

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

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

Plaintiffs,

v.

THE UPS STORE, INC.; HERRING
VENTURES, LLC d/b/a/ THE UPS STORE;
AUSTIN ELSÉN; TAMMIE ELSÉN;
COURTNEY HERRING; DIANE LOFTON;
CHANDLER WESTOVER; RAWLINGS &
MACINNNIS, PA; TAMMY VINSON; and
JEANNIE CHISHOLM,

Defendants.

Case No. 3:19-cv-364-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

Oral Argument Requested

**THE UPS STORE, INC.’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION**

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant The UPS Store, Inc. (“TUPSS, Inc.”) respectfully submits this Motion to Dismiss for Lack of Subject Matter Jurisdiction the Amended Complaint, ECF No. 14, filed by Plaintiff Alysson Mills (“Plaintiff” or the “Receiver”), as the Receiver for the estates of Arthur Lamar Adams (“Adams”) and his company Madison Timber Properties, LLC (“Madison Timber”) (together “Adams/Madison Timber”).

GROUND FOR DISMISSAL

The Receiver lacks standing to bring her claims in the Amended Complaint because she has failed to plead any injury to the estate of Adams/Madison Timber, which themselves

perpetrated the fraud at issue and directly caused investor losses. The claims the Receiver seeks to assert against TUPSS, Inc.—for conspiracy, aiding and abetting, and negligence—are not claims that belong to the Receivership estates, and do not seek to recover property that belongs to the Receivership estates. Rather, the claims asserted would belong only to the *victims* of the Adams/Madison Timber Ponzi scheme—the more than 150 investors who were bilked by Adams/Madison Timber. And the only damages the Receiver seeks to recover in the Amended Complaint are not damages to Adams/Madison Timber, but rather are damages to, again, the investors. These allegations are not enough to plead a cognizable injury to establish standing under Article III of the United States Constitution. The Court therefore lacks subject-matter jurisdiction over the case, and must dismiss the Amended Complaint.

WHEREFORE, for the reasons set forth in TUPSS, Inc.’s memorandum of law in support of its motion to dismiss, TUPSS, Inc. respectfully requests that the Court dismiss the Amended Complaint in its entirety with prejudice.

Dated: August 26, 2020

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CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that I electronically filed the above and foregoing THE UPS STORE, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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THIS, the 26th day of August, 2020.

s/ Mark R. McDonald

MARK R. MCDONALD

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**THE UPS STORE, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

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Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant The UPS Store, Inc. (“TUPSS, Inc.”) respectfully submits this Memorandum of Law in support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction the Amended Complaint, ECF No. 14, filed by Plaintiff Alysson Mills (“Plaintiff” or the “Receiver”), as the Receiver for the estates of Arthur Lamar Adams (“Adams”) and his company Madison Timber Properties, LLC (“Madison Timber”) (together “Adams/Madison Timber”).

I. INTRODUCTION

In May 2018, shortly after the SEC commenced civil litigation against Adams/Madison Timber arising out of their Ponzi scheme, the SEC sought appointment of a temporary receiver to “collect[] and possess[] all property subject to the receivership.” (Expedited Motion to Appoint Temporary Receiver at 2-3, *SEC v. Adams*, No. 3:18-cv-0252-CWR-FKB (S.D. Miss.), ECF No. 11.) The Court granted the request and appointed Plaintiff as the Receiver of Adams/Madison Timber’s property. This Court’s Order of Appointment authorized the Receiver to “assume and control the operation of [Adams/Madison Timber]” and “pursue and preserve all of *their* claims.” (See Order Appointing Receiver at 5, *SEC v. Adams*, No. 3:18-cv-0252-CWR-FKB (S.D. Miss.), ECF No. 33 (emphasis added).)

