

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ISLAND FARMS, LLC, ET AL.

PLAINTIFFS

V.

NO. 3:21-CV-721-HTW-LGI

UMB BANK, N.A.

DEFENDANT

**MEMORANDUM BRIEF IN SUPPORT OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Plaintiffs Island Farms, LLC, Porter Planting Company Partnership and Wyatt Farms Partnership (“Plaintiffs”) are creditors of non-party Express Grain Terminals, LLC (“Express Grain”). Plaintiffs allege that they delivered grain to Express Grain with the expectation that Express Grain would pay them, but Express Grain failed to pay and then filed for bankruptcy.¹

Plaintiffs have sued the wrong party. To attempt to remedy Express Grain’s non-payment, they have asserted claims against UMB Bank, N.A. (“UMB”)—a fellow creditor of Express Grain and its affiliates. Plaintiffs cannot state a plausible claim against UMB for at least four fundamental reasons: (1) Mississippi law does not impose a duty on UMB in this context, which would be necessary for Plaintiffs to state a claim for fraud; (2) Mississippi law bars non-customers from asserting common law negligence claims against a bank; (3) Mississippi courts do not recognize aiding and abetting claims; and (4) Plaintiffs admit they transferred title to and delivered the grain at issue to Express Grain, not UMB, and that they expected payment from Express Grain, not UMB. Plaintiffs’ claims, if any, lie with the Express Grain bankruptcy estate. Accordingly, this action should be dismissed with prejudice under Fed. R. Civ. P. 12(b)(6).

¹ Express Grain filed a voluntary Chapter 11 petition on September 29, 2021. *See* Case No. 21-11832-SDM pending in the United States Bankruptcy Court for the Northern District of Mississippi. Affiliated companies Express Biodiesel, LLC and Express Processing, LLC also filed voluntary Chapter 11 petitions the same date. All three cases are being jointly administered in the Express Grain case (*i.e.* the “lead” case). *See* Doc. 1158, Case No. 21-11832-SDM (Bankr. N.D. Miss., filed Nov. 18, 2021).

Dismissal does not leave Plaintiffs without recourse. As Plaintiffs' own pleading admits, there is a pending bankruptcy case involving Express Grain and its affiliates in the Northern District of Mississippi. In that proceeding, Plaintiffs can assert (and have asserted) their rights as purported creditors of Express Grain and the bankruptcy court will resolve the claims of all creditors. In fact, the bankruptcy court has already outlined a schedule and expedited procedure for addressing parties' rights, interests, and ownership claims to grain held by the debtors, as well as the proceeds to such grain.² Those issues are set for a final determination hearing beginning on March 4, 2022.³ This civil action and the common law claims asserted against UMB are not the proper means for Plaintiffs to raise their disputes.

I. SUMMARY OF ALLEGATIONS

UMB disputes many of Plaintiffs' allegations, including their inaccurate contention that UMB "laid a trap" to "steal" grain, Doc. 15 ¶ 48, and it made loans with "actual knowledge of the insolvency of Express Grain." Doc. 15 ¶ 29. Those allegations are untrue. For purposes of this motion, however, the Court does not need to resolve any factual disputes. The below facts alleged by Plaintiffs illustrate that they cannot prevail on their claims against UMB as a matter of law.⁴

A. PLAINTIFFS ARE CREDITORS OF EXPRESS GRAIN.

Express Grain operates a large grain elevator business serving farmers in the Mississippi Delta, purchasing grain from farmers and then selling it on the open market. Doc. 15 ¶ 15.

² See Order Establishing Procedures for Determination of Rights, Ownership Interests, Liens, Security Interests and All Other Interests in and to Grain and Proceeds of Grain, Doc. 1070, *In re Express Grain, LLC*, Case No. 21-11832 (Bankr. N.D. Miss., filed Nov. 8, 2021). UMB reserves the right to seek a stay of this action based on the bankruptcy proceedings.

³ See Amended Section 557 Procedures – Phase 2 Scheduling Order, Doc. 1800, *In re Express Grain, LLC*, Case No. 21-11832 (Bankr. N.D. Miss., filed Jan. 31, 2022).

⁴ UMB reserves the right to dispute these allegations even though the Rule 12(b)(6) standard requires the Court to assume the truth of Plaintiffs' allegations at this stage. See Section II *infra*.

Plaintiffs are farmers that delivered grain to Express Grain during the fall harvest in anticipation of prompt payment from Express Grain. Doc. 15 ¶¶ 1-2, 11-13, 16.

“From at least 2018 (if not earlier) and continuing through 2021, Express Grain was in financial distress.” Doc. 15 ¶ 33. Plaintiffs complain that Express Grain made representations touting its financial condition and ability to pay, and Plaintiffs relied on those representations by delivering crops to Express Grain rather than a different grain elevator. Doc. 15 ¶¶ 19, 21, 39, 54-62. Express Grain failed to pay Plaintiffs. Doc. 15 ¶ 67. Then, on or about September 29, 2021, Express Grain filed for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Mississippi. Doc. 15 ¶ 71.

