

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

MISSISSIPPI DEPARTMENT
OF HUMAN SERVICES

PLAINTIFF

vs.

CAUSE NO. 22-cv-286-EFP

MISSISSIPPI COMMUNITY
EDUCATION CENTER, INC., *et al.*

DEFENDANTS

and

MISSISSIPPI COMMUNITY
EDUCATION CENTER, INC.

COUNTER-PLAINTIFF

vs.

MISSISSIPPI DEPARTMENT
OF HUMAN SERVICES

COUNTER-DEFENDANT

RESPONSE IN OPPOSITION TO MCEC'S MOTION TO COMPEL THE
HONORABLE PHIL BRYANT TO PRODUCE DOCUMENTS RESPONSIVE TO
SUBPOENA DUCES TECUM

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the Honorable Phil Bryant, the 64th
Governor of the State of Mississippi**

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NOW INTO COURT, by and through undersigned counsel, comes the Honorable Phil Bryant and responds to the motion to compel him to produce documents responsive to a subpoena duces tecum served by Mississippi Community Education Center, Inc. (“MCEC”) [Doc. 131], as follows:

INTRODUCTION

On May 9, 2022, the Mississippi Department of Human Services (“MDHS”) filed this action against several defendants, including MCEC and its President and Founder, Nancy New [Doc. 2].¹ In its complaint, MDHS seeks to recover funds diverted from the Temporary Assistance for Needy Families (“TANF”) program. Certain transactions at issue are also the subject of ongoing criminal investigations and prosecutions. New and former-MDHS Director John Davis have pleaded guilty to federal and state crimes.

According to MDHS, one of the diversions of TANF funds involved MCEC’s payment of \$1.1 million to National Football League Hall of Fame quarterback Brett Favre for promotional services [Doc. 2 at 49-50]. Favre voluntarily repaid this money, claiming he did not know the \$1.1 million payment was made with TANF funds. MDHS does not contend the \$1.1 million payment was related to the construction of a women’s volleyball facility at the University of Southern Mississippi (“USM Volleyball Center”). Similarly, MDHS does not seek to recoup \$5 million of TANF funds that MCEC paid to sublease the USM Volleyball Center from the University of Southern Mississippi Athletic Foundation (“USM Athletic Foundation”), nor does it allege wrongdoing associated with this expenditure. This is likely because the Board of Trustees of the State Institutions of Higher Learning (“IHL Board”) approved the project after it was recommended by Special Assistant Attorney General Stephanie Ganucheau.

¹ Co-Defendant Nancy New incorporated MCEC as a non-profit corporation on June 9, 1992. New identified herself as the “President & Founder” of MCEC in Articles of Amendment filed with the Mississippi Secretary of State on February 26, 1993. *See*, Exhibit 1.

MCEC served a subpoena on former-Governor Phil Bryant on July 25, 2022, seeking documents related to the USM Volleyball Center. Governor Bryant objected to subpoena, claiming the documents are privileged and outside the bounds of permissible discovery. MCEC subsequently filed the present motion. The motion does not establish a particularized need for the documents. In fact, the motion does not address the privileges invoked by Governor Bryant in any way.

MCEC did not attempt to meet-and-confer with Governor Bryant in advance of filing the present motion. Instead, MCEC went to the press – an action that flies in the face of the *Suppression Order* pending in related criminal cases. This motion was brought in bad faith and solely to annoy, embarrass, and oppress Governor Bryant because he refused to turn a blind eye to the crimes perpetrated by New and Davis. This court should recognize MCEC’s improper motive and award substantial sanctions, including attorneys’ fees, to Governor Bryant.

PROCEDURAL BACKGROUND

I. The claims and defenses in the MDHS lawsuit.

MDHS’ complaint seeks to recover “over \$20 million in public funds diverted” from the TANF program and “squandered by and for” MCEC and its co-defendants “for their enrichment and other private purposes incompatible with the TANF statutes of the United States, with the TANF statutes of Mississippi, and with the alleviation of poverty.” [Doc. 2 at 2]. As to the \$1.1 million paid to Favre, the complaint alleges:

137. Defendant Brett Favre and an entity he owned and controlled, Defendant Favre Enterprises, Inc., entered a contract with Defendant MCEC beginning July 1, 2017, purportedly for services by Favre through the date of July 31, 2018. That contract, on its face, required that Brett Favre speak at three different public events, and one “keynote address,” and that Favre sign autographs at events promoting MCEC itself. Neither Brett Favre, nor anyone on behalf of Favre Enterprises, Inc., ever performed any such speaking or autograph “services.” Certainly, no services were performed by Favre that had anything to do with the pursuit of lawful TANF purposes.

138. Nevertheless, and without regard to whether Favre was performing any service of any kind to anyone for MCEC, MCEC paid Favre Enterprises, Inc., with TANF

funds, a total of \$1,100,000, through a payment to Favre Enterprises of \$500,000 in December of 2017 and a further payment of \$600,000 in June of 2018.

[Doc. 2 at 49-50]. In short, MDHS claims MCEC hired Favre to perform promotional services, Favre did not perform the services, and MCEC paid him \$1.1 million anyway. MDHS *does not* claim the \$1.1 million payment to Favre was intended to fund the USM Volleyball Center construction project.

MCEC answered the complaint on July 11, 2022 [Doc. 70]. MCEC addressed the above allegations as follows:

137. MCEC admits that it was instructed by MDHS, acting through the MDHS Executives, to provide funds to Brett Favre. MCEC contracted with Favre Enterprises, Inc. for \$1,100,000 for Favre to speak publicly and make radio or television advertisements in support of MDHS's Families First initiative. Marketing and other outreach activities to increase public awareness of benefits and services are permissible grant, including TANF, expenditures. For example, the TANF State Plan contemplates "an aggressive public service campaign including billboards and radio and television announcements" to "promote abstinence, reduce the teen and out-of-wedlock births, and develop teen leadership throughout the State by working with public and private organizations, schools, churches and interested groups." MDHS State Plan (Oct. 1, 204 – Dec. 31, 2017), p. 11. Favre provided services pursuant to this contract. MCEC is without knowledge or information sufficient to form a belief as to the truth of the remaining averments. Therefore, they are denied.

138. MCEC is without knowledge or information sufficient to form a belief as to the truth of the averments. Therefore, they are denied.

[Doc. 70 at 23]. MCEC's defense is that Favre performed promotional services and the \$1.1 million payment was a permissible TANF expenditure. MCEC's answer does not mention the USM Volleyball Center project or any connection between it and the \$1.1 million payment to Favre.

II. MCEC subpoenaed Governor Bryant for documents relating to the USM Volleyball Center.

The circuit clerk issued a subpoena duces tecum to Governor Bryant on July 25, 2022, at the request of MCEC [Doc. 93]. Even though no claim or defense has been asserted in this action regarding the USM Volleyball Center, MCEC's subpoena requests production of the following documents:

1. All Documents including, without limitation, Documents reflecting

communications between you and any person concerning the USM Volleyball Center.

2. All Documents including, without limitation, Documents reflecting communications between you and any person or entity concerning funding for the USM Volleyball Center.
3. All Documents [] including, without limitation, Documents reflecting communications between you and any person intended to further efforts to secure funding from MDHS for the USM Volleyball Center.

[Doc. 93 at 6]. Counsel for MCEC and Governor Bryant agreed to extend the due date for a response to the subpoena to August 26, 2022.²

III. Governor Bryant objected to the subpoena but offered to produce documents subject to the entry of a protective order.

Governor Bryant provided MCEC with written objections to the subpoena pursuant to Miss. R. Civ. P. 45(d)(2)(B) on August 26, 2022 (“Objection”).³ The Objection summarizes Governor Bryant’s position as follows:

Mississippi Rule of Civil Procedure 45(d)(2)(B) provides in pertinent part that, “[t]he person to whom the subpoena is directed may . . . serve upon the party serving the subpoena written objections to inspection or copying any and all of the designated materials. . . . If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued.” My client objects to producing certain documents requested by the subpoena on the basis of attorney-client privilege and the work product doctrine. My client is willing to produce other documents requested by the subpoena subject to the entry of a protective order that preserves other applicable privileges and prevents the disclosure of said documents or their contents to non-parties.

I have previously raised with you the issue of producing documents responsive to the subpoena following the entry of a protective order. You refused to agree to any form of a protective order and acknowledged that we may serve objections to the subpoena. What follows is a brief discussion of applicable privileges, reasons why a protective order should be entered, and a brief analysis of additional issues raised by the subpoena.

Id. at 1. In addition to asserting the attorney-client privilege, the Objection raises a pair of privileges

² Exhibit 2.

³ Exhibit 3.

that may be properly invoked by state executive officers. These are the deliberative process privilege and the chief executive communications privilege.

A. The subpoena seeks documents that are protected by the deliberative process privilege.

The Objection states as follows regarding the deliberative process privilege:

While the Mississippi Supreme Court has not addressed the deliberative process privilege, we are confident the Court would recognize the privilege exists under Mississippi law if confronted with the issue. The deliberative process privilege refers to “the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received, and the exchange of views may not be as frank and honest as the public good requires.” *Soucie v. David*, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring).

Id. at 1-2. The Objection continues, “Some of the documents sought by the subpoena are protected by the deliberative process privilege. My client is **willing to produce these documents** with the entry of a protective order that preserves the privilege and prevents disclosure of said documents and their contents to non-parties, so long as said documents are not otherwise protected by the attorney-client privilege or work product doctrine. Such an arrangement would preserve the privileged nature of the documents and would prevent them from being misused for media attention or some other illegitimate reason while simultaneously allowing the parties to utilize the documents within the confines of this case as allowed by the Mississippi Rules of Civil Procedure and Mississippi Rules of Evidence.” *Id.* at 2 (emphasis added).

B. The subpoena seeks documents that are protected by the chief executive communications privilege.

The Objection discusses the chief executive communications privilege as follows:

The Mississippi Supreme Court has not addressed the chief executive communications privilege. We believe the Court would also recognize this privilege under Mississippi law, just as courts in many other states have done when confronted with the issue. *See*, e.g., *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978); *Hamilton v. Verdon*, 414 A.2d 914 (Md. 1980); *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska 1986); *Capital Information Group v. State*, 923 P.2d 29, 33 (Alaska 1996); *Killington, Ltd. v. Lash*, 572 A.2d 1368 (Vt. 1990); *New England Coalition for Energy Efficiency & the Environment v. Office of the Governor*, 670

A.2d 815 (Vt. 1995); *Guy v. Judicial Nominating Committee*, 659 A.2d 777 (Del. 1995); *Times Mirror Co. v. Super. Ct.*, 813 P.2d 240 (Cal. 1991); *Taylor v. Worrell Enter., Inc.*, 409 S.E.2d 136 (Va. 1991); *Courier-Journal v. Jones*, 895 S.2d 6 (Ky. Ct. App. 1995); *New Mexico v. First Judicial District Court of New Mexico*, 629 P.2d 330 (N.M. 1981); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 476 (Ohio 2006).

The executive privilege is broader in scope than the deliberative process privilege. It “applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). The United States Supreme Court has held that the “need for information for use in civil cases, while far from negligible, does not share the urgency or significance” of criminal subpoena requests. *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 384 (2004). Additionally, the Court explained that “our precedent provides no support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections.” *Id.* at 388. Instead, such specificity would only be required after the party seeking disclosure has “satisfied his burden of showing the propriety of his requests.” *Id.*

Id. The Objection explains that “[a]ll responsive documents within my client’s care, custody, or control are protected by the executive privilege. A strict application of the law would require you to provide the court with sufficient reasons why the executive privilege should not apply, or in the event it does apply, why the documents should be nonetheless produced and pursuant to what terms and conditions. Again, notwithstanding this privilege and the threshold showing you are required to make, my client is willing to produce said documents following the entry of a carefully-crafted protective order.” *Id.*

C. The entry of a protective order would be consistent with the *Suppression Order* entered in related criminal proceedings.

The Objection observes that a protective order would further the purposes of a *Suppression Order* this court previously entered in related criminal proceedings. *State v. New*, Nos. 20-0-052, 20-0-053 (Hinds Cty. Cir. Ct.). The Objection explained:

On November 16, 2020, Circuit Court Judge Faye Peterson entered a *Suppression Order* [Doc. 17] in the above-referenced criminal cases. The order states that, “[t]he Court, in an effort to ensure that the State and [Nancy New] . . . receive a fair and impartial trial in the Circuit Court of Hinds County, Mississippi and having admonished the parties concerning an article published November 14, 2020 that directly relates to this cause, hereby enters a *Suppression Order* limiting pre-trial publicity until the

completion of the trial or disposition without trial.” (emphasis added). The court ordered “that all attorneys, their representatives, parties, witnesses, law enforcement officers and court personnel are prohibited from discussing or commenting on any aspects of this case with the media until such time as it has concluded[.]”

The above-referenced civil action is also pending in Hinds County Circuit Court before Judge Peterson. As you pointed out in the *Motion to Stay Discovery or, Alternatively, for Protective Order* [Doc. 71] in the civil action, “MDHS’s Complaint involves the same issues present in the ongoing criminal proceedings and investigation. They do not merely overlap, but, as in *McCoy v. Yazoo City*, 2014 U.S. Dist. LEXIS 177646, at *3 (S.D. Miss. Dec. 29, 2014)], the issues are ‘seemingly identical.’” A protective order would prevent the same individuals from releasing documents and information in the civil action that the *Suppression Order* prevents in the criminal cases. Moreover, a protective order would accomplish the same end as the *Suppression Order* accomplishes in the criminal cases – namely, preserving the integrity of court proceedings.

