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IN THE SUPREME COURT OF MISSISSIPPI
No. 2023-M-00567

BRETT LORENZO FAVRE, PETITIONER,

VERSUS

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES, RESPONDENT.

RESPONDENT MISSISSIPPI DEPARTMENT OF HUMAN SERVICES'S ANSWER TO PETITIONER BRETT LORENZO FAVRE'S PETITION FOR INTERLOCUTORY APPEAL

Kaytie M. Pickett (MSB No. 103202)
Adam Stone (MSB No. 10412)
Clarence Webster, III (MSB No. 102111)
JONES WALKER LLP
190 E. Capitol St., Suite 800
Jackson, Mississippi 39201
Tel. (601) 949-4900
Fax (601) 949-4804
kpickett@joneswalker.com
astone@joneswalker.com
cwebster@joneswalker.com

Stephen F. Schelver (MSB No. 101889)
Special Assistant Attorney General
550 High Street, Suite 1100
Jackson, Mississippi 39205-3522
Tel. (601) 359-3522
Stephen.Schelver@ago.ms.gov

Attorneys for Respondent

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF CURRENT CASE STATUS 2

STATEMENT OF THE FACTS 2

A. The volleyball facility conspiracy 2

B. The Prevacus conspiracy 3

STANDARD OF REVIEW 4

ARGUMENT 5

I. The denial of Favre's motion to dismiss is not appropriate for interlocutory review. 5

II. MDHS states a claim under MUFTA against Favre. 6

A. MDHS pleaded Favre was a guarantor, which satisfies § 15-3-113(a). 6

B. Favre's factual challenge to the allegation he personally guaranteed construction costs is wrong and inappropriate on a motion to dismiss 7

C. Favre cannot show that as a matter of law, satisfaction of his guarantee within fifteen months was impossible, so his statute of frauds defense fails. 8

D. The Foundation is not the State. 10

E. Zach New's guilty plea establishes actual intent. 11

III. MDHS sufficiently pleaded conspiracy. 12

IV. Neither in pari delicto nor estoppel defeats MDHS's claims. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Elec., Div. of FL Indus. v. Singarayar,
530 So. 2d 1319 (Miss. 1988)....................4

Avery v. Univ. of Miss.,
346 So. 3d 904 (Miss. Ct. App. 2022)....................10

Barber v. Union Nat'l Bank (In re KZK Livestock),
190 B.R. 626 (Bankr. C.D. Ill. 1996)....................11

Board of Trustees. v. Chicago Corporation,
708 F. Supp. 1499 (N.D. Ill. 1989)....................14

Bonded Fin. Servs. v. European Am. Bank,
838 F.2d 890 (7th Cir. 1988)....................6

Bradley v. Kelley Bros. Contractors, Inc.,
117 So. 3d 331 (Miss. Ct. App. 2013)....................12

Byrd v. Miss. Power Co.,
943 So. 2d 108 (Miss. Ct. App. 2006)....................4

Cannon Imp. of Vicksburg, LLC v. Provance,
No. 2020-M-00529-SCT, 2020 Miss. LEXIS 327 (Sep. 9, 2020) (King, J., dissenting)....................5

City of Meridian v. $104,960.00 U.S. Currency,
231 So. 3d 972 (Miss. 2017)....................4, 7

Clark v. St. Dominic-Jackson Mem'l Hosp.,
660 So. 2d 970 (Miss. 1995)....................8

De La Pena Stettner v. Smith (In re IFS Fin. Corp.),
669 F.3d 255 (5th Cir. 2012)....................11

Dr. Ben Branch v. Fed. Deposit Ins. Corp.,
825 F. Supp. 384 (D. Mass. 1993)....................6

EDW Invs., LLC v. Barnett,
149 So. 3d 489 (Miss. 2014)....................5

#101330279v8

Enroth v. Mem'l Hosp. at Gulfport,
566 So. 2d 202 (Miss. 1990) 7

Farrish Gravel Co. v. Mississippi State Highway Commission,
458 So. 2d 1066 (Miss. 1984) 13

In re Finley, Kumble, et al.,
130 F.3d 52 (2d Cir. 1997) 6

Groundworx, LLC v. Blanton,
34 So. 3d 363 (Miss. 2017) 13

Haidar v. Margetta,
352 So. 3d 206 (Miss. Ct. App. 2022) 5

Heckler v. Cmty. Health Servs.,
467 U.S. 51 (1984) 14

Hicks v. Harris,
606 F.2d 65 (5th Cir. 1979) 13

Hill v. Thompson,
564 So. 2d 1 (Miss. 1989) 14

J.B. Hunt Transp., Inc. v. Forrest Gen. Hosp.,
34 So. 3d 1171 (Miss. 2010) 4

Janvey v. Democratic Senatorial Campaign Committee, Inc.,
712 F.3d 185 (5th Cir. 2013) 14

