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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2023-CA-01273 CONSL. W/ NO. 2017-IA-167

THE PROMENADE D'IBERVILLE, LLC — APPELLANT

VS.

JACKSONVILLE ELECTRIC AUTHORITY — APPELLEE

On Appeal from Harrison County Circuit Court,
Second Judicial District
Cause No. 24CI2:10-cv-00041

Brief of Appellee JEA

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Certificate of Interested Persons

The undersigned counsel of record for Appellee JEA certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusals.

1. The Promenade D'Iberville, LLC ("Promenade"), Appellant
2. CBL & Associates Properties, Inc. ("CBL"), owner of Promenade
3. JEA (f/k/a the Jacksonville Electric Authority), Appellee
4. Joe Sam Owen, Counsel for JEA
5. James J. Crongeyer, Jr., Hugh Ruston "Rusty" Comley, Paul H. Stephenson III, Watkins & Eager PLLC, Counsel for JEA
6. Kyle S. Moran, James G. Wyly, Phelps Dunbar LLP, Counsel for Promenade
7. J. Jeffrey Landen, Michael S. Jones, Murphy Landen Jones, PLLC, Of Counsel for Promenade (admitted Pro Hac Vice in Trial Court)
8. Daniel Knecht, Graydon Head Ritchey, LLC, Of Counsel for Promenade (admitted Pro Hac Vice in Trial Court)
9. Honorable Christopher L. Schmidt, Circuit Court Judge for Harrison County, Second Judicial District, Mississippi

SO CERTIFIED this the 30th day of September, 2024.

/s/ H. Rusty Comley
Hugh Ruston Comley

Statement Regarding Oral Argument

Oral argument is requested and may assist with the understanding of the complex Constitutional issues, as well as avoiding confusion as to the type of preratification sovereign immunity enjoyed by JEA and other governmental entities from tort suits in state court, immunity which requires dismissal of this case pursuant to *Hyatt III*.

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STATEMENT OF THE ISSUES

1. The Circuit (trial) Court having properly found JEA is a Florida municipal utility and body politic that enjoys sovereign immunity in cases filed in state court under state law because such sovereign immunity existed prior to ratification of the Constitution, which was thereafter reaffirmed by statute, whether *Hyatt III*[1] requires dismissal of JEA for lack of subject matter jurisdiction from this state product liability construction defect case.

2. Alternatively, whether the trial court correctly held in the alternative that *Hyatt III* reinforces the requirements of comity and Full Faith and Credit set out in *Hyatt I*[2] and *Hyatt II*[3], such that dismissal of JEA is mandated under the notice and venue requirements of Fla. Stat. § 768.28, which are consistent with the notice and venue provisions of the MTCA applicable to similarly-situated Mississippi governmental entities.

3. Further in the alternative, should the Court revisit the trial court's Omnibus *Hyatt II* Order, whether the trial court:

a. correctly found there was no waiver of sovereign immunity defenses;

b. did not abuse its discretion in denying an amendment to add inverse condemnation/environmental claims to a product liability construction defect case in which discovery was closed; where the "JEA products" were purchased for use in construction of the successful shopping center, a proprietary commercial use and not a public use; and where Promenade excluded any such claims in its related insurance litigation, certified to the SEC, MDEQ, and USACE it had no environmental issues, and repeatedly assured the trial court it is not making any environmental claims; and, failed to exhaust its MDEQ administrative remedies for any such never before asserted claims;

c. correctly granted summary judgment negating Promenade's request for injunctive relief where Promenade has calculated its alleged damages; does not claim any continued actions by JEA; and, the requested injunctive relief invades the exclusive jurisdiction of the MDEQ.

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[1] *Franchise Tax Bd. of California v. Hyatt,* 587 U.S. 230 (2019).
[2] *Franchise Tax Bd. of California v. Hyatt,* 538 U.S. 488 (2003).
[3] *Franchise Tax Bd. of California v. Hyatt,* 578 U.S. 171 (2016).

STATEMENT OF ASSIGNMENT

Promenade materially mischaracterizes the effect of the trial court's dismissal of Promenade's claims. JEA agrees with Promenade, however, that the Mississippi Supreme Court should retain this appeal. The determinative issues on appeal concerning subject matter jurisdiction as addressed in *Hyatt III* and related comity and Full Faith and Credit Clause principles as considered in *Hyatt I* and *Hyatt II* are important substantial legal questions not previously addressed by Mississippi courts of appeal. Some 180 years ago in *Yalobusha Cnty. v. Carbry,* 11 Miss. 529 (Miss. Err. & App. 1844), *overruled on other grounds by Dismukes v. Stokes,* 41 Miss. 430 (Miss. Err. & App. 1867), this Court recognized the sovereign immunity of all levels of state government that existed prior to ratification of the U.S. Constitution. Reaffirming this preratification immunity serves both to respect sister state sovereign immunity and to protect Mississippi governmental entities from tort suits under the laws, and in the courts, of co-equal sovereign sister states. Moreover, this appeal affords this Court the needed opportunity to recognize that *Church v. Massey*, 697 So. 2d 407 (Miss. 1997) cannot serve as grounds to avoid Constitutional mandates dictated by *Hyatt III* as to lack of subject matter jurisdiction over immune sister state entities and by *Hyatt II* as to the Full Faith and Credit Clause.

STATEMENT OF THE CASE

This is a product liability construction defect case brought by a shopping center and its Tennessee owner/developer (CBL) (collectively "Promenade") against their general contractor (EMJ), sitework contractor (M. Hanna), geotechnical engineer (Gallet), a soil additive product manufacturer (LA Ash), and the Florida municipal utility (JEA) that supplied ash to LA Ash, which LA Ash used as a component to manufacture its soil additive product (OPF42). Promenade began construction on the shopping center in 2008. The owner/developer discovered heaving and swelling problems with the soil in the Spring of 2009, but continued construction which was

completed in October 2009. As part of completing construction, and with knowledge of heaving issues, Promenade certified to MDEQ and USACE that its use of OPF42 complied with the project's permits.

In 2010, Promenade filed this construction defect and product liability case in Mississippi state court. Over the next seven years, it also sued its own insurers in Mississippi federal court and the general contractor and its insurers in Tennessee state court, seeking insurance coverage for this construction project. In those cases, Promenade asserted damages from a soil amendment product. Indeed, calling the OPF42 product a "waste" would have triggered the total pollution exclusions in the insurance policies under which Promenade sought coverage. Promenade also filed multiple public records lawsuits against JEA in Florida. Prior to the Supreme Court's decision in *Hyatt II*, Promenade settled the insurance litigation with all of the parties, except JEA, for millions of dollars in excess of the money it has spent on repairs and store owner settlements. The shopping center is full and successful and no remediation has been reported to JEA in almost a decade.

Due to the issue of personal jurisdiction not being decided for more than two years, JEA first answered the 2010 complaint in late 2012. It raised subject matter jurisdiction, comity, Full Faith and Credit and sovereign immunity among other defenses. Simultaneously, JEA moved to dismiss for lack of subject matter jurisdiction. After discovery closed in 2015, Promenade filed its second amended complaint and asserted additional claims against JEA, including physical invasion of property. JEA answered, denied the new allegations, and reasserted all previous defenses. The Special Master denied JEA's subject matter jurisdiction motion based on comity shortly thereafter on May 28, 2015. This ruling was consistent with the law of subject matter jurisdiction at the time under *Nevada v. Hall,* 440 U.S. 410 (1979), *Hyatt I*, and this Court's decision in *Church v. Massey*.

The Supreme Court decided *Hyatt II* on April 19, 2016. JEA filed its Motion to Reconsider

on May 6, 2016. After the trial court correctly applied Full Faith and Credit to JEA pursuant to *Hyatt II*, Promenade made three attempts to avoid application of the Mississippi Tort Claims Act ("MTCA") limitation on damages. First, it sought leave to amend for a third time to try to turn this construction case into an inverse condemnation and environmental waste case, despite (1) the fact that all of the claims against JEA are subsumed by the MPLA, and under which Promenade avoided summary judgment and (2) Promenade's repeated assurances to the trial court that it was not making environmental claims. Second, it sought to advance its injunctive relief claim after six years even though the relief requested invoked the exclusive jurisdiction of the Mississippi Department of Environmental Quality ("MDEQ") <u>and</u> it had calculated its monetary damages. In its Omnibus *Hyatt II* Order, the trial court denied these attempts to avoid *Hyatt II* and the MTCA cap on damages based on Full Faith and Credit.

Promenade filed a Petition for Interlocutory Appeal (R.6420-40),[4] which was granted (R.6457). The Interlocutory Appeal was briefed, argued and awaiting a decision in this Court when *Hyatt III* was decided on May 13, 2019. Three days later, this Court handed down its En Banc Order (J.R.E.15) which holds as follows:

> In view of ***Franchise Tax Board of California v. Hyatt***, No. 17-1299 (U.S. May 13, 2019) (***Hyatt III***), overruling ***Nevada v. Hall***, 440 U.S. 410 (1979), and holding that the United States Constitution does not "permit[] a State to be sued by a private party without its consent in the courts of a different State," ***Hyatt III***, slip op. at 1, this appeal is dismissed and this case is remanded to the trial court for further consideration in light of ***Hyatt III***. The parties are to bear their own costs.

Promenade then filed a motion for rehearing in this Court. Promenade argued that this Court "erroneously found that the United States Supreme Court's opinion in *Hyatt III*, as it is now

[4] The Record (0001-6491), including Transcripts (0001-1394), is taken from the first appeal (on *Hyatt II*), and the designations of "R." and "T." are used herein. The additional Record for this appeal (on *Hyatt III*) is comprised of the "Clerk Papers" (0001-3963) and is designated "C.P." JEA's Record Excerpts are designated "J.R.E."

known, was controlling on all issues presented in this interlocutory appeal" because *Hyatt III* "applies only to states which enjoy true and inherent sovereignty." (J.R.E.20). The Mississippi Supreme Court denied Promenade's motion for rehearing (J.R.E.39).

The parties proceeded in the trial court to brief and argue the issue of subject matter jurisdiction in light of *Hyatt III*. In *Hyatt III*, the Supreme Court held that "States retain their sovereign immunity from private suits brought in the courts of other States." 587 U.S. at 236. The States have immunity "both in their own courts and in other courts." *Id.* at 249. *Hyatt III* expressly overruled *Hall*, which held that a State is not constitutionally immune from suit in the courts of another state. *Id.* at 236. In its detailed opinion and order (J.R.E.40-52) addressing *Hyatt III*, the trial court held that JEA should be dismissed because it is immune from suit under *Hyatt III*, just as the State of Florida and any of its governmental entities are immune under *Hyatt III*. The trial court reasoned that *Hall* and *Church v. Massey* can no longer serve as the basis for subject matter jurisdiction over sister state entities which had preratification sovereign immunity from state court tort suits. In doing so, the trial court rejected Promenade's argument that JEA does not have the inherent sovereign immunity contemplated in *Hyatt III*, and refused to utilize an arm of the state test to determine whether an entity like JEA enjoys such sovereign immunity.

Alternatively, the trial court determined that JEA is entitled to dismissal through the continued application of comity and Full Faith and Credit under *Hyatt I* and *Hyatt II* because the notice and exclusive venue provisions of the Florida Tort Claims Act, Fla. Stat. Ann. § 768.28(6)(a) & (1) are consistent with the notice and venue provisions in the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-11(1) & 11-46-13(2), that apply to all Mississippi governmental entities. Promenade's failure to give proper pre-suit notice and sue JEA in the exclusive venue under Florida law was not disputed, and the trial court rejected the notion that *Hyatt III* somehow weakens application of Full Faith and Credit to JEA.

STATEMENT OF FACTS

The extensive factual background of this 15-year-old case is detailed in JEA's prior Statement of Facts on pages 3 through 21 in its Appellee's Brief filed on February 14, 2018, Case No. 2017-IA-00167. JEA respectfully requests permission to incorporate those detailed facts by reference herein. JEA, however, summarizes below the facts pertinent to the trial court's order applying *Hyatt III* and the underlying product liability construction defect case.

I. JEA IS A MUNICIPAL UTILITY AND BODY POLITIC OF THE STATE OF FLORIDA

"JEA is a municipal utility and body politic located within the State of Florida." (J.R.E.4). The Florida Legislature established JEA in 1967 (then as "Jacksonville Electric Authority") as a "body politic and corporate" and provided JEA with "all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in the future could be, or could have been ... exercised by the City of Jacksonville." *Fluid Dynamics Holdings LLC v. City of Jacksonville,* No. 3:14-CV-1454-J-32MCR, 2017 WL 3723367, at *3 (M.D. Fla. Aug. 29, 2017) (citing Art. 21, § 21.01, Charter of the City of Jacksonville). "As the Charter makes plain, the JEA is a governmental entity created by the Florida Legislature, and it primarily acts as the City's agent in providing utility services." *Id.*[5]

The City of Jacksonville, as a political subdivision of the State of Florida, is a consolidated city and county government comprised of all of Duval County and Jacksonville that was created by the Florida Legislature pursuant to the express authority provided by Section 9, Art. 8 of the Florida Constitution. *See* Chapter 67-1320, Laws of Florida; Chapter 92-341, Laws of Florida.