Id. at 3. The Objection continues:

My client agrees with Judge Peterson. The allegations levied against your client should be tried in a court of law, not in the media. Evidence, and especially privileged materials, should not be utilized to unduly influence public opinion and to bias potential jurors. In a court of law, parties and witnesses have a right to respond to unfounded or misguided allegations before an impartial judge and jury. This is not always true with the media. Media members sometimes carry biases and unfounded and unfair opinions that impact their work. Instead of impartially seeking the truth about a given matter, the media member sometimes seeks to reinforce her already-existing beliefs, however unfounded they may be. Some publications limit or disallow this sort of journalism. Unfortunately, others do not. This can result in an echo-chamber of confirmation bias that unduly influences court proceedings and biases potential jurors against one party or another. I am sure you do not want such a situation to arise for your client.

Id. In light of these legitimate concerns, Governor Bryant offered “to produce the requested documents with a protective order in place that: (1) ensures the integrity of the court proceedings in the civil action and its related criminal actions, (2) does not unduly prejudice the rights of the defendants in the civil action and its related criminal actions, (3) respects the privacy and other similar rights of non-party respondents, and (4) preserves the privileged nature of documents and information.” *Id.*

D. The subpoena exceeds the scope of permissible discovery.

Governor Bryant also objected to the subpoena because it seeks documents that are outside the proper scope of discovery. The Objection explains:

Mississippi Rule of Civil Procedure 26(b)(1) provides in pertinent part that, “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party.” The rule also recognizes that, “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Thus, for your subpoena to be enforceable, you must show that the subpoena seeks documents that are: (1) relevant to the issues raised by the claims or defenses of a party and (2) reasonably calculated to lead to the discovery of admissible evidence.

Id. at 3-4. The Objection observes that, “[t]he Complaint in the civil action [Doc. 2] does not address the USM Volleyball Center. No defendant has alleged an affirmative defense that addresses the USM Volleyball Center. It strains credibility to contend documents or information relating to a matter that is not at issue in the civil action is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the documents sought by your subpoena are not discoverable.” *Id.* at 4. Nonetheless, Governor Bryant offered to produce the requested documents subject to the entry of a protective order.

E. The subpoena is a “fishing expedition” designed to distract attention from New’s criminal conduct.

Finally, the Objection summarizes Governor Bryant’s position regarding the subpoena as follows:

In sum, my client has several valid objections to the subpoena, many of which would render it wholly unenforceable. ***It appears that your client is attempting to distract from her alleged wrongdoing by involving a former Governor of this state in a fishing expedition that has no relation to the claims brought by MDHS.*** Nonetheless, my client is willing to produce the overwhelming majority of the documents you seek if all attorneys, their representatives, parties, witnesses, law enforcement officers, and court personnel (*i.e.*, all of the same persons bound by the *Suppression Order* in the criminal actions) are subject to a protective order that protects the integrity of this legal proceeding, preserves applicable privileges, and ensures this civil action and its related criminal actions are tried in a court of law.

Id. (emphasis added). MCEC's counsel did not respond to the Objection and made no effort to meet-and-confer to resolve the dispute or to craft a mutually agreeable protective order. Instead, MCEC filed the present motion and attached numerous text messages to create a media frenzy that distracts from New's felonious conduct.

FACTUAL BACKGROUND

MCEC's motion says nothing about the merits of Governor Bryant's objections and does not address his offer to produce documents subject to the entry of a protective order. The failure to address these matters speaks volumes. MCEC knows Governor Bryant's position is legally sound and consistent with previous pronouncements of this court in related criminal proceedings. MCEC's primary intention with the present motion is not to seek legitimate discovery, but rather to create a media circus. The purpose of this response is to set the record straight regarding Governor Bryant's knowledge of and involvement with the USM Volleyball Center project, to argue in favor of fair and reasonable discovery limitations, and to seek an award of substantial sanctions against MCEC and any other responsible interests for their bad faith abuse of the subpoena power.

I. Favre asked Governor Bryant in mid-2017 to assist him in raising private donations and corporate sponsorships for the USM Volleyball Center.

Governor Bryant first learned Favre was attempting to raise money for the construction of the USM Volleyball Center on April 20, 2017. A text message from Favre to Bryant reads:

Hey governor[,] this [is] [B]rett Favre. Poncho and I are flying to [C]huck Scianna's golf tournament now and I asked him to pass your number. Deanna and I are building a volleyball facility on campus and I need your influence somehow to get donations and or sponsorships. Obviously Southern has no money so I'm hustling to get it raised. We want to start this summer and finish in a year or less. I met Cspire about sponsoring and they are thinking it over and I'm trying others as well. Think about it and if you are in [Hattiesburg] again and want to swing by [my] place you[']r[e] certainly welcome or poncho and I can see you. Thanks in advance for all you do

Governor Bryant responded a few hours later, "Of course I am all in on the [v]olleyball facility. Y'all have fun and next week come see me. We will have that thing built before you know it. One

thing I know how to do is raise money [thumbs up emoji].”⁴ Over two months later, on July 21, 2017, Favre texted the following to Governor Bryant:

Not sure how we [] can help get this facility built for Vball. But you are the governor and [,] on our side [,] and that’s a good thing. Actually [,] a great thing.

Governor Bryant responded, “We can do that. Just get me some numbers and I’ll find a way. Maybe USM or the Coach can call me and we’ll get on it.” Favre replied that he would “have [] on Gilbert[,] the new [athletic director][,] give you everything you need.”⁵ On the following day, Favre forwarded the “[l]atest plans” for the facility to Governor Bryant and once again explained, “I’m trying to get sponsors, donations etc... if we can find a contractor that would say hey rather than give you money I’ll build for free!! Maybe you [k]now of someone[?] [thumbs up emoji].” Governor Bryant told Favre that he was “all over it.”⁶

It is important to note that, in these early text messages, Favre never mentioned the use of public funds, much less the use of TANF funds for the construction of the facility. At this time, the discussions between Favre and Governor Bryant were focused on private donations and corporate sponsorships.

II. Meanwhile, unbeknownst to Governor Bryant, New and Favre were pursuing MDHS funds for the USM Volleyball Center.

It appears New and Davis discussed using MDHS funds to pay for the construction of the USM Volleyball Center in advance of a July 24, 2017, meeting with USM officials. Favre seemed surprised in a text message to New following the meeting. The message reads, “Nancy[,] thank you again!!! John mentioned 4 million and [I was] not sure if I heard him right. Very big deal and [I] can’t

⁴ Exhibit 4. Governor Bryant has attempted to correct typographical and grammatical errors within quoted text messages for the sake of the reader.

⁵ Exhibit 5.

⁶ Exhibit 6.

thank you enough ☺.” [Doc. 131-3]. Governor Bryant had no knowledge of or involvement in this meeting, nor did he have knowledge of or involvement with Davis’ \$4 million commitment.

A few days later, Favre suggested to New in a text message that he could perform “a few radio spots” for MCEC. New liked the idea and said MCEC could make a “first phase” payment to Favre of \$500,000. The contract would renew in September 2017. Favre explained that he would donate or direct the payments to USM for the construction of the volleyball facility [Docs. 131-4, 131-5]. The texts attached to the motion to compel read:

Favre: Also[,] I want to help you and was thinking a PSA is [an] option that could be done quick and easy to put together ☺

Favre: Ok. I could record a few radio spots here initially[,] I’m sure right here. [We could s]ee how it is received and whatever compensation could go to USM

New: 4 million dollars ☺ ☺ ☺. Just kidding. The first phase could be \$500,000 and after Sept. we can renew. This is a good approach. What do you think?

Favre: Was just thinking that here is the way to do it!!

New: Exactly. Ok, Zach [New, Nancy’s son] can get you a MOA or you may have one that you would rather use. Either way we can get this done.

Favre: Excuse my football intelligence[,] but what is [a] MOA? [frowny face emoji]

New: Working agreement, no big deal. We will send you one and you can adjust

Favre: My biggest concern is time commitment so [if] we can manage that I’m good

New: Please do not worry about your time commitment. We can only imagine how many directions you are pulled. Just a few things here and there, spread out, will be plenty.

Favre: Ok great

Whatever arrangement MCEC and Favre ultimately reached, if any, the point remains the same: Governor Bryant was not involved in crafting the arrangement, and he had no knowledge of its existence. Clearly, the concept of passing through funds to USM was not Governor Bryant’s idea.

III. Favre asked New if the media might discover MCEC's payments to him.

On August 2, 2017, Favre sent a text message to New that reads, "John said you guys have a big meeting Monday with [the] university. Hope we hit a homerun. Looks as though the facility is gonna [sic] be more than we thought which is always the case." [Doc. 131-6]. In a follow-up text, Favre expressed uneasiness to New about their arrangement being leaked to the press:

Favre: If you were to pay me is there anyway [sic] the media can find out where it came from and how much?

New: No, we never have had that information publicized. I understand you being uneasy about that though. Let's see what happens on Monday with the conversation with some of the folks at Southern. Maybe it will click with them. Hopefully.

Favre: Ok thanks

[Doc. 131-7]. Once again, Governor Bryant is not included in any of the messages between New⁷ and Favre and had no contemporaneous knowledge of their discussions.

New informed Favre on August 4, 2017, that she had "just got off the phone with Phil Bryant! He is on board with us! We will get this done!" *Id.* New did not tell Governor Bryant that she and Davis had arranged to contribute \$4 million in TANF funds to the project. She simply explained that she was helping Favre gain university approval of the project and it appeared the university would ultimately approve it. Just as he had indicated to Favre, Bryant told New that he would assist them in raising private donations and corporate sponsorships to help fund the project.

IV. Without Governor Bryant's involvement, the Attorney General's Office and the IHL approved the use of MDHS funds for the USM Volleyball Center project.

On August 10, 2017, Dr. Gordon Cannon⁸ notified New that the university president and general counsel had decided to proceed with the USM Volleyball Center project. New delivered the

⁷ New had a personal interest in securing new athletic facilities for USM. She is an alumna of USM and has sat on multiple university boards of directors, including the board of the USM Athletic Foundation. *See*, https://southernmiss.com/news/2016/8/24/Fan_Feature_Nancy_New.aspx.

⁸ Cannon serves as the T.W. Bennett Distinguished Professor in the Sciences and Vice-Provost for Research at USM. *See*, <http://www.research.olemiss.edu/agenda/bios/GordonCannon.pdf>.

news to Favre that same day [Doc. 131-8]. Cannon provided additional information to New nine days later. New and Favre exchanged the following text messages on August 19, 2017:

New: Morning. I got a call yesterday from Gordon Cannon that their meetings went well on accepting the money, etc. Next Wed. there is another meeting with [the] MDHS attorney and USM to make sure all the wording is good before it goes to IHL. Still keeping my fingers crossed. I still think it will happen.

Favre: Thanks Nancy. [USM Athletic Director] Jon Gilbert said the same thing yesterday. [praying hands emoji]

[Doc. 131-9]. Dr. Cannon supplied further inside information to New on August 23, 2017, which New passed along to Favre. New told Favre that Cannon had concluded a meeting with Garrig Shields⁹ and Jacob Black¹⁰ and “everything [is] a go. Daniel Feig¹¹ will be in touch with you or Zack [New] to ask for a draft lease. Our target date for having everything complete for board approval is Sept[.] 22. I know this is a short time line but that would get us approval [before] October which would not delay bidding the project as currently scheduled.” [Doc. 131-10].

⁹ Shields was “General Counsel to the Executive Director’s Office of MDHS before transitioning to serve MDHS agency wide as a Special Assistant Attorney General.” See, <https://www.shieldsgoodson.com/about>.

¹⁰ The state auditor served “a civil demand for \$3,648,557.60 on former Deputy Director of the Mississippi Department of Human Services (DHS) Jacob Black. The demand requires Black to repay misspent Temporary Assistance for Needy Families (commonly called ‘welfare’) money. Black was served with this demand based on audit findings from the Office of the State Auditor and new findings released in April 2022 by an independent CPA firm reviewing DHS spending. The audits found Black assisted a vendor, NCC Ventures, in violating procurement procedures. NCC Ventures has already been issued a demand by the Auditor for work that was not completed and has been sued by the State of Mississippi. Black’s demand is also based on his role assisting the flow of welfare money to the Mississippi Community Education Center—a non-profit owned by Nancy and Zach New—and the Autism Center of North Mississippi. Nancy and Zach New have already been charged and pleaded guilty to state and federal charges in the largest public fraud scheme in Mississippi’s history.” See, <https://www.dailyleader.com/2022/05/27/auditor-issues-civil-demand-on-former-dhs-deputy-director-black/>.

¹¹ Feig currently is the Director of Athletics/Vice Chancellor for Intercollegiate Athletics at USC Upstate. Feig previously served as “Executive Associate Athletic Director [at USM], assisting with the day-to-day management and administration of all aspects of the Department of Intercollegiate Athletics. Among his broad responsibilities, Feig directly supervised several administrative units within the department, including the athletic compliance office, athletic academic services, the athletic training office, the strength and conditioning program, the drug testing program, and the graduate assistantship program. As a former practicing attorney, Feig also served as the Athletic Department’s contract administrator and liaison to the University’s General Counsel.” See, <https://upstatespartans.com/staff-directory/daniel-feig/100>.

