

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

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

Plaintiff,

v.

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

Defendants

Case No. 3:19-cv-941-CWR-FKB

Arising out of Case No. 3:18-cv-252
*Securities and Exchange Commission v.
Arthur Lamar Adams and Madison
Timber Properties, LLC*

Hon. Carlton W. Reeves, District Judge

**DEFENDANT SOUTHERN BANCORP BANK'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

The Receiver's omnibus response to all defendants' motions to dismiss highlights the problem identified by Southern in its motion to dismiss. As was done in the Complaint, the Receiver again lumps together all "defendants" and restates her conclusory allegations against the lot of them, failing entirely to explain how the scant facts alleged as to *Southern* support any claim for relief. The Receiver failed to distinguish Southern from the other defendants and to differentiate facts relevant to Southern. This defect is fatal. The Court must evaluate the Receiver's facts and claims specifically alleged against Southern in the Complaint. The omnibus response fails to shore up the Receiver's glaring deficiencies in the complaint. Indeed, the Local Rules require the Receiver to file a separate response

to each defendant's motion to dismiss and the Receiver has failed to do so.¹ The Receiver attempts to justify this failure by stating without authority that the rule is not her practice.² Southern's motion to dismiss should be granted.

Southern will not attempt to address each of the arguments raised in the Receiver's 53-page omnibus Response, most of which do not pertain to Southern, and the legal arguments which are already thoroughly briefed. Instead, Southern focuses this reply on the facts and claims specific to Southern.

I. The Receiver Failed to Plead Fraud with Particularity.

The Receiver has failed to plead fraud with particularity as required by the Federal Rules and Fifth Circuit precedent. "Rule 9(b) applies by its plain language to all averments of fraud, *whether they are part of a claim of fraud or not.*" *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) (emphasis added). "Where averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated." *Id.* "The proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated." *Id.* When averments of fraud are insufficiently pleaded, "A district court need not rewrite such a deficient complaint . . . It may dismiss, without prejudice, placing that

¹ See L.U. Civ. R. 7(b)(3)(B) and (b)(4); *Rich v. Sheppard*, 3:16-cv-366-DPJ-LRA, 2018 WL 4344563, *2 (S.D. Miss. Sept. 11, 2018), stating the Local Rules "exist for a reason" and the requirement of separate briefing is intended to "help the Court differentiate the issues."

² See Response p. 1, footnote 1, where the Receiver eschews the Local Rules, saying it is her "practice to file one brief in response to several motions," and it is Southern's job to parse through her combined arguments to "tell the Court" why the Receiver's arguments are lacking as applied to Southern. This is not the standard required by the Local Rules, as interpreted and applied by courts in this district. See *Brown v. Wiggins*, 3:18-cv-487-HTW-LRA, 2019 WL 3723628, *1 (S.D. Miss. Aug. 7, 2019).

responsibility upon counsel.” *Id.*

Here, the Receiver asserts various causes of action against Southern based on her theory that “Madison Timber was a fraud from its inception and . . . [Southern] assisted [Adams]” (*see* Response p. 10), and “Defendants gave substantial assistance and encouragement to Adams” *See* Response p. 27. This allegation is wholly insufficient. Namely, the Receiver’s averments of fraud are the foundation of all her claims against Southern. If there were no underlying fraud, none of her claims against Southern could stand. Her averments of fraud, therefore, must be pleaded with particularity or be disregarded.

II. The Receiver Fails to Plead Sufficient Facts as to Southern.

The omnibus response highlights the Receiver’s lack of any factual support for her claims against Southern. It also clearly evidences the Receiver’s use of unsupported conclusions in place of facts, a practice repeatedly condemned by the Supreme Court. For example, in footnote 100, the Receiver attempts to argue that Southern’s was an “active wrongdoer” rather than a “passive wrongdoer.” *See* Response p. 44. But in the nearly half-page, single spaced, 10-point font footnote, the Receiver fails to cite or identify even *one fact* stated in the complaint to support the conclusion that Southern was actively involved in Adams’s fraud. Instead, the Receiver simply concludes, as she did in the complaint, that “Southern Bancorp actively participated in growing the Madison Timber Ponzi scheme.” This conclusory allegation is woefully inadequate. The Court cannot consider the Receiver’s baseless conclusions and argument, without any factual allegations.

