In the Supreme Court of the State of California

The Gillette Company & Subsidiaries, **Plaintiffs and Appellants,** **v.** **California Franchise Tax Board, an Agency of the State of California,** **Defendant-Respondent.**	Case No. S206587

First Appellate District Division Four, Case No. A130803
San Francisco County Superior Court, Case No. CGC-10-495911
The Honorable Richard A. Kramer, Judge

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Acting Solicitor General
KATHLEEN A. KENEALY
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
W. DEAN FREEMAN
Supervising Deputy Attorney General
LUCY F. WANG
Deputy Attorney General
State Bar No. 199772
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5202
Fax: (415) 703-5480
Email: Lucy.Wang@doj.ca.gov
Attorneys for Defendant and Respondent Franchise Tax Board

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ISSUES PRESENTED

In 1974, California joined the Multistate Tax Compact (Compact), an interstate agreement between 19 states for their taxation of multistate businesses. (Stats.1974, ch. 93, § 3, p. 193; former Rev. & Tax Code, § 38006, repealed by Stats. 2012, ch. 37 (S.B.1015), § 3, eff. June 27, 2012.) As originally promulgated, California's Compact statute allowed taxpayers to elect to apportion their business income using an equally weighted three-factor formula (payroll, property, and sales) (former Rev. & Tax. Code, § 38006, art. IV, subd. 9 [Compact formula]), or California's own alternative apportionment formula (Rev. & Tax. Code, § 25128). (See former Rev. & Tax Code, § 38006, art. III, subd. 1.) At the time California adopted the Compact, section 38006 and section 25128 set forth the same three-factor apportionment formula.

In 1993, California amended section 25128[1] to require, "[n]otwithstanding Section 38006," that taxpayers apportion their business income exclusively using a double-weighted sales factor as the only apportionment formula available to multistate taxpayers.

The issues presented are:

(1) Whether the Court of Appeal erroneously construed the Compact in a manner that contravenes the member states' longstanding, consistent construction that permits a member state to eliminate or modify the Compact's election and income apportionment provisions without having to withdraw from the Compact?

(2) Whether the 1993 amendment of section 25128 violated the contracts clauses of the state and federal Constitutions? (U.S. Const., art. I, § 10; Cal. Const., art I, § 9.)

---

[1] Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

(3) Whether the 1993 amendment of section 25128 violated the reenactment rule of the California Constitution? (Cal. Const., art. IV, § 9.)

INTRODUCTION

From 1967 to 1993, California apportioned the income of multistate taxpayers through a formula based on three equally weighted factors: property, payroll, and sales. (Former Rev. & Tax. Code, § 25128.) In 1993, California changed its apportionment formula to double-weight the sales factor. (Rev. & Tax. Code, § 25128.) For many years, the appellant taxpayers (collectively "Gillette") filed original returns complying with the new formula. In 2006, however, Gillette filed claims for refund in excess of $34 million with the Board on the ground that California's 1993 revision of its apportionment formula was invalid.

Gillette claimed that, pursuant to article III, subdivision (1) of the Multistate Tax Compact, which California adopted in 1974, the Board was bound to allow taxpayers to make, annually, an election to use an equally weighted three-factor formula. This provision of the Compact, which is often referred to as the election provision, states that a taxpayer subject to apportionment may elect to use the equally weighted three-factor formula in article IV of the Compact rather than the method prescribed by the state's statute. This formula is the same one that was used in California's statutes prior to 1993. The Board denied Gillette's claim.

Gillette then filed a tax-refund lawsuit in which it repeated its claims. After the trial court granted the Board's demurrer without leave to amend, Gillette appealed. The Court of Appeal held that the Compact is "a binding, enforceable agreement with the other signatory states," therefore, "under established compact law, the Compact superseded subsequent conflicting state law." (Slip opn. at p. 16.) The court also held that California's change of apportionment formula was an unconstitutional impairment of contract, and violated the reenactment clause. (*Ibid.*)

The lower court's interpretation imposes an unyielding rule that undermines the existence and the purposes of the Compact because it prevents a member state from changing its apportionment formula unless or until it *completely withdraws* under the Compact's withdrawal clause. (Art. X, subd. (2).) The Compact is not that brittle; member states intended it to allow a flexible approach consistent with addressing issues of multistate concern, while maintaining their own sovereignty to effectuate tax policies that address their unique concerns. In many respects, member states will find common ground, but in other respects—as here—divergent interests will dictate multiple approaches. In fact, fourteen member states have already eliminated the equally weighted three-factor formula as an option.

The decision below misconstrued the Compact. It declined to give proper consideration to member states' intent and construction of the Compact to allow flexibility to do precisely what California did in adopting a different apportionment formula. It failed to apply the correct rules of statutory construction for alleged surrenders of a state's tax sovereignty. It incorrectly applied the laws of congressionally approved compacts to this non-congressionally approved compact. And it applied incorrect rules regarding impairment of contracts and reenactment.

This Court should reject the lower court's short-sighted approach; adopt the Board's position, which is supported by the Multistate Tax Commission and the Compact's member states; and affirm the judgment of the superior court granting the Board's demurrer without leave to amend.

STATEMENT

I. CALIFORNIA TAX LAW USES A FORMULA TO APPORTION THE INCOME OF MULTISTATE TAXPAYERS.

California has long provided for the use of various factors to apportion the income of multistate taxpayers that is attributable to sources within this state. Prior to 1966, California relied on "sales, purchases,

expenses of manufacture, payroll, value and situs of tangible property[.]" (Former Rev. & Tax. Code, § 25101.) In 1966, when California adopted the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA), a model law for the state taxation of multistate taxpayers (former Rev. & Tax. Code, §§ 25120-25139), the apportionment formula was changed to three equally weighted factors: payroll, property, and sales. (Stats. 1966, ch. 2, p. 179; Rev. & Tax. Code, §§ 25120-25139.)

