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**

RIVERHILLS BANK'S REPLY IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The issues before the Court are whether the Receiver has standing (even if she has obtained some assignments from creditor investors) and whether her non-conclusory threadbare allegations are sufficient to state a claim against RiverHills Bank ("RiverHills"). Fundamental fairness dictates that the burdens and cost of discovery not be used to extract a settlement. And, no matter how tragic the losses caused by the evil corruption of Adams, the rule of law cannot be set aside solely to find a source for making whole the losses caused by Adams. One injustice cannot be remedied by another injustice. The Supreme Court mandates against allowing a case shy of plausibility to go forward:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management' … given the common lament that the success of judicial supervision and checking discovery abuse has been on the modest side.
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> * * *
>
> ... The threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovering cases

> with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a §1 claim.

Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1967 (2007). Far from being jury questions presented to the Court, these are legal questions that the Court should decide by "draw[ing] on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). An Ohio court accurately described the failings of the receiver's pleading in this instance:

> Here plaintiffs allege that the various "red flags" they describe, of increasing deposits and returns, regulatory guidance, or complaints about CFR, are enough to support the inference the defendants agreed to conspire to facilitate the illegal conduct. The cases discussed above support the opposite conclusion: the facts plead in the [Third Amended Complaint] do not plausibly suggest an agreement to conspire by these defendants. The Supreme Court held in *Iqbal*, as it had in *Twombly*, that the court may infer from the complaint's factual allegations that "obvious alternative explanations" suggest lawful conduct by a defendant, rather than the unlawful conduct that the plaintiff asks the court infer. . . . or, as the district court phrased it in MLSNK Investments, the defendants perhaps "could have connected the dots" at some point while CFR used its account with defendants, but the facts that are actually alleged in the TAC failed to plausibly support the inference that the defendants actually did so, and thereafter agreed to conspire with CFR.

Johnson v. US Bank Nat'l Assoc., 2011 WL 13186544, at *7 (S.D. Ohio).

In order to hide her failure to state a plausible claim, the Receiver resorts to a false narrative. No defendant, and certainly not RiverHills, has argued that it should make Ponzi schemes part of its "line of business" or that "Mississippi public policy favors Ponzi schemes."[1] Rather, it asks the Court to apply Rule 12(b)(1) and (6) because the law is no respecter of persons. The Receiver attempts to conceal the fundamental failing of her Complaint by conflating allegations against RiverHills with the other Defendants and vice-versa. By grouping allegations against all "defendants", the Receiver has failed to meet pleading requirements under *Iqbal* and *Twombly*. Her claims against RiverHills should be dismissed.

[1] Another false narrative is that RiverHills does "not dispute that [it] had before [it] the nuts and bolts of Madison Timber's fraud." (Doc. #48, p.2) It most certainly disputes that claim.

II. ARGUMENT

A. The Receiver lacks standing because she has sustained no injury-in-fact.

The Receiver does not deny that the injury to the Receivership estates is contribution to the unpaid liabilities of MTP. Instead, she attempts to distinguish *Dejoria* and *Lloyds*. The Receiver argues *Latitude Solutions, Inc. v. DeJoria*, 922 F. 3d 690 (5th Cir. 2019) is distinguishable because it is only one contract and because it is not a Ponzi scheme. Whether the claim involves one or multiple contracts is a difference in degree and not substance. The principle of law--that contribution to liabilities does not constitute an injury-in-fact--applies regardless of whether the claims involve a Ponzi scheme. Whether the case involves one fraudulent scheme or one contract, the principle is nevertheless the same.

The Receiver attempts to distinguish *Reneker I* in footnote 21 by a faulty argument regarding *Reneker II*. However, in *Dejoria*, the Fifth Circuit adopted the principle in *Reneker I* without qualification. And, it had the benefit of *Reneker II* and *Reneker III* but elected not to refer to them or rely upon them. In the *Reneker* cases, the receivership, "AmeriFirst," sought to hold the law firm Godwin Pappas liable for legal malpractice. In *Reneker I*, the claims were dismissed because the allegation was that Godwin's misrepresentations to the Texas State Securities Board ("TSSB") allegedly increased the receivership estates liabilities to investors. *Reneker v Offill* (*Reneker I*), 2009 WL 804134, at *2 (N.D. Tex.). Reneker was essentially claiming that if Godwin had not made misrepresentations to the regulatory agency, the agency would have shut down the illegal and/or fraudulent activity.

