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REPLY BRIEF OF BAY POINT HIGH AND DRY, LLC

I. INTRODUCTION

This current action is pending before the Court on the appeal of Bay Point High and Dry, LLC ("Bay Point") challenging, as reversible error, the Trial Court's granting of summary judgment in favor of New Palace Casino, LLC ("New Palace"). In support of its arguments, on or about February 10, 2010, Bay Point filed its Appellant's Brief with the Court. New Palace Casino, LLC filed a response on or about April 14, 2010. Bay Point now submits this reply brief to address issues and to clarify points of fact and law raised by New Palace.

II. STATEMENT OF THE ISSUES

Whether the Trial Court committed reversible error in granting summary judgment in favor of New Palace.

III. SUMMARY OF REPLY ARGUMENT

The Trial Court erroneously ruled that satisfying the Mississippi Gaming Commission mooring requirement was the duty owed to Bay Point by New Palace. However, the State Legislature never expressly or implicitly delegated the power to the Mississippi Gaming Commission to create legal duties. Furthermore, Mississippi Supreme Court precedent governs and shows that any legal duty (or inference thereof) created by regulations of a state commission, which are not expressly authorized by the legislature, is unenforceable. Therefore, the Trial Court's implication that no duty is breached as long as the Mississippi Gaming Commission's mooring requirement was met or exceeded by New Palace is fatally flawed and must be reversed.

Additionally, New Palace places heavy emphasis on the fact that Hurricane Katrina was an incredibly destructive storm.[1] No one denies the fact that Hurricane Katrina was a devastating storm. However, the mere fact alone that Hurricane Katrina could be considered an "Act of God" does not absolve New Palace of liability. New Palace was still required to take reasonable precautions and exercise reasonable care to prevent injuries. Furthermore, New Palace's reliance on the "Act of God" defense requires proof that **no amount** of foresight, pains, or care, reasonably could have been expected to prevent the damages caused by the New Palace breaking free from its moorings and destroying the Bay Point marina. New Palace claims it has met this standard; however, the evidence proves to the contrary. On their best day, this latter point is a genuine issue of material fact to be determined by the jury. In fact, the story of the Treasure Bay Casino reveals that the use of a small amount of pains or care could have prevented Bay Point's damages. Simple, cost-effective, and reasonable measures as used by Treasure Bay could have been employed by New Palace to prevent the destruction of Bay Point's marina.

Finally, when reasonable minds might differ on questions of proximate cause, foreseeability, breach of duty, and whether a particular storm was an Act of God, these questions are generally for the determination of the jury. As reasonable minds might differ on these questions, and the Trial Court disposed of this matter on New Palace's Motion for Summary Judgment, the Court has again committed reversible error due to the existence of genuine issues of material fact.

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[1] See Brief of Appellee at page 1.

IV. REPLY ARGUMENT

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT APPLIED AN ERRONEOUS LEGAL STANDARD.

The Mississippi Gaming Commission's regulation was created "as a condition of licensure," not for establishing a legal duty in civil actions[2]. Furthermore, the Mississippi Gaming Commission is not a legislative body and cannot establish legal duties. "State boards and commissions are creatures of the Legislature and have no powers other than those delegated to it by the Legislature." *Howard v. Estate of Harper*, 947 So.2d 854 (Miss.2006) citing *Masonite Corp. v. State Oil & Gas Bd.*, 240 So.2d 446 (Miss.1970).

The Trial Court held as a matter of law that New Palace met its legal duty when it constructed a mooring system that met, if not exceeded, the requirements of the Mississippi Gaming Commission, despite Bay Point's proof that New Palace failed to satisfy the Mississippi Gaming Commission's mooring requirement.[3] The Trial Court has applied an erroneous legal standard. Where the trial judge has applied an erroneous legal standard, the Mississippi Supreme Court **should not hesitate to reverse**. (Emphasis added) *McClendon v. State*, 539 So.2d 1375 (Miss.1989) citing *Detroit Marine Engineering v. McRee*, 510 So.2d 462, 467 (Miss.1987); *Bell v. City of Bay St. Louis*, 467 So.2d 657, 661 (Miss.1985).

