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-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

THE UPS STORE, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES RE INVESTOR DISCOVERY AND MOTION FOR INVESTOR DISCOVERY

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I. INTRODUCTION

Under Mississippi law regarding notary public liability, Defendants in this action ("the Notary Public Action") are entitled to discovery from the investors who were allegedly damaged due to purported errors by five notary publics who were working at a The UPS Store® in Madison, Mississippi owned by Defendant Herring Ventures (collectively, "the Herring Ventures' Defendants"). The Honorable Carlton Reeves has previously ruled that Defendants in this case are entitled to discovery related to the dealings between Lamar Adams and those investors, which is mandated by settled Mississippi law regarding notary public liability. *Gulledge v. Shaw*, 880 So. 2d 288, 294 (2004.)("a notary public would not be liable for negligent or wrongful acts which were not a proximate, or cause in fact, of the damages suffered. It is thus apparent that the specific loss must be proximately caused by the notary's negligent or wrongful act.") It would be plain error not to allow discovery from investors who Plaintiff contends lost money due to the conduct of the notary publics in this action..

Defendant The UPS Store, Inc.("TUPSS"), Herring Venture's franchisor, has been seeking discovery from investors since February 2021. TUPSS—at very considerable expense—served an initial tranche of subpoenas for documents on approximately 32 of the investors . Plaintiff moved to quash those subpoenas. Briefing before Magistrate Judge Ball was completed in July 2021 but he did not rule on Plaintiff's Motion to Quash. During conferences with Magistrate Judge Ball about Plaintiff's Motion to Quash, Judge Ball recognized that many if not all of the defendants in the other cases filed by Plaintiff would also seek discovery from investors. Shortly thereafter TUPSS, Inc. moved to consolidate the various cases filed by Plaintiff for discovery purposes, and moved to vacate the discovery cut-off and trial dates in the Notary Public Action largely because of the need for coordination about investor discovery. Judge Ball granted that motion on September 30, 2021. Shortly thereafter Judge Ball issued an

order agreeing with TUPSS that investor discovery was relevant to the claims and defenses in the case, and was proportional to the needs of the case, but terminated TUPSS' motion as "moot" because of his consolidation order.

On March 20, 2023, Judge Ball issued an Order (ECF No. 592) (the "March 20, 2023 Order") in the consolidated cases requiring any party seeking any "discovery related to the investors in the Madison Timber Ponzi scheme" to file "motion[s] to conduct investor discovery," by April 21, 2023. The March 20, 2023 Order further provided that:

> The parties' requests must identify the following:
>
> (a) The subject matter and general topics on which the discovery is requested;
>
> (b) The reasons the discovery requested is necessary, including the specific claims and/or defenses to which the discovery is relevant;
>
> (c) The form(s) of discovery requested (specifically, subpoenas, depositions –whether under Fed. R. Civ. P. 30 or 31, or other proposed forms) and from whom the discovery is requested; and
>
> (d) The estimated time frame to complete the discovery requested.

(March 20, 2023 Order at 1-2.) The March 20, 2023 also provided that "[t]he motions must include the information and submissions requested in United States District Judge Carlton Reeves's Order [221] entered in *Mills v. BankPlus*, 3:19-cv-196-CWRFKB, including proposed jury instructions and verdict forms." (*Id*. at 2.)

TUPSS filed its motion on April 21, 2023 and also joined in the motion filed by the other defendants that same day. Those motions were likewise not resolved. Instead, on September 27, 2023, the Court terminated the pending investor discovery motions because it was "de-consolidated" the cases.

TUPSS, on behalf of itself and the Herring Ventures Defendants, is therefore filing another motion explaining why it would be plain error for the Court to rule that Defendants may not take any discovery from the investors and their related parties.

II. BACKGROUND FACTS

A. Plaintiff's Claims and Defendants' Defenses in the Notary Public Action

The parties in the Notary Public Action were originally (1) five notary publics—Austin Elsen, Tammie Elsen, Courtney Herring, Diane Lofton, and Chandler Westover— who worked at a The UPS Store® franchised business in Madison, Mississippi; (2) Herring Ventures, LLC, the franchisee who owned and operated the Madison The UPS Store; (3) TUPSS, Inc., the franchisor; (4) two notary publics—Tammy Vinson and Jeannie Chisholm—who worked at Rawlings & MacInnis P.A. law firm; and (5) Rawlings & MacInnis, P.A. In short, Plaintiff alleges that the notaries public acknowledged the identity of Adams and a purported landowner on timber deeds that Adams then used in connection with his Ponzi scheme, when in fact there was not a landowner who appeared before any of the notaries public at the time of the acknowledgements who deeded timber rights to Adams. Plaintiff alleges that Adams either presented the timber deeds to the notary public with a forged landowner signature or that Adams added the forged landowner signature after obtaining the acknowledgment. In response to Defendants' written discovery questions, Plaintiff has stated she does now know which of those two scenario occurred. Plaintiff further alleges that "[i]nvestors received timber deeds that purported to secure their investments—but the deeds were fake." (ECF No. 14 ("Am. Compl.") at 2, *Mills v. TUPSS, Inc.*, No. 3:19-cv-00364-CWR-FKB.)

