

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, AMERICAN
CASUALTY COMPANY OF READING,
PENNSYLVANIA,

Defendants.

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

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

**DEFENDANTS' JOINT NOTICE OF MOTION TO STAY OR FOR A PROTECTIVE
ORDER [REQUEST FOR A DECISION BY JUNE 4, 2024]**

Pursuant to Federal Rule of Civil Procedure 26(c), Defendant The UPS Store, Inc. (“TUPSS”) respectfully submits this Joint Motion to Stay or for a Protective Order [Request for a Decision By June 4, 2024].

Dated: May 29, 2024

By: /s/ William Lee Guice
William Lee Guice III (MSBN 5059)
RUSHING & GUICE, P.L.L.C.
Post Office Box 1925
Biloxi, MS 39533-1925
Telephone: 228.374.2313
Facsimile: 228.875.5987

*Attorneys for Defendants
Herring Ventures, LLC, Austin Elsen,
Tammie Elsen, Courtney Herring, Diane
Lofton, and Chandler Westover*

Dated: May 29, 2024

By: /s/ LaToya C. Merritt
LaToya C. Merritt, MSB #100054
Mallory K. Bland, MSB #105665
PHELPS DUNBAR, LLP
4270 I-55 North Jackson
Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Telecopier: 601-360-9777
Email: LaToya.Merritt@phelps.com
Mallory.Bland@phelps.com

*Attorneys for Defendant
The UPS Store, Inc.*

Dated: May 29, 2024

By: /s/ Mark R. McDonald
Mark R. McDonald (CA Bar No. 137001)
(*Pro Hac Vice*)
MORRISON & FOERSTER LLP
707 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: 213.892.5200
Facsimile: 213.892.5454
Email: MMcDonald@mofo.com

Adam J. Hunt (NY Bar No. 4896213)
(*Pro Hac Vice*)
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
Telephone: 212.468.8000
Facsimile: 212.468.7900
Email: AdamHunt@mofo.com

*Attorneys for Defendant
The UPS Store, Inc.*

Dated: May 29, 2024

By: /s/ John A. Banahan
John A. Banahan (MSBN 1731)
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
1103 Jackson Avenue (39567)
Pos Office Drawer 1529
Pascagoula, MS 39568-1529
Telephone: 228.762.6631
Facsimile: 228.769.6392

*Attorneys for Defendant
American Casualty Company of Reading,
Pennsylvania*

CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that I electronically filed the above and foregoing **DEFENDANTS' JOINT MOTION TO STAY OR FOR A PROTECTIVE ORDER [REQUEST FOR A DECISION BY JUNE 3, 2024]** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Dated: May 29, 2024

/s/ Mark R. McDonald

Mark R. McDonald

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DECLARATION OF MARK R. MCDONALD IN SUPPORT OF
DEFENDANTS' JOINT MOTION TO STAY OR FOR A PROTECTIVE ORDER
[REQUEST FOR A DECISION BY JUNE 4, 2024]

I, Mark R. McDonald, under penalty of perjury, declare as follows:

1. I am a partner at the law firm Morrison & Foerster LLP, attorneys of record for Defendant The UPS Store, Inc. ("TUPSS, Inc."). I have personal knowledge of the statements below and, if called to testify, I could and would competently testify to them.

2. There is not a discovery cut-off date or trial date set in this action, nor a scheduling order.

3. After Defendants' Motion for Summary Judgment re Standing was filed, counsel for Defendants met and conferred with the Receiver's counsel asking that any deposition be deferred until Defendants' Motion for Summary Judgment is decided. During that call the Receiver's counsel was incensed that TUPSS would join in a motion to stay the Notary depositions. Receiver's counsel stated complaint was that, when I asked for the all-party meet and confer, my email said the purpose was to discuss "those depos and those dates", which the Receiver's counsel said he interpreted as concerning only when the Notary depositions would occur, not whether they would occur.

4. The Receiver rejected the request to defer the depositions of the Notaries and served notices for the depositions of each of the Notaries (Defendants Austin Elsen, Tammie Elsen, Courtney Herring, Diane Lofton and Chandler Westover) in Ocean Springs, Mississippi starting June 10, 17, 18, 19 and 20.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 29, 2024.

