5/15/23 2345

ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

No. 2023-M-00567-SCT

BRETT LORENZO FAVRE **PETITIONER**

VS.

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES **RESPONDENTS**

PETITION FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT, CASE NO. 25CI1:22cv286-EFP

PETITION FOR INTERLOCUTORY APPEAL

Of Counsel:

ERIC D. HERSCHMANN, Esq.
Eric D. Herschman (PHV #995916)
210 Lavaca Street
Austin, Texas 78701
Telephone: (512) 551-3344
Facsimile: (512) 798-4376

KASOWITZ BENSON TORRES LLP
Daniel R. Benson (PHV# 995927)
Jennifer M. McDougall (PHV# 995926)
Daniel J. Koevary (PHV# 995925)
1633 Broadway
New York, NY 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

MICHAEL J. SHEMPER, PLLC
Michael J. Shemper (MSB# 100531)
Attorney at Law
140 Mayfair Road, Suite 1200
Hattiesburg, MS 39402
Telephone: (601) 545-7787
Facsimile: (601) 545-1711

MOTION# 2023-1495

SULLIVAN & SULLIVAN, PLLC
James Robert "Bob" Sullivan, Jr. (MSB# 8613)
Attorneys at Law
424 Sawmill Road
P. O. Box 45
Laurel, MS 39441
Telephone: (601) 428-1505
Facsimile: (601-428-1590)

CERTIFICATE OF INTERESTED PERSONS

1. Brett Lorenzo Favre, Petitioner/Defendant.

2. Michael J. Shemper of Michael J. Shemper PLLC, James Robert "Bob" Sullivan, Jr. of Sullivan & Sullivan PLLC, Eric D. Herschmann, Daniel R. Benson, Jennifer McDougall, and Daniel Koevary of Kasowitz Benson Torres LLP (counsel for Petitioner/Defendant).

3. Mississippi Department of Human Services, Respondent/Plaintiff.

4. Joe Bradley Pigott of Pigott Law Firm, PA, Stephen F. Schelver of the Mississippi Attorney General's Office and Adam Stone, Kaytie M. Pickett, Abbey Reeves, and Clarence Webster of Jones Walker LLP (Counsel for Respondent/Plaintiff).

5. John Davis, Co-Defendant.

6. Andy J. Clark of Law Office of Andy J. Clark (Counsel for Davis).

7. Mississippi Community Education Center, Co-Defendant.

8. Nancy Whitten New, Co-Defendant.

9. Zachary W. New, Co-Defendant.

10. Jesse Steven New, Jr., Co-Defendant.

11. Magnolia Strategies LLC, Co-Defendant.

12. N3 Holdings LLC, Co-Defendant.

13. Thomas G. Bufkin and Luke Whitaker of Carol Bufkin PLLC (Counsel for Mississippi Community Education Center, Nancy New, Zachary New, Jesse New, Magnolia Strategies LLC, N3 Holdings).

14. Family Resource Center of North Mississippi, Inc., Co-Defendant.

15. Christi H. Webb, Co-Defendant.

16. Northeast Mississippi Football Coaches Association, Co-Defendant.

17. Casey L. Lott of Langston & Lott, P.A. (Counsel for Family Resource Center, Webb, Northeast Mississippi Football Coaches Association).

18. Amy S. Harris, Co-Defendant.

19. Arch Bullard (Counsel for Harris).

20. The University of Southern Mississippi Athletic Foundation, Co-Defendant.

21. Michael Scott Jones and Timothy J. Anzenberger of Adamas and Reese LLP (Counsel for University of Southern Mississippi Athletic Foundation).

22. Jacob W. Vanlandingham, Co-Defendant.

23. Prevacus, Inc., Co-Defendant.

24. PresolMD, LLC, Co-Defendant.

25. George W. Schmidt, II of Schmidt Law Firm PLLC (Counsel for Vandlandingham, Prevacus and PresolMD).

26. Paul Victor Lacoste, Co-Defendant.

27. Victory Sports Foundation, Inc., Co-Defendant.

28. Michael Heilman of Heilman Law Group, P.A. (Counsel for Lacoste and Victory Sports Foundation).

29. Marcus L. Dupree, Co-Defendant.

30. Marcus Dupree Foundation, Inc., Co-Defendant.

31. J. Matthew Eichelberger and Madeline Iles of The Eichelberger Law Firm (Counsel for Dupree and Dupree Foundation).

32. Ted M. DiBiase, Sr., Co-Defendant.

33. Heart of David Ministries, Inc., Co-Defendant.

34. Michael Thomas Dawkins and Cooner G. Whitten of Baker Donelson Bearman Caldwell & Berkowitz (Counsel for DiBiase, Sr., Heart of David Ministries).

