

SEP 11 2015

OFFICE OF THE CLERK

No. 143, Original

---

**In the Supreme Court of the United States**

---

STATE OF MISSISSIPPI,

*Plaintiff,*

v.

STATE OF TENNESSEE, CITY OF MEMPHIS,  
TENNESSEE, AND MEMPHIS LIGHT, GAS &  
WATER DIVISION,

*Defendants.*

---

*On Bill of Complaint in Original Action*

---

**ANSWER OF  
DEFENDANTS THE CITY OF MEMPHIS, TENNESSEE,  
AND MEMPHIS LIGHT, GAS & WATER DIVISION**

---

CHERYL W. PATTERSON  
CHARLOTTE KNIGHT GRIFFIN  
MEMPHIS LIGHT, GAS &  
WATER DIVISION  
220 South Main St.  
Memphis, TN 38103  
(901) 528-4343

HERMAN MORRIS, JR.  
REGINA MORRISON NEWMAN  
PHILIP OLIPHANT  
THE CITY OF MEMPHIS, TENNESSEE  
125 North Main St., Room 336  
Memphis, TN 38103  
(901) 636-6614

LEO M. BEARMAN  
*Counsel of Record*  
DAVID L. BEARMAN  
KRISTINE L. ROBERTS  
BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWTIZ, P.C.  
165 Madison Ave., Suite 2000  
Memphis, TN 38103  
(901) 526-2000  
lbearman@bakerdonelson.com

MARK S. NORRIS, SR.  
ADAMS AND REESE LLP  
6075 Poplar Avenue, Suite 700  
Memphis, TN 38119  
(901) 525-3234

*Counsel for Defendants The City of Memphis, Tennessee,  
and Memphis Light, Gas & Water Division*

---



**ANSWER OF  
DEFENDANTS THE CITY OF MEMPHIS,  
TENNESSEE AND MEMPHIS LIGHT, GAS &  
WATER DIVISION**

---

The City of Memphis, Tennessee (the “City”), and Memphis Light, Gas & Water Division (“MLGW”), pursuant to the Order of this Court of June 29, 2015, respectfully submit their joint Answer to the Bill of Complaint (the “Complaint”) filed by State of Mississippi (“Plaintiff” or “Mississippi”) and state:

**ANSWER OF THE CITY AND MLGW**

1. It is admitted that Mississippi is a sovereign state of the United States of America (the “United States”) and that Mississippi purports to bring this suit in its capacity as sovereign, and as *parens patriae* for its citizens. The remaining allegations in paragraph 1 are denied.

2. Admitted.

3. Admitted.

4. Admitted.

5. The City and MLGW admit that this Court has jurisdiction to hear interstate groundwater disputes. The City and MLGW admit that this Court has original and exclusive jurisdiction to equitably apportion the interstate aquifer at issue in this cause called the “Memphis Sand Aquifer” or the “Sparta Sand Aquifer” by Mississippi (hereinafter the “Aquifer”); provided, however, that the complaining state alleges and can prove real and substantial damages. The City and MLGW specifically deny that Mississippi has

asserted a claim for equitable apportionment or alleged real and/or substantial damages. The City and MLGW specifically deny that Mississippi has stated any claim or cause of action for which relief can be granted. The remaining allegations in paragraph 5 are denied.

6. The City and MLGW admit that this Court has jurisdiction to hear interstate groundwater disputes. The City and MLGW admit that this Court has original and exclusive jurisdiction to equitably apportion the interstate Aquifer at issue in this cause; provided, however, that the complaining state alleges and can prove real and substantial damages. The City and MLGW specifically deny that Mississippi has asserted a claim for equitable apportionment or alleged real and/or substantial damages. The City and MLGW specifically deny that Mississippi has stated any claim or cause of action for which relief can be granted. The remaining allegations in paragraph 6 are denied.

7. The City and MLGW admit that this Court has jurisdiction to hear interstate groundwater disputes. The City and MLGW admit that this Court has original and exclusive jurisdiction to equitably apportion the interstate Aquifer at issue in this cause; provided, however, that the complaining state alleges and can prove real and substantial damages. The City and MLGW specifically deny that Mississippi has asserted a claim for equitable apportionment or alleged real and/or substantial damages. The City and MLGW specifically deny that Mississippi has stated any claim or cause of action for which relief can be granted. The City and MLGW specifically deny that Defendants have mechanically extracted groundwater from the

territory of the State of Mississippi at any time. The remaining allegations in paragraph 7 are denied.

