No. 132, Original

IN THE

Supreme Court of the United States

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

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

There is only one reason that plaintiffs seek summary enforcement of the Sanctions Resolution – and that is that after receiving notice and an opportunity to defend against the charge that it violated the Compact,[1] North Carolina *declined* to avail itself of this opportunity. The Compact authorizes the Commission, not the courts, to impose sanctions. North Carolina's argument that it can bypass the Commission and raise its defenses to sanctions in the courts is obviously wrong and would make the Court a sanctioning authority, rather than a forum for judicial review of sanctions decisions. The Commission does not claim that sanctions decisions should be rubberstamped; the Court has full power to review those decisions. But where, as here, the sanctioned State received notice and an opportunity to appear and contest the sanction and refused to do so, the State has forfeited or waived its right to review of non-jurisdictional defenses to any sanctions imposed. The forfeiture or waiver encompasses the claims that the Commission is inherently biased and that the Commission may not impose monetary sanctions – both of which are also entirely without merit. Finally, the Sanctions Resolution is reasonable as a matter of law.

In any event, as set forth in Plaintiffs' Summary Judgment Memorandum 25-27, the Compact authorizes the Commission to impose monetary sanctions on party States that breach their obligations. The Compact uses broad, inclusive language whose meaning is confirmed by a statutory mandate of liberal construction. It is implicitly conceded that the text and structure of the Compact are, at least, ambiguous. US Br. 13-15; NC Opp. 31-34. Where the breaching State's goal is to withdraw from the Compact to evade its Compact obligations and liability, it makes no sense to construe the

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[1] Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, 99 Stat. 1859 (1986) ("Compact").

Compact's sanctioning authority as limited to expulsion. That is plainly not a "liberal[] constru[ction]" that "give[s] effect to the purposes [of the Compact]." Compact, Art. IX. Use of *other* compacts' language as an aid to construction is wholly inapt here. There is *no* evidence that the Compact's negotiators were even aware of other compacts' language and no congressional mandate of uniformity — to the contrary, the states in each Compact independently fashioned their own language.

The United States' attempt to impose a "clear statement" rule here is unprecedented and wrong. A "clear statement" requirement applies when a court addresses whether a State has waived or Congress has abrogated a constitutional sovereign immunity. Where, as here, one co-equal State sues another, neither the Eleventh Amendment nor any other aspect of the constitutional structure provides immunity to the State, and the "clear statement" rule is inapplicable.

North Carolina also argues that the Commission's power to impose sanctions extends only to party States not quick enough to withdraw before the sanctions proceeding concludes. Plaintiffs' Summary Judgment Memorandum and Opposition show that the Compact expressly contemplates and forecloses a party State's escape from its Compact obligations by withdrawal *during the sanctions process*. In addition, plaintiffs demonstrated that only their interpretation of the Compact serves its purposes and comports with established principles of contract and other common law. In response, North Carolina relies primarily on the language of other regional compacts. This language does not further its cause and is immaterial, again because there is no evidence that the Compact negotiators were aware of, let alone considered, the language other regions were negotiating.

Finally, North Carolina argues that if the Sanctions Resolution is not enforced, plaintiffs are not entitled to summary judgment on any other aspect of their claims. North Carolina's Rule 56(f) Declaration apparently disputes the

amount of the liability under Counts II-IV. But, on the undisputed facts, North Carolina's stated reason for repudiation of its obligations violates the Compact as a matter of law. Further, even under North Carolina's theory of commercial impracticability, plaintiffs are entitled to restitution as a matter of law. Thus, the sole issue that requires further discovery is the precise amount of damages or restitution resulting from North Carolina's conduct.

ARGUMENT

I. THE SANCTIONS AWARD CAN BE ENFORCED.

A. North Carolina argues that the Court cannot summarily enforce the Sanctions Resolution and must instead decide *de novo* whether North Carolina can be sanctioned for its breach of obligations arising under the Compact. NC Opp. 13. North Carolina conflates plaintiffs' claim for enforcement of the Sanctions Resolution and their alternative claims for damages and restitution. Both questions are posed by this litigation.

There is nothing in the Constitution or in this Court's jurisprudence that precludes a compact from creating an entity such as the Commission that interprets, administers, and enforces an interstate compact. Compacts routinely establish such entities, and courts routinely review their decisions. See, *e.g.*, *Old Town Trolley Tours of Wash., Inc.* v. *WMATA*, 129 F.3d 201, 203-04 (D.C. Cir. 1997); *S&M Inv. Co.* v. *Tahoe Reg'l Planning Agency*, 911 F.2d 324, 325 (9th Cir. 1990); *Seattle Master Builders Ass'n* v. *Pac. Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986); *Brooklyn Bridge Park Coalition* v. *Port Auth.*, 951 F. Supp. 383, 386-87 (E.D.N.Y. 1997). Courts are not required to re-examine every decision made by a compact entity on its merits, without regard to the power delegated to that entity under the compact and the proceedings conducted.

