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

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES **PLAINTIFF**

v. **CAUSE No. 22-cv-286-EFP**

MISSISSIPPI COMMUNITY EDUCATION CENTER, INC., *ET AL*. **DEFENDANTS**

and

MISSISSIPPI COMMUNITY EDUCATION CENTER, INC. **COUNTER-PLAINTIFF**

v.

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES **COUNTER-DEFENDANT**

REPLY IN SUPPORT OF MOTION TO COMPEL GOVERNOR PHIL BRYANT TO PRODUCE DOCUMENTS RESPONSIVE TO SUBPOENA DUCES TECUM

In his 70-page Response,[1] Governor Bryant makes one thing abundantly clear: he is desperate to avoid public scrutiny of his text messages concerning welfare funds used to build the Volleyball Facility at USM. Of course, Bryant insists he did nothing to facilitate the flow of millions from MDHS to the athletic construction project, but he refuses to produce his text messages and other documents that presumably would support his contentions, if true. In lieu of transparency, Bryant opts for obfuscation.

Bryant goes on the offensive in his Response, this time seeking to "open a hole" for himself rather than others.[2] He attacks anyone who dares to disagree with his self-serving interpretation of piecemeal evidence he has chosen expressly for this purpose. His dizzying spin on the evidence,

[1] MCEC moves to strike Bryant's Response to the Motion to Compel, which was filed outside the time period allowed by Rule 4.02(3) and exceeds the 25-page limit of Rule 4.02(4). UCRCCC Rule 4.02(3) and (4).

[2] Ex. 1. Anna Wolfe, "Phil Bryant has his sights on a payout as welfare funds flowed to Brett Favre," Mississippi Today, April 4, 2022. https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/

including long discussion of weight and credibility, is both tiring and grossly misplaced. This is a Motion to Compel, and the standard is relevance.

MCEC respectfully submits that the evidence before the Court is more than sufficient to show that Bryant's text messages, and the other documents sought pursuant to the subpoena, are relevant to issues raised by the claims or defenses of the parties. Therefore, Bryant should be required to produce them.

I. BRYANT'S TEXTS AND DOCUMENTS ARE RELEVANT

A. Legal Standard

The standard on motion to compel is relevance. MCEC is entitled to Bryant's documents related to "*any matter*, not privileged, which is *relevant to the issues* raised by the *claims* or *defenses* of *any* party." [3] Contrary to Bryant's assertion, the standard is not strict. "Courts of necessity must follow a more liberal standard as to relevancy" during discovery,"[4] even compared to "the [already] low bar for relevance" at trial.[5] Demonstrating relevance is "not difficult for a party seeking discovery,"[6] because "[c]ourts have traditionally construed relevance broadly: information is relevant if it encompasses any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case."[7]

B. Claims and Defenses

MDHS alleges in its Complaint that MCEC paid Favre $1,100,000 for public appearances that were not permissible TANF expenditures.[8] In her Answer, Nancy New, former Director of MCEC, asserts Bryant directed her to provide funds to Favre for the Volleyball Facility:

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[3] Miss. R. Civ. P. 26(b)(1) (emphasis added).
[4] *United States v. McKesson Corp.*, 2011 U.S. Dist. LEXIS 74418, at 3 (N.D. Miss. July 11, 2011),
[5] *Novick v. Shipcom Wireless, Inc.*, 946 F.3d 735, 741 (5th Cir. 2020).
[6] *Bituminous Cas. Corp. v. Smith Bros. Inc.*, 209 WL 10676928, at 3 (S.D. Miss. Jan. 7, 2009),
[7] *Vertex Aero., LLC v. Dickinson*, 2022 U.S. Dist. LEXIS 100984, at 8-9 (S.D. Miss. Apr. 26, 2022) (quoting Coughlin v. Lee, 446 F.2d 1152, 1159 (5th Cir. 1991)).
[8] Doc. 2, p. 47.