Reneker II is different from this action because Reneker amended his complaint to allege that AmeriFirst had obtained bad advice from Godwin. *Reneker v Offill* (*Reneker II*), 2009 WL 3365616, at *3 (N.D. Tex.). Reneker amended to claim that Godwin, a law firm whose advice

AmeriFirst had sought, had negligently failed to advise AmeriFirst its activities were illegal and to cease the illegal activities. There is no such allegation in the instant action. The Receiver does not allege that Adams and MTP came to RiverHills for advice and were given bad advice. And, there is no allegation that Adams did not know the Ponzi scheme was illegal.

The Receiver mischaracterizes RiverHills' position with regard to *Securities & Exchange Commission v. Stanford International Bank, Ltd. (Lloyds)*, 926 F.3d 830 (5th Cir. 2019). One looks in vain in RiverHills' brief to find where it has argued or suggested that either the investors are injured or the entity in receivership is injured, but never both. *Lloyds* highlights the fact that the Receiver has a different standing than the investors. The investors stand in their own shoes to recover their own losses caused by MTP and Adams while the Receiver stands in the shoes of MTP and Adams. They are looking at the forest (the Ponzi scheme) from different angles. The Receiver missed the point of the quote in *Lloyds* that is contained on page 9 of her brief. The Fifth Circuit was addressing two limitations to a receivership. One limitation is standing and the second limitation is that "the court may not exercise unbridled authority over assets belonging to third parties to which the receivership estate has no claim." *Id.* at 841. "Both [of these limitations] derive from the broader principle that the Receiver collects and distributes *only assets of the entity in receivership*." *Id.* (emphasis added).

The Receiver's final claim in this regard is that *Zacarias v. Stanford Int'l Bank, Ltd. (Willis)*, 945 F.3d 833 (5th Cir. 2019) overrules the *Dejoria* and *Lloyds*. The Receiver's contention is in error for three reasons:

First, the language the Receiver quotes from *Willis* is dicta. The issue in *Willis* was whether the court had the power to bar claims not before the court from being filed in the future

by investors. *Id*. at 889. The parties in *Zacarias* did not dispute that the Receiver could sue for increased liabilities to the estate, so the court never addressed the issue.[2]

Second, *Willis'* dicta is in direct conflict with *Dejoria*, which was controlling precedent at the time *Willis* was issued. The panel in *Willis* does not distinguish, discuss or even cite *Dejoria*. A later panel opinion cannot displace an earlier panel's holding. *See Society of Seperationists, Inc. v. Homin*, 939 F.2d 1207, 1211 (5th Cir. 1991) (quoting *Boyd v. Puckett*, 905 F.2d 895, 897 (5th Cir. 1990) ("the earlier opinion controls and is the binding precedent in this circuit")).

B. The Receiver lacks standing notwithstanding the purported assignments.

The Receiver possesses no authority to obtain assignments and bring claims on behalf of the creditor investors. As stated above, 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 claims 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

[2] Perhaps it was never challenged because the allegations against the defendants were that the defendants provided letters for Stanford advisors which were a "key part of the successful marketing efforts that drove the Ponzi scheme, as insurance played a central role in the bank's overall attractiveness to investors." *Zacarias*, 945 F.3d at 889-90. It was not a "red flags" or "indicia of fraud" case.

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.

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. No form assignment is attached. 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. And, even if she possessed authority to accept assignments under the Receivership statutes, it does not confer standing to assert the claims on behalf of MTP and Adams' estates.

RiverHills has a right to know the identity of the assignor investors and the substance of the assignment in order to defend itself against their claims. The identity of the assignor investors lets RiverHills know whether the assignors have standing to assert claims against RiverHills or whether RiverHills has certain defenses, like statutes of limitations, it may assert against them. On the other hand, the assignor investors have no right to keep their identities confidential. The fact that the investors were victims of a massive fraud does not entitle them to proceed anonymously or to keep their names confidential. "The federal rules of Civil Procedure make no provision for anonymous plaintiffs. Secrecy in judicial proceedings, including concealment of parties' names, is disfavored." 27 Fed. Proc., L.ED. §62:108 *Fictional or*

Anonymous Plaintiffs (2020). The Receiver offers no compelling reason to keep the identity of the assignors confidential. As this Court has stated, "that the plaintiff may suffer some embarrassment or economic harm is not enough. There must be a strong social interest in concealing the identity of the plaintiff." *Doe v. Hallock*, 119 FRD 640, 644 (S.D. Miss.) (quoting *Doe v. Rostker*, 89 FRD 158, 162 (N.D. CO. 1981)). Rule 10 of the Federal Rules of Civil Procedure favors disclosure of the identity of the parties. *Id*. at 643. There is a "customary and constitutionally embedded presumption of openness in judicial proceedings." *Id.* at 643 (quoting *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981)).

