No. _____

In The
Supreme Court of the United States

SONOCO PRODUCTS COMPANY, *et al*.,

Petitioners,

v.

DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Multistate Tax Compact (the "Compact") is a multistate agreement that addresses state taxation of multistate businesses. Michigan enacted and entered into the Compact in 1970. The Compact requires member States to allow taxpayers an election to apportion their tax base using an equally weighted three-factor apportionment scheme. Petitioners made such elections for tax years 2008 through 2011. In 2011, the Michigan Legislature enacted legislation that purported to deny the Compact apportionment election effective January 1, 2011. In July 2014, the Michigan Supreme Court held that a taxpayer's Compact apportionment election for 2008 was valid. *Int'l Bus. Machines Corp. v. Dep't of Treasury*, 852 N.W.2d 865 (2014). In September 2014, the Michigan Legislature enacted legislation that purported to repeal and withdraw from the Compact retroactively effective January 1, 2008. As a result, the Courts below held that Petitioners' elections were retroactively extinguished.

The questions presented are:

1. Does the Compact have the status of a contract that binds its signatory States and requires them to allow taxpayers to elect to use the Compact's equally weighted apportionment formula until the State prospectively withdraws from the Compact?

2. Did Michigan's retroactive repeal of, and withdrawal from, the Compact violate the Contract Clause?

QUESTIONS PRESENTED – Continued

3. Did Michigan's retroactive repeal of, and withdrawal from, the Compact violate the Due Process Clause?

4. Did Michigan's retroactive repeal of, and withdrawal from, the Compact violate the Commerce Clause?

RULE 14.1(b) LIST OF PARTIES

Petitioners, Sonoco Products Company, Ingram Micro Inc. & Subsidiaries, AK Steel Holding Corporation, Big Lots Stores, Inc., Nintendo of America Inc., Advance/Newhouse Partnership, Fluor Corporation & Subsidiaries, T-Mobile USA, Inc. & Subsidiaries, Intuitive Surgical, Inc., and General Aluminum Mfg. Company & Affiliates, were plaintiffs in the Michigan Court of Claims below as well as appellants in two consolidated cases before the Michigan Court of Appeals. Petitioners filed two joint Applications for Leave to Appeal with the Michigan Supreme Court, which were denied. Thirty-seven other parties[1] were also appellants

[1] The parties to the two Court of Appeals decisions below who are not Petitioners in this Petition were: Harley Davidson Motor Company, Inc., Dun & Bradstreet, Inc., Easton Telecom Services, LLC, Anheuser Busch, Inc., Conair Corporation and Subsidiaries, McNeil-PPC, Inc., DirecTV, Solo Cup Operating Corporation, Conagra Foods, Inc. and Subsidiaries, Boise, Inc., L'Oreal USA, Inc. & Subsidiaries, Skadden, Arps, Slate, Meagher & Flom, LLP, Johnson Matthey, Inc., Gillette Commercial Operations North America & Subsidiaries, Yaskawa America, Inc., Ranier Investment Management, Inc., Hansen Beverage Company, Coventry Health Care, Inc., International Business Machines Corporation, Paperweight Development Corporation, Dollar Tree, Inc., Ball Corporation, Commercial Metals Company, Biorx, LLC, United Stationers Supply Company, Rodale, Inc., Circor Energy Products, Inc., Crown Holdings, Inc., Michelin Corporation, Interstate Gas Supply, Inc., Sapa Extrusions, Inc., formerly known as Alcoa Extrusions, Inc., Raven Industries, Inc., Cargill, Inc., Watts Regulator Company, Lord Corporation, Teradyne, Inc., Lubrizol Corporation, Goodyear Tire & Rubber Company, and Hallmark Marketing Company, LLC.

RULE 14.1(b) LIST OF PARTIES – Continued

in the two Michigan Court of Appeals decisions for which review is sought, but they are not Petitioners herein, although some of those parties may file separate Petitions for a Writ of Certiorari.

Respondent, the Michigan Department of Treasury, was the sole defendant in the Michigan Court of Claims and the sole appellee in the Michigan Court of Appeals and Michigan Supreme Court below.

RULE 29.6 STATEMENT

Sonoco Products Company has no parent company. Blackrock, Inc. owns more than 10% of its stock.

Ingram Micro Inc. & Subsidiaries consists of Ingram Micro Inc. and its wholly owned subsidiaries. Ingram Micro Inc. has no parent company and no publicly held company owns 10% or more of its stock.

AK Steel Holding Corporation has no parent corporation. No publicly held company owns 10% or more of the stock of AK Steel Holding Corporation.

Big Lots Stores, Inc. is a wholly owned subsidiary of Big Lots, Inc., a publicly held corporation that has no parent company. No publicly held company owns 10% or more of the stock of Big Lots, Inc.

Nintendo of America Inc. is a wholly owned subsidiary of Nintendo Co., Ltd., a publicly held corporation. No publicly held company owns 10% or more of the stock of Nintendo Co., Ltd.

RULE 29.6 STATEMENT – Continued

Advance/Newhouse Partnership is a partnership wholly owned by Advance Publications, Inc. and Newhouse Broadcasting Corporation. No publicly held company owns 10% or more of the stock of Advance Publications, Inc. or Newhouse Broadcasting Corporation.

Fluor Corporation & Subsidiaries are a unitary business group consisting of Fluor Corporation and its wholly owned subsidiaries. Fluor Corporation has no parent company and no publicly held company owns 10% or more of the stock of Fluor Corporation.

T-Mobile USA, Inc. & Subsidiaries consist of T-Mobile USA, Inc. and its wholly owned subsidiaries. T-Mobile USA, Inc. is wholly owned by T-Mobile US, Inc., a publicly traded U.S. corporation. Deutsche Telekom AG, a publicly traded German company, indirectly owns more than 10% of the stock of T-Mobile US, Inc.

Intuitive Surgical, Inc. has no parent company. T. Rowe Price Associates owns more than 10% of its stock.

General Aluminum Mfg. Company & Affiliates are a unitary business group consisting of General Aluminum Mfg. Company and corporate affiliates, all of whom are wholly owned by Park Ohio Holdings Corporation, a publicly traded company. No publicly held company owns 10% or more of the stock of Park Ohio Holdings Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the Michigan Court of Appeals.

OPINIONS BELOW

The orders of the Michigan Supreme Court denying leave to appeal (App. 143-50; 205-09) are unreported. The first decision of the Michigan Court of Appeals (App. 1-76) is reported at 878 N.W.2d 891. The second, virtually identical decision of the Michigan Court of Appeals (App. 151-75) is unreported. The decisions of the Michigan Court of Claims (App. 77-142; 176-204) are unreported.

JURISDICTION

The jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. § 1257(a). The Michigan Court of Appeals entered its first opinion on September 29, 2015. Petitioners who were parties to that case timely filed an Application for Leave to Appeal with the Michigan Supreme Court. Although Justices Markman and Viviano of the Michigan Supreme Court would have granted the Application, the Michigan Supreme Court denied it on June 24, 2016. App. 143-50. On September 9, 2016, Justice Kagan extended the time for filing a Petition for a Writ of Certiorari to November 21,

2016. The Michigan Court of Appeals entered its second Opinion on March 15, 2016. App. 151-75. Petitioners who were parties to that second case filed a Joint Application for Leave to Appeal with the Michigan Supreme Court, which was denied on September 6, 2016. App. 205-09.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, amend. XIV, § 1, provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]"

The Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, provides in relevant part:

> No State shall * * * pass any * * * Law impairing the Obligation of Contracts.

The Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, provides, in relevant part, that "Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The Compact as enacted in Michigan by 1969 Mich. Pub. Acts 343, codified as MICH. COMP. LAWS § 205.581 to 205.589, is reproduced in full in App. 210-38. The Compact provided, in relevant part:

205.581 Multistate tax compact; enactment.

The multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

* * *

Article III. Elements of Income Tax Laws

Taxpayer Option, State and Local Taxes.

(1) Any taxpayer subject to an income tax . . . may elect to apportion and allocate his income in the manner provided by the laws of such state . . . without reference to this compact, or may elect to apportion and allocate in accordance with article IV. . . .

* * *

Article IV. Division of Income

* * *

(9) All business income shall be apportioned to this state by multiplying the income by a fraction the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is 3.

* * *

Article X. Entry Into Force and Withdrawal

(1) This compact shall enter into force when enacted into law by any 7 states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. . . .

> (2) Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

In May 2011, the Michigan Legislature passed 2011 Mich. Pub. Acts 40 (the "2011 Act"), which purported to amend the Compact. The relevant section of the 2011 Act amended Article III of the Compact and provided:

> Article III. Elements of Income Tax Laws.
>
> Taxpayer Option, State and Local Taxes.
>
> (1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV **except that beginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV**. . . . (emphasis added).

In September 2014, the Michigan Legislature passed 2014 Mich. Pub. Acts 282 (the "2014 Act"), which purported to repeal the Compact effective January 1, 2008. The "Enacting Section" of the 2014 Act provides:

> Enacting section 1. ***1969 PA 343, MCL 205.581 to 205.589 is repealed retroactively and effective beginning January 1, 2008***. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of [1969 PA 343], MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713. (emphasis added).

STATEMENT OF THE CASE

The Multistate Tax Compact (the "Compact") was drafted in 1966 and became effective, according to its

own terms, on August 4, 1967, after seven States had adopted it. *United States Steel Corp. v. Multistate Tax Comm.*, 434 U.S. 452, 455 (1978) ("*U.S. Steel*"). Articles III and IV of the Compact allow multistate taxpayers to elect to apportion their tax bases using an equally weighted three-factor formula based on the location of the taxpayer's sales, payroll, and property. *Id*. at 458 n.6; App. 213-22. Michigan joined the Compact in 1970. *U.S. Steel*, 434 U.S. at 454 n.1.

Effective January 1, 2008, Michigan adopted the Michigan Business Tax ("MBT"), which apportioned a taxpayer's tax based solely upon the location of the taxpayer's sales. MICH. COMP. LAWS § 208.1303. Because the Compact's equally weighted three-factor apportionment formula offered more favorable treatment to out-of-state taxpayers, many of them – including Petitioners – elected to apportion their tax base using the Compact rather than the MBT. Taxpayers began filing such returns in 2009.[2]

In July 2010, the Michigan Legislature introduced Michigan House Bill No. 6351, which would have eliminated the Compact election for MBT taxpayers. That bill did not pass. In May 2011, the Legislature enacted the 2011 Legislation, which purported to eliminate the Compact election effective January 1, 2011.

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[2] *See Int'l Bus. Machines Corp. v. Dep't of Treasury*, 852 N.W.2d 865, 868 (Mich. 2014) (noting that the taxpayer filed its 2008 MBT return taking the Compact election in December 2009).

Respondent, the Michigan Department of Treasury, denied Petitioners' Compact apportionment elections for tax years 2008 through 2011. Petitioners filed suit in the Michigan Court of Claims seeking validation of their Compact apportionment elections. The Court of Claims held taxpayer cases in abeyance pending the outcome of an earlier filed case involving International Business Machines Corporation ("IBM") that raised the same issue.

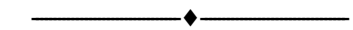
In July 2014, the Michigan Supreme Court held in favor of IBM, holding that its Compact apportionment election was valid. *Int'l Bus. Machines Corp. v. Dep't of Treasury*, 852 N.W.2d 865 (Mich. 2014) ("*IBM*"). In September 2014, the Michigan Legislature passed the 2014 Legislation, which purported to repeal the Compact retroactively effective January 1, 2008. The Michigan Court of Claims held that this retroactive repeal extinguished Petitioners' claims based on the Compact apportionment election and entered judgment for the Michigan Department of Treasury.

The Michigan Court of Appeals affirmed the Michigan Court of Claims. App. 1-76 and App. 151-75.[3] The Court of Appeals first held that the Compact was not a "binding" compact based upon this Court's decision in

[3] While there are two separate Court of Appeals decisions, the first decision was the only decision in which the Court of Appeals substantively addressed the constitutional issues presented herein. In the second decision, the Court of Appeals held that the constitutional challenges to the 2014 Legislation had been addressed in the first decision and merely adhered to that prior decision. App. 160-62.

Northeast Bancorp v. Bd. of Governors, 472 U.S. 159 (1985). App. 30-32. The Court of Appeals then held that the Legislature's retroactive repeal of the Compact did not violate the Contract Clause because the Compact was not a binding contract. App. 30-32. The Court of Appeals rejected Petitioners' claims that the retroactive repeal of the Compact violated the Due Process Clause, holding that taxpayers did not have a vested right in the Compact's three-factor apportionment election, that the Michigan Legislature had a legitimate purpose for retroactively repealing the Compact, and that the approximately six and one-half year retroactive period was "sufficiently modest." App. 41-45. The Court of Appeals also rejected Petitioners' claim that the retroactive repeal of the Compact violated the Commerce Clause, holding that the repeal of the Compact merely ensured that both in-state and out-of-state taxpayers used the same apportionment formula. App. 54-57. The Michigan Supreme Court denied Petitioners' Applications for Leave to Appeal. App. 143-50; 205-09.

This case therefore presents straightforward questions of law unencumbered by disputes or issues of fact. Is the 2014 Legislation, which retroactively repealed the Compact effective January 1, 2008, constitutionally valid or does it run afoul of the Contract Clause, the Due Process Clause of the Fourteenth Amendment, or the Commerce Clause?



REASONS FOR GRANTING THE WRIT

This case appears to involve the first instance in the history of this country in which a State has attempted to retroactively repeal an interstate compact and is a case of first impression as to whether doing so is permissible under the Contract Clause or the Due Process Clause. Citizens, businesses, and states rely upon the validity of interstate compacts and need to know whether such compacts can be retroactively repealed. Only this Court can definitively resolve this issue.

Retroactive changes to state tax statutes have become more commonplace. *See, e.g.*, *Dot Foods, Inc. v. Dep't of Revenue*, 372 P.3d 747 (Wash. 2016); *Gen. Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. App. 2010), *cert. denied*, 132 S. Ct. 1143 (2012). In *United States v. Carlton*, 512 U.S. 26 (1994), the Court upheld a retroactive change to tax legislation in which the period of retroactivity was "modest" and imposed only back to the previous legislative session to forestall an unanticipated revenue loss. *Id*. at 32-34. In *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Fla. Dep't of Bus. Regulation*, 496 U.S. 18, 40 n.23 (1990), the Court held that retroactive assessment of a tax increase does not necessarily deny due process "though beyond some temporal point" it may, "depending upon 'the nature of the tax and the circumstances in which it is laid.'" State courts, which apply this

Court's test due to the Tax Injunction Act,[4] are deeply divided about the length of retroactivity that is permissible. *See, e.g.*, *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 382 (N.Y. 2013) (16 to 32 month period of retroactivity considered excessive); and *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 560 U.S. 935 (2010) (six to ten year period of retroactivity acceptable). A leading state tax treatise notes that "court decisions provide little concrete guidance." 1 Jerome Hellerstein *et al*., *State Taxation* ¶ 4.17[1][a][i] (3d ed. 2001-15 & Supp. 2015). Academics likewise have noted that current jurisprudence "provide[s] no sense of clarity that will help taxpayers to plan for or guard against a retroactive taking." Mystica M. Alexander, *California – Land of "Lawless Taxation" and the "Midnight Special": Outlier or Leader in a Growing Trend?* 12 U.N.H. L. REV. 1055, 1058 (1997) (considering the Court's retroactivity cases in the *Carlton* era more broadly and observing that those "decisions, rife with separate opinions, reflect a variety of conflicting and confusing approaches"). Taxpayers, legislators and state courts need guidance regarding the limits on retroactive tax legislation and only this Court can provide that guidance.

Michigan's retroactive repeal of the Compact raises significant Commerce Clause concerns. Only taxpayers operating in interstate commerce are protected by the Compact and the repeal of the Compact

[4] The Tax Injunction Act, 28 U.S.C. § 1341, generally prevents taxpayers from challenging the constitutionality of state tax statutes in federal district court.

did not affect taxpayers operating in intrastate commerce. Furthermore only out-of-state taxpayers operating in interstate commerce were adversely affected by Michigan's retroactive repeal of the Compact – taxpayers based in Michigan were unaffected. Thus, even assuming the Compact was merely a tax statute rather than a contract, Michigan has retroactively changed the law in a manner that adversely affected only out-of-state companies operating in interstate commerce. The Court should decide whether this discriminatory effect is permissible under the Commerce Clause. Resolving this issue is critically important to multistate businesses, which rely upon the law when making business decisions and whose expectations are disrupted by retroactive changes to the law.

I. THE COMPACT IS A BINDING CONTRACT AND MICHIGAN'S RETROACTIVE REPEAL VIOLATES THE CONTRACT CLAUSE.

A. The Compact is a Contract Binding Upon its Member States.

The Michigan Court of Appeals erroneously held that the Compact was neither a contract nor a "binding compact" based upon a misunderstanding of this Court's decision in *Northeast Bancorp*. The Court of Appeals held:

> Relying upon case law addressing whether an agreement between two or more states constitutes a compact for purposes of the Compact

> Clause, in its own words the trial court considered "[t]he three 'classic' indicia of a binding interstate compact[, which] are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal." *See Northeast Bancorp, Inc v. Bd of Governors of the Fed Reserve Sys*, 472 U.S. 159, 175; 105 S Ct 2545; 86 L Ed 2d 112 (1985) and *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F2d 1359, 1363 (CA 9, 1986). Applying these same factors, we conclude that the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contract Clause.

App. 30.

This analysis shows a fundamental misunderstanding by the Michigan Court of Appeals. Whether an agreement runs afoul of the Compact Clause turns on a two-prong test: (1) whether there is a compact or agreement between states that (2) tends to the increase of political power of the States, which may encroach upon or interfere with the just supremacy of the United States. *U.S. Steel*, 434 U.S. at 471. In *U.S. Steel*, this Court held that the Compact did not meet the second prong of this test and did not increase the power of the states *vis-à-vis* the federal government. *U.S. Steel*, 434 U.S. at 471. The issue before the Court in *Northeast Bancorp* was whether the state statutes at issue met either prong of the test because two states

merely passed similar legislation and there was no evidence of any compact or agreement. As the Court held in that case:

> We have some doubt as to whether there is an agreement amounting to a compact. The two statutes are similar, in that they both require reciprocity and impose a regional limitation, both legislatures favor the establishment of regional banking in New England, and there is evidence of cooperation among legislators, officials, bankers, and others in the two States in studying the idea and lobbying for the statutes. But several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation.

Northeast Bancorp, 472 U.S. at 175.

When analyzing the Multistate Tax Compact in *U.S. Steel*, the Court had no such doubts whether there was "an agreement amounting to a compact," holding repeatedly that the Multistate Tax Compact was an interstate compact. Indeed, in the Court's Opinion in *U.S. Steel*, the Court referred to the Multistate Tax Compact as "the Compact" over 50 times. *See also Asarco v. Idaho State Tax Comm.*, 458 U.S. 307, 311 (1982) (holding that the Compact is "an interstate taxation agreement concerning state taxation of multistate

businesses"). If the Compact was not a binding interstate agreement, this Court could have decided *U.S. Steel* without analyzing whether it encroached upon federal supremacy. Furthermore, the "classic indicia" of a compact are present in the Multistate Tax Compact. There was a joint organization established by the Compact. App. 223-27 (creating and outlining the powers of the Multistate Tax Commission (the "MTC")); *U.S. Steel*, 434 U.S. at 456-57 (same). The effectiveness of the Multistate Tax Compact was contingent upon reciprocal action by other states. *U.S. Steel*, 434 U.S. at 454 (noting that the Compact "became effective, according to its own terms, on August 4, 1967, after seven States had adopted it"). The provisions of Article X of the Compact also place restrictions on a party state's ability to modify or withdraw. App. 236-37.

The Court of Appeals erred when it concluded that the Compact was not a contract or a "binding" compact. Indeed, the word "compact" means "[a]n agreement or covenant between two or more parties, esp. between governments or states." Black's Law Dictionary (10th ed.). "In fact, the terms compact and contract are synonymous. . . ." *Green v. Biddle*, 21 U.S. 1, 92 (1823). "[A] Compact is, after all, a contract." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Further, the fact that the Compact is a contract can be determined from the first sentence of MICH. COMP. LAWS § 205.581, which provides that "the multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein. . . ." App. 210. Thus, the Michigan Legislature expressly recognized that it was "entering into" a

contract, not merely enacting a statute. Further, the Compact has the form of a contract. There is an offer (a proposal to enter into an agreement with other member states), an acceptance (enactment of the Compact by the member states), and consideration (the benefits provided to member states such as dispute resolution mechanisms, the ability for the MTC to conduct joint audits, and a mechanism to address issues of mutual interest).

In the Compact itself, the member States agreed that members could withdraw from the Compact but any such withdrawal must be prospective. Specifically, Article X of the Compact (App. 236-37) provides:

> Article X. Entry Into Force and Withdrawal
>
> (1) This compact shall enter into force when enacted into law by any 7 states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. . . .
>
> (2) Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

Thus, the Compact itself therefore provided that, if Michigan was going to withdraw from the Compact, it would, and could, do so only prospectively and no withdrawal would, or could, affect Michigan's liabilities. Thus, Michigan cannot justify its rejection of Petitioners' Compact elections for the tax years at

issue (2008-2011),[5] a liability already incurred, by attempting to retroactively repeal and withdraw from the Compact in 2014. Michigan has no authority to retroactively alter or repeal its obligations under an interstate compact once it has agreed to be bound by its terms. *See, e.g.*, *Green*, 21 U.S. at 89 ("Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the State, in some other respect? The Court cannot perceive how this proposition could be maintained.").

Because the Compact is binding and expressly provides that Michigan could withdraw only prospectively, Michigan's attempted 2014 retroactive withdrawal is invalid. Allowing party states to retroactively repeal and withdraw from interstate compacts would jeopardize any state's ability to rely on other states adhering to their compact commitments and the ability of states to use interstate compacts to address complex issues. Indeed, the Opinions below essentially eviscerate interstate compacts just as surely as allowing a party to a private contract to retroactively invalidate that contract would invalidate private contracts as a mechanism to impose obligations and rights upon private parties.

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[5] Some Petitioners elected to utilize the Compact apportionment election for the 2011 tax year on the basis that Michigan was still a member of the Compact during that year and, therefore, was required to allow such an election notwithstanding the 2011 Legislation that purported to preclude such an election effective January 1, 2011.

B. Retroactive Repeal of the Compact Violates the Contract Clause.

The Michigan Court of Appeals' Contract Clause analysis was based upon its erroneous conclusion that the Compact "contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contract Clause." App. 30. As explained above, this conclusion is erroneous. Determining whether the Compact is binding and has been impaired through Michigan's actions is the role of this Court. "To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies . . . is the function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). "While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced." *Id*. at 29. In cases involving the Contract Clause, the Court repeatedly has explained that "ultimately[,] we are 'bound to decide for ourselves whether a contract was made.'" *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). That is because "[t]he question whether a contract was made is a federal question for purposes of

Contract Clause analysis . . . and 'whether it turns on issues of general or purely local law, [this Court] can not surrender the duty to exercise [its] own judgment.'" *Ibid*. (quoting *Appleby v. City of New York*, 271 U.S. 364, 380 (1926)). *Accord, Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942).

The Contract Clause prohibits state laws that impair the state's own obligations committed to by interstate compact. *Green*, 21 U.S. at 39 ("[t]he constitution of the United States embraces all contracts . . . a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."). In determining whether state action impaired a contract, courts look at whether a change in law substantially impaired a contractual obligation; and if so, whether the change in law was "reasonable and necessary to serve an important public purpose." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22, 25 (1977) ("*U.S. Trust*"). Michigan's retroactive repeal of the Compact fails this test because the entire compact, including all its core provisions, was retroactively repealed. By its terms, Michigan and other party states contractually committed to provide multistate taxpayers with the election to apportion under the Compact unless and until they validly withdraw from the Compact. This was a core provision of the Compact, central to each of its purposes and to staving off federal preemption in the field of state taxation.[6] Further, Michigan and all other party states

[6] *See U.S. Steel*, 434 U.S. at 455-56.

contractually committed that if any state was going to withdraw from the Compact, it would do so only prospectively. Thus, any attempt to retroactively repeal the Compact to eliminate the Compact election is a substantial impairment of the Compact. *See Allied Structural Steel v. Spannaus*, 438 U.S. 234, 247 (1978) (subsequent statute that "nullifies express terms" central to the contract found to violate contract clause); *U.S. Trust*, 431 U.S. at 19 ("total[] eliminat[ion]" of an important contract provision is a substantial impairment). Moreover, when a state is attempting to avoid one of its own contractual obligations, a court must closely scrutinize claims that the impairment is justified by and tailored to meet a public purpose. *Id.* at 25-26 ("deference . . . is not appropriate because the State's self-interest is at stake"). This Court's precedent makes it clear that simply protecting the public fisc is not a sufficient reason for impairment of a contract. *Id.* at 26 ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."). Thus, Michigan cannot justify the 2014 Legislation by claiming it would be expensive to pay the refunds owed to taxpayers who elected to apportion pursuant to the Compact. *See also Lynch v. United States*, 292 U.S. 571, 580 (1934) (need for money is no excuse for repudiating contractual obligations).

II. RETROACTIVE REPEAL OF THE COMPACT VIOLATES THE DUE PROCESS CLAUSE.

Even assuming that the Compact was a mere statute and not both a statute and a contract, its retroactive repeal would still be invalid as a violation of the Due Process Clause. Although this Court has affirmed retroactive changes in tax laws against challenges under the Due Process Clause, it has only done so when the changes were made as soon as legislatively possible. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court considered a retroactive amendment to a Wisconsin tax that imposed tax upon previously exempt dividends and held the retroactive change was not unconstitutional, holding that taxpayers cannot justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income when this is done by the legislature at the first opportunity after knowledge of the nature and amount of the income is available. *Id.* at 150. Similarly, in *Carlton*, the Court upheld a retroactive change in a federal tax statute, noting that "Congress acted promptly and established only a modest period of retroactivity." 512 U.S. at 33.

In this case, there was nothing "prompt" or "modest" regarding the actions of the Michigan Legislature. Unlike the situation in *Welch v. Henry*, in which the Wisconsin legislature acted "at the first opportunity," the Michigan Legislature became aware that taxpayers were filing their Michigan Business Tax Returns and claiming the Compact election in 2009. In 2010, Michigan House Bill No. 6351 was introduced that

would have eliminated the Compact election for MBT Taxpayers but was not passed. It was only in May 2011 that the Michigan Legislature belatedly acted and passed legislation that purported to eliminate the Compact election effective January 1, 2011. The action of the 2014 Legislature, which, in September 2014, purported to repeal the Compact effective January 1, 2008, was even more untimely and was not made "at the first available opportunity" to establish only a "modest period of retroactivity."

The only companies targeted and adversely affected by Michigan's retroactive withdrawal from and repeal of the Compact are out-of-state businesses operating in interstate commerce.[7] This is made apparent by considering two hypothetical companies – a Michigan company that has all of its employees and property in Michigan and sells equal amounts of its products in Michigan and State X, and an out-of-state company that has all of its employees and property in State X and sells equal amounts of its products in Michigan and State X. These companies' Michigan apportionment formulas would be calculated as follows:

[7] Only businesses operating in interstate commerce are allowed to apportion their tax base under the MBT, MICH. COMP. LAWS § 208.1301(2), and only taxpayers operating in interstate commerce are allowed to elect to apportion under the Compact. *See* Compact Art. II (defining "taxpayer" as an entity "acting as a business entity in more than one state.").

Table 1

	Out-of-state company using Compact's three-factor apportion-ment	Out-of-state company using Michigan's single sales factor apportion-ment	In-state company using Compact's three-factor apportion-ment	In-state company using Michigan's single sales factor apportion-ment
MI Sales Factor	50%	50%	50%	50%
MI Property Factor	0%	N/A	100%	N/A
MI Payroll Factor	0%	N/A	100%	N/A
Final Appor-tionment Factor	16.6667%[8]	50%	83.3333%	50%

In this hypothetical, the company based outside of Michigan[9] would have a Michigan apportionment factor three times higher (50% v. 16.6667%) under the

[8] Pursuant to the Compact's formula, the sales factor, payroll factor, and property factor are added together and then divided by three.

[9] As used herein, an "out-of-state" company is defined as a company whose Michigan sales factor is higher than the average of its Michigan property and payroll factors. In other words, its operations (as reflected by the location of its payroll and property) are predominantly outside of Michigan, while it sells its products into Michigan.

