

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

ATTORNEYS AT LAW

1200 SMITH STREET, SUITE 1400

HOUSTON, TEXAS 77002

(713) 658-1818 (800) 342-5829

(713) 658-2553 (FAX)

www.chamberlainlaw.com

HOUSTON  
ATLANTA  
PHILADELPHIA

CHARLES T. JEREMIAH  
SENIOR COUNSEL  
DIRECT DIAL NO. (713) 654-9638  
E-MAIL: charles.jeremiah@chamberlainlaw.com

August 1, 2008

Docket Clerk  
TCEQ Office of Chief Clerk  
MC 105  
12100 Park 35 Circle,  
Bldg. F, Room 1101  
Austin, Texas 78753

Via Federal Express No. 8663 3364 4104

Re: *Flagship Hotel, Ltd. v. The City of Galveston*  
TCEQ Docket No. : 2007-0879-UCR  
SOAH Docket No. : 582-07-3473

CHIEF CLERKS OFFICE

2008 AUG -4 AM 10:59

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

To Whom It May Concern:

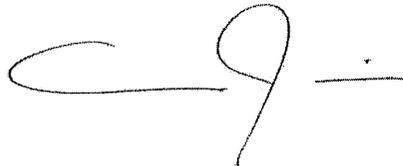
Enclosed is an original and eleven (11) copies of the City of Galveston's Brief Regarding Administrative Law Judge's Request to Answer a Certified Question in the above referenced matter.

By copy of this letter all counsel of record are being notified of this filing.

If you have any questions, please do not hesitate to call. Your cooperation and assistance in this matter is appreciated.

Sincerely yours,

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN



Charles T. Jeremiah

CTJ:tmh  
Enclosures  
0692088.01  
003840-000002

cc: Millard A. Johnson  
Johnson Deluca Kennedy & Kurisky  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

*Via CM-RRR No. 7160 3901 9845 6022 3325*

Carol Wood  
Administrative Law Judge  
State Office of Administration Hearings  
P. O. Box 13025  
Austin, Texas 78711-3025

*Via CM-RRR No. 7160 3901 9845 6022 3318*

Brian MacLeod  
TCEQ Legal Division MC 173  
P. O. Box 13087  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 6022 3301*

Blas Coy  
TCEQ Office of Public  
Interest Counsel MC 103  
P. O. Box 13087  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 6022 3295*

Bridget Bohac  
TCEQ Office of Public Assistance MC 108  
P. O. Box 13087  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 6022 3288*

SOAH DOCKET NO. 582-07-3473  
TCEQ DOCKET NO. 2007-0879-UCR

2008 AUG -4 AM 10: 59

BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
AND STATE OFFICE OF ADMINISTRATIVE HEARINGS CHIEF CLERKS OFFICE

FLAGSHIP HOTEL, LTD. §  
v. §  
THE CITY OF GALVESTON §

**CITY OF GALVESTON BRIEF REGARDING ADMINISTRATIVE LAW  
JUDGE'S REQUEST TO ANSWER A CERTIFIED QUESTION**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

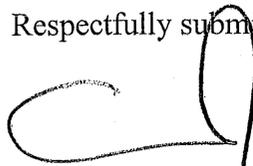
The City of Galveston (hereinafter "City"), files this Brief in reference to Administrative Law Judge Cara Wood's Request to Answer a Certified Question, and would show:

1. The Flagship Hotel, Ltd. filed what it styled as an "Amended Petition" with the Texas Commission on Environmental Quality ("TCEQ") last year, which was referred to the State Office of Administrative Hearings ("SOAH") and assigned to the Honorable Judge Cara Wood. Over the past year, the parties have thoroughly briefed the issue of the Texas Commission on Environmental Quality's jurisdiction over this matter to the SAOH. In addition, the City of Galveston filed a motion to dismiss the Flagship Hotel, Ltd.'s Amended Petition on independent grounds, which were the subject of additional briefing by the parties.
2. On May 30, 2008, Judge Wood issued a Request to Answer a Certified Question. In her request, after setting forth the respective parties' positions, Judge Wood sets forth her well-researched and well-reasoned analysis of the jurisdiction issue [p. 9, Sect. D, "Judge's Analysis"]. She states "[t]he Judge recommends the Commission find that it has exclusive appellate jurisdiction under Water Code § 13.042(d) to review the orders of a governing municipality,

including those orders pertaining to the municipality's own water and sewer service customers." [Id]. The Judge sets forth the basis for her recommendation. The City agrees with the Judge's rationale and conclusions, as well as her recommendation to the Commission.

3. The City attaches hereto copies of its briefing submitted in response to the Flagship Hotel Ltd.'s "Amended Petition for Review," which set forth in detail its factual and legal position regarding the issue jurisdiction previously submitted in connection with this matter. The City incorporates this briefing and included arguments and authority, as the City's argument here.

Respectfully submitted,



---

WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 1<sup>st</sup> day of August, 2008.

Millard A. Johnson  
Johnson Deluca Kennedy & Kurisky  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

*Via CM-RRR No. 7160 3901 9845 6022 3325*

Carol Wood  
Administrative Law Judge  
State Office of Administration Hearings  
P. O. Box 13025  
Austin, Texas 78711-3025

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Brian MacLeod  
TCEQ Legal Division MC 173  
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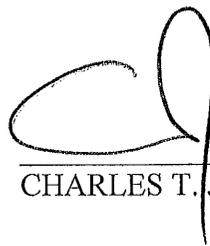
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*Via CM-RRR No. 7160 3901 9845 6022 3288*



CHARLES T. JEREMIAH

CHIEF CLERKS OFFICE

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SOAH DOCKET NO. 582-07-3473  
TCEQ DOCKET NO. 2007-0879-UCR

BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
AND STATE OFFICE OF ADMINISTRATIVE HEARINGS

FLAGSHIP HOTEL, LTD.                   §  
  §  
v.   §  
  §  
THE CITY OF GALVESTON               §

**CITY OF GALVESTON BRIEF REGARDING ADMINISTRATIVE LAW  
JUDGE'S REQUEST TO ANSWER A CERTIFIED QUESTION**

**INDEX**

1. Brief on the Issue on the Texas Commission on Environmental Quality's Jurisdiction over this Matter
2. City of Galveston's Reply to the Flagship Hotel, LTD's Brief on TCEQ's Lack of Jurisdiction and the City of Galveston's Motion to Dismiss the Flagship Hotel, LTD's Amended Petition
3. City of Galveston's Sur-Reply to the Executive Director's Reply to the City of Galveston's Brief on the Jurisdictional Issues and Motion to Dismiss
4. Motion to Dismiss
5. Reply to Flagship Hotel, Ltd.'s Response to City of Galveston's Motion to Dismiss
6. Supplement to Reply to Flagship Hotel, Ltd.'s Response to City of Galveston's Motion to Dismiss
7. Amended Petition for Review of the City of Galveston with Respect to the City of Galveston's Failure to Refund Sums Paid to Avoid Disconnection of Water Service
8. City of Galveston's Response to Flagship Hotel, LTD.'s Motion to Strike and to Exclude

IN THE STATE OFFICE OF ADMINISTRATIVE HEARINGS  
AUSTIN, TEXAS -- BY REFERRAL FROM THE TEXAS  
COMMISSION ON ENVIRONMENTAL QUALITY

FLAGSHIP HOTEL, LTD.

v.

THE CITY OF GALVESTON

§  
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**CITY OF GALVESTON'S BRIEF ON THE ISSUE OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY'S JURISDICTION OVER THIS MATTER**

COMES NOW, The City of Galveston (hereinafter "City"), and files this brief on the issue of the Texas Commission on Environmental Quality's (TCEQ) jurisdiction over this matter, and would show as follows:

**Dispute Not Properly Before the TCEQ**

1. The City has previously submitted extensive briefing establishing that this matter is not properly before the Texas Commission on Environmental Quality. The underlying matter was not timely or properly disputed at the municipal level and the Flagship's attempt to appeal *five years after the complained of action* is unquestionably and particularly untimely. The City refers to the argument and authorities set forth in its Motion to Dismiss and related briefs. Accordingly, this proceeding can and should be dismissed without further consideration of the issues addressed in detail below.

**Texas Water Code § 13.042 Grants TCEQ Exclusive Appellate Jurisdiction Over This Dispute**

2. The Texas Water Code, § 13.042(d) is unequivocal in its language:

"The commission shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in this chapter."

Texas Water Code § 13.042(d).

*All Appellate Courts Considering the Issue Have Found Jurisdiction*

3. Two Courts of Appeal have held that the TCEQ has exclusive appellate jurisdiction over *this very dispute*. The First Court of Appeals in Houston held that "section 13.042(d) vests appellate authority over this dispute with the TNRCC." *City of Galveston v. Flagship Hotel*, 73 S.W.3d 422 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.). In a separate appeal involving these same parties, the Sixth Court of Appeals in Texarkana held as follows:

"[T]he First Court of Appeals...held that the Texas Water Code granted the City exclusive original jurisdiction over such disputes and the Texas Natural Resource Conservation Commission (TNRCC) appellate jurisdiction. See *Flagship Hotel, Ltd.*, 73 S.W.3d at 427. We find the First Court of Appeals reasoning persuasive, and Flagship must exhaust its administrative remedies through the Texas Commission on Environmental Quality, formerly the TNRCC.

*Flagship Hotel, Ltd., v. City of Galveston*, 117 S.W.3d 552, 563 (Tex.App. – Texarkana 2003, pet. denied). The Texas Supreme Court denied review. The Flagship asks the TCEQ to ignore two prior appellate decisions in this very proceeding finding that it had exclusive appellate jurisdiction over this dispute. However, this final appellate decision establishes the "rule of the case" for this matter and cannot be set aside or disregarded in this Agency's review.

4. "[T]he law of the case doctrine provides that the final ruling of an appellate court on a question of law in a case will govern throughout the subsequent proceedings of the same case." *Treadway v. Shanks*, 110 S.W.3d 1, 4 (Tex.App. – Dallas 2000), *aff'd on other grounds*, 110

S.W.3d 444 (Tex. 2003), citing, *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *City of Dallas v. Cornerstone Bank, N.A.*, 879 S.W.2d 264, 268 (Tex.App. – Dallas 1994, no writ). Again, two Courts of Appeals have decided the issue of the TCEQ's jurisdiction in this case. The doctrine is "intended to achieve uniformity of decision as well as judicial economy and efficiency." *Hudson*, at 630. It is "based on public policy and aimed at putting an end to litigation." *Id.* As the jurisdictional issue has been decided on appeal, twice, the law of the case doctrine clearly precludes this agency from deciding the issue yet again.

5. Moreover, and more generally, all other appellate courts considering the issue are in agreement. The Second Court of Appeals has held in accordance with the First and Sixth. "[T]he water code confers exclusive original jurisdiction over water service disputes to the municipality and exclusive appellate jurisdiction over such disputes to the Commission." *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 340 (Tex.App. – Fort Worth 2005, no pet.). Similarly, the Thirteenth Court of Appeals held that "[t]he TCEQ has exclusive appellate jurisdiction to review orders or ordinances of [a] City." *City of Donna v. Victoria*, 2005 WL 1831593 (Tex.App. – Corpus Christi 2005, pet. denied) (unpublished). Thus, four Texas Courts of Appeal have held unequivocally that the TCEQ has exclusive appellate jurisdiction over orders or ordinances of a municipality on water service disputes. Indeed, no appellate Court in Texas had ever held otherwise. Furthermore, the Texas Supreme Court has denied petitions for writ in at least two of the cases. Thus, four courts of higher jurisdiction deciding the issue have unanimously reached the same conclusion – that the TCEQ has exclusive appellate jurisdiction over disputes such as the instant one – based on their plain reading of the statute.

*City Respectfully Submits That ALJ Newchurch's Determination is Unsupported and Was Rejected By Appellate Court*

6. In urging the Commission to reach an advisory finding that it has no jurisdiction, the Flagship may rely upon Proposals For Decision (PFD's) in the *City of Donna v. Victoria* matter. Administrative Law Judge ("ALJ") William Newchurch issued a PFD on or about January 8, 2004 recommending the Commission find no jurisdiction and the Commission ultimately agreed.<sup>1</sup> That decision ultimately came before the Thirteenth Court of Appeals, which disagreed with ALJ Newchurch's determination, and the Commission's position, rejected it, and held that the TCEQ did have jurisdiction.<sup>2</sup> Apparently while this matter remained in the Court system, it was re-filed with the TCEQ, and ALJ Gary Elkins adopted ALJ Newchurch's position, notwithstanding the appellate court decisions to the contrary. With due respect to the opinions of ALJs Newchurch and Elkins, their conclusions, not those of the twelve appellate justices considering the issue, are incorrect. Moreover, they are inconsistent with binding precedent.

7. ALJ Newchurch opined that the Commission had "some jurisdiction over the water 'service' of a municipally owned utility that has a CCN, even within the municipality's corporate limits," under Texas Water Code § 13.041. However, Newchurch opined that the Commission does not have exclusive appellate jurisdiction over a municipally owned utility's rates, in his words "hesitantly" disagreeing with the *Flagship* opinions. ALJ Newchurch's opinion purportedly hinged upon the phrase "those municipalities" in Texas Water Code § 13.042(d), and his conclusion that the *City of Donna* was not one of "those municipalities" within the meaning

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<sup>1</sup> SOAH Docket No. 582-04-0252; TCEQ Docket No. 2003-0697-UCR; Proposal for Decision, dated January 8, 2004.

<sup>2</sup> The history after the opinion was rendered by the Thirteenth Court of Appeals is rather confusing, as the case was removed to federal court and then improperly transferred to the United States Court of Appeals for the Fifth Circuit, dismissed, and then remanded back to state Court in April 2007.

of the Code. The opinion rested upon ALJ Newchurch's unfounded assertion that the phrase referred only to "the *immediately preceding* portions of Water Code § 13.042" (emphasis added).

8. Again, § 13.042(d) applies to orders and ordinances of those municipalities "as provided in this chapter." Texas Water Code § 13.042(d). "Chapter" refers to Texas Water Code § 13.001, *et seq*, not just 13.042. Indeed, as the ALJ concedes, 13.041(d)(1) authorizes the Commission to order a municipally owned utility to continue to serve a customer on an emergency basis, and thus the Commission has "some jurisdiction" over the water service of a municipally owned utility. The municipally owned utilities contemplated by that section would, of course, be among "those municipalities as provided in this chapter" [Chapter 13]. There is no logical basis to include some, but not other, municipally owned utilities in the phrase "those municipalities."<sup>3</sup> The ALJ simply reads into 13.042(d) a nonexistent restriction, and again, with all due respect, his premise is incorrect.

9. Furthermore, under ALJ Newchurch's analysis, the Texas Water Code addresses only a municipality's regulation of other entities and simply does not address jurisdiction over a municipally owned or operated utility, original or appellate, leaving a gaping omission. Finally, there is no explanation or logical basis why the Code would grant the Commission exclusive appellate jurisdiction over a municipality's orders or ordinances affecting utilities of others, but not their own.

*Statutory Language is Matter for Texas Legislature*

10. Although the language of the Texas Water Code was clear enough to lead four appellate courts to determine that the TCEQ has jurisdiction over orders and ordinances of municipally

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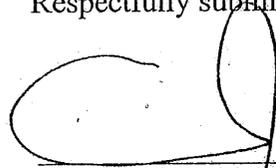
<sup>3</sup> Indeed, ALJ Newchurch's analysis could only be correct if all the sections other than 13.042 of the Texas Water Code excluded any reference to a municipally owned utility. Otherwise a City which owns a utility would be included in the broad language "those municipalities as provided in this chapter."

owned utilities, if the wording of the statute leaves room for improvement, that is a matter to be addressed to the Texas Legislature. Furthermore, if the legislature intended to restrict Texas Water Code 13.042(d) as ALJ Newchurch reads it, it could have easily drafted the provision to so indicate. It did not.

**Conclusion**

11. While again this matter should be dismissed as untimely, there is no legal basis for an advisory opinion that the TCEQ does not have jurisdiction over this matter, a ruling which would be contrary to four courts of appeal, including a ruling on this very dispute and, accordingly, the binding rule of the case on this issue. The matter should be dismissed, and no opinion advisory or otherwise should issue that the TCEQ lacks jurisdiction over this dispute because it involves a municipally owned utility.

Respectfully submitted,



---

WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

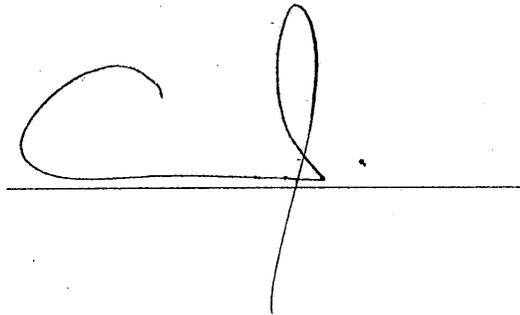
CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 18<sup>th</sup> day of December, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087



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003840-000002

# CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Attorneys at Law

1200 SMITH STREET, SUITE 1400  
HOUSTON, TEXAS 77002-4496

(713) 658-1818 (800) 342-5829

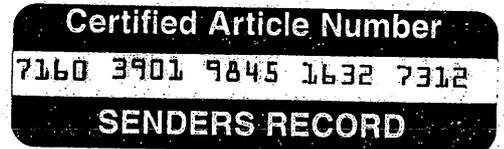
(713) 658-2553 (FAX)

chwww@chamberlainlaw.com

HOUSTON  
ATLANTA

December 18, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087



Re: *Flagship Hotel, Ltd. v. The City of Galveston*  
SOAH Docket No. : 582-07-3473  
TCEQ Docket No. : 2007-0879-UCR

Dear Ms. Castañuela:

Enclosed are an original and one copy of the City of Galveston's Brief on the Issue of the Texas Commission on Environmental Quality's Jurisdiction over this Matter in the above-referenced matter.

Please date stamp the enclosed copy and return to our office in the enclosed self-addressed stamped envelope being provided to you. By copy of this letter all counsel of record are being notified of this filing.

If you have any questions, please do not hesitate to call. Your cooperation and assistance in this matter is appreciated.

Very truly yours,

A handwritten signature in cursive script that reads "Terry M. Harms".

Terry M. Harms,  
Legal Administrative Assistant  
to Charles T. Jeremiah

\tmh  
Enclosures  
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003840-000002

December 18, 2007

Page 2

cc: Judge Carol Wood  
State Office of Administration Hearing  
William P. Clements Bldg.  
300 W. 15th Street, Suite 504  
Austin, Texas 78701

Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

**Certified Article Number**

7160 3901 9845 1632 7299

**SENDERS RECORD**

**Certified Article Number**

7160 3901 9845 1632 7305

**SENDERS RECORD**

DATE STAMP AND RETURN

**FILE**

**CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN**

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

**Attorneys at Law**

1200 SMITH STREET, SUITE 1400

**HOUSTON, TEXAS 77002-4496**

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(713) 658-2553 (FAX)

chwwm@chamberlainlaw.com

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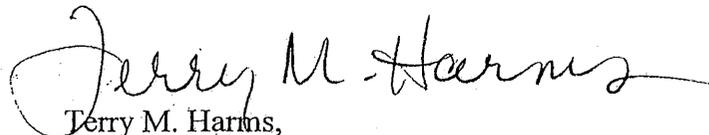
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Very truly yours,



Terry M. Harms,  
Legal Administrative Assistant  
to Charles T. Jeremiah

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SOAH DOCKET NO. 582-07-3473  
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IN THE STATE OFFICE OF ADMINISTRATIVE HEARINGS  
AUSTIN, TEXAS -- BY REFERRAL FROM THE TEXAS  
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FLAGSHIP HOTEL, LTD.

v.

THE CITY OF GALVESTON

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**CITY OF GALVESTON'S BRIEF ON THE ISSUE OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S JURISDICTION OVER THIS MATTER**

COMES NOW, The City of Galveston (hereinafter "City"), and files this brief on the issue of the Texas Commission on Environmental Quality's (TCEQ) jurisdiction over this matter, and would show as follows:

**Dispute Not Properly Before the TCEQ**

1. The City has previously submitted extensive briefing establishing that this matter is not properly before the Texas Commission on Environmental Quality. The underlying matter was not timely or properly disputed at the municipal level and the Flagship's attempt to appeal *five years after the complained of action* is unquestionably and particularly untimely. The City refers to the argument and authorities set forth in its Motion to Dismiss and related briefs. Accordingly, this proceeding can and should be dismissed without further consideration of the issues addressed in detail below.

IN THE STATE OFFICE OF ADMINISTRATIVE HEARINGS  
AUSTIN, TEXAS --BY REFERRAL FROM THE TEXAS  
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FLAGSHIP HOTEL, LTD. §  
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THE CITY OF GALVESTON §

**CITY OF GALVESTON'S REPLY TO THE FLAGSHIP HOTEL, LTD'S BRIEF ON  
TCEQ'S LACK OF JURISDICTION AND THE CITY OF GALVESTON'S MOTION  
TO DISMISS THE FLAGSHIP HOTEL, LTD'S AMENDED PETITION**

TO THE HONORABLE JUDGE OF THE STATE OFFICE OF ADMINISTRATIVE  
HEARINGS:

The City of Galveston (hereinafter "City"), files this Reply to the Flagship Hotel, Ltd.'s ("Flagship's") Brief on TCEQ's Lack of Jurisdiction and the City of Galveston's Motion to Dismiss the Flagship Hotel, Ltd's Amended Petition, and would show as follows:

1. Initially, the City re-urges its Motion to Dismiss what is essentially a nullity – a petition filed *five years* after the fact, which refers to a dispute which was not timely presented at the municipal or state level in the first instance. The City avers again that the request, for an advisory opinion on jurisdiction, is improper,<sup>1</sup> and the relief sought is barred by the well-established doctrines of "law of the case," *res judicata* and collateral estoppel and laches.<sup>2</sup>

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1. Flagship essentially stipulates the matter is not properly before the TCEQ but urges it to render an opinion for its self-serving use under the guise of correcting erroneous legal precedent. This is neither proper as a request nor within the power of the TCEQ or SAOH.

2 While the Executive Director argues that SAOH need not or should not engage in a complicated analysis on the merits of this dispute, he nonetheless urges the SAOH to engage in a complicated analysis of the Texas Water Code, no doubt to fortify his position in future disputes. The SAOH need not engage in any analysis – the matter is not properly before it to consider jurisdiction, and can be dismissed on its face as a five year old request for an advisory opinion, contrary to the prior law of the case.

## **Response to Inaccurate and Misleading "Factual Background"**

2. Predictably, the Flagship devotes a substantial portion of its brief to attempting to convince the State Office of Administrative Hearings ("SOAH") that it is a hapless innocent victim of an oppressive governmental body. This gross distortion cannot go unchallenged.<sup>3</sup> The principal of the Flagship, and its predecessor, Evergreen Lodging, Inc., is Daniel Der-Yun Yeh ("Mr. Yeh"). Mr. Yeh pled guilty in October 2007 to felony charges – making claims for the Flagship Hotel upon the Federal Emergency Management Agency ("FEMA"), "knowing that the claim was false, fictitious, and fraudulent" which included "fraudulent billing representations" in violation of Title 18 U.S.C. § 287. [Attachment "A"]. Yeh's conduct was reported to be the biggest incident of fraud related to Hurricane Katrina. He now awaits sentencing in federal court.