/s/ *Mark R. McDonald*

Mark R. McDonald

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DEFENDANTS' JOINT MOTION TO STAY OR FOR A PROTECTIVE ORDER
[REQUEST FOR A DECISION BY JUNE 4, 2024]

I. INTRODUCTION

Defendants in this action (the “Notary Public Action”) are (1) five notaries public (the “Notaries”) who notarized certain documents for Lamar Adams; (2) Herring Ventures, the owner of a The UPS Store franchise where the Notaries performed notary services for Adams; (3) The UPS Store, Inc. (“TUPSS”), Herring Venture’s franchisor, and (4) American Casualty Company, an insurance carrier for Herring Ventures. Defendants jointly request a stay of depositions of the Notaries that have just been noticed by the Receiver of the estates of Lamar Adams and Madison Timber Properties, LLC. (ECF Nos. 392 – 396.)

On May 14, 2024, in the companion case of *Mills v. Baker Donelson*, Case No. 3:18-cv-00866-CWR-BWR, Defendant Baker Donelson filed a motion for summary judgment supported by a recent Eleventh Circuit decision, *Wiand v. ATC Brokers Ltd.*, 96 F.4th 1303 (11th Cir. 2024), which held that that a receiver for a Ponzi schemer and his controlled entity cannot state common law tort claims against alleged co-conspirators because (1) a receiver lacks standing to bring common law tort claims against third parties for damages that arose “from its *own* fraudulent scheme,” and (2) a receiver, standing in the shoes of the Ponzi schemer, could not state a claim for those common law torts. *Id.* at 1310. Baker Donelson showed in its motion for summary judgment that there was no need for any discovery before its motion for summary judgment was granted.

One week later, Defendants in this action filed an identical motion for summary judgment (“Defendants’ Motion for Summary Judgment re Standing.”) (ECF No. 390.) The Receiver’s Opposition to Defendants’ Motion is due on June 3, and Defendants’ Joint Reply on June 10, 2023.

After Defendants’ Motion for Summary Judgment re Standing was filed, Defendants met and conferred with the Receiver’s counsel asking that any deposition be deferred until

Defendants' Motion for Summary Judgment is decided.¹ (Declaration of Mark McDonald ("McDonald Decl.") ¶ 3.) The Receiver rejected that request and then served notices for the depositions of each of the Notaries (Defendants Austin Elsen, Tammie Elsen, Courtney Herring, Diane Lofton and Chandler Westover) in Ocean Springs, Mississippi starting June 10, 17, 18, 19 and 20. (*Id.* ¶ 4.)

There is ample good cause to stay the depositions of the notaries, or grant a protective order to preclude the depositions from going forward as scheduled. Courts frequently stay or defer proceedings, including discovery, pending resolution of a summary judgment motion that could end a case. There is no question that the Court has broad discretion to stay the depositions of the notaries upon a showing of "good cause." Fed. R. Civ. P. 26(c).

Trial courts have "broad discretion in discovery matters." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006) (quoting *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 220 (5th Cir. 2000) (quoting *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982))). "[A] plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited, and may be cut off when the record shows that the requested discovery is not likely to produce the facts needed by plaintiff to withstand a [Rule 56] motion for summary judgment." *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1029-30 (5th Cir. 1983). "Discovery is not justified when cost and inconvenience will be its sole result." *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990).

¹ When counsel for TUPSS participated that meet and confer with the Receiver's counsel on May 22, 2024 in advance of Defendants' filing this Joint Motion, the Receiver's counsel was incensed that TUPSS would join in a motion to stay the Notary depositions. Receiver's counsel stated complaint was that, when TUPSS' counsel asked for the all-party meet and confer, his email said the purpose was to discuss "those depos and those dates", which the Receiver's counsel said he interpreted as concerning only when the Notary depositions would occur, not whether they would occur. TUPSS' counsel's email request was not misleading in any way, but certainly did not constitute some representation that TUPSS' only objection to the Receiver's deposition notices concerned dates. (McDonald Decl. ¶ 3.)

Am. Gen. Life Ins. Co. v. Hannah, No. 1:12-CV-00087-GHD-DAS, 2012 WL 6132507, at *1 (N.D. Miss. Dec. 10, 2012) (staying proceedings pending a ruling on a potentially dispositive summary judgment motion.)

