

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2017-IA-00167-SCT
(CONSOLIDATED WITH 2023-CA-1273)**

THE PROMENADE D'IBERVILLE, LLC

APPELLANT

v.

JEA

APPELLEE

**On Appeal from the Circuit Court of
Harrison County, Mississippi, Second Judicial District
Civil Action No.: A-2402-10-41**

**BRIEF OF APPELLANT
THE PROMENADE D'IBERVILLE, LLC**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

PARTIES

1. Plaintiff-Appellant The Promenade D'Iberville, LLC.
2. Defendant-Appellee JEA (f/k/a the Jacksonville Electric Authority).

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TRIAL COURT JUDGE

8. Honorable Christopher Schmidt, Circuit Judge for the Circuit Court of Harrison County, Second Judicial District.

SO CERTIFIED, this the 27th day of June, 2024.

/s/ Kyle S. Moran
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested, as the decision of the Harrison Circuit Court concludes that the courts of Mississippi are required by the Constitution of the United States, as construed by the Supreme Court of the United States in *Hyatt I*, *Hyatt II* and *Hyatt III*, to refrain from exercising subject matter jurisdiction over JEA. In so doing, the Harrison Circuit Court has construed the scope and application of those decisions in a manner that results in overruling well-settled principles of Mississippi law relating to sovereign immunity, governmental immunity and comity. The constitutional issues are complex. In the view of the undersigned, oral argument would benefit the parties and the justices of this Court.

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STATEMENT OF THE ISSUES

Dismissal of the claims of Plaintiff-Appellant The Promenade D'Iberville, LLC, (“Promenade”) against Defendant-Appellee JEA (“JEA”) on the grounds that the Court has no jurisdiction over JEA pursuant to *Hyatt III* improperly prevents Promenade from pursuing an adequate remedy for the damage done to its land in this state by JEA, a foreign community-owned utility.

Accordingly, Promenade presents the following issues for review:

I. The Circuit Court erred by applying the U.S. Supreme Court’s decisions in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (April 19, 2016) (“*Hyatt II*”) and *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485 (2019) (“*Hyatt III*”) in a manner beyond the holdings of those respective decisions with the effect of implicitly or effectively overruling binding precedents of the Mississippi Supreme Court. Final judgment of dismissal was improper.

2. Neither the Full Faith and Credit Clause nor comity requires Mississippi Courts to dismiss claims against a foreign municipal utility or to afford a foreign municipal utility the damages caps provided to Mississippi government entities by the Mississippi Tort Claims Act (“MTCA”) when:

- a. The foreign municipal utility failed to timely pursue its alleged immunity defense while participating in the litigation;
- b. Mississippi has a legislated policy towards municipal utilities acting beyond their state’s borders to consent to the laws of the affected forum state; and
- c. Sufficient Mississippi policy interests run counter to the application of the caps, including but not limited to Mississippi’s interests in protecting its citizens’ property and the State’s territorial sovereignty from the unapproved importation and deposition of harmful materials holding a negative value.

3. Even if, purely *arguendo*, the decisions of the Supreme Court of the United States in *Hyatt II* and *Hyatt III* were pertinent to the exercise of jurisdiction over JEA by the courts of

Mississippi, genuine issues of material fact exist regarding the adequacy of Promenade’s remedies at law such that Promenade should have been allowed to pursue its claims for injunctive relief on the merits, inasmuch as:

- a. The injunctive relief sought is for a physical invasion to land by deleterious agents;
- b. The damages at law are artificially restricted to less than 1% of the damages claimed by the unprecedented application of the MTCA’s damages caps to a foreign utility; and
- c. An injunction is the only remedy to prevent Promenade from inequitably bearing the risk involved with the excavation, handling, and disposal of the offending waste.

STATEMENT OF ASSIGNMENT

The Supreme Court of Mississippi should retain The Promenade D’Iberville, LLC’s (“Promenade”) appeal of the trial court’s dismissal of the Promenade’s claims against JEA. This appeal concerns a conclusion by a trial court that decisions of the Supreme Court of the United States require the courts of Mississippi to overturn well-established principles of Mississippi law. The particular issues regarding the application of *Hyatt II* and *Hyatt III* have not been previously considered by any appellate court in this state, and have only rarely been considered by courts in other states. Furthermore, the decision of the trial court – if it is allowed to stand – has the effect of establishing a rule of law that impinges upon the sovereignty of Mississippi and that is in derogation of the rights of its citizens. Accordingly, this appeal presents certain questions of first impression concerning the application of Mississippi’s traditional rules of sovereign immunity, governmental immunity and comity subsequent to the U.S. Supreme Court rulings in *Hyatt II* and *Hyatt III*. This appeal should therefore be retained under M.R.A.P. 16(d)(1)

STATEMENT OF THE CASE

Promenade is the developer and owner of a shopping center in D’Iberville, Mississippi. With the exception of a few parcel sales to certain retail anchors, Promenade owns and operates

the balance of the original 73 acre site, on which it leases space to over 50 commercial tenants.

JEA is a community-owned electric utility, which at times pertinent to this case¹ generated 500,000 annual tons of power plant byproduct waste (a.k.a. “bed ash materials”). JEA developed and funded a plan to remove and market its power plant waste as a construction aggregate to Gulf Coast projects outside of the State of Florida. Approximately 32,000 tons of JEA’s power plant waste that was shipped to Mississippi by JEA is under Promenade’s shopping center in D’Iberville, Mississippi.

In March 2010, Promenade filed suit against four defendants and several John Does. On April 8, 2010 Promenade filed its First Amended Complaint substituting JEA for “John Doe 1.” Promenade alleged that JEA’s waste byproducts contain deleterious characteristics, which have damaged Promenade’s property, and sought both injunctive relief and tens of millions of dollars in damages.²

More than two years after JEA was served, JEA filed for the first time a “Motion to Dismiss for Lack of Subject Matter Jurisdiction” based on an alleged sovereign immunity defense.³ Although JEA styled its immunity defense as a jurisdictional Motion to Dismiss, JEA did not pursue the defense as such, and engaged in extensive motion practice and discovery across the next two years. JEA did not bring its Motion for a hearing until more than two years after it was filed, months after the close of discovery and more than four years into the case.⁴ Following a

¹ The case relates to conduct of JEA prior to the year 2010. The case itself has been pending for well over a decade, first at the trial court level, then as a prior appeal to this Court, then as remanded to the trial court level for a ruling on the jurisdictional issues in light of the intervening *Hyatt III* decision, and now once again back in this Court.

² See R. 4431-5, Amendment to Complaint. In a subsequent amendment, Promenade specified that JEA’s waste effected a physical invasion of Promenade’s land in Mississippi. “R.” denotes references to the Record, “T.” denotes references to the Transcript.

³ R. 898-904, JEA Motion to Dismiss. (October 1, 2012)

⁴ The docket for Case No. A-2402-10-41 (R. 5-152) shows 522 intervening entries before JEA brought its motion for a hearing.

hearing, the Special Master issued a Report and Recommendation (“Rpt. & Rec.”) on May 28, 2015 rejecting JEA’s alleged immunity.⁵ Relying on this Court’s decision in *Church v. Massey*, 697 So. 2d 407 (Miss. 1997), the Special Master also found: “...*JEA is not an employee or political subdivision nor enjoys any other status that would provide the protection afforded under the Mississippi Tort Claims Act.*”⁶ JEA did not file an objection to the Rpt. & Rec. pursuant to Rule 53.

Eleven weeks after the Special Master’s Rpt. & Rec., Promenade moved *ore tenus* for its adoption via a proposed order that was expressly unopposed by JEA and adopted by the Court in August 2015.⁷ The parties proceeded towards the trial scheduled for October 3, 2016.⁸

Nearly a year after adoption of the Special Master’s Rpt. & Rec. by the Court, JEA filed a Motion to Reconsider the August 2015 Order based on the U.S. Supreme Court’s April 19, 2016 decision in *Hyatt II*.⁹ In briefing and at the hearing on the matter, JEA characterized the *Hyatt II* decision as an “extraordinary” one that caused fundamental change in the law. The Circuit Court indicated it was extending *Hyatt II* to provide certain MTCA immunity to JEA as if JEA were a Mississippi government entity, and two weeks later Promenade filed a Motion for Leave to Amend.¹⁰ The proposed amendment sought to add a claim for inverse condemnation pursuant to Article 3, § 17 of the Mississippi Constitution and 42 U.S.C. § 1983, given the Circuit Court’s newly stated decision to reverse its own prior ruling on the basis of *Hyatt II*. If JEA was now to be

⁵ R. 4660-3, Special Master Report and Recommendation.

⁶ *Id.*, at R. 4663 (emphasis added).

⁷ R. 4982; *see also* T. 956: 23-6, Hearing Transcript (Aug. 13, 2015) (“THE COURT: And Master Simpson entered a recommendation on a motion to dismiss for lack of subject matter jurisdiction, I think, on May 28th. *There’s been no objection.*”) (emphasis added). A proposed order presented to the Court was signed the following day. (R. 4982).

⁸ R. 4992, Order setting trial.

⁹ R. 5120-34, JEA Motion to Reconsider.

¹⁰ R. 5684-98, Promenade Motion for Leave to Amend.

treated like a Mississippi government entity, the proposed inverse condemnation claim restated Promenade's preexisting physical invasion claim as against a government actor.¹¹

Although the Circuit Court's subsequent Omnibus Order explicitly extended *Hyatt II* to JEA, the Circuit Court denied Promenade's corresponding request to amend and assigned no reason for such denial.

Earlier in the case, JEA had moved for and had been denied summary judgment on all of Promenade's claims, including Promenade's claim for physical invasion.¹² Following the expiration of the summary judgment deadlines, and after JEA's Motion for Reconsideration based on *Hyatt II*, JEA moved for partial summary judgment on Promenade's claim for injunctive relief and for partial summary judgment to preclude the consideration of multiple occurrences under the MTCA.

In light of the *Hyatt II*-related motions, the Circuit Court canceled the trial that had been scheduled for October 3, 2016. The Circuit Court then issued its Omnibus Order, which included the following rulings:

- That under *Hyatt II*, the Full Faith and Credit Clause required the Circuit Court to afford JEA immunity to the extent Mississippi agencies are entitled to immunity under Mississippi law;¹³
- That Promenade may not amend its complaint to add a claim for inverse condemnation despite the new application of interstate sovereign immunity under the Full Faith and Credit Clause;¹⁴
- That JEA is entitled to partial summary judgment on Promenade's claim for injunctive relief; and
- That JEA is entitled to partial summary judgment on Promenade's claim for multiple occurrences under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-15.

¹¹ *Id.*

¹² See R. 4993-6, R. 5289, R. 5290-4, and R. 5821, Orders denying summary judgment to JEA.

¹³ R. 6406-19, Omnibus *Hyatt II* Order at 6409.

¹⁴ *Id.* at R. 6414.

Based on these rulings, Promenade's maximum recovery against JEA was inequitably capped by the Circuit Court at \$500,000 – a figure dwarfed by the amount expended by Promenade in pursuing its claims against JEA for several years, let alone the millions in damages already done to Promenade's property and the ongoing adverse consequences of the JEA material remaining at the Promenade site.

On February 8, 2017, Promenade petitioned this Court for interlocutory review of the issues presented *supra*. After briefing and oral argument, but before a substantive decision was rendered by this Court, the Supreme Court of the United States rendered its decision in *Hyatt III*. This Court remanded the case back to the Harrison Circuit Court to be conducted in light of *Hyatt III*.

JEA submitted a Re-Urged Motion to Dismiss, raising arguments based on JEA's interpretation of *Hyatt III*. After briefing and a hearing, the Harrison Circuit Court rendered a decision styled Order and Reasons on October 11, 2023 (Doc. 900) and dismissed the case with prejudice. Promenade timely appealed.

STATEMENT OF THE FACTS

The factual background of this case has been described at length on pages 6 through 21 of the Statement of Facts included in the Brief of Appellant filed by Promenade on December 11, 2017, 2017-IA-00167. In order to avoid mere repetition, Promenade hereby incorporates that Statement of Facts by reference as if fully restated.