C. Under Mississippi law, the Receiver's claims are barred by *in pari dilecto* And the wrongful conduct rule.

Mississippi law applies the doctrine of *in pari dilecto* and the wrongful conduct rule in tort cases. Applicability of *in pari delicto* is "controlled by state common law." *Jones*, 666 F.3d at 965. In *Janvey v. Proskauer Rose, LLP*, 2015 WL 11121540 (N.D. Tex.), relied upon by the Receiver, the court deferred deciding whether *in pari delicto* applies until it determined whether Texas or New York law applied to the case. It recognized the claims could be barred under the doctrine of *in pari delicto* if New York law applied. *Id.* at *4. While the Mississippi Courts have recognized that the doctrine may be set aside in instances "where the paramount public interest demands it," the exceptions are narrow. For example, in *Rideout v. Mars*, 54 So. 801, 802 (Miss. 1911), "the interest of the general public" was the prohibition against rebating premiums so as not to allow discrimination in favor of certain individuals in the same class. Or, as in *Noxubee Cty. Hardware Co. v. City of Macon*, 43 So. 304, 305 (Miss. 1907) where the public interest involved §109 of the Mississippi constitution which prohibits public officers or members of the legislature from having an interest in any contract with governmental entities. As the court stated:

> The state cares nothing about Holberg or Horton, or their concerns. The state cares everything that the salutary principle of public policy embodied in this section 109 shall be faithfully and fearlessly carried out, so as to prevent graft of every possible sort, and secure the honest and clean administration of municipal affairs.

Id.

Here, the interest involves private parties who were cheated by Adams and MTP. But if fraud between private parties is always a matter of "public interest", then the doctrine of *in pari delicto* would never apply. And this is especially so when the parties sought to be held liable received no benefit from the conduct at issue, nor had any actual knowledge that the alleged conduct/acts were being undertaken. The Mississippi Courts draw a line and looks for matters that affect the "general public" and not just private matters involving persons who are otherwise part of the public. [3]

Neither the Fifth Circuit nor Mississippi Courts have held that the doctrine of *in pari delicto* never applies to tort claims brought by a receiver. The Receiver quotes *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955 (5th Cir. 2012) for this unfounded claim. In *Jones*, the Fifth Circuit stated, "application of *in pari delicto* would undermine one of the primary purposes of the receivership established ***in this case,*** and would thus be inconsistent with the purposes of the doctrine." *Id.* at 966. (emphasis added) The Fifth Circuit further recognized that, "application of the doctrine 'depends upon the peculiar facts and equities of the case, and the answer usually given is that which it is thought would serve better public policy.'" *Id.* (quoting *Lewis v. Davis*, 199 S.W. 2d 146, 151 (Tex. 1947)). Other district courts in the Fifth Circuit have recognized that receivers are not entitled to a blanket exception to application of *in pari delicto*, even in one

[3] The Receiver also cites *Morrissey v. Bologna*, 123 So. 2d 537 (Miss. 1960) for her proposition. However, in *Morrissey*, the Court had applied *in pari delicto* in an earlier case between two parties that entered into an illegal contract. *Id.* at 297. But *Morrissey* was not a suit about that earlier case. Instead, it involved a different Plaintiff who was not *in pari delicto* with anybody. *Id.* at 297-98.

of the cases relied upon by the Receiver. The Receiver relies upon *Janvey v. Adams & Reese, LLP*, 2013 WL 12320921 (N.D. Tex.) but there the court relied upon *Knauer* and noted that the "public policy calculus might differ based on the particular claim pursued." Id. at *3, n.4; *see also Ogle*, 2012 WL 2567139, at *3, n.5 (distinguishing *Knauer* from case at hand because *Knauer* did not involve fraudulent transfer claims)

