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

REPLY TO BAKER DONELSON'S OPPOSITION TO MOTION TO COMPEL OR FOR LEAVE

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC, respectfully submits this memorandum in further support of her motion to compel Baker Donelson's responses to her discovery requests [155], and in reply to Baker Donelson's opposition to it [160]:

1.

The Receiver first addresses the notion that she is not entitled to the discovery she seeks because the complaint does not allege a claim for ratification.

Ratification is not a standalone claim. It is a theory of vicarious liability. *Woodard v. Miller*, 326 So. 3d 439, 448 (Miss. 2021) (quoting *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 763 (Miss. 2004), *aff'd*, 13 So. 3d 260 (Miss. 2009)) ("There is no vicarious liability where an agent acted with personal or malicious motive, *unless the principal authorized or ratified the acts*.") (emphasis added). *See also Sturkin v. Mississippi Ass'n of Supervisors, Inc.*, 315 So. 3d 521, 540 (Miss. Ct. App. 2020) (Wilson, Cory, P.J., dissenting) ("ratification is a common law theory under which an employer may be held vicariously liable for torts committed by an employee outside the scope of employment").

The complaint expressly alleges that Baker Donelson is vicariously liable for Jon Seawright and Brent Alexander's acts because Baker Donelson "backed" them. [57 at p. 23-25, 50]. The complaint actually says a lot more, but even if it said no more, it would say enough for present purposes. "[U]nder the Federal Rules of Civil Procedure, **a complaint need not pin plaintiff's claim for relief to a precise legal theory**. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011) (citing 5 C. Wright & A. Miller, Federal Practice & Procedure § 1219, pp. 277–278 (3d ed. 2004 and Supp. 2010)) (emphasis added). "It was the design of the rulemakers that the discovery procedures should give the parties an opportunity for securing an elaboration of the allegations; **that process—not the pleadings—bears the burden of filling in the details of the dispute for the parties and the court**." § 1215 Statement of the Claim—In General, 5 Fed. Prac. & Proc. Civ. § 1215 (4th ed.) (emphasis added).

The complaint is not deficient because it does not use the word "ratification," but any deficiency would be technical, and not a basis for denying discovery. "Pleadings must be construed

so as to do justice." Fed. R. Civ. P. 8(e). "[T]he federal rules contemplate a decision on the merits rather than a final resolution of the dispute on the basis of technicalities, particularly those relating to pleading." § 1217 Statement of the Claim—"Short and Plain", 5 Fed. Prac. & Proc. Civ. § 1217 (4th ed.).

The forgoing notwithstanding, there is no court-ordered deadline for amendment, and Rule 15 otherwise permits amendment at any time "when justice so requires," even as late as trial. Fed. R. Civ. Pro. 15(b)(1) ("If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended."). If Baker Donelson insists that the evidence is not within the issues raised in the complaint, the Receiver will seek leave to amend the complaint—not because she agrees but because a dispute over a technicality cannot stand in the way of a resolution on the merits.

The Receiver drafted the complaint based on the facts known to her at the time. If Baker Donelson did not know those same facts before, it learned of them no later than December 2018, when the complaint was filed, and certainly no later than May 2021, when Seawright's and Alexander's criminal indictments were unsealed. **The evidence obtained through discovery thus far is that Baker Donelson took no adverse action against either.** Seawright apparently remained a shareholder, and Baker Donelson permitted him to work on its clients' matters, at least until September 2021, when he personally requested a leave of absence. "Where an employer learns of the past intentional conduct and does nothing to reprimand the employee, this acts as a ratification." *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961, 966 (Miss. Ct. App. 2006) (*Royal Oil Co. v. Wells*, 500 So.2d 439, 446 (Miss. 1986); *Allen v. Ritter*, 235 So.2d 253, 255–56 (Miss. 1970)).

It is disingenuous of Baker Donelson to represent the issue is "novel." The issue cannot be both novel and two years old. Even indulging Baker Donelson's argument that it did not have

notice of the Receiver's theory of liability before, unquestionably it had notice no later than July 2022, when the Receiver first asked for minutes of meetings of Baker Donelson's board of directors since April 2018.[1] The Receiver's requests are not out of the blue.

2.

The argument that the Receiver's requests are untimely today because they were untimely when she first made them in July 2022 lacks perspective. This case is six years old,[2] but before now, the parties' only meaningful discovery was during a compressed six-month window in 2022 as part of a consolidated action in which the Receiver had to issue and respond to written discovery requests to and from not just Baker Donelson but also BankPlus, Trustmark Bank, RiverHills Bank, Southern Bancorp, UPS, Herring Ventures, Rawlings & MacInnis, and numerous individual defendants. The process was meaningful but imperfect and never intended to fully close the door to all future written discovery.

