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

SUPPLEMENTAL BRIEF OF THE APPELLEE JEA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION & SHORT ANSWER

In its Order dated July 5, 2018, the Court requested supplemental briefing to address the following question:

> Would our declining to apply the damages caps of the Mississippi Tort Claims Act comport with the Full Faith and Credit Clause in light of the Mississippi Constitution's broad eminent domain provision, which constitutionally established Mississippi's policy of assuring that private property owners obtain due compensation for damage to land taken for public use? Miss. Const. Art. 3 § 17. For the purposes of the supplemental briefing question, the parties may assume that the remedy of inverse condemnation is not available against the State of Florida for damage to land situated in the State of Mississippi.

JEA answers the Court's question "no."[1] *Hyatt II*[2] controls the case before the Court. This case does ***not*** involve Art. 3 § 17 (hereafter § 17) or its underlying policies. This case is about the application of sovereign immunity to tort claims. Mississippi immunity law is consistent with Florida immunity law. Both provide limited immunity to political subdivisions. These laws are in no way repugnant or obnoxious to each other so there is no reason for Mississippi to refuse to give Full Faith and Credit to the Florida immunity statute consistent with *Hyatt II*.

The trial court spent months considering these issues and found no reason not to apply *Hyatt II*. The trial court properly ***denied*** Promenade's Motion to Amend to assert a claim under § 17 of the Mississippi Constitution. Since a § 17 claim is not at issue, and cannot be asserted in this case, it is irrelevant as a basis for recovery **or** as "a sufficient policy consideration" under *Hyatt II*. And, since the immunity laws of Mississippi and Florida are consistent there is no reason to search for a policy consideration to justify rejecting non-forum law.

[1] Stated another way: Does the public policy underlying Miss. Const. Art. 3, § 17 constitute a sufficient policy consideration to allow the Court to deny Full Faith and Credit to Florida's law of limited waiver of sovereign immunity for tort claims?

[2] The case of *Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277, 1278, 194 L. Ed. 2d 431 (2016) is referred to as *Hyatt II* throughout.

Section 17 was designed to protect private property from a taking by a ***Mississippi*** governmental entity. The case of *King v. Vicksburg* was decided shortly after the adoption of the present Constitution. 42 So. 2d 204 (Miss. 1906). In *King*, the Court emphasized that "Const. § 17 makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public." *Id.* Section 17 was intended to protect private property rights by requiring a Mississippi governmental entity to pay due compensation for private property taken for the public use of Mississippi citizens. As correctly assumed by the Court's question, inverse condemnation would not be a legally viable claim against JEA in this case. For that reason, the policy underlying § 17 could ***never*** be a sufficient policy consideration with respect to the application of immunity law to the tort claims in this case. To hold otherwise would require the Court to improperly engage in speculation and assumption concerning hypothetical and advisory determinations of fact.

Additionally, Promenade's attempts to paint JEA as a rogue polluter or solid waste dumper as the basis for generally equitable "sufficient policy considerations" are unsupported by the facts, contrary to repeated assurances made to the trial court and subject to judicial estoppel, and within the exclusive authority of the Mississippi Department of Environmental Quality (MDEQ). Consequently, even ***if*** JEA were a Mississippi governmental entity and the Court were to overlook Promenade's repeated assurances that this is not an environmental case, Full Faith and Credit would be irrelevant, but the requirement of administrative exhaustion would still bar such a claim.

ARGUMENT

I. Section 17 is Not a *Relevant* Policy Consideration

A. Full Faith and Credit has No Application to Condemnation Law.

Plaintiff has asked the trial court to apply Mississippi Law. JEA has ***not*** asked the court

to give Full Faith and Credit to Florida Condemnation Law, as it is legally irrelevant to this case. Property Law/Condemnation of land is inherently intrastate. No state can condemn land in another state. In *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1922), the Court said that "the power of eminent domain is an attribute of sovereignty, and inheres in every state" and is "deemed to be essential to the life of the state." And, a sister state's decree concerning land ownership in another state is ineffective. *Fall v. Easton*, 215 U.S. 1 (1909). Full Faith and Credit can ***never*** have any application to a claim of direct or inverse condemnation because the law of the forum will ***always*** be the only law applicable to the claim against that state's own governmental entity.[3]

The Full Faith and Credit sought here by JEA simply asks Mississippi to recognize that under Fla. Stat. Ann § 768.28, JEA is a Florida political subdivision entitled to immunity for amounts exceeding $200,000. The trial court initially rejected this request and applied Mississippi Law under the center of gravity test. After *Hyatt II* was decided, the trial court gave Full Faith and Credit to this statute but increased the cap on damages to any amount above $500,000 using the MTCA as a **benchmark**, just as Nevada should have done in *Hyatt II*.

Full Faith and Credit is not self-executing. A non-forum party must ***ask*** the forum to apply the law of a sister state. JEA has made no such request with respect to Florida condemnation law, and it would not make sense to do so. Neither Full Faith and Credit nor Florida condemnation law would apply to a § 17 claim, even if one existed in this case.[4]

B. JEA is Not a Mississippi Governmental Entity.

Giving Full Faith and Credit to the Florida statute does not transform JEA, a Florida

[3] *See Carroll v. Lanza*, 349 U.S. 408, 412 (1955) ("Full Faith and Credit does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy.").

[4] Mississippi policy in this regard is typical and no more broad or significant than the policy of most other States, as forty-seven States have a constitutional provision similar to § 17. Of those, twenty-seven include "or damaged" or words of similar import.

political subdivision, into a Mississippi political subdivision subject to § 17 of the Mississippi Constitution. Promenade argues that since the trial court created a "fiction" by limiting damages under *Hyatt II* that it is only fair to create a **real fiction** and deem JEA to be a Mississippi political subdivision subject to § 17 of the Mississippi Constitution. (Promenade's Reply Br. at 11-12, 23). Full Faith and Credit is not a "fiction" but a positive command from the United States Constitution. It provides that "Full faith and credit shall be given in each state to the public acts … of every other state." A statute is a public act. The Constitution envisions "50 individual and equally dignified states." *Hyatt II*, 136 S. Ct. at 1282. The trial court embraced the constitutional command.

The trial court applied Mississippi law and the Full Faith and Credit clause in a manner that respected both states. Since JEA has immunity above $200,000, the court gave effect to this Florida statute. Using the MTCA as a **benchmark** only and to make the Florida limited statutory immunity consistent with Mississippi law, the court limited damages to $500,000. The court did not transform JEA into a Mississippi political subdivision.[5] The court did not ***apply*** the MTCA but used it as a "benchmark," which is consistent with both *Hyatt I* (Comity) and *Hyatt II* (Full Faith and Credit).[6]

JEA is not entitled to the ***direct*** application of the MTCA. Miss. Code Ann. § 11-46-1(g) ("'Governmental entity' means the state [Mississippi] and [Mississippi] political subdivisions."). Promenade asked the trial court to apply the Florida Tort Claims Act jury trial provision, but not

[5] The question posed by the Court is "would our declining to ***apply*** the damages caps of the Mississippi Tort Claims Act comport with the Full Faith and Credit clause . . . ?" (Emphasis added). JEA has not asked the Court to ***apply*** the MTCA's cap. Instead, JEA has asked Mississippi to give Full Faith and Credit to Fla. Stat. Ann. § 768.28 consistent with *Hyatt II*, using the MTCA's cap as a benchmark.

