IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

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| THE GILLETTE COMPANY & SUBSIDIARIES,<br>Plaintiffs & Appellants,<br>v.<br>CALIFORNIA FRANCHISE TAX BOARD, AN AGENCY OF THE STATE OF CALIFORNIA,<br>Defendant and Respondent. | Case No. A130803 |

San Francisco County Superior Court, Case No. CGC-10-495911
[Consolidated Case Nos. CGC-10-495912; CGC-10-495916; CGC 10-496437; CGC-10-496438; CGC-10-499083]
Honorable Richard A. Kramer, Judge

# BRIEF OF THE MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT AND RESPONDENT

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## INTEREST OF THE AMICUS

*Amicus curiae* Multistate Tax Commission respectfully submits this brief in support of the California Franchise Tax Board.[1] California's adoption of a mandatory double-weighted sales factor[2] is wholly consistent with the terms of the Multistate Tax Compact,[3] which accords its members flexibility to vary – directly or indirectly – from Compact Articles III.1 and IV. It is the compact members themselves who determine any limitations on that flexibility, consistent with the purposes of the Compact. And the members have indicated by their course of performance that the California legislation is compatible with those purposes.

The Commission is the administrative agency for the Compact, which became effective in 1967 when the required minimum of seven states had enacted it. The United States Supreme Court upheld the validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), and today forty-seven states and the District of Columbia participate in the Commission's activities. Twenty of those jurisdictions

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the state of California.

[2] Calif. Rev. & Tax. Code § 25128(a).

[3] Multistate Tax Compact, RIA State & Local Taxes: All States Tax Guide (2005); The Model Multistate Tax Compact can be found at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf.

adopted the Compact by statutory enactment. Six are sovereignty members. Another twenty-two are associate members.[4]

The stated purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation.[5]

These purposes are central to the very existence of the Compact, which was the states' answer to an urgent need for reform in state taxation of interstate commerce.[6] If the states failed to act, Congress stood ready to impose reform through federal legislation that would preempt and regulate important aspects of state taxation. Preserving state tax

[4] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, New Jersey, South Carolina, and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming.

[5] Multistate Tax Compact, Art. I.

[6] *See, H.R. Rep.* No. 89-952, Pt. VI, p. 1143 (1965) and *Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966), illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax.

sovereignty under our vibrant federalism remains a key purpose of the Compact and the Commission.

The Commission's interest in this case arises directly from the Compact's purposes of promoting uniformity and preserving member states' sovereign authority to effectuate their own tax policies. Our interest is particularly acute because the achievement of those purposes is being challenged, perversely, on the basis of the Compact itself. As the administrative agency for the Compact, the Commission is uniquely situated to inform the Court regarding a proper interpretation of this Compact and the course of performance of its members. *We interpret the terms of the Compact to allow for the flexibility which the state of California has exercised.* That interpretation is supported by the course of performance of the other Compact members, consistent with the purposes of the Compact, the holdings of the United States Supreme Court, and compact jurisprudence from other federal and state courts. To hold otherwise would have the contrary effect of frustrating the very purposes that the Compact is intended to promote.

## INTRODUCTION

In 1993, when the California Legislature determined that the state's corporate taxpayers must apportion their income using a double-weighted sales factor, California joined a nation-wide transition away from an equal-weighting of the property, payroll, and sales factors and toward an emphasis on the sales factor in state apportionment formulas. Today, thirty-nine of forty-seven states with a corporate income tax at least

double-weight the sales factor.[7] The question we address is whether the Multistate Tax Compact adopted by California affords the flexibility to participate in this nation-wide trend, and to accomplish its legislature's objectives, consistent with the Compact's purposes of preserving state sovereignty and promoting uniformity. The answer is that it does.

