IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| In re: | ) | |
| | ) | Chapter 11 |
| CURAE HEALTH, INC., et al.[1] | ) | Case No. 18-05665 |
| | ) | Judge Walker |
| Debtors. | ) | Jointly Administered |
| | ) | |
| April 9, 2019 10:00 am | ) | |
| Courtroom 2 | ) | |
| 2nd Floor Customs House | ) | |
| 701 Broadway, Nashville, TN 3720 | ) | |

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REPLY OF THE STATE OF MISSISSIPPI DIVISION OF MEDICAID TO JOINT OBJECTION OF THE DEBTORS AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND OBJECTION TO CROSS-CLAIM

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The State of Mississippi Division of Medicaid replies to the Joint Objection of the above-captioned debtors and debtors in possession (the "Debtors") and the official committee of unsecured creditors (the "Committee"), together with Debtors, the ("Objecting Parties"). The Objecting Parties have inserted a "Cross-Motion" into their objection. The

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Curae Health, Inc. (5638); Amory Regional Medical Center, Inc. (2640); Batesville Regional Medical Center, Inc. (7929); and Clarksdale Regional Medical Center, Inc. (4755); Amory Regional Physicians, LLC (5044); Batesville Regional Physicians, LLC (4952); Clarksdale Regional Physicians, LLC (5311). The Motion and this Reply do not concern and is not directed at Amory Regional Physicians, LLC (5044); Batesville Regional Physicians, LLC (4952); Clarksdale Regional Physicians, LLC (5311).

MSDOM objects to the Cross-Claim and MSDOM reserves all of its defenses and claims for assertion in its response to the Cross-Motion including, but not limited to, jurisdictional defenses both as to subject matter and person, immunity under the Federal and State Constitution and relevant statutes, no consent, lack of standing, improper venue, failure to exhaust administrative remedies, election, waiver of claim, violation of Rule 7001 of the Federal Rules of Bankruptcy Procedure, failure to state a claim, lack of process and service of process, failure to join necessary parties, assignment of claims, release, accord, satisfaction, estoppel, unclean hands, recoupment and, as allowed by the Court, set off and any and all other matters of defense or affirmative matters in avoidance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

## INTRODUCTION

In September of each year, Mississippi assesses, and hospitals are liable for, two (2) taxes: a Mississippi Medical Care Fund solvency tax by which each existing hospital is allocated tax responsibility for a percentage share of projected deficit prevention in the Mississippi Medical Care Fund up to a yearly level, being $102.9 Million for FY-19 and a Mississippi Hospital Access Program (MHAP) Tax tied to the State's fiscal year which begins in July of each year by which each existing hospital is allocated tax responsibility for a percentage share[2] of Mississippi's nonfederal share of the federal FMAP allotment to the State. These Taxes are assessed each month thereafter.

In addition in October of each year, Mississippi assesses for the first time, and hospitals are liable for, a Disproportionate Share Hospital ("DSH") Tax tied to the federal government's fiscal year which starts in October. Under this tax, each existing hospital is allocated tax responsibility for a percentage share of Mississippi's nonfederal share of the federal DSH allotment to the State. This Tax is assessed each month thereafter.

The Mississippi Medical Care Fund Taxes raise revenue which

[2] The percentage or rate is calculated using final cost reports two (2) years prior to tax year. This allocates a tax percentage or rate to each hospital based upon the percentage share of the non-Medicare days of the taxed hospital in relation to the total non-Medicare days for the state as a whole. This allocation can change throughout the year and is only finalized in June.

Mississippi applies to solvency of this fund[3] and to payment of Mississippi's nonfederal share of supplemental payment sub-programs in the Medicaid Program.

The purpose of these taxes is to raise revenue which is expended by Mississippi to make its Medical Care Fund sound for the payment of benefits and administrative costs[4] and sound for meeting the State's nonfederal share for matching funds. This expenditure by the State is for the benefit of vulnerable people who qualify for Medicaid and for the benefit of the general public as the program addresses the serious needs of vulnerable people which impact the entire society, provides a safety net and as a by product has a multiplier economic impact statewide.

## ARGUMENT

## MISSISSIPPI'S MEDICAL CARE FUND TAXES ARE TAXES FOR PURPOSES OF THE BANKRUPTCY CODE

To determine whether Mississippi Medical Care Fund Taxes are taxes for purposes of 11 U.S.C. §503, the Court should apply the criteria identified by the Sixth Circuit in **In re Suburban Motor Freight, Inc.,** 998 F.2d 338 (6th

[3] All Medicaid dollars go through this Fund not just the revenue generated by the Mississippi Medical Care Fund Taxes. Therefore deficits or threats to solvency can come about due to fee for service demands and other payments for vulnerable people who qualify for Medicaid.

[4] See Exhibit A MSDOM Total Cost Per Member. This report reflects that 92.30% of the almost $6 Billion dollars in Medicaid are spent on the vulnerable people which participate in the program. Only 2.6% is spent on MSDOM administrative cost.

Cir. 1993) (**Suburban I**)[5]:

> 1. Is the State compelling an involuntary extraction?;
>
> 2. Is the extraction universally applicable to similarly situated persons or firms?; and,
>
> 3. Are the extractions directed at the financial soundness of a public fund upon which a limited class of the public depend?[6]

998 F.2d at 342. The **Suburban I** court noted that where a state "'compel[s] the payment' of 'involuntary exactions, regardless of name,' and where such payment is universally applicable to similarly situated persons or firms, these payments are taxes for bankruptcy purposes." Id. (citation omitted).[7]

In applying these factors to "unpaid premiums due the Ohio Bureau of Workers' Compensation," by a private employer, the **Suburban I** court concluded that the unpaid premiums were "entitled to priority in bankruptcy under 11 U.S.C. §507(a)(7)(E) as 'excise taxes.'" Id.

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[5] The Sixth Circuit rejected the test set forth by the Ninth Circuit in **County Sanitation District v. Lorber Industries of California** (**In re Lorber Industries of California**), 675 F.2d 1062 (9th Cir. 1982) and elected "to follow the relatively balanced approach crafted by the Fourth Circuit in **New Neighborhoods v. West Virginia Workers' Compensation Fund**, 886 F.2d 714 (4th Cir.1989)."

[6] "Needless to say, all money collected by the Government goes toward defraying its expenses, and is used for public purposes. **Suburban I**, 998 F.2d at 341. As such the "public benefit" component adopted by the Ninth Circuit in **Lorber** is not the "determining factor" in the Sixth Circuit." Id.

[7] In **Bos. Reg'l Med. Ctr., Inc. v. Massachusetts Div. of Health Care Fin. & Policy**, the First Circuit Court of Appeals applied these **Suburban I** factors in circumstances very similar to the present case and concluded that assessments for the "Uncompensated Care Pool" under Massachusetts law was an excise tax. 365 F.3d 51, 57-65 (1st Cir. 2004).

The same **Suburban I** factors are satisfied, in this case, with regard to the Mississippi Medical Care Fund Taxes under 11 U.S.C. §503.

Like §507, §503 provides for a priority for taxes, except §503 is concerned with post-petition taxes. So the allowance is tied to a specific provision of the Bankruptcy Code.

The Medical Care Fund Taxes set forth in Miss. Code §43-13-145(4) are not voluntary. See **Bos. Reg'l Med. Ctr., Inc. v. Massachusetts Div. of Health Care Fin. & Policy**, 365 F.3d 51, 60 (1st Cir. 2004). Under Mississippi law, an assessment "on each hospital licensed in the state is imposed on each non-Medicare hospital inpatient day." Id.[8] MSDOM can compel the payment of these taxes by the imposition of interest, penalties, withholding from any Medicaid reimbursement payments, the institution of litigation and the filing of a notice of a tax lien against the property of the defaulting hospital. Miss. Code §43-13-145(9).

"Each hospital" means hospitals in existence during the month of assessment. Miss. Code §43-13-145(4).

These taxes are true taxes. Under Mississippi law, as written and applied, no hospital receives any amount of the solvency tax, and can claim no benefit. As to the other taxes, there are hospital taxpayers which receive

[8] Miss. Code §43-13-145(4)(d) provides that "Hospitals operated by the United States Department of Veterans Affairs and state-operated facilities that provide only inpatient and outpatient psychiatric services shall not be subject to the hospital assessment provided in this subsection.").

no corresponding DSH or MHAP supplemental payments. See Exhibit B MSDOM Spreadsheet of Hospitals DSH Tax and DSH Payments - FY2018 and Exhibit C MSDOM Spreadsheet of Hospitals MHAP Tax Exceeds MHP Payments - FY2019.[9]

The licensed hospitals being assessed these taxes are as similarly situated to each other as every private Ohio employer in **Suburban I** was similarly situated to each other private employer in Ohio.

