UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC Defendants.	Case No. 3:18-cv-252 Hon. Carlton W. Reeves, District Judge Hon. F. Keith Ball, Magistrate Judge

RECEIVER'S RESPONSE TO OBJECTIONS

Alysson Mills, in her capacity as the court-appointed receiver (the "Receiver") for Arthur Lamar Adams ("Adams") and Madison Timber Properties, LLC ("Madison Timber"), respectfully responds to objections to her Motion for Approval of Proposed Settlement. [Doc. 221]

Introduction

The Receiver's motion asks the Court to approve a proposed $9,500,000 settlement with Butler Snow LLP, Butler Snow Advisory Services, LLC, and Matt Thornton ("the Butler Snow Parties").

The proposed settlement with the Butler Snow Parties is the first with a defendant in any of the Receiver's four pending lawsuits.[1] The proposed settlement will dispose of the Butler Snow

[1] *See, e.g.*, *Alysson Mills v. Butler Snow, et al.*, No. 3:18-cv-866 (S.D. Miss.) (remaining defendants include Baker, Donelson, Bearman, Caldwell & Berkowitz, PC; Alexander Seawright, LLC; Brent Alexander; and Jon Seawright—a law firm and its agents who lent their influence, their professional expertise, and even their clients to Adams and Madison Timber); *Alysson Mills v. BankPlus, et al.*, No. 3:19-cv-196 (S.D. Miss.) (defendants include BankPlus; BankPlus Wealth Management, LLC; Gee Gee Patridge, Vice President and Chief Operations Officer of BankPlus; Stewart Patridge; Jason Cowgill; Martin Murphree; Mutual of Omaha Insurance Company;

Parties' appeal, allow for progress in other cases, and, most importantly, make possible a meaningful distribution to Madison Timber's victims.

The Receiver provided notice of the proposed settlement to interested parties, including Madison Timber's victims, and invited comments and objections. The Receiver received only positive feedback from persons who contacted her personally.

Interested parties who wished to file a formal objection had until February 18, 2021, to do so. Three formal objections were filed, and several parties joined them. The Receiver addresses each objection in turn.

Objection No. 1

Filed by Baker Donelson [Doc. 230]
Joined by Alexander Seawright LLC and Brent Alexander [Doc. 231]
Joined by Jon Seawright [Doc. 232]
Joined by BankPlus [Doc. 233]
Joined by Mutual of Omaha [Doc. 235]
Joined by RiverHills Bank [Doc. 237]

Baker Donelson is Butler Snow's co-defendant in the case styled *Alysson Mills vs. Butler Snow, et al.*, No. 3:18-cv-00866 (S.D. Miss.). Baker Donelson acknowledges that it is differently situated than Butler Snow and that, obviously, it is not a party to the proposed settlement. Baker Donelson "conditionally" objects to the Receiver's proposed settlement with Butler Snow on the premise that the Receiver lacks standing to sue.

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and Mutual of Omaha Investor Services, Inc.—financial institutions and their agents who lent their influence, their professional services, and even their customers to Madison Timber, establishing for it a de facto DeSoto County headquarters); *Alysson Mills v. The UPS Store, Inc., et al.*, No. 3:19-cv-364 (S.D. Miss.) (defendants include 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—the notaries and their employers on whom Adams principally relied to notarize fake timber deeds); *Alysson Mills v. Trustmark Nat'l Bank, et al.*, No. 3:19-cv-941 (S.D. Miss.) (defendants include Trustmark National Bank, Bennie Butts, Jud Watkins, Southern Bancorp Bank, and RiverHills Bank—financial institutions and professionals who provided banking services that enabled and sustained the Madison Timber Ponzi scheme).

Baker Donelson uses its objection as an opportunity to re-urge its argument that, under the Fifth Circuit's opinion in *DeJoria*, the Receiver has no standing to assert her claims.[2] Whatever the merits of Baker Donelson's reliance on *DeJoria* when it first made its argument back in 2019, subsequent opinions of the Fifth Circuit conclusively undercut it.