Subsequent to that prior filing, JEA litigated the issue of whether JEA is part of the city government in a First District Florida Court of Appeals case styled *City of Jacksonville and JEA v. Tamere Boman*, Case No. 1D20-0658, Lower Tribunal No. 16-2017-CA-007355. In briefing that case, JEA stated as follows:

By contending that the City is vicariously liable for JEA, Boman is essentially asking this Court to treat JEA like a typical municipal utility owned and

operated by a city. See, e.g., § 180.06, Fla. Stat. (authorizing municipalities to provide water, sewage disposal, and gas); §§ 111-112, Charter of the City of Tallahassee (authorizing the city commission to supply residents and businesses with light, heat, power, and “good and wholesome water”); § 10-1-1, Pensacola Code of Ordinances (granting city right to acquire gas and electric light and power systems). **Unlike a typical municipal utility, JEA is an independent body politic and corporate** created by an act of the Florida Legislature. Ch. 67-1569, Laws of Fla.; § 18.07(a) and (d), Charter of the City of Jacksonville. **As such, it is an agency independent of the City.**

Reply Brief of JEA in *Tamere Boman*, dated June 29, 2020, at p.6 (emphasis added).

SUMMARY OF THE ARGUMENT

The sovereignty implications that spurred the Full Faith and Credit analysis in *Hyatt II* and the pre-ratification sovereignty analysis in *Hyatt III* are not at issue in this case because JEA is not an arm of the state of Florida. Because JEA is not a “state agency,” treating JEA like any other tortfeasor under this Court’s precedent in *Church v. Massey* does not constitute a policy of hostility to the State of Florida; rather, it supports Mississippi’s constitutional and jurisdictional interests in protecting its territorial sovereignty and the property interests of its citizenry from JEA’s hostile and reckless actions directed across state lines.

The analysis of state sovereign immunity in *Hyatt III* applies to the 50 states, not to lesser governmental and quasi-governmental entities that exist independent from the state and without reliance on the state’s fisc. The trial court’s extension of *Hyatt III* to apply to JEA ignores the established United States Supreme Court precedent of *Alden v. Maine*, which established state sovereign immunity prohibits private suits against States ***but not against lesser entities.***¹⁵

In regard to the trial court’s alternative basis for dismissal predicated on Full Faith and Credit and comity, the analysis is both inconsistent with the applicable Mississippi precedent articulating Mississippi’s public policy with regard to the liability of out-of-state entities and an

¹⁵ *Alden*, 527 U.S. at 756, 119 S. Ct. at 2267.

improper adverse determination of genuine issues of material fact about JEA's knowledge and activity in the procedural context of a motion to dismiss. As recognized by the U.S. Supreme Court in *Hyatt II*, the Full Faith and Credit Clause is not without its limits.¹⁶ Neither the Framers, nor the presiding Justices in *Hyatt II*, intended the Clause to operate as an escape hatch for a foreign municipal utility engaged in rogue interstate operations that effect a taking of private property beyond the borders of its home state's legislated immunities. This is especially so when, as here, Mississippi has evinced a clear policy of holding its own utilities accountable for any tortious conduct committed outside of Mississippi to the full extent of the forum state's law, and of holding foreign utilities accountable for damage inflicted to property within Mississippi.¹⁷

The Circuit Court's extension of the *Hyatt II* ruling to supply damages caps to an out-of-state municipal utility reversed its prior unopposed adoption of the Special Master's ruling denying JEA immunity, and runs counter to this Court's ruling in *Church v. Massey*.¹⁸ By doing so, the Circuit Court failed to appreciate the other constitutional protections conferred to Promenade under Article 3, Sec. 17 of the Mississippi Constitution and the Fifth Amendment to the U.S. Constitution. Promenade's claim for physical invasion to land, on which Promenade already survived summary judgment, is equivalent to a claim for inverse condemnation. Given the change in the law under the Circuit Court's extension of *Hyatt II*, Promenade should have been allowed to amend its complaint to restate its claim for physical invasion as one for inverse condemnation so that its constitutional right to just compensation for the taking of its land is preserved.¹⁹ To hold otherwise would elevate the legislated damages caps over the due process principles preserved in

¹⁶ 136 S.Ct. at pp. 1281, 1283.

¹⁷ See Miss Code Ann. § 77-5-769; see also The State of Mississippi's Response in Opposition to Defendants' Motions for Judgment on the Pleadings (Apr. 6, 2016) filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.) (available at <http://www.ca6.uscourts.gov/special-master>).

¹⁸ 697 So. 2d 407 (Miss. 1997).

¹⁹ *Crum v. City of Corinth*, 183 So.3d 847, 851 (Miss. 2016).

Mississippi's Constitution.

Moreover, many of the same facts and circumstances that demonstrate that this case meets the exception to the application of the Full Faith and Credit Clause under *Hyatt II*, also show that the partial summary judgments on Promenade's claims for injunctive relief and multiple occurrences were unwarranted and premature. Mississippi case law is replete with decisions granting injunctive relief in circumstances such as those faced by Promenade, and in this case there are at least issues of material fact such that a determination on the appropriateness of requested injunctive relief should be reserved for the fact-finder following the conclusion of the evidence at trial.²⁰ Likewise, under *Mississippi Department of Human Services v. S.W.*, there is at least a genuine issue of material fact with regard to the number of times JEA breached its nondiscretionary ministerial duties to properly dispose of its waste.²¹

STANDARD OF REVIEW

When the issue presented is one of law not fact, the standard of review is de novo review.²² “‘Immunity is a question of law,’ and this Court conducts a de novo review of the application of the MTCA.”²³ The Supreme Court also reviews whether to grant leave to amend the complaint

²⁰ See, e.g., *Punzo v. Jackson County*, 861 So.2d 340 (Miss. 2003) (remanding for consideration of whether the facts presented at trial entitled the plaintiff to injunctive relief under the appropriate standard), *Gulf Park Water Co. v. First Ocean Springs Dev. Co.*, 530 So.2d 1325, 1334 (Miss. 1988) (noting that “[r]ights in real property cannot ordinarily be taken from the owner at valuation, except under the power of eminent domain[.]” and holding “land is per se property of peculiar value, and will be protected by injunction without reference to its quality, use or value.”), and *Phillips v. Davis Timber Co., Inc.*, 468 So.2d 72 (Miss. 1985) (finding injunctive relief appropriate for nuisance).

²¹ 111 So.3d 630 (Miss. Ct. App. 2012) (hereafter “S.W.”); see also *Donald v. AMOCO Prod. Co.*, 735 So.2d 161, 175 (Miss. 1999).

²² *J.E.W. v. T.G.S.*, 935 So.2d 954 (Miss. 2006), *Tel-Com Management, Inc. v. Waveland Resort Inns, Inc.*, 782 So.2d 149, 151 (Miss.2001), *Ellis v. Anderson Tully Co.*, 727 So.2d 716, 718 (Miss.1998).

²³ *City of Jackson v. Harris*, 44 So.3d 927, 931, 2010 Miss. LEXIS 393, *10 (quoting in part from *Miss. Dep't of Pub. Safety v. Durn*, 861 So.2d 990, 994 (Miss. 2003)). JEA styled its original motion as one to dismiss for lack of subject matter jurisdiction. While the issue is not actually based on subject matter jurisdiction, subject matter jurisdiction is also a question of law which the Court reviews *de novo*. *Trustmark National Bank v. Johnson*, 865 So.2d 1148 (Miss. 2004), *Briggs & Stratton Corp. v. Smith*, 854 So.2d 1045 (Miss.2003); *Rogers v. Eaves*, 812 So.2d 208 (Miss. 2002).

under an abuse of discretion standard.²⁴ It is well-settled that appellate review of the trial court’s grant or denial of a motion for summary judgment requires the application of de novo review.²⁵

ARGUMENT

JEA’s Motion to Dismiss granted by the Circuit Court is premised on an interpretive leap unsupported by the U.S. Supreme Court’s decision in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019) (“*Hyatt III*”), and contrary to the constitutional case law on which the *Hyatt III* decision rests. JEA jumps to its unfounded conclusion in the first paragraph of its introduction to its Re-Urged Motion, contending: “*Hyatt III* held that ‘States retain their sovereign immunity from private suits brought in the courts of other States.’ ... *Therefore*, the courts of a state may no longer exercise subject matter jurisdiction over *the governmental entities of another state* in a private tort action such as this one.”²⁶

The flaws in JEA’s logic are myriad. Foremost, JEA (fka “Jacksonville Electric Authority”) is neither “the State,” nor is it a “governmental entit[y] of another state.” It is a “community-owned electric utility located in Jacksonville, Florida.”²⁷ Accordingly, the concerns about respecting the relationship between “co-equal” sovereigns addressed by *Hyatt III* do not exist. Indeed, were this Court to accept JEA’s argument (as the Circuit Court did), this Court would be adopting the position that the judicial branch of the government of the sovereign State of Mississippi is “perfect[ly] equa[l]” to the operator of a coal-fired power plant pursuing commercial enterprises.²⁸ Embracing such a false equivalency would implicitly abdicate

²⁴ *Webb v. Braswell*, 930 So.2d 387 (Miss. 2006).

²⁵ *Adams v. Graceland Care Center of Oxford, LLC*, 208 So.3d 575 (Miss. 2017), *Copiah Cty. v. Oliver*, 51 So.3d 205 (Miss. 2011) (citing *Monsanto v. Hall*, 912 So.2d 134 (Miss. 2005)).

²⁶ JEA Motion to Dismiss (Oct. 11, 2019), at p. 1 (emphasis added).

²⁷ See Omnibus Order entered 1/17/17 (Doc # 828).

²⁸ See *Hyatt III*, 139 S.Ct. 1485 (2019) (quoting *Nathan v. Virginia*, 1 Dall. 77, 78, 1 L.Ed. 44 (C. P. Phila. Cty. 1781) (no superiority between the States “because the States were ‘perfect[ly] equa[l]’”).

Mississippi's inherent sovereignty, and would be a “humiliating and degrading” offense to Mississippi not unlike that which the Supreme Court sought to end by overruling *Nevada v. Hall*.

Inherent sovereignty is at the center of the Supreme Court’s decision in *Hyatt III*. The Court’s holding in *Hyatt III* is “that States *retain* their sovereign immunity from private suits brought in the courts of other States.”²⁹ The word “retain” is significant in the *Hyatt III* holding, because it refers to a sovereign immunity (i) that each State inherently had before it joined with the other States to form the United States and (ii) that each State retained after it ratified the Constitution.³⁰ Indeed, the concluding paragraph of the majority opinion in *Hyatt III* states that *Nevada v. Hall* is overruled because it “is irreconcilable with our constitutional structure and with the historical evidence showing a widespread *prer ratification understanding* that States *retained* immunity from private suits, both in their own courts and in other courts.”³¹

The majority opinion in *Hyatt III* also emphasizes that each of the fifty States were already protected from suits in federal court.³² *Hyatt III* explains that the constitutional basis for the sovereign immunity of the States in federal court is not the adoption of the Eleventh Amendment.³³ No immunity springs from the Eleventh Amendment; rather, it confirms the States’ pre-existing immunity. As the *Hyatt III* Court described it, “the ‘natural inference’ from its speedy adoption is that ‘the Constitution was understood, in light of its history and structure, to preserve the State’s

²⁹ *Hyatt III*, 139 S.Ct. at 1492 (emphasis added).

³⁰ The analysis in *Hyatt III* begins with the statement: “*Nevada v. Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.” *Hyatt III*, 139 S.Ct. at 1492. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“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”) (quoted with approval in *Hyatt III*, 139 S.Ct. at 1493) (emphasis added).

³¹ *Hyatt III*, 139 S.Ct. at 1499.

³² *Id.* At 1496.

³³ The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

traditional immunity from private suits.”³⁴ “The ‘sovereign immunity of the States,’ [the Supreme Court has] said, ‘neither derives from, nor is limited by, the terms of the Eleventh Amendment.’”³⁵ *Hyatt III* stresses the Eleventh Amendment simply “confirmed” that the Constitution was not meant to raise up suits against the State that were “anomalous and unheard of when the Constitution was adopted.”³⁶

By overruling *Nevada v. Hall*, the majority opinion in *Hyatt III* harmonizes the result when a claim is brought against any of the 50 sovereign States in the courts of another State with the result when a claim is brought against any of the 50 sovereign States in federal court. In light of *Hyatt III*, it is now explicitly recognized that each of the 50 States will generally have sovereign immunity in both state courts and federal courts, subject to each State’s ability to waive that immunity. More importantly, for purposes of analyzing JEA’s claims of immunity here, the majority opinion in *Hyatt III* has clarified that the reason why the States enjoy that immunity in both places is because they – as sovereign states – have an inherent preratification sovereignty that they have each retained when they joined the Union. In short, because the Eleventh Amendment simply confirms a sovereignty that was already there, the immunity that a State government can now invoke in the courts of another State in the wake of *Hyatt III* is **the same inherent preratification sovereign immunity** that the State could already invoke if it had been sued in federal court.