In *Howard v. Estate of B. Harper*, 947 So.2d 854 (Miss.2006), the Mississippi Supreme Court noted that where there is no **express language** creating a legal duty in the statute or regulation in question, no such legal duty is created. (Emphasis added). The statute referred to in *Howard* was

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[2] See Miss. Gaming Comm. Reg. § II(B)(10)

[3] See Judgment, page 2 [911].

enacted for generally similar reasons as the statute granting licensing authority to the Mississippi Gaming Commission: the protection of Mississippi citizens.[4] "As the scope of Sections 43-11-1 *et seq.* is limited to licensing concerns, any duty (or inference thereof) created by the regulations is unenforceable." *Howard, supra.* Similarly, as the scope of the Mississippi Gaming Commission regulation is limited to licensing concerns by the express language in the regulation, any duty (or inference thereof) created by the regulations is unenforceable. See *Howard, supra.*

A more careful reading of Bay Point's Appellate Brief by New Palace's counsel would reveal that Bay Point is not arguing for the first time on appeal that the Mississippi Gaming Commission regulation has no legal effect or that the Mississippi Gaming Commission was not authorized to issue the **licensing** regulation. In fact, Bay Point contends, as it always has, "The regulation is, at best, a minimum standard of care that must be met by New Palace, and the plain and simple truth is that the minimum standard was not met because Hurricane Katrina was a Category 3 storm when it came ashore." [5] Put simply, if New Palace fails to meet this **minimum** standard of care, then New Palace would be liable of negligence per se. However, if New Palace satisfies this minimum standard of care, which it did not, it is not automatically absolved of any liability as the regulation is not a legal duty. The Mississippi Gaming Commission is only authorized to issue regulations for licensing conditions; it is not expressly authorized to create legal duties, period.

Finally, presumably due to an inability to find legal support for his contention, New Palace's counsel falls back on a last ditch"common sense" appeal: "as a matter of common sense, the

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[4] See Miss.Code Ann. § 43-11-1 *et seq* and Miss.Code Ann. § 75-76-1 *et seq.*

[5] See Bay Point's Appellate Brief at pages 5, 9, 11, 12 and 20.

argument fails because it is so clearly at odds with what the legislature intended."[6] Not surprisingly, counsel for New Palace has yet to point out the express language in the Gaming Control Act granting the Mississippi Gaming Commission the authority to create legal duties. In New Palace's Brief of Appellee, which is replete with references to the fact that arguments or speculation of counsel have no legal effect, it is ironic that he now relies solely on his own conclusory argument that the legislature clearly intended to grant the Mississippi Gaming Commission the power to enact legal duties.[7] Nevertheless, as *Howard* is the controlling authority on this subject or, at very least, incredibly persuasive, the Trial Court's interpretation that New Palace's compliance with the regulation established no duty owed to Bay Point was breached is a clear error in the application of Mississippi law and should be reversed.

B. WHERE REASONABLE MINDS COULD DIFFER, QUESTIONS OF PROXIMATE CAUSE AND NEGLIGENCE ARE FOR THE JURY.

When reasonable minds might differ on the matter, questions of proximate cause and of negligence are generally for determination of jury. *Hankins Lumber Co. v. Moore*, 774 So.2d 459 (Miss.App.2000) citing *American Creosote Works of Louisiana v. Harp*, 215 Miss. 5, 12, 60 So.2d 514, 517 (1952). These questions are for the jury to decide under proper instructions of the court as to the applicable principles of law involved. *Hankins Lumber Co., supra,* citing *Smith v. Walton*, 271 So.2d 409, 413 (Miss.1973). Foreseeability and breach of duty are also issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case. *American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254, 1259 (Miss.App.2000). Furthermore, whether a particular natural event is

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[6] See New Palace's Brief at page 17.

