IN THE SUPREME COURT OF THE STATE OF OREGON

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| HEALTH NET, INC. and SUBSIDIARIES,<br>Plaintiffs-Appellants,<br>v.<br>DEPARTMENT OF REVENUE, State of Oregon,<br>Defendant-Respondents. | ) | Tax Court (Regular Division)<br>Case No. TC 5127<br><br>S063625 |

**BRIEF OF *AMICUS CURIAE***
**COUNCIL ON STATE TAXATION (COST)**
**IN SUPPORT OF PLAINTIFFS HEALTH NET, INC. AND SUBSIDIARIES**

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt, Judge

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## I. INTEREST OF *AMICUS CURIAE* AND ASSISTANCE PROVIDED BY *AMICUS* BRIEF

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. with an office in Portland, Oregon. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST's interest in this proceeding is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission COST has steadfastly pursued since its inception.

Today COST has an independent membership of almost 600 multistate corporations engaged in interstate and international commerce, many of which do business in Oregon. COST members represent the part of the nation's business sector that is most directly affected by state taxation of interstate and international business operations. COST members employ a substantial number of Oregon citizens and conduct substantial business in Oregon. Thus, COST is vitally interested in cases such as this one that involve the ability of multijurisdictional taxpayers to use the uniform and certain apportionment formula embodied in the Multistate Tax Compact ("Compact").[1] This allows such taxpayers to fairly

[1] The apportionment formula prescribed by the Compact is at *former* ORS 305.655, *repealed by* Or Laws 2013 ch 407 § 4.

apportion their income to the Compact member states and ease the burden of multistate tax compliance.

COST's existence and history has been closely intertwined with the Compact, which was created two years prior to COST in 1967. Consistent with that fact, COST has participated in filing *amicus curiae* briefs in litigation in other states related to the issue here, namely whether Compact member states' taxpayers may use the Compact's equally weighted three-factor apportionment election. *See Gillette Co. v. Franchise Tax Bd.*, 363 P3d 94 (Cal 2015); *Graphic Packaging Corp. v. Hegar*, 471 SW3d 138 (Tex App 2015); *Int'l Bus. Mach. Corp. v. Dep't of Treasury*, 852 NW2d 865 (Mich 2014); *Kimberly-Clark Corp. & Subs. v. Comm'r of Revenue*, No. 8670-R, 2015 WL 3843986 (Minn Tax June 19, 2015).[2]

Through its connection to the Compact and distinctive status representing large multijurisdictional taxpayers, COST hopes to provide this Court with a unique *amicus* perspective and historical background demonstrating that the Compact was created as a binding interstate agreement to avoid federal preemption of state taxation.

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[2] COST *amicus curiae* briefs are available online at: http://www.cost.org/StateTaxLibrary.aspx?id=3386.

## II. INTRODUCTION

On the surface, this case might be viewed as a dispute over corporate income tax law. The central question, however, involves the construction of the Compact entered into among several states, including Oregon. This particular interstate compact made it possible for the states to stave off congressional intervention in the state corporate income tax arena. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 US 452, 455-56, 98 S Ct 799, 54 L Ed 2d 682 (1978).[3] The Compact is therefore not merely an advisory "uniform act" as the Tax Court indicated, but, rather, a binding interstate compact among the member states to cede a modest amount of sovereignty over the corporate apportionment formula in order to avoid federal preemption of state taxation.

The events leading to the Compact began in 1959, when the U.S. Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota*, 358 US 450, 79 S Ct 357, 3 L Ed 2d 421 (1959). In that opinion, the Supreme Court broadened the states' ability to impose their business activity taxes, such as Oregon's corporate income tax, on multijurisdictional businesses. *See also U.S. Steel*, 434 US at 455. This alarmed the multijurisdictional business community.

[3] "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 from encroachments of certain federal legislation introduced in congress during the past three years." Multistate Tax Comm'n, First Annual Report 1 (1968).

