UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

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

Plaintiff,

v.

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

Defendants.

Case No. 3:19-cv-00364

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

Hon. Carlton W. Reeves, District Judge

RECEIVER'S OPPOSITION TO REQUEST FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, respectfully opposes the "Certification Request Pursuant to 28 U.S.C. § 1292(b)" filed by The UPS Store, Inc. ("UPS")[1] and joined by its co-defendants.[2]

[1] Doc. 183.

[2] Docs. 184, 185.

INTRODUCTION

On March 1, 2021 this Court denied UPS's second motion to dismiss the Receiver's complaint.[3]

Defendants such as UPS file motions to dismiss every day, and every day courts deny them. Defendants have no right to appeal such orders, absent extraordinary circumstances. Here, the legal precedent is clear; UPS simply disagrees with it. That is nothing extraordinary.

"The decision to permit such an appeal is within the district court's sound discretion." *Coates v. Brazoria Cty. Tex.*, 919 F. Supp. 2d 863, 867 (S.D. Tex. 2013) (citing *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995)). For the reasons stated below, this Court should deny UPS's request for certification for interlocutory appeal.

ARGUMENT

"Certification of an interlocutory appeal under section 1292(b) is only appropriate when: (1) the order from which the appeal is taken involves a 'controlling question of law'; (2) there is a 'substantial ground for difference of opinion' concerning the issue; and (3) 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Coates*, 919 F. Supp. 2d at 867 (quoting 28 U.S.C. § 1292(b)).

UPS's primary argument is there is a "substantial ground for difference of opinion" as to whether the Receiver has standing to prosecute her claims against UPS. The Receiver addresses that argument first.

[3] Doc. 169.

Substantial ground for difference of opinion

UPS contends reasonable jurists could debate whether the question of the Receiver's standing ought to be decided by *Latitude Solutions, Inc. v. DeJoria*, 922 F.3d 690 (5th Cir. 2019), as opposed to *Zacarias v. Stanford International Bank*, 945 F.3d 883 (5th Cir. 2019). UPS is wrong.

There might have been a time, shortly after *DeJoria* was decided (on April 30, 2019), that a defendant such as UPS might have argued that *DeJoria* could be read to foreclose the Receiver's claims. But *DeJoria* is a bankruptcy case. It did not involve a Ponzi scheme. The Receiver has had several occasions to address *DeJoria* in her briefing in this and other cases. There is nothing new to say about it here; to the extent necessary, the Receiver incorporates her prior briefing by reference.[4]

In any event, whatever argument a defendant might have made shortly after *DeJoria* was decided, the Fifth Circuit quickly put it to rest in not one but a series of opinions. Before even *Zacarias*, there was *Securities and Exchange Commission v. Stanford International Bank, Ltd. (Lloyds)*, 927 F.3d 830 (5th Cir. 2019) (decided June 17, 2019). In *Lloyds*, the Fifth Circuit held the Stanford receiver lacked standing to settle Stanford's employees' claims against Stanford's insurers arising from the insurers' denials of coverage because those separate, "non-derivative"—i.e., non-investment-related—claims did not affect that receivership estate. By contrast, the court affirmed that the Stanford receiver had standing to settle investors' claims against the same insurers. *See* 927 F.3d at 850 ("here, the Receiver had standing to pursue its own claims" and investors' claims were merely "redundant").

[4] *See, e.g.*, Doc. 147. *See also, e.g.*, Docs. 46, 65, and 66, Alysson Mills vs. Butler Snow, et al., No. 3:18-cv-00866 (S.D. Miss.); Doc. 99, Alysson Mills vs. BankPlus, et al., No. 3:19-cv-00196 (S.D. Miss.); and Docs. 48 and 77, Alysson Mills vs. Trustmark, et al., No. 3:19-cv-00941 (S.D. Miss.).