[7] See New Palace's Brief at pages 12, 14, and 19.

of such extraordinary and unprecedented nature as to constitute an "Act of God" is a question of fact for the jury. See *Feld v. Columbus & G. Ry. Co.*, 153 Miss. 601, 121 So. 272 (Miss.1929)[8]; See also *Lee v. Mobil Oil Corp.*, 203 Kan. 72, 452 P.2d 857 (Kan.1969).

Are all storms or natural events "Acts of God"? "Unquestionably, the ice storm of 1994 can best be characterized as an "Act of God," of which Entergy had no control. Nor could Entergy have done anything to prevent or lessen the end result." *McFarland v. Entergy Mississippi, Inc.*, 919 So.2d 894 (Miss.2005). The "Act of God" defense "applies only to events in nature so extraordinary that the history of climatic variations and other conditions **in the particular locality** affords no reasonable warning of them." (Emphasis added) *McFarland, supra*, citing *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550, 1553 (11th Cir.1989) (citing to *Bradford v. Stanley*, 355 So.2d 328, 330 (Ala.1978)) (citing *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374 (1902)).

New Palace's own expert[9] testified that in order to properly design to Mississippi Gaming Commission regulations, the mooring design must take into consideration the high tides experienced on the Mississippi Gulf Coast, such as the high tides generated by Hurricane Camille. This is

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[8] *Feld v. Columbus & G. Ry. Co.*, 153 Miss. 601, 121 So. 272 (Miss.1929): "The court instructs the jury that the plaintiff is entitled to recover in this case, unless the jury believe from the weight of the evidence that the seed sued for were lost or damaged by what is termed, under the law, an act of God; and, to constitute an act of God, it must arise from some violent disturbance of the elements, such as a storm, tempest or flood, and must be the immediate, proximate and sole cause of the loss or damage, not concurred in by the negligence of the defendant; and the burden of proof is upon the defendant in this case to show from the weight of the evidence not only that the loss and damage to the seed in question was caused by a violent flood, but that the defendant and its employees were free from fault, which did not contribute to, or cooperate with the flood in causing loss or damage to the seed." The Court in *Feld* places the same questions presented in this case in the hands of the jury.

[9] Terry Moran was not designated by New Palace in this case, but was used by New Palace as an expert in litigation with its insurance carrier, RSUI, on a Hurricane Katrina property damage claim

evidence that Hurricane Katrina was foreseeable. Furthermore, ice storms clearly do not occur frequently in the deep south; however, the same cannot be said for hurricanes. They are a recurring fact of life on the Gulf Coast. In a locale where hurricanes strike on a yearly and consistent basis with increasing strength and devastation, can it really be claimed that reasonable people living on the Mississippi Gulf Coast had no reasonable warning of a storm the size of Hurricane Katrina? Did not Hurricane Camille give warning of this potential event? What about Hurricane Betsy, Hurricane Ivan, or the storm of 1947? What more warning could one want? Reasonable minds could differ on the answer to that very question when all the facts are presented.[10] Furthermore, reasonable minds could also differ on the following genuine issues of material fact presented in Bay Point's Appellant Brief: (1) whether New Palace actually satisfied the minimum standard set by the Mississippi Gaming Commission regulation; (2) whether a U.S. Coast Guard inspection might have required more stringent mooring and secondary restraints; (3) whether the surge in the Biloxi Bay was actually above fifteen (15) feet; (4) whether New Palace was negligent by not employing simple, cost -effective secondary restraints; and (5) whether a tide above fifteen (15) feet was the first and only force to dislodge the SportsZone. Therefore, these are all questions of fact for the jury and should not be disposed of on summary judgment.

