

No. 132, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

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 MOTION TO DISMISS THE COMMISSION,
MOTION FOR SUMMARY JUDGMENT,
AND MOTION TO DISMISS THE COMPLAINT

PRELIMINARY REPORT OF THE SPECIAL MASTER

BRADFORD R. CLARK
Special Master
Washington, D.C.

April 2009

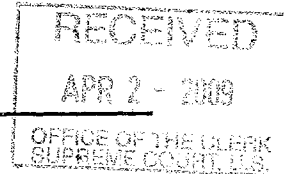


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This Preliminary Report was originally distributed to the parties in June 2006, but not filed with the Supreme Court at that time. The Special Master is now filing this Preliminary Report simultaneously with his Second Report. The Preliminary Report addresses three preliminary legal motions filed by the parties. North Carolina filed a Motion to Dismiss the claims of the Southeast Interstate Low-Level Radioactive Waste Management Commission, the Plaintiffs filed a Motion for Summary Judgment, and North Carolina filed a Motion to Dismiss the Bill of Complaint. For the reasons set forth below, the Special Master recommends that the first two motions be denied and the third be granted in part and denied in part.

I. Background

In 1986, with the consent of Congress, the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia entered into the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact"), Pub. L. No. 99-240, Tit. II, 99 Stat. 1871, as amended by the Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, 103 Stat. 1289. The purpose of the Compact was to provide facilities for the disposal of the region's low-level radioactive waste. The Compact created the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission"), consisting of

two voting members from each State, to administer the Compact.¹

Under the Compact, a preexisting disposal facility in Barnwell, South Carolina, owned by that State, served as the initial disposal facility for the region until a new facility could be built. In September 1986, the Commission selected North Carolina to be the second host State to construct and operate a new regional facility. Under the terms of the Compact, the Commission is not “responsible for any costs associated with . . . the creation of any facility.” Compact, Art. 4(K). Nonetheless, the Commission decided in 1988 to provide financial assistance to the second host State for pre-operational costs associated with the construction of a new facility. The Commission raised substantial revenue through various surcharges on waste brought to the Barnwell facility and used these funds to assist North Carolina’s efforts to site and develop a new facility. From 1988 through 1997, the Commission provided North Carolina with close to \$80 million in assistance. During the same period, North Carolina expended approximately \$50 million of its own funds, but did not begin construction of a new facility.

By the end of 1997, the Commission ceased providing North Carolina with additional financial

¹ The following description is based on the submissions of the parties and does not consist of findings by the Special Master. This description is intended solely to provide background and context for this Report and in no way precludes the parties from contesting any of the propositions set forth herein.

assistance, in part because South Carolina had withdrawn from the Compact in 1995, thereby depriving the Commission of further revenue from the Barnwell facility. North Carolina withdrew from the Compact in July 1999. In December 1999, the Commission held a Sanctions Hearing, found that North Carolina had breached the Compact, and ordered it to repay close to \$80 million it received from the Commission along with an additional \$10 million sanction and attorney's fees. North Carolina did not participate in this hearing and did not comply with the Commission's order. The Commission subsequently attempted to sue North Carolina in the original jurisdiction of the Supreme Court, but the Court denied the Commission leave to file its complaint. *See Southeast Interstate Low-Level Radioactive Waste Management Comm'n v. North Carolina*, 533 U.S. 926 (2001).

The Commission, joined by Alabama, Florida, Tennessee, and Virginia, filed a similar complaint, and the Court granted leave to file in 2003. North Carolina then moved to dismiss the Commission for lack of jurisdiction. After the case was assigned to the Special Master, North Carolina filed a motion to dismiss the complaint for failure to state a claim, and the Plaintiffs filed a motion for summary judgment with respect to Count I of the complaint. The parties, and the United States as amicus curiae, subsequently appeared before the Special Master to argue all three of these motions.

II. North Carolina's Motion to Dismiss the Commission

As a preliminary matter, North Carolina moves to dismiss the claims of the Commission on the grounds that these claims are barred by the Eleventh Amendment and principles of state sovereign immunity. Although North Carolina acknowledges that States cannot assert sovereign immunity to bar suits brought against them by sister States or the United States, it insists that a State cannot be sued without its consent in the Supreme Court's original jurisdiction by other parties, such as the Commission.

The Plaintiffs oppose North Carolina's motion to dismiss the Commission on the ground that several of the Court's prior precedents have permitted non-State parties to intervene in original actions—at least when the non-State parties are asserting the same claims and seeking the same relief as the original parties. See *Arizona v. California*, 460 U.S. 605 (1983); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Oklahoma v. Texas*, 258 U.S. 574 (1922). The Plaintiffs maintain that the Bill of Complaint asserts the same claims on behalf of the Commission and the States. Accordingly, the Plaintiffs urge the Court to deny the motion and allow the Commission to remain a party to the suit.

North Carolina's Reply takes the position that the Commission's claims cannot proceed against a non-consenting State even if the claims are the same as those asserted by the Plaintiff States. Specifi-

cally, North Carolina maintains that the Court has effectively disavowed the ancillary jurisdiction theory of its earlier cases in subsequent decisions. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Accordingly, North Carolina insists that state sovereign immunity requires the Court to dismiss the Commission's claims.

The Special Master recommends that the Court deny North Carolina's motion to dismiss the Commission's claims at this point in the proceedings. The threshold question is whether the Commission should be treated as a State or as a non-State party in evaluating North Carolina's claim of sovereign immunity. The Supreme Court has held that Compact Clause entities do not themselves enjoy Eleventh Amendment immunity when sued in federal court. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). According to the Court, such "entities occupy a significantly different position in our federal system than do the States themselves." *Id.* at 400. Although an open question, the logic of the Court's opinion in *Hess* suggests that if Compact Clause entities should not be treated as States when they are sued as defendants, then they should not be treated as States when they sue as plaintiffs. Given the Special Master's recommendation with respect to North Carolina's motion to dismiss the Commission, however, it is not necessary to resolve this question at this time.