The Receiver does not accept Baker Donelson's invitation to relitigate the issue again here. The Receiver has briefed the issue no less than a half dozen times, most recently on Monday of last week in her opposition to motions to dismiss filed in the case styled *Alysson Mills vs. BankPlus, et al.*, No. 3:19-cv-00196 (S.D. Miss.). For economy, the Receiver attaches the relevant section of that brief here and incorporates it by reference.[3] Suffice it to say, Baker Donelson omits from its objection those opinions of the Fifth Circuit that undermine its position. In fact, just recently, Judge Southwick, writing for a Fifth Circuit panel in *Rotstain v. Mendez*, 2021 WL 359989, — F.3d — (5th Cir. Feb. 3, 2021), applied the same precedent and logic that the Receiver has advocated all along. His opinion in *Rotstain* is absolutely clear that the Receiver here, just like the Stanford receiver in each of the *Lloyds*, *Zacarias*, and *Rotstain* cases, has standing to sue third parties such as Butler Snow and Baker Donelson to recover money for defrauded investors.

There is, however, no need to go back-and-forth about the standing issue in the context of this proposed settlement because the Receiver and the Butler Snow Parties agree to amend Paragraph 13 of the proposed Order Approving Settlement as follows:

> 13. Nothing in this Order Approving Settlement or the Settlement Agreement and no aspect of the Settlement Agreement or negotiation thereof is or shall be construed to be an admission, concession, or any finding of the Court, of any violation of any statute or law, of any fault, liability, or of any infirmity in the claims

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[2] Baker Donelson also now cites an opinion of the Eleventh Circuit, *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296 (11th Cir. 2020). That case is distinguishable for many reasons, not the least of which is it was decided under *Florida* law.

[3] See Exhibit A, excerpt from Doc. 99-1, Opposition to Motions to Dismiss, *Alysson Mills vs. BankPlus, et al.*, No. 3:19-cv-00196 (S.D. Miss.).

> or defenses of any party in any proceeding involving the Receiver or the Butler Snow Parties. **For the avoidance of doubt, nothing in this Order Approving Settlement or the Settlement Agreement shall impair or affect the right of any person to assert that the Receiver lacks standing to assert certain types of claims in any other action brought by the Receiver related to the Madison Timber Ponzi scheme; however, this clarification does not affect the scope, effect, or construction of the bar order set forth herein.**

This amending language materially addresses Baker Donelson's concerns, closely tracks amending language proposed by Baker Donelson itself, and moots Baker Donelson's objection.

Objection No. 2

Filed by BankPlus [Doc. 233]
Joined by Mutual of Omaha [Doc. 235]
Joined by RiverHills Bank [Doc. 237]

BankPlus is a defendant in the case styled *Alysson Mills vs. BankPlus, et al.*, No. 3:19-cv-00196 (S.D. Miss.). BankPlus also acknowledges that it is differently situated than Butler Snow and that, obviously, it is not a party to the proposed settlement. BankPlus says it objects "out of an abundance of caution" to a handful of provisions.

BankPlus objects to the confidentiality of the proposed settlement's "Notice Parties" to the extent it would prevent a party such as BankPlus from inquiring into the identity of assignors in the course of discovery in related cases. Respectfully, the Receiver does not understand how BankPlus could read things that way. The Receiver has consistently protected victims' identities from public disclosure and will continue to do so[4]—nevertheless she has cooperated with other

[4] The Receiver consulted with counsel for other federal equity receivers and the consensus is how a receiver handles victims' identities necessarily depends on the case. In similar cases, *e.g.*, Doc. 75, *Securities and Exchange Commission v. Joseph F. Forte, et al.*, No. 09-63 (E.D. Penn.), receivers have identified investor victims by numbers. The protective order in the Forte receivership applied in all pending receivership cases and any future ancillary actions brought by the receiver. *See, e.g.*, Doc. 13, *Marion A. Hecht v. Investor #1102 and Investor #1119*, No. 10-1377 (E.D. Penn.).

