

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2017-IA-00167-SCT

THE PROMENADE D'IBERVILLE, LLC

APPELLANT

VS.

JEA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI, SECOND JUDICIAL DISTRICT

BRIEF OF THE APPELLEE

JEA

Joe Sam Owen (MSB #3965)
OWEN, GALLOWAY & MYERS, PLLC
Post Office Drawer 420
Gulfport, Mississippi 39502-0420
jso@owen-galloway.com

Michael W. Ulmer (MSB #5760)
James J. Crongeyer, Jr. (MSB #10536)
H. Ruston Comley (MSB #102307)
WATKINS & EAGER PLLC
Post Office Box 650
Jackson, Mississippi 39205-0650
Telephone: (601) 965-1900
Facsimile: (601) 965-1901
mulmer@watkinseager.com
rcomley@watkinseager.com

ATTORNEYS FOR APPELLEE,
JEA

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2017-IA-00167-SCT

THE PROMENADE D'IBERVILLE, LLC

APPELLANT

VS.

JEA

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, JEA, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualifications or recusals.

1. The Promenade D'Iberville, LLC ("Promenade"), Appellant.
2. CBL & Associates Properties, Inc. ("CBL"), owner of Promenade.
3. JEA (f/k/a the Jacksonville Electric Authority), Appellee.
4. Joe Sam Owen, Esq., Owen, Galloway & Myers, PLLC, counsel for JEA.
5. Michael W. Ulmer, Esq., James J. Crongeyer, Jr., Esq., H. Ruston Comley, Esq., Watkins & Eager PLLC, counsel for JEA.
6. Kyle S. Moran, Esq., James G. Wyly, III, Esq., Phelps Dunbar LLP, counsel for Promenade.
7. J. Jeffrey Landen, Esq., Michael S. Jones, Esq., Murphy Landen Jones PLLC, of counsel for Promenade (admitted *pro hac vice* in the trial court).
8. Daniel Knecht, Esq., Graydon Head & Ritchey LLP, of counsel for Promenade (admitted *pro hac vice* in trial court).
9. Tim C. Holleman, Esq., Boyce Holleman & Associates, counsel for CBL & Associates Properties, Inc. and Promenade.
10. Roland F. Samson, III, Esq., Samson & Powers, PLLC, counsel for Promenade.
11. Honorable Christopher L. Schmidt, Circuit Judge of Harrison County, Mississippi, Second Judicial District.

12. Honorable Stephen B. Simpson, Special Master, Deutsch Kerrigan & Stiles LLP, 2510 14th Street, Suite 1001, Gulfport, Mississippi 39501.

SO CERTIFIED, this the 14th day of February, 2018.

/s/ H. Ruston Comley
H. Ruston Comley (MSB #102307)
Counsel for Appellee, JEA

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES v

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS 3

 I. The Players In The Promenade Project..... 4

 A. Promenade and Its Owner, CBL.....4

 i. The Promenade’s History. 5

 a. The use of the ash product, OPF42. 5

 b. Assurances that this is not an environmental case. 6

 c. CBL/Promenade’s permit certifications. 7

 d. Recognizing and exploiting JEA’s governmental entity status..... 8

 ii. CBL/Promenade’s Other Related Lawsuits. 8

 B. The Contractors—EMJ and M. Hanna9

 C. The Geotechnical Engineer—Gallet.....11

 D. The Manufacturer of OPF42—LA Ash.....13

 i. LA Ash’s Knowledge of Ettringite and Lime-Sulfate Swelling Reactions. 15

 ii. LA Ash’s Manufacturing Process and Use of JEA’s Byproduct Ash. 15

 iii. LA Ash’s Port Bienville, Mississippi Facility..... 17

 iv. OPF42 is a Product, *not* a “Solid Waste.” 18

 E. The Public Utility—JEA.....18

 II. Monetary Damages Alleged 20

 III. Settlements & Remediation..... 21

SUMMARY OF THE ARGUMENT 21

ARGUMENT	24
I. <i>Hyatt II</i> – The Evolution to Full Faith and Credit	24
A. Subject Matter Jurisdiction	24
B. Comity	25
C. Full Faith and Credit	26
II. The Trial Court Correctly Applied <i>Hyatt II</i>	27
A. <i>Hyatt II</i> is On Point and Controls	29
B. The Status of <i>Church v. Massey</i>	31
C. The Joint Municipal Electric Power & Energy Law has <i>Nothing</i> to do	32
with This Case.	32
III. Efforts by Promenade to Avoid the Constitutional Limits on Damages.....	33
A. The Inverse Condemnation Claim has No Basis in Law or Fact.	34
B. The Trial Court Properly Denied Promenade Leave to Amend its Complaint.....	35
to add Environmental Issues.....	35
C. Promenade is Not Entitled to Injunctive Relief.....	37
i. There is <i>no</i> Imminent Threat of Irreparable Harm for which there is No Adequate	
Remedy at Law.	37
ii. Promenade failed to exhaust its administrative remedies through MDEQ.....	40
D. There was One “Occurrence,” <i>not</i> Hundreds.	41
E. Promenade’s Assertion of Waiver has No Merit.	46
CONCLUSION.....	50
CERTIFICATE OF SERVICE	52

TABLE OF AUTHORITIES

Cases

Allred v. Yarborough, 843 So. 2d 727 (Miss. 2003)..... 43

Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982) 43

Ashmore v. Miss. Auth. on Educ. Television, 148 So. 3d 977 (Miss. 2014) 49

Bradley v. Tishomingo County, 810 So. 2d 600 (Miss. 2002) 34

Brantley v. City of Horn Lake, 152 So. 3d 1106 (Miss. 2014) 44

Buffington v. State, 824 So. 2d 576 (Miss. 2002) 42

Burkett v. Ross, 86 So. 2d 33 (Miss. 1956)..... 35

California Franchise Tax Bd. v. Hyatt, 135 S. Ct. 2940, 192 L. Ed. 2d 975 (2015) 26

Carroll v. Lanza, 349 U.S. 408, 99 L. Ed. 1183, 75 S. Ct. 804 (1955) 25

Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145 (Miss. 2002)..... 40

Church v. Massey, 697 So. 2d 407 (Miss. 1997) 3, 23, 31, 32, 48

City of Jackson v. Estate of Stewart ex rel. Womack, 908 So. 2d 703 (Miss. 2005) 43, 44

Crum v. City of Corinth, 183 So. 3d 847 (Miss. 2016)..... 36

East Miss. State Hosp. v. Adams, 947 So. 2d 887 (Miss. 2007) 46

Elston-Richards Storage Co. v. Indem. Ins. Co. of N. Am., 194 F. Supp. 673
(W.D. Mich. 1960)..... 43

Elston Richards Storage Co. v. Indem. Ins. Co of N. Am., 291 F.2d 627 (6th Cir. 1961) 43

Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464 (5th Cir. 1985).. 38

EOTT Energy Corp. v. Storebrand Int'l Ins. Co., 45 Cal. App. 4th 565 (1996)..... 43

Estate of Grimes v. Warrington, 982 So. 2d 365 (Miss. 2008) 46, 47

Estate of Puckett v. Clement, No. 2016-IA-00636-SCT, 2017 WL 4456739
(Miss. Oct. 5, 2017) 49

<i>Fluid Dynamics Holdings LLC v. City of Jacksonville</i> , No. 3:14-CV-1454-J-32MCR, 2017 WL 3723367 (M.D. Fla. Aug. 29, 2017)	18-19, 30, 31
<i>Franchise Tax Bd. of California v. Hyatt</i> , 2002 WL 31863327 (U.S.), 1 (U.S.Amicus.Brief, 2002)	25
<i>Franchise Tax Bd. of California v. Hyatt</i> , 538 U.S. 488 (2003).....	3, 23, 24, 25, 26, 32, 36, 48
<i>Franchise Tax Board v. Hyatt</i> , 335 P. 3d 125 (Nev. 2014)	26
<i>Franchise Tax Bd. of California v. Hyatt</i> , 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016).....	<i>passim</i>
<i>Franchise Tax Bd. of State of California v. Hyatt</i> , 407 P.3d 717 (Nev. 2017).....	25, 30
<i>Georgia-Pacific Corp. v. Mooney</i> , 909 So.2d 1081 (Miss. 2005)	37, 40, 41
<i>Gilland v. State</i> , 614 So.2d 370 (Miss. 1993).....	32
<i>Hertz Commercial Leasing v. Morrison</i> , 567 So. 2d 832 (Miss. 1990).....	47
<i>Home Indem. Co. v. Anders</i> , 459 So. 2d 836 (Ala. 1984).....	43
<i>Kelley, LLC v. Corinth Pub. Utilities Comm'n</i> , 200 So. 3d 1107 (Miss. Ct. App. 2016), <i>reh'g denied</i> (June 28, 2016).....	34
<i>Kuhn of Brownsville, Inc. v. Bituminous Cas. Co.</i> , 270 S.W.2d 358 (Tenn. 1954).....	43
<i>Lombard v. Sewerage & Water Board of New Orleans</i> , 284 So. 2d 905 (La. 1973)	43
<i>Maldonado v. Kelly</i> , 768 So. 2d 906 (Miss. 2000)	42
<i>McDonald v. Bd. of Mississippi Levee Comm'rs</i> , 832 F.2d 901 (5th Cir. 1987)	30
<i>Michigan Chem. Corp. v. Am. Home Assur. Co.</i> , 728 F.2d 374 (6th Cir. 1984)	43
<i>Miss. Dep't. of Human Servs. v. S.W.</i> , 111 So. 3d 630 (Miss. Ct. App. 2012).....	42, 43
<i>Mississippi Dep't of Trans. v. Allred</i> , 928 So. 2d 152 (Miss. 2006).....	43
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979).....	24, 48
<i>Pollan v. Wartak</i> , No. 2015-IA-01762-SCT, 2017 WL 6051186 (Miss. Dec. 7, 2017).....	49
<i>Pollard v. Hagan</i> , 44 U.S. 212 (1845).....	35
<i>Prentiss Cty. Bd. Of Educ. v. Beaumont</i> , 815 So. 2d 1135 (Miss. 2002).....	43

<i>Prosource Mgmt. Sols. v. Aetna Life Ins. Co.</i> , No. CIV.A H-09-3579, 2010 WL 299479 (S.D. Tex. Jan. 19, 2010).....	38
<i>Punzo v. Jackson County</i> , 861 So. 2d 340 (Miss. 2003).....	37, 38, 39
<i>Ran-Nan Inc. v. Gen. Acc. Ins. Co. of America</i> , 252 F.3d 738 (5th Cir. 2001)	43
<i>Sec'y of State v. Gunn</i> , 75 So. 3d 1015 (Miss. 2011).....	38
<i>Stuart v. Univ. of Mississippi Med. Ctr.</i> , 21 So. 3d 544 (Miss. 2009).....	46, 48
<i>Warren ex rel. Warren v. Glascoe</i> , 880 So. 2d 1034 (Miss. 2004).....	42, 43
<i>Watson Labs., Inc. v. State</i> , No. 2014-CA-01213-SCT, 2018 WL 372297 (Miss. Jan. 11, 2018).....	49
<i>Webb v. Braswell</i> , 930 So. 2d 387 (Miss. 2006).....	35
 Statutes	
15 U.S.C.A. § 78m.....	7
Cal. Gov't Code § 860.2	29
Fla. Stat. Ann. § 768.28 (2008).....	28
Fla. Stat. Ann. § 768.28	30
Fla. Stat. Ann. § 768.28	30
Miss. Code Ann. § 11-46-1	30
Miss. Code Ann. § 11-46-9.....	42
Miss. Code Ann. §11-46-15.....	22, 28, 33, 41, 42, 43, 47
Miss. Code Ann. § 17-17-1.....	6, 36, 37, 40
Miss. Code Ann. § 17-17-2.....	40
Miss. Code Ann. § 17-17-29.....	40
Miss. Code Ann. § 75-24-15.....	49
Miss. Code Ann. § 77-5-701.....	32

Miss. Code Ann. § 77-5-703.....	32
Miss. Code Ann. § 77-5-705.....	32
Miss. Code Ann. § 77-5-707.....	32
Miss. Code Ann. § 77-5-763.....	33
Miss. Code Ann. § 77-5-769.....	33
Miss. R. Civ. P. 53	48
Nev. Rev. Stat. Ann. § 41.031	29
Nev. Rev. Stat. Ann. § 41.035 (2006).....	26
Nev. Rev. Stat. Ann. § 41.035 (1995).....	29

Other Authorities

Mississippi Constitution, Article 3, Section 17	33, 34, 35
Charter of the City of Jacksonville § 21.01	19
1 <i>Civ. Actions Against State & Local Gov't</i> § 6:14	43
26 Am. Jur. 2d <i>Eminent Domain</i> § 21 (2016).....	35
29A C.J.S. <i>Eminent Domain</i> § 23 (2016)	35
The Restatement (Second) of Torts § 944	39

STATEMENT OF THE ISSUES

1. Did the trial court properly apply *Hyatt II* to a foreign governmental entity, entitled to limited sovereign immunity in Florida, by holding that Full Faith and Credit requires the foreign governmental entity to be treated no worse than a similarly situated Mississippi governmental entity and it is therefore entitled to the limited waiver of sovereign immunity under the MTCA?

2. Was it within the trial court's discretion to deny an amendment to add inverse condemnation/environmental claims to a construction defect case pending for six years where: discovery was closed; the plaintiff repeatedly assured the court it is not making environmental claims; the plaintiff excluded any such claims in related insurance litigation; the plaintiff failed to exhaust its administrative remedies for such claims with the MDEQ; and, the defendant is a foreign governmental entity lacking the power of eminent domain in Mississippi?

3. Did the trial court properly grant summary judgment denying injunctive relief where the plaintiff has calculated its alleged damages; does not claim any continued actions by defendant; and the requested injunctive relief invades the exclusive jurisdiction of the MDEQ?

4. Did the trial court properly grant summary judgment on the issue that the use of a soil additive product during construction of a shopping center alleged to have caused heaving and swelling damage is one occurrence, especially where the plaintiff alleged in parallel insurance litigation that this use constituted an occurrence?