Careful review of the Court's precedents suggests that a non-State party may join a State or the

United States in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs. The Plaintiffs in this case have filed a joint Bill of Complaint and are currently asserting the same claims and seeking the same relief against North Carolina. North Carolina suggests that the Plaintiff States may not be entitled to assert some of the claims that the Commission is entitled to assert, but this question cannot be resolved without further factual and legal development. If and when the Commission asserts claims that the States themselves cannot assert, North Carolina remains free to renew its motion and seek dismissal of such claims.

The Supreme Court's prior decisions support this resolution. For example, in *Maryland v. Louisiana*, the Court permitted several pipeline companies to intervene as plaintiffs in an original action brought by several States and the United States against Louisiana. The suit challenged the constitutionality of Louisiana's "First Use Tax" on certain uses of natural gas brought into Louisiana, principally from the Outer Continental Shelf. As the Court explained, because the challenged tax was "directly imposed on the owner of imported gas and . . . the pipelines most often own the gas, those companies have a direct stake in this controversy." 451 U.S. at 745 n. 21. Accordingly, the Court permitted the companies to intervene "in the interest of a full exposition of the issues." *Id.* Significantly, there was no indication that the pipeline companies as-

serted any claims or sought any relief other than those pursued by the original plaintiffs. On the contrary, the pipeline companies specifically asserted in their brief before the Supreme Court that the “proposed complaint attached to the pipelines’ motion [to intervene] raised the same constitutional issues as those raised by the plaintiff States.” Response of Pipeline Companies to Louisiana’s Exceptions to Special Master’s Report, *Maryland v. Louisiana*, 1980 WL 339270, *3 (U.S. 1980) (No. 83, Orig.).²

² In opposing North Carolina’s motion to dismiss the Commission, the Plaintiffs also rely on *Oklahoma v. Texas*, 258 U.S. 574 (1922). In that case, Oklahoma sued Texas to settle a controversy between them over the location of their common boundary along the course of the Red River, and over title to the southern half of the river bed. The United States intervened to set up a claim to the river bed as against both States. In order to prevent armed conflicts among rival aspirants, the Court appointed—at the suggestion of the United States and with the approval of the States—a receiver to take possession of the disputed portion of the river bed and to control and conduct all necessary oil and gas operations therein. *Id.* at 580. The Court’s order established a mechanism for ascertaining and holding the net proceeds of oil and gas operations in such a way that they could be paid to whoever was ultimately determined to be the rightful owner. *Id.* As contemplated by the Court’s order, interested parties intervened to assert rights to portions of the river bed and the net proceeds of the associated oil and gas. The Court permitted the interventions on the narrow ground that they all related to tracts and funds in the receiver’s possession and thus exclusively within the Court’s control. According to the Court: “It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised—and this although independent suits to enforce the claims could not be

Similarly, in *Arizona v. California*, the Court permitted several Indian tribes to intervene in an original action brought by Arizona against California to determine the parties' rights to the waters of the Colorado River. In earlier proceedings, the United States intervened to assert water rights on behalf of five Indian Reservations dependent on the river for water. Several of the affected Indian tribes moved to intervene in order to assert their water rights directly. Both States opposed intervention on the ground that the tribes' participation in the suit without their consent would violate the Eleventh Amendment. The Court began by noting that the water rights at issue had already been asserted by the United States on behalf of the tribes and that nothing in the Eleventh Amendment prevents the United States from bringing suits against States. *See* 460 U.S. at 614. The Court then rejected the States' Eleventh Amendment defense on relatively narrow grounds:

The Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting

entertained in that court." *Id.* at 581. Because the Eleventh Amendment was neither raised by the parties nor discussed by the Court, the decision has no direct bearing on the pending motion.

leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Id. In other words, because the United States had—consistent with the Eleventh Amendment—already asserted water rights claims on behalf of tribes against States, permitting the real parties in interest (the tribes) to intervene to assert the same claims would not expose the States to any additional claims barred by the Eleventh Amendment.³

As applied to this case, these precedents suggest that the Eleventh Amendment permits the Commission to remain a party so long as it does not assert any claims other than those that the Plaintiff States are entitled to assert. North Carolina asserts that there is “no genuine dispute that recovery of the \$80 million ‘sanction’ is relief *only* the Commission can seek as plaintiff.” N.C. Mot. to Dismiss Comm’n at 11. As support for this proposition, North Carolina relies primarily on several statements made by the Commission when it initially sought leave to file suit by itself against North Carolina in Original No. 131. These statements suggested that only the Com-

³ At the time that *Arizona v. California* was decided, the Court had not yet determined whether States possess sovereign immunity from suits brought by Indian tribes. The Court assumed in *Arizona*—consistent with its subsequent resolution of this question in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)—that States enjoy such immunity. See *Arizona v. California*, 460 U.S. at 614 (assuming *arguendo* that “a State may interpose its immunity to bar a suit brought against it by an Indian tribe”).

mission, and not the member States, may seek to enforce the Commission's sanction against North Carolina and recover funds provided by the Commission.⁴ In response, the Plaintiffs point out that these statements were made by the Commission rather than the States. In addition, on the merits, they argue that "like any party to a contract, the States have a direct interest in the enforcement of that contract, whether it calls for payments to the States themselves or to some third party (here, the Commission)." Pl. Opp. to Mot. to Dismiss Comm'n at 4. The Special Master therefore does not agree, at this stage of the proceedings, that the Commission's claim seeking enforcement of the \$80 million sanction is necessarily a separate and distinct claim.

North Carolina maintains that the Supreme Court has effectively disavowed its earlier precedents and that the Court's more recent decisions recognize that the Eleventh Amendment bars parties other than States and the United States from asserting claims of any kind against a State without its consent. Specifically, North Carolina relies on two cases: *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), and *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985). While these

⁴ At oral argument on its motion, North Carolina clarified that it is not making an estoppel or law of the case claim. Transcript of Hearing Before the Special Master (Sept. 3, 2004) ("Tr.") at 13-14. Rather, North Carolina is merely urging that the Commission's prior submissions are persuasive on the question whether the Commission and the States have separate claims.

cases strongly endorse state sovereign immunity, they do not require dismissal of the Commission's claims at this stage of the proceedings.