The IHL Board approved a lease agreement between USM and the USM Athletic Foundation on October 19, 2017. The board minutes¹² state:

USM – Approved the Amended and Restated Lease with the University of Southern Mississippi Athletic Foundation (Foundation/Lessee). The premises involve approximately two acres of land known as the Payne Center parking lot located at 101 MK Turk Circle, Hattiesburg, MS 39406. The premises also include portions of the Reed Green Coliseum located adjacent to the proposed construction in the Payne Center parking lot. During the term of the Lease, the Foundation will construct a Wellness Center of approximately thirty thousand square feet in accordance with plans and specifications as approved by USM. The premises shall also include certain other underutilized athletic space as agreed upon by the parties hereto. ***The Foundation intends to sublease the premises to a third party for prepaid rent in order to allow the Foundation to perform the construction to the premises.*** The purpose of the Lease Agreement is to provide the Foundation the right to utilize the premises as needed and agreed upon by the parties, including the right to construct and lease/sublease a new Wellness Center and/or other athletics related space, including but not limited to the Reed Green Coliseum. All construction of the facilities by the Foundation shall be in accordance with plans and specifications as approved by USM. The term of the Lease shall commence subsequent to IHL Board approval and full execution of the Lease and shall expire on July 31, 2022. The contract amount shall be \$1.00 cash in hand. This lease and subsequent sublease are being funded through the lease of athletic department facilities by the Mississippi Community Education Center (MCEC), a 501(c)3 organization designed to provide schools, communities and families with educational services and training programs in South Mississippi. ***MCEC will use the subject facilities to support their programming efforts for South Mississippi. MCEC's funding for this project is via a Block Grant from the Mississippi Department of Human Services. The funding from MCEC shall be prepaid rent to the Foundation in the amount of Five Million Dollars (\$5,000,000) for the leasing of certain USM athletic facilities including but not limited to the to be constructed Wellness Center, Reed Green Coliseum and additional athletic space as agreed upon by USM and the Foundation. The agreement, which was reviewed and approved by the Attorney General's Office prior to the Board's approval of this item,*** is on file in the Board Office.

Special Assistant Attorney General Stephanie L. Ganucheau reviewed the lease agreement and recommended that the IHL Board approve it. The October 9, 2017, memorandum she drafted to Dr. John Pearce, Associate Commissioner of Finance and Administration,¹³ plainly reads:

¹² Exhibit 7 (emphasis added).

¹³ Exhibit 46.

MEMORANDUM

TO: Dr. John Pearce, Associate Commissioner of Finance and Administration
FROM: Stephanie L. Ganuchau, Special Assistant Attorney General
DATE: October 9, 2017
RE: USM Amended and Restated Lease with USM Athletic Foundation

Pursuant to your request, I have reviewed the proposed Amended and Restated Lease between the University of Southern Mississippi (USM) and the University of Southern Mississippi Athletic Foundation, for the construction of a wellness center and utilization of other under-utilized athletic space, and would make the following recommendation:

Recommendation: I recommend the attached letter for IHL Board approval.

Please let me know if you have any questions.

cc: Leigh Patterson
Van Gillespie

New notified Favre that the IHL Board approved the lease arrangement. The text message exchange between them on October 19, 2017, reads:

New: It's a go. All approved by IHL!

Favre: Finally[,] and thanks Nancy. I hope it's enough now. Jon [Gilbert] said 500k has to go to renovations for reed green and another 500 to maintenances fund

Favre: See ya [sic] next week ☺

New: We will still [do a] fundraiser, etc. we will get the rest. Also, I thought Jon let you know but we had to postpone the 25th due to Dr. Bennett's request but I will get us another date.

Favre: Ok ☺

New: Also, in the next few days could I send you a draft proposal to do a couple of psa[']s, etc. for Families First[?]

Favre: K good

[Doc. 131-11]. Gilbert announced the construction of the new facility on that same day. Southern Miss Student Media reported his announcement on October 24, 2017, as follows:¹⁴

“On behalf of the university, the Department of Athletics, and as a community member, I am proud and honored to announce this facility,” Gilbert said. “It is certain to be a point of pride, as it stands to serve our student-athletes, our student body and community constituents for years to come.”

The Wellness Center, the current name the facility will go by, is intended to be 26,000 to 28,000 square feet and is to be located along West Fourth Street by the Payne Center. The facility is planned to hold one thousand people and will be the new home for the Golden Eagles’ volleyball team. Planning to host community and student events, the center will have a weight room, volleyball court, training room, locker rooms and classrooms.

Currently, Reed Green Coliseum is home to the men and women’s basketball team, the volleyball team and hosts numerous study body events. The construction of the Wellness Center will ease the burden on the aging Reed Green facility.

The Wellness Center will be funded through private donations and by the Mississippi Community Education Center. The architectural firm of Wier Boerner Allin of Jackson was chosen to design the new facility.

Wier Boerner Allin designed Mississippi State’s new baseball stadium that is currently under construction and new softball stadium. The firm also designed Millsaps’ new softball and tennis facility, along with the Mississippi Coliseum in Jackson and Ed’s Burgers in Hattiesburg.

Much more is still in development such as the cost and the design of the Wellness Center. However, once the funding is secured and cost of construction is finalized, the construction itself is projected to take 12 to 15 months.

The USM Athletic Foundation signed the lease on October 26, 2017. The university signed the lease on November 2, 2017.¹⁵ On that same day, New and Favre discussed obtaining Governor Bryant’s assistance in a private fundraiser for the facility. The text message exchange reads:

New: I saw the Gov last night. We will still plan the fundraiser as well[.] [W]e can get another date from him that works with your time, too. Surely, Southern folks won’t say to postpone it again. At any rate[.] it’s all going to work out.

Favre: I[‘m] ready [thumbs up emoji]

¹⁴ See, <https://sm2media.com/17598/news/southern-miss-announces-new-facility/> (emphasis in original).

¹⁵ Exhibit 8 at 14.

[Doc. 131-12]. The USM Athletic Foundation “received the first installment of \$2,500,000 in TANF funds on Nov. 6, 2017, followed by a second payment for the same amount on Dec. 5, 2017.”¹⁶ The insinuation by New and certain members of the press that Governor Bryant “worked. . . to channel”¹⁷ these payments of TANF funds is completely unsupported and absolutely false.

V. Favre received his first payment from MCEC in late-December 2017.

Favre Enterprises, Inc. received a \$500,000.00 payment from MCEC in late-December 2017.¹⁸ Governor Bryant had no knowledge of or involvement with this payment. Favre thanked New for the payment in a December 27, 2017, text message and the following exchange ensued:¹⁹

Favre: Nancy[,] Santa came today and dropped some money off ☺ ☺ thank you my goodness thank you. We need to setup the promo for you soon. You[']r[e] way to[o] kind

New: Yes, he did. He felt you had been pretty good this year! After these holidays let’s get our calendars together on a few activities, etc. [P]lease know if we asked you to do something and you can’t, it is ok. We will get it all worked out.

New: How is the building coming along and Beach Volleyball? Is it the way you had hoped?

Favre: Well[,] it’s more of when they will start it. Now it’s February they are saying [thumbs down emoji]

VI. Favre asked Governor Bryant in May 2018 to assist him in finding someone to build lockers for the USM Volleyball Center.

Favre sent the following message to Governor Bryant on May 9, 2018:

Governor[,] this Brett. I’m still trying to save money on [the] Vball facility. We have visitor and [h]ome lockers yet to build and Warren Hood is donating any lumber. [It would be helpful] [i]f someone would build them on [their] spare time. Poncho mentioned the prison industry possibly as a builder. The architects can provide all specs

¹⁶ See, <https://www.mississippifreepress.org/27465/in-depth-how-brett-favre-secured-6-million-in-welfare-funds-for-a-volleyball-stadium>.

¹⁷ See, <https://mississippitoday.org/2022/09/13/phil-bryant-brett-favre-welfare/>.

¹⁸ *Id.*

¹⁹ Doc. 131-13.

Governor Bryant said he would “get on it”.²⁰ Nine days later, on May 18, 2018, Governor Bryant asked Favre for an address to which the governor could send a personal donation for the volleyball project. Favre provided the address and payment instructions. Governor Bryant responded with the following message:

Ok. I got Chuck Davis in Laurel ready to come down and get on the Lockers. He is a cabinet builder and does all the work for Ben Napier on their T.V. [show] HOME TOWN. Chuck can be reached at [REDACTED]. If someone will give him a call[,] he will get on it and I will pay for the work [thumbs up emoji]. If you have time to meet him there one day[,] I bet we would get a really good price. I am also going to reach out to Ponch and see if we can't get a fundraiser in Hattiesburg put together [thumbs up emoji].²¹

Governor Bryant and Favre did not discuss the use of public funds for this project.

VII. Favre and New hoped Governor Bryant could raise a substantial amount of money in a private fundraiser.

Favre notified New on March 28, 2018, that the construction bids for the facility were much higher than anticipated. Favre had been confident that construction costs would be fully covered by the \$5 million payment and other money “we have saved.” New reminded Favre that they could still have a fundraiser “at the Governor’s mansion.” And, according to New, “if we need to, we will roll up our sleeves and get the rest.” The text message exchange is as follows:

Favre: Nancy[,] I wanted to update you on [the] facility. The bids all are in and shockingly the lowest is 6.9. The architects were confident it would come in lower than what we have saved. Really frustrating. Jon [Gilbert] said he wanted to go back to [the] lowest bid[der] and talk to them about getting it down to 5.9. I'll keep you updated.

New: Wow, that is disturbing. Lordy, all this time and now to find this out. Well, let's see what the lowest bid comes back with and then if we need to, we will roll up our sleeves and get the rest. We can still have the fundraiser at the Governor’s mansion, too. We can use Phil’s business list that he offered earlier. I will be thinking and hopefully there will be something in the new budget for Families First to offer. But that’s not [un]til July. I will be thinking on other things. Thanks for letting me know.

[Doc. 131-14]. One or more private donors had already been enlisted to pay for a separate beach

²⁰ Exhibit 9.

²¹ Exhibit 10.

volleyball complex at USM. The Mississippi Free Press implied in a recent report that Favre may have utilized part of the \$1.1 million paid to him by MCEC for promotional services to pay for the beach volleyball complex. The September 16, 2022, article reads:

In June 2018, MCEC transferred a second TANF payment to Favre Enterprises in the amount of \$600,000. That same month, WDAM reported that the beach volleyball project would consist of three new outdoor courts constructed just south of the upcoming stadium and that it would cost \$250,000 with a June 2019 completion date. The story said the beach volleyball project was “funded through private donations,” but did not name the apparent donors.²²

Governor Bryant had no knowledge of or involvement with the beach volleyball project.

VIII. Governor Bryant did not attend or participate in the meeting at Favre’s home.

In its motion, MCEC references a Microsoft Outlook calendar appointment dated January 1, 2019, from Davis to Ted DiBiase that contains the following description: “This meeting was requested by Brett Favre and the Governor to discuss the Education Research Program that addresses brain injury caused by concussions. They also want to discuss the new facility at USM.” [Doc. 131-15]. Mississippi Today reporter Anna Wolfe correctly reported on April, 4, 2022, that Governor Bryant did not attend or participate in this meeting:

In a calendar entry obtained by Mississippi Today, Davis wrote that the governor and Favre requested the meeting, which was originally to take place at New’s office. But due to bad weather preventing a flight from Hattiesburg to Jackson, texts show, Davis and New drove to the football player’s south Mississippi mansion instead.²³

Despite what Davis’s calendar entry says, Governor Bryant did not request the meeting, did not attend the meeting, did not participate in the meeting, and has no knowledge of what was discussed.

²² See, <https://www.mississippifreepress.org/27465/in-depth-how-brett-favre-secured-6-million-in-welfare-funds-for-a-volleyball-stadium>.

²³ See, <https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/>.

IX. Ben Napier assisted with locker construction for the USM Volleyball Center at Governor Bryant's request.

On January 12, 2019, Governor Bryant made the following post on Twitter: "Don't forget the Season 3 premiere of Home Town, with Mississippians Ben and Erin Napier, comes on Monday night at 8:00 p.m. We are proud of them for showcasing our great state on a nation[al] scale." Bryant sent a link to his tweet to Favre and asked, "Please retweet. Ben helped us with the lockers for the Volleyball Complex. He and Erin's show in Laurel is doing great. Thanks brother." Favre responded, "You bet."²⁴

X. Favre asked Davis for additional public funds.

In her reporting, Wolfe stated that Favre approached Davis for additional MDHS funding of the volleyball project on March 18, 2019.²⁵ Wolfe wrote:

Around the same time, Favre was getting nervous about holding the bag for more than \$1 million that the Southern Miss Athletic Foundation needed to build the new volleyball facility Favre promoted.

"Hey brother Deanna and [I] still owe 1.1 million on Vball," Favre texted Davis, referring to his wife, Deanna Favre. "Any chance you and Nancy can help with that? They don't need it at the moment."

Wolfe's story continued:

"Good to hear from you. Let me see what we can do," Davis responded. "[W]e certainly want to see the Vball project come together. I'll get back with you tomorrow."²⁶

Favre exchanged the following messages with New on May 15 and 16, 2019:

Favre: Nancy[,] I asked the college for an update on what is owed as of today and it's 1,070,000. It's not due right now. And we almost have the final plans for beach. They look great. Of course[,] you can help out again. And regardless I owe you big time. ☺

New: Hey Brett. That amount is not too bad. We will see what we can do hopefully after July 1. I can't wait to hear about the plans for the beach. Keep me posted.

²⁴ Exhibit 11.

²⁵ See, <https://mississippitoday.org/2022/04/06/brett-favre-used-fame-favors-welfare-dollars/>.

²⁶ *Id.*

[Doc. 131-16]. Favre subsequently mentioned in a text to one of his business partners, “I still owe 1.2 for the Vball complex on campus and not sure if Nancy and John can keep covering for me.”²⁷

Favre claimed his debt grew from \$1.07 million to \$1.2 million to \$1.8 million by May 30, 2019. Favre again reached out to New about his debt on May 30, 2019. New explained to Favre that she and Davis “were on board” with satisfying Favre’s debt with TANF funds. The exchange reads:

Favre: Nancy[,] are you still confident you can cover the 1.8 and that number will probably be less as we get closer[?]

New: Morning. In a meeting with John Davis now. He said we will cover much of [it] but [it] may have to be in a couple of payments. We are on board!

[Doc. 131-17]. Favre’s debt had apparently grown to \$1.95 million by June 26, 2019. He explained to New, “Nancy as of today the number is 1.95 mill for everything. It’s not due and if anything[,] that number will go down[,] but not up. Deanna and I keep chipping away also. Thank you as always.”

New and Favre then engaged in the following exchange:

New: Hey there. Steadily working on this and hope to have some relief after the first of July. I am feeling good about getting some of it knocked down and then more should be available soon after.

