

**IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

**IN THE MATTER OF THE STEWARDSHIP OF
THE PUBLIC TRUST TIDELANDS**

CIVIL ACTION NO. C2402-02-760

**SECRETARY OF STATE, ERIC CLARK,
TRUSTEE AND PETITIONER; CITY OF BILOXI,
A MUNICIPAL CORPORATION; BOARD OF TRUSTEES OF
STATE INSTITUTIONS OF HIGHER LEARNING IN ITS
OWN CAPACITY AND ON BEHALF OF THE
UNIVERSITY OF SOUTHERN MISSISSIPPI,
THE GULF COAST RESEARCH LABORATORY,
AND THE J. L. SCOTT MARINE EDUCATION CENTER;
ISLE OF CAPRI CASINOS, INC. AND RIVERBOAT
CORPORATION OF MISSISSIPPI, A MISSISSIPPI CORPORATION,
D/B/A THE ISLE OF CAPRI CASINO;
THE POINT CADET DEVELOPMENT CORPORATION,
A MISSISSIPPI NON-PROFIT CORPORATION, CO-PETITIONERS**

**THE CITY OF BILOXI'S MOTION TO ENFORCE THE POINT CADET
COMPROMISE AND SETTLEMENT AGREEMENT, ADJUST THE EQUITIES OF
THE CO-TENANTS TO THE POINT CADET PROPERTY, AND DECLARE H.B. 878
AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACTS AND A TAKING OF
CITY OF BILOXI'S PROPERTY RIGHTS**

COMES NOW, the City of Biloxi, Mississippi ("Biloxi") and files its Motion to Enforce the Point Cadet Compromise and Settlement Agreement [hereinafter "the Agreement" or "PCCSA"], Adjust the Equities of the Co-Tenants to the Point Cadet Property, and Declare H.B. 878 an Unconstitutional Impairment of Contracts and a Taking of City of Biloxi's Property Rights, and would respectfully show unto the Court as follows:

1. Biloxi is requesting the Court to make the following rulings: (1) the State of Mississippi has breached the PCCSA by failing to pay Biloxi the sum of Six Hundred Six Thousand Three Hundred Fifty and 52/100 (\$606,350.52) dollars [See Affidavit of Susan Pickich

attached to the Motion as Ex. “1”] due and owing under the terms of the PCCSA; (2) the State of Mississippi, in its role as one of the tenants in common in ownership of the real property described as the POINT CADET PROPERTY in the PCCSA, has inequitably retained money belonging to the other tenant in common, Biloxi, and the equities between the parties must be adjusted to allow Biloxi to recoup the sum of Six Hundred Six Thousand Three Hundred Fifty and 52/100 (\$606,350.52) dollars; (3) H.B. 878, as applied to the PCCSA, violates *Miss. Const. Art. 3, Sec. 16* as it impairs contractual rights between the State of Mississippi and Biloxi and constitutes an unconstitutional taking of Biloxi’s property.

2. The facts are not and cannot be disputed. On, or about August 15, 2002, Biloxi, the State of Mississippi, the Secretary of State of the State of Mississippi, the Board of Trustees of State Institutions of Higher Learning, the Isle of Capri Casinos, Inc.¹ and Riverboat Corporation entered into the Point Cadet Compromise and Settlement Agreement (“PCCSA”). A copy of this settlement agreement is attached hereto as Exhibit “2” and incorporated herein.

3. Paragraph II(1) of the PCCSA states:

As a resolution of the tidelands boundary issues between STATE and City and in consideration of the mutual covenants, promises, and **revenue sharing provisions contained in Paragraph IV hereof**, it is agreed that **(i) the interest of CITY in the Point Cadet Property is a vested undivided one-third (1/3) interest; . . . (iv) that in lieu of litigating the claims of STATE, CITY AND IHL to the POINT CADET PROPERTY, STATE, CITY, and IHL agree to accept the benefits and obligations of this AGREEMENT; and (v) STATE and CITY shall hereafter hold and administer the Point Cadet Property according to the terms of this Agreement.**