35. Ted M. ("Teddy") DiBiase, Jr., Co-Defendant.

36. Priceless Ventures LLC, Co-Defendant.

37. Familiae Orientem LLC, Co-Defendant.

38. Graham Patrick Carner of Graham P. Carner, PLLC (Counsel for DiBiase, Jr., Priceless Ventures, Familiae Orientem).

39. Brett Dale DiBiase, Co-Defendant.

40. Restore2 LLC, Co-Defendant.

41. Marc Edward Brand and John David Sanford of Marc E. Brand & Associates (Counsel for Brett DiBiase and Restore2 LLC).

42. Rise Luxury Rehab, LLC d/b/a/ Rise in Malibu, Co-Defendant.

43. Adam Andrew Such, Co-Defendant.

44. SBGI, LLC, Co-Defendant.

45. Aafram Y. Sellers (Counsel for Adma Such, SBGI LLC).

46. Nicholas Cronin Coughlin, Co-Defendant.

47. NCC Ventures LLC, Co-Defendant.

48. Francis Starr Springer of Springer Law Office, PLLC (Counsel for Coughlin and NCC Ventures).

49. Brian Jeff Smith, Co-Defendant.

50. Daniel W Kitchens of Kitchens Law Firm PA (Counsel for Brian Smith).

51. JTS Enterprises LLC, Co-Defendant.

52. Austin G. Smith, Co-Defendant.

53. Jim D Waide, III of Waide and Associates, P.A. (Counsel for Austin Smitt).

54. Lobaki Foundation, Co-Defendant.

55. Lobaki, Inc., Co-Defendant.

56. Amanda B. Barbour, Sammy L. Brown, Jr., Tommie Cardin, Caroline Baker Smith of Butler Snow LLP (Counsel for Lobaki Foundation and Lobaki Inc.).

57. William Longwitz, Co-Defendant and Counsel for himself and Inside Capitol.

58. Inside Capitol LLC, Co-Defendant.

59. Soul City Hospitality LLC, Co-Defendant.

60. James David Holland of Page Kruger & Holl (Counsel for Soul City).

61. Chase Computer Services, Co-Defendant.

62. George Martin Via, I of George Martin Via, Attorney at Law PA (Counsel for Chase Computer Services).

63. Southtec, Inc. , Co-Defendant.

64. Bethany Clark and Wayne Doss of the Doss Law Firm PLLC (Counsel for Southtec, Inc.).

65. Jacob Black, Co-Defendant.

66. James Henry Powell, III of Horan and Horan, PLLC (Counsel for Jacob Black).

67. William Garrigues ("Garrig") Shields, Co-Defendant.

68. Vicki Lynn Gilliam of The Gilliam Firm, PLLC (Counsel for Shields).

69. Williams, Weiss, Hester, & Co., PLLC, Co-Defendant.

70. Lawrence Matthew Quinlivan, Zachary Wessler and Phillip Martin Lemere of Deutsch, Kerrigan, LLP (Counsel for Williams, Weiss, Hester, & Co., PLLC).

71. The Honorable E. Faye Peterson, Circuit Judge.

41. Marc Edward Brand and John David Sanford of Marc E. Brand & Associates (Counsel for Brett DiBiase and Restore2 LLC).

42. Rise Luxury Rehab, LLC d/b/a/ Rise in Malibu, Co-Defendant.

43. Adam Andrew Such, Co-Defendant.

44. SBGI, LLC, Co-Defendant.

45. Aafram Y. Sellers (Counsel for Adma Such, SBGI LLC).

46. Nicholas Cronin Coughlin, Co-Defendant.

47. NCC Ventures LLC, Co-Defendant.

48. Francis Starr Springer of Springer Law Office, PLLC (Counsel for Coughlin and NCC Ventures).

49. Brian Jeff Smith, Co-Defendant.

50. Daniel W Kitchens of Kitchens Law Firm PA (Counsel for Brian Smith).

51. JTS Enterprises LLC, Co-Defendant.

52. Austin G. Smith, Co-Defendant.

53. Jim D Waide, III of Waide and Associates, P.A. (Counsel for Austin Smitt).

54. Lobaki Foundation, Co-Defendant.

55. Lobaki, Inc., Co-Defendant.

56. Amanda B. Barbour, Sammy L. Brown, Jr., Tommie Cardin, Caroline Baker Smith of Butler Snow LLP (Counsel for Lobaki Foundation and Lobaki Inc.).

57. William Longwitz, Co-Defendant and Counsel for himself and Inside Capitol.

58. Inside Capitol LLC, Co-Defendant.

59. Soul City Hospitality LLC, Co-Defendant.

60. James David Holland of Page Kruger & Holl (Counsel for Soul City).

61. Chase Computer Services, Co-Defendant.

62. George Martin Via, I of George Martin Via, Attorney at Law PA (Counsel for Chase Computer Services).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

Defendant Brett Favre respectfully brings this petition for an interlocutory appeal from an order denying his motion to dismiss meritless claims against him based on an unprecedented extension of the Mississippi Uniform Fraudulent Transfer Act ("UFTA")—an extension that, if permitted to stand, would effectively place no limits on who could be held liable under the UFTA.

In its original complaint, Plaintiff Mississippi Department of Human Services ("MDHS") alleged that Favre had improperly received MDHS's welfare funds—claims it was forced to withdraw after Favre filed a motion to dismiss showing that after being informed that the funds at issue (funds he had properly received under a contract with a non-profit company to render promotional services) were welfare funds, he voluntarily repaid those very funds—as MDHS and Public Auditor Shad White who instigated this lawsuit well knew. Nonetheless, eager to keep Favre in the lawsuit because of the publicity that generates (which Public Auditor White has used to advance his political ambitions), MDHS filed an amended complaint asserting an entirely new claim: that Favre is liable, not because he received any welfare-related funds, but because a supposedly improper transfer of MDHS funds—a transfer carried out by MDHS itself and structured and approved by government officials and lawyers, including the Attorney General—was for his "benefit" under the UFTA, supposedly by relieving him of an oral "handshake" agreement that he supposedly made in 2017 to raise funds for a volleyball center at the University of Southern Mississippi ("Southern Miss").