The formula remained the same when California adopted the Compact in 1974. (See Multistate Tax Com., First Ann. Rep. (1968) pp. 1-2; Stats. 1974, ch. 93, p. 193, § 3; former Rev. & Tax. Code, § 38006, art. X, subd. 1.) The Compact is generally understood to have been formed as a response by states to their concerns that Congress might—following the Supreme Court decision of *Northwestern States Portland Cement Co. v. Minnesota* (1959) 358 U.S. 450—impose rules for the state tax treatment of multistate businesses. (*U.S. Steel Corp. v. Multistate Tax Commission* (1978) 434 U.S. 452, 455.) State tax administrators and other state leaders drafted the Compact as part of an effort to discourage the enactment of federal legislation that would have infringed on traditional state sovereignty over tax issues. (*Id.* at pp. 454-455.) By the time the Compact became effective in California in 1974, six different attempts to deal with the subject of state taxation had died in Congress. (*Id.* at p. 456.) This unbroken string of congressional *inaction* continues to this day.

The purposes of the Compact are "(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." (*U.S. Steel Corp. v. Multistate Tax*

Commission, supra, 434 U.S. at p. 456; former Rev. & Tax. Code, § 38006, art. I.) In addition, as the Multistate Tax Commission explained in its amicus letter in support of the Board's petition for review (MTC Amicus), one of the Compact's purposes was "*preserving* member states' sovereign authority to effectuate their own tax policies." (MTC Amicus at p. 1; italics in original.) The Compact left states free to adopt and enact through their own legislation the portions of the Compact they wished. Eighteen states are currently Compact member states.[2]

The Compact has several provisions which are at issue in this case. Article III, subdivision (1) contains the election provision, which provides that a taxpayer subject to apportionment may annually elect to apportion income under article IV of the Compact rather than under the laws of the state. Article IV contains the standard UDITPA provisions, and includes section 9, which contains the equally weighted three-factor apportionment formula. Article X, subdivision (2) contains a withdrawal clause providing that "[a]ny party State may withdraw from this compact by enacting a statute repealing the same[.]" The Compact contains no provisions relating to amendment.

II. THIRTEEN OTHER COMPACT STATES HAVE ALSO ADOPTED CHANGES IN THE COMPACT—SIMILAR TO THE 1993 AMENDMENT OF REVENUE AND TAXATION CODE SECTION 25128—TO ESTABLISH ALTERNATE MANDATORY APPORTIONMENT FORMULAS.

Both before and after California's 1974 adoption of the Compact, thirteen other member states have individually superseded, amended, or repealed various Compact provisions by statute, including the election and apportionment provisions, without objection from any other members.

---

[2] Member states are those that have enacted the Compact into their state law. At the time the present litigation commenced, there were 20 member states.

In 1971, Florida—one of seven original Compact member states—repealed articles III and IV, which contained the election and apportionment provisions. (Board's Request for Judicial Notice, filed concurrently with this brief in this Court on or about April 17, 2013 (RJN), Exs. B, C.) Shortly thereafter, at a Commission meeting, all member states unanimously adopted a resolution affirming that Florida remained a member in good standing of both the Compact and the Commission. The resolution noted that "Florida view[ed] its position as fully consistent with the principles of the Multistate Tax Compact," and that Florida's partial repeal "adher[ed] to the spirit of the Compact[.]" (*Id.*, Ex. A.)[3]

Like California, most other Compact member states have superseded and repealed (expressly or by implication) the Compact's election and apportionment provisions. In 1986, Minnesota increased the weighting of its sales factor from 33 percent (the equally weighted three-factor formula) to 70 percent, and in 1987 repealed articles III and IV of its version of the Compact altogether.[4] In 1989, Oregon double-weighted (50 percent) its sales factor.[5] Between 1991 and 1997, Michigan increased the weight given to the sales factor from 40 percent to 80 percent.[6]

In 1993, California joined this trend by double-weighting the sales factor. (Rev. & Tax. Code, § 25128, subd. (a) ["Notwithstanding Section 38006, all business income shall be apportioned . . . [by] a fraction, the

---

[3] Board counsel only became aware of this resolution on September 25, 2012. Accordingly, it was not provided to either court below.

[4] Board's Request for Judicial Notice in Support of Respondent's Brief, filed below on August 9, 2011, and granted on October 31, 2011 (RJN-COA), Exs. 28 (Minn. Stat. § 290.171) and 29 (excerpt from Minn. Session Laws, 1987 Regular Session, ch. 268, art. 1, §§ 74, 75).

[5] RJN-COA, Ex. 31 (Or. Rev. Stat. § 305.655); Ex. 32 (Or. Rev. Stat. § 314.650); and Ex. 33 (Or. Admin. R. 150-314.650).

[6] RJN-COA, Ex. 25 (Mich. Comp. Laws Ann. § 208.1301); and Ex. 26 (Mich. Comp. Laws Ann. § 208.1303).

numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four]".)

Since 1993, the trend has continued unabated in other states. In 1995, Arkansas moved to a double-weighted (50 percent) sales factor.[7] In 1996, Idaho moved to a double-weighted (50 percent) sales factor.[8] In 2006, Texas revised its franchise tax law, but kept the single-factor apportionment formula it first initiated in 1991.[9] In 2009, Colorado began requiring taxpayers to apportion their income using a 100 percent-weighted sales factor.[10] In 2010, Utah eliminated the property and payroll factors and moved to a 100 percent-weighted sales factor for most multistate taxpayers.[11] In 2010, Alabama began requiring multistate companies to double-weight (50 percent) their sales factor.[12] Three other Compact members (Hawaii, Kansas, and the District of Columbia) have also departed from the Compact's formula.[13]

---

[7] RJN-COA, Ex. 8 (Ark. Code Ann. § 26-51-709); Ex. 9 (Ark. Corp. Inc. Tax Regs. 1.26-51-709; and Ex. 10 (Ark. Code Ann. § 26-5-101 [Arkansas' Compact; see especially art. IV, § 9 thereof]).

[8] RJN-COA, Ex. 18 (Idaho Code § 63-3027(i)(1)).

[9] RJN-COA, Ex. 36 (Tex. Tax Code Ann. § 171.106(a)).

