No. 132, ORIGINAL

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary Report and the Second Report of the Special Master

THE STATE OF NORTH CAROLINA'S REPLY TO EXCEPTIONS BY PLAINTIFFS TO THE REPORTS OF THE SPECIAL MASTER

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

August 2009

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE SANCTIONS ORDER SHOULD NOT BE SUMMARILY ENFORCED. 3

A. The Compact Does Not Empower The Commission To Impose Monetary Sanctions. 4

B. The Sanctions Order Has No Application To North Carolina, Which Was Not A Party State When The Sanctions Hearing Was Held And When The Sanctions Order Was Issued. 15

II. THE SPECIAL MASTER CORRECTLY DETERMINED THAT NORTH CAROLINA DID NOT BREACH THE COMPACT. 24

A. The Commission's Unilateral Determination Of Breach Is Neither Binding Nor Entitled To Deference. 25

B. The Undisputed Facts Establish That North Carolina Did Not Breach The Compact. . 34

1. *North Carolina Did Not Breach The Compact By Exercising Its Express Right To Withdraw*. 36

2. *North Carolina Complied With The Obligation To Take "Appropriate Steps" As A Designated Host State*. 45

III. PLAINTIFFS ARE NOT ENTITLED TO RESTITUTION FOR NORTH CAROLINA'S PURPORTED BREACH OF THE COMPACT. 58

CONCLUSION 62

TABLE OF AUTHORITIES

CASES

Aspen Advisors LLC v. United Artists Theatre Co., 843 A.2d 697 (Del. 2004) 38

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 33

Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) 33

Davy's Executors v. Faw, 11 U.S. 171 (1812) . 32, 33

Dolan v. USPS, 546 U.S. 481 (2006) 11

Dong v. Smithsonian Inst., 125 F.3d 877 (D.C. Cir. 1997) 10

Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434 (Del. 2005) 42

EEOC v. Green, 76 F.3d 19 (1st Cir. 1996) 53

FCC v. Nextwave Pers. Commc'n, Inc., 537 U.S. 293 (2003) 10

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 32

Gutierrez v. Ada, 528 U.S. 250 (2000) 6

Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821 (1994) 11

Iowa v. Illinois, 151 U.S. 238 (1894) 26

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990) . . . 42

Louisiana v. Texas, 176 U.S. 1 (1900) 29

Market St. Assoc. Ltd. P'ship v. Frey, 941 F.2d 588 (7th Cir. 1991) 45

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 39, 40

Metro. Area Transit v. Nicholson, 463 F.3d 1256 (Fed. Cir. 2006) 50

Mobil Oil Exploration & Producing SE., Inc. v. United States, 530 U. S. 604 (2000) 61

NLRB v. Granite State Joint Bd., Textile Workers Union, Local 1029, 409 U.S. 213 (1972) 21, 22

North Dakota v. Minnesota, 263 U.S. 365 (1923) 32

Old Town Trolley Tours v. Washington Metro. Area Transit Comm'n, 129 F.3d 201 (D.C. Cir. 1997) 31

Schweiker v. McClure, 456 U.S. 188 (1982) 33

Summers v. Baptist Med. Ctr. Arkadelphia,
91 F.3d 1132 (8th Cir. 1996) 53

Texas v. New Mexico,
462 U.S. 554 (1983) 7, 8, 26, 27, 29, 30, 39

Tymshare, Inc. v. Covell,
727 F.2d 1145 (D.C. Cir. 1984) 42, 43

United States Dep't of Energy v. Ohio,
503 U.S. 607 (1992) 11, 12

United States v. Mead Corp.,
533 U.S. 218 (2001) 30

United States v. Winstar Corp.,
518 U.S. 839 (1996) 39

United Steelworkers v. Enter. Wheel & Car Corp.,
363 U.S. 593 (1960) 32

STATUTES

9 U.S.C. § 10 32

42 U.S.C. § 2011 *et seq.* ("AEA") 54

10 C.F.R. § 61.1 *et seq.* 54

Central Compact, Art. III(f),
99 Stat. 1865 (1986) 41

Central Compact, Art. VII(e),
99 Stat. 1870 (1986) 7

Central Midwest Compact, Art. III(i)(5),
99 Stat. 1885 (1986) 17

Central Midwest Compact, Art. III(i)(6),
99 Stat. 1885 (1986) 17

Central Midwest Compact, Art. V(a),
99 Stat. 1886 (1986) 41

Central Midwest Compact, Art. VIII(d),
99 Stat. 1891 (1986) 17

Central Midwest Compact, Art. VIII(f),
99 Stat. 1891 (1986) 7

Midwest Compact Art. V(a),
99 Stat. 1897 (1986) 41

Midwest Compact, Art. VIII(e),
99 Stat. 1900 (1986) 17

Midwest Compact, Art.VIII(i),
99 Stat. 1901 (1986) 38

Northeast Compact, Art. IV(i)(14),
99 Stat. 1915 (1986) 7

Northeast Compact, Art. VIII(h),
99 Stat. 1922 (1986) 17

N.C. Gen. Stat. § 104G-4 (repealed 1999) . . . 55, 56

N.C. Gen. Stat. § 104G-6(a)(13) (repealed 1999) 56

N.C. Gen. Stat. § 104G-17(b) (repealed 1999) . . . 56

1999 N.C. Session Laws 357 16

SECONDARY SOURCES

5 *Corbin on Contracts*, § 24.28 (rev. ed. 1988) 6

23 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 63:22 (4th ed. 2003) 42

Restatement (*Second*) *of Contracts* § 202(4) (1981) 50, 51

Restatement (*Second*) *of Contracts* § 370 cmt. a & b (1981) 59, 60

6A N.Y. Jur. 2d Associations & Clubs § 18 21

Black's Law Dictionary 1341 (7th ed. 1999) 9

INTRODUCTION AND SUMMARY OF ARGUMENT

The Southeast Compact Commission has claimed unreviewable authority to award itself $80 million - an award beyond its remedial power, entered against a sovereign State outside its jurisdiction, for a breach of the Compact that never happened. The Special Master correctly determined that the Commission's *ultra vires* sanctions award cannot be summarily enforced, and that its Compact breach claim lacks legal and factual merit. Plaintiffs' exceptions are likewise without merit.

I. The sanctions order cannot be summarily enforced for two reasons. *First*, the Commission lacks the power to impose monetary sanctions under the terms of the Compact. Unlike several other (but not all) contemporaneously enacted compacts, which expressly permit their commissions to impose monetary awards, the Southeast Compact Commission's remedial power is limited to revocation and suspension of Compact rights. Plaintiffs' contrary reading would give the Commission implausibly extreme sanctions authority, and cannot be reconciled with the Compact's text and structure.

Second, North Carolina withdrew from the Compact before the sanctions process was even initiated. Again, unlike several other (but not all) contemporaneously enacted compacts, which expressly permit their commissions to sanction former party States for conduct occurring during membership, the Southeast Compact Commission's sanctions authority expressly applies *only* to "party States." Plaintiffs' contrary reading would make nonsense of the very

language they cite. And the fact that a State cannot be sanctioned by the Commission after withdrawal does not mean the State escapes *liability* for conduct during membership - if that conduct breached the Compact, the State can still be held liable in court for the breach.

II. North Carolina did not breach the Compact, and is entitled to summary judgment based on the undisputed facts.

A. The Commission's breach determination is not entitled to deference: the Commission is not the Compact's exclusive forum for resolving disputes; the Commission's authority over member States is nothing like the authority of a federal administrative agency or a private commercial arbitrator; and North Carolina was not subject to its authority in any event.

B. Plaintiffs' two contract-breach theories lack merit. *First*, North Carolina did not breach by exercising its right to withdraw. Interstate compacts generally cannot be subject to unwritten limits on express rights, and the Southeast Compact in particular cannot be read as implicitly barring a host States from withdrawing, given *other* explicit limits on withdrawal set forth in the Compact as well as in other contemporaneously enacted compacts.

Second, North Carolina did not breach its Compact obligation to take "appropriate steps" toward licensing when it suspended operations in December 1997, following the Commission's declaration that it would no longer provide financial assistance for the licensing

process. The ambiguous phrase "appropriate steps" is properly construed by the parties' course of performance, which demonstrates that the parties expressly agreed from the outset that a host State could not realistically bear the costs of licensing alone, and that significant financial assistance was "necessary and appropriate" to facilitate the licensing process. The Commission was not *required* to provide such assistance; rather, its voluntary decision to do so confirms the parties' understanding that it was not realistically possible, and therefore not an "appropriate step," for a host State to pursue the licensing process without financial assistance.

III. Plaintiffs' restitution argument is relevant only if the Court holds that North Carolina breached the Compact. Even if it does, restitution is not an available remedy for breach here. Under black-letter law, restitution is available only *to the party who provided funds*. Only the Commission provided funds to North Carolina - the plaintiff States provided no financial assistance. Because the Commission is not a party to the Compact, it cannot pursue remedies for its breach.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE SANCTIONS ORDER SHOULD NOT BE SUMMARILY ENFORCED.

Count I of the Complaint seeks summary enforcement of the Commission's sanctions order. The

Special Master recommended dismissal of that Count for two reasons: (1) the Compact "does not authorize the Commission to impose monetary sanctions against member States," and (2) "North Carolina withdrew from the Compact prior to the imposition of sanctions." P.R. 15. Both recommendations are correct.[1]

A. The Compact Does Not Empower The Commission To Impose Monetary Sanctions.

The Special Master correctly concluded that the Compact does not confer on the Commission the power to levy monetary sanctions against the treasuries of member States. P.R. 16-27. As the Solicitor General explained below, "the Compact authorizes the Commission to sanction a State that refuses to fulfill its Compact obligations *only* by denying that State the benefits of Compact membership." U.S. Supp. Br. in Response to Mot. to Dismiss 7 (emphasis added); *see* U.S. Br. 20-30.

1. Analysis of the Commission's sanctions power must begin with the Compact provision enumerating the commission's powers, Article 4(E). According to that provision: "The Commission has the following

---

[1] Plaintiffs' third stated exception asserts that North Carolina "waive[d] its right to contest the legality of the sanctions proceedings" because it did not participate in the hearing. As the Solicitor General notes, plaintiffs waived this exception by failing to address it in their brief. U.S. Br. 20 n.6. And it is wrong for the reasons stated by the Special Master. P.R. 32-33.

duties and powers," which are specifically identified thereafter.