In the early days of corporate income taxes, a myriad of different apportionment methodologies were in use by the states. The Uniform Law Commission had promulgated the model Uniform Division of Income for Tax Purposes Act (UDITPA), which includes the equal-weighted formula, in 1957, but states were not rushing to adopt it.[8] Then, in 1959, the United States Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), holding that a small sales force office in a state is a sufficient presence to establish nexus in that state.[9] The decision created turmoil among multistate taxpayers. Within seven weeks, Congress was holding hearings, and in just over six months it had passed P.L.86-272, which restricted the application of *Northwest States Portland Cement Co.* and created a Special

[7] *State Apportionment of Corporate Income;* Federation of Tax Administrators http://www.taxadmin.org/Fta/rate/apport.pdf .

[8] Uniform Division of Income for Tax Purposes Act, 7A part 1 West's Uniform Laws Annotated (2002) page 141.

[9] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, commonly called the Willis Committee, to study state business taxes.[10]

The Willis Committee performed an extensive study and found that although "each of the state laws contains its own inner logic, the aggregate of these laws – comprising the system confronting the interstate taxpayer – defies reason."[11] The Committee found the benefits of increased uniformity so compelling that it recommended federal legislation to, among other things, establish a uniform state income tax base (federal AGI) and a uniform state apportionment formula (equal-weighted two-factor formula based on property and payroll) – both of which are fundamental aspects of a state tax policy, the federal pre-emption of which would comprise a significant affront to state tax sovereignty.[12]

The states rallied to stave off federal intervention and protect their sovereignty. Many adopted UDITPA directly into their statutes. Some enacted the Multistate Tax Compact, Article IV of which incorporates UDITPA nearly word for word. And some,

[10] PUB. LAW 86-272, TITLE II, 73 STAT. 555 (1959). *See,* Fatale, Michael T.; *Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272*; Virginia Tax Review, Volume 21, No. 4, pp. 475-476 (spring 2002).

[11] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1143 (1965). The Willis Committee's study was sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959), to consider additional issues surrounding adoption of that Act.

[12] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).

like California, did both. The California legislature enacted UDITPA in 1966 and the Multistate Tax Compact in 1974.[13]

By 1978, the U.S. Supreme Court recognized that the equal-weighted formula was "the prevalent practice,"[14] and a "rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates."[15] But at the same time the Court recognized that "political and economic considerations vary from state to state," and that states may constitutionally address those considerations by requiring alternative factor weightings.[16] Over time, the states have done so. And while they have moved away from requiring the equal-weighted formula, they have moved in a decidedly uniform manner: by emphasizing the sales factor.

Today, 39 of the 47 states with a corporate income tax at least double weight the sales factor.[17] Only eight states exclusively require the equal-weighted formula.[18] Among compact members, the movement is the same. Only seven of the twenty compact

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[13] Cal. Stats 1966 ch 2 §7. Calif. Rev. & Tax. Code §§ 25120-25139. Calif. Rev. & Tax. Code § 38006. *et seq.*

[14] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

[15] *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 561 (1983).

[16] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

[17] *State Apportionment of Corporate Income;* Federation of Tax Administrators http://www.taxadmin.org/Fta/rate/apport.pdf

[18] *Id.*

members continue to require an equal-weighted formula.[19] Ten require at least a double-weighted sales factor.[20]

Furthermore, virtually all compact members have managed this movement away from equal-weighting in a manner that does not permit an Article III.1 election. Only one compact member currently recognizes the election.[21] Three compact members have eliminated or limited the election directly.[22] Three have amended Article IV to be consistent with their statutory apportionment formula that emphasizes the sales factor.[23] Four, including California, have indicated by separate statute or law that the compact election does not apply to factor-weighting.[24] And the remaining members require an

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[19] *Id.* Alaska, District of Columbia, Hawaii, Kansas (a single sales factor election is available only for "qualified taxpayers," K.S.A. 79-3279(b)(2)), Montana, New Mexico, and North Dakota.

[20] *Id.* Alabama (House Bill amended Code of Ala. § 434 40-27-1 for tax years beginning after December 31, 2010), Arkansas, California, Colorado, Idaho, Michigan, Minnesota, Oregon, Texas, and Utah. One compact member, Missouri, allows an election between equal-weighting and separate accounting. The remaining two members, Washington and South Dakota, joined the Compact despite the fact they have not imposed a corporate income tax. The Franchise Tax Board notes in its brief that members have also diverged from the Compact in other ways. Respondent's Brief at 19-24.