As an aside, the U.S. Attorney's Office is also protective of victims' identities and ought to be provided notice and opportunity to be heard before any decision on public disclosure is made.

defendants on such matters in the course of ordinary discovery, subject to a protective order. But if it moots BankPlus's objection, the Receiver and the Butler Snow Parties agree to amend Paragraph 5 of the proposed Order Approving Settlement to include:

> **The Settlement Agreement's confidential treatment of the Notice Parties shall not constitute a basis for any objection to discovery in any related case regarding the identity of the Receivers' assignors or the terms of those assignments.**

BankPlus separately objects to the proposed settlement's bar order. To be clear, BankPlus "does not object to the concept of a settlement bar"—given its benefit to a defendant, one should hope not—but BankPlus wants a credit for Butler Snow's settlement and so asks that the parties and the Court incorporate into Butler Snow's bar order "the methodology used in the Private Securities Litigation Reform Act." The Receiver and Butler Snow do not agree to incorporate any future "PSLRA methodology" into the proposed settlement. The PSLRA only applies to federal Section 10(b) and Rule 10b-5 securities fraud actions; there is no reason to complicate this settlement with a reference to an inapplicable federal statute. The Receiver's claims arise under Mississippi law; if BankPlus later wants a credit, it can look for a basis there. It is premature to calculate settlement credits here, before any case is tried and a judgment is entered that might raise the issue.

For good measure, the Receiver has reviewed bar orders in settlement agreements between the Stanford receiver and third parties that were approved by the Stanford district court and, in some instances, affirmed by the Fifth Circuit. The Receiver has yet to find one that incorporates the PSLRA. The Receiver and Butler Snow do not agree to the amendment BankPlus proposes.

Objection No. 3

Filed by John Hawkins on behalf of his clients [Doc. 238]

John Hawkins, on behalf of his clients,[5] objects to the Receiver's proposed settlement with Butler Snow because it includes a bar order. After the Receiver filed her complaint against Butler Snow, Mr. Hawkins, on behalf of his clients, filed a complaint in state court that alleges claims for emotional distress. Mr. Hawkins indicates that he will "add the Butler Snow Parties . . . as party defendants" in that lawsuit once this Court's stay is lifted. [Doc. 238 at ¶ 11] The proposed settlement's bar order would bar any person from asserting a claim against Butler Snow arising out of the Madison Timber Ponzi scheme, including the claim which Mr. Hawkins proposes to bring once the stay is lifted.

The Receiver knows Mr. Hawkins's clients well and is sensitive to their interests. They are victims of the Madison Timber Ponzi scheme and, as much as any other victim, beneficiaries of the Receivership Estate.

The Receiver did not agree to a bar order as a condition of the proposed settlement because she wanted to restrict Mr. Hawkins's client's claims. She agreed to a bar order because it allowed her to negotiate as a big a settlement as she could, for the benefit of all victims, including Mr. Hawkins's clients. Bar orders give a defendant such as Butler Snow an incentive to settle with a receiver, and courts frequently enter bar orders in cases such as this.

Zacarias v. Stanford Int'l Bank, Ltd. (*Zacarias*), 945 F.3d 883 (5th Cir. 2019), is instructive. The bar order in *Zacarias*, like the bar order here, was a condition of the Stanford

[5] The Receiver characterizes the objection as John Hawkins's objection because he appears to have named all of his clients in the objection, but certain of those clients contacted the Receiver directly to express their support of the proposed settlement. To be clear, the Receiver did not seek out Mr. Hawkins's clients' support, but, the Receiver answers her phone herself, and she returns calls. The Receiver is especially attentive to elderly investors, of which there are many, including Mr. Hawkins's clients.

receiver's settlement with a defendant. The bar order extinguished claims that certain investors separately had filed against the same defendant. The district court entered the bar order over those investors' objections, and the Fifth Circuit affirmed. *Id. See also Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830, 843 (5th Cir. 2019) (affirming bar order as condition of Stanford receiver's settlement to the extent it barred objecting investors' claims).

Without disparaging Mr. Hawkins's clients' claims for emotional distress, unlike even the objecting investors in *Zacarias*, Mr. Hawkins's clients did not appear to have a personal connection with the defendants. Neither the Butler Snow Parties nor Michael Billings, who had a relationship with Butler Snow Advisory Services, LLC, introduced Mr. Hawkins's clients to Madison Timber.

In any event, the Fifth Circuit has made clear that while investors in a Ponzi scheme may have "hypothetical claims they could independently bring but for the receivership," a receivership exists "precisely to gather such interests in the service of equity and aggregate recovery." *Id.* at 899. Indeed, it is only through a receivership that a recovery can be equitably distributed:

> 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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> ***
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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 (emphasis added).