This action against TUPSS, Inc. oversteps Plaintiff’s authority as Receiver. The claims the Receiver seeks to assert against TUPSS, Inc.—for conspiracy, aiding and abetting, and negligence—are not claims that belong to the Receivership estates, and this action does not seek to recover property that belongs to the Receivership estates. Rather, the claims asserted would belong only to the *victims* of Adams’/Madison Timber’s Ponzi scheme—the more than 150 investors who were bilked by Adams/Madison Timber. And the damages the Receiver seeks to recover are not damages that Adams/Madison Timber suffered, but rather are damages allegedly incurred by investors. The Fifth Circuit addressed this issue in the analogous situation where a

bankruptcy trustee sought to bring claims to recover sums lost by parties who were harmed by the bankrupt entity pre-petition. *In re Latitude Sols., Inc. (DeJoria)*, 922 F.3d 690, 696–97 (5th Cir. 2019), *cert. denied*, *Ebert v. DeJoria*, 140 S. Ct. 521 (2019). There, the Fifth Circuit held that a court-appointed bankruptcy trustee lacked standing to bring such claims and the Fifth Circuit rejected the same theory that the Receiver advances here, namely that she has standing to recover losses incurred by third parties because those losses are or could be “debts” of Adams/Madison Timber. Because the Receiver lacks standing to pursue the claims asserted against TUPSS, Inc. in this action, the Court lacks subject matter jurisdiction.

A similar challenge to the Receiver’s standing is currently presented in three other cases pending before this Court. (*See Mills v. Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss.); *Mills v. BankPlus*, No. 3:19-cv-196 (S.D. Miss.); *Mills v. Trustmark Nat’l Bank*, No. 3:19-cv-00941 (S.D. Miss.)) In all three of these cases, the Receiver is pursuing the same claims (for conspiracy, aiding and abetting, and negligence) that she has asserted against TUPSS, Inc., and the Receiver is seeking to recover the same alleged damages as she seeks here—losses allegedly incurred by persons who invested in the Adams/Madison Timber Ponzi scheme. Defendants in all three of those cases have moved to dismiss for lack of subject matter jurisdiction based on *DeJoria*. The Court has not yet ruled on these motions; the Court stayed the *BankPlus* action pending disposition of the outstanding motions in the *Butler Snow* case, after discussing the similarity of the legal issues raised in the defendants’ motions to dismiss.¹ (Receiver’s Report at 7, *SEC v. Adams*, No 3:18-cv-00252 (S.D. Miss. Apr. 27, 2020), ECF No. 209; Text-Only Order, *BankPlus*, No. 3:19-cv-196 (S.D. Miss. Mar. 31, 2020).)

¹ TUPSS, Inc. believes this action should similarly be stayed pending resolution of this Motion to Dismiss for Lack of Subject Matter Jurisdiction and intends to seek consensus from the other parties that a stay be issued.

The Fifth Circuit’s holding in *DeJoria* applies with equal force here and requires dismissal for lack of subject matter jurisdiction. The Receiver lacks standing to sue for losses allegedly incurred by investors.

II. BACKGROUND

A. This Action by the Receiver Seeking to Recover Alleged Investor Losses

This Court is familiar with the decades-long Ponzi scheme that Adams ran through Madison Timber. (Am. Compl. at 2; *see* Criminal Information ¶¶ 2-4, *U.S. v. Adams*, No. 3:18-cr-00088-CWR-LRA (S.D. Miss. May 1, 2018), ECF No. 1.) That scheme resulted in a federal criminal case against Adams, who pleaded guilty to federal wire fraud charges, and this Court sentenced him to almost 20 years in prison. (Criminal Information ¶¶ 16-28, *U.S. v. Adams*, No. 3:18-cr-00088-CWR-LRA (S.D. Miss. May 1, 2018), ECF No. 1.)