JEA’s Motion, granted by the Circuit Court, blew past the *Hyatt III* majority opinion’s explanation of the inherent preratification sovereignty of the 50 States, perhaps in the hope that this Court will not recognize the actual implications of *Hyatt III* in this context. *Hyatt III* only

³⁴ *Hyatt III*, 139 S.Ct. at 1496 (emphasis added).

³⁵ *Id.* (quoting *Alden v. Maine*, 527 U.S. at 713).

³⁶ *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

applies to sovereign States. After *Hyatt III*, the viability of JEA’s claim of sovereign immunity in the Courts of Mississippi therefore depends – at the outset – on whether JEA is one of the 50 States that have the inherent preratification immunity of sovereigns. Obviously, there is a State of Florida, but there is no State of JEA. Therefore, JEA – as JEA – has no inherent preratification sovereign immunity within the constitutional framework explained in *Hyatt III*.

That leaves the question: does JEA properly assert inherent preratification sovereign immunity pursuant to *Hyatt III* by arguing that JEA is somehow part of the Florida state government? The answer to that question is “no” as well.

JEA is correct that the Eleventh Amendment does not apply in this case, but the underlying question and answer are the same whether it is asked in the context of an Eleventh Amendment analysis in federal court (as it has been before *Hyatt III*) or whether it is asked in the context of determining if JEA can invoke inherent preratification sovereignty (now that *Hyatt III* has found those principles to be applicable in the courts of other states as well as in federal court). The same inherent preratification sovereignty analysis applies in both places. Moreover, in light of prior JEA cases that arose in the federal court context, the Mississippi courts do not have to start from scratch in that analysis. As more fully discussed below, JEA (like municipalities and other similarly situated low-level political subdivisions) has always been subject to the jurisdiction of federal courts. Therefore, while the Eleventh Amendment does not apply here, the fact that JEA is subject to suit in federal court by private citizens establishes that JEA has no *inherent preratification sovereign immunity* that would exclude claims against JEA from the subject matter jurisdiction of a Mississippi court.

JEA is not a sovereign State, so *Hyatt III* is not a bar to this Court exercising subject matter jurisdiction here. What is left to decide after completing the *Hyatt III* analysis therefore comes

down to a simple conflicts of laws issue. The Mississippi Supreme Court’s decision in *Church v. Massey* – which does not rely on *Nevada v. Hall* – still stands. Mississippi law governs this case. Applying the controlling Mississippi precedent, *Church v. Massey*, this Circuit Court previously rejected JEA’s earlier attempts to assert subject matter jurisdiction defenses based on comity.³⁷ That answer remained the same when JEA “re-urged” its motion: JEA (because it is not a sovereign State) “enjoys no greater status under [Mississippi] tort law than any other similarly situated tort defendant,” and Promenade’s claims against JEA are within the subject matter jurisdiction of the Mississippi courts.³⁸ Accordingly, the Circuit Court should have denied JEA’s Motion to Dismiss and set the matter for trial.

I. HYATT III DOES NOT LIMIT MISSISSIPPI’S EXERCISE OF JURISDICTION OVER A NON-STATE ENTITY SUCH AS JEA.

The opinion of the Supreme Court of the United States in *Franchise Tax Board of California v. Hyatt (Hyatt III)*, addresses the sovereign immunity of each of the 50 states in the courts of another state. The sole question presented for review was stated at the outset of the majority opinion: “This case, now before us for the third time, requires us 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.”³⁹ Holding that the Constitution does not, the 5-4 majority narrowly overruled the

³⁷ “A foreign government entity enjoys no greater status under our tort law than any other similarly situated tort defendant.” *Church v. Massey*, 697 So. 2d 407, 410 (Miss. 1997). As more fully discussed below, Promenade acknowledges that, in theory, *Church v. Massey* could be limited by the principles stated in *Hyatt III* when the defendant is one of the other 49 sovereign States – but that is not the circumstance presented here.

³⁸ JEA’s Motion, with its misplaced reliance on *Hyatt III*, shifts its entire analysis to the pursuit of an “all or nothing” dismissal predicated on lack of subject matter jurisdiction. Moreover, there is significant doubt that *Hyatt II* has any continuing effect in light of *Hyatt III*. Promenade therefore restricts this response to JEA’s attempt to apply *Hyatt III* in this case. Nevertheless, if the Court at any point decides it is appropriate to revisit the *Hyatt II* factors, Promenade requests an opportunity to provide further briefing on whether the *Hyatt II* framework has any continuing viability in light of *Hyatt III*.

³⁹ *Hyatt III*, 139 S.Ct. at 1490 (capitalization in original).

Court’s earlier decision in *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182 (1979).⁴⁰ Thus, the *Hyatt III* opinion holds that – as a matter of Constitutional law – each of the States retains its sovereign immunity from private suit brought in courts of other States.

In so holding, the *Hyatt III* Court made no change to the long-standing principle that sovereign immunity is an inherent characteristic of a State. On the contrary, *Hyatt III* clarified any ambiguity which might have previously existed about the pre-1789, or preratification, origins of sovereign immunity. Pre-ratification, “there could be no superiority between the States, and thus no jurisdiction, because the States were perfectly equal and entirely independent.”⁴¹ As the majority opinion in *Hyatt III* explained, each of the states which joined together to form the United States of America had an intrinsic status as a sovereign, and the States retain that sovereignty despite joining the union:

After independence, the States considered themselves fully sovereign nations. As the Colonies proclaimed in 1776, they were “Free and Independent States” with “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” Declaration of Independence ¶4. Under international law, then, independence “entitled” the Colonies “to all the rights and powers of sovereign states.” *McIlvaine v. Coxe’s Lessee*, 8 U.S. 209, 4 Cranch 209, 212, 2 L. Ed. 598 (1808).⁴²

“In short, at the time of the founding, it was well settled that States were immune under both the common law and the law of nations. The Constitution’s use of the term ‘States’ reflects both of these kinds of traditional immunity. And the States retained these aspects of sovereignty, ‘except as altered by the plan of the Convention or certain constitutional Amendments.’”⁴³ But the establishment of Article III courts in the Constitution was not intended to infringe on that traditional immunity beyond express limited circumstances, and it was certainly not intended to

⁴⁰ *Id.*

⁴¹ *Id.* at 1494 (quoting *Nathan v. Virginia*, 1 Dall. 77, 78, 1 L.Ed. 44 (C. P. Phila. Cty. 1781) (internal quotation marks and brackets omitted).

⁴² *Hyatt III*, 139 S. Ct. 1485 (2019).

⁴³ *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636).

allow the federal judiciary to assert jurisdiction “over controversies between a State and Citizens of another State.”⁴⁴ When this intention was misinterpreted in *Chisolm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), “Congress and the States acted swiftly to remedy the Court’s blunder by drafting and ratifying the Eleventh Amendment.” Its adoption did not confer new immunity to the States; rather, it recognized and “preserve[d] the States’ traditional immunity from private suits.”⁴⁵ Likewise, *Hyatt III* does not confer any immunity; it simply corrects the *Nevada v. Hall* Court’s oversight of “the historical evidence that interstate sovereign immunity is preserved in the constitutional design[.]”⁴⁶ Specifically, the Constitution limits the ability “of one State to hale another into its courts without the latter’s consent.”⁴⁷

Accordingly, there are two key immunity concepts embedded in *Hyatt III*’s holding applicable to State court jurisdiction, each of which identically tracks the federal jurisprudence on the States’ immunity from federal jurisdiction: (1) whether the private action is against “the State,” and (2) if the action is against the State, whether the State consented to be sued.⁴⁸

The second step implies that this is not truly a matter of “subject matter jurisdiction” as JEA contends, because parties cannot confer subject matter jurisdiction by stipulation. It follows that, if a State can consent to the jurisdiction of another, its immunity from jurisdiction can also be waived.⁴⁹ Yet, the Court need not reach the issues of waiver or consent because Promenade’s

⁴⁴ *Id.* at 1495.

⁴⁵ *Id.* at 1496 (quoting from *Alden*, 527 U.S. at 723 - 724).

⁴⁶ *Id.* at 1496.

⁴⁷ *Id.* at 1497.

⁴⁸ *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. Fla. 1971) (identifying “a two-step test for the existence of an Eleventh Amendment immunity from suit in federal court: (1) whether the action is against the state, and (2) if the action is against the state, whether the state consented to be sued in the federal courts.”), *certiorari denied*, 93 S.Ct. 110, 409 U.S. 892, 34 L.Ed.2d 149.

⁴⁹ JEA waived its immunity by failing to object to the Special Master’s ruling on jurisdiction under Rule 53 and by participating in the litigation without advancing its jurisdictional defense (*see Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 547 (Miss. 2009) (quoting in part from *Grimes v. Warrington*, 982 So. 2d 365, 369 - 370 (Miss. 2008) and finding Mississippi entity waived MTCA jurisdictional immunity by failing to timely pursue it.).

action against JEA is plainly not one against “the State.” In other words, the State of Florida is neither the real party in interest, nor at risk of having to pay any judgment. This is evident from (a) JEA’s attempt to extend the State-centered language of *Hyatt III* to lower governmental entities, and (b) the fact that JEA’s immunity is neither inherent nor traditional, but instead a creature of recent state legislation. Moreover, the absence of JEA having inherent traditional sovereign immunity is confirmed by application of the test created by federal courts to determine whether a governmental entity is an “alter-ego” or “arm of the state.”

In apparent recognition of this, JEA concluded its Motion by again asking for the application of comity. The Circuit Court had already performed a comity analysis (*See Docs. 674 and 702*), and nothing in *Hyatt III* serves to extend or change that analysis (certainly not to entities that are not State-arms). As before, *Church v. Massey* remains good law and still controls. *Massey* requires the application of Mississippi law and the treatment of JEA as any other tortfeasor.

Accordingly, the Circuit Court erred by granting JEA’s Re-Urged Motion to Dismiss for Lack of Subject Matter Jurisdiction based on *Hyatt III*.

A. *Hyatt III* applies only to the several states and JEA is not the 51st state; *Hyatt III* Does Not Apply to JEA.

The JEA Motion attempts to portray *Hyatt III* as somehow confirming that JEA has constitutionally mandated immunity under the United States Constitution. But *Hyatt III* does no such thing.

As set forth above, the Supreme Court of the United States predicates its *Hyatt III* analysis on the inherent sovereignty of each of the several States before the ratification of the U.S. Constitution. *Hyatt III* stands for the proposition that the several States, as co-equal sovereigns, each had to limit part of its inherent preratification sovereignty in order to join the constitutional

framework of the Union.⁵⁰ JEA accurately quotes the following, but ignores the plain meaning of the emphasized words:

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.” ... 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.

JEA Motion, at p. 6 (quoting *Hyatt III*, 139 S. Ct. at 1497) (emphasis added).

Each of the 50 States therefore starts from the premise that it has retained its preratification sovereignty, except to the extent that each such State has voluntarily given up or limited its inherent preratification sovereignty. Basing its analysis explicitly on that inherent preratification sovereignty, the majority opinion in *Hyatt III* concluded that the “Constitution implicitly strips States of any power they once had to refuse each other’s sovereign immunity.” See JEA Motion, at p. 6 (quoting *Hyatt III*, 139 S. Ct. at 1498) (emphasis added).

JEA is not the 51st state. JEA has no inherent preratification sovereign immunity that its “sister States” must respect pursuant to *Hyatt III*. Therefore, *Hyatt III* does nothing to support JEA’s claims of sovereign immunity. *Hyatt III* does not apply to JEA because JEA is not a State, nor “the State.”