5. Did the trial court correctly find that a foreign governmental entity did not waive its constitutional right to Full Faith and Credit where it timely asserted the defense in its original answer and answer to an amended complaint, and where the defense only provides for a limitation on damages that is not case dispositive?

STATEMENT OF THE CASE

This is a construction defect case brought by a shopping center (Promenade) and its Tennessee owner/developer (CBL) against their general contractor (EMJ), sitework contractor (M. Hanna), geotechnical engineer (Gallet), a soil additive product manufacturer (LA Ash), and the Florida municipal utility (JEA) that supplied ash used as a component in LA Ash's manufacture of its soil additive product (OPF42). CBL/Promenade began construction on the shopping center in 2008. The owner/developer discovered heaving and swelling problems with the soil in the Spring of 2009, but continued construction which was completed in October 2009. In 2010, CBL/Promenade filed this construction defect case in Mississippi state court. Over the next seven years, it also sued its own insurers in Mississippi federal court and the general contractor and its insurers in Tennessee state court, seeking insurance coverage related to this construction project. CBL/Promenade also filed multiple public records lawsuits against JEA in Florida. Prior to the Supreme Court's decision in *Hyatt II*, CBL/Promenade settled the Tennessee insurance litigation and with all of the parties in this case, except JEA, for approximately \$██████████. It, however, has spent only \$██████████ on repairs and store owner settlements. The shopping center is fully occupied and successful.

Due to the issue of personal jurisdiction not being decided for more than two years, JEA first answered the 2010 complaint in late 2012. It raised subject matter jurisdiction, comity, Full Faith and Credit and sovereign immunity among other defenses. Simultaneously, JEA moved to dismiss for lack of subject matter jurisdiction. After discovery closed in 2015, CBL/Promenade filed its second amended complaint and asserted additional claims against JEA, including physical invasion of property. JEA answered, denied the new allegations, and reasserted all previous defenses. The Special Master denied JEA's subject matter jurisdiction motion shortly thereafter on May 28, 2015. This ruling was consistent with the law of subject matter

jurisdiction at the time under *Hyatt I* and this Court's decision in *Church v. Massey*.

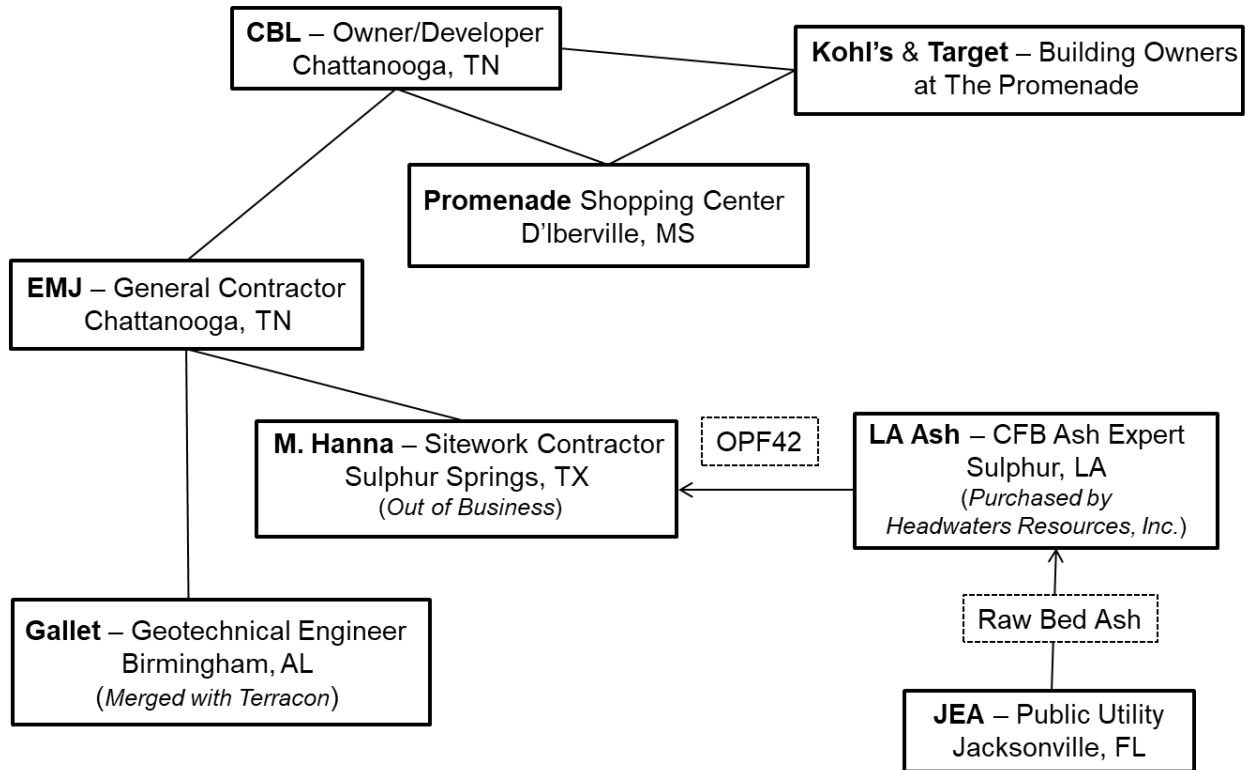
The Supreme Court decided *Hyatt II* on April 19, 2016. JEA filed its Motion to Reconsider on May 6, 2016. After the trial court correctly applied Full Faith and Credit to JEA pursuant to *Hyatt II*, Promenade made three attempts to avoid application of the Mississippi Tort Claims Act ("MTCA") limitation on damages. First, CBL/Promenade sought leave to amend for a third time to try to turn this construction case into an inverse condemnation and environmental case, despite the fact that JEA is not a Mississippi governmental entity with eminent domain power in Mississippi, and despite its repeated assurances to the court that it was not making environmental claims. CBL/Promenade also sought to advance its injunctive relief claim for the first time in six years, even though it had calculated its damages and its basis for injunctive relief would invoke the exclusive jurisdiction of the Mississippi Department of Environmental Quality ("MDEQ"). Finally, Promenade attempted a one-hundred-eighty-degree reversal of course from its insurance coverage cases, wherein it asserted that the use of the soil additive product was **an** occurrence, by arguing that the use of the product be considered multiple occurrences counted by the railcar shipments of JEA's ash to the product's manufacturer/seller, LA Ash. The trial court denied these attempts to avoid *Hyatt II* and the MTCA cap on damages. This appeal ensued.

STATEMENT OF THE FACTS

Promenade spends the majority of its fact section (Appeal Br. at 6-20) trying to rewrite this construction defect case into an environmental case involving solid waste with the hope that it might avoid the trial court's proper application of *Hyatt II*. JEA provides the following factual background so that the trial court's rulings applying *Hyatt II*, as well as its rulings on Promenade's attempts to avoid *Hyatt II*, are viewed in the proper light. The trial court understood that this case is about a construction project and the knowing use of an ash soil stabilization product by the project's developer and its contractors and engineers.

I. The Players In The Promenade Project

The nine parties who litigated this construction defect case for nearly seven years are: CBL & Associates Properties, Inc. (“CBL”), the Tennessee developer and owner of The Promenade shopping center (“Promenade”); EMJ Corporation (“EMJ”), the general contractor; M. Hanna Construction Company (“M. Hanna”), the sitework contractor; Gallet & Associates (“Gallet”), the geotechnical engineer; LA Ash, the manufacturer of the OPF42 ash product; Kohl’s and Target, owners of two major parcels/stores in the shopping center; and, JEA, a “municipal power authority and body politic of the City of Jacksonville, Florida” that supplied raw ash to LA Ash that it used to manufacture its OPF42 product. (R.6406). The following illustration depicts these relationships:



A. Promenade and Its Owner, CBL

CBL, headquartered in Chattanooga, Tennessee, took over the Promenade project in 2008. CBL has developed numerous mall properties like The Promenade throughout the country. CBL was formerly a party to this litigation. EMJ, a construction company, is also

headquartered in Chattanooga in same office complex as CBL. During the construction of this project, this lawsuit, and two related insurance coverage lawsuits, “[c]ertain executive officers of [CBL] and members of the immediate family of Charles B. Lebovitz, Chairman of the Board of [CBL], collectively have a significant noncontrolling interest in EMJ, a construction company that [CBL] engaged to build substantially all of [CBL]’s development Properties.” (ROA.5906 – CBL’s 2013 Annual Report and SEC Form 10-K at 140-41).

On April 8, 2010, CBL/Promenade filed its First Amended Complaint against EMJ, M. Hanna, Gallet, LA Ash, and JEA in the Circuit Court of Harrison County, Mississippi seeking damages arising from the use of OPF42 as a soil stabilizer. (R.134-35). It specifically alleged that “LA Ash manufactured, produced, marketed, distributed, assembled and/or supplied **a product** that was used on the Project called ‘**OPF42**’; Promenade is an entity that LA Ash might reasonably have expected to use, consume or be affected by OPF42; JEA was a source supply of components of OPF42” and “a substantial portion of the OPF42 that LA Ash caused to be supplied for use at the Project included JEA Products.” (ROA.131-32 (emphasis added)).

i. The Promenade’s History.

a. The use of the ash product, OPF42.

This case has always been about the use of a soil additive product, OPF42, on a construction project. Indeed, CBL/Promenade’s Project Manager, Jennifer Greer, testified that “we would not be here if the -- if no OPF42 was used in the site.” (R.6981). After the close of discovery, which included 52 depositions, Promenade filed a second amended complaint in March of 2015 and repeated all of the previous allegations in the first amended complaint “as if fully rewritten herein.” (R.4431-32). Promenade’s new claims alleged that: “[t]he **use** of the JEA Products at the Project effected a physical invasion of Plaintiff’s land . . . ; [s]aid **use** also constitutes **a** nuisance, nuisance per se, and/or trespass; [and] [a]s **a** proximate result of the said

physical invasion, Promenade has suffered damages” (ROA.4432 (emphasis added)).

b. Assurances that this is not an environmental case.

Neither Promenade’s 2010 complaint (R.126-75) nor its 2015 amendment (R.4431-32) asserted environmental claims, and neither alleged that OPF42 or “JEA products” are solid waste. Such allegations first appeared in Promenade’s 2016 proposed third amendment in which it alleges JEA violated Mississippi’s Solid Waste Disposal Law, Miss. Code Ann. § 17-17-1, *et seq.* The trial court denied this amendment. (R.6414). In its Omnibus *Hyatt II* Order, the court noted that “Promenade has repeatedly assured the Court that it is not making environmental claims. Regardless, since the case has been pending since 2010, Promenade had the opportunity to pursue any administrative remedy it may have with MDEQ with respect to remediation or cleanup.” (R.6416 at n. 5).

Since 2010, Promenade assured the trial court on at least three occasions that it was not making environmental claims. It did so most recently at the hearing on its motion for leave to file its Second Amended Complaint, which added claims for physical invasion of property and common plan or scheme claims many months after the close of discovery:

CBL/Promenade’s Counsel: “. . . All we’ve added is a nuisance count and a common design scheme count between JEA and LA Ash. . . . In looking at the response by JEA, they seem to center on the question that we had -- statements that there was [sic] no environmental claims. **There still are no environmental claims.** Nuisance is not an environmental claim. Environmental claim would be CERCLA, EPA, those type of violations. **We’ve not made those claims.**”

(R.6311 (emphasis added)). Earlier, during discovery, Promenade professed to the Court that it was “**not making environmental claims in here**” (R.Tr. 306 (emphasis added)).

Promenade first admitted to the absence of environmental issues at a hearing on August 23, 2013—“And those two [public records requests] that are before the court next week in Florida have nothing to do [with this case]. **They’re environmental issues. They’re not an issue that**

has been put in this case. . . . those public records requests are environmental issues unrelated to this case.” (R.Tr. 168 (emphasis added)).

Michael Lebovitz, CBL’s executive vice president and part owner, testified that CBL’s report on this litigation in its annual 10-K report to the Securities and Exchange Commission (“SEC”) and investors does not mention any environmental issues, problems, solid waste or hazardous waste with respect to The Promenade.¹ (R.6314-20). CBL’s annual report also states that it performs environmental assessments and believes that all of its properties are in compliance with environmental regulations. (R.6314-16). Mr. Lebovitz also testified he was not aware of any environmental issues at The Promenade. (R.6320 – “**Q.** Do you have any reason to believe that there are environmental issues with The Promenade that should have been reported in this document [the 10-K]? **A.** No.”).

c. CBL/Promenade’s permit certifications.

As part of the project, CBL/Promenade submitted permit applications to the MDEQ and U.S. Army Corps of Engineers (“USACE”) to use *clean fill* in the areas of the project that involved filling wetlands. (R.4771-75). However, CBL/Promenade’s jointly-designated corporate representative testified that it has not told MDEQ or USACE that it used a chemical drying agent, OPF42, in wetland areas:

Q. Has CBL/Promenade subsequent to the issuance of this -- at any time subsequent to the issuance of the permit that's associated with this application, has CBL and Promenade ever gone to the Army Corps of Engineers, the Department of Marine Resources, and the Mississippi Department of Environmental Quality and told those agencies that in the wetland areas we used a chemical drying agent?

A. Not to my knowledge.

(R.4775-78). In December of 2009, Jennifer Greer, CBL/Promenade’s Project Manager, certified the company complied with the Corps’ permits, after it knew no later than May of 2009

¹ Publicly traded companies (issuers of securities) are prohibited from knowingly falsifying information included in their annual reports. 15 U.S.C.A. § 78m (West).

that the OPF42 ash product had been used to dry the site's soils. (R.4783-85).

d. Recognizing and exploiting JEA's governmental entity status.