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[5] Promenade cites to briefing in the inapplicable case of *City of Jacksonville v. Boman,* 320 So. 3d 931 (Fla. Dist. Ct. App. 2021). In *Boman,* the plaintiff alleged she hurt herself stepping onto an unsecured JEA manhole. *Id.* at 933. The dispute centered on whether her pre-suit notice to the City of Jacksonville under the Florida Tort Claims Act (FTCA), Fla. Stat. § 768.28, could also serve as proper notice to JEA. The appellate court held it could not because JEA was the allegedly responsible agency and § 768.28 pre-suit notice requirement calls for "notice of the claim in writing to the appropriate agency." *Id.* at 935-36. Notably, **JEA's sovereign immunity and application of § 768.28 was not disputed.**

JEA owns, manages, and operates water, sewer, and electrical utilities systems for "the benefit of the City of Jacksonville." *See* Art. 21, § 21.01, Charter of the City of Jacksonville.[6] In 2015-16, "[t]he second largest source of revenue to Jacksonville/Duval County was JEA. Last year, the utility transferred $235 million to the city, about 24 percent of the budget." (J.R.E.53-55).[7]

Promenade seized on JEA's status as a Florida governmental entity to conduct discovery by using the Florida Public Records Act. Promenade propounded more than 50 sets of Florida Public Records Requests ("PRRs") to JEA (J.R.E.75), and filed seven (7) lawsuits against JEA **in Florida** based on the Florida Public Records Act. (J.R.E.63 – mentioning one of Promenade's Florida Public Records lawsuits against JEA). In response to JEA's motion for protective order in this suit with respect to numerous PRRs, **Promenade argued the Mississippi trial court had no jurisdiction over the Florida Public Records Law requests it was making to JEA thereunder.** (J.R.E.61). Promenade emphasized JEA's status as a Florida public entity on numerous occasions. (J.R.E.69 – "**This is a public entity** …"; J.R.E.65 – "The laws have been passed to keep **public bodies like the county, like JEA** from withholding public records …"; J.R.E.77 – "Thank God **they are a public entity** and those documents are public documents …." (Emphasis added)).

II. THE CLAIMS AGAINST JEA ARE ALL GOVERNED BY THE MPLA AND ARE NOT ENVIRONMENTAL CLAIMS

The Promenade D'Iberville, LLC ("Promenade") is a shopping center that opened in 2010. It has been highly successful. (J.R.E.78-79).

This lawsuit arose out of subsurface soil movement due to the mis-engineering of LA Ash's OPF42 ash product used to dry some unsuitable soils used in the shopping center project's

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[6] The City holds broad home rule powers including those afforded to both counties and municipalities in Florida, as well as the power (with some limitations) to amend, repeal or revise its Charter in the same manner as the State Legislature. *See* Chapter 92-341, Laws of Florida.

[7] Marbut, *How JEA helps keep the lights on for city*, Jacksonville Daily Record, available at https://www.jaxdailyrecord.com/news/2016/jun/28/how-jea-helps-keep-lights-city/ (last visited 09/16/24).

construction. Promenade's developer (CBL), its long-time geotechnical engineer (Gallet), and wholly-owned general contractor (EMJ) mis-tested OPF42 on only *some* of the project's suitable soils but approved it as a soil amendment for *all* soils (J.R.E.82, 85-86, 87, 89-91, 92-93, 94-95) used by the project's earthwork contractor (M. Hanna) (J.R.E.99-100, 102-04). The untested and unsuitable soils used at Promenade's site contained alumina which when mixed with OPF42 allowed for the formation of expansive crystals known as ettringite or thaumasite, especially when immediately placed after mixing and insufficiently compacted.[8]

As part of its efforts to find beneficial re-uses for its lime-like ash from its circulating fluidized bed powerplant, JEA provided some of its raw bed ash via rail cars, freight on board, to LA Ash in Jacksonville, Florida. (P.R.E.0015-16). JEA understood that LA Ash was initially shipping the bulk bed ash to Port Bienville, Mississippi, but also understood that the ash was to be further transported for follow-on environmental remediation projects in Texas and Louisiana. (P.R.E.0318-321; J.R.E.160, 162).[9] Because of the ash's lime-like ability, it can be used to dry liquid waste, sludge, or contaminated soils so that they can then be transported for proper disposal. (P.R.E.0404). JEA did not have any knowledge of the Promenade shopping center project (J.R.E.106-07, 157-58). JEA did not process or market the OPF42 product manufactured and sold by LA Ash for use in drying soils as part of construction. (J.R.E.117-18, 120, 122).

Promenade originally sued Gallet, EMJ, M. Hanna, and LA Ash for construction defects and product liability in 2009. It later added JEA as a defendant in its First Amended Complaint in 2010 (R.126-175). JEA, however, was only a bit player when first added to the case. Indeed, the

[8] After hydration, JEA's bed ash is itself non-swelling (P.R.E.0062). However, when the OPF42 or hydrated bed ash was combined with clay soils containing alumina, the ingredients necessary for the formation of ettringite/thaumasite were present, which can cause swelling up to 15.7% (*Id.*). Gallet's test regime was inadequate because it conducted a free swell test with mixtures of OPF42 and soils from only one area of the site and none with the sandy clay soils trucked in for fill (P.R.E.0063).

[9] While JEA was not aware of LA Ash manufacturing or processing ash products at a Port Bienville facility (J.R.E.114-15, 127, 157-58), **the MDEQ was aware and had visited the facility** (J.R.E.109-11).

gist of the claims against JEA are for product liability based on heaving related to other defendants' decisions to approve and use LA Ash's OPF42 ash product as part of construction.

Promenade asserted that because JEA processed and marketed its own construction ash products in Florida, called EZBase and EZSorb, under a Beneficial Use Determination (BUD) from the Florida Department of Environmental Quality (FDEQ), and the same bed ash materials were a component of LA Ash's OPF42, the products are one in the same. The First Amended Complaint refers to the "**OPF42 product**" 75 times and "**JEA Products**" 73 times (R.126-175; *see, e.g.,* J.R.E.82-83). Promenade alleges that "JEA markets certain **products** throughout the Southeastern U.S. in connection with soil conditions on construction projects," "…JEA manufactured, produced, marketed, distributed, sold, assembled, and/or supplied **products** that were used in connection with the sold at the [Promenade] Project," and "…**JEA was a source supply of components of OPF42**." (J.R.E.83 (emphasis added)). All of the claims against JEA are governed by the Mississippi Product Liability Act (MPLA), Miss. Code Ann. § 11-1-63.

Promenade utilized 100 pages of briefing to successfully defeat JEA's summary judgment motion under the MPLA by arguing that (1) JEA was a product manufacturer under the MPLA as opposed to bulk material or component supplier and (2) LA Ash's OPF42 product was essentially the same as JEA's trademarked EZBase products[10] because it utilized JEA's same hydrated bed ash (R.2386-2486). Promenade convinced the Special Master that there are at least disputed issues of fact as to its claims governed by the MPLA (J.R.E.136-38).

Prior to the previous appeal, Promenade and CBL settled their claims against all of the parties involved in the actual marketing, purchasing, testing, engineering, approval, and use of the OPF42 product. Those parties paid CBL/Promenade millions of dollars more than it has spent on remediating the property (or settling store owner claims) due to soil movement (J.R.E.78, 79-80).

[10] *See also* LA Ash OPF42 and JEA EZBase product literature (J.R.E.130-35).

JEA is the sole remaining defendant. Promenade last reported to JEA any necessary remediation as a result of subsurface movement *nearly a decade ago*.[11] In the interim, these construction defects have not hampered the success of Promenade shopping center (J.R.E.78 & 79).

Promenade has never believed there to be any environmental issues or taint with the shopping center. Promenade's Senior Executive VP, Michael Lebowitz, testified that the shopping center has no environmental issues, consistent with its reporting to the Securities & Exchange Commission (SEC) in CBL's Form 10-K, and verified by the fact that CBL performs environmental assessments on its properties (J.R.E.141-47). Promenade's corporate representative, VP David Neuhoff, testified the company **provided certifications** to the MDEQ and the U.S. Army Corps of Engineers ("USACE") – *after heaving issues were known* – **that Promenade's fill soils knowingly mixed with the OPF42 ash product complied with the project's permits** (J.R.E.149-54). Promenade represented to the project's insurers in related litigation that there are no environmental issues with the project.[12] Promenade repeatedly said the same to the trial court.[13]

SUMMARY OF THE ARGUMENT

JEA is a governmental entity established by the Florida Legislature and it, like all other levels of government in Florida, enjoys the same sovereign immunity as the State of Florida. *See* Fla. Stat. § 768.28. This immunity existed prior to ratification of the U.S. Constitution, *Cauley v.*

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[11] This is consistent with the **2014** findings of Dr. Thomas L. Robl of the University of Kentucky Center for Applied Energy Research that "the expansion and swelling of the soils at the D'Iberville site are most likely completed." (P.R.E.0063).

[12] Had Promenade alleged damage from a "waste" in related insurance cases from the use of the OPF42 product at the shopping center, it would have had no coverage and no multi-million dollar settlements from insurers. The "pollution exclusion" in the insurance policies would have excluded coverage for an alleged "waste." (R.5591-92 – excluding coverage for "pollutants"; R.5603 – defining "pollutants" to include "waste"; R.5653 – "Total Pollution Exclusion"). *See* also Complaint against National Union at ¶ 12, claiming damages under policy from "EMJ's and/or its subcontractors' defective work and/or products" (R.5919); suit against Factory Mutual Insurance due to a "soil additive" in ¶ 20, no mention of a "waste" (R.5966-74); and, Zurich suit about "the use of a soil stabilizing product, known as OPF4" (R.5960).

[13] (*See* J.R.E.11, 227, 230-31, 234, 235).

City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981), and was reaffirmed and waived in limited circumstances, by § 768.28. The preratification sovereign immunity for lower governmental entities dates back to *Russell v. The Men of Devon*, 100 Eng. Rep. 359 (1788), which the U.S. Supreme Court, Florida Supreme Court, and this Court have all cited for this proposition. Pursuant to *Hyatt III*, JEA, like a similarly-situated Mississippi governmental entity, is entitled to sovereign immunity in a state law tort case brought in a sister state's court.

Alternatively, *Hyatt III* strengthened comity and the requirement of Full Faith and Credit, which likewise require the same result. This is because the Florida Tort Claims Act's pre-suit notice and home venue requirements have not been met, and those are the same requirements afforded to Mississippi governmental entities under the MTCA.

Dismissal cannot be avoided with arguments of waiver, an inverse condemnation amendment, injunctive relief or false policy considerations that belie that this is a product liability case in state court against a governmental subdivision with sovereign immunity. First, there is no waiver. JEA asserted its sovereign immunity defenses in its original answer, and as part of its original subject matter jurisdiction motion. The Special Master rejected Promenade's waiver contentions in December 2014. JEA asserted its immunity defenses again in response to Promenade's 2015 second amended complaint. The evolution of the *Hyatt* cases dictated further consideration of immunity defenses.

Second, an inverse condemnation amendment is improper. There was no public use with respect to this private, successful shopping center that knowingly purchased, tested, and used a privately manufactured ***product*** and certified that use as proper to MDEQ and USCAE. Promenade's attempted amendment, specifically premised on an environmental statute and regulation, was directly contrary to Promenade's repeated representations to the trial court, its insurers, the SEC, MDEQ, and USACE that the shopping center has no environmental issues.

Third, Promenade tries to manufacture a policy consideration to avoid application of Full Faith and Credit with an inapplicable Mississippi law promoting power plant partnership projects to generate electricity. This case involves a shopping center and product, not a joint power plant project. Finally, Promenade is not entitled to injunctive relief because it has monetized ***all*** its alleged damages. Moreover, Promenade has settled with the contractors and engineers who purchased, tested, and used the OPF42 ash product, as well as the product's manufacturer, LA Ash, for millions more than it has spent on remediation that ceased nearly a decade ago.

The trial court's *Hyatt II* and *Hyatt III* Orders are correct. The *Hyatt III* Order is dispositive here. Essential constitutional interests of state sovereignty are rightly upheld, interests themselves valuable to Mississippi and its political subdivisions in affording protection from tort actions in sister states.

ARGUMENT

I. *HYATT III* HONORS PRERATIFICATION SOVEREIGN IMMUNITY AMONG STATES

In *Hyatt III*, the Supreme Court said it was required to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. 587 U.S. at 233. In deciding that the Constitution does not permit such civil actions, the Court found *Hall* to be "contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution" holding that "States retain their sovereign immunity from private suits brought in the courts of other States." *Id.* at 236. The Court explained that the Constitution "fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at 237. In rejecting Hyatt's arguments, *id.* at 245, the Court said:

> The problem with Hyatt's argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional

> "limitation[s] on the sovereignty of all its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design. Numerous provisions reflect this reality.

The Court found that "Interstate sovereign immunity is similarly integral to the structure of the Constitution" where the "Constitution implicitly strips States of any power they once had to refuse each other's sovereign immunity…." *Id.* at 246-47. *Hyatt III* recognizes that *Hall* "is irreconcilable with our constitutional structure" and the "preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." *Id.* at 249.