> Governor Phil Bryant directed Defendant [New, on behalf of MCEC] to provide funds to Brett Favre, and Defendant caused MCEC to contract with Favre Enterprises, Inc. in the among of $1,100,000 in consideration for Favre speaking at events, keynote speaking, radio and promotional events, and business partner development. Favre performed services pursuant to this agreement, and payment for said services is a Permissible TANF Expenditure."[9]

While $1,100,000 was paid based on a contract for public appearances, and Favre did record a radio advertisement, the payment was intended, as requested by Bryant, to help Favre raise funds for construction of the Volleyball Facility.

On July 26, 2017, Favre asked New if there was "a way for John [Davis at MDHS] to allocate money to an entity that could then give to us that would pay for [construction of the Volleyball Facility]."[10] Favre continued, that a public service announcement "… could be done quick and easy to put together [smiley face emoji]."[11] "… I could record a few radio spots here initially I'm sure right here. See how it is received and *whatever compensation could go to USM*."[12] New was in favor of the idea, and Favre responded, "Was just thinking that here is the way to do it!!"[13]

The $1,100,000, and Bryant's involvement in directing TANF expenditures, is relevant to MCEC's Counterclaim.

MCEC's Counterclaim alleges that, "MDHS seeks to reframe its historically 'broad' and 'flexible' view of a Permissible Grant Expenditure into a narrow, strictly construed interpretation of Miss. Code Ann. § 43-17-1(4) that is inconstant with every federal and state authority upon which the TANF program is based."[14] The Counterclaims goes on to state, "MDHS has had a 25-

[9] Doc. 72, p. 21.
[10] Ex. 2.
[11] Doc. 131-4.
[12] Doc. 131-5.
[13] *Id.*
[14] Doc. 70, p. 35.

year love affair with TANF's extreme flexibility. MDHS cannot now divest itself of its contractual obligations simply because it is politically and financially expedient to do so."[15]

MDHS, acting through the MDHS Executives, including Governor Bryant, consistently has applied a flexible standard to TANF expenditures in Mississippi, under Mississippi's TANF State Plans. MDHS's departure from this flexibility in its Complaint is at issue in this case. Governor Bryant's involvement in directing, facilitating, or approving TANF funds for TANF expenditures in the Complaint, including the $1,100,000 paid to Favre, is directly relevant to MCEC's defense that MDHS is attempting to narrowly construe TANF's parameters, and the historic application of its TANF State Plan, artificially.

Similarly, Nancy New and Zach New both assert defenses relevant to the $1,100,000 payment to Favre for construction of the Volleyball Facility:

> MDHS directed and/or approved all expenditures referenced in the Complaint [including the $1,100,000], and Defendants had a right to rely on, and did rely on, directions and/or approvals by MDHS, acting through the MDHS Executives [which is defined in the Answers to include Bryant].[16]

Based on these defenses, MCEC has a right to discover upon whose authority or direction its officers provided $1,100,000, which MDHS now seeks to recover, and whether the actual purpose for which the funds were provided is a permissible TANF expenditure. This is particularly relevant since, so far, MDHS has refused to seek recovery of $6,100,000 MDHS provided for construction of the Volleyball Facility. MDHS indicates, somewhat disconcertingly, that construction of the Volleyball Facility with TANF welfare funds may have been permissible pursuant to Mississippi's TANF State Plan, and Bryant's knowledge and interpretation of a

[15] *Id.*
[16] Doc. 72, p. 3; Doc. 73, p. 3.

permissible TANF expenditure, and his actions regarding TANF funds, certainly are relevant and important to the defenses of MCEC, Nancy New, Zach New, and other Defendants.

C. "Knew or Should Have Known"

Bryant's interpretation, as an MDHS Executive, of permissible TANF expenditures is particularly important given MDHS's alleges that Defendants "knew or should have known" TANF expenditures alleged in the Complaint were unlawful.[17] The "knew or should have known" standard makes relevant all evidence that may impact what a particular Defendant "knew or should have known" concerning TANF, in general, and the TANF expenditures in the Complaint, specifically, including the $1,100,000 paid to Favre.

