UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

HOWARD TURNER, d/b/a TRIPLE TEE FARMS, and KILLEBREW COTTON CO., Plaintiffs, v. UMB BANK, N.A. and HORNE LLP, Defendants.	Civil Action No. 3:23-cv-00005-HTW-FKB

DEFENDANT HORNE LLP'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Horne LLP ("Horne") submits this memorandum in support of its motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6).

INTRODUCTION

Plaintiffs, farmers in the Mississippi Delta, had no relationship with Horne. They were not clients and they were not parties to Horne's professional engagement with its client, Express Grain Terminals, LLC ("EGT"). Plaintiffs do not—and cannot—allege that Horne delivered audited financial statements for EGT to them, nor that Horne reasonably expected someone else to do so. Plaintiffs are complete strangers to the audit work Horne did for EGT. As a matter of law, Horne owed no duty to Plaintiffs.

To get around this defect, Plaintiffs rely on statutes that empower the Mississippi Department of Agriculture and Commerce ("MDAC"), and on related regulations. But those statutes and regulations do not create a private right of action; they cannot furnish a duty where none exists.

Absent a viable duty, Plaintiffs fail to state claim for relief and their complaint against Horne must be dismissed.

BACKGROUND[1]

Horne is an accounting firm that audited financial statements for EGT, a now-insolvent Mississippi grain warehouse and dealer. Doc. 1-7 at ¶¶ 1, 17. EGT purchased grain from farmers in the Mississippi Delta, stored that grain in its silos, and later sold the grain on the open market. *Id.* at ¶ 8. Howard Turner, d/b/a Triple Tee Farms, and Killebrew Cotton Co. ("Plaintiffs") are two such farmers who sold grain to EGT. *Id.* at ¶¶ 3–4. Plaintiffs and other farmers frequently received delayed payment from EGT. *Id.* at ¶ 10. Because of this customary delay in payment, EGT owed money to Plaintiffs for their soybeans and corn when it filed for bankruptcy on September 29, 2021. *Id.* at ¶¶ 3–4, 47. Plaintiffs expect that EGT's bankruptcy proceeding will not fully compensate them for this loss.

EGT was regulated by MDAC. *Id.* at ¶ 14. MDAC's regulations establish a licensing process requiring grain dealers and warehouses like EGT to submit various documents to MDAC as proof of their financial health, including "a financial statement prepared by an independent public accountant and the grain warehouseman." *Id.* at ¶ 15, 26; 2 Code Miss. R. Pt. 1, Subpt. 2, Ch. 10. Plaintiffs allege that EGT submitted financial statements prepared by Horne to MDAC as part of this licensing process. Doc. 1-7 at ¶ 17–19. Horne-audited financial statements would have alerted MDAC (and any other reader) that EGT was in financial distress: Horne "stated in

[1] The facts recited in this memorandum are accepted as true for argument's sake only. *See Rooster's Grill, Inc. v. Peoples Bank*, 965 F. Supp. 2d 770, 772 (S.D. Miss. 2013) ("[T]he court is limited to the pleadings and any documents attached thereto, and must accept as true all well-pleaded facts and view them in the light most favorable to the plaintiffs.").

its audited financial statements that there was substantial doubt that EGT could continue as a going concern for all years from 2018-2021." *Id.* at ¶ 20.

But EGT concealed its financial distress from MDAC. Plaintiffs allege that, beginning in 2018, EGT's Chief Executive Officer John Coleman fraudulently altered Horne's statements before submitting them to MDAC. *Id.* at ¶ 19. These "fake audits" downplayed EGT's financial losses and instability. *Id.* Significantly, Coleman removed Horne's going concern opinion—*i.e.*, the most glaring signal of EGT's dire financial condition—from the fake audits. *Id.*

Although EGT submitted fake audits to MDAC, and EGT failed to pay Plaintiffs for their grain, Plaintiffs attempt to shift the blame from EGT onto Horne for their injury. Plaintiffs allege that Horne had an affirmative duty to submit statements or certifications to MDAC as part of the licensure process, and that Horne should have either notified MDAC of EGT's ongoing financial instability or withdrawn as its auditor. *Id.* at ¶ 28. Plaintiffs allege that Horne's failure to take these steps proximately caused their injury. *Id.* at ¶ 30.