The Court also recognized that "'all jurisdiction implies superiority of power,' … [and], the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts." *Hyatt III,* 587 U.S. at 241. In other words, unlike the Federal Government and its courts, the States do not have superiority of power over another State.

II. PROMENADE'S ARGUMENTS THAT JEA'S SOVEREIGN IMMUNITY IS SOMEHOW LESS THAN, LEGISLATED, OR BESTOWED IGNORES THE HISTORY OF SOVEREIGN IMMUNITY

A. JEA Shares Florida's Sovereign Immunity

JEA is not the 51st State but it has the same immunity as the State of Florida as far as any other State is concerned. This is so because Florida law says so. "Article X, Section 13 of the Florida Constitution provides 'absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment.'" *Orlando v. Broward Cty., Fla.,* 920 So. 2d 54, 57 (Fla. Dist. Ct. App. 2005) (quoting *Cir. Ct. of the Twelfth Jud. Cir. v. Dep't of Natural Resources,* 339 So. 2d 1113, 1114 (Fla.1976)). *See also Seguine v. City of Miami,* 627 So. 2d 14, 16 (Fla. Dist. Ct. App. 1993) & *Miami-Dade Cty. v. Miller,* 19 So. 3d 1037, 1039 (Fla. Dist. Ct. App. 2009) ("Generally speaking, the state and its subdivisions, including municipalities and counties, are sovereignly immune from tort liability unless such immunity is expressly waived by

statute.").[14] "Section 768.28, Florida Statutes (1999), 'constitutes a limited waiver of the states sovereign immunity.'" *Orlando,* 920 So. 2d at 57 (quoting *Cir. Ct. of the Twelfth Jud. Cir.*). **"Common law sovereign immunity for the state, its agencies, and counties remained in full force until section 768.28's enactment."** *Cauley v. City of Jacksonville,* 403 So. 2d 379, 381 (Fla. 1981). Initially there was no cause of action by an individual against a municipality, **"**and only by court pruning of sovereign immunity doctrine were some causes of action allowed." *Id.* at 384. "**There was no statutory right to recover for a municipality's negligence** predating the adoption of the declaration of rights contained in the Florida constitution nor was there a cause of action at common law **as of July 4, 1776,** adopted under section 2.01, Florida Statutes." *Id.* at 385.

The Florida Supreme Court made it clear that "sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner." 403 So. 2d at 387. Indeed, the *Cauley* court reasoned that "Municipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized local governmental entities. Our cities currently provide a substantial portion of our public services, funded in part with state and federal revenues." *Id.* at 386.

The trial court previously found in its Omnibus *Hyatt II* Order that JEA has sovereign immunity(J.R.E.4). This ruling is in accord with the courts of Florida. In *Fluid Dynamics Holdings v. City of Jacksonville,* 752 Fed. Appx. 924 (11th Cir. 2018), the Eleventh Circuit rejected the assertion that JEA did not have sovereign immunity under Fla. Sat. § 768.28 ("the FTCA"). The court held that "**JEA has sovereign immunity *subject to* the § 768.28 waiver**." *Id.* at 925 (emphasis added). The court explained "the Florida Legislature 'created and established' the JEA by statute as a 'body politic and corporate' to exercise 'all powers with respect to electricity . . .

[14] Fla. Const. art. X, § 13 is titled "Suits against the state" and reads: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

which . . . could have been but for this article exercised by the City of Jacksonville.'" *Id.* The court held that "the bottom line is that JEA is entitled to sovereign immunity" *subject to* the limited waiver set forth in § 768.28. *Id.* at 926.

B. *Hyatt III* Encompasses More Than Just the States Themselves

In making its "51st state" argument, Promenade glosses over the fact that *Hyatt III* logically encompasses more than just the States themselves. After all, *Hyatt III* was applied not to California, but to its agency, the CFTB, which had immunity granted by a California statute. Promenade also ignores the *Amicus* briefs joined in by forty-three State Attorney Generals and the numerous court opinions applying *Hall* to state political subdivisions like JEA. Over *Hall*'s 40 years as precedent, *it* was often applied to political subdivisions like JEA to permit subject matter jurisdiction. In other words, *Hall* was not just used to sustain jurisdiction in state courts over one of the fifty States.

In the Amicus Briefs of 44 of the State Attorney Generals ("AGs") in *Hyatt II*, including the AGs of Mississippi and Florida, the AGs emphasized that courts necessarily apply the erroneous jurisdictional holding of *Hall* to state political subdivisions, like JEA. *See* Brief of Amici Curiae State of West Virginia and 43 Other States, 2015 WL 5345832, at 23-26. Mississippi and 17 other States (including Florida), as well as Puerto Rico, had previously filed an Amicus Brief in *Hyatt I* arguing that *Hall* should be overruled. *See* 2002 WL 31863327. The AGs cited the following cases involving political subdivisions, as opposed to "the state", as examples of why *Hall* should be overruled:

- *Reynolds v. Lancaster Cty. Prison,* 325 N.J. Super. 298, 739 A.2d 413 (App. Div. 1999). Victims of a dog attack sued Lancaster County Prison, "a Pennsylvania public entity," in New Jersey. 325 N.J. Super. at 306. The dog (named "Diesel") was used at the prison until he attacked guards on five occasions. *Id.* The county prison then gave Diesel to a New Jersey guard dog service. *Id.* The victims sued the county prison in state court in their home state of New Jersey where the attacks occurred. *Id.* Lancaster County's Motion to Dismiss was denied, and the case proceeded to judgment (more than $3 million) in New Jersey. The county urged New Jersey to apply the Pennsylvania Public Subdivision Tort Claims Act and grant immunity, or at a minimum, to apply Pennsylvania's cap on damages. *Id.* at 316-318. The New Jersey court relied upon *Hall* holding that "under the federal Constitution a state is

not entitled to immunity from suits in the courts of another state." *Id.* at 318. The New Jersey court treated the county as a state.

- *Head v. Platte Cty., Mo.,* 242 Kan. 442, 749 P.2d 6 (1988). In this case, a Kansas resident was arrested in Kansas based on a warrant issued by the Sheriff of Platte County, Missouri. 242 Kan. at 442. She sued the sheriff and Platte County in state court in Kansas. *Id.* The Kansas court relying upon *Hall* refused to dismiss and rejected the county's prayer for comity saying, "that nothing in the Constitution requires one state to apply a sister state's sovereign immunity in tort suits against the sister state." *Id.* at 447. The Kansas court treated Platte County as the state.

- *Laconis v. Burlington Cty. Bridge Comm'n,* 400 Pa. Super. 483, 583 A.2d 1218 (1990). The bridge where the accident occurred links New Jersey and Pennsylvania. 400 Pa. Super. at 486. The injured motorist filed suit in Pennsylvania state court against the New Jersey based County Bridge Commission. *Id.* at 485. The Bridge Commission asserted immunity from suit. *Id.* at 485-86. In rejecting this defense, the court cited *Hall* saying that "the Supreme Court expressly held that whether one state is required to accord sovereign immunity in its courts to another state is purely a question of comity." *Id.* at 489. The Pennsylvania court treated the Bridge Commission ("a public entity under New Jersey state law"—*id.* at 490) as "another state."

- *Hernandez v. City of Salt Lake,* 100 Nev. 504, 686 P.2d 251 (1984) is another cross border false arrest, false imprisonment case. 100 Nev. at 505. Hernandez was awarded significant damages against the City of Salt Lake, Utah. *Id.* at 506. Hernandez was arrested in Nevada based on a warrant issued by the City of Salt Lake. *Id.* at 505. He sued in state court in Nevada. *Id.* The city argued for immunity since it would have immunity under Utah law. *Id.* at 507. The Nevada Supreme Court relied upon *Hall* saying, "the federal Constitution does not require the recognition of one state's limitations of its own liability when it is sued in the courts of another state." *Id.* The Nevada court treated the city as a state.

Other cases (not in *Hyatt* amicus briefs) also show that *Hall* was applied to political subdivisions:

- *Radley v. Transit Auth. of City of Omaha,* 486 N.W.2d 299 (Iowa 1992). Radley rode a transit authority bus from Omaha to Iowa (crossed the river) and was injured when getting off the bus in Iowa. *Id.* at 300. She sued the Transit Authority in state court in Iowa for her injuries. *Id.* at 301. The Transit Authority argued that "because it is a political subdivision of a sovereign state other than Iowa, it is only subject to suit in accordance with the laws of the state that created it." *Id.* at 301. The Iowa Supreme Court rejected this argument based on *Hall* saying that "In the *Hall* case, the court held that a state may not claim immunity from suit in the courts of another state absent an agreement or as a matter of comity." *Id.* The court treated the Transit Authority as the state.

- *Bd. of Cty. Comm'rs of Cty. of Beaver Okl. v. Amarillo Hosp. Dist.,* 835 S.W.2d 115 (Tex. App. 1992). In this case, an arrestee was shot in Oklahoma. *Id.* at 120. After initial treatment in Beaver County, Oklahoma, the arrestee was transported by the Beaver County sheriff to a hospital in Amarillo, Texas. *Id.* Beaver County refused to pay the Texas hospital and was sued in state court in Texas. *Id.* at 118-19. Beaver County argued that because it was "an

Oklahoma political subdivision," *id.* at 119, Texas did not have jurisdiction "because the county was entitled to sovereign immunity." *Id.* at 130. In rejecting this argument, the court relied on *Hall* saying, "a state does not necessarily have a claim of immunity in the courts of another state." *Id.* The Texas court treated the county as the state.

- *Wendt v. Osceola Cty., Iowa,* 289 N.W.2d 67 (Minn. 1979). This case involved a one vehicle accident on the border between Iowa and Minnesota. *Id.* at 68. Plaintiff sued County of Osceola, Iowa in state court in her home state of Minnesota. *Id.* The court said the sole issue is "whether Minnesota residents may assert jurisdiction over an Iowa county . . . ." *Id.* at 69. The Minnesota court held as follows: "There is no barrier to asserting personal jurisdiction over Osceola County because of its status as a political subdivision of the State of Iowa. In *Hall* (citation omitted) the Supreme Court held that a state was not constitutionally immune from suit in the courts of another state." *Id.* Again, the court treated the county as the state.

Consistent with the AGs before the Supreme Court, the Special Master, trial court, Promenade, and JEA all accepted the applicability of *Hall* to JEA when both the original Motion to Dismiss was briefed and argued before *Hyatt II*, and the same was true with JEA's Motion for Reconsideration after *Hyatt II*.

No court or plaintiff has made the argument that when the *Hyatt III* uses the word "state," it means **only** one of the fifty States. If this were so, it would have been completely unnecessary to discuss the holding in *Hall* when a "State" was not the party. The Court could have simply said that *Hall* does not apply to a political subdivision. It should be understood that State includes its political subdivisions, just as California and the 44 State AGs filing Amicus briefs did. It is true, as the trial court recognized, that a few courts when analyzing *Hyatt III* considered whether a governmental entity was an arm of the state under the Eleventh (11th) Amendment analysis. (J.R.E.45). However, as discussed in Section II.E. below, those courts' analysis was not thorough or consistent with the State AGs' position or the preratification immunity discussed in *Hyatt III* and enjoyed by political subdivisions of the States. Besides the trial court in this case, no court has thoroughly and thoughtfully examined the preratification immunity afforded to political subdivisions of States, and as result, JEA.

C. JEA's Immunity is Rooted in Preratification Immunity & Reaffirmed by Statute

At the heart of all of Promenade's arguments is the assertion that state constitutions or statutory immunity does not count; that the only immunity of importance under *Hyatt III* is what Promenade describes as "inherent" immunity. But Promenade has conflated two ideas which are clearly separate. In *Hyatt III*, the Court was concerned with the importance to the States of preratification immunity. The Court used the words "implied," "implicit," "inherent," and "integral" because immunity is "not spelled out in the Constitution." *Hyatt III,* 587 U.S. at 247. The Court found constitutional protection for sovereign immunity without textual support because it was integral to the "constitutional design." *Id.* at 245. To use the words "inherent" immunity in the place of preratification immunity serves to confuse not enlighten. The immunity is "inherent" only in the sense that the Constitution is silent on the subject.