New: Is this amount on the facility or beach volleyball?

Favre: Total

[Doc. 131-18]. Favre explained in a text message to a business partner in July 2019, “Here is my dilemma which isn’t your concern. Nancy has been awesome to me and has paid 4.5 million for a 7 million facility. And she said it was all gonna [sic] be taken care of until this morning. Suddenly she said I don’t think I can do anymore. So now I am looking at a big pay out.”²⁸ At this time, Governor Bryant had no knowledge of Favre’s “dilemma” or the efforts to utilize public funds to cover his Favre’s debt.

²⁷ *Id.*

²⁸ *Id.*

XI. Governor Bryant accepted Davis' resignation and alerted the state auditor to potential fraud.

Meanwhile, misuse of MDHS funds came to light in June 2019. Davis resigned several weeks later. Austin Smith is MCEC's co-defendant in this suit and Davis' nephew. Smith explained the circumstances surrounding his uncle's resignation in his answer to the complaint as follows:

Shortly before John Davis resigned as director of DHS, John Davis explained to family members that Governor Bryant had told him (John Davis) that he (John Davis) was going to "f***ing jail." John Davis told family members, including Austin Smith, that Brett DiBiase had received a check at John Davis' mailbox, and Governor Bryant apparently believed this check was a kickback. John Davis stated that Brett DiBiase was getting a divorce and wanted to hide his income from his wife. This was the reason the check was sent to John Davis' mailbox. John Davis indicated that Jacob Black, John Davis' second in command, had informed Governor Bryant about the check going to Davis' mailbox. Governor Bryant then reported the matter to the State auditor, and this report from Governor Bryant to the State auditor formed the basis of the State auditor's claim that Governor Bryant was the "whistleblower" responsible for the investigation into the fraud occurring at the Department of Human Services.

[Doc. 58 at 12-13]. New was obviously concerned about Davis' resignation and that an ensuing investigation by the state auditor might also uncover her criminal acts. On July 2, 2019, New texted Governor Bryant, "Governor, may I please meet with you for a few minutes this morning? It truly is important and I do appreciate any time you may have to give me. Thank you. Nancy New." Bryant responded, "I can see you at 8:30 at the Sillers Office." [Doc. 131-19].

Governor Bryant explained to New in the meeting that he had received distressing information concerning the handling of MDHS funds. Bryant told New that he had turned the matter over to the state auditor for review. Bryant and New did not discuss the USM Volleyball Center or any past or future funding of the project.

In a text to Favre dated July 16, 2019, New expressed her concern about recent events and their impact on her ability to cover Favre's debt on the USM Volleyball Center project:

Favre: Nancy if I can help you in any way[,] you know I will. Please know that

New: Thanks Brett. That means a lot to me. I am ok, just politics and people. We are trying to stay above all the foolishness and we will. Too much good stuff to get done.

I am concerned though that I may not be able to assist you in Aug. as we had planned. I will continue to work on that though. I am not sitting still! Hope all is well with you.

Favre: Oh goodness. Even if it's a little later? The due date

New: Will continue to work on it for sure [two thumbs up emojis]

Favre: I can try and delay as long as possible if you think that would help. The beach is at least 6 months away from any payment

New: Do that and that will give me time to work some other angles for us [thumbs up emoji]

Favre: About to see Governor Bryant. Anything I can say to him that could help?

New: Let him know how much we work together on youth development, sports programs that instill leadership and future work skills

[Doc. 131-20] (emphasis added).

XII. Governor Bryant first learned MDHS was involved with the USM Volleyball Center project in July 2019.

Governor Bryant first learned that MDHS was involved with funding the USM Volleyball Center project in a text message he received from Favre on July 16, 2019.²⁹ This was nearly two years after the IHL Board approved the \$5 million lease payment. Favre's message to the governor reads:

I'm on [my] way and I'm sure I won't have time [or] privacy enough to speak about this so I want you to know how much I love Nancy New and John Davis. What they have done for me and Southern Miss is amazing. Her family's first is incredible and she cares. We were planning to do workshops and youth clinics in the new Vball facility with her families first kids. And also[,] I paid for 3/4 of Vball facility and the rest was a joint project with her and John which was saving me 1.8 million. ***I was informed today that she may not be able to fund her part. I and we need your help very badly*** Governor and sorry to even bring this up.

It is apparent from the bolded portion of the above text that, after being told by New that additional MDHS funding was doubtful, Favre began a campaign to aggressively lobby the governor to help him cover the debt on the USM Volleyball Center. Although Governor Bryant had no reason

²⁹ Exhibit 12.

to question Favre concerning construction costs and payment commitments at the time, we now know Favre's message was inaccurate. Specifically, Favre had not paid three-quarters of the construction costs for the facility, and MDHS's financial commitment to the project was obviously more than \$1.8 million.

Moreover, based on the content and tenor of Favre's text message, it is also apparent that Governor Bryant did not know what had previously transpired between New, Davis, and Favre regarding the funding of the USM Volleyball Center. If, as MCEC and certain press members have insinuated, Governor Bryant was directing the funding for the project, why did Favre provide him a synopsis of the project's funding history? And why did Favre provide details of the funding history to the governor? Regardless of the answer to these questions, the record is clear that USM and its attorneys, the IHL Board, and the state attorney general's office all approved a \$5 million payment of TANF funds from MCEC to construct the facility without Governor Bryant's involvement.

Referring to Davis' resignation, Governor Bryant told Favre, "I will handle that . . . long story but had to make a change. But I will call Nancy and see what it will take [thumbs up emoji]." ³⁰ Favre copied that text message and forwarded it to New [Doc. 131-21]. Bryant and New engaged in the following exchange forty-five minutes later:

Bryant: Just left Brett Favre. Can we help him with his project[?] We should meet soon to see how I can make sure we keep your projects on course.

New: I would really appreciate having the opportunity to follow through with all the good things we are working on, especially projects like Brett's and Tim Bennett's. I can make myself available when you have time. I would really appreciate a little of your time soon.

Bryant: I can do 4pm on Thursday.

New: Thank you. I can be there.

Bryant: [thumbs up emoji] at the Mansion.

³⁰ *Id.*

New: Ok. Thank you.³¹

New immediately informed Favre that she had scheduled a meeting with the governor. Her message reads, “I am meeting with the Gov. at 4 on Thursday. He wants me to continue to help you and us get our project done. I feel good about that.” Favre replied, “I love John [Davis] so much. And you too ☺.” [Doc. 131-23].

Governor Bryant and one of his staff attorneys³² met with New on July 18, 2019.³³ Bryant explained that he supported the USM Volleyball Center project, but MDHS must comply with federal and state laws. Bryant further explained that the state auditor’s investigation of MDHS may provide clarity on the matter. Favre thanked the governor for meeting with New. Governor Bryant responded, “Working with her. Lots of challenges but we will do our best.”³⁴

XIII. Governor Bryant contacted Chris Freeze about replacing Davis as MDHS Director.

Governor Bryant contacted Chris Freeze about assuming the role as MDHS Director on July 19, 2019. After exchanging pleasantries about Freeze’s recent retirement from the FBI, Governor Bryant told Freeze that he “[m]ay give you a call later. Have a[n] Agency Director position open at Dept. of Human Services that needs a compassionate leader. ☺” Freeze said he was “[h]appy to talk about it” and the two scheduled a time to speak later that day.³⁵

XIV. Governor Bryant told Favre that MDHS funding of the USM Volleyball Center project must be approved by the state auditor.

Three days later, on July 22, 2019, Governor Bryant asked a staff attorney to “*check with Nancy New and see what the contract with Southern Miss is all about.*” Brett is asking for info

³¹ Exhibit 13. Part of this exchange can also be found at Doc. 131-22.

³² Governor Bryant has redacted all identifying references to staff attorneys in order to preserve the confidentiality of the attorney. Several attorneys were members of Governor Bryant’s staff. Governor Bryant does not waive attorney-client privilege regarding the identity of the attorneys referenced and quoted herein.

³³ Exhibit 14.

³⁴ Exhibit 15.

³⁵ Exhibit 16.

on the proposed funding.” The attorney responded, “Yes sir.”³⁶ Later that day, the attorney provided the governor with findings reached by the state auditor and updated the governor on a recent discussion the attorney had with New. The text message exchange between the attorney and Governor Bryant is as follows:

Staff Attorney: FYI, auditor’s findings from [his] year long [sic] audit.

Staff Attorney: The Department of Human Services (DHS) was the subject of several significant findings in the report. The report notes that DHS

- Did not certify whether multiple childcare centers met health and safety standards
- Did not monitor recipients of several grants to determine whether grant money was spent in accordance with the law
- Did not compile basic, required documents, like a comprehensive list of grant recipients
- Did not follow federal reporting guidelines, submitting some federal paperwork nearly two years late
- Did not follow all legal requirements for ensuring beneficiaries of large programs like Supplemental Nutrition Assistance Program (SNAP), Temporary Assistant for Needy Families (TANF), and Child Care and Development Fund (CCDF) were actually eligible for the programs
- And did not or could not ensure childcare centers receiving CCDF funds accurately counted children in the centers.

Several of these DHS findings have been repeatedly identified by the Auditor’s office since 2014 with no corrective action completed.

Bryant: Saw that... was there a response from DHS?

Staff Attorney: *I talked to Nancy. She said the program at usm is a health and fitness program. The contract is with usm to rent buildings to put on this program. Brett volunteers his time. Nancy is getting a one pager.*

Staff Attorney: Not yet. We think dhs needs to respond.

Bryant: They should and explain why this was not corrected since 2014. *Can we get*

³⁶ Exhibit 17 (emphasis added).

[the] Auditor to tell [us] if the USM Contract is proper?

Staff Attorney: I can certainly ask them.

Bryant: *If it [is] proper then we should move ahead since they are planning it to happen.* Has Nancy heard any further from [the] Auditor since Friday?

Staff Attorney: I don't think so but the auditor's office said they couldn't say they were done with Nancy yet. They think the John Davis, [DiBiase] investigation will take another month or so to wrap up. They haven't found any additional info since what they reported 4 weeks ago.

Staff Attorney: 3 weeks ago*

Bryant: [thumb up emoji]³⁷

To be clear, the above exchange is protected by the attorney-client privilege. A former governor of this state should not be forced to publicly divulge attorney-client communications to confront and disprove unfounded allegations that an admitted felon has levied against him in the press through the guise of a legitimate subpoena. That is precisely what New, using MCEC as a conduit, has done in causing a frivolous subpoena to issue in order to create a media circus that was calculated to embarrass and harass Governor Bryant. The implication that Governor Bryant did anything improper concerning the USM Volleyball Center is an outright lie. While Governor Bryant supported the project, he consistently told Favre and New that project funding would need to be vetted through proper channels, including the state auditor, and follow legal requirements.

Following the discussion with his staff attorney, Governor Bryant explained to Favre, “[t]he State Auditor is reviewing all the Contracts at DHS which [f]und [] Families First. Hope we get legal clearance soon. Don't want to get anyone in trouble for improper expenditures. Should know soon.”

Favre continued to press the matter:

Favre: Ok. As far as families first and facilities goes[,] I think we can do so much together. It would be beneficial for both.

Bryant: Hope we get clearance.

³⁷ Exhibit 18 (emphasis added).

Favre: So do I. Thanks. What's your gut tell you will happen? I have to come up with a lot of money if this doesn't get clearance

Bryant: It's the State Auditor that will give the approval. Has to have legal authority. I will check today. []

Favre: Governor[,] I know you are doing all possible and I appreciate your help tremendously [3 thumbs up emojis][]. If I need to do anything to help make this all work please let me know.

Bryant: Will do... we are checking today. Thanks for caring.

Favre: Your welcome.³⁸

XV. Governor Bryant explained to Favre the reasons why the state auditor must approve the use of MDHS funds for the USM Volleyball Center project.

Chris Freeze became MDHS Director on or about July 25, 2019.³⁹ Favre texted New that afternoon and asked, "You think I should send the Governor a message?" New responded, "It wouldn't hurt. I sent the proposal to Whitney, his legal person [,] the same day I copied you in. I think he has been gone some this week but today he did announce John Davis' replacement from somewhere, maybe he is back in Jackson. Maybe he hasn't had a chance to talk to Whitney but we need to get his approval soon[er rather] than later. I know he is in town tomorrow according to his calendar." [Doc. 131-24]. Following through on New's suggestion, Favre texted Governor Bryant the following:

Favre: Hey Governor[,] I know you[']r[e] busy but I hope you can take a look at Nancy[']s proposal when you have time. By the way[,] I do follow you on Twitter ☺ [thumbs up emoji]

Bryant: [thumbs up emoji] just back in town. Met with new Director today. It will take time to get the Auditors Report. Working on it...

Favre: That's all I can ask[,] [T]hank you

³⁸ Exhibit 19.

³⁹ Exhibit 20.

Bryant: [thumbs up emoji] Keep the Faith⁴⁰

Favre copied the first of the two texts from Bryant and sent it to New. She responded, “Hmm. Not sure what to make of that but maybe whatever he is waiting on will be done soon. He has so much to deal with all the time. I think the new Director will be good to work with, too. He is a retired FBI Director. I look forward to getting to know him. I hope to meet with him in the next few days.” Favre replied, “He said for us to keep the faith also ☺” [Doc. 131-24].