[10] RJN-COA, Ex. 11 (Colo. Rev. Stat. § 39-22-303.5(4)(a)); Ex. 12 (Colo. Rev. Stat. § 24-60-1308); and Ex. 13 (Colo. Rev. Stat. § 24-60-1301 [Colorado's Compact law].)

[11] RJN-COA, Ex. 39 (Utah Code Ann. §§ 59-7-312, 59-7-315 and 59-7-317); Ex. 40 (S.B. 165, Utah 58th Legislature, 2010 Gen. Sess.); and Ex. 41 (Utah Code Ann. § 59-7-311).

[12] RJN-COA, Ex. 5 (2011 Ala. H.B. 434 (Jun. 9, 2011)).

[13] RJN-COA, Ex. 6 (Alaska Stat. § 43.20.071); Ex. 7 (Alaska Stat. § 43.20.072); Ex. 19 (Kan. Stat. Ann. § 79-4301); Ex. 20 (Kan. Stat. Ann. § 79-3279(a)); Ex. 39 (Utah Code Ann. §§ 59-7-312, 59-7-315 and 59-7-317); Ex. 40 (S.B. 165, Utah 58th Legislature, 2010 Gen. Sess.); Ex. 41 (Utah Code Ann. § 59-7-311); Ex. 14 (Dist. of Columbia Code § 47-441).

These changes have not affected the Compact's administration, or imposed obligations on other member states or the Commission. And neither the Commission, nor any member state, has objected to any of these changes throughout the forty-five year history of the Compact.

III. HISTORY OF THE PRESENT LITIGATION.

Gillette and the other appellant taxpayers complied with the new law for more than a decade. Then, in 2006, they filed claims for refund on the grounds that the Legislature had not intended amended section 25128 to supersede the Compact formula or, if the Legislature did so intend, amended section 25128 was unconstitutional. (AA0003, AA0306, AA0347, AA0612, AA0653.)[14] The combined refund claims involve six taxpayers, 39 taxpayer-years, and claimed tax refunds totaling approximately $34 million (plus statutory interest).[15]

The Board denied the refund claims and the appellant taxpayers brought refund suits alleging that amended section 25128 did not override or repeal the election and apportionment provisions of the Compact, and that they had the right to elect to use the Compact's equally weighted three-factor formula. The Board's demurrer was sustained without leave to amend. (AA0283-84.) Appellant taxpayers appealed.

The Board argued on appeal that the legislative intent to impose a mandatory double-weighted sales formula was clear, and that the Legislature's action was neither invalid nor unconstitutional. (AA0007,

---

[14] The designation "AA" refers to the Appellants' Appendix filed in the Court of Appeal.

[15] Refunds are being sought for taxable years 1993 through 2005. (See AA0004, AA0307, AA0348, AA0613, AA0654, AA0695.) For at least 37 of the 39 taxpayer-years at issue, the originally filed returns apportioned income using the double-weighted sales formula required by amended section 25128. (See AA0004, AA0307, AA0348, AA0613, AA0654, AA0695.)

AA0309, AA0352, AA0616, AA0657, AA0698). The Court of Appeal disagreed and reversed the judgment of the trial court.

After oral argument in the Court of Appeal, Senate Bill No. 1015 became law on July 27, 2012. It provided for California's complete withdrawal from the Compact and the Commission, and states that: "Part 18 (commencing with Section 38001) of Division 2 of the Revenue and Taxation Code is repealed." (Stats. 2012, ch. 37, § 3, eff. June 27, 2012.)[16]

The Board petitioned this Court for review on November 13, 2012. Its petition was supported by amicus letters from the Multistate Tax Commission, and from Attorneys General representing 18 of the then 19 Compact states.

This Court granted review on January 16, 2013.

ARGUMENT

I. AMENDED SECTION 25128 WAS EFFECTIVE TO OVERRIDE THE COMPACT'S ELECTION PROVISION.

Sovereign states may enter into mutual agreements, or compacts, between themselves. The federal constitution's compact clause provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State[.]" (U.S. Const., art. I, § 10, cl. 3.) The clause is not to be read strictly, but only as requiring congressional consent for compacts that "tend[] to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of

---

[16] Senate Bill No. 1015 does not reduce the importance of this case. Review remains forward-looking because (1) potential refund claims may exceed $750 million, (2) adoption of the Board's construction may result in California rejoining the Compact and Commission, (3) the same issues are pending in other states, (4) impairment and reenactment remain significant on a prospective basis, and (5) the reasoning in the decision below could possibly be extended to apply to other laws that vary from the Compact, to other compacts, and to other revenue streams.

the United States." (*U.S. Steel Corp. v. Multistate Tax Commission, supra*, 434 U.S. 452, 471.) In 1974, California became a member of the Multistate Tax Compact, which does not require (*id.* at p. 479), nor has ever received, congressional approval.

The Court of Appeal held below that amended section 25128 was invalid and unconstitutional for three reasons:

> First, under established compact law, the Compact superseded subsequent conflicting state law. Second, the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts. And finally, the FTB's construction of the effect of the amended section 25128 runs afoul of the reenactment clause of the California Constitution.

(Slip opn. at p. 16.)

First, the Court of Appeal's determination that under *established* compact law, the Compact superseded subsequent *conflicting* state law is incorrect, and may be answered in two distinct ways: (1) amended section 25128 does not *conflict* with the Compact; and (2) the *established* compact law that the court relied upon applies to congressionally approved compacts.

Second, amended section 25128 did not violate the impairment clauses of the federal and state constitutions.

Third, amended section 25128 did not violate the reenactment rule.

II. THE LEGISLATURE'S 1993 AMENDMENT OF REVENUE AND TAXATION CODE SECTION 25128, ESTABLISHING AN ALTERNATE MANDATORY DOUBLE-WEIGHTED SALES-FACTOR FORMULA, DID NOT CONFLICT WITH THE COMPACT.

A non-congressionally approved compact is "construed as state law." (*McComb v. Wambaugh* (3rd Cir. 1991) 934 F.2d 474, 479.) Since "in some contexts [a compact] is a contract between the participating states" (*ibid.*), it has a dual nature and must be interpreted by looking at both state statutory and state contract law.