3. Yeh is the same individual who has relied on a side deal back in the early 1990's with the terminated former Galveston City Manager to pay only a small fraction of the metered water consumption for his hotel, for years – at taxpayer expense. Fortunately for Texas' taxpayers, a Texas municipality cannot be bound to such a deal by a corrupt or incompetent official – it can act in such manner only through the elected City Council.<sup>4</sup> Not surprisingly, the Flagship does not now identify, and has never identified, any legitimate agreement to give Yeh or the Flagship

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<sup>3</sup> While the Judge advised the parties to focus their briefing on the jurisdictional issue, which the City did, the Flagship consistently injects rhetoric and irrelevant or distorted facts, perhaps to garner sympathy or favor. Regrettably, the City is compelled to "set the record straight."

<sup>4</sup> This principle either escapes the Flagship's counsel or they simply ignore it. The Flagship refers to the City Manager as "the City." The relevant legal authority refuting that notion is set forth in the trial statement to the Bankruptcy Court. [An additional copy is submitted herewith as Attachment "B"].

\$200,000 worth of City money in the form of the taxpayer's utilities.<sup>5</sup> When the purported deal between the former City Manager and Yeh was discovered through the scrutiny of a new City administration, after the City Manager was fired for similar questionable conduct, demand was appropriately made on the taxpayer's behalf for the outstanding accrued amounts.

4. Flagship claims the adjustments to its bill were the result of the City Manager's belief that the Flagship was somehow misled or otherwise wronged when it leased the property, and the City Manager aimed to "make it right." This theory is 'all vines and no taters.' The tenor of Yeh's dealing with the City Manger is evident from his December 11, 1992 letter [See, attachment "C"]. Of course, the Flagship claimed breach of the lease agreement, and Texas law would govern the lessor and lessee rights, not the City Manager's self-assessment of what he considers just. Ultimately, the Sixth Court of Appeals reviewed the lease. The Court held that the Flagship, not the City, was responsible for the area of the leased premises from the *surface upward* – including the hotel itself. *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 562 (Tex.App. – Texarkana 2003, pet. denied). This, coupled with Yeh's unabashed admission that he does not dispute that all water service billed by the City was for water that actually flowed through the Flagship's meter demonstrated that Yeh's claim is nothing but an attempt to unlawfully shift his or his company's own obvious financial obligations and costs under the lease to the taxpayers.

5. Not surprisingly, the Flagship has never produced or identified a document which it contends binds the City to provide it with water at its cost. Notably, Flagship Hospitality, Ltd., the entity which has filed this action, was formed in 1995, years after it supposedly made such an

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<sup>5</sup> City Manager Matthews assumed a loss of 8.5 million gallons of water out of 14.5 million gallons which has passed through the meter.

agreement [See, Corporate Records / Business Registration, Attachment "D"]. Moreover, Flagship Hospitality, Ltd. never paid the City for the water arrearages. Rather, checks were tendered by "Flagship Hospitality, Inc."<sup>6</sup> and "Belinda Min Chu Yeh and Daniel Der-Yun Yeh."<sup>7</sup> [See Attachment "E"]. Flagship Hospitality, Ltd., which filed this action and refers to itself generally and misleadingly as "Flagship" has no standing or basis to bring this action, and it never did.

6. Flagship states that, to avoid disconnection, it paid the amounts due under protest. Again, setting aside the issue of standing, the Flagship neither complied with City of Galveston Municipal Code § 36-69(b)(1) and (2)<sup>8</sup> regarding protest of disconnection, or City of Galveston Municipal Code § 36-67 requiring a protest within seventeen (17) days-related to any disputed water bill. Although the Flagship now claims a "fact issue" on its compliance with § 36-67, it actually identifies no such fact issue.

7. To be sure, the Flagship contends it received notification it owed the water services arrearages on March 15, 2002, and was required to pay or face disconnection; that it chose to pay and it does not dispute that it did not protest the request for payment within the required seventeen day period. While, on October 23, 2002, six months later, the Flagship claims it filed its appeal petition with the TCEQ, such appeal would be untimely under the Texas Water Code and impermissible because, as even the Flagship admits, it did not avail itself of the necessary *initial* procedural step of addressing its claim to the certificate holder; the City. Indeed, the

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<sup>6</sup> \$90,000.

<sup>7</sup> \$125,920.15.

<sup>8</sup> The Flagship contends its payment arose out of a notice of termination of water service, but then contends 36-39 does not apply because the dispute does not relate to termination of water service.

attempted appeal was more than ninety days after the Flagship failed to invoke the procedures in the municipal code.<sup>9</sup>

8. The Flagship correctly points out that the Court of Appeals held that it had no jurisdiction over the dispute, as the Flagship had not gone through the City first and the TCEQ as the proper appellate body. The Flagship then, without any adjudicated claim, instituted an adversary proceeding in Bankruptcy Court. That action was dismissed because the Bankruptcy Court could not address an unliquidated claim.

9. While the "Amended Petition for Review" was purportedly premised on the bankruptcy judge's dismissal of the adversary proceeding, the Flagship's bankruptcy proceeding, No. 04-81356-G3-11 in the United States Bankruptcy Court, at the urging of Flagship's counsel, is now closed. [See, Final Decree, Attachment "F"]. Contrary to the Flagship's assertions, the Bankruptcy Court didn't order it to do anything – rather the Court simply, and correctly, acknowledged, based on the City's motion, that it didn't have powers over an unresolved claim like that asserted by the Flagship.

10. There is no basis for the Flagship's filing of an "Amended Petition for Review" in this forum. It is, at bottom, an untimely request for an advisory opinion which must be denied.

#### **Jurisdiction of TCEQ**

11. The Flagship now claims the Court of Appeals issued a "clearly erroneous" decision in "*Flagship II*," *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552 (Tex.App. – Texarkana 2003, pet. denied). Of course, the Flagship fails to mention that three other Courts of Appeal

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<sup>9</sup> Of course, the Flagship's position begs the question: what were they attempting to appeal to the TCEQ if not the City's request for payment and notice of intent to disconnect? In *City of Donna v. Victoria Palms*, 2005 WL 1831593 (Tex.App. – Corpus Christi 2005, pet. denied) (unpublished) (copy enclosed), the Court held that the City's decision not to credit the Plaintiff mobile home park, but rather seek payment under threat of disconnection constituted an "order" under the Texas Water Code § 13.002(14).

have reached the same conclusion. *City of Galveston v. Flagship Hotel*, 73 S.W.3d 422 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.); *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 340 (Tex.App. – Fort Worth 2005, no pet.); *City of Donna v. Victoria Palms Resort, Inc.*, 2005 WL 1831593 (Tex.App. – Corpus Christi 2005, pet. denied) (unpublished) (copy enclosed). Furthermore, the Flagship acknowledges it did not seek review of the **allegedly erroneous holding to the Texas Supreme Court**. Indeed, it accepted and waived its right to further protest the holding in *Flagship II*, including the Court's ruling on the jurisdictional issue. Accordingly, Flagship, at least, is bound by that decision and cannot attempt to circumvent that holding by filing here.

12. Predictably, both the Flagship and Executive Director ("ED") urge that the presiding Judge here should disregard the reasoned conclusions of four courts of Appeal, and the rule of this case and instead should follow Administrative Law Judge ("ALJ") Newchurch's 2004 reasoning in the *City of Donna* case, which the Thirteenth Court of Appeals essentially rejected on review.

13. In construing a statute, the Court starts with "the plain and common meaning of the statute's words." *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). In 2005, the Court of Appeals in *City of Donna* held that the plain wording of the Texas Water Code unambiguously grants exclusive appellate jurisdiction to the TCEQ to review ordinances and orders of a City under § 13.042(d).

14. In his Proposal for Decision in *City of Donna*, ALJ Newchurch opined that the TCEQ does not have exclusive appellate jurisdiction over a municipally owned utility's rates, in his words "hesitantly" disagreeing with the *Flagship* opinions. ALJ Newchurch's opinion purportedly hinged upon the phrase "those municipalities" in Texas Water Code § 13.042(d), and

his conclusion that the *City of Donna* was not one of "those municipalities" within the meaning of the Code. More specifically, the opinion rested upon ALJ Newchurch's unfounded, and ultimately erroneous, assertion that the word "those" referred only to "the *immediately preceding* portions of Water Code § 13.042" (emphasis added).

15. With due respect for ALJ Newchurch's analysis, it is erroneous as ruled by the Court of Appeals. Texas Water Code § 13.042(d) by its own terms applies to orders and ordinances of those "**municipalities as provided in this chapter.**" Texas Water Code § 13.042(d). "Chapter" plainly refers to Texas Water Code § 13.001, *et seq.*, not just 13.042 or its subsections. Indeed, as the ALJ conceded, 13.041(d)(1) authorizes the Commission to order a municipally owned utility to continue to serve a customer on an emergency basis, and thus the Commission has "some jurisdiction" over the water service of a municipally owned utility. The municipally owned utilities contemplated by that section would, of course, be among "those municipalities as provided in this chapter" [Chapter 13]. There is no logical, and certainly no legal, basis to include some, but not other, municipally owned utilities in the phrase "those municipalities."<sup>10</sup>

The ALJ simply reads into § 13.042(d) a nonexistent restriction, and again, with all due respect, his analysis is incorrect, and is not binding here.

16. The Flagship's reliance on § 13.042(a) and (b) is misplaced. Those provisions do not conflict with § 13.042(d) and do not bear on its content. Section 13.043 does not override § 13.042, and the language of § 13.043 is more restrictive, limiting its application to "[t]his subsection."

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<sup>10</sup> Indeed, ALJ Newchurch's analysis could only be correct if all the sections other than 13.042 of the Texas Water Code excluded any reference to a municipally owned utility. Otherwise a City which owns a utility would be included in the broad language "those municipalities as provided in this chapter."

17. Although the language of the Texas Water Code was clear enough to lead four appellate courts to determine the TCEQ has jurisdiction over orders and ordinances of municipally owned utilities, if the wording of the statute leaves room for improvement, that is a matter to be addressed to the Texas Legislature, not this forum. Furthermore, if the legislature intended to restrict Texas Water Code § 13.042(d) as ALJ Newchurch reads it, it could have easily drafted the provision to so indicate. It did not.

**Law of the Case Doctrine Precludes Contrary Advisory Opinion**

18. The *Flagship* decisions directly addressing this case control here because they, along with other appellate decisions, are the law. However, as an independent matter, they are the law of *this* case, were rendered in this very dispute, and are controlling here.

19. Even if the TCEQ views the *Flagship* decisions as incorrect, and believes that it does not have jurisdiction over the dispute, and the SOAH agrees, the "Law of the Case" Doctrine prohibits a contrary advisory opinion in this dispute. The *Flagship* filed its most recent petition for an improper purpose – to obtain an advisory opinion with which to attempt to revive and re-litigate issues in this dispute which were resolved five and seven years ago in *Flagship I* and *Flagship II*. Both prior decisions held that the TCEQ (formerly TNRCC) had exclusive appellate jurisdiction over the *Flagship*'s purported water claim, thus requiring the *Flagship* to exhaust its administrative remedies. It is a fundamental proposition that those appellate rulings are the 'law of the case' here.

20. "[T]he law of the case doctrine provides that the final ruling of an appellate court on a question of law in a case will govern throughout the subsequent proceedings of the same case." *Treadway v. Shanks*, 110 S.W.3d 1, 4 (Tex.App. – Dallas 2000), *aff'd on other grounds*, 110

S.W.3d 444 (Tex. 2003), citing, *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *City of Dallas v. Cornerstone Bank, N.A.*, 879 S.W.2d 264, 268 (Tex.App. – Dallas 1994, no writ).

21. The Flagship claims that the doctrine should not apply because one of the *Flagship* cases, *Flagship II* is, in its opinion, "clearly erroneous." Again, the Flagship waived this argument when it didn't contest that decision or pursue further relief. "Where the supreme court declines an opportunity to review a court of appeal's opinion, that opinion is not clearly erroneous." *Caplinger v. Allstate Insurance Co.*, 140 S.W.3d 927, 930 (Tex.App. – Dallas 2004, pet. denied). ALJ Newchurch's "hesitant" disagreement with the decision, rejected by the Thirteenth Court of Appeals, surely doesn't meet that standard.

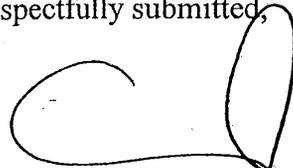
22. The ED argues that the Law of the Case doctrine only applies if the Texas Supreme Court has expressly ruled on an issue. That is simply not the law.

23. Flagship spuriously argues that "[t]he SOAH must be permitted to consider whether Flagship I & II were clearly erroneous." Why? Because the Flagship wants to litigate the issue in this case in various forums until it gets its desired result? The SOAH is not authorized to render advisory opinions to "correct" prior decisions of other forums, or to grant a "right to be heard" because a party claims it can find no forum for relief. While the Executive Director argues that this case is important because of supposedly erroneous appellate decisions, he contends that "[t]he TCEQ has already held that it will not follow those [appellate decisions]" [ED's Brief, Section I], apparently referring to the *City of Donna* case. Hence, there would be even less justification for an advisory opinion in this matter.

24. This matter is not properly before the TCEQ or the SAOH given that it is not a timely filing of a live dispute. In fact the issue presented was decided years ago. Nor is the TCEQ a

"party" in this matter, or the Executive Director's briefing in this matter grounds for disregarding the prior adjudication of issues between the parties.

Respectfully submitted,



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WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

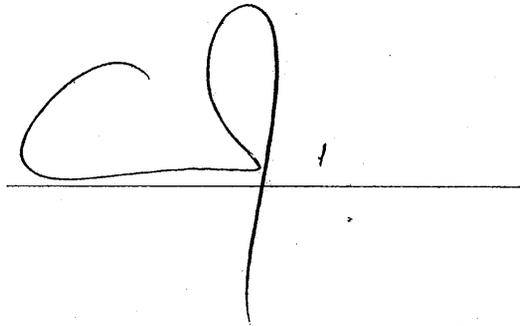
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 18th day of January, 2008.

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087



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003840-000002

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

UNITED STATES OF AMERICA           §  
  §  
VS.                                       § CRIMINAL NO. G-06-04  
  §  
DANIEL YEH                             §

ORDER ACCEPTING GUILTY PLEA

On September 28, 2007, United States Magistrate Judge John R. Froeschner, by designation and referral of this Court and with the consent of the parties, conducted the Rearrangement and Guilty Plea Colloquy of Daniel Yeh, the named Defendant in the above-styled and numbered cause.

Now before the Court is the Report of the United States Magistrate Judge containing his recommendation that this Court accept the guilty plea of Daniel Yeh, the named Defendant in the above-styled and numbered cause, and adjudge him guilty of the offense as charged in Count 24 of the Indictment filed in this cause charging that Daniel Yeh made a claim against and upon the Federal Emergency Management Agency, an agency of the United States, for Short Term Lodging Program funds, knowing that the claim was false, fictitious, and fraudulent in that the claim included fraudulent billing representations at the Flagship Hotel in Galveston, Texas, in violation of Title 18 U.S.C. § 287 [Count 24]. No objections have been filed to the Report and Recommendation of the Magistrate Judge.

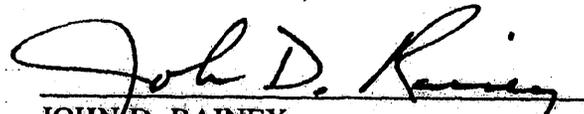
Having given the matter of Daniel Yeh's re-arraignment de novo review, pursuant to 28 U.S.C. § 636(b)(1)(C), this Court is of the opinion that the Report and Recommendation of the Magistrate Judge is supported by the record and it is hereby **ACCEPTED** by this Court.

Attachment "A"

Accordingly, it is the Finding of this Court in the case of United States of America v. Daniel Yeh, that the Defendant, Daniel Yeh, is fully competent and capable of entering an informed plea, that he is aware of the nature of the charge made against him and the consequence of his plea, and that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense with which he is charged.

It is, therefore, the ORDER of this Court that the Guilty Plea of Daniel Yeh to Count 24 of the Indictment, entered before the United States Magistrate Judge on September 28, 2007, is ACCEPTED by this Court and the Defendant, Daniel Yeh, is now ADJUDGED guilty of making a claim against and upon the Federal Emergency Management Agency, an agency of the United States, for Short Term Lodging Program funds, knowing that the claim was false, fictitious, and fraudulent in that the claim included fraudulent billing representations at the Flagship Hotel in Galveston, Texas, in violation of Title 18 U.S.C. § 287 [Count 24].

DONE at Galveston, Texas, this 23<sup>rd</sup> day of October, 2007.

  
JOHN D. RAINEY  
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

IN RE: §  
FLAGSHIP HOTEL, LTD., §  
A Texas Limited Partnership §  
Debtor §  
CASE NO. 04-81356  
Chapter 11

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FLAGSHIP HOTEL, LTD., §  
Plaintiff §  
VS. §  
THE CITY OF GALVESTON §  
Defendant §  
ADV. NO. 05-8042

**DEFENDANT CITY OF GALVESTON'S TRIAL STATEMENT**

Comes now, the City of Galveston, Defendant in the above adversary proceeding, who, pursuant to the rules of this Court, files this Trial Statement.

**I. Appearance of Counsel**

William S. Helfand  
Charles T. Jeremiah  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553

**COUNSEL FOR DEFENDANT  
CITY OF GALVESTON**

**II. Jurisdiction**

Defendant City of Galveston contends that this Court does not have subject matter jurisdiction over this matter, and has moved separately for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1). Cf., *In re Satelco, Inc.*, 58 B.R. 781, 786 (Bankr. N.D. Tex. 1986).

**III. Pending Motions**

Defendant City of Galveston's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

#### IV. Statement of Facts

##### *City of Galveston Government*

The City of Galveston ("the City") is a municipal governmental unit and is a home-rule city as defined by Texas law, operating at all pertinent times with a Council-Manager form of government. [City of Galveston Charter, Article I]. All powers of the city are generally vested in an elected Council. The City Manager, and other city officers have no authority except that expressly conferred upon them by the City Charter.

##### *Powers of the City Manager*

In 1977, Article V, § 2 provided as follows:

Section 2. Powers and Duties of the City Manager. The City Manager shall be responsible to the Council for the proper administration of all the affairs of the City. He shall have the power and shall be required to: (1) Appoint and remove any officers or employees of the City except those officers appointed by the Council as otherwise provided by law or this Charter; (2) Prepare the budget annually, submit it to the Council for approval, and be responsible for its administration after adoption; (3) Keep the Council advised of the financial condition and administrative activities of the City, and make such recommendations as may seem desirable; (4) Perform such other duties as may be prescribed by this Charter or required of him by the Council, not inconsistent with the provisions of this Charter.

Between 1961 and 1989, Galveston Municipal Code Sec. 2-58<sup>1</sup> authorized the City Manager "to enter upon *purchases* and *contracts* without further action of the city council where the expenditure is provided in the budget and does not exceed two thousand dollars (\$2,000.00). All other expenses must have the expressed approval of the council in advance."<sup>2</sup> Galveston Ordinance 61-29, § 1, In 1989, the voters of Galveston approved an increase in the spending limit, from \$2,000 to \$5,000. Galveston Ordinance 89-131. In 1990, the Code was amended to authorize the City Manager to approve change orders on construction contracts if the increase or decrease did not exceed \$5,000. Galveston Ordinance 90-23.

In 1991, the voters of Galveston rejected a proposal to grant the City Manager authority to enter contracts or make purchase without the City's approval where the expenditure was in the City budget and did not exceed limitations established by state law. Galveston Ordinance 91-95. A 1993 Ordinance *required* the City Manager to make recommendations to the City Attorney to impose liens for nonpayment of water bills.

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<sup>1</sup> Pursuant to Galveston City Charter, Article VII § 17 (providing for limited purchasing/contracting authority of City Manager where permitted by Ordinance).

<sup>2</sup> Emphasis added.

Between 1990 and 1996, the relevant time period, the City Manager had purchasing authority limited to a total of \$5,000. The City Manager has never been empowered to forgive or reduce debt to the City,<sup>3</sup> or provide free goods or services at the City's expense.

### *Lease Agreement*

The Texas Local Government Code, Chapter 307, expressly addresses and approves an entity such as the City of Galveston entry into a lease of a property such as the Flagship Hotel and pier. During the relevant time, the City of Galveston was party to a lease of the Flagship Hotel.<sup>4</sup> By Resolution 90-11, on January 18, 1990, the City Council approved the assignment of the lease it had with Hospitality Interests, Inc. to Daniel Yeh<sup>5</sup> d/b/a Evergreen Lodging, Inc. By Resolution 95-46, the lease was assigned again, on May 12, 1995, to Flagship Hospitality, Inc., a general partner of Flagship Hotel, Ltd.

Thus, between January 18, 1990 and May 12, 1995, the lease was assigned to Evergreen Lodging, Inc.<sup>6</sup> As of May 8, 1995, the lease was assigned to Flagship Hospitality, Inc. a Texas corporation which is general partner in the debtor, Flagship Hotel, Ltd.

The lease assignment transaction between the City and lessees Evergreen and Flagship Hospitality were arm's length transactions, with proper disclosures by the City<sup>7</sup> and opportunity to inspect the premises by the lessees. The City disputes that it failed to disclose information, and denies that it "conceded that it was obligated to maintain the water lines.." as suggested. To the contrary, the obligations under the lease became the subject of litigation between the parties, and the Texarkana Court of Appeals held that the City's repair and maintenance obligations pertained only to the surface of the pier proceeding downward; not to anything attached to the pier, and obviously *not* including the hotel itself.<sup>8</sup> The City had no legal obligation to maintain or repair water pipes (or any alleged damage resulting therefrom) in the walls of the Hotel, which Flagship claims were leaky. It is reasonable to conclude that the respective apportionment of obligations and risk factored into the lease rates.

At no time did the City, through necessary action or authorization of the City Council renegotiate the terms of the lease based on alleged leakage in the water pipes at the Hotel. At no time did the City waive its rights or obligations under the lease (including the lessee's obligation to repair and maintain from the surface upward). At no time did the City incur an indebtedness to the lessee by undertaking voluntary measures to try to fix any water leaks.

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<sup>3</sup> The City Manager has never been empowered to unilaterally "adjust bills."

<sup>4</sup> Formerly known as the Flagship Inn. The lease was amended and reassigned several times to different entities.

<sup>5</sup> Yeh was indicted for fraud on the government related to Hurricane Katrina, but found incompetent to stand trial and is currently housed a federal prison medical facility.

<sup>6</sup> Now dissolved.

<sup>7</sup> Indeed, the Flagship never suggested any misrepresentation or failure to disclose by the City – until this dispute over water fees arose.

<sup>8</sup> *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 562 (Tex. App. – Texarkana, 2003, pet. denied).

Notwithstanding the allegations about actions of the former City Manager, Douglas Matthews, and his communications with Mr. Yeh, the City never concluded that it owed the Flagship compensation for leakage in the water pipes.<sup>9</sup> The City<sup>10</sup> never "reduced the Flagship's water service bills," and any attempt to adjust or reduce the bills, temporarily or permanently, at taxpayer expense, was done without legal authorization, and was void, *ab initio*.

The only body which was authorized to reduce, or "adjust" the Flagship's water service bill, and effectively forgive debt – the Galveston City Council – was never even made aware by the City Manager that he was unilaterally attempting to make adjustments.<sup>11</sup> In fact, although during the same time frame, the City Manager discussed issues relating to the Flagship Hotel, and submitted requests for expenditure to the Council, he never sought Council approval of, or even discussed, his unilateral agreement with Yeh to forgive the Flagship \$196,291.15 in water charges incurred by the Flagship Hotel.