Janvey v. Libyan Inv. Auth.,
840 F.3d 248 (5th Cir. 2016) 6, 15

Jones v. McGahey,
187 So. 2d 579 (Miss. 1966) 9

Jones v. Rebel Rags, LLC,
270 So. 3d 903 (Miss. 2018) (Waller, J., dissenting) 12

Love v. Robinson,
161 Miss. 585, 137 So. 499 (1931) 14

Mills v. Baker Donelson,
No. 3:18-CV-866-CWR-FKB, 2021 U.S. Dist. LEXIS 85656 (S.D. Miss. May 5, 2021) 15

New York v. UPS,
160 F. Supp. 3d 629, 649-50 (S.D.N.Y. 2016) 14

#101330279v8

State ex rel. Pittman v. Griffin,
450 So. 2d 426 (Miss. 1984) 14

Rawls Springs Util. Dist. v. Novak,
765 So. 2d 1288 (Miss. 2000) 14

Rex Distrib. Co. v. Anheuser-Busch, LLC,
271 So. 3d 445 (Miss. 2019) 12

Riverview Dev. Co. v. Golding Dev. Co.,
109 So. 3d 572 (Miss. Ct. App. 2013) 4

In re Rothstein,
Adv. Pro. No 10-02612-BKC-RBR-A, 2010 Bankr. LEXIS 4662 (S.D. Fla. Dec. 14, 2010) 11

S & S Dragline Servs. v. Calhoun,
No. 95-CA-00192-COA, 1998 Miss. App. LEXIS 570 (Miss. Ct. App. 1998) (unpublished) 9

Sanders v. Dantzler,
375 So. 2d 774 (Miss. 1979) 9

State v. Bayer Corporation,
32 So. 3d 496 (Miss. 2010) 7

State v. New,
25CI1:22-cr-00003-EP, Docket #7 (Hinds Co. Cir. Ct., Apr. 22, 2022) 13

Thames v. State,
310 So. 3d 1163 (Miss. 2021) 4

United States Finance Company. v. Barber,
247 Miss. 800, 157 So. 2d 394 (1963) 9

State Statutes

MISS. CODE § 11-46-5(2) (Rev. 2023) 13

MISS. CODE § 15-3-1(d) (1972) 8

MISS. CODE § 15-3-113 (Rev. 2006) 5

MISS. CODE § 43-17-1 (Rev. 2022) 1

Rules

MISS. R. CIV. P. 12(b) 4

MISS. R. APP. P. 5(a) 1, 4, 5, 6

MISS. R. EVID. 201(b) 7

Regulations

2 C.F.R § 200.434 (Rev. 2020)..2

2 C.F.R § 200.439(b)(3) (Rev. 2020)..2

Miss. A.G. Op., Bryant, Op. No. 98-0676, 1998 Miss. AG LEXIS 552 (Nov. 6, 1998) 10

Constitutional Provisions

MISS. CONST. ART. ANN. 4, § 104 14

Other Authorities

37 C.J.S. *STATUTE OF FRAUDS* § 42 9

INTRODUCTION

Mississippi's largest welfare fraud is the subject of MDHS's lawsuit. The key wrongdoers—all of whom have pleaded guilty to criminal fraud—are former MDHS executive director John Davis; Mississippi Community Education Center (MCEC) directors Nancy New and Zach New; and Family Resource Center (FRC) director Christi Webb. MDHS seeks to recover the misspent TANF[1] funds from those who aided these fraudsters and benefitted from their frauds.

Brett Favre is one of those people. Favre took $1.1 million in TANF funds from Nancy New for speeches he never made. Favre repaid that, but he has neither repaid the $1.7 million he arranged for his drug company, Prevacus, to receive in exchange for giving Nancy New stock, nor the $5 million he orchestrated the USM Athletic Department to receive for a volleyball facility. The trial court properly held that MDHS's 98-page amended complaint states a claim against Favre under the Mississippi Uniform Fraudulent Transfer Act (MUFTA), Mississippi Code § 15-3-113(a) (Rev. 2006), and for these two conspiracies. *See* Order, Ex. "A" to Pet.

The Court does *not* grant interlocutory appeals based on whether a defendant is famous, or on speculations about the plaintiff's motives,[2] or on fact disputes. Mississippi Rule of Appellate Procedure 5(a) requires a question of law. Favre frames his petition as questioning MUFTA's scope, but his arguments depend on fact questions based on excluded extrinsic evidence.[3] And Favre's MUFTA arguments cannot terminate the proceedings; MDHS would still have conspiracy

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[1] TANF stands for Temporary Assistance for Needy Families. *See* MISS. CODE § 43-17-1 (Rev. 2022).

[2] Favre claims MDHS sued him to further the State Auditor's political ambitions. The State Auditor is not a party, and Favre has no basis to claim the State Auditor is dictating MDHS's legal strategy.