(Emphasis added). Four points should be taken from this paragraph: (1) the State of Mississippi contractually recognized Biloxi’s interest in the Point Cadet Property (2) the State of Mississippi contractually agreed to the revenue sharing provisions; (3) Biloxi has a vested one-third interest

¹ Isle of Capri Casinos, Inc. is no longer a party to any of the relevant agreements.

in the POINT CADET PROPERTY; (4) the State of Mississippi contractually agreed to accept the obligation to distribute the revenue in accordance with the PCCSA; and (5) as a co-tenant Biloxi has a right, shared with the State, to hold and administer the Point Cadet Property, a right which inherently includes the right to hold and administer revenue from the Point Cadet Property in accord with the revenue-sharing provisions of the PCCSA.

4. Further emphasizing the State of Mississippi's contractual and fiduciary obligation to distribute revenue in accordance with the PCCSA is paragraph VIII(2) wherein the parties agreed, "Rents under STATE LEASES and CITY LEASES and any new leases of the POINT CADET PROPERTY, or any portion thereof will be paid to the 'Point Cadet Leasing Fund.' Disbursements from the 'Point Cadet Leasing Fund' **shall** be made by the State Treasurer upon direction of the Secretary of State in accordance with the terms of this Agreement." *Ex. "2"*, §VIII(2) (emphasis added).

5. The signatories to the PCCSA include: (a) "State of Mississippi, by and through Eric Clark, Secretary of State (*Ex. "2"*, pg. 13); (b) Ronnie Musgrove, then Governor of the State of Mississippi (*Id.*, pg. 15); and (c) Mike Moore, then Attorney General for the State of Mississippi in his capacity as legal counsel for Eric Clark, Secretary of State and Board of Trustees of State Institutions of Higher Learning (*Id.*).

6. On, or about, August 15, 2002, the Chancery Court of Harrison County, Mississippi, Second Judicial District entered its *DECREE APPROVING AGREEMENTS RELATING TO POINT CADET PROPERTIES*, a copy of which is attached hereto as Exhibit "3" and incorporated herein. Signatories to the Decree include Nancy Parkes, Special Assistant Attorney General. Of pertinent concern is ¶11 of the Court's Decree:

That rents under the existing leases described in the Point Cadet Agreement... shall be paid to the "Point Cadet Leasing Fund" and

that disbursements from the “Point Cadet Leasing Fund” shall be made by the State Treasurer upon direction of the Secretary of State in accordance with the terms of the Point Cadet Agreement.

7. For many years Biloxi, the Secretary of State and the State of Mississippi operated under the above judicially approved contractual terms. However, during the 2016 Regular Session, the Mississippi Legislature adopted H.B. 878² on April 19, 2016, that became law on May 9, 2016, the day Governor Phil Bryant signed it. H.B. 878, §1 directs:

During fiscal year 2016, the State Fiscal Officer shall transfer to the Capital Expense Fund out of the following enumerated funds, the amounts listed below from each fund:

...

Ex. “4”.

“The Treasury fund that received and distributed the Point Cadet Leasing Fund payments was among the funds listed in the legislation.” *See* July 5, 2016, Letter from Laura Jackson, Department of Finance and Administration, attached hereto as Exhibit “5” and incorporated herein. Ms. Jackson advised Biloxi that, “[A]pproximately \$1.6 million was transferred from the Point Cadet Leasing Fund.” *Id.* In fact, the state fiscal officer (the Executive Director of the Department of Finance and Administration), acting as directed by H.B. 878 transferred the exact sum of One Million Five Hundred Ninety Three Thousand Nine Hundred Seventy and 52/100 (\$1,593,970.52)³ from the judicially created Point Cadet Leasing Fund to the State’s Capital Expense Fund. *See* Ex. “6” attached hereto and Dkt #10-1.

8. In short, what occurred is the Legislature took the Court-mandated “Point Cadet Leasing Fund”, including funds belonging to Biloxi, without regard to this Court’s Decree, and the funds were transferred to the State’s Capital Expense Fund, which is part of the State’s

² H.B. 878 is attached hereto as Exhibit “4” and incorporated herein as if copied in full.

³ This amount is allocated between the co-tenants as follows: Biloxi - \$606,350.52; IHL - \$493,810.00; and Public Trust Tidelands Fund - \$493,810.00.

