IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CITY OF JACKSONVILLE, FLORIDA, a Florida municipal corporation, and JEA, a body politic and corporate, **Plaintiffs/Counterclaim Defendants,** **v.** **MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA, a public body corporate and politic of the State of Georgia,** **Defendant/Counterclaim Plaintiff.**	**CIVIL ACTION FILE** **NO. 1:19-CV-3234-MHC**

ORDER

This case comes before the Court on Defendant Municipal Electric Authority of Georgia ("MEAG")'s Motion for Judgment on the Pleadings [Doc. 206].

I. BACKGROUND

A. Factual Background

This case arises from a dispute between Plaintiffs City of Jacksonville, Florida (the "City") and JEA, and MEAG, over the validity of a Power Purchase Agreement ("PPA") between MEAG and JEA. Am. Compl. for Declaratory J. ("Am. Compl.") [Doc. 22] ¶ 1. JEA is an independent agency of the City, created and established pursuant to the Charter of the City of Jacksonville. Id. ¶ 4. MEAG is a public corporation of the state of Georgia that generates and transmits wholesale electric power to forty-nine communities across Georgia. Id. ¶ 5; see also O.C.G.A. § 46-3-110 *et seq*. (the "MEAG Act").

In 2005, MEAG and the other joint owners of the Alvin W. Vogtle Electric Generating Plant ("Plant Vogtle") (collectively, "the Co-Owners") agreed to develop two additional nuclear power generating units, Plant Vogtle Units 3 and 4 (the "Additional Units") (generally, "the Vogtle Project"). Id. ¶¶ 13-15. MEAG holds an undivided 22.7% ownership interest in the Additional Units and is responsible for that proportion of the Vogtle Project's construction costs. Id. ¶¶ 16, 18. Georgia Power Company ("Georgia Power") owns the largest share of the Additional Units and acts as agent for the Co-Owners, including MEAG. Id.

¶ 19. Because the projected electrical output of the Additional Units over their forty-year life was expected to exceed MEAG's needs, MEAG divided its undivided interest in the Additional Units into three separately undivided interests, one of which, Project J, is relevant to this case. Id. ¶ 20. MEAG created MEAG Power SPVJ LLC (the "Project J Entity") as a wholly-owned, direct subsidiary and transferred to it approximately 41.175% of MEAG's ownership interest in the Additional Units. Id. ¶ 22.

MEAG and JEA entered into a PPA dated May 12, 2008, by which MEAG agreed to sell and JEA agreed to purchase all the capacity and energy generated through Project J during the first twenty years of the Additional Units' operation. Id. ¶¶ 23, 28. On December 31, 2014, MEAG and JEA executed an amended and restated PPA [Doc. 22-1], which is the current operative agreement between them. Id. ¶ 24. The Jacksonville City Council did not approve or ratify either the original or the amended and restated PPA. Id. ¶¶ 25-26. JEA did not acquire an ownership interest in the Additional Units themselves or in the interest created by Project J, and JEA has no control over any decisions concerning the construction or operation of Project J or the Vogtle Project generally. Id. ¶ 29.

In order to finance Project J's portion of the construction of the Additional Units, MEAG authorized and validated approximately $6 billion in revenue bonds

to be secured by JEA's payments under the PPA. Id. ¶ 32. MEAG issued a portion of these bonds in 2010 and 2015, and approximately $1.43 billion in principal was outstanding as of December 31, 2017. Id. ¶ 33. MEAG also applied to the United States Department of Energy ("DOE") for loans guaranteed by the DOE, and the DOE issued a commitment to guarantee loans of up to $577.4 million. Id. ¶¶ 34-35. As of December 31, 2017, approximately $337.9 million of these loans for Project J construction costs had been drawn and were outstanding. Id. ¶ 36.

The PPA unconditionally requires JEA to pay MEAG for capacity and energy at the full cost of production of Project J, including debt service on the bonds and DOE-guaranteed loans. Id. ¶ 37. JEA is obligated to fix the rates for its electric utility and charge its ratepayers at levels sufficient to meet these obligations. Id. ¶ 38. Further, JEA must pay these obligations before making debt service payments on JEA's own debt. Id. The PPA contains a "hell-or-high-water clause" that obligates JEA to pay unconditionally, regardless of whether the electricity is ever delivered, whether the Additional Units are completed or operating or operable, and whether their output is suspended, interrupted, interfered with, reduced or curtailed or terminated in whole or in part. Id. ¶ 39; see PPA § 204(g).

In 2008, Georgia Power, for itself and as agent for the other Co-Owners, entered into a contract ("the EPC Contract") in which Westinghouse Electric Company LLC ("Westinghouse") and its affiliate WECTEC Global Project Services Inc. ("WECTEC") agreed to design, engineer, procure, construct, and test the Additional Units. Id. ¶ 40. The EPC Contract was a fixed-cost contract, which required Westinghouse and WECTEC to absorb most of the construction cost overruns from the Vogtle Project. Id. ¶ 41. After significant construction delays and cost overruns with the Vogtle Project, Westinghouse and WECTEC filed for bankruptcy on March 29, 2017. Id. ¶¶ 42-43.

Effective October 23, 2017, Georgia Power, for itself and as agent for the other Co-Owners, entered into the Construction Completion Agreement ("Construction Agreement") with Bechtel Corporation ("Bechtel"), who serves as the primary construction contractor for the remainder of the Vogtle Project. Id. ¶ 45. The Construction Agreement is a cost-reimbursement arrangement under which the Co-Owners agreed to reimburse Bechtel for its actual construction costs plus certain additional fees, and each Co-Owner is liable for its proportionate share of all amounts owed to Bechtel. Id. ¶ 46. Since the Construction Agreement was made, the estimated cost to complete Project J has increased from $1.387 billion to $2.918 billion and the estimated completion date has been pushed from April 2016

to November 2021. Id. ¶ 47. JEA was not permitted to participate in negotiation of the terms of the Construction Agreement or the decision to continue construction of the Additional Units. Id. ¶ 48. Plaintiffs contend that the change from a fixed-cost to a cost-reimbursement contract changed the nature of JEA's obligations and risks with respect to Project J because MEAG was able to pass along a substantial part of the theoretically unlimited costs to construct the Additional Units, while JEA was still required to satisfy this obligation pursuant to the PPA. Id. ¶ 49.

B. Procedural Background

On September 11, 2018, Plaintiffs sued MEAG in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, seeking a declaratory judgment that the PPA between JEA and MEAG violates Florida's constitution, laws, and public policy and is therefore *ultra vires*, void *ab initio*, and unenforceable.[1] See

[1] Earlier that day, MEAG filed suit against JEA in this Court seeking a declaration that the PPA is enforceable and asserting claims for breach of contract and specific performance. See Compl. for Declaratory J. and Breach of Contract [Doc. 1], Mun. Elec. Auth. of Ga. v. JEA, No. 1:18-CV-4295-MHC (N.D. Ga. Sept. 11, 2018) (the "Related Action"). MEAG's appeal of this Court's order dismissing the Related Action and denying as moot a motion for preliminary injunction is currently pending before the United States Court of Appeals for the Eleventh Circuit. See Mun. Elec. Auth. of Ga. v. JEA, No. 19-11373 (11th Cir. Apr. 11, 2019).

Compl. for Declaratory J. [Doc. 1-1]. On October 2, 2018, MEAG removed the case to the United States District Court for the Middle District of Florida. See Def. Mun. Elec. Auth. of Ga.'s Notice of Removal [Doc. 1]. Plaintiffs filed their Amended Complaint on October 25, 2018. See Am. Compl.

The case was transferred to this Court on July 17, 2019. See generally July 16, 2019, Order [Doc. 104]. On July 26, 2019, MEAG answered the Amended Complaint and counterclaimed for (1) a declaratory judgment that the PPA is enforceable, and (2) breach of contract. See Def.'s Answer and Countercl. to Pl.'s Am. Compl. [Doc. 109]. MEAG seeks a declaration that the PPA is enforceable, an order requiring that JEA specifically perform, an award of damages for JEA's alleged breach of contract, and reasonable attorney's fees, costs, and expenses. Id. at Prayer for Relief. On August 16, 2019, Plaintiffs answered MEAG's counterclaim, and JEA asserted its own alternative counterclaims[2] for (1) breach of fiduciary duty, (2) failure to perform in good faith, and (3) negligent performance of undertaking. See JEA's Answer and Defenses to Countercl. of Mun. Elec. Auth. of Ga. and Alternative Countercls. of JEA against MEAG [Doc. 126]; City of Jacksonville, Fla.'s Answer and Defenses to Countercl. [Doc. 127].