[3] Because MDHS's allegations state a claim, Favre accuses MDHS of lacking a good-faith basis for its allegations. Pet. at 6. MDHS conditionally offered the trial court its own exhibits to show its good faith, while objecting that the court should *not* pierce the pleadings. *See* MDHS Resp. to Mot. to Dismiss, Exhibit "D" to Pet., at 8-14. This Court should *not* consider either side's extrinsic evidence; but if Favre's is considered, then so should MDHS's.

claims against him. Favre's petition meets none of the interlocutory review criteria, and his arguments on the merits fail. MDHS respectfully asks that the Court deny Favre's petition.

STATEMENT OF CURRENT CASE STATUS

The trial court recently issued a suppression order and a temporary stay to allow any defendant to move to stay based on parallel criminal proceedings. Favre's counsel announced he would not seek a stay.

STATEMENT OF THE FACTS

MDHS alleged five pages of facts against Favre.[4] Key are the following allegations:

A. The volleyball facility conspiracy

"In April 2017, Brett Favre made a handshake deal with the USM Athletic Foundation (the 'Foundation'), in which he committed to personally guarantee the funds necessary for the brick-and-mortar construction of a volleyball facility." 1st Am. Compl., ¶ 83.[5] In July 2017, Favre met with Nancy New and John Davis, and Davis told New and Favre that MDHS could provide $4 million for the construction of the volleyball facility. *Id.* at ¶¶ 85-86.

Under 2 C.F.R § 200.434 (Rev. 2020) and § 200.439(b)(3) (Rev. 2020), TANF funds cannot be used as donations or to finance brick-and-mortar construction. *Id.* at ¶¶ 57-58. Favre "understood that grant funds provided by MDHS could not be used for brick-and-mortar construction," but he nonetheless urged the Foundation to accept the funds. *Id.* at ¶ 88, 90. He "did not want to pay the costs out of his own pocket." *Id.* at ¶ 84.

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[4] *See* MDHS Resp. to Mot. to Dismiss, Exhibit "D" to Favre Pet., at 3-8. MDHS does not summarize its conditionally-offered exhibits, because the Court should not consider extrinsic evidence.

[5] MDHS's First Amended Complaint is attached as Exhibit "B" to Favre's petition.

Favre "agreed for John Davis to direct funds to MCEC so that MCEC could provide the funds to the Foundation under the guise of a 'sublease' which was in fact intended to finance the brick-and-mortar construction of the volleyball facility." *Id.* at ¶ 91. MCEC transferred the Foundation $5 million in TANF funds. *Id.* at ¶ 99. "Zach New pleaded guilty to defrauding MDHS with respect to payments made under the USM Athletic Foundation Sublease." *Id.* at ¶ 108.

MDHS alleged (in fact, quoted from Favre's text messages) that Favre characterized this transfer as Nancy New's having given him $5 million for the volleyball facility via grant money. *Id.* at ¶ 107 ("**[New] gave me 5 million for Vball facility via grant money**.'" (emphasis added)).

B. The Prevacus conspiracy

In late December 2018, Favre was the largest individual outside investor in Prevacus, Inc., a private, for-profit biotechnology corporation. 1st Am. Compl, ¶ 113. Favre assisted Prevacus with raising investor funds to pay for human trials of its concussion drug. *Id.* at ¶ 114. Favre urged Prevacus's CEO, Jake Vanlandingham, "to directly solicit Nancy New to use MDHS grant proceeds to invest in Prevacus stock." *Id.* at ¶ 115. Favre hosted a meeting at his home, attended by Vanlandingham, Nancy New, Zachary New, John Davis, and Ted M. DiBiase, Jr., for a sales pitch, concerning a substantial stock investment in Prevacus. *Id.* at ¶ 116. Favre knew Davis attended as MDHS Director, and that Nancy New and Zachary New were grantees of government funds from MDHS. *Id.* at ¶ 117. Favre also knew that governmental grant funds received by the News and MCEC would fund any resulting investment in Prevacus. *Id.* at ¶ 118. Favre, however, agreed for the News to spend MDHS grant funds to purchase stock in Prevacus. *Id.* at ¶ 119.

Favre knew, or should and would have known had he exercised reasonable care, use of TANF funds to purchase stock in a private, for-profit company was inconsistent with *any* purpose of any grant funds received by MDHS from the United States Government, and was therefore an

illegal transaction. *Id.* at ¶ 120. Favre, nevertheless agreed for the News to use TANF grant funds received from MDHS to invest substantial funds in ownership interests in Prevacus and PreSolMD, to his financial benefit. *Id.* at ¶ 121. MCEC entered into a sham agreement with Prevacus to transfer "development funding" for the purpose of securing "clinical trial sites" for the concussion drug. *Id.* at ¶ 123. The News pleaded guilty to state crimes related to those transactions. *Id.* at ¶ 125.