After Matthews was discharged by the City as City Manager, and a new City Manager and other City officials and Council members took office, the failure of the City to collect these substantial sums of taxpayer money, to the benefit of the Flagship and possibly Matthews, over the years was discovered. The water charges unpaid by the Flagship through its secret deal with Matthews, were calculable, and in fact calculated, based upon water *which passed through the water meter*, metered consumption, into the Hotel premises. In other words, the evidence is undisputed that the City provided, and the Hotel received all the water for which it originally paid, and for which it later tendered the remaining sum. The amount of water charged for by the City, was provided by the City. Yeh had requested, and was aware, that Matthews was dramatically reducing the requirement to pay the water bills in full, as incurred, and that the Flagship was paying far less than the amount registered as metered consumption.

Although it was clearly not the case, if leaks existed in the pipes in the Hotel, as alleged, and the City was in fact obligated to make repairs under the lease, the Flagship's remedy would be to seek enforcement of the lease obligations.

To be sure, Matthews didn't adjust Flagship's bill to reflect "actual use" or "actual consumption," – he dramatically reduced the invoiced amount, supposedly based on some reference to bills in prior years issued to a prior owner. By way of example, he assumed an annual water loss of 8.5 Million gallons of water, out of 14.5 Million gallons of metered consumption.<sup>12</sup> Accordingly, he unilaterally attempted to reduce the invoiced amount by well

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<sup>9</sup> The references, again, are to Matthews' representations, not the City's.

<sup>10</sup> The Flagship's reference to the "City" is misleading. The allegations refer to conduct and agreements by the "City Manager" without the knowledge of the City Council.

<sup>11</sup> Matthews kept the purported agreement confidential, and ordered the Public Works Director to comply with his "bill adjustments" for the Flagship, rejecting her concerns that the enormous reduction lacked a reasonable basis and was excessive.

<sup>12</sup> This would be more than the equivalent volume of an Olympic size swimming pool supposedly leaking into the walls every month.

over fifty percent, and some months more than *seventy percent*. The City Council was kept in the dark, and never approved such a reduction of the invoiced amount, on a temporary or permanent basis, expressly or implicitly.

The City sought payment of the overdue charges for metered water consumption at the Flagship, which former City Manager Matthews certainly had no actual or apparent authority to forgive or waive on behalf of the City. The Flagship rejected the request. The City made continuing efforts to collect the water service arrearages.

After being provided with a disconnect notice by the City, the Flagship failed to timely exhaust its administrative remedies, by pursuing the City's own procedures and then seeking redress from the Texas Natural Resources Conservation Commission ("TNRCC").<sup>13</sup> The Flagship initially obtained an injunction in District Court against collection of the water arrearages. However, on appeal, the First Court of Appeals in Houston dissolved the injunction, permitting the City to proceed with collection efforts.

The City again provided a disconnection notice to the Flagship. The Flagship's persistent refusal to pay resulted in an accrued amount of \$215,920.15 which was due and owing. The City was provided with two checks, which combined, amounted to the total arrearages.

Notably, as well, Flagship Hotel, Limited, the debtor, never paid the water arrearages to the City. Rather, the City received a check in the amount of \$90,000 from "Flagship Hospitality, Inc." and \$125,920.15 from "Belinda Min Chu Yeh and Daniel Der-Yun Yeh" on or about March 18, 2003.

After requesting a refund, the Flagship further failed to comply with the procedures contained in Chapter 36 of Part II of the Galveston City Code.

## **V. Statement of Law**

### **The Court Has No Jurisdiction Over this Matter**

As set forth in the City of Galveston's Motion to Dismiss Adversary Action for Lack of Subject Matter Jurisdiction, this Court has no subject matter jurisdiction over this matter, and must dismiss it. See, *In re Satelco*, 58 B.R. 781 (Bankr. N.D. Tex. 1986).

### **No Basis For Claim**

Furthermore, the Plaintiff has failed to identify any cognizable legal theory or cause of action, relying exclusively on the turnover provisions of the Bankruptcy Code. As set forth in the Motion to Dismiss, the turnover provisions do not apply to this disputed claim. For the Court to enter to grant Plaintiff relief, in the absence of any viable cause of action over which it has jurisdiction would effectively deny the City and tax payers due process. The action must be dismissed.

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<sup>13</sup> Now known as the Texas Commission on Environmental Quality ("TCEQ").

## **Matthews Had No Authority to Reduce the Flagship's Water Bill.**

The City Manager's supposed "adjustments" of the Flagship's water bill, in a total amount of \$196,291.15, were well beyond his authority. Plaintiff suggests in its argument that the City Manager has the authority to unilaterally determine who he thinks is being "overcharged" by the City, and correct it in his sole discretion. Indeed, under this rationale, he would enjoy limitless power to correct whatever he viewed as the City's "wrongs" by reapportioning money from the taxpayers to businesses in his favor, through secret side deals.

In fact, like any City officer, he has no authority beyond that expressly conferred upon him by the City Charter, and as specified therein, through duly enacted Ordinances approved by the City Council, local representatives of the citizens of Galveston. No provision has ever given the City Manager the right to dispense with taxpayer monies recovered or recoverable in payment for water service as gauged by metered consumption.

The City delivered a valuable goods and services with a value of nearly \$200,000 to the Flagship. This was the metered consumption.<sup>14</sup> The City Manager has no greater rights under the guise of "balancing the [alleged] equities" with the Flagship, because the Flagship claims a water leak, and claims that it was the City's obligation to repair.<sup>15</sup>

The City Manager's power to "administer the budget" does not give him authority to reduce water bills. A reduction in the water bill for the Flagship was never in the City's budget. The governmental safeguards are designed to prevent this type of end run around the fiscal authority of the City Council, and prevent such abuse.

Indeed, the City Manager did not even have the authority to purchase or contract – that is, obtain for the City valuable goods and/or services, in amounts greater than \$5,000 at the time. In this instance, Plaintiff suggests that he had the authority to forgive, or dispense with, more than \$200,000, for no value.

Neither a municipality nor its officers can do any act, or make any contract, or incur any liability not authorized by the charter. All acts beyond the scope of powers granted are void. See, *Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1923). A City's governing body may not delegate the right to make decisions affecting transaction of city business. It can only delegate the right to perform acts and duties necessary to transaction of the City's business, and then only by Ordinance. See, *DeSoto Wildwood Development v. City of Lewisville*, 184 S.W.3d 814, 826 (Tex.App. – Fort Worth 2006, no pet.) (City attorney not empowered to act by City Council, so actions not binding on City).

---

<sup>14</sup> Plaintiff does not contest the propriety of charging residents based on "metered consumption," the manner in which all residents are charged. Rather, they rely exclusively on the special deal they claim was given to them by City Manager Matthews.

<sup>15</sup> According to the lease, the Flagship had that obligation. Moreover, absent from Flagship's contention is any claim that it compromised its own rights under the lease, based on any adjustment of its water bill.

"[T]he doctrine of apparent authority does not apply to municipalities.." *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617 (Tex.App. – Fort Worth 2003, pet. denied); See, *Cleontes v. City of Laredo*, 777 S.W.2d 187, 189 (Tex.App. – San Antonio 1989, pet. denied) (holding evidence of airport director's apparent authority to abate rent due on leased property irrelevant where ordinance necessary under city charter to authorize abatement was never passed);<sup>16</sup> See also, *Wilke v. City of Ballinger*, 31 S.W.2d 1102, 1103 (Tex.App. – Austin 1930, no pet.) (no apparent authority; no estoppel where officials *authorized to waive written provisions* did not do so).

Moreover, "[e]ven if the doctrine of apparent agency were made applicable to public officers, the existence of apparent authority must be determined from the acts of the alleged principal and not from the actions of the alleged agent." *Thermo Products Co. v. Chilton ISD*, 647 S.W.2d 726, 733 (Tex. App. – Waco 1983, pet. ref'd).<sup>1</sup> That is hardly the case here.

### **The City is Not Subject to Estoppel, and Estoppel Cannot Serve as Basis For Affirmative Relief**

The Flagship claims the city is subject to estoppel because its acts were proprietary.

However, a municipality's governmental functions expressly include "waterworks" and "water and sewer service." Tex. Civ. Prac. & Rem. Code § 101.0215(a)(11),(32). The Flagship seeks turnover of what it claims to be an overpayment for water service. There can be no reasonable dispute that the claim relates to a governmental function of the City of Galveston.<sup>17</sup>

"[C]omplaints concerning estoppel are not properly applicable to a governmental entity.." *Jefferson Co. Drainage Dist., v. Lower Neches Valley Authority*, 876 S.W.2d 940, 953 (Tex.App. – Beaumont 1994, pet. denied). See also, *Richmond Printing v. Port of Houston Authority*, 996 S.W.2d 220, 225 (Tex.App. – Houston [14<sup>th</sup> Dist. 1999, no pet) (void contracts cannot be ratified; no estoppel from denying contract).

Furthermore, a claim of estoppel cannot serve as the basis for affirmative relief. *Jefferson Co. Drainage Dist.*, at 953. "Equitable estoppel is defensive in character. It cannot be used to create a contract or a cause of action where, without an estoppel, none had existed." *Watson v. Nortex Wholesale Nursery, Inc.*, 830 S.W.2d 747, 751 (Tex.App. – Tyler 1992, pet. denied) (where by law the Plaintiff had no contract cause of action, estoppel could not revive it); "An agreement that is void as prohibited by law cannot be rendered valid by invoking the doctrine of estoppel." *Schmidt v. Matisse*, 747 S.W.2d 883, 887 (Tex.App. – Dallas 1988, pet. denied). "[E]stoppel cannot be invoked for any purpose other than preserving rights which had previously been acquired." *Id.* Plaintiff plainly cannot assert the theory of estoppel in support of its claim.

<sup>16</sup> In *Cleontes*, the abatement was offered by the airport director as reimbursement for improvements the Plaintiff, a lessee of an apartment building, made to the facility.

<sup>17</sup> Even if the matter related to the use of the park property generally (and leasing of the pier), as opposed to the administration of water service, it would be a governmental function. See, e.g., Local Gov't Code Sect. 307.

The theory of estoppel is inapplicable anyway. The City delivered water service to the Flagship Hotel in an amount valued at \$196,291.15. If it weren't paid, because of some special deal forged between the City Manager without authorization, and Daniel Yeh, the City would lose that amount. Estoppel could only conceivably apply in such instance where a party wrongfully obtained some kind of windfall.

Finally, the Flagship and its officers are charged with knowledge of the power of City officials, under Texas law, and cannot rely on some inaccurate assumption that Matthews had authority to unilaterally adjust their bill or reduce their obligations.

### **Flagship Failed to Exhaust Administrative Remedies**

The Flagship failed, prior to going to the TNRCC, to apply for a refund from the City until April 17, 2002, a prerequisite set forth in City Ordinance. When that application was denied, the Flagship didn't go back to the TNRCC until November, some eight months later. To date, Flagship's counsel, J. Michael Fieglein admits that the Flagship has failed to exhaust administrative remedies to completion.

### **Flagship Hotel, Ltd. Estate Has No Right to Recover Non-Debtor Payments**

The only evidence of payment submitted by the Flagship in this case is evidence that other entities or individuals paid the water arrearages. Specifically, \$90,000 from a corporation, "Flagship Hospitality, Inc. and \$125,920.15 from individuals "Belinda Min Chu Yeh and Daniel Der-Yun Yeh." This separate corporation and these individuals are *not the Debtor* in this proceeding. The Debtor, Flagship Hotel, Ltd., has no right to claim or recover in its estate monies paid by *other entities or parties*, to the City of Galveston, more than a year before bankruptcy.

Finally, the lease assignment to parties other than the debtor,<sup>18</sup> during the relevant time period, raises the question whether the Debtor has any standing or basis to make this claim.

### **VI. Exhibits**

Defendant City of Galveston's Exhibit list is attached hereto. Defendant is serving its exhibits on Plaintiff under separate cover.

### **VII. Witnesses**

Defendant City of Galveston's Witness List is attached hereto.

### **VIII. Settlement**

---

<sup>18</sup> The records do not indicate assignment of the lease to "Flagship Hotel, Ltd."

The parties have discussed, but have not been able to reach a settlement at this juncture. The parties have advised the Court that they believe a mediation would likely facilitate an out-of-court amicable resolution of this matter.

**IX. Trial**

Trial would be to the bench and would be expected to last two to three days. No scheduling conflicts are known at this time and no logistical problems are foreseen.

Respectfully submitted,

By: /s/ Charles T. Jeremiah  
WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

**CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN**  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record in accordance with the District's ECF service on this 15<sup>th</sup> day of February, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010

/s/ Charles T. Jeremiah

# City of Galveston



Office of the City Manager

P. O. Box 779 / Galveston, Texas 77553-0779 / (409) 766-2150 / FAX (409) 763-4847

December 11, 1992

Mr. Daniel Yeh  
President  
Evergreen Lodging Inc.  
2501 Seawall Boulevard  
Galveston, Texas 77550

Dear Mr. Yeh:

In an effort to keep you fully apprised of various developments regarding your water bill adjustments, I have enclosed correspondence from the Public Works Department.

They have sought to reduce your water adjustment, however I over ruled them because as you know the City of Galveston owns the Flagship Hotel and at the time you purchased the Management Lease, you were lead to believe that the monthly water bills were a certain amount and the water and sewer lines were in good shape. Approximately, four months after acquired the hotel, you learned that the waterline were in deteriorated condition. Eight months ago, city crews began to undertake the repair work on the 7th floor of the hotel but have since abandoned the work because our lack experience in this type of work.

I am committed to keeping the Flagship Hotel water adjustment until the City either repairs or replaces the 30 year old waterline that presently leaks.

Sincerely,

*Douglas W. Matthews*

Douglas W. Matthews  
City Manager

DWM:gg

Enclosure

Attachment "C"

TX8129810

**CORPORATE RECORDS & BUSINESS REGISTRATIONS**

Database Last Updated: 01-16-2008  
Update Frequency: DAILY  
Current Date: 01/16/2008  
Source: AS REPORTED BY THE SECRETARY OF STATE OR OTHER  
OFFICIAL SOURCE

**COMPANY INFORMATION**

Name: THE FLAGSHIP HOTEL, LTD.  
Address: 2501 SEAWALL BLVD.  
GALVESTON, TX 77550  
USA

**FILING INFORMATION**

Filing Number: 8129810  
Filing Date: 05/19/1995  
State of Incorporation: TEXAS  
Duration: PERPETUAL  
Status: IN EXISTENCE  
Business Type: DOMESTIC LIMITED PARTNERSHIP (LP)  
Where Filed: SECRETARY OF STATE  
1019 BRAZOS ST  
AUSTIN, TX 78701

**REGISTERED AGENT INFORMATION**

Name: BELINDA YEH  
Address: 3323 RIVIERA DR  
SUGAR LAND, TX 77479

**NAME INFORMATION**

Legal Name: THE FLAGSHIP HOTEL, LTD.  
Status: IN USE  
Filing Date: 05/19/1995

Attachment "D"

**PRINCIPAL INFORMATION**

Name: **FLAGSHIP HOSPITALITY, INC.**  
Title: **GENERAL PARTNER**  
Address: **2501 SEAWALL BLVD**  
**GALVESTON, TX 77550 USA**

**AMENDMENT INFORMATION**

Amendments: 06/26/2006 PERIODIC REPORT; DOCUMENT NUMBER -  
134624780002  
06/13/2006 REPORT NOTICE; DOCUMENT NUMBER -  
132524750001  
09/15/1999 PERIODIC REPORT; DOCUMENT NUMBER - 3159010  
05/19/1995 CERTIFICATE OF LIMITED PARTNERSHIP;  
DOCUMENT NUMBER - 3159009

Call Westlaw CourtExpress at 1-877-DOC-RETR (1-877-362-7387)  
to order copies of documents related to this or other matters.  
Additional charges apply.

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END OF DOCUMENT

(C) 2008 Thomson/West. No Claim to Orig. US Gov. Works.

FLAGSHIP HOSPITALITY, INC.  
2501 SEAWALL  
GALVESTON, TEXAS 77550

5064

PAY TO THE ORDER OF

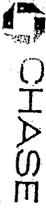
City of Galveston

DATE

3/18/03

32-115-948  
1110

\$ 90,000.00



the Chase Manhattan Bank  
P.O. Box 200000  
Houston, Texas 77216-8993

BUSINESS REVOLVING CREDIT

DOLLARS

FOR

⑆005064⑆ ⑆11001150⑆ ⑆94802019404⑆

*D. S. S. of Gal*

BELINDA MIN CHU YEH  
DANIEL DER-YUN YEH  
4118 MEADOW EDGE DR  
SUGAR LAND, TX 77475-2438  
(281) 265-1728

318

PAY TO THE ORDER OF

City of Galveston

3/18/03

DATE

\$ 125,920.15

Washington Mutual

Washington Mutual Bank, F.A.  
Sweepstar Financial Center  
4937 Sweepstar Boulevard  
Sugar Land, TX 77479

1-800-762-3300  
24 Hour Customer Service

PLATINUM CUSTOMER

FOR

⑆111993778⑆⑆388⑆⑆343639⑆⑆3⑆ 0318

*D. S. S. of Gal*

MP

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ENTERED  
12/20/2007

**UNITED STATES BANKRUPTCY COURT  
Southern District of Texas**

In re: **THE FLAGSHIP HOTEL, LTD** Bankruptcy No. 04-81356-G3-11  
**Debtor\***  
Social Security No.:  
Employer Tax I.D. No.: 76-0470109

**FINAL DECREE**

The estate of the above named debtor has been fully administered.

\_\_\_ The deposit required by the plan has been distributed.

IT IS ORDERED THAT:

\_\_\_\_\_  
(name of trustee)  
is discharged as trustee of the estate of the above- named debtor and the  
bond is canceled;

XX the chapter 11 case of the above named debtor is closed; and

\_\_\_ (other provisions as needed)

Date:

12/19/07

Bankruptcy Judge

\*Set forth all names, including trade names, used by the debtor within the last 6 year. (Bankruptcy Rule 1005) For joint debtors set forth both social security numbers.

**Certified Article Number**

7160 3901 9845 1630 9301

**SENDERS RECORD**

cc: LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 1630 9301*

**Certified Article Number**

7160 3901 9845 1630 9318

**SENDERS RECORD**

Millard A. Johnson  
Janent Reinarz  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Tamar Street, Suite 1000  
Houston, Texas 77010

*Via CM-RRR No. 7160 3901 9845 1630 9318  
& Facsimile (713) 652-5130*

**Certified Article Number**

7160 3901 9845 1630 9325

**SENDERS RECORD**

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 1630 9325  
& Facsimile (512) 239-0606*

# CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Attorneys at Law

1200 SMITH STREET, SUITE 1400

HOUSTON, TEXAS 77002-4496

(713) 658-1818 (800) 342-5829

(713) 658-2553 (FAX)

chwww@chamberlainlaw.com

HOUSTON

ATLANTA

January 18, 2008

Certified Article Number

7160 3901 9845 1630 9332

SENDERS RECORD

Judge Carol Wood  
State Office of Administration Hearing  
William P. Clements Bldg.  
300 W. 15th Street, Suite 504  
Austin, Texas 78701

Via CM-RRR No. 7160 3901 9845 1630 9332

Via Facsimile (512) 936-0730

Re: *Flagship Hotel, Ltd. v. The City of Galveston*  
SOAH Docket No. : 582-07-3473  
TCEQ Docket No. : 2007-0879-UCR

Your Honor:

Enclosed are an original and one copy of the City of Galveston's Reply Brief to the Flagship Hotel, Ltd.'s Brief on TCEQ's Lack of Jurisdiction and the City of Galveston's Motion to Dismiss the Flagship Hotel, Ltd.'s Amended Petition in the above referenced matter.

Please date stamp the enclosed copy and return to our office in the enclosed self-addressed stamped envelope being provided to you. By copy of this letter all counsel of record are being notified of this filing.

If you have any questions, please do not hesitate to call. Your cooperation and assistance in this matter is appreciated.

Very truly yours,



Terry M. Harms,  
Legal Administrative Assistant  
to Charles T. Jeremiah

\tmh  
Enclosures  
0657390.01  
003840-000002

IN THE STATE OFFICE OF ADMINISTRATIVE HEARINGS  
AUSTIN, TEXAS -- BY REFERRAL FROM THE TEXAS  
COMMISSION ON ENVIRONMENTAL QUALITY

FLAGSHIP HOTEL, LTD.

v.

THE CITY OF GALVESTON

§  
§  
§  
§  
§

**CITY OF GALVESTON'S SUR-REPLY TO THE EXECUTIVE DIRECTOR'S REPLY  
TO THE CITY OF GALVESTON'S BRIEF ON THE JURISDICTIONAL  
ISSUES AND MOTION TO DISMISS**

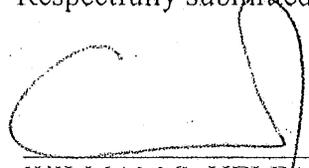
TO THE HONORABLE JUDGE OF THE STATE OFFICE OF ADMINISTRATIVE  
HEARINGS:

The City of Galveston (hereinafter "City"), files this Sur-Reply to the Executive Director's Reply to the City of Galveston's Brief on the Jurisdictional Issues and Motion to Dismiss, and would show as follows:

1. The City reasserts its argument and the authorities cited in its prior briefing in this matter. In addition, the City avers that the Executive Director has misconstrued the decision of the Texas Supreme Court in *Loram Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006). The *Ianni* case doesn't stand for the proposition that the "law of the case" doctrine only applies where a Texas Supreme Court decision is rendered on an issue. The TCEQ's suggestion that a case not granted discretionary review by the Supreme Court does not become the law of the case demonstrates both a complete misunderstanding of doctrine of "the law of case" and the *Ianni* opinion.

2. At most, the Court held that "[t]he denial or dismissal of a petition [for review] does not give any indication of this Court's decision on the merits of the issue." *Id.*, at 596. "Our denial of the petition for review in *Ianni I* does not preclude us from reviewing the duty issue now." *Id.* The Texas Supreme Court was referring to its own power to review the case, and whether it was bound by a lower court because it had previously declined to grant review. It was not opining on whether an appellate court decision would bind courts at that level and below on an issue previously adjudicated. To be sure, "[w]here a losing party fails to avail itself of an appeal in the court of last resort, but allows the case to be remanded for further proceedings, **the points decided by the court of appeals will be regarded as the law of the case and will not be re-examined.**" *City of Houston v. Precast Structures*, 60 S.W.3d 331, 338 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2001), pet. denied)(emphasis added), citing, *Lee v. Lee*, 44 S.W.3d 151, 154 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2001, pet. denied). The law of this case was established by two consistent decisions by two Courts of Appeal and preclude re-litigation of the TCEQ's jurisdiction, *in this case*. This tribunal is bound to uphold the law of *this case*, regardless of what opinion it may have about the issues which have already been decided by the Appellate Courts.

Respectfully submitted,



---

WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 23rd day of January, 2008.

Judge Carol Wood  
State Office of Administration Hearing  
William P. Clements Bldg.  
300 W. 15th Street, Suite 504  
Austin, Texas 78701

*Via CM-RRR No. 7160 3901 9845 1630 9363*

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

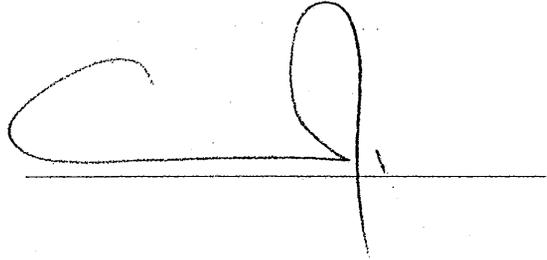
*Via CM-RRR No. 7160 3901 9845 1630 9370*

Millard A. Johnson  
Janent Reinarz  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

*Via CM-RRR No. 7160 3901 9845 1630 9387*

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 1630 9394*

A handwritten signature in black ink, appearing to be 'BM', written over a horizontal line.

# CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Attorneys at Law

1200 SMITH STREET, SUITE 1400

HOUSTON, TEXAS 77002-4496

(713) 658-1818 (800) 342-5829

(713) 658-2553 (FAX)

chwwm@chamberlainlaw.com

HOUSTON

ATLANTA

January 23, 2008

Judge Carol Wood  
State Office of Administration Hearing  
William P. Clements Bldg.  
300 W. 15th Street, Suite 504  
Austin, Texas 78701

Via CM-RRR No. 7160 3901 9845 1630 9363

**Certified Article Number**

7160 3901 9845 1630 9363

**SENDERS RECORD**

Re: *Flagship Hotel, Ltd. v. The City of Galveston*  
SOAH Docket No. : 582-07-3473  
TCEQ Docket No. : 2007-0879-UCR

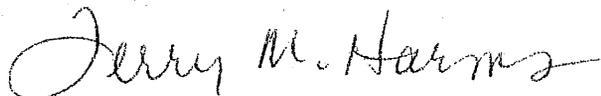
Your Honor:

Enclosed are an original and one copy of the City of Galveston's Sur-Reply to the Executive Director's Reply to the City of Galveston's Brief on the Jurisdictional Issues and Motion to Dismiss in the above referenced matter.

By copy of this letter all counsel of record are being notified of this filing.

If you have any questions, please do not hesitate to call. Your cooperation and assistance in this matter is appreciated.

Very truly yours,



Terry M. Harms,  
Legal Administrative Assistant  
to Charles T. Jeremiah

\tmh  
Enclosures  
0662839.02  
003840-000002

cc: LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

Millard A. Johnson  
Janent Reinartz  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 1630 9370*

*Via CM-RRR No. 7160 3901 9845 1630 9387*

*Via CM-RRR No. 7160 3901 9845 1630 9394*

**Certified Article Number**  
7160 3901 9845 1630 9370  
**SENDERS RECORD**

**Certified Article Number**  
7160 3901 9845 1630 9387  
**SENDERS RECORD**

**Certified Article Number**  
7160 3901 9845 1630 9394  
**SENDERS RECORD**

January 23, 2008

Page 3

cc: Susie Green  
City Attorney  
City of Galveston  
P.O. Box 779  
Galveston, Texas 77553-0779

Steve LeBlanc  
City Manager  
City of Galveston  
P.O. Box 779  
Galveston, Texas 77553-0779

Lloyd Rinderer  
City's Risk Manager  
City of Galveston  
P.O. Box 779  
Galveston, Texas 77553-0779

**FILE**

DATE STAMPED AND RETURN

COMMISSION  
ON ENVIRONMENTAL  
QUALITY

DOCKET NO. 2007-0879-UCR

IN THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
AUSTIN, TEXAS

2007 JUL 30 PM 3:10

CHIEF CLERKS OFFICE

FLAGSHIP HOTEL, LTD.

§

v.

§

§

§

THE CITY OF GALVESTON

§

**CITY OF GALVESTON'S MOTION TO DISMISS**

COMES NOW, The City of Galveston (hereinafter "City"), moving the Texas Commission on Environmental Quality ("TCEQ")<sup>1</sup> to decline the request of the Flagship Hotel, Ltd. (the "Flagship") for an **advisory opinion** that it lacks jurisdiction, and dismiss the petition as untimely, and for other reasons set forth below. In support, the City would show as follows:

**THE FLAGSHIP HAS GROSSLY MISCHARACTERIZED THIS MATTER**

1. Remarkably, through its baseless rhetoric and hyperbole, the Flagship seeks sympathy and attempts to paint City officials cleaning up the former "good ole boy business practices" as malfeasants.<sup>2</sup> In actuality, the Flagship's owner, Daniel Der-Yun Yeh, now reportedly indicted for the largest nationwide fraud in connection with Hurricane Katrina,<sup>3</sup> relied on an illegal sweetheart deal made with the terminated former City Manager, to pay a small fraction of the metered water consumption for his hotel – *at taxpayer expense*. Honest officials put an end to corrupt practices that were wasting taxpayer money and lining the pockets of individuals like Yeh.

<sup>1</sup> Formerly Texas Natural Resource Conservation Commission ("TNRCC").

<sup>2</sup> "City used its procedures as a pretext...to try to destroy the Flagship's business..." [Flagship's Reply, p. 10].

<sup>3</sup> See, attachments A and B. Yeh blames his alleged fraud on a medical condition.

THE TCEQ SHOULD SIMPLY DISMISS THE FLAGSHIP'S UNTIMELY FILING

2. However, the TCEQ and Office of Administrative Hearings should not consider the merits of the dispute, or even the issue of whether it has jurisdiction over the Flagship's "Amended Petition"<sup>4</sup> under Texas Water Code § 13.041. It cannot and should not render an advisory opinion, as the Flagship requests, because no dispute has been timely or properly presented to it under the provisions of the Texas Water Code. The disputed water charges were paid, and this dispute admittedly arose *more than five years ago*. The Texas Water Code is clear – an appeal of a dispute over water charges must be filed with the TCEQ no later than ninety (90) days after the rate change or decision of the governing body. Texas Water Code § 13.043(c).

3. As the "Amended Petition" is quite simply a nullity and on its face untimely by *five years*, the TCEQ should dismiss it as untimely, without consideration of any of the merits. *See e.g., Sierra Club v. Texas Commission on Environmental Quality*, 188 S.W.3d 220, 221 (Tex.App. – Austin 2005, no pet.) (appeal dismissed as untimely at urging of TCEQ, where Sierra Club failed to file notice of appeal within thirty days). Indeed, if this matter is not dismissed as untimely, the procedural rules under the Texas Water Code, including § 13.043(c) would be meaningless.

*Flagship Missed Municipal Deadlines*

4. The Flagship's failure to timely pursue its available remedies is well documented and began at the municipal level. Although the Flagship first filed a request for an "Emergency Order" from the TCEQ to stop the disconnection, the Flagship's water was not disconnected.

---

<sup>4</sup> The term "Amended Petition" is intentionally misleading. There was no live petition before the TCEQ when this document was filed.

Instead, payment was made on the Flagship's behalf for the unpaid water consumption on March 18, 2002. In other words, rather than dispute the proposed disconnect for the undisputed non-payment and under the procedures provided by the City, the bill was paid and the water service was not terminated. After payment was made by Dr. Yeh and another company on behalf of the Flagship for the amount invoiced by the City for arrearages for metered water consumption, which the Flagship did not dispute, the Flagship took no action within five (5) days, or even seventeen (17) days, ignoring the requirements of both Galveston Code §§ 36-69 and 36-67. Instead, it waited nearly thirty days to protest to the City, when, by letter, its attorney sent a "request for refund," on April 17, 2002. Accordingly, the Flagship did not timely present the dispute to the City in the first instance, as required by the water code, since the Commission hears appeals. The City, through its retained counsel, advised the Flagship, through its attorney, that the protest was untimely, on April 30, 2002.<sup>5</sup> Having failed to comply with the basic municipal procedures, the Flagship had no subsequent right of "appeal" to the TCEQ.

*Flagship Missed TCEQ Deadline*

5. However, after missing the deadline to address the matter to the certificate holder, the City, the Flagship again failed to file any kind of appeal within the ninety (90) day deadline set forth in Texas Water Code § 13.043(c). In fact, by its own account, the Flagship waited *six months*, until at least October 23, 2002 to supposedly file an *appeal* petition with the TCEQ. Notably, the TCEQ has no record of this supposed filing. See attachment C, testimony of Douglas Holcomb, P.E., pp. 33-37 (no reason to believe TCEQ received it); attachment D, Affidavit of Michael Fieglein, attached (contending the TCEQ "failed and refused to docket the

---

<sup>5</sup> Remarkably, the Flagship now suggests unconvincingly that it didn't receive the fax. This is immaterial in light of the Flagship's failure to comply with the deadline in the first place.

Petition;").<sup>6</sup> In any event, if submitted to the TCEQ at all, a fact which is disputed, the Petition would have been submitted several *months* after the statutory deadline.<sup>7</sup>

6. To be sure, the Flagship has not even suggested that its Amended Petition is timely, based upon some event *within the last ninety days* nor that its original filing was within ninety days of any relevant event, for that matter. Nor does Flagship present its petition as one for "reconsideration," which would likewise be untimely under the Texas Government Code § 2001.142, *et seq.* Rather, having attempted to litigate this issue in various Courts for years now, abandoning their pursuit of review through an untimely petition to the TCEQ, if any appeal was ever actually filed, the Flagship takes the position that it is free to now assert a protest or dispute in this agency in clear derogation of applicable law.<sup>8</sup>

#### IMPROPER PURPOSE OF FLAGSHIP'S REQUEST

7. The Flagship's "Amended Petition" should be dismissed for the additional reason that its sum and substance is an inappropriate request, and it is not properly a matter before this agency, given its purpose. The Flagship admittedly seeks a determination by the State Office of Administrative Hearings that the TCEQ has no jurisdiction, not to resolve a dispute in this forum, but for the purpose of gaining a certain posture in its bankruptcy proceeding. Indeed, the TCEQ is not empowered to render such advisory opinions. The TCEQ's purpose is not to arm

---

<sup>6</sup> Holcomb has no recollection of seeing it. There is no response to the document, and it is not marked in the normal fashion. According to Mr. Holcomb, if it was received, it would be in "the CCN [file] for the City of Galveston." P. 38.

<sup>7</sup> The Flagship argues that based on futility, it didn't need a final decision of the City Council, but again has offered no explanation why its Petition was untimely (if filed at all), nor why it waited five years to file yet another petition. Even if the Flagship had some type of futility argument with the City, as they seem to suggest, -- it would have started the timeline years ago.

<sup>8</sup> A complete 'red herring,' whether the Flagship believes it has some constitutional or other claims, has no bearing on the issue. The Flagship has no "constitutional claims." Indeed, the Flagship attempted to add such claims to its bankruptcy adversary proceeding, but the Bankruptcy Court rejected that attempt.

the Flagship so that it can mount a challenge to prior rulings of the Court of Appeal in this very dispute. For this additional reason, the Amended Petition must be dismissed.

DOCTRINES OF "LAW OF THE CASE," COLLATERAL ESTOPPEL AND *RES JUDICATA* APPLY TO BAR THE INSTANT DISPUTE

8. The City of Galveston is mindful of, and acknowledges, that an Administrative Law Judge recently considered, and recommended dismissal for lack of jurisdiction, a billing or rate dispute in *Victoria Palms Resort, Inc. v. City of Donna, Texas*, SOAH Docket No. 582-06-1766. To the undersigned's knowledge, no action has been taken by the Commission on that recommendation. Regardless, that matter is easily distinguished from this case.

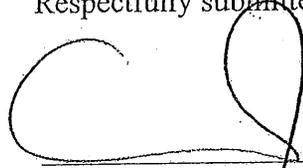
9. Here, the Flagship seeks a re-litigation of the very same issue between the exact same parties decided in *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552 (Tex.App. – Texarkana 2003, pet. denied) – whether the Texas Water Code granted the City [of Galveston] exclusive original jurisdiction over [this] dispute[] and the Texas Natural Resource Conservation Commission (TNRCC) appellate jurisdiction." *Id.* at 563. Indeed the Houston Court of Appeals had previously decided this issue in *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422, 427 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.). In other words, the Flagship seeks a ruling years later, contrary to the decisions of two Courts of Appeal deciding the issue *in this case*. After the decision rendered by the Texarkana Court of Appeals, the Flagship filed a petition for review with the Texas Supreme Court. The Texas Supreme Court denied review.

10. Without question, the jurisdictional issue in this case was presented to, and decided by, the District Court, two Courts of Appeal, and the Texas Supreme Court. The finding of jurisdiction is, at the very least, the "law of the case." Moreover, the well-established principles of collateral estoppel (issue preclusion) and *res judicata* (claim preclusion) would act to bar re-litigation of the issue – certainly in this case – in this forum or any other. Thus, the issue has

already been decided, and should not be revived and again reviewed in this proceeding, particularly for the Flagship's self-serving purpose of attempting to mount a renewed challenge to the jurisdictional issue.

11. In conclusion, the Commission should decline the Flagship's invitation to engage in a review of its jurisdiction and render an advisory opinion, and should simply dismiss this "Amended Petition" as untimely, and otherwise barred by the doctrines of "law of the case," *res judicata* and collateral estoppel.

Respectfully submitted,



---

WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

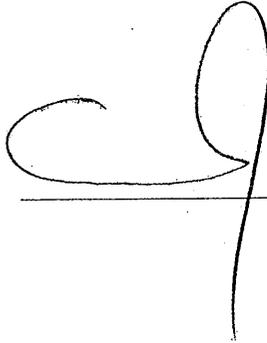
OF COUNSEL:

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 26th day of July, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010



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# Department of Justice

United States Attorney Chuck Rosenberg  
Southern District of Texas

FOR IMMEDIATE RELEASE  
FRIDAY, MARCH 2, 2006  
[WWW.USDOJ.GOV/USAO/TXS](http://WWW.USDOJ.GOV/USAO/TXS)

CONTACT: NANCY HERRERA  
PHONE: (713) 567-9301  
FAX: (713) 718-3389

## GALVESTON'S FLAGSHIP HOTEL OWNER CHARGED WITH DEFRAUDING FEMA HURRICANE EVACUEE RELIEF PROGRAMS

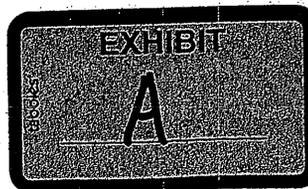
HOUSTON, TX—United States Attorney Chuck Rosenberg announced today the return of a 39-count indictment charging Daniel Yeh, 52, of Sugar Land, Texas, with twenty-two counts of wire fraud and seventeen counts of filing false claims against the Federal Emergency Management Agency (FEMA). Yeh is the principal owner of Flagship Hotel Ltd., which operates the Flagship Hotel (Flagship), located at 2501 Seawall Boulevard in Galveston, Texas.

Yeh is accused of wire fraud and filing false claims totaling at least \$232,000 in connection with disaster relief lodging programs for hurricane evacuees funded by FEMA's Public Assistance Program. This case is the first of its kind in the nation. Eight others were previously arrested in this district on charges of fraud in connection with hurricane disaster relief programs.

The indictment was returned today by a Houston grand jury, and will be prosecuted in the Galveston Division of the Southern District of Texas. A warrant will issue for Yeh's arrest. It is anticipated that the U.S. District Court for the Galveston Division will issue an order setting a date and time in the near future for Yeh to surrender to the U.S. Marshal's Service and be arraigned on the charges.

After Hurricane Katrina, a FEMA Public Assistance grant funded the Special Transient Accommodations and Assistance Program (STAAP) administered by the Red Cross, and later known as the Short-Term Lodging program (SLP) administered by FEMA, allowed hurricane evacuees from designated disaster areas to stay in hotels free of charge. The FEMA grant programs reimbursed those hotels for the evacuee's stay.

According to the indictment, the Flagship enrolled in the FEMA lodging programs after Hurricane Katrina to provide hotel rooms for evacuees and continued to participate in the programs after Hurricane Rita. The indictment alleges that between October 1, 2005, and December 15, 2005, Daniel Yeh knowingly devised a scheme to defraud the federal disaster relief programs of at least \$232,000. As part of the scheme, it is alleged that Daniel Yeh took over the task of billing the federal lodging programs online after Hurricane Rita. Yeh is accused of filing fraudulent claims for reimbursement for (1) rooms in the names of hotel employees who previously stayed at the Flagship free of charge as part of their employment arrangement; (2) rooms in the name of supposed hurricane evacuees on dates when those rooms were occupied by paying hotel guests with different names; (3) rooms occupied by friends, relatives, and employees of his wife's business, who were recruited to stay at the hotel, but were not evacuees; (4) rooms in the names of supposed hurricane evacuees who never had rooms at the Flagship; (5) rooms in the name of supposed hurricane evacuees on dates when those rooms were unoccupied; (6) for multiple rooms in the names of a single guest when, in fact, the guest occupied fewer rooms than billed.



Each of the twenty-two wire fraud counts carries a punishment of up to 20 years imprisonment and a fine of up to \$250,000. Each of the seventeen false claim counts carries a punishment of up to five years imprisonment and a fine of up to \$250,000.

The United States Attorney's Office for the Southern District of Texas is a member of the Department of Justice's Hurricane Katrina Fraud Task Force, created by Attorney General Alberto R. Gonzales to deter, detect and prosecute unscrupulous individuals who try to take advantage of the Hurricane Katrina and Hurricane Rita disasters. Headed by Assistant Attorney General Alice S. Fisher, the Task Force consists of federal, state, and local law enforcement investigating agencies and the United States Attorney's Offices in the Gulf Coast region and nationwide.

This matter was investigated by the Department of Homeland Security Office of Inspector General with the assistance of the U.S. Secret Service, and is being prosecuted by Assistant United States Attorney Gregg Costa and Special Assistant United States Attorney Jason Varnado.

**An indictment is a formal accusation of criminal conduct, not evidence. The public is reminded that a defendant is presumed innocent unless and until convicted through due process of law. The United States always bears the burden of proving guilt beyond a reasonable doubt.**

###

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## Man Accused of Katrina Fraud Blames It All on Brain Tumor

August 14, 2006 9:52 AM

Joseph Rhee and Vanessa Washington Report:



A Texas hotel owner says his medical condition led him to unintentionally defraud the federal government over Katrina disaster relief claims.

Daniel Yeh, the owner of the Flagship Hotel in Galveston, Texas, had enrolled in a FEMA program that reimbursed hotels for providing free lodging for Katrina evacuees. Yeh is accused of filing false claims totaling over \$200,000 for guests who were not evacuees.

Yeh is facing trial for 22 counts of wire fraud and 17 counts of filing false claims. But Yeh's attorney, Robert Bennett, said his client's judgment at the time was severely impaired by a pre-existing brain tumor that led him to misunderstand the rules of the FEMA program. According to Bennett, "The brain tumor affected his frontal lobe, the center for rational thought -- essentially all executive decision-making."

At a pre-trial hearing, Bennett claimed Yeh's medical condition made him unable to assist in his own defense and understand the charges brought against him. A court-appointed forensic psychiatrist confirmed Yeh's condition and agreed that he was incompetent to stand trial.

During the hearing, prosecutors hotly contested Yeh's alleged incompetency. Nancy Herrera of the U.S. Attorney's Office said, "The U.S. presented evidence which showed that during the time that Mr. Yeh was engaging in these claims to FEMA he was teaching a college-level class at the University of Houston." Herrera added that in December of 2005 Yeh negotiated the sale of a \$1.2 million hotel in Oklahoma City.

A district court judge is expected to decide shortly on whether or not Yeh should stand trial.

According to Bennett, Yeh is no longer running the hotel and has paid the government back for the disputed charges.

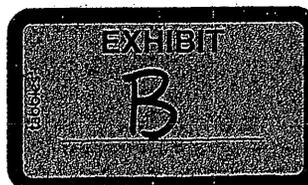
[TO THE BLOTTER HOMEPAGE](#)

August 14, 2006 in [Hurricane Katrina](#) | [Permalink](#) | [User Comments \(5\)](#)

### User Comments

Yeah right!

Posted by: LC | Aug 14, 2006 12:45:59 PM



UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

IN RE: \*  
FLAGSHIP HOTEL, LTD. \*  
A Texas Limited Partnership\* CASE NO. 04-81356  
Debtor \* Chapter 11

FLAGSHIP HOTEL, LTD. \*  
Plaintiff \*  
\*  
v. \* ADV. NO. 05-8042  
\*  
THE CITY OF GALVESTON \*  
Defendant \*

ORAL DEPOSITION OF  
DOUGLAS EDWARD HOLCOMB  
TAKEN NOVEMBER 3, 2006

ORAL DEPOSITION OF DOUGLAS EDWARD HOLCOMB,  
produced as a witness at the instance of the Plaintiff and  
duly sworn, was taken in the above-styled and numbered  
cause on the 3rd day of November, 2006, from 10:02 a.m. to  
11:02 a.m., before Steffanie L. Decker, RFR, CSR in and  
for the State of Texas, reported by machine shorthand, at  
the offices of TCEQ, 12100 Park 35 Circle, Building F,  
Conference Room 31036, Austin, Texas, pursuant to the  
Federal Rules of Civil Procedure and the provisions stated  
on the record or attached hereto.

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APPEARANCES

1 FOR THE PLAINTIFF:

2 Mr. Millard A. Johnson

3 JOHNSON DELUCA KENNEDY & KURISKY

4 4 Houston Center

5 1221 Lamar Street, Suite 1000

6 Houston, Texas 77010

7 Phone: 713-652-2525

8 E-mail: mjohnson@jdkklaw.com

9 FOR THE DEFENDANT:

10 Mr. William S. Helfand

11 CHAMBERLAIN, HRDLJCKA, WHITE, WILLIAMS & MARTIN

12 1200 Smith Street, 14th Floor

13 Houston, Texas 77002

14 Phone: 713-658-1818

15 E-mail: bill.helfand@chamberlainlaw.com

16 FOR THE TCEQ:

17 Mr. Brian D. MacLeod

18 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

19 12100 Park 35 Circle

20 Building A

21 Austin, Texas 78753

22 Phone: 512-239-0750

23 E-mail: bmacleod@tceq.state.tx.us

24

25

DOUGLAS EDWARD HOLCOMB

1 having been first duly sworn, testified as follows:

2 EXAMINATION

3 BY MR. JOHNSON:

10:02 4 Q. Would you state your full name for the record?

10:02 5 A. Douglas Edward Holcomb.

10:02 6 Q. And Mr. Holcomb, how are you employed?

10:02 7 A. I'm employed by the Texas Commission on

10:02 8 Environmental Quality. I'm an engineer with the Agency.

10:02 9 I'm also manager of the Utilities and District Section of

10:02 10 the Water Supply Division. It's a mouthful.

10:03 11 Q. Yeah. What does that mean? What are you

10:03 12 responsible for?

10:03 13 A. Right now I'm managing about 45, 50 technical

10:03 14 and financial staff that review various applications for

10:03 15 utility related issues, water district related issues that

10:03 16 the Agency has authority and jurisdiction over.

10:03 17 Q. And how long have you had this position with the

10:03 18 TCEQ?

10:03 19 A. Well, I've been in this particular program since

10:03 20 19 -- 1986. I've been manager since around 2000.

10:03 21 Q. Okay. And I represent the Flagship Hotel in a

10:03 22 dispute with the City of Galveston, Texas regarding a

10:03 23 water bill. And I've got some questions for you about

10:03 24 some things that have transpired that involve the TCEQ.

10:03 25



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10:33 1 Q. Which I think attached the Court of Appeals  
 10:33 2 opinion. And as you'll see, the last thing is the  
 10:33 3 March 14th, 2002 judgment of the Court of Appeals. Do you  
 10:33 4 see that?  
 10:33 5 A. Uh-huh. Uh-huh.  
 10:33 6 Q. Now, if the TNRC had received Exhibit 4, if it  
 10:33 7 had ever received Exhibit 4, would that be with the same  
 10:34 8 records or should that be with the same records that  
 10:34 9 included Exhibit 2?  
 10:34 10 A. That's correct.  
 10:34 11 Q. All right. If the TNRC had ever received  
 10:34 12 Exhibit 5, should that be with the same records that  
 10:34 13 included Exhibit 2?  
 10:34 14 A. That's also correct.  
 10:34 15 Q. Now, as we sit here today, do you have any  
 10:34 16 reason to believe that the TNRC or TCEQ has ever received  
 10:34 17 Exhibits 4 or 5 before they were handed to you today?  
 10:34 18 MR. JOHNSON: Objection, form.  
 10:34 19 THE WITNESS: I've never seen them before  
 10:34 20 so...  
 10:34 21 Q. (By Mr. Helfand) Okay. And would --  
 10:34 22 within the normal course of doing the business here,  
 10:34 23 if these further requests related to this issue had  
 10:34 24 come in, would they have been properly routed to you  
 10:34 25 again?