8. The City and MLGW admit that on December 10, 1817, Mississippi was admitted as the twentieth state to the Union. The remaining allegations in paragraph 8 are denied because they are legal conclusions for which no response is required.

9. The allegations in paragraph 9 are denied because they are legal conclusions for which no response is required.<sup>1</sup>

10. The allegations in paragraph 10 are denied because they are legal conclusions for which no response is required. For further answer, the City and MLGW specifically deny the allegations in paragraph 10 to the extent Plaintiff states or implies that the Aquifer is not a shared, interstate water resource and/or that Mississippi “owns” any portion of the groundwater in the Aquifer.

11. The allegations in paragraph 11 are denied because they are legal conclusions for which no response is required. For further answer the City and MLGW specifically deny the allegations in paragraph 11 to the extent Plaintiff states or implies that the Aquifer is not a shared, interstate water resource and/or that Mississippi “owns” any portion of the groundwater in the Aquifer. The City and MLGW specifically deny that Mississippi law governs this dispute.

---

<sup>1</sup> The City and MLGW aver that the language quoted in paragraph 9 of the Complaint is properly attributed to *Kansas v. Colorado*, 206 U.S. 46, 93 (1907).

12. The City and MLGW admit that the quoted language in paragraph 12 appears in Miss. Code. Ann. § 51-3-1 (2003) and in Richard J. McLaughlin, "Mississippi" in 6 WATER AND WATER RIGHTS, 712 (Robert E. Beck, Ed., 1991 ed., repl. vol. 2005), respectively. The remaining allegations in paragraph 12 are denied because they are legal conclusions for which no response is required. The City and MLGW specifically deny the allegations in paragraph 12 to the extent Plaintiff states or implies that the Aquifer is not a shared, interstate water resource and/or that Mississippi "owns" any portion of the groundwater in the Aquifer.

13. The City and MLGW admit that, at the time Mississippi was admitted to the Union, it shared a border with Tennessee, which had been admitted to the Union on June 1, 1796. The City and MLGW specifically deny that Mississippi's shared border with Tennessee is located at 35° latitude. See NAT'L GEODETIC SURVEY, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NGS DATA SHEET EH2662, *available at* [http://www.ngs.noaa.gov/cgi-bin/ds\\_mark.prl?PidBox=EH2662](http://www.ngs.noaa.gov/cgi-bin/ds_mark.prl?PidBox=EH2662). The remaining allegations in paragraph 13 are denied.

14. The City and MLGW admit that MLGW constructs and operates well pumping fields entirely within the borders of Tennessee. For further answer, the City and MLGW state that MLGW's wells are drilled vertically and do not slant so as to pump groundwater from beneath Mississippi. The City and MLGW admit that MLGW's pumping is authorized by and in compliance with all applicable laws and regulations. The City and MLGW specifically deny

that MLGW “forcibly extracts” “from Mississippi” or has “mechanically taken” “a limited natural resource” from “within Mississippi.” The City and MLGW specifically deny that, under natural conditions, groundwater in the Aquifer would not have flowed through and out of Mississippi’s borders. The City and MLGW specifically deny that they have invaded Mississippi’s sovereign territory, committed trespass against Mississippi, converted Mississippi natural resources, and/or violated Mississippi water law. The City and MLGW specifically deny that Mississippi law is controlling in this dispute over a shared, interstate groundwater resource. The remaining allegations in paragraph 14 are denied.

15. The City and MLGW admit that the groundwater at issue is naturally collected from precipitation on the outcrop areas of the Aquifer. It is admitted that the Aquifer has a surface outcrop area which, generally stated, extends from the southeastern boundary of Shelby County, Tennessee and western boundary of Fayette County, Tennessee, into the eastern boundary of Desoto County, Mississippi and western boundary of Marshall County, Mississippi. For further response, the City and MLGW aver that the Aquifer also has outcrop areas around its northern and western edges. It is admitted that, from its eastern outcrop area, the Aquifer descends, while thickening as it moves toward the deepest portion of the Aquifer that lies roughly beneath the Mississippi River. The City and MLGW admit that the Aquifer is sandwiched between upper and lower clay formations which are, with some exceptions, impermeable, or of very low permeability. The City and MLGW specifically deny that “Mississippi’s groundwater” is at issue in this

case. The City and MLGW specifically deny that the Aquifer descends from the outcrop area within Mississippi exclusively with an east-to-west/southwest slope. The remaining allegations in paragraph 15 are denied.

