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Brian J. Isaac
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Court of Appeals

STATE OF NEW YORK

KATHLEEN HENRY,

Plaintiff-Respondent,

against

NEW JERSEY TRANSIT CORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

and

CHEN NAKAR,

Defendant.

BRIEF FOR PLAINTIFF-RESPONDENT

POLLACK, POLLACK, ISAAC
& DECICCO, LLP
225 Broadway, 3rd Floor
New York, New York 10007
212-233-8100
bji@ppid.com

Appellate Counsel to:

MARDER, NASS & WEINER, PLLC
Attorneys for Plaintiff-Respondent
450 Seventh Avenue, 37th Floor
New York, New York 10123
212-967-1122
lenny@mnwlawny.com

Of Counsel:

Brian J. Isaac
Christopher J. Soverow

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KATHLEEN HENRY,

RESPONDENT'S BRIEF

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSIT CORPORATION and
RENAUD PIERRELOUIS,

Defendants-Appellants,

-and-

CHEN NAKAR,

Defendant.

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PRELIMINARY STATEMENT

Plaintiff-Respondent Kathleen Henry ("Henry" or "Plaintiff") submits this brief in response to the appeal by Defendants-Appellants New Jersey Transit Corporation ("NJT") and Renaud Pierrelouis ("Pierrelouis") (hereinafter collectively referred to as "Defendants"), upon this Court's decision, dated January 5, 2022 (C120-123),[1] which granted leave to appeal from the Appellate Division's unanimous decision, dated June 3, 2021, which (1) denied Defendants' demand for the protections of sovereign immunity and (2) affirmed the jury's damage award (C3-4).

[1] "C" followed by numbers in parentheses refer to pages of the Compendium whereas "R" followed by numbers in parenthesis refer to pages of the record on appeal.

This appeal arises from Defendants attempt to avoid liability for a six-figure judgment in this personal injury action by claiming, for the first time on appeal without even pleading the common law doctrine as a defense, that they are entitled to sovereign immunity. However, as a threshold issue in this and related cases, neither NJT nor Pierrelouis qualify for sovereign immunity because NJT is a mere municipal corporation and Pierrelouis has been sued in his individual capacity as a bus driver. Regardless, Defendants completely misapprehend the doctrine of sovereign immunity, which sounds in personal jurisdiction in cases such as this and is, in any event, waivable through litigation conduct. Additionally, there is an open, unanswered question as to whether Defendants consented to suit by contract, which further renders this appeal premature and unripe for review. Moreover, whether by State or Federal statute, Defendants consented to be bound by New York law. Finally, Defendants' claim that New York would not hold itself liable in such circumstances is false; and, particularly where Defendants seek to avoid a judgment post-expiration of the statute of limitations, it is Defendants who violate the Full Faith and Credit Clause by being outright hostile to a judgment entered in this State's courts, the public acts of New York, and New York citizenry.

QUESTION PRESENTED

1.) Are Defendants entitled to sovereign immunity pursuant to the Eleventh Amendment and related jurisprudence?

No, NJT is a municipal corporation and Pierrelouis was sued in his individual capacity, which deprives both Defendants of sovereign immunity under any standard. Regardless, Eleventh Amendment immunity only applies to questions of federal jurisdiction. Structural immunity sounds in personal jurisdiction, which New York courts unquestionably possess over Defendants. In addition, Defendants waived the defense by their litigation conduct. Regardless, there is an open question as to whether Defendants consented to New York jurisdiction by express or implied contract, which Defendants have circumvented discovery on through their dilatory conduct, relegating this appeal both unpreserved and unripe. Finally, Defendants consented to New York jurisdiction by the terms of the New Jersey Tort Claims Act and by virtue of being a federally registered common carrier, a fact withheld by Defendants in this and all related matters.

2.) Did the First Department violate the Full Faith and Credit Clause by holding Defendants to a more stringent standard than New York State entities?

No, under either New York or New Jersey law, a state entity must be held liable for negligently injuring someone while

operating motor vehicles. It is, instead, the acts of Defendants that evince hostility toward New York in violation of the Constitution.

STATEMENT OF THE CASE

A. Procedural History

Defendants' recitation of the procedural history of this case and arguments omits facts that must be supplied.

Plaintiff sustained serious injuries on October 5, 2015, when she was a passenger in a bus owned by NJT and operated by Pierrelouis, which collided with the vehicle driven by Defendant Chen Nakar ("Nakar"). The accident occurred in the Lincoln Tunnel while the bus was in transit from Manhattan to New Jersey (R7-8). Plaintiff severely injured her dominant, right shoulder (a three-part proximal humerus impact fracture that required surgery with internal fixation), which rendered her unable to work for two years and causes serious pain to date (7-10).

Plaintiff initiated this action on June 29, 2015 (481-490), and Defendants joined issue on September 23, 2015 (498-504). Notably, although Defendants asserted seven affirmative defenses and one cross-claim, Defendants did not state or preserve their alleged defense of sovereign immunity (R501-502). The matter proceeded through discovery and litigation for over three years before a trial was held from December 4-11, 2018, resulting in a verdict for Plaintiff, at which point Defendants requested and

were granted permission to file a motion to set aside the verdict (R505-1107).

Defendants filed their motion on February 15, 2019 (R25-35), Plaintiff opposed on April 5, 2019 (R36-471), and Defendants replied on April 25, 2019 (R472-480). The sole issue in the post-trial motion was whether the jury's verdict was excessive (R25-480). By decision dated June 27, 2019, and entered on July 3, 2019, the trial court denied the motion to set aside the verdict finding it was not excessive (R7-24). On September 4, 2019, Defendants filed their notice of appeal raising only the issue of excessiveness (2-5). Defendants perfected their appeal on October 5, 2020, which challenged the verdict as excessive but also, for the first time, argued that the entire case should be dismissed on the grounds of sovereign immunity in accordance with Franchise Tax Bd. v. Hyatt, __ U.S. __, 139 S. Ct. 1485 [2019] ("Hyatt III").

B. NJT's Business Activities

As discussed further below, NJT's purposeful availment to the privileges of conducting business in New York as well as its status as a common carrier are critical to this appeal. Accordingly, a short discussion is warranted.

As per NJT's website: "Covering a service area of 5,325 square miles, NJ TRANSIT is the nation's third largest provider of bus, rail and light rail transit, linking major points in New Jersey, New York and Philadelphia. The agency operates an active fleet of

2,221 buses, 1,231 trains and 93 light rail vehicles. On 251 bus routes and 12 rail lines statewide, NJ TRANSIT provides nearly 270 million passenger trips each year."[2] Notably, NJT requires that its drivers have one of the following licenses: "a non-provisional NJ Driver's License (for the last three years), a NJ Commercial Driver's License permit, or a Commercial Driver's License from NJ, NY or PA."[3] It is perverse to argue that NJT does not at least implicitly consent to abide by New York's VTL or New York's jurisdiction when it undertakes millions of trips into New York,

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[2] See, "About Us," NJT Official Website, located at https://www.njtransit.com/about/about-us (last accessed June 3, 2022).

As per NJT's Federal Registration as a common carrier, it employs 3,704 drivers to operate 2,200 buses (See, Safety Measurement System - Overview (U.S. DOT #74293), located at https://ai.fmcsa.dot.gov/SMS/Carrier/74293/Overview.aspx (last accessed 6/3/2022).

Please note, judicial notice may be taken of official government websites. See, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 AD3d 13, 19 [2d Dept. 2009].

[3] See, "Careers: Bus Operators," NJT Official Website, located at https://www.njtransit.com/careers/bus-operators/ (last accessed June 3, 2022).

derives revenue therefrom,[4] and consents to New York's commercial driver licensing laws as a qualification for employment.[5]

NJT is also is a federally registered common carrier with the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation[6] and is bound by Federal Regulations to adhere to state and local laws pursuant to the Federal Motor Carrier Safety Regulations (see, §390.3(a)),[7] which expressly do not "preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto" (see, §390.9). Federal law also

[4] As an indication of the amount of money NJT derives from its activities, please note that it was recently granted $1.5 billion from the Second CARES Act to compensate it for some of its loses sustained as a result of reduced ridership during the COVID pandemic. See, https://www.nj.com/news/2020/12/nj-transit-gets-125b-but-port-authority-struck-out-on-second-federal-covid-19-aid-request.html (last accessed June 3, 2022).

New Jersey Transit's operating budget for the fiscal year of 2020 was projected to be $2.39 billion with $1.42 billion in capital improvements. See, "NJ Transit Adopts Fiscal Year 2020 Operating, Capital Budgets," July 19, 2019, NJT Official Website, located at < https://www.njtransit.com/press-releases/nj-transit-adopts-fiscal-year-2020-operating-capital-budgets> (last accessed June 3, 2022).

[5] See, supra, n. 4.

[6] See, Safety Measurement System - Overview (U.S. DOT #74293), located at https://ai.fmcsa.dot.gov/SMS/Carrier/74293/Overview.aspx (last accessed June 3, 2022).

[7] For the Court's convenience, a copy of these regulations is maintained on the official electronic government registry for federal regulations. See, Electronic Code of Federal Regulations (eCFR), located at <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&ty=HTML&h=L&mc=true&=PART&n=pt49.5.390# top>(last accessed June 3, 2022).

broadly provides for civil penalties and subjects common carriers to the jurisdiction of any forum that an injured party can avail itself. See, 49 USC §§13101, 13102, 13501, 14501, 14704, 14901, 14906, 14914.