State constitutions and statutes are the natural ways for States to express preratification immunity. After all, both *Hall* and the *Hyatt* cases explicitly involved the immunity statutes enacted by California and Nevada. A State's preratification immunity can be asserted, waived, limited by caps and shared with political subdivisions—usually by state statute. Florida, like Mississippi, confirms its shared immunity with its political subdivisions (*see* Fla. Stat. §768.28), and allows ***exactly*** the same limited waiver of that immunity as the State.[15]

Promenade admits that JEA has immunity but says it "is neither **inherent nor traditional**, but instead a creature of recent state legislation." (Appeal Br. at 17 (emphasis added), *see also id.* at 24-26). This argument ignores the persuasive sovereign immunity history lesson provided by the trial court discussing *Cauley* (J.R.E.43-36). The court in *Cauley* explained that sovereign immunity's roots extend to medieval England; that "[t]he people of Florida vested the power to

[15] While the MTCA separately defines "state" and "political subdivisions", the act considers them both to be a "governmental entity" with the same immunity. Miss. Code Ann. §11-46-3 and §11-46-15.

waive immunity in the Florida legislature at an early date. *See* Art. IV, s 19, Fla. Const. (1868) (now Art. X, s 13, Fla. Const.)." 403 So. 2d at 381. Relying on *Russell v. The Men of Devon*, 100 Eng. Rep. 359 (1788), the court noted that "[p]rior to 1776, the common law doctrine of sovereign immunity applied without distinction between governmental entities." *Id.* at 381-82. The Florida Supreme Court held:

> **There was no statutory right to recover for a municipality's negligence** predating the adoption of the declaration of rights contained in the Florida Constitution **nor was there a cause of action at common law as of July 4, 1776**, adopted under section 2.01, Florida Statutes.
>
> . . .
>
> It is our decision that, in this state, **sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner.**

Cauley, 403 So. 2d at 385, 387. The trial court correctly noted that "[t]he legal foundation for [Cauley's] determination [of sovereign immunity] is significant" because of *Cauley*'s reliance on *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788). (J.R.E.43). *Men of Devon* is rooted in English common law—i.e., preratification—and "held the male inhabitants of the unincorporated County of Devon were immune from claims of damages to a wagon as a result of the County's bridge being out of repair." (J.R.E.43). This Court also cited *Men of Devon* in the case of *Yalobusha Cnty. v. Carbry,* 11 Miss. 529, 552 (Miss. Err. & App. 1844),[16] "for the proposition that governmental subdivisions held sovereign immunity at common law unless abrogated by statute." The trial court further aptly pointed out that the U.S. Supreme Court cited *Men of Devon* in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n. 19 (1981), noting that "[l]ocal units of government initially were shielded from tort liability by the doctrine of sovereign immunity." (J.R.E.43).

It is also telling that both the Mississippi and Florida Legislatures, in passing their tort claims acts, recognized the existence of the preratification immunity of both the State and its

[16] *Overruled on other grounds by Dismukes v. Stokes,* 41 Miss. 430 (Miss. Err. & App. 1867).

political subdivisions, which is consistent with their respective State Supreme Courts' decisions in *Carbry* and *Cauley*. In Miss. Code Ann. § 11-46-3, "(1) The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and **its "political subdivisions,"** as such terms are defined in Section 11-46-1, are not now, **have never been and shall not be liable**, ***and*** **are, always have been and shall continue to be immune from suit at law or in equity** on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract … [and] (2) **The immunity of the state and its political subdivisions recognized and reenacted herein is and always has been the law in this state**, before and after November 10, 1982, and before and after July 1, 1984, …." (Emphasis added). The FTCA provides that sovereign immunity existed in totality for Florida *and its political subdivisions* such that it could be waived in limited part by the act, stating "(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself **and for its** agencies or **subdivisions**, **hereby *waives* sovereign immunity** for liability for torts, **but *only* to the extent specified in this act**." Fla. Stat. § 768.28 (emphasis added). *See also Cauley,* 403 So. 2d at 381 ("Common law sovereign immunity for the state, its agencies, and counties remained in full force until section 768.28's enactment."). It is manifest that if sovereign immunity had not existed for the state and its subdivisions, there would have been nothing for § 768.28 to waive.[17]

This is the history lesson Promenade ignores. (*See also* J.R.E.46). The trial court understood "the significance of Mississippi, Florida, and the Supreme Court all recognizing that

[17] Promenade does not address *Cauley*. It instead cites to an earlier Florida AG Opinion and Court of Appeals case for the *incorrect* notion that § 768.28 both waives *and grants* immunity. (Appeal Br. at 25 n. 51, 52). Besides ignoring *Cauley*, Promenade overlooks more recent Florida Court of Appeals cases dispelling that notion and finding consistent with *Cauley* that "**[g]enerally speaking, the state and its subdivisions, including municipalities and counties, are sovereignly immune from tort liability *unless such immunity is expressly waived by statute***." *See also Seguine,* 627 So. 2d at 16 & *Miami-Dade Cty. v. Miller,* 19 So. 3d 1037, 1039 (Fla. Dist. Ct. App. 2009) (quoting *Seguine*).

political subdivisions of the States traditionally enjoyed preratification immunity" in light of *Hyatt III*'s finding that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits'" 587 U.S. at 243 (quoting *Alden v. Maine,* 527 U.S. 706 (1999)) (J.R.E.44).

Consequently, the trial court cogently reasoned that "the Constitution has only abrogated the traditional preratification immunity of States and their subdivisions in four specific ways," because of the design which can, in some circumstances, subject the State and its political subdivisions to jurisdiction of only the higher federal power, whether under the higher sovereign's (federal) law or in some of its courts. (J.R.E.44). Preratification immunity does not preclude subject matter jurisdiction over States and their political subdivisions with respect to: "(1) private suits under Federal law pursuant to Article I, but *only* as to lower governmental entities, because nonconsenting States, as determined by the 11th Amendment analysis, are still barred from such suits (*see Alden*, 527 U.S. at 712-13); (2) suits brought by the United States in Article III courts (*Hyatt III,* 139 S.Ct. at 1495); (3) suits brought by one State against another in Article III courts (*id.*); and, (4) Article IV's requirement that one State give another State Full Faith and Credit for its judgments and public acts (*id.* citing Hyatt *II*, 578 U.S. at 176)." (J.R.E.44-45). Since this is a construction defect case under Mississippi product liability law brought by a private shopping center against a Florida political subdivision in Mississippi state court, "nothing in *Hyatt III* calls for the traditional immunity enjoyed equally by all levels of Florida and Mississippi governmental entities to be abrogated." (J.R.E.45).

Synthesizing the preratification history of political subdivision immunity history with *Hyatt III*'s reasoning, "JEA's immunity is 'inherent'; it is not newly created but flows from the State of Florida itself," and "[f]or the same reason, JEA's immunity is 'traditional' as evidenced by § 768.28." (J.R.E.46). As a result of the obvious preratification immunity enjoyed by state

political subdivisions and "because *Hyatt III* has expressly overruled *Nevada v. Hall* and implicitly overruled *Church v. Massey*," the trial court granted JEA's motion and "dismissed Promenade's claims against it for lack of subject matter jurisdiction based on sovereign immunity." (J.R.E.46). The trial court's thorough and thoughtful ruling should be affirmed.

D. <u>Promenade's 11th Amendment "Arm of the State" Argument is Misplaced</u>

Promenade previously argued to this Court that the Eleventh (11th) Amendment's arm of the state analysis is relevant to the application of Full Faith and Credit under *Hyatt II*.[18] Promenade recycles it for *Hyatt III.* It was misplaced there as to *Hyatt II*, and it is here also as to *Hyatt III*. The trial court soundly rejected it, recognizing that "[b]ecause preratification immunity and the 11th Amendment have different purposes, it is not appropriate to limit *Hyatt III* using the 11th Amendment" (J.R.E.45). This Court should likewise reject it. As correctly found by the trial court: "[T]he Eleventh Amendment is not the source of immunity described in *Hyatt III*." "The Court in *Hyatt III* made it clear that 'the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today' even though the Constitution is silent on subject. 139 S. Ct. at 1493." *Hyatt III* instructs: "'The 'sovereign immunity of the States', we have said, 'neither derives from, nor is limited by, the terms of the Eleventh Amendment.'" 587 U.S. at 243 (citations omitted). (J.R.E.45).

In short, the 11th Amendment has nothing to do with this case because it does not apply to

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[18] *See* Promenade's Appellant Brief in Case No. 2017-IA-00167-SCT ("1st Appeal), at 8-11, filed on Mar. 15, 2018 in which Promenade sought to distinguish *Hyatt II* by arguing that: "JEA does not enjoy Eleventh Amendment immunity" (*id.* at 7); and, "JEA is not a 'state agency' nor is it funded by the State of Florida" (*id.* at 8, 20). Promenade also speculated that the *Hyatt II* court would not have required Nevada to give Full Faith and Credit to the statutes of California ***if*** the case had involved a "lower level governmental" entity. (*Id.* at 20, 23). Under *Hyatt II*, a statute is a 'public act' within the meaning of the Full Faith and Credit Clause, 578 U.S. 176. Promenade's speculation was wrong. On remand from *Hyatt II*, the Nevada Supreme Court analyzed application of its damages cap on Hyatt's fraud and punitive damages verdict. In both instances, the Nevada court recognized that Nevada's cap would apply to "governmental agencies," a "government entity," "any political subdivision," and an "employee of the state of any political subdivision." *Franchise Tax Bd. of State of California v. Hyatt,* 407 P.3d 717, 740, 747 (Nev. 2017), *rev'd and remanded sub nom. Hyatt III*.

suits in state court. Instead, the 11th Amendment addresses a limitation on the higher federal sovereign's exercise of jurisdiction by addressing "the judicial power of the United States," and it specifically divests the ***federal courts*** of jurisdiction over the State and arms of the State.[19] In other words, the 11th Amendment has nothing to do with the judicial power of sister sovereign states. It applies only to suits in federal court or under federal law, and usually arises when the State or an arm of the State is seeking dismissal from a suit in federal court or under federal law.

Promenade acknowledges that "JEA is correct that the Eleventh Amendment does not apply in this case …" (Appeal Br. at 13), but then spends the next sixteen pages of its brief explaining that while it does not ***apply***, it should ***control***. The 11th Amendment's arm of the state test is used to protect the purse of the state from attack under federal law or in federal court. *Black v. North Panola School District,* 461 F. 3d 584, 596 (5th Cir. 2006). Promenade says that *Hyatt III* only applies to arms of the state—political subdivisions who cannot be sued in federal court because of 11th Amendment immunity (Appeal Br. at 24). But, *Hyatt III* says no such thing.

Promenade's argument mixes multiple concepts. While getting the ultimate issue wrong, the Court in *Hall* said that "the doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to [1] **suits in the sovereign's own courts** and the other to [2] **suits in the courts of another sovereign**." 440 U.S. at 414. However, Promenade attempts to add an irrelevant third concept involving the [3] **immunity of a state from suit in federal court under the 11th Amendment**. Confusing these concepts leads to a misplaced argument. To get the right answer is simple. An arm of the state test only matters with respect to cases involving the power of the higher federal sovereign. In other words, if the case does not involve federal law (Article I of the Constitution) or federal courts (Article III), then there is no arm of the state test. This is

[19] "Given that 'all jurisdiction implies superiority of power,' Blackstone 235, the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts." *Hyatt III,* 587 U.S. at 241.

because states are co-equal sovereigns, and they and their political subdivisions enjoyed preratification immunity, and according to *Hyatt III*, that is still the case.

Promenade's favorite cases are *Alden v. Maine,* 527 U.S. 706 (1999) and *Northern Ins. Co, of N.Y. v. Chatham County,* 547 U.S. 189 (2006), but Promenade's use of them exemplifies the mixing of the concepts above. Indeed, these cases deal with the element of superiority of federal law or federal courts with respect to the exercise of jurisdiction, as opposed to the exercise of jurisdiction by a co-equal sovereign. On page 19 of its brief, Promenade offers the following quote from *Northern Ins.,* 547 U.S. at 193, with Promenade's emphasis added in underlined italics:

> A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that *only States and arms of the State* possess immunity **from suits authorized by federal law**. See *Alden, supra* [527 U.S. 706 (1999)], at 740; *Mt. Healthy City Bd. Of Ed. v. Doyle,* 429 U.S. 274, 280 (1977). Accordingly, *this Court has repeatedly refused to extend sovereign immunity to counties.* See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U. S. 391, 401 (1979); *id.,* at 401, n. 19 (gathering cases); *Workman* v. *New York City,* 179 U. S. 552, 565 (1900); *Lincoln County* v. *Luning,* 133 U. S. 529, 530 (1890). See also *Jinks* v. *Richland County,* 538 U. S. 456, 466 (2003) *("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit").*

Promenade's emphasis above overlooks the bold underline point of import in *Alden* – that *Alden* involves state probation officers' claims under the *federal* Fair Labor Standards Act law (Article I), a different concept than states exercising jurisdiction over co-equal sister sovereign states.

Likewise, *Northern Ins.* involved both Article I and III jurisdiction as it was a suit involving a vessel damaged in a collision with a malfunctioning county drawbridge, brought under *federal* admiralty law and *in federal court*. The same is true for the other cases in the block quote; they involve jurisdiction under federal law (Article I) or in federal court (Article III): *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (a teacher's suit for violation of the First and Fourteenth Amendments and in federal court); *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391 (1979) (suit over a land use ordinance in federal court and

involving federal civil rights claims); *Workman v. City of New York,* 179 U.S. 552 (1900) (a maritime collisions case under federal admiralty law and in federal court); *Lincoln Cnty. v. Luning,* 133 U.S. 529 (1890) (a bond/coupon dispute in federal court); and, *Jinks v. Richland Cnty., S.C.,* 538 U.S. 456 (2003) (an arrestee's widow's case under federal §1983 law).

Neither this case, nor *Hyatt III*, implicates Article I or Article III jurisdiction. Thus, an arm of the state test has no place. After all, *Hyatt III* could have said an arm of the state test should apply to assertions of jurisdiction by co-equal sovereign states, but it didn't. It makes sense that the Supreme Court did not do so, especially in light of the arguments and cases cited by the 44 State AGs complaining of assertions of jurisdiction over their states' political subdivisions by co-equal sovereign states. *See supra* at pp. 15-17.