Based on those allegations, Plaintiff asserts three primary causes of action: conspiracy, aiding and abetting, and negligence. Plaintiff also asserts claims against Herring Ventures for negligent supervision of the Notary Public Defendants. Plaintiff has admitted that she sued

TUPSS based solely on the theory that it is vicariously liable for the conduct of the Herring Ventures notary publics, and does not contend that TUPSS conspired with Adams, aided and abetted Adams or was itself negligent.

B. Defendants' Efforts to Obtain Discovery Regarding Investors

Before the cases were consolidated, in April 2021, TUPPS, Inc. served document demands on Plaintiff seeking, among other things, all documents regarding the investors, including all documents received from or provided to the investors and all communications between Plaintiff and investors. After Plaintiff objected to TUPSS' requests for documents on various grounds, Magistrate Ball granted TUPPS, Inc.'s Motion to Compel. On February 3, 2022, Plaintiff filed an objection to a small portion of Magistrate Ball's ruling, specifically Plaintiff objected that Judge Ball erred by allowing discovery of Plaintiff's communications with investors after she was appointed Receiver—she did not seek review of Judge Balls ruling that documents the Receiver received from investors were relevant and needed to be produced. ECF No. 323 at 2. ("The Receiver's objection to the magistrate judge's order is narrow. She asks the Court to reconsider only the magistrate judge's ruling that she must produce to UPS all her communications.")

On August 15, 2022, Judge Reeves ruled that communications between investors and Mills after she was appointed Receiver were irrelevant, but Judge Reeves' Order expressly stated that "[t]he relevant communications in this case are those that predate the appointment of the Receiver: those between Adams/Madison Timber and investors . . . . Those communications remain 'fair game.'" ECF No. 338 at 3.

In early June 2021, TUPSS served a first tranche of subpoenas for documents on thirty-two (of the approximately 185) Madison Timber investors seeking documents only. TUPSS (wisely) started with only 32 subpoenas to see how it would go, before serving subpoenas on the

remaining investors. On June 28, 2021, Plaintiff moved to quash those thirty two subpoenas in their entirety or for a protective order excusing those witnesses from complying with TUPSS, Inc.'s subpoenas. (ECF No. 213, *Mills v. TUPSS, Inc.*, No. 3:19-cv-00364-CWR-FKB.) The briefing on Plaintiff's Motion to Quash was completed by July 2021, and Judge Ball conducted several conferences with counsel to discuss those investor subpoenas and Plaintiff's Motion to Quash, but Judge Ball never ruled on the merits of Plaintiff's Motion.

In August 2021, TUPSS moved to consolidate the Notary Public Action with three other actions filed by Plaintiff alleging similar claims, and seeking the same damages. That motion was granted in September 2021.

On February 7, 2022, Judge Ball issued an order finding that the subpoenas to investors sought documents relevant to causation and damages, at a minimum, and were proportional to the needs of the case. (ECF 320 at 2.) Judge Ball found Plaintiffs' Motion to Quash was "moot," however, because the cases had been consolidated for discovery purposes. (Id. at 3.)

On February 28, 2022, all Defendants in the newly consolidated cases jointly served a notice of intent to serve subpoenas on the investors identified by Plaintiff as the persons who invested in the Madison Timber Ponzi scheme along with a questionnaire that Defendants proposed asking each investor to fill out. On March 14, 2022, Plaintiff served an "Objection to Subpoenas." (ECF No. 83). Plaintiff did not move to quash the subpoenas or for a protective order. Defendants later gave notice of their intent to subpoena two additional witnesses who were spouses of investors, to which Plaintiff objected as well on May 24, 2022. In her May 24, 2022 objection, Plaintiff asserted that she had "put the question of investor discovery before Judge Reeves in both the *BankPlus* and *The UPS Store, Inc*. cases." (ECF No. 283 at 2, n.1.)

In the *BankPlus* action, Plaintiff and BankPlus filed motions for judgment on the pleadings. Plaintiff's motion for judgment sought judgment on BankPlus' affirmative defense that "[t]he Receiver's claims against BankPlus are barred, in whole or in part, by the absence of actual, justifiable, or reasonable reliance on the part of the [Madison Timber] investors in connection with their purchase(s) of [Madison Timber] promissory notes." (ECF No. 183 at 2, *Mills v. BankPlus*, No. 3:19-cv-00196-CWR-FKB.) On January 17, 2023, Judge Reeves issued an order deferring a ruling on Plaintiff's motion for judgment on the pleadings and instructing BankPlus to "submit proposed jury instructions demonstrating how its 'bad faith investor' defenses are grounded in the aiding and abetting case law, rather than fraudulent transfer cases. This is not a fraudulent transfer case. . . . A hearing on these issues will be scheduled for the same day as the Magistrate Judge's next in-person conference." (ECF No. 221 at 3-4, *Mills v. BankPlus*, No. 3:19-cv-00196-CWR-FKB.)

