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December 29, 2023

The Honorable Debra H. Gibbs, Presiding
Hinds County Circuit Court
Post Office Box 327
Jackson, MS 39205

Re: Favre v. White, Case No. 25CI1:23-cv-00095-DHG

Dear Judge Gibbs:

We represent Plaintiff Brett Favre in this defamation action against Defendant Shad White for falsely and maliciously accusing Favre of stealing and misusing welfare funds. I respectfully write to apprise the Court of several new developments that bear directly on White's pending motion to dismiss and alternative motion for summary judgement, both of which are *sub judice*. Dkt. 19 (Mar. 27, 2023). These new developments confirm that White's motions should be denied.

White's motion to dismiss was based on his claim that as State Auditor he is cloaked with an absolute privilege to defame private Mississippi citizens, including Favre. Favre opposed White's motion, showing that, under Mississippi law, superior executive officers do not possess an absolute privilege to defame and that, even assuming *arguendo* that they did, White's remarks are unprotected because they were made outside the scope of his official duties.¹ Dkt. 22 (Apr. 6, 2023). In opposing White's summary judgment motion, Favre showed that White had failed to satisfy his burden to make a prima facie showing under Rule 56(c), because the press releases and news articles that White had proffered to support his motion did not and could not foreclose factual disputes on actual malice and falsity, and Favre invoked the protection of Rule 56(f), which precludes summary judgment before discovery. Dkt. 22.

As to the motion to dismiss, it has now been (shockingly) disclosed that White has authored a book titled *Mississippi Swindle: Brett Favre and the Welfare Scandal That Shocked America*. According to a blurb advertising the book, which a publisher and distributor are marketing, the book, a "true crime drama," is a "riveting exposé" that details how White uncovered that "popular public figures, including Hall of Fame quarterback Brett Favre, lined their own pockets with tens of millions of dollars diverted from the federal government's

¹ As Favre noted in opposition to the motion, when White had raised this same defense in a previous defamation action brought by another Mississippi citizen, Judge Peterson rejected it. *See Thomas v. White*, No. 20 Civ. 806 (Miss. Cir. Cit. Sept. 2, 2022), Dkt. 17.

TANF—temporary assistance for needy families—program.” Steerforth Press is scheduled to publish the book on August 6, 2024; Penguin Random House is distributing it.²

White’s publication of this book—in which it is apparent he will continue his outrageous defamation campaign against Favre—provides even further confirmation that, when, as alleged in the complaint, White appeared on national and international media outlets to defame Favre, he was in no way acting within the scope of his official duties but instead to advance his personal political ambitions and, in the case of the book, make money. Far from acting within the scope of his duties, White shamefully seeks to personally profit from his official position by continuing to defame a private citizen.³

The non-privileged nature of White’s defamatory statements about Favre recently was further underscored by an amicus brief that White’s counsel, Mississippi Attorney General Lynn Fitch, co-filed in the U.S. Supreme Court case *O’Connor-Ratcliff v. Garnier*. There, Attorney General Fitch argued that “an official’s conduct should not be attributed to the State” for First Amendment purposes “unless that official acted pursuant to an identifiable source of government authority”:

[E]lected leaders campaign by publicizing their acts *in office*. They spend their time advertising, position taking, and credit claiming in the hope of retaining their positions. ... If the act of communicating one’s views to constituents is considered ‘governmental’ in some nebulous sense, it will be practically impossible to separate ‘government’ conduct from the official’s pursuit of reelection, which is solely a ‘private’ activity.⁴

² Steerforth Press Website, <https://steerforth.com/product/mississippi-swindle-9781586423865/> (Dec. 29, 2023); Penguin Random House Website, <https://www.penguinrandomhouse.com/books/748707/mississippi-swindle-by-shad-white/> (Dec. 29, 2023).

³ None of White’s defamatory statements could conceivably fall within the scope of his official duties as State Auditor. *See* Miss. Code Ann. § 7-7-211 (enumerating powers and duties, including a duty to “investigate” misappropriated public funds); *see also* 4 Miss. Admin. Code Pt. 1, R. 1.2 (describing State Auditor’s office); 4 Miss. Admin. Code Pt. 1, R. 1.3 (describing divisional responsibilities within State Auditor’s office).

