No. 143, Original

In the Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

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

Before the Honorable Eugene E. Siler, Jr., Special Master

CITY OF MEMPHIS, TENNESSEE AND MEMPHIS LIGHT, GAS & WATER DIVISION'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF LAW IN SUPPORT

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Defendants The City of Memphis, Tennessee ("Memphis"), and Memphis, Light, Gas & Water Division ("MLGW"), by and through counsel, hereby move for judgment on the pleadings. Defendants respectfully request oral argument. In support of their Motion, Defendants state as follows:

I. INTRODUCTION

This is a dispute over the use of groundwater from an interstate aquifer. In its complaint, the State of Mississippi sues the State of Tennessee, Memphis, and MLGW alleging conversion of and trespass to groundwater in the Memphis Sand Aquifer, also referred to as the Sparta Aquifer (the "Aquifer"). The Aquifer is an extensive, water-bearing resource underlying northwestern Mississippi, western Tennessee, and portions of other states. The Aquifer's water has never been apportioned among the overlying states by judicial decree, interstate compact, or congressional act. For more than 125 years, Memphis has relied on the Aquifer as its primary water source for homes and businesses.

This action is not the first time that Mississippi has sued Memphis and MLGW seeking monetary damages for withdrawing and using groundwater within Tennessee from this same interstate Aquifer. Mississippi brought and lost these same tort claims against Memphis and MLGW in *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625

(5th Cir. 2009), *cert. denied*, 130 S. Ct. 1319 (2010). This most recent action should meet the same fate.

Mississippi's new complaint rests upon two false premises. First, Mississippi repeats the same failed position it took in the first lawsuit, asserting that it "owns" the groundwater that Defendants allegedly "converted." That contention was rejected in the first lawsuit by both the U.S. District Court for the Northern District of Mississippi and the U.S. Court of Appeals for the Fifth Circuit. The U.S. Supreme Court has consistently held that a state's claim to own its natural resources, including groundwater, is "pure fantasy" and a "legal fiction." Further, Mississippi's claim of ownership over a portion of the water in the Aquifer directly conflicts with acts of the Mississippi legislature and holdings of the Mississippi Supreme Court.

Second, Mississippi mischaracterizes the water of the Aquifer as an "intrastate" resource of Mississippi. In the first lawsuit, Mississippi asserted that the Aquifer's water was interstate water and that the Aquifer was an interstate resource. In fact, Mississippi relied on the "interstate nature of the dispute" as the basis for asserting federal subject-matter jurisdiction. In this new lawsuit, Mississippi asserts the opposite. Thus, the groundwater that Mississippi once insisted was an interstate resource shared by Mississippi and Tennessee is now alleged to be an intrastate resource "owned" solely by Mississippi. There is no

basis in law or science to support the conclusion that the water of the multi-state Aquifer is "intrastate" water.

When ruling on a motion for judgment on the pleadings, a trial court is not required to accept as true any allegation that constitutes a legal conclusion or a conclusory allegation improperly couched as a fact. *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."). Mississippi's allegation that the Aquifer is an "intrastate" resource is just such a conclusory allegation masquerading as fact. It is undisputed that the Aquifer underlies Mississippi and Tennessee (as well as other states), and therefore, by definition, the water is interstate water. Mississippi's allegations to the contrary—no matter how many times they appear in the complaint—are false and contrary to Supreme Court precedents. For purposes of Defendants' Motion, these allegations should be disregarded as inaccurate legal conclusions.

For over a century, the Supreme Court has resolved disputes between states over the use of shared, interstate resources by applying the doctrine of equitable apportionment. Remarkably, Mississippi disavows any claim for equitable apportionment, averring that the doctrine does not govern here because the water in dispute is "intrastate" water "owned" by Mississippi. Compl. ¶ 38. Mississippi's misguided effort to avoid the application of equitable apportionment is surely

motivated by two factors: First, Mississippi has not alleged an essential element of equitable apportionment—namely, that it has suffered real and substantial damages as a result of Defendants' alleged actions. Second, retrospective money damages are not recoverable in an equitable apportionment suit. Mississippi is attempting to create a novel cause of action as a means to extract money damages from Defendants. Mississippi's attempt should be denied.

It is particularly significant that Mississippi concedes that all of MLGW's well fields, wells, and pumps are in Tennessee. Compl. ¶¶ 18-19. Mississippi does not allege that any MLGW pumping activity or withdrawal of groundwater takes place over or across the state line into Mississippi. *Id*. As Mississippi acknowledges, MLGW's actual pumping from the Aquifer is "out of the state of Tennessee." Tr. Case Management Conf., Jan. 26, 2016 at 6:6-9. Because Mississippi does not "own" the water at issue and because it is undisputed that all water withdrawals and uses by Defendants have taken place within the borders of Tennessee, Mississippi cannot under any circumstances prevail on its conversion and trespass claims.

Mississippi's complaint should fail as did its first lawsuit, and Defendants' Motion for Judgment on the Pleadings should be granted for the reasons set forth below. There is no logical, scientific, or legal basis for treating interstate water

below the ground differently from interstate water above the ground. Mississippi has failed to state a valid cause of action against Defendants.

II. OVERVIEW OF THE AQUIFER AND CONTROLLING LAW

A. THE MEMPHIS SAND AQUIFER

The Aquifer[1] at issue is an underground water resource, which underlies Mississippi and Tennessee, as well as four other states.[2] Compl. ¶¶ 15, 41, 50. The Aquifer is comprised of fine- to coarse-grained sand through which water accumulates and flows. *Id.* App. 29a. Through the agency of natural laws, water has seeped downward from the ground surface and has moved through the geologic formation over thousands of years. *Id.* ¶ 16. As Mississippi concedes, water flowed in the Aquifer across the present-day state boundary line into Tennessee prior to any pumping from the Aquifer. *Id.* App. 70a.

The Aquifer is continually recharged by rainfall seeping into the Aquifer in outcrop areas and by "leakage" from other aquifers. *Id.* ¶ 16, App. 29a-30a. These outcrop areas are primarily east of Memphis in Tennessee and extend south into Mississippi. *Id.* App. 30a.

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[1] The Aquifer is commonly called the "Memphis Sand Aquifer" in Tennessee, the "Sparta Aquifer" in northwest Mississippi and Arkansas, and the "Middle Claiborne Aquifer" by the U.S. Geological Survey. For purposes of this Motion, it is referred to as the "Aquifer."

[2] In addition to Mississippi and Tennessee, the Aquifer extends into Arkansas, Louisiana, Missouri, and Kentucky. Compl. App. 101a-102a.

Since the late nineteenth century, Memphis has relied on the Aquifer as its source of water for residential and commercial uses. *Id.* ¶ 18. All of MLGW's well fields, wells, and pumps are in Tennessee. *Id.* ¶¶ 18, 19. Mississippi does not allege that any pumping activity or withdrawals of groundwater take place over or across the state line into Mississippi. *See id.*

B. THE SUPREME COURT'S DOCTRINE OF EQUITABLE APPORTIONMENT

For more than a century, "disputes [between states] over the allocation of water" have been resolved by the doctrine of equitable apportionment. *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2125 (2013); *see also Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) ("Equitable apportionment [has been] the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream."). The federal common law of equitable apportionment was created as a means to resolve disputes between sovereign states over the use of shared interstate resources in a way that recognizes the equal rights of each state and "establish[es] justice between them." *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). In so doing, the doctrine reflects and embraces the "cardinal rule underlying all the relations of the states to each other"—"equality of right." *Id.* at 97; *see also Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931) (stating that equitable apportionment

disputes are to "be settled on the basis of equality of right") (citing *Kansas v. Colorado*, 206 U.S. at 100).

