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-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

THE UPS STORE, INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS 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 Reply Memorandum of Law in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") 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").

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INTRODUCTION

The Receiver asserts that, as a court-appointed equity receiver, she has unlimited authority to pursue "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." (Opp. at 4.) That is simply not correct. As the Fifth Circuit held and explained in *DeJjoria*, involving the analogous circumstances of a bankruptcy trustee, a trustee or receiver lacks standing to assert claims where "'the only harm alleged is the Receivership Estate's inability to satisfy its liabilities.'" *See In re Latitude Sols., Inc.* (*DeJoria*), 922 F.3d 690, 696–97 (5th Cir. 2019) (quoting *Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 U.S. Dist. LEXIS 24567, at *18 (N.D Tex. Mar. 26, 2009)), *cert. denied*, *Ebert v. DeJoria*, 140 S. Ct. 521 (2019). Here the Receiver is asserting causes of action that belong only to investors in the Adams/Madison Timber Ponzi scheme based solely on the damages theory that *DeJoria* rejected—that Adams/Madison Timber were purportedly harmed because they cannot satisfy their liabilities to investors who allegedly lost money in the Ponzi scheme. The Receiver has no answer to *DeJoria* except to assert that that case did not involve a Ponzi scheme, a distinction which makes no difference. This Court lacks subject matter jurisdiction to adjudicate the claims asserted here.

The Receiver's Opposition also asserts that TUPSS, Inc.'s Motion to Dismiss adds "nothing new to standing arguments made by other defendants" (Opp. at 3) in two virtually identical cases that the Receiver has filed and in which the defendants similarly moved to dismiss for lack of subject matter jurisdiction on the grounds that the Receiver lacks standing. (*See Mills v. Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss.); *Mills v. Trustmark Nat'l Bank,* No. 3:19-cv-00941 (S.D. Miss.).) If that assertion were true, the Receiver's argument might have some merit if this Court had denied those other motions to dismiss, but the Court has not. Those motions were taken under submission on January 24, 2020 in the *Butler Snow* case and on June

9, 2020 in the *Trustmark* case and have not been decided. And the Receiver admits that her Opposition to TUPSS, Inc.'s Motion only "re-addresses" her responses to those other defendants' motions to dismiss. (Opp. at 3.) Thus, the Receiver essentially concedes TUPSS, Inc.'s point that if the Court grants the motions in either *Butler Snow* or *Trustmark* and holds that the Receiver lacks standing, then TUPSS, Inc.'s Motion to Dismiss would likewise have to be granted.

ARGUMENT

I. THE RECEIVER LACKS STANDING TO RECOVER LOSSES INCURRED BY INVESTORS AND TO PURSUE CLAIMS THAT DO NOT BELONG TO ADAMS/MADISON TIMBER.

The Receiver ignores the central argument in TUPSS, Inc.'s Motion—that an equity receiver's authority to bring claims against third parties is not unlimited, and that in this action, the Receiver has overstepped her authority by seeking to recover investor losses through claims that do not belong to Adams/Madison Timber. TUPSS, Inc. has never contested that "a receiver may . . . use ancillary litigation against third-party defendants to gather ***the entity's assets***." (Opp. at 3-4 & 12 (emphasis added) (quoting *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 896–97 (5th Cir. 2019).) Nor has TUPSS, Inc. questioned the Receiver's ability to "pursue ***the corporation's claims***." (Opp. at 11-12 (emphasis added) (quoting *Zacarias*, 945 F.3d at 896-97).) But the purported unpaid debts that the Receiver claims to be seeking as damages are not Adams/Madison Timber's assets; they are investor losses. (Mot. at 8-10.) Nor are the claims that the Receiver has asserted claims that Adams/Madison Timber could assert itself, because the conspiracy and aiding and abetting claims require an injury to third parties other than Adams/Madison Timber and the negligence claim requires the existence of a duty owed to Madison Timber, which the Receiver does not and cannot allege. (Mot. at 10-13.)

The Fifth Circuit has repeatedly held that an equity receiver has the authority to "sue ***only to redress injuries to the entity in receivership***[.]'" *See SEC v. Stanford Int'l Bank, Ltd. (Lloyds)*, 927 F.3d 830, 841 (5th Cir. 2019) (emphasis in original) (citation omitted). And controlling Fifth Circuit precedent has expressly rejected the Receiver's theory of injury in this case, i.e., that any person or entity that in any way "contributed . . . to the debts" of a receivership entity to its bilked investors can be held liable for the entirety of those investors' losses. (Motion at 7-9 (discussing *DeJoria*, 922 F.3d at 696–97.)