None of this is true—among other things, the claim that Favre made any such oral "handshake" agreement is negated by official contemporaneous records, and MDHS itself admits that a large portion of the transferred funds it seeks to recover from Favre was used for purposes other than the center. In any event, MDHS's legal arguments are utterly meritless. For example, it purports to predicate UFTA liability on a transfer from the non-profit company to the University

of Southern Mississippi Athletic Foundation (the "Foundation"), but it omits that the funds originated from MDHS (a state entity), which under state law was permitted to distribute its funds through the non-profit; that the Foundation is an arm of Southern Miss (a state entity); and that the funds merely passed through the Foundation's bank account on the way to Southern Miss, rendering the Foundation a conduit. Thus, the transfer was, in substance, a transfer from the State to itself. And MDHS's assertion that UFTA liability should extend to Favre, as a transfer beneficiary, goes far beyond the purpose and intent of the statute and is contrary to the clear consensus of authority: he could not have been a beneficiary, given that he did not receive any of the funds and he had no legally binding obligation that the transfer discharged.

MDHS's theories, which were summarily and erroneously upheld by the circuit court, would extend UFTA liability beyond all reasonable bounds and beyond what any court in Mississippi or elsewhere has ever permitted. Favre recognizes that interlocutory review is extraordinary relief, but respectfully submits that this Court's urgent intervention here is warranted under Miss. R. App. P. 5. Interlocutory review would resolve issues of general importance in the administration of justice, including the limits to liability under the UFTA; would materially advance this case's termination, inasmuch as it would resolve issues applicable to all of MDHS's claims, including whether a transfer from the State to itself can qualify as a fraudulent transfer under the UFTA; and would prevent further substantial and irreparable harm to Favre's reputation generated by public officials seizing on meritless claims to attract public attention.

STATEMENT OF QUESTIONS PRESENTED

1) Whether MDHS states a claim against Favre under the UFTA, where he received none of the transferred funds, the allegedly wrongful transfer was approved by public officials and lawyers, and the transfer supposedly for his "benefit" neither discharged any of his legal obligations nor conferred on him any quantifiable benefit.

2) Whether MDHS's UFTA claims suffer from threshold defects, including the fact that they are predicated on transfers from the State to itself, given that the funds originated from MDHS (a state agency) and passed through the Foundation to Southern Miss (a state agency).

3) Whether MDHS states claims for civil conspiracy against Favre, where he received no funds, numerous public officials and lawyers approved the transfers, he had no authority to direct or approve the transfers, and he was never aware of the alleged fund-use restrictions.

4) Whether the doctrine of *in pari delicto* bars this action against Favre, given that MDHS itself conceived and carried out the allegedly wrongful scheme.

STATEMENTS OF TIMELINESS AND CURRENT CASE STATUS

This petition is timely under M.R.A.P. 5(a), as it is filed within twenty-one days from the April 24, 2023, entry of the circuit court's order denying Favre's motion to dismiss. Favre filed his answer on May 4, 2023. Discovery is ongoing.

STATEMENT OF NECESSARY FACTS

MDHS alleges that MDHS officials, the non-profit Mississippi Community Education Center ("MCEC"), Southern Miss, and its fundraising arm, the Foundation, conspired to transfer tens of millions of dollars in state funds and federal Temporary Assistance for Needy Families ("TANF") program funds from MDHS to MCEC, which used the funds for non-TANF purposes, including building a $5 million volleyball center for Southern Miss. As alleged in MDHS's pleading, between 2016 and 2019, Jon Davis (MDHS's Executive Director), Jacob Black (MDHS's Deputy Administrator), Garrig Shields (MDHS's Deputy Executive Director), Nancy New (CEO of MCEC), her son Zachary, and others—though not Favre—concocted and carried out the scheme. *See* Ex. B ¶¶ 63–81. MDHS brings thirteen claims against 46 defendants and makes ten sets of allegations. Three claims and two sets of allegations concern Favre. *See id.*

I. Favre's Limited Involvement in Fundraising to Build a Volleyball Center.

MDHS alleges that in the spring and summer of 2017, Davis, Black, Shields, Nancy New, Zachary New, and administrators from the Foundation and Southern Miss devised a plan under which MDHS—entitled under state law to distribute its funds through non-profits—would deliver $5 million in funds to MCEC, which would deliver the funds through the Foundation to Southern Miss to construct a volleyball center on Southern Miss's campus. *Id.* ¶¶ 92–97. To circumvent restrictions against using TANF funding for brick-and-mortar projects, Black and Shields—who are lawyers—structured the transaction as a sublease under which the Foundation (which had leased the center's site from Southern Miss) subleased the site to MCEC, thus giving MCEC rights to use the center and other campus spaces; in exchange, MCEC delivered $5 million in funds to the Foundation. *Id.* ¶¶ 92–97, 298. According to MDHS, Southern Miss put $4 million put toward building the center, and $1 million toward repairing and maintaining other campus buildings. *See* Ex. D (Opp. 18 n.5). MDHS, MCEC, and other state entities, including other state universities, had previously engaged in similar transactions as a legal means to comply with federal TANF restrictions. *See* Ex. C (Mot., Ex. 2). MDHS has never claimed that those transactions at other state universities were improper, nor has MDHS brought any UFTA actions based on those transactions.