The Court of Appeal acknowledged that, as a statute, the "clear import" of amended section 25128 was to impose the mandatory use of the double-weighted sales-factor formula. (Slip opn. at p. 15.) Nevertheless, it concluded that—given its "dual nature" (*id.* at p. 16)—the Compact "superseded subsequent *conflicting* state law." (*Ibid.*; emphasis added.)

However, for two reasons, amended section 25128 did not *conflict* with the Compact.

First, the Compact's history shows that the member states' intent and construction of the Compact was to allow them to change their state laws to establish alternate mandatory apportionment formulas.

Second, states retain the authority to make or change tax laws, unless that right has been surrendered in terms that are unmistakably clear. This "doctrine of unmistakability" is a rule of construction, the effect of which is that the prior grant of a tax exemption will not be construed to limit a state's right to change the law to withdraw the exemption, unless there is a plain statement surrendering that right.

A. THE MEMBER STATES INTENDED THE COMPACT TO PROVIDE THEM THE POWER AND AUTHORITY TO OVERRIDE THE ELECTION AND APPORTIONMENT PROVISIONS.

In construing a multistate compact, the most important task is to determine the member states' intent. (*Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n* (3d Cir. 2002) 311 F.3d 273, 281 ["[court's] role in interpreting the Compact is, therefore, to effectuate the clear intent of [the] sovereign states"]; *Alabama v. North Carolina* (2010) ___ U.S. ____ [130 S.Ct. 2295, 2317, 176 L.Ed.2d 1070, 1091][conc. opn. of Kennedy, J.] ["Court's duty in interpreting a compact involves ascertaining the intent of the parties."].) This is consistent with the well-settled rule that "'[i]n construing statutes, we must determine and

effectuate legislative intent.'" (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268, quoting *Woods v. Young* (1991) 53 Cal.3d 315, 323.)

While the Compact's original election and apportionment provisions did set out a particular apportionment formula, nothing in the text of the Compact prevented a member state from repealing the original provision or formula, or from enacting its own mandatory formula. The states understood that they had the latitude to make these changes, and this understanding has consistently been borne out by their actions.

In 1972, Florida repealed the election and apportionment provisions of the Compact, an action unanimously affirmed by the other member states. Since 1972, a steady stream of member states have rejected the original three-factor formula and moved to alternate formulas. Some states have followed California and accomplished this through legislation that applies "notwithstanding" the Compact, while others have simply amended their state's Compact legislation. Other member states have repealed articles III and IV of the Compact entirely, and one jurisdiction joined the Compact without ever having adopted the election provision.

The member states' actions support an inference that they intended to allow for the adoption of an alternate mandatory apportionment formula.[17] Indeed, as the Multistate Tax Commission explained in its amicus letter in support of the Board's petition for review, one of the Compact's purposes was "*preserving* member states' sovereign authority to effectuate their own tax policies." (MTC Amicus at p. 1; italics in original.)

The Court of Appeal declined to consider the member states' actions as evidence of the intent of the parties to the Compact, and held that "the

---

[17] See section II of the Board's Statement in this brief, commencing above at page five, detailing the various changes to the Compact made by California and thirteen other member states.

course of performance of a contract is only relevant to ascertaining the parties' intention *at the time of contracting*." (See slip opn. at p. 19; emphasis in original.) However, contract law supports the Board's position because "in interpreting a contract, courts may properly consider the acts and conduct of the parties following the contract's execution." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 474.)

In fact, the lower court was obligated to consider the member states' actions because "[t]he acts of the parties . . . [are] one of the most reliable means of arriving at their intention[.]" (14A Cal. Jur. 3d Contracts, § 218.) "[I]t is a court's *duty* to give effect to the intention of the parties where such intention is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties on the instrument is the best evidence of their intention." (*Ibid.*; emphasis added.) Witkin agrees that "[t]he conduct of the parties may be, in effect, a *practical* construction thereof, for they are probably least likely to be mistaken as to the intent." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 749, p. 837.) Thus, this Court has explained that "even if . . . the words [of the contract] standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions . . . that to them the contract [means] something quite different, the meaning and intent of the parties should be enforced." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1978) 22 Cal.3d 302, 314; internal quotation marks and citations omitted.)

At the time California entered the Compact, the member states had clearly spoken through their ratification of the Florida resolution, and had thus affirmed that a member could repeal the election and apportionment provisions. And the member states have continued to speak through their actions for the 40 years since. Under the Commission's and member states'

construction of the Compact, the original apportionment formula was never intended to preclude a state from enacting a different mandatory formula through subsequent legislation. (MTC Amicus at p. 2 ["Commission's longstanding position [is] that the Compact does not prohibit the action taken in 1993 by California or by most other Compact member states before and after that date"].)

The member states' continuing course of conduct is also relevant in light of the Compact's unilateral withdrawal provision. (Art. X, subd. (2).) Each day for the last 40 years, every member state (including California) has had the absolute right to withdraw from the Compact. This means that member states did not just make the initial decision to join the Compact, but *to remain* in the Compact, even as various members modify their own mandatory formulas. It is hardly creditable that they would do so if they did not understand the Compact as allowing states the flexibility to make these choices. As the amicus curiae letter of Texas and 14 other Compact jurisdictions (Texas AC) stated in support of the Board's petition for review, "States have necessarily relied on this common interpretation in choosing to join and remain in the Compact." (Texas AC at p. 4.)

Construing the Compact as allowing for amendment of the apportionment formula without completely withdrawing from the Compact is also good policy. Leaving member states with only an all-or-nothing choice of complete withdrawal would create the absurd result that, despite all of the beneficial reasons for becoming and remaining a Compact member, a state must completely withdraw if it wanted to change its apportionment formula. Indeed, if every member state that has changed its apportionment formula were required to completely withdraw, it could threaten the Compact's ongoing viability.