Bryant's knowledge, actions and instructions in relation to TANF expenditures, including the Volleyball Facility, are particularly relevant to what Defendants "knew or should have known" because: (a) Bryant, as State Auditor for 12 years, had experience interpreting the TANF State Plan and overseeing TANF funds; (b) Bryant, as former Lieutenant Governor, was familiar with legislative matters involving funding; and (c) Bryant appointed John Davis as Executive Director of MDHS, and, as Davis's sole supervisor, was responsible with Davis for all TANF funds allocated to Mississippi.

In their Answers and Affirmative Defenses, Nancy New and Zach New assert affirmatively:

> Defendant reasonably relied on then-Governor Phil Bryant, acting within his broad statutory authority as chief executive of the State, including authority over MDHS and TANF, and his extensive knowledge of Permissible TANF Expenditures from 12 years as State Auditor, four years as Lieutenant Governor, and a number of years as Governor leading up to and including the relevant time period.[18]

[17] Doc. 2.
[18] Doc. 72, pp. 26-27; Doc. 73, p. 26.

By 2017, Bryant likely had more knowledge of, and experience with, TANF than any other elected official in Mississippi. Simply stated, if Bryant, with all of his TANF experience, thought building a Volleyball Facility with TANF welfare funds was permissible, how were others, most of whom had no knowledge of, or experience with, TANF, supposed to know their expenditures were not permissible under the "knew or should have known" standard alleged by MDHS. Evidence of Byrant's knowledge of, and actions in relation to, TANF expenditures, generally, and funding for the Volleyball Facility, specifically, including the $1,100,000, are relevant to the defenses and counterclaims asserted by MCEC, and defenses asserted by Nancy New, Zach New, and, generally, all Defendants.

D. Evidence of Relevance / No Fishing Expedition

Anticipating Bryant's "fishing expedition" argument, MCEC included in support of its Motion specific evidence it expects to receive from Bryant as a result of the subpoena. The evidence, which is described below, suggests that Bryant was asked to use his influence to fund the Volleyball Facility, did use his influence to fund the Volleyball Facility from April 2017 forward, and that influence resulted in $6.1 million in welfare funds from MDHS to build the Volleyball Facility. Examples of evidence sought from Bryant pursuant to the subpoena, include:

On April 20, 2017, Favre asked Bryant to use his "influence" to raise money to build the Volleyball Facility.[19] Bryant responded, "I am all in on the Volleyball facility.[20] 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 it raise money."[21] Bryant argues that Favre was asking for private donations only, but the evidence suggests otherwise.

[19] Doc. 140, p. 9.
[20] *Id.*
[21] *Id.*, pp. 9-10.

On July 18, 2017, Favre met with Nancy New, who administers millions in grant funds for MDHS under the supervision of John Davis and Bryant.[22]

On July 19, 2017, John Davis texted New and another non-profit director saying, "Been with Gov [Bryant] for last two days. He's loving what we are doing."[23] The timing of Davis's text message is significant. While Favre and New were meeting to discuss MDHS funding for the Volleyball Facility, Bryant and Davis were meeting at length discussing funding for various MDHS projects.

On July 21, 2017, Favre texted 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."[24] Bryant responded, "We can do that. Just get me some numbers and I'll find a way."[25]

On July 22, 2017, Favre texted Bryant the "plans" for construction of the Volleyball Facility.[26] At this point, Bryant knew without a doubt that the Volleyball Facility required construction of a building.

Bryant argues Favre never mentioned "public funds" in any of his texts, but he didn't have to. Favre was meeting with people who handled public funds, almost exclusively. Favre asked Bryant, who oversaw public funds, to use his influence. Favre then met with Nancy New, who handled public funds for MDHS, and subsequently John Davis, who handled public funds for MDHS. Then, Favre received public funds from MDHS for his volleyball project.

