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

Alysson Mills, as Receiver for
Arthur Lamar Adams and
Madison Timber Properties, LLC — Plaintiff

v. — No. 3:19-cv-00941-CWR-FKB

Trustmark National Bank,
Bennie Butts, Jud Watkins,
Southern Bancorp Bank,
and Riverhills Bank — Defendants

Reply Brief in Support of Trustmark's Motion to Dismiss

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Introduction

The Receiver's arguments fail in three fundamental ways.

First, she refuses to accept (or even acknowledge) the Supreme Court's holding in *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) that a federal receiver's claims are governed by state law – here, Mississippi law. Whenever the Receiver refers to "federal equity receivership" cases, she signals that she is about to argue the wrong law, because under Mississippi law, she loses.

Second, the Receiver refuses to accept the *substance* of Mississippi law, under which Lamar Adams, Madison Timber, and the Receiver are legally the same person. In Mississippi, plaintiffs who are victimized by criminals cannot recover damages from non-criminal third parties, except in rare circumstances not present here. Mississippi law does not impose a duty on a bank to detect, report, or prevent criminal acts. Mississippi limits civil RICO suits to defendants who have been convicted of RICO crimes. Mississippi does not recognize civil actions for aiding and abetting. Under Mississippi law, receivers do not enjoy special privileges to set aside meritorious defenses.

Third, the Receiver spurns *Twombly*, *Iqbal*, and their progeny. After delving through Madison Timber's financial records and emails, and thousands of Trustmark documents, the Receiver merely alleges facts that are consistent with proper, lawful banking services and with due diligence by Trustmark's security personnel. Such allegations are insufficient to state a claim, or to expose Trustmark to "the threat of discovery expense [that] will push cost-conscious defendants to settle even anemic cases . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

The Receiver's Complaint does not state a claim against Trustmark under Mississippi law, viewed through the lens of *Twombly*. The Complaint must be dismissed.

O'Melveny & Myers v. F.D.I.C. is Critical to Assessment of the Receiver's Arguments.

For just a moment, the Receiver acknowledges that Mississippi law controls this case – but in the same breath, she signals that she is above that law. She states "[t]here is no question that Mississippi law applies to the Receiver's tort claims, ***but the Receiver is a federal equity receiver*** –

she is specifically charged by Court order to institute litigation against third parties to maximize the benefit to the Receivership Estate." (#48, pp.46-47, n. 105) (emphasis added).

There is no "but." Trustmark's initial brief (#40, pp. 9-10) showed that under *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994), there is no "federal common law" for a "federal" receiver. The Receiver presses this Court to commit the same error the Supreme Court reversed in *O'Melveny* – she urges the Court to accept arguments that are unsupported by Mississippi law, because she is a "federal equity receiver" (and because she likes the outcome of some non-Mississippi cases).

In *O'Melveny*, the defendant law firm had represented the bank in receivership in two real estate syndications. Investors in the syndications made claims against the receivership. The receiver sued the law firm for preparing memos that failed to disclose the bank's true financial status to investors, who made claims against the receivership estate. *FDIC v. O'Melveny & Myers*, 969 F.2d 744, 746-47 (9th Cir. 1992). The law firm obtained summary judgment because under California law, the receiver was "subject to all defenses that might lie as between the wrongdoers themselves and those who may have aided and abetted them in bringing about the disaster." *Id.* at 748.[1]

The Ninth Circuit reversed, and "fashion[ed] a federal rule of decision" refusing to bar the receiver's claims based on the conduct and knowledge of dishonest bank officers. *Id*. at 751. The Ninth Circuit opined that the receiver's appointment was "part of an intricate regulatory scheme designed to protect the interests of third parties who also were not privy to the bank's inequitable conduct. That scheme would be frustrated by imputing the bank's inequitable conduct to the receiver, thereby diminishing the value of the asset pool held by the receiver and limiting the receiver's discretion in disposing of the assets." *Id*. at 752. *These same "equity" theories are asserted by the*

