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.

THE UPS STORE, INC.; HERRING VENTURES, LLC d/b/a THE UPS STORE; AUSTIN ELSEN; TAMMIE ELSEN; COURTNEY HERRING; DIANE LOFTON; CHANDLER WESTOVER; RAWLINGS & MACINNIS, 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 OPPOSITION TO RECEIVER'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

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I. INTRODUCTION

The Court entered a scheduling order in this action on February 5, 2020 that set the deadline for amending the pleadings on February 20, 2020. (Case Management Order at 4, ECF No. 67.) Thus, the Court would have to find "good cause" to modify that order. The Receiver cannot show good cause to file a third amended complaint that seeks to add a claim for negligent supervision against The UPS Store, Inc. ("TUPSS") six years after this action was commenced, five and a half years after the Court ordered deadline for amending the pleadings, and after the close of fact discovery.

The Receiver's claim that a December 2024 decision (which is still seven months before the Receiver's untimely motion) by the Honorable Daniel P. Jordan III—*Neely v. Great Escapes Pelahatchie, LP*, No. 3:21-CV-786-DPJ-ASH, 2024 U.S. Dist. LEXIS 226807 (S.D. Miss. Dec. 16, 2024)—constitutes new law that justifies granting leave to amend is nonsense. *Neely* is merely further support for the argument that TUPSS has been making throughout this action—namely, that TUPSS cannot be liable for any alleged errors of the notary publics employed by franchisee Herring Ventures unless TUPSS "assumed or retained control" over those notaries and the provision of notary services at Herring Ventures' The UPS Store®. *Id.* at *22 (granting summary judgment under Mississippi law for franchisor because plaintiff, who contracted E coli at a water park, could not show "the franchisor assumed or retained control over water-management operations at the pools before finding that it had a legal duty over water safety.") Judge Neely noted that under existing Mississippi law a franchisor cannot be *vicariously* liable for an injury at a franchisee's business unless the franchisor had "the right to control the specific instrumentality or aspect of the business that was alleged to have caused the harm." *Id.* at *18 (quoting *Allen v. Choice Hotels Int'l*, 942 So. 2d 817, 821-22 (Miss. Ct. App. 2006).

Although Judge Jordan did not address it, the Mississippi Court of Appeals long ago addressed whether a franchisor could be directly liable for negligent supervision of a franchisee's employees and similarly held that the franchisor could not be liable unless the plaintiff could establish at minimum that the franchisor had assumed the right to "hire or fire employees, to direct the hours the employees worked, or to direct the details of the manner in which the day-to-day work of each employee was completed." *Parmenter v. J&B Enters.*, 99 So. 3d 207, 215 (Miss. Ct. App. 2012).

The "*Erie* guess" that Judge Jordan made in *Neely* was to predict that the Mississippi Supreme Court would apply those same principles to ***any*** negligence-based claim against a franchisor (not just negligent supervision) and hold that a franchisor could not be held directly liable for negligence unless the franchisor had assumed control over the specific instrumentality or aspect of the business that was alleged to have caused the harm. *See Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1229 (Miss. 2005) (holding that, under Mississippi law, a claim "of negligent hiring, retention and supervision of [an employee] is simply a negligence claim, requiring a finding of duty, breach of duty, causation and damage.") Judge Jordan rejected the plaintiff's attempt to hold the franchisor directly liable for negligence absent evidence that the franchisor had assumed control over the specific instrumentality that caused the plaintiff's injuries because to do so would be "fashioning novel causes of action not yet recognized by the state courts." *Neely*, 2024 U.S. Dist. LEXIS 226807, at *22 (quoting *In re DePuy Orthopaedics, Inc.*, 888 F.3d 753, 781 (5th Cir. 2018)).

It would be an understatement to say that the Receiver is putting on a brave face to suggest that *Neely* supports liability against TUPSS in any way. Throughout this action, TUPSS has argued that this Court must apply *Parmenter* and *Allen* as the governing law on franchisor

liability in Mississippi. Knowing that she cannot possibly prevail under the *Parmenter*/*Allen* standard, the Receiver has instead repeatedly invoked an older case, *Elder v. Sears, Roebuck & Co.*, 516 So. 2d 231 (Miss. 1987), which is plainly inapplicable because it does not involve franchisor liability, has never been applied in Mississippi as to a franchisor, and was decided on an apparent authority theory (Sears had led the plaintiff to believe it owned the business where she slipped and fell.) Judge Jordan's well-reasoned opinion in *Neely* that the Mississippi Supreme Court would confirm the standard set out in *Allen* for franchisor liability and apply it whether the plaintiff sought to hold the franchisor directly liable on a negligence theory or vicariously liable should be the final nail in the coffin of the Receiver's case against TUPSS. Rather than constituting new precedent that justifies amending the pleadings, *Neely* further shows why the Receiver's existing vicarious liability theory against TUPSS is meritless and why the proposed amendment to add a negligent supervision claim would be futile.

There is no good cause for modifying the scheduling order that set February 20, 2020 as the deadline for amending the pleadings because no new law or facts were recently discovered to justify a new cause of action against TUPSS for negligent supervision, and because any amendment would be futile. The Receiver's Motion should be denied.

II. THE RECEIVER'S CONTENTION THAT THERE IS NO SCHEDULING ORDER IN THIS CASE IS INCORRECT; THE "GOOD CAUSE" STANDARD APPLIES

The Receiver claims this Court failed to issue a Rule 16(b)(3) scheduling order in this action that set any deadline for amending the pleadings, so therefore her proposed amendment is "timely" and the Court must "liberally" allow amendment of the pleadings per Rule 15 even at this extraordinarily late date. (ECF No. 488 ("Mot") at 2.) The Receiver is wrong. The scheduling order in this action dated February 5, 2020, put the deadline for amending the pleadings on February 20, 2020. (*See* ECF No. 67 at 4.) The fact that Magistrate Judge Ball and

Magistrate Judge Rath found good cause to modify other deadlines in the Scheduling Order does not change the fact that the Scheduling Order was entered on February 5, 2020. Thus, that order can "be modified only for good cause and with the judge's consent."[1] Fed. R. Civ. P. 16(b)(4). *See also S&W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003) ("We take this opportunity to make clear that Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired.")