MBT's single sales factor scheme rather than the equally weighted Compact formula. The Michigan-based company necessarily would not elect to use the Compact's apportionment provisions in Michigan.[10] The fact that only out-of-state companies benefit from the Compact election was confirmed by the Department of Treasury, which stated in a motion for stay filed with the Michigan Supreme Court in *IBM* that the Court's decision upholding the Compact "may significantly impact the manner in which out of state businesses pay taxes to the State. . . ."

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994). *See also* Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound

[10] This is not to say that the Compact in any way hurts Michigan-based companies. Those Michigan-based companies may elect to use the Compact's equally weighted three-factor apportionment formula in other party states in which the companies do business and, therefore, benefit from the Compact.

legislation nor with the fundamental principles of the social compact.").

One reason retroactive statutes are disfavored is the risk that a legislature "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. Unlike prospective tax legislation, retroactive tax legislation can be specifically targeted against certain taxpayers and cannot be avoided by changing behavior. For example, if a taxpayer wishes to avoid the consequence of a prospective tobacco tax, the taxpayer may choose to stop using tobacco. The taxpayer has no such choice if a tobacco tax is suddenly retroactively imposed on the amount of tobacco consumed in the prior five years. Because Petitioners and other out-of-state taxpayers had filed their MBT returns for the years in issue, the State knew with mathematical precision both the class of taxpayers that were disadvantaged (i.e., only out-of-state businesses) and the exact amount of increased tax liability imposed for each such taxpayer.

State laws that burden only out-of-state interests, which are not represented in the state Legislature and are not protected by the normal political process, are subject to heightened scrutiny. *See, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978). In this case, both factors are present – the unfairness of retroactivity and the burden only upon out-of-state businesses with no voice in the Michigan Legislature – and both factors compel the conclusion that the retroactivity of the 2014 Legislation is invalid.

Michigan's 2014 retroactive repeal of the Compact also violates due process because, in Article X of the Compact, Michigan committed that it would not withdraw from the Compact retroactively. This "bait and switch" violates due process. For example, in *Newsweek, Inc. v. Florida Dep't of Rev.*, 522 U.S. 442 (1998), the Court found it improper for a State to " 'bait and switch' by holding out what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after disputed taxes have been paid, that no such remedy exists." *Id*. at 444 (citing *Reich v. Collins*, 513 U.S. 106 (1994)). Here, as in *Newsweek*, there has been an unconstitutional "bait and switch." Michigan enticed out-of-state companies to engage in interstate commerce in Michigan and statutorily provided them the ability to elect the Compact's equally weighted three-factor apportionment. Moreover, Michigan declared that it would not retroactively withdraw from or repeal the Compact. Years after out-of-state companies engaged in interstate commerce, Michigan attempted to retroactively change the rules of the game and deny out-of-state companies the ability to use the Compact's equally weighted three-factor apportionment.

The Court has noted that retroactive legislation must meet a burden not faced by prospective legislation – there must be a valid justification for the retroactive application. *See Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723-24, 729 (1984) (noting that Congress carefully chose the retroactive effective date to prevent the opportunistic withdrawal

of employers from benefit plans while Congress debated their liability). The Michigan Court of Appeals concluded that the retroactive repeal of the compact had a legitimate purpose: to protect state revenues. App. 43. If this is the law, there are no due process limitations at all on retroactive taxes. As the New York Court of Appeals held, "[r]aising funds is the underlying purpose of taxation, and such a rationale would justify every retroactive tax law." *See James Square Assocs. LP*, 993 N.E.2d at 383. The Michigan Court of Appeals also summarily concluded that taxpayers such as Petitioners had no "vested rights" in tax legislation and, therefore, Petitioners' due process claims must fail. App. 41-42. Again, the problem with this analysis is that it means that there are no due process protections for taxpayers from retroactive tax legislation.

The Michigan Court of Appeals further concluded that the period of retroactivity of the 2014 Legislation was modest, holding that "there is no doubt that the Legislature acted promptly to correct the error" because only after *IBM* was decided on July 14, 2014 "was it made clear to the Legislature that 2007 PA 36 was defective." App. 44-45. This was erroneous. The Legislature was on notice of the controversy as early at 2009 when taxpayers such as IBM began making the Compact election on their MBT returns and then filed suit when those returns were rejected. There is nothing "prompt" about waiting for cases to wind their way through the courts, to and through the Michigan Supreme Court. In *Carlton*, Congress did not wait for a

court case to tell it how the prior law at issue should be interpreted and amending legislation was introduced just three months after the law became effective. Indeed, the Michigan Legislature, rather than acting promptly, gave a series of "head fakes" by first introducing but not enacting 2010 House Bill No. 6351, then enacting the 2011 Legislation that eliminated the Compact election effective January 1, 2011, and then enacting the 2014 Legislation that retroactively repealed the Compact effective January 1, 2008.

As Justice O'Connor cautioned in her concurrence in *Carlton*, "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose. . . . In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. . . . A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." *Carlton*, 512 U.S. at 37-38 (O'Connor concurring). A one-year period beyond which retroactive tax legislation is constitutionally suspect makes sense when balancing the legislative need for time to recognize and correct a problem with taxpayers' needs for certainty and repose. Because Congress meets annually, a one-year period was appropriate in *Carlton* to ensure prompt legislative action regarding the federal tax legislation in that case.

Likewise, because 46 state legislatures meet annually,[11] a one-year period would also be generally appropriate for state laws to ensure prompt legislative action. Furthermore, securities laws generally require corporations to annually report their financial results,[12] which are affected by tax liabilities, and a one-year period would generally afford taxpayers sufficient notice to recognize and report potential retroactive tax liabilities to their owners, investors and the financial markets.

III. RETROACTIVE REPEAL OF THE COMPACT VIOLATES THE COMMERCE CLAUSE.

This case involves significant Commerce Clause concerns. Only taxpayers operating in interstate commerce are protected by the Compact. *See* Compact Art. II (defining "taxpayer" as an entity "acting as a business entity in more than one state."). Thus, entities operating only in intrastate commerce were not affected at all by the retroactive repeal of the Compact. Furthermore, the retroactive repeal of the Compact only adversely affected out-of-state businesses operating in Michigan.

The Commerce Clause prohibits states from discriminating against interstate commerce or imposing undue burdens upon interstate commerce. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S.

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[11] The state legislatures of Montana, Nevada, North Dakota and Texas meet biennially.

[12] *See, e.g.*, 17 C.F.R. § 229.101.

333 (1977). In this case, the retroactive repeal of the Compact both discriminates against and unduly burdens interstate commerce. The retroactive repeal of the Compact is discriminatory because the only taxpayers whose tax burdens were increased are out-of-state taxpayers operating in interstate commerce who did business in Michigan. Such out-of-state businesses pay higher taxes when a single sales factor apportionment formula is applied to their MBT base instead of the Compact's three-factor formula. Furthermore, even if one were to argue that the 2014 Legislation is a facially neutral state law because it requires all taxpayers to use the same apportionment factor, it is still unconstitutional because it unduly burdens interstate commerce. Even a facially neutral law may violate the Commerce Clause by imposing an undue burden on interstate commerce. *Hunt*, *supra* (holding that a facially neutral state apple grading law unduly burdened interstate commerce).

Petitioners are not arguing that it would have violated the Commerce Clause for Michigan to prospectively withdraw from the Compact, as allowed by Article X of the Compact. But because prospective legislation would not violate the Commerce Clause does not necessarily mean that retroactive application of that same legislation is constitutionally permissible. When determining whether state legislation runs afoul of the Commerce Clause, the Court has held that "the practical effect of [the challenged legislation] must be evaluated, not only by considering the consequences of the statute itself, but also by considering

how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation." *See Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992). *See also National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 759 (1967) ("For if Illinois can impose such [tax] burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation. . . ."). If other states acted in the manner that Michigan has, there would be wide-ranging disturbance in the stream of interstate commerce.

Multistate businesses must be able to forecast and budget for their tax liabilities in other states. In *Landgraf*, 511 U.S. at 265-66, the Court held that prospective legislation "has timeless and universal appeal" and that, "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." The converse is true as well – retroactive legislation burdens commercial endeavors because it erodes confidence about the legal consequences of business decisions. If tax liabilities can be retroactively changed to adversely affect only out-of-state companies, a business will have an incentive to operate only in its home state, in which it has influence with its legislature, to protect itself. Retroactive state tax legislation such as Michigan's encourages out-of-state businesses operating in interstate commerce to

retreat into isolationism rather than risk being whipsawed by another state's capricious and retroactive change to its tax scheme.

The Michigan Court of Appeals below concluded that there was no discrimination against interstate commerce because all taxpayers must use the same apportionment formula. App. 54. It is true that denying the Compact apportionment election results in all taxpayers using the same apportionment formula. As this Court has held, however, "'[f]airly apportioned' and 'nondiscriminatory' are not synonymous terms" and a tax may be fairly apportioned yet still violate the Commerce Clause. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 398-99 (1984). The Michigan Court of Appeals ignored the fact that the 2014 Legislation violates the "central concern" of the Commerce Clause – "the conviction that, in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). If Michigan is allowed to retroactively repeal the Compact election for out-of-state taxpayers operating in Michigan, it would give an incentive for other states to retaliate and states that currently allow Michigan-based companies to elect to use the Compact's equally weighted three-factor apportionment could attempt a similar retroactive repeal of the Compact for out-of-state companies. This tit-for-tat retaliation against out-of-state commerce is exactly what the Commerce Clause is intended to prevent.

CONCLUSION

This Court generally affords deference to state legislatures and tests retroactive changes to state laws using a fairly deferential rational basis test. *See, e.g.*, *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). In *Romein*, however, as in almost all cases in which this Court has endorsed retroactive state legislation, the legislation merely apportioned burdens between competing concerns within the state. For example, in *Romein*, the retroactive legislation "preserved the delicate legislative compromise" regarding the balance between injured workers and their employers. 503 U.S. at 191. Under the circumstances presented in this case, however, deference to a state legislature is not warranted for at least two reasons. First, the beneficiary of the retroactive change in the state tax law is the state itself. This is not a "delicate legislative compromise" between competing interests of citizens or groups within a state but is, instead, the State itself taking money from the pockets of out-of-state taxpayers. *See, e.g.*, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26-27 (1977) ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."); *Id*. at 26 n.25 (noting dual standard of review under Fifth Amendment to federal legislation interfering with private contracts and government contracts). Second, because the only taxpayers who were disadvantaged by Michigan's retroactive repeal of the Compact were out-of-state businesses with no voice in the Michigan legislature, the normal checks of the political

process against legislative overreaching are not present. *See, e.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1944) ("[T]he Court has often recognized that to the extent . . . the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."). In short, the only protections out-of-state taxpayers have against the retroactive repeal of the Multistate Tax Compact and similar retroactive laws will be those announced by this Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 21, 2016

STATE OF MICHIGAN

COURT OF APPEALS

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA & SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	FOR PUBLICATION September 29, 2015 9:00 a.m. No. 325258 Court of Claims LC No. 14-000053-MT
YASKAWA AMERICA, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325475 Court of Claims LC No. 11-000077-MT
RAINIER INVESTMENT MANAGEMENT INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325476 Court of Claims LC No. 13-000015-MT

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RAINIER INVESTMENT MANAGEMENT INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325478 Court of Claims LC No. 13-000110-MT
RAINIER INVESTMENT MANAGEMENT INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325479 Court of Claims LC No. 12-000032-MT

HANSEN BEVERAGE COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325480 Court of Claims LC No. 11-000080-MT
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INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325484 Court of Claims LC No. 14-000219-MT
PAPERWEIGHT DEVELOPMENT CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325485 Court of Claims LC No. 12-000160-MT

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DOLLAR TREE, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325487 Court of Claims LC No. 14-000192-MT
BALL CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325488 Court of Claims LC No. 13-000123-MT
COMMERCIAL METALS COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325489 Court of Claims LC No. 12-000161-MT

COMMERCIAL METALS COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325490 Court of Claims LC No. 12-000087-MT
DOLLAR TREE, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325491 Court of Claims LC No. 14-000030-MT
BIORX, LLC, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325492 Court of Claims LC No. 11-000128-MT

SONOCO PRODUCTS COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325505 Court of Claims LC No. 14-000142-MT
ANHEUSER-BUSCH, LLC, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325506 Court of Claims LC No. 13-000111-MT
INGRAM MICRO, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325507 Court of Claims LC No. 11-000035-MT
RENAISSANCE LEARNING, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325508 Court of Claims LC No. 12-000093-MT

RENAISSANCE LEARNING, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325509 Court of Claims LC No. 13-00006-MT
AK STEEL HOLDING CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325510 Court of Claims LC No. 13-000074-MT
ADVANCE/NEW HOUSE PARTNERSHIP Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325511 Court of Claims LC No. 14-000067-MT

UNITED STATIONERS SUPPLY COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325515 Court of Claims LC No. 12-000059-MT
RODALE, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325516 Court of Claims LC No. 12-000101-MT
CIRCOR ENERGY PRODUCTS, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325517 Court of Claims LC No. 13-000098-MT
CROWN HOLDINGS, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325518 Court of Claims LC No. 13-000106-MT

MICHELIN CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325520 Court of Claims LC No. 14-000217-MT
INTERSTATE GAS SUPPLY, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325522 Court of Claims LC No. 14-000144-MT
INTERSTATE GAS SUPPLY, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325523 Court of Claims LC No. 14-000070-MT

SAPA EXTRUSIONS, INC., formerly known as ALCOA EXTRUSIONS, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325525 Court of Claims LC No. 14-000157-MT
RAVEN INDUSTRIES, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325526 Court of Claims LC No. 14-000037-MT
CARGILL, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325528 Court of Claims LC No. 12-000113-MT

WATTS REGULATOR COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325529 Court of Claims LC No. 13-000021-MT
WATTS REGULATOR COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325532 Court of Claims LC No. 13-000041-MT
WATTS REGULATOR COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325533 Court of Claims LC No. 14-000010-MT

LORD CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325534 Court of Claims LC No. 13-000124-MT
TERADYNE, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325535 Court of Claims LC No. 12-000063-MT
LUBRIZOL CORPORATION, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325541 Court of Claims LC No. 14-000143-MT
GOODYEAR TIRE & RUBBER COMPANY, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325972 Court of Claims LC No. 14-000024-MT

HALLMARK MARKETING COMPANY, LLC, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325974 Court of Claims LC No. 15-000009-MT
BIG LOTS STORES, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326039 Court of Claims LC No. 13-000133-MT
KIMBALL INTERNATIONAL MARKETING, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326075 Court of Claims LC No. 14-000300-MT

NINTENDO OF AMERICA, INC., Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326080 Court of Claims LC No. 14-000253-MT
ADVANCE/NEWHOUSE PARTNERSHIP, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326110 Court of Claims LC No. 14-000206-MT
FLUOR CORPORATION AND SUBSIDIARIES, Plaintiff-Appellant. v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326123 Court of Claims LC No. 14-000292-MT

T-MOBILE USA, INC.
AND SUBSIDIARIES,

Plaintiff-Appellant.

v

DEPARTMENT
OF TREASURY,

Defendant-Appellee.

No. 326136
Court of Claims
LC No. 14-000276-MT

Before: MURRAY, P.J., and JANSEN and METER, JJ.

MURRAY, P.J.

I. INTRODUCTION

In these consolidated appeals, numerous foreign[1] corporations doing business in Michigan appeal as of right the trial court's order granting summary disposition to defendant Michigan Department of Treasury pursuant to MCR 2.116(I)(1), and dismissing their complaints.

These cases involve a significant number of state and federal constitutional challenges to 2014 PA 282, which the Legislature – taking the cue from the Supreme Court in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) *(IBM)* enacted to retroactively rescind Michigan's membership in the Multistate Tax Compact, which then precluded foreign corporations from utilizing a three

[1] By foreign we mean corporations that were incorporated outside of Michigan, not necessarily outside of the United States.

factor apportionment formula previously available under the Compact, MCL 205.581 *et. seq*. In a well-written and well-reasoned opinion, the trial court rejected each of the constitutional challenges. For the reasons expressed below, so do we. Consequently, we affirm the trial court's final order of dismissal.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

Rather than re-creating the wheel, we adopt the trial court's recitation of the background facts leading to these lawsuits:

> **History of the Compact**
>
> The Compact is an interstate tax agreement that was originally enacted in 1967 by the legislatures of seven states. The Compact was initially drafted out of concerns of state sovereignty in reaction to the introduction of federal legislation that sought to regulate various areas of state taxation.[3] The original purposes of the Compact included:
>
> > (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative

> taxation. [*US Steel Corp v Multistate Tax Comm*, 434 US 452, 456; 98 S Ct 799; 54 L Ed 2d 682 (1978).[4]]

Michigan adopted the Compact provisions, effective in 1970, through enactment of 1969 PA 343.

Apportionment Formulas under the Compact and the MBT Act

The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating MBT [Michigan business tax]. Under the MBT Act, created by 2007 PA 36,[5] income is apportioned by applying a single factor apportionment formula based solely on sales. MCL 208.1301(2). In contrast, under the Compact's election provision, income may be apportioned using an equally-weighted, three-factor apportionment formula based on sales, property and payroll. The potential effect of electing "out" of the MBT Act's single-factor apportionment methodology is a reduction of the overall apportionment percentage for companies that do not have significant property and payroll located in Michigan.

Decision in *IBM*

In *IBM*, 496 Mich 642, the Supreme Court considered the issue of whether MBT taxpayers must use a single-factor apportionment formula as mandated by the MBT Act or whether MBT taxpayers may elect to apply a three-factor apportionment formula under

the Compact. The parties were asked by the Court to brief four issues:

> (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq.*; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact. [*Int'l Business Machines Corp v Dep't of Treasury*, 494 Mich 874 (2013).]

In its decision, the Court determined that for tax years 2008 through 2010,[6] the Legislature did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq.*, and concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also concluded that both the business income tax base and the modified gross receipts tax base of the MBT are "income taxes" within the meaning

of the Compact. The Court did not reach the third issue of whether the Compact constitutes a contract. On November 14, 2014, the Michigan Supreme Court denied reconsideration. *Int'l Business Machines Corp v Dep't of Treasury*, [497 Mich 894]; 855 NW2d 512 (2014).

Retroactive Repeal of the Compact Provisions by [2014] PA 282

On September 11, 2014, 2013 SB 156 (SB 156) was enacted into law as [2014] PA 282, amending the MBT Act and expressly repealing the Compact provisions, as codified under MCL 205.581 to MCL 205.589. The Legislature gave the Act retroactive effect by providing as follows:

> Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of

> the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

[2014] PA 282 thus amended the MBT Act to express the "original intent" of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT Act's apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact's election provision under MCL 205.581.[8]

The effect of the amendments, as written, retroactively eliminates a taxpayer's ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT Act and income tax act.

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[3] The legislation, which was never enacted, was introduced in the wake of *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959), which held that there is no Commerce Clause barrier to the imposition of a direct income tax on a foreign corporation carrying on interstate business within a taxing state.

[4] The Compact was never approved by Congress, but it was upheld against constitutional challenges in *US Steel*, 434 US 452.

[5] For a history of business taxation in Michigan, *see IBM*, 496 Mich at 648-650.

[6] The Legislature explicitly repealed the Compact apportionment provisions effective January 1, 2011, through enactment of 2011 PA 40.

[8] [2014] PA 282 also clarified that the Compact's election provision is not available under the income tax act of 1967, 1967 PA 281. [Bolded text in original.]

Between 2011 and 2015 these multi-state taxpayers all filed suit in the Court of Claims seeking refunds due under the Compact that had been refused by Treasury on the ground that the only apportionment method available was that established by the MBT. Most of the cases were filed prior to the Supreme Court's resolution of *IBM*, so the trial court prudently held the cases in abeyance pending that decision. Ultimately, however, the case was resolved not by the *IBM* decision, but by passage of 2014 PA 282, at least once the trial court upheld the statute against plaintiffs' constitutional challenges. We now turn our attention to those same constitutional arguments.

III. ANALYSIS

A. STANDARDS OF REVIEW

The trial court entered summary disposition in favor of Treasury under MCR 2.116(I)(1), a decision which we review de novo. *Kenefick v Battle Creek*, 284

Mich App 653, 654; 774 NW2d 925 (2009). MCR 2.116(I)(1) states: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." We likewise pay no deference to the trial court's statutory interpretation or resolution of constitutional issues, as both of those issues also require de novo review. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013); *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).[2]

B. GENERAL PRINCIPLES

Before delving into our analysis of these issues, we first set forth in chronological sequence several undisputed factual matters and legal principles that, although partially contained in section II of this opinion, are worth keeping in mind as they provide critical background for our decision:

1. Michigan became a member state to the Compact in 1970.

2. A member state can withdraw from the Compact by "enacting a statute repealing the same." MCL 205.581, art X(2).

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[2] Though we can give no deference to the trial court's legal rulings, unlike the deference we give to discretionary calls on evidence or findings of fact, we nevertheless give the trial court's legal rulings careful consideration.

3. Under the Compact as originally enacted, a foreign business taxpayer had the option of either utilizing the apportionment formula under the Compact or what was available under a state's tax laws. MCL 205.581, art III.

4. The Michigan Business Tax Act, enacted into law in 2007 and effective January 1, 2008, required foreign business taxpayers to use the apportionment formula contained in the Act. MCL 208.1301(2) and MCL 208.1303.

5. In 2011, the Legislature repealed the apportionment provision of the Compact, effective January 1, 2011. 2011 PA 40.

6. In *IBM*, the Supreme Court held that through 2011 PA 40 the Legislature created a window (from January 1, 2008 until January 1, 2011) wherein relevant taxpayers could still utilize the apportionment option available under Article IV of the Compact. The Court recognized, however, that the Legislature "could have – but did not – extend this retroactive repeal to the start date of the [MBT]." *IBM*, 496 Mich at 659.

7. In response to the *IBM* decision, the Legislature enacted 2014 PA 282, which retroactively repealed the Compact to the start date of the MBT. 2014 PA 282 therefore eliminated the three-year window the *IBM* Court stated was created by 2011 PA 40.

8. In general, it is constitutional for tax statutes to be retroactively amended and taxpayers do not generally have a vested interest in

> tax laws that exist at any particular moment. *United States v Carlton*, 512 US 26, 30; 114 S Ct 2018; 129 L Ed 2d 22 (1994).

With these principles and facts in mind, we now turn our attention to the precise arguments put forth by the parties.

C. STATE AND FEDERAL CONTRACT CLAUSES

We first address whether 2014 PA 282's repeal of the Compact violated the Contract Clauses of the state and federal constitutions. The United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ," US Const, art I, § 10, cl 1, while our state Constitution similarly provides that "[n]o . . . law impairing the obligation of contract shall be enacted." Const 1963, art 1, § 10. In conducting this constitutional review, we give deference to the legislative branch by presuming statutes to be constitutional, and we will construe them as constitutional unless their unconstitutionality is clearly apparent. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011). This presumption is "'especially strong'" when tax legislation is concerned. *Id.* at 308 (citation omitted).

Like many provisions of the federal constitution, the Contract Clause has not been applied by the Supreme Court according to its plain, unequivocal language. As that Court has acknowledged, "[a]lthough

the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697; 74 L Ed 2d 569 (1983), quoting *Home Building & Loans Ass'n v Blaisdell*, 290 US 398, 434; 54 S Ct 231; 78 L Ed 413 (1934). In order to determine whether the clause's prohibition should be accommodated, the Supreme Court developed a three-part test. The first part of the three-part test is "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'" *General Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992), quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

Whether a change in state law has resulted in "a substantial impairment of a contractual relationship" itself requires consideration of three factors: "[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial." *Romein*, 503 US at 186. If this first prong of the test is met, i.e., "if the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. . . ." *Energy Resources Group*, 459 US at 411. Finally, the third part of the test is "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable

conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* at 412 (citation, quotation marks, and brackets omitted). *See also Borman LLC v 18718 Borman LLC*, 777 F3d 816, 824-825 (CA 6, 2015).[3]

We agree with the trial court that the Compact is not a binding contract under Michigan law. Because Congress did not approve the Compact, Michigan law governs its interpretation. *See McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991) (where the consent of Congress is not obtained, a compact does not express federal law and must be construed as state law). The trial court provided the following analysis of the Compact under Michigan law, with which we are in full agreement:

> In Michigan, there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). "In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id.* at 662 (quotation marks and citation omitted). As noted in the dissent in *IBM*, "[t]his presumption is grounded in the principle that 'surrenders of legislative power are subject to strict limitations that have developed in order

[3] Lower federal court decisions are not binding on this Court but may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

> to protect the sovereign prerogatives of state governments.'" *IBM*, 496 Mich at 682 (MCCORMACK, J., dissenting), quoting *Studier*, 472 Mich at 661.
>
> There are no words in the Compact, as adopted by the Legislature under 1969 PA 343, that indicate that the state intended to be bound to the Compact, and specifically to Article III(1). Therefore, the presumption must be that the state did not surrender its legislative power to require use of a particular apportionment formula. Such interpretation comports with the Supreme Court's recognition of "the basic principle[] that the States have wide latitude in the selection of apportionment formulas. . . ." *Moorman* [*Mfg Co v Blair*], 437 US [267,] 274[; 98 S Ct 2340; 57 L ED 2d 197 (1978)]. This interpretation is also consistent with the Court's recent acknowledgement that states "do not easily cede their sovereign powers. . . ." *Tarrant* [*Regional Water Dist v Herrmann*], 133 S Ct [2120,] 2132[; 186 L Ed 2d 153 (2013)]. Because there is no clear indication under MCL 205.581 that the state contracted away its ability to either select an apportionment formula that differs from the Compact, or to repeal the Compact altogether, the Court concludes that no contractual obligation was created by enactment of 1969 PA 343 that would prohibit the enactment of [2014] PA 282.

See also IBM, 496 Mich at 683 (MCCORMACK, J., dissenting) (opining that the Compact's withdrawal provision is "strong evidence that the member states

did not intend to be contractually bound, as it demonstrates the member states' desire to retain control over their sovereignty with respect to taxation."). Accordingly, plaintiffs' state and federal Contract Clause arguments are unavailing because they are premised on the incorrect view that the Compact comprises a binding contract under state law.[4] *Romein*, 503 US at 186.

However, plaintiffs also argue, using law developed under the federal Compact Clause, US Const, art 1, § 10[5], that Michigan created binding contractual obligations by entering into the Compact and that those binding obligations are enforceable under the Contract Clause. *See, e.g.*, *Thompson v Auditor General*, 261

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[4] We also point out that because a legislature cannot bind a subsequent legislature under Michigan law, 1969 PA 343 did not restrict a subsequent legislature's ability to correct an error prospectively or retroactively. *See, e.g.*, *Studier*, 472 Mich at 660; *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002). *See also Atlas v Wayne Co Board of Auditors*, 281 Mich 596, 599; 275 NW 507 (1937) ("The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors.").

[5] Plaintiffs do not allege a violation of the Compacts Clause, and for good reason. According to the Supreme Court, the Compacts Clause is limited to "agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *US Steel*, 434 US at 471, quoting *Virginia v Tennessee*, 148 US 503, 519; 13 S Ct 728; 37 L Ed 537 (1893). The Compact does nothing of the sort, and essentially exists for the benefit of multi-state taxpayers. It gives no advantage to the States vis-a-vis the federal government.

Mich 624, 636; 247 NW 360 (1933), citing *Green v Biddle*, 21 US (8 Wheat) 1; 5 L Ed 547 (1823), and *Doe v Ward*, 124 F Supp 2d 900, 915 n 20 (WD Penn, 2000), quoting *Aveline v Pennsylvania Bd of Probation and Parole*, 729 A 2d 1254, 1257 n 10 (Pa, 1999). Relying upon case law addressing whether an agreement between two or more states constitutes a compact for purposes of the Compact Clause, in its own words the trial court considered "[t]he three 'classic' indicia of a binding interstate compact[, which] are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal." *See Northeast Bancorp, Inc v Bd of Governors of the Fed Reserve Sys*, 472 US 159, 175; 105 S Ct 2545; 86 L Ed 2d 112 (1985) and *Seattle Master Builders Ass'n v Pacific Northwest Electric Power & Conservation Planning Council*, 786 F2d 1359, 1363 (CA 9, 1986). Applying these same factors, we conclude that the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contract Clause.

With respect to the first factor, whether the Compact created a joint regulatory agency, although the Compact created the Commission, MCL 205.581, art VI, it did not confer any governing or regulatory powers to that body. Rather, the Commission's powers included studying state and local tax systems, developing and recommending proposals for greater uniformity, and compiling information helpful to the party states. MCL 205.581, art VI(3). As the trial court noted,

"[n]one of these purposes is regulatory, and it in no way indicates a delegation of sovereign authority to tax," a point the Court in *US Steel Corp*, 434 US at 473, also made clear:

> [The Compact] 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.* [emphasis added.]