MDHS alleges that Favre, a Southern Miss alumnus and longtime supporter, and New discussed, along with Davis and others, ways through which MDHS could provide "grant funds" to support Southern Miss's plans for the center. *See* Ex. B ¶¶ 86, 89, 107. MDHS's funds comprise TANF funds and state funds that do not carry the same use restrictions as TANF funds. MDHS nowhere alleges that Favre understood that those "grant funds" would involve restricted TANF funds. Instead, MDHS hinges its case against Favre on this allegation: "In April 2017, [Favre] made a handshake deal with [the Foundation] in which he committed to personally guarantee the funds necessary for the brick-and-mortar construction of a volleyball facility." *Id.* ¶ 83. Yet MDHS

does not identify the person whose hand Favre shook or anything else about the deal. Nor does it explain how performing the alleged oral agreement—*i.e.*, constructing the center—could have been accomplished within fifteen months to render it enforceable, *see* Miss. Code § 15-3-1(d). MDHS's sole basis to bring this deficient allegation is a 2020 text between Southern Miss President, Dr. Rodney Bennett, and Governor Phil Bryant, stating: Favre had "personally guaranteed the project, and on his word and handshake we proceeded." *See* Ex. D (Opp. 19). But that text was not and could not have been referencing any 2017 handshake deal—contemporaneous state records confirm that Favre made no such April 2017 handshake deal, *see infra* at 7. At most, the text was referring imprecisely to a 2018 written fundraising commitment by the Favres—which is not (and could not be) the predicate for MDHS's UFTA claim here. See *infra* at 7.

II. Favre's Limited Involvement in Introducing State Officials to Prevacus.

MDHS also alleges that, in 2019, MCEC delivered $2.1 million in funds from MDHS to Prevacus, a biotech company, to promote an anti-concussion drug and secure clinical trial sites in Mississippi. *See* Ex. B ¶ 126. Favre is alleged only to have invested in Prevacus; introduced Nancy New to Prevacus's CEO Jacob VanLandingham in December 2018; and attended a meeting with Davis, New, VanLandingham, and others in January 2019 where VanLandingham pitched his company's mission. *Id.* ¶¶ 113–18. MDHS does not allege that Favre had any authority to direct or approve the funds' use or that he was aware that the Prevacus transaction involved TANF funds.

III. MDHS's Claims Against Favre and the Circuit Court's Decision

MDHS alleges that Favre is liable under the UFTA for the entire $5 million transfer, which is predicated on the theory that because Favre made the supposed 2017 "handshake deal" regarding the center, he was "the person for whose benefit the transfer was made," even though, as MDHS admits in a footnote, Southern Miss used only $4 million dollars for the center. *See* Ex. B ¶¶ 83, 370; Ex. D (Opp. 18 n.5). And although MDHS does not, as it cannot, allege that Favre knew the

funds were TANF (or other welfare) funds, it also brings civil conspiracy claims against Favre for conspiring with others to use TANF funds for non-TANF purposes in the center and Prevacus transactions. *See* Ex. B ¶¶ 322, 324. Favre moved to dismiss the amended complaint for failing to state a claim. *See* Ex. C. The chancery court denied the motion. *See* Ex. A.

ARGUMENT

I. The Circuit Court Erred in Holding That Favre Was a UFTA Beneficiary.

Under the UFTA, if a debtor transfers an asset "with actual intent to hinder, dela, or defraud" a creditor, the creditor may recover "judgment for the value of the asset transferred" or the "amount necessary to satisfy the creditor's claim," which judgment "may be entered against: (a) The first transferee of the asset or the person for whose benefit the transfer was made." Miss. Code § 15-3-113(2). Neither Miss. Code § 15-3-113(2) nor 11 U.S.C. § 550(a), the bankruptcy-code template for the UFTA section, defines the phrase, "the person for whose benefit the transfer was made." *See* Nat'l Conf. of Comm'rs on Uniform State Laws, Cmt. No. 2 to Uniform Fraudulent Transfer Act § 8 (1984). Nor have Mississippi courts defined or interpreted it. Still, the scope of beneficiary liability must have limits: statutes are afforded a "construction which will produce reasonable results." *Kellum v. Johnson*, 237 Miss. 580, 586 (1959). Here, as shown below, the circuit court critically erred in holding that MDHS had properly pleaded that Favre was the beneficiary under the UFTA of the volleyball-center transfer, simply because he supposedly had made a "handshake deal" in April 2017 to guarantee the center's construction.

A. There Was No Handshake Deal.

As an initial matter, MDHS has no good-faith basis for its allegation that Favre made a "handshake deal" in April 2017 to fund the center's construction. *See* Ex. B ¶ 83. Official records[1]

[1] This Court may take judicial notice of information that is "helpful and appropriate, including official public documents" and "records." *See Enroth v. Mem'l Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990).

from Southern Miss confirm that Favre had made "no pledge," oral or otherwise, even as of June 2017. *See* Ex. C (Mot., Ex. 19) (June 8, 2017) ("no pledge has been set up"). And July 2017 emails between the Southern Miss athletic department and Nancy New show that Favre had "agreed to help with fundraising for the facility," nothing more. *See* Ex. C (Mot., Ex. 14) (July 16, 2017).

