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,

Plaintiff,

v.

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

Defendants.

Case No. 3:19-cv-00364

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

RECEIVER'S OPPOSITION TO MOTION TO DISMISS

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, respectfully submits this opposition to the motion to dismiss filed by defendant The UPS Store, Inc. (UPS) [Doc. 138] and joined by defendants Rawlings & MacInnis, P.A., Tammy Vinson, and Jeannie Chisholm [Doc. 140] and Herring Ventures, LLC, Austin Elsen, Courtney Herring, Diane Lofton, and Chandler Westover [Doc. 141].

INTRODUCTION

The instant motion is UPS's second motion to dismiss. In its first motion to dismiss, UPS made numerous arguments, including that the Receiver cannot state claims against UPS and its notaries; that UPS cannot be liable for any judgment against its Madison store; and that the amended complaint does not allege facts sufficient to state claims for civil conspiracy and aiding and abetting. [Doc. 42].

This Court denied UPS's motion on September 30, 2019, and ordered the parties to commence discovery, observing:

> The complaint is particularly detailed, Fifth Circuit and Mississippi law support the Receiver's causes of action, and The UPS Store's affirmative defense is one that will turn on facts adduced during discovery. The better course of action is to begin that discovery, which in a case about notarization should not be overly complex, and adjudicate the motions for summary judgment next year.

[Doc. 49].

It is now next year. But instead of a motion for summary judgment on the merits, UPS has filed this, its second motion to dismiss, to raise the issue of standing. While as a general proposition standing is an issue that may be raised at any time, UPS offers no reason for its failure to raise the issue sooner. The Receiver suspects that UPS's true purpose is to obtain a stay of discovery and, ultimately, a further delay of the parties' trial date.

UPS points to the standing arguments of other defendants in other of the Receiver's cases. Whatever the merits of those defendants' standing arguments, at least those defendants made their standing arguments in their initial motions to dismiss filed pursuant to Rule 12(b)(6). UPS stops just short of arguing, but nevertheless seems to suggest, that it would be unfair to UPS to force it to proceed with discovery and trial while cases against other defendants are stayed. Of course, it is hardly the Receiver's or this Court's fault that UPS itself elected not to make its standing

argument in its initial motion to dismiss (perhaps because UPS properly concluded at that time that the standing argument lacked merit).

In any event, this, UPS's second motion to dismiss, adds nothing new to standing arguments made by other defendants. The Receiver already addressed those standing arguments in her responses to each of those defendants' motions—but she gladly re-addresses them here. The instant motion is distinct in that it is the only pending motion that raises the discrete standing issue by itself. (Other defendants' motions raise numerous issues, not merely the standing issue.) The instant motion thus gives this Court the opportunity to decide the standing issue neatly.

ARGUMENT

The Receiver has standing to sue UPS. Recent opinions of the Fifth Circuit, primarily *Zacarias* but also *Lloyds*, leave no doubt.

UPS's motion relies instead on the Fifth Circuit's opinion in *DeJoria*. That reliance is misplaced; *DeJoria* was a narrow opinion in a case that did not involve a Ponzi scheme.

I. THE RECEIVER HAS STANDING.

The Receiver's lawsuit against UPS is one of a handful that she has filed in the fulfillment of her duties as the court-appointed receiver for Madison Timber.

Lamar Adams used Madison Timber to perpetrate a massive Ponzi scheme that defrauded hundreds of investors. In 2018 he pleaded guilty to the federal crime of wire fraud and this Court sentenced him to a term of imprisonment of 235 months. The S.E.C. requested that this Court appoint a receiver for the estates of Adams and Madison Timber, and the Court appointed Alysson Mills. The Receiver's job is to recover money and assets for the benefit of defrauded investors.

Relevant here, the Receiver stands in Madison Timber's shoes for the express purpose of maximizing assets available to Adams's victims. "As directed by the court, a receiver may

systematically use ancillary litigation against third-party defendants to gather the entity's assets. Once gathered, these assets are distributed through a court-supervised administrative process." *Zacarias v. Stanford Int'l Bank, Ltd*., 945 F.3d 883, 896–97 (5th Cir. 2019). This Court's order of appointment vests in the Receiver the power to, among other things:

> investigate and . . . 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.[1]

The Receiver filed this lawsuit in her capacity as the Receiver for Madison Timber and pursuant to the power vested in her by the Court's orders and applicable law. Madison Timber's debts are now the Receivership Estate's. The Receiver has standing to pursue, *inter alia*, claims against third parties whose actions contributed to the success of the Madison Timber Ponzi scheme, and therefore to the debts of the Receivership Estate.

