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-00364-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 MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC, respectfully submits this reply to The UPS Store, Inc.'s response [491] to her motion for leave to amend [488].

REPLY INTRODUCTION

UPS opposes the Receiver's motion on the bases that any amendment is untimely, without good cause, and futile. But UPS's arguments do not withstand scrutiny.

UPS relies on a CMO from 2020 that has been inoperative for years. It omits that for much if not most of the past six years this case was stayed.

UPS glosses over the reality that the Receiver's complaint already alleges a negligence claim against UPS. The proposed amendment would not change anything in this case. UPS has always defended this case on the ground that it did not train or supervise The UPS Store Madison's employees. The Receiver does not even have to amend the complaint to specifically allege negligent supervision to argue the theory to a jury, so long as the evidence supports it. She filed her motion "out of an abundance of caution only."

But if amendment is necessary, and if good cause is required, there is good cause: UPS asserts the Receiver should have known enough facts to allege its negligent supervision years ago, but by its own account the first indication that UPS's inspections were negligent was Diane Lofton's deposition in June 2024. Lofton testified UPS's inspectors did not ask to see her notary logbook, yes, but she also testified she had no knowledge of UPS's inspectors' reports. The Receiver might have known that UPS conducted inspections, but it did not know *how* until May 16, 2025, when, finally, UPS's inspectors sat for depositions.

The reality is the Receiver learned facts relevant to UPS's supervision in depositions because prior to depositions UPS withheld them. UPS still has not produced the manual governing the inspections. The manual is responsive to requests the Receiver made of UPS in 2021, but the Receiver did not learn of its existence until April 23, 2025, when UPS's corporate representative disclosed it in his deposition.

The Receiver replies more fully below.

REPLY ARGUMENT

1. The parties' February 5, 2020 CMO has been nonoperative for years.

UPS says any amendment is untimely under a CMO entered February 5, 2020. [67] That CMO did set a two-week deadline for amendment. But it set a deadline for many things, including discovery and trial, and none were enforced. Under the CMO, the discovery cutoff was December 21, 2020, and trial was May 7, 2021:

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.

Obviously none of the CMO's deadlines were respected.

The CMO also reasonably limited depositions to 12 fact witnesses per each side. [67 at 2] UPS apparently did not believe the CMO applied when earlier this year it noticed more than 100 depositions. UPS cannot have it both ways. The CMO on which UPS's untimeliness argument relies is not operative.

2. UPS omits context.

UPS focuses on the inoperative CMO and ignores everything else that happened in (or, better said, stalled) this case.

UPS omits that for much if not most of the past six years this case was stayed. UPS moved to stay the case in September 2020; that motion was denied, but not until March 2021. [148, 169] In August 2021, UPS moved to stay the case again and to consolidate it with three other cases. [261] That motion was granted. [October 21, 2021 docket entry only ("In accordance with the 10/20/2021 Text-Only Order entered in 3:18-cv-866-CWR-FKB staying this case until 1/31/2022 and ordering the parties to submit a discovery plan[.]")].

Nothing happened in the new consolidated case until January 2022, when the Court entered a new CMO which permitted written discovery only. After a brief six-month period of written discovery, the consolidated case was effectively stayed until late 2023, when it was statistically closed.

This case was then reopened, and in January 2024 Judge Rath held a status conference for the stated purpose of issuing a new CMO. But the Court did not enter any order setting any deadlines until November 2024 [450] and January 2025 [455], and neither order set any deadline for amendment.

The Court may recall that, when the Receiver on her own began noticing depositions in May 2024, UPS argued the case was *still* stayed. [598] UPS also represented to the Court that the Receiver had had an "unfettered right" to take depositions "for three years" and failed to do so. The representation struck the Court as incredible and it ordered UPS to provide evidentiary support. [408]

UPS's untimeliness argument might make sense if this were a normal case, with a single, operative CMO, and if UPS had not fought discovery every step of the way. It does not make sense in context here.

3. UPS overstates the proposed amendment's effect on the case.

UPS also overstates the proposed amendment's effect on the case.

