IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

Alysson Mills, as Receiver for
Arthur Lamar Adams and
Madison Timber Properties, LLC — Plaintiff

v. — No. 3:19-cv-00941-CWR-FKB

Trustmark National Bank,
Bennie Butts, Jud Watkins,
Southern Bancorp Bank,
and Riverhills Bank — Defendants

Trustmark's Motion to Certify Order (#67) For Interlocutory Appeal

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1. Defendant Trustmark National Bank respectfully moves the Court, pursuant to 28 U.S.C. § 1292(b), to modify its Order (#67, March 1, 2021), certifying the Order for interlocutory appeal.

2. The controlling question of law that justifies interlocutory appeal is this:

> ***O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) held that a federal receiver's state-law claims are governed exclusively by state law. Thus, a plaintiff's status as a federal receiver does not improve her ability to recover damages, or to avoid defenses.**
>
> **In light of *O'Melveny*, does the plaintiff's status as a "federal equity receiver" A) give the plaintiff Article III standing to pursue claims against third parties for "increased liabilities" of the receivership estate, or B) enable the plaintiff to avoid state-law defenses?**

3. The statutory criteria for this Court to certify its decision under § 1292(b) are present:

A) The Order is not otherwise appealable under 28 U.S.C.A. § 1292.

B) The Order involves a controlling question of law.

C) There is substantial ground for difference of opinion regarding the

controlling question of law.

D) An immediate appeal would advance the ultimate termination of this litigation.

4. The grounds for this motion, and supporting authorities, are set forth in detail in Trustmark's separate memorandum brief.

WHEREFORE, PREMISES CONSIDERED, Trustmark National Bank requests that this Court modify its Order (#67) to certify said Order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), enabling Defendants to petition the U.S. Court of Appeals for the Fifth Circuit for permission to appeal.

Respectfully submitted, this the 17th day of March, 2021.

TRUSTMARK NATIONAL BANK

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Certificate of Service

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Trustmark's Memorandum in Support of Motion to Certify Order (#67) For Interlocutory Appeal

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Introduction

Trustmark moves the Court, pursuant to 28 U.S.C. § 1292(b), to modify its Order (#67, March 1, 2021, "Order" herein), certifying the Order for interlocutory appeal.

At the urging of the Receiver, this Court has ruled that the Receiver has standing to sue for purported "increased liability" injuries to Madison Timber, and that the Receiver may be able to avoid the Mississippi Wrongful Conduct Rule and Mississippi's doctrine of *in pari delicto*. But the Order is based on rulings by federal courts, in other receiverships, which have no bearing on Mississippi's controlling substantive law. And importantly, in the recent Stanford cases on which the Receiver relies, the Fifth Circuit has never addressed a controlling Supreme Court decision regarding the application of state law in federal receiverships. The controlling question of law that justifies interlocutory appeal is this:

> ***O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) held that a federal receiver's state-law claims are governed exclusively by state law. Thus, a plaintiff's status as a federal receiver does not improve her ability to recover damages, or to avoid defenses.**
>
> **In light of *O'Melveny*, does the plaintiff's status as a "federal equity receiver" A) give the plaintiff Article III standing to pursue claims against third parties for "increased liabilities" of the receivership estate, or B) enable the plaintiff to avoid state-law defenses?**

This Court relied on federal receivership cases, unconnected to Mississippi substantive law, to conclude that the Plaintiff has standing, and to deny dismissal motions based on defenses including Mississippi's Wrongful Conduct Rule and *in pari delicto* doctrine. This Court reached those conclusions because Plaintiff is a receiver. *See* Order, pp. 8-10, ruling that the Receiver has standing according to *Zacarias v. Stanford Int'l. Bank*, 945 F.3d 883, 899 (5th Cir. 2019); Order, pp. 18-19, ruling the Receiver is not subject to Mississippi law of *in pari delicto* according to *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012); Order, p. 19,

ruling the Receiver is not subject to Mississippi's Wrongful Conduct Rule according to *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) because "appointment of the receiver removed the wrongdoer from the scene." Trustmark respectfully submits the Court thus relied on "federal common law" favoring receivers, rather than strictly applying Mississippi law as required by *O'Melveny*.

Argument

Trustmark recognizes that the Fifth Circuit has issued confusing, and even conflicting, opinions regarding a receiver's standing to sue based on investor or creditor losses. Trustmark also recognizes that this Court has felt required to choose among those conflicting opinions.