Adams misused Madison Timber to sustain a singular fraud over many years, and UPS assisted him. UPS and its codefendants are the notaries and their employers on whom Adams principally relied to notarize fake timber deeds. The Madison Timber Ponzi scheme could not have grown without their assistance.

In a Ponzi scheme, "the harms arise from a singular scheme, not isolated acts—that is, from a composite of conduct by numerous conspirators taken over many years, collectively establishing and perpetrating the fraud." *Zacarias*, 931 F.3d 382, 397, (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 945 F.3d 883. In *Zacarias*, the Stanford receiver's claims were the very same type of claims the Receiver alleges against UPS. The Stanford receiver sued two insurance brokers

[1] Doc. 33, Securities & Exchange Commission vs. Adams, et al., No. 3:18-cv-00252 (S.D. Miss.). By order dated August 22, 2018, the Court eliminated the requirement that the Receiver obtain "prior approval of this Court upon ex parte request" before bringing any legal action. Doc. 38, Securities & Exchange Commission vs. Adams, et al., No. 3:18-cv-00252 (S.D. Miss.).

whose actions contributed to the success of the Stanford Ponzi scheme. Relevant here, as summarized by the Fifth Circuit, the Stanford receiver alleged:

> (1) that Willis and BMB knowingly or recklessly aided, abetted, or participated in the Stanford directors' and officers' breaches of fiduciary duties towards the receivership entities, *resulting in exponentially increased liabilities and the misappropriation of billions of dollars*;
>
> (2) that Willis and BMB violated their duty of care towards the receivership entities by enabling and participating in the Stanford directors' and officers' Ponzi scheme, *resulting in exponentially increased liabilities and the misappropriation of billions of dollars*;
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> [and] (5) that Willis and BMB breached their duties of care to the receivership entities in their hiring, supervision, and retention of employees who issued comfort letters in furtherance of the Stanford Ponzi scheme, *causing exponentially increased liabilities and the misappropriation of billions of dollars*[.]

Zacarias, 945 F.3d at 893 (emphasis added). Like the Stanford receiver, here the Receiver "is suing [UPS] to recover for the additional liability [Madison Timber] incurred to its investors, allegedly by virtue of [UPS's] participation in the scheme." *Id.* at 900. If the Stanford receiver had standing to sue the insurance brokers in *Zacarias*, the Receiver has standing to sue UPS here.

UPS does not address *Zacarias* in its motion, except to attempt to dismiss it on the premise that "the Fifth Circuit did not even address standing in *Zacarias*." [Doc. 139 at 14]. With all due respect, **UPS's challenge to the Receiver's authority here and the challenge to the Stanford receiver's authority in *Zacarias* are the same**: UPS's motion is a "motion to dismiss for lack of subject matter jurisdiction"; in *Zacarias*, investors objected to a bar order on the basis that "the district court lacked subject matter jurisdiction." *Zacarias*, 945 F.3d at 895. UPS argues this Court lacks subject matter jurisdiction because the Receiver lacks standing to sue UPS; in *Zacarias*, investors argued the district court lacked subject matter jurisdiction to bar their claims because the Stanford receiver lacked standing to settle their claims. UPS's statement that "the Fifth Circuit did

not even address standing in *Zacarias*" is simply untrue; to the contrary, the question of standing was unavoidable in *Zacarias*. Indeed, the Fifth Circuit's opinion makes clear that the district court's subject matter jurisdiction in that case depended on the Stanford receiver's standing:

> The case at hand is one of several ancillary suits under the primary SEC action to enforce the federal securities laws against Robert Allen Stanford and his Ponzi-scheme co-conspirators. There is no dispute that the receiver and Investors' Committee had standing to bring their claims against Willis and BMB. They bring only the claims of the Stanford entities—not of their investors—alleging injury to the Stanford entities, including the unsustainable liabilities inflicted by the Ponzi scheme. The receiver and Investors' Committee "allege that Defendants' participation in a fraudulent marketing scheme increased the sale of Stanford's CDs, ultimately resulting in greater liability for the Receivership Estate," and that defendants "harmed the Stanford Entities' ability to repay their investors." The receiver and Investors' Committee sought to recover for the Stanford entities' Ponzi-scheme harms, monies the receiver will distribute to investor-claimants. The district court had subject matter jurisdiction over these claims.