[21] Missouri Rev. Statutes § 32.200.

[22] Colorado (C.R.S. §§ 39-22-303.5 and 39-22-303.7); Minnesota (Minn. Statutes § 290.171); Michigan (as applied to the Michigan Business Tax after January 1, 2011; MCL 205.581; *See,* H.B. 4479 (2011)).

[23] Alabama (Code of Ala. § 434 40-27-1), Arkansas(Ark. Code § 26-5-101), Utah (Utah Code § 59-1-801.IV.9)

[24] California (Calif. Rev. and Tax. Code § 25128(a)), Idaho (Idaho Stat. § 63-3027(i)), Oregon (O.R.S. §§ 314.606), Texas (letter ruling 201007003L).

equal-weighted factor, identical to the Compact, such that the election is of no consequence.[25]

The compact members clearly interpret their agreement to allow for these adjustments. And, as explained in detail below, that interpretation is appropriate in accordance with laws of statutory and contract construction. The Compact's own terms suggest that its members are accorded the flexibility to vary – directly or indirectly – from compact provisions. This result is consistent with the stated purposes of the Compact, among them promoting uniformity and preserving state sovereignty, including uniformity and sovereignty with respect to state policy choices such as factor weighting and elections. This interpretation and its result is also consistent with the conclusions reached by the United States Supreme Court in *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), and compact jurisprudence from other federal and state courts.

To the extent there may be limitations on the exercise of this flexibility, we ask the court to recognize that it is the members of the agreement themselves who make that evaluation. The touchstone is that, when viewed as a whole, a state's enactment remains substantially supportive of the Compact's purposes. Ensuring that the purposes are met ensures that the benefits other members expected when entering the Compact will continue to be received. And, in the case of California's 1993 legislation, the members have long indicated by their course of performance that the Compact's purposes continue to be met, and their expected benefits continue to be received.

[25] Alaska, D.C., Hawaii, Kansas, Montana, New Mexico, North Dakota; *supra,* fn.17.

## ARGUMENT

### 1. The Compact Affords its Member States the Flexibility to Adopt Apportionment Formulae that Vary From its Terms.

In joining the Compact, the members did not surrender any aspect of state sovereignty to tax. Indeed, that was one of the primary reasons the United States Supreme Court ruled that the Compact did not require Congressional approval under the Compact Clause.

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission.

*U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 473 (1978). In construing the members' powers under the terms of the Compact, it is thus important to keep in mind that the members exercise sovereign control over their tax laws and exercise their powers precisely as they would in the Compact's absence.

A statutory interpretation of the Compact's terms begins in the same way interpretation of any other statute begins: with its plain meaning.[26] Importantly, the language contains no prohibition against members' varying from the model Compact's provisions. Rather, the plain meaning of the Suggested Enabling Act's introduction, the

[26] "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." *Green v. State of California,* 42 Cal.4th 254, 260, 64 Cal. Rptr.3d 390, 165 P. 3d 118 (2007); *see also Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 567, 67 Cal.Rptr. 3d 468, 169 P.3d 889 (2007).

Suggested Enabling Act, and the Compact itself, all support the ability of Compact members to exercise some degree of flexibility in the enactment of its provisions.[27]

The Suggested Enabling Act's introduction clearly indicates that the Compact was not designed to lock its members into a system where no one member could make changes without all members doing the same. The introduction states, "[t[he Multistate Tax Compact is a model law. … [It] is not truly a Compact in that actions taken under its authority have only an advisory and/or recommendatory effect on its member states."[28]

Section 1 of the Suggested Enabling Act, as well as the same section of the California Enabling Act,[29] contains ample evidence of this flexibility by declaring that "[t]he 'Multistate Tax Compact' is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form *substantially* as follows …" [emphasis added]. By their own terms, neither the Suggested Enabling Act nor California's adopted Enabling Act require member states to enact the model Compact verbatim. And many

[27] The Multistate Tax Compact Suggested Legislation and Enabling Act is available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/About_MTC/MTC_Compact/COMPACT(1).pdf (last visited November 8, 2011). The use of the term "suggested" in the title supports the Commission's position that the compact does not require its members to act in lockstep.