General Funds that the Legislature appropriates for State agencies and programs. Despite his role as custodian of the Point Cadet Leasing Fund, the Secretary of State is now unable to retrieve these funds from the State's Capital Expense Fund and pay Biloxi its share of the rent due in 2016.

9. In 2016, Biloxi filed a Motion to Enforce (Dkt. #4) as against the Secretary of State ("SOS") only and ultimately Biloxi, IHL and the Secretary of State sought and received an "Order Approving Settlement." Dkt. No. 24. As part of that Settlement, "SOS, City and IHL [agreed] to work together to approach the State Legislature in an attempt to recover the 2015-2016 funds allocated to the General Fund [specifically the State's Capital Expense Fund within the State's General Funds] pursuant to H.B. 878." Dkt. No. 24, pg. 2. Additionally, "all Parties reserve[d] and preserve[d] all rights against the State of Mississippi, the Department of Finance and any other agency, officer, or official (excluding SOS) for the funds removed by the State Legislature from the Point Cadet Leasing Fund." *Settlement Agreement and Release of Claims*, ¶4, Dkt. 24-1.

10. Biloxi's efforts prior to and during the 2017 Regular Session to have the Legislature restore the funds to the judicially created Point Cadet Leasing Fund were unsuccessful. In the 2017 Regular Session, Senators Gollott, Tindall and Seymour introduced S.B. 2366 (Ex. "7"), and Rep. Scott Delano introduced H.B. 973 (Ex. "8"), which would have restored the full \$1,593,970.52 taken from the Point Cadet Leasing Fund.⁴ However, S.B. 2366 and H.B. 973 died in their respective Appropriations Committees. *See* Exhibits "9" and "10" attached. In the 2017 Regular Session, S.B. 2625, an omnibus appropriations bill that, in its Sections 2 and 41, included restoration of the \$1,593,970.52 to the Point Cadet Leasing Fund,

⁴ As shown in the title of both of these bills, the State Fiscal Officer was directed to reimburse amounts to the Point Cadet Leasing Fund that were "inadvertently transferred."

was passed by the Senate, amended and passed by the House, and referred to a Senate-House Conference Committee. Ultimately, however, SB 2625 was never reported out of the Conference Committee, and the bill died. *See* Exhibit “11”.

THE CONTRACTUAL BREACH

11. “[C]onsent judgments are ‘given the same force and effect as [] judgments rendered after litigation.’” *Peebles v. Peebles*, 153 So. 3d 728, ¶12 (Miss. Ct. App. 2014). Without question there has been a Court approved agreed settlement among the parties. *See* Ex. “3”. There is no question of a meeting of the minds or the exact terms. Those terms have been expressed in writing and approved by the Court. The State of Mississippi patently signed off on the PCCSA. There is no doubt that the State of Mississippi, separate and apart from the Secretary of State, executed the PCCSA. “That the chancery court has the power to enforce its decrees goes without saying.” *Edmondson v. Ramsey*, 122 Miss. 450, 84 So. 455, 466 (1920). “The law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the agreement which the parties have made, absent any fraud, mistake, or overreaching.” *Ammons v. Cordova Floors Inc.*, 904 So.2d 185, 190, ¶19 (Miss. Ct. App. 2005).

12. Biloxi requests that the Court enter an Order enforcing the explicit terms of the PCCSA. The State of Mississippi contractually agreed to the revenue sharing provisions of the PCCSA. *See* Ex. “2” ¶ II(1). The State of Mississippi then petitioned this Court to approve its contractual obligations thereby subjecting itself to the jurisdiction of this Court. *See* Ex. “3”. The Court approved the PCCSA, and it should be enforced. Once the State subsequently took ownership of Biloxi’s share of the funds, the State breached the Agreement. This Court should enforce the Agreement as written.

