

**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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**DEFENDANT BRETT LORENZO FAVRE’S MOTION TO DISMISS THE AMENDED  
COMPLAINT WITH INCORPORATED MEMORANDUM**

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**COMES NOW**, Defendant, Brett Lorenzo Favre, pursuant to Miss. R. Civ. P. 12(b)(6), and respectfully submits this Motion to Dismiss the First Amended Complaint filed herein by the Mississippi Department of Human Services (“MDHS”) against him (MEC No. 197, “Amended Complaint” or “FAC”).<sup>1</sup> Favre would show unto the Court the following:

**PRELIMINARY STATEMENT**

Brett Favre has done nothing wrong. MDHS still does not and cannot allege that he did. The claims against him in MDHS’s Amended Complaint fail as abjectly as did those in its first complaint, and they must be dismissed.

There is no factual or legal basis to include Favre in this lawsuit—in which MDHS seeks to recover public funds it misspent—and no justification for the defamatory torrent of negative publicity concerning Favre that MDHS has instigated and others have propagated—negative publicity that properly should be directed not at Favre, but at MDHS and those responsible for spending and monitoring its funds.

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<sup>1</sup> Annexed hereto as Appendix A are tables of exhibits and authorities cited herein.

*The transfers of funds MDHS purports to now regret indisputably were devised, authorized and approved not only by MDHS itself, but by numerous other state entities and officials who, unlike Favre, were responsible for ensuring the proper use of MDHS's funds.*

It is apparent that MDHS has sued Favre, a Mississippi and national celebrity, to try to deflect responsibility for its own egregious wrongdoing in allowing tens of millions of dollars of its public funds to be misspent—funds for which MDHS itself admits it was “exclusively responsible.” FAC ¶ 1. Favre had no control whatsoever over MDHS’s funds, he did not know that the funds at issue were welfare funds, and he did not have any reason to know that the funds were being misused—and MDHS does not and cannot allege that he did.

MDHS nonetheless absurdly alleges that Favre, a private citizen, is liable for MDHS’s transfer, as a result of fraud by the non-profit Mississippi Community Education Center Inc. (“MCEC Inc.”) and other defendants—*but not including Favre*—of public funds from MDHS through MCEC to another state entity, The University of Southern Mississippi (“Southern Miss”), for construction of a multi-purpose campus building (the “Wellness Center”) and to Prevacus, Inc., a company seeking to develop treatments for concussions, a goal Favre, as a former football player, champions. MDHS concedes that Favre received none of these funds. The sole basis in the Amended Complaint for the claims against Favre are that he supported those causes—his alma mater and the fight against concussions.

MDHS claims that the funds it transferred to Southern Miss and Prevacus, Inc. included funds MDHS received from the federal Temporary Assistance for Needy Families (“TANF”) welfare program—which, according to MDHS, cannot lawfully be used for those purposes. But, again, the Amended Complaint (like the original Complaint (MEC No. 2)) does not allege that Favre knew or was told anything about the supposed misuse of federal welfare funds or even the

source of the funds—because he did not know and was not told—or that he had any control over the funds—because he had no such control. Nor, given that MDHS’s accounts consisted of commingled TANF funds and State funds, which carried no specific use restrictions, does or can the Amended Complaint allege how it could be proven that the allegedly wrongful transfers were or included TANF funds—and still less how Favre could have known that they did.

According to the Amended Complaint, MDHS’s own Executive Director, John Davis, devised a scheme with MCEC Inc.’s CEO, Nancy New (“New”), 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 its State and TANF funds. MDHS distributes the bulk of its 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—through their control of MDHS and MCEC unlawfully used portions of the funds to enrich themselves and their families and friends.

MDHS seized on Favre’s support for two causes that received MDHS funds through MCEC—his alma mater Southern Miss and Prevacus, Inc., a company he supported because he has suffered from numerous concussions himself—as the pretext for blaming Favre, publicizing his involvement, and bringing its baseless claims against him in this lawsuit. But, again, Favre, who unlike Davis and New and the other public officials, did not know or have any reason to know that the funds transferred to Southern Miss or Prevacus, Inc. even might have included TANF funds, had no responsibility or ability to audit or monitor—and certainly no control over—the use of MDHS or MCEC funds, and did nothing wrong in connection with those funds, none of which

Favre received. 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, with the focus on MDHS’s false insinuations concerning Favre’s supposed involvement, rather than on MDHS, which in fact is responsible for this scandal. The blatantly improper political motive behind MDHS’s suing Favre—with no basis for doing so—is underscored by the fact that MDHS is selectively suing only a fraction of those who actually received the funds that Davis and New allegedly diverted and has taken no action against the numerous public officials responsible for overseeing MDHS—including former Governor Bryant and the State Auditor statutorily obligated to conduct annual audits of MDHS, who did nothing about MDHS’s transfers of tens of millions of dollars to MCEC until 2020, nearly five years after those transfers began.

MDHS’s claims thus are factually and legally baseless. It alleges that Favre is responsible, under the Mississippi Uniform Fraudulent Transfer Act, Miss. Code Ann. § 15-3-101 *et seq.* (“UFTA”), for the \$5 million that MDHS transferred to Southern Miss because it was supposedly made to “benefit” him by relieving him of a supposed legally binding “handshake deal” with Southern Miss’s Athletic Foundation in April 2017 in which Favre supposedly “committed to personally guarantee the funds necessary for the brick-and-mortar construction of a volleyball facility.” FAC ¶¶ 83, 370. MDHS does not identify the person with whom Favre made this supposed oral “handshake deal” or any other details concerning it—because there was no such deal, which in any event could not have been legally binding under Mississippi’s Statute of Frauds, Miss. Code Ann. § 15-3-1. Even worse, Southern Miss’s written contemporaneous records—

records in MDHS's possession which it has withheld from the Court and the public—directly contradict its conclusory allegation of a “handshake deal” and unequivocally confirm that Favre never made any “guarantee” or “pledge”—oral or otherwise—in 2017; that he only agreed to help with “fundraising”; and that he contributed money as an outright “gift” to Southern Miss towards building the facility. *See infra* at 20-21.