III. THERE IS NOT "GOOD CAUSE" TO ALLOW THE RECEIVER TO AMEND HER COMPLAINT FIVE YEARS AFTER THE DEADLINE EXPIRED AND AFTER DISCOVERY HAS ENDED

In the Fifth Circuit, courts evaluating a motion to modify a scheduling order per Rule 16(b) consider: "(1) the explanation for the failure to [timely move for leave to amend]; (2) the importance of the [amendment]; (3) potential prejudice in allowing the [amendment]; and (4) the availability of a continuance to cure such prejudice." *Id.* at 536 (citation omitted). If a court finds good cause to modify a scheduling order, it must also consider whether to grant a motion for leave to amend under Rule 15. *Powers v. Northside Indep. Sch. Dist.*, No. A-14-CV-01004-SS, 2018 U.S. Dist. LEXIS 138894, at *6-7 (W.D. Tex. Aug. 16, 2018) ("where the scheduling order precludes the filing of an amended pleading, the movant must first demonstrate good cause for modification of the order. Fed. R. Civ. P. 16(b)(4). Only then may the court consider whether leave to amend should be granted or withheld under the more liberal pleading standard of Rule 15(a)(2)."), *aff'd by* 951 F.3d 298 (5th Cir. 2020). Under Rule 15(a)(2) "[t]he five relevant considerations are: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by previous amendments, (4) undue prejudice to the opposing party, and (5)

[1] The Court did not need to address the "good cause" standard when the Receiver filed a second amended complaint on December 20, 2023 because Defendants gave their written consent to that amended pleading. (*See* ECF Nos. 346, 347.)

futility of the amendment." *Truxillo v. Nat'l Maint. & Repair of La. Inc*., Civil Action No. 22-4300 SECTION "P" (2), 2023 U.S. Dist. LEXIS 113053, at *6 (E.D. La. June 30, 2023).

A. The Receiver's Purported Reasons for Not Seeking to Amend Earlier Are Feeble

The Receiver flippantly asserts that "[h]er proposed amendment merely accounts for evidence she recently obtained in discovery and new case law . . . which did not exist when she filed her complaint." (Mot. at 5.) Both contentions are disingenuous and obviously pretextual. In truth, there is no good reason the Receiver could not have asserted her proposed negligent supervision claim long ago rather than springing her motion to amend at the eleventh hour.

1. Judge Jordan Did Not Make New Law in *Neely* Justifying the Receiver's Proposed Amendment

The Receiver asserts:

> [I]t merits mention that when the Receiver filed her complaint in 2019, there was no precedent in Mississippi for holding a franchisor such as The UPS Store, Inc. directly liable for negligence. That recently changed in *Neely*. . . . Judge Dan [sic] Jordan entered summary judgment for the franchisor in *Neely*, but, relevant here, he made an *Erie* guess that, in a different case, a franchisor may be directly liable for negligence under Mississippi law where it has sufficient control over its franchisee.

(Mot. at 7.) The Receiver's argument is wrong for multiple reasons.

First, an alleged ***lack*** of "precedent" is no excuse for a party not to assert a claim for relief. Courts agree that amendments should generally not be allowed based on alleged "new law," because under Rule 11 a party has the right to assert claims based on "a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law."

> Rule 11 allows a plaintiff's counsel to raise 'claims, defenses, and other legal contentions [that] are warranted . . . by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.' Fed. R. Civ. P. 11(b)(2). Although there was no case law directly on point when [plaintiff] filed his original complaint, [plaintiff] has not pointed to any precedent that would have rendered a claim for conversion of cellular data frivolous. At most, conversion of

> cellular data was an open issue. Therefore, [plaintiff] has not shown good cause to add a conversion claim

Turner v. Apple, Inc., No. 5:20-cv-07495-EJD, 2024 U.S. Dist. LEXIS 156725, at *10-11 (N.D. Cal. Aug. 30, 2024) (citation omitted). Thus, an alleged change in law justifies an amended pleading only where existing, binding law would have rendered a claim frivolous, and then new law is made that makes the claim viable. That is clearly not the case here, as the Receiver's Motion admits. The Receiver does not claim a negligent supervision claim would have been subject to Rule 11 as "frivolous" prior to *Neely*. Instead, she claims (wrongly) that there was "no precedent" in Mississippi that expressly authorized a claim for negligent supervision against franchisor. That's not enough to justify amending a complaint.

Second, the Receiver is wrong when she suggests that, until *Neely,* there was "no precedent" for holding a franchisor liable on a negligent supervision theory under Mississippi law. *Parmenter*, decided in 2012, is just as much "precedent" for a negligent supervision claim as is *Neely*, since both cases suggest that, ***if a franchisor assumes control over hiring, firing, supervising and directing the day-to-day activities of a franchisee's employees***, then the franchisor could potentially be liable for the employee's conduct. 99 So. 3d 207; 2024 U.S. Dist. LEXIS 226807. Both *Parmenter* and *Neely* stand for the proposition, however, that a franchisor cannot be liable for allegedly negligently supervising employees ***unless*** the franchisor has elected to assume control over the franchisee's employees. *Id*.

Third, Judge Jordan was not ***expanding*** a franchisor's potential liability under Mississippi law in *Neely*. To the contrary, Judge Jordan wrote:

> ***The* Erie *guess***. The Court believes Mississippi would follow other courts and require proof that the franchisor assumed or retained control over water-management operations at the pools before finding that it had a legal duty over water safety. Plaintiffs cite no contrary authority, and "[w]hen sitting in diversity, a federal court exceeds the bounds of its legitimacy in fashioning novel causes of

> action not yet recognized by the state courts." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 781 (5th Cir. 2018).

Neely, 2024 U.S. Dist. LEXIS 226807, at *22. *See also Weatherly v. Pershing, L.L.C.*, 945 F.3d 915, 920-21 (5th Cir. 2019) (a federal court determining state law "do[es] not 'adopt innovative theories of state law'" but aim[s] simply 'to apply that law as it currently exists.' And we 'are emphatically not permitted to do merely what we think best; we must do that which we think the state supreme court would deem best.'").

