

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Ronayne Krause, P.J., and Borrello and Riordan, J.J.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant-Appellee.

Supreme Court No. 146440

Court of Appeals No. 306618

Court of Claims No. 11-033-MT

BRIEF AMICUS CURIAE OF LORILLARD TOBACCO COMPANY

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Court of Appeals' unpublished per curiam decision in *International Business Machines Corp v Department of Treasury*, issued November 20, 2012 (Docket No. 306618), pursuant to MCR 7.301(A)(2).

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Lorillard Tobacco Company (“Lorillard”) is a corporation that conducts a multistate business and operates in and pays taxes to Michigan and many other States. Like Plaintiff Appellant International Business Machines Corp. (“IBM”), Lorillard made the election contained in Article III(1) of the Multistate Tax Compact, as enacted in MCL 205.581 (the “Compact Act”), on its timely filed original Michigan Business Tax (“MBT”) return for the tax period ended December 31, 2008. Unlike IBM, Lorillard made the election with respect to the Business Income Tax levy of the MBT (“Business Income Tax”) only, whereas IBM made the election for the Modified Gross Receipts Tax (“MGRT”) of the MBT and the Business Income Tax.

Under Article III(1), a taxpayer may apportion an “income tax” base by the terms of Article IV of the Compact Act using an average of property, payroll, and sales factors (“three-factor apportionment” and, collectively with Article III(1), the “Election”).

Defendant-Appellee, Department of Treasury (“Defendant”), has conceded in this appeal as well as in Lorillard’s appeal that the Business Income Tax is an “income tax.” However, Defendant contends in this appeal that the MGRT is not an “income tax.”¹

Inasmuch as this Court granted Lorillard’s motion for leave to file a brief *amicus curiae*, Lorillard respectfully requests that this Court now grant its motion to file that brief *amicus curiae* inasmuch as Lorillard is the plaintiff-appellant in the Michigan Court of Appeals, *Lorillard Tobacco Company v. Michigan Department of Treasury*, Court of Appeals Docket Number 313256, and Lorillard can help educate this Court regarding a variant of the relevant issues of which this Court may not otherwise become aware until after it decides IBM’s appeal.

¹ Inasmuch as Lorillard did not make the Election with respect to the MGRT on its 2008 returns, Lorillard expresses no opinion with respect to the MGRT in this brief.

STATEMENT OF QUESTIONS PRESENTED

1. Could taxpayers elect to use the apportionment formula provided in the Compact Act, MCL 205.581, in calculating their 2008 MBT tax liability?

Plaintiff-Appellant IBM says, Yes.

Defendant-Appellee says, No.

Amicus Lorillard says, Yes.

Court of Claims held, No.

Court of Appeals held, No.

2. Did § 301 of the Michigan Business Tax Act, MCL 208.1301, repeal by implication the Election in the Compact Act for 2008?

Plaintiff-Appellant IBM says, No.

Defendant-Appellee says, Yes.

Amicus Lorillard says, No.

Court of Claims held, It did not rule.

Court of Appeals held, Yes.

3. Does the Multistate Tax Compact constitute a contract that cannot be unilaterally altered or amended by a member state?

Plaintiff-Appellant IBM says, Yes.

Defendant-Appellee says, No.

Amicus Lorillard says, Yes.

Court of Claims held, It did not address.

Court of Appeals held, No.

4. Inasmuch as Lorillard did not make the Election with respect to the MGRT, Lorillard does not address whether the MGRT is an "income tax" as defined by the Compact Act.

INTRODUCTION

This appeal involves whether IBM could make the Election for 2008 for purposes of the MBT. The Michigan statutes permitted IBM and other taxpayers to make the Election for 2008 for the MBT. The Election applies to “income taxes.” Defendant concedes that the Business Income Tax is an “income tax.” The Court of Appeals erred when it held that the MBT Act precluded IBM from making the Election. For 2008, the MBT Act can only be harmonized with the Compact Act by permitting the Election.

The MBT Act did not repeal by implication the Election for 2008. The Legislature expressly repealed the Election beginning in 2011. Both the Legislature and Defendant viewed the 2011 legislation as a change in law, and not a clarification. They inserted specific language regarding a 2011 effective date, and they called the legislation a “change.” They even assigned a revenue estimate to the change. Any one of the foregoing separately demonstrates legislative intent that precludes a finding of repeal by implication. However, all of the foregoing boldly underscore Legislative intent to allow the Election for 2008.

If this Court finds that the Election was available to taxpayers for 2008 under the Michigan statutes, it does not need to address the third issue that this Court requested for briefing, i.e., the Multistate Tax Compact issue. However, inasmuch as the issue is before this Court and is capable of repetition, this Court may address it even if it finds that taxpayers may make the Election for 2008 as a matter of statutory construction.

The Multistate Tax Compact ensured that the Election survived regardless of the MBT Act. The Court of Appeals erred when it held otherwise. The Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member State. The Multistate Tax Compact is entitled to greater weight (as a compact) than a statute, is a binding

contract, and may not be altered by implication. The Court of Claims in *Anheuser-Busch, Inc. v. Dep't of Treasury*, Opinion And Order of the Court of Claims, issued on June 6, 2013 (Docket No. 11-85-MT) agreed with this position.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Lorillard refers this Court to the Statement Of Facts And Procedural History on pages 15 and 16 of Brief of Plaintiff/Appellant International Business Machines Corporation. Unlike IBM, Lorillard only made the Election for purposes of the Business Income Tax levy. 2am-3am, Affidavit of Mark A. Baker submitted to support Lorillard's Motion ("Aff.") ¶ 5.²

MICHIGAN PROMOTED AND ADOPTED THE MULTISTATE TAX COMPACT

The Multistate Tax Compact was drafted by the States to thwart Congress' attempts to pass legislation intended to remedy several problems in the States' taxation of multistate businesses. 9am-18am, Multistate Tax Commission, First Annual Report (January 28, 1969), available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf (accessed November 2, 2013) ("First Annual Report").

The problems included:

[T]hat multistate businesses were being treated unfairly and inequitably by the states; there were too many tax returns which had to be filed, there was too much of a maze of *nonuniformity* in the various laws and regulations of the states; compliance was too difficult and too costly for multistate businesses; [and] multistate businesses were discriminated against or subjected to duplicate taxation. [17am, First Annual Report (emphasis added).]

Congress' concern over the issues resulted in the proposal of several federal bills that would have imposed restrictions on the States' jurisdiction to tax multistate businesses as well as the manner in which tax was computed. 9am-18am, First Annual Report.

² A number followed by the letters "am" (e.g., 1am) refers to a page in Lorillard's appendix.