On March 20, 2023, Magistrate Judge Ball issued his order requiring all defendants seeking investor discovery to file motions to conduct investor discovery by April 21, 2023. TUPSS, Inc. and the other defendants in the consolidated cases filed their Investor Discovery Motions on April 21, 2023. Those motions were not ruled upon. On September 30, 2023, Magistrate Judge Rath terminated the investor discovery motions with leave to re-file and ordered that the cases no longer be consolidated.

III. DEFENDANTS ARE ENTITLED TO DISCOVERY REGARDING INVESTORS

As stated, Judge Reeves previously issued a ruling acknowledging that the dealings between Adams and investors are relevant to the claims and defenses in this case and that discovery was "fair game." That should end the matter. But even if the Court were inclined to revisit the matter, it is obvious that information from and about the investors is discoverable.

A. Defendants Must Be Allowed Discovery from the Investors to Defend the Conspiracy Count

Count I of the Amended Complaint in the Notary Public Action is for "Civil Conspiracy." In that Count I, Plaintiff alleges that "Defendants conspired with Adams to commit . . . tortious acts . . . by notarizing fake timber deeds" and "were complicit in Adams's intent to defraud [investors]." (Am. Compl. ¶¶ 78-79, 82.) In various briefs, Plaintiff claims the damages the Receivership entities seek to recover on this conspiracy count are the amount for which the Receivership entities are liable to investors.

Under Mississippi law, there is no stand-alone cause of action of conspiracy, with its own elements. *See Langston v. 3M Co.*, No. 2:12cv163-KS-MTP, 2013 U.S. Dist. LEXIS 74639, at *9 (S.D. Miss. May 28, 2013) ("[A] civil conspiracy claim cannot stand alone, but must be based on an underlying tort" (quoting *Aiken v. Rimkus Consulting Grp., Inc.*, 333 F. App'x 806, 812 (5th Cir. 2009)) (per curiam)); *Wells v. Shelter Gen. Ins. Co.*, 217 F. Supp. 2d 744, 755 (S.D. Miss. 2002) (applying Mississippi law; collecting cases: "Plaintiffs argue that a civil conspiracy claim can stand alone, without reference to an underlying tort. The Court finds no support for such a contention under Mississippi or any other law, however. Authority to the contrary is, in fact, legion."); *see also Fikes v. Wal-Mart Stores, Inc.*, 813 F. Supp. 2d 815, 822 (N.D. Miss. 2011) (granting motion to dismiss claim for aiding and abetting and civil conspiracy because complaint failed to state a claim for an underlying tort and "there must be an underlying tort for the Defendants to have aided and abetted").

In the Notary Public Action, Plaintiff alleges the underlying tort to be "to defraud [investors]." (Am. Compl. ¶¶ 78-79, 82.) Thus, a jury would need to be instructed on the elements of fraud, plus the elements necessary to make the notary publics liable as Adams' co-conspirators. *Rex Distrib. Co. v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019)

("Under Mississippi law, the elements of a civil conspiracy are: '(1) an agreement between two or more persons, (2) to accomplish an unlawful purpose or a lawful purpose unlawfully, (3) an overt act in furtherance of the conspiracy, (4) and damages to the plaintiff as a proximate result.'" (citation omitted)).

Simply reciting the Mississippi jury instructions for fraud, and stating Mississippi law on conspiracy, shows that Plaintiff, who stands in the shoes of Adams and Madison Timber, is not the proper plaintiff to assert a conspiracy to defraud investors cause of action in the Notary Public Action.

Mississippi Model Jury Instructions for fraud state:

1701 Fraud - General Instruction and Verdict Form

General Instruction

[Name of plaintiff] claims that [name of defendant] committed fraud and that [name of defendant] is legally responsible for [name of Plaintiff]'s damages. To establish this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence:

1. [Name of defendant] stated _____ [describe defendant's alleged false statement];

2. This statement was false;

3. This statement concerned an important or material fact;

4. [Name of defendant] knew or reasonably should have known that the statement was false;

5. [Name of defendant] intended that [name of plaintiff] would reasonably act upon the statement;

6. [Name of plaintiff] did not know that the statement was false;

7. [Name of plaintiff] relied on the statement;

8. [Name of plaintiff] had a right to rely on the statement; and

9. [Name of plaintiff] suffered damages as a result of [his/her/its] reliance on the statement.

Verdict Form

We answer the questions submitted to us as follows:

1. Do you find by clear and convincing evidence that [name of defendant] stated _____ [describe defendant's alleged false statement]?

   YES _____ NO _____

   If your answer to question 1 is YES, then answer question 2. If you answered NO, stop here and tell the bailiff.

2. Do you find by clear and convincing evidence that this statement was false?

   YES _____ NO _____

   If your answer to question 2 is YES, then answer question 3. If you answered NO, stop here and tell the bailiff.

3. Do you find by clear and convincing evidence that this statement concerned an important or material fact?

   YES _____ NO _____

   If your answer to question 3 is YES, then answer question 4. If you answered NO, stop here and tell the bailiff.

4. Do you find by clear and convincing evidence that [name of defendant] knew or reasonably should have known that the statement was false?

