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.

BUTLER SNOW LLP; BUTLER SNOW ADVISORY SERVICES, LLC; MATT THORNTON; BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC; ALEXANDER SEAWRIGHT, LLC; BRENT ALEXANDER; and JON SEAWRIGHT,

Defendants.

Case No. 3:18-cv-866-CWR-BWR

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

Carlton W. Reeves, District Judge
Bradley W. Rath, Magistrate Judge

THE RECEIVER'S RESPONSE TO BAKER DONELSON'S MOTION FOR SUMMARY JUDGMENT

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC, respectfully responds to the latest motion filed by Baker Donelson [128] as follows:

Introduction

Baker Donelson's motion argues a recent decision of the Eleventh Circuit, *Wiand v. ATC Brokers Ltd.*, 96 F.4th 1303 (11th Cir. 2024), requires this Court to dismiss the Receiver's claims and enter summary judgment in favor of Baker Donelson.

Baker Donelson would have the Court believe that *Wiand* is binding and groundbreaking here. But *Wiand* applies Florida (not Mississippi) law, a fact Baker Donelson omits to mention for much of its brief. The Eleventh Circuit's decision in *Wiand* is furthermore unremarkable inasmuch as it merely follows other decisions from that circuit applying Florida law in Florida cases.

Baker Donelson creates out of *Wiand* another opportunity to attack the Receiver's standing and claims. But Fifth Circuit and Mississippi law control here. The Court has already addressed the Receiver's standing and claims under Fifth Circuit and Mississippi law numerous times in this and related cases. Nothing in *Wiand* changes any ruling in this case thus far.

The Receiver responds more specifically as follows:

Argument

1. *Wiand* applies the Florida rule.

Baker Donelson omits to mention until page 7 of its brief that *Wiand* applies Florida (not Mississippi) law. *See Wiand*, 96 F.4th at 1315 (Marcus, J., concurring, joined by entire panel) ("Sitting in diversity, we are *Erie*-bound to follow Florida law.").

The receiver in *Wiand*, like the Receiver here, alleged tort claims against a Ponzi schemer's alleged accomplices. But Florida law, not Mississippi law, exclusively governed the receiver's claims. The Eleventh Circuit affirmed the district court's dismissal of the receiver's tort claims under Florida law, following the court's decision in *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296 (11th Cir. 2020).

"*Isaiah* [itself had] followed the Florida case of *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543 (Fla. 2d DCA 2003)." *Wiand*, 96 F.4th at 1315 (Marcus, J., concurring, joined by entire panel). In *Freeman* the Florida Second District Court of Appeal established the Florida

"rule": "Florida's courts will not recognize that a receiver has a cause of action to sue in common-law tort on behalf of a Ponzi corporation." *Id.* (citing *Freeman*). That rule, adopted as early as 2003, reflects Florida's own "practical and equitable concerns":

> Florida's Second District Court of Appeal was driven by what appear to be practical and equitable concerns. The court reasoned that it is not possible, where a corporation contains no honest member, "to separate the fraud and intentional torts of the insiders from those of the corporation itself"—and that the corporate insiders would not be entitled to contribution for torts they themselves carried out. Nor, the court continued, could third parties have a duty to disclose wrongdoing to a corporation with no innocent person to whom they could have made the disclosure.

Id. (citing *Freeman*, 865 So. 2d 551-52).

2. The Florida rule is a matter of substantive Florida law, not of Article III standing.

The Florida rule's net effect is that, in Florida, to survive a motion to dismiss, "the receiver must allege the presence of innocent decision-makers within the corporation to whom fraudulent conduct could be reported." *Id.* at 1310-11.

Properly understood, the Florida rule is a matter of substantive Florida law, not of Article III standing. Judge Marcus, writing for the entire *Wiand* panel, explained:

> [T]he problem with a receiver bringing common-law tort claims on behalf of a Ponzi corporation in Florida is not that a court lacks the power to adjudicate the claims, but that it chooses not to recognize them. The receiver is without a cause of action precisely because the Florida courts have so ruled, not because the receiver lacks Article III standing, which is a different question the federal courts must answer.