Notably, just last year and well-after the First Department rendered its decision in this case, the New Jersey Supreme Court ruled that the NJT is not entitled to sovereign immunity in negligence cases arising out of its use of buses as a common carrier. Maison v. New Jersey Transit Corp., 245 A.3d 536, 2021 N.J. LEXIS 160, at *34-35 and *38 [NJ Feb. 17, 2021].

ARGUMENT

Although there are issues as to preservation and ripeness, as discussed *infra* at Point I(D)(1), we respectfully submit that there is no need for Plaintiff (and related plaintiffs) for further proceedings because Defendants are not entitled to the defense of sovereign immunity as a matter of law, which this Court can decide the issue now to prevent a profound injustice to Plaintiff and others similarly victimized by NJT.

POINT I

DEFENDANTS MISAPPREHEND AND, THEREBY, MISAPPLY BASIC SOVEREIGN IMMUNITY PRINCIPLES

In reading Supreme Court, other federal courts, and state courts' opinions grappling with the issue of sovereign immunity, it becomes apparent that the absolute bounds of the doctrine, like

many legal doctrines, is not perfectly defined. However, there are several bright line principles that stand out based on established jurisprudence and the history of the doctrine. The first is that, as discussed below, the doctrine originated at common law as a limit upon personal jurisdiction and our judicial system continues to recognize that limit to date. Secondly, there are distinct types of sovereign immunity: (1) structural immunity, the original form of sovereign immunity that sounds in personal jurisdiction; (2) Eleventh Amendment immunity, which is akin to a subject matter jurisdiction limitation on federal courts' jurisdiction; and (3) State sovereignty, which States apply within their own borders with respect to actions brought against the State. It is unclear when Eleventh Amendment jurisprudence should be applicable to structural immunity, but it is a well-trod body of law that can present a useful analog absent any conflict. On a related note, the third bright line principle is that sovereign is waivable by litigation conduct or consent.

Here, Defendants' thirteenth-hour demand for sovereign immunity is morally bankrupt and, as is common in such instances, the law does not permit such a result. There are two reasons Defendants are not entitled to immunity for their conduct as a common carrier: (1) New York has personal jurisdiction over Defendants and, to the extent Eleventh Amendment jurisprudence is applicable, (2) neither NJT nor Pierrelouis qualify for sovereign

immunity. Regardless, in this case that went all the way to verdict, Defendants have waived the defense. Additionally, by State or federal statute, Defendants have consented to suit. We respectfully submit that Defendants are never entitled to sovereign immunity for their negligence as a common carrier or, in the alternative, Defendants have waived the defense or consented to jurisdiction either by contract or both state and federal statute. In the alternative, Defendants' dilatory conduct has rendered this matter both unpreserved and unripe for review.

A. Neither NJT nor Pierrelouis Qualify for Sovereign Immunity

1. NJT is a Municipal Corporation that is not Entitled to Sovereign Immunity for its Common Carrier Activities

Although the federal courts employ various tests for analyzing whether an organization qualifies as an arm of the state as opposed to a mere municipal corporation, the consensus is that entities responsible for transportation, such as the NJT, are municipal corporations. Notably, Defendants heavily rely upon Karns v. Shanahan, 879 F.3d 504 [3d Cir. 2018] (see, Def.'s Br., cited *passim*). However, the Third Circuit's test has been previously rejected by the Supreme Court in similar circumstances.

It is indisputable that a state agency acting akin to a municipal corporation is not entitled to sovereign immunity under the Eleventh Amendment. See, Woods v. Rondout Valley Cent. Sch.

Dist. Bd of Educ., 466 F3d 232, 236 [2d Cir. 2006]; Mancuso v. New York State Thruway Auth., 86 F3d 289, 292 [2d Cir. 1996], cert. den., 519 US 992 [1996]; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 US 274, 280 [1977] ("a governmental entity is entitled to Eleventh Amendment immunity only if it is more like an arm of the State, such as a state agency, than like a municipal corporation or other political subdivision [internal quotation marks omitted]").

Although the federal circuits apply varying tests for when a public entity qualifies as an arm of the state,[8] as noted by

[8] Whether a given entity is entitled to the protections of the Eleventh Amendment is one of federal law. See, e.g., Woods, 466 F3d at 236-237.

However, New York State Courts are bound by the U.S. Supreme Court's interpretation and are not otherwise beholden to the rules of other federal courts. People v. Kin Kan, 78 NY2d 54, 59 [1991]. Absent a clear mandate from the Supreme Court or uniformity within the federal circuits, state courts are free to exercise their own discretion. 423 S. Salina St. v. Syracuse, 68 NY2d 474, 489 [1986]. Although the Supreme Court has determined that agencies akin to NJT are not "arms of the state" (see, e.g., Hess and Mancusco, supra), it "has not articulated a clear standard for determining whether a state entity is an 'arm of the state' entitled to sovereign immunity." Leitner v. Westchester Cmty. College, 779 F3d 130, 134 [2d Cir. 2015]. As a result, each circuit has developed its own set of rules that contain various prongs and, moreover, differ as to whether the analysis is fact specific. Compare, e.g., Guertin v. Michigan, 912 F3d 907, 936-937 [6th Cir. 2019], cert. den., 140 S.Ct. 933 [2020]; Couser v. Gay, 959 F3d 1018 [10th Cir. 2020]; McAdams v. Jefferson Cty. 911 Emergency Communs. Dist., 931 F3d 1132, 1135 [11th Cir. 2019]; United States ex rel. Fields v. Bi-State Dev., 829 F3d 598 [8th Cir. 2016], cert. den., 138 S.Ct. 677 [2018]; P.R. Ports Auth. v. FMC, 531 F3d 868, 873 [DC Cir. 2008], cert. den., 555 US 1170 [2009]; Fresenius Med. Care Cardiovascular Res. Inc. v. Puerto Rico, 322 F3d 56 [1st Cir. 2003], cert. den., 540 US 878 [2003]; Burrus v. State Lottery Comm'n of Ind., 546 F3d 417, 420 [7th Cir. 2008]; Mitchell v. Los Angeles Community College Dist., 861 F2d 198 [9th Cir. 1988], cert. den., 490 US 1081 [1989]; Ram Ditta v. Maryland Nat'l Capital Park & Planning Com., 822 F2d 456 [4th Cir. 1987]; Clark v. Tarrant County, 798 F2d 736, 744 [5th Cir. 1986].

Defendants, "[t]he likelihood that a judgment entered against an entity will be paid from a state's treasury is a 'critical' factor in deciding whether to grant immunity" (Defs.' Br., p. 10, citing Hess v. Port Auth. Trans-Hudson Corp., 513 US 30, 49 [1994]). We join Defendants in urging the Court to apply the standards espoused in Hess, pursuant to which NJT is not an arm of the state because New Jersey, by statute, is never responsible for NJT's debts.

Indeed, a proper reading of New Jersey law establishes that NJT is not an arm of the state. Although there is no dispute that NJT is a "public entity," that does not qualify it as an "arm of the state." NJT quite easily satisfies New Jersey's definition of "public entity," but fails to meet the definition of the term "state" because it is authorized to sue and be sued and was not specifically included in the definition, unlike the Palisades Interstate Park Commission, which was only afforded State status for acts within New Jersey. See, N.J. Stat. Ann. ("NJSA") §§27:25-5(a) and 59:1-3. New Jersey law states that NJT was created to be part of the executive branch (NJSA § 27:25-4(a)) that is "allocated within the Department of Transportation...." NJSA §27:25-4(a).

We respectfully submit, though, that this Court need not analyze each and every Circuit Court's multi-prong analysis because (a) the statutory language is clear, (b) NJT is akin to the agencies discussed above, and (c) there is no dispute that NJT operates as a common carrier, derives billions of dollars in revenues as a result, and New Jersey is not liable for the debts or liabilities of NJT. Moreover, NJT's has the burden to prove it is an arm (Leitner, 779 F3d at 134), which they have failed to do here.

Defendants observed the very same statutory language (Defs.' Br., pp. 10-11), but failed to advise the Court of the next sentence of §27:25-4, which states: "the corporation [the NJT] shall be independent of any supervision or control by the department [of Transportation] or by any body or officer thereof." Defendants further failed to observe that NJT has complete control over, among other things listed in this lengthy section of the statute, its finances. NJSA §27:25-5(v). Moreover, not only is NJT entitled to procure contracts, but it also may procure insurance or establish its own wholly-owned insurance subsidiary. NJSA §27:25-5(r). Critically, New Jersey is not liable for any judgment entered against NJT because, as a matter of statute, "[n]o debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State." NJSA §27:25-17.[9]

Under similar circumstances, the Southeastern Pennsylvania Transportation Authority, the New York State Thruway Authority, and the Port Authority Trans-Hudson Corporation (i.e., "PATH") are

[9] The other portions of the NJSA cited by Defendants, including the Governor and legislature's veto powers (see, Defs.' Br., pp. 11-12) does not render NJT any different than PATH, NYSTA, SEPTA, or any other state analog transportation authority. In fact, identical arguments and statutes in connection with another NJT analog, the West Virginia Parkways Authority, have been expressly rejected. See, Monaco v. WV Parkways Auth., 2021 US Dist. LEXIS 19682, at *7-9 [S.D. W. Va. Feb. 2, 2021] (citing, Am. Trucking Ass'ns v. New York State Thruway Auth., 795 F.3d 351 [2d Cir. 2015]; Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140 [3d Cir. 1995]; Miller-Davis Co. v. Illinois State Toll Highway Authority, 567 F.2d 323 [7th Cir. 1977]).

all public entities but have been held not to be "arms of the State" for the purposes of the Eleventh Amendment, the latter by virtue of the United States Supreme Court's correction of an erroneous Third Circuit ruling. Hess, 513 US at 44-53 [1994]; Mancuso, 86 F3d 289, 292-296 [2d Cir. 1996], cert. den., 519 US 992 [1996]; Bolden v. Southeastern Pa. Transp. Auth., 953 F2d 807, 817-818 [3d Cir. 1991], cert. den., 504 US 943 [1992]. Notably, the Supreme Court rejected the Third Circuit's contention that PATH was not an "arm of the state" in favor of the Second Circuit's conclusion to the contrary. We respectfully submit that there is little to no functional or legal distinction between PATH and NJT.