During discovery, CBL/Promenade not only recognized JEA's status as a Florida governmental entity, but used the Florida Public Records Act to conduct discovery. Indeed, it propounded more than 50 sets of Florida Public Records Requests ("PRRs") to JEA (R.Tr.1099), and filed seven lawsuits in Florida against JEA based on the Florida Public Records Act. (R.Tr.159 – mentioning one of CBL/Promenade's Florida Public Records lawsuits against JEA). In response to JEA's motion for protective order in this suit with respect to numerous PRRs, CBL/Promenade argued the trial court had no jurisdiction over Florida Public Records Law and the requests it was making to JEA thereunder. (R.Tr.154). While defending its use of more than 50 PRRs as a discovery tool, CBL/Promenade recognized JEA's status as a Florida public entity on numerous occasions. (R.979: "**This is a public entity . . .**"; R.Tr.170: "The laws have been passed to keep **public bodies like the county, like JEA** from withholding public records"; R.1103 – "Thank God **they are a public entity** and those documents are public documents" (Emphasis added)).

ii. CBL/Promenade's Other Related Lawsuits.

One year after it filed this lawsuit, in June of 2011, Promenade filed a declaratory judgment action against EMJ and EMJ's insurers in Tennessee state court. In that action, Promenade alleged, in both its complaint against one insurer and in its counterclaim against another intervening insurer, that "Promenade seeks coverage under the subject insurance policies for property damage caused by **an occurrence**, . . . , all as defined by the subject insurance policies." (ROA.5917 – *Complaint for Declaratory Judgment* at ¶ 1; ROA.5936 – *Answer ... to Complaint in Intervention of Zurich* . . . at p. 10, (emphasis added)). The subject insurance policies to which Promenade referred state that "exposure to substantially the same general

harmful conditions will be deemed to arise out of **one Occurrence**.” (ROA.5949 – National Union Insurance Policy (emphasis added)).² In its papers in the Tennessee insurance proceeding, EMJ summarized Promenade’s claims against it in this Court as EMJ “is liable for property damage and loss of use of the Shopping Center due to the **use** of a soil stabilizing **product**, known as OPF42, which has caused heaving and cracking of the parking lot and structures” (ROA.5960 – EMJ’s *Answer and Counterclaim to Complaint...for Declaratory Judgment* at p. 9 (emphasis added)). Promenade settled the Tennessee case with EMJ’s insurers for \$ [REDACTED] in 2014.

CBL/Promenade filed another declaratory judgment action related to this project in 2012, this time against its own insurers in Mississippi federal court. It once again alleged that the use of OPF42 caused its damages. Specifically, Promenade alleged that “a soil additive **used** by a contractor during the performance of the site work has reacted chemically and/or will react chemically with other subsurface materials to produce harmful effects, including but not necessarily limited to, the formation of ettringite crystals or similar compounds.” (R.5969 – *Complaint for Declaratory Judgment* at ¶ 20 (emphasis added)).

In both insurance cases, CBL/Promenade affirmatively alleged it was injured by a soil additive product, ***not a waste***. Had it alleged damage from a “waste,” it would have had no coverage and no [REDACTED] dollar settlement in the Tennessee litigation. For example, the “pollution exclusion” in National Union policy’s in the Tennessee case would have excluded coverage for an alleged “waste.” (R.5603, R.5653; *see also* R.5303-06).

B. The Contractors—EMJ and M. Hanna

On May 30, 2008, CBL and EMJ entered into a construction contract (“the Construction Contract”) wherein “EMJ agreed to perform certain work relating to the Shopping Center (the

² This definition of occurrence upon which Promenade relied is consistent with the meaning and application of “occurrence” under the MTCA, as discussed below in the Argument, Section III.D.

“Project”).” (ROA.129 – Amend. Compl. ¶ 12).

Pursuant to its obligations under the Construction Contract, on or about July 16, 2008, EMJ subcontracted a portion of the work required thereunder to M. Hanna (the “Sitework Contract”). “The Sitework Contract required M. Hanna to perform site demolition, earthwork, rough grading, excavation, backfill, compaction, soil stabilization, other building pad preparation, erosion control, road construction, and other related work.” (ROA.129) M. Hanna then integrated OPF42 it purchased from LA Ash into the sitework it performed on the Project. (R.5910-12 – 30(b)(6) Dep. of M. Hanna). In other words, there was a single contract for all sitework for the shopping center which included the use of any soil additives, like OPF42, for soil stabilization. “[A]n **ash product** was used as a soil additive in the shopping center project” and “M. Hanna . . . used the **ash product** to dry or stabilize the site’s soils as part of its earth work under the project’s sitework contract.” (R.6418 – *Hyatt II* Order (emphasis added)).

The general contractor, EMJ, knew it was working with an ash product:

Q. Okay. Well, let's go back to the time of -- you understand that LA **Ash** calls the product that they provided OPF42?

A. That's correct. I understand that.

Q. Okay. And at the time the OPF42 submittals were being submitted --

A. Correct.

Q. -- did EMJ believe that the product fell into one of the materials listed here?

A. I -- I think we believed that it was -- it would have fallen under the category of fly **ash**.

(R.5401 – EMJ’s 30(b)(6) Dep. (emphasis added)). The same is true for the sitework subcontractor, M. Hanna, as evidenced by its testimony:

Q. . . . And you said that had been used in the past?

A. We had used fly **ash**, as I said earlier, for 15 years in all kinds of applications for drying soil.

Q. Was this fly **ash** that you bought from LA **Ash**?

A. Yes, sir.

. . .

Q. So that's how you define fly ash, anything that comes from a power plant?

A. Yes, sir.

Q. Whether it's bed ash, fly ash or --

A. Yes, sir.

(R.5404-05 – M. Hanna 30(b)(6) Dep. (emphasis added)). M. Hanna testified that Gallet *tested and approved* its use of OPF42. (R.5911-12 – M. Hanna 30(b)(6) Dep.).

C. The Geotechnical Engineer—Gallet

EMJ also retained a geotechnical engineering and construction materials testing firm on or about July 2, 2008, Gallet, “to perform certain geotechnical testing and inspection work on the Project.” (R.131). Gallet knew it was testing and ultimately approving the use of the OPF42 ash product for soil stabilization. An email between Gallet personnel demonstrates this fact:

```
From: Steve Casey
To: Steve Winter
Cc: Tad Nelson
Sent: Thu Aug 07 12:53:15 2008
Subject:

Steve,

We just started a new job in D'Iberville, MS called the Promenade for EMJ. The situation we have is soils with high moisture content and not enough time in the schedule basically to let it dry naturally. So the contractor is shopping around for local suppliers of fly ash to use as a drying agent to bring down moisture and get compaction. One company called LA ash has a fly ash product that is called OPF42 and is a hydrated ash that contains some percentage of lime. It looks like dirt and is not powder like pure fly ash. We need to determine the proctor curve on the on-site soils and then on-site soils with OPF42 added by volume at 5%,10%,15% etc...

I have 15 gallons of this OPF42 that I picked up. We need to analyze this product with on-site soils as well as analyze on-site soils with both class C and class F pure fly ash as drying agents. This is a loss prevention measure for this job and is critical for satisfying our client on this one. Please let me know your thoughts on this. If we need more than 15 gallons of this material for testing let me know and I will get it.

Burns,Cooley and Dennis in Gulfport are performing swell tests for fly ash as a drying agent for fill below footings,slabs and we should be copied with their test results.
```

(R.5435 (emphasis added)). Gallet was also aware of and concerned about the possibility of OPF42 swelling. (R.5452: “ODF42 [sic] comes from LA Ash out of Louisiana ODF42 [sic] looks good to me, however, my concern is whether or not it may or may not swell.”). Indeed, Gallet’s engineering technician, Steve Casey, twice raised a concern about OPF42 swelling.

“Q. The -- and in the next paragraph, you say ODF42 [sic] looks good to me, however **my concern is whether or not it may or may not swell**. Now, you had raised the **swell concern** a couple of weeks earlier, had you not?

A. Yes.

Q. And you raised it again on August the 28th of 2008?

A. That's correct.”

(ROA.1884 (emphasis added)).

While Gallet knew it needed to perform swell tests, it did not test properly. Gallet performed a swell test with OPF42, but it did not perform a 30-day swell test before OPF42 was used on the project. (R.1893-94). Gallet’s engineer, David Been, testified that a Terracon technical bulletin in Gallet’s records stated “swell testing should continue for at least 30 days, with 45 days being recommended . . .” to determine if lime-sulfate reactions, like ettringite, may occur. (R.3145-47).³ Been also testified that Gallet did not perform any chemical testing on the project soils or OPF42, which would determine the potential of such mixtures to form ettringite⁴ after placement. (R.3144: “Q. But back in the -- August, September 2008 time frame, did Gallet do any of this chemical makeup testing of either The Promenade on-site soils or the OPF samples that were provided by LA Ash? A. No, sir, we did not.”).

Gallet’s own internal correspondence below between its employees, Steve Casey, David Been and Steve Winter, also called into question the experience of its personnel in testing and interpreting swell test results for ash products like OPF42:

³ Gallet produced in discovery a technical bulletin by Terracon (the entity it merged with) titled “Heave Induced by Lime-Sulfate Reactions” by Steve M. Levenson, Ph.D., P.E. (R.3196-3206).

⁴ A detailed discussion on ettringite and lime-sulfate reactions is included in the Report of JEA’s Designated Expert Dr. Thomas Robl at P.R.E.81-85.

From: Steve Casey
Sent: Sunday, September 21, 2008 2:21 PM
To: David Been
Cc: Steve Winter
Attachments: Promenade-PDF42 swell tests.XLS

I haven't had any experience interpreting swell test data. I assume this test confirms that swelling of soils treated with ODF42 is within standard tolerances for building pads and parking lots. I didn't have anything to compare it to in the spec book. Please let me know if it is alright.

*Steve Casey
Office Manager
Gallet and Associates Mid-Gulf*

(R.3100 – Gallet employees’ email re. PDF42 [sic] or ODF42 [sic] swell tests).

D. The Manufacturer of OPF42—LA Ash

LA Ash is an expert in the field of Circulating Fluidized Bed (“CFB”) ash. LA Ash “possesses extensive experience and knowledge with respect to the appropriate uses of its products.” (R.1841 – LA Ash’s RFA Resp.). LA Ash’s corporate representative and President and CEO testified: “**Q.** Did you have experience in the CFB use of ash that was greater than anyone at JEA? **A.** Yes. **Q.** To your knowledge, is that why they hired you? **A.** Yes.” (ROA.1819 – LA Ash 30(b)(6) Dep.). Other LA Ash employees testified similarly.

- Tommy Stewart, LA Ash’s Sales Director, testified that:
 - He did not know of anybody that had “more experience or knowledge than LA Ash in marketing this type of ash.” (R.1852).
 - “[JEA] trusted us to use the material from JEA appropriate[ly], not to use it in violation of law and hazardous to people or animals, vegetation, health, that we would not use it incorrectly.”
 - “LA Ash knows how to use the ash correctly.” (R.1855)
 - “LA Ash has a lot of experience and a lot of access to experts and has actually access [sic] to use these experts to help it analyze, understand, and better use the ash.” (R.1857).
- Jesse Hite, LA Ash’s COO, was asked: “Is there anybody in the United States in your opinion that has the expertise that LA Ash does from top to bottom in ash starting with the ash that’s created in the CFB boiler, the movement of that ash, the hydration of that ash, the marketing of that ash, and the reasonable and safe use of that ash? Is there anybody that you know of that has that range of expertise that LA Ash has?”

His answer was, “**to my knowledge, no.**” (R.1869 (emphasis added)).

Testimony from JEA’s witnesses likewise confirms LA Ash’s role as a CFB ash expert. During questioning about the initial relationship between JEA and LA Ash, which began soon after JEA’s Northside Generating Station’s CFB boilers first came on line in 2002, JEA’s Project Manager at the time, Vickie Cavey, was asked about whether LA Ash was training JEA employees to eventually take over LA Ash’s role. She responded, “They [LA Ash] weren’t training anyone. As a matter of fact, they [LA Ash] were the experts I turned to for almost everything.” (R.1879-80). JEA’s Byproduct Services Director at the time of the Promenade project, Scott Schultz, testified that “. . . LA Ash was an expert. They are an expert. In the industry they’re accepted as experts. We gave them product and subsidized transportation and expected them to use it, and that’s what we thought they did, in a proper manner.” (R.1832-33).

LA Ash’s original proposal to JEA to become its byproduct consultant and marketer stated, “LA Ash is the largest marketer of coke-fired CFB ash in the world;” “LA Ash knows CFB ash;” and, “LA Ash has built a database over the past 7 years of research & development information that it brings to the partnership, data on how the CFB ashes react in numerous environmental projects. . . .” (R.1511 – LA Ash’s Marketing and Sales Proposal of CFB ash from Northside Station Facility to JEA).

Companies that are ash experts, like LA Ash and Headwaters, can and do successfully use combustion ash products in construction projects.⁵ In 2014, Headwaters acquired LA Ash.⁶

⁵ *JEA’s Answer to Petition of Promenade for Interlocutory Appeal* at 5 n. 3 – “Headwaters’ Construction Materials . . . safely provides sustainable raw materials and products to the construction industry. Coal ash recycling is one of America’s greatest environmental success stories. Headwaters has long been a leader in coal ash recycling, managing and marketing more than 20 million tons of coal combustion products (annually) that would otherwise end up being discarded. Decades of experience transforming this byproduct into a strategic resource benefits infrastructure projects, the environment, and our economy.” See <http://www.headwaters.com/Our-Products-Services/Heavy-Construction/#Headwaters-Construction-Materials> (last visited Feb. 13, 2018).

⁶ *Id.* at 5. n. 3. (See <https://www.businesswire.com/news/home/20140714005935/en/Headwaters-Incorporated-Announce-Acquisition-Assets-LA-As> (last visited Feb. 13, 2018)).

i. LA Ash's Knowledge of Ettringite and Lime-Sulfate Swelling Reactions.

LA Ash was also knowledgeable about ettringite reactions with ash products that can result in swelling. LA Ash's Sales Director, Tommy Stewart, testified that:

Any CFB ash has alumina, and silica, and iron, and calcium, and sulfur. Alumina, calcium, sulfur, and water are the ingredients you need to make ettringite. So, you take any CFB ash and you mix it in water, you're going to make ettringite. And so, that's part of the chemistry of hydration of a CFB ash. *When* that happens is what's critical.