[2] JEA asserts these counterclaims as alternative grounds for relief only if the Court concludes that the PPA is enforceable.

On November 25, 2019, the Court granted in part MEAG's Motion to Dismiss JEA's Counterclaims [Doc. 140], dismissing JEA's alternative counterclaims for breach of fiduciary duty and failure to perform in good faith. Nov. 25, 2019, Order [Doc. 198] at 29. However, the Court did not dismiss JEA's alternative counterclaim for negligent performance of undertaking. Id. On December 19, 2019, the Court granted MEAG's request to file a motion for judgment on the pleadings and denied without prejudice JEA's request to file a motion for summary judgment. See Dec. 19, 2019, Order [Doc. 205] at 10. On December 27, 2019, MEAG filed the present Motion for Judgment on the Pleadings, requesting that the Court (1) declare that the PPA is valid and enforceable, (2) grant MEAG judgment on Plaintiffs' declaratory judgment claim, and (3) grant MEAG judgment on its declaratory judgment counterclaim. See Def.'s Mot. for J. on the Pleadings at 1-2.

II. LEGAL STANDARD

A party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." FED. R. CIV. P. 12(c). "Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367,

1370 (11th Cir. 1998) (citing FED. R. CIV. P. 12(c)); see also Horsley v. Rivera, 292 F.3d 695, 700 (11th Cir. 2002). "A motion for judgment on the pleadings is subject to the same standard as a Rule 12(b)(6) motion to dismiss." Roma Outdoor Creations, Inc. v. City of Cumming, 558 F. Supp. 2d 1283, 1284 (N.D. Ga. 2008). Under Federal Rule of Civil Procedure 12(b)(6), a claim will be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion for judgment on the pleadings only if the factual allegations in the pleading are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

On a motion for judgment on the pleadings, the court accepts all the well-pleaded factual allegations in the complaint as true, as well as all reasonable inferences drawn from those facts. Perez v. Wells Fargo N.A., 774 F.3d 1329,

1335 (11th Cir. 2014); Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1301 (11th Cir. 2001). Not only must the court accept the well-pleaded allegations as true, they must be construed in the light most favorable to the pleader. Id. "However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Gordon v. YMCA ECDC of Atlanta, No. 3:13-CV-11(CAR), 2014 WL 1392962, at *1 (M.D. Ga. Apr. 9, 2014) (quotation and citation omitted). "A complaint will survive judgment on the pleadings if it contains 'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Iqbal, 556 U.S. at 678).

III. DISCUSSION

Plaintiffs allege in the Amended Complaint that JEA acted beyond the limits of its authority by entering the PPA in violation of the constitution, laws, and public policy of the state of Florida, rendering the PPA *ultra vires*, void, and unenforceable. Am. Compl. ¶ 51. They request the entry of judgment declaring that the PPA is *ultra vires*, void, and unenforceable against JEA. Id. ¶ 107. In its Motion for Judgment on the Pleadings, MEAG contends that it is entitled to judgment on the pleadings because the proceedings to validate the revenue bonds

that financed Project J established conclusively that the PPA is valid and enforceable. See Def.'s Mem. of Points and Auths. in Supp. of its Mot. for J. on the Pleadings ("Def.'s Mem.") [Doc. 206-15] at 11.

Pursuant to Georgia's constitution, "[t]he General Assembly shall provide for the validation of any revenue bonds authorized and shall provide that such validation shall thereafter be incontestable and conclusive." Ga. Const. art. IX, § 6, ¶ IV. The MEAG Act authorizes MEAG to issue revenue bonds and delineates the process for their validation. See O.C.G.A. §§ 46-3-126(11); 46-3-131. When MEAG intends to issue revenue bonds, it gives notice to the district attorney of the Atlanta Judicial Circuit, who files a complaint in the Superior Court of Fulton County in the name of the state and against MEAG. Id. § 46-3-131(g)-(h). The Superior Court conducts a hearing and renders a judgment. Id. § 46-3-131(j).

> In the event no appeal is filed within 30 days after the date of the judgment of validation, or, if an appeal is filed, in the event the judgment is affirmed on appeal, the judgment of the superior court so confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive upon the validity of the bonds and the security therefor.

Id. § 46-1-131(k).

Here, the Superior Court "validated approximately $6 billion of revenue bonds to be secured for the first 20 years by the payments to be made by JEA

under the PPA (the 'Project J Bonds')[.]" Am. Compl. ¶ 32; see also Validation J., State of Ga. v. Mun. Elec. Auth. of Ga., No. 2015CV259189 (Super. Ct. Fulton Cty. Apr. 20, 2015) ("2015 Judgment") [Doc. 206-3]; Validation J., State of Ga. v. Mun. Elec. Auth. of Ga., No. 2009CV179503 (Super. Ct. Fulton Cty. Jan. 19, 2010) ("2010 Judgment") [Doc. 206-6]; Validation J., State of Ga. v. Mun. Elec. Auth. of Ga., No. 2008CV159297 (Super. Ct. Fulton Cty. Nov. 18, 2008) ("2008 Judgment") [Doc. 206-9] (collectively, "Judgments").[3] Because no appeal was filed, MEAG contends that these judgments are "forever conclusive" as to the validity of the bonds and the security thereof. Def.'s Mem. at 13-14. MEAG also contends that because the PPA was the security for the bonds its validity cannot now be collaterally attacked by JEA or the City. Id. at 15, 17, 19. Plaintiffs make numerous arguments to the contrary, which the Court considers *seriatim*.

[3] As explained in this Court's December 19, 2019, Order, the Court can rely on documents from the validation proceedings without converting MEAG's Motion for Judgment on the Pleadings into a motion for summary judgment. Dec. 19, 2019, Order at 7-9; see also Lozman v. City of Riviera Beach, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013) (citations omitted); Cunningham v. Dist. Attorney's Office for Escambia Cty., 592 F.3d 1237, 1255 (11th Cir. 2010).

A. Whether the MEAG Act Applies to the 2015 Judgment

JEA contends that the MEAG Act may not apply at all to the 2015 Judgment, "which is the only judgment purportedly applicable to the []PPA."[4] JEA's Mem. in Opp'n to Def.'s Mot. for J. on the Pleadings ("JEA's Opp'n") [Doc. 211] at 13. According to JEA, the MEAG Act only permits validation proceedings for prospective bond issuance, not validating previously-issued bonds. Id. at 13 & n.7 (citing O.C.G.A. § 46-3-131(g)). JEA's argument is unavailing. Plaintiffs allege in the Amended Complaint that MEAG validated approximately $6 billion in Project J Bonds and "issued a portion of the Project J Bonds in 2010 and 2015." Am. Compl. ¶¶ 32-33. Thus, at least some of the Project J Bonds had to be validated prior to the 2015 Judgment. In fact, the 2008 Judgment validated PPA bonds in the amount of $6,010,140,000.00, and held that "PPA Bonds validated pursuant to this authority may also be issued for any other purposes of the PPA Project." 2008 J. ¶ 3. The 2010 Judgment incorporated the 2008 Judgment, 2010 J. ¶ 9, and the 2015 Judgment incorporated the 2008 and 2010 Judgments. 2015 J. ¶¶ 15, 17. The 2015 Judgment also restated that MEAG was

[4] Plaintiffs' briefs sometimes use the acronym "APPA" to refer to the operative agreement between MEAG and JEA. Since the Amended Complaint uses "PPA," the Court does as well for the sake of clarity.

authorized to issue PPA bonds in an amount up to $6,010,140,000.00. 2015 J. ¶ 90. Thus, the MEAG Act applies to the 2008, 2010, and 2015 Judgments.

B. Whether the MEAG Act Precludes Challenges to the PPA

JEA also contends that, even if the MEAG Act applies to any of the Judgments, the plain language of the MEAG Act does not prohibit JEA from challenging the enforceability of the PPA. JEA's Opp'n at 14. JEA contends that O.C.G.A. § 46-3-132 ("Section 132"), not O.C.G.A. § 46-3-131 ("Section 131"), applies to the PPA and Section 132 precludes a collateral challenge only by Georgia public entities, citizens, and property owners. Id. at 14-15.