They were deeply concerned about the prospect of each state imposing its own formula for the apportionment of business activities, which would increase the likelihood of double taxation and create significant compliance burdens. Congress also became concerned and was poised to step in with legislation that would impose a single mandatory apportionment formula to which all states would be bound. The proposed legislation was particularly unfavorable to "market states" (*i.e.*, states that tended to be destinations for sales) as opposed to industrial states (*i.e.*, states with large manufacturing sectors).

Rather than face the straight-jacket of Congress imposing uniform rules for apportionment, a number of states banded together to address this concern. Through the auspices of the Council of State Governments an interstate compact, the Multistate Tax Compact (ORS 305.653, *et seq*.), was drafted. Oregon "enacted into law and entered into" the Compact in 1967. Or Laws 1967, ch 242, § 1.

The central issue in this case is an election the Compact provides to multijurisdictional taxpayers to use either a member state's unique apportionment formula or the Compact's uniform apportionment formula. When the Compact went into effect, it was intended to be a binding interstate compact, which is an agreement among states to do or not do something according to its express terms.

Addressing what constitutes an interstate compact, the U.S. Supreme Court stated the following:

> "If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous * * *."

*Green v. Biddle*, 21 US (8 Wheat) 1, 92, 5 L Ed 547 (1823).

In the present case, the Compact represents a minimalist approach to corporate tax uniformity with the member states ceding only as much of their sovereignty as necessary to keep Congressional critics from interfering with state taxation.[4] Through the Compact, the states did not limit their authority to set or alter the *rate* or *base* of their corporate income tax or their ability to establish *credits* that might be used to offset tax liability. The states did not even agree to refrain from enacting their own apportionment regimes. Compact member states did agree, however, to give taxpayer*s* the *option* to choose what was then regarded as the gold standard for fair, reasonable, uniform apportionment: the Uniform Division of Income for Tax Purposes Act ("UDITPA") three-factor apportionment

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[4] Overreaching state tax regimes shifting the tax burden to out-of-state companies was the chief concern of Congress's "Willis Committee" in the aftermath of *Northwestern States Portland Cement*. Special Subcomm on State Taxation of Interstate Commerce of the House Comm on the Judiciary, "State Taxation of Interstate Commerce," HR Rep No. 1480, 88th Cong, 2d Sess 426-27 (1964) (the "Willis Committee Report"), vol 1, at 8.

formula.[5] This election (Compact, Art III) is the uniformity "glue" that makes the Compact meaningful as an interstate agreement.

Consistent with its binding nature, the Compact only allows member states to withdraw prospectively by affirmatively "enacting a statute repealing the same." Compact, Art X. The withdrawal provision did not, as the Tax Court contends, create a basis for an "illusory promise" that undermined the binding nature of the entire Compact. Rather, it reflected the particular needs of the states with respect to their taxing power, ceding some authority to protect their overall sovereignty. A state can withdraw from the Compact, but not in piecemeal fashion, and only with the enactment of a statute that completely pulls the state out of the agreement.

Several states have ultimately withdrawn from the Compact. See Michigan (2014 Mich Pub Acts 282), California (2012 Cal Stat ch 37, § 3), Nevada (1981 Nev Stat ch 181 at 350), Maine (2005 Me Legis Serv ch 332, § 29 (West)), Minnesota (HF 677, 2013 Leg 88th Sess (Minn 2013)), Nebraska (1985 Neb Laws L B 344, § 9), South Dakota (SB 239, 2013 Leg Assemb 88th Sess (SD 2013)), and West Virginia (1985 W Va Acts ch 160).[6] If the Compact was not binding and

[5] UDITPA is a model law developed in the late 1950s to address apportionment of business income among the states.

[6] Other states have followed Oregon's approach, withdrawing from the Compact by repealing it and subsequently enacting a new compact without the UDITPA or the taxpayer election provisions of Article III. *See* Or Laws 2013, ch 407, § 4, eff Oct. 7, 2013 (SB 307(2013)); Utah Laws 2013, ch 462, § 4, eff June 30, 2013 (SB 247); District of Columbia (DC Law 20-61, § 7342(a), (b), 60 DCR 12472).

merely advisory as the Tax Court asserted, then it would not have been necessary for those states to withdraw in accordance with the terms of the Compact.