Concerning the second factor, we adopt the trial court's finding that the Compact did not require reciprocal action:

> There is nothing reciprocal about the Compact's provisions. Each member state operates its respective tax systems independently from the tax systems of other Member States, and the determination of tax in one state is generally independent of the determination in another state. With respect to apportionment formulas, in particular, Articles III(1) and IV's application in one member state has no bearing on another state. And the functionality of one member state's apportionment methodology does not hinge on whether another member state's apportionment methodology is reciprocal in nature. As the Supreme Court recognized in *Moorman Mfg Co* [437 US at 274], "the States have wide latitude in the selection of apportionment formulas." Consistent with *Moorman*, a Member State's decision to allow or eliminate a certain

> apportionment formula is unaffected by the choice of formula that another member state has made.

Finally, the third factor also requires a conclusion that the Compact allows unilateral modification and withdrawal. The Compact expressly says that member states are free to withdraw unilaterally without notice to other member states. As previously noted, MCL 205.581, art X(2), provides that a state may withdraw from the Compact by enacting a statute repealing it. *See also US Steel Corp*, 434 US at 473 ("[E]ach state is free to withdraw at any time."). Because the Compact specifically allows member states to unilaterally withdraw (subject to one condition, discussed later in this opinion) by merely passing legislation doing so, which is precisely what Michigan did through 2014 PA 282, we hold that the Compact was not a binding agreement on this state. Instead, it was an advisory agreement that was agreed to by participating states as a means of addressing interstate business taxation and threatened federal intervention into that area. 2014 PA 282, which removed the state as a member of the Compact, was therefore not prohibited.[6]

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[6] We also point out, as did Justice MCCORMACK in her *IBM* dissent, that the member states' course of performance shows that unilateral amendments or withdrawals had long been accepted. As Justice MCCORMACK noted, "member states did *not* view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members." *IBM*, 496 Mich at 681-682 (MCCORMACK, dissenting).

Before concluding on this issue, we point out that even if there was a binding contractual commitment on the part of the state, there likely would still be no violation of the Contract Clause. The United States Court of Appeals for the Sixth Circuit recently stated that "an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits." *Borman LLC*, 777 F3d at 826, citing *US Trust Co of New York v New Jersey*, 431 US 1, 21, 31; 97 S Ct 1505; 52 L Ed 2d 92 (1977). As the Court has previously declared, "a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment." *Exxon Corp v Eagerton*, 462 US 176, 190; 103 S Ct 2296; 76 L Ed 2d 497 (1983). Given the fact that these taxpayers have no vested interest in the continuation of a tax law, and that tax law is one of the more highly regulated areas in the law, it is difficult to see what reasonable expectation was actually interfered with. See, e.g., *All Star Inc v Georgia Atlanta Amusements, LLC*, 332 Ga App 1, 9; 770 SE 2d 22 (2015), and cases cited therein. This is particularly so when considering Treasury's position on this issue over the past five years or so.

In any event, because the Compact is not binding, either as a contract or a compact, it is subject to Michigan law concerning the interpretation of statutes.

D. RETROACTIVITY AND THE DUE PROCESS CLAUSES

We hold, as did the trial court, that the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal constitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself.

In confronting these issues it is certainly worth repeating that, "[s]tatutes are presumed to be constitutional, and this presumption is especially strong with respect to tax legislation. The party challenging the constitutionality of a statute has the burden of proving the law's invalidity." *Gen Motors Corp*, 290 Mich App at 369 (citations omitted). In *General Motors Corp* we noted that the Due Process Clause of the Fourteenth Amendment has been read by the Supreme Court to contain a substantive component even though the Clause itself contains only a procedural component:

> The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." Although textually only providing procedural protections, the Due Process Clause has a substantive component that protects individual liberty and property interests from arbitrary government actions. But to be protected by the Due Process Clause, a property interest must be a vested right. A vested right is an interest that the government is compelled to recognize and

> protect of which the holder could not be deprived without injustice. [*Id.* at 370 (citations and quotation marks omitted).]

Both the federal courts and our state courts have uniformly held that the retroactive modification of tax statutes does not offend due process considerations so long as there is a legitimate legislative purpose that is furthered by a rational means. For example, in *Welch v Henry*, 305 US 134, 146-151; 59 S Ct 121; 83 L Ed 87 (1938), the United States Supreme Court rejected a due process challenge to a Wisconsin statute enacted in 1935 that imposed a tax on income received in 1933. The Supreme Court explained that "a tax is not necessarily unconstitutional because retroactive." *Id.* at 146. It further concluded that,

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. [*Id.* at 146-147.]

In order to resolve this issue, it is necessary "[i]n each case . . . to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive

as to transgress the constitutional limitation." *Id.* at 147.

Carlton, 512 US 26, involved a due process challenge to the retroactive application of a 1987 amendment of a federal tax law to a taxpayer's transactions that occurred in 1986. The Supreme Court noted that it "repeatedly has upheld retroactive tax legislation against a due process challenge." *Carlton*, 512 US at 30. In addressing the "harsh and oppressive" language in *Welch*, the Court explained that "[t]he 'harsh and oppressive' formulation . . . does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy." *Id.* (citation and quotation marks omitted). That is, if the retroactive application of a statute is supported by a legitimate legislative purpose that is furthered by rational means, then the wisdom of the legislation is a determination left *exclusively* to the legislative and executive branches. *Id.* at 30-31. Once the relatively easy two part test is met, a court has no further business addressing any policy implications emanating from the statute.

Carlton makes clear that a taxpayer's reliance on a view of the law – even a correct view of the law – does not prevent the legislature from retroactively amending a statute. In *Carlton*, the 1987 amendment was adopted as a curative measure because the tax provision adopted in 1986 failed to require that the decedent must have owned the stock in question in order for the decedent's estate to qualify for the deduction. *Id.* at 31. "As a result, any estate could claim the deduction

simply by buying stock in the market and immediately reselling it to an ESOP [employee stock ownership plan], thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation." *Id.* Congress did not contemplate such a broad application of the deduction when it was originally enacted in 1986. *Id.* In rejecting the taxpayer's due process challenge to the retroactive application of the 1987 amendment, the Supreme Court reasoned:

> We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress'[s] purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally "innocent" taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable. [*Id.* at 32.]

The *Carlton* Court explained that Congress had acted promptly and established only a modest period of retroactivity. *Id.* The Court took note of the customary congressional practice of giving general revenue statutes effective dates that precede the dates of actual enactment, confined to short and limited periods related to the practicalities of producing national legislation. *Id.* at 32-33.

In *Carlton*, "the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year." *Id.* at 33. Although it was uncontested that the taxpayer in *Carlton* had relied on the original 1986 version of the tax statute when engaging in stock transactions in December 1986, and the reading of the original statute on which the taxpayer relied appeared to have been correct, the taxpayer's reliance alone was insufficient to establish a due process violation. *Id*. "Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.* And, the 1987 amendment did not impose "a wholly new tax." *Id.* at 34 (quotation marks omitted). Because the retroactive application of the 1987 amendment was rationally related to a legitimate legislative purpose, the Court held that the amendment as applied to the taxpayer's 1986 transactions comported with due process. *Id.* at 35.

Michigan law is, of course, in accord. In *Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994), our Supreme Court noted that "[t]he concern regarding the retroactivity of statutes arises from constitutional due process principles that prevent retrospective laws from

divesting rights to property or vested rights, or the impairment of contracts."

> A vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. Nonetheless, when determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted. [*Id.* at 699 (citations omitted).]

A vested right is a legal or equitable title to the present or future enjoyment of property or to the present or future enforcement of a demand or a legal exemption of a demand by another. *GMAC, LLC v Treasury Dep't*, 286 Mich App 365, 377; 781 NW2d 310 (2009). To be vested, a right must be more than a mere expectation based on an anticipated continuance of the present laws. *Id.* Relative to taxpayers, the *Walker* Court – just like the United States Supreme Court in *Carlton* – held that "it is also well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law." *Walker*, 445 Mich at 703. Not surprisingly, we have more recently held, consistent with *Walker*, that:

> [A] vested right cannot be premised on an expectation that general laws will continue *and certainly cannot be premised on the continuation of tax law.* In light of the fact that plaintiffs did not have a vested right, the contention that due process rights were violated

> is simply without merit. [*GMAC*, 286 Mich App at 378.]

Likewise, in *Gen Motors Corp*, 290 Mich App at 371, we held that the plaintiff's "claim for a refund of use taxes it paid was not a vested right but rather a mere expectation that its claim might succeed in light of' an earlier decision of this Court. The plaintiff's "claim rest[ed] on the theory that it held a vested chose in action – its refund claim – and relies on cases involving rights of action for damages to property or personal injury." *Id.* But, this Court noted, the case before it involved a tax rather than a right of action, and the plaintiff, "as a taxpayer, does not have a vested right in a tax statute or in the continuance of any tax law." *Id.* This Court concluded that the Legislature had not acted illegitimately by enacting a statute for the purpose of reversing a decision of this Court because the statute did not reverse a judicial decision or repeal a final judgment. *Id.* at 372-373. Stating the obvious we said that "[I]t is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted." *Id.*, citing *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation."). "A legislature's action to mend a leak in the public treasury or tax revenue – whether created by poor drafting of legislation in the first instance or by a judicial decision – with retroactive legislation has almost universally been recognized as 'rationally related to a

legitimate legislative purpose.'" *Gen Motors Corp*, 290 Mich App at 373, quoting *Carlton*, 512 US at 35.

In *Gen Motors Corp*, 290 Mich App at 376, the retroactive application of the statute did not exceed the modesty limitation of the Due Process Clause, as the statutory amendment did not reach back in time to assess a wholly new tax on long-concluded transactions. *Id.* Rather, it confirmed a tax that had been assessed and paid for many years. *Id.* Quite similar to this case, the Legislature acted promptly in response to this Court's earlier decision by correcting what might have resulted in a significant loss of revenue. *Id.* This Court reasoned that "the nominal period to which the amendment retrospectively applies – five years – cannot be said to extend beyond the taxpayers' interest in finality and repose because the period of retroactivity is consistent with the applicable statute of limitations." *Id.* The period of retroactivity was "comparable to the time frames of other retroactive legislation that this Court, other state courts, and federal courts have held were within the modesty limits of the Due Process Clause." *Id.* at 377 (footnote omitted); *see also id.* at 377 n 3 (citing authorities in support of this proposition).

On the basis of the above authorities, we hold that the retroactive impact of 2014 PA 282 did not violate the due process clauses of either the state or federal constitutions. First, plaintiffs had no vested right in the tax laws or in the continuance of any tax laws. *Carlton*, 512 US at 33; *Walker*, 445 Mich at 703; *GMAC*, 286 Mich App at 378. Indeed, plaintiffs attempt to characterize their tax refund claims as causes of action

that comprised vested interests, but that same argument was considered and rejected in *Gen Motors Corp*, 290 Mich App at 371. Plaintiffs did not have a vested interest protected by the due process clause in the continuation of the Compact's apportionment provision.

Second, case law supports the proposition that the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282. As the trial court explained, a Senate Fiscal Agency analysis of SB 156 addressed the potential ramifications of failing to accord retroactive effect to 2014 PA 282:[7]

> The first enacting section of the bill would retroactively repeal the State's enactment of the Multistate Tax Compact, effective January 1, 2008. As a result, taxpayers filing under the MBT would not be allowed to use alternative apportionment calculations provided under the Compact when computing a Michigan tax base. While the Department of Treasury has not allowed taxpayers to use these alternative calculations, the Michigan Supreme Court's recent decision in *IBM Corp. v Department of Treasury* may enable certain taxpayers to use these calculations, and the Department estimates that approximately $1.1 billion in refunds would be paid as a result. Because MBT revenue is directed to the General Fund, these

[7] Legislative bill analyses can be probative in determining historical background leading up to the introduction of legislation, though we do not look to them for official statements of legislative intent. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Kelly Servs, Inc v Dep't of Treasury*, 296 Mich App 306, 317; 818 NW2d 482 (2012).

> refunds would reduce General Fund revenue, and *the bill would prevent a reduction in General Fund revenue of $1.1 billion.* [Senate Legislative Analysis, SB 156, September 10, 2014, p 5 (emphasis added).]

It is legitimate legislative action to both (1) correct a perceived misinterpretation of a statute, and (2) eliminate a significant revenue loss resulting from that misinterpretation. *See Carlton*, 512 US at 32 (finding a legitimate legislative purpose for the retroactive application of tax legislation meant to correct what Congress reasonably viewed as a mistake in earlier legislation "that would have created a significant and unanticipated revenue loss."), and *Gen Motors Corp*, 290 Mich App at 373 (noting that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted" and that "[a] legislature's action to mend a leak in the public treasury or tax revenue – whether created by poor drafting of legislation in the first instance or by a judicial decision – with retroactive legislation has almost universally been recognized as rationally related to a legitimate legislative purpose.") (quotation marks and citation omitted). Accordingly, the retroactive application of 2014 PA 282 served a legitimate governmental purpose.

The retroactive application of 2014 PA 282 was likewise a rational means to further these legitimate purposes. Four factors are relevant in this determination. First, like the statutes in *Carlton* and *Gen Motors*

Corp, 2014 PA 282 "does not reach back in time to assess a 'wholly new tax' on long-concluded transactions." *Id.* at 376. Rather, 2014 PA 282 clarifies the method of apportioning the tax base for a previously enacted tax, the MBT, by confirming that the single-factor apportionment method must be utilized and that the three-factor method may not be elected. Second, plaintiffs, as a matter of law, could not have relied on the availability of the three-factor apportionment method. As discussed, taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, and states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. And, factually, plaintiffs either were – or should have been – aware that the state (through Treasury) had been arguing since at least 2011 (and even then relative to the 2008-2009 tax years) that the apportionment provision in the Compact was no longer available. See *Intl Business Machines Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No 306618), rev'd by *IBM*, 496 Mich 642.

Third, there is no doubt that the Legislature acted promptly to correct the error. As the trial court found, "[n]ot until July 14, 2014, when the Court decided *IBM*, was it made clear to the Legislature that 2007 PA 36

was defective. SB 156, H-1, which added the retroactive repeal of the Compact[] provisions, was introduced on September 9, 2014, and was enacted into law on September 11, 2014." Fourth, the six and one-half year retroactive period was sufficiently modest relative to time frames of other retroactive legislation that have been upheld by Michigan courts, federal courts, and other state courts. See *Gen Motors Corp*, 290 Mich App at 376-377 (upholding a five-year retroactive application), and at 377 n 3 (citing case law from Michigan and other jurisdictions approving equivalent retroactive periods); *GMAC*, 286 Mich App at 378 (affirming a seven-year retroactive period). These factors squarely lead to the conclusion that the retroactive application of 2014 PA 282 was a rational means of furthering legitimate governmental purposes.

Some plaintiffs rely on *Newsweek, Inc v Fla Dep't of Revenue*, 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998), contending that Michigan engaged in a "bait and switch" by enticing foreign companies to engage in commerce in Michigan by providing the three-factor apportionment formula, and then retroactively taking away this apportionment method. But reliance on *Newsweek* is misplaced. In *Newsweek*, 522 US at 444, the Supreme Court held that a state could not engage in a "bait and switch" by holding out what appeared to be a clear and certain remedy, i.e., a tax appeal that could be pursued after paying disputed taxes, and then later declare that no such remedy exists. Here, however, Michigan has not taken away any procedure for seeking a refund, nor has any procedural remedy been

denied. Instead, the Michigan legislature has done what legislatures across the country have had to do – clarify through statutory amendment the intended meaning of a statutory provision that had been misread by the courts. Further, Michigan never engaged in a "bait and switch" because it never suggested that the three-factor method of apportionment under the Compact could not be altered. To the contrary, the Compact expressly indicated a member state *could unilaterally* get out of the Compact at any time, and as we just emphasized, Michigan has consistently maintained that the three-factor apportionment method could not be used under the MBT Act, as reflected in the litigation in *IBM*, 496 Mich 642.[8] The retroactive provisions of 2014 PA 282 were not enacted in violation of the state or federal due process clauses.

Plaintiffs also argue that retroactive withdrawal from the Compact is prohibited by 1969 PA 343, MCL 205.581, art X(2), which states that a party state may by statute withdraw from the Compact but that "[n]o withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal." According to plaintiffs retroactive withdrawal is nonsensical because Michigan *participated* under the Compact in the period from 2008 through 2010 by paying dues, voting, participating in

[8] Some plaintiffs suggest that the retroactive application of 2014 PA 282 violates Michigan case law setting forth rules regarding retrospective legislation. This unpreserved argument fails because plaintiffs lacked a vested interest in the continuance of tax laws and in a tax refund based on the continuation of the Compact election provisions.

Commission leadership and meetings, and exchanging confidential taxpayer information. However, plaintiffs have failed to provide any law establishing the relevancy of such evidence, and since the statutory and constitutional issues raised are legal issues, *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009) ("We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a statute."), we fail to see how Michigan's participation in the Commission impacts the legal import of the statute. Accordingly, we are unconvinced by plaintiffs' contention that Michigan's alleged participation in the Commission during the relevant timeframe affects the question whether 2014 PA 282 retroactively repealed the Compact provisions.

F. SEPARATION OF POWERS

We now turn our attention to the argument that retroactive application of 2014 PA 282 violates the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2 states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "Simply put, legislative power is

the power to make laws. By contrast, a defining aspect of judicial power is the interpretation of law." *People v Konopka*, ___ Mich App ___, ___; ___ NW2d ___ (2015); slip op at 9 (quotation marks and citation omitted).

There is little doubt that the Legislature lacks authority to reverse a judicial decision or to repeal a final judgment, *Wylie v Grand Rapids City Comm*, 293 Mich 571, 582; 292 NW 668 (1940); *Gen Motors Corp*, 290 Mich App at 372-373, but there is also little doubt but that it also has the authority – if not the obligation – to amend a statute that it believes has been misconstrued by the judiciary, *Romein v Gen Motors Corp*, 436 Mich 515, 537; 462 NW2d 555 (1990), reh den 437 Mich 1202 (1990), aff'd 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992); *see also Gen Motors Corp*, 290 Mich App at 373 (stating that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted."). This power to amend includes the power to retroactively correct the judiciary's misinterpretation of legislation:

> [The Legislature possesses the] authority to retroactively amend legislation perceived to have been misconstrued by the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of the Contract and Due Process Clauses of the federal and state constitutions, and *so long as the retroactive provisions of the statute do not impair final judgments.*

> Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments. In *Seese v Bethlehem Steel Co*, 168 F2d 58, 62 (CA 4, 1948), the court reasoned that the Legislature's enactment of a retroactive statute repealing the effects of a prior judicial decision is not an exercise of judicial power[.] [*Romein*, 436 Mich at 537 (emphasis added).]

See also *Konopka*, ___ Mich App at ___; slip op at 10-11 (finding no separation of powers violation where the Legislature retroactively amended a statute that was perceived to have been misconstrued by the judiciary); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

There are several reasons why the Legislature did not violate the separation of powers clause by retroactively repealing the Compact to January 1, 2008, thereby obviating the *IBM* Court's legal conclusions. First, 2014 PA 282 did not reverse a judicial decision or repeal a final judgment. In *IBM*, 496 Mich at 645, 658-659, 662, the lead opinion held that *2007 PA 36* did not implicitly repeal the Compact's election provision. 2014 PA 282 did not overturn this judicial interpretation of that 2007 law. Instead, the Legislature created a new law, not interpreted by the *IBM* Court, that

explicitly repealed the Compact provisions effective beginning January 1, 2008, to further what the Legislature understood to have been its original intent when it enacted 2007 PA 36. This did not impinge on the judiciary's role of interpreting the law but instead corrected a mistake that was made clear by the holding in *IBM*. That is, the Legislature in 2014 PA 282 *explicitly* repealed the Compact provisions after the holding in *IBM* revealed that the Compact election provision had not been *implicitly* repealed by enactment of 2007 PA 36. Although 2014 PA 282 may have rendered moot the effect of the judicial interpretation in *IBM*, this did not overturn that Court's judgment and did not violate the separation of powers doctrine. See *Romein*, 436 Mich at 537 (citing with approval a federal case "reason[ing] that the Legislature's enactment of a retroactive statute repealing the effects of a prior judicial decision is not an exercise of judicial power"); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

Some plaintiffs cite *Presque Isle Twp Bd of Ed v Presque Isle Co Bd of Ed*, 364 Mich 605, 612; 111 NW2d 853 (1961), for the proposition that a legislative body may not declare what its intention was on a former occasion such that it would affect past transactions. Although *Presque Isle* cited a Wisconsin case[9] that contained this language, the actual holding in *Presque Isle*

[9] *Northern Trust Co v Snyder*, 113 Wis 516; 89 NW 460 (1902).

was the unremarkable proposition that one legislator's present recollection of what he intended when a bill was passed could not be received in evidence for use in interpreting a statute. *Id.* The holding in *Presque Isle* is inapplicable to this issue.[10]

Finally, plaintiffs proclaim that they are entitled to the benefit of the *IBM* Court's ruling as to the effect of 2007 PA 40. They are wrong. Instead, it is well-settled that our duty as an appellate court is to apply the most recent legislative pronouncement on an issue pending before this Court when the legislature makes the new law or amendment retroactive. As stated by the United States Supreme Court:

> It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's

[10] Plaintiffs also contend that the 2014 Legislature could not declare the intent of the Legislature in 2007 because only 15% of the members of the 2014 Legislature were members of the 2007 Legislature. We have been presented with no authority stating that the composition of the Legislature affects whether it may clarify its original intent in enacting a prior law, *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1994), and cannot square that purported rule with the overwhelming case law recognizing the Legislature's power to correct what it perceives to be an incorrect interpretation of a statute.

> latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. [*Plout v Spendthrift Farms, Inc.*, 514 US 211, 226-227; 115 S Ct 1447; 131 L Ed 2d 328 (1995) (citations omitted).]

2014 PA 282 did not declare what the law was as to any final judgment, as each of these cases was pending[11] when the statute was passed. In other words, none of these cases had a judgment that was "frozen in time," *King v McPherson Hospital*, 290 Mich App 299, 306; 810 NW2d 594 (2010), and so it was constitutionally permissible to apply 2014 PA 282 to these pending cases.

For all these reasons, we hold that the Legislature did not violate the separation of powers provision of the state Constitution when it enacted 2014 PA 282.

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[11] Although International Business Machines is a party to these appeals, its tax appeal from the 2008 tax year – the tax year subject to the Supreme Court's 2014 *IBM* decision, is not at issue here.

G. COMMERCE CLAUSE

We next turn to plaintiff's argument that 2014 PA 282 violates the Commerce Clause of the United States Constitution.

The Commerce Clause, US Const, art I, § 8, cl 3, provides: "The congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." Although the Commerce Clause says nothing about the protection of interstate commerce in the absence of any action by Congress, the Supreme Court has greatly expanded this Clause to include "a negative sweep" by "prohibit[ing] certain state actions that interfere with interstate commerce." *Quill Corp v North Dakota*, 504 US 298, 309; 112 S Ct 1904; 119 L Ed 2d 91 (1992). According to the Court, the Commerce "Clause prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce." *Id.* at 312.

> The United States Supreme Court . . . has established a four-pronged test to determine whether a state tax violates the Commerce Clause. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). A state tax will withstand scrutiny under a Commerce Clause challenge and will be held to be constitutionally valid under the four-pronged test articulated in *Complete Auto* provided that the tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce,

> and (4) is fairly related to the services provided by the state. [*Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 415; 488 NW2d 182 (1992) (footnote omitted).]

Only the third prong is challenged in this case; plaintiffs contend that 2014 PA 282 discriminates against interstate commerce. "A tax violates the third prong of the *Complete Auto* test if it is facially discriminatory, has a discriminatory purpose, *or* has the effect of unduly burdening interstate commerce." *Caterpillar*, 440 Mich at 422, citing *Amerada Hess Corp v NJ Dep't of Treasury*, 490 US 66, 75; 109 S Ct 1617; 104 L Ed 2d 58 (1989).

We hold that 2014 PA 282 does not discriminate against or unduly burden interstate commerce. First, 2014 PA 282 is not facially discriminatory. A tax statute is facially discriminatory if there is "an explicit discriminatory design to the tax." *Id.* at 76. 2014 PA 282 does not, on its face, create any classification based on a taxpayer's state of origin or the location of commerce. Rather, it repeals the Compact and eliminates the provision allowing election of a three-factor apportionment formula for *all* taxpayers, both in-state and out-of-state companies. Therefore, 2014 PA 282 does not reflect an explicit discriminatory design, and no facial discrimination occurred.

Second, 2014 PA 282 does not have a discriminatory purpose. A discriminatory purpose may be found, for example, where a tax statute "was motivated by an intent to confer a benefit upon local industry not

granted to out-of-state industry[.]" *Amerada Hess Corp*, 490 US at 76. 2014 PA 282 recites that it was enacted to express the original intent of the Legislature to eliminate the election provision for purposes of the MBT Act and the income tax act of 1967, as well as to protect state revenues. Senate Legislative Analysis, SB 156, September 10, 2014, p 5. There is no evidence of a legislative intent to give a benefit to local industry that is denied to out-of-state businesses. Indeed, 2014 PA 282 puts in and out of state corporate taxpayers *in the same position* relative to Michigan tax calculations.

There is a contention by some that a discriminatory purpose is reflected in comments made by certain legislators to the media, but as we have said, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski v Xermac, Inc*, 457 Mich 593, 608 n 18; 580 NW2d 817 (1998); *Detroit Bd of Ed v Romulus Bd of Ed*, 227 Mich App 80, 89 n 4; 575 NW2d 90 (1997); *City of Williamston v Wheatfield Twp*, 142 Mich App 714, 719; 370 NW2d 325 (1985), citing *Presque Isle*, 364 Mich at 612. Plaintiffs identify no case law permitting consideration of the statements of individual legislators, particularly statements made to the media, to establish legislative intent. And in any event, the purported media comments of the legislators do not reveal any intent to discriminate against interstate commerce but, instead, are reasonably understood to reflect a desire to ensure a *level playing field* and to

avoid giving an unfair advantage to out-of-state businesses. There is no evidence of a discriminatory purpose underlying the enactment of 2014 PA 282.

Third, 2014 PA 282 does not have a discriminatory effect, as it merely precludes both in-state and out-of-state taxpayers from electing the three-factor apportionment formula previously available under the Compact. The federal Constitution does not impose a constitutional restraint on a state's selection of an apportionment formula, and a single-factor formula is presumptively valid. *Moorman*, 437 US at 273, provides a good example. In that case, the Supreme Court rejected a Commerce Clause challenge to Iowa's use of a single-factor formula; the Court did not agree with the argument that Iowa's single-factor formula was responsible for an alleged duplication of taxation with Illinois, which used a three-factor formula. *Id.* at 276-280. The Court held that, in the absence of implementing legislation from Congress, the Commerce Clause did not require Iowa to compute net income under Illinois's three-factor formula. *Id.* at 277-278. The Court reasoned in part that any disparity in the tax treatment of Iowa and Illinois companies was "not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter." *Id.* at 277 n 12. The purported "discrimination" against interstate commerce was "simply a way of describing the potential consequences of the use

of different formulas by the two States. These consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in either State's formula." *Id.*

Plaintiffs have not established that application of the single-factor formula required by 2014 PA 282 produces a discriminatory effect against out-of-state companies. As noted, the single-factor formula applies to *all* taxpayers, both Michigan and out-of-state companies. As with the Iowa statute in *Moorman*, 2014 PA 282 treats local and foreign companies with an equal hand by requiring the single-factor formula for both. Any purported "discrimination" against interstate commerce is, in truth, "simply a way of describing the potential consequences of the use of different formulas by" Michigan and other states. *Id.* Such "consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in" the apportionment formula used by Michigan or by other states. *Id.* Plaintiffs have not established that Michigan's single-factor formula discriminates against interstate commerce. 2014 PA 282 does not violate the Commerce Clause.

H. THE FIRST AMENDMENT

Moving on to the next argument, we conclude that plaintiffs were not denied the right to petition the government under the First Amendment of the federal Constitution or the analogous Michigan provision.

"The right of citizens to petition their government for redress of grievances is specifically guaranteed by the United States and Michigan Constitutions." *Jackson Co Ed Ass'n v Grass Lake Community Sch Bd of Ed*, 95 Mich App 635, 641; 291 NW2d 53 (1979), citing US Const, Am I, and Const 1963, art 1, § 3. But this right "may be circumscribed to the extent necessary to achieve a valid state objective." *Jackson Co Ed Ass'n*, 95 Mich App at 642. The right to petition extends to all departments of the government and includes the right of access to the courts. *Cal Motor Transp Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972). See also *In re ALZ*, 247 Mich App 264, 276; 636 NW2d 284 (2001) (noting that the *Cal Motor Transp Co* Court "found a constitutional basis for the right of access to the courts as an aspect of the First Amendment right of petition."); *Mayor of Lansing v Knights of the Ku Klux Klan (After Remand)*, 222 Mich App 637, 647; 564 NW2d 177 (1997) ("The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs.").