The MEAG Act provides that MEAG

> shall also have the power, which may be exercised either as principal or as agent, . . . to continue to sell electric power to political subdivisions of this state which are authorized to contract with the authority pursuant to Code Section 46-3-130 and to other persons and entities and, as agent for any or all of the same, to make power and energy otherwise available to them through arrangements with other persons, all in the exercise of the powers of the authority and to effectuate the purposes of this article[.]

O.C.G.A. § 46-3-126(5) (emphasis added).[5] MEAG also has the power

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[5] Section 46-3-130 states: "The political subdivisions with which the authority shall be authorized to contract to provide an electric power supply pursuant to this article shall be those political subdivisions of this state which, on March 18, 1975, owned and operated an electric distribution system." O.C.G.A. § 46-3-130.

> [t]o contract with the state and its agencies, instrumentalities, and departments, with those political subdivisions of the state which are authorized to contract with the authority pursuant to Code Section 46-3-130 and with private persons and corporations. This power includes the making of contracts for the construction of projects, which contracts for construction may be made either as sole owner of the project or as owner, in common with other public or private persons, of any divided or undivided interest therein[.]

Id. § 46-3-126(6) (emphasis added). Thus, MEAG has the power to contract with and sell electricity to political subdivisions of Georgia, as limited by Section 130, and with other persons and entities. With this background in mind, the Court considers JEA's argument that only Section 132 and not Section 131 of the MEAG Act applies to the PPA.

1. Whether Section 131 of the MEAG Act Applies to the PPA

When MEAG seeks to issue revenue bonds like the Project J Bonds, it

> shall, prior to the adoption of a resolution authorizing the issuance of such bonds, enter into one or more contracts with no less than five political subdivisions which are authorized to contract with the authority in accordance with Code Section 46-3-130. All such contracts shall be in accordance with Code Section 46-3-129.

Id. § 46-3-131(a).[6] Thereafter, MEAG may authorize the issuance of revenue bonds by resolution. Id. § 46-3-131(b). After MEAG gives notice to the district

[6] Since JEA and the City are not political subdivisions of Georgia, the "contracts" referenced in Subsection 46-3-131(a) would not include the PPA.

attorney of the Atlanta Judicial Circuit, who files a complaint in the name of the state and against MEAG, the Superior Court of Fulton County holds a hearing to confirm and validate the issuance of the revenue bonds and the security therefor.

Id.

§ 46-3-131(g)-(h), (j).

> Any citizen of this state may become a party to the proceedings at or before the time set for the hearing. Any party who is dissatisfied with the judgment of the court confirming and validating the issuance of the bonds and the security therefor or refusing to confirm and validate the issuance of the bonds and the security therefor may appeal from the judgment under the procedure provided by Article 2 of Chapter 6 of Title 5. No appeal may be taken by any person who was not a party at the time the judgment appealed from was rendered.

Id. § 46-3-131(j) (emphasis added).

> In the event no appeal is filed within 30 days after the date of the judgment of validation, or, if an appeal is filed, in the event the judgment is affirmed on appeal, the judgment of the superior court so confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive upon the validity of the bonds and the security therefor.

Id. § 46-3-131(k) (emphasis added).

Section 132 states:

> When payments which are made by political subdivisions pursuant to contracts entered into under subsection (a) of Code Section 46-3-131 are pledged as security for the payment of bonds sought to be validated, the petition for validation shall make party defendant the authority and shall also make parties defendant to such action every political subdivision which has contracted with the authority for the use of the

> facilities, commodities, and services of the project for which bonds shall be sought to be validated and issued. In addition, every other party, whether public or private, contracting with the authority in any manner with relation to the operation of such project, and particularly with relation to any common ownership of such project or to the supplying of electric energy to the authority or the taking or purchasing of electric energy from the project, shall be made parties defendant.

Id. § 46-3-132(a) (emphasis added). Because JEA is not a political subdivision of Georgia, its payments could not have been made pursuant to a contract entered into by a political subdivision under O.C.G.A. § 46-3-131(a). See id. §§ 46-3-130, 131(a). Thus, if JEA was made a party defendant to the bond validation proceedings under Section 132(a), it was not because it was a "political subdivision," but because it was an "other party" contracting with MEAG in relation to a project for which MEAG was issuing bonds. See generally id. § 46-3-132(a).

Like Section 131, Section 132 provides that any citizen of Georgia may intervene in the validation proceedings and only parties to the proceeding may appeal. Id. § 46-3-132(d)-(e). However, Section 132's provision concerning the conclusive and binding effect of the adjudication reads differently:

> An adjudication as to the validity of any such contract which adjudication is unexcepted to within 30 days after the date of the judgment of validation or, if an appeal is filed, which adjudication is confirmed on appeal shall be forever conclusive and binding upon such political subdivisions and the resident citizens and property owners of this state.

Id. § 46-3-132(f) (emphasis added). Thus, under the plain language of this subsection, an adjudication on the validity of a contract under Section 132 would not be "forever conclusive and binding" upon JEA and the City unless they are property owners of Georgia.

MEAG contends that the PPA fell under both Sections 131 and 132 because the PPA is both a contract with an "other party" contracting with MEAG and is pledged as security for the revenue bonds. Def.'s Reply in Supp. of Mot. for J. on the Pleadings ("Def.'s Reply") [Doc. 212] at 9. JEA contends that Section 131 does not apply to the PPA because the PPA is not "the security" for the Project J Bonds but rather "a contract for payments that have been pledged as security for the payment of Project J Bonds." JEA's Opp'n at 14, 17-18. Plaintiffs concede that this distinction is "nuanced" but claims it is "uncontroverted in the bond documents." Pls.' Sur-Reply Mem. in Opp'n to Def.'s Mot. for J. on the Pleadings ("Pls.' Sur-Reply") [Doc. 218] at 4.

In the 2008 Judgment, the Superior Court of Fulton County held that "[s]uch PPA Bonds and the security for the payment thereof, including the PPA Power Sales Contracts and the JEA PPA, shall be and the same hereby are in each and every respect confirmed and validated . . . ." 2008 J. ¶ 3. In 2010 and 2015, the Superior Court of Fulton County held that the 2008 Judgment "remains in full

force and effect." 2010 J. ¶ 29; 2015 J. ¶ 130. Furthermore, in the 2010 Judgment, the Superior Court of Fulton County held that JEA was a party to the bond validation proceeding not under Section 46-3-132(a), but because, "among other things . . . (c) certain payments required to be made by JEA . . . in accordance with or pursuant to any provision of the JEA PPA . . . are pledged to secure the payment of the respective PPA Bonds . . ." 2010 J. ¶¶ 14-15. Even Plaintiffs concede that under the Second Amended and Restated Plant Vogtle Additional Units PPA Project Bond Resolution [Doc. 218-1], which they assert is the authoritative governing document that defines the security for the Project J Bonds, "certain payments, rights and remedies under the PPA are pledged as security for the Project J Bonds." Pls.' Sur-Reply at 4, 7-8.

MEAG contends that Georgia courts reject the distinction Plaintiffs try to draw between a contract as security and payments under a contract as security. Def.'s Resp. to Pls.' Sur-Reply in Supp. of Def.'s Mot. for J. on the Pleadings ("Def.'s Sur-Resp.") [Doc. 220] at 2-9. No party cites any cases applying the relevant provisions of the MEAG Act to support their positions, and the Court has found none. It appears that the most relevant authority consists of Georgia cases applying the Revenue Bond Law, O.C.G.A. § 36-82-60 *et seq*. The Revenue Bond

Law, like the MEAG Act, describes the finality of a judgment validating revenue bonds:

> If no appeal is filed within the time prescribed by law or if an appeal is filed and the judgment is affirmed on appeal, the judgment of the superior court confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive against the governmental body upon the validity of such bonds and the security therefor.

O.C.G.A. § 36-82-78. The Georgia Supreme Court "has held consistently that this statutory provision prevents any collateral attack by the county, county residents, or taxpayers who had proper notice of the validation proceedings but chose not to intervene." Ambac Indem. Corp. v. Akridge, 262 Ga. 773, 774 (1993) (citations omitted).