The Tax Court erroneously held that the Compact was not a binding contract pursuant to Oregon and federal law.[7] However, the Tax Court's analysis of whether the Compact meets the key elements of a contract was unduly focused on a formalistic discussion of contract law. The Tax Court glossed over the history and purpose of the Compact to forestall Congressional intervention, a critical aspect to determine the parties' intent and whether there was a meeting of the minds at the time the Compact was enacted. The Tax Court also ignored the clear evidence that the drafters and the states were well aware of how interstate compacts worked to bind states to a common objective, having previously entered into such compacts, and specifically chose the compact mechanism to make the UDITPA election mandatory and binding on the member states.

A review of the history and purpose of the Compact reinforces that it satisfies all of the key elements of a contract and, therefore, is a binding interstate compact. Because Oregon was bound by the Compact during the years at issue,

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[7] COST, as *amicus curiae*, will not address the specific Oregon state tax issue presented here (*i.e.*, whether ORS 314.606 disabled the Compact); rather, COST will focus on the history and purpose of the Compact, which was disregarded by the Tax Court and illustrates that the Compact was intended to be binding.

Plaintiff-Appellant is entitled to make the three-factor election provided for in Article III of the Compact. This Court should reverse the Tax Court's decision.

## III. STATEMENT OF THE CASE

COST adopts the Statement of the Case as set forth by Plaintiff-Appellant in its Opening Brief and Except of Record of Plaintiffs-Appellants Health Net Inc., and Subsidiaries (hereinafter referred to as "Plaintiff-Appellant's Brief"). Plaintiff-Appellant's Brief at 1-19.

## IV. ASSIGNMENT OF ERROR

The Tax Court erred in denying plaintiffs' motion for summary judgment, granting defendant's cross-motion for summary judgment and entering judgment sustaining the denial of plaintiffs' claims for refund.

### A. Preservation of Error and Standard of Review.

COST adopts the Preservation of Error and Standard of Review as set forth by Plaintiff-Appellant in its Plaintiff-Appellant's Brief. *Id*. at 19-20.

## V. ARGUMENT ON ASSIGNMENT OF ERROR

### A. The History and Nature of the Compact Reveal It Is Binding and Supersedes Conflicting State Laws.

The Tax Court erroneously determined that the Compact is not binding. *Health Net, Inc. & Subsidiaries v. Dep't of Rev.*, TC 5127 (Or Tax Reg Div Sept. 9, 2015). In reaching this decision, the Tax Court focused on the Compact's

withdrawal provision, mistakenly concluding that the Compact constituted an illusory promise between the states. Slip op at 21-23. As a result, the Tax Court found that there was nothing in the Compact that precluded the Oregon Legislature from simply amending the Compact without violating the impairment of contract provisions in the federal and Oregon constitutions. In support of this view, the Tax Court focused on the conduct of other member states as well as the Oregon Legislature after the Compact was adopted.[8] *Id*. at 7-12, 24-27.

The Tax Court's decision missed the mark. More specifically, the Tax Court's analysis failed to consider the facts and circumstances surrounding the Compact's enactment, which are the key to understanding whether a "meeting of the minds" took place between the member states. Instead of considering the purpose and history of the Compact and the states' actions to provide multijurisdictional taxpayers the option to use a uniform apportionment formula and forestall Congressional intervention, the Tax Court pointed to subsequent actions by Oregon and other states as evidence that the Compact was not binding. The history and purpose of the Compact show that member states meant to be

[8] The Tax Court's analysis of the Oregon Legislature's actions following the implementation of the Compact relate to the Legislature's adoption of ORS 314.606. Although this is a matter of state law that *amicus* will not specifically address, it is COST's position that the Compact election was binding and could not be superseded until Oregon withdrew in accordance with the Compact's withdrawal provision. Because Oregon did not withdrawal from the Compact until 2013, for the years at issue, the taxpayer was entitled to make the election.

bound by the Compact when it was enacted.