THE INEQUITABLE CONDUCT BY A CO-TENANT IN COMMON

13. This Court has jurisdiction over all matters in equity. *See Miss. Const. §159*. Biloxi and the State of Mississippi are tenants in common in the POINT CADET PROPERTY. *See Ex. “2” ¶II(3)* (“STATE and CITY agree that POINT CADET PROPERTY shall be held as a tenancy in common as public trust property.”). “Tenants in common hold by several and distinct titles, with unity of possession; and each tenant owns an undivided fraction, being entitled to an interest in every inch of the property” *Wilder v. Currie*, 231 Miss. 461, 474, 95 So.2d 563 (1957). Each tenant in common is entitled “to receive his share of the rents and profits.” *Id.* “It is an established principle of equity that tenants in common sustain toward each other such a relation of trust as forbids one to do any act hostile to the interests of the others. . . .” *Walker v. Williams*, 84 Miss. 392, 36 So.450, 397-98 (1904). H.B. 878, as it relates to the Point Cadet Leasing Fund, effectively denied Biloxi its share of the contractually owed rents. As such, H.B. 878 was either a misunderstanding of the PCCSA structure or a hostile act to the interests of Biloxi.

14. The State of Mississippi has, through H.B. 878, taken an advance on its portion of the revenue from the POINT CADET PROPERTY. Patently, when one co-tenant, the State, has attempted to use its power to receive more than it was legally entitled, this action constitutes an inequitable treatment of Biloxi’s right to receive its share of the rents. Accordingly, the Court should exercise its equity jurisdiction to adjust the equities of the co-tenants and allow Biloxi to recoup its portion of the 2015/16 lease-year revenue from future lease-year rental payments received from the POINT CADET PROPERTY. Biloxi requests that the Court adjust the equities to allow Biloxi to recoup its portion of the revenue.

**THE UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT
AND TAKING OF BILOXI'S PROPERTY**

15. The State of Mississippi contractually agreed to revenue sharing with Biloxi. *See Ex. "2", ¶II(1)*. "Ex post facto law, or laws impairing the obligation of contract, shall not be passed." *Miss. Const. Art. 3, §16*. However, H.B. 878 is an unconstitutional law impairing Biloxi's contractually recognized property and revenue sharing rights. These rights were expressly recognized by the State of Mississippi in the PCCSA and in the Court's Decree.

16. As a result of H.B. 878, the State of Mississippi has legislatively impaired its contractual revenue sharing obligation to Biloxi, and the State has taken Biloxi's property--namely, \$606,350.52 in cash was wrongfully taken without just compensation to Biloxi.

**THIS COURT SHOULD GRANT APPROPRIATE REMEDIES
TO RIGHT THE WRONG**

17. One of the great maxims of equity is, "Wherever a legal right has been infringed, a remedy will be given." *Gordon v. Warfield*, 74 Miss. 553, 21 So. 151 (1896); *see also Blair & Anderson v. Kansas City, Memphis & Birmingham R.R. Co.*, 76 Miss. 478, 24 So. 879 (1898) ("It is not that equity will permit no wrong to exist without a remedy but that though equity permits no wrong to exist without a remedy, it still exacts the use of the remedy appropriate to right the wrong.").

18. Another great maxim of equity is, "Equity delights to do complete justice and not by halves." Griffith, *Mississippi Chancery Practice*, §34, p. 37 (2d Edition, 1950). "It is our settled policy that if equity have jurisdiction of the cause of action it should assume full jurisdiction and settle all disputed questions....so that when the matter is thus settled there will be no doors left open out of which it is probable that further suits or further contention will spring." *Id.*, §36, p. 39. In 2002, the State, by its own Petition, submitted itself to the

jurisdiction of this Court and asked this Court to accept jurisdiction of the parties and the subject matter to approve and enforce the Point Cadet Compromise and Settlement Agreement. Now, the State by its intentional actions has created a dispute arising out of the PCCSA, a dispute that the State's own Petition in 2002 put within the jurisdiction of this Court. This Honorable Court has jurisdiction of the parties and the subject matter and is now called upon to settle this question so that "there will be no doors left open out of which...further contention will spring."