The Supreme Court has broadly applied equitable apportionment to interstate disputes involving a variety of natural resources, including surface rivers,[3] rivers with hydrologically connected subsurface water (aquifers),[4] and even wild salmon migrating through multiple states.[5]

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[3] *See, e.g.*, *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Catawba River); *Colorado v. New Mexico*, 459 U.S. 176 (1982) (Vermejo River); *Arizona v. California*, 298 U.S. 558 (1936) (Colorado River); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (Connecticut River); *New Jersey v. New York*, 283 U.S. 336 (1931) (Delaware River); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (Laramie River).

[4] *See, e.g.*, *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (finding that Nebraska's allegation of "groundwater pumping within Wyoming threatens substantial depletion of the natural flow of the river" was "a change in conditions posing a threat of significant injury"); *Wisconsin v. Illinois*, 449 U.S. 48, 48-50 (1980) (applying equitable apportionment to water "diverted from Lake Michigan . . . with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer"); *Washington v. Oregon*, 297 U.S. 517, 524-26 (1936) (noting that "'a substantial part of the water applied to irrigation in Oregon . . . goes into the underground water supply,' and returns to the river"); *Kansas v. Colorado*, 206 U.S. at 114 (rejecting the argument that "subsurface water" should be distinguished from a surface stream in an equitable apportionment analysis).

[5] *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983).

III. PROCEDURAL BACKGROUND

A. PRIOR LITIGATION

In 2005, Mississippi filed suit against Memphis and MLGW[6] in the Northern District of Mississippi alleging that Memphis and MLGW were wrongfully taking "Mississippi's water" from the Aquifer. The district court rejected Mississippi's position that Memphis was "pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of which State." *Hood*, 533 F. Supp. 2d at 648. Relying on Supreme Court precedents, the district court recognized that:

> It is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a de facto apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee.

Id.

The Fifth Circuit affirmed the district court's decision in all respects. *Hood, ex rel. Mississippi v. City of Memphis, Tenn*., 570 F.3d 625, 633 (5th Cir. 2009). Mississippi filed a Petition for Writ of Certiorari (Case No. 09-289), which the Supreme Court denied on January 25, 2010. (This lawsuit, filed in federal court in Mississippi and appealed to the Fifth Circuit and Supreme Court, is referred to herein as "*Mississippi I*").

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[6] Tennessee was not a party to the first lawsuit.

At the same time it sought certiorari, Mississippi filed a separate Motion for Leave to File Bill of Complaint in an Original Action (Case No. 139, Original). Mississippi's bill of complaint repeated the same tort claims asserted in *Mississippi I* against Memphis and MLGW, but also included a "provisional" or "conditional" claim for equitable apportionment against Tennessee. The Supreme Court denied Mississippi's motion for leave on January 25, 2010. The Court's order denying leave cited *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003), and *Colorado v. New Mexico*, 459 U.S. at 187 n.13. *Virginia v. Maryland* states that "Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." 540 U.S. at 74 n.9. *Colorado v. New Mexico* explains that "a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it 'real or substantial injury or damage.'" 459 U.S. at 187 n.13.

B. PROCEDURAL HISTORY OF THE PRESENT LAWSUIT

On June 6, 2014, Mississippi filed its second Motion for Leave to File Bill of Complaint. Defendants filed their respective briefs opposing Mississippi's Motion for Leave on September 4 and 5, 2014. On October 10, 2014, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General filed a brief on May 12, 2015, urging the

Court to deny Mississippi's motion for leave. The Supreme Court granted Mississippi's motion for leave on June 29, 2015. Memphis and MLGW filed their answer on September 11, 2015, and Tennessee filed its answer on September 14, 2015. The Court appointed the Honorable Eugene E. Siler, Jr. as Special Master on November 10, 2015. At the initial case management conference on January 26, 2016, the Special Master granted Defendants leave to file preliminary dispositive motions and stayed discovery.

C. MISSISSIPPI'S BILL OF COMPLAINT

In its most recent complaint, Mississippi again sues Defendants for the alleged wrongful taking of groundwater from the unapportioned Aquifer. Despite Mississippi's concessions that the Aquifer lies beneath both Mississippi and Tennessee, Compl. ¶ 41, and that water has been flowing within the Aquifer across the state line since before any pumping from the Aquifer began, *id.* App. 70a, Mississippi inexplicably argues that the Aquifer is not an interstate resource, *id.* ¶ 50. On that erroneous basis, Mississippi contends that this case "does not fall within the Court's equitable apportionment jurisprudence." *Id.* ¶ 38.

Mississippi alleges that it "owns" a fixed portion of the Aquifer that is defined by Mississippi's original territorial boundaries. Mississippi claims that MLGW's withdrawal of water from the Aquifer (from within Tennessee) has pulled "Mississippi's groundwater" across its northern border into Tennessee.

Mississippi claims that MLGW's pumping of groundwater entirely within Tennessee constitutes "a violation of Mississippi's retained sovereign rights under the United States Constitution, and a wrongful and actionable trespass upon, and conversion, taking and misappropriation of, property belonging to Mississippi and its people." *Id.* ¶ 52. According to Mississippi, "Defendants' actions have resulted in a permanent taking of groundwater owned and held by Mississippi in trust for its people." *Id.* ¶ 53. Mississippi seeks a declaratory judgment, injunctive relief—including that Memphis be required to construct and develop an alternate water system to use water from the Mississippi River—and $615 million in alleged damages arising out of what it asserts to be Defendants' conversion of and trespass to the water at issue.

IV. APPLICABLE STANDARD

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). When a motion for judgment on the pleadings is made by the defendant, it is in effect a motion to dismiss for failure to state a claim upon which relief can be granted. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999); *see also Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009) ("We review a district court's dismissal pursuant to Fed. R. Civ. P. 12(c) *de novo*, employing 'the same . . . standard applicable to dismissals pursuant to Fed. R. Civ. P. 12(b)(6).'"). Such a motion

admits the truth of all relevant and material averments in the complaint but asserts that such facts fail to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). A "plausible claim for relief" is one in which the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 566 U.S. at 678.

A court is not required to accept as true "[c]onclusory allegations or legal conclusions masquerading as factual allegations." *Faber v. Metropolitan Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011); *Eidson v. Tenn. Dept. of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation."). "Because only well-pleaded facts are taken as true, we will not accept a complainant's unsupported conclusions or interpretations of law." *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993). "The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *id.*, or "'allegations which are contradicted by documents referred to in the

complaint,'" *id.* at 989 (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)).

While Mississippi may argue that the Court's granting of its Motion for Leave is akin to a holding that the Complaint states a plausible claim for relief, the Court has never so held. The Court's decision to grant Mississippi's Motion for Leave is not a judgment that the Complaint states a claim upon which relief may be granted. *See Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976) ("This order is not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted.").

