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. — **CASE NO. 3:19-cv-941-CWR-FKB**

TRUSTMARK NATIONAL BANK; BENNIE BUTTS; et al. — **DEFENDANTS**

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FILED BY BENNIE BUTTS

Putting aside the Receiver's sarcasm, including statements that "Mississippi banks should make Ponzi schemes a line of business" and "Mississippi public policy favors Ponzi schemes," she identifies zero facts or authorities to support her claims against Bennie Butts. Doc. 48 at 2. Despite the invitation to do so, the Receiver failed to articulate any legally sufficient basis for suing Bennie Butts individually. The Receiver's response shows that her strategy is simply to sue as many people who had any dealings with Adams as possible in hopes of increasing the potential recovery for the victims she purports to represent, but clearly without regard to whether she actually has a sound legal basis for her claims. The Receiver admits that she has reviewed the "Defendants' own documents," but she is unable to allege a single fact demonstrating that Butts knew Adams was engaged in fraud, that Butts received a single dollar from the fraud, or that he owed Adams any duty. The Receiver says that her alleged "indicia of fraud" are "damning enough," but those allegations are based on mere innuendo and speculation that do not state a claim for which relief could be granted under applicable law.

The Receiver alleges that Defendants enabled Madison Timber "by providing banking services that gave to Adams and Madison Timber the imprimatur of a sophisticated financial institution." Doc. 48 at 5. As an initial matter, the Receiver does not explain why that equates to liability for Butts, an employee of the bank. In fact, the Receiver did not even respond to Butts's argument that he cannot be held individually liable for alleged tortious acts in which he did not actively participate. As stated in Butts's opening brief, "Mississippi follows the general rule that individual liability of corporate officers or directors may not be predicated merely on their connection to the corporation but must have as their foundation individual wrongdoing." *Turner v. Wilson*, 620 So. 2d 545, 548 (Miss. 1993). The Receiver has not alleged any facts to show Butts "actively participate[d] in the commission of a tort." *Wilson v. S. Cent. Miss. Farmers, Inc.*, 494 So. 2d 358, 361 (Miss. 1986). Moreover, it is obviously the business of every bank (and bank employee) to attempt to operate in a sophisticated manner and to provide customers with professional banking services. The Receiver's ire rings hollow, as her Complaint does not contain a single fact to show that Butts (or any other Defendant) actually knew Adams was running a Ponzi scheme or otherwise assisted Adams in an illegal manner. Accordingly, the Court should dismiss all of the Receiver's claims against Butts.

I. The Receiver does not have standing.

The Receiver does not dispute Butts's statement of the holding in *Latitude Solutions, Inc. v. DeJoria*, 922 F.3d 690, 696 (5th Cir. Apr. 30, 2019), *cert. denied*, 2019 WL 6107784 (Nov. 18, 2019). Rather, the Receiver attempts to argue *DeJoria* is not controlling because the trustee in that case "told the jury to 'forget about the other hundred and something creditors.'" Doc. 48 at 8. The Receiver does not explain why the trustee's trial strategy negates the court's holding that an estate's unpaid debts do not "injure" the estate. *DeJoria*, 922 F.3d at 696. The number of

creditors, or investors, is irrelevant to the holding of the case. As in *DeJoria*, the debts of the estate to investors represent injuries to the investors, not to the estate.

The Receiver acknowledges the *Reneker* line of cases, which make clear that the Receiver does not have standing to pursue damages of investors, as opposed to damages of the estate. *See Reneker v. Offill*, 2012 WL 2158733, at *5 (N.D. Tex. June 14, 2012) (dismissed claim for lack of standing because it was based on increased liabilities incurred by defrauded investors); *Reneker v. Offill*, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009) (receiver lacked standing because "the only harm alleged is the Receivership Estate's inability to satisfy its liabilities"). There is no "fuller development" of the Receiver's claims which would allow her to establish that the debts she is attempting to pursue belong to Madison Timber.