(R.3192 (emphasis added)). LA Ash's COO, Jesse Hite, also confirmed LA Ash's knowledge about ettringite in general (R.3177), and that of geotechnical firms (R.3179: "The geotechnical firms nowadays are very up on ettringite, the formation of it, what happens and that much more so than they were back 15, 20 years ago."). Mr. Hite also testified as to LA Ash's awareness that elements in soils, like aluminum and sulfur, can swell when mixed with OPF42. (R.3182: "**Q.** So is it your understanding then that the material as marketed under the name OPF42J could be expansive if there is either alumina or sulfur in the soil in which it is used? **A.** Yes.").

LA Ash's hydrated ash product, OPF42, is also designed to have a 42% expansion via the cementitious reaction of the remaining free lime. (R.3166 – Dep. of LA Ash's CEO Livengood ("**Q.** And the OPF42, is it any coincidence about the 42 being the 42 percent expansion; or is there a connection? **A.** That's exactly what it is.")).

ii. LA Ash's Manufacturing Process and Use of JEA's Byproduct Ash.

LA Ash manufactured its OPF42 product sold to the Promenade project using JEA's raw, unhydrated bed ash from its CFB (also known as "clean coal technology") boilers at its Northside Generating Station power plant in Jacksonville, Florida. The President and CEO of LA Ash made it clear that raw, unhydrated ash is not sold as the OPF42 product:

Q. Is the idea on the **unhydrated material** that it is obtained by LA Ash from the source and then sent directly to the customer without stopping and being dumped in a silo or otherwise handled by LA Ash at one of LA Ash's own processing facilities?

A. No. No. We may acquire raw material. If it goes -- and **it goes to our manufacturing facility**, it's basically a raw material that we're acquiring. We go through all the controls on that material, and so it's a raw material. It goes through our process, so we're not selling it on behalf of anybody else, you know. We're taking raw materials and going through our process facility, **manufacturing a product.**

(R.1817-18 – LA Ash 30(b)(6) Dep. (emphasis added)). Like other power plants, JEA paid LA Ash a transportation subsidy to avoid the greater cost of landfilling, and because the ash has a beneficial use. (P.R.E.0015-16).

LA Ash also performed chemical testing and analysis of JEA ash. LA Ash got “samples” of JEA’s raw bed ash every time it received a rail shipment, and LA Ash representatives testified unequivocally that they had dedicated testing and quality control which involved periodic chemical analysis. (R.3167 – Livengood Dep. (“**Q.** . . . After March 30 of 2007, did LA Ash continue to use JEA bed or fly ash in the production of OPF42? **A.** Yes. **Q.** And did -- did LA Ash do chemical analysis samples on a periodic basis of material that it received from any of these facilities that we've talked about? **A.** Yes.”; *see also* R.1861-62 –Stewart Dep. (“**Q.** And you have labs that work for you that have the capabilities of doing all kinds of testing and they, in fact, do testing for LA Ash? **A.** Yes. **Q.** And periodically whatever ash you sell is sampled and tested by these various labs? **A.** Yes.”)).

Jimmy Smith was the LA Ash employee most involved in the sale of OPF42 to the Promenade project, and he testified that **JEA had nothing to do with it.** “JEA had no contact with our customer.” (R.4482). He also debunked any notion that JEA was *pushing* LA Ash to take ash out of Florida so JEA could avoid the cost of landfilling which was greater than the cost of paying a rail subsidy. Mr. Smith responded to Promenade’s counsel as follows:

Q. Is it your recollection that Mr. Schultz [JEA’s Director of Byproduct Services] was encouraging you to continue to accept material from the Northside Generating Plant?

A. Mr. Schultz wasn’t encouraging us. We were taking material from him. I mean, he didn’t encourage us in any way. We

would call him if we had -- if we wanted more material or if we had projects coming on, but **he didn't encourage us in any way to take more material** that I recall.

(R.4489 (emphasis added)). Sales Director, Tommy Stewart, testified similarly. When asked if JEA was pushing LA Ash to take any ash, he answered: “**We approached JEA about getting the ash.**” (R.3193; *see also* R.4507: “**Q.** Was there pressure on LA Ash by JEA to move material? **A.** No. I would – no. We actually approached them about getting the material.” (emphasis added)). Besides JEA, LA Ash looked to other power plants, like NISCO, Cleco, Formosa, Georgia-Pacific, and Cedar Bay as suppliers of ash for its products. (R.4503 – LA Ash COO J. Hite Dep.; R.4511 – LA Ash Sales Director Stewart Dep.).

iii. LA Ash's Port Bienville, Mississippi Facility.

Sales Director Tommy Stewart explained that LA Ash invested in the Port Bienville facility pursuant to its business plan to try to develop the New Orleans market after Hurricane Katrina. (R.4514-15). He also explained that much of the ash from JEA was intended for the Shell/Motiva project in Texas, but when that project unexpectedly slowed or stopped, LA Ash “diverted it to Port Bienville.” (R.4509-10).

JEA had nothing to do with LA Ash's Port Bienville's manufacturing site. (R.4500 – J. Hite Dep. (“**Q.** And as far as Port Bienville is concerned, LA Ash was in control of that facility and made the decisions about how things were done at that facility? **A.** Yes, we did.”)). Rob Hite was in charge of Port Bienville for LA Ash. He testified that the process of manufacturing OPF42 was LA Ash's process. (R.4524). He also testified that JEA had no role in the selection, operation or employment at LA Ash's Port Bienville facility. (R.4523). LA Ash's CEO also confirmed that JEA was not involved in the manufacture of OPF42 sold by LA Ash to the Promenade or the Port Bienville facility. (R.4531-32).

The MDEQ, on the other hand, was aware of LA Ash's production of the OPF42 product

and had been to the Port Bienville processing facility. (R. 6404-05 – Livengood Dep.).

iv. OPF42 is a Product, not a “Solid Waste.”

Multiple states have determined that OPF42 made from JEA’s ash byproduct is not a solid waste. (R.6390-93 – Stewart Dep. (*No approvals for use of ash products required in Louisiana, Texas, and Alabama*)). Indeed, the Alabama Department of Environmental Management and the State of Louisiana wrote in letters that OPF42 is not regulated as or considered to be a “solid waste.” (R. 6391, 6393). CEO Gary Livengood also testified that he did not believe that a Beneficial Use Determination (“BUD”) or MDEQ’s permission was required for LA Ash to sell OPF42 in Mississippi:

Q. Out at what site?

A. They were out -- they had been out to the Port Bienville site.

Q. “They,” being **MDEQ**?

A. Yes. . . .

Q. Well, you said, “We”-- and I'm paraphrasing because I don't have it written down exactly, but that **you went to them and talked about it being a product, and they said that you could use it as long as you didn't create an environmental condition.**

A. Correct.

Q. Is the, “They,” in that answer the **MDEQ**?

A. That's correct.”

(R.6403-05 (emphasis added)).

E. The Public Utility—JEA

“JEA is a municipal utility and body politic located within the State of Florida.” (R.6409 – *Hyatt II* Order (citing R.4663 – Special Master’s Rep.). The Florida Legislature established JEA in 1967 (then as “Jacksonville Electric Authority”) as a “body politic and corporate” and provided JEA with “all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in the future could be, or could have been ... exercised by the City of Jacksonville.” *Fluid Dynamics Holdings LLC v. City of Jacksonville*, No. 3:14-CV-1454-J-

32MCR, 2017 WL 3723367, at *3 (M.D. Fla. Aug. 29, 2017) (citing Charter of the City of Jacksonville § 21.01). The City of Jacksonville is now a consolidated county/city government for Duval County, Florida.

“[B]ed ash from JEA’s power plant in Jacksonville, Florida was transported via 437 railcar loads to former defendant LA Ash’s processing facility in Port Bienville, Mississippi.” (R.6418 – *Hyatt II* Order). The raw, unhydrated CFB ash used by LA Ash to manufacture its OPF42 product sold to the Promenade project was produced at JEA’s Northside Generating Station (“NGS”). JEA’s NGS, like the Red Hills Power Plant in Ackerman, Mississippi,⁷ uses CFB technology and limestone to capture sulfur emission from the burning of coal or petroleum coke to create electricity. (R.5240; *see also* P.R.E.0064). In the combustion process, the limestone used to capture the sulfur is heated by the boiler resulting in large amounts of free or quick lime. (P.R.E.0064-65). Thus, the byproduct has the same desirable and useful characteristics as free or quick lime. (P.R.E. 0065).

In 2015-16, “[t]he second largest source of revenue to Jacksonville/Duval County was JEA. Last year, the utility transferred \$235 million to the city, about 24 percent of the budget.” (*JEA’s Answer to Petition of Promenade for Interlocutory Appeal* at 3 n.2 (quoting Max Marbut, *How JEA helps keep the lights on for city*, <https://www.jaxdailyrecord.com/article/how-jea-helps-keep-lights-city> (last visited Feb. 13, 2018))).

Besides propounding 50 sets of PRRs to JEA during this case (R.Tr.1099) and suing JEA in 7 Florida lawsuits under the Florida Public Records Act (R.Tr.159), CBL/Promenade deposed 24 current or former JEA employees or consultants over a total of 26 days. Subsequently, CBL/Promenade finally admitted to the Circuit Court that no evidence exists that JEA had any knowledge of, or involvement with, the Promenade project:

⁷ *See* www.pureenergyllc.com/projects/choctaw-generation-lp-red-hills-power-plant/, last visited Feb. 13, 2018.

THE COURT: With respect to my question about knowledge and consent, JEA has consistently taken the position, and it hadn't been disputed that I can tell that they never heard of Promenade until they got sued, that they that [sic] were not part of LA Ash's marketing and negotiating with M. Hanna or Promenade or anybody else with respect to putting this product under your shopping center.

MR. HOLLEMAN [CBL/Promenade's counsel]: **I don't disagree with that. They didn't know about Promenade at that time as far as we know.** But that doesn't have anything to do ultimately with the strict liability. . . .

(R.5977-78 (emphasis added)).

II. Monetary Damages Alleged

During the combined corporate depositions of CBL and Promenade taken by JEA, CBL/Promenade offered its "Promenade Damage Claims" document as an exhibit. (R.5854-61; *see also* R.5863-74 – CBL/Promenade 30(b)(6) Dep.). CBL/Promenade's document calculates its damages over a span of eight pages to be approximately \$120 million.⁸ The claimed damages include calculations for "remediation costs" and "taint . . . even after remediation is complete":

II. Repair and Remediation Costs.

The full extent of the property damage at the shopping center is not yet known, but includes not less than \$8,389,771 in incurred repair and remediation costs. The itemization of those costs is located at PDI_269634-269646 with supporting documents at PDI_221376-223173; PDI_258930-258934; and PDI_269616-269623.

In addition to the incurred repair and remediation costs, Promenade is claiming not less than \$64,159,581 in estimated costs associated with repair, mitigation and remediation of other areas at the shopping center. These figures are based on information supplied by others regarding the expected depths and densities of the deleterious material and a cost per square foot for removal and restoration. The following information is provided on a "not less than" basis, reserving all rights to seek additional relief.

⁸ *See* R.5836 at n.9 – Promenade's contract with EMJ to build the shopping center was \$44 million.

F. Damages To Reputation Or Marketability. Promenade is claiming not less than \$12,500,000 for damages to the reputation or marketability of the shopping center, including but not limited to a “taint” effect currently existing and projected to remain even after remediation is complete. The existence of the subsurface issues and continual remediation continue to impair Promenade’s ability to attract certain tenants/occupants to the shopping center that generate a larger customer base and are projected to result in depressed rental income and pad sales at the effected stores and throughout the shopping center in the years to come. Promenade specifically reserves the right to amend or supplement the damages enumerated herein.

(R.5855, R.5861 (emphasis added)).

III. Settlements & Remediation

“Promenade pursued defect claims against multiple non-sovereign defendants involved in the construction of the shopping center and attained monetary settlements from each of those defendants.” (R.6416 – *Hyatt II* Order at n. 6). CBL/Promenade has settled with all of the parties (and their insurers) who had knowledge of and participated in the construction of the shopping center—the general contractor (EMJ), the sitework contractor (M. Hanna), the geotechnical engineer (Gallet), and the supplier of OPF42 (LA Ash). It remediated thirty-seven (37) stores in the first few years after the shopping center was opened. (ROA.5847-50). It *spent approximately* \$ [REDACTED] on its remediation efforts and settlements with store owners, Target and Kohl’s, but it *collected approximately* \$ [REDACTED] in settlements and has performed little remediation in the last three to four years to a shopping center that is 100% leased and successful. (R.6300; R.5835, n. 6 & 7; R.2997).

SUMMARY OF THE ARGUMENT

JEA is a public utility for the consolidated government of the City of Jacksonville and Duval County in Florida. JEA is a body politic of the State of Florida entitled to sovereign immunity, and the limited waiver thereof, under Florida law. As such, according to the United States Supreme Court in *Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016), known as *Hyatt II*, Full Faith and Credit requires application of the Mississippi Tort

Claims Act cap (Miss. Code Ann. § 11-46-15(1)) to Promenade's claims against JEA in Mississippi. JEA, however, is not a Mississippi sovereign entity capable of exercising eminent domain in Mississippi. Since these facts and points of law are not legitimately debatable, Promenade's appeal brief attempts to rewrite this construction defect case into an environmental case about solid waste in hopes of avoiding the MTCA cap.

In the trial court's Omnibus *Hyatt II* Order that is the subject of Promenade's appeal, it describes this case as: "*a construction defect case* involving a large retail shopping center in D'Iberville, Mississippi" (Order at 1 (emphasis added)). Over the seven (7) years of this construction defect litigation, Promenade repeatedly assured the trial court that it is *not* making environmental claims. Yet, the third amendment Promenade sought to make to its complaint, which the trial court properly denied, would have converted the case to an environmental case and made it subject to dismissal for lack of administrative exhaustion.