The SEC also filed a civil case against Adams/Madison Timber asserting claims under the anti-fraud provisions of the federal securities laws, Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5. (*See SEC v. Adams*, No. 3:18-cv-0252-CWR-FKB (S.D. Miss.)) Almost immediately after it commenced that action, the SEC filed an Emergency Motion Seeking Appointment of a Temporary Receiver. (*See SEC v. Adams*, No. 3:18-cv-0252-CWR-FKB (S.D. Miss.), ECF Nos. 8, 11.) In its Motion, the SEC explained that a receiver “serves as a disinterested court officer who collects and possesses all *property subject to the receivership*, known as the receivership ‘estate.’” (Expedited Motion to Appoint Temporary Receiver at 2-3, *SEC v. Adams*, No. 3:18-cv-0252-CWR-FKB (S.D. Miss.), ECF No. 11 (citing *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 370-71 (1908)).) The SEC argued that a temporary receiver was “necessary to *take control of [Adams/Madison Timber’s] assets* for the benefit of investors in order to marshal and preserve those assets.” (*Id.* at 2 (emphasis added).) The SEC proposed that the temporary receiver file a

report with a “preliminary plan for the administration of the receivership estate, including recommendations as to the most efficient means for marshalling, liquidating and distributing assets within that estate.” (*Id.* at 3.)

The Court granted the Motion for Appointment of a Receiver but, instead of appointing the candidate proposed by the SEC, the Court accepted applications for the role and ultimately appointed Allyson Mills as the Receiver for the estates of Adams/Madison Timber. (*See* Order Appointing Receiver, *SEC v. Adams*, No. 3:18-cv-0252-CWR-FKB (S.D. Miss.), ECF No. 33.) The Court’s Order of Appointment stated that the Receiver would “assume and control the operation of [Adams/Madison Timber]” and “pursue and preserve all of *their* claims.” (*Id.* at 5 (emphasis added).) The order defined the “Receivership Estate” as follows:

[M]onies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind and description, wherever located, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly . . .

(*Id.* at 6.) The Order also listed the Receiver’s powers and duties, including, inter alia:

(3) to take custody, control, and possession of all Receivership Property, Receivership Records, and any assets traceable to assets owned by the Receivership Estate; and, with prior approval of this Court upon ex parte request, institute such actions or proceedings to impose a constructive trust, to sue for and collect, recover, receive or take into possession from third parties all Receivership Property, Receivership Records, and any assets traceable to assets of the Receivership Estate

(*Id.* at 7) and
...

(16) to investigate and, following this Court’s approval upon ex parte request, to bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging her duties as Receiver.

(*Id.* at 9.)

A year after her appointment, the Receiver filed the Amended Complaint in this case,

naming ten Defendants: (1) the law firm of Rawlings & MacInnis; (2) two employees of Rawlings & MacInnis who were notaries public; (3) Herring Ventures, an independent business authorized under a written franchise agreement with TUPSS, Inc. to operate a The UPS Store; (4) five employees of Herring Ventures who were notaries public; and (5) TUPSS, Inc. The Receiver's Amended Complaint purports to state three claims for relief against TUPSS, Inc: (1) conspiracy, for allegedly conspiring with Adams/Madison Timber in their Ponzi scheme; (2) aiding and abetting Adams'/Madison Timber's Ponzi scheme; and (3) negligence. For each of these claims, the Receiver seeks to recover damages that investors' allegedly lost by investing in the Adams/Madison Timber Ponzi scheme. The Amended Complaint seeks to characterize these injuries suffered by investors as the "debts of the Receivership Estate." (Am. Compl. ¶¶ 86, 96, 109, 120.) The Receiver alleges that "[b]ecause they contributed to the success of the Madison Timber Ponzi scheme, [Defendants] are liable for the debts of the Receivership Estate to investors." (*Id.* at 2; *see also id.* ¶¶ 85, 95, 108, 119.)