The import of *Hyatt III* is that the Constitution does not permit a State to be sued by a private party in the courts of a different State, with an exception made if the defendant State consents. *Hyatt III* makes no mention whatsoever of any immunity which may be claimed by counties, cities, and other local authorities, rather than States. There is good reason for that: the

⁵⁰ *Hyatt III* determined that *Nevada v. Hall*, which permitted States to sue each other subject only to the limitation of voluntary comity, “is irreconcilable with our constitutional structure” and “the preratification understanding that the States retained immunity from private suits, both in their own courts and in other courts.” JEA Motion, at p. 6 (quoting *Hyatt III*, 139 S. Ct. at 1499).

immunity enjoyed by counties, cities, and other local authorities is a governmental immunity. The origin of whatever governmental immunity a county, city, or other local authority may enjoy is legislative, rather than a product of the inherent sovereignty of the State itself.

The Court in *Hyatt III* noted that the *Hall* Court had acknowledged “that ours is not a union of 50 wholly independent sovereigns.” *Hyatt III*, 139 S. Ct. 1485, 1492 (2019) (quoting *Nevada v. Hall*, 440 U.S. 410, 425, 99 S. Ct. 1182, 1190 (1979)). The *Hyatt III* Court continued, “*Hall* inferred from the lack of an express sovereign immunity granted to the States and from the Tenth Amendment that the States retained the power in their own courts to deny immunity to other States. *Ibid.*” *Id.* (quoting *Hall*, 440 U.S. at 425, 99 S. Ct. at 1190).

Justice Thomas wrote the majority opinion in *Hyatt III* as well as the majority opinion in *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 126 S. Ct. 1689 (2006), in which the United States Supreme Court also emphasized the source and limits of the preratification sovereignty of the States themselves:

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”).

Id. at 193 (emphasis added). Thus, under Justice Thomas’s own reasoning, which the High Court unanimously adopted, only if JEA is the State of Florida or an arm of the State does it enjoy immunity from suit brought by Promenade.

Hyatt III, like *Northern Ins. Co.* and *Nevada v. Hall*, addresses the sovereign immunity of each of the 50 states that is preserved by the Constitutional framework of the United States. But JEA is not a State. JEA’s claimed governmental immunity originates in Florida Statute § 768.28,

not in the Constitutional structure of the United States upon which the State of Florida itself could claim sovereign immunity from suits in the Courts of Mississippi. Unlike the Franchise Tax Board of *California* (a state with inherent sovereign immunity), the Defendant here is the electric authority of *Jacksonville* (a city, and itself a creature of statute).

Hyatt III has nothing to do with the immunity of counties, cities, and other local authorities that do not have the inherent preratification sovereignty of a State. Inasmuch as JEA does not even claim to be a part of the state government of Florida, *Hyatt III* has no impact on the Court's subject matter jurisdiction in this case at all.

There are also ample authorities applying Mississippi law that support the necessity of drawing a distinction between the State itself and other governmental entities. One clear example is Mississippi's own Tort Claims Act which distinguishes between the State and its political subdivisions. Additionally, the Fifth Circuit has distinguished between a Mississippi political subdivision and an "arm of the state." *Black v. N. Panola Sch. Dist.*, 461 F.3d 584 (5th Cir. 2006) (finding claims against the School District there would not be barred in state court).

In *Black*, the Fifth Circuit was examining whether the North Panola School District was an arm of the State of Mississippi and entitled to Eleventh Amendment immunity. *Id.* The Court there found the School District to be a political subdivision, but not an arm of the state, recognizing a second immunity limit beyond the State's giving consent to suit:

Under the Eleventh Amendment, states retain immunity from private suit in their own courts. *Alden v. Maine*, 527 U.S. 706, 754, 119 S. Ct. 2240, 2267, 144 L. Ed. 2d 636 (1999). However, the states' immunity is not unlimited; states cannot disregard the Constitution or valid federal law under the guise of the Eleventh Amendment. *Id.* at 754-55, 119 S. Ct. at 2266. **Thus, two constitutional principles limit state sovereign immunity. *Id.* First, states are immune from suit only in the absence of their consent. *Id.* at 755, 119 S. Ct. at 2267.** Where, on its own initiative, a state enacts a statute that consents to suit, it abandons sovereign immunity. *Id.* An exception exists: under § 5 of the Fourteenth Amendment, states cannot prohibit individuals from bringing private suits in state court under § 1983. *Id.* at 756, 119 S. Ct. at 2267 (internal citation omitted). When Congress enacts appropriate legislation, such as § 1983, pursuant to its enforcement power under § 5, it may properly

assert authority over the States that is otherwise unauthorized by the Constitution. *Id.* (internal citations omitted). ***Second, state sovereign immunity prohibits private suits against States but not against lesser entities.*** *Alden*, 527 U.S. at 756, 119 S. Ct. at 2267. Eleventh Amendment immunity does not extend to suits prosecuted against municipalities or other governmental entities that are not considered arms of the state. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 at 280, 97 S. Ct. 568, 50 L. Ed. 2d 471; *Lincoln County v. Luning*, 133 U.S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890)).

Black, 461 F.3d at 593-94 (emphasis added). Thus, beyond the limit of consent, courts also look to another limit on sovereign immunity -- that it applies only to the States, and not a lesser entity like JEA.

Although the *Hyatt III* Court did not discuss Eleventh Amendment case law extensively, it did not need to do so because those analyses are primarily directed to questions of federal jurisdiction. *Hyatt III*, 139 S. Ct. 1485 (2019). *Hyatt III* emphasizes that the source of the immunity confirmed by the Eleventh Amendment is each State's inherent sovereignty, rather than an immunity granted by the Eleventh Amendment itself.

The analysis in the *Black* case is more detailed. Black filed a second suit against the North Panola School District in federal court while she appealed the decision in her first state-court action against the School District. The School District moved for dismissal of Black's claims, or in the alternative, for summary judgment, on the basis that Black's federal action was barred by *res judicata*. Black later argued that her federal claims were barred from being brought in her prior state court action by the Mississippi Tort Claims Act, but the trial court there disagreed, dismissing Black's suit, and the Fifth Circuit affirmed. *Black*, 461 F.3d at 588. The Fifth Circuit held the claims against a lesser entity, which was not an arm of the state and did not enjoy a State's level of sovereign immunity, could be brought against it in state court. *Id.*

The Fifth Circuit employed a six-part test to determine if sovereign immunity would have barred Black's claims from being brought in state court against a lesser entity which is not an arm of the State:

“The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities.” *Alden*, 527 U.S. at 756, 119 S. Ct. at 2267. Historically, when states imposed duties on municipalities by charter or statute, they withdrew municipal immunity for actions arising out of the performance or nonperformance of those duties. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 67 n. 7, 109 S. Ct. 2304, 2310, 105 L. Ed. 2d 45 (internal citations omitted). Accordingly, lesser governmental entities such as counties and municipalities are not considered arms of the state for purposes of Eleventh Amendment immunity. *Id.*; *see also Alden*, 527 U.S. at 756-57, 119 S. Ct. at 2267-68 (internal citations omitted). Likewise, Mississippi courts routinely entertain § 1983 actions against municipalities and individual defendants acting under color of state law in accordance with substantive federal law. *Burrell*, 536 So. 2d at 864; *Starnes v. City of Vardaman*, 580 So. 2d 733, 737 (Miss. 1991); *Mallery v. Taylor*, 805 So. 2d 613, 620 (Miss. 2002) (citing *Howlett*, 496 U.S. at 375-76). To determine whether NPSD is an arm of the state entitled to Eleventh Amendment immunity, this court examines the district according to the six following factors: "(1) whether the state statutes and caselaw view the agency as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property." *United States ex. rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004) (citing *Hudson v. City of New Orleans*, 174 F.3d 677, 679 (5th Cir. 1999)); *Cozzo*, 279 F.3d at 281.

Black, 461 F.3d at 595-596. This six-part test, while employed in the *Black* case in the context of an Eleventh Amendment analysis, can serve as a helpful guide to this Court in this matter, as JEA is not a State.

The record makes clear that JEA is not a “state agency” and is not funded by the State of Florida. JEA operates independently not only from the State of Florida but also from the City of Jacksonville, and its actions directed at Promenade in Mississippi were beyond the oversight of the Florida authorities supposedly tasked with regulating JEA’s in-state conduct. Instead, JEA is a “community-owned electric utility located in Jacksonville, Florida.” JEA’s activities conducted outside the State of Florida are not subject to Florida’s state regulatory agencies, JEA’s “authority” is territorially limited to its comparatively small service area, and JEA does not call on the State of Florida to pay its judgments.

Recognizing the importance in protecting the public fisc, the Fifth Circuit in *Black* went on to point out:

In light of the fundamental purpose of the Eleventh Amendment--protecting state treasuries--the

source of the entity's funding is given the most weight. *Barron*, 381 F.3d at 440 (internal citation omitted); *Cozzo*, 279 F.3d at 281 (internal citation omitted). “To determine if the state treasury is being protected, this court looks first to whether the state would be liable for a judgment against the defendant and then to whether the state would be liable for the defendant's general debts and obligations.” *Barron*, 381 F.3d at 440 (internal citation and quotation marks omitted).

Black, 461 F.3d at 596 (noting there that the first factor was outweighed by federal law). Funding is clearly the most important factor in that analysis.

Examining the most important factor, the source of funding, the Fifth Circuit there held that “the local source of NPSD's operational funding, along with its required excess insurance for potential judgments, weighs in favor of finding that NPSD is not an arm of the state. *See Barron*, 381 F.3d at 440; *Minton [v. Bernard Parish Sch. Bd.]*, 803 F.2d 129, 131-32 (5th Cir. 1986)]” *Black*, 461 F.3d at 597. That is true in the present case, as well.

The Court in *Black* also noted that the “third and fourth factors—the degree of the entity’s local autonomy and the entity’s concern with local problems—weigh heavily towards finding that NPSD is not an arm of the state.” *Id.* This, too, is true in the case at bar.

The Fifth Circuit further determined that “the right to hold property and the entity's ability to sue and be sued in state court are the least significant factors. *Cozzo*, 279 F.3d at 281 (internal citation omitted),” noting that the right of the agency there to hold property was granted by statute, and that the Mississippi Tort Claims Act permitted the agency there to be sued. *Id.* at 597-98. “To the extent these factors may be considered, they weigh in favor of finding that NPSD is not an arm of the state.” *Id.* Again, this is descriptive of this very case and JEA as well.

After weighing all six factors, the *Black* Court held: “Upon consideration of these factors, we conclude that NPSD is not an arm of the state of Mississippi; therefore, it is not entitled to Eleventh Amendment immunity in federal or state court. *See Howlett*, 496 U.S. at 379-380, 110 S. Ct. at 2445 (internal citations omitted); *Minton*, 803 F.3d at 131-32.” *Id.* at 598. Most importantly, the Court there held: “[N]one of Black’s federal claims against NPSD would have been barred by

sovereign immunity in Mississippi state court.” *Id.* Likewise, the claims against JEA should not be barred by sovereign immunity here. JEA is not a State, nor is it even a part of the Florida state government.

Because JEA is not a State entitled to claim the inherent immunity of a Sovereign that each then-independent State had prior to 1789, *Hyatt III* does JEA no good. On the contrary, the effect of *Hyatt III* on this case is that JEA’s position is now weaker. The United States Supreme Court has clarified that the source of sovereign immunity (for both federal court Eleventh Amendment purposes and for state court purposes) is based on the pre-1789 or preratification status of the entity claiming immunity. When the scope and source of the underlying immunity are taken into account, *Hyatt III* in practical application is limited to claims that could result in a judgment against a state agency paid from a state treasury. Here, JEA is not inherently sovereign, nor an arm of the state of Florida, and the liabilities of JEA are not backed by the Florida Treasury. *Hyatt III* does not provide JEA any protection, and the Circuit Court therefore erred by granting JEA’s Motion.

B. JEA’s claimed immunity, if any, is not inherent “sovereign immunity” as the State, but rather a legislated immunity bestowed by the State.

JEA’s claim of immunity has largely relied on a Florida statute, Fla. Stat. Ann. § 768.28 (1977) (Supp. 2018), which by its own terms provides a limited “waiver of sovereign immunity” for certain types of entities. As “used in this act,” the phrase “state agencies or subdivisions” is defined to include “the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.” Fla. Stat. Ann. § 768.28(2). JEA of course enjoys leaning on this part of that statute. However, the statute also specifically goes on to provide: “The limitations of liability set forth in

this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.” Fla. Stat. Ann. § 768.28(2).