[6] In *Hyatt I*, 538 U.S. 488 (2003), the Court noted that Nevada declined jurisdiction over the negligence claim because both states granted complete immunity for negligence. The Court allowed the intentional tort claim to proceed because Nevada did not completely immunize its own employees from such claims. The Court held that Nevada had sensitively applied principles of comity using Nevada's own sovereign immunity **"as a benchmark for its analysis."** *Id.* at 499.

inverse condemnation law. JEA requested a non-jury trial, which is consistent with the MTCA. The trial court consistently held that "JEA is not an employee or political subdivision nor enjoys any other status that would provide the protections afforded under the Mississippi Tort Claims Act." (R.4663). In denying JEA's request for a non-jury trial, the court held that *Hyatt II* "does not broadly hold that any foreign state agency sued in a sister state enjoys each and every sovereign immunity protection of that sister state; it is entitled to enjoy only those to which it would have otherwise been provided in its home state." (R.6411). The trial court carefully compared the law of Mississippi with the Law of Florida. (R.6410). Under Florida law, JEA would be subject to a jury trial. The MTCA provides for a nonjury trial. (*Id.*) Since the laws were in conflict, the court denied JEA's motion for a nonjury trial demonstrating again the careful comparative approach and a refusal to directly apply the MTCA. (R.6411).

To avoid *Hyatt II* and the limit on damages, Promenade urges the Court to treat JEA as a Mississippi political subdivision subject to § 17 of the Mississippi Constitution. (Promenade's Reply Br. at 23). That is a real fiction designed to do what *Hyatt II* rejected. JEA is not a Mississippi governmental entity and thus not subject to § 17 or its underlying policies.

C. Section 17 does Not Apply to a Foreign Governmental Entity.

Section 17 of the Mississippi Constitution does not apply to a private person or a foreign governmental entity.[7] Section 17 requires a Mississippi governmental entity taking or damaging private property for a public use to pay due compensation. In this case, there is ***neither*** a Mississippi governmental entity ***nor*** public use. Promenade argues that JEA built its whole argument on the assertions that it lacked the "power" of eminent domain. (Promenade's Reply Br. at 13). However, that is not the crux of JEA's argument. Even if it were, it would make no

[7] Article 3 § 17 of the Mississippi Constitution provides that "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; …."

difference under the facts here. Promenade cited a number of out of state cases for the proposition that a governmental entity can be sued for inverse condemnation even though the statutory power is absent. (*Id.* at 15-16). All of those cases, however, involved **a governmental entity *of the state in which the property was located*** and the case was pending. As an example, Promenade relies upon *Fountain v. Metropolitan Atlanta Rapid Transit Authority* ("MARTA"), 678 F. 2d 1038 (11th Cir. 1982). In that case, an Atlanta, Georgia service station owner sued MARTA in inverse condemnation. *Id.* at 1039. MARTA is a State of Georgia created agency but without the ***bestowed*** power of eminent domain. *Id.* at 1040. The district court held that since MARTA did not have the statutory power of eminent domain, it could not be sued for inverse condemnation. *Id.* at 1041. The Eleventh Circuit reversed holding that the bestowed power of eminent domain is not necessary. *Id.* at 1043-45. In *Fountain*, the property was located in Georgia, and MARTA was a Georgia state agency. *Id.* at 1039. *Fountain* and the line of cases Promenade cites deal only with whether a taking may occur where the condemning authority lacked the express power of eminent domain. None of the cited cases have any application to an out-of-state governmental entity "taking" property in the forum state, and ***all*** required public use.

Mississippi law is clear that only a ***Mississippi* governmental entity** can be sued under § 17 for inverse condemnation. This Court held in *Burkett v. Ross*, 86 So. 2d 33 (Miss. 1956) that § 17 applies only where property is taken or damaged for public use by the public authority "vested with the power of eminent domain." *See also City of Tupelo v. O'Callaghan*, 208 So. 3d 556, 573 (Miss. 2017) (quoting *Wells by Wells v. Panola Cty. Bd. of Educ.*, 645 So. 2d 883 (Miss. 1994) ("'…'takings' jurisprudence has concerned the rights of property owners—typically real property owners—to be compensated where ***the State's action*** somehow diminishes the value of their property …'")) (emphasis added)).

Promenade cites the earlier case of *King v. Vicksburg Ry & Light Co*., 42 So. 204 (Miss. 1906), but it fails to support Promenade's position that JEA could be subject to an inverse condemnation claim in Mississippi. In *King*, a Mississippi light company operating "under a franchise granted by the city" was sued in inverse condemnation for soot and smoke descending upon a neighboring property located in Mississippi. *Id.* at 204. The Court repeatedly referred to the power company as a "public authority," "public franchise," and being engaged in "public employment useful to society." *Id.* at 204-05. Although the opinion did not discuss whether the light company was expressly bestowed with the power of eminent domain, the facts involved a Mississippi public authority damaging land in Mississippi for a public purpose.

JEA is *not* a Mississippi governmental entity, it has no bestowed power of eminent domain in Mississippi, and the Promenade property was not taken or damaged for public use as required by § 17. Section 17 was intended to protect Mississippi private land owners and to assure that property taken was put to public use. *Id. at* 575 (quoting *City of Vicksburg v. Herman*, 72 Miss. 211, 215, 16 So. 434, 435 (1894) (applying Section 17 "for damages to [ ] property that may result from ***works for public use***." (Emphasis added)). It seems obvious that the public use contemplated by § 17 is a Mississippi (not a Florida) public use to benefit the citizens of Mississippi. Moreover, after years of extensive litigation, the trial court was well aware that the professional developer, contractors, and engineers knowingly purchased and used an ash product as a soil additive in Promenade's commercial shopping center, and that this was not done for a public use.

D. *Hyatt II* Does Not Allow for the Fictitious Application of § 17.

Using a law (§ 17) that has ***no*** application to the claims at issue as a "sufficient policy consideration" to avoid limited statutory immunity is precisely the type of "hostility" rejected in *Hyatt II*. 136 S. Ct. at 1282. In that case, the Court expressly rejected Nevada's explanation that

it was seeking to afford adequate redress to a citizen of Nevada who claimed harm by a rogue employee of a California political subdivision. *Id.* The Court reversed a million dollar fraud verdict holding that the verdict should be reduced to $50,000. *Id.* at 1280-81. Under California law, the California political subdivision had complete immunity whereas under Nevada law the damages for a similar agency were limited to $50,000. *Id.* at 1284. Allowing the million dollar verdict to stand was inconsistent with the law of both California and Nevada. *Id.* at 1282. In rejecting Nevada's argument, the U. S. Supreme Court focused on Nevada's claim that its citizens were entitled to "adequate redress" because California did not properly control its agency. *Id.* The Court said that this explanation of a "sufficient policy consideration" was "little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls, and cannot justify the application of a special and discriminatory rule."[8] *Id.* The argument made by Promenade is that Mississippi law and the application of *Hyatt II* does not provide "adequate redress" to a citizen of Mississippi for the "bad" acts of a Florida governmental entity. This argument was made and rejected in *Hyatt II*. And, as pointed out by the trial court, Promenade, unlike *Hyatt*, had other targets from which it sought and obtained redress. (R.6406, 6416 at n. 6). Promenade sued and settled with the insured general contractor, the insured and bonded dirt work contractor, the insured geotechnical engineer and the insured processor of OPF42 for many millions more than it has spent on repairs and store settlements. (R.6300, R.5835 at n. 6 & 7, R.2997; *infra* pp. 26-27).