On July 24, 2017, Favre met with John Davis, New, USM officials and others at USM to discuss funding for the Volleyball Facility. This was Favre's first proposal to Davis regarding

[22] Ex. 3.
[23] Ex. 4.
[24] Doc. 140, p. 10.
[25] *Id.*
[26] *Id.*

funding for the Facility. Davis, however, had met with Bryant earlier in the week to discuss MDHS's projects,[27] and Bryant had known about the Volleyball Facility, and Favre's request for help funding it, for months.[28] At the meeting at USM, Davis committed $4 million for construction of the Facility.

Bryant's denials notwithstanding, the evidence and timing of the meetings described herein, suggest that Davis discussed Favre's Volleyball Facility with Bryant the week of the meeting at USM and received approval from Bryant, express or implied, to fund the project through MDHS. After the meeting at USM, Davis explaining the large funding commitment saying, "the Governor likes this project and wants to get it done." Importantly, Davis was Executive Director of MDHS for approximately four years. In the entirety of his tenure, he committed $4 million or more only twice upon first hearing a proposal. The first time was the Volleyball Facility. The second was Prevacus. The evidence suggests that Bryant was involved in both projects.

Despite MDHS's $4 million funding commitment, construction of the Volleyball Facility did not immediately take off.

On July 26, 2017, Favre texted New. USM was having concerns over "accepting such a large grant. Got me very uneasy," said Favre.[29]

On July 29, 2017, Favre texted New, "[D]o I need to involve the governor…?"[30]

On August 2, 2017, Favre texted New again regarding USM's concerns. "They are scared to death it seems," Favre told New.[31]

[27] Ex. 4.
[28] Doc. 140, p. 9.
[29] Ex. 5.
[30] Ex. 6.
[31] Ex. 7.

On August 4, 2017, New texted Favre, "Wow, just got off the phone with Phil Bryant! He is on board with us! We will get this done!"[32]

II. BRYAN NOT BEING TREATED "UNFAIRLY"

A. The Subpoena Seeks Relevant Evidence

Bryant argues that the Motion to Compel was intended solely to harass, annoy or embarrass him. Of course, MCEC's subpoena is not the first subpoena in this case to seek Bryant's communications concerning the Volleyball Facility.

On July 11, 2017, Plaintiff MDHS issued a subpoena for documents to the USM Athletic Foundation seeking, among other things, Bryant's communications with the Foundation concerning funding for the Volleyball Facility.[33] The MDHS subpoena placed Bryant's communications concerning the Volleyball Facility, and funding for the Facility, squarely at issue in the case.[34]

Based on the MDHS subpoena, MCEC certainly had a good faith basis for believing that Bryant may have relevant evidence in this regard. The MDHS subpoena, along with the evidence presented by MCEC, establishes conclusively MCEC's good faith basis for subpoenaing Bryant's Volleyball Facility-related documents.

B. Bryant Engaged the Media in a Case of Public Importance

Bryant also argues that the media is treating him unfairly, and he blames this on MCEC, as well. However, the media's attention was fixed firmly on this case, and Bryant, long before MCEC filed its subpoena or its Motion to Compel.

[32] Doc. 131-7.
[33] Doc. 67.
[34] *Id.*

The State Auditor has publicly announced that $77 million in welfare funds allegedly was squandered as a result of waste, fraud and abuse and described the case as "one of the largest public embezzlement cases" in Mississippi history.[35] It certainly stands to reason that the Governor, in charge of the State at the time of the alleged squandering, and in charge of its welfare agency, and its welfare agency's director, and the federal TANF funds allegedly squandered, may garner a bit of media attention and have a few questions to answer.