A stay of discovery pending resolution of a summary judgment motion is particularly appropriate where (1) the depositions sought to be stayed could not possibly affect the outcome of the motion, and (2) the summary judgment motion could end the entire case. *Am. Gen. Life Ins. Co.*, 2012 WL 6132507, at *2 (staying discovery pending resolution of a motion for summary judgment and a motion for judgment on the pleadings “both of which raise questions of law that cannot be answered by discovery.”); *Petrus v. Bowen*, 833 F.2d 581, 583 (“A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.”)

Here, Defendants’ Motion for Summary Judgment re Standing raises “preliminary questions that may dispose of the case,” and nothing the notaries might say in deposition could possibly affect the Court’s ruling on that Motion.

The Court’s Local Rules also evince a policy of having potentially dispositive legal issues resolved at an early stage, to avoid discovery that might prove unnecessary. Local Rule 26(f)(4) requires the parties at the Rule(f) conference to discuss “whether discovery should be conducted in phases or be limited to or focused upon particular issues,” reflecting the goal of focusing on particular issues that might resolve a case with little or no discovery. Obviously, the legal issues raised by Defendants’ Summary Judgment Motion re Standing are the kinds of “particular” issues that should be resolved, which could reduce or eliminate the need for discovery.

Importantly, there is not a discovery cut-off date or trial date set in the Notary Public Action, nor a scheduling order. (McDonald Decl. ¶ 2.)

It is particularly appropriate to stay the depositions of the Notaries which could avoid expense and inconvenience for all parties. One would think the Receiver would want to avoid spending time and the money of the Receivership estates conducting five out of town depositions on issues that could not possibly affect the outcome of the Motions for Summary Judgment re Standing by Defendants in this action or the Baker Donelson motion.

[A] receiver is a “neutral officer of the Court.” *Sterling v. Stewart*, 158 F.3d 1199, 1201 n.2 (11th Cir 1998). While a receiver must be impartial between parties, that impartiality “does not extend to h[er] relationship with the receivership estate” as receivers owe a “‘fiduciary duty to the owners of the property under h[er] care’ and thus must ‘protect and preserve’ the receivership’s assets ‘for the benefit of the persons ultimately entitled to it.’” *SEC v. Schooler*, No. 3:12-cv-2164-GPC-JMA, 2015 U.S. Dist. LEXIS 46870, 2015 WL 1510949, at *3 (S.D. Cal. March 4, 2015) (quoting *Sovereign Bank v. Schwab*, 414 F.3d 450, 454 (3d Cir. 2005)).

FTC v. On Point Global LLC, Civil Action No. 19-25046-Civ-Scola, 2020 WL 5819809, at *2 (S.D. Fla. Sept. 30, 2020). There is no good and legitimate reason to proceed with depositions of the Notaries while a motion for summary judgment is pending that will likely end the case.

II. THE RECEIVER WANTS TO DEPOSE THE NOTARIES TO MOOT AN ARGUMENT BY TUPSS IN CONNECTION WITH ITS MOTION FOR SUMMARY JUDGMENT RE FRANCHISOR LIABILITY

On April 1, 2024, one of the Defendants in this action—TUPSS—filed a different motion for summary judgment limited to the issue of franchisor liability. (ECF No. 384.) In Opposition, the Receiver argued TUPSS’ Motion should be denied based on Federal Rule of Civil Procedure 56(d) because, she claimed, she had been prevented from taking any depositions in the case. (ECF No. 387.) In response to the Receiver’s argument, (ECF No. 388), TUPSS referred to the well settled Fifth Circuit standard for Rule 56(d):

Per Rule 56(d), a district court may defer or deny a summary judgment motion, or allow additional time for discovery, if a “nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.” . . . To win on a Rule 56(d) motion, the moving party must “show (1) why she needs additional discovery and (2) how that discovery will create a genuine issue of material fact.” . . . It’s not enough to “simply rely on vague assertions that additional discovery will produce needed, but unspecified facts.” . . . Instead, the movant “must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will *influence the outcome of the pending summary judgment motion.*” . . . The movant “must also have diligently pursued discovery.”

Byrd v. BP Exploration & Prod., Inc., No. 22-30654, 2023 WL 4046280, at *2 (5th Cir. June 16, 2023) (citations omitted); (ECF No. 388 at 1). TUPSS showed that its Motion could not and should not be denied based on Rule 56(d) because the Receiver did not meet that Fifth Circuit standard, especially because the Receiver had had more than three years to take depositions in the case and had not taken any. (ECF No. 388 at 1, 13.) TUPSS showed that the Receiver’s opposition brief did not attempt to set forth a plausible basis for believing that specific facts existed which could influence the outcome of the motion re franchisor liability. (*Id.* at 12.) TUPSS also showed that the Receiver was mistaken when she argued that she had never been allowed to take depositions in the case; in truth, for more than three years the Receiver had been free to take depositions. (*Id.* at 12-13.) TUPSS’ Summary Judgment Motion re franchisor liability is fully briefed and awaiting decision.