B. UMB IS ALSO A CREDITOR OF EXPRESS GRAIN.

UMB is Express Grain’s “principal creditor,” pursuant to loan agreements dating back to 2015. Doc. 15 ¶ 23. As of September 2021, the total balance of UMB’s loans was approximately \$70 million. Doc. 15 ¶ 24. Express Grain pledged virtually all of its assets, including property acquired by Express Grain after signing the loan documents, as collateral for the loans from UMB. Doc. 15 ¶ 27. The collateral included grain delivered to Express Grain. Doc. 15 ¶ 28. After Plaintiffs delivered grain to Express Grain, UMB notified Express Grain that it was accelerating its loans to Express Grain, and declaring all amounts immediately due and payable. Doc. 15 ¶ 68.

Plaintiffs do not allege that UMB took physical possession of the grain that they delivered to Express Grain. Instead, they ambiguously plead that UMB “effectively seized the grain.” Doc. 15 ¶ 4. This conclusion is based on Plaintiffs’ allegation that UMB’s collateral increased in value through Plaintiffs’ deliveries to Express Grain. Doc. 15 ¶ 5. According to Plaintiffs, UMB had the right to foreclose on this collateral, Doc. 15 ¶ 66, but there is no allegation that UMB ever foreclosed.

C. PLAINTIFFS' ALLEGATIONS AS TO UMB'S PURPORTED INVOLVEMENT IN EXPRESS GRAIN'S NON-PAYMENT.

Plaintiffs allege that UMB “propped up Express Grain just enough to allow it to survive into harvest season,” which led to Plaintiffs delivering grain to Express Grain. Doc. 15 ¶¶ 1-3. They also conclude that UMB “took advantage of Express Grain’s misrepresentations and omissions concerning its financial stability” and postponed calling the loans to allow Express Grain to acquire more grain during the fall harvest, over which UMB would claim a lien. Doc. 15 ¶ 5. Finally, Plaintiffs allege that the Mississippi Department of Agriculture and Commerce (“MDAC”) contacted UMB in December 2020, after “MDAC received a complaint from a farmer who had not been paid by Express Grain,” and UMB told MDAC that “Express Grain’s loans were simply being refinanced as a matter of ordinary business and that everything at Express Grain was just fine.” Doc. 15 ¶¶ 38-39. Plaintiffs claim those statements were false. Doc. 15 ¶ 38.

II. MOTION TO DISMISS STANDARD

The United States Supreme Court has adopted a two-step approach for deciding motions to dismiss under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). First, the Court is to identify and ignore conclusions, including those disguised as factual allegations; such conclusions are not entitled to the assumption of truth. *Id.* at 678. If a claim rests on merely “labels and conclusions,” it should be dismissed since “a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Second, based only on the well-pled factual allegations, the Court is to determine whether the allegations plausibly entitle the claimant to relief. *Id.* In *Twombly*, the Supreme Court emphasized two reasons for the plausibility requirement at the pleading stage: (1) to put the defendant on notice of alleged misconduct for purposes of crafting a defense and (2) to avoid expensive discovery when a claim is groundless. *See id.* at 555, 558-59; *see also Clark v. Thompson*, 850 F. App’x 203, 212 (5th Cir.

2021) (“The Supreme Court has ‘explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’”) (internal citations omitted).

III. ARGUMENT

Each count in the Plaintiffs’ Amended Complaint fails as a matter of law, as summarized below:

- Count I: Plaintiffs cannot maintain a claim for fraud because UMB did not have a fiduciary relationship with MDAC (the only entity that allegedly heard the purported statements) and Plaintiffs do not allege that MDAC relayed those statements to them. Also, those statements, even if they did occur, are opinions that Mississippi courts have routinely held cannot give rise to fraud.
- Count II: Plaintiffs cannot maintain a claim for civil conspiracy to commit fraud because the underlying fraud claims fail as a matter of law.
- Count III: Plaintiffs cannot maintain a claim for “aiding and abetting fraud” against UMB because no such claim exists under Mississippi law.
- Counts IV-V: Plaintiffs’ claims for negligence and negligent misrepresentation fail because, as a matter of Mississippi law, noncustomers cannot assert such claims against a bank.
- Counts VI–VII: Plaintiffs’ claims for unjust enrichment and constructive trust also fail because Plaintiffs transferred the grain at issue to Express Grain, not UMB, with an expectation of being paid by Express Grain, not UMB.

A. PLAINTIFFS CANNOT STATE A CLAIM FOR FRAUD AGAINST UMB.

Count I of the Amended Complaint seeks to assert a claim against UMB for fraud. Doc. 15 ¶¶ 84-92. Specifically, Plaintiffs allege two theories of fraud: First, that UMB omitted or concealed information it had a duty to disclose *to MDAC*. Second, that UMB made false representations *to MDAC* that “everything at Express Grain was just fine” and Express Grain’s refinancing was “as a matter of ordinary business,” which MDAC relied on in not revoking Express Grain’s license. Doc. 15 ¶¶ 38-39, 84-92. Plaintiffs also allege that they delivered grain to Express Grain based on *Express Grain’s statements* to Plaintiffs regarding its financial stability, and relied on Express Grain’s continued licensure by MDAC when delivering grain to Express Grain. Doc. 15 ¶¶ 62, 84-92.