   YES _____ NO _____

   If your answer to question 4 is YES, then answer question 5. If you answered NO, stop here and tell the bailiff.

5. Do you find by clear and convincing evidence that [name of defendant] intended that [name of plaintiff] would reasonably act upon the statement?

   YES _____ NO _____

   If your answer to question 5 is YES, then answer question 6. If you answered NO, stop here and tell the bailiff.

6. Do you find by clear and convincing evidence that [name of plaintiff] did not know that the statement was false?

YES _____ NO _____

If your answer to question 6 is YES, then answer question 7. If you answered NO, stop here and tell the bailiff.

7. Do you find by clear and convincing evidence that [name of plaintiff] relied on the statement?

YES _____ NO _____

If your answer to question 7 is YES, then answer question 8. If you answered NO, stop here and tell the bailiff.

8. Do you find by clear and convincing evidence that [name of plaintiff] had a right to rely on the statement?

YES _____ NO _____

If your answer to question 8 is YES, then answer question 9. If you answered NO, stop here and tell the bailiff.

9. Do you find by clear and convincing evidence that [name of plaintiff] suffered damages as a result of [his/her/its] reliance on the statement?

YES _____ NO _____

If your answer to question 9 is YES, then answer question 10. If you answered NO, stop here and tell the bailiff.

10. What are [name of plaintiff]'s damages?

$_____ TOTAL

After you have filled out the verdict form, please tell the bailiff that you have reached a verdict.

As a recitation of these elements make clear, the plaintiff for the "underlying tort" of fraud here would be the investor who allegedly was duped by Adams and his lies. The estates of Adams and Madison Timber do not have a claim for fraud—they have liability for fraud. Likewise, the elements of civil conspiracy confirm that the proper plaintiff on a conspiracy claim is the person who is harmed by the agreement to accomplish an unlawful purpose, not a participant in the agreement like Adams and Madison Timber.

A receiver may only assert claims that the receivership entities could have asserted. *See SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 841 (5th Cir. 2019) ("'an equity receiver may sue only to redress injuries to the entity in receivership[.]'" (quoting *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995))); *Reneker v. Offill*, No. 3:08-cv-1394-D, 2009 U.S. Dist. LEXIS 24567, at *15 (N.D. Tex. 2009) ("A receiver stands in the place of the individuals and entities over whose property he has been appointed receiver. . . . Therefore, [the Plaintiff-Receiver], standing in the shoes of the [Receivership corporate entity], must allege an 'injury in fact' suffered by the [corporate entity]." (citing *Hymel v. FDIC*, 925 F.2d 881, 883 (5th Cir. 1991) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))).

From these principles it should be obvious that Plaintiff—who stands in the shoes of Lamar Adams and Madison Timber—cannot sue Adams and Madison Timber for defrauding investors and thus Adams and Madison Timber cannot sue TUPSS, Inc. and the other Defendants for conspiring with Adams and Madison Timber to defraud investors. Other courts have recognized and applied this principle. For example, in *Jarrett v. Kassell*, 972 F.2d 1415 (6th Cir. 1992), a court-appointed receiver for the National Coal Exchange ("NCE") sued NCE's officers and another entity that allegedly "conspired to sell contracts for future delivery of coal in violation of the Commodity Exchange Act . . . and conspired to defraud [NCE's] customers in violation of Tennessee common law." *Id*. at 1417-18. The Sixth Circuit held that the receiver lacked the authority to assert those conspiracy claims because the receiver "had no authority to bring a cause of action on behalf of individual customers" who were the actual victims of the alleged conspiracy. *Id*. at 1426.

In response to the investor discovery motions, Plaintiff asserted that the causes of action she is asserting in these consolidated cases are "not novel;" that the receiver in the Stanford

Ponzi scheme cases pleaded the same causes of action; and that the Fifth Circuit approved of the causes of action. (Case 3:22-cv-00036-CWR-BWR, ECF 643 at 5.) Plaintiff also asserted that in none of those cases were defendants allowed to take discovery from investors who lost money in the Stanford Ponzi scheme. (Id.) None of that is true. In fact, the receiver in the Stanford cases did not seek to recover the amount of investor losses against any defendant on the theory that the defendant conspired with the Stanford entities in receivership to defraud investors.

Plaintiff will undoubtedly argue that Judge Reeves has already ruled, based on *Zacarias v. Stanford International Bank*, 945 F.3d 883 (5th Cir. 2019), that she has standing to "sue[] notaries that, she alleges, furthered the Ponzi scheme and caused greater liabilities to the receivership estate." (ECF No. 169 at 2, *Mills v. TUPSS, Inc.*, No. 3:19-cv-00364-CWR-FKB.) Even if the theory of increased liabilities were an appropriate measure of damages, a plaintiff has to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "Civil conspiracy" to "defraud investors" is not a claim under Mississippi law upon which relief can be granted to ***Plaintiff*** standing in the shoes of Adams/Madison Timber. Mississippi jury instructions on fraud and Mississippi law on conspiracy make that clear. Neither *Zacarias,* nor any other litigation related to the Stanford Ponzi scheme, nor any other litigation related to any other alleged Ponzi scheme, asserted a claim brought by a receiver or trustee for civil conspiracy to defraud investors.