The eleventh of the enumerated "powers and duties" of the Commission identifies the scope of the Commission's sanctions power: "(11) To revoke the membership of a party state in accordance with Article 7(F)." Article 4(E)(11). Article 7(F), in turn, is the provision that describes the sanctions process. Article 4(E)(11) thus explicitly empowers the Commission to issue the sanctions contemplated in Article 7(F). And the only sanction power conferred by Article 4(E)(11) is the power to revoke the membership status of a member State.

That power excludes monetary sanctions, but is consistent with the terms of the sanction procedures clause it cross-references, Article 7(F), which states that a breaching "party state" "may be subject to sanctions by the Commission, *including suspension of its rights under this compact and revocation of its status as a party state*" (emphasis added). The remainder of the paragraph details the procedures for imposing sanctions, providing specific limits on the revocation of party status, and stating that "rights and obligations incurred by being declared a party state under the compact" continue until expressly altered by a sanction affecting those rights.

The structure of that provision shows that suspension of membership rights is understood to be a lesser power, encompassed by the greater power - conferred separately by Article 4(E)(11) - to revoke the rights of membership altogether. U.S. Br. 23. But

what Article 7(F) does *not* provide, either expressly or by implication, is the qualitatively *different* power to impose *monetary* sanctions.

2. That the sanctions referred to in Article 7(F) do not go beyond compact-rights-related sanctions is confirmed in two ways by the Compact's terms and structure. The first is a separate provision, Article 6(B), which prohibits member States from "pass[ing] any law or adopt[ing] any regulation which is inconsistent with this compact." "To do so," this provision warns, "may jeopardize the membership status of the party state." *Id.* This is another provision that refers to possible sanctions for breach, and again the only type of sanction expressed relates to membership rights. U.S. Br. 23.

The second confirmation of the Commission's limited sanction power is the interpretive canon *esjudem generis*, under which "the meaning of a general term in a contract is limited by accompanying specific limitations." 5 *Corbin on Contracts*, § 24.28, at 309 (rev. ed. 1988). Accordingly, "any meaning given to the general term must have a reasonable degree of similarity to the items mentioned." *Id.*; *cf. Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("words . . . are known by their companions"). The only types of sanctions expressly mentioned in Article 7(F) relate to the exercise of Compact rights. They are not of the same "kind or character" as the monetary award Commission conferred on itself.

3. The Compact's omission of any reference to monetary penalties stands in telling contrast to the

language of the other compacts approved by the same Act of Congress. P.R. 23-24; U.S. Br. 26-27; *see Texas v. New Mexico*, 462 U.S. 554, 565 (1983) (construing compact by reference to other contemporaneously enacted compacts). The Northeast Compact uses language nearly identical to the Southeast Compact in vesting its commission with sanctioning authority, except that the Northeast Compact *also* expressly authorizes its commission to "impose sanctions, *including but not limited to, fines*, suspension of privileges and revocation of the membership of a party state . . . ." Art. IV(i)(14), 99 Stat. 1909, 1915 (1986). The Central Compact likewise permits its commission to exact "pay[ment] . . . for a period not to exceed five-years from the date of notice of revocation, an amount determined by the Commission based on the anticipated fees which the generators of such party state would have paid to each regional facility and an amount equal to that which such party state would have contributed," as sanction for a State's failure to "comply with the terms of this compact or fulfill its obligations hereunder." Central Compact, Art. VII(e), 99 Stat. 1863, 1870 (1986). Most striking of all, the Central Midwest Compact provides that a "designated host state which withdraws from the compact after 90 days and prior to fulfilling its obligations shall be assessed a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Art. VIII(f), 99 Stat. 1880, 1891 (1986).

The Southeast Compact is devoid of any such provisions. Especially given the repeatedly and contemporaneously demonstrated ability of Congress

and the States to enact compact provisions expressly allowing compact commissions to impose monetary sanctions, this Court cannot renegotiate the bargain reflected in the terms of *this* Compact by writing into it a Commission power Congress and the States did not include. *See Texas v. New Mexico*, 462 U.S. at 565 (the "Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it").

Plaintiffs have no serious answer to the distinction between the Southeast Compact's limited sanctions provision and the sanctions provisions of other compacts expressly authorizing monetary sanctions. Their main argument - that there is no evidence that compact negotiators were aware of other compacts' texts (Pls. Br. 21-22) - is manifestly frivolous. In construing the compact in *Texas v. New Mexico* by reference to other contemporaneously enacted compacts, this Court cited no evidence that the compact drafters were aware of other compacts' texts. *See* 462 U.S. at 565; U.S. Br. 26 n.7. And the Southeast Compact and other compacts, in any event, "are not merely agreements among the participating States," but were "enacted by Congress . . . in a single Act." U.S. Br. 26 n.7.

Plaintiffs' other argument is equally misguided. They point to the Rocky Mountain Compact, which "does not authorize sanctions generally; . . . only exclusion." Pls. Br. 22. Plaintiffs infer that this means the Rocky Mountain Compact "generally forbids sanctions," *id.*, as if that somehow undermined the Special Master's analysis. It does not. Notably, the

Northwest Compact *also* provides no sanction power to its commission. The complete lack of any commission sanction power in those compacts hardly means, as plaintiffs contend, that those commissions are free to impose whatever broad sanctions they decide to impose. The opposite is true: those commissions *lack the power to impose any sanctions*, leaving enforcement solely to the courts. Those compacts underscore that the limited sanction power authorized in the Southeast Compact reflects a substantive *choice*: Congress and the party States could have granted the Commission more sanction power (as in the Northeast, Central, and Central Midwest Compacts), or they could have granted it less (as in the Northeast and Rocky Mountain Compacts). Instead they granted the Commission power to suspend or revoke rights, no more and no less.

4. Plaintiffs also rely heavily on Article 7(F)'s description of potential sanctions as "including" the suspension and revocation of rights. Plaintiffs note that "including" is "*usually* a term of enlargement, and not of limitation." Pls. Br. 19 (emphasis added; quotation omitted). And because the term "sanction" linguistically encompasses any "penalty or coercive measure," *id*. (quoting *Black's Law Dictionary* 1341 (7th ed. 1999)), it must follow, say plaintiffs, that the Commission's sanctions power includes monetary sanctions.

Plaintiffs are wrong. To start, as already noted, Article 7(F) is not the Compact provision that establishes the Commission's sanction power - that provision is Article 4(E)(11), which specifically grants

the Commission power "to revoke the membership of a party state." If the "including" phrase in Article 7(F) tacitly conferred on the Commission power to impose *any* "penalty or coercive" measure on party States, as plaintiffs insist, then there would have been no reason to specify one type of sanction in Article 4(E)(11). On plaintiffs' reading, that provision is meaningless surplusage. *See FCC v. Nextwave Pers. Commc'n, Inc.*, 537 U.S. 293, 302 (2003) (a reading of statutory terms that renders language superfluous "of course . . . must be rejected"). Indeed, Article 7(F)'s "including" phrase *itself* would be surplusage - if "sanctions" already includes any penalty or coercive measure within the term's broad meaning, there would be no reason to specify suspension or revocation of party rights as examples of such measures. The more sensible construction, consistent with the context and the *ejusdem generis* canon, is that the "including" phrase identifies the *type* of sanctions a party State can expect from the Commission, i.e., rights-related sanctions.

Plaintiffs' own citation notes that "including" is only *usually* a term of enlargement, confirming that it sometimes operates to introduce examples establishing the limits of the category. In *Dong v. Smithsonian Institute*, 125 F.3d 877, 880 (D.C. Cir. 1997), for instance, the court read examples following "including" to express a narrower "unifying theme," where the plaintiff could not point to a coherent larger theme. That is certainly true here. As the Special Master observed, plaintiffs "seem unable to articulate any clear principle that would limit the range of sanctions available to the Commission if the Compact is interpreted to authorize sanctions other than

suspension of rights and revocation of party status." P.R. 18. The term "sanction" includes *many* kinds of penalties, *none* of which could plausibly be considered within the Commission's power under the Compact. The "paradigmatic" sanction, for instance, is *imprisonment*, according to one of the primary cases plaintiffs themselves cited below. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994). As this example demonstrates, the Commission plainly does not possess power to impose just *any* "sanction," as that term is broadly defined. If the Commission could impose any measure that would "punish" or "coerce" a compact State, then it could impose punitive fines - as plaintiffs themselves remarkably insist, P.R. 18 (quoting oral argument) - or other even more implausible penalties. *Id.*

It is thus evident that the term "sanction," as used in the Compact, was *not* intended to grant the Commission powers commensurate with the term's broadest ordinary usage. Rather, its scope must be limited by the context in which it is used. *See Dolan v. USPS*, 546 U.S. 481, 486 (2006) ("[a] word in a statute may or may not extend to the outer limits of its definitional possibilities"). This Court so held in the only case cited by plaintiffs for the meaning of "sanctions," *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). Truncating a quotation from that case, plaintiffs suggest that the broad term "sanction" is "spacious enough to cover not only what we have called punitive fines, but coercive ones as well." *Id.* at 621. The rest of sentence - omitted by the plaintiffs - continues: ". . . and use of the term carries no necessary implication that a reference to punitive fines

is intended." *Id.* In other words, the case means the opposite of what plaintiffs say: the term "sanction" does *not* always mean any penalty or coercive measure, but must be interpreted according to its context. As the Court states in another passage ignored by plaintiffs: "The term's context, of course, may supply a clarity that the term lacks in isolation." *Id.* at 622. The Court then performs a close reading of the term's context within the statute, deriving from that context a specific meaning of "sanction" as *excluding* punitive fines, which normally would be well within the meaning of the term. *Id.*

Plaintiffs disdain such contextual analysis here, because they know its results are fatal to their cause. Every reference to "sanctions" in the Compact explicitly relates to, or only makes sense as relating to, the power to suspend or revoke rights.