Accordingly, because the Compact, with North Carolina's and Congress's assent, establishes the Commission, acting on behalf of the member states, as the sanctioning authority, the Compact empowers the Court not to impose sanctions, but to review sanctions decisions. Neither "the character of interstate compacts" nor the "nature of original jurisdiction" (NC Opp. 14) requires the Court to conduct *de novo* review of Commission decisions. The Sanctions Resolution clearly is subject to judicial review for reasonableness and support in the record, and this Court could scrutinize the record and arguments (*id*. at 15), had North Carolina appeared and defended, instead of forfeiting or waiving all non-jurisdictional defenses to sanctions.

B. In arguing that its forfeiture or waiver can be overlooked, North Carolina first relies on *Texas* v. *New Mexico*, 462 U.S. 554 (1983), but there is no comfort there. In that case, the Pecos River Commission divided evenly on the question of Compact violation, and "took *no action*" for lack of agreement between the two voting Commissioners. *Id*. at 561 (emphasis supplied). New Mexico, benefited by the Commission's failure to act, argued that the Court was permitted to "do nothing more than review official actions of the . . . Commission," and that the Court had nothing to review because the Commission was at an impasse. *Id.* at 566. As a result of the Commission's *failure to act*, the Court stepped in and decided whether the Compact had been breached. *Id.* at 569.

Nothing in the decision suggests that the Court would review *de novo* a Pecos River Commission decision. Indeed, the contrary is suggested when the Court explains that "[i]f authorized representatives of the compacting States have reached an agreement within the scope of their congressionally ratified powers, recourse to this Court when one State has second thoughts is hardly 'necessary for the State's protection.'" *Id.* at 570-71. Plaintiffs wholeheartedly agree with the actual holding of *Texas* v. *New Mexico* – that

absent a compact commission decision to review, the Court has jurisdiction to determine whether a compact has been breached and to provide an appropriate remedy, including money damages. Pl. Opp. 18-25; US Br. 19-22. Here, however, the Compact Commission has made a decision for the Court to review.

North Carolina's additional arguments — that the Commission is not a federal agency and that the Commission's proceedings are not arbitrations — miss the point. The Compact authorizes the Commission to sanction party States in breach of their Compact obligations. Thus, the Commission is like an agency in that it administers the statute that established it, and is like an arbitrator in that it is contractually designated to resolve certain matters for contracting parties. The consequences of the contractual and statutory designation of the Commission as sanctioning authority are that the Commission's decisions should be reviewed for reasonableness, as an agency's decisions would be; that the parties should be deemed to have contractually consented to the Commission's sanctions authority; and therefore that the parties have an obligation to appear and defend against a sanctions complaint before the Commission or be deemed to have forfeited or waived all non-jurisdictional defenses. See, *e.g.*, *Old Town Trolley Tours*, 129 F.3d at 204 (adopting the standards in APA § 706(2)(A)-(D) for review of compact entity's licensing decisions); *id.* ("[o]f one thing we can be fairly confident – that our review should not be *de novo*. That would deprive the Commission's judgment of importance and would, in effect, place the court in the position of the licensing authority"); *People of State of Cal. ex rel. Younger* v. *Tahoe Reg'l Planning Agency*, 516 F.2d 215 (9th Cir. 1975). Here, the Court need not determine the precise scope of judicial review that should apply to the Commission's decision because of North Carolina's default.

North Carolina's position is that the Compact's statutory designation of the Commission as the sanctioning authority

means *nothing*, and that is surely wrong. Plaintiffs do *not* claim that the mere existence of a Sanctions Resolution ends the inquiry. In normal circumstances, where the breaching State has appeared and defended, Commission decisions are reviewed for reasonableness. Here, North Carolina's forfeiture or waiver precludes such review.

C. North Carolina next seeks to avoid forfeiture and waiver and the enforcement of the Sanctions Resolution by claiming that the Commission is "inherently biased," excusing North Carolina from any requirement that it assert partiality or contest the breach or scope of the sanctions before the Commission. NC Opp. 15. This is wrong for several reasons. First, by entering into the Compact, North Carolina agreed that the Commission, as constituted, had the authority to decide by a supermajority vote to sanction any party State which "fails to comply with the provisions of th[e] compact or to fulfill the obligations incurred by becoming a party state." Compact, Art. VII(f). North Carolina, accordingly, cannot argue that the Commission is "inherently biased" – indeed, North Carolina acknowledges that the Commission could expel it from the Compact. See, *e.g.*, NC Opp. 27.

Second, North Carolina cannot challenge the sanctions decision on Due Process grounds. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of our Union, and to our knowledge this has never been done by any court." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966).

Third, assuming *arguendo* that there is some unknown contractual or constitutional basis for its bias claim, North Carolina is required to support its claim with something more than the composition of the Commission and a bare allegation. "[A]ny alleged prejudice on the part of the decisionmaker must be evident from the record and cannot be based on speculation or inference." *Navistar Int'l Transp. Corp.* v. *U.S. EPA*, 941 F.2d 1339, 1360 (6th Cir. 1991). In

addition, North Carolina is claiming institutional rather than individual bias. As a result, North Carolina's claim is subject to more rigorous review. Institutional decisionmaking receives the benefit of a presumption of fairness and regularity. See *United States* v. *Morgan*, 313 U.S. 409, 420-21 (1941); *FTC* v. *Cement Inst.*, 333 U.S. 683, 700-03 (1948).