In Ambac, a taxpayer and county resident, Akridge, sought to set aside a bond validation order on the grounds of fraud and mistake. Id. at 773. The court explained that the security for the bonds was

> an intergovernmental contract . . . for the construction of a resource recovery system in Berrien County. The authority agreed to issue two million dollars in revenue bonds to finance and operate the system and to provide garbage and solid waste disposal services. In return, the county agreed to pay the authority any deficiency between the authority's revenues and the amount required to pay the principal and interest on the authority's bonds with the deficit to come from the county's general fund or tax proceeds. This contract served as security for the bonds.

Id. at 773. The Georgia Supreme Court held that "[h]aving chosen not to intervene and appeal the validation order, Akridge is precluded from a collateral attack on the security for the bonds." Id. at 775.

In Savage v. State, 297 Ga. 627 (2015), three individuals challenged the trial court's validation of revenue bonds that would be used to finance a new Atlanta Braves stadium. Savage, 297 Ga. at 627.

> To provide security for the bonds, the Authority and the County entered into the Intergovernmental Agreement (IGA). Under the IGA, the Authority agrees to issue the bonds, and the County in turn agrees to pay an amount sufficient to cover the principal and interest on the bonds as well as the administration costs and other reasonable fees incurred by the Authority in connection with the bonds and the stadium project.

Id. at 630. In upholding the validation of the bonds, the Georgia Supreme Court explained that "[t]here is no dispute that the bonds for the stadium project are adequately secured by the County's pledge under the Intergovernmental Agreement to cover all bond costs not covered by the license fees paid by the Braves parties." Id.

In Quarterman v. Douglas Cty. Bd. of Comm'rs, 278 Ga. 363 (2004), an individual sought to restrain the Douglas County Board of Commissioners from collecting a Special Purpose Local Option Sales Tax ("SPLOST") which had been approved in a special referendum for the purpose of providing recreational facilities and roadway improvement. Quarterman, 278 Ga. at 363. The

Development Authority of Douglas County elected to finance these improvements by issuing revenue bonds, and it "authorized the bond financing and entered into an intergovernmental contract with the Board which obligated the County to repay the bonds from SPLOST proceeds or, if there was a shortfall, from any lawfully available funds." Id. The Georgia Supreme Court affirmed the trial court's dismissal of the collateral attack on the judgment and the intergovernmental contract:

> The intergovernmental contract between the Board and the Authority was specifically found in the validation order to constitute a legal, valid, binding, and enforceable obligation of the County. Therefore, the judgment of validation, from which timely appeal was not filed, is conclusive on the question of the validity of the revenue bonds and the intergovernmental contract.

Id. at 365 (citations omitted).

While Ambac, Savage, and Quarterman did not explicitly reject the distinction between a contract as security and payments under that contract as security, these cases show that Georgia courts have treated a promise to pay in a contract as the security for revenue bonds. Notably, Plaintiffs have not cited a single case where a court did not treat a promise to pay in a contract as the security for revenue bonds. The Superior Court of Fulton County held that the PPA was valid and that it was the security for the Project J Bonds. See 2008 J. ¶ 3; 2010 J.

¶ 29; 2015 J. ¶¶ 65, 130. "[E]ven if the judgment of validation is unconstitutional, arguably void, or obtained by fraud, accident, or mistake, it cannot be collaterally attacked with respect to either the revenue bonds or their security." Quarterman, 278 Ga. at 365 (citing Ambac, 262 Ga. 773, 774); Turpen v. Rabun Cty. Bd. of Comm'rs, 251 Ga. App. 505, 508-09 (2001) (internal punctuation omitted) ("[A] judgment validating revenue bonds or certificates from which no timely appeal is filed, is conclusive on the question of the validity of the bonds and the security therefor."). Because the 2008, 2010, and 2015 Judgments validated the Project J bonds and the security therefor, JEA's payments to be made pursuant to the PPA, Section 131 of the MEAG Act applies and the Judgments cannot be collaterally attacked with respect to the PPA.

2. Whether MEAG Forfeited the Right to Invoke Section 131(k) of the MEAG Act

JEA contends that MEAG has forfeited the right to invoke the preclusive effect of Section 131(k) regarding the PPA "by including multiple components not relating to the payment of debt service of the Project J Bonds among JEA's []PPA obligations, rather than addressing those items in a separate agreement." JEA's Opp'n at 19-20. According to JEA, because its obligations under the PPA "exceed mere payments to secure MEAG's bonds," the PPA is not security for bonds under Section 131. See id. JEA cites no authority supporting this proposition.

MEAG contends, and the Court agrees, that a contract such as the PPA may fall under both Section 131 and Section 132 when that contract contains both a promise to pay that is pledged as security for the bonds and contains other provisions related to the project. See O.C.G.A. §§ 46-3-131(j)-(k), 132(a). The 2015 Judgment references both Sections 131 and 132. 2015 J. ¶¶ 23, 24, 27, 29, 38, 58.[7] The fact that MEAG and JEA included in one agreement JEA's obligation make payments to secure the Project J Bonds and other obligations does not mean the security for the Project J Bonds can now be collaterally attacked. See generally O.C.G.A. § 46-3-131(k).

3. Whether Section 131(k) of the MEAG Act Applies to Out-of-State Public Entities

Plaintiffs also contend that, despite the lack of limiting language in Section 131(k), it does not apply to out-of-state public entities. JEA's Opp'n at 20-23; Pl. City of Jacksonville's Mem. in Opp'n to Def.'s Mot. for J. on the Pleadings ("City's Opp'n") [Doc. 210] at 7. Plaintiffs emphasize that the Georgia Supreme Court has never applied the limitation on collateral attacks on bond judgments to foreign public entities. JEA's Opp'n at 20; City's Opp'n at 11. This

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[7] In what appears to be a scrivener's error, the 2015 Judgment occasionally references Section 46-3-1<u>5</u>1 when describing the content of Section 46-3-1<u>3</u>1.

is neither surprising nor outcome-determinative in this case. First, it appears there is very little caselaw applying Section 131. There are only two cases citing Section 131, and neither is applicable to the facts of this case.[8] Second, cases applying the Revenue Bond Law do not address out-of-state public entities because under the Revenue Bond Law, judgments are "forever conclusive against the governmental body." See O.C.G.A. § 36-82-78 (emphasis added). The Revenue Bond Law authorizes governmental bodies to issue revenue bonds. Id. §§ 36-82-62 to 63. "'Governmental body' means any school district, county, or municipal corporation of this state." Id. § 36-82-61(2)(A) (emphasis added). Because the Revenue Bond Law by its plain terms makes judgments validating revenue bonds forever conclusive against only Georgia school districts, counties, and municipal corporations, it makes sense that there are no cases holding that such judgments are conclusive against out-of-state entities.

Similar to the Revenue Bond Law, Section 132 of the MEAG Act includes qualifying language making the adjudication of those contracts which are not

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[8] Greensboro Lumber Co. v. Ga. Power Co., 643 F. Supp. 1345, 1376 (N.D. Ga. 1986) (stating that the Superior Court of Fulton County must validate the issuance of all MEAG revenue bonds); Thompson v. Mun. Elec. Auth. of Ga., 238 Ga. 19 (1978) (affirming superior court's validation of $1,600,000,000.00 in MEAG revenue bonds).

security for revenue bonds "forever conclusive and binding upon such political subdivisions and the resident citizens and property owners of this state." Id. § 46-3-132(f). However, Section 131 of the MEAG Act does not limit the conclusive effect of judgments to only Georgia entities: "[T]he judgment of the superior court so confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive upon the validity of the bonds and the security therefor." Id. § 46-3-131(k).

It appears that this issue, whether a judgment validating a revenue bond issued by MEAG is conclusive as the bond and the security thereof against non-Georgia entities, is one of first impression. "In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter." O.C.G.A. § 1-3-1(b). In applying the rules of statutory construction, Georgia courts "look to the plain language of the statute and . . . we presume that the General Assembly means what it says and says what it means." Akintoye v. State, 340 Ga. App. 777, 782 (2017) (citing Williams v. State, 299 Ga. 632, 633 (2016)).

> To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.