The Receiver claims that RiverHills did not explain why they believe this Court should look to opinions in the Seventh Circuit, New York or South Carolina for guidance. However, RiverHills did explain the reason. First, as discussed above, district court cases in the Fifth Circuit have acknowledged that the affirmative defense of *in pari delicto* may be applicable depending upon the state law. Second, RiverHills explained that the Fifth Circuit found its footing on this issue in *Scholes,* a Seventh Circuit case. Or, as the Fifth Circuit put it, *Scholes v. Lehmann* is "the leading case" addressing this issue. *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013). The Fifth Circuit also "endorsed *Scholes* limitation" of allowing the Receiver to redress only injuries to the entity in receivership. *Willis,* 927 F.3d at 841. Thus, there is no reason to expect that the Fifth Circuit which relied heavily upon *Scholes*, would not recognize the same fencing as the Seventh Circuit did in *Knauer*.

Another reason to follow *Knauer* and its progeny is that it provides sound, fair and equitable reasoning for when the doctrine should apply. He who consents to an act is not wronged by the act. MTP should not be allowed to take advantage of its own wrong. In addition to the other cases cited, other courts have also recognized the wisdom of *Knauer* and that the affirmative defense of *in pari delicto* could apply to a receiver's tort claims. *See, e.g., Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 142-45 (D. Mass. 2008)(recognizing the potential application of *Knauer*); *Bell v. Kaplan*, 2016 WL 815303, at *4 (W.D.N.C.)(distinguishing case

before it from *Knauer* on the ground that "receiver's claims against Kaplan are not merely passive, derivative, or related to the supervision of others."); *Moecker v. Bank of America, N.A.*, 2013 WL 12159056, at *6 (N.D. Fla.)(having adopted *Knauer* for standing analysis then recognized that application of *in pari delicto* to receiver's claims depends on whether plaintiff's guilt is far less in degree and whether doctrine would be contrary to public policy); *Zayed v. Associated Bank, N.A.*, 2015 WL 4635789 at *3 (D. Minn.)("courts routinely apply *in pari delicto* to bar actions where … receiver asserts a claim for tort damages from entities that derive no benefit from the embezzlements, but they were allegedly partly to blame for their occurrence.")(quoting *Knauer v. Johnathan Roberts Fin. Grp., Inc.*, 348 F.3d 230, 236 (7th Cir. 2003)).

Equally applicable, but a different rule, is the wrongful conduct rule. Mississippi has long recognized the principle of law that a plaintiff cannot recover in tort for injuries suffered if that plaintiff suffered those injuries while engaged, in or as a proximate result of, engaging in illegal conduct. *See Downing v. City of Jackson*, 199 Miss. 464, 477, 24 So.2d 661, 664 (1946). Because the Receiver stands in MTP and Adams' shoes, the rule applies to all of her claims.

Finally, the Receiver fails to address RiverHills' separate argument that the Estate of Adams' claims are barred by *in pari delicto* and the wrongful conduct rule. [Doc. #47, p. 6] The failure to separately address it is essentially conceding the correctness of RiverHill's position. But even if there is no such concession, the Fifth Circuit is clear that it does make a difference. *See, e.g., Jones*, 666 F.3d at 966 (recognizing that individual wrongdoer Wahab could stand *in pari delicto* even if corporation might not).

D. The Receiver has not pled facts from which the Court could infer that RiverHills had actual or constructive knowledge of Watkins' alleged tortious activities.

The Receiver fails to address any of the arguments set forth by RiverHills in its motion. Instead, she expresses confusion about one statement by RiverHills and then repeats her conclusory allegations.

The Receiver states that she does not understand the import of the proposition that RiverHills cannot be deemed to have actual or constructive knowledge of Watkins' knowledge gained or alleged tortious activities when he was employed at Trustmark. The import of that statement is that the Receiver cannot show specific evidence of RiverHills' actual or constructive knowledge of tortious tendencies based upon allegations of what Watkins' knew or did when he was employed at Trustmark. Mississippi law requires that for such a duty to exist, there must be "specific evidence of an employer's actual or constructive knowledge of the tortious tendencies in order to create a genuine issue of material fact when on a supervision theory of liability." *Holmes v. Campbell Properties, Inc.*, 47 So. 721, 720 (Miss. 2010).