16. The City and MLGW admit that, under natural conditions (before pumping began), rainwater falling in the outcrop area within Mississippi's current borders collected there and was drawn by gravity into the Aquifer. The City and MLGW specifically deny that the natural flow of groundwater that recharged in the outcrop area within Mississippi was exclusively east-to-west/southwest and further deny that United States Geological Survey reports support Plaintiff's allegations. The remaining allegations in paragraph 16 are denied.

17. The City and MLGW admit that, under natural conditions, over thousands of years, the Aquifer lying beneath Mississippi and Tennessee (and other states) was saturated with high quality groundwater that has remained at a fairly constant volume and under significant hydrostatic pressure. The City and MLGW specifically deny that groundwater originating in the outcrop area within Mississippi would, under natural conditions, never have been available within Tennessee's territorial borders. The City and MLGW specifically deny that the Aquifer is an "intrastate natural resource." The City and MLGW admit that the Aquifer is generally confined by the clay formations above and below it, but specifically deny that the Aquifer is confined laterally or horizontally such that groundwater would not have naturally flowed through and out from beneath Mississippi to the north and to



the west. The City and MLGW specifically deny that, under natural conditions, groundwater in the Aquifer migrating through Mississippi would have remained within Mississippi. The remaining allegations in paragraph 17 are denied.

18. The City and MLGW admit the allegations in the first sentence of paragraph 18. The City and MLGW admit that, for years, MLGW has pumped groundwater from the Aquifer. The City and MLGW admit that the Aquifer underlies both Tennessee and Mississippi. The remaining allegations in paragraph 18 are denied.

19. The City and MLGW admit that, between 1965 and 1985, MLGW expanded its groundwater pumping operations from five to nine well fields and increased its total pumping from within the borders of Shelby County, Tennessee, from approximately 72 million gallons a day ("MGD") to over 131 MGD. The City and MLGW admit that pumping from the Lichterman well field in Memphis increased from approximately 4 MGD to over 21 MGD. The City and MLGW admit that a portion of the Lichterman well field is within three miles of the Mississippi border. The allegations in the last sentence of paragraph 19 are admitted. The remaining allegations in paragraph 19 are denied.

20. The City and MLGW admit that MLGW's distribution system currently pumps approximately 140 MGD. The remaining allegations in paragraph 20 are denied. For further answer, the City and MLGW aver that MLGW's water distribution system presently includes more than 160 wells in eleven well fields.

21. The City and MLGW admit that Tennessee exercises general supervision and authority over MLGW's public water system as set forth in applicable Tennessee statutes and regulations. The City and MLGW specifically deny that Tennessee "supervised, authorized, and regulated . . . all features relating to quantity and source of water supply." The remaining allegations in paragraph 21 are denied.

22. The City and MLGW admit that MLGW's wells, located entirely within Tennessee's borders, mechanically pump groundwater from the Aquifer and that the Aquifer underlies both western Tennessee and western Mississippi. The City and MLGW specifically deny that any of the groundwater pumped by MLGW "belongs to Mississippi which would never, under natural conditions, resided or been available within Tennessee's boundaries." The remaining allegations in paragraph 22 are denied.

23. Denied. For further answer, the City and MLGW specifically deny that any groundwater in the Aquifer is "owned by Mississippi."

24. Denied. For further answer, the City and MLGW specifically deny that any groundwater in the Aquifer is "Mississippi groundwater" or "Mississippi's groundwater." The City and MLGW specifically deny that they have taken groundwater "from within Mississippi's borders."

25. Denied.

26. Denied.

27. Denied. For further answer, the City and MLGW specifically deny that the relocation of its wells

to the north and east of MLGW's distribution system and/or use of Mississippi River water as an alternate or supplemental source of water supply is reasonable or feasible. The City and MLGW specifically deny that any groundwater pumped by MLGW constitutes a "wrongful taking."