The Tax Court also erred by holding that the ability of member states to unilaterally withdraw from the Compact somehow renders it illusory. Under the terms of the withdrawal provision, a state could withdraw from the Compact, but not in a piecemeal fashion. It has to be done with an overt public enactment of a statute that pulls the state completely out of the Compact. This was not an "illusory promise" as the Tax Court concluded, but a realistic balancing in light of the competing pulls on the member states between avoiding federal preemption and maintaining their taxing sovereignty.

All of these points are explained more fully below.

**1. The History of the Compact**

With the rapid growth of interstate and international commerce, states and multistate taxpayers were faced with a difficult problem in the 1950s: how to devise an equitable and constitutional method for taxing corporations doing business in multiple states and countries. It was understood that there was a need for uniformity among the states to avoid double taxation, but the states did little to achieve such uniformity. As one commentator noted: "Before 1957, the need for uniformity in state income taxation of multistate businesses was something like the weather—everybody talked about it, but nobody did anything about it. Then in

that year, the [UDITPA] was born." John S. Warren, *UDITPA—A Historical Perspective*, 38 State Tax Notes 133, 133 (2005).

Fortunately, in 1957, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[9] took steps to address this issue by adopting a model law, UDIPTA. UDITPA had two main objectives: "(1) to promote uniformity in allocation practices among the * * * states which impose taxes on or measured by the income of corporations, and (2) to relieve the pressure for congressional legislation in this field." Frank M. Keesling & John S. Warren, *California's Uniform Division of Income for Tax Purposes Act, Part 1*, 15 UCLA L Rev 156, 156 (1967).

UDITPA provided the "gold standard" of apportionment formulas: the three-factor formula that uses equally weighted property, payroll, and sales factors (33.3 percent each). The policy rationale behind the UDITPA apportionment formula is that equitable division of multistate business activity among states should be based on the three factors of production: property representing capital, payroll representing labor, and sales representing the market. The states, however, were slow to enact corporate income tax statutes based on the UDITPA model

[9] NCCUSL is now known as the Uniform Law Commission.

statute. Those states that enacted UDITPA did so with substantial variations of the uniform terms.[10]

In 1959, the U.S. Supreme Court gave states unprecedented latitude to tax the income of out-of-state corporations with a limited presence in the state. In *Northwestern States Portland Cement*, 358 US 450, the Court held that the in-state solicitation by an out-of-state corporation was sufficient to create nexus for the purpose of imposing a state income tax. *Id*. at 464. The business community was alarmed by the Court's decision in *Northwestern States Portland Cement*. As one commentator noted:

> "There were predictions of the most dire consequences to business and, indeed, the entire nation. Two Senate Committees promptly held hearings, and there was vociferous demand for immediate congressional action. Congress reacted with astonishing speed and, for the first time in its history, adopted an act restricting the states' power to tax interstate businesses."

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 6.17 (3d ed 2013 & Supp 2015) (citations omitted).

Businesses quickly realized that if states exercised the authority of *Northwestern States Portland Cement*, they could face double taxation and

[10] While the states touted the uniformity provided by UDITPA, they were nevertheless free to enact whatever parts they thought beneficial or change them entirely. UDITPA, therefore, was "uniform in name only." *See* John Dane, Jr., *A Solution to the Problem of State Taxation of Interstate Commerce*, 12 Vill L Rev 507, 510 (1967).

compliance burdens would increase. It was these concerns that led Congress to pass Public Law No. 86-272 within just six months of the Court's decision. Public Law No. 86-272 limits the states' ability to impose net income taxes on businesses that have no presence in a state other than to merely solicit sales of tangible personal property in a state. Interstate Income Act, Pub L No. 86-272, 73 Stat 555 (1959) (codified at 15 U.S.C. §§ 381-391).

The reach of Public Law 86-272 is, however, limited. Although it addressed when a state may impose an income tax for sellers of tangible personal property, it did not help businesses providing services or address how the income of a multistate business should be divided (apportioned) among the states. Thus, the business community continued to be concerned about the holding in *Northwestern States Portland Cement* and the possible double taxation of multijurisdictional businesses' income.