Contrary to the Receiver's suggestion, Judge Jordan did not make an *Erie* guess that Mississippi would ***expand*** the circumstances under which a franchisor could be liable for negligence beyond the very narrow circumstances in existing Mississippi case law. To the contrary, Judge Jordan refused to do so, because the Court would "exceed[] the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts." *Neely*, 2024 U.S. Dist. LEXIS 226807, at *22. Judge Jordan made the *Erie* guess that Mississippi would ***not*** allow a direct claim for negligence against a franchisor unless "the franchisor assumed or retained control" over the specific aspect of the business that caused the plaintiff's injury—which is what Judge Jordan noted is the same as Mississippi law regarding a franchisor's potential ***vicarious*** liability as stated in *Allen*. *Id*. Applying principals of *Parmente*r, *Allen* and *Neely* to this case, a franchisor like TUPSS cannot be liable – directly or vicariously—for any injury caused by its franchisee's employees' conduct unless the franchisor assumed responsibility for hiring and firing those employees, and directing their day to day performance—which is plainly not the case. To suggest that *Neely* is precedent for ***expanding*** the circumstances in which TUPSS could be liable in this action is a gross mischaracterization.

There is simply no truth in the Receiver's claim that *Neely* provides "good cause" to allow the addition of a claim for negligent supervision—which is surely why the Receiver did not seek to amend her complaint seven months ago when *Neely* was decided.

2. Discovery in May 2025 Did Not Reveal a New Basis for a Negligent Supervision Claim

Similarly, for the Receiver to suggest that she just recently learned of the facts on which she wants to base a negligent supervision claim is untrue. The Receiver's fuzzy argument seems to be that she learned only during depositions of former employees of non-party Fleming Expansions that were completed on May 16, 2025 that Fleming conducted quarterly reviews of Herring Venture's The UPS Store® but did not evaluate "compliance with The UPS Store, Inc.'s operations manual's mandates governing notarial services, which included, most importantly, the maintenance of notarial logs." (Mot. at 4.)

As a threshold matter, the fact that TUPSS authorized Fleming (which itself was a franchisee of TUPSS) to periodically review Herring Ventures' The UPS Store® has nothing to do with establishing that TUPSS "assumed control" over hiring, firing and directing the day-to-day functions of notaries working at Herring Ventures.

In all events, the Receiver knew before this action was filed that notaries in Mississippi were supposed to maintain a journal of their notarial acts and that the notaries who worked at Herring Ventures did not record each notarial act they performed for Lamar Adams (since he was known to them.) That allegation figured prominently in the initial complaint the Receiver filed on ***May 23, 2019***. (ECF No. 1 ¶ 63 ("Compl.") ("The UPS employees did not enter in 'a chronological official journal of notarial acts' the notarial acts that they performed for Adams, in direct violation of Rules 5.15 and 5.16.").) The Receiver's initial complaint also alleges (falsely) that TUPSS "controls every aspect" of each franchisee's business, "including their provision of

notary services." (*Id*. ¶¶ 52, 110.) Thus, when she commenced this action in May 2019, the Receiver claimed that TUPSS "control[led] . . . notary services" at the Herring Ventures The UPS Store®, and the Receiver knew that TUPSS had not somehow ensured that each notary had recorded each Adams document in the notaries' logbook. The Receiver thus had all the information necessary to accuse TUPSS of negligently supervising those notaries before she filed her complaint in May 2019. Nonetheless, the Receiver chose to sue Herring Ventures, not TUPSS, for negligent supervision presumably because she knew that Herring Ventures, not TUPSS, employed the notaries and supervised them on a day-to-day basis.

By at least ***November 2019***, the Receiver obtained the Herring Venture's franchise agreement as part of initial disclosures, which refers to and provides for TUPSS or a designee (like Fleming Expansions) to conduct inspections of franchisees.[2] (*See* ECF No. 55.) Thus, the testimony by Fleming's former employees that they conducted audits and yet they obviously did not ensure that each notary was complying with Mississippi law regarding notary logs was not a revelation discovered in May 2025.

In ***February 2021***, TUPSS produced a copy of the Center Operations manual, which contained a statement that franchisees should retain for three years any notary logbooks in their possession unless required to be turned into state offices.[3] ("TUPSS requires Franchisees to maintain the following business and accounting records as well as other documentation for at least three (3) full calendar or fiscal years."). That provision about how long a franchisee should retain documents has nothing to do with the requirement under Mississippi law that each Herring

[2] The Herring Ventures' franchise agreement was first produced in November 2019 and Bates stamped RG 00450-RG 00603. (McDonald Decl. ¶2.)

[3] TUPSS's Center Operations Manual was produced as part of TUPSS's second production and Bates stamped TUPSS0000119-TUPSS0000554. (McDonald Decl. ¶3.)

Ventures notary was supposed to, but apparently did not, record ***each*** notarial act for Adams in their log book. But, since the Receiver refers to that requirement, it must be noted that she has known of that document retention requirement at least four and a half years.

In ***June 2021***, TUPSS produced the actual inspection reports showing that the only review conducted by Fleming regarding notary was to ask if the center was offering notary services—further proving that TUPSS did not assume control over the provision of notary services at Herring Ventures The UPS Store. (McDonald Decl. ¶4.)

On ***April 1, 2024*** – fifteen months ago – TUPSS filed a motion for summary judgment on franchisor liability affirmatively arguing that TUPSS did not supervise or train the Herring Ventures notaries at all. (*See* ECF Nos. 384, 385.) Surely the Receiver had knowledge at that time that TUPSS did not supervise and train notaries in a non-negligent manner, since TUPSS's motion was based on the undisputed evidence that TUPSS did supervise or train the notaries at all. In her Opposition filed on ***April 15, 2024***, the Receiver recited the same facts on which she now seeks to base a negligent supervision claim—namely that TUPSS "inspected quarterly to confirm compliance with 'Notary services.' *See* excerpt of representative inspection report, Exhibit D at TUPSS0000667. It even required all franchisees to maintain 'for at least three (3) full calendar or fiscal years … all notary logbooks not required to be turned into state offices.' *See* Operations Manual (Maintaining Required Records and Other Documentation), Exhibit A at TUPSS0000199." (Opp. to MSJ at 12, ECF No. 387.)