The *Pennhurst* litigation began when residents of the facility and the United States sued Pennhurst State School and Hospital, and various Pennsylvania officials, alleging numerous violations of both federal and state law. The United States Court of Appeals for the Third Circuit affirmed relief based on the provisions of a federal statute, but the Supreme Court reversed on the ground that the statute did not create any substantive rights. *See* 451 U.S. 1 (1981). The Court remanded the case to the Court of Appeals to determine if the remedial order could be supported by any other provision of state or federal law. On remand, the Court of Appeals reaffirmed its prior judgment solely on the basis of state law and rejected the argument that the Eleventh Amendment barred a federal court from considering pendent state law claims against state officers and institutions. The Supreme Court reversed, holding that the Eleventh Amendment barred these claims in federal court.

Significantly, the Court rejected the plaintiffs' argument that "the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration." 465 U.S. at 104 n.12. The Court reasoned that while the Amendment does not bar the United States from suing to enforce federal law, "the United States does not have standing to assert the state-law claims of third-parties." *Id.* Thus, the question of Eleventh Amendment immu-

nity to the plaintiffs' state law claims was "unaffected by the United States' participation in the case," *id.*, and "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121. Under these circumstances, a "federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.* In *Pennhurst*, the Court concluded that the private plaintiffs' state law claim—unavailable to the United States—constitutes a claim against the State barred by the Eleventh Amendment. *Id.*

County of Oneida is similar. Several Indian Tribes sued two New York counties seeking damages for the fair rental value of land then and occupied by the counties. The Tribes claimed that the land was purchased by the State of New York from their ancestors in 1795 in violation of the Trade and Intercourse Act of 1793 ("Nonintercourse Act"), 1 Stat. 329. The counties impleaded the State as a third-party defendant and sought indemnification for any damages they owed to the Tribes. The United States Court of Appeals for the Second Circuit held that federal courts may exercise ancillary jurisdiction over this claim, but the Supreme Court reversed. Relying on *Pennhurst*, the Court held that the Eleventh Amendment forecloses "the application of normal principles of pendent and ancillary jurisdiction where claims are pressed against the State," 470 U.S. at 251, and that the claim is barred in the absence of the State's consent. *Id.*

Rather than effectively disavowing or overruling the Court's prior precedents, *Pennhurst* and *County of Oneida* simply underscore the limitation implicit in those decisions. If the United States or a State has already asserted an appropriate claim against a State, then permitting a private party with a stake in the outcome to assert the *same* claim does not infringe upon the State's Eleventh Amendment immunity. If, on the other hand, a private party attempts to assert a novel or different claim against a State, then the Eleventh Amendment bars the claim unless the State waives its immunity. In this regard, the Special Master agrees with the suggestion of the United States as amicus curiae that there is no present necessity to reconsider the continuing validity of the Court's prior precedents.

The Special Master agrees with the Plaintiff States—at least at this point in the proceedings—that they have the right to seek enforcement of the Compact and that their claims appear to be identical to those of the Commission. At oral argument, however, the Plaintiffs refused to stipulate that the Commission would forego a claim even if it was subsequently found to be unavailable to the States. Tr. at 19. Although no reason appears at this point in the proceedings why the States will be unable to pursue all of the claims they assert in their complaint, North Carolina is free to renew its motion to dismiss if and when the Commission attempts to

pursue a claim legally foreclosed to the States.⁵ It suffices for present purposes that the Commission and the States are asserting the same claims and seeking the same relief. With respect to such claims, the Commission's participation would facilitate a full exposition of the issues. In addition, under *Arizona v. California, supra*, the Commission's assertion of such claims would not improperly enlarge the Court's judicial power over the case in contravention of the Eleventh Amendment.

For the foregoing reasons, the Special Master recommends that North Carolina's motion to dismiss the claims of the Commission be denied.

III. Plaintiffs' Motion for Summary Judgment

The Plaintiffs seek summary judgment against North Carolina on Count I of the Bill of Complaint. Count I alleges that North Carolina violated the Compact by failing to fund, license, con-

⁵ The Plaintiffs also assert that the Supreme Court effectively resolved whether the Commission may pursue its claims against North Carolina when it granted the Commission and the States' joint motion for leave to file this action. The Plaintiffs acknowledged at oral argument, however, that North Carolina did not raise the issue of sovereign immunity in opposition to the Plaintiffs' motion. Tr. at 15. Accordingly, North Carolina retains the right to assert such immunity if and when the Commission asserts a claim against it that the States cannot assert on their own. See *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982) (stating that an Eleventh Amendment defense "partakes of the nature of a jurisdictional bar" and may be raised at any time) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)).

struct, and operate a regional disposal facility after being designated as a host State by the Commission in 1986. On July 26, 1999, North Carolina enacted a law withdrawing from the Compact. At the request of Florida and Tennessee, the Commission subsequently held a Sanctions Hearing, found that North Carolina had failed to fulfill its obligations under the Compact, and voted to require North Carolina to repay the \$79,930,337 that it had received from the Commission to assist it in developing a disposal facility.⁶ By this motion, the Plaintiffs are essentially seeking summary enforcement of the Commission's sanctions order against North Carolina. North Carolina, in opposing this motion and by filing its own motion to dismiss the Bill of Complaint in its entirety, essentially argues that it has no liability whatsoever to the Plaintiffs as a matter of law.

The Plaintiffs' Motion for Summary Judgment should be denied because the Compact does not authorize the Commission to impose monetary sanctions against member States, and because North Carolina withdrew from the Compact prior to the imposition of sanctions. In addition, North Carolina did not waive its right to contest enforcement of the Commission's order by failing to appear in that proceeding. Denial of the Plaintiffs' motion, however, merely means that the Commission's sanctions order

⁶ In addition, the Commission voted to require North Carolina to pay \$10,000,000 for the loss of future revenue that the Commission would have received had the facility been built, as well as the Commission's attorney fees.

should not be summarily enforced. It does not mean that North Carolina faces no potential liability as a matter of law with respect to the Plaintiffs' other claims. *See* Part IV, *infra*.