STANDARD OF REVIEW

Interlocutory review is only appropriate "if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may: (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) Protect a party from substantial and irreparable injury; or (3) Resolve an issue of general importance in the administration of justice." MISS. R. APP. P. 5(a). "Interlocutory appeals, pursuant to the rule, must involve questions of law only." *Byrd v. Miss. Power Co.*, 943 So. 2d 108, 112 (Miss. Ct. App. 2006); *see also Am. Elec., Div. of FL Indus. v. Singarayar*, 530 So. 2d 1319, 1323 (Miss. 1988).

When presented with evidence outside the pleadings on a motion to dismiss, a trial court may exclude the evidence or convert the motion to one for summary judgment. MISS. R. CIV. P. 12(b). The Court generally reviews the exclusion of evidence for abuse of discretion. *Thames v. State*, 310 So. 3d 1163, 1170 (Miss. 2021). Likewise, the Court reviews a trial court's decision regarding judicial notice for abuse of discretion. *Riverview Dev. Co. v. Golding Dev. Co.*, 109 So. 3d 572, 576 (Miss. Ct. App. 2013).

The Court reviews the denial of a motion to dismiss *de novo*. *City of Meridian v. $104,960.00 U.S. Currency*, 231 So. 3d 972, 974 (Miss. 2017). "Review is limited to the face of the pleading, and allegations must be accepted as true." *Id.* A motion to dismiss is proper only if there are "**no set of facts that would allow the plaintiff to prevail**." *Id.* (emphasis added) (quoting *J.B. Hunt Transp., Inc. v. Forrest Gen. Hosp.*, 34 So. 3d 1171, 1173 (Miss. 2010)).

ARGUMENT

I. The denial of Favre's motion to dismiss is not appropriate for interlocutory review.

Favre's petition satisfies none of the interlocutory review criteria. Rule 5(a) requires a debatable question of law, but Favre primarily bases his petition on a fact dispute. *See* Pet. at 4-6 (disputing existence of alleged "handshake deal"). His argument is inappropriate for a motion to dismiss, let alone an interlocutory appeal. *See Haidar v. Margetta*, 352 So. 3d 206, 207 (Miss. Ct. App. 2022) (holding "questions of fact…cannot be resolved as a matter of law on a motion to dismiss").

Favre's petition does not meet the other Rule 5(a) criteria, either. Resolution of the MUFTA claim will not advance the litigation against Favre, because the conspiracy claims remain. Nor will resolution of the MUFTA claim materially advance the litigation as a whole. MDHS's MUFTA claim against Favre is based on Miss. Code § 15-3-113(2)(a), which allows MDHS to recover from "the person for whose benefit the transfer was made." Out of forty-six defendants, MDHS asserts this basis for recovery against only two other defendants. *See* 1st Am. Compl, ¶¶ 384, 395. This issue is not of "general importance" to the case, nor is it important to the "administration of justice." Claims under MUFTA are uncommon; the Court has only mentioned it once. *See EDW Invs., LLC v. Barnett*, 149 So. 3d 489 (Miss. 2014); *Cannon Imp. of Vicksburg, LLC v. Provance*, No. 2020-M-00529-SCT, 2020 Miss. LEXIS 327 (Sep. 9, 2020) (King, J., dissenting) ("That there have been so few cases would seem to indicate that this is not a matter of such 'general importance to the administration of justice' to require granting an interlocutory appeal."). And because Favre's arguments depend on undeveloped fact disputes, justice will not suffer if the Court waits to address Favre's arguments until final judgment.

Finally, this appeal cannot "prevent irreparable harm to Favre's reputation," which Favre, not MDHS, is responsible for damaging. Pet. at 2. Favre admittedly received TANF funds directly

from MCEC for speeches he never gave. This is what began the negative publicity, which increased when Mississippi Today obtained Favre's text messages. MDHS's lawsuit is not to blame, and the trial court's suppression order limits any further publicity.

II. MDHS states a claim under MUFTA against Favre.

A. MDHS pleaded Favre was a guarantor, which satisfies § 15-3-113(a).

No debatable legal question is presented here: courts universally recognize a guarantor as the paradigmatic "person for whose benefit the transfer [was] made" under the Uniform Fraudulent Transfer Act and its Bankruptcy Code counterpart.[6] *See, e.g., Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 265 (5th Cir. 2016) (construing Texas UFTA and noting "a transfer beneficiary is typically the guarantor of a debt that was extinguished by the transfer."); *In re Finley, Kumble, et al.*, 130 F.3d 52, 57 (2d Cir. 1997); *Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 895 (7th Cir. 1988). Because MDHS pleaded Favre was the Foundation's guarantor, MDHS states a claim under § 15-3-113(a). *See* 1st Am. Compl., ¶¶ 84, 102, 107. And MDHS pleaded Favre *admitted* the transfer was to his benefit: he said Nancy New "gave *me* 5 million for Vball facility via grant money." *Id.* at ¶ 107. The Court need not define the outer limits of the statutory phrase "person for whose benefit the transfer [was] made," because MDHS's pleading squares with the statute's narrowest construction. Because Favre's petition fails to present a debatable question of law, interlocutory review should be denied. MISS. R. APP. P. 5(a).