ARGUMENT

Plaintiffs bring claims against Horne for (I) aiding and abetting fraud, (II) intent, negligence, negligence per se, and gross negligence, (III) negligent misrepresentation, and (IV) unjust enrichment. Each fails as a matter of law because Plaintiffs have failed to plead facts sufficient to support their claims.

I. Horne did not owe a duty to Plaintiffs.

Plaintiffs' fraud and negligence-based claims (Counts I-III) all require the existence of a legal duty. *See Darling Ingredients Inc. v. Moore*, 337 So. 3d 214, 216 (Miss. 2022) (duty as element of negligence); *Ballard v. Com. Bank of DeKalb*, 991 So. 2d 1201, 1208 (Miss. 2008) (duty as component of reasonable reliance, an element of fraud and negligent misrepresentation).

"The existence *vel non* of a duty of care is a question of law to be decided by the Court." *Foster by Foster v. Bass*, 575 So. 2d 967, 972 (Miss. 1990).

The complaint relies on two sources for the possible existence of a legal duty owed by Horne. First, Plaintiffs attempt to extend Horne's contractual duty to EGT to the general public. Doc. 1-7 at ¶¶ 23, 60–62. Second, Plaintiffs adopt MDAC statutes and regulations to conjure a duty. *Id.* at ¶ 26, 53. Neither source furnishes a duty in this case.

A. Horne's contractual duties to EGT do not extend to Plaintiffs because Plaintiffs were not the reasonably foreseeable nor actual users of the audits.

An auditor undertakes a professional duty of care to its client based on a contractual engagement, but that duty does not run to the whole world. Instead, the Mississippi Supreme Court has held that "an **independent auditor is liable to reasonably foreseeable users of the audit, who request and receive a financial statement from the audited entity** for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditor's negligence." *Touche Ross & Co. v. Com. Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987) (emphasis added). Though a plaintiff need not formally request an audited financial statement, the plaintiff *must* be a person whom an auditor "may reasonably be expected to supply with information." *Hosford v. McKissack*, 589 So. 2d 108, 111 (Miss. 1991). Thus, "[t]he proper inquiry is whether it was reasonably foreseeable that [a user] would receive and rely on [an auditor's] report." *Paul v. Landsafe Flood Determination, Inc.*, 550 F.3d 511, 516 (5th Cir. 2008) (citation omitted).

The Mississippi Supreme Court did not envision its *Touche Ross* rule imposing unlimited liability on auditors to all members of the general public. It explained that the "rule protects third parties, who request, receive and rely on a financial statement, while it also protects the auditor

from an unlimited number of potential users, who may otherwise read the financial statement, once published." *Touche Ross*, 514 So. 2d at 322–23; *see also Hosford*, 589 So. 2d at 110 ("[The rule does] not expose these defendants to liability to the whole world. The door opened by the demise of privity is limited by more realistic inquiries into foreseeability and detrimental reliance."). An auditor's duty is therefore limited to those who foreseeably receive, or should have received, a copy of the audit.

Extending Horne's duty to Plaintiffs would require this Court to stretch Mississippi's formulation of duty further than any Mississippi court has ever gone. In *Touche Ross*, the plaintiff was an insurance company that had received and relied upon the defendant's audit of a bank as part of its decision to insure that bank. 514 So. 2d at 316. In *Hosford*, the plaintiffs were home purchasers who received a copy of the defendant's negligently performed termite inspection at closing and relied on it. 589 So. 2d at 109–11. In *Paul*—a federal case applying *Touche Ross* and *Hosford*—the plaintiff was a homeowner who paid for the defendant's determination that her home was not in a flood zone; as a result of this incorrect classification, the plaintiff's insurer did not require her to get flood insurance and the damage to her home from a flood was not covered. 550 F.3d at 512.