MDHS's only purported support for its deficient April 2017 handshake allegation is a January 2020 text message from Southern Miss President Bennett to Governor Bryant, stating that Favre "personally guaranteed the project, and on his word and handshake we proceeded." *See* Ex. D (Opp. 19). But that text, at most, was referring (inaccurately) to a formal written May 2018 donor agreement between the Favres and the Foundation. In that agreement, which is not implicated in the UFTA claim here, the Favres committed to raise, collect, or pay around $1.5 million to the Foundation for the center's construction. *See* Ex. E (Reply, Ex. 1) (May 2, 2018). The agreement further provided that, in order to "move forward with the [center] and "accept a bid for construction," the Foundation "must first receive written confirmation from donors to raise and collect or personally pay funds for the construction," and that the Foundation would not move forward "without having agreements in hand for full [center] funding." *Id.*

In light of these 2017 and 2018 records, there is no good-faith, plausible basis to allege a 2017 handshake, and the only plausible inference is that the 2020 text was inaccurately referencing the 2018 commitment. Indeed, the reason that MDHS must stretch the 2020 text beyond plausibility is that there are no communications between Favre and the Foundation that would support the allegation that he made any 2017 guarantee to cover the center's construction—instead, the contemporaneous records refute that allegation. After all, if the April 2017 handshake deal had occurred, then the May 2018 donor agreement would have been unnecessary.[2]

[2] Although the Southern Miss President is automatically an *ex-officio* Foundation board member, MDHS does not, because it cannot, allege that Favre ever knew that Bennett was an *ex-officio* board member or ever spoke to him in that capacity. *See* Ex. B ¶ 83; Ex. C (Mot., Ex. 29).

B. The Supposed Handshake Deal Was Unenforceable.

Even if Favre shook hands in April 2017 to guarantee the center's construction (and contemporaneous records prove he did not), that oral agreement would have been unenforceable under the Statute of Frauds, because the agreement's full performance—*i.e.*, completing the center—could not have been accomplished within the Statute's fifteen-month timeframe. *See* Miss. Code § 15-3-1(d) (precluding action "upon any [oral] agreement which is not to be performed within the space of fifteen months from the making thereof"). Designing, planning, approving, paying for, and constructing a multi-million-dollar public building within fifteen months of April 2017 was an objectively impossible feat. In fact, according to MDHS's own pleading, officials and administrators were still conducting discussions to iron out the funding structure in July 2017; the payments were not sent until November and December 2017; and the center was not constructed until December 2019, thirty months after April 2017. *See* Ex. B ¶¶ 85–100.[3]

The Restatement (Second) of Contracts provides an instructive example: "A orally promises B to sell him five crops of potatoes to be grown on a specified farm in Minnesota, and B promises to pay a stated price on delivery. The contract is within the Statute of Frauds. It is impossible in Minnesota for five crops of potatoes to mature in one year," the common-law duration. *Id.* § 130; *see also Burns v. Georgetown Univ.*, 2012 WL 2563037, at *3 (S.D. Miss. May 30, 2012) (holding that oral promise to provide high-school student a scholarship was unenforceable, as it was made "well before" plaintiff "graduated from high school, ensuring more than fifteen months lapsed between" dates of promise and performance). So too, here, fully performing on the supposed oral promise within fifteen months was objectively impossible.

[3] In April 2017, Southern Miss athletic director Daniel Feig wrote that Southern Miss still had not "select[ed] a site for the [volleyball] facility" or obtained architectural drawings, and that Southern Miss was hoping to break ground on the center "by the end of the summer or early fall." *See* Ex. D (Opp., Ex. B at 6). In July 2017, Southern Miss was still looking for donors (which prompted Southern Miss to reach out to Nancy New for funding) and "finaliz[ing] the layout of the building." *See* Ex. D (Opp., Ex. C).

C. The Transfer Did Not Confer a Quantifiable Benefit on Favre.

Because Favre's supposed handshake was unenforceable, the transfer did not discharge any legal duty that Favre owed the Foundation to fund the center's construction. He also received no funds. Since the transfer did not afford him a quantifiable benefit, he is not the UFTA beneficiary.

MDHS contended below that Favre is liable even if he "informally guaranteed the volleyball project at its outset," as "the transfer was to his benefit." *See* Ex. D (Opp. 20). The circuit court adopted MDHS's position without explanation. *See* Ex. A. Yet that position amounts to an unprecedented extension of beneficiary liability under the UFTA and contravenes the overwhelming weight of federal and state authority nationwide.

Although the Mississippi courts have not reached the issue, the clear consensus of authority on beneficiary liability is that the benefit must be "direct, ascertainable, and quantifiable"—not "incidental, unquantifiable, or remote"—and "must correspond to, or be commensurate with, the value of the property that was transferred." *See, e.g.*, *In re Arabella Petroleum Co.*, LLC, 647 B.R. 851, 871 & n.187 (Bankr. W.D. Tex. 2022). The rationale for this universal rule is that recovery under fraudulent-transfer law is predicated on "the concept of disgorgement," and disgorgement "requires that an actual, quantifiable benefit is conferred upon a party which must then be disgorged." *See, e.g.*, *In re Alta Mesa Res., Inc.*, 2023 WL 2359022, at *6 (Bankr. S.D. Tex. Ct. Mar. 3, 2023). For that reason, courts uniformly hold that, for an entity to be deemed a beneficiary under the UFTA as a guarantor, that entity must have incurred a *legally binding* obligation to cover a debtor's debt, and the debtor's transfer must have reduced the guarantor's *legally binding* liability—thus conferring an economic benefit. *See, e.g.*, *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 265–66 (5th Cir. 2016) ("Absent the transfer from debtor to creditor, the guarantor would have had to make the transfer itself. As the transfer beneficiary, it avoids that obligation").[4] No