[28] Taxpayers attempt to limit this language to the associate members of the Commission. Appellants' Reply Brief at 16 – 17. Such an interpretation is nonsensical. The "model Compact" is the version developed by the drafters as a model for states that wish to join the Compact by enacting it "in substantially similar form." (Enabling Act, § 1) The associate members, by definition, have not enacted any version of the model Compact.

[29] Calif. Rev. & Tax. Code §38001.

compact members have indeed varied – directly or indirectly – from the model Compact's provisions.[30]

As Article I.2 of both the model Compact and the enacted California compact statute recognize, the Compact is designed "to *promote* uniformity *or compatibility*" in tax systems (emphasis added).[31] "Promote" is defined as "to forward; to advance; to contribute to the growth, enlargement, or excellence of."[32] Enactment, by itself, is not expected to *achieve* uniformity in any particular component of tax systems, including uniformity in apportionment formulae or elections among the member states. Rather, enactment is intended to create the forum by which members may work to advance the growth and enlargement of uniformity or compatibility in their tax systems.[33]

Additional evidence that the compact anticipates some variation among its members is found in Art. VII.1, which provides;

> Whenever any two or more party States or subdivisions of party States have *uniform or similar* provisions of law relating to an income tax … the Commission may adopt uniform regulations *for any phase* of tax

[30] Respondent's Brief at 19-24.

[31] Calif. Rev. & Tax. Code § 38006, I.2

[32] Webster's New Universal Unabridged Dictionary, Deluxe 2d Edition.

[33]Pursuant to the provisions of Articles VI.3(b) and VII of the compact, the Commission works to advance uniformity through the ongoing work of its Uniformity Committee. The two subcommittees of the Uniformity Committee – one for corporate income tax and the other for sales and use tax – continuously work to draft model uniform statutes and regulations for the states to consider. The MTC model statutes and regulations are advisory only. Articles VI.3(b) and VII. They provide a framework for the member states to design their tax systems with a view to making them more uniform. For a compilation of the Commission's completed uniformity projects, see http://www.mtc.gov/Uniformity.aspx?id=524.

> administration of such law… The Commission may also act with respect to the provisions of Article IV of this compact. [Emphasis added.]

Art. VII.1 authorizes the Commission to initiate a uniformity project when two or more party States have *similar* provisions of law regarding *any phase* of tax administration, and permits it to act with respect to the provisions of Article IV of the Compact. Article VII.1 is not limited to instances in which the Compact provisions are uniform. It expressly contemplates invoking the uniformity process when states have apportionment formulae that are similar to, but not necessarily uniform with, that contained in Article IV. Article VII.1 contemplates situations where state enactments of certain compact provisions will be similar to, but not identical with, the provisions of the model Compact. Thus Article VII.1 also indicates that some variation from the model Compact is anticipated.

The model Compact's severability provision in Article XII also demonstrates the value placed on inclusiveness over standardization.[34] Article XII provides:

> If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States *and in full force and effect as to the State affected as to all severable matters.* [emphasis added.]

Under this severability provision, the Compact continues in full force in a particular member state even if some of its provisions are found to be unconstitutional in that state. A legislature's decision to include such a clause in a statute is evidence of the legislature's intent that the remaining portions of the statute should stand if the court declares some of its provisions to be unconstitutional or otherwise invalid. The inclusion

[34] Calif. Rev. & Tax. Code § 38006, XII.

of a severability clause in the model Compact indicates the intent that a member state remain a compact member even if its Compact provisions ultimately vary from the model Compact. If the intent were otherwise, a severability clause would not have been included. If any one compact provision were truly critical, the model Compact may well have included a *nonseverability* clause instead.

Given that Article XII of the model Compact requires it to be "liberally construed so as to effectuate [its] purposes," the inherent flexibility suggested by its plain meaning should be given weight, and it should not be construed in a rigid or frozen manner. If the only options available to a state that needs to depart from the Compact's equally weighted apportionment formula are to withdraw, acquiesce in a provision that is contrary to the state's needs, or convince every other state – including states whose needs may be quite different – to amend their enacted versions of the Compact, the Compact could not long endure and its purposes would be entirely frustrated. The Compact does not require such a draconian set of choices.