In response to questions concerning his involvement in funding the Volleyball Facility and Prevacus, Bryant chose to sit for a three-hour interview with Mississippi Today in an apparent attempt to shift the public narrative, and the media coverage, in his favor. By doing so, Bryant voluntarily thrust himself further into the media spotlight.

Bryant literally has spent more time on the record in this case than all of the Defendants and all of the other public officials combined. Now that his attempt to manipulate the media has achieved lackluster results, Bryant demands a protective order to shield him, and his text messages and documents, from further public scrutiny. Suffice to say, neither Bryant nor his text messages are entitled to protection from his own voluntary actions.[36]

III. BRYANT ARGUES MCEC FAILED TO "MEET AND CONFER"

Governor Bryant argues that MCEC failed to "meet and confer" in good faith prior to filing its Motion to Compel. This argument misstates the law, and, regardless, is incorrect.

[35] Ex. 8. https://www.wlbt.com/2020/02/06/millions-stolen-miss-taxpayers-states-largest-public-embezzlement-scheme-documents-show/

[36] Bryant, who is not a party in this proceeding or any proceeding related hereto, attempts to invoke a Suppression Order entered by the Court in a separate, but related, criminal proceeding. The Suppression Order was intended to protect the criminal defendants' right to a fair trial. No Defendant in this civil case has moved to invoke a similar suppression order in the instant civil proceeding, multiple third parties such as the current Governor, the State Auditor, the current MDHS Director, MDHS's former outside counsel, and Bryant have commented freely in the media concerning the civil case.

There is no "meet and confer" obligation applicable to objections to subpoenas. Rule 4.03 is the basis for a party's "meet and confer" obligations in state court, and this Rule applies to written discovery between parties in a case, such as interrogatories, requests for production, and requests for admissions.[37] Rule 45, applicable to subpoenas issued to third parties such as Bryant, states, "[t]he party serving the subpoena may, *if objection has been made*, *move at any time* upon notice to the person served for an order to compel the production or inspection."[38] MCEC was within its rights, by Rule, to file its Motion to Compel immediately upon receipt of Bryant's objection. Nevertheless, MCEC waited 11 days before filing its Motion to Compel expecting that Bryant would file a motion for protective order which never came.

Even though MCEC had no "meet and confer" obligation, MCEC conferred with counsel sufficiently to recognize an impasse had been reached. Below is the chronology of the subpoena to Bryant and the communications between counsel.

On July 25, 2022, MCEC issuing four subpoenas seeking documents related to the Volleyball Facility.[39] The subpoenas were issued to the Foundation, the Institutions of Higher Learning ("IHL"), the Office of the Attorney General of the State of Mississippi ("OAG"), and Bryant. Among these four recipients, only Bryant has not produced documents.

On July 27, 2022, Bryant's counsel and MCEC's counsel spoke by phone. The issues discussed included relevance, Bryant's responsive documents, privileges Bryant may assert, and Bryant's time in which to respond to the Subpoena. At Bryant's request, MCEC's counsel afforded Bryant 30 days, rather than the customary 10, to respond to the subpoena.

[37] UCRCCC 4.03.
[38] Miss. R. Civ. P. 45(d)(2)(B) (emphasis added).
[39] Doc. 93.

On August 18, 2022, Bryant's counsel and MCEC's counsel discussed the Subpoena again, this time by text. Bryant's counsel proposed postponing Bryant's response until January 2023. MCEC's counsel apologized but declined saying, "[s]orry but can't agree to more time. Got to stick with Aug. 26. Too much to do and not enough time to do it." Later that day, Bryant's counsel asked MCEC to agree to a protective order. After it became clear that the proposed protective order would make Bryant's documents confidential, and shield them from public use, MCEC's counsel responded, "I can't agree to a protective order. If you need to file a motion, I certainly understand."

On August 26, 2022, Bryant's counsel, instead of filing a motion for protective order, sent a letter. The letter raised Bryant's objections and arguments for a protective order. Bryant' objection immediately gave rise to MCEC's right to file a motion to compel.[40] However, as stated previously, MCEC waited an additional 11 days before filing its Motion.