Promenade ***never*** identified the policies behind § 17 as repugnant to Florida immunity law to justify ignoring *Hyatt II*. Instead, it argues that being a rogue polluter is more important or worse than being a rogue tax collector. (Promenade's Reply Br. at 12). In *Hyatt*, the

[8] Notably, the policy justification rejected by the Court in *Hyatt II related* directly to the tort claims and immunity statutes at issue. In contrast, the policies underlying § 17 are unrelated to the tort claims and immunity statutes at issue in this case.

plaintiff's tort claims were based on alleged facts of egregious conduct, including that the California auditor was alleged to have traveled to Nevada, peered through Hyatt's windows, rummaged through his garbage, contacted estranged family members and shared Hyatt's personal information inappropriately all in an effort to prove Hyatt lied about when he moved to Nevada to avoid California taxes. *Hyatt II*, 136 S. Ct. at 1284 (dissent). Hyatt was referred to by this auditor in anti-Semitic terms and "trophy-like pictures" were taken in front of his home. *Id.*

Promenade argues that its interest in adequate redress when balanced against the actions of an alleged out-of-state polluter should tilt the Full Faith and Credit analysis in its favor. (Promenade's Reply Br. at 23). However, this "balancing of interests" approach to resolve conflicts of law under the Full Faith and Credit Clause was rejected expressly in *Hyatt I,* 538 U.S. at 498-99, and *Hyatt II,* 136 S. Ct. at 1283. The Court refused to compare the importance of tax collections to providing adequate redress to Mr. Hyatt in *Hyatt I* and *II*, *id.*, or the importance of highway safety with public education in *Nevada v. Hall*, 440 U.S. 410, 424 (1979). The Court noted in *Hyatt I* that past experience counsels against the balancing approach suggested by the California Franchise Tax Board:

> If we were to compare the degree to which the alleged tortious acts here and in *Hall* are related to a ***core sovereign function***,[9] we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other.

538 U.S. at 499 (emphasis added).

[9] Promenade makes the argument that legislated immunity is not entitled to the same respect as inherent immunity. It claims that "JEA's so-called public status is gratuitous, extended by the Florida legislature to it and other entities outside those performing core (and thus inherently sovereign) governmental functions" and "a legislated immunity cannot be the triggering event for the 'partial credit' immunity of *Hyatt II*" (Promenade's Reply Br. at 8). In support of its argument, Promenade relies exclusively upon the amici briefs in *Hyatt I* (Promenade's Reply at 9-11). However, the Court in *Hyatt I* addressed and rejected this same argument and refused to give "inherent immunity" more weight than "legislated immunity." 538 U.S. at 499. The source of JEA's sovereign immunity is irrelevant to the issues at hand.

Hyatt II built upon *Carroll v. Lanza*, *Nevada v. Hall* and *Hyatt I*. In explaining what constitutes a sufficient policy consideration to justify a refusal to give Full Faith and Credit, the Court explained that an ***actual conflict*** is required between the law of the forum and a sister state. Carroll lived in Missouri and worked for a Missouri contractor. 349 U.S. at 409. After being injured on a job in Arkansas, he filed a workers' compensation claim in Missouri against his employer. *Id.* Later he sued the general contractor in Arkansas in tort. *Id.* at 410. The general contractor raised the law of Missouri as a bar. *Id.* Missouri prohibited third-party claims. *Id.* at 409. Arkansas did not. *Id.* at 410. Thus, the laws were repugnant to one another. *Id.* at 411. The Court found that Arkansas had a legitimate interest in applying its law. *Id.* at 413.

Carroll v. Lanza demonstrates that there must be a conflict in the laws of the forum and non-forum to cause an inquiry into whether policy considerations exist to allow the forum to apply its law and not the law of a sister state. 349 U.S. 408. In this case, however, there is ***no*** conflict between Mississippi and Florida. Both provide a limited waiver of immunity to their political subdivisions. The only difference is the amount of immunity waived.

Though *Nevada v. Hall* involved the jurisdiction of California to entertain a suit against the University of Nevada, it is still instructive. 440 U.S. 410. In that case, a University of Nevada vehicle collided with and injured a California resident in California. *Id.* at 411. Nevada sought to limit its damages under Nevada immunity law. *Id.* at 412. California refused to recognize Nevada immunity because it had waived its own immunity under similar circumstances. *Id.* at 413. The Court observed that Full Faith and Credit requires each state to give effect to the laws of other states but not "in violation of its own legitimate public policy." *Id.* at 422. California had a legitimate policy-based reason to apply its own law of a complete waiver of immunity because Nevada's law was in direct conflict with California's law. *Id.* at 424.

While *Hyatt I* was decided based on comity—not Full Faith and Credit—it too is instructive. 538 U.S. 488. The *Hyatt I* Court praised the Nevada court for declining jurisdiction over the negligence claims since both states provided immunity for such claims. *Id.* at 492-93. The Court found that Nevada "sensitively applied principles of comity with a healthy regard for California's sovereign status" relying on the contours of Nevada's own sovereign immunity as a benchmark. *Id.* at 499. Nevada respected California law where the statutes were similar. *Id.*

Finally, *Hyatt II* found that refusing to recognize the Tax Board's immunity under California law and refusing to give the Tax Board the immunity of a similarly situated Nevada political subdivision was a violation of Full Faith and Credit. 136 S. Ct. at 1281. Nevada did, however, correctly set aside a $250 million verdict for punitive damages[10] since both states had immunity from such damages. *Id.* at 1280.

It is clear from these authorities that where the statutes (policy) at issue are comparable, Full Faith and Credit applies. There is no reason to ask about "policy considerations" since the policies are not obnoxious to each other. The immunity statutes of Mississippi and Florida are comparable. Both provide a limited waiver of immunity for tort claims against political subdivisions. The only difference is the amount of the cap ($500,000 vs. $200,000), and the trial court adjusted (increased) the Florida cap to make it consistent with Mississippi law.

There is simply no reason to refuse to apply Full Faith and Credit here, or to search for policy considerations having ***no*** application to this case.

E. The Question Calls for an Advisory Opinion.

The question asked by the Court also calls for an impermissible advisory opinion in two respects. "It is not within the province of this Court to render advisory opinions." *Hughes v. Hosemann,* 68 So. 3d 1260, 1263 (Miss. 2011); *Gipson v. State,* 36 So. 2d 154, 154 (Miss. 1948).

[10] *Franchise Tax Bd. of Cal. v. Hyatt,* 335 P.3d 125, 130 (Nev. 2014), *vacated and remanded* by *Hyatt II.*

See also Tallahatchie Gen. Hosp. v. Howe, 49 So. 3d 86, 93 (Miss. 2010) ("[T]his Court does not issue advisory opinions.").