Within the class of taxed hospitals the Mississippi Taxes are universally applied. Miss. Code §43-13-145(4).[10]

Lastly, these taxes are directed at the financial soundness of the Mississippi Medical Care Fund upon which a class of the public depend, i.e.,

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[9] This was also true under the previous versions of the law. See **Mem'l Hosp. at Gulfport v. Dzielak**, 250 So. 3d 397, 402 (Miss. 2018)("They receive a DSH payment of zero."). This case also illustrates the administrative and state law procedures which must be exhausted by one claiming a DSH payment.

[10] Contrast this universality with the very different circumstances in **In re Suburban Motor Freight, Inc.**, 36 F.3d 484 (6th Cir. 1994) (**Suburban II**). In **Suburban II** the court noted that the debtor's "liability arises solely by virtue of its default, and is not a liability 'universally applicable to similarly situated persons or firms.' The benefit resulting from Suburban's liability for these claims payments is not one inuring to the public generally, and Suburban's liability is a penalty discretely imposed due to its disregard of its statutory obligations. This lack of universality prevents the Bureau's claim [for repayment] from being accorded priority treatment." 36 F.3d at 489.

In the present case, liability arises from a tax which the State uses for governmental purposes. Liability to pay the taxes does not require any event of default. In addition, unlike a subrogation claim to recover on benefits paid, payment of Mississippi's Taxes does not replace money already spent by the State, except in the case of the solvency tax, and the tax payments support the Mississippi Medical Care Fund and by their very nature inure to the benefit of the public generally. Lastly Mississippi's Taxes are not a penalty for disregard of statutory obligations.

vulnerable people.[11] Moreover the revenues raised and expended benefit Mississippi's general public as discussed more fully below. **Bos. Reg'l Med. Ctr., Inc.**, 365 F.3d 51, 60-65 (1st Cir. 2004)("Thirdly, the Pool exaction is for a public purpose, i.e. for the defraying of expenses or undertakings of a type commonly assumed by the government—namely, those providing free health care to persons without the resources to pay for it.").

All taxes collected under Miss. Code §43-13-145 must be deposited by MSDOM in the Medical Care Fund created by Miss. Code §43-13-143. Miss. Code §43-13-145(7). Miss. Code §43-13-143 provides:

> There is created in the State Treasury a special fund to be known as the "Medical Care Fund," which shall be comprised of monies transferred by public or private health care providers, governing bodies of counties, municipalities, public or community hospitals and other political subdivisions of the state, individuals, corporations, associations and any other entities for the purpose of providing health care services. Any transfer made to the fund shall be paid to the State Treasurer for deposit into the fund, and all such transfers shall be considered as unconditional transfers to the fund. **The monies in the Medical Care Fund shall be expended only for health care services**, and may be expended only upon appropriation of the Legislature. **All transfers of monies to the Division of Medicaid by health care providers and by governing bodies of counties, municipalities, public or community hospitals and other political subdivisions of the state shall be deposited into the fund.** Unexpended monies remaining in the fund at the end of a fiscal year shall not lapse into the State

[11] Interestingly enough the Ohio law covered hospitals as employers. Nothing in **Suburban I** suggests that a hospital employer could claim the premium was a fee because an injured employee might be treated at the hospital and the payment for treatment might come from the compensation fund.

> General Fund, and any interest earned on monies in the fund shall be deposited to the credit of the fund.

(Emphasis added).

All transfers into the Medical Care Fund are "unconditional transfers" and the monies in the Medical Care Fund can be expended only for health care services, which includes MSDOM operations and Medicaid program, and the cost of defraying the expenses of health care services by government health care providers, governing bodies of counties, municipalities, public or community hospitals and other political subdivisions of the State of Mississippi. Id.

The vulnerable people who depend on the soundness of Mississippi's Medical Care Fund are just as dependent on the soundness of that fund as potential and actual injured workers in Ohio were dependent upon the payment of premiums to the Ohio Bureau of Workers' Compensation. Likewise the general public rely on the soundness of Mississippi's Medical Care Fund as a safety net, as a preventer of society wide catastrophe, as an economic multiplier, and as a component of securing the general welfare and well being of the general public.

In dicta, the **Suburban I** court pointed out that had the Ohio program funded by premiums been "optional" or allowed the substitution of private insurance such that Ohio could be equated to a private actor acting in a

private capacity then it "would be unfair and without statutory justification to call state-collected premiums 'taxes' and put the Bureau ahead in line while leaving unpaid private insurers to languish along with the rest of the unsecured creditors." Id. at 342.

Here the statutory justification is set forth in §503. There is no option or substitution allowed under the statutes. Likewise there is nothing unfair about Mississippi being able to collect its taxes. The State is acting as a sovereign and not as a private insurer or any private equivalent. The State is an involuntary creditor. There are no similar or equivalent creditor to the State. The Opposing Parties have not identified a similar or equivalent creditor and no such creditor exist.

The Mississippi Medical Care Fund Taxes are taxes for purposes of 11 U.S.C. §503.

## MISSISSIPPI'S MEDICAL CARE FUND TAXES ARE ASSESSED MONTHLY AND THOSE MONTHS OCCURRED AFTER THE PETITIONS WERE FILED

It is certainly understandable that the Opposing Parties are confused as to the operation of Mississippi law, as written and as applied by the agency which interprets and applies such law. A careful review of the law and as applied practice should clear up any confusion.

The petition in this case was filed on August 24, 2018.

The Motion is concerned only with those taxes assessed after August 24, 2018, when the acts giving rise to liability took place. See **In re Sunarhauserman, Inc.**, 126 F.3d 811, 818 (6th Cir. 1997).

The primary defect in the Opposing Parties' argument stems from a failure to recognize that each of the Mississippi Medical Care Fund Taxes are assessed monthly. Miss. Code §43-13-145(4). Monthly assessment is fundamental due to the complexity and ever changing components which occur between assessments.

Due to the complexity of the federal and state systems the DSH Tax Model is first assessed in October, is not truly set until December of each year and is actively revised thereafter. Initial computations and estimates are not published until November of each year with information on the MHAP Tax and $102.9 Assessment Tax to be assessed month. See Exhibit D - November 28, 2018, Letter to Hospital Administrators and CFOs.

While it is true that the statute does contemplate an annual assessment, in practice this is not possible, the first assessment of any of the taxes, other than the DSH Tax, first takes place in September and then only as an estimate. The DSH Tax, which is governed by the federal government's fiscal year, cannot be set or calculated until the federal government provides the DSH allotment in October of each year. As such the FY-19 DSH Model was not sent out to hospitals until November 28, 2018, with individual hospital

changes solicited with a deadline of December 10, 2018, or later for monthly adjustments. See Exhibit D.

In practice the MHAP Model is not sent out to hospitals until November. In November hospitals are informed that MHAP Taxes and the $102.9 Assessment Tax will be "assessed monthly and collected in September, December and monthly, thereafter, from January 2019 through June 2019. In a separate e-mail, your hospital will receive an invoice for the taxes due in December."

After the notifications in November, due to the complexity of the systems these figures change and are assessed and recalculated monthly and trued up in June at the end of the fiscal year. Miss. Code §43-13-145(4).

These tax are not imposed on time periods which have not occurred. No taxpayer is liable until certain taxes, other than the DSH Tax, are assessed monthly beginning in September of each year and the DSH Tax having its first monthly assessments no sooner than October. Id.

According to the Sixth Circuit, a tax obligation accrues when the event triggering liability occurs. See **In re Federated Dep't Stores, Inc.**, 270 F.3d 994, 1000-1001 (6th Cir. 2001)(property tax)(state law determines with a tax accrues)(citations omitted). In **Federated Dep't Stores** the court addressed both the time at which an estate incurs a tax and the time liability for such tax attaches on the date of assessment:

> "At the time the levy took place, the debtor's estate oversaw the property and is therefore responsible for paying the tax. Thus, the tax was incurred by the estate for purposes of §503(b)(1)(B)(i)."

Id. at 1004.

In the present case the monthly levies of the taxes for which allowance is sought occurred in months after the debtors' estates oversaw the properties. As in **Federated Dep't Stores**, the debtors' estates oversaw the property and incurred the tax on those post-petition months and were, and are, responsible for paying those taxes for purposes of §503.

The taxes which are the subject of the Motion are post-petition taxes for purposes of §503.

## STATEMENT IN REPLY

## OPPOSING PARTIES SEEK RELEIF WHICH THREATENS THE GENERAL WELFARE OF THE ENTIRE STATE OF MISSISSIPPI

The Opposing Parties seek to further destabilize and burden the health care systems, fragile and not fragile, which serve the most vulnerable people in Mississippi.

Mississippi funds its sovereign policy choices in relation to its Medicaid program through the collection of taxes. The Opposing Parties' opposition to the payment of three (3) of these taxes is a direct threat to the availability of

health care to vulnerable people in Mississippi.