On ***June 10, 2024***, the Receiver deposed one of the notaries, Diane Lofton, who worked at Herring Ventures and she confirmed all the facts recited above, including that, when Fleming conducted their reviews, they did not ask about or ask to see, the notary's journals – the very

same testimony that the Receiver falsely suggests was not uncovered until May 16, 2025. (McDonald Decl. ¶ 5 (Exhibit A, Deposition of Diane Lofton, at 43:9-21.)

The Receiver's suggestion that there has been no undue delay and that, as soon as she learned the facts upon which her proposed negligent supervision claim is based, she acted diligently in seeking leave to amend on ***June 23, 2025*** is not true, which is putting it as mildly as possible. The Receiver's proffered explanation for why she could not have sought leave to amend prior to June 23, 2025 does not explain anything.

IV. THE RECEIVER'S PROPOSED AMENDMENT IS FUTILE AND UNIMPORTANT

A. The Receiver's Proposed Amendment Is Futile

Leave to amend should be denied for the further reason that the Receiver's proposed negligent supervision claim would not survive a Rule 12(b)(6) motions. *Morningstar v. Resort*, No. 3:23-cv-328-CWR-FKB, 2023 U.S. Dist. LEXIS 234216, at *7 (S.D. Miss. July 18, 2023)("Because Morningstar's proposed amendment would not survive a Rule 12(b)(6) motion, the Court finds his proposal futile.")

1. The Receiver Does Not Allege that TUPSS Hired the Notaries, Could Fire the Notaries, and Controlled Their Day-to-Day Work as Notaries

As *Parmenter* holds, under Mississippi law, a franchisor cannot be liable on a negligent supervision claim unless the franchisor has the right to "hire or fire employees, to direct the hours the employees worked, or to direct the details of the manner in which the day-to-day work of each employee was completed." *Parmenter*, 99 So. 3d at 215. *Parmenter* involved direct and respondeat superior claims against both franchisor McDonald's and a franchisee arising out of a worker's attack on a customer. Plaintiff sued both McDonald's and the franchisee for "[n]egligently hiring a person . . . whom the Defendant[s] knew or should have know[n] was a person of violent propensities; [n]egligence in failing to adequately train the personnel . . .

[n]egligence in failing to adequately supervise and control the premises and employees at said McDonald's . . . and [n]egligence in failing to have adequate security present and on duty at said McDonald's." *Id*. at 211. The trial court granted McDonald's summary judgment motion on all causes of action and the Court of Appeals affirmed, holding that McDonald's Corporation could not be liable for the worker's conduct unless McDonald's itself could be considered the employer. *Id*. at 213 ("we must first determine whether McDonald's was in fact an 'employer' or acting as a master of another party."). And the Court found that McDonald's Corporation could not be liable as the employer because it did not have the right to "hire or fire employees, to direct the hours the employees worked, or to direct the details of the manner in which the day-to-day work of each employee was completed." *Id*. at 215.

Although *Parmenter* was decided by the Mississippi Court of Appeals rather than the Mississippi Supreme Court "[w]here the state's highest court has not spoken to an issue, we defer to intermediate state appellate court decisions unless convinced that the highest court would disagree." *Netto v. Atl. Specialty Ins. Co.*, 929 F.3d 214, 217 (5th Cir. 2019). The Mississippi Supreme Court did not disagree with *Parmenter*. The plaintiff filed a writ of certiorari in the case, and the Mississippi Supreme Court denied it. *Parmenter v. J & B Enters.*, 98 So. 3d 1073 (Miss. 2012) (en banc). Further, the Mississippi Supreme Court has accepted and assumed that only an employee's ***employer*** could be liable for negligently supervising the employee. *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So. 3d 474, 489 (Miss. 2010) ("Under Mississippi law, 'employers do not have a duty to supervise their employees when the employees are off-duty or not working.'") Judge Jordan likewise recently made the *Erie* guess that the Mississippi Supreme Court would adopt the same standard for negligence claims generally that was recognized in *Parmenter* as to negligent supervision claims

specifically, and held that a franchisor cannot be liable for negligence absent evidence the franchisor assumed control over the instrumentality/employees that caused the plaintiff's alleged harm. *See Neely*, 2024 U.S. Dist. LEXIS 226807.

Other states that have considered negligent supervision claims against a franchisor have likewise held that a franchisor cannot be liable on such a theory unless the franchisor itself hired and employed the employee, could fire the employee and directed the employee's day to day work. *N.T. v. Taco Bell Corp.*, 411 F. Supp. 3d 1192, 1197 (D. Kan. 2019) (granting defendant franchisor's motion to dismiss negligent supervision cause of action because plaintiff failed to allege franchisor's "control over daily personnel matters."); *Cha v. Hooters of Am., LLC*, No. 12-CV-4523(DLI)(JMA), 2013 U.S. Dist. LEXIS 144750, at *5 (E.D.N.Y. Sept. 30, 2013) (granting defendant franchisor's motion to dismiss negligent supervision claim because plaintiff failed to show that the tortfeasor and the franchisor were in an employee-employer relationship); *New Star Realty, Inc. v. Jungang PRI USA, LLC*, 346 Ga. App. 548, 562 (2018) (judgment for franchisor on negligent supervision claim: "[plaintiff] also sought to hold [franchisor] New Star California directly liable for its alleged failure to exercise ordinary care in the hiring of New Star Georgia's office manager, in the education and training it provided to New Star Georgia, and in its supervision over New Star Georgia's handling of the escrow account. But, there can be no claim for negligent hiring, training, and supervision of certain individuals where, as here, the defendant [franchisor] was not the employer of those individuals."); *Lind v. Domino's Pizza LLC*, 87 Mass. App. Ct. 650, 660-61 (2015) (defendant franchisor was not liable because the franchisee was "wholly responsible for . . . hiring employees [and] training employees . . . ."); *J.M.L. ex rel. T.G. v. A.M.P.*, 379 N.J. Super. 142, 152 (Super. Ct. App. Div. 2005) (defendant

franchisor not liable because franchisor did not have "any role in hiring or terminating employees or [in] any other personnel issues at any franchise.").

Parmenter is the controlling law on a negligent supervision claim under Mississippi law. And under that test, the Receiver's proposed negligent supervision claim is plainly defective. The Receiver does not seek to amend her complaint to allege that TUPSS hired and could fire the notaries, determined each of the notarys' daily work hours, and directed the manner in which each of those notaries completed their day to day work—and she well knows from the discovery record that she cannot allege those facts. Absent those allegations, the Receivers' proposed negligent supervision claim is fatally defective under Mississippi law and would be dismissed.

