

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

**MISSISSIPPI DEPARTMENT OF HUMAN SERVICES** **PLAINTIFF**

**VS.** **CASE NO. 25CI1:22cv286-EFP**

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

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**DEFENDANTS BRETT LORENZO FAVRE’S AND FAVRE ENTERPRISES, INC.’S  
MOTION TO DISMISS WITH INCORPORATED MEMORANDUM**

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**COME NOW**, Defendants, Brett Lorenzo Favre and Favre Enterprises, Inc. (hereinafter together referred to as “Favre”), pursuant to Miss. R. Civ. P. 12(b)(6), and respectfully submit this Motion to Dismiss the Complaint filed herein by the Mississippi Department of Human Services (“MDHS”) against them (MEC No. 2, “Complaint” or “Compl.”). Favre would show unto the Court the following:

**PRELIMINARY STATEMENT**

Brett Favre has done nothing wrong. MDHS does not and cannot allege that he did, and its claims against him and his company must be dismissed. It is apparent that MDHS has sued Favre, a Mississippi and national celebrity, in an effort to deflect responsibility for its own egregious wrongdoing in allowing \$94 million of its public funds to be misspent—funds for which MDHS itself admits it was “exclusively responsible.” There is no factual or legal basis to include Favre in this lawsuit or for the torrent of the unjustified negative publicity concerning Favre that MDHS has outrageously instigated—publicity that properly should be directed at MDHS, not Favre.

In this lawsuit, MDHS seeks to recover that portion of the misspent public funds that it alleges Mississippi Community Education Center, Inc. (“MCEC Inc.”), Favre, and the other defendants wrongfully diverted. But MDHS does not allege that Favre did *anything* wrongful—because he did not. MDHS does not allege that Favre knew or was told *anything* about any diversion of funds or even the source of the funds—because he did not know and was not told. MDHS also conspicuously omits from its Complaint the fact that over six months before MDHS filed its Complaint, Favre, once informed of the source of the funds, voluntarily *returned* to MDHS the funds he received.

According to the Complaint, MDHS’s own Executive Director, John Davis (“Davis”), devised a scheme with Nancy New (“New”), the Chief Executive Officer of MCEC Inc., whereby MDHS transferred to MCEC Inc. or its affiliate, the Family Resource Center of North Mississippi, Inc. (“FRC,” and together with MCEC Inc., “MCEC”) tens of millions of dollars of federal funds MDHS received under the federal Temporary Assistance for Needy Families (“TANF”) program and other similar programs. Mississippi distributes, through MDHS, the bulk of its TANF and other public benefits funds through block grants to private non-profit entities like MCEC and other subgrantees, which then are supposed to disburse the funds for the benefit of needy Mississippians and other lawful purposes. MDHS alleges that instead of using these funds only for lawful TANF purposes, Davis and New—who have now pled guilty to criminal charges for their conduct—through their control of MDHS and MCEC unlawfully used portions of the funds to enrich themselves and their families and friends.

MDHS, in this lawsuit, is pursuing only a fraction of the funds Davis and New allegedly diverted (\$23 million of the \$94 million total) and is selectively suing only a fraction of those who allegedly received the funds, while inexplicably ignoring the numerous other recipients. MDHS

also has ignored the numerous public officials responsible for overseeing MDHS, such as former Governor Dewey Phillip Bryant and current State Auditor Shad White, who, despite his statutory obligation to conduct annual audits of MDHS, did not “question” MDHS’s transfers of tens of millions of dollars to MCEC until 2020, nearly five years after those transfers began.

By contrast, Favre, unlike Davis and New and the other public officials, in fact did not know that any funds he received were TANF funds or were subject to a legal use restriction, had no responsibility or ability to audit or monitor, let alone control, the use of MDHS or MCEC funds, and did nothing wrong in connection with those funds. MDHS does not allege otherwise, and by suing Favre, MDHS groundlessly and irresponsibly seeks to blame Favre for its own grossly improper and unlawful handling of welfare funds and its own failure to properly monitor and audit how MDHS subgrantees like MCEC used the funds. Including Favre in this lawsuit has had the intended effect—it has attracted national media attention to this case, with the focus on MDHS’s false insinuations concerning Favre’s supposed involvement, rather than on MDHS, which in fact is responsible for allowing this scandal to occur.<sup>1</sup>

MDHS seized on Favre’s support for two causes that received MDHS funds through MCEC—Prevacus, Inc., a concussion treatment and prevention company in which he had invested, and The University of Southern Mississippi (“Southern Miss”), his alma mater—as the pretext for blaming Favre, publicizing his involvement, and bringing its baseless claims against him in this lawsuit. MDHS seeks, through those claims, to recover the funds MDHS transferred, through MCEC, to Prevacus, Inc. or its affiliate PreSolMD, LLC (“PreSolMD,” and together with

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<sup>1</sup> As Governor Reeves noted, the MDHS attorney who brought this lawsuit against Favre, and who was since terminated, was “much more interested in chasing a political angle than he is in focusing on what’s best for the state.” *Gov. Reeves at Neshoba Fair: Fired Attorney Probing Welfare Fraud Was ‘Chasing a Political Angle,’* MISSISSIPPI FREE PRESS, July 29, 2022, annexed hereto as Exhibit 1 and available at <https://www.mississippifreepress.org/26083/gov-reeves-at-neshoba-fair-fired-attorney-probing-welfare-fraud-was-chasing-a-political-angle>. Also annexed hereto as Appendix A are tables of exhibits and authorities used herein.

Prevacus, Inc., “Prevacus”) and the funds Favre received in exchange for services he rendered to MCEC—funds, as noted, he has already returned.

With respect to the alleged payments from MCEC to Prevacus—ostensibly to entice Prevacus do business in Mississippi—the Complaint itself makes clear that Favre has no liability. All Favre is alleged to have done was to introduce New to Prevacus Chief Executive Officer Jacob “Jake” VanLandingham (“VanLandingham”) and attend one meeting with them, Davis, and others. The Complaint does not and cannot allege that Favre was involved in, let alone responsible for, the transfer of any of the \$2.1 million MCEC allegedly invested in Prevacus—he had no authority to direct anyone to make or accept any such payments, and he never received any of those funds. In fact, the Complaint does not, as it cannot, allege that Favre was aware that the money given to Prevacus consisted of TANF funds. And, even if Favre knew that Prevacus received this public funding, he would have had no reason to suspect that there was anything improper about it—state governments routinely give financial benefits to private businesses to entice them to do business within their states—precisely what is alleged as to Prevacus.

As to the \$1.1 million MCEC paid Favre, it did so in exchange for Favre agreeing to perform services for MCEC, including recording a radio advertisement promoting Families First of Mississippi, a program launched by Governor Bryant, in conjunction with MDHS and MCEC, to provide services to needy Mississippians. MDHS does not and cannot allege that Favre knew that the funds he received from MCEC were MDHS funds and, even if he did, that he knew that they were TANF funds, particularly given that MDHS also derives funding from other sources, or that he knew that there was anything at all improper in the use of the funds. In fact, as State Auditor White has repeatedly stated, he is not aware of *any* evidence suggesting that Favre knew that he received TANF money—no such evidence exists, because Favre did not know.

