UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No. 3:19-cv-364-CWR-FKB

Arising out of Case No. 3:18-cv-252, *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC*

Hon. Carlton W. Reeves, District Judge

CERTIFICATION REQUEST PURSUANT TO 28 U.S.C. § 1292(b)

The UPS Store, Inc. ("TUPSS, Inc.") respectfully asks this court to amend its March 1, 2021 order denying TUPSS, Inc.'s motion to dismiss for lack of standing [Doc. No. 169] to certify the order for immediate appeal under 28 U.S.C. § 1292(b). *See* Fed. R. App. P. 5(a)(3) ("[T]he district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement.").

This is a textbook case for interlocutory appeal. There is a substantial ground for disagreement on the question of the Receiver's standing. Two 2019 Fifth Circuit decisions point in seemingly different directions on the question—one relied upon by TUPSS, Inc. in opposing the Receiver's standing and another relied upon by the Receiver and this Court in supporting it. Only the Fifth Circuit can reconcile these decisions, and this case would present it the ideal opportunity to do so. And if the court of appeals agrees with TUPSS, Inc. that standing is lacking, the decision would save TUPSS, Inc., the Receiver, and this Court from the burdens of discovery and further litigation.

The fact that this same standing issue impacts several of the Receiver's cases further supports an interlocutory appeal. The same day the court denied TUPSS, Inc.'s motion to dismiss, the court also denied the motions to dismiss for lack of standing filed by defendants in *Mills v. Trustmark Nat'l Bank* (*see* No. 3:19-cv-00941 (S.D. Miss.), ECF No. 67), which raised the same argument as TUPSS, Inc.'s motion to dismiss (*see id.*, ECF Nos. 31-32, 33-34, 37-38, 39-40). Trustmark National Bank has likewise asked this Court to amend the order denying its motion to dismiss to certify that order for immediate appeal. (*See id.*, ECF Nos. 69-70.) The Court has not yet ruled on the motions to dismiss for lack of standing in *Mills v. Butler Snow LLP*[1]

[1] The motion to dismiss for lack of standing in *Butler Snow LLP* was filed by defendant Baker, Donelson, Bearman, Caldwell & Berkowitz P.C ("Baker Donelson"). (*See Mills v. Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss.), ECF Nos. 59-60.) Baker Donelson's motion to dismiss

and *Mills v. BankPlus*, which made essentially the same standing arguments made by TUPSS, Inc. and Trustmark. (*See Mills v. Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss.), ECF Nos. 59-60; *Mills v. BankPlus*, No. 3:19-cv-196 (S.D. Miss.), ECF Nos. 77-78, 80-81, 92-95.) Thus, the resolution of the standing issue would advance the resolution of not only this action but also several other actions commenced by the Receiver.

Certification of an interlocutory order for appeal is appropriate when the order "involves [1] a controlling question of law [2] as to which there is substantial ground for difference of opinion and . . . [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). All three conditions are satisfied here.

I. THE ORDER DECIDED A CONTROLLING QUESTION OF LAW

The Receiver's standing is a controlling question of law. "There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings *or for a dismissal that might have been ordered without the ensuing district-court proceedings*." Charles Alan Wright, et al., Federal Practice and Procedure § 3930 (Oct. 2020 update) (emphasis added) ("Wright & Miller"); *see Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) (denial of a motion to dismiss for "lack of subject-matter jurisdiction" "clearly qualifie[s]" as a controlling question of law). Were the Fifth Circuit to conclude that the

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cannot be decided, however, until the court lifts the current stay on the case pending the resolution of *separate* defendants Butler Snow LLP, Butler Snow Advisory Services, LLC, and Matt Thornton's (collectively, the "Butler Snow Parties") interlocutory appeal of the court's denial of their motion to compel arbitration. (Text Only Order Staying Case, *Mills v. Butler Snow LLP*, No. 3:18-cv-866 (S.D. Miss. Sept. 30, 2020).) That appeal is itself stayed pending the district court's approval of a settlement between the Receiver and the Butler Snow Parties. (*See* Order at 2, *Mills v. Butler Snow LLP*, No. 19-60749 (5th Cir. Mar. 1, 2021) and Notice of Subsequent Facts Relating to Prior Motion to Stay Further Proceedings at 2, *Mills v. Butler Snow LLP*, No. 19-60749 (5th Cir. Jan. 4, 2021), *available* here and here.)