Fearing the enactment of Congress' proposals, the States' opposed the federal bills and drafted the Multistate Tax Compact to alleviate the need for federal intervention. *Id.* Michigan played a crucial role in opposing the federal bills and developing and recommending the Multistate Tax Compact. William D. Dexter, who was at the time an Assistant Attorney General of the State of Michigan, "was a leader among state tax administration personnel who spoke out against the proposed [federal] legislation, petitioned political leaders to oppose it, and made sure that their governors, attorneys general, and -- in some cases -- their congressmen testified against it or otherwise opposed it." 27am, Eugene Corrigan, Remembrance of a Great Lawyer: William David Dexter, State Tax Today (May 1, 2000) (hereinafter, "Corrigan, Remembrance") (Eugene Corrigan was the first executive director of the Multistate Tax Commission).

Michigan's own Mr. Dexter "fathered the idea" of the Multistate Tax Compact and was an active recruiter and organizer with respect to the Multistate Tax Compact and the Multistate Tax Commission. 33am-36am, Eugene Corrigan, MTC's 40th Anniversary – A Retrospective, State Tax Today (October 20, 2007); Corrigan, Remembrance, *supra*. Mr. Dexter ultimately became general counsel to the Multistate Tax Commission in 1975. 28am, Corrigan, Remembrance, *supra*.

To ensure that multistate taxpayers would not be subject to duplicative taxation arising from differences in the taxing laws of the various States, the participating States adopted: (1) the Uniform Division of Income for Tax Purposes Act ("UDITPA") as Article IV of the Multistate Tax Compact; and (2) the election in Article III(1) to permit use of Article IV. UDITPA provides a uniform method for allocating and apportioning a taxpayer's income to the States, i.e., three-factor apportionment. The Election, Article III(1) of the Compact Act, which was

adopted by Michigan in 1970, read as follows until Michigan modified the language of

MCL 205.581 effective January 1, 2011:

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. (Emphasis added).

The Election was necessary because several States had allocation and apportionment provisions in their statutes that varied from UDITPA, i.e., Article IV of the Multistate Tax Compact, that could have resulted in more than 100% of a multistate taxpayer's income being apportioned. By granting taxpayers the right to make the Election, the Multistate Tax Compact ensured that variances in the States' standard allocation and apportionment provisions would not result in duplicative taxation because, if such statutes would result in duplicative taxation, a taxpayer could simply elect to allocate and apportion under Article IV's uniform choice. Thus, the Multistate Tax Compact thwarted the federal bills by offering taxpayers a uniform choice for apportioning income that effectively prevented double taxation.

The uniform choice available to taxpayers through the Election was widely understood.

Indeed, Mr. Dexter wrote that:

"[T]he [Multistate Tax Compact] contains *uniform* legislation. The [UDITPA] is the most significant legislation contained therein. The Compact permits multistate-multinationals *to elect* UDITPA for allocation and apportionment of income *to prevent any potential income tax duplication* in any of the member states." [Corrigan, Schoettle, and Dexter, *The Search for Equity and Accountability in State and Local Taxation of Multistate-Multinational Corporations*, 12 Urb Law 553, 554 (1980) (emphasis added).]

Regarding the Election, a report from the Multistate Tax Commission in 1970 (the same year that Michigan entered the Multistate Tax Compact) stated:

The Multistate Tax Compact makes UDITPA available to each taxpayer on an *optional* basis, thereby preserving for him the substantial advantages with which lack of uniformity provides him in some states. Thus a corporation which is selling into a state in which it has little property or payroll will want to insist upon the use of the three-factor formula (sales, property and payroll) which is included in UDITPA because that will substantially reduce his tax liability to that state below what it would be if a single sales factor formula were applied to him; on the other hand, he will look with favor upon the application of the single sales factor formula to him by a state from which he is selling into other states, since that will reduce his tax liability to that state. The Multistate Tax Compact thus preserves the right of the states to make such alternative formulas available to taxpayers *even though it makes uniformity available to taxpayers where and when desired*. [44am, Multistate Tax Commission, Third Annual Report, p 3 (October 10, 1970) (emphasis added), *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resoures/Archives/Annual_Reports/FY69-70.pdf (accessed November 2, 2013); see also 73am, Brochure, Multistate Tax Commission.]

The Multistate Tax Compact became effective in 1967 according to its own terms after seven States had adopted it. *United States Steel Corp v Multistate Tax Comm*, 434 US 452, 454; 98 S Ct 799; 54 L Ed 2d 682 (1978). In 1969, Michigan enacted legislation that made the Multistate Tax Compact effective in Michigan in 1970. 1969 PA 343.

Although Michigan and other States agreed to allow taxpayers the uniform choice for apportionment purposes when they adopted the Multistate Tax Compact, such States retained control of their tax systems. In the seminal United States Supreme Court case regarding the validity of the Multistate Tax Compact, which was argued for the Multistate Tax Commission by Mr. Dexter, the United States Supreme Court explained that each party State to the Multistate Tax Compact retains “complete control over all legislation and administrative action affecting the *rate of tax* [and] the *composition of the tax base . . .*” *United States Steel, supra* at 457

(emphasis added); MCL 205.581, art XI. Furthermore, the Multistate Tax Compact provides the escape for Michigan that “[a]ny party state may withdraw from this compact by enacting a statute repealing the same.” MCL 205.581, art X(2); *United States Steel, supra* at 457.

The States viewed the Multistate Tax Compact as a compact that was intended to protect, not take away, States’ sovereignty. 72am, Brochure, Multistate Tax Commission. Regarding the Multistate Tax Compact, the Multistate Tax Commission stated: “Multistate Compacts Do Work. With respect to handling significant problems which are beyond the unaided capabilities of the regularly constituted agencies of individual state governments, the accepted instrument is an interstate compact or agreement.” 70am, Brochure, Multistate Tax Commission. When Michigan adopted the Multistate Tax Compact it was made clear that the “preservation of tax administration” and “protection of fiscal and political sovereignty” were advantages to the States afforded by the Multistate Tax Compact. 72am, Brochure, Multistate Tax Commission (Errata, indicating the Michigan adopted the Multistate Tax Compact after the brochure was published), p 16 (stating many benefits to States).

STANDARD OF REVIEW

“Questions of statutory interpretation are . . . reviewed *de novo*.” *Grimes v Mich Dept of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006) (emphasis added). This Court’s review of a decision to deny or grant summary disposition is *de novo*. *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). Summary disposition should be granted when the affidavits or other documentary evidence demonstrate that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999); MCR 2.116(C)(10). On review of the undisputed

facts and the questions of law in the grant of summary disposition, the standard of review in this appeal is *de novo*.

In construing tax statutes, any ambiguities must be resolved in favor of the taxpayer. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994). Tax statutes are to be liberally construed in favor of the taxpayer. *Ford Motor Co v State Tax Comm'n*, 400 Mich 499, 506; 255 NW2d 608 (1977). Ambiguities and doubtful language are to be construed in favor of the taxpayer. *Ecorse Screw Machine Prods Co v Michigan Corp & Sec Comm*, 378 Mich 415, 418; 145 NW2d 46 (1966). Moreover, tax officials have the burden to identify express language authorizing the tax sought to be imposed. *Standard Oil Co v Michigan*, 283 Mich 85, 88-89; 276 NW 908 (1937).