The Receiver proposes to amend her complaint to specifically allege negligent supervision. Negligent supervision is a theory of negligence. The Receiver's complaint already alleges a negligence claim against UPS. A plaintiff's complaint "need not pin plaintiff's claim for relief to a precise legal theory." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011) (citing 5 C. Wright & A. Miller, Federal Practice & Procedure § 1219). The Receiver's complaint is already adequate to argue a theory of negligent supervision to the jury. Thus, she filed her motion to amend "out of an abundance of caution only." [488 at 2 (first sentence in introduction)]

Indeed, if the Receiver did nothing now and instead waited until trial, she would still be entitled to a jury instruction on the theory of negligent supervision, so long as the evidence supported it. *E.g., Tillman ex rel. Migues v. Singletary*, 865 So. 2d 350, 353 (Miss. 2003) ("A party has the right to embody its theories of the case in the jury instructions provided there is testimony and/or evidence to support it, and if the instructions are conditioned upon the jury finding that such facts existed. *Reese v. Summers*, 792 So. 2d 992, 994 (Miss. 2001). There was a sufficient basis of facts for the granting of plaintiff's instruction P–5, the instruction on negligent supervision. The trial court erred in failing to put this instruction to the jury.").

The Receiver has the burden of proof, but she does not ask for additional discovery to carry it. Her proposed amendment merely conforms the complaint to the evidence already obtained in discovery. "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). Not only is there nothing wrong with amending a complaint to conform to the evidence,

such amendment is proper, even as late as trial. *See* Fed. R. Civ. Pro. 15(b)(1). *See also Calhoun v. Collier*, 78 F.4th 846, 853-54 (5th Cir. 2023), as revised (Aug. 31, 2023) ("Merely because a claim was not presented as promptly as possible, [] does not vest the district court with authority to punish the litigant.") (quoting *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982)).

4. UPS is not prejudiced.

There is no basis for UPS's assertion that the proposed amendment would require it to reopen any depositions. The Receiver questioned the defendant notaries on UPS's training and supervision of them. UPS attended the same depositions. If UPS did not ask questions itself, it is not because it did not understand the Receiver's complaint to encompass a theory of negligent supervision.

The Receiver has always alleged UPS was negligent, and UPS has always defended the case on the ground that it did not train or supervise The UPS Store Madison's employees. In UPS's own words:

> TUPPS has affirmatively argued that TUPPS does not exercise control over the notaries and the provision of notary service at Herring Ventures because TUPPS does not train the notaries on how to perform their jobs as notaries or supervise those notaries in any way.

[491 at 25]. UPS already filed a motion for summary judgment that, in its own words, "affirmatively argu[ed] that TUPPS did not supervise or train the Herring Ventures notaries at all." [491 at 16]

In short, UPS has been defending a negligent supervision claim all along. Nothing in the proposed amendment, which is not even necessary to argue the theory to a jury, changes that.

The Receiver's proposed amendment does not even require UPS to brief its defense differently. UPS's response to the Receiver's motion to amend demonstrates as much: UPS's argument that the Receiver's proposed amendment is futile because it would not survive a motion

to dismiss relies on the same principal case and body of law on which UPS has always relied. [compare 491 at 17-24 (citing *Parmenter*) with 42 (UPS's August 29, 2019 motion to dismiss, citing *Parmenter*) 384 (UPS April 1, 2024 motion for summary judgment, citing *Parmenter*)].

There is a benefit to UPS of the Receiver proposing to amend her complaint now rather than at trial: UPS will have an opportunity to file a dispositive motion that addresses the amendment. Surely UPS already intends to file several dispositive motions. The deadline is not until November 1. The filing of a dispositive motion that also addresses negligent supervision is not an unwarranted or undue burden sufficient to constitute a substantial reason to deny an amendment.

5. To the extent amendment is necessary, and good cause is required, there is good cause.

The impetus for the Receiver's proposed amendment is the testimony of the three individuals who, for the years in question, conducted quarterly inspections of The UPS Store Madison for UPS.

It is not Judge Jordan's decision in *Neely*, but that decision is notable because it holds that a franchisor can be directly liable for negligence. As the Receiver pointed out, Judge Jordan entered judgment for the franchisor in *Neely*, but the facts here are distinguishable, as the inspectors' deposition testimony demonstrates. Unlike the franchisor in *Neely*, UPS did have a right of control and did supervise for compliance with its mandates. But its supervision, through its inspectors, was negligent.

UPS argues the Receiver has always known that UPS's supervision was superficial. [491 at 14-16] That is not true. She did not know anything when she filed her complaint. She knew enough to allege general negligence against UPS, but not more.

She received a copy of UPS and The UPS Store Madison's franchise agreement in 2019. The franchise agreement might have alerted her to the existence of inspections, but it did not describe the inspections and in any event did not include all of UPS's mandates governing notarial services.