Indeed, Favre did not know, and had no reason to suspect, that there was any impropriety until New was arrested in February 2020. Once Favre was informed that he had received TANF money, he voluntarily returned it, completing the repayment more than six months before MDHS filed this lawsuit, and leading State Auditor White to “applaud Mr. Favre for his good faith effort to make this right and make the taxpayers and TANF families whole.”

In other words, *Favre has already repaid to MDHS the only funds MDHS alleges he received*. MDHS is so intent on trying to shift the blame for its own egregious misconduct that it ignores this and other dispositive facts that prove that its claims against Favre are not only meritless, but sanctionable.

MDHS’s claims against Favre thus fail on numerous legal grounds.

MDHS’s purported “wrongful payment” claim under Mississippi Code Ann. § 43-1-27 (“Section 27”) fails because MDHS has already been repaid the very funds it seeks to recover and because MDHS utterly fails to plead, as it must, that Favre wrongfully received any TANF funds. Not only did Favre long ago voluntarily repay the funds he received—which itself is dispositive that the claim must be dismissed—but the Complaint alleges only that the payment was wrongful because Favre did not perform services he contractually agreed to perform. Even if that were true, and it is not, that would at most give rise to a breach of contract claim for MCEC and does not constitute wrongful conduct giving rise to a Section 27 claim.

With respect to MCEC’s payments to Prevacus to entice Prevacus to do business in Mississippi, MDHS does not and cannot allege that Favre ever received any portion of those funds. That is fatal to the claim because Section 27 authorizes recovery only from a “recipient” of MDHS funds. And while the Complaint alleges (§ 127) that the Section 27 claim arises from “false statements and concealments of material fact” in the agreement between MCEC and Prevacus

providing for those payments, there is no allegation (nor could there be) that Favre made any of those false statements or concealed any material fact. Nor does the Complaint allege, as it must, that the payments were made “as a result” of those alleged false statements or concealments. It could not be the case that any of those statements or concealments resulted in the payments, given that, as the Complaint itself alleges (¶¶ 124-26), MCEC, the party that made those payments, already knew that the agreement contained the allegedly false statements and concealed material facts.

MDHS’s civil conspiracy claim must be dismissed because it does not allege, as it must, an underlying claim—under Mississippi law, there is no stand-alone civil conspiracy claim—or that Favre entered into an agreement to accomplish an unlawful purpose. Even assuming that MDHS sufficiently alleges that Davis and New entered into such an agreement to unlawfully use TANF funds or accomplish any other unlawful purpose, MDHS does not and cannot allege that Favre knew that Davis and New had so agreed, let alone that he had agreed with them or anyone else to accomplish any unlawful purpose.

MDHS’s negligence claim must be dismissed because MDHS does not and cannot allege, as it must to plead a negligence claim, that Favre owed any duty to MDHS.

MDHS’s intentional interference with contractual relations claim fails because MDHS fails to identify any contract Favre supposedly interfered with, fails to allege that Favre engaged in any conduct calculated to cause damage to MDHS or acted with actual malice, and fails to allege that anything Favre did caused any breach of any contract.

MDHS’s claim for breach of an alleged contract between Favre and MCEC must be dismissed because MDHS does not and cannot allege that MDHS was a third-party beneficiary of the alleged contract.

Finally, all of MDHS's meritless claims are barred by the doctrine of *in pari delicto* because the Complaint makes clear that MDHS was the primary wrongdoer—in fact, the Complaint fails to plead any wrongdoing by Favre, so as between MDHS and Favre, MDHS was the only wrongdoer. MDHS's claims also all relate to payments MDHS and MCEC allegedly made and/or conduct that occurred more than three years before MDHS commenced this lawsuit and are therefore time-barred under the applicable three-year statute of limitations..

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Favre respectfully requests that this Court put an end now to MDHS's egregious misuse of these legal proceedings in its transparent effort to divert attention from its own misconduct. MDHS's meritless claims against Favre fail as a matter of fact and law and must be dismissed in their entirety.

### **FACTS**

#### **A. Background On MDHS's TANF Program And Its Misuse Of Funds Through MCEC**

In this lawsuit, MDHS seeks to recover its TANF funds it alleges were diverted through MCEC to unlawful purposes. TANF is a federally funded grant program that provides states the ability to create and administer their own assistance programs for families in need. The TANF program provides block grants to states to assist needy families' care for children at home; end the dependency of needy parents on government benefits by promoting job preparation, work, and marriage; reduce the incidence of out-of-wedlock pregnancies; and encourage two-parent families. States have broad flexibility to carry out the program. Mississippi has employed a scheme whereby, rather than distributing most TANF funds directly to those in need, it distributes them to state entities such as public universities and non-profit entities such as MCEC.

Mississippi in fact has a long history of disregarding the federal TANF goals and statutory restrictions on permitted TANF expenditures.<sup>2</sup> According to the Center for Budget and Policy Priorities, a nonpartisan non-profit that analyzes the impact of federal and state budget policies, only four percent of Mississippians in need have received cash benefits from TANF, even though as of 2020 Mississippi had accumulated a balance of nearly \$50 million in unused TANF funds, and continues to leave an additional \$20 million in TANF funds unspent each year.<sup>3</sup> Instead, the State often uses tens of millions of dollars of those funds to fill budget gaps, and provide grants to private organizations, without maintaining proper documentation or even monitoring the outcome of this spending.<sup>4</sup>

MDHS also employs extremely weak internal controls and oversight over TANF subgrants. For example, while the Complaint alleges (§ 54 (quoting 2 CFR 200.320(b)) that federal law requires subgrantees like MCEC to use “formal procurement methods,” including “request for written proposals” (RFPs), to ensure that “all procurement transactions shall be conducted in a manner that provides maximum open and free competition,” in 2012 MDHS eliminated its RFP processes and did not reinstate them until 2019, after Davis left MDHS.<sup>5</sup> As another example, a year prior to its findings concerning MDHS expenditures to MCEC, discussed herein, the Office

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<sup>2</sup> *Data Dive: Mississippi’s TANF Work Program Expenditures 2015-2022*, MISSISSIPPI TODAY, Oct. 17, 2022, annexed hereto as Exhibit 2 and available at <https://mississippitoday.org/2022/10/17/mississippi-tanf-reports/>.

<sup>3</sup> *TANF Cash Assistance Should Reach Many More Families in Mississippi to Lessen Hardship*, CENTER ON BUDGET AND POLICY PRIORITIES, annexed hereto as Exhibit 3 and available at [https://www.cbpp.org/sites/default/files/atoms/files/tanf\\_trends\\_ms.pdf](https://www.cbpp.org/sites/default/files/atoms/files/tanf_trends_ms.pdf).

<sup>4</sup> *DHS, in midst of leadership transition, failing to monitor spending of public dollars, child care center safety standards*, MISSISSIPPI TODAY, July 24, 2019, annexed hereto as Exhibit 4 and available at <https://mississippitoday.org/2019/07/24/dhs-in-midst-of-leadership-transition-failing-to-monitor-spending-of-public-dollars-child-care-center-safety-standards/>.

<sup>5</sup> Ex. 2.

of the State Auditor criticized MDHS for failing to comply with federal regulations requiring MDHS to monitor subgrantees of federal funds.<sup>6</sup>

MDHS admits (Compl. ¶ 1) that it is “exclusively responsible” for administering TANF funds consistently with federal and Mississippi statutes. MDHS, as part of the State’s executive branch, is overseen by the governor who appoints MDHS’s executive director. Governor Bryant appointed Davis as MDHS’s executive director in 2016.<sup>7</sup> Miss. Code Ann. § 43-1-2(1)-(2). The State Auditor is statutorily responsible for conducting annual audits of all State departments, including MDHS. Miss. Code Ann. § 7-7-11(d).