The Receiver misstates the holding in *SEC v. Stanford Int'l Bank, Ltd. (Lloyds)*, 927 F.3d 830, 841 (5th Cir. 2019), which made clear "the receiver collects and distributes only assets of the entity in receivership." The Receiver's argument is not correct under *Lloyds*, in which the Fifth Circuit scolded the lower court for failing to implement "two interrelated limitations on the Stanford receivership" which were (1) in a standing analysis "an equity receiver may sue *only to redress injuries to the entity in receivership*;" and (2) "the court may not exercise unbridled authority over assets belonging to third parties to which the receivership has no claim." *Id.*; *see also Janvey v. Dem. Sen. Campaign Comm.*, 712 F.3d 185, 190 (5th Cir. 2013) ("federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors"). Here, the Receiver lacks standing because her claims are based on unpaid debts of the receivership estate—claims that do not belong to the estate.

Contrary to the Receiver's response, *Willis* also cited *Lloyds* for the proposition that a receivership "cannot reach claims that are independent and non-derivative and that do not

involve assets claimed by the receivership." *Zacarias v. Stanford Int'l Bank, Ltd. (Willis)*, 945 F.3d 883, 897 (5th Cir. 2019). In *Willis*, the court expressly stated that standing was not an issue *because* the receiver brought "only the claims of the Stanford entities—not of their investors." *Id.* at 899 and n.61 (citing *Janvey*, 712 F.3d at 190 and *Scholes v. Lehman*, 56 F.3d 750, 753 (7th Cir. 1995)). Here, none of the Defendants, especially Bennie Butts, received fraudulent transfers from Adams or Madison Timber. Accordingly, the Receiver lacks Article III standing to pursue her tort claims, each of which belongs to third-party investors and not to the estate.

Finally, the Receiver's attempt to create standing by claiming, without any factual support, that she has obtained alleged assignments from investors is insufficient. The Receiver cites zero factual evidence to show that she "stands in the shoes of investors, too." Doc. 48 at 14. The Receiver does not identify the assignors; details of the assigned claims; or against which Defendants the assignors' claims are made. Instead, the Receiver argues the "assignors' claims are the very claims the complaint alleges." *Id.* at 14. That is insufficient under Rules 12(b)(1) and 12(b)(6).[1] The Receiver does not allege any theory under which a third-party investor would have a claim against Butts individually. Mississippi law does not recognize duties owed by Trustmark, much less Butts, which do not arise directly under the customer's account agreement. *See, e.g., United Plumbing & Heating Co. v. AmSouth Bank*, 30 So. 3d 343, 348 (Miss. Ct. App. 2009); *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 234 (5th Cir. 2010). Butts is not a party to

[1] The Court should "'accept all *well-pleaded* facts as true'" but should not "'accept as true conclusory allegations or unwarranted deductions of fact.'" *Great Plains Trust Co. v. Morgan Stanley Dean & Witter & Co.*, 313 F.3d 305, 312-13 (5th Cir. 2002) (emphasis added) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)). A court should not accept "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

any such agreements. And neither Trustmark nor Butts owed duties to non-customers of the bank.[2] The Court should dismiss the Receiver's claims against Butts for lack of standing.

II. The Receiver fails to state claims against Butts for fraudulent transfers; civil conspiracy; aiding and abetting; RICO; and negligence.

a. Fraudulent transfers

The Receiver does not even respond to Butts's argument that the Court should dismiss the fraudulent transfer claim against him individually because the Complaint contains no allegations to show Adams or Madison Timber transferred fees to Butts. Indeed, the Receiver does not even mention the argument in her brief. Even if routine banking fees—received by *banks* in good faith and for value provided—qualified as fraudulent transfers, and they do not, it is undisputed that the Complaint contains no allegations that Adams or Madison Timber paid such fees to *Butts*. Accordingly, the Court should dismiss this claim against Butts with prejudice.

b. Civil conspiracy

The Receiver cites *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013), for the statement that an "agreement to conspire . . . 'may be express, implied, or based on evidence of a course of conduct.'" Doc. 48 at 17. The Receiver ignores the court's clarification: "For a civil conspiracy to arise, the alleged confederates must be aware of the fraud or wrongful conduct at the beginning of the agreement." *Bradley*, 117 So. 3d at 339 (citing 16 Am. Jur. 2d Conspiracy § 51) (emphasis added); *see also Midwest Feeders*, 886 F.3d at 520 (civil conspiracy requires proof that conspirators "knew of [the] fraudulent scheme").[3] Even if an

[2] *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 519 (5th Cir. 2018) (citing *Red Rock v. Jafco, Ltd.*, 79 F.3d 1146, at *4 (5th Cir. 1996) ("A bank, however, owes no legal duty of care to investigate or disclose its customers' conduct or intent to third parties with whom the bank's customers do business.").

