IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN RESPONSE TO CASE MANAGEMENT ORDER NO. 3 AS TO THE SCOPE OF THE COMPLAINT

In response to Case Management Order No. 3, entered March 19, 2008, South Carolina respectfully submits this reply brief as to the scope of its Complaint.

Introduction and Summary

South Carolina's Complaint and the supporting papers it filed with this Court seeking leave to file its Complaint all forthrightly sought an "equitable apportionment" of the Catawba River. This Court's cases set forth the standards that apply in considering claims for such an apportionment — the harms to the downstream State seeking the apportionment as well as the factors the Court must weigh in determining each State's fair share of the scarce waters of a disputed river.

North Carolina seeks to limit in an impermissible and ungrounded manner the nature of this case before it has begun. Its position, however, rests on flawed

premises: on a mistaken view of the proper legal standard to apply in construing South Carolina's Complaint; on an erroneous reading of the Complaint itself; and on a flawed perception of how the problems caused by its overly permissive interbasin transfer ("IBT") statute should be analyzed and redressed.

North Carolina begins with the incorrect legal premise that, because the Supreme Court has noted that ordinary "solicitude for liberal *amendment* of pleadings . . . does not suit cases within [its] original jurisdiction," *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (emphasis added), "[p]rinciples of notice pleading are not applicable." N.C. Brief in Response to Case Management Order No. 3 Regarding Scope of Pleadings 2 ("NC Br."). The Court's Rules and recent cases under the Federal Rules of Civil Procedure reject that premise. Supreme Court Rule 17.2 provides that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed," and it is Federal Rule 8, which sets out the notice pleading regime, that "prescribe[s]" the "form of pleadings." Moreover, principles of notice pleading concern (among other related concepts) liberal *construction* of pleadings, not amendment, *see* Fed. R. Civ. P. 8(a), (e), and require that, where "a claim has been stated adequately," as the Supreme Court has already determined here, "it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007). South Carolina is thus entitled to bring forward any set of facts that tend to show it has been harmed by (and is entitled to relief from) North Carolina's overconsumption of the Catawba River.

From its erroneous starting premise, North Carolina moves on to three erroneous conclusions, all to the effect that South Carolina should be limited to proving only those specific factual allegations that are the "focus" of its Complaint, NC Br. 5, 7, and that all other allegations and areas of inquiry consistent with those allegations (outside what North Carolina wants the "focus" to be) should be excised from this litigation even before discovery begins. That is not the law — indeed, the suggestion is fundamentally inconsistent with notice pleading. Nor is that position consistent with the Supreme Court's appointment of a Special Master, for "in original actions, [the Court] passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950). Thus, consistent with "the Court's pronouncements," the Special Master should (as prior Masters have done) "[take] a generous view of the admission of evidence and factual development" and "favor[] a principle of inclusion over exclusion in creating a record." Report by Special Master Paul R. Verkuil, *New Jersey v. New York*, No. 120, Orig. (U.S. filed Mar. 31, 1997), 1997 WL 291594, at *15.

Argument

The Notice Pleading Standard Governs And Requires That North Carolina's Arguments Be Rejected

North Carolina's attempt to create a heightened pleading standard (akin to Federal Rule 9(b)) for this original action finds no support in the precedents North Carolina cites (or any other precedent of which South Carolina is aware). As South Carolina noted in its opening brief (at 12-13), both *Nebraska v. Wyoming*, 515 U.S. 1 (1995), and *Ohio v. Kentucky*, 410 U.S. 641 (1973), involved the parties' attempts to inject wholly new legal claims into a pending original action. In that circumstance, and with reference to the requirement in Supreme Court Rule 17.3 that an "initial pleading shall be preceded by a motion for leave to file," the Court has shown understandable concern that new claims for relief should be sufficiently related to the initial claim, and should be of sufficient seriousness, to warrant the exercise of its original jurisdiction. *See Ohio v. Kentucky*, 410 U.S. at 644 (noting that, "[u]nder our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage").