The Court has allowed this conspiracy to defraud investors count to proceed, however, so there must be discovery on the matters about which a jury would be asked.

For Plaintiff to prove her pleaded theory that the notary publics conspired "to defraud investors," evidence about each element of that underlying fraud claim is patently relevant, including what allegedly false statements were made to the investor, whether the statement was

false; whether that false statement concerned an important or material fact; whether Adams knew or reasonably should have known that the statement was false; whether Adams intended the investor would reasonably act upon the statement; whether the investor did not know that the statement was false; whether the investor relied on the statement; whether the investor had a right to rely on the statement; and whether investors suffered damages as a result of their reliance on the statement. Furthermore, to prove liability against the notary publics, Plaintiff would also have to prove that the notary publics made "(1) an agreement [with Adams], (2) to accomplish an unlawful purpose or a lawful purpose unlawfully, (3) [committed] an overt act in furtherance of the conspiracy, (4) and damages to the plaintiff as a proximate result." *Rex Distrib. Co.*, 271 So. 3d at 455 (citation omitted). If the Court allows Plaintiff to pursue this conspiracy to defraud claim even though Plaintiff was not defrauded, Plaintiff would have to prove, among other things, that damages were the "proximate result" of those allegedly improper notarizations, which would require evidence whether each investor saw, reviewed or cared about those notarizations.

The Mississippi Supreme Court has written several opinions that make it clear that a notary public is not automatically and strictly liable for all damages that would not have occurred if the notary's false notarization had been accurate or had not been given. Instead, a person allegedly harmed has to show that the notary's error was the proximate cause of the harm. *Gulledge v. Shaw*, 880 So.2d 288, 293-294 (Miss., 2004) (noting that it was "obvious" that a notary public's actions "were not a proximate cause of [the victim's] death."); *see also U. S. Fidelity & Guaranty Co. v. State, for Use of Ward*, 53 So.2d 11, 14, 211 Miss. 864, 872 (Miss. 1951) (notary public liable where plaintiff proved that reliance on the fraudulently notarized deeds was the proximate cause of the damage).

Plaintiff has argued repeatedly—including in a brief filed earlier this month in opposition to a motion from Baker Donelson in a related case—that investor discovery is not relevant because "[r]eliance is not an element" of her claims, including her conspiracy claim. (*See Mills v. Butler Snow LLP*, ECF No. 125). As discussed above, because Plaintiff's conspiracy claim alleges that the notary publics conspired with Adams to "defraud investors" she must prove that investors were, in fact, defrauded, which requires proof of investor reliance, in addition to the other elements of fraud. Furthermore, Plaintiff must also prove proximate causation. Plaintiff has explicitly alleged that "[i]nvestors received timber deeds that purported to secure their investments" and that the notaries "fraudulent notarial acts are a proximate cause" of the investors' losses. (Amended Complaint ¶¶ 48, 85, 95, Mills v. The UPS Store, Inc., ECF No. 14.) Thus, Plaintiff must still establish that any claimed damages were proximately caused by the Herring Notaries' allegedly improper notarizations of certain timber deeds. TUPSS therefore is entitled to take discovery to disprove Plaintiff's theory that the notary stamps on the timber deeds investors received somehow proximately caused their losses.

B. Defendants Must Be Allowed Discovery from the Investors on Plaintiff's Claim that the Notary Publics Aided and Abetted Adams' Fraud

Count II of the Amended Complaint in the Notary Public Action is for "aiding and abetting." (Am. Compl. ¶¶ 88-97.) Plaintiff's Amended Complaint alleges: "The Restatement (Second) of Torts § 876(b) (1979) provides that a defendant is liable if he 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.' Stated differently, a defendant is liable for aiding and abetting the wrongful conduct of another. . . . Defendants aided and abetted Adams by notarizing fake timber deeds that investors received in exchange for their investments in Madison Timber." (*Id*. ¶¶ 89-90.)

Although "[t]he Mississippi Supreme Court has never recognized aiding and abetting as a civil cause of action" (*Fikes*, 813 F. Supp. 2d at 822), the Court has ruled Plaintiff can assert a claim for aiding and abetting fraud based on the prediction that the Mississippi Supreme Court would approve such a cause of action. Like the conspiracy count, the jury would thus have to be instructed on both fraud and aiding and abetting liability. *See id.* ("there must be an underlying tort for the Defendants to have aided and abetted").

As with Plaintiff Mill's conspiracy to defraud count, her aiding and abetting fraud is not properly brought by her, standing in the shoes of Adams and Madison Timber. Mississippi's fraud jury instructions show that the proper plaintiff on a fraud claim is the person (here, the investor) who was defrauded. Further, Adams/Madison Timber cannot state a claim against the notary publics for aiding and abetting Adams/Madison Timber's own fraud. Plaintiff's own cited authorities prove that point. Section 876 of the Second Restatement of Torts, which Plaintiff references in her Amended Complaint as the authority for the aiding and abetting fraud claim, states: "***[f]or harm resulting to a third person*** from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement (Second) of Torts § 876, (b) (1979) (emphasis added); (Am. Compl. ¶ 89). But the tort of aiding and abetting fraud concerns harm to a defrauded "third person" (i.e. the investors), not alleged harm to the "other" whose "conduct constitutes a breach of duty."