5. There is no merit to plaintiffs' suggestion (Pls. Br. 19-20) that monetary sanctions are necessary to give meaning to the last sentence of Article 7(F)'s first paragraph, which provides: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." According to plaintiffs, this phrase authorizes sanctions against party states after they have withdrawn, which could not logically include suspension or revocation of compact rights. This is wrong in two respects.

First, the premise is incorrect: nothing in the phrase authorizes the Commission to impose sanctions

on party States after they have withdrawn. To the contrary, the phrase expressly refers to the rights and obligations *of party states* - once a state withdraws and thus is *not* a party State, it necessarily *no longer has* the rights and obligations of a party state.

Second, properly construed, the phrase actually refutes plaintiffs' construction of the Commission's sanctions power. U.S. Br. 24. By its terms, the phrase directly "links" the "rights and obligations" of Compact membership to the date of a sanctions order, and restates the Commission's authority to provide in the sanctions order whether and how those rights and obligations will continue. *Id.* A monetary penalty, by contrast, has nothing to do with the party States' Compact rights and obligations. The phrase on which plaintiffs rely so heavily is yet another example of language referring solely to Compact membership as the basis for sanction.

6. Finally, plaintiffs argued below that the remedy of suspension or revocation of Compact rights is inadequate, and must be supplemented by monetary penalties, because Compact rights themselves are worthless. They have apparently abandoned that position, and rightly so - its premise is obviously wrong: "[T]he Commission's power to revoke the membership of a party State or to limit or suspend its rights under the Compact constitute serious sanctions," in at least two respects. P.R. 21. First, the party state would lose presumably valuable "benefits of membership," including the right to use regional waste facilities. *Id.* Second, host states would lose the additional significant benefit of "all future revenue

generated by operating the region's waste disposal facility." *Id*. Suspending or expelling a host state, in other words, "would not only deprive [the] host State of the right to dispose of its own waste, but also deny it the opportunity to recoup its expenditures." *Id*. at 22.

For all these reasons, the Compact cannot plausibly be construed as tacitly granting the Commission the authority to impose monetary penalties.[2]

---

[2] The Special Master also invoked a "clear statement" rule, endorsed by the Solicitor General, which would counsel against interpreting any compact as authorizing monetary penalties absent a clear statement to that effect. P.R. 20; U.S. Br. 24-26. North Carolina certainly agrees that a "clear statement" rule should apply, although the rule is hardly needed to find that the Commission lacks power to impose monetary sanctions. Indeed, the Solicitor General invokes the rule only after explaining at length why the Commission lacks such power under the Compact's plain terms. U.S. Br. 21-24. In any event, there is no merit to plaintiffs' argument that such a rule cannot be applied to a Compact involving "coequal sovereigns" (Pls. Br. 21), for the reasons explained below, *infra* at 40.

B. The Sanctions Order Has No Application To North Carolina, Which Was Not A Party State When The Sanctions Hearing Was Held And When The Sanctions Order Was Issued.

The Special Master also correctly determined that "North Carolina was not subject to the sanctions authority of the Commission because it withdrew from the Compact before sanctions were imposed." P.R. 32.

1. a. The express terms of the Compact unambiguously limit the Commission's sanctions authority to States that are parties to the Compact at the time sanctions are imposed. According to the Compact:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

Article 7(F). By its plain terms this provision authorizes the imposition of sanctions only against "party states." Further, the express specification of permissible sanctions identifies only actions that *could* be applied to party States, *e.g.*, suspension of rights under the Compact and revocation of status as a party State. And as discussed above, every other Compact provision referring explicitly or implicitly to sanctions

relates to Compact rights and membership, which logically would not apply to non-party states.

North Carolina was not subject to the Commission's sanctions power because by the time the sanctions procedure was initiated - and certainly by the time sanctions were imposed - North Carolina was no longer a "party state" under the Compact. North Carolina exercised its Article 7(G) right to withdraw effective July 26, 1999. Complaint ¶ 50; *see also* 1999 N.C. Session Laws 357 (state law repealing Chapter 104F of N.C. General Statutes (adoption of Compact) and withdrawing from Compact). The Commission did not approve a sanctions inquiry until August 1999, it did not notify North Carolina of any "hearing" until November 8, 1999, it did not hold its so-called "hearing" until December 8, 1999, and it did not vote to impose sanctions until December 9, 1999 - more than four months after North Carolina ceased being a Compact party State. Complaint ¶¶ 51, 52, 55. Nobody disputes that North Carolina was not a party State when the sanctions inquiry was conducted and sanctions were imposed. Accordingly, the Commission had no authority under Article 7(F) to impose sanctions of any kind on North Carolina.

b. In this respect the Compact again differs materially from the other interstate compacts approved in the same congressional Act. *See supra* at 6-9. Unlike the Southeast Compact, other compacts expressly authorize the imposition of sanctions on a former State for conduct occurring while it was a member. Some compacts specifically state that "[w]ithdrawal does not affect any liability . . .

chargeable to a party state prior to the time of such withdrawal." Central Midwest Compact, Art. VIII(d), 99 Stat. 1880, 1891 (1986); *accord* Midwest Compact, Art. VIII(e), 99 Stat. 1892, 1900 (1986) (same); Northeast Compact, Art. VIII(h), 99 Stat. 1909, 1922 (1986) (similar). And some compacts specifically declare that withdrawals are not legally effective until years after the member gives formal notice of its withdrawal, ensuring that they remain subject to their commissions' sanctions authority for conduct prior to the withdrawal notice. *See* Central Midwest Compact, Art. VIII(d), 99 Stat. at 1891 ("no withdrawal may take effect until 5 years after the governor of the withdrawing state gives notice in writing of the withdrawal to the Commission"); Midwest Compact, Art. VIII(e), 99 Stat. at 1900 (same). The Southeast Compact includes no such provisions. Nor does it even include a "catch-all" empowering provision which authorizes its enforcing commission to "[t]ake any action which is appropriate and necessary to perform its duties and functions as provided in this compact," Central Midwest Compact, Art. III(i)(5), 99 Stat. at 1885, beyond the power to "[s]uspend the privileges or revoke the membership of a party state," *id*. Art. III(i)(6), 99 Stat. at 1885.

The presence of provisions in the compacts negotiated by other States and approved by Congress along with the Southeast Compact only confirms what the Southeast Compact's own language already makes clear: the Commission's sanctions authority does not extend to party States that have withdrawn from the Compact. P.R. 29.

c. That conclusion is further underscored by the one major limitation on party States' withdrawal rights that was added to the Compact in 1989: thirty days after the second host State commences operation of a disposal facility, party States no longer will be able to withdraw unilaterally, but will require unanimous consent of the Compact's members for withdrawal. Article 7(H). Unlike the unconditional withdrawal right applicable when North Carolina withdrew, the new Article 7(H) withdrawal provision *will* enable the Commission to regulate - and impose sanctions on - a party State that seeks to withdraw unilaterally from the Compact. The Article 7(G) withdrawal right includes no such limitation.[3]

2. Plaintiffs' objections to the Special Master's analysis misconstrue both his analysis and the Compact.

a. Plaintiffs' primary contention is that Article 7(F) expressly authorizes the Commission to sanction former party States. They rely on this passage:

---

[3] Plaintiffs wholly ignore Article 7(H) here, no doubt because they had no good answer to it below. Plaintiffs argued that Article 7(H) "*illustrates* and *exemplifies* the member states' and Congress's recognition that expulsion and suspension are entirely inadequate to enforce the Compact's obligation." Pls. Opp. to Mot. Dismiss 8. The argument is inexplicable. To the extent Article 7(H) indicates dissatisfaction with the Commission's rights-related remedial power, that only confirms the parties' understanding that the power is limited in that way.

"Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction."

As plaintiffs read this language, all the "rights and obligations" of a party State continue *even beyond withdrawal from the Compact*, up to any point in the future when (and if) sanctions are imposed. On this reading, it is only the imposition of sanctions that can terminate "rights and obligations" under the Compact - withdrawal would have no legal consequence whatsoever.

This makes no sense. To start, under plaintiffs' theory that Compact "rights and obligations" carry forward past withdrawal unless and until a sanction is imposed, the Commission could impose sanctions on a former party State at *any time* in the future, so long as the ostensible "hook" for the sanctions is conduct that occurred during the State's membership in the Compact. The Commission could, for example, choose today to subject South Carolina to sanctions for acts committed by South Carolina prior to its withdrawal from the Compact. That is not a plausible reading of the Compact.

Further, plaintiffs' reading ignores half the provision. On their theory, a party State's "rights" would survive withdrawal, just like its "obligations." But plaintiffs cannot explain how a State could enforce its "rights" under the Compact once it has legally withdrawn and is no longer a party State. Nor can

plaintiffs explain what happens to these post-withdrawal rights if no sanctions are ever imposed - presumably, but nonsensically, they simply last forever. On plaintiffs' theory, the Compact's enactors must simply have erred in providing that a party State's "rights" survive along with its "obligations."

By contrast, the entire phrase is readily understandable if the Commission has authority only to sanction *current party States*. The Commission has authority to suspend or revoke the rights of a party State, but until such a sanction is actually imposed, the party State retains all of its rights and obligations under the Compact. The State thus cannot use the pendency of a sanction inquiry to avoid its obligations (unless it withdraws outright); nor can the Commission suspend or revoke rights preliminarily, before sanctions process is complete. Thus, although the phrase is nonsense under plaintiffs' reading, it is perfectly sensible under the Special Master's analysis.

b. Plaintiffs' reading of the "rights and obligations" phrase is also undermined by other compacts. P.R. 31-32. As already noted, several compacts explicitly provide that withdrawal does not affect "liability" that is "chargeable" to a State prior to its withdrawal, and others impose specific limitations on withdrawal akin to the not-yet-operative Article 7(H). *Supra* at 16-17. Plaintiffs' response is simply to assert, with no reasoning or justification whatsoever, that Article 7(F) *does* provide exactly the same clear authorization other compacts provides. Pls. Br. 24. It plainly does not, as already shown. And even if the

phrase were ambiguous, the clarity with which other compacts speak to post-withdrawal liability counsels against reading similar liability into the Southeast Compact, where its enactors chose not to adopt it expressly. P.R. 29 ("The presence of these express limitations on withdrawal [in other contemporaneously approved compacts] suggests that such limitations should not be read into the [Southeast] Compact.").

c. Plaintiffs assert that "settled legal principles" governing private voluntary associations tacitly authorize the Commission to impose sanctions on former party States. But the law of associations - including the very case plaintiffs cite - squarely refutes plaintiffs' position. This Court held in *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*,409 U.S. 213 (1972), that "when a member lawfully resigns from the union, its power over him ends." *Id*. at 215. Plaintiffs ignore that passage, and the one they do quote is unexceptional, stating the settled rule that upon withdrawal, an association member remains "subject of course to any financial obligations *due and owing* the group with which he was associated." *Id*. at 216 (emphasis added; quotation omitted). In other words, it is only financial obligations that are already "due and owing" upon resignation that are carried forward. An authority cited by plaintiff below is to the same effect: a "member may lawfully resign at any time and terminate his liability for dues and fees upon payment of all *accrued charges*." 6A N.Y. Jur. 2d Associations & Clubs § 18 (emphasis added).