[1] "O'Melveny argues that the acts of the wrongdoing officers are attributable to the corporation itself, and because FDIC 'stands in the shoes' of the corporation as its receiver, by transference, FDIC is entitled to no more than the wrongdoing officers themselves would have been." *Id*. at 749. "O'Melveny argues that under well-established California law, '[a] receiver occupies no better position than that which was occupied by the ... party for whom he acts ... and any defense good against the original party is good against the receiver.' . . . Thus, if O'Melveny can raise an equitable estoppel defense against ADSB, it can raise it against receiver FDIC as well." *Id*. at 751.

Receiver here, in her effort to dodge Mississippi substantive law doctrines such as the wrongful conduct rule. The Supreme Court reversed, holding that a "federal" receiver is bound by the same state-law rules as any other party. The Court recognized the "runaway tendencies" of the untethered "federal common law" suggested by the receiver, readily rejecting the receiver's policy arguments that applying valid, applicable state law would "disserve the federal program" by imposing costs "on the nation's taxpayers, rather than on the negligent wrongdoer." *O'Melveny*, 512 U.S. at 89.

The "federal" receiver in *O'Melveny* was FDIC. The *O'Melveny* rule applies equally to S.E.C. receivers. *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966, n.11 (5th Cir. 2012) (citing *O'Melveny*, in S.E.C. receivership, "[t]he rights of a receiver are determined by state law.").[2]

O'Melveny is critical to evaluating this case, yet the Receiver ignores it completely. She instead pivots to a supposed body of "Fifth Circuit law," or to arguments of "equity" unconnected to Mississippi law, because under Mississippi law, her claims fail.

Under Mississippi Law, the Receiver, Lamar Adams, and Madison Timber are Legally the Same Person.

Trustmark's opening brief showed that under Mississippi law, receivers stand in the shoes of their predecessors and cannot assert any claim that could not be asserted by the pre-receivership entity. (#40, pp. 7-10.) The Receiver says that Trustmark "spills a lot of ink" on that point (#48, p.45) but does not otherwise respond – except to pivot again to the supposed law of "federal equity receiverships," which supposedly allows her to "maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so." (#48, pp. 45-46.)

The Receiver cites *Jones v. Wells Fargo*, *supra*, for that position. *Jones* contradicts her. In *Jones*, the Fifth Circuit properly cited *O'Melveny*, and expressly applied **Texas law** to decide

[2] It is troubling that the Receiver cites *Jones v. Wells Fargo* repeatedly, and at some length (#48, pp. 45-47, 51), for the suggestion that "federal equity receivers" enjoy special privileges, such as an "innocent successor" exception to the doctrine of *in pari delicto*. In *Jones*, the Fifth Circuit expressly applied *O'Melveny*, and expressly relied on the **state law of Texas** in determining whether *in pari delicto* applied to the receiver's claims. *Id*. There is not one reference to a "federal receiver," or "federal equity receiver," in the *Jones* opinion.

whether a receiver could dodge the *in pari delicto* defense. *Jones*, 666 F.3d at 966. In fact, her quote of the Fifth Circuit opinion, with "internal quotation marks and citation omitted," is a direct quote from a Texas Court of Appeals decision. *Id*. And that quote is followed in *Jones* by footnote 11, which states that "[t]he rights of a receiver are determined by state law," citing *O'Melveny*.[3]

The Receiver cites no Mississippi case law suggesting that receivers have special rights to avoid defenses. She does not refute Trustmark's review of Mississippi receivership law. In Mississippi, "[t]he receiver acquires no other or better or greater interest than had the person out of whose hands it was taken." J. Shelson, *Mississippi Chancery Practice* § 20:12, "The Effect of a Judgment of Receivership" (Westlaw 2019 ed.). The Receiver's status as Adams's stand-in undermines her arguments entirely, on all theories.

Mississippi's "Wrongful Conduct Rule" Requires Dismissal of this Lawsuit.