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10:35 1 you obtained from --  
 10:35 2 Q. This is from the open records request --  
 10:35 3 A. -- the open records request --  
 10:35 4 Q. That is a copy of Exhibit Number 3 that came  
 10:35 5 from the open records request.  
 10:35 6 A. Right. Normally the -- the documents are  
 10:35 7 stamped when they're received or it looks like I indeed  
 10:36 8 did receive this document because this is my handwriting  
 10:36 9 on here that I received it March 18th so --  
 10:36 10 Q. Just for the record, you're looking now at a  
 10:36 11 copy of the -- of the Open Records Act copy 1 got of  
 10:36 12 Exhibit 2.  
 10:36 13 A. Correct. This is a copy you got.  
 10:36 14 MR. JOHNSON: Did you copy me with your  
 10:36 15 open records request?  
 10:36 16 MR. HELFAND: I don't know, but that's not  
 10:36 17 something we need to talk about right now.  
 10:36 18 MR. JOHNSON: No, I can ask you that on the  
 10:36 19 record.  
 10:36 20 MR. HELFAND: I'll answer you after the  
 10:36 21 deposition.  
 10:36 22 MR. JOHNSON: I take it your answer is no?  
 10:36 23 MR. HELFAND: My answer is I don't know,  
 10:36 24 but to be sure there's no obligation to do so.  
 10:36 25 MR. JOHNSON: I'm not so sure.

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10:34 1 A. They -- yes, they would have.  
 10:34 2 Q. Okay. And you -- not only have you not seen  
 10:34 3 them, but would they be somewhere other than in the  
 10:34 4 records that would have been produced in response to an  
 10:35 5 open records request that yielded Exhibit Number 2, that  
 10:35 6 is Number 4 and 5?  
 10:35 7 A. No.  
 10:35 8 Q. All right. So as we sit here today, do you have  
 10:35 9 any reason to believe that the Commission has ever  
 10:35 10 received Exhibit 4?  
 10:35 11 MR. JOHNSON: Objection, form.  
 10:35 12 THE WITNESS: I have no reason to believe  
 10:35 13 they have. I've never seen the documents.  
 10:35 14 Q. (By Mr. Helfand) And as we sit here today,  
 10:35 15 do you have any reason to believe the Commission has  
 10:35 16 ever received Exhibit 5?  
 10:35 17 MR. JOHNSON: Same objection. Objection,  
 10:35 18 form --  
 10:35 19 THE WITNESS: No.  
 10:35 20 Q. (By Mr. Helfand) Did you answer?  
 10:35 21 A. No.  
 10:35 22 Q. Okay. And let me take a look here. Is there  
 10:35 23 any type of coding that the Commission would do if, in  
 10:35 24 fact, it received Exhibits 4 or 5?  
 10:35 25 A. Coding? Well, I noticed on the -- the documents

Page 36

10:36 1 Q. (By Mr. Helfand) Okay. So coming back --  
 10:36 2 before the interruption. What you are looking at is  
 10:36 3 the document I got from the TN -- TCEQ in response  
 10:36 4 to an open records request, which is the same as  
 10:36 5 Exhibit Number 2, except the TCEQ copy has some  
 10:36 6 handwriting on it and a -- and Mr. Freiglein's  
 10:36 7 business card attached to the front page.  
 10:36 8 MR. JOHNSON: Objection, form.  
 10:36 9 Q. (By Mr. Helfand) Is that right?  
 10:36 10 A. That's what it appears to be.  
 10:36 11 MR. HELFAND: Okay. What's the form  
 10:36 12 objection?  
 10:36 13 MR. JOHNSON: You say document you've got.  
 10:36 14 If you want to do that, let's mark that document and  
 10:36 15 make it part of the record.  
 10:37 16 MR. HELFAND: Okay. We'll just mark that  
 10:37 17 as the next exhibit.  
 10:37 18 MR. JOHNSON: I don't know where you got  
 10:37 19 it.  
 10:37 20 MR. HELFAND: Okay.  
 10:37 21 MR. JOHNSON: Unless you're going to swear  
 10:37 22 yourself in.  
 10:37 23 (Exhibit Number 6 marked for  
 10:37 24 Identification.)  
 10:37 25 Q. (By Mr. Helfand) Okay. Looking now at

Page 37

10:37 1 what is marked as Exhibit 6. Turn to the second  
 10:37 2 page, if you would, please. Does this appear to be  
 10:37 3 the document that would be maintained in the file of  
 10:37 4 the TNRCC that is the same as Exhibit 2?  
 10:37 5 A. Yes, it appears to be the document --  
 10:37 6 Q. Okay. And the markings that are written on  
 10:37 7 there, can you -- can you read the handwriting in the  
 10:37 8 upper right-hand corner? What does it say?  
 10:37 9 A. Yeah. It was received March 18th, 2002. It was  
 10:37 10 hand-delivered by J.M. Freiglein to Doug Holcomb, that's  
 10:37 11 me, at TCEQ Headquarters.  
 10:37 12 Q. Okay.  
 10:37 13 A. Possibly --  
 10:37 14 Q. You said TCEQ, but it actually says TNRCC.  
 10:37 15 A. I'm sorry, TNRCC. See, I'm seeing TCEQ now  
 10:38 16 whenever I see that.  
 10:38 17 Q. Okay.  
 10:38 18 A. But it looks like I even went on to say it was  
 10:38 19 at 8:45 a.m.  
 10:38 20 Q. Okay.  
 10:38 21 A. And then down at the corner -- the other  
 10:38 22 difference is down in the lower right-hand corner, appears  
 10:38 23 that we stapled Mr. Freiglein's card.  
 10:38 24 Q. Okay. Now -- and we'll have to make a copy of  
 10:38 25 this, because I'll need to get my copy back to keep my set

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10:38 1 complete.  
 10:38 2 MR. HELFAND: I'm assuming you don't object  
 10:38 3 to that, Mr. Johnson?  
 10:38 4 MR. JOHNSON: I'm sorry?  
 10:38 5 MR. HELFAND: I'm assuming you don't mind  
 10:38 6 my getting a copy of this before we --  
 10:38 7 MR. JOHNSON: Oh, no, no, no --  
 10:38 8 MR. HELFAND: -- because this is my only  
 10:38 9 copy.  
 10:38 10 MR. JOHNSON: That's fine.  
 10:38 11 Q. (By Mr. Helfand) Okay. How do we find  
 10:38 12 out, Mr. Holcomb, whether in fact Mr. Freiglein ever  
 10:38 13 actually sent Exhibit 4 or Exhibit 5 to the TCEQ?  
 10:38 14 And if so, when?  
 10:38 15 A. The only way I know of we could find out would  
 10:38 16 be to go pull the CCN for the City of Galveston and see if  
 10:38 17 it's in -- in the file.  
 10:38 18 Q. Is there any reason it would be anywhere other  
 10:38 19 than in the CCN file for the City of Galveston, if, in  
 10:39 20 fact, either of those documents were received?  
 10:39 21 MR. JOHNSON: Objection, form.  
 10:39 22 THE WITNESS: This is a big agency. Things  
 10:39 23 have been -- fallen through the cracks before, but  
 10:39 24 generally, normally when copies like this come in,  
 10:39 25 that's where they wind up, in the CCN file.

Page 39

10:39 1 Q. (By Mr. Helfand) Okay. I guess what I'm  
 10:39 2 asking is if there's a dispute in this lawsuit as to  
 10:39 3 whether Mr. Freiglein actually ever filed these  
 10:39 4 documents with the TCEQ, what is the best way to  
 10:39 5 determine whether that in fact happened?  
 10:39 6 A. To contact Ms. Castanuela and to pull the CCN  
 10:39 7 file, the correspondence file that this would have been  
 10:39 8 placed in.  
 10:39 9 Q. Okay. All right. Is that -- and I don't want  
 10:39 10 to create more trouble than we need to today, but since we  
 10:39 11 are all here, is that something that -- can you get the  
 10:39 12 CCN file while we are here and look at it or is that going  
 10:39 13 to be problematic?  
 10:40 14 A. Central Records is over in another building.  
 10:40 15 Q. Okay. Don't worry about it. We'll work on that  
 10:40 16 another day.  
 10:40 17 MR. JOHNSON: Yeah.  
 10:40 18 Q. (By Mr. Helfand) Okay. All right. As we  
 10:40 19 sit here today, can you tell us whether Exhibits  
 10:40 20 Number 4 or 5 were ever received by the TCEQ?  
 10:40 21 A. I can't tell you that they were or weren't.  
 10:40 22 Q. Okay. Mr. Johnson was asking you what happens  
 10:40 23 if somebody sends you a letter for something or asks you  
 10:40 24 to do something that you all as a Commission don't think  
 10:40 25 you have the authority to do. Do you remember that?

Page 40

10:40 1 A. Uh-huh.  
 10:40 2 Q. Okay. And what you said was we -- if I  
 10:40 3 understand correctly is if we don't think we have  
 10:40 4 authority or jurisdiction to do it, we tell them. Is that  
 10:40 5 fair to say?  
 10:40 6 A. We tell them and we usually follow up with a  
 10:40 7 letter.  
 10:40 8 Q. Is, in fact, that's what Exhibit 3 is?  
 10:40 9 A. It appears to be.  
 10:40 10 Q. Now, if Exhibit 4 or 5 were ever actually  
 10:41 11 received by the TCEQ, would the TCEQ make a determination  
 10:41 12 as to whether it could do what it was being asked to do in  
 10:41 13 those letters?  
 10:41 14 A. TCEQ generally responds to all correspondence we  
 10:41 15 receive.  
 10:41 16 Q. Okay. Even if you don't think you have  
 10:41 17 jurisdiction or authority to do something?  
 10:41 18 A. Yes, that's correct.  
 10:41 19 Q. Okay. And is there any response to either  
 10:41 20 Exhibits 4 or 5 in the TCEQ's files that you're aware of?  
 10:41 21 A. Not that I'm aware of.  
 10:41 22 Q. If in fact 4, which is the petition, was  
 10:41 23 received --  
 10:41 24 A. Uh-huh.  
 10:41 25 Q. Five is just a letter asking about it. But if,

LAW OFFICES  
J. MICHAEL FIEGLEIN

JACKSON SQUARE, SUITE 208  
621 MOODY  
GALVESTON, TEXAS 77550

TELEPHONE: (409) 765-7741  
FAX: (409) 765-5357

J. MICHAEL FIEGLEIN

October 23, 2002

Ms. La Donna Continuella  
Chief Clerk  
Texas National Resource  
Conservation Commission  
P.O. Box 13087; Mail Code 105  
Austin, Texas 78711

Re: Flagship Hotel, Ltd. v. City of Galveston  
Petition for Review of Inaction of the City of Galveston  
With Respect to Application for Refund of Water Charge  
Overpayment

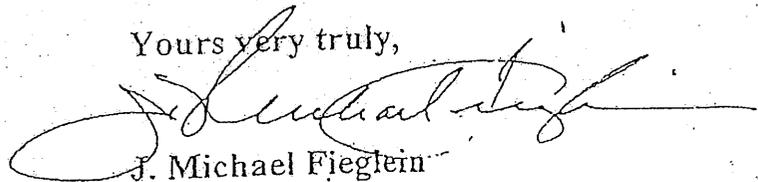
Dear Ms. Continuella:

Enclosed for filing and docketing is the above-referenced Petition for Review filed on behalf of Flagship Hotel, LTD.

By copy hereof we are providing the same to the City of Galveston.

Thank you for your attention.

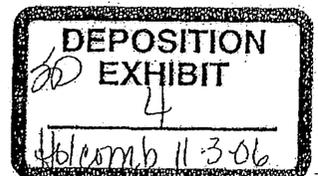
Yours very truly,



J. Michael Fieglein

JMF/bn  
Enclosure

cc: Susie Green, City Attorney, City of Galveston  
Mr. Doug Holcomb, Manager, Utilities & Districts Section  
Ms. Angela Stepherson, Senior Attorney, Environmental Law Division



IN THE TEXAS NATURAL RESOURCES  
CONSERVATION COMMISSION  
AUSTIN, TEXAS

FLAGSHIP HOTEL, LTD.           §  
  §  
VS.                                   §  
  §  
THE CITY OF GALVESTON       §

FLAGSHIP HOTEL, LTD.'s PETITION FOR REVIEW IN INACTION OF  
THE CITY OF GALVESTON WITH RESPECT TO APPLICATION FOR  
REFUND OF WATER CHARGE OVERPAYMENT

TO THE HONORABLE TNRCC:

COMES NOW, FLAGSHIP HOTEL, LTD.. and, pursuant to the ruling of  
the 405<sup>th</sup> District Court in Galveston County, Texas, requests that the Commission  
review the inaction of the City of Galveston with respect to the Application of  
Flagship Hotel, Ltd. for Refund of Water Charge Overpayment. In support  
thereof, Flagship Hotel, Ltd. would respectfully show as follows:

JURISDICTION

1. The 405<sup>th</sup> Judicial District Court has ruled that the TNRCC has the primary  
authority to review the issue between Flagship Hotel, Ltd. and the City of  
Galveston concerning the an application for the refund of an overpayment of water  
charges. 98CV0795; *Flagship Hotel, Ltd. v. City of Galveston*, 405<sup>th</sup> Judicial  
District Court, Galveston County, Texas, Order dated March 27, 2002, copy  
attached and incorporated herein by reference.

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

IN RE:

FLAGSHIP HOTEL, LTD.  
A Texas Limited Partnership  
Debtor

§  
§  
§

CASE NO. 04-81356  
Chapter 11

FLAGSHIP HOTEL, LTD.  
Plaintiff

§  
§  
§  
§  
§  
§

v.

ADV. NO. 05-8042

THE CITY OF GALVESTON  
Defendant

**Affidavit of J. Michael Fieglein in Opposition to Motion for Summary Judgment of the City of Galveston**

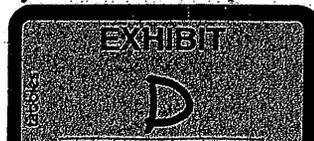
BEFORE ME, the undersigned authority personally appeared J. MICHAEL FIEGLEIN, who by me being first duly sworn, deposed and said:

“My name is J. MICHAEL FIEGLEIN, I am over the age of 21 and am qualified to make this affidavit. I am special counsel for the debtor in this cause and all facts stated herein are within my personal knowledge and are true.

“During the State court proceedings, I took the deposition of Douglas Matthews on August 22, 2000, and the excerpts thereof attached to the brief of debtor are true and correct copies thereof.

“The exhibits attached to this Affidavit are true and correct copies of the originals thereof.

“On March 15, 2002, The City of Galveston threatened to shut-off the water service to the Flagship Hotel if payment of a disputed charge in



the amount of \$215,920.15, was not paid by 5:00 p.m. on March 18, 2002. On March 18, 2002, Flagship Hotel, Ltd., presented its Request for Emergency Orders Pursuant to Water Code §13.041(d)(1) to Enjoin Cessation of Water Service Pending Resolution of Dispute to the Texas Natural Resource Conservation Commission in Austin, Texas. A copy of that petition is attached.

“On March 18, 2002, the Texas Natural Resource Conservation Commission refused to take the issue irrespective of the opinion of the District Court and the Court of Appeals requiring debtor to exhaust its administrative remedies, and issued its letter of refusal on that date denying jurisdiction. A copy of that refusal letter is attached.

“On March 18, 2002, debtor paid the disputed water charge in protest.

“On April 17, 2002, debtor petitioned The City of Galveston to refund the overpayment of water charges paid in protest on March 18, 2002, and demanded a hearing if the Request for Refund was denied.

“The City of Galveston never responded to the Request for Refund and failed to grant a hearing as demanded. Repeated requests of the City Manager and Public Works Department failed to secure a response or a hearing.

“Debtor thereafter, on October 23, 2002, filed a Petition for Review with respect to the application for refund of the water charge overpayment made under protest with the Texas Natural Resource Conservation Commission. A copy of that Petition for Review is attached. ~~The Texas Natural Resource Conservation Commission (now the Texas Commission on Environmental Quality) failed and refused to docket the Petition, providing orally that the prior letter denying jurisdiction was the position of the Commission. Repeated attempts to secure action on the petition or a written refusal went unaided. On June 1, 2004, in a last effort to secure action on the Petition, debtor wrote the Commission to set a hearing on the Petition but to no avail. A copy of that letter is attached.~~

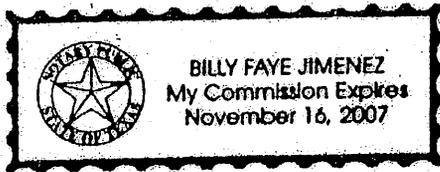
“Debtor has exhausted its efforts to exhaust its administrative remedies with no response or relief or opportunity to secure relief through the administrative process. The only forum for debtor to

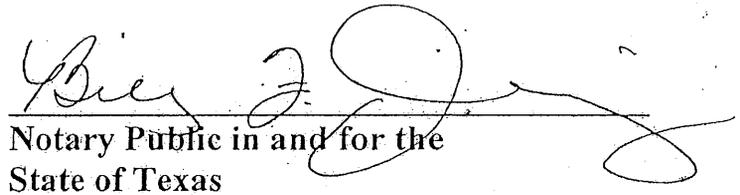
secure relief is through the bankruptcy court pursuant to the adversary action filed by debtor to recover the overpayment of water charges.”

**Dated:** November 12, 2005.

  
J. MICHAEL FIEGLEIN

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public this 12<sup>th</sup> day of November, 2005, by J. Michael Fieglein.



  
Notary Public in and for the  
State of Texas

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

**FILE**

ATTORNEYS AT LAW

1200 SMITH STREET, SUITE 1400

HOUSTON, TEXAS 77002

(713) 658-1818 (800) 342-5829

(713) 658-2553 (FAX)

www.chamberlainlaw.com

HOUSTON  
ATLANTA  
PHILADELPHIA

CHARLES T. JEREMIAH  
SENIOR COUNSEL  
DIRECT DIAL NO. (713) 654-9638  
E-MAIL: charles.jeremiah@chamberlainlaw.com

DATE STAMP AND RETURN

July 26, 2007

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
JUL 30 PM 3:10  
CHIEF CLERKS OFFICE

Via CM-RRR No. 7160 3901 9849 9898 5178

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

P. O. Box 13087; Mail Code 105

Austin, Texas 78711-3087

Re: Flagship Hotel, Ltd./City of Galveston - Flagship Hotel, Ltd.'s "Amended Petition for Review" dated April 4, 2007

Dear Ms. Castañuela:

Enclosed is an original and one copy of the City of Galveston's Motion to Dismiss for filing in the above referenced matter.

Please date stamp the enclosed copy and return to our office in the enclosed self-addressed stamped envelope being provided to you. By copy of this letter all counsel of record are being notified of this filing.

If you have any questions, please do not hesitate to call. Your cooperation and assistance in this matter is appreciated.

Sincerely yours,

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN

Charles T. Jeremiah

CTJ:tml

Enclosures

0625454.02

003840-000002

cc: **Via CM-RRR No. 7160 3901 9849 9898 5185**  
Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

ATTORNEYS AT LAW

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HOUSTON  
ATLANTA  
PHILADELPHIA

CHARLES T. JEREMIAH  
SENIOR COUNSEL  
DIRECT DIAL NO. (713) 654-9638  
E-MAIL: charles.jeremiah@chamberlainlaw.com

July 26, 2007

Certified Article Number

7160 3901 9849 9898 5178

SENDERS RECORD

Via CM-RRR No. 7160 3901 9849 9898 5178

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

P. O. Box 13087; Mail Code 105

Austin, Texas 78711-3087

Re: Flagship Hotel, Ltd./City of Galveston - Flagship Hotel, Ltd.'s "Amended Petition for Review" dated April 4, 2007

Dear Ms. Castañuela:

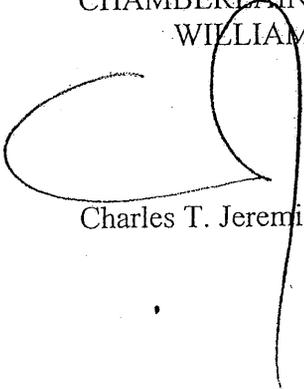
Enclosed is an original and one copy of the City of Galveston's Motion to Dismiss for filing in the above referenced matter.

Please date stamp the enclosed copy and return to our office in the enclosed self-addressed stamped envelope being provided to you. By copy of this letter all counsel of record are being notified of this filing.

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Sincerely yours,

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN

  
Charles T. Jeremiah

CTJ:tmh

Enclosures

0625454.02

003840-000002

cc: Via CM-RRR No. 7160 3901 9849 9898 5185  
Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

**Certified Article Number**  
7160 3901 9849 9898 5185  
**SENDERS RECORD**

Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

DOCKET NO. 2007-0879-UCR

IN THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
AUSTIN, TEXAS

**FILE**  
CHIEF CLERK'S OFFICE

2007 SEP 21 PM 3:03

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

FLAGSHIP HOTEL, LTD.

§  
§  
§  
§  
§

v.

THE CITY OF GALVESTON

**CITY OF GALVESTON'S REPLY TO FLAGSHIP HOTEL, LTD.'S RESPONSE TO  
CITY OF GALVESTON'S MOTION TO DISMISS**

COMES NOW, The City of Galveston (hereinafter "City"), and files this Reply to the Flagship Hotel, Ltd.'s ("Flagship") Response to the City of Galveston's Motion to Dismiss and in support thereof, would show as follows:

**Flagship's Filing is Untimely**

1. That the Flagship disputes the factual background in this matter doesn't make its most recent filing timely. Once again, Flagship's filing is **five (5) years** too late.<sup>1</sup> Not surprisingly, the Flagship completely dodges this dispositive issue.

2. Apparently, the Flagship contends that it is free to file a complaint at any time, regardless of when the dispute arose. The only reason the Flagship filed what it has dubbed its "Amended Petition," now, is because it didn't succeed in its most recent case in Federal Bankruptcy Court, and seeks an advisory opinion it can use for litigation in another forum. As set forth in the City's Motion to Dismiss, the Commission need not, and should not, engage in any analysis of its jurisdiction under the Water Code, so that the Flagship can try and challenge prior state court rulings in this matter. Quite simply, the instant proceeding is extremely untimely *and* barred by *res judicata*, collateral estoppel and law of the case. It should and must be dismissed.

<sup>1</sup> Indeed, the Texas Court of Appeals addressed the issue of jurisdiction in this matter five years ago!

### Flagships Arguments Are A Giant 'Red Herring'

3. The Flagship has freely disparaged the City – claiming in essence it set out to destroy an innocent businessman's business, alleging that "[t]he City played games with its procedures in order to coerce the Flagship into paying arrearage under duress," and that "during the height of the spring break season, the Flagship was forced to pay the City in order to avoid the complete destruction of its business," and that "the City manufactured" "what it purported to be a 'bill' for the water arrearage." See, Flagship Hotel Ltd.'s Reply to the City of Galveston's Response to Flagship Hotel, Ltd.'s Amended Petition for Review (excerpts). The Flagship continues with its 'spin,' now suggesting for the first time some diabolical motive by the City to divest the Flagship from ownership of the hotel" in favor of developers. Having so claimed, the Flagship indignantly protests the City's reference to the *accurate* factual background in this case.<sup>2</sup>

4. The Flagship (or its counsel) lacks a basic understanding of municipal representative government. Contrary to Yeh's claim, the City Manager never had authority to write off \$200,000 in taxpayer provided water for Mr. Yeh.<sup>3</sup> Indeed, the City's manager's authority to *purchase* goods or services for the City was limited by City Charter to the amount of \$5,000. Certainly, he had no authority to individually forgive or reduce any debt owed to the City to "balance the equities" as the Flagship suggests. Only after the City Manager left was the purported "side deal" he made with Yeh even discovered.<sup>4</sup>

---

<sup>2</sup> Yeh is apparently set for arraignment on September 28, 2007. See, Exhibit "A." His stated position in reference to the prosecution is set forth in the ABC News Article "Man Accused of Katrina Fraud Blames it All on Brain Tumor," which quotes his lawyer in the criminal proceeding.