**2. The Compact Members Have Indicated by Their Course of Performance that California's 1993 Legislation is Fully Consistent with the Flexibility Inherent in the Compact and the Promotion of the Compact's Purposes.**

As far back as the early 1800's, the United States Supreme Court expressly recognized that compacts, even though statutory, are also contractual in nature, stating "… the terms 'compact' and 'contract' are synonymous." *Green v. Biddle*, 8 Wheat. 1, 40 (1823). Thus, in addition to general principles of statutory construction, substantive contract law applies in the interpretation of a compact:

> When adopted by a state, the compact is not only an agreement between the state and other states that have adopted it, but it becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states. 1 A Sutherland, *Statutes and Statutory Construction* §32.5.

Where the issue is the proper interpretation of an interstate compact – an interstate contract – the governing law is state contract law.

Most relevant to this case is the basic premise of contract law that "the parties [to the contract] themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was".[35] Section 2-208 of the Uniform Commercial Code extends this approach by making *course of performance* relevant to determine the meaning of the contract even where the contract's express terms seems clear on their face.[36] In interpreting the obligations of the parties to a compact, courts have long recognized that, as for contracts generally, the actual performance of a compact by the parties has high probative value in determining the scope of those obligations:

> In determining [the meaning of a compact] the parties' course of performance under the Compact is highly significant.

*Alabama v. North Carolina*, 130 S.Ct. 2295, 2309 (2010).

The course of performance doctrine has two material elements, both of which have been satisfied in this case. According to Cal. Comm. Code §1303(a);

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[35] U.C.C. §2-208 cmt. 1 Section 2-208 of the U.C.C. is codified, without substantive change, at Cal. Comm. Code §1303(a).

[36] 1 Hawkland, Uniform Commercial Code ¶2-208:1 (2001).

> A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
>
> (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
>
> (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

Ten Compact members – parties to the contract – have, like California, varied from Articles III.1 and IV by enacting mandatory apportionment formulae other than the Article IV equal-weighted formula.[37] As these enactments are a matter of public record, having been adopted by statute, the other parties to the contract are charged with knowledge of each of these ten occasions.

The Compact member states have had numerous opportunities to object to the adoption of a varying apportionment formula by any or all of the ten states, and have declined to do so. Pursuant to Commission bylaw 6, the Executive Committee of the Commission meets periodically throughout the year.[38] In addition, the Commission itself meets at least once a year.[39] Therefore, the parties to the Compact have had repeated opportunities to object to the adoption by any or all of the ten states of an apportionment formula that precludes a taxpayer from exercising the Article III.1 election. No member state has ever raised such an objection. Indeed, compact members have *supported*

[37] *Supra*, fn. 20. Note that several compact members have also departed from the apportionment provisions of Article IV in ways other than by adopting an apportionment formula that emphasizes sales. Respondent's Brief at 19-24.

[38] Commission bylaw 6 is available at http://www.mtc.gov/About.aspx?id=2232.

[39] Compact, Article VI.1 (e).

California's compact membership by repeatedly electing its representatives to serve as Commission officers and chairs of Commission committees notwithstanding California's 1993 adoption of mandatory double-weighted apportionment.[40]

Thus, compact members' course of performance strongly supports an interpretation of the Compact as sufficiently flexible to recognize California's 1993 legislation as fully consistent with the purposes of the Compact. In contract terms, the promotion of the Compact's purposes is analogous to the benefit the parties expected to receive upon joining the agreement. Many benefits can be expected from the continued participation of a large and influential state such as California. Every additional state enactment of the Compact enlarges the membership of the Commission, broadens the Commission's base with the addition of the views of that state's tax administrator to its deliberations, and increases the weight of the results of those deliberations in the courts and in the Congress. These and other benefits of membership would be frustrated by a rigid and inflexible interpretation of the Compact.