First, § 17 is inapplicable to any of the claims at issue in this case. Applying a law which has no application to the claims made as a "sufficient policy consideration" requires an advisory opinion, and also runs afoul of *Hyatt II*.

Second, treating JEA as a Mississippi political subdivision subject to § 17 of the Mississippi Constitution to avoid *Hyatt II* and the limit on damages, as Promenade urges this Court to do, creates a fiction and poses a hypothetical question. (Promenade's Reply Br. at 23). This Court has held that ruling on a fiction or addressing a hypothetical question is also improper. "[The issue] is in the nature of a hypothetical question directed to this Court for an advisory opinion. This Court has consistently held it will not give advisory opinions." *Rowell v. Turnage,* 618 So. 2d 81, 82 (Miss. 1993) (citing *Game and Fish Commission v. Marlar,* 206 So. 2d 628, 631 (Miss.1968)).

For the Court to adopt a fiction that the policies underlying § 17 are sufficient to deny Full Faith and Credit would require the Court to assume a series of speculative hypothetical facts that can never be proven at trial by Promenade, nor defended by JEA: (1) that JEA is a Mississippi governmental entity; (2) that there is a valid inverse condemnation claim against JEA; (3) that JEA had no defenses; (4) that Promenade would have been successful in proving an inverse condemnation case; and (5) that Promenade would have recovered more than $500,000 of damages. As discussed in detail throughout this brief, these necessary hypothetical assumptions are far from certain. Promenade and its professional contractors and engineers knowingly purchased and used OPF42 as a construction material on the project which is now a thriving shopping center. Further, Promenade failed to exhaust its administrative remedies with

MDEQ. Under these facts, Promenade would not have been able to obtain an inverse condemnation judgment against a Mississippi governmental entity.

Making such speculative hypothetical assumptions in the interest of discriminating against JEA and in favor of Promenade is forbidden by Full Faith and Credit and *Hyatt II*. Notably, hypothetical assumptions of this nature were not employed in *Hyatt II*. The plaintiff was able to prove liability and damages far in excess of the Nevada tort cap on ***the actual tort claims at issue***. However, the fact that Hyatt would have recovered the full amount from a private defendant did not change the analysis that Full Faith and Credit required Nevada to recognize California's immunity law.

For these reasons, the Court should not engage in hypothetical and advisory opinions.

II. The Trial Court Correctly Determined that this is Not an Environmental or Pollution Case when it Denied the Inverse Condemnation Amendment

A. The Fiction Promenade Requests is Unsupported by the Facts and is Inconsistent with Promenade's Prior Positions.

To embrace the fiction that § 17's policy considerations should apply to this case requires a determination that JEA is a rogue interstate polluter or dumper of solid waste. The trial court would have had to embrace this same fiction to grant Promenade's proposed inverse condemnation amendment, which specifically incorporated the Solid Wastes Disposal Law and MDEQ's solid waste regulations. To do so, however, the trial court would have had to ignore both what it learned and was told during the six years of litigation which included 52 depositions and over a dozen expert reports.[11]

Specifically, to allow Promenade's inverse condemnation claim which invoked

[11] *See* R.52-53, R.56-59, R.67-73, R.76-88 (docket entries of notices of depositions: Doc. #'s 148, 149, 151-53, 181-83, 185-87, 193-95, 197-99, 204, 210, 211, 217, 284-85, 287-88, 322-32, 343-49, 351-54, 384-87, 395, 398-99, 406, 420, 422, 424-33, 447, 452-53, 467-68, 470-74, 478, 485, 488-90,492-93, 495, 497, 499, 500, 502-03, 510-11, 513, 515, 546, 548, and 550). *See also* R.80 (Kohl's Dept. Store's Expert Designations – Doc. # 434; Promenade's Expert Designations – Doc. # 435); R.87 (JEA's Expert Designations – Doc.# 529); and, R.88 (EMJ's Expert Designations – Doc. # 537).

environmental laws and regulations, the trial court would have had to specifically ignore: (1) that § 17 is legally inapplicable to a claim against JEA; (2) that the case was litigated for years as a construction defect/product liability case; (3) Promenade's senior executive testified Promenade had no environmental issues (R. 6314-20); (4) Promenade's attorneys repeatedly assured the trial court Promenade was not making environmental claims (R.Tr.168, 306, 372; R.6311, 6416 at n.5); (5) Promenade produced certifications to MDEQ and the U.S. Army Corps of Engineers (USACE) that its shopping center's fill (soils) complied with the project's permits (R.4771-78); and (6) Promenade represented to the project's insurers in related litigation that there are no environmental issues with the project (R.5603, 5653; *see also* R.5303-06).

Promenade argues that an inverse condemnation claim is merely a relabeling of its physical invasion of property claim. (Promenade's Reply Br. at 20). This is not true. Unlike its physical invasion of property claim the trial court allowed a year prior, Promenade's proposed inverse condemnation claim specifically referred to the OPF42 product as a "solid waste" and invoked "Miss. Code Ann. § 17-17-1, et seq." (Solid Wastes Disposal Law) and "11 Miss. Admin. Code Pt. 4 Rule 1, et seq." (MDEQ's Regulations). (*Compare* R.4432 – physical invasion claim *with* R.5695-96 – proposed inverse condemnation claim).

Promenade's attempt to add an environmental claim for inverse condemnation came only after *Hyatt II*. Before *Hyatt II* was decided on April 19, 2016, Promenade asserted against JEA 7 claims: (1) Product liability under the MPLA; (2) Breach of Express Warranty; (3) Breach of Implied Warranty; (4) Breach of Fitness for a Particular Purpose; (5) Negligence; (6) Breach of Duty; and (7) Physical Invasion of Property (2014 Amendment to First Amended Complaint) (R.4431--35).[12]

[12] Promenade relies heavily on *McLemore v. Mississippi Transp. Comm'n*, 992 So. 2d 1107 (Miss. 2008) as support for not considering the MTCA's cap when a § 17 claim is pled. However, in *City of Tupelo*, the Court noted that it was significant to its *McLemore* decision that McLemore's "cause of action [] was

On May 16, 2016, JEA filed its Motion to Reconsider and Revise Order to Comply With Subsequent Binding Decision of The United States Supreme Court (R.5120-34). When briefing was completed and after oral argument, the trial court entered its order on July 25, 2016 wherein it found "*Hyatt II* holds, and this court finds, that the Full Faith and Credit clause requires this court to afford JEA, 'a municipal utility and body politic located within the State of Florida' immunity to the extent Mississippi agencies are entitled to immunity under Mississippi Law."[13] (*See* R.117 – Order, Doc. # 787, which was subsequently withdrawn for omnibus consideration). All of the above referenced claims by Promenade against JEA were subject to this ruling.[14]

On August 9, 2016, Promenade moved to amend to assert a claim of inverse condemnation. (R.5684-98). Promenade's expressed purpose of this amendment was to avoid the effect of the court's ruling applying *Hyatt II*. (R.1245). This motion was argued September 1, 2016 and denied. (*See* R.119 – Order (Doc. # 807), one of the orders withdrawn for omnibus consideration). Promenade thereafter filed its Motion to Withdraw and Reconsider Certain Orders including the original *Hyatt II* ruling (Doc. # 787 and # 789); Order on Motion for Clarification (Doc. # 809) and the Order Denying the Motion to Amend to Assert Inverse Condemnation (Doc. # 791). (*See* R.120 – Doc. # 810). The court granted this Motion (R.5822).