If, as MDHS falsely alleges, Favre was part of a conspiracy, it was the most public and open conspiracy in Mississippi history, it was directed and carried out by MDHS itself to transfer funds from one public state entity to another, Southern Miss, and it was vetted and approved by numerous lawyers and State officials. To hold Favre responsible under these circumstances would have no legal or factual justification. As MDHS itself alleges, MDHS officials were the ones who devised and pitched the plan for MDHS to transfer funds to Southern Miss for the State-owned Wellness Facility via MCEC. These officials discussed their proposal with executives in Southern Miss's athletics department and “a group of [Southern Miss] administrators” (FAC ¶ 94), including Southern Miss's general counsel and another of its inhouse attorneys. The agreements were drafted by Southern Miss's lawyers and circulated to other Southern Miss employees, as well as to its Athletic Foundation's outside counsel and the Board of Trustees of the Mississippi Institutions of Higher Learning (“IHL”). The agreement was reviewed and approved by the Attorney General, who recommended that the IHL Board of Trustees approve it, which they did. *See infra* at 13, 26, 29. The IHL Board of Trustees expressly noted that MCEC's funding was via a block grant from MDHS. The Governor was aware of the source of the funding and supported it. Following final approval, Southern Miss publicly announced the plans for the State-owned Wellness Center and lauded MCEC's support for the project. Not one public Mississippi official or lawyer expressed any objection to or concern about the funding and plan.

In fact, this was not the first time that MDHS devised a plan to provide funding for construction of a building at a public university. In 2018, the year before Southern Miss's Wellness Center opened, Alcorn State University announced the opening of its Student Athlete and Family Enhancement Center which was "built and operated in part with funding" from MDHS. *See Ex. 1.* MDHS, in pitching its idea to Southern Miss to use MDHS funding for the State-owned Wellness Center, cited this as an example of similar building construction projects for which MDHS provided funding. *See Ex. 2.* No one, including the State Auditor, has ever sued anyone or claimed that MDHS's funding of the construction of Alcorn State's building was illegal or improper. Here, however, doing so has enabled self-promoting politicians to attract massive media attention by wrongfully sullyng Favre's reputation and seeking to blame him for what MDHS itself, State officials, and lawyers all conceived, approved, and carried out.

The Amended Complaint's sole claim against Favre relating to MCEC transferring funds to Prevacus, Inc. fares no better. All Favre is alleged to have done was to introduce Nancy New to Prevacus' Chief Executive Officer Jacob "Jake" VanLandingham and attend one meeting with them, Davis, and others. It does not and cannot allege that Favre was involved in, let alone responsible for, the transfer of any money from MCEC to Prevacus—and he never received any of those funds. The Amended Complaint, again, does not, as it cannot, allege that Favre was aware that the money given to Prevacus consisted of TANF funds, even assuming that it did. And, even if Favre knew that Prevacus received 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. Tellingly, in its Amended Complaint, MDHS dropped four out of its five original claims against Favre relating to Prevacus, leaving only a claim for civil conspiracy. But, as shown

further below, the civil conspiracy claim, which depends on the assertion of a substantive actionable claim, is equally baseless and frivolous.

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Unfortunately, and shockingly, MDHS, rather than finally acknowledging the truth—that it has no basis for any claims against Favre—has in its Amended Complaint continued to make allegations against him it knows are utterly false. In its first Complaint, MDHS sued Favre for \$1.1 million Favre had voluntarily repaid *six months before* MDHS commenced this lawsuit. Now it has included a claim against him it knows is contradicted by the State’s own indisputable documentary record.

MDHS’s meritless claims against Favre fail as a matter of fact and law. They are factually incoherent and legally impossible. MDHS has now twice been utterly unable to plead actionable claims against Favre, and its claims against him must be dismissed in their entirety with prejudice. Favre respectfully requests that this Court put an end now to MDHS’s egregious and sanctionable misuse of these legal proceedings in its transparent effort to divert attention from its own misconduct.

## **FACTS**

### **A. MDHS’s TANF Program And Its Misuse Of Funds Through MCEC**

MDHS seeks to recover what it claims are federal TANF funds that were diverted through MCEC for unlawful purposes. TANF is a federally funded anti-poverty program that provides block grants to states. States have broad flexibility in how they carry out TANF’s goals. Mississippi, rather than distributing the bulk of TANF funds directly to those in need, sends TANF funds to state entities (including public universities) and non-profit entities (like MCEC). To qualify for TANF grants, states must agree to limit their use of TANF funds to specific purposes and contribute a percentage of their own state funds to support its needy citizens. *See* 45 C.F.R.

Part 263 (1999). Federal law prohibits certain uses of TANF funds—generally they may not be used to make real property improvements, 2 C.F.R. § 200.439(b)(3) (2020)—but Mississippi law does not have similar prohibitions on MDHS’s use of State funds.

Despite its allegations, because MDHS commingled its TANF and State funds, it cannot prove, as it must to sustain its claims, that it in fact transferred TANF funds to MCEC or that MCEC improperly used TANF funds. Mississippi’s annual budget appropriations show that MDHS receives funding from three sources: federal, state, and “other.” *See, e.g.*, Exs. 3-4. MCEC’s audited financial statements for the fiscal year ending June 30, 2018, which covers the period MCEC allegedly made \$5 million in transfers to the Athletic Foundation, highlights this issue. There, MCEC reported total revenues of more than \$26 million from “Grants from Government Agencies.” This is less than the total state appropriations to MDHS that year, which were approximately \$50 million. To the extent MCEC’s government agency grants were provided by MDHS, it is therefore possible that the entirety of those funds came from state appropriations to MDHS and, in any event, because money is fungible, it is impossible to determine from the commingled funds whether MDHS’s transfers to MCEC consisted of federal, state, or “other” appropriations. This issue is compounded by the fact that MCEC reported that only approximately \$18.6 million of its \$26 million in revenue from government agency grants originated from federal awards. *See* Ex. 5 at 15. MCEC’s funds, like MDHS’s, are commingled and it is thus similarly impossible to determine if the \$5 million it allegedly transferred to the Athletic Foundation came from federal awards or elsewhere.