The Receivership Estate exists to represent the interests of at least 184 investors in Madison Timber (217, if you also count investors in the Alexander Seawright Timber Fund). The Receiver submits that the proposed settlement with Butler Snow is, at this moment, the best opportunity to make a meaningful distribution, equitably among all investors. A bar order is a necessary condition of securing the settlement and, if it is approved here, might encourage other defendants to settle—particularly as it will allow those lawsuits to move again.[6]

Conclusion

For the reasons stated here in the Receiver's Motion for Approval of Proposed Settlement [Doc. 221], the Receiver submits that the proposed settlement is in the Receivership Estate's best interests and should be approved.

[6] Mr. Hawkins observes that the Receiver has recovered approximately $21.3 million but then says "it appears nearly certain that far less than half of the amounts scammed from investors will ultimately be recovered." If the target number is $85 million, the Receiver's recovery thus far is not insubstantial and Butler Snow's $9,500,000 contribution is a good sign, given that there remain four big lawsuits, each with several defendants. But without a bar order, there is no settlement with Butler Snow and likely no settlement with any other similarly situated defendant.

February 22, 2021

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.

February 22, 2021 *<u>/s/ Kristen Amond</u>*

371 U.S. 178, 182 (1962)) ("Not surprisingly, denying leave to amend, absent articulable reason, is 'not an exercise of discretion' but rather 'abuse of . . . discretion.'").

I. The Receiver has standing.

The Receiver first addresses a threshold matter: her standing to sue.

Every defendant in all of the Receiver's four pending lawsuits has challenged the Receiver's standing to sue. The defendants' arguments are largely the same and piggyback an argument first made by defendant Baker Donelson in 2019: that applying *Latitude Sols., Inc. v. DeJoria* (*DeJoria*), 922 F.3d 690 (5th Cir. 2019), a then-recent opinion of the Fifth Circuit, the Receiver lacks standing to sue third parties to recover money for defrauded investors.[19]

Since Baker Donelson first made the argument, the Receiver has addressed it at least a half dozen times as each subsequent defendant has raised it. The Receiver has shown, over and over, most recently in her response to defendant UPS's second motion to dismiss,[20] both that defendants' reliance on *DeJoria* is misplaced and that two subsequent opinions of the Fifth Circuit, both arising in the Stanford receivership, *Securities and Exchange Commission v. Stanford International Bank, Ltd.* (*Lloyds*), 927 F.3d 830 (5th Cir. 2019), and *Zacarias v. Stanford Int'l Bank, Ltd.* (*Zacarias*), 945 F.3d 883, 896–97 (5th Cir. 2019), confirm the Receiver's standing.

This Court has not yet addressed the matter, which has hung like an existential cloud over the Receiver's pending lawsuits. The Court's caution was not unwise, given the issue was raised by defendant Butler Snow in its appeal and might have been resolved by the Fifth Circuit, had Butler Snow not elected to settle.

[19] Doc. 45, *Alysson Mills vs. Butler Snow, et al.*, No. 3:18-cv-00866 (S.D. Miss.).

[20] Doc. 147, *Alysson Mills vs. The UPS Store, Inc., et al.*, No. 3:19-cv-00364 (S.D. Miss.).

The Receiver is pleased to nevertheless advise the Court that the Fifth Circuit indeed has resolved the issue in a new opinion in another appeal, also arising in the Stanford receivership: *Rotstain v. Mendez* (*Rotstain*), 2021 WL 359989, --- F.3d ---- (5th Cir. Feb. 3, 2021). In that new opinion, Judge Southwick, writing for the panel,[21] applies the same precedent and logic that the Receiver has advocated all along. *Rotstain* is absolutely clear that the Receiver here, just like the Stanford receiver in each of the *Lloyds*, *Zacarias*, and *Rotstain* cases, has standing to sue third parties such as defendants to recover money for defrauded investors.

For completeness, the Receiver addresses *DeJoria*, *Lloyds*, *Zacarias*, and *Rotstain* each in turn.

DeJoria

Defendants[22] contend that, under *DeJoria*, bankruptcy trustees and equity receivers alike 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.

The company in *DeJoria*, 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.

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[21] Incidentally, the panel in Butler Snow's appeal also included Judge Southwick.

[22] See Jason Cowgill's argument at Doc. 81 at 6 (citing *DeJoria*), Gee Gee Patridge's argument at Doc. 91 at 19 (citing *DeJoria*), and Mutual of Omaha's argument at Doc. 93 at 5 (citing *DeJoria*).