Trustmark's opening brief (#40, pp. 10-13) explained that Mississippi's Wrongful Conduct Rule entirely bars the Receiver's claims. The Wrongful Conduct Rule requires dismissal if the wrongful act is an "integral and essential" part of the plaintiff's case. *Price v. Purdue Pharma Co*., 920 So.2d 479, 484 (Miss. 2006); *Western Union Tel. Co. v. McLaurin*, 66 So. 739, 740 (Miss. 1914). The rule equally applies to claims of successor parties who did not personally commit the wrongful act. *Downing v. City of Jackson*, 24 So.2d 661 (Miss. 1946) (widow's claims were barred due to her husband's wrongful conduct – even though the widow was blameless).

The Receiver says very little in response. She claims "the rule effectively mirrors the *in pari delicto* maxim," and fails "for the same reasons" (presumably referring to her claim that "federal equity receivers" are immune from *in pari delicto*). She does not cite a single case to support that position. *In pari delicto* and the Wrongful Conduct Rule are related, but not the same.[4] The

[3] Mississippi law does not allow advantages in litigation due to appointment of a receiver. Despite *O'Melveny*, the Receiver calls that point "nonsense," citing cases decided under Texas law. (#48, pp. 49-50.)

[4] *In pari delicto* means "in equal fault," and applies "where the plaintiff is equally or more culpable than

Receiver ignores Trustmark's reference to the widow's claim in *Downing*, because – again – there is nothing she can say that will help her.[5] With nothing else to say, the Receiver resorts to her usual mantra – she is a "federal equity receiver," and "*Price* is not a Ponzi scheme case and does not involve a receiver," and there are no Mississippi cases applying the Wrongful Conduct Rule "in these circumstances." (#48, p.51.) That is dodge, not a principled or reasoned distinction of case law.

The Receiver's Claims are Also Barred by *In Pari Delicto*

Regarding the *in pari delicto* doctrine, Trustmark's opening brief anticipated the Receiver's response. She claims that costly litigation against businesses and professionals is "for the benefit of the public." (#48, pp. 45-46.) She argues that she should win because of "equity" and "public policy," and repeats her shibboleths about "federal equity receivers," including her citations to non-Mississippi law. But she has not shown that Mississippi's "public policy," as reflected in its law, is on her side.

The Madison Timber Ponzi scheme relied on investors who pursued above-market returns of 12% to 15% per year. (S.E.C. Complaint against Adams, Case 3:18-cv-00252-CWR-FKB, Doc. #3, ¶13.) The Receiver says that promised return was "too good to be true."[6] The Receiver claims that

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the defendant or acts with the same or greater knowledge as to the illegality or wrongfulness of the transaction." *Latham v. Johnson*, 262 So. 3d 569, 582 (Miss. App. 2018), *reh'g denied* (Oct. 9, 2018), *cert. denied,* 260 So. 3d 798 (Miss. 2019). The Wrongful Conduct Rule derives from the maxim "*ex dolo malo non oritur actio*," which means that "[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Price*, 920 So.2d at 484. The Wrongful Conduct Rule applies when the illegal act is an essential part of the plaintiff's evidence. The rule applies here, because the Receiver's case depends on proof of her own predecessor's Ponzi scheme.

[5] Trustmark's opening brief cited *In re Munivest Services, LLC*, 500 B.R. 487 (Bankr. E.D. Mich. 2013) as an example of sound reasoning in applying the wrongful conduct rule, even when the plaintiff – a bankruptcy trustee – was an innocent successor to the wrongdoer. The Receiver oddly says that Trustmark "grasps at straws" regarding *Munivest*. (#48, p.51, n. 114.) *Munivest* is directly on the point. Even more oddly, the Receiver cites the comment in *Munivest* that "with the exception of the Fifth and Ninth Circuits," federal courts apply the *in pari delicto* doctrine to bankruptcy trustees. (#48, p.51, n.114.) *Munivest* dismissed an innocent successor plaintiff's claims based on the Michigan's wrongful conduct rule, not the *in pari delicto* rule. The opinion persuasively rejected the very arguments implicitly made by the Receiver in the present case, i.e., that "equity allows the Court to decline to apply the wrongful conduct rule" to a trustee who engaged in no wrongful conduct. 500 B.R. at 496.