North Carolina ignores not only its consent to the Commission's sanctions authority, but also that the Commission's power must be exercised through a supermajority vote, Compact, Art. VII(f), and that the Commission has twice previously *rejected* motions by a frustrated South Carolina to sanction North Carolina for its failure to produce a disposal facility within a reasonable period of time, see Pl. Summ. J. Mem. 11. North Carolina further ignores that the Commissioners do not personally profit from any sanction imposed; the money would provide a solution to the region's disposal problem – the solution that North Carolina's breach has postponed indefinitely. Moreover, North Carolina ignores that this Court would have had ample authority to review the Commission's decision had North Carolina appeared to defend itself. See *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602 (1993) (holding that statute authorizing the trustees of a pension plan to assess withdrawal liability against an employer and placing the burden of proof on the employer to disprove the trustees' assessment did not violate the employer's due process right to an impartial tribunal).[2]

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[2] North Carolina relies on cases addressing the impartiality requirement in internal union disciplinary proceedings to argue that the Commission is inherently biased (Opp. 19), but those cases undermine this proposition. Union members and elected officials routinely try and discipline members charged with misconduct, and "'[c]ourts . . . are justified in ruling a union tribunal is biased only upon a demonstration that it has been substantially actuated by improper motives.'" *Yager* v. *Carey*, 910 F. Supp. 704, 715 (D.D.C. 1995) (omission in original) (finding no bias), *aff'd*, 159 F.3d 638 (D.C. Cir. 1998) (Table).

Finally, if North Carolina believed the Commission was biased, it had an obligation to make that claim before the Commission. See, *e.g.*, *Rabushka ex rel. United States* v. *Crane Co.*, 122 F.3d 559, 566 (8th Cir. 1997) (judge); *Marcus* v. *Dir., Office of Workers' Compensation Programs*, 548 F.2d 1044, 1050-51 (D.C. Cir. 1976) (per curiam) (administrative agency); *JCI Communications, Inc.* v. *Int'l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (arbitrator). Where, as here, a decision maker addresses an issue statutorily and contractually delegated to it, a party cannot raise the issue of bias *post hoc*.

In resisting forfeiture or waiver of its defense of partiality (and breach and the propriety of money sanctions), North Carolina cites cases, none of which suggests that North Carolina's failure to appear and defend does not result in its forfeiture or waiver of these defenses. For example, in *Compagnie Noga D'Importation et D'Exportation S.A.* v. *Russian Fed'n*, 361 F.3d 676, 683 (2d Cir. 2004), the Russian government lost an arbitration, and the prevailing party sought to enforce the award against the Russian Federation. The Federation argued that the award could not be enforced against it because it did not participate in the arbitration, but the court rejected this argument. The unpublished opinion in *Syncor International Corp.* v. *McLeland*, 120 F.3d 262 (4th Cir. 1999) (per curiam), *available at* 1997 WL 452245, illustrates *plaintiffs'* point. There McLeland failed to participate in an arbitration based on his belief that the dispute was not arbitrable. *Id*. at **2. When Syncor sought to enforce the award, McLeland opposed that motion on the

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> While a history of conflict and animosity between a member of a union and its governing body may set the stage for harsh or improper treatment of that member, charges that bias undermined the fairness of a disciplinary proceeding must be supported by specific factual allegations from which the operation of bias can be inferred.

Frye v. *United Steelworkers of Am.*, 767 F.2d 1216, 1225 (7th Cir. 1985), *superceded by statute on other grounds*, *Meyer* v. *Rigdon*, 36 F.3d 1375 (7th Cir. 1994).

grounds that, among other things, the award was *ex parte*. The court rejected this argument and confirmed the award after reviewing it *de novo*. In doing so, the court noted that judicial review of an arbitration award is "extraordinarily narrow" and would normally preclude such review, but the contract at issue – unlike the Compact – specifically required judicial consideration of the arbitrator's legal reasoning. *Id*. at **6.

North Carolina's citation of *Toyota of Berkeley* v. *Automobile Salesmen's Union, Local 1095*, 834 F.2d 751 (9th Cir. 1987), is even more puzzling. There, the Ninth Circuit addressed whether an arbitration could proceed *ex parte* and whether the arbitrator was biased. The court held that where the collective bargaining agreement "provid[ed] for designation of an arbitration without the participation of both parties, an arbitrator *may issue an enforceable default award when one party fails to attend the hearing.*" *Id.* at 754. Thus, the court concluded that when the employer "willfully chose not to attend [the arbitration] . . . the ex parte hearing did not violate due process." *Id.* at 755. See also *Painters Local Union 171* v. *Williams & Kelly, Inc.*, 605 F.2d 535, 538 (10th Cir. 1979) ("an arbitration award is not defective merely because a party exercises his prerogative not to attend the hearings"). It is difficult to imagine how these cases support North Carolina's assertion that it may consent to Commission jurisdiction over sanctions proceedings, fail to appear, and still contest the merits of the Sanctions Resolution.