In *Latitude Sols., Inc. v. DeJoria*, 922 F.3d 690, 696 (5th Cir. Apr. 30, 2019), *cert. denied*, 2019 WL 6107784 (Nov. 18, 2019), the Fifth Circuit held that liabilities owed by a failed entity are injuries to the creditor, not to the failed entity. Therefore, the trustee in *DeJoria* lacked Article III standing. In *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 185, 190 (5th Cir. 2013), the court held that "a federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors."

But other cases suggest a different rule, based on the legal fiction that a Ponzi scheme is "injured" each time it cheats an investor. In its Order denying defendants' motions to dismiss, this Court relied on *Zacarias v. Stanford International Bank, Ltd.*, 945 F.3d 883 (5th Cir. 2019). The *Zacarias* panel indicated in *dicta* that a receiver has standing to sue for injuries to the Ponzi scheme resulting from investor losses. A different Fifth Circuit panel recently followed *Zacarias* in *Rotstain v. Mendez*, 986 F.3d 931, 941 (5th Cir. 2021), *reh'g. den.* (March 12, 2021). The panel declared it was "bound by *Zacarias*" to allow the receiver's assignee to pursue claims for Stanford International Bank's injuries "in the form of the entities' additional liability to investors

due to Defendants' conduct." In addition to inconsistency in the Fifth Circuit, there is also an inter-circuit split.[1]

In denying rehearing in *Mendez*, the panel issued a *per curiam* order "for clarity." The panel stated that "Consistent with the rule that OSIC[2] can bring claims to redress harm only to the receivership estate, OSIC has adequately alleged such harm, including the misappropriation of 'billions of dollars' of property belonging to the Stanford entities. . . . Our conclusion cannot be interpreted to mean that OSIC need not prove its standing." The panel concluded that "Our reliance on *Zacarias* . . . does not run afoul of prior precedent where we disallowed a trustee or receiver from bringing claims on behalf of creditors or from borrowing an injury from another **without alleging a direct injury to the debtor or receivership estate**." (Order denying rehearing, No. 19-11131, Doc. #00515778823, 5th Cir. 3/12/2021, emphasis added.)

The Receiver's claims therefore depend on a "direct injury" to Madison Timber each time Madison Timber bilked an investor. This Court's Order (pp. 8-9) relied on *Zacarias* to presume that Madison Timber's "greater liabilities" could constitute an "injury in fact" sufficient to confer Article III standing.

There is a fundamental problem with applying *Zacarias* or *Mendez* to this case. By failing to identify and follow the controlling substantive state law, *Zacarias* and *Mendez*

[1] *See Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1306-08 (11th Cir. 2020) ("The corporation—and the receiver who stands in the shoes of the corporation—lacks standing to pursue such tort claims because the corporation, 'whose primary existence was as a perpetrator of the Ponzi scheme, cannot be said to have suffered injury from the scheme it perpetrated.'"); *In re Bernard L. Madoff Inv. Securities LLC.*, 721 F.3d 54, 66-68 (2nd Cir. 2013) (federal trustee for Bernie Madoff Ponzi scheme lacked standing to pursue claims for investor losses).

[2] OSIC is the Official Stanford Investors Committee. The standing analysis in *Mendez* addressed claims assigned by the Stanford receiver to OSIC.

apparently violated clear, on-point[3] Supreme Court authority. As Trustmark discussed in its opening and reply briefs (#40 and #60), the Supreme Court held in *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) that a federal receiver's claims are governed by state law – here, Mississippi law. The Receiver in the present case chose to ignore Trustmark's reliance on *O'Melveny*,[4] and suggested that "federal equity receiver" case law somehow controlled this case.[5] The Receiver thus led this Court to the wrong conclusion.

When the proper substantive law is identified, the Receiver's claims fail, and she lacks standing. Under Mississippi law, a receiver's rights are no greater than those of the failed entity – legally, *the Receiver is Lamar Adams*. In Mississippi, plaintiffs who are victimized by criminals cannot recover damages from non-criminal third parties, except in rare circumstances that are not present here. Mississippi law does not impose a duty on a third party to detect, report, or prevent criminal acts. Mississippi does not recognize civil actions for aiding and abetting. Under Mississippi law, receivers do not enjoy special privileges to set aside meritorious defenses. And under *O'Melveny*, the Receiver/Plaintiff in this case cannot dodge Mississippi law. Whether the Receiver has standing depends purely on Mississippi law.[6]

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[3] *O'Melveny* involved defenses that were based on imputing bank officers' wrongful conduct to the bank's federal receiver. The Supreme Court held the claims and defenses were governed strictly by California law, not by some "federal common law," rejecting FDIC's policy-based arguments that were remarkably similar to those advanced by plaintiff in this case.