A. The Commission's Authority to Impose Monetary Sanctions

In determining whether the Commission has authority under the Compact to impose monetary sanctions on member States, it is important to interpret the Compact as a coherent whole and in a manner consistent with its overall structure and purpose. *See Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'"). Article 4 of the Compact establishes the Commission, and Article 4(E) describes its duties and powers.

Two provisions are particularly relevant here. First, Article 4(E)(7) authorizes the Commission to designate a host State for the establishment of a needed regional facility, and "to revoke the membership of a party State that willfully creates barriers to the siting of a needed regional facility." Compact, Art. 4(E)(7). Second, Article 4(E)(11) authorizes the Commission "[t]o revoke the membership of a party

State in accordance with Article VII(f).” Compact, Art. 4(E)(11). Article 7(F), in turn, provides in pertinent part:

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.

Compact, Art. 7(F). Resolution of the Plaintiffs’ summary judgment motion turns on whether the Compact authorizes the Commission to impose monetary penalties on a party State as a sanction.

Plaintiffs emphasize the word “including” and argue that the plain language of the Compact authorizes the Commission to impose a variety of sanctions including monetary penalties. Specifically, the Plaintiffs argue that the “word ‘including’ is not a term of exclusion or limitation,” Pl. Mot. for S.J. at 25, and that the Southeast Compact should be interpreted to authorize monetary sanctions notwithstanding their express omission. As the Supreme Court has explained, however, a “word in a statute may or may not extend to the outer limits of its definitional possibilities.” *Dolan*, 546 U.S. at 486. Moreover, the term “including” is not always used as a term of enlargement. On the contrary, sometimes the term is used simply to provide examples of the kinds of things that are meant to be included. In

such circumstances, the term should not be read to authorize any and all possible alternatives. *Cf. Dong v. Smithsonian Institution*, 125 F.3d 877, 880 (D.C. Cir. 1997) (interpreting the term “includes” narrowly when no general principle appears behind the statute’s enumeration of examples).

Indeed, the 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. At oral argument, for example, the Special Master asked the Plaintiffs whether the Commission has authority under the Compact to sanction a member State by requiring it to surrender all of its tax revenue to the Commission for a two-year period. The Plaintiffs responded that such a sanction would be subject to some kind of excessiveness challenge and would go beyond the authority of the Commission. Tr. at 79. At the same time, however, the Plaintiffs expressed the view that the Commission has authority to impose a punitive fine, such as treble damages, on the ground that a sanction implies that there is a punishment. Tr. at 83. The only limitation is that the sanction must be “reasonable.” *Id.* Finally, the Plaintiffs were skeptical that the Commission could sanction North Carolina by ordering it to allow South Carolina to build and run a low-level radioactive waste disposal facility in North Carolina. *Id.*

The Plaintiffs’ skepticism is well founded. As they acknowledge, the Compact expressly preserves the sovereign prerogatives of the States. Article 3 of

the Compact provides: “The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights.” Compact, Art. 3. Permitting the Commission to override a State’s territorial integrity and health and safety regulations would undoubtedly infringe upon the sovereign rights of the State reserved by the Compact. Similarly, as numerous cases recognize, ordering a State to pay money from its treasury implicates state sovereignty. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Thus, an order by the Commission ordering a State to pay money damages would appear “to infringe upon, limit or abridge” the rights of sovereign States reserved under the Compact.

The Plaintiffs seek to overcome the effect of the Compact’s express reservation of sovereign rights by arguing that the States gave up or waived some of these rights—including the right to be free from monetary sanctions—by entering into the Southeast Compact. If the Compact contained an express provision authorizing the Commission to subject member States to monetary sanctions, a reviewing court would have to confront the problem of reconciling such a provision with the Compact’s instruction that it not be construed to abridge sovereign rights. In this case, however, the Compact is silent on the question of monetary sanctions. Thus, the Plaintiff’s position is essentially that the Supreme Court should construe the Compact to authorize such sanctions by implication. Such a con-

struction, however, is precisely what the Compact forbids.

Based on Article 3 of the Compact, the Special Master agrees with the United States that the Compact should not be construed to confer power upon the Commission to impose monetary sanctions in the absence of a clear statement to that effect in the Compact. *See* Br. for U.S. at 18. A clear statement requirement ensures that the member States retain all of their sovereign rights unless they expressly surrender such rights in the Compact. The Plaintiffs object to the use of a clear statement rule on the grounds that it is inconsistent with Article 9 of the Compact and represents a misapplication of the Supreme Court's clear statement decisions. Neither objection is persuasive in this context.

Article 9 provides in pertinent part: "The provisions of this Compact shall be liberally construed to give effect to the purposes thereof." Compact, Art. 9. As Article 3 of the Compact makes plain, however, one of the purposes of the Compact is to preserve "the rights enjoyed by sovereign states." Compact, Art. 3. As discussed, construing the Compact to include implicit authorization to impose monetary sanctions would contradict Article 3. Thus, Article 9's general instruction to construe the Compact liberally should not be used to circumvent Article 3's more specific command not to construe the Compact to infringe upon the rights enjoyed by sovereign States.

The Plaintiffs nonetheless contend that their construction of the Compact is necessary to make it

effective. The Plaintiffs overlook the fact that the Commission's power to revoke the membership of a party State or to limit or suspend its rights under the Compact constitute serious sanctions. The member States entered into the Compact in order to enjoy the benefits of membership, such as the right to have waste stored, treated, and disposed of at regional facilities and other facilities made available pursuant to agreements entered into by the Commission. Compact, Art. 3(a). With respect to a State designated as a host State, revocation of membership would also deprive the State of all future revenue generated by operating the region's waste disposal facility. As discussed below, some Compacts go further and authorize monetary sanctions, but such sanctions are not inherently necessary to make the Compact effective.