Payment of the assessed months in relation to two (2) of these taxes — which are the sole source funding the State's nonfederal share of supplemental payment programs— is the essential and mandated first step for the State to fund those programs. The tight fiscal control which must be applied necessaries that MSDOM calibrate tax receipts to fund outflows. The other tax, known as the Hospital Tax, does not correspond to any claimed alleged benefit but is directed at preventing program deficits in "any fiscal year."

This craven attempt to hijack state and federal funds used to fund Mississippi's policy choices —in effect creating system instability which threatens the health care of vulnerable people— needlessly exposes Mississippi to allegations of non-compliance with its approved State Plan for Medicaid, violations of Mississippi law, and ultimately threatens to create a fund deficit which potentially reduces care or will be a tax burden borne by others, including but not limited to other hospitals and rural hospital, all of which are the sole source of state funding for the supplemental payments programs and which are the principal source of attempted deficit prevention within the program.

The Opposing Parties give no consideration to those hospitals which pay thousands of dollars in DSH Taxes and MHAP Taxes, sometimes

millions of dollars, which fund Mississippi's governmental actions and which do not receive a penny or receive much less in supplemental payments than the taxes paid. See Exhibits B and C - Tax And Payments Spreadsheets.

Without shame the Opposing Parties argue that a party which owes the tax can, without paying the tax, collect payments from a program with insufficient or potentially insufficient funding due to the non-payment of the tax.

Without shame the Opposing Parties argue on the one hand these taxes are so tied to the alleged benefits to hospitals that they are not taxes[12] but on the other hand so separate from the alleged benefits that the tax transaction is alien to the alleged benefit and therefore not to be recouped if the alleged benefits are paid. These positions cannot be reconciled and represent a type of unwarranted gamesmanship.[13]

In truth and fact, the taxes and benefits are tied, not at the hospital level, but at the State's level of having a solvent fund which benefits the

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[12] That the Opposing Parties are currently ineligible for supplemental payments yet still owe taxes through the dates the status as hospital(s) ceased further demonstrates that the taxes at issue are in fact taxes. While this will be addressed with other defenses in the reply to the Cross-Motion, there are no hospitals which qualify for payment. Two (2) hospitals have passed to new owners. In addition it appears that the Opposing Parties are asserting demands owned by others. Clarksdale HMA, LLC claims that, after December 16, 2018, it is liable for the taxes and that it is entitled to, and owns, any payments in relation to the hospital in Clarksdale, Ms. [Docket No. 905 - Limited Objection of CHS/ Community Health Systems, Inc. ("CHS/")]. Reference to this document is not an agreement to the assertions therein.

[13] See *infra* note 21-27 concerning the unsuccessful and discredited **Gardens** stratagem.

general public and in the funding of the State's nonfederal share of sub-programs which benefit the general public.

The Opposing Parties allegation of undue delay by MSDOM is completely false and is negated by their own statements. Exhibit E - Curae Health Hospitals Proposal On MHAP Tax Payments.[14]

Instead any delay or inaction rests on some or all of the Opposing Parties. When the Court was wrestling with keeping rural hospitals open, the Opposing Parties were silent.[15]

MSDOM can hardly be blamed for this failure, refusal, election and waiver or for the fact that benefits were not, and are not, payable; that the claimants in the cross-motion lack standing and are ineligible for payments as they are not operating any hospitals; or that law and equity foreclose any payment.

The Court need not, and should not, assist the Opposing Parties in their quest to further destabilize and burden the health care systems, fragile and not fragile, which serve the most vulnerable people in Mississippi.

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[14] This document has limited admissibility under FRE 408 and should only be considered in relation to the bias of "Curae Health Hospitals" and to negate the Opposing Parties argument that MSDOM has unduly delayed making any payments.

[15] This is a telling feature of the behavior of the Opposing Parties. If, as they now assert, a "right" existed to force MSDOM to transfer $4,000,000.00, then why wasn't such right brought to the Court's attention in response to repeated inquiries for solutions to hospital closings. The Opposing Parties' silence was because no such right existed or exist.

## MISSISSIPPI'S MEDICAID PROGRAM

Mississippi's Medicaid Program serves people, vulnerable people: children, women and men, the new born, the aged, the blind, the disabled, and those in poverty. See Exhibit F 2019 Mississippi Medicaid Fact Sheet, Exhibit G "Who Qualifies For Coverage?" and Exhibit H Income Limits For Mississippi Medicaid.

This service to the most vulnerable people in Mississippi requires billions of dollars, most from the tax revenues of the federal government and to a lesser, but proportionally significant amount, from the tax revenues of the State of Mississippi. See Exhibit I Mississippi Division Of Medicaid Annual Report Fiscal Year 2018 July 1, 2017-June 30, 2018.

By most standards the State of Mississippi is the poorest state in the nation and the rural areas involved in this action are the poorest of the poor with perhaps some of the most vulnerable people in the nation.

Almost twenty-five percent (25%) of Mississippians receive Mississippi Medicaid health benefits. Exhibit F 2019 Mississippi Medicaid Fact Sheet. Of all children in Mississippi, half are covered by Medicaid. Exhibit J Report by Kaiser Family Foundation. Seventy-five percent (75) of nursing home residents in Mississippi are covered by Medicaid. Id.

Mississippi has the highest infant mortality rate in the country. See Exhibit K Ms Department of Health Infant Mortality Report 2017.

Mississippi's Medicaid program covers approximately 65% of all births and children up to age one. See Exhibit I Annual Report Fiscal Year 2018.

## MEDICAID BENEFITS THE GENERAL PUBLIC AND VULNERABLE PEOPLE

Given the significant percentage of Mississippi's population, especially children, on the program, one can hardly argue that the program, including the DSH and MHAP sub-programs, does not benefit the general public. One need only to look to historical facts of the conditions which existed just 52 years ago,[16] the present infant mortality rate and CDC health data for Mississippi[17] to conclude that, in the absence of this program and sub-programs, Mississippi's general public would directly suffer due to the ill effects of twenty-five percent (25%), or more, of the population —and 50% of its children— being ravaged by untreated sickness, disease and death.

The general public benefits from the program in its role as a safety net for all residents who are not presently in need, especially the "working poor"

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[16] In 1967, U.S. Senators Clark and Kennedy led a tour of the Mississippi Delta which brought national attention to the plight of people living in the region. The abominable conditions, which included inadequate healthcare, found at that time existed just 52 years ago and at least remind one of the conditions which can prevail in the absence of a state medicaid program.
[https://en.wikipedia.org/wiki/Joseph_S._Clark%27s_and_Robert_F._Kennedy%27s_tour_of_the_Mississippi_Delta].

[17] Mississippi has the nation's highest percentage of death due to heart disease, Alzheimers, and kidney disease. The state is second highest for death due to cancer, diabetes, flu/pneumonia and septicemia. CDC Data. [https://www.cdc.gov/nchs/pressroom/states/mississippi/mississippi.htm]. See Exhibit M.

which slip in and out of poverty or families which experience a catastrophic illness which drags them into poverty.

The program sustains large and small government hospitals which serve the general public, including Mississippi's public research and treating medical school which provides training for most of the state's physicians and other medical professionals. These public institutions employ thousands, including some of the most high paying and specialized jobs in their communities if not the entire state, and their payrolls and other purchases of supplies and support services have an economic multiplier effect in the state and local economies as benefited members of the general public pay taxes, pay for housing, purchase food, etc. The general public in these communities benefit from the avoidance of the ill effects of the poor and vulnerable of these communities being left without readily accessible healthcare.

The program benefits small non-government hospitals which are exclusively committed to the poor and vulnerable. These hospitals do not pay the taxes at issue in this case, because they have no taxable non-Medicare beds days to be assessed.[18] These institutions provide employment to the general public in their communities, including some of the most high paying and specialized jobs in such communities, and their payrolls and other purchases of supplies and support services have an economic multiplier effect

[18] Currently only Pearl River County Hospital meets this criteria. It reports no non-Medicare bed days.

in local economies as benefited members of the general public pay taxes, pay for housing, purchase food, etc. The general public in these communities served by zero tax hospitals benefit from the avoidance of the ill effects of the poor and vulnerable of these communities being left without readily accessible healthcare.

On a slightly smaller scale the program also benefits small private hospitals which serve the general public in their communities.[19] These institutions provide employment in their communities, including some of the most high paying and specialized jobs in such communities, and their payrolls and other purchases of supplies and support services have an economic multiplier effect in local economies as benefited members of the general public pay taxes, pay for housing, purchase food, etc. The general public in these communities benefit from the avoidance of the ill effects of the poor and vulnerable of these communities being left without readily accessible healthcare.