Williams, 299 Ga. at 633 (citation omitted). The most natural and reasonable way to read Section 131(k), particularly in light of the limiting provisions present in Section 132(f) and in the Revenue Bond Law but absent from Section 131(k), is that a judgment validating a revenue bond issued by MEAG is conclusive as to the bond and the security thereof, period. This Court cannot limit Section 131(k) when the General Assembly did not do so. State v. Fielden, 280 Ga. 444, 448 (2006) (alteration accepted) (quoting Etkind v. Suarez, 271 Ga. 352, 353 (1999)) ("[U]nder our system of separation of powers this Court does not have the authority to rewrite statutes. 'The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced. Under that doctrine, statutory construction belongs to the courts, legislation to the legislature. We can not add a line to the law.'").

Plaintiffs contend that out-of-state residents have no right to appeal an adverse bond judgment in Georgia and this indicates that the General Assembly intended to limit Section 131(k) to Georgians. JEA's Opp'n at 22; see also City's Opp'n at 8, 11. The MEAG Act permits only those who were parties at the time of judgment to appeal the judgment. O.C.G.A. §§ 46-3-131(j), 132(e). Section 131 permits "any citizen" of Georgia to become a party to the proceeding, and Section 132 permits "[a]ny citizen resident" to intervene. Id. §§ 46-3-131(j), 132(d).

According to JEA, the effect of these provisions is to limit the right of non-residents to intervene in MEAG bond validation proceedings. JEA's Opp'n at 22.

However, Section 132 requires that any party to a contract related to a MEAG project for which MEAG plans to issue bonds must be named a party defendant. Id. § 46-3-132(a). Furthermore, the Georgia Civil Practice Act ("CPA") permits "anyone" who meets certain requirements to intervene in an action by filing a motion. Id. § 9-11-24. "[T]he provisions of the CPA addressing intervention apply to bond validation proceedings." Sherman v. Dev. Auth. of Fulton Cty., 321 Ga. App. 550, 555 (2013) (citation omitted) (en banc); see also O.C.G.A. § 9-11-81 ("This chapter shall apply to all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by law; but, in any event, the provisions of this chapter governing . . . intervention . . . shall apply to all such proceedings."). Thus, a non-Georgia resident may intervene and become a party to, and thereafter appeal, a judgment validating a MEAG-issued bond and its security. Because the MEAG Act also permits Georgia residents who do not meet the CPA's intervention requirement to become a party it does not follow that the General Assembly intended to limit Section 131(k) to citizens of Georgia.

Plaintiffs contend that the Georgia Supreme Court has construed the Revenue Bond Law to mean that only a Georgia citizen can intervene and become a party to challenge a bond validation. See City's Opp'n at 8; Pls.' Sur-Reply at 13. The Court disagrees. In Sherman v. City of Atlanta, 293 Ga. 169 (2013), the Georgia Supreme Court dismissed an appeal from a bond validation proceeding, finding that the appellants failed to prove their standing under the Revenue Bond Law because they did not prove in the trial court that they were citizens of Georgia and residents of the governmental body which issued the bonds. Sherman, 293 Ga. at 172, 175. However, contrary to Plaintiffs' argument, the court did not hold that the CPA's general intervention provision did not apply. The court explicitly did not address O.C.G.A. § 9-11-24 because appellants did not rely upon it in their appeal. See id. at 175 n.3. The court noted that, had appellants relied upon this general intervention provision, their objection to the bond validation "presumably could have been struck" because they appeared to have "failed to follow the procedures for intervention in a civil action set forth in O.C.G.A. § 9-11-24(c)." Id. (citing Sherman, 321 Ga. App. at 554). Thus, Sherman v. City of Atlanta supports MEAG's argument that the CPA's general intervention provision applies to bond validation proceedings.

JEA also contends that if the General Assembly had intended Section 131(k) to apply to out-of-state entities, it would have required notice and an opportunity to intervene for out-of-state entities. JEA's Opp'n at 23. The CPA provides for intervention as a matter of right

> [w]hen the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id. § 9-11-24(a)(2). It also permits intervention "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." Id. § 9-11-24(b)(2). Thus, out-of-state entities can intervene under Section 131. Furthermore, out-of-state entities that are parties to a contract related to a MEAG project for which MEAG plans to issue bonds must be made party defendants. See id. § 46-3-132(a). As the MEAG bond validation proceedings relevant to this case demonstrate, the Superior Court addresses contracts under Section 132 in the same proceeding validating the revenue bonds and the security thereof under Section 131.[9]

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[9] It is true that the MEAG Act requires the clerk of the Superior Court of Fulton County to publish a notice of the bond hearing in the official organ of Fulton County. O.C.G.A. § 46-3-131(i). It is also true that the MEAG Act requires notice of the validation hearing be published "in the newspaper in which sheriff's advertisements are published . . . in each county in which any portion of any of the

C. Whether the Judgments Are Final Judgments

JEA also contends that because MEAG sought confirmation through the 2015 Judgment that the 2008 Judgment and 2010 Judgment remained valid, these judgments are not final judgments and therefore subject to collateral review in this Court. JEA's Opp'n at 24-25. JEA cites no authority supporting its argument that these judgments were not final. On their face, the 2010 Judgment and 2015 Judgment did not seek to modify anything. The fact that MEAG sought "confirmation" that the 2008 Judgment and 2010 Judgment "remain[ed] in full force and effect" does not mean that those judgments were not final. See generally Pet. and Compl., State of Ga. v. Mun. Elec. Auth. of Ga., No. 2015CV259189 (Super. Ct. Fulton Cty. Apr. 3, 2015) [Doc. 206-4] ¶ 110. The 2015 Judgment confirmed and validated the PPA, 2015 J. ¶ 130(h), and held that the 2008 Judgment and 2010 Judgment "remain[] in full force and effect, except as supplemented by this proceeding." Id. ¶ 130(k)-(l). The 2010 Judgment held that the 2008 Judgment "remains in full force and effect." 2010 J. ¶ 34. Nothing in the

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defendant political subdivisions [of Georgia that has contracted with MEAG regarding the project for which revenue bonds are sought] lie." See id. § 46-3-132(c). However, the Court does not find that these provisions indicate that the General Assembly intended Section 131(k) not to apply to out-of-state entities.

2008 Judgment indicates it is anything other than a final judgment. Most importantly, Section 131(k) of the MEAG Act provides that bond validation judgments are final upon the exhaustion of any appeal. O.C.G.A. § 46-3-131(k). Thus, the 2008, 2010, and 2015 Judgments are final judgments under Georgia law.

D. Whether the Judgments Are Not Binding Upon the City Because They Did Not Reference the City's Interests

The City contends that the Judgments "have no binding effect on the City's claims" because the Judgments "never even referenced the City's interests, much less adjudicated anything related to those interests." City's Opp'n at 12. "Bond validation decisions are incontestable and conclusive. However, this restriction only attaches to those matters that are referenced and adjudicated in the bond proceedings." Columbus Bd. of Tax Assessors v. Med. Ctr. Hosp. Auth., 302 Ga. 358, 362 (2017) (internal quotation marks and citations omitted).

Here, the bond validation proceedings referenced and adjudicated the core issue in this case: the validity of the PPA. See 2015 J. ¶¶ 65 (holding that the PPA is "valid, binding, and enforceable against MEAG Power and JEA in accordance with its terms"), 67 (holding that JEA "has all requisite power and authority to conduct JEA's business . . . and to execute and deliver, and to perform JEA's obligations under, the Amended and restated JEA PPA"), 68 (holding that execution and performance of by JEA of its obligations under the Amended and

Restated JEA PPA "will not result in a violation of its enabling legislation); 130(h) (confirming and validating the Amended and Restated PPA and its terms and conditions); 2008 J. ¶ 3 ("Such PPA bonds and the security thereof, including the PPA Power Sales Contracts and the JEA PPA, shall be and the same hereby are in each and every respect confirmed and validated . . . ."); see also Answer of JEA, State of Ga. v. Muni. Elec. Auth. of Ga., No. 2015CV259189 (Super. Ct. Fulton Cty. Apr. 17, 2015) ("2015 JEA Answer") [Doc. 206-5] ¶¶ 4-6 (admitting allegations in the complaint that JEA had authority to enter into and perform under the PPA). Because the validity of the PPA was referenced and adjudicated during bond validation proceedings, the Judgments are binding on the City's claims.