When North Carolina resigned from the Compact, it had *no* monetary obligations that were already "due and owing" or "accrued." The asserted financial obligation was imposed entirely *after* North Carolina withdrew, as a result of a sanctions inquiry that had not even been initiated by the Commission prior to withdrawal. If monetary sanctions were permissible and validly imposed while North Carolina was a member, it plainly could not escape responsibility for such sanctions simply by withdrawing. But once a State withdraws from the Compact, the Commission's "power over [it] ends." *Granite State*, 409 U.S. at 215.

d. Finally, plaintiffs contend that unless the Commission can impose sanctions on a former member, the Compact would be come a "nullity," because a host State could "escape sanctions for its conduct as a member by withdrawing." Pls. Br. 24-25. The premise again is flawed: withdrawing from the Compact would *not* permit North Carolina to escape liability for its conduct as a member, because withdrawal would not displace the normal exercise of this Court's jurisdiction to adjudicate breach claims arising out of a State's conduct during membership. P.R. 22. Withdrawal simply means that the *Commission itself* may no longer exercise sanctions authority over North Carolina.

Further, plaintiffs' argument that the Compact would be a nullity unless the Commission can sanction former members again fundamentally misunderstands the remedial structure of the Compact, wrongly presuming that the enacting parties believed that there would be no cost whatsoever to the loss of rights

and benefits afforded by Compact membership. *Id*. at 21-22. In fact, the Compact presupposes that membership rights would have substantial value to the party States. Each State is guaranteed access to a proximate disposal facility, and each State is assured that, when it assumes the burden of constructing a facility, it will have a regional monopoly on waste disposal and therefore a reliable stream of revenue to support the facility's operation. Accordingly, there are significant costs to withdrawal that a State must consider. North Carolina, for example, had to weigh the fact that withdrawing would mean it would have no right of access to any regional waste disposal facility *and* that it would never recoup its own investment of some $34 million.

As the Special Master recognized, "the conclusion that party States may withdraw from the Compact and escape further sanctions *by the Commission*" fits hand-in-glove with "the limited nature of the express sanctions available under the Compact." P.R. 31 (emphasis added). Given that the only Commission remedies available under the Compact relate to the suspension of Compact rights, once a State withdraws, it has already "effectively imposed upon itself the most severe sanction available to the Commission - loss of membership as a party State." *Id*. And the State is still exposed to *liability* for any breach of Compact obligations during its membership, since this Court remains available to provide whatever remedy is available and appropriate for such breach.[4]

---

[4] The Court should disregard the Solicitor General's ill-considered, unreasoned, and equivocal footnote

The Court should adopt the Special Master's recommendation to dismiss Count I seeking summary enforcement of the sanctions order.

II. THE SPECIAL MASTER CORRECTLY DETERMINED THAT NORTH CAROLINA DID NOT BREACH THE COMPACT.

Plaintiffs next challenge the Special Master's recommendation to grant summary judgment to North Carolina on Count II of the Complaint, which asserts that North Carolina breached the Compact. S.R. 48. Plaintiffs contend that the Commission's

---

suggesting that if the Court concludes that the Commission *does* have authority to impose monetary sanctions, then the Court "probably" should hold that the Commission can impose such sanctions even on a *former* party State. U.S. Br. 30 n.9. The Solicitor General's not-quite-argument is that if the Commission has authority to impose a monetary sanction on North Carolina, "North Carolina should not be allowed to avoid that obligation by exercising a unilateral right to withdraw." *Id.* The Solicitor General cannot explain, however, how withdrawal would enable North Carolina to "avoid" an obligation that *did not even exist when North Carolina was a member*. Like plaintiffs, the Solicitor General simply confuses the Commission's own sanctions authority with the authority of this Court to adjudicate and remedy a Compact breach. If North Carolina breached any obligation that *did* exist under the Compact *while it was a member*, then North Carolina cannot avoid the consequences of that breach by withdrawing, because this Court can exercise its jurisdiction to provide an available remedy.

determination of breach, made after North Carolina withdrew from the Compact, is entitled to conclusive or strong deference from the Court. Assuming there is any room for the Court adjudicate the issue of breach itself, plaintiffs then assert three ways in which North Carolina breached the Compact. The Special Master correctly rejected these arguments and properly concluded that North Carolina was entitled to summary judgment on plaintiffs' count for breach of the Compact.

A. The Commission's Unilateral Determination Of Breach Is Neither Binding Nor Entitled To Deference.

Plaintiffs assert that Article 7(C) of the Compact vests the Commission with "the sole power to 'judge' whether a party State breached the Compact" (Pls. Br. 26), making the Commission's determination of breach binding on this Court. Alternatively, plaintiffs contend that the Court should review the Commission's judgment under a highly deferential arbitrary-and-capricious standard, analogizing the Commission either to a federal administrative agency or to a private contract arbitrator. As shown below, and as the Special Master and the Solicitor General agree, these arguments are meritless. S.R. 18-20; U.S. Br. 29-30. The Court, in the exercise of its original jurisdiction to resolve disputes among sovereign States, must decide for itself whether North Carolina breached its Compact obligations, and, if so, what remedy is appropriate.

1. The requirement of full, non-deferential review by the Court follows from both the subject matter of the action (i.e., an interstate compact) and the nature of the Court's original jurisdiction. It would be inconsistent with the character of interstate compacts and with the nature of original jurisdiction for the Court to presume itself bound by a "finding" of breach made by a compact entity. This is not a private action between two commercial entities. This is an action between sovereign States - an effort by several States, joined by a non-Compact entity, to seize money from another State's treasury. The Court can resolve that dispute only upon "the utmost circumspection and deliberation," *Iowa v. Illinois*, 151 U.S. 238, 242 (1894), not by summary enforcement of an inherently biased award of money by a compact commission to itself.

The Court recognized essentially this point in *Texas v. New Mexico*, 462 U.S. at 566-71, which involved the Pecos River Compact. New Mexico argued that the Court's role was to do "nothing more than review official actions of the . . . Commission, on the deferential model of judicial review of administrative action by a federal agency," and that the Court thus should countermand the Commission's action only if it was "arbitrary or capricious." *Id.* at 566-67. The Court rejected that argument as inconsistent with the nature of its original jurisdiction, which "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Id.* at 567. If the States and Congress had agreed to make the Pecos River Commission "the exclusive forum for disputes between the States," then

the Court would not exercise its original jurisdiction. *Id*. at 569. But because "the express terms of the Pecos River Compact [did] not constitute the Commission as the sole arbiter of disputes between the States over [their Compact] obligations," the Court was obliged to exercise its original jurisdiction and to resolve the dispute de novo. *Id*. "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id*. at 569-70.

2. Plaintiffs argue that the Southeast Compact makes the Commission the "exclusive forum" for disputes among Compact members, relying on Article 7(C):

> Each state eligible to become a party state to this compact shall be declared a party state upon enactment of this compact into law by the state and upon payment of the fees required by Article 4(H)(1). The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

Plaintiffs read this language as "vest[ing] the Commission with the sole power to 'judge' whether a party State breached the Compact," divesting this

Court of authority to do anything other than summarily enforce the Commission's breach determination. Pls. Br. 26. Plaintiffs are wrong for two reasons.

First, even assuming the language means what plaintiffs claim, it logically can apply only to the Commission's exercise of authority *in the sanctions process set forth in Article 7(F).* Plaintiffs cannot seriously contend that the Compact's enactors intended for the Commission to act as a "judge" of party States' alleged breaches without any adjudicative process, hearings, testimony, or examinations. No "judge" acts that way - petty tyrants do. If Article 7(C) means that the Commission is the sole judge of breach, and that this Court therefore lacks authority to makes its own determination, then the authority contemplated in Article 7(C) must be exercised in at least the quasi-judicial sanctions process described in Article 7(F). And the problem for plaintiffs is that the Article 7(F) process was of no legal consequence here, because North Carolina was no longer a party State when the Article 7(F) "hearing" was held. Not only did the Commission's sanctions jurisdiction over North Carolina terminate upon its withdrawal, so too did its power to act as any type of "judge" as to North Carolina's conduct.

Second, as the Solicitor General demonstrates, it is clear from the language and context of Article 7(C) that the Commission's authority as "the judge" only involves issues concerning the eligibility to become a "party state" within the meaning of the Compact. U.S. Br. 29-30. Article 7(C) addresses what an eligible

state must do before it may be declared a party State, and then provides that the Commission is the "judge" of the party States' "qualifications" and whether they comply with the "conditions and requirements of the compact" - *not* "duties" or "obligations" under the Compact. In context, then, the function of the "judge" reference is to grant "to the Commission, rather than to individual party States or prospective member States, ultimate authority to determine whether a prospective member has satisfied the conditions for Compact membership." U.S. Br. 30.

Nothing in "the deep roots in the common law of contracts" (Pls. Br. 27) is to the contrary. The "contract" here does not grant the Commission conclusive authority to decide questions of breach by former parties, so nothing about the contract compels conclusive deference to the Commission's determination.