ARGUMENT

I. THE MICHIGAN STATUTES PERMIT TAXPAYERS TO MAKE THE ELECTION FOR INCOME TAXES TO COMPUTE 2008 TAX LIABILITY (COURT'S ISSUE #1, STATE'S POINT #2).

A. The Election Applies To "Income Taxes" And Defendant Concedes That The Business Income Tax Is An "Income Tax."

By its plain terms, the Election applies to all "income taxes," i.e., "tax[es] imposed on or measured by net income." MCL 205.581, art II(4); MCL 205.581, art III(1). Defendant concedes that the Business Income Tax is "a tax imposed on or measured by net income." *Int'l Business Machines Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012, p 4-5 (Docket No. 306618) (hereinafter "*IBM*"); Brief On Appeal Of Appellee Department Of Treasury Of The State Of Michigan ("Defendant's Brief") at 6.

B. The MBT And The Compact Act May Be Harmonized To Permit The Election For 2008.

The MBT Act reads: “Except as otherwise provided in [the MBT] act, each tax base established under this act shall be apportioned in accordance with this chapter.” MCL 208.1301. The MBT Act provides for single sales factor apportionment. MCL 208.1303. The Court of Appeals in *IBM* erred in finding that the words “except as otherwise provided in [the MBT] act” and “shall” in MCL 208.1301 precluded the Election. *IBM, supra* at 3-4.

- I. “Except as otherwise provided” coordinates the various levies in the MBT Act and does not preclude the Election.

The MBT contains multiple levies including the Business Income Tax, the MGRT, a tax on insurance companies, and a tax on financial institutions. MCL 208.1201; MCL 208.1203; MCL 208.1235; MCL 208.1263. Not all of these taxes use formulary apportionment (e.g., three-factor apportionment or single sales factor apportionment). For example, the levy on insurance companies does not use formulary apportionment and is contained in a separate chapter from Section 208.1301 *et seq.* MCL 208.1235 *et seq.* Without the phrase “[e]xcept as otherwise provided in this act,” MCL 208.1301(1) would provide that “each tax base established under this act shall be apportioned in accordance with this chapter” and would require insurance companies to use formulary apportionment. By including the “except as otherwise provided” language, the Legislature ensured that insurance companies would not be required to use MCL 208.1301 *et seq.* to apportion. “Except as otherwise provided” coordinated the various parts of the MBT Act. It did not preclude the Election.

2. “Shall” has been used in every apportionment statute since 1967 but has not previously prohibited the Election.

The word “shall” in the MBT Act does not prohibit the Election for 2008. From 1967, i.e., before the enactment of the Compact Act, through 2011, the Michigan statutes always used “shall” in the apportionment provisions. Nevertheless, the Michigan Courts and Defendant recognized that such language did not prohibit the Election for income taxes. The Court of Appeals in *IBM* erred in holding otherwise. *IBM, supra* at 3-4.

Since the time that Michigan adopted the Multistate Tax Compact, i.e., from 1967, and through the end of 2010, Michigan did not meaningfully change the language it used to determine the apportionment methodologies for business tax purposes. From 1967 through 1975, the Michigan corporate income tax statutes (1967 PA 281) used the words “shall” and “as provided” for apportionment. MCL 206.103 (1975). Michigan repealed the 1967 levy for corporations for tax years beginning on or after January 1, 1976, when it adopted the Single Business Tax (the “SBT”), which applied from 1976 through 2007, and used the words “shall” and “as provided” for apportionment. MCL 208.41 (2007).

Just as the Michigan statutory language regarding apportionment did not materially change until after 2010, the language of the Election and Article IV were unchanged from Michigan’s adoption (1970) through 2010 and used the language “shall” and “as provided.” MCL 205.581, art IV(1). The statutory history from 1967 through 2010 of the Compact Act, the Michigan Income Tax Act of 1967, the SBT, and the MBT are set forth in the following chart:

Compact Act (1970-2010)	Michigan Income Tax Act (1967-1975)
<p>"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." MCL 205.581, art III(1).</p>	<p>"Any taxpayer . . . shall allocate and apportion his net income as provided in [the Michigan Income Tax] act of 1967." MCL 206.103 (1975) (emphasis added).</p> <p>Equally-weighted three-factor apportionment. MCL 206.105.</p>
<p>"Any taxpayer . . . shall allocate and apportion his net income as provided in this article." MCL 205.581, art IV(2) (emphasis added).</p>	<p>SBT Act (1976-2007)</p> <p>"A taxpayer . . . shall apportion his tax base as provided in this chapter." MCL 208.41 (emphasis added).</p>
<p>Equally-weighted three-factor apportionment. MCL 205.581, art IV(9).</p>	<p>Equally-weighted three-factor apportionment when the SBT was enacted; for later years the sales factor became increasingly weighted. MCL 208.45; MCL 208.45a.</p>
	<p>MBT Act (2008-2010)</p> <p>"Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1) (emphasis added).</p> <p>Single sales factor apportionment. MCL 208.1303.</p>

In 1983, the Michigan Court of Appeals stated that: "a multistate taxpayer may elect to apportion or allocate its income in accordance with state law or may elect to apportion and allocate its income in accordance with Article IV of the [C]ompact." *Donovan Constr Co v Dep't of Treasury*, 126 Mich App 11, 20; 337 NW2d 297 (1983) (so stating notwithstanding that the Michigan statute provided that a taxpayer "shall allocate and apportion his net income as provided in the [Michigan Income Tax] act"). MCL 206.103 (1975) (emphasis added). The *Donovan* Court recognized the existence of the Election and the Michigan Legislature did not act to disabuse *anyone* of this choice until it removed the Election purposefully for 2011.

Furthermore, Defendant recognized that the Election was available. In 1987, Defendant stated that:

Although Michigan is a member of the Multistate Tax Compact and Article 3 of the Compact permits a taxpayer to opt for apportionment and allocation pursuant to Article 4 of the Compact (which is UDITPA) such taxpayer option is only available in reference to an income tax. The SBT is not an income tax but is rather a tax upon "value-added". Multistate taxpayers subject to the SBT must apportion their tax base as provided in MCL Sec. 208.41 et seq. . . ." [Letter, Department of Treasury, June 30, 1987 (discussing the SBT).]

Defendant further stated in 2006 that:

Michigan is a member of the Multistate Tax Commission and has adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA") for income tax purposes. However, the SBT . . . is not an income tax. [Michigan Internal Policy Directive 2006-8, September 29, 2006.]