By necessity the administration of the program employs around 900 people at the various offices of the Mississippi Division of Medicaid and creates numerous outside consulting and support jobs and suppliers. This shoe string level of employment and frugal purchases have an economic

[19] Contrary to the claims of the Opposing Parties, hospitals are tools and instrumentalities which serve people, not the other way around. In the absence of vulnerable people no supplemental payments would be made. In absence of government taxes no funds would be available.

multiplier effect in local economies as benefited members of the general public pay taxes, pay for housing, purchase food, etc. The general public benefit from the professionalism and dedication of the people which administered these programs which ultimately are directed solely at benefiting the poor and vulnerable and avoidance of the ill effects of the poor and vulnerable of these communities being left without readily accessible healthcare.

Mississippi's Medicaid Program has no discrete beneficiaries other than the general public which includes the vulnerable members of the general public.

MEDICAID MECHANICS

For Mississippi to obtain federal funds for its Medicaid program, it must have a "State Plan" approved by the Secretary of Health and Human Services. 42 U.S.C. §1396a.[20] The State Plan, which must have numerous elements, must provide for "financial participation by the State" at certain

[20] 42 U.S.C. §1396a and §1396r-4 do not create a private right or private remedy. **Armstrong v. Exceptional Child Ctr., Inc.**, 135 S. Ct. 1378, 1387 (2015) ("And again, the explicitly conferred means of enforcing compliance with [42 USC §1396a(a)(30)(A)] by the Secretary's withholding funding, §1396c, suggests that other means of enforcement are precluded…")(citation omitted) and **Gonzaga Univ. v. Doe**, 536 U.S. 273, 284 (2002) ("But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private right but also a private remedy.") (citation omitted).

levels. 42 U.S.C. 1396a(a)(2).[21]

Federal law provides for quarterly payments by the Federal Government to Mississippi based upon estimates and provides for complex adjustments, recalculations and accounting resolutions during the course of the year. 42 U.S.C. §1396b.

Federal law specifically provides that Mississippi's financial participation can be funded by certain permissible health care-related taxes. 42 CFR §433.68. As allowed Mississippi has enacted three (3) health care-related taxes. Miss. Code §43-13-145.

All taxes collected under Miss. Code §43-13-145 must be deposited by MSDOM in the Medical Care Fund created by Miss. Code §43-13-143. Miss. Code §43-13-145(7).

SYSTEM SOLVENCY TAX

The $102.9 Million Assessment Tax is set forth in Miss. Code §43-13-145(4)(a)(ii). The Hospital Tax is applied to "reconcile any remaining deficit in any fiscal year." Miss. Code §43-13-145(4)(a)(ii). The Hospital Tax is used to balance the books at the close of any fiscal year and is not used for

[21] 42 U.S.C. §1396a(a)(13) states that a plan should provide…(A) for a public process for determination of rates of payment under the plan for hospital services, nursing facility services, and services of intermediate care facilities for the mentally retarded under which … (iv) in the case of hospitals, such rates take into account (in a manner consistent with section 1923) the situation of hospitals which serve a disproportionate number of low-income patients with special needs. Contrary to the assertions of the Opposing Parties this language does not create a private right or private remedy. See *supra* note 19.

payments to Coordinated Care Organizations or providers. Id.

This tax is an additional assessment on each hospital. The $102.9 Million Assessment Tax is initially estimated and assessed for the first time in September, but like all the Mississippi Taxes under discussion, it is subsequently assessed monthly thereafter and is "trued up" by the end of the fiscal year in June. See Miss. Code §43-13-145(4)(b). The $102.9 Million Assessment Tax is due and payable in September, December, January, February, March, April, May and June.

SUPPLEMENTAL DSH PAYMENTS

Mississippi law provides for an "additional reimbursement to hospitals that serve a disproportionate share of low-income patients and that meet the federal requirements for those payments as provided in Section 1923 of the federal Social Security Act and any applicable regulations. It is the intent of the Legislature that the division shall draw down all available federal funds allotted to the state for disproportionate share hospitals." Miss. Code §43-13-117(A)(18)(a).

Mississippi has enacted a DSH Tax to make the Medical Care Fund sound and to able to make these supplemental payments:

> (ii) In addition to the assessment provided under subparagraph (i), effective for state fiscal years 2016 through fiscal year 2021, an additional annual assessment on each hospital licensed in the state is imposed on each non-Medicare hospital inpatient day as defined below at a rate that is determined by dividing twenty-five

> percent (25%) of any provider reductions in the Medicaid program as authorized in Section 43-13-117(F) for that fiscal year up to the following maximum amount, plus the nonfederal share necessary to maximize the Disproportionate Share Hospital (DSH) and inpatient Medicare Upper Payment Limits (UPL) Program payments and inpatient hospital access payments, by the total number of non-Medicare hospital inpatient days as defined below for all licensed Mississippi hospitals: in fiscal year 2010, the maximum amount … shall be Forty Million Dollars ($40,000,000.00).

Miss. Code §43-13-145(4)(a)(ii). This tax is an assessment on each hospital licensed in the state. Id.

Miss. Code §43-13-117 and §43-13-145 as written and as applied, require that a hospital with taxable non-Medicare hospital inpatient days must pay the DSH Tax when and as due so that MSDOM has the funding to pay the non-federal share of the DSH payment. The operating requirements of MSDOM are so tight that it must calibrate the payment of DSH payments and tax receipts.

Liability for the DSH Tax cannot be known until the allotment informations is received from the federal government in October. Unlike the other taxes under consideration, the DSH Tax is calculated using the fiscal year of the federal government which begins in October. The DSH Assessment Tax is initially assessed in October, but like all the Mississippi Taxes under discussion, it is subsequently assessed monthly and is "trued up" or reconciled by the end of the fiscal year in June. See Miss. Code

§43-13-145(4)(b). The DSH Assessment Tax is due and payable in three (3) installments "no later than" December 15th, March 15th and June 15th. Id.

SUPPLEMENTAL MHAP PAYMENTS

Mississippi law provides for a "Mississippi Hospital Access Program (MHAP)." MHAP is operated by MSDOM "for the purpose of protecting patient access to hospital care through hospital inpatient reimbursement programs provided in this section designed to maintain total hospital reimbursement for inpatient services rendered by in-state hospitals" and certain qualifying out-of-state hospitals. Miss. Code §43-13-117(A)(18)(c)(i). The MHAP program is scheduled to end within the decade.

The MHAP Program provides "increased inpatient capitation (PMPM) payments to managed care entities contracting with the division … to support availability of hospital services or such other payments permissible under federal law necessary to accomplish the intent of this subsection." Miss. Code §43-13-117(A)(18)(c)(ii).

To make the Medical Care Fund sound, the law provides that MSDOM "shall assess each hospital as provided in Section 43-13-145(4)(a) for the purpose of financing the state portion of the MHAP, supplemental payments and such other purposes as specified in Section 43-13-145. The assessment will remain in effect as long as the MHAP and supplemental payments are in effect." Miss. Code §43-13-117(A)(18)(c)(vi). This tax is an

additional assessment on each non-Medicare hospital inpatient day at each hospital licensed in the state. Miss. Code §43-13-145(4).

Miss. Code §43-13-117 and §43-13-145 as written and as applied, require that a hospital with taxable non-Medicare hospital inpatient days must pay the MHAP Tax when and as due, at the conclusion of the first quarter, so that MSDOM has the funding to pay the non-federal share of the future MHAP payment. The operating requirements of MSDOM are so tight that it must calibrate the payment of MHAP payments and tax receipts.

The MHAP Assessment Tax is initially estimated and assessed for the first time in September, but like all the Mississippi Taxes under discussion, it is subsequently assessed monthly thereafter and is "trued up" by the end of the fiscal year in June. See Miss. Code §43-13-145(4)(b). The monthly determined MHP Assessment Tax is due and payable in September, December, January, February, March, April, May and June. Id.

The debtors owe these taxes. See Exhibit L-1, L-2, and L-3 Tax Calculation Spreadsheets reflects amounts currently due.

REPLY TO OBJECTION BY PARAGRAPHS

In further reply to the Joint Objection, MSDOM replies by paragraphs:

MSDOM reserves all of its defenses and claims for assertion in its response to the Cross-Motion including, but not limited to, jurisdictional defenses both as to subject matter and person, immunity under the Federal

and State Constitution and relevant statutes, standing, venue, failure to exhaust administrative remedies, election, waiver, violation of Rule 7001 of the Federal Rules of Bankruptcy Procedure, failure to state a claim, lack of process and service of process, failure to join necessary parties and any other matters of defense, assignment of claims, release, accord, satisfaction, estoppel, unclean hands, recoupment and, as allowed by the Court, set off.

1. Denied, except it is admitted that work has been done and that rural hospitals benefit their communities so much so that it is factually incorrect to conclude that supplemental payments to rural hospitals are primarily intended to benefit the tools, such as hospitals, by which care is provided. It is expressly denied that MSDOM owes any funds as alleged, or that funds payable were withheld or that there are funds which are property of the debtors, or any combination of them. It is the Opposing Parties and not MSDOM which has risked the shutdown of hospitals and jeopardized the well being of Mississippi residents. With regard to the debtor's failure to pay pre-petition taxes the only actions of MSDOM has been to file a proof of claim. Unless expressly admitted the remaining averments of paragraph no. 1 of the Objection are denied. See Reservation of defenses above.