However, the First Amendment right to advocate does not guarantee that the speech will persuade or that the advocacy will be effective. *Smith v Ark State Hwy Employees, Local 1315*, 441 US 463, 464-465; 99 S Ct 1826; 60 L Ed 2d 360 (1979). That is, "the First Amendment does not impose any affirmative obligation on the government to listen" or respond to the speaker. *Id.* at 465. "Nothing in the First Amendment

or in [the United States Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn State Bd for Community Colleges v Knight*, 465 US 271, 285; 104 S Ct 1058; 79 L Ed 2d 299 (1984). See also *We The People Foundation, Inc v United States*, 376 US App DC 117, 120; 485 F3d 140 (2007) (rejecting the plaintiffs' contention "that they have a right under the First Amendment to receive a government response to or official consideration of a petition for a redress of grievances.").

Further, legislative retraction of the only remedy available to a decision-maker is different from interference with the plaintiffs' abilities to express their views to the decision-maker. Thus, such a retraction does not violate the right to petition the government. *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 336; 788 NW2d 842 (2010) (finding no denial of lenders' right of access to courts in a 42 USC 1983 case; "[p]laintiff cannot claim that a violation of 42 USC 1983 occurred simply because a newly enacted statute precluded recovery of certain damages that plaintiff's members had become accustomed to receiving in NSF cases."). Accord: *American Bus Ass'n v Rogoff*, 396 US App DC 353, 360; 649 F3d 734 (2011).

Plaintiffs assert that, in rejecting their argument, the trial court erred in relying on cases addressing the right to be heard by the Legislature; plaintiffs say they are instead contending that they were "thrown out of

court." As a result of the enactment of 2014 PA 282, plaintiffs contend that they have been denied the right to petition Treasury and to appeal to a court for a refund of taxes already paid. Plaintiffs characterize this as a classic denial of the right to petition and rely on *Flagg v Detroit*, 715 F3d 165, 174 (CA 6, 2013), to argue that they have established the elements necessary to establish a denial of access to the courts.

In *Flagg*, the court observed that the United States "Supreme Court has recognized a constitutional right of access to the courts, whereby a plaintiff with a nonfrivolous legal claim has the right to bring that claim to a court of law." *Id.* at 173, citing *Christopher v Harbury*, 536 US 403, 415 n 12; 122 S Ct 2179; 153 L Ed 2d 413 (2002). The right to access the courts does not create substantive rights; a plaintiff claiming a denial of access "must have an arguable, nonfrivolous underlying cause of action." *Flagg*, 715 F3d at 173. The *Flagg* court explained:

> Denial of access to the courts claims may be forward-looking or backward-looking. In forward-looking claims, the plaintiff accuses the government of creating or maintaining some frustrating condition that stands between the plaintiff and the courthouse door. The object of the suit is to eliminate the condition, thereby allowing the plaintiff, usually an inmate, to sue on some underlying legal claim. In backward-looking claims, such as those at issue in the instant case, the government is accused of barring the courthouse door by concealing or destroying evidence so

> that the plaintiff is unable to ever obtain an adequate remedy on the underlying claim. Backward-looking claims are much less established than forward-looking claims, but this Court has recognized them and the Supreme Court has provided additional guidance as to the elements of a viable backward-looking claim. [*Id.* (citations and quotation marks omitted).]

Relying on *Christopher*, 536 US 403, and *Swekel v City of River Rouge*, 119 F3d 1259 (CA 6, 1997), the *Flagg* court identified the "elements of a backward-looking denial of access claim: (1) a non-frivolous underlying claim; (2) obstructive actions by state actors; (3) substantial prejudice to the underlying claim that cannot be remedied by the state court; and (4) a request for relief which the plaintiff would have sought on the underlying claim and is now otherwise unattainable." *Flagg*, 715 F3d at 174 (citations omitted).

Plaintiffs cannot establish the second element identified in *Flagg* for a backward-looking denial of access claim, as there are no obstructive actions by state actors. Although plaintiffs contend that enactment of 2014 PA 282 obstructed plaintiffs' access to the courts by retroactively destroying their right to elect the three-factor apportionment formula under the Compact and preventing them from obtaining a larger tax refund, *Flagg* itself indicates that a backward-looking denial of access claim can only prevail when "the government is accused of barring the courthouse door *by concealing or destroying evidence. . . .*" *Flagg*, 715 F3d

at 173 (emphasis added). There is no allegation in these cases that defendant or any state actor has concealed or destroyed evidence. The enactment of 2014 PA 282 retroactively repealing the Compact and requiring the use of a single-factor apportionment formula did not deny plaintiffs access to the courts. In fact, as is obvious, this very litigation demonstrates that plaintiffs have had an ample opportunity to present their arguments to the courts.[12] Legislative elimination of the right to elect the three-factor apportionment formula and any refund on the basis of such an election does not interfere with plaintiffs' abilities to file claims or seek refunds from the courts or Treasury. All that they have been prohibited from doing is seeking a refund under one particular formula. This does not violate the First Amendment. See *American Bus Ass'n*, 396 US App DC at 360; *Mich Deferred Presentment Servs Ass'n, Inc*, 287 Mich App at 336.

I. MISCELLANEOUS STATE CONSTITUTIONAL PROVISIONS

Despite plaintiffs' protests to the contrary, the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution.

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[12] Like any other citizen, the First Amendment gave plaintiffs the ability to voice any objection to the Legislature or Governor before 2014 PA 282 was passed and signed into law.

1. TITLE-OBJECT

Const 1963, art 4, § 24 provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

2014 PA 282 contains the following title:

> AN ACT to amend 2007 PA 36, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to make appropriations," by amending sections 111, 305, 403, and 433 (MCL 208.1111, 208.1305, 208.1403, and 208.1433), sections 111 and 305 as amended by 2012 PA 605, section 403 as amended by 2008 PA 434, and section 433 as amended by 2007 PA 215, and by adding section 508; and to repeal acts and parts of acts.

This Court has explained:

> When assessing a title-object challenge to the constitutionality of a statute, all possible presumptions should be afforded to find constitutionality. An amended title should be construed reasonably, not narrowly and with unnecessary technicality. The goal of the Title-Object Clause is notice, not restriction, of legislation, and it is only violated where the subjects are so diverse in nature that they have no necessary connection. The purpose of the clause is to prevent the Legislature from passing laws not fully understood, and to ensure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge. [*Lawnichak v Dep't of Treasury*, 214 Mich App 618, 620-621; 543 NW2d 359 (1995) (citations omitted).]

Three types of challenges may be asserted under the Title-Object Clause:

> (1) a "title-body" challenge, which indicates that the body exceeds the scope of the title, (2) a "multiple-objects challenge," which indicates that the body embraces more than one object, and (3) a "change of purpose challenge," which indicates that the subject matter of the amendment is not germane to the original purpose. [*Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 185; 658 NW2d 804 (2002).]

All three types of challenges have been raised in these cases.

We agree with the trial court that plaintiffs' multiple-objects challenge is devoid of merit. "The body of the law, and not just its title, must be examined to determine whether the act embraces more than one object. The purpose of the single-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection." *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 557; 595 NW2d 176 (1999) (citations and quotation marks omitted). "The object of the legislation must be determined by examining the law as enacted, not as originally introduced." *People v Kevorkian*, 447 Mich 436, 456; 527 NW2d 714 (1994). "The object of a law is defined as its general purpose or aim. The constitutional requirement should be construed reasonably and permits a bill enacted into law to include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Gen Motors Corp*, 290 Mich App at 388 (citations and quotation marks omitted). "Legislation should not be invalidated merely because it contains more than one means of attaining its primary object." *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 499; 378 NW2d 402 (1985). "The Legislature may enact new legislation or amend any act to which the subject of the new legislation is germane, auxiliary, or incidental. A statute may authorize the doing of all things that are in furtherance of the general purpose of the act without violating the one-object limitation of art 4, § 24." *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 564; 492 NW2d 246 (1992) (citations and quotation marks

omitted), overruled in part on other grounds by *Silverman v Univ of Mich Bd of Regents*, 445 Mich 209 (1994), overruled in part on other grounds by *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763 (2003).

In *Mooahesh*, this Court quoted from a prior opinion of this Court that summarized the single-object requirement in a case concerning the repeal of a tax:

> It might have been better draftsmanship to have placed the provision concerning the taxability of municipal transportation utilities in the general property tax law (where one might expect to find it) rather than in the home rule act. There is, however, no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. *The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended.* [*Mooahesh*, 195 Mich App at 564, quoting *Detroit Bd of Street R Comm'rs v Wayne Co*, 18 Mich App 614, 622-623; 171 NW2d 669 (1969) (emphasis added in *Mooahesh).*]

The trial court in *Mooahesh* found that 1988 PA 516, which amended the Individual Income Tax Act to provide that lottery winnings are taxable, violated the

Title-Object Clause because it repealed a section of the Lottery Act containing a tax exemption for lottery winnings, which the trial court viewed as an object distinct from the general object of raising revenue. *Mooahesh*, 195 Mich App at 562. This Court reversed that determination, noting that the object of 1988 PA 516 was to raise revenue, *id.* at 565, and that "[t]he object of such an act is necessarily broad-ranging and comprehensive." *Id.* at 566 (citation and quotation marks omitted).

> Revenues can be raised in any number of ways, as history has made obvious. Taxes may be imposed, increased, or rearranged. The object of meeting deficiencies in state funds may reasonably be found to include the repeal of a tax exemption, even if that exemption does not appear in any act specifically devoted to taxation. While it might have been better draftsmanship to have provided for a separate amendment to the Lottery Act, the inclusion of the repeal of the tax exemption provision in an act amending the income tax laws does not render the act in violation of the single-object requirement. [*Id.* (citations, quotation marks, and brackets omitted).]

In rejecting plaintiffs' multiple-objects challenge in the present cases, the trial court discussed *Mooahesh* and reasoned as follows:

> Just as the statute considered in *Mooahesh* had as its general purpose the raising of revenues, so too was the general purpose of [2014] PA 282. And just as it might

> have been "better draftsmanship" to have provided for a separate amendment repealing § 34 of the Lottery Act, the Legislature in enacting [2014] PA 282 might have been better advised to repeal the Compact provisions in a separate act. But like the choice to amend the [Individual Income Tax Act] and repeal a section of the Lottery Act in one act, the choice to include the repeal of the Compact and amend the MBT in one act is not a violation of the single-object requirement.

The trial court's analysis is convincing. The single object, i.e., the general purpose or aim, of 2014 PA 282 is to amend 2007 PA 36, the MBT Act. This general object was accomplished by amending provisions of the MBT Act and by repealing the Compact. This object is reflected in the title of 2014 PA 282, which references the amendment of sections of 2007 PA 36 and the repeal of acts and parts of acts. Enacting section 1 of 2014 PA 282 provides that the Compact is repealed retroactive to January 1, 2008, and provides that the repeal is intended to express the original intent of the Legislature regarding the application of a section of the MBT Act and to eliminate the apportionment election provision in the Compact. This enacting section thus clarifies that the repeal of the Compact and the concomitant elimination of the apportionment election provision is germane to the object of amending the MBT Act in that it clarifies the appropriate method of apportionment. In other words, the Compact and the MBT Act are related to one another because they each pertain to the method of apportioning the tax base.

Thus, 2014 PA 282 does not contain diverse subjects that have no necessary connection. Rather, the repeal of the Compact directly relates to, carries out, and implements the principal object of amending the MBT Act.

"With regard to a title-body challenge, this Court has indicated that the title of an act must express the general purpose or object of the act." *Wayne Co Bd of Comm'rs*, 253 Mich App at 185. "Only the general object and not all the details and incidents of a statute need be indicated in the title." *Ace Tex Corp v Detroit*, 185 Mich App 609, 616; 463 NW2d 166 (1990).

> [I]t is not necessary that a title be an index of all of an act's provisions. It is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose. [*City of Livonia*, 423 Mich at 501 (citations, quotation marks, and ellipsis omitted).]

"Whether a provision is germane to its purpose depends upon its relationship to the object of the act." *Ace Tex Corp*, 185 Mich App at 616. "The test is whether the title gives fair notice to the legislators and the public of the challenged provision. The notice aspect is violated where the subjects are so diverse in nature that they have no necessary connection." *HJ Tucker & Assoc, Inc*, 234 Mich App at 559 (citations and quotation marks omitted).

Again, the title of 2014 PA 282 expresses the general purpose or object of amending the MBT Act and references the repeal of acts or parts of acts. Although the title does not use the word "Compact," the title need not be an index of all of the act's provisions. *City of Livonia*, 423 Mich at 501. The repeal of the Compact is germane, auxiliary, or incidental to the amendment of the MBT Act because the elimination of the Compact's election provision is pertinent to the proper method of apportionment of the MBT tax base. The subjects are not so diverse in nature that they lack a necessary connection, and neither the legislators nor the public were deprived of notice of the challenged provision. See also *Mooahesh*, 195 Mich App at 569 ("Despite [1988 PA 516's] failure to state explicitly in the title that the Lottery Act exemption was being repealed, we are able to declare that the subjects are not so diverse as to have 'no necessary connection.'").

When confronting a change-of-purpose challenge, a court must consider whether the change comprises a mere amendment or extension of the basic purpose of the original bill or instead introduces an entirely new and different subject matter. *Anderson v Oakland Co Clerk*, 419 Mich 313, 328; 353 NW2d 448 (1984). "[T]he test for determining if an amendment or substitute changes a purpose of the bill is whether the subject matter of the amendment or substitute is germane to the original purpose. The test of germaneness is much like the standard for determining whether a bill is limited to a single object." *Kevorkian*, 447 Mich at 461. In *Kevorkian*, 447 Mich at 451-452, the bill as introduced

would have created a commission on death and dying to study "voluntary self-termination of life," but the amended bill that became law added criminal penalties for assisting another person in committing suicide. Our Supreme Court rejected a change-of-purpose challenge because the criminal penalties were an interim measure that provided a stable environment while the commission, the Legislature, and the citizenry studied the matter further. *Id.* at 461.

With respect to 2014 PA 282, both the original and amended bill contained provisions related to the MBT tax base. The original purpose of SB 156 was to amend the MBT Act in various ways, including by enacting amendments concerning the gross receipts tax base under the MBT. The change implemented by substitute H-1, as enrolled as 2014 PA 282, did not introduce an entirely new and different subject matter. Instead, it amended or extended the basic purpose of the original bill by retaining the original amendments and adding other provisions, including by retroactively repealing the Compact provisions and expressing legislative intent concerning the use of the single-factor apportionment formula and the elimination of the Compact's election provision. This was germane to the original purpose of amending the MBT Act because, as discussed, the elimination of the Compact's election provision was pertinent to the proper method of apportionment under the MBT Act. Therefore, the repeal of the Compact was sufficiently interconnected with the MBT Act that it fell within the basic purpose

of the original bill. This was a far cry from the introduction of an entirely new and different subject matter, as in *Toth v Callaghan*, 995 F Supp 2d 774, 778 (ED Mich, 2014), where a bill that began by allowing emergency managers to reject, modify, or terminate collective bargaining agreements ended up being passed as a bill that excluded graduate student research assistants from the definition of "public employee."

2. THE FIVE DAY RULE

Plaintiffs have also failed to establish a violation of the Five-Day Rule. Const 1963, art 4, § 26 provides, in relevant part: "No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days."

> The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule.
>
> Whether measured by the title of the act or by the title and contents of the act, the five-day rule could be rendered ineffective without a change of purpose provision. It is equally clear that a change of purpose rule standing alone would be meaningless, because any time the purpose of a bill was changed it would be

> a new bill which could be passed immediately. In sum, the alteration of purpose provision operates as an ultimate limitation to prevent evasion of the five-day rule. [*Anderson*, 419 Mich at 330 (footnotes omitted).]

"A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit." *Id.* at 329.

The legislative record establishes that SB 156 was before each house for at least five days. And as discussed earlier, there was no change of the original bill's purpose. Accordingly, no violation of the Five-Day Rule occurred.

3. DISTINCT-STATEMENT CLAUSE

Finally, plaintiffs have not established a violation of the Distinct-Statement Clause. Const 1963, art 4, § 32, provides: "Every law which imposes, continues or revives a tax shall distinctly state the tax." The purpose of this provision "is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature." *Dawson v Secretary of State*, 274 Mich App 723, 747; 739 NW2d 339 (2007) (citations and quotation marks omitted). The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax, *Dukesherer Farms, Inc v Ball*, 73 Mich

App 212, 221; 251 NW2d 278 (1977), aff'd 405 Mich 1 (1979), such as when a tax is disguised as a regulatory fee, *Dawson*, 274 Mich App at 740. 2014 PA 282 does not impose or revive any tax but clarifies the Legislature's intent regarding the method of apportionment of the MBT's tax base. There is nothing deceptive about the legislation. It is clear from the title and body of 2014 PA 282 that it is amending the MBT Act. There has been no violation of the Distinct-Statement Clause.

J. DISCOVERY

"[S]ummary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the party opposing the motion." *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994) (citation omitted). As alluded to earlier, plaintiffs wanted to engage in discovery regarding Michigan's participation in the Commission since 2008, which according to plaintiffs would establish that the Compact was not in fact repealed retroactively beginning on January 1, 2008, because Michigan in fact participated in the Commission during the relevant time.

But as we also alluded to earlier, discovery on any of these issues would not produce relevant information. Setting aside plaintiffs failure to cite authority regarding the relevancy of Michigan's participation in

the Commission, more to the point is the fact that the issues raised concern statutory interpretation and constitutional challenges. And those issues are, as we said before, matters of law. *Elba Twp*, 493 Mich at 277-278; *see also Hunter*, 484 Mich at 257; *GMAC*, 286 Mich App at 380. How and to what extent the state participated in the Commission has no bearing on the meaning or effect of the words used in the statute or the state and federal Constitutions. Accordingly, discovery on this issue did not stand a fair chance of providing support for plaintiffs' position.

Discovery was also not required regarding the extent of plaintiffs' reliance on the Compact election provision. As a matter of law taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, while states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. Therefore, plaintiffs have not established a fair chance that discovery on the extent of their reliance on the Compact apportionment method would have led to any relevant support for their position.

Plaintiffs also incorrectly contend that discovery should have been held regarding the Legislature's intent in enacting 2014 PA 282, including internal communications regarding the purpose of the legislation.

But as we previously made clear, statements of individual legislators generally do not comprise proper evidence of legislative intent. *See Chmielewski*, 457 Mich at 608 n 18; *Detroit Bd of Ed*, 227 Mich App at 89 n 4; *City of Williamston*, 142 Mich App at 719, citing *Presque Isle*, 364 Mich at 612. Hence, discovery on this issue would not have had a fair chance of producing support for plaintiffs' position.

Affirmed. No costs, an issue of public importance being involved. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Patrick M. Meter

STATE OF MICHIGAN

COURT OF CLAIMS

INGRAM MICRO, INC. & SUBSIDIARIES, Plaintiff, v DEPARTMENT OF TREASURY, Defendant.	**OPINION AND ORDER** Case No. 11-000035-MT Hon. Michael J. Talbot (Filed Dec. 19, 2014)

This matter comes before the Court pursuant to its sua sponte order issued to plaintiff Ingram Micro, Inc. to show cause why judgment should not be entered in favor of defendant Department of Treasury (Department) in light of the retroactive effect of 2014 PA 282 (PA 282). In addition, plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The Court concludes that the Department is entitled to judgment as a matter of law and so DENIES plaintiff's motion and instead GRANTS summary disposition in favor of the Department pursuant to MCR 2.116(I)(2).

INTRODUCTION

This case is one of many cases currently pending in the Court of Claims involving taxpayers that have claimed refunds of tax under the Michigan Business

Tax (MBT) Act, MCL 208.1101 *et seq.*, based on an election to utilize a three-factor apportionment formula under the Multistate Tax Compact (Compact) provisions, MCL 205.581 *et seq.*[1] The underlying premise of these claims is that the elective three-factor apportionment provision of the Compact, as adopted by 1969 PA 343, remained viable under the MBT Act, as enacted by 2007 PA 36. Use of the single-factor apportionment formula under the MBT Act, it is argued, is not mandated because the Compact provisions, including the three-factor apportionment election provisions, remain in effect.[2]

The validity of this argument was addressed on July 14, 2014, by the Michigan Supreme Court in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW 2d 865 (2014) ("*IBM*"). Finding that the Legislature, in adopting the MBT Act, did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq.*, the Court concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes.

On September 11, 2014, in response to *IBM*, the Legislature enacted PA 282, which retroactively repealed the Compact provisions under MCL 205.581 *et*

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[1] Section 1 of 1969 PA 343, codified under MCL 205.581 *et seq.*, includes the provisions of the Compact originally enacted by parties to the Compact (Member States).

[2] Taxpayers in some of these cases have also argued that the Compact provisions remain in effect with regard to the Income Tax Act, MCL 206.1 *et seq.*

seq., to January 1, 2008, and mandated the use of a single-factor apportionment formula for purposes of calculating MBT.

The Court now considers the retroactive application of PA 282. Having considered the arguments made in response to the Court's show cause order, and for the reasons stated below, the Court concludes that PA 282 retroactively applies to this case, and all pending MBT refund actions filed in reliance on the Compact's elective, three-factor apportionment formula under the former MCL 205.581 *et seq*.

BACKGROUND

History of the Compact

The Compact is an interstate tax agreement that was originally enacted in 1967 by the legislatures of seven states. The Compact was initially drafted out of concerns of state sovereignty in reaction to the introduction of federal legislation that sought to regulate various areas of state taxation.[3] The original purposes of the Compact included:

> (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax

[3] The legislation, which was never enacted, was introduced in the wake of *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959), which held that there is no Commerce Clause barrier to the imposition of a direct income tax on a foreign corporation carrying on interstate business within a taxing state.

> bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. [*US Steel Corp v Multistate Tax Comm*, 434 US 452, 456; 98 S Ct 799; 54 L Ed 2d 682 (1978).[4]]

Michigan adopted the Compact provisions, effective in 1970, through enactment of 1969 PA 343.

Apportionment Formulas under the Compact and the MBT Act

The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating MBT. Under the MBT Act, created by 2007 PA 36,[5] income is apportioned by applying a single factor apportionment formula based solely on sales. MCL 208.1301(2). In contrast, under the Compact's election provision, income may be apportioned using an equally-weighted, three-factor apportionment formula based on sales, property and payroll. The potential effect of electing "out" of the MBT Act's single-factor apportionment methodology is a reduction of the overall apportionment percentage for companies

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[4] The Compact was never approved by Congress, but it was upheld against constitutional challenges in *US Steel*, 434 US 452.

[5] For a history of business taxation in Michigan, see *IBM*, 496 Mich at 648-650.

that do not have significant property and payroll located in Michigan.

Decision in *IBM*

In *IBM*, 496 Mich 642, the Supreme Court considered the issue of whether MBT taxpayers must use a single-factor apportionment formula as mandated by the MBT Act or whether MBT taxpayers may elect to apply a three-factor apportionment formula under the Compact. The parties were asked by the Court to brief four issues:

> (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq.*; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact. [*Int'l Business Machines v Dep't of Treasury*, 494 Mich 874; 832 NW2d 388 (2013).]

In its decision, the Court determined that for tax years 2008 through 2010,[6] the Legislature did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq.*, and concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also concluded that both the business income tax base and the modified gross receipts tax base of the MBT are "income taxes" within the meaning of the Compact. The Court did not reach the third issue of whether the Compact constitutes a contract.[7] On November 14, 2014, the Michigan Supreme Court denied reconsideration. *Int'l Business Machines v Dep't of Treasury*, ___ Mich ___; 855 NW2d 512 (2014).

Retroactive Repeal of the Compact Provisions by PA 282

On September 11, 2014, 2013 SB 156 (SB 156) was enacted into law as PA 282, amending the MBT Act and expressly repealing the Compact provisions, as

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[6] The Legislature explicitly repealed the Compact apportionment provisions effective January 1, 2011, through enactment of 2011 PA 40.

[7] Thus, this Court is bound only by the Supreme Court's pre-PA 282 ruling that (1) the Compact's election provision under Article III(1) of the Compact was not implicitly repealed by enactment of the MBT Act in 2008, (2) the election provision properly applied to the modified gross receipts tax component of the MBT, and (3) IBM could elect to use the Compact's three-factor apportionment formula in calculating its 2008 MBT liability.

codified under MCL 205.581 to MCL 205.589. The Legislature gave the Act retroactive effect by providing as follows:

> Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

PA 282 thus amended the MBT Act to express the "original intent" of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT Act's apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact's election provision under MCL 205.581.[8] The effect of

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[8] PA 282 also clarified that the Compact's election provision is not available under the income tax act of 1967, 1967 PA 281.

the amendments, as written, retroactively eliminates a taxpayer's ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT Act and income tax act.

PROCEDURAL SUMMARY

During the pertinent period, plaintiff was an out-of-state corporation with business activities in Michigan. Plaintiff, and other similar taxpayers, filed their MBT returns calculating tax by taking an election under Article III(1) of the Compact to apportion the MBT tax base using a three-factor apportionment formula. The returns reflected overpayments of tax, and taxpayers requested refunds of these amounts. The Department denied the refund claims, asserting that use of the three-factor apportionment was improper and that use of the single-factor apportionment was mandated by MCL 208.1301. In response, taxpayers paid the tax and filed actions in the Court of Claims.

Pending the Supreme Court's resolution of *IBM*, this Court ordered this case and other similar cases held in abeyance. After the case was decided, the Court lifted its order holding the cases in abeyance and ordered the Department to brief the Court on why *IBM* 496 Mich 642, should not control the disposition of these cases. After the Legislature enacted PA 282 that retroactively repealed the Compact provisions, the Court issued the show cause order concerning that legislation. Plaintiff also filed a motion for summary

disposition. The Court now considers the arguments against retroactive application of PA 282.

LEGAL ANALYSIS

I. THE UNILATERAL REPEAL OF THE COMPACT PROVISIONS BY ENACTMENT OF PA 282 WAS A PERMISSIBLE EXERCISE OF THE LEGISLATURE'S SOVEREIGN AUTHORITY TO LEGISLATE

The Court first considers whether the Legislature was authorized to unilaterally repeal the Compact provisions by enacting PA 282. This determination will depend on an analysis of (1) whether the Compact created a binding contract with Member States, (2) whether enactment of PA 282 impaired contractual obligations under the federal or state constitutional Contracts Clauses, and (3) under Michigan law, whether 1969 PA 343 could restrict subsequent legislatures from repealing the Compact provisions. For the following reasons, the Court concludes that the Legislature acted constitutionally and within its sovereign authority to legislate when it repealed the Compact provisions through enactment of PA 282.

A. THE COMPACT IS NOT A BINDING CONTRACT

In evaluating whether repeal of the Compact by application of PA 282 unconstitutionally impairs a contract or whether a future legislature is bound to the provisions created by 1968 PA 343, there must first be

a determination that a contract exists. See *IBM*, 496 Mich at 681 (MCCORMACK, J., dissenting).

1. The Compact Lacks the "Classic Indicia" of a Binding Interstate Compact under Federal Compact Law

The United State Supreme Court has recognized that not all interstate compacts are binding contracts that restrict future legislatures. See *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985). While a Congressionally-approved interstate compact has the force of federal law and is binding on Member States,[9] an interstate compact that has not been approved by Congress, such as the Compact here, can be either a *binding* interstate compact or merely an *advisory* compact.[10]

The test for distinguishing between an advisory compact and a binding interstate compact is set forth in *Northeast Bancorp*, as further explained in *Seattle Master Builders Ass'n v Pacific Northwest Electric Power*, 786 F2d 1359, 1363 (CA 9, 1986). The three "classic indicia" of a binding interstate compact are: (1)

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[9] The Compact Clause of the US Constitution, art I, §10, cl 3, provides, "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State. . . ."

[10] Advisory interstate compacts have no formal or regulatory enforcement mechanisms and are intended to study and make recommendations on interstate problems. Broun, et al, The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide (2006), p 13.

the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal. *Northeast Bancorp*, 472 US at 175; *Seattle Master Builders*, 786 F2d at 1363. Looking at the three indicia of a binding interstate compact, the Compact has none of these features and is more properly characterized as a non-binding advisory compact.

a. The Compact did not establish a joint regulatory agency

A hallmark of an advisory compact, as opposed a binding contract, is that advisory compacts "cede no state sovereignty nor delegate any governing power to a compact-created agency." Broun, et al, The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide (2006), p 14. When the Compact, through Article VI, established the Multistate Tax Commission (Commission),[11] no governing or regulatory powers were conferred. Enumerated in Article VI, the powers of the Commission are (1) to study state and local tax systems, (2) to develop and recommend proposals for greater uniformity, and (3) to compile information helpful to the states.[12] None of these purposes is regulatory, and it in no way indicates a delegation of sovereign authority to tax.