[6] Receiver's complaint against Butler Snow et al, No. 3:18-cv-00866-CWR-FKB, #1, ¶93. See also

she, as the criminal's successor, should not be charged with the criminal's conduct via *in pari delicto* because she hopes to return funds to those investors.

Trustmark is sympathetic to Adams's victims. But Mississippi's policy is not to require banks to pay the losses of risk-taking investors who are victimized by crooks, even if the crooks put money in and out of bank accounts. Mississippi's policy is to place that blame on the criminal.

Count I, Civil Conspiracy, Fails to State a Claim

The first element of a claim for civil conspiracy is "an agreement between two or more persons." *Rex Distrib. Co., Inc. v. Anheuser-Busch*, LLC, 271 So.3d 445, 455 (Miss. 2019). Trustmark's principal brief explained that the Conspiracy count fails, because it does not identify any Trustmark "agreement." (#40, pp. 14-16.) The Receiver responds with sophistry, saying that "damages – as opposed to the agreement – 'are the essence'" of a conspiracy claim. (#48, p.17) But the cases cited by the Receiver directly identify four elements of a civil conspiracy claim, with "an agreement between two or more persons" first. *Rex Distrib. Co*., 271 So.3d at 455; *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So.3d 331, 339 (Miss. 2013).

To state a claim for civil conspiracy against Trustmark, the Receiver would have to allege, with sufficient factual heft to satisfy federal pleading standards, that Trustmark *agreed* to operate the Ponzi scheme with Lamar Adams, *knowing* of his conduct. The Receiver's authorities say so. *Bradley,* 117 So. 3d at 339 ("For a civil conspiracy to arise, the alleged confederates must be aware of the fraud or wrongful conduct at the beginning of the agreement.").

The Receiver makes only a naked, conclusory assertion that Trustmark "conspired" with Lamar Adams (Complaint ¶ 99). That is insufficient to meet the Rule 8 federal pleading standard. *Twombly*, 550 U.S. at 557-58. (conspiracy allegations based on inferences of agreement failed to

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transcript of Adams sentencing hearing, p. 286, ll. 14-20, Court's similar observation. While the Receiver bristles at those facts, investors' voluntary risk-taking would surely play a role in deciding whether "equity" deprives Trustmark of defenses. *Cf. Holifield v. BancorpSouth, Inc*., 891 So.2d 241, 250 (Miss. Ct. App. 2004) (in Ponzi scheme case, "[t]he investors, now appellants, were the voluntary source of the money.").

state a conspiracy claim; "[t]he requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with ''a largely groundless claim'' from ''tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'").[7] The Receiver does not, and cannot honestly, identify any Trustmark agreement to do something wrong. It is offensive, false, and beyond the bounds of proper advocacy to accuse Trustmark of conspiring with Adams.

The facts alleged by the Receiver are more consistent with a bank's lawful provision of banking services to a customer who than with any unlawful purpose on Trustmark's part. The Receiver has not identified a conspiracy because she has not adequately alleged an agreement.[8]

Count II, Aiding and Abetting, Fails to State a Claim.

Mississippi has not adopted "civil aiding and abetting," and Count II would not even state a claim under other states' law. (#40, pp. 16-22.)

