

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

JIM HOOD, ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI, ex rel.
THE STATE OF MISSISSIPPI
v.

PLAINTIFF

CIVIL ACTION NO. 17-84

MANAGEMENT & TRAINING
CORPORATION; CHRISTOPHER
B. EPPS; CECIL MCCRORY and
DEFENDANTS DOES 1 through 5

DEFENDANTS

**MANAGEMENT & TRAINING CORPORATION'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Defendant Management & Training Corporation ("MTC") submits this memorandum in support of its Motion to Dismiss. As set forth below, multiple counts against MTC should be dismissed pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure.

I. INTRODUCTION

On February 8, 2017, the State of Mississippi initiated the present action against Defendants MTC, Christopher Epps, and Cecil McCrory. In the Complaint, the State makes serious and unfounded allegations against MTC. Specifically, the State alleges that MTC participated in a scheme with Epps and McCrory to defraud the State and obtain contracts to operate correctional facilities in Mississippi through bribery and fraud. MTC adamantly denies the State's allegations and intends to prove through the course of this action that it did not engage in any wrongdoing when entering into contracts with the Mississippi Department of Corrections and local correctional facility authorities. However, for purposes of this Motion to Dismiss, MTC must assume that the allegations against it are true (which they are not), and MTC will

establish below that many of the State's claims are subject to dismissal pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure.

In total, five of the State's claims against MTC should be dismissed at this early stage in the litigation. First, MTC cannot be held liable under Miss. Code Ann. § 25-4-105 as alleged in Count I of the Complaint because MTC is not and has never been a Mississippi public servant. Additionally, the State cannot maintain a claim against MTC under Mississippi's bidding requirements as asserted in Count IV because Miss. Code Ann. § 31-7-13 does not authorize a civil cause of action for its alleged violation. Count V should likewise be dismissed because the Mississippi Supreme Court has never recognized a cause of action for "aiding and abetting" a breach of a fiduciary duty, and Count VI should be dismissed because MTC is not a public official capable of violating a provision of the Mississippi state constitution. Finally, the State cannot maintain a claim against MTC for unjust enrichment, requiring the dismissal of Count IX.

For all of these reasons which are more fully explained below, the Court should dismiss the State's claims against MTC in Counts I, IV, V, VI, and IX of the Complaint.

II. BACKGROUND

Since 1987, Defendant Management and Training Corporation has been managing and operating correctional facilities throughout the United States. Today, MTC operates 25 facilities in 8 states and employs more than 5,000 corrections staff. MTC is a member of a small group of market participants who have the knowledge, experience, and manpower to operate large-scale correctional facilities.

In 2012, MTC learned that the Mississippi Department of Corrections ("MDOC") was terminating certain contracts with MTC's competitors who were operating privately-run correctional facilities in Mississippi. In response, MTC submitted various bid proposals and

pricing information to MDOC. Ultimately, MTC was awarded contracts for the operation of East Mississippi Correctional Facility, Marshall County Correctional Facility, and Walnut Grove Correctional Facility in 2012. Later, in 2013, MTC was awarded the contract to operate the Wilkinson County Correctional Facility. Although the Walnut Grove facility was subsequently closed due to budget constraints and a court-ordered consent decree (which was issued before MTC began operating the facility), MTC continues to operate the other three privately-managed correctional facilities in Mississippi.

When entering a new market, MTC routinely hires a political consultant who is well connected and familiar with the political and community landscape of the particular territory. Mississippi was no exception. After MTC had been awarded contracts in Mississippi in 2012, Christopher Epps recommended Cecil McCrory as a consultant for MTC. Following the advice of its new client, MTC entered into a consulting agreement with McCrory in June 2012 to help MTC navigate the Mississippi correctional market. MTC had no knowledge of McCrory and Epps' alleged arrangement. Nor was MTC aware that McCrory made various payments to Epps as alleged in the Complaint. Instead, MTC followed its established business model and has fully performed under its contracts with the State.

III. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure tests the legal sufficiency of a plaintiff's complaint. *Rose v. Tullos*, 994 So. 2d 734, 737 (Miss. 2008). To prevail on such a motion, the "allegations in the complaint must be taken as true, and there must be no set of facts that would allow the plaintiff to prevail." *Id.* (citation omitted). Importantly, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Penn Nat'l Gaming v. Ratliff*, 954 So.

2d 427, 431 (Miss. 2007). *See also Chalk v. Bertholf*, 980 So. 2d 290, 296 (Miss. Ct. App. 2007) (recognizing that conclusory allegations are insufficient to defeat a motion to dismiss). "Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Penn Nat'l Gaming*, 954 So. 2d at 431.

"When a complaint is tested via a motion under Rule 12(b)(6) . . . the sufficiency of the complaint is in substantial part determined by reference to Rule 8(a) and (e)." *Stanton & Assocs., Inc. v. Bryant Constr. Co.*, 464 So. 2d 499, 505 (Miss. 1985). Rule 8(a) of the Mississippi Rules of Civil Procedure mandates that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This rule is patterned after its federal counterpart, and the Mississippi Supreme Court turns to federal court interpretations of procedural rules when construing Mississippi's rules of civil procedure. *See Ratliff*, 954 So. 2d at 432; *White v. Stewman*, 932 So. 2d 27, 39 (Miss. 2006) (noting that "federal practice should be our guide when considering questions arising under the Mississippi Rules of Civil Procedure").