The conclusion that the Compact did not cede state authority or governing power to the Commission

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[11] MCL 205.581, Art VI.

[12] *Id.* at Art VI(3).

was expressly acknowledged by the Court in *US Steel Corp*:

> [The Compact] 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.* [Emphasis added.] [*US Steel Corp*, 434 US at 473.]

In summary, the Compact, by its terms, does not create a regulatory body.

b. The Compact does not require reciprocal action

There is nothing reciprocal about the Compact's provisions. Each member state operates its respective tax systems independently from the tax systems of other Member States, and the determination of tax in one state is generally independent of the determination in another state. With respect to apportionment formulas, in particular, Articles III(1) and IV's application in one member state has no bearing on another state. And the functionality of one member state's apportionment methodology does not hinge on whether another member state's apportionment methodology is reciprocal in nature. As the Supreme Court recognized in *Moorman Mfg Co v Bair*, 437 US 267, 274; 98 S Ct 2340; 57 L Ed 2d 197 (1978), "the States have wide latitude in the selection of apportionment formulas." Consistent with *Moorman*, a Member State's decision to

allow or eliminate a certain apportionment formula is unaffected by the choice of formula that another member state has made.

c. The Compact allows unilateral withdrawal and modification

Under the express terms of the Compact, Member States are free to unilaterally withdraw at any time without notice to another member state. MCL 205.581, Art X(2) ("Any party state may withdraw from this compact by enacting a statute repealing the same.) See also *US Steel*, 434 US at 473 ("[E]ach State retains complete freedom to adopt or reject the rules and regulations of the Commission.") Thus unilateral *withdrawal* is clearly permitted under the Compact.

Whether unilateral *modification* is permitted under the Compact is less clear and is not directly addressed under the Compact. However, three factors lead to a conclusion that Member States did not intend to restrict their ability to vary terms of the Compact. First, as pointed out recently by the United States Supreme Court, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Tarrant Regional Water Dist v Herrmann*, ___ US ___; 133 S Ct 2120, 2133; 186 L Ed 2d 153 (2013). Because there is no such "clear indication" under the terms of the Compact that states are prevented from asserting their sovereign powers to legislate and vary the Compact's terms, it is reasonable to conclude that the

parties were free to unilaterally amend the Compact provisions, including Articles III(1) and IV.

Second, language in the Compact that it "shall be liberally construed as to effectuate the purposes thereof," supports an interpretation that flexibility in administering Compact provisions was contemplated. MCL 205.581, Art XII.

Third, the Member States' course of performance shows that unilateral amendments to or withdrawals from the Compact have long been accepted. As pointed out by the dissent in *IBM*, 496 Mich at 681-682, "[M]ember [S]tates did *not* view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated without objection from other members."[13] Moreover,

> "It bears emphasizing that Compact members have not only refrained from bringing legal action against one another for deviating from Articles III and IV, they have endorsed the Commissioner's interpretation of the Compact: in the *Gillette* [*Co v Franchise Tax Bd*, 151 Cal Rptr 3d 106; 291 P3d 327 (2013)] litigation, all of the member states jointly filed an amicus brief urging the Supreme Court of California to reject the lower

[13] As summarized in Hellerstein & Hellerstein, State Taxation (2014), the course of performance of states with regard to the Compact provisions generally, and the elective apportionment provisions specifically, shows that unilateral repeal and modifications to the Compact provisions have been widespread.

> court's construction of the Compact as a binding contract. [*IBM*, 496 Mich at 682 n 7 (MCCORMACK, J., dissenting).]

Because the Compact fails to create a regulatory body, contemplates no reciprocal actions, and contains no bar to unilateral deviations or repeal, the Court concludes that none of the "classic indicia" of a binding compact exist. Rather than a binding interstate contract, it is more properly interpreted as an advisory compact that did not act to bind future legislatures.

2. The Compact is not a Binding Contract under Michigan Law

Because it was not congressionally-approved, the Compact is governed by state law. See *Doe v Young Marines of The Marine Corps League*, 277 Mich App 391, 399; 745 NW2d 168 (2007) (finding that Michigan courts are not bound to follow a federal court's interpretation of state law.) See also *McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991) (finding that because a non-Congressionally approved compact does not express federal law, it must be construed as state law.) Michigan law therefore governs the interpretation of the Compact.

In Michigan, there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). "In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable

construction than that the Legislature intended to be bound to a contract." *Id.* at 662 (quotation marks and citation omitted). As noted in the dissent in *IBM,* "[t]his presumption is grounded in the principle that 'surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments.'" *IBM*, 496 Mich at 682 (MCCORMACK, J., dissenting), quoting *Studier*, 472 Mich at 661.

There are no words in the Compact, as adopted by the Legislature under 1969 PA 343, that indicate that the state intended to be bound to the Compact, and specifically to Article III(1). Therefore, the presumption must be that the state did not surrender its legislative power to require use of a particular apportionment formula. Such interpretation comports with the Supreme Court's recognition of "the basic principle[] that the States have wide latitude in the selection of apportionment formulas. . . ." *Moorman*, 437 US at 274. This interpretation is also consistent with the Court's recent acknowledgment that states "do not easily cede their sovereign powers. . . ." *Tarrant*, 133 S Ct at 2132. Because there is no clear indication under MCL 205.581 that the state contracted away its ability to either select an apportionment formula that differs from the Compact, or to repeal the Compact altogether, the Court concludes that no contractual obligation was created by enactment of

1969 PA 343 that would prohibit the enactment of PA 282.[14]

B. REPEAL OF THE COMPACT BY PA 282 DOES NOT VIOLATE THE CONTRACTS CLAUSES OF THE STATE OR FEDERAL CONSTITUTIONS

The United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." US Const, art I, § 10, cl 1. The Michigan Constitution provides: "No . . . law impairing the obligation of contract shall be enacted." Const 1963, art 1, §10. "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Request for Advisory Opinion*

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[14] Even if the Compact could somehow be construed as a binding contract under Michigan law, the Member States' course of performance supports a determination that Member States either waived or modified the Compact's terms under Articles III(1) and IV, or materially breached the terms under Articles III(1) and IV well before the repeal of the Compact provisions under PA 282. See n 12. In addition, as suggested in the dissenting opinion in *IBM*, taxpayers would have no standing to enforce the terms of any purported contract that was made with Member States.

> [I]t is not entirely clear to me why IBM has standing to enforce the Compact as a contract, given that IBM is neither a party to the Compact nor is it clear that they were intended as a third-party beneficiary. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003); MCL 600.1405. In any event, because I conclude that no such contractual relationship was formed, I find it unnecessary to address this issue *sua sponte*. [*IBM* at 681 n 5 (McCormack, J., dissenting).]

Regarding Constitutionality of 2011 PA 38, 490 Mich 295, 307; 806 NW2d 683 (2011) (citation and quotation marks omitted). In addition, "'[t]he presumption of constitutionality is especially strong'" when tax legislation is concerned. *Id.* at 308 (citation omitted).

As discussed earlier, the Compact creates no binding contract, and therefore the Legislature's repeal of the Compact by PA 282 does not impair an obligation of contract in violation of the Michigan or United States Constitutions.

C. BECAUSE LEGISLATURES CANNOT BIND SUBSEQUENT LEGISLATURES UNDER MICHIGAN LAW, 1969 PA 343 DOES NOT RESTRICT THE ABILITY OF A SUBSEQUENT LEGISLATURE TO CORRECT AN ERROR, EITHER PROSPECTIVELY OR RETROACTIVELY

Generally, legislatures have the power to repeal legislation and are not bound by the acts of prior legislatures, so long as existing contractual obligations are not impaired. See, e.g., *Studier*, 472 Mich at 660; *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002). See also *Atlas v Wayne Co Board of Auditors*, 281 Mich 596, 599; 275 NW 507 (1937) ("The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one

legislature restrict or limit the power of its successors"). The principle that one legislature cannot bind a succeeding legislature is thus derived from the constitutional power of the Legislature to legislate. Const 1963, art 4, § 1. As discussed earlier, no contract was created by enactment of the Compact provisions. Thus, the Legislature's constitutional right to change, amend or repeal the law could not be restricted by enactment of 1969 PA 343. *Studier*, 472 Mich at 660. Therefore, the Legislature, by enacting PA 282 to correct its drafting error contained in 2007 PA 36, acted within the scope of its legislative powers as vested in it by the Michigan Constitution.

Moreover, correcting the drafting errors from 2007 PA 36 by repeal of the Compact provisions through PA 282 is consistent with the intent of the Legislature in enacting 1969 PA 353. This is evidenced by the language of Article X of the Compact:

> Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal. [MCL 205.581, Art X(2).]

"When interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 167; 853 NW2d 310 (2014) (quotation marks omitted). This requires the Court to consider "the plain meaning of the critical word or phrase as well as its placement and purpose in

the statutory scheme." *Id.* (citations and quotation marks omitted).

It is clear from the language of Article X(2) that in 1969 the Legislature contemplated the possibility of future withdrawal from the Compact. Withdrawal from the Compact provisions by PA 282 is therefore consistent with the Legislature's intent. The Court rejects any argument that under Article X(2) repeal of the Compact can be prospective only. As made clear by the enacting provisions of PA 282, the repeal of the Compact provisions was intended to apply prospectively from January 1, 2008. Because it is this Court's duty to carry out the intent of the Legislature, repeal of the Compact provisions by PA 282 must be given effect.

D. CONCLUSION

The Court concludes that the Compact did not create a binding contract with Member States, but it was merely an advisory compact. Because no contract was created under federal Compact or Michigan law, there was no impairment of contractual obligations and therefore no violations of the Contracts Clauses of the federal or state constitutions. Finally, inasmuch as there is no impairment of contractual obligations, the Legislature was free to amend or repeal 1969 PA 343. Thus this Court must give effect to and apply the intent of PA 282 as a valid expression of the Legislature's sovereign and constitutional authority to legislate.

II. THE RETROACTIVE APPLICATION OF PA 282 DOES NOT VIOLATE OTHER PROVISIONS OF THE STATE OR FEDERAL CONSTITUTIONS

Other constitutional arguments against the retroactive application of PA 282 concern due process, separation of powers, the Commerce Clause, and the First Amendment's right to petition.[15] These arguments have no merit.

It is well settled that a tax act is not necessarily unconstitutional because it is retroactive. *Welch v Henry*, 305 US 134, 147; 59 S Ct 121; 83 L Ed 87 (1938). A statute is presumed constitutional unless there is a clear showing to the contrary. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 635; 732 NW 2d 116 (2007); *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW 2d 698 (2010). In addition, a taxing statute must be shown to "clearly and palpably violate the fundamental law before it will be declared unconstitutional." *Ammex*, 273 Mich App at 635-636 (citation and internal quotation marks omitted). For

[15] Contracts Clause arguments are relevant in the context of whether a contract that was allegedly entered into vis-à-vis the adoption of the Compact, and for reasons discussed earlier, must fail. As to whether the retroactive application of a tax statute would generally implicate the Contracts Clauses of the Michigan or United States Constitutions, taxes are not considered contractual in nature, but are instead statutory. *Welch v Henry*, 305 US 134, 146; 59 S Ct 121; 83 L Ed 87 (1938). Any further discussion of whether PA 282 violates the Contracts Clauses is unnecessary.

the following reasons, the presumption that PA 282 is constitutional remains intact.

A. RETROACTIVE APPLICATION OF PA 382 DOES NOT VIOLATE DUE PROCESS

PA 282's retroactive application does not violate due process of law. First, taxpayers have no vested interests in tax laws, and therefore no valid claim that an interest in "life, liberty, or property" has been deprived by retroactive application of PA 282. Second, the Legislature had a legitimate purpose for giving retroactive effect to PA 282. And third, the period of retroactivity of PA 282 is rationally related to that purpose.

1. Taxpayers have No Vested Interests

"The due process clauses of the United States and Michigan Constitutions apply when government actions deprive a person of a liberty or property interest." *Edmond v Dep't of Corrections*, 143 Mich App 527, 533; 373 NW2d 168 (1985). To determine whether the Due Process Clause applies, courts look to the nature of the interest at stake. *Id.* A property interest must be a vested right to be protected under due process. *Detroit v Walker*, 445 Mich 682, 698-699; 520 NW2d 135 (1994).

In *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 2d 222 (1994), the Supreme Court specifically rejected the argument that the taxpayer had

a viable vested right in tax legislation. *Id.* at 33. It explained that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.* The Michigan Court of Appeals has also made clear that a taxpayer "does not have a vested right in a tax statute or in the continuance of any tax law." *Gen Motors Corp*, 290 Mich App at 371. See also *Walker*, 445 Mich at 703; *GMAC v Treasury Dep't*, 286 Mich App 365, 377-378; 781 NW2d 310 (2009). Similarly, no taxpayer has a vested right in a tax refund based on the continuation of the Compact election provisions, and any due process claim must fail.

2. The Legislature had a Legitimate Purpose for Giving Retroactive Effect to PA 282

Not only are taxpayers' rights not vested here, but there are no substantive due process violations implicated by the retroactive application of PA 282. The test for determining whether due process has been violated by retroactive tax legislation was set forth by the Supreme Court in *Carlton*, 512 US 26. Under *Carlton*, a statute's retroactive application satisfies due process if: (1) it is supported by a legitimate legislative purpose, and (2) it is rationally related to that legislative purpose. *Carlton*, 512 US at 30.

In enacting PA 282 and giving it retroactive effect, the Legislature had a legitimate purpose: to protect state revenues. The potential ramifications of not giving retroactive effect to PA 282 were made clear in

the Senate Fiscal Agency's legislative analysis of SB 156:[16]

> The first enacting section of the bill would retroactively repeal the State's enactment of the Multistate Tax Compact, effective January 1, 2008. As a result, taxpayers filing under the MBT would not be allowed to use alternative apportionment calculations provided under the Compact when computing a Michigan tax base. While the Department of Treasury has not allowed taxpayers to use these alternative calculations, the Michigan Supreme Court's recent decision in *IBM Corp. v Department of Treasury* may enable certain taxpayers to use these calculations, and the Department estimates that approximately $1.1 billion in refunds would be paid as a result. Because MBT revenue is directed to the General Fund, these refunds would reduce General Fund revenue, and *the bill would prevent a reduction in General Fund revenue of $1.1 billion.* [Senate Legislative Analysis, SB 156, September 10, 2014, p 5. (Emphasis added.)]

Furthermore, as was recognized by the Court in *Gen Motors*, 290 Mich App at 373, a legislature's purpose to

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[16] Although legislative bill analyses are not official statements of legislative intent, they nonetheless can have probative value. See, e.g., *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 2729; 576 NW2d 641 (1998); *People v Grant*, 455 Mich 221, 240-241; 565 NW2d 389 (1997); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 164-166, 551 NW2d 132 (1996) (opinion by BOYLE, J.).

"mend a leak in the public treasury or tax revenue" is legitimate. See also *Carlton*, 512 US at 32 (finding a legitimate governmental purpose where the Internal Revenue Code was retroactively amended for purposes of correcting a legislative error that would have "created a significant and unanticipated revenue loss.")

Here, PA 282 served the legitimate governmental purpose of fixing a legislative error and preventing the potential loss of over $1 billion of MBT revenues in the form of tax refunds from overpayments.

3. Retroactive Application of PA 282 is a Rational Means of Furthering this Legitimate Purpose

In addition to having a legitimate legislative purpose of preventing a catastrophic fiscal shortfall, the retroactive application of PA 282 is also a rational means of furthering this legitimate purpose. In *Gen Motors*, 290 Mich App at 375, the Court of Appeals found that whether a retroactive tax law met the rational means prong of *Carlton* includes a consideration of whether the retroactive period is "modest" as tested against the "totality of circumstances." In determining that a five-year look back period was a rational means of accomplishing the prevention of revenue loss, the Court looked to whether (1) the retroactive amendment created a "wholly new tax," (2) the taxpayer acted in reliance on an expectation its activity would not be taxed, (3) how promptly the Legislature acted to correct the problem leading to loss in revenue, and (4) the

period of time to which the amendment retrospectively applies.

Applying the "totality of circumstances" here, the retroactive application of PA 282 does not exceed the modest limitation of the Due Process Clause and is a rational means of accomplishing the Legislature's purpose of stemming revenue losses.

First, PA 282 does not reach back in time to assess a "wholly new tax" on long-concluded transactions, but rather it confirmed that single-factor apportionment under the MBT was mandatory and that an election to use a three-factor apportionment formula could not be made.

Second, as a matter of law, there can be no valid claim that an MBT taxpayer acted in reliance on an expectation that for the MBT its income would be apportioned by the three-factor apportionment provision. As the Supreme Court recognized in *Moorman*, 437 US 267, the states have wide latitude in the selection of an apportionment methodology. Moreover, it is also well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law. *Walker*, 445 Mich at 703; *Ludka v Dep't of Treasury*, 155 Mich App 250; 399 NW2d 490 (1986). And as *Carlton*, 512 US at 33, made clear, even where a taxpayer has detrimentally relied on a tax statute, this does not result in a constitutional violation:

> Although Carlton's reliance is uncontested – and the reading of the original statute on which he relied appears to have been correct

> – his *reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.* [Emphasis added.]

Because taxpayers do not, as a matter of law, have a reliance interest in any particular apportionment formula a state chooses in dividing the income of multistate taxpayer, this Court rejects any assertion that a taxpayer would have changed its behavior or structured its affairs differently had it known that the Compact's elective provision was no longer available.

Third, the Legislature acted promptly in correcting its error. Not until July 14, 2014, when the Court decided *IBM*, was it made clear to the Legislature that 2007 PA 36 was defective. SB 156, H-1, which added the retroactive repeal of the Compact, provisions, was introduced on September 9, 2014, and was enacted into law on September 11, 2014.

Fourth, the period of time to which the amendment applies was modest, particularly in light of the time frames of other retroactive legislation that Michigan courts and those of other jurisdictions have held were within the modesty limits of the Due Process Clause. For example, in *Gen Motors*, 290 Mich App 355, the Court concluded that a five-year retroactive period (eleven years as applied to the specific taxpayer's tax years) was modest. In *GMAC*, 286 Mich App 365, the Court upheld a law with a seven-year retroactive period. See also *Enterprise Leasing Co v Arizona Dep't of Revenue*, 221 Ariz 123; 211 P3d 1 (Ariz Ct App, 2008)

(six year period); *King v Campbell Co*, 217 SW3d 862 (Ky Ct App, 2006) (upholding 2005 legislation that denied refunds of taxes overpaid since 1986 under 2004 judicial decision); *Miller v Johnson Controls, Inc*, 296 SW3d 392 (Ky, 2009) (upholding 2000 legislation retroactively ratifying 1988 tax-agency policy that a 1994 judicial decision overruled); *Zaber v City of Dubuque*, 789 NW2d 634 (Iowa, 2010) (five-and-one-half years); *Licari v Comm'r*, 946 F2d 690 (CA 9, 1991) (four years); *Tate & Lyle, Inc v Comm'r of Internal Revenue*, 87 F3d 99 (CA 3, 1996) (six years); *Montana Rail Link, Inc v United States*, 76 F3d 991 (CA 9, 1996) (four years).

All of these factors lead to the conclusion that the Legislature's means of stemming the loss of revenues, by giving retroactive effect to PA 282, was a rational means of furthering a legitimate governmental purpose.

B. RETROACTIVE APPLICATION OF PA 282 DOES NOT VIOLATE PRINCIPLES OF SEPARATION OF POWERS

In addition to being a rational means of achieving a legitimate purpose, PA 282 does not violate the principle of separation of powers under the Michigan Constitution. The Separation of Powers Clause is set forth in Const 1963, art 3, § 2:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one

> branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.[17]

With respect to retroactive legislation, the Legislature is permitted to retroactively change legislation, so long as it does not [sic] "not reverse a judicial decision or repeal a final judgment." *GMAC*, 286 Mich App at 380; *Romein v Gen Motors Corp*, 436 Mich 515, 536-537; 462 NW2d 555 (1990), aff'd 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992). See also *Wylie v City Comm'n of Grand Rapids*, 293 Mich 571; 292 NW 668 (1940). Furthermore, a legislature is entitled to correct its own mistakes though retroactive legislation. See *Gen Motors*, 290 Mich App at 373.

By enacting PA 282, the Legislature acted within its authority to legislate by correcting a mistake made clear to it by the Court in *IBM*. PA 282 did not purport to overturn the *IBM* decision, nor did it repeal the final judgment as it applied to the plaintiff. The Court's

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[17] As expressly provided in the Constitution, the legislative power is vested in a senate and a house of representatives, Const 1963, art 4, § 1; the executive power is vested in the governor, Const 1963, art 5, § 1 Sec. 1; and the judicial power is vested exclusively in the courts, Const 1963, art 6, § I. Pursuant to these powers, it is the legislature's duty to state what the law is, it is the judiciary's role to interpret this law, and it is and it is[sic] the executive branch's obligation to enforce the law as written and as interpreted by the judiciary. 1 Official Record, Constitutional Convention 1961, pp 601-602 ("[H]e who makes a law shall not enforce it, nor sit in judgment upon it; that he who enforces a law shall not make or change it nor shall he judge of its violation; and he who sits in judgment shall have neither made the law nor enforced it.")

holding in *IBM* was limited to a finding that there was no *implicit* repeal of the Compact apportionment provisions through enactment of 2007 PA 36, and PA 282 does not conflict with or disturb this ruling. Through enactment of PA 282, the Legislature took steps to retroactively repeal the Compact provisions *explicitly*, clarifying its original intent in enacting the MBT. Such action did not impinge upon the judiciary's functions in violation of the separations [sic] of powers.

Although *IBM* left unresolved the issue of whether the retroactive repeal of the Compact provisions would be constitutional, both the majority and the concurring opinions suggest that an explicit, retroactive repeal of the Compact provisions, effective January 1, 2008, could have led to a different result.[18] Rather than deviating from the Court's opinion, PA 282's explicit, retroactive repeal of the Compact provisions is consistent with the language in *IBM* suggesting that retroactive repeal would be an appropriate legislative response to

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[18] Discussing 2011 PA 40, which retroactively repealed the Compact apportionment provisions effective January 1, 2011, the majority stated that "[t]here is no dispute that the Legislature specifically intended to retroactively repeal the Compact's election provision for taxpayers subject to the [MBT] beginning January 1, 2011. *The Legislature could have – but did not – extend this retroactive repeal to the start date of the* [*MBT*]." *IBM*, 496 Mich at 659. (Emphasis added.) See also concurring opinion of Justice Zahra, noting that "the [MBT's] exclusive apportionment method remains in conflict with the election provision of the Compact. *This conflict, in my view, is easily resolved because the Legislature in 2011 also expressly supplemented the Compact.*" *Id.* at 669. (Emphasis added.)

the challenges being made. The Legislature did not violate the separation of powers doctrine when it passed the retroactive amendments under PA 282.

C. PA 282 DOES NOT VIOLATE THE COMMERCE CLAUSE

PA 282 does not violate the Commerce Clause[19], which prohibits state laws that (1) facially discriminate against interstate commerce, (2) have a discriminatory effect, or (3) are enacted for a discriminatory purpose. *Caterpillar Inc v Dep't of Treasury*, 440 Mich 400, 422-425; 488 NW2d 182 (1992). Under the dormant Commerce Clause, states may not discriminate against interstate commerce by "unduly burden[ing] interstate commerce." *Quill Corp v North Dakota*, 504 US 298, 312; 112 S Ct 1904; 119 L Ed 2d 291 (1992) (citations omitted). PA 282 neither discriminates against, nor unduly burdens, interstate commerce.

First, PA 282 is not facially discriminatory. Facial discrimination requires an "explicit discriminatory design to the tax." *Amerada Hess Corp v Dir*, 490 US 66, 75; 109 S Ct 1617; 104 L Ed 2d 58 (1989). The text of PA 282 makes clear, on its face, that no taxpayer, regardless of location, can elect the three-factor apportionment.

Second, PA 282 has no discriminatory effect. The effect of PA 282 is that no taxpayer, whether in-state

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[19] US Const, art I, § 8, cl 3.

or out-of-state, can make an election to apply a three-factor apportionment for MBT purposes. As the United States Supreme Court made clear in *Moorman*, 437 US 267, requiring a single-factor apportionment formula does not have the effect of discriminating against an out-of-state taxpayer.

In addition, PA 282 was not enacted for a discriminatory purpose, but rather sought to clarify the original intent of the 2007 Legislature with respect to all taxpayers, both in-state and out-of-state. Any claims made that PA 282 violates the Commerce Clause of the United States Constitution must therefore fail.

D. PA 282 DOES NOT VIOLATE THE FIRST AMENDMENT PETITION CLAUSE

Neither does PA 282, by retroactively revoking taxpayers' right to petition the Department and appeal to a court for a refund of tax, violate their First Amendment right to petition the government.

The right of citizens to petition the government for redress of grievances is specifically guaranteed by the United States and Michigan Constitutions. US Const Amend I; Const 1963, art 1, § 3. This right is not unlimited, however, and "may be circumscribed to the extent necessary to achieve a valid state objective." *Jackson Co Ed Ass'n v Grass Lake Community Sch Bd of Ed*, 95 Mich App 635, 641-642; 291 NW2d 53 (1979).

The Supreme Court has long made clear that the First Amendment does not require the government to

listen to individuals or to respond to individual grievances. In *Bi-Metallic Investment Co v State Bd of Equalization*, 239 US 441; 36 S Ct 141; 60 L Ed 372 (1915), the Court responded to a real estate owner's argument that it had no opportunity to be heard in opposition to a legislative tax valuation increase by stating:

> Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. Generally statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. *Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.* [*Id.* at 445 (emphasis added).]

See also *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463, 464-465; 99 S Ct 1826; 60 L Ed 2d 360 (1979) (finding that the Arkansas Highway Commission did not have an affirmative obligation under the First Amendment "to listen, to respond or, in this context, to recognize the association and bargain with it.")

The Supreme Court's analysis in *Bi-Metallic Investment* applies here. There is no merit to any argument that the retroactive application of PA 282

violates a taxpayers's First Amendment right to petition the government. Taxpayers' First Amendment rights on matters of tax legislation – whether prospective or retroactive – are properly protected by taxpayers' power over those who "make the rule[s]" – that is, the Legislature. *Bi-Metallic Investment*, 239 US at 445. While the Court has an obligation, within jurisdictional limits, to respond to taxpayers' grievances with respect to individual overpayments of tax, it is under no constitutional obligation under the First Amendment to answer to taxpayers about general validity of the legislation itself. Thus application of PA 282 does not violate a taxpayer's First Amendment rights.

Moreover, to the extent that PA 282 may impact taxpayers' procedural rights of petitioning the court for a refund of tax, these rights are properly safeguarded under rights of due process, which "affirmatively require[s] the government to provide meaningful procedural opportunities in response to judicial petitions, far and above any required by the First Amendment standing alone." Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St L J 557, 634 (1999). And as the Court has already discussed, plaintiff's constitutional rights of due process have been satisfied with respect to the application of PA 282.

III. THERE WERE NO PROCEDURAL VIOLATIONS THAT BAR APPLICATION OF PA 282

A. THE TITLE-OBJECT CLAUSE OF THE MICHIGAN CONSTITUTION WAS NOT VIOLATED

PA 282 satisfies the Title-Object Clause of the Michigan Constitution. This clause states:

> No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

PA 282 is titled as follows:

> AN ACT to amend 2007 PA 36, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to make appropriations," by amending sections 111, 305, 403, and 433 (MCL 208.1111, 208.1305, 208.1403, and 208.1433), sections 111 and 305 as amended by 2012 PA 605, section 403 as amended by 2008 PA 434, and section 433 as amended by 2007 PA 215, and by

adding section 508; and to repeal acts and parts of acts.

The three different challenges that may be brought against a statute on the basis of the Title-Object Clause are: (1) a multiple-object challenge, (2) a title-body challenge, and (3) a change of purpose challenge. *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 728; 575 NW2d 63 (1997); *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 556-557; 595 NW2d 176 (1999). In assessing the validity of these challenges, the constitutional requirements under the Title-Object clause are to be construed reasonably. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 563; 492 NW2d 246 (1992). See also *Gen Motors Corp*, 290 Mich App at 388.