2. TUPSS Did Not Owe a Duty of Care to Adams/Madison Timber to Train the Notaries to Avoid Being Tricked by Him

The Receiver's proposed amendment is futile for the further reason that there is no precedent under Mississippi law for a fraudster like Lamar Adams being able to state a negligent supervision claim on the theory that an employer (much less a franchisor) negligently trained a notary public, and had the notary been adequately trained, the fraudsters' fraud might have been uncovered earlier. That is the expert opinion the Receiver's franchising expert hopes to give in support of the negligent supervision claim if allowed.[4] The Mississippi Supreme Court has never, and surely would never, hold that a fraudster can sue persons he tricked for negligence on the theory that, if they hadn't allowed themselves to be tricked, the fraud "might have been" uncovered earlier.

[4] The Expert Report of Kathleen Gosser ¶ 62 says, "I also believe that the training on the standards for notaries appears to be non-existent or very limited. . . . It is my opinion that if TUPSS had evaluated the notary standards in the same fashion as the management standards, there might have been a faster identification of suspicious activity." (McDonald Decl. ¶6.)

A receiver stands in the shoes of the person or entity over which she has been appointed receiver, and thus can assert only claims that person or entity could have asserted. *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 896 (5th Cir. 2019) ("The receiver, standing in the shoes of the injured corporations, is entitled to pursue the corporations claims . . . ."); *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. Mar. 26, 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))). *Lank v. New York Stock Exchange*, 548 F.2d 61, 67 (2d Cir. 1977) ("A receiver stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted."); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) ("Since 1935 it has been well settled that 'the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.'. . . [T]he receiver can only make a claim which the corporation could have made." (citation omitted)).

The Mississippi Supreme Court has never issued an opinion suggesting an employer (much less a franchisor) owes ***to a fraudster*** a duty of care to train employees (much less notary publics) to detect the fraudster's fraud and not be duped.

Under Mississippi law, "[f]or 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 (Miss. 1995). An "[a]ctionable negligence cannot exist in the absence of a legal duty to an injured plaintiff." *See Gross v. Balt. Aircoil Co.*, 2016 U.S. Dist. LEXIS 194945, at *10 (S.D. Miss. Aug. 30, 2016) (quoting *Stanley v. Morgan & Lindsey, Inc.*, 203 So. 2d 473, 475 (Miss. 1967) (granting summary judgment where plaintiff failed to establish any duty of care)), *aff'd sub nom. Gross v. NCH Corp.*, 691 F. App'x 203 (5th Cir. 2017). The Receiver cannot seriously contend that Mississippi would adopt a rule holding that a franchisor owes a duty ***to a crook like Lamar Adam*** to train each franchisee's employees so that they can detect the fraud. And for this Court to make an *Erie* guess that Mississippi would do so would certainly be adopting a "novel" claim that the Mississippi Supreme Court has not authorized.

There are not many cases where a receiver tried to bring negligence claims against someone whose negligence allegedly facilitated the fraud, but there are a few. In *Troelstrup v. Index Futures Grp. Inc.*, 130 F.3d 1274 (7th Cir. 1997), the Seventh Circuit 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 Index Futures Group, Inc. ("Index"), whose accounts Tobin used for trading, 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 (bolded emphasis supplied). 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.

Similarly, in *Wiand v. ATC Brokers Ltd.*, 96 F.4th 1303 (11th Cir. 2024), the Eleventh Circuit held that a receiver standing in the shoes of a fraudulent entity could not assert a negligence claim against a defendant whose negligence allegedly allowed the fraud to continue.

Mississippi would surely follow those decisions.

Furthermore, there is nothing in Mississippi law that suggests anyone—employer or franchisor—owes a duty to train and supervise ***notary publics*** on how to perform their duties as a notary public. As is true in every state, under Mississippi law, Mississippi commissioned notaries public are public officials who have duties and rights given by the state. *See* Miss. Code Ann. § 25-34-1, *et seq*. Each Mississippi commissioned notary must take the same oath of office that other Mississippi public officials must take, swearing to "obey the law" and "faithfully discharge the duties of the office." Miss. Const. Art. 14 § 268. Notaries public are appointed by the Governor for a four-year term after the applicant files the oath and a bond in the Office of the Secretary of State. Mississippi's Secretary of State may revoke or suspend a commission as a notary public for "any act or omission that demonstrates the individual lacks the honesty, integrity, competence or reliability to act as a notary public." Miss. Code Ann. § 25-34-43. Mississippi commissioned notaries are "responsible for exercising the duties and responsibilities of the notary commission." 01-000 Miss. Code R. § 050.1.1.

Under Mississippi law, ***the notary*** is responsible for knowing and exercising his or her duties and responsibilities. No one else owes a duty of care to others to ensure the notary is properly trained because that is ***the notary's*** responsibility. The fact that an employer like Herring Ventures had a notary public on staff who performed notarial acts at the Herring

Ventures' business did not obligate Herring Ventures to train those notaries. There is nothing in Mississippi law that could create such a duty.[5]

To the contrary, in each reported opinion in Mississippi where a plaintiff sought to hold the person or entity who hired a notary public liable for the conduct of the notary public, that person or entity was held not liable. *Third Nat'l Bank v. Vicksburg Bank*, 61 Miss. 112, 117-18 (1883) (affirming summary judgment for bank that hired notary public to provide services because the bank could not be liable where the bank was without fault in hiring the notary public.); *Gulledge v. Shaw*, 880 So. 2d 288, 296 (2004) (affirming summary judgment for bank because the notary's "act of notarizing a forged document was not in the furtherance of the Bank's business - rather, it was a personal act.")

As the Fifth Circuit has instructed, a federal court sitting in diversity "do[es] not 'adopt innovative theories of state law' but aim[s] simply 'to apply that law as it currently exists.'" *Weatherly*, 945 F.3d at 920-21. Here, a claim that TUPSS—a franchisor based in San Deigo, California—owed a duty to Lamar Adams, or anyone else, to train and supervise the five Mississippi commissioned notary publics employed by Herring Ventures would surely not be "apply[ing state] law as it currently exists"; it is asking this Court to adopt a theory of law without any precedence in Mississippi or anywhere else. *Id*.