[6] MDHS does *not* suggest that this is the only path to liability as a transfer beneficiary. *See, e.g., Dr. Ben Branch v. Fed. Deposit Ins. Corp.*, 825 F. Supp. 384, 401 (D. Mass. 1993) ("The provision applies on its face to any 'entity' for whose benefit a transfer is made, and contains no express limitation upon the type of 'benefit' required. Courts have, in fact, applied section 550(a)(1) to many 'entities' and 'benefits' outside the 'paradigm' examples..."). But the Court need not reach this issue to deny Favre's petition.

B. Favre's factual challenge to the allegation he personally guaranteed construction costs is wrong and inappropriate on a motion to dismiss.

Because MDHS's allegation of Favre's personal guarantee satisfies MUFTA, Favre attacks the allegation's truthfulness with extrinsic evidence. *See* Pet. at 6-7. MDHS's pleading is accurate and evidence-based, but that is irrelevant: the Court *must* take MDHS's allegation as true for the purpose of a motion to dismiss. *City of Meridian*, 231 So. 3d at 974 ("Review is limited to the face of the pleading, and allegations must be accepted as true.").

Favre's insistence that this Court examine extrinsic evidence is contrary to the law. In *State v. Bayer Corporation*, 32 So. 3d 496 (Miss. 2010), the trial court considered a settlement agreement between the State and Bayer in granting a motion to dismiss. Even though the State's settlement agreements are public record, the Supreme Court reversed, holding that the trial court erred in considering matters outside the pleadings. *Id.* at 503. The trial court properly refused to consider Favre's evidence here. *See* Order at 3, Ex. "A" to Pet.

Judicial notice does not save Favre's attempt to rely on extrinsic evidence. Rule of Evidence 201(b) provides, "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Whether Favre orally agreed to guarantee construction costs before signing a written pledge does not meet either element. That information is unlike a hospital's status as a publicly funded entity. *See Enroth v. Mem'l Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990). MDHS pleaded Favre made an oral agreement to guarantee construction costs before the $5 million transfer; Favre contends the emails show he signed no official, written pledge until after the transfer. *See* 1st Am. Compl., ¶ 84; Pet. at 7. But one does not disprove the other. Because the facts remain subject to reasonable dispute, the trial court did not abuse its discretion.

As Favre notes, MDHS based its allegation of a "handshake deal" upon Dr. Rodney Bennett's text message to former Governor Bryant that Favre "personally guaranteed the [volleyball] project, and on his word and handshake we proceeded."[7] *See* Pet. at 7. Favre argues the Court should infer that this text message "was referring (inaccurately) to a formal written May 2018 donor agreement." *See* Pet. at 7. But even on a summary judgment motion, the Court gives the non-movant—here, MDHS—"the benefit of all reasonable inferences and interpretations which the facts may support." *Clark v. St. Dominic-Jackson Mem'l Hosp.*, 660 So. 2d 970, 972 (Miss. 1995). To assume Dr. Bennett mistakenly characterized a written pledge as Favre's "word and handshake" is to wrongfully grant *Favre* the benefit of multiple inferences. And those inferences are inconsistent with Favre's own characterization of the $5 million transfer as Nancy New's giving *him* the money—which Favre does not attempt to reconcile with his narrative. The trial court properly refused to look outside the pleadings.

C. Favre cannot show that as a matter of law, satisfaction of his guarantee within fifteen months was impossible, so his statute of frauds defense fails.

None of the fraudulent transfer cases Favre cites address the statute of frauds. Assuming for the sake of argument, however, that MDHS must plead the existence of an enforceable guarantee, MDHS's pleading satisfies this standard.

The statute of frauds requires a contract "not to be performed within the space of 15 months" to be in writing. MISS. CODE § 15-3-1(d) (1972). "To bring a contract within this statute,

[7] Again, the Court should not look outside the pleadings. If the Court does, it should also consider MDHS's evidence, which shows Favre had more than just a casual interest as an alumnus. Long before he signed a written pledge, Favre represented to many people that he was personally responsible for building the volleyball facility. *See* MDHS Resp. to Favre's Mot. to Dismiss at 10 and Exs. "D" and "E" thereto, attached as Ex. "D" to Pet. And after the transfer happened, Nancy New reassured Favre that she would make sure the $5 million "is used as you [Brett Favre] have planned." *See* MDHS Resp. to Favre's Mot. to Dismiss at 13 and Ex. "L" thereto, attached as Ex. "D" to Pet. If Favre had *not* intended for the transfer to fulfill his commitment, then he would have no right to dictate how the funds were spent.

it must, on its face, be *impossible* to perform it within 15 months." *S & S Dragline Servs. v. Calhoun*, No. 95-CA-00192-COA, 1998 Miss. App. LEXIS 570, at *5-6 (Miss. Ct. App. 1998) (unpublished) (emphasis added) (citing 37 C.J.S. *Statute of Frauds* § 42; *Jones v. McGahey*, 187 So. 2d 579, 585 (Miss. 1966)).