E. Whether the Judgments Have No Preclusive Effect on the City Because of a Material Change in Circumstances

The City contends that the Judgments have no preclusive effect upon it because circumstances have materially changed since the 2015 Judgment was entered on April 20, 2015. City's Opp'n at 20; Pl.'s Sur-Reply at 9-10. The City contends that circumstances have materially changed in that, following Westinghouse's bankruptcy, MEAG and the other Co-Owners entered into a new construction contract with a new contractor on a cost-plus basis, whereas the total costs were capped under the previous construction contract. City's Opp'n at 21. Under Georgia law,

> a former judgment binds only as to the facts in issue and events existing at the time of such judgment, and does not prevent a re-examination even of the same questions between the same parties, if in the interval the material facts have so changed or such new events have occurred as to alter the legal rights or relations of the litigants[.]

Nix v. 230 Kirkwood Homes, LLC, 300 Ga. 91, 95 (2016) (quoting Durham v. Crawford, 196 Ga. 381, 387 (1943)) (finding that res judicata or collateral estoppel did not bar a quiet title action). MEAG contends, *inter alia*, that the MEAG Act has no exception for changed circumstances and this supersedes the common-law rule. MEAG's Reply at 33-34.

The Court agrees that the MEAG Act, which makes judgments "forever conclusive," appears to supersede the common law rule.[10] See Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364 (2012) (internal quotation marks and citations omitted) ("A statute does not need to expressly say, 'this is intended to preempt the common law.' The actual canon of statutory construction is that statutes in derogation of the common law must be limited strictly to the meaning of the language employed, and not extended beyond the plain and explicit terms of the statute."); see also,

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[10] The Court notes that JEA only discusses this common law rule when, "out of an abundance of caution," explaining why Georgia's general preclusion law does not estop this case even though JEA acknowledges that "MEAG does not contend . . . that JEA's declaratory judgment action is barred by Georgia's general law of *res judicata* or collateral estoppel." See JEA's Opp'n at 26-27, 31-33.

e.g., Ambac, 262 Ga. at 774 (holding that judgments pursuant to the Revenue Bond Law are "forever conclusive" and may not be collaterally attacked); Quarterman, 278 Ga. at 365 (same).

Plaintiffs counter that Section 132(b) of the MEAG Act suggests that changed circumstances are relevant to "contracts not pledged as security for bonds." Pl.'s Sur-Reply at 9.[11] Section 132(b) states:

> All such parties defendant shall be served and shall be required to show cause, if any exists, why such contracts and the terms and conditions thereof should not be inquired into by the court and the validity of the terms thereof determined and the matters and conditions imposed on the parties to such contracts and all such undertakings thereof adjudicated to be valid and binding on the parties thereto.

O.C.G.A. § 46-3-132(b) (emphasis added). Section 132(b) requires the parties to contracts not pledged as security for bonds to show cause why "the matters and conditions" imposed on the parties should not be "valid and binding." Id. Nothing in this language suggests that the contracts are invalid or the Superior Court's judgment not binding if the circumstances change. Furthermore, Section 132(f) does not state that judgments are forever conclusive unless circumstances change. See id. § 46-3-132(f).

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[11] The Court discusses Section 132 here because while the PPA was a contract pledged as security for bonds under Section 131, supra part III.B.1, MEAG contends that the PPA also falls under Section 132. Def.'s Reply at 9.

Plaintiffs contend that Sherman v. Atlanta Indep. Sch. Sys., 293 Ga. 268 (2013), refutes MEAG's argument that changed circumstances are not relevant to statutorily-conducted bond validation proceedings. Pl.'s Sur-Reply at 10 n.7. However, that case involved a change in the law governing a bond validation. See Sherman, 293 Ga. at 268. In Woodham v. City of Atlanta, 283 Ga. 95 (2008), the Georgia Supreme Court found that the proposed use of school taxes to fund bonds for the City of Atlanta's BeltLine Redevelopment Plan violated the Georgia Constitution. See id. Following the Woodham decision, the Georgia Constitution was amended to allow school taxes to be used for general redevelopment purposes and projects. Id. at 270-71. The amendment required that such tax allocation districts be approved by the applicable governing body of the county, municipality, or board of education, but authorized the General Assembly to give effect to such approvals without regard to whether the approval occurred before or after the amendment took effect. Id. at 271. The General Assembly gave such effect with regard to "[a]ny consent by a local board of education to the inclusion of educational ad valorem property taxes as a basis for computing tax allocation increments and any authorization to use such funds for such purpose." Id. at 271 (citation omitted).

The plaintiff in Sherman v. Atlanta Indep. Sch. Sys. contended that the effect of Woodham was to render the resolutions, redevelopment plans, and intergovernmental agreements approving certain tax allocation districts ("TADs") "unconstitutional in their entirety, void ab initio, and unamendable—even by constitutional amendment." Id. at 268. The plaintiff "argue[d] vociferously . . . that an unconstitutional law is 'void from inception' and thus such a law cannot merely be amended to make it constitutional." Id. at 276. The Georgia Supreme Court disagreed:

> Sherman is also wrong—and decisively so—because the subsequent constitutional amendment and revision of the statute governing TADs *changed* the applicable law, and those changes were expressly made retroactive with respect to the county, city, and local board of education approvals needed to use school taxes for redevelopment purposes.

Id. at 268. The court explained that

> despite our decision in Woodham and the general rule against retroactive legislation, the original, pre-2008 Amendment resolutions of the Atlanta School Board and the other local government acts approving the use of school taxes in the tax allocation increments for the BeltLine and Perry-Bolton tax allocation districts are not unconstitutional and remain effective, subject to any subsequent amendments thereto.

Id. at 278. Thus, while Sherman v. Atlanta Indep. Sch. Sys. indicates that a bond resolution that would have been invalid pursuant to previously-governing law can remain effective when the governing law is changed and the change is made

retroactive, that case does not stand for the proposition that a change in factual circumstances like the City alleges here renders a bond validation proceeding not forever conclusive and binding.

Plaintiffs also contend that "the PPA itself includes a provision that contemplated changed circumstances where JEA may no longer be authorized to continue performing under the agreement." Pl.'s Sur-Reply at 11 & n.9 (citing PPA § 702(d)). Section 702 of the PPA contains JEA's representations and warranties as the Buyer. PPA § 702. Among other things, JEA represented and warranted that it "has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging all covenants and obligations on its part to be performed under and pursuant to this Agreement." Id. § 702(b). JEA also represented and warranted that

> [n]o authorization, approval, order, license, permit, franchise or consent, and no registration, declaration or filing with any Governmental Authority is required on the part of Buyer in connection with the execution, delivery and performance of this Agreement except those which Buyer anticipates will be timely obtained in the ordinary course of performance of this Agreement.

Id. § 702(d) (emphasis added). Plaintiffs do not explain how this provision contemplates circumstances where JEA is no longer authorized to perform. JEA merely represented and warranted that it had all approvals it needed to perform

under the PPA except for those that JEA anticipated it would obtain in the course of performance. See id.

Furthermore, Plaintiffs' argument runs contrary to the binding nature of the PPA as Plaintiffs describe it in their Amended Complaint. Plaintiffs allege that the PPA unconditionally requires JEA to pay MEAG for capacity and energy at the full cost of production of Project J, including debt service on the bonds and DOE-guaranteed loans. See Am. Compl. ¶ 37. They also allege that the PPA contains a "hell-or-high-water clause" that obligates JEA to pay unconditionally, regardless of whether the electricity is ever delivered, whether the Additional Units are completed or operating or operable, and whether their output is suspended, interrupted, interfered with, reduced or curtailed or terminated in whole or in part. See id. ¶ 39. Other provisions of the PPA unequivocally state that JEA's obligation to perform is absolute. See, e.g. PPA §§ 103(a), 204(g), 502, 1107. In short, nothing in the PPA contemplates that changed circumstances may authorize JEA to stop performing.

F. Whether the Judgments Cannot Bind the City Because They Did Not Account for Florida Laws Restricting JEA's Ability to Enter the PPA

The City contends that because the Superior Court did not consider the facts in the Amended Complaint showing why JEA lacked authority to enter the PPA

under Florida law, the Judgments cannot bind the City. City's Opp'n at 22. Put another way, "any actions by JEA's representatives in the validation proceedings cannot forestall later judicial review of their legality. Otherwise, illegality challenges could never succeed." Id. at 23. The City's argument may be persuasive outside the context of bond validation proceedings under Georgia law. See, e.g., City of Statham v. Diversified Dev. Co., 250 Ga. App. 846, 848 (2001) (internal quotation marks and citation omitted) ("Not even estoppel can legalize or vitalize that which the law declares unlawful and void. If so, the conduct of individuals, whether independently or collusively, could render any and all laws invalid and impotent."); see also O.C.G.A. § 45-6-5 ("The public may not be estopped by the acts of any officer done in the exercise of an unconferred power.").