V. ARGUMENT

Mississippi's legal theory—that one state can sue another in tort for the alleged cross-boundary diversion of unapportioned water from an interstate resource—fails to state a cognizable claim. The Supreme Court has never recognized a state's claim seeking a monetary award against a neighboring state, a municipality, or its utility division arising out of past municipal withdrawals of groundwater entirely within the boundaries of the neighboring state. Notwithstanding the lack of precedent for its position, Mississippi unilaterally claims a sovereign right to a portion of the interstate Aquifer—water that Mississippi wrongly asserts is "Mississippi's groundwater."

No decision of the Supreme Court holds that a state can claim "ownership" of water in an unapportioned aquifer or any water resource that spans multiple states. Such water is "interstate" water as a matter of law. As the Fifth Circuit and the district court in Mississippi both recognized in *Mississippi I*, the Court's precedents make clear that the Aquifer must be equitably apportioned before Mississippi can bring a viable cause of action based on Tennessee's (or any other state's) use of the water in the Aquifer. To find that Mississippi's complaint states a claim upon which relief may be granted would be a sweeping and drastic departure from the Court's precedents and would re-write the jurisprudence by which states have resolved interstate water disputes for more than a hundred years.

Of equal fundamental importance, Mississippi's complaint fails because it is barred by the doctrine of issue preclusion. Mississippi has already litigated—and lost—the questions of whether the groundwater at issue is interstate water and whether an equitable apportionment is required before Mississippi could ever have a viable claim against any other state based on the respective states' use of water from the Aquifer.

Finally, Mississippi's claims for conversion and trespass must be dismissed because, under any circumstances, they are contrary to the holdings of the Supreme Court and in direct conflict with Mississippi's own statutory and common law. The complaint should be dismissed with prejudice.

A. THE AQUIFER IN QUESTION IS AN INTERSTATE RESOURCE, AND THE GROUNDWATER IN IT IS INTERSTATE WATER

The Aquifer is an interstate resource, and Mississippi cannot unilaterally claim that Defendants are taking "Mississippi's groundwater" unless and until the Aquifer has been apportioned. As the Fifth Circuit and district court held in dismissing Mississippi's nearly identical allegations in *Mississippi I*—and as Mississippi itself previously acknowledged—the Aquifer is an interstate body of water. Because the Aquifer underlies multiple states, it must be allocated by equitable apportionment or interstate compact, like any other resource in which different states have competing interests.

1. The Supreme Court Has Consistently Held That Natural Resources That Extend Across State Borders Are Interstate—Not Intrastate—Resources

The Supreme Court's precedents recognize that natural resources that cross state lines, such as the Aquifer, are shared, interstate resources. *E.g.*, *Kansas v. Colorado*, 206 U.S. at 115 ("Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico.").

Mississippi's strained attempt to describe the Aquifer as an "intrastate natural resource," Compl. ¶ 17, is contrary to settled law.

As the Supreme Court has noted, "[i]nterstate waters have been a font of controversy since the founding of the Nation," and the Court "has frequently resolved disputes between States that are separated by a common river . . . , that border the same body of water . . . , or that are fed by the same river basin." *Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992) (citations omitted) (internal quotation marks omitted). This dispute between states overlying the same interstate aquifer is no different. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983) (observing, in a case involving anadromous fish, that a dispute over water flowing through a river system would be resolved through equitable apportionment and that there is "no reason to accord different treatment to a controversy over a similar natural resource of that system").

It is well-settled that "[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." *Virginia v. Maryland*, 540 U.S. at 74 n.9. As a natural resource that crosses state borders, the Aquifer is subject to equitable apportionment, and the fact that Mississippi claims the water at issue originated in Mississippi "should be essentially irrelevant to the adjudication of these sovereigns' competing claims." *Colorado v. New Mexico*, 467 U.S. 310,

323 (1984). Mississippi has cited no authority to depart from this doctrine in the case of an aquifer.

More importantly, the Supreme Court's cases have "consistently denied" the proposition on which Mississippi now relies—that the water at issue is somehow "intrastate" water and that Mississippi exercises "ownership or control" over all "waters flowing within her boundaries." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938) (internal quotation marks omitted); *see Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1025 ("[A] State may not preserve solely for its own inhabitants natural resources located within its borders."). Rather, the Court has "appropriately balance[d] the unique interests involved in water rights disputes between sovereigns," *Colorado v. New Mexico*, 467 U.S. at 316, and its rulings are "neither dependent on nor bound by existing legal rights to the resource being apportioned." *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1025. Mississippi's claim that the water at issue is "intrastate" water cannot be reconciled with the Court's equitable apportionment jurisprudence. The case law is clear: water in an interstate resource is interstate water, and Mississippi's assertion that it has a sovereign and exclusive interest in some portion of the Aquifer "must give way . . . to broader equitable considerations." *Id.*

The conclusory allegation that the water at issue is "intrastate" water is not a well-pled fact that must be taken as true for purposes of Defendants' Motion.

Mississippi is making an unsupported legal conclusion or inference, as explained above, and the Court need not accept it. *See Papasan*, 478 U.S. at 286. Moreover, Mississippi's "intrastate" claim is contradicted by Mississippi's own admissions. The complaint admits that the "geological formation in which the groundwater is stored straddles two states." Compl. ¶ 41; *see also id.* ¶ 22 (stating that the "Sparta Sand formation . . . extends into western Tennessee"); *id.* ¶ 50 ("The Sparta Sand formation underlies both Mississippi and Tennessee . . . ."). Mississippi thus concedes that the Aquifer spans both states and extends laterally through the region.

Mississippi also concedes that water in the Aquifer is moving. *Id.* ¶ 16 ("[R]ainwater falling within Mississippi's current borders collected on the formation outcrops; was drawn by gravity into and down the natural east-to-west/southwest dip of the formation at a rate of about an inch a day; and was stored as groundwater within the territorial borders of Mississippi."); *see also* App. 31a ("As rain falls on the outcrop area of the Sparta it slowly percolates downward and then under gravity and the weight of the water accumulated above it in the formation slowly provides recharge as it seeps through the tiny pore spaces of the sandstone down gradient following the dip of the formation . . . ."). Mississippi even admits that groundwater naturally flowed across the state line into Tennessee before any pumping began. *Id.* App. 70a (describing that the "estimated

potentiometric surface map for predevelopment conditions" includes an "area of limited natural flow from Mississippi to Tennessee"). Mississippi acknowledges that pumping in one state affects the other. *Id.* ¶¶ 22-24. Its claims are based on the notion that when Tennessee withdraws and uses water from the Aquifer in Tennessee that withdrawal has an impact on the movement of groundwater in Mississippi. *Id.* In the face of its own claims, Mississippi's allegation that the water in the Aquifer is "intrastate" water is not reasonable or warranted.