MDHS pleaded that Favre orally guaranteed the cost of construction in April 2017. Without reference to the pleadings, Favre argues that the volleyball facility could not be constructed within fifteen months of that agreement.[8] But the agreement to be performed is the guarantee, *not* the construction of the facility. Favre could have stroked a check at any time. And Favre asks the Court to assume that a volleyball facility *always* takes years to build. Yet construction is not like a crop's maturing or a student's finishing high school, which both have defined and easily ascertainable time frames. The Court has recognized that construction is not so predictable. In *United States Finance Company. v. Barber*, 247 Miss. 800, 157 So. 2d 394 (1963), an electrical subcontractor agreed to provide wiring on all homes the general contractor built in Mississippi, Louisiana, and Alabama. The general contractor terminated the agreement, and when sued for wrongful termination, argued the agreement did not satisfy the statute of frauds. The Court disagreed, finding that "[t]he possibility of performance within the fifteen months takes the contract out of the operation of the statute." *Id.* at 810.

Finally, Favre's argument ignores the doctrine of promissory estoppel, under which an oral agreement can be enforced even if it does not comply with the statute of frauds. *See Sanders v. Dantzler,* 375 So. 2d 774, 776 (Miss. 1979). MDHS pleaded that the Foundation proceeded with

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[8] Favre again relies on evidence outside the pleadings. Pet. at 8, n.3. As stated above, MDHS continues to object. If the Court examines the evidence over MDHS's objection, MDHS notes that Favre told former Governor Bryant in April 2017, "We want to start this summer and finish in a year or less." *See* Bryant's Resp. to Mot. to Compel, Exhibit 4 [Doc. 140-4]. This squarely contradicts the claim that Favre believed performance impossible within fifteen months when he made his commitment.

the volleyball facility project in reliance on Favre's handshake deal. This is sufficient to plead an enforceable obligation under the doctrine of promissory estoppel.

D. The Foundation is not the State.

MDHS transferred funds to MCEC, a non-profit subgrantor, who transferred $5 million to the Foundation for the payment of the construction costs (at Favre's urging and to his benefit). There was no transfer from one state entity to another state entity. To argue otherwise, Favre asks the Court to hold that the Foundation is a state entity. He ignores well-established law that university foundations are private entities. *See Avery v. Univ. of Miss.*, 346 So. 3d 904, 909 n.2 (Miss. Ct. App. 2022) ("The Development Office and the Foundation are two separate entities. The former is a department of the University, and the latter is a private entity."); *see also* Miss. A.G. Op., Bryant, Op. No. 98-0676, 1998 Miss. AG LEXIS 552, *6 (Nov. 6, 1998) ("The foundations are not agencies or political subdivisions of the State of Mississippi, and the funds raised and collected by them are not public funds…").[9]

Favre argues in the alternative that the Foundation is just a "conduit" for the transfer of funds from MDHS to USM. *See* Pet. at 12. His argument assumes the Foundation paid the funds over to USM. This assumption is not based on anything in the amended complaint, and it is factually wrong.[10] Ultimately, MCEC never fulfilled its debt to MDHS: it provided no services for the $5 million nor repaid the debt. USM's volleyball facility, which MDHS does not possess, does not satisfy MCEC's debt to MDHS.

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[9] To hold otherwise would be to subject every university foundation to Mississippi's public bid laws and bond laws.

[10] Again, the Court should not consider extrinsic evidence, but MDHS notes that the Athletic Foundation's tax returns are public record and available on its website. Those tax returns show it paid construction contractors, not USM.

E. Zach New's guilty plea establishes actual intent.

Because intent is difficult to prove, § 15-3-107(2) provides a non-exclusive list of circumstances from which fraudulent intent can be inferred. But when a transferor pleads guilty to defrauding the transferee, resort to the "badges of fraud" to infer intent is unnecessary. Here, Zach New pleaded guilty to defrauding MDHS with respect to the volleyball facility payment, which satisfies § 15-3-107(1)'s requirement of fraudulent intent.