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[23] 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—it held 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

[23] The *DeJoria* panel also included Judge Southwick.

For economy, the Receiver does not address *Reneker v. Offill*, No. 3:08-cv-1394, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009), an unpublished opinion on which Mutual of Omaha relies. The Receiver addressed that unpublished opinion and the Fifth Circuit's mention of it in prior briefing, most recently in her opposition to motions to dismiss filed by Trustmark National Bank, RiverHills Bank, and Southern Bancorp Bank. *See* Doc. 48 at 8, *Alysson Mills v. Trustmark Nat'l Bank, et al.*, No. 3:19-cv-941 (S.D. Miss.).

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.

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.

Defendants are simply wrong to contend that the Receiver, standing in the shoes of Madison Timber, has no injury-in-fact. *DeJoria* is not dispositive of the Receiver's claims; it is a different case altogether.

Lloyds

Shortly after it decided *DeJoria*, the Fifth Circuit addressed a receiver's standing in a Ponzi scheme case.

In *Lloyds*, 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 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).

Defendants[24] cite *Lloyds* for the proposition that "[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entity in receivership[.]" That proposition is not new. For completeness's sake, the actual language from the Fifth Circuit's opinion is as follows:

> [As] to the Receiver's standing: "[l]ike a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, *an equity receiver may sue only to redress injuries to the entity in receivership*, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit."

Lloyds, 927 F.3d at 841 (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995)).

Defendants misuse *Lloyds* to suggest an either/or proposition: either investors are injured, or the entity in receivership is injured, but never both.[25] That proposition is false. The fact that investors are injured does not mean the entity in receivership is not. The fact that investors were

[24] See Jason Cowgill's argument at Doc. 81 at 6 (citing *Lloyds*) and Mutual of Omaha's argument at Doc. 93 at 5 (citing *Lloyds*).

[25] See, e.g., Jason Cowgill's argument at Doc. 81 at 6 (contending "[t]he Fifth Circuit has clarified that a federal-court-appointed equity receiver lacks standing to sue for creditors' injuries").

injured here does not mean the Receiver may not sue Defendants to redress injuries to Madison Timber.[26] The question is simply whether the entity in receivership was injured—and here it was: Madison Timber was a fraud from its inception. Lamar Adams misused Madison Timber to perpetrate a Ponzi scheme and Defendants assisted him. An entity in receivership often alleges claims that overlap with claims of investors, as *Lloyds* itself illustrates. Applying *Lloyds*, the Receiver alleges injuries-in-fact.

Zacarias

Shortly after it decided *Lloyds*, the Fifth Circuit addressed the Stanford receiver's standing again in *Zacarias*. The court affirmed the Stanford receiver's standing to allege, and therefore the district court's subject matter jurisdiction to decide, the very same type of claims the Receiver alleges here.

The Stanford receiver had sued two of Stanford's insurance brokers for their participation in 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*;
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> (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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[26] *Scholes*, 56 F.3d at 755 ("We add that if in place of the receiver's actions the investors had brought a class action against the present defendants, or had sued them individually, the defendants would no doubt be arguing that the action was improper because the injury was to the corporations and only derivatively to investors in the corporations.").

> [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).

The Stanford receiver and the defendants entered a settlement whereby the defendants would pay the receiver $132.85 million in exchange for the Stanford receiver's obtaining from the district court an order that barred any actions against the defendants arising from the Stanford Ponzi scheme. *Id.* at 893–94. A group of investors objected to the bar order because it extinguished claims against the same defendants that the investors had filed in state court. *Id.* at 894–95. The district court entered the bar order over the investors' objections.

On appeal, the investors argued the district court lacked subject matter jurisdiction to bar claims not before it. The Fifth Circuit rejected that argument, observing:

> 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.

Id. at 899. It is only through the receivership, the court explained, 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 (emphasis added).

The court next explained that the district court had subject matter jurisdiction to bar the investors' claims as part of the Stanford receiver's settlement with the defendants because the investors' claims are derivative of the Stanford receiver's claims, **for which the Stanford receiver unquestionably had standing**. Relevant here, the Stanford receiver, like the Receiver in this case, alleged injuries only "to the Stanford entities, including the unsustainable liabilities inflicted by the Ponzi scheme":

> 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.*

Id. at 899–900 (emphasis added).