From 2014 through 2021, MDHS’s annual budget was approximately \$1.4 billion, one of the largest budgets in Mississippi government. Despite the size of its budget, MDHS apparently faced little financial oversight by the State Auditor or anyone else. Since MCEC began receiving funds from MDHS in 2015 (Compl. ¶ 44), no one challenged to whom and how MDHS or MCEC made distributions. Only in 2020 did State Auditor White issue an audit report “questioning” MDHS’s yearly expenditures of tens of millions of dollars to MCEC.<sup>8</sup> And, according to State Auditor White, he did not discover any improprieties through his normal state audit process, but rather through a tip from his boss, Governor Bryant—a former State Auditor and the chief executive of the branch of government overseeing MDHS, whom State Auditor White then

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<sup>6</sup> State of Mississippi 2018 Single Audit Report for the Fiscal Year Ended June 30, 2018, MISSISSIPPI OFFICE OF THE STATE AUDITOR SHAD WHITE, June 28, 2019, at 151-53, excerpts annexed hereto as Exhibit 5 and available at <https://www.osa.ms.gov/documents/single-audit/18sar.pdf>.

<sup>7</sup> *Gov. Phil Bryant names new state auditor to replace Stacey Pickering*, MISSISSIPPI CLARION LEDGER, July 6, 2018, annexed hereto as Exhibit 6 and available at <https://www.clarionledger.com/story/news/politics/2018/07/06/gov-phil-bryant-surprise-pick-state-auditor-replace-pickering/762629002/>.

<sup>8</sup> State of Mississippi Single Audit for Year Ending June 30, 2019, MISSISSIPPI OFFICE OF THE STATE AUDITOR SHAD WHITE, Apr. 30, 2020, at 82, excerpts annexed hereto as Exhibit 7 and available at <https://www.osa.ms.gov/documents/single-audit/19sar.pdf>.

designated as the “whistleblower” in this matter.<sup>9</sup> State Auditor White—who was previously Governor Bryant’s campaign manager and policy director and was appointed State Auditor by Governor Bryant—made this designation knowing that Governor Bryant was both aware of and supported MCEC’s payments to Prevacus at issue in this lawsuit, as well as its \$5 million payment to Southern Miss in connection with the construction of a wellness center (the “Wellness Center”).

We address here MDHS’s highly publicized payment of TANF funds to Southern Miss for the Wellness Center, because it served as one of the false pretexts for MDHS to target Favre in this lawsuit. Favre agreed to help his alma mater, Southern Miss, with fundraising to construct a volleyball facility, which was later designated as the Wellness Center. While he had helped raise funds for the facility and thereby met Davis and New, Favre, as with the transfers complained of in the Complaint, did absolutely nothing wrong in connection with the Wellness Center. During Favre’s fundraising efforts, in July 2017, the Southern Miss athletic director introduced Favre to New, a Southern Miss Athletic Foundation board member,<sup>10</sup> as someone who could assist Favre with the fundraising.<sup>11</sup> New was well connected with numerous Mississippi officials, including Davis and then-Governor Bryant, and close friends with Governor Bryant’s wife Deborah Bryant. New had formed MCEC in 1993 with the ostensible goal to provide Mississippi schools, communities, and families with educational services and training programs.<sup>12</sup> For decades, MCEC and its affiliates provided parenting and fatherhood classes, motivational speaking, and health and

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<sup>9</sup> *Auditor identifies Gov. Bryant as whistleblower in DHS investigation*, SUPERTALK MISSISSIPPI MEDIA, Feb. 10, 2020, annexed hereto as Exhibit 8 and available at <https://www.supertalk.fm/auditor-identifies-gov-bryant-as-whistleblower-in-dhs-investigation/>.

<sup>10</sup> *Fan Feature: Nancy New*, SOUTHERN MISS – OFFICIAL ATHLETICS WEBSITE, August 24, 2016, annexed hereto as Exhibit 9 and available at [https://southernmiss.com/news/2016/8/24/Fan\\_Feature\\_Nancy\\_New.aspx](https://southernmiss.com/news/2016/8/24/Fan_Feature_Nancy_New.aspx).

<sup>11</sup> Email from Jon Gilbert to New, dated July 16, 2017, annexed hereto as Exhibit 10.

<sup>12</sup> *Mississippi Community Education Center*, GUIDESTAR, annexed hereto as Exhibit 11 and available at <https://www.guidestar.org/profile/58-2046994>.

wellness programs for Mississippians using funds derived in part from millions of dollars MDHS granted it.<sup>13</sup> State officials like Davis, former Governor Bryant, and current Governor Reeves were aware that New, through MCEC, used State money to provide services and funding to various State initiatives, through, among other things, the Family First Initiative of Mississippi, an anti-poverty program which was started by Governor Bryant in conjunction with other state officials.<sup>14</sup> Deborah Bryant and New hosted fundraisers together at the governor's mansion.<sup>15</sup> Governor Reeves even filmed a campaign ad in 2019 at New's school.<sup>16</sup>

Favre told New about the fundraising needs for the Wellness Center and she offered to help. She also introduced Favre to Davis, who offered to provide \$4 million in funding (later increased to \$5 million). Davis and New then worked together, along with Southern Miss and other state officials, to structure the funding as a sublease between the Southern Miss Athletic Foundation and MCEC, rather than as a direct grant for construction costs, and to have Southern Miss commit to use the Wellness Center in part for "MCEC programming and services to benefit thousands of eligible individuals in south Mississippi."<sup>17</sup>

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<sup>13</sup> *Embattled welfare group paid \$5 million for new USM volleyball center*, MISSISSIPPI TODAY, Feb. 27, 2020, annexed hereto as Exhibit 12 and available at <https://mississippitoday.org/2020/02/27/welfare-program-paid-5-million-for-new-volleyball-center/>.

<sup>14</sup> *Inside Mississippi's false promise of putting the Family First*, MISSISSIPPI TODAY, July 20, 2022, annexed hereto as Exhibit 13 and available at <https://mississippitoday.org/2022/07/20/mississippi-false-promise-of-putting-family-first/>.

<sup>15</sup> *Mississippi Welfare Scandal Timeline: Brett Favre And The Volleyball Stadium*, MISSISSIPPI FREE PRESS, Sept. 30, 2022, annexed hereto as Exhibit 14 and available at <https://www.mississippifreepress.org/27903/mississippi-welfare-scandal-timeline-brett-favre-and-the-volleyball-stadium>.

<sup>16</sup> *Governor race: Hood says Reeves ad filmed at private school is 'phony'*, CLARION LEDGER, Oct. 16, 2019, annexed hereto as Exhibit 15 and available at <https://www.clarionledger.com/story/news/politics/2019/10/16/governor-race-jim-hood-tate-reeves-ad-filmed-private-school-phony/3996337002/>.

<sup>17</sup> *Statement of The University of Southern Mississippi*, THE UNIVERSITY OF SOUTHERN MISSISSIPPI, Nov. 3, 2022, annexed hereto as Exhibit 16 and available at <https://www.usm.edu/news/2022/release/statement-november-3-2022.php>.