The Receiver's only response is that *DeJoria* "was not a Ponzi scheme case" (Opp. at 7) and that two later Fifth Circuit rulings somehow support her theory. (*See generally* Opp. at 9 (discussing *Zacarias*, 945 F.3d at 896–97 and *Lloyds*, 927 F.3d 830.) Not so. *Zacarias* and *Lloyds* do not support the Receiver's bid for unlimited authority to pursue claims against third parties like TUPSS, Inc. As a threshold matter, neither decision discuss, let alone overrules, *DeJoria*, which was binding precedent when those cases were decided. (Mot. at 10.) Further, the Receiver mischaracterizes both cases, which did not address the core issue here and demonstrate why the Receiver lacks standing.

In *Zacarias*, the receiver and a committee of defrauded investors sued two insurance brokers through which the receivership entities in the Stanford Ponzi scheme purchased insurance policies. 945 F.3d at 889. These insurance brokers "performed insurance assessments on all aspects of [the receivership entities'] businesses, such that they enjoyed full understanding of operations." *Id.* at 890. "As a result, the brokers knew that" the receivership was issuing certificates of deposit for "an illiquid real-estate fund, and that the quality and risk of the underlying investments had not been disclosed to investors." *Id*. at 890. "Moreover, the brokers procured policies that provided no meaningful coverage of deposits in [a bank that was part of

the receivership estate.]" *Id*. The receiver and the committee then brought claims against the insurance brokers for aiding and abetting the receivership entities' officers' and directors' ***breaches of fiduciary duty to the receivership entities***; for breaching alleged duties of care owed ***to the receivership entities***; for being ***unjustly enriched by the proceeds of the Ponzi scheme***; and for aiding and abetting the receivership entities' officers and directors in ***fraudulently transferring the receivership's assets***. *Id*. at 893. The receiver and the majority of the investors then settled these claims "conditioned . . . on the district court entering bar orders enjoining Stanford-Ponzi-scheme-related claims against" the brokers. *Id*. at 894. The district court approved the settlement and entered the bar orders over the objections of certain investors, who then appealed. *Id*.

On appeal, the Fifth Circuit noted that "[t]here is no dispute that the receiver and Investors' Committee had standing to bring their claims against" the insurance brokers. *Id*. at 899. Thus, contrary to the Receiver's arguments (Opp. at 5), the Fifth Circuit ***did not address the standing challenge at issue in this case and in Butler Snow and Trustmark***. Instead, the court in *Zacarias* addressed only the objecting investors' arguments that their claims pending in other litigations were "independent and distinct from those asserted by the receiver." *Zacarias*, 945 F.3d at 899. The Fifth Circuit rejected this argument, in part because the objecting investors were seeking to recover the same "finite resources"—i.e., the receivership's assets in the form of damages that the receivership could obtain from the brokers for its claims that the brokers, by obtaining worthless insurance coverage for the receivership entities, participated in a scheme to breach duties owed to the receivership entities and unjustly enrich themselves. *Id*. at 899-902. Here, the Receiver has not and cannot allege that TUPSS, Inc. owed, let alone breached, any

duty to Madison Timber or received any profits from the Ponzi scheme. The Fifth Circuit's decision in *Zacarias* is therefore entirely inapposite.

Similarly, in *Lloyds*, the Fifth Circuit addressed another challenge to bar orders entered by the district court in connection with the Stanford Ponzi scheme. There, the receiver sued insurance "[u]nderwriters who issued policies providing coverage for fidelity breaches, professional indemnity, directors and officers protection, and excess losses" ***to the receivership entities*** to recover amounts owed ***under the policies to the receivership entities*** based on claims for fraudulent transfer, unjust enrichment, and breach of fiduciary duty. *Lloyds*, 927 F.3d at 836-37. The receiver settled with the underwriters contingent on the district court entering "orders barring all actions against Underwriters relating to the policies or the Stanford Entities." *Id*. at 838. The district court entered those bar orders over the objections of investors, who argued that they could recover against the underwriters for securities law violations directly under Louisiana's "Direct Action Statute." *Id*. at 839. Because the investors' claims "unequivocally implicate[d] the policy proceeds and therefore ***assets of the receivership***," the Fifth Circuit upheld the bar orders. *Id*. at 850. Here, however, the damages that the Receiver is seeking to recover are not ***assets*** of the receivership estate akin to the insurance policy proceeds in *Lloyds*; the Receiver is seeking to recover for potential ***liabilities*** of Madison Timber to its investors. That flies in the face of well-settled limitations on a receiver's authority that, as the Fifth Circuit emphasized in *Lloyds*, "derive from the broader principle that the receiver collects and distributes only assets of the entity in receivership" and limit a receiver's standing to "sue ***only to redress injuries to the entity in receivership***." *See Lloyds*, 927 F.3d at 841 (emphasis in original) (citation omitted).