In short, a receiver has standing 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."

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

Applying *Zacarias* here, the Receiver, just like the Stanford receiver in *Zacarias*, has standing to sue third parties, including the defendants in each of her pending lawsuits, for the increase in "unsustainable liabilities inflicted by the Ponzi scheme."

Zacarias thus undercuts not only defendants' arguments that the Receiver lacks standing but Defendant BankPlus's related argument that the Receiver cannot recover for "increases in the Receivership Estate's 'liabilities'" to investors.[27] BankPlus invokes bankruptcy case law in an attempt to apply Delaware state law to dismiss the Receiver's complaint on the premise that the Receiver's "theory of damages" is for "deepening insolvency," a concept that BankPlus says has been "widely criticized" by bankruptcy courts.[28]

This Court need not master the "law of subordination"[29] or any number of attendant bankruptcy principles to dispose of BankPlus's argument. Deepening insolvency presumes a legitimate and viable corporation whose life has been fraudulently prolonged. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 351 (3d Cir. 2001) ("the fraudulent prolongation of its life past solvency"). Deepening insolvency does not presume a Ponzi scheme.

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[27] Doc. 78 at 39.

[28] Doc. 78 at 38–39.

[29] Doc. 78 at 38.

Madison Timber was never legitimate. The Receiver does not allege ordinary "diminution in value."[30] BankPlus has a lot to say about run-of-the-mill bankruptcy cases,[31] but for present purposes *Zacarias* is directly on point and dispels any doubt that a receiver **in a Ponzi scheme case** can recover for "increases in the Receivership Estate's 'liabilities'" to investors.[32]

Rotstain

If there remained any doubt after *Zacarias* that the Receiver has standing to sue defendants to recover money for defrauded investors, *Rotstain* removed it.

The pertinent facts are as follows: The Stanford receiver assigned certain rights to sue to a committee named OSIC. In turn OSIC sued a handful of third-party banks (including, incidentally, Trustmark bank) to recover money for the Stanford receivership estate. A group of investors tried to intervene and, after the district court denied their motion, appealed. The Fifth Circuit affirmed, determining that OSIC already adequately represented the investors' interests.

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[30] Doc. 78 at 38–39.

[31] In each of the cases on which BankPlus relies a once-solvent entity suffered a loss in value. *See In re SI Restructuring, Inc.*, 532 F.3d 355, 362 (5th Cir. 2008) (plaintiff argued that "the value of the company deteriorated as a result of [a] loan transaction, thus decreasing the amount of funds available for the creditors"); *In re VarTec Telecom, Inc.*, 335 B.R. 631, 645 (Bankr. N.D. Tex. 2005) (defendant loaned money to an entity, allegedly allowing entity "to go deeper into the zone of insolvency, to become more insolvent, or to exist past the point of insolvency"); *In re Hallwood Energy, L.P.*, No. 10-03263, slip op. at 20 (Bankr. N.D. Tex. Nov. 18, 2013) (a bankrupt entity argued its "value was substantially diminished" as a result of its attorney's breaches).

[32] *See also, e.g.*, *Rotstain v. Trustmark National Bank*, No. 3:09-cv-2384, 2015 WL 13034513, *9 (N.D. Tex. Apr. 21, 2015) ("[T]he Receiver has standing to assert tort claims based on the harm to the Receivership Estate's ability to repay its creditors."); *Janvey v. Willis of Colorado Inc.*, No. 3:13-cv-3980, 2014 WL 12670763, at *4 (N.D. Tex. Dec. 5, 2014), amended for other reasons sub nom. *Official Stanford Inv'rs Comm. v. Willis of Colorado, Inc.*, No. 3:13-cv-3980, 2015 WL 13742125 (N.D. Tex. Feb. 4, 2015) (allegations that "Defendants knowingly contributed to the growth and success of the scheme, thereby increasing the Receivership Estate's liability to its creditors" are, "[f]or the purposes of standing, . . . enough to state an injury to the Receivership Estate . . . ."); *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-cv-4641, 2014 WL 12572881, at *6 (N.D. Tex. Dec. 17, 2014) ("This Court has held that the Receiver may assert tort claims against third parties based on allegations that the third parties' torts contributed to the liabilities of the Receivership Estate."); *Janvey v. Adams & Reese*, LLP, No. 3:12-cv-0495, 2013 WL 12320921, at *4 (N.D. Tex. Sept. 11, 2013) ("[B]ecause the Lawyer Defendants and the Director Defendants did not stop Stanford from controlling his entities to perpetuate his fraud and use Stanford Entities funds for his own lavish lifestyle, money was improperly diverted from the entities, causing injury to those entities. This harmed the Stanford Entities' ability to repay their creditor-investors.").