But Davis and New did not (and could not have) authorized structuring the \$5 million in funding as a sublease on their own. They needed and obtained the approval and assistance of other State officials and agencies—including Governor Bryant, the Attorney General, the Mississippi Institutions of Higher Learning, Southern Miss itself, and the Southern Miss Athletic Foundation.<sup>18</sup> As Southern Miss recently stated, it approved the sublease agreement between the Southern Miss Athletic Foundation and MCEC “in good faith, following thorough due diligence by outside legal counsel, and after multiple assurances from officials at the highest levels of MDHS.”<sup>19</sup>

Favre is a private citizen with no position in government, MCEC, or Southern Miss. He is not a lawyer and had no reason to question the propriety of how MCEC was disbursing its funds, the source of its funds, or the State approvals of disbursements of State funds from one public entity to another. MDHS and MCEC, not Favre, controlled the funds that were transferred to Southern Miss. Favre had no role—and could not have had any role—in authorizing MDHS or MCEC to transfer those funds to Southern Miss or anywhere else.

**B. The Allegations of the Complaint—Davis And New’s “Corrupt Agreement”**

The Complaint alleges that between 2016 and 2019, while Davis was MDHS’s Executive Director, Davis and New agreed, in disregard of the restrictions on the permitted use of TANF funds, to divert MDHS’s TANF funds to New’s non-profit entity, MCEC, which in turn would transfer them to other entities owned by New, Davis, and their family members and friends. These transfers from MCEC were allegedly for non-TANF purposes and included diversions to Davis’s

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<sup>18</sup> Once the State legally resolved the restriction relating to “brick and mortar” by approving the sublease, Favre would not and could not have challenged the State’s determination.

<sup>19</sup> Ex. 16.

family and friends, to New’s family and friends and to sports celebrities. Compl. ¶¶ 62, 64, 67-148. Davis and New have pled guilty to charges brought as a result of certain of these transfers.<sup>20</sup>

The Complaint provides only conclusory and utterly insufficient allegations that these transfers were made as a result of a false statement, misrepresentation, concealment of a material fact, or failure to disclose assets and that the transfers were “made as a result in part of fraudulent conduct and misrepresentations by John Davis and Nancy New arising out of their corrupt quid pro quo agreement.” *Id.* ¶ 66. The Complaint does not allege, as it must under Mississippi law, what the misrepresentations were, to whom such misrepresentations were directed, or if or how they were relied upon.

**C. The Allegations of the Complaint—Favre’s Extremely Limited and Non-Actionable Involvement**

The Complaint alleges six purported causes of action against 38 defendants who purportedly diverted and/or were the recipients of TANF funds. Of the 175 paragraphs in the Complaint, only nine (¶¶ 116-21, 123, 126, 137-38) allege conduct by Favre. Based on those allegations, the Complaint purports to assert five purported causes of action against Favre—recovery under Section 27 (Count 1), civil conspiracy (Count 2), negligence (Count 3), intentional interference with contractual relations (Count 4), and breach of contract (Count 5).

1. The \$1.1 million in transfers from MCEC to Favre Enterprises

MDHS devotes two paragraphs of its Complaint to allegations that MCEC made two transfers of TANF funds to Favre Enterprises in 2017 and 2018 totaling \$1.1 million pursuant to a contract between MCEC and Favre Enterprises (the “MCEC/Favre Contract”):

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<sup>20</sup> *An ex-director of Mississippi’s welfare agency pleads guilty over misspent money*, NPR, Sept. 22, 2022, annexed hereto as Exhibit 17 and available at <https://www.npr.org/2022/09/22/1124505714/john-davis-mississippi-welfare-favre>; *Nancy and Zach New plead guilty to bribery and fraud in state welfare case*, MISSISSIPPI TODAY, Apr. 22, 2022, annexed hereto as Exhibit 18 and available at <https://mississippitoday.org/2022/04/22/nancy-new-zach-new-plead-guilty-welfare-scandal/>.

137. 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.

Contrary to these allegations, Favre performed services pursuant to the MCEC/Favre Contract by promoting Families First of Mississippi, the joint initiative between Governor Bryant, MCEC, and MDHS to assist in providing government and nonprofit services to needy families. Moreover, while the Complaint alleges that the funds MCEC used to pay Favre Enterprises were TANF funds, there is no allegation (nor could there be) that Favre knew that the funds MCEC transferred to Favre Enterprises were TANF funds. Even more egregiously, the Complaint omits the fact that when he found out that they were, Favre repaid all of these funds.

2. The \$2.1 million in transfers from MCEC to Prevacus

MDHS alleges that MCEC made transfers to Prevacus in 2019 totaling \$2.1 million, in relation to an agreement between MCEC and Prevacus, Inc. (the “MCEC/Prevacus Contract”). *Id.* ¶¶ 124-29. According to the Complaint, Prevacus, was a “a private, for-profit biotechnology corporation in which Favre had individually invested over \$250,000.” *Id.* ¶ 116. In December 2018, Favre allegedly introduced Prevacus CEO VanLandingham to New so that VanLandingham could “solicit Nancy New to use MDHS grant proceeds to invest in the stock of Prevacus.” *Id.* ¶ 117. The Complaint then makes a conclusory allegation that VanLandingham and New spoke by phone the next day at Favre’s “urging,” which supposedly “demonstrated that New, Favre and

VanLandingham had agreed for New to use MDHS grant money to invest in Prevacus stock.” *Id.* ¶ 118.

The Complaint further alleges that on January 2, 2019, Favre hosted a meeting at his home during which VanLandingham made a “stock sales pitch” to Davis, New, and other defendants. *Id.* ¶ 119. According to the Complaint, all participants in this meeting, including Favre, “knew throughout the course of the meeting that John Davis was attending (and considering the stock sales pitch) as MDHS Director, and that Nancy New and Zachary New were attending (and considering the stock sales pitch) as a grantee of government funds from MDHS,” and further that all participants “knew, and agreed, that any investment in Prevacus which would take place as a result of that sales presentation would be funded by governmental grant funds received by New and Defendant MCEC from MDHS.” *Id.* ¶ 120. The Complaint, once again, fails to allege how attending such a meeting could subject Favre to liability for any of the claims asserted against him. Further, although Favre is not an officer or director of MCEC, Prevacus, Inc., or PreSolMD, and has no authority over or on behalf of those entities or MDHS funds, the Complaint fails to explain how Favre could have “agreed” with Davis, New, and VanLandingham that MCEC would use MDHS grant money to invest in Prevacus stock.

According to the Complaint: in furtherance of this supposed “agreement,” VanLandingham, Prevacus, New, and MCEC entered into the MCEC/Prevacus Contract which allegedly “obligated Defendant MCEC to transfer \$1.7 million in funds derived from MDHS to Defendant Prevacus to provide ‘development funding’ to the for-profit Prevacus” (*id.* ¶ 124); the MCEC/Prevacus Contract was a “sham” because it “falsely pretended that the \$1.7 million investment of MDHS-derived funds in Prevacus was for the purpose of securing ‘clinical trial sites’ to be located within Mississippi in order to promote an experimental anti-concussion drug

being developed by Prevacus,” and “concealed the material fact that the actual purpose of the transaction was financially to benefit” Favre, VanLandingham, New, and others (*id.* ¶¶ 125-26); and the MCEC/Prevacus Contract’s “false statements and concealments of material fact . . . resulted in the payments by MCEC to Prevacus” of \$2.1 million between January 18, 2019 and October 7, 2019 (*id.* ¶ 127). The Complaint does not allege (nor could it) that Favre was a party to the MCEC/Prevacus Contract, or that Favre made any of the “false statements and concealments of material fact” allegedly contained therein. The Complaint also does not, as it cannot, allege that Favre received any of the funds that MCEC paid to Prevacus, nor explain how he supposedly financially “benefitted” from MCEC’s investment in Prevacus.