Plaintiffs never allege that UMB misrepresented anything *to Plaintiffs*. In fact, Plaintiffs do not allege they had any contact whatsoever with UMB. Instead, to try to manufacture a fraud claim, Plaintiffs want to use a third-party recipient of information—MDAC—as a surrogate for Plaintiffs—who never heard the purported statements and provide no context for them. This is improper under Mississippi law. Plaintiffs cannot state a claim for fraudulent concealment or fraudulent misrepresentation based on the nature of the alleged statements and Plaintiffs’ remote connection to any such statements.

1. The Fraudulent Concealment Theory Fails As A Matter Of Law.

Under Mississippi law, UMB did not have a fiduciary relationship with MDAC. This is fatal to Plaintiffs’ fraudulent concealment claim.

“In Mississippi, a claim of fraud by omission arises only where the defendant had a duty to disclose material facts purportedly omitted.” *Taylor v. S. Farm Bureau Cas. Co.*, 954 So. 2d 1045, 1049 (¶ 12) (Miss. Ct. App. 2007) (citing *Langston v. Bigelow*, 820 So. 2d 752, 756 (¶ 9)

(Miss. Ct. App. 2002)). This duty to disclose “arises only where there is a fiduciary relationship between the parties.” *Id.* (citing *Langston*, 820 So. 2d at 756 (¶ 9)); *see also Frye v. Am. Gen. Fin., Inc.*, 307 F. Supp. 2d 836, 842 (S.D. Miss. 2004) (“[S]ince silence, in the absence of a duty to speak, is not actionable, plaintiffs’ claims for misrepresentation by omission are dependent on the existence of a duty of disclosure, which would arise if a fiduciary relationship existed.” (internal citations omitted)).

It appears that no Mississippi court has considered the question of whether a bank owes a fiduciary duty, or a duty to disclose, to a government department or state agency in this context.⁵ Useful though, is a Nebraska court’s consideration of this issue. *See Schwan v. CNH Am. LLC*, No. 4:04CV3384, 2006 WL 1215395, at *30-31 (D. Neb. May 4, 2006). Its findings are helpful and persuasive because the Nebraska court premised its analysis on the Restatement (Second) of Torts, which Mississippi courts also follow.⁶ *Id.*

As here, in *Schwan*, plaintiffs alleged that the defendants “concealed or suppressed material facts that they had a duty to disclose to certain government agencies for the benefit of the public[.]” *Id.* at *30–31. In particular, plaintiffs alleged that the defendants intentionally failed to notify the plaintiffs or government of a certain report, and that plaintiffs detrimentally relied on the absence of that information. *Id.* at *31. The court noted that failure to supply information to a government

⁵ In other contexts, such as products liability, Mississippi law does not permit fraudulent concealment claims based on silence or failure to disclose, and has dismissed such claims as a matter of law. *See Harris v. Brush Engineered Materials, Inc.*, 2005 WL 3806048 at *2 (S.D. Miss. Feb. 18, 2005) (“[I]n Mississippi, mere silence or nondisclosure of material facts by a manufacturer does not support a finding of fraudulent concealment brought by the ultimate consumer.”); *Jowers v. BOC Grp., Inc.*, No. 1:08-CV-0036, 2009 WL 995613, at *7 (S.D. Miss. Apr. 14, 2009), *aff’d in part, vacated in part, remanded sub nom. Jowers v. Lincoln Elec. Co.*, 617 F.3d 346 (5th Cir. 2010) (“Unless and until a Mississippi court states that Mississippi law allows for an omissions-based fraud claim [in the manufacturing context] this Court must conclude that conscious misrepresentation claims based on omissions or half-truths will fail as a matter of law.”).

⁶ *Henley v. Biloxi H.M.A., LLC*, 489 F. Supp. 3d 580, 589 (S.D. Miss. 2020) (When considering whether there is a duty to disclose, “the Mississippi Supreme Court has adopted the Restatement (Second) of Torts[.]”).

agency could give rise to such a claim if the defendant was required to disclose by statute, but explained that the plaintiffs cited no authority for the proposition that the failure to disclose information to a government agency could “provide the basis for a private right of action for fraudulent concealment.” *Id.* The court dismissed the fraudulent concealment claim with prejudice. *Id.*

The same reasoning should apply here. As a matter of law, Plaintiffs’ fraudulent concealment claim must fail because UMB did not have a fiduciary duty to MDAC, and no duty was created by virtue of responding to MDAC’s questions regarding Express Grain.⁷ Plaintiffs do not allege that any Mississippi law or statute created such duty, and a claim for a failure to disclose information to a government agency without such duty cannot “provide the basis for a private right of action for fraudulent concealment.” *Id.* Accordingly, Plaintiffs’ claim for fraudulent concealment should be dismissed with prejudice.