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[40] *E.g.*, Kristine Cazadd, Interim Executive Director of the California State Board of Equalization was elected to serve on the Commission's Executive Committee for FY 2011-2012 (http://www.mtc.gov/About.aspx?id=74 ); Selvi Stanislaus, Executive Director, California FTB, was elected to the Commission's Executive Committee for FY 2007-2008 (MTC Annual Report FY 2006-2007, p. 5, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/AR_FY06_07.pdf ); Will Bush, California FTB was elected to serve on the Commission's Executive Committee in FY 2005-2006 and FY 2006-2007 (MTC Annual Report FY 2004-2005, p.5 http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY04_05.pdf and MTC Annual Report FY 2005-2006, p.4 http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/AR_FY05_06.pdf ).

Taxpayers' argument that members cannot vary from the model Compact derives from compact cases that are not germane to the Multistate Tax Compact. Appellants' Opening Brief at pp. 22-30. First, many of the cases on which taxpayers rely concern congressionally approved compacts. Because a congressionally approved compact is federal law, no state can alter its terms without congressional approval.[41] The Multistate Tax Compact does not require, and has not received, congressional approval. It is therefore not subject to these limitations.[42] Even more fundamentally, the cases which hold that the compacts at issue could not be unilaterally altered, including compacts that do not require federal approval, turned on the fact that the parties to those compacts undertook mutual obligations to each other that were *critical* for the proper function of the compact across state lines. The Port Authority of New York and New Jersey, for example, simply could not maintain bridges and tunnels that connect those two states if one state could unilaterally decide that it will change the rules by which the bridges and tunnels operate. The compact creating the Port Authority, therefore, specifically requires the legislatures of both states to concur in or authorize rules and regulations promulgated by the Port Authority for the improvement of the conduct of navigation and commerce for those rules and regulations to be binding and effective upon all persons affected thereby.[43] Similarly, interstate compacts that provide for the supervision of parolees or

[41] *Cuyler v. Adams,* 443 U.S. 433, 440 (1981).

[42] *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978).

[43] N.J.S.A. 32:1-19.

the placement of children across state lines cannot function if one state could unilaterally change the terms under which it will perform its compact obligations.[44] In contrast, the Multistate Tax Compact allows each member to fully exercise its sovereign power to tax independent of any requirement of concurrence by the other members and with no delegation of power to the Commission to bind the members.[45] The United States Supreme Court has recognized that the rights and obligations of state tax law apply entirely within the jurisdiction of the taxing state, irrespective of the taxpayer's obligations in another.[46] No compact member state has a reliance interest in another state's retaining the Article IV mandatory apportionment formula, which in no way impacts the function of the Compact in another state.

## CONCLUSION

A proper interpretation of the compact, in accordance with laws of statutory and contract construction, indicates member states are accorded flexibility to vary – directly or indirectly – from the model Compact's terms, including Articles III.1 and IV. Ultimately, it is for the parties to the Compact to judge whether its members have exercised the flexibility granted by the Compact in ways that further its objectives. The parties to the Compact have demonstrated throughout their repeated course of

[44] *McComb v. Wambaugh,* 934 F. 2d 474 (3d Cir. 1991), *Doe v. Ward*, 124 F. Supp. 2d 900 (WD Pa. 2000).

[45] *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473 (1978).

[46] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 279 (1978).

performance that the adoption of California's mandatory apportionment formula other than the UDITPA formula that supersedes the Article III election is not an impermissible alteration or amendment of the Compact. The Commission respectfully requests this Court sustain the authority of the members of the Compact to determine its meaning and sustain California's adoption of its apportionment formula as fully consistent with the Compact.

Respectfully submitted this 14th day of November, 2011.