C. THE MERE FACT THAT HURRICANE KATRINA COULD BE CLASSIFIED AS AN "ACT OF GOD" DOES NOT ABSOLVE NEW PALACE OF LIABILITY.

The Trial Court failed to consider reasonable precautions that New Palace could and should have taken to prevent Bay Point's injuries when it stated that New Palace could not have guarded

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[10] Forecasters have been warning for years about the increasing strengthening of hurricanes. "The number of storms that reach Category Four and Five—the most powerful, damaging hurricanes—has nearly doubled over the past 35 years, the study finds." Roach, John. "Hurricanes Are Getting Stronger, Study Says." National Geographic News, 15 Sept. 2005.

against Hurricane Katrina. As stated previously, Treasure Bay Casino employed a simple, cost-effective secondary restraint system that held the barge in place when the moorings failed. Treasure Bay Casino's implication of secondary restraints clearly demonstrates that there was, at very least, some amount of foresight, pains, or care that New Palace could have exercised to prevent Bay Point's injuries. It defies all logic to argue that it was impossible to guard against Hurricane Katrina's storm surge when Treasure Bay and other casinos did exactly that.[11] There is nothing extraordinary or unreasonable about this fail-safe device, and it could have prevented the SportsZone from destroying the Bay Point marina.

New Palace argues that Bay Point's description of the secondary restraint system is a misnomer because the restraint system used by Treasure Bay was actually a "primary" system. Misnomer or not, the fact is that there existed an unextraordinary, cost-effective "secondary" or "primary" mooring system that could have been employed by New Palace to prevent Bay Point's damages. Additionally, New Palace asserts that Bay Point offered no evidence that a secondary restraint system was required to be employed by New Palace.[12] However, Bay Point is not required to prove that a "secondary" restraint system was required. Nevertheless, Bay Point has shown that there was some amount of foresight, pains, or care that New Palace could have exercised to prevent Bay Point's injuries. If Treasure Bay could design a simple, cost-effective "primary" system that did not fail and did not even need a "secondary" system in place to act as a fail-safe, then there is no reason why New Palace could not have done the same. Accordingly, New Palace has failed to prove that **no amount** of foresight, pains, or care by New Palace could have been exercised to prevent Bay

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[11] See Brief of Appellee at page 15.

[12] See Brief of Appellee at page 15.

Point's injuries. Finally, and more for the sake of allowing New Palace's counsel one last opportunity to point out the legal effect of argument of counsel, it does not take much of a seaman, let alone a marine engineer (New Palace's engineer was from Minnesota) to know that an anchor or an extra line is needed to secure a vessel in a storm. Any seaman worth his salt, let alone a marine engineer, should know that wind brings seas and thus a system, anchor line, chains, or dolphins must account for waves.

CONCLUSION

As stated previously, in addition to the Trial Court's erroneous interpretation that the Mississippi Gaming Commission's mooring regulation established the duty owed to Bay Point, the following genuine issues of material fact still exist and must be determined by the trier of fact: (1) whether New Palace actually satisfied the minimum standard set by the Mississippi Gaming Commission regulation; (2) whether a U.S. Coast Guard inspection might have required more stringent mooring and secondary restraints; (3) whether the surge in the Biloxi Bay was actually above fifteen (15) feet; (4) whether New Palace was negligent by not employing simple, cost - effective secondary restraints; (5) whether a tide above fifteen (15) feet was the first and only force to dislodge the SportsZone; (6) whether the storms in the past gave warning to the future; (7) whether there was adequate warning in the few days before Katrina to cause New Palace to take appropriate action; and (8) whether New Palace's "Act of God" was foreseeable; and (9) whether the mooring system was designed to withstand lateral wave action when the SportsZone broke free.

Accordingly, Bay Point respectfully requests that this Court rule the Trial Court committed reversible error in granting summary judgment in favor of New Palace.

Respectfully submitted, this the 28th day of April, 2010.

BAY POINT HIGH AND DRY, L.L.C.,
Appellant

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CERTIFICATE OF SERVICE

The undersigned counsel for the Appellant does hereby certify that a true and correct copy of the foregoing document has this day been served via U.S. mail, postage prepaid, to the following:

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This the 28th day of April, 2010.