**D. The 2019 Single Audit**

On April 30, 2020, State Auditor White released the Single Audit for Year Ending June 30, 2019 (the “2019 Single Audit”) which “questioned” approximately \$94 million of MDHS spending of federal welfare and other types of federal funding. In a press release accompanying the 2019 Single Audit, State Auditor White was quoted stating that MDHS’s misspending was “egregious” and that “if there was a way to misspend money, it seems DHS leadership or their grantees thought of it and tried it.”<sup>21</sup> The 2019 Single Audit details instances of forgeries, false documents, and fraudulent accounting entries.<sup>22</sup> The 2019 Single Audit discusses the MCEC transfers to Favre Enterprises and Prevacus, as well as \$5,000,000 in transfers to Southern Miss. There are no claims of forgeries, false documents, or fraudulent accounting entries with respect to any of these transfers, except for an instance accusing MCEC of making fraudulent accounting

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<sup>21</sup> *Audit of DHS Reveals Millions Wasted*, MISSISSIPPI OFFICE OF THE STATE AUDITOR, May 4, 2020, annexed hereto as Exhibit 19 and available at <https://www2.osa.ms.gov/news/audit-of-dhs-reveals-millions-wasted/>.

<sup>22</sup> *See, e.g.*, Ex. 7 at 83.

entries with respect to transfers to Prevacus.<sup>23</sup> In no instance is Favre accused of forgery, falsifying documents, or making fraudulent accounting entries.

**E. Favre Repays All Funds Received**

The 2019 Single Audit claims that the funds Favre received from MCEC were TANF funds. Within days of learning of the findings of this report, which was the first time Favre learned that he may have received TANF funds, Favre voluntarily returned the funds to MDHS, even though he had performed services in exchange for the funds and had paid income taxes on the funds he received. He repaid \$500,000 in early May 2020, for which State Auditor White praised him:

I want to applaud Mr. Favre for his good faith effort to make this right and make the taxpayers and TANF families whole. To date, we have seen no records indicating Mr. Favre knew that TANF was the program that served as the source of the money he was paid.<sup>24</sup>

The State Auditor had seen no records indicating that Favre knew that MCEC used TANF funds to pay him, because none exist. Favre in fact had no idea that he received TANF funds.

The Complaint makes no mention of the fact that, even though he had performed services for MCEC, Favre repaid the full \$1.1 million MDHS seeks to recover more than six months before it brought this lawsuit.

**ARGUMENT**

A motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure “tests the legal sufficiency of the complaint.” *Triplett v. Brunt-Ward Chevrolet*, 812 So. 2d 1061, 1064 (Miss. Ct. App. 2001) (affirming dismissal of complaint). Dismissal must be granted if, accepting

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<sup>23</sup> See *id.* at 92, 106-07, 129 (Apr. 30, 2020).

<sup>24</sup> *Favre Repays TANF Funds*, MISSISSIPPI OFFICE OF THE STATE AUDITOR, May 6, 2020, annexed hereto as Exhibit 20 and available at <https://www2.osa.ms.gov/news/favre-repays-tanf-funds/>.

the complaint's well-pled factual allegations as true, there is no set of facts that would allow plaintiff to prevail. *Rose v. Tullos*, 994 So. 2d 734, 737 (Miss. 2008) (affirming dismissal of complaint for failure to state a claim). A court "need not accept as true . . . unwarranted factual inferences . . . which will not defeat a Rule 12(b)(6) motion to dismiss," *Corr Wireless Commc'ns, L.L.C. v. AT&T, Inc.*, 2013 WL 4829287, at \*2 (N.D. Miss. Sept. 10, 2013) (internal quotations omitted), and "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss," *Rose*, 994 So. 2d at 739.

Rule 8 of the Mississippi Rules of Civil Procedure requires a plaintiff to set forth factual allegations "either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Townsend v. What a Combo Inc.*, 281 So. 3d 43, 46 (Miss. Ct. App. 2019); *see also Chalk v. Bertholf*, 980 So. 2d 290, 296 (Miss. Ct. App. 2007) ("Although Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim."). To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Merideth v. Merideth*, 987 So. 2d 477, 481 (Miss. Ct. App. 2008).

**I. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST FAVRE UNDER SECTION 27**

In Count 1, MDHS seeks to recover from Favre, under Section 27, the \$1.1 million of alleged TANF funds MCEC paid to Favre Enterprises, all of which was returned to MDHS over a year ago, and the \$2.1 million of alleged TANF funds it paid to Prevacus. Section 27 provides, in relevant part, that the State may recover "from the recipient" misappropriated state or federally funded assistance program funds:

Any sums paid to or on behalf of any person, entity or subgrantee . . . under any state or federally funded assistance program as a result of any false statement,

misrepresentation, concealment of a material fact, failure to disclose assets, or by whatever means, becomes a debt due to the state department of public welfare. The amount of value of any assistance shall be recoverable from the recipient or his estate in a civil action brought in the name of the state department of public welfare pursuant to this section.

Miss. Code Ann. § 43-1-27(1).

This claim must be dismissed in its entirety. Even assuming *arguendo* that the funds paid were TANF funds and even assuming *arguendo* that the payments were “as a result” of a false statement or other means enumerated in Section 27(1), Favre could have no liability thereunder because he has already repaid all the \$1.1 million and he was not the “recipient” of the \$2.1 million paid to Prevacus. Moreover, and as an independent ground for dismissal, the Complaint does not allege that Favre made any false statements or concealed any material facts, or that Prevacus received TANF funds “as a result” of a false statement or other Section 27(1)-enumerated means.

**A. Favre Repaid All Funds He Received and Was Not the Recipient of the Rest**

While the Complaint alleges (¶ 138) that MCEC used TANF funds to pay Favre Enterprises \$1.1 million, it conspicuously fails to mention that Favre already voluntarily repaid this amount to the State—six months prior to the filing of the Complaint. Accordingly, insofar as the claim arises from that \$1.1 million payment, and even assuming *arguendo* that MDHS otherwise would have a right to recover the payment, there is nothing left for MDHS to “recover[.]” under Section 27(1), and the claim must be dismissed. *See, e.g., Kuhn v. T. Rowe Price Trust Co.*, 2013 WL 8940409, at \*3 (Miss. Cir. Ct. June 17, 2013) (where defendant had returned all monies that were previously paid to plaintiff, “Plaintiff [was] made whole, and any further recovery would now result in an unlawful double recovery”); *see also Turner v. Pickens*, 711 So. 2d 891, 893 (Miss. 1998) (“a plaintiff is only entitled to one satisfaction” of his claim) (citations omitted).