Receiver lacks standing to assert its claim against TUPSS, Inc., that would end the case against TUPSS, Inc.

II. THE ORDER DECIDED AN ISSUE ON WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

There is a "substantial ground for difference of opinion" (28 U.S.C. § 1292(b)) on whether the Receiver has standing to prosecute her claim against TUPSS, Inc. This standard is satisfied when the question presented is one "about which reasonable jurists can . . . debate." *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 399 (5th Cir. 2010) (en banc). That is the case here because the opposing reasonable jurists here could each find some support for their positions in Fifth Circuit decisions.

In defendant's view, the standing issue here is controlled by the Fifth Circuit's decision in *Latitude Solutions, Inc. v. DeJoria*, 922 F.3d 690 (5th Cir. 2019). There, the bankruptcy trustee for LSI sued several of LSI's officer and directors for breach of fiduciary duty and aiding and abetting on the theory that they caused LSI to incur debts to a third party, Jabil, by entering into, and then breaching, a contract with Jabil. *DeJoria*, 922 F.3d at 692-95. The trustee argued that LSI had suffered an injury in fact because of the liability for the debts that LSI owed Jabil. *Id.* at 695. The Fifth Circuit disagreed, finding the receiver lacked standing. *Id.* at 697.

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

LSI, and instead purported to base its injury on the money owed by LSI to Jabil, the Fifth Circuit held that the trustee lacked standing. *Id.* at 700.

In reaching this conclusion, the Fifth Circuit endorsed *Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 U.S. Dist. LEXIS 24567 (N.D Tex. Mar. 26, 2009), as one of the "persuasive authorities holding there was no Article III standing in factually analogous scenarios." 922 F.3d at 696; *see also SEC v. Stanford Int'l Bank, Ltd.* (*Lloyd's*), 927 F.3d 830, 841 (5th Cir. 2019) ("'[l]ike a trustee in bankruptcy . . . , an equity receiver may sue only to redress injuries to the entity in receivership[.]'"). *Reneker* is on all fours with this action against TUPSS, Inc. In *Reneker*, an SEC receiver sued a law firm that had represented the receivership entities, alleging that the firm's negligence allowed the entities "to continue their illegal [securities] sales . . . [and] thereby rendered [them] liable to third party investors in the sum of at least $36.5 million." 2009 U.S. Dist. LEXIS24567, at *7 (internal quotation marks omitted). The district court dismissed the Receiver's claims for lack of standing because "the only harm alleged is the Receivership Estate's inability to satisfy its liabilities" and "[t]he Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harm[ed] the investors," not the receiver. *Id.* at *18 (emphasis added).

The Fifth Circuit in *DeJoria* adopted this reasoning: "*Reneker* is also analogous to LSI's case; the receiver and bankruptcy trustee are similarly situated . . . the securities laws violations are analogous to the Jabil contract as the event the receiver and trustee argue caused damages. Based on the triggering events, [the trustee] and the receiver attempted to recover damages owed [to third parties] because of fraudulent or negligent conduct." *DeJoria*, 922 F.3d at 696 (*quoting Reneker*, 2009 U.S. Dist. LEXIS 24567, at *6). The "financial inability to satisfy liabilities owed

to investors as a result of" the notaries alleged conduct "'harm[ed] the investors,' not the receiver." *DeJoria*, 922 F.3d at 696 (*quoting Reneker*, 2009 U.S. Dist. LEXIS 24567, at *6).[2]

Here, the relief sought is for losses allegedly incurred by investors caused by Adams/Madison Timber, not damages incurred by Adams/Madison Timber caused by TUPSS, Inc. The Receiver's Amended Complaint alleges that "Defendants" "contributed to the success of the Madison Timber Ponzi scheme [and therefore] they are liable for the debts of the Receivership Estate to investors." (See Am. Compl. at 2, ¶ 5 (emphasis added).) *DeJoria* squarely rejected the argument that those investor losses are injuries to an entity in receivership or bankruptcy because the entity might be liable for those debts.

On the other hand, TUPSS, Inc. recognizes that this Court relied on a different Fifth Circuit decision, *Zacarias v. Stanford International Bank*, 945 F.3d 883 (5th Cir. 2019), in finding that the receiver does in fact have standing. Order 1-2. As this Court noted, the Fifth Circuit in that case said there was "no dispute" that a receiver had standing to prosecute claims against defendants who allegedly assisted the receivership entities' fraud, on the ground that the defendants' actions had increased the entitities' "unsustainable liabilities" to victims for their fraud. *Id.* (*quoting Zacarias*, 945 F.3d at 899). *Zacarias* did not cite *DeJoria*, much less reconcile its statement about standing with that earlier decision.