2. Denied. See Reservation of defenses above.

3. Denied. See Reservation of defenses above.

DISCREDITED **GARDENS** STRATAGEM

4. Denied. The Opposing Parties hope to deploy a legal strategy which counsel for the Committee bragged it employed "successfully" in California. But upon examination this **Gardens** stratagem[22] is unsound,[23] conflicted and not even controlling law in California,[24] is incomplete,[25] and was less than

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[22] See **In re Gardens Reg'l Hosp. & Med. Ctr., Inc.**, 573 B.R. 811 (Bankr. C.D. Cal. 2017) (held California's hospital quality fee was not a tax but if it was a tax it was a pre-petition tax), aff'd, No. BR 2:16-17463 ER, 2018 WL 2213449 (C.D. Cal. May 11, 2018)(District Court did not reach issue of whether fee was a tax; affirmed pre-petition), appeal dismissed sub nom., **California Dep't of Health Care Servs. v. Gardens Reg'l Hosp. & Med. Ctr., Inc.**, No. 18-55752, 2018 WL 4348162 (9th Cir. June 20, 2018)(appeal voluntarily dismissed). The date voluntary dismissal is after the bankruptcy court and the United States Bankruptcy Appellate Panel of the Ninth Circuit each in turn ruled that the California agency could collect the pre-petition "fees" by recoupment from program benefit payments. **In re Gardens Reg'l Hosp. & Med. Ctr., Inc.**, No. 2:16-BK-17463-ER, 2018 WL 1354334 (B.A.P. 9th Cir. Mar. 12, 2018). The decision of the 9th Circuit Bankruptcy Appellate Panel is on appeal to the 9th Circuit.

[23] The **Gardens** stratagem requests the Court elevate a hospital to the point where a state's medicaid law is deemed a statutory scheme to principally benefit and enrich hospitals. However, whatever vagaries might have been present in California law, under Mississippi law, vulnerable people are the preeminent focus of Medicaid and hospitals are simply tools or instrumentalities and are in no way the intended direct beneficiaries of Mississippi's tax laws nor the State's Medicaid laws. Moreover, there are taxpayers which don't receive any supplemental payments or which receive less that the tax paid.

[24] The Objecting Parties fail to disclose to the Court that in **In re Ridgecrest Healthcare, Inc.**, 571 B.R. 838 (Bankr. C.D. Cal. 2017), a California Bankruptcy Court found that the "Quality Assurance Fees" imposed by California were an excise tax. 571 B.R. at 844 ("Because all five factors of the [Ninth Circuit's] functional test for determining whether a claim is based on an excise tax are satisfied, the court concludes that QA Fees are an excise tax.")(§507 priority case). On March 29, 2019, the US District Court in California in the **Ridgecrest** case held that California's HQA were an excise tax leveed on a transaction. See Exhibit N.

[25] **In re Gardens**, 2018 WL 2213449 (C.D. Cal. May 11, 2018)(subsequent history omitted)("Because the Court concludes the claim arose prepetition, it need not address whether the HQA fee is a tax.").

successful[26] as California appears to have collected its pre-petition Quality Assurance Fees in full from the **Gardens** debtor.

This unsuccessful gamesmanship[27] in the Ninth Circuit was orchestrated in one (1) court working with distinguishable California statutes and policies adopted by one of the wealthiest states in the nation serving a population different from the vulnerable population protected by MSDOM and involved a hospital in Los Angelos County, California[28] which is very very different from these rural areas in Mississippi.

As discussed above, Mississippi's Taxes are assessed monthly and the Motion is addressed monthly after the date the petition was filed. Unless

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[26] **In re Gardens Reg'l Hosp. & Med. Ctr., Inc.**, 569 B.R. 788, 794–95 (Bankr. C.D. Cal. 2017), aff'd, No. 2:16-BK-17463-ER, 2018 WL 1354334 (B.A.P. 9th Cir. Mar. 12, 2018) ("DHCS was entitled to recoup the unpaid HQA Fees from the postpetition Supplemental HQA Payments that it owed to the Debtor."). Regardless it is clear that recoupment is available. See e.g., **In re Tri Cty. Home Health Servs., Inc.**, 230 B.R. 106, 112 (Bankr. W.D. Tenn. 1999)(Recoupment in Medicare setting)("Recoupment is well-recognized as exempt from the operation of the automatic stay in bankruptcy.").

[27] The **Gardens** stratagem involves asserting two (2) opposed and inconsistent positions. First, the assertion that the tax is so closely tied to the "benefit" that it constitutes a fee. Second, that recoupment is not allowed out of the "benefit" because the fee is not closely tied to the benefit, i.e, the transactions are so separate that states law and equitable recoupment are not allowed.

[28] The hospital in the **Gardens** cases was located in Hawaiian Gardens, Los Angelos County, California. **In re Gardens Reg'l Hosp. & Med. Ctr., Inc.**, 573 B.R. 811, 812 (Bankr. C.D. Cal. 2017)(subsequent history omitted). Los Angelos County "is the largest non–state level government entity in the United States. Its population is larger than that of 41 individual U.S. states. It is the third-largest metropolitan economy in the world, with a Nominal GDP of over $700 billion—larger than the GDPs of Belgium, Saudi Arabia, Norway, and Taiwan." (https://en.wikipedia.org/wiki/Los Angeles County, California#cite note-10). By comparison, Clarksdale, Mississippi has a median household income of $16,045.00, with 36.4% of the population living below the federal poverty line. (https://www.census.gov/quickfacts/fact/table/clarksdalecitymississippi/PST045217).

expressly admitted the remaining averments of paragraph no. 4 of the Objection are denied. See Reservation of defenses above.

5. Denied. MSDOM has not asked for conversion or dismissal. It has asked for a show cause hearing if the post-petition taxes are not paid as required by 11 U.SC. §1112. Unless expressly admitted the remaining averments of paragraph no. 5 of the Objection are denied. See Reservation of defenses above.

6. Denied. MSDOM has made no attempt to collect pre-petition taxes other than file a proof of claim. No funds have been withheld and thus no authority need be cited. Debtors are not entitled to any funds. Debtors have not been damaged. The debtors do not operate any hospitals. Debtors have no claims under federal law, bankruptcy or otherwise. See Reservation of defenses above.

7. Admitted except it is denied that federal law establishes parameters which all states must follow. States are given discretion and different waivers have been granted to different states. It is denied that MSDOM has failed to comply with any "parameters." Unless expressly admitted the remaining averments of paragraph no. 7 of the Objection are denied. See Reservation of defenses above.

DEBTORS HAVE NO PRIVATE CLAIM
OR REMEDY UNDER FEDERAL LAW

8. Denied. Mississippi did not begin a Medicaid program until 1969. The law is misstated. It is expressly denied that the Opposing Parties, or any one or more of them, have a claim against MSDOM under federal law. No law provides for the debtors to receive any payments. MSDOM is in compliance with the law. 42 USC §1396a and §1396r-4 do not create a private right or private remedy. **Armstrong v. Exceptional Child Ctr., Inc.**, 135 S. Ct. 1378, 1387 (2015) ("And again, the explicitly conferred means of enforcing compliance with [42 USC §1396a(a)(30)(A)] by the Secretary's withholding funding, §1396c, suggests that other means of enforcement are precluded…")(citation omitted) and **Gonzaga Univ. v. Doe**, 536 U.S. 273, 284 (2002)("But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private right but also a private remedy.") (citation omitted). Unless expressly admitted the remaining averments of paragraph no. 8 of the Objection are denied. See Reservation of defenses above.

9. Denied. The law is misstated. It is expressly denied that the Opposing Parties, or any one or more of them, have a claim against MSDOM under federal law. No law provides for the debtors to receive any

payments. MSDOM is in compliance with the law. Unless expressly admitted the remaining averments of paragraph no. 9 of the Objection are denied. See Reservation of defenses above.

10. It is admitted that Mississippi administers it Medicaid program through MSDOM. It is admitted that Mississippi must fund the nonfederal share and that Mississippi attempt to raise enough revenue so that it may obtain matching federal funds. The case cited is irrelevant and misquoted. It concerns matters in 2008.

Mississippi is under direction to phrase out its MHAP program.

Unless expressly admitted the remaining averments of paragraph no. 10 of the Objection are denied. See Reservation of defenses above.

OBJECTORS' ADMISSION OF RECEIPT
OF REQUIRED TAX PAYMENT
IN ADVANCE OF SUPPLEMENTAL PAYMENT

11. The Opposing Parties are correct to admit, as they must, that after these necessary steps "Then" and only "Then" does a hospital receive supplements which might equal or exceeds the amount paid in taxes. It is denied that every hospital receives a supplement payment. It is denied that every hospital receives a supplement payment equal or exceeding the amount paid in taxes.