Defendants' reliance upon the Third Circuit's decision in Karns, supra (see, Def.'s Br., cited *passim*), does not invite a different result for three reasons. First and foremost, the Third Circuit in Karns failed to discuss NJSA §27:25-17 (i.e., that New Jersey is never responsible for NJT's debts) at all and, thus, failed to consider the critical factor required by Hess. This is particularly baffling considering that the Third Circuit expressly invoked Hess in Karns, supra, at 512.

Secondly, Karns is defective and unlikely to withstand scrutiny. The Supreme Court in Hess settled a dispute between the Second and Third Circuits – the Second Circuit held that PATH was a municipal corporation whereas the Third Circuit, relying upon its own test as set forth in Fitchik v. New Jersey Transit Rail

Operations, Inc., 873 F.2d 655, 659 [3d Cir. 1989], ruled that it was an arm of the state. The Supreme Court rejected the Third Circuit's approach and affirmed the Second Circuit's. Astoundingly, the Karns Court again relied upon the Fitchik decision as its guidepost despite the fact that the Supreme Court rejected it! Karns, supra, at 513. Simply put, Karns flies directly in the face of Hess.[10]

Finally, the facts and circumstances of Karns are radically different than those at bar. Defendants rightly observe that whether a state agency is an arm of the state depends on the "'essential nature and effect of the proceeding' in which the entity has been sued" (Defs.' Br., p. 9, quoting Regents of the Univ. of California v. Doe, 519 U.S. 425, 429-430 [1997]). In Karns, supra, the Third Circuit evaluated whether sovereign immunity applied in the context of actions by NJT's police officers. As set forth repeatedly herein, this proceeding involves

[10] Defendants also rely upon Robinson v. N.J. Transit Rail Operations, Inc., 2019 U.S. App. LEXIS 3386, at *2 [3d Cir. 2019] (see, Defs.' Br., p. 22), in which the Third Circuit, relying on Karns, supra, held that the NJT was entitled to sovereign immunity from its own employees' personal injury lawsuits brought under the Federal Employers Liability Act ("FELA"). Since Robinson relied upon Karns, it suffered from the same defects as discussed above. Such defects, however, were never brought before the Supreme Court because the New Jersey legislature acted swiftly to pass a statute forbidding NJT from relying upon "sovereign immunity as a defense to claims arising under certain federal statutes, including FELA." Robinson v. New Jersey Tr. Rail Operations, Inc., 776 F App'x 99, 100 [3d Cir. 2019]. We respectfully submit that the foregoing evinces the legislature's intent that sovereign immunity for the NJT in the context personal injury lawsuits is a travesty of justice. The Court, however, need not await the legislature to enact a similar statute here because the defense of sovereign immunity is unavailable as a matter of law.

a common carrier being sued for its negligent operation of a motor vehicle in connection with its multi-billion-dollar business practices. Just last year, two years after Karns was decided, the New Jersey Supreme Court held that §59:2-2(a) of the New Jersey Tort Claims Act ("NJTCA") necessarily required that NJT be held to the heightened common carrier standard (i.e., of "utmost care"); and, moreover, that §59:3-1 "strongly implies that similarly situated public common carriers and private common carriers are not to be treated in a different manner or to a different extent for liability purposes." Maison, 245 A.3d 536, at *34-35 and *38.

As previously held by the New Jersey Supreme Court: "[a] public body may be considered an agency of the State for some purposes but not for others." Bunk v. Port Auth., 144 NJ 176, 187 [1996]. In Maison, the Court went further and held that the very defendant that seeks immunity here is shielded from liability for alleged failures to provide police protection but is held "to the same negligence standard under the TCA as other common carriers" when the case instead turns on the alleged negligence of one of its bus drivers. Maison, 245 NJ at 275. Thus, Karns, in accordance with Maison, only applies with respect to police officers and not NJT's activities as a common carrier.

Overall, it is well-established that transit authorities, like NJT, that do not make States liable for their debts are

municipal corporations that are not entitled to sovereign immunity.

2. Pierrelouis is not Entitled to Sovereign Immunity

Similarly, it is black letter law that Pierrelouis, who was sued in his individual capacity, is not a member of the state who is entitled to sovereign immunity. See, Hafer v. Melo, 502 US 21, 23, 29, 31 [1991] (where discharged employees sued Pennsylvania's Auditor General in federal court and the Supreme Court ruled that "[i]nsofar as respondents seek damages against Hafer personally, the Eleventh Amendment does not restrict their ability to sue in federal court"); Ying Jing Gan v. City of New York, 996 F2d 522, 529 [2d Cir. 1993] ("To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state … As to a claim brought against him in his individual capacity, however, the state official has no Eleventh Amendment immunity"); Guillemard-Ginorio v. Contreras-Gomez, 585 F3d 508, 530-531 [1st Cir. 2009] (accord).

This is not a case where someone is sued "[i]n an official capacity claim, [where] the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." Lewis v. Clarke, __ U.S. __, 137 S. Ct.

1285, 1291 [2017]. In allowing suit to proceed against prison officials sued in their individual capacities, the Second Circuit held as follows:

> As the Supreme Court has noted, "an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of the principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort." Accordingly, the Court has consistently held that the eleventh amendment does not protect state officials from personal liability when their actions violate federal law, even though state law purports to require such actions.

Farid v. Smith, 850 F2d 917, 921 [2d Cir. 1988] (quoting internally, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 113 n.23 [1984]).

Unlike the prison officials in Farid, Pierrelouis was not following or enacting some official policy. Pierrelouis is not being sued as an officer or representative of New Jersey. He was sued and held liable individually for negligently operating a vehicle, resulting in severe personal injuries. He is not even nominally clothed in the powers of the state. Not even Karns stands for a contrary position in that the Third Circuit held that the suits against the individually named police officers were not subject to sovereign immunity (although the court ruled in the officers' favor on the facts). Karns, supra, at 519-522. To the extent there is any doubt, Plaintiff further notes that public

employees are not immune from liability for personal injuries by statute. NJSA §59:3-1

B. Sovereign Immunity Sounds in Personal Jurisdiction in the Cases Such as This

The inescapable truth is that the United States embraces a hybrid model of sovereign immunity whereby a State's immunity to federal interference is a matter of subject matter jurisdiction, and a State's immunity to private suit by individuals in state courts sounds instead in personal jurisdiction. Considered under the rubric of personal jurisdiction, there is no genuine dispute that NJT's purposeful availment of the privileges of conducting business in New York amounts to consent to jurisdiction.

In the same breath as noting that "consent" is required, the Hyatt III Court invoked several authorities regarding sovereign immunity being beholden to other legal principles, including traditional personal jurisdiction concerns. In overturning Nevada v. Hall, 440 U.S. 410 [1979] ("Hall"), the Hyatt III Court discussed the alteration of the States from their colonial roots of pure sovereign entities to a hybrid, whereby States suborn their interests to those of their sister States under numerous circumstances. Hyatt, supra, 1497-1498. In rejecting the prior precedent of Hall, the Hyatt court held:

> 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 of 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. Numerous provisions reflect this reality.

Id. at 1497 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 [1980]). According to the Hyatt court, Article I's divestment of State military powers, and Article IV's (1) Full Faith and Credit Clause and (2) Privileges and Immunities Clause are examples of this. With respect to the Full Faith and Credit Clause, the Hyatt Court affirmed its prior rulings: "The Court's Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from 'adopt[ing] any policy of hostility to the public Acts' of other States." Id. (quoting Hyatt II, 136 S. Ct. 1277).

The Supreme Court also relied upon the article by Professor Caleb Nelson. See, Hyatt III at 1493 (citing, Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1574-1579 (2002)). [11] As set forth by Professor Nelson, dating back to English common-law, the doctrine of sovereign immunity is

[11] The Hyatt III Court also cited to Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 581-588 (1994), for the same proposition.

originally rooted in personal jurisdiction concerns over service of process and the Eleventh Amendment only reversed the subject matter jurisdiction effect of Chisolm v. Georgia, 2 U.S. 419 [1793], which resulted in what Professor Nelson referred to as a "hybrid" model of sovereign immunity. See, 115 Harv. L. Rev. at 1574-1611.

In addition to the Hyatt III Court, numerous courts have invoked Professor Nelson's article in support of the position that sovereign immunity sounds in personal jurisdiction. See, Va. Dep't of Corr. v. Jordan, 921 F3d 180, 187 [4th Cir. 2019]; Cutrer v. Tarrant Cty. Local Workforce Dev. Bd., 943 F3d 265, 270, n 4 [5th Cir. 2019];[12] P.R. Ports Auth. v. FMC, 382 US App DC 139, 152, 531 F3d 868, 881 [D.C. Cir. 2008]; Lee v. Polk County Clerk of Court, 815 NW2d 731, 737 [Iowa 2012]; Rusk State Hosp. v. Black, 392 SW3d 88, 104-06 [Tex. 2012].