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[2] The Fifth Circuit very recently reaffirmed the rule of *DeJoria*, emphasizing that a receiver may not "bring[] claims on behalf of creditors or . . . borrow[] an injury from another without alleging a direct injury to the . . . receivership estate." *Mendez v. Trustmark Nat'l Bank*, No. 19-11131, Order on Petition for Rehearing En Banc at 2 (Mar. 12, 2021) (*citing DeJoria*, 922 F.3d at 695-97). The court noted that a receiver could "bring claims to redress harms only to the receivership estate," which in that case was alleged harm flowing from the claim that defendants had engaged in "misappropriation of 'billions of dollars' of property belonging to" the receivership entities. *Id.* at 1.

TUPSS, Inc. believes that *DeJoria*, not *Zacarias*, controls the standing question presented here.[3] But it is not seeking to relitigate that argument in this filing. Instead, it discusses *Dejoria*'s holding on standing to illustrate that there is at the least substantial ground for disagreement on the question decided by this Court. And only the Fifth Circuit is in a position to clear up the confusion caused by these two lines of its own precedent.

Further illuminating the substantial ground for disagreement here, the Eleventh Circuit last year found a lack of standing in a case indistinguishable from this one. *See Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296 (11th Cir. 2020). There, the receiver for entities that had engaged in a Ponzi scheme sued a bank for allegedly aiding and abetting the scheme. *Id.* at 1305. The Eleventh Circuit noted that "[i]t is axiomatic that a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership." *Id.* at 1306. The court thus looked to the relevant rights of action and concluded that "any claims for aiding and abetting the torts of the Receivership Entities' corporate insiders belong to the investors who suffered losses from this Ponzi scheme, not the Receivership Entities." *Id.* at 1307. "The Receivership Entities thus cannot assert tort claims against third parties like [a bank] for aiding and abetting the Ponzi scheme." *Id.* at 1307-08. And because the receiver "stands in the shoes of the Receivership Entities, he too lacks standing to bring these aiding and abetting

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[3] *Zacarias* did not analyze the receiver's standing; it simply noted that standing was undisputed by the parties. 945 F.3d at 899; *see Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011) (a decision's "unexamined" "assumptions" about jurisdiction are not precedent). Indeed, in successfully opposing certiorari, the *Zacarias* receiver emphasized that the case did *not* involve "receivers' standing to assert—i.e., directly litigate—claims on behalf of investors," but instead only the question "whether the Receivership court had authority to bar satellite claims that do not belong to the Receiver." Brief for Respondents Ralph S. Janvey, et al., *Zacarias v. Janvey* in Opposition at 26 (S.Ct. Nos. 19-1402 & 19-1411). Also, the claims in *Zacarias* were being jointly prosecuted by the receiver *and by investors*, who clearly had standing to pursue them. 945 F.3d at 892.

claims." *Id.* at 1308. The Fifth Circuit should be afforded an opportunity to state whether it agrees with it agrees with this analysis (which would require a finding of no standing here) or whether its approach conflicts with that of its sister circuit.

III. ALLOWING AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Finally, immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). Certification is particularly appropriate where there is "a highly debatable question that is easily separated from the rest of the case, that offers an opportunity to terminate the litigation completely, and that may spare the parties the burden of a trial that is expensive." Wright & Miller § 3930.

Those are exactly the circumstances here. If the Fifth Circuit holds that the Receiver lacks standing (a question separate from the merits), "the whole case" against TUPSS, Inc. "ends once and for all." *Hadjipateras v. Pacific, S.A.*, 290 F.2d 697, 701 (5th Cir. 1961). "Neither the Court nor the parties should be put to the expense in time for a trial of such a possible congenital deficiency." *Id.*

CONCLUSION

For these reasons, TUPSS, Inc. respectfully asks the Court to certify its order denying its motion to dismiss for immediate appeal under 28 U.S.C. § 1292(b).

Dated: March 29, 2021

By: */s/ Mark R. McDonald*
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CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that I electronically filed the above and foregoing Certification Request Pursuant to 28 U.S.C. § 1292(b) 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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