Id. at 1316 (Marcus, J., concurring, joined by entire panel).

3. No court has cited *Freeman*, *Isaiah*, or *Wiand* to dismiss a receiver's claims under *another* state's laws.

The Florida Second District Court of Appeal decided *Freeman* in 2003. To the Receiver's knowledge, which is based on a review of cases which have cited *Freeman*, *Isaiah*, and *Wiand*, no court has applied the Florida rule outside of Florida, either as a matter of substantive law or as a

principle of standing. Numerous courts have cited *Freeman*, *Isaiah*, or *Wiand* for their general propositions, but none have relied on them to dismiss a receiver's claims under *another* state's laws.

4. *Wiand* does not alter the Receiver's standing.

This Court has already addressed the Receiver's standing many, many times.[1]

In assessing the Receiver's standing, this Court relied primarily on the Fifth Circuit's opinion in *Zacarias v. Stanford International Bank*, 945 F.3d 883 (5th Cir. 2019), because that case presented the same essential facts as here. And there was "no dispute" that the receiver in *Zacarias* had standing. [70 at 6-7] If the Fifth Circuit's opinion in *Zacarias* was not clear enough, in *Rotstain v. Mendez*, 986 F.3d 931 (5th Cir. 2021), another case presenting the same essential facts as here, the Fifth Circuit reiterated that the receiver had standing specifically to "recover[] for injury to the [receivership estate] entities in the form of the entities' additional liability to investors due to Defendants' conduct." *Rotstain*, 986 F.3d at 941.

The Fifth Circuit did not look to state law for its holdings in either *Zacarias* or *Rotstain*; a plaintiff's Article III standing is a question federal courts must answer. *E.g., Wiand*, 96 F.4th at 1316 (Marcus, J., concurring, joined by entire panel) ("Article III standing … is a different question the federal courts must answer"). But if the court had looked to Mississippi law instead, the result would have been the same. Indeed, Mississippi's courts are *more permissive* than federal courts in granting standing. Whereas federal courts must "adhere to a stringent definition of

[1] *See* Doc. 70. *See also* Doc. 67 (order denying Trustmark's motion to dismiss) and 94 (order denying motion for interlocutory appeal), *Alysson Mills vs. Trustmark, et al.*, No. 3:19-cv-00941 (S.D. Miss.); Doc. 49 (order denying Rawlings & MacInnis's and UPS's motions to dismiss) and Doc. 169 (order denying UPS's motion to dismiss for lack of standing), *Alysson Mills vs. The UPS Store, Inc., et al*., No. 3:19-cv-00364 (S.D. Miss.); Doc. 123 (order denying BankPlus's motion to dismiss), *Alysson Mills vs. BankPlus, et al.*, No. 3:19-cv-00196 (S.D. Miss.).

standing based on the United States Constitution, art. III, § II," and thereby "limit review to actual 'cases and controversies,'" Mississippi courts are not so restricted. *Van Slyke v. Bd. of Trustees of State Institutions of Higher Learning*, 613 So. 2d 872, 875 (Miss. 1993) ("The Mississippi Constitution, however, contains no such restrictive language."). *See also* Miss. Const. art. III § 24 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay . . . ").

Baker Donelson can only argue "the Receiver lacks standing" under *Wiand* [129 at 6-8] by omitting entirely from its analysis Fifth Circuit (and for that matter Mississippi) law. If the motion's reader did not know better, she might reasonably believe that this Court sits in the Eleventh Circuit instead.