[3] The Receiver states that the lower court in *Midwest Feeders* allowed the case to go forward based on "circumstantial evidence" of a conspiracy. Doc. 48 at 19. Yes, but the element of "knowledge" was not at issue in the lower court decision, and the Fifth Circuit ultimately reversed the lower court, finding that the

"association" could be shown by a course of conduct, Mississippi law requires facts establishing *knowledge of the fraud at the beginning of the alleged agreement* to conspire. The Receiver has failed to plead a claim against Butts in that regard.[4]

The Receiver alleges Butts "knew or should have known that Adams was engaged in illegal banking activity." *Id.* at ¶¶63-64. That allegation is conclusory, speculative, and not sufficient to state a claim for which relief can be granted against Butts. The purported presence of "indicia of fraud" (i.e., "red flags") is, again, the epitome of a "legal conclusion masquerading as factual conclusions" that should not "suffice to prevent a motion to dismiss." *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)).[5] In fact, the Complaint contains zero facts establishing Butts *actually was aware* Adams was operating a Ponzi scheme.

Instead, the Receiver focuses on "overt acts" by Madison Timber. Doc. 48 at 17–18. The Receiver relies on *Rex Distribution Company v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019), to argue that she is not required to show Butts committed an overt act in furtherance of the conspiracy because she has alleged that Adams committed overt acts in furtherance of the conspiracy. But that is not at issue here, and the *Rex* decision changes nothing about the requirement that the alleged conspirator have knowledge of the fraud at the beginning

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circumstantial evidence failed "to establish the plausible existence of a civil conspiracy" because the allegations were based "merely upon speculation and conjecture." 886 F.3d at 520–21.

[4] The Receiver cites *Aetna Ins. Co. v. Robertson*, 94 So. 7, 22 (Miss. 1922), for the proposition that a conspiracy may lie where there is a "tacit understanding between the conspirators." Doc. 48 at 19. But the Receiver again ignores binding Mississippi law that requires her to sufficiently plead allegations of knowledge and awareness of the fraud at the beginning of the "tacit understanding." The Receiver's argument that she only needs to show that Defendants "agreed to and participated in Adams's course of action" is a misstatement of the law, which clearly requires knowledge of the fraud at the time of the agreement to participate in a fraudulent course of action. *See id.*; *Bradley*, 117 So. 3d at 339.

[5] That the Receiver felt obliged to hedge her claim ("or should have known") underscores that she cannot in good faith allege the required actual knowledge. *Litson-Gruenber v. JPMorgan Chase & Co.*, 2009 WL 4884426, at *2 (N.D. Tex. Dec. 16, 2009) (dismissing claims in Ponzi-scheme case because "pleading based on an allegation the defendant 'knew or should have known' is insufficient" for actual knowledge)).

of the alleged agreement. In *Rex*, the complaint alleged facts to show that Mitchell knew about Anheuser-Busch's intent to divert the sale in Mitchell's favor and agreed on the front end to purchase Rex, which was the conspiracy. *See* 24CI1:17-cv-00033 at Doc. 1. Mitchell was "alleged to have agreed to and participated in Anheuser-Busch's course of action, before and after Anheuser-Busch formally demanded that Rex sell to Mitchell instead of Adams." 271 So. 3d at 455. The Mississippi Supreme Court reversed the dismissal of Rex's civil conspiracy claim against Mitchell because there was an overt act by Anheuser-Busch in furtherance of the conspiracy, obviating the need for an overt act by Mitchell. *Id.*

Here, the Receiver has alleged overt acts by Adams in furtherance of the fraud, but her civil conspiracy claim against Butts fails simply because she has not alleged any facts to show Butts had *knowledge* of the fraud at the beginning of the alleged agreement to conspire with Adams.[6] Thus, the Court should dismiss the claim for civil conspiracy against Butts.[7]

c. *Aiding and Abetting*

The Receiver admits that "no Mississippi state court has had the occasion to" recognize a civil cause of action for aiding and abetting. Doc. 48 at 23. The analysis should end there. Though the Receiver does not dispute the Fifth Circuit's instruction that "a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts," *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liability Lit.*, 888 F.3d 753, 781-782 (5th Cir. 2018), she attempts to distinguish it on the basis that "the Texas Supreme

[6] The Receiver does not allege facts to show that Adams and Butts had a "'meeting of the minds'" to accomplish the fraud, as is required to state a claim for civil conspiracy under Mississippi law. *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 459 (5th Cir. 2005) (quoting *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004)).