2. The Fraudulent Misrepresentation Theory Fails As A Matter Of Law.

Plaintiffs’ fraud claim also fails because (1) Plaintiffs cannot establish justifiable reliance on UMB’s statements to MDAC that everything “was just fine” and Express Grain’s loans were

⁷ Under Mississippi law, UMB did not have a fiduciary duty to Express Grain, further demonstrating that such a heightened duty cannot apply to non-customers. “An arms length business transaction involving a normal debtor-creditor relationship does not establish a fiduciary relationship.” *Burgess v. Bankplus*, 830 So. 2d 1223, 1228 (Miss. 2002) (finding as a matter of law that no fiduciary duty existed between the parties where the only evidence of such relationship was that the debtors had known the bank branch president for more than twenty years (citing *Hopewell Enters., Inc. v. Trustmark Nat’l Bank*, 680 So. 2d 812, 816 (Miss. 1996)). The Mississippi Supreme Court “has repeatedly held that the power to foreclose on a security interest does not, without more, create a fiduciary relationship.” *Gen. Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 270 (1999) (“the general rule is that there is no presumption of a fiduciary relationship between a debtor and creditor.”).

being refinanced “as a matter of ordinary business,” and (2) such statements, even if they did occur, were non-actionable opinions.

In Mississippi, to prove a fraudulent misrepresentation, “a plaintiff must prove, by clear and convincing evidence, the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of the truth; (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.” *Holland v. Peoples Bank & Tr. Co.*, 3 So.3d 94, 100 (Miss. 2008) (citing *Bank of Shaw v. Posey*, 573 So. 2d 1355, 1362 (Miss. 1990)); *see also Prism Mktg. Co. v. Casino Factory Shoppes, LLC*, No. 2:08CV163-SA-SAA, 2009 WL 5030702, at *1 (N.D. Miss. Dec. 15, 2009). To survive a motion to dismiss, “allegations of fraud [must] be pled with particularity, e.g., in addition to alleging each of the elements of fraud, plaintiffs must also allege the circumstances constituting fraud with specificity.” *See Terry v. N L Indus., Inc.*, CIV A No. 4:04CV269-P-B, 2007 WL 1484742, at *1 (N.D. Miss. May 17, 2007) (internal citations omitted); *see also id.* at *2 n.1 (dismissing fraud claim where plaintiffs failed “to cite any pertinent legal authority endorsing reliance by a third party nonplaintiff as an acceptable substitute for reasonable reliance by plaintiffs.”).

In *Schwan*, the plaintiffs were not recipients of the alleged misrepresentations; instead, the plaintiffs alleged that the defendants “intended [the plaintiffs] to rely on the[] false representations” made to a government agency. 2006 WL 1215395, at *29–31. In dismissing this argument, the court observed that:

Although the plaintiffs have included a *pro forma* allegation that the defendants ‘intended [the plaintiffs] to rely on these false material misrepresentations,’ . . . one can only assume that the alleged misrepresentation in 1990 was intended to mislead the [government agency], not the plaintiffs.

Id. at *29. The court concluded that there was “no liability to the plaintiffs for a misrepresentation that was made to a third party *unless they intended or had reason to expect that its terms would be repeated or its substance communicated to the plaintiffs.*” *Id.* (citing Restatement (Second) of Torts § 533) (emphasis added) (internal citations omitted).

Here, there is no allegation that UMB intended, or had reason to expect, that its statements to MDAC (even if they did occur) would be repeated or communicated to Plaintiffs. Rather, Plaintiffs argue that they relied on MDAC’s continued licensure of Express Grain when selecting a grain elevator. This allegation is insufficient. Plaintiffs do not allege that MDAC repeated or otherwise communicated the alleged statements to them *before* Plaintiffs delivered grain to Express Grain (or even communicated them after delivery). Plaintiffs also do not allege that MDAC relied solely, or materially, on the alleged statements in maintaining Express Grain’s license.⁸ The lack of reliance is no surprise given, as alleged by Plaintiffs, the MDAC’s inquiry to UMB was prompted by a single complaint of non-payment. The Court should follow *Terry* and “decline[] to forge new law” where (1) Plaintiffs attempt to prove “reliance by a third party nonplaintiff as an acceptable substitute for reasonable reliance by plaintiffs,” 2007 WL 1484742, at *2 n.1, *and* (2) Plaintiff cannot even allege reliance by that third party.

Further, Plaintiffs’ fraudulent misrepresentation claim fails because the alleged statements—“everything . . . was just fine” and that Express Grain was refinancing “as a matter of ordinary business”—are vague, non-actionable statements of opinion. “Under Mississippi law the mere expression of an opinion is not actionable.” *Thompson v. Nationwide Mut. Ins. Co.*, 971 F.

⁸ Plaintiffs’ claim that MDAC would have revoked Express Grain’s license if the alleged misstatements had not been made is a legal conclusion that need not be accepted as true for purposes of a motion to dismiss. However, even if it were taken as true, Plaintiffs’ claims would still fail as a matter of law because the statements were vague, non-actionable expressions of opinion. Moreover, Plaintiffs allege that the purported inquiry was sparked by a single farmer’s non-payment, so it unreasonable to assume that MDAC relied solely on any statements about this issue when deciding the fate of Express Grain’s license.