2. In *Mississippi I*, Mississippi Repeatedly Averred That the Aquifer and the Groundwater Are Interstate Resources

In *Mississippi I*, Mississippi relied on the interstate character of the Aquifer and the water in it as the basis for asserting subject-matter jurisdiction. *See, e.g.*, Am. Compl., U.S. District Court for the Northern Division of Mississippi, ¶ 11 ("This is an interstate groundwater action . . . .") (emphasis added); *id.* ¶ 14 ("The Memphis Sand Aquifer, or 'Sparta Aquifer' as it is known in Mississippi . . . is an underground reservoir that underlies portions of West Tennessee and Northwest Mississippi."); Mississippi's Br., U.S. Court of Appeals for the Fifth Circuit, at 1 (asserting that the "Memphis Sand Aquifer [is] an interstate underground body of water") (emphasis added); *id.* at 21 ("The interstate nature of the aquifer confers federal question jurisdiction on the District Court. . . . It is the interstate context that actually confirms the District Court's subject matter jurisdiction . . . .") (emphasis added); *id.* at 22-23 (asserting that the "aquifer is an interstate body of

water") (emphasis added); Mississippi's Reply Br., U.S. Court of Appeals for the Fifth Circuit, at 11 (asserting that, "because of the interstate character of the aquifer, the context of the litigation calls for application of federal common law").[7] Since Mississippi asserted throughout *Mississippi I* that the Aquifer—and the groundwater in it—is an interstate resource, Mississippi cannot now take a contrary position.

3. The Fifth Circuit and the Trial Court in Mississippi Both Held That the Aquifer Is an Interstate Resource and Must Be Equitably Apportioned

In *Mississippi I*, the district court held that "interstate water is the subject of the suit," as "it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi." *Hood*, 533 F. Supp. 2d at 648-49. The Fifth Circuit agreed, ruling that "[t]he Aquifer is an interstate water resource, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share." *Hood*, 570 F.3d at 630.

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[7] In *Mississippi I*, the district court noted, "while the Plaintiff contends on the one hand that only Mississippi water is involved in this suit, it also contends that the sole basis for the court's jurisdiction is the existence of a federal question because interstate water is the subject of the suit. The Plaintiff cannot have it both ways." *Hood*, 533 F. Supp. 2d at 649.

As in this case, Mississippi's district court claims were based on the false assumption that Mississippi has a predetermined claim to a specific portion of the groundwater in the Aquifer:

> The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of which State.

Hood, 533 F. Supp. 2d at 648. In affirming the district court's ruling, the Fifth Circuit likewise recognized that "the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share." *Hood*, 570 F.3d at 630 (emphasis added) (citations omitted).

The district court dismissed Mississippi's first lawsuit, and the Fifth Circuit affirmed that dismissal, based on the following specific findings:

a. The Aquifer is a shared interstate water resource

"The Aquifer is an interstate water source . . . ." *Hood*, 570 F.3d at 630; *see also Hood*, 533 F. Supp. 2d at 648 ("[I]t is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi."); *Hood*, 570 F.3d at 627 ("The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas.").

b. Mississippi's rights to the groundwater in the Aquifer can be judicially determined only by an equitable apportionment action filed in the Supreme Court

"Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Hood*, 570 F.3d at 630 (quoting *Colorado v. New Mexico*, 459 U.S. at 183); *see also id*. at 632 ("Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law . . . . Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis.").

"Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine." *Id*. at 630. "The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation." *Id*. at 631.[8]

A "suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a)." *Id.* at 632; *see also id*. at 628 ("[T]he doctrine of equitable

[8] The Fifth Circuit noted that "[a] handful of Supreme Court cases mention aquifers in the context of interstate water disputes." *Hood*, 570 F.3d at 630 n.5 (citing *Texas v. New Mexico*, 462 U.S. 554, 556-57 nn.1-2 (1983), and *Wisconsin v. Illinois*, 449 U.S. at 50).

apportionment has historically been the means by which disputes over interstate waters are resolved.").

c. Because the Aquifer has not been equitably apportioned, Mississippi cannot state a viable claim for misappropriation

Absent an apportionment of the Aquifer by equitable apportionment or interstate compact, Mississippi cannot state a viable claim for the alleged wrongful taking of "Mississippi's groundwater." For that very reason, the district court expressly rejected Mississippi's contention that "only Mississippi water is involved in this suit." *Hood*, 533 F. Supp. 2d at 649.

"The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share." *Hood*, 570 F.3d at 630 (emphasis added). Thus, to afford "any relief to [Mississippi] of necessity requires apportionment of the subject aquifer." *Hood*, 533 F. Supp. 2d at 650. The Fifth Circuit affirmed this ruling. *See Hood*, 570 F.3d at 629-30 (finding "that the district court made no error of law as to the necessity of equitably apportioning the Aquifer") (citing *Hinderlider*, 304 U.S. at 104-05); *see also Hood*, 533 F. Supp. 2d at 648 ("[A]bsent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's

water is the property of which State."); *id.* at 649 ("[T]o afford the State of Mississippi the relief sought and to hold that the Defendants have misappropriated Mississippi's water from the Memphis Sands aquifer, the court must necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee, and so on, thereby effectively apportioning the aquifer. Mississippi cannot be afforded any relief otherwise.").

4. Mississippi's Claims Are Barred by the Doctrine of Issue Preclusion

The Supreme Court has long adhered to the doctrines of claim preclusion and issue preclusion.[9] *Allen v. McMurry*, 449 U.S. 90, 94 (1980). Both doctrines reflect the "fundamental precept of common-law adjudication . . . that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.'" *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)); *see also Arizona v. California*, 460 U.S. 605, 619 (1983) ("[A]n issue once determined by a competent court is conclusive."). Precluding "parties from contesting matters that they have had a full and fair opportunity to litigate protects

[9] *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) (noting that "issue preclusion" has replaced the doctrine of collateral estoppel). In this Motion, the term "issue preclusion" is used except in those instances where a court is quoted using the term "collateral estoppel."

their adversaries from the expenses and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* (quoting *Montana v. United States*, 440 U.S. at 153-54).

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of an issue in a suit on a different cause of action involving a party to the first case." *Allen*, 449 U.S. at 94; *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-04 (1940) (noting a decision by the National Bituminous Coal Commission and affirmed by the Fifth Circuit had determined an appellant's coal was "bituminous" in character and holding appellant's attempt to reargue the same issue in a subsequent action was precluded).[10]

Issue preclusion "does not depend on an earlier adjudication of the substance of the underlying claim." *Sonus Networks, Inc. v. Ahmed*, 499 F.3d 47, 59 (1st Cir. 2007). Accordingly, "even adjudications such as dismissal for lack of jurisdiction or failure to join an indispensable party, which are expressly denominated by Rule

[10] This Court has noted that "[s]ome courts and commentators use 'res judicata' as generally meaning both forms of preclusion." *Allen*, 449 U.S. at 94 n.5. *Sunshine Anthracite Coal* illustrates this point. In *Sunshine*, the *issue* precluded was the character of appellant's coal (*i.e.*, that it was bituminous coal). *Sunshine*, 310 U.S. at 402. However, the Court referred to the applicable preclusion doctrine as "res judicata." *Id.* at 403.

41(b) as not being 'on the merits,' are entitled to preclusive effect," *id.*, and are, therefore, "conclusive as to matters actually adjudged," *Equitable Trust Co. v. Commodity Futures Trading Comm'n*, 669 F.2d 269, 272 (5th Cir. 1982); *see also Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("Although the dismissal was without prejudice, 'an issue actually decided in a non-merits dismissal is given preclusive effect in a subsequent action between the same parties.'") (quoting *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999)); *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997) ("A dismissal for lack of subject-matter jurisdiction, while not binding as to all matters which could have been raised, is, however, conclusive as to matters actually adjudged.") (quoting *Equitable Trust Co.*, 669 F.2d at 272)); *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987) (noting dismissals for lack of subject matter jurisdiction "have preclusive effect as to matters actually adjudicated" and "preclude relitigation of the precise issue of jurisdiction that led to the initial decision").