Finally, most cases applying *Hyatt III* do not involve a similarly-situated body politic of consolidated city and county government utility sued in state court under state law. As the trial court acknowledged, however, some of the few post-*Hyatt III* state court cases[20] involving private tort suits against political subdivisions have first confirmed whether those entities are arms of the state. (J.R.E.45). It is unclear why they did though. It was not because *Hyatt III* calls for it. Confused by the different concepts of sovereign immunity, those courts applied an arm of the state test simply like earlier courts when questions of dissimilar immunity, believed to be 11th Amendment immunity, arose. That is exactly what cases like *Cauley* and *Hyatt III* had to correct.

An interesting example of a post-*Hyatt III* case in which a state supreme court is confused by the type of immunity involved with a political subdivision is *Galindo v. City of Flagstaff,* 452 P.3d 1185 (Utah 2019). In *Galindo*, a Utah resident sued an Arizona municipality, seeking damages for injuries from a motor vehicle accident in Utah with an Arizona municipal employee.

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[20] *Farmer v. Troy Univ.,* 879 S.E.2d 124 (N.C. 2022), *cert. denied*, 143 S.Ct. 2561 (May 30, 2023); *Galindo v. City of Flagstaff,* 452 P.3d 1185 (Utah 2019); and, *Marshall v. Se. Pennsylvania Transp. Auth.,* 300 A.3d 537, 540 (Pa. Commw. Ct. 2023).

The Utah Supreme Court found that "we need not address that sea change in sovereign immunity practice because 'municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit' under the Eleventh Amendment of the United States Constitution." *Id.* at 1187 (quoting *Jinks,* 538 U.S. at 466; *Alden,* 527 U.S. at 756). The Utah Supreme Court makes the same mistake Promenade asks this Court to make by looking to constitutionally protected sovereign immunity under the 11th Amendment, which again only relates to immunity involving federal law or in federal courts, i.e., a higher sovereign's power limited by the Constitution. Instead of looking to preratification immunity as the Court did in *Hyatt III*, the Utah Supreme Court's immunity confusion led it to find that "[t]he principles of *Hall* continue to govern a state's governmental immunity grant to its political subdivisions and the respect that should be attributed to it by other states." *Id.* at 1187, n. 2.

At first glance, *Galindo* tracks Promenade's argument; it even erroneously found that states *granted* government immunity to their political subdivisions, which is not born out in the *Men of Devon*, *Cauley*, *Yalobusha Cnty,* and *City of Newport* or by Fla. Stat. § 768.28 and Miss. Code Ann. § 11-46-3. So, why does Promenade not discuss *Galindo*, especially when the trial court does here? (J.R.E.49-50). Because, even though *Galindo* confuses the type of sovereign immunity involved and its source, the Utah Supreme Court still gets to the right place of dismissing the City of Flagstaff based on comity and Full Faith and Credit. As discussed in the next section, the trial court properly dismissed on this alternative basis, too.

Finally, Promenade erroneously relies upon *Black,* 461 F.3d 584, an 11th Amendment case. *Black* stands for the unsurprising proposition that a school district is not an arm of the state for purposes of 11th Amendment immunity. *Id.* at 597-98. *Black* was filed ***in federal court*** against a Mississippi school district. *Id.* at 587. Again, 11th Amendment immunity applies as a defense to the judicial power of Article III courts to exercise jurisdiction in federal court.

The immunity described in *Hyatt III* is simply different than the immunity granted by the 11th Amendment. The "fundamental purpose of the Eleventh Amendment—protecting state treasuries," *Black,* 461 F.3d at 596, is narrower and serves a different purpose than the immunity described in *Hyatt III*. The plan of the Constitution was a "vision of 50 individual and equally dignified States," equal in power, dignity, and authority. *Hyatt II,* 578 U.S. at 179. Subjecting a state to the power (jurisdiction) of a sister state undercuts this fundamental principle. Nothing in the 11th Amendment grants Mississippi and its courts power superior to that of Florida.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT FULL FAITH & CREDIT AND COMITY PROVIDE AN ALTERNATIVE BASIS FOR DISMISSAL

If this Court were to find subject matter jurisdiction, the *Hyatt* line of cases, in any event, dictate dismissal under the Full Faith and Credit Clause or principles of comity.

In *Hyatt I*, the Court found "that both Nevada and California have generally waived their sovereign immunity from suit in state court and 'have extended the waivers to their state agencies or public employees except when state statutes expressly provided immunity.'" 538 U.S. at 492. The Court further found that "California has expressly provided [CFTB] with complete immunity" by statute. *Id.* at 493. *Hyatt II* made a similar observation: California law provided state agencies immunity for actions during the course of collecting taxes citing the California Code. 578 U.S. at 174. In *Hyatt III*, the Court acknowledged that the basis of CFTB's immunity was statutory, citing Cal. Govt. Code Ann. § 860.2 (West 1995). 587 U.S. at 234. The same was true in *Hall*. The Court said, "A Nevada statute places a limit of $25,000 on any award in a tort action against the state pursuant to its statutory waiver of sovereign immunity," citing Nev. Rev. Stat. §41.035 (1). 440 U.S. at 412, n. 2.

The Nevada statute, much like the statutes in Florida and Mississippi, waives sovereign immunity up to the cap for the state and "all political subdivisions." The state has the same immunity as its political subdivisions. **The sovereign immunity under consideration in *Hall***

and the *Hyatt* line of cases was 100% statutory. Explaining as the Court did in *Hyatt III*, that the States' sovereign immunity was implicit in the constitutional plan and existed before ratification does nothing to undercut statutory enactments of sovereign immunity and limited consent to be sued by nearly all of the states. Florida did have preratification immunity as explained by the Court in *Hyatt III*. That immunity has simply been codified as being shared by both Florida and its political subdivisions, such as JEA, as Florida had the perfect (true and inherent) right to do. Consequently, this Court must give § 768.28 Full Faith and Credit in accordance with *Hyatt II* and *Hyatt III* and grant JEA's motion to dismiss for failure to comply with the statute's notice and venue requirements, or at a minimum, apply the damages cap.

Further in the alternative, a prudent exercise of comity requires dismissal of Promenade's claims against JEA. After all, both the majority in *Hall* and the dissent in *Hyatt III* highlighted the expectation that "prevailing notions of comity would provide adequate protection against ***the unlikely prospect*** of an attempt by the courts of one State to assert jurisdiction over another." *Hall*, 440 U.S. at 419 (emphasis added). Unfortunately, this case and those discussed above (*supra* at 15-17) show that courts have not necessarily done what is expected. Instead, they demonstrate a lack of prevailing notions of comity and stand in contrast to Justice Breyer's "count" of a small number of cases "in which one State has entertained a private citizen's suit against another State in its courts." *Hyatt III*, 587 U.S. at 260 (Breyer, J., dissenting). If nothing else, *Hyatt III* further strengthens the notion of comity applicable here.

Whether under *Hyatt III* due to a lack of subject matter jurisdiction, or alternatively pursuant to Full Faith and Credit or comity under *Hyatt II* and *Hyatt III*, JEA's motion to dismiss was properly granted.

A. <u>Full Faith and Credit Requires Dismissal</u>

i. Hyatt III strengthens Full Faith & Credit.

Before *Hyatt III*, the trial court decided under *Hyatt II* that the "Full Faith and Credit Clause requires this court to afford JEA, a 'municipal utility and body politic with the State of Florida' immunity to the extent Mississippi agencies are entitled to immunity under Mississippi law." (J.R.E.4). Under Florida law, JEA would have immunity above $200,000. Fla. Stat. § 768.28 (2008). A Mississippi political subdivision under similar facts and circumstances would have immunity above $500,000. Miss. Code Ann. §11-46-15. Consistent with the teaching of *Hyatt II*, the trial court held that "to deny JEA a cap on damages would be inconsistent with Florida and Mississippi law and would be a special rule of law that evinces a policy of hostility contrary to the Full Faith and Credit Clause." (J.R.E.5). "JEA must be given the sovereign immunity protection of the Mississippi Tort Claims Act where the policies of the foreign and forum state are **not** opposed to one another; i.e. application of damage caps." (J.R.E.6 (emphasis in original)).

Promenade asserts that ***somehow*** *Hyatt III* weakens JEA's sovereign immunity and the alternative basis for dismissal here via the application of Full Faith and Credit and comity. (Appeal Br. at 14, n. 38). This assertion ignores the clear direction of the U.S. Supreme Court and the *Hyatt III* opinion.

The Supreme Court has steadily moved away from *Hall* which allowed the forum State court to exercise jurisdiction over a sister State. While the Court in *Hyatt I*, 538 U.S. 488, 489 (2003), did not apply Full Faith and Credit, it did say that:

> The Nevada Supreme Court sensitively applied principles of Comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.

In *Hyatt II*, the Court did not invoke the same comity analysis, and instead held that Nevada violated Full Faith and Credit:

> The Nevada Supreme Court has ignored both Nevada's typical rules of immunity and California's immunity-related statutes (insofar as California's statutes would prohibit a monetary recovery that is greater in amount than the maximum recovery that Nevada law would permit in similar circumstances). Instead, it has applied a special rule of law that evinces a "'policy of hostility'" toward California. [citations omitted]. Doing so violates the Constitution's requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." Art. IV, §1.

Hyatt II, 578 U.S. at 176. *Hyatt III* completed the retreat from *Hall* by overruling it. It seems fair to say that since *Hall*, the Supreme Court has more willingly embraced sovereign immunity using all the tools available—comity, Full Faith and Credit, and subject matter jurisdiction.

With respect to the opinion in *Hyatt III*, both the majority and dissent cited *Hyatt II* with favor. The trial court noted as much in its order here (J.R.E.47). The majority opinion in *Hyatt III* had this to say about *Hyatt II*:

> The Court's Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from "adopt[ing] any policy of hostility to the public Acts" of other States.

Hyatt III, 587 U.S. at 245.

Hyatt III only strengthens the argument for application of Full Faith and Credit in this case. If the implied constitutional framework requires one State to recognize the sovereignty of its sister States, then certainly the express constitutional mandate to give Full Faith and Credit to the public Acts of those same sister-States must be honored. In other words, the proper consideration to be given to a sister-State's laws may now rise to the level of "full" faith and credit rather than the "partial" faith and credit to which Chief Justice Roberts objected in his *Hyatt II* dissent. *See* 578 U.S. at 188.

Promenade argues that this Court should ignore JEA's sovereign immunity because JEA is not a "co-equal sovereign" with the State of Mississippi. As addressed in Sections I and II above,

this argument is unfounded and does not substantiate subject matter jurisdiction under *Hyatt III*. For the purposes of application of Full Faith and Credit, however, Promenade is mischaracterizing the issue. Promenade is asking this Court to refuse to give full faith and credit to the sovereign immunity **statutes** of the undeniably, co-equal State of Florida, not just to JEA.[21] Application of Full Faith and Credit to the FTCA embraces not only the statutory cap but also the notice and venue provisions of § 768.28, which require prefiling notice of suit and suit in Florida—just as the MTCA requires for a suit against a Mississippi political subdivision.

ii. Promenade's claims were properly dismissed for lack of pre-suit notice.

The trial court carefully analyzed the pre-suit notice requirements of the FTCA[22] and MTCA[23] and correctly found them consistent. (J.R.E.48). Both laws require notice as a precondition to maintaining suit. (*Id.*)[24] Moreover, "Promenade did not dispute the lack of pre-suit notice to JEA." (*Id.*). Absent from Promenade's appeal brief is any discussion whatsoever of the trial court's dismissal based on Full Faith and Credit for the failure to comply with the pre-suit notice requirement under the consistent provisions of the FTCA and MTCA.

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[21] Ironically, as JEA has no assets in Mississippi, were Promenade to obtain a judgment in this case that ignores Florida's public acts, Promenade must then ask a Florida court to enforce that judgment by invoking the same Full Faith and Credit Clause it asks this Court to disregard. An inconsistent application of Full Faith and Credit and circumvention of Florida's sovereignty laws is at odds with *Hyatt III*'s view of an inherent constitutional framework requiring one State to respect the sovereignty of another State regardless of the first State's own laws.

[22] Fla. Stat. Ann. § 768.28(6)(a) & (b) provides in pertinent part with respect to pre-suit notice:

> (a) **An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency**, …
> (b) … **the requirements of notice to the agency** and denial of the claim pursuant to paragraph (a) **are conditions precedent to maintaining an action** ….

[23] The MTCA's pre-suit notice requirement in Miss. Code Ann. § 11-46-11 (emphasis added) reads:

> (1) … **at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity**....
> (3)(b) **No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires**, ….

[24] "[C]ompliance with the notice requirements of subsection 768.28(6) is a condition precedent to maintaining a suit against a government entity." *Menendez v. N. Broward Hosp. Dist.,* 537 So. 2d 89, 91 (Fla. 1988).

Likewise, Promenade chose not to address the trial court's dismissal due to the failure to comply with the FTCA's home venue requirements, which are also consistent with the MTCA.

iii. Home Venue requirements of the FTCA and MTCA also support dismissal.