More specifically, the Plaintiffs argue that limiting the Commission's sanctions authority to expulsion makes no sense in this case because it would allow North Carolina to escape its duties under the Compact while retaining the funds provided by the Commission to fulfill those duties. This argument is unpersuasive for two reasons. First, the Compact was drafted on the apparent assumption that a State (such as North Carolina) designated as a host State would bear the costs of building its own disposal facility and would not receive funding from the Commission. *See* Compact, Art. 4(K) (stating that "Commission shall not be responsible for any costs associated with . . . the creation of any facility"). On this assumption, expulsion is a meaningful

sanction because it would not only deprive a host State of the right to dispose of its own waste, but also deny it the opportunity to recoup its expenditures through operation of an exclusive regional facility. Second, the Plaintiffs' argument implicitly assumes that if the Commission lacks power to impose a monetary sanction, then there is no other remedy available for North Carolina's alleged misconduct. As the Plaintiffs themselves argue elsewhere, however, a judicial remedy may be available in appropriate circumstances independent of the Commission's sanctions authority. As discussed in Part IV, the Plaintiffs' complaint seeks just such a remedy.

The Plaintiffs also object that reliance on a clear statement rule in "original actions by States against States and by the United States against States would be dramatic, unprecedented, and unjustified." Pl. Reply in Support of Mot. for S.J. at 13. They suggest that a clear statement rule should apply only when a State has sovereign immunity under the Eleventh Amendment or the constitutional design. *Id.* at 12. The Plaintiffs are correct that in an original action like this one, a State enjoys no constitutional immunity from suit. The source of the clear statement rule in this case, however, is not the Constitution but Article 3 of the Compact itself, which provides that the Compact shall not be construed to infringe the sovereign rights of member States. In other words, reading Article 7(F) to limit the Commission's sanctions authority to revocation of membership and lesser included measures of the same

genus does not depend on some external source of respect for state sovereignty. Rather, this construction merely reflects the Special Master's interpretation of the Compact as a whole.

Viewing the Compact in its entirety, the Special Master believes that the Compact does not authorize the Commission to impose monetary sanctions against party States, and that the Plaintiffs' Motion for Summary Judgment should therefore be denied. Article 4(E) of the Compact sets forth the powers and duties of the Commission. Perhaps the most relevant provision is Article 4(E)(7), which empowers the Commission to designate a host State for the establishment of a new regional facility. That section specifically authorizes the Commission "to revoke the membership of a party State that willfully creates barriers to the siting of a needed regional facility." Compact, Art. 4(E)(7). In other words, if a party State is chosen to be a host State and willfully impedes completion of a new facility, then the Commission may revoke its membership. The other relevant provision of Article 4 is section (E)(11), which authorizes the Commission "[t]o revoke the membership of a party State in accordance with Article VII(f)." Compact, Art. 4(E)(11).

Conspicuously absent from Article 4—the article defining the powers of the Commission—is any mention of monetary sanctions. As discussed, this omission is significant because Article 3 requires the Compact to be construed to preserve the sovereign rights of the States. This omission is also noteworthy because other regional compacts approved by

Congress at the same time as the Southeast Compact expressly provide for monetary sanctions. For example, the Northeast Compact authorizes the compact commission to “impose sanctions, including but not limited to, fines, suspension of privileges and revocation of the membership of a party state.” Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. IV(I)(14), 99 Stat. 1915. In addition, the Central Midwest Compact empowers the compact commission to impose on a host State that withdraws before fulfilling its obligations “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.” Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(f), 99 Stat. 1891. *See also* Central Interstate Low-Level Radioactive Waste Management Compact, Art. VII(e)(14), 99 Stat. 1870 (authorizing compact commission to require specific monetary payments as a sanction for non-compliance or failure to fulfill compact obligations).

Because the Southeast Compact was approved at the same time as these compacts, both Congress and the compacting States were presumably aware of the differing sanctions regimes established by the various compacts. The Southeast Compact’s failure to include a provision expressly authorizing monetary sanctions contrasts sharply with other compacts and counsels against finding such power in the Southeast Compact.

The Supreme Court faced a similar question in *Texas v. New Mexico*, 462 U.S. 554 (1983). There, the Court considered whether the Pecos River Compact should be interpreted to give a federal representative a vote on the Pecos River Commission. The Court held that it should not, in part because “[o]ther interstate compacts, approved by Congress contemporaneously with the Pecos River Compact, allow federal representatives a vote on compact-created commissions.” *Id.* at 565. The Court concluded that the “Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it.” *Id.*

The Plaintiffs attempt to distinguish *Texas v. New Mexico* on the ground that in several other cases, the Supreme Court has ordered monetary relief for breach of a Compact even though the Compact did not expressly authorize such relief against a party State. *See* Pl. Reply in Support of Mot. for S.J. at 13 (*citing Texas v. New Mexico*, 482 U.S. 124, 130 (1987), and *Kansas v. Colorado*, 533 U.S. 1, 11 (2001)). The Plaintiffs, however, are conflating two distinct questions. The question raised by the Plaintiffs’ motion is whether the Compact authorized *the Commission* to impose monetary sanctions on a member State. The cases cited by the Plaintiffs do not address this question. Rather, they merely establish the unexceptionable proposition that the Supreme Court, in the exercise of its original jurisdiction, may award money damages against a State for breach of a Compact in appropriate circumstances. Thus, the conclusion that the Compact does not au-

thorize the Commission to award money damages leaves open the possibility that the Court may ultimately award such damages in this case as part of an appropriate judicial remedy.

Finally, the Plaintiffs suggest that the Commission's interpretation of the Compact should receive deference similar to that given by courts to agency interpretations of statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The analogy is unpersuasive for several reasons. First, the Supreme Court has previously rejected the contention "that this Court may do nothing more than review official actions of . . . [a Compact] Commission, on the deferential model of judicial review of administrative action by a federal agency." *Texas v. New Mexico*, 462 U.S. at 566. Second, *Chevron* deference applies only when a statute is ambiguous—that is, when traditional tools of statutory construction do not yield a clear answer. *Chevron*, 467 U.S. at 843 n.9. Here, interpreted correctly, the Compact does not give the Commission authority to impose monetary sanctions on member States.