Baker Donelson does not even acknowledge that the *Wiand* panel, in applying the Florida rule that Baker Donelson urges here, expressly distinguished between standing (which federal courts ought to decide for themselves) and the Florida rule (which Florida substantive law dictates). *Wiand*, 96 F.4th at 1316 (Marcus, J., concurring, joined by entire panel) ("The receiver is without a cause of action precisely because the Florida courts have so ruled, not because the receiver lacks Article III standing, which is a different question the federal courts must answer.").

In short, Baker Donelson asks this Court to reverse itself, disregard binding Fifth Circuit law (and, to the extent it is persuasive, Mississippi law, too), and apply a peculiar Florida rule to dismiss the Receiver's case on standing grounds, five years into this litigation. The Court cannot do that. *Wiand* does not alter the Receiver's standing.

5. *Wiand* does not speak to the viability of the Receiver's claims, which are governed exclusively by Mississippi and Fifth Circuit law.

Alternatively, Baker Donelson asks this Court to hold the Receiver has no cause of action because a receiver for a "corporation used for Ponzi schemes" does not have "a cause of action to sue in common-law tort on behalf of a Ponzi corporation." [128 at 8 (quoting *Wiand*, 96 F.4th at 1315)]

Again, Baker Donelson relies for its argument solely on *Wiand*, which relies solely on the Florida rule. There is no authority in this Circuit for what Baker Donelson asks this Court to do. Baker Donelson does not point to any heretofore unaddressed principle of Mississippi law which today, five years in, would invalidate the Receiver's claims.

The Court is very familiar with the Receiver's claims. Her theories of liability are not novel. She has settled identical claims against six similarly situated institutions including law firms and banks. Each of them fiercely defended the Receiver's claims against them. None asked this Court to apply Florida law to dismiss the Receiver's claims.

The parties have briefed the Mississippi law governing the Receiver's claims many times already. The Court already held the Receiver's claims are viable, in this and in related cases.[2]

Baker Donelson asserts that "[t]he analysis here is distinct from the *in pari delicto* doctrine, which the Court considered at the motion-to-dismiss stage." [129 at 8] But Baker Donelson's argument here is the same in substance: Here, as before, it represents that "[i]t is 'a fundamental principal' that '[t]he law does not afford a criminal conspirator the right to sue his coconspirator for civil damages arising out of a criminal conspiracy.'" [129 at 9 (quoting *Bolton v. John Lee, P.A.*, 2023 WL 140980, at *4 (Miss. Ct. App. Jan. 10, 2023)] Here, as before, it reasons that the Receiver stands in Adams's and Madison Timber's shoes; Adams was a fraudster; Madison

[2] See footnote 1.

Timber was his instrument; and "Adams and Madison Timber cannot recover for aiding and abetting their own fraud" therefore the Receiver cannot recover either. [129 at 11] In other words, *in pari delicto*: "a wrongdoer is not entitled to compel contribution from a joint tortfeasor." *Sneed v. Ford Motor Co.*, 735 So. 2d 306, 308 (Miss. 1999).

The parties in this and related cases already briefed the *in pari delicto* doctrine many times, and this Court already held it does not apply in this case. Excepting the Receiver from the *in pari delicto* doctrine is prudent and consistent with Mississippi law and Fifth Circuit precedent. The *in pari delicto* doctrine and the related wrongful conduct rule are variants of the equitable doctrine of unclean hands. In Mississippi these principles exist to protect the public; Mississippi courts apply equity when "sound public policy" calls for it. *See Cole v. Hood*, 371 So. 2d 861, 864 (Miss. 1979) ("[I]t is the duty of the court to apply it, on the basis of a sound public policy."); *Thigpen v. Kennedy*, 238 So. 2d 744, 747 (Miss. 1970) ("The fact that the parties in this case are *in pari delicto* does not aid appellee. The maxim is not invoked for the benefit of the parties to a fraudulent transaction, but rests upon the proposition that society must be protected."); *Morrissey v. Bologna*, 123 So. 2d 537, 543 (Miss. 1960) ("Even where the contracting parties are *in pari delicto*, the courts may interfere from motives of public policy."); *Hall v. Bowman*, 749 So. 2d 182, 184 (Miss. Ct. App. 1999) ("A court of equity considers results rather than the means by which they are obtained." (quoting *Savage v. Dowd*, 54 Miss. 728, 732 (1877)). Accepting Baker Donelson's argument here would punish the innocent investors who are the beneficiaries of the Receivership Estate and reward Adams's co-conspirators and aiders and abettors. In other words, accepting Baker Donelson's argument here would be inequitable, *see e.g.*, *Cole*, 371 So. 2d at 864 ("Courts of equity do not countenance iniquity nor give it sanctuary . . . ")—against public policy therefore against Mississippi law.