During this same period, the states continued to fear further Congressional intervention to address corporate apportionment rules. Their fears were realized when Congress formed the Willis Committee with the mandate to study state taxation of interstate commerce and make recommendations to *promote uniformity*. One of the Willis Committee's conclusions was that the existing system used by states to tax the income of interstate businesses created substantial inequities for

those businesses. HR Rep No. 88-1480, at 1135 (1964). To solve this problem, the Willis Committee issued a report in 1965 calling for sweeping federal legislation that would have severely limited state authority to tax interstate business operations and imposed a series of mandates, including a uniform apportionment regime on the states. *See id.*; *see also* Richard D. Pomp, *State and Local Taxation* 11-14 (7th ed 2011). The Willis Committee's recommendations were incorporated into House Report 11798, entitled the Interstate Taxation Act, which was introduced in October 1965. HR 11798, 89th Cong (1st Sess 1965).[11]

The Willis Committee's findings and threat of federal legislation prodded the states into action.

> "[A]fter examining the bill's provisions, state tax administrators had real cause for alarm. An immediate reaction was the calling of an unprecedented special meeting of the National Association of Tax Administrators for January 13 and 14, 1966, in Chicago. As stated by Mr. Bernard F. Nossel, then Secretary of NATA, [']The task faced by the state representatives on January 13th was not merely to express opposition to H.R. 11798, but to oppose it in a constructive manner and to suggest workable alternatives which would eliminate the need for the kind of congressional action embodied in this bill.['] It was at this meeting that the idea of *multistate tax compact* was envisioned."

Multistate Tax Comm'n, First Annual Report 1 (1968) (emphasis added).[12] Soon

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[11] The bill utilized a uniform *two* factor formula (property and payroll) for the apportionment of income, leaving out the sales factor included in the UDITPA and most existing state apportionment formulas.

[12] Available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY67-68.pdf.

after the Willis Committee made its recommendations, the Council of State Governments began drafting an interstate compact—the Multistate Tax Compact. Council of State Governments, *The Multistate Tax Compact, Summary and Analysis* (Jan. 20, 1967).[13] The purpose of the Compact was to provide multijurisdictional taxpayers uniformity in member states (*i.e.*, the ability to use a uniform apportionment formula) and to stave off federal legislation. *See id.*; *Gillette Co. v. Franchise Tax Bd.*, 147 Cal Rptr 3d 603 (App 2012), *reversed in* 363 P3d 94 (Cal 2015).

In 1966, the Compact was finalized, and, beginning in January 1967, it was presented to state legislatures. The Compact became effective under its terms, on August 4, 1967, when it was enacted into law by seven states.[14] *See former* ORS 305.655 (1967) ("This compact shall enter into force when enacted into law by any seven states."). "The Compact [was] the state's answer to Federal control of state taxing policies and programs." Multistate Tax Comm'n, *1968 Brochure on the Multistate Tax Compact*, *reprinted in* 66 State Tax Notes 600, 600 (2012).

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[13] Available at https://www.pwc.com/us/en/state-local-tax/multistate-tax-compact/pdfs/csg_1967_mtc_summary_and_analysis.pdf.

[14] Oregon was one of the seven original party states to adopt the Compact. *Former* ORS 314.655 (1967).

### 2. The Apportionment Formula Election Is the Compact's Uniformity Glue

The Compact was enacted largely in reaction the Willis Committee's major criticisms of state tax regimes lacking a uniform apportionment formula.[15] Multistate Tax Comm'n, Third Annual Report 2 (1970). And, the Commission, in its own words, illustrated its intent that the UDITPA three-factor apportionment formula was, in fact, the uniformity glue underlying the Compact:

> "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.*"

*Id.* at 3 (emphases added).

Against this historical backdrop, it is clear that a binding Compact providing taxpayers with the election to utilize the three-factor UDITPA apportionment

[15] Lack of uniformity among the business income tax statutes of the various states was the basis of a major business complaint to Congress. The enactment of the Multistate Tax Compact has substantially increased that uniformity in that bodily incorporated into the Compact is the Uniform Division of Income for Tax Purposes Act (UDITPA). Hellerstein, *supra*, ¶ 9.05 n 93 (3d ed & Supp 2014).

formula was the minimum threshold by which the states avoided federal preemption over state apportionment rules. By entering into the Compact and modestly limiting their freedom of action, the states avoided the much more onerous and inflexible outcome of a Congressionally mandated apportionment formula for all states and all taxpayers.