Applying Full Faith and Credit to the FTCA's home venue requirements, which are consistent with the MTCA, also entitles JEA to dismissal. (J.R.E.48). Fla. Stat. Ann. § 768.28(1) provides that "[a]ny such action [against the Florida entity] may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued." Similarly, Miss. Code Ann. § 11-46-13 (2) states: "The venue for any suit …against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located." (J.R.E.48-49).

As found by the trial court, "both [Florida and Mississippi] require that the lawsuit be brought in the county in which the cause of action accrued (i.e., the act, omission, or event took place), [b]ut Florida further mandates that the political subdivision have an office in that county; otherwise, the suit can only be pursued where the political subdivision is 'at home.'" (J.R.E.49 (quoting *Lee Mem'l Health Sys. v. Martinez,* 338 So. 3d 350, 354 (Fla. Dist. Ct. App. 2022) (also discussing that § 768.28(1) is entirely consistent with the home venue privilege Florida governmental entities enjoyed at common law)). *See also Carlile v. Game & Fresh Water Fish Comm'n,* 354 So. 2d 362, 363–64 (Fla. 1977) ("[V]enue in civil actions brought against the state or one of its agencies or subdivisions, absent waiver or exception, properly lies in the county where the state, agency, or subdivision, maintains its principal headquarters.") & *Greer v. Mathews,* 409 So. 2d 1105, 1106 (Fla. Dist. Ct. App. 1982) ("At the outset, we acknowledge that the state's venue

privilege remains well entrenched in Florida, notwithstanding the enactment of Section 768.28, Florida Statutes (1975), a statutorily qualified waiver of sovereign immunity." (citing *Carlile*)).

The trial court further correctly found that "[t[he minor difference between the two laws is insignificant here because (i) JEA's ash byproduct was loaded into railcars in Jacksonville, Florida, Duval County, where JEA is headquartered; (ii) JEA was not involved in construction of the shopping center; and, (iii) there is no evidence JEA knew about the Promenade shopping center before suit." (J.R.E.49). These undisputed facts[25] plainly warrant enforcement of JEA's statutory right to its home venue.

iv. Comity also counsels dismissal.

This trial court also dismissed based on comity (J.R.E.49-52). Comity is the expectation, not the exception. The dissent in *Hyatt III* makes this point saying that most States are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally. "Thus, even in the absence of constitutionally mandated immunity, States normally grant sovereign immunity voluntarily." *Hyatt III,* 587 U.S. at 260 (J. Breyer, dissenting).

In deciding whether or not to apply comity,[26] courts generally look at several factors, including (1) whether the forum governmental entities would enjoy similar immunity under similar circumstances, and (2) whether the state sued is likely to extend immunity to other states. *Montano v. Freeza*, 393 P. 3d 700, 704 (N.M. 2017). Florida and Mississippi have similar notice and home venue privileges dictating civil actions be brought in the home State after proper pre-suit notice.

The case of *Schoeberlein v. Purdue Univ.,* 544 N.E.2d 283 (Ill. 1989) is often cited on the issue of comity.[27] *Schoeberlein* involved an Illinois resident filing a tort claim in Illinois against

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[25] *See* J.R.E.106-07, 117-18, 120, 122, 157-58. *See also* P.R.E.0015-16; R.5977-78; P.R.E.0318-21.

[26] Comity has been characterized as a "golden rule" among sovereigns. *Black's Law Dictionary*, 261-262 (7th ed., West 1999) and *Athay v. Stacey*, 196 P.3d 325 (Idaho 2008).

[27] *See, e.g.*, *Wells v. Vincennes Univ.,* 982 F.2d 1147, 1151-52 (7th Cir. 1992); *Coleman v. Clark,* 322 F. Supp. 3d 1, 8 (D.D.C. 2018); *Jacobson v. Nat'l R.R. Passenger Corp.,* No. 97 C 6012, 1999 WL 1101299,

Purdue University, an Indiana university. *Id.* at 284. The court dismissed based on comity, declining to address the 11th Amendment or Full Faith and Credit. *Id.* at 284-85. The court first looked at whether an Illinois agency would enjoy statutory imposed sovereign immunity in a tort context if it had been sued by an Illinois resident in Illinois under similar circumstances. *Id.* at 285-86. Concluding that an Illinois agency would have immunity, the court then looked at whether Indiana would have immunity if sued by plaintiff in Indiana. *Id.* at 286. Finding similar immunity, the court noted that plaintiff had a remedy, but he did not select "the proper forum for his grievance." *Id.* Finally, the court said that "our legislature hoped that other States would respect the [Illinois] court of claims by refusing jurisdiction over suits in which Illinois is a party defendant." *Id.* at 287.

In its own self-interest, Mississippi, like Illinois in *Schoeberlein*, could and should choose to afford JEA comity expecting a similar result should a Mississippi political subdivision be sued in a sister State. To do otherwise, invites similar unfavorable treatment.

The trial court turned to two cases applying comity in similar circumstances. (J.R.E.49-51). The first case of *Galindo* is a post-*Hyatt III* application of comity (and Full Faith and Credit). The second, is *Montano*, which applies comity after *Hyatt II* but before *Hyatt III*.

In *Galindo*, a Utah citizen filed state law tort claims against the City of Flagstaff, Arizona and its employee in Utah state court for injuries arising from an automobile accident in Orem, Utah. 452 P.3d at 1186. The Utah Supreme Court first applied the 11th Amendment to the City of

at *12 (N.D. Ill. Nov. 29, 1999); *Hoffman v. Connecticut,* No. 09-CV-79-B-H, 2009 WL 3055137, at *20 n. 17 (D. Me. Aug. 7, 2009), *report and recommendation adopted as modified,* 671 F. Supp. 2d 166 (D. Me. 2009); *Univ. of Iowa Press v. Urrea,* 440 S.E.2d 203, 205 (Ga. App. 1993); *Solomon v. Supreme Court of Fla.,* 816 A.2d 788, 790 (D.C. 2002); *Radley v. Transit Auth. of City of Omaha,* 486 N.W.2d 299, 301 (Iowa 1992); *Levert v. Univ. of Illinois at Urbana/Champaign ex rel. Bd. of Trustees,* 857 So. 2d 611, 620 (La. App. 1 Cir. 9/26/03), *writ denied,* 864 So. 2d 635(La. 1/16/04); *Reed v. Univ. of N. Dakota,* 543 N.W.2d 106, 109 (Minn. Ct. App. 1996); *Hyatt,* 407 P.3d 717, 729 (Nev. 2017), *rev'd and remanded sub nom. Hyatt III,* 587 U.S. 230 (2019); *Morrison v. Budget Rent A Car Sys., Inc.,* 230 A.D.2d 253, 268 (N.Y. App. Div. 1997); and, *Hansen v. Scott,* 687 N.W.2d 247, 250 (N.D. 2004).

Flagstaff, which the trial court below found to be erroneous (J.R.E.49).[28] Then, the Utah Supreme Court applied comity (and Full Faith and Credit) to Arizona's notice of claim requirements applicable to the City of Flagstaff. The Utah court's comity and Full Faith and Credit findings were instructive to the trial court below (J.R.E.49). Galindo had served pre-suit notice on the City 364 days after the accident, and argued that this was within the one-year notice requirement in Utah's law, which should apply. 452 P.3d at 1186. On the other hand, the City argued that the shorter six-month notice requirement under Arizona's law should apply, which would make Galindo's 364-day notice untimely. *Id.* The Utah Supreme Court looked to comity as "a principle under which the courts of one state give effect to the laws of another state ... not as a rule of law, but rather out of deference or respect." *Id.* at 1187. Applying comity, the court found nothing "sufficiently offensive" to or "contraven[ing]" Utah public policy to apply Arizona's shorter six-month notice period, especially considering both State laws do not reflect different policies merely because they have different time frames for notice. *Id.* at 1189. As a result, the Utah Supreme Court dismissed Galindo's claim. *Id.*

The same is true here. There is nothing "sufficiently offensive" to application of the nearly identical pre-suit notice and home venue requirements of the FTCA applicable to JEA, when tort claims against a similarly situated Mississippi public utility, like the Harrison County Utility Authority, would have the same requirements.

In *Montano*, a New Mexico patient sued a physician at Texas Tech for medical malpractice related to a bariatric bypass surgery. 393 P. 3d at 702. The Supreme Court of New Mexico also looked to Comity (and Full Faith and Credit), *id.* at 704, and used a multi-part test to determine whether the Texas Tort Claims Act applied, *id.* "The Texas law prohibits suits against individual governmental employees and requires courts to dismiss such suits unless the plaintiff substitutes

[28] *See supra* at pp. 22-27 as to why the 11th Amendment analysis is wrong.

the governmental employer of the employee within thirty days of the motion. *Id.* at 703." (J.R.E.50). The trial court rightfully found *Montano* instructive. As should this Court, including recognition of the trial court's following insightful implementation of the New Mexico Supreme Court's four-part Comity test with respect to this case:

> (1) *Whether the forum state would enjoy similar immunity under similar circumstance*s – This first question is answered easily here in that both the MTCA and FTCA require notice and home venue;
>
> (2) *Whether the other state has or is likely to extend immunity to other states* – The answer here is also yes, because Florida would likely extend immunity in the same circumstances because there is no public policy of paramount import. *See* 10 Fla. Jur 2d Conflict of Laws § 4 ("Although the Florida courts may generally recognize the legislative enactments and judicial acts of another state as a matter of comity, they will depart from the rule of comity for the purpose of the necessary protection of the citizens of Florida or of enforcing some paramount rules of public policy."). *See also Herron v. Passailaigue,* 110 So. 539, 542 (Fla. 1926) (holding that the public policy interest must be of paramount importance to warrant application of Florida law) and *In re Est. of Nicole Santos,* 648 So. 2d 277, 282 (Fla. Dist. Ct. App. 1995) (finding that Florida homestead law was sufficient public policy to not apply Comity to prenup under Puerto Rico law);
>
> (3) *Whether the forum state has a strong interest in litigating this case under its law by comparing its policy interests to those of the defendant's state* – The Supreme Court of New Mexico's Comity test is broader than the balancing test abandoned in *Hyatt I* and meant to honor principles of interstate harmony and a "spirit of cooperation" between states; applying it, that court found that both States' tort claims act have the same effect of placing limited payment obligations on the agency, not the employee. Here, Mississippi certainly has an interest in litigating claims affecting property in the State, but that interest is not compelling on examination of the relevant facts: (i) JEA provided a raw material to LA Ash at its facility in Florida; (ii) JEA had no knowledge of the Mississippi shopping center project or (iii) of any intended use of the ash in Mississippi; (iv) LA Ash's OPF42 product was tested and approved by Promenade's geotechnical engineer, and approved and used by Promenade's contractors; and, (v) Promenade recovered millions from those parties responsible for the testing, approval, and use of the ash product in constructing the shopping center.[29]
>
> (4) *Whether the use of the foreign forum promotes forum shopping* – The New

[29] These facts are not properly disputed: (i) JEA provided raw material in Jacksonville (P.R.E.0015-16); (ii) JEA had no knowledge of the Promenade shopping center (J.R.E.106-07, 157-58); (iii) JEA did not know the intended use in Mississippi (P.R.E.0318-321; J.R.E.114-15, 127, 157-58, 160, 162); (iv) Gallet tested and approved OPF42 (J.R.E.82, 85-86, 87, 89-91, 94-95) and EMJ and M. Hanna approve and used it (J.R.E.92-93, 97, 99-100, 102-04); (v) CBL/Promenade's settlements (J.R.E.78, 79-80).

> Mexico Supreme Court found that not applying the Texas Tort Claims Act would indeed encourage forum shopping. Here, not applying § 768.28 has and will result in forum shopping in Mississippi. This is evidenced by the fact that Promenade has sued JEA seven times in Duval County, Florida related to public records requests.[30]

(J.R.E.50-51).

Thus, as also found by the trial court, the MTCA and FTCA are in harmony. (J.R.E.51). Pre-suit notice and home venue for governmental agencies are required under both Acts. Promenade failed to provide pre-suit notice to JEA. Promenade knew well JEA's home venue as it has sued JEA multiple times in Florida in pursuit of its onerous public records requests. It is telling that Promenade refused to address the trial court's dispositive reliance on *Montano* and *Galindo* in application of comity and Full Faith and Credit to the consistent pre-suit notice and home venue provisions of the FTCA and MTCA. The trial court's alternative finding that comity and Full Faith and Credit require dismissal of JEA (J.R.E.52) should be affirmed.

IV. COMITY, FULL FAITH AND CREDIT & *HYATT III* CANNOT BE BYPASSED BY PROMENADE'S PRIOR ARGUMENTS OF WAIVER, AN IMPROPER AMENDMENT, AN INAPPLICABLE STATUTE, AND INAPPROPRIATE INJUNCTIVE RELIEF

After the trial court's *Hyatt II* ruling, Promenade made several attempts to avoid the limit on damages imposed by the Full Faith and Credit Clause of the U.S. Constitution. It reuses those same arguments again, but to no benefit. First, Promenade argues JEA waived its subject matter jurisdiction defenses, which it did not. Second, Promenade sought leave to amend its product liability tort complaint to assert an inverse condemnation claim under Article 3, Section 17 of the Mississippi Constitution claiming that JEA took or damaged its property for public use, which the trial court denied. Next, Promenade argues that a statute intended to encourage out of state power generation projects somehow applies to thwart sovereign immunity; it cannot. Finally, Promenade dusted off its injunctive relief claim, dormant since the 2010 First Amended Complaint, which the

[30] *See supra* at p 7.

trial court properly denied because Promenade calculated its alleged damages.