3. Plaintiffs next contend that if the Compact does not wholly divest this Court of decisionmaking responsibility, then it at least compels the Court to give strong deference to the Commission's breach determination. They invoke the models of administrative agency action and private contract arbitration, but neither is applicable to the "delicate and grave" exercise of original jurisdiction to resolve disputes between sovereign States. *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

a. As the Special Master noted (P.R. 26), this Court rejected the administrative agency model in *Texas v. New Mexico*, at least in cases involving

disputes between the member States themselves, where the Compact did not make the commission the exclusive forum for resolving disputes among members. Under *Texas v. New Mexico*, either the commission is the exclusive forum under the compact, in which case its decision is conclusive and this Court will not even exercise its original jurisdiction, or the commission is not the exclusive forum - as here - in which case this Court adjudicates the case de novo. There is no middle ground of agency-style "deference" in original actions.

Further, as the Solicitor General shows, "an interstate compact entity . . . is not equivalent to a federal agency charged with administering an Act of Congress." U.S. Br. 28. Unlike federal statutes authorizing agency action, the Compact does not "grant the Commission any general authority to construe its terms" or "to determine the scope of permissible sanctions." *Id.* And as the Special Master noted, principles of agency deference assume that Congress "has implicitly assigned policymaking discretion" to an agency, and there is no reason to believe that the Compact's enactor's "sought to assign this type of discretion to the Commission in this case." P.R. 26-27. Full agency deference is appropriate only where Congress has intended for the agency's pronouncements to have "the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), such that they "bind more than the parties to the ruling" and serve as "precedent in later transactions," *id.* at 232, through a procedure that reflects "fairness and deliberation," *id.* at 230. None of those standards is met here. The last is especially significant - it is

impossible to say that the Commission's breach determination reflects a process of "fairness and deliberation," given that the plaintiffs themselves admit that it was reached *without* the benefit of an adjudicative hearing or fair process of any kind,[5] and given that the Commission, unlike a federal agency, is "a party to the case and stands to benefit financially from its own interpretation." P.R. 27.

Old Town Trolley Tours v. Washington Metro. Area Transit Comm'n, 129 F.3d 201 (D.C. Cir. 1997), does not support deference to the Commission's decision. *Old Town Trolley* did not involve a dispute between States; it involved a commission acting as a neutral arbiter for a private dispute arising from a licensing decision. The commission was not simultaneously

---

[5] Plaintiffs assert that the Commission made its breach determination "[i]n January 1998, and again, in April 1999 - before North Carolina's withdrawal." Pls. Br. 25-26. They characterize the 1998 event as "an authoritative determination that North Carolina breached the Compact." Pls. Br. 2. Plaintiffs rely on a January 12, 1998 letter conveying "the stated position of the Commission" that North Carolina was in breach (Joint Supp. Fact Br. App. 55), and an April 26, 1999 letter which indicated that "[t]he Commission believes that the State of North Carolina currently stands in violation of the compact law" (Pls. App. 323). Both events long preceded the sanctions hearing. By plaintiffs' own account, then, the Commission exercised its authority as "judge" without *any* quasi-judicial process, hearing, testimony, or examinations - a view of the duties of a "judge" that says much about the Commission's fairness and impartiality.

asserting and adjudicating its own monetary claim, and no concern for the rights and interests of sovereign States was involved.

b. The arbitration model is even more flawed. As noted above, an interstate compact is not the same as a private commercial contract, and the Court's original jurisdiction is not the same as the jurisdiction it exercises to resolve private commercial disputes. *See North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923) ("The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties."). In the private commercial arbitration setting, courts give extraordinary deference to the decisions of arbitrators, because federal law and labor policy requires them to do so. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citing 9 U.S.C. § 10); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). There is no federal statute or policy requiring the Court to defer to compact commission decisions.

Furthermore, even if arbitration were an appropriate analogy in the abstract, it would not compel deference to the Commission's sanction here, because the Commission proceeding lacked a key due process feature of arbitration - an impartial decisionmaker - long deemed essential to judicial enforcement of private, quasi-judicial dispute resolution mechanisms. In *Davy's Executors v. Faw*, 11 U.S. 171 (1812), this Court held, in reviewing a decision declining to enforce a private arbitration award, that it is a "proposition[] not to be

controverted" that "judges chosen by the parties themselves as well as those who are constituted by law, ought to be exempt from all imputation of partiality." *Id*. at 174. More recent cases have confirmed that "quasi-judicial" decisionmakers - the type of decisionmaker the Commission claims to be - must adhere to the same requirements of both actual and apparent impartiality that govern true judicial officers. *See Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 618 (1993); *Schweiker v. McClure*, 456 U.S. 188, 196 (1982); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

The Commission's open and notorious partiality in this matter makes it a far cry from the kind of neutral quasi-judicial decisionmaker whose decisions courts will enforce in commercial settings and in union disciplinary proceedings. S.R. 19 ("the Commission cannot be considered an independent and impartial decisionmaker"). No court would summarily enforce a private commercial arbitration award where a party was the arbitrator. But that is exactly what plaintiffs seek here. The Commission is both a party seeking payment of money and the decisionmaker that awarded itself that money from North Carolina. Certain members of the Commission who voted on the sanctions were the parties who brought the initial sanctions claim. Members of the Commission even testified against North Carolina. And long before even the arguably quasi-judicial sanctions hearing was held, the Commission publicly announced that it had already prejudged North Carolina's guilt. *See supra* at 31 n.5. In short, to the extent private arbitration

provides any kind of useful analogy to this dispute among sovereign States, it is to demonstrate that the sanctions award in this case deserves no deference, because it makes a mockery of the minimum due process requirements required even for private quasi-judicial proceedings.[6]

B. The Undisputed Facts Establish That North Carolina Did Not Breach The Compact.

The Special Master correctly determined that, on the undisputed facts, North Carolina is entitled to summary judgment on plaintiffs' claim that North Carolina breached its obligations under the Compact. To understand the Special Master's ruling, it is important first to understand clearly what conduct plaintiffs allege to have been a breach of the Compact.

---

[6] Plaintiffs' insistence that the Commission's decision-making process was fair and the decision unbiased is risible. Plaintiffs assert that "North Carolina assisted in creating the process" used by the Commission, and that "[t]he hearing was presided over by retired Judge VanKann." Pls. Br. 30 n.8. But by their own admission, the Commission decided the breach issue *before* there was any sanctions hearing. And by definition, the parties to an arbitration agree to the process, but that does not obviate the requirement that the process be fair and the decisionmaker be neutral. Nor is it relevant who presided over the sanctions hearing that was finally held: the breach determination had already been made, and Judge VanKann was not a decisionmaker - he did not even have a vote.

Plaintiffs nominally articulate three theories of breach, but two of them are functionally indistinguishable. One theory is that North Carolina breached the Compact by exercising its express right to withdraw from the Compact. Pls. Br. 42. Plaintiffs acknowledge North Carolina's express right to withdraw at any time, but they contend that the right was restricted by an implied covenant of good faith, which North Carolina violated by accepting financial assistance and then withdrawing before licensing a facility. *Id.* ("To be sure, North Carolina could withdraw from the Compact; it simply could not do so in bad faith.").

Plaintiffs' second and third theories focus not on the act of withdrawal, but on North Carolina's conduct *before* withdrawal. Plaintiffs acknowledge that the Compact did not impose an unyielding obligation to license a facility no matter what, but only to "take appropriate steps" to obtain a license for the facility. Article 5(C); *see* Pls. Br. 30-31. Plaintiffs make clear that North Carolina did not breach that obligation at any time before December 19, 1997, when North Carolina suspended operations after being advised it would no longer receive the financial assistance from the Commission it had been receiving since the beginning of the project. Pls. Br. 31, 34. That suspension, plaintiffs contend, was a breach of North Carolina's duty to "take appropriate steps" towards licensing. Plaintiffs' third theory of breach is analytically identical: North Carolina allegedly breached as of December 1997 because at that point North Carolina "repudiated" its contractual obligations by suspending the project. Pls. Br. 48. Indeed,

plaintiffs' own description of their primary "appropriate steps" breach theory asserts that North Carolina "repudiated" the Compact in December 1997. Pls. Br. 34. Obviously, if the suspension was consistent with North Carolina's obligation to take "appropriate steps" towards licensing a facility, it was not a "repudiation" of that obligation, so considering the two theories separately serves no useful analytical purpose.

Accordingly, we address below first the theory that North Carolina breached the Compact by withdrawing, then the theory that North Carolina breached or repudiated its obligation to take "appropriate steps" by suspending operations in December 1997.

1. *North Carolina Did Not Breach The Compact By Exercising Its Express Right To Withdraw*.

a. Article 7(G) confers on party States an express right to withdraw, with no condition or restriction relevant to this case:

> Subject to the provisions of Article 7 Section (H), *any party state may withdraw from the compact*, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the Compact.

Article 7(G) (emphasis added). The right to withdraw is not withheld from host States, or from States that have accepted financial assistance offered by the Commission, or from States that no longer believe the benefits of membership are worth the costs. The Compact imposes only two limitations on the right to withdraw, which operate to confirm that no *other* limitation can fairly be read into the Compact.

The first limitation is stated directly in Article 7(G): if a host State with an existing facility wants to withdraw, it may do so, but it is required to make the facility available to Compact States for four years. *Id.* If the Compact already impliedly barred host States from withdrawing where doing so would undermine the interests of other Compact members, the specific four-year proviso limiting host States' ability to withdraw and preclude access to their facilities would not have been necessary.

The second limitation is even more significant. After North Carolina was designated as a host state, it sought and obtained an amendment to the Compact's withdrawal provision. That amendment added new content to Article 7(H) which expressly terminates Article 7(G)'s unilateral withdrawal right, but only *after* "the commencement of operation of the second host state disposal facility." The amendment, designed to ensure that North Carolina and subsequent host States would have sufficient revenue stream to recoup their investments, thereafter permits withdrawal only upon the unanimous approval of Commission and the consent of Congress.

The addition of Article 7(H)'s express restriction refutes plaintiffs' theory that the Compact "contains implied restrictions on withdrawal." S.R. 32. "If the Commission or other party States had been concerned about the possibility that a host State (such as North Carolina or South Carolina) might withdraw, they could have proposed further amendments to restrict withdrawal." S.R. 33. They did not. Thus, "[a]s the Compact stands . . . North Carolina (like South Carolina before it) was free to withdraw when it chose to do so." *Id.* Reading a limitation on that express, unfettered withdrawal right "would be to grant [plaintiffs], by judicial fiat, contractual protection [they] failed to secure for themselves at the bargaining table." *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. 2004).