Zacarias came one month later (decided July 22, 2019; on petition for rehearing, new opinion substituted on December 19, 2019). In *Zacarias*, the Fifth Circuit affirmed the Stanford receiver's standing to allege, and therefore the district court's subject matter to decide, the very same type of claims the Receiver alleges against UPS. The Receiver's alleged injury in this case is the same injury the Stanford receiver alleged in *Zacarias*. If there remained any doubt that the Receiver has standing to pursue her claims against UPS, *Zacarias* dispelled it. Even Judge Willett, who dissented in *Zacarias*, did not dispute the Stanford receiver's standing to pursue the Stanford entities' claims. The panel was not divided on the question that matters to UPS.

Lloyds and *Zacarias* are both Ponzi scheme cases. The injuries alleged in those cases are a lot like, if not the same as, the injuries alleged here. No reasonable jurist would debate that *Lloyds* and *Zacarias*—and not *DeJoria*—apply here.

But even pretending that some doubt remained after *Zacarias*, *Rotstain v. Mendez (Rotstain)*, 986 F.3d 981 (5th Cir. 2021) (decided February 3, 2021; petition for rehearing en banc denied March 12, 2021), another Ponzi scheme case, removed it. The three-judge panel in *Rotstain* included Judge Southwick, who also was a member of the three-judge panel that decided *DeJoria*. Writing for the panel in *Rotstain*, Judge Southwick applied the same precedent and logic that the Receiver has advocated all along. The question in *Rotstain* was whether the Stanford receiver's assignee had standing to assert claims against, among others, Trustmark bank. To answer that question, Judge Southwick's opinion referred to its recent opinions in *Lloyds* and *Zacarias* and concluded that the assignee had standing because the Stanford receiver had standing. Relying primarily on *Zacarias*, the opinion 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, 986 F.3d 981, at *7. Simply put, after *Rotstain*, there can be no pretense of doubt that *Zacarias*, and not *DeJoria*, applies here. Reasonable jurists would not debate it.

It is telling that UPS addresses *Rotstain* in a footnote only, and then misleadingly. UPS says the Fifth Circuit, in its order denying a petition for rehearing en banc in *Rotstain*, "reaffirmed the rule of *DeJoria*."[5] That is true, insofar as it goes. But UPS omits all of the important context. In their petition for rehearing en banc, the *Rotstain* defendants argued, just like UPS argues here, that *DeJoria* and not *Zacarias* applied to the receiver's claims. The *Rotstain* defendants argued, just like UPS argues here, that "the [*Rotstain*] panel creates a conflict with [*DeJoria*]," and that "*Zacarias* cannot be read to prevail over this Court's earlier-decided precedent discussed above, including [*DeJoria*]."[6] The *Rotstain* defendants even argued, just like UPS argues here, that the *Rotstain* panel "creat[es] a Circuit split," referring, just as UPS does here, to the Eleventh Circuit's opinion in *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296 (11th Cir. 2020).[7] UPS omits that the *Rotstain* defendants' arguments did not persuade either the *Rotstain* panel or the en banc court. Indeed, "[n]o member of the panel nor judge in regular active service of the court [even] requested that the court be polled on Rehearing En Banc."[8]

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[5] Doc. 183 at 6 n.2.
[6] Petition for rehearing at 10 and 12, *Rotstain v. Mendez*, No. 19-11131 (5th Cir. Feb. 17, 2021).
[7] Petition for rehearing at 14, *Rotstain v. Mendez*, No. 19-11131 (5th Cir. Feb. 17, 2021). The Eleventh Circuit relied on Florida state law to decide *Isaiah*. No one purports to rely on Florida state law here. No one relied on Florida state law in *Lloyds*, *Zacarias*, or *Rotstain*. The Fifth Circuit's opinions do not create a circuit split with the Eleventh Circuit.
[8] Order denying petition for rehearing at 2, *Rotstain v. Mendez*, No. 19-11131 (5th Cir. March 12, 2021).