Further, Mississippi has a long history of disregarding the federal TANF goals. *See* Ex. 6. 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 tens of millions of dollars of additional TANF funds unspent each year. *See* Ex. 7. Instead, the State often uses tens of millions of dollars of TANF funds to fill budget gaps, and provide grants to private organizations, without maintaining proper documentation or even monitoring the outcome of this spending. *See* Ex. 8.

MDHS also employs extremely weak internal controls and oversight over TANF subgrants. For example, while federal law requires subgrantees like MCEC to use “formal procurement methods,” including “requests for written proposals” (RFPs), to ensure that “all procurement transactions shall be conducted in a manner that provides maximum open and free competition,” *see* 2 C.F.R. 200.320(b) (2022), in 2012 MDHS eliminated its RFP processes and did not reinstate them until 2019, after Davis left MDHS. *See* Ex. 6.

MDHS admits (FAC ¶ 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. The State Auditor is statutorily responsible for conducting annual audits of all State departments, including MDHS. Miss. Code Ann. § 7-7-45(c).

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 (Complaint ¶ 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. *See* Ex. 9. 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 designated as the “whistleblower” in this matter. *See* Ex. 10. 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 even though Governor Bryant was both aware of and supported MCEC’s payments to Prevacus and the Athletic Foundation.

**B. The Allegations of the Complaint—The “Conspiracy to Defraud MDHS”**

The Amended Complaint alleges that between 2016 and 2019, while Davis was MDHS’s Executive Director, Davis, Nancy New and others—though notably not Favre—engaged in a “far-reaching, multi-million dollar scheme to defraud [MDHS] through the gross misuse of governmental TANF grant funds.” FAC ¶¶ 63-69. In furtherance of this scheme, TANF funds were diverted 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, as well as to former athletes. *Id.* ¶ 70. Davis and New have pled guilty to charges brought as a result of certain of these transfers. *Id.* ¶¶ 125, 153.

Nancy New was well connected with numerous Mississippi officials, including Davis and then-Governor Bryant, and close friends with Governor Bryant’s wife Deborah Bryant. State officials like Davis, former Governor Bryant, and current Governor Tate 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 started by Governor Bryant in conjunction with other State officials. *See* Ex. 11. Deborah Bryant and New hosted fundraisers together at the governor’s mansion. *See* Ex. 12. Governor Reeves even filmed a campaign ad in 2019 at New’s school. *See* Ex. 13.

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

The Amended Complaint alleges 13 purported causes of action against 46 defendants who purportedly diverted and/or were the recipients of TANF funds. There are only two purported causes of action against Favre—civil conspiracy (Count 3) in relation to the MCEC transfers for the State-owned Wellness Center and to Prevacus, and recovery under UFTA (Count 5) solely in relation to the MCEC transfers for the Wellness Center.

1. The \$5 million in transfers relating to the State-owned Wellness Center

MDHS’s allegations concerning the State-owned Wellness Center relate to MCEC transferring \$5 million to Southern Miss’ Athletic Foundation (the “Athletic Foundation”). Beginning around April 2017, Southern Miss asked for Favre’s support for its plans to construct a volleyball facility on its campus. Favre agreed to assist with the fundraising efforts and himself donated money and goods worth over a million dollars in furtherance of the project. To further facilitate fundraising, Southern Miss’s then-Athletic Director, Jon Gilbert, met with Nancy New in July 2017 and put her in touch with Favre. Ex. 14. The Amended Complaint alleges that Favre and New discussed, along with Davis and others, ways in which MDHS could provide “grant funds” to support Southern Miss’s plans for the volleyball facility (later referred to as the Wellness Center). FAC ¶¶ 86, 89, 107.

According to the Amended Complaint, TANF funds cannot be used for “brick-and-mortar” construction. *Id.* ¶ 92. To “circumvent” this restriction, the Amended Complaint alleges that *MDHS officials* proposed to Southern Miss a plan whereby MCEC would transfer MDHS funds to Athletic Foundation and that MCEC would sublease the State-owned Wellness Center site from the Athletic Foundation, which had already leased the site from Southern Miss (the “Sublease”). *Id.* ¶¶ 92, 94-95, 298. Pursuant to the Sublease, MCEC would transfer \$5 million to the Athletic

Foundation (the “MCEC/Athletic Foundation Transfers”) in return for MCEC’s right to use the volleyball facility and other campus spaces “for various activities that benefit the area’s underserved population.” *Id.* ¶ 99; Ex. 15 at 3.

In furtherance of this plan devised by MDHS, MDHS alleges that, at Davis’ direction, MDHS officials “met with Assistant [Southern Miss] Athletic Director Daniel Feig, [Gilbert], and a group of [Southern Miss] administrators” where they “encouraged the [Athletic] Foundation to move forward with executing a Sublease with MCEC to be paid with MDHS-provided TANF funds.” *Id.* ¶¶ 94-95. Feig’s notes from this meeting with MDHS provide additional information about this meeting, which took place on August 23, 2017. According to the notes, the “group of [Southern Miss] administrators” who attended this meeting included two of Southern Miss’s in-house attorneys, General Counsel Bob Gholson and Associate General Counsel Truett Roberts, and numerous Southern Miss vice presidents. *See* Ex. 2. Feig writes that a MDHS representative stated that MCEC would be the “legal entity leasing a space” because MDHS “[c]an’t directly fund a building project.” *Id.* The MDHS representative also stated that MDHS is “doing [] similar project[s]” with other public universities, including Alcorn State University, Jackson State University, and Mississippi State University, consisting of “sub grants to do youth camps in athletic facilities” and that “[t]here is a lease component to every one of these deals—all with [MCEC].”<sup>2</sup> *Id.* The MDHS representatives also explained that the “MDHS [f]ederal [r]equirements re how you spend money are removed once the money is given to [MCEC],” because “[i]t is then private money.” *Id.*

Thus, and as discussed further (*infra* at 26, 29), while MDHS claims that the MCEC/Athletic Foundation Transfers and related Sublease were devised as part of a “conspiracy,”

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<sup>2</sup> The “similar project” at Alcorn State University is described *supra* at 6.

