

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.

MICHAEL D. BILLINGS and
MDB GROUP, LLC; TERRY WAYNE
KELLY, JR. and KELLY
MANAGEMENT, LLC; and WILLIAM
B. MCHENRY, JR. and FIRST SOUTH
INVESTMENTS, LLC,

Defendants

Case No. 3:18-cv-679-CWR-FKB

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

Hon. Carlton Reeves, District Judge
Hon. F. Keith Ball, Magistrate Judge

MEMORANDUM BRIEF OF DEFENDANTS
MICHAEL D. BILLINGS AND MDB GROUP, LLC
IN SUPPORT OF THEIR MOTION TO DISMISS

Michael D. Billings and MDB Group, LLC (collectively, “Billings”) submit this Memorandum Brief in support of their Motion to Dismiss [Dkt. 23] (the “Motion”) as to Count IV of the Amended Complaint [Dkt. 15] filed by Alysson Mills (the “Receiver”), in her capacity as Receiver for Arthur Lamar Adams (“Adams”) and Madison Timber Properties, LLC (“MTP”).

FACTS

The Receiver filed her initial Complaint [Dkt. 1] against Billings on October 2, 2018. Before Billings had an opportunity to file an answer, the Receiver amended her Complaint

[Dkt. 15] on October 17, 2018. Billings now has until October 31 to serve responsive pleadings to the Receiver's Amended Complaint.

Besides asserting new facts against other defendants in this case, the Amended Complaint also raised a new claim against Billings at Count IV, "for Disgorgement of Commissions Earned in Violation of 15 U.S.C. § 77e and Miss. Code Ann. § 75-51-301" ("Count IV"). Count IV claims that the Receiver is entitled to disgorgement of the money paid to Billings by MTP, alleging that it was derived from the sale of unregistered securities in violation of federal and state securities laws. Count IV goes on to allege that "Adams and his associates used methods of interstate commerce . . . to facilitate the sales of promissory notes." Dkt. 15 at pg. 20.

But Count IV misses the mark against Billings. Neither statute cited by the Receiver grants her the disgorgement cause of action that she asserts. Count IV should be dismissed with prejudice under Fed. R. Civ. P. 12(b)(6).

STANDARD

"[A] federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors[.]" *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 185, 190 (5th Cir. 2013). "If a plaintiff does not have statutory standing, [s]he lacks a cause of action, and the action should be dismissed under Federal Rule of Procedure 12(b)(6)." *Royal v. Boykin*, 2017 U.S. Dist. LEXIS 144976 *6 (N.D. Miss. Sept. 5, 2017).

ANALYSIS

The new claims asserted against Billings under Count IV of the Receiver's Amended Complaint fail as a matter of law.

1. Claims under 15 U.S.C. § 77e

According to the Receiver, 15 U.S.C. § 77e grants her a cause of action for “disgorgement” against Billings for alleged violation of the registration requirements under federal securities laws. But 15 U.S.C. § 77l provides that such a claim may be maintained only by the “person purchasing [a] security” sold in violation of § 77e. Count IV fails out of the blocks because the Receiver is not a “purchaser” under the statute. *See 7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 225 (5th Cir. 1994) (recognizing that standing to maintain private right of action created under 15 U.S.C. § 77l is based upon the requirement that the plaintiff be the actual purchaser of securities.).

Further, although “[r]eceptors appointed at the SEC's request are equipped with a variety of tools to help preserve the status quo,” their power “is not without limits.” *Eberhard v. Marcu*, 530 F.3d 122, 131-32 (2d Cir. 2008). The Fifth Circuit has recently described the limits on a receiver's power to bring claims belonging to third parties: “[A] federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors[.]” *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 712 F.3d 185, 190 (5th Cir. 2013).

The Fifth Circuit's holding in *Janvey* is also reflected¹ in the district court case of *Cobalt Multifamily Investors I, LLC v. Arden*, 46 F. Supp. 3d 357, 361 (S.D.N.Y. 2014):

¹ “The authority of a receiver is defined by the entity or entities in the receivership; a receiver may commence lawsuits, but it generally stands in the shoes of the corporation and can assert only those

“Even though the Receiver brings its [securities violations] claim with the admirable goal of obtaining money to compensate defrauded investors, the Receiver cannot assert claims belonging to those outside the receivership entities (i.e., investors) simply because [s]he was appointed ‘for [their] benefit.’” *Id.* “Other courts² have similarly rejected [securities violations] claims filed by receivers (or those in similar roles), even those appointed following SEC enforcement actions.” *Id.* “The **Receiver's complaint [] does not allege that the receivership entities purchased any of the unregistered securities at issue. . . .** The Court finds this argument unavailing and thus dismisses the Receiver's first cause of action.” *Id.* at 360-61 (emphasis added).