Applied here, the doctrine of issue preclusion is dispositive of Mississippi's claims. *Mississippi I* established that the Aquifer is an "interstate water source" and that "the amount of water to which each state is entitled . . . must be allocated before one state may sue an entity for invading its share." *Hood*, 570 F.3d at 630. At issue in *Mississippi I* was whether it was necessary to equitably apportion the

water in the Aquifer, and this issue now decided "cannot be disputed in a subsequent suit." *Montana*, 440 U.S. at 153. By operation of issue preclusion, the dismissal of *Mississippi I* was "with prejudice" as to those issues that were litigated and decided. *See In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (finding that, even though "a judgment for the defendant is not on the merits, the plaintiff . . . is precluded from relitigating the very question which was litigated in the prior action").

In *Mississippi I*, Mississippi had its day in court and had the opportunity to present its evidence and its view of the law. The district court litigation lasted three years, including extensive document review and production, fact depositions, third-party discovery, and expert reports and testimony. The parties engaged in substantial motion practice and briefing, up through and including pre-trial arguments, which led to the district court's ruling that it could not afford relief to Mississippi "because it has not yet been determined which portion of the aquifer's water is the property of which state." *Hood*, 533 F. Supp. 2d at 648. The Fifth Circuit affirmed, holding that determining the states' relative rights to the Aquifer "brings this case squarely within . . . the equitable apportionment doctrine." *Hood*, 570 F.3d at 630. The district court and Fifth Circuit thus rejected the very issues that Mississippi seeks to relitigate in its complaint. To allow Mississippi to proceed with its complaint would subject Memphis and MLGW to the "expenses

and vexation" of multiple lawsuits, result in the duplicative use of judicial resources, and raise the possibility of "inconsistent decisions" regarding the issues already decided. *Arizona*, 460 U.S. at 619.

B. THE SOLE JUDICIAL MECHANISM FOR RESOLVING THIS INTERSTATE WATER DISPUTE IS EQUITABLE APPORTIONMENT

1. Unless and Until the Aquifer is Apportioned, Mississippi Has No Right to Claim a Portion of the Interstate Water

As noted above, "[e]quitable apportionment [has been] the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream" for more than a century. *Colorado v. New Mexico*, 459 U.S. at 183. Yet Mississippi has disavowed any claim of equitable apportionment. *See* Compl. ¶ 38 ("This case does not fall within the Court's equitable apportionment jurisprudence."). According to Mississippi, an equitable apportionment of the Aquifer is not necessary, and instead the Court should permit Mississippi to proceed with claims seeking hundreds of millions of dollars for Defendants' alleged conversion of or trespass to "[a]ll groundwater located under Mississippi upon its admission to the Union in 1817 [which] became the sovereign property of Mississippi at that time." *Id.* ¶ 43. This contention is wrong as a matter of law.

Because interstate water resources must be equitably apportioned "between states," *Hinderlider*, 304 U.S. at 107, and because the Aquifer has never been

apportioned, Mississippi has no cognizable claim against Defendants based on a unilateral declaration of ownership of the unapportioned water of the Aquifer. Mississippi's tort claims against Memphis and MLGW are contrary to the "cardinal rule" at the heart of the equitable apportionment doctrine—"equality of right." *Kansas v. Colorado*, 206 U.S. at 97. Mississippi seeks to reach across the state boundary line into Tennessee by asserting claims against Tennessee citizens who are withdrawing groundwater exclusively from within Tennessee and in compliance with Tennessee's laws. By unilaterally claiming "ownership" of a specific portion of the interstate Aquifer, Mississippi overtly "reaches, through the agency of natural laws, into the territory of another state." *Id.*

Unless and until the Aquifer is apportioned among the relevant states, Mississippi cannot assert any right "susceptible of judicial enforcement." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). The Supreme Court has held that "a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1025; *Colorado v. New Mexico*, 467 U.S. at 323 (holding that a state's border is "essentially irrelevant to the adjudication of these sovereigns' competing claims"). Mississippi's contention that it can claim "sovereign ownership and control" of the groundwater at issue, Compl. ¶ 39, also conflicts with this Court's holdings requiring consideration of "many factors to ensure a fair and equitable allocation."

Idaho ex rel. Evans v. Oregon, 462 U.S. at 1026 n.10; *see also id.* at 1025 (noting that "apportionment is based on broad and flexible equitable concerns rather than on precise legal entitlements"); *Colorado v. New Mexico*, 459 U.S. at 186 (stating that "in an equitable apportionment of interstate waters it is proper to weigh the harms and benefits to competing states"); *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (stating that "[a]pportionment calls for the exercise of an informed judgment on consideration of many factors").

If Mississippi's legal position had any merit, the Supreme Court's settled application of the doctrine of equitable apportionment to resolve interstate resource disputes would have been unnecessary. The Court should reject Mississippi's attempt to brush aside that precedent and to extract tort damages based on a state's claimed "right, title, and interest in the waters naturally residing within its boundaries." Compl. ¶ 38.[11]

2. Mississippi Has Not Asserted a Real or Substantial Injury

At the heart of every original action ever entertained by the Supreme Court was a demonstration that the plaintiff had suffered a harm of serious magnitude warranting the Court's exercise of its scarce jurisdiction. In this case, there are no

[11] Further, if each state "owns" the groundwater "residing within its boundaries," the Court should reject Mississippi's claims because it is undisputed that the groundwater pumped by Defendants "resides within the boundaries" of Tennessee and, therefore, under Mississippi's theory, is "owned" by Tennessee.

such allegations of substantial harm. On this basis alone, the complaint should be dismissed. The alleged taking of groundwater from the Aquifer, without real or substantial injury to Mississippi, is insufficient to assert a viable claim against Memphis and MLGW.

The complaint in this case fails because it does not allege "real or substantial injury or damage" to Mississippi's use of or ability to use the groundwater in the Aquifer. *Colorado v. New Mexico*, 459 U.S. at 187 n.13. Mississippi does not allege any actual loss of water use—at the current time or in the future. *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1028 (dismissing Idaho's bill of complaint because it "d[id] not demonstrate that Oregon and Washington are now injuring Idaho . . . or that they will do so in the future"); *Connecticut v. Massachusetts*, 282 U.S. at 674 (dismissing Connecticut's action because Connecticut's "substantial interests" were not "being injured" by alleged diversions of water by Massachusetts). While Mississippi claims that the groundwater at issue "ha[s] been permanently lost to Mississippi," Compl. ¶ 54, Mississippi admits that the Aquifer is continually recharged by rainwater collecting on "formation outcrops . . . drawn by gravity" into the Aquifer, *id.* ¶ 16. Mississippi's complaint does not contain any concrete allegations of an adverse impact to Mississippi's present or future use of the groundwater in dispute.