MDHS omits from the Amended Complaint—because these facts vitiate its claims—that Southern Miss’s own inhouse attorneys were present at the meeting when an MDHS official explained the entire supposedly “unlawful scheme”; that numerous other public officials and lawyers approved of the Sublease and transfer of MDHS funds to use in constructing the volleyball facility, including Powell “Gee” Ogletree, Jr. (the Athletic Foundation’s outside counsel and an IHL trustee appointed by former Governor Bryant), the Attorney General, and the IHL Board of Trustees, and that the officials and lawyers involved were openly and publicly seeking and structuring a way to comply with federal TANF restrictions in transferring public funds from one state entity (MDHS) to another (Southern Miss).

While the Amended Complaint does not and cannot allege that Favre engaged in any fraud, MDHS claims that these transfers are voidable under UFTA and that under UFTA, Miss. Code Ann. § 15-3-113(2)(a), Favre is liable for the full \$5 million transferred because he allegedly is the “person for whose benefit the transfer was made.” FAC ¶ 370. MDHS’s sole basis for its claim is a conclusory and deficient allegation that “[i]n April 2017, Brett Favre made a handshake deal with the [Athletic Foundation], in which he committed to personally guarantee the funds necessary for the brick-and-mortar construction of the volleyball facility.” *Id.* ¶ 83. As discussed herein (*infra* at 20-21), contemporaneous documentary evidence MDHS has had for months but produced only on January 27, 2023, wholly contradicts this allegation, necessitating dismissal of this claim.

MDHS also alleges that it is entitled to a judgment against Favre for his participation in a conspiracy by “agree[ing] to accomplish the unlawful purpose of the expenditure of TANF funds for the non-TANF purpose of a disguised donation for the brick-and-mortar construction of a volleyball facility through the execution of a sham lease.” *Id.* ¶ 324. The Amended Complaint does not allege how Favre ever agreed or that he knew that the members of this supposed

conspiracy had agreed to accomplish some “unlawful purpose” or even that there was an unlawful purpose. Favre, a non-lawyer and private citizen, was not an officer or director of MCEC and had no authority over or ability to act on behalf of MCEC or MDHS or any control over their funds. While the Amended Complaint conclusorily alleges (¶¶ 85, 109-10) that Favre was a director or agent of the Athletic Foundation, he did not become a director until 2018, *see* Ex. 16, months after the MCEC/Athletic Foundation Transfers, and the Amended Complaint fails to allege how Favre was the Athletic Foundation’s agent. In any event, even if Favre were an Athletic Foundation director or agent at any relevant time, which he was not, MDHS fails to show how that would subject him to liability.

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

The Amended Complaint’s allegations with respect to Prevacus are substantially identical to those in the original Complaint. Again MDHS fails to allege that Favre did anything wrong. According to the Amended Complaint, Prevacus is a “a private, for-profit biotechnology corporation in which Favre had individually invested over \$250,000.” *Id.* ¶ 113. The Amended Complaint alleges that MCEC and Prevacus “entered into a written contract dated January 19, 2019, “obligating MCEC to transfer \$1.7 million in funds derived from MDHS to Prevacus to provide ‘development funding’ to the for-profit Prevacus” (*id.* ¶ 122); that contract “falsely pretended” investment of MDHS-derived funds “was for the purpose of securing ‘clinical trial sites’ [in Mississippi] to promote an experimental anti-concussion drug” (*id.* ¶ 123); and was a “sham” because it “concealed the material fact that the actual purpose of the transaction was to financially benefit” Favre, VanLandingham, and the News (*id.* ¶ 124). MCEC allegedly transferred \$2.1 million of TANF funds to purchase ownership interests in Prevacus between January 18, 2019 and October 7, 2019. *Id.* ¶ 126. The Amended Complaint does not, as it cannot,

allege that Favre received any of the funds that MCEC paid to Prevacus, nor does it explain how Favre supposedly financially “benefitted” from MCEC’s transfers to Prevacus.

All Favre is alleged to have done with respect to Prevacus was to introduce Nancy New to Prevacus’ Chief Executive Officer Jacob “Jake” VanLandingham in December 2018 so that VanLandingham could “solicit Nancy New to use MDHS grant proceeds to invest in the stock of Prevacus” (*id.* ¶ 115), to have attended a meeting with New, VanLandingham, Davis and others in January 2019 during which VanLandingham made a “sales pitch” to Davis, New, and other defendants “concerning a substantial stock investment in Prevacus,” (*id.* ¶ 116), and to have “agreed” with VanLandingham, Nancy New and her two sons, Jesse New and Zachary New, “that the three News would spend substantial MDHS grant funds to purchase stock in Prevacus” (*id.* ¶ 119).

The Amended Complaint does not and cannot allege how making such an introduction or attending such a meeting could make Favre responsible for any of the \$2.1 million MCEC allegedly later transferred to Prevacus. *Id.* ¶ 126. As with the allegations concerning the State-owned Wellness Center, Favre had no authority to approve or direct anyone to make or accept any such payments, and he never received any of those funds. 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. In short, the Amended Complaint does not allege how or in what capacity Favre could have “agreed” with Davis, New, and VanLandingham that MCEC would use MDHS grant money to invest in Prevacus stock, or how any such supposed “agreement” could give rise to any liability.

And, again, the Amended Complaint does not, as it cannot, even allege that Favre was aware that the money given to Prevacus consisted of TANF funds. But even if Favre knew that Prevacus received 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 the transfers were ostensibly to entice Prevacus to do business in Mississippi. *Id.* ¶ 123.

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

While the Amended Complaint alleges that MCEC paid Favre \$1.1 million in TANF grant funds “as compensation for Favre’s recording radio advertisements or making speeches or appearances on behalf of MCEC and FRC,” (*id.* ¶ 104), it admits that that Favre already repaid this \$1.1 million, (*id.* ¶ 105). MDHS alleges that the funds MCEC used to pay Favre were TANF funds, but even assuming they were and notwithstanding that MHDS commingled its State and TANF funds, there is no allegation (nor could there be) that Favre knew that the funds were TANF funds. Indeed, Favre did not know, and had no reason to suspect, that there was any impropriety until Nancy New was arrested in February 2020. Once Favre was informed that he had received TANF money, he voluntarily returned it.