The MBT Act's apportionment language is worded similarly to that of the corporate income tax at issue in *Donovan* and that of the SBT and provides: "each tax base established under [the MBT Act] shall be apportioned in accordance with this chapter." MCL 208.1301(1) (emphasis added); see also MCL 208.1301(2).

As Defendant concedes, the Legislature is "presumed to know of and legislate in harmony with existing laws" and the interpretations of the courts to such laws. Defendant's Brief at 20, 24; *People v Harrison*, 194 Mich 363, 369; 160 NW 623 (1916); *Southeastern Mich Transp Authority v Dep't of Treasury*, 122 Mich App 92, 103; 333 NW2d 14 (1982). Had the Legislature intended to impliedly repeal the Election for the MBT Act for 2008 or at any time after the Court of Appeals' decision in *Donovan* that recognized the Election, it would not have used the language: (1) for which the Election was recognized; and (2) for which Defendant stated the Election would apply if the SBT were an income tax. Thus, the Election survived the adoption of the MBT Act for 2008.

3. The Election is permitted for 2008 under the only construction of the Michigan statutes that harmonizes the Compact Act and the MBT and Michigan's normal and alternative apportionment provisions.

The only state of harmony of the Multistate Tax Compact's apportionment provision and the MBT Act's apportionment provision is that they work together as a whole to provide apportionment "in the manner provided by the laws of such state" and provide a uniform choice to "elect to apportion and allocate" using three-factor apportionment. See MCL 205.581, art III(1). Under the Election, and the MBT Act, a taxpayer that chooses not to make the Election must allocate and apportion using the MBT Act's single sales factor apportionment. For 2008 (and since 1970), Article IV of the Compact Act provides that a taxpayer "*shall* allocate and apportion his net income as provided in this article" and "[a]ll business income *shall* be apportioned to this state by [three-factor apportionment]." MCL 205.581, art IV(2) and art IV(9) (emphasis added). Similarly, the MBT Act's apportionment statute uses the word "shall" with respect to single sales factor apportionment. MCL 208.1301(1), (2). Without the Election, the Compact Act's and MBT Act's use of the word "shall" would be in conflict. However, the Election allows the two uses of the word "shall" to be read in harmony.

The rules of statutory construction require that tax statutes "be read together to produce an *harmonious whole* and to reconcile any inconsistencies wherever possible." *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999) (emphasis added). The Election language allows the Compact Act's *uniform choice* of apportionment provision and the MBT Act's apportionment provision to be read *in pari materia* to produce a harmonious whole when the Election is read to support a taxpayer's apportionment choice. If a taxpayer does not make the Election, then the taxpayer is required to use the MBT Act's apportionment method. If a taxpayer does make the Election, then the taxpayer is required to use the apportionment method

of the Compact Act. Because the apportionment provisions of the MBT Act may reasonably be read in a manner that complements, not contradicts, the Election and the Compact Act, such a harmonious construction is required. *World Book, supra* at 416; *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 491-492; 618 NW2d 1 (2000).

The MBT Act's alternative apportionment statute, MCL 208.1309, has nothing to do with the facts of this appeal. The alternative apportionment provisions do not harmonize the Compact Act and the MBT Act. The Election does not render the MBT Act's alternative apportionment provision meaningless. The Court of Appeals correctly recognized in *IBM* that the MBT Act's alternative apportionment provisions do not affect the issues herein. *IBM, supra* at 3.

Three-factor apportionment and single sales factor apportionment are both presumptively fair and constitutional apportionment formulas. *Container Corp of Am v. Franchise Tax Bd*, 463 US 159, 170, 103 S Ct 2933; 77 L Ed 2d 545 (1983); *Moorman Mfg Co v Bair*, 437 US 267, 273; 98 S Ct 2340; 57 L Ed 2d 197 (1978). The MBT Act's and the Compact Act's alternative apportionment provisions permit Defendant to require, or a taxpayer to request, a remedy for unfair apportionment caused by the presumptively fair standard apportionment formulas of the MBT Act or the Compact Act with respect to business activity in Michigan. MCL 205.581, art IV(18); MCL 208.1309. The Court of Appeals correctly recognized that, by contrast, the Election serves to allow a taxpayer to choose at will which presumptively fair apportionment formula it will use. *IBM, supra* at 3.

Furthermore, a taxpayer's Election does not deprive Defendant of its alternative apportionment powers. Regardless of which presumptively fair method is used by the taxpayer (three-factor or single factor), Defendant (or the taxpayer) can assert alternative apportionment because both the MBT Act and the Compact Act have alternative apportionment statutes to

provide the remedy. If the taxpayer chooses single sales factor apportionment under the MBT, the taxpayer or Defendant may assert alternative apportionment under MCL 208.1309. If the taxpayer makes the Election to use three-factor apportionment, the taxpayer or Defendant may assert alternative apportionment under MCL 205.581, Article IV(18).

**II. THE ELECTION WAS NOT REPEALED BY IMPLICATION FOR 2008
(COURT'S ISSUE #2, STATE'S POINT #2).**

**A. Repeal By Implication Is Disfavored And Should Not Be Found Here
Because A Reasonable Construction Of The Statutes Exists That Harmonizes
The Compact Act And The MBT.**

The MBT Act did not impliedly repeal the Election for 2008 inasmuch as (1) a reasonable construction of the MBT Act and the Election exists and (2) finding implied repeal would mean that similarly worded statutes are interpreted differently. The Compact Act plainly permits the Election for income taxes. Therefore, for 2008, the Election must have been either: (1) available for the income tax levies within the MBT; or (2) impliedly repealed. The Court of Appeals in *IBM* erred in finding that a repeal by implication occurred. *IBM, supra* at 3-4. However, a majority of the Court of Appeals judges in *IBM* correctly reasoned that to reach a conclusion that the Election was not previously available it would have to be the case that the MBT Act impliedly repealed the Election. *Id.*

Repeals by implication are disfavored. *Wayne Co Prosecutor v Dep't of Corr*, 451 Mich 569, 576; 548 NW2d 900 (1996); *Knauff, supra* at 491-492. Implied repeal should not be found "if there is any other reasonable construction." *Knauff, supra* at 491-492 (quotation marks and citations omitted). "If the Legislature intended to repeal a statute or a statutory provision, it would have expressly done so." *Id.* at 491. In this appeal, no finding of implied repeal is supported because a reasonable construction of the Election and the MBT Act exists for 2008 and the Legislature expressly repealed the Election for 2011. The reasonable construction

of the Election and the MBT Act's apportionment provision is that a taxpayer that does not make the Election for purposes of the income tax levies within the MBT must use single-sales factor apportionment as provided for in the MBT.

B. The 2011 Express Repeal Of The Election Demonstrates That No Implied Repeal Occurred For 2008.

In 2011, the Legislature amended Article III(1) of the Compact Act to expressly repeal the Election for MBT periods subsequent to 2008. HB 4479 (2011) (became 2011 PA 40). The repeal was not an uncodified part of the legislation. The Court of Appeals in *IBM* incorrectly "declined" to look at the 2011 repeal to determine legislative intent. *IBM, supra* at 3.