The remaining allegations are denied, except it is admitted that DSH and MHAP supplemental payments are made using state tax revenue and

federal funds, mostly from federal tax receipts or federal borrowing based upon tax receipts.

Mississippi's program is not similar to the programs of wealthy states such as California and Illinois. Mississippi has imposed taxes by which it funds its Health Care Fund. Some of the money in the Health Care Fund goes to DSH payments to hospitals and some goes to MHAP payments to MCOs. The Health Care Fund is not an investment. The Health Care Fund does not benefit hospitals. The Fund benefits vulnerable people and the public in general. Mississippi hospitals pay taxes, or are supposed to pay them. MSDOM places these tax receipts in the Fund and uses some of the funds to pay Mississippi's nonfederal share.

It is admitted that the taxes must first be paid before a federal match occurs and before monies are paid out. This calibration of taxes and benefits is essential to program stability.

The taxes are assessed based upon the formulas set forth in Miss. Code §43-13-145.

Mississippi is imposing and collecting taxes to raise funds. The taxes raise funds for Mississippi which are placed in its Health Care Fund, in part, to pay the State's nonfederal share.

The taxes are not assessed to benefit hospitals that pay the taxes. No Hospital receives a "benefit" from the $102.9 Million Assessment Tax.

Many Hospitals pay the DSH Tax and do not get DSH payments or get less in DSH payments than paid in DSH Tax. Many Hospitals pay the MHAP Tax and do not get MHAP payments or get less in MHAP payments than paid in MHAP Tax.

Unless expressly admitted the remaining averments of paragraph no. 11 of the Objection are denied. See Reservation of defenses above.

12. Denied. The debtors have no hospitals or have one (1) hospital which they do not operate. The debtors are not serving low income patients. In the past the named hospitals did pay taxes and the taxes funded the State's nonfederal share in relation to DSH and MHAP. In the past the named hospitals received DSH payments from MSDOM after funding was in place. Since 2016, MSDOM has not made any MHAP payments to any hospital. MHAP payments are made to MCOs/COOs after funding is in place. Unless expressly admitted the remaining averments of paragraph no. 12 of the Objection are denied. See Reservation of defenses above.

13. Denied. The law is misstated and Miss. Code §43-13-145 controls regardless of what an invoice might or might not say. The Taxes are initially estimated and assessed in September for the taxes other than the DSH Tax which is first assessed in October, but like all the Mississippi Taxes under discussion, they are subsequently assessed monthly and are "trued up" or reconciled by the end of the fiscal year in June. See Miss. Code

§43-13-145(4)(b).

All of the debtors' taxes which came due after the Petition Date were assessed after the Petition Date for months which occurred after the Petition Date. Unless expressly admitted the remaining averments of paragraph no. 13 of the Objection are denied. See Reservation of defenses above.

14. Denied. The law is misstated and Miss. Code §43-13-145 provides for the taxes to be calculated and assessed monthly. The historical information is used to determine the rate or percentage of the state wide tax liability borne by a single hospital. It does not reflected when liability occurs due to monthly assessment. See Exhibit D - Letter to Hospital Administrators.

The rate feature is based upon the complexity of the information, the need for efficiency and costs saving, the delay in information and the need to project rates and percentages while not waiting for and processing daily or monthly reports from each hospital in Mississippi.

Mississippi is not, as is implied, taxing days which happened two (2) years ago. The system is little different from basing a required quarterly tax payment based upon information from the previous year. That does not mean the tax is on the previous years income. Unless expressly admitted the remaining averments of paragraph no. 14 of the Objection are denied. See Reservation of defenses above.

15. Denied, except it is admitted that petitions were filed on August 24, 2018, the documents were filed and have descriptions therein. Unless expressly admitted the remaining averments of paragraph no. 15 of the Objection are denied. See Reservation of defenses above.

16. Denied, except it is admitted that no trustee was appointed and a committee was appointed on the date asserted. Unless expressly admitted the remaining averments of paragraph no. 16 of the Objection are denied. See Reservation of defenses above.

17. It is admitted that the debtors have not pay the post-petition taxes. Unless expressly admitted the remaining averments of paragraph no. 17 of the Objection are denied. See Reservation of defenses above.

18. Denied as shockingly false. Unless expressly admitted the remaining averments of paragraph no. 18 of the Objection are denied. See Reservation of defenses above.

19. It is admitted that two (2) hospitals have been sold. It is admitted that CHS is operating the Clarksdale Hospital. Unless expressly admitted the remaining averments of paragraph no. 19 of the Objection are denied. See Reservation of defenses above.

20. Denied. The letter speaks for itself and clearly states post-petition taxes. The copy is true and correct. Unless expressly admitted the remaining averments of paragraph no. 20 of the Objection are denied. See Reservation

of defenses above.

21. Denied. Unless expressly admitted the remaining averments of paragraph no. 21 of the Objection are denied. See Reservation of defenses above.

22. Denied. Unless expressly admitted the remaining averments of paragraph no. 22 of the Objection are denied. See Reservation of defenses above.

23. Denied. Unless expressly admitted the remaining averments of paragraph no. 23 of the Objection are denied. See Reservation of defenses above.

24. Admitted as to authorities cited, except it is denied that granting the Motion would prejudice other creditors in these Chapter 11 Cases. The sovereign State of Mississippi did not volunteer to be a creditor. §503 provides for a clear priority and allowance. §1112 indicates that post-petition taxes must be paid. There are no creditor similarly situated to MSDOM. See **Bos. Reg'l Med. Ctr., Inc. v. Massachusetts Div. of Health Care Fin. & Policy**, 365 F.3d 51, 63 (1st Cir. 2004). Unless expressly admitted the remaining averments of paragraph no. 24 of the Objection are denied. See Reservation of defenses above.

25. Admitted as to authorities cited.

26. Denied. Unless expressly admitted the remaining averments of

paragraph no. 26 of the Objection are denied. See Reservation of defenses above.

**GARDENS** REVISITED

27. Denied. **In re Gardens Reg'l Hosp. & Med. Ctr., Inc.**, 573 B.R. 811 (Bankr. C.D. Cal. 2017) is neither controlling nor instructive.[29]

First it is directly contrary to the outcome in **In re Ridgecrest Healthcare, Inc.**, 571 B.R. 838 (Bankr. C.D. Cal. 2017), in which a California Bankruptcy Court found that the "Quality Assurance Fees" imposed by California were an excise tax. 571 B.R. at 844. The Court should adopt the analysis in **In re Ridgecrest Healthcare, Inc.**

Second, the **Gardens** court applied the Ninth Circuit's **Lorber** test which was rejected in **Suburban I.** Particularly the **Gardens** court treated its benefit analysis as the determining factor. In **Suburban I** the Sixth Circuit noted that "all money collected by the Government goes toward defraying its expenses, and is used for public purposes." **Suburban I**, 998 F.2d at 341. As such the "public benefit" component adopted by the Ninth Circuit in **Lorber** is not the "determining factor" in the Sixth Circuit." Id.

Importantly in **Suburban I**, the benefit analysis did not turn on any requirement of a benefit to the general public at large or the balancing of benefits to the employers of paying the premiums. All that was required was

[29] See *supra* note 21-27.

that the premiums, like Mississippi's Taxes, are directed at the financial soundness of a fund upon which a class of the public depended. 998 F.2d at 342. The **Gardens** court gives little more than lip service to the fact that the collected revenue goes first to the state and is applied to the state's expenditures. Mississippi's Taxes meet the requirement of public benefit, including the required level of benefit to Mississippi's general public. See benefits discussion above.

Third, the factors identified by the **Gardens** court are not present in this case:

a. California's DHCS had the discretion to waive interest and penalties for non-payment of the "fee." 573 B.R. at 817. Miss. Code §43-13-145 does not allow this type of discretion to MSDOM and certain Mississippi constitutional provisions prohibit waivers of this type.[30]

b. Excess fees were required to be reimbursed to hospitals. Id. Neither Miss. Code §43-13-145 nor §43-13-117 allow this. Under Miss. Code §43-13-143 "[u]nexpended monies remaining in the fund at the end of a fiscal year shall not lapse into the State General Fund, and any interest

[30] MS Const. Art. 4, §100: "No obligation or liability of any person, association, or corporation held or owned by this state … shall ever be remitted, released or postponed, or in any way diminished by the Legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury…." See also MS Const. Art. 4, §66: "No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use."

earned on monies in the fund shall be deposited to the credit of the fund."

c. California hospitals were reimbursed directly for services. Id. In 2015, inpatient hospital services paid for by MSDOM were transitioned to the "MississippiCAN" program, and since 2016 MHAP payments[31] are not made to hospitals but instead are made to Coordinated Care Organizations ("CCO")[32] under contracts submitted for approval to CMCS. Id.