[5] Some states—***but not Mississippi***—have enacted legislation making a notary public's ***employer*** liable for a notary public's conduct in certain, limited circumstances. *See, e.g.*, 5 ILCS 312/7-102 ("The employer of a notary public is also liable to the persons involved for all damages caused by the notary's official misconduct if: (a) the notary public was acting within the scope of the notary's employment at the time the notary engaged in the official misconduct; and (b) ***the employer consented to the notary public's official misconduct***." (emphasis added)); Fla. Stat. § 117.05 (6) (similar).

B. The Receiver's Proposed Amendment Is Not Important

The Receiver's Motion does not explain why her proposed amendment is important. That's her burden, and she has not met it. The proposed amendment is not important. As discussed above, Judge Jordan has made the *Erie* guess that the Mississippi Supreme Court will hold that a franchisor cannot be liable under either a direct or vicarious liability theory unless the franchisor exercised control over the instrumentality that caused the harm. Thus, it is not somehow easier for the Receiver to prevail on a direct negligence claim against TUPSS than on a vicarious liability theory.

V. ALLOWING THE RECEIVER TO CHANGE HER THEORY OF LIABILITY AGAISNT TUPSS AFTER SIX YEARS OF LITIGATION IS HIGHLY PREJUDICIAL WHICH CANNOT BE CURED BY A CONTINUANCE

From the outset of this case, the Receiver had admitted and alleged that ***Herring Ventures***—not TUPSS—was the employer of the notaries public who notarized timber deeds for Adams, and alleged that ***Herring Ventures***—not TUPSS—failed to train and supervise those notaries. (Compl. ¶ 104.) The Receiver has asserted that TUPSS is vicariously liable for those notaries' alleged errors on the flawed theory that TUPSS "controls" certain aspects of the business, such as requiring consistency among franchisees in the services they offer, the use of The UPS Store® branding and marks, and The UPS Store® center design. For six years TUPSS has sought dismissal of this case on the ground (among many other) that a franchisor requiring all of its franchisees to offer the same services, use the same branding and marks, and have consistent layouts and signage is patently insufficient under Mississippi law (like everywhere else) to make TUPSS liable for alleged errors by its franchisee's notary employees. TUPSS has affirmatively argued that TUPSS does not exercise control over the notaries and the provision of notary service at Herring Ventures because TUPSS does not train the notaries on how to perform their jobs as notaries or supervise those notaries in any way. Now after six years of expensive

litigation, the Receiver has realized that she has no facts to support her original theory of liability and cannot find a franchising expert who would support it. So she seeks to go in an entirely different direction and claim that TUPSS should be liable because it did not exercise ***more control*** over the notaries and should have, but did not, train and supervise those notaries. Allowing such a completely different theory of liability at this extraordinarily late stage of the case is patently prejudicial. *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004) (affirming denial of leave to amend where amendment would fundamentally alter the nature of the case); *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 (5th Cir. 1992) (affirming order denying leave to amend where the amended complaint would have "established an entirely new factual basis for the plaintiffs' claims" and thus "radically altered the nature of a trial on the merits"), *reinstated in relevant part by* 37 F.3d 1069, 1073 & n.8 (5th Cir. 1994) (en banc); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) ("The new claims set forth in the amended complaint would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense."). *See, e.g.*, *Escamilla v. Elliott*, 816 F. App'x 919, 929 (5th Cir. 2020) (affirming order denying leave to amend because "[h]ad [plaintiff] promptly sought to amend her claim in response to deficiencies raised *nine* months earlier in [defendant's] summary judgment motion, the issues in dispute might have been streamlined, resources likely would have been conserved, and final resolution might have been expedited.").

It should also be noted that the Receiver's proposed negligent supervision claim is inconsistent with her pleaded claim against TUPSS of vicarious liability. The Receiver proposes that a franchisor is vicariously liable if it does supervise and train a franchisee's employees, and a franchisor is directly liable for negligent supervision if the franchisor does not supervise and

train a franchisee's employees. The Receivers proposed "heads I win, tails you lose" theory of franchisor liability is beyond "novel." The Receiver's illogical argument that TUPSS can be liable for negligently supervising the notaries because it did ***not*** supervise and train the notaries to record every document for Lamar Adams would turn Mississippi law on franchisor liability on its head. Surely, this Court would not make an "*Erie* guess" that Mississippi would adopt such an outlandish theory.

It should also be noted that TUPSS, Herring Ventures and the notaries are not represented by the same counsel and their interests are not necessarily aligned.[6] While TUPSS did not see a need to question Herring Ventures, the notaries, or the former Fleming employees at deposition given the testimony and the Receiver's existing theory of liability against TUPSS, the only way TUPSS could be assured of obtaining testimony from those persons and entities to rebut a negligent supervision claim against TUPSS would be to re-open those depositions. Not all of those witnesses are even within trial subpoena range so TUPSS has only their existing deposition testimony to offer at trial. Reopening depositions would delay the close of fact discovery, which would require the extension of expert discovery, which would delay dispositive and Daubert motions, and drive up costs further.

Furthermore, TUPSS did not have reason to think it would need an expert to rebut a negligent supervision claim until June 23, 2025, when it received the Receiver's expert reports and the motion for leave to amend to add a negligent supervision claim. Given the predicament TUPSS has been put in by the Receiver's gambit of submitting an expert report on the same day she filed a motion for leave to amend to fit the expert report, TUPSS has no choice but to try to

[6] Among other things, Herring Ventures has a contractual obligation to indemnify TUPSS for losses and costs incurred as a result of Herring Ventures' operations of its The UPS Store®.

scramble and line up an expert to rebut the Receiver's new theory before the Court rules on the motion for leave to amend—which itself constitutes prejudice.

Finally, TUPSS has also filed a motion for summary judgment on the issue of franchisor liability. (*See* ECF No. 384.) In this Circuit, "courts 'more carefully scrutinize a party's attempt to raise new theories of recovery by amendment when the opposing party has filed a motion for summary judgment.'" *Powers*, 2018 U.S. Dist. LEXIS 138894, at *7 (quoting *Par. v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999)). *See also Alexander v. Metrocare Servs.*, Civil Action No. 3:08-CV-1398-D, 2009 U.S. Dist. LEXIS 97362, at *4 n.2 (N.D. Tex. Oct. 21, 2009) ("When leave to amend is sought after the summary judgment motion is filed, courts routinely deny leave to amend."). Although the Court rejected that Motion as premature because depositions had not been conducted, that Motion would have to be substantially rewritten if the Court were to allow the Receiver to amend her complaint to allege an entirely new theory of liability against TUPSS.