[4] The Receiver's strategic decision to ignore Trustmark's extensive reliance on *O'Melveny* may have succeeded in deflecting the Court's attention from that precedent – neither the Receiver's brief, nor this Court's Order, mentioned *O'Melveny*.

[5] The Receiver acknowledged that Mississippi law applies, and then cast that point aside, all in one sentence, stating "[t]here is no question that Mississippi law applies to the Receiver's tort claims, but the Receiver is a federal equity receiver – she is specifically charged by Court order to institute litigation against third parties to maximize the benefit to the Receivership Estate." (#48, pp.46-47, n. 105). The "but" pivot is a wide-open invitation to defy *O'Melveny*.

[6] *See Miree v. DeKalb Cnty, Georgia*, 433 U.S. 25, 28-29 (1977) (whether third-party contract beneficiaries had standing to sue county depended on state law); *League of United Latin American*

This Court has statutory power, and good reason, to certify its decision for interlocutory appeal.

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A. § 1292(b).

The statutory criteria for this Court to certify its decision are obviously present:

- The Order is not otherwise appealable under 28 U.S.C.A. § 1292.

- The Order involves a "controlling" question of law. If the Receiver lacks standing entirely, or if Mississippi's Wrongful Conduct Rule and *in pari delicto* doctrine are applied, the case must be dismissed. *See Hood v. JPMorgan Chase & Co., and Chase Bank USA, N.A.*, 3:12-CV-565-WHB-LRA, 2013 WL 12092108, at *2 (S.D. Miss. Sept. 12, 2013) (question is "controlling" "if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for dismissal that might have been ordered without the ensuing district court proceedings.").

- There is substantial ground for difference of opinion regarding the question of law set forth on page 1 above, and therefore, regarding the Receiver's Article III standing. The inconsistent decisions of the Fifth Circuit, and the effect of O'*Melveny*, should be addressed in the Fifth Circuit. And – without re-arguing the merits of Trustmark's Motion to Dismiss – this Court's "*Erie* guesses" about (for example) the Receiver's claims of "aiding and abetting," and application of Mississippi's Wrongful Conduct Rule, are subject to serious debate.[7]

Citizens, Dist. 19 v. City of Boerne, 675 F.3d 433, 436, n. 1 (5th Cir. 2012) (Article III standing evaluated based on state-law voting rights injury).

[7] In Trustmark's view, the Fifth Circuit would be well served in this case by certifying questions to the Mississippi Supreme Court, pursuant to Miss. R. App. P. 20. Unfortunately, the Mississippi Supreme

- An immediate appeal would advance the ultimate termination of this litigation. If Trustmark prevails on appeal, the litigation would be over, or at least significantly reduced and focused. Even if the Receiver were to prevail on appeal, resolution of the issues addressed in this Court's Order would greatly assist the parties in evaluating their claims and defenses, and preparing their cases.

"The advantages of immediate appeal increase with the probabilities of prompt reversal, the length of the district court proceedings saved by reversal of an erroneous ruling, and the substantiality of the burdens imposed on the parties by a wrong ruling." 16 Wright and Miller, Fed. Prac. & Proc. Juris. § 3930, "Criteria for Permissive Appeal" (3d ed. Westlaw). If the Receiver is allowed to pursue "increased liabilities" claims, this case (and the others filed by the Receiver) will certainly impose substantial burdens on the parties, and the Court.

As the Fifth Circuit stated soon after § 1292(b) was enacted, the statute exists for the purpose of avoiding "a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn." The statute provides "a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided." *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 703 (5th Cir. 1961).

This Court's Order allows the Receiver to sue Trustmark, and many defendants, for alleged "injuries" to the Ponzi scheme. There is a substantial and legitimate difference of opinion whether those are legally cognizable injuries under Mississippi law. There is no doubt that the question of standing depends on the viability of the Receiver's claims for "increased

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Court does not accept certified questions from District Courts.

liabilities." And there is no doubt that early, definitive resolution of these difficult issues will advance the case and bring clarity to these proceedings – which will, of course, lead to conservation of time and resources.

For the grounds stated above, Trustmark respectfully moves the Court to certify its Order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), so that Trustmark can petition the Fifth Circuit for permission to appeal. Trustmark further submits that it has identified a proper controlling question of law for certification, as set forth on page 1 of this Memorandum.

Respectfully submitted, this the 17th day of March, 2021.

TRUSTMARK NATIONAL BANK

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