1. Multiple-Object Challenge

With respect to the multiple-object challenge, the body of the law, as well as its title, must be examined to determine whether the act embraces more than one object or purpose. *Ray Twp*, 226 Mich App at 731. The object of the legislation must be determined by examining the law as enacted, not as originally introduced. *People v Kevorkian*, 447 Mich 436, 456; 527 NW2d 714 (1994). A bill that is enacted into law may include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object. *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 497; 378 NW2d 402 (1985). "The purpose of the single-object rule is to avoid bringing into one

bill diverse subjects that have no necessary connection." *Mooahesh*, 195 Mich App at 564.

In determining whether PA 282 violated the single object rule, *Mooahesh* is instructive. *Mooahesh* involved a title-object challenge to 1988 PA 136, which (1) amended the Individual Income Tax Act to provide that lottery winnings are taxable, and (2) repealed a section from the Lottery Act that had previously exempted lottery winnings from taxation.[20] The Court first determined that the general purpose of the act as found in the title ("to meet deficiencies in state funds") was to raise revenues, and that "[a] statute may authorize the doing of all things that *are in furtherance of the general purpose of act* without violating the one-object limitation of art 4, § 24." *Mooahesh*, 195 Mich App at 564 (emphasis added). It further stated that "[t]he object of 'meet[ing] deficiencies in state funds' may reasonably be found to include the repeal of a tax

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[20] The title of 1988 PA 516 provided, in pertinent part:

> An act to amend sections . . . of the Public Acts of 1967, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, and enforcement by lien and otherwise of taxes on or measured by net income; to prescribe the manner and time of making reports and paying the taxes, and the functions of public officers and others as to the taxes; to permit the inspection of the records of taxpayers; to provide for interest and penalties on unpaid taxes; to provide exemptions, credits and refunds of the taxes; to prescribe penalties for the violation of this act; to provide an appropriation; and to repeal certain acts and parts of acts. . . ." [Emphasis added.]

exemption, even if that exemption does not appear in any act specifically devoted to taxation." *Mooahesh*, 195 Mich App at 566. In addition, acknowledging that "it might have been 'better draftsmanship,' to have provided for a separate amendment to the Lottery Act," the Court determined that "the inclusion of the repeal of the tax exemption provision in an act amending the income tax laws does not render the act in violation of the single-object requirement." *Id.* (internal citations omitted.)

Just as the statute considered in *Mooahesh* had as its general purpose the raising of revenues, so too was the general purpose of PA 282. And just as it might have been "better draftsmanship" to have provided for a separate amendment repealing § 34 of the Lottery Act, the Legislature in enacting PA 282 might have been better advised to repeal the Compact provisions in a separate act. But like the choice to amend the ITA and repeal a section of the Lottery Act in one act, the choice to include the repeal of the Compact and amend the MBT in one act is not a violation of the single-object requirement.[21]

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[21] As repeated by the Court in *Mooahesh*, 195 Mich App at 564:

> There is . . . no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object

2. Title-Body Challenge

With respect to a title-body challenge, the title of an act must express the general purpose or object of the act. *Ray Twp*, 226 Mich App at 728. "'[T]he title need not serve as an index of all that the act contains.'" *Midland Twp v Mich State Boundary Comm'n*, 401 Mich 641, 653; 259 NW 2d 326 (1977) (quoting *People v Milton*, 393 Mich 234, 246-247; 224 NW2d 266 (1974)). It is sufficient if the title "'is a descriptive caption, directing attention to the subject matter which follows . . . or if it be expressive of the purpose and scope of the enactment.'" *Mooahesh*, 195 Mich App at 556-557, quoting *People ex rel Wayne Prosecuting Atty v Sill*, 310 Mich 570, 574; 17 NW2d 756 (1945). The test under a title-body challenge is whether the title "gives fair notice to the legislators and the public of the challenged provision." *H J Tucker & Assocs*, 234 Mich App at 559. "The notice aspect is violated where the subjects are so diverse in nature that they have no necessary connection." *Mooahesh*, 195 Mich App at 569.

Here, as discussed earlier, the Legislature's broad purpose of PA 282 was to raise revenue through the imposition of tax. The title adequately expressed this object and gave notice of this general purpose. To withstand scrutiny under Const 1963, art 4, § 24, it was not necessary for the Legislature to provide in the title "an index of all that the act contains," *Midland Twp*, 401

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expressed in the title of the amendatory act and the act being amended. [*Id.* quoting *Detroit Bd of Street R Comm'rs v Wayne Co*, 18 Mich App 614, 622-623; 171 NW2d 669 (1969).]

Mich at 653. In addition, the subjects within the title all had a nexus to the purpose of raising revenue and were not "so diverse in nature that they [had] no necessary connection" to this purpose. *Mooahesh*, 195 Mich App at 569. There was no violation of the title-body rule under PA 282.

3. Change-of-Purpose Challenge

Finally, a change of purpose challenge to PA 282 on the ground that its purpose changed during passage through the Legislature, is tested as to whether "the change represents an amendment or extension of the basic purpose of the original, or the introduction of entirely new and different subject matter." *Anderson v Oakland Co Clerk*, 419 Mich 313, 328; 353 NW2d 448 (1984) (LEVIN, J., concurring) (internal quotation marks omitted). See also *Kevorkian*, 447 Mich at 461 ("[T]he test for determining if an amendment or substitute changes a purpose of the bill is whether the subject matter of the amendment or substitute is germane to the original purpose.")

Here, as discussed earlier, the general purpose of SB 156 as originally introduced was to raise revenues. This original purpose of SB 156 did not change under Substitute H-1, as introduced and later enrolled as PA 282.

As originally introduced, SB 156 amended the MBT by (1) allowing an adjustment to the modified gross receipts tax base for amounts attributable to the taxpayer pursuant to a discharge of indebtedness, (2)

revising the calculation of the investment credit with respect to the recapture of revenue when property previously subject to the credit is sold, (3) revising the calculation of the credit for a taxpayer located and conducting business in a renaissance zone before December 1, 2002, and, (4) revising a provision concerning a dock sale, for purposes of apportionment. See Senate Legislative Analysis, SB 156, March 19, 2013. The original bill stated that the act was "curative and intended to clarify the original intent of the Legislature." *Id.* Substitute H-1, as enrolled as PA 282, retained the original proposed amendments, and added, in pertinent part, (1) a requirement that a taxpayer claim a refund in 2015 if as a result of the amendments, there was an overpayment for a tax year between 2010 and 2014, and (2) a provision that the bill would retroactively repeal the Compact provisions under Public Act 343 of 1969 to January 1, 2008, and express legislative intent regarding the single-factor apportionment formula and the elimination of the Compact's election provision. See Senate Legislative Analysis, SB 156, September 10, 2014.

Substitute H-1, as enrolled as PA 282, was "an extension of the basic purpose of the original," rather than "the introduction of the entirely new and different subject matter" that would otherwise violate the change-of-purpose rule. *Anderson*, 419 Mich at 327. The general purpose of both the bill as originally enacted, and substitute H-1, as enrolled as PA 282, was also to raise revenues. Because the general purpose of the bills did not change or introduce new and different

subject matter, a change-in-purpose challenge to PA 282 must fail.

In conclusion, given the presumption that PA 282 is constitutional, and in light of the fact that the Title-Object Clause is to be liberally construed, the Court concludes that PA 282 does not violate the Title-Object Clause of the Constitution.

B. THE "FIVE-DAY RULE" UNDER THE MICHIGAN CONSTITUTION WAS NOT VIOLATED

The issue whether PA 282 violates the Title-Object Clause is integrally related to the "five-day rule" of art 4, § 26 of Const 1963 which states, in pertinent part, that no bill can be passed until it has been printed or reproduced and in the possession of each house for at least five days.[22] This rule was not violated by passage of PA 282.

Whether the five-day rule has been violated depends on whether (1) the bill was in the possession of both houses for five days, and (2) whether there has been a change in purpose. *Anderson*, 419 Mich at 339 (LEVIN, J., concurring). Here, SB 156 was before both

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[22] As explained by the Court in *Anderson*, 419 Mich at 329-330, "The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule."

the House and Senate for at least 5 days.[23] And as discussed earlier, SB 156 as finally passed served the original bill's general purpose of raising revenues. The Court therefore concludes that enactment of PA 282 did not violate Const 1963, art 4, § 26.

C. THE TAX-TITLE CLAUSE OF THE MICHIGAN CONSTITUTION WAS NOT VIOLATED

PA 282 does not violate the "tax-title" clause of art 4, § 32 of the Michigan Constitution. That provision, also known as the "distinct-statement" clause, requires that "[e]very law which imposes, continues or revises a tax shall distinctly state the tax." *Id.* The purpose of this clause is "'to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature.'" *Dawson v Sec of State*, 274 Mich App 723, 747; 739 NW2d 339 (2007). (Citation omitted.)

Both the title and the body of PA 282 make clear that the act related distinctly to tax, and there is no language within SB 156, enrolled as PA 282, that would have caused the Legislature to be "deceived in regard to any measure for levying taxes." *Dawson*, 274 Mich App at 747. There is no merit to any claim that PA 282 violates Const 1963, art 4, § 32.

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[23] See 2013 Senate Journal 9; 2014 Senate Journal 61.

IV. CONCLUSION

The passage of PA 282 is a valid, constitutional act by the Legislature that provided clarity to taxpayers as to the original intent of the MBT Act.[24] It also prevented the significant fiscal harm to the state that would have resulted if taxpayers had been permitted to elect apportionment provisions under the Compact. The Legislature's choice in PA 282 to retroactively repeal the Compact provisions was within the boundaries of the Michigan and United States Constitutions and stayed true to the Legislature's original intent to require single-factor apportionment under the MBT Act. Application of PA 282 to the disposition of this case, and others like it, is appropriate;[25] failure to do so would otherwise provide taxpayers with a windfall that the Legislature did not mean to provide. See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv L Rev 692, 705 (1960).

IT IS HEREBY ORDERED that plaintiff's motion for summary disposition is DENIED, and summary disposition is GRANTED in favor of the Department pursuant to MCR 2.116(I)(2).

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[24] PA 282 also clarified that the Compact's election provision is not available under the Income Tax Act, MCL 206.1, *et seq*.

[25] Similar claims brought under the Income Tax Act, MCL 206.1, *et seq*., would likewise fail; PA 282 would apply and negate the basis for the plaintiff's claim.

This order resolves the last pending claim and closes the case.

Dated: December 19, 2014

/s/ Michael J. Talbot
Hon. Michael J. Talbot
Chief Judge, Court of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

ADVANCE/NEW HOUSE [sic] **PARTNERSHIP v DEPT OF TREASURY**

Case No. **14-000067-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

ADVANCE/NEWHOUSE PARTNERSHIP v DEPT OF TREASURY

Case No. **14-000206-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

AK STEEL HOLDING CORPORATION v DEPT OF TREASURY **Hon. Michael J. Talbot**

Case No. **13-000074-MT**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dept of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dept of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

BIG LOTS STORES INC v DEPT OF TREASURY **Hon. Michael J. Talbot**

Case No. **13-000133-MT**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is partially premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants partial summary disposition to the Department pursuant to MCR 2.116(I)(1).

With respect to the remaining claims, the parties have until February 2, 2015, to file dispositive motions. Any response must be filed within 14 days of the service of said motion. The parties will be notified if

the Court determines that oral argument is necessary.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

FLUOR CORPORATION AND SUBSIDIARIES v DEPT OF TREASURY

Case No. **14-000292-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dept of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

NINTENDO OF AMERICA INC v DEPT OF TREASURY **Hon. Michael J. Talbot**

Case No. **14-000253-MT**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

SONOCO PRODUCTS COMPANY v DEPT OF TREASURY **Hon. Michael J. Talbot**

Case No. **14-000142-MT**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

T-MOBILE USA INC AND SUBSIDIARIES v DEPT OF TREASURY

Case No. **14-000276-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT [sic] and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL]

STATE OF MICHIGAN

COURT OF CLAIMS

ADVANCE/NEWHOUSE PARTNERSHIP, Plaintiff, v DEPARTMENT OF TREASURY, Defendant.	**OPINION AND ORDER** (Filed Feb. 4, 2015) Case No. 14-000206-MT Hon. Michael J. Talbot

This case comes before the Court on plaintiff's motion for reconsideration pursuant to MCR 2.119(F), which challenges this Court's December 19, 2014 order. The motion is DENIED.

Under MCR 2.119(F)(3), a party bringing a motion for reconsideration under [sic] must "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition must result from correction of the error." Generally, a motion for reconsideration that merely presents the same issues already ruled on by the court will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).

In support of its motion, plaintiff argues that the Court committed palpable error in its finding that (1) the Multistate Tax Compact (Compact) was not a binding contract, (2) the application of 2014 PA 282 (PA 282) did not violate the Contracts Clauses of the United States or the 1963 Michigan Constitutions, (3) PA 282 did not violate the Compact provisions, MCL 205.581, *et seq.*, (4) PA 282 did not violate the Change of Purpose Clause of the Michigan Constitution, (5) PA 282 does not violate Due Process Clauses of the United States or Michigan Constitutions, (6) PA 282 does not violate the Commerce Clause of the United States Constitution, (7) PA 282 does not violate the Separation of Powers Clause of the Michigan Constitution, and (8) PA 282 does not violate the Title-Object Clause of the Michigan Constitution.

Plaintiff's motion for reconsideration is essentially an assertion of the arguments that were fully addressed in the December 19, 2014 opinions in *Ingram Micro Inc v Dep't of Treasury*, 11-000035-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, which were referenced in the order entered in the present case. None of the arguments persuades this Court of the need to correct that order.

First, this Court correctly determined in the referenced opinions that the Compact did not create a binding contract. The holding in *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), does not require this Court to uphold the Compact and find that a binding contract exists. The Supreme Court in *US Steel Corp* addressed the issue of

whether the Compact was constitutionally invalid because it lacked Congressional approval. The Court upheld the facial validity of the Compact against various constitutional challenges, *id.* at 473-479, but it did not hold that the Compact bound states to the provisions of the Compact. Finding that the Compact did not need Congressional approval, the Court underscored that each state retains its sovereign power to tax and is unrestricted by the Compact's terms.[1] Further, the Court acknowledged that a key component to its determination that the Compact did not require Congressional approval was the lack of regulatory power held by the Commission, whose role was recognized as advisory only:

> Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in

[1] [I]ndividual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax based (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." *US Steel Corp*, 434 US at 457.

> accordance with its own law. [*US Steel Corp*, 434 US at 457.]

The Court also disagrees with plaintiff's assertion that consideration of the three primary indicia of a compact as set forth in *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985), was misplaced. Plaintiff has provided no authority for its assertion that application of the three "classic" indicia of a compact is limited to a determination of whether a law is a compact, versus a "mere statute." Although *Northeast Bancorp* did not establish an *essential* list of criteria that must exist in an interstate compact, application of the three "classic indicia of a compact" as set forth in from [sic] *Northeast Bancorp* is relevant in this matter and confirms that the Compact does not bear sufficient indicia of a binding contract. This Court correctly determined that the Compact does not satisfy the indicia of a binding contract, and no palpable error occurred.

Second, because no palpable error occurred with respect to whether the Compact created a binding contract, the Court declines to address again whether the Contracts Clauses of the United States and Michigan Constitutions were violated.

Third, with respect to plaintiff's argument that PA 282 violates the Compact because of statutory language expressing an intent that repeal or withdraw must be prospective only, no palpable error occurred. Plaintiff's argument that repeal could be prospective only is consistent with what the Legislature did when

it enacted PA 282: it made an explicit clarification that in enacting 2007 PA 36, the Legislature intended that the repeal of the Compact be prospective, as of January 1, 2008.

The Legislature's prior failure to make repeal of the Compact terms explicit was a technical oversight. While the Court passes no judgment on whether retroactive legislation of tax laws would always be appropriate or constitutional, the legislative action taken by PA 282 was the sort of retroactive technical "fix" that the Supreme Court found appropriate in *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 22 (1994). It was not just the drafters of 2007 PA 36 that had overlooked the need to clarify that the Compact terms had been repealed. Taxpayers, and their counsel, too,[2] did not notice the technical oversight at the time the Michigan Business Tax (MBT) Act was enacted. In *Int'l Business Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*") and the vast majority of cases like the present one, taxpayers now arguing for the right to elect the three-factor apportionment did not claim that right on their original MBT returns. Only after the unintended "loophole" was discovered and brought to the attention of IBM and other taxpayers did they attempt to take advantage of it resulting

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[2] See e.g., Nowak, *From the SBT to the MBT: Michigan Business Tax Transition Issues*, 53 Wayne L Rev 1553, 1573 (2007) where no mention is made of the Compact or the possibility of making an election for three-factor apportionment under 2007 PA 36. ("The MBT employs a single sales factor apportionment formula, which is used to apportion both gross receipts and business income.")

in the filing of an abundance of amended returns seeking tax refunds.

Further, the Court rejects any contention in plaintiff's brief that due process was violated by the government's purported "bait and switch" of the apportionment rules. There was no bait offered, and no switch occurred. As mentioned above, it was only after the oversight was later discovered by taxpayers – and their accountants and lawyers – that attempts to exploit the loophole were made. These attempts eventually led to the Michigan Supreme Court's decision in *IBM*, followed shortly thereafter by the appropriate legislative correction under PA 282.

Plaintiff's remaining arguments also do not demonstrate palpable error; plaintiff merely rehashes arguments that have already been adequately addressed by the Court.

IT IS HEREBY ORDERED that the motion for reconsideration is DENIED.

This order resolves the last pending claim and closes the case.

Dated: FEB -4 2015 /s/ Michael J. Talbot
Hon. Michael J. Talbot
Chief Judge of the
Court of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

FLUOR CORPORATION AND SUBSIDIARIES, Plaintiff, v DEPARTMENT OF TREASURY, Defendant.	**OPINION AND ORDER** (Filed Feb. 4, 2015) Case No. 14-000292-MT Hon. Michael J. Talbot

This case comes before the Court on plaintiff's motion for reconsideration pursuant to MCR 2.119(F), which challenges this Court's December 19, 2014 order. The motion is DENIED.

Under MCR 2.119(F)(3), a party bringing a motion for reconsideration under [sic] must "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition must result from correction of the error." Generally, a motion for reconsideration that merely presents the same issues already ruled on by the court will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).

In support of its motion, plaintiff argues that the Court committed palpable error in its finding that (1) the Multistate Tax Compact (Compact) was not a binding contract, (2) the application of 2014 PA 282 (PA 282) did not violate the Contracts Clauses of the United States or the 1963 Michigan Constitutions, (3) PA 282 did not violate the Compact provisions, MCL 205.581, *et seq.*, (4) PA 282 did not violate the Change of Purpose Clause of the Michigan Constitution, (5) PA 282 does not violate Due Process Clauses of the United States or Michigan. Constitutions, (6) PA 282 does not violate the Commerce Clause of the United States Constitution, (7) PA 282 does not violate the Separation of Powers Clause of the Michigan Constitution, and (8) PA 282 does not violate the Title-Object Clause of the Michigan Constitution.

Plaintiff's motion for reconsideration is essentially an assertion of the arguments that were fully addressed in the December 19, 2014 opinions in *Ingram Micro Inc v Dep't of Treasury*, 11-000035-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, which were referenced in the order entered in the present case. None of the arguments persuades this Court of the need to correct that order.

First, this Court correctly determined in the referenced opinions that the Compact did not create a binding contract. The holding in *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), does not require this Court to uphold the Compact and find that a binding contract exists. The Supreme Court in *US Steel Corp* addressed the issue of

whether the Compact was constitutionally invalid because it lacked Congressional approval. The Court upheld the facial validity of the Compact against various constitutional challenges, *id.* at 473-479, but it did not hold that the Compact bound states to the provisions of the Compact. Finding that the Compact did not need Congressional approval, the Court underscored that each state retains its sovereign power to tax and is unrestricted by the Compact's terms.[1] Further, the Court acknowledged that a key component to its determination that the Compact did not require Congressional approval was the lack of regulatory power held by the Commission, whose role was recognized as advisory only:

> Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in

[1] "[I]ndividual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax based (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." *US Steel Corp*, 434 US at 457.

> accordance with its own law. [*US Steel Corp*, 434 US at 457.]

The Court also disagrees with plaintiff's assertion that consideration of the three primary indicia of a compact as set forth in *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985), was misplaced. Plaintiff has provided no authority for its assertion that application of the three "classic" indicia of a compact is limited to a determination of whether a law is a compact, versus a "mere statute." Although *Northeast Bancorp* did not establish an *essential* list of criteria that must exist in an interstate compact, application of the three "classic indicia of a compact" as set forth in from [sic] *Northeast Bancorp* is relevant in this matter and confirms that the Compact does not bear sufficient indicia of a binding contract. This Court correctly determined that the Compact does not satisfy the indicia of a binding contract, and no palpable error occurred.

Second, because no palpable error occurred with respect to whether the Compact created a binding contract, the Court declines to address again whether the Contracts Clauses of the United States and Michigan Constitutions were violated.

Third, with respect to plaintiff's argument that PA 282 violates the Compact because of statutory language expressing an intent that repeal or withdraw must be prospective only, no palpable error occurred. Plaintiff's argument that repeal could be prospective only is consistent with what the Legislature did when

it enacted PA 282: it made an explicit clarification that in enacting 2007 PA 36, the Legislature intended that the repeal of the Compact be prospective, as of January 1, 2008.

The Legislature's prior failure to make repeal of the Compact terms explicit was a technical oversight. While the Court passes no judgment on whether retroactive legislation of tax laws would always be appropriate or constitutional, the legislative action taken by PA 282 was the sort of retroactive technical "fix" that the Supreme Court found appropriate in *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 22 (1994). It was not just the drafters of 2007 PA 36 that had overlooked the need to clarify that the Compact terms had been repealed. Taxpayers, and their counsel, too,[2] did not notice the technical oversight at the time the Michigan Business Tax (MBT) Act was enacted. In *Intl Business Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*") and the vast majority of cases like the present one, taxpayers now arguing for the right to elect the three-factor apportionment did not claim that right on their original MBT returns. Only after the unintended "loophole" was discovered and brought to the attention of IBM and other taxpayers did they attempt to take advantage of it, resulting

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[2] See e.g., Nowak, *From the SBT to the MBT: Michigan Business Tax Transition Issues*, 53 Wayne L Rev 1553, 1573 (2007) where no mention is made of the Compact or the possibility of making an election for three-factor apportionment under 2007 PA 36. ("The MBT employs a single sales factor apportionment formula, which is used to apportion both gross receipts and business income.")

in the filing of an abundance of amended returns seeking tax refunds.

Further, the Court rejects any contention in plaintiff's brief that due process was violated by the government's purported "bait and switch" of the apportionment rules. There was no bait offered, and no switch occurred. As mentioned above, it was only after the oversight was later discovered by taxpayers – and their accountants and lawyers – that attempts to exploit the loophole were made. These attempts eventually led to the Michigan Supreme Court's decision in *IBM*, followed shortly thereafter by the appropriate legislative correction under PA 282.

Plaintiff's remaining arguments also do not demonstrate palpable error; plaintiff merely rehashes arguments that have already been adequately addressed by the Court.

IT IS HEREBY ORDERED that the motion for reconsideration is DENIED.

This order resolves the last pending claim and closes the case.

Dated: FEB -4 2015 /s/ Michael J. Talbot
Hon. Michael J. Talbot
Chief Judge of the
Court of Claims

Order **Michigan Supreme Court**
Lansing Michigan

June 24, 2016 Robert P. Young, Jr.,
Chief Justice

152598-610 Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

SONOCO PRODUCTS COMPANY,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152598
COA: 325505
Court of Claims:
14-000142-MT

ANHEUSER-BUSCH, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152599
COA: 325506
Court of Claims:
13-000111-MT

INGRAM MICRO, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152600
COA: 325507
Court of Claims: 11-000035-MT

RENAISSANCE LEARNING, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152601
COA: 325508
Court of Claims: 12-000093-MT

RENAISSANCE LEARNING, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152602
COA: 325509
Court of Claims: 13-000006-MT

AK STEEL HOLDING CORPORATION,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152603
COA: 325510
Court of Claims: 13-000074-MT

ADVANCE/NEWHOUSE PARTNERSHIP,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152604
COA: 325511
Court of Claims: 14-000067-MT

BIG LOTS STORES, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152605
COA: 326039
Court of Claims: 13-000133-MT

KIMBALL INTERNATIONAL MARKETING, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152606
COA: 326075
Court of Claims: 14-000300-MT

NINTENDO OF AMERICA, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152607
COA: 326080
Court of Claims: 14-000253-MT

ADVANCE/NEWHOUSE PARTNERSHIP,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152608
COA: 326110
Court of Claims: 14-000206-MT

FLUOR CORPORATION AND SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152609
COA: 326123
Court of Claims: 14-000292-MT

T-MOBILE USA, INC. AND SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 152610
COA: 326136
Court of Claims: 14-000276-MT

On order of the Court, the application for leave to appeal the September 29, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*).

I respectfully dissent from this Court's order denying leave to appeal. Because the issues raised here are, in my judgment, of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state, I believe they ought to be heard by the highest court of this state, and would thus grant leave to appeal.

In 1970, Michigan joined the Multistate Tax Compact (the Compact) when the Legislature enacted MCL 205.581. See 1969 PA 243, effective July 1, 1970. Article III(1) of the Compact provided that certain multistate taxpayers may elect to apportion income to Michigan for tax purposes "in the manner provided by the laws of such state," i.e., the laws of Michigan, or else "in accordance with Article IV." MCL 205.581, art III(1). Article IV provided for an apportionment formula based on property, payroll, and sales factors. MCL 205.581, art IV(9). Effective January 1, 2008, the Legislature enacted the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq.*, 2007 PA 36, which provided that "each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1). Finally, MCL 208.1301(2) of the BTA provided for an apportionment formula based solely on a sales factor.

At issue in *IBM v Dep't of Treasury*, 496 Mich 642 (2014), was whether the plaintiff multistate taxpayer could elect to use the Compact's three-factor

apportionment formula for its 2008 Michigan taxes or whether, as the defendant Department of Treasury argued, it was required to use the BTA's sales-factor-only apportionment formula. This Court ruled in *IBM* that the taxpayer could elect to use the Compact's apportionment formula. The lead opinion stated that "the Legislature had [not] repealed the Compact's election provision by implication when it enacted the BTA," *id.* at 645 (opinion by VIVIANO, J.), while the concurring opinion left that question open, *id.* at 668 (ZAHRA, J., concurring). In response, the Legislature enacted 2014 PA 282, which repealed the Compact "retroactively and effective beginning January 1, 2008." 2014 PA 282, enacting § 1. As a consequence, 2014 PA 282 retroactively repealed the Compact election provision beginning that date as well. Several multistate taxpayers challenged the constitutionality of 2014 PA 282, but the Court of Claims and the Court of Appeals upheld the statute against those challenges. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 401 (2015). In my judgment, the following four constitutional questions that are raised in the taxpayers' various applications for leave to appeal warrant thorough consideration by this Court by a grant of leave to appeal:

First, is 2014 PA 282 consistent with federal due-process protections, US Const, Ams V and XIV, given that the retroactivity period here of six years and nine months arguably exceeds "a modest period of retroactivity," *United States v Carlton*, 512 US 26, 32 (1994), and that one justice has observed in this same regard

in a frequently cited statement that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions," *id.* at 38 (O'Connor, J., concurring in the judgment)?

Second, is 2014 PA 282 consistent with the Michigan Due Process Clause, Const 1963, art 1, § 17, when that clause is worded differently than the federal Due Process Clause and we have held that the state provision may afford heightened protections, *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7 (1984), because "while the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution," *People v Victor*, 287 Mich 506, 514 (1939)?

Third, does 2014 PA 282 violate either the federal or state prohibitions against the impairment of contracts, US Const, art I, § 10, cl 1; Const 1963, art 1, § 10, because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from the Compact amounts to an unconstitutional impairment of that contract, see *Gillette Co v Franchise Tax Bd*, 62 Cal 4th 468, 477-479 (2015)?

Fourth, does 2014 PA 282 violate the Separation of Powers Clause, Const 1963, art 3, § 2, because by prescribing the outcomes of those cases that were held in abeyance pending *IBM*, as well as *IBM* itself, the

Legislature has impinged on the judicial power, Const 1963, art 6, § 1, and contravened the principle that "the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered," *People ex rel Sutherland v Governor*, 29 Mich 320, 325-326 (1874); cf. *Plaut v Spendthrift Farm, Inc*, 514 US 211, 217-218 (1995) ("Congress has exceeded its authority by requiring the federal courts to exercise '[t]he judicial Power of the United States,' U. S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.")?