Finally, in addition to the Compact's own internal structure, comparison to other contemporaneously enacted compacts again confirms that the Southeast Compact's withdrawal right is unencumbered by unwritten limitations. "Unlike the Southeast Compact, other regional compacts approved by Congress specifically limit a party State's right to withdraw after being selected as a host State to build a disposal facility." S.R. 32. Three compacts delay the effects of host state withdrawal for five years, and one compact even expressly requires a withdrawing host State to pay a "sum" assessed by the Commission "to cover the costs borne by the Commission and remaining party states as a result of that withdrawal" - the very limitation plaintiffs want *added* to this Compact by judicial implication. *Id.* (quoting Midwest Compact, Art.VIII(i), 99 Stat. at 1901). The Southeast

Compact "clearly lacks the features of these other compacts" - especially Midwest Compact - and this Court is "not free to rewrite it." *Texas v. New Mexico*, 462 U.S. at 565.

b. Plaintiffs advance no serious basis for holding that North Carolina breached the Compact by exercising its right to withdraw. Plaintiffs concede North Carolina's express contractual withdrawal right, but they say it was implicitly barred from exercising that right because North Carolina had "sought and obtained almost $80 million to assist it in fulfilling its Compact obligations," while "reaffirm[ing] its commitment to complete a facility." Pls. Br. 42. Those facts do not establish that North Carolina's withdrawal was a breach of any unwritten restrictions for numerous reasons.

First, this Court has never held that sovereign States can be subjected to unwritten legal obligations in the course of their performance under an interstate compact. The opposite rule should obtain - "considerations of federalism counsel caution" when "construing interstate compacts to include implied duties." S.R. 30. "Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding." *United States v. Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia, J., concurring). A State's "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Merrion v. Jicarilla Apache*

Tribe, 455 U.S. 130, 148 (1982). The principle is even more salient here, given that the Southeast Compact specifically expresses the party States' intent that "nothing in this compact shall be construed to infringe upon, limit or abridge" their rights as sovereign states. Article 3.

Plaintiffs contend that federalism principles and respect for States' sovereign authority are irrelevant when "States contract with fellow States." Pls. Br. 44. But there is no reason a State should be forced to surrender important rights or interests by judicial implication, merely because the beneficiary of the implication is another State. What is more, the federalism concern involves not just the usurpation of one State's interests (or, here, its Treasury) by other States, but the intrusion on the State's rights by *the judiciary*. Reading interstate compacts strictly according to their terms limits courts' ability to invoke indeterminate equitable principles to impose new, unanticipated obligations and burdens on States committed to interstate compacts. That kind of freewheeling contract-by-judicial-implication approach is what would truly "undermine the stability of Compacts and the predictability of contractual relations." Pls. Br. 43. Enforcing compacts according to their strict terms, and avoiding judicial implication of new terms, is the proper way to promote stability and predictability in interstate compacts. States are the most sophisticated of legal entities, and are perfectly capable of protecting their interests as needed through express contractual statements of rights and obligations - as States did in other

compacts, and as the Southeast Compact States themselves did in Article 7(H).[7]

Second, even assuming interstate compacts are theoretically subject to implied obligations, the terms, history, and context of the Southeast Compact preclude the imposition of unwritten restrictions on its withdrawal right. Unlike express limits on withdrawal in other Compacts, and unlike even the express limit on withdrawal in *this* Compact that arises when Article 7(H) becomes operative, the primary Article 7(G) withdrawal right was explicitly written in *unrestricted* terms. Plaintiffs not only fail to mention Article 7(H) anywhere in their brief, but, incredibly, the version of the Compact appended to their brief does not even include the amended Article 7(H).

Even outside the context of interstate compacts, modern courts are reluctant to recognize unwritten limitations on express contractual rights, with a few increasingly rare exceptions in the employment

---

[7] Reading implied obligations into the Southeast Compact would be especially inappropriate, given that three other compacts include express provisions affirmatively establishing a duty of good faith, whereas the Southeast Compact includes no such provision. *See* Central Compact, Art. III(f), 99 Stat. at 1865; Central Midwest Compact, Art. V(a), 99 Stat. at 1886; Midwest Compact Art. V(a), 99 Stat. at 1897. The omission of the provision suggests a conscious determination by the Southeast Compact's enactors that this Compact be construed literally, precluding judicial creativity in constructing new rights and duties.

context. "There can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged." 23 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 63:22 (4th ed. 2003). "[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). When a contract is "silent," principles of good faith may "fill the gap" in appropriate circumstances - i.e., where there is evidence the parties would have agreed to the term if they had considered it, *see id.* at 442 - but unwritten good faith obligations cannot "block use of terms that actually appear in the contract." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990). As shown above, the Southeast Compact's withdrawal right is expressly established in, and protected by, the Compact's written terms. To prohibit the exercise of that express right by judicial implication is simply to rewrite the contractual term - to provide the parties by fiat what they failed to obtain by negotiation.

Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984), is not to the contrary. *Tymshare* involves a private employment contract, and it specifically recognizes that application of the implied good faith covenant depends on the language of the agreement at issue and the expressed or implied intent of the parties. As then-Judge Scalia explained, "the object of our inquiry is whether it was *reasonably understood by the parties* to this contract that there were at least certain purposes for which the expressly conferred

power . . . could not be employed." *Id*. at 1153 (emphasis added). And he acknowledged that "certain express powers . . . *are implicitly absolute* . . . while others are not." *Id*. at 1154 (emphasis added). In this case, all interpretive evidence demonstrates that the Compact's express withdrawal right is absolute.

Third, the implied limit on withdrawal plaintiffs assert is not even a generally applicable, predictable limitation. Their proposed restriction rests entirely on the fact that North Carolina had accepted funds from the Commission while affirming its commitment to build a facility. Pls. Br. 42. Plaintiffs do not contend that North Carolina would have breached if it had exercised its right to withdraw immediately after being named host state, before the Commission began providing the financial assistance the Commission deemed "necessary and appropriate." The implied obligation plaintiffs would read into the Compact is thus tantamount to a special *amendment* - whereas North Carolina was free to withdraw at any time before licensing a facility under the Compact's plain terms, its acceptance of funds created a new contractual obligation not to withdraw without licensing a facility.

The problem is obvious: there was no agreement by the parties that the Commission's provision of assistance was conditioned on North Carolina's promise to license a facility before exercising its contractual right to withdraw. To the contrary, plaintiffs have specifically *disclaimed* the existence of any "supplemental agreement between North Carolina and the Commission that would have limited North

Carolina's right to withdraw in exchange for financial assistance from the Commission." S.R. 21. The parties all agree that the Commission instead "provided assistance merely to facilitate North Carolina's performance under the Compact and neither requested nor expected any additional performance." *Id*. If at any point the Commission had stated that it would provide further assistance only if North Carolina conclusively promised to license a facility and waived its express right to withdraw from the Compact, North Carolina would have flatly rejected the proposal. Plaintiffs cannot now use an implied covenant to retroactively create a binding contractual agreement they never sought or obtained.

Finally, there is no merit to plaintiffs' assertion that enforcing the Article 7(G) withdrawal right by its plain, unrestricted terms would make the Compact "illusory" or "self-defeating." Pls. Br. 47. As already explained, the Compact's operating premise is that membership rights are valuable and withdrawal is costly. The costs to North Carolina indeed were severe: "Plaintiffs do not dispute that North Carolina spent approximately $34 million of its own funds in its efforts to site and license a new facility" - funds North Carolina now will never recoup through an operating facility. S.R. 34. It is thus simply false to accuse North Carolina of "opportunistic conduct" by withdrawing when it did. Pls. Br. 43. Plaintiffs cannot deny that North Carolina spent the Commission's $80 million solely on licensing efforts, or that North Carolina spent $34 million of its own money toward the same end. As the Special Master recognized, "the current record suggests that North

Carolina worked diligently to obtain a license and did not withdraw until it became clear that it would not have the requisite funds to seek and secure a license for the facility." S.R. 33-34. There is nothing opportunistic about cutting losses.[8]

2. *North Carolina Complied With The Obligation To Take "Appropriate Steps" As A Designated Host State*.

Plaintiffs recognize, as they must, that the Compact obligates a designated host State only to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Article 5(C); *see* Pls. Br. 30-31. The Compact "does not impose an absolute obligation on the host State to build a facility." S.R. 20-21. Instead, "the obligation in question is properly construed to be more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost." S.R. 21.

---

[8] *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588 (7th Cir. 1991), does not support plaintiffs' position. The "opportunistic behavior" that "violat[ed] the duty of good faith" in that case occurred if one party to the contract "tried to trick" the other "and succeeded in doing so." *Id*. at 596. Here, North Carolina was always candid with the Commission and the party States that while it was committed to licensing a facility, it could not do so without outside financial assistance.

Plaintiffs assert that North Carolina first breached its "appropriate steps" obligation in December 1997, after North Carolina commenced an orderly shutdown of the project in response to the Commission's pronouncement that financial assistance would no longer be available. Plaintiffs do not contend that North Carolina failed to take "appropriate steps" *prior* to December 1997; rather, their contention is that "by refusing after that time to assume the entire financial burden associated with licensing and building a facility, North Carolina failed to take appropriate steps and breached its obligations under the Compact." S.R. 20; *see* Pls. Br. 2-3 (North Carolina breached when it "ceased licensing activities in December 1997") *id.* at 31 (North Carolina failed to take appropriate steps "as of December 1997"); *id.* at 34 (similar).