In the final analysis, the formation, adoption, and amendment of the Compact are political calculations that member states must make, and are

intended to make. When properly construed, it is clear that amended section 25128 did not conflict with the Compact.

B. ANY SURRENDER OF A STATE'S BROAD SOVEREIGN AUTHORITY TO IMPOSE THE TAX LAWS OF ITS CHOICE MUST BE EXPRESSED IN UNMISTAKABLY PLAIN LANGUAGE.

Every state has the power to tax. "[T]he taxing power of a State is one of its attributes of sovereignty [.]" (*Railroad Co. v Peniston* (1873) 85 U.S. 21, 29; *People v. Coleman* (1854) 4 Cal. 46, 49.) "There is no subject over which it is of greater moment for the State to preserve its power than that of taxation." (*Louisville Water Co. v. Clark* (1892) 143 U.S. 1, 13.)

The Court of Appeal's determination that amended section 25128 was superseded by the Compact's election and apportionment provisions necessarily, and erroneously, presumed that California sublimated its sovereign taxation authority by participating in the Compact. In determining whether states have surrendered this power, courts have long utilized a rule of construction—the unmistakability doctrine—that requires such surrenders must be expressed in unmistakably plain terms.

The doctrine has been applied in a variety of circumstances. In 1938, this Court was asked to determine the validity of a tax on fuel sales on national park lands that California had conveyed to the federal government. The taxpayer argued that California had ceded exclusive jurisdiction over the lands in question to the United States, and had thus surrendered its sovereign right to impose taxes there. The Court disagreed and, quoting *Ryan v. State* (1936) 188 Wash. 115, noted that "'[t]he taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable.'" (*Standard Oil Co. v. Johnson* (1938) 10 Cal.2d 758, 767; quoting *Ryan v. State, supra*, 188 Wash. at p. 131.) *Ryan* in turn looked to *Erie R. Co. v. Pennsylvania* (1875) 88 U.S. 492, where the Supreme Court acknowledged that a state

may contract to provide tax exemptions or limitations, but "the language in which the surrender is made must be clear and unmistakable." (*Id.* at p. 499.)

While the text of the Compact does not expressly allow California to adopt a new formula, neither does it waive or surrender in unmistakably plain terms California's sovereign right to enact subsequent legislation to change the formula. As the principal opinion (by Justice Souter, with three Justices concurring and three Justices concurring in the judgment) explained in *U.S. v. Winstar Corp.* (1996) 518 U.S. 839, "unmistakability [is] needed for waiver, not reservation." (*Id.* at p. 878.)

In *Winstar*, the federal government argued that under the unmistakability doctrine, any limitation on Congress' future regulatory authority was required to be expressed in unmistakable terms. (*U.S. v. Winstar Corp., supra,* 518 U.S. at p. 871.) In the government's view, this meant that the prior agreements allowing certain thrifts to use supervisory good will for specific time periods to meet capital requirements "should not be construed to waive Congress's authority to enact a subsequent bar to [that practice]." (*Ibid.*)

The Court's principal opinion rejected the government's argument, but in doing so it reaffirmed the unmistakability doctrine, stating that "[s]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." (*U.S. v. Winstar Corp., supra*, 518 U.S. at pp. 871-872; citations and internal quotation marks omitted.) The Court concluded that the doctrine did not apply to the decision under review because the government's promise to indemnify "did not implicate its sovereign powers at all[.]" (*Id.* at p. 887.) The opinion contrasted that situation, however, with claims like the one Gillette makes here, "such as a claim for rebate under an agreement for a tax exemption." (*Id.* at p. 880.) Thus, the Court

explained, "[g]ranting a [tax] rebate, like enjoining enforcement, would simply block the exercise of the taxing power, . . . and the unmistakability doctrine would have to be satisfied." (*Ibid.*) The Court explained that the doctrine is a canon of construction that applies to prevent the inference of "an unstated term exempting the other contracting party from the application of a subsequent sovereign act[.]" (*U.S. v. Winstar Corp., supra*, 518 U.S. at p. 878.)

Applying the unmistakability doctrine to the present case means that California's mere grant of a tax benefit (i.e., acquiescence to a particular apportionment formula) under the Compact, without more, does not "exempt[] . . . [another] party from the application of a subsequent sovereign act" (*U.S. v. Winstar Corp., supra*, 518 U.S. at p. 878), such as amended section 25128. In construing the Compact against the Board, the Court of Appeal turned the doctrine on its head. In effect, the lower court required California to reserve its right to enact subsequent legislation in unmistakable terms, rather than requiring a surrender or waiver of that right to be in unmistakable terms. This was error because "unmistakability [is] needed for waiver, not reservation." (*Ibid.*)

The Compact's withdrawal provision does not affect either the application of the unmistakability doctrine in the first instance, or the Compact's construction under the doctrine. The unmistakability doctrine is a rule of construction that applies regardless of the withdrawal provision. The withdrawal provision simply says that states may withdraw by enacting legislation repealing the Compact. The provision does not expressly address a state's right to tax, nor does it require surrender of a state's right to tax. This is insufficient to establish an unmistakable surrender of California's right to amend its tax laws to establish a different apportionment formula.

III. THE COURT OF APPEAL ERRONEOUSLY RELIED UPON LAW THAT APPLIES TO CONGRESSIONALLY APPROVED COMPACTS.

The rule that the lower court relied on—"under established compact law, the Compact superseded subsequent conflicting state law" (slip opn. at p. 16)—applies to compacts that have received congressional approval. In the case of a non-congressionally approved compact, the issue is whether there is a constitutionally prohibited impairment of a contract obligation.

The Court of Appeal's error is a common one. "The case law [under the Compact Clause] is jumbled and confused." (Eichorn, *Note, Cuyler v. Adams and the Characterization of Compact Law* (1991) 77 Va.L.Rev. 1387.) "[N]either the courts nor the scholarly literature has produced a coherent explanation of the status of noncompact interstate agreements under the contract impairment cases." (Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency* (1997) 49 Fl.L.Rev. 1, 40.) Nevertheless, it was an error, and should be corrected.