Three days later, on July 28, 2019, Favre expanded his request for MDHS funding to include funding for a new indoor practice facility for the USM football team. Favre’s text to Governor Bryant reads:

Favre: Sorry to bother you but Friday I picked up Deion Sanders and his son who is going to be a junior in high school and plays QB. He has at least 30 offers thus far including us. Deion and I have been great friends since 91’ and have great respect for each other. We have a great opportunity to get this kid but with 2 years remaining before he can sign we have many hurdles to jump and much opposition especially in the resource department. As I suspected Deion’s son asked where the indoor facility was and I said [we] don’t have one but [we] are hoping to break ground in less than 2 years. Now that will not happen without your help/commitment!!! I know we have the Vball to complete first and I’m asking a lot with that and I believe 100% that if you can get this done Nancy will reach and help many and in the recruiting war [a new indoor practice facility] will give USM’s [football program] instant credibility and [USM football will] become relevant again.⁴¹

Governor Bryant explained to Favre that the use of DHS funds is “tightly controlled.” His detailed text message in response to Favre reads:

Bryant: *Nancy has some limited control over Federal Funds in the form of Grants for Children and adults in the Low [-] Income Community. Use of these funds [is] tightly controlled. Any improper use could result in violation of Federal Law. Auditors are currently reviewing the use of these funds by Families First. As soon as the Audit is complete [,] we will know if the project at USM is a proper expenditure. Neither I nor Nancy can make this decision. She must have approval from DHS and the State Auditor. As soon as we get approval we can move forward. Without that approval any expenditure could be illegal and Nancy and USM could be made to repay the Federal Government any and all funds spent. That’s why we are waiting [until] it is approved. I am*

⁴⁰ Exhibit 21.

⁴¹ *Id.*

*Sorry it takes so long. Hope we can get there soon. Will let you know [w]hen I do. Thanks for helping.*⁴²

Governor Bryant clearly explained to Favre that New did not have unfettered discretion over public funds. Bryant explained that New's expenditures must comply with federal and state laws, and her expenditures were currently being reviewed by the state auditor. The governor further explained that neither he nor New could direct funds to the volleyball project without prior clearance from the state auditor and the new MDHS director. This communication once again illustrates that the narrative advanced by MCEC in its motion is completely unfounded, as are the recent press reports that ran with it.

XVI. Favre continued to push for MDHS funding for the USM Volleyball Center project.

On August 2, 2019, Favre inquired of New, "Any word? Met the new Director yet?" New responded, "Not yet, but I have asked for one ASAP. Yesterday was his first day so I am in hopes to get to see him at least by Monday. I am very anxious to get in there and talk with him. The Gov wants me to[], so I am counting on his push, too." [Doc. 131-25].

Favre sent a text message to Governor Bryant later that day that reads, "Nancy just told me you are getting her and the new Director together ASAP. Thanks as always." Governor Bryant responded that he "[w]ill make it happen [thumbs up emoji]."⁴³

Favre asked the governor on August 5, 2019, if there was "[a]ny word yet on [m]ine and Nancy[']s project?" Governor Bryant told Favre that he would "check . . . [a]gain."⁴⁴ Later that day, Governor Bryant asked a staff attorney, "[d]id we get a plan from Nancy New about a Project [with] Southern Miss and Families First?" The attorney supplied Bryant with a copy of New's proposal.⁴⁵

⁴² *Id* (emphasis added).

⁴³ Exhibit 22.

⁴⁴ Exhibit 23.

⁴⁵ Exhibit 24.

The proposal reads:

To: Governor Phil Bryant

From: Dr. Nancy New, Mississippi Community Education Center
Brett Favre

Re: The Dewey Phillip Bryant Center for Excellence at the University of Southern Mississippi (The proposed name was intended to be a surprise honor to the Governor. Due to the urgency in getting this secured, we felt it appropriate to share.)

Project Name: The Dewey Phillip Bryant Center for Excellence at the University of Southern Mississippi focusing on Obesity, Bullying Prevention and Personal Development Project Summary

The Mississippi Community Education Center (“MCEC”), the Mississippi Department of Human Services (“MDHS”), the University of Southern Mississippi Athletic Foundation (“USM”) and Brett Favre, Mississippi native and member of the National Football League Hall of Fame, by and through the Families First for Mississippi services, have engaged in a collaborative partnership aimed at providing evidence-based and research-based resources and initiatives to individuals, families and communities throughout Mississippi. Specifically, the partnership provides support and resources for individuals and families through provision of healthy living and nutrition (with a primary focus on childhood obesity and family nutrition), health choices; as well as, bullying awareness and prevention education. Additionally, resources and support are provided in areas of leadership development, job readiness training, personal and financial stability and a variety of other skills-based resources and trainings.

Programs & Initiatives

This initiative provides numerous programs and resources which enable a wide network of support designed to impact and stabilize the whole family. These programs include, but are not limited to, the following:

1. Healthy living and nutrition with primary focus on obesity.
2. Impacts and effects of bullying awareness and prevention.
3. Positive youth development.
4. Soft skills, job readiness and workforce training.
5. Personal financial literacy.
6. Personal wellness, fitness and nutrition.
7. Leadership development training.

Who will benefit?

This collaboration has an immediate positive impact on individuals and

families throughout Mississippi. There is a direct positive impact for the University of Southern Mississippi and surrounding areas. The Dewey Phillip Bryant Center for Excellence will serve as a model program that could easily be expanded to each of the Institutions of Higher Education and Community College campuses, thereby facilitating accessibility of these resources, programs and supports in communities statewide.

Project Needs & Logistics

It is estimated that **\$1.5 to \$2.0 million (\$1,500,000.00 - \$2,000,000.00)** is needed to adequately fund this project. These funds will be deposited in and maintained by the **University of Southern Mississippi Athletic Foundation** and designed specifically for the Dewey Phillip Bryant Center of Excellence at the University of Southern Mississippi. This commitment will help to ensure that this isn't just a project or program, rather it is a sustainable process that provides a perpetual direct and meaningful impact on youth and families for many years to come.

MCEC has over thirty (30) years of experience in providing services and resources; not only in Mississippi, but across the United States and in other countries. Brett Favre has a vast professional and personal network which provides resources and expertise from individuals with varied backgrounds and experiences. Together, this team of professionals will continue to implement and provide programs and resources which will have a profound and direct long-lasting impact.

Conclusion

This collaboration will provide a long-lasting repository for resources and professional support for the people of Mississippi. MCEC will provide resources and support in areas in which the organization has cultivated expertise for over three decades. Brett Favre has committed to relying on his vast network of friends and fellow professionals in providing training and education across a broad spectrum of areas. The requested funding will allow this partnership to conduct training and forge additional partnerships in a wide variety of educational and professional areas. Most importantly, said funding will provide a mechanism to continue and expand these meaningful and much needed resources to move Mississippi positively in obesity, bullying related suicides, and bridging the soft-skills gap. The Dewey Phillip Bryant Center for Excellence on the campus of University of Southern Mississippi will serve as a model program in the country and a catalyst for sustainable, systemic change.

As the proposal makes crystal clear, the naming of the facility did not originate with Governor Bryant. Rather, this was a desperate ploy by New to curry favor. It did not have the intended effect. On August 8, 2019, New and Favre discussed MCEC's proposal for another \$1.5 to \$2 million in funding. The exchange reads:

New: Gov. texted and said y'all are meeting on the proposal I gave him. Call or text if you need my help! We are going to get this done!!!

Favre: We met in regards to an issue poncho was needing resolved and he only had 15 minutes but he did say at the end that he will get this done with you!!!

Favre: He sure came across as sincere and believable

New: He said something about project managers. We will need those, too. We have to make this all about teaching, education, obesity prevention, exercise, etc. and we can pay a lease or facilities' use.

Favre: Should I forward this to him as well?

New: Sure[,] that is fine.

[Doc. 131-27]. Later that day, Governor Bryant asked Favre if “the Funding from Nancy [is] planned for bricks and mortar? Her application is not very clear what the money will be used for?”⁴⁶ Favre forwarded the messages New sent to him earlier in the day and added a few of his own comments:

No brick and mortar. We can use funds for that. But we can pay for Lease expenses, curriculum for several programs that will be taught there on youth development programs and activities, health, nutrition classes, Obesity prevention programs. We will need staffing part time and a couple full time possibly. Much more but this will help.

She said we can't use for brick and mortar.

He said something about project managers. We will need those, too. this all about teaching, education, obesity prevention, exercise, etc. and we can pay a lease or facilities' use.

Program monies, facilities fees, education, entrepreneurship Every penny spent will be used wisely and accountable.

Also from Nancy⁴⁷

Two days later, on August 10, 2019, New nervously inquired once more of Favre. The exchange reads:

New: What did the Gov say to you about our proposal? I know the new director knows about it because I brought it up to him. He asked if that was the one that the Gov's name was to go on the bld??? I said yes but honestly[,] I couldn't read why he asked that about his name. Keep that quiet right now. Lots of politics[,] I think.

Favre: The only the thing Phil said was the questions I relayed to you but Phil is

⁴⁶ Exhibit 25.

⁴⁷ *Id.*

adamant it will get done. Of course[,] he is a politician so I'm a little uneasy

New: Yep, I totally agree. I hope he will stay steady and help us get it done.

Favre: I'll keep asking weekly

[Doc. 131-28]. On August 14, 2019, Favre notified Governor Bryant, "Now that the facility is almost done[,] I expect to start payment. I know you[re] on it and Thanks."⁴⁸ Governor Bryant responded, "Nancy has to provide the proper documentation to MDHS. It's all up to her to get the paperwork in and then I can help."⁴⁹ Favre forwarded the governor's message to New. The resulting exchange between New and Favre is as follows:

New: Wow, I have given the proper information to several people several times. [big eyes emoji] Even the new director mention[ed] this proposal to me the other day so I know they have seen it. But I will definitely submit it again today. When we get this done and you and I have a few minutes to visit, I will share a couple of my real thoughts with you on some folks! [two smiley faces with teeth emojis] But in the meanwhile I am sending this proposal again and will keep pushing. Thanks so much.

Favre: Do you want me to say anything back to Governor?

Favre: He said to me just a second ago that he has seen it but hint hint that you need to reword it to get it accepted.

New: Reword?? Wonder what he means. I am making a call now to get a little more information from someone on the inside and will get back with you. Just let him know that it was submitted but I am reworking it today.

[Doc. 131-28]. Favre's characterization of the governor's message is far from accurate. Governor Bryant plainly stated that he could not determine whether the funding supplied by MCEC would be used for brick-and-mortar construction costs. Later that day, the following exchange between Governor Bryant and Favre occurred:

Favre: Nancy said she would re-send. But she said the new director has seen and looked it over. If you are saying she needs to reword and resubmit I'll tell her.

Bryant: I would do that if I were her.

⁴⁸ *Id.*

⁴⁹ *Id.*

Favre: Ok. I'll tell her. Any other advice is welcomed since want to get this accomplished. Thanks Governor[.] She said she would redo but sure would like some insight for guidance if possible

Bryant: [thumbs up emoji]

Favre: Please let me know if I can tell Nancy anything that can help get this done.⁵⁰

Favre reached out to the governor once again on August 16, 2019. The text message exchange reads:

Favre: Nancy has reached out to a few folks for some intel but they haven't returned her calls so she is rewording/redesigning the proposal to submit this morning. Again Gov[.] any advice I can pass on would help

Bryant: That's all I know to tell her. Hopefully she can put more details in the proposal. Like how many times the facility will be used and how many child[ren] will be served and for what specific purpose.⁵¹

Favre sent an amended proposal to the governor later that day. Favre asked Governor Bryant if the amended proposal looked "sufficient enough."⁵² Governor Bryant responded, "We will see soon. I would have listed the number of people proposed to be reached by the program and the number of employees necessary to achieve these goals."⁵³

New followed up with Favre, "Confidential; Do you get the impression that the governor will help us?" Favre responded, "I really feel like he is trying to figure out a way to get it done without actually saying it" [Doc. 131-28]. Turns out, Favre was wrong. Governor Bryant and newly-appointed MDHS Director Chris Freeze engaged in the following exchange on August 17, 2019:

Bryant: *Brett Favre is blowing me up over that proposal Nancy New submitted for the Center at Southern Miss. I have told him it would be reviewed just like all other proposed projects.* Brett needs more to do in his life just now [thumbs up emoji]. I really do think he believes in the project.

Freeze: *Yes, Nancy is blowing me up, too. Unless there is additional information you would like MDHS to consider, I'm not inclined to approve at*

⁵⁰ *Id.*

⁵¹ Exhibit 26.

⁵² *Id.* Favre submitted additional amended proposals to Governor Bryant at 10:38 a.m. and 4:41 p.m. The funding request in the proposals increased the range to \$1.8-\$2 million. *See*, Exhibits 27-28.

⁵³ Exhibit 26.

this time. I don't think now is the time to give them \$2 million. We have reviewed and think there might be other ways to accomplish their goals than by creating a center at USM. Brett could be a part of those if he wanted. If you would like to talk so I can further explain, I would be happy to call at your convenience, sir.

Bryant: *As always[,] I am not going to interfere. You [have] got a better understanding than I do of these projects. I think Brett was told it was going to get done by the previous Director. One of the reasons that he is the former Director.*⁵⁴

XVII. Undeterred, Favre continued to press Governor Bryant for assistance.

Having personally guaranteed payment for the USM Volleyball Center, Favre continued to press Governor Bryant for meetings and assistance. Favre and Bryant engaged in the following exchange on August 23, 2019:

Favre: Nancy and I will come meet with you and [the] new director if you think that will help.

Bryant: Can't hurt [thumbs up emoji]

Favre: Ok. [Is] Monday morning ok?

Bryant: [thumbs up emoji]

Favre: 8:30?

Bryant: I am gone all next week... have Nancy get with Bethany and schedule something for us...

Favre: Ok. Obviously[,] I or we need you [to] help us big time with this.

Bryant: Understand⁵⁵

Favre told Governor Bryant on the following day that he would soon owe over \$1 million on the project if the state did not offer additional funding. The message between Favre and the governor is as follows:

Favre: Governor[,] the indoor volleyball facility could be completed any day now and I'm sure the university will be calling for the remaining 1,048,000. I can try to buy some time. You[?]r[e] our starting QB and we can only go as far as you take us.

⁵⁴ Exhibit 29 (emphasis added).

⁵⁵ Exhibit 30.

Bryant: *I got called into this game late.* Headed to Taiwan today at 4:30. Let's get a meeting with Director Freeze as soon as I return. Not sure who made the deal for a million dollars. Nancy needs to work with Bethany to arrange a meeting.