Plaintiff has asserted that the Stanford receiver brought similar aiding and abetting claims, which the district court and Fifth Circuit approved. That is not true. None of the cases Plaintiff has never identified any claim by the Stanford receiver against a defendant who allegedly aided and abetted the Stanford entities' fraud seeking to recover the sums for which

those entities were allegedly liable to investors. One of the Stanford Ponzi scheme cases, *Janvey v. Proskouer*, involved allegations that the Proskouer law firm aided and abetted the fraudulent Ponzi scheme, but in that action, the Official Stanford Investors Committee, who represented the Stanford investors, was a plaintiff. Furthermore, in the *Proskouer* case, neither OSIC nor the Stanford entities' receiver was seeking to recover the amount of the investor losses on a theory of "increasing liability." Rather, OSIC alleged that the defendants aided and abetted:

> the Stanford Financial companies' directors and officers, including but not limited to the directors and officers of SIBL, SGC, STC, SFIS, STCL and Stanford Financial Group Company, in a fraudulent scheme against such companies, and therefore the Receiver and Receivership Estate. In particular, Defendants' legal services and other services assisted a fraudulent scheme that enables and assisted Allen Stanford and his co-conspirators in misappropriating billions of dollars in assets from Stanford Financial companies, and therefore from the Receiver and the Receivership Estate."

(First Amend. Compl. at 108, *Janvey v. Proskauer Rose, LLP*, No. 3:13-cv-00477-N-BQ (N.D. Tex. Jan. 31, 2013), ECF No. 302.) Plaintiff Mills does not allege in this case that Defendants "misappropriated" funds from Adams or Madison Timber. Plaintiff has never cited a single case in the Stanford actions or elsewhere where a receiver sued any defendant for allegedly aiding and abetting the receivership entity's own fraud of investors.

Given that Count II for aiding and abetting fraud claim survives, however, Defendants are entitled to take discovery from investors on each subject addressed in the fraud and aiding and abetting instructions. There are no model jury instructions in Mississippi for aiding and abetting fraud, but other courts have determined that, on a cause of action for aiding and abetting fraud, the jury must be instructed that the aider and abetter's conduct proximately caused the investors's damages. In *Coquina Invs. v. Rothstein*, No. 10-60786-Civ, 2012 U.S. Dist. LEXIS 139947 (S.D. Fla. Sept. 28, 2012), *aff'd sub nom*., *Coquina Invs. v. TD Bank, N.A*., 760 F.3d 1300 (11th Cir. 2014) Plaintiff Coquina Investments (an investor, not a receiver) sued "TD Bank,

N.A. . . . and Ponzi schemer and former attorney Scott Rothstein. Coquina alleged that TD Bank aided and abetted Rothstein's fraud against Coquina and made fraudulent misrepresentations to Coquina." *Id.* at *2-3. The court instructed the jury that "[y]ou may only find that TD Bank 'substantially assisted' in the fraud causing the damages Coquina seeks to recover from TD Bank if you find that TD Bank's alleged conduct in the fraud against Coquina proximately caused those damages.'" *Id.* at *58 (citation omitted). To disprove that the investor Coquina's losses were proximately caused by TD Bank's conduct, "TD Bank questioned Damson and White [Coquina's principals] to show that they did not conduct sufficient due diligence and the Rothstein deals were simply too good to be true, suggesting they should have known that the investments were fraudulent." *Id*. at *7. *Coquina* thus shows that, on a cause of action for aiding and abetting fraud, a defendant can defeat the claim by showing that the defendant did not "substantially assist" the fraud because the defendant's conduct was not the proximate cause of the alleged damages. *Coquina* also shows that one way to disprove proximate causation is to show that the investor knew or should have known the investments were fraudulent. All these topics are appropriate during investor discovery.[1]

C. Defendants Must Be Allowed Discovery from the Investors to Defend Plaintiff's Negligence Claim

Count III of the Amended Complaint purports to state a negligence/gross negligence claim against the notaries public, and thus Herring Ventures and TUPSS. In Count III, Plaintiff alleges that the notary publics failed to exercise any care at all in performing their notarial

[1] It should also be noted that the aiding and abetting cause of action alleged in the Notary Public Action is different from the aiding and abetting cause of action alleged in the Baker Donelson action. Plaintiff alleges that the Baker Donelson defendants aided and abetted Adam's breach of fiduciary duty to Madison Timber. Thus, even if the Court were to find that investor discovery were not "necessary" on the cause of action for aiding and abetting breach of fiduciary duty in the Baker Donelson action, investor discovery would have to be permitted in the Notary Public Action.

services, and that due to their negligence, Adams and Madison Timber were able to grow their Ponzi scheme.