The Court of Appeals in *IBM* failed to give meaning to the express language of the statute when it found no meaning in the clear language of the 2011 legislation that expressly repealed the Election prospectively. *IBM, supra* at 3. The legislative history and language of HB 4479 demonstrate that the Legislature believed that the Election applied for 2008 and intended to repeal the Election only for subsequent periods. Subsequent express repeal of a statute is evidence that no prior implied repeal has occurred. Sutherland Statutory Construction, (7th Ed.), §23:11.

1. The Legislature could not have computed a revenue increase attributable to the repealing legislation if the Election was not available for 2008.

The Election repealer (HB 4479) must have meant that the Election existed for 2008 because both House and Senate analyses of the bill computed revenue increases resulting from enacting the bill. If the bill actually reflected the law then in effect (if it was just a clarification), no revenue impact could have resulted from enacting the bill to repeal the Election. This Court has relied on House Fiscal Agency and Senate Fiscal Agency analyses in determining the meaning of a statute. See, e.g., *Lash v Traverse City*, 479 Mich 180, 204; 735 NW2d 628 (2007) (looking to a Senate Fiscal Agency analysis to "explain[] the rationale behind [an] act"); *Elias*

Bros Rests, Inc v Dep't of Treasury, 452 Mich 144, 152; 549 NW2d 837 (1996) (citing to a Senate Fiscal Agency analysis for a description of the purpose of a bill); *Dodak v State Admin Bd*, 441 Mich 547, 588; 495 NW2d 539 (1993) (citing a House Fiscal Agency Explanation Sheet for an articulation of the two goals behind a legislative change).

Both House and Senate analyses of HB 4479 provide estimates of changes in revenue resulting from HB 4479. The House analysis states: “According to the Department of Treasury, House Bill 4479 would increase MBT revenue by approximately \$50 million per year.” 79am (House Legislative Analysis, HB 4479, March 29, 2011 (emphasis added)). Further, Defendant agrees with the revenue change.

The Senate analysis that was “based on information from the Michigan Department of Treasury” also stated that the bill would result in a revenue change for the 2011 MBT year. 85am, 87am (SB Bill Analysis, HB 4479, May 9, 2011); 93am, 95am (Senate Bill Analysis, HB 4479, May 26, 2011). The later (May 26, 2011) analysis indicates a net revenue decrease for 2011 and a revenue increase for 2012 attributable to “Multistate Tax Compact Changes” as follows: a \$50 million net decrease for 2011 and a \$25 million net increase for 2012. At an impact of \$25 million per year (see 2012 stand-alone figure) and effecting four open tax years for 2011 (i.e., 2011 as well as 2008, 2009, and 2010), the \$50 million net decrease for 2011 corresponds to (1) an increase in revenue of \$25 million attributable to no longer permitting the Election (just like for 2012) and (2) three negative \$25 million impacts for refunds attributable to MBT years 2008 through 2010.³ 95am.

³ For 2011’s net figure, add positive \$25 million (for 2011 revenue increase) to negative \$75 million (for 2008, 2009, and 2010 refund impacts of \$25 million each) for a total of negative \$50 million.

If the Election was not otherwise available for the Business Income Tax for 2008 and until the 2011 amendment, then the Legislature and Defendant could not have anticipated a fiscal impact for the amendment to repeal the Election. Defendant should be estopped from taking a position contrary to its previously published statements and the statements upon which the Legislature relied in enacting the repeal.

2. The Legislature would not have woven a 2011 effective date into the statute to repeal the Election if the Election was not available before 2011.

HB 4479 could not have been a clarification because the Legislature wrote an effective date for the repeal into the statute. HB 4479 included the phrase “*except that beginning January 1, 2011*” in its modification to the Election. MCL 205.581, art III(1) (2011) (emphasis added). To serve any purpose or have any relevance in the statute, this phrase must mean that the Election is available for 2008.

“One of the primary rules of statutory construction is to avoid a construction that would render statutory language “surplusage or nugatory.” *World Book, supra* at 417. Moreover, the Legislature is “presumed to know of and legislate in harmony with existing laws.” *People v Harrison, supra* at 369. As applied to the Compact Act, the language “*except that beginning January 1, 2011*” would be unnecessary if the Election was not available or if it had been impliedly repealed for purposes of the Business Income Tax for earlier taxable periods. The Election must have applied to 2008 in order for the legislation’s effective date to have any meaning.

Further, an early version of HB 4479 demonstrates that the Legislature intended for the repeal of the Election to apply only for 2011 forward. As introduced in the House, HB 4479 did not contain the language “except that beginning January 1, 2011.” 99am (House Bill 4479 (as introduced March 23, 2011)). The House later amended HB 4479 to add the language “except

that beginning January 1, 2011.” House Bill 4479 (as amended and passed April 28, 2011). The Legislature would not have amended the language of HB 4479 to include such language if the Election did not apply for 2008.

Additionally, a 2010 bill that would have repealed the Election had it been enacted in that legislative session demonstrates that the 2011 amendment applied prospectively. The failed bill would have amended Article III(1) of the Compact Act to read, in pertinent part:

Except that any taxpayer subject to the Michigan Business Tax Act, 2007 PA 36, MCL 208.1101 to 208.1601, 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. [127am (HB 6351 (2010)).]

In addition to the foregoing language, HB 6351 (2010) contained language in an enacting section (that followed the statute as modified in the bill) which provided that such language would apply retroactively to all MBT periods, as follows:

This amendatory act shall be retroactively applied to tax years beginning after December 31, 2007 and reflects the *original intention* of the legislature that the provisions of the Michigan Business Tax Act, 2007 PA 36, MCL 208.1101 to 208.1601, governing the apportionment and allocation of the tax base are the exclusive method for apportioning the tax base under that act. [151am (emphasis added)]

Similar language regarding the Legislature’s purported “original intention” as asserted by Defendant was not included in HB 4479 (2011) (the Election repealer) as enacted. Had the Legislature intended the 2011 Legislation to prohibit the Election for all MBT tax periods, it demonstrated that it knew how to indicate that intent using language similar to that contained in HB 6351. The Legislature used no such language in the bill that became law.

3. The legislative history of the 2011 Election repealer would not have stated that the Election existed and was being repealed if the Election was not available before 2011.

If the Legislature had intended for the Election not to apply to (or be decoupled from) the MBT retroactively for 2008, the Legislature would not have stated that the Election was available for 2008 and was being repealed effective January 1, 2011. Legislative analyses prepared by both the House and Senate confirm that the Legislature (1) understood that the Election survived the MBT Act and (2) decided to repeal the Election for MBT years beginning in 2011. The House legislative analysis of the bill states:

[U]nder Article IV of the Multistate Tax Compact, business income is to be apportioned based equally on three factors: property, payroll, and sales. *House Bill 4479 would make the MBT . . . apportionment provisions apply rather than those in the Multistate Tax Compact.* [House Legislative Analysis, HB 4479, March 29, 2011 (emphasis added).]