Zacarias, 945 F.3d at 898–99. *See also id.* at 898 (citing *Sec. & Exch. Comm'n v. DeYoung*, 850 F.3d 1172, 1175 (10th Cir. 2017), and observing that the Tenth Circuit "[found] that the receiver had standing to sue First Utah Bank on behalf of the receivership entity and that the court had subject matter jurisdiction to enter the bar order").[2]

Even Judge Willett, who dissented in *Zacarias*, agreed that the Stanford receiver had standing to sue the insurance brokers in question for their failure "to thwart the Ponzi scheme" by, for example, "turn[ing] a blind eye to Stanford officers' misdeeds." *Zacarias*, 945 F.3d at 905. Judge Willett's dissent argued only that the Stanford receiver lacked standing to settle the objecting investors' claims, where their injuries were factually distinct. *Id.* ("[The insurance brokers] injured the Stanford entities by failing to thwart the Ponzi scheme. They turned a blind eye to Stanford

[2] That the *Zacarias* opinion said there was "no dispute" that the receiver had standing does not mean the question of standing was not essential to the Fifth Circuit's decision and should be disregarded here. Standing is not something parties can agree not to dispute. A court does not let a lack of standing slide. The Fifth Circuit said there was "no dispute" that the receiver had standing because, as explained, given the facts and the law there could be no dispute that the receiver had standing.

officers' misdeeds—*inaction.* So the Receiver asserted breach of fiduciary duty and negligence claims against them. But [the insurance brokers] separately injured the Objectors. . . . ").

Zacarias is not the only recent opinion of the Fifth Circuit to address the Stanford receiver's standing to pursue claims against third parties. In *Securities and Exchange Commission v. Stanford International Bank, Ltd. (Lloyds)*, 927 F.3d 830 (5th Cir. 2019), the Stanford receiver, Stanford's employees, and certain of Stanford's investors all claimed rights to proceeds from insurance policies issued by Stanford's insurers. The Stanford receiver purported to have settled the claims of all interested parties, and after he obtained a bar order from the district court. The employees and investors objected to the bar order on the basis (again) that the Stanford receiver lacked standing to settle their claims. The Fifth Circuit agreed that the Stanford receiver lacked standing to settle employees' claims because those claims were "independent, non-derivative" of the receiver's claims. *Lloyds*, 927 F.3d at 843. But it rejected the notion that the Stanford receiver lacked standing to settle investors' claims: investors' claims were merely "redundant" of the receiver's own claims, and "here, the Receiver had standing to pursue *its own claims.*" *Id.* at 850 (emphasis in original).

In short, if there were any question, *Zacarias* and *Lloyds* leave no doubt that the Receiver has standing.

II. THIS CASE IS NOT *DEJORIA*.

UPS relies on *Ebert v. DeJoria*, 922 F.3d 690 (5th Cir. 2019), to argue bankruptcy trustees and equity receivers lack standing to sue third parties to recover money for defrauded investors. But *DeJoria* was not a Ponzi scheme case. In *DeJoria* the court held only that a bankruptcy trustee lacked standing to pursue a discrete claim that belonged to a single distinct creditor.

In *DeJoria*, the company in question, LSI, was a publicly traded company that developed patented technology for the treatment of wastewater for the oil and gas industry. *DeJoria*, 922 F.3d at 693. LSI contracted with Jabil, a manufacturer, to provide equipment to LSI. *Id.* at 696. Jabil delivered the equipment to LSI, but LSI never paid Jabil's invoice. *Id.* After LSI filed for bankruptcy, the bankruptcy trustee leased and eventually sold the equipment. *Id.* Jabil filed a claim for $9.55 million in LSI's bankruptcy proceedings. *Id.* at 694.

The bankruptcy trustee tried to recoup Jabil's loss by suing LSI's officers, who she alleged improperly entered the contract with Jabil. *Id.* at 695. At trial, the trustee argued Jabil specifically had been misled. *Id.* She told the jury to "forget about the other hundred and something creditors . . . focus on Jabil"—"the fraud, the improper conduct, was entering into the Jabil contract." *Id.* The jury found for the trustee. *Id.*

The Fifth Circuit vacated the jury's verdict, holding the trustee was not entitled to damages for an injury that Jabil alone suffered. *Id.* at 696. The court observed that LSI itself was not injured by the contract with Jabil: LSI received the equipment without paying for it and even benefited from it by leasing and eventually selling it. *Id.* The court expressly did not hold the trustee could never recover damages arising from the defendants' breaches of fiduciary duty—but instead only that, under the circumstances, the trustee was not entitled to damages that belonged solely to a single distinct creditor. *Id.* at 697 n.6 ("**We need not address and therefore do not hold that there could not possibly be an Article III injury in fact stemming from Cohen and DeJoria's breaches of fiduciary duty.** Instead, we hold there is no Article III injury stemming from the claims Ebert asserted and Damage Element No. 1 of the jury instruction." (emphasis added)).