On September 12, 2022, MCEC, having received no motion for protective order, filed its Motion to Compel.

IV. BRYANT HAS WAIVED THE ATTORNEY-CLIENT PRIVILEGE

Bryant's demand for a protective order is moot. Bryant's Response includes allegedly privileged communications. Bryant's attorney-client privilege, to the extent it existed at the time he filed his Response, is waived. The attorney-client privilege, under Mississippi law, is intended to be a shield, not a sword.[41] In his Response, Bryant wielded his allegedly privileged messages as a sword, attempting to support his denials and, in his own words, "set the record straight."[42] Bryant admits as much, stating that his Response, "reveal[s] privileged communications to the public in

[40] Miss. R. Civ. P. 45(d)(2)(B).
[41] *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 374-75 (Miss. 1992).
[42] Doc. 140, p. 17.

order to defend himself."[43] He attempts to limit the waiver to the specific communications attached to the Response, but this is not the law. Nor do the cases cited by Bryant support this position.

In *Century 21 Deep South Properties, Ltd. v. Corson*, the Mississippi Supreme Court addressed the testimony of an attorney offered as proof of his client's attorney fees.[44] The supreme court held that a partial waiver of the privilege was allowed, but the partial waiver applied to the issue – *i.e.* the attorney fees – not a singular document.[45]

In *Baptist Health v. BancorpSouth Ins. Servs.*, the Mississippi Supreme Court' held, in contradiction to Bryant's position:

> The attorney-client privilege was intended as a shield, not a sword. When confidential communications are made a material issue in a judicial proceeding, fairness demands treating the defense as a waiver of the privilege. The great weight of authority holds that the attorney-client privilege is waived when a litigant places information protected by it [the privilege] in issue through some affirmative act for his own benefit [such as a Response], and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party. Moreover, the general rule, which Mississippi appears to follow, is that a waiver of the privilege is deemed to encompass all information related to that topic.[46]

As in *Baptist Health*, Bryant has selectively disclosed allegedly privileged communications that occurred between himself and his attorneys in order to use these communication in support of his argument to avoid producing documents. This is the very essence of "some affirmative act for his own benefit" which waives the privilege.[47] Moreover, "the waiver of the privilege is deemed to encompass all information related to that topic [in the disclosed communications]."[48]

Accordingly, Bryant's privilege is waived as to all communications and documents pertaining to the subject matter of the allegedly privilege communications he used, and thereby

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[43] *Id.* at 68.
[44] *Corson*, 612 So. 2d at 374-75.
[45] *Id*.
[46] *Baptist Health v. BancorpSouth Ins. Servs*., 270 F.R.D. 268, 270 (N.D. Miss. 2010).
[47] *Id*.
[48] *Id*.

disclosed, in his Response. Bryant should produce immediately all communications regardless of any privilege claim relating to the Volleyball Facility.

V. MISSISSIPPI DOES NOT RECOGNIZE EXECUTIVE PRIVILEGES

Mississippi, like many other states, does not recognize a state-level executive privilege or deliberative process privilege[49]. In fact, the Mississippi Supreme Court only once has been presented with a claim of executive privilege.[50] Although the Court decided this case on other grounds, it addressed the executive privilege claim stating: "Because we find a substantial basis in the record for the conclusion that the governor had an arguable basis for acting in disregard to an injunction not directed at him[,] this Court need not reach the issue of ***supposed*** executive privilege."[51] This is hardly a ringing endorsement for the adoption of the executive privilege in Mississippi.

MCEC respectfully submits the Court should decline to create new law on an issue mentioned by the Mississippi Supreme Court with such skepticism.

Even if the Court were to consider the executive privilege argument, Bryant does not satisfy the requirements necessary for the privilege to apply in the few state that recognize it.