On January 1, 2017, the court entered its Omnibus *Hyatt II* Order (R.6406-19), which again denied the motion to amend.

Promenade argues that its motion to amend was "denied without explanation" and was an "unexplained perfunctory denial" of a properly sought amendment. The procedural history,

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not **rooted in tort** . . . ." 208 So. 3d at 566 (emphasis added). In other words, *McLemore* was rooted in damage to property for public use by a Mississippi governmental entity. This case, on the contrary, has been rooted in tort—construction defect and product liability—since its inception in 2010.

[13] Correctly using the MTCA as a benchmark and not giving JEA the ***direct*** application of the MTCA.

[14] It was at this point in time that Promenade dusted off its long dormant injunction claim. The fact that it lay dormant for six years undercuts the "imminent" nature of the threat of irreparable harm. Promenade also made for the first time its argument that the damages were caused by multiple occurrences.

however, proves this wrong. It was Promenade that moved for omnibus treatment which resulted in the Omnibus Order. The consideration of this motion was anything but perfunctory. The trial judge gave this motion the same careful attention he gave every other ruling in this case. It was briefed and argued (R.5684-98, 5761-71, 5786-5816, R.Tr.1241-76), and then ruled upon ***twice*** (R.119 – Order (Doc. # 807) & R.6406-19 – *Hyatt II* Order).

The oral argument on the Motion to Amend to Assert Inverse Condemnation spans almost 40 pages. (R.Tr.1241-76). Counsel for Promenade said he tried to understand "what's happened for the last six years, [and] why are we trying to, at this point in time one month before trial, amend the complaint to allege inverse condemnation." (R.Tr.1244). He then answered his own question by explaining that the court's original *Hyatt II* order was "a game changing decision" which required the proposed amendment (to avoid the caps). (R.Tr.1245). On three occasions, the court asked about prejudice to JEA and how the amendment would affect the case. (R.Tr.1254, 1272, 1274). Forgetting for the moment issues of timeliness, prejudice and discretion, the trial court was ultimately being asked to apply § 17 of the **Mississippi** Constitution to a non-Mississippi governmental entity which had supposedly taken private property—***not*** for Mississippi public use—but for its own benefit. At the hearing, Promenade argued that the "public use" was entirely to benefit JEA. (R.Tr.1249-52). The futility of its proposed amendment was patently obvious.

B. Judicial Estoppel Precludes Promenade's Attempts to Change the Facts of This Case.

Judicial estoppel also supports the denial of the amendment which sought to add inverse condemnation claims based on environmental laws and regulations ***after*** Promenade had repeatedly assured the court it was ***not*** making environmental claims. (R.Tr.168, 306, 372; R.6311, 6416 at n.5). "The doctrine of [j]udicial estoppel is designed to protect the judicial system and applies where intentional self-contradiction is being used as a means of obtaining

unfair advantage in a forum provided for suitors seeking justice." *TRK, LLC v. Myles*, 214 So. 3d 191, 196 (Miss. 2017) (internal quotations omitted; quoting *Clark v. Neese*, 131 So.3d 556, 560 (Miss. 2013)). "A party will be judicially estopped from taking a subsequent position if (1) the position is inconsistent with one previously taken during litigation, (2) a court accepted the previous position, and (3) the party did not inadvertently take the inconsistent positions." *Id.* Promenade's attempt to assert an inverse condemnation claim based on "solid waste" laws and regulations, or to use "solid waste" "dumping" allegations as "sufficient policy considerations" to avoid Full Faith and Credit, is inconsistent with its numerous assurances to the trial court that it was not making environmental claims. (R.Tr.168, 306, 372, 394, R.6311, 6416 at n. 5). The trial court necessarily relied on those assurances in granting the physical invasion of property claim four years into the case and after discovery closed. (R.Tr.372). The assurances were repeated and purposeful, and Promenade won its amendment. Now, Promenade improperly hopes to use the same environmental allegations it assured the trial court it was not making (R.6416 at n. 5) to gain another amendment or to sidestep *Hyatt II*, or both.

C. Promenade's Failure to Exhaust Administrative Remedies would have Barred a Claim under § 17 against a Mississippi governmental entity.

Finally, even if the Court engages in the fiction that § 17 applies and Promenade's proposed amendment should have been granted, the case must be dismissed for failure to exhaust administrative remedies. In rejecting Promenade's claim for injunctive relief, the trial court ruled that to allow the remedy would "require Promenade to exhaust its administrative remedies with MDEQ" and cited *Georgia Pacific Corp. v. Mooney*, 909 So. 2d 1081, 1091 (Miss. 2005) (R.6416 – Omnibus *Hyatt II* Order). Administrative exhaustion must also apply to an inverse condemnation claim based on an allegation that the highly successful Promenade shopping center is actually a solid waste dump or landfill in violation of the Solid Wastes Disposal Law. The dumping of solid waste falls squarely within the primary jurisdiction of MDEQ. Miss. Code

Ann. § 17-17-1, et seq. Again, Promenade invoked both the Solid Wastes Disposal Law and the specific regulations MDEQ promulgated with respect to solid wastes and BUDs in its proposed inverse condemnation claim. (R.5645-96). Thus, the inverse condemnation claim is not exempt from administrative exhaustion and the primary jurisdiction of MDEQ.

Even if it were true, *which it is not*, that JEA somehow dumped solid waste under the successful Promenade shopping center via the OPF42 soil stabilization product (tested, purchased, engineered, and installed by professional engineers and contractors), then Promenade has adequate redress via the MDEQ. MDEQ not only has the exclusive authority to declare whether or not the OPF42 product is a solid waste, but it also has the expertise to determine what, if any, remediation is necessary if OPF42 is deemed to be a solid waste. MDEQ can also declare that the thriving shopping center is not a solid waste dump or landfill, taking away Promenade's supposed "taint" claim. In short, if Promenade truly believes its "solid waste dumping" allegation, then this case should be dismissed because it has refused to exhaust its exclusive administrative remedy with MDEQ.

III. JEA is *Not* a "Bad Actor" from which Promenade Cannot Obtain "Adequate Redress"

Promenade asks this Court to create a fiction in that JEA should be considered a Mississippi governmental entity which has taken or damaged its shopping center for public use,[15] or else Promenade will be denied adequate redress. (Promenade's Reply Br. at 23). This request actually requires the creation of a second fiction—that this a "dumping" of "solid waste" case under § 17, not the actual construction defect/product liability case Promenade pursued for six years before it sought the amendment (R.126-75).[16] Promenade only made its dumping assertions ***after*** it settled with various insurers that ***excluded*** coverage for waste under the

[15] This is clearly not a "taking" case. The shopping center is vibrant and financially very successful.
[16] Promenade also sued its professional general contractor, earthwork contractor, and geotechnical engineers for negligently testing and using the OPF42 product in constructing the shopping center.

pollution exclusion (R.5603, 5653; *see also* R.5303-06), and ***after*** the trial court's first *Hyatt II* order. (*See* R.117 – Order (Doc. # 787).