Context is important. The trustee in *DeJoria* narrowed her case at trial **to a single contract that injured a single creditor**. Although she tried to paint LSI as a fraud from its inception, the

court observed both that LSI was a publicly traded company that developed patented technology, *id.* at 693, and that the trustee herself had attempted to find investors to keep LSI operating, *id.* at 694. **LSI was not a Ponzi scheme**. In a Ponzi scheme case, the underlying business is a fraud from its inception. The Ponzi scheme's perpetrators misuse the underlying business entity to perpetrate **one singular fraudulent scheme** that injures the entity and investors in the same way. The entity and investors both seek recovery to address the same harms sustained by the same conduct. The fact that investors were injured does not mean that the entity was not. This is why, in Ponzi scheme cases, it is often said that investors' injuries are "redundant," *see Lloyds*, 927 F.3d at 844, 850 (Stanford investors' claims were "redundant"), or "derivative," *see id.* at 847–48 (Stanford employees' claims, by contrast, were "non-derivative"), or "duplicative," *see id.* at 844; *Zacarias*, 945 F.3d at 896 (investors' lawsuits would result in "duplicative litigation"), of the entity's.

UPS is simply wrong to argue the Fifth Circuit in *DeJoria* "squarely rejected" the underpinnings of the Receiver's standing in this case. The fact that LSI's trustee lacked standing in *DeJoria* does not mean the Receiver lacks standing here. The injury in *DeJoria*, arising from a single contract, was unique to Jabil—so much so that the trustee told the jury to "forget about the other hundred and something creditors," *DeJoria*, 922 F.3d at 695—and actually benefited LSI, which not only applied the money it owed Jabil to other, arguably legitimate, purposes but also profited from the lease and sale of Jabil's equipment. By contrast, the injury here is not unique to any one party; the fraudulent scheme injured Madison Timber and investors in the exact same way. The fact that investors were injured does not mean that Madison Timber was not.

UPS is also wrong to argue *DeJoria* "controls" here because the panel in *Zacarias* did not "overrule [or] distinguish" it. [Doc. 139 at 14]. The fact that the panels in *Zacarias* and *Lloyds* did not "even mention" *DeJoria* only goes to show that *DeJoria*, which is a narrow opinion, did not

speak to those two cases and does not speak to this case. It is absurd for any defendant to continue to insist that this Court contort the facts and law to apply *DeJoria* to dismiss the Receiver's claims—especially where two more recent opinions in a similar Ponzi scheme case leave no doubt that the Receiver has standing.

No other authority cited by any defendant supports applying *DeJoria* in the Receiver's cases. All defendants have observed that the *DeJoria* court cited approvingly *Reneker v. Offill*, No. 3:08-cv-1394, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009), an unpublished case in which a district court held a receiver lacked standing to purse claims against a law firm. ***Reneker* also was not a Ponzi scheme case.** Furthermore, the *DeJoria* court cited *Reneker I* only. Importantly, even in *Reneker I* the district court observed that, **unlike here**, the receiver had not alleged that the law firm "increased the [receivership companies'] liability to third parties or caused the [receivership companies] to be liable to third parties when they otherwise would not have been." *Id.* at *6, n.5. After *Reneker I*, the receiver amended his complaint to expressly allege that the law firm had caused the receivership companies "to incur additional and unnecessary liabilities to third parties." In *Reneker II*, the district court held the amendment was sufficient to survive the law firm's motion to dismiss for lack of standing. *Reneker v. Offill*, No. 3:08-cv-1394, 2009 WL 3365616 at *2 (N.D. Tex. Oct. 20, 2009). Years later, **after a fuller development of the case**, the district court granted in part the law firm's motion for summary judgment for lack of standing in *Reneker III*. *Reneker v. Offill*, No. 3:08-cv-1394, 2012 WL 2158733, at *6 (N.D. Tex. June 14, 2012). None of the three *Reneker* opinions, all unpublished, support granting any defendant's motion to dismiss.