"For a plaintiff to recover in a negligence action the conventional tort elements of duty, breach of duty, proximate causation and injury must be proven by a preponderance of the evidence." *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995). The Receiver does not argue that the notaries breached a duty of care ***to Adams/Madison Timber*** which caused Adams/Madison Timber injuries. To the contrary, the Receiver alleges that "Defendants knew or should have known that the timber deeds were fake" and therefore "were complicit in Adams's intent to defraud" ***investors***. (Am. Compl. ¶ 104.) In other words, the Receiver contends that the notaries owed a duty to fulfill their notary functions properly, and by allegedly breaching that duty, the notaries injured investors who allegedly relied on those notarized deeds.

The Receiver, standing in the shoes of Adams/Madison Timber, lacks standing to sue for negligence. In *Troelstrup v. Index Futures Grp.*, 130 F.3d 1274 (7th Cir. 1997), the Seventh Circuit considered a similar claim and dismissed out of hand the idea that a receiver, standing in the shoes of a fraudster who had bilked investors, could sue an allegedly negligent person under any possible theory. There, the district court appointed a receiver for the estates of a commodities trader, Tobin, who had defrauded investors. *Id*. at 1275-76. The receiver brought a negligence claim against Tobin who traded through accounts maintained by Index Futures Group, Inc. ("Index") on the theory that Index's negligence "facilitated Tobin's fraud." *Id*. The Seventh Circuit ordered the district court to dismiss the claim because the "[receiver] could not sue Index on behalf of either Tobin, the defrauder, who has no possible claim against Index, or on behalf of the investors, the victims of the fraud, because he was not their receiver." *Id.* at

1277. The Seventh Circuit held that the fraudster could not sue for negligence because he "had not been wronged by Index's negligence." *Id*. at 1276.

The same is true here. Adams and Madison Timber do not have a claim against the notaries publics for negligence—it is undisputed that Adams sought to have documents notarized to facilitate his own fraudulent scheme.

None of the actions brought by the Stanford receiver alleged that a defendant breached a duty of care to the receivership entities by failing to stop the Ponzi scheme and was therefore liable to the receivership entities themselves for the amounts those receivership entities stole from investors.

Nonetheless, TUPSS and the Notary Public Defendants must defend the claim, and to do so requires evidence from the investors. The relevant Mississippi Model Jury Instructions regarding negligence are:

> **2500 Negligence - Definition** [Name of plaintiff/Plaintiff as receiver for Adams and Madison Timber] claims that [the name of each notary public] was negligent. Negligence is doing something that a reasonably careful [person/business/corporation] would not do under similar circumstances or failing to do something that a reasonably careful [person/business/corporation] would do under similar circumstances.
>
> **2502 Negligence - Gross Negligence - General and Non-Punitive Damages Cases**: Gross negligence is negligence of a degree so great that it shows a reckless disregard for the safety and/or rights of others.
>
> **2504 Negligence - Proximate Cause**: In order for [name of each notary public] to be legally responsible for [estate of Adams'/Madison Timber's] damages, [name of each notary public]'s negligence must have (1) actually caused [Adams'/Madison Timber's]'s damages and (2) a reasonable [person] would have anticipated that some damages would occur as a result of [notary public's] negligence. In order to be a legal cause, [notary public's]'s negligence must have been a substantial factor in causing [name of plaintiff]'s damages. If [name of plaintiff] would have suffered damages even if [name of defendant] had not been negligent, then [name of defendant]'s negligence was not a substantial factor in causing [name of plaintiff]'s damages.

> **2506 Negligence - Independent Superseding Cause**: Under certain circumstances, a second event, which occurs later, can cause damages which are completely separate and independent from [notary public's] negligence. In order for this second event to be the actual cause of [Adams'/Madison Timber's] damages, the second event should not have been anticipated and must have been a significant factor in causing [Adams'/Madison Timber's] damages.

The jury would also have to be instructed that

> **2513 Negligence - Negligence by One Defendant and One Non-Party - General Instruction and Verdict Form**
>
> *General Instruction*
>
> [Plaintiff as receiver for the estates of Adams and Madison Timber] claims that [name of defendant] and [name of non-party]'s negligence harmed or injured [name of plaintiff] and that [name of defendant 1] and [name of non-party] are legally responsible for [Adams and Madison Timber]'s damages. To establish this claim, [Plaintiff as receiver for the estates of Adams and Madison Timber] must prove all of the following are more likely true than not true:
>
> **Section A - [Name of Defendant]**
>
> 1. [notary public] was negligent;
>
> 2. [Adams and Madison Timber] suffered damages as a result of [notary public]'s negligence;
>
> 3. [notary public]'s negligence was a substantial factor in causing [name of plaintiff]'s damages.
>
> **Section B - [Name of Non-Party]**
>
> 4. [Name of non-party] was negligent;
>
> 5. [Adams and Madison Timber] suffered damages as a result of [name of non-party]'s negligence; and
>
> 6. [Name of non-party]'s negligence was a substantial factor in causing [Adams and Madison Timber]'s damages.
>
> ****

Verdict Form

We answer the questions submitted to us as follows:

Section A - [Name of Defendant]

1.Was [notary public] negligent?

YES _____ NO _____

If your answer to question 1 is YES, then answer question 2. If you answered NO, stop here and go to Section B.