⁴ *See* Br. of States as Amici Curiae, *O’Connor-Ratcliff v. Garnier*, No. 22-324 (U.S.), https://www.supremecourt.gov/DocketPDF/22/22-324/270248/20230630171535742_22-324%20tsac%20TN%20Final.pdf, at 9, 12. The Attorney General’s (White’s attorney’s) argument in the *O’Connor-Ratcliff* amicus brief cannot be distinguished on the ground that the state-action doctrine was at issue there. Both that doctrine and whether a public official retains an absolute privilege to defame private citizens turn on the same question—whether the public official acted within the scope of his or her official duties. *Compare* White Proposed Findings (Doc. 29) at 3–4, with *Kallinen v. Newman*, 616 F. Supp. 3d 645, 650–51 (S.D. Tex. 2022) (observing that the state-action inquiry considers whether the conduct amounted to “the officer’s performance of official duties”) (citation and punctuation omitted), *aff’d*, 2023 WL 2645555 (5th Cir. Mar. 27, 2023).

So, too, White was in no way acting in his official governmental capacity when, with no “identifiable source of governmental authority,” he made his defamatory statements about Favre, as alleged in the complaint, to promote himself or when he makes defamatory statements about Favre in his forthcoming book to make money.⁵

Recent events have also confirmed the impropriety of granting White’s premature motion for summary judgment. *See Favre Proposed Findings* (Doc. 30) at 11–15. It could not make sense to hold, in this case, that there are no factual disputes precluding summary judgment—based on articles in the popular press that White attached to his motion, and based on no discovery or evidence whatsoever—when, in the action brought by the Mississippi Department of Human Services (MDHS) against the Mississippi Community Education Center (MCEC) and Favre, among numerous others, discovery is still being taken, the evidence is still being developed, and no factual findings have been rendered. *See MDHS v. MCEC*, No. 25CI1:22-cv-00286. All the discovery taken in that matter to date—including Favre’s deposition, taken on December 11, 2023, and the deposition of the former President of the University of Southern Mississippi (“Southern Miss”), Dr. Rodney Bennett, taken on October 31, 2023—confirms that Favre had no knowledge that welfare funds were being misused or that MCEC’s funding was a sham, and that he committed no wrongdoing. Indeed, discovery taken in that matter confirms that numerous government agencies, lawyers, university administrators, and former Governor Phil Bryant were aware of and approved the funding at issue, which defeats the accusation that Favre, a layperson, could have known about any alleged improprieties.

As Dr. Bennett specifically confirmed at his deposition, to his knowledge, the funding at issue, the related leasing, and MCEC’s involvement complied with federal and state laws, was vetted by counsel, was reviewed and authorized by the Mississippi government (including MDHS itself and the Mississippi Attorney General’s Office), was reviewed and authorized by officials from Southern Miss and the Mississippi Institutions of Higher Learning, reflected nothing inappropriate, did not involve fraud, did not involve concealment, did not involve criminal conduct, and did not reflect any intention to rip off Mississippi citizens. *See Tr.* 141, 161, 168, 196, 211, 215, 216, 220, 234, 240, 241, 276. With respect to the individuals and entities involved in the transactions at issue, he repeatedly affirmed: “It was the intent to comply with the law.” *Tr.* 197–200; *see also Tr.* 291, 293 (confirming, about Favre, that there was nothing inappropriate about his fundraising efforts); *Tr.* 308 (adding: “He and his wife have contributed significantly to philanthropic causes across the State of Mississippi He loves the

⁵ As Favre showed in his opposition, this Court need not reach whether White’s remarks fall within the scope of his official duties, as the Mississippi Supreme Court has expressly held that an absolute privilege to make defamatory statements extends only to legislative, judicial, and military proceedings. Accordingly, White’s case, *Barr v. Matteo*, 360 U.S. 564 (1959) does not apply in Mississippi, and unless and until the Mississippi Supreme Court decides that it does, this Court must follow the Mississippi Supreme Court’s existing express holding, as did Judge Peterson in *Thomas v. White*. *See Cromwell v. Williams*, 333 So. 3d 877, 883 (Miss. Ct. App. 2022). *See Favre Proposed Findings* (Doc. 30) at 4–7.

University of Southern Mississippi, I believe. And I think that—I think his story is such an inspirational story for young people from all walks of life.”).⁶

Such evidence proves not only that White’s defamatory statements were false but also that White knew or was reckless in not knowing that his statements were false—that is, that White made the statements with actual malice. Plainly, the parties in this case must be afforded the opportunity to develop and submit such evidence *before* a summary judgment motion is entertained. Magazine articles attached to a motion are no substitute for discovery. White’s procedurally preposterous motion is unsupported by any actual evidence, and the *MDHS v. MCEC* litigation reveals the evidence that White’s motion would prevent from seeing the light of day in this action.

Respectfully,

/s/ Daniel R. Benson

Daniel R. Benson

cc: All Counsel of Record

⁶ If the Court deems it necessary, Favre’s counsel is prepared to provide the Court with this deposition transcript upon the Court’s request, as the transcript is no longer subject to the *MDHS v. MCEC* protective order.