The U.S. Supreme Court clarified federal Rule 8's pleading standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In *Twombly*, the Court announced that, while Rule 8 does not require "detailed factual allegations," a "formulaic recitation of the elements of a cause of action" will be insufficient to survive a motion to dismiss. *Id.* A plaintiff's allegations must state a plausible claim, and "be enough to raise a right to relief above the speculative level." *See id.* at 557-58. Therefore, "when the allegations in a complaint, however true, could not raise an entitlement to relief, 'this basic deficiency should be exposed at the point of minimum expenditure of time and money'" by the court and the parties. *Id.* at 558 (citation omitted).

The Supreme Court revisited Rule 8's pleading standard in *Ashcroft v. Iqbal*, 129 S. Ct.

1937 (2009). To withstand a motion to dismiss, a complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949. Moreover, conclusions of law or "threadbare recitals of the elements of a cause of action" are not entitled to the presumption of truth. *Id.* at 1950. Accordingly, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint must be dismissed for failure to state a claim. *Id.*

When this standard is applied to the present action, it is clear that numerous counts asserted by the State cannot be maintained and should be dismissed as a matter of law.

IV. ARGUMENT.

The State asserts nine different counts against MTC in the Complaint. However, five of these counts fail to state a claim for which relief may be granted against MTC and should be dismissed pursuant to Rule 12(b)(6).

A. Count I - Violations of Miss. Code Ann. § 25-4-105

In Count I of the Complaint, the State seeks to hold MTC liable for alleged violations of Mississippi's Ethics in Government Laws. Count I should be dismissed because MTC is not a public servant and cannot, as a matter of law, violate § 25-4-105 of the Mississippi Code.

The State alleges that Epps, as a public servant, violated three different subsections of Miss. Code Ann. § 25-4-105. Complaint at ¶¶ 41-44. First, the State quotes § 25-4-105(1) and alleges that Epps used "his official position to obtain . . . pecuniary benefit for himself other than that compensation provided for by law" *Id.* at ¶ 43. The State further claims that Epps, "while a public servant," was "interested, directly or indirectly, . . . in [several] contract[s] with the [S]tate." *Id.* at ¶ 43 (alterations in original) (quoting Miss. Code Ann. § 25-4-105(2) (2016)). Finally, the State asserts that Epps violated § 25-4-105(3)(d) by receiving compensation while a

public servant to influence a decision of the Mississippi Department of Corrections. *Id.* at ¶ 44. Based on Epps' alleged violations of these statutory provisions, the State seeks to hold MTC liable for a governmental ethics violation.

Notwithstanding the State's allegations to the contrary, the State's Ethics in Government Laws specifically restrict conduct by public servants in this State. *See* Miss. Code Ann. § 25-4-105. Section 25-4-103(d) defines a "public servant" as "[a]ny elected or appointed official of the government" or "[a]ny officer, director, . . . chief, head, agent or employee of the government or any agency thereof." No reasonable interpretation of that statutory definition can include MTC, and the State does not allege otherwise. MTC simply cannot be held liable for violating a statute that limits its scope to the actions of public servants. The State's claims may survive against those Defendants who were public servants at the time of the alleged conduct, but, because MTC was not and is not a public servant, the State cannot recover against MTC under this statutory cause of action. For these reasons, the Court should dismiss Count I against MTC.

B. Count IV - Violations of Miss. Code Ann. §31-7-13

The Court should dismiss Count IV of the Complaint because Miss. Code Ann. § 31-7-13 does not authorize a civil cause of action against MTC for alleged violations of the State's bidding requirements.

In this count, the State contends that Defendants, including MTC, violated the bidding requirements for State purchases over \$50,000. Complaint ¶¶ 64-65. According to the Complaint, Defendants used "untrue and fabricated circumstances as justification for using wrongful 'no-bid' contracts" for the operation of Mississippi's privately-run correctional facilities. Complaint ¶ 64. The State further claims that the no-bid process caused it to overpay for MTC's services, and the State seeks "a return of all profits and reimbursement of all excess costs" from

Defendants. *Id.* at ¶ 65.

Notwithstanding the State's request, this statute does not create a civil cause of action against MTC for an alleged violation of its bidding requirements. The only provision addressing violations of this section is criminal in nature and cannot be used in a civil action. *See* Miss. Code Ann. § 31-7-55(o) (2016); *Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098 (Miss. 1987). This provision prohibits certain contracts that violate the statute, but it is limited in scope to instances where invoices have been split to circumvent the bidding requirements. There is simply no statutory provision creating a civil cause of action for violating the bidding requirements as alleged in the Complaint. Similarly, no statute or case law entitles the State to money damages against MTC for MDOC's alleged violation. The State cannot create a cause of action where none exists, and Count IV does not state a valid claim for relief against MTC. For this reason, Count IV should be dismissed as against MTC.