Contrary to Promenade's assertions, this case does not involve the dumping of solid waste, but the knowing purchase and use of an *ash product* from a company named LA *Ash*. Promenade's contractors and engineers used the ash product, OPF42, in 2008 and 2009 with unsuitable soils, after improperly testing mixtures of the OPF42 product and soils. The unsuitable soils swelled after being mixed with the OPF42 product and exposed to water and caused damage to some of the buildings and parking areas in the shopping center. Promenade and its owner/developer, CBL in Chattanooga, Tennessee, knew about and acquiesced in the use of the OPF42 ash product by their contractors and engineers in the Spring of 2009—after it was known that mixtures of OPF42 and some soils had resulted in swelling. CBL/Promenade, however, continued construction and opened the shopping center in October of 2009.

In the nearly decade since the use of the OPF42 ash product, CBL/Promenade never pursued any environmental determination or cleanup action by the MDEQ. Instead, it certified

construction of the shopping center complied with all permits, including those issued by MDEQ and USACE. It also told other state and federal courts in insurance coverage lawsuits related to the project, as well as its stockholders in its annual reports, that the claims in this case were about the use of a product, *not* a solid waste, and more specifically, that its environmental assessments show that its properties are in environmental compliance. In other words, there are no environmental issues with the Promenade shopping center.

JEA timely and properly asserted Full Faith and Credit defenses in its answer to both the first and second amended complaint. JEA's subject matter jurisdiction motion which sought to apply the MTCA damages cap was denied under the precedent of *Hyatt I* and *Church v. Massey*. Within a month of *Hyatt II*, JEA moved for reconsideration, which was granted. Even if Full Faith and Credit was subject to waiver, there is no waiver here.

Besides its futile amendment, CBL/Promenade makes two other arguments in hopes of avoiding application of the MTCA cap required by *Hyatt II*. It argues it is entitled to injunctive relief, but it has monetized its alleged damages. It has also settled with the contractors and engineers who purchased, tested, and used the OPF42 ash product, as well as its manufacturer, LA Ash, for millions more than it has spent on any remediation. CBL/Promenade finally contends that *the use* of the OPF42 ash product by its contractors and engineers should be considered multiple occurrences under the MTCA. Such an assertion does not comport with the facts or the law, and is also contradictory to the position CBL/Promenade took in two other lawsuits involving insurance coverage for the defective construction of the shopping center.

The trial court was correct in its rulings in the *Hyatt II* Order, and with respect to its denial of Promenade's motion for leave to amend its complaint.

ARGUMENT

I. Hyatt II – The Evolution to Full Faith and Credit

The United States Constitution requires that Full Faith and Credit shall be given “in each state to the public acts” of every other state. In *Hyatt II*, the Supreme Court decided that Full Faith and Credit did not permit the forum state (Nevada) to apply a rule of Nevada law that awards damages against a California agency that are greater than it could award against a Nevada agency under similar circumstances. The Court applied Full Faith and Credit even though it had refused to do so in *Hyatt I*. Key cases in the evolution to Full Faith and Credit are *Nevada v. Hall*, *Hyatt I*, and the subsequent decision by the Nevada Supreme Court.

A. Subject Matter Jurisdiction.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Supreme Court addressed the **power** of a state to adjudicate a claim involving a sister state. In *Hall*, California residents injured in an auto accident in California with a University of Nevada vehicle on official business, sued in California. 440 U.S. at 411. The jury awarded more than \$1 million in damages. *Id.* at 413. With three justices dissenting, the Court rejected Nevada’s argument that the California court lacked subject matter jurisdiction over the university. *Id.* at 426-27. The Court also rejected Nevada’s motion in *limine* based on a Nevada statute which capped damages at \$25,000 for a similar claim against a Nevada university. *Id.* at 424. The Court reasoned that California “has unequivocally waived its own immunity from liability for the torts committed by its own agents and authorized full recovery even against the sovereign.” *Id.* Full Faith and Credit does not **require** the forum state to apply a sister state’s law in violation of its own legitimate public policy though “[i]t may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability.” *Id.* at 426. Thirty-seven years after *Nevada v. Hall*, the Supreme Court upheld its ruling on subject matter

jurisdiction in *Hyatt II* by the barest of margins, a tie vote which required affirmance.

B. Comity.

In 2003 the Supreme Court decided *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003), known as *Hyatt I*.⁹ This case was filed by Hyatt in Nevada against the California Franchise Tax Board (“CFTB”) and arose from an audit by the CFTB. *Id.* at 490-91. The CFTB contested Hyatt’s claim as to when he moved from California to Nevada. *Id.* The date of the move had tax, interest and penalty implications exceeding \$6 million. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 726 (Nev. 2017). Hyatt sought damages for negligence and intentional torts committed by the CFTB during the audit. 538 U.S. at 491. The Nevada Supreme Court decided in an unpublished opinion that the lower court should have declined to exercise jurisdiction over the negligence claim but that the intentional tort claims could proceed to trial. *Id.* at 492. As to the negligence claim, both states have similar immunity so there was reason to honor the law of California. *Id.* at 493. With respect to the intentional tort claim, however, Nevada had not conferred complete immunity for intentional torts whereas California had. *Id.* The U.S. Supreme Court granted certiorari to decide whether Full Faith and Credit required Nevada to give full faith and credit to California’s statute providing its tax agency with complete immunity from suit. *Id.* at 494.

The Court observed that a state’s sovereignty interests are not foreign to the full faith and credit command and held:

But we are not presented here with a case in which a State has exhibited a “policy of hostility to the public acts” of a sister state. *Carroll v. Lanza*, 349 US, at 413, 99 L. Ed. 1183, 75 S. Ct. 804. The Nevada Supreme Court sensitively applied principles of **comity** with a healthy regard for California’s sovereignty status, relying on the contours of Nevada’s own sovereign immunity from suit as a **benchmark** for its analysis.

⁹ The Mississippi Attorney General filed an amicus in support of California. *Franchise Tax Bd. of California v. Hyatt*, 2002 WL 31863327 (U.S.), 1 (U.S.Amicus.Brief, 2002)

Id. at 499 (emphasis added).

Hyatt's case then spent the next eleven years working its way through the Nevada Court system culminating in a decision by the Nevada Supreme Court. *Franchise Tax Board v. Hyatt*, 335 P. 3d 125 (Nev. 2014). At trial, Hyatt was awarded \$139 million on his tort claims and \$250 million in punitive damages. *Id.* at 130. The Nevada Supreme Court held that all of Hyatt's causes of action except for his fraud and intentional infliction of emotional distress claims failed as a matter of law. *Id.*

Despite the U.S. Supreme Court's ruling and rationale in *Hyatt I*, the Nevada Supreme Court rejected CFTB's argument that it was entitled to Nevada's statutory cap on damages for government entities under comity principles and stated that providing the Nevada caps "would conflict with our state's policy interest in providing adequate redress to Nevada citizens." 335 P. 3d at 153. California provided complete immunity whereas Nevada capped damages at \$50,000 under similar circumstances. *Id.* at 145-46; *see also* Nev. Rev. Stat. Ann. § 41.035 (West 2006).

As to punitive damages, both states provide for full immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, "we hold that under comity principles [C]FTB's immune from punitive damages." *Id.* at 154.

The decision by the Nevada Supreme Court to refuse to give the California agency the benefit of a cap that it would apply to a Nevada agency under similar circumstances brought *Hyatt* back to the United States Supreme Court for the second time by certiorari granted on June 30, 2015. *California Franchise Tax Bd. v. Hyatt*, 135 S. Ct. 2940, 192 L. Ed. 2d 975 (2015).

C. Full Faith and Credit.

Hyatt II, 136 S. Ct. 1277, 194 L. Ed. 2d 431, was decided on April 19, 2016. The Supreme Court framed the question as follows: "whether Full Faith and Credit permits Nevada to award damages against California agencies under Nevada law that are *greater* that it would

award against its own agencies in similar circumstances.” 136 S. Ct. at 1280. The Court found that Nevada has applied a special rule of law that evinces a “policy of hostility” towards California. *Id.* at 1281. The Court found that a statute is a “public act” within the meaning of the Full Faith and Credit clause. *Id.* In rejecting the Nevada Supreme Court’s decision, the Court observed that “with respect to damages awards greater than \$50,000, the ordinary principles of Nevada law do not ‘conflict’ with California law, for both would grant immunity.” *Id.* at 1282. Allowing damages to exceed \$50,000 violated both California and Nevada law. *Id.* The Supreme Court was dismissive of Nevada’s “excuse”—i.e. California’s agencies do not have sufficient oversight as compared to similar Nevada public bodies. *Id.*

In his dissent, Chief Justice John Roberts described the majority ruling as follows:

Today the court shifts course. It now holds that the Full Faith and Credit clause requires the Nevada Supreme Court to afford the Board immunity to the extent Nevada agencies are entitled to immunity under Nevada law. Because damages in a similar suit against Nevada agencies are capped at \$50,000 by Nevada law, the Court concludes that damages against the board must be capped at that level as well.

Id. at 1284. He explained that “[T]he court instead permits partial credit: to comply with the Full Faith and Credit clause, the Nevada Supreme Court need only afford the Board the same limited immunity that Nevada agencies enjoy,” not the complete immunity provided for under California law. *Id.*

II. The Trial Court Correctly Applied *Hyatt II*

The trial court “sought and received extensive briefing and oral argument from JEA and Promenade with respect to the application of *Hyatt II*.” (R.6406-07). The motion was argued June 30, 2016. The court found that the “Full Faith and Credit Clause requires this court to afford JEA, a ‘municipal utility and body politic with the State of Florida’ immunity to the extent Mississippi agencies are entitled to immunity under Mississippi law.” (R.6409). Under Florida

law, JEA would have immunity above \$200,000. Fla. Stat. Ann. § 768.28 (2008). A Mississippi political subdivision under similar facts and circumstances would have immunity above \$500,000. Miss. Code Ann. §11-46-15. The court held that “to deny JEA a cap on damages would be inconsistent with Florida and Mississippi law and would be a special rule of law that evinces a policy of hostility contrary to the Full Faith and Credit Clause.” (R.6410). “JEA must be given the sovereign immunity protection of the Mississippi Tort Claims Act where the policies of the foreign and forum state are **not** opposed to one another; i.e. application of damage caps.” (R.6411 (emphasis in original)).

Despite Promenade’s assertions to the contrary, there is no additional factual analysis necessary in this case to address whether “sufficient policy considerations” may justify a special rule of law that discriminates against Florida’s laws. (Appeal Br. at 27-33). The analysis mandated by *Hyatt II* is a legal comparison of the laws of the states at issue. Like in *Hyatt II*, the limitation of damages laws at issue here, Mississippi’s and Florida’s, are consistent and do not conflict. *Hyatt II*, 136 S. Ct. at 1282. The trial court properly reviewed the policies of Mississippi and Florida and recognized that both provided a framework for limited waiver of sovereign immunity for governmental entities. (R. 6411). Promenade claims entitlement to a special rule of law that ignores *Hyatt II* because it alleges JEA is an out-of-control, rogue polluter. Accepting this as true, *although it isn’t*, that is the exact argument rejected in *Hyatt II*—that the CFTB auditor was rogue and not subject to appropriate controls by the CFTB (unlike the controls Nevada would place on its auditors). (Appeal Br. at 32-33). Promenade argues that it has evidence of a lack of oversight of JEA by Florida which would change the *Hyatt II* analysis, but the Supreme Court refused to accept such an excuse in *Hyatt II*, stating:

The Nevada Supreme Court explained its departure from those general principles by describing California’s system of controlling its own agencies as failing to provide ‘adequate’ recourse to Nevada’s citizens. It expressed concerns about the fact that California’s agencies ‘operat[e]

outside’ the systems of ‘legislative control, administrative oversight, and public accountability’ that Nevada applies to its own agencies. Such an explanation, which amounts to little more than a conclusory statement disparaging California’s own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground is hostile to another State.

136 S. Ct. at 1282 (internal citations omitted). No additional facts were necessary for the trial court in this case to properly decide that Full Faith and Credit required the application of the limited waiver of sovereign immunity found in the MTCA to JEA. To do otherwise would evidence an impermissible policy of hostility towards the public laws of Florida, simply because JEA is a Florida governmental entity and not a Mississippi entity.

A. *Hyatt II* is On Point and Controls.

Promenade seeks to distinguish *Hyatt II* by arguing that: the trial court interpreted it “beyond that decision’s own holding with the effect of implicitly or effectively overruling binding precedents of the Mississippi Supreme Court” (Appeal Br. at 1); “JEA does not enjoy Eleventh Amendment immunity” (*id.* at 7); and, “JEA is not a ‘state agency’ nor is it funded by the State of Florida” (*id.* at 8, 20). Promenade speculates that the *Hyatt II* court would not have required Nevada to give Full Faith and Credit to the statutes of California (“A statute is a ‘public act’ within the meaning of the Full Faith and Credit Clause,” *Hyatt II*, 136 S. Ct. at 1281) *if* the case had involved a “lower level governmental” entity. (Appeal Br. at 20, 23).

Hyatt II does not consider some qualitative analysis of the character of the government entity. It requires the forum give appropriate respect to the statutes (public acts) of an equally dignified sister state. The California statute in *Hyatt II* provided for complete immunity to any **public entity or public employee**. Cal. Gov’t Code § 860.2 (West). The Nevada statute which served as a benchmark applied to “the state or any political subdivision.” Nev. Rev. Stat. Ann. § 41.035(1) (1995); *see also* Nev. Rev. Stat. Ann. § 41.031 (West). Mississippi likewise provides

immunity for the “State” and its “political subdivisions”—neither receiving more or less immunity than the other. Miss. Code Ann. § 11-46-1. Florida is the same. Fla. Stat. Ann. § 768.28 (West). It provides immunity for its “agencies or subdivisions” which include “. . . independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipality, including the Florida Space Authority.” Fla. Stat. Ann. § 768.28(2). *Hyatt II* is about giving Full Faith and Credit to the public acts of California. It had nothing to do with the relative importance of the California Franchise Tax Board.¹⁰

Promenade asked the trial court to “clarify” the decision that *Hyatt II* applied to “lower-level governmental entities.” (R.6412 – *Hyatt II* Order). It did. The court reaffirmed that “the *Hyatt II* analytical framework applies to JEA in this instance.” (R.6412-13). The court found that JEA is a municipal utility and body politic of Florida with sovereign immunity. (R.6412). The *Jetton* line of Florida cases relied upon by the trial court (R.6412-13) was recently reaffirmed in *Fluid Dynamics Holdings LLC v. City of Jacksonville*, No. 3:14-CV-1454-J-32MCR, 2017 WL 3723367, at *3 (M.D. Fla. Aug. 29, 2017) (“Florida circuit courts and federal district courts have continuously cited *Jetton* and ruled that Section 768.28 applies to JEA.”)