28. The City and MLGW admit that MLGW has provided funding and assistance for USGS and Ground Water Institute research, studies, and publications. The remaining allegations in paragraph 28 are denied.

29. Denied.

30. Denied. For further answer the City and MLGW specifically deny that any portion of the Aquifer is "Mississippi groundwater."

31. Denied.

32. The City and MLGW admit that MLGW's rate of pumping has decreased. The remaining allegations in paragraph 32 are denied.

33. The City and MLGW aver that the Tennessee Comptroller's Office March 2002 Special Report speaks for itself. The City and MLGW deny that they are extracting "Mississippi's groundwater" and that there exists a "serious water scarcity issue." The allegations in the last sentence of paragraph 33 are denied because the City and MLGW lack sufficient information or knowledge to respond.

34. Denied.

35. The City and MLGW admit that there have been prior attempts to litigate these issues and admit that the citations to federal reporters in paragraph 35

are accurate. The City and MLGW deny that prior attempts to litigate these issues have been unsuccessful. The remaining allegations in paragraph 35 are denied.

36. The allegations in paragraph 36 are denied because the City and MLGW lack sufficient information or knowledge to respond.

37. The City and MLGW admit neither state's legal regime governs this dispute. The remaining allegations in paragraph 37 are denied.

38. The City and MLGW admit that this is a dispute between sovereign states. The City and MLGW specifically deny that this case falls outside of this Court's equitable apportionment jurisprudence. The City and MLGW specifically deny that the groundwater in dispute naturally accumulated within Mississippi's sovereign territory before the formation of the United States and would never through the agency of natural laws have moved into, or been available in Tennessee. The City and MLGW specifically deny that that the Aquifer is not a shared natural resource. The remaining allegations in paragraph 38 are denied.

39. Denied. For further answer, the City and MLGW specifically deny that they have reached into or invaded Mississippi's sovereign territory, trespassed upon, and/or wrongfully converted any natural resources under the sovereign ownership and control of Mississippi.

40. The City and MLGW admit that in prior litigation relating to this dispute, the United States District Court for the Northern District of Mississippi and the United States Court of Appeals for the Fifth

Circuit held that a determination of whether the Defendants' taking of groundwater was wrongful could not be made without first determining the relative rights of Mississippi and Tennessee to groundwater stored in the interstate Aquifer by an equitable apportionment action. The City and MLGW admit that those same courts also held that Tennessee would be a necessary and indispensable party to any equitable apportionment action by Mississippi seeking such determination, and that original and exclusive jurisdiction over an equitable apportionment action would reside in the United States Supreme Court. The remaining allegations in paragraph 40 are denied.

41. The City and MLGW admit that the geologic formation through which the groundwater migrates underlies two states, as well as other states. The City and MLGW specifically deny that the groundwater at issue is an intrastate natural resource. The City and MLGW specifically deny that the groundwater at issue is not a naturally shared interstate resource. The City and MLGW specifically deny that any portion of the Aquifer is "Mississippi's groundwater." The City and MLGW specifically deny that groundwater in the Aquifer underlying Mississippi would never naturally move or flow north into Tennessee. The City and MLGW specifically deny that this action presents a different factual or legal situation from the shared interstate river or stream disputes resolved under the Court's original and exclusive jurisdiction through equitable apportionment, where opposing states have co-equal rights to use the water traversing and freely flowing across two or more states under natural conditions. The remaining allegations in paragraph 41 are denied.

42. The City and MLGW admit that the quoted language in paragraph 42 appears in Miss. Code Ann. § 51-3-1. The remaining allegations in paragraph 42 are denied because they are legal conclusions for which no response is required. For further answer, the City and MLGW specifically deny that Mississippi law governs this dispute.

43. The City and MLGW admit that the quoted language in paragraph 43 appears in Miss. Code Ann. § 51-3-3(n) and Miss. Code Ann. § 51-3-5, respectively. The City and MLGW specifically deny that Mississippi law governs this dispute. The remaining allegations in paragraph 43 are denied.