The Hyatt III Court, as noted above, also discussed World-Wide Volkswagen, a banner case on personal jurisdiction that reaffirmed that courts have jurisdiction over entities that possess sufficient minimum contacts with the forum to satisfy traditional notions of "fair play and substantial justice." (444 U.S. at 492-493 (discussing and quoting Int'l Shoe Co. v. Wash.,

[12] Please note, both Va. Dep't of Corr. v. Jordan, supra, and Cutrer, supra, were decided after Hyatt III.

326 US 310 [1945]). The Supreme Court discussed the "minimum contacts" test as specifically rooted in the context of State sovereignty. Id. at 492. It is, therefore, antithetical to Hyatt III and World-Wide Volkswagen to hold that a sovereignty's consent to another State's jurisdiction be divorced from the minimum-contacts test.

Defendants might argue that the mere citation by the Hyatt III Court to World-Wide Volkswagen and Professor Caleb's in-depth historical review of the doctrine are not enough to infer the Supreme Court's position as to whether sovereign immunity sounds in personal jurisdiction. At the outset, we do not believe the Supreme Court idly cites to authorities without considering and endorsing the contents cited to. Regardless, to the extent there is any doubt, we refer the Court to the decision and dissents in PennEast Pipeline Co., LLC v. New Jersey, __ U.S. __, 141 S. Ct. 2244 [June 29, 2021] ("PennEast").

In PennEast, the majority held that a private gas/oil company could exercise the federal government's powers of eminent domain. Id., at 2251-2263. Justice Barrett, joined by Justices Thomas, Kagan, and Gorsuch, dissented and argued that states do not surrender their sovereign rights to private condemnation proceedings. Id., at 2265-2271.

Separately, Justice Gorsuch, joined by Justice Thomas (who penned the majority in Hyatt III), dissented for the purpose of

clarifying that, under Hyatt III and its predecessors, sovereign immunity is not a purely substantive due process issue and, instead, has three different iterations. Id., at 2263-2251. "The first—'structural immunity'—derives from the structure of the Constitution." Id., at 2265 (citing Hyatt III, supra, at 1495). "Structural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity by 'consent' if it wishes." Id. (citing. Hyatt III, supra, at 1490-1491; Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 [1998] (Kennedy, J., concurring)). The second type of sovereign immunity derives from the Eleventh Amendment and affects when a state is beholden to federal jurisdiction. Id. at 2264-2265. Justice Gorsuch further argued that the Eleventh Amendment type of sovereign immunity cannot be waived. Id. The third type of sovereign immunity, "state-law immunity," regards a state's control over its own court's jurisdiction. Id. at 2264, n. 1.

In response, the majority did not dispute that there are three distinct forms of sovereign immunity or that structural immunity sounds in personal jurisdiction. Instead, the majority argued that Eleventh Amendment immunity, contrary to Justice Gorsuch's dissent, is "a personal privilege which a State may waive at pleasure." Id., at 2262 (internal edit marks omitted) (quoting Clark v. Barnard, 108 U.S. 436, 447 [1883]; citing, e.g., Lapides v. Bd. of Regents, 535 U.S. 613, 618-619 [2002]; Gunter v. Atl.

Coast Line R.R., 200 U.S. 273, 284 [1906]). Moreover, the majority held as follows:

> When "a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 [1985]. Such consent may, as here, be "inherent in the constitutional plan." McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18, 30 [1990] (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 329 [1934]; see, e.g., Cent. Virginia Community Coll. v Katz, 546 US 356, 377-378 [2006].

Id. (citations edited). Accordingly, under Hyatt III and PennEast, structural immunity sounds in personal jurisdiction, Eleventh Amendment in federal subject matter jurisdiction, and both are waivable. Structural immunity is at issue here given that Defendants were sued in state court, rather than federal, and the Eleventh Amendment is, therefore, not implicated.

Numerous other courts, including this Court, have also held that sovereign immunity sounds in personal jurisdiction. In Ehrlich-Bober & Co. v. University of Houston, 49 NY2d 574, 580 [1980], this Court held:

> Arrayed against that policy which essentially serves administrative convenience, is New York's recognized interest in maintaining and fostering its undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world (cits.). That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here. Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting

> business in New York as its unique financial and communications resources.
>
> New York's interest in providing a convenient forum is least subject to challenge when a transaction is centered here (cits.), and particularly when it is wholly commercial in character (cits.). In those circumstances, a State entering this jurisdiction specifically to take advantage of its unique commercial resources may be considered to have given up any claim of jurisdictional immunity by virtue of governmental capacity. Conversely, this State's interest in providing a forum may be less where the issue is one which goes to the heart of a governmental function (cits.).

Ehrlich-Bober, supra, 49 NY2d at 581. In Ehrlich-Bober, both New York and Texas had similar forum restriction clauses, and the Court of Appeals held that both act as a waiver of sovereign immunity; moreover, New York is not divested of jurisdiction due to the Texas statute's narrow forum selection clause. Id. at 581-582. Ehrlich-Bober stands for the proposition that, when there is purposeful availment and a statutory waiver of immunity to suit in the State seeking immunity, New York Courts are neither obligated to grant sovereign immunity from suit in New York nor transfer the case to that State as New York has an overriding interest in regulating activities within its borders. Twenty-six years later, this Court affirmed the same reasoning. Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 NY3d 65, 72-73 [2006] ["Here, Montana's legislation serves essentially the same purpose as the Texas statute in Ehrlich-Bober to limit venue rather than liability—and New York's identified interests remain at least as compelling today as in

1980"]. The Appellate Division has also recognized same. State Div. of Human Rights v. New York State Dep't of Corr. Servs., 90 AD2d 51, 61 [2d Dept. 1982] ("the doctrine of sovereign immunity prevents the exercise of personal jurisdiction over the State absent its consent"). See also, Morrison v. Budget Rent a Car Sys., 230 AD2d 253, 257-62 [2d Dept. 1997] (accord).[13]

The Fourth Circuit also correctly observed that sovereign immunity sounds in either personal jurisdiction or subject matter jurisdiction, depending on which concept the facts of the case implicate. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479-484 [4th Cir. 2005]. In fact, several states – Alaska, South Carolina, Wisconsin, and North Carolina – hold that sovereign immunity solely pertains to personal jurisdiction. See, Rusk State Hosp., supra at 107 (collecting cases).

Moreover, as noted above, sovereign immunity can be waived as a defense. As a result, it cannot be so easily shoe-horned into the framework of a standard subject matter jurisdiction defense, which cannot be waived. Indeed, Justice Kennedy (whose concurring opinion was relied upon in PennEast, supra, at 2265) noted that

[13] Please note that, on appeal, Defendants cited to Morrison, supra for the mistaken proposition that sovereign immunity is a non-waivable subject matter jurisdiction defense only that may be raised at any time (Defs.' Br., pp. 22 and 27). In Morrison, the Second Department expressly held that sovereign immunity involves both subject matter and personal jurisdiction, and personal jurisdiction must comport with "traditional notions of fair play and justice." 230 AD2d at 259-260. In so holding, Morrison also relied upon World-Wide Volkswagen, supra, which the Supreme Court also relied upon in Hyatt III and informs the Court's inquiry in this case.

sovereign immunity "bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*." Wis. Dep't of Corr., 524 U.S. at 394 (citing Patsy v. Bd. of Regents, 457 U.S. 496, 516 n. 19 [1982]).

Here, it is beyond dispute that NJT has consented to the jurisdiction of New York by virtue of its operation of a fleet of buses on the streets of New York City and its collection of fees associated therewith. NJT's purposeful availment of the benefits of transacting business in New York firmly establishes its minimum contacts to New York and, therefore, it has consented to New York jurisdiction. See, CPLR §302(a); World-Wide Volkswagen, supra; Int'l Shoe, supra.

Moreover, as noted above, NJT is a registered common carrier with the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation.[14] As a registered common carrier, Defendants were bound by the Federal Motor Carrier Safety Regulations (see, §390.3(a)),[15] which expressly do not "preclude

[14] See, Safety Measurement System - Overview (U.S. DOT #74293), located at https://ai.fmcsa.dot.gov/SMS/Carrier/74293/Overview.aspx (last accessed June 3, 2022).

[15] For the Court's convenience, a copy of these regulations is maintained on the official electronic government registry for federal regulations. See, Electronic Code of Federal Regulations (eCFR), located at < https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&ty=HTML&h=L&mc=true&=PART&n=pt49.5.390# top> (last accessed June 3, 2022).

States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto" (see, §390.9).

One such State law, New York's Vehicle & Traffic Law ("VTL") §253(1) provides as follows:

> The use or operation by a non-resident of a vehicle in this State, or the use or operation in this State of a vehicle in the business of a non-resident, or the use or operation in this State of a vehicle owned by a non-resident, if so used or operated with his permission, express or implied, shall be deemed equivalent to an appointment by such non-resident of the Secretary of State to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such non-resident may be involved while using or operating such vehicle in this State, or in which such vehicle may be involved while being used or operated in this State in the business of such non-resident with the permission, express or implied, of such non-resident owner; and such use or operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the State, and within the territorial jurisdiction of the court from which the summons issues, and that such appointment of the Secretary of State shall be irrevocable and binding upon his executor or administrator.

This Court has consistently held that the statute is constitutional, as it is based upon general experience, probability and fairness, since a person may waive a constitutional right especially where, like here, it involves securing access to a specific market or territory. See generally, Aranzullo v. Collins Packing Co., 14 NY2d 578 [1964], affg. 18 AD2d 1068 [1st Dept.