As to the \$2.1 million payment, Section 27(1) permits MDHS to recover only from a “recipient” of a wrongful payment. The Complaint alleges that Prevacus was the recipient of the payment, and MDHS’s claim to recover it from Favre must also be dismissed.<sup>25</sup>

**B. The Complaint Fails to Plead Conduct That Violates Section 27**

An independent ground for dismissal of the purported Section 27 claim is that MDHS fails to allege any conduct by Favre that could give rise to a Section 27 claim. Section 27 requires MDHS to allege that funds “under a state or federally funded assistance program” were obtained “as a result of any false statement, misrepresentation, concealment of a material fact, failure to disclose assets, or by whatever means.” The Complaint is devoid of a single allegation that Favre, through any false statement, misrepresentation, concealment of any material fact, failure to disclose any assets or otherwise, obtained any funds under any such program.

MDHS alleges with respect to the \$1.1 million paid to Favre only that the funds were paid to him under a contract he supposedly breached (Compl. ¶ 137), not that the funds were paid “under any state or federally funded assistance program.” This could give rise to a breach of contract claim by MCEC, not a claim under Section 27. And with respect to the payments from MCEC to Prevacus, the Complaint alleges (*id.* ¶ 127) that the MCEC/Prevacus Contract contains “false statements and concealments of material fact,” but fails to plead that any payments from MCEC to Prevacus were made “as a result of” such false statements or concealment, and it cannot so allege because the very party that allegedly made those payments, MCEC, was aware of the falsity of those statements and the facts that were concealed (*id.* ¶¶ 124-27).

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<sup>25</sup> The Complaint’s only attempt to connect Favre to these funds is through a conclusory allegation (¶ 126) that he “financially . . . benefit[ed]” from them. Even assuming *arguendo* that were true, the plain language of Section 27(1) authorizes recovery only from a recipient of, not from someone who “benefitted” from, a wrongful payment. *See, e.g., Rose*, 994 So. 2d at 737 (“This Court has long held that when a statute is not ambiguous, it must be construed according to its plain meaning.”) (citing *Miss. Ins. Guar. Ass’n v. Cole*, 954 So. 2d 407, 412 (Miss. 2007)).

The Section 27 claim must, therefore, be dismissed.

## II. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST FAVRE FOR CIVIL CONSPIRACY

Count 2 alleges that Favre and the other defendant engaged in a civil conspiracy. Because there is no independent claim for civil conspiracy under Mississippi law, and because, as shown herein, all of MDHS's other claims must be dismissed, MDHS's civil conspiracy claim must also be dismissed as a matter of law. *See State ex rel. Fitch v. Yazaki N. Am., Inc.*, 294 So. 3d 1178, 1190 (Miss. 2020) (dismissing civil conspiracy claim because plaintiff's underlying claims were dismissed pursuant to Rule 12(b)(6)).

Moreover, under Mississippi law, a plaintiff asserting a claim for civil conspiracy must plead "specific facts that would substantiate an agreement between [defendants]." *Alston v. Miss. Dept. of Emp't Sec.*, 300 So. 3d 543, 547 (Miss. Ct. App. 2020) (dismissing civil conspiracy claim); *see also Palmisano v. Miss. Dep't of Wildlife, Fisheries, & Parks*, 2015 WL 1925466, at \*2 (S.D. Miss. Apr. 28, 2015) (dismissing civil conspiracy claim under Mississippi law where "Plaintiffs alleged no specific facts indicating an agreement or meeting of the minds between Defendants"). Here, the Complaint fails to allege any facts, let alone specific ones, that Favre formed an agreement with anyone to do anything unlawful. The unlawful conduct alleged in the Complaint (¶¶ 62-66) is that Davis and New entered into a "corrupt agreement" whereby Davis, on MDHS's behalf, would "disregard all legal requirements pertaining to lawful TANF purposes in order to facilitate and support transfers" to New through MCEC to enrich New, Davis, and their friends and family members.<sup>26</sup> Assuming *arguendo* that these allegations sufficiently plead a conspiracy

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<sup>26</sup> Additionally, the Complaint alleges that unlawful conduct included the same acts that form the basis of their tortious interference and breach of contract claims. As described herein (*see supra* at Sections IV-V), those claims are meritless and therefore the claim for civil conspiracy cannot survive. Moreover, in order to maintain a claim for civil conspiracy based on breach of contract, a plaintiff must show that the breach was tortious which is not alleged here with respect to Favre. *See MultiPlan, Inc. v. Holland*, 937 F.3d 487, 495 (5th Cir. 2019) (dismissing conspiracy claim based on tortious breach of contract because, under Mississippi law, plaintiff was required to show that the

between New and Davis, MDHS, to state a claim also against Favre, would need to allege that Favre agreed to join this conspiracy. *See Cook v. Wallot*, 172 So. 3d 788, 801 (Miss. Ct. App. 2013) (dismissing civil conspiracy claim because the complaint did “not state that an agreement, unlawful or otherwise, was made by the defendants”) (citing *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 786-87 (Miss. 2004)). The Complaint fails to allege that Favre did so.

Here, there are *no* allegations that Favre agreed to join Davis and New’s allegedly unlawful agreement to misuse TANF funds. Indeed, as noted, there is no allegation that Favre even knew that funds he allegedly received or that Prevacus allegedly received were TANF funds and no allegation that he even had any knowledge of Davis and New’s alleged scheme.

At most, the Complaint alleges that Favre entered into a contract with MCEC to perform services that he supposedly did not perform, was paid by MCEC using TANF funds, with no allegation that Favre “knew that TANF was the program that served as the source of the money he was paid,”<sup>27</sup> and introduced VanLandingham to New and attended a meeting where VanLandingham made a “stock sales pitch” to New and Davis. These allegations, taken separately or together, in no way give rise to any inference that Favre agreed with any other defendant or anyone else to do anything unlawful. Likewise, the allegation (Compl. ¶ 123) that Favre “agreed” that New would use MDHS grant money to invest in Prevacus, even if true, gives rise to no such inference, particularly where the Complaint does not and cannot allege that Favre knew that the funds were TANF funds or that the allegedly contemplated use was unlawful. *See S. Health Corp. of Houston v. Crausby*, 174 So. 3d 916, 920 (Miss. Ct. App. 2015) (reversing jury verdict because evidence did not support that defendant’s conduct was in pursuit of an unlawful purpose).

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breach involved “some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort”) (quoting *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 988 (Miss. 2017)).

<sup>27</sup> Ex. 20.

MDHS's claim against Favre for civil conspiracy must be dismissed.

### **III. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST FAVRE FOR NEGLIGENCE**

Mississippi law requires that a plaintiff asserting a negligence claim plead that “the defendant had a duty, breached that duty, caus[ed] the plaintiff to suffer damages, and a causal connection between those damages and the breach of duty such that the breach is the proximate cause of the damages to establish a cause of action for negligence.” *Robbins v. Comput. Sciences Corp.*, 486 F. Supp. 2d 581, 586 (S.D. Miss. 2007) (citing *Gulledge v. Shaw*, 880 So. 2d 288, 292-93 (Miss. 2004)). The Complaint fails to allege any of these elements.