[7] The Receiver already has all of the applicable documents and information, yet she could not allege facts to show Butts had knowledge of the fraud. She should not be allowed to continue to attempt to create claims out of thin air in an obvious attempt to leverage settlements.

Court had explicitly stated that it 'has not expressly decided whether Texas recognizes a cause of action for aiding and abetting.'" Doc. 48 at 23–24, n.45 (quoting *First United Pentecostal Church of Beaumont v. Parker*, 515 S.W.3d 214, 244 (Tex. 2017)). The Receiver clings to a distinction without a difference—the Mississippi Supreme Court has never recognized the civil aiding and abetting cause of action, and it would not make that fact truer if the court stated as much in an opinion. *See In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011) ("no Mississippi court has recognized a claim for civil aiding and abetting, whether under § 876(b) or § 876(c)."); *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694, 700-01 (S.D. Miss. 2002) (Mississippi courts "have not expressly recognized the tort of aiding and abetting fraud.").[8]

Further, even if Mississippi courts had recognized a claim for civil aiding and abetting, the Receiver concedes that to state such a claim she must sufficiently plead "know[ledge] that the other's conduct constitutes a breach of duty . . . ." Doc. 48 at 24 (quoting Restatement (Second) of Torts § 876(b)). As demonstrated at length above, the Receiver's allegations are legally insufficient to satisfy the required element of knowledge. The Receiver alleges that "Defendants knew that Lamar Adams was the manager of his company, Madison Timber" and that "Adams owed Madison Timber fiduciary duties of care." Doc. 48 at 25. The Receiver alleges that "Adams breached those duties," but she does not allege that *Butts knew* about any such breaches. *Id.* Again the Receiver relies only on alleged "indicial of fraud," but that is simply not sufficient under the law to state the required knowledge element.

[8] The *Dale* court made an *Erie* guess that such a claim would be viable under Mississippi law, reasoning that Mississippi recognizes the analogous tort of civil conspiracy. *Dale*, 203 F. Supp. 2d at 701; *In re Evans*, 467 B.R. at 409. To date, however, the Mississippi Supreme Court has not recognized the tort as viable, and this Court therefore should follow *In re Depuy Orthopaedics*, which restrains the Court from recognizing the "novel" aiding and abetting cause of action. 888 F.3d at 781; *see also Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011) (finding "Mississippi Supreme Court has never recognized aiding and abetting as a civil cause of action" and declining to make an *Erie* guess).

The Receiver cites *Janvey v. Proskauer Rose LLP*, 2015 WL 11121540, at *5 (N.D. Tex. June 23, 2015), in support of her position that "indicia of fraud" supports "knowledge for aiding and abetting purposes." Doc. 48 at 26–27. In *Proskauer Rose*, however, the court found the plaintiff "sufficiently alleged [defendant—an attorney hired to defend the Ponzi scheme operator in an SEC enforcement action—]was aware that Stanford was engaged in a fraudulent enterprise, and that the enterprise was very possibly a Ponzi scheme." 2015 WL 11121540 at *5. The court found defendant was aware: (1) Antiguan regulators were not independent from Stanford; (2) Stanford was offering unrealistic rates of return on his products; and (3) the unrealistic rates of return supported the SEC's belief that Stanford was operating a fraudulent scheme. *Id.* Here, the Complaint sets forth no facts demonstrating Butts actually became aware of facts to show Adams was conducting a fraudulent scheme. And unlike in *Proskauer Rose*, the Complaint contains no factual allegations that before Adams turned himself into authorities, Butts was aware that the SEC believed Adams was operating a fraudulent scheme. Thus, the Court should dismiss the claim for civil aiding and abetting against Butts.[9]

d. RICO

First, the Receiver does not adequately respond to Butts's contention that the Receiver's RICO claims against him should be dismissed because *Butts* has not been convicted of any crime. Doc. 48 at 35 n.79. Whether *Adams* has personally been convicted of a crime has little to do with whether *Butts* is liable under RICO. Mississippi Code Annotated § 97-43-9(5) expressly states that a civil remedy for alleged victims of RICO activity is available only if the RICO