Favre: Not to put pressure on you but if anyone can make this work you can. Have a great trip and see you after.

Bryant: Nancy has already called and we will get that meeting set [thumbs up emoji]⁵⁶

Governor Bryant, Director Freeze, New, and Favre met on September 4, 2019, to discuss the request for an additional \$1.8 to \$2 million for programs at the USM Volleyball Center. Favre and Bryant engaged in the following text message exchange after the meeting:

Favre: Thank you for having us. We obviously need your help big time and time is working against us. And we feel that your name is the perfect choice for this facility and we are not taking No for an answer! You are a Southern Miss Alumni, and folks need to know you are also a supporter of the University.

Bryant: We are going to get there. This was a great meeting. *But we have to follow the law.* I am to[o] old for Federal Prison. [smiley face, sunglasses emoji]

Favre: So[,] you think we will get [i]t at least?

Bryant: I hope so . . . it's [] about Nancy and her play book...

Favre: You tell me what I should relay to her and I'll do it

Bryant: We will see. It's not going to happen [until] November.

Favre: Ok. Before someone goes out of office I hope

Bryant: [thumbs up emoji]⁵⁷

Two days later, Governor Bryant and a staff attorney discussed New and her request for additional funding. It is apparent that Bryant suspected New had violated the law in her operation of MCEC. The text message exchange reads:

Bryant: I can call you. If it's about the Grant or DHS Funding there isn't much I can do. Until Audit has [completed] its work I am staying out of all decisions that the agency will make. It would be best to meet with [a staff attorney] at this time. Thanks.

⁵⁶ Exhibit 31 (emphasis added).

⁵⁷ Exhibit 32 (emphasis added).

Bryant: To Nancy New. She wants to meet again. Don't think that's a good idea. Keep this response as a record.

Staff Attorney: Yes sir. She's relentless.

Bryant: Nancy is worrying. She know[s] what they were doing was wrong.

Staff Attorney: 100%. She should be worried.

Bryant: Isn't about the audit or DHS at all. Actually, it's about me but that's ok, I understand. I am sorry to bother you especially on a Friday. Have a nice weekend. It's going to be a hot one [New's response to Bryant that he copied and sent to the staff attorney].

Bryant: Nancy's reply []⁵⁸

The meeting never occurred. However, it is likely that New wanted to discuss a letter she received from Freeze earlier that day [131-31]. Freeze's letter communicated that certain MCEC expenditure requests had been allowed and others had been disallowed. Importantly, none of the expenditure requests were related to the USM Volleyball Center. The letter plainly indicates that Freeze will not rubber stamp his predecessor's requests, particularly when they run afoul of state and federal law. It is likely that Freeze's correspondence added to New's anxiety.

Shortly after becoming MDHS director, Freeze instituted a bidding process for TANF subgrants. Governor Bryant explained to Favre on September 16, 2019, that Freeze could not ignore the bid process to cover Favre's debt. The message exchange between Favre and Governor Bryant reads:

Favre: Governor[,] this [is] my last message I promise. I know you said nothing will be done before thanksgiving and I understand, but the completion of the facility is any day now and then I am to pay the remainder of [the] amount. If you think I should move forward on my own and pay it then that's fine but if I should politely ask for a few more months then I'm sure Charlie Finnegan would allow that. The university has [no] money nor would I expect them to help. We really can help not only the university with this but a lot of other folks as well. Thank you

Bryant: *I wo[u]ld ask for an extension. The Bid process the Director talked*

⁵⁸ Exhibit 33. The second to last text message from Bryant was New's reply to Bryant. He accidentally typed a question mark after "reply" in the following text.

about is state law. To override or not obey the law would be a potentially criminal offense. Neither one of us want an investigation by the Auditor. I promise you, there is nothing more I can do except follow the law...

Favre: I'll ask for an extension. Thank you

Bryant: [thumbs up emoji]⁵⁹

On October 13, 2019, Favre asked Governor Bryant if he had “gotten any good vibes yet for our funding?” Bryant did not immediately respond. Nine days later, Governor Bryant and Favre exchanged the following messages:

Bryant: I am meeting with [the] Director of MDHS this week to see where we are in the grant request. We may have to go to the Legislature in January and get language in a Funding bill. I also know how to make that play [football emoji]. Keep the faith. [thumbs up emoji]

Favre: Governor[,] you would help me out tremendously if you can get it done. [It] [s]ure will make it easier on me. Thank you

Bryant: On it . . .⁶⁰

As any fair reader can see, Governor Bryant told Favre that he was awaiting a final decision from Freeze regarding MCEC's request for additional funding for programs at the volleyball facility. Bryant further explained that, should the request for MDHS funds be denied, he may be able to lobby the legislature to add the funding in an appropriations bill. He did not commit TANF funds to the construction of the facility.

Favre once again approached Governor Bryant about state funding for the volleyball facility on November 5, 2019. The text message exchange reads:

Favre: I know you said wait [un]til November and dang time flies so I know it's Election Day and you are probably busy[,] but while we know who our Governor is presently[,] not to mention arguably the most popular and influential[,] I want to stay on your radar. If our guy wins[,] I'll feel better about things [,] but if the other guy wins[,] I feel like Nancy and I can forget our vision for Southern Miss.

Bryant: That's one reason I have been pushing Tate so hard. He has to win. Then we

⁵⁹ Exhibit 32 (emphasis added).

⁶⁰ Exhibit 34.

[can] set up a meeting on [the] Wellness Center at USM.

Favre: Ok. What's your gut telling you?

Bryant: We will win... you should text him and just say good [l]uck today [thumbs up emoji]⁶¹

Favre asked Governor Bryant once again on November 11, 2019, "Think you will get the wellness center project done?"⁶² Governor Bryant forwarded that message to Freeze and the following text message exchange ensued:

Bryant: Think you will get the wellness center project done? Brett

Bryant: Brett Favre keeps asking about the project. I told him a number of times it would be January before we would know anything. Apparently[,] he was assured by Nancy it would be funded.

Freeze: The proposals are due November 15. The committee will begin their work the following Monday. Results and notifications are expected by Dec 13th.

Bryant: Can I send that to Brett?

Freeze: Yes. That's public information.

Freeze: Should I ask how strongly you feel about the project?

Bryant: I am a supporter and think it can be a big help to a lot of people...

Freeze: Ok.

Bryant: Thanks⁶³

Governor Bryant responded to Favre's message after communicating with Freeze. The text message exchange between Favre and Bryant reads:

Bryant: Will depend on the Grants in January and if we can get the Ms. Legislature to help . . . Lot of moving parts just now. *Nancy should have been more careful in giving any assurance that the project would be approved. One of the reasons John Davis is gone is because of this type of issue.* We will keep working on it...

⁶¹ Exhibit 35.

⁶² Exhibit 36.

⁶³ *Id.*

Bryant: The proposals are due November 15. The committee will begin their work the following Monday. Results and notifications are expected by Dec 13th.

Favre: I sure hope this gets cleared. Thanks Governor

Bryant: Pushing hard

Favre: I know and I really appreciate it very much

Bryant: [thumbs up emoji]⁶⁴

A month later, on December 12, 2019, Favre once again requested the governor's assistance.

The text message exchange is as follows:

Favre: Hey Gov[,] I think you[?]r[e] meeting with Nancy tomorrow. This [money] will be used for state programs as well as help USM[,] but w/ a director in place good things will happen and [t]he [u]niversity is all in as well. I know you[?]r[e] doing all you can and we appreciate you very much.

Bryant: Thanks Brett. We are working on it for sure. Will know [m]ore when I meet with Nancy.⁶⁵

The Mississippi Free Press interviewed Chris Freeze in conjunction with a recently-released article addressing the matters arising from the present motion. The article reports:

In an interview on Friday, Sept. 16, 2022, Freeze told the Mississippi Free Press that MDHS officials “felt like we had an obligation because the (previous) executive director (Davis) had verbally approved” some of New’s requests. But he was working to implement new controls at MDHS that had been sorely lacking under Davis, who often made verbal agreements without accompanying paperwork. Part of that process included implementing an RFP process, which would require entities like New’s to make formal proposals for funding.

By the end of the year, New had submitted an RFP, Freeze said. “Our independent team reviewed it along with everybody else’s, and I funded the programs that we thought were appropriate under TANF guidelines. ... In Nancy’s case, they got less than half of what they had requested.” He said he did not recall her final RFP including funding for the volleyball stadium or USM-related money, but that his senior team was not involved in the review “so as to maintain integrity of the RFP.”⁶⁶

⁶⁴ Exhibit 37 (emphasis added).

⁶⁵ Exhibit 38.

⁶⁶ See, <https://www.mississippifreepress.org/27465/in-depth-how-brett-favre-secured-6-million-in-welfare-funds-for-a-volleyball-stadium>.

Governor Bryant asked New on December 18, 2019, “Did y’all get any [o]f the new programs from DHS?” New responded, “Yes, we did. From all the craziness going on, we had been made to believe we were not getting refunded. But we did. ‘Someone’ was definitely pulling for us behind the scenes. Thank you.” Bryant responded, “☺” [Doc. 131-32]. Director Freeze addressed this exchange in his interview with the Mississippi Free Press. Freeze explained that “if New thought ‘somebody was looking out for her, it had nothing to do with the governor talking to me . . . The governor can send smiley faces back, but within two weeks he said don’t fund her and don’t fund Christi Webb at the Family Resource Center.”⁶⁷

Freeze did as Governor Bryant instructed, which is why New sent the following desperate text to Governor Bryant on January 9, 2020 – six days before he would leave office:

Thought I would just text instead of you having to call. I can imagine how busy you are today and I sincerely hate to bother you with this but there is no one at DHS to ask. We were recently told that our new contracts, effective Jan. 1 from DHS had been pulled back and no money would be dispersed. I don’t have to know the reasoning behind that necessarily, but more importantly, my coworkers are trying to keep the family services going and in fact, they don’t know that they are very close to losing their own jobs. Unfortunately, we are going to have to stop all of our services funded by DHS as we have exhausted all monies just trying to hold on. I will need to have my leadership lay off around 60-73 people. Also, we will need to start closing our families first centers across the state by next week. DHS already owes my organization a huge amount of reimbursement from the previous contract. I can’t borrow any more money to hold on. So in saying all of this, would you check on the status of those contracts under my name (MCEC) being executed with some operational monies soon? Thank you so very much. N. New⁶⁸

Governor Bryant responded, “Let me see what I can find out...,” but he already knew the answer. Bryant had instructed Freeze to cease further funding of MCEC.

XVIII. The “bottom line” was that Favre personally guaranteed the USM Volleyball Center project and it was “time for him to pay up.”

Changing course, and after Governor Bryant had left office, Favre sought Bryant’s assistance

⁶⁷ *Id.*

⁶⁸ Exhibit 48.

in obtaining a legislative appropriation to cover his personal debt. The text message exchange between Favre and Bryant on January 26, 2020, reads:

Favre: Governor[,] can you think of anyone or any other way of getting funding for the remainder of Vball?

Bryant: Maybe we can talk Monday and I can get more info. and look for some funding. The Auditor continues his investigation into spending at the Department of Human Services. May need to go visit LT GOV Hoseman and Gov. Reeves.

Favre: I [j]ust paid 350k which leaves the total around 1.6 and I am giving another 200k next week. How can Tate and Delbert help you think?

Bryant: They [j]ust have to find a budget and put money into it. I have probably gotten USM \$40 million in funding the last 8 yrs. Sen. Briggs Hopson is Senate Appropriations Chair. That's Coach Hop[']s brother...

Favre: Wow. I just sent Tate a message. Should I do the same with Briggs and Delbert

Bryant: I would. I will call them also...

Favre: Ok.

Brett, you aren't bothering me at all and please always feel free to reach out to me anytime. I will help any way I can. I will be glad to set something up with Tate. Tell me kind of what the plan in place for funding is/was. Did Gov Bryant mention maybe trying to get it as part of a bond bill for [the] University? Admittedly, I'm not the expert on some of this stuff but I will certainly do everything I can to get all the right minds together and formulate a plan to sort it out.

From [REDACTED]

I told him I would ask

Bryant: It's complicated to do Bonds unless it[']s brick and mortar and the University puts it in its list of priorities for Bonds.

Bryant: They could put \$1.5 in a Bond Bill without a problem.

Favre: Bond Bill is what you recommend?

Bryant: Is it brick and mortar?

Favre: Good question I'll find out. Do we want it not to be? I think it's more the finishing cosmetic type work. 5.5 has already been paid.

Bryant: We want it to be one time construction cost not ongoing expenses.

Favre: We can certainly do that

Bryant: [thumbs up emoji]

Favre: So[,] do I need to have the university do something first?

Bryant: Let me talk to [USM President] Rodney [Bennett]...

Favre: Ok[,] Thanks Governor

Favre: [eagle emoji] I know you already know this[,] but I need you big time on this. And it sounds like if you can't then it will not get done. So[,] thanks again

Bryant: On it...

Favre: Gov.[,] I will be out of town Thursday through Sunday so if we need to meet with the powers that be before then please let me know

Bryant: Will know more tomorrow

Favre: Ok thank you⁶⁹

On the following day, Favre told Governor Bryant that he had spoken “with Tate and he said he would get with his team on a plan. I’m sure with you in his ear that would help tremendously.” Governor Bryant replied, “Good deal... will make that happen [thumbs up emoji].” Favre thanked the governor and said, “I can[t] focus on anything else with this looming.”⁷⁰ Governor Bryant replied, “I understand.”⁷¹

On January 27, 2020, Governor Bryant sent a text message to USM President Rodney Bennett. The governor explained, “Brett keeps asking to help him fund the Volleyball Facility. I want to help but wanted to see your position before I go [to] the Lt[.] Governor.” The following exchange ensued:

Bennett: Governor!!! It’s so good to hear from you – we miss you! I haven’t forgotten about the project for you at USM – I made a personnel change which I believed slowed our momentum a bit but it’s definitely on the radar and a project we want to do. *I’ve*

⁶⁹ Exhibit 39.