Numerous courts have held that guilty pleas are sufficient to state a *prima facie* case of actual fraudulent intent under the Uniform Fraudulent Transfer Act. *See, e.g., Barber v. Union Nat'l Bank (In re KZK Livestock)*, 190 B.R. 626, 629 (Bankr. C.D. Ill. 1996) ("His guilty plea stands as *prima facie* evidence of a pervasive, actual intent to defraud…."); *In re Rothstein*, Adv. Pro. No 10-02612-BKC-RBR-A, 2010 Bankr. LEXIS 4662, *15 (S.D. Fla. Dec. 14, 2010) ("[c]riminal plea agreements are admissible to establish the existence of a Ponzi scheme and a wrongdoer's fraudulent intent" and "criminal convictions based on operating a Ponzi scheme establish fraudulent intent for the purposes of the fraudulent transfer provisions."). Further, "[e]vidence that a company operated as a fraudulent enterprise at the time of the transfer, moreover, may be sufficient to establish actual intent." *De La Pena Stettner v. Smith (In re IFS Fin. Corp.)*, 669 F.3d 255, 265 (5th Cir. 2012).

New's guilty plea establishes a specific, actual intent to defraud MDHS as a creditor. New's plea establishes MCEC sought to avoid its debt to MDHS—to either provide the services or repay the money—by fraudulently disguising the payment to the Athletic Foundation as a lease. And Zach New and Nancy New's guilty pleas show MCEC was used as part of a fraudulent scheme to misuse TANF funds. MDHS states a *prima facie* case of actual intent to defraud under § 15-3-107(1).

III. MDHS sufficiently pleaded conspiracy.

MDHS pleaded Favre knew that the transfers to the Athletic Foundation and to Prevacus were unlawful. *See* 1st Am. Compl., ¶¶ 90, 120. For the volleyball facility conspiracy, MDHS pleaded Favre "understood that grant funds provided by MDHS could not be used for brick-and-mortar construction." *See id.* at ¶ 90. For the Prevacus conspiracy, MDHS pleaded that Favre knew or should have known that use of grant funds "to purchase stock in a private, for-profit company was inconsistent with the pursuit of lawful TANF purposes (**or with any other purpose of any grant funds received by MDHS from the United States Government**), and was therefore an illegal transaction." *Id.* at ¶ 120 (emphasis added). MDHS need not plead or prove that Favre knew the funds were TANF funds for MDHS to establish that Favre made an agreement for the purpose of "accomplishing an unlawful purpose or a lawful purpose unlawfully." *Rex Distrib. Co. v. Anheuser-Busch, LLC*, 271 So. 3d 445, 455 (Miss. 2019).

Favre quotes a dissent to argue that MDHS needed to plead that Favre knew the funds were TANF funds. *See* Pet. at 14 (quoting *Jones v. Rebel Rags, LLC*, 270 So. 3d 903, 904 (Miss. 2018) (Waller, J., dissenting)). The quote originates from *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So. 3d 331 (Miss. Ct. App. 2013). In *Bradley*, the Court of Appeals reversed summary judgment on a conspiracy claim, finding the evidence of the parties' course of conduct sufficient from which to infer an agreement. *Id.* at 339-340. *Bradley* does not support Favre's argument, because it does not addresses what knowledge a conspirator must possess at the outset of a conspiracy. MDHS pleaded that Favre agreed to the unlawful use of the funds, which is enough to state a claim.

IV. Neither in pari delicto nor estoppel defeats MDHS's claims.

Favre cannot bar MDHS's suit through *in pari delicto*, because MDHS is not responsible for Davis's fraud. The United States has identified MDHS as the *victim* of Davis's fraud, not the perpetrator. *See U.S. v. Davis*, 3:22-cr-00104-CWR-FKB [Doc. 23], Plea Colloquy, Tr. at 3:17-

23. And Zach New pleaded guilty to "acting in concert with and/or aiding, abetting, assisting or encouraging **John Davis**," not MDHS. *See State v. New*, 25CI1:22-cr-00003-EP, Docket #7 (Hinds Co. Cir. Ct., Apr. 22, 2022). Favre cites no case holding a state entity victimized by an employee's fraud responsible for that employee's fraud.

Under the Mississippi Tort Claims Act, no government entity can be liable for an employee's fraud or criminal offense. MISS. CODE § 11-46-5(2) (Rev. 2023). Even in breach of contract cases, the government is not liable for an employee's unauthorized acts. *See, e.g., Groundworx, LLC v. Blanton*, 34 So. 3d 363, 370 (Miss. 2017); *Farrish Gravel Co. v. Mississippi State Highway Commission*, 458 So. 2d 1066, 1070 (Miss. 1984). For MDHS to be immune for an employee's fraud when it is a *defendant*, but responsible when it is a plaintiff, would defy reason. The law is not so one-sided.