[9] The Receiver's allegation that Butts "should have known" about the Ponzi scheme due to "indicia of fraud" falls short of establishing he "knew about conduct constituting a conspiracy." *Dickens v. A-1 Auto Parts & Repair, Inc.*, No. 1:18-cv-162-LG-RHW, 2018 WL 5726206, at *3 (S.D. Miss. Nov. 1, 2018) (Rule 12(b)(6) dismissal of civil aiding and abetting).

defendant (Butts) has been criminally convicted of an underlying RICO offense. Butts has not been convicted; accordingly, the Court should dismiss the RICO claim against him.

Second, contrary to the Receiver's arguments, § 97-43-5(3) of Mississippi's RICO Act does *not* make it illegal to simply "associate with" a person who, unbeknownst to the associate, is engaged in a fraudulent scheme; rather, the statute makes it illegal for an associate "to conduct or participate, directly or indirectly, in such [fraudulent] enterprise through a pattern of racketeering activity or the collection of an unlawful debt." Miss. Code Ann. § 97-43-5. The Receiver alleges no facts to support a claim that Butts knowingly participated in the Ponzi scheme or did so "through a pattern of racketeering activity," which by definition requires Butts to have knowledge of the fraudulent enterprise. *See Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 239 (5th Cir. 2010) (The Receiver must sufficiently plead Butts "at least kn[e]w of the conspiracy and 'adopt[ed] the goal of furthering or facilitating the criminal endeavor.'") (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

The Receiver baldly asserts that Butts "associated together with Madison Timber for a common purpose of engaging" in the Ponzi scheme. Doc. 48 at 35 (citing *Boyle v. United States*, 556 U.S. 938, 947 (2009)). But the Receiver has alleged no facts to support her conclusory allegation. "A person cannot be held liable for a RICO conspiracy 'merely by evidence that he associated with other . . . conspirators or by evidence that places the defendant in a climate of activity that reeks of something foul.'" *Chaney*, 595 F.3d at 239 (quoting *United States v. Posada–Rios*, 158 F.3d 832, 857 (5th Cir. 1998)). Under both the Mississippi and Federal RICO Acts, *knowledge* is a key element of the claim. *See, e.g.*, *United States v. Rosenthal*, 805 F.3d 523, 530 (5th Cir. 2015) (elements of conspiracy to violate RICO include "(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and

agreed to the overall objective of the RICO offense") (emphasis added).[10] The Receiver alleges no facts to show Butts knew of the fraud or agreed to further it. Accordingly, the Court should dismiss the Receiver's RICO claims against Butts.

e. Negligence

The Receiver states that Mississippi banks "have a statutory duty of ordinary care" defined as "observance of reasonable commercial standards" for banks in the area. Doc. 48 at 29. The Receiver does not allege what "reasonable commercial standards" *Butts* owed or failed to observe.[11] Again, the Receiver is attempting to recover debts owed by the receivership estate to third-party investors, but the Fifth Circuit has recognized that banks generally owe no duties to non-customers, *see Midwest Feeders*, 886 F.3d at 518, and that banks' duties are defined by the account agreement between the bank and its customer. *See United Plumbing & Heating Co.*, 30 So. 3d at 348 (bank could not be liable for negligence where plaintiff cited "no contract, statute, or law that would establish that AmSouth had a duty to . . . investigate or contradict a valid

[10] *See also Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994) (to establish civil liability under RICO, plaintiff must show "defendant was generally aware of the defendant's role as part of an overall improper activity . . . [and] each defendant in a RICO conspiracy case must have joined knowingly in the scheme"); *United States v. Minicone*, 960 F.2d 1099, 1108 (2d Cir. 1992) ("To prove a RICO conspiracy under § 1962(d), the government must show that the defendant agreed to participate in two predicate racketeering acts and he knew that the general nature of the conspiracy extended beyond his individual role."); *United States v. Eufrasio*, 935 F.2d 553, n.29 (3d Cir. 1991) (defendant prosecuted under Federal RICO Act "must be shown to have been aware of at least the general existence of the enterprise named in the indictment" and "knowingly agreed to participate in the enterprise through a pattern of racketeering") (citations and internal quotations omitted); *United States v. Colacurcio*, 659 F.2d 684, 689 (5th Cir. 1981) (facts of conspiracy "together with DiMopoulas' knowledge of the gambling enterprise and his knowledge that the officer was one of those on the 'take,' are sufficient to support the conclusion that DiMopoulas participated in a bribe.") (emphases added in citations).