The primary argument by the Receiver is contrary to Mississippi law and common sense. It is her position that as long as she pleads a conclusory allegation that the employee himself provided material assistance, it is not unreasonable to infer that the employers were aware to some degree. Such is not Mississippi law. The Receiver fails to cite any authorities that stand for the proposition that RiverHills owed a duty to MTP and Adams to supervise Watkins. She fails to cite to the Court where in her pleadings she has pled facts showing "specific evidence" of knowledge of Watkins' alleged tortious tendencies. Relatedly, she fails to respond to RiverHills' contention that she failed to plead that facts that if true could infer Watkins did something tortious. She fails to address that even if a duty to supervise exists, it does not include a duty to

uncover concealed, clandestine, and personal activities. Finally, she fails to address the proximate cause argument. By failing to address these, she concedes RiverHills' motion on this claim.

E. The Receiver's claim for recklessness, gross negligence and negligence fails because she had not identified any legal duty RiverHills owed and breached.

One hundred and thirty years ago *Eyerich v. Capital State Bank* the Mississippi Supreme Court set forth the law that banks do not have a duty to investigate its customers' accounts to determine if they are engaged in wrongdoing. See Doc. #38, p. 13 for quote to *Eyerich*. The Receiver makes no effort to rebut *Eyerich* and the other authorities cited by RiverHills and other defendants which stand for the proposition that RiverHills owed no duties to MTP and Adams to investigate and stop the Ponzi scheme. Instead, the Receiver argues that "Defendants can only point to a handful of cases in which a bank was found to have exercised reasonable care under the facts of those cases." One wonders how many cases need to be cited to satisfy the Receiver, who offers no authorities in opposition to those relied upon by RiverHills.

The Receiver fails to distinguish the cases cited by RiverHills. The Receiver claims that *Collier v. Trustmark National Bank* is inapposite because it was decided at the summary judgment stage. This Court can rely upon a principle of law given in a summary judgment opinion as well as it can rely upon an opinion adjudicating a motion to dismiss. The Receiver attempts to distinguish *Citizen's Nat'l Bank v. First Nat'l Bank* on the grounds that there was no fiduciary or confidential relationship with a competing bank. But a competing bank is "another person" just like an investor is another person. The principle remains the same. Finally, the Receiver's reliance upon *Midwest Feeders Inc*., for the proposition that "a bank may owe a duty to the non-customer" fails. The statement in *Midwest Feeders* that a bank "may" owe a duty to a non-customer is dicta. It is incumbent upon the Receiver to cite Mississippi law to identify that

there *is* a duty. Here, the Receiver can cite no Mississippi case which supports her contention that RiverHills owed a duty to investigate and stop the Ponzi scheme.

F. The Receiver's claim for civil conspiracy because she does not plead facts from which the Court could infer an agreement by RiverHills to participate in the Ponzi scheme.

The glaring deficiency in the Receiver's response is the absence of any factual pleading that RiverHills "agreed to" participate in the Ponzi scheme. Although the Receiver correctly cites case law that sets forth this requirement, she proceeds to ignore it. For there to be such an agreement, RiverHills "must be aware of the fraud or wrongful conduct at the beginning of the agreement." *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So. 3d 331, 339 (Ct. App. 2013). It is not enough to allege that Adams knew and Adams committed acts in furtherance of the scheme. There are no facts pled by the Receiver from which the Court could reasonably infer that RiverHills had agreed it would participate in the Ponzi scheme.

The Receiver argues that a conspiracy can be formed by a "mere tacit understanding" as if that means an agreement is not required. But even if a conspiracy may be formed by "tacit" understanding, it still requires "concurrence of intent." *Aetna Ins. Co. v. Robertson*, 94 So. 7, 22 (Miss. 1922). "Tacit" means "expressed or carried on without words or speech." *Merriam-Webster* online. Thus, a tacit understanding or agreement by one person means that the other person must actually communicate some sort of plan or scheme to commit an underlying tort to which the first person asserts by silence or an act. Stated differently, at least one party must articulate the parameters of the conspiracy, to which the other party could tacitly agree or accept. No such facts are alleged in the Complaint.

Relying upon *Rex Distributing Co., Inc. v. Anheuser-Busch, LLC*, the Receiver suggests that mere completion of a task that is part of the conspiracy, even if done unwittingly, constitutes

an agreement to participate in conspiratorial course of action. By her line of reasoning, a cab driver who drove Adams to pick up a check from an investor agreed to complete a task associated with a conspiracy and therefore could be held liable. But *Rex* recognizes the longstanding rule that the agreement must be "to accomplish an unlawful purpose or a lawful purpose unlawfully." *Rex*, 271 So.3d at 455 (quoting *Bradley*, 117 So.3d at 339).