Finally, Promenade’s 11th Amendment “arm of state” argument is completely misplaced. The 11th Amendment prohibits the State from being sued in *federal court*. In determining 11th Amendment immunity the question is often “Who is the State?”¹¹ Promenade has sued JEA in state court. Whether JEA would be an arm of the state in an 11th Amendment context is

¹⁰ Indeed, on remand from the Supreme Court’s decision in *Hyatt II*, the Nevada Supreme Court analyzed application of its damages cap on Hyatt’s fraud and punitive damages verdict. In both instances, the court recognized that its cap would apply to “governmental agencies,” a “government entity,” and an “employee of the state of any political subdivision.” *Hyatt*, 407 P.3d at 740, 747.

¹¹ For instance, the court in *McDonald v. Bd. of Mississippi Levee Comm’rs*, 832 F.2d 901, 906-08 (5th Cir. 1987) held that the levee board was sufficiently distinct from the state such that it could be sued in federal court.

irrelevant here. As illustrated by the ruling in *Fluid Dynamics*, even where a federal court accepts subject matter jurisdiction of a claim against JEA (the only issue raised by the 11th Amendment), the court must still apply the limited waiver of sovereign immunity under Florida law with respect to its liability for the claim. *Id.*

B. The Status of *Church v. Massey*.

Promenade contends that the lower court's application of *Hyatt II* "effectively" overruled *Church v. Massey*, 697 So. 2d 407 (Miss. 1997). (Appeal Br. at 1, 23). In *Church*, an Alabama Junior College, Brewer State, claimed complete immunity under Alabama law for an automobile accident in Mississippi that injured a Mississippi resident. *Id.* at 409. The Mississippi Supreme Court held that Brewer State was not entitled to complete immunity. *Id.* at 410. If this case came before this Court today, the result would be the same as far as complete immunity is concerned since a similarly situated Mississippi Community College would not enjoy complete immunity. Brewer State would, however, be entitled to be treated no worse than a Mississippi Community College. Thus, the holding in *Church* is in line with *Hyatt II* if it is interpreted as follows:

A foreign governmental entity (such as Brewer State) enjoys no greater status under our tort law than any other similarly situated tort defendant (a Mississippi community college). We find no compelling public policy considerations which would dictate that Brewer State Junior College should enjoy immunity above and beyond those provided to our citizens (i.e. a Mississippi community college).

Church, 697 So. 2d at 410 (parentheticals added). Conversely, the application of *Church* would be entirely consistent with Full Faith and Credit, if the foreign government defendant had completely waived sovereign immunity for that type of claim.

The trial court was asked by Promenade to answer whether it had concluded that *Hyatt II* overruled *Church*. (R.5709). The court thoughtfully responded and said no. "Such a conclusion would be too broad of an interpretation of *Hyatt II*." (R.6413 – *Hyatt II* Order). The court

explained that:

Hyatt II mandates that JEA must be given the sovereign immunity protections of the MTCA where the policies underlying them are “not ‘opposed’ . . . [but] consistent” with the laws of the State of Florida.

(R.6413).

Church was decided in 1997, years before *Hyatt I* or *Hyatt II*. It can be reconciled with *Hyatt II*. However, to the extent, if any, that *Church* is inconsistent with the interpretation of the United States Constitution by the United States Supreme Court in *Hyatt II*, it must yield. *Gilland v. State*, 614 So.2d 370 (Miss. 1993).

C. The Joint Municipal Electric Power & Energy Law has *Nothing* to do with This Case.

Promenade also argues that Miss. Code Ann. § 77-5-701 *et seq.*, somehow excuses Mississippi from giving Full Faith and Credit to the public laws of Florida to the extent it can do so without violating its own law. (Appeal Br. at 30).¹²

Section 77-5-701, *et seq.*, is the Joint Municipal Electric Power and Energy Law. Its purpose is to authorize and promote Mississippi municipal electric systems to jointly own electric generation/transmission facilities with in-state or out-of-state partners. Miss. Code Ann. § 77-5-703. The Law defines a municipality as “created under the laws of this state [Mississippi].” Miss. Code Ann. § 77-5-705. In order to meet the present and future electric power and energy needs for their inhabitants/customers, the Law grants the power to Mississippi municipalities to own and operate electric power facilities with in-state or out-of-state partners. Miss. Code Ann. § 77-5-707. The section of the Law to which CBL/Promenade cites states:

Legislative consent is hereby given (a) to the application of the laws of other states with respect to taxation, payments in lieu of taxes, and the assessment thereof, to **any municipality** or joint agency created pursuant to this article which has acquired or has an interest in a **project**, real or

¹² Promenade appears to be quoting *its* own argument to the trial court as authority for one of its statements. (Appeal Br. at 30 n.114).

personal, situated **without the state**, or which owns or operates a project **without the state** pursuant to this article, and (b) to the application of regulatory and other laws of other states and of the United States to any municipality or joint agency which owns or operates **a project without the state**.

Miss. Code Ann. § 77-5-769 (emphasis added). In short, this Law allows a Mississippi municipality to acquire an interest in an out-of-state electric generation/transmission facility. If such occurs, then § 77-5-769 could come into play. Nothing like that is present in this case. JEA does not own an electric generation/transmission facility in Mississippi. JEA was sued over an ash product manufactured from its byproduct by LA Ash and used by Promenade's contractors and engineers to construct a shopping mall. The Circuit Court's application of the MTCA's cap pursuant to *Hyatt II* does not implicate, let alone offend, the Joint Municipal Electric Power and Energy Law.

Moreover, nothing about this Law affects a Mississippi municipality's sovereign immunity under the MCTA. To the contrary, the Law preserves that immunity for its employees acting "within or without" the territory of that municipality. Miss. Code Ann. § 77-5-763.

III. Efforts by Promenade to Avoid the Constitutional Limits on Damages

After the trial court's *Hyatt II* decision, Promenade made several attempts to avoid the limit on damages imposed by the Full Faith and Credit Clause of the U.S. Constitution. First, Promenade sought leave to amend its complaint to assert an inverse condemnation claim under Article 3, Section 17 of the Mississippi Constitution claiming that JEA took or damaged its property for public use. Next, Promenade dusted off its claim for injunctive relief which had been dormant since the Amended Complaint was filed in April 2010. Finally, Promenade claimed that "occurrence" as used in Miss. Code Ann. § 11-46-15 should be interpreted to be 437 railcar loads of ash and not the heaving and swelling damage resulting from the use of OPF42 by CBL/Promenade's contractors and engineers in building the shopping center.

A. The Inverse Condemnation Claim has No Basis in Law or Fact.

The trial court denied Promenade’s Motion to Amend to assert an inverse condemnation claim under Article 3, § 17 of the Mississippi Constitution. (R.6414 – *Hyatt II* Order). Such a claim was futile. In *Bradley v. Tishomingo County*, 810 So. 2d 600, 603 (Miss. 2002), this Court held that “Section 17 is not applicable except where private property is taken for **public use** by **public authorities.**” (Emphasis added). Promenade alleges no “public use” by Mississippi or its citizens. In fact, Promenade alleges the opposite—that a private shopping center was used as a dumping ground not for the benefit of Mississippi but to its detriment. In *Kelley, LLC v. Corinth Pub. Utilities Comm’n*, 200 So. 3d 1107, 1118 (Miss. Ct. App. 2016), *reh’g denied* (June 28, 2016), the public utility damaged a private development while installing water lines. This Court found “no plausible allegations that the alleged damage was for any ‘public use’” and that “[n]ot every tort committed by a governmental entity gives rise to an action for inverse condemnation.” *Id.* at 1118 (emphasis added).

The Supreme Court’s ruling in *Hyatt II* did not convert a Florida sovereign body into a Mississippi sovereign body with immunity under the MTCA. The MTCA applies to the State of Mississippi and its political subdivisions. JEA is entitled to immunity because it is sovereign under Florida law, and the Full Faith and Credit Clause requires that it be treated no worse than a similarly situated Mississippi political subdivision. The trial court understood that it could not convert JEA to a Mississippi political subdivision, but rather it simply looked to the MTCA as a benchmark to insure compliance with Full Faith and Credit. The trial court said:

The court’s implication here is that JEA is entitled only to those protections to which it is now entitled post-*Hyatt II*—not every protection of the MTCA Under *Hyatt II*, therefore, this Court is required to afford JEA the protection of a damages cap so as not to unconstitutionally apply a special rule of Mississippi law that is hostile to the sovereign status of its sister State of Florida.

(R.6413-14 – *Hyatt II* Order (emphasis in original)).

Further, JEA—a Florida sovereign—has no power of eminent domain in Mississippi whatsoever; it therefore is not subject to a claim under Section 17. In *Burkett v. Ross*, 86 So. 2d 33, 36 (Miss. 1956), this Court held: “We do not think that Section 17 of our state Constitution is applicable except where property is taken or damaged for public use by the public authorities or corporations, etc., **vested with the power of eminent domain.**” (Emphasis added).

A cornerstone principle of eminent domain law is that “no state can take or authorize the taking of property situated in another state, and each state holds all the property in its territory free from eminent domain of another state.” 26 Am. Jur. 2d *Eminent Domain* § 21 (2016); accord 29A C.J.S. *Eminent Domain* § 23 (2016). As the Supreme Court long ago recognized, the “right of eminent domain . . . belongs exclusively to the states within their respective territorial jurisdiction.” *Pollard v. Hagan*, 44 U.S. 212, 230 (1845). Numerous courts since then have held likewise. “Promenade does not dispute that JEA has no eminent domain power in Mississippi.” (R.5787). Without the power of eminent domain, JEA is not subject to a claim under § 17. Promenade has a claim for physical invasion. It theoretically could have a legal remedy for that, but not for inverse condemnation.

B. The Trial Court Properly Denied Promenade Leave to Amend its Complaint to add Environmental Issues.

The trial court was well within its discretion in denying the motion to amend to assert environmental issues. *Webb v. Braswell*, 930 So. 2d 387 (Miss. 2006). In *Webb*, this Court held that an amendment should not occur “when to do so would prejudice the defendant” because of “more discovery, preparation and expense.” *Id.* at 393, 394-95. For years and years this case has been about damage to the shopping center buildings because of heaving or swelling of the treated soils (performance issues). Further, CBL/Promenade “repeatedly assured the court that it is not making environmental claims.” (R.6416 at n. 5 – *Hyatt II* Order; see also *supra* at 6-7). And its

executives testified and represented to the SEC and investors that there are no environmental compliance issues with The Promenade. (R.6314-20; *supra* at 7). Promenade’s proposed amended complaint (R.5695-98), however, specifically seeks to invoke the Solid Wastes Disposal Law of 1974, Miss. Code Ann. § 17-17-1 *et seq.*, which has **no** application to performance issues and **only** relates to potential harm to the environment. MDEQ is charged with the duty to enforce this law. Miss. Code Ann. § 17-17-29.

Promenade cites *Crum v. City of Corinth*, 183 So. 3d 847 (Miss. 2016) and makes a “fairness” argument—since Mississippi immunity law changed, Promenade should be entitled to the amendment. In *Crum*, the plaintiff filed a MTCA claim against the city arising from a backflow of sewage into her home. *Id.* at 849. After losing at the trial court on a motion to dismiss, plaintiff appealed. *Id.* While the case was on appeal, this Court abandoned the public-policy function test with respect to discretionary function immunity. *Id.* at 851-52. This Court held that plaintiff “ought to be given the opportunity to redraft her pleadings in accordance” with the new test. *Id.* at 851. Promenade argues that the *Hyatt II* ruling by the trial court is a “dramatic change in the application of Mississippi’s immunity law.” (Appeal Br. at 34). But the MTCA was not changed by *Hyatt II*. *Hyatt II* requires Mississippi to give Full Faith and Credit to Florida law to the extent it can do so without doing violence to its own law. Since JEA has immunity under Florida law above \$200,000 and a similarly situated Mississippi political subdivision has immunity above \$500,000, *Hyatt II* simply requires that JEA be treated no worse than a Mississippi political subdivision. JEA is not a direct beneficiary of MTCA because it is not a Mississippi political subdivision. Its protection is via the Full Faith and Credit Clause with the MTCA limitations on damages used as a “benchmark.” (*See Hyatt I*, 538 U.S. at 499).

To permit a construction defect and product liability case to morph into an environmental case after discovery was closed and experts had been designated, none of whom opined on

environmental issues at The Promenade, would be extremely prejudicial to JEA. The trial court's Omnibus *Hyatt II* Order also indicates the judge was aware that if he allowed the case to become about environmental solid waste issues, Promenade would then be required to exhaust its administrative remedies with MDEQ under the Solid Waste Disposal Law (§ 17-17-1 *et seq.*) and *Georgia-Pacific Corp. v. Mooney*, 909 So.2d 1081, 1091 (Miss. 2005). (R.6416) Undue prejudice in the form of a new environmental case and delay for administrative exhaustion are two more reasons the amendment was properly denied.

C. Promenade is Not Entitled to Injunctive Relief.

An injunction requires proof by the party seeking an injunction that there is (1) an imminent threat of (2) irreparable harm for which there is (3) no adequate remedy at law. The trial court found that Promenade satisfied *none* of these requirements. Further, the trial court found that injunctive relief would be unavailable even if the court accepted as true Promenade's recent assertion that JEA has created a solid waste dump on Promenade's property that required remediation because MDEQ has primary jurisdiction which has not been exhausted. (R.6414-17 – *Hyatt II* Order).

i. There is no Imminent Threat of Irreparable Harm for which there is No Adequate Remedy at Law.