MDHS originally asserted five claims against Favre and Favre Enterprises, Inc. (“Favre Enterprises”), his company which received the payments from MCEC. Favre and Favre Enterprises moved to dismiss these claims (MEC No. 191), highlighting MDHS’s omission of the critical fact that Favre had repaid the funds. MEC Nos. 192, 196. In the Amended Complaint, MDHS has dropped Favre Enterprises as a named defendant and all of its claims for these payments.<sup>3</sup>

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<sup>3</sup> Favre Enterprises appears in two allegations, apparently inadvertent vestiges of the original Complaint. FAC ¶¶ 322, 399. To the extent MDHS still asserts that Favre Enterprises is liable, its claims against Favre Enterprises are plainly deficient and must be dismissed.



**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 federal funding. In an accompanying press release, State Auditor White stated 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.” *See* Ex. 17. The 2019 Single Audit details instances of forgeries, false documents, and fraudulent accounting entries. *See, e.g.*, Ex. 9 at 83. The 2019 Single Audit discusses the MCEC transfers to the Athletic Foundation and Prevacus, as well as the \$1.1 million to Favre Enterprises. There are no claims of forgeries, false documents, or fraudulent accounting entries with respect to any of these transfers, except for an allegation that MCEC made fraudulent accounting entries in its own books with respect to transfers to Prevacus. *See id.* at 92, 106-07, 129. Favre is not accused of forgery, falsifying documents, or making fraudulent accounting entries.

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. State Auditor White praised Favre stating:

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.

*See* Ex. 18. The State Auditor had seen no records indicating that Favre knew that MCEC used TANF funds to pay him, because none exist. Favre had no idea that he received TANF funds.

That, unfortunately, did not stop White from later reversing course and falsely blaming Favre, with no justification, in an unseemly effort to attract publicity and advance his political career.

### ARGUMENT

A motion to dismiss under Rule 12(b)(6) must be granted if, accepting the complaint's well-pled factual allegations as true, there is no set of facts that would allow plaintiff to prevail. *See Rose v. Tullos*, 994 So. 2d 734, 737 (Miss. 2008) (affirming dismissal of complaint for failure to state a claim). The 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). Moreover, the 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." *State ex rel. Fitch v. Yazaki N. Am., Inc.*, 294 So. 3d 1178, 1189 (Miss. 2020); *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."). Fraudulent transfer claims are governed by Rule 9(b), which requires that the "circumstances constituting fraud or mistake shall be stated with particularity." *See Walton v. Walton*, 52 So. 3d 468, 471 (Miss. Ct. App. 2011).

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

The purpose of UFTA is to provide a remedy for creditors against a debtor who intentionally transfers its assets to avoid paying its creditors. *See Est. of Roby v. Roby*, 84 So. 3d 786, 792 (Miss. Ct. App. 2011). A transfer by a debtor is voidable under UFTA Section 15-3-111(1)(a), “if the debtor made the transfer . . . with actual intent to hinder, delay or defraud any creditor of the debtor.” UFTA Section 15-3-113(2) provides that “to the extent a transfer is voidable . . . under Section 15-3-111(1)(a), the creditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor’s claim, whichever is less,” and that such judgment “may be entered against: (a) The first transferee of the asset or the person for whose benefit the transfer was made.”

MDHS seeks to recover the \$5 million MCEC transferred to the Athletic Foundation from Favre as the “person for whose benefit the transfer was made.” FAC ¶ 370. The UFTA claim is legally deficient and must be dismissed.

**A. The Allegation That Favre Made An Oral Pledge Is Conclusory, False, And Belied By Documentary Evidence**

MDHS’s sole basis for claiming that Favre should be held liable for \$5 million for the supposedly voidable MCEC/Athletic Foundation Transfers is that those transfers were made for Favre’s “benefit” based on the allegation that “[i]n April 2017 [Favre] made a handshake deal with the [Athletic Foundation] in which he committed to personally guarantee the funds necessary for the brick-and-mortar construction of a volleyball facility.” FAC ¶¶ 83, 370. This conclusory and baseless allegation, devoid of any details whatsoever, including to whom this “deal” was supposedly made or its terms and conditions, is untruthful and contradicted by contemporaneous documentary evidence, including the records of Jon Gilbert, the Athletic Director at Southern Miss who is also the Chairman of the Board and CEO of its Athletic Foundation.

Indeed, for months following Favre’s supposed oral pledge, internal Southern Miss/Athletic Foundation documents—including emails with Gilbert and head of development, Brian Morrison—reflect that Favre had made “**no pledge(s)**,” verbal or otherwise, even as of June 2017. He had only made “**gifts**” in support of the facility and offered to assist Southern Miss with “**fundraising**”:

**From:** Brian Morrison  
**Sent:** Thursday, June 08, 2017 3:52 PM CDT  
**To:** Ethel Allen <ethel.allen@usm.edu>; Bruce Rosengrant <Bruce.Rosengrant@usm.edu>  
**CC:** Christi Holloway <christi.holloway@usm.edu>  
**Subject:** RE: Grandfathered campaign gifts

Ethel,

Please grandfather both of DeBartolo's gifts and Brett's gifts (\$150,000 and \$500,000) to the campaign.

Mr. DeBartolo has made two separate \$100,000 gifts to the volleyball facility. These are cash gifts, no pledge was set up. Same thing for Brett Favre. Both of his are cash gifts, no pledge(s) at this point.

Ex. 19; *see also* Exs. 20-24. These documents, and similar ones, have been in MDHS’s possession for months prior to filing the Amended Complaint,<sup>4</sup> yet it has shockingly withheld them from the public and the Court, in violation of its lawyers’ duty of candor. This documentary evidence, omitted from the Amended Complaint, rebuts entirely MDHS’s vague, conclusory, and deficient allegation that Favre made a “handshake deal with the USM Athletic Foundation,” which on its own would not satisfy Rule 8, let alone the heightened pleading standard of Rule 9(b).