The Receiver relies upon *Midwest Feeders, Inc. v. Bank of Franklin ("Midwest I")*, 114 F. Supp. 3d 419 (S. D. Miss. 2015), pointing out that the Court denied defendant's motion to dismiss the claim for civil conspiracy. But the Court did not deny the motion to dismiss the conspiracy claim merely because the perpetrator of the fraud "confessed to the fraudulent activity," as the Receiver suggests. The Receiver is essentially arguing that she should be allowed to weed it out in the discovery process, something frowned upon in *Twombly*, quoted above.

Despite the allegations in *Midwest I*, the Court later granted summary judgment to the bank on the civil conspiracy claim. The "evidence" that was *insufficient* to state a material fact was "the close relationship that existed between Rawls and Magee" and approval of "multiple wire transfers" when there was no money in the account. *Midwest Feeders, Inc. v. Bank of Franklin* (*Midwest II*), 2017 WL 216715, at *9 (N.D. Miss. 2017). Although the Receiver alleges that there was a "close relationship" between Watkins and Adams,[4] she does not allege that RiverHills approved wire transfers where funds were lacking because such would be false. She admits in her Complaint all wire transfers were made with collected monies. The Receiver spills a lot of ink quoting from her Complaint with regard to allegations against Trustmark. (Doc. #48, pp. 20-22). She follows it with a conclusory allegation that RiverHills "saw the same

[4] She bases this on an email by Billings where he allegedly represented to an investor that MTP followed its banker of "twenty plus years." Mr. Watkins was in high school 20 years prior to when Adams opened the RiverHills account.

patterns Trustmark saw." But she does not make any factual allegations to support her claim that *RiverHills* saw the same patterns allegedly seen by Trustmark. She also makes the conclusory allegations that Defendants "saw that none of the hundreds of millions of dollars of investors' money was used to purchase timber." But her Complaint alleges and acknowledges that the RiverHills accounts used in the Ponzi scheme were only wire transfers from another bank and wire transfers to investors. She alleges no facts from which the court could conclude that RiverHills knew that no money was being used to purchase timber. And, as discussed above, RiverHills had no duty to investigate and determine whether timber purchases were being made upstream. According to the Complaint, the RiverHills wire transfers were limited to money received from another bank and paid to investors.

The Court's description in *Midwest II* of the plaintiff's allegations of civil conspiracy, aptly describes the Receiver's allegations herein:

> Like an unidentified sound in the night, Midwest's argument beckons wild assumptions about hidden schemes skulking beneath a shadow of the facts. But to accept the conspiracy theory advanced by Midwest Feeders would require the fact-finder to pile inference upon inference, namely that McGee knew of Rawls' fraudulent scheme, that he agreed to conspire with Rawls and that he acted on behalf of the Bank of Franklin in furtherance of that agreement.

Id.

G. The Receiver Fails to State a Claim for Aiding and Abetting.

The Mississippi Supreme Court has never recognized a civil cause of action for aiding and abetting. *See Pikes v. Walmart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011); *see also Expro Americas, LLC v. Walters*, 179 So. 3d 1010, 1025 (Miss. 2015) (*King, J., dissenting*) (amended complaint offers no additional claims besides "aiding and abetting a breach of the duty of loyalty, and it offers no case law to show that such a 'claim' actually exists"). But even if this Court does make an *Erie* guess that Mississippi would recognize such a cause of action, which

the Court is not obligated to do, the Receiver has failed to state a claim against RiverHills for aiding and abetting.

Even if the Receiver is proceeding under RESTATEMENT (SECOND) OF TORTS §876(b), she has still not stated a claim. The Receiver does not identify the facts, which if taken as true, would establish that RiverHills knew that Adams was breaching a duty. All she can offer is "the Complaint alleges that the Defendants actually knew that Madison Timber was a fraud." (Doc. #48, p. 25). Such is a conclusory allegation is not a factual allegation from which the court can infer, if true, states a claim. *See Litson-Greunber v. J.P. Morgan Chase & Co.*, 7:09-cv-056-O, 2009 U.S. Dist. Lexis 117749, at *5-8 (N.D. Tex. December 16, 2009) (allegation the defendant knew or should have known insufficient to state a claim for aiding and abetting). All the Receiver could muster in response to RiverHills' arguments was to quote the conclusory allegation of her Complaint that RiverHills "could see all the indicia of fraud but chose to look away . . .". (Doc. #48, p. 26).