A. Promenade's Assertion of Waiver has No Merit

Promenade contends the trial court erred in finding *Hyatt II* permitted JEA to "revive" its previously asserted immunity defenses (Appeal Br. at 31-33). It wrongly asserts JEA waived its jurisdictional defenses associated with JEA's status as a Florida governmental entity. Promenade misportrays the record, disregards the significance of *Hyatt II*, as well as *Hyatt III*'s reinforcement of comity and Full Faith and Credit.

It is true that JEA did not move for dismissal based on subject matter jurisdiction and comity principles until two years after service of the complaint. Yet, the reason is obvious because as to JEA that initial two-year period was dedicated to determining whether personal jurisdiction existed over JEA. Rather than plead, JEA filed its motion to dismiss for lack of personal jurisdiction on July 10, 2010 (R.176-94). Substantial discovery limited to the personal jurisdiction issue including discovery motion practice was conducted. The personal jurisdiction issue was not resolved until August 31, 2012 (J.R.E.163).

JEA timely answered (J.R.E.164-77) after resolution of the personal jurisdiction issue and simultaneously moved to dismiss for lack of subject matter jurisdiction based on JEA's sovereign status (J.R.E.178-80). JEA's motion included assertions of JEA's statutory home venue privilege and Promenade's failure to give the statutorily required notice to JEA before filing suit, as well as the applicability of statutory caps (J.R.E.179). JEA promptly noticed the motion for hearing in February 2013 (R.1003).

Litigation proceeded in 2013 and into 2014 without a hearing or resolution of JEA's motion to dismiss, with three separate judges presiding up to this point from the filing of the complaint. In September 2014, the court appointed a special master (J.R.E.185) and thereafter granted him "the authority to hear and rule on any and all discovery matters as well as all dispositive,

jurisdictional, and evidentiary matters." (J.R.E.186-87).

On December 15, 2014, Promenade supplemented its opposition to JEA's motion to dismiss for lack of subject matter jurisdiction (R.4386-98). Promenade argued, among other things, that under *Stuart v. Univ. of Mississippi Med. Ctr.,* 21 So. 3d 544, 548 (Miss. 2009) and *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008), JEA had waived its sovereignty defenses by failing to set its motion hearing for over two years. To fit within the line of cases relied upon by Promenade, the defense must be (1) an affirmative defense that will serve to terminate or stay the litigation and (2) defendant must offer no reasonable explanation for the delay in raising the defense. In this case, none of those circumstances are present.

At the December 19, 2014 hearing on the motion, the Special Master, expressing thorough familiarity with the record, without hesitancy rejected Promenade's assertion that JEA waived its jurisdictional defenses (J.R.E.207-10). On March 26, 2015, Promenade filed its second amended complaint to assert additional claims against JEA. (J.R.E.1994). JEA answered on April 6, 2015, denied the new allegations and reasserted all previous defenses (J.R.E.198-99). On May 28, 2015, by written report and recommendation, the Special Master recognized that it was "well-settled that JEA is a municipal utility and body politic located within the State of Florida, but nonetheless recommended denial of JEA's motion to dismiss on the basis JEA did not "enjoy a status that would provide protection afforded under the Mississippi Tort Claims Act." (J.R.E.214). On August 18, 2015, the trial court adopted the Special Master's recommendation without objection by JEA. (J.R.E.215).

At that time, JEA could not effectively argue subject matter jurisdiction because of *Hall*. It could not argue Full Faith and Credit because of *Hyatt I*. Left with a comity argument from *Hyatt I*, rejected in *Church* ("This case does not present a question dealing with the principle of comity"), it is understandable the Special Master rejected JEA's argument. The Special Master's ruling on

May 28, 2015, was consistent with the law at that time with respect to subject matter jurisdiction. (J.R.E.211-14). For these reasons, JEA did not object, and because the rule permits, but does not require, an objection. Miss. R. Civ. P. 53(g)(2).

Hyatt II was decided on April 19, 2016 and materially changed the playing field. *Hyatt II* decided how Full Faith and Credit should be applied in a case like this. On May 6, 2016, JEA immediately filed its Motion to Reconsider and Revise Order to Comply with Subsequent Binding Decision of the U.S. Supreme Court. (J.R.E.188-91). The Special Master had applied *Massey*'s choice of law approach to immunity (J.R.E.213-14), an application foreclosed by *Hyatt II*. Promenade opposed the motion (R.5135-52), erroneously asserting nothing in *Hyatt II* merited reconsideration of the trial court's adoption of the Special Master's finding that JEA was not entitled to protection under the MTCA. (R.5136 & 5152). The trial court's January 2017 Omnibus *Hyatt II* Order (J.R.E.1-14) essentially concluded matters at the trial court level as Promenade's interlocutory appeal followed. This Court thereafter dismissed the interlocutory appeal. This Court directed trial court reconsideration of its *Hyatt II* order in light of *Hyatt III*, a directive not unlike JEA's May 2016 request for trial court reconsideration of its August 2015 order denying JEA's motion to dismiss in light of *Hyatt II*. [31]

Rulings in related state court litigation can first trigger the assertion of a defense even when a case has been pending for years. In *Watson Lab'ys, Inc. v. State,* 241 So. 3d 573, 591–92 (Miss. 2018), this Court rejected the State's argument that *Watson* waived a statutory defense by not asserting it for almost seven years ("Thus, once *Watson* learned of the Sandoz verdict in late 2011, which awarded compensatory damages pursuant to § 75-24-15 even though not pleaded, it promptly filed the motion to dismiss. Such action was reasonable.").

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[31] H*yatt III* serves to further strengthen comity and Full Faith and Credit (*see Galindo*) such that JEA's asserted (and reasserted after the Second Amended Complaint) notice and home venue defenses also became legally viable.

In two other decisions, this Court has rejected claims of waiver. In *Pollan v. Wartak,* 240 So. 3d 1185, 1191–92 (Miss. 2017), this Court found that in a complex malpractice action, the defendants did not waive a statute of limitations defense where they engaged in discovery related and unrelated to this defense, and plaintiff "has failed to show how she was prejudiced by the defendants' delay in pursuing their statute-of-limitations defense." In another case, *Est. of Puckett v. Clement,* 238 So. 3d 1139, 1145 (Miss. 2018), this Court said the delay must be substantial and unreasonable. The 17-month delay in determining the proper executor was not unreasonable. *Id.* Promenade has shown no prejudice as dismissal of JEA would not have terminated the litigation against the parties actual involved in the engineering, construction, and selling of the OPF42 product. Plus, the discovery Promenade got from JEA was relevant to its claims against those parties who ultimately paid Promenade millions of dollars.[32] This is also true with respect to the damages cap about which Promenade complains. The discovery and trial preparation in this case had to be done whether there was a cap or not. Applicability of the damages cap is determined at the conclusion of the litigation. It is not subject to waiver for alleged failure to assert at the outset of litigation.

Hyatt III was a cataclysmic shift to subject matter jurisdiction, and this Court rightly remanded to the trial court (over Promenade's objection) for full consideration.

B. The Inverse Condemnation Claim has No Basis in Law or Fact

The trial court correctly denied Promenade's Motion to Amend to assert an inverse condemnation claim under Article 3, § 17 of the Mississippi Constitution. (J.R.E.9). Such a claim was futile. In *Bradley v. Tishomingo County,* 810 So. 2d 600, 603 (Miss. 2002), this Court held that "Section 17 is not applicable except where private property is taken for **public use** by **public**

[32] "The standard of review for the waiver of an affirmative defense is abuse of discretion. …[citations omitted]. Under this deferential standard, we must affirm the trial court's ruling unless there is a firm and definite conviction that the trial court committed clear error." *Pollan,* 240 So. 3d at 1190.

authorities." (Emphasis added). Promenade alleges no "public use" by Mississippi or its citizens. Examples of public uses are:

> among other things, the construction of highways for the use of the motoring public, *Starkville Lodge LLC. v. Miss. Trans. Comm'n*, 296 So. 3d 83, 89-90 (Miss. Ct. App. 2019), *cert. denied*, 297 So. 3d 1110 (Miss. 2020), construction of a municipal harbor, *Murphy*, 202 So. 3d at 1247, construction of public parking facilities, *Jackson Redevelopment Auth. v. King, Inc.*, 364 So. 2d 1104, 1113 (Miss. 1978), construction of drainage ditches, *Winters v. City of Columbus*, 735 So. 2d 1104, 1108 (Miss. Ct. App. 1999), and construction of electric transmission lines, *Knight v. S. Miss. Elec. Power Ass'n*, 943 So. 2d 81, 85 (Miss. Ct. App. 2006).

Sturdivant v. Coahoma Cnty., 303 So. 3d 1124, 1131 (Miss. Ct. App. 2020).

This is a product liability tort case (**R.126-175**), not a public use case. JEA's ash, including as a component for its own construction ash product (EZBase) (J.R.E.134-35) or provision to LA Ash as part of its OPF42 product (J.R.E.130-33), and Promenade's use of an ash product,[33] are not comparable to the above exemplar public uses.

Promenade is a highly successful, private shopping center (J.R.E.78, 79). Promenade alleged it was damaged **in tort** by the OPF42 ash **product** that its geotechnical engineer tested and approved (J.R.E.82, 85-86, 87, 89-91, 94-95), and which its contractors approved and used (J.R.E.92-93, 97, 99-100, 102-04). Eleventh hour allegations that Promenade's successful shopping center is an ash waste dump are foreclosed. Such allegations are in the teeth of: (1) Promenade's own certifications to MDEQ and USACE that the use of the OPF42 ash product complied with its permits (J.R.E.149-54); Promenade's executives' testimony and representations to the SEC and investors that there are no environmental issues (J.R.E.141-47); (3) Promenade's attorneys' representations to the court to secure the physical invasion amendment of no environmental claims (J.R.E.11, 227, 230-31, 234, 235); and, (4) its representations to the project's insurers in related litigation that there are no environmental issues with the project. (*See supra* at

[33] *See* R.126-175, *e.g.,* J.R.E.82-83; R.2386-2486; J.R.E.136-38.

p. 10. n. 12). Promenade ultimately recovered millions in excess of amounts spent on remediation and store settlements by avoiding claiming this tort case involved a waste so as to avoid insurance exclusions. (J.R.E.78, 79-80).[34]

King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 42 So. 204 (1906), on which Promenade relies is clearly not applicable. *King* is a proper § 17 claim in that a *Mississippi* public utility engaged in the ***public use*** of generating electricity was allegedly contemporaneously invading the plaintiffs' property with smoke, soot, cinders, steam, vibration, and noise from its operations. But the intentional purchase from a private corporation (LA Ash) by agents of a private corporation (Promenade) of a declared product that the private purchaser's agents mistest, approve, and use to dry soils that results in some heaving on a private shopping center project is not a public use.

Here, there are "no plausible allegations that the alleged damage was for any 'public use'" and that **"*[n]ot every tort committed by a governmental entity gives rise to an action for inverse condemnation*."** *Kelley, LLC v. Corinth Pub. Utilities Comm'n,* 200 So. 3d 1107, 1118 (Miss. Ct. App. 2016), *cert denied* (Sep. 22, 2016) (the public utility damaged a private development while installing water lines held to be a tory claim, not an inverse condemnation claim).

i. The Trial Court Properly Denied Promenade Leave to Amend its Complaint to add Environmental Issues.

The trial court was well within its discretion in denying the motion to add the futile Section 17 claim which specifically pled environmental issues. *Webb v. Braswell*, 930 So. 2d 387 (Miss.

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[34] Of course, JEA—a Florida sovereign—has no power of eminent domain in Mississippi whatsoever. JEA is therefore not subject to a claim under Section 17. In *Burkett v. Ross*, 86 So. 2d 33, 36 (Miss. 1956), this Court held: "We do not think that Section 17 of our state Constitution is applicable except where property is taken or damaged for public use by the public authorities or corporations, etc., **vested with the power of eminent domain**." (Emphasis added). A cornerstone principle of eminent domain law is that "no state can take or authorize the taking of property situated in another state, and each state holds all the property in its territory free from eminent domain of another state." 26 Am. Jur. 2d *Eminent Domain* § 21 (2016); *accord* 29A C.J.S. *Eminent Domain* § 23 (2016). "Promenade does not dispute that JEA has no eminent domain power in Mississippi." (R.5787). Without the power of eminent domain, JEA is not subject to a claim under § 17. *See also Sturdivant,* 303 So. 3d at 1129-30.