⁷⁰ The “can” in this message is likely a typographical error. Given the context, it seems likely that Favre meant “can’t”.

⁷¹ Exhibit 40.

asked Brett not to do the things he's doing to seek funding from state agencies and the legislature for the volleyball facility. As you know, IHL has a process of how we request and get approval for projects and what he's doing is outside those guidelines. I will see, for the "umpteenth time" if we can get him to stand down. The bottom line is he personally guaranteed the project, and on his word and handshake we proceeded. It's time for him to pay up – it really is just that simple.

Bryant: *That's was my thoughts. Maybe he wants the State to pay off his promises. Like all of us I like Brett. He is a legend but he has to understand what a pledge means. I have tried many time[s] to explain that to him.*

Bennett: Indeed!! I will be in contact regarding the project in the library for you.

Bryant: Thanks. That will be quite an honor from my University [thumbs up and eagle emojis]⁷²

Governor Bryant's final text messages with Favre concerning the volleyball facility are dated February 6 and 7, 2020. Favre asked, "Governor have you spoken to Tate? He said he was gonna [sic] get with his team and figure something out." Governor Bryant forwarded Favre a link to an article published in www.mspolicy.org titled, "Largest public embezzlement scheme in Mississippi history uncovered," and explained, "This has been the problem. Not sure what funding will be available in the future." The remaining messages read as follows:

Favre: Yeah[,] I'm well aware of it. I think the angle Tate is looking at is a bond bill according to [REDACTED]. You think that has a chance?

Bryant: Bonds can sure be used for Brick and mortar...

Favre: Anything I can do?

Bryant: May want to meet with Tate when you can...

Favre: I did and he said he would get with his team

Bryant: Then just have to wait [until] a bond bill is drafted and hope you make the list [thumbs up emoji]

Favre: Ok⁷³

⁷² Exhibit 41 (emphasis added).

⁷³ Exhibit 42.

XIX. Favre returned the \$1.1 million that MCEC paid him for promotional services despite contending he performed services for MCEC.

On April 30, 2020, the state auditor released his 2019 Single Audit Report of the State of Mississippi. The report revealed MCEC had paid Favre a total of \$1.1 million in TANF funds between 2017 and 2018. The audit said MCEC contracted with Favre “to appear at several events, record promotions, and provide autographs for marketing materials.”⁷⁴ The audit report continued, “Due to the inability to verify that any work was performed in order to fulfill the contract, and due to the unreasonable amount paid, the entire payment of \$1,100,000 paid in FY 2018 is questioned.”⁷⁵ Favre responded to the report with a series of tweets on May 6, 2020. Favre stated:

My agent is often approached by different products and brands for me to appear in one way or another. This request was no different, and I did numerous ads for Families First. I have never received monies for obligations I didn't meet. To reiterate Auditors White's statement, I was unaware that the money being dispersed was paid for out of funds not intended for that purpose, and because of that I am refunding the full amount back to Mississippi.

I have spent my entire career helping children through Favre 4 Hope donating nearly \$10 million to underserved and underprivileged children in Mississippi and Wisconsin. It has brought a ton of joy to my life, and I would certainly never do anything to take away from the children I have fought to help! I love Mississippi and I would never knowingly do anything to take away from those that need it most.⁷⁶

Favre repaid \$500,000 in 2020 and \$600,000 in October 2021. Favre continues to dispute that he owes \$228,000 in interest and continues to dispute the auditor's claim that he did not perform promotional services for MCEC. Interestingly, Favre's position mirrors the position MCEC has taken in its answer to the complaint in this action. Governor Bryant does not contend or imply that Favre violated applicable laws or that he did not perform promotional services for MCEC.

⁷⁴ Exhibit 43 at 92, 193-94.

⁷⁵ *Id.*

⁷⁶ See, <https://www.mississippifreepress.org/27465/in-depth-how-brett-favre-secured-6-million-in-welfare-funds-for-a-volleyball-stadium>.

XX. New and Davis pleaded guilty to violating federal and state criminal laws.

On April 20, 2022, New pleaded guilty to violating “Title 18, United States Code, Section 1957 for Monetary Transactions with the Proceeds of a Specified Unlawful Activity, that is, wire fraud.”⁷⁷ Two days later, she pleaded “guilty to the charges of: Bribery of a Public Official (four counts), 2 Fraud Against the Government (two counts), and 6 Wire Fraud (five counts), RICO” in this court.⁷⁸ New’s guilty plea sets forth a laundry list of corrupt acts that were calculated to enrich her at the expense of this state’s most vulnerable population. MCEC’s \$5 million expenditure of TANF funds for the construction of the USM Volleyball Center is not addressed in the indictment or in her plea.

This court entered an *Order of Nolle Prosequi* in *State of Mississippi v. John Davis*, No. 22-0-238(1-20) (Hinds Cty., Cir. Ct.) on September 21, 2022.⁷⁹ The order explains that –

[t]he State and Defense have announced that a global plea resolution has been reached between the State, the federal authorities and the Defendant, John Davis, whereby the Defendant, John Davis has agreed to fully cooperate, including providing truthful testimony at trial, with the State and all federal authorities in the prosecution of any and all additional criminally charged defendants, in State or Federal Court, for the criminal misuse of Federal TANF grant funds, State of Mississippi Funds, Mississippi Community of Education Center funds or any other funds available to or through the Mississippi Department of Human Services during his tenure as the Executive Director of the Mississippi Department of Human Services. The State and the Defense have advised the Court that pursuant to the global plea resolution, all parties have agreed that the Defendant, John Davis will serve all of his incarcerated time in the custody of the Federal Bureau of Prisons.

Regarding the federal charges, Davis pleaded guilty on September 22, 2022, to “the felony crimes of Conspiracy and Theft from Programs Receiving Federal Funds, in violation of 18 U.S.C. 371 and 18 U.S.C. 666. Davis also pleaded guilty in this court “to five counts of Conspiracy and thirteen counts of Fraud Against the Government, in violation of Section 97-1-1 and 97-7-10 of the

⁷⁷ Exhibit 44.

⁷⁸ Exhibit 45.

⁷⁹ Exhibit 47.

Mississippi Code Ann.” *Id.* As with New, MCEC’s \$5 million expenditure of TANF funds for the construction of the USM Volleyball Center is not addressed in the indictment or in Davis’ plea.

ARGUMENT

Miss. R. Civ. P. 45(d)(2)(C) grants circuit courts the authority to “quash or modify” subpoenas that are “unreasonable or oppressive.” Governor Bryant respectfully requests that this court quash the subpoena at issue. In the alternative, pursuant to Rule 26(d)(1) and (2), Governor Bryant requests the entry of a protective order that would preserve the privileges at issue and protect the integrity of these proceedings. Finally, Governor Bryant requests that this court sanction MCEC pursuant to Rules 45(f) and 26(d)(4) for exercising the subpoena power in bad faith and to unreasonably annoy, embarrass, and oppress Governor Bryant.

I. The subpoena should be quashed.

A. MCEC cannot overcome Governor Bryant’s privilege claims.

1. The deliberative process privilege

The deliberative process privilege is the most oft-cited form of executive privilege. *In re Sealed Case*, 121 F.3d at 737. The rationale of this privilege is that certain executive communications are “so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The United States Supreme Court has explained that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.” *United States v. Nixon*, 418 U.S. 683, 705 (1974). In its most basic form, the deliberative process privilege refers to –

the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring).

The “major impact of the deliberative process privilege has been on the day-to-day functioning of . . . government[s].” RUSSELL L. WEAVER & JAMES T.R. JONES, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 283 & n.24 (1989). The Supreme Court recognized in 1938 that it “was not the function of the court to probe the mental processes” of government officials, specifically the Secretary of Agriculture. *Morgan v. United States*, 304 U.S. 1, 18 (1938). The Court of Claims incorporated this principle into the deliberative process privilege twenty years later. *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (citing *Morgan*, 304 U.S. at 18).

The deliberative process privilege allows government officials to “withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *In re Sealed Case*, 121 F.3d at 737 (quoting *Carl Zeiss Stiftung v. V.E.V. Carl Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1996)). Courts have established two substantive requirements that must be satisfied before the privilege presumptively attaches to a document. *Id.* First, the document must be pre-decisional, meaning it was created before the end of the deliberative process. WEAVER & JONES at 290. Second, the document must be deliberative, meaning it reflects the “give-and-take of the consultative process.” *Coastal States Gas Corp.*, 617 F.2d at 866. This second prong requires that the material be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” WEAVER & JONES at 296. Accordingly, facts are not privileged, unless they are “so inextricably intertwined with the deliberative sections of documents that [their] disclosure would inevitably reveal the government’s deliberations.” *In re Sealed Case*, 121 F.3d at 737.⁸⁰

⁸⁰ Federal courts typically require the individual claiming the privilege to establish his claim by utilizing the *Vaughn* Index. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The *Vaughn* Index provides an itemized and detailed summary of each document cross-referenced to the relevant parts of the government’s justifications for the privilege. *Id.* at 826-27; *City of Colo. Springs v. White*, 967 P.2d 1042, 1053 (Colo. 1998). A proper index includes a description of the author, recipient, and subject matter of the documents in question. WEAVER & JONES at 301-02. Additionally, the index must include an explanation of why the document is privileged,

2. The chief executive communications privilege

Although the two privileges “are closely affiliated,” the chief executive communications privilege is broader in scope than the deliberative process privilege. *Id.* at 745. The chief executive communications privilege “applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.” *Id.*

The District of Columbia Circuit Court of Appeals was the first court to address the chief executive communications privilege. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). In *Sirica*, the grand jury investigating the Watergate break-in ordered President Nixon to produce nine tapes for *in camera* review. *Id.* at 704. President Nixon refused, claiming executive privilege. *Id.* at 704-05. In upholding the district court's subpoena for these tapes, the court of appeals recognized a preliminary version of the chief executive communications privilege. *Id.* at 704, 717. Noting the strong public interest in protecting “the confidentiality of conversations that take place in the President's performance of his official duties” and “the effectiveness of the executive decision-making process,” the court attached a presumptive privilege to presidential communications. *Id.* However, it determined the chief executive communications privilege was qualified, indicating it could be overcome by a sufficient showing of need. *Id.* Using this balancing test, the court struck down President Nixon's claim of privilege because the information sought was relevant and necessary to the ongoing Watergate investigations. *Id.* at 719-20.

including the role it played in the deliberative process. *Id.* at 302. Finally, if the document contains non-redactable information, “the index should state the existence of that material and explain why it is not segregable.” *Id.* at 303.

Governor Bryant did not supply a *Vaughn* Index to MCEC because the documents at issue are also protected by the executive communications privilege. As explained *infra*, MCEC bears the burden of establishing the discoverability of documents protected by the executive communications privilege.

A year later, the United States Supreme Court addressed executive privilege in *United States v. Nixon*. In *Nixon*, the special prosecutor appointed by the Attorney General to conduct the Watergate investigations issued a subpoena for additional tapes possessed by President Nixon. 418 U.S. at 688. The tapes were to be used as evidence in criminal prosecutions against seven governmental officials linked to the Watergate break-in. *Id.* at 687. In response to the subpoena, President Nixon filed a motion to quash based on claims of executive privilege. *Id.* at 688.

In a unanimous opinion, the Court recognized a “presumptive privilege for Presidential communications” grounded in the constitutional doctrine of separation of powers. *Id.* at 708. Due to the President's unique role in the government, the privilege was necessary for the –

protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. at 708. The Court's rationale implies that the executive communications privilege is broader than the deliberative process privilege, and encompasses it. Therefore, at a minimum, it protects the deliberative and mental processes of the President.

The Court did, however, reject President Nixon's contention that the privilege was absolute. *Id.* at 706. It held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege.” *Id.* Instead, the Court recognized the presumptive privilege attached to presidential communications can be overcome by a demonstration of need. *Id.* at 713. In this case, President Nixon's general assertions of executive privilege yielded to the “demonstrated, specific need for evidence in a pending criminal trial.” *Id.* at 713-14.

The Supreme Court's next foray into the chief executive communications privilege occurred in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Upon enactment of the Presidential

Recordings and Materials Preservation Act (PRMPA),⁸¹ many materials – including the Watergate tapes – were transferred from the Nixon administration to the General Services. *Id.* at 433-34. President Nixon challenged the constitutionality of the PRMPA, claiming the statute impinged on the chief executive communications privilege. *Id.* at 439-40.

The Court first distinguished between sitting and former presidents, holding the privilege is given less weight when asserted by the latter. *Id.* at 448. Next, the Court quoted *United States v. Nixon* to limit the privilege to “communications ‘in performance of [a President's] responsibilities,’ ‘of his office,’ and made ‘in the process of shaping policies and making decisions.’” *Id.* at 449 (citations omitted) (quoting *Nixon*, 418 U.S. at 708, 711, 713 (alteration in original)). As the Court explained, there was only minor interference with the confidentiality of presidential communications when the material was screened by archivists. *Id.* at 451-54. Because such screening had been accomplished without problems for earlier Presidents, the court viewed the interference as insubstantial and justified by the public interests underlying the PRMPA. *Id.* at 452-53.

More recently, the chief executive communications privilege arose in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004). In *Cheney*, two organizations filed a civil lawsuit alleging an energy task force chaired by Vice President Richard Cheney violated the Federal Advisory Committee Act (FACA). *Id.* at 373; Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. app. §§ 1-16 (2000)). The two organizations obtained discovery orders against Vice President Cheney and other high-ranking executive officials requiring the production of information relating to the structure and membership of the task force. *Id.* at 375. Although the district court mentioned the possible applicability of the chief executive communications privilege, Vice President Cheney did not raise the issue while petitioning for a writ of mandamus to abate enforcement of the discovery order. *Id.* at 375-77.