To accept Promenade's fiction, this Court must also overlook the following facts:

- LA Ash's product, OPF42 was a known ash product tested, purchased, and used on this project by professional contractors and engineers (JEA's Br. at 10-13);
- The trial court's finding that "Promenade has repeatedly assured the court that it is not making environmental claims" (R.6416 at n. 5 – *Hyatt II* Omnibus Order);
- Promenade's admission to the trial court that JEA was not part of LA Ash's marketing or negotiations with respect to putting OPF42 under the shopping center and **"**[Promenade's counsel:] **They [JEA] didn't know about Promenade at that time as far as we know"** (R. 5977-78 (emphasis added)); and,
- Promenade did not learn new facts during discovery to justify this new approach; its new theory is driven solely by Promenade's dissatisfaction with the trial court's application of *Hyatt II* and seeks to avoid it.

The trial court also knew that the allegations on which Promenade bases its rogue polluter or solid waste dump assertions are without merit. Taking those allegations in turn:

A. There are No Inherent "Deleterious" Characteristics of OPF42 when it is Properly Used.

From the start, Promenade has described the deleterious[17] characteristics as "a significant amount of the JEA products incorporated into the project contained ingredients with deleterious characteristics including excessive expansiveness in the presence of moisture." (R.126-75 – First Amended Complaint, April 8, 2010). Stated more simply, the product swells when water is introduced. In this case, the use of unsuitable soil and water resulted in the continuation of the product's swelling reaction and caused structural problems with the buildings, roads and parking lots built on top of it. (R.2261-62, P.R.E.0033-40, P.R.E.0062-63). This same "excessive

[17] This is a two-dollar word Promenade uses to make the reader forget it claimed that JEA ash was defective and caused structural problems at the shopping center because of these deleterious characteristics.

expansiveness in the presence of moisture" formed the basis for Promenade's Motion to Amend to Assert a claim for Physical Invasion of Property which it says is the same as its inverse condemnation claim.[18] (R.1760-73). In defending the physical invasion claim, Promenade said "to date Promenade has ***not*** asserted that the deleterious characteristics of JEA's by-products are causing 'environmental public health problems' – but that does not change the fact that JEA's by-products are a power plant waste and that this waste is causing property damage in a variety of ways." (R.4847 (emphasis added)). Promenade's present dumping of solid waste allegation, meant to support a claim under § 17 or to suggest sufficient policy considerations under *Hyatt II*, is completely unsupported by any pleading or expert report.

All Circulating Fluidized Bed (CFB) ash swells when water is introduced. It is an "inherent characteristic" that makes the product perform. For instance, LA Ash sells a product called OPF90 which is just raw, unhydrated (right out of the silo) CFB ash for use in environmental remediation. It is often used for dredge soil stabilization, solidification of liquids and stabilization of sludges.[19] It swells 90% as the name indicates. (*See* R.3166, 3170, 3191). It will dry up and solidify an oil field sludge pond to the point that it can either be built on or removed by track hoe and landfilled.[20]

LA Ash's OPF42 is a **hydrated** product which has an expected expansion of 42% ***while*** it is being processed. (R.3166). OPF42 has a different use from OPF90. OPF42 is used as a base for roads and parking lots and more generally to stabilize unstable soils. LA Ash explained that CFB ash is composed of calcium sulfate, calcium oxide and alumina. (R.3192). When the CFB ash is introduced to a 24-hour water bath, the purpose is to create ettringite (a strong crystal

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[18] In *City of Meridian v. Peavy*, 194 So. 595 (Miss. 1940), the Court said that the defenses available to the city "in a suit for damages under the constitutional provision, and such suit on the theory of negligence are entirely different, as disclosed by the opinions in the cases referred to."

[19] R. 4406, By-Product Opportunity Analysis, Ducker Worldwide (Aug. 3, 2006), at p. 60 (filed under seal).

[20] A liquid cannot be landfilled.

formation). (*Id.*; R.3177-78). The slurried material is then decanted, aerated, compacted, and several weeks later milled. (R.1817-18). It is this process that causes the expansion to occur. There is no question that CFB ash swells; it is an inherent characteristic of the ash. (R.1839, 1841). The important issue is ***when*** the swelling occurs. (R.2983, R.3184, R.2263). It is believed that swelling problems occurred at the Promenade project because of the presence of alumina in the clay soils. (R.2261-62, P.R.E.0033-40, P.R.E.0062-63). As LA Ash explained, OPF42 will not swell unless a new driver such as alumina is introduced along with water. (*Id.*; R.3182; *see also* P.R.E.81-85).

The fact that CFB ash swells is common knowledge to people in the industry and geotechnical engineers. (R.5452, 1884, 3145-47, 3100, 3179). The geotechnical engineer on the Promenade project, Gallet & Associates, expressed concerns about swelling ***before the project started*** and put OPF42 through a swell test. (R.1884, 1888).

Taking the first amended complaint to mean what it said, and to satisfy Miss. Code Ann. § 11-1-63(b), JEA propounded the following request for admission to LA Ash:

> **Request for Admission No. 3**: An inherent characteristic of the ash in question is that it expands when mixed with water.
>
> **Response to Request for Admission No. 3**: Admitted. The raw and untreated bed ash typically expands when introduced to copious amounts of water. As such, through a proprietary bathing process, un-hydrated bed ash is introduced to water to eliminate its expansive properties prior to use in construction applications.

(R.1839). Swelling of a product is not "dumping" or a taking under § 17. The swelling of OPF42 did not cause any environmental damage. The structural damage was to some parking lots and buildings, not to people or the environment. What is especially ironic is that Promenade set a construction schedule so short that the contractors had to resort to extreme measures to dry

the soil.[21] It then violated its own specifications by using OPF42 on this project when it was not approved.[22] Even more egregious, Promenade's site work specifications required that only crushed gravel, crushed stone, and natural or crushed sand (engineered fill) be used ***within four feet of the slab or subgrade***. (R.2681 – "engineered fill" defined; R.2687 – four feet of sub-grade requirement).[23] Promenade is asking the Court to require JEA to remove a product it did not make or sell, from a project it did not know about, which was not specified for use on this project and from a location (within 4 feet of a building slab) where it was expressly prohibited by the Promenade specifications and caused the most problems.

Swelling is an inherent characteristic of CFB ash. This inherent characteristic makes it useful. The fact that it can be misused or misapplied does not make it a product with deleterious characteristics.[24]

B. The Rail Subsidy JEA paid LA Ash was Not Illegal or Nefarious.

Another of Promenade's allegations is that JEA's payment of a rail subsidy to LA Ash is somehow wrong or nefarious. There is nothing illegal or nefarious about this arrangement. JEA could either pay a rail subsidy or incur more cost to landfill the same material that has uses. (P.R.E.0015-16). Cedar Bay, another generating plant in Jacksonville, unrelated to JEA, paid LA Ash a ***larger*** rail subsidy to ship ash to the same location. (*See* R.4503, 4511). Promenade leaned on this argument so much it prompted the Special Master to say to Promenade's counsel "… you've emphasized this argument, not only today, but in every hearing about this $10 million savings [to JEA] and wanting to get it out of Florida and the expense of the landfill."