No such concern could obtain here, where the issues North Carolina raises concern only what *factual support* may be offered to prove South Carolina's *existing claim for relief*, namely, for an equitable apportionment of the Catawba River — the very claim the Court has already validated as justifying the Complaint South

Carolina sought leave to file.[1] Contrary to North Carolina's unexplained assertion, the Court's previous cases denying leave to add new legal claims (where the Court could determine preliminarily that the claims were without merit) has no logical relationship with how pleadings should be construed or the level of detail with which pleadings should be crafted in the first place. The cases North Carolina cites at most stand for the proposition that original actions "are *not invariably* governed . . . by current rules of civil procedure." *Ohio v. Kentucky*, 410 U.S. at 644 (emphasis added). But they do not in any way suggest the contrary of what Supreme Court Rule 17.2 states rather directly: that Rule 8 of the Federal Rules of Civil Procedure (which unmistakably governs the "form of pleadings") must be "followed" in this original action. Principles of notice pleading thus apply. *See* Fed. R. Civ. P. 8(a), (e).

As the Supreme Court has recently explained, notice pleading means that, in proving a claim, "a plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint." *Twombly*, 127 S. Ct. at 1969 (internal quotation marks omitted). Charles E. Clark, whom the Court has called

[1] Indeed, as South Carolina noted in its opening brief (at 11-13), none of the Supreme Court's precedents purports to require a motion for leave to amend where the purpose of the amendment is not to add a new legal claim, but rather to clarify the factual support that will be offered to prove an existing legal claim, which the Court has already determined to be a worthy subject of its exercise of original jurisdiction. This is unsurprising, given that, under notice pleading standards, such a motion is unnecessary. But, to the extent the Special Master believes clarification of the Complaint would be appropriate, the Special Master has ample authority to allow it.

the "principal draftsman" of the Federal Rules, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283 (1988), put the matter this way:

> Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result.

Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase – Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A.J. 976, 977 (1937). This "simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues," *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), which the Court has likewise adopted in original actions, *see United States v. Texas*, 339 U.S. at 715. Hence, in this original action (as in other cases), the "accepted pleading standard" is that "once a claim has been stated adequately" — as the Court has already determined here by granting South Carolina's motion for leave to file — "it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct. at 1969.

Viewed in light of that standard, the remainder of North Carolina's arguments — all attempts to limit the discovery South Carolina may take and the proof it may offer — fall away.

1. *South Carolina is entitled to prove the cumulative effect of North Carolina's consumptive uses of the Catawba River.*

North Carolina argues that the "singular focus of the complaint is interbasin transfers" and that "the relief that South Carolina requests in its complaint is limited to interbasin transfers." NC Br. 5. That position has no merit for three reasons. First, it ignores the Complaint's repeated and express requests for an equitable apportionment of the Catawba River. *See* Compl. ¶¶ 4, 7, 24, Prayer for Relief ¶ 1. As South Carolina explained in its opening brief (at 5-7), one cannot sensibly consider whether North Carolina is taking more than its equitable share, or devise an equitable apportionment, without considering the whole of what North Carolina is taking or threatening to take — the *cumulative* effect of North Carolina's withdrawals matters to South Carolina. North Carolina's attempt to limit discovery in this matter to IBTs is thus inconsistent with that common-sense reality, which (as noted at pages 5-6 of South Carolina's opening brief) is recognized by North Carolina's own IBT statute.

Second, the North Carolina interbasin statutory regime facilitates North Carolina's overconsumption of the Catawba River. It requires a permit for transfers above 2 million gallons per day (and those permitted amounts are especially problematic to South Carolina), which is the source of specific, large transfers of water. *See* Compl. ¶ 20. It allows withdrawals without a permit of less than that amount (which enable North Carolina to cloak potentially large cumulative uses of the River without accountability), and "South Carolina does not know the extent to

which the North Carolina statute has implicitly permitted one or more transfers of less than 2 million gallons per day from the Catawba River." *Id.* ¶ 22. And it specifically grandfathers withdrawals in amounts for users who took water prior to the statute's enactment in 1993, including a withdrawal of 5 million gallons per day. *See id.* ¶ 21; SC Opening Br. 6 & n.2. Thus, North Carolina inappropriately seeks to obscure South Carolina's fundamental objection to the North Carolina IBT statute. That statute is not just limited to large IBTs themselves but authorizes a wide range of uses that cumulatively permit North Carolina's overconsumption of the River.