UPS also cites *Jarrett v. Kassell*, 972 F.2d 1415 (6th Cir. 1992), and *Troelstrup v. Index Futures Group*, 130 F.3d 1274 (7th Cir. 1997). Neither was a Ponzi scheme case, both are Commodities Futures Trading Commission (CFTC) cases, and each is distinguishable. *Jarrett*

asked whether a CFTC receiver's due diligence was attributable to his co-plaintiffs, defrauded customers who independently sued the officers of the receivership entity, for the purposes of equitably tolling a statute of limitations. *Toelstrup* asked whether a CFTC receiver for a commodities trader had standing to sue on behalf of a trading account for which he was not appointed receiver. Neither *Jarrett* nor *Toelstrup* speaks to this case.

III. A FEW WORDS ON DAMAGES.

It is easy for UPS and other defendants to argue that the damages the Receiver seeks belong to investors, not the Receivership Estate. The Receivership Estate exists to recover money for investors—of course the damages belong them. It does not follow, however, that the Receiver lacks standing to pursue those damages in her capacity as the Receiver for Madison Timber. That is what a receiver in a case like this does: "pursue the corporation's claims 'for the benefit not of [the wrongdoers] but of innocent investors,'" "in the service of equity and aggregate recovery":

> It is necessarily the case that where a district court appoints a receiver to coordinate interests in a troubled entity, that entity's investors will have hypothetical claims they could independently bring but for the receivership: the receivership exists precisely to gather such interests in the service of equity and aggregate recovery.

Zacarias, 945 F.3d at 899.

Indeed, the Fifth Circuit has observed it is only through a receivership that a recovery can be equitably distributed:

> Exercising their jurisdiction under the securities laws, federal district courts can utilize a receivership where a troubled entity, bedeviled by their violation, will be unable to satisfy all of its liabilities to similarly situated investors in its securities. Without a receiver, investors encounter a collective-action problem: each has the incentive to bring its own claims against the entity, hoping for full recovery; but if all investors take this course of action, latecomers will be left empty-handed. A disorderly race to the courthouse ensues, resulting in inefficiency as assets are dissipated in piecemeal and duplicative litigation. The results are also potentially iniquitous, with vastly divergent results for similarly situated investors.
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> The receiver, standing in the shoes of the injured corporations, is entitled to pursue the corporation's claims "for the benefit not of [the wrongdoers] but of innocent investors." The receiver is therefore allowed to curb investors' individual advantage-seeking in order to reach settlements for the aggregate benefit of investors under the court's supervision. As directed by the court, a receiver may systematically use ancillary litigation against third-party defendants to gather the entity's assets. Once gathered, these assets are distributed through a court-supervised administrative process.

Id. at 896–97.

DeJoria makes for a distracting academic debate but in the end does nothing to undermine a receiver's standing—and duty—in a Ponzi scheme case to recover damages from defendants whose acts contributed to the debts of the receivership estate, including from the increase in "unsustainable liabilities inflicted by the Ponzi scheme," for the benefit of investors. *Id.* at 899–900.[3] Applying *DeJoria* to dismiss the Receiver's claims would deprive investors of an equitable, aggregate recovery.

CONCLUSION

The Court should deny UPS's motion to dismiss for the reasons stated. If, however, the Court grants the motion for any reason, the Receiver respectfully requests leave to amend her complaint to allege standing on alternative bases, including that investors have executed assignments that entrust to her the right to sue on their behalves.

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[3] In addition to *Zacarias* and *Lloyds*, see also other Stanford Ponzi scheme cases that expressly hold that a receiver has standing to assert tort claims against third parties for increased liabilities to the receivership estate. *E.g., Rotstain v. Trustmark Nat'l Bank*, No. 3:09-cv-2384, 2015 WL 13034513, at *9 (N.D. Tex. Apr. 21, 2015); *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-cv-4641, 2014 WL 12572881, at *4 (N.D. Tex. Dec. 17, 2014); *Janvey v. Willis of Colorado, Inc*., No. 3:13-cv-3980, 2014 WL 12670763, at *3 (N.D. Tex. Dec. 5, 2014); *Janvey v. Adams & Reese, LLP*, No. 3:12-cv-0495, 2013 WL 12320921, at *1 (N.D. Tex. Sept. 11, 2013).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Date: September 23, 2020 */s/ Kristen D. Amond*