Congressional approval "transforms an interstate compact . . . into a law of the United States" (*Texas v. New Mexico* (1983) 462 U.S. 554, 564; citations and internal quotation marks omitted), which supersedes state law under the supremacy clause. Non-congressionally approved compacts are not transformed into federal law, and thus there is no supremacy clause analysis. Their construction is purely a matter of state statutory and contract law principles, and requires a separate analysis under each.

As a matter of statutory law, it is well established that a statute can be amended, repealed or superseded, in whole or in part, by a subsequently enacted statute. (1A Sutherland, Statutes and Statutory Construction (7th ed. 2009) § 23:3, pp. 432-433.)

As a matter of contract law, later-enacted statutes that conflict with a person's vested contract rights are not automatically invalid, but must be examined under the principles of impairment of contracts.

IV. THERE WAS NO UNCONSTITUTIONAL IMPAIRMENT OF A CONTRACTUAL OBLIGATION.

To determine under modern contract clause analysis whether a state law has unconstitutionally impaired contract rights, courts use a three-prong test.[18] (*Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411-413.) The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." (*Id.* at p. 411.) Second, assuming a substantial impairment, the state must have a significant and legitimate public purpose behind the regulation. (*Id.* at p. 412.) Third, assuming a legitimate public purpose, whether the adjustment of the "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." (*Ibid.*, citing *U.S. Trust Co. v. New Jersey* (1977) 431 U.S. 1, 22.) Had the lower court used this three-prong test, it would have found no unconstitutional impairment.

A. AMENDED SECTION 25128 IS NOT A SUBSTANTIAL IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP.

The first prong of the impairment analysis—whether there is a substantial impairment of a contractual relationship (*Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at p. 411, citing *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244, and *U.S.*

---

[18] The cases relied on by the lower court do not apply. *Green v. Biddle* (1823) 21 U.S. 1 is a 190-year old case decided before the "modern era" of impairment clause jurisprudence. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 559 [foundation of modern contract analysis "is [*U.S. Trust Co. v. New Jersey* (1977) 431 U.S. 1], a 1977 United States Supreme Court decision that, for the first time in nearly 40 years, overturned a state law as violating the contract clause"].) *Doe v. Ward* (W.D. Pa. 2000) 124 F.Supp.2d 900, 911 was decided "[w]ithout ruling on the constitutional issues[.]"

Trust Co. v. New Jersey, supra, 431 U.S. at p. 17)—is a threshold inquiry with three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." (*General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186.) A negative answer to any component establishes that there is no constitutional violation.

The first component determines whether a contractual relationship exists *between the taxpayers and the Compact member states*. The taxpayers are not parties to the Compact, nor are they third-party beneficiaries. The Court of Appeal concluded that the election provision "is a right specifically extended not to the party states but to taxpayers as third parties regulated under the Compact." (Slip opn. at p. 11.) However, for a contract to bestow third party beneficiary rights, it "must be made expressly for the benefit of the third person," (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1600, emphasis in original), or made for a "class for whose benefit the contract was created" (*Mariani v. Price Waterhouse* (1999) 70 Cal.App.4th 685, 699, quoting *Outdoor Services, Inc. v. Pabagold, Inc.* (1986) 185 Cal. App.3d. 676, 681).

Moreover, a third party may enforce a contract only when it was "made expressly" for that party's benefit. (Civ. Code, § 1559.) Taxpayers have not demonstrated, and cannot demonstrate, that the Compact provides them with any contractual—as opposed to purely statutory—rights. In addition, because the trial court granted its demurrer, the Board has not filed any answers below, and thus has yet to raise its affirmative defenses. Nevertheless, the general four-year statute of limitations for asserting a breach of contract has long passed. (Code Civ. Proc., § 337.)

The second component, "whether a change in law impairs [the] contractual relationship" (*General Motors Corp. v. Romein, supra*, 503

U.S. at p. 186), requires that the state's action must alter the obligations or duties of the parties to the contract. (*Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at p. 244.) However, the right to elect an apportionment formula was not a binding contractual obligation on Compact member states because amended section 25128 did not conflict with the Compact.

The history of the Compact demonstrates that member states intended and construed it to allow for subsequent changes to the apportionment formulas. And, when properly construed, the Compact did not unmistakably surrender member states' rights to subsequently enact alternate mandatory apportionment formulas. Because there was no conflict, amended section 25128 did not "impair[] [the] contractual relationship" (*General Motors Corp. v. Romein, supra*, 503 U.S. at p. 186), and accordingly did not violate either the state or federal prohibition on the impairment of contracts.

The third component—"whether the impairment is substantial" (*General Motors Corp. v. Romein, supra*, 503 U.S. at p. 186)—looks to the "legitimate expectations of the contracting parties." (*U.S. Trust Co. v. New Jersey, supra*, 431 U.S. at pp. 19-20 fn.17; *Maryland State Teachers Assn., Inc. v. Hughes* (D.Md. 1984) 594 F. Supp. 1353, 1360-1361.) This in turn examines (1) whether the complaining party's contract right was a vested right; (2) if it was vested, whether and to what extent there was reliance by the complaining party; and (3) whether the alleged impairment of the contractual obligation was prospective or retroactive.

First, *Bailey v. North Carolina* (1998) 348 N.C. 130 explained that decisions as to whether a government-provided pension had been impaired by a subsequent legislative act were "rooted in the protection of expectational interests upon which individuals have relied through their actions, thus gaining a vested right." (*Id.* at pp. 143-146, emphasis added;

United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, 100, 101, 106, 107; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 785 [impairment of contract premised upon finding that "employee pension beneficiaries have a vested interest in the integrity and security of the source of funding for the payment of benefits"].) Because member states had the unilateral right to withdraw from the Compact at any time, neither the election provision nor the equally weighted three-factor formula were vested rights for any prospective tax years.[19] Appellant taxpayers do not claim that California could not change its apportionment formula, but that it had to withdraw from the Compact before doing so; however, there is no vested right (or reasonable expectation) in requiring California to follow a procedure that did not affect them.