Third, and to the extent North Carolina's overconsumption of the Catawba River occurs outside the specific auspices of its IBT statute, North Carolina's position is inconsistent with the notice pleading standard discussed above, which makes clear that any consumptive use that contributes to North Carolina's exceeding its equitable share of the River is the proper subject of discovery and proof in this matter. Indeed, North Carolina has acknowledged that it "represent[s] the interests of every person that *uses* water from the North Carolina portion of the Catawba River basin," N.C. Brief in Response to the City of Charlotte's Motion for Leave To Intervene and File Answer 1-2 (U.S. filed Feb. 22, 2008) (emphasis added), not just those users that are authorized to make transfers of water by the North Carolina IBT statute.

2. *South Carolina is entitled to prove inadequate flows in the absence of drought.*

North Carolina contends that "[t]he harms upon which South Carolina bases its complaint are expressly limited . . . to harms that occurred during 'drought conditions.'" NC Br. 6. North Carolina does not quote the language it believes makes such an express limitation. Indeed, as South Carolina explains, the Complaint makes clear that periods of inadequate flow may occur at all times of year and are not limited to times of drought. *See* SC Opening Br. 8-9; Compl. ¶ 15. Moreover, South Carolina's supporting papers, which were before the Supreme Court in granting leave to file, expressly asserted that the Catawba River has "wide fluctuations — due to both drought *and non-drought* causes of inadequate flow." S.C. Reply Brief in Support of Application for a Prelim. Inj. 6 (U.S. filed Aug. 22, 2007) (emphasis added). Contrary to North Carolina's assertions, under notice pleading standards, South Carolina is not confined to proving only those harms that are identified, by way of example, in paragraph 17 of the Complaint. *See* Compl. ¶ 17 (noting that "South Carolina and its citizens [have] suffered numerous harms, *including*" those listed) (emphasis added).[2] Rather, South Carolina may properly offer proof that the Catawba River's flows are inadequate, regardless of whether drought conditions have been declared by either State.

[2] At most, North Carolina raises a minor ambiguity here: Did South Carolina mean "including" to precede an exhaustive list, or did it mean "including, without limitation"? That kind of ambiguity must be resolved in South Carolina's favor. *See* SC Opening Br. 3 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

3. *South Carolina is entitled to prove harm at any point in the Catawba / Wateree River System.*

Similarly, North Carolina argues that "[t]he specific harms claimed in the complaint all appear to occur upstream from the discharge at Lake Wateree into the Wateree River" and that "the complaint certainly implies that the focus of South Carolina's claim is on that upstream part of the system." NC Br. 7. That contention is incorrect first because it elides the proper standard for reviewing the Complaint. The specific harms identified in paragraph 17 of the Complaint were intended as examples, not an exhaustive list. And, as set forth above, no such exhaustive list was required to satisfy notice pleading standards. North Carolina offers no support for its assertion that a plaintiff's discovery and proof are restricted in an original action to those specific harms that are the "impli[cit]" "focus" of the complaint. *Id.*

In all events, North Carolina again ignores those portions of the Complaint that are inconsistent with its attempts to confine the case. As South Carolina explained in its opening brief (at 10-11), the Complaint defines the Catawba River Basin as extending well past the stopping point North Carolina suggests. And any ambiguity, of course, must be resolved in South Carolina's favor. *See* SC Opening Br. 3.

Conclusion

For the foregoing reasons, and those set forth in South Carolina's opening brief, South Carolina respectfully requests that the Special Master reject North Carolina's suggestion that the Complaint should be narrowed in the ways proposed by North Carolina.

Respectfully submitted,

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