1963]; Leighton v. Roper, 300 NY 434 [1950]; Shushereba v. Ames, 255 NY 490 [1931]; Gesell v. Wells, 229 AD 11 [3d Dept. 1930], affd. 254 NY 604 [1930].

The Supreme Court has affirmed the propriety of this doctrine of law as well. In Hess v. Pawloski, 274 US 352, 356 [1927], it declared: "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property." Statutes such as VTL §253 and its antecedent incarnations have long been upheld as a valid exercise of the police power of the state. Id. See also, Burnham v. Superior Court of Cal., 495 US 604 [1990]. The statute applies to foreign corporations and entities and was enacted to meet the conditions laid down by Chief Justice Taft in Wuchter v. Pizzutti, 276 US 13, 20 [1928]. Indeed, states can require that non-resident entities or corporations appoint an in-state agent upon whom process can be served as a condition for transacting business within their borders. St. Clair v. Cox, 106 US 350 [1882]. Moreover, the State's power to regulate the use of motor vehicles on its highways extends to residents as well as non-residents. Kane v. New Jersey, 242 US 160 [1916]; Burnham, supra).

Either expressly or implicitly, Defendants have consented to New York jurisdiction and to be bound by New York's VTL as any foreign entity, common carrier, or individual does upon driving into New York, particularly for business purposes. The idea that

NJT and its employees are not beholden to New York authority is obscene.[16] As noted above, NJT provides over 270 million passenger trips each year and derives billions of dollars in revenue by virtue of the privileges of transacting business in New York. It, further, requires that its drivers either be licensed in New Jersey or have a commercial license issued by New York. Frankly, it would be shocking to learn that NJT drivers are not instructed to expressly adhere to all state and local guidelines, including the VTL. In keeping with the longstanding legal principles ensconced in VTL §253(1) and related case law, Plaintiff respectfully submits that Defendants have consented to New York jurisdiction and to be bound by the VTL just as all other entities do upon operating their vehicles in New York.

To be perfectly clear, structural sovereign immunity absolutely prohibits a State from being unceremoniously haled or hauled into a foreign jurisdiction when the State has had no affirmative contacts with the forum state. In Hyatt III, the Franchise Tax Board of California ("FTB") had no contacts with the forum state (Nevada) other than having been named in a lawsuit by the plaintiff. The same is true in the cases relied upon by Defendants (see, e.g., Defs. Br., pp. 19, 22, 24, 29, citing Trepel v. Hodgins, 183 AD3d 429 [1st Dept. 2020]; Farmer v. Troy Univ.,

[16] It warrants further noting that NJT assigns routes to private entities. See, Private Carriers: Contracted Service Carriers, located at <https://www.njtransit.com/private-carriers> (last accessed June 3, 2022).

855 S.E.2d 801, 805-10 [N.C. Ct. App. 2021][17]). Each of these cases, too, involves a State-entity that was unceremoniously hauled into a forum state with which it did not have prior minimum contacts. In other words, these precedents fall within the subject matter jurisdiction arm of the American hybrid system, rather than the personal jurisdiction arm.

Ultimately, under a proper reading of sovereign immunity, Eleventh Amendment jurisprudence sounds exclusively in subject matter jurisdiction and pertains to a State's immunity from federal jurisdiction, which is inapplicable here as per Hyatt III and PennEast. Instead, it is structural immunity, a personal jurisdiction issue. Given the facts — NJT acting as a common carrier, driving on New York roads while subject to the VTL, and receiving billions in revenue — there is no genuine dispute that Defendants are subject to the personal jurisdiction of New York having (1) purposely availed themselves to the privileges of transacting business and (2) physically committed a tortious act here. See, e.g., World-Wide Volkswagen, supra; Int'l Shoe, supra;

[17] Please note, after the Supreme Court of North Carolina granted leave to appeal, the appeal was withdrawn. Farmer v. Troy Univ., 379 NC 164, 863 SE2d 621 [2021]. The highest court of North Carolina, accordingly, has yet to endorse the appellate court's decision. We further note that the North Carolina Court of Appeals, with approval by the North Carolina Supreme Court, has previously held that sovereign immunity sounds in personal jurisdiction. See, e.g., Data Gen. Corp. v. County of Durham, 143 N.C. App. 97, 100 [N.C. Ct. App. 2001]; Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132 [1987]; Sides v. Cabarrus Memorial Hospital, Inc., 22 N.C. App. 117 [N.C. Ct. App. 1974], modified and affirmed, 287 N.C. 14, 213 S.E. 2d 297 [1975].

Thackurdeen v. Duke Univ., 130 F. Supp. 3d 792, 798-809 [SDNY 2015].[18] As such, Defendants are not entitled to sovereign immunity even if the issue were properly preserved.

C. Defendants Waived Sovereign Immunity

The Supreme Court has repeatedly held that sovereign immunity, even under the Eleventh Amendment, is waivable. There is no genuine dispute as to whether it is waivable, nor any question that Defendants here – who consented to jurisdiction through trial without even pleading immunity as a defense to suit – have waived it.

While it is true that a true lack of subject matter jurisdiction may be asserted at any time (Matter of Hook v. Snyder, 193 AD3d 588 [1st Dept. 2021]), such is immaterial since the Supreme Court has repeatedly held that a State can waive its Eleventh Amendment immunity from suit either by consenting in advance to suit beyond its own courts (Sossamon v. Texas, 563 US 277, 283-284, [2011]; Port Auth. Trans-Hudson Corp. v. Feeney, 495 US 299, 304 [1990]) or by its litigation conduct (Lapides v. Bd. of Regents, 535 US 613, 620-623 [2002]). Indeed, the Supreme Court has long held that sovereign immunity, like qualified immunity, "is an immunity from suit rather than a mere defense to liability;

[18] Please note, the reasoning in Farmer, supra, that a university's mere operation of a recruitment office does not constitute waiver of immunity is akin to New York's treatment of personal jurisdiction in the same context. Thackurdeen, supra, at 798-809.

and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 US 139, 144 [1993]. Last year, the Supreme Court reiterated that, consistent with Hyatt III, both structural and sovereign immunity are waivable. See, PennEast, supra, at 2262, 2264-2265. Numerous courts, relying upon Supreme Court precedent, have held that sovereign immunity is waivable. See, Virginia Dept. of Corr., 921 F3d at 187 [4th Cir. 2019] (citing Lapides, supra) ("Yet state sovereign immunity is unlike subject matter jurisdiction, and like personal jurisdiction, in that it can be affirmatively waived"). See also, Lee v. Polk County Clerk of Court, 815 NW2d 731, 737-38 [Iowa 2012] (accord). Similarly, the Supreme Court of Texas held: "[S]overeign immunity doctrine contains elements that are inconsistent with regarding it as a limit on subject matter jurisdiction. While parties cannot ordinarily create a basis for federal jurisdiction by consenting to litigate in federal court, a state may waive sovereign immunity both explicitly and by its conduct during litigation." Rusk, 392 SW3d at 106-07.

Some courts hold there needs to be a predicate legal filing in the forum first (i.e., a motion to remove, filing pleadings, or change venue). Compare, Hill v. Blind Indus. & Servs., 179 F.3d 754, 760 [9th Cir. 1999] (sovereign immunity is affirmatively and constructively waivable); Ruffin v. Deperio, 97 F. Supp. 2d 346,

357-358 [WDNY 2000] (collecting cases regarding predicates – e.g., moving to remove or filing pleadings – necessary prior to finding waiver). The Ninth Circuit in Hill, supra, held that a state can waive it through inaction. In Ruffin, supra, the Western District held there must be some predicate action signaling participation in the litigation, such as a motion to remove. Here, defendants conduct satisfies both standards. Either by virtue of delay (Hill, supra) or having undertaken multiple predicates (filing an answer, proceeding through discovery, undertaking a full trial, moving to set aside the verdict, and taking an appeal from the denial of said motion (Ruffin, supra), defendants have waived the defense of sovereign immunity.

This is true under New Jersey jurisprudence as well. In Triffin, supra, the Southeastern Pennsylvania Transportation Authority ("SEPTA") failed to plead a lack of jurisdiction due to sovereign immunity, proceeded through discovery, and then, on the first day of trial, the trial court raised the issue of personal jurisdiction and asked why SEPTA should be compelled to litigate the case in New Jersey at all. 462 N.J. Super. Ct. at 179. On appeal, the New Jersey Appellate Court held, "[o]nce the defense of lack of personal jurisdiction is waived, there is no bar — constitutional or otherwise — to a court's adjudication of a claim against a non-resident defendant. Even without sufficient contacts, a non-resident may be subjected to a forum's jurisdiction

by consent or by choosing not to dispute the forum's exertion of personal jurisdiction." Id. at 178 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 [1985]; YA Global Investments, L.P. v Cliff, 419 NJ Super 1, 9 [N.J. Super. Ct., App. Div. 2011]). Accordingly, the Triffin Court held that the trial court erred in raising personal jurisdiction *sua sponte* when SEPTA failed to preserve or timely move to dismiss on that basis, thereby waiving the defense. Id. at 180-181.