[11] The Receiver cites *Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1128 (Miss. 2014) for the following quote: "Negligence is a failure to do what the reasonable person would do under the same or similar circumstances." *See* Doc. 48 at 28. *Hixson*, however, was a legal malpractice case that analyzed duties of care and loyalty owed by a lawyer to his client. The Receiver also cites *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, 2014 WL 12572881, at *4 (N.D. Tex. Dec. 17, 2014), but that case also was a legal malpractice case. The relationship between Butts and Adams and Madison Timber was strictly limited to the accounts that Adams opened at Trustmark and the LLCs that he and other members used to borrow money from Trustmark for non-Madison Timber related investments.

request made by its client"); *Chaney*, 595 F.3d at 231 (citing *Century Bus. Credit Corp. v. N. Fork Bank*, 246 A.D.2d 395 (N.Y. App. Div. 1998) (requiring bank to monitor customers' accounts for creditors' benefit would "unreasonably expand banks' orbit of duty"); *Home Sav. of Am., FSB v. Amoros*, 233 A.D.2d 35 (N.Y. App. Div. 1997) ("depository bank has no duty to monitor fiduciary accounts . . . to safeguard the funds in those accounts from fiduciary misappropriation")). Butts was not a party to any agreement between Trustmark and Adams or Madison Timber, and the Receiver has not alleged that Butts was required by agreement to monitor Adams's or Madison Timber's accounts for fraud or investigate any transactions.

The Receiver cites *Midwest Feeders* for the proposition that "a bank may owe a duty to a non-customer" if "(1) there is a fiduciary relationship between the customer and the non-customer, (2) the bank knows or ought to know of the fiduciary relationship, and (3) the bank has 'actual knowledge or notice that a diversion is to occur or is ongoing.'" 886 F.3d at 518 (quoting *Cheney*, 595 F.3d at 232) (emphasis added). That is, before a bank may arguably owe a duty to a non-customer, the bank must have "actual knowledge of its customer's misappropriation." *Id.* As stated above, the Receiver has not alleged any facts to demonstrate Trustmark or Butts had "actual knowledge" of Adams's fraud or his misappropriations of investors' funds.

"Under Mississippi law, for a person to be liable for another person's injury, the cause of an injury must be of such a character and done in such a situation that the actor should have reasonably anticipated some injury as a probable result." *Rein v. Benchmark Constr. Co.*, 865 So. 2d at 1134, 1143–44 (2004) (citing *Mauney v. Gulf Ref. Co.*, 9 So. 2d 780, 781 (Miss. 1942)). The Receiver's Complaint fails to plead facts to show that Butts "should have reasonably anticipated some injury as a probable result" of accounts that Adams and Madison Timber maintained at Trustmark or due to Butts's banking relationship with Adams.

The Receiver failed to even respond to the established authorities cited in Butts's initial brief to show that banks and its employees do not owe "some broad duty . . . to monitor . . . accounts for suspicious activity and to investigate that activity upon discovery." *Chaney*, 595 F.3d at 234; *Wise v. Valley Bank*, 861 So. 2d 1029, 1033 (Miss. 2003) (relationship between bank and depositor is simply one of debtor and creditor and does not invoke fiduciary duty); *Holifield v. BancorpSouth, Inc.*, 891 So. 2d 241 (Miss. Ct. App. 2004) (bank had no duty to prevent withdrawal of funds from trust account absent actual knowledge of wrongdoing); *Collier v. Trustmark Nat'l Bank*, 678 So. 2d 692 (Miss. 1996) (bank had no duty to trust beneficiaries absent "actual knowledge" that trustee was embezzling funds); *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1322–23 (M.D. Fla. 2015) ("The essence of the Receiver's negligence claim is that [Trustmark and Butts] failed to monitor [Adams' and Madison Timber's] account activities." But the Receiver "points to no authority supporting such a 'nebulous' duty." And there is "no duty on a bank to investigate transactions."); *Douglas v. Trustmark*, 201 F. Supp. 3d 800, 807–08 (S.D. Miss. 2016) ("Courts have repeatedly rejected negligence claims based on a bank's duty [to issue a suspicious activity report], concluding the bank's duty is owed only to the government and not to private parties."); *Citizens Nat'l Bank v. First Nat'l Bank*, 347 So. 2d 964 (Miss. 1977) (Trustmark and Butts had no duty to prevent Adams from committing a crime).