In the alternative, North Carolina argues that its challenge to the Commission's imposition of monetary sanctions is jurisdictional and cannot be forfeited or waived. NC Opp. 22 n.4. This is wrong. Under *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89-92 (1998), the question whether a party has a cause of action for a particular remedy is *not* a jurisdictional question. The Commission is statutorily delegated the power to impose sanctions. A challenge to the appropriate scope of such sanctions is purely a question of

statutory/contract interpretation, not a question of jurisdiction, and thus can be forfeited or waived by a failure to appear and defend. See also *Lake County Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979) ("respondents' 'jurisdictional' arguments are not squarely directed at jurisdiction itself, but rather at the existence of a remedy for the alleged violation of their federal rights") (citing *Mt. Healthy Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 279 (1977)).

For the reasons set forth here and in Plaintiffs' Summary Judgment Memorandum 23-24, North Carolina's "decision not to participate in th[e Sanctions] proceedings – based on its own, good-faith conclusion that the Commission lacked jurisdiction" (NC Opp. 22) – means that only its jurisdictional arguments are preserved and that its arguments about the Commission's partiality, the scope of the Commission's sanctioning authority, and its defenses to the charge of breach are forfeited or waived on judicial review.

D. Even if the Court were reviewing the Sanctions Resolution for reasonableness, it should be enforced as a matter of law. As shown *infra* at 22-25, it is undisputed that North Carolina ceased to perform because the Commission would not provide additional funds on the terms that North Carolina demanded. As a matter of law, North Carolina's decision to cease performing for this reason violated the Compact and renders it liable. The amount of the sanctions is fully supported by evidence in the record and common law principles of contract enforcement. App. 137a-138a. The Resolution should be enforced because the Commission's decision is reasonable as a matter of law under a standard analogous APA standard.

II. THE COMMISSION MAY IMPOSE MONETARY SANCTIONS.

Plaintiffs' Summary Judgment Memorandum demonstrates that the text and purposes of the Compact authorize the Commission to impose sanctions, including monetary

sanctions. Indeed, after the Compact negotiators agreed to the final Compact language, an attorney for the Southern States Energy Board ("SSEB"), who assisted the compact negotiators throughout the negotiations and drafting process, prepared a March 1, 1982 Briefing Paper, to summarize the contents of the Compact for use during the process of securing legislative approval in the various states. See Attach. 1 to Third Haynes Decl. The paper states, "[t]he commission may impose sanctions against any party state that fails to comply with the provisions of the compact. The failure to comply with the provisions of the compact may *also* result in revocation of the state's membership." *Id.* at 19 (emphasis supplied). This clearly supports the broad reading of the words "sanctions" and "including" used in the Compact, and already mandated by the Compact's liberal-construction requirement.

North Carolina and the United States resist this interpretation on several grounds.

A. Preliminarily, as addressed *supra* at 4-10, North Carolina has forfeited or waived any argument that the Commission's sanctioning authority does not include the power to impose monetary sanctions. The United States does not address this question.

B. The United States (like North Carolina) ignores the statutory mandate that the Compact be "liberally construed to give effect to the purposes thereof," Compact, Art. IX, and instead proposes that the Compact be narrowly construed – indeed, that the Compact is subject to a "clear statement" requirement based on the States' "traditional immunity from judicial monetary assessments." US Br. 14-15. Imposition of a "clear statement" requirement is inconsistent not only with the Compact's liberal-construction mandate, but also with the Supreme Court's precedent concerning the "clear statement" rule and compact interpretation.

First, as *Alden* v. *Maine*, 527 U.S. 706 (1999), makes absolutely clear, the States' traditional immunity from suit, including monetary assessments, has its source in the Eleventh Amendment and in the constitutional design; it exists "'save where there has been "a surrender of this immunity in the plan of the convention."'" *Id.* at 729 (quoting *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting *The Federalist No. 81*)). Critically, however, neither the Eleventh Amendment nor the structure of the Constitution provides a State with sovereign immunity when sued by another State or the United States. In fact, the constitutional design expressly strips States of sovereign immunity in these circumstances. "The States are subject to suit by both their sister States and the United States." *Nevada* v. *Hall*, 440 U.S. 410, 420 n.19 (1979) (listing cases); *Alden*, 527 U.S. at 755 ("[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government"). "[T]he Constitution did not reflect an agreement *between the States* to respect the sovereign immunity of one another." 527 U.S. at 738 (citing *Nevada* v. *Hall*, 440 U.S. at 416) (emphasis supplied).

The "clear statement" rule applies when a State has sovereign immunity under the Eleventh Amendment or the constitutional design. The Supreme Court requires a clear statement to find either that Congress abrogated that immunity or that a State has waived its immunity or otherwise consented to suit. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991); *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002). The "clear statement" rule has no application where, as here, *nothing* in the Constitution supports state sovereign immunity, and where, in fact, the Constitution reflects the Framers' determination that States deal with each other in parity. Cf. *Hall*, 440 U.S. at 443 (Rehnquist, C.J., dissenting) ("[t]he federal system as expressed in the Constitution . . . is built on notions of state parity"). The "clear statement" rule is not a free-floating

grant of special treatment, a thumb on the scale, for the States in any and all settings in which they are required to fulfill statutory obligations by paying money. It is tied to sovereign immunity and the circumstances in which such immunity is granted by the Constitution – its expansion to original actions by States against States and by the United States against States would be dramatic, unprecedented, and unjustified.

