbitrate all claims she possesses. In *Wiand*, the Receiver for six hedge funds that were part of a Ponzi scheme brought a claw-back action against the estate of an investor who made money from the scheme. The investor had entered into an arbitration agreement with one of the hedge funds and moved to compel arbitration of all claims involving all six hedge funds. The district court granted the motion and the Eleventh Circuit confirmed. *Id*. at 921. The Receiver argued that

[4] "This is why it is often said that investors' injuries are 'redundant' or 'derivative' or 'duplicative' of the entity's." [Doc. # 48, p. 8] (citations omitted).

even if there was a valid enforceable arbitration clause, it would be binding only on the one hedge fund which contained the arbitration provision. The court pointed out that the flaw in the Receiver's argument was that the other five hedge funds had no relationship to the investor. Therefore, those five funds' only right to recover part of the investor's false profits is "completely derivative from whatever right Victory might have to recover from the estate."

In the instant action, the purported assignor investors have no relationship with Watkins. According to the Receiver, the assignor investors' right to recover is derivative of whatever right the Receiver might have to recover in this action. She has an agreement to arbitrate "all" claims she possesses, whether they are a result of assignment or not. Moreover, under equitable estoppel, the court may compel a non-signatory to arbitrate claims. If the Receiver is bringing claims on behalf of the investors, she has raised "virtually indistinguishable factual allegations" against Watkins. *Hayes v. HCA Holdings, Inc.*, 838 F.3d 605, 612 (5th Cir. 2016). In *Hayes*, the Fifth Circuit compelled a non-signatory to arbitrate because of intertwined claims estoppel. The court recognized, "it is undeniable that Hayes regarded the parties as closely related by failing to differentiate his factual allegations." *Id.* at 613. The tight relatedness of the parties and controversies compels the assignor investors to arbitrate their claims.

3. Arbitration of the Receiver's claims with Watkins does not conflict with the policies underlying the receivership.

The Receiver devotes little attention to this issue. She quotes *Zacarias v. Stanford Int'l Bank, Ltd.* for the proposition that "the purpose of federal equity receiverships is . . . to marshal assets, preserve value, equitably distribute to creditors, and, either reorganize, if possible, or orderly liquidate." 945 F.3d 883, 895 n.27 (5th Cir. 2019). But none of those purposes is undermined by arbitration and she fails to explain how arbitration undermines those purposes.

Should she achieve a recovery in arbitration, she will have marshaled that asset. She would then include that asset in the receivership account and equitably distribute it at the proper time.

The Receiver's argument that arbitration would undermine consolidation and interfere with efficient administration of the receivership estate is also without merit. Although the courts order establishing the receivership allows for a centralized forum, it does not prohibit actions in other forums. There is little difference in filing separate lawsuits, as she has done in this instance, and pursuing a separate claim in arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985) (courts must enforce arbitration provisions "even where the result would be possibly inefficient maintenance of separate proceedings in different forums").

The Receiver ignores Watkins' citation to authorities from the Sixth Circuit, Eleventh Circuit and the Supreme Court where a receiver was required to arbitrate. *See* Doc. #36, p.8. The receiver in *Wiand* made the same argument. The court rejected the argument because 28 U.S.C. §754 "does not refer to the *district court's* authority to decide all disputes relating to the contested property, but rather to the *Receiver's* right to take charge of all contested property regardless of its physical location." *Wiand,* 778 F.3 at 923. "A Receiver is granted this jurisdiction and control so that he can manage the full scope of the assets with legally binding authority." *Id*. The receivership statutes establish a particular person to recover and distribute assets and not a special method by which that must occur. *Id*.

The Receiver quotes *Janvey v. Alguire*, a pre-*Schein*, case for the proposition that arbitration in "cases such as this" raises important concerns. Although in *Janvey v. Alguire* the Fifth Circuit refused to compel arbitration, it did so because the bank was not a signatory to any of the arbitration agreements and the party seeking to compel arbitration had waived his right to compel arbitration by participating in discovery and other pre-trial litigation. *Janvey v. Alguire*,

847 F.3d 231, 242-43 (5th Cir. 2017). The Fifth Circuit expressly rejected the broad policy argument that the Receiver is making herein. It stated:

> Nor do we reach the Receiver's similar but broader policy argument that the underlying purpose of the Federal Equity Receivership statutes is at odds with the FAA's mandate in favor of arbitration. In support of this alternative basis for denying motions to compel arbitration, the district court raised important concerns about undermining Congress' goal with consolidating receivership claims before a single court. However, we are wary of endorsing these broad policy arguments in the absence of specific direction from the Supreme Court.

Id. at 245.

The Fifth Circuit is right to be wary. The following year, the Supreme Court addressed whether the FAA's saving clause provided a basis for refusing to enforce arbitration agreements that waive collective action procedures for claims under the FLSA and class action procedures for claims under state law. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In *Epic*, the court stated:

> Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties chose to arbitrate their disputes *the rules* under which that arbitration will be conducted."