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[21] There was not sufficient time for it to dry naturally. (R.5435).

[22] The CBL project manager for the Promenade testified that OPF42 was not allowed under the plans and specifications and should not have been used on this project. (R.2847).

[23] It is undisputed that OPF42 was used directly under slabs in violation of Promenade's specifications. (R.2847-48).

[24] Many products arguably contain deleterious characteristics when used improperly. For example, a life-saving prescription can instead harm a patient that takes an excessive dose.

(R.Tr. 1019-20). The Special Master observed that there was nothing wrong whatsoever with this arrangement saying "[I]t's a business decision." (R.Tr.1020). The reality is that if LA Ash had to pay the transportation costs to Port Orange, Texas (Shell/Motiva remediation project) or Port Bienville it could not compete with other local substitute products such as limestone. JEA had no profit incentive like a private company.

Promenade, on the other hand, had a profit motive in using OPF42 contrary to the project's specifications. The geotechnical engineer described the use of OPF42 as "a loss prevention measure for this job and is critical for satisfying our client on this one." (R.1121). Even after problems were discovered and finger-pointing started, the general contractor wrote:

> "Total ***stabilization material*** [not solid waste] used– approx 33,000 tons
>
> Savings on OPF42 vs. Lime - $ 1,155,000
>
> Savings on OPF42 vs. Cement - $ 2,211,000 minimum"

(R.2852 (emphasis added)).

Promenade would have the Court believe that saving money is bad for a governmental subdivision, but it is okay for a private owner and a contractor to save money (i.e. increase profit on a private job).[25]

C. JEA did Not Hide Out-of-State Use from FDEP.

Promenade also makes the allegation that JEA hid the out-of-state use of its CFB ash from the Florida Department of Environmental Protection (FDEP). This is not true. JEA met with FDEP and discussed out of state use. (R.3902-04). Not unexpectedly, FDEP said that was not its concern. (R.3903; 3922-23). FDEP placed no restrictions on out-of-state use. (*Id.*) It had no right to do so. The Special Master called this a "no-brainer". (R.Tr.989).

[25] Promenade and EMJ (general contractor) shared in project savings. (R.2511-12).

D. JEA did Not Use "Dummy Invoices."

JEA is a public entity subject to Florida's Public Records Act. JEA produced to Promenade every invoice it paid to LA Ash as a rail subsidy. Promenade claimed that JEA was creating "dummy invoices" and violating its own requisition procedures to pay the rail subsidy. However, the testimony in the record by JEA's head of by-products, Scott Schultz, shows that he had the authority to add money to the original purchase order for transportation of ash byproducts and the transactions were not improper. (R.4037-39, 4051-54). Schultz testified that the requisition used was all that was need to add money to the purchase order (PO) used for the rail subsidy. (R.4037).

E. There was No "Side Agreement" Between JEA and LA Ash.

Shortly after JEA's clean coal technology plant went on line, it hired LA Ash to manage and market the ash by-product. LA Ash was the world's largest and most experienced marketer of coke-fired CFB ash. (R.1511; *see also* JEA's Response Br. at 13-17). LA Ash served in a similar role for NISCO whose coke-fired CFB boilers came on line in the 1990's. LA Ash, working with NISCO, developed the process of hydrating CFB ash for use in road base applications creating a product called Calbase. The relationship between JEA and LA Ash evolved as follows:

- On **September 1, 2003**, LA Ash and JEA entered into a "By-Product Marketing Agreement" (R.2019-36);
- On **December 1, 2006**, JEA and LA Ash entered into the "Shell Oil Company/Motiva Enterprises LLC Project Agreement" (R.2037-38);
- On **January 21, 2008**, Mr. Schultz, JEA's Director of By-Product Services, set out in an internal email terms of the vendor/vendee arrangement by which LA Ash could continue to obtain JEA's raw material bed ash without quantity obligations on either party, and which JEA understood to still be for the Shell Oil/Motiva Project (R.2041-43); and,

- On **March 1, 2008** – ***before*** LA Ash delivered any OPF 42 to the Promenade Project – JEA and LA Ash entered into an "Agreement Regarding and Confirming ***Termination*** of By-Product Marketing Agreement and Shell/Motiva Agreements" which formalized **the previous termination of the agreements by the parties' conduct as of April 1, 2007** (R.2039-40).

In 2007 and 2008, LA Ash's role changed from providing "the entire CFB By-Product Marketing requirements for the facility," to a vendor/vendee relationship with a "'you send them, we'll load them, based on ash availability' arrangement." (R.5808). Promenade's claims to the contrary are demonstrably false. This relationship is very much like the vendor/vendee relationship LA Ash had with other similar power plants. LA Ash needed the ash to make its product, and the power plants hoped to avoid the cost of landfilling the ash.

F. JEA did Not "Target" Mississippi.

In the 2006 timeframe, JEA hired a consulting firm, Ducker Worldwide, to develop a market profile for the JEA Northside Generating Plant CFB ash. Ducker wrote an 89-page report and covered various topics such as production and utilization of CFB ash, different beneficial uses, competition (there are 90 CFB operations in the United States), competitive products, and barriers to marketing CFB ash.[26] Ducker found that expenses from collection and disposal greatly outweighed revenue generated from such products in that shipping cost represents a huge barrier (saying "economically, it is not feasible to move the product long distances because competitive products" are available).[27] When discussing regulatory barriers, Ducker said Alabama, Mississippi and Texas are low barrier states.[28] From this Promenade spins a narrative

[26] R. 4406, By-Product Opportunity Analysis, Ducker Worldwide (Aug. 3, 2006), at p. 12 (filed under seal).
[27] *Id.* at pp. 15, 64, & 87.
[28] R. 4406, By-Product Opportunity Analysis, Ducker Worldwide (Aug. 3, 2006), at p. 25 (filed under seal). In support of its incorrect claim that JEA "targeted" Mississippi, Promenade touts Mississippi as a "low barrier" state. This is odd since Louisiana, Alabama and Texas have ***no*** barriers. *Id.* at pp. 26 & 28.

that JEA targeted Mississippi. JEA did ***not*** "target" any state. It wanted to provide its CFB ash to LA Ash because it was beneficial to the rate payers in Duval County, Florida, and JEA trusted LA Ash "to use the material from JEA appropriately, not to use it in violation of law and [in a manner] hazardous to people or animals, vegetation, health, that we would not use it incorrectly." (R.1855 – LA Ash's T. Stewart Dep.).

G. OPF42 is Not an Illegal Product.

Promenade has asserted two types of claims against JEA: (1) Product liability claims, controlled by Miss. Code Ann. § 11-1-63; and (2) physical invasion of land claims, controlled by the common law. Promenade's proposed inverse condemnation amendment and related briefing asserts that LA Ash's OPF42 product OPF42 is illegal because it is a "solid waste," and no Beneficial Use Determination (BUD) was obtained from MDEQ. Therefore, Promenade's use of the product allegedly turned its land into an unauthorized dump. This claim is not relevant to the product liability or physical invasion claims. Even if the Court were to hypothetically assume the § 17 claim was at issue in this case, the primary jurisdiction of MDEQ would require administrative exhaustion. Miss. Code Ann. § 17-17-1, et seq.