Second, the court examines "whether the parties have relied on the preexisting contract right and the extent to which the [state action] violates the reasonable expectations of the parties." (*United States v. State Water Resources Control Board, supra*, 182 Cal.App.3d 82, 146-147; *Mobil Oil Corp. v. Rossi* (1982) 138 Cal.App.3d 256, 263-264 ["trial court must consider the extent of reliance"].) Because every member state had the unilateral right to withdraw, no one—not Gillette, not member states, and not the federal government—could rely on the equally weighted three-factor formula not being changed.

Third, because amended section 25128 operated prospectively only to future tax years there was no substantial impairment. (*Maryland State*

---

[19] "Tax legislation is not a promise, and a taxpayer has no vested right in the [tax code]." (*United States v. Carlton* (1994) 512 U.S. 26, 33.) "[T]he government [has not] ever represented that future years would not bring changes in the tax laws. Such changes are as inevitable as taxation itself." (*Picchione v. Commissioner of Internal Revenue* (1st Cir. 1971) 440 F.2d 170, 173, citing *Welch v. Henry* (1938) 305 U.S. 134, 146.)

Teachers Assn., Inc. v. Hughes, supra, 598 F.Supp. at pp. 1360-1361 ["very important prerequisite to the applicability of the Contract Clause at all to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective effect"].) "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." (*City of El Paso v. Simmons* (1965) 379 U.S. 497, 515.)

B. AMENDED SECTION 25128 HAD A SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE.

The second prong asks whether "the state has a 'significant and legitimate public purpose behind the regulation' alleged to impair the contract, such as the 'remedying of a broad and general social or economic problem.'" (*Linton by Arnold v. Commissioner of Health & Env't* (1995) 65 F.3d 508, 517, citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at p. 411.) A satisfactory purpose includes "the use of reasonable means to safeguard the economic structure upon which the good of all depends." (*Amana Society v. Colony Inn, Inc.* (Iowa 1982) 315 NW2d 101, 112, emphasis in original, quoting *Home Building & Loan Association v. Blaisdell* (1934) 290 U.S. 398, 442.)

California sought here to readjust the in-state incidence of taxation between corporations to conform to the trend of states moving toward a more heavily weighted sales-factor component of their apportionment formulas,[20] and to promote both uniformity (one of the Compact's stated purposes) and in-state economic development. California also sought to treat taxpayers the same.

---

[20] See footnote 17, above.

This is not the type of case where courts have found an unconstitutional impairment of a contractual obligation. The state is not seeking "to repudiate debts it has incurred under a contract." (*Interstate Marina Development Co. v. County of L.A.* (1984) 155 Cal.App.3d 435, 448.) This case does not involve the borrowing of money, or the promising of vested pension benefits. It simply involves a prospective change in the incidence of taxation among the various businesses conducting operations in this state. The state's action is valid because it is attempting to "achieve the legitimate purpose of promoting the welfare of its people." (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, supra*, 86 Cal.App.4th at p. 564, quoting *Interstate Marina Development Co. v. County of Los Angeles* (1984) 155 Cal. App. 3d 435, 448.)

C. AMENDED SECTION 25128 WAS REASONABLE AND APPROPRIATE.

The third prong is whether, assuming a significant and legitimate public purpose, the "adjustment of rights and responsibilities [is] . . . reasonable [and] . . . appropriate[.]" (*Linton by Arnold v. Commissioner of Health & Env't, supra,* 65 F.3d at p. 517, citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra,* 459 U.S. at p. 411.)

In *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, the court upheld a state law allowing condominium owners associations to reduce the percentage of votes necessary to amend their declaration of covenants, conditions and restrictions because "the statutes have a significant and legitimate public purpose and act by appropriate means." (*Id.* at p. 585, quoting *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1055.) So does amended section 25128.

The purpose of amended section 25128 was to modify the in-state incidence of taxation, to move toward a more heavily weighted sales-factor formula, and to promote in-state economic development. Doing this by

amending section 25128 to modify the Compact's original equally weighted three-factor formula, in a fashion that did not generate more total tax revenues, or repudiate any debts, was reasonable and appropriate.

V. AMENDED SECTION 25128 DOES NOT VIOLATE THE REENACTMENT RULE.

Amended section 25128 requires that taxpayers must use the double-weighted sales apportionment formula, and thus it completely eliminates the option of electing the equally weighted three-factor formula pursuant to the Compact's election and apportionment provisions. The Court of Appeal held that because the Legislature did not "repeal, amend or reenact any part of the Compact at the time," amended section 25128 violated the "reenactment rule" because "neither the public nor the legislators had adequate notice that the intent of this amendment was to eviscerate former section 38006." (Slip opn. at p. 21.)[21]

The reenactment rule seeks to avoid "the enactment of statutes in terms so blind that legislators themselves [are] sometimes deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, failed to become appraised of the changes made in the laws." (*Hellman v. Shoulters* (1896) 114 Cal. 136, 152; citation and internal quotation marks omitted.) It is well settled, though, that that "the provision should be reasonably construed and limited in its application to the specific evil which it was designed to remedy. It is

---

[21] As set forth in the California Constitution, the reenactment rule provides:

> A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended.

(Cal. Const., art. IV, § 9.)

not to be technically measured, nor used as a weapon for striking down legislation which may not reasonably be said to have been enacted contrary to the specified method[.]" (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 256; citations omitted.)

While one of the purposes of the reenactment rule is to prevent the confusion that can result when statutes are amended indirectly, there was no confusion created by the amendment to section 25128. The legislative history establishes that both legislators and the public were aware that the 1993 amendment of section 25128 would require the mandatory use of the double-weighted sales factor for most business activity, and would eliminate the option of electing UDITPA's equally weighted three-factor apportionment formula. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1137 [the legislative history of a statute, including legislation and committee reports is the proper subject of judicial notice]; *Kaufman & Broad Communities, Inc. v. Performance Plastering* (2005) 133 Cal.App.4th 26, 39-40 [judicial notice taken of Enrolled Bill Reports].)