To get a mandatory injunction, Promenade must prove an “imminent threat of irreparable harm for which there is no adequate remedy at law.” *Punzo v. Jackson County*, 861 So. 2d 340, 347 (Miss. 2003). This Court in *Punzo* discussed the difficulty in meeting this standard:

Nothing is better settled in this state, and nothing is or ought to be better understood, than the rule that a mandatory injunction should never issue unless the right to it is so clearly and certainly shown that there can be no reasonable doubt of its propriety, no probability that the defendant can make any valid objection to it and no possibility that its justice can be controverted.

...

[A] mandatory injunction is a rather harsh remedial process and is not

avored by the courts. It is not regarded with judicial favor and is used only with caution and in cases of great necessity. The case must be one clearly disclosing irreparable injury to the complainant.

Id. at 347-48.

Promenade's property is **not** under any **imminent** threat. It sued JEA in April 2010. But it made no effort to pursue injunctive relief for more than six years, and then only after the trial court was considering JEA's motion to conform its earlier ruling with *Hyatt II*. (R.5139 – Promenade's Response to JEA's Motion to Reconsider). Promenade's "imminent threat" claim lay dormant until it was needed to avoid *Hyatt II*. The last OPF42 was incorporated into the soil in 2009 – and none since. There is no imminent threat.

There is also no **irreparable harm**. Promenade has sued and settled with EMJ, the general contractor; M. Hanna, the dirt work contractor; Gallet, the site geotechnical engineering and materials testing firm; and LA Ash, the manufacturer and seller of the OPF42. Promenade claims that "stroking a check" is inadequate; yet, it has accepted checks totaling more than \$ [REDACTED] from the parties actually involved in the construction. (R.6416, R.6300, R.5835, n.6 & 7, R.2997; *see also supra* 21). Promenade has used some of this money to make repairs where the swelling soil caused problems with slabs, building walls and parking areas. (R.5857-50). Promenade has spent approximately \$ [REDACTED] on repairs or in settlements to two stores, which leaves a windfall to Promenade of \$ [REDACTED]. (*Supra* at 21). An "injury is 'irreparable' only if it cannot be undone through monetary remedies." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). In the words of one court, "[a]n injunction is not the remedy for a problem that could be solved with a check." *Prosource Mgmt. Sols. v. Aetna Life Ins. Co.*, No. CIV.A H-09-3579, 2010 WL 299479, at *2 (S.D. Tex. Jan. 19, 2010). *Sec'y of State v. Gunn*, 75 So. 3d 1015, 1021 (Miss. 2011) ("In other words, if an adequate remedy at law existed, the harm would be 'reparable' rather than 'irreparable'").

Promenade has put a dollar figure on its damages acknowledging that they are reparable. Indeed, it submitted the “Promenade Damage Claims” document as an exhibit at its own corporate deposition taken by JEA. (R.5863-74; *supra* at 20-21). Over a span of eight pages, Promenade calculates its damages to be approximately \$120 million. (*Id.*). They include numerous calculations for “remediation costs” and “taint . . . even after remediation is complete,” which alone total more than \$76 million. (R.5855, R5861; *supra* at 21). In short, Promenade has calculated its damages, including for purported environmental clean-up, for remedying with a check. As a result, Promenade cannot now claim irreparable harm and seek injunctive relief.

The trial court correctly applied the *Punzo* standard and found that “Promenade cannot meet this standard because it has calculated its alleged damages.” (R.6416). Promenade cites *Punzo* but urges the court to follow The Restatement (Second) of Torts § 944. (Appeal Br. at 42-44). This Court has never adopted § 944. In fact, only four states and two federal courts have looked to § 944.

The trial court also noted that Promenade does not contend that JEA is continuing to place ash at the shopping center, and that Promenade “does not seek injunctive relief to stop ongoing actions or to prevent future imminent actions by JEA such that a mandatory injunction might be proper.” (R.6416).

Finally, the trial court rejected Promenade’s argument that application of a \$500,000 cap to JEA creates an inadequate remedy at law.¹³ It noted that the Legislature imposed full immunity then chose as a matter of public policy to provide a limited waiver of sovereign immunity up to \$500,000. “Were the court to accept Promenade’s argument, it would render the Legislature’s limited waiver of sovereign immunity meaningless. This court cannot find that such legislative actions create an inadequate remedy at law.” (R.6417 – *Hyatt II* Order). The

¹³ By comparison, in *Hyatt II*, the Supreme Court effectively reduced Hyatt’s damages awarded for fraud and emotional distress from \$86 million to \$50,000.

cap reflects a legislative judgment. It is presumptively fair.

ii. Promenade failed to exhaust its administrative remedies through MDEQ.

Even if the trial court accepted Promenade’s argument that JEA has created a solid waste dump that must be remediated, an injunction by the *court* is not an available remedy. The court correctly found that “were it to allow Promenade’s request for injunctive relief, it must then require Promenade to exhaust its administrative remedies with MDEQ.” (R.6416 – *Hyatt II* Order). It specifically cited the Solid Wastes Disposal Law of 1974, Miss. Code Ann. § 17-17-1 *et seq.* and *Georgia-Pacific Corp. v. Mooney*, 909 So. 2d 1081, 1091 (Miss. 2005), quoted as follows:

“To the extent that causes of action relate to the need for closure of a site or relate to the authority of MDEQ, a party must exhaust its administrative remedies prior to seeking relief from the courts.” “The Mississippi legislature has delegated authority to MDEQ in regard to solid waste management.” *Mooney*, 909 So.2d at 1090. MDEQ has the authority to enforce compliance and “may impose civil penalties, injunctive relief, remediation or cleanup.”

(R.6416 (quotations in original)).

MDEQ regulates solid waste. Miss. Code Ann. § 17-17-2. It has the power of penalties, injunction, and to recover the cost of remedial action. Miss. Code Ann. § 17-17-29. Section 17-17-29(4) provides that any person creating a need for “remedial or clean up action involving solid waste” shall be liable for the cost and MDEQ may recover the cost of same in Circuit Court. The primary jurisdiction of MDEQ is made clear in *Mooney*. In *Mooney*, Georgia-Pacific was sued by plaintiffs claiming that Georgia-Pacific dumped waste material on their property. 909 So. 2d at 1082. The trial courts (Circuit and Chancery) either would not hear or denied Georgia-Pacific’s motion to dismiss for failure to exhaust administrative remedies. *Id.* In reversing, this Court relied upon *Chevron U.S.A., Inc. v. Smith*, 844 So. 2d 1145 (Miss. 2002) which held that MDEQ had authority over compliance related to solid waste and that any claims

by plaintiffs that related to clean-up or remediation must be dismissed for failure to exhaust administrative remedies. *Mooney*, 909 So. 2d at 1082.

Finally, Promenade argues that an injunction is needed because of possible environmental regulatory actions. (Appeal Br. at 42-43). There are four problems with this argument. First, if future regulatory action is a concern, simply do what the law requires—exhaust the available administrative remedies. Second, using environmental concerns as justification for an injunction runs headlong into multiple representations Promenade made to the court that it was making **no** such claim and there were **no** environmental issues at this site. (R.6311, R.Tr.306, R.Tr.168, R.6416 at n.5; *supra* at 6-7). Third, CBL/Promenade certified to MDEQ and USACE that construction complied with the permits from those agencies. (R.4783-85, R.4775-78; *see supra* at 7-8). Finally, CBL/Promenade and its partially-owned general contractor, EMJ, assured the project’s insurers that the project was injured by a soil additive or soil stabilizing product, not by a waste which would have precluded coverage. (ROA.5960, 5969; *see supra* at 8-9). Thus, these assurances were given to **avoid** administrative exhaustion, the denial of insurance coverage, and because **no** environmental issues exist.

There is no question that OPF42 interacted with soil and water at the site causing swelling that damaged some of the slabs and structures. These are performance, not environmental, issues. This has been Promenade’s consistent theory. Promenade has now interjected “environmental issues” into the case to avoid the *Hyatt II* rule, but it runs headlong into its own prior representations and assurances, and most significantly, the duty to exhaust administrative remedies as found by the trial court.

D. There was One “Occurrence,” not Hundreds.

The trial court said the main question before the court “is what constitutes an ‘occurrence’ under Miss. Code Ann. §11-46-15.” (R.6417 – *Hyatt II* Order). It found that the

proper application of the MTCA was a question of law, *Maldonado v. Kelly*, 768 So. 2d 906, 908 (Miss. 2000) and that the statute, being in derogation of the common law, must be “strictly construed not to extend liability.” *Warren ex rel. Warren v. Glascoe*, 880 So. 2d 1034, 1037 (Miss. 2004). (*Id.* at R.6417-18). After giving “Promenade every benefit of the doubt,” the trial court rejected Promenade’s 437 railcars theory and held:

The court concludes that there can be only one occurrence in this case under the MTCA because the heaving and swelling damage to Promenade’s property is alleged to have been caused by the use of the ash product with the project’s soils as part of the sitework construction, not by the transportation of ash to Port Bienville or of the ash product to the project site in D’Iberville. The “occurrence” was the property damage caused by the use of the ash product.

(*Id.* at R.6418-19).

Promenade relies upon *Miss. Dep’t. of Human Servs. v. S.W.*, 111 So. 3d 630 (Miss. Ct. App. 2012) (per Carlton J., for an equally divided court). (Appeal Br. at 46-48). The plurality opinion in *S.W.* conflates the issues of complete immunity for discretionary functions under Miss. Code Ann. § 11-46-9(1)(d) with § 11-46-15 which limits damages “[I]n any claim or suit for damages . . . arising out of a single occurrence.” *Id.* at 633-34, 637, 645. The court in *S.W.* ruled that *each* breach of duty was subject to a new cap under § 11-46-15. *Id.* at 636-37. For instance, the trial judge in *S.W.* found that DHS missed eight meetings with the child, each of which constituted a separate occurrence entitling the child to the then existing cap multiplied by the number of missed meetings. *Id.* at 633, 660. The court also awarded separate damages for breaches of two other duties by DHS—duty to investigate and duty to provide counseling.¹⁴ *Id.*

The *S.W.* plurality opinion is of no precedential value. *Buffington v. State*, 824 So. 2d 576, 580 (Miss. 2002) (“It is true that a majority of all sitting judges is required to create

¹⁴ *S.W.* is admittedly a very tough case to apply the MTCA cap considering the child was repeatedly molested by two different state employees at two different facilities.

precedent, and therefore, it follows that a plurality vote does ‘not create a binding result’”).

Further, *S.W.* is at odds with Mississippi law. Statutes like the MTCA, which reaffirms sovereign immunity and provides a limited waiver of sovereign immunity, and are otherwise in derogation of the common law, are strictly construed **not** to extend liability. *Warren*, 880 So. 2d at 1037.

Three Mississippi appellate cases allude to or discuss what constitutes an “occurrence” under § 11-46-15. In *Prentiss Cty. Bd. of Educ. v. Beaumont*, 815 So. 2d 1135, 1137 (Miss. 2002), this Court relied on Section 11-46-15’s “single occurrence” language in holding that all claimants from a school bus accident were collectively limited to the aggregate liability limits of the County’s policy. The next year, this Court similarly held that Section 11-46-15’s “per occurrence” liability limit does not apply on a “per claimant” basis, even though multiple persons had been injured. *Allred v. Yarborough*, 843 So. 2d 727, 730 (Miss. 2003); *accord Mississippi Dep’t of Trans. v. Allred*, 928 So. 2d 152, 155-56 (Miss. 2006). By so holding in those two cases, this Court seemingly adopted what is known as the “Cause approach” to determining what constitutes an occurrence under the MTCA. The “Cause approach” considers an occurrence to encompass all claims and damages stemming from a single proximate cause.¹⁵

In *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 706-07 (Miss. 2005), an elderly lady who fell after exiting a city van at the medical center sued the city and the medical center in **both** tort and implied contract in an effort to have the cap apply twice. This Court held that while plaintiff may pursue two causes of action or theories, she cannot collect the

¹⁵ This is, by far, the majority approach among states. 1 *Civ. Actions Against State & Local Gov’t* § 6:14; *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982); *Michigan Chem. Corp. v. Am. Home Assur. Co.*, 728 F.2d 374, 379 (6th Cir. 1984); *Home Indem. Co. v. Anders*, 459 So. 2d 836 (Ala. 1984); *EOTT Energy Corp. v. Storebrand Int’l Ins. Co.*, 45 Cal. App. 4th 565 (1996); *Ran-Nan Inc. v. Gen. Acc. Ins. Co. of America*, 252 F.3d 738, 740 (5th Cir. 2001). The minority approach determines an occurrence by the number of injured persons or things. *See Elston-Richards Storage Co. v. Indem. Ins. Co. of N. Am.*, 194 F. Supp. 673, 682 (W.D. Mich. 1960), *aff’d sub nom. Elston Richards Storage Co. v. Indem. Ins. Co. of N. Am.*, 291 F.2d 627 (6th Cir. 1961); *Kuhn of Brownsville, Inc. v. Bituminous Cas. Co.*, 270 S.W.2d 358 (Tenn. 1954); *Lombard v. Sewerage & Water Board of New Orleans*, 284 So. 2d 905, 915–16 (La. 1973).

same damages under both even after having established liability under both. *Id.* at 711. In support of its holding, this Court relied on the rule that “[t]here can be but one satisfaction of the amount due the plaintiff for his damages.... Thus, double recovery for the same harm is not permissible.” *Id.* (internal quotations and citations omitted). With the abandonment of the public-policy function test in *Brantley v. City of Horn Lake*, 152 So. 3d 1106, 1112 (Miss. 2014) and the fact that any governmental entity may be “subject to several ministerial statutes and regulations” (*id.* at 1116), it is important to reaffirm that an occurrence under the MTCA encompasses all claims and damages from a single proximate cause.

i. The MTCA does not Support Promenade’s 437 Railcars Theory.