The prejudice TUPSS would suffer by this proposed late amendment cannot be cured by a continuance. *Bequest Funds, LLC v. Magnolia Fin. Grp., LLC*, Civil Action No. 3:23-cv-0866-B, 2025 U.S. Dist. LEXIS 11092, at *6 (N.D. Tex. Jan. 22, 2025) ("prejudice cannot be cured by a continuance, because allowing [plaintiff] to amend its Complaint would unnecessarily delay trial and increase litigation costs."); *Williams v. BFI Waste Servs., LLC*, Civil Action No. 3:16cv75-DPJ-FKB, 2017 U.S. Dist. LEXIS 234193, at *6 (S.D. Miss. June 16, 2017) ("Granting this motion [to amend] more than a year after the amendment deadline—and after the close of discovery and motion practice—would require a complete do-over. As one leading commentator noted, '[I]f the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation, the court may deem it prejudicial.' 6 Charles Alan Wright & Arthur

R. Miller, Federal Practice and Procedure § 1487 (3d ed. 1998). Williams's offer to allow BFI to conduct new discovery does not negate the prejudice that has already occurred.")

VI. CONCLUSION

The Receiver should not be allowed to file an amended complaint at this late date, years after the Court ordered deadline for amendments passed.

By: */s/ Mark R. McDonald*

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Attorneys for Defendant
THE UPS STORE, INC.

CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that on July 7, 2025, I electronically filed the foregoing The UPS Store, Inc.'s Opposition to Receiver's Motion to Amend Complaint with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

THIS, the 7th day of July 2025.

/s/ Mark R. McDonald
Mark R. McDonald

CASE MANAGEMENT ORDER

Last Updated: February 2016

FORM 1 (ND/SD MISS. DEC. 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS — **PLAINTIFF**

v.

CIVIL ACTION
NO. 3:19-cv-364-CWR-FKB

THE UPS STORE, INC., ET AL. — **DEFENDANTS**

CASE MANAGEMENT ORDER

This Order, including all deadlines, has been established with the participation of all parties and can be modified only by order of the Court on a showing of good cause supported with affidavits, other evidentiary materials, or reference to portions of the record.

IT IS HEREBY ORDERED:

1. **ESTIMATED DAYS OF TRIAL:** 10-15

   ESTIMATED TOTAL NUMBER OF WITNESSES: 20

   EXPERT TESTIMONY EXPECTED: Yes **NO. OF EXPERTS:** 2-4

2. **ALTERNATIVE DISPUTE RESOLUTION [ADR].**

   Alternative dispute resolution techniques appear helpful and will be used in this civil action as follows:

   Private mediation or a settlement conference with the Court is required in this matter. The parties are to schedule and complete same by the discovery deadline.

3. **CONSENT TO TRIAL BY UNITED STATES MAGISTRATE JUDGE.**

   The parties do not consent to trial by a United States Magistrate Judge.

4. DISCLOSURE.

The following additional disclosure is needed and is hereby ordered:

The parties shall fully comply with the pre-discovery disclosure requirements of Fed.R.Civ.P.26 (a)(1) and L.U.Civ.R. 16(d) and 26(a) by February 24, 2020 or 21 days from entry of Court's ruling on the parties' motions for protective order [57, 59], whichever is later.

5. MOTIONS; ISSUE BIFURCATION.

Staged resolution, or bifurcation of the issues for trial in accordance with FED. R. CIV. P. 42 (b) will not assist in the prompt resolution of this action.

Statement Not Applicable.

6. DISCOVERY PROVISIONS AND LIMITATIONS.

A. Interrogatories are limited to 25 succinct questions.

B. Requests for Production are limited to 25 succinct questions.

C. Requests for Admissions are limited to 25 succinct questions.

D. Depositions are limited to the parties, experts, and no more than

12 fact witness depositions per party without additional approval of the Court.

E. The parties have complied with the requirements of Local Rule 26(e)(2)(B) regarding discovery of electronically stored information and have concluded as follows [The parties MUST state whether or not there is ESI and, if so, how they propose to address it]:

The parties are ordered to retain any relevant ESI.

For any relevant ESI, including emails, that become an issue, the parties will produce such ESI in hard copy form or on a CD or similar external device. In the event that any privileged information is inadvertently disclosed during the production of any ESI, the parties agree that the privilege is not waived. The parties reserve the right to conduct forensic searches of devices, hard drives, or machines, as necessary for litigation.

F. The court imposes the following further discovery provisions or limitations:

☐ 1. The parties have agreed that defendant may obtain a Fed. R. Civ. P. 35 (L.U.Civ.R. 35) medical examination of the plaintiff (within subpoena range of the court) by a physician who has not examined the plaintiff, and that defendant may arrange the examination without further order of the court.

☑ 2. Pursuant to Rule 502(d) of the Federal Rules of Evidence, the attorney-client privilege and the work-product protections are not waived by any disclosure connected within this litigation pending before this Court. Further, the disclosures are not waived in any other federal or state proceeding.

☐ 3. Plaintiff must execute an appropriate, HIPAA-compliant medical authorization.

☑ 4. The court desires to avoid the necessity of filing written discovery motions where court participation in an informal discussion of the issue might resolve it, even after the parties have been unsuccessful in a good faith attempt to do so. Consequently, before a party may serve any discovery motion, counsel must first confer in good faith as required by F.R.Civ.P. 37(a)(1). If the attorney conference does not resolve the dispute, counsel must contact the chambers of the magistrate judge to request a telephonic conference to discuss the issue as contemplated by F.R.Civ.P. 16(b)(3)(v). Only if the telephonic conference with the judge is unsuccessful in resolving the issue may a party file a discovery motion.

☐ 5. Other:

Additional Provisions: The limits on written discovery in Sections 6. A, B, and C apply to each party, and the limit on depositions in Section 6. D. applies to each side (i.e., Plaintiff as one side and Defendants, cumulatively, as one side).