C. ADDITIONALLY, MISSISSIPPI'S CONVERSION CLAIM SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM UNDER ANY RECOGNIZED LAW

1. Mississippi's Ownership Theory Fails as a Matter of Law

Conversion of interstate water does not exist in Supreme Court jurisprudence. The Court has not recognized such a cause of action for good reason. "It is elementary that ownership is an essential element of conversion." *Cmty. Bank, Ellisville, Miss. v. Courtney*, 884 So.2d 767, 772 (Miss. 2004) (emphasis added).[12]

Mississippi's claim to "own" a portion of the Aquifer's water is a position that has been soundly and squarely rejected by the Supreme Court and by Mississippi's own legislative and judicial branches. Because Mississippi cannot claim to "own" the water in the interstate Aquifer, Mississippi's conversion claim should be dismissed as a matter of law.

a. The Supreme Court has held that states do not "own" the groundwater beneath them

"[T]he Supreme Court has made it abundantly clear that it has little patience with claims of absolute 'ownership' [of groundwater] by *either* [state or federal]

[12] While Mississippi concedes that neither its law nor Tennessee's law governs, Compl. ¶ 37, Mississippi's allegations imply that Mississippi tort law applies. *Id*. ¶ 14 (asserting a violation of "Mississippi water law"). However, federal common law applies to this dispute between states over rights to use an interstate water resource, and for the past century, that federal common law has been equitable apportionment. *See supra* Sections II(B), V(B).

government." Robert E. Beck, 4 WATER AND WATER RIGHTS § 36-02, p. 36-8 – 36-9 (Amy L. Kelley ed., 3rd ed. 1991); *see also* Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 740 (2012) ("State ownership [of water] is a fiction for the assertion of the power to regulate all aspects of use and enjoyment rather than an assertion of full ownership.").

Mississippi's claim to "own" the groundwater at issue would have the effect of resuscitating *Geer v. Connecticut*, 161 U.S. 519 (1896), a decision long ago rejected and expressly overruled. As the Supreme Court explained in *Hughes v. Oklahoma*:

> *Geer* sustained against a Commerce Clause challenge a statute forbidding the transportation beyond the State of game birds that had been lawfully killed within the State. The decision rested on the holding that no interstate commerce was involved. This conclusion followed in turn from the view that the State had the power, as representative for its citizens, who "owned" in common all wild animals with the State, to control not only the *taking* of game but also the *ownership* of game that had been lawfully reduced to possession. By virtue of this power, Connecticut could qualify the ownership of wild game taken within the State by, for example, prohibiting its removal from the State . . . .

441 U.S. 322, 327 (1979) (citing *Geer*, 161 U.S. at 535). The *Hughes* Court observed that the "erosion of *Geer* began only 15 years after it was decided," and subsequently led to an "explicit" "shift away from *Geer*'s formalistic 'ownership' analysis." *Hughes*, 441 U.S. at 327, 329-34 (citing *Toomer v. Witsell*, 334 U.S. 385, 402 (1948)) ("The whole ownership theory, in fact, is now generally regarded

as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.") (emphasis added). Accordingly, the *Hughes* Court expressly overruled *Geer*, "bring[ing] [its] analytical framework into conformity with practical realities." *Hughes*, 441 U.S. at 335; *see also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977) ("A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures.") (emphasis added); *Missouri v. Holland*, 252 U.S. 416, 431 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.").

Not long after *Hughes*, the Supreme Court applied the same analysis to determine the constitutionality of a Nebraska statute that forbade the transport of groundwater pumped from beneath Nebraska into Colorado. *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). The Court held that groundwater was an article of commerce, *id.* at 954, and that the statute was unconstitutional, *id.* at 960. Nebraska's position that it "owned" the groundwater could not be

sustained because it was "based on the legal fiction of state ownership," which had been "expressly overrul[ed]" when the Court decided *Hughes.* *Id.* at 951. Particularly relevant here is that the groundwater at issue in *Sporhase* came from an interstate aquifer—just as in this case. *Id.* at 941. The Court recognized that the "multi-state character of the Ogallala aquifer"—underlying Colorado, Nebraska, Wyoming, South Dakota, Texas, New Mexico, Oklahoma, and Kansas—"confirms that there is a significant federal interest in conservation as well as in the fair allocation of this diminishing resource." *Id.* at 953 (emphasis added).

Mississippi's "state ownership theory" is a vestige of *Geer*—a decision that fell out of favor shortly after it was decided and was then expressly overruled. This Court's modern jurisprudence holds that a state's claim to "own" its natural resources, including groundwater, is "pure fantasy" and a "legal fiction." Mississippi's claim to "own" the water of the Aquifer is likewise "fantasy" and "fiction."

b. The Mississippi legislature has recognized and the Mississippi Supreme Court has held that Mississippi does not own the groundwater beneath it

Mississippi's theory of ownership is also in conflict with the state's own laws and jurisprudence. Specifically, Mississippi Code Annotated § 51-3-41 grants authority to the Mississippi Commission on Environmental Quality ("MCEQ") to "negotiate" Mississippi's "share" of groundwater and surface water

resources, portions of which are in Mississippi and portions of which are in another state. Thus, MCEQ has authority:

> to negotiate and recommend to the Legislature compacts and agreements concerning this state's share of ground water and waters flowing in watercourses where a portion of those waters are contained within the territorial limits of a neighboring state.

Miss. Code Ann. § 51-3-41 (emphasis added).

The Mississippi legislature's recognition that Mississippi's "share" of an interstate water resource like the Aquifer must be negotiated with the other interested states belies Mississippi's erroneous contention that its share has already been determined by the public trust doctrine or as an innate right of statehood. If, as Mississippi contends, its share of the Aquifer was fixed as an inherent right of sovereignty, there would be nothing to negotiate, and Section 51-3-41 would be of no consequence.

Implicit in Section 51-3-41 is the Mississippi legislature's recognition that (1) if portions of any water resource "are contained within the territorial limits of [both Mississippi and] a neighboring state," that water resource is interstate in character; (2) Mississippi, therefore, does not "own" a share of any interstate groundwater resource by reason of it becoming a state; and (3) the Mississippi legislature makes no substantive distinction between the state's interest in an interstate groundwater resource and an interstate surface water resource—

including rivers, streams, and lakes.[13] Mississippi's "share" of any and all interstate water resources must be negotiated with those states in which a portion of the resource is contained. Each and all of the above are fatal to Mississippi's complaint.

As Mississippi's own statute acknowledges, Mississippi has no legal authority to lay claim to any share of an interstate water resource unless and until that resource has been apportioned. The apportionment of an interstate water resource can be accomplished "through a compact approved by Congress or an equitable apportionment action." *Hood*, 570 F.3d at 630 (citing *Hinderlider*, 304 U.S. at 104-05). Mississippi's claims are irreconcilable with its own statute and should be rejected.

Mississippi's conversion claim also conflicts with the rulings of the Mississippi Supreme Court, which has held that water, "in its ordinary or natural state . . . is neither land nor tenement, nor susceptible to absolute ownership." *Dycus v. Sillers*, 557 So. 2d 486, 501 (Miss. 1990) (emphasis added) (quoting *State Game & Fish Comm'n v. Louis Fritz Co.*, 193 So. 9, 11 (Miss. 1940)); *see also id.* at 502 (noting that water "is a moveable wandering thing and admits only of a transient, usufructory property") (quoting *Louis Fritz*, 193 So. at 11). The

[13] Accordingly, Mississippi's allegation that this dispute does not fall within the Supreme Court's equitable apportionment jurisprudence because the Aquifer is not like a river or lake, Compl. ¶ 38, is wholly without merit.