Plaintiffs here are far removed from the audit's users in *Touche Ross*, the termite inspection report users in *Hosford*, or the flood-zone inspection report users in *Paul*. Unlike the third parties in those cases, Plaintiffs do not allege that they ever received or reviewed an audited financial statement prepared by Horne. Nor do Plaintiffs allege that they were foreseeable users of the audits. They were not parties to a specific transaction (like a home sale or mortgage, as in *Hosford* and *Paul*) for which the audited financial statements were specifically prepared. Instead, Plaintiffs merely claim that Horne's "duties extend to all reasonably foreseeable persons who

may be harmed by the auditor's negligence, fraud, or reckless disregard of their duties." Doc. 1-7 at ¶ 23. That is not an accurate statement of Mississippi law governing an auditor's duty. An auditor's duties extend to "*reasonably foreseeable users*" of the audit, users Horne should reasonably expect to "*receive and rely*" on the audit—not to anyone who may be harmed.

Despite Plaintiffs' attempts to blur the line between the foreseeability standard in an ordinary case and a case involving an auditor's professional undertaking, this distinction between the two standards is critical to "protect[ing] the auditor from an unlimited number of potential users." *Touche Ross*, 514 So. 2d at 322. Plaintiffs' alternative formulation of duty would swallow the *Touche Ross* rule whole. These Plaintiffs stand in no closer relation to Horne-audited financial statements than any other person who did business with EGT—all of whom were presumably harmed when EGT declared bankruptcy. So, if Horne owed a duty to these Plaintiffs, it likewise owed a duty to whoever sold EGT office supplies, whoever provided EGT janitorial services, whoever serviced EGT's computers and technical equipment, etc. That cannot possibly be; it makes a mockery of the limitation on liability intended by *Touche Ross*. Because Plaintiffs were members of the general public who did not actually or foreseeably review Horne's audits, Horne owed no duty to Plaintiffs.

Plaintiffs' use of the term "aiding and abetting fraud" does not impact the analysis. Like EGT's CEO, employees of the audited bank in *Touche Ross* had engaged in fraud. 514 So. 2d at 315–16, 318, 323. That had no bearing on the *Touche Ross* Court's definition of an auditor's duty. Regardless of whether they are framed as negligence, aiding and abetting fraud, or negligent misrepresentation, Plaintiffs' claims fail for the same reason: Horne owed a duty only to EGT and other foreseeable users of its audit, and Plaintiffs are simply too remote to fall within the scope of this duty.

B. MDAC statutes and regulations do not create a duty where none otherwise exists.

Perhaps sensing that Horne's professional undertaking for its client cannot create a duty that runs to the general public, Plaintiffs attempt a workaround. They contend that Horne had a duty to MDAC and allege that the failure to notify MDAC of EGT's problems—either by directly delivering audited financial statements to MDAC or by withdrawing as EGT's accountant—caused MDAC to continue licensing EGT, making EGT's wrongdoing possible. This workaround fails for two reasons:

First, the MDAC statutes and regulations regulate gain warehouses, not accountants. Plaintiffs simply misconstrue Mississippi Code Section 75-44-43 and the regulations promulgated by MDAC. Doc. 1-7 at ¶ 26. Section 75-44-43(2) states that "[e]very grain warehouse shall at least annually send to the commissioner a copy of its financial statement prepared by a[licensed] accountant." That law falls in a chapter that "shall apply to all grain warehouses and to the operations of such grain warehouses." *Id.* § 75-44-3. It does not apply to or govern accountants or auditors. Consistent with the scope of the chapter, Section 75-44-43 imposes a requirement *on the grain warehouse* as a condition of receiving a license: submitting a financial statement prepared by a licensed accountant. By its own terms, this requirement does not impose any duties or obligations on the licensed accountant. Indeed, it does not even require that the accountant knows that its financial statement is being submitted to MDAC.

Plaintiffs also point to a regulation requiring that "[e]ach application for license or renewal thereof shall be accompanied by a financial statement prepared by an independent public accountant and the grain warehouseman. The accountant, in addition to preparing the financial statement, must check and certify to the accuracy of the accounts receivable and listed inventories." 2 Code Miss. R. Pt. 1, Subpt. 2, Ch. 10; Doc. 1-7 at ¶ 26. Plaintiffs mistakenly

claim that this regulation imposes duties on an accountant "to submit sworn financial reports to MDAC." Doc. 1-7 at ¶ 26. Plaintiffs later read the regulation to require Horne to proactively "inform MDAC of the material weaknesses in EGT's internal inventory controls." *Id.* at ¶ 29. But Plaintiffs' reading disregards the regulation's clear and unambiguous language in their search for a duty which simply does not exist. The two sentences require each application—which is *submitted by the grain warehouse, not the accountant*— to include a financial statement and the accountant's certification of the accuracy of the accounts receivable and listed inventories. Contrary to Plaintiffs' strained reading, the regulation does not impose any freestanding duty on an accountant to submit anything to MDAC or otherwise independently contact MDAC.