Until the *Hyatt II* ruling in this case, Promenade had consistently asserted that its property damage was caused by the *use* of OPF42. In 2010, Promenade filed this lawsuit seeking damages arising from **the use** of OPF42 as a soil stabilizer. (ROA.131-35)

Promenade made the same assertions in its insurance coverage lawsuits in Tennessee state court in 2011 and Mississippi federal court in 2012. In both cases, Promenade alleged that its damages were caused by **an occurrence** arising from **the use** of a soil additive [OPF42]. (R.5917, R.5936, R.5969; *supra* at 7-8). The insurance policies at issue considered “**All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence.**” (R.5949 (emphasis added)). Promenade settled the Tennessee case with EMJ’s insurers for \$ [REDACTED] in 2014.

After the close of discovery in this case, Promenade filed a second amended complaint in March of 2015 which reasserted all of the allegations in its prior complaint (R.4431-32), and in its new claims, asserted that “**[t]he use** of the JEA Products at the Project effected **a** physical invasion of Plaintiff’s land . . .; **[s]aid use** also constitutes **a** nuisance, nuisance per se, and/or trespass; [and] [a]s **a** proximate result of the said physical invasion, Promenade has suffered

damages” (ROA.4432 (emphasis added)).

This case has always been about *one project* and *one use*—the use of OPF42. Indeed, CBL/Promenade’s Project Manager, Jennifer Greer, testified that “we would not be here if the -- if no OPF42 was used in the site.” (R.6981 (emphasis added)). Despite its assertions in three lawsuits and multiple amendments to its complaint in this case saying otherwise, Promenade takes the contradictory position that the use of OPF42 somehow comprises multiple occurrences based on the mode of transportation of OPF42 to the project. (Promenade’s Br. at 18, 49). This is both incorrect and improper.

Clearly, neither the method of delivery of the OPF42 to Promenade’s property, nor the delivery itself, was the cause of Promenade’s alleged damages or the basis for its claims. It was the use of the OPF42 as a soil additive that caused damages. It is illogical to determine the number of occurrences based on the mode of transportation. Following such flawed logic, there would be only one occurrence were there a single truck large enough to carry the tonnage of OPF42 used, or if it could have been delivered by a single barge via the nearby river. If it had not already settled with all of the other defendants, Promenade would now be asserting differing numbers of occurrences for the same claim depending on the identity of the defendant in this action. For example, EMJ or M. Hanna were accused of one occurrence in incorporating OPF42 into the sitework in Promenade’s cases against their insurers. Or carrying Promenade’s flawed logic to its extreme, LA Ash could be accused of 1,300 occurrences for each of the truckloads of OPF42 delivered to the project.¹⁶ Finally, JEA is accused of 437 occurrences, equal to the number of railcars of raw ash transported from JEA to LA Ash. These theories don’t hold up and are inconsistent with the facts. As alleged and admitted by Promenade, only the use of OPF42 in the sitework caused Promenade’s damages. If the OPF42 had been delivered, but not

¹⁶ Promenade first advised the trial court at a status conference that there were 1,300 occurrences to match the truck loads of OPF42 delivered to the project by LA Ash.

used, Promenade would not have its current claims. Similarly, whether the OPF42 was delivered in a single load or a thousand, Promenade's claimed damages and their cause would be **identical**. Under the undisputed facts, and the law, the multiple shipments and use comprise just one occurrence.

E. Promenade's Assertion of Waiver has No Merit.

Promenade claims that JEA waived the Full Faith and Credit defense by participating in the litigation and waiting too long to assert this defense, with no reasonable explanation. (Appeal Br. at 28-29). It relies primarily upon *Stuart v. Univ. of Mississippi Med. Ctr.*, 21 So. 3d 544, 548 (Miss. 2009) and *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008). In *Stuart*, UMMC waited two-and-a-half years to move for summary judgment based upon plaintiff prematurely filing suit before the 90-day notice of claim had expired. 21 So. 3d at 548. In reversing summary judgment for UMMC, this Court found that UMMC provided no explanation for the delay and "doing nothing to prevent the case from proceeding is unreasonable and inexcusable." *Id.* This Court quoted from *East Miss. State Hosp. v. Adams*, 947 So. 2d 887 (Miss. 2007) as follows:

A defendant's failure to timely and reasonably raise and pursue the enforcement of any **affirmative defense** or other affirmative matter or right which would serve **to terminate or stay the litigation**, coupled with active participation in the litigation process will ordinarily serve as a waiver.

Stuart, 21 So. 3d at 548 (emphasis added).

In *Estate of Grimes*, this Court reversed summary judgment in favor of Dr. Warrington based on complete immunity because the doctor waited more than 5 years to move for summary judgment. 982 So. 2d at 369-70. This Court found that the doctor offered "no explanation" for the delay and "[a]ll of this [litigation and discovery] was an unnecessary and excessive waste of the time and resources of the parties and the court" *Id.* at 370. This Court again recited the

rule that a failure to timely pursue an affirmative defense which would serve to “terminate or stay the litigation” coupled with active participation will ordinarily serve as a waiver. *Id.*

To fit within the line of cases relied upon by Promenade, the defense must be (1) an affirmative defense that will serve to terminate or stay the litigation and (2) defendant must offer no reasonable explanation for the delay in raising the defense. In this case, none of those circumstances are present.

First, importantly, applying Full Faith and Credit as an affirmative defense does not terminate or stay the litigation. A matter is an avoidance or affirmative defense “only if it assumes the plaintiff proves everything he alleges or asserts, [and] even so, the defendant wins.” *Hertz Commercial Leasing v. Morrison*, 567 So. 2d 832, 835 (Miss. 1990). If Promenade proves everything it alleges, Promenade, not JEA, will win. In that event, JEA will move post-judgment for application of the cap required by *Hyatt II*. Miss. Code Ann. § 11-46-15(3) (If a verdict exceeds maximum dollar amount, the court shall reduce it so as to not exceed the cap).

Second, JEA has an abundantly reasonable explanation for the timing of its motion. JEA’s answer (R.840-97) was filed two-and-one-half years after the complaint naming JEA because the issue of personal jurisdiction was not finally decided until then. In its Answer, JEA raised subject matter jurisdiction, comity, Full Faith and Credit and sovereign immunity among other defenses. (R.841-43). Simultaneously with its answer, JEA moved to dismiss for lack of subject matter jurisdiction. (R.898-904). As to Full Faith and Credit, JEA’s Answer (R.841, R.843) provides as follows:

FIFTH DEFENSE

The United States Constitution and the Full Faith and Credit Clause require that JEA be afforded immunity from suit in the courts of a sister state.

. . .

TWELFTH DEFENSE

If this Court has jurisdiction over JEA, which JEA denies, and [JEA] is not completely immune, and if Florida Law does not control these issues, then this Court must, or under principles of comity should because Mississippi governmental utilities and entities are entitled to limited sovereign immunity, treat any claims or judgment against JEA and entities as limited as to scope and amount to the same extent as they would be against a Mississippi governmental utility, including all limitations on the amount of damages and limitations upon the availability of interest and/or exemplary damages.

On March 26, 2015, Promenade filed its second amended complaint to assert additional claims against JEA. (R.4431-35). JEA answered on April 6, 2015, denied the new allegations and reasserted all previous defenses. (R.4436-39). Shortly thereafter, the Special Master denied JEA's subject matter jurisdiction motion. (R.4660-63).

Since subject matter jurisdiction can never be waived, *Stuart*, 21 So.3d at 548, and with existing law stacked against it—*Nevada v. Hall*, *Hyatt I* and *Church*, JEA did not initially bring forward its motion in hopes that the law would change. JEA could not effectively argue subject matter jurisdiction because of *Nevada v. Hall*. It could not argue Full Faith and Credit because of *Hyatt I*. Left with a comity argument from *Hyatt I*, which was rejected in *Church* (“This case does not present a question dealing with the principle of comity”), it is understandable the Special Master rejected JEA's argument. The Special Master's ruling on May 28, 2015, was consistent with the law at that time with respect to subject matter jurisdiction. (R.4660-63). For these reasons, JEA did not object, and because the rule permits, but does not require, an objection. Miss. R. Civ. P. 53(g)(2).

On a separate timeline, the Nevada Supreme Court entered its decision on remand from the U.S. Supreme Court on September 18, 2014. The Supreme Court granted certiorari (for the second time) on June 30, 2015. *Hyatt II* was decided on April 19, 2016.

When *Hyatt II* decided how Full Faith and Credit should be applied in a case like this, on

May 6, 2016, JEA immediately filed its Motion to Reconsider and Revise Order to Comply with Subsequent Binding Decision of the U.S. Supreme Court. (R.5120-34). A change in the law that provides a defense that did not previously exist cannot be waived by asserting the defense within three weeks. Rulings in related state court litigation can first trigger the assertion of a defense even when a case has been pending for years. In *Watson Labs., Inc. v. State*, No. 2014-CA-01213-SCT, 2018 WL 372297, at *14 (Miss. Jan. 11, 2018), this Court rejected the State’s argument that *Watson* waived a statutory defense by not asserting it for almost seven years (“Thus, once *Watson* learned of the Sandoz verdict in late 2011, which awarded compensatory damages pursuant to § 75-24-15 even though not pleaded, it promptly filed the motion to dismiss. Such action was reasonable.”).

In two other recent decisions, this Court has rejected claims of waiver. In *Pollan v. Wartak*, No. 2015-IA-01762-SCT, 2017 WL 6051186, at *4 (Miss. Dec. 7, 2017), this Court found that in a complex malpractice action, the defendants did not waive a statute of limitations defense where they engaged in discovery related and unrelated to this defense, and plaintiff “has failed to show how she was prejudiced by the defendants’ delay in pursuing their statute-of-limitations defense.” The discovery and trial preparation in this case had to be done whether there was a cap or not. In another case, *Estate of Puckett v. Clement*, No. 2016-IA-00636-SCT, 2017 WL 4456739, at *2 (Miss. Oct. 5, 2017), this Court said the delay must be unreasonable. The 17-month delay in determining the proper executor was not unreasonable. *Id.*

Finally, the trial court rejected the waiver argument. “The standard of review for the waiver of an affirmative defense is abuse of discretion. [omitting cite] Under this deferential standard, we must affirm the trial court’s ruling unless there is a firm and definite conviction that the trial court committed clear error.” *Pollan*, 2017 WL 6051186, at *3. This Court in *Ashmore v. Miss. Auth. on Educ. Television*, 148 So. 3d 977, 982 (Miss. 2014) held “abuse of discretion is

the most deferential standard of review appellate courts employ.”

CONCLUSION

After extensive briefing and hearings, the trial court got it right. JEA is a Florida political subdivision and Full Faith and Credit under *Hyatt II* requires that JEA be afforded the same immunity and limited waiver thereof afforded to a similarly situated Mississippi governmental entity. In this case, that means should a jury award Promenade damages, JEA is entitled to the MTCA cap. The trial court also correctly rejected Promenade’s efforts to avoid application of the MTCA cap by: attempting to amend to add inverse condemnation claims based on supposed environmental violations; arguing it is entitled to injunctive relief; and, asserting that the use of OPF42 by its contractors and engineers involved multiple occurrences based on the mode of transportation of JEA’s raw bed ash to LA Ash’s processing facility. This construction defect case has always been about the use of a product, not modes of transportation. Promenade’s third amendment was properly denied because this is a construction defect case in which CBL/Promenade repeatedly assured the trial court, its investors and the SEC, and other courts that it was not making environmental claims, and because *Hyatt II* does not turn JEA into a Mississippi governmental entity capable of exercising eminent domain in Mississippi. Promenade is not entitled to injunctive relief because it monetized its alleged damages, and to order such would invoke MDEQ’s exclusive jurisdiction and administrative exhaustion. For all of the foregoing reasons, the trial court’s rulings in this case were proper and should be affirmed.

RESPECTFULLY SUBMITTED, this the 14th day of February, 2018.

JEA

/s/ Joe Sam Owen
Joe Sam Owen (MSB #3965)
OWEN, GALLOWAY & MYERS, PLLC
Post Office Drawer 420
Gulfport, Mississippi 39502-0420
jso@owen-galloway.com

/s/ H. Ruston Comley
Michael W. Ulmer (MSB #5760)
James J. Crongeyer, Jr. (MSB #10536)
H. Ruston Comley (MSB #102307)
WATKINS & EAGER PLLC
Post Office Box 650

Jackson, Mississippi 39205-0650
Telephone: (601) 965-1900
Facsimile: (601) 965-1901
mulmer@watkinseager.com
rcomley@watkinseager.com

ATTORNEYS FOR APPELLEE, JEA

CERTIFICATE OF SERVICE

I, H. Ruston Comley, do hereby certify that I have this day filed the foregoing with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record. I also certify that I have mailed, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to the following:

Honorable Christopher L. Schmidt
Harrison County Circuit Court
Post Office Box 1461
Gulfport, MS 39502-1461

Kyle S. Moran, Esq.
James G. Wylly, III, Esq.
PHELPS DUNBAR LLP
2604 13th Street, Suite 300
Gulfport, MS 39501
Counsel for Promenade

Tim Holleman, Esq.
BOYCE HOLLEMAN &
ASSOCIATES, P.A.
1720 23rd Avenue/Boyce Holleman Blvd.
Gulfport, MS 39501
Counsel for Promenade & CBL

Roland F. Samson, III, Esq.
SAMSON & POWERS, PLLC
Post Office Box 1417
Gulfport, MS 39502-1417
Counsel for Promenade

J. Jeffrey Landen, Esq.
Michael S. Jones, Esq.
MURPHY LANDEN JONES PLLC
Post Office Box 17534
Ft. Mitchell, KY 41017-0534
Counsel for Promenade

Daniel Knecht, Esq.
GRAYDON HEAD & RITCHEY LLP
312 Walnut Street, Suite 1800
Cincinnati, OH 45202
Counsel for Promenade

This, the 14th day of February, 2018.

s/ H. Ruston Comley
H. Ruston Comley