Moreover, if MDHS’s allegation concerning a verbal pledge had any validity, Jon Gilbert in July 2017 would never have approached Nancy New about supporting the facility as he did to seek her help getting a grant from the State to help build a State-owned Wellness Center. *See* Ex. 14. Most importantly, Gilbert made clear to New then that Favre and his wife “have agreed to help with fundraising for the facility,” nothing more and nothing less. *Id.* Only when there was a

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<sup>4</sup> MDHS did not provide the Athletic Foundation’s production to Favre or the other defendants until January 27, 2023, months after MDHS received them. The documents had been produced to MDHS pursuant to a subpoena it issued in *July 2022* with an *August 10, 2022* return date. *See* MEC No. 67.

shortfall of funds in April 2018—a full year after this supposed “handshake deal”—did Favre make a voluntary pledge, in writing, to help bridge the gap in funding either with his own funds or through additional fundraising. FAC ¶ 101; Ex. 25. No self-serving contradictory claim by MDHS in its latest complaint can rebut this indisputable evidence which was created by its own State employees.

MDHS’s UFTA claim against Favre fails completely without this made up allegation. MDHS is simply desperate to assert *some* claim against Favre after having been forced by Favre’s motion to dismiss to withdraw nearly all of its other claims against him in the original Complaint. Indeed, without this allegation, which under Rules 8 and 9(b) is utterly insufficient and should be disregarded, there is no basis for claiming that Favre was the “person for whose benefit” MCEC/Athletic Foundation Transfers were made, as required by UFTA Section 113(2)(a). *See Walton*, 52 So. 3d at 471 (affirming dismissal of fraudulent transfer claim where chancellor found “no merit in [plaintiff’s] assertions that [defendants] engaged in fraud and ruled that [plaintiff] could not prove any set of facts in support of his claim”).

Finally, even if Favre had made any oral pledge, it would have been unenforceable. Mississippi’s statute of frauds requires that “any agreement which is not to be performed within the space of fifteen months from the making thereof . . . shall be in writing, and signed by the party to be charged therewith.” Miss. Code Ann. § 15-3-1. The alleged verbal pledge whereby Favre in April 2017 “committed to personally guarantee the funds necessary for the brick-and-mortar construction of a volleyball facility” could not have been performed within 15 months. Southern Miss was only at the very beginning of planning for such a facility at that time and it could never have been designed and constructed with all the necessary approvals within 15 months of April 2017 (*see* Ex. 26)—in fact, construction was not completed until December 2019 (FAC ¶ 100),

more than 30 months after the supposed verbal pledge. Favre’s supposed commitment would have necessarily gone beyond 15 months, because it was for a sum uncertain until such time as construction of the volleyball facility was completed and all of its costs known. *See Powertrain, Inc. v. Ma*, 2014 WL 3908129, at \*4 (N.D. Miss. Aug. 11, 2014) (“[V]aguely alleged do-no-harm agreement could not have been performed in fifteen months from the alleged date of its formation—some date prior to May 2005—because [underlying case] did not even go to trial until July of 2007, at least twenty-six months after the alleged agreement was formed.”). Clearly, there could be no benefit to Favre from MDHS making a transfer to cover an unenforceable pledge, and MDHS cannot rely on this supposed pledge as the basis of its UFTA claim.

**B. There Cannot Be A Fraudulent Transfer Where The Claimant is The Ultimate Recipient Of The Transfer**

MDHS, a State agency, absurdly brings an UFTA claim even though in the transaction it complains of the State transferred funds to itself. The MCEC/Athletic Foundation Transfers were not a transaction from one private entity to another—it was a shuffling of public funds from one state agency (MDHS) so that another (Southern Miss) could use them. Here, MDHS is seeking to recover from Favre state funds that were used by the state to construct a state-owned Wellness Center.

MDHS can only make this absurd claim because the state parties involved decided that funds should go through Southern Miss’ Athletic Foundation’s accounts instead of directly to Southern Miss. This was due in part to the fact that the Athletic Foundation had already leased the premises where the volleyball facility was to be built from Southern Miss (for consideration of \$1) so that the Athletic Foundation could oversee the building of the facility. Ex. 27. Moreover, while the Athletic Foundation is a private non-profit, it is an arm of Southern Miss, run by Southern Miss employees and whose offices are within Southern Miss. Southern Miss describes the Athletic

Foundation as one of six “affiliated organization[s]” that was “formed exclusively for the benefit of [Southern Miss] and serve[s] to promote, encourage, and assist with educational, scientific, literary, research, athletic, facility improvement, and service activities of the University and its affiliates.” Ex. 28 at 59. The Athletic Foundation has three *ex officio* board memberships for Southern Miss personnel, consisting of Southern Miss’s president, a faculty representative, and Southern Miss’s athletic director who also serves as chairman of the Athletic Foundation’s board and its CEO. Ex. 29, Arts. V § 2 & VII §§ 1-2. And, as noted (*supra* at 5, 12), MDHS executives met with Southern Miss personnel, including its general counsel, to discuss funding for the State’s Wellness Center and the Sublease between MCEC and the Athletic Foundation. And the Sublease itself, which was between MCEC and the Athletic Foundation, was drafted by Southern Miss’s attorneys. Ex. 30. Treating the Athletic Foundation as anything other than an arm of Southern Miss and in turn the state is nothing more than form over substance.

At a minimum, MDHS is not entitled to a judgment against Favre because its supposed “claim” has already been satisfied. UFTA Section 15-3-113(2) states that a judgment “may” be entered in favor of a creditor and against a transferee or person for whose benefit the transfer was made up to “the amount necessary to satisfy the creditor’s claim.” Here, Southern Miss used the \$5 million in transfers from MCEC to construct the State-owned Wellness Center, which is owned by Southern Miss, a state university. The State’s possession of this asset satisfies any “claim” that the State could have regarding the MCEC/Athletic Foundation Transfers.