[4] *See also Bonded Fin. Servs., Inc. v. Eur. Am. Bank*, 838 F.2d 890, 896 (7th Cir. 1988) ("[D]ebtors often

court has ever held that an "informal guarantee" could support beneficiary liability: because an entity that makes an "informal guarantee" bears no legal obligation to uphold the guarantee, satisfying or failing to satisfy "the informal guarantee" would not benefit or harm the entity in economic terms; consequently, a debtor's transfer that discharges the "informal guarantee" would not confer a quantifiable benefit. Only a formal, legal guarantee will trigger beneficiary liability, because only then will the transfer confer a quantifiable benefit.[5]

Therefore, because Favre's supposed handshake was not a legally binding promise, the transfer to fund the center's construction did not benefit him in any manner relevant to the UFTA. Had the transfer not occurred, he would have been no worse off in an economic sense. True, he might have derived some pleasure from the construction of the center—but such an amorphous, psychic benefit is not "quantifiable" and thus does not trigger beneficiary liability under the UFTA. *See, e.g.*, *In re Int'l Mgmt. Assoc.*, 399 F.3d 1288, 1292–93 (11th Cir. 2005) (an "unquantifiable advantage is not the sort of 'benefit' contemplated," and "winning 100% control over depleted assets" is "not a tangible or a quantifiable benefit"); *Lo v. Lee*, 234 Cal. Rptr. 3d 824, 830 (Cal. Ct. App., 1st Dist. 2018) (reasoning that the educational benefit from paying a child's tuition was an "intangible and theoretical" benefit: it "cannot be valued solely in terms of dollars and cents").[6]

---

pay money to A for the benefit of B; ... but for the payment B may have had to make good on the guarantee or pay off his own debt; and accordingly ... B should be treated the same way initial recipients are treated"); *In re TOUSA, Inc.*, 680 F.3d 1298, 1313 (11th Cir. 2012) ("The guarantor receives an immediate benefit when the debtor pays back a creditor, which reduces the liability of the guarantor.").

[5] In addition, in the limited scenarios where courts find beneficiary liability outside the guarantor context, the point remains that only a quantifiable benefit will suffice. *See In re TOUSA*, 680 F.3d at 1301 (creditor benefitted where debtors transferred liens to new lenders who then paid off old lenders); *In re Compton Corp.*, 831 F.2d 586, 595 (5th Cir. 1987) (unsecured creditor benefitted from a secured letter of credit).

[6] *See also Mack v. Newton*, 737 F.2d 1343, 1359–60 (5th Cir. 1984) (declining to impose beneficiary liability on debtor's principals, even though transfer kept debtor in business, because continued operations is "an incidental, unquantifiable, and remote benefit"); *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 821 (N.D. Tex. 2012) ("[I]f [debtor] had failed to make these interest payments, it does not appear as if Verizon would have been adversely affected. This suggests that Verizon did not in fact benefit from the interest payments.").

Southern Miss's use and allocation of the transferred funds further confirms that Favre was not "the person for whose benefit the transfer was made." *See* Miss. Code § 15-3-113(2). As MDHS itself admits, Southern Miss put $4 million toward constructing the center and $1 million toward repairing and maintaining other campus buildings. *See* Ex. D (Opp. 18 n.5). But Favre is alleged to have informally agreed to fund only the center. *See* Ex. B ¶ 83. So, the transfer's purpose could not have been to benefit Favre. Presumably Favre and other Southern Miss alumni and supporters were gratified by—and in that way benefitted from—the transfer of funds to Southern Miss, including the funds used for non-center purposes, but that does not make them liable.

MDHS's position and the holding below—that settled limiting principles need not restrict the scope of beneficiary liability—would undermine the administration of justice in Mississippi. Informal guarantees should not trigger beneficiary liability—for the same reason that informal guarantees are unenforceable. This State's citizens should not have to worry that monetary liability will attach to casual offers to assist others. Put differently, for the same reason that it would have been unjust and unlawful for Favre to face liability on the supposed oral promise itself, it is unjust and unlawful for Favre to face liability as a transfer beneficiary. And yet, under MDHS's view of the law, Favre is liable for his alleged informal guarantee, even if the guarantee itself would have been unenforceable in court, and liable for whatever amount it might have been—whether $5 million or $500 million. The ambit of beneficiary liability must have reasonable limits, and the circuit court's holding to the contrary warrants this Court's immediate intervention.

II. MDHS's UFTA Action Is Otherwise Fundamentally Defective.

A. The State Is Not Entitled to a Judgment to Recover Its Own Assets.

MDHS, a state agency, brings a UFTA claim even though in the complained-of transactions, the State transferred funds to itself. Although MDHS purports to predicate UFTA liability on a transfer from MCEC as debtor to the Foundation as transferee, with MDHS as creditor

(*see* Ex. B ¶¶ 369–70), it omits that the funds originated from MDHS (a state agency); that the Foundation is an arm of Southern Miss (a state agency); and that the funds merely passed through the Foundation's bank account on the way to Southern Miss, rendering the Foundation a conduit. Thus, the transfer in substance was from one state agency, MDHS, to another state agency, Southern Miss. *See Boyer v. Crown Stock Distribution, Inc.*, 587 F.3d 787, 793 (7th Cir. 2009) (observing that doctrine looks to "substance, rather than form") (citation omitted).