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## Attachment

### STATE APPORTIONMENT OF CORPORATE INCOME

(Formulas for tax year 2011 -- as of January 1, 2011)

| | | | |
|---|---|---|---|
| ALABAMA * | 3 Factor | NEBRASKA | Sales |
| ALASKA* | 3 Factor | NEVADA | No State Income Tax |
| ARIZONA * | Double wtd Sales/80% Sales, 10% Property & 10% Payroll | NEW HAMPSHIRE | Double wtd Sales |
| | | NEW JERSEY | Double wtd Sales |
| ARKANSAS * | Double wtd Sales | NEW MEXICO * | 3 Factor/Double wtd. Sales |
| CALIFORNIA * | Sales/Double wtd Sales (1) | NEW YORK | Sales |
| COLORADO * | Sales | NORTH CAROLINA * | Double wtd Sales |
| CONNECTICUT | Double wtd Sales/Sales | NORTH DAKOTA * | 3 Factor |
| DELAWARE | 3 Factor | OHIO | Triple Weighted Sales (4) |
| FLORIDA | Double wtd Sales | OKLAHOMA | 3 Factor |
| GEORGIA | Sales | OREGON | Sales |
| HAWAII * | 3 Factor | PENNSYLVANIA | 90% Sales, 5% Property & 5% Payroll |
| IDAHO * | Double wtd Sales | | |
| ILLINOIS * | Sales | RHODE ISLAND | 3 Factor |
| INDIANA | Sales | SOUTH CAROLINA | Double wtd Sales/Sales (5) |
| IOWA | Sales | SOUTH DAKOTA | No State Income Tax |
| KANSAS * | 3 Factor/Sales | TENNESSEE | Double wtd Sales |
| KENTUCKY * | Double wtd Sales | TEXAS | Sales |
| LOUISIANA | Sales | UTAH | 3 Factor/Double wtd Sales |
| MAINE * | Sales | VERMONT | Double wtd Sales |
| MARYLAND | Sales/Double wtd Sales | VIRGINIA | Double wtd Sales |
| MASSACHUSETTS | Double wtd Sales | WASHINGTON | No State Income Tax |
| MICHIGAN | Sales | WEST VIRGINIA * | Double wtd Sales |
| MINNESOTA | 90% Sales, 5% Property, & 5% Payroll (2) | WISCONSIN * | Sales |
| | | WYOMING | No State Income Tax |
| MISSISSIPPI | Sales/Other (3) | DIST. OF COLUMBIA | 3 Factor |
| MISSOURI * | 3 Factor/Sales | | |
| MONTANA * | 3 Factor | | |

Source: Compiled by FTA from state sources.

Notes:
The formulas listed are for general manufacturing businesses. Some industries have a special formula different from the one shown.
* State has adopted substantial portions of the UDITPA (Uniform Division of Income Tax Purposes Act).
Slash (/) separating two formulas indicates taxpayer option or specified by state rules.
3 Factor = sales, property, and payroll equally weighted.
Double wtd Sales = 3 factors with sales double-weighted
Sales = single sales factor

(1) Beginning with the 2011 tax year, California taxpayers may elect to use a single sales factor.
(2) Minnesota is phasing in a single sales factor which will reach 100% in 2014.
(3) Mississippi provides different apportionment formulas based on specific type of business. A single sales factor formula is required if no specific business formula is specified.
(4) Formula for franchise tax shown. Department publishes specific rules for situs of receipts under the CAT tax.
(5) Taxpayers are allowed only 80% of the reduced taxes from a single sales factor.

FEDERATION OF TAX ADMINISTRATORS -- MARCH 2011

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court (14)(c)(1), I hereby certify that this Amicus Curiae brief is in 13-point type and, according to the word count of the computer program used to prepare this brief, contains 5,438 words (including footnotes).

Dated: November 14, 2011

_____

Sheldon Laskin
Attorney for *Amicus Curiae*
Multistate Tax Commission

**PROOF OF SERVICE BY MAIL**

(CCP 1013a, 2015.5)

I am employed by the Multistate Tax Commission, whose address is 444 North Capitol Street, N.W., Suite 425, Washington, D.C. 20001-1538. I am over the age of eighteen years and not a party to the within cause.

On November 14, 2011, I served a true copy of:

**BRIEF OF THE MULTISTATE TAX COMMISSION AS *AMICUS CURIAE***

**IN SUPPORT OF DEFENDANT AND RESPONDENT**

on the following by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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I deposited such envelopes in the United States mail at Baltimore, Maryland with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 14, 2011, at Baltimore, Maryland.

_____

Sheldon H. Laskin