Cobalt Multifamily applies the principles found in *Janvey* to dismiss the exact federal law claims asserted here by the Receiver in Count IV of her Amended Complaint. The analysis and outcome found in *Cobalt Multifamily* apply here, as well.

2. Claims under Miss. Code Ann. § 75-71-301

The state law claim asserted by the Receiver under Miss. Code Ann. § 75-71-301 is similar to the Receiver’s federal claim asserted under 15 U.S.C. § 77e—both allege a disgorgement cause of action as a result of securities laws violations. It is also not surprising that Miss. Code Ann. § 75-71-509, like 15 U.S.C. § 77l, is a remedy that is expressly available only to a “purchaser” of a security. In regards to these types of state law securities claims, the Mississippi Supreme Court has held: “Mississippi's regulations are similar to the

claims which the corporation could have asserted.” *Cobalt Multifamily Investors I, LLC v. Arden*, 46 F. Supp. 3d 357, 361 (S.D.N.Y. 2014) (internal citations and quotations omitted).

² See string citation (parentheticals omitted) provided at end of quote in the *Cobalt Multifamily* case: *See Glusband v. Fittin Cunningham Lauzon, Inc.*, 582 F. Supp. 145, 149-50 (S.D.N.Y. 1984) 12(1).”); *Canut v. Lyons*, 450 F. Supp. 26, 27-29 (C.D. Cal. 1977); *Thomas v. Roblin Indus., Inc.*, 520 F.2d 1393, 1394, 1396 (3d Cir. 1975).

federal securities regulations, and we are able to look to federal caselaw for guidance. In fact, “[Section] 75-71-501 is virtually identical to [15 U.S.C. § 77] of the Securities Act of 1933[.]” *Harrington v. Office of Miss. Sec’y of State*, 129 So.3d 153, 159 (Miss. 2013).

This district court has actually echoed *Harrington*’s holding in the case of *CEH Energy, LLC v. Intrepid Drilling, LLC*. There, the plaintiff alleged violations of the same federal and state securities laws asserted here by the Receiver. 2016 U.S. Dist. LEXIS 80531 *3-4 (S.D. Miss. June 21, 2016). The defendant filed a motion to dismiss, *Id.* at *1-2, and the Court ultimately dismissed the plaintiff’s federal securities claims. *Id.* at *9. In analyzing the state securities claims, Judge Starrett expressly recognized the similarities between the federal and state claims, calling them “counterparts” to one another. *Id.* at *11. “Because the Court has concluded that the [federal] claims, the federal counterparts to the state securities claims, are due to be dismissed, it also finds that the claims under the Mississippi Securities Act should also be dismissed with prejudice.” *Id.*

As it previously did in *CEH Energy, LLC*, this Court should dismiss the Receiver’s state securities claims for the same reasons that federal law requires dismissal of her federal securities claims. *Janvey* and *Cobalt Multifamily* teach us that the Receiver may not bring federal securities claims before this Court. Then, *CEH Energy, LLC* follows with the requirement that her state law claims be dismissed, as well.

CONCLUSION

The Receiver does not have unlimited power, and she is bound by the law. She may only maintain actions that belong to MTP. She is not entitled to bootstrap her position by asserting claims that the receivership estate never could have asserted.

Count IV of the Amended Complaint should be dismissed, with prejudice.

Respectfully submitted, this the 24th day of October, 2018.

MICHAEL D. BILLINGS and MDB GROUP, LLC
Defendants

By: /s/ R. Andrew Taggart, Jr.

R. ANDREW TAGGART, JR. (MSB# 7422),
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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2018 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record in this matter. I further certify that I have mailed by United States Postal Service the document to the following non-ECF participants: NONE.

SO CERTIFIED, this the 24th day of October, 2018.

/s/ R. Andrew Taggart, Jr.

R. ANDREW TAGGART, JR.