Whatever it calls them, the principles Baker Donelson invokes do not operate to bar the Receiver's claims against Adams's co-conspirators and aiders and abettors. "[I]t is well established that when the receiver acts to protect innocent creditors he can maintain and defend actions done in fraud of creditors even though the corporation would not be permitted to do so." [70 at 17 (quoting *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012)]

The Florida rule is contrary, but it does not apply here. The Receiver's claims are governed exclusively by Mississippi and Fifth Circuit law. *Wiand* does not speak to the viability of the Receiver's claims.

6. The Court need not address other of Baker Donelson's assertions.

Baker Donelson's motion seeks summary judgment in its favor on the sole basis that *Wiand* compels it. Because *Wiand* and the Florida rule on which it relies do not apply here, the Court may simply deny Baker Donelson's motion. It need not address anew the elements of the Receiver's claims and whether the Receiver sufficiently alleges each. The Court has already done that, too many times to count, in this and related cases.[3] Unless the Court desires, the Receiver will not defend each element of each of her claims here.

The Receiver wishes, however, to address briefly two of Baker Donelson's assertions.

First, the assertion that, in addition to each of the elements of her claims, the Receiver must prove each of the elements of fraud. [129 at 10] Mississippi law does not require the Receiver to prove the specific tort of fraud or securities fraud. The underlying wrong is the Ponzi scheme itself. *E.g., Rex Distrib. Co., Inc. v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019)

[3] See footnote 1. In addition to this and related cases, the parties briefed the same issues, repeatedly, in the consolidated case *In re Consolidated Discovery in Cases Filed By Alysson Mills*, No. 3:22-cv-00036 (S.D. Miss), insofar as they related to discovery.

("First, Mitchell contends there was no underlying tort and therefore no civil conspiracy. But there is an underlying wrong …").

Second, the assertion that Madison Timber had no innocent decisionmaker. [129 at 7] The fact is only relevant insofar as the Florida rule applies, but the fact nevertheless is disputed. Baker Donelson attaches to its motion materials which it intends to show that Adams, and Adams alone, acted on Madison Timber's behalf. But Madison Timber's vice president Wayne Kelly, who has not been charged with any criminal conduct, was equally important to Madison Timber's operations and, relevant here, was responsible for Madison Timber's relationship with Baker Donelson.

Conclusion

Wiand does not speak to this case. The Court must deny Baker Donelson's motion, permit the Receiver to proceed with overdue discovery, and set this case for trial by jury.

Respectfully submitted,

/s/ Lilli Evans Bass

BROWN BASS & JETER, PLLC
Lilli Evans Bass, Miss. Bar No. 102896
1755 Lelia Drive, Suite 400
Jackson, Mississippi 39216
Tel: 601-487-8448
Fax: 601-510-9934
bass@bbjlawyers.com

/s/ Brent B. Barriere

FISHMAN HAYGOOD, LLP
Admitted pro hac vice
Brent B. Barriere
Kaja S. Elmer
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Tel: 504-586-5253
Fax: 504-586-5250
bbarriere@fishmanhaygood.com
kelmer@fishmanhaygood.com

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: June 3, 2024

/s/ Brent B. Barriere