2. Did [Adams and Madison Timber] suffer damages as a result of [name of defendant]'s negligence?

YES _____ NO _____

If your answer to question 2 is YES, then answer question 3. If you answered NO, stop here and go to Section B.

3. Was [notary public]'s negligence a substantial factor in causing [Adams and Madison Timber]'s damages?

YES _____ NO _____

Go to Section B.

Section B - [Name of Non-Party]

4. Was [name of non-party] negligent?

YES _____ NO _____

If your answer to question 4 is YES, then answer question 5. If you answered NO, stop here and go to Section C.

5. Did [Adams and Madison Timber] suffer damages as a result of [name of non-party]'s negligence?

YES _____ NO _____

If your answer to question 5 is YES, then answer question 6. If you answered NO, stop here and go to Section C.

6. Was [name of non-party]'s negligence a substantial factor in causing [name of plaintiff]'s damages?

YES _____ NO _____

Go to Section C.

Section C

7. If your answers to questions 1-3 are YES, then give a percentage of fault to

[notary public]: [notary public] _____%

If you answered NO to any question 1, 2, or 3, then write 0 in the blank.

If your answers to questions 4-6 are YES, then give a percentage of fault to

[Name of non-party]: [Name of non-party] _____%

If you answered NO to any question 4, 5, or 6, then write 0 in the blank.

TOTAL 100 %

8. What are [Adams and Madison Timber]'s damages? TOTAL $_____

Mississippi's Model Jury Instructions thus require the jury to consider whether any investor was negligent, whether that negligence caused harm, whether any other non-party or defendant was negligent, and then apportion fault among each negligent non-party and other defendants. Defendants in the notary public action have the right to take discovery from each (non-party) investor to argue that the investor's negligence was a substantial factor in the liabilities of Adams/Madison Timber.

Plaintiff has acknowledged that, under Mississippi law on negligence, fault must be apportioned among non-parties and other defendants. (*See* ECF No. 288 at 11, *Mills v. TUPSS, Inc.*, No. 3:19-cv-364-CWR-FKB ("The Receiver acknowledges that for negligent, as opposed to willful, acts, a defendant is entitled to apportion fault.").

IV. PLAINTIFF HAS CONCEDED THAT INVESTORS MAY HAVE RELEVANT INFORMATION AND WILL TESTIFY AT TRIAL.

Plaintiff cannot credibly argue that investors do not have relevant information. Plaintiff has interacted directly with Madison Timber investors about this case. She issued a written survey to investors, and has apparently spoken with many of them. *See* ECF No. 212 (Receiver's Report) at 14 (Case No. 3:18-cv-252, *SEC v. Adams*). She also agreed during a hearing before Magistrate Judge Ball that a further questionnaire to investors "could be very productive" in helping to narrow the scope of potential depositions." Critically, Plaintiff has also conceded that "that "there might exist good cause for a particular Defendant to depose a particular victim," and that "[v]ictims who meaningfully interacted with a Defendant or who the Receiver identifies as likely trial witnesses might well be proper subjects for deposition." (Consolidated Cases ECF No. 643 at 2, 18.) By admitting that Defendants have to be allowed to depose ***some*** investors, including any investor who Plaintiff calls to testify at trial, Plaintiff is necessarily conceding that investors possess evidence that is "relevant to any party's claim or defense." (*Id*. at 18); Fed. R. Civ. P. 26(b). Indeed, Plaintiff's admission that she intends to call some investors to testify at trial is dispositive on the issue of whether investors possess relevant testimony. If investor testimony were irrelevant as a matter of law to the claims asserted in the Notary Public Action, there would be no reason or right to have them testify. And, given that Plaintiff concedes that investors possess discoverable information, there is no basis to limit what discovery Defendants can take of those investors, certainly at this stage.

V. TUPSS' PLAN FOR INVESTOR RELATED DISCOVERY

Plaintiff contends that each notary public, and Herring Ventures, and TUPSS is liable for all liabilities (that is, all investor losses) of Adams and Madison Timber—even as to investors who did not receive a timber deed acknowledged by any Herring Ventures' Notary Public. TUPSS believes that theory of liability is frivolous, for multiple reasons, but given that Plaintiff persists in pressing that damages claim, Defendants must be allowed discovery regarding all investors. TUPSS has a right to serve subpoenas for documents on investors, and then determine what additional subpoenas for documents and depositions to serve after having had the opportunity to review the documents produced. TUPSS acknowledges that that process will be time consuming but that is solely a function of the causes of action Plaintiff is asserting and her overbroad damages claim.

VI. CONCLUSION

Plaintiff has asserted that the Notary Public Defendants are each jointly and severally liable for $100 million—which Plaintiff claims is the full extent of the Adams/Madison Timber Ponzi scheme. TUPSS, Inc. and the other Notary Public Defendants have been put to significant expense litigating causes of action that Plaintiff cannot bring because Adams and Madison Timber could not have brought the claims. Plaintiff is inviting further error by now disputing Defendants' right to take discovery from investors.

By: */s/ Mark R. McDonald*

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Mark R. McDonald
MARK R. MCDONALD