Indeed, while MDHS is seeking to recover from Favre the funds that the State used to construct the center, because, according to MDHS, Favre benefitted from the transfer to the Foundation, MDHS can make this perverse claim only because the state parties involved decided that the funds should go through the Foundation's accounts instead of directly to Southern Miss. Moreover, while the Foundation is a private non-profit, it is an arm of Southern Miss and run by Southern Miss employees whose offices are within Southern Miss. In fact, the Foundation is an "affiliated organization" that was "formed exclusively for the benefit of [Southern Miss] and serve[s] to promote, encourage, and assist with educational, scientific, literary, research, athletic, facility improvement, and service activities of the University and its affiliates." *See* Ex. C (Mot., Ex. 28 at 590). And because the Foundation held funds only "to make the funds available to someone else," *i.e.*, Southern Miss, the Foundation is a "mere conduit," not a transferee. *See, e.g.*, *Matter of Coutee*, 984 F.2d 138, 141 (5th Cir. 1993). At bottom, MDHS's UFTA action is defective because the transaction that MDHS sues upon does not reflect the creditor-debtor-transferee structure that is necessary for the UFTA even to apply. *See* Miss. Code §§ 15-3-107, 15-3-112.

In any event, MDHS is not entitled to a judgment against Favre because its supposed "claim" has been satisfied. Under the UFTA, a judgment "may" be entered for a creditor and against a transferee or beneficiary up to "the amount necessary to satisfy the creditor's claim." *Id.* § 15-3-112. Here, the $5 million was used to construct the center, which Southern Miss (the State)

now owns. The State's possession of this asset satisfies any "claim" that the State could have.

B. MDHS Is Estopped from Attacking Its Own Transfer.

Although the Mississippi courts have not reached the issue, courts from other jurisdictions routinely hold that a creditor who participates in a transfer may be estopped from attacking it as a matter of equity. *See, e.g.*, *Sanford v. Martin*, 182 F.3d 914, 915 (5th Cir. 1999). Here, MDHS officials—Davis, Shields, and Black—participated in the very transfer that MDHS now, as a purported creditor, seeks to void under the UFTA. See *supra* at 4. Nor may MDHS evade estoppel by pinning the blame on those persons. When a creditor's agents participate in the transfer, that participation estops the creditor itself. *See, e.g.*, *Verizon*, 479 B.R. at 411.

C. MDHS Failed to Plead MCEC's "Actual Intent" under the UFTA.

To state a UFTA claim, MDHS must plead that MCEC made a transfer with "actual intent to hinder, delay or defraud" a creditor. *See* Miss. Code § 15-3-107. The UFTA sets forth numerous factors to determine whether the debtor acted with "actual intent," and based on MDHS's pleading, the vast majority point away from "actual intent" here, including the most essential: the transfer was "disclosed" and not "concealed," given that MDHS officials openly ratified it, MCEC and Foundation officials openly executed it; numerous lawyers and state officials thoroughly vetted it, and Southern Miss publicly celebrated it. *See* Miss. Code § 15-3-107(c); see *supra* at 4–5.[7] And although MDHS claims that it has pleaded "actual intent" under the UFTA based on Zachary New's guilty plea, MDHS has confused general fraud with the particular fraud relevant to the UFTA: that is, fraud prejudicing the creditor's ability to collect a debt. *See State v. New*, 25CI 1:22

[7] MDHS does not, as it cannot, allege that: **(f)** the debtor "absconded"; **(g)** the debtor "removed or concealed assets"; **(b)** the debtor "retained possession or control of the property" after the transfer; **(d)** the debtor had "been sued or threatened with suit" before the transfer; **(e)** the transfer involved "substantially all the debtor's assets"; **(i)** the debtor was "insolvent" or became "insolvent shortly after the transfer was made"; or **(k)** the debtor "transfer[red] the essential assets of the business to a lienor who transferred the assets to an insider of the debtor." *See* Miss. Code § 15-3-10.

Cr. 3 (EFP), Doc. 7, at 6 (Hinds Co. Cir. Ct., Apr. 22, 2022) (admitting guilt, *not* to preventing MDHS from collecting a debt, but rather to disguising the transaction as a lease to circumvent TANF restriction on brick-and-mortar). Mississippi's UFTA was enacted not to remedy general fraud but "to prevent debtors from putting their property which is available for the payment of their debts beyond the reach of creditors." *Barbee v. Pigott*, 507 So. 2d 77, 84 (Miss. 1987); *see also* Miss. Office of Sec'y of State, Policy & Research Div., Mem. re *Potential Amendments to Mississippi's UFTA* (Aug. 5, 2014) (observing that UFTA does not target general fraud).