**C. MDHS Has Not Sufficiently Pled That There Was A Voidable Transfer**

As noted, the purpose of fraudulent transfer laws “is to avert debtors from keeping property accessible to payment of their debts, away from creditors.” *Est. of Roby*, 84 So. at 792 (internal quotation and citation omitted). MDHS has not made any allegations, as it must to assert a claim under UFTA, that the MCEC/Athletic Foundation Transfers were made to prevent MDHS from

recovering on a claim or that MCEC engaged in those transfers “with the actual intent to hinder, delay or defraud any creditor” of MCEC, as required by UFTA Section 15-3-107(1).

The Amended Complaint alleges (¶ 370) that MCEC, through Nancy and Zachary New, acted with “actual intent to defraud MDHS in transferring TANF funds to the [] Athletic Foundation.” Its sole basis for this allegation is that Zachary New “pleaded guilty to defrauding MDHS with respect to payments made under the USM Athletic Foundation Sublease.” FAC ¶ 108. But that allegation and Zachary’s guilty plea to defrauding MDHS are irrelevant to its purported UFTA claim against Favre. For that claim, as noted, MDHS must allege that the transfers were made with the actual intent to defraud, not MDHS itself, but the *creditors* of MDHS. MDHS does not, because it cannot, make any such allegation.

Moreover, according to the Amended Complaint itself, it was MDHS itself and its employees Davis, Jacob Black, and Garrig Shields that directed that the State-owned Wellness Center be funded through transfers of MDHS funds by MCEC. The Amended Complaint alleges that Davis “direct[ed] funds to MCEC so that MCEC could provide the funds to the [Athletic Foundation] under the guise of a ‘sublease’ which was in fact intended to finance the brick-and-mortar construction of the volleyball facility.” FAC ¶ 91. Black and Shields “provided substantial assistance” by “advising on how to circumvent the TANF prohibition against paying for ‘brick and mortar,’” including advising Southern Miss personnel that “the source of funds will be TANF funds and that the sublease would be with MCEC because MDHS ‘can’t directly fund a building project.”” *Id.* ¶¶ 92, 94. Further, Black and Shields allegedly “encouraged the [Athletic] Foundation to move forward with executing a [s]ublease with MCEC to be paid with MDHS-provided TANF funds.” *Id.* ¶ 95. Accordingly, MDHS cannot plausibly claim that anyone made the MCEC/Athletic Foundation Transfers with the “actual intent” to defraud MDHS because



MDHS itself was not only aware of the transfers but directed that they be made in the way they were.

As noted, this supposed “fraud” was also widely known and publicized, suggesting that no one acted with any “actual intent to defraud.” MDHS officials pitched their idea for a sublease to Southern Miss, including its general counsel. FAC ¶¶ 92, 94-95; Ex. 2; *see supra* at 5, 12-13, 23. The Sublease itself, which was drafted by Southern Miss’s general counsel, expressly provides that MCEC will use underutilized portions of the State-owned Wellness Center and other Southern Miss facilities “for various activities that benefit the area’s underserved population.” Ex. 15 at 3-4; Ex. 30. The Attorney General reviewed the Sublease and recommended it for the IHL Board of Trustees’ approval. Ex. 31; *see supra* at 5, 13. The IHL Board of Trustees approved the Sublease on October 19, 2017. Ex. 32 at 9-10. Minutes from the IHL Board of Trustees’ meeting indicate that the Sublease was being “funded through the lease of athletic department facilities by [MCEC]” and that “MCEC’s funding for this project is via a Block Grant from [MDHS].” *Id.* Following IHL approval, Southern Miss announced plans for the Wellness Center on its website, noting that Southern Miss collaborated with MCEC. Ex. 33. Even assuming the MCEC/Athletic Foundation Transfers did not comply with federal law governing the use of TANF funds, the fact that the structure for the funding was discussed so openly and approved by numerous state entities makes it crystal clear that no one acted with “the actual intent to defraud” MDHS.

As to Favre, he is not alleged to have defrauded anyone. The Amended Complaint itself makes clear that Favre did not know or have reason to know that limited-use TANF funds were being used to fund the State-owned Wellness Center (even assuming they were used). It alleges (¶ 107) that Favre was aware that MCEC was using “grant funds” to pay the Athletic Foundation and that Favre “knew that MDHS is Mississippi’s ‘welfare agency,’” but “grant funds” can mean

many things, and there is nothing unusual about a state using public funds or grant funds for a public project. And “welfare” is merely one component of MDHS which, according to its website “provid[es] a wide range of public assistance programs, social services and support for children, low-income individuals and families” Ex. 34, which are funded through various federal grants (not only TANF) and state appropriations, *see infra* at 30-31. Further, the stated goals of the Wellness Center are entirely consistent with MDHS’s purpose. By way of example, in announcing plans for the Wellness Center, Gilbert stated that it was not only to provide a home for Southern Miss volleyball but also “provide space for community programming” and “benefit [the community] in many ways [as it will] have the ability to host camps, clinics, classes, community events, seminars and group meetings.” Ex. 33. Thus, Favre had no reason to suspect that there were any improprieties with respect to how the State-owned Wellness Center was funded or that the stated goals for the Wellness Center to be used for various community initiatives were inconsistent with MDHS’s mission—because it was not.

Further, as noted, the entire purpose of UFTA is to prevent transfers made for the purpose of shielding assets from creditors. The gravamen of MHDS’s purported claims here is that TANF funds were improperly used for construction of a facility. There are no allegations that transfers were made with the “actual intent to hinder, delay or defraud” creditors. Accordingly, the UFTA claim must be dismissed.

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

Count 3 alleges that Favre and other defendants engaged in a civil conspiracy in relation to the MCEC/Athletic Foundation Transfers and Prevacus. However, there is no independent claim for civil conspiracy under Mississippi law; there must be an underlying actionable claim. *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). MDHS's only other claim against Favre is the UFTA claim which relates to the State-owned Wellness Center and not Prevacus. Because, as shown, MDHS's UFTA claim must be dismissed and MDHS has no other actionable underlying claim against Favre relating to Prevacus or otherwise, MDHS's civil conspiracy claim must be dismissed as a matter of law.