At the same time, the Compact did not entirely strip the states of the ability to enact their own apportionment formulas, so long as they were optional and not mandatory. Consistent with this fact, in 1989 Oregon amended its version of UDITPA but not the Compact, providing an apportionment formula giving more weight to the "sales factor" than in the traditional three-factor formula.

### 3. The Compact Was Binding When Enacted

#### a. Compacts Are Binding by Nature

States enter into interstate compacts to address shared interests or problems among the states. The unique characteristic of interstate compacts is that they contractually tie participating states to one another and impose collective governing requirements. They are at once contracts *and* binding reciprocal state statutes among the parties to the agreement:

> "When adopted by a state, a compact is not only an agreement between that state and the other states that have adopted it, but becomes the law of those states as well, and must be interpreted as both contracts between states and statutes within those states."

Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 32:5 (7th ed 2007); *see also Texas v. New Mexico*, 482 US 124, 128, 107 S Ct 2279, 96 L Ed 2d 105 (1987) ("There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact."); *Doe v. Ward*, 124 F Supp 2d 900, 914-15 (WD Pa 2000) ("[I]nterstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes. . . . Having entered into a contract, a participant state may not unilaterally change its terms." (ellipsis in original; internal quotation marks and citation omitted).

The reason interstate compacts are binding on party states is because each state cedes a portion of their sovereignty when they agree to enter the compact.

> "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 & Assocs., Inc. v. Wash. Metro. Area Transit Auth.*, 414 F Supp 408,

409 (D Md 1976).[16]

Because a compact has this dual character—state statutes and reciprocal agreements with other states—a compact "is superior to both prior and subsequent law." *Id.*; *see also Alcorn v. Wolfe*, 827 F Supp 47, 52-53 (DDC 1993) ("[T]he terms of the * * * compact cannot be modified unilaterally by state legislation to take precedence over conflicting state law."); *McComb v. Wambaugh*, 934 F2d 474, 479 (3d Cir 1991) ("A Compact also takes precedence over statutory law in member states."); Ward, *supra*, at 914-15 ("[I]nterstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes." (internal quotation marks and citation omitted)). In other words, the decision of the Oregon Legislature to enter into the Compact effectively prohibited the Legislature from enacting laws that unilaterally impair or alter the Compact's obligations piecemeal. *Hellmuth*, 414 F Supp at 409.

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[16] The U.S. Supreme Court has long maintained that not every agreement among the states requires congressional consent to qualify as a binding interstate compact. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 US 452, 468-72, 98 S Ct 799, 54 L Ed 2d 682 (1978). Even without congressional consent, "[h]aving entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states." *McComb*, 934 F2d at 479; *see also Virginia v. Tennessee*, 148 US 503, 519, 13 S Ct 728, 37 L Ed 537 (1893).

### b. The History of the Compact Shows the Parties Intended to Be Bound

*Amicus* does not dispute that the Tax Court was required to consider whether the Compact was a contract. The Tax Court's approach, however, disregarded the history and purpose of the Compact. In focusing on the form of the Compact rather than its historical purpose of forestalling Congressional action, the Tax Court missed the forest for the trees. The Tax Court attempted to re-write history by disregarding the importance of a binding agreement between the states to prevent Congressional action and federal preemption.

The states' choice of an interstate compact as the means for implementing the election to choose uniform apportionment rules is also strong evidence of the intent of the parties to make the contract binding. Oregon and the other states had previously entered into other interstate compacts and were very familiar with the use of this mechanism not as an "advisory" agreement but as one that bound the states together for a common goal. The historical evidence indicates that the drafters and the states were familiar with how interstate compacts worked, called the document a compact, used the form of a compact, and fully intended this Compact to work in the same way as other compacts in binding the member states. (*Compact Summary and Analysis, supra.*)

The contemporaneous analysis of the Compact by the Council of State Governments (the organization responsible for its drafting) makes clear the Compact's election was intended to be vested in taxpayers and *required* to be provided by the member states:

> "The compact would permit any multistate taxpayer, at his option, to employ the Uniform Act for allocations and apportionments involving party States or their subdivisions. Each party State could retain its existing division of income provisions *but it would be required to make the Uniform Act available to any taxpayer wishing to use it.* Consequently, any taxpayer could obtain the benefits of multi-jurisdictional uniformity whenever he might want it."