Supp. 242, 243 (N.D. Miss. 1997) (citing *White v. Hancock Bank*, 477 So. 2d 265, 270 (Miss. 1985)); *In re Huffman*, 505 B.R. 726, 766 (Bankr. S.D. Miss. 2014) (“A misrepresentation must be a statement of fact; statements of opinions are not actionable.”).

In *Thompson*, the court considered a claim of fraudulent misrepresentation based on a statement that policy coverage “would adequately protect [defendant’s] family in the event of a catastrophe.” 971 F. Supp. at 243. The court dismissed the claim for fraudulent misrepresentation based on this statement and explained:

The words attributed to [defendant] are vague and imprecise (What is “adequate protection?” How does one define a “catastrophe?”). Obviously, [defendant’s] statement is in the nature of an opinion, not one of fact. Under Mississippi law the mere expression of an opinion is not actionable. *White v. Hancock Bank*, 477 So. 2d 265, 270 (Miss. 1985).

Thompson, 971 F. Supp. at 243. The purported statements here that everything “was just fine” and that refinancing was occurring “as a matter of ordinary business” are even vaguer than the assurance of “adequate protection” in *Thompson*. Where a statement is “susceptible to many interpretations, including innocent ones,” it is not actionable. *See Ind. Elec. Workers’ Pension Tr. Fund IBEW v. Shaw Grp., Inc.*, 537 F.3d 527, 538 (5th Cir. 2008) (citing *In re Integrated Elec. Servs., Inc.*, No. Civ.A 4:04–CV–3342, 2006 WL 54021, at *4 (S.D. Tex. Jan. 10, 2006) (unpublished) (holding that comment by corporate manager to employee was too ambiguous to support strong inference of scienter), *aff’d*, *Cent. Laborers*, 497 F.3d 546 (5th Cir. 2007)). The statements by UMB to MDAC, even if they did occur as alleged, were vague statements of opinion, and their expression cannot sustain a claim for fraudulent misrepresentation under Mississippi law.

Plaintiffs fail to state a claim under either theory of fraud, and the Court should dismiss Count I with prejudice.

B. PLAINTIFFS CANNOT STATE A CLAIM FOR CONSPIRACY TO COMMIT FRAUD AGAINST UMB.

Count II of the Amended Complaint seeks to assert a claim against UMB for civil conspiracy to commit fraud. Doc. 15 ¶¶ 93-108. As explained above, Plaintiffs fail to state a claim of fraud against UMB. Thus, Count II also fails because in Mississippi, “a civil conspiracy claim cannot stand alone, but must be based on an underlying tort.” *Aiken v. Rimkus Consulting Grp., Inc.*, 333 Fed. App’x 806, 812 (5th Cir. 2008) (per curiam) (citing *Wells v. Shelter Gen. Ins. Co.*, 217 F. Supp. 2d 744, 755 (S.D. Miss. 2002) (applying Mississippi law; collecting cases)); *M St. Invs., Inc. v. Zurich Am. Ins. Co.*, No. 3:13-CV-878 DCB MTP, 2014 WL 1326105, at *3 (S.D. Miss. Mar. 28, 2014) (“If the plaintiff fails to state a claim for fraud underlying its civil conspiracy claim, the civil conspiracy claim must also be dismissed.”).

In addition, Plaintiffs have not pled facts sufficient to allege the other elements of their conspiracy claim with the requisite particularity. *See M St. Invs., Inc.*, 2014 WL 1326105, at *3 (holding that the particularity standard of Rule 9(b) “applies to pleading a state law claim of conspiracy to commit fraud.”). Mississippi law provides that “[a] conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully.” *Levens v. Campbell*, 733 So. 2d 753, 761 (Miss. 1999) (internal citations omitted). “To establish a civil conspiracy, the plaintiff must prove (1) an agreement between two or more persons, (2) to accomplish an unlawful purpose or a lawful purpose unlawfully, (3) an overt act in furtherance of the conspiracy, (4) and damages to the plaintiff as a proximate result.” *Bradley v. Kelley Bros. Contractors, Inc.*, 117 So. 3d 331, 339 (Miss. Ct. App. 2013) (internal citations omitted).

Here, Plaintiffs conclude that UMB and Express Grain had an agreement to act in concert against them, but do not pled any facts supporting that conclusion. UMB had an arms-length, creditor relationship with Express Grain, and there are no facts put forth supporting any agreement

between those parties that pertains to any unlawful objective. Also, the statements purportedly made by UMB to MDAC do not mention Plaintiffs, nor do they evidence an underlying agreement with respect to Plaintiffs. Plaintiffs have *not* pled facts to support the essential element of an agreement to act in concert to accomplish an unlawful purpose or a lawful purpose unlawfully.

Furthermore, Plaintiffs have not alleged any overt acts in furtherance of a conspiracy. As explained above, the statements UMB purportedly made to MDAC, prompted by MDAC learning of a single complaint of non-payment, are not actionable, but are rather vague expressions of opinion. Even if such statements could constitute the requisite “act” for a civil conspiracy claim, Plaintiffs allege no facts to demonstrate how this furthered a purported conspiracy. The alleged statements do not support the existence of an unlawful agreement, nor the overt act required. Count II should be dismissed with prejudice because Plaintiffs failed to plead an underlying fraud and other elements of the conspiracy claim with particularity.