Critically, it is textbook law in New York and New Jersey that personal jurisdiction must be raised immediately or it is waived. See, e.g., CPLR §3211(e); Triffin v. Southeastern Pennsylvania Transp. Auth., 462 NJ Super 172, 225 A3d 152 [N.J. Super. Ct., App. Div. 2020] (discussing, e.g., N.J. Court Rules, R. 4:6-2). Here, Defendants did not demand immunity in their answer and, instead, waited until they perfected their post-verdict appeal on unrelated grounds to assert such defense to suit in clear contravention of New Jersey and Supreme Court jurisprudence. PennEast, supra; Puerto Rico Aqueduct, supra; Triffin, supra.

For their part, Defendants recognize that, "[f]or waiver to be found, the courts also consider voluntary invocation of jurisdiction, voluntary submission to jurisdiction, or litigation conduct" (Defs.' Br., p. 19, citing Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 547 [2002]; Lapides v. Bd. of Regents, 535 U.S. 613 [2002]). However, Defendants also argue that there is no

need to raise the defense at the outset of litigation (Defs.' Br., p. 20, discussing Raygor, supra). This is an outright misrepresentation of Raygor and the Supreme Court's holding. The Raygor Court first noted that there are "limited situations where this Court has found a State consented to suit, such as when a State voluntarily invoked federal court jurisdiction or otherwise 'made a clear declaration that it intends to submit itself to our jurisdiction." Raygor, supra, at 547 (internal quotation marks omitted) (quoting, College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 [1999]). The Raygor Court went on to hold, based on Justice Kennedy's concurring opinion in Wis. Dep't of Corr., supra, that the State did not fail to make an objection at the outset because, unlike here, the defense was raised and preserved in the answer. Id. Thus, Raygor supports rejecting Defendants' belated demand for immunity. Regardless, as discussed extensively above and as recently held in PennEast, supra, sovereign immunity is absolutely waivable.

Defendants also argue that New Jersey, NJT, and Pierrelouis were "involuntarily haled into New York's courts" by being named as defendants and that the delay in raising sovereign immunity was not "out of gamesmanship but out of necessity" because Hyatt III was decided after the post-trial motion was fully briefed (Defs.' Br., p. 21).

The notion that Defendants were powerless to raise sovereign immunity earlier is specious. The defense of sovereign immunity has existed for centuries in this country alone. While the standard was less favorable under Hall, supra, Defendants were not without recourse. They could have preserved the issue in the first instance by pleading it as an affirmative defense. NJT further could have fought Hall in the same way that FTB did in Hyatt III and its predecessors. In fact, NJT would be better positioned to do so in some sense because in Karns, supra, at 514, a case heavily relied upon by NJT on this appeal, the Third Circuit (erroneously, as discussed above) ruled that NJT is entitled to sovereign immunity. Hyatt III was decided on May 13, 2019, which was 18 days after the post-trial motion was fully briefed and nearly two months prior to entry of judgment. NJT could have easily included Hyatt III in its post-trial motion or even moved to renew yet failed to do so. Defendants did not even raise the issue in the notice of appeal, filed on September 4, 2019 (2-5), and instead waited until they perfected their appeal on October 5, 2020, to blindside Plaintiff with the claim that – post-verdict and entry of judgment – Plaintiff's case should be dismissed on sovereign immunity grounds. The notion that Defendants were powerless victims of the United States judicial system is, thus, belied by the procedural history of this case and the cases they rely upon on appeal.

Instead, Defendants shamelessly seek to escape liability for their negligence through pure gamesmanship.

Regardless, as discussed above, the Eleventh Amendment defense is waivable by litigating within a form and, regardless, is inapplicable because it only implicates the jurisdiction of federal courts. Instead, it is "structural immunity" and personal jurisdiction inquiries that apply. PennEast, supra. NJT purposefully availed itself to the privileges of conducting business here. Unlike other sovereigns that have no contacts until they enter the forum for the first time as a defendant, NJT and Pierrelouis were physically present in New York, transacting business, and were held liable for negligently causing Plaintiff's severe injuries. Defendants further litigated this entire matter through verdict, which they challenged only as excessive without any reference to Hyatt III. Furthermore, as noted by the First Department, the statute of limitations to bring suit in New Jersey has long expired and Defendants have refused to consent to waive the statute of limitations. Belfand v. Petosa, 196 AD3d 60, 73 [1st Dept. 2021]. This is so in this case as well as several related matters. See, e.g., Fetahu v. New Jersey Tr. Corp., 197 AD3d 1065 [1st Dept. 2021]; Nizomov v. Jones, Docket Nos. 2020-09716 and 2021-03847 [N.Y. App. Div., 2d Dept.]; Nizomov v. Jones,

Index No. 518809/2018 [N.Y. Sup. Ct., Kings Cnty].[19] With all due respect, this is the height of gamesmanship and a travesty of justice.

Defendants also argue that, pursuant to a decision by the Fifth Circuit and six cases relied upon therein, "all of which permitted Eleventh Amendment immunity to be asserted for the first time on appeal, and that any gamesmanship had been assuaged" (Defs.' Br., p. 23, discussing Union Pac. R.R. v. La. PSC, 662 F.3d 336, 341-342 [5th Cir. 2011]). Defendants, once again, misrepresent the law.

As an initial matter, the Fifth Circuit held that it did not amount to gamesmanship or an unfair tactical advantage by waiting until the appeal to raise sovereign immunity because (unlike the case at bar), "[t]he State was successful in the district court and it is not attempting to use immunity to void an unfavorable judgment." Id. at 341. Moreover, "because the State of Louisiana has not waived its Eleventh Amendment immunity, it may still properly assert this defense on appeal." Id. at 341-342.

Defendants also mislead the Court by stating that the Fifth Circuit's decision "was in accord with six other circuit court of appeal[s]" (Defs.' Br., p. 5). The Fifth Circuit did, indeed, cite

[19] New York courts may take judicial notice of the electronic dockets of cases. See, Kingsbrook Jewish Med. Ctr., 61 AD3d at 19.

to six decisions by other Circuit Courts of Appeals in support of the proposition that, "although the law in other circuits has been less than clear, our conclusion that immunity has not been waived here is supported by that case law, which generally has held that Eleventh Amendment immunity may be raised for the first time on appeal." Id. at 342 (citing, e.g., United States ex rel. Burlbaw v. Orenduff, 548 F3d 931 [10th Cir. 2008]; Lombardo v. Pennsylvania, 540 F3d 190 [3d Cir. 2008]; State Contr. & Eng'g Corp. v. Florida, 258 F3d 1329 [Fed. Cir. 2001]). Not only do Defendants mislead the Court by implying some categorical as opposed to general rule regarding waiver of Eleventh Amendment sovereign immunity (which is not at issue here), but Defendants also omit that the Fifth Circuit cited two other cases in opposition to the general rule. See, id. (citing Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F3d 1011, 1021-22 [9th Cir. 2010]; Ku v. Tennessee, 322 F3d 431, 435 [6th Cir. 2003]). As noted by the Fifth Circuit, both Johnson and Ku stand for the proposition that a State's litigation of a suit to verdict constitutes a waiver of sovereign immunity. Id. Notably, the majority in PennEast, supra, at 2264, agrees. Moreover, the cases relied upon by the Fifth Circuit further undercut Defendants' positions on appeal.

In Orenduff, supra, the Tenth Circuit held that sovereign immunity (1) can be raised at any time, including for the first time on appeal; (2) but it can be waived by litigation conducted;

and (3) can be, but does not need to be, raised *sua sponte*. 548 F3d at 941-942 (citations omitted). Accordingly, the Tenth Circuit held that "[t]he net effect of these characteristics is that a state defendant retains broad discretion over whether a court must hear an Eleventh Amendment argument that may end the litigation" or, "[a]s more succinctly stated by the Supreme Court, '[u]nless the State raises the matter, a court can ignore it.'" Id., at 492 (quoting Wis. Dep't of Corr., 524 U.S. at 389). Furthermore, the Tenth Circuit lambasted the State for asserting the defense for the first time on appeal on a conditional basis (i.e., "defendants have chosen not to assert Eleventh Amendment immunity unless we reverse the district court's merits-related decision"). Id. (citation omitted and emphasis removed). The Tenth Circuit rightly distinguished such circumstances from a direct assertion of immunity. Id. Here, Defendants did not raise the defense in their answer or at any time prior to or after verdict before the trial court and, instead, conditionally did so on appeal for the first time.

In Lombardo, supra, the Third Circuit held that Eleventh Amendment immunity could be raised for the first time on appeal but, in the next sentence, held that "the ability of States to waive their immunity or consent to suit, and the lack of a requirement that federal courts raise Eleventh Amendment immunity defects *sua sponte*, may resemble personal jurisdiction

requirements." 540 F3d at 197, n. 6 (citing, e.g., Erwin Chemerinksy, Federal Jurisdiction §7.1 [4th ed. 2003]; Wis. Dep't of Corr., 524 US at 393-98 (Kennedy, J., concurring)). As discussed above, Professor Caleb's article, Hyatt III, and PennEast are expressly in accord with the historical fact that structural immunity, the issue at bar, sounds in personal jurisdiction.

As for the Federal Circuit, the court held that merely defending a claim is not, by itself, sufficient to constitute waiver. State Contr. & Eng'g Corp., 258 F3d at 1336 (citing, e.g., Allinder v. Ohio, 808 F2d 1180, 1184 [6th Cir. 1987]). However, in Allinder, the Sixth Circuit held "[d]efendants asserted the [E]leventh [A]mendment defense in both actions and have never indicated an intention to waive the defense." Allinder, 808 F2d at 1184. Here, Defendants did not assert it as an affirmative defense and never indicated any intention to do so until the post-verdict appeal despite having ample opportunity to raise the defense to suit throughout litigation, starting with in the answer, which Defendants failed to do.