Council of State Governments, *The Multistate Tax Compact, Summary and Analysis* at 1 (emphasis added).[17] This in conjunction with the Compact's history and purpose show adopting states intended the Compact to be binding upon enactment.

As discussed at length above, the purpose of the Compact was to prevent Congress from passing a federal law that would have imposed a uniform apportionment formula. Had Congress acted, the states would have been required to follow that formula, completely eliminating their sovereignty on a key element of corporate income taxation—how to divide (*i.e.*, apportion) corporate business income among the states. As the history indicates, the states were almost

[17] Available at https://www.pwc.com/us/en/state-local-tax/multistate-tax-compact/pdfs/csg_1967_mtc_summary_and_analysis.pdf.

apoplectic regarding the threat of Congressional intervention in state tax policy. To forestall such an outcome, the states knew that they had to do more than create another advisory model law, which would do nothing to stop Congress from passing new legislation. Indeed, UDITPA had already been passed by several states but had not obtained sufficient enough support to prevent federal preemption. Faced with the prospect of a federal law that would strip away their sovereignty over corporate income tax apportionment rules, the states understood they needed to do more.

This is the historical backdrop that the Tax Court completely disregarded. Nowhere in its recitation of the facts did the Tax Court acknowledge the circumstances surrounding the enactment of the Compact by this state or any other state, which is crucial to determining the intent of the parties. And, in the remainder of its opinion, the Tax Court also failed to give any consideration to the grave threat to their sovereignty that the states faced during the time when the Compact was being enacted by Oregon and other member states. The historical record is compelling and provides ample evidence of the parties' intent to be bound by the Compact.

The contemporary, extrinsic evidence also supports a finding that the Compact was binding when enacted. California's entry into the Compact is

instructive in this respect since it is clear California was entering into a binding compact, not merely enacting a uniform law. Because California had already enacted the UDITPA as a model law, enacting the Compact's virtually identical UDITPA language as an advisory compact containing model laws would have been a superfluous legislative act. *See Hoechst Celanese Corp. v. Franchise Tax Bd.*, 22 P3d 324, 331 (Cal 2001) ("California's [UDITPA] mirrors the UDITPA.").

Oregon, like California, had already enacted UDITPA prior to adopting the Compact. According to the Tax Court, the Oregon Legislature's reference to UDITPA during the enactment of the Compact was an "indication" that the Legislature "likely thought it had enacted a uniform law." *Health Net*, slip op at 23. Specifically, the Tax Court states that "[t]he legislative history shows that the Oregon Legislature in adopting the Compact likely thought it was adopting UDITPA in another form." *Id.* The Tax Court went on to cite the following legislative history:

> "In the 'Tax Commissioner's Explanation,' contained within the legislative history to the original enactment of the Compact, there is a statement that the Compact 'allows taxpayers the choice of apportionment on the basis of the particular apportionment tax policies already adopted by a state, or on the basis of [UDITPA] (adopted by Oregon in 1965 as part of this program), which is made part of the [C]ompact.'"

*Id.* (second bracket in original) (citing Testimony, Joint Ways and Means Committee, HB 1124, Mar. 10, 1967, Ex. 4). The Tax Court concluded the

legislature believed the Compact to be "as malleable as UDITPA" and that the Compact was not binding. *Id.*

Yet this reasoning is nonsensical on its face. As in *Hoechst*, the Oregon Legislature would have had no reason to adopt the Compact if it were merely another model law *since it had already adopted UDITPA*. Considering that the Legislature's action would have been superfluous if the Compact was only meant to be another form of UDITPA, the Tax Court's determination regarding the legislative history should be disregarded.