No such claim exists: This Court must dismiss Count II according to *In re Depuy Orthopedics, Inc.*, 888 F.3d 753, 781 (5th Cir. 2018), which expressly held the federal court could not "expand [Texas] law beyond its presently existing boundaries" by allowing a claim for civil aiding and abetting. *Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N. A*., 800 F. App'x. 239 (5th Cir. 2020) reaffirms that holding. The Receiver's dismissive approach to these on-point, controlling

[7] The Receiver cites *Aetna Ins. Co. v. Robertson*, 94 So. 7, 22 (Miss. 1922) to say that a "mere tacit understanding . . . to work a common purpose" can form a conspiracy. But in *Aetna*, the Mississippi Supreme Court applied *Twombly*-type analysis, 85 years before *Twombly*, stating that "If there are two or more reasonable theories which may be drawn from the facts proven, the proof will be insufficient because, to **invest mere circumstances with the force of truth**, the conclusion must not only be logical, and tend to prove the facts charged, but **must be inconsistent with a reasonable theory of innocence**." *Aetna*, 94 So. 23 (emphasis added) (further stating that **"[d]isconnected circumstances, any one of which is just as consistent with a lawful purpose as an unlawful purpose, are not sufficient to establish a conspiracy**.").

[8] *See also Ronald Moore, InTouch Enterprises, LLC v. Miss. Gaming Comm'n*, No. 1:15-cv-13-DMB-DAS, 2016 WL 5477673, at *15 (N.D. Miss. Sept. 29, 2016)(allegations of gaming agent obtaining three indictments and dismissing one were just as consistent with lawful behavior as with malicious conspiracy; also, allegation of including suspect's social security number in motion to dismiss criminal charges was just as consistent with mistake as with conspiracy).

cases – a mere footnote mischaracterizing the Fifth Circuit's words – is jaw-dropping.[9]

Failure to state a claim under other states' law: The Complaint expressly relied on the *Restatement (Second) of Torts*, § 876(b), as the source of the aiding and abetting claim. (#1, p. 27, ¶109.) Trustmark's opening brief explained that section has been superseded by the *Restatement (Third) of Torts: Liability for Economic Harm*, § 28, "Aiding and Abetting" (2020). The new *Restatement* (including the illustrations, comments, and citations) makes clear that, in states that recognize the claim, the plaintiff must prove a defendant **knew** the third party (Adams) was engaged in wrongful conduct, and **knowingly and substantially assisted him.** Even if the Receiver could prove Trustmark had actual knowledge of Adams's fraud, the bank's provision of routine services would not constitute "substantial assistance." *Rosner v. Bank of China*, 528 F.Supp.2d 419 (S.D.N.Y. 2007).[10] The *Restatement (Third)*, in Illustration 5 and Comment c., accepted the *Rosner* rule, rather than the contrary dicta in *Rotstain v. Trustmark Nat'l Bank*, 2015 WL 13034513 (N.D. Tex. Apr. 21, 2015). The Complaint does not allege adequate facts to support a claim for aiding and abetting, as shown in Trustmark's opening brief (#40, pp. 19-22).

[9] *Midwestern Cattle* stated "we cannot recognize a claim that the Texas Supreme Court has yet to expressly adopt." 800 Fed.Appx. at 250. The Receiver falsely twists that language, arguing that "the Mississippi Supreme Court, unlike the Texas Supreme Court, has made no pronouncement expressly declining to adopt a claim for aiding and abetting." (#48, p.24, n. 45.) **The Texas Supreme Court has made no such "pronouncement."** Indeed, the Court of Appeals of Texas stated twelve days ago that "[t]he Supreme Court of Texas has not expressly decided whether Texas recognizes a cause of action for aiding and abetting." *Nguyen v. Watts*, 2020 WL 2786841, at *23, n.19 (Tex. App.--Hous. [1st Dist.] May 28, 2020).

[10] "**Even if Rosner had established BoC's actual knowledge of the fraud, BoC's actions did not rise to the level of providing 'substantial assistance**.'" The Corrected Complaint details how the funds were transferred to Macau through BoC, but gives no evidence that BoC was doing anything more than providing its usual banking services to a customer, and 'the 'mere fact that participants in a fraudulent scheme use accounts at a bank to perpetrate it, without more, does not in and of itself rise to the level of substantial assistance.'' . . . **Financial transactions that are not considered 'atypical' or 'non-routine' do not constitute substantial assistance**."). *Rosner*, 528 F.Supp.2d at 426-27 (emphasis added).