This is indicative of the Receiver's treatment of Southern throughout the complaint and omnibus response. Indeed, in the entirety of the 53-page response, Southern can find reference to only *one fact* alleged in complaint as to Southern – “The Southern Bancorp account took in \$1,000,000 and sent back out \$1,000,000 in the same day.” *See* Response p. 22. But this fact does not support the conclusion of any knowledge, assistance, or wrongdoing by Southern. Rather than pointing the Court to the facts supporting her conclusions, the Receiver side-steps the issue entirely, asking the Court to blindly accept that she has “expressly alleged” facts supporting this, that, or the other (without ever identifying the actual facts).

At page 38 of the Response, the Receiver argues that “Defendants ignore the allegations made in paragraphs 55 through 65 and 87 through 96 of the complaint, which *expressly allege* Defendants’ actual knowledge.” (emphasis added). But Southern *did* address these paragraphs on pages 14 and 15 of Southern’s brief in support of its motion to dismiss, explaining that the statements therein are purely conclusory averments of knowledge unsupported by any facts alleged as to Southern. And, as shown by the authorities cited in Southern’s brief, such conclusory statements of knowledge must be disregarded by the Court in reviewing Southern’s motion to dismiss. Notably, the Receiver has cited to *no authority* to support the proposition that a general averment of knowledge, unsupported by *any* facts, is sufficient to meet the pleading standards of the Federal Rules. This admission by silence mandates dismissal.

Another example of the lack of precision that permeates the Receiver’s

pleadings is found on page 34 of the omnibus response. In arguing she has stated a sufficient claim for negligent retention and supervision, the Receiver states, “Trustmark, RiverHills, and Southern Bancorp had a duty to supervise acts that their employees, including Watkins and Butts, undertook within their offices and in reliance on their name and resources.” *See* Response p. 34. But Watkins and Butts were not employees of Southern, nor are they alleged to have been. No employees of Southern have been identified by the Receiver, nor has the Receiver identified *even one instance* where someone allegedly “undertook” any action within Southern’s offices or relied on Southern’s name and resources. The only allegations against Southern are that Adams controlled three bank accounts there, passed money through those accounts, and made transfers to himself and for his personal benefit out of an account held in his own name. These allegations fall far short of stating any plausible claim for relief against Southern.

Further, the Receiver also fails to provide any authority regarding *any* duties owed to non-customers which is a question of law. Southern identified this failure in its Memorandum in Support of its Motion to Dismiss. *See* Doc. 32, pp. 8-11 (citing, *i.e.*, *Midwest Feeders*, 886 F.3d 507 (5th Cir. 2018)(banks do *not* owe non-customers a duty to protect them from the intentional torts of customers); *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 234 (5th Cir. 2010) (banks have no duty to monitor accounts for suspicious activity or to investigate activity upon discovery); *Wiand v. Wells Fargo Bank*, 86 F. Supp. 3d 1316, 1322 (M.D. Fla. 2015), *aff’d*, 677 Fed. Appx. 573 (11th Cir. 2017); *Freeman v. Dean Witter Reynolds*, 865 So. 2d 543,

552 (Fla. 2d DCA 2003); *Lawrence v. Bank of America, N.A.*, 455 Fed. Appx. 904, 907 (11th Cir. 2012) (holding there is no duty on a bank to investigate transactions). The Receiver attempts to dispose of this lack of authority by claiming that Southern and others were part of a Ponzi scheme. This assertion does not eliminate, however, the Receiver's legal burden to establish a legal duty exists for each negligence claim. Because the Receiver has failed to establish that Southern owed a legal duty to non-customers, the Court must dismiss all of the negligence claims.

Conclusion

The Receiver is obligated to plead sufficient facts showing her entitlement to relief against Southern. The Receiver has failed to satisfy this obligation. The Court may not rewrite the deficient complaint or infer alleged facts. Further, Southern is not obligated to parse through the Receiver's consolidated allegations and arguments against "all defendants" to speculate the specific claims asserted against Southern. The omnibus response confirms the deficiencies in the Receiver's complaint related to Southern and, therefore, the complaint must be dismissed.

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

SOUTHERN BANCORP BANK

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CERTIFICATE OF SERVICE

I certify that on this day I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

This the 9th day of June, 2020

/s/ Scott Jones _____