<sup>3</sup> Indeed, it is rather disconcerting that counsel would think it normal and appropriate for a local governmental official to simply decide to balance the equities with a contracting party, and secretly write off money owed to the City for metered consumption.

<sup>4</sup> To be sure, there is no support anywhere for Flagship's claim that such "adjustments" were made for "numerous customers."

5. To be sure, there was no imbalance in equities or overcharge anyway. The Flagship now falsely states that the allegedly leaky pipes were the City's responsibility under the lease but the Courts have already found to the contrary. See, *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 562 (Tex.App. – Texarkana 2003, pet. denied) (Flagship obligated to repair/maintain from surface of the pier upward which would include the entire hotel). In short, the Flagship wished to impose on the taxpayers its contractual obligations under the lease.

6. Furthermore, incredibly, Yeh and the City Manager attempted to reduce the bill by 8.5 million gallons of water annually, out of the 14.5 million gallons of undisputed accrual *metered consumption*. In other words, the Flagship sought to write off *most* of the water supplied to the hotel on a monthly basis. Though absurdly suggesting some right under contractual theory, the Flagship has not sought redress under the lease, or the negotiation of the lease; both of which it knows would fail.

7. Because the Flagship has been somewhat of a 'moving target' in all the costly litigation it has filed against the City, the City pointed out that, *in addition to* filing this latest reincarnation of its complaint five years too late, the Flagship originally failed to meet the deadlines of *either* 36-67 or 36-69 of the City's Municipal Code.<sup>5</sup> The Flagship's filing was untimely; the purported appeal, six months later was untimely,<sup>6</sup> and this action is untimely. The Flagship confusingly refers to dates ranging from 1996 to 2007. The applicable timing is set forth in the Defendant's motion and supported by the record. The Flagship apparently contends that no deadlines apply and, if it doesn't get a satisfactory outcome, it can keep coming back until it does.

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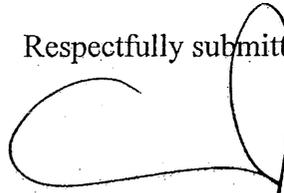
<sup>5</sup> Again, the Flagship missed the five (5) day and seventeen (17) day deadlines. See, Galveston Municipal Code § 36-37, 36-69, attached as Exhibit "B." The Flagship waited thirty (30) days. Even if it didn't receive the April 30, 2002 letter, as it seems to suggest, the Flagship's protest was untimely.

<sup>6</sup> The Flagship contends it filed an appeal – after six months. This would have been three months too late.

8. The TCEQ is not obligated to analyze and evaluate whether it has exclusive jurisdiction under provisions under the Texas Water Code, the issue upon which the Flagship seeks an advisory opinion, where there is no timely filing in the first instance and the issue upon which the filer seeks an opinion has already been considered and decided by Texas Courts' of Appeal, with a petition denied by the Texas Supreme Court.

9. Clearly, the "amended petition" should be dismissed as untimely.

Respectfully submitted,



---

WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

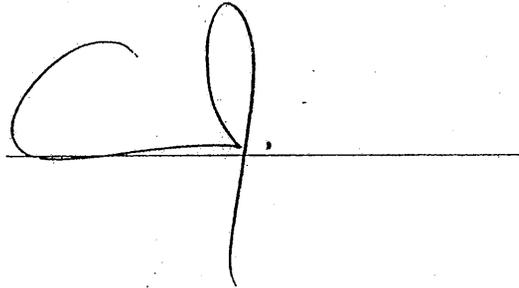
CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 18<sup>th</sup> day of September, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087



0630932.02  
003840-000002

UNITED STATES DISTRICT COURT

SOUTHERN

DISTRICT OF

TEXAS

UNITED STATES OF AMERICA

NOTICE

v.

DANIEL YEH

CASE NUMBER: CR-G-06-04

TYPE OF CASE:

CIVIL

CRIMINAL

TAKE NOTICE that a proceeding in this case has been set for the place, date, and time set forth below:

PLACE

UNITED STATES COURTHOUSE  
601 Rosenberg (25<sup>th</sup> Streets)  
Galveston, Texas 77550

ROOM NO.

5<sup>TH</sup> FLOOR COURTROOM

DATE AND TIME

TYPE OF PROCEEDING

RE-ARRAIGNMENT

TAKE NOTICE that a proceeding in this case has been continued as indicated below:

PLACE

United States Courthouse  
Galveston, Texas

DATE AND TIME PREVIOUSLY  
SCHEDULED

September 14, 2007 @ 10:30

CONTINUED TO DATE  
AND TIME

September 28, 2007 at 1:30 p.m.

MICHAEL N. MILBY, CLERK

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

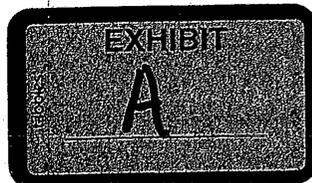
August 30, 2007

DATE

Sheila R. Anderson / 409-766-3533

(BY) DEPUTY CLERK

TO: Gregg Costa - AUSA  
Robert Bennett - Atty f/Dft  
US Marshal



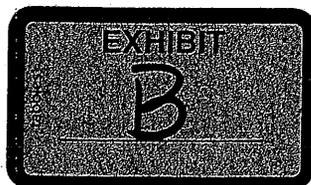
**Sec. 36-67. Billing and due date.**

(a) All bills for water service shall be due and owing upon receipt. Any person desiring to protest such bill for any reason shall do so within seventeen (17) days after the mailing of the same. After such period no person except the city manager may take action on any such protest.

(b) All bills shall be due within seventeen (17) days from date of mailing such bill to the customer. Bills paid on or before the expiration of said seventeen-day period may be paid in the reduced amount, known as the "net amount." Bills paid after said seventeen-day period shall be in the "gross amount," which shall mean the net amount plus an additional ten (10) percent.

(c) The foregoing procedure shall apply to all accounts, whether commercial, residential or governmental.

(Code 1960, § 23-20; Ord. No. 84-19, § 1, 3-29-84)



**Sec. 36-69. Disconnection for nonpayment and liability for municipal services.**

(a) The customer service superintendent of the customer service department, or the customer service superintendent's designee, shall verify delinquent accounts, notify delinquent customers of possible termination, and take the following action to terminate service:

(1) The customer service superintendent, or designee, shall notify delinquent customers of the city's procedures for termination of service, including the procedure customers must follow to contest any decision made by the customer service representative.

(2) The customer service department shall send a delinquent customer written notice referred to as a "ten-day letter." The ten-day letter shall:

a. State that the city's records indicate the customer's bill is delinquent;

b. State that the customer has ten (10) business days to make satisfactory payment before the city takes further action;

c. State in bold type that if the customer fails to make satisfactory payment or contest the billing as provided by these procedures within ten (10) business days from the date of the letter, the city shall terminate water service;

d. Provide the phone number and address of the customer service department; and

e. Advise a delinquent customer of the dispute and appeal procedure.

(3) In addition to the ten-day letter, the customer service department shall send the delinquent customer a separate final invoice stating "final notice."

(4) If a customer advise a customer service representative that the customer does not have funds to pay a delinquent water bill, the customer service representative shall provide the customer a list of social services. This notification shall not stop the termination process.

(b) Procedures for customers disputing termination of water service:

(1) A customer wishing to dispute termination of water service must contact the customer service department within five (5) days of the date of the ten-day letter and advise the department of a dispute. A customer service department representative shall discuss the situation with the customer before the city terminates water service.

(2) If the dispute is not resolved to the customer's satisfaction, the customer may request an appeal to the customer service superintendent. The customer shall request this appeal within three (3) business days of the dispute meeting with the customer service representative. The customer service superintendent shall hear the appeal within two (2) business days of notification of the appeal.

(3) If the superintendent does not resolve the dispute in the customer's favor, the customer service department shall notify the customer in writing that the customer is responsible for the total amount in question.

(4) The customer shall have three (3) business days from the date of the letter in which to pay the delinquency.

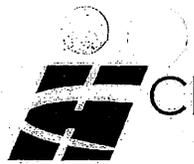
(5) If the customer fails to pay the delinquency, the city shall terminate water service.

(6) In addition to termination of water service, the city shall implement all appropriate legal remedies to collect the amount owed.

(7) The customer service superintendent may require an additional deposit from a customer who has service terminated two (2) times within a twelve-month period.

(8) Nothing herein shall restrict the right of a customer at any time to dispute a billing or payment issue that is not related to a notice of termination of water service.

(Code 1960, § 23-4; Ord. No. 93-50, § 2, 5-24-93; Ord. No. 96-17, § 2, 2-20-96; Ord. No. 97-34, § 2, 5-22-97)



Chamberlain Hrdlicka  
Attorneys at Law

300 CONSHOHOCKEN STATE RD.  
SUITE 570  
WEST CONSHOHOCKEN PA 19428

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
1200 SMITH STREET, 14<sup>th</sup> Floor  
HOUSTON, TX 77002  
713.658.1818 800.342.5829  
Direct Fax: 713.658.2553

191 PEACHTREE STREET, N.E., 9<sup>TH</sup> FLOOR  
ATLANTA, GA 30303-1747  
TELEPHONE 404.659.1410

FACSIMILE TRANSMITTAL SHEET



Please deliver the following pages to:

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2. Brian Macleod	(512) 239-0606	(512) 239-0750		
3.				
4.				

FROM: William S. Helfand/tmh

Direct Dial #: 713.654.9630

DATE: September 18, 2007

CHWWM CLIENT NO.: 003840-000002

Total Pages Including This Page: **11**

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	<input type="checkbox"/> Overnight Delivery	<input type="checkbox"/> Messenger
<b>MESSAGE:</b> Please see the attached.		

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0641930.01

003840-000002

**Fax Header Information**

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713-658-2553  
18-Sep-2007 12:16 PM

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15	18-Sep-2007 12:10 PM	Send	87136525130	5:56	11	Success



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WEST CONSHOHOCKEN PA 19428

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
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ATLANTA, GA 30303-1747  
TELEPHONE 404.658.1410

**FACSIMILE TRANSMITTAL SHEET**

**III MERITAS LAW FIRMS WORLDWIDE**

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2. Brian Macleod	(512) 239-0606	(512) 239-0750		
3.				
4.				

FROM: William S. Helfand/tmh

Direct Dial #: 713.654.9630

DATE: September 18, 2007

CHWWM CLIENT NO.: 003840-000002

Total Pages Including This Page: **11**

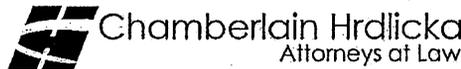
NOTE: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address. Thank you.

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	<input type="checkbox"/> Regular Mail	<input type="checkbox"/> Certified Mail
	<input type="checkbox"/> Overnight Delivery	<input type="checkbox"/> Messenger
<b>MESSAGE:</b>		
Please see the attached.		

**Fax Header Information**

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713-658-2553  
18-Sep-2007 12:18 PM

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 A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
 1200 SMITH STREET, 14<sup>th</sup> Floor HOUSTON, TX 77002  
 713.658.1818 800.342.5829 Direct Fax: 713.658.2553  
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 DATE: September 18, 2007 CHWWM CLIENT NO.: 003840-000002

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 Original Will Follow VIA:  
 Regular Mail  Certified Mail  
 Overnight Delivery  Messenger

**MESSAGE:**  
 Please see the attached.

September 18, 2007

Via CM-RRR No. 7160 3901 9845 1631 2912

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087, Mail Code 105  
Austin, Texas 78711-3087

Re: *Flagship Hotel, Ltd. v. The City of Galveston*  
SOAH Docket No. : 582-07-3473  
TCEQ Docket No. : 2007-0879-UCR

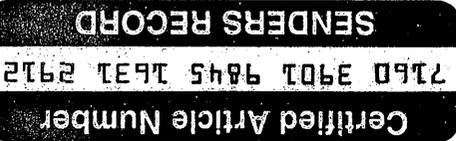
Dear Ms. Castañuela:

Enclosed is an original and one copy of the City of Galveston's Reply to Flagship Hotel, Ltd.'s Response to City of Galveston's Motion to Dismiss in the above referenced matter. Please date stamp the enclosed copy and return to our office in the enclosed self-addressed stamped envelope being provided to you. By copy of this letter all counsel of record are being notified of this filing. If you have any questions, please do not hesitate to call. Your cooperation and assistance in this matter is appreciated.

Very truly yours,

Terry Harms,  
Legal Assistant to William S. Helfand

WSHvmmh  
Enclosures  
0645288.01  
003840-000002



Texas Commission on Environmental Quality  
September 18, 2007  
Page 2

cc: Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

*Via Facsimile (713) 652-5130*

*Via Facsimile (512) 239-0606*

DOCKET NO. 2007-0879-UCR

IN THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
AUSTIN, TEXAS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
2007 OCT 26 PM 3:12  
CHIEF CLERKS OFFICE

FLAGSHIP HOTEL, LTD.

§  
§  
§  
§  
§

v.

THE CITY OF GALVESTON

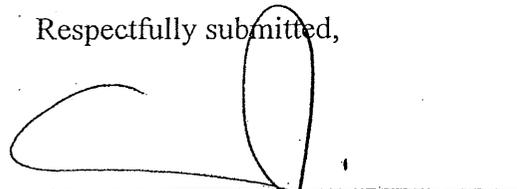
**CITY OF GALVESTON'S SUPPLEMENT TO REPLY TO FLAGSHIP HOTEL, LTD.'S  
RESPONSE TO CITY OF GALVESTON'S MOTION TO DISMISS**

COMES NOW, The City of Galveston (hereinafter "City"), and files this Supplement to its previously filed Reply to the Flagship Hotel, Ltd.'s ("Flagship") Response to the City of Galveston's Motion to Dismiss and in support thereof, would show as follows:

1. Again, the "amended petition" filed by the Flagship five years after the fact, should be dismissed as untimely, plain and simple.
2. Lest the indignant protest by Daniel Yeh,<sup>1</sup> in his Response, to disclosure of criminal charges filed against him in *United States of America v. Daniel Yeh*, Criminal No. G-06-04, in the United States District Court for the Southern District of Texas, Galveston Division be given any credence or give any pause to the Commission, the City attaches the Plea Agreement signed by Yeh on September 28, 2007, admitting his guilt to filing a false claim with the Federal Emergency Management Agency ("FEMA") for funds distributed in connection with Hurricanes Katrina and Rita. See, attached Exhibit "A," including pp. 8-9, ¶ 15 (a)-(f).
3. For the reasons previously advanced and discussed in greater detail, the City prays that the Commission dismiss the amended petition as untimely.

<sup>1</sup> Principal of Flagship Hotel, Ltd.

Respectfully submitted,



WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

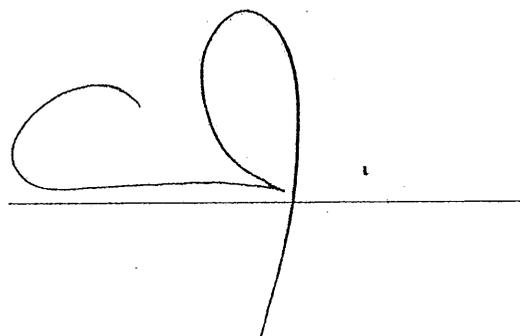
CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 23rd day of October, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010

Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087



0650483.01  
003840-000002

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

United States Courts  
Southern District of Texas  
FILED

SEP 28 2007

UNITED STATES OF AMERICA

v.

DANIEL YEH

§  
§  
§  
§  
§

CRIMINAL NO. G-06-04

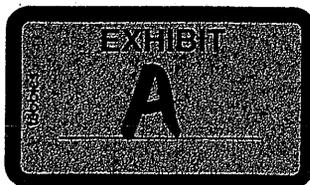
Michael N. Milby, Clerk of Court

**PLEA AGREEMENT**

The United States of America, by and through Donald J. DeGabrielle, Jr., United States Attorney for the Southern District of Texas and Gregg Costa, Assistant United States Attorney, the defendant, Daniel Yeh, and the defendant's counsel, Robert S. Bennett, pursuant to Rules 11(c)(1)(A) and 11(c)(1)(B) the Federal Rules of Criminal Procedure, state that they have entered into an agreement, the terms and conditions of which are as follows:

**The Defendant's Agreement**

1. The defendant agrees to plead guilty to Count Twenty Four of the Indictment. Count Twenty Four charges the defendant with filing a false claim with the Federal Emergency Management Agency (FEMA) for funds under the Short Term Lodging Program established for Hurricane Katrina and Rita victims, in violation of Title 18, United States Code, Section 287. The defendant, by entering this plea agrees that he is waiving any right to have the facts that the law makes essential to the



punishment either charged in the indictment or proved to a jury or proven beyond a reasonable doubt.

### **Punishment Range**

2. The statutory maximum penalty for each violation of Title 18, United States Code, Section 287, is imprisonment of not more than 5 years and a fine of not more than \$250,000. Additionally, the defendant may receive a term of supervised release after imprisonment of up to three years. Title 18, U.S.C. §§ 3559(a)(3) and 3583(b)(2). Defendant acknowledges and understands that if he should violate the conditions of any period of supervised release which may be imposed as part of his sentence, then the defendant may be imprisoned for up to two years, without credit for time already served on the term of supervised release prior to such violation. Title 18, U.S.C. §§ 3559(a)(3) and 3583(e)(3). Defendant understands that he cannot have the imposition or execution of the sentence suspended, nor is he eligible for parole.

### **Mandatory Special Assessment**

3. Pursuant to Title 18, U.S.C. § 3013(a)(2)(A), immediately after sentencing, defendant will pay to the Clerk of the United States District Court a special assessment in the amount of one hundred dollars (\$100.00) per count of conviction.

### **Fine and Reimbursement**

4. Defendant understands that under the Sentencing Guidelines, the Court is permitted to order the defendant to pay a fine that is sufficient to reimburse the government for the costs of any imprisonment or term of supervised release; if any is ordered.

5. — Defendant agrees that any fine or restitution imposed by the Court will be due and payable immediately, and defendant will not attempt to avoid or delay payment.

6. Defendant agrees to make complete financial disclosure by truthfully executing a sworn financial statement (Form OBD-500) prior to sentencing if he is requested to do so. In the event that the Court imposes a fine or orders the payment of restitution as part of the Defendant's sentence, the Defendant shall make complete financial disclosure by truthfully executing a sworn financial statement immediately following his sentencing.

### **Waiver of Appeal**

7. The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. The defendant agrees to waive the right to appeal the sentence imposed or the manner in which it was determined on any grounds set forth in 18 U.S.C. § 3742, except that the defendant reserves the right to

appeal a sentence imposed above the Guideline range the Court deems applicable. Additionally, the defendant is aware that 28 U.S.C. § 2255 affords the right to contest or "collaterally attack" a conviction or sentence after the conviction or sentence has become final. The defendant waives the right to contest his conviction or sentence by means of any post-conviction proceeding, including but not limited to proceedings authorized by 28 U.S.C. § 2255.

8 In exchange for this Agreement with the United States, the defendant waives all defenses based on venue, speedy trial under the Constitution and Speedy Trial Act, and the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed, in the event that (a) the defendant's conviction is later vacated for any reason, (b) the defendant violates any provision of this Agreement, or (c) the defendant's plea is later withdrawn.

9. In agreeing to these waivers, the defendant is aware that a sentence has not yet been determined by the Court. The defendant is also aware that any estimate of the possible sentencing range under the *Sentencing Guidelines* that he may have received from his counsel, the United States, or the Probation Office is a prediction, not a promise, did not induce his guilty plea, and is not binding on the United States, the Probation Office, or the Court. The United States does not make any promise or representation concerning what sentence the defendant will receive. The defendant

further understands and agrees that the *Sentencing Guidelines* are “effectively advisory” to the Court. *United States v. Booker*, 125 S.Ct. 738 (2005). Accordingly, the defendant understands that, although the Court must consult the *Sentencing Guidelines* and must take them into account when sentencing him, the Court is bound neither to follow the *Sentencing Guidelines* nor to sentence the defendant within the guideline range calculated by use of the *Sentencing Guidelines*.

10 The defendant understands and agrees that each and all of his waivers contained in this Agreement are made in exchange for the corresponding concessions and undertakings to which this Agreement binds the United States.

#### **The United States’ Agreements**

11. The United States agrees to each of the following:
- (a) If defendant pleads guilty to Count Twenty Four of the Indictment and persists in that plea through sentencing, and if the Court accepts this plea agreement, the United States will move to dismiss remaining counts of the Indictment at the time of sentencing; and
  - (b) At the time of sentencing, the United States agrees not to oppose defendant’s anticipated request to the Court and the United States Probation Office that he receive a two (2) level downward adjustment pursuant to U.S.S.G. Section 3E1.1(a) should the defendant accept responsibility as contemplated by the Sentencing Guidelines.
  - (c) If the defendant qualifies for an adjustment under U.S.S.G. Section 3E1.1(a), the United States agrees to file a motion for an additional one level departure based on the timeliness of the plea if the defendant’s offense level is 16 or greater.

- (d) The United States agrees to recommend a sentence at the low end of the Guidelines range the Court deems applicable.

### **United States' Non-Waiver of Appeal**

12. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right:

- (a) to bring its version of the facts of this case, including its evidence file and any investigative files, to the attention of the Probation Office in connection with that office's preparation of a presentence report;
- (b) to set forth or dispute sentencing factors or facts material to sentencing;
- (c) to seek resolution of such factors or facts in conference with defendant's counsel and the Probation Office; and,
- (d) to file a pleading relating to these issues, in accordance with U.S.S.G. Section 6A1.2 and Title 18, U.S.C. § 3553(a).

### **Sentence Determination**

13. Defendant is aware that the sentence will be imposed after consideration of the United States Sentencing Guidelines and Policy Statements, which are only advisory, as well as the provisions of Title 18, U.S.C. § 3553(a). Defendant nonetheless acknowledges and agrees that the Court has authority to impose any sentence up to and including the statutory maximum set for the offense(s) to which Defendant pleads guilty, and that the sentence to be imposed is within the sole

discretion of the sentencing judge after the Court has consulted the applicable Sentencing Guidelines. Defendant understands and agrees the parties' positions regarding the application of the Sentencing Guidelines do not bind the Court and that the sentence imposed is within the discretion of the sentencing judge. If the Court should impose any sentence up to the maximum established by statute, or should the Court order any or all of the sentences imposed to run consecutively, Defendant cannot, for that reason alone, withdraw a guilty plea, and will remain bound to fulfill all of the obligations under this plea agreement.

#### **Rights at Trial**

14. Defendant represents to the Court that he is satisfied that his attorney has rendered effective assistance. Defendant understands that by entering into this agreement, he surrenders certain rights as provided in this plea agreement. Defendant understands that the rights of a defendant include the following:

- (a) If defendant persisted in a plea of not guilty to the charges, defendant would have the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States, and the court all agree.
- (b) At a trial, the United States would be required to present witnesses and other evidence against the defendant. Defendant would have the opportunity to confront those witnesses and his attorney would be allowed to cross-examine them. In turn, the defendant could, but would not be required to, present witnesses and other evidence on his own behalf. If the witnesses for defendant would not appear voluntarily, he

could require their attendance through the subpoena power of the court.