Counts III and IV, Negligence, Must Be Dismissed Due to Absence of Duty.

The Receiver does not identify a single Mississippi case that holds a bank liable for failing to detect, report, or prevent a customer from defrauding third parties. Banks have no such duty.

Mississippi does not impose on its citizens "the duty to control the conduct of others," absent "a special relationship . . . that gives the injured party a right to protection." *Holland v. Murphy Oil USA, Inc*., 290 So.3d 1253, 1256 (Miss. 2020); Trustmark's brief (#40, pp. 22-28). Therefore, the Mississippi appellate courts have consistently refused to impose liability on banks for criminal acts of their customers.[11] This Court and the Fifth Circuit have followed suit.[12]

The Receiver routinely "distinguishes" important case law with the pat statement a case was "not a Ponzi scheme." (E.g., #48, p. 8, and n. 21, and p. 51.) That is not a substantive argument. And the *Holifield* case was a Ponzi scheme case, in which the Mississippi Court of Appeals rejected investor claims similar to the Receiver's. *Holifield* held a bank could not be liable if it did not have "awareness at the moment of the transaction that the fiduciary[13] is defrauding the principal." 891 So.2d at 249. Trustmark's first brief discussed *Holifield* in depth (#40, pp. 25-27), but the Receiver barely mentions *Holifield*, in a footnote string cite. (#48, p. 30, n. 66.) She does not distinguish *Holifield* or allege facts supporting duty or breach under *Holifield* or any Mississippi case.

In the absence of legal support for her negligence claims, the Receiver comes up with two novel arguments to impose a duty on banks and bankers. Both are wrong. First, she says that Miss.

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[11] *Citizens Nat'l. Bank v. First Nat'l. Bank*, 347 So.2d 964 (Miss. 1977); *Collier v. Trustmark Nat'l. Bank*, 678 So.2d 693 (Miss. 1996); *Holifield v. BancorpSouth, Inc*., 891 So.2d 241 (Miss. Ct. App. 2004).

[12] *Midwest Feeders, Inc. v. Bank of Franklin*, 5:14-CV-78-DCB-MTP, 2017 WL 216715, at *6 (S.D. Miss. Jan. 18, 2017), *aff'd,* 886 F.3d 507 (5th Cir. 2018) (concluding the "Supreme Court of Mississippi would join a majority of courts by finding that Bank of Franklin owed no duty to Midwest Feeders based on the facts presented," and "federal courts siting in diversity should be cautious about 'push[ing] state law to new frontiers.'"); *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507 (5th Cir. 2018).

[13] The Receiver tiptoes past the apparent absence of any fiduciary relationship. Adams and Madison Timber were alter egos. No Mississippi authority holds that Adams owed himself a fiduciary duty. Nor has the Receiver explained how Adams owed a fiduciary duty to his investors.

Code Ann. § 11-7-20, which abolished the ancient doctrine of "privity," "is controlling." (#48, pp. 30-31.) The Receiver does not cite a single case applying that statute – and no wonder. "Privity" and "duty" are different things.

> The demise of the defense of privity removes only a formalistic barrier to recovery. It does not expose these defendants to liability to the whole world. The door opened by the demise of privity is limited by more realistic inquiries into foreseeability and detrimental reliance.