Id. at 1621 (quoting *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)). In holding that the FAA savings clause did not provide a basis for refusing to enforce such arbitration agreements, the Supreme Court warned:

> When confronted with two acts of Congress allegedly touching on the same topic, this court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both."

Id. at 1624 (quoting *Morton v. Mancari*, 94 S. Ct. 2474, 2790 (1974)). Here, the receiver cites no authority to support that the rigorous enforcement of the FAA conflicts with the receivership statutes. (28 U.S.C. §§754, 959 and 1692).

The Receiver makes the statement that "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." She cites no authority for that proposition and she does not explain why she ought to be able to reject an arbitration agreement. Watkins should not be in a position of guessing whether the Receiver is referring to arguments asserted in another case when she has not included them in her response. Nevertheless, there is no inherent conflict with an arbitration provision and the purposes of the bankruptcy statutes. And, bankruptcy trustees are not given *carte blanche* to reject arbitration agreements.

The Fifth Circuit has refused to accept that an arbitration provision is an executory contract that can be rejected by the trustee. It stated:

> We refuse to find such an inherent conflict based solely on the jurisdictional nature of a bankruptcy proceeding. Rather, as did the Third Circuit in *Hayes*, we believe that non-enforcement of otherwise applicable arbitration provision turns on the underlying nature of the proceeding, i.e., whether the proceeding derives exclusively from the provisions of the bankruptcy code, and, if so, whether arbitration of the proceeding would conflict with the purposes of the code.

In Re National Gibson Co., 118 F.3d 1056, 1067 (5th Cir. 1997); *see also Truck Driver's Local Union #807, Int'l Board of Teamsters v. Bohack Corp.*, 541 F.2d 312, 321 n. 15 (2nd Cir. 1976) ("If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of the filing the petition under Chapter 11, but like any other unilateral breach of contract, it does not destroy the contract so as to absolve the parties (particularly the breaching party) from the contractual duty to arbitrate their disputes."); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1989) (trustee bound by terms of arbitration agreement to same extent as debtor); *In Re Statewide Realty Co.*, 159 B.R. 719, 724 (D.J. 1993) (compelling arbitration of claim by creditor); *La Transformation, et La*

Commercialisation Des Hydrocarbures v. Distrigas Corp., 80 B.R. 606, 609, 613-14 (D. Mass. 1987) (arbitration provision survives debtor's rejection of contract); *Fleming Cos. v. PCT* (*In Re Fleming*), 49, 2007 WL 788921, at *3 (D. De.) (because causes of action derive from the contractual relationship of the parties, arbitration provision is enforceable). *Northwestern Corp. v. Nat'l Union Fire Insurance Co. Vicksburg, P.A.*, 321 B.R. 120, 123 (D. Del. 2005) ("A number of federal circuit court decisions have reached the conclusion that bankruptcy courts must compel arbitration regarding non-core proceedings, assuming, of course, all other requirements of a binding arbitration agreement are present."); *In Re Farmland Industries, Inc.*, 309 B.R. 14, 158 (W.D. MO. 2004) ("Courts widely accept that the bankruptcy court must stay its own proceedings to allow arbitration to continue in non-core matters because allowing arbitration in non-core matters is unlikely to conflict with the underlying policies of the bankruptcy code").

As the court in *Wiand* explained:

> Furthermore, neither the bankruptcy cases nor the FCUA cases indicate that there is any inherent conflict between arbitration and the receivership statutes. Both the use of the bankruptcy courts and the administrative-claims process set up in the FCUA are methods by which one entity's assets may be distributed to a myriad of creditors who have a legitimate claim to them. A receiver on the other hand is the individual (or entity) responsible for the collection and management of those assets until they can be distributed; this role is analogous to a trustee in a bankruptcy case rather than to the bankruptcy-court system itself.

The Receiver's claims are not comparable to a claim arising from a core proceeding. All of her claims asserted are state common law claims (or, in the case of aiding and abetting, purported to be a state common law claim) and do not arise out of the receivership statutes. Accordingly, even a bankruptcy trustee would not be permitted to reject this arbitration agreement.

4. The claims against Watkins should be dismissed.

The Receiver concedes that if all of her claims against Watkins are subject to arbitration, it is appropriate to dismiss Watkins from this action. [Doc. #49, p.13, n.12]. As set forth above, all of the claims against Watkins are subject to arbitration and in any event that is a decision to be made by the arbitrator.

WHEREFORE, PREMISES CONSIDERED, Jud Watkins' respectfully requests that the Court dismiss the Complaint against him and order the Receiver to pursue her claims against Watkins in arbitration subject to the Agreement.

This, the 9th day of June, 2020.

Respectfully submitted,

RIVERHILLS BANK

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