- (c) At a trial, defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the defendant desired to do so, he could testify on his own behalf.

### **Factual Basis for Guilty Plea**

15. If this case were to proceed to trial, the United States could prove each element of the offense beyond a reasonable doubt. The following facts, among others would be offered to establish the defendant's guilt:

(a) After Hurricane Katrina, FEMA funded the Special Transient Accommodations and Assistance Program, which the Red Cross initially administered. The hotel portion of the program paid hotels for rooms in which hurricane evacuees were staying. The Red Cross contracted with Corporate Lodging Consultants (CLC), a hotel payment provider, to manage billing for the hotel program. Eligible hotels submitted billing information for evacuees via CLC's website. After Hurricane Rita, the program was extended to also cover Rita evacuees. On October 24, 2005, FEMA took over administration of the program from the Red Cross and changed the name of the program to the Short-Term Lodging Program (SLP). Despite the new administrator and name change, there were no relevant changes in the operation of the program. FEMA, for example, retained CLC to continue its management of program billing.

(b) The Flagship Hotel, located in Galveston, began participating in the FEMA-funded hotel programs after Katrina. Defendant Yeh was the principal owner of Flagship Hotel, Ltd., which operated the Flagship. In November 2005, an individual provided a tip to federal agents stating that while the hotel records showed full occupancy, in fact a significant number of rooms were unoccupied.

(c) The investigation revealed that initially the Flagship's assistant general manager submitted the reimbursement claims through the CLC website. After Rita, however, Yeh, who was typically not involved in clerical matters such as billing, told

the assistant general manager that he would take over billing for the FEMA-funded hotel program. Yeh directed another hotel employee to fax the hotel's daily report, which is a list showing which guests are checked into which rooms, to Yeh's home each evening. Yeh then submitted the reimbursement claims through the CLC website from his home using his laptop computer.

(d) According to hotel employees, in early October 2005, Yeh provided his nephew, who worked as a desk clerk, with approximately thirty names to enter into the hotel reservation system at the "FEMA rate" of \$84.99/night. Yeh then went to the hotel and picked up the room cards created for these individuals rooms. The Flagship began billing CLC for rooms in the names of these individuals even though they had not checked into the hotel. Investigation revealed that a number of these individuals were relatives and friends of Yeh's who were not hurricane evacuees.

(e) Yeh submitted the specific claim at issue in Count Twenty Four of the indictment to CLC on October 31, 2005. The claim sought payment for Room 701 at the Flagship, stating that Minh Khuu was staying in that room from October 28, 2005 through November 11, 2005. Based on this claim, CLC paid the Flagship \$1,189.86. Federal agents interviewed Minh Khuu who stated that he did not have a room at the Flagship during October and November 2005. Khuu stated that he knows Yeh because he is a contractor who submitted a bid to Yeh during 2004 to remodel bathtubs at the Flagship and again met with Yeh during the fall of 2005 to bid on a remodeling project for a New Orleans hotel with which Yeh was associated. Khuu did not end up doing either of these projects.

(f) In the days following the December 21, 2005 execution of a federal search warrant at his home, Yeh wrote the government two checks totaling \$232,022, based on his calculation of the number of relatives, friends and hotel employees who had been improperly billed to the FEMA program.

#### **Breach of Plea Agreement**

16. If defendant should fail in any way to fulfill completely all of the obligations under this plea agreement, the United States will be released from its

obligations under the plea agreement, and the defendant's plea and sentence will stand. If at any time defendant retains, conceals or disposes of assets in violation of this plea agreement, or if defendant knowingly withholds evidence or is otherwise not completely truthful with the United States, then may move the Court to set aside the guilty plea and reinstate prosecution. Any information and documents that have been disclosed by defendant, whether prior to or subsequent to this plea agreement, and all leads derived therefrom, will be used against defendant in any prosecution.

#### **Complete Agreement**

17. This written plea agreement, consisting of eleven pages, including the attached addendum of defendant and his attorney, constitutes the complete plea agreement between the United States, defendant and his counsel. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. Defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

18. Any modification of this plea agreement must be in writing and signed by all parties.

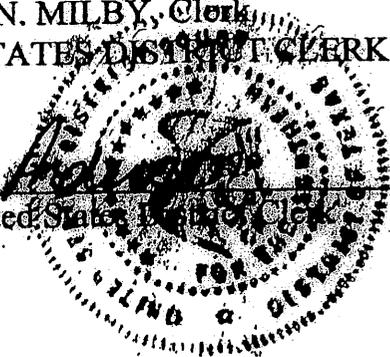
Filed at Galveston, Texas, on September 28, 2007.

Samuel Yeh  
Defendant

Subscribed and sworn to before me on September 28, 2007.

MICHAEL N. MILBY, Clerk  
UNITED STATES DISTRICT CLERK

By: Debra A. ...  
Deputy United States District Clerk



APPROVED:

DONALD J. DeGABRIELLE, JR.  
United States Attorney

By: Gregg Costa  
Gregg Costa  
Assistant United States Attorney  
Southern District of Texas

Robert S. Bennett  
Robert S. Bennett  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

UNITED STATES OF AMERICA

v.

DANIEL YEH

§  
§  
§  
§  
§

CRIMINAL NO. G-06-04

**PLEA AGREEMENT - ADDENDUM**

I have fully explained to defendant his rights with respect to the pending Indictment. I have reviewed the provisions of the United States Sentencing Commission's Guidelines Manual and Policy Statements and I have fully and carefully explained to Defendant the provisions of those Guidelines which may apply in this case. I have also explained to Defendant that the Sentencing Guidelines are only advisory and the court may sentence Defendant up to the maximum allowed by statute per count of conviction. Further, I have carefully reviewed every part of this plea agreement with Defendant. To my knowledge, Defendant's decision to enter into this agreement is an informed and voluntary one.

Bar Bernick

Defense Counsel

9/28/07

Date

# CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Attorneys at Law

1200 SMITH STREET, SUITE 1400

HOUSTON, TEXAS 77002-4496

(713) 658-1818 (800) 342-5829

(713) 658-2553 (FAX)

chwwm@chamberlainlaw.com

HOUSTON  
ATLANTA

October 23, 2007

Certified Article Number

7160 3901 9845 1629 2849

SENDERS RECORD

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
ATTN: SOAH Docket Clerk  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

Via CM-RRR No. 7160 3901 9845 1629 2849

Re: *Flagship Hotel, Ltd. v. The City of Galveston*  
SOAH Docket No. : 582-07-3473  
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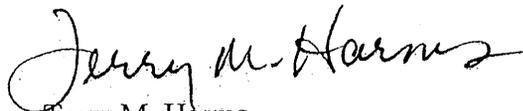
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Very truly yours,



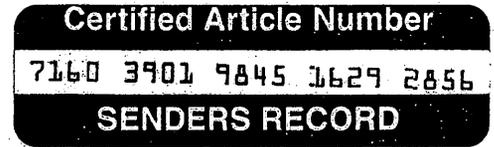
Terry M. Harms,  
Legal Administrative Assistant  
for Charles T. Jeremiah

\tmh  
Enclosures  
0650657.01  
003840-000002

Texas Commission on Environmental Quality  
October 23, 2007  
Page 2

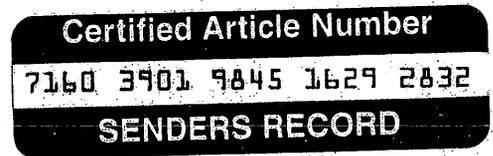
cc: Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010

*Via CM-RRR No. 7160 3901 9845 1629 2856*



Brian Macleod  
Texas Commission on Environmental Quality  
P. O. Box 13087; Mail Code 105  
Austin, Texas 78711-3087

*Via CM-RRR No. 7160 3901 9845 1629 2832*



IN THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
AUSTIN, TEXAS

FLAGSHIP HOTEL, LTD.

vs.

THE CITY OF GALVESTON

§  
§  
§  
§  
§

**CITY OF GALVESTON'S RESPONSE TO FLAGSHIP HOTEL, LTD.'S  
"AMENDED PETITION FOR REVIEW"**

TO THE HONORABLE TCEQ:

COMES NOW, The City of Galveston (hereinafter "City"), suggesting the Commission must reject the request of Flagship Hotel, Ltd. (the "Flagship") for an advisory opinion or declaration that it has no jurisdiction, and simply decline as untimely consideration of the petition.

1. The Flagship's filing is the latest – and not the first untimely - attempt to drag the TCEQ back into a relentless effort by the Flagship to recover money from the City of Galveston which spans more than a decade. The Commission can and should simply deny any consideration of this Amended Petition for Review ("Amended Petition") as clearly untimely, regardless whether it would have jurisdiction to consider the merits of the underlying dispute. The Flagship returns to this forum after the United States Bankruptcy Court found that it hadn't established any right to turnover, and the 405<sup>th</sup> Judicial District Court of Galveston County dismissed the Flagship's most recent lawsuit against the City.

## Underlying Factual Background of The Water Dispute

2. For a period of five years,<sup>1</sup> the Flagship Hotel failed to pay for a substantial portion, indeed most of its metered consumption of water, which water was supplied by the City of Galveston, as a result of an alleged side deal between then City Manager Doug Matthews and Daniel Der-Yun Yeh, a principal in the general partner of the Flagship. Under the law, Matthews, as city manager, had no authority to tell the Flagship hotel not to pay any portion of its water bill and the City carried the past due balance on its books. After the City Council learned of Flagship's debt, the City demanded payment of the overdue amount.

3. Notably, the Flagship Hotel, Ltd. paid nothing to the City for the water arrearages. Flagship Hospitality, Inc., a separate legal entity from Flagship Hotel, Ltd., tendered a check for \$90,000 and Daniel Yeh remitted a check for \$125,920.15 on March 18, 2002. Seeking money for its bankruptcy estate, the Flagship has sued for recovery of the money.

4. Notably, although the City Ordinance provides a process for disputing water bills, the Flagship failed to timely object to payment or apply for a refund under the City Ordinance, and failed to timely address the matter to the TCEQ. To be sure, its attempt to *refile* the dispute in this forum as an "Amended Petition," more than five years after the dispute arose, is completely untimely, a nullity, and is simply being used as a tool to perpetuate this dispute only after the bankruptcy court had found no jurisdiction to grant relief.<sup>2</sup>

### **Flagship Failed to Initiate a Dispute in a Timely Manner Under City Ordinance and Has Waived Any Administrative Review**

5. The City agrees it notified the Flagship of its intent to disconnect water services in March 2001 for underpayment and the Flagship responded by filing suit seeking a Temporary

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<sup>1</sup> January 18, 1990 and May 12, 1995.

<sup>2</sup> Incredibly, the Flagship alludes to its intent to prospectively "seek recovery on a number of different theories."

Restraining Order and Temporary Injunction. The trial court granted the request but the Court of Appeals reversed, holding that the Flagship was obligated to exhaust its administrative remedies.<sup>3</sup> *Flagship v. Galveston*, 73 S.W.3d 422 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.). The City then notified the Flagship again of its intent to terminate water service.<sup>4</sup> Payment was tendered by other parties on March 18, 2002. However, both before and after payment the Flagship failed to utilize the mandatory dispute procedure set forth in Section 36-69 of Chapter 36 of Part II of the Galveston City Code. Specifically, the Flagship did not initiate a dispute of the matter within the prescribed five (5) day period. Instead of complying with the City Ordinance, the Flagship bypassed the first step, at the City, and filed a petition with the TCEQ at the time the arrearages were paid – skipping over the City's codified procedures entirely.<sup>5</sup>

6. By the Flagship's own account, it waited nearly *thirty* days – twenty-five days *after* the deadline - to initiate the City's procedures, when, on April 17, 2002 attorney Michael Fieglein sent a letter styled as a "request for refund." The Flagship also improperly rests on the claim that "[t]he City did not respond" (to this request). That is simply false. Indeed, on April 30, 2002, the Flagship, through its attorney, Fieglein, was specifically informed that its request was denied

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<sup>3</sup> The Sixth Court of Appeals in Texarkana reached the same conclusion – that Flagship was obligated to timely exhaust its administrative remedies. The Texas Supreme Court denied the Flagship's petition to hear the case and this has become the law of the case. *Flagship v. Galveston*, 117 S.W.3d 552, 562 (Tex.App. – Texarkana 2003, pet. denied).

<sup>4</sup> The Flagship had been aware of the demand for payment of the arrearages since 1996, *six years earlier*.

<sup>5</sup> The Flagship now erroneously claims that the City's process could not have been availing because the City Council was "not in the loop." There is no competent allegation or evidence that a recommendation by the Assistant Public Works Director to resolve the dispute could not have been placed on the City Council's agenda, if the Flagship were, in fact, entitled to relief. Regardless, one cannot avoid a procedurally required step by simply claiming futility. Rather, the failure to exhaust the first step in the process precludes the Flagship's attempt to invoke the TCEQ's jurisdiction on "appeal" from a decision of the City which the Flagship acknowledges it was required to obtain, yet it never sought. *See, e.g., Harrison v. Neely*, \_\_\_ S.W.3d \_\_\_, 2007 WL 1341486 (Tx.App. – San Antonio); *Employee Retirement System of Texas v. Rizzo*, 180 S.W.3d 231, 233 (Tex.App. – San Antonio 2005, no pet. hist.).

as *untimely* and, accordingly, that the requested review had therefore been waived. See attached Exhibit "A".

### **The Flagship Failed to Timely Appeal to the TCEQ**

7. The Flagship then waited again, by its own admission, more than six months, until at least October 23, 2002, to file a purported "appeal" petition with the TCEQ. The First Court of Appeals in Houston held that the Texas Water Code § 13.042(d), "vests the TNRCC [now TCEQ] with *exclusive* appellate jurisdiction." (emphasis in original). Under Texas Water Code § 13.043, an *appeal* must be filed with the TCEQ no later than ninety (90) days after the decision of the governing body. Texas Water Code § 13.043. Accordingly, the October 2002 filing was defective for two reasons: first, Flagship failed to seek the City's review in the first instance, as required, and second, Flagship's purported "appeal" was more than three months past the deadline, and untimely.

8. Any request for appeal filed with the TCEQ would have been timely only if filed within twenty (20) days of any decision or order. See, § 13.003, Texas Water Code, referencing application of Texas Government Code, Chapter 2001; Texas Government Code § 2001.146.<sup>6</sup> Assuming, solely arguendo, the City's letter was sufficient exhaustion of the first step – review by the City – Flagship's October filing was more than seven months after the letter attached by the Flagship to its Amended Petition as Exhibit C, and therefore, unquestionably untimely. The Amended Petition was filed nearly five years later; *five years* too late! The Flagship posits no legal authority for the asserted proposition that it can wait five years to pursue its "appeal."

9. Obviously, the request for review is untimely and was never timely and is void due to Flagship's failure to address its claim to the City in the first instance. Indeed, the Flagship

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<sup>6</sup> "A motion for rehearing in a contested case must be filed by a party not later than the twentieth day after the day on which the party or the party's attorney of record is notified as required by § 2001.142 of a decision or order that may become final under § 2001.144.

plainly wishes for the Commission to deny consideration of this dispute but for its own self-serving reasons – the Flagship's goal is not resolution here. Rather, the Flagship wants the Commission to engage in some analysis of its jurisdiction over this stale dispute, and then render for its [the Flagship's] purposes elsewhere, a ruling of some sort declaring its lack of jurisdiction. Here, that lack of jurisdiction is based upon Flagship's failure to comply with the City Ordinance and the water code, not some mere generalized theory of the Commission's jurisdiction; a question which, under these circumstances, the Commission need not reach

10. The Commission has no obligation to engage in some analysis of its jurisdiction generally over a claim five years after the claim was filed and where the customer skipped the first step in the review process. Nor should it render the equivalent of an "advisory opinion" in a dispute which is not live and timely before the Commission. The Flagship's attempted filing, on its face untimely regardless of whether the Commission has general appellate jurisdiction over the issue, or is a nullity and triggers no obligation on the part of the Commission. The Commission should simply decline to review this matter again and decline to render some determination on the Texas Water Code as the Flagship seeks. The appropriate course of action is to simply decline to consider it, as the filing was not in compliance with the Texas Water Code.

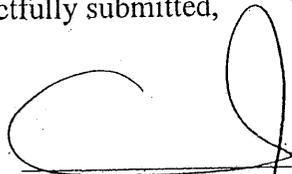
11. The Commission should not, and cannot, at this juncture consider the untimely request, but in the unlikely event it does, the City prays that it receive notice and an opportunity to fully respond. The City of Galveston attaches hereto the "Trial Statement" filed in the recent abated bankruptcy proceeding, containing further detail regarding the history of this dispute. Exhibit "B". It is incorporated within the City's response as if set forth in full.

12. In sum, (1) there is no decision from which the Flagship is appealing and (2) they didn't timely appeal anyway.

13. The City urges the Commission to simply decline any consideration of this matter, as untimely and not brought before the commission on "appeal" in compliance with the requirements of the Texas Water Code.

Respectfully submitted,

By:



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WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

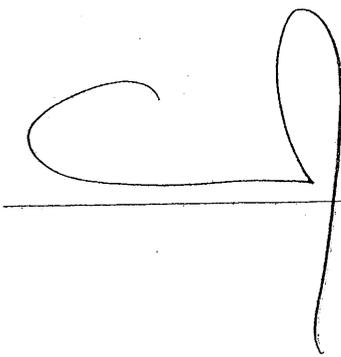
OF COUNSEL:

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record via certified mail, return receipt requested on this 15th day of May, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010



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003840-000002

ATTORNEYS AT LAW

# MAGENHEIM, BATEMAN & HELFAND

A PROFESSIONAL LIMITED LIABILITY COMPANY  
3600 ONE HOUSTON CENTER, 1221 MCKINNEY STREET, HOUSTON, TEXAS 77010  
TELEPHONE (713) 609-7700 FACSIMILE (713) 609-7777  
WWW.MBHTEXAS.COM

WILLIAM S. HELFAND

DIRECT DIAL (713) 609-7881

April 30, 2002

*Via Facsimile (409) 765-5357*

Mr. J. Michael Fieglein  
The Law Offices of J. Michael Fieglein  
Jackson Square, Suite 208  
621 Moody  
Galveston, Texas 77550

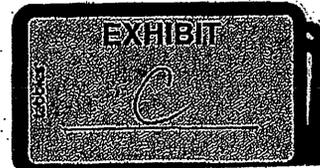
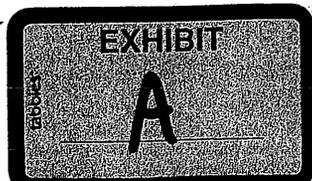
Re: Cause No. 98-CV-0795; *Flagship Hotel, LTD v. The City of Galveston*; In the 212<sup>th</sup>  
Judicial District Court of Galveston County, Texas.

Dear Mr. Fieglein:

The City must deny your request for a refund of \$215,920.15 for payment of past due water bills, as well as your request for a hearing on the issue.

Pursuant to the Code of the City of Galveston, 1981, as amended, your client has waived its right to contest this matter. Specifically, section 36-69, "Disconnection for nonpayment and liability for municipal services" provides, in pertinent part:

- (b) Procedures for customers disputing termination of water service:
- (1) A customer wishing to dispute termination of water service must contact the customer service department within five (5) days of the date of the ten-day letter and advise the department of a dispute. A customer service department representative shall discuss the situation with the customer before the city terminates water service.
  - (2) If the dispute is not resolved to the customer's satisfaction, the customer may request an appeal to the customer service superintendent. The customer shall request this appeal within three (3) business days of the dispute meeting with the customer service representative. The customer service superintendent shall hear the appeal within two (2) business days of notification of the appeal.



J. Michael Fieglein  
April 30, 2002  
Page 2

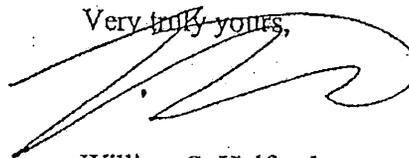
- (3) If the superintendent does not resolve the dispute in the customer's favor, the customer service department shall notify the customer in writing that the customer is responsible for the total amount in question.
- (4) The customer shall have three (3) business days from the date of the letter in which to pay the delinquency.
- (5) If the customer fails to pay the delinquency, the city shall terminate water service.
- (6) In addition to termination of water service, the city shall implement all appropriate legal remedies to collect the amount owed.
- (7) The customer service superintendent may require an additional deposit from a customer who has service terminated two (2) times within a twelve-month period.
- (8) Nothing herein shall restrict the right of a customer at any time to dispute a billing or payment issue that is not related to a notice of termination of water service.

Importantly, although your client received the ten-day notice, it clearly failed to contact the customer service department within five days of the date of the ten-day letter and advise the department of a dispute. Because your client failed to timely initiate the dispute and appeal process, in accordance with the City Code, it has no right to a hearing on this matter at this late date.

Additionally, because the dispute pertains directly and specifically to a notice of termination of water service, sub-section (8) above precludes the City from considering your client's request for a hearing on this matter. Accordingly, your request for a refund and/or a hearing on this issue must be denied based upon your client's decision, prior to disconnect, to forego the City's review procedure.

Should you wish to discuss any aspect of this issue further, please feel free to contact me at your convenience.

Very truly yours,



William S. Helfand

WSH/hjd

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

IN RE:  
    **FLAGSHIP HOTEL, LTD.,**  
    **A Texas Limited Partnership**  
    **Debtor**

§  
§  
§  
§

CASE NO. 04-81356  
Chapter 11

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**FLAGSHIP HOTEL, LTD.,**  
    **Plaintiff**

§  
§  
§  
§  
§  
§

VS.

ADV. NO. 05-8042

**THE CITY OF GALVESTON**  
    **Defendant**

**DEFENDANT CITY OF GALVESTON'S TRIAL STATEMENT**

Comes now, the City of Galveston, Defendant in the above adversary proceeding, who, pursuant to the rules of this Court, files this Trial Statement.

**I. Appearance of Counsel**

William S. Helfand  
Charles T. Jeremiah  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553  
**COUNSEL FOR DEFENDANT**  
**CITY OF GALVESTON**

**II. Jurisdiction**

Defendant City of Galveston contends that this Court does not have subject matter jurisdiction over this matter, and has moved separately for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1). Cf., *In re Satelco, Inc.*, 58 B.R. 781, 786 (Bankr. N.D. Tex. 1986).

**III. Pending Motions**

Defendant City of Galveston's Motion to Dismiss for Lack of Subject Matter Jurisdiction.



#### IV. Statement of Facts

##### *City of Galveston Government*

The City of Galveston ("the City") is a municipal governmental unit and is a home-rule city as defined by Texas law, operating at all pertinent times with a Council-Manager form of government. [City of Galveston Charter, Article I]. All powers of the city are generally vested in an elected Council. The City Manager, and other city officers have no authority except that expressly conferred upon them by the City Charter.

##### *Powers of the City Manager*

In 1977, Article V, § 2 provided as follows:

Section 2. Powers and Duties of the City Manager. The City Manager shall be responsible to the Council for the proper administration of all the affairs of the City. He shall have the power and shall be required to: (1) Appoint and remove any officers or employees of the City except those officers appointed by the Council as otherwise provided by law or this Charter; (2) Prepare the budget annually, submit it to the Council for approval, and be responsible for its administration after adoption; (3) Keep the Council advised of the financial condition and administrative activities of the City, and make such recommendations as may seem desirable; (4) Perform such other duties as may be prescribed by this Charter or required of him by the Council, not inconsistent with the provisions of this Charter.