The Special Master correctly rejected this theory, relying primarily on the undisputed facts establishing the parties' clear and consistent understanding, from the outset of the Compact, that it would not be "appropriate" for North Carolina to license a facility entirely at its own taxpayers' cost, because external financial assistance was "necessary" to enable North Carolina to complete the siting and licensing process. Given that understanding, continuing the process entirely on its own, without the outside funding recognized by all as necessary, was not an "appropriate step" North Carolina was obliged by the Compact to take. Rather, suspending the project, but preserving records and materials while seeking alternative funding prior to its withdrawal in July 1999, "satisfied its obligation under the Compact to take 'appropriate

steps.'" S.R. 28. Plaintiffs' objections to that conclusion are meritless.

a. As the factual record demonstrates, the parties always understood that, whatever their cost estimations might have been prior to the Compact's enactment, a host State could not realistically be expected to bear the full costs of the licensing process alone. Thus, soon after North Carolina was designated by the Commission in September 1986 to be the host State for the next regional facility, the Commission enacted a resolution establishing the "Host State Assistance Fund," which was intended to assist "with the financial costs and burdens associated with the preliminary planning, the administrative preparation, and other pre-operational costs" of developing a disposal facility. Pls. App. 63-65. The Commission's resolution expressly declared that it was "*appropriate and necessary* to provide financial assistance" to the designated host state. Pls. App. 63 (emphasis added).[9]

---

[9] Plaintiffs falsely assert that the Host State Assistance Fund resolution provided only an initial sum of $200,000, and that the "appropriate and necessary" language only "applied to the small amount of 'seed' money provided for by the actual resolution." Pls. Br. 40 n.13. Financial assistance pursuant to the resolution was not limited to $200,000; instead, a total of $1.2 million was provided to North Carolina (Complaint ¶ 20), in annual payments over a six-year period from the Fund. Pls. App. 329. Further, if a mere $200,000 was deemed "appropriate and necessary" to assist the host state, another $79 million would be, if anything, even *more* necessary.

Subsequent express acknowledgments demonstrate the parties' mutual understanding that on-going, substantial financial assistance was "appropriate and necessary." The Commission's institution in 1989 of a "Capacity Assurance Charge" was explicitly intended to generate funds "to support the licensing phase of North Carolina's site development." Pls. App. 71. Financial assistance provided to North Carolina pursuant to the "Capacity Assurance Charge" exceeded $19.7 million. Pls. App. 329. The November 1992 Resolution establishing an access fee on southeastern generators for the period from January 1, 1993 through December 31, 1995, likewise declared that the Commission "*must* take appropriate action to furnish additional funds for use . . . [in] the licensing phase of site development in North Carolina." Def. App. 87a (emphasis added). Over $23.4 million of the financial assistance provided to North Carolina came from these access fees. Pls. App. 329.

Additionally, following receipt of the Commission's first indication that "[a]t some point, Commission funds will no longer be available to North Carolina for site development, and North Carolina will need to make alternative plans" for future project funding (January 5, 1996 ltr, Joint Supp. Fact Br. App. 3), North Carolina responded by outlining its development of a revised work plan designed to provide a reasonable estimate of the time and costs involved in getting to a licensing decision. This notice to the Commission advised that "when the revised work plan is completed, it will be *necessary and appropriate* for the Compact Commission to decide

whether it will provide continued funding for this project." April 8, 1996 ltr, Joint Supp. Fact Br. App. 12 (emphasis added). The Commission did not respond by asserting that financial assistance for a host state was not necessary or appropriate under the Compact, but by adopting a resolution stating "that the Commission 'is willing and able to provide funds to support site development in North Carolina.'" June 20, 1996 ltr, Joint Supp. Fact Br. App. 19. And the Commission thereafter provided millions of dollars of additional financial assistance during 1996 and 1997. Complaint ¶¶ 39-42; Pls. App. 329.

Subsequently, the Commission declared that "[s]ufficient Commission funds are not available to complete development of a . . . disposal site in North Carolina, and a plan is need to secure the necessary funding" (August 29, 1997 ltr, Joint Supp. Fact Br. App. 37), and later notified North Carolina that funding would not be released for work beyond November 30, 1997. But even in the funding termination notice the Commission reiterated that it "remains dedicated to work with the Authority and waste generators to develop a plan to share the cost for site development in North Carolina." December 1, 1997 ltr, Joint Supp. Fact Br. App. 49. And, following North Carolina's December 19, 1997, "orderly shutdown of the project" notification, the Commission *again* stated that it "remains dedicated to work with the Authority to develop a plan to *share the cost* for site development in North Carolina." January 12, 1998 ltr, Joint Supp. Fact Br. App. 55 (emphasis added).

b. The foregoing funding history is essential to understanding what "steps" the parties deemed "appropriate" for North Carolina to "take" in pursuing a license. As the Special Master explained, "the phrase 'appropriate steps,' as used in the Compact, is ambiguous," and "suggests that not *all* steps are required by the Compact." S.R. 22 (emphasis added). A host State, for instance, would not be required under the "appropriate steps" obligation to locate a facility in an urban area if a rural site could not be found. *Id.* And "[c]ost is undoubtedly also relevant in assessing the obligation to take 'appropriate steps'" - a host State obviously would not be expected to license a facility *no matter what the cost*. *Id.* To determine what "cost" expectations were embedded in the ambiguous phrase "appropriate steps," the Special Master turned to the parties "course of performance under the Compact," as set forth above. *Id.* at 23.[10] "When, as here, the contract language is ambiguous, the parties' own course of performance is highly relevant to contract interpretation." *Metro. Area Transit v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006); *see Restatement*

---

[10] There is no evidence of any specific cost expectations when the Compact was enacted in 1986. But the goal of the Compact was to have a regional disposal facility ready to operate no later than 1991, Article 4(E)(6), and the record does show that in 1989 the parties expected that the "total of all projected expenditures . . . through the receipt of the license on December 31, 1991 is approximately $21,000,000." Pls. App. 74. The record thus strongly suggests that the eventual costs of the licensing process wildly exceeded the parties' expectations.

(*Second*) *of Contracts* § 202(4) (1981) ("any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").

The Special Master correctly concluded that, given the longstanding and consistent course of performance under the Compact, North Carolina did not breach or repudiate its obligation to take "appropriate steps" toward licensing a facility when it suspended operations in December 1997, after the Commission cut off "necessary" financial assistance. "If North Carolina's limited financial contributions satisfied its obligation to take 'appropriate steps' prior to 1998," the Special Master explained, "then it is difficult to conclude that its refusal to assume an unlimited financial commitment going forward breached this obligation." S.R. 25-26. As detailed above, after the Compact was enacted, the parties immediately and mutually recognized that a host State could not feasibly bear the siting and licensing costs entirely on its own, and that a "Host State Assistance Fund" would be "necessary" to facilitate the licensing process. To recognize that financial assistance is *necessary* is also to recognize that pursuing a license *without* that assistance is not realistically possible. And if pursuing a license without financial assistance is not realistically possible, then it cannot plausibly be considered an "appropriate step," within the meaning of the Compact, for the host State to pursue licensing without any prospect of obtaining that necessary

assistance.[11] The Special Master therefore properly concluded that North Carolina satisfied its obligation to take "appropriate steps" when it declined to waste substantial additional taxpayer dollars on the "futile" prospect (S.R. 25) of obtaining a license with no outside funding assistance (S.R. 36).

c. The Special Master also recognized that plaintiffs' "appropriate steps" breach theory reduces to an absurd proposition: North Carolina would not have breached the Compact if it had simply withdrawn immediately in December 1997, rather than remaining a member, preserving records and materials, and trying to work out a viable continuing cost-sharing arrangement. S.R. 26-27. As noted above, plaintiffs do not contend that North Carolina breached its duty to take "appropriate steps" at any point *before* December 1997. Until then, plaintiffs concede that it was perfectly appropriate for North Carolina to limit its own financial contributions toward the licensing process. Plaintiffs' complaint is that after North Carolina suspended activities in December 1997, it "failed to take *any* steps, let alone 'appropriate steps,' towards obtaining or issuing a license." Pls. Br. 34.

---

[11] As of December 1996, the estimated additional cost of reaching the point where a license could be issued was $34 million, and the best cost estimate of constructing a facility was an additional $75 million. S.R. 18. Of the $34 million needed for licensing, the existing business plan noted that the Commission had available approximately $22 million and assumed that North Carolina would provide $7 million towards efforts necessary to reach the point of licensing issuance. Joint Supp. Fact Br. App. 139.

Even leaving aside the factual error in that claim - North Carolina continue to spend $440,000 a year in record and facilities maintenance (S.R. 27) - the legal problem is that North Carolina was at that point free to withdraw outright from the Compact, as shown above. And if North Carolina would not have breached the Compact by exercising its unfettered withdrawal right in December 1997, it is nonsensical to assert that North Carolina *did* breach the Compact by *remaining* a member, and taking active steps to preserve the prospect of license issuance, including by trying to negotiate different financial assistance measures.

d. Plaintiffs' counter-arguments are unavailing. First, plaintiffs contend that the phrase "appropriate steps" is "not ambiguous," and thus the Special Master erred by relying on the longstanding course of performance to establish the parties' understanding of what cost-sharing burden would be "appropriate." Pls. Br. 32, 35-36. Plaintiffs are wrong. It is hard to imagine a contractual obligation that is *more* ambiguous - more open-ended and less specific - than the duty to take "appropriate steps" toward a goal. *See*, *e.g.*, *Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1136 (8th Cir. 1996) (describing "appropriate" as an "ambiguous term"); *EEOC v. Green*, 76 F.3d 19, 23 n.6 (1st Cir. 1996) (noting "apparent ambiguity" in phrase "appropriate charges"). The parties employed an objectively vague phrase, "appropriate steps," to describe the host State's obligations, which then would be construed in light of

the actual, operational experience of the parties acting under the Compact.[12]

Second, plaintiffs repeatedly assert that the Commission had no contractual *obligation to* provide funds to North Carolina, *see*, Article 4(K) ("[t]he Commission is not responsible for any costs associated with . . . the creation of any facility"), and that North Carolina was the only party with a legal obligation to fund the licensing process. This badly misses the point. It is true that the Commission was under no legal *duty* to provide the funds, but that says nothing about whether the parties believed it would be "appropriate" for North Carolina to fund the process *without* the Commission's voluntary assistance. There is, after all, a reason the Commission volunteered almost $80 million in funds, without any contractual obligation to do so, and without obtaining any contractual commitment in exchange for the funds: the Commission understood from the beginning that the only way North Carolina could realistically undertake the licensing process was with significant outside financial assistance. Absent the $80 million, the

---

[12] Plaintiffs' reliance on the Atomic Energy Act and NRC regulations is misplaced. Pls. Br. 32-33. When the parties wanted to define a Compact term by reference to the AEA or NRC regulations, they did so explicitly. *See* Article 2(6.) ("'Low-level radioactive waste' or 'waste'"); Article 2(12.)("Transuranic wastes"). And inasmuch as neither the AEA nor the NRC regulations define or even use the phrase "appropriate steps," *see* AEA, 42 U.S.C. § 2011 *et seq*.; 10 C.F.R. § 61.1 *et seq*., neither source can give specific content to phrase as used in the Compact.