No public official is authorized to break the law. Federal cases apply this bedrock principle to bar estoppel arguments against the government. In *Hicks v. Harris*, 606 F.2d 65, 68 (5th Cir. 1979), the Fifth Circuit rejected an estoppel argument against the Department of Education, holding that the government cannot be "bound nor estopped by the acts of their officers and agents in entering into an agreement or arrangement to do . . . what the law does not sanction or permit…"[11] MDHS has specifically pleaded that John Davis, Garrig Shields, and Jacob Black violated § 31-7-57 by authorizing expenditures for an object not authorized by law. *See* 1st Am. Compl., ¶¶ 286-293. Their wrongdoing is not MDHS's wrongdoing, and MDHS cannot be barred from protecting the public interest as a result of their actions.

[11] Favre raises estoppel as a separate argument, Pet. at 13, but he did not raise this defense in the Court below. Regardless, it fails for the same reason as his *in pari delicto* defense.

"[T]he State of Mississippi, because of the peculiar nature of its existence (for the benefit and welfare of all its citizens), occupies a different status from the ordinary litigant…" *State ex rel. Pittman v. Griffin*, 450 So. 2d 426, 430-31 (Miss. 1984). A government entity's different status means statutes of limitations do not run, and equitable defenses like laches, unclean hands, and estoppel do not apply. *See* Miss. Const. Art. 4, § 104 (statute of limitations); *Hill v. Thompson*, 564 So. 2d 1, 14 (Miss. 1989) (laches); *Love v. Robinson*, 161 Miss. 585, 593-94, 137 So. 499, 501 (1931) (unclean hands); *Rawls Springs Util. Dist. v. Novak*, 765 So. 2d 1288, 1292 (Miss. 2000) (equitable estoppel). The cases recognize the injustice of punishing the citizenry for its public officials' misdeeds. *See Heckler v. Cmty. Health Servs*., 467 U.S. 51, 60-61 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."). Because *in pari delicto* is an equitable, affirmative defense, the same underlying principles apply here.

Favre cites three cases he claims hold that *in pari delicto* should apply to government agencies. He cites *New York v. UPS*, 160 F. Supp. 3d 629, 649-50 (S.D.N.Y. 2016), without noting the decision was vacated, 2016 U.S. Dist. LEXIS 201153 (S.D.N.Y., June 21, 2016). In the vacated decision, the court distinguished applying *in pari delicto* to government plaintiffs "when plaintiffs are acting in a role akin to that of a private actor, rather than as an enforcer of public rights or protector of a public interest." 160 F. Supp. at 649. Here, MDHS acts as a protector of the public interest. Favre cites *Board of Trustees. v. Chicago Corporation*, 708 F. Supp. 1499, 1501 (N.D. Ill. 1989), where the court noted that the defendants could raise *in pari delicto*, but that it was "too early in this litigation to decide the merits of an *in pari delicto* defense." Finally, Favre cites *Janvey*

v. Democratic Senatorial Campaign Committee, Inc., 712 F.3d 185, 192 (5th Cir. 2013), where the Fifth Circuit **rejected** *in pari delicto* against a court-appointed receiver.

A federal district court relied on *Janvey* in rejecting an *in pari delicto* defense in *Mills v. Baker Donelson*, No. 3:18-CV-866-CWR-FKB, 2021 U.S. Dist. LEXIS 85656 (S.D. Miss. May 5, 2021), reasoning it would thwart the receivership's purpose to recover funds for innocent investors. *Id.* Similarly, MDHS holds public funds in trust and acts for the benefit of innocent citizens. The public should not suffer more for Davis and his co-conspirators' wrongdoing.

CONCLUSION

Favre's petition does not meet the criteria for interlocutory review, and the trial court properly denied his motion to dismiss. MDHS respectfully asks that his petition be denied.

Dated: May 30, 2023

Respectfully submitted,

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES

By Its Attorneys,
JONES WALKER, LLP

By: */s/ Kaytie M. Pickett*
KAYTIE M. PICKETT

Kaytie M. Pickett (MSB No. 103202)
Adam Stone (MSB No. 10412)
Clarence Webster, III (MSB No. 102111)
JONES WALKER LLP
190 E. Capitol St., Suite 800
Jackson, Mississippi 39201
Tel. (601) 949-4900
Fax (601) 949-4804
kpickett@joneswalker.com
astone@joneswalker.com
cwebster@joneswalker.com

Stephen F. Schelver (MSB No. 101889)
Special Assistant Attorney General
550 High Street, Suite 1100
Jackson, Mississippi 39205-3522
Tel. (601) 359-3522
Stephen.Schelver@ago.ms.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, KAYTIE M. PICKETT, of JONES WALKER LLP, do hereby certify that I have this day filed the foregoing document via the Court's electronic filing system, which forwarded an electronic copy to all counsel of record.

SO CERTIFIED, this the 30th day of May, 2023.

/s/ Kaytie M. Pickett
KAYTIE M. PICKETT