As the United States Supreme Court has recognized, "[T]he power to tax involves the power to destroy[.]" *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 431 (1819). This power must be kept subject to proper constitutional limits, particularly when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago. While I do not yet have any firm belief regarding the constitutionality of 2014 PA 282, I do have a firm belief that before retroactive tax burdens such as those set forth in this law are imposed, the arguments of affected taxpayers deserve consideration by the highest court of this state. Accordingly, I respectfully dissent and would grant leave to appeal.

VIVIANO, J., joins the statement of MARKMAN, J.

STATE OF MICHIGAN

COURT OF APPEALS

HARLEY DAVIDSON MOTOR COMPANY, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	UNPUBLISHED March 15, 2016 No. 325498 Court of Claims LC No. 13-000158-MT
DUN & BRADSTREET, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325499 Court of Claims LC No. 13-000085-MT
DUN & BRADSTREET, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 325500 Court of Claims LC No. 12-000125-MT

L'OREAL USA, INC. & SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326130 Court of Claims LC No. 14-000174-MT

L'OREAL USA, INC. & SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326131 Court of Claims LC No. 14-000178-MT

SKADDEN, ARPS, SLATE, MEAGHER, & FLOM, LLP, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326135 Court of Claims LC No. 14-000296-MT

EASTON TELECOM SERVICES, LLC, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 326862 Court of Claims LC No. 15-000068-MT
ANHEUSER BUSCH, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327057 Court of Claims LC No. 11-000085-MT
INTUITIVE SURGICAL, INC., Plaintiff-Appellant/ Cross-Appellee, v DEPARTMENT OF TREASURY, Defendant-Appellee/ Cross-Appellant.	No. 327178 Court of Claims LC No. 15-000012-MT

T-MOBILE USA, INC. AND SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327217 Court of Claims LC No. 15-000071-MT
GENERAL ALUMINUM MFG COMPANY AND AFFILIATES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327218 Court of Claims LC No. 15-000021-MT
CONAIR CORPORATION AND SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327220 Court of Claims LC No. 15-000007-MT

CONAIR CORPORATION AND SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327222 Court of Claims LC No. 15-000072-MT
JOHNSON MATTHEY, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327694 Court of Claims LC No. 14-000269-MT
MCNEIL-PPC, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327964 Court of Claims LC No. 12-000143-MT

FLUOR CORPORATION & SUBSIDIARIES, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 327995 Court of Claims LC No. 12-000147-MT
DIRECTV, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 328193 Court of Claims LC No. 13-000092-MT
SOLO CUP OPERATING CORPORATION, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 328206 Court of Claims LC No. 13-000062-MT

CONAGRA FOODS, INC. AND SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328317
Court of Claims
LC No. 15-000120-MT

BOISE, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328967
Court of Claims
LC No. 15-000133-MT

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

In these 20 consolidated appeals, plaintiff-taxpayers challenge the Court of Claims' summary dismissal of their actions seeking tax refunds. Specifically, each plaintiff is a corporation that earns income in many states and made use of the elective three-factor apportionment formula in the Multistate Tax Compact to which Michigan previously adhered. With the passage of 2014 PA 282, the Legislature clarified that its enactment of the Michigan Business Tax Act (MBTA), 2007 PA 36, withdrew the state from the compact and

created a single-factor apportionment formula. 2014 PA 282 provided for retroactive application to 2008.

Plaintiffs challenge the validity and constitutionality of 2014 PA 282. However, this Court rejected identical arguments in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (Docket No. 325258 *et al*, issued September 29, 2015). Certain parties raise other challenges that also lack merit. We affirm.

I. BACKGROUND

As discussed by this Court in *Gillette*, slip op at 14, the Multistate Tax Compact was enacted in 1967 by the legislatures of seven states, including Michigan. Of relevance to this case is the method of income apportionment described in the Compact:

> The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating MBT [Michigan business tax]. Under the [MBTA], created by 2007 PA 36, income is apportioned by applying a single factor apportionment formula based solely on sales. MCL 208.1301(2). In contrast, under the Compact's election provision, income may be apportioned using an equally-weighted, three-factor apportionment formula based on sales, property and payroll. The potential effect of electing "out" of the [MBTA's] single-factor apportionment methodology is a reduction of the overall apportionment percentage for companies that do not

> have significant property and payroll located in Michigan. [*Id.*]

On July 14, 2014, our Supreme Court issued its opinion in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) (*IBM*). In *IBM*, the Court considered whether the enactment of the MBTA required taxpayers to use the single-factor apportionment methodology or whether taxpayers could continue to opt into the three-factor Compact method. *Gillette*, slip op at 14-15. As summarized in *Gillette*, slip op at 15, the Supreme Court

> determined that for tax years 2008 through 2010, the Legislature did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq.*, and concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also concluded that both the business income tax base and the modified gross receipts tax base of the MBT are "income taxes" within the meaning of the Compact.

The Legislature responded by enacting 2014 PA 282 on September 11, 2014. The act specifically indicated that 2007 PA 36 eliminated the statutory provision permitting taxpayers to elect into the Compact's three-part apportionment methodology and made the 2014 enactment retroactive to January 1, 2008. *Gillette*, slip op at 15.

Each plaintiff in the current appeals desired to use the three-part apportionment formula to calculate

their Michigan income tax liability between 2008 and 2010. They filed suit in the Court of Claims seeking a refund of the excess taxes they were required to pay under the MBTA's single-factor formula. The Court of Claims summarily dismissed that portion of each plaintiff's action.

II. CONSTITUTIONALITY OF 2014 PA 282

In all the consolidated appeals, plaintiffs contend that they should have been permitted to apportion their income using the three-factor Compact method and assert that 2014 PA 282 violates the Compact, as well as the contracts, due process, separation of powers, commerce, and title-object clauses of the Michigan and federal constitutions and the five-day rule articulated in Const 1963, art 4, § 26. Accordingly, they contend that the Court of Claims should not have dismissed their refund counts.

We review de novo the grant of summary disposition under MCR 2.116(I)(1). *Gillette*, slip op at 16. MCR 2.116(I)(1) states: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." We also review de novo underlying issues of statutory interpretation and the resolution of constitutional issues. *Gillette*, slip op at 16.

Plaintiffs' arguments are identical in all relevant respects to those raised in *Gillette.* This Court rejected the plaintiffs' myriad challenges in *Gillette*, and we are

bound by that ruling. MCR 7.215(C)(2). In particular, this Court held that the Compact was an advisory, not binding, agreement. Accordingly, 2014 PA 282's removal of Michigan from membership in the Compact was not prohibited and no contractual violation occurred. For the same reason, this Court found no violation of the Contract Clauses of either the federal or state constitutions. *Gillette*, slip op at 21.

This Court held that "the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal constitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself." *Id.* at 22. "First, plaintiffs had no vested right in the tax laws or in the continuance of any tax laws." *Id.* at 25. Second, "the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282": to "prevent a reduction in General Fund revenue of $1.1 billion." *Id.* at 25-26 (emphasis omitted). And the means selected were rationally related to the goals to be achieved. *Id.* at 26. Third, this Court concluded, the Legislature acted promptly following the *IBM* decision to correct the error perceived by the Supreme Court. Finally, this Court reasoned that the 6.5-year retroactive period "was sufficiently modest to time frames of other retroactive legislation" that had been upheld by appellate courts in the past. *Id.*

Gillette found no violation of the Separation of Powers clauses of either the federal or the state constitutions. The Legislature has the constitutional power to enact legislation to correct judicial misconceptions

about the meaning of a law. *Id.* at 28, 30. This Court discerned no discrimination or undue burden placed on interstate commerce that would violate the United States Constitution's Commerce Clause. *Id.* at 31-32. This Court further found no violation of Michigan's Title-Object Clause, *id.* at 35-38, or the Michigan constitutional rule requiring that a bill be before each legislative house for a minimum of five days. *Id.* at 39.

As each challenge was raised, considered and resolved by this Court in *Gillette*, no new issues remain for our review. Accordingly, we discern no ground to overturn the dismissal of plaintiffs' refund claims. Nor are we convinced by plaintiffs' argument that we should express disagreement with *Gillette* and invoke the process for convening a special panel. See MCR 7.215(J)(2), (3). The plaintiffs' applications for leave to appeal in *Gillette* are currently pending before the Michigan Supreme Court. That appellate proceeding is sufficient to resolve the legal questions presented.

III. MODIFIED GROSS RECEIPTS

In Docket No. 327057, plaintiff Anheuser Busch, Inc. (Anheuser) argues that the predecessor Court of Claims judge erred in concluding that the Modified Gross Receipts Tax (MGRT) portion of the MBTA was not an "income tax" under the Compact's definition of that term. Anheuser contends that the MGRT is in fact an income tax under the Compact and therefore subject to the elective three-factor apportionment formula. Pursuant to *IBM*, 496 Mich at 663 (VIVIANO, J.),

Anheuser would have been correct. Yet, we need not reach this issue. As 2014 PA 282 clarifies, Michigan has withdrawn from the Compact and its definitions no longer have relevance in apportioning one's income under Michigan tax law. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues. A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief.").

IV. PENALTY WAIVERS

In Docket Nos. 327995 and 328206, plaintiffs Fluor Corporation & Subsidiaries (Fluor) and Solo Cup Operating Corporation (Solo Cup) presented their requests for penalty waivers before the Court of Claims. Plaintiffs were penalized because they made inadequate quarterly tax payments in 2008. Plaintiffs assert that their estimates were reasonable given the uncertain state of the law that year, excusing the shortfall. The Court of Claims dismissed plaintiffs' counts in this regard.

The Court of Claims granted defendant's motions for summary disposition of this issue under MCR 2.116(C)(10). In reviewing a (C)(10) motion, we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine

whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We review underlying issues of statutory interpretation, and interpretation of administrative rules, de novo. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007). Unambiguous statutory and administrative rule language must be enforced as written in accordance with its plain meaning. *Id.*

Under the MBTA, which was repealed effective May 25, 2011, a taxpayer who reasonably expected to pay taxes in excess of $800 for the tax year was required to file an estimated return and to pay an estimated tax for each quarter of the tax year. MCL 208.1501(1), repealed by 2011 PA 39. Each quarterly estimated payment was to "be for the estimated business income tax base and modified gross receipts tax base for the quarter or 25% of the estimated annual liability." MCL 208.1501(3), repealed by 2011 PA 39. Defendant is statutorily required to assess a penalty when a taxpayer fails to make a sufficient estimated payment. See MCL 205.23(2) ("A deficiency in an estimated payment as may be required by a tax statute administered under this act shall be treated in the same manner as a tax due. . . ."); MCL 205.24(2)

(requiring defendant to assess a penalty when a taxpayer fails or refuses to file a return or pay a tax).

MCL 205.24(4) provides for the waiver of a penalty as follows:

> If a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the state treasurer or an authorized representative of the state treasurer shall waive the penalty prescribed by [MCL 205.24(2)].

Mich Admin Code, R 205.1013 sets forth the procedure for requesting a penalty waiver, in relevant part, as:

> (2) If a return is filed or a remittance is paid after the time specified, the taxpayer may request that the commissioner of revenue waive and the commissioner shall waive the penalty authorized by [MCL 205.24(4)] if the taxpayer establishes that the failure to file the return or to pay the tax was due to reasonable cause and not to willful neglect.
>
> (3) A waiver of penalty request shall be in writing and shall state the reasons alleged to constitute reasonable cause and the absence of willful neglect.
>
> (4) The taxpayer bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to file or failure to pay was due to reasonable cause.

Although each case must be evaluated individually, defendant has provided a list of examples that generally constitute reasonable cause and a list of factors that may establish reasonable cause when considered with other circumstances. See Mich Admin Code, R 205.1013(7), (8).

In Docket No. 327995, Fluor acknowledges that it underpaid its quarterly estimated taxes in 2008, but contends, for the first time on appeal, that this was due to uncertainty regarding the MBT, which had at that point only recently been enacted. Fluor asserts that defendant initially failed to provide guidance regarding the MBT because defendant did not release tax forms and instructions for the 2008 tax year until November 2008. Fluor also says that it was not negligent in electing to use the Compact's apportionment formula.

As Fluor did not raise this specific challenge until its appellate brief, there is no record supporting its claim. Defendant, on the other hand, replied to this new argument by appending to its appellate brief the instructions it published in December 2007, explaining when estimated quarterly payments were due, how the estimates were to be calculated, and the penalty for not making the payments. We arguably cannot consider this document because it is not in the lower court record. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal."). Had Fluor raised this claim in a timely manner, defendant likely would have presented these instructions below.

And pursuant to MRE 201, we may take judicial notice of facts that can be readily confirmed by sources whose accuracy cannot reasonably be questioned. Given this unrebutted evidence, the Court of Claims would have had no choice but to reject Fluor's challenge. In any event, parties are presumed to know the law, *Mudge v Macomb Co*, 458 Mich 87, 109 n 22; 580 NW2d 845 (1998), and Fluor has alleged no facts or law to overcome this fundamental principle.

Fluor further contends that it acted with reasonable cause and not willful neglect in choosing to calculate its 2008 quarterly tax payments using the three-factor Compact apportionment formula. However, as aptly noted by the Court of Claims, "according to the record, the penalty was based solely on the underpayment of total tax liability for 2008 as reported by plaintiff," not the taxpayer's apportionment method. Although defendant adjusted the number upward, Fluor reported a total tax liability using the Compact formula of $2,613,151.00. Pursuant to former MCL 208.1501(3), Fluor's quarterly payments should have been $653,287.75. Fluor's payments were all under $200,000, an excessive shortfall warranting the penalty imposed regardless of the calculation method.

In Docket No. 328206, Solo Cup argues that the Court of Claims erroneously concluded that it failed to exhaust its administrative remedies by petitioning defendant for a penalty waiver before filing suit. According to Solo Cup, there is no exhaustion of remedies requirement in the Revenue Act, and such a requirement would be at odds with the statutory provision

requiring a taxpayer to file an appeal in the Court of Claims within 90 days after the assessment, decision, or order. See MCL 205.22(1). Solo Cup also contends that nothing in MCL 205.24(4) requires a taxpayer to submit a written request for a waiver of penalty and that Rule 205.1013(3) does not provide that a penalty waiver request must be submitted before filing suit in the Court of Claims. Even if a written waiver request were required, Solo Cup claims that its Court of Claims complaint qualifies as such a written request.

"The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009). Nonetheless, if "it is clear that appeal to an administrative body is an exercise in futility and nothing more than a formal step on the way to the courthouse, resort to the administrative body is not required." *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981); see also *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994). "[C]ourts should not presume futility in an administrative appeal but should assume that the administrative process will, if given a chance, discover and correct its own errors." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52; 620 NW2d 546 (2000) (quotation marks omitted); see also *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007).

MCL 205.24(4) contemplates the submission of a waiver request *to defendant* by stating that a waiver shall be granted if "it is shown *to the satisfaction of the department* that the failure was due to reasonable cause and not willful neglect[.]" (Emphasis added.) Rule 205.1013 prescribes in further detail that the taxpayer must file a written request stating the reasons alleged to constitute reasonable cause and the absence of willful neglect and articulates that the taxpayer has the burden of establishing reasonable cause by clear and convincing evidence. Because defendant provides a remedy to taxpayers seeking a penalty waiver, Solo Cup was required to seek such relief before petitioning the Court of Claims. *Cummins*, 283 Mich App at 691.

Solo Cup's Court of Claims complaint did not fulfill the statutory and rule notice requirements. The complaint sought action from the court, not defendant, and sought to satisfy the court, not defendant, that the taxpayer's quarterly payments were reasonably calculated. Solo Cup's suggestion that it lacked sufficient time to pursue the administrative remedy in light of the 90-day time limit for filing an appeal in the Court of Claims is conjectural. It could have filed the waiver request and if a response was not forthcoming, it could have filed the Court of Claims action. Courts will not presume that an administrative appeal would have been futile. *Citizens for Common Sense in Gov't*, 243 Mich App at 52. A party's speculation about the outcome of an administrative remedy does not excuse the obligation to exhaust that remedy. *Id.* at 54.

Solo Cup relies on *Montgomery Ward & Co, Inc v Dep't of Treasury*, 191 Mich App 674; 478 NW2d 745 (1991), to support its argument, but that case in [sic] inapposite. *Montgomery Ward* involved a taxpayer's judicial appeal of a tax assessment. The statute at issue in that case included specific steps to perfect court jurisdiction. As the taxpayer had taken those steps, the court had jurisdiction over the case. Here, the taxpayer did not jump through the hurdles outlined in the relevant statutes and administrative rules. Therefore, the taxpayer failed to exhaust the available administrative remedies and the suit was premature.

V. SUBJECT MATTER JURISDICTION

The matter underlying Docket No. 327178 has a slightly different procedural history than its brethren. Plaintiff Intuitive Surgical, Inc. (Intuitive) first appealed defendant's tax adjustments for 2008, 2009, and 2010 to the Michigan Tax Tribunal (MTT). Defendant sought summary disposition of Intuitive's claims because the department complied with the plain language of 2007 PA 36 and 2014 PA 282. Defendant further argued that the MTT lacked jurisdiction to resolve the constitutional challenges to 2014 PA 282. In response, Intuitive filed a declaratory judgment action in the Court of Claims to resolve the constitutional issues. The MTT held the proceedings in abeyance pending the Court of Claims' resolution. And the Court of Claims found no constitutional violation and summarily dismissed Intuitive's declaratory judgment action.

Defendant now contends that the Court of Claims lacked jurisdiction to hear the matter because (1) the action was filed beyond the 90-day window, (2) the declaratory judgment complaint did not allege an "actual controversy" as required by MCR 2.605(A), and (3) the Court of Claims' action was actually a collateral attack on certain MTT decisions, which should have been challenged through a direct appeal to this Court. Defendant did not raise these challenges below. However, "jurisdictional defects may be raised at any time, even if raised for the first time on appeal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97; 693 NW2d 170 (2005). We review such jurisdictional questions de novo. *Id.* at 98.

The lack of subject matter jurisdiction is a serious defect. A court must dismiss an action without considering the merits when jurisdiction is lacking. See *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002) ("The lack of subject-matter jurisdiction is so serious a defect in the proceedings that a tribunal is duty-bound to dismiss a plaintiff's claim even if the defendant does not request it. Indeed, having determined that it has no jurisdiction, a court should not proceed further except to dismiss the action.") (citation omitted). Accordingly, even though the Court of Claims correctly resolved the constitutional question, we must determine whether it had authority to consider the claim in the first instance.

First, we discern no error in the Court of Claims considering this action despite that it was filed more than 90 days after defendant's adverse decision. See

MCL 205.22(1). This Court impliedly accepted the waiver of this time limitation in *Toll Northville, LTD v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2000), aff'd in part and vacated in part on other grounds 480 Mich 6; 743 NW2d 902 (2008), when a party seeks resolution of a constitutional issue that arises during the pendency of an MTT case.

Second, there existed an actual controversy to place before the Court of Claims for resolution. MCR 2.605 governs declaratory judgment actions. MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(2) continues, "For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment."

> Generally, an actual controversy exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978); *Durant v Dep't of Ed (On Remand)*, 238 Mich App 185, 204-205; 605 NW2d 66 (1999). "What is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Shavers*, 402

> Mich at 589; *Fieger v Comm'r of Ins*, 174 Mich App 467, 470-471, 437 NW2d 271 (1988). Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist. *Recall Blanchard Comm v Secretary of State*, 146 Mich App 117, 121; 380 NW2d 71 (1985). [*Citizens for Common Sense in Gov't*, 243 Mich App at 55.]

In *Toll Northville*, 272 Mich App at 355, the plaintiff appealed the defendant township's decision to increase the taxable value of its property in 2000 and therefore impose a higher tax liability in 2001 and 2002 to the MTT. During that action, the constitutionality of the underlying statute came into question. As the MTT lacks statutory jurisdiction to consider such constitutional attacks, the plaintiff filed a separate declaratory judgment complaint in the circuit court to resolve the issue. *Id.*; see also See [sic] *Meadowbrook Village Assoc v Auburn Hills*, 226 Mich App 594, 596; 574 NW2d 924 (1997) ("The [MTT] does not have jurisdiction over constitutional questions and does not possess authority to hold statutes invalid."). The defendant contended in both the MTT and the circuit court action that the MTT lacked jurisdiction to impose a remedy because the plaintiff attacked the 2001 and 2002 tax assessments, but the change in taxable value occurred in 2000. *Toll Northville*, 272 Mich App at 359-360. This Court concluded that the circuit court did have jurisdiction over the constitutional claim, however, because no decision had been made regarding the MTT's jurisdiction and the parties retained an interest in adverse claims. *Id.* at 361.

So too here, Intuitive filed an MTT action regarding tax years 2008 through 2010. The MTT had yet to resolve those actions and the parties retained an interest in their adverse claims. Accordingly, an actual controversy existed which the Court of Claims could resolve to guide the definition of the parties' rights in the future in the MTT action. Moreover, just as in *Toll Northville*, the current plaintiff sought a present resolution about past tax years. Although the financial injury had already occurred, resolution of the parties' rights would affect the present and the future.

Defendant's claim that Intuitive's declaratory judgment complaint was actually a collateral attack is similarly unfounded. The MTT could not resolve the constitutional challenge and resolution of that question was necessary before the merits of Intuitive's underlying challenge to the tax assessment could be decided. Evidencing that the MTT could not resolve the matter, it held the case in abeyance pending the Court of Claims' decision. The MTT had yet to resolve the matter, so Intuitive's Court of Claims' action could not be a collateral attack.

Finally, defendant asserts that the Court of Claims should have dismissed Intuitive's declaratory judgment complaint because another action between the same parties raising the same issues remained pending in the MTT. This contention is completely inconsistent with *Toll Northville*, however, in which the MTT also held a matter in abeyance to permit the

plaintiff to seek resolution of a constitutional issue in the circuit court.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens

STATE OF MICHIGAN

COURT OF CLAIMS

INTUITIVE SURGICAL INC v DEPT OF TREASURY **Hon. Michael J. Talbot**

Case No. **15-000012-MT**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
February 3, 2015.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's constitutional challenges to 2014 PA 282 lack merit. The challenges have been addressed by this Court in the December 19, 2014 opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000035-MT and *Yaskawa America, Inc v Dep't of Treasury*, No.11-000077-MT. For the reasons explained in those opinions, the Court rejects plaintiff's claims that PA 282 is unconstitutional. Defendant is entitled to judgment as a matter of law. MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael Talbot
Michael J. Talbot,
Chief Judge

STATE OF MICHIGAN

COURT OF CLAIMS

GENERAL ALUMINUM MFG COMPANY AND AFFILIATES v DEPT OF TREASURY

Case No. **15-000021-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
February 5, 2015.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael Talbot
Michael J. Talbot,
Chief Judge

STATE OF MICHIGAN

COURT OF CLAIMS

T-MOBILE USA INC AND SUBSIDIARIES v DEPT OF TREASURY

Case No. **15-000071-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on
March 24, 2015.

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions, For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael Talbot
Michael J. Talbot,
Chief Judge

STATE OF MICHIGAN

COURT OF CLAIMS

INTUITIVE SURGICAL INC,

Plaintiff,

v.

DEPARTMENT OF TREASURY,

Defendant.

OPINION AND ORDER

(Filed Apr. 17, 2015)

Case No. 15-000012-MT

Hon. Michael J. Talbot

This case comes before the Court on plaintiffs motion for reconsideration pursuant to MCR 2.119(F), which challenges this Court's February 3, 2015 order. The motion is DENIED.

Under MCR 2.119(F)(3), a party bringing a motion for reconsideration under must "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition must result from correction of the error." Generally, a motion for reconsideration that merely presents the same issues already ruled on by the court will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).

In support of its motion, plaintiff argues that the Court committed palpable error in its finding that

(1) the Multistate Tax Compact (Compact) was not a binding contract, (2) the application of 2014 PA 282 (PA 282) did not violate the Contracts Clauses of the United States or the 1963 Michigan Constitutions, (3) PA 282 did not violate the Compact provisions, MCL 205.581, *et seq.*, (4) PA 282 did not violate the Change of Purpose Clause of the Michigan Constitution, (5) PA 282 does not violate Due Process Clauses of the United States or Michigan Constitutions, (6) PA 282 does not violate the Commerce Clause of the United States Constitution, (7) PA 282 does not violate the Separation of Powers Clause of the Michigan Constitution, and (8) PA 282 does not violate the Title-Object Clause of the Michigan Constitution.

Plaintiff's motion for reconsideration is essentially an assertion of the arguments that were fully addressed in the December 19, 2014 opinions in *Ingram Micro Inc v Dep't of Treasury*, 11-000035-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, which were referenced in the order entered in the present case. None of the arguments persuades this Court of the need to correct that order.

First, this Court correctly determined in the referenced opinions that the Compact did not create a binding contract. The holding in *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), does not require this Court to uphold the Compact and find that a binding contract exists. The Supreme Court in *US Steel Corp* addressed the issue of whether the Compact was constitutionally invalid because it lacked Congressional approval. The Court

upheld the facial validity of the Compact against various constitutional challenges, *id.* at 473-479, but it did not hold that the Compact bound states to the provisions of the Compact. Finding that the Compact did not need Congressional approval, the Court underscored that each state retains its sovereign power to tax and is unrestricted by the Compact's terms,[1] Further, the Court acknowledged that a key component to its determination that the Compact did not require Congressional approval was the lack of regulatory power held by the Commission, whose role was recognized as advisory only:

> Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law. [*US Steel Corp*, 434 US at 457.]

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[1] "[I]ndividual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax based [sic] (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." *US Steel Corp*, 434 US at 457.

The Court also disagrees with plaintiff's assertion that consideration of the three primary indicia of a compact as set forth in *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985), was misplaced. Plaintiff has provided no authority for its assertion that application of the three "classic" indicia of a compact is limited to a determination of whether a law is a compact, versus a "mere statute." Although *Northeast Bancorp* did not establish an *essential* list of criteria that must exist in an interstate compact, application of the three "classic indicia of a compact" as set forth in from [sic] *Northeast Bancorp* is relevant in this matter and confirms that the Compact does not bear sufficient indicia of a binding contract. This Court correctly determined that the Compact does not satisfy the indicia of a binding contract, and no palpable error occurred.

Second, because no palpable error occurred with respect to whether the Compact created a binding contract, the Court declines to address again whether the Contracts Clauses of the United States and Michigan Constitutions were violated.

Third, with respect to plaintiff's argument that PA 282 violates the Compact because of statutory language expressing an intent that repeal or withdraw must be prospective only, no palpable error occurred. Plaintiff's argument that repeal could be prospective only is consistent with what the Legislature did when it enacted PA 282: it made an explicit clarification that in enacting 2007 PA 36, the Legislature intended that

the repeal of the Compact be prospective, as of January 1, 2008.

The Legislature's prior failure to make repeal of the Compact terms explicit was a technical oversight. While the Court passes no judgment on whether retroactive legislation of tax laws would always be appropriate or constitutional, the legislative action taken by PA 282 was the sort of retroactive technical "fix" that the Supreme Court found appropriate in *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 22 (1994). It was not just the drafters of 2007 PA 36 that had overlooked the need to clarify that the Compact terms had been repealed. Taxpayers, and their counsel, too,[2] did not notice the technical oversight at the time the Michigan Business Tax (MBT) Act was enacted. In *Int'l Business Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*") and the vast majority of cases like the present one, taxpayers now arguing for the right to elect the three-factor apportionment did not claim that right on their original MBT returns. Only after the unintended "loophole" was discovered and brought to the attention of IBM and other taxpayers did they attempt to take advantage of it, resulting

[2] See e.g., Nowak, *From the SBT to the MBT: Michigan Business Tax Transition Issues*, 53 Wayne L Rev 1553, 1573 (2007) where no mention is made of the Compact or the possibility of making an election for three-factor apportionment under 2007 PA 36. ("The MBT employs a single sales factor apportionment formula, which is used to apportion both gross receipts and business income.")

in the filing of an abundance of amended returns seeking tax refunds.

Further, the Court rejects any contention in plaintiff's brief that due process was violated by the government's purported "bait and switch" of the apportionment rules. There was no bait offered, and no switch occurred. As mentioned above, it was only after the oversight was later discovered by taxpayers – and their accountants and lawyers – that attempts to exploit the loophole were made. These attempts eventually led to the Michigan Supreme Court's decision in *IBM*, followed shortly thereafter by the appropriate legislative correction under PA 282.

Plaintiff's remaining arguments also do not demonstrate palpable error; plaintiff merely rehashes arguments that have already been adequately addressed by the Court.

IT IS HEREBY ORDERED that the motion for reconsideration is DENIED.

This order resolves the last pending claim and closes the case.

Dated: APR 17 2015 /s/ Michael Talbot
Hon. Michael J. Talbot
Chief Judge of the
Court of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

GENERAL ALUMINUM MFG COMPANY AND AFFILIATES,

Plaintiff,

v.