Commission knew that North Carolina could never obtain the license. If the Commission actually believed that North Carolina could realistically obtain a license entirely on it own - as plaintiffs now contend - then simply handing $80 million to North Carolina without strings attached was a breathtaking abuse of the Commission's own corporate responsibilities.

The question, in short, is not whether the Commission was *required* to fund North Carolina's licensing efforts. It is whether the obligation to take "appropriate steps" required North Carolina to complete the process *without continued external financial assistance*, despite the repeated explicit demonstrations of the parties' mutual recognition that such assistance was "necessary," and that it was *not* "appropriate" to expect North Carolina alone to shoulder the financial burden. The Special Master properly considered the course of performance between the parties to answer the question, and correctly concluded that North Carolina's actions satisfied its obligations under the Compact.[13]

---

[13] Likewise, North Carolina's recognition of its own funding obligation (Pls. Br. 36, 38, 40, 50) says nothing about *how much funding* the parties believed would be "appropriate" - or, put differently, what "steps" toward licensing were "appropriate" without *any* additional funding. As noted above, North Carolina was not required to take any and all steps toward licensing no matter what cost - it was only required to take steps the parties deemed "appropriate."

For the same reason, plaintiffs err in emphasizing the North Carolina legislation declaring that the purpose of the Authority was to "site, finance, build" a disposal

e. Plaintiffs' contention that North Carolina "repudiated" its "appropriate step" obligations by suspending operations in December 1997 is legally indistinguishable from their claim that North Carolina breached that obligation by the same conduct, as shown above, *supra* at 35-36, and is wrong for essentially the same reasons.

As demonstrated by the parties' course of performance, North Carolina's position after the December 1997 funding cut-off was identical to the position it had maintained throughout the licensing process: "Soon after being selected as the second host State, North Carolina indicated that it could not bear the full financial burden of siting, licensing, and building a new facility." S.R. 23. North Carolina never deviated from that position.

North Carolina's actions following the December 1997 cessation of financial assistance from the Commission reflected the parties' mutual understanding that licensing without financial assistance was not realistically possible, and therefore

---

facility, N.C. Gen. Stat. § 104G-4; *see* Pls. Br. 34. The Authority's purpose *was* partly to finance the process, but never at all costs. Underscoring the point, that same August 1987 legislative enactment included § 104G-6(a)(13), which authorized the Authority to accept "grants of money . . . from a compact commission," and § 104G-17(b), which created a separate account with the State Treasurer for "monies from the Southeast Interstate Low-Level Radioactive Waste Management Compact Commission." Pls. App. 38, 46.

futile to pursue absent such assistance. And North Carolina's actions after December 1997 were "appropriate" based on the established course of conduct by the parties, especially in light of the Commission's expressly restated recognition of the need for a mutual plan to fund the licensing effort in its statements immediately before and after North Carolina's "orderly shutdown" notification. The funding cut-off notification states that "[t]he Commission remains dedicated to work with the Authority and waste generators to develop a plan to share the cost for site development in North Carolina" (December 1, 1997 ltr, Joint Supp. Fact Br. App. 49), and the reaction to North Carolina's "orderly shutdown" notification reiterates that "the Commission remains dedicated to work with the Authority to develop a plan to share the cost for site development in North Carolina in order that North Carolina can fulfill its obligations under the law." January 12, 1998 ltr, Joint Supp. Fact Br. App. 55. In response, North Carolina did not simply withdraw from the Compact, but instead "continued to fund the Authority for almost two more years in the hope that alternative funding could be secured." S.R. 27. It would have been a pointless waste of taxpayers' dollars to continue that funding if North Carolina all along secretly intended never to restart the licensing process. The rational choice for North Carolina, if it never intended to perform, would have been to exercise its unambiguous withdrawal right. The fact that it did not do so until the Commission first cut off all funds conclusively, then also threatened to demand the return of all money North Carolina had *already spent* trying to obtain a license, establishes North Carolina's

commitment to the Compact process, not its repudiation.[14]

III. PLAINTIFFS ARE NOT ENTITLED TO RESTITUTION FOR NORTH CAROLINA'S PURPORTED BREACH OF THE COMPACT.

Plaintiffs claim an entitlement "to restitution of $80 million, plus interest" (Pls. Br. 53) as a remedy for North Carolina's purported breach of contract, asserting that the Commission, "on behalf of the party States," provided financial assistance to North Carolina in reliance upon its "obligation and commitment to the other States to develop and operate a regional facility as required by the Compact." Pls. Br. 52.[15]

---

[14] There is no merit to plaintiffs' contention that repudiation is established by North Carolina's "*admission* that it took no steps to license or site a facility after December 19, 1997." Pls. Br. 49; *see* Pls. Br. 11, 31. Again, North Carolina's obligation was only to take "appropriate" steps, and the parties recognized that it was not "appropriate" for a host State to seek a license without financial assistance. North Carolina's "admitted" conduct after December 1997 thus did not repudiate its relevant Compact obligation.

[15] Contrary to plaintiffs' characterization, North Carolina plainly did *not* have a duty to "develop and operate a facility." North Carolina's sole relevant duty was to take "appropriate steps" towards licensing a facility. *See supra* at 45.

This claim is, at best, irrelevant and premature. It presupposes a breach of the Compact which, as shown above, did not occur. Accordingly, there is no reason to consider the restitution remedy on that basis. S.R. 45 (based on conclusion that North Carolina did not breached Compact, "it is not necessary to resolve whether the Plaintiffs would be entitled to restitution of $80 million").

The only question raised by plaintiffs is whether restitution is an appropriate remedy *if* there is a breach. The Court should not decide the issue in the abstract. If it is ever finally determined that North Carolina breached the Compact, the restitution remedy may be considered at that time, but even then the Special Master should address it in the first instance, after conducting any necessary factual inquiries.

If the Court does decide that North Carolina breached the Compact as a matter of law, however, and the Court *also* decides to reach the restitution question in the first instance, the Court should hold that restitution of $80 million is not a legally available remedy under the circumstances. It is axiomatic that restitution is only available to a party that itself conferred a benefit on another party.

> A party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party. Restitution is, therefore, available to a party only to the extent that he has conferred a benefit on the

> other party. . . . The benefit *must have been conferred by the party claiming restitution.*

Restatement (*Second*) *of Contracts* § 370 cmt. a & b (1981) (citation omitted).

As detailed in North Carolina's own Exceptions Brief, *see* NC Br. 41-56, the plaintiff States may not seek restitution of funds provided to North Carolina because all funding assistance came exclusively from the Commission. The States themselves have no cognizable legal interest in the Commission's funds. And because the Commission is not a party to the Compact, it has no claim of breach, and thus cannot claim restitution as a contractual remedy. Nor can the States seek restitution as a remedy for breach on the theory that the Commission was acting as their agent in providing funds to North Carolina. As previously shown, *see* NC Br. 50-56, the Commission was a separate legal entity acting on its own behalf.

The States are the only parties potentially entitled to contract remedies, but they provided no funds and thus cannot claim restitution. "The Commission's funds did not come from the party States. Rather, they were raised through surcharges and fees imposed on waste generators." S.R. 15. While the plaintiff States can assert and pursue a breach of contract claim and seek the recovery of *their own* expectation damages or out-of-pocket losses, they cannot pursue a remedy seeking the recovery of money provided to North Carolina *by the Commission*. It is only the Commission - and not the plaintiff States - that can pursue restitution for financial assistance provided by

the Commission. And that distinct restitution claim by the Commission is, in turn, barred by the Eleventh Amendment and North Carolina's assertion of sovereign immunity, as North Carolina has shown. NC Br. 25-39.

Plaintiffs' reliance on *Mobil Oil Exploration & Producing SE., Inc. v. United States*, 530 U.S. 604 (2000), is misplaced. In that case, this Court held that two oil companies had been deprived of the benefit of their bargain when the government breached lease contracts for the exploration and development of off-shore oil fields, and ruled that the companies were entitled to recover the $158 million in up-front money which they themselves had paid pursuant to the terms of the agreement. *Id.* at 623-24. The contracts at issue involved traditional promisor/promisee relationships in which the breaching party had received money pursuant to the contract *from the non-breaching party*. Basic principles of contract and restitution law entitled the companies to recover on a restitution theory because the parties asserting breach had conferred a monetary benefit on the breaching party. Here, in contrast, there is a disconnect between the only parties in a position to assert a breach of contract claim against North Carolina - the Plaintiff States - and the only party that conferred a financial benefit on North Carolina - the Commission.

Every authority cited by plaintiffs makes clear that restitution is available only to the party that conferred the benefit upon the defendant. Plaintiffs attempt to blur the distinction between the actions of the Commission and the actions of the plaintiff States,

but the distinction is a crucial determinant of which party may pursue restitution (the Commission, but for the Eleventh Amendment), and which may not (the plaintiff States). The doctrine of restitution precludes the plaintiff States from recovering money they did not provide.

CONCLUSION

Plaintiffs' exceptions should be overruled. This Court should adopt the Special Master's recommendation to grant North Carolina's Motion to Dismiss as to Count I of the Bill of Complaint and to grant North Carolina's Motion for Summary Judgment as to Count II.

Respectfully submitted,

WALTER DELLINGER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
GRAYSON G. KELLEY*
Chief Deputy Att'y General
JOHN F. MADDREY
Assistant Solicitor General
RONALD M. MARQUETTE
Special Deputy Att'y Gen.
MARK A. DAVIS
Special Deputy Att'y Gen.
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
Telephone: (919) 716-6900

August 2009

* *Counsel of Record*