Accordingly, based on Defendants' litigation conduct, the defense of sovereign immunity was neither preserved in its answer nor raised in a timely fashion, which constitutes a waiver of the defense and a consent to New York's jurisdiction to adjudicate this matter. To hold otherwise would permit Defendants to snatch

victory from the jaws of defeat after years of litigation and a trial on the merits.

D. Defendants Consented to New York Jurisdiction

1. There is an Open Question as to Whether NJT Waived its alleged Immunity by Contract that Further Renders Defendants' Appeal Unpreserved and Unripe for Review

Due to Defendants' unexcused dilatory conduct, this Court and the Appellate Division before it (both in this case and all related cases) have been deprived of a full record regarding whether NJT's business activities within New York are governed by a contract with New York or any other governmental entity (e.g., the Port Authority), and whether NJT's status as a common carrier expressly constrain it to abide by local laws and submit to New York jurisdiction.

As discussed above, the Hyatt III Court did not proscribe what constitutes consent, leaving open the fact that a State (or an alleged arm of the state) can waive immunity via contract. In addition, the New Jersey Tort Claims Act expressly provides that New Jersey can waive sovereign immunity via contract. Moreover, , "generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until she has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." Filus v. Lot Polish Airlines, 907 F.2d 1328 [2d Cir. 1990] (citing e.g., Oppenheimer Fund v. Sanders, 437 U.S.

340, 351 and n. 13 [1978]). In Filus, the Second Circuit held that the plaintiff was entitled to discovery as to the Union of Soviet Socialist Republic's ("USSR") sovereign immunity defense because there was evidence that the USSR undertook activities (i.e., servicing the engine of a plane that crashed) on domestic soil. Id.[20]

By statute, New Jersey "waive[d] its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations; provided, however, that there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law." NJ Rev. Stat. 59:13-3. Notably, New Jersey cannot be liable for the debts of the NJT. NJSA §27:25-17.

The record is silent as to what authority NJT possesses that allows it to operate its buses in New York or park in the Port Authority in New York City. There was no discovery on this because Defendants never raised sovereign immunity at any time prior to its appeal to the Appellate Division. The similarly situated cases, moreover, did not address this salient issue. See, e.g., See, e.g.,

[20] In other words, as further discussed above, sovereign immunity is not a bar to litigation where the sovereign affirmatively enters the plaintiff's jurisdiction in the first instance.

Fetahu, 197 AD3d 1065; Belfand, 196 AD3d 60; Taylor v. New Jersey Tr. Corp., 199 AD3d 540 [1st Dept. 2021]. However, in Nizomov, supra, our office raised this issue before the trial court at oral argument, on a motion to reargue, and also before the Second Department in a pending appeal.

Moreover, NJT further failed to advise the various courts that it is also a registered common carrier with the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation and is bound to adhere to its Regulations, including §390.3(a), which expressly permits forum states to enforce their own vehicular laws on the common carrier. As a result, Plaintiff respectfully submits that Defendants are subject to at least an implied contract to be bound by New York State's interest in enforcing its own state and local law, including VTL §251, see supra.

Had Plaintiff been advised of the need to do so, further discovery would have informed the issue of consent by contract or by virtue of being a common carrier. Among other things, Plaintiff could have demanded copies of any contracts NJT has with either New York State or the Port Authority that permit its operations. Plaintiff also could have demanded any contracts between NJT and private carriers[21] assigned NJT routes to see whether those same

[21] See, supra, n. 16.

private carriers are required to adhere to State and local laws. Moreover, Plaintiff could have demanded all applications, forms, rules, and regulations by which NJT operates as a common carrier. Depositions of NJT officials could have addressed the foregoing issues and, e.g., whether NJT trains its drivers or has any internal policies regarding complying with local law and what informs its policy of allowing drivers to operate its buses with a commercial license from New York. With the pertinent discovery in hand, a proper record would have been presented to the trial court, Appellate Division, and this Court. Instead, we are left with a glaring hole as to whether NJT consented to suit in New York via contract or by virtue of the terms that bind it as a registered common carrier.

There is further no question that Plaintiff (and the plaintiffs in similarly situated cases) are entitled to discovery. In Filus, the USSR serviced one plane on domestic soil and the Second Circuit ruled that the plaintiff was entitled to discovery on the defense of sovereign immunity. Here, the NJT runs millions of routes through New York every year and earns billions of dollars in the process.

Defendants' belated attempt to raise the defense of sovereign immunity in its post-verdict appeal completely circumvented the discovery process, has hamstrung Plaintiff, and deprived the Court of critical information. See, Misicki v. Caradonna, 12 NY3d 511,

519 [2009]. There is no genuine dispute as to whether this constitutes improper gamesmanship. As discussed above, sovereign immunity has been a defense for centuries, the procedural timeline clearly establishes that Defendants had ample opportunity to bring sovereign immunity to the trial court's attention, and yet failed to do so in their answer or at any point prior to appeal.

Accordingly, it is abundantly within the Court's power to deny Defendant's apply outright based on the general rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" should be followed here. Sean M. v. City of New York, 20 AD3d 146, 149 [1st Dept. 2005]. Litigants in each of the cases involving NJT's belated attempt to assert sovereign immunity have been hamstrung in their defense, putting the NJT on the precipice of a windfall – the absolute defense of sovereign immunity notwithstanding any express consent via contract or by virtue of its status as a common carrier.

Additionally, depending on the outcome of this case, there could be an appeal to the Supreme Court. However, under established jurisdictional rules, such appeal would be unripe for review absent the further discovery discussed above. "Ripeness is a jurisdictional inquiry" that the Court must consider first and, in doing so, "must presume that [it] cannot entertain [Plaintiff's] claims 'unless the contrary appears affirmatively from the record.'" Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347

[2d Cir. 2005] (citing Vandor, Inc. v. Militello, 301 F.3d 37, 38 [2d Cir. 2002]; quoting Renne v. Geary, 501 U.S. 312, 316 [1991]). The purpose of the ripeness doctrine "is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." Id. at 347 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 [1967], overruled on other grounds, Califano v. Sanders, 430 U.S. 99 [1977]). In general, ripeness requires a balancing of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. (quoting Abbott Labs, 387 U.S. at 149).

The hardship, in this case especially, is completely one-sided. Plaintiff suffered serious personal injuries, litigated this case for years and successfully to verdict, and now faces Defendants unconscionable attempt to exercise sovereign immunity without any waiver of the expired statute of limitations. In other words, Defendants seek to avoid the duly entered judgment against it through a belated demand for sovereign immunity without ever having engaged in discovery regarding the same in outright hostility to the acts of this State and Plaintiff. Not only does this render the issue unripe but, as discussed herein, such tactical gamesmanship is proscribed by law.

Accordingly, the record establishes at least an implied contract regarding NJT's operation of buses in New York.

Alternatively, this appeal is premature and unripe, and it should be denied on that basis.

2. Statutory Consent

To the extent a sovereign's consent need be evidenced by legislative intent, Plaintiff respectfully submits that the New Jersey Tort Claims Act (NJ Rev. Stat. §59, et seq.), VTL §253, and NJT's operation of buses as a registered common carrier establish consent.

Pursuant to the New Jersey Tort Claims Act, "[a] public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." NJSA §59:2-2. In addition, the New Jersey Legislature expressly stated that public employees are liable to the same extent as private persons for injuries and cannot be subject to immunity. NJSA §59:3-1.

In applying and interpreting this legislation, the following principles apply:

> The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State

> that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

NJSA §59:1-2.

Moreover, as held in Maison, supra, pursuant to §59:2-2(a), the NJTCA necessarily required that NJT be held to the heightened common carrier standard (i.e., of "utmost care"); and, also, that §59:3-1 "strongly implies that similarly situated public common carriers and private common carriers are not to be treated in a different manner or to a different extent for liability purposes." Id. at *34-35, 38.

Not only does Maison establish that NJT is a common carrier subject to traditional rules of negligence, but NJT is actually registered as a common carrier with the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation and is, therefore, subject to the Federal Motor Carrier Safety Regulations, including §390.3(a), which establishes that, as a common carrier, NJT is subject to another state's enforcement of its own laws. Moreover, as a matter of federal statute, NJT is liable for even personal injuries and must accept the jurisdiction of foreign tribunals. See, 49 USC §§13101, 13102, 13501, 14501, 14704, 14901, 14906, 14917.

Plaintiff respectfully submits that the forgoing demonstrates express statutory consent to suit in New York. Moreover, Defendants' demand for immunity breaches the federal regulations and statutes governing NJT as a common carrier. As a matter of law, "the interests in ending a continuing violation of federal law outweigh the interests in state sovereignty." Will v. Mich. Dep't of State Police, 491 US 58, 89 [1989].

In keeping with our duty of candor, we recognize that the First Department in Belfand, supra, at 68-69, held that the NJTCA's waiver of immunity only applies to suits brought in New Jersey courts and is not a total waiver of immunity because it lacks consent to federal court jurisdiction. However, Plaintiff respectfully submits that this holding is inapplicable here because: (1) NJT is not an arm of the state and (2) is instead a common carrier, pursuant to which NJT and its employees are obligated by federal law to comply with New York state laws, including New York's VTL. Aside from repeated violations of federal regulations, Plaintiff respectfully submits that the Belfand Court did not address whether NJT was an arm of the state nor did it discuss NJT's status as a common carrier or what effect the Maison ruling has on its analysis. It is a particularly disparate result to hold that, on the one hand, NJT is a common carrier and yet, unlike any other common carrier, it can only be sued in its venue of choice. Moreover, holding so would be contrary to the express

purposes of the NJTCA, which, as set forth above, was specifically designed to preclude an inequitably strict imposition of sovereign immunity. NJSA §59:1-2.