Third, the theory underlying *Chevron* deference is that Congress has implicitly assigned policymaking discretion to agencies rather than courts to resolve statutory ambiguities within a permissible range. Under these circumstances, courts defer to reasonable agency interpretations in order to respect Congress's institutional preferences. There is no reason to believe that the compacting States or Congress sought to assign this type of dis-

cretion to the Commission in this case. To the contrary, Article 3 of the Compact suggests that the parties to the Compact preferred to retain their sovereign rights, including their right to have the Supreme Court exercise independent judgment concerning the meaning and application of the Compact. Fourth, *Chevron* deference would be particularly inappropriate in this context because the Commission is a party to the case and stands to benefit financially from its own interpretation. In sum, although the Commission's views may provide some guidance as to the proper interpretation of the Compact, they cannot take the place of the independent judicial judgment to which the States are entitled under the Constitution.

For the foregoing reasons, the Special Master concludes that the Compact does not authorize the Commission to impose monetary sanctions on member States.

B. North Carolina's Withdrawal from the Compact

The Plaintiffs' Motion for Summary Judgment should also be denied because North Carolina withdrew from the Compact before the Commission voted to impose sanctions. The Plaintiffs maintain that the Commission's jurisdiction to sanction the conduct of a member State (such as North Carolina) is unaffected by the State's withdrawal from the Compact. In support of their position, the Plaintiffs rely again on Article 7(F), which provides:

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.

Compact, Article 7(F). In addition, the Plaintiffs contend that the Compact makes clear that a member State cannot escape its obligations by simply withdrawing from the Compact. *See id.* (“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.”).

North Carolina, by contrast, contends that it was free to withdraw from the Compact at any time before the Commission imposed its sanction. Article 7(G) of the Compact provides in pertinent part: “Subject to the provisions of Article VII section (h), any party state may withdraw from this compact by enacting a law repealing the compact” Compact, Art. 7(G). North Carolina enacted such a law and thus maintains that the Commission lacked jurisdiction over North Carolina after that date. Specifically, North Carolina argues that it was no longer a “party state” and thus no longer subject to sanctions by the terms of the Compact. North Carolina also points out that other regional compacts, adopted contemporaneously with the Southeast Compact,

expressly limit the right to withdraw in several ways.

For example, some compacts authorize imposition of sanctions on States even after they have withdrawn. *See* Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(d), 99 Stat. 1880, 1891 (1986) (“Withdrawal does not affect any liability . . . chargeable to a party state prior to the time of such withdrawal.”); Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1892, 1900 (1986) (same); Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(h), 99 Stat. 1909, 1922 (1986) (“No withdrawal shall affect any liability . . . chargeable to a party state prior to that time.”). Other compacts declare that such withdrawals are not effective for a specified period of time. *See* Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(d), 99 Stat. 1880, 1891 (1986) (stating that “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 Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1892, 1900 (1986) (same). The presence of these express limitations on withdrawal in other “interstate compacts, approved by Congress contemporaneously” with the Southeast Compact, suggests that such limitations should not be read into the Compact. *See Texas v. New Mexico*, 462 U.S. at 565.

In addition, the Southeast Compact contains an express provision restricting the right to withdraw, but it applies only after the second host State begins operating its disposal facility. Article 7(H) provides:

The right of a party state to withdraw pursuant to Article VII section (g) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress.

Compact, Art. 7(H). This provision was added at the suggestion of North Carolina after it was chosen to be the second host State.⁷ The negative implication of this provision, read in conjunction with Article 7(G), is that party States remained free to withdraw from the Compact at all times prior to the opening of the second waste disposal facility.

⁷ The evident purpose of this provision was to protect North Carolina after it became a host State. Restricting the States' right to withdraw would ensure that North Carolina had a steady stream of customers for its facility, which would help it recover development and construction costs. In addition, restricting the party States' right to withdraw would ensure that the State chosen to be the third host State could not withdraw after enjoying the right to dispose of its waste at the second host State's disposal facility.

Finally, the conclusion that party States may withdraw from the Compact and escape further sanctions by the Commission must be viewed in connection with the limited nature of the express sanctions available under the Compact. As discussed, the only sanctions expressly mentioned by the Compact are revocation of the membership of a party State and suspension or limitation of a party State's rights under the Compact. Under these circumstances, it is not surprising that the Compact does not generally limit a party State's right to withdraw. Once a State withdraws, it has effectively imposed upon itself the most severe sanction available to the Commission—loss of membership as a party State. Conversely, as one might expect, regional compacts that expressly authorize monetary sanctions also expressly limit the right to withdraw from the compact.

For example, the Central Midwest Compact authorizes its Commission to impose as a sanction on a host State that withdraws without fulfilling its obligations "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." Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII (f), 99 Stat. 1891. At the same time, the Central Midwest Compact expressly provides that "[w]ithdrawal does not affect any liability . . . chargeable to a party state prior to the time of such withdrawal." *Id.* In other words, compacts such as the Central Midwest Compact that authorize non-rights-

based sanctions such as fines also limit withdrawal, whereas compacts such as the Southeast Compact that authorize only rights-based sanctions do not similarly limit withdrawal. Reading the sanctions and withdrawal provisions of the Southeast Compact together, moreover, makes sense because these provisions are both found in the same Article of the Compact.

For the foregoing reasons, the Special Master concludes that North Carolina was not subject to the sanctions authority of the Commission because it withdrew from the Compact before sanctions were imposed.

C. Waiver

Finally, the Plaintiffs maintain that North Carolina waived its right to contest the legality of the Commission's sanctions order by refusing to participate in the sanctions hearing. This suggestion is unpersuasive. Had the Compact clearly authorized the Commission to impose monetary sanctions and to restrict a party State's right to withdraw, perhaps North Carolina could have been found to have waived its right to contest such a sanction by failing to appear before the Commission. The Court need not reach this question, however, because the Southeast Compact contained no such express provisions.

North Carolina withdrew from the Compact in accordance with Article 7(G) and had no reason to participate in the Commission's subsequent proceedings. As North Carolina (correctly) interpreted the Compact, there was no need for a sanctions hearing.