However, the judgments of bond validation proceedings in Georgia are not subject to such challenges. The Georgia Supreme Court "has held consistently that [the Revenue Bond Law] prevents any collateral attack" on the validation proceedings by the parties specified in the statute. Ambac, 262 Ga. at 774 (citations omitted).

> [E]ven if the judgment of validation is unconstitutional, arguably void, or obtained by fraud, accident, or mistake, it cannot be collaterally attacked with respect to either the revenue bonds or their security. . . . [Plaintiff] cannot now challenge the revenue bonds or enjoin repayment pursuant to the intergovernmental contract, regardless of whether that

> contract was authorized under the constitutional and statutory law of this state.

Quarterman, 278 Ga. at 365 (citing Ambac, 262 Ga. at 774; Turpen, 251 Ga. App. at 508-09); see also Cox v. Ga. Educ. Auth., 225 Ga. 542, 544 (citing Gibbs v. City of Social Circle, 191 Ga. 422, 425-27 (1940)) (holding that the judgment validating revenue certificates was conclusive "upon all questions, including the constitutionality of the statute under which the proceedings are had"). As the Georgia Supreme Court has explained,

> [t]his preclusion is necessary to protect the ability of governmental bodies to obtain long-term financing in the bond market. Potential purchasers would be reluctant to invest in the state's bonds without the assurance that the revenue bonds and their security are not subject to collateral attacks after a court with proper jurisdiction has entered a final validation order. Any perceived risk in the revenue bonds as an investment would impede the ability of state and local governments to finance needed public improvement projects.

Ambac, 262 Ga. at 775.

> Any other result . . . would place local financing in a precarious state. Like the trial court, we are constrained by the Georgia Constitution, statutory provisions governing bond validation, policy concerns, and the citizens' failure to appeal the bond validation order. Although the defendants did not follow the Hospital Acquisition Act, we cannot countenance the citizens' effort to attack the validity of the revenue bonds at this point.

Turpen, 251 Ga. App. at 509.

Similar to how a judgment confirming and validating the issuance of revenue bonds is "forever conclusive against the governmental body upon the validity of such bonds and the security therefor" under the Revenue Bond Law, a judgment confirming and validating MEAG's issuance of revenue bonds and the security therefor is "forever conclusive upon the validity of the bonds and the security therefor." See O.C.G.A. §§ 36-82-78, 46-3-131(k). Since the PPA is security for the Project J Bonds, the Judgments are "forever conclusive" upon the validity of the PPA with respect to both JEA and the City.

G. Whether Applying Section 131(k) of the MEAG Act Against JEA Would Violate Federalism Principles

JEA contends that if the MEAG Act is applied to bar this suit, it would violate principles of federalism regarding the relationship between the respective powers of the sovereign states. JEA's Opp'n at 9. According to JEA, if the MEAG Act were applied to require JEA to violate Florida law by compelling performance under the PPA, then Georgia law would effectively override the restraints on JEA's authority created by Florida law. Id. at 10. MEAG contends that under the Full Faith and Credit Act, this Court must give the same preclusive effect to the Judgments as would Georgia courts under Section 131(k) of the MEAG Act. MEAG's Reply at 15.

> The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered. But the Act, like all statutes, is subject to the requirements of the Due Process Clause. And the law of preclusion is also subject to due process limitations.

Walker v. R.J. Reynolds Tobacco Co., 734 F.3d 1278, 1286 (11th Cir. 2013) (alteration accepted, internal quotation marks and citations omitted). "[W]here we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982).

> The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.

Milwaukee Cty. v. M.E. White Co., 296 U.S. 268, 276-77 (1935).

JEA does not contend that the bond validation proceedings in the Superior Court of Fulton County failed to satisfy procedural due process. JEA was a named defendant to the 2015, 2010, and 2008 bond validation proceedings. See 2015 J.

¶ 9; 2010 J. ¶ 5; 2008 J. at 1. JEA filed answers in each of these proceedings. See 2015 JEA Answer; Answer of JEA, State of Ga. v. Muni. Elec. Auth. of Ga., No. 2009CV179503 (Super. Ct. Fulton Cty. Jan. 19, 2010) ("2010 JEA Answer") [Doc. 206-8]; Answer of JEA, State of Ga. v. Muni. Elec. Auth. of Ga., No. 2008CV159297 (Super. Ct. Fulton Cty. Nov. 18, 2008) ("2008 JEA Answer") [Doc. 206-11].

JEA cites a myriad of cases representing federalism principles not at issue here: States define themselves as sovereigns through the structure of their government and the character of those who exercise that authority, see Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); states are immune from application of the Fair Labor Standards Act to their state employees, see Alden v. Maine, 527 U.S. 706, 713 (1999); the federal government may not commandeer the states or their subdivisions through federal regulatory programs, see Printz v. United States, 521 U.S. 898, 925 (1997); a federal law prohibiting state authorization of sports gambling violated this anticommandeering rule, see Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018); and a state may not be sued by a

private party in without its consent in the courts of another state, see Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1490, 1499 (2019).[12]

JEA also relies on Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51 (1984), wherein the United States Supreme Court considered whether the federal government is estopped from recovering federal Medicare funds because the nonprofit corporation relied on the express authorization of a reasonable government agent in making the expenditures. Heckler, 467 U.S. at 53-54. Heckler construed the doctrine of equitable estoppel, stating that "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." Id. at 60.

This case does not involve equitable estoppel; the issue here is whether this Court, a federal court sitting in diversity in Georgia, must give full faith and credit to the final judgments of a Georgia court against an out-of-state public entity. None of JEA's cited cases stand for the proposition that a public entity cannot be bound by the judgment of an out-of-state court. The fact that the PPA allegedly

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[12] JEA also relies upon World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), which addressed whether the exercise of personal jurisdiction over a nonresident automobile dealer and its wholesale distributor comported with the Due Process Clause of the Fourteenth Amendment.

violates Florida's constitution and laws does not mean that the Superior Court's judgments validating the PPA should not be given full faith and credit. See generally Fauntleroy v. Lum, 210 U.S. 230, 233-34 (1908) (reversing the Mississippi Supreme Court's refusal to grant full faith and credit to a Missouri court judgment affirming an arbitrator's award on a futures contract that was unenforceable under Mississippi law).

H. Whether Applying Section 131(k) of the MEAG Act Against the City Violates Due Process

The City contends that it would violate due process to bind it to the Judgments because it was not a party to the bond validation proceedings. City's Opp'n at 5-7. The City correctly states the general rule: "It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (internal quotation marks omitted) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

> A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.

Hansberry, 311 U.S. at 40 (citations omitted).

> The rule against nonparty preclusion, however, is subject to six categories of exceptions. A court may apply nonparty preclusion if: (1) the nonparty agreed to be bound by the litigation of others; (2) a substantive legal relationship existed between the person to be bound and a party to the judgment; (3) the nonparty was adequately represented by someone who was a party to the suit; (4) the nonparty assumed control over the litigation in which the judgment was issued; (5) a party attempted to relitigate issues through a proxy; or (6) a statutory scheme foreclosed successive litigation by nonlitigants. See id. at 2172–73.

Griswold v. Cty. of Hillsborough, 598 F.3d 1289, 1292 (11th Cir. 2010) (citing Taylor, 553 U.S. at 883-95).

MEAG contends that the City participated in the bond validation proceedings because the City's control over JEA makes it an instrumentality or agency of the City. MEAG's Mem. at 20. Plaintiffs' Amended Complaint asserts only that JEA "is an independent agency of the City of Jacksonville." Am. Compl. ¶ 4. Attorneys from the City's Office of General Counsel signed JEA's 2010 Answer and 2008 Answer. See 2010 JEA Answer at 4; 2008 JEA Answer at 3. The City contends that it does not operate JEA and JEA is not its agent. City's Opp'n at 18. However, it appears that Florida state courts, federal district courts in Florida, and the United States Court of Appeals for the Eleventh Circuit have previously found that "the City's control over the JEA makes it an instrumentality or agency of the municipality." See Fluid Dynamic Holdings, LLC v. City of

Jacksonville, 752 F. App'x 924, 926 (11th Cir. 2018), cert. denied, 139 S. Ct. 2617 (2019).