Equally to the point, the United States' argument contravenes the Court's precedent. In several cases, the Court has explicitly held that it has the power to order monetary relief for breach of a Compact *despite the fact that the Compact did not expressly authorize monetary relief against a party State*. See *Texas* v. *New Mexico*, 482 U.S. 124, 130 (1987) ("the lack of a specific provision for a remedy in case of breach does not, on our view, mandate repayment in water and preclude damages"); *Kansas* v. *Colorado*, 533 U.S. 1, 11 (2001) (requiring Colorado to pay money damages and prejudgment interest, despite the absence of any provision for monetary damages or interest); Pl. Opp. 20-23. For the purpose of assessing whether a "clear statement" requirement exists, it is irrelevant that these cases involve judicial constructions: In interpreting and applying compacts, there either is or is not a "clear statement" requirement. This Court's cases make plain that there is not.

Finally, if a "clear statement" requirement were imposed in the Compact Clause setting, it would logically extend to litigation that the United States brings against the States. We are aware of no cases suggesting that States can resist monetary liability for breach of a contractual obligation to the United States on this basis.

In this regard, the traditional concern for a State's fisc that sovereign immunity reflects is misplaced where, as here, the contract is among sovereign components of the federal system. Here, concern for a breaching State's fisc is matched by concern for other States' or the United States' fiscs. Indeed, where sovereigns contract, the general principle is

that "[w]hen the United States [or a State] enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Marathon Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (quotations omitted). *A fortiori*, this principle applies when sovereigns contract with each other. In litigation under general contract principles, the contract at issue would surely be construed to authorize the Commission to award money damages (and to require a party State to contest that award before the Commission in order to preserve its non-jurisdictional challenges to the award).

In sum, the United States' suggestion – that a Compact must contain a clear statement to be construed to authorize a State to enforce sanctions or traditional contract remedies against another State – should be rejected as a wholly unwarranted expansion of the "clear statement" rule.

C. Once the "clear statement" argument is eliminated, the interpretive principle that governs is the statutory requirement of liberal construction to serve the Compact's purposes. The United States acknowledges that the word "'sanction'" is a generic term related to punishment and that the word "'including'" "suggests that the available sanctions are not limited to those two specific measures." US Br. 13. But, the United States says, nothing in the Compact "suggests that the Commission may go beyond measures of the same genus, namely, measures that share the core characteristic of withholding benefits of Compact membership from a party State." *Id*.

There are numerous problems with this argument. First, as the United States admits, the word "including" means that other sanctions were expressly contemplated. If expulsion and suspension represent the universe of membership-benefit denial, what are these other sanctions that are "include[d]"? A proper interpretation of Article VII(f) cannot render the word "including" meaningless.

Second, numerous aspects of the Compact demonstrate that the Commission may go beyond expulsion or suspension, including (i) the text's use of the generally inclusive terms "sanction" and "including" and (ii) the structure of Article VII(f) which refers to "[a]ny sanction," thereby reinforcing that sanctions extend beyond expulsion and suspension. A narrow interpretation of the term "sanction" also ignores the import of Article VII(h), which *forbids* any member State to withdraw after the second disposal site is open. This provision implicitly recognizes that expulsion is not a sanction when a State wants nothing more than to shed its Compact obligations; confining the Commission's sanctioning authority to expulsion from the Compact would convert the Compact from a binding contract to a temporary association of convenience. The interpretation of the Compact urged by the United States and North Carolina is crabbed, not "liberal," as the Compact requires. It eliminates the Compact's ability both to punish and deter and thus renders the term sanction meaningless in derogation of its purpose.

The language in other interstate compacts enacted in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act does not support a narrow interpretation of the Compact's sanctions provision. All of these compacts were negotiated independently; there is no evidence that the Compact negotiators consulted the negotiators of other compacts or were even aware of the terms of other compacts.[3]

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[3] The United States' citation of *Texas* v. *New Mexico* in support of its reliance on other compacts is wholly inapt. There was no provision in the Pecos River compact that even arguably authorized the United States to act as a tiebreaker on the compact commission when the representatives of Texas and New Mexico disagreed, so the compact could not be *construed* to include such a provision; the Special Master simply proposed the addition of a tiebreaking mechanism to avoid impasse on the compact commission. The Court cited other compacts' provisions specifying that the United States would serve as a tiebreaker in support of its conclusion

In addition, in several instances, the Compact uses sanctions language broader than that in other compacts, reinforcing that it authorizes money sanctions. Pl. Opp. 14-15.

Finally, the Commission's interpretation of the Compact is entitled to deference. The fact that the Compact does not *expressly* grant the Commission authority to construe its terms and that the Commission is not a federal agency do not undermine the Commission's legitimate claim to judicial respect for its interpretation. With respect to the first, the Compact gives the Commission the power to sanction and, by doing so, necessarily gives the Commission related authority to interpret the Compact. Moreover, where, as here, the Compact gives the Compact entity authority to administer the Compact, it is reasonable to use the APA as a model for determining the standard of review of the Compact entity's decisions, rather than converting the Court into the sanctioning authority. See, *e.g.*, *Old Town Trolley Tours*, 129 F.3d at 204; *supra* at 3-5. Even assuming, however, that the Commission is not entitled to deference, the mandate of liberal construction requires that the ambiguous language of the Compact be interpreted to grant the Commission the authority to impose money sanctions here.