Thus, the Florida statute, when applied inside the State of Florida, is both (1) a waiver of *sovereign* immunity allowing recovery up to the monetary limits established by the statute for those who function as parts of Florida’s state government when they are acting in a manner in which they are otherwise protected by sovereign immunity (if the claimant complies with certain ancillary procedures) and (2) a grant of *legislated* immunity limiting recovery down to the monetary limits (and subject to the ancillary procedures) established by the statute for those governmental actors who lack the protection of sovereign immunity in relation to a given function.

This *grant* of immunity in a statute that is facially about *waiving* immunity has been noted by Florida’s own Attorney General, as well as Florida courts.⁵¹ Florida Statute § 768.28 enhances recoveries in some situations (when sovereign immunity completely barred recovery before the legislation went into effect) while limiting recoveries in others (when the one potentially liable is a local government without the protection of sovereign immunity).⁵² By virtue of the classifications created by the Florida Legislature, JEA can claim a *legislated* immunity pursuant to § 768.28 (implementing the aspect of the statute that pushes the potential for certain recoveries

⁵¹ See, e.g., Florida A.G. Advisory Legal Opinion 78-42 (“Although the hospital district may not have possessed sovereign immunity prior to the Legislature’s waiver of sovereign immunity in section 768.28, the statute now expressly provides that the limitations on liability contained therein are applicable to all state agencies and subdivisions as defined in s. 768.28(2), regardless of whether they possessed sovereign immunity prior to July 1, 1974.”); *Jetton v. JEA*, 399 So. 2d 396, 398 (Fla. Ct. App. 1981) (“While we may agree with appellant that municipal electrical operations were proprietary functions under the now discarded test for municipal sovereign immunity, we disagree with his assertion” that JEA lacks immunity).

⁵² That dual effect was explicitly identified in *Jetton v. JEA*: “Here the classifications were designed to enable enhanced recoveries in most cases while recognizing that requiring local governments to protect themselves against full liability could impose too heavy a financial burden on local taxpayers.” 399 So. 2d at 399.

against local governments down to a legislated limit), but JEA does not have an inherent preratification *sovereign* immunity (so the aspect of § 768.28 that waives sovereign immunity up to a legislated limit does not come into play).

Faced with the reality that the origin of any immunity applicable to JEA is only legislated (and thus outside the scope of the State’s inherent preratification sovereign immunity that *Hyatt III* finds to be constitutionally protected), JEA inaccurately asserted that the sovereign immunity at issue in *Hyatt III* is “100% Statutory” In boldface type, JEA declared that “**The sovereign immunity under consideration in *Hall* and the *Hyatt* line of cases was 100% statutory.**” (JEA Motion, at p. 16) (emphasis in original). That statement is beyond misleading: in fact, it turns the entire theme and analysis of *Hyatt III* on its head.

As discussed above, JEA does not have the inherent preratification sovereign immunity that the State of Mississippi and the State of Florida enjoy under *Hyatt III*. JEA’s arguments that JEA gains some benefit from *Hyatt III* are therefore groundless. Trapped in that corner, JEA dared to suggest that *Hyatt III* is not really about inherent preratification sovereign immunity (something that JEA lacks) and that *Hyatt III* is actually about immunity that is “100% statutory” (something JEA can claim under Florida law).

The trial court should have denied JEA’s Motion in recognition that 1) JEA is not functionally or *de jure* a part of the State of Florida reliant on the public fisc, and 2) any immunity which JEA has, even though self-denominated as “sovereign” immunity, is a bestowed immunity granted by the legislature to an entity that is not part of the state itself.

C. JEA is not an arm of the State when it is sued in federal court; logically it cannot be an arm of the state when it is sued in Harrison County.

The Eleventh Amendment confirmed the inherent sovereignty of the States, which

precluded their exposure to private suit in federal court.⁵³ Despite this bar in federal court, States could still be subject to private suits in the courts of their sister States under *Nevada v. Hall*. In *Hyatt III*, the U.S. Supreme Court overruled *Nevada v. Hall*, confirming that the same inherent sovereignty that precludes private suits against States in federal court also operates to bar suits against States in the courts of other States.

In essence, *Hyatt III* was to *Nevada v. Hall* what the Eleventh Amendment was to *Chisolm v. Georgia*.⁵⁴ Neither *Hyatt III*, nor the Eleventh Amendment, are the source of the States' immunity from private suits. Instead, each confirmed the existence of States' traditional preratification sovereignty, and the continuing viability of that sovereignty as a bar to private suits after ratification. After *Hyatt III*, States' immunity from private suits in federal courts and sister-State courts are identical in concept and practice.

Federal courts employ “a two-step test for the existence of an Eleventh Amendment immunity from suit in federal court: (1) whether the action is against the state, and (2) if the action is against the state, whether the state consented to be sued in the federal courts.”⁵⁵ The U.S. Supreme Court in *Hyatt III* echoed this same analysis by holding that the Constitution limits the ability “of one State to hale another into its courts without the latter’s consent.”⁵⁶

Of course, Mississippi courts do not yet have their own test for determining the first prong, whether a foreign entity constitutes “the State” for purposes of recognizing the sovereignty confirmed by *Hyatt III*. Fortunately, there is no need to reinvent the wheel because federal courts

⁵³ See *Hyatt III*, 139 S.Ct. at 1496. (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

⁵⁴ See *id.* (quoting in part from *Alden v. Maine*, 527 U.S. at 706, 722 (1999) and stating “the natural inference from [the Eleventh Amendment’s] speedy adoption is that “the Constitution was understood, in light of its history and structure, to preserve the States’ traditional immunity from private suits.”); see also *id.* at 1499 (“*Hall* failed to account for the historical understanding of state sovereign immunity[.]”).

⁵⁵ *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. Fla. 1971), certiorari denied 93 S.Ct. 110, 409 U.S. 892, 34 L.Ed.2d 149.

⁵⁶ *Id.* at 1497.

have developed their own test to determine whether an entity is an “arm of the State,” and have been applying it for decades to determine jurisdiction. It is a commonplace practice for Mississippi’s courts to look to federal precedent on matters of first impression, especially when the issue before it is similar to a federal doctrine.⁵⁷ This Court should do so here.

Federal courts consider several factors in determining whether an entity qualifies as an “arm of the State” for the purposes of establishing jurisdictional immunity. The Fifth Circuit reviews six factors “to determine whether [a government entity] is an arm of the state entitled to sovereign immunity or a local government body not entitled to sovereign immunity.”⁵⁸ Of these, most weight is typically given to the source of the entity’s funding, its autonomy, and whether a judgment would be paid from the public fisc.⁵⁹ Importantly, “the fact that a governmental entity has been given sovereign immunity in its own state courts by state law is not dispositive of federal jurisdiction.”⁶⁰ As noted before, none of the factors that favor “State-status” apply to JEA, which is not a Florida agency, operates independent of the City of Jacksonville, raises its own funds, collects its own revenues, pays its own judgments, and owns property in and conducts business in other States. In fact, JEA performs an exclusively proprietary function and operates as a commercial enterprise.

Similarly situated utilities are routinely found by federal courts not to have the inherent sovereign immunity recognized by the Eleventh Amendment, and thus subject to suit private suits:

⁵⁷ See, e.g., *Smothers v. State*, 741 So. 2d 205, 207 (Miss. 1999) (Considering Fifth Circuit’s treatment of similar issues on which no Mississippi case law exists); see also *Younge Mech., Inc. v. Max Foote Const. Co.*, 869 So. 2d 1079, 1082 (Miss. Ct. App. 2004) (finding federal decisions interpreting the Miller Act instructive and persuasive when interpreting Mississippi’s “Little Miller Act”).

⁵⁸ *Sissom v. Univ. of Texas High Sch.*, 927 F.3d 343, 347 (5th Cir. 2019) (relying on test developed in *Clark v. Tarrant Cty., Tex.*, 798 F.2d 736 (5th Cir. 1986)).

⁵⁹ See, e.g., *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47, 51 (1994).

⁶⁰ *Wright & Miller*, 13 Federal Practice and Proc. Juris. §3524.2 (3d ed.); see also *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999) (“the fact that a school district is entitled to state sovereign immunity does not determine the extent of Eleventh Amendment immunity.”).

- *Town of Smyrna, Tenn. v. Municipal Gas Authority of Georgia*, 723 F.3d 640, 650-651 (6th Cir. 2013) (District court did not err in concluding that the Municipal Gas Authority of Georgia was not an arm of the state. The Authority was responsible for its own expenses and judgments, selected its own leadership, and engages in a commercial activity rather than a state-mandated function.);
- *Bushek v. Washington Suburban Sanitary Com'n*, 155 F. Supp. 2d 478, 480 (D. Md. 2001) (Fourth Circuit considered three factors to determine suit against public water utility would not “offend the sovereign dignity” and therefore Eleventh Amendment does not apply to bar jurisdiction); and
- *Brooks v. Sulphur Springs Valley Elec. Co-op.*, 951 F.2d 1050 (9th Cir. 1991), *cert. denied*, 503 U.S. 938, 112 S. Ct. 1478 (1992) (Electrical cooperative is not entitled to immunity because it was independent nonprofit public service corporation rather than a state agency).

Likewise, even municipalities like the City of Jacksonville lack the traditional immunity necessary to avoid answering to private suits in federal courts.⁶¹

Here, there is no need even to apply an “arm of the State” factors analysis to JEA. JEA has never been afforded Eleventh Amendment immunity in federal courts, and JEA has repeatedly been subjected to their jurisdiction.⁶²

Hyatt III confirms that the sovereignty protecting States from suit in federal court is the same that bars private suits in the courts of sister States.⁶³ JEA has already failed the State-status test. The trial court erred by concluding that JEA is part of the government of the State of Florida when the question is asked in the context of a *Hyatt III* analysis, given that it is already firmly established that JEA is not an arm of the State of Florida.

⁶¹ See, e.g., *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1231 (11th Cir. 2000) (“The Eleventh Amendment grants immunity to the states from suits in federal court ...This immunity extends to state agencies, *but does not extend to independent entities, such as counties or municipalities.*”) (emphasis added); see also *Liberty Mut. Ins. Co. v. Fortress Homes & Cmtys. of Fla., LLC*, No. 2003-CA-00856 (Fla. Cir. Ct. Oct. 12, 2004) (“JEA is a governmental unit which primarily acts as an instrumentality or an agency of a municipality.”).

⁶² See, e.g., *Cont'l Cas. Co. v. City of Jacksonville, Jacksonville Electric Authority, et al.*, 384 Fed. Appx. 900 (11th Cir. 2010); *Jacksonville Port Authority v. W.G. Yates & Sons Construction Company, et al.*, Case no. 3:12-cv-01227 (MD Fla. 2015); and *Fluid Dynamics Holdings LLC v. Jacksonville*, 2017 U.S. Dist. LEXIS 138671 (Aug. 29, 2017). If JEA had been an arm of the state of Florida (which it is not), the federal courts would not have had subject matter jurisdiction over JEA.

⁶³ See *Hyatt III*, 139 S.Ct. at 1496 and 1499.

The truth is the truth. The answer does not depend on why the question is being asked: either JEA is an arm of the State of Florida or it is not, Logically and constitutionally, the answer must be the same whether the question is asked in the context of the Eleventh Amendment or asked in the context of *Hyatt III*. JEA cannot be the State in one forum, but a community-owned electric authority in the other. In short, suing JEA in Harrison County does not constitute haling the State of Florida into the court of a sister State.

D. JEA’s Motion to Dismiss should not have been granted on the basis of unsubstantiated factual assertions: JEA’s claim of immunity status based on its relationship to the State of Florida is a question of fact.

JEA now claims to be part of the State of Florida that somehow “shares” in Florida’s sovereignty,⁶⁴ but that phrasing itself is merely a word game. JEA is no more a part of the state of Florida than Disneyworld. The Florida State Capitol Complex in Tallahassee is part of the State of Florida, in the sense that it lies within the boundaries of the State of Florida, but also in the sense that it is part of the government of the State of Florida itself. JEA is an entity that operates in Florida, but it is not part of the government of the State of Florida.