The Solid Wastes Disposal law is administered by MDEQ pursuant to § 17-17-2. Unauthorized dumps are a nuisance per se subject to punishment under § 17-17-29. MDEQ has the power to take legal or equitable action where there exists a "substantial hazard to the public health or to the environment." Miss. Code Ann. § 17-17-27(8). MDEQ can sue to enforce the rules and regulations under § 17-17-29(2). And, MDEQ has the power to order "remediation or clean up involving solid waste" against "any person creating or responsible for creating" any such need for clean up or remediation. Miss. Code Ann. § 17-17-29(4).

As far as a BUD is concerned, an application can be submitted by the generator (JEA), distributor (LA Ash) or end user (Promenade). 11 Miss. Admin. Code, Pt. 4, Ch. 9, Rule 9.2 –

Procedures for Beneficial Use Determinations.[29] Promenade did not seek a BUD. It did not ask LA Ash to secure a BUD. It has taken no steps with MDEQ with respect to clean up or remediation which is required where there is a hazard to public health or to the environment. Promenade cannot claim the benefit of this section of the code—declaring OPF42 a "solid waste" and demanding remediation of a supposed dump—without running headlong into the primary jurisdiction of MDEQ.

A BUD does not make a product "legal." The absence of a BUD does not make a product "illegal." The regulations provide that a BUD "should **not** be considered to be an endorsement of the approved use or an endorsement of that by-product and should not be construed as such. Nor should such a determination be considered protection from liability and responsibility created under other applicable laws and regulations." 11 Miss. Admin. Code, Pt. 4, Ch. 9, Rule 9.2 – *Procedures for Beneficial Use Determinations* (emphasis added).

Promenade said over and over to the trial court that it is not making environmental claims. Yet, it describes the Promenade as an unauthorized dump created by a solid waste to make its § 17 claim more appealing. These are determinations to be made by MDEQ.

Moreover, the use of OPF42 or LA Ash's Port Bienville processing facility was not a secret. LA Ash sought a BUD from MDEQ, told MDEQ its view that OPF42 was a product not subject to a BUD and MDEQ took **no** action. (R.6403-05 – LA Ash's CEO Livengood Dep.). MDEQ also visited LA Ash's Port Bienville processing facility and took no adverse action. (R.6404).

JEA trusted LA Ash to use its raw material in accordance with all laws and regulations. The laws do vary from state to state. In at least Alabama, Louisiana and Texas, coke-fired CFB

[29] Available at https://www.mdeq.ms.gov/wp-content/uploads/2017/06/11-Miss.-Admin.-Code-Pt.-4-Ch.-9..pdf., last visited Sep. 4, 2018.

ash is ***not*** subject to regulation because it is a product. (R.6390-93). If OPF42 represented an actual environmental hazard, then MDEQ would have or could have taken action. But, it has not. In any event, having a BUD or not having a BUD is not dispositive of whether a product may be a hazard to public health or the environment.

H. Promenade has Adequate Redress via its Tort Claims.

Promenade argues that an inverse condemnation claim is required to provide it with adequate redress. This argument, however, was made by Mr. Hyatt in *Hyatt II* and rejected by the United States Supreme Court which cut his damages for fraud from $1 million to $50,000. The trial court addressed this argument saying that "this court cannot find that such legislative action [§ 11-46-15] creates an inadequate remedy at law." (R.6418 – Omnibus *Hyatt II* Order). It also noted that Promenade pursued defect claims against multiple non-sovereign defendants and attained monetary settlements. (*Id.* at n. 6).

Promenade entered into settlements with M. Hanna (earthwork contractor), its sureties and insurers, Gallet (geotechnical engineer) and its insurers, LA Ash (OPF42 suppliers) and its insurers, EMJ (general contractor) and its insurers.

Promenade claims it has spent $8,389,771 "in incurred repair and remediation costs." (R.5855). Promenade has spent a fraction of that sum on some minimal remediation since its "Promenade Damage Claims" document (R.5854-61), but ***no*** substantial remediation has been done in the last several years. It also made settlement payments to Target and Kohl's for its faulty construction of their stores. However, Promenade's total settlements received from its contractors, engineers, and insurers are estimated to exceed the total is had paid in remediation and settlement by many millions of dollars.

Besides these settlements, EMJ entered into a consent judgment against M. Hanna in an amount not to exceed $74,000,000. (R.1681-82). In EMJ's settlement with Promenade, it

assigned these rights to Promenade. Also, Promenade entered into a consent judgment with LA Ash for an unspecified amount. (R.4380-85). Finally, Promenade filed and sought to stay a suit against its own insurers in the Southern District of Mississippi pending the final resolution of this case. The court closed the case for statistical purposes. *Promenade D'Iberville, LLC v. Factory Mutual Insurance Company and Federal Insurance Company*, Civil Action No. 1:12-cv-00047-LG-JCG.

In its reply brief, Promenade challenged the accuracy of JEA's representations about its multi-million dollar windfall from settlements.[30] Those numbers have been presented to the mediator and the trial court on multiple occasions. JEA has the settlement agreements to which Promenade has asserted confidentiality. (R.Tr.1037-39; s*ee* also R. 6300; R 5835 n. 6 & 7; R 2997.) If Promenade continues to suggest the JEA's representations are inaccurate, it should be prepared to give this Court two answers at oral argument: (1) How much has Promenade collected, and (2) How much has it spent on remediation and settlements, not including attorneys' fees?

CONCLUSION

Hyatt II requires that the Court give Full Faith and Credit to JEA's sovereign immunity under Florida law. In this case, that means the trial court correctly applied the amount of Mississippi's tort cap to Promenade's claims against JEA.

The Court cannot engage in the hypothetical and advisory quest proposed by Promenade to create a special rule that it is hostile to Florida law. The application of Full Faith and Credit does not transform a Florida entity into a Mississippi entity; it merely honors the laws of Florida to the extent they are consistent with Mississippi's own.

All cases are important. JEA understands that. This case, however, takes on additional

[30] *See JEA's Motion to Substitute the Public Record with a Redacted Version of Appellee's Brief (*Mar. 9, 2018) and this Court's Order (Mar. 21, 2018).

importance because one day a Mississippi political subdivision will most likely be sued out of state. The respect given in this case to a sister state political subdivision will determine the respect received when the roles are reversed. *Schoeberlein v. Purdue Univ.*, 129 Ill. 2d 372, 544 N.E.2d 283 (1989) and *K.D.F. v. Rex*, 878 S.W.2d 589 (Tex. 1994).

The trial court spent literally hundreds of hours on this case. It understood that this was a construction defect/product liability case, not a solid waste dumping case. Promenade assured the court of this. The trial court also understood that if this case were turned into a solid waste dumping case, it would be subject to MDEQ's exclusive jurisdiction and administrative exhaustion. After patiently considering all of the arguments by the parties, it concluded that *Hyatt II* applied. That ruling is consistent with Mississippi law, not repugnant to it.

JEA asks this Court to affirm.

RESPECTFULLY SUBMITTED, this the 4th day of September, 2018.

JEA

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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:

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This, the 4th day of September, 2018.

s/ H. Ruston Comley
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