First, the Complaint does not allege that Favre had a legally cognizable duty to MDHS. The basis for the negligence claim (Compl. ¶ 172) is that defendants, including Favre, breached contracts with MCEC. However, under Mississippi law, breach of a contract can give rise to an independent tort only “if in addition to violating a contract obligation [the breach] also violates a duty owed to plaintiff independent of the contract.” *Palmer v. Orkin Exterminating Co.*, 871 F. Supp. 912, 914 (S.D. Miss. 1994), *aff'd*, 71 F.3d 875 (5th Cir. 1995) (citing *Smith v. Orkin Exterminating Co.*, 791 F. Supp. 1137, 1143 (S.D. Miss. 1990), *aff'd*, 943 F.2d 1314 (5th Cir. 1991)). Accordingly, a plaintiff cannot sustain a tort claim where “the facts alleged by plaintiff disclose no tort, intentional or otherwise, that is independent of the parties’ contract.” *Id.* at 915. Here, MDHS does not allege that Favre had any duty beyond his purported obligation to perform pursuant to the MCEC/Favre Contract.

Instead, the Complaint attempts to invent a duty that has no basis in the law. According to the Complaint (¶ 49), Favre and the other defendants who contracted with MCEC “knew, or should (and would) have known in the exercise of reasonable care in the performance of their contractual obligations to MCEC, that the ultimate or original source of funds received by them was the United

States Government, acting through the Plaintiff MDHS as grantee, and that the fact of such a federal source inherently and foreseeably carried with it some federal restrictions on the private use of such funds.” In other words, according to MDHS, the alleged obligation of a contracting party to “exercise reasonable care with respect to all material aspects of their contractual performance” (Compl. ¶ 48) includes a duty to inquire as to the source of funds it receives from its counterparty and whether the counterparty’s performance is governed by any particular statutes or regulations.

MDHS’s novel theory is not only unworkable and overreaching, it is flatly contrary to established law. Entering into a contract does not create a duty beyond the obligation to perform, unless such a duty exists “because of the relationship between the parties, or because of defendant’s calling or because of the nature of the harm.” *Palmer*, 871 F. Supp. at 914; *see also Clausell v. Bourque*, 158 So. 3d 384, 391 (Miss. Ct. App. 2015) (breach of contract not actionable as tort unless breaching party also breached a duty of care “fixed by law and independent of the contract”) (citing *Hazell Mach. Co. v. Shahan*, 249 Miss. 301, 317 (Miss. 1964)); *Smith v. Orkin Exterminating Co.*, 791 F. Supp. 1137, 1143 (S.D. Miss. 1990), *aff’d*, 943 F.2d 1314 (5th Cir. 1991) (“[A]n action in tort may not be maintained for what is merely breach through non-action or through ineffective performance (which is the same thing) of a contract duty—the duty must arise independent of contract to constitute a tort.”) (citations omitted). The MCEC/Favre Contract allegedly (Compl. ¶ 137) required Favre to perform certain services, such as speaking at public events and signing autographs. There is no basis to suggest that that agreement created any duties other than to perform services pursuant to it (which he did).

Most importantly, nothing in the Complaint, including MDHS’s bizarre legal theory, suggests that Favre *had a duty to MDHS*. At most, Favre may have had a duty to MCEC to perform

his obligations under the MCEC/Favre Contract, but, as shown below, because MDHS was not a third-party beneficiary to the contract, even that duty cannot be extended to MDHS.

For these reasons, the Complaint's purported claim against Favre for the tort of negligence must be dismissed.

#### **IV. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST FAVRE FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS**

Next, the Complaint alleges (§ 173) that all defendants, including Favre, tortiously interfered with the "contractual relations and obligations between MCEC (on the one hand) and Plaintiff MDHS (on the other hand)." An action for interference with a contract in Mississippi "is defined as a malicious or intentional interference with a valid and enforceable contract by a third party which causes one contracting party not to be able to perform and the failure to perform results in a monetary loss for the other contracting party." *Courtney v. Glenn*, 782 So. 2d 162, 164-65 (Miss. Ct. App. 2000); *see also Springer v. Ausbern Constr. Co.*, 231 So. 3d 1065, 1068 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 980 (Miss. 2017). To state a claim for tortious interference with contractual relations, a plaintiff must allege "(1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiff in his/her lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which acts constitute malice); and (4) that actual damage or loss resulted." *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So. 2d 1093, 1098 (Miss. 2005). "In this context, 'malicious' is defined as the intentional doing of a harmful act without legal or sound justification or excuse, in other words, the willful violation of a known right." *Springer*, 231 So. 3d at 1068 (internal quotations and citations omitted). Additionally, "[a] plaintiff claiming intentional interference with a contract must prove that the contract would have been performed but for the alleged interference." *Scruggs, Millette, Bozeman & Dent, P.A.*, 910

So. 2d at 1098-99 (citations omitted); *see also Watkins v. Oakes*, 318 So. 3d 1125, 1129 (Miss. Ct. App. 2020) (plaintiff must show that defendant “acted in such a way to cause [the contracting party] to stop performing under its [] contract with [plaintiff]”). Finally, Mississippi law also requires pleading that “the defendant’s acts were the proximate cause of the loss or damage suffered by the plaintiff.” *Scruggs, Millette, Bozeman & Dent, P.A.*, 910 So. 2d at 1099. The Complaint fails to plead these required elements.

First, the Complaint fails even to allege what contract Favre supposedly “interfered” with. The Complaint alleges (¶ 44) that MCEC and MDHS were parties to multiple “TANF Subgrant” contracts, but does not allege that Favre (or any other defendant) interfered with any of these contracts or some other contracts or which one. This does not provide Favre with sufficient notice under Rule 8. *See State ex rel. Fitch*, 294 So. 3d at 1190 (upholding dismissal of claim because pleading that failed to sufficiently allege element of claim did provide defendants with sufficient notice under Rule 8).

Even assuming *arguendo* that the Complaint alleged that Favre interfered with one of the TANF Subgrant contracts, the Complaint fails to allege that these contracts were valid. The Complaint also fails to plead that but for Favre’s conduct, MCEC would have performed its obligations pursuant to the contract Favre supposedly interfered with. Indeed, the Complaint alleges (¶¶ 64, 166) that MCEC is responsible for over \$19 million of transfers of TANF funds for non-TANF purposes, suggesting that MCEC would not have performed its contractual obligations under the TANF Subgrant contracts regardless of any conduct of Favre.

Second, the Complaint fails to allege that Favre engaged in any conduct “calculated to cause damage to the plaintiff” or acted with malice. The Complaint does not allege that Favre had any knowledge of alleged agreements between MCEC and MDHS. Therefore, Favre could not

have engaged in conduct calculated to cause damage to MDHS or willfully violated a known right of MDHS's.

Finally, the Complaint fails to allege that any conduct by Favre was the proximate cause of damage to MDHS. The Complaint could not be clearer that Davis and New through their "corrupt agreement" were the parties responsible for harming MDHS, not Favre. *See Scruggs, Millette, Bozeman & Dent, P.A.*, 910 So. 2d at 1099 (dismissing intentional interference claim because other parties were the proximate cause of plaintiffs' losses).

For these reasons, the intentional interference with contractual relations must be dismissed as to Favre.

**V. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST FAVRE FOR BREACH OF CONTRACT**

The final claim asserted against Favre is for breach of contract. MDHS does not allege that it was party to any agreement with Favre. Instead, the Complaint alleges (¶¶ 145, 174) that MDHS "was known to be the third-party beneficiary" of the all contracts named in the Complaint between MCEC and the other defendants, including the MCEC/Favre Contract.<sup>28</sup> Apparently, MDHS believes that it is entitled to the fees that Favre earned and paid taxes on in return for the services he provided to MCEC, and this despite the fact that, once again, Favre has already repaid the entirety of those fees. In any event, the conclusory allegation that MDHS was a third party beneficiary of the MCEC/Favre Contract or MCEC/Prevacus Contract is insufficient for MDHS to sustain this claim.