D. The United States' final argument is that "recognition of a power in the Compact Commission to impose monetary sanctions" is not "necessary to ensure the effectiveness of the Southeast Compact," because the Supreme Court may award damages. US Br. 16. Initially, plaintiffs fully agree with the United States that the Supreme Court has the power to award money damages or other appropriate relief for breach of this Compact. That does not, however, mean that the Commission lacks such power (subject to review by this Court) or that the

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that it could not simply add such a term to the Compact without any basis in the text. 462 U.S. at 565.

Commission does not need such power to serve the Compact's purposes.

If the Commission's sole recourse is to expel or suspend a member State for a breach or tolerate the breach, the Commission is fundamentally powerless in a variety of situations that inflict grave injury on the Compact (*e.g.*, where a designated host State drags its feet with respect to its obligation to provide a facility or a party State passes a law or regulation inconsistent with the Compact). The siting process may be delayed indefinitely. Moreover, expulsion or suspension of a member State deprives the regional disposal facility of the fees it requires to fund the regional solution. Regional generators lose an advantageous economy of scale and pay more for waste disposal to make up for the missing volume. Expulsion also undermines the Compact's purpose of creating regional solutions to the low-level radioactive waste disposal problem by fragmenting the regional compact and does not further the goal of obtaining a regional facility.[4] Imposition of a money sanction or the threat of a money sanction has none of these injurious consequences to the federal purposes.

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[4] North Carolina purports to distinguish *Nebraska* v. *Central Interstate Low-Level Radioactive Waste Compact Commission*, 187 F.3d 982, 986 (8th Cir. 1999), in which the court rejected an argument that monetary sanctions could not be imposed where the sanction of expulsion was "'useless'" because it did not motivate the state to provide a facility in a "'reasonable time.'" NC Opp. 35 n.7. North Carolina argues that the Commission here was not subject to a reasonable time requirement; this ignores the Compact's instruction that the Commission "seek to ensure that [a] facility is licensed and ready to operate as soon as required but in no event later than 1991." Compact, Art. IV(e)(6). North Carolina also observes that the money sanction against Nebraska was judicially imposed; the crucial point, however, is that the compact was interpreted to authorize the imposition of money sanctions despite the absence of a specific provision. If a judge can so interpret a compact, so too can the entity created by the compact to interpret, administer and enforce the compact.

Here, the Commission's interpretation of its sanctioning authority to include the power to impose monetary sanctions is the better interpretation of the Compact text and best serves the Compact's purposes. It is entitled to respect by the Court.

III. NORTH CAROLINA'S WITHDRAWAL DID NOT DEPRIVE THE COMMISSION OF JURISDICTION TO IMPOSE SANCTIONS.

A. In their Summary Judgment Memorandum 28-33 and Opposition 3-9, plaintiffs showed that the Compact authorizes the Commission to sanction a member State for breaches of obligations arising out of its status as a member State. In responding, North Carolina again relies heavily on the language of other compacts limiting their member States' withdrawal rights.

Again, dispositively, there is no evidence that the negotiators of the Southeast Compact were even aware of the provisions of these other compacts, let alone that they relied on or considered those provisions in negotiating the Compact at issue.[5] Indeed, Congress did not require consistency among the compacts, but instead allowed states the freedom and flexibility to draft appropriate compact language based on each region's particular needs and desires. Equally to the point, the Southeast Compact contains language expressly stating that the Commission may enforce a sanction against a party State "until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Compact, Art. VII(f). North Carolina offers no alternative meaning for this language, which clearly contemplates the Commission's continued jurisdiction over a

[5] For the reasons set forth *supra* at 15 n.3, North Carolina's reliance on *Texas* v. *New Mexico* to support consideration of other compacts' language is wholly misplaced.

breaching State with respect to a sanction until the Sanctions Resolution is fulfilled.[6]

North Carolina's other textual arguments are straw men. North Carolina characterizes plaintiffs' argument as retroactively reinstating it into the Compact. NC Opp. 26. This is plainly incorrect. North Carolina may withdraw; it simply may not leave the obligations arising out of its status as a party State unfulfilled. Similarly, North Carolina contends that the Commission has not explained what "'rights'" it might have post-sanction or post-withdrawal. *Id.* The answer lies in the text of Article VII(f) – *all* rights "until the effective date of the sanction imposed" or those "provided in the resolution of the Commission imposing the sanction."

North Carolina also contends that party States are unlikely to render the Compact hortatory by withdrawing to avoid sanctions, because such States lose access to the Compact disposal facility. (NC Opp. 27). As this and other cases show, this is not true, and the problem is particularly acute with respect to the party designated to be host State. For that State, the temptation to withdraw and evade its Compact obligations is strong. Here, of course, there is no longer a regional facility because North Carolina failed to build one, and South Carolina refused to endure further delays. The Compact should not be interpreted to undermine a host State's obligations by permitting it to withdraw and avoid any consequence for breach of its obligations as host State.