III. The Circuit Court Erred in Failing to Dismiss the Conspiracy Claims against Favre.

"For a civil conspiracy to arise, the alleged confederates must be aware of the fraud or wrongful conduct at the beginning of the agreement." *Jones v. Rebel Rags, LLC*, 270 So. 3d 903, 904 (Miss. 2018). Here, contrary to the circuit court's holding, MDHS does not, as it cannot, plead that Favre was aware that the volleyball-center and Prevacus transactions were unlawful. As noted, MDHS does not—because it cannot—allege that Favre understood that using "grant funds" for the center would involve TANF funds: "grant funds" can mean many things, and there is nothing unusual about state officials using "grant funds" to build a public project.[8] *See* Ex. A ¶¶ 86, 89, 107. Nor does MDHS allege that Favre was aware that there was anything unlawful about the way the center was funded: lawyers and officials from MDHS, MCEC, Southern Miss, and the Foundation had all signed off, and as a non-lawyer and the least knowledgeable person, Favre had no reason to suspect that there was anything untoward, and MDHS does not allege otherwise. Moreover, Favre received no funds. See *supra* at 4. Likewise, MHDS does not—because it cannot—allege that Favre was aware that the Prevacus transactions involved TANF funds. Nor

[8] Although MDHS alleges that Favre "knew that MDHS is Mississippi's 'welfare agency'" (*see* Ex. B ¶ 107), the welfare program is merely one component of MDHS, which offers an array of public services, including services that receive no TANF funding. *See, e.g.*, Ex. C (Mot., Ex. 34); Miss. Code Ann. §§ 43-1-4, 43-1-7, 43-1-31, 43-1-41, 43-1-65. And although MDHS alleges that Favre was reluctant to publicize his involvement (*see* Ex. B ¶ 103), he had every right to try to keep his life private.

does MDHS allege that Favre had any reason to suspect that the transactions were improper; state officials routinely offer incentives to entice private companies to bring business to their states.

IV. The Circuit Court Incorrectly Held That *In Pari Delicto* Is Inapplicable.

It is apparent from the face of the complaint that MDHS is far more culpable than Favre is (even assuming he has any culpability at all), and the *in pari delicto* doctrine therefore bars MDHS's claims against him. *See Latham v. Johnson*, 2018 WL 3121362, at *10 (Miss. Ct. App. June 26, 2018). Although the Mississippi courts have not reached the issue whether the doctrine applies to government agencies, courts in other jurisdictions have—and for good reason: "it would be manifestly unfair to allow a government agency knowingly or recklessly engaged in violations of the statute to avoid the ramifications of its own wrongdoing by shifting the blame to the financial institution and then recouping its losses." *Bd. of Trs. v. Chicago Corp.*, 708 F. Supp. 1499, 1501 (N.D. Ill. 1989); *see also Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013); *Bd. of Trs. v. Chicago Corp.*, 708 F. Supp. 1499, 1501 (N.D.Ill. 1989); *New York v. UPS, Inc.*, 160 F. Supp. 3d 629, 654 (S.D.N.Y 2016). Yet the circuit court summarily and erroneously rejected this argument. *See* Ex. A.

* * *

Inasmuch as MDHS's entire UFTA action suffers from threshold defects, interlocutory review is warranted under each of the grounds for such review under Miss. R. App. P. 5: review would materially advance this case's termination and enable the parties and the circuit court to avoid the exceptional expense of litigating meritless claims; avoid further unwarranted damage to Favre's reputation; and facilitate the administration of justice in Mississippi by resolving legal issues of general importance, including the scope of beneficiary liability under the UFTA (on which the circuit court's holding contravenes the clear consensus of authority) and the application of *in pari delicto* against the State. Favre respectfully requests that this Court grant the petition.

RESPECTFULLY SUBMITTED on this, the 15th day of May, 2023.

BRETT LORENZO FAVRE, Defendant

By: _____
MICHAEL J. SHEMPER, MSB# 100531

By: _____
ERIC D. HERSCHMANN

Prepared by:

ERIC D. HERSCHMANN, Esq.
(PHV #995916)
210 Lavaca Street
Austin, Texas 78701
Telephone: (512) 551-3344
Facsimile: (512) 798-4376
Email: EDHNotice@gmail.com

KASOWITZ BENSON TORRES LLP
Daniel R. Benson (PHV# 995927)
DBenson@kasowitz.com
Jennifer M. McDougall (PHV# 995926)
JMcDougall@kasowitz.com
Daniel J. Koevary (PHV# 995925)
DKoevary@kasowitz.com
1633 Broadway
New York, NY 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

MICHAEL J. SHEMPER, PLLC
Michael J. Shemper (MSB# 100531)
Attorney at Law
140 Mayfair Road, Suite 1200
Hattiesburg, MS 39402
Telephone: (601) 545-7787
Facsimile: (601) 545-1711
Email: michael@shemperlaw.com

SULLIVAN & SULLIVAN, PLLC
James Robert "Bob" Sullivan, Jr.
(MSB# 8613)
Attorneys at Law
424 Sawmill Road
P. O. Box 45
Laurel, MS 39441

Telephone: (601) 428-1505
Facsimile: (601-428-1590)
Email: bob@sst-lawoffice.com

Counsel for Defendant Brett Lorenzo Favre

CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that he has on this date sent the foregoing Petition to the below via courier service:

The Honorable E. Faye Peterson
Hinds Circuit Court
407 East Pascagoula Street
Jackson, Mississippi 39205

Adam Stone, Esq.
Kaytie M. Pickett, Esq.
Clarence Webster III, Esq.
JONES WALKER LLP
190 East Capitol Street, Suite 800
Jackson, Mississippi 39201

Stephen F. Schelver, Esq.
Special Assistant Attorney General
Office of the Attorney General
Civil Litigation Division
550 High Street
Jackson, Mississippi 39201

So certified, this the 15th day of May, 2023.

By: _____
MICHAEL J. SHEMPER, MSB#100531

By: _____
ERIC D. HERSCHMANN