Second, the MDAC statutes and regulations cannot, as a matter of law, create a duty enforceable by private citizens like these Plaintiffs. In other words, even if the MDAC statutes and regulations said what Plaintiffs claim that they say, it would make no difference; Plaintiffs still lack the authority to enforce those statutes and regulations. Mississippi courts have consistently declined to find a duty or cause of action in state laws and regulations unless the laws and regulations expressly create one. "A violation of one of [the State Board of Pharmacy's] internal regulations, which may serve as evidence of negligence, does not, however, create a separate cause of action. The regulations do not establish a legal duty of care to be applied in a civil action." *Moore ex rel. Moore v. Mem'l Hosp. of Gulfport*, 825 So. 2d 658, 665 (Miss. 2002); *see also Est. of Hazelton ex rel. Hester v. Cain*, 950 So. 2d 231, 235 (Miss. Ct. App. 2007) ("[W]e find no language in the nursing homes statutes or regulations to expressly create a legal duty for licensees or administrators."); *Howard v. Est. of Harper ex rel. Harper*, 947 So. 2d 854, 860 (Miss. 2006) (same); *Bolton v. Lee*, 2023 WL 140980, at *6 (Miss. Ct. App.

Jan. 10, 2023) (duties under Bank Secrecy Act and related regulations run only to the government).

Federal courts have construed *Moore* to permit regulations to create a legal duty or cause of action if they do so expressly. For example, in *Conley v. Nails*, the plaintiff was injured after slipping in a standing pool of water at a nail salon. No. 3:15-CV-186-NBB-SAA, 2016 WL 3922640, at *1 (N.D. Miss. July 15, 2016). She alleged in part that regulations promulgated by the Mississippi State Cosmetology Board imposed a duty on the nail salon to prevent slip and falls. *Id.* at *3. "[H]ere the substance of the Mississippi State Board of Cosmetology's internal regulations do not impose a legal duty to prevent slip and falls. . . . [T]here is no mention of a requirement to prevent water from leaking, spilling, flooding, pooling, etc. for the purpose of keeping an environment safe from injury in cosmetology businesses." *Id.* at *4.

Even if Horne owed a duty to MDAC, the statutes and regulations did not expressly extend that duty to members of the general public. It would be up to MDAC to enforce its own enabling legislation and the regulations it has promulgated. In other words, any claims for aiding and abetting fraud, negligent misrepresentation, or professional negligence lie with MDAC, not Plaintiffs or other members of the general public. The governing statutes and regulations do not expressly impose any duty on Horne or other accountants working for grain warehouses. Mississippi common law does not impose any duty on Horne to Plaintiffs. Absent any duty, Plaintiffs have failed to state a claim for relief.

II. Horne was not unjustly enriched at Plaintiffs' expense.

Plaintiffs have failed to state a claim for unjust enrichment (Count IV) because there was no promise, actual or implied in law, made by Horne to Plaintiffs. "Unjust enrichment is a modern designation for the doctrine of 'quasi-contracts.' The basis for an action for 'unjust

enrichment' lies in a promise, which is implied in law, that one will pay to the person entitled thereto which in equity and good conscience is his. This restitution-based remedy applies in situations where no legal contract exists, and the person charged is in possession of money or property which, in good conscience and justice, he or she should not be permitted to retain, causing him or her to remit what was received." *Bradley v. Kelley Bros. Contractors*, 117 So. 3d 331, 338 (Miss. Ct. App. 2013) (internal quotations and citations omitted). "[T]he implied promise is that one will pay to the person entitled thereto which in equity and good conscience is his." *Hughes v. Shipp*, 324 So. 3d 286, 293 (Miss. 2021) (internal quotations omitted).