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 Amended 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 Amended Complaint centers around defendants Davis and Nancy New. For example, the Amended Complaint alleges that Davis, as head of MDHS, "illegal[ly] and fraudulent[ly] misuse[d] the public funds entrusted to his authority," and that the Nancy New "conspired with John Davis and aided and abetted his fraud by hiring and contracting with his family members, friends, and favorite former athletes under the false pretense that MCEC and FRC would use TANF funds to achieve TANF purposes, when the true purpose was the personal enrichment of the co-conspirators and the enrichment of their families and friends." FAC ¶¶ 64, 70. Additionally, Davis and New "agreed for MCEC . . . to disregard the legal requirements for the legal and proper uses of TANF grant funds" and "agreed for MCEC and FRC to award sham contracts, leases, and second-tier grants to entities that would not and could not provide social services in compliance

with lawful TANF purposes.” *Id.* ¶¶ 75-76. Assuming *arguendo* that these allegations sufficiently plead a conspiracy between Davis and New, MDHS, to state a conspiracy claim against Favre, would need to allege that he 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 Amended Complaint does not and cannot do so.

Here, there are *no* allegations that Favre agreed to join any unlawful agreement to misuse TANF funds. Indeed, as noted, there is no allegation that Favre even knew that the funds were TANF funds (assuming that they were) and no allegation that he even had any knowledge of the alleged scheme. At most, the Amended Complaint alleges (¶ 107) that Favre knew that MDHS was providing “grant funds” to MCEC to fund the State-owned Wellness Center. There is nothing on its face wrong with one government entity providing “grant funds” to another public entity for construction of a public building. There is also no allegation that Favre was aware of any impropriety relating to the structure for funding that MDHS itself devised and that Southern Miss, its lawyers, the Attorney General, and the IHL Board of Trustees approved. *See supra* at 5, 13. The Amended Complaint conclusorily alleges (¶ 89) with no factual basis whatsoever that Favre knew that “grant funds provided by MDHS could not be used for brick-and-mortar construction.” But Favre, who is not a lawyer, would not have had any reason to suspect that MDHS and the various state officials and lawyers involved in planning, reviewing, and approving using “grant funds” for the State-owned Wellness Center were not acting in compliance with the law.

Moreover, there is nothing inherently wrong with using TANF funds for a lease. MDHS annually transfers millions of dollars of its TANF block grants to the Social Services Block Grant

(“SSBG”).<sup>5</sup> SSBG permits up to 10% of SSBG funding to be used for “rentals.” See 18 Miss. Code. R. § 21-1-21.1. Accordingly, even people familiar with TANF regulations would have had no reason to suspect any improprieties with MDHS using funds for a lease.

As to Prevacus, the Amended Complaint alleges (¶¶ 115-16) that Favre introduced VanLandingham to New and attended a meeting where VanLandingham made a “sales pitch . . . to the News and Davis[] concerning a substantial stock investment in Prevacus.” These allegations 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 (FAC ¶ 119) that Favre “agreed” that New would use MDHS “grant funds” to invest in Prevacus, even if true, gives rise to no such inference, where the Amended 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).

Accordingly, MDHS’s claim against Favre for civil conspiracy must be dismissed.

### **III. MDHS COULD NEVER PROVE THAT THE TRANSFERS TO THE ATHLETIC FOUNDATION OR PREVACUS CONSISTED OF TANF FUNDS**

MDHS’ claims are premised on the false pretense that TANF funds were improperly used for “brick and mortar” to build the State-owned Wellness Center at the public university, Southern Miss, with the full knowledge and consent of, among others, the Governor, the Director of MDHS, Southern Miss and its Board of Directors, IHL and the Attorney General, in violation of the TANF use restriction. However, even if MDHS’ position was factually correct—it is not—its position is legally impossible. MDHS provided funds for the State-owned Wellness Center from its own

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<sup>5</sup> MDHS transferred over \$8 million in TANF funding to the SSBG block grant in years 2015, 2016, and 2018. See Ex. 35 at Table A.6; Ex. 36 at Table A.6; Ex. 37 at Table A.6.

accounts which were commingled state and federal TANF funds. *See supra* at 3, 8. Since money in MDHS' accounts were commingled federal TANF and state grant funds and since money is fungible, it is legally impossible to establish that only TANF restricted "brick and mortar" funds were used for the State-owned Wellness Center. MCEC's funds are similarly commingled with only approximately \$18.6 million of the \$26 million in government grants it received in fiscal year 2018 coming from federal awards. *See Ex. 5*. For MDHS' legal theory to be arguably sustainable, it would need to establish that only federal TANF funds were improperly used. It cannot do so because of this commingling of federal TANF funds with other funds at MDHS and MCEC. The transfers of MDHS funds that MCEC made to Prevacus likewise came from commingled funds and are similarly untraceable to TANF grants.

Accordingly, the foundation of the argument that Brett Favre knew that the source of funding was a misuse of federal TANF funds *and* that federal TANF funds were used exclusively to construct the State-owned Wellness Center fails factually and legally, requiring dismissal.

#### **IV. 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. Ct. App. 2018), *reh'g denied* (Oct. 9, 2018). 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. *See generally* FAC ¶¶ 63-81. 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).

**CONCLUSION**

**WHEREFORE, PREMISES CONSIDERED,** Defendant Brett Lorenzo Favre respectfully requests that all claims against him be dismissed with prejudice and that this Court enter an Order granting his Motion to Dismiss in its entirety. Defendant Brett Lorenzo Favre further requests any other relief this Court deems appropriate.

**RESPECTFULLY SUBMITTED** on this, the 10th day of February, 2023.

**BRETT LORENZO FAVRE, Defendant**

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 10<sup>th</sup> day of February, 2023, served a true and correct copy of the foregoing pleading on all counsel of record herein via the MEC filing system.

This, the 10<sup>th</sup> day of February, 2023.

*/s/ Eric D. Herschmann*

**ERIC D. HERSCHMANN**