A. Bryant was Communicating with Non-Public Officials

Bryant's text messages and documents include many that are between Bryant and non-public officials such as Favre. If Mississippi were to recognize the executive privilege, it would not apply to communications between Bryant and Favre, or any other non-public official.[52]

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[49] Deliberative process privilege is a narrower privilege that "is encompassed within the executive privilege." *ACLU v. NSA*, 925 F.3d 576, 592 n.70 (2d Cir. 2019) (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999)). *N.Y. Times Co. v. United States DOJ*, 939 F.3d 479, 490 n.6 (2d Cir. 2019)

[50] *Fordice v. Thomas*, 649 So.2d 835, 846 (Miss. 1995) (emphasis added.)

[51] *Id.*

[52] *People v. Keating*, 286 A.D. 150 (N.Y. App. Div. 1955)(the executive privilege "attaches to confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged).

B. Communications Were Not Exchanged in Public Business or Interest

Bryant's text messages and documents relate to the Volleyball Facility, and the use of TANF money to fund construction of the Facility. If there were an executive privilege in Mississippi, communications, in order to be protected, would need to be in furtherance of public business or the public's interest.[53] The Volleyball Facility has been questioned by the State Auditor, [54] questioned by Clifton Larson Allen, LLC, a private audit firm, [55] and is the subject of a criminal plea agreement. These factors alone would preclude application of the executive privilege, were it to exist in Mississippi, as using welfare funds to build a Volleyball Facility is unlikely to be considered a legitimate public business or in the public interest.

C. Application of an Executive Privilege Fails the Balancing Test

If an executive privilege were to exist in Mississippi, before it could apply and protect communications from disclosure, the public interest protected by the privilege would need to be weighed against the public interests served by disclosure.[56] Communications by a public official relating to millions of dollars in welfare funds used to construct a Volleyball Facility, which has been the subject of criminal proceedings and audit findings, is unlikely to be found to be in the public interest or support protection from disclosure.

VI. BRYANT HAS NO VALID BASIS FOR A PROTECTIVE ORDER

Bryant demands a protective order allegedly to: (1) protect his privileges, which now have been waived, (2) adhere to the Suppression Orders in a separate, but related, criminal proceeding, which is addressed in Note 36, and (3) prevent "biased" and "unfair" media scrutiny, which is addressed in Section II *supra*.

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[53] *Id*. at 51.
[54] Ex. 9, 2019 Single Audit, Office of the State Auditor of Mississippi, p. 106.
[55] Ex. 10, TANF Forensic Audit Procedures and Results, p. 146.
[56] *In re Sealed Case*, 121 F.3d 729, 734 (1997).

For all of the reasons stated herein, and in the Motion to Compel, MCEC respectfully requests that Bryant be compelled to produce all of his text messages and other documents responsive to MCEC's subpoena, as requested in the Motion to Compel, including communications alleged to be protected by the attorney-client privilege, which has been waived.

Respectfully submitted, this the 30th day of September, 2022.

CARROLL BUFKIN, PLLC

/s/ Thomas G. Bufkin
Thomas G. Bufkin, MSB No. 10810

On behalf of Defendant MCEC

Of Counsel:

Thomas G. Bufkin, MSB No. 10810
Luke E. Whitaker, MSB No. 105579
CARROLL BUFKIN, PLLC
1076 Highland Colony Parkway
600 Concourse, Suite 125
Ridgeland, MS 39157
T: (601) 982-5011
F: (601) 853-9540
tgb@carrollbufkin.com
lwhitaker@carrollbufkin.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the above and foregoing *via* MEC, which automatically provides a copy to all counsel of record.

I also certify that I have this day provided notice of this Reply to counsel for Governor Phil Bryant, as required by Mississippi Rule of Civil Procedure 45(d)(2)(B).

Dated: September 30, 2022

/s/ Thomas G. Bufkin
Thomas G. Bufkin