Between 1961 and 1989, Galveston Municipal Code Sec. 2-58<sup>1</sup> authorized the City Manager "to enter upon *purchases* and *contracts* without further action of the city council where the expenditure is provided in the budget and does not exceed two thousand dollars (\$2,000.00). All other expenses must have the expressed approval of the council in advance."<sup>2</sup> Galveston Ordinance 61-29, § 1, In 1989, the voters of Galveston approved an increase in the spending limit, from \$2,000 to \$5,000. Galveston Ordinance 89-131. In 1990, the Code was amended to authorize the City Manager to approve change orders on construction contracts if the increase or decrease did not exceed \$5,000. Galveston Ordinance 90-23.

In 1991, the voters of Galveston rejected a proposal to grant the City Manager authority to enter contracts or make purchase without the City's approval where the expenditure was in the City budget and did not exceed limitations established by state law. Galveston Ordinance 91-95. A 1993 Ordinance *required* the City Manager to make recommendations to the City Attorney to impose liens for nonpayment of water bills.

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<sup>1</sup> Pursuant to Galveston City Charter, Article VII § 17 (providing for limited purchasing/contracting authority of City Manager where permitted by Ordinance).

<sup>2</sup> Emphasis added.

Between 1990 and 1996, the relevant time period, the City Manager had purchasing authority limited to a total of \$5,000. The City Manager has never been empowered to forgive or reduce debt to the City,<sup>3</sup> or provide free goods or services at the City's expense.

### *Lease Agreement*

The Texas Local Government Code, Chapter 307, expressly addresses and approves an entity such as the City of Galveston entry into a lease of a property such as the Flagship Hotel and pier. During the relevant time, the City of Galveston was party to a lease of the Flagship Hotel.<sup>4</sup> By Resolution 90-11, on January 18, 1990, the City Council approved the assignment of the lease it had with Hospitality Interests, Inc. to Daniel Yeh<sup>5</sup> d/b/a Evergreen Lodging, Inc. By Resolution 95-46, the lease was assigned again, on May 12, 1995, to Flagship Hospitality, Inc., a general partner of Flagship Hotel, Ltd.

Thus, between January 18, 1990 and May 12, 1995, the lease was assigned to Evergreen Lodging, Inc.<sup>6</sup> As of May 8, 1995, the lease was assigned to Flagship Hospitality, Inc. a Texas corporation which is general partner in the debtor, Flagship Hotel, Ltd.

The lease assignment transaction between the City and lessees Evergreen and Flagship Hospitality were arm's length transactions, with proper disclosures by the City<sup>7</sup> and opportunity to inspect the premises by the lessees. The City disputes that it failed to disclose information, and denies that it "conceded that it was obligated to maintain the water lines.." as suggested. To the contrary, the obligations under the lease became the subject of litigation between the parties, and the Texarkana Court of Appeals held that the City's repair and maintenance obligations pertained only to the surface of the pier proceeding downward; not to anything attached to the pier, and obviously *not* including the hotel itself.<sup>8</sup> The City had no legal obligation to maintain or repair water pipes (or any alleged damage resulting therefrom) in the walls of the Hotel, which Flagship claims were leaky. It is reasonable to conclude that the respective apportionment of obligations and risk factored into the lease rates.

At no time did the City, through necessary action or authorization of the City Council, renegotiate the terms of the lease based on alleged leakage in the water pipes at the Hotel. At no time did the City waive its rights or obligations under the lease (including the lessee's obligation to repair and maintain from the surface upward). At no time did the City incur an indebtedness to the lessee by undertaking voluntary measures to try to fix any water leaks.

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<sup>3</sup> The City Manager has never been empowered to unilaterally "adjust bills."

<sup>4</sup> Formerly known as the Flagship Inn. The lease was amended and reassigned several times to different entities.

<sup>5</sup> Yeh was indicted for fraud on the government related to Hurricane Katrina, but found incompetent to stand trial and is currently housed a federal prison medical facility.

<sup>6</sup> Now dissolved.

<sup>7</sup> Indeed, the Flagship never suggested any misrepresentation or failure to disclose by the City – until this dispute over water fees arose.

<sup>8</sup> *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 562 (Tex. App. – Texarkana, 2003, pet. denied).

Notwithstanding the allegations about actions of the former City Manager, Douglas Matthews, and his communications with Mr. Yeh, the City never concluded that it owed the Flagship compensation for leakage in the water pipes.<sup>9</sup> The City<sup>10</sup> never "reduced the Flagship's water service bills," and any attempt to adjust or reduce the bills, temporarily or permanently, at taxpayer expense, was done without legal authorization, and was void, *ab initio*.

The only body which was authorized to reduce, or "adjust" the Flagship's water service bill, and effectively forgive debt – the Galveston City Council – was never even made aware by the City Manager that he was unilaterally attempting to make adjustments.<sup>11</sup> In fact, although during the same time frame, the City Manager discussed issues relating to the Flagship Hotel, and submitted requests for expenditure to the Council, he never sought Council approval of, or even discussed, his unilateral agreement with Yeh to forgive the Flagship \$196,291.15 in water charges incurred by the Flagship Hotel.

After Matthews was discharged by the City as City Manager, and a new City Manager and other City officials and Council members took office, the failure of the City to collect these substantial sums of taxpayer money, to the benefit of the Flagship and possibly Matthews, over the years was discovered. The water charges unpaid by the Flagship through its secret deal with Matthews, were calculable, and in fact calculated, based upon water *which passed through the water meter*, metered consumption, into the Hotel premises. In other words, the evidence is undisputed that the City provided, and the Hotel received all the water for which it originally paid, and for which it later tendered the remaining sum. The amount of water charged for by the City, was provided by the City. Yeh had requested, and was aware, that Matthews was dramatically reducing the requirement to pay the water bills in full, as incurred, and that the Flagship was paying far less than the amount registered as metered consumption.

Although it was clearly not the case, if leaks existed in the pipes in the Hotel, as alleged, and the City was in fact obligated to make repairs under the lease, the Flagship's remedy would be to seek enforcement of the lease obligations.

To be sure, Matthews didn't adjust Flagship's bill to reflect "actual use" or "actual consumption," – he dramatically reduced the invoiced amount, supposedly based on some reference to bills in prior years issued to a prior owner. By way of example, he assumed an annual water loss of 8.5 *Million* gallons of water, out of 14.5 *Million* gallons of metered consumption.<sup>12</sup> Accordingly, he unilaterally attempted to reduce the invoiced amount by well

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<sup>9</sup> The references, again, are to Matthews' representations, not the City's.

<sup>10</sup> The Flagship's reference to the "City" is misleading. The allegations refer to conduct and agreements by the "City Manager" without the knowledge of the City Council.

<sup>11</sup> Matthews kept the purported agreement confidential, and ordered the Public Works Director to comply with his "bill adjustments" for the Flagship, rejecting her concerns that the enormous reduction lacked a reasonable basis and was excessive.

<sup>12</sup> This would be more than the equivalent volume of an Olympic size swimming pool supposedly leaking into the walls every month.

over fifty percent, and some months more than *seventy percent*. The City Council was kept in the dark, and never approved such a reduction of the invoiced amount, on a temporary or permanent basis, expressly or implicitly.

The City sought payment of the overdue charges for metered water consumption at the Flagship, which former City Manager Matthews certainly had no actual or apparent authority to forgive or waive on behalf of the City. The Flagship rejected the request. The City made continuing efforts to collect the water service arrearages.

After being provided with a disconnect notice by the City, the Flagship failed to timely exhaust its administrative remedies, by pursuing the City's own procedures and then seeking redress from the Texas Natural Resources Conservation Commission ("TNRCC").<sup>13</sup> The Flagship initially obtained an injunction in District Court against collection of the water arrearages. However, on appeal, the First Court of Appeals in Houston dissolved the injunction, permitting the City to proceed with collection efforts.

The City again provided a disconnection notice to the Flagship. The Flagship's persistent refusal to pay resulted in an accrued amount of \$215,920.15 which was due and owing. The City was provided with two checks, which combined, amounted to the total arrearages.

Notably, as well, Flagship Hotel, Limited, the debtor, never paid the water arrearages to the City. Rather, the City received a check in the amount of \$90,000 from "Flagship Hospitality, Inc." and \$125,920.15 from "Belinda Min Chu Yeh and Daniel Der-Yun Yeh" on or about March 18, 2003.

After requesting a refund, the Flagship further failed to comply with the procedures contained in Chapter 36 of Part II of the Galveston City Code.

## **V. Statement of Law**

### **The Court Has No Jurisdiction Over this Matter**

As set forth in the City of Galveston's Motion to Dismiss Adversary Action for Lack of Subject Matter Jurisdiction, this Court has no subject matter jurisdiction over this matter, and must dismiss it. See, *In re Satelco*, 58 B.R. 781 (Bankr. N.D. Tex. 1986).

### **No Basis For Claim**

Furthermore, the Plaintiff has failed to identify any cognizable legal theory or cause of action, relying exclusively on the turnover provisions of the Bankruptcy Code. As set forth in the Motion to Dismiss, the turnover provisions do not apply to this disputed claim. For the Court to enter to grant Plaintiff relief, in the absence of any viable cause of action over which it has jurisdiction would effectively deny the City and tax payers due process. The action must be dismissed.

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<sup>13</sup> Now known as the Texas Commission on Environmental Quality ("TCEQ").

### **Matthews Had No Authority to Reduce the Flagship's Water Bill.**

The City Manager's supposed "adjustments" of the Flagship's water bill, in a total amount of \$196,291.15, were well beyond his authority. Plaintiff suggests in its argument that the City Manager has the authority to unilaterally determine who he thinks is being "overcharged" by the City, and correct it in his sole discretion. Indeed, under this rationale, he would enjoy limitless power to correct whatever he viewed as the City's "wrongs" by reapportioning money from the taxpayers to businesses in his favor, through secret side deals.

In fact, like any City officer, he has no authority beyond that expressly conferred upon him by the City Charter, and as specified therein, through duly enacted Ordinances approved by the City Council, local representatives of the citizens of Galveston. No provision has ever given the City Manager the right to dispense with taxpayer monies recovered or recoverable in payment for water service as gauged by metered consumption.

The City delivered a valuable goods and services with a value of nearly \$200,000 to the Flagship. This was the metered consumption.<sup>14</sup> The City Manager has no greater rights under the guise of "balancing the [alleged] equities" with the Flagship, because the Flagship claims a water leak, and claims that it was the City's obligation to repair.<sup>15</sup>

The City Manager's power to "administer the budget" does not give him authority to reduce water bills. A reduction in the water bill for the Flagship was never in the City's budget. The governmental safeguards are designed to prevent this type of end run around the fiscal authority of the City Council, and prevent such abuse.

Indeed, the City Manager did not even have the authority to purchase or contract – that is, obtain for the City valuable goods and/or services, in amounts greater than \$5,000 at the time. In this instance, Plaintiff suggests that he had the authority to forgive, or dispense with, more than \$200,000, for no value.

Neither a municipality nor its officers can do any act, or make any contract, or incur any liability not authorized by the charter. All acts beyond the scope of powers granted are void. See, *Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1923). A City's governing body may not delegate the right to make decisions affecting transaction of city business. It can only delegate the right to perform acts and duties necessary to transaction of the City's business, and then only by Ordinance. See, *DeSoto Wildwood Development v. City of Lewisville*, 184 S.W.3d 814, 826 (Tex.App. – Fort Worth 2006, no pet.) (City attorney not empowered to act by City Council, so actions not binding on City).

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<sup>14</sup> Plaintiff does not contest the propriety of charging residents based on "metered consumption," the manner in which all residents are charged. Rather, they rely exclusively on the special deal they claim was given to them by City Manager Matthews.

<sup>15</sup> According to the lease, the Flagship had that obligation. Moreover, absent from Flagship's contention is any claim that it compromised its own rights under the lease, based on any adjustment of its water bill.

"[T]he doctrine of apparent authority does not apply to municipalities.." *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617 (Tex.App. – Fort Worth 2003, pet. denied); See, *Cleontes v. City of Laredo*, 777 S.W.2d 187, 189 (Tex.App. – San Antonio 1989, pet. denied) (holding evidence of airport director's apparent authority to abate rent due on leased property irrelevant where ordinance necessary under city charter to authorize abatement was never passed);<sup>16</sup> See also, *Wilke v. City of Ballinger*, 31 S.W.2d 1102, 1103 (Tex.App. – Austin 1930, no pet.) (no apparent authority; no estoppel where officials *authorized to waive written provisions* did not do so).

Moreover, "[e]ven if the doctrine of apparent agency were made applicable to public officers, the existence of apparent authority must be determined from the acts of the alleged principal and not from the actions of the alleged agent." *Thermo Products Co. v. Chilton ISD*, 647 S.W.2d-726, 733 (Tex. App. – Waco 1983, pet. ref'd). That is hardly the case here.

### **The City is Not Subject to Estoppel, and Estoppel Cannot Serve as Basis For Affirmative Relief**

The Flagship claims the city is subject to estoppel because its acts were proprietary.

However, a municipality's governmental functions expressly include "waterworks" and "water and sewer service." Tex. Civ. Prac. & Rem. Code § 101.0215(a)(11),(32). The Flagship seeks turnover of what it claims to be an overpayment for water service. There can be no reasonable dispute that the claim relates to a governmental function of the City of Galveston.<sup>17</sup>

"[C]omplaints concerning estoppel are not properly applicable to a governmental entity.." *Jefferson Co. Drainage Dist., v. Lower Neches Valley Authority*, 876 S.W.2d 940, 953 (Tex.App. – Beaumont 1994, pet. denied). See also, *Richmond Printing v. Port of Houston Authority*, 996 S.W.2d 220, 225 (Tex.App. – Houston [14<sup>th</sup> Dist. 1999, no pet) (void contracts cannot be ratified; no estoppel from denying contract).

Furthermore, a claim of estoppel cannot serve as the basis for affirmative relief. *Jefferson Co. Drainage Dist.*, at 953. "Equitable estoppel is defensive in character. It cannot be used to create a contract or a cause of action where, without an estoppel, none had existed." *Watson v. Nortex Wholesale Nursery, Inc.*, 830 S.W.2d 747, 751 (Tex.App. – Tyler 1992, pet. denied) (where by law the Plaintiff had no contract cause of action, estoppel could not revive it); "An agreement that is void as prohibited by law cannot be rendered valid by invoking the doctrine of estoppel." *Schmidt v. Matisse*, 747 S.W.2d 883, 887 (Tex.App. – Dallas 1988, pet. denied). "[E]stoppel cannot be invoked for any purpose other than preserving rights which had previously been acquired." *Id.* Plaintiff plainly cannot assert the theory of estoppel in support of its claim.

<sup>16</sup> In *Cleontes*, the abatement was offered by the airport director as reimbursement for improvements the Plaintiff, a lessee of an apartment building, made to the facility.

<sup>17</sup> Even if the matter related to the use of the park property generally (and leasing of the pier), as opposed to the administration of water service, it would be a governmental function. See, e.g., Local Gov't Code Sect. 307.

The theory of estoppel is inapplicable anyway. The City delivered water service to the Flagship Hotel in an amount valued at \$196,291.15. If it weren't paid, because of some special deal forged between the City Manager without authorization, and Daniel Yeh, the City would lose that amount. Estoppel could only conceivably apply in such instance where a party wrongfully obtained some kind of windfall.

Finally, the Flagship and its officers are charged with knowledge of the power of City officials, under Texas law, and cannot rely on some inaccurate assumption that Matthews had authority to unilaterally adjust their bill or reduce their obligations.

### **Flagship Failed to Exhaust Administrative Remedies**

The Flagship failed, prior to going to the TNRCC, to apply for a refund from the City until April 17, 2002, a prerequisite set forth in City Ordinance. When that application was denied, the Flagship didn't go back to the TNRCC until November, some eight months later. To date, Flagship's counsel, J. Michael Fieglein admits that the Flagship has failed to exhaust administrative remedies to completion.

### **Flagship Hotel, Ltd. Estate Has No Right to Recover Non-Debtor Payments**

The only evidence of payment submitted by the Flagship in this case is evidence that other entities or individuals paid the water arrearages. Specifically, \$90,000 from a corporation, "Flagship Hospitality, Inc. and \$125,920.15 from individuals "Belinda Min Chu Yeh and Daniel Der-Yun Yeh." This separate corporation and these individuals are *not the Debtor* in this proceeding. The Debtor, Flagship Hotel, Ltd., has no right to claim or recover in its estate monies paid by *other entities or parties*, to the City of Galveston, more than a year before bankruptcy.

Finally, the lease assignment to parties other than the debtor,<sup>18</sup> during the relevant time period, raises the question whether the Debtor has any standing or basis to make this claim.

### **VI. Exhibits**

Defendant City of Galveston's Exhibit list is attached hereto. Defendant is serving its exhibits on Plaintiff under separate cover.

### **VII. Witnesses**

Defendant City of Galveston's Witness List is attached hereto.

### **VIII. Settlement**

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<sup>18</sup> The records do not indicate assignment of the lease to "Flagship Hotel, Ltd."

The parties have discussed, but have not been able to reach a settlement at this juncture. The parties have advised the Court that they believe a mediation would likely facilitate an out-of-court amicable resolution of this matter.

**IX. Trial**

Trial would be to the bench and would be expected to last two to three days. No scheduling conflicts are known at this time and no logistical problems are foreseen.

Respectfully submitted,

By: /s/ Charles T. Jeremiah  
WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

OF COUNSEL:

**CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN**  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 654-9630  
(713) 658-2553 (Fax)  
ATTORNEYS FOR DEFENDANT  
CITY OF GALVESTON

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record in accordance with the District's ECF service on this 15<sup>th</sup> day of February, 2007.

Millard A. Johnson  
Johnson, DeLuca, Kennedy & Kurisky  
1221 Lamar, Suite 1000  
Houston, Texas 77010

/s/ Charles T. Jeremiah

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

ATTORNEYS AT LAW

1200 SMITH STREET, SUITE 1400

HOUSTON, TEXAS 77002

(713) 658-1818 (800) 342-5829

(713) 658-2553 (FAX)

www.chamberlainlaw.com

HOUSTON  
ATLANTA

CHARLES T. JEREMIAH  
SENIOR COUNSEL  
DIRECT DIAL NO. (713) 654-9638  
E-MAIL: charles.jeremiah@chamberlainlaw.com

May 15, 2007

Certified Article Number

7160 3901 9849 9898 0623

SENDERS RECORD

Via CM-RRR No. 7160 3901 9849 9898 0623

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

P. O. Box 13087; Mail Code 105

Austin, Texas 78711-3087

Re: Flagship Hotel, Ltd./City of Galveston - Flagship Hotel, Ltd.'s "Amended Petition  
for Review" dated April 4, 2007

Dear Ms. Castañuela:

Enclosed is an original and one copy of the City of Galveston's Response to Flagship  
Hotel, Ltd.'s "Amended Petition for Review for filing in the above referenced matter.

Please date stamp the enclosed copy and return to our office in the enclosed self-  
addressed stamped envelope being provided to you. By copy of this letter all counsel of record  
are being notified of this filing.

If you have any questions, please do not hesitate to call. Your cooperation and assistance  
in this matter is appreciated.

Sincerely yours,

CHAMBERLAIN, HRDLICKA, WHITE,  
WILLIAMS & MARTIN

Charles T. Jeremiah

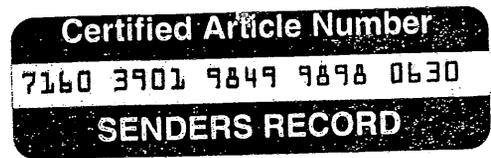
CTJ:tmh

Enclosures

0625454.01

003840-000002:5/10/2007

cc: **Via CM-RRR No. 7160 3901 9849 9898 0630**  
Millard A. Johnson  
Andrew H. Sharensen  
Johnson Deluca Kennedy & Kurisky  
4 Houston Center  
1221 Lamar Street, Suite 1000  
Houston, Texas 77010



IN THE STATE OFFICE OF ADMINISTRATIVE HEARINGS  
AUSTIN, TEXAS -- BY REFERRAL FROM THE TEXAS  
COMMISSION ON ENVIRONMENTAL QUALITY

FLAGSHIP HOTEL, LTD. §  
v. §  
THE CITY OF GALVESTON §

**CITY OF GALVESTON'S RESPONSE TO FLAGSHIP HOTEL, LTD.'S  
MOTION TO STRIKE AND TO EXCLUDE**

TO THE HONORABLE JUDGE OF THE STATE OFFICE OF ADMINISTRATIVE  
HEARINGS:

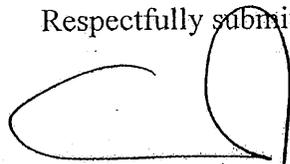
The City of Galveston (hereinafter "City"), files this Response to Flagship Hotel, Ltd.'s ("Flagship") Motion to Strike and to Exclude and would show as follows:

1. The Flagship's motion really doesn't merit a response and simply perpetuates the briefing in this case. In an abundance of caution, the City files this brief response.
2. In its prior briefing, the Flagship deviated from the issue of jurisdiction, and sought advantage by ascribing all sorts of ill motives to City officials, while portraying Daniel Yeh as an innocent honest businessman, treated unfairly by City representatives. Now they hypocritically protest and cry foul when Mr. Yeh's credibility is appropriately impeached.
3. Yeh previously complained about mention of the criminal charges because guilt or innocence had not been determined. Now it has, so now Yeh claims that such evidence is "inadmissible" under Rule 408(b) of the Texas Rules of Evidence, and seeks extreme and inappropriate relief, without any basis in law. While the evidentiary rules for a hearing before the Office of Administrative Hearings are more expansive than the Texas Rules of Evidence,

Yeh's criminal adjudication is clearly admissible under the Texas Rules of Evidence. Rule 609 of the Texas Rules of Evidence *expressly* provides for the admissibility of conviction of a crime which is a felony, or a crime of moral turpitude. See, e.g., *Escobedo v. State*, 202 S.W.3d 844, 848 (Tex.App. – Waco 2006, pet. ref'd) (moral turpitude encompasses crimes involving "dishonesty, fraud, deceit [and] misrepresentation" as well as "conduct committed knowingly contrary to justice, honesty, principle, or good morals"). Yeh's crime was *both*.<sup>1</sup> Yeh's argument is contrary to basic evidentiary law.

4. In any event, the Flagship's rather sophomoric rhetoric<sup>2</sup> and its ill-conceived and baseless attack on undersigned counsel should be disregarded. The City is confident that the Honorable Administrative Judge, considering all the briefing, can and will in reasoned fashion determine what amount of weight and consideration should be accorded to various argument and evidence in deciding the City's Motion to Dismiss, and if that is denied, the issue of the TCEQ's jurisdiction under the Texas Water Code. To be sure, there is no basis for striking or excluding the City's briefing, and Flagship's improper request must be denied.

Respectfully submitted,



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WILLIAM S. HELFAND  
State Bar No. 09388250  
CHARLES T. JEREMIAH  
State Bar No. 00784338

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<sup>1</sup> According to the Court's Order, "Daniel Yeh is now ADJUDGED guilty of making a claim against and upon the Federal Emergency Management Agency, an agency of the United States, for Short Term Lodging Program funds, knowing that the claim was false, fictitious, and fraudulent in that the claim included fraudulent billing representations at the Flagship Hotel in Galveston, Texas, in violation of Title 18 U.S.C. § 287 [Count 24]." Court's Order signed by United States District Judge John D. Rainey on October 23, 2007.

<sup>2</sup> E.g. "the City cannot stand the fact..." and "the City will desperately say and do anything..." [Flagship's Motion].