She received a copy of UPS's operations manual in 2021 (after the deadline for amendment in the February 5, 2020 CMO, *see above*). The operations manual includes mandates governing notarial services specifically, but it did not describe the inspections to confirm compliance with those mandates.

She received copies of inspection reports in 2021. Those inspection reports included, among other items in a checklist, an item for notarial services. Still, she did not know what the inspections for notarial services entailed.

UPS is correct that Diane Lofton, a defendant and a notary-employee of The UPS Store Madison, testified that UPS's inspectors never asked to see her notary logbook. That deposition was not until *June 2024*. Relevant here, she testified that she had no knowledge of the actual inspection reports.[1]

Throughout all this time, UPS continued to affirmatively represent that it "did not supervise or train the Herring Ventures notaries at all" [491 at 16], and the Receiver waited to take its inspectors' depositions. As shown, for most of this case UPS resisted all depositions. For its inspectors, UPS provided contradictory information regarding its ability to make them available. For years UPS represented that its inspectors could be contacted only through UPS's counsel. Eventually, after numerous failed attempts to obtain UPS's cooperation, and only after Judge Rath

[1] Deposition of Diane Lofton, page 44 at line 3.

required UPS to provide contact information earlier this year, the Receiver subpoenaed finally subpoenaed them.

As it turns out, UPS's inspectors were not independent third parties at all but instead employees of another UPS franchisee, Fleming. The Receiver learned of the existence of a separate agreement and manual between UPS and Fleming governing its inspections of The UPS Store Madison in the course of her deposition of UPS's corporate representative on April 23, 2025.[2] The Receiver's counsel immediately asked for a copy of the agreement and manual.[3] The agreement and manual are responsive to written discovery requests of UPS the Receiver served in 2021.[4] As of this filing, UPS still has not produced the agreement and manual to the Receiver, despite several follow up requests.

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[2] UPS calls its inspecting franchisee an "area franchisee":

> Q. And what is the operative agreement between TUPSS and an area franchisee is called?
>
> A. There is an area franchisee agreement. That outlines all of the responsibilities of an area franchisee, And there's an area operations manual as well.

Deposition of Sean O'Neal, UPS's 30(b)(6) representative, pages 50-51 and page 178 at line 16.

[3] Deposition of Sean O'Neal, UPS's 30(b)(6) representative, page 179 at line 2.

[4] On January 30, 2021 the Receiver made the following formal discovery requests:

> **Request for Production No. 3:**
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> Please produce any documents referring, relating, or pertaining in any way to any inspections, evaluations, investigations, audits, or appraisals of Herring Ventures by You or Your designated agent, including any records collected by You at any inspection, evaluation, investigation, audit, or appraisal of Herring Ventures.
>
> **Request for Production No. 4:**
>
> Please produce any reports and any document referring, relating, or pertaining in any way to any reports made or produced by You or Your designated agent about Herring Ventures.

The agreement and manual are plainly responsive and should have been produced in 2021. But out of an abundance of caution (as always), the Receiver's counsel made a formal specific discovery request for the agreement and manual the very same day of the deposition (which was 30 days prior to the close of fact discovery) and even issued a subpoena duces tecum to Fleming.

The Receiver deposed UPS's inspectors on May 16, 2025, without the benefit of the agreement or manual, but the depositions were nevertheless revelatory. The totality of the evidence today is, *on paper* UPS had numerous mandates governing notarial services—but, in reality, it did not care whether its franchisees complied with them. It only cared that notaries made money. According to inspectors, that is all they checked for. The item for notarial services on inspectors' checklist was for nothing more than "a dollar amount."[5]

The takeaway is the Receiver knew as early as 2021 that UPS supervised The UPS Store Madison, yes, but it did not know *how* until May 16, 2025. To the extent amendment is necessary, and good cause is required, there is good cause.

CONCLUSION

The Receiver's proposed amendment merely conforms the complaint to the evidence obtained as recently as May 16, 2025, but it does not change anything in this case. UPS has always defended this case on the ground that it did not train or supervise The UPS Store Madison's employees. If amendment is necessary, federal rules and precedent counsel it must be permitted, there is good cause, and there is no prejudice to UPS.

[5] Deposition of Robert Summers, page 22 at line 21.

Respectfully submitted,

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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.

/s/ Kaja S. Elmer