B. The Receiver's Actions Against Others Seeking to Recover Investor Losses, and Those Defendants' Challenges to the Receiver's Standing

The Receiver has filed three other actions against other defendants in which she is seeking to recover the same alleged "debts of the Receivership Estate to investors" that she seeks to recover in this action. (*See* Amended Complaint at 2-3, ¶¶ 133-135, 144-146, 155-157, *Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss. Nov. 22, 2019), ECF No. 57; Complaint at 2, ¶¶ 91-93, 100-102, 109-112, *BankPlus*, No. 3:19-cv-196 (S.D. Miss. Mar. 20, 2019), ECF No. 1; Complaint at 2, ¶¶ 104-106, 115-117, 125-128, *Trustmark Nat'l Bank*, No. 3:19-cv-00941 (S.D. Miss. Dec. 30, 2019), ECF No. 1.) The defendants in those three other actions are law firms, financial institutions, and other companies, who also allegedly "contributed to the success of the Madison Timber Ponzi scheme." (*See* Amended Complaint at 3, ¶¶ 134, 145, 156, 171, 188,

198, *Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss. Nov. 22, 2019), ECF No. 57; Complaint at 2, ¶¶ 92, 101, 111, 126, 135, *BankPlus*, No. 3:19-cv-196 (S.D. Miss. Mar. 20, 2019), ECF No. 1; Complaint at 2, ¶¶ 105, 116, 127, 137, 153, *Trustmark Nat'l Bank*, No. 3:19-cv-00941 (S.D. Miss. Dec. 30, 2019), ECF No. 1.)

Defendants in the *Butler Snow*, *Trustmark*, and *BankPlus* actions have moved to dismiss the Receiver's claims for lack of standing based on the Fifth Circuit's ruling in *DeJoria*. (See *Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss.), ECF Nos. 59-60; *BankPlus*, No. 3:19-cv-196 (S.D. Miss.), ECF Nos. 30-31; *Trustmark Nat'l Bank*, No. 3:19-cv-00941 (S.D. Miss.), ECF Nos. 39-40.) The Court has not yet ruled on these motions; the Court stayed the *BankPlus* action pending disposition of the outstanding motions in the *Butler Snow* case, after recognizing the similarity of the legal issues raised in the defendants' motions to dismiss. (Receiver's Report at 7, *SEC v. Adams*, No 3:18-cv-00252 (S.D. Miss. Apr. 27, 2020), ECF No. 209; Text-Only Order, *BankPlus*, No. 3:19-cv-196 (S.D. Miss. Mar. 31, 2020).)

III. LEGAL STANDARD

“A case is properly dismissed for lack of subject-matter jurisdiction [under Rule 12(b)(1)] when the court lacks the statutory or constitutional power to adjudicate the case.” *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015) (citation omitted); see also *Howard v. Miss. Dep't of Corr.*, No. 1:19CV543-LG-RHW, 2020 U.S. Dist. LEXIS 75161, at *5 (S.D. Miss. Apr. 29, 2020). “Article III of the Constitution limits the ‘judicial power’ of the United States to the resolution of ‘cases’ and ‘controversies.’” *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). There is no “controversy” where the plaintiff lacks standing. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). “Standing, of course, is an essential component of federal jurisdiction. A defect in Article III standing is a defect in subject-matter jurisdiction that can be

raised by the parties or the court at any time, and a court is required to address such questions when they are present.” *Cadle Co. v. Neubauer*, 562 F.3d 369, 374 (5th Cir. 2009); *see also Int'l Ass'n of Machinists and Aero. Workers Local Lodge 2121 v. Goodrich Corp.*, 410 F.3d 204, 211 (5th Cir. 2005) (“A federal court is without jurisdiction if the only complaining party lacks standing”).

Article III standing has three elements: (1) “the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical”; (2) “there must be a causal connection between the injury and the conduct complained of”; and (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks omitted). “The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.” *Id.* at 1547; *see also Handshoe v. Perret*, No. 1:15CV382-HSO-JCG, 2018 U.S. Dist. LEXIS 183855, at *9 (S.D. Miss. Oct. 26, 2018).