7. SCHEDULING DEADLINES

A. Trial. This action is set for JURY TRIAL during a two-week term of court beginning on: June 1, 2021, at 9:00, a.m., in Jackson, Mississippi, before United States District Judge Carlton W. Reeves.

ANY CONFLICTS WITH THIS TRIAL DATE MUST BE SUBMITTED IN WRITING TO THE TRIAL JUDGE IMMEDIATELY UPON RECEIPT OF THIS CASE MANAGEMENT ORDER.

B. Pretrial. The pretrial conference is set on: May 7, 2021, at 9:00, a.m., in Jackson, Mississippi, before United States District Judge Carlton W. Reeves.

C. Discovery. All discovery must be completed by: December 21, 2020.

D. Amendments. Motions for joinder of parties or amendments to the pleadings must be filed by: February 20, 2020.

E. Experts. The parties' experts must be designated by the following dates:

1. Plaintiff(s): September 21, 2020.

2. Defendant(s): October 21, 2020.

FORM 1 (ND/SD MISS. DEC. 2015)

8. **MOTIONS.** All dispositive motions and *Daubert*-type motions challenging another party's expert must be filed by: January 4, 2021 .The deadline for motions *in limine* is fourteen days before the pretrial conference; the deadline for responses is seven days before the pretrial conference.

9. **SETTLEMENT CONFERENCE.**

A SETTLEMENT CONFERENCE is set on: December 8, 2020 , at 9:00 , a.m. in Jackson , Mississippi, before United States Magistrate Judge F. Keith Ball .

Seven (7) days before the settlement conference, the parties must submit via e-mail to the magistrate judge's chambers an updated CONFIDENTIAL SETTLEMENT MEMORANDUM. All parties are required to be present at the conference unless excused by the Court. If a party believes the scheduled settlement conference would not be productive and should be cancelled, the party is directed to inform the Court via e-mail of the grounds for their belief at least seven (7) days prior to the conference.

10. **REPORT REGARDING ADR.** On or before (7 days before FPTC) April 30, 2021 , the parties must report to the undersigned all ADR efforts they have undertaken to comply with the Local Rules or provide sufficient facts to support a finding of just cause for failure to comply. *See L.U.Civ.R.83.7(f)(3).*

SO ORDERED:

February 5, 2020
DATE

/s/ F. Keith Ball
UNITED STATES MAGISTRATE JUDGE

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.

THE UPS STORE, INC.; HERRING VENTURES, LLC d/b/a THE UPS STORE; AUSTIN ELSEN; TAMMIE ELSEN; COURTNEY HERRING; DIANE LOFTON; CHANDLER WESTOVER; RAWLINGS & MACINNIS, 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

DECLARATION OF MARK R. MCDONALD IN SUPPORT OF THE UPS STORE, INC.'S OPPOSITION TO RECEIVER'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

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. The Herring Ventures' franchise agreement was first produced in November 2019 and Bates stamped RG 00450-RG 00603. The franchise agreement refers to and provides for TUPSS or a designee (like Fleming Expansions) to conduct inspections of franchisees.

3. In February 2021, TUPSS produced a copy of the Center Operations Manual which contained a statement that franchisees should retain for three years any notary logbooks in their possession unless required to be turned into state offices.

4. In June 2021, TUPSS produced the actual inspection reports showing that the only review conducted by Fleming regarding notary was to ask if the center was offering notary services.

5. The attached Exhibit A shows that on June 10, 2024, the Receiver deposed one of the notaries, Diane Lofton, who worked at Herring Ventures. Lofton testified that:

> "Q. At any time during your 14-year tenure, did the person conducting the inspection ask to see your notary journal?
>
> A. No, sir, they did not.
>
> Q. Were you ever asked whether you maintained a notary journal during one of those inspections?
>
> A. Not to my knowledge.
>
> Q. Were you ever asked during your 14 years of -- term during one of those inspections as to the specific notary services you had provided?
>
> A. No, sir."

6. The Receiver's franchise expert report of Kathleen Gosser ¶ 62, says "I also believe that the training on the standards for notaries appears to be non-existent or very limited. . . . It is my opinion that if TUPSS had evaluated the notary standards in the same fashion as the management standards, there might have been a faster identification of suspicious activity."

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 July 7, 2025.

/s/ Mark R. McDonald
Mark R. McDonald

CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that on July 7, 2025, I electronically filed the foregoing The UPS Store, Inc.'s Declaration of Mark R. McDonald In Opposition to Receiver's Motion to Amend Complaint with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

THIS, the 7th day of July, 2025.

/s/ Mark R. McDonald
Mark R. McDonald

EXHIBIT A

IN THE 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, Case No. 3:19-cv-00364

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 & MACINNIS, PA; TAMMY VINSON; and JEANNIE CHISHOLM,

Defendants.

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

VIDEOTAPED DEPOSITION OF DIANE LOFTON
(Confidential Subject to Protective Order)

Taken at the offices of Rushing & Guice, 1000 Government Street, Suite E, Ocean Springs, Mississippi, on Monday, June 10th, 2024, beginning at 10:00 a.m.

REPORTED BY:

Melissa Burdine-Rodolfich
Esquire Legal Solutions

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ATTORNEYS FOR AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA

THE VIDEOGRAPHER:

Jason Daniel

ALSO PRESENT:

Alysson Mills, Receiver
Dexter Herring
Austin Elsen (Via Zoom)
Chandler Westover (Via Zoom)
Courtney Herring (Via Zoom)

Mr. Herring provided accurate information as to when those inspections were to occur?

A. Yes, sir, he did.

Q. Okay. And beyond -- well, strike that.

During any of those inspections were you asked about notary services provided by Herring Ventures?

A. No, sir, I was not.

Q. At any time during your 14-year tenure, did the person conducting the inspection ask to see your notary journal?

A. No, sir, they did not.

Q. Were you ever asked whether you maintained a notary journal during one of those inspections?

A. Not to my knowledge.

Q. Were you ever asked during your 14 years of -- term during one of those inspections as to the specific notary services you had provided?

A. No, sir.

Q. Generally, how long did these inspections take?

A. I would -- sometimes it would be an hour, maybe two, but no longer than that.

Q. All right. If I understood your