#### c. The Compact's Withdrawal Provision Did Not Render It Illusory

The Tax Court also mistakenly concluded that the withdrawal provision rendered the Compact illusory, noting that "[a] 'provision giving [a] party unlimited discretion to relieve itself of an obligation under a contract renders that contract illusory.'" *Health Net*, slip op at 18 (original brackets and citation omitted). This may be true for certain types of contracts; however, this interstate compact deals with a state's right to tax. As the Tax Court points out, the Oregon Legislature may bargain away its power to tax and spend. *Id.* at 15. A state's sovereign right to tax, however, is fundamental to a state's independence and autonomy—a right that states are reluctant to completely assign away. Thus, the

drafters knew that states would not enact the Compact if a state were not able to exit it.

It is also important to note that the withdrawal provision does not give a state unbridled discretion to get out of the Compact. Rather, if a state determines withdrawal is in its best interest, it may do so by the same means used to adopt the Compact (*i.e.*, through the legislative process). This requires legislative action, which is not an insignificant process and requires an overt public repeal of the statute. Further, to withdraw, a state cannot simply do it piecemeal; it is an all or nothing endeavor.

Considering the reasons for the withdrawal provision in conjunction with the requirement for a state to seek legislative approval to withdrawal pursuant to the terms of the Compact, it becomes clear that upon entering the Compact states like Oregon gave up a piece of their taxing sovereignty (more than a mere peppercorn). Thus, a state enacting the Compact did bind itself, with the promise of the election, to other Compact member states. And, although it has the option to withdraw, until it does so in accordance with the terms of the Compact, it is bound to the Compact, which includes the election.[18]

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[18] The Tax Court's determination that the Legislature implicitly repealed the election when it enacted ORS 314.606 was also erroneous. Because the election was binding when it was enacted and member states agreed to be bound until they

This conclusion is bolstered by the fact that in 2013, Oregon did properly withdraw from the Compact in accordance with the withdrawal provision in Article X, section 2 of the Compact. If the Compact were not binding as the Tax Court suggests, there would have been no reason for the Legislature to undertake such action. For the years prior to such withdrawal, however, the Compact was still in effect. Because the Compact was binding when enacted and Oregon had not yet withdrawn from the Compact, Plaintiff-Appellant is entitled to make the election pursuant to the Compact.

## VI. CONCLUSION

The Compact is a binding interstate compact and reflects the terms of an agreement among the states party to it, the terms of which take precedence over even conflicting subsequently enacted state statutes. Indeed, to function as it was intended—to forestall Congressional action to limit state tax authority and to effectuate what the previously adopted uniformity provisions of UDITPA did not—the Compact must be viewed as binding as to the states that enacted it. As a Compact member, the State of Oregon may not unilaterally nullify, revoke, or

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withdrew in accordance with the election, Oregon's implementation of ORS 314.606 had no impact on the Compact or the election it provides. Until Oregon completely withdrew in accordance with the Compact's withdrawal provision, it was bound by its terms and was not able to repeal a piece of the Compact through the passage of another statute.

amend the provisions of the Compact. Absent Oregon's withdrawal from the Compact, it must adhere to its terms, including providing the taxpayer in this case the election afforded it under Article III.

For these reasons, *amicus* respectfully submits that the decision of the Tax Court be reversed.

Dated: March 29, 2016

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## CERTIFICATE OF COMPLIANCE WITH ORAP 9.10(3) AND ORAP 5.05(4)(f)

I certify that this brief complies with the word count limitation in ORAP 5.05(2)(b), with a count of 7,385 words.

I certify that the font size in this brief is Times New Roman 14-point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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## CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief Of Amicus Curiae Council On State Taxation (Cost) In Support Of Plaintiffs Health Net, Inc. And Subsidiaries on March 29, 2016, with Rebecca Osborne, Appellate Court Administrator, using the Appellate Court Electronic Filing System.

I hereby certify that I served the foregoing Brief Of Amicus Curiae Council On State Taxation (Cost) In Support Of Plaintiffs Health Net, Inc. And Subsidiaries on the following named person(s) on the date indicated below by notice of electronic filing using CM/ECF system with a copy served via email:

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