JEA went far outside the record to assert that JEA is a political subdivision of the State of Florida that somehow partakes of the inherent preratification sovereign immunity of the State itself. The affirmative defense that JEA sought to renew through its Motion to Dismiss asserted

⁶⁴ JEA’s Motion, at p. 7, asserts that “JEA Shares Florida’s Sovereign Immunity.” In the discussion that followed, JEA did not support that statement factually or legally. Instead, JEA advanced an argument emphasizing that Florida courts have found that JEA enjoys immunity in Florida based on “the application of Florida law.” *Id.* As discussed above, Florida’s statute granting immunity to counties, municipalities and other entities (where inherent sovereignty does not otherwise exist) does not transform those other entities into parts of Florida’s state government. Nor can the Florida statute “share” the State of Florida’s own inherent status as a true co-equal sovereign State with lesser governmental entities that are distinct from the State itself. The constitutional question presented here is not whether the Florida legislature has made the decision to bestow immunity on counties, municipalities and other entities by *statute* for Florida’s own internal purposes, but whether JEA enjoys an inherent preratification *constitutional* immunity as a sovereign State.

that JEA is “a body politic and corporate of the City of Jacksonville, State of Florida”⁶⁵ – not that JEA is part of the government of the State of Florida that “shares” in the inherent sovereignty of the State itself. To the extent that JEA made various factual assertions about its relationship to the State, (A) JEA failed to back those factual statements up with proof about how JEA is funded and how it functions in relation to the State; and (B) Promenade should have been provided an opportunity to probe any such JEA factual assertions about JEA’s relationship to the State with discovery directed to that topic.⁶⁶

II. UNDER THE CIRCUMSTANCES OF THIS CASE AND THE ANALYTICAL FRAMEWORK PROVIDED IN *HYATT II*, JEA WAS NOT ENTITLED TO FINAL DISMISSAL

In *Hyatt II*, the U.S. Supreme Court reaffirmed that the Full Faith and Credit Clause does not require a forum state to afford immunity to a foreign state agency if doing so reflects a conflicting and opposed policy held by the forum state.⁶⁷ Likewise, the Supreme Court articulated an exception to extending immunity under the analytical framework created by its decision in *Hyatt II* when there exist “sufficient policy considerations” to justify a special rule of law that discriminates against a sister state.⁶⁸

Thus, even if this Court were to agree with the Circuit Court that the *Hyatt II* decision applies to a municipal utility like JEA, such that JEA merits consideration by the Court of whether to extend the damages caps reserved for Mississippi entities to JEA, the facts and circumstances of this case weigh against doing so. The policy analysis required by *Hyatt II* was not addressed by

⁶⁵ JEA Motion, at p. 4 (which in turn references JEA’s pleading at Doc. # 111, p.1) (emphasis added). Similarly, in its prior Omnibus *Hyatt II* Order, this Court described JEA as “a municipal utility and body politic within the State of Florida.” Doc. #828, at p. 4.

⁶⁶ See, e.g., *Woods v. Rondout Valley Central School Dist. Bd of Educ.*, 466 F.3d 232 (2d Cir. 2006) (holding the governmental entity invoking Eleventh Amendment immunity bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity).

⁶⁷ *Hyatt II*, 136 S. Ct. at 1281- 1283 (citing *Carroll v. Lanza*, 349 U.S. 408, 412 (1955)).

⁶⁸ See *Hyatt II*, 136 S. Ct. at 1283.

the Circuit Court, and each of the following policy considerations provides an independently sufficient basis for concluding that immunity should not be extended to JEA in those circumstances.

A. The foreign municipal utility failed to timely pursue its alleged immunity defense while participating in the litigation.

Despite Promenade’s protests under Rule 53 and *Stuart v. Univ. of Miss. Med. Ctr.*,⁶⁹ the Circuit Court ruled that *Hyatt II* allowed JEA (a municipal utility with no inherent sovereignty) to revive its previously rejected immunity defense and receive MTCA immunities.

In *Stuart*, this Court recounted the facts and ruling of its prior decision in *Grimes v. Warrington*, 982 So.2d 365, 369 - 370 (Miss. 2008) and found the Circuit Court’s dismissal of a plaintiff’s claims against a Mississippi State hospital was improper because the hospital had waived its MTCA defense by failing to timely pursue it.

Discussing *Grimes*, this Court stated: “the defendant ‘did nothing to argue or even assert immunity until he moved for summary judgment solely on this defense’ more than five years after filing his answer.”⁷⁰ This Court noted that, “instead of filing a motion to dismiss based on the immunity defense, the defendant ‘proceeded substantially to engage the litigation process by consenting to a scheduling order, participating in written discovery, and conducting depositions.’”⁷¹ It concluded, “[t]hus, this Court found that the defendant had waived its MTCA defense.”⁷²

JEA took a similar approach to its purported immunity defense as the defendants in *Grimes* and *Stuart*. More than two years after JEA was first served, JEA filed for the first time a “Motion to Dismiss for Lack of Subject Matter Jurisdiction” based on an alleged sovereign immunity

⁶⁹ 21 So.3d 544, 547 (Miss. 2009).

⁷⁰ *Stuart*, 21 So.3d at 547 (quoting in part from *Grimes*, 982 So. 2d at 369 - 370).

⁷¹ *Id.*

⁷² *Id.*

defense.⁷³ Even then, JEA did not pursue the motion for *another two years*, and engaged in extensive motion practice and discovery in the interim. Indeed, JEA did not bring its Motion on for a hearing until more than two years after it was filed, four and a half years into the case, and several months after the close of discovery.⁷⁴

After JEA finally argued its motion, the Special Master made the finding of fact and conclusion of law in May of 2015, that: “...*JEA is not an employee or political subdivision nor enjoys any other status that would provide the protection afforded under the Mississippi Tort Claims Act.*”⁷⁵ JEA did not file an objection to the Special Master’s report and recommendation pursuant to Rule 53. The Report was then adopted by the Court on Promenade’s motion without any objection by JEA.⁷⁶ Thus, in addition to waiving its defenses under *Stuart*, JEA also failed to preserve its objection under Rule 53.⁷⁷

It is both the policy and the law in Mississippi that the legislated MTCA defenses can be waived. Thus, even if JEA would otherwise be entitled to MTCA immunity under *Hyatt II*, this Court is not obligated to extend the MTCA protections to JEA under the Full Faith and Credit Clause when doing so would be contrary to Mississippi’s own laws and policies that dictate a waiver under these circumstances.

B. Mississippi has a legislated policy towards municipal utilities acting beyond their state’s borders to consent to the laws of the affected forum state.

⁷³ R. 898-904, JEA Motion to Dismiss.

⁷⁴ The docket for Case No. A-2402-10-41 (R. 5-125) shows 522 intervening entries before JEA brought its motion for a hearing.

⁷⁵ R. 4663, Rpt. & Rec. of Special Master (emphasis added).

⁷⁶ R. 4982, Order adopting Special Master’s Rpt. & Rec.; *see also* T. 956:23-26, Hearing Transcript (Aug. 13, 2015) (“THE COURT: And Master Simpson entered a recommendation on a motion to dismiss for lack of subject matter jurisdiction, I think, on May 28th. *There’s been no objection.*”) (emphasis added). A proposed order presented to the Court was signed the following day. (R. 4982).

⁷⁷ *See, e.g., Miles v. Miles*, 949 So.2d 774 (Miss. Ct. App. 2006) (finding “that a party has a right to a hearing on their objections to a special commissioners’ report where the party that seeks the hearing follows the requirements set forth in Rules 53(g)(2), 6(d), and 7(b)(1).” (writ of certiorari denied by 949 So.2d 37 (Miss. 2007))).

The Full Faith and Credit Clause does not require a forum state to extend immunity to a foreign state agency if doing so reflects a conflicting and opposed policy held by the forum state.⁷⁸

Mississippi has defined – both through legislation and by the State’s lawsuit against the State of Tennessee to protect its territorial sovereignty – a policy that conflicts with granting a municipal utility immunity for wrongs committed to land in other states.

In Title 77 of Mississippi Code (“Public Utilities and Carriers”), Chapter 5 (“Electric Power”), the Legislature has stated its policy on municipal electric utilities operating beyond their home-state’s borders. Specifically, in Miss. Code Ann. § 77-5-769 (which is titled “Application of laws of other states and the United States”), the Legislature stated: “Legislative consent is hereby given...*(b) to the application of regulatory and other laws of the other states and of the United States to any municipality or joint agency which owns or operates a project without the state.*”⁷⁹

Thus, it is the legislated policy of Mississippi to subject Mississippi utilities to the laws of the forum states in which they operate. If an analogous Mississippi municipal electric utility damaged land beyond Mississippi’s borders, that utility would be subject to the full “Application of laws” of the state of injury.⁸⁰ JEA should not receive special treatment better than that to which Mississippi’s own municipal electric utilities would be entitled. Excluding JEA from the application of *Massey* via the Full Faith and Credit Clause thus conflicts with Mississippi’s legislated policy of municipal electric utilities consenting to the laws of the affected forum state.

Additionally, Mississippi has emphatically stated its position that, “each state has full

⁷⁸ *Hyatt II*, 136 S. Ct. at 1281- 1283.

⁷⁹ (emphasis added); *see also* T. 1196:29 - 1197:15, Hearing on JEA’s Motion to Reconsider (June 30, 2016) (citing Mississippi Attorney General Opinion 2005-0247, which advised a Mississippi fire department that the protections afforded under the MTCA would not extend to torts committed by the department on a fire run beyond Mississippi’s borders).

⁸⁰ *See* T. 1195:11 - 1197:15, Hearing on JEA’s Motion to Reconsider (June 30, 2016).

jurisdiction over the lands within its borders[.]”⁸¹ Mississippi filed an original action in the U.S. Supreme Court against the State of Tennessee and certain of its utilities for damage done to Mississippi’s resources held in trust for its citizens.⁸² In its lawsuit, Mississippi sought its full measure of damages for what it describes would otherwise be an act of war if the states were fully sovereign.⁸³ Given its stance on territorial sovereignty of Mississippi and the application of that sovereignty to the protection of *public* resources from transgressions by other states, it stands to reason that Mississippi has a parallel policy interest in protecting the privately held lands within its borders from destruction by foreign utilities sending waste across state lines. Thus, the Circuit Court’s refusal to allow Promenade an opportunity to be made whole for damage to its land is contrary to Mississippi’s stated policy interest in preserving the land within its territorial borders. Moreover, at its most basic, the *Hyatt II* analytical framework involves a damages analysis: a determination of whether the forum state’s application of its damages law “reflects a constitutionally forbidden” policy of hostility.⁸⁴ Hostility turns on whether the damages awarded represent an unjustified departure from how the forum state would treat a similarly situated agency. Were JEA a Mississippi municipal utility in this case, the MTCA would not limit Promenade’s recovery to the damages caps because JEA’s physical invasion to land constitutes a taking under Article 3, §17 of the Mississippi Constitution and the 5th Amendment to the United States

⁸¹ The State of Mississippi’s Response in Opposition to Defendants’ Motions for Judgment on the Pleadings (Apr. 6, 2016) filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.) (available at <http://www.ca6.uscourts.gov/special-master>).

⁸² *See id.*, at pp.14, 15 (“The Defendants intentional violation of Mississippi’s territorial sovereignty goes to the foundations of the Constitution and its Amendments on which our federal system is built. In this context, the Court possesses the authority to both grant such relief and enforce such remedies as are necessary to prevent such abuses and best promote the purposes of justice.”).

⁸³ *See* Mississippi’s Motion for Leave to File Bill of Complaint in Original Action, Complaint, and Brief in Support of Motion (June 6, 2014), at p. 1, filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.), 2014 WL 5319728 (also available at <http://www.ca6.uscourts.gov/special-master>).

⁸⁴ *Hyatt II*, 136 S.Ct. at 1279.

Constitution. Allowing Promenade the full measure of damages constituting “just compensation” for the physical invasion to Promenade’s private land is not “constitutionally forbidden” – it is constitutionally ensured, and thus neither hostile, nor a special rule.

Accordingly, even if the *Hyatt II* analytical framework were to be applied to JEA, the policy analysis would show that extending immunity to JEA under these circumstances would constitute a conflicting and opposed policy to Mississippi’s own Constitution, its laws and its policies.