B. North Carolina further asserts that plaintiffs are "[t]urning away from the text of the Compact" when they look to common law principles that support plaintiffs'

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[6] North Carolina incorrectly argues that the Commission's interpretation renders Article VII(h)'s prohibition on withdrawal meaningless because the Commission could simply sanction a withdrawing state and "nullif[y] withdrawal." NC Opp. 25. A sanction does not nullify withdrawal; it simply allows the Commission to retain jurisdiction to the extent necessary to enforce the sanction.

interpretation of the Compact (NC Opp. 28) but this is not so. These principles are aids to interpretation of the contract at issue.

In any event, North Carolina's attempt to distinguish the analogous law of private associations rests on a fundamental misunderstanding of that law. North Carolina acknowledges that an association member that withdraws is liable for accrued financial obligations (*id*.) but contends that its obligations had not accrued as of the date of its withdrawal. This argument misconceives what it means for an obligation to accrue. North Carolina's breach occurred *while it was a member State*; and the liability arising from that breach accrued at that time. Indeed, the sanctions complaint was filed *while North Carolina was a party State*. This point is illustrated by *Litton Financial Printing Division* v. *NLRB*, 501 U.S. 190 (1991). A contracting party's contract rights accrue during the contract term, and that is why the party can enforce those rights even after contract termination.

Indeed, in *Litton*, the Supreme Court adopted a "presumption in favor of postexpiration arbitration of matters unless 'negated expressly or by clear implication,'" as long as the "arbitration was of *matters and disputes arising out of the relation governed by contract*." *Id.* at 204 (emphasis supplied); *id.* at 205 ("if a dispute arises under the contract here in question, it is subject to arbitration even in the postcontract period"). Here, the language clearly specifies the Commission's authority to impose sanctions for conduct arising under the Compact, and North Carolina's withdrawal has no more effect on that power than does the termination of the contract period in *Litton*.

North Carolina also claims that these common law principles are inapplicable, because there is no presumption in favor of arbitration in inter-state contracts. In fact, however, where, as here, the contracting States have specified a contractual procedure for determining violation, there is a strong basis for deferring to that process. Arbitration is a

substitute for industrial strife, a device to further cooperative labor relations and increase American productivity. Compacts are substitutes for inter-state strife and conflict, *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901), and a constitutional device to allow inter-state cooperation on issues of regional importance, *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278-79 (1959). Parties to a compact should be encouraged to employ the compact's processes before resorting to this Court for the resolution of conflicts arising thereunder – if for no other reason than to ensure that the Court has an adequate basis to review the decision of the statutorily-designated compact entity.

C. Finally, North Carolina argues that there will be no chilling effect if the Compact is interpreted to allow it to escape any sanction for its breach, because compacts can be written more carefully in the future. This Compact was so written. In addition, North Carolina misses a crucial point – compact interpretation should not be a "gotcha" game, in which the presumption is that a contracting State can walk away from obligations to its fellow States. In this contract among equals, interpretive presumptions should favor enforcement of contractual obligations and furtherance of statutory purposes.

In sum, the text and purposes of the Compact support the Commission's jurisdiction to impose sanctions on North Carolina for conduct arising out of its status as a party State.

IV. IN THE ALTERNATIVE, UNDISPUTED MATERIAL FACTS DEMONSTRATE THAT NORTH CAROLINA MUST PAY DAMAGES OR RESTITUTION AS A MATTER OF LAW, WITH ONLY THE AMOUNT REMAINING SUBJECT TO DISPUTE.

North Carolina contends that factual and legal issues must be resolved in order for the Special Master to make a recommendation about whether plaintiffs are entitled to a

remedy for North Carolina's failure to fulfill legal obligations arising from the Compact. NC Opp. 37. Nothing in North Carolina's Rule 56(f) Declaration raises a dispute as to certain material facts that, in turn, demonstrate that plaintiffs are entitled to restitution or damages as a matter of law.

North Carolina first asserts that the Compact requires only a "good-faith effort" by North Carolina to site, license and construct a facility, and that plaintiffs do not dispute its good faith. *Id*. at 38. Plaintiffs certainly *do* dispute North Carolina's good faith and allege that its bad faith conduct breached the Compact,[7] but that is not the basis of Plaintiffs' current motion. A contracting party may be liable for breaching or repudiating its obligations due to impracticality, even in the (alleged) absence of bad faith.

Plaintiffs laid out the course of events that shows North Carolina's failure to fulfill its obligations as the second host State for the Compact in their Summary Judgment Memorandum, and will not repeat it here. What is critical for purposes of plaintiffs' motion is that North Carolina has admitted in contemporaneous documentation and in these briefs that its reason for withdrawal and for ceasing to fulfill its obligations under the Compact was the Commission's decision not to provide North Carolina with more funding on the terms North Carolina demanded. See App. 81a ("North Carolina is not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed"); *id*. at 119a (informing the Commission of the Authority's decision to shutdown the

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[7] North Carolina states (Opp. 7) that it will provide evidence about the amount of hydrogeological testing necessary to prove that the site was safe, the inadequate performance of the contractor, and the difficulty of the task. The Commission will certainly dispute that any of these allegations suffice to excuse North Carolina's failure to fulfill its obligation to provide a facility.

project pending the Commission's reversal of its position regarding funding").[8]

The decision to cease performance for this reason violates North Carolina's obligations under the Compact as a matter of law. The Compact expressly states that "[t]he Commission shall not be responsible for any costs associated with (1) the creation of any facility." Compact, Art. IV(k).[9] In addition, the design of the Compact distributes costs among the party States by obligating each State in turn to develop and operate a facility and by allowing the host State to be repaid for its expenses in development and operation of the facility from

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[8] As the letters exchanged between the parties (*see* Pl. Summ. J. Mem. 13-16) reveal, the Commission declined simply to hand over further funds, but offered to develop loans and other sources of funding for North Carolina. It is undisputed that North Carolina declined to seek to appropriate further funds or to issue bonds or obtain loans; these were the "choice[s]" (NC. Opp. 9-10) other than breaching its Compact obligations that were open to North Carolina.