Hosford v. McKissack, 589 So.2d 108, 110 (Miss. 1991).[14]

Second, the Receiver argues – again without case law – that Trustmark owed (someone) a statutory duty of "ordinary care." But the statute she cites is Miss. Code Ann. § 75-3-103(a)(9), which is an inapplicable *definition* of "ordinary care" from Article 3 of the UCC, which relates to handling of negotiable instruments. The negligence claims must be dismissed due to absence of duty.[15]

Trustmark's opening brief noted the Complaint does not identify any act or omission that constituted an alleged breach of duty. Trustmark posed two key questions: ***A duty to whom? A duty to do what?*** The Receiver has no answer, so she states (without citation): "That is not an element of a negligence claim that the Receiver is required to plead." (#48, p. 31, n. 68.) She is wrong. "To allege negligence, a complaint cannot merely make conclusory assertions but **must specify a negligent act** and 'characterize the duty whose breach might have resulted in negligence liability.'" *Jefferson v. Collins*, 905 F. Supp. 2d 269, 284 (D.D.C. 2012) (emphasis added), quoting *District of Columbia v. White*, 442 A.2d 159, 162 (D.C.1982).

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[14] The Receiver argues that the Fifth Circuit "did not take into account" § 11-7-20 in *Midwest Feeders* (#48, p. 31), and she implies that the Mississippi courts must have overlooked the statute in all of the other cases finding banks owed no duty to third parties. It is the Receiver, not the courts, who is mistaken about the statute. Abolishing the doctrine of "privity" did not create an unlimited duty to the world.

[15] The "negligent supervision and retention" claim fails additionally because there is no allegation that any Trustmark employee was "incompetent or unfit" for his job, much less that Trustmark knew of any such incompetence or unfitness. See Receiver's brief, #48, p. 33, citing *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1229 (Miss. 2005).

Count V, "Violations of Mississippi's Fraudulent Transfer Act," Does Not State a Claim.

The Receiver's MUFTA claim is deficient. She has not identified a single "transfer" and has failed to plead "fraud" with particularity. As the Fifth Circuit determined in Matter of Life Partners Holdings, Inc., 926 F.3d 103 (5th Cir. 2019), every circuit to decide the issue has applied Rule 9(b) to UFTA claims. Yet she does not identify one transfer to Trustmark or explain why any specific transfer falls within the fact-specific requirements of MUFTA.16 Her claim fails under Twombly.

Count VI, Mississippi RICO Claim, is Frivolous.

Trustmark's opening brief (#40, pp. 30-31) showed that Mississippi's RICO act, Miss. Code Ann. § 97-43-9, permits a civil action only against a defendant who has been convicted of one of the twenty-nine state-law "Racketeering Activity" crimes listed in Miss. Code Ann. § 97-43-3. The statute permits civil claims only "**against any person or enterprise convicted** of engaging in activity in violation of **this chapter**."[17] The Receiver's only "response" to this point is in footnote 79 of her brief, which does not address the argument at all.

Why would a Court-appointed receiver press this frivolous claim, accusing reputable people and businesses of "racketeering?" There are two possible motives, and both are bad. First, the Receiver may hope the claim has coercive settlement value, due to the reputational harm of being accused of racketeering.[18] Second, the Receiver likely hopes her other claims will look stronger in

[16] The Receiver has reported: "I have reviewed documents relating to the provision of banking services to Adams and Madison Timber for more than a year and a half . . . ." (Receiver Report, Case 3:18-cv-00252-CWR-FKB, #195, 12/31/19, p. 9.) But she has not named a single "fee" or other transfer to Trustmark, and a deposit of funds into a checking account is not a "transfer" under UFTA. *See, e.g., In re Berjac of Oregon*, 538 B.R. 67, 80 (D. Or. 2015). Trustmark is entitled to notice of the claim it is defending. "By failing to allege with clarity the timing and nature of the allegedly fraudulent transfers, plaintiff has failed to give defendants sufficient information so that they can defend against the charge...." *Id.*

[17] Since the conviction requirement was added to the statute in 1986, in response to the United States Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479 (1985), the Mississippi Legislature has twice rejected "An Act . . . to Amend Section 97-43-9, Mississippi Code of 1972, **to Remove the Requirement That a Person or Entity Be Convicted of Engaging in Racketeering Activity Before He Can Be Named as a Defendant in a Civil Action** Seeking Injunctive Relief or Damages for Injury . . ."