Additionally, the Senate Legislative Analysis of the bill states:

House Bill 4479 amends the MTC to *change* the way taxpayers are allowed to apportion their activity between states. *Under the law, a multistate taxpayer can elect to file under the provisions of the MTC rather than the requirements of the laws of states in which it has business activity. One of these provisions involves how to allocate business activity across states. The MTC allows a taxpayer to compute an apportionment factor by computing three separate factors, adding them together and dividing by three.*

...
House Bill 4479 amends the Multistate Tax Compact to *remove the option* for certain out-of-state taxpayers *to apportion* their tax base (under . . . the MBT . . .) *using an equally weighted three-factor formula instead of the 100%-sales factor formula specified in the MBT*

...
Under House Bill 4479, any taxpayer subject to . . . the MBT . . . does not have the option of using the apportionment factor in the MTC [i.e., the Multistate Tax Compact]. As a result, all taxpayers are required to use the 100%-sales factor apportionment. *The changes apply to all tax years beginning January 1, 2011, or later.* [Senate Bill Analysis, HB 4479, May 26, 2011, p 5-6 (emphasis added).]

Had the Legislature believed that it was clarifying existing law when it enacted HB 4479, it would not have expressed the contrary in its legislative analyses.

4. The language of Michigan's New Corporate Income Tax (effective January 1, 2012), unlike the previous Michigan business taxes in effect from 1967 through 2010, expressly decouples from the Election for the first time.

In 2011, the Legislature repealed the MBT and created a New Corporate Income Tax effective beginning January 1, 2012.⁴ House Bill 4361 (became 2011 PA 38) (MCL 206.601 *et seq.*) (except that some taxpayers could opt to remain on the MBT after 2011 (MCL 206.680)). Its apportionment statutes, MCL 206.661 and MCL 206.663, require taxpayers to apportion income using a single sales factor. MCL 206.661 provides that “the tax base established under this part *shall* be apportioned *in accordance with* this chapter.” (Emphasis added). However, regarding apportionment of the New Corporate Income Tax, the Legislature *additionally* provided that: “[T]he tax base of a taxpayer is apportioned to this state by multiplying the tax base by the sales factor multiplied by 100% and that apportionment shall not be based on property, payroll, or any other factor *notwithstanding [the Compact Act]*.” MCL 206.663(3) (emphasis added) (enacted at the same time as HB 4479 (prospective repeal of the Election)). The 2011 express repeal of the Election (HB 4479) also applies to the New Corporate Income Tax. MCL 205.581, art III(1) (2012).

For the first time since Michigan's enactment of the Compact Act (in 1970), the Legislature included more than the standard statutory “shall” and “in accordance with” (or other similar language) that it had used to implement apportionment under a corporate tax. This language was adopted at the same time as the express repeal of the Election. This language

⁴ The New Corporate Income Tax is located at what was the end of the Income Tax Act of 1967.

would have been unnecessary if the words “shall” and “in accordance with” alone overrode the Election for the New Corporate Income Tax.

Phrases in a statute are not to be interpreted as surplusage or nugatory. *World Book, supra* at 417. Inasmuch as the words “notwithstanding [the Compact Act]” and the express repeal language in MCL 205.581 would be surplusage or nugatory language if they did not repeal the Election prospectively for the New Corporate Income Tax, the similarly worded provision of the MBT Act (“shall” and “in accordance” with) applicable to 2008 is insufficient to prohibit the Election for 2008.

III. TAXPAYERS MAY MAKE THE ELECTION FOR 2008 BECAUSE THE MULTISTATE TAX COMPACT IS A BINDING COMPACT AND CONTRACT THAT CANNOT BE UNILATERALLY ALTERED (COURT'S ISSUE #3, STATE'S POINT #1).

If this Court finds that a taxpayer may make the Election for 2008, then the Court need not address its third issue, the compact issue. However, inasmuch as the issue is before the Court and is capable of repetition but may avoid judicial review, the Court may nevertheless decide to address the compact issue even if finding for IBM on the statutory grounds. *In re Midland Pub Co*, 420 Mich 148, 153, 362 NW2d 580 (Mich. 1984) (addressing apparently moot issues related to suppression orders because the issues were capable of repetition while avoiding judicial review).

In 1970, Michigan adopted the Multistate Tax Compact to create uniformity by providing a uniform choice to avoid double taxation of multistate businesses. The Election’s uniform choice furthers the purposes of the Multistate Tax Compact. Two of the stated purposes of the Multistate Tax Compact are:

1. To “[f]acilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases . . .; and.
2. To “[a]void duplicative taxation.”

MCL 205.581, art I. These purposes were necessary to demonstrate to the United States Congress that multistate businesses would be taxed fairly. Michigan and the other States that created and adopted the Multistate Tax Compact used the Multistate Tax Compact as a sword to thwart Congressional action and understood well the potential for duplicative taxation (and therefore unfair taxation) and the pressure to levy additional taxes on multistate businesses. The Election played an important role in preventing such unfairness. As Michigan's own Mr. Dexter stated:

“[T]he [Multistate Tax Compact] contains uniform legislation. The [UDITPA] is the most significant legislation contained therein. The Compact permits multistate-multinationals to elect UDITPA for allocation and apportionment of income *to prevent any potential income tax duplication* in any of the member states.” [Corrigan, Schoettle, and Dexter, *The Search for Equity and Accountability in State and Local Taxation of Multistate-Multinational Corporations*, *supra* at 554 (1980) (emphasis added).]

The Compact Act was precisely crafted to include the Election to curb duplicative taxation. It creates something more than a mere statute inasmuch as it establishes an agreement with other States through reciprocal legislation. Part of that agreement is that the Election is available to taxpayers as a uniform choice. 44am, First Annual Report. The Court of Appeals in *IBM* erred in refusing to permit the Election as a matter of compact law. *IBM, supra* at 4-5.

A. The Election Does Not Conflict With The Michigan Constitution And The Michigan Legislature Did Not Surrender Its Taxing Authority When It Adopted A Uniform Choice For Apportionment Purposes.

1. The Multistate Tax Compact was designed to protect, not cede, States' taxing authority.

The purpose of the Multistate Tax Compact was to prevent federal control of state taxing powers. Indeed the Multistate Tax Commission stated that: “The origin and history of the Multistate Tax Compact are intimately related and bound up with the history of the states’

struggle to save their fiscal and political independence . . .” 8am, First Annual Report. The Multistate Tax Commission has also stated that the Compact was a means for the States’ “preservation of Tax Administration.” 72am, Brochure, Multistate Tax Commission.

