

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.

CIVIL ACTION

No. 3:18-cv-252-CWR-FKB

Hon. Carlton W Reeves, District Judge  
Hon. F. Keith Ball, Magistrate Judge

**THE UPS STORE, INC.’S RESPONSE TO THE RECIEVER’S MOTION TO APPROVE  
FIRST PROPOSED DISTRIBUTION**

The UPS Store, Inc. (“TUPSS, Inc.”) is a defendant in *Mills v. The UPS Store, Inc., et al.*, Case No. 3:19-cv-364-CWR-FKB (S.D. Miss.). TUPSS, Inc. submits this response to: (1) the Motion to Approve First Distribution filed on April 19, 2021 by Plaintiff Alysson Mills as the court-appointed Receiver for the Estates of Arthur Lamar Adams and Madison Timber Properties, LLC (the “Receiver”), ECF No. 264 (the “Proposed Distribution Motion”); and (2) the Order Setting Hearing issued by the Court on April 26, 2021, ECF No. 266 (the “April 26, 2021 Order”).

The April 26, 2021 Order provides that the Court is setting a hearing on the Proposed Distribution Motion because “victims should have an opportunity to evaluate her proposal and, if they choose, be heard by the Court.” ECF No. 266 The April 26, 2021 Order also states that “victims or other interested parties” may submit comments five days before the hearing and shall

be given an opportunity to speak at the hearing. *Id.* The April 26, 2021 Order provides that it will be served on victims only, but will also be made available on the Receiver’s website. *Id.* Neither the Proposed Distribution Motion nor the April 26, 2021 Order were served on TUPSS, Inc.

After learning of the Proposed Distribution Motion and April 26, 2021 Order, and before the deadline for submitting comments on the Proposed Distribution Order, counsel for TUPSS, Inc. contacted the Receiver’s counsel and asked to be provided with a [Proposed] Order on the Receiver’s Proposed Distribution Motion so TUPSS, Inc. could evaluate whether the Proposed Distribution Motion could affect TUPSS, Inc.’s rights in any way, and if so, to assess what TUPSS, Inc.’s position should be. The Receiver’s Counsel refused to provide a [Proposed] Order on the Proposed Distribution Motion; referred TUPSS, Inc. to the Proposed Distribution Motion; and stated the Receiver would prepare a [Proposed] Order when required to do so by the Court. The Receiver’s counsel did state, however, that he could not see how the Proposed Distribution Motion could affect TUPSS, Inc.’s rights.

Without knowing precisely what the Receiver wants this Court to “So Order,” TUPSS, Inc. cannot be certain whether it is an “interested party” as that term is used in the April 26, 2021 Order, much less can TUPSS, Inc. determine its position on the Proposed Distribution Motion. The procedure the Receiver is following clearly does not give TUPSS, Inc. a full and fair opportunity to protect TUPSS, Inc.’s interests in the event any order issued by the Court on the Receiver’s Proposed Distribution Motion is later sought to be used against TUPSS, Inc. in any way. Accordingly, out of caution, TUPSS, Inc. makes the following comments addressing statements made by the Receiver in the Proposed Distribution Motion.

The Receiver’s proposal to pay an “equitable advance” to investors who already were paid “interest that exceeds any principal still due to them under their promissory notes” (ECF No.

265)—as well as future distributions that “would pay any remaining amounts still due to any investor under any promissory note” (*id.*)—is improper, and an improper exercise of the Receiver’s fiduciary duties, because there is no legal basis for paying investors in a Ponzi scheme anything beyond the principal that they invested. The Fifth Circuit and every other Circuit to address this issue has held that a “net winner” in a Ponzi scheme is not entitled to retain any amounts beyond the principal invested. That is because in a Ponzi scheme, the fraudster uses the principal from other investors to pay fictitious interest or profits to other investors. Accordingly, these transfers are not “for value”—they harm the estate by increasing its debts—and allowing investors to retain them is not equitable. *See Janvey v. Brown*, 767 F.3d 430, 442 (5th Cir. 2014) (holding that “investor-defendants have no claim for contractual interest from a Ponzi scheme” and that transfers were not “for value” because “[e]ach payment of ‘interest’ only worsened this insolvency [of the estate] because each payment was made using a later investor’s deposit”); *see also Picard v. Gettinger (In re Bernard L. Madoff Inv. Sec. LLC)*, 976 F.3d 184, 196 (2d Cir. 2020) cert denied *Gettinger, et al. v. Picard, et al.*, Case No. 20-1382, 593 U.S. \_\_\_\_ (May 3, 2021) (“regardless of whether the [Madoff investors] had securities entitlements as a result of the account statements, they did not have property rights to the values in excess of principal reflected there . . . when BLMIS transferred those full values to the defendants-appellants, the transfers were not in satisfaction of property rights and therefore were not ‘for value.’”); *Donell v. Kowell*, 533 F.3d 762, 771-72 (9th Cir. 2008) (“Amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual. If the net is positive, the receiver has established liability [to recover the excess]”); *Sender v. Buchanan (In re Hedged-Invs. Assocs.)*, 84 F.3d 1286, 1290 (10th Cir. 1996) (“Because [defendant] had no claim against HIA Inc. for damages in excess of her original investment, HIA Inc. had no debt to her for those

amounts.”); *Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir. 1995) (in a Ponzi scheme “[a] profit is not offset by anything; it is the residuum of income that remains when costs are netted against revenues. The paying out of profits to [a net winner investor] . . . conferred no benefit on the corporations but merely depleted their resources faster.”). Adams/Madison Timber would obviously not be able to recover from defendants in these various cases the amounts that Adams fraudulently promised to the investors he lied to, so the Receiver cannot recover such amounts. *See Mills v. The UPS Store, Inc., et al.*, Case No. 3:19-cv-364-CWR-FKB (S.D. Miss.) ECF No. 183 (citing, inter alia, *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296 (11th Cir. 2020) (“[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.”)).

TUPSS, Inc. submits that the proposed “equitable advance” should not be permitted or ordered by the Court. If, however, the Court does permit or order the “equitable advance” proposed by the Receiver, the Court’s order should clarify and confirm that it is not determining that the Receiver could potentially recover from TUPSS, Inc. (or any of the other defendants in any of the actions commenced by the Receiver) any profits that investors would have been paid by Adams/Madison Timber had Adams/Madison Timber kept their contractual promise to pay interest to investors. TUPSS, Inc.’s defenses to any claims for damages based on interest owed to investors should be fully and fairly litigated in the Receiver’s action against TUPSS, Inc.

Dated: May 12, 2021

By: /s/ Mark R. McDonald  
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**Attorneys for Defendant  
THE UPS STORE, INC.**

**CERTIFICATE OF SERVICE**

I, Mark R. McDonald, do hereby certify on this date I served the foregoing THE UPS STORE, INC'S RESPONSE TO THE RECEIVER'S FIRST PROPOSED DISTRIBUTION to all counsel of record via CM/ECF.

THIS, the 12<sup>th</sup> day of May, 2021.

/s/ Mark R. McDonald  
Mark R. McDonald