The Bill Analysis for amended section 25128 stated the "[t]he bill would have the effect of . . . increasing the tax on most businesses based in other states[.]" (See RJN-COA, Ex. 1.) "[S]ome taxpayers would experience a tax decrease while others would experience a tax increase" and there would be "winners and losers." (*Ibid.*) The Enrolled Bill Report for SB 1176 similarly noted that "[t]his bill increases taxes on corporations with a relatively small presence in California," and that "[f]or some out-of-state manufacturers, this measure would . . . rais[e] their taxes." (RJN-COA, Ex. 2.) This history shows that there was ample notice that amended section 25128 completely eliminated the option of electing the equally weighted three-factor formula. Had the election not been eliminated, the proposed amendment of section 25128 would not have increased anyone's taxes. (RJN-COA, Ex. 3.) This is also undoubtedly why many out-of-state

corporations, including appellant Proctor & Gamble, opposed the amendment. (RJN-COA, Ex. 3.)

Furthermore, as a practical matter, amending section 25128 without repealing or amending the Compact did not create confusion because a multistate taxpayer cannot in any event determine its tax liability by looking only at the Compact. For example, California's Corporation Tax Law is set forth in Part 11 of the Revenue and Taxation Code, whereas the Compact is set forth in Part 18. Yet Part 18 cannot stand alone because it is missing all the provisions relating to the determination of income, deductions, credits and tax rates. Thus, even if a taxpayer wanted to use the Compact's election and apportionment provisions, it still must use other laws to determine whether it would be advantageous to make the election. California's tax forms also provided notice since they clearly show that double-weighting the sales factor has been required since 1993. (RJN, Ex. D [Form 100 and Schedule R, and instructions thereto, for 1993].)

Moreover, the reenactment rule does not apply to statutes, like amended section 25128, which repeal or modify by implication only preexisting statutory provisions. (See *Brosnahan v. Brown, supra*, 32 Cal.3d at p. 256; *Hellman v. Shoulters, supra*, 114 Cal. at p. 153 [reenactment rule does not apply to statutes which amend others by implication as it would almost prohibit legislation].) The petitioners in *Brosnahan* claimed that Proposition 8 (the Victims' Bill of Rights), which affected ten sections of the Penal Code and the Welfare and Institutions Code, was void to the extent it amended or repealed by implication various statutory provisions that were not identified within the proposition itself. This Court disagreed, explaining: "'To say that every statute which thus affects the operation of another is therefore an amendment of it would introduce into law an element or uncertainty which no one can estimate. *It is impossible for the wisest legislator to know in advance how every statute*

proposed would affect the operation of existing laws.'" (*Brosnahan v. Brown, supra*, 32 Cal.3rd at p. 257 [emphasis in original], quoting *Hellman v. Shoulters, supra*, 114 Cal. at p. 152.)

The Court of Appeal's reliance on *American Lung Association v. Wilson* (1996) 51 Cal.App.4th 743 is misplaced. *American Lung* is an exception to the general rule—that reenactment does not apply to implied repeals or modifications—and applies only where "the new code section directly amends another existing statute, *and* the legislators and the public would not be reasonably notified of the direct change in the law unless the existing statute is reenacted." (*White v. State* (2001) 88 Cal.App.4th 298, 314-315.) It does not apply here, however, because there was ample and reasonable notice.

Amended section 25128 does not violate the reenactment rule because its "notwithstanding section 38006" language is an implied repeal of the Compact's election and apportionment provisions set out in former section 38006. Were the lower court's reasoning to prevail, hundreds of California statutes which contain the "notwithstanding" phrase would be called into question as purported violations of the reenactment rule.

CONCLUSION

The amendment of Revenue and Taxation Code section 25128 did not violate the Compact, or the impairment or reenactment provisions. The decision of the Court of Appeal must be vacated and the judgment of the trial court granting the Board's demurrer without leave to amend affirmed.

Dated: April 17, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Acting Solicitor General
KATHLEEN A. KENEALY
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
W. DEAN FREEMAN
Supervising Deputy Attorney General
LUCY F. WANG
Deputy Attorney General

W. DEAN FREEMAN
Supervising Deputy Attorney General
Attorneys for Defendant and Respondent Franchise Tax Board

SF2010900595
40686987.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent Opening Brief on Merits uses a 13 point Times New Roman font and contains 8,392 words.

Dated: April 17, 2013

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Acting Solicitor General
KATHLEEN A. KENEALY
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
W. DEAN FREEMAN
Supervising Deputy Attorney General
LUCY F. WANG
Deputy Attorney General

W. DEAN FREEMAN
Supervising Deputy Attorney General
Attorneys for Defendant and Respondent Franchise Tax Board

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: The Gillette Company & Subsidiaries v California Franchise Tax Board
Supreme Court Case No. S206587
Court of Appeal Case No.: A130803
San Francisco Superior Court Case No. CGC10495911

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 17, 2013, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Amy L. Silverstein, Esq.
Edwin P. Antolin, Esq.
Silverstein & Pomerantz LLP
55 Hawthorne Street, Suite 440
San Francisco CA 94105

Jeffrey B. Litwak
1608 NE Knott Street
Portland OR 97212

Clerk of the Court
Court of Appeal
First Appellate District
350 McAllister Street
San Francisco CA 94102

Cory Fong, Tax Commissioner
Office of State Tax Commissioner
State of North Dakota
600 E. Boulevard Avenue, Department 127
Bismarck ND 58505-0599

Clerk of the Court
San Francisco Superior Court
400 McAllister Street
San Francisco CA 94102

Lawrence G. Wasden
Attorney General, State of Idaho
State of Idaho Office of the Attorney General
P.O. Box 83720
Boise ID 83720-0010

Ellen F. Rosenblum
Attorney General, State of Oregon
Department of Justice
Justice Building
1162 Court Street NE
Salem OR 97301-4096

R. Bruce Johnson
Commission Chair
Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

I declare under penalty of perjury under the laws of the State of California the foregoing is true

and correct and that this declaration was executed on April 17, 2013, at San Francisco, California.

Joan Randolph
Declarant


Signature

SF2010900595
40687723.doc