Unjust enrichment generally exists in situations where "one party has mistakenly paid another party" or "where no legal contract exists, and the person charged is in possession of money or property which, in good conscience and justice, he or she should not be permitted to retain." *Willis v. Rehab Sols., PLLC*, 82 So. 3d 583, 588 (Miss. 2012). "Thus, the action is based on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. It is an obligation created by law in the absence of any agreement; therefore, it is an implied in law contract." *1704 21st Ave., Ltd. v. City of Gulfport*, 988 So. 2d 412, 416 (Miss. Ct. App. 2008) (internal quotations omitted).

The facts as alleged by Plaintiffs do not support an unjust enrichment claim. Horne had no dealings with Plaintiffs and made no promises to Plaintiffs. Plaintiffs, in turn, did not confer anything of value upon Horne. Horne contracted with EGT to perform audits and fulfilled its contractual obligations to EGT. Doc. 1-7 at ¶ 20. Plaintiffs do not, and cannot, suggest that they ever paid Horne or had any relationship whatsoever with Horne. They only allege direct dealings with EGT through the sale of grain to EGT in exchange for payment. Doc. 1-7 at ¶ 3–4, 10. Plaintiffs have therefore failed to demonstrate that Horne "is in possession of money . . . which,

in good conscience and justice, [it] should not be permitted to retain." EGT's failure to pay Plaintiffs for their grain is unrelated to EGT's transactions with Horne. In reality, Horne was shorted payment by EGT too. Far from being "enriched," Horne is an injured party like Plaintiffs. Thus, Plaintiffs have failed to state a claim for unjust enrichment.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims against Horne.

Dated: January 12, 2023

By: */s/ J. William Manuel*
J. William Manuel (MS Bar No. 9891)
Simon T. Bailey (MS Bar No. 103925)
BRADLEY ARANT BOULT CUMMINGS LLP
One Jackson Place
188 E Capitol Street, Ste 1000
Jackson, MS 39201
Phone: 601.948.8000
Fax: 601.948.3000
wmanuel@bradley.com
sbailey@bradley.com

Attorneys for Defendant
Horne LLP

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2023, a true and correct copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

I further certify that I have at the same time served by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

John W. ("Don") Barrett, Esq.
Katherine Barrett Riley, Esq.
Sterling Aldridge, Esq.
David McMullan, Jr., Esq.

BARRETT LAW GROUP, P.A.
P.O. Box 927
404 Court Square North
Lexington, Mississippi 39095
donbarrettpa@gmail.com
kbriley@barrettlawgroup.com
saldridge@barrettlawgroup.com
dmcmullan@barrettlawgroup.com

Bryant W. Clark, Esquire
BRYANT W. CLARK LAW, PLLC
Post Office Box 179
Lexington, Mississippi 39095
bryant@bryantclarklaw.com

Charlie M. Merkel, Jr., Esq.
Christopher W. Winter, Esq.
Merkel And Cocke
A Professional Association
30 Delta Avenue
Post Office Box 1388
Clarksdale, MS 38614
cmerkel@merkel-cocke.com
cwinter@merkel-cocke.com

Jonathan W. Cuneo, Esq.
Monica Miller, Esq.
Jennifer E. Kelly, Esq.
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue, NW, Suite 200
Washington, DC 20016
jonc@cuneolaw.com
monica@cuneolaw.com
jkelly@cuneolaw.com

Michael T. Lewis, Sr. Esq.
Pauline Shuler Lewis, Esq.
LEWIS AND LEWIS ATTORNEYS
PO Box 2430
Oxford, MS 38655

mike@lewisattomeys.com
pauline@lewisattomeys.com

Gerald M. Abdalla
ABDALLA LAW, PLLC
602 Steed Road, Suite 200
Ridgeland, Mississippi 39157
jerry@abdalla-law.com

E. Carlos Tanner, III
TANNER & ASSOCIATES, LLC
263 E. Pearl Street
Jackson, Mississippi 39201
Carlos.tanner@thetannerlawfirm.com

William N. Reed
Conner G. Whitten
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
One Eastover Center
100 Vision Drive, Suite 400 (ZIP 39211)
P. O. Box 14167
Jackson, Mississippi 39236
wreed@bakerdonelson.com
cwhitten@bakerdonelson.com

/s/ J. William Manuel
OF COUNSEL