2. The Election only requires a uniform choice for apportionment (i.e., a division of the tax base for multistate corporations) and the Legislature retained control over all other aspects of its taxing system including the tax base, tax rate, and the normal apportionment formula from which an Election can be made.

Defendant’s arguments run contrary to the purpose for which the States adopted the Multistate Tax Compact. Permitting the Election for 2008 as a matter of compact law does not bind the Legislature. The Court of Appeals in *IBM* erred in reasoning that permitting the Election would bind the Legislature. *IBM, supra* at 4-5. The Election does not conflict with the Michigan Constitution inasmuch as the Election only applies to one end of one aspect of the MBT, *i.e.*, the division of income among the States through allocation and apportionment. It also applies only to a limited set of Michigan taxpayers, *i.e.*, multistate corporations subject to the MBT and that could benefit from the Election.

The Legislature retains control of its taxing power even though the Election is available to taxpayers. The United States Supreme Court explained that each party State to the Multistate Tax Compact retains “complete control over all legislation and administrative action affecting the rate of tax [and] the composition of the tax base (including the determination of the components of taxable income) . . .” *United States Steel, supra* at 457 (emphasis added); MCL 205.581, art XI.

The Legislature is free to choose which and how many tax bases to establish. It is free to set varying rates for each base. Further, it is free to establish various credits to use against the tax for each base. It could tinker with the combination of rate, base, and other features of the tax

system to achieve the revenue and policy objectives that it wanted. Importantly, the Legislature could choose tax bases that are not “income taxes” as defined by the Compact Act, i.e., “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.” MCL 205.581, art II(4). It could choose a property base or a salary base. Since 1970, Michigan has had numerous tax bases.

The enactment of the MBT demonstrates that the Legislature retained control over the MBT even though the Election is available to taxpayers as a matter of compact law. Legislative analysis lists several of the features of the MBT – all of which aside from the allocation and apportionment provisions are not affected by the Election. The unaffected provisions, include:

- Nexus or subjectivity (i.e., what contacts with Michigan subject a corporation to the MBT)
- The number of bases for taxation (e.g., the Business Income Tax and MGRT)
- Taxation of specific industries (i.e., a separate tax on insurance companies and financial institutions)
- Exempt entities
- Unitary combined filing methodology (as opposed to separate entity filing)
- The generally applicable tax rate
- Filing thresholds (i.e., the \$350,000 filing threshold)
- Compensation and investment tax credits
- Research and development credits
- Small business credits
- Personal property tax credits
- Retention of 12 credits from the Single Business Tax
- Estimated payment methodology
- Return due dates
- Information to be included with returns.

Legislative Analysis, Michigan Business Tax, July 1, 2007.

Additionally, the Election only applies to a subset of taxpayers. Taxpayers that do not allocate or apportion are unaffected by the Election. The Legislature retained control over the standard allocation formula that would apply to allocating and apportioning taxpayers. Should

the Legislature decide to use single sales factor apportionment (as it did with the MBT), perhaps to benefit companies with a large or growing presence in Michigan, it was free to do so. Only those taxpayers for whom the Election was more favorable than the standard single sales factor apportionment were affected.

Examples of the Legislature's freedom include:

- (1) The Legislature could set multiple bases to even out revenue, e.g., a receipts base (for down economies; an income base (for profitable times), and a net worth base (as a different measure of value);
- (2) The Legislature could set separate rates for each of the bases to smooth its revenue or to participate more heavily in profitable years;
- (3) The Legislature could establish hiring credits, research credits, or capital expense credits to promote additional types of activities;
- (4) The Legislature could remove property and payroll factors from the apportionment formula (as it did in the MBT) so as to invite corporations to hire more people or to invite corporations to expand factories in Michigan without increasing the portion of the corporation's income or activity that would be subjected to the tax rate – as long as the Legislature permits corporations to use the Election if they so desire;
- (5) The Legislature each and every year could repeal the Compact Act.

For the foregoing reasons, the Legislature did not surrender its taxing authority when it enacted the Compact Act.

3. The Legislature did not surrender its taxing authority inasmuch as the Compact Act (i.e., a Michigan statute) provides that Michigan is free to withdraw from the Multistate Tax Compact at any time by repealing the Compact Act and every year the Legislature has chosen not to withdraw.

As Defendant concedes, the Compact Act provides for its own repeal at the whim of the Legislature. Defendant's Brief on Appeal, p 161 see MCL 205.581, art X(2); *United States Steel, supra* at 473 ("each State is free to withdraw at any time.") (emphasis added). Inasmuch as Michigan adopted the Compact Act and participated in the Multistate Tax Commission's activities, Michigan must follow the terms of that statutorily enacted compact until it withdraws from the Multistate Tax Compact as specified in Michigan's statutes by enacting a statute that

repeals MCL 205.581. If Michigan desires to repeal the Election, it must repeal the Compact Act, and it could have done so, but did not do so, each and every year since 1971.

State repeal of the Multistate Tax Compact is not uncommon and several States' Legislatures repealed the Multistate Tax Compact beginning as early as the 1970s. *United States Steel, supra* at 455 (noting that Florida, Illinois, Indiana, and Wyoming had withdrawn from the Multistate Tax Compact). California recently passed a bill to withdraw from the Multistate Tax Compact. Cal. SB 1015 (2012); *The Gillette Co v Franchise Tax Bd*, 209 Cal App 4th 938; 147 Cal Rptr 3d 603 (2012); lv granted 151 Cal Rptr 3d 106 (2013) (permitting the Election in California). Let us remember that Michigan did not have to adopt the Multistate Tax Compact in 1970. Yet it did adopt the Compact in 1970.

Given the straightforward process for withdrawing from the Multistate Tax Compact and the history of States that have done so, nothing in the Compact Act or the history of the Multistate Tax Compact suggests that the Compact Act binds future Legislatures (every year the Legislature is free to choose) or that Michigan surrendered, suspended, or contracted away the Legislature's taxing power. "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." *United States Steel, supra* at 473 (emphasis added).

B. The Multistate Tax Compact Constitutes A Valid, Binding Compact And Contract That Cannot Be Unilaterally Amended Or Modified By Michigan.

Inasmuch as the Legislature has not repealed the Compact Act, taxpayers have the right to make the Election as a matter of compact law. An interstate compact that does not require and has not received Congressional consent, is to be construed as state law. *McComb v Wambaugh*,

934 F2d 474, 479 (CA 3 1991).⁵ *United States Steel, supra* at 479, held that the Multistate Tax Compact did not need Congressional consent, which would have resulted in the Multistate Tax Compact becoming federal law. However, the United States Supreme Court's holding does not diminish the supremacy of the Multistate Tax Compact. It explained that "[a]n interstate compact, by its very nature, shifts a part of a state's authority. . . ." *Hess v Port Auth Trans-Hudson Corp*, 513 US 30, 42; 115 S Ct 394; 130 L Ed 2d 245 (1994) (internal citations omitted). Federal courts have further explained that:

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and *subsequent* law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. [*C.T. Hellmuth & Assoc, Inc v Wash Metro Area Trans Auth*, 414 F Supp 408, 409 (D Md 1976) (emphasis added); see also *Doe v Ward*, 124 F Supp 2d 900, 914-915 (WD Pa 2000) (citing *McComb, supra* at 479).]