C. PLAINTIFFS CANNOT STATE A CLAIM FOR AIDING AND ABETTING FRAUD AGAINST UMB BECAUSE NO SUCH CLAIM EXISTS UNDER MISSISSIPPI LAW.

Count III of the Amended Complaint seeks to assert a claim against UMB for “aiding and abetting fraud.” Doc. 15 ¶¶ 109-121. Aiding and abetting claims are outlined in section 876 of the Second Restatement of Torts. *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011). Plaintiffs seek to assert a claim under section 876(b) by alleging “substantial assistance and/or encouragement to Express Grain to engage in tortious conduct” and knowledge of Express Grain’s tortious conduct. Doc. 15 ¶¶ 106-07. This claim fails as a matter of law because there is no such cause of action under Mississippi law.

The Fifth Circuit prohibits district courts sitting in diversity from recognizing causes of action “not yet recognized by the state courts.” *In re DePuy Orthopaedics, Inc., Pinnacle Hip*

Implant Prod. Liab. Litig., 888 F.3d 753, 781 (5th Cir. 2018) (holding defendant was entitled to judgment as a matter of law “on plaintiffs’ aiding-and-abetting claim because no such claim exists in Texas”). Thus, the question for the Court with regard to Count III is whether Mississippi state courts have recognized a cause of action for aiding and abetting fraud. The answer is that “[n]o Mississippi court has recognized a claim for civil aiding and abetting, whether under § 876(b) or § 876(c).” *Evans*, 467 B.R. at 469; accord *In re On-Site Fuel Serv., Inc.*, No. 18-04196-NPO, 2020 WL 3712868, at *27 (Bankr. S.D. Miss. May 8, 2020) (dismissing a section 876(b) aiding and abetting claim, pursuant to *DePuy*, because Mississippi courts have not directly recognized such a claim).⁹ As “no such claim exists in Mississippi,” the Court should dismiss Count III with prejudice. *On-Site*, 2020 WL 3712868, at *27.

D. PLAINTIFFS CANNOT STATE A CLAIM FOR NEGLIGENCE AGAINST UMB.

Count IV of the Amended Complaint seeks to assert a claim against UMB for “negligence, gross negligence, and recklessness.” Doc. 15 ¶¶ 122-33. Count IV fails to state a claim because a non-customer cannot, as a matter of Mississippi law, assert a claim of common law negligence against a bank, and non-customers cannot escape that limitation by relying on a bank’s alleged interactions with a non-party state agency.

The Fifth Circuit has expressly affirmed the finding that non-customers like Plaintiffs cannot, as a matter of Mississippi law, assert a claim of common law negligence against a bank. In *Midwest Feeders Inc. v. Bank of Franklin*, 886 F.3d 507 (5th Cir. 2018), the court considered a

⁹ In *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694 (S.D. Miss. 2002), this Court noted “the Mississippi Supreme Court has not expressly recognized the tort of aiding and abetting fraud,” but presumed that Mississippi courts would recognize such a claim. 203 F. Supp. 2d at 700-01. Such a presumption as to whether Mississippi courts *might recognize an aiding and abetting claim if presented with one in the future* is no longer sufficient. *DePuy*, 888 F.3d at 781 (“*Erie* authorizes us to wager a guess about how the state court might fill the interstices of existing doctrinal frame-works; inventing a new framework *ex nihilo* is another matter entirely.”).

non-customer’s allegations of negligence against a bank, arising from a bank customer’s alleged fraud. 886 F.3d at 515-19. The court first explained that: “Mississippi requires that the plaintiff establish ‘the traditional elements of negligence: duty or standard of care, breach of that duty or standard, proximate causation, and damages or injury.’” 886 F.3d at 515 (citing *Lyle v. Mladinich*, 584 So. 2d 397, 398-99 (Miss. 1991)). “Whether a duty exists is a question of law.” *Lyle*, 584 So. 2d at 400. As specifically applied to the question of whether a bank owed a duty to plaintiff, who was not the bank’s customers, the court predicted that the Mississippi Supreme Court would not “impose upon [the defendant bank] a duty of reasonable care to [plaintiff], a non-customer.” *Midwest Feeders*, 886 F.3d at 519. Thus, as a matter of law, Plaintiffs cannot state a claim for negligence or recklessness against UMB; Mississippi law provides that UMB did not and does not owe the requisite duty to Plaintiffs.¹⁰

Further, Plaintiffs cannot state a negligence claim based on any interactions between UMB and the non-party MDAC. Plaintiffs failed to plead facts supporting the contention that MDAC served as their de facto agent, or that UMB otherwise had a duty to MDAC. Doc. 15 ¶ 126. Under Mississippi law:

[A]n agency relationship may be express or de facto. A de facto agency may be proven by the presence of three elements at the time of contracting:

¹⁰ In *Midwest Feeders*, the Fifth Circuit noted that courts outside Mississippi have held that a bank could be liable to a non-customer related to a bank customer’s wrongful acts “if a fiduciary duty exists between the customer and the non-customer, the bank knows or ought to know of the fiduciary relationship, and the bank has actual knowledge of its customer’s [wrongdoing].” *Id.* at 518. However, the Fifth Circuit did not predict that the Mississippi Supreme Court would adopt this exception to impose a duty between a bank and a non-customer. *Id.* at 519. And, even if the exception applied in Mississippi (which it does not), Plaintiffs could not meet the exception. Plaintiffs have not pled facts that plausibly suggest they had a fiduciary relationship with Express Grain, nor one of which UMB was aware or should have been aware. And, Plaintiffs could not plead such a fiduciary relationship via another amended pleading either because “[a]n arms-length business transaction involving a normal debtor [grain elevator]-creditor [farmer] relationship does not establish a fiduciary relationship.” *Burgess*, 830 So. 2d at 1228 (citing *Hopewell*, 680 So. 2d at 816); *see also Taylor*, 954 So. 2d at 1049 (When a transaction occurs in the normal course of business and is “deemed to be an arms length transaction . . . no fiduciary duty arises.”); *Steele v. Carmichael*, 249 Miss. 574, 581, 163 So. 2d 663, 664 (1964) (upholding finding below that “there was no fiduciary or confidential relationship between buyer and seller under contract” to buy interest in bank stock); *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So. 2d 990, 994–95 (Miss. 2006) (“Ordinarily this Court does not impose fiduciary duties upon parties to a contractual agreement[.]”).

(1) ‘manifestation by the alleged principal, either by words or conduct, that the alleged agent is employed as such by the principal,’ (2) ‘the agent's acceptance of the arrangement,’ and (3) ‘the parties understood that the principal will control the undertaking.’

Elmore v. Acre Beyond the Rye, LLC, No. 3:16CV296-HSO-JCG, 2017 WL 3754675, at *7 (S.D. Miss. Aug. 29, 2017) (citing *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 870 (5th Cir. 2000)). Even assuming that a state entity can serve as an agent to state citizens for purposes of a negligence claim, here, the claim fails because there are no facts supporting (1) a manifestation by Plaintiffs that MDAC was employed by them as an agent, (2) that MDAC accepted this arrangement, or (3) that the parties had an understanding that MDAC would act as Plaintiffs’ agent. None of these elements are present in Plaintiffs’ pleading. Thus, as a matter of law, Plaintiffs have not pled the requisite facts to support a negligence claim based on a purported agency relationship between Plaintiffs and MDAC.

The Court should dismiss Count IV with prejudice.

E. PLAINTIFFS CANNOT STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION AGAINST UMB.

Count V of the Amended Complaint seeks to assert a claim against UMB for negligent misrepresentation. Doc. 15 ¶¶ 134-45. Again, this claim fails because Plaintiffs were not customers of UMB, and thus, as a matter of Mississippi law, they cannot assert claims based on common law negligence against UMB. *Midwest Feeders*, 886 F.3d at 518-19. Even if the negligent misrepresentation claims were not barred for this reason, Count V would still fail because the Amended Complaint omits essential elements.

To establish a claim for negligent misrepresentation, Mississippi requires “(1) a misrepresentation or omission of a fact; (2) that the representation or omission is material or significant; (3) that the defendant failed to exercise that degree of diligence and expertise the public

is entitled to expect of it; (4) that the plaintiff reasonably relied on the defendant's representations; and (5) that the plaintiff suffered damages as a direct and proximate result of his reasonable reliance." *Skrmetta v. Bayview Yacht Club, Inc.*, 806 So. 2d 1120, 1124 (Miss. 2002). In addition, a heightened pleading standard applies to a negligent misrepresentation claim when a fraudulent misrepresentation claim is based on the same sets of facts. *See On-Site*, 2020 WL 3712868, at *20 (applying heightened pleading standard to both negligent and fraudulent misrepresentation claims); *Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 723 (5th Cir. 2003) (applying Rule 9(b) to negligent misrepresentation claims "when the parties have not urged a separate focus" and the fraud and negligent misrepresentations claims are based on the same set of alleged facts).

Here, the negligent misrepresentation claim fails because the underlying statements—that everything "was just fine" and that Express Grain was refinancing "as a matter of ordinary business"—are opinions, and as a matter of law do not constitute material statements that can give rise to a negligent misrepresentation claim. *See supra*, § III.A.2; *see also Spragins v. Sunburst Bank*, 605 So. 2d 777, 779-80 (Miss. 1992) (holding plaintiff's claim against bank for negligent misrepresentation failed because bank's statement that it "did not know of any other serious bidders" for foreclosure sale was an opinion rather than a fact). Moreover, as explained above, even if the alleged statements to MDAC could be considered material, Plaintiffs cannot establish the necessary element of reliance to maintain the negligent misrepresentation claim because there is no allegation that MDAC conveyed the representations at issue to the Plaintiffs. *See supra*, § III.A.2. Accordingly, Count V should be dismissed with prejudice for multiple reasons.