Relevant here, the Fifth Circuit asked, in the first instance, whether OSIC had standing to assert claims the investors sought to assert. To answer that question, the court referred to its recent opinions in *Lloyds* and *Zacarias* and concluded that OSIC had standing **because the Stanford receiver had standing**. Relying primarily on *Zacarias*, the court explained:

> OSIC seeks recovery for injury to the Stanford entities in the form of the entities' additional liability to investors due to Defendants' conduct. [Investors] seek recovery for the same injury. If the Stanford entities had suffered no injury, the investors would have no claims.
>
> The claims here are more like the claims in *Zacarias* than *Lloyds*. As in *Zacarias*, the Defendants here are alleged to be participants in the Ponzi scheme, even if unknowing ones, and the investors' claims are based on conduct in furtherance of that scheme. . . . We are bound by *Zacarias* to hold that OSIC, as assignee of the receiver, has standing to bring the claims.
>
> . . . Our holding is based on our conclusion in *Zacarias* that the claims the investors sought to bring were derivative of and dependent on the receiver's claims. Because the claims were derivative and dependent, the receiver was authorized to bring them and to settle them.

Rotstain, 2021 WL 359989 at *7.

Rotstain finally puts to bed any argument by any defendant in any of the Receiver's pending lawsuits that *Zacarias* does not speak to these cases. Defendant Trustmark previously argued *Zacarias* "absolutely did not hold that 'increased liabilities' constitute an injury in fact under Article III."[33] More recently, defendant UPS argued "the Fifth Circuit did not even address standing in *Zacarias*."[34] *Rotstain* makes clear that *Zacarias* means exactly what the Receiver has said it means: the Receiver has standing—including, specifically, standing to sue to "recover[] for

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[33] Doc. 40 at 35, *Alysson Mills vs. Trustmark, et al.*, No. 3:19-cv-00941 (S.D. Miss.).

[34] Doc. 139 at 14, *Alysson Mills vs. The UPS Store, Inc., et al.*, No. 3:19-cv-00364 (S.D. Miss.).

injury to the [Receivership Estate] in the form of the [Receivership Estate's] additional liability to investors due to Defendants' conduct." *Rotstain*, 2021 WL 359989 at *7.[35]

Today, finally, there can be no question that the Receiver, as the court-appointed receiver for Madison Timber, has standing to sue on behalf of the Receivership Estate any defendant in any of the Receiver's pending lawsuits. But if any question on remained, the Receiver nevertheless has standing to sue on behalf of investors who have executed assignments that entrust to her that right. Standing is not an impediment to the Receiver's prosecution of her claims. Either way, the Receiver has standing to recover money for defrauded investors.

II. No doctrine bars the Receiver's claims.

Standing is not the only threshold argument defendants make. Every defendant in all of the Receiver's four pending lawsuits has argued some other doctrine bars the Receiver's claims against them. Here, BankPlus, Gee Gee Patridge, Jason Cowgill, and Mutual of Omaha argue the *in pari delicto* doctrine bars the Receiver's claims. BankPlus, Gee Gee Patridge, and Mutual of Omaha also separately argue Mississippi's "wrongful conduct rule" bars the Receiver's claims. However they cast it, their argument is the same: the Receiver, having stepped in the shoes of Lamar Adams, can have no right of action against them. Now that the Receiver has stepped in the shoes of investors, too, the argument is academic. Nevertheless, the Receiver shows the argument has no support in law or equity.

[35] *See also Rotstain*, 2021 WL 359989 at *6 ("[F]irst, the claims were derivative and dependent because the receiver was suing to recover for an **injury** to the Stanford entities **in the form of 'additional liability Stanford incurred to its investors' due to the insurance brokers' participation in the Ponzi scheme.** The investors' claims depended on that injury; had the Stanford entities not been injured, neither would the individuals who invested in them.") (emphasis added).