[18] Since "mere assertion of a RICO claim ... has an almost inevitable stigmatizing effect on those named as

comparison – and that the Court will, for that reason, let those invalid claims proceed.

The Court Lacks Subject Matter Jurisdiction Because There is No "Injury in Fact" and No Article III Standing.

Trustmark, and other defendants, have fully addressed the lack of an "injury in fact" and the resulting lack of Article III standing. The Receiver's clinging references to cases decided under Texas law (especially the various Stanford cases) do not save her claim. *O'Melveny* requires the Receiver to identify allowable damages under Mississippi law. She has not done so.

The Receiver, Madison Timber, and Lamar Adams are legally the same. There was no looted corporation. There were no innocent shareholders. There is not a true company in receivership. Per the Receiver, "To be clear: Madison Timber was never a legitimate business." (Receiver's brief, #48, p. 43, n. 97.) The one-man LLC was Adams's alter ego. "That is, courts will disregard the separate corporate existence, and the corporation and the shareholder will no longer be seen as separate entities." *Jarrett v. Dillard*, 167 So. 3d 1147, 1152 (Miss. 2015).

When Lamar Adams stole from an investor, the investor sustained damages – not Adams, or the Madison Timber shell. Claims against third parties for "increasing the liabilities" of Adams defy reason. Those claims are identical to the thoroughly-discredited "deepening insolvency" theory, which the Receiver disavows.[19] "Simply calling a discredited deepening insolvency cause of action by some other name does not make it a claim that passes muster." *In re SI Restructuring, Inc.*, 532 F.3d 355, 364, n.15 (5th Cir. 2008), quoting *Radnor Holdings Corp., et al. v. Tennenbaum Capital Partners et al.*, 353 B.R. 820, 842 (Bankr.D.Del.2006). The Fifth Circuit's analysis in *Latitude Solutions, Inc. v. Dejoria* unveils the nonsense of that theory. (#40, pp. 31-32.)

The Receiver's coy allegations about assignments from investors have no import. She did not

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defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Figueroa Ruiz v. Alegria,* 896 F.2d 645, 650 (1st Cir.1990).

[19] Receiver's brief in Case 3:19-cv-00196-CWR-FKB, #54, Filed 06/17/19, Page 41.

plead those assigned claims, so they are not part of the injury-in-fact standing analysis. Trustmark's opening brief showed the Complaint is inadequate to even identify, much less state, any assigned claim (#40, p. 34). *See also MAO–MSO Recovery II, LLC v. Boehringer Ingelheim Pharm., Inc*, 281 F.Supp.3d 1278, 1283 (S.D. Fla. 2017) (dismissing claims for lack of Article III standing, because complaint did not sufficiently plead details of alleged assignments).

The Receiver's final excuse for not pleading assigned claims is concern for investor "privacy." The investors' individual circumstances, sophistication, and decisions would be important to prove defenses such as the statute of limitations and comparative negligence. The assigned claims cannot be proven without those details. There is simply no legal authority to hide the names of investors from the defendants or from the public. *Doe v. McKesson*, 945 F.3d 818, 835, n.12 (5th Cir. 2019) (affirming denial of motion to proceed anonymously, because party's fear of violent repercussions were not adequately supported). "Personal embarrassment is normally not a sufficient basis for permitting anonymous litigation." *Doe 1 v. George Washington Univ.*, 369 F.Supp.3d 49, 62 (D. D.C. 2019). The Receiver's concern about investors' embarrassment rings hollow, in light of her eagerness to brand respected bankers and businesses with claims of racketeering and conspiracy.

Conclusion

The Court has entrusted the Receiver with significant power. That power is subject to misuse. The Receiver has filed claims that range from unsupported to frivolous. As the Supreme Court observed in *Twombly*, it is important to protect defendants against expensive, unjustified litigation. The Receiver's claims are not valid, and her arguments cannot withstand scrutiny. This case should be dismissed.

Respectfully submitted, this the 9th day of June, 2020.

TRUSTMARK NATIONAL BANK

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2020 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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