Again, even if Trustmark owed a duty to Adams to investigate and report to Adams his own fraud, the law certainly does not impart such a duty to Butts, and the Receiver does not allege any facts to establish a duty owed by Butts. Accordingly, Butts owed no duty to Adams or Madison Timber, even if Trustmark owed some duty.

III. *In pari delicto* and "wrongful conduct" doctrines bar the Receiver's claims.

The Court should apply *in pari delicto* here because it is apparent from "the face of the complaint" that Adams and Madison Timber were far more culpable than Butts. *See Latham v. Johnson*, 2018 WL 3121362, at *10 (Miss. Ct. App. June 26, 2018). As expected, the Receiver cites *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955 (5th Cir. 2012), as the basis for her objection to *in pari delicto.* In his initial brief, Butts explained why the Receiver's reliance on *Jones* is misplaced. *See* Doc. 34 at 26–27. *Jones* is inapplicable because there is no "fundamental distinction" between Adams and Madison Timber; in other words, Adams's actions can and should be rightfully imputed to Madison Timber. *See* 666 F.3d at 955–58.[12]

Throughout her pleadings, the Receiver relies on principles of "equity" and "public policy." *See, e.g.*, Doc. 48 at 46–48. Yet the Receiver ignores equity and policy for her argument that she, while standing in the shoes of Adams and Madison Timber, should be able to proceed with tort claims against Butts. The Mississippi public is well served by applying established law that prevents joint tortfeasors from suing one another for contribution. Standing in Adams's shoes, the Receiver should not be able to bring tort claims against those she alleges were somehow involved in Adams's fraud. That would be inequitable.[13]

Similarly, as stated in Butts's opening brief, the Receiver's claims are barred by Mississippi's wrongful conduct rule. *See, e.g.*, *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483

[12] In *Jones*, the court declined to apply *in pari delicto* because it would have the inequitable consequence of preventing other owners of W Financial from recovering against Wells Fargo Bank. *Jones*, 666 F.3d at 958, 966-67 (application of *in pari delicto* "depends upon the peculiar facts and equities of the case, and the answer usually given is that which it is thought will better serve public policy"). No such inequity would result here by applying *in pari delicto*.

[13] The Receiver cites *Janvey v. Adams & Reese, LLP*, 2013 WL 12320921, at *3 (N.D. Tex. Sept. 11, 2013), but the Fifth Circuit in that case made clear that the decision was based purely on Texas law and that "*in pari delicto* could apply to the Receiver in some jurisdictions." Likewise, in *Greenberg Traurig, LLP*, 2014 WL 12572881, at *4, the Court applied Texas law and held that *in pari delicto* does not apply when a Receiver seeks to reclaim assets for innocent investors. Again, the Receiver in this case stands in Madison Timber's shoes and does not have the authority to assert claims of third-party investors.

(Miss. 2006) ("If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him."). Adams broke the law, by and through Madison Timber, and absent his illegal conduct, the Receiver would have no alleged claims against Butts. For this additional reason, the Court should dismiss the Receiver's claims.

CONCLUSION

For the reasons discussed above and in Bennie Butts's initial brief, Butts respectfully requests that the Court dismiss all Counts of the Complaint against him with prejudice. Bennie Butts requests such other and further relief as the Court deems just under the circumstances.

Date: June 9, 2020.

Respectfully submitted,

BENNIE BUTTS

By: */s/ David Kaufman*
One of His Attorneys

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CERTIFICATE OF SERVICE

I, David Kaufman, hereby certify that on June 9, 2020, I caused the foregoing pleading to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and registered participants.

/s/ David Kaufman
David Kaufman, MSB No. 3526