44. Denied.

45. The City and MLGW admit that the quoted language in paragraph 45 appears in Tenn. Code Ann. § 68-221-702 and Tenn. Code Ann. § 68-221-703(13), respectively.

46. Denied. *See Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982) (“[T]his Court traced the demise of the public ownership theory and definitively recast it as ‘but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979)).

47. Denied.

48. The allegations in paragraph 48 are denied because they are legal conclusions for which no response is required.

49. The City and MLGW admit that quoted language in paragraph 49 appears in *Kansas v. Colorado* and *Connecticut v. Massachusetts*, respectively. The remaining allegations in paragraph 49 are denied. The City and MLGW specifically deny that these cases support Mississippi's allegations. See *Hood, ex rel. Mississippi v. City of Memphis, Tennessee and Memphis Light Gas & Water Division*, 570 F.3d 625, 630 (5th Cir. 2009), cert. denied, 559 U.S. 904 (2010) ("Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine.").

50. The City and MLGW admit the Aquifer underlies both Mississippi and Tennessee. The remaining allegations in paragraph 50 are denied.

51. Denied. See *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) ("Last Term, the Court rejected the notion that the mere fact that the Vermejo River originates in Colorado automatically entitles Colorado to a share of the river's waters."); *Idaho v. Oregon*, 462 U.S. 1017 (1983) ("After *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), however, Idaho cannot claim legal ownership of the fish. While the origin of the fish may be a factor in the fashioning of an equitable decree, it cannot by itself establish the need for a decree.").

52. Denied. For further answer, the City and MLGW specifically deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal theory.

53. Denied. For further answer, the City and MLGW specifically deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal theory.

54. Denied, including subparts (a) - (c). For further answer the City and MLGW specifically deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal theory.

55. Denied. For further answer, the City and MLGW specifically deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal theory.

56. Denied. The City and MLGW specifically deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal theory.

57. Denied. For further answer, the City and MLGW specifically deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal theory.

In answer to Plaintiff's Prayer for Relief on pages 23 - 24 of the Complaint, including the paragraphs identified as (A) - (E), the City and MLGW deny that Plaintiff is entitled to any of the relief Plaintiff seeks in this cause. The City and MLGW deny that they have acted wrongfully and that they are liable to Plaintiff in any amount or under any legal authority. The City and MLGW specifically deny that Mississippi owns, has exclusive dominion over, and/or has the exclusive right to control groundwater in the unapportioned Aquifer.



The City and MLGW hereby deny any allegation that was not specifically admitted or denied herein.

### **DEFENSES OF THE CITY AND MLGW**

The City and MLGW incorporate each and every admission, denial, and averment above as though fully set forth herein. The City and MLGW assert separately and/or alternatively the following defenses, reserving the right to amend same:

#### **FIRST DEFENSE**

The Complaint fails to state a claim upon which relief can be granted and should, therefore, be dismissed.<sup>2</sup>

#### **SECOND DEFENSE**

The Aquifer at issue (known as the “Memphis Sand Aquifer” in Tennessee and the “Sparta Aquifer” in Mississippi) is a shared, interstate resource underlying and migrating through portions of southwest Tennessee, northwest Mississippi, and other states. The groundwater flowing in the Aquifer has never been apportioned by interstate compact or by equitable apportionment. Disputes over interstate water resources are matters between states and fall within the original and exclusive jurisdiction of the United States Supreme Court. For over a century, the Supreme Court has resolved such interstate disputes by application of the doctrine of equitable

---

<sup>2</sup> The City and MLGW aver that Mississippi has failed to state a viable claim in this cause. Averments and affirmative defenses set out herein addressing Plaintiff's tort claims, including without limitation, conversion and trespass, are pled in the alternative.

apportionment. Unless and until the Aquifer is so apportioned, Plaintiff cannot state a viable claim for wrongful taking of groundwater by users in Tennessee (or Arkansas).