The most severe sanction that the Commission was authorized to impose was revocation of North Carolina's status as a party State. Because North Carolina had already withdrawn from the Compact, it had no reason to contest the imposition of this sanction. If a State is to be deprived of its right to contest enforcement of a sanctions order, the Compact must at least provide clear and unambiguous notice of what is at stake in the proceedings. North Carolina's withdrawal from the Compact, however, does not mean that the Plaintiffs lack alternative means of asserting their claims. They have sued North Carolina in the original jurisdiction of this Court, and North Carolina's withdrawal from the Compact does not affect its potential liability in this forum. *See Part IV, infra.*

For the foregoing reasons, the Special Master recommends that the Plaintiffs' Motion for Summary Judgment be denied.

IV. North Carolina's Motion to Dismiss the Complaint

North Carolina moves to dismiss the Bill of Complaint for failure to state a claim upon which relief can be granted. North Carolina offers three grounds in support of its motion. First, North Carolina contends that the Commission's sanctions order cannot be enforced because it was no longer a party to the Compact when the sanctions were imposed. Second, North Carolina maintains that the sanctions order cannot be enforced because the Compact does not authorize the Commission to impose

monetary sanctions. Third, North Carolina argues that the Plaintiffs' rights against it arise solely out of the terms of the Compact and that the Plaintiffs cannot seek a judicial remedy beyond the remedies prescribed by the Compact.

North Carolina's first two arguments have already been discussed in connection with the Plaintiffs' Motion for Summary Judgment. *See* Part III, *supra*. These grounds suffice to deny the Plaintiffs' request for summary enforcement of the Commission's sanctions order. At the same time, they support North Carolina's motion to dismiss some of the relief requested by the Plaintiffs in their complaint. Specifically, the Bill of Complaint requests that the Court declare that North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decisions, notwithstanding North Carolina's withdrawal from the Compact. In addition, the Bill of Complaint requests that the Court declare that the sanctions against North Carolina imposed by the Commission are subject to enforcement. Because the Compact does not authorize the Commission to impose monetary sanctions and because North Carolina withdrew from the Compact before sanctions were imposed, the Special Master recommends that those portions of the Bill of Complaint requesting enforcement of the Commission's sanctions order be dismissed.

These two grounds, however, do not support dismissal of the remainder of the Bill of Complaint. In addition to seeking enforcement of the Commission's sanctions order, the Plaintiffs assert various

legal and equitable claims against North Carolina, including violation of the Compact, breach of contract, unjust enrichment, promissory estoppel, and money had and received. In connection with these claims, the Plaintiffs seek such damages, costs, and further relief as the Court deems just and proper. North Carolina's third ground in support of its motion attempts to justify dismissal of these claims.

In moving to dismiss the Bill of Complaint, North Carolina maintains that the Supreme Court has no more authority to award monetary remedies than did the Commission in the first instance because such remedies would be at odds with the Compact's express provisions. There are essentially two steps in North Carolina's argument. First, North Carolina asserts that the Plaintiffs' claims arise solely and entirely out of North Carolina's alleged failure to fulfill its obligations under the terms of the Compact. Second, North Carolina contends that the Compact's clearly prescribed remedies—suspension and revocation of rights—are the exclusive remedies available to the Plaintiffs in this original action because “no court may order relief inconsistent with [a compact's] express terms, no matter what the equities of the circumstances might otherwise invite.” *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (internal quotations omitted). Neither proposition withstands analysis.

With respect to North Carolina's first ground, it is not clear that all of the Plaintiffs' claims arise solely and entirely out of North Carolina's obligations under the Compact. Some do. For example,

Count I of the Bill of Complaint alleges that North Carolina violated the Compact by failing to fund, license, construct, and operate a regional disposal facility after it was designated as a host State. Similarly, Count II restates essentially the same claim as a breach of contract claim. The Plaintiffs' other claims, however, do not necessarily arise out of North Carolina's obligations under the Compact. Counts III and IV, in particular, may be construed to allege that the Commission provided North Carolina with close to \$80 million in exchange for North Carolina's express or implied promise to construct and operate a regional disposal facility.

North Carolina has acknowledged—both in its briefs and at oral argument—that the Commission was not required to provide such funding under the terms of the Compact. Thus, arguably North Carolina's acceptance of these funds from the Commission signified its agreement to forego its right to withdraw under the Compact before building and operating a regional disposal facility. On this account, even if North Carolina were free to withdraw from the Compact after being designated a host State, it arguably was no longer free to do so after it accepted funding from the Commission. In other words, depending on the facts and circumstances, North Carolina and the Commission may have entered into a supplemental agreement under which both parties undertook obligations beyond the original terms of the Compact. Further proceedings are needed to determine (1) whether the parties intended to make such an agreement, (2) the precise

terms of any such agreement, and (3) whether the terms of the agreement provide a sufficiently certain basis for determining whether a breach has occurred and the nature of an appropriate remedy. *See Texas v. New Mexico*, 482 U.S. 124, 129 (1987). For these reasons, dismissal of the Bill of Complaint would be premature at this stage of the proceedings.

With respect to North Carolina's second ground, the Compact remedies (suspension and revocation of rights) are not the only ones that the Supreme Court may impose in the event that it finds North Carolina to have breached its obligations under the Compact. North Carolina quotes language from *New Jersey v. New York*, but that decision does not support its position. The case concerned the interpretation of an 1834 compact between New York and New Jersey fixing the boundary between the two States as the middle of the Hudson river except as otherwise provided therein. 523 U.S. at 773. One of the exceptions was that New York would retain jurisdiction over Ellis Island, then consisting of only three acres. *Id.* After the United States began using the Island to receive immigrants in 1891, it gradually expanded the Island by adding 24.5 acres to the original Island. Although this filled land fell on the New Jersey side of the boundary, New York continued to assert jurisdiction over the entire Island. New Jersey sued to settle the question and the Court found that New York has jurisdiction only over the original portion of the Island and that New Jersey has jurisdiction over the remainder.