She fails to address the numerous cases cited by RiverHills that "red flags" or "indicia of fraud" are not sufficient to state a claim. Instead, she repeats her conclusory allegation that "Defendants saw Adams' fraud and knew it was fraud." (Doc. #48, p. 26); *Wiand*, 938 F.Supp.2d at 1246 ("cases addressing the liability of banks for Ponzi schemes consistently hold that 'red flags' arising from suspicious activity giving rise to the presumption that the bank *should have known* about the Ponzi scheme are insufficient to allege aiding-and-abetting liability"). A claim that transactions are "atypical and non-routine" is a conclusory allegation that "cannot satisfy [the] burden of pleading substantial assistance with requisite particularity." *Rosner v. Bank of China*, 2008 WL 5416380, at *5 (S.D.N.Y. 2008). Here, the wire transfers are routine banking transactions even if the Receiver makes the conclusory

allegation that it was an excessive number. The transactions were legal and were made with collected funds. Such cannot constitute substantial assistance. The Receiver cites no authority for her position that the number of wire transfers were suspicious and constituted substantial assistance.

H. The Receiver Has Not Stated a Claim for Violation of Mississippi's RICO Act.

The elephant in the room the Receiver refuses to acknowledge is the lack of criminal conviction of RiverHills. The right to bring a civil suit under Mississippi's RICO Act is triggered only when the "defendant" has been "convicted of engaging in activity in violation of this Chapter." RiverHills has not been convicted of engaging in activity in violation of "this Chapter." For good reason the Receiver avoids addressing *Sedima, S.P.R.L. v. Imrex, Co., Inc.* and its impact on the amendment to Mississippi's RICO statute. Instead, she attempts to sidestep the issue in footnote 79 by claiming that RiverHills' argument is that there was no conviction of Adams under Mississippi law. However, such is a mischaracterization of RiverHills' argument. RiverHills' argument is there is no conviction of *RiverHills*. Even if the court were to consider Adams' conviction as a means of satisfying the conviction requirement under Mississippi's RICO as the Receiver advocates, the requirement is still not met because Adams has not been convicted of a violation "of this Chapter."

The Receiver suggests that *Chaney v. Dreyfus Service Corp*., 595 F.3d 219 (2010) stands for the proposition that a bank has duty to investigate when it sees red flags but only if it is trained its staff to spot those red flags. *Chaney* made no such pronouncement. Instead, the Fifth Circuit stated:

> Before moving on, we should refer to the receiver's suggestion that the many "red flags" suggestive of money laundering gave rise to an obligation on behalf of DSC to investigate Frankel's account activity; and that in discharging this duty,

> DSC would have discovered the fiduciary relationship between LMS and the insurance companies as well as Frankel's misappropriation.
>
> * * *
>
> The receivers have cited no cases suggesting some broad duty for financial institutions to monitor all their accounts for suspicious activity and to investigate that activity upon discovery. We will certainly not act to impose such an expansive obligation.

Id. at 234.

The Receiver relies upon *Hanover* for the proposition that all she has to do is show some sort of association between Adams and RiverHills to establish an "association-in-fact." In *Hanover An. Ins. Co. v. Gibbs*, 2015 WL 5971139, (E.D. La.), the association was markedly different from the allegations in the Receiver's complaint. Hanover alleged that the co-conspirators had staged motor vehicle accidents. Hanover alleged that "Brandon and Brian Gibbs are cousins, Young is Brian Gibbs' girlfriend, Walker is a friend and neighbor, and Jonathan Norman is a friend and cousin to Walker." *Id.* at *2. Moreover, *Hanover* specifically alleged that Brandon had been involved in 15 staged motor vehicle accidents, Brian in three staged motor vehicle accidents and Young in six staged motor vehicle accidents.

But, "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 Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998)). One need only contrast the Receiver's complaint with *Hanover* to see the difference. The Receiver claims a close relationship between Adams and Watkins based upon a third-party's email claiming that Watkins that had been his banker for "over 20 years." Watkins would have been in high school 20 years prior to the opening of the RiverHills account. The Receiver attaches significance to Watkins' communication to Adams

apologizing for a mistake in service and to a text by Watkins after the arrest of Adams stating the bank would be all right, as if there is something sinister in believing that he did nothing wrong. The Receiver's allegations do not rise to the level of Hanover's allegations.