Federal law prohibits MSDOM from making MHAP payments directly to hospitals.[33]

d. California hospitals could apply the reimbursements to treatment of non-Medi-Cal patients. Id. Neither Miss. Code §43-13-145 nor §43-13-117 allow this.

e. California hospitals with emergency rooms were required to comply with 42 U.S.C. §1395dd which required needed emergency service be provided regardless of ability to pay. "The fact that emergency department patients would receive treatment even if the Act did not exist supports the Court's finding that it is hospitals who receive the preponderance of benefits

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[31] See Exhibit I - Annual Report and Exhibit D - Letter to Hospital Administrators.

[32] The CCOs are Managed care organization (MCO) as defined in 42 CFR §438.2.

[33] Federal law now provides that MSDOM "must ensure that no payment is made to a network provider other than by the MCO … for services covered under the contract between the State and the MCO… , except when these payments are specifically required to be made by the State in Title XIX of the Act, in 42 CFR chapter IV, or when the State agency makes direct payments to network providers for graduate medical education costs approved under the State plan." 42 CFR §438.60.

under the Act." Id.

This is a puzzling isolation of a matter outside the control of a state to determine the benefits of California's fee. It is also a puzzling isolation of emergency room patients from other patients and the community and general public, i.e., since ER patient don't appear to need to benefit ergo no patients benefits ergo the hospital benefits most. It is a puzzling exclusion of the paid for ER services, including those paid for by MCOs, private insurance or self pay. On the whole this factor lacks a logical base and does not translate to Mississippi's circumstances.

In contrast the **Suburban I** did not indicate that the fact that an injured worker could be treated in the ER "regardless of ability to pay" somehow would render the Ohio premium to sustain its fund more like a fee than a tax.

f. "A certain amount of the funds distributed under the [California] Act must be used 'to minimize uncompensated care provided by hospitals to uninsured patients ….'" **Gardens**, 573 B.R. at 817.

This is not a requirement of Mississippi's Hospital Tax. With regard to the Mississippi DSH payment, that payment is directed at hospitals which serve a disportioncate share of low income patients. There is no mention of uninsured patients.

The provisions concerning the MHAP payment only mention the

possible creation of an alternative to MHAP in the form of a "low-income utilization pool of funds to reimburse hospitals for the costs of uncompensated care, charity care and bad debts as permitted and approved pursuant to federal regulations and the Centers for Medicare and Medicaid Services." Miss. Code §43-13-117(A)(18)(b).

Lastly this factor ignores the patient, their communities and Mississippi's public at large as primary beneficiaries of the payments and that with regard to these taxes themselves they only benefit the State as a source of revenue.

g. "DHCS is required to "work in consultation with the hospital community to implement" the Act's provisions…." Neither Miss. Code §43-13-145 nor §43-13-117 require this. The only "consultation" language in §43-13-117 concerns the potential developments of "alternative models" to MHAP. Miss. Code §43-13-117(A)(18)(b).

This factor is also questionable. First "consultation" is no mandate to implement the desires of the consulted. Second, consultation in an area of such complexity would likely occur without statutory identification. That an agency communicates with a taxed entity can hardly determine whether an extraction is a tax.

h. "[The California] Act's purpose is to increase the total amount of funding available to California hospitals by ensuring that California receives

the maximum amount of matching federal dollars under the Medicare program." Id. at 816. The **Gardens** court based this conclusion on a legislative history which stated as much. Id. There is no such legislative history here.

A distinguishing difference for Mississippi is the focus of the directive: the "division shall assess each hospital as provided in Section 43-13-145(4)(a) for the purpose of financing the state portion of the MHAP, supplemental payments and such other purposes as specified in Section 43-13-145. MHAP is operated by MSDOM "for the purpose of protecting patient access to hospital care…." Miss. Code §43-13-117(A)(18)(c)(i).

The Mississippi Legislature was clear that the tax is directed at "financing the state portion of the MHAP, supplemental payments and such other purposes as specified in Section 43-13-145" and "protecting patient access." This financing benefits patients, communities, provides jobs in communities, purchases medicines and equipment, benefits managed care entities and also benefits hospitals. In the final analysis the MHAP Tax is about revenue to pay the "state portion" and "protecting patient access." An affluent state like California, as described in **Gardens**, might be more interested in hospital profit, but Mississippi is not. See discussion of public benefits above.

**Gardens** is an outlier and does not address a tax like Mississippi's Hospital Tax. **Gardens** does not apply to, or even mention, DSH taxes and payments. The factors identified by the **Gardens** court concerning affluent California's fee and a Los Angelos County Hospital do not translate to an analysis of Mississippi's Medical Fund Taxes, vulnerable population or benefits to the public at large.

28. Denied. This is a misstatement or incomplete description of the law. In ¶11 of their Joint Objection the Objecting Parties admit that the sequence of events as they describe them require the payment of the funding mechanism and "Then" the payment is made. [Docket No. 901 ¶11].

Miss. Code §43-13-117 and §43-13-145 as written and as applied, do not require MSDOM to make any payment in the absence of adequate funding. Certainly MSDOM has discretion to calibrate the receipt of tax revenue with the rate of payments out of the Medical Care Fund.

Even if there was a violation, which there is not, in Mississippi the mere violation of a statute or regulation will not support a claim where no private cause of action exists. **Tunica Cty. v. Gray**, 13 So. 3d 826, 829 (Miss. 2009). The Opposing Parties cite no Mississippi authority for a claim. Unless expressly admitted the remaining averments of paragraph no. 28 of the Objection are denied. See Reservation of defenses above.

29. Denied. This is a misstatement or incomplete description of the law.

Unless expressly admitted the remaining averments of paragraph no. 29 of the Objection are denied. See Reservation of defenses above.

30. Admitted.

31. Denied. The legislative rules cited cannot be taken as any indication that revenue is not revenue. The houses of Mississippi's Legislature are not bound by their rules or even the state constitution in meds of procedure. Mississippi courts "lack[] constitutional authority to interfere in the procedural workings of the Legislature, even when those procedures are constitutionally mandated. **Gunn v. Hughes**, 210 So. 3d 969, 971 (Miss. 2017). Moreover, this argument cannot be reconciled with the cases which indicates that the courts are not interested in labels. "One must comprehend, however, the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy." **Ry. Exp. Agency, Inc. v. Com. of Va.**, 358 U.S. 434, 441 (1959).

No where in Miss. Code §43-13-117 is it written that any action is for the benefit of a hospital or hospitals. The statute does state that certain "audits shall determine among other items, the financial benefit to the State of Mississippi of the managed care program…." Id.

No where in Miss. Code§43-13-145 is it written that any action is for the benefit of a hospital or hospitals. In fact the word benefit does not occurred in the statute.

The payments for Mississippi's Medical Care Fund Taxes are tax revenue.

32. Denied, except it is admitted that Mississippi's Taxes are taxes as defined in the cases cited. It should be observed that "the granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it." **License Tax Cases**, 72 U.S. 462, 471 (1866).

33. Denied. See discussion of **Suburban I**.

34. Admitted.

35. Denied. The Mississippi Taxes as issue here are not user sewer fees. The Mississippi Taxes are not a license fee. The Opposing Parties cite no authority except **Lorber** and no authority for the claim that taxes "associated … with licensure, are incident to Debtor's voluntary act and are thus voluntary fees." There is no citation because the statement is unsupportable and its wider application would render all taxes from the voluntary ownership of land to voluntary work as a hedge fund manager free from taxation.

36. Admitted.

37. Denied. The Opposing Parties do not explain how the cases cited establish their position. A review of the cases shows them to be neutral or

supportive of the conclusion that Mississippi's Taxes are indeed Taxes. In **Suburban I** the Sixth Circuit stated "all money collected by the Government goes toward defraying its expenses, and is used for public purposes." **Suburban I,** 998 F.2d at 341. In this case the purpose is placement of funds in the Medical Care Fund. The Fund is used in part for payment of Mississippi's nonfederal share of certain payments. The general public benefits, including but not limited to that segment which is vulnerable.

38. Denied. **Saint Catherine Hosp. of Indiana, LLC v. Indiana Family & Soc. Servs. Admin.,** 800 F.3d 312 (7th Cir. 2015) is neither controlling nor authoritative. No party in **Saint Catherine** argued that the admitted fee was a tax, only half heartedly that it was "akin to a tax." 800 F.3d at 317. Moreover the opinion does not provide enough information for a comparison between affluent Illinois' fee and statues and Mississippi's law and circumstances.

Under Mississippi law, taxes are assessed monthly and a true up and reconciliation occurs in June. Funds are raised for the Mississippi Medical Care Fund. In the Illinois case it appears that the fee was calculate and fixed once before a petition was filed. That just is not the case before this Court. See Exhibit D.