2006). In *Webb*, this Court held that an amendment should not occur "when to do so would prejudice the defendant" because of "more discovery, preparation and expense." *Id.* at 393, 394-95. Promenade disclaimed environmental claims to secure its physical invasion of land amendment (J.R.E.235), but then sought an amendment adding an inverse condemnation claim **specifically citing an environmental statute and regulation** (J.R.E.237-38), yet it now tells this Court that its physical invasion to land count, "is a claim nearly identical to inverse condemnation." (Appeal Br. at 38). Promenade's own product liability complaint and summary judgment arguments, related insurance litigation pleadings, SEC filings, permit certifications to MDEQ and USACE, and representations to the trial court show there is no dispute that this is product liability tort case, not an environmental waste case (*supra* at pp. 42-43).

Promenade cites *Crum v. City of Corinth*, 183 So. 3d 847 (Miss. 2016) and makes a "fairness" argument—since Mississippi immunity law changed, Promenade should be entitled to the amendment. In *Crum*, the plaintiff filed a MTCA claim against the city arising from a backflow of sewage into her home. *Id.* at 849. After losing at the trial court on a motion to dismiss, plaintiff appealed. *Id.* While the case was on appeal, this Court abandoned the public-policy function test with respect to discretionary function immunity. *Id.* at 851-52. This Court held that plaintiff "ought to be given the opportunity to redraft her pleadings in accordance" with the new test. *Id.* at 851. Promenade argues that the *Hyatt II* ruling by the trial court is a "dramatic change in the application of Mississippi's immunity law." (Appeal Br. at 39). But the MTCA was not changed by *Hyatt II* or *Hyatt III*. The *Hyatt* cases requires Mississippi to give Full Faith and Credit to Florida law to the extent it can do so without doing violence to its own law. Since JEA, as well as a similarly-situated Mississippi public utility, are entitled to caps, pre-suit notice, and home venue, there is no violence to Mississippi law. And, again, this is a construction defect product liability case, not a takings case involving public use.

As a matter of fairness, to permit a product liability construction defect case to morph into an environmental waste case after discovery was closed and experts had been designated, none of whom opined on environmental issues at The Promenade, would be extremely prejudicial to JEA. The trial court's Omnibus *Hyatt II* Order indicated that the judge was aware that if he allowed the case to become about environmental solid waste issues, Promenade would then be required to exhaust its administrative remedies with MDEQ under the Solid Waste Disposal Law (§ 17-17-1 *et seq*.) and *Georgia- Pacific Corp. v. Mooney*, 909 So.2d 1081, 1091 (Miss. 2005). (J.R.E.11). Undue prejudice in the form of a new environmental case and delay for administrative exhaustion are two more reasons the amendment was properly denied.

C. The Joint Municipal Electric Power and Energy Law has *Nothing* to do with This Case

While Promenade never argued Miss. Code Ann. § 77-5-701 *et seq*. to the trial court with respect to the motion and order appealed from here (*see* C.P.3698-3729; C.P.3930-51), it recycles its argument from its prior *Hyatt II* appeal (Appeal Br. at 33-36). However, § 77-5-701 *et seq*. does not excuse Mississippi from extending comity to JEA, or from giving Full Faith and Credit to the public laws of Florida.

Section 77-5-701, *et seq.,* is the Joint Municipal Electric Power and Energy Law. Its purpose is to authorize and promote Mississippi municipal electric systems to jointly own projects electric generation/transmission facilities with in-state or out-of-state partners. Miss. Code Ann. § 77-5-703. The Law defines a municipality as "created under the laws of this state." Miss. Code Ann. § 77-5-705. **In order to meet the present and future electric power and energy needs for their inhabitants/customers**, the Law grants the power to Mississippi municipalities ***to own and operate electric power generation facilities ("projects") with in-state or out-of-state partners***. Miss. Code § 77-5-707. The section of the Law to which Promenade cites states:

> Legislative consent is hereby given (a) to the application of the laws of other states with respect to taxation, payments in lieu of taxes, and the assessment thereof, to **any municipality** or joint agency created pursuant to this article which has acquired or has an interest in a **project**, real or personal, situated **without the state**, or which owns or operates a project **without the state** pursuant to this article, and (b) to the application of regulatory and other laws of other states and of the United States to any municipality or joint agency which owns or operates **a project without the state**.

Miss. Code Ann. § 77-5-769 (emphasis added). In short, this Law allows a Mississippi municipality to acquire an interest in an out-of-state **electric generation/transmission facility project**. If such a **project** occurs, then § 77-5-769 could come into play. Nothing like that is present in this case. JEA does not co-own an electric generation/transmission facility project in Mississippi. JEA was sued over an ash product manufactured from its byproduct by LA Ash and used by Promenade's contractors and engineers to construct a shopping mall. The trial court's application of the pre-suit notice and home venue requirements of the FTCA and MTCA, via Comity and Full Faith and Credit, as well as its prior application of the MTCA's cap pursuant to *Hyatt II*, do not implicate, *let alone offend*, the Joint Municipal Electric Power and Energy Law.[35]

Moreover, nothing about this Law affects a Mississippi municipality's sovereign immunity under the MTCA. To the contrary, the Law preserves that immunity for its employees acting "within or without" the territory of that municipality. Miss. Code Ann. § 77-5-763. The suggestion that this joint project law serves to waive or undermine historical, fundamental immunities from limitless damages awards in tort actions is absurd

D. Promenade is Not Entitled to Injunctive Relief

An injunction requires proof by the party seeking an injunction that there is (1) an imminent

[35] Promenade's references to prior pleadings in the decided case of *State of Mississippi v. Tennessee,* 595 U.S. 15 (2021) make no sense. Setting aside that Mississippi's case for damages from Tennessee's pumping of groundwater from the shared Middle Caliborne Aquifer was dismissed due to the doctrine of equitable apportionment [of natural resources], there can be no comparison to the use of a shared aquifer with a private shopping center's mistesting of **a product** when there are no environmental issues or claims.

threat of (2) irreparable harm for which there is (3) no adequate remedy at law. The trial court correctly found that Promenade satisfied ***none*** of these requirements. Further, the trial court found that injunctive relief would be unavailable even if the court accepted as true Promenade's recent contrived assertion that JEA has created a solid waste dump on Promenade's property that required remediation because MDEQ has primary jurisdiction which has not been exhausted. (J.R.E.9-11).

i. There is No Imminent Threat of Irreparable Harm for which there is No Adequate Remedy at Law.

To get a mandatory injunction, Promenade must prove an "imminent threat of irreparable harm for which there is no adequate remedy at law." *Punzo v. Jackson County*, 861 So.2d 340, 347 (Miss. 2003). This Court made clear in *Punzo* this standard is difficult to meet—" Nothing … ought to be better understood, than … a mandatory injunction should never issue unless the right to it is so clearly and certainly shown that there can be no reasonable doubt of its propriety, no probability that the defendant can make any valid objection to it and no possibility that its justice can be controverted." *Id.* at 347-48. Promenade's property is **not** under any **imminent** threat. Promenade sued JEA in April 2010. It made no effort to pursue injunctive relief for more than six years, and then only after the trial court was considering JEA's motion to conform its earlier ruling with *Hyatt II*. (J.R.E.10). The last OPF42 was incorporated into the soil in 2009. And, Promenade last reported to JEA any necessary remediation as a result of subsurface movement nearly a decade ago, which is consistent with expert determinations that the soil expansion and swelling likely ceased in 2014 (P.R.E.00632). There is no imminent threat. As noted by the trial court, there is no Promenade contention that JEA is continuing to place ash at the shopping center. Promenade "does not seek injunctive relief to stop ongoing actions or to prevent future imminent actions by JEA such at a mandatory injunction might be proper." (J.R.E.11).

There is also no **irreparable harm**. Promenade sued and settled with EMJ, M. Hanna, Gallet, and LA Ash. Promenade claims that "stroking a check" is inadequate; yet, it has accepted

checks totaling millions from the parties actually involved in the construction. (J.R.E.79-80). It used some of this money to make repairs where the swelling soil caused problems with slabs, building walls, and parking areas. (J.R.E.241-42). But it has only spent a fraction on repairs or in settlements for two stores, which left a windfall of millions to Promenade. An "injury is 'irreparable' only if it cannot be undone through monetary remedies." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464, 472 (5th Cir. 1985). *Sec'y of State v. Gunn,* 75 So. 3d 1015, 1021 (Miss. 2011) ("In other words, if an adequate remedy at law existed, the harm would be 'reparable' rather than 'irreparable'"). Promenade has put a dollar figure on its damages, acknowledging that they are reparable. "Promenade Damage Claims" demonstrates as much. (J.R.E.11, 241-49). Promenade has calculated its damages, including for any purported environmental clean-up, for remedying with a check. As a result, the trial court correctly concluded Promenade cannot now claim irreparable harm and seek injunctive relief. (J.R.E.12).[36]

ii. Promenade failed to exhaust its administrative remedies through MDEQ.

Even if the trial court accepted Promenade's argument that JEA has created a solid waste dump that must be remediated, an injunction by the ***court*** is not an available remedy. The court correctly found that "were it to allow Promenade's request for injunctive relief, it must then require Promenade to exhaust its administrative remedies with MDEQ." (J.R.E.11). The trial court's order specifically cited the Solid Wastes Disposal Law of 1974, Miss. Code Ann. § 17-17-1 *et seq.* and *Georgia-Pacific Corp. v. Mooney*, 909 So. 2d 1081, 1091 (Miss. 2005):

> "To the extent that causes of action relate to the need for closure of a site or relate to the authority of MDEQ, a party must exhaust its administrative remedies prior to seeking relief from the courts." "The Mississippi legislature

[36] The trial court rejected Promenade's argument that application of a $500,000 cap to JEA creates an inadequate remedy at law. By comparison, in *Hyatt II*, the Supreme Court effectively reduced Hyatt's damages awarded for fraud and emotional distress from $86 million to $50,000. Moreover, the concept of seeking an injunction to force a Florida governmental entity to engage in a remediation operation in Mississippi highlights the significant legal and practical issues that arise in the absence of applying the principles of *Hyatt I* and *Hyatt II*.

> has delegated authority to MDEQ in regard to solid waste management." *Mooney*, 909 So.2d at 1090. MDEQ has the authority to enforce compliance and "may impose civil penalties, injunctive relief, remediation or cleanup."

(J.R.E.11 (quotations in original)).

MDEQ regulates solid waste. Miss. Code Ann. § 17-17-2. It has the power of penalties, injunction, and recovery of the cost of remedial action. Miss. Code Ann. § 17-17-29. Section 17-17-29(4) provides that any person creating a need for "remedial or clean up action involving solid waste" shall be liable for the cost and MDEQ may recover the cost of same in Circuit Court. The primary jurisdiction of MDEQ is made clear in *Mooney*. In *Mooney*, Georgia-Pacific was sued by plaintiffs claiming that Georgia-Pacific dumped waste material on their property. 909 So. 2d at 1082. The trial court(s) either would not hear or denied Georgia-Pacific's motion to dismiss for failure to exhaust administrative remedies. *Id.* In reversing, this Court relied upon *Chevron U.S.A., Inc. v. Smith,* 844 So. 2d 1145 (Miss. 2002) which held that MDEQ had authority over compliance related to solid waste and that any claims by plaintiffs that related to clean-up or remediation must be dismissed for failure to exhaust administrative remedies. *Mooney,* 909 So. 2d at 1082.

Finally, Promenade argues that an injunction is needed because of possible environmental regulatory actions. (Appeal Br. at 45-46). There are four problems with this argument. First, if future regulatory action is a concern, simply do what the law requires—exhaust the available administrative remedies. Second, using environmental concerns as justification for an injunction runs headlong into multiple representations Promenade made to the court that is was making **no** such claim and there were **no** environmental issues at this site (J.R.E.11, 227, 230-31, 234, 235). Third, Promenade certified to MDEQ and USACE that construction complied with the permits from those agencies. (J.R.E.149-54). Finally, Promenade and its partially-owned general contractor, EMJ, assured the project's insurers that the project was injured by a soil additive or soil stabilizing product, not by a waste which would have precluded coverage. (*See supra* at p. 10.

n. 12). Thus, these assurances were given to ***avoid*** administrative exhaustion, the denial of insurance coverage, and because ***no*** environmental issues exist.

There is no question that OPF42 interacted with soil and water at the site causing swelling that damaged some of the slabs and structures. These were structural performance issues, not environmental issues. Promenade has consistently made a construction defect tort claim to insurers and other courts, as well as representing to governmental authorities and the trial court below that it had no environmental claims. Promenade cannot not manufacture "environmental issues" to avoid comity and Full Faith and Credit.

CONCLUSION

For the reasons set forth above, the dismissal of this action due to a lack of subject matter jurisdiction under *Hyatt III* should be affirmed. Alternatively, the dismissal of this action based on the Full Faith and Credit Clause and comity principles should be affirmed. Further, only in the alternative, this Court should affirm the trial court's denial of amendments to the pleadings and Promenade's attempts to pursue injunctive relief, and further find that in the event of resolution of this action by trial, the MTCA damages caps are to be applied.

RESPECTFULLY SUBMITTED, this the 30th day of September, 2024.

JEA

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Certificate of Service

I do hereby certify that a true and correct copy of the above and foregoing Brief of Appellee JEA was served via the Court's MEC System and/or U.S. Mail, postage prepaid to the following:

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This the 30th day of September, 2024.

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