This limit on State authority applies equally to non-Congressionally approved interstate compacts. See *McComb, supra* at 479 at 479. The United States Court of Appeals stated with regard to a non-Congressionally approved compact: "Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states." *Id.*

⁵ A citation to *McComb* indicates that it was overruled by *State Dep't of Econ Sec v Leonardo*, 22 P3d 513 (Ariz Ct App 2001). However, *Leonardo* addressed questions of the interpretation of a regulation under the Interstate Compact for the Placement of Children. *Id.* *Leonardo* cited *McComb* favorably for the proposition that "a state may not enact laws that conflict with a compact the state has adopted." *Id.* at 519.

The Multistate Tax Compact is more than a model law. Unlike a mere model law that a State could adopt without passage by another State, the Multistate Tax Compact *required reciprocal legislation by other States* in order to take effect. MCL 205.581, art X(2). Moreover, the Multistate Tax Compact resulted in the formation of a commission, the Multistate Tax Commission, in which Michigan continues to participate. Such attributes demonstrate that the Multistate Tax Compact is more than a model law. It is a law plus an obligation.

The Multistate Tax Compact was designed to be an interstate compact, not just a model law. Indeed, the Multistate Tax Commission touted an interstate compact as the key to maintaining the State's sovereign power to tax. In promoting the Compact, the Multistate Tax Commission issued a pamphlet to extol the virtue of the Multistate Tax Compact and stated: "Multistate Compacts Do Work. With respect to handling significant problems which are beyond the unaided capabilities of the regularly constituted agencies of individual state governments, the accepted instrument is an interstate compact or agreement." 70am, Brochure, Multistate Tax Commission.

That the Multistate Tax Commission has no binding authority does not demonstrate that the Multistate Tax Compact is a model law. The enactment of the Multistate Tax Commission was only a piece of the entire Multistate Tax Compact and was not necessary to the overarching purpose of the Multistate Tax Compact, i.e., to discourage Congress from adopting federal legislation. Defendant's arguments regarding the Multistate Tax Commission as opposed to the Multistate Tax Compact do not support the conclusion that the Multistate Tax Compact is a model law. *See* Defendant's Brief on Appeal, p 12-15.

As discussed at pages 6 to 10 *supra*, it is clear that the States bonded together to convince Congress to not usurp their taxing authority with federal legislation. The business community

was applying pressure on Congress for such federal legislation. As the pamphlet indicates, the States made promises to business leaders to coopt them in the fight to get Congress to stand down. Such advising and consulting leaders included leaders from some of the most influential companies and organizations of the day. 75am, Brochure, Multistate Tax Commission, p 12 (listing eighteen others as observers at the Multistate Tax Commission's meetings). The promise as stated in the brochure and made in the Multistate Tax Compact were real and the promise induced corporations to reduce pressure on Congress.

The purported course of performance of the States is irrelevant and does not diminish the binding nature of the Election in Michigan inasmuch as taxpayers first brought challenges under the Compact Act for 2008, the first year for which a challenge was possible under the MBT. No challenge under the Business Income Tax of the MBT could have been brought before the tax took effect in 2008.

Taxpayers such as IBM and Lorillard claimed the Election for the first year for which the Election applied to the MBT. The course of performance with respect to the Multistate Tax Compact or other State actions do not demonstrate acquiescence to a departure from the Multistate Tax Compact.

Tarrant Regional Water District v Herrmann, 596 U.S. ____; 133 S Ct 2120 (2013) is inapposite. It does not support Defendant's course of performance arguments. *Tarrant* involved litigation by a governmental authority brought under a water rights compact several years after the authority bringing the challenge could have had an argument under that compact. *Id.* at 2135. Inasmuch as the authority in *Tarrant* could have brought a challenge for earlier years but did not do so until much later, the course of performance weighed against relief. *Id.* In the

compact issue herein, IBM and Lorillard are challenging for the first year that the issue arose (i.e., 2008),

C. Although Michigan Law Presumes That A Statute Does Not Create A Contract, A Compact Creates An Enforceable Agreement For Which Taxpayers Have Standing To Challenge.

The Legislature may not override the Election without impairing an obligation of contract in violation of the United States Constitution and the Michigan Constitution. 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. The Michigan Constitution provides: “No . . . law impairing the obligation of contract shall be enacted.” Const 1963, art 1, §10.

As applied to interstate compacts, federal courts have explained:

As with other contracts, the Contract Clause of the United States Constitution protects compacts from impairment by the states. This means that *upon enacting a compact, it takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide.* [*Doe, supra* at 915 n. 20 (internal citations omitted) (emphasis added).]

The Court of Appeals relied on *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 319-325; 806 NW2d 683 (2011), in reasoning that no rights, compact or contractual, were created by the enactment of the Compact Act. *IBM, supra* at 4. *In re Request for Advisory Opinion* is inapposite. The facts at issue in that case concerned whether the Legislature was prohibited from repealing a tax exemption prospectively. *In re Request for Advisory Opinion, supra* at 318-325. This Court found that repeal was permitted and no contractual right had been established when the tax exemption was originally enacted. *Id.* The law at issue in that appeal, unlike the Compact Act, had no express methodology for repealing the exemption and was not part of an interstate agreement. The

Compact Act presents no threat of binding the Legislature because the Legislature is free to repeal the Compact Act at any time.

Taxpayers have standing to raise compact law challenges. The Compact Act directly affects many multistate taxpayers' tax liability and such taxpayers' reliance on the multistate agreement in the Multistate Tax Compact is entirely consistent with multistate taxpayers' challenges to Defendant's actions based on such compact arguments. Further, the Multistate Tax Compact induced businesses to remove pressure from Congress.

Moreover, multistate taxpayers are intended beneficiaries of the Multistate Tax Compact. Under Michigan law, "[a]ny person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405. A promise is made for the benefit of a person when "the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person." *Id.* at (1). The Legislature directly undertook to provide taxpayers with the Election when it adopted the Multistate Tax Compact and enacted the Compact Act. As such, taxpayers have the same rights to enforce a provision of the Compact Act as if the taxpayers were parties to the Multistate Tax Compact.

CONCLUSION

For the above reasons, this Court should hold that for 2008: (1) IBM may make the Election under the Michigan statutes; (2) the MBT Act did not impliedly repeal the Election; and (3) the Multistate Tax Compact constitutes a compact and contract that cannot be unilaterally altered or amended by a member state.

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