“[A] plaintiff must demonstrate standing for each claim [s]he seeks to press’ and have ‘standing separately for each form of relief sought.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

IV. ARGUMENT

A. The Receiver Lacks Standing to Recover the Relief She Seeks

The standing issue here is controlled by the Fifth Circuit’s 2019 decision in *DeJoria*. There, the bankruptcy trustee for LSI sued several of LSI’s officer and directors for breach of fiduciary duty and aiding and abetting on the theory that they caused LSI to incur debts to a third party, Jabil, by entering into, and then breaching, a contract with Jabil. *DeJoria*, 922 F.3d at 692-95. The trustee argued that LSI had suffered an injury in fact because of the debts that LSI

owed Jabil. *Id.* at 695. On appeal from a \$9.5 million jury verdict, defendants argued there was no subject matter jurisdiction because the trustee lacked standing to sue. *Id.* The Fifth Circuit agreed and reversed, finding that the federal court lacked jurisdiction to hear the claim. *Id.* at 697.

After noting that the Fifth Circuit had “not squarely addressed Article III standing under the circumstances presented in this case,” the Fifth Circuit concluded the trustee lacked standing to pursue claims based on a theory that LSI was injured “by taking on” the debt to Jabil because those “liabilities [that] are still owed and have not yet been paid . . . represent Jabil’s injury, not LSI’s.” *Id.* at 696. Further, the Court noted that LSI actually benefitted from the transaction because it received the equipment, which it later sold in bankruptcy, and it “did not pay the invoices” for that equipment. *Id.* Because the trustee failed to allege any injury to LSI, and instead purported to base its injury on the money owed by LSI to Jabil, the Fifth Circuit held that the trustee lacked standing. *Id.* at 700.

In reaching this conclusion, the Fifth Circuit endorsed *Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 U.S. Dist. LEXIS 24567 (N.D. Tex. Mar. 26, 2009) as one of the “persuasive authorities holding there was no Article III standing in factually analogous scenarios.” 922 F.3d at 696; *see also SEC v. Stanford Int’l Bank, Ltd. (Lloyd’s)*, 927 F.3d 830, 841 (5th Cir. 2019) (“[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entity in receivership[.]” (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995))). *Reneker* is on all fours with this action against TUPSS, Inc. In *Reneker*, an SEC receiver sued a law firm that had represented the receivership entities, alleging that the firm’s negligence allowed the entities “to continue their illegal [securities] sales . . . [and] thereby rendered [them] liable to third party investors in the sum of at least \$36.5 million.” 2009 U.S. Dist. LEXIS

24567, at *7 (internal quotation marks omitted). The district court dismissed the receiver’s claims for lack of standing because “the only harm alleged is the Receivership Estate's inability to satisfy its liabilities” and “[t]he Receivership Estate’s financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harm[ed] the investors,” not the receiver. *Id.* at *18 (emphasis added).

The Fifth Circuit in *DeJoria* adopted this reasoning: “*Reneker* is also analogous to LSI’s case; the receiver and bankruptcy trustee are similarly situated . . . the securities laws violations are analogous to the Jabil contract as the event the receiver and trustee argue caused damages. Based on the triggering events, [the trustee] and the receiver attempted to recover damages owed [to third parties] because of fraudulent or negligent conduct.” *DeJoria*, 922 F.3d at 696 (quoting *Reneker*, 2009 U.S. Dist. LEXIS 24567, at *6). The “financial inability to satisfy liabilities owed to investors as a result of” the notaries alleged conduct “‘harm[ed] the investors,’ not the receiver.” *DeJoria*, 922 F.3d at 696 (quoting *Reneker*, 2009 U.S. Dist. LEXIS 24567, at *6).

Here, the relief sought in this action is for losses allegedly incurred by *investors* caused by Adams/Madison Timber, not damages incurred by *Adams/Madison Timber* caused by TUPPS, Inc. or the other Defendants in this action. The Receiver’s Amended Complaint tries to finesse that fatal defect by alleging that “Defendants” “contributed to the success of the Madison Timber Ponzi scheme [and therefore] they are liable for *the debts of the Receivership Estate to investors.*” (See Am. Compl. at 2, ¶ 5 (emphasis added).) The Fifth Circuit in *DeJoria* squarely rejected the argument that those investor losses are injuries to an entity in receivership or bankruptcy because the entity might be liable for those debts. The Receiver simply does not have standing to recover the sums she is seeking in this action.