C. Count V - Aiding and Abetting Breach of Fiduciary Duty

Count V should be dismissed against MTC because the State cannot recover under a theory of "aiding and abetting" a breach of a fiduciary duty. In this count, the State alleges that Epps breached his fiduciary duty of care and loyalty to the State by accepting bribes from entities seeking public contracts. Complaint ¶¶ 68-70. The State contends that MTC had knowledge of Epps' fiduciary duties and aided and abetted his breach of fiduciary duties to the State. *See id.*

Even assuming these allegations are true, the Mississippi Supreme Court has not recognized the tort of aiding and abetting a breach of fiduciary duty. *Cf. Dale v. Ala. Acquisitions, Inc.*, 203 F. Supp. 2d 694 (S.D. Miss 2002). Accordingly, no state court in Mississippi has validated this alleged cause of action or defined the elements of any such tort. As a result, this cause of action should be dismissed, and the State should not be permitted to

proceed under a theory that does not exist under Mississippi law.

D. Count VI - Violation of the Mississippi Constitution: Article 4, § 109

Count VI of the Complaint should be dismissed because MTC is not a public official or a state actor, and therefore MTC cannot violate a provision of the Mississippi Constitution. In this Count, the State alleges that Epps breached Article 4, § 109, which states that "[n]o public officer . . . shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof." Miss. Const. art. IV, § 109. Although the Attorney General is authorized to bring actions for violations of §109, no claim for relief may be asserted against MTC under the constitutional provision cited by the State

The Mississippi Supreme Court has explained that § 109 is directed toward public officials who use their positions for personal gain: "It prohibits an individual having an interest in a contract when he as public officer served on the official body which enabled the contract to come into being. It is *that simple*." *Frazier v. State ex rel. Pittman*, 504 So. 2d 675, 694 (Miss. 1987). The provision may likewise be invoked when public officials are appointed to other agencies and boards as a result of their current positions.

This constitutional conflict of interest provision does not and cannot apply to MTC. It is that simple. The provision is limited to conduct of public officials, and MTC is not a public official (and the State has not alleged otherwise). As a result, Count VI of the Complaint should be dismissed against MTC.

E. Count IX: Unjust Enrichment -- Restitution

Plaintiff's final count should be dismissed against MTC because the State has no basis for recovering against MTC under a theory of unjust enrichment. An unjust enrichment action is based on a promise, which is implied in law, that one will pay a person what he is entitled

according to “equity and good conscience.” *1704 21st Avenue, Ltd. v. City of Gulfport*, 988 So. 2d 412, 416 (Miss. Ct. App. 2008). 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.” *Id.* It is an obligation created by law in the absence of any agreement; therefore, it is an implied in law contract. *Id.*

To recover under an unjust enrichment theory, a plaintiff "must show there is no legal contract, but the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another." *Ellis v. Anderson Tully Co.*, 727 So. 2d 716, 719 (Miss.1998). In this case, however, the State has alleged that MTC actually executed contracts with MDOC for the provision of services at four correctional facilities in Mississippi. The State does not allege that MTC failed to provide the services for which the State bargained. Nor does the State allege that MTC charged an unreasonable amount. Instead, the State claims that MTC was paid by the State "through the contracts described [in the Complaint]," and the State seeks to recover "disgorgement of all ill-gotten funds, gains and profits received by Defendants as a result of their actions." Complaint ¶¶ 84-85. Such allegations are insufficient as a matter of law to state a claim for the equitable remedy of unjust enrichment.

Furthermore, MTC is *still providing* services at three different correctional facilities in Mississippi. MTC was awarded contracts to provide services at correctional facilities in Mississippi, and MTC continues to provide such services today. The State cannot recover against MTC under any set of facts for "unjust enrichment," and Count IX against MTC should be dismissed.

IV. CONCLUSION

For all of the reasons set forth above, the Court should dismiss the State's claims against MTC in Counts I, IV, V, VI, and IX of the Complaint. MTC is not a public official or a state actor and therefore cannot be held liable for violating Mississippi's Ethics in Government Laws (Count I) or Mississippi Constitution (Count VI). Likewise, MTC cannot be held liable under Mississippi's bidding requirements (Count IV), which do not create a cause of action against MTC. Furthermore, the State cannot recover against MTC under a theory of aiding and abetting a breach of fiduciary duty (Count V) when no Mississippi state court has recognized a right of recovery under such a claim. Finally, the State cannot recover under a theory of unjust enrichment (Count IX) because written contracts exist and MTC has performed as obligated under its agreements with the State. Rule 12(b)(6) mandates the dismissal of these counts with prejudice.

This the 13th day of March, 2017.

Respectfully Submitted,

MANAGEMENT & TRAINING
CORPORATION.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the Court's MEC filing system, which will send notification of such filing to all counsel of record.

This, the 13th day of March, 2017.

/s/W. Davis Frye
W. DAVIS FRYE