In its order denying the *Rotstain* defendants' petition for rehearing en banc, the *Rotstain* panel explained that its decision "does not run afoul of prior precedent [including *DeJoria*] where we disallowed a trustee or receiver from bringing claims . . . without alleging a direct injury to the debtor or receivership estate."[9] That prior precedent was inapplicable in *Rotstain* and, it follows, inapplicable here. The *Rotstain* panel explained that it all comes down to the nature of the injury:

> In *Zacarias*, we looked past the styling of the objectors' claims and held that the objectors "were injured by the Ponzi scheme." *Zacarias*, 945 F.3d at 900. That injury derived from the harm the Ponzi scheme inflicted on the receivership estate. *Id.* Here, too, despite the manner in which appellants have styled their claims, they have alleged injury by the Ponzi scheme. That injury derives from a harm to the Stanford entities . . . .[10]

In *Rotstain,* in *Zacarias*, and in this case, the injury that is the subject of the receiver's claims "derive[] from the harm the Ponzi scheme inflicted on the receivership estate," or, stated differently, "from a harm to the [receivership] entities" themselves.[11]

"The threshold for establishing the 'substantial ground for difference of opinion' . . . required for certification pursuant to § 1292(b) is a high one." *Louisiana State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Louisiana*, No. 19-cv-479-JWD-SDJ, 2020 WL 6130747, at *9 (M.D. La. Oct. 19, 2020) (quoting *S. U.S. Trade Ass'n v. Unidentified Parties*, No. 10-cv-1669, 2011 WL 2790182, at *2 (E.D. La. July 14, 2011) (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002))). "Of the three criteria, this one 'has caused [courts] the least difficulty' and 'judges have not been bashful about refusing to find substantial reason to question a ruling of law.'" *Coates*, 919 F. Supp. 2d at 868 (quoting 16 Charles Alan Wright et al., Federal Practice and Procedure, § 3930 at 492 (3d ed. 2012)). UPS has not come even close to meeting the threshold here. There is no substantial ground for difference

[9] Order denying petition for rehearing at 3, *Rotstain v. Mendez*, No. 19-11131 (5th Cir. Mar. 12, 2021).
[10] Order denying petition for rehearing at 3, *Rotstain v. Mendez*, No. 19-11131 (5th Cir. Mar. 12, 2021).
[11] Order denying petition for rehearing at 3, *Rotstain v. Mendez*, No. 19-11131 (5th Cir. Mar. 12, 2021).

of opinion as to whether the Receiver has standing. Reasonable jurists—the entire Fifth Circuit—have debated the question in three similar cases already, and in each they sided with the receiver. They had an opportunity to debate the question again—on the *Rotstain* defendants' petition for rehearing en banc, which relied on *DeJoria* and *Isaiah*, specifically—and flatly declined it.

Controlling question of law
Material advancement of ultimate termination of litigation

Because there is no substantial ground for difference of opinion, the Court need not address the two other criteria for an interlocutory appeal: "(1) the order from which the appeal is taken involves a 'controlling question of law'"; and "(3) 'an immediate appeal from the order may materially advance the ultimate termination of the litigation,'" *Coates*, 919 F. Supp. 2d at 867 (quoting 28 U.S.C. § 1292(b)).

In any event, even accepting that the Court's denial of UPS's second motion to dismiss involves a controlling question of law (to the extent its incorrect disposition would require reversal of a final judgment), immediate appeal is not likely to materially advance the ultimate termination of the litigation. Because this Court faithfully followed the Fifth Circuit and Mississippi law, the appeal likely will be unsuccessful.

CONCLUSION

The only parties who continue to debate the Receiver's standing are the defendants who aided and abetted the Madison Timber Ponzi scheme. The fact that a defendant in a lawsuit disputes it is not a substantial reason to question a ruling of law. The Receiver's standing is not debatable merely because defendants including UPS say so. There is no justification for interlocutory appeal. This Court should deny UPS's request for it.

April 12, 2021

Respectfully submitted,

/s/ Lilli Evans Bass

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CERTIFICATE OF SERVICE

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

Date: April 12, 2021 */s/ Kristen D. Amond*