In the *Baker Donelson* action pending before this Court, the Receiver argues that *DeJoria*

is not controlling and that another Fifth Circuit opinion that was issued shortly after *DeJoria*—*Zacarias v. Stanford Int’l Bank, Ltd.*, 931 F.3d 382 (5th Cir. 2019), *opinion withdrawn and superseded on reh’g*, 945 F.3d 883 (5th Cir. 2019)—supports standing. (See ECF No. 43 at 27.) Not so. The Fifth Circuit did not even address standing in *Zacarias*. 931 F.3d at 392–93, 396. Further, *DeJoria* was controlling precedent at the time *Zacarias* was issued and the panel in *Zacarias* did not overrule, distinguish, or even mention *DeJoria*. A later panel opinion cannot displace an earlier panel’s holding. See *Soc’y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211, n.7 (5th Cir. 1991) (“the earlier opinion controls and is the binding precedent in the circuit” (quoting *Boyd v. Puckett*, 905 F.2d 895, 897 (5th Cir. 1990))). Moreover, if the Fifth Circuit had wished to overrule or distinguish *DeJoria*, it had an opportunity to do so when the losing party in *Zacarias* filed a petition for rehearing en banc. (See Appellants’ Joint Pet. for Reh’g En Banc, *Zacarias v. Stanford Int’l Bank, Ltd.*, No. 17-11073 (5th Cir. Aug. 5, 2019).) Instead, the Fifth Circuit treated the petition as one for panel rehearing and issued a revised opinion, which also does not mention *DeJoria*, but which clarifies that *Zacarias* “address[es] only the effect of . . . bar orders enjoining third-party investors’ claims.” *Zacarias*, 945 F.3d at 902.

DeJoria is the controlling law of this Circuit.

B. The Receiver Lacks Standing to Pursue Any of The Claims Asserted Against TUPSS, Inc.

As stated above, “a plaintiff must demonstrate standing” for “each claim he seeks to press,” in addition to showing standing “for each form of relief that is sought.” *Town of Chester*, 137 S. Ct. at 1650; see also *DeJoria*, 922 F.3d at 695. An analysis of each of the three claims for relief asserted in the Amended Complaint leads to the same conclusion—the Receiver lacks standing.

In Count I of the Amended Complaint, the Receiver alleges that “Defendants conspired with Adams to commit . . . tortious acts . . . by notarizing fake timber deeds” and “were complicit in Adams’s intent to defraud [investors].” (Am. Compl. ¶¶ 78-79, 82.) “Under Mississippi law, the elements of a civil conspiracy are: (1) an agreement between two or more persons, (2) to accomplish an unlawful purpose or a lawful purpose unlawfully, (3) an overt act in furtherance of the conspiracy, (4) and *damages to the plaintiff* as a proximate result.” *Rex Distrib. Co. v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019) (emphasis added) (citation omitted). As a recitation of these elements make clear, the proper plaintiff on a conspiracy claim is someone *outside* the conspiracy who is harmed by it, not one of the participants in the conspiracy.

Here, the Receiver’s Amended Complaint contends that the victims of the alleged conspiracy were the investors. As a participant in the alleged conspiracy, Adams/Madison Timber lack standing to sue for conspiracy, and thus the Receiver likewise lacks standing. *See Lloyd’s*, 927 F.3d at 841 (“an equity receiver may sue only to redress injuries to the entity in receivership[.]”) (quoting *Scholes*, 56 F.3d at 753); *Reneker*, 2009 U.S. Dist. LEXIS 24567, at *15 (“A receiver stands in the place of the individuals and entities over whose property he has been appointed receiver. Therefore, [the Plaintiff-Receiver], standing in the shoes of the [Receivership corporate entity], must allege an ‘injury in fact’ suffered by the [corporate entity].”) (citing *Hymel v. FDIC*, 925 F.2d 881, 883 (5th Cir. 1991) and *Lujan*, 504 U.S. at 560-61.)