Mississippi Supreme Court's holding that water is not susceptible to proprietary ownership was based on its precedents concerning a state's interest in wild animals, which it found to be analogous. *Id.*; *see also Louis Fritz Co.*, 193 So. at 12 (holding that "the State does not own the fish as proprietor or absolute owner") (citations omitted).[14]

2. Mississippi Cannot State a Viable Claim for Conversion Because the Groundwater at Issue Is Not Property Subject to Conversion

As stated in Section V(C)(1)(a) above, the Supreme Court's holding in *Sporhase* that a state's claimed ownership of groundwater is a legal fiction was an outgrowth of the well-established law of *ferae naturae*. For two centuries, it has been the law that dominion over a wild animal can be exercised only upon the animal's actual, physical capture. Prior to capture, no one can rightly claim any ownership interest in a wild animal that is sufficient to sustain a claim of conversion. *See Pierson v. Post*, 3 Caines 175 (1805) (finding Post, who was actively pursuing a wild fox, had no property interest in the animal such that he

[14] *See also Bausch & Lomb, Inc. v. Utica Mutual Ins. Co*., 625 A.2d 1021, 1034-36 (Md. Ct. App. 1993) (citing *Sporhase* and holding that "the State's interest in groundwater rests on its power to preserve and regulate" and "[t]hat power does not constitute a property interest within the contemplation of the insurance policy in dispute") (citations omitted); *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 860 n.7 (Cal. 2000) (finding the state's interest in "the public groundwater and surface waters" was "not an ownership interest, but rather a nonproprietary regulatory one").

could collect damages from Pierson who caught the fox being chased); *Young v. Hichens*, 1 Dav. & Mer. 592; 6 Q.B. 606 (1844) (dismissing a claim by a fisherman who, while a large shoal of mackerel was within his net, had the fish taken from him when the defendant's boat traveled through an opening in the net and captured all of the fish in his own net, because that the plaintiff did not have custody or possession of the fish at the time the defendant captured them); *see also Hughes v. Reese*, 109 So. 731, 731 (Miss. 1926) (denying recovery to a plaintiff whose silver fox escaped and was killed by the defendant because the fox was "'wild by nature,' and in such an animal a qualified property right can be acquired by reducing it to possession and keeping it, if alive, in custody").

Relying on those same "wild" legal roots, courts have held that groundwater is not subject to conversion unless and until it is physically captured, *i.e.*, pumped. *See, e.g.*, *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1982) ("In the absolute sense, there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control by the person claiming them because of their migratory character. Like wild animals free to roam as they please, they are the property of no one.") (emphasis added); *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663, 667 (Fla. 1979) *cert. denied*, 444 U.S. 965 (1979) ("There can be no ownership in seeping and percolating waters in the absolute sense, because of their wandering and migratory

character, unless and until they are reduced to the actual possession and control of the person claiming them.") (emphasis added); *Knight v. Grimes*, 127 N.W.2d 708, 711 (S.D. 1964) ("The notion that this right to take and use percolating water constitutes an actual ownership of the water prior to withdrawal has been demonstrated to be legally fallacious.") (citations omitted).

A "groundwater right is a usufructuary right, that is, a right to use, not own the groundwater." *Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 660 (Ariz. Ct. App. 2008) (emphasis added). A usufructuary right to pump and use groundwater is, however, distinguished from the "separate personal property right to the water itself only when it is possessed and controlled." *Id.* (emphasis added). Thus, water can become "personal property" only after it is "reduced to possession and control within pipes"—that is, only after it is pumped. *Id.* (emphasis added).

Here, Mississippi does not allege that the groundwater allegedly converted was taken by Defendants from pumps or pipes owned by Mississippi. To the contrary, Mississippi concedes, as it must, that the groundwater at issue was pumped by MLGW directly from the Aquifer—*in situ*. Compl. ¶ 22 ("MLGW's wells . . . pump groundwater from the Sparta Sand formation which extends into western Tennessee."). Under any circumstances, therefore, Mississippi's conversion claim must be dismissed because the groundwater at issue had not

previously been captured within Mississippi, and therefore, it is not subject to conversion.

D. ADDITIONALLY, MISSISSIPPI'S TRESPASS CLAIM SHOULD BE DISMISSED BECAUSE THERE HAS BEEN NO PHYSICAL INVASION OF MISSISSIPPI'S PROPERTY

Like its conversion claim, Mississippi's trespass claim is novel to the Supreme Court. There simply is no support for this cause of action under the precedents set forth by the Court.

Indeed, Mississippi's claim for trespass is novel to the laws of Mississippi. It is well-established in Mississippi's own jurisprudence that "trespass requires an actual physical invasion of the plaintiff's property." *Prescott v. Leaf River Forest Prods., Inc*., 740 So. 2d 301, 310 (Miss. 1999) (emphasis added).

On facts involving private parties analogous to the case at bar, the Mississippi Supreme Court rejected the position taken by Mississippi in this cause. In *California Co. v. Britt*, 154 So. 2d 144 (Miss. 1963), plaintiffs sued a defendant for trespass arising out of the displacement of mineral interests beneath the plaintiffs' property caused by the defendant's actions on its own property. *Id*. at 147. The Mississippi Supreme Court rejected the trespass claim. *Id.* at 148. The court held that "[t]he wells drilled by [defendant] . . . have been drilled on lands in which [plaintiffs] have no interest whatever. Since [defendant] has not trespassed

upon [plaintiffs'] land, has not drilled a well on it, and has violated no rights of [plaintiffs], it is not liable to them in tort." *Id*. (emphasis added).

Mississippi concedes that pumping by MLGW and Memphis occurs entirely within Tennessee. Counsel for Mississippi acknowledged that MLGW does not extend its wells into Mississippi or engage in "diagonal" pumping.[15] Because no part of any well owned by MLGW physically invades Mississippi's territory, Mississippi cannot prove an essential element of its trespass claim.

E. THE EQUAL FOOTING AND PUBLIC TRUST DOCTRINES DO NOT SUPPORT MISSISSIPPI'S COMPLAINT

Mississippi alleges that its "ownership" of the groundwater at issue is based on the equal footing and public trust doctrines. Compl. ¶¶ 10, 12. Neither doctrine supports Mississippi's position. In fact, it was the Supreme Court's consideration of those doctrines in the context of a shared interstate resource that led to the creation of the doctrine of equitable apportionment.

Mississippi cites *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (1986), for the proposition that since Mississippi became a state, Mississippi "state law has controlled ownership and allocation of the use of Mississippi's natural resources." Compl. ¶ 11. At issue in *Cinque Bambini* was real property, *i.e.*, land.

[15] The Special Master asked Mississippi's counsel how Defendants obtained the groundwater: "Do they get a long pipe underground or something?" Mississippi's counsel answered: "No, sir, they are pumping out of the state of Tennessee." Tr. Case Management Conf., Jan. 26, 2016 at 6:6-9.