C. Sufficient Mississippi policy interests run counter to the application of the caps, including but not limited to Mississippi’s interests in protecting its citizens’ property and the State’s territorial sovereignty from the unapproved importation and deposition of harmful wastes holding a negative value.

The Circuit Court’s decision extending immunity to JEA under the *Hyatt II* analytical framework also failed to appreciate the differences in the procedural posture between this case and the one before the U.S. Supreme Court in *Hyatt II*.

The U.S. Supreme Court, and the parties before it, each had the benefit of a full trial record. This is critical because the exception carved out by the Supreme Court in *Hyatt II* is inherently fact dependent. Based on the record in the underlying trial, the U.S. Supreme Court held that there were not sufficient policy considerations to justify a special rule.⁸⁵ Likewise, the Court found that the Nevada Supreme Court’s contention that California did not have adequate control over its own taxing authority to be conclusory and not based on the evidence.⁸⁶

Conversely, Promenade *does* have evidence that Florida lacked oversight of JEA’s activities in Mississippi.⁸⁷ Likewise, Promenade has powerful evidence that justifies a special rule outside the ordinary immunity that could be afforded under the MTCA. JEA targeted Mississippi

⁸⁵ *Hyatt II*, 136 S.Ct. at 1283.

⁸⁶ *Id.* at 1283.

⁸⁷ See P.R.E. 226-8, Email from Matt McClure to Christopher Teaf (emphasis added); see also P.R.E. 359-61, Testimony of Dr. Teaf.

for its waste, identifying it as a jurisdiction with a “low barrier to entry[.]”⁸⁸ JEA then implemented and funded an interstate waste removal scheme railing tens of thousands of tons of its byproducts to Mississippi to avoid the landfilling costs and regulatory burdens in its home state of Florida. Now Promenade (and ultimately Mississippi) is forced to suffer the consequences of JEA’s reckless cost-saving measures.

Based on the ruling in *Hyatt II*, any “hostility” determination by this Court (or the Circuit Court) should be based on the facts developed at trial. Promenade has not been able to put on its evidence and create a record to show that JEA’s actions warrant relief from any caps of the MTCA, and to demonstrate that such uncapped relief would be justified under these circumstances.

The “hostility” analysis in *Hyatt II* is rooted in fairness and is fact dependent. Promenade should be afforded the opportunity to present its case because fairness dictates that a systematic program implemented by a municipal utility in another state to make its waste problems the problems of Mississippians should not go unchallenged.

III. DEPRIVING PROMENADE THE OPPORTUNITY TO CONFORM ITS COMPLAINT AND PROOF TO THE NEW “INTER-STATE” IMMUNITY FRAMEWORK ADOPTED BY THE CIRCUIT COURT IS PATENTLY UNFAIR

Were this Court to affirm the Circuit Court’s application of *Hyatt II* and *Hyatt III* to JEA, thereby extending immunity to a foreign municipal utility, it would represent a departure from *Church v. Massey*, and thus a dramatic change in the application of Mississippi’s immunity laws. As discussed below, when litigants were previously faced with similar changes to the application and/or interpretation of the MTCA, this Court has consistently found that refusing such a litigant the opportunity to amend its complaint to conform its allegations to the change would be patently unfair. Here, the Circuit Court’s denial of Promenade’s motion for leave to amend to state a claim

⁸⁸ R. 4406, By-products Opportunity Analysis by Ducker Worldwide (Aug. 3, 2006), at p. 26 (filed under seal).

for inverse condemnation was especially unfair given that Promenade had already survived summary judgment on its existing claim for physical invasion to land, which is a claim nearly identical to inverse condemnation. Moreover, the Circuit Court denied Promenade’s motion for leave without articulating or identifying any grounds for denial.

In *Frank v. Dore*, this Court reviewed whether a trial court’s denial of an appellant’s motion for leave to amend constituted an abuse of discretion.⁸⁹ Noting the deferential standard under Rule 15, this Court quoted extensively from the U.S. Supreme Court’s decision in *Forman v. Davis*: “the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion[.]”⁹⁰ The foregoing emphasis was provided by this Court because in Frank the “[a]ppellant was denied leave to amend by the court without the court expounding on the reasons for denial.”⁹¹ This Court concluded that the trial court “committed manifest error in denying Appellant’s Motion for leave to amend.”⁹²

More recently, this Court again held that refusal to allow a plaintiff to conform its complaint to a change in the Court’s approach to Mississippi’s immunity laws would be patently unfair. In *Crum v. City of Corinth*, the plaintiff’s claims against the City of Corinth were dismissed based on the City’s discretionary immunity defense.⁹³ While on appeal, this Court announced its abandonment of the public-policy function test, and ordered supplemental briefing from the parties to address this change.⁹⁴ Despite supplemental briefing, this Court held that plaintiff/appellant “ought to be given the opportunity to redraft her pleadings in accordance with this Court’s recent

⁸⁹ 635 So.2d 1369 (Miss. 1994).

⁹⁰ *Id.* at 1375 (quoting from *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (emphasis in original).

⁹¹ *Id.*

⁹² *Id.* at 1376; see also *Pratt v. City of Greenville*, 804 So.2d 972, 978 (Miss. 2001).

⁹³ 183 So.3d 847 (Miss. 2016).

⁹⁴ *Id.* at 850.

decisions in *Brantley v. City of Horn Lake*, 152 So. 3d 1106 (Miss. 2014), and *Boroujerdi v. City of Starkville*, 158 So. 3d 1106 (Miss. 2015).”⁹⁵ Accordingly, this Court stated that “Crum has not been provided the opportunity in the trial court to attempt to ‘conform her complaint and proof to this Court’s current approach to discretionary function immunity.” This Court held “depriving Crum of this opportunity would be ‘patently unfair.’”⁹⁶

Like the lower court’s decision in Crum, the Circuit Court’s denial of Promenade’s request to conform its complaint in the wake of *Hyatt II* was “patently unfair.” Similar to the plaintiffs in *Frank*, *Pratt*, and *Crum*, Promenade’s amendment simply seeks to add an additional theory of recovery based on the same transactions and series of events.

Even more compelling, Promenade’s request to amend does not revive an otherwise terminated litigation claim to the prejudice of the defendant. The substance of Promenade’s inverse condemnation claim – physical invasion to land – already exists and has been deemed worthy of trial over JEA’s attempted summary judgment.⁹⁷

Promenade’s physical invasion claim is premised on the precedent established by this Court in *King v. Vicksburg R. & L. Co.*⁹⁸ Promenade’s prior briefing in support of its claim for physical invasion explained:

The Mississippi Supreme Court held “[t]he evidence shows that the property of the plaintiff was damaged by **physical invasion of deleterious agents produced by the plant of the defendant**...and it should have been left to the jury to say...to what extent.”⁹⁹

In Promenade’s discussion of *King*, Promenade also pointed out that “notably, the defendant power

⁹⁵ *Id.* at 851.

⁹⁶ *Id.* (quoting from *Boroujerdi*, 158 So.3d at 1114).

⁹⁷ See R. 5821, Order denying JEA’s Motion for Partial Summary Judgment on Promenade’s Claim for Physical Invasion.

⁹⁸ 42 So. 204 (Miss. 1906).

⁹⁹ R. 4559, Promenade’s Memorandum in Support of Partial Summary Judgment (discussing *King*, emphasis added).

plant claimed it was ‘exempt from any liability for any damage, because it is operating under public authority[.]’”¹⁰⁰

Importantly, the Mississippi Supreme Court’s rule of law in *King* that no one may “set in motion agencies which physically invade the home of another,” was established despite the power plant’s assertion of an immunity defense. This Court further held:

Public authority may confer the right to operate a public work, and thus make it lawful, but cannot confer a right to take or damage private property without compensating the owner for its value as taken or damaged--that is, diminished in its market value as property--by some physical invasion of it or by affecting some right of the owner in relation to it.¹⁰¹

This Court based its ruling on Article 3, Section 17 of the Mississippi Constitution, which the Court held mandates that a property owner “be fully compensated for any loss of value sustained from any physical injury to his property...whereby its market value is diminished.” The Court then contemplated and rejected the very argument JEA raised in its underlying briefing 110 years later, stating:

It is true that the language of sec. 17 of the constitution was intended for formal condemnation proceedings, wherein it provides for compensation to be first made in a manner to be prescribed by law; **but it is equally protective of the owner of private property, when no condemnation is had and his property is taken or damaged by public use.** Due compensation is what ought to be made--that is, **what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses,** or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use.¹⁰²

This Court specifically noted the public nature and societal importance of the defendant’s power plant operations, but held “it is equally important to enforce the mandate of the constitution and protect the owner of private property, which is the purpose of this decision.”¹⁰³

¹⁰⁰ *Id.* at n.70.

¹⁰¹ *King*, 42 So. at 204.

¹⁰² *Id.* at 205.

¹⁰³ *Id.*

King, and its progeny, formed the basis of Promenade’s 2014 physical invasion claim, the addition of which via amendment was recommended by the Special Master and approved by the Circuit Court at a time when JEA was to be treated as any other tortfeasor per *Church v. Massey*. Should this Court affirm the Circuit Court’s holding that the existing *Church v. Massey* precedent is subject to a *Hyatt II* analysis for JEA, it would confer a public status on JEA. Doing so activates the constitutional mandate announced in *King* to protect Promenade from the damage caused by a public authority through physical invasion of its private property.

Accordingly, there was no basis for the Circuit Court’s unexplained denial of leave for Promenade to amend its complaint to reflect a claim for inverse condemnation. But for the public status of the defendant, the claims for physical invasion and inverse condemnation are generally equivalent. Thus, this Court should reverse the Circuit Court’s denial of leave, or in the alternative, decree that the damages sought pursuant to Promenade’s existing physical invasion claim cannot be capped due to the protections afforded by Article 3, Section 17 of the Mississippi Constitution and the Fifth Amendment of the Constitution of the United States.

IV. IN THE EVENT THE CIRCUIT COURT’S EXTENSION OF *HYATT II* STANDS, PROMENADE SHOULD BE ALLOWED TO PRESENT ITS CLAIMS FOR INJUNCTIVE RELIEF TO THE FACT-FINDER RATHER THAN SUFFER FINAL DISMISSAL.

The Circuit Court’s Omnibus Order granting JEA partial summary judgment on Promenade’s claims for injunctive relief failed to consider the record “in the light most favorable to the non-moving party, who has the benefit of every reasonable doubt.”¹⁰⁴

Promenade presented facts in support of its claim for physical invasion to land that were sufficient to survive JEA’s 2015 Motion for Partial Summary Judgment.¹⁰⁵ Yet, after the summary judgment

¹⁰⁴ *Garrett v. Northwest Miss. Junior College*, 674 So.2d 1, 2 (Miss. 1996).

¹⁰⁵ R. 5290-4, Consolidated Rpt & Rec. of Special Master (overruling JEA’s exhaustion arguments, as adopted by Order at R. 5821).

deadline had long passed, JEA sought to foreclose Promenade’s remedy for injunctive relief.

Injunctive relief is typically allowed to be tried to the fact finder on the merits in cases where there are sufficient facts showing harm to land from deleterious agents.¹⁰⁶ For example, in *Punzo v. Jackson County*, this Court reviewed a trial court’s decision that had found the plaintiff’s claim for money damages was time-barred and had denied the plaintiff’s request for injunctive relief against a Mississippi county that harmed the plaintiff’s real property.¹⁰⁷

The plaintiff in *Punzo* owned real property that suddenly began flooding following heavy rains.¹⁰⁸ The plaintiff later discovered that the flooding was caused by the construction of culverts by Jackson County and filed suit seeking “\$129,973.98 in damages to date” and a mandatory injunction.¹⁰⁹ The trial court dismissed the plaintiff’s claim for money damages on statute of limitations grounds under the MTCA, but allowed the plaintiff’s claim for injunctive relief to proceed to trial.¹¹⁰ Following the trial, the lower court entered a judgment also denying the plaintiff’s claim for injunctive relief.