This issue was presented in *Jarrett v. Kassell*, 972 F.2d 1415 (6th Cir. 1992). There, a court-appointed receiver for the National Coal Exchange (“NCE”) sued NCE’s officers and another entity that allegedly “conspired to sell contracts for future delivery of coal in violation of the Commodity Exchange Act . . . and conspired to defraud [NCE’s] customers in violation of

Tennessee common law.” *Id.* at 1417-18. The Sixth Circuit held that the receiver lacked the authority to assert those conspiracy claims because the receiver “had no authority to bring a cause of action on behalf of individual customers” that were the actual victims of the alleged conspiracy. *Id.* at 1426.

The same reasoning applies here: the Receiver for Adams/Madison Timber does not have standing to sue their own alleged co-conspirators for the damage the conspiracy caused the investors. Because the Receiver stands in Adams/Madison Timber’s shoes, she has no greater standing to claim conspiracy than they do.

In Count II of the Amended Complaint, the Receiver alleges that “Defendants aided and abetted Adams by notarizing fake timber deeds that investors received in exchange for their investments in Madison Timber.” (Am. Compl. ¶ 90.) In support of that cause of action, the Receiver’s Amended Complaint refers to § 876 of the Second Restatement of Torts, which states: “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” Restatement (Second) of Torts § 876, (b) (1979) (emphasis added); (Am. Compl. ¶ 89). Again, the proper plaintiff on a claim for aiding and abetting is the “*third person*” allegedly harmed, not the wrongdoer who was allegedly aided by another defendant. The Receiver lacks standing to pursue an aiding and abetting claim.

Count III of the Amended Complaint purports to state a negligence/gross negligence claim against TUPSS. “For a plaintiff to recover in a negligence action, the conventional tort elements of duty, breach of duty, proximate causation and injury must be proven by a preponderance of the evidence.” *Palmer v. Anderson Infirmary Benevolent Ass’n*, 656 So. 2d

790, 794 (Miss. 1995). The Receiver does not argue that the notaries breached a duty of care *to Adams/Madison Timber* which caused Adams/Madison Timber injuries. To the contrary, the Receiver alleges that “Defendants knew or should have known that the timber deeds were fake” and therefore “were complicit in Adams’s intent to defraud” *investors*. (Am. Compl. ¶ 104.) In other words, the Receiver contends that the notaries owed a duty to fulfill their notary functions properly, and by allegedly breaching that duty, the notaries injured investors who allegedly relied on those notarized deeds. The Receiver, standing in the shoes of Adams/Madison Timber, lacks standing to sue for negligence.

In *Troelstrup v. Index Futures Grp.*, 130 F.3d 1274 (7th Cir. 1997), the Seventh Circuit considered this issue and concluded that a receiver lacked standing to assert a claim against a party whose negligence allegedly harmed persons who invested with the entities in receivership. There, the district court appointed a receiver for the estates of a commodities trader, Tobin, which had been sued by the Commodity Futures Trading Commission for defrauding investors. *Id.* at 1275-76. Tobin traded through accounts maintained by Index Futures Group, Inc. (“Index”). *Id.* The receiver sued Index for negligence, claiming that Index’s negligence “facilitated Tobin’s fraud.” *Id.* The Seventh Circuit ruled that the receiver lacked standing to assert negligence claims because Tobin “had not been wronged by Index’s negligence”. *Id.* at 1276. The Seventh Circuit thus found the federal court lacked subject matter jurisdiction. The Receiver similarly lacks standing to pursue a negligence claim here.

V. CONCLUSION

For the reasons set forth above, TUPSS, Inc. respectfully requests that the Court dismiss the Amended Complaint against TUPSS with prejudice for lack of jurisdiction.

Dated: August 26, 2020

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CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that I electronically filed the above and foregoing THE UPS STORE, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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