Cinque Bambini, 491 So. 2d at 510. Specifically, the plaintiff partnership sought to determine whether undeveloped land impacted by the ebb and flow of the tide belonged to the state or to the partnership, which claimed the lands under a grant from the Spanish government that pre-dated Mississippi's statehood. Finding the issue before it "turns on whether the disputed lands are part of the public trust," the Mississippi Supreme Court applied the public trust doctrine to decide the "geophysical confines" of the land ceded to Mississippi when it became a state. *Id.* at 511. *Cinque Bambini* is, therefore, immediately distinguishable because it concerned land, not water. The public trust doctrine simply does not apply. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988) (affirming the Mississippi Supreme Court and noting that the "issue here is whether . . . Mississippi, when it entered the Union in 1817, took title to lands lying under waters that were influenced by the tide running in the Gulf of Mexico, but were not navigable in fact.") (emphasis added).

Cinque Bambini is further distinguishable because it did not involve an interstate dispute—the land at issue was located entirely within Mississippi. The Mississippi Supreme Court recognized in *Cinque Bambini* that the state's interest in the trust property was always "subject to 'the paramount power' of the United States to regulate navigability pursuant to the commerce clause." *Cinque Bambini*, 491 So. 2d at 513 n.3 (emphasis added); *see also Tarrant*, 133 S. Ct. at 2133 n.11

("Of course, the power of States to control water within their borders may be subject to limits in certain circumstances. For example, those imposed by the Commerce Clause.") (citing *Sporhase*, 458 U.S. at 954-58).[16]

The case at bar concerns a dispute over the use of a single groundwater resource, portions of which are contained in Mississippi, portions of which are contained in Tennessee, and portions of which are contained in other states. If as Mississippi alleges, each state was admitted to the Union on an equal footing with the others, Compl. ¶ 10, then it must be that the public trusts of every state overlying the Aquifer (not just Mississippi) are equally implicated, *id.* ¶¶ 45-46 (conceding Tennessee's interests are also at issue).

Mississippi urges that its public trust doctrine somehow carves out from the interstate Aquifer a fixed portion of groundwater that is an "intrastate" resource of Mississippi—a portion defined by Mississippi's state boundaries and "owned" by Mississippi. The Supreme Court has expressly rejected Mississippi's position. Instead, the Court addresses the competing interests of states in an interstate resource by considering the entirety of the interstate resource as a single unit, with each stakeholder state having a "real and substantial interest" in the whole. *See Hinderlider*, 304 U.S. at 102-03 (quoting *Wyoming*, 259 U.S. at 466, and *New*

[16] The Supreme Court's citation to *Sporhase* is significant because in *Sporhase* the Court found that groundwater was an article of commerce. *See supra* Section V(C)(1)(a).

Jersey, 283 U.S. at 342-43) ("The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other. . . . Both States have real and substantial interests in the River that must be reconciled as best they may."); *see also Kansas v. Colorado*, 206 U.S. at 115 ("Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico."); *Colorado v. New Mexico*, 467 U.S. at 323 (rejecting "the notion that the mere fact that the [river] originates in Colorado automatically entitles Colorado to a share" and finding that the water's source "should be essentially irrelevant to the adjudication of these sovereigns' competing claims"); *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1028 n.12 (noting that, "[w]hile the origin of the fish may be a factor in the fashioning of an equitable decree, it cannot by itself establish the need for a decree").

This Court is called upon to resolve a dispute concerning the competing sovereign interests of Mississippi and Tennessee "in such a way as will recognize the equal rights of both and at the same time establish justice between them." *Kansas v. Colorado*, 206 U.S. at 667. It is precisely because Mississippi cannot impose its laws on Tennessee, and Tennessee likewise cannot impose its laws on

Mississippi, that "[n]either State's legal regime provides any effective mechanism for resolving this dispute." Compl. ¶ 37. The Supreme Court created the federal common law of equitable apportionment to address this very circumstance.[17]

The path urged by Mississippi is neither equitable nor just. Mississippi's "ownership" theory necessarily requires this Court to find that Mississippi's public trust is superior to the public trust granted to Tennessee upon its becoming a state. Only by ignoring the Supreme Court's equitable apportionment precedents and Tennessee's equal sovereign rights in the Aquifer can Mississippi purport to seek damages for the pumping of groundwater from within Tennessee's borders, by Tennessee citizens acting in compliance with the laws and regulations of Tennessee. Mississippi's complaint unabashedly asks this Court to extend the reach of Mississippi law (as erroneously interpreted by Mississippi) beyond the state's own political boundaries and impose it on entities residing in and acting wholly within Tennessee and in compliance with Tennessee law. Such a position is untenable and cannot be sustained.

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[17] Mississippi alleges that in 1985 the Mississippi legislature codified the public trust doctrine in the "Omnibus Water Rights Act." Compl. ¶ 12 (quoting Miss. Code Ann. § 51-3-1). However, Mississippi's Omnibus Water Rights Act actually supports Defendants' position. Section 51-3-41 recognizes that Mississippi does not, by right of statehood, "own" any portion of interstate water resources such as the Aquifer. *See supra* Section V(C)(1)(b). Mississippi's share of that resource must be apportioned by interstate compact or by equitable apportionment. It is also worth noting that the terms "own" or "owner" do not appear anywhere in Mississippi's Omnibus Water Rights Act.

Because the Aquifer is "multi-state [in] character," the federal government has a "significant interest" in the "fair allocation" of that resource. *Sporhase*, 458 U.S. at 953 (emphasis added). Equal footing means equal footing. It cannot be, as Mississippi's complaint argues, that Mississippi's footing is "more equal" than that of Tennessee's.

VI. CONCLUSION

The tort claims brought by Mississippi in this case are unsupported by precedent. Mississippi's claims can survive only by overturning the century-old doctrine of equitable apportionment and imposing Mississippi law on Tennessee citizens acting lawfully and wholly within Tennessee. Mississippi's claim to "own" water in an interstate Aquifer solely by right of statehood directly conflicts with Supreme Court precedents and with Mississippi's own laws.

The financial and legal ramifications of a ruling that Mississippi has stated a viable claim cannot be overstated. [18] Allowing Mississippi's claims to survive this Motion for Judgment on the Pleadings will exacerbate existing interstate water

[18] Dozens of multi-state aquifers and aquifer systems underlie the continental United States. U.S. Dep't of the Interior, U.S. Geological Survey, GEOLOGICAL SURVEY, GROUND WATER ATLAS OF THE UNITED STATES (2000), *available at* http://pubs.usgs.gov/ha/ha730/gwa.html (describing dozens of interstate aquifers and aquifer systems across the United States); *see also Sporhase*, 458 U.S. at 953 (noting the "multistate character of the Ogallala aquifer—underlying . . . Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma and Kansas").

disputes (above and below ground) by adding the enticement of potential monetary recoveries. Mississippi urges this Court to break from established precedent and follow a path that will dramatically increase the incentive for states to litigate and decrease the incentive for states to resolve their concerns by negotiation and accommodation. Such a result would be antithetical to the legal and public policy foundations upon which the doctrine of equitable apportionment was built.

For all of the reasons set forth above, Defendants' Motion for Judgment on the Pleadings should be granted, and Mississippi's complaint should be dismissed with prejudice.

Respectfully submitted,

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