The Receiver has not made any secret of her strategy, which is to try to take the depositions of the Notaries although TUPSS’ Motion for Summary Judgement re Franchisor Liability is fully briefed, and then file a further opposition to TUPSS’ Motion using the Notaries’ deposition. TUPSS respectfully submits that the Court should rule on the Receiver’s Rule 56(d) request to defer or deny TUPSS’ Motion for Summary Judgement re Franchisor Liability before

the Receiver engages in self-help by taking the depositions she asked for permission to take in her Rule 56(d) request.

But even if the Court were inclined to let the Receiver take some discovery before the Court decides TUPSS' Motion for Summary Judgement re Franchisor Liability there is absolutely no reason the Receiver needs to or should be allowed to take the depositions of the Notaries before Defendants' Joint Motion for Summary Judgment re Standing is decided. Thus it makes sense to decide Defendants' Joint Motion for Summary Judgment re Standing and Baker Donelson's Motion for Summary Judgment first, and then, if those Motions are denied, then the Court can consider TUPSS' Motion re Franchisor Liability, and the Receiver's request for discovery.

Furthermore, it is particularly appropriate to defer the depositions of the notaries until after the Court rules on the pending Motions for Summary Judgment. The notaries are five individuals who Adams' claimed to have "fooled" into notarizing documents. Those individuals, who worked for near minimum wage for Herring Ventures, LLC, the owner operator of a The UPS Store franchise business in Madison, Mississippi, will have to miss work to prepare for and sit for depositions on topics that are completely irrelevant to the Court's determination of the Motions for Summary Judgment re Standing.

III. DEFENDANTS REQUEST A RULING ON THIS MOTION WELL IN ADVANCE OF JUNE 10, 2024

The Federal Rules and the Local Rules provide that the filing of a motion for a protective order and request to stay depositions does not itself stay the depositions—the moving party must obtain a ruling in advance of the depositions. Here, the Receiver set the first deposition of a Notary on June 10, 2024. (ECF No. 395.) To be prepared for a deposition on June 10, 2024, to

prepare a witness for deposition on June 10, 2024, and to arrange travel to Ocean Springs, Mississippi, Defendants request that the Court rule on this Motion by June 4, 2024.

Dated: May 29, 2024

By: /s/ William Lee Guice
William Lee Guice III (MSBN 5059)
RUSHING & GUICE, P.L.L.C.
Post Office Box 1925
Biloxi, MS 39533-1925
Telephone: 228.374.2313
Facsimile: 228.875.5987

*Attorneys for Defendants
Herring Ventures, LLC, Austin Elsen,
Tammie Elsen, Courtney Herring, Diane
Lofton, and Chandler Westover*

Dated: May 29, 2024

By: /s/ LaToya C. Merritt
LaToya C. Merritt, MSB #100054
Mallory K. Bland, MSB #105665
PHELPS DUNBAR, LLP
4270 I-55 North Jackson
Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Telecopier: 601-360-9777
Email: LaToya.Merritt@phelps.com
Mallory.Bland@phelps.com

*Attorneys for Defendant
THE UPS STORE, INC.*

Dated: May 29, 2024

By: /s/ Mark R. McDonald
Mark R. McDonald (CA Bar No. 137001)
(*Pro Hac Vice*)
MORRISON & FOERSTER LLP
707 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: 213.892.5200
Facsimile: 213.892.5454
Email: MMcDonald@mofo.com

Adam J. Hunt (NY Bar No. 4896213)
(*Pro Hac Vice*)
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
Telephone: 212.468.8000
Facsimile: 212.468.7900
Email: AdamHunt@mofo.com

*Attorneys for Defendant
THE UPS STORE, INC.*

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By: /s/ John A. Banahan

John A. Banahan (MSBN 1731)
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
1103 Jackson Avenue (39567)
Pos Office Drawer 1529
Pascagoula, MS 39568-1529
Telephone: 228.762.6631
Facsimile: 228.769.6392

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/s/ Mark R. McDonald

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