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<sup>28</sup> The Complaint does not allege that Favre was a party to the MCEC/Prevacus Contract. *See* Compl. ¶ 124. Accordingly, Favre cannot be liable for any breaches of that agreement. *See, e.g., Allgood v. Bradford*, 473 So. 2d 402, 415 (Miss. 1985) ("In order to maintain an action to enforce a breach of contract or to recover damages growing out of a breach, a relationship of privity of contract must exist between the party damaged and the party sought to be held liable for the breach.") (citations omitted).

A person who is not a party to a contract “may enforce a promise made for his benefit” where such right “spring[s] from the terms of the contract itself.” *Miss. High School Activities Ass’n, Inc. v. Farris By and Through Farris*, 501 So. 2d 393, 395-96 (Miss. 1987). The Mississippi Supreme Court has held:

In order for the third person beneficiary to have a cause of action, the contracts between the original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. This obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself.

*Burns v. Washington Sav.*, 171 So. 2d 322, 325 (Miss. 1965).

In *Burns*, the Supreme Court held that a third party could not sustain a breach of contract claim and was merely an incidental beneficiary, where the contract did not expressly name the third party, use any terms showing the intent of the parties to include the third party as a beneficiary, or indicate that either party had a “substantial and articulate interest” in the third party’s welfare. *Id.*

Here, as in *Burns*, there are no allegations that the MCEC/Favre Contract or the MCEC/Prevacus Contract expressly named MDHS, showed any intent to include MDHS as a beneficiary, or indicated that either party had an interest in MDHS’s welfare. Instead, the Complaint relies only upon the conclusory allegation (¶¶ 145, 174) that MDHS was a “known third-party beneficiary.” This is deficient. *See Rose*, 994 So. 2d at 739 (“Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss.”). Accordingly, the Complaint does not sufficiently allege that MDHS is a third-party beneficiary to the MCEC/Favre Contract, and the claim for breach of contract must be dismissed.

## VI. THE CLAIMS ARE BARRED BY *IN PARI DELICTO*

The *in pari delicto* doctrine bars recovery by a plaintiff where the plaintiff is “equally or more culpable than the defendant or acts with the same or greater knowledge as to the illegality or wrongfulness of the transaction.” *Latham v. Johnson*, 262 So. 3d 569, 582 (Miss. App. 2018), *reh'g denied* (Oct. 9, 2018); *see also J. B. Hunt Transp. v. Forrest Gen. Hosp.*, 34 So. 3d 1171, 1174 (Miss. 2010) (joint tortfeasor may recover against others “only when [she] is liable merely because of passive negligence”). At the motion to dismiss stage, where, as here, the defense is established on the face of the complaint, *in pari delicto* bars recovery. *See Alexander v. Verizon Wireless Servs.*, 875 F.3d 243 (5th Cir. 2017).

Here, there is no question from the face of MDHS’s own Complaint that MDHS was “more culpable” than Favre—given that MDHS alleges that it was not Favre, but MDHS’s Executive Director, Davis, who, along with New, devised and was the driving force behind the alleged illegal scheme, for which Davis later pled guilty to criminal charges, to divert millions of dollars of MDHS’s TANF funds. Compl. ¶¶ 62, 64, 66, 67-148. In fact, as between Favre and MDHS, MDHS was the sole wrongdoer, inasmuch as MDHS alleges no facts establishing that Favre did anything wrongful. Accordingly, all of the claims against Favre should be dismissed as barred by the doctrine of *in pari delicto*. *See, e.g., Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013).

## VII. THE CLAIMS AGAINST FAVRE ARE TIME-BARRED

The Section 27 claim has “no other period of limitation . . . prescribed,” so, under the catch-all statute of limitations provision, Miss. Code Ann. § 15-1-49, the period is three years “after the cause of such action accrued, and not after.” The other claims are also governed by the three-year limitations period in Miss. Code Ann. § 15-1-49. *See Peoples Bank of Biloxi v. McAdams*, 171 So. 3d 505, 508 (Miss. 2015) (negligence); *Trustmark Nat’l Bank v. Meador*, 81 So. 3d 1112, 1118

(Miss. 2012) (intentional interference with contract); *Sharkey v. Barber*, 188 So. 3d 1245, 127 (Miss. Ct. App. 2016) (statute of limitations for civil conspiracy claim is based on underlying tort or other wrong that forms the basis of the conspiracy); *Wallace v. Greenville Pub. Sch. Dist.*, 142 So. 3d 1104, 1106 (Miss. Ct. App. 2014) (breach of contract).

“[A] cause of action accrues when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. In other words, the statute of limitations begins to run when all the elements of a tort, or cause of action, are present.” *Weathers v. Metro. Life Ins. Co.*, 14 So. 3d 688, 692 (Miss. 2009); *see also Wallace*, 142 So. 3d at 1107 (a cause of action for breach of contract accrues at the time of breach).

Here, all of the purported causes of action against Favre accrued more than three years before MDHS commenced this lawsuit. The Complaint alleges (¶ 138) that Favre breached the MCEC/Favre Contract—breaches which, as noted, appear to be the supposed basis for the Section 27 and other claims—between July 1, 2017 and July 31, 2018. Even under the latest possible accrual date, the causes of action against Favre would need to have been filed within three years of July 31, 2018—*i.e.*, July 31, 2021. The Complaint, however, was filed over nine months later, on May 9, 2022. Accordingly, to the extent the claims against Favre relate to the MCEC/Favre Contract, they must be dismissed.

As to the allegations concerning Prevacus, the sole pertinent allegations of the Complaint are that Favre hosted a meeting at his home on January 2, 2019 (Compl. ¶ 119); that a written contract was entered into between New/MCEC and Prevacus on January 19, 2019 (*id.* ¶ 124); and that MCEC made payments to Prevacus commencing on January 18, 2019 (*id.* ¶ 129). Here, under the latest possible accrual date, the causes of action against Favre would have need to have been

filed within three years of January 19, 2019—*i.e.*, January 19, 2022. Again, the Complaint was filed over three months later, on May 9, 2022. Accordingly, these claims are untimely.

**CONCLUSION**

**WHEREFORE, PREMISES CONSIDERED**, Defendants Brett Lorenzo Favre and Favre Enterprises, Inc., respectfully request that all claims against them be dismissed with prejudice and that this Court enter an Order granting their Motion to Dismiss in its entirety. Defendants Brett Lorenzo Favre and Favre Enterprises, Inc., further request any other relief this Court deems appropriate.

**RESPECTFULLY SUBMITTED** on this, the 28th day of November, 2022.

**BRETT LORENZO FAVRE and FAVRE  
ENTERPRISES, INC., Defendants**

By: /s/ Eric D. Herschmann  
**ERIC D. HERSCHMANN**

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**CERTIFICATE OF SERVICE**

I, Eric D. Herschmann, do hereby certify that I have on this 28<sup>th</sup> day of November, 2022, served a true and correct copy of the foregoing pleading on all counsel of record herein via the MEC filing system.

This, the 28<sup>th</sup> day of November, 2022.

/s/ Eric D. Herschmann

**ERIC D. HERSCHMANN**