⁸¹ Pub. L. No. 93-526, 88 Stat. 1696 (codified as amended at 44 U.S.C. § 2107 Note (2000)).

In a divided opinion, the Court of Appeals dismissed Vice President Cheney's petition for a writ. *Id.* at 376. Despite its recognition that the discovery orders were overly broad, the Court of Appeals justified dismissal based upon the availability of alternative remedies. *Id.* at 376-77. The alternative remedies included an assertion of the chief executive communications privilege with the requisite specificity. *Id.* at 376.

The Supreme Court reversed the Court of Appeals and denied Vice President Cheney's writ of mandamus. *Id.* at 378. The Court distinguished the facts before it from those in *Nixon*. Focusing on the nature of lawsuits in which the allegedly privileged materials are needed, the Court held that the ***“need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in Nixon.”*** *Id.* at 384 (emphasis added). In essence, the Court held that the need for disclosure is much weaker in civil lawsuits, thereby making it more difficult to overcome an assertion of the chief executive communications privilege.

Additionally, the Court expounded on its holding in *Nixon*. Distinguishing between the narrow subpoena in *Nixon* and the plaintiffs' broad discovery requests, the Court opined that “our precedent provides no support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections.” *Id.* at 388. Instead, such specificity would only be required after the party seeking disclosure has “satisfied his burden of showing the propriety of his requests.” *Id.* In *Nixon*, the special prosecutor met this burden. *Id.* Here, the plaintiffs “discovery requests [were] anything but appropriate.” *Id.*

As discussed in the Objection to MCEC’s subpoena, numerous state courts have recognized the executive communications privilege. The most recent state to recognize the privilege is Ohio. *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006). In the spring of 2005, the Ohio media shed light on mismanaged investments made by the Ohio Bureau of Worker's Compensation (BWC) that resulted in state losses of over \$200 million. *Id.* at 476. Seeking to obtain information regarding Governor Bob

Taft's knowledge of these investments, State Senator Mark Dann submitted public records requests to the governor. *Id.* Senator Dann requested weekly memoranda and reports from BWC officials to the Office of the Governor. *Id.* Although Governor Taft produced a number of these documents, he withheld a significant number on the grounds of executive privilege. *Id.* As a result, Senator Dann instituted a mandamus action in the Ohio Supreme Court to compel production of the requested documents. *Id.* Before ruling on the parties' discovery motions, the Ohio Supreme Court asked the parties to brief the issue of whether the "Governor of Ohio may claim an executive privilege to prevent disclosure of documents provided to the Governor by staff members or other executive-branch officials." *Id.* at 477.

Opening its opinion with an historical examination of executive privilege, the Ohio Supreme Court recognized its development at both the federal and state level. *Id.* at 479-82. At the federal level, the Court noted the evolution of two separate and independent forms of executive privilege: the deliberative process privilege and the chief executive communications privilege. *Id.* at 479-81. The Court, however, touched only briefly on the deliberative process privilege because the Governor disclaimed any reliance on it. *Id.* at 480. Instead, the Court focused on the chief executive communications privilege. *Id.*

In conjunction with its discussion of the chief executive communications privilege, the Court placed heavy reliance on the United States Supreme Court's decision in *Nixon*. Quoting the *Nixon* opinion at great length, the Court used the same rationale in applying the presidential communications privilege to the "chief executive official of a state." *Id.* at 481. The Court further noted that several other states had applied some form of executive privilege to the chief executive officers of their states. *Id.* at 481-82.

The Court grounded its holding in the doctrine of separation of powers. This doctrine mandates that each branch of government be allowed to carry out its constitutional responsibilities

without interference from the other branches. *Id.* at 484. The executive communications privilege is designed to protect the governor's independence.

Ohio's version of executive privilege parallels the qualified privilege recognized in *Nixon*. The Court established a three-step process for determining when the privilege attaches. First, the governor must formally assert the privilege. *Id.* at 485. To do so, the governor must state that “he or she has reviewed the requested materials” and concluded that they fall within the scope of the privilege. *Id.* at 485-86. Second, once a formal assertion of the privilege has been made, the requested materials are presumed to be privileged. *Id.* at 485. This presumption, in favor of non-disclosure, shifts the burden to the party seeking disclosure to “demonstrate a particularized need for disclosure of the material deemed confidential by the governor.” *Id.* Third, and only after the first two prongs have been satisfied, the Court will hold an *in-camera* hearing to review the requested documents and determine whether the privilege applies. *Id.* at 485. If the hearing establishes that the “communications to the governor were, in fact, made for the purpose of fostering informed and sound deliberations, policymaking, and decision-making,” the Court will “balance the requester's need for disclosure against the public's interest in ensuring informed and unhindered gubernatorial decision making.” *Id.* at 485. Materials will be disclosed only when the balancing test weighs in favor of the public interest. *Id.*

In the case at bar, Governor Bryant's Objection plainly states that “[a]ll responsive documents within [his] care, custody, or control are protected by the executive privilege.” This assertion is consistent with Miss. R. Civ. P. 45(e)(2)(A)'s requirement that a privilege claim “shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.” The Objection shifted the burden to MCEC to demonstrate a “particularized need” for the subpoenaed documents.

Miss. R. Civ. P. 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party.” MDHS claims MCEC hired Favre to perform promotional services, claims Favre did not perform the services, and claims MCEC paid him \$1.1 million anyway. MCEC’s defense is that Favre performed promotional services and the \$1.1 million payment was a permissible TANF expenditure. The complaint does not allege any connection between the USM Volleyball Center project, the \$1.1 million payment to Favre, and Governor Bryant. And MCEC has not offered a defense that connects the USM Volleyball Center project and the payment to Favre to Governor Bryant. That assertion is only found in the motion to compel, and it has been wholly refuted in this filing. Accordingly, MCEC has failed to demonstrate a particularized need sufficient to overcome Governor Bryant’s assertion of the chief executive communications privilege. The subpoena should be quashed and Governor Bryant should not be compelled to produce additional privileged materials.

B. The subpoena exceeds the proper scope of discovery.

Miss. R. Civ. P. 26(b)(1) provides in pertinent part that, “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party.” The rule also recognizes that, “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Thus, MCEC must show the subpoena seeks documents that are: (1) relevant to the issues raised by the claims or defenses of a party and (2) reasonably calculated to lead to the discovery of admissible evidence. *Flechas v. Pitts*, 138 So. 3d 907, 910 (Miss. 2014) (noting that to obtain a subpoena duces tecum, the requesting party must show the information is relevant so that the witness is not subjected to unnecessary or irrelevant production).

The complaint does not address the USM Volleyball Center. MCEC has not alleged a defense that addresses the USM Volleyball Center. No party in this action has credibly alleged Governor

Bryant knew of the \$1.1 million payment to Favre, nor has any party credibly alleged Bryant caused public funds to be expended on the USM Volleyball Center project. Governor Bryant has refuted the bald assertions made in the motion to compel with an overwhelming degree of specificity and proof. It strains credibility to contend documents or information relating to a matter that is not at issue in this case is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the documents sought by the subpoena fall outside the proper scope of discovery.

II. Alternatively, the court should enter a protective order.

Should the court determine the subpoenaed documents are discoverable, it should enter a protective order that shields the documents from public consumption. There are three reasons why this is so. First, this court entered a *Suppression Order* [Doc. 17] in *State v. New*, Nos. 20-0-052, 20-0-053 (Hinds Cty. Cir. Ct.) on November 16, 2020. The order states that, “[t]he Court, in an effort to ensure that the State and [Nancy New] . . . receive a fair and impartial trial in the Circuit Court of Hinds County, Mississippi and having admonished the parties concerning an article published November 14, 2020 that directly relates to this cause, hereby enters a Suppression Order limiting pre-trial publicity until the completion of the trial or disposition without trial.” The court ordered “that all attorneys, their representatives, parties, witnesses, law enforcement officers and court personnel are prohibited from discussing or commenting on any aspects of this case with the media until such time as it has concluded[.]” The allegations in this action and the criminal cases, according to New, are “seemingly identical.” [Doc. 71 at 5]. A protective order would prevent the same individuals from releasing documents and information in this action that the *Suppression Order* prevents in the criminal cases. Moreover, a protective order would accomplish one of the same ends that the *Suppression Order* accomplishes in the criminal cases – namely, preserving the integrity of court proceedings.

Second, the subpoenaed documents are privileged. The only way this court can preserve the privileges and allow discovery of the documents is by entering a well-tailored protective order. The

Rules of Civil Procedure certainly contemplate such. Miss. R. Civ. P. 26(d)(1)(E) (court may order “that discovery be conducted with no one present except persons designated by the court” and any other order “which justice requires to protect a party or person from. . . oppression, or undue burden”).

Third, the court should enter a protective order to preserve the integrity of these proceedings. The baseless accusations levied by MCEC against Governor Bryant are extremely serious. Governor Bryant never should have been forced to defend himself with the use of privileged documents in a public filing. He did so because the media frenzy that has ensued since MCEC filed its motion has been unfounded and unfair. Parties, and especially non-party subpoena respondents, should not be faced with this Hobson’s choice. Accordingly, should the court determine the subpoenaed documents are discoverable, it should enter a protective order that ensures the integrity of this court’s proceedings in this action and its related criminal actions, that does not unduly prejudice the rights of the defendants in the civil action and its related criminal actions, that respects the privacy and other similar rights of non-party respondents, and that preserves the privileged nature of documents and information.

III. The court should award monetary sanctions to Governor Bryant.

Miss. R. Civ. P. 45(f) provides in pertinent part as follows:

On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, electronically stored information, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

Additionally, Miss. R. Civ. P. 26(d)(4) provides that “Rule 37(a)(4) applies to the award of expenses incurred in relation” to a motion for a protective order. Rule 37(a)(4) provides in pertinent part:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Governor Bryant properly invoked the attorney-client privilege, deliberative process privilege, and the chief executive communications privilege in his Objection to the subpoena. Despite this Objection, Governor Bryant offered to accommodate MCEC's request with the entry of a well-tailored protective order. This was a substantial and highly-reasonable concession, considering the subpoena seeks documents which fall well outside the bounds of permissible discovery.

Instead of contesting the privileges or the way they were invoked, and without attempting to meet-and-confer with Governor Bryant to resolve this discovery dispute, MCEC filed the present motion and attached numerous text messages that are devoid of context. The motion does not address the privileges invoked by Governor Bryant, but MCEC's statement to Anna Wolfe of Mississippi Today does. MCEC's counsel told Wolfe, "We do not believe a protective order shielding the Governor's documents from public view, and thus limiting our ability to use them in open court or public pleadings in support of our defenses, is appropriate."⁸²

This comment is meritless media bait. Counsel well-knows that a protective order does not impede the legitimate use of covered documents in court proceedings. Covered documents are filed under seal or in a redacted fashion. In the event covered documents are ultimately used in open court, they are provided to the parties, witnesses, judge, and jury and are entered into evidence. The primary outside interest from whom privileged documents are shielded is the press – and that is the point. In a court of law, Governor Bryant has the right to respond to unfounded or misguided allegations before an impartial court. This is not true with the media. Media members sometimes carry biases and

⁸² See, <https://mississippitoday.org/2022/09/13/phil-bryant-brett-favre-welfare/>.

unfounded and unfair opinions that impact their work. Instead of impartially seeking the truth, the media member sometimes seeks to reinforce her already-existing beliefs, however unfounded they may be. This can result in a social media echo-chamber of confirmation bias that unduly influences court proceedings and biases potential jurors against parties and/or witnesses. And this influence threatens the integrity of this court's proceedings.

MCEC served a subpoena and filed this motion to force the governor to make a choice. Either preserve his rightfully-invoked privileges, seek a protective order, and risk damaging to his reputation by allowing false accusations to go unchallenged, or reveal privileged communications to the public in order to defend himself. Governor Bryant has chosen the latter course of action and, in doing so, he makes it clear that he only waives privileges attaching to the documents that are exhibits to this filing. Governor Bryant's privilege waiver is limited to this extent and this extent only. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 375 (Miss. 1992) ("The attorney-client privilege can be waived for limited purposes."); *Baptist Health v. BancorpSouth Ins. Services, Inc.*, 270 F.R.D. 268, 274 n.2 (N.D. Miss. 2010); *Liberty Mut. Ins. Co. v. Tedford*, No. 3:07-cv-73-A-A, 2008 WL 1930573, *2 n.2 (N.D. Miss. May 1, 2008).

MCEC has transparently used the subpoena power in a bad faith effort to annoy, embarrass, and oppress Governor Bryant. Accordingly, this court should award sanctions to Governor Bryant, including the attorneys' fees incurred in the preparation, filing, and argument associated with this response.

CONCLUSION

This court should deny MCEC’s motion to compel. The documents sought by the subpoena are privileged and outside the bounds of permissible discovery. MCEC has undertaken no effort to establish a particularized need for the documents, which is telling considering the detailed Objection that Governor Bryant made to the subpoena in advance of this motion.

MCEC did not attempt to meet-and-confer with Governor Bryant in advance of filing the present motion. Instead, MCEC went to the press – an action that flies in the face of the *Suppression Order* pending in related criminal cases. This motion was brought in bad faith and solely to annoy, embarrass, and oppress Governor Bryant because he refused to turn a blind eye to the crimes perpetrated by New and Davis. This court should recognize MCEC’s improper motives and award substantial sanctions, including attorneys’ fees, to Governor Bryant.

Respectfully submitted, on this the 23rd day of September, 2022.

By: /s/ William M. Quin II
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**Attorneys for Non-Party Respondent, the
Honorable Phil Bryant, the 64th Governor of the
State of Mississippi**

CERTIFICATE OF SERVICE

I, William M. Quin II, do hereby certify that the foregoing pleading was filed electronically through the Court's CM/ECF system and served electronically on all parties enlisted to receive service electronically.

This the 23rd day of September, 2022.

/s/ William M. Quin II

William M. Quin II