### THIRD DEFENSE

Mississippi's Complaint is barred in whole or part by the doctrine of judicial estoppel. In previous litigation Plaintiff sued the City and MLGW alleging wrongful taking of "Mississippi's water" in the Aquifer. *Hood, ex rel. Mississippi v. City of Memphis, Tennessee and Memphis Light Gas & Water Division*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009), cert. denied, 559 U.S. 904 (2010) ("*Mississippi I*"). In *Mississippi I*, Plaintiff repeatedly and affirmatively averred that the Aquifer was an interstate resource. Further, Plaintiff relied on the interstate nature of the Aquifer as a basis for jurisdiction in federal court. See Mississippi's Amended Complaint in the U.S. District Court for the Northern Division of Mississippi, ¶ 11 ("This is an interstate groundwater action ..."); *id.* at ¶ 14 ("The Memphis Sand Aquifer, or 'Sparta Aquifer' as it is known in Mississippi ... , in an underground reservoir that underlies portions of West Tennessee and Northwest Mississippi."); Mississippi's Brief to Fifth Circuit, p. 21 ("The interstate nature of the aquifer confers federal question jurisdiction on the District Court. ... It is the interstate context that actually confirms the District Court's subject matter jurisdiction ..."); *id.* at pp. 22-23 (asserting that the "aquifer is an interstate body of water"); *id.* at p. 46 ("The interstate context of this case confers federal question jurisdiction upon the District Court ...");

Mississippi's Reply Brief to Fifth Circuit, p. 11 (asserting that, "because of the interstate character of the aquifer, the context of the litigation calls for application of federal common law."). Mississippi should be judicially estopped from asserting that the Aquifer is an intrastate resource.

#### FOURTH DEFENSE

Mississippi's Complaint is barred in whole or in part by the doctrine of issue preclusion. In *Mississippi I*, both the District Court and the Fifth Circuit considered and held that (1) the Aquifer was an interstate resource, (2) Mississippi could not state a viable claim for the alleged taking of "Mississippi's groundwater" from the Aquifer unless and until the interstate resource was equitably apportioned by the Supreme Court, and (3) the only judicial relief available to Mississippi for its claims relating to the Aquifer is an equitable apportionment suit. *See Mississippi I*, 533 F. Supp. 2d at 648 (stating that "it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi"); *Mississippi I*, 570 F.3d at 630-31 ("Despite Mississippi's contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries."); *id.* at 630 ("The Aquifer is an interstate water source ... ."); *id.* ("The Aquifer flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water."); *id.* ("Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original

development and application of the equitable apportionment doctrine.”); *id.* at 629-630 (“We find that the district court made no error of law as to the necessity of equitably apportioning the Aquifer. The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share.”).

### FIFTH DEFENSE

The rights of the various states overlying the Aquifer to the groundwater therein are usufructuary rights, not ownership rights. Mississippi does not “own” any portion of the interstate groundwater migrating through the Aquifer in a proprietary sense and, therefore, cannot state a viable claim for conversion. *See Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982) (“[T]his Court traced the demise of the public ownership theory and definitively recast it as ‘but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979)); 4 WATER AND WATER RIGHTS § 36-02, p. 36-8 – 36-9 (Robert E. Beck, ed., 1991 ed.) (“[T]he Supreme Court has made it abundantly clear that it has little patience with claims of absolute ‘ownership’ [of groundwater] by *either* [state or federal] government.”).

### SIXTH DEFENSE

MLGW pumps groundwater entirely from within the borders of Tennessee. MLGW’s wells are drilled vertically and do not slant so as to pump groundwater

from beneath Mississippi or extend across state lines into Mississippi. No part of any well or pump owned by MLGW lies within Mississippi's borders, and, therefore, Mississippi does not have standing to assert a claim for trespass and/or cannot state a viable claim for trespass.

### **SEVENTH DEFENSE**

Mississippi's claims are barred in whole or in part because Mississippi has not been damaged or injured by groundwater pumping by MLGW. The Aquifer underlying Mississippi and Tennessee is a healthy and abundant interstate resource. The groundwater in the Aquifer migrating through and out from beneath Mississippi to the north and west is, and under natural conditions was, constantly replaced by rainwater and other sources that recharge the Aquifer in the outcrop areas. The volume of groundwater in the Aquifer that is presently migrating from Mississippi to Tennessee is virtually unchanged from natural conditions. There is no shortage of groundwater in the Aquifer. The quantity of groundwater pumped from within the borders of northwestern Mississippi is presently limited only by installed infrastructure, not by water availability.