This Court reversed the trial court on both the dismissal of the plaintiff’s claim for money damages and the denial of injunctive relief. Relying on “another property damage case” – *Donald v. AMOCO Prod. Co.* (the case that supports Promenade’s physical invasion claim and other claims) – the Supreme Court held: “We find the trial court erred in dismissing the money damages

¹⁰⁶ See, e.g., *Punzo v. Jackson County*, 861 So.2d 340 (Miss. 2003) (remanding for consideration of whether the facts presented at trial entitled the plaintiff to injunctive relief under the appropriate standard), *Gulf Park Water Co. v. First Ocean Springs Dev. Co.*, 530 So.2d 1325, 1334 (Miss. 1988) (noting that “[r]ights in real property cannot ordinarily be taken from the owner at valuation, except under the power of eminent domain[.]” and holding “land is per se property of peculiar value, and will be protected by injunction without reference to its quality, use or value.”), and *Phillips v. Davis Timber Co., Inc.*, 468 So.2d 72 (Miss. 1985) (finding injunctive relief appropriate for nuisance).

¹⁰⁷ 861 So.2d 340 (Miss. 2003).

¹⁰⁸ *Id.* at 342-343.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 343.

portion of [plaintiff's] complaint as time barred. We reverse and remand the matter for a full trial on the merits.”

The Court then analyzed the plaintiff's appeal of the trial court's denial of injunctive relief. Notably, this Court stated that, “[t]he trial court made detailed findings of fact **after a trial on the merits** and concluded that [plaintiff] did not sustain the burden of proof required to justify the court's establishment of a mandatory injunction against the County.”¹¹¹ This Court reversed the trial court, finding that the trial court had used the wrong standard in denying injunctive relief, and remanded for the trial court to reconsider the facts presented at trial to determine whether the plaintiff satisfactorily showed a threat of irreparable harm for which there is no adequate remedy at law.¹¹²

This Court's decision in *Punzo* is important here for three reasons: (1) claims for injunctive relief against Mississippi governmental entities relating to property damage are not barred by the MTCA; (2) a plaintiff whose real property has been injured is entitled to a full trial on the merits for both its liquidated money damages and its claim for injunctive relief; and (3) even though the “trial court made detailed findings of fact after a trial on the merits[,]” this Court required the trial court as the trier of fact to reevaluate the evidence under the appropriate standard, rather than simply finding harmless error based on the record.

Punzo supports the conclusion that, based on the evidence presented by Promenade, Promenade's claim for injunctive relief requires a full trial so that the facts can be weighed and considered under the injunctive relief standard.

Another case that addresses damage to real property, specifically in the context of a

¹¹¹ *Id.* at 347.

¹¹² *Id.* at 348.

nuisance created by waste materials, is *Gulf Park Water Co. v. First Ocean Springs Dev. Co.*¹¹³

This Court affirmed a judgment that ordered a water company to properly dispose of its waste and awarded money damages for the harm done.

In *Gulf Park*, a golf course owner sought an injunction and money damages for sewage effluent that was being discharged into a lagoon on the golf course and which caused algae problems. The trial court ordered that the sewage company properly discharge its waste, awarded damages for the cost to combat the algae growth caused by the effluent with fungicide and for related labor, and “decreed that Gulf Park submit a report detailing efforts to bring its system into compliance with state pollution control standards...[, that] the chancellor retained jurisdiction over the plant operation for purposes of monitoring compliance...[, and] enjoined [Gulf Park] from discharging effluent unless or until it acquired a permit.”¹¹⁴

On appeal, this Court specifically addressed the issue of “irreparable harm” in the context of injury to real property. This Court emphasized the appropriateness of injunction for injuries to land:

The general rule is that a landowner is entitled to an injunction directing the removal of a trespassing structure on his land erected thereon by the owner of the adjoining land. The facts that the aggrieved owner suffers little or no damage from the trespass, that the wrongdoer acted in good faith and would be put to disproportionate expense by the removal of the trespassing structures, and that neighborly conduct as well as business judgment would require acceptance of compensation in money for the land appropriate, are ordinarily no reasons for denying an injunction. **Rights in real property cannot ordinarily be taken from the owner at valuation, except under the power of eminent domain.** Only when there is some estoppel or laches on the part of the plaintiff, or a refusal on his part to consent to acts necessary to the removal or abatement which he demands, will an injunction ordinarily be refused.¹¹⁵

In particular, this Court stated that “land is per se property of peculiar value, and will be

¹¹³ 530 So.2d 1325 (Miss. 1988).

¹¹⁴ *Id.* at 1330.

¹¹⁵ *Id.* at 1333-1334 (quoting from *Turner v. Morris*, 17 So.2d 205 (Miss. 1994) (emphasis added)).

protected by injunction without reference to its quality, use or value.”¹¹⁶ This Court noted that this concept was “cited approvingly in *Phillips v. Davis Timber Co., Inc.*, 468 So.2d 72 (Miss. 1985) [a case previously relied on by Promenade in support of its claim for physical invasion].”¹¹⁷ The Court summarized the *Phillips* case, stating “[i]n *Phillips* this Court reversed a chancellor who failed to grant relief to a landowner whose lake had been polluted from release of pentachlorophenol, or PCP. The Court considered this invasion a nuisance, and held that Phillips was entitled to an injunction[.]”

Accordingly, this Court affirmed the trial court’s decision awarding the golf course an injunction, and held:

These cases stand for the proposition that an injunction will be available, despite the absence of demonstrable harm, to prevent a trespass or abate a nuisance. Since Gulf Park has no easement, Pine Island in effect met its burden of showing irreparable harm by establishing a continuing trespass.

In addition, Gulf Park argues that through enforcement proceedings brought by the State Bureau of Pollution Control, there exists an adequate remedy of enforcement and/or damages, making the harsh remedy of injunctive relief inappropriate. With this we cannot agree.¹¹⁸

This Court summarized its affirmance of the mandatory injunction by stating, “we think the chancellor reached the best possible remedy in a difficult case[.]”¹¹⁹

Like the plaintiffs in the foregoing cases, Promenade’s interests in real property have been injured and continue to be injured and threatened. The trespassing waste on Promenade’s property is not something that will simply disappear by stroking a check. This is especially true with the incalculable risk of potential future lawsuits, regulatory actions, or other injuries that could arise

¹¹⁶ *Id.* at 1334 (quoting from *Shattles v. Field, Brackett & Pitts, Inc.*, 261 So.2d 795, 798 (Miss. 1972).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1334 (citing Miss. Code Ann. § 49-17-43) (emphasis added).

¹¹⁹ *Id.* at 1326.

from the handling and disposal of JEA's waste. The evidence in the record creates at least an issue of material fact with regard to the necessity for injunctive relief, and the Circuit Court should have weighed that evidence following a trial to make the appropriate determination in this complex and unusual case.

In addition to the foregoing examples in which Mississippi's Courts have held equitable relief necessary and appropriate in cases with fact patterns similar to Promenade's, the Restatement (Second) of Torts also bolsters Promenade's position regarding the inadequacy of a purely financial remedy.¹²⁰ Section 944 of the Restatement concerns the "Relative Adequacy of Damages." It advises that "[t]he relative adequacy of the damage remedy for tort as compared with the remedy of injunction, depends" upon: (a) the nature of the interests harmed, (b) the effects of the rules of law governing the measure of damages, (c) the availability and persuasiveness of evidence bearing upon the assessment of damages, (d) the effects of resort to measures of self-help, (e) the cost of assessing damages, and, in the case of repeated or continuing torts, the cost of a multiplicity of suits, (f) the collectability of the judgment, and (g) other pertinent factors.

When considered in the context of the current proceedings, these factors overwhelmingly support Promenade's entitlement to equitable relief in addition to money damages for the harm already suffered and will continue to suffer until the JEA material is removed. Indeed, the facts presented here meet every single one of the criteria identified by the Restatement:

- The nature of the interests harmed: Promenade's real property;
- The alleged effects of the rules of law governing the measure of damages: The Circuit Court found *Hyatt II* requires the application of the MTCA damages caps, which JEA asserts would require that Promenade's damages to be statutorily limited to \$500,000, despite the many millions of dollars of harm already suffered by Promenade to date and millions in financial hardship and risk;

¹²⁰ See Restatement (Second) of Torts § 944.

- The availability of evidence bearing upon the assessment of damages: Monetizing Promenade’s risk for future regulatory actions and other potential lawsuits are likely to be considered conjectural by the Circuit Court for the purposes of a money judgment, though both can be eliminated by removal of the JEA material from Promenade’s real property;
- The effects of resort to measures of self-help: Promenade inequitably bears the regulatory risk associated with the removal and disposition of JEA’s waste, which JEA should have properly disposed of in Florida;
- The case of repeated or continuing torts: Promenade faces repeated – and in some respects unknown – harm, particularly from potential third party claimants and regulators;
- The collectability of the judgment: JEA has repeatedly argued to the Court that any judgment for money damages will be uncollectable in Mississippi and unenforceable in Florida;¹²¹ and
- Other pertinent factors: The predicament caused by JEA’s waste disposal scheme implicates ongoing and future site monitoring, which JEA currently conducts at its own facilities and other areas from which JEA has removed its waste. Also, JEA’s self-proclaimed efficiencies and expertise with regard to the long-term impact of the waste, and the monitoring, handling, and disposal of its waste favor injunctive relief.¹²²

The circumstances of this case satisfy every single factor identified by the Restatement for consideration in determining whether injunctive relief is the necessary and adequate remedy, as opposed to money alone. Accordingly, the facts and the law establish that a mandatory injunction is the only adequate remedy to prevent Promenade from inequitably bearing the risk involved with the handling and disposal of JEA’s waste. Indeed, an equitable remedy is the favored remedy by Mississippi and other courts to abate a nuisance and to protect a plaintiff’s interests in damaged and/or threatened real property. Furthermore, JEA’s own efforts to cap its monetary liability and to

¹²¹ See T. 504:19-25, Hearing Transcript (Dec. 19, 2014) (counsel for JEA argued, “[i]f there is a judgment in this case, it will have to be enforced against the assets of JEA in Florida. We have no assets in Mississippi...So Florida may refuse to allow the judgment to be enforced in Florida[.]”)

¹²² See, e.g., R. 6046-6050, Promenade’s Response to JEA’s Motion for Partial Summary Judgment on Promenade’s Claim for Injunctive Relief (enumerating several examples of JEA’s removal of its ash material when it caused problems); see also R. 6095, Email from S. Schultz to T. Hobson (Mar. 9, 2012) (JEA’s Scott Schultz wrote: “My people can remove the material more efficiently than anybody[.]”).

challenge eventual collection emphasize the inadequacy of a strictly financial remedy.

Nevertheless, the Circuit Court decided that Promenade's injuries could be undone through monetary remedies alone. And, conceding that there was no authority in support of the point, the Circuit Court ruled that allowing injunctive relief for injury to land in these circumstances would "render the Legislature's limited waiver of sovereign immunity meaningless."¹²³ But that ruling ignores the reality that JEA has no inherent sovereign immunity, and certainly none under the MTCA. Moreover, it fails to appreciate that Florida law allows injunctive relief against JEA and other similarly situated entities, and thus an injunction in this case cannot be considered a hostile "special rule of law."¹²⁴ Likewise, allowing injunctive relief for the injury to land in these circumstances does not render the limited waiver meaningless any more than the constitutional protections of Article III, §17 of the Mississippi Constitution can be considered to render the MTCA meaningless.

Accordingly, JEA was not entitled to dismissal of Promenade's longstanding claim for injunctive relief.

CONCLUSION

Based on the foregoing, this Court should reverse the Circuit Court's application of *Hyatt II* and *Hyatt III* to JEA, which is not a sovereign arm of the State of Florida. The dismissal should be set aside, and the case should be remanded to the Circuit Court for further proceedings.

¹²³ R. 6416-17, Omnibus Hyatt II Order.

¹²⁴ *Dep't of Transp. v. Burnette*, 384 So. 2d 916, 922, 1980 Fla. App. LEXIS 16911, *17-18 (Fla. Dist. Ct. App. 1st Dist. 1980) ("If the sovereign's immunity was ever a serious impediment to a suit for injunction to secure relief from action by the State having that effect...it is no longer. Every remedy which would be available against an individual for such a repeated trespass or continuing nuisance, including an injunction to prevent a multiplicity of damage suits, is now available against the State.").

Respectfully submitted, this the 27th day of June, 2024.

THE PROMENADE D'IBERVILLE, LLC,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served via the Court's MEC system:

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