19. The State of Mississippi cannot point to a single legislative act that created the Point Cadet Leasing Fund. Nor can it point to one legislative act directing that income derived from the Point Cadet leases is under the State's authority. In fact, both the Legislative and Executive branches have violated the separation of powers doctrine. *See generally Jackson County v. Neville*, 95 So. 626 (Miss. 1923) ("The true meaning of separation of powers is that the whole of power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments."). Here, the Legislature excised the whole power over a judicially created fund, and the Executive branch acquiesced by sweeping the account. The result was a complete alteration of this Court's Decree. A Court-ordered remedy is therefore appropriate. The funds paid into the Point Cadet Leasing Fund are not funds subject to appropriation by the Mississippi Legislature and are not funds owned by the State of Mississippi.

20. Biloxi submits that the following is an appropriate remedy to right the wrong visited upon it. Biloxi requests that this Honorable Court enforce the PCCSA and the Court's Decrees of August 15, 2012 and October 6, 2016 by ordering that from, and after, the entry of the Court's Order Enforcing the Agreement, Riverboat Corporation of Mississippi shall make all rental payments due under the various Point Cadet leases directly to a third party trustee

appointed by the Court.⁵ The trustee should then withhold \$606,350.52 from any amounts “due” to the State of Mississippi until Biloxi recoups the \$606,350.52 of past due rent to which is it entitled, and thereafter the trustee should distribute and pay the collected rent to the three landlords in accord with the provisions of the PCCSA. Utilizing a third party trustee will also preserve and protect the interests of Biloxi-s co-tenants. Money due to IHL and the Tidelands Trust Fund will be ensured to flow to those beneficiaries rather than be subjected to the whims of further legislation.

21. Biloxi requests that the Court adjust the equities between the co-tenants in the form set forth in the preceding paragraph.

22. Biloxi requests the Court to declare that H.B. 878 violates *Miss. Const. Art. 3, Section 16* as H.B. 878 impairs the contractual and judicially created rights between the State of Mississippi and Biloxi.

23. Biloxi requests that the Court award pre-judgment and post judgment interest from and after May 9, 2016 on the amounts past due and reasonable attorney fees and expenses for the necessity of bringing this Motion to correct the State’s: (a) breach of contract; (b) violation of co-tenant’s equitable/fiduciary duty to account for and pay over Biloxi’s share of the revenue; and (c) the State of Mississippi’s violation of *Miss. Const. Art. 3, §16* and unlawful taking of Biloxi’s property

WHEREFORE, the City of Biloxi respectfully prays and requests that the Court enter an Order: (a) enforcing the terms of the *POINT CADET COMPROMISE AND SETTLEMENT AGREEMENT*, the *DECREE APPROVING AGREEMENTS RELATING TO POINT CADET PROPERTIES* and the *ORDER APPROVING SETTLEMENT* and finding due and owing to

⁵ The Secretary of State, despite also agreeing to use his best efforts to restore Biloxi’s share, was unable to effect legislation reimbursing the Point Cadet Leasing Fund. Given the current custodian’s lack of control, it is appropriate that an independent third party trustee be appointed.

Biloxi the sum of \$606,350.52; (b) appointing a third party trustee to receive all future rent payments according to the PCCSA from Riverboat Corporation of Mississippi Inc.; (c) directing that the third party trustee is to withhold from such payments the State of Mississippi's portion until such time as the equities are fully adjusted between the co-tenants; (d) declare H.B. 878 unconstitutional as applied to the Point Cadet Leasing fund, as such law impairs the contract between the State of Mississippi and Biloxi; (e) awarding the City of Biloxi pre-judgment interest from May 19, 2016 and post judgment interest at a reasonable rate; (d) awarding the City of Biloxi reasonable attorney fees to be set by the Court; and (e) directing that after the City of Biloxi has recouped the money owed to it, the trustee shall distribute and pay the future collected rent to the three landlords in accord with the formula for distribution in the provisions of the PCCSA. Biloxi prays for such other relief as the Court may deem appropriate.

This, the 10th day of April, 2017.

Respectfully submitted,

THE CITY OF BILOXI, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Michael E. Whitehead, of the law firm of Page, Mannino, Peresich & McDermott, PLLC, hereby certify that I have electronically filed the foregoing with the Clerk of the Court by using the MEC system, which sent notification to all parties who have appeared in this case. I further certify that I have on this day, mailed a copy of the foregoing by United States Postal Service, first class, postage prepaid, to the following:

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This, the 10th day of April, 2017.

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