### **EIGHTH DEFENSE**

Any award of money damages to Mississippi is barred in whole or in part based on the doctrines of setoff and/or recoupment.

### **NINTH DEFENSE**

Any award of money damages to Mississippi should be reduced (or barred) by that portion of the damages

that is attributable to Mississippi's own pumping from the Aquifer.

### **TENTH DEFENSE**

Plaintiff's claims are barred in whole or in part because Plaintiff has failed to mitigate its damages.

### **ELEVENTH DEFENSE**

Mississippi's Complaint is barred in whole or in part by the applicable statute(s) of limitation and the doctrine of laches.

### **TWELFTH DEFENSE**

While strongly denying that Mississippi has stated a viable claim, the City and MLGW affirmatively assert in the alternative all defenses and damage caps available in the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. §§ 29-20-101 *et seq.*, which governs any tort claims against them.

### **THIRTEENTH DEFENSE**

The relief sought by Plaintiff violates the Constitution of the United States. By unilaterally claiming sovereign rights over a specific portion of the Aquifer or the groundwater in the Aquifer, Mississippi seeks to "reach, through the agency of natural laws, into the territory of another state." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). Mississippi's request for declaratory and injunctive relief infringes on Tennessee's sovereignty because Mississippi presumes that its rights to the unapportioned water in the Aquifer are superior to Tennessee's rights to the same interstate resource.

#### **FOURTEENTH DEFENSE**

Plaintiff's claims are barred in whole or in part because it lacks standing to bring them.

#### **FIFTEENTH DEFENSE**

Plaintiff's conversion claim is barred because the groundwater at issue has not been reduced to capture.

#### **SIXTEENTH DEFENSE**

While strongly denying that Plaintiff has stated a viable claim or suffered any compensable injury, the City and MLGW aver in the alternative that the measure of damages should not exceed the change in groundwater storage beneath Mississippi from 1985 to the present.

#### **SEVENTEENTH DEFENSE**

Plaintiff's claims are barred in whole or in part based on the doctrines of waiver, ratification, estoppel, prescription, acquiescence, and authority of law. Mississippi's Department of Environmental Quality has long been aware that groundwater was flowing from Mississippi across the state border into Tennessee.

#### **EIGHTEENTH DEFENSE**

Plaintiff's claims are barred in whole or in part based on the doctrine of unclean hands. Mississippi should not be permitted to assert that the City and MLGW's use of water is unlawful and or inequitable when pumping of groundwater from within Mississippi causes cones of depression that extend from Mississippi into other states.

**NINETEENTH DEFENSE**

Plaintiff's claims are barred in whole or in part based on the doctrine of preemption.

**PRAYER FOR RELIEF**

The City and MLGW pray that judgment be entered:

- A. Dismissing Mississippi's complaint with prejudice;
- B. Rejecting all of Mississippi's requests for relief; and
- C. Granting such further relief as this Court may deem just and proper.

Respectfully submitted,

LEO M. BEARMAN

*Counsel of Record*

DAVID L. BEARMAN

KRISTINE L. ROBERTS

**BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWITZ, PC**

165 Madison Avenue, Suite 2000

Memphis, Tennessee 38103

Tel: (901) 526-2000

Fax: (901) 577-0716

lbearman@bakerdonelson.com

*Counsel for Defendants The City of  
Memphis, Tennessee, and Memphis Light,  
Gas & Water Division*



*Of counsel:*

CHERYL W. PATTERSON  
CHARLOTTE KNIGHT GRIFFIN  
**MEMPHIS LIGHT, GAS & WATER  
DIVISION**

220 South Main Street  
Memphis, Tennessee 38103  
Tel: (901) 528-4343  
Fax: (901) 528-7776

HERMAN MORRIS, JR.  
REGINA MORRISON NEWMAN  
PHILIP OLIPHANT  
**THE CITY OF MEMPHIS,  
TENNESSEE**

125 North Main Street, Room 336  
Memphis, Tennessee 38103  
Tel: (901) 636-6614  
Fax: (901) 636-6524

MARK S. NORRIS, SR.  
**ADAMS AND REESE LLP**  
6075 Poplar Avenue, Suite 700  
Memphis, Tennessee 38119  
Tel: (901) 525-3234  
Fax: (901) 524-5419