39. Denied. Contrary to the claims of the Opposing Parties, the Mississippi statutes expressly state the tax is directed at "financing the state

portion of the MHAP, supplemental payments and such other purposes as specified in Section 43-13-145" and "protecting patient access." The "division shall assess each hospital as provided in Section 43-13-145(4)(a) for the purpose of financing the state portion of the MHAP, supplemental payments and such other purposes as specified in Section 43-13-145. MHAP is operated by MSDOM "for the purpose of protecting patient access to hospital care…." Miss. Code §43-13-117(A)(18)(c)(i). To say that financing does not involve the generation of revenue is absurd. And again there is no language indicating a direct benefit to hospitals. Mississippi's focus is where it should be on vulnerable patients and the general public. Any benefit to hospitals is indiscrete, indirect and ancillary.

40. Denied. See discussion of $102.9 Million Assessment Tax which involves no "reimbursement." The MHAP payments go to MCO/COOs. The Mississippi Taxes raise funds for the State. The purpose is for placement in the Mississippi Medical Care Fund which in turn funds the State's nonfederal share and other Medicaid programs. See reply to ¶38 above.

41. Denied. See discussion of **Gardens** above.

42. Denied. See discussion of **Gardens** and **Saint Catherine** above. In **Suburban I** the Sixth Circuit rejected the **Lorber** test and especially rejected a "public at large" factor. It was enough that the collected funds were directed at the soundness of a fund which benefited a limited class. **Suburban I,** 998 F.

2d at 342.

43. Denied. See discussion of **Gardens** above.

44. Denied. Mississippi's Constitution prohibits "investments." MS Const. Art. 14, §258 ("The credit of the State shall not be pledged or loaned in aid of any person, association, or corporation; and the State shall not become a stockholder in any corporation or association ...."). Moreover, some hospitals get no supplemental payments or less than they pay in taxes. And again, it was enough in **Suburban I** that the collected funds were directed at the soundness of a fund which benefited a limited class. 998 F.2d at 342. See also **In re Ridgecrest Healthcare, Inc.**, 571 B.R. 838, 842-844 (2017).

45. Denied. The Mississippi Taxes are universally applicable to similarly situated entities, i.e., all licensed hospital. The taxes don't result from privileges claimed by hospitals. Any benefit to hospitals by the State funding the Mississippi Medical Care Fund is not discrete to such hospitals. See discussion of **Suburban II.**[34]

The Hospital Tax does not benefit hospitals. The MHAP and DSH Taxes do not provide a benefit to many hospitals. This is the nature of taxes. The purchase of a B-1 bomber may not benefit one taxpayer directly, in fact the taxpayer might oppose the purchase, but the tax expenditure provides

[34] See *supra* note 9.

military readiness, employment, a multiplier effect, etc. The manufacture and its employees and suppliers get paid is of no consequence.

Here the benefit is to the public as discussed above and cannot be disengaged from the public's interest except by elevating the tool used to benefit the public above the public itself. This elevation is not warranted by the Mississippi Statutes.

MSDOM is not engaged in any private activity and no private creditors have a claim like MSDOM. MSDOM is a sovereign exercising its sovereignty and did not volunteer to be a creditor. See **Suburban II**. See also **In re Ridgecrest Healthcare, Inc.**, 571 B.R. at 842-844. The Opposing Parties fail to identify a similarity situated creditor because there is not one.

46. Denied. See above.

47. Denied. §503 expressly allows the priority.

48. Denied.

49. Denied. Each of the Mississippi Medical Care Fund Taxes are assessed monthly. Miss. Code §43-13-145(4)(emphasis added). These months occurred post-petition. See **Federated Dep't Stores,** 270 F.3d at 1000-1001.

50. Denied. See **Federated Dep't Stores,** 270 F.3d at 1000-1001.

51. Admitted.

52. Denied. See **Federated Dep't Stores,** 270 F.3d at 1000-1001. None of the cases cited by the Opposing Parties are government tax collection

cases. Your humble author has been paying federal taxes since the 1977. The argument of the Opposing Parties suggest that the federal government should have fairly contemplated decades of income taxes in 1977 as it claim for future taxes arose then. This is just not logical. [35]

53. Admitted but not applicable.

54. Denied. Each of the Mississippi Medical Care Fund Taxes are assessed monthly. Miss. Code §43-13-145(4)(emphasis added). These months occurred post-petition. See **Federated Dep't Stores,** 270 F.3d at 1000-1001.

55. Denied. The interest and penalties relate to post-petition taxes.

56. Admitted.

57. Denied. Each of the Mississippi Medical Care Fund Taxes are assessed monthly. Miss. Code §43-13-145(4)(emphasis added). These months occurred post-petition. See **Federated Dep't Stores,** 270 F.3d at 1000-1001.

59. Denied. Id.

60. Admitted as to existence of "conduct test" but denied as to conclusion. Miss. Code §43-13-145(4)(emphasis added). These months occurred post-petition. See **Federated Dep't Stores,** 270 F.3d at 1000-1001.

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[35] A single case of this circuit was located which addressed taxes and the "fair contemplation" standard. **In re Senczyszyn**, 426 B.R. 250 (Bankr. E.D. Mich. 2010), aff'd on other grounds, 444 B.R. 750 (E.D. Mich. 2011). In this case the income was earned and the taxes were self-assessed prior to the filing of a petition. The "Debtors having already declared under penalty of perjury that they owed 2008 income taxes, such that a possible claim was within the fair contemplation of the State of Michigan at the time the petition was filed on March 31, 2009." This gets to the same outcome as required by **Federated Dep't Stores** but the route is questionable.

The post-petition months are the conduct.

61. Denied. See discussion of **Saint Catherine** above.

62. Denied. See above.

63. Denied. See above.

64. Denied, except dismissal may be the only course of action if the Court orders a show cause hearing and no cause is shown.

65. Admitted.

66. Denied. The Movant has asked for a show cause hearing in the event there is a failure to pay allowed tax claims.

67. Denied. The Movant has asked for a show cause hearing in the event there is a failure to pay allowed tax claims.

68. Denied. The Movant has asked for a show cause hearing in the event there is a failure to pay allowed tax claims.

69. Denied.

70. Denied.

ANSWER AND OBJECTION TO CROSS-CLAIM

MSDOM pleads the following defenses: jurisdictional defenses both as to subject matter and person, immunity under the Federal[36] and State

[36] Mississippi Division of Medicaid is immune under the 11th Amendment. **Walker v. Mississippi State Bd. of Med. Licensure**, No. 2:99CV114-P-A, 2000 WL 33907678, at *2 (N.D. Miss. Sept. 22, 2000). The Cross-Claim is not an "in rem" matter, **Tennessee Student Assistance Corp. v. Hood**, 541 U.S. 440, 446 (2004), and does not involve an action for preferential transfers. **Cent. Virginia Cmty. Coll. v. Katz**, 546 U.S. 356, 379 (2006). Moreover the dissent in **Katz** is likely the current view of the US Supreme Court.

Constitution and relevant statutes, no consent, lack of standing, improper venue, failure to exhaust administrative remedies, election, waiver of claim, violation of Rule 7001 of the Federal Rules of Bankruptcy Procedure, failure to state a claim, lack of process and service of process, failure to join necessary parties, assignment of claims, release, accord, satisfaction, estoppel, unclean hands, recoupment and, as allowed by the Court, set off and any and all other matters of defense or affirmative matters in avoidance.

The Cross-Motion is not a core proceeding and should be dismissed. Alternatively the Court should abstain. **Burford v. Sun Oil Company**, 319 U.S. 315 (1943) and avoid the potentially disruptive impact that federal court intervention would have on the state's efforts to maintain a unique and complex administrative structure to regulate a vital state activity.

71. Denied.

72. Denied. MSDOM has not violated any duty and the Opposing Parties are not entitled to any relief.

73. Denied. MSDOM has not violated any duty and the Opposing Parties are not entitled to any relief.

74. Denied. MSDOM has not violated any duty and the Opposing Parties are not entitled to any relief.

75. Denied. MSDOM has not violated any duty and the Opposing Parties are not entitled to any relief.

76. Denied. MSDOM has not violated any duty and the Opposing Parties are not entitled to any relief.

77. Denied. MSDOM has not violated any duty and the Opposing Parties are not entitled to any relief.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

## CONCLUSION

Accordingly the State of Mississippi Division of Medicaid prays that the Joint Objection be rejected and the Motion of MSDOM granted. MSDOM further prays that the Joint Objectors' Cross-Motion be dismissed with prejudice or in the alternative that the court abstain from the exercise of jurisdiction.

Dated: April 2, 2019.

Respectfully submitted,

STATE OF MISSISSIPPI
DIVISION OF MEDICAID

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2019, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on

the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

s/James A. Bobo
James A. Bobo