F. PLAINTIFFS CANNOT STATE A CLAIM FOR UNJUST ENRICHMENT AGAINST UMB.

Count VI of the Amended Complaint seeks to assert a claim for unjust enrichment against UMB. Doc. 15 ¶¶ 146-60. Plaintiffs contend the alleged misrepresentations and omissions caused

Plaintiffs to deliver “grain to Express Grain that they would not have delivered had they known the truth,” *id.* ¶ 152, and UMB “was enriched by increasing its profits, or alternatively substantially mitigating its losses, at the expense of farmers who delivered grain, without compensation, to Express Grain on the eve of its bankruptcy.” *Id.* ¶ 157. Plaintiffs also conclude that UMB “has taken and holds property of Plaintiffs” that UMB “should not retain.” *Id.* ¶ 158.

“Unjust enrichment 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.” *Willis v. Rehab Sols., PLLC*, 82 So. 3d 583, 588 (Miss. 2012). Every entity that benefits from goods transferred or services provided is not liable for *quantum meruit* damages; instead, the person who transferred the goods or provided the services can recover *quantum meruit* damages only from the person who was reasonably expected to pay. *Ground Control, LLC v. Capsco Indus., Inc.*, 214 So. 3d 232, 243-245 (Miss. 2017) (citing *Redd & Hill v. L&A Contracting Co.*, 151 So. 2d 205 (Miss. 1963)).

In Count VI, Plaintiffs complain about their delivery of grain to Express Grain. Doc. 15 ¶ 152. Plaintiffs delivered the grain with an expectation that *Express Grain would pay them.* *Id.* ¶¶ 2, 16-17, 62-65, 67. Thus, UMB is not a proper party to Plaintiffs’ unjust enrichment claim. *See Ground Control, LLC*, 214 So. 3d at 245. The Court should dismiss Count VI with prejudice.

G. PLAINTIFFS CANNOT STATE A CLAIM FOR CONSTRUCTIVE TRUST AGAINST UMB.

Finally, Count VII seeks to impose a constructive trust. Doc. 15 ¶¶ 161-76. Plaintiffs are not entitled to this remedy against UMB for the same reasons the previous claim fails—Plaintiffs admit that they transferred the grain in question to Express Grain rather than UMB, and they

expected payment from Express Grain. Accordingly, Plaintiffs claim for a constructive trust against UMB fails as a matter of law.

“A constructive trust is a fiction of equity created for the purpose of preventing unjust enrichment by one who holds legal title to property which, under principles of justice and fairness, rightfully belongs to another.” *McNeil v. Hester*, 753 So. 2d 1057, 1064 (Miss. 2000). A Mississippi constructive trust claim requires, among other requirements: (1) that the plaintiff can recover against defendant on an underlying cause of action for unjust enrichment, *Mahli, LLC v. Admiral Ins. Co.*, No. 1:14CV175-KS-MTP, 2015 WL 4915701, at *28 (S.D. Miss. Aug. 18, 2015); and, (2) “that the defendant hold or possess property to which plaintiff ‘is rightfully entitled.’” *Strickland v. Broome*, 812 F. App’x 204, 206 (5th Cir. 2020) (quoting *Allred v. Fairchild*, 785 So. 2d 1064, 1067–68 (Miss. 2001)); see also *First Nat’l Bank of Jackson v. Huff*, 441 So. 2d 1317, 1321 (Miss. 1983) (stating that a “transfer of title” before the plaintiff filed suit “precludes the imposition of a constructive trust”).

Plaintiffs’ constructive trust claim fails to satisfy these essential elements. As explained above, Plaintiffs admit that they transferred the grain to Express Grain and that they expected payment from Express Grain. These admissions bar Plaintiffs’ unjust enrichment claim and their corresponding request for a constructive trust as a remedy. Accordingly, UMB is not a proper party to a constructive trust claim. See *Strickland*, 812 F. App’x at 206 (affirming dismissal of constructive trust claim for failure to state a claim, under Mississippi law, because defendant did not possess life insurance proceeds at issue when lawsuit was filed). The Court should dismiss Count VII with prejudice.

IV. CONCLUSION

The defects in Plaintiffs' claims take many forms. Most particularly, Plaintiffs' claims are aimed at the wrong party. UMB did not transact business with Plaintiffs or make any representations to Plaintiffs. Rather, Plaintiffs dealt with Express Grain; they delivered grain to Express Grain and expected payment from Express Grain. Plaintiffs' remedies, if any, are against the bankruptcy estate of Express Grain. In short, the conclusory allegations in the Amended Complaint cannot withstand scrutiny and the claims against UMB are fatally defective as a matter of law. Accordingly, UMB respectfully asks the Court to dismiss this action with prejudice.

This the 22nd day of February, 2022.

Respectfully submitted,

UMB BANK, N.A.

By Its Attorneys,
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.

By: /s/ William N. Reed
WILLIAM N. REED

William N. Reed (MS Bar No. 4689)
Conner G. Whitten (MS Bar No. 106351)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
One Eastover Center
100 Vision Drive, Suite 400 (ZIP 39211)
P. O. Box 14167
Jackson, Mississippi 39236
Telephone: 601.351.2400 / Facsimile: 601.351.2424
wreed@bakerdonelson.com
cwhitten@bakerdonelson.com

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

This the 22nd day of February, 2022.

/s/ William N. Reed

WILLIAM N. REED