Baker Donelson relies for its argument solely on the consolidated action's CMO, but that CMO also did not permit depositions, and the parties are taking depositions now. No other party takes the position that the consolidated action's CMO operates to bar any written discovery going forward. UPS was a party to the same CMO, and it issued written discovery requests to the Receiver on October 24, 2024 and again on February 20, 2025. Baker Donelson's counsel even represented to the Receiver that Baker Donelson joined in at least one of those requests, and it has been using documents the Receiver produced in response to the request in its investor depositions. Inasmuch as the Court itself reads the consolidated action's CMO differently, UPS's reading

[1] **Incidentally, Seawright apparently was still a member of the board during this time.**

[2] And for most of that time was stayed, first by Butler Snow's motion to compel arbitration which was denied and then appealed to the Fifth Circuit, then by Seawright's and Alexander's criminal indictments, then by the consolidation.

supports that the issue is at least debatable. If reasonable minds can disagree, good cause exists to permit the Receiver's requests.

3.

Baker Donelson does not have to conduct another "firm-wide review of all employees' custodial files" to respond to the Receiver's three discrete requests. The board has only between seven and fifteen directors. Presumably the board's minutes and directors' emails can be searched electronically using the same search terms it used before. Baker Donelson does not lack for counsel to review the documents; it is represented by one of the nation's premier litigation firms, with at least three partners and two associates appearing on all correspondences.

4.

Baker Donelson also cannot categorically assert attorney-client privilege for all documents responsive to the Receiver's requests. Baker Donelson has no authority for its position.[3] The case law is clear that "'the attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents[,]' but rather it 'must be specifically asserted with respect to particular documents[.]'" *United States v. Ritchey*, 605 F. Supp. 3d 891, 899 (S.D. Miss. 2022) (quoting *United States v. El Paso Co*., 682 F.2d 530, 538 (5th Cir. 1982)) (other citations omitted).

[3] The case law that Baker Donelson cites does not support its position.

In *In re Terra Int'l, Inc*., 134 F.3d 302, 306 (5th Cir. 1998), the Fifth Circuit "intimate[d] no view as to the merits of Terra's claims of privilege and other limitations on discovery." In any event, the parties appear to have thoughtfully litigated privilege issues relating to at least four distinct categories of documents.

It is difficult to discern what exactly transpired in *Landrum v. Conseco Life Ins. Co*., No. 1:12-CV-5-HSO-RHW, 2013 WL 12124055, at *4 (S.D. Miss. June 14, 2013), but Baker Donelson omits material language from its citation: "The Magistrate Judge found that '[e]arly in the discovery progress ... Defendant objected to producing certain documents **absent protective order**.'" (emphasis added).

No one disputes that communications between a board and its counsel are privileged insofar as they are made "for the primary purpose of securing a legal opinion, legal services, or assistance in the legal proceeding." *United States v. Nelson*, 732 F.3d 504, 518 (5th Cir. 2013). But "[t]he privilege does not protect 'everything that arises out of the existence of an attorney-client relationship.'" *Id.* (citation omitted). "Determining the applicability of the privilege is a highly fact-specific inquiry, and the party asserting the privilege bears the burden of proof." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (citation omitted).

Without knowing more, the Receiver, and the Court, cannot accept the assertion of privilege whole cloth. "The decision whether a document is privileged is for the court, not the party." § 2016.1 Privileged Matter—Assertion of Privilege, 8 Fed. Prac. & Proc. Civ. § 2016.1 (3d ed.). The Court cannot make that decision, cannot even decide whether an *in camera* inspection is warranted, without a log. Baker Donelson's assertion of privilege "fails for lack of specificity." *E.g.*, *Ritchey*, 605 F. Supp. 3d at 899.

5.

In conclusion: There is no good reason not to require Baker Donelson to respond to the Receiver's requests (or, if leave is required, to grant the Receiver leave to make the requests). The requests are not wide-ranging. There are only three requests for production, and all pertain to Baker Donelson's board of directors. The information is relevant to the issue of ratification, which is viable theory of vicarious liability supported by existing evidence. Full discovery is underway, and this motion has been filed sufficiently in advance of its cutoff to avoid a continuance.

The Receiver respectfully asks that the Court grant her motion and require Baker Donelson to respond to her requests of it in a timeframe that permits her to make effective use of the to-be-discovered information.

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: February 24, 2025

/s/ *Kaja S. Elmer*

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GOOD FAITH CERTIFICATE

All counsel certify that they have conferred in good faith to resolve the issues in question and that it is necessary to file the *Motion to Compel or for Leave* filed by Alysson Mills, in her capacity as the court-appointed Receiver for Arthur Lamar Adams and Madison Timber Properties, LLC [154].

Counsel further certify that:

✓ as appropriate:

1. The motion is unopposed by all parties.

2. The motion is unopposed by:

✓ 3. The motion is opposed by: BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

4. The parties agree that replies and rebuttals to the motion will be submitted to the magistrate judge in accordance with the time limitations stated in L.U. CIV. R. 7(b)(4).

This the 24th day of February, 2025.

/s/ Kaja S. Elmer

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