North Carolina also argues here for the first time (*id*. at 8) that in light of South Carolina's withdrawal from the Compact and opening of the Barnwell facility to other Compact States, North Carolina's facility could not be assured of a monopoly and thus of sufficient disposal fees to fund its facility. The Commission has the power, however, to prohibit the export of regional waste (Compact, Art. IV(*l*)), a power that was always utilized *while there was a regional waste facility*. In addition, the Commission has the power to authorize the importation of waste from outside of the region if the host State agrees (*id.*, Art. IV(e)(9)). This is a straw man, as North Carolina knows.

[9] North Carolina's argument – that plaintiffs' statement that it provided money necessary to license and operate a facility is a concession that Commission financial assistance was necessary (Opp. 8) – is absurd. The statement's obvious import is descriptive – *viz*, that money was necessary to complete the project (Pl. Summ. J. Mem. 23 n.6).

North Carolina's further statement, unsupported by any citation to a Compact provision or any other document, that the Commission has an "obligation to assist substantially with funding toward development of the facility" (NC Opp. 8) is simply wrong and conflicts with the language of the Compact.

the revenues of the facility once opened. *Id.*, Art. III(b) &(c), IV(h)(2) & (k), V(c) & (e), VI(b). Because it is undisputed that North Carolina ceased to perform due to the Commission's refusal to provide funding on the terms North Carolina demanded and because this is an unlawful basis for ceasing to perform, North Carolina breached its obligations under the Compact as a matter of law.

North Carolina responds by saying that there were no legal restrictions on its right to cease performing under the Compact and withdraw and that its performance of the contract had been rendered commercially impracticable. NC Opp. 38-39. With respect to the first, North Carolina's position is that the Compact was not a contract, but a meaningless exhortation – that it could simply withdraw and avoid any obligations arising out of its designation as host State. This is a patently unreasonable reading of the Compact that fails to comport with either the Compact Clause or with common law principles of compact and contract interpretation.

The Compact obligates North Carolina to fulfill its Compact obligations as addressed in the Sanctions Resolution without regard to its withdrawal. In any event, a contracting party may not terminate a contract at its own whim, particularly where, as here, other contracting parties have already provided the terminating party with substantial contract benefits (including approximately $80 million and access to a regional disposal facility, which is difficult to value precisely). Such a termination is effective only prospectively and is accompanied by an obligation to pay damages or restitution and any other liability incurred pursuant to the contract. See US Br. 16-23; Pl. Opp. 6 (citing authority); *Restatement (Second) of Contracts*, ch. 16, topic 4 introductory note (1981) ("[a] party who has received a benefit at the expense of the other party to the agreement is required to account for it, either by returning it in kind or by paying a sum of money"); *Restatement* § 371, cmt a ("[i]f the

benefit consists simply of a sum of money received by the party from whom restitution is sought, there is no difficulty in determining this amount").[10]

With respect to commercial impracticability (which plaintiffs would, of course, vigorously dispute if their motion for summary judgment is denied), North Carolina ignores that, in such circumstances, plaintiffs are legally entitled to restitution of the money paid to North Carolina to fulfill its contractual obligation to provide a disposal facility. A party whose performance is made impossible either by its own acts or by supervening impracticability "is not privileged to keep something for nothing, and restitution is an available remedy against it." See 5 Corbin, *supra*, § 1102, at 549.[11]

As a matter of law, on the undisputed facts, North Carolina has breached or repudiated its Compact obligations, and plaintiffs are entitled to damages or restitution.

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[10] The benefit plaintiffs conferred on North Carolina is measured at the moment of performance – when the money was provided. *Restatement* § 348 cmt. a; 5 Arthur L. Corbin, *Corbin on Contracts* § 1112, at 596 (1964). To avoid paying restitution, North Carolina must (but cannot) show that it provided some offsetting benefit to plaintiffs.

[11] North Carolina does not dispute that access to the regional site was a benefit, but does implausibly argue that the receipt of approximately $80 million was not a benefit to it (NC Opp. 40). Regardless of how North Carolina spent the money, $80 million constitutes a benefit. In addition, North Carolina argues that the Commission cannot recover any contract-based damages resulting from providing $80 million to North Carolina, because neither party had any expectation that it would be paid back. The expectation was that North Carolina would provide a disposal facility, not that the Commission was giving North Carolina something for nothing.

CONCLUSION

The Special Master should recommend that Plaintiffs' Motion for Summary Judgment should be granted.

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