The Receiver cannot avoid the rule laid out in *DeJoria* by claiming that Madison Timbers has been harmed due to "increased debts" owed to the investors. The Fifth Circuit in *DeJoria* squarely rejected that theory in holding that a bankruptcy trustee, like and equity receiver, lacks standing to pursue claims based solely on outstanding liabilities that a bankruptcy or receivership estate entity owes creditors or investors. *DeJoria*, 922 F.3d at 696 (holding that the bankruptcy trustee lacked standing to assert claims based on "liabilities [that] are still owed and have not yet been paid . . . represent [the creditor's] injury, not [the estate's]."); (*see* Mot. at 7-9); *see also*, *SI Restructuring, Inc. v. Faulkner (In re SI Restructuring, Inc.)*, 532 F.3d 355, 363 (5th Cir. 2008) (holding, the bankruptcy context, that "deepening insolvency is not a valid theory of damages." (citing *In re CitX Corp.*, 448 F.3d 672, 677 (3d Cir. 2006))). It does not matter that *DeJoria* involved a "single creditor" and that the Receiver bases her claims on injuries to allegedly numerous investors. (Opp. at 8.) Because the only harm that the Receiver has alleged is to investors, she does not have standing and dismissal for lack of subject matter jurisdiction is required.

Finally, the Receiver's baseless contention that TUPSS, Inc. filed its motion to dismiss for lack of subject matter jurisdiction solely "to obtain a stay of discovery" (Opp. at 2) is frivolous. TUPSS, Inc. filed its motion to have this case dismissed because the Receiver does not have standing to bring it and this Court lacks jurisdiction to hear it.[1]

[1] The Receiver also ignores the fact that discovery in this case was delayed by more than six months because the Receiver refused to agree to a standard protective order in this action consistent with the local rules. (*See* ECF No. 89 (denying Receiver's motion for protective order inconsistent with the local rules).) In any event, the Receiver concedes, as she must, that this Court can address a challenge to subject matter jurisdiction "at any time." (Opp. at 2.) And staying this case so that the Court and the parties do not unnecessarily spend resources litigating where the Court may lack jurisdiction would serve the interests of justice and judicial economy, consistent with the stay orders in *Butler Snow* and *Trustmark*. (*See* ECF No. 149.)

II. THE RECEIVER SHOULD NOT BE GRANTED LEAVE TO AMEND TO ATTEMPT TO CURE THE LACK OF SUBJECT MATTER JURISDICTION.

In the conclusion of her Opposition, the Receiver offers a contingency plan: "If . . . the Court grants the motion [to dismiss] 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." (Opp. at 12.) The Receiver's request should be denied.

First, "regardless of when the district court actually determines it lacks subject matter jurisdiction over the original plaintiff, 'Rule 15 . . . do[es] not allow a party to amend to create jurisdiction where none actually existed.'" *Fed. Recovery Servs. v. United States*, 72 F.3d 447, 453 (5th Cir. 1995) (quoting *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986)). Thus, if the Court grants this Motion, it will "lack[] jurisdiction to allow the amendment." *Frascogna v. Sec. Check, LLC*, No. 3:07cv686 DPJ-JCS, 2009 U.S. Dist. LEXIS 4044, at *14 (S.D. Miss. Jan. 7, 2009) ("the timing of the mootness ruling matters not").

Second, the Receiver's request is procedurally improper. The Receiver filed an amended pleading once as of right nearly a year and half ago, and the deadline to amend the pleadings under the operative case management order passed long ago on February 20, 2020. (*See* ECF No. 67.) Accordingly, the Receiver must file a formal motion seeking the Court's leave to amend under Federal Rule of Civil Procedure 15 and Local Uniform Civil Rules 7(b)(2) and 15. *See* Fed. R. Civ. P. 15 (if a party has already filed an amended pleading, "a party may amend its pleading only with the opposing party's written consent or the court's leave"); L.U.Civ.R. 7(b)(2) & 15 ("If leave of court is required under Fed.R. Civ.P. 15, a proposed amended pleading must be an exhibit to a motion for leave to file the pleading.")

CONCLUSION

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

Dated: October 7, 2020

By: */s/ Mark R. McDonald*

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CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that on October 7, 2020, I electronically filed the foregoing *MEMORANDUM* 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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