In the course of this litigation, New Jersey challenged the Special Master's recommendation that the boundary between the two States be adjusted "for reasons of practicality and convenience." *Id.* at 810. The Supreme Court agreed with New Jersey that it lacked authority to adjust the boundary, *id.*, even though adhering to the precise boundary set forth in the compact would divide "not just an island but some of the buildings on it" as well. *Id.* at 811. It was in this context that the Court declared: "[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms,' no matter what the equities of the circumstances might otherwise invite." *Id.* at 811 (citation omitted) (quoting *Texas v. New Mexico*, 462 U.S. at 564). Because a "fair construction" of the 1834 compact "calls for a line so definite," *id.*, the Court could not alter the line without contradicting the express requirements of the compact.

Here, by contrast, there is no similar conflict between the express terms of the Compact and the relief requested by the Plaintiffs. The Southeast Compact authorizes the Commission to sanction member States by suspending or revoking their rights under the Compact. It contains no provision, however, limiting *judicial* enforcement of the Compact or the imposition of appropriate judicial remedies. In this regard, the case is similar to *Texas v. New Mexico*, the original source of the language quoted by North Carolina. Texas and New Mexico entered into a compact to apportion the waters of the

Pecos Basin. The compact established a commission to administer the compact, consisting of two voting members (one from each State) and a non-voting member appointed by the United States. After the Commission deadlocked, Texas invoked the original jurisdiction of the Supreme Court and sought a decree commanding New Mexico to deliver water in accordance with the compact. New Mexico contended that the Court had no authority to act *de novo* or supplant the decisions of the commission. The Court disagreed, noting that “the mere existence of a compact does not foreclose the possibility that we will be required to resolve a dispute between the compacting States.” 462 U.S. at 568.

The Court acknowledged that parties to an interstate compact may establish a commission “to be the exclusive forum for disputes between the States,” *id.* at 569, but it stated that they must make their intention to do so clear. According to the Court: “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. In that case, the Court retained jurisdiction and proceeded to the merits because “the express terms of the Pecos River Compact do not constitute the Commission as the sole arbiter of disputes between the States over New Mexico’s [compact] obligations.” *Id.* at 569.

Like the Pecos River Compact, the Southeast Compact does not establish the Commission as the exclusive arbiter of disputes among the party States over their rights and obligations under the Compact. Rather, it merely allows the Commission to further the goals of the Compact by suspending and revoking the membership rights of party States. If the Plaintiffs feel that these sanctions are inadequate to redress North Carolina's alleged violation of the Compact, then they remain free to pursue appropriate judicial remedies. *See Texas v. New Mexico*, 482 U.S. at 130 (recognizing "the propriety of money judgments against a State in an original action" even when the applicable compact lacks a "specific provision for a remedy in case of breach").

Further proceedings are necessary to determine whether North Carolina in fact breached its obligations under the Compact. At a minimum, the parties appear to agree that the Compact required "a good faith effort by North Carolina to site, license and construct a facility, consistent with the environmental, safety, and health requirements of the citizens of the State." N.C. Opp. to Pl. Mot. for S.J. at 38. North Carolina maintains that it acted in good faith, while the Plaintiffs "dispute North Carolina's good faith and allege that its bad faith conduct breached the Compact." Pl. Reply in Support of Mot. for S.J. at 22. The parties also disagree over whether North Carolina had any implied obligation under the Compact not to withdraw after being selected as a host State, and when if ever such an obligation attached. Further proceedings are also necessary to

evaluate the merits of the Plaintiffs' claims of unjust enrichment and money had and received. These claims appear to be based on a theory of restitution rather than a separate agreement.

In addition, to the extent that the Plaintiffs are alleging claims that arise outside the Compact, they are presumably free to pursue such claims in an original action such as this one. Of course, to the extent that the parties allege that North Carolina and the Commission entered into some kind of supplemental agreement outside the Compact, they may face a variety of legal and practical hurdles in seeking relief based on any such agreement. At this stage of the proceedings, however, no reason appears why such claims must be dismissed as a matter of law.

Further proceedings are necessary to determine whether North Carolina and the Commission entered into any supplemental agreement outside the four corners of the Compact, the precise terms of any such agreement, and whether either party breached the agreement. For example, the Plaintiffs have suggested that North Carolina promised not to withdraw from the Compact before completing a regional facility in exchange for the Commission's promise to provide additional funding. North Carolina has suggested something similar: "The recovery sought by the Commission is based on an entirely extra-contractual arrangement between North Carolina and the Commission," which is independent of North Carolina's "actual Compact obligations to the other compacting States." N.C. Reply Br. in Sup-

port of Mot. to Dismiss Complaint at 23. These suggestions raise several legal and factual questions that cannot be resolved without further proceedings.

With respect to any claims that arise outside the Compact, North Carolina renews its Eleventh Amendment objection. According to North Carolina, only the Commission—as opposed to the States—provided funds to North Carolina for which repayment could be made. Thus, according to North Carolina, only the Commission could seek restitution of these funds. If that is the case, then the Commission is asserting a claim that the States cannot assert on their own behalf, which in turn triggers Eleventh Amendment concerns. *See Part II, supra.* The Plaintiffs counter that under the terms of the Compact, the funds provided to North Carolina by the Commission “represent the financial commitments of all party states to the Commission.” Compact, Art. 4(H)(2)b. Accordingly, the Plaintiffs maintain that the States have the right to seek repayment of such funds to the Commission because such repayment will inure to the benefit of the member States. At least at this stage of the proceedings, North Carolina has not shown that the States cannot assert this claim as a matter of law.

For the foregoing reasons, the Special Master recommends that North Carolina’s Motion to Dismiss the Bill of Complaint be granted solely with respect to the Plaintiffs’ request that the Court declare that North Carolina is subject to the jurisdiction of the Commission and that the Commission’s sanctions order against North Carolina be enforced.

With respect to the remainder of the Bill of Complaint, the Special Master recommends that the motion be denied.

V. Conclusion

The Special Master recommends that North Carolina's Motion to Dismiss the Commission be denied, that the Plaintiffs' Motion for Summary Judgment be denied, and that North Carolina's Motion to Dismiss the Bill of Complaint be granted in part and denied in part.

Respectfully submitted,

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