DEPARTMENT OF TREASURY,

Defendant.

OPINION AND ORDER

(Filed Apr. 17, 2015)

Case No. 15-000021-MT

Hon. Michael J. Talbot

This case comes before the Court on plaintiff's motion for reconsideration pursuant to MCR 2.119(F), which challenges this Court's February 5, 2015 order. The motion is DENIED.

Under MCR 2.119(F)(3), a party bringing a motion for reconsideration under must "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition must result from correction of the error," Generally, a motion for reconsideration that merely presents the same issues already ruled on by the court will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).

In support of its motion, plaintiff argues that the Court committed palpable error in its finding that (1) the Multistate Tax Compact (Compact) was not a binding contract, (2) the application of 2014 PA 282 (PA 282) did not violate the Contracts Clauses of the United States or the 1963 Michigan Constitutions, (3) PA 282 did not violate the Compact provisions, MCL 205.581, *et seq.*, (4) PA 282 did not violate the Change of Purpose Clause of the Michigan Constitution, (5) PA 282 does not violate Due Process Clauses of the United States or Michigan Constitutions, (6) PA 282 does not violate the Commerce Clause of the United States Constitution, (7) PA 282 does not violate the Separation of Powers Clause of the Michigan Constitution, and (8) PA 282 does not violate the Title-Object Clause of the Michigan Constitution.

Plaintiff's motion for reconsideration is essentially an assertion of the arguments that were fully addressed in the December 19, 2014 opinions in *Ingram Micro Inc v Dep't of Treasury*, 11-000035-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, which were referenced in the order entered in the present case. None of the arguments persuades this Court of the need to correct that order.

First, this Court correctly determined in the referenced opinions that the Compact did not create a binding contract. The holding in *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), does not require this Court to uphold the Compact and find that a binding contract exists. The Supreme Court in *US Steel Corp* addressed the issue of

whether the Compact was constitutionally invalid because it lacked Congressional approval. The Court upheld the facial validity of the Compact against various constitutional challenges, *id.* at 473-479, but it did not hold that the Compact bound states to the provisions of the Compact. Finding that the Compact did not need Congressional approval, the Court underscored that each state retains its sovereign power to tax and is unrestricted by the Compact's terms.[1] Further, the Court acknowledged that a key component to its determination that the Compact did not require Congressional approval was the lack of regulatory power held by the Commission, whose role was recognized as advisory only:

> Articles VII and VIII detail more specific powers of the Commission. Under Art, VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in

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> accordance with its own law. [*US Steel Corp*, 434 US at 457.]

The Court also disagrees with plaintiff's assertion that consideration of the three primary indicia of a compact as set forth in *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985), was misplaced. Plaintiff has provided no authority for its assertion that application of the three "classic" indicia of a compact is limited to a determination of whether a law is a compact, versus a "mere statute." Although *Northeast Bancorp* did not establish an *essential* list of criteria that must exist in an interstate compact, application of the three "classic indicia of a compact" as set forth in from [sic] *Northeast Bancorp* is relevant in this matter and confirms that the Compact does not bear sufficient indicia of a binding contract. This Court correctly determined that the Compact does not satisfy the indicia of a binding contract, and no palpable error occurred.

Second, because no palpable error occurred with respect to whether the Compact created a binding contract, the Court declines to address again whether the Contracts Clauses of the United States and Michigan Constitutions were violated.

Third, with respect to plaintiff's argument that PA 282 violates the Compact because of statutory language expressing an intent that repeal or withdraw must be prospective only, no palpable error occurred. Plaintiff's argument that repeal could be prospective only is consistent with what the Legislature did when

it enacted PA 282: it made an explicit clarification that in enacting 2007 PA 36, the Legislature intended that the repeal of the Compact be prospective, as of January 1, 2008.

The Legislature's prior failure to make repeal of the Compact terms explicit was a technical oversight. While the Court passes no judgment on whether retroactive legislation of tax laws would always be appropriate or constitutional, the legislative action taken by PA 282 was the sort of retroactive technical "fix" that the Supreme Court found appropriate in *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 22 (1994). It was not just the drafters of 2007 PA 36 that had overlooked the need to clarify that the Compact terms had been repealed. Taxpayers, and their counsel, too,[2] did not notice the technical oversight at the time the Michigan Business Tax (MBT) Act was enacted. In *Int'l Business Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*") and the vast majority of cases like the present one, taxpayers now arguing for the right to elect the three-factor apportionment did not claim that right on their original MBT returns. Only after the unintended "loophole" was discovered and brought to the attention of IBM and other taxpayers did they attempt to take advantage of it, resulting

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in the filing of an abundance of amended returns seeking tax refunds.

Further, the Court rejects any contention in plaintiff's brief that due process was violated by the government's purported "bait and switch" of the apportionment rules. There was no bait offered, and no switch occurred. As mentioned above, it was only after the oversight was later discovered by taxpayers – and their accountants and lawyers – that attempts to exploit the loophole were made. These attempts eventually led to the Michigan Supreme Court's decision in *IBM*, followed shortly thereafter by the appropriate legislative correction under PA 282.

Plaintiff's remaining arguments also do not demonstrate palpable error; plaintiff merely rehashes arguments that have already been adequately addressed by the Court.

IT IS HEREBY ORDERED that the motion for reconsideration is DENIED.

This order resolves the last pending claim and closes the case.

Dated: APR 17 2015 /s/ Michael Talbot
Hon. Michael J. Talbot
Chief Judge of the
Court of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

T-MOBILE USA INC AND SUBSIDIARIES,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendant.

OPINION AND ORDER

(Filed Apr. 20, 2015)

Case No. 15-000071-MT

Hon. Michael J. Talbot

This case comes before the Court on plaintiff's motion for reconsideration pursuant to MCR 2.119(F), which challenges this Court's March 24, 2015 order. The motion is DENIED.

Under MCR 2.119(F)(3), a party bringing a motion for reconsideration under must "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition must result from correction of the error." Generally, a motion for reconsideration that merely presents the same issues already ruled on by the court will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987).

In support of its motion, plaintiff argues that the Court committed palpable error in its finding that (1) the Multistate Tax Compact (Compact) was not a binding contract, (2) the application of 2014 PA 282 (PA 282) did not violate the Contracts Clauses of the United States or the 1963 Michigan Constitutions, (3) PA 282 did not violate the Compact provisions, MCL 205.581, *et seq.*, (4) PA 282 did not violate the Change of Purpose Clause of the Michigan Constitution, (5) PA 282 does not violate Due Process Clauses of the United States or Michigan Constitutions, (6) PA 282 does not violate the Commerce Clause of the United States Constitution, (7) PA 282 does not violate the Separation of Powers Clause of the Michigan Constitution, and (8) PA 282 does not violate the Title-Object Clause of the Michigan Constitution.

Plaintiff's motion for reconsideration is essentially an assertion of the arguments that were fully addressed in the December 19, 2014 opinions in *Ingram Micro Inc v Dep't of Treasury*, 11-000035-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, which were referenced in the order entered in the present case. None of the arguments persuades this Court of the need to correct that order.

First, this Court correctly determined in the referenced opinions that the Compact did not create a binding contract. The holding in *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), does not require this Court to uphold the Compact and find that a binding contract exists. The Supreme Court in *US Steel Corp* addressed the issue of

whether the Compact was constitutionally invalid because it lacked Congressional approval. The Court upheld the facial validity of the Compact against various constitutional challenges, *id*, at 473-479, but it did not hold that the Compact bound states to the provisions of the Compact. Finding that the Compact did not need Congressional approval, the Court underscored that each state retains its sovereign power to tax and is unrestricted by the Compact's terms.[1] Further, the Court acknowledged that a key component to its determination that the Compact did not require Congressional approval was the lack of regulatory power held by the Commission, whose role was recognized as advisory only:

> Articles VII and VIII detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in

[1] "[I]ndividual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax based [sic] (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." *US Steel Corp*, 434 US at 457.

> accordance with its own law. [*US Steel Corp*, 434 US at 457.]

The Court also disagrees with plaintiffs assertion that consideration of the three primary indicia of a compact as set forth in *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985), was misplaced. Plaintiff has provided no authority for its assertion that application of the three "classic" indicia of a compact is limited to a determination of whether a law is a compact, versus a "mere statute." Although *Northeast Bancorp* did not establish an *essential* list of criteria that must exist in an interstate compact, application of the three "classic indicia of a compact" as set forth in from [sic] *Northeast Bancorp* is relevant in this matter and confirms that the Compact does not bear sufficient indicia of a binding contract. This Court correctly determined that the Compact does not satisfy the indicia of a binding contract, and no palpable error occurred.

Second, because no palpable error occurred with respect to whether the Compact created a binding contract, the Court declines to address again whether the Contracts Clauses of the United States and Michigan Constitutions were violated.

Third, with respect to plaintiff's argument that PA 282 violates the Compact because of statutory language expressing an intent that repeal or withdraw must be prospective only, no palpable error occurred. Plaintiff's argument that repeal could be prospective only is consistent with what the Legislature did when

it enacted PA 282: it made an explicit clarification that in enacting 2007 PA 36, the Legislature intended that the repeal of the Compact be prospective, as of January 1, 2008.

The Legislature's prior failure to make repeal of the Compact terms explicit was a technical oversight. While the Court passes no judgment on whether retroactive legislation of tax laws would always be appropriate or constitutional, the legislative action taken by PA 282 was the sort of retroactive technical "fix" that the Supreme Court found appropriate in *United States v Carlton*, 512 US 26; 114 S Ct 2018; 129 L Ed 22 (1994). It was not just the drafters of 2007 PA 36 that had overlooked the need to clarify that the Compact terms had been repealed. Taxpayers, and their counsel, too,[2] did not notice the technical oversight at the time the Michigan Business Tax (MBT) Act was enacted. In *Intl Business Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*") and the vast majority of cases like the present one, taxpayers now arguing for the right to elect the three-factor apportionment did not claim that right on their original MBT returns. Only after the unintended "loophole" was discovered and brought to the attention of IBM and other taxpayers did they attempt to take advantage of it, resulting

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in the filing of an abundance of amended returns seeking tax refunds.

Further, the Court rejects any contention in plaintiff's brief that due process was violated by the government's purported "bait and switch" of the apportionment rules. There was no bait offered, and no switch occurred. As mentioned above, it was only after the oversight was later discovered by taxpayers – and their accountants and lawyers – that attempts to exploit the loophole were made. These attempts eventually led to the Michigan Supreme Court's decision in *IBM*, followed shortly thereafter by the appropriate legislative correction under PA 282.

Plaintiff's remaining arguments also do not demonstrate palpable error; plaintiff merely rehashes arguments that have already been adequately addressed by the Court.

IT IS HEREBY ORDERED that the motion for reconsideration is DENIED.

This order resolves the last pending claim and closes the case.

Dated: APR 20 2015 /s/ Michael Talbot
Hon. Michael J. Talbot
Chief Judge of the Court
of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

FLUOR CORP.
& SUBSIDIARIES,

Plaintiff,

v

DEPARTMENT
OF TREASURY,

Defendant.

OPINION AND ORDER

(Filed Jun. 1, 2015)

Case No. 12-000147-MT

Hon. Michael J. Talbot

This case comes before the Court on defendant's motion for summary disposition pursuant to MCR 2.116(C)(4) and (10) and plaintiffs motion for partial summary disposition pursuant to MCR 2.116(C)(10) with respect to the last remaining count in this matter. The Court GRANTS defendant's motion and DENIES plaintiffs motion.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

This case, as originally filed, involved plaintiff's tax 2008, 2009, and 2011 liabilities under the Michigan Business Tax (MBT), Act, MCL 208.1101 *et seq.* On December 19, 2014, the Court granted partial summary disposition in favor of defendant pursuant to MCR 2.116(I)(1), and entered an order dismissing Count I of Plaintiff's Second Amended Complaint for reasons stated in the opinion and orders entered in the matters

of *Ingram Micro, Inc v Dep't of Treasury*, Case No. -MT, and *Yaskawa America, Inc v Dep't of Treasury*, Case No. 11-35-MT. The dismissed count related to the issue of whether plaintiff was entitled to elect three-factor, equally-weighted apportionment under the Multistate Tax Compact (Compact), MCL 208.581, *et seq*. The remaining issue before the Court concerns Count II, Erroneous Calculation of Penalty and Interest, which relates to whether plaintiff had reasonable cause for its underpayment of tax or whether it was due to willful neglect such that the penalty should not be waived.

According to defendant, the penalty and interest in dispute relates to plaintiffs underpayment of estimated quarterly tax payments based on the total amount of tax liability as reported on the original 2008 return. The total 2008 tax liability as plaintiff reported on the original return was $2,613,161, and according to the defendant, plaintiff was required by statute to have made quarterly payments of at least 25% of this total, or $653,290. MCL 208.1501. Because plaintiff's four estimated payments in 2008 ($110,000, $160,000, $155,000, and $115,000) totaled less than 25% of the reported tax liability, defendant maintains that it was required to impose a penalty for failure to remit sufficient quarterly estimated payments under MCL 205.24(2). The record also reflects that there was confusion caused by erroneous adjustments made for the amended 2008 return, but that those adjustments have since been corrected.

Plaintiff argues that its failure to pay the tax owed was due to reasonable cause because it was based on a

return position (that is, the election to use a three-factor, equally-weighted apportionment formula) that was found permissible by the Michigan Supreme Court in *Int'l Bus Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014). Plaintiff further argues that the calculation of penalty and interest was erroneous. This is so, it is argued, because plaintiff has been unable to determine how the penalty and interest was calculated for the 2008 tax year.

In response, defendant makes two arguments. First, it argues that because plaintiff did not file a penalty waiver request prior to filing suit, there was no decision rendered by defendant with respect to penalties which would otherwise give the Court jurisdiction in this matter. Second, defendant argues that the imposition of a penalty for the underpayment of a quarterly estimated payment is mandatory, and that defendant has discretion under MCL 205.24(4) to deny the waiver request where the plaintiff has not established its burden of showing reasonable cause by clear and convincing evidence under Mich Admin Code, R 205.1013(4). Defendant asserts that the failure to pay the estimated tax on the original return had nothing to do with the election made on that return to use three-factor, equally-weighted apportionment under the Multistate Tax Compact, and that plaintiff has not otherwise met its burden of showing that abatement of the tax is appropriate.

STANDARD FOR GRANTING SUMMARY DISPOSITION

Summary disposition may be granted under MCR 2.116(C)(4) where "[t]he court lacks jurisdiction of the subject matter." The court reviews the pleadings, affidavits, depostions [sic], admissions, and documentary evidence to determine if they demonstrate the court lacks subject-matter jurisdiction. *Forest Hills Co-operative v City of Ann Arbor*, 305 Mich App 572, 617; 854 NW2d 172 (2014).

Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when documentary evidence in the record, viewed in the light most favorable to the moving party, shows that there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

DISCUSSION

During the relevant time period, MCL 208.1501(3) provided that "[t]he estimated payment made with each quarterly return of each tax year shall be for the estimated business income tax base and modified gross receipts tax base for the quarter or 25% of the estimated annual liability." The assessment of penalty and interest for failure to pay a tax is controlled by statute.

Under MCL 205.24(2), "if a taxpayer fails or refuses to file a return *or pay a tax*," defendant shall add a penalty. (Emphasis added.) A deficiency in an estimated payment under the MBT Act is treated in the same manner as a tax due. MCL 205.23(2).

Here, the basis for imposing penalty under MCL 205.24(2) is plaintiff's failure to pay tax as a result of deficiencies in the estimated payments for the 2008 tax year. According to the record, there is no question that plaintiff failed to make the necessary quarterly payments of 25% of the total tax as plaintiff reported on its original return. Thus, defendant was required under MCL 205.24(2) to apply a penalty.

Plaintiff contends that the penalty should be waived in this case. The circumstances in which a penalty can be waived are set forth in MCL 205.24(4), which provides that

> [i]f a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was *due to reasonable cause* and not to willful neglect, the state treasurer or an authorized representative of the state treasurer shall waive the penalty prescribed by subsection (2). [Emphasis added.]

The administrative rule, R 205.1013, defines reasonable cause for failure to pay and states in relevant part:

> (2) If a return is filed or a remittance is paid after the time specified, the taxpayer

> may request that the commissioner of revenue waive and the commissioner shall waive the penalty authorized by section 24(4) of the act if the taxpayer establishes that the failure to file the return or to pay the tax was due to reasonable cause and not to willful neglect.
>
> (3) A waiver of penalty request shall be in writing and shall state the reasons alleged to constitute reasonable cause and the absence of willful neglect.
>
> (4) The taxpayer bears the burden of affirmatively establishing by clear and convincing evidence, that the failure to file or failure to pay was due to reasonable cause.
>
> (5) A taxpayer is required to exercise ordinary business care and prudence in complying with filing and payment requirements.

Here, plaintiff unpersuasively argues that the penalty for underpayment of tax was due to defendant's rejection of plaintiff's apportionment formula election under the Compact. However, according to the record, the penalty was based solely on the underpayment of total tax liability for 2008 as reported by plaintiff.[1] That the tax on the original return was calculated by making an election under the Compact, or that the Department later disputed the validity of plaintiff's

[1] There was an erroneous adjustment made by defendant in connection with plaintiff's 2008 amended return, but according to the record, that error has since been corrected. The remaining penalty and interest at issue relate to the underpayment of estimated tax based on the total tax liability as reported by plaintiff on its original 2008 return.

Compact election, has no bearing on the penalty imposed in this case.

In conclusion, plaintiff has not met its burden of showing by clear and convincing evidence that its failure to make sufficient estimated payments for 2008 was due to reasonable cause. Therefore, defendant was well within its authority to reject plaintiff's request for abatement of the penalties.

Because there are no grounds for abating the penalty and interest in this matter, the issue of whether plaintiff made a proper written request for a waiver need not be addressed. The Court rejects defendant's claim that because there was no "decision" by defendant to deny a penalty waiver, the Court lacks jurisdiction in this matter. Plaintiff properly appealed from the defendant's Final Assessment issued August 27, 2012, and the Court's jurisdiction in this matter is proper.

CONCLUSION

Defendant has established that there is no question of a material fact that exists in the record and that it is entitled to judgment as a matter of law.

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(10) and plaintiff's motion for partial summary disposition is DENIED.

This order resolves the last pending claim and closes the case.

Dated: June 1, 2015 /s/ Michael Talbot
Hon. Michael J. Talbot
Chief Judge,
Court of Claims

Order

September 6, 2016

153594-608

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

HARLEY DAVIDSON MOTOR COMPANY, INC.,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 153594
COA: 325498
Court of Claims: 13-000158-MT

L'OREAL USA, INC. & SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee. /

SC: 153595
COA: 326130
Court of Claims: 14-000174-MT

L'OREAL USA, INC.
& SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153596
COA: 326131
Court of Claims:
14-000178-MT

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153597
COA: 326135
Court of Claims:
14-000296-MT

ANHEUSER-BUSCH, INC.,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153598
COA: 327057
Court of Claims:
11-000085-MT

INTUITIVE SURGICAL, INC.,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153599
COA: 327178
Court of Claims:
15-000012-MT

T-MOBILE USA, INC.
AND SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153600
COA: 327217
Court of Claims:
15-000071-MT

GENERAL ALUMINUM
MFG COMPANY,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153601
COA: 327218
Court of Claims:
15-000021-MT

JOHNSON MATTHEY, INC.,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153602
COA: 327694
Court of Claims:
14-000269-MT

McNEIL-PPC, INC.,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153603
COA: 327964
Court of Claims:
12-000143-MT

FLUOR CORP
& SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153595
COA: 326130
Court of Claims:
14-000174-MT

DIRECTV,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153605
COA: 328193
Court of Claims:
13-000092-MT

SOLO CUP
OPERATING CORP.,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153606
COA: 328206
Court of Claims:
13-000062-MT

CONAGRA FOODS, INC.
and SUBSIDIARIES,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153607
COA: 328317
Court of Claims:
15-000120-MT

BOISE, INC.,
Plaintiff-Appellant,

v

DEPARTMENT
OF TREASURY,
Defendant-Appellee. /

SC: 153608
COA: 328967
Court of Claims:
15-000133-MT

On order of the Court, the application for leave to appeal the March 15, 2016 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, J.

MULTISTATE TAX COMPACT

UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT

P.A.1969, No. 343, Eff. July 1, 1970

AN ACT to adopt a multistate tax compact to facilitate and promote convenient, uniform, nonduplicative and proper determination of state and local tax liability of multistate taxpayers.

The People of the State of Michigan enact:

205.581. Enactment; form

Sec. 1. The multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

MULTISTATE TAX COMPACT

Article I. Purposes

The purposes of this compact are to:

(1) Facilitate proper determination of state and local tax liability of multi-state taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

(2) Promote uniformity or compatibility in significant components of tax systems.

(3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

(4) Avoid duplicative taxation.

Article II. Definitions

As used in this compact:

(1) "State" means a state of the United States, the district of Columbia, the commonwealth of Puerto Rico, or any territory or possession of the United States.

(2) "Subdivision" means any governmental unit or special district of a state.

(3) "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than 1 state.

(4) "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions.

(5) "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

(6) "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the

gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

(7) "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by state or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

(8) "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

(9) "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of article IX of this compact shall

apply only in respect to determinations pursuant to article IV.

Article III. Elements of Income Tax Laws

Taxpayer Option, State and Local Taxes

(1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV. This election for any tax year may be made in all party states or subdivisions thereof or in any one or more of the party states or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from state taxes and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein article IV is employed for all subdivisions of a state may the sum of all apportionments and allocations to subdivisions within a state be greater than the apportionment and allocation that would be assignable to that state if the apportionment or allocation were being made with respect to a state income tax.

Taxpayer Option, Short Form

(2) Each party state or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision, is not in excess of $100,000.00 may elect to report and pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The multistate tax commission, not more than once in 5 years, may adjust the $100,000.00 figure in order to reflect such changes as may occur in the real value of the dollar, and, such adjusted figure, upon adoption by the commission, shall replace the $100,000.00 figure specifically provided herein. Each party state and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage

(3) Nothing in this article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income

(1) As used in this article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have

been established or approved by a federal, state or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this article.

(h) "State" means any state of the United States, the district of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(i) "This state" means the state in which the relevant tax return is filed or, in the case of application of this article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

(2) Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this article, the taxpayer may elect to allocate and apportion his entire net income as provided in this article.

(3) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a

franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(4) Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this article.

(5)(a) Net rents and royalties from real property located in this state are allocable to this state.

(b) Net rents and royalties from tangible personal property are allocable to this state: (1) if and to the extent that the property is utilized in this state, or (2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was

located at the time the rental or royalty payer obtained possession.

(6)(a) Capital gains and losses from sales of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(7) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

(8)(a) Patent and copyright royalties are allocable to this state: (1), if and to the extent that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that the patent copyright is utilized by the payer in a state in which the taxpayer is not taxable, and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting

procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(9) All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

(10) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(11) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(12) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(13) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

(14) Compensation is paid in this state if:

(a) The individual's service is performed entirely within the state;

(b) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) Some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(15) The sales, factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is

the total sales of the taxpayer everywhere during the tax period.

(16) Sales of tangible personal property are in this state if:

(a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

(17) Sales, other than sales of tangible, personal property, are in this state if:

(a) The income-producing activity is performed in this state; or

(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(18) If the allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) Separate accounting;

(b) The exclusion of any one or more of the factors;

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws

Tax Credit

(1) Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall he applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates, Vendors May Rely

(2) Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate state or subdivision taxing authority, the vendor shall be relieved

of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission

Organization and Management

(1)(a) The multistate tax commission is hereby established. It shall be composed of 1 "member" from each party state who shall be the head of the state agency charged with the administration of the types of taxes to which this compact applies. If there is more than 1 such agency, the state shall provide by law for the selection of the commission member from the heads of the relevant agencies. State law may provide that a member of the commission be represented by an alternate but only if there is on file with the commission written notification of the designation and identity of the alternate. The attorney general of each party state or his designee, or other counsel if the laws of the party state specifically provide, shall be entitled to attend the meetings of the commission, but shall not vote. Such attorneys general, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this article.

(b) Each party state shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the commission member from that state.

(c) Each member shall be entitled to 1 vote. The commission shall not act unless a majority of the members are present, and no action shall be binding unless

approved by a majority of the total number of members.

(d) The commission shall adopt an official seal to be used as it may provide.

(e) The commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its executive committee may determine. The commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The commission shall elect annually, from among its members, a chairman, a vice chairman and a treasurer. The commission shall appoint an executive director who shall serve at its pleasure, and it shall fix his duties and compensation. The executive director shall be secretary of the commission. The commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party state, the executive director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the commission and shall fix their duties and compensation. The commission bylaws shall provide for personnel policies and programs.

(h) The commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental entity.

(i) The commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The commission may establish 1 or more offices for the transacting of its business.

(k) The commission shall adopt bylaws for the conduct of its business. The commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party states.

(*l*) The commission annually shall make to the governor and legislature of each party state a report covering its activities for the preceding year. Any donation or grant accepted by the commission or services borrowed shall be reported in the annual report of the commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The commission may make additional reports as it may deem desirable.

Committees

(2)(a) To assist in the conduct of its business when the full commission is not meeting, the commission shall have an executive committee of 7 members, including the chairman, vice chairman, treasurer and 4 other members elected annually by the commission. The executive committee, subject to the provisions of this compact and consistent with the policies of the commission, shall function as provided in the bylaws of the commission.

(b) The commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the commission, including problems of special interest to any party state and problems dealing with particular types of taxes.

(c) The commission may establish such additional committees as its bylaws may provide.

Powers

(3) In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local

tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would' assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance

(4)(a) The commission shall submit to the governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

(b) Each of the commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party state and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the commission shall employ such available public sources of information as, in its

judgment, present the most equitable and accurate comparisons among the party states. Each of the commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The commission shall not pledge the credit of any party state. The commission may meet any of its obligations in whole or in part with funds available to it under paragraph (1)(i) of this article: provided that the commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the commission makes use of funds available to it under paragraph (1)(i), the commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

(e) The accounts of the commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the commission.

(f) Nothing contained in this article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the commission.

Article VII. Uniform Regulations and Forms

(1) Whenever any 2 or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of article IV of this compact.

(2) Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least 1 public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

(3) The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits

(1) This article shall be in force only in those party states that specifically provide therefor by statute.

(2) Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

(3) The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony

with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: provided that such state has adopted this article.

(4) The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a Court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

(5) The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it

may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

(6) Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

(7) Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this article.

(8) In no event shall the commission make any charge against a taxpayer for an audit.

(9) As used in this article "tax," in addition to the meaning ascribed to it in article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration

(1) Whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation

placing this article in effect, notwithstanding the provisions of article VII.

(2) The commission shall select and maintain an arbitration panel composed of officers and employees of state and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

(3) Whenever a taxpayer who has elected to employ article IV, or whenever the laws of the party state or subdivision thereof are substantially identical with the relevant provisions of article IV, the taxpayer, by written notice to the commission and to each party state or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the state or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by 2 or more party states or subdivisions thereof. Each party state and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

(4) The arbitration board shall be composed of 1 person selected by the taxpayer, 1 by the agency or agencies involved, and 1 member of the commission's arbitration panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the arbitration panel. The 2 persons selected for the board in the manner provided by the foregoing

provisions of this paragraph shall jointly select the third member of the board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the arbitration panel. No member of a board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

(5) The board may sit in any state or subdivision party to the proceeding, in the state of the taxpayer's incorporation, residence or domicile, in any state where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

(6) The board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The board shall act by majority vote.

(7) The board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the board. In case of failure to obey a subpoena, and upon application by the board, any judge of a court of competent jurisdiction of the

state in which the board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in states that have adopted this article.

(8) Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the board in such manner as it may determine. The commission shall fix a schedule of compensation for members of arbitration boards and of other allowable expenses and costs. No officer or employee of a state or local government who serves as a member of a board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such board member shall be entitled to expenses.

(9) The board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

(10) The board shall file with the commission and with each tax agency represented in the proceeding: the determination of the board; the board's written statement of its reasons therefor; the record of the board's proceedings; and any other documents required by the arbitration rules of the commission to be filed.

(11) The commission shall publish the determinations of boards together with the statements of the reasons therefor.

(12) The commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party states.

(13) Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X. Entry Into Force and Withdrawal

(1) This compact shall enter into force when enacted into law, by any 7 states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. The commission shall arrange for notification of all party states whenever there is a new enactment of the compact.

(2) Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

(3) No proceeding commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the board thereby lose

jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction

Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement article III(2) of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in article VIII(9) may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to article VI(3) may apply.

(c) Withdraw or limit the jurisdiction of any, state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause,

sentence or provision of this compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. 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.