This Court's jurisprudence is consistent with the long-established framework of sovereign immunity sounding in personal jurisdiction in cases such as this. See, Ehrlich-Bober, supra, 49 NY2d at 581. As noted above, in Ehrlich-Bober, both New York and Texas had similar forum restriction clauses, and this Court held that both act as a waiver of sovereign immunity except when, citing cf., Hall, the dispute went to the "heart of a governmental function." Id. This Court reiterated that principle in Deutsche Bank, supra, at 72-73.

As discussed above, nothing in Hyatt III renders either Ehrlich-Bober or Deutsche Bank inapplicable. Instead, as held in Hyatt III and PennEast, both Ehrlich-Bober and Deutsche Bank properly recognized that a State that waives sovereignty in its own state and affirmatively enters into New York's jurisdiction also consents to jurisdiction here. Nor can it be said that driving a bus goes to the "heart of a governmental function" in light of the plain language of the statutes as well as the ruling in Maison. In addition, it is well-established that New York's prevailing interest outweighs New Jersey's passing interest in acting as a partial forum. See, Deutsch Bank, supra; Ehrlich-Bober, supra.

Under the proper sovereign immunity jurisprudence, NJT's statutory consent to suit, which is not limited in forum, should properly be viewed as a consent to New York's jurisdiction.

POINT II

NJT'S HOSTILITY TOWARD THE PUBLIC ACTS OF NEW YORK

Defendants' argument based upon the Full Faith and Credit Clause is entirely misplaced. Not only do Defendants misinterpret the very cases upon which they rely, but they also ignore that it is their conduct that evinces hostility to the public acts of New York, which is decried by the Full Faith and Credit Clause.

According to Defendants, the Full Faith and Credit Clause should inure to their benefit because New York would afford itself sovereign immunity in similar circumstances (Defs.' Br., pp. 29-31, discussing Franchise Tax Bd. v. Hyatt, 578 U.S. 171 [2016] ("Hyatt II"); Pittman v. Rutherford, 2020 U.S. Dist. LEXIS 202837 [E.D. Ky. Oct. 30, 2020]; Pollard v. State, 173 AD2d 906 [3d Dept. 1991]; Heisler v. State, 78 AD2d 767, 768 [4th Dept. 1980]).

The premise for Defendants' argument, that New York would afford itself sovereign immunity, is false. In Pollard, supra, the Third Department, relying upon Heisler, surpa, held that New York "State has a duty recognized by the law of torts; accordingly, liability may be imposed by application of general tort principles and the doctrine of sovereign immunity cannot serve as a bar to

claimant's action." 173 AD2d at 907. Similarly, before the case reached the First Department, Justice Silvera rejected the same argument on the grounds that Hyatt III and the Full Faith and Credit clause prohibit a State (like Nevada) from applying unfavorable standards on another State that it would not apply to itself, but "[t]he State of New York does not bar suit against the New York equivalent of the NJT, the Metropolitan Transportation Authority (hereinafter 'MTA') and the New York City Transit Authority (hereinafter 'NYCTA') for motor vehicle accidents." Fetahu v. New Jersey Tr. Corp., 2020 NY Slip Op 31089[U], *2-3 [N.Y. Sup. Ct., NY Cty. 2020]. Moreover, Justice Silvera observed "that New Jersey permits victims of motor vehicle accidents to sue the State of New Jersey in New Jersey, and has not raised jurisdictional objections to suits against it in New York in the past." Id. at *4 (citing Ceretta v. New Jersey Transit Corp., 267 AD2d 128 [1st Dept. 1999]). As discussed above, both New Jersey statutory law and the New Jersey Supreme Court expressly hold that NJT and its employees are not entitled to sovereign immunity for their negligence in causing physical injuries while operating buses as a common carrier. See, Maison, supra, discussing §§59:2-2(a) and 59:3-1).

Quite frankly, Defendants' argument flies in the face of New York and New Jersey jurisprudence, as well as the doctrine of comity that Defendants urge the Court to apply. In such

circumstances, comity would require Defendants to recognize the absurdity of their position, relent, and pay the judgment entered against them. That they will not speaks volumes to their hostility toward New York's public acts and citizenry.

Moreover, Hyatt III reaffirmed the ruling of Hyatt II, and the line of authorities upon which it relied, that sovereign immunity is not absolute and bends to the Full Faith and Credit Clause, which, in addition to requiring that States provide full effect to judgments in sister States,[22] also "preclude[s] States from 'adopt[ing] any policy of hostility to the public Acts' of other States." Hyatt III, supra, at 1497 (quoting Hyatt II, supra). As noted above, providing for the safety of residents is squarely within a State's sacrosanct police powers.[23] Defendants' application of sovereign immunity in this context is as hostile an act toward New York's public acts as there can be. According to defendants, they or any employee of New Jersey can violate the VTL at will and cannot be held accountable save in New Jersey's own, as described in Hyatt III, "partial, local tribunals." See, Hyatt III, supra, at 1498). According to Defendants, they could negligently or even recklessly drive a bus through Times Square

[22] E.g., the judgment entered against Defendants here.

[23] See also, Nebbia v. New York, 291 U.S. 502, 524-525 [1934] ("Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government").

and not be called to answer for any property damage, personal injuries, or wrongful death in a New York court of law.

As further noted above, this case and many others in which NJT has filed motions and appeals seeking to be relieved of liability for their own negligence based on sovereign immunity are now beyond the statute of limitations in New Jersey. In Belfand, supra, at 73, the First Department noted that NJT has refused to waive the statute of limitations. In Nizomov, supra, we requested that NJT waive the statute of limitations defense in light of the procedural history of the case or, in the alternative, that the trial court at least request in its order that the courts of New Jersey provide comity to New York's CPLR §205 because New Jersey law has no analog. The trial court declined to do so as it held it was deprived of jurisdiction, and the Second Department has yet to weigh in.

Under New York law, unless an action is terminated by voluntary discontinuance, CPLR §205(a) provides litigants with a six-month grace period to institute a new suit for the same transaction or occurrence. Moreover, New York law holds that defendants are equitably estopped from asserting a statute of limitations defense when the plaintiff has relied upon the conduct of defendants or defendants' affirmative wrongdoing produced the delay between accrual of the cause of action and filing. Putter v. North Shore Univ. Hosp., 7 NY3d 548, 552 [2006]; Zumpano v. Quinn,

6 NY3d 666, 673 [2006]. Given Defendants' refusal to afford Full Faith and Credit to the VTL and this Court's jurisdiction, there is no guarantee that, should she needa to do so, Plaintiff's request for tolling on the foregoing basis will be honored in the partial forum of New Jersey. Plaintiff respectfully submits it is in the interests of justice to not deprive her of her meritorious claim based upon defendants' delay in seeking sovereign immunity, gamesmanship in waiting to assert it post-verdict, and its refusal to consent to suit (or enforcement of the judgment against it) in New Jersey. To the contrary, the foundation of the Full Faith and Credit clause is the enforceability of judgments entered by foreign courts (see, Hyatt III, at 1497 (quoting Hyatt II, at 1277)), which Defendants directly seek to avoid here. In other words, Defendants actions in this appeal are emblematic of the very hostility the Supreme Court has repeatedly held violates the Full Faith and Credit Clause.

In Belfand, supra, at 73, the First Department resolved this inequity via the doctrine of waiver, which we submit is the correct resolution. To the extent this Court disagrees with this and the other positions taken herein, Plaintiff respectfully requests that, in the alternative, the inequity should be duly set forth in a ruling (as done by the Belfand Court) while simultaneously requesting or urging comity from New Jersey courts with respect to the New York legal issues set forth above. Doing so is in accord

with the Hyatt Court's position that sovereign states are obliged to afford the forum state's laws and judgments Full Faith and Credit. Nothing precluded the Belfand Court from commenting on the inequity of NJT's conduct and Plaintiffs respectfully request that this Court do so as well and, further, to add commentary concerning New York's CPLR §205 and estoppel principles. This would appropriately preserve the issue for review by the Supreme Court.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Appellate Division's decision order should be affirmed.

Respectfully submitted,

By:_____

Brian J. Isaac
POLLACK POLLACK ISAAC & DeCICCO, LLC
225 Broadway, 3rd Floor
New York, NY 10007
212-233-8100
bji@ppid.com

Appellate Counsel to:

MARDER, NASS & WIENER, PPLC
Attorneys for Plaintiff-Respondent
450 Seventh Avenue, 37th Floor
New York, NY 10123
212-967-1122
Kenneth@mnwlawny.com

Of counsel:
Brian J. Isaac, Esq.
Christopher J. Soverow, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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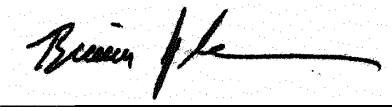
By: 

Brian J. Isaac
POLLACK POLLACK ISAAC & DeCICCO, LLC
225 Broadway, 3rd Floor
New York, NY 10007
212-233-8100
bji@ppid.com

Appellate Counsel to:

MARDER, NASS & WIENER, PPLC
Attorneys for Plaintiff-Respondent
450 Seventh Avenue, 37th Floor
New York, NY 10123
212-967-1122
Kenneth@mnwlawny.com

Of counsel:
Brian J. Isaac, Esq.
Christopher J. Soverow, Esq.