The Receiver admits that her RICO claim is contingent upon there being a duty on the part of RiverHills to investigate Adams based upon the alleged red flags. But, as stated in *Chaney*, there is no such "expansive" duty. *See also United Food & Commercial Workers Unions and Employers Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 854-55 (7th Cir.) (dismissing plaintiff's RICO claim where nothing in complaint revealed how one might infer that interactions between parties comprising an alleged enterprise-in-fact were undertaken on behalf of the enterprise as opposed to on behalf of the parties individual capacities to advance their individual self-interest); *Meridian Trust Co. v. Batista*, 2018 WL 4693533, at *8 (S.D. Fla.) (red flags or aroused suspicions do not constitute actual awareness of one's role in fraudulent scheme and dismissing RICO claim); *In Re Countrywide Financial Corp. Mortgage-Bat Securities Litigation*, 2012 WL 10731957, at *10 (C.D. Cal.) (holding that nothing in complaint indicated underwriters worked together to operate affairs of an enterprise rather than their own affairs); *Zazzali v. Hrischoer Fleischer, PC*, 482 BR 495, 515-16 (D. Del. 2012) (dismissing claim because no allegation defendant paid more than its customary fee for legal services it provided or gained any improper benefit from the fraudulent scheme and that red flags does not adequately plead knowingly and willful participation in the underlying racketeering activities).

I. The Receiver has not stated a Claim Under the Mississippi Fraudulent Transfer Act.

Mississippi law recognizes that whether a transfer is fraudulent must be determined by looking at the facts specific to the transfer. In *Janvey v. Golf Channel, Inc. (Golf Channel IV)*, 834 F.3d 570, 573 (5th Cir. 2016), the Fifth Circuit held that payments made to the Golf Channel

for advertising for additional investors did not constitute a fraudulent transfer. The Receiver argues that the Fifth Circuit has determined that *any* transfer made by the operator of a Ponzi scheme is *per se* a fraudulent transfer. She relies upon Fifth Circuit cases interpreting the Texas Uniform Fraudulent Transfer Act and no Mississippi case or federal case interpreting Mississippi's Uniform Fraudulent Transfer Act. But the Fifth Circuit has never stated that any transfer made by the operator of a Ponzi scheme to any party is *per se* a fraudulent transfer.

In her response, the Receiver clarifies her ambiguous allegation and admits the "fees" at issue are the fees charged by RiverHills for making the wire transfers.[5] The Receiver argues that under *Warfield v. Byron*, RiverHills as a matter of law could not have in good faith received payment for the transaction cost of the wire transfers. Such a claim lacks common sense and is contradicted by *Golf Channel IV*. MTP received comparable value for the wire fee because the transfers were made. The wire transfers did not further the Ponzi scheme but reduced liabilities to the investors.

Contrary to the Receiver's contention, RiverHills doesn't challenge the Ponzi scheme presumption just based upon Minnesota law. *Finn v. Alliance Bank*, 860 N.W. 2d 638 (Minn. 2015) provides sound reasoning for rejecting the Receiver's broad-brush Ponzi-scheme presumption. It is also consistent with *Golf Channel IV*, which recognizes that not every transfer should be subjected to the Ponzi-scheme presumption. Finally, it bears noting that the Receiver completely ignores the body of law which recognizes that the Uniform Fraudulent Transfer Act is "inappropriate as applied to a bank."

[5] The Receiver accuses RiverHills of "grossly" misunderstanding the fraudulent transfer claim. The problem is her Complaint groups her claims against the Defendants to make a claim for "fees at issue" or "*other such payments*." One could hardly call that a bastion of clarity.

III. CONCLUSION

The Receiver's Complaint should be dismissed with prejudice. She has had the benefit of the RiverHills documents presumably for over a year prior to filing the lawsuit. There is no just reason to allow her to amend her Complaint. If she could not state a claim when she filed the Complaint, she never will. And, her standing will not change by the filing of an amended complaint.

WHEREFORE, PREMISES CONSIDERED, RiverHills Bank moves the Court to dismiss all claims against it with prejudice, or, in the alternative, partial dismissal.

This, the 9th day of June, 2020.

Respectfully submitted,

RIVERHILLS BANK

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