In Jetton v. Jacksonville Elec. Auth., a Florida court considered whether a Florida statute that "waives sovereign immunity to tort claims against the state and its subdivisions" applied to JEA. Jetton, 399 So.2d 396, 397 (Fla. Dist. Ct. App. 1981). The court held that it did:

> We cannot accept appellant's threshold contention that JEA is not entitled to the Section 768.28(5) limitation on recovery because it is not a municipal agency. We agree with JEA that it is a governmental unit, an electric utility operated by the City of Jacksonville. Ven-Fuel v. Jacksonville Elec. Auth., 332 So.2d 81 (Fla. 3d DCA 1975); Amerson v. Jacksonville Elec. Auth., 362 So.2d 433 (Fla. 1st DCA 1978). The waiver of sovereign immunity under the statute clearly extends to units that, like JEA, are "primarily acting as instrumentalities or agencies of . . . municipalities." Fla. Stat. § 768.28(2) (1977).

Id. at 398.

In Fluid Dynamic Holdings LLC v. City of Jacksonville, a federal district court also held that "JEA, the City of Jacksonville's independent electric authority," is entitled to sovereign immunity. Fluid Dynamic Holdings, No. 3:14-cv-1454-J-32MCR, 2017 WL 3723367, at *1 (M.D. Fla. Aug. 29, 2017), aff'd, 752 F. App'x 924. The court noted that "Jetton determined that JEA was a governmental unit, an electric utility operated by the City of Jacksonville," id. at *3 (citation and internal quotation marks omitted), and explained that "Florida

circuit courts and federal district courts have continuously cited Jetton and ruled that section 768.28 applies to JEA." Id. at *3 & n.5 (collecting cases). The court also noted that "other Florida courts have come to a similar conclusion concerning the sovereign immunity of other municipal utilities in the state." Id. at *4.

On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's holding because Florida law waives sovereign immunity for "corporations primarily acting as instrumentalities or agencies of municipalities" and "[a]s the Charter [of the City] makes plain, the JEA is a governmental entity created by the Florida legislature, and it primarily acts as the City's agent in providing utility services." Fluid Dynamic Holdings, 752 F. App'x at 925 (citations and internal quotation marks omitted).

> As the district court explained, the Jacksonville Charter defines the JEA as an "independent agenc[y]" of the City. JACKSONVILLE, FLA., CHARTER § 18.07. The Florida legislature "created and established" the JEA by statute as a "body politic and corporate" to exercise "all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in future could be, or could have been but for this article, exercised by the City of Jacksonville." Id. § 21.01 (citing statutes creating the JEA).

Id. The Eleventh Circuit Court of Appeals also relied upon Jetton, noting that "Florida courts continue to follow Jetton's sovereign immunity holding" and "the Second District Court of Appeal cited Jetton in Sebring Utilities Comm'n v. Sicher, 509 So.2d 968, 970 (Fla. Dist. Ct. App. 1987), in concluding another

Florida municipal agency has sovereign immunity." Id. at 926. As the Eleventh Circuit Court of Appeals explained,

> [t]he City exercises control over the JEA. The mayor appoints, and the municipal council confirms, members of the JEA's board. JACKSONVILLE, FLA., CHARTER § 21.03. The mayor and the municipal council approve the JEA's budget and have unique powers over the JEA's revenues. JACKSONVILLE, FLA., CHARTER § 21.07. And the municipal council has the power to amend the article of the charter that delineates the JEA's powers. JACKSONVILLE, FLA., CHARTER § 21.11. The Florida Supreme Court found a similar level of control sufficient to make the University of Central Florida Athletic Association an instrumentality of the University of Central Florida. See Plancher v. UCF Athletics Ass'n, Inc., 175 So.3d 724, 728–729 (Fla. 2015). So too the City's control over the JEA makes it an instrumentality or agency of the municipality.

Id. (other internal citations omitted). While JEA's sovereign immunity is not at issue here, these cases demonstrate that JEA is an instrumentality or agency of the City.

The City's response to these cases is to state that, "[r]egrettably, some courts have missed the mark when at times describing the relationship between the City and JEA." City's Opp'n at 18 n.10. Despite the fact that JEA was created in 1968 and has apparently been a party to several lawsuits, the City cites no cases supporting its argument that JEA is not an agent of the City. As MEAG points out, in the order transferring this case to this Court, Judge Brian J. Davis stated, albeit in the context of enforcing the PPA's forum selection clause against the City:

> [T]he relationship is clear enough. JEA and the City work closely together. They are parts of the same consolidated form of government . . . .
> Moreover, given the money, time, and overlap in personnel over the course of the Project, there was no risk that the City would be surprised by the terms of the Amended PPA. . . . This is especially true where the City approved JEA's budget every year for the last decade, which was required to provide the City notice of all of JEA's experiences, capital outlay, and debt service, including those obligations arising from the Amended PPA.

July 12, 2019, Order at 19-20.

In Jetton, Fluid Dynamic Holdings, and other cases, JEA argued that it was the City's agent and JEA and the City benefited from courts finding that JEA was an instrumentality or agency of the City.[13] Now in this case, the City wishes to disclaim those courts' holdings because if JEA is its agent, then the City is bound by the Judgments in the bond validation proceedings. The Court has reviewed the relevant Florida Laws and the City's Charter; it appears that the provisions that the Jetton and Fluid Dynamic Holdings courts relied upon to find that JEA was the City's agent have not changed. The City does not provide, and the Court does not find, a reason why JEA is an agent of the City for sovereign immunity purposes

[13] Florida's waiver of sovereign immunity in tort actions statute contains several limitations on recovery, including monetary caps, limits on attorney's fees, statutes of limitations, and more. See Fla. Stat. § 768.28.

but not for nonparty preclusion purposes in this case.[14] Accordingly, the Court finds that precluding the City from challenging the Judgments does not violate due process because a substantive legal relationship existed between the entity to be bound, the City, and a party to those judgments, JEA.[15]

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion for Judgment on the Pleadings [Doc. 206] is **GRANTED**. This Court **DECLARES** that the Amended and Restated Power Purchase Agreement between MEAG and JEA [Doc. 22-1] is **VALID AND ENFORCEABLE**.

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[14] The City's reliance on Georgia cases stating that "[a]n agency or master-servant relationship (does not) ipso facto (constitute) privity for purposes of res judicata or estoppel by judgment" is misplaced since MEAG is not asserting res judicata or estoppel by judgment. See generally Allen v. King Plow Co., 227 Ga. App. 795, 797 (1997) (internal quotation marks and citation omitted). MEAG asserts only that Section 131(k) of the MEAG Act precludes the City challenging the Judgments, and the issue here is whether enforcing that statute to preclude the City's claims violates due process.

[15] MEAG also contends that the MEAG revenue bond validation proceedings fit the sixth category of exceptions, a statutory scheme that forecloses successive litigation. MEAG's Reply at 27-30. Plaintiffs contend that if so, the City did not have sufficient notice of the bond validation proceedings. See City's Opp'n at 3, 7; Pls.' Sur-Reply at 12-15. Because the Court finds that a substantive legal relationship existed between the City and JEA, it need not reach these issues.

It is further **ORDERED** that judgment on the pleadings is **GRANTED** as to (1) Defendant's counterclaim for declaratory judgment (Count One) [Doc. 109 at 77-80] and (2) Plaintiffs' Amended Complaint for Declaratory Judgment [Doc. 22], which is **DISMISSED**.

It is further **ORDERED** that the stay of discovery in the Court's December 19, 2019, Order [Doc. 205] is terminated and discovery on Defendant's counterclaim for breach of contract (Count Two) [Doc. 109 at 80-84] and Plaintiff JEA's alternative counterclaim for negligent performance of undertaking (Count III) [Doc. 126 at 36-39] shall resume fourteen (14) days